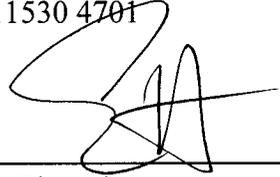


CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of September 2013, a true copy of the foregoing Opposer's Third Notice of Reliance was served on the following counsel of record for Applicant via first class mail, postage prepaid:

ADAM B KAUFMAN ASSOCIATES PLLC
585 STEWART AVENUE, SUITE 302
GARDEN CITY, NY 11530 4701



Eric T. Fingerhut
Attorney for Opposer

EXHIBIT A

LIKELIHOOD OF CONFUSION BETWEEN CLEARCHOICE
AND THE NAMES REALCHOICE AND RIGHTCHOICE

A STUDY CONDUCTED FOR
DYKEMA GOSSETT, PLLC

FEBRUARY 2011

RL ASSOCIATES

601 EWING STREET SUITE A-11
PRINCETON, NEW JERSEY 08540
(609) 683-9200
(609) 683-0855 FAX

TABLE OF CONTENTS

I	INTRODUCTION	1
	BACKGROUND	1
	THE IMPACT DIRECT CASE	1
	THE DR. GOLDSCHLAG CASE	1
	THE HYPOTHESES TESTED IN THIS STUDY	2
II	METHODOLOGY	3
	INTRODUCTION	3
	GENERAL APPROACH	3
	UNIVERSE AND SAMPLE	3
	STUDY DESIGN	4
	AN ADDITIONAL MEASURE OF NOISE	5
	QUESTIONNAIRE	5
	INTERVIEWING	7
	VALIDATION	8
III	DATA AND DISCUSSION	9
	DATA	9
	DISCUSSION	11
IV	CONCLUSIONS	12
V	PERSONNEL AND REMUNERATION	13
	APPENDIX A -- QUESTIONNAIRE	
	APPENDIX B -- RESUME OF MICHAEL RAPPEPORT	

I – INTRODUCTION

Background

ClearChoice Holdings, LLC (“ClearChoice”), through its subsidiary ClearChoice Management Services, LLC, “provides administrative, management, financial, marketing, advertising, and other business support services” to a national affiliation of centers that specialize in dental implants and related services.¹ We understand that the dental implant centers have operated under the name ClearChoice since at least as early as 2005. We also understand that ClearChoice currently has centers in more than 20 metropolitan areas across the country.

The Implant Direct Case

We have been informed that Implant Direct Intl. (“Implant Direct”) manufactures dental implant systems. The network of dental practices that use Implant Direct’s dental implants operate under the name RealChoice Dental Implant Centers. We have been informed that there are approximately 19 practices currently operating under the RealChoice name in the United States and Canada.

Dykema Gossett, PLLC (“Dykema”), counsel to ClearChoice, has brought suit against Implant Direct claiming, among other things, that because of the similarity of the names consumers are likely to confuse the names ClearChoice and RealChoice when the names are used in the context of dental implant services. Specifically, they argue that when consumers who are aware of ClearChoice dental implant centers come into contact with the name RealChoice, they are likely to confuse the two names.

The Dr. Goldschlag Case

We have also been informed that Dale D. Goldschlag, D.D.S., P.C. (“Dr. Goldschlag”) operates a dental practice in New York City under the name RightChoice. One of the procedures offered by Dr. Goldschlag is dental implantation.

Dykema has also brought suit against Dr. Goldschlag claiming, among other things, that because of the similarity of the names, consumers are likely to confuse the names ClearChoice and

¹ This quotation and other information is from the ClearChoice website (<http://www.clearchoice.com/about-clearchoice>). Other information in this paragraph is from the complaint.

RightChoice when the names are used in the context of dental implant services. Specifically, they argue that when consumers who are aware of ClearChoice dental implant centers come into contact with the name RightChoice, they are likely to confuse the two names.

The Hypotheses Tested in This Study

Dykema commissioned RL Associates to design and carry out a fair and unbiased test of these claims. We translated Dykema's concerns into the following two testable hypotheses:

- 1) When potential consumers who are aware of ClearChoice encounter the name RealChoice used in the context of dental implant services, they are likely to confuse it with ClearChoice.
- 2) When potential consumers who are aware of ClearChoice encounter the name RightChoice used in the context of dental implant services, they are likely to confuse it with ClearChoice.

For efficiency, we elected to combine the two claims in a single study. This is a report on the results of that study.

II – METHODOLOGY

Introduction

Before beginning our discussion of the specific methodology used in this survey, we think it is important to note that the methodology used in any survey research project involves some degree of compromise between conflicting objectives. For instance, on the one hand, there is a desire to completely control the survey process, and on the other hand, a desire to replicate actual market conditions. It is therefore important to keep in mind throughout our discussion of methodology that, of necessity, the procedures used incorporated such compromises.

General Approach

The primary goal of this survey is to test whether, and if so to what extent, respondents who are aware of ClearChoice, and then come into contact with the names RealChoice or RightChoice, are likely to confuse one or the other with the name ClearChoice. The general approach we chose to use was telephone interviews, which enabled us to interview a representative sample of respondents in a timely and cost effective manner. We note that regardless of whether a survey is intended for use in litigation or as general market research, telephone interviewing is one of the most common ways of doing such surveys, and is generally accepted in the field as valid survey methodology.

Universe and Sample

Since the central issue in this case concerns the likelihood of confusion that may result when people who have heard of ClearChoice encounter the name RealChoice or RightChoice, we defined as the universe potential purchasers of dental implants who are known to be aware of ClearChoice, and have previously shown an interest in dental implants. We operationalized this definition as all people who have contacted a ClearChoice dental implant center in the past three years.

Dykema informed us that ClearChoice had a list of such people. They provided us with three files (broken down alphabetically by city) containing a total of more than 150,000 people² who had contacted a ClearChoice dental implant center in the past three years. We forwarded the

² The list included the person's first and last name, address, telephone number, email address, the date they contacted a ClearChoice center, and the location of the center they contacted.

files to Directions in Research (DIR), a market research firm in San Diego, CA, and instructed them on how to draw a sample. Specifically, they were to combine the three files into one master list, sort the master list alphabetically by the person's last name, and starting with the tenth name on the list, add every fiftieth name to the sample.

Study Design

The basic design of this study consisted of presenting respondents with names of companies that provide dental implant services (one at a time), and asking whether or not they have ever heard of each of the companies. We believe that it is potential evidence of likelihood of confusion when respondents say that they have heard of RealChoice or RightChoice.

However, it is of course at least possible that respondents have actually heard of RealChoice or RightChoice. To account for this possibility the order in which respondents were asked about the companies was rotated. The basic analysis idea was to compare the proportion of respondents who, before they were asked about ClearChoice, said they had heard of RealChoice or RightChoice, with the proportion of respondents who said they had heard of RealChoice or RightChoice after they were asked about ClearChoice. The underlying assumption is that:

- Respondents who say they have heard of RealChoice or RightChoice after they were asked about ClearChoice were either telling the truth or guessing,
- Respondents who say they have heard of RealChoice or RightChoice before they were asked about ClearChoice were either telling the truth or guessing or exhibiting the likelihood of confusion at issue.

Thus, by subtracting the proportion of respondents who said they had heard of RealChoice or RightChoice after they were asked about ClearChoice, from the proportion of respondents who said they had heard of RealChoice or RightChoice before they were asked about ClearChoice, we get a good estimate of the proportion of respondents exhibiting the likelihood of confusion at issue.

We believe that this design captures what is likely to happen in the real world when a person who is aware of ClearChoice encounters RealChoice and/or RightChoice for the first time.

An Additional Measure of Noise

The central question in this case is whether or not respondents who have had previous contact with ClearChoice are likely to be confused when they hear either of the names RealChoice or RightChoice. The basic study design allows us to distinguish the proportion of respondents exhibiting a likelihood of confusion from those who are just guessing or have actually heard of RealChoice or RightChoice. However, as an added control for possible guessing we made up an additional pair of (dental implant) company names ("Real Option" and "Right Option."), which as far as we know do not actually exist.

These control names are variations of the two names being challenged by ClearChoice. In both instances, we kept the first part of the name ("Real" and "Right"), and replaced the word "Choice" with the word "Option." We believe that the resulting names – Real Option and Right Option – have a similar connotation to the original names, but do not have any elements in common with the name ClearChoice, and thus should have little chance of being confused with ClearChoice. We reiterate that as far as we can determine, neither of the names is used as the name of a company in the dental implant industry. The proportion of respondents who say that they have heard of these names can be regarded as a second measure of noise in this study.

Questionnaire

Once the person from the sample was on the phone, the interviewer read the following introduction: *We're conducting a brief survey about a dental procedure called dental implantation. I want to emphasize that we are not selling anything. The survey takes only about ten minutes to complete. If you qualify for and complete the survey, we will send you a check for \$10 for your participation.*

In order to qualify for the study, respondents were screened to meet three basic criteria. Specifically, they had to:

- Say they are familiar with dental implants
- Be willing to state their age as either under 50, or 50 years old or older
- Be willing to give their state of residence

Respondents were offered a \$10 honorarium if they qualified for and completed the study. Individuals who were able to be interviewed at the time of the initial telephone contact were interviewed on the spot. Individuals who were interested in participating in the survey, but could not do the interview immediately were asked to set up an appointment with DIR to do the interview at a later time.

At the start of the study the interviewer said, *I am going to read you the names of several companies that provide dental implant services. Some of these companies may be located in your area, and some may not. I am going to read you the names one at a time, and ask you questions about each.*

The interviewer then asked:

Q1. *The first name is [INSERT NAME]. Have you ever heard of [INSERT NAME]?*

Those respondents who said they had heard of the company were asked two follow-up questions:

Q1a. *What, if anything, can you tell me about [INSERT NAME], aside from the fact that they provide dental implant services?*

Q1b. *By any chance, have you or has anyone in your household ever had any contact with [INSERT NAME]?*

Those respondents who said they or someone in their household had contact with the company were asked:

Q1c. *By any chance, have you or has anyone in your household ever had any work done by [INSERT NAME]?*

This question series was repeated until the respondent heard, and answered questions about, a total of three names which the respondent heard in a randomized order:

- a) ClearChoice,
- b) One of the two names being challenged by ClearChoice (either RealChoice or RightChoice), and
- c) One of two control names made up by RL Associates (either Real Option or Right Option).³

³ As far as we can tell, neither of the control names are used as the names of companies in the dental implant industry.

The respondents were split sampled, so that half of the respondents heard the names ClearChoice, RealChoice, and Right Option, and the other half of the respondents heard the names ClearChoice, RightChoice, and Real Option. Within each sample split, the names were rotated so that each possible order of the names was heard by the same number of respondents. Thus, overall 1/12th of the respondents heard the names in each of the following orders:

ClearChoice - RealChoice - Right Option
 RealChoice - ClearChoice - Right Option
 Right Option - ClearChoice - RealChoice
 Right Option - RealChoice - ClearChoice
 ClearChoice - Right Option - RealChoice
 RealChoice - Right Option - ClearChoice
 ClearChoice - RightChoice - Real Option
 RightChoice - ClearChoice - Real Option
 Real Option - ClearChoice - RightChoice
 Real Option - RightChoice - ClearChoice
 ClearChoice - Real Option - RightChoice
 RightChoice - Real Option - ClearChoice

The questionnaire was programmed by DIR, who conducted the interviews using a computer-assisted telephone interviewing (CATI) system. At the end of the interview, the interviewer confirmed the respondent's name and mailing address for the purpose of sending the \$10 incentive. A complete copy of the questionnaire that was provided to DIR is included in Appendix A.

Interviewing

Courts have consistently held that surveys conducted for use in litigation require that the interviewing be done by professional interviewers who are shielded from the client sponsoring the work, from the purpose of the study, and even to the degree possible from the fact that the study is being conducted for litigation. That is, the interviewing procedures must be "double blind." For this reason, in this study the interviewers and their supervisors were never told for whom the study was being conducted, nor that it was being conducted for litigation purposes. We believe that in this study the test procedures themselves are transparent, in the sense that an independent observer could not tell who had commissioned the survey.

DIR conducted all 180 interviews in the study. All interviews were conducted in November 2010 by professional interviewers employed by a firm that we have used several times in the past, and that we consider reliable and trustworthy.

Validation

In order to ensure that the interviewing was carried out as reported, two members of the RL Associates professional staff independently read all of the interview data. This practice allows us to look for patterns in the interviews conducted by a particular interviewer (e.g., repetition of an unusual phrase) that indicate that the interviews might not have been completed correctly, or were even simply made up by the interviewer.

In addition, at least 20% of each interviewer's work has been formally validated by AVC Research, an independent interviewing service located in Belvidere, New Jersey. The purpose of this formal validation is to determine whether the respondent recalled participating in the interview, not to verify a respondent's answers to any particular question. It is our opinion that all interviews were carried out according to our instructions.

An additional source of validation is the cancelled \$10 honoraria checks sent to the respondents.

III - DATA AND DISCUSSION

Data

A total of 180 respondents completed the interview. The following three tables present the data from these interviews: Table I presents the data for the 90 respondents in the RealChoice cell; Table II presents the data for the 90 respondents in the RightChoice cell; and Table III combines the data from both cells.

a) RealChoice Cell

TABLE I

Q1. *Have you ever heard of [NAME]?*

	<u>Number of respondents</u> (90)	<u>Heard of</u> 86%	<u>Not heard of</u> 13%	<u>Not sure</u> 1%
ClearChoice				
Heard RealChoice before ClearChoice	(45)	27%	73%	0
Heard RealChoice after Clear Choice	(45)	4%	96%	0
Right Option	(90)	3%	97%	0

TABLE READS ACROSS.

b) RightChoice Cell

TABLE II

Q1. *Have you ever heard of [NAME]?*

	<u>Number of respondents</u> (90)	<u>Heard of</u> 84%	<u>Not heard of</u> 13%	<u>Not sure</u> 2%
ClearChoice				
Heard RightChoice before ClearChoice	(45)	27%	71%	2%
Heard RightChoice after Clear Choice	(45)	7%	91%	2%
Real Option	(45)	6%	94%	0

TABLE READS ACROSS.

c) Combined RealChoice and RightChoice

TABLE III

Q1. *Have you ever heard of [INSERT NAME]?*

	<u>Number of respondents</u> (180)	<u>Heard of</u> 85%	<u>Not heard of</u> 13%	<u>Not sure</u> 2%
ClearChoice				
Heard RealChoice/RightChoice before ClearChoice	(90)	27%	72%	1%
Heard RealChoice/RightChoice after Clear Choice	(90)	6%	93%	1%
Real Option or Right Option	(180)	4%	96%	0

TABLE READS ACROSS.

Table III shows that a large majority of the 180 respondents (85%) said they have heard of ClearChoice.

Respondents' tendency to say they have heard of RealChoice or RightChoice varies, depending on the order in which the names were read to the respondents. Overall, Table III shows when the name RealChoice or RightChoice is presented to respondents before they hear the name ClearChoice, 27% of those 90 respondents say they have heard of RealChoice or RightChoice. On the other hand, when the name RealChoice or RightChoice is presented to respondents after they hear the name ClearChoice, only 6% of those 90 respondents say they have heard of RealChoice or RightChoice.

Tables I and II show that, when the names were presented before ClearChoice, there were no statistically meaningful differences between the percentage of respondents who said they had heard of RealChoice and RightChoice. Tables I and II also show that, when the names were presented after ClearChoice, there were no statistically meaningful differences between the percentage of respondents who said they had heard of RealChoice and RightChoice.

Discussion

a) RealChoice/RightChoice as a function of whether mentioned before or after ClearChoice

Given the sample sizes, and the fact that the results for the estimates of guessing and prior actual contact for the two names (RealChoice and RightChoice) are not statistically different, we believe combining the estimates of guessing for RealChoice and RightChoice gives a statistically more reliable measure of the noise than looking at the noise for each name individually. That is the 6% of the respondents who, after they had heard the name ClearChoice, said they had heard of Real Choice/RightChoice is the best available measure in this study of the overall level of guessing/prior actual contact. Following standard procedures, we subtract the estimate of the guessing/prior contact from the measured value of the test stimuli to get a measure of the actual likelihood of confusion in the real world for each of the two names at issue in this case.

	measured		Best available	
Net of noise result (overall)	= value	minus	guessing/prior contact	
Net for RealChoice	= 27%	-	6%	= 21%
Net for RightChoice	= 27%	-	6%	= 21%

b) Real Option and Right Option as a Measure of "Noise"

In this study, a second, and essentially independent measure of noise is given by the 4% of respondents who said they had heard of the control names Real Option (6%) and Right Option (3%).⁴ Again, following standard procedures, we subtract the estimate of the noise from the measured value of the test stimuli to get a measure of likelihood of confusion, net of noise, for the two names at issue in this case.

Net of noise result (overall)	=	measured value	minus	estimate of noise	
Net for RealChoice	=	27%	-	4%	= 23%
Net for RightChoice	=	27%	-	4%	= 23%

⁴ We note that this measure of noise is statistically equal to the percentage of respondents who said they had heard of RealChoice / RightChoice after they had been presented with the name ClearChoice.

IV – CONCLUSIONS

The hypotheses we sought to test in this study are:

- 1) When potential consumers who are aware of ClearChoice encounter the name RealChoice used in the context of dental implant services, they are likely to confuse it with ClearChoice.
- 2) When potential consumers who are aware of ClearChoice encounter the name RightChoice used in the context of dental implant services, they are likely to confuse it with ClearChoice.

Our data confirms both of these hypotheses. When the name RealChoice or RightChoice is presented to respondents before they hear the name ClearChoice, net of guessing and/or prior actual contact, between 21% and 23% of the respondents say they have heard of RealChoice or RightChoice. In our experience, courts have always held a figure of 21% in an acceptable survey as significant evidence of a likelihood of confusion.

V – PERSONNEL AND REMUNERATION

Michael Rappeport was responsible for all aspects of this survey. Dr. Rappeport's resume, including cases and publications, is attached as Appendix B. Dr. Rappeport retains the right to supplement this report if new information should become available to him.

RL Associates is being compensated \$32,800 for this survey. Dr. Rappeport's hourly compensation rate for time spent subsequent to this report is \$575/hour.

 February 3, 2011
Michael Rappeport

EXHIBIT B

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Hearing:
August 13, 2013

Mailed:
August 26, 2013

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board
—

Clear Choice Holdings LLC

v.

Implant Direct Int'l

—
Opposition No. 91190485
—

Neal G. Massand and Brian A. Colao of Dykema Gossett PLLC for Clear Choice Holdings LLC.

Patrick F. Bright of Wagner, Anderson & Bright, P.C. for Implant Direct Int'l.

—
Before Quinn, Gorowitz, and Hightower, Administrative Trademark Judges.

Opinion by Hightower, Administrative Trademark Judge:

On January 20, 2009, applicant Implant Direct Int'l applied to register the mark REAL CHOICE, in standard characters, for dental implant services.¹

Opposer Clear Choice Holdings LLC opposes registration on the grounds that applicant's mark is likely to cause confusion with its mark CLEARCHOICE

¹ Application Serial Number 77652784, filed on the basis of a bona fide intention to use the mark in commerce pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). Applicant states in its brief that it is now Implant Direct Sybron International LLC ("IDS") and IDS now owns applicant's mark. Applicant's Brief at 9 n.1. However, no assignment has been recorded.

DENTAL IMPLANTS pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), and also likely to cause dilution pursuant to Section 43(c) of the Trademark Act, 15 U.S.C. § 1125(c). Both parties filed trial briefs, opposer filed a reply brief, and a hearing was held on August 13, 2013.

The Record

The parties made the following evidence of record by stipulation:

- Deposition transcripts of the following fact witnesses, with exhibits:²
 - Steve Boyd, manager and a founder and owner of opposer;
 - Lawrence Deutsch, marketing director of opposer; and
 - Dr. Gerald Alvin Niznick, president and CEO of applicant.
- Deposition transcripts of the following expert witnesses, with exhibits:
 - Michael Rappeport, opposer's survey expert, and
 - Hal Poret, who prepared a critique of the Rappeport survey on behalf of applicant.

² The Boyd and Niznick discovery deposition transcripts may be offered in evidence at trial because those witnesses are officers of the parties. Trademark Rule § 2.120(j)(1), 37 C.F.R. § 2.120(j)(1). Although no written stipulations are of record, it appears that the parties stipulated to introduction of the discovery depositions of all other witnesses as trial evidence. *See* Niznick Transcript at 112:1-12 (“Mr. Bright: One thing I do want to put on the record . . . Mr. Colao and I have agreed, that these depositions, meaning the deposition of ClearChoice under Rule 30(b)(6) where the witness was Mr. Boyd, Stephen Boyd, and the testimony of Mr. Deutsch for ClearChoice and the testimony of Dr. Niznick, are both what the Trademark Trial and Appeal Board calls discovery and evidentiary, meaning that they can be used in the evidentiary phase of the opposition. Correct? Mr. Colao: Yes, they can.”). This stipulation is hereby approved. *See* Trademark Trial and Appeal Board Manual of Procedure (TBMP) § 704.09 (3d ed. rev. 2 June 2013). The Board also will receive in evidence the expert deposition transcripts submitted pursuant to the parties’ joint stipulation although they were untimely filed on October 18, 2012, after the close of trial on August 20, 2012, as Exhibits 1 and 2 to the “Joint Supplemental Notice of Reliance.” The parties are advised that agreements to modify Board procedure should be submitted to the Board for approval. *See* TBMP § 705 (“Subject to the approval of the Board, parties may enter into a wide variety of stipulations concerning the admission of specified matter into evidence.”).

Opposition No. 91190485

All transcripts were introduced by notice of reliance. The parties are advised that otherwise admissible deposition transcripts are not admissible via notice of reliance but instead should be individually filed with the Board pursuant to the procedure identified in Trademark Rule § 2.125, 37 C.F.R. § 2.125.

The following additional evidence was made of record via notice of reliance:

- A status and title copy of opposer's pleaded Registration Number 3225921, as well as a certified copy of its file history;³
- The file history of the opposed application, Serial Number 77652784;⁴
- The following discovery documents:
 - Opposer's initial disclosures;
 - Opposer's response to applicant's interrogatories;
 - Opposer's response to applicant's request for production of documents;
 - Opposer's first amended response to applicant's interrogatories;
 - Applicant's responses to opposer's interrogatories;
 - Applicant's responses to opposer's requests for production of documents;

³ Opposer also attempted to introduce copies of its other three pleaded registrations – Nos. 3553219, 3685880, and 3181966 – as Exhibit 3 to the “Joint Supplemental Notice of Reliance.” However, opposer provided only plain copies of the registration certificates, which do not establish current status and title of the registrations. Pursuant to Trademark Rule § 2.122(d), this was not effective to make these registrations of record, and they are not in evidence. Furthermore, we take judicial notice of the fact that Registration No. 3181966 was cancelled July 12, 2013 pursuant to Section 8 of the Trademark Act. See *Nike Inc. v. WNBA Enters. LLC*, 85 USPQ2d 1187, 1193 n.9 (TTAB 2007); *Black & Decker Corp. v. Emerson Elec. Co.*, 84 USPQ2d 1482, 1487-88 n.10-12 (TTAB 2007); TBMP § 704.03(b)(1)(A).

⁴ It was unnecessary to submit the file history of the opposed application, as it forms part of the record of the proceeding without any action by the parties. Trademark Rule § 2.122(b)(1); TBMP § 704.03(a). For the same reason, it also was unnecessary to submit the pleadings in the case by notice of reliance.

Opposition No. 91190485

- Applicant's supplemental responses to opposer's interrogatories;
- Opposer's survey report, prepared by Michael Rappeport of RL Associates, and verbatim survey responses;
- Expert report of Hal Poret, an analysis of opposer's survey prepared for applicant; and
- A series of letters and emails exchanged between opposer's counsel and applicant's principal.

All of these documents were proffered by opposer via notice of reliance.

It was improper for opposer to submit its own discovery responses. Trademark § 2.120(j)(5); Trademark Trial and Appeal Board Manual of Procedure (TBMP) § 704.10 (3d ed. rev. 2 June 2013). Additionally, letters, emails, and expert reports are not admissible by notice of reliance. Trademark Rule 2.122(e); TBMP § 704.08(a). However, applicant did not object to admission of any of these materials; in fact, applicant affirmatively incorporated by reference each of the documents submitted by opposer in its own notice of reliance. For these reasons, we hereby admit into evidence all the materials listed above for whatever persuasive value they may have.⁵

Finally, we take judicial notice of the excerpt from THE SYNONYM FINDER attached as Exhibit A to opposer's reply brief. We also take judicial notice of the following definitions of the adjectives "clear" and "real" on the Merriam-Webster Online Dictionary (m-w.com), referenced in applicant's brief, as available on the date of the oral hearing:

⁵ We note that several of the documents also appear in the record as deposition exhibits.

Definition of *CLEAR*

- 1 *a* : BRIGHT, LUMINOUS
b : CLOUDLESS; *specifically* : less than one-tenth covered
<a *clear* sky>
c : free from mist, haze, or dust <a *clear* day>
d : UNTROUBLED, SERENE <a *clear* gaze>
- 2 : CLEAN, PURE: as
a : free from blemishes <*clear* skin>
b : easily seen through : TRANSPARENT <*clear* glass>
c : free from abnormal sounds on auscultation
- 3 *a* : easily heard <a loud and *clear* sound>
b : easily visible : PLAIN <a *clear* signal>
c : free from obscurity or ambiguity : easily understood :
UNMISTAKABLE <a *clear* explanation>
- 4 *a* : capable of sharp discernment : KEEN <a *clear*
thinker>
b : free from doubt : SURE <not *clear* on how to proceed>
- 5 : free from guile or guilt : INNOCENT <a *clear*
conscience>
- 6 : unhampered by restriction or limitation: as
a : unencumbered by debts or charges <a *clear* estate>
b : NET <a *clear* profit>
c : UNQUALIFIED, ABSOLUTE <a *clear* victory>
d : free from obstruction <*clear* passage>
e : emptied of contents or cargo
f : free from entanglement or contact <staying *clear* of
controversy> <keep *clear* of the boundary>
g : BARE, DENUDED <*clear* ground>

Definition of *REAL*

- 1 : of or relating to fixed, permanent, or immovable
things (as lands or tenements)
- 2 *a* : not artificial, fraudulent, or illusory : GENUINE <*real*
gold>; *also* : being precisely what the name implies <a
real professional>
b (1) : occurring or existing in actuality <saw a *real* live
celebrity> <a story of *real* life> (2) : of or relating to
practical or everyday concerns or activities <left school
to live in the *real* world> (3) : existing as a physical
entity and having properties that deviate from an ideal,
law, or standard <a *real* gas> — compare IDEAL 3b
c : having objective independent existence <unable to
believe that what he saw was *real*>

d : FUNDAMENTAL, ESSENTIAL
e (1) : belonging to or having elements or components that belong to the set of real numbers <the *real* roots of an equation> <a *real* matrix> (2) : concerned with or containing real numbers <*real* analysis> (3) : REAL-VALUED <*real* variable>
f : measured by purchasing power <*real* income> <*real* dollars>
g : COMPLETE, UTTER <a *real* fiasco>
3 *of a particle* : capable of being detected — compare VIRTUAL 3

See *UMG Recordings Inc. v. Mattel, Inc.*, 100 USPQ2d 1868, 1874 (TTAB 2011); FED. R. EVID. 201(c)(1), (2); TBMP § 704.12.

Standing and Priority

We first consider opposer's standing to bring this opposition against the involved application. Opposer has established its ownership of pleaded Registration No. 3225921, issued April 3, 2007 for the mark CLEARCHOICE DENTAL IMPLANTS for "dental services, namely dental implant services." Opposer's standing to oppose registration of applicant's mark is established by its pleaded registration, which the record shows to be valid and subsisting, and owned by opposer. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000). In addition, because opposer's pleaded registration is of record, priority is not in issue with respect to the services identified in the registration, namely dental implant services. *Penguin Books Ltd. v. Eberhard*, 48 USPQ2d 1280, 1286 (TTAB 1998) (citing *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974)). There is no dispute that opposer has priority vis-à-vis applicant, which filed the involved application on an intent-to-use basis on January 20, 2009.

Likelihood of Confusion

“We determine likelihood of confusion by focusing on the question whether the purchasing public would mistakenly assume that the applicant’s [services] originate from the same source as, or are associated with, the [services] in the cited registrations.” *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We consider all probative facts in evidence that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973).

The parties have presented evidence on the following *du Pont* factors: similarity of the parties’ marks (factor 1); similarity of their services (factor 2); similarity of trade channels and the buyers to whom sales are made, including consumer sophistication (factors 3 and 4); fame of opposer’s mark (factor 5); the nature and extent of any actual confusion (factor 7); and the length of time during and conditions under which there has been concurrent use without evidence of actual confusion (factor 8). Opposer also has submitted evidence concerning applicant’s alleged bad-faith intent in adopting its mark (*du Pont* factor 13; *see also, e.g., M2 Software, Inc. v. M2 Commc’ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006)). We find the remaining factors to be neutral or inapplicable.

A. Similarity of the Services, Channels of Trade, and Classes of Customers

We begin with the similarities or differences between opposer’s and applicant’s services, the second *du Pont* factor. It is settled that in making our determination regarding the relatedness of the parties’ services, we must look to the services as identified in the application and opposer’s pleaded registration. *See*

Opposition No. 91190485

Octocom Sys. Inc. v. Houston Computer Servs. Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). That is, because the scope of the registration applicant seeks is defined by its application (not by its use), it is the application (not its use) that we must look to in determining applicant's right to register:

The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed.

Id.

The services identified in opposer's Registration No. 3225921 for CLEARCHOICE DENTAL IMPLANTS are "dental services, namely dental implant services." The services identified in the application likewise are "dental implant services." Thus, the parties' services are identical.

The third *du Pont* factor assesses the similarity of the trade channels for the parties' services. Because there are no limitations to the recitation of services in the application or opposer's registration as to channels of trade and classes of purchasers, we must presume that the parties' services travel through all usual channels of trade and are offered to all normal potential purchasers. *See Citigroup Inc. v. Capital City Bank Group, Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006); *see also Paula Payne Prods. Co. v. Johnson Publ'g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973). Moreover, because the services described in the application and opposer's registration are identical, we presume that the channels of trade and

classes of purchasers are the same. *See In re Viterro Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (finding Board entitled to rely on this legal presumption in determining likelihood of confusion); *American Lebanese Syrian Assoc. Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011).

The second and third *du Pont* factors weigh heavily in opposer's favor.

B. Similarity of the Marks

We next address the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of “the marks in their entireties as to appearance, sound, connotation, and commercial impression.” *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). In comparing the marks, we are mindful that the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether they are sufficiently similar in terms of their overall commercial impression so that confusion as to the source of the services offered under the respective marks is likely to result. *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Rests. Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd*, No. 92-1086 (Fed. Cir. June 5, 1992).

Because the similarity or dissimilarity of the marks is determined based on the marks in their entireties, our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224

Opposition No. 91190485

USPQ 749, 751 (Fed. Cir. 1985); *see also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). On the other hand, different features may be analyzed to determine whether the marks are similar. *Price Candy Co. v. Gold Medal Candy Corp.*, 220 F.2d 759, 105 USPQ 266, 268 (CCPA 1955). In fact, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re Nat’l Data Corp.*, 224 USPQ at 751.

Where, as here, the services are identical, the degree of similarity between the marks necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the services. *See Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enters. Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007).

The mark applicant seeks to register is REAL CHOICE. Opposer’s registered mark is CLEARCHOICE DENTAL IMPLANTS, with DENTAL IMPLANTS – the generic term for both parties’ identified services – disclaimed. It is well-settled that disclaimed, descriptive matter may have less significance in likelihood of confusion determinations. *See Cunningham v. Laser Golf Corp.*, 55 USPQ2d at 1846 (“Regarding descriptive terms, this court has noted that the ‘descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of

confusion.”) (quoting *In re Nat’l Data Corp.*, 224 USPQ at 752); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often “less significant in creating the mark’s commercial impression”). Thus, though we compare the marks REAL CHOICE and CLEARCHOICE DENTAL IMPLANTS in their entireties, we give more weight to the distinctive portions of the two marks: REAL CHOICE and CLEARCHOICE.

The absence of a space between the words CLEAR and CHOICE in opposer’s registration does not significantly impact the commercial impression made by its mark, as consumers are still likely to recognize the individual component words CLEAR and CHOICE. In appearance and sound, REAL CHOICE and CLEARCHOICE are similar; each prefaces the word CHOICE with a one-syllable term featuring a long “e” vowel sound framed by consonants. Indeed, REAL is an anagram of CLEAR minus the “c.”

Applicant disputes opposer’s contention that CLEAR and REAL have similar meanings. Nonetheless, opposer provided a thesaurus listing “real” as one of many synonyms for the adjective “clear.”⁶ Although we do not view the phrases REAL CHOICE and CLEARCHOICE as exact synonyms, their connotations are related.

Overall, applicant’s REAL CHOICE mark makes a commercial impression similar to opposer’s registered mark CLEARCHOICE DENTAL IMPLANTS, particularly considered in the context of the parties’ identical identified services. The first *du Pont* factor weighs in opposer’s favor.

⁶ J.I. RODALE, THE SYNONYM FINDER 174 (1978), Opposer’s Reply Brief, Exhibit A.

C. Conditions of Sale and Consumer Sophistication

Under the fourth *du Pont* factor, we consider the conditions under which and buyers to whom sales are made. The evidence shows that dental implant services can be very expensive, costing from \$10,000 to \$50,000.⁷ We are constrained, however, to consider the parties' "dental implant services" as they are recited in the application and registration, which are not limited to services of any certain price. Moreover, there is no evidence establishing that purchasers of dental implants are sophisticated.⁸ The Board has previously noted that, "in purchasing healthcare services, even ordinary consumers are likely to exercise greater care and will know with whom they are dealing." *Carefirst of Md., Inc. v. FirstHealth of the Carolinas Inc.*, 77 USPQ2d 1492, 1504 (TTAB 2005). Yet even assuming that ordinary consumers tend to exercise some sophistication when purchasing healthcare services, careful or sophisticated purchasers are not immune from source confusion where similar marks are used in connection with related services. *See In re Research & Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) ("Human memories even of discriminating purchasers . . . are not infallible.") (quoting *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970)).

We find that the similarities between the marks and the goods sold thereunder outweigh any sophisticated purchasing decision. *See HRL Assocs. Inc.*

⁷ Boyd Transcript at 36:7-10, 84:5-20.

⁸ Opposer's manager Steve Boyd testified that both parties offer their services to "[a]nybody who is missing one, several or all of their teeth or needs to have their bad teeth replaced." *Id.* at 115:16-18.

Opposition No. 91190485

v. Weiss Assocs. Inc., 12 USPQ2d 1819, 1823 (TTAB 1989), *aff'd*, *Weiss Assocs., Inc. v. HRL Assocs., Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (similarities of goods and marks outweigh sophisticated purchasers, careful purchasing decision, and expensive goods). Thus, the fourth *du Pont* factor is neutral.

D. Fame of Opposer's Mark

The fifth *du Pont* factor requires us to consider the fame of opposer's marks. Fame, if it exists, plays a dominant role in the likelihood of confusion analysis because famous marks enjoy a broad scope of protection or exclusivity of use. A famous mark has extensive public recognition and renown. *Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002).

Fame may be measured indirectly by the volume of sales and advertising expenditures of the services identified by the marks at issue, "the length of time those indicia of commercial awareness have been evident," widespread critical assessments and notice by independent sources of the services identified by the marks, and by the general reputation of the services. *Id.*, 63 USPQ2d at 1305-09. Some context in which to place raw numbers of product sales and advertising expenses may be necessary (*e.g.*, the substantiality of the sales or advertising figures for comparable types of products or services). *Id.* at 1309. Finally, because of the extreme deference that we accord a famous mark in terms of the wide latitude of legal protection it receives, and the dominant role fame plays in the likelihood of confusion analysis, it is the duty of the party asserting that its mark is famous to clearly prove it. *Leading Jewelers Guild Inc. v. LJOW Holdings LLC*, 82 USPQ2d 1901, 1904 (TTAB 2007).

Opposer's evidence falls woefully short of establishing the fame of its mark. Opposer provides only scant, indirect evidence of fame in the form of testimony that it currently has 32 centers in 21 geographic marketplaces nationwide;⁹ that it has treated "thousands" of customers;¹⁰ and that its centers spend \$1 million per month advertising its services.¹¹ Conspicuous in its absence is any evidence, whether direct or indirect, that opposer's efforts to publicize its mark have succeeded in garnering consumer or third-party recognition of its mark. Applicant provides no evidence as to its sales or share of the dental implant services market, no detail as to how many "thousands" of customers it has treated nationwide, no evidence as to the time frame during which it has spent \$1 million per month on advertising,¹² and little specific evidence by which we could determine the forms of opposer's

⁹ Deutsch Transcript at 16:5-8.

¹⁰ *Id.* at 31:5-32:10.

¹¹ Boyd Transcript at 118:20-119:7. Applicant argues in its brief that testimony by Mr. Boyd regarding opposer's advertising expenditures is inadmissible because he lacked personal knowledge under FED. R. EVID. 602. We note that applicant's counsel did not object to this testimony at deposition. We also disagree with applicant's argument because, not only was Mr. Boyd designated as opposer's corporate representative, he also testified that he had personal knowledge of this subject. Boyd Transcript at 118:20-119:2. Applicant also objects that evidence of opposer's advertising expenditures should have come from original documents pursuant to FED. R. EVID. 1002. *See* Applicant's Brief at 22-23. In this case, any written evidence of advertising expenditures would fall under FED. R. EVID. 1004(d), an exception to the "best evidence rule" embodied in Rule 1002, because such documents are "not closely related to a controlling issue." *See Mag Instrument, Inc. v. Brinkmann Corp.*, 96 USPQ2d 1701, 1707-08 (TTAB 2010), *aff'd*, No. 2011-1052, -1053 (Fed. Cir. Nov. 9, 2011). Thus, we see no reason to exclude Mr. Boyd's oral testimony. In any event, should admission of Mr. Boyd's testimony be held erroneous on appeal, the error is harmless because opposer's advertising expenditures are insufficient to prove fame and do not affect our finding on *du Pont* factor 5 or our holding herein.

¹² There is no record support for opposer's assertion in its brief that opposer has spent a total of nearly \$84 million on advertising. Opposer's Brief at 17. Presumably, this figure was derived simply by multiplying \$1 million by the number of months opposer has been in existence. No witness testified that opposer has spent \$1 million in advertising each month since it began doing business, and such a conclusion is unsupported by any record evidence.

advertising and how that advertising uses opposer's mark.¹³ Because opposer has not proven that its mark is famous, the fifth *du Pont* factor is neutral.

E. Extent of Concurrent Use and Actual Confusion

Among the final relevant *du Pont* factors, factor 7 assesses the nature and extent of any actual confusion, while factor 8 is the length of time during and conditions under which there has been concurrent use without evidence of actual confusion.

Proof of actual confusion is not necessary to show a likelihood of confusion, and its absence is not dispositive. *See Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 396 (Fed. Cir. 1983). A showing of actual confusion would of course be highly probative, if not conclusive, of a likelihood of confusion. Yet the opposite is not true; the lack of evidence of actual confusion carries little weight. *See J. C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 144 USPQ 435, 438 (CCPA 1965).

The parties had coexisted for approximately 4½ years at the time of the oral hearing, since applicant first used the REAL CHOICE mark in February 2009, without evidence of actual confusion.¹⁴ However, applicant contends, and opposer

¹³ *See, e.g.*, Boyd Transcript at 81:7-12 (stating that opposer advertises via television, newspaper, radio, billboards, magazines, direct mail, and the Internet), 104:15-105:5 (stating that some of opposer's ads feature celebrities Mike Ditka and Tony Curtis), and Exhibit 4-23 (2009 newspaper ad for opposer featuring Mike Ditka). Although 85% of the respondents to opposer's survey – which will be discussed further *infra* – said they had heard of ClearChoice, we give this result no weight in our fame analysis because the survey universe was selected from a list of individuals who opposer said had contacted it within the preceding three years, presumably all of whom should be familiar with opposer.

¹⁴ *See* Boyd Transcript at 10:16-18; Niznick Transcript at 27:5-9; Exhibits 20 and 22, applicant's response to opposer's interrogatory No. 4.

does not dispute, that there are only three markets where both marks are in use: Atlanta, San Francisco, and Washington, D.C.,¹⁵ limiting the opportunities for actual confusion to arise. *Du Pont* factor 8 is therefore neutral.

Opposer submitted a survey, which can be regarded as evidence of actual confusion. See *Blue Cross & Blue Shield Ass'n v. Harvard Cmty. Health Plan Inc.*, 17 USPQ2d 1075, 1078 n.7 (TTAB 1990). However, while we will not address and do not necessarily accept all the critiques of that survey in the analysis by applicant's expert Hal Poret, the survey still suffers from numerous serious flaws.

First and foremost, the survey did not follow an established format to measure likelihood of confusion, but was created by opposer's expert in a design never before used in a trademark survey or accepted by any court.¹⁶ The survey combined tests of applicant's mark REAL CHOICE and a different third-party mark opposer is challenging (represented as RIGHT CHOICE),¹⁷ an approach the Poret analysis criticized. It also used a small number of respondents to test each mark: 90. Mr. Poret pointed out that smaller samples produce larger error rates, and we have found similar numbers of survey respondents insufficient. See *Zimmerman v. Nat'l Ass'n of Realtors*, 70 USPQ2d 1425, 1436 (TTAB 2004) (96 survey subjects too low); *In re Kimpton Hotel & Rest. Group, Inc.*, 55 USPQ2d 1154, 1157 (TTAB 2000) (100 respondents insufficient).

¹⁵ Applicant's Brief at 14. How long the parties' services have overlapped in these markets is unknown.

¹⁶ See Rappeport Transcript at 62:23-65:17.

¹⁷ The Rappeport survey report ("Rappeport Report") states that the name RightChoice is used by a dental practice in New York City that offers dental implantation. *Id.* at 1.

In addition, rather than following the accepted approach of using a survey universe comprising potential consumers of applicant's dental implant services,¹⁸ opposer's survey was conducted among a sample of 150,000 customers who had contacted opposer within the preceding three years and did not live in the 19 markets¹⁹ where applicant offers its services. Thus, the survey universe was purposely selected to be aware of opposer²⁰ and not applicant.²¹ Moreover, respondents were asked only whether they were familiar with dental implants, not if they were prospective consumers of dental implants.²²

The survey was designed, in relevant part, to test the hypothesis that: "When potential consumers who are aware of ClearChoice encounter the name RealChoice used in the context of dental implant services, they are likely to confuse it with ClearChoice."²³ During the survey, respondents were told that the

¹⁸ 6 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS & UNFAIR Competition § 32:159 (4th ed. 2013) ("In a traditional case claiming 'forward' confusion, not 'reverse' confusion, the proper universe to survey is the potential buyers of the *junior user's* goods or services. . . . A survey of the wrong 'universe' will be of little probative value in litigation.").

¹⁹ See Exhibit 22, attachment to applicant's supplemental responses to opposer's interrogatories.

²⁰ The Poret analysis raises questions as to whether this assumption underlying the survey hypothesis and design was borne out by the results. Some 15% of the 180 total survey respondents said that they had never heard of CLEAR CHOICE, while another 38% said they had never had contact with CLEAR CHOICE, for a total of 53% – more than half.

²¹ See Rapoport Transcript at 34:9-13 (answering that survey respondents were from "places RealChoice was not available. That's the whole point."). Surveys in which the target population was consumers of the plaintiff's product have been criticized for not studying the full range of potential customers. See Shari Seidman Diamond, *Reference Guide on Survey Research*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 359, 379 (3d ed. 2011).

²² Questionnaire, Appendix A to Rapoport Report, at 1.

²³ Rapoport Report at 2.

interviewer would read them the names of companies that provide dental implant services, and asked whether they had heard of the two marks at issue here; 45 heard CLEAR CHOICE first followed by REAL CHOICE, while the other 45 heard the marks in reverse order. Respondents were also asked about the control name RIGHT OPTION during the portion of the survey relevant here. The results were:

- 86% of the 90 respondents said they had heard of CLEAR CHOICE, 13% had not heard of it, and 1% were not sure;
- 27% of the 45 respondents [i.e., 12 people] who heard REAL CHOICE before CLEAR CHOICE said they had heard of REAL CHOICE while 73% had not heard of it;
- 4% of the 45 respondents [i.e., 2 people] who heard REAL CHOICE after CLEAR CHOICE said they had heard of it, 96% had not heard of it; and
- 3% of the 90 respondents said they had heard of the control name RIGHT OPTION and 97% had not heard of it.²⁴

The survey then combined “the estimates of guessing and prior actual contact” with both names tested, REAL CHOICE and RIGHT CHOICE, to increase statistical reliability of what the survey author considered to be noise, arriving at a figure of 6%. This 6% “estimate of the guessing/prior contact” was subtracted from the 27% result to yield a 21% result for the name REAL CHOICE. In a second measure of noise, the survey again combined respondents who said they had heard of the controls across both names tested to arrive at a 4% estimate of noise, yielding a 23% result for the name REAL CHOICE.

In sum, 21% to 23% more survey respondents said they had heard of CLEAR CHOICE and not REAL CHOICE when questioned about the terms in that order

²⁴ *Id.* at 9.

than when asked with the terms in reverse order. Opposer's expert contends that this result shows confusion in those percentages; that is, that 21% to 23% of potential consumers who are aware of CLEAR CHOICE and encounter the name REAL CHOICE in the context of dental implant services are likely to confuse it with CLEAR CHOICE.²⁵

Survey respondents also were asked follow-up questions:

- Q1a. What, if anything, can you tell me about [INSERT NAME], aside from the fact that they provide dental implant services?
- Q1b. By any chance, have you or has anyone in your household ever had any contact with [INSERT NAME]?

Those respondents who said they or someone in their household had contact with the company were asked:

- Q1c. By any chance, have you or has anyone in your household ever had any work done by [INSERT NAME]?

However, opposer's expert report does not address the responses to these follow-up questions, and they apparently were not factored into the survey results.

Mr. Poret contends in his analysis that, among the 24 respondents who were asked about REAL CHOICE or RIGHT CHOICE before CLEAR CHOICE and answered that they had heard of REAL CHOICE or RIGHT CHOICE, 16 respondents gave additional answers indicating that they were not confused by the test names. Mr. Poret states that four subjects said they had not heard of CLEAR CHOICE, so they could not be experiencing source or trademark confusion between

²⁵ *Id.* at 12.

the parties. According to Mr. Poret, 12 other subjects gave responses suggesting that they recognize the parties here (or the user of the RIGHT CHOICE mark) as separate entities and were not confused.²⁶ Mr. Poret argues that this leaves only 8 out of 90 respondents who possibly could have been confused, that is, less than 9% of respondents before accounting for survey noise and margin of error.

Given that opposer characterizes its mark as famous, we question why opposer's expert chose not to follow the *Ever-Ready*²⁷ survey format, which we have accepted and which has been called the "gold standard" in likelihood of confusion cases.²⁸ 6 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 32:173.50 (4th ed. 2013) (quoting J.B. Swann, *Likelihood of Confusion Studies and the Straightened Scope of Squirt*, 98 TRADEMARK REP. 739, 746 (2008)); see also *Starbucks U.S. Brands, LLC v. Ruben*, 78 USPQ2d 1741, 1753 (TTAB 2006) (stating "given the way in which this survey format carefully follows the *Ever-Ready* likelihood of confusion survey format, we find that it is reliable and therefore of probative value on the issue of likelihood of confusion herein").

²⁶ According to Mr. Poret, these 12 individuals said during the survey that they had contacted one but not the other of the parties (or RIGHT CHOICE), indicating that they understood them to be distinct sources.

²⁷ *Union Carbide Corp. v. Ever-Ready, Inc.*, 531 F.2d 366, 188 USPQ 623 (7th Cir. 1976). In that case, plaintiff Union Carbide conducted a survey to determine whether there was a likelihood of confusion between defendant's EVER-READY lamps and plaintiff's EVEREADY batteries, flashlights and bulbs. The survey asked: "Who do you think puts out the lamp shown here? [showing a picture of defendant's EVER-READY lamp and mark]," "What makes you think so?" and "Please name any other products put out by the same concern which puts out the lamp shown here." *Id.* at 640.

²⁸ Opposer's expert testified that he designed the survey to test initial interest confusion. See Rapoport Transcript at 37-39. Our primary reviewing court has not embraced the theory of initial confusion. *Weiss Assocs., Inc. v. HRL Assocs., Inc.*, 902 F.2d 1546, 14 USPQ2d 1840, 1842-43 (Fed. Cir. 1990).

Because we cannot conclude that opposer's survey actually measured an appreciable likelihood of confusion, we give it no weight in our analysis. *See In re Hotels.com, L.P.*, 87 USPQ2d 1100, 1109-10 (TTAB 2008), *aff'd*, *In re Hotels.com LP*, 573 F3d 1300, 91 USPQ2d 1532 (Fed. Cir. 2009). *Du Pont* factor 7 is neutral.

F. Applicant's Intent

Finally, opposer emphasizes that applicant initially adopted a logo that was virtually identical to opposer's logo, including incorporating the same shooting star design, and that applicant copied elements of opposer's website. In response, applicant's CEO, Dr. Niznick, did not deny that applicant initially used a logo incorporating a shooting star in the same manner as opposer's logo, but emphasized that it was changed promptly after opposer objected. Dr. Niznick testified:

. . . I told my IT people, "We want to put together a Web site that we could offer to doctors," and I referred them to the ClearChoice Web site as an example of the kind of patient information that we would need, just like I look at [dental implant maker] Nobel's Web site or anybody else's. This is what they came up with.

As soon as your client contacted us and objected to it, I immediately changed and responded and went to something that is very distinct from – in the look, eliminating the star, putting an implant in, different color background, different font.²⁹

Bad faith, or intent to confuse, falls under the thirteenth *du Pont* factor, "any other established fact probative of the effect of use." *L.C. Licensing Inc. v. Berman*, 86 USPQ2d 1883, 1890 (TTAB 2008). "[A] party which knowingly adopts a mark similar to one used by another for related goods should not be surprised to find

²⁹ Niznick Transcript at 27:16-28:1.

scrutiny of the filer's motive." *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1442 (TTAB 2012). "[W]here there is evidence of an applicant's intent to adopt a mark that suggests to purchasers a successful mark already in use by another, the Board may, and ought to, take into account that intent when resolving the issue of likelihood of confusion when that issue is not free from doubt." *First Int'l Servs. Corp. v. Chuckles Inc.*, 5 USPQ2d 1628, 1633 (TTAB 1988). However, "an inference of 'bad faith' requires something more than mere knowledge of a prior similar mark." *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793, 1798 (Fed. Cir. 1987). A finding of bad faith must be supported by evidence of an intent to confuse, rather than mere knowledge of another's mark or even an intent to copy. *See, e.g., Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 588 F.3d 97, 92 USPQ2d 1769, 1782 (2d Cir. 2009) ("[T]he only relevant intent is intent to confuse. There is a considerable difference between an intent to copy and an intent to deceive.") (quotation omitted).

In light of applicant's change to its logo after contact by opposer, we cannot conclude that applicant manifested a bad-faith intent to deceive consumers, even if it did intend to copy opposer's logo and website. We therefore find the final likelihood of confusion factor to be neutral.

Weighing the Factors

We have carefully considered all of the record evidence pertaining to the relevant *du Pont* factors, as well as the parties' arguments with respect thereto (including any evidence and arguments not specifically discussed in this opinion). All relevant factors either favor opposer or are neutral. On balance, we find by a

Opposition No. 91190485

preponderance of the evidence that applicant's REAL CHOICE mark is likely to cause confusion with opposer's mark CLEARCHOICE DENTAL IMPLANTS when used in association with dental implant services. To the extent we have any doubt, it must be resolved in favor of the prior registrant. *Nike Inc. v. WNBA Enters. LLC*, 85 USPQ2d at 1202; *Hard Rock Cafe Int'l (USA) Inc. v. Elsea*, 56 USPQ2d 1504, 1514 (TTAB 2000).

Likelihood of Dilution by Blurring

We conclude by briefly addressing opposer's claim that applicant's mark will dilute its mark under Trademark Act § 43(c), 15 U.S.C. § 1125(c), by blurring its distinctiveness. To prevail on a dilution claim, opposer must prove that: (1) its mark is famous, (2) its mark became famous prior to the date of the application to register the applicant's mark, and (3) applicant's mark is likely to blur the distinctiveness of the opposer's famous mark. *Nike, Inc. v. Maher*, 100 USPQ2d 1018, 1023 (TTAB 2011).

Dilution requires a more stringent showing of fame than likelihood of confusion. *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1724 (Fed. Cir. 2012). For all the same reasons we have determined that opposer has not met its burden to prove that its mark is famous for purposes of likelihood of confusion, opposer has not met its higher burden to prove fame in the dilution context, and its dilution claim must fail. *See id.* at 1727.

Decision: The opposition is sustained on the ground of likelihood of confusion pursuant to Section 2(d) of the Trademark Act and dismissed as to likelihood of dilution under Trademark Act Section 43(c).