

Response to Office Action (Ser. No. 90/383,311)

Boston Scientific Scimed, Inc. (“Applicant”) submits this response to the Office Action issued on June 13, 2021, in connection with Applicant’s Application Serial No. 90/383,311 (the “Application”) for the mark COGNITA (the “Mark”). The Examining Attorney preliminarily refuses registration of the Application on the ground of an alleged likelihood of confusion with the mark = KOGNITO (“Cited Mark”) owned by Kognito Solutions LLC (“Registrant”). The Examining Attorney contends that confusion among the marks is likely because the Mark and the Cited Mark are similar in appearance. In addition, the Examining Attorney argues that the compared goods and services are related because both parties “offer software pertaining to health-related issues.” Applicant respectfully submits that confusion among the marks is not likely because there is insufficient commercial relationship between software for physicians and patients in the field of pain management/pain management implantable devices and software role play simulations where learners enter a virtual environment, engage in practice conversations with responsive avatars, and receive personalized feedback in the areas of health and behavioral health topics. Because of the dissimilarities between the compared goods and services, the differences between the Mark and the Cited Mark further reduces the likelihood of confusion among consumers who will no doubt encounter the mark in entirely distinct and dissimilar market conditions. Extensive third-party use and registration of marks like the Cited Mark reinforces Applicant’s position that consumer confusion is improbable. Applicant therefore requests that the Examining Attorney withdraw the refusal and approve the application for publication.

No Likelihood of Confusion

In re E.I. DuPont de Nemours & Co., 476 F.2d 1357, 177 U.S.P.Q. 563 (C.C.P.A. 1973), sets forth a list of several factors which should be considered when determining a likelihood of confusion under Section 2(d). Those “evidentiary elements are not listed . . . in order of merit.” Rather “[e]ach may from case to case play a dominant role.” *Id.* Based upon an analysis of all of the factors, it appears that there are insufficient grounds upon which to base a determination that there exists a likelihood of confusion. Moreover, likelihood of confusion is synonymous with “probable” confusion – it is not sufficient if confusion is merely “possible.” *Brennan’s, Inc. v. Brennan’s Restaurant, L.L.C.*, 360 F.3d 125, 135, 69 U.S.P.Q.2d 1939 (2nd Cir. 2004).

I. Comparison of the Marks

Appearance, Sound, Meaning, and Commercial Impression

The appearance, sound, meaning, and commercial impression of Applicant’s Mark and the Cited Mark are markedly different. Most notably, Applicant’s Mark and the Cited Mark are clearly not identical in appearance.

Applicant’s Mark:	COGNITA
Cited Mark:	= Kognito

Applicant's Mark and the Cited Mark differ by two letters and a design element, which sufficiently distinguishes the marks in the minds of consumers.

Moreover, the sound, meaning, and/or commercial impression of each of the marks is significantly different. That is, the literal elements in the Cited Mark could create the sound, meaning and/or commercial impression of "Equal Kognito" as evidenced by the description of the Cited Mark and design search codes assigned to it. To the contrary, this sound, meaning, and commercial impression is not presented in Applicant's Mark.

Considering the above, Applicant's Mark and the Cited Mark are distinguishable on several levels.

Distinctiveness

Upon a review of the United States Patent and Trademark Office (USPTO) database, Applicant found that the Cited Mark coexists with other nearly identical COGNITO marks for software related goods/services, COGNITO-formative and other arguably similar marks that, like Applicant's Mark, differ from the Cited Mark by a few letters, in connection with "health related" goods/services, as listed below:

- **COGNETA** registered to Pharmaceutical Strategies Group, LLC for providing online, non-downloadable software for evaluating and monitoring the performance of specialty contract pharmacies and administration of patient prescription card programs; providing online, non-downloadable split-billing software for qualifying, ordering and inventory management of prescription drugs; providing online, non-downloadable software for analyzing drug spend to facilitate enhanced cost management for plan sponsors; etc.
 - Use: [Cogneta | Your Full Service Pharmacy Benefit Management Program](#)
- **COGNITO HEALTH** (disclaims HEALTH) registered to Cognito Health Corporation for patient medical monitors for monitoring vital signs of patient; patient medical monitors for monitoring blood pressure, heart rate, lung function, temperature, moisture, local skin pressure, sleep quality; patient medical monitors for detecting sleep apnea; portable medical devices with sensors to monitor blood pressure, heart rate, lung function, temperature, moisture, local skin pressure, sleep quality, physical movements or physical positions of patients wearing or carrying the device; patient monitoring sensors and alarms; medical devices, namely, patient monitors and patient sensors for monitoring and measuring blood properties and respiratory events; patient monitors for critical care and anesthesia; health monitoring devices, namely, blood pressure monitors, thermometers, and pedometers; medical products, namely, therapeutic mattresses, beds, seats and cushions.
 - Use: [Predictive Patient Monitoring | Cognito Health | United States](#)
- **COGNIDNA** is registered to Cognidna Inc. for providing genetic analysis services, namely, dna analysis services to determine cognitive genomics.
 - Use: [cogniDNA - DNA insights for Fitness, Mental Health, and Intelligence - cogniDNA | Main](#)
- **COGNIUM** registered to Magnus Lerch for software for medicine safety, namely, software for analyzing and updating medicine safety data; software for data analysis and risk management in the field of medicine safety and medical risk management in Class

09; software as a service (SaaS) featuring software for use in analyzing and updating medicine safety software; scientific and technological services, namely scientific research, computer programming, research and design in the field of medical computing, machine learning and artificial intelligence and research services, in particular scientific research for medical purposes; etc. in Class 42; medical services, medical diagnostic services and medical consultancy, in particular in the fields of medicine safety and medical risk management; medical analysis for medical treatment; pharmaceutical advice, in particular in the field of medicine safety and active ingredient tolerance in Class 44.

- Use: [About – Dr. med. Magnus Lerch](#)
- **COGNIZANT** is registered to Cognizant Technology Solutions for software for use in medical practice management, health case management, health data profiling, data mining, data base management, data access and reporting, scheduling, decision support systems; etc.
 - Use: [Digital Solutions to Advance Your Business | Cognizant](#)
- **COGNITO** registered to Saasman Soutions, Inc. for software as a service (SAAS) services featuring software for business and professional practice management; providing a website featuring non-downloadable software for business and professional practice management in Class 42.
 - Use: [Cognito Workflow Software \(cognitosoftware.com\)](#)
- **COGNITO** registered to Cognito, LLC for cloud based platform that is non-downloadable software that allows web developers and content managers to integrate organizational customer data using customizable forms for building surveys, employment applications, customer feedback forms, customizable payment information forms, and other business use forms, and that provides synchronization of data and integration with text, images, and other electronic media so that organizations can use the forms to interface with customers and manage customer data, all of which can then be integrated with a user's own website and on user generated software for mobile devices in Class 42.
 - Use: [Cognito Forms: Free Online Form Builder](#)
- **COGNITO** registered to Vectra AI, Inc. for computer software for use in automating the real-time detection, mitigation and/or prediction of cyber-attacks; computer software for use in performing automated hunting, triaging and correlating of cyber-security threats within network packets, system log data, authentication log data, application log data, host data and customer supplied data; computer software for continuous monitoring, identifying, verifying, analyzing, comparing, classifying, sorting and scoring of collected or acquired data from network traffic, network communication, network flow data, and network intercommunication, acquisition and classification of data, event triage, threat analysis, threat correlation and system and application logs created and identified by artificial intelligence, machine learning and/or deep learning; computer software for cyber-security, detecting and mitigating advanced network attacks using artificial intelligence, machine learning and/or deep learning; computer software for continuous classification, assortment, sorting and grading of data collection, acquisition and compilation into specific areas, event triage, threat analysis, threat correlation and system and application logs created and identify by artificial intelligence, machine learning and/or deep learning; computer software for linking together multiple artificial intelligence, machine learning and/or deep learning systems to share or extend threat hunting, triage and correlation across a globally accessible network; all of the above relating specifically to analytical computing technologies that provide multi-modal natural language processing, generation, reasoning and machine learning for contextual analysis and natural interaction in Class 09; Computer services for others for automating

the real-time detection, mitigation and/or prediction of cyber-attacks; computer services for the development, implementation and delivery of artificial intelligence, machine learning and deep learning for use in controlling automated hunting, triaging and correlating of cyber-security threats within network packets, system log data, application log data, authentication log data, host data and customer supplied data; providing software as a service for cyber-security, detecting, mitigating and/or predicting advanced networks attacks using artificial intelligence, machine learning and/or deep learning; computer services for others for the development of artificial intelligence and machine learning computer systems, including deep learning for continuous data collection, acquisition, compilation, correlation, retrieval, analysis and classification of data from network traffic, network communication, network flow data, and network intercommunication; providing computer services for others, namely, developing customized artificial intelligence services for continuous monitoring, identifying, verifying, analyzing, correlating, comparing, classifying, sorting and scoring of data collection, acquisition from network traffic, network communication, network flow data, and network intercommunication, acquisition and compilation of data into specific areas, event triage, threat analysis threat correlation and system and application logs created and identified by artificial intelligence, machine learning and/or deep learning; computer services for others, namely, development of Natural Language Processing (NLP), Computational Linguistics (CL), Information Retrieval (IR) and Machine Learning (ML) computer systems which are capable of understanding general human queries and formulating responses; computer systems analysis; integration of computer systems and networks; Computer services, namely, computer system administration for others for systems used in commercial interactions over global computer networks; scientific and industrial research, namely, research and development of new cybersecurity products or threat intelligence systems; Technical research in the field of computers that integrate Natural Language Processing (NLP), Computational Linguistics (CL), Information Retrieval (IR) and Machine Learning (ML) which is capable of understanding general human queries and formulating responses, and scientific research for cyber-security purposes; computer consultation services for threat detection and response; Computer consulting services in the field of security operations; all of the above relating specifically to analytical computing technologies that provide multi-modal natural language processing, generation, reasoning and machine learning for contextual cyber-security threat analysis and response, and natural interaction in Class 42.

- Use: Network Threat Detection & Response Platform | Vectra AI

The TESS printout is attached as Exhibit A.

As demonstrated by Exhibit A, the concurrent use and registration of Applicant's Mark and Cited Mark is unlikely to cause confusion because a crowded field of similar third-party marks peacefully coexist both on the Federal Register and in the marketplace. The sheer number of coexisting registrations and uses of the same or arguably similar marks demonstrates that such marks enjoy only a narrow scope of protection and can coexist without risk of confusion based on minor differences. The dissimilarities between the intended use and registration of Applicant's dissimilar Mark makes it even more unlikely that confusion with the Cited Mark would occur. Accordingly, Applicant's Mark can coexist with the Cited Mark based on the differences between the marks.

II. Comparison of the Goods

Commercial Relationship

Even if the marks of the respective parties are deemed to be similar, the USPTO must consider the commercial relationship between the goods and/or services of the respective parties carefully to determine whether there is a likelihood of confusion.

The Examining Attorney focuses on the fact that it appears both parties offer software pertaining to “health” related issues. The focus on health as the common link between the goods and services is misguided and ultimately mischaracterizes the nature of the compared goods and services as they are described in Applicants’ application and Registrant’s registration. As listed in the Application¹, Applicant’s goods and services cover software for physicians and patients and healthcare services, all in the field of pain management. Pain management in this context refers to spinal cord stimulation (“SCS”). SCS is an implantable device (underneath the skin) prescribed for chronic intractable pain of the trunk and/or limbs, including unilateral and bilateral pain associated with failed back surgery syndrome, intractable low back pain and leg pain. See snapshot of Applicant’s SCS implantable devices below and attached as Exhibit B. Purchasers who ultimately purchase and use or refer patients to use Applicant’s goods and services are spine and interventional pain specialists.



SCS Portfolio

Explore all of our spinal cord stimulator systems and leads.

Registrant appears to be a health simulation company with virtual humans to prepare people to lead real-life conversations to recognize signs of mental health issues, distress, and suicide. See Exhibit C and snapshots below. Purchasers who ultimately purchase the services under the Cited Mark appear to be college and PK-12 educators, school counselors, veterans and service members, and doctors in the field of

¹ Applicant is within the TEAS form of this Response revising the identification of goods and services (and paying the additional Class fees) to: *Downloadable computer software, namely, an integrated suite of enterprise software programs for physicians and patients in the field of pain management and pain management medical devices in Class 09; Suite of software as a service featuring software for physicians and patients in the field of pain management and pain management medical devices in Class 42; and Healthcare services in the nature of health and wellness programs, namely, a suite of health self-management programs for physicians and patients in the field of pain management and pain management medical devices in Class 44.*

community health/wellness, not physicians or medical professionals involved with minimally invasive medical procedures. As a result, the medical fields appear to be quite distinct.

<https://kognito.com> :

Kognito - Evidence-Based Health Simulations and Training

Kognito is a health simulation company. Our simulations with virtual humans prepare people to lead real-life conversations that change lives - experience a ...

At Risk Elementary School

A game-based simulation for adolescents that builds ...

At-Risk for College Students

A suite of products to educate faculty, staff, and students about ...

Products

Learn how Kognito's role-play simulation platform is enabling ...

At-Risk for High School ...

A game-based simulation for adolescents that builds ...

About

We are a health simulation company that believes in the ...

PK-12

Kognito role-play simulations enable organizations to rapidly ...

Here, the differences in the nature of the products and services provided by Applicant and Registrant indicate a likelihood of confusion does not exist. There are other considerations that also indicate that a likelihood of confusion does not exist, namely, purchaser sophistication and purchasing care and attention.

Customer Sophistication and Exercise of Great Care

Further, the Trademark Trial and Appeal Board has held that circumstances suggesting care in purchasing may tend to minimize the likelihood of confusion. *See, e.g., In re N.A.D., Inc.*, 754 F.2d 996, 999-1000, 224 USPQ 969, 971 (Fed. Cir. 1985) (concluding that, because only sophisticated purchasers exercising great care would purchase the relevant goods, there would be no likelihood of confusion merely because of the similarity between the marks NARCO and NARKOMED); *In re Homeland Vinyl Prods., Inc.*, 81 USPQ2d 1378, 1380, 1383 (TTAB 2006).

The goods and services under Applicant's Mark will never be an impulse purchase, but rather subject to sophisticated sales efforts, possible face-to-face meetings and software and device training, and careful customer decision making. Similarly, customers purchasing the services under the Cited Mark will likely be subject to the same careful, sophisticated purchasing situation.

Since the parties' goods and services are obtained with such a significant degree of care, the likelihood of confusion between the marks is even further diminished.

Conclusion

Confusion must be likely, not merely possible, to refuse registration of Applicant's Mark. Considering the differences in the parties' marks, the lack of distinctiveness of the Cited Mark, and the sophistication and care by the purchasers of each of the parties' services, Applicant respectfully requests the Examining Attorney to reconsider and withdraw the likelihood of confusion refusal and approve the Application for publication. Applicant appreciates the Examining Attorney's consideration.

Prior Pending Applications

The Examining Attorney also noted the following earlier-filed applications:

- **COGNITIO** (90/204,577; now registration no. 6,465,272) – as evidenced by the specimen of use, the services under this mark appear to relate to enterprise service management for organizations. See Exhibit D.

<https://www.cognitohealth.com> :

Predictive Patient Monitoring | Cognito Health | United States

Cognito Health is a predictive, contact-free and continuous monitoring system that can help you to reduce your patient falls and pressure injuries. WATCH VIDEO.

Like the arguments above, because of the dissimilarities between the compared goods and services, the differences between the Mark and these further reduces the likelihood of confusion among consumers who will no doubt encounter the marks in entirely distinct and dissimilar market conditions. Extensive third-party use of similar marks reinforces Applicant's position that consumer confusion is improbable.