

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed:  
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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*ClearChoice Holdings, LLC*  
*v.*  
*Dale D. Goldschlag, D.D.S., P.C.*

—  
Opposition No. 91191371

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Marsha G. Genter of Dykema Gossett PLLC for ClearChoice Holdings, LLC.

David M. Andersen of Bacal Law Group, P.C. for Dale D. Goldschlag, D.D.S., P.C.

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Before Bergsman, Lykos and Adlin, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Dale D. Goldschlag, D.D.S., P.C. (“Applicant”) filed a use-based application to register the mark **RightChoice**, in standard character form, for “dental implant services,” in Class 44.<sup>1</sup> Applicant submitted a specimen that displayed its mark as shown below:

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<sup>1</sup> Application Serial No. 77685491 filed on March 6, 2009. Applicant claimed March 6, 2009 as its dates of first use of its mark anywhere and first use of its mark in commerce.



ClearChoice Holdings, LLC (“Opposer”) opposed the registration of Applicant’s mark pursuant to Section 2(d) of the Trademark Act of 1946, 15 U.S.C. § 1052(d), on the ground that use of Applicant’s mark is likely to cause confusion with Opposer’s previously registered **ClearChoice** marks for “dental services, namely, dental implant services,” in International Class 44, listed below:<sup>2</sup>

1. Registration No. 3225921 for CLEARCHOICE DENTAL IMPLANTS, in standard character form.<sup>3</sup> Opposer disclaimed the exclusive right to use the term “dental implants”;

2. Registration No. 3553219 for the mark CLEARCHOICE DENTAL IMPLANT CENTER, in standard character form.<sup>4</sup> Opposer disclaimed the exclusive right to use the term “dental implant center”; and

3. Registration No. 3685880 for the mark **ClearChoice** and design, shown below.<sup>5</sup>

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<sup>2</sup> Opposer also pleaded that Applicant’s mark is likely to dilute the distinctive character of its ClearChoice marks but withdrew the dilution claim in its brief. *See Research in Motion Limited v. Defining Presence Marketing Group Inc.*, 102 USPQ2d 1187, 1189-90 (TTAB 2012); *Swiss Watch International Inc. v. Federation of the Swiss Watch Industry*, 101 USPQ2d 1731, 1734 n.4 (TTAB 2012).

<sup>3</sup> Registered on April 3, 2007; Sections 8 and 15 affidavits accepted and acknowledged.

<sup>4</sup> Registered on December 30, 2008.

<sup>5</sup> Registered on September 22, 2009. Opposer pleaded ownership of application Serial No. 77686189, filed March 9, 2009, which matured into Registration No. 3685880 during this proceeding. Opposer claimed November 1, 2005 as the date of first use of its mark anywhere and the date of first use of its mark in commerce.



I. The Record

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), Applicant's application file. In addition, Opposer filed the notices of reliance listed below:

1. Notice of reliance on dictionary definitions of the words "right" and "clear" and the entry for the word "clear" in Rodale, **THE SYNONYM FINDER** (1978);<sup>6</sup>

2. Notice of reliance on the Board's nonprecedential decision in *Clear Choice Holdings LLC v. Implant Direct Int'l* (Opposition No. 91190485) (August 26, 2014);<sup>7</sup> and

3. Notice of reliance on certified copies of Opposer's pleaded registrations prepared and issued by the United States Patent and Trademark Office showing both the current status of and title to the registrations and a copy of the file history for Application Serial No. 77652784 for the mark REAL CHOICE filed by the third party involved in the above-noted *Choice Holdings LLC v. Implant Direct Int'l* opposition.<sup>8</sup>

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When an opposer pleads ownership of the underlying application in the notice of opposition, the opposer may make the registration which issues during the opposition of record without having to amend the notice of opposition to assert reliance on the registration. See *UMG Recordings, Inc. v. Charles O'Rourke*, 92 USPQ2d 1042, 1045 n.12 (TTAB 2009).

<sup>6</sup> 40 TTABVue. Citations to the record are to TTABVue, the docket history system for the Trademark Trial and Appeal Board.

<sup>7</sup> 41 TTABVue.

<sup>8</sup> 42 TTABVue.

Applicant did not introduce any testimony or evidence.

## II. Standing

Because Opposer has properly made of record its pleaded registrations and the pleaded application that became a registration, Opposer has established its standing. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982).

## III. Priority

Because Opposer has properly made of record its pleaded registrations and application that became a registration, Section 2(d) priority is not an issue in the opposition as to the marks and the services covered by the pleaded registrations. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).

## IV. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry

mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks”).

A. The similarity of dissimilarity and nature of the services, the established, likely-to-continue channels of trade and classes of consumers.

The services are identical: dental implant services.

Because the services described in the application and Opposer’s registrations are identical, we must presume that the channels of trade and classes of purchasers are also the same. *See In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1028 (TTAB 2011). *See also In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion).

B. The similarity of the marks in their entirety in terms of appearance, sound, meaning and commercial impression.

We now turn to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont De Nemours & Co.*, 177 USPQ at 567. In a particular case, a “finding of similarity as to any one factor (sight, sound or meaning) alone ‘may be sufficient to support a holding that the marks are confusingly similar.’” *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535

(TTAB 1988) (citations omitted). *See also In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 (TTAB 1987). In comparing the marks, we are mindful that where, as here, the services are identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the services. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enterprises Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007); *Schering-Plough HealthCare Products Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1325 (TTAB 2007).

Further “[t]he proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs. Inc. v. Triumph Learning LLC*, 101 USPQ2d at 1721 (citation omitted). *See also San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff’d mem.*, 972 F.2d 1353 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

The mark Applicant seeks to register is **RightChoice**. Opposer's marks are CLEARCHOICE DENTAL IMPLANTS, CLEARCHOICE DENTAL IMPLANT CENTER, and **ClearChoice** and design shown below:



The dominant element of Opposer's marks is the term "Clear Choice" displayed as either "**ClearChoice**" or "CLEARCHOICE." In the case of the "**ClearChoice**" and design mark, the words are given greater weight because they would be used by consumers to request the services. *Joel Gott Wines, LLC v. Rehoboth Von Gott, Inc.*, 107 USPQ2d 1424, 1431 (TTAB 2013) (citing *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999)). See also *Sweats Fashions Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793, 1798 (Fed. Cir. 1987); *Giant Food, Inc. v. Nation's Food Service, Inc.*, 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983). Moreover, the design of the shooting star used to dot the letter "i" in Opposer's composite mark is not so distinctive as to make a commercial impression separate and apart from the term "**ClearChoice**." If anything, the shooting star design highlights the term "ClearChoice" by dotting the letter "i" and, thus, indicating that by selecting Opposer, the "Clear Choice" in dental implant services, the consumer is making the correct choice.

With respect to the CLEARCHOICE DENTAL IMPLANTS and CLEARCHOICE DENTAL IMPLANT CENTER registrations, Opposer disclaimed the exclusive right to use "Dental Implants" and "Dental Implant Center," which

are highly descriptive terms for both parties' services. It is settled that descriptive matter may have less significance in likelihood of confusion determinations. *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.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985)).

In noting that the term “**ClearChoice**” or “CLEARCHOICE” is the dominant element of Opposer’s marks, we are aware that the likelihood of confusion analysis cannot be predicated on dissecting marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *In re National Data Corp.*, 224 USPQ at 751. *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, 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 entirety. *In re National Data Corp.*, 224 USPQ at 751. Thus, though we compare the marks **RightChoice** and CLEARCHOICE DENTAL IMPLANTS, CLEARCHOICE DENTAL IMPLANT CENTER, and **ClearChoice** and design in



their entireties, we give more weight to the distinctive portions of Opposer's marks: CLEARCHOICE and **ClearChoice**.

Applicant's mark **RightChoice** and Opposer's marks CLEARCHOICE DENTAL IMPLANTS and CLEARCHOICE DENTAL IMPLANT CENTER are presented in standard character form. Marks presented in standard characters are not limited to any particular depiction. The rights associated with a mark in standard characters reside in the wording and not in any particular display. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909-11 (Fed. Cir. 2012); *In re RSI Systems, LLC*, 88 USPQ2d 1445, 1448 (TTAB 2008). This means, for example, that Applicant's mark **RightChoice** may be displayed as RIGHTCHOICE and Opposer's mark CLEARCHOICE DENTAL IMPLANTS may be displayed as **ClearChoice** Dental Implants.

In appearance and sound, **RightChoice** and **ClearChoice** or CLEARCHOICE are similar; each prefaces the word "Choice" with a one-syllable word that describes the selection or "choice" the customer should make as wise (*i.e.*, a "Clear" choice or the "Right" choice). Thus, even if the words "Right" and "Clear" were to be considered the dominant part of the marks, those words have the same essential meaning and engender the same commercial impression especially when used with "Choice" as the second word in both marks.

Applicant disputes Opposer's contention that "RightChoice" and "ClearChoice" or "CLEARCHOICE" have similar meanings and engender similar

commercial impressions.<sup>9</sup> According to Applicant, “the term ‘right’ evokes an image of goodness, correctness, and truthfulness; in contrast, the term ‘clear’ denotes something that is luminous, transparent, and easy to see.”<sup>10</sup>

The word “Right” is defined, *inter alia*, as “accurate or correct,” “suitable, appropriate,” and “most favorable or desired.”<sup>11</sup> The word “Clear” is defined, *inter alia*, as “not subject to misinterpretation or more than one interpretation” which is synonymous with “clear-cut,” “obvious” “straightforward,” or “unmistakable.”<sup>12</sup> Therefore, while we do not view the terms “Right Choice” and “Clear Choice” as exact synonyms, we find that their connotations and commercial impressions are similar because consumers will interpret them to mean the “correct choice” or the “obvious choice.” “[E]xact similitude is not required to conclude that two marks are confusingly similar.” *Hercules, Inc. v. National Starch & Chem. Corp.*, 223 USPQ 1244, 1246 (TTAB 1984) (“when there are small differences between the marks, the differences may be insignificant in obviating the likelihood of confusion when compared to the marks’ overall similarities.”).

In view of the foregoing, we find that the similarities between the marks outweigh the dissimilarities and that the marks are similar in their entirety as to their appearance, sound, connotation and commercial impression.

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<sup>9</sup> Applicant’s Brief, pp. 9-10 (53 TTABVue 14-15).

<sup>10</sup> Applicant’s Brief, p. 9 (53 TTABVue 14).

<sup>11</sup> Merriam-Webster Online Dictionary (w-w.com) (40 TTABVue 5-6).

<sup>12</sup> 40 TTABVue 13.

C. Degree of consumer care.

Applicant did not introduce any evidence regarding the degree of care that consumers exercise when selecting dental implant services to show that this *du Pont* factor minimizes the likelihood of confusion. Nevertheless, Applicant argues that the relevant consumers will exercise a high degree of care in purchasing dental implant services.<sup>13</sup> Even assuming that consumers exercise a high degree of care, we consider this *du Pont* factor to be outweighed by the similarity of the marks and the identity of the services. Furthermore, even careful consumers are likely to be confused when presented with similar marks used in connection with identical services. *In re Research and Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) (quoting *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970)).

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<sup>13</sup> Applicant's Brief, pp. 11-12 (53 TTABVue 16-17). Applicant attached evidence to its brief purportedly to prove that the relevant consumers will exercise a high degree of care. Because Applicant's testimony period has closed, the evidence Applicant attached to its brief is untimely. However, we may consider the entry from the **ENCYCLOPAEDIA BRITANNICA** (53 TTABVue 25) because the Board may take judicial notice of information from encyclopedias. *Productos Lacteos Tocumbo S.A. de C.V. v. Paeteria La Michoacana Inc.*, 98 USPQ2d 1921, 1934 n.61 (TTAB 2011); *In re Petroglyph Games Inc.*, 91 USPQ2d 1332, 1338 (TTAB 2009). The encyclopedia entry does not address the degree of care that consumers exercise when selecting dental implant services. We must infer that consumers will exercise a high degree of care because a dental implant is a type of oral surgery. However, without any evidence regarding how consumers select oral surgeons, any inferences about that subject would be speculation based on the experience of this panel and not objective evidence.

D. The number and nature of similar marks in use in connection with similar services.

As indicated above, Applicant did not introduce any testimony or evidence and, therefore, there is no evidence in the record regarding third-party use. Accordingly, this *du Pont* factor is neutral.

E. Reported instances of actual confusion.

There are no reported instances of actual confusion. However, the absence of any reported instances of confusion is meaningful only if the record indicates appreciable and continuous use by Applicant of its mark for a significant period of time in the same markets as those served by Opposer under its mark. *Citigroup Inc. v. Capital City Bank Group, Inc.*, 94 USPQ2d 1645, 1660 (TTAB 2010), *aff'd*, 637 F.3d 1344, 98 USPQ2d 1253 (Fed. Cir. 2011); *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). In other words, for the absence of actual confusion to be probative, there must have been a reasonable opportunity for confusion to have occurred. *Barbara's Bakery Inc. v. Landesman*, 82 USPQ2d 1283, 1287 (TTAB 2007) (the probative value of the absence of actual confusion depends upon there being a significant opportunity for actual confusion to have occurred); *Red Carpet Corp. v. Johnstown American Enterprises Inc.*, 7 USPQ2d 1404, 1406-1407 (TTAB 1988); *Central Soya Co., Inc. v. North American Plant Breeders*, 212 USPQ 37, 48 (TTAB 1981) (“the absence of actual confusion over a reasonable period of time might well suggest that the likelihood of confusion is only a remote possibility with little probability of occurring”). Since neither Opposer, nor Applicant, introduced any testimony or evidence regarding the use of their marks,

we have no basis upon which to determine whether there has been a reasonable opportunity for confusion to have occurred. Accordingly, we find that this *du Pont* factor is neutral.

F. Balancing the factors.

Because the marks are similar, the services are identical, and we must presume that the services move in the same channels of trade and are sold to the same classes of consumers, we find that Applicant's mark **RightChoice** for "dental implant services" is likely to cause confusion with Opposer's **ClearChoice** marks for "dental implant services."

**Decision:** The opposition is sustained and registration to Applicant is refused.