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Mailed: October 27, 2006

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Allianz Life Insurance Company of North America

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Serial No. 78289313

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Eric D. Paulsrud of Leonard, Street & Deinard for Allianz  
Life Insurance Company of North America.

Katrina S. Mister, Trademark Examining Attorney, Law Office  
104 (Chris Doninger, Managing Attorney).

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Before Hohein, Walters and Cataldo, Administrative Trademark  
Judges.

Opinion by Walters, Administrative Trademark Judge:

Allianz Life Insurance Company of North America has  
filed an application to register the mark WEALTHCARE ELITE  
on the Principal Register in standard character form for  
"insurance services, namely, underwriting, claims  
processing, claims administration, consultation and  
brokerage, in the fields of life insurance and annuities,"

in International Class 36.<sup>1</sup> The application includes a disclaimer of WEALTHCARE apart from the mark as a whole.

The examining attorney has issued a final refusal to register under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark shown below, previously registered on the Principal Register for "medical insurance brokerage services," in International Class 36,<sup>2</sup> that, if used on or in connection with applicant's services, it would be likely to cause confusion or mistake or to deceive.



Applicant has appealed. Both applicant and the examining attorney have filed briefs. We affirm the refusal to register.

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 likelihood of confusion issue. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay*

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<sup>1</sup> Serial No. 78289313, filed August 19, 2003, based on use of the mark in commerce, alleging first use and use in commerce as of August 4, 2003.

<sup>2</sup> Registration No. 1532334, issued March 28, 1989, which is now owned by Brooks-Shettle Company; sections 8 (six-year) and 15 affidavits accepted and acknowledged, respectively.

*Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

The examining attorney contends that confusion is likely because the marks are substantially similar, the services are closely related, and the trade channels and classes of purchasers are the same. With respect to the marks, she states the following (brief, unnumbered pp. 4-5):

[T]he marks not only share the term ELITE but they also share the term CARE combined with prefixes which have a similar sound and spelling. The only terms that differ in the marks, WEALTH and HEALTH, are 'visually and aurally' similar because they are rhyming words comprised of the same amount of syllables and the same amount of letters. The only visual difference between the two words is the first letter in each word. ... [Regarding the design element of the cited mark,] the word portion is more likely to be impressed upon a purchaser's memory and to be used in calling for the ... services.

Regarding the services, the examining attorney asserts that both applicant and the cited registrant offer insurance brokerage services and that "while they may be in different fields of insurance, they are offered by common sources and are services that all people need for the preservation of their health and financial well-being" (brief, unnumbered p. 10). In support of her position, the examining attorney submitted copies of seven use-based third-party

registrations. The marks and relevant portions of the recitations of services are shown below:

- TRUSTED CHOICE (Registration No. 2863176)  
Providing insurance and annuity brokerage in fields of ... health insurance, life insurance, medical insurance ...;
- ING LIFE DIRECT (Registration No. 2611770)  
Insurance brokerage, investment brokerage ... life insurance underwriting ... medical insurance underwriting;
- CONSECO STEP UP (Registration No. 2627483)  
Insurance brokerage, investment brokerage ... life insurance underwriting, medical insurance underwriting;
- WE FINANCE THE THINGS THAT MOVE YOU (Registration No. 2417098) ... life insurance underwriting ... medical insurance underwriting ... insurance brokerage ...;
- EMERALD FIRST FINANCIAL LTD. (Registration No. 2417086) (same owner as mark immediately above) ... life insurance underwriting ... medical insurance underwriting ... insurance brokerage ...;
- SOUTHLAND LIFE (Registration No. 2262718) ... insurance brokerage; ... life insurance underwriting ... medical insurance underwriting ...; and
- ALLIANZ. THE POWER BESIDE YOU (Registration No. 2391233) (owner - Allianz Aktiengesellschaft)  
Insurance agencies and a full line of insurance services in the fields of life insurance ... health insurance ... medical insurance.

Regarding the marks, applicant contends that, although the marks share the common term ELITE, they differ in overall commercial impression because applicant's mark contains only two words, WEALTHCARE and ELITE, whereas the registered mark contains a distinctive design and three

words, HEALTH, CARE and ELITE; and that "it is not the words, but this design in its entirety, with the words stenciled, separated, stacked and presented with a drawing of a globe, which makes the cited mark distinctive" (brief, p. 7). Applicant also asserts that ELITE is not the dominant portion of either mark; rather, ELITE is a relatively weak laudatory term "in common use for a variety of goods and services" (brief, p. 8) and, as such, is not protectable apart from the design. Applicant states that the USPTO records contain numerous registrations and applications for marks containing the term ELITE; however, applicant submitted no evidence in support of this point. Applicant also argues that "the cited mark is weak as applied to medical insurance brokerage services because 'health care' is the common generic or descriptive term for this category of insurance" (brief, p. 9). Applicant argues that, because of the weakness of the wording in the registered mark, the wording cannot be considered dominant; that the design element predominates; and that the mark must be considered as a whole.

With respect to the services, applicant contends that the services are not related merely by virtue of the fact that both are in the broad field of "insurance brokerage" and that, in fact, "these services are used for very different and noncompetitive purposes [in that] life

insurance and annuity products provide benefits to others upon the death of the consumer and, in some cases, offer retirement and investment opportunities [whereas,] by contrast, medical insurance provides a way for a customer to cover the expenses of medical care and maintaining good health" (brief, p. 14). Applicant states that "consumers would not necessarily expect that all insurance-related goods and services identified with a trademark that includes the term 'elite' emanate from the same source" (brief, p. 15).

Applicant also argues that the trade channels differ and the purchasers for the respective services exercise great care in making such purchases and are knowledgeable about the respective products. In this regard, applicant makes the following statements (brief, p. 15-16):

Applicant's life insurance and annuity products can be expected to be purchased by individuals who contact agents directly in order to implement personal estate plans and provide retirement benefits for themselves or death benefits for their families. By contrast, registrant's medical insurance brokerage services can be expected to be purchased by sophisticated and knowledgeable benefits professionals who are responsible for selecting and purchasing medical insurance coverage for a large group of individuals or employees and deal with agents on behalf of those individuals.

Applicant's and registrant's services are selected after careful consideration by discriminating purchasers with specific needs and requirements. ... Both applicant's and registrant's services are complex and expensive services that are of interest to consumers with very specific

requirements. The services are not purchased on impulse or on the basis of the mark alone, but after detailed investigation and careful study of the source, its reputation, stability, length of existence, and the features and benefits offered by the services.

Finally, applicant contends that confusion is unlikely because the marks have coexisted for "nearly three years" without actual confusion.

In considering the evidence of record on the *du Pont* factors, we keep in mind that "[t]he 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." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

We turn, first, to a determination of whether applicant'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. 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).

We agree with the examining attorney that the marks, considered in their entirety, are confusingly similar. The registered mark consists of the words HEALTH CARE ELITE in dark block-type letters stacked vertically and appearing in front of a globe. Without discounting the globe element of the mark, we note that the words are much larger than, and positioned in front of a portion of, the globe. The font used is not particularly distinctive. Thus, we find that the words clearly predominate in the overall commercial impression of the mark. This conclusion is supported by the fact that "minor design features do not necessarily obviate likelihood of confusion arising from consideration of the marks in their entirety. Moreover, in a composite mark comprising a design and words, the verbal position of the mark is the one most likely to indicate the origin of the

goods to which it is affixed." *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983).

Both marks end with the word ELITE, which applicant contends is weak and laudatory. Because there is no evidence on this point in the record, we do not reach such a conclusion. The common term ELITE is preceded in each mark by the relatively weak terms, respectively, WEALTHCARE and HEALTH CARE. Applicant through its disclaimer has essentially admitted the descriptiveness of the term WEALTHCARE and there is no question that, in connection with the services in the cited registration, the term HEALTH CARE is at least highly suggestive. Further, while having different connotations, the terms WEALTHCARE and HEALTH CARE rhyme and applicant's mark and the word portion of the registered mark differ only in their first letter. The fact that applicant telescopes the terms WEALTH and CARE into a single word is insufficient to distinguish these portions of the marks or the marks in their entireties. The marks are unlikely to be viewed side-by-side and this distinction is unlikely to be noticed or, if noticed, remembered by prospective purchasers. We find that, considered in their entireties, the overall commercial impressions of the two marks is substantially similar and this *du Pont* factor weighs against applicant.

Turning to consider the services involved in this case, we note that the question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant's application vis-à-vis the goods or services recited in the registration, rather than what the evidence shows the goods or services actually are. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). See also, *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1992); and *Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991).

Further, it is a general rule that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991), and cases cited therein.

As applicant notes, the respective types of insurance brokerage services are different, one being life insurance

and the other being medical insurance, and are sold to fulfill different needs of the purchaser. However, the test, as noted above, is not whether purchasers can distinguish between these different insurance products, but whether they might mistakenly believe that the source of the brokerage services is the same. We also agree with applicant that all "insurance brokerage services" are not *per se* related and that the burden is upon the examining attorney to establish any relationship. As listed herein, the examining attorney has submitted seven use-based third-party registrations from six companies, each including in its recitation of services, *inter alia*, insurance underwriting and brokerage services for a wide range of insurance products including both medical and life insurance. While these registrations are not evidence that these marks are in use, they have some probative value and do indicate that the services of applicant and registrant are of a type which may emanate from the same source. In re TSI Brands Inc., 67 USPQ2d 1657, 1659 (TTAB 2002); In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785-86 (TTAB 1993). While the record would be significantly stronger if the examining attorney had included evidence of use of these or other third-party marks in connection with such services, for example, excerpts from Internet web sites, we find this evidence sufficient to reach the conclusion that the

services are sufficiently related that, if identified by confusingly similar marks, confusion as to source is likely. Thus, this *du Pont* factor also weighs against applicant.

We do not agree with applicant's contention, unsupported by any evidence, that the trade channels for life insurance brokerage versus medical insurance brokerage services differ. Both identifications of services are broadly written without any limitations on either the trade channels, the class of services or the purchasers thereof. We must presume that the insurance brokerage services of applicant and registrant are sold in all of the normal channels of trade to all of the usual purchasers for insurance brokerage services. See *Canadian Imperial Bank v. Wells Fargo, supra*. Further, there is no indication in the recitations of services that, as argued by applicant, medical brokerage services would only be offered to corporate entities for group medical insurance coverage. Rather, the broadly worded recitations of services in both the application and registration would encompass both purchasers of policies for group coverage and individual consumers purchasing individual policies. In other words, we must presume that the services of applicant and registrant are sold through the same channels of trade to the same classes of purchasers.

While applicant contends that the respectively identified services are purchased only after careful consideration by knowledgeable purchasers, because the class of purchasers includes all consumers, the extent of knowledge and degree of care used by consumers is likely to vary widely. Further, even considering the subset of knowledgeable business purchasers, we note that such purchasers are not immune from confusion when the marks are as similar as these marks and there is evidence that the services with which these marks are used do sometimes emanate from the same source. See *In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986), citing *Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) ("Human memories even of discriminating purchasers ... are not infallible."). See also *Wincharger Corp. v. Rinco, Inc.*, 297 F.2d 261, 132 USPQ 289 (CCPA 1962); *In re Pellerin Milnor Corp.*, 221 USPQ 588 (TTAB 1983); and *In re General Electric Co.*, 180 USPQ 542 (TTAB 1973). Thus, these *du Pont* factors also weigh against applicant.

Finally, applicant argues that it is unaware of any instances of actual confusion between its mark and the cited registered mark, notwithstanding contemporaneous use of the two marks for a period of nearly three years. However, we cannot determine on this record that the nature and scope of

applicant's and registrant's actual use of their marks have been such as to have created any meaningful opportunity for actual confusion to occur, nor has registrant had an opportunity to be heard on this issue due to the *ex parte* nature of this proceeding. The absence of actual confusion, under the seventh *du Pont* factor, therefore is counterbalanced by the absence of evidence of any opportunity for actual confusion to have occurred, under the eighth *du Pont* factor.

Therefore, we conclude that in view of the substantial similarity in the commercial impressions of applicant's mark, WEALTHCARE ELITE, and registrant's mark, HEALTH CARE ELITE and design, their contemporaneous use on the closely related services involved in this case is likely to cause confusion as to the source or sponsorship of such services. Nonetheless, to the extent that any of applicant's arguments may possibly raise any doubt as to our conclusion, we resolve such doubt, as we must, in favor of the registrant. See, e.g., *In re Chatam International Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1948 (Fed. Cir. 2004); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 156, 223 USPQ 1289, 1290 (Fed. Cir. 1984); and *In re Pneumatiques Caoutchouc Manufacture et Plastiques Kleber-Colombes*, 487 F.2d 918, 179 USPQ 729, 729 (CCPA 1973).

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*Decision:* The refusal under Section 2(d) of the Act is affirmed.