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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Reliance Standard Life Insurance Company

v.

American National Insurance Company

Opposition No. 91178996
to Application Serial No. 78895793
filed on May 30, 2006

Roberta Jacobs-Meadway of Eckert Seamans Cherin & Mellott,
LLC for Reliance Standard Life Insurance Company.

Margaret A. Boulware of Boulware & Valor for American
National Insurance Company.

Before Quinn, Bergsman and Kuczma,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

American National Insurance Company ("applicant") filed
a use-based application to register the mark BENCHMARK
RELIANCE, in standard character form, for the "issuance and
administration of annuities," in Class 36.

Reliance Standard Life Insurance Company ("opposer")
opposed the registration of applicant's mark on the ground
of likelihood of confusion under Section 2(d) of the
Trademark Act of 1946, 15 U.S.C. §1052(d). Opposer alleged

that it has used the mark RELIANCE STANDARD in connection with insurance underwriting and issuing and administering annuities since at least as early as August 1965, a date prior to any date on which applicant can rely for the first use of its mark, and that applicant's use of the mark BENCHMARK RELIANCE for the "issuance and administration of annuities" so resembles opposer's mark RELIANCE STANDARD for insurance underwriting and issuing and administering annuities as to be likely to cause confusion. Opposer pleaded ownership of the registrations listed below:

1. Registration No. 1617943 for the mark RSL RELIANCE STANDARD LIFE INSURANCE COMPANY, in typed drawing form, for "life accident and health insurance underwriting services," in Class 36;¹ and

2. Registration No. 3064739 for the mark RELIANCE STANDARD, in standard character form, for "insurance underwriting in the fields of life, health and accident; financial services in the fields of processing, funding, underwriting, issuing and administering annuities," in Class 36.²

Applicant, in its answer, admitted that it "claims no date earlier than August 25, 2003 for the purpose of claiming priority," but denied the remaining salient

¹ Issued October 16, 1990; renewed.

² Issued March 7, 2006; Sections 8 and 15 affidavits accepted and acknowledged.

allegations in the notice of opposition. During the course of the proceeding, applicant filed a counterclaim to cancel Registration No. 3064739 for the mark RELIANCE STANDARD on the ground of fraud. Applicant alleged that opposer's registration "was procured by Opposer's knowingly false or fraudulent statements [to overcome a Section 2(d) likelihood of confusion refusal] which were made with the intent to deceive the Patent and Trademark Office into granting registration" to opposer. Opposer denied the salient allegations in the counterclaim.

Preliminary Issues

A. Whether likelihood of confusion based on opposer's use of the word "Reliance" as a stand alone mark was tried by express or implied consent?

As noted above, opposer alleged that "[i]t has continuously used Reliance Standard as its name and mark in connection with its activities since August 1965" and that applicant's mark BENCHMARK RELIANCE so resembles opposer's "'Reliance Standard' tradename and marks,... that it is likely to cause confusion, mistake, and/or deception."³ In its brief, opposer claimed use of the name and mark "Reliance" for the first time. Because opposer may not rely on unpleaded marks, we must determine whether opposer's attempt to assert use of RELIANCE as a stand-alone mark was tried by express or implied consent.

³ Notice of Opposition ¶¶4 and 17.

Implied consent to the trial of an unpleaded issue can be found only where the nonoffering party (1) raised no objection to the introduction of evidence on the issue, and (2) was fairly apprised that the evidence was being offered in support of the issue.

TBMP § 507.03(b) (3rd ed. 2011). See also *Morgan Creek Productions Inc. v. Foria International Inc.*, 91 USPQ2d 1134, 1138 (TTAB 2009); *H.D. Lee Co. v. Maidenform Inc.*, 87 USPQ2d 1715, 1720-1721 (TTAB 2008); *Long John Silver's Inc. v. Lou Scharf Inc.*, 213 USPQ 263, 266 n.6 (TTAB 1982) (applicant's objection to the introduction of evidence regarding an unpleaded issue obviated the need to determine whether the issue had been tried by implied consent); *Boise Cascade Corp. v. Cascade Coach Co.*, 168 USPQ 795, 797 (TTAB 1970) ("Generally speaking, there is an implied consent to contest an issue if there is no objection to the introduction of evidence on the unpleaded issue, as long as the adverse party was fairly informed that the evidence went to the unpleaded issue.").

The question of whether an issue was tried by consent is basically one of fairness. The non-moving party must be aware that the issue is being tried, and therefore there should be no doubt on this matter.

Morgan Creek Productions Inc. v. Foria International Inc.,
91 USPQ2d at 1139.

During the deposition of David Gittelman, opposer's Director of Marketing, Mr. Gittelman answered a series of questions relating to opposer's first use of the "Reliance Standard" name and mark.⁴ The questioning turned to how opposer uses the mark.

Q. How does Reliance Standard use the Reliance Standard name and mark?

A. As a ... as a printed brand, if you will. We use the term Reliance Standard, so you'll notice on most of our printed materials if there's a logo present it is a Reliance Standard logo, and that would be inclusive of all our operating divisions. We are known in the marketplace widely as Reliance. I mean if you were to speak to one of our brokers, you know, and you said who's your Reliance rep, that's ... that's pretty much the - -

Q. Okay.

A. - - the lingo.

Q. And how often does that happen?

A. Daily.⁵

The only evidence introduced by opposer displaying the use of the mark RELIANCE is Gittelman deposition exhibit No. 5, a flyer about opposer's SmartChoice disability coverage for small business groups.⁶

Q. And could you identify the bottom portion as to how Reliance Standard is marked?

⁴ Gittelman Dep., p. 12.

⁵ Gittelman Dep., p. 13.

⁶ Gittelman Dep., pp. 21-23.

- A. In this particular sheet Reliance is identified by the mark Reliance, and then Reliance Standard Life Insurance Company below that.⁷

The testimony of David Whitehead, opposer's Vice President of Accumulation Products Marketing, relating to the use of RELIANCE as a stand-alone mark was less definite.

- Q. Is Reliance ever used alone, apart from Reliance Standard?

- A. Typically not on formal materials and forms, but is used frequently. Somebody will refer to Reliance instead of Reliance Standard or instead of Reliance Standard life. If I get a phone call from one of our agencies or I'm talking to one of our agencies, they may say hey, we really like that Reliance product, that Reliance X, Y, Z product, okay. So it's not used formally on our materials but it is used in discussions and is - - we are referred to by a number of our, you know, agencies and producers at different points in time.⁸

Applicant did not object to the above-noted testimony or object to the introduction of Gittelman Exhibit 6 relating to the use of RELIANCE as a stand-alone mark. In its brief, applicant acknowledged that opposer was claiming rights in the "marks RELIANCE and RELIANCE STANDARD for annuities."⁹

The issue is whether the mark BENCHMARK RELIANCE ... is likely to cause confusion with Opposer, Reliance Standard Life

⁷ Gittelman Dep., p. 23.

⁸ Gittelman Dep., p. 11.

⁹ Applicant's Brief, p. 1.

Insurance's marks RELIANCE and RELIANCE
STANDARD for annuities ... ¹⁰

In view of the fact that applicant expressly acknowledged that opposer was claiming use of RELIANCE as a stand-alone mark, we deem opposer's notice of opposition amended to assert RELIANCE as a stand-alone mark under Fed.R.Civ.P. 15(b)(2).

B. Opposer's motion to strike applicant's evidence of third-party use.

In response to opposer's Interrogatory No. 16, requesting applicant to identify all known third parties using the word "Reliance" as a part of a mark in connection with annuities, insurance and other financial services, applicant identified Reliance Insurance Group, Reliance National Indemnity of Pennsylvania, American Select - Reliance Ultimate Choice, Reliance Management, Equity Reliance Group, Old Reliance Insurance Company, and Reliance Mortgage Group. In addition, applicant identified twelve third-party marks with the word "Reliance."

In response to opposer's request for production of documents No. 14, requesting documents identifying third parties using the term "Reliance" in connection with financial services, applicant stated that it "will produce responsive, non-privileged, non-confidential documents that

¹⁰ Applicant's Brief, p. 1.

are in its possession, custody or control." However, applicant did not produce any documents.

At trial, applicant introduced a certificate of licensure for Reliance Insurance Group LLC (printed from the Internet on August 9, 2010),¹¹ an A.M. Best Company financial rating for Old Reliance Insurance Company (copyright 2009),¹² an excerpt from the Reliance Insurance Group website (printed on August 3, 2010),¹³ an excerpt from the Reliance Wealth & Trust Partners website (printed on August 17, 2010),¹⁴ an excerpt from the Reliance Financial Group website (printed on August 17, 2010),¹⁵ and an excerpt from the Reliance Trust website (printed on August 17, 2010).¹⁶

Opposer objected to the introduction of those exhibits during the depositions of George Crume and Christina Hodges-Eaken and reasserted the objection in a motion to strike the exhibits filed with its brief on the ground that applicant never produced any evidence of third-party use of the term "Reliance" during discovery.

It is not clear from the record when or why applicant obtained the A.M. Best Company financial rating for Old

¹¹ Crume Dep., Exhibit 13.

¹² Crume Dep., Exhibit 14.

¹³ Hodges-Eaken Dep., Exhibit 20.

¹⁴ Hodges-Eaken Dep., Exhibit 21.

¹⁵ Hodges-Eaken Dep., Exhibit 22.

¹⁶ Hodges-Eaken Dep., Exhibit 23.

Reliance Insurance Company. Nonetheless, we admit the A.M. Best Company financial report for Old Reliance Insurance Company, because applicant identified that company in its response to opposer's interrogatory No. 16, thereby minimizing any surprise or prejudice to opposer. With the exception of the A.M. Best Company report, it is clear that the other objected-to documents were obtained by applicant in preparation for its testimony and were not responsive documents that were already within its possession or control when applicant was responding to document requests.

While a party need not investigate third-party use in response to discovery requests, *Rocket Trademarks Pty Ltd. v. Phard S.p.A.*, 98 USPQ2d 1066, 1071 (TTAB 2011); *Sports Authority Michigan Inc. v. PC Authority Inc.*, 63 USPQ2d 1782, 1783 (TTAB 2001), applicant's initial interrogatory response suggests that it had indeed made at least some such investigation. It seems highly unlikely that it could have identified several third-party users of "Reliance" by name without having some documentation concerning each. Its concurrent responses to the related document request promised that it would produce responsive documents, but applicant never did. Instead, applicant introduced documents concerning third-party use only after discovery as exhibits during testimonial depositions.

However, a failure to discharge one's duty to supplement under Rule 26(e)(1) does not automatically require a sanction, such as striking of proffered evidence, unless the other party was prejudiced. In *Rocket Trademarks Pty Ltd. v. Phard S.p.A.*, we previously overruled a similar objection in similar circumstances because the opposer in that case had an opportunity to eliminate or minimize any prejudice during its later rebuttal testimony period:

Opposer's objection, in essence, is that it was somehow prejudiced by not having the documents produced earlier in response to its discovery requests. However, opposer was not put at a disadvantage.

Again, applicant had no duty to conduct an investigation of third-party use during discovery and, certainly, applicant's attempt to present evidence of third-party use of the term ELEMENT should not have come as a surprise because it is common practice to introduce third-party use to demonstrate that a mark is weak and, therefore, entitled to only a narrow scope of protection. The documents introduced as exhibits to Ms. Fuchs' deposition were equally accessible to opposer, i.e., they were publicly available via the internet. Finally, opposer had thirty days between the close of applicant's testimony period and the opening of its rebuttal period to prepare any rebuttal against the evidence of third-party use. Accordingly, opposer's objection to the Fuchs' testimony deposition exhibits on the basis that the documents were not previously produced in response to opposer's discovery requests is overruled.

That analysis applies here as well.¹⁷ While we do not condone applicant's apparent failure to timely supplement discovery responses, the lack of prejudice leads us to overrule opposer's objection to applicant's evidence of third-party use. The above-noted exhibits will be considered for whatever probative value they may have (which, as we explain *infra*, is minimal).

C. Applicant's objection to opposer's Internet evidence.

Applicant filed a motion to strike opposer's notice of reliance introducing into evidence printouts from websites on the ground that such printouts are not permitted under Trademark Rule 2.122(e), 37 CFR § 2.122(e). Applicant's motion is not well taken. The Board now permits documents obtained from the Internet to be introduced into evidence via a notice of reliance. *Safer Inc. v. OMS Investments Inc.*, 94 USPQ2d 1031, 1039 (TTAB 2010) ("*if a document obtained from the Internet identifies its date of*

¹⁷ We are not holding that a party's duty to supplement its discovery responses expires when its testimony period begins. While it is true that applicant could have supplemented its responses immediately prior to introducing the material at trial, that would scarcely have made a significant difference in the conduct of applicant's testimony period. If opposer believed that it was critical to possess this type of material prior to the opening of applicant's testimony period, it could have sought the information through its own means, for it was equally accessible to opposer and applicant prior to trial. In addition, we note that this case has proceeded under the rules that govern cases commenced prior to November 1, 2007, which do not require a party to make pretrial disclosure of the evidence it plans to produce at trial. Therefore, we discern no significant prejudice to opposer by applicant's failure to supplement its responses immediately prior to introducing the material at trial.

publication or date that it was accessed and printed, and its source (e.g., the URL), it may be admitted into evidence pursuant to a notice of reliance in the same manner as a printed publication in general circulation in accordance with Trademark Rule 2.122(e) (emphasis in the original). Applicant's motion to strike opposer's notice of reliance introducing into evidence printouts obtained from the Internet is denied.

The Record

By operation of Trademark Rule 2.122, 37 CFR § 2.122, the record includes the pleadings and the application file for applicant's mark and the application file for opposer's pleaded registration for which applicant seeks cancellation. The record also includes the following evidence:

A. Opposer's Evidence.

1. Testimony deposition of David Gittelman, opposer's Director of Marketing, with attached exhibits;

2. Testimony deposition of David Whitehead, opposer's Vice President of Accumulation Products Marketing, with attached exhibits;

3. Testimony deposition of John F. Metzger, a legal assistant in opposer's counsel's law firm, with attached exhibits;

4. Notice of reliance on certified copies of opposer's pleaded registrations prepared and issued by the

United States Patent and Trademark Office showing both the current status of and current title to the registrations;

5. Notices of reliance on applicant's responses to opposer's interrogatory Nos. 12, 14 and 15;

6. Notices of reliance on applicant's responses to opposer's requests for admission;

7. Notice of reliance on dictionary definitions for the words "benchmark" and "standard";

8. Notice of reliance on copies of third-party registrations purporting "to show the nature and extent of the use of the term 'benchmark'";

9. Notice of reliance on copies of third-party registrations purporting "to show the relatedness of 'annuities' and employee benefits programs and products";

10. Notice of reliance on copies of printed publications purporting "to establish descriptive use of the term 'benchmark' in relation to annuities";

11. Notice of reliance on copies of printouts from websites purporting "to establish that companies advertise or market both annuities and employee benefit plans to members of the general public, and that colleges and universities offer annuities as part of benefit packages";

12. Notice of reliance on copies of printed publications purporting "to establish use of the 'RELIANCE

STANDARD' name and mark by persons in the relevant trade to refer to Opposer and its services"; and

13. Notice of reliance on third-party registrations purporting "to show the relatedness of 'annuities' and insurance products and services."

B. Applicant's evidence.

1. Testimony deposition of Christina L. Hodges-Eaken, the Vice President for Compliance for Legacy Marketing Group, a business partner of applicant in the field of developing and marketing annuity programs, with attached exhibits;

2. Testimony deposition of George C. Crume, Sr., applicant's Vice President of Brokerage Sales, with attached exhibits;

3. Applicant's notice of reliance on the following items:

- a. Copies of third-party registrations for marks incorporating the word "Reliance" for financial services in Class 36;
- b. Opposer's responses to applicant's interrogatories;
- c. Opposer's responses to applicant's requests for admission;
- d. Copies of the file histories for opposer's pleaded registrations;

- e. Copies of materials from the LexisNexis database purportedly to show "usage and adoption of the term 'Reliance' in the marketplace by other third parties";
- f. Copies of materials from the LexisNexis database purportedly to show "the reputation, goodwill and recognition of Applicant American National Insurance Company in the market place";
- g. Copy of the New Jersey certificate of licensure for Reliance Insurance Group, LLC purportedly to show "usage and adoption of the term 'Reliance' in the marketplace by other third parties"; and

4. Notice of reliance on third-party registrations registered for annuities but not with employee or group benefits purportedly "to show that annuities are not related to employee or group benefits in the marketplace."

Counterclaim to Cancel Registration No. 3064739
for the mark RELIANCE STANDARD

Standing

Applicant has standing to assert its counterclaim for cancellation based on opposer's assertion of Registration No. 3064739 against applicant in its opposition to the application. *Ohio State University v. Ohio University*, 51 USPQ2d 1289, 1293 (TTAB 1999) ("[A]pplicant's standing to

assert the counterclaim arises from applicant's position as a defendant in the opposition and cancellation initiated by opposer").

Fraud

Applicant bears the burden of proving the elements of fraud by clear and convincing evidence. Any doubt must be resolved against applicant as the charging party. *In re Bose Corp.*, 580 F.3d 1240, 91 USPQ2d 1938, 1939 (Fed. Cir. 2009). During the prosecution of opposer's application to register the mark RELIANCE STANDARD, the examining attorney refused to register opposer's mark on the ground of likelihood of confusion with, *inter alia*, Registration No. 2297714 for the mark RELIANCE CAPITAL MANAGEMENT, owned by an unrelated third party, for "financial services in the nature of investment management and research," in Class 36.

Opposer's specimen showing use of the mark RELIANCE STANDARD for "insurance underwriting in the fields of life, health and accident; financial services in the fields of processing, funding, underwriting, issuing and administering annuities" was a copy of its homepage (rsli.com/home) printed on February 19, 2004. The homepage provided the following information (Emphasis added):

Reliance Standard underwrites a variety of group coverages that are incorporated into basic employee benefit packages including group life, group disability income, personal accidental death and dismemberment, integrated disability,

administrative services, group dental and vision. **Reliance Standard offers a complete portfolio of fixed rate annuity products to individuals.**

To support the likelihood of confusion refusal, the examining attorney argued that the "marks are virtually identical" and "[t]he [opposer], as well as the registrants in the aforementioned marks,¹⁸ use their marks for financial investment and underwriting services."¹⁹

In response to the likelihood of confusion refusal, opposer made the following arguments (Emphasis added):

The differences in [Opposer's] mark RELIANCE STANDARD and registrant's mark RELIANCE CAPITAL MANAGEMENT taken together with the differences in the goods and services, the sophistication of the purchasers and the differences in the trade channels all preclude a reasonable likelihood of confusion.²⁰ ...

The goods and services in question are not related and would not be encountered by the same purchasers in situations that would give rise to an incorrect assumption as to the source of the goods and services. ... **[Opposer] sells group insurance and annuity goods and services to employers for inclusion into those employers' employee benefits programs, and has sold such goods and services for over 90 years. In contrast, registrant offers investment management and research. A person seeking an**

¹⁸ The examining attorney cited five (5) registrations as bars to registration.

¹⁹ September 27, 2004 Office Action.

²⁰ Subsequently in the response, opposer concluded its argument stating that "[g]iven the above factors, there is no reasonable likelihood of confusion between [opposer's] mark and registrant's mark, **notwithstanding the similarity between the marks themselves.**" (Emphasis added).

investment manager or advisor would not encounter employer sponsored insurance products, and likewise, a company executive seeking corporate insurance products would not encounter an investment manager's or advisor's goods and services. Because the goods and services are not related, a purchaser would not be confused as to their source.

[Opposer] and registrant have different purchasers and market their goods and services in different ways, further decreasing any possible likelihood of confusion. ... [Opposer] markets the goods and services under its mark to company executives responsible for employee benefit programs, while registrant would, based upon the goods and services described in the registration, market its goods and services [sic] financial institutions and investment advisors.

... The purchasers of the goods and services under [opposer's] and registrants' marks are not impulse buyers, but are highly sophisticated professionals buying specialized products. The purchasers of [opposer's] and registrant's goods and services would purchase only after a process of evaluation, negotiation and consideration, therefore, removing any reasonable likelihood of confusion as to the source of the goods and services in question.²¹

After receipt of opposer's response to the Office action, the examining attorney withdrew the Section 2(d) refusal and approved the mark in opposer's application for publication.

The essence of applicant's fraud claim is set forth in paragraph No. 14 of its amended counterclaim:

Opposer knew at the time of filing its response to [sic] office action and even several years later as stated in the declarations of Mssrs. Whitehead and Gittelman that its annuities services were not offered to employers but only to individuals. Despite always knowing that its annuities goods and services were offered only to individuals, Opposer knowingly argued that its annuities services were sold to employers. Opposer did not represent the truth to the Patent and Trademark Office that it sells annuity services to individuals and that its annuity services are not sold to employers.

The relevant standard for proving fraud, set forth in *In re Bose Corp.* requires clear and convincing proof of the following four elements:

- (1) applicant/registrant made a false representation to the USPTO;
- (2) the false representation is material to the registrability of a mark;
- (3) applicant/registrant had knowledge of the falsity of the representation; and
- (4) applicant/registrant made the representation with intent to deceive the USPTO.

In re Bose Corp., 91 USPQ2d at 1941. As explained below, we find that opposer did indeed make material false statements

²¹ Opposer's January 25, 2005 response, pp. 3-5, to the September 27, 2004 Office Action in the file for Registration No. 3064739.

to the examining attorney, and that opposer knew they were false. We have enough doubt as to opposer's intent to deceive, however, that the fraud claim must fail.

A. Whether opposer made a false representation to the USPTO?

Applicant contends that opposer's arguments that it was selling annuities to employers as part of a package of employee benefits is a false statement because opposer was also offering its annuities to individuals. In its brief, applicant specifically references Paragraph No. 27 in the Declaration of David Whitehead, opposer's Vice President of Accumulation Products Marketing.²² (Emphasis added).

[Opposer] and other companies, including [applicant], sell annuities and other financial products through IMOs. IMOs are independent, that is not affiliated with a carrier, and usually offer through their agents annuity products from several insurance carriers. **The agents who sell annuity products to individuals** work with one or more IMOs and rely on them for assistance and expertise when deciding what products to offer their clients.

In addition, we note that Mr. Whitehead declared that opposer's "annuities are marketed and sold to individuals"²³ "through insurance agents by intermediaries commonly referred to as IMOs."²⁴ In this regard, Mr. Whitehead

²² Whitehead Dep., Exhibit 16. The Declaration was introduced into evidence in Mr. Whitehead's deposition.

²³ *Id.* at ¶24.

²⁴ *Id.* at ¶23.

provided an example of how an individual consumer could encounter the annuities of both parties:

31. It is reasonable to assume that individuals who have been exposed to [opposer's] benefits and Absence Solutions® products and advertising for them are likely to also be exposed to [opposer's] annuities, and annuities of other competitors, including [applicant]. It is likely that this will happen in a variety of contexts. By way of example only, this can happen when an individual employed by an employer that offers [opposer's] benefit coverages encounters a situation where he or she has assets to invest (from rolling over a 401k, an inheritance, sale of a home, etc.) and meets with an agent who offers annuity products underwritten by [opposer] or [applicant]. This exposure could also occur where a company executive charged with selecting the company's employee benefits coverages subsequently seeks to invest his or her own individual assets. In a number of instances, the annuity products could be offered by the same agent who offers and markets the benefit coverages, or alternatively by a separate agent.²⁵

Mr. Whitehead also testified that "all annuity contracts are sold by licensed insurance agents to individuals"²⁶ and "[t]hose independent agents then go out to the kitchen table or wherever else ... you know, wherever else they meet their customers and talk about our annuity products and then ultimately take an application and submit

²⁵ *Id.* at ¶31.

²⁶ Whitehead Dep., p. 12.

it to" [opposer].²⁷ Mr. Whitehead identified the ultimate customer as an individual.²⁸ Mr. Whitehead later clarified that opposer does not market directly to individuals; it markets to independent agencies and agents who market directly to individuals.²⁹ However, Mr. Whitehead confirmed that opposer prepares point-of-sale materials the independent agents may use with individual customers.³⁰ In this regard, Mr. Whitehead referenced opposer's website with links for employers, brokers/agents, and employees and individuals ("it talks about the fact that as an individual you may have an insurance policy through work or you may be interested in purchasing a fixed or indexed annuity for retirement savings").³¹

Opposer argues to the contrary that none of the statements in its application was false, reciting facts relating to opposer's sales of group benefits packages and annuities.³² Opposer provides the following explanation as to why its arguments in the application were not false:

None of the facts above stated alters the fact or contradicts the fact that persons seeking investment managers are not looking for employer sponsored insurance products. None of the facts above stated alters the fact or contradicts the fact the company

²⁷ *Id.* at p. 17.

²⁸ *Id.*

²⁹ *Id.* at p. 28.

³⁰ *Id.* at pp. 28-29 and Exhibits 4-6.

³¹ *Id.* at p. 35 and Exhibit 7.

³² Opposer's Rebuttal Brief, pp. 6-8.

executives seeking corporate insurance products would not be looking to investment advisors. None of the facts above stated alters the fact that [opposer] markets the goods and services under its mark to company executives responsible for employee benefits. It does this and it does not market its goods and services to financial institutions as such or to investment advisors, as would the owner of the registration cited in the prosecution of the application for [RELIANCE CAPITAL MANAGEMENT cited as a bar to registration]. [Applicant] certainly presents no evidence to the contrary either of independent investment managers regularly working with individuals or others through individuals or others through employee benefits programs, or of the corporate executives who deal with insurance benefits retaining outside investment advisors in connection with such benefits programs.³³

Opposer is correct to the extent that in response to the likelihood of confusion refusal it accurately argued that it "sells group insurance and annuity goods and services to employers for inclusion into those employers' employee benefits programs." However, opposer's argument is based on the false premise that it only sells group insurance and annuities through employee benefits programs as part of an employee benefits package. The evidence of record is unequivocal that opposer sells annuities to individuals through independent agents and brokers. Opposer even prepares point-of-sale materials for individuals and

³³ Opposer's Rebuttal Brief, p. 8.

has a link on its website for individuals to access.³⁴ Thus, by telling a half-truth in its response to the Office Action (*i.e.*, that opposer renders its services to company executives in connection with employer benefits programs and omitting opposer's sales of annuities to individuals through independent agents and brokers), opposer made false statements that were likely to mislead the examining attorney to believe that opposer does not sell annuities to individuals. *See General Electro Music Corp. v. Samick Music Corp.*, 19 F.3d 1405, 30 USPQ2d 1149, 1154 (Fed. Cir. 1994) (submission of a false or misleading statement is usually sufficient to support conclusion that statement was made with the intent to deceive); *Swiss Watch International Inc. v. Federation of the Swiss Watch Industry*, 101 USPQ2d 1731, 1746 (TTAB 2012) (deliberately omitting relevant portions of a document, or making a statement that, while true, gives only part of the story is an act deliberately designed to mislead and may be treated as a false statement in its effect and also to show the necessary element of intent).

B. Whether opposer had knowledge of the falsity of the representation?

Opposer knew that it rendered its annuity services to individuals and, therefore, it also knew that its statements

³⁴ Whitehead Dep., pp. 28-30; Exhibits 4-7.

that it "sells group insurance and annuity goods and services to employers for inclusion into those employers' employee benefits programs" was only half true and misleading. Moreover, opposer does not contest the fact that it knew it rendered its annuity services to individuals.

We note that the false statements at issue were attorney argument. Nevertheless, it is well settled that a client is bound by the actions of its attorney. See *HighBeam Marketing LLC v. Highbeam Research LLC*, 85 USPQ2d 1902, 1906 (TTAB 2008) (opposer's counsel improperly prevented a deposition from going forward and, in this instance, counsel's conduct is attributable to opposer as a party); *CTRL Systems Inc. v. Ultraphonics of North America Inc.*, 52 USPQ2d 1300, 1302 (TTAB 1999) ("communication between the client and attorney is a two-way affair"). As stated by the Supreme Court in *Link v. Wabash Railroad*, 370 U.S. 626, 633-634 (1962):

[T]here is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he can not now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, which each party is deemed bound by the acts of his lawyer-agent and is

considered to have notice of all facts, notice of which can be charged upon the attorney.

In any event, Mr. Charles Denaro, opposer's Vice President, Secretary and Deputy General Counsel, advised counsel in preparing the response to the likelihood of confusion refusal.³⁵ Accordingly, the false statements were not an honest mistake regarding opposer's channels of trade and classes of consumers, and at no point does opposer contend to the contrary.

C. Whether the false representation was material to the registrability of opposer's mark?

Opposer's false statements are material because they address the channels of trade and classes of consumers to whom opposer renders its services and were made to overcome a substantive refusal to register its mark. Opposer argued, in essence, in its response to the likelihood of confusion refusal, that because its services are rendered to company executives in connection with employer benefits programs (and not to individuals through independent agents and brokers), opposer's "insurance underwriting in the fields of life, health and accident; financial services in the fields of processing, funding, underwriting, issuing and administering annuities" would not be encountered by the same consumers interested in the cited registrant's

³⁵ Opposer's answers to applicant's third set of interrogatories Nos. 19-22.

"financial services in the nature of investment management and research" and, therefore, confusion would be unlikely. Opposer's false statements are material because they form the basis of opposer's contention that its services and the services in the cited registration move in different channels of trade and are sold to different classes of consumers thereby avoiding a likelihood of confusion.

Opposer argues that the false statements were not material because they were based on the differences between group benefits products and investment management and research services and they did not reference opposer's sales of annuities to individuals who may or may not need investment management and research services. With respect to its failure to address the sales of annuities to individuals, opposer argues that "the sale of annuities to individuals was not in question during the Office action response. [Opposer] had already disclosed its sale of annuities to individuals at the time it applied for registration of its mark" referencing its specimen of use noted above.³⁶

Opposer's argument is based in part on the fact that in the September 27, 2004 Office Action refusing registration, the examining attorney argued that "[t]he [opposer], as well as the registrants [there were 5 cited registrations] in the

³⁶ Opposer's Rebuttal Brief, pp. 9-10.

aforementioned marks, use their marks for financial investment and underwriting services." However cursory the analysis of the relatedness of the services presented in the Office Action, there is no basis for opposer's contention that the examining attorney removed annuity services from consideration in the likelihood of confusion analysis. Opposer's annuity services were identified as "financial services in the fields of processing, funding, underwriting, issuing and administering annuities" and, thus, they fall within the penumbra of both financial investment and underwriting services.

Likewise, opposer's statement in the specimen of use that it "offers a complete portfolio of fixed rate annuity products to individuals" does not remove the annuity services from the likelihood of confusion analysis pending before the examining attorney. In this regard, we note that opposer argued that it "sells group insurance and annuity goods and services to employers for inclusion into those employers' employee benefits programs." There was no reason for opposer to reference annuities in its response if opposer believed that the use of its mark in connection with those services was not at issue.

We view the false statements made by opposer as material because they were made in response to the refusal to register and presumably led the examining attorney to

withdraw the likelihood of confusion refusal and approve opposer's application for publication.³⁷

D. Whether opposer made the representation with intent to deceive the USPTO?

On the record before us, however, we have doubts about whether opposer intended to deceive the PTO. Opposer argues that it did not intend to deceive as evidenced by the fact that it "fully disclosed the nature of its business, including the sale of annuities to individuals, to the USPTO."³⁸ As indicated above, opposer submitted as its specimen of use an excerpt from its website indicating that it "offers a complete portfolio of fixed rate annuity products to individuals." Although our experience tells us that opposer intended to mislead the examining attorney by arguing that opposer "sells group insurance and annuity goods and services to employers for inclusion into those employers' employee benefits programs," the specimen raises doubt as to opposer's intent to deceive.

Because opposer's specimen of use expressly states that opposer "offers a complete portfolio of fixed rate annuity products to individuals," we must presume that the examining attorney was aware of that statement when considering opposer's right to registration. Under these circumstances,

³⁷ We acknowledge that a refusal to register may be withdrawn for various reasons, but find the examining attorney's reliance on opposer's argument, as applicant, to be the most plausible.

³⁸ Opposer's Rebuttal Brief, p. 10.

we cannot logically find that there was a willful withholding of facts which, if transmitted and disclosed to the examining attorney, would have resulted in the disallowance of the registration sought by opposer. See *Menzies v. International Playtex, Inc.*, 204 USPQ 297, 305 (TTAB 1979).

E. Conclusion.

A party seeking cancellation of a trademark registration for fraudulent procurement bears a heavy burden of proof. *Bose*, 91 USPQ2d at 1939. Indeed, "the very nature of the charge of fraud requires that it be proven 'to the hilt' with clear and convincing evidence. There is no room for speculation, inference or surmise and, obviously, any doubt must be resolved against the charging party." *Bose*, 91 USPQ2d at 1940, quoting *Smith Int'l, Inc. v. Olin Corp.*, 209 USPQ 1033, 1044 (TTAB 1981).

After reviewing opposer's application file, the evidence of record, and the arguments in the briefs, we find that opposer's false statements regarding its channels of trade and classes of consumers in connection with its annuities were not occasioned by a misunderstanding, an inadvertence, or a mere negligent omission, and were material to the examination of opposer's application. However, applicant failed to meet its burden of proving by clear and convincing evidence that opposer's false

statements were made with intent to deceive the USPTO during the prosecution of opposer's application for registration.

In view of the foregoing, applicant's counterclaim to cancel opposer's Registration No. 3064739 for the mark RELIANCE STANDARD, in standard character form, for "insurance underwriting in the fields of life, health and accident; financial services in the fields of processing, funding, underwriting, issuing and administering annuities" is dismissed.

Likelihood of Confusion

Standing

Because opposer has properly made its pleaded registrations of record, opposer has established its standing.³⁹ *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Lipton Industries, Inc. v. Ralston Purina Co.*, 213 USPQ at 189.

³⁹ Even if we had granted applicant's counterclaim to cancel Registration No. 3064739, opposer still proved its standing in connection with the common law mark RELIANCE STANDARD. David Whitehead, opposer's Vice President of Accumulation Products Marketing, testified that opposer has used "the Reliance Standard name and mark" "since the mid '60's" in connection with its two lines of business: "Our employee benefits line of business as well as our fixed annuity line of business." (White Dep., pp. 9-10; see also Gittelman Dep., pp. 11-12). This testimony is sufficient to demonstrate that opposer has a real interest in this proceeding, and therefore has standing regardless of the existence of its pleaded registration. *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982).

Priority

Because opposer's pleaded registrations are of record, Section 2(d) priority is not an issue in this case as to those marks and the services covered by the registrations.⁴⁰ *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).

With respect to RELIANCE as a stand-alone mark, because RELIANCE is not registered, opposer must prove its date of first use. Applicant first used BENCHMARK RELIANCE "in the third or fourth quarter - - I believe third quarter - - of 2003."⁴¹ Accordingly, for purposes of determining priority, we will use September 30, 2003 as applicant's priority date. *See EZ Loader Boat Trailers, Inc. v. Cox Trailers, Inc.*, 213 USPQ 597, 598 n.5 (TTAB 1982) (documentary evidence showed first use in 1977, the month and day were unknown, therefore, the Board could not presume any date earlier than the last day of the proved period). *See also Osage Oil &*

⁴⁰ The evidence of record establishes that opposer has priority of use for the mark RELIANCE STANDARD even without its registration. As indicated in the previous footnote, Mr. Whitehead and Mr. Gittelman, opposer's Director of Marketing, testified that opposer has been using the mark RELIANCE STANDARD in connection with opposer's employee benefits line of business and its fixed annuity line of business since the "mid '60s." Also as indicated above, applicant, in its answer, admitted that it does not claim any date "earlier than August 25, 2003 for the purpose of claiming priority." (Applicant's Answer, ¶2). Accordingly, opposer has proven its common law priority of the mark RELIANCE STANDARD in connection with opposer's fixed annuity line of business and employee benefits line of business.

⁴¹ *Hodges-Eaken Dep.*, p. 24. *See also Hodges-Eaken Dep.*, p. 33 (the BENCHMARK RELIANCE "product became available for sale in, I believe the third quarter of 2003").

Transportation, Inc. v. Standard Oil Co., 226 USPQ 905, 911 n.22 (TTAB 1985) (evidence established first use in 1968-1969, therefore December 31, 1969 is date of first use).

Opposer must establish its use of RELIANCE as a stand-alone mark or trade name prior to September 30, 2003.⁴²

Mr. Gittelman testified that opposer's predecessor was a subsidiary of Reliance Group Holdings until 1981 "when it was spun off to a group called ... Dresser Standard, Incorporated, and we were with them until the late '90s when we were acquired by Delphi Financial Group."⁴³ As part of the Dresser Standard, Incorporated transaction, opposer's predecessor "secured the right to continue to use the marks Reliance Standard, Reliance, and Reliance Standard Life Insurance in all of our operations and advertising."⁴⁴ However, as noted above during the discussion relating to whether opposer's use of RELIANCE as a stand-alone mark was tried by consent, both Mssrs. Gittelman and Whitehead testified that opposer's independent brokers and agents refer to opposer as RELIANCE, not that opposer uses RELIANCE as a mark or trade name. Mr. Gittelman further testified that RELIANCE STANDARD is opposer's mark and that opposer

⁴² As indicated above, in its answer, applicant admitted that it was not claiming any date of use earlier than August 25, 2003.

⁴³ Gittelman Dep., p. 9.

⁴⁴ Gittelman Dep., p. 10.

tries not to deviate from that mark in its printed materials.⁴⁵

The only documentary evidence corroborating opposer's use of RELIANCE as a stand-alone mark is Gittelman Exhibit 5, a flyer for its SmartChoice disability coverage, for small groups (2-29 persons), where opposer displayed the word "Reliance" as a stand alone mark directly above "Reliance Standard Life Insurance Company."⁴⁶ However, the flyer is not dated, Mr. Gittelman did not testify as to when the flyer was distributed, and the flyer states that opposer's "3-Year Rate Guarantee" is "valid for all businesses with 2007 effective dates." Gittelman Exhibit 5 does not prove opposer used RELIANCE as a stand-alone mark prior to September 30, 2003 or even the May 30, 2006 filing date of applicant's application.

Mr. Gittelman's testimony may be sufficient to prove opposer's first use if it is clear, convincing, consistent and uncontradicted. *See National Bank Book Co. v. Leather Crafted Products, Inc.*, 218 USPQ 826, 828 (TTAB 1993) (oral testimony may be sufficient to prove the first use of a party's mark when it is based on personal knowledge, it is clear and convincing, and it has not been contradicted); *Liqwacon Corp. v. Browning-Ferris Industries, Inc.*, 203 USPQ

⁴⁵ Gittelman Dep., p. 72.

⁴⁶ Gittelman Dep., p. 21-23, Exhibit 5.

305, 316 (TTAB 1979) (oral testimony may be sufficient to establish both prior use and continuous use when the testimony is proffered by a witness with knowledge of the facts and the testimony is clear, convincing, consistent, and sufficiently circumstantial to convince the Board of its probative value); *GAF Corp. v. Anatox Analytical Services, Inc.*, 192 USPQ 576, 577 (TTAB 1976) (oral testimony may establish prior use when the testimony is clear, consistent, convincing, and uncontradicted). Based on the testimony of opposer's witnesses, it is not clear when opposer first used RELIANCE as a stand-alone mark and whether opposer used RELIANCE as a stand-alone mark or trade name or whether such use was limited to independent brokers and agents referring to opposer. See *Big Blue Products Inc. v. IBM*, 19 USPQ2d 1072, 1074 (TTAB 1991). The instant case does not involve a record like that in the *Big Blue Products* case, because the testimony regarding the public recognition of opposer as "Reliance" *per se* is not clear, consistent or convincing and the testimony applies only to the independent agents and brokers, not the ultimate consumers.

Finally, while Messrs. Gittelman and Whitehead testified that opposer's Independent Marketing Organizations and independent agents refer to opposer as "Reliance," there is no corroborating evidence in the record. Opposer did not call any brokers or independent agents to confirm that

opposer is known in the industry as "Reliance." The few references in the media where the authors abbreviated third-party company names to "Reliance" are not persuasive that opposer is known only as "Reliance," especially because opposer does not refer to itself as simply "Reliance."

In view of the foregoing, opposer has failed to prove its priority of RELIANCE as a trade name or service mark prior to either the filing date of applicant's application [May 30, 2006] or applicant's earliest date of first use [September 30, 2003] and, therefore, RELIANCE as a stand-alone mark will be given no further consideration.

Likelihood of Confusion Factors

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also, In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003).

A. The degree of consumer care.

Because the purchase of an annuity is part of a comprehensive financial plan for the ultimate consumer, we turn first to the degree of consumer care exercised in making a decision to purchase such a financial instrument. In this regard, we carefully consider the nature of an

annuity, who buys annuities, the factors that go into the purchasing decision, and how annuities are sold.

An "annuity" is defined as "a specified income payable at stated intervals for a fixed or contingent period, often for the recipient's life, in consideration of a stipulated premium paid either in prior installment payments or in a single payment."⁴⁷ For example, the minimum initial premium for applicant's BENCHMARK RELIANCE annuity is \$10,000 and the maximum premium is \$1,000,000,⁴⁸ and opposer's average premium per policy is \$50,000.⁴⁹

An article in the February 18, 2002 issue of the *Orlando Sentinel* provided the following information about annuities:

For retirees, this is a the problem:

... Stocks have been in a funk for three years, so by making withdrawals from a stock portfolio to cover living expenses you run the risk of depleting your nest egg.

A possible answer ... is ... to buy an immediate fixed annuity.

⁴⁷ The Random House Dictionary of the English Language (Unabridged), p. 84 (2nd ed. 1987). The Board may take judicial notice of dictionary evidence. *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983). See also "The 2007 Individual Annuity Market Sales and Assets" report by LIMRA International, Inc., p. 70 (Definitions) (Crume Dep., Exhibit 9). Opposer is a participating company of LIMRA.

⁴⁸ Hodges-Eaken Dep., pp. 93.

⁴⁹ Whitehead Dep., pp. 13, 17 and 65; Whitehead Dep. Exhibit 16 (Whitehead Dec. ¶25). Mr. Whitehead also testified that opposer has accepted a premium as low as \$5,000 and as much as \$500,000 (Whitehead Dep., pp. 13-14). But see Whitehead Dep. Exhibit 16 (Whitehead Dec. ¶26) (opposer has accepted a \$1,500,000 premium).

In return for your one-time, lump-sum payment; an insurance company guarantees it will send you a check for the rest of your life, or other period you designate. Most couples opt to receive payments until both spouses die.

* * *

"Usually people attracted to fixed annuities are conservative investors looking for something that's guaranteed," Carlson said [Bob Carlson, editor of a monthly newsletter called Retirement Watch]. "People who want growth usually don't even want to consider fixed annuities." An immediate variable annuity, by combining the two approaches, could appeal to investors who are not in either extreme, either too risk-averse or too aggressive.⁵⁰

Annuities have "features and benefits that are attractive primarily to the senior market";⁵¹ that is, people "close to or in retirement."⁵² "[G]enerally that's the over 60, over 65 age group."⁵³ These investors are very conservative; they are looking to preserve their capital, they are looking for fixed income at a competitive interest rate, and they are looking for low risk.⁵⁴

⁵⁰ Applicant's notice of reliance.

⁵¹ Hodges-Eaken Dep., pp. 12-13.

⁵² Hodges-Eaken Dep., p. 13.

⁵³ Hodges-Eaken Dep., pp. 21 and 83. See also Crume Dep., p. 22 ("our sales are mostly to people in the senior market with disposable income ... Most of our sales are single premium, which means you make a one-time deposit ... there is [sic] no additional deposits"), p. 23 ("age 60 and up, 65, in that area, and up"); Whitehead Dep., p. 13 (50 to 80 age group but average age is 67), p. 65 (60-70 years old "is pretty standard"); Whitehead Dep. Exhibit 16 (Whitehead Dec. ¶¶ 6, 7 and 25).

⁵⁴ Hodges-Eaken Dep., p. 21; Crume Dep., p. 23; Whitehead Dep., pp. 13-14; Whitehead Dep. Exhibit 16 (Whitehead Dec. ¶¶ 6 and 7).

The identity of the company underwriting the annuity is an important factor in purchasing the annuity. For example, the underwriter's performance ratings and length of time the company has been in business are important to the customer.⁵⁵

Q. What are the selling points of an annuity?

A. Well, the selling points of an annuity: First of all, the most important thing to the end-user is, first of all, the name of the company and its financial strength, its ratings, how long its been in business, track record with the product line that's being marketed. And that's the most important thing to begin with.

Then the product itself and its features, obviously whether it's suitable for that client and it fits their needs. That's the second thing - - second thing involved in it.

Then also basically when the client decides whether - - the amount of money they want to put into the product or whatever, it just depends upon their needs. I used to say "their needs, their dreams," whatever they foresee for their future.

The company is probably the most important thing to enter into the conversation, its financial strength, and so forth, and then the product itself, its features, and how they fit the needs of the end-user, the client; and then foremost, if it's an annuity,

⁵⁵ Hodges-Eaken Dep., p. 25.

basically the interest rate, if it's competitive and so forth.⁵⁶

Opposer's witness David Whitehead, opposer's Vice President of Accumulation Products Marketing, concurred:

A. Typically when a customer has 50, a hundred, \$200,000 and they're handing it over to an insurance company they want to know a little bit more about - - than the company name, and I think it's important that they know, you know, who -- what the heritage is, you know, the fact that we've been around a hundred years, you know, and the fact that we've been owned by the same organization for more than 20 years.⁵⁷

* * *

Q. Why do you talk about this type [financial strength ratings] of information?

A. Again, if somebody is going to entrust their hard earned dollars to a financial institution they typically want to know what ratings have been assigned by the financial rating ... by the financial rating agencies.⁵⁸

The parties market their annuities through independent marketing organizations and independent agents.⁵⁹ According to George Crume, applicant's Vice President of Brokerage sales, "[t]he protocol is that the end-user is to work

⁵⁶ Crume Dep., p. 21. See also Crume Dep., pp. 26-27.

⁵⁷ Whitehead Dep., pp. 19-20.

⁵⁸ Whitehead Dep., p. 24.

⁵⁹ Hodges-Eaken Dep., p. 11 (independent insurance agents "typically solicit products direct to the public or the end consumer"); Whitehead Dep. pp. 17-18, 28.

through their agent or their broker. Then their broker works through their marketing company and then through my national sales manager team and then eventually to the home office."⁶⁰ David Whitehead provided the following testimony:

Q. How do you market your annuities?

A. We use what I'll refer to as managing general agents or independent marketing organizations to promote our products to independent agents. Those independent agents then go out to the kitchen table or wherever else ... you know, wherever else they meet their customers and talk about our annuity products and then ultimately would take an application and submit it to Reliance Standard.⁶¹

Opposer has contracted with approximately 100 independent marketing organizations that interact with approximately 12,000 agents.⁶² Likewise, applicant has contracted with 20,000 agents across the country.⁶³

Customers rely on these independent agents in deciding whether to buy an annuity and what annuity to buy.⁶⁴

Q. [H]ow do they go through the selection process?

A. The selection process - -

⁶⁰ Crume Dep., p. 19.

⁶¹ Whitehead Dep., p. 17. See also Whitehead Dep. Exhibit 16 (Whitehead Dec. ¶23).

⁶² Whitehead Dep., p. 18.

⁶³ Hodges-Eaken Dep., pp. 26-27.

⁶⁴ Hodges-Eaken Dep., p. 28.

- Q. For the client.
- A. Again, when we talked about the suitability review, typically [the independent insurance agent] are gathering key information from the respective client, going through and identifying what other investments they have, their risk tolerance, their short- and long-term financial objectives, their health status, what their income and expenses are, what's the purpose of the monies. And then based on that information, they may recommend a couple of different products to the client.

* * *

You know the sales process is so individualized based on, you know, the consumer information. And then based on that, the producer may, you know, recommend or present to a prospective [sic] two - - one or two or three annuities; and then the client generally chooses what is appropriate based on the features and benefits of the product and obviously, you know, the strength and security of the insurance company that is underwriting it.

- Q. Do the [independent agents] know the companies, or do they know the identity of the companies or the insurance companies who are offering the particular annuities?
- A. Yes. Most definitely they would know that. One, because they want to make sure that they're presenting a product, you know, that had certain ratings if strength and security was a concern. Also the name of the company is on any type of brochures that they might use during the

solicitation. So an agent is always going to know the insurance company name.⁶⁵

Based on the nature of an annuity as a financial instrument, the personal interaction between the prospective annuitant and the selling agent, and the cost of the premium, one would expect that the relevant purchasers exercise a high degree of care making their purchasing decision. Nothing in the record is to the contrary. The relevant consumers, senior citizens and/or persons planning for their retirement, have a focused need or plan for the annuity (e.g., fixed income and preservation of capital). The relevant consumers consult with independent agents, who sell the annuities for the underwriters. These agents are experts in the field who carefully assess the consumers' needs and help them select among several alternatives. Purchasing an annuity is an important purchase and is unusual in terms of its complexity. There is a reasonably intense evaluation process by the ultimate consumer in collaboration with the independent selling agent. In view of the foregoing, we find that annuities are purchased only after careful consideration by the relevant consumers with specific consideration given to the identity and reputation of the annuity underwriter.

⁶⁵ Hodges-Eaken Dep., pp. 58-60.

- B. The similarity or dissimilarity and nature of the services at issue, the established, likely-to-continue trade channels and classes of consumers.

Applicant is seeking to register its mark for the "issuance and administration of annuities." Opposer's Registration No. 3064739 for the mark RELIANCE STANDARD, in standard character form, is for, *inter alia*, "financial services in the fields of processing, funding, underwriting, issuing and administering annuities." Accordingly, the services are in part identical. In fact, applicant and opposer are competitors⁶⁶ that offer similar annuities.⁶⁷

Because both parties are engaged in issuing and administering annuities, we focus the likelihood of confusion analysis on the annuity services. If we do not find likelihood of confusion with respect to the marks at issue for identical services, then there would be no likelihood of confusion with a registered mark for services that are not identical. See *In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

Because the services described in the application and opposer's registration are in part identical, we must presume that the channels of trade and classes of purchasers are the same. See *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101

⁶⁶ Gittelman Dep., p. 70; Whitehead Dep., pp. 10, 47. See also Whitehead Dec., ¶18 attached to the Whitehead Dep., Exhibit 16.

⁶⁷ Whitehead Dep., p. 51.

USPQ2d 1022, 1028 (TTAB 2011); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) ("Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers."). See also *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion).

C. The strength of opposer's mark.

1. Inherent Strength

Through a notice of reliance, applicant introduced two registrations owned by Covenant Reliance Producers, LLC:

- a. Registration No. 3054867 for the mark COVENANT RELIANCE PRODUCERS, LLC for "insurance brokerage in the field of senior retirement products such as life, health, and annuities." Registrant disclaimed the exclusive right to use "LLC"; and
- b. Registration No. 3096202 for the mark COVENANT RELIANCE PRODUCERS for "insurance brokerage for annuities, life, and long-term care."

Applicant also introduced Registration No. 2297714 for the mark RELIANCE CAPITAL MANAGEMENT for "financial services

in the nature of investment management and research." That registrant disclaimed the exclusive right to use the term "Capital Management."

Finally, applicant introduced seven (7) registrations for marks which incorporate the word "Reliance" for financial services other than issuing and underwriting annuities.

The third-party registrations introduced by applicant are not evidence that those marks are in use, let alone used so extensively that consumers have become sufficiently conditioned by their usage that they can distinguish between such marks on the bases of minute differences. The probative value of third-party trademarks depends entirely upon their usage. *E.g., Scarves by Vera, Inc. v. Todo Imports, Ltd.*, 544 F.2d 1167, 192 USPQ 289, 294 (2d Cir. 1976) ("The significance of third-party trademarks depends wholly upon their usage. Defendant introduced no evidence that these trademarks were actually used by third parties, that they were well promoted or that they were recognized by consumers."). As the Court of Customs and Patent Appeals, the predecessor to our primary reviewing court, pointed out in *Lilly Pulitzer, Inc. v. Lilli Ann Corp.*, 376 F.2d 324, 153 USPQ 406, 407 (C.C.P.A. 1967), "the existence of these registrations is not evidence of what happens in the market place or that customers are familiar with their use."

Nevertheless, the third-party registrations may be used in the manner of a dictionary to show that a mark or a portion of a mark is descriptive or suggestive of goods and services. *Tektronix, Inc. v. Daktronics, Inc.*, 187 USPQ 588, 592 (TTAB 1975) (the third-party registrations may be considered in the same manner as a dictionary to show a possible meaning or significance in a particular trade). In view of the foregoing, and given the definition of "reliance" as "confident or trustful dependence," "confidence," and "something or someone relied on"),⁶⁸ when it is used as part of a trademark in connection with financial services, "RELIANCE" may be understood as suggesting that the consumer may have "confidence" in the financial service provider.

2. The number and nature of similar marks in use in connection with similar services.
 - a. Media references to companies in the financial services field that incorporate "Reliance" in their trade name.

Through a notice of reliance, applicant introduced articles from publications obtained from the LexisNexis database referencing "Reliance" used as part of the trade name of companies in the financial services field. The articles are discussed below:

⁶⁸ The Random House Dictionary of the English Language (Unabridged), p. 1628.

1. Four (4) articles in business publications (2008-2009) referenced Reliance Trust Company, a division of Reliance Financial Corporation that formed Reliance Asset Advisors, LLC "to serve the trust, wealth management and financial services needs of the Greater Wilmington, North Carolina market." After the initial introduction of the company, three (3) articles referred to the company as "Reliance."

2. Four (4) articles posted on newswires (2001) referenced three related companies, Reliance Group Inc., Reliance Insurance Co., and Reliance Group Holdings, and their financial difficulties. After the initial reference to the full name of the companies, the articles referred to them as "Reliance."

3. Four (4) articles posted on newswires (1983, 1992, and 1999) referencing the Reliance Insurance Group, a property and casualty insurer.

The eight (8) articles posted on newswires have minimal probative value because the record does not indicate whether the stories were picked up by publications in general circulation and whether they were read by relevant consumers. *See In re Cell Therapeutics Inc.*, 67 USPQ2d 1795 (TTAB 2003) (while newswire stories may have value they may not have the same probative value as stories appearing in magazines and newspapers). *See also In re International*

Business Machines Corp., 81 USPQ2d 1677, 1683 n.10 (TTAB 2006). The remaining four (4) articles in business publications reference one other company using the name "Reliance." While these articles may have some value in that they were published in business publications that may be read by the independent brokers and agents that sell annuities, there is no indication that the ultimate consumers of the annuities would have encountered these articles.

b. Third-party use.

As indicated in the preliminary issue section at the beginning of this decision, applicant introduced a certificate of licensure for Reliance Insurance Group LLC (printed on August 9, 2010),⁶⁹ an A.M. Best Company financial rating for Old Reliance Insurance Company (copyright 2009),⁷⁰ an excerpt from the Reliance Insurance Group website (printed on August 3, 2010),⁷¹ an excerpt from the Reliance Wealth & Trust Partners website (printed on August 17, 2010),⁷² an excerpt from the Reliance Financial Group website (printed on August 17, 2010),⁷³ and an excerpt

⁶⁹ Crume Dep., Exhibit 13.

⁷⁰ Crume Dep., Exhibit 14.

⁷¹ Hodges-Eaken Dep., Exhibit 20.

⁷² Hodges-Eaken Dep., Exhibit 21.

⁷³ Hodges-Eaken Dep., Exhibit 22.

from the Reliance Trust website (printed on August 17, 2010).⁷⁴

Internet websites can be used as evidence "that the public may have been exposed to those internet websites and therefore may be aware of the advertisements contained therein." *Rocket Trademarks Pty Ltd., v. Phard S.p.A.*, 98 at 1072. *But see Penguin Books Ltd. v. Eberhard*, 48 USPQ2d 1280, 1284 n.5 (TTAB 1998) (white pages listings do not show that the public is aware of the companies). However, there is nothing in the record to indicate the extent of the public exposure to these listings. *Anthony's Pizza & Pasta International Inc. v. Anthony's Pizza Holding Co.*, 95 USPQ2d 1271, 1278 (TTAB 2009) ("we consider the restaurant listings for what they show on their face (*i.e.*, that 'Anthony's' has been extensively featured in the name of restaurants)."), *aff'd unpublished*, No. 2010-1191 (Fed. Cir. November 18, 2010). Moreover, the number of Internet sites showing third-party use (four) is extremely limited. As for the certificate of licensure and financial rating information, the fact that a company has been licensed by a particular state or has been given a financial rating does not indicate the extent of public exposure to that company name, let alone that the name is used as a mark. In sum, we find the probative value of this evidence to be minimal.

⁷⁴ Hodges-Eaken Dep., Exhibit 23.

c. Conclusion

The evidence of third-party use is sufficient to show that the word "Reliance" is used by others in the financial services industry to suggest that the provider of the financial services instills confidence or may be relied upon.

3. The fame or strength of the prior mark (sales, advertising length of use).

In its brief, opposer contends that RELIANCE STANDARD is a strong mark for the following reasons:

- a. Opposer has been using the mark RELIANCE STANDARD since the mid-60's;⁷⁵
- b. Opposer is well known and respected in the insurance industry;⁷⁶ and
- c. Opposer's sales have been consistently strong.⁷⁷

⁷⁵ White Dep., pp. 9-10; Gittelman Dep., pp. 11-12.

⁷⁶ White Dep., pp. 48-49 (opposer ranks "in the 30-40 category" in fixed annuities and independent distribution); Gittelman Dep., pp. 26-27 ("we are generally regarded as a very solid, very secure company in the space that we occupy" and are highly rated by independent financial ratings agencies), p. 65 (according to the Ward Group, an independent consulting firm, opposer is among the top 50 performing life and health insurance companies), p. 69. Opposer also referenced 27 articles in printed publications referring to opposer as evidence of opposer's renown. The articles do not demonstrate that opposer is well known. Most of the articles reference opposer in passing (e.g., "Sarkar said that she was ill for a while after the transplant but began to feel well enough to return to work at Reliance Standard Life Insurance Co. last July").

⁷⁷ Whitehead Dep., pp. 22-26; Gittelman Dep., pp. 25-29.

Opposer also introduced testimony and evidence regarding its advertising expenditures.

David Gittelman, opposer's Director of Marketing, provided the following testimony:

Consider for a second that you're an employer making a decision between three benefit plans, you may be looking at Hartford and Aetna and Reliance Standard; and Hartford [sic]. You know what a deer looks like and, you know, Aetna you've heard of and, you know, everybody knows what Snoopy looks like, and Reliance Standard may not be a common household name, so this is an opportunity for both prospects and ultimately customers to know who we are.⁷⁸

4. Assessment of evidence of strength of the prior mark.

Overall, the evidence demonstrates that opposer is a successful company; it does not demonstrate that the mark RELIANCE STANDARD is particularly well known, let alone a strong or famous mark.

D. The nature and extent of any actual confusion.

Applicant argues that there is no likelihood of confusion as evidenced by the lack of any reported instances of actual confusion.⁷⁹ However, the absence of any reported instances of confusion is meaningful only if the record

⁷⁸ Gittelman Dep., pp. 57-58.

⁷⁹ Applicant's Brief, p. 26. Opposer, of course, argues that actual confusion is not the test. (Opposer's Brief, pp. 35-36). Opposer is unaware of any reported instances of actual confusion. Opposer's response to applicant's interrogatory No. 8.

indicates appreciable and continuous use by applicant of its mark for a significant period of time in the same markets as those served by opposer under its mark. *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). In other words, for the absence of actual confusion to be probative, there must have been a reasonable opportunity for confusion to have occurred. *Barbara's Bakery Inc. v. Landesman*, 82 USPQ2d 1283, 1287 (TTAB 2007) (the probative value of the absence of actual confusion depends upon there being a significant opportunity for actual confusion to have occurred); *Red Carpet Corp. v. Johnstown American Enterprises Inc.*, 7 USPQ2d 1404, 1406-1407 (TTAB 1988); *Central Soya Co., Inc. v. North American Plant Breeders*, 212 USPQ 37, 48 (TTAB 1981) ("the absence of actual confusion over a reasonable period of time might well suggest that the likelihood of confusion is only a remote possibility with little probability of occurring").

As indicated above, we consider applicant's date of first use to be September 30, 2003, the last day of the third quarter. Opposer's trial period closed July 6, 2010. Both applicant and opposer do business throughout the entire United States.⁸⁰ Accordingly, there has been almost 7 years of simultaneous use of the marks RELIANCE STANDARD by opposer and BENCHMARK RELIANCE by applicant for identical

⁸⁰ Crume Dep., pp. 8, 11-12; Gittelman Dep., p. 13.

annuity services, sold in the same channels of trade to the same classes of consumers.

We also note that opposer contends that it is "generally well regarded as a very solid, very secure company in the space we occupy,"⁸¹ that it is "in the top ten in all these areas [industry rankings],"⁸² and that its reputation carries across its different business sections because it cross promotes its services.⁸³ As noted in the previous section, opposer had introduced evidence showing that it has used the mark RELIANCE STANDARD since the mid-60's, that opposer is well-known and respected in the industry and that opposer has had consistently strong sales. Likewise, applicant claims that it is known as "a very strong company, a lot of financial strength."⁸⁴ In fact, applicant has made the *Forbes* magazine list of "100 Most Trustworthy Companies" in 2008 and 2009.⁸⁵

Applicant and opposer "compete against each other ... for the sales of insurance, group benefits programs, and annuities," citing the testimony of Messrs. Whitehead, Gittelman, and Crume and Ms. Hodges-Eaken.⁸⁶ Moreover, as described above, the annuities are sold to the ultimate

⁸¹ Gittelman Dep., p. 27.

⁸² Gittelman Dep., pp. 29, 69

⁸³ Gittelman Dep., pp. 51-52; Whitehead Dep., pp. 36-37.

⁸⁴ Crume Dep., p. 12.

⁸⁵ Crume Dep., p. pp. 12-13.

⁸⁶ Opposer's Brief, p. 24.

consumer by independent insurance agents and brokers who interview the end consumer to identify the end consumer's financial status and goals and then present up to three annuities from different companies that the agent/broker believes will meet that goal. According to Mr. Whitehead, "[m]any of our IMOs [Independent Marketing Organizations] offer products from both [applicant] as well as [opposer]"⁸⁷ and he expressly identified five (5) who represent both opposer and applicant.⁸⁸

The parties have designated their advertising expenditures and sales revenues as confidential and, therefore, we may only refer to them in general terms. However, we can say that in terms of annuity premiums, applicant's revenues exceeded opposer's premiums in 2004 through 2006, and marketing expenditures of the parties were comparable in 2004 through 2006.⁸⁹ The sales and marketing information for both parties is substantial enough for us to conclude that there has been a reasonable opportunity for confusion to have occurred and that the lack of any reported instances of confusion weighs against finding that there is a likelihood of confusion. So as to be clear, however, we recognize that actual confusion is not necessary to show

⁸⁷ Whitehead Dep., pp. 52, 60.

⁸⁸ Whitehead Dep., pp. 52-56, Exhibits 11-15.

⁸⁹ Applicant's amended responses to opposer's interrogatory Nos. 11 and 14; opposer's supplemental responses to applicant's interrogatory Nos. 4 and 5.

likelihood of confusion. *See, e.g., Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002).

E. The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.

We now turn to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont De Nemours & Co.*, 177 USPQ at 567. Opposer's mark is RELIANCE STANDARD and applicant's mark is BENCHMARK RELIANCE.

While the marks are similar in appearance because they share the word "Reliance," they look different because applicant's mark begins with the word "Benchmark." Because, consumers are likely to focus on the word "Benchmark" in applicant's mark BENCHMARK RELIANCE rather than the word "Reliance," as the word "Benchmark" is the first word in the mark and because the word "Reliance" is suggestive when used in connection with financial services. *See Presto Products Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered"). *See also Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin*, 396 F.3d 1369, 73 USPQ2d 1689, 1692

(Fed. Cir. 2005) ("Veuve" is the most prominent part of the mark VEUVE CLICQUOT because "veuve" is the first word in the mark and the first word to appear on the label); *Wet Seal Inc. v. FD Mgmt. Inc.*, 82 USPQ2d 1629, 1639 (TTAB 2007). By the same token, because of its position as the first word in opposer's mark, "Reliance" would be noted by the consumer. However, the significance of the word "Reliance" is limited because it is suggestive.

The marks BENCHMARK RELIANCE and RELIANCE STANDARD have a different sound because of the suggestive nature of the shared word "Reliance" and because "Reliance" is the second word in applicant's mark and the first word in opposer's mark. Accordingly, the marks roll off the tongue differently.

With respect to the connotation and commercial impression engendered by the marks, the word "Reliance" may be understood as suggesting that the consumer may have "confidence" in the financial service provider.

The word "Standard" is defined, *inter alia*, as follows:

1. something considered by an authority or by general consent as a basis of comparison; an approved model.
2. an object that is regarded as the usual or most common size or form of its kind ...
3. a rule or principle that is used as a basis for judgment: *They tried to establish standards for a new philosophical approach.*
4. an average or normal requirement quality, quantity,

level, grade, etc.: *His work this week hasn't been up to his usual standard.*⁹⁰

Opposer focuses its advertising on convincing consumers that it is a company that deserves the consumer's confidence and that its annuities are "stable and competitive vehicles for accumulating retirement assets and providing a guaranteed retirement income you can't outlive."⁹¹ Thus, RELIANCE STANDARD means and engenders the commercial impression of a model of confidence.

The word "Benchmark" is defined as follows:

1. a standard or excellence, achievement, etc. against which similar things must be measured or judged: *The new hotel is a benchmark in opulence and comfort.*
2. any standard or reference by which others can be measured or judged: *The current price for crude oil may become the benchmark.*⁹²

Ms. Hodges-Eaken testified that the goal of the branding campaign for the BENCHMARK RELIANCE annuity is to convey "confidence inspired by experience, meaning the BenchMark family of products has been available for a number of years and you've got confidence in the company that's underwriting the product."⁹³ Her testimony is corroborated by applicant's advertising that uses "Confidence inspired by

⁹⁰ The Random House Dictionary of the English Language (Unabridged), p. 1857.

⁹¹ Whitehead Dep., Exhibit 4.

⁹² The Random House Dictionary of the English Language (Unabridged), p. 1857. See also Compact Oxford English Dictionary of Current English (askoxford.com) (Opposer's notice of reliance).

⁹³ Hodges-Eaken Dep., pp. 24-25.

experience" as an advertising tagline.⁹⁴ The mark BENCHMARK RELIANCE means and engenders the commercial impression that consumers may have confidence in the underwriter's standard of excellence. Thus, the meaning and commercial impressions created by the marks are similar.

Opposer argues, in essence, that the marks are similar because they share a common word "Reliance" and the other elements of the marks "Benchmark" and "Standard" have similar meanings which bestow a similar overall meaning upon the marks BENCHMARK RELIANCE and RELIANCE STANDARD. While opposer possesses rights in the mark RELIANCE STANDARD, BENCHMARK RELIANCE is distinguishable in appearance and sound and is not likely to be equated with RELIANCE STANDARD, especially considering the degree of care with which the services are rendered. *See Floss Aid Corp. v. John O. Butler Co.*, 205 USPQ 274, 285 (TTAB USPQ 1979) (scope of protection for opposer's rights in its mark "Flossaid" is sufficient to bestow umbrella of protection upon it in its field, should not extend to preclude others in trade from registering marks for same goods that project same or similar suggestion relative to use of goods where marks are otherwise distinguishable in appearance and sound and are not likely to be equated with opposer's mark due to hazy or faulty recollection of marks). Similarity of

⁹⁴ Hodges-Eaken Dep., Exhibits 4-7 and 12.

meaning is more significant in cases of inherently strong marks than if the marks are suggestive. *See for example, Hancock v. American Steel & Wire Co.*, 203 F.2d 737, 97 USPQ 330 (CCPA 1953) (CYCLONE vs. TORNADO both for fencing). In this case, the term common to both marks, "Reliance," is suggestive, and one may not exclusively appropriate the connotation of suggestive terms because competitors must be free to use those terms to describe their goods and services. *See E. L. Bruce Co. v. American Termicide*, 285 F.2d 462, 128 USPQ 341 (CCPA 1960) (suggestive nature of "TERMI" on products for extermination of termites is critical part of holding that "TERMICIDE" AND "TERMINIX" are not confusingly similar, in spite of their similar connotations); *Sure-Fit Products Co. v. Saltzson Drapery Co.*, 254 F.2d 158, 117 USPQ 295 (CCPA 1958) (fact that common element "FIT," in "SURE-FIT" and "RITE-FIT" for slip covers, was descriptive is decisive factor in holding that marks are not confusingly similar, in spite of their similar meanings); *Hillyard Chemical Co. v. Vestal Laboratories, Inc.*, 206 F.2d 926, 99 USPQ 117 (CCPA 1953) (highly suggestive nature of "BRITEN-ALL" and "SHINE-ALL" for cleaning and polishing compounds persuasive of holding of non-likelihood of confusion in spite of their similar meanings); *Penn Dairies, Inc. v. Pennsylvania Agricultural Cooperative Marketing Association*, 200 USPQ 462 (TTAB 1978)

("PENN BEST" and "PENSUPREME" held not confusingly similar in spite of their similar suggestiveness due to the laudatory nature of the suffixes and geographical significance of the prefixes); *Sunbeam Corp. v. Green Bay Tissue Mills, Inc.*, 199 USPQ 695, 698 (TTAB 1978) ("although the designations 'PURE BREW' [for coffee filters] and 'CLEAR BREW' [for coffeemakers] may have similar meanings, the differences between them in sound and appearance are sufficient, in the view of the [suggestive] natures of such marks, to obviate any likelihood of confusion").

Despite the fact that the marks have similar meanings and engender similar commercial impressions, the differences in their appearance and sound outweigh the similarities. In view of the foregoing, we find that applicant's mark BENCHMARK RELIANCE is not similar to opposer's mark RELIANCE STANDARD.

F. Balancing the factors.

Based on the nature of the services, underwriting annuities, the high degree of care exercised by consumers in deciding whether to purchase such a financial instrument is a significant factor in the likelihood of confusion analysis. In this regard, the testimony and evidence of record indicate that consumers pay close attention to the financial stability and reputation of the underwriter.

We also find that the lack of any reported instances of actual confusion is relevant because there has been a reasonable opportunity for confusion to have occurred. Both parties have good reputations in the industry so that their annuities are marketed by the independent marketing organizations and independent agents. They render identical services, through the same channels of trade and to the same classes of consumers. In fact, opposer identified five Independent Marketing Organizations that sell the annuities underwritten by both parties. After seven (7) years of simultaneous use, there have been no reported instances of confusion.

Overall, and particularly in view of the high degree of care exercised by consumers, the lack of any reported instances of confusion, and the differences in the marks, we find that applicant's mark BENCHMARK RELIANCE for the "issuance and administration of annuities" is not likely to cause confusion with opposer's mark RELIANCE STANDARD for "insurance underwriting in the fields of life, health and accident; financial services in the fields of processing, funding, underwriting, issuing and administering annuities." Because we did not find a likelihood of confusion between applicant's mark and opposer's mark RELIANCE STANDARD for in part identical services, there is no likelihood of confusion between applicant's mark and the more different mark RSL

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RELIANCE STANDARD LIFE INSURANCE COMPANY for "life accident and health insurance underwriting services."

In reaching this conclusion, we have carefully considered all of the evidence pertaining to the relevant *du Pont* factors, as well as all of the parties' arguments with respect thereto (including any evidence and arguments not specifically discussed in this opinion).

Decision: The counterclaim to cancel opposer's Registration No. 3064739 is dismissed.

The opposition is dismissed and applicant's mark will be forwarded for registration in due course.