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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92051361
Party	Plaintiff United Home Care Services, Inc
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Submission	Motion for Summary Judgment
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Attachments	Motion for summary judgment - UHC.pdf (17 pages)(102038 bytes)

**THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of:

Registration No.: 3,180,437
Registration Date: December 5, 2006
Trademark: UNITED HOME CARE
Registrant: United Home Care, Inc.

United Home Care Services, Inc.

Petitioner,

v.

Cancellation No. 92051361

United Home Care, Inc.,

Respondent.

PETITIONER'S MOTION FOR SUMMARY JUDGMENT AS TO COUNT I

Petitioner, United Home Care, Inc. ("Petitioner" or "UHC"), by and through undersigned counsel, hereby moves for summary judgment against United Home Care, Inc. ("Respondent") pursuant to Fed. R. Civ. P. 56 and TBMP § 528, as to the first count of its petition for cancellation, based on priority and likelihood of confusion. The undisputed material facts indicate that Petitioner has been using its mark since 1974, a quarter century before the date Respondent asserts as its date of first use for its identical mark. Accordingly, Petitioner must prevail as a matter of law and Respondent's registration should be cancelled.

UNDISPUTED MATERIAL FACTS

Petitioner UHC

UHC is a non-profit organization, governed by a volunteer board of directors, which provides home health services to the elderly and to disabled adults, as well as to their caregivers.

UHC works in partnership with private and public agencies concerned with the care of the elderly and disabled. *See Declarations of Jose R. Fox and Joaquin Leon, Esq.* (“UHC Declarations”)¹ attached hereto as exhibits 1, and 2, each at ¶4. UHC’s services include non-skilled services such as personal caregiver, homemaker, escort, respite, as well as skilled services such as nursing care and wound care. *Id* at ¶5.

UHC was founded in 1974, as a division of United Way, with the objective of improving the lives of indigent clients in need of in-home services. *Id* at ¶6. Since then, it has grown and has continued to establish partnerships to better serve the community. In 1976, UHC’s first full-time Executive Director was appointed. *Id* at ¶7. In 1979, UHC became independent of United Way and became Miami-Dade County’s official lead agency for state community care for the elderly. *Id* at ¶8. In 1993, UHC became a licensed home health agency and obtained Medicaid certification. *Id* at ¶9. In 1998, UHC became a Certified Medicare Agency. *Id* at ¶10. In 2004, the year it celebrated its 30th anniversary, UHC became accredited by CHAP (Community Health Accreditation Program) and became a Nursing Home Diversion program provider offering a full continuum o health care services for those at high risk of nursing home placement. *Id* at ¶11.

In 2001, the South Florida Business Journal ranked UHC as the largest home health care agency in South Florida. *Id* at ¶12.

Over its 35+ year history, UHC has received a number of honors and accolades. In 1993, Florida Governor Lawton Chiles recognized UHC’s commitment to providing services for the elderly. In that same year, the United Way of Dade County presented UHC an award for excellence in non-profit management “in recognition of exemplary fiscal and program management among social services agencies with budgets of over \$2million.” In 1994, UHC

¹ These declarations, and the documents identified therein and attached thereto, are offered into evidence on summary judgment. *See* TBMP 528.05(b).

received the “Statewide Management Award” from the Florida Association of Non-Profit Organizations. In the same year, UHC’s President and CEO, Jose R. Fox, received the United Way of Dade County’s “Outstanding Human Services Professional Award in recognition of his leadership of UHC. Also in 1994, the city of Coral Gables, Florida honored UHC for its services to the elderly. In 1997, UHC was awarded “Best Home Health Agency” by Medical Business of South Florida. In 1999, Miami-Dade County declared May 13, 1999 “United Home Care Services Day” in recognition of UHC’s 25 years of service to the community. In 2005, UHC received the Florida Medical Quality Assurance Inc. Achievement Award for outstanding achievement in outcome-based quality improvement. In that same year, UHC was awarded a grant from the Health Foundation of South Florida to implement a new technology that gives UHC the ability to monitor a client’s vital signs and other clinically significant information remotely, linking the client from his home to a registered nurse at UHC’s facility. Also, in 2005, Board member Jose K. Fuentes was honored with a Valor Award for his work with UHC. In 2007, UHC was chosen as a finalist for the Alliance for Human Services’ “Making a Difference” community service award. In that same year, UHC was selected for the 2007 Home Care Elite, an annual compilation of the top 25% most successful Medicare-certified home health care providers in the United States. *Id* at ¶13; *see also compilation of UHC awards and honors*, attached as Exhibit “A” to the UHC Declarations.

UHC continues to expand the services it offers. In 2009, UHC launched additional services including a private pay program, and programs for dementia support, chronic disease management, medication management, depression screening, and depression management. *See also compilation of literature and media articles discussing UHC’s services*, attached hereto as

Exhibit “C”. *Id* at ¶14; *see also compilation of literature and media articles discussing UHC’s services*, attached as Exhibit “B” to the UHC Declarations.

In 1995, in commemoration of its 20th anniversary, UHC established the Annual Claude Pepper Memorial Awards Dinner to honor individuals who have improved the lives of the elderly and disabled. Last year, in 2009, UHC celebrated its 35th anniversary and its 15th annual Claude Pepper Memorial Awards Dinner. *Id* at ¶15; *see also compilation of awards dinner programs* attached as Exhibit “C” to UHC Declarations.

Throughout its proud 35+ history of service, UHC has continuously identified itself and its services to the public with the mark “UNITED HOME CARE”. *Id* at ¶16. UHC sometimes appends the descriptive terms “services” and “Inc.”, in connection to its use of “UNITED HOME CARE”, as in its corporate name “United Home Care Services, Inc.”, or as on its website banner logo, which contains the literal element “United HomeCare Services”, and other times uses “UNITED HOME CARE” without these terms, as in its domain name www.unitedhomecare.com. *Id* at ¶17. UHC sometimes, in using its mark, omits the space between the words “HOME” and “CARE and employs a stylized capitalization of the letters H and C, as in “United HomeCare” or “United HomeCare Services”. *Id* at ¶18. As a result of UHC’s long use of the UNITED HOME CARE mark and the outstanding reputation it has built since 1974, UHC’s UNITED HOME CARE mark enjoys significant public recognition and goodwill. *Id* at ¶19.

UHC believes that it is being, and will continue to be, harmed by Respondent’s registration of the mark UNITED HOME CARE for home healthcare services because Respondent would have presumptive exclusive rights to UHC’s UNITED HOME CARE mark for services that UHC renders. UHC also believes that it is being, and will continue to be,

harmful by Respondent's registration of the mark UNITED HOME CARE for home healthcare services because the existence of such registration would likely prevent the USPTO from granting UHC a registration for its mark. *Id* at ¶20.

Respondent

On December 5, 2006, Respondent was awarded a registration for the mark UNITED HOME CARE for home healthcare services in International Class 44. *See* United States Trademark Registration No. 3,180,437.²

Respondent describes its own services as "Home Health services for Medicare, Medicaid, commercial, and private insurance patients in many counties across Georgia." *See specimen submitted with Trademark Application Ser No. 78770431.*³ Respondent claims to offer services including "skilled nursing services", "certified nursing assistants", "wound care", "home medication assistance", and housekeeping". *See id.* Respondent's claimed date of first use of the UNITED HOME CARE mark on these services is April 12, 1999, approximately 25 years after Petitioner UHC began its use of UNITED HOME CARE. *See Trademark Application Ser No. 78770431*; United States Trademark Registration No. 3,180,437. Respondent was incorporated on this same date, April 12, 1999. *See Respondent's Certificate of Incorporation*, attached hereto as Exhibit 4.⁴ In short, even viewing the facts in the light most favorable to Respondent, and accepting their asserted date of first use as true,⁵ Petitioner had been using the mark at issue for a quarter century before Respondent even existed, much less began use of its mark.

² The certificate of the registration at issue is part of the evidentiary record on summary judgment. *See* TBMP §528.05(a); 37 C.F.R. §2.122(d)(1).

³ The entire file of the subject registration is part of the evidentiary record on summary judgment. *See* TBMP §528.05(a); 37 C.F.R. §2.122(b).

⁴ This self-authenticating record of the Georgia Secretary of State is hereby offered into evidence on this summary judgment. *See* TBMP §528.05(e); *see also* 37 C.F.R. §2.122(e).

⁵ It strains belief to think that Respondent made use of its mark in commerce on the very same day that it came into existence. Accordingly, Petitioner also seeks cancellation of Respondent's mark on grounds of fraud before the PTO, although summary judgment on that count is not sought here.

ARGUMENT

A. *Standard on Summary Judgment.*

Summary judgment is appropriate where there are no genuine issues of material fact in dispute, thus allowing the case to be resolved as a matter of law. *See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The purpose of the motion is judicial economy, that is, to avoid an unnecessary trial where there is no genuine issue of material fact and more evidence than is already available in connection with the summary judgment motion could not reasonably be expected to change the result in the case. *See, e.g., Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 222 USPQ 741 (Fed. Cir. 1984).

A factual issue is material when its resolution would affect the outcome of the proceeding under governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is genuinely in dispute if the evidence of record is such that a reasonable fact finder could return a verdict in favor of the nonmoving party. *See Lloyd's Food Products Inc. v. Eli's Inc.*, 987 F.2d 766 (Fed. Cir. 1993). However, a dispute over a fact which would not alter the Board's decision on the legal issue will not prevent entry of summary judgment. *See, for example, Kellogg Co. v. Pack'em Enterprises Inc.*, 14 USPQ2d 1545 (TTAB 1990), *aff'd*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991).

The evidence on summary judgment must be viewed in a light most favorable to the non-movant, in this case Respondent, and all justifiable inferences are to be drawn in Respondent's favor. *Lloyd's Food Products, Inc. v. Eli's, Inc.*, 987 F.2d 766, 767, 25 USPQ2d 2027, 2029 (Fed. Cir. 1993); *Opryland USA Inc. v. Great American Music Show, Inc.*, 970 F.2d 847 (Fed. Cir. 1992); *Olde Tyme Foods, Inc. v. Roundy's, Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992).

However, Respondent may not rest on mere denials or conclusory assertions, but rather must proffer countering evidence, by affidavit or otherwise, showing that there is a genuine factual dispute for trial. See *Enbridge, Inc. v Excelerate Energy Limited Partnership*, 92 USPQ2d 1537 (TTAB October 6, 2009). The Board may not resolve issues of material fact; it may only ascertain whether issues of material fact exist. See *Lloyd's Food Products*, 987 F.2d at 766, 25 USPQ2d at 2029; *Olde Tyme Foods*, 961 F.2d at 200, 22 USPQ2d at 1542.

Petitioner prevails on its claim for cancellation under Section 2(d) of the Lanham Act if it establishes standing, priority, and likelihood of confusion. See *Green Spot, Ltd. v. Vitasoy Int'l Holdings, Ltd.*, 86 USPQ2d (TTAB 2008). There are no genuine issues of material fact with respect to any of the elements. Accordingly, the Board should grant summary judgment in favor of Petitioner and Respondent's registration should be cancelled.

B. Standing

Any person who believes it is or will be damaged by registration of a mark has standing to file a petition for cancellation. See TBMP §309.03(b); 15 U.S.C. §§1063 and 1064. Petitioner has standing because is the prior user of the UNITED HOME CARE mark for home health care services. *Green Spot*, 86 USPQ2d 1283. There is also no dispute that Petitioner has an interest in using the UNITED HOME CARE mark in its business and that the parties are engaged in the sale of the same or similar services, or, at a minimum, services that are within the normal expansion of one another's businesses. *C.f. Jewels Vigilance Committee Inc. v. Ullenberg Corp.*, 823 F.2d 490, 2 USPQ2d 2021 (Fed. Cir. 1987); *Otto Roth & Co. v. Universal Corp.*, 640 F.2d 1317, 209 USP 40 (CCPA 1981); *Golomb v. Wadsworth*, 592 F.2d 1184, 201 USPQ 200 (CCPA 1979); *Binney & Smith, Inc. v. Magic Marker Industries, Inc.*, 222 USPQ 1003 (TTAB 1984). It is also beyond dispute that Petitioner believes, reasonably, that

registration of its UNITED HOME CARE mark for home healthcare services would be refused in view of Respondent's registration for the UNITED HOME CARE mark for healthcare services. *See Cerveceria Modelo, S.A. de C.V. v. R.B. Marco & Sons, Inc.*, 55 USPQ2d 1298 (TTAB 2000); *Hartwell Co. v. Shane*, 17 USPQ2d 1569 (TTAB 1990). Finally, as described below, a review of the undisputed facts reveals that Respondent has a meritorious, indeed compelling, claim of likelihood of confusion. *See Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982); *Metromedia Steakhouses, Inc. v. Pondco II Inc.*, 28 USPQ2d 1205, 1209 (TTAB 1993); *Selva & Sons, Inc. v. Nina Footwear, Inc.*, 705 F.2d 1316, 1326, 217 USPQ 641, 648 (Fed. Cir. 1983); *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650, 1657 (TTAB 2002); *The Nestle Company Inc. v. Nash-Finch Co.*, 4 USPQ2d 1085, 1087 (TTAB 1987); *Liberty Trouser Co. v. Liberty & Co.*, 222 USPQ 357, 358 (TTAB 1983). Any one of these reasons alone is sufficient to establish standing, and there can be no serious question that Petitioner has standing to bring this Cancellation proceeding.

C. Priority

To establish priority on a likelihood of confusion claim brought under Trademark Act § 2(d), a party must prove that, vis-a-vis the other party, it owns "a mark or trade name previously used in the United States ... and not abandoned..." *See* 15 U.S.C. § 1052(d). A party may establish its own prior proprietary rights in a mark through ownership of a prior registration, actual use or through use analogous to trademark use which creates a public awareness of the designation as a trademark identifying the party as a source. *See* 15 U.S.C. §§ 1052(d) and 1127; *see also T.A.B. Systems v. PacTel Teletrac*, 77 F.3d 1372, 37 USPQ2d 1879 (Fed. Cir. 1996). Here, the undisputed evidence is that Petitioner began its use of the UNITED HOME CARE

mark a quarter century before Respondent began its use, or even existed, and has not abandoned the mark. Accordingly, there is no genuine dispute of material fact as to priority.

D. Likelihood of Confusion

In determining whether there is any genuine issue of material fact relating to the legal question of likelihood of confusion, the Board must consider all of the probative facts in evidence which are relevant to the factors bearing on likelihood of confusion as identified in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). As noted in the *du Pont* decision itself, various factors, from case to case, may play a dominant role. *Id.*, 177 USPQ at 567. Even a single du Pont factor may be dispositive in certain cases. *See Kellogg Co. v. Pack'em Enterprises Inc.*, 14 USPQ2d 1545 (TTAB 1990), *aff'd*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991). In any likelihood of confusion analysis, the two “key” *du Pont* factors are the similarities of the marks and the similarities of the goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks”); *see also In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999). The undisputed record here pertains to these two key factors, both of which dictate overwhelmingly in favor of a finding of likelihood of confusion.

i. Similarity Between the Marks

In a determination of whether Petitioner’s mark and the registered mark, when viewed in their entireties, are similar in terms of appearance, sound, connotation and commercial impression, the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall

commercial impressions that confusion as to the source of the goods or services offered under the respective marks is likely to result. *H.D. Lee Co. v. Maidenform Inc.*, 87 USPQ2d 1715 (TTAB 2008). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entirety, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. *See In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

There is no genuine issue of material fact that the marks are identical or nearly identical in appearance, sound, meaning and commercial impression. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). Both marks are “UNITED HOME CARE”. Both marks consist of the terms “UNITED”, “HOME”, and “CARE” in direct sequence.

The only even marginally arguable differences between the marks is that Petitioner’s mark sometimes appends the descriptive terms “services” or “Inc.”, as in the corporate name “United Home Care Services” or “United Home Care Services, Inc.” or omits the space between the words “HOME” and “CARE and employs a stylized capitalization, as in “United HomeCare” or “United HomeCare Services”. Such minor differences are not sufficient to create a genuine issue as to the similarity or dissimilarity between the marks. Marks may be confusingly similar in appearance, sound, meaning and commercial impression despite the addition, deletion or substitution of letters or words, the addition or deletion of spaces between words, or the presence of or absence of corporate entity designations. *See Cunningham v. Laser*

Golf Corp., 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (quoting, *In re National Data Corp.*, 24 USPQ2d at 752 ("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"); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often "less significant in creating the mark's commercial impression; *In re Packaging Specialists, Inc.*, 221 USPQ 917, 919 (TTAB 1984) (the element "INC." [in PACKAGING SPECIALISTS, INC.] has "no source indication or distinguishing capacity"). Moreover, the dominant features of the marks in question, and therefore the portions due the most weight in the analysis, "UNITED" "HOME" and "CARE", are identical. *See In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749; *In re Couriaire Express Int'l, Inc.*, 222 USPQ 365, 366 (TTAB 1984) (capitalization of certain letters in mark insufficient to establish distinctiveness); *Aromatique Inc. v. Lang*, 25 USPQ2d 1359 (TTAB 1992) (finding alterations to typeface and capitalization did not change commercial impression of mark); *see e.g., In re Vega*, 2009, Serial No. 77279955, TTAB LEXIS 493 (TTAB July 16, 2009) (non-precedential) (finding the deletion of the space between terms insufficient to distinguish the marks, citing *RE/MAX of America, Inc. v. Realty Mart, Inc.*, 207 USPQ 960, 964 (TTAB 1980) (similarity in sound alone may be sufficient to support a finding of likelihood of confusion)); *see also, Molenaar, Inc. v. Happy Toys Inc.*, 188 USPQ 469 (TTAB 1975), and *In re Cresco Mfg. Co.*, 138 USPQ 401 (TTAB 1963)). There is no meaningful difference between the marks.

Respondent, as the registrant of an identical mark, cannot seriously challenge the inherent distinctiveness or strength of Petitioner's mark. This is especially true because Respondent did not rely on an assertion of acquired distinctiveness in prosecuting its trademark application, but instead implicitly asserted that the non-disclaimed features of its mark are

inherently distinctive. If Petitioner's mark is not protectable after 35 years of use, Respondent's identical mark certainly is not protectable after 10. But if Respondent did assert that Petitioner's mark is weak, this argument would change nothing even if it succeeded. Even a weak mark is entitled to protection against the registration of a nearly identical mark, like Respondent's for closely related goods or services. *See King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400 (CCPA 1974).

The first *du Pont* factor weighs heavily against Respondent because Petitioner's mark is extremely similar to, if not nearly identical to, the registered mark. *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984).

ii. Similarity Between the Services

Next, the Board must consider whether Petitioner's services and the services of the Respondent, and the channels of trade through which the services travel, are related. *See du Pont.*, 476 F.2d 1357, 177 USPQ 563. In order to find that there is a likelihood of confusion, it is not necessary that the goods and/or services on or in connection with which the marks are used be identical or even competitive. It is enough if there is a relationship between them such that persons encountering them under their respective marks are likely to assume that they originate from the same source or that there is some association between their sources. *See, e.g., On-line Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000). Moreover, Respondent may not restrict the scope of its services in the registration by extrinsic argument or evidence, for example, as to the quality or price of the goods. *See, e.g., In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986). Rather, the nature and scope of a party's goods or services must be determined on the basis of the goods or services recited in the registration, which is the broad umbrella category "home healthcare services". *See, e.g.,*

Hewlett-Packard Co. v. Packard Press Inc., 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1786 & 1787 (Fed. Cir. 1990); *In re Uncle Sam Chemical Co., Inc.*, 229 USPQ 233 (TTAB 1986).

The undisputed evidence is that both Petitioner and Respondent are offering services under their marks that fall with home healthcare services. More specifically, Petitioner offers services including personal caregivers, homemakers, escorts, respite services, medication management, nursing care, and wound care. Respondent, taking the assertions of its own specimen at face value, offers services including “skilled nursing services”, “certified nursing assistants”, “wound care”, “home medication assistance”, and housekeeping”. In short, the parties’ specific services are virtually identical and overlap substantially. In view of this there is no genuine issue of material fact that the goods and services are not related.

Turning to channels of trade, the undisputed evidence also shows that both Respondent and Petitioner offer their services to the elderly and disabled in connection with government programs like Medicare and Medicaid. Moreover, because there is no limitation in Respondent’s application or its registration as to the channels of trade or customers for the services, the Board should deem the parties identical goods to travel in the same channels of trade and to be sold to the same classes of consumers. See *Canadian Imperial Bank of Commerce v. Wells Fargo Bank, N.A.*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); *In re Riley Company*, 182 USPQ 510 (TTAB 1974). Because the identifications in the registration describes services broadly, and there is no limitation as to the nature, type, channels of trade or class of purchasers, it should be presumed that the registration encompasses all services of the type described, that they move in all channels of trade normal for these services, and that they

are available to all classes of purchasers for the described services. See *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992).

Both of the key *du Pont* factors at issue weigh heavily in favor of a finding of likelihood of confusion.

iii. Other Factors

While the bulk of the evidence before the Board pertains to the two key *du Pont* factors analyzed above, consideration of the other factors does not create a factual issue precluding summary judgment. There is no indication in the record that trial would produce additional or different evidence on these points so as to change their weight in the balancing of the *du Pont* factors. Nor is there any indication that Respondent could produce at trial any evidence on other *du Pont* factors that would change the balance. See *Kellogg v. Pack'em*, 14 USPQ2d 1545.

Although Petitioner has not offered evidence of actual confusion despite a period of contemporaneous use, this does not raise a genuine issue precluding summary judgment. Of course, Petitioner is not required to prove actual confusion in order to make out a prima facie showing of likelihood of confusion. See *Block Drug Co. v. Den-Mat, Inc.*, 17 USPQ2d 1315 (TTAB 1989); *Airco, Inc. v. Air Equipment Rental Co., Inc.*, 210 USPQ 492 (TTAB 1980). Moreover, while evidence of actual confusion may be some of the best evidence of likelihood of confusion, the converse is not true, as evidence of actual confusion is difficult to obtain. See *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 396 (Fed. Cir. 1983) (absence of significant evidence of actual confusion does not mean that there is no likelihood of confusion); see also, *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). At best, this factor slightly favors Respondent in the overall likelihood of

confusion analysis, but cannot outweigh the strength of Petitioner's case on the "key" factors of similarity of the marks and similarity of the services. Similarly, any evidence that might be offered by Respondent as to the existence of third-party use of similar marks would not alleviate the strong likelihood of confusion that exists because of the use of highly similar marks in connection with highly similar services, and therefore would not change the outcome of the analysis or preclude summary judgment here. *See In re Farah Manufacturing Co., Inc.*, 435 F.2d 594, 58 C.C.P.A. 829, 168 USPQ 277, 278 (CCPA 1971).⁶

Nor can Respondent raise a genuine issues of material fact regarding the conditions under which, and the buyers to whom, sales are made. The evidence is that both Petitioner's and Respondent's target clientele are elderly and disabled individuals in need of specialized home healthcare. There is no indication that they are especially sophisticated, and it would actually appear that, given their need for the sort of services offered by the parties, they are in no position to be especially careful in making their purchasing decisions. Even if this were not the case, the fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are immune from source confusion. *See In re Decombe*, 9 USPQ2d 1812 (TTAB 1988); *In re Pellerin Milnor Corp.*, 221 USPQ 558 (TTAB 1983). If anything, analysis of this factor bolsters a finding a likelihood of confusion, and raises no genuine issue of material fact that prevents summary judgment in Petitioner's favor.

⁶ Of course, third-party trademark registrations themselves are not evidence of use of the marks shown therein. Thus, they are not proof that consumers are familiar with such marks so as to be accustomed to the existence of the same or similar marks in the marketplace. *See Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462 (CCPA 1973); *Richardson-Vicks, Inc. v. Franklin Mint Corp.*, 216 USPQ 989 (TTAB 1982).

CONCLUSION

Based on the foregoing arguments and citations of authority, Petitioner moves this Court for entry of Summary Judgment in favor of Petitioner on Count I of its Petition for Cancellation. Respondent's registration should be cancelled in due course.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the r were served by First Class U.S. Mail this 26th day of March, 2010 upon: J. Tucker Barr, Esq., Arnall Golden Gregory, LLP, 171 17th Street, N.W., Suite 2100, Atlanta, GA 30363.

By: /Michael Tschupp/
Michael Tschupp