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Mailed:
March 30, 2007

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Global Healing Center, Inc.

Serial No. 78665906

Erik J. Osterrieder of Schubert Osterrieder & Nickelson
PLLC for Global Healing Center, Inc.

Saima Makhdoom, Trademark Examining Attorney, Law Office
101, (Ronald R. Sussman, Managing Attorney).

Before Seeherman, Zervas and Mermelstein, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Global Healing Center, Inc. has appealed from the
final refusal of the Trademark Examining Attorney to
register GLOBAL HEALING CENTER, in standard character form,
for the following goods and services:

Nutritional supplements (Class 5); and

Nutrition consultation and counseling;
Providing information about dietary
supplements and nutrition; Dietary and

nutritional guidance; Providing health information; Providing health care information by telephone, mail, and electronic mail; Providing counseling and nutritional support for degenerative diseases and for healing of the mind, body and soul; Providing medical information, namely, information on alternative medical care and nutritional supplementation (Class 44).¹

Applicant has disclaimed exclusive rights to the word HEALING.²

Registration has been refused on two grounds. It is refused pursuant to Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that applicant's mark is merely descriptive, and pursuant to Section 2(d) of the

¹ Application Serial No. 78665906, filed July 7, 2005, and asserting first use and first use in commerce as of March 5, 1998.

² As a result of a typographic error, applicant offered a disclaimer of the word HEALTH (which word does not appear in applicant's mark) rather than HEALING in its response to the first Office action. It is clear from applicant's brief, however, that applicant intended to offer a disclaimer of HEALING. In the second (and final) Office action the Examining Attorney stated that "the requirement for a disclaimer is not necessary because the examining attorney has held that the entire mark is descriptive under Section 2(e) of the Trademark Act. The disclaimer was only required if the mark was allowed to proceed to registration." In its appeal brief applicant stated that its "proffered disclaimer of HEALING was not entered because a disclaimer was now no longer required since Applicant's entire mark was deemed merely descriptive under Section 2(e)(1)." This statement by applicant is not entirely correct. Although the Examining Attorney stated that a disclaimer was no longer necessary, because applicant had submitted the disclaimer, and because an applicant is permitted to disclaim matter even in the absence of requirement for a disclaimer, the disclaimer was entered into the record. Office records have now been corrected to reflect that the disclaimer is of the word HEALING.

Trademark Act, 15 U.S.C. § 1052(d), on the ground that it so resembles the mark GLOBAL WELLNESS CENTER, previously registered in typed or standard character form, with the words WELLNESS CENTER disclaimed, for "on-line retail drug store services; on-line retail pharmacy services," in Class 35, and "providing health information to others," in Class 42,³ that as used in connection with applicant's identified goods and services, it is likely to cause confusion or mistake or to deceive.

The appeal has been fully briefed.

Before we address the substantive grounds for refusal, there are some procedural issues that we must discuss. On February 8, 2007, three months after the filing of its reply brief, and at the time the appeal was ready for decision, applicant filed what it called a "Supplemental Brief," but what was in actuality an attempt to make additional evidence of record. Trademark Rule 2.142(d) provides that the record in the application should be complete prior to the filing of an appeal. After an appeal is filed, if the applicant wishes to introduce additional evidence, the applicant may request the Board to suspend the appeal and remand the application for further

³ Registration No. 2527033, issued January 8, 2002.

examination. Accordingly, we will treat applicant's submission as a request for remand.

Section 1207.02 of the TTTAB Manual of Procedure discusses requests for remand in order to make additional evidence of record. It states that the request must include a showing of good cause, and that the point in the appeal process at which the request for remand is made will be considered in the determination of whether good cause exists. "Generally, the later in the appeal proceeding that the request for remand is filed, the stronger the reason that must be given for good cause to be found." In the present case, applicant seeks to make of record the prosecution history record from the Office of Harmonization in the International Market in regard to applicant's pending European Community trademark ("CTM") application for the same mark at issue herein, which shows that on February 5, 2007, the CTM application was accepted without any substantive rejections, including no "devoid of distinctiveness" rejection, which applicant states is parallel to a merely descriptive refusal under Section 2(e)(1).⁴

⁴ The material submitted by applicant from the Office of Harmonization is so small as to be illegible. It could be read, and with great difficulty, only by magnifying the computer image to twice its normal size. The Examining Attorney had previously advised applicant that some of its submissions were illegible

The fact that the acceptance of the application occurred on February 5, 2007 shows that this is newly available evidence that applicant could not have submitted earlier. However, the question of whether good cause for remand has been shown must be considered in the context of the stage of the appeal during which the request for remand was filed. As noted, the appeal was ready for decision when applicant filed its request. To remand the application at this point would require the Examining Attorney to consider the evidence and, if the evidence were not persuasive, to issue an action directed to it, after which the applicant would file a supplemental appeal brief, the Examining Attorney would file a supplemental brief in response, and then applicant would have the opportunity to file a supplemental reply brief. In view of the fact that decisions by foreign trademark offices have virtually no probative value on our decisions, and given the late stage of the appeal, we do not find good cause for remanding the application. Therefore, the materials submitted with applicant's "supplemental brief" will not be considered.

(final Office action, mailed June 13, 2006 regarding third-party marks), yet applicant has continued to submit exhibits that are so small that they are illegible. It is applicant's responsibility to submit evidence in legible form. Therefore, we have considered the exhibits only to the extent that we could read them.

In her appeal brief the Examining Attorney has objected to Exhibits 8 and 9 submitted by applicant with its appeal brief, namely, a listing of applications and registrations from the USPTO database for marks that use the terms "global" and "center." In its reply brief applicant states that exhibit 8, a listing of marks that contain the words "global" and "center," was submitted as part of applicant's response, filed March 2, 2006, to the first Office action. Applicant is correct, and exhibit 8 is therefore part of the record. As for exhibit 9, a listing of applications and registrations that include the words "global" and "health," applicant acknowledges that this list was not previously submitted. However, applicant relies on the following sentence in *In re Norfolk Wallpaper, Inc.*, 216 USPQ 903, 904 (TTAB 1983) to contend that consideration of this exhibit does not require any reopening or expansion of the examination procedure, because it is merely an extension of the same argument made with Exhibit 8:

We note that this single piece of evidence was improperly introduced as an exhibit to the Statement on Appeal, a practice which the Board has had occasion to question in numerous ex parte opinions as an improper juncture for reopening or expansion of the examination procedure.

Applicant also asserts, without any explanation, that Trademark Rule 2.142(d) does not mandate exclusion of Exhibit 9 either.

In Norfolk the Board refused to consider the evidence which the Examining Attorney had sought to introduce with his brief. We do not read Norfolk as providing an exception to the rule that it is impermissible to submit new evidence with an appeal brief. Rather, since 1983, when Norfolk was decided, the cases are legion that such evidence is untimely. See TBMP § 1207.01. It is also clear that consideration of the list of third-party marks in Exhibit 9 would require reopening of the examination procedure; in response to applicant's submission of its list of third-party marks (Exhibit 8) with its March 2, 2005 response, the Examining Attorney checked these marks and determined that only one, the cited registration, was for goods or services similar to the applicant's. The Examining Attorney obviously has had no opportunity to ascertain what goods or services are covered by the marks shown in Exhibit 9. The submission of Exhibit 9 is untimely, and it has not been considered. See Trademark Rule 2.142(d).

Even if Exhibit 9 had been timely submitted, we point out that a mere listing of registrations or applications is

not sufficient to make them of record. "To make a third-party registration of record, a copy of the registration, either a copy of the paper USPTO record, or a copy taken from the electronic records of the Office, should be submitted." TBMP § 1208.02. Mere listings of registrations or applications are not sufficient to make the registrations of record. Id. With respect to Exhibit 8, however, because applicant submitted this list with its response to the first Office action, and the Examining Attorney did not advise applicant that the listing was insufficient to make the registrations and applications of record at a point when applicant could have cured this infirmity but, on the contrary, discussed the listing, the Examining Attorney is deemed to have stipulated them into the record. Thus, we have considered the listing for what it shows on its face. Id.

There is one other evidentiary issue that was not raised by applicant or the Examining Attorney, but which we must address. In her brief, the Examining Attorney quotes a sentence from applicant's website, which page "was made of record as the specimen in the original application." She then states that "applicant's website also includes the following phrases," which she sets forth. Brief, p. 17. We have reviewed the portion of the webpage which applicant

submitted with its application, and cannot find the quote which the Examining Attorney has reported in her brief. Nor are any other webpages of record, including webpages which contain the phrases the Examining Attorney has listed in her brief. Because the evidence from which she purportedly obtained the quoted material is not of record, we have not considered these quotations.

We turn now to the refusal of registration under Section 2(e)(1). This refusal requires some clarification. At the time of the first Office action, applicant's identification was limited to services in Class 44, and the Examining Attorney refused registration on the ground that applicant's mark was merely descriptive of applicant's services. In its response to that action, applicant amended its identification to include goods in Class 5 as well as services in Class 44. In the final Office action the Examining Attorney discussed the descriptiveness of applicant's mark in connection with its services, although she did not specifically state that the refusal was made only with respect to the services in Class 44, and not with respect to the application in Class 5. Applicant viewed the refusal as being limited to the services in Class 44, as shown by the statements in its appeal brief. In her brief the Examining Attorney did not specifically address

the question of whether the refusal pertained to both the goods and services, or only the Class 44 services. On page 1 of her brief she stated that the refusal of registration was made on the basis that "the mark is merely descriptive when used on the identified goods." At page 14, the heading for the section of the brief discussing the merely descriptive refusal is "Applicant's mark is merely descriptive when used in connection with the goods and services identified in the application." However, throughout the discussion in this section the Examining Attorney has referred to the mark being merely descriptive only of applicant's services, and has not discussed the goods at all. Viewing all of the submissions in the file, it is clear that the refusal of registration on the ground of mere descriptiveness pertains only to the services in Class 44, and not to the goods in Class 5.

A term is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). A term need not immediately convey an idea of each and every specific

feature of the applicant's goods or services in order to be considered to be merely descriptive; rather, it is sufficient that the term describes one significant attribute, function or property of the goods or services. In re H.U.D.D.L.E., 216 USPQ 358 (TTAB 1982); In re MBAssociates, 180 USPQ 338 (TTAB 1973). Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with the goods or services, and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of its use; that a term may have other meanings in different contexts is not controlling. In re Bright-Crest, Ltd., 204 USPQ 591, 593 (TTAB 1979). Moreover, if the mark is descriptive of any of the goods or services for which registration is sought, it is proper to refuse registration as to the entire class. In re Analog Devices Inc., 6 USPQ2d 1808 (TTAB 1988), aff'd without pub. op., 871 F.2d 1097, 10 USPQ2d 1879 (Fed. Cir. 1989).

In support of her position that applicant's mark is merely descriptive, the Examining Attorney has submitted

dictionary definitions⁵ of the words "global," "healing" and "center," to wit:

Global: 1. worldwide: relating to or happening throughout the whole world; 2. overall: taking all the different aspects of a situation into account.

Healing: n. process of curing or becoming well: the process of curing somebody or something or of becoming well; adj. Curative: having the effect of curing or improving something

Center: ... 6. place for particular activity: a place where a particular activity is carried on a *sports center*; ... 8. influential place or organization: a place, area, or group of people exerting control or influence over somebody or something else[,] a *center of design innovation*

The Examining Attorney asserts that GLOBAL HEALING CENTER merely describes the purpose or function of applicant's services, namely, "a place where consumers around the globe can purchase products and access online information pertaining to degenerative diseases, alternative medical care and well-being for the whole body." Brief, p. 15. In particular, the Examining Attorney points to the definitions of the word "global," listed above, and argues that "when the mark is applied to applicant's services, the consumer is immediately informed

⁵ <http://encarta.msn.com>. These definitions were made of record with the second Office action.

that the GLOBAL HEALING CENTER is a place where consumers around the world can go to obtain health information, information on healing degenerative diseases and medical information on alternative healing modalities" or, alternatively, "the consumer is immediately informed "that applicant's website is offering healing services to consumers all over the globe." Brief, pp. 16-17.⁶

The Examining Attorney also argues, based on the second definition of "global," that applicant's mark merely describes the purpose or function of applicant's services, "namely, to provide information on 'global' or whole body healing." Brief, p. 18.

There is little question that the word HEALING has a descriptive significance with respect to applicant's services. Applicant has conceded as much by its disclaimer of this term in response to the Examining Attorney's refusal of registration on the ground of mere descriptiveness. The dictionary definition shows that the word CENTER, too, has a descriptive significance as indicating the place where applicant carries out its health-related services. In this connection, we take

⁶ As noted previously, the Examining Attorney quotes certain phrases in her brief that purportedly came from applicant's website. However, because the webpages are not of record, these statements have not been considered. Even if they had been of record, they would have no effect on our decision herein.

judicial notice that one dictionary definition for "center" is "a place of concentrated activity or influence."⁷

Applicant itself has stated it would be willing to disclaim CENTER "if viewed necessary for registration purposes."

Brief, p. 24. The primary question we must address, then, is the effect of the word GLOBAL in the mark, and whether the mark as a whole is merely descriptive.

With respect to the second definition of GLOBAL, "overall: taking all the different aspects of a situation into account," the Examining Attorney argues that GLOBAL HEALING CENTER describes the purpose of applicant's services, of providing information on whole body healing. However, the Examining Attorney has submitted no evidence that "global healing" is a recognized term, such that consumers viewing the mark GLOBAL HEALING CENTER in connection with the identified services would immediately understand that a significant feature of applicant's services is that they are directed to "whole body healing." Rather, we find that a series of mental steps would be necessary for consumers to reach a conclusion as to the nature of applicant's services based on this definition of

⁷ The American Heritage Dictionary of the English Language, © 1970. The Board may take judicial notice of dictionary definitions. *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

the word GLOBAL. To this extent, then, we can consider the mark only as suggestive rather than merely descriptive. See *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987) (a mark is suggestive if imagination, thought, or perception is required to reach a conclusion on the nature of the goods).

The Examining Attorney also points to the definition of "global" as "worldwide: relating to or happening throughout the whole world" to assert that the mark is merely descriptive of a place where consumers from around the world can go to obtain health information or that applicant's healing services are offered to consumers all over the globe. However, we consider "global" in the context of applicant's services to be such a vague concept that it does not directly and immediately inform consumers about a significant feature or characteristic of applicant's services. Although "global" may well have a descriptive meaning if it were used, for example, for travel services, there is no evidence of record which shows that "global" is a concept for the type of services identified in applicant's application. Compare, *National Fidelity Life Insurance v. National Insurance Trust*, 199 USPQ 691 (TTAB 1978), in which NATIONAL INSURANCE TRUST was found merely descriptive of handling administrative matters

in locating suitable insurance coverage for attorneys, in view of evidence of widespread use of the term "national" in the insurance and financial fields to describe the geographic extent of the operations of companies employing the term.

Accordingly, we reverse the refusal to register GLOBAL HEALING CENTER on the ground that it is merely descriptive of the identified services. However, because of our finding that HEALING and CENTER are merely descriptive terms, a registration may not issue without a disclaimer of these words. As noted, applicant has already submitted a disclaimer of HEALING, and it has stated that it would be willing to disclaim CENTER if necessary for registration purposes. Accordingly, the Board has treated this statement as an authorization to enter such a disclaimer. Thus, Office records have been amended to reflect a disclaimer of HEALING CENTER.

This brings us to the refusal based on the issue of likelihood of confusion. Our determination of this issue is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In

any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). Because applicant is attempting to register its mark for both goods and services, we will consider the issue of likelihood of confusion with respect to each class of the application, beginning with applicant's services in Class 44.

We turn first to the du Pont factor of the similarity of the services. One of the services identified in applicant's application is "providing health information." This service is identical to the "providing health information to others" that is identified in the cited registration. Therefore, the services must be considered legally identical in part. Because likelihood of confusion must be found if there is likely to be confusion with respect to any item that comes within the identification of goods or services in the application, see *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981), we need not undertake an extensive analysis as to whether the additional services identified

in Class 44 of applicant's application are related to the registrant's identified services, although we note that applicant's remaining identified services, including "providing health care information by telephone, mail and electronic mail," "providing medical information, namely, information on alternative medical care and nutritional supplementation," "nutrition consultation and counseling" and "providing counseling and nutritional support for degenerative diseases and for healing of the mind, body and soul" either come within the general category of "providing health information to others" or are closely related to such services.

Applicant appears to argue that, despite the identical language used to identify the services, the registrant's Class 44 services differ from those of applicant because the registration also includes "on-line retail drug store services" and "on-line retail pharmacy services." Because registrant also uses its mark for on-line drug stores and pharmacies, and applicant does not, applicant contends that there are dissimilarities in the services. Applicant also asserts that, although both it and the registrant provide health information to others, applicant's services "are primarily aimed at providing alternative medicine care related to *its* nutritional supplements." Brief, p. 14.

We are not persuaded by these arguments. As applicant at least nominally recognizes, "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 [or services] set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods [or services], the particular channels of trade or the class of purchasers to which sales of the goods [or services] are directed." *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 952, 16 USPQ2d 1783 (Fed. Cir. 1990), quoted by applicant at p. 13 of its brief. The same is true with respect to the goods or services in the cited registration: likelihood of confusion must be determined based on the identification. The identification of the registrant's services in Class 44 is not restricted to "providing health information to others in the context of on-line retail drug store or pharmacy services." Moreover, whether or not applicant's services are aimed at providing "alternative medicine care" related to its own nutritional supplements, its identification does not include such limitations. Thus, as the statement from Octocom quoted in applicant's brief makes clear, the fact that applicant's services may, in actuality, be limited in this manner is irrelevant to our

analysis. The du Pont factor of the similarity of the services strongly favors a finding of likelihood of confusion with respect to the Class 44 services.

Moreover, because the services are legally identical in part, they must be deemed to travel in the same channels of trade and be sold to the same classes of consumers, which in this case would be the public at large. Applicant's argument that its services are offered only on its own website ignores the statement applicant previously quoted from Octocom., i.e., that registrability must be determined based on the basis of the applicant's identification, regardless of what the record may reveal as to the particular nature of the particular channels of trade of the applicant's services. Thus, this du Pont factor also favors a finding of likelihood of confusion.⁸

This brings us to the du Pont factor of the similarity of the marks. We begin our analysis with three well-established principles: when marks would appear on

⁸ In its appeal brief applicant states that "if in the view of the examiner and/or the Board a limiting amendment regarding trade channels to Applicant's goods and services of record is required to lessen any perceived likelihood of confusion, then Applicant is willing to accept a limiting amendment. Brief, p. 17. Applicant is advised that the Board does not decide what identifications might avoid the likelihood of confusion and then suggest them to the applicant. Applicant had a full opportunity to file a limiting amendment to its identification during the examination of its application. Making this offhand statement in its brief is clearly not appropriate.

virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines, *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); under actual marketing conditions, consumers do not necessarily have the luxury of making side-by-side comparisons between marks, and must rely upon their imperfect recollections, *Dassler KG v. Roller Derby Skate Corporation*, 206 USPQ 255 (TTAB 1980); and 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.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

The marks at issue herein have obvious similarities. Both consist of three words and begin with the identical word GLOBAL and end with the identical word CENTER. They also differ to the extent that the middle word in applicant's mark is HEALING and the middle word in the cited mark is WELLNESS. The words HEALING and CENTER, as noted in our discussion of the refusal on the ground of mere descriptiveness, are descriptive. Accordingly, because they have less source-identifying significance,

they are entitled to less weight in the comparison of the marks. Similarly, the words WELLNESS CENTER in the cited mark, which have also been disclaimed and are descriptive, deserve less weight in our analysis.

When the marks are compared in their entireties, and giving due consideration to the stronger source-indicating significance of the word GLOBAL in both marks, the similarities in the marks far outweigh the differences. Not only are the marks identical insofar as the words GLOBAL and CENTER are concerned, but the only portions that are different, HEALING and WELLNESS, have similar connotations, with "healing" being defined as "the process of curing or becoming well" and "wellness" being defined as the "quality or state of being in good health."⁹ Thus, the marks are very similar in connotation, and overall they convey the same commercial impressions. The du Pont factor of the similarity of the marks favors a finding of likelihood of confusion.

Applicant has asserted that applicant's and the registrant's customers are sophisticated, and that the respective services are not the subject of impulse

⁹ These definitions were taken from the Merriam-Webster Online Dictionary, and were submitted by the Examining Attorney with the Office action mailed February 8, 2006.

purchases. Although we do not dispute that some customers for applicant's and the registrant's services would be careful in that the services involve information about health, we must also recognize that the services are rendered to the public at large, and that not everyone will necessarily exercise the same degree of care in obtaining the services. Applicant has provided no information about the cost of its services, nor do we have information as to the cost of the registrant's health information services. They may, for example, be provided without charge through the Internet. Rather than relying on the information as a critical factor in deciding on a course of treatment, customers may encounter the services while attempting to gain preliminary information about a problem or concern, and before they need to check carefully the source of such information in order to determine whether or not the information is reliable. Such consumers are not likely to notice the slight distinction between applicant's mark and the registrant's mark; in fact, a consumer who had viewed the registrant's mark on a website in connection with health information services might, upon encountering applicant's mark during a subsequent Internet search, misremember the mark because of the previously-discussed similarities, and think that they are the same. In this

connection, we reiterate the point that under actual marketing conditions, consumers do not necessarily have the luxury of making side-by-side comparisons between marks, and must rely upon their imperfect recollections. To this extent, i.e., for consumers that are obtaining preliminary health information, this du Pont factor must be considered to favor a finding of likelihood of confusion.

With regard to the factor of fame, as applicant points out, there is no evidence that the registrant's mark is famous. This is usually the case in an ex parte proceeding, since the Examining Attorney normally would have no access to evidence that would prove the fame of a mark. However, the lack of fame of the registrant's mark does not support the contrary conclusion, asserted by applicant, that the cited mark is weak. See *In re Majestic Distilling Co., Inc.*, supra, 65 USPQ2d at 1205, in which the Court stated that while the fame of a registered mark is relevant to likelihood of confusion, "we decline to establish the converse rule that likelihood of confusion is precluded by a registered mark's not being famous." Thus, this du Pont factor is neutral.

The next factor we consider is that of third-party use. As applicant points out, evidence of third-party use can be used to show that customers have become so

conditioned by a plethora of similar marks that they can distinguish between such marks on the basis of minute distinctions. However, applicant has provided no probative evidence of such use. Applicant has submitted a search summary page of the results of a search made using the Google search engine which includes, in a description of one "hit," the statement that "Charming Health.com is the first Global Wellness Center that offers an online solution for emotional imbalance." However, the actual webpages from that website, also submitted by applicant, do not include this phrase, and certainly are not evidence of use of "Global Wellness Center" as a trademark. Applicant has also submitted a list of third-party registrations and applications, taken from USPTO records, of marks that include the words GLOBAL and CENTER. Third-party applications show only that the applications have been filed; third-party registrations are not evidence that the marks shown therein are in use or that the public is familiar with them. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993). Thus, there is no evidence of third-party use, and this du Pont factor must be considered neutral.

Third-party registrations may also be used in the manner of dictionary definitions, to show that a term has a

particular significance for the goods or services at issue. Because the list applicant submitted, i.e., Exhibit 8, does not reflect the goods or services with which the marks are associated, they do not show that GLOBAL has any significance for the applicant's or registrant's goods or services. (As noted previously, based on the dictionary definition, HEALING and CENTER have descriptive significance.) Further, as noted earlier in this decision, in response to applicant's submission of this list, the Examining Attorney stated that none of the marks, with the exception of the cited registration, is for goods or services similar to the applicant's. Applicant has not contradicted this characterization.

The final du Pont factor that has been the subject of argument by applicant or the Examining Attorney is that of lack of evidence of actual confusion. Applicant asserts that there have been no instances of actual confusion despite concurrent use since May 2000 (assuming use by registrant since the date claimed in its registration), despite "Applicant's continuous, hourly, and widespread use of GLOBAL HEALING CENTER for almost a decade." Brief, p. 21. The comments of the Court in *In re Majestic Distilling Co., Inc.*, supra 65 USPQ2d at 1205, are particularly applicable to this argument (citations omitted):

With regard to the seventh *DuPont* factor, we agree with the Board that Majestic's uncorroborated statements of no known instances of actual confusion are of little evidentiary value. A showing of actual confusion would of course be highly probative, if not conclusive, of a high likelihood of confusion. The opposite is not true, however. The lack of evidence of actual confusion carries little weight, especially in an *ex parte* context.

We also point out that, while applicant may be available on a "continuous" or "hourly" basis, applicant has provided no evidence regarding the number of customers to whom it has provided information, where they are located, etc. Nor do we have any information as to the extent of the registrant's activities, such that we could determine whether there has been an opportunity for confusion to occur. Nor, for that matter, do we have any information as to the registrant's experience, and whether it has encountered any instances of actual confusion. Thus, the factor of lack of evidence of actual confusion is neutral.

After considering all of the relevant du Pont factors, we find that applicant's use of its mark GLOBAL HEALING CENTER in connection with its identified services is likely to cause confusion with the cited registration.

We now turn to a consideration of the issue of likelihood of confusion with respect to the use of

applicant's mark for nutritional supplements. Applicant takes the position that its goods and the registrant's identified services are fundamentally dissimilar because its application is for goods, and the registration includes only services. However, it is not necessary that the goods and services of the applicant and registrant be similar or competitive, or even that they move in the same channels of trade, to support a holding of likelihood of confusion. It is sufficient that the respective goods and services are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods and services are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer. See *In re International Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978).

In support of the refusal, the Examining Attorney has made of record various third-party registrations. Third-party registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods and/or services are of a type which may emanate from a single source and be sold under a single mark. See *In re Albert Trostel & Sons*

Co., supra. The third-party registrations that include or refer to "nutritional supplements" (the subject of applicant's Class 5 application) are Registration No. 2790613 for vitamins and nutritional supplements and retail drug store services; Registration No. 2702920 for nutritional supplements and prescription pharmaceutical preparations sold through mail order pharmacy services; Registration No. 2710200 for, inter alia, mail order services featuring health products and nutritional supplements and counseling in the field of health, well-being and nutrition; Registration No. 2790613 for vitamins and nutritional supplements and retail drug store services; Registration No. 2867665 for retail pharmacy services featuring, inter alia, nutritional supplements; and Registration No. 2842946 for LONGS for, inter alia, dietary and nutritional supplements as part of "a full line of pharmaceutical products" and "retail store services featuring pharmaceuticals" and "online pharmacy services."¹⁰

In addition, the Examining Attorney submitted printouts of

¹⁰ The LONGS registration appears to be a house mark, in that it is registered by Longs Drug Stores in 21 classes. Normally registrations for house marks are given little probative value in terms of showing that the various goods and services listed therein are related because they cover such a disparate range of goods. However, here we are not viewing the registration to indicate that all of the items in all the classes are related, but as evidence of the wide variety of goods and services that can be sold through retail stores and online pharmacies.

pages from various websites that show on-line pharmacies and drug stores offer nutritional supplements and also offer health care information. See, for example, the website for Walgreens.com which lists "dietary supplements" and also includes a "health library" with a "Health Encyclopedia," "Drug Information & Prices" and "Ask a Pharmacist"; and the webpages for CVS pharmacy which has the categories "Vitamins & Supplements," and "Health Resources," the latter of which lists "Articles with advice & tools on health topics," "From the Pharmacist" and "Pharmacy Q&A." The website for drugstore.com lists, as product categories, "supplements a-z," "vitamins," "condition specific supplements" and "herbs." In addition, an article on BlueSuitMom.com about online drugstores states that online drugstores stock "a range of over-the-counter health aids, personal care items and beauty products," and also provide "information for the health conscious customer" with an "Ask the Pharmacist" feature. It states, for example, that PlanetRx.com "links you to health channels for in-depth information on specific diseases, medications and alternative treatments," while Rx.com "brings you health guides, drug factsheets and an index of natural remedies." Although this article is not evidence of the truth of the statements made therein, it

can be used to show some public awareness of these features of online drugstores.

We recognize that not all of the third-party registrations include the specific services identified in the cited registration, and the webpages do not actually show use of the same mark for both on-line drug store services and nutritional supplements. However, this evidence, when taken in its entirety, serves to indicate some relatedness between nutritional supplements, on the one hand, and online drugstore services and providing health information on the other, in that nutritional supplements are a product and providing health information is a service that is offered through online drugstores. More importantly, applicant's own activities shows the relatedness between nutritional supplements and providing health information, i.e., applicant provides health care information related to its nutritional supplements. Thus, because registrant's service of "providing health information to others" can include providing health information regarding nutrition, if consumers who are aware of registrant's health information services encounter nutritional supplements sold under a confusingly similar mark, they are likely to believe that the nutritional

supplements emanate from or are associated with or sponsored by the same source.

Applicant points out that the third-party registrations include goods as well as services, but that the cited registration is only for services. It appears to be applicant's position that because the cited registration does not include any goods, the registrant is not associated with any goods, and presumably that consumers would not make a connection between goods and the registrant. While we agree that the registration does not include goods, it is not required, to support a finding of likelihood of confusion, that the registrant actually use its mark on goods - what is required is that consumers will likely believe that there is an association as to source between the goods and the services. Whether or not the registrant actually sells nutritional supplements or other goods is not the issue.

Accordingly, because we find that applicant's nutritional supplements are related to the registrant's services, and particularly the service of providing health information to others, the du Pont factor of the similarity of the goods and services favors a finding of likelihood of confusion.

We have already discussed at some length the other du Pont factors in connection with our consideration of applicant's services. Most of these comments apply to the determination of whether the use of applicant's mark for its identified goods is likely to cause confusion with the cited registration. Thus, with the exception of the principle regarding the likelihood of confusion when marks are used for identical services, the same statements we made in our discussion of the similarity of the marks apply with regard to the similarity of the marks as used on applicant's goods and the registrant's services. That is, although applicant's goods and the registrant's services are not, obviously, identical, the marks are so similar, because of the identical nature of the source-identifying element GLOBAL in both marks, as well as the similarities in appearance and pronunciation due to the elements GLOBAL and CENTER, and the overall similarities in connotation and commercial impression, that consumers are likely to believe that the service of providing health information under the mark GLOBAL WELLNESS CENTER, and nutritional supplements sold under the mark GLOBAL HEALING CENTER, emanate from or are sponsored by the same source. Even if we posit that consumers will note the difference between the marks (a supposition that we consider to be in doubt), they are

likely to believe that the marks are variations of each other, rather than identifying separate sources of the goods and services.

As for the channels of trade, while we agree that the registrant would not sell applicant's nutritional supplements as part of its own service of providing health information, as the registrant would not deliberately attempt to cause confusion in this manner, the same classes of customers are likely to encounter both the registrant's services and applicant's goods. That is, the general public could encounter the services of the provision of health information through mail, telephone, Internet websites, and the like, and also encounter nutritional supplements offered in brick and mortar drugstores or through on-line drugstores. To the extent that the goods and services are offered to the same classes of customers, this factor favors a finding of likelihood of confusion.

With respect to the sophistication and care of the customers for the respective goods and services, again, the customers are the public at large, and they range in terms of the care that they would exercise in purchasing nutritional supplements or obtaining health information. We have already discussed the question of the level of care with respect to health information. As far as nutritional

supplements are concerned, again applicant has provided no information about the cost of such products. We do note, from the webpages submitted by the Examining Attorney, that third parties advertise products such as fish body oils for \$7.99 for 180 capsules and yeast natural symptom prevention and relief for \$6.39 for 60 tablets, (drugstore.com), indicating that nutritional supplements can be bought for a relatively low cost. Further, a consumer may suddenly be reminded, upon seeing nutritional supplements on a drugstore shelf, that it would be a good idea to take, for example, a calcium supplement. Therefore, although some consumers may well deliberate and exercise care in determining which brand of nutritional supplement to buy, for others the decision will be an impulse purchase, and they will not exercise great care in examining the trademark of the product. Thus, with respect to these purchasers, this du Pont factor favors a finding of likelihood of confusion.

The only other factor for which we must make an additional comment is that of lack of evidence of actual confusion. We reiterate our comments made in the previous section of our opinion with respect to this factor. In addition, we would add that it is not clear in what manner applicant may have made "continuous" and "hourly" use of

its mark for nutritional supplements; our assumption is that applicant means that its supplements have been available at all times on a website. However, applicant has not provided any evidence about the number or extent of its sales of nutritional supplements. Further, it appears that applicant sells its nutritional supplements only through its own website or those of its distributors. Thus, we cannot conclude from the evidence of record that there has been an opportunity for confusion, such that we can assume from the lack of evidence of actual confusion that confusion is not likely to occur.

With respect to the remaining du Pont factors, we reiterate the comments made in our discussion of these factors as they applied to applicant's services.

Thus, we find that applicant's mark, as used for nutritional supplements, is likely to cause confusion with the cited registration. To the extent that there is any doubt on this issue, such doubt must be resolved in favor of the registrant. In re Azteca Restaurant Enterprises Inc., 50 USPQ2d 1209 (TTAB 1999).

Decision: The refusal of registration on the ground of mere descriptiveness with respect to the services is reversed, but a disclaimer has been entered for the words HEALING CENTER. The refusal of registration on the ground

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of likelihood of confusion is affirmed with respect to the goods in Class 5 and the services in Class 44.