Hearing:
Dec. 7, 2006

Mailed:
July 12, 2007

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Evolutions Healthcare Systems, Inc.
v.
Evolution Benefits, Inc.

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Opposition No. 91158602
to application Serial No. 78019803
filed on August 4, 2000

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James K. Stronski and Deena Levy Weinhouse of Frommer Lawrence & Haug, LLP for Evolutions Healthcare Systems, Inc.

Michael A. Bucci of Day Pitney LLP for Evolution Benefits, Inc.

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Before Quinn, Grendel and Rogers, Administrative Trademark Judges.

Opinion by Grendel, Administrative Trademark Judge:

INTRODUCTION

Evolution Benefits, Inc. ("applicant") seeks registration on the Principal Register of the mark depicted below

EVOLUTION BENEFITS

for goods and services identified in the application as

> Printed matter, namely, booklets, bulletins, bibliographies and directories of services, providers, and products related to services in the field of voluntary employee savings and defined contribution plans, in Class 16;
>
> Financial services, namely, automatically verifying eligibility, adjudicating claims, processing payment, transferring funds, and updating records of employees expenditures, all via communications networks, using encoded smart cards operating in conjunction with electronically-stored, voluntary employee savings and defined contribution plan accounts; employee benefits services, namely, providing employee benefits and benefit management services to third party administrators and employers, namely, providing program development and aiding administration of voluntary employee savings and defined contribution plans for others; and providing educational information in the field of employee benefits, specifically to patients, employees, and employers in the area of employee benefits involving voluntary employee savings and defined contribution plans and services, in Class 36; and
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> Computer services, namely, providing temporary use of online, non-downloadable software that permits employers and third party administrators to substantiate and administer employee benefits program transactions involving electronically encoded smart cards operating in conjunction with voluntary employee savings and defined contribution plan accounts, and allows employees, employers and third party administrators to access employee benefit program services involving

> voluntary employee saving and defined contribution plans, in Class 42.

The application, Serial No. 78019803, was filed on August 4, 2000, and is based on applicant's asserted bona fide intention to use the mark in commerce. Trademark Act Section 1(b), 15 U.S.C. §1051(b). In the application, applicant has disclaimed the exclusive right to use BENEFITS apart from the mark as shown.

Registration of applicant's mark has been opposed by Evolutions Healthcare Systems, Inc. ("opposer"). As its ground of opposition, opposer alleges that applicant's mark, as (or if) used in connection with the goods and services recited in applicant's intent-to-use application, so resembles opposer's company name and house service mark EVOLUTIONS HEALTHCARE SYSTEMS and the abbreviated mark EVOLUTIONS, previously used by opposer (since September 1998) in connection with medical utilization review and cost containment services and in connection with organizing pre-paid healthcare plans in the nature of preferred provider organizations (PPOs), as to be likely to cause confusion, to cause mistake, or to deceive. Trademark Act Section 2(d), 15 U.S.C. §1052(d).[1]

[1] In its amended notice of opposition, opposer also based its Section 2(d) claim on its alleged ownership of two registrations, i.e., Reg. No. 2237294, which is of the mark EVOLUTIONS HEALTHCARE SYSTEMS for "medical utilization review and cost containment services" in Class 35 and "organizing pre-paid

Applicant filed an answer by which it denied the salient allegations of the amended notice of opposition.

The evidence of record consists of the file of the opposed application; the pleadings herein; opposer's and applicant's respective notices of reliance on certain discovery responses, certain official records and certain printed publications; opposer's testimony depositions of Mr. Gulau, Mr. Johnes (two depositions), Mr. Barcomb and Mr. Ross, and the exhibits thereto; and applicant's testimony deposition of Ms. Porritt, and the exhibits thereto.

The case is fully briefed, and an oral hearing was held on December 7, 2006 at which both parties presented arguments. After careful consideration of the evidence of record and the arguments of the parties, and for the reasons discussed below, we find that opposer has failed to prove its Section 2(d) claim. We therefore dismiss the opposition.

Preliminarily, we note that both parties have asserted numerous evidentiary objections, in their briefs as well as

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healthcare plans in the nature of preferred provider organizations" in Class 36, and Reg. No. 2237295, which is of the mark EVOLUTIONS for the same services. As discussed below, however, opposer failed to make these registrations of record. Opposer's Section 2(d) claim therefore must be deemed to be based solely on the prior common law rights alleged in Paragraph 2 of the amended notice of opposition. Opposer, in the amended notice of opposition, also asserted a dilution claim under Trademark Act Section 43(c), but opposer has not pursued that claim at trial or in its briefs. We deem opposer to have waived such claim, and we shall give it no further consideration.

in previously-asserted motions to strike. We deem it unnecessary to discuss or rule on each and every one of these objections. At relevant points in this decision, we will refer as necessary to specific evidence which is the subject of objections. Suffice it to say that we have given each item of evidence in the record whatever probative value it deserves. We will note specifically, however, that we have not considered any of the evidence which opposer submitted after its testimony periods had closed. This includes the notice of reliance on status and title copies of opposer's pleaded registrations. Also, opposer's Exhibits 73 and 74 were not made of record during trial, and we shall give them no consideration.

We turn now to the merits of this case. To prevail in this opposition proceeding, opposer must present evidence sufficient to establish its standing to oppose, as well as its pleaded Section 2(d) ground of refusal. The Section 2(d) claim itself requires opposer to establish priority and likelihood of confusion. We shall discuss each of these issues in turn.

STANDING

Opposer uses the marks EVOLUTIONS HEALTHCARE SYSTEMS and EVOLUTIONS in connection with organizing healthcare plans in the nature of preferred provider organizations

(PPOs). (Gulau Depo. at 5.) In view thereof, we find that opposer has established its standing to bring this opposition proceeding. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

SECTION 2(d) PRIORITY

Priority is an issue in this case because opposer failed to make its pleaded registrations of record. *Compare King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974)(priority not an issue where plaintiff's pleaded registrations are of record).

The record shows that opposer has used its EVOLUTIONS HEALTHCARE SYSTEMS and EVOLUTIONS marks in connection with organizing PPOs since September 1998. (Gulau Depo. at 5.) The earliest date upon which applicant can rely for priority purposes is August 4, 2000, the filing date of its intent-to-use application. In view thereof, we find that opposer has established its Section 2(d) priority.

LIKELIHOOD OF CONFUSION

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood

of confusion issue (the *du Pont* factors). *See In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co.,* 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

Factor 1 - Similarity of the Marks.

The first *du Pont* factor requires us to determine the similarity or dissimilarity of the parties' marks when viewed in their entireties in terms of appearance, sound, connotation and overall commercial impression. *Palm Bay Imports, Inc., supra*. The test, under the first *du Pont* factor, 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 impression that confusion as to the source of the goods or services offered under the respective marks is likely to result. Furthermore, although the marks at issue must be considered in their entireties, 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 Chatam International Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004); *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

Applicant's mark is EVOLUTION BENEFITS and design, as depicted above.[2] We find that the dominant feature in applicant's mark is the word EVOLUTION. It appears prominently as the first word in the mark. On this record, it appears to be arbitrary or at worst slightly suggestive of applicant's services. The word BENEFITS in applicant's mark is disclaimed by applicant and obviously is highly descriptive of applicant's goods and services, and it contributes little or nothing to the source-indicating significance of the mark. Likewise, we find that the design element in applicant's mark is or would be of lesser source-indicating significance to purchasers, because it would not be pronounced when the mark is used in connection with the goods and services, but rather would be viewed simply as an ornamental accent in the mark. For these reasons, we find that the word EVOLUTION is the dominant feature of applicant's mark; it is that word which is likely to be

[2] Applicant argues that confusion is unlikely because applicant essentially always uses its BENNY mark in connection with its goods and services, in addition to its EVOLUTION BENEFITS and design mark. This argument is unavailing, because our comparison of the parties' marks must be based on applicant's mark as it is depicted in the application for registration. The BENNY

recognized and used by purchasers as the primary if not sole source-indicating feature of the mark. Although we do not ignore the other elements of applicant's mark, we find that they are entitled to less weight in our comparison of applicant's mark and opposer's mark. *See In re Chatam International Inc. supra*; *In re National Data Corp.*, *supra*.

We likewise find that the dominant feature of opposer's EVOLUTIONS HEALTHCARE SYSTEMS and EVOLUTIONS marks is the word EVOLUTIONS. It appears prominently as the first word or the only word in the marks, and it appears on this record to be arbitrary or at worst slightly suggestive of opposer's services. Applicant's contention that EVOLUTIONS is descriptive and weak as applied to opposer's services is not persuasive. The words HEALTHCARE SYSTEMS in opposer's EVOLUTIONS HEALTHCARE SYSTEMS mark obviously are highly descriptive of opposer's PPO services, and they therefore contribute little or nothing to the source-indicating significance of opposer's mark. For these reasons, we find that the word EVOLUTIONS is the dominant feature of opposer's marks, and that it therefore is entitled to the most weight in our comparison of opposer's marks and applicant's mark. Although we do not ignore the other elements of opposer's marks, we find that they are entitled

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designation does not appear in the drawing of the mark applicant seeks to register.

to less weight. *See In re Chatam International Inc. supra*; *In re National Data Corp.*, *supra*.

Viewing the marks in their entireties, while according appropriate weight to the various elements thereof, we find as follows. The marks are highly similar to the extent that opposer's marks are dominated by the arbitrary or only slightly suggestive word EVOLUTIONS, and applicant's mark is dominated by the essentially identical word EVOLUTION. The fact that opposer's marks depict the word in the plural while applicant's mark depicts it in the singular does not diminish or negate the essential identity of these two words. As they are presented in the respective marks, the words EVOLUTION and EVOLUTIONS look and sound essentially the same, and they have the same arbitrary or only slightly suggestive connotation and commercial impression when considered in connection with the parties' respective goods and services. The respective marks are not identical when viewed in their entireties, due to the difference in the additional descriptive or generic wording in applicant's mark and in opposer's EVOLUTIONS HEALTHCARE SYSTEMS mark as well as the presence of the design element in applicant's mark. However, we find that these points of dissimilarity between the parties' marks simply do not suffice to overcome the more basic similarity between the marks which results

from the presence of the word EVOLUTION or EVOLUTIONS in each mark.

For these reasons, we find that the parties' marks are similar rather than dissimilar, and that the first *du Pont* factor accordingly weighs in opposer's favor.

Factors 2, 3 and 4 – Similarity of Goods and Services; Similarity of Trade Channels and Purchasers; and Conditions of Purchase/Sophistication of Purchasers: Findings of Fact.

We turn next to the second, third and fourth *du Pont* factors. The second factor requires us to determine the similarity or dissimilarity of the parties' respective goods and/or services. The third factor requires us to determine the similarity or dissimilarity of the trade channels in which, and the classes of purchasers to whom, the parties' respective goods and/or services are marketed. The fourth *du Pont* factor requires us to consider the conditions of purchase, including the sophistication of purchasers. The record establishes the following facts which are pertinent to these three related *du Pont* factors.

Under the second *du Pont* factor, we find that opposer uses its EVOLUTIONS HEALTHCARE SYSTEMS and EVOLUTIONS marks in connection with organizing healthcare networks in the nature of preferred provider organizations (PPOs).[3]

[3] Opposer pleaded and has argued that it also offers medical utilization review and cost containment services. However, it offers such services only through third-party vendors such as

Opposer's PPOs are networks of healthcare providers who contract with opposer to provide healthcare services at a discounted rate. Opposer markets its PPO networks to large self-insured employers, to insurance carriers, to third-party administrators, and to brokers/consultants in the employee benefits industry. Opposer markets its services to these "distributors" (Johnes Depo. 3/8/05 at 18), in an attempt to persuade the distributors to include or bundle opposer's PPO networks as part of the employee benefits package sold to employers and offered by employers to their employees. Opposer is not an insurance company.

Often and increasingly, another bundled component of an employee benefits package is a mechanism or means by which employees may accrue funds with which to pay their share of the cost of their employee benefits, including their healthcare benefits. These mechanisms take the form of voluntary employee savings and defined benefit contribution plans or accounts, into which the employee and the employer contribute funds to be used for the employee's payment of his or her healthcare costs. These plans or accounts, which provide tax advantages, include flexible spending accounts

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Managed Care 2000, who contract separately with the purchasers of such services. When pressed upon cross-examination, Mr. Gulau conceded that Managed Care 2000 does not use opposer's EVOLUTIONS HEALTHCARE SYSTEMS or EVOLUTIONS marks in marketing such services. (Gulau Depo. at 83-84.)

(FSAs), health reimbursement accounts (HRAs) and, more recently, health savings accounts (HSAs).

Applicant's goods and services as identified in the application all have to do with the payment technologies used in connection with these voluntary employee savings and defined benefit contribution plans. Applicant does not itself offer these accounts; the accounts are offered by banks or other financial institutions. Rather, applicant is a supplier of encoded smart cards (and associated technology) which are used by end users, i.e., insured employees, at the point of service to access their healthcare savings accounts in order to pay the healthcare provider for the employee's share of the cost of healthcare services. These are stored-value cards similar to debit or credit cards, which function as a form of "currency" like other MasterCard or Visa debit and credit cards but which are tied specifically and exclusively to the employee's benefits account.

Under the third *du Pont* factor, we find that applicant markets its payment technology services to the same purchasers to whom opposer markets its PPO network organization services, i.e., to large self-insured employers, insurance carriers, third-party administrators of employee healthcare benefits plans, and brokers and consultants in the employee benefits industry. Like

opposer, applicant markets its services to these distributors in an effort to persuade them to include applicant's payment technology services in the employee benefits packages that the distributors themselves are organizing and marketing to the insured employee's employer.

Under the fourth *du Pont* factor, we find that these actual purchasers of the parties' goods and services, i.e., large employers, insurance carriers, third-party administrators and benefits brokers and consultants, are highly sophisticated and knowledgable about the employee benefits industry, including the healthcare benefits field. The sales process undertaken by both opposer and applicant is usually lengthy (taking many months) and detailed, most frequently involving one or more, and often many, face-to-face meetings or phone calls.

With these facts in mind, we turn now to an analysis of second, third and fourth *du Pont* factors, beginning with the second factor, i.e., the similarity or dissimilarity of the parties' respective goods and/or services.

Factor 2 - Similarity of Goods and Services.

Both opposer's services and applicant's goods and services are part of the employee benefits industry, specifically including the healthcare and health insurance fields. However, healthcare is a multi-billion dollar

industry which is so broad that the mere fact that both parties' services might fall within the field does not suffice, in itself, to support a finding that the respective goods and/or services are similar for purposes of the second *du Pont* factor.

The parties' respective goods and/or services, in terms of their nature, purpose and function, are dissimilar and non-competitive on their face. Opposer organizes PPO networks of healthcare providers, while applicant's goods and services have to do with employee benefits accounts and associated payment technologies and applications, including the use of encoded smart cards. Neither party renders the other's type of services.

We are not persuaded by opposer's contention that the parties' services should be deemed to be similar because they both can be bundled as components of an overall employee benefits package put together and marketed by the actual purchasers of the parties' respective services, i.e., large self-insured employers, insurance carriers, and third-party administrators. Again, the fact that both parties' goods and/or services have to do, directly or indirectly, with the healthcare and health insurance fields does not suffice to make the goods and/or services similar for purposes of the second *du Pont* factor.

Opposer's primary argument with respect to this *du Pont* factor appears to be that the healthcare and health insurance markets in general are "converging." Part of this convergence is asserted to be an expansion by PPOs such as opposer's into the employee benefits healthcare savings accounts and payment card services of the type offered by applicant. Opposer argues that, given this industry trend, applicant's payment technology goods and services are within opposer's zone of natural expansion, such that opposer is entitled to "bridge the gap" into goods and services like applicant's, which opposer has not heretofore marketed.

As the Board has previously explained:

> Under the doctrine of natural expansion, the first user of a mark in connection with particular goods or services possesses superior rights in the mark not only as against subsequent users of the same or similar mark for the same or similar goods or services, but also as against subsequent users of the same or similar mark for any goods or services which purchasers might reasonably expect to emanate from it in the normal expansion of its business under the mark. This is so whether or not the first user of the mark has actually expanded its use of its mark, after the commencement of the subsequent user's use, to goods or services which are the same as or closely related to those of the subsequent user. The application of the doctrine is strictly limited to those cases where the expansion, whether actual or potential, is "natural," that is, where the goods or services of the subsequent user, on the one hand, and the goods or services as to which the first user has prior use, on the other, are of such nature that purchasers would generally expect them to emanate from the same source. The reason for the limitation is that the prior user of a mark on particular goods or services cannot extend

> its use of the mark to distinctly different goods or services if the result could be a conflict with valuable intervening rights established by another through extensive use and/or registration of the same or similar mark for the same or closely related goods or services in the new sphere of trade.
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> Among the factors to be considered in determining whether an expansion is natural are: (1) whether the second area of business (that is, the subsequent user's area of business, into which the first user has or potentially may expand) is a distinct departure from the first area of business (of the prior user), thereby requiring a new technology or know-how, or whether it is merely an extension of the technology involved in the first area of business; (2) the nature and purpose of the goods or services in each area; (3) whether the channels of trade and classes of customers for the two areas of business are the same, so that the goodwill established by the prior user in its first area of business would carry over into the second area; and (4) whether other companies have expanded from one area to the other.
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> Finally, the determination of whether an expansion is or would be natural must be made on the basis of the circumstances prevailing at the time when the subsequent user first began to do business under its mark, i.e., what was "natural" in the relevant trade at that time.

Mason Engineering and Design Corp. v. Mateson Chemical Corp., 225 USPQ 956, 962 (TTAB 1985)(internal citations omitted).

We are not persuaded that the evidence of record supports opposer's contention that the relevant purchasers in the field are likely to assume or expect that an organizer of PPO networks like opposer has expanded or would naturally expand into the employee benefits account payment technology marketplace in which applicant uses its mark.

The evidence opposer principally relies on to support this contention (the articles and webpages depicted in opposer's Exh. Nos. 55-61 and 65-72), even to the extent that it is accepted as admissible and probative despite its obvious hearsay and foundation problems,[4] simply fails to establish that applicant's services are within opposer's natural zone of expansion.

Opposer's evidence perhaps can be construed as showing that large health insurance carriers, such as Assurant, Great-West, First Health and Blue Cross Blue Shield, have recently been expanding into the employee benefit accounts and related payment technology field, partnering with financial institutions such as Mellon Financial and Chase. But opposer is not an insurance carrier, and its attempts to equate itself to insurance carriers are wholly unpersuasive. Likewise unpersuasive is opposer's contention (made repeatedly by Mr. Gulau and Mr. Johnes in their testimony) that these large insurance carriers somehow are opposer's competitors in the market for PPO network organization services. These insurance carriers are not competitors of

[4] These exhibits were introduced during the August 5, 2005 testimony of Mr. Johnes, during opposer's rebuttal testimony period. To the extent that opposer relies on the articles for the truth of the matters asserted therein, they clearly are hearsay. The hearsay defect was not cured by Mr. Johnes' testimony in introducing the exhibits. With respect to each of the articles, his testimony consisted of merely reading or paraphrasing the articles themselves for their truth. He repeatedly started his testimony regarding each of the articles with the statement "I will read from the text...".

opposer's, but rather are potential and actual customers of opposer's, i.e., purchasers of opposer's PPO network organization services and the similar services of opposer's actual competitors. Opposer's competitors are other PPO network organizers, not the insurance carriers to whom opposer and its competitors market their services. The fact that these insurance carriers may bundle the PPO network organization services of opposer's competitors as part of the insurance carrier's overall healthcare benefits package does not make the insurance carriers themselves opposer's competitors.

Thus, even if we assume that opposer's evidence suffices to prove that insurance carriers are expanding into applicant's area of service, such expansion does not support opposer's claim that applicant's services are within opposer's own zone of natural expansion. The evidence of record simply does not support a finding that PPO network organizers, per se, are expanding into the employee benefits accounts and related payment technology market, or that the actual purchasers of the parties' respective goods and/or services would expect such an expansion by opposer or by any other PPO network organizer.[5]

[5] We also note that Mr. Gulau testified (Gulau Depo. at 12-13) that he had a conversation in the summer of 2004 with Alan Ross, a consultant in the employee benefits industry who is familiar with opposer and applicant. When Mr. Gulau mentioned "Evolution Benefits" to Mr. Ross, Mr. Ross "said he was also confused the

Moreover, even if we were to assume for the sake of argument that opposer is correct in its contention that applicant's services are now or are coming to be within opposer's natural zone of expansion, opposer's argument would fail because the evidence does not establish that any such "natural expansion" would have been expected or assumed by the purchasers of opposer's services as of the time that applicant entered the field. Even if we measure from the time of applicant's actual entry into the payment card market in early 2001 (Porritt Depo. at 12), rather than from the earlier August 4, 2000 filing date of its application, essentially all of opposer's evidence on this "market convergence" issue refers to events occurring after applicant's entry into the payment card marketplace. Opposer is not entitled to rely on a "bridge the gap" argument in these circumstances. *See Mason Engineering and Design Corp., supra.*

For these reasons, we find that the parties' respective goods and/or services are dissimilar rather than similar, for purposes of the second *du Pont* factor. They are dissimilar on their face in terms of nature, purpose and

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first time he saw Evolution Benefits and was surprised that we were moving into that area." This testimony obviously is hearsay, but Mr. Ross' asserted "surprise" suggests that he would not normally expect a PPO network organizer like opposer to have expanded into the payment technology field occupied by applicant.

function. They may be bundled together by opposer's and applicant's purchasers as part of an overall employee healthcare benefits package. However, that fact does not suffice to establish that these actual purchasers of opposer's and applicant's goods and/or services, i.e., large employers, insurance carriers and third-party administrators, as well as broker/consultants, are likely to assume that a source relationship or other affiliation exists between opposer and applicant. On this record, we cannot find that these purchasers would be likely to expect that a PPO network organizer like opposer has or reasonably could have expanded into the employee benefits accounts and payment technologies business. The second *du Pont* factor accordingly weighs against a finding of likelihood of confusion.

Factor 3 – Similarity of Trade Channels and Purchasers.

With respect to the third *du Pont* factor, we find that opposer and applicant market their goods and/or services in the same trade channels and to the same classes of purchasers. These purchasers are large self-insured employers, insurance carriers, third-party administrators, and also brokers and consultants in the employee benefits industry. To this extent, the third *du Pont* factor weighs in opposer's favor in our likelihood of confusion analysis.

However, and contrary to opposer's contention, we find that the relevant purchasers in this case, for purposes of the third *du Pont* factor, do not include healthcare providers and insured employees who are the downstream end users of the parties' respective services. There is no evidence in the record which would support a finding that these persons influence or are in a position to influence the purchasing decisions made by the actual purchasers of the respective services, i.e., large self-insured employers, insurance carriers, and third-party administrators. Absent evidence of such influence on the purchasing decision, these persons cannot be deemed to be relevant purchasers for purposes of our likelihood of confusion analysis. *See Electronic Design & Sales, Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713, 21 USPQ2d 1388 (Fed. Cir. 1992).[6]

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[6] See, e.g., the court's discussion at 954 F.2d 717, 21 USPQ2d at 1391:

> The tenuous connection between applicant's and opposer's trade channels becomes clearer when one considers the uses of their respective marks within the medical field. Opposer supplies data processing services for medical insurers, whereas applicant sells batteries and power supplies to makers of medical equipment such as bedside alert systems and crib monitors. As to which persons might be confused, or would even see both marks in connection with these goods and services, opposer suggests that when a medical device fitted with one of applicant's power supplies malfunctions and the unit is opened to reveal applicant's mark ("E.D.S." in a stylized box), opposer's reputation is damaged by the negative context in which applicant's mark appears. However, opposer offers no reason to infer, for example, that Blue Cross officials responsible for purchasing its computer services might decide to discontinue purchasing from opposer because of confusion by a secretary in a

Beacon Mutual Insurance Co. v. OneBeacon Insurance Group, 376 F.3d 8, 71 USPQ2d 1641 (1st Cir. 2004), cited by opposer for the proposition that providers and insured employees are relevant purchasers for purposes of analyzing likelihood of confusion, is not persuasive authority in this case. First, *Beacon Mutual* was an infringement case in which the plaintiff and the defendant were directly competing workers' compensation insurers. The court's decision held only that the plaintiff's overwhelming evidence of actual confusion among providers and insured employees was relevant evidence which sufficed to preclude entry of summary judgment for defendant on the likelihood of confusion issue. Our case is distinguishable because opposer and applicant are not direct competitors, and there is absolutely no evidence of actual confusion among providers and insured employees. Second and more importantly, the *Beacon Mutual* decision, to the extent that it suggests that downstream end users are relevant purchasers in the likelihood of confusion analysis despite the fact that they have no direct influence on the

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physician's office who mistakenly attributes the malfunction to opposer, even though the secretary will process patients' claims to Blue Cross. Indeed, it seems clear such officials would not even become aware of the secretary's confusion. Therefore, the secretary cannot be a relevant person. Nor, for the same reason, can the physician or nurse. None of them ordinarily would have any involvement in Blue Cross's purchase of computer services.

purchasing decision, is contrary to the principle laid down by the Federal Circuit, our primary reviewing court, in *Electronic Design & Sales, Inc., supra.*

Factor 4 – Conditions of Purchase/Sophistication of Purchasers.

With respect to the fourth *du Pont* factor, we find that the purchasers of the parties' respective goods and/or services in this case, i.e., large self-insured employers, insurance carriers, third-party administrators and brokers/consultants, are highly sophisticated, knowledgable and careful purchasers. The process by which the parties market their goods and/or services to these purchasers is lengthy and detailed, usually taking many months and involving at least one, and often many, face-to-face or phone meetings between opposer or applicant and the purchaser. The sophistication and knowledge of the marketplace which is possessed by these relevant purchasers, and the care and time required in making the purchasing decision, weigh against a finding of likelihood of confusion.

As discussed above, we find that the relevant purchasers in this case do not include healthcare providers and insured employees who are the downstream end users of the parties' respective goods and/or services and who have

no influence in the purchasing decisions made by the actual purchasers of the goods and services. However, even if we were to deem these persons to be relevant purchasers, we would find that they are sufficiently knowledgable and careful that confusion cannot be considered to be likely.

Healthcare providers are recruited into opposer's PPO network after careful negotiations with opposer regarding the scope of their services and the discounts at which the services will be provided. Mr. Johnes testified:

> Currently, in order for a claim to be adjudicated, we absolutely are involved. We have direct contracts with the providers. These contracts differ from provider to provider. They differ from a provider's perspective between various PPO and HMO entities, insurers that they have those contracts with. So it's a fairly sophisticated environment to work in in and of itself.

(Johnes Depo. 8/5/05, at 63.) Nothing in the record proves that these providers would be confused about which PPO they are dealing with, or that they would assume that a PPO network organizer like opposer also is in the business of creating and offering payment card technology like applicant's.

As for the insured employees, the evidence of record shows that healthcare and health insurance are becoming increasingly consumer-driven rather than group-driven, such that the insured employee, in making his or her healthcare and insurance decisions, is likely to exercise a substantial

degree of care. This is especially so with respect to the employee benefits accounts like HSAs. In this regard, opposer's witness Mr. Johnes testified:

> A significant change is occurring around the HSAs product in general. And a little background on the product: The product mandated by Congress has to have a high deductible health plan, which kicks in for an individual at a thousand dollars and for a family at two thousand dollars. And what that means is that the first thousand dollars or two thousand dollars respectively has to be borne by the insured before the high deductible healthcare plan product kicks in and begins to pay benefits. And as a result of that, consumers are now burdened with having to pay a lot more of the upfront healthcare costs that they are receiving under this plan than they had previously been. As a result of that, both consumers and providers are now engaged in a dialogue about the costs, about the payment methodologies, along with their insurance companies, as well as their HSAs custodians, to facilitate getting a thousand dollars or two thousand dollars worth of upfront expenses paid in a timely manner.

(Johnes 8/5/05 Depo. at 30-31.) Similarly, Mr. Johnes testified: "And the major significance is that the product, the HSA, in particular, is a fairly involved product in all aspects. It is brand new. There's a significant amount of education that needs – or is required on the consumer's part in order for them to make valued decisions in using this product." (Johnes 8/5/05 Depo. at 56.)

In short, given the marketplace knowledge and sophistication of the actual purchasers of the parties' respective services, i.e., large self-insured employers,

insurance carriers, third-party administrators and brokers and consultants, we find that the fourth *du Pont* factor weighs against a finding of likelihood of confusion in this case. To the extent that providers and insured employees might be deemed to be relevant purchasers (and we do not deem them to be so), we find that they are likely to be at least somewhat knowledgable and careful in making their purchasing decisions, given the increasing complexity of the health insurance marketplace. If the fourth *du Pont* factor with respect to such persons weighs in favor of a finding of likelihood of confusion, it does so only slightly.

Factors 2, 3 and 4 – Conclusion.

To summarize with respect to the second, third and fourth *du Pont* factors, we find that although the parties' respective goods and/or services are or would be marketed to the same classes of purchasers, i.e., large self-insured employers, insurance carriers, third-party administrators and brokers and consultants in the employee benefits industry, these purchasers are highly knowledgable and unlikely to be confused, notwithstanding the similarity of opposer's and applicant's marks. The parties' respective goods and/or services are dissimilar on their face, and the record does not establish that, as of applicant's entry into the marketplace (or even thereafter), these purchasers would

expect that a PPO network organizer like opposer has or is likely to "bridged the gap" into the field of employee benefits accounts and related payment technology which is occupied by applicant. In short, we find that the third *du Pont* factor weighs in opposer's favor, but that the second and fourth factors weigh in applicant's favor. On balance, the fact that the parties' purchasers are the same is clearly offset and outweighed by the dissimilarity of the services and the sophistication of the purchasers.

Factor 6 - Similar Third-Party Marks in Use.

With respect to the sixth *du Pont* factor, i.e., the number and nature of similar marks in use on similar goods or services, the third-party registrations of EVOLUTION-formative marks submitted by applicant are not evidence of third-party use for purposes of the sixth *du Pont* factor. *See Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992). Applicant's internet evidence of third-party uses of EVOLUTION marks is de minimis and does not suffice to persuade us that such third-party use of such marks in connection with the goods and services at issue in this case is so prevalent or widespread that purchasers have become accustomed to distinguishing between such marks. *See Palm Bay Imports* v. *Veuve Clicquot*

Ponsardin, supra. Thus, we find that the sixth *du Pont* factor is neutral in this case.

Factor 7 – Actual Confusion.

The seventh *du Pont* factor requires us to consider evidence regarding instances of actual confusion among purchasers. Opposer has offered testimony which, according to opposer, evidences several instances of actual confusion between opposer's mark and applicant's mark. We shall address each of them in turn.

First, Mr. Johnes testified (at Johnes Depo. 3/8/05, pp. 59-63) that he was attending and presenting at a trade show in 2002 on behalf of opposer, and that applicant also was presenting at that show. He was in opposer's booth when he was approached by "two people" from the Society of Human Resources Management who handed him a plaque and thanked him for advertising in their magazine. The plaque itself identified applicant, not opposer. "They clearly thought we were Evolution Benefits." We find that this testimony, to the extent that it is not inadmissible hearsay, is vague and without foundation. It does not support a finding that the "two people" were actually confused. In any event, they were not customers of either opposer nor applicant, and any confusion they may have experienced accordingly is not relevant to this case.

Second, Mr. Johnes testified (at Johnes Depo. 3/8/05, pp. 63-67) that in January 2004 Allen Cranford of opposer placed a telephone call to Rob Butler of Medibank, one of applicant's competitors. He left a voice mail message requesting a return call. Later, Mr. Butler, along with Medibank's CEO, Mr. Natt, returned the telephone call. Mr. Johnes testified that Mr. Butler and Mr. Natt, in returning the call to opposer, "had mistaken us for Evolution Benefits." Again, we find this testimony to be unpersuasive on the issue of actual confusion. Even to the extent that it is not hearsay, it is not particularly probative because Mr. Johnes conceded on cross-examination that he did not hear how Mr. Cranford had identified himself when he made the initial phone call. Therefore, we do not know why Mr. Butler and Mr. Natt might have assumed they were calling applicant instead of opposer. Moreover, it is clear that Medibank is not a customer of opposer or applicant, so the alleged actual confusion is not relevant here.

Next, Mr. Johnes testified (at Johnes Depo. 3/8/05, pp. 67-68), that he was attending a trade show in 2004 where he had a conversation with Steve Blake from a pharmacy benefits manager company, CareMark. Mr. Blake reportedly told Mr. Johnes that he had attended another trade show previously at which "a company called Evolutions" had made a presentation on the subject of debit cards and flexible spending

accounts. (The presentation was made by applicant, not opposer.) "And he indicated to me that at the time he – he didn't realize that we had offered those services." We find this testimony to be vague and unpersuasive as evidence of purported actual confusion on the part of Mr. Blake. And, again, the allegedly confused person was not a customer of opposer or applicant.

Finally, Mr. Johnes testified (at Johnes Depo. 8/5/05, at 79-82) that opposer received a letter in April 2005 from a trade association seeking opposer's attendance at its trade show. The top of the letter identified the addressee as David Guerrero of "Evolutions Healthcare Sys., Inc." (Mr. Guerrero is not opposer's employee.) The top of the letter, although it correctly identifies opposer as the recipient, sets forth applicant's address in Connecticut, not opposer's address in Florida. We find this letter to be of little probative value on the issue of actual confusion. The envelope in which the letter came is not of record, but we presume that it was correctly addressed to opposer at its Florida address; otherwise opposer would not have received it. In view of the correctly-addressed envelope and the correct identification of opposer at the top of the letter, the reason for the mistaken address as set forth on the letter itself is not apparent, and such mistake does not necessarily mean that the sender was confused as to whom he

was addressing the letter. Moreover, the trade association is not a customer of either applicant or opposer.

Taken as a whole, we find that opposer's proffered evidence of actual confusion is too vague, ambiguous and de minimis to constitute persuasive evidence of actual confusion.

Likelihood of Confusion - Conclusion

Finally, we note that opposer does not argue that the actual purchasers of the parties' respective services, i.e., large self-insured employers, insurance carriers, third-party administrators, and brokers and consultants in the employee benefits industry, are likely to be confused as to source, sponsorship or affiliation. The likelihood of confusion scenarios posited by opposer all involve persons who are not relevant purchasers, i.e., healthcare providers and insured employees. Even as to these persons, however, who conceivably could carry or accept at point of service both an insurance identification card bearing opposer's mark and a debit card bearing applicant's mark (Porritt Depo. at 151), we find that the potential for confusion is highly speculative, at best. "We are not concerned with mere theoretical possibilities of confusion, deception, or mistake or with de minimis situations but with the practicalities of the commercial world, with which the

trademark laws deal." *Electronic Design & Sales, Inc.*, *supra*, 954 F.2d at 717, 21 USPQ2d at 1391, quoting from *Witco Chem. Co. v. Whitfield Chem. Co.*, 418 F.2d 1403, 1405, 164 USPQ 43, 44-45 (CCPA 1969).

The record simply does not establish that relevant purchasers would be likely to expect or assume that a provider of PPO network organization services like opposer also is in the business of providing services centered on the payment card technology used in connection with employee benefits accounts. The fact that the parties' respective services both involve or relate to the healthcare and health insurance field, and the fact that PPO services and payment card services might be bundled together as part of an overall employee benefits package, do not suffice to create a likelihood that relevant purchasers will be confused as to source, sponsorship or affiliation.

After considering the evidence of record as it pertains to the *du Pont* factors, we find, on balance, that there is no likelihood of confusion. Although the marks are similar and the parties' purchasers are the same, those facts (as well as opposer's unconvincing evidence purported to establish the existence of actual confusion) are outweighed, in our likelihood of confusion analysis, by the basic dissimilarity of the parties' services, and by the

sophistication of the relevant purchasers and the care with which the purchasing decision is made.

Decision: The opposition is dismissed.