Hearing:
November 18, 2010

Mailed:
March 14, 2011

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Lincoln National Life Insurance Company
v.
LifeVentures Corp.

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Opposition No. 91179205
to Application Serial No. 78974288
filed September 14, 2006

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Jonathan P. Froemel of Barnes & Thornburg LLP for Lincoln National Life Insurance Company.

Erik M. Pelton for Erik M. Pelton & Associates, PLLC for LifeVentures Corp.

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Before Walters, Grendel and Bergsman,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Lincoln National Life Insurance Company ("opposer"), has opposed the application filed by LifeVentures Corp. ("applicant") to register the mark LIFE FOR THE LIVING, in standard character form, for services ultimately identified as "insurance agency services in the field of life insurance," in Class 36. As the ground for opposition, opposer has alleged likelihood of confusion under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d). Specifically, opposer has alleged that it is the owner of a

registration for the mark LIFE INSURANCE FOR LIVING for "universal life insurance underwriting that prepays the death benefit for long-term care," in Class 36 and that the registration of applicant's mark so resembles opposer's mark as to be likely to cause confusion.[1]

In its answer, applicant denied the salient allegations in the notice of opposition. In an amended answer, applicant filed a counterclaim to cancel opposer's pleaded registration on the ground of abandonment and on the ground that opposer's mark is generic. In its reply to the counterclaim, opposer denied the salient allegations of the counterclaim.

Preliminary Issues

A. The Improper Designation of Confidential Information

The Board's standard protective order is applicable in this proceeding. Consistent with Fed.R.Civ.P. 26(c)(1), the Board's standard protective order protects confidential, trade secret, and commercially sensitive information by allowing a party to limit the access to trade secret or other confidential information or by permitting the information to be revealed only in a designated way. The Advisory Committee Notes to the 1970 Amendment to Fed.R.Civ.P. 26(c) explains that the Rule does not provide complete immunity against disclosure; rather, in each case,

[1] Registration No. 2345497, issued April 25, 2000; renewed.

the need for privacy must be weighed against the need for disclosure.

During the trial, the parties designated as confidential the entire discovery and testimony depositions of Stephen Sharrock, applicant's President, and the testimony deposition of Jodi Dodson, opposer's Marketing Director for life insurance, MoneyGuard, and group protection products. Very little of the testimony and evidence falls within the penumbra of confidential or commercially sensitive information. For example, in both of his depositions, Mr. Sharrock testified about the services set forth in the application. While some of the specifics regarding applicant's services may be commercially sensitive because the services are under development, all discussion regarding the scope of applicant's services cannot be confidential or commercially sensitive because they are listed in its application and are publicly available. In this regard, Section 7(c) of the Trademark Act, 15 U.S.C. §1057(c), provides that filing an application for registration on the Principal Register, including an intent-to-use application, establishes constructive use and nationwide priority, contingent on issuance of the registration. The identification of goods and/or services in an application defines the scope of those rights established by the filing of an application for registration

on the Principal Register. The scope of applicant's services cannot be confidential or commercially sensitive because the purpose of the application is to put the public on notice as to the extent of applicant's rights.

Because of the over designation of testimony and evidence by the parties, it is not clear to us what is intended to be truly "Confidential," "Highly Confidential" or "Trade Secret/Commercially Sensitive." Therefore, in rendering our decision, we will not be bound by the parties' designation. Board proceedings are designed to be publicly available and the improper designation of materials as confidential thwarts that intention. It is more difficult to make findings of fact, apply the facts to the law, and write decisions that make sense when the facts may not be discussed. The Board needs to be able to discuss the evidence of record, unless there is an overriding need for confidentiality, so that the parties and a reviewing court will know the basis of the Board's decisions. Therefore, In view of the parties' improperly broad designations of confidentiality, in this opinion, we will treat only testimony and evidence that we find to be truly confidential and commercially sensitive as confidential. *See Edwards Lifesciences Corp. v. VigiLanz Corp.,* 95 USPQ2d 1399, 1402-1403 (TTAB 2010).

B. Opposer's Objection to Applicant's Notice of Reliance.

Opposer objects to Exhibits 2-6 of Applicant's notice of reliance on the ground that the documents were not produced during discovery. Initially, we note that opposer's objection is not substantively significant. First, none of the documents which are the subject of the objection are case dispositive; that is, the admissibility or inadmissibility of any of these documents does not affect the outcome of the case. Second, some of the documents, as discussed in the analysis of the claims, favor opposer's position. Finally, most of the documents are irrelevant.

Nevertheless, to clarify the record, we must discuss the specific objections.

1. Exhibit 2 – Third-party registrations.

During discovery, opposer requested that applicant produce "[a]ll documents referring or relating to Applicant's awareness of the use or registration or attempted registration by any third party, including Opposer, of the Mark."[2] Applicant asserted boilerplate objections and answered that it had none.[3] Opposer's objection is overruled. With the exception of the search report conducted for applicant by LegalZoom.com, there is no basis for assuming that applicant had any knowledge of

[2] Opposer's Document Request No. 27.
[3] Applicant's Response to Opposer's Document Request No. 27.

third-party registrations until its counsel copied the registrations for the notice of reliance. Thus, applicant did not have custody of those documents prior to trial.

Although applicant had the search report conducted by LegalZoom.com during discovery, it is not clear why applicant did not produce it. Nevertheless, the search report has no bearing on our decision in this case.

2. Exhibit 3 – Opposer's Client Product Guide, Client Overview brochure, and Advisor Guide brochure.

Opposer asserts that applicant should have produced the above-identified documents in response to the above-noted Document Request No. 27. Applicant contends that because they are opposer's documents, opposer is not prejudiced and, that in any event, opposer failed to produce them in response to applicant's written discovery. Opposer's objection to applicant's introduction of Opposer's Client Product Guide is overruled. Through its notice of reliance, applicant is seeking to introduce an original of the 2007 Product Guide. Opposer introduced a copy of the 2008 Product Guide through the testimony deposition of Jodi Dodson.[4] The two documents are substantially the same and the 2007 Product Guide introduced by applicant more accurately displays the mark at issue.

[4] Dodson Dep., Exhibit 26.

With respect to the Client Overview and Advisor Guide brochures, neither document displays "the Mark" at issue so they are not responsive to opposer's Document Request No. 27. Accordingly, opposer's objection is overruled.[5]

3. Exhibit 4 – Dictionary Definitions.

Opposer did not explain the basis of this objection, so it is overruled. In any event, the Board may take judicial notice of dictionary definitions and other reference books. *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594 (TTAB 1982), *aff'd,* 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983) (dictionary definitions); *In re Broyhill Furniture Industries Inc.,* 60 USPQ2d 1511 1514 n.4 (TTAB 2001) (dictionary definitions and standard reference works).

4. Exhibit 5 – "Insurance industry publications and materials."

Exhibit 5 in applicant's notice of reliance consists of the documents listed below. Applicant authenticated the documents through a declaration by a law clerk employed by applicant's counsel. Trademark Rule 2.123(b) provides that "[b]y written agreement of the parties, the testimony of any witness or witnesses of any party, may be submitted in the form of an affidavit by such witness or witnesses." Because

[5] Despite overruling opposer's objection, applicant's argument that it should be forgiven for failing to produce the documents during discovery because opposer failed to produce the documents during discovery is meritless and frivolous.

there is no stipulation as to the admissibility of the declaration authenticating applicant's documents, the declaration is given no consideration. Therefore, as discussed below, the admissibility of each document depends on what it shows on its face.

a. A glossary of terms from the Life and Health Insurance Foundation for Education. The source of this document does not appear on the document. *See Safer Inc. v. OMS Investments Inc.,* 94 USPQ2d 1031, 1039 (TTAB 2010) (a document obtained from the Internet that identifies its date of publication or date that it was accessed and its source (e.g., the URL) may admitted into evidence pursuant to Trademark Rule 2.122(e)). Opposer's objection is sustained and the document is stricken.

b. Life Insurance and Annuities, a booklet by the California Department of Insurance, Virginia Life Insurance Consumer's Guide, a booklet prepared by the Commonwealth of Virginia State Corporation Commission Bureau of Insurance, explaining life insurance policies and annuities to consumers, and Own Your Future, a booklet prepared by the U.S. Department of Health & Human Services, regarding long term care. These documents appear to be official publications from their respective states and the federal government and, therefore, admissible pursuant to Trademark

Rule 2.122(e) providing for the introduction of official records through a notice of reliance.

c. What You Should Know About Buying Life Insurance, a booklet published by the American Council of Life Insurers. The document displays a URL (acli.com) and its date (a 2008 copyright notice). Accordingly, it is admissible pursuant to *Safer.*

d. Webpages from (i) the New York State Insurance Department, "Top Ten Questions," (ii) the Independent Insurance Agents & Brokers of America, "How Financially Secure Are Your Insurance Providers," (iii) U.S. Department of Health and Human Resources, "Paying for LTC," (iv) a glossary of terms from the longtermcare.gov website, and (v) a glossary of terms from opposer's website all of which displayed URLs and dates and, therefore, are admissible pursuant to *Safer.*

5. Exhibit 6 - Internet third party use of the terms at issue.

Applicant attempted to authenticate these documents through the declaration of a law clerk working for applicant's counsel. As indicated above, there was no stipulation authorizing the testimony of the witness by declaration. Accordingly, the Internet documents are admissible only if they meet the requirements set forth in *Safer* discussed above. In this regard, the following documents did not meet the *Safer* requirements: the United of

Omaha Insurance Company brochure, the document from the Professional Planning Associates, Inc., the Mutual of Omaha document, and the "Reference Publications" document.

The Record

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

A. Opposer's Evidence.

1. Testimony deposition of Jodi Dodson, opposer's Marketing Director for life insurance, MoneyGuard, and group protection products, with attached exhibits; and

2. A notice of reliance with the following items:

   a. Discovery deposition transcript of Stephen Sharrock, applicant's President, with attached exhibits;

   b. Applicant's response to opposer's written discovery;[6]

   c. Copies of opposer's pleaded registration showing the current status and ownership

[6] There is no provision in the Trademark Rules of Practice for introducing applicant's response to opposer's document requests through a notice of reliance. Accordingly, we considered applicant's responses to opposer's document requests only to resolve opposer's objections to applicant's notice of reliance.

printed from the U.S. Patent and Trademark Office's TESS and TARR automated databases;

d. Copies of various third party applications and file histories printed from the electronic database of the U.S. Patent and Trademark Office to demonstrate opposer's efforts to enforce its mark;

e. Copies of various oppositions printed from the electronic database of the U.S. Patent and Trademark Office to demonstrate opposer's efforts to enforce its mark; and

f. A copy of opposer's application Serial No. 77612703 for the mark LIFE INSURANCE FOR LIVING for "life insurance underwriting" and portions of its file history.

B. Applicant's Evidence.

1. Testimony deposition of Stephen Sharrock, with attached exhibits.

2. A notice of reliance on the following items:

a. Documents produced by opposer during discovery and authenticated in responses to applicant's requests for admission;

b. Third-party registrations;

c. Opposer's Client Product Guide, Client

Overview brochure, and Advisor Guide brochure discussed above;

d. Dictionary definitions;

e. "Insurance industry publications and materials" and government publications discussed above;

f. Internet evidence discussed above;

g. Opposer's responses to applicant's discovery requests.[7]

Applicant's Counterclaims

We first address applicant's counterclaims to cancel opposer's pleaded Registration No. 2345497.

Standing.

Applicant has standing based on its position as defendant in the opposition initiated by opposer. *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").

Whether Opposer's Mark Is Generic.

There is a two-part test used to determine whether a designation is generic: (1) what is the genus of services

[7] As indicated in footnote No. 6, there is no provision in the Trademark Rules of Practice for the introduction of opposer's responses to applicant's requests for production of documents through a notice of reliance. Accordingly, we did not consider those documents.

at issue? and (2) does the relevant public understand the designation primarily to refer to that genus of services? *H. Marvin Ginn Corp. v. Int'l Assn. of Fire Chiefs, Inc.*, 782 F.2d 987, 990, 228 USPQ 528, 530 (Fed. Cir. 1986). The public's perception is the primary consideration in determining whether a term is generic. *Loglan Inst. Inc. v. Logical Language Group Inc.*, 902 F.2d 1038, 22 USPQ2d 1531, 1533 (Fed. Cir. 1992). Evidence of the public's understanding of a term may be obtained from any competent source, including testimony, surveys, dictionaries, trade journals, newspapers and other publications. *Loglan Inst.* 22 USPQ2d at 1533; *Dan Robbins & Associates, Inc. v. Questor Corp.*, 599 F.2d 1009, 202 USPQ 100, 105 (CCPA 1979).

Where, as here, the mark is in the nature of a phrase, applicant must provide evidence of the meaning of the composite mark as a whole. *In re American Fertility Society*, 188 F.3d 1341, 51 USPQ2d 1832, 1837 (Fed. Cir. 1999) (SOCIETY FOR REPRODUCTIVE MEDICINE not generic for association services in the field of reproductive medicine because where the mark is a phrase evidence that each separate term is generic is not sufficient). *See also In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807, 1810 (Fed. Cir. 2001) (1-888-M-A-T-R-E-S-S not generic for telephone shop-at-home retail services in the field of mattresses because it "bears closer conceptual resemblance

to a phrase than a compound word" and there is no evidence of record that the mark as a whole is generic); and *In re Active Ankle Systems Inc.*, 83 USPQ2d 1532 (TTAB 2007) (DORSAL NIGHT SPLINT found generic for orthopedic splints for the foot and ankle based on record that included third-party use of the entire phrase).

A. The genus of services at issue.

The category of services involved here is underwriting life insurance; specifically underwriting life insurance with an accelerated benefits option. *See* the description of services in opposer's pleaded registration ("universal life insurance underwriting that prepays the death benefit for long-term care); Dodson Dep., p. 6 ("MoneyGuard is a universal life insurance product with an accelerated benefits rider which provides for long-term care needs"), p. 12 ("it provides funds for long-term care in the context of a life insurance policy"); Dodson Exhibit 5, p. 4 ("If you should ever need long-term care benefits … your portion of the death benefit is accelerated to pay for covered long-term care services"). Applicant agrees that the category of services is "life insurance with living benefits."[8] In fact, the original description of services in applicant's application was "life insurance products that provide death benefits but also significant living benefits." "Living

[8] Applicant's Brief, p. 32.

benefits" are "benefits provided to and obtained by those insured, while still alive. They include the ANNUITY, CASH SURRENDER VALUE, DISABILITY INCOME (DI), POLICY LOAN, and WAIVER OF PREMIUM (WP)."[9] (Emphasis in the original).

B. The relevant public.

The second part of the generic test is whether the relevant public understands the designation primarily to refer to that class of goods. The relevant public for a genericness determination is the purchasing public for the services at issue. *Magic Wand Inc. v. RDB Inc.,* 940 F.2d 638, 19 USPQ2d 1551, 1553 (Fed. Cir. 1991). According to opposer's witness Jodi Dodson, the relevant consumers are between the ages of 50 and 80 with $500,000 or more in assets. "We would consider them mass affluent, kind of middle income, or we also market to the high net worth and high (sic) affluent."[10] Opposer's 2007 MoneyGuard Reserve Advisor Guide brochure describes prospective clients as "astute adults, ages 55-75," "financially secure," "have at least $300,000 in assets," and "are concerned about the impact long-term care could have on their retirement income security."[11] Similarly, applicant identifies the ultimate

[9] Dictionary of Insurance Terms, p. 289 (4th ed. 2000). *See also* Insurance Words & Their Meanings, p. 111 (21st ed. 2006) ("benefit options where the cash value or proceeds of life policies are paid to a terminally ill insured to provide funds for the financial burden of the illness").
[10] Dodson Dep., p. 53.
[11] Applicant's Notice of Reliance, Exhibit 3.

consumers for its life insurance services that provide living benefits as people who are concerned about out-living assets, preserving retirement assets and not becoming a burden on their families.[12] In its brief, applicant contends that the relevant public is "general consumer(s) with life insurance needs and long-term care needs."[13]

Based on the testimony and evidence discussed above, we find that the relevant consumers are consumers with life insurance needs and long-term care needs who are between the ages of 55-80, financially secure, with at least $300,000 in assets and who want to preserve their retirement income and assets in the event that they need long-term care.

C. Public Perception.

1. Dictionary and glossary definitions.

"Life insurance" is defined as "insurance providing payment of a stipulated sum to a designated beneficiary upon the death of the insured."[14]

"Living" is defined as "the condition of being alive," "having life" and "involving living persons."[15]

While there is no definition for "Life Insurance For Living," applicant argues that "[o]pposer's mark is

[12] Sharrock Discovery Dep., Exhibits 10 and 11; Sharrock Testimony Dep., Exhibit 4.
[13] Applicant's Brief, p. 32.
[14] Merriam-Webster Online Dictionary (2009) applicant's notice of reliance Exhibit 4.
[15] *Id.*

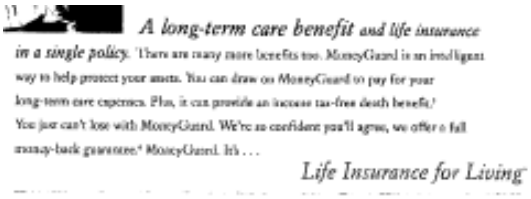
essentially 'Life Insurance for Living Benefits' with the word 'benefits' left off the end."[16] As indicated above, "living benefits" are "benefits provided to and obtained by those insured, while still alive."

2. Opposer's use of LIFE INSURANCE FOR LIVING.

As shown by the Dodson testimony deposition exhibits, opposer uses LIFE INSURANCE FOR LIVING as a stand alone mark to identify its underwriting services or as an advertising tagline in connection with the MoneyGuard mark to identify those services. Below is representative sample of opposer's use of the mark as an advertising tagline.[17]

MONEYGUARD®
Life Insurance for Living℠

In advertising brochures, LIFE INSURANCE FOR LIVING is used as a stand alone mark to identify opposer's MoneyGuard combined life insurance and long term care insurance policy.[18] The excerpt shown below is representative of how opposer has displayed its mark.[19]


A long-term care benefit and life insurance in a single policy. There are many more benefits too. MoneyGuard is an intelligent way to help protect your assets. You can draw on MoneyGuard to pay for your long-term care expenses. Plus, it can provide an income tax-free death benefit.† You just can't lose with MoneyGuard. We're so confident you'll agree, we offer a full money-back guarantee.* MoneyGuard. It's . . .
Life Insurance for Living™

[16] Applicant's Brief, p. 32.
[17] Dodson Dep., Exhibit 4. The samples of stand alone use will not reproduce well enough to be helpful in this decision.
[18] Dodson Dep., Exhibits 5-9 and 11-20.
[19] Dodson Dep., Exhibit 9.

In opposer's 2007 and 2008 Client Program Guide, opposer uses "*Life insurance for living®*" in its table of contents and as a chapter heading.[20] The use of the mark as a chapter heading in the 2008 Client Program Guide is shown below.[21]

Life insurance for living®

Consider what life will be like in the next five to ten years. Do you envision retirement income security or a time of financial uncertainty? Lincoln *MoneyGuard*® Reserve can help you focus on the big picture, so you'll have less to worry about for your financial future.

Yours today for tomorrow

Lincoln *MoneyGuard* Reserve links life insurance and long-term care in one policy, protecting your assets from the risk of long-term care expenses while providing an income tax-free death benefit you can pass to your loved ones. Products and features are subject to state availability.

Lincoln *MoneyGuard* Reserve lets you:

- Get more for your long-term care dollar
- Get your money back if you don't need to use your policy—when you fund your policy with a single premium payment or certain flexible payments.
- Be tax-smart about long-term care with income tax-free benefits

Opposer does not use LIFE INSURANCE FOR LIVING descriptively in any of the materials made of record.

[20] Dodson Dep., Exhibit 26; applicant's notice of reliance Exhibit No. 3.

[21] In the 2007 Client Program Guide the mark is not displayed in italics. The mark is the color green while the remainder of the text is black.

3. Applicant's use of the term LIFE INSURANCE FOR LIVING.

Applicant does not use the term LIFE INSURANCE FOR LIVING; it uses LIFE FOR THE LIVING as a service mark in materials prepared in preparation for rendering its services. Moreover, applicant does not use the term LIFE INSURANCE FOR LIVING to refer to its life insurance with living benefits concept.

4. Third-party registrations.

Applicant introduced into evidence 180 third-party registrations as evidence of the strength and meaning of opposer's mark.[22] More than 20 of the registrations include the word "Living" and more than 120 of the registrations include the term "Life Insurance."[23] None of the registrations include both the word "Living" and the term "Life Insurance." None of the registrations include the word "Living" or the term "Living Benefits" in their description of services.

FBBC, LLC owns two registrations on the Principal Register for the term "Living Benefit" for the following services:

1. Registration No. 2907500, issued December 7, 2004

> Financial and investment services, namely, originating, underwriting, acquiring, managing, administering and brokering previously owned life insurance policies; and

[22] Applicant's First Notice of Reliance, p. 2 and Exhibit 2.
[23] Applicant's Brief, p. 44.

2. Registration No. 2716888, issued May 20, 2003

Financial services, namely managing life insurance policies purchased from the terminally ill.

Also, three registrations used the term "viatical settlements and life insurance settlement services." "Viatical settlements" are "[w]hen all of the proceeds from a life insurance policy are provided or paid out to an insured who is terminally ill."[24]

5. The use of the term LIFE INSURANCE FOR LIVING by third parties.

As discussed above, much of applicant's third-party evidence submitted as part of Exhibit 6 of its notice of reliance was inadmissible. In addition, much of it was not relevant because it did not relate to insurance services (*e.g.*, an unidentified webpage identifying LIFE FOR THE LIVING as the title for an unidentified work). We discuss below the relevant and admissible third-party use of the term LIFE INSURANCE FOR LIVING.

a. An article from *Time* magazine (October 18, 1963) (time.com) regarding selling life insurance in India. According to the article, selling life insurance in India presents a unique challenge because many Indians believe

[24] Insurance Words & Their Meanings, p. 185. *See also* Federal Employees' Group Life Insurance Program Handbook, U.S. Office of Personnel Management attached to applicant's notice of reliance Exhibit No. 4, defining "viatical settlement" as private sector payments of "living benefits."

that life insurance "defies and tempts the gods," "land seems the only smart investment, and attempts to sell them life insurance are repulsed as schemes to snatch their money." Accordingly, "[A]gents are trained to sell 'life insurance for living' with policies that pay for retirement or for the marriage of a daughter as well as death benefits."

b. A webpage from *ProducersWeb.com* prompting the column from "Life Insurance for Living" purportedly in the field of life insurance strategies. The actual column was not introduced into evidence.

c. A webpage from *ExPatFinder.com,* a website for persons living abroad, displaying a section entitled "Life Insurance for Living." The section is a link to "free and easy quotes to find the best life insurance plan with the best premium according to your specific situation and needs."

d. An excerpt from the Aetna insurance website (aetna.com) prompting the company's Aetna Life Essentials program. The relevant section states that "There is an old saying that life insurance isn't for the dead – it's for the living – so why shouldn't you be able to take advantage of resource and services available through your coverage while you're living?"

D. Discussion

There is simply no evidence demonstrating that the term LIFE INSURANCE FOR LIVING is perceived as a generic term for life insurance underwriting services. Based on the evidence before us, we find that the term LIFE INSURANCE FOR LIVING is suggestive when used in connection with "universal life insurance underwriting that prepays the death benefit for long-term care" because the mark is incongruous and, therefore, it takes a multiple-step reasoning process to make the connection between the services and the mark. The mark LIFE INSURANCE FOR LIVING is incongruous because life insurance is not for living; it provides a death benefit for the insured's survivors. As demonstrated by opposer's use of the mark, applicant's use of its mark, and the third-party use of the mark, or similar terms, LIFE INSURANCE FOR LIVING suggests that a life insurance policy may do more than just pay a death benefit; it may have benefits during the owner's life, hence, LIFE INSURANCE FOR LIVING.

Simply put, applicant has failed to meet its burden of proving that relevant consumers perceive the term LIFE INSURANCE FOR LIVING to be a generic term. Accordingly, the counterclaim to cancel opposer's pleaded registration on the ground that the mark is generic is dismissed with prejudice.

Whether Opposer Has Abandoned Its Mark?

Under Section 45 of the Trademark Act of 1946, 15 U.S.C. 1127, a mark shall be deemed abandoned *inter alia*:

> (a) When its use has been discontinued with intent not to resume such use. Intent not to resume may be inferred from circumstances. Nonuse for 3 consecutive years shall be prima facie abandonment. "Use" of a mark means the bona fide use of such mark made in the ordinary course of trade, and not made merely to reserve a right in the mark.

Under the Act, *prima facie* abandonment is established by proof of its nonuse for three consecutive years. To overcome that *prima facie* case, the respondent (opposer in this case) must come forth with evidence that it did not "discontinue" use of the mark, or if such use had been discontinued, the nonuse of the mark was without "an intent not to resume" use. *Imperial Tobacco Ltd. v. Philip Morris Inc.*, 899 F.2d 1575, 14 USPQ2d 1390, 1393 (Fed. Cir. 1990).

Applicant contends that opposer has abandoned its use of the mark LIFE INSURANCE FOR LIVING for the following reasons:

> Opposer's use of "Life Insurance for Living" as the title of one section in only one brochure among many marketing materials encountered by purchasers does not amount to a *bona fide* use of Opposer's mark in the ordinary course of trade. Rather, Opposer's actions amount to only token or sham use, sufficient to satisfy the limited requirements of trademark maintenance and renewal, but insufficient to reasonably create in

> consumers any source identifying function.[25]
>
> * * *
>
> Here, Opposer has discontinued *bona fide* use of the LIFE INSURANCE FOR LIVING mark in the ordinary course of trade as required by the Lanham Act. Furthermore, the evidence shows that Opposer's lack of *bona fide* use has continued for at least three consecutive years. However, even if the Board finds that Opposer discontinued *bona fide* use less than three years, Opposer's acts and omissions demonstrate its intent not to resume a *bona fide* use in the foreseeable future.[26]

Applicant focuses its argument on opposer's use of the mark as a chapter heading in the 2008 Client Program Guide shown below,[27] as the most current use of the mark, arguing that the use of the mark is so limited that it does not function as a trademark and that its limited use is not consistent with the ordinary course of trade.[28]

[25] Applicant's Brief, p. 20.
[26] Applicant's Brief, p. 22.
[27] Dodson Dep., Exhibit 26.
[28] Applicant's Brief, p. 22.

Life insurance for living®

Consider what life will be like in the next five to ten years. Do you envision retirement income security or a time of financial uncertainty? Lincoln *MoneyGuard®* Reserve can help you focus on the big picture, so you'll have less to worry about for your financial future.

Yours today for tomorrow
Lincoln *MoneyGuard* Reserve links life insurance and long-term care in one policy, protecting your assets from the risk of long-term care expenses while providing an income tax-free death benefit you can pass to your loved ones. Products and features are subject to state availability.

Lincoln *MoneyGuard* Reserve lets you:

- Get more for your long-term care dollar
- Get your money back if you don't need to use your policy—when you fund your policy with a single premium payment or certain flexible payments.
- Be tax-smart about long-term care with income tax-free benefits

Even though LIFE INSURANCE FOR LIVING is a chapter heading in opposer's Client Program Guide, we find that it would be perceived as a service mark because it is used to introduce opposer's MoneyGuard combination life insurance and long-term care policy; that is, it serves the purpose of a service mark to identify and distinguish opposer's underwriting services. Furthermore, the mark is highlighted by being displayed at the top of the page, in a larger font and in italics.

Applicant argues that opposer's limited use of its mark in the Client Program Guide since 2008 is not consistent good faith use of the mark in the ordinary course of business and that such use is intended only for the purpose

of maintaining the registration.[29] Applicant bases this claim on opposer's extensive advertising for its MoneyGuard policy without LIFE INSURANCE FOR LIVING.

Section 45 of the Trademark Act, 15 U.S.C. §1127, defines "use in commerce" as the "bona fide use of a mark in the ordinary course of trade, and not merely to reserve a right in a mark."

> A key factor is that the sale or sales made cannot be "token" in the sense that they are artificially made solely to reserve a right in a mark and not made as part of a usual product or service launch. Thus, even sales made in a test marketing program will probably suffice as a bona fide use of the mark in the ordinary course of trade because test market sales are a common harbinger of a proposed new product launch.

McCarthy On Trademarks And Unfair Competition §19:109 (4th ed. 2010).

Use in commerce should be interpreted with flexibility to account for different industry practices.

> The legislative history of the Trademark Law Revision Act reveals that the purpose of the amendment was to eliminate "token use" as a basis for registration, and that the new, stricter standard contemplates instead commercial use of the type common to the particular industry in question.

Paramount Pictures Corp. v. White, 31 USPQ2d 1768, 1774 (TTAB 1994), *aff'd*, *White v. Paramount Pictures Corp.*, 108 F.3d 1392 (Fed. Cir. 1997) (non-precedential).

[29] Applicant's Brief, pp. 23-26.

As presented by applicant, the issue we must decide is whether opposer's use of the mark LIFE INSURANCE FOR LIVING in its 2008 Client Program Guide is a legitimate commercial use in the ordinary course of business or a token use for the purpose of maintaining the registration. If the Client Program Guide is a legitimate marketing tool or other commercially reasonable use of media in the ordinary course of trade (*i.e.*, genuine use of the mark), then we must find that the Client Program Guide constitutes *bona fide* use of the mark in commerce.

Based on the testimony and evidence of record, we find that opposer's 2008 Client Program Guide displays a *bona fide* commercial use of the mark in connection with opposer's underwriting services. Jodi Dodson testified that the Client Program Guide explains the details and mechanics about its life insurance policy with accelerated payments.[30] The Client Program Guide is distributed to the ultimate consumer through opposer's agents and it is still used today.[31]

> Q. But you can say that many of these sales would have been made in connection with marketing materials that included the Life Insurance for Living mark?
>
> A. Yes. The majority of kits that go out actually include the Client Program Guide which has it on page

[30] Dodson Dep., p. 46.
[31] Dodson Dep., pp. 46-47.

> 1, and also then the first section of that guide, and those kits are used at the point of sale for the majority of these sales.[32]

Dodson Exhibit No. 5 are copies of seven invoices from January 3, 2007 through November 18, 2008 to print the Client Program Guide.[33] The January 2008 invoice was for 15,000 copies, the May 2008 invoice was for 25,000 copies and the November 2008 invoice was for 4,000 copies of the Client Program Guide. The 44,000 copies of the Client Program Guide printed in 2008 is evidence of more than mere token use to maintain opposer's registration. Furthermore, we note that applicant was able to obtain its own copy of the 2007 Client Program Guide, thus, indicating that the Client Program Guides are in circulation. [34]

Applicant introduced numerous examples of other materials used by opposer to promote its underwriting services; none of which use the mark LIFE INSURANCE FOR LIVING. Applicant contends that "the Board must seriously question whether consumers can come to associate the mark with Opposer or its services without encountering it more than once or even in the context of an identifier of source"[35] and that "[b]arring a reasonable explanation for

[32] Dodson Dep., p. 56.
[33] Dodson Dep., pp. 47-50.
[34] Applicant's Brief, p. 6 wherein applicant explained that opposer withheld the Client Program Guide from opposer's responses to applicant's request for production of documents.
[35] Applicant's Brief, p. 25.

such extraordinarily limited use of Opposer's mark, the Board must assume that Opposer lost interest in the mark."[36] The problem with applicant's argument is that it is based on the mistaken premise that the *bona fide* commercial use of a mark is based on the effectiveness of opposer's use, on some unspecified minimum quantity of use, or on a comparison with how opposer uses other marks or advertising materials. As indicated above, we must determine whether opposer's use of its mark is a legitimate commercial use in the ordinary course of business. There is nothing in applicant's evidentiary showing that persuades us that opposer's use of LIFE INSURANCE FOR LIVING in the Client Program Guide is anything other than a legitimate commercial use. There is no minimum quantity of use so long as the use is legitimate commercial use. *See E.I. du Pont de Nemours and Co. v. Big Bear Stores, Inc.*, 161 USPQ 50, 51 (TTAB 1969) (*bona fide* test marketing and experimental sales in small volumes are sufficient to show use of a mark); *compare Paramount Pictures Corp. v. White,* 31 USPQ2d 1768, 1769 n.9 (TTAB 1994), *aff'd*, *White v. Paramount Pictures Corp.*, 108 F.3d 1392 (Fed. Cir. 1997) (non-precedential) (the use at issue was not genuine trademark use, it was *de minimis* and noncommercial in nature and not made in the ordinary course of trade in games). Furthermore, the fact that

[36] Applicant's Brief, p. 26.

opposer does not use the mark LIFE INSURANCE FOR LIVING on all or most of its promotional literature is not dispositive so long as the use that opposer does make is legitimate commercial use.

In view of Jodi Dodson's testimony deposition taken in April 2009 that the 2008 Client Program Guide displaying the mark LIFE INSURANCE FOR LIVING is currently being used and opposer's order for 4,000 copies of the 2008 Client Program guide in November 2008, we find that opposer has been using the mark at least as late as April 2009. Therefore, applicant has failed to prove that there has been not been any use of the mark by opposer, let alone nonuse of the mark for three consecutive years.

In view of the foregoing, the counterclaim to cancel opposer's pleaded registration on the ground of abandonment is dismissed with prejudice.

Opposer's Claim Of Likelihood Of Confusion

Standing

Because opposer has properly made its pleaded registration of record, opposer has established its standing. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982).

Priority

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

Likelihood of Confusion

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 fame of opposer's marks.

This *du Pont* factor requires us to consider the fame of opposer's marks. Fame, if it exists, plays a dominant role in the likelihood of confusion analysis because famous marks enjoy a broad scope of protection or exclusivity of use. A famous mark has extensive public recognition and renown. *Bose Corp. v. QSC Audio Products Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002); *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000); *Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992).

Fame may be measured indirectly by the volume of sales and advertising expenditures of the goods and services identified by the marks at issue, "by the length of time those indicia of commercial awareness have been evident," widespread critical assessments and through notice by independent sources of the products identified by the marks, as well as the general reputation of the products and services. *Bose Corp. v. QSC Audio Products Inc.*, 63 USPQ2d at 1305-1306 and 1309. Although raw numbers of product sales and advertising expenses may have sufficed in the past to prove fame of a mark, raw numbers alone may be misleading. Some context in which to place raw statistics may be necessary (*e.g.*, the substantiality of the sales or advertising figures for comparable types of products or services). *Bose Corp. v. QSC Audio Products Inc.*, 63 USPQ2d at 1309.

Finally, because of the extreme deference that we accord a famous mark in terms of the wide latitude of legal protection it receives, and the dominant role fame plays in the likelihood of confusion analysis, it is the duty of the party asserting that its mark is famous to clearly prove it. *Leading Jewelers Guild Inc. v. LJOW Holdings LLC*, 82 USPQ2d 1901, 1904 (TTAB 2007).

Opposer contends that the mark LIFE INSURANCE FOR LIVING is famous because (i) opposer has used the mark

continuously since 1997, (ii) opposer's underwriting services identified by the mark have generated substantial revenues, and (iii) opposer's advertising expenditures are substantial.[37]

While opposer has used the mark continuously since 1997, it has always been used in connection with opposer's MoneyGuard service mark. In fact, opposer's MoneyGuard mark is the primary mark and LIFE INSURANCE FOR LIVING is a secondary mark used in the nature of an advertising tagline. The fact that MoneyGuard as the primary mark and LIFE INSURANCE FOR LIVING is a secondary mark is demonstrated by the fact that opposer's has extensively advertised its underwriting services with the MoneyGuard mark, while opposer's use of LIFE INSURANCE FOR LIVING is less extensive.[38] In this regard, the evidence of record shows that all the advertising for opposer's underwriting services feature the MoneyGuard mark, LIFE INSURANCE FOR LIVING is used on only some of the advertising, and there are no advertising materials featuring LIFE INSURANCE FOR LIVING without MoneyGuard. Thus, there is no independent reference to the services apart from the MoneyGuard mark and consumers have no basis on which to disassociate LIFE INSURANCE FOR

[37] Opposer's Brief, pp. 10-12.
[38] Applicant's Notice of Reliance, Exhibit 7.

LIVING from MoneyGuard. *See Bose Corp. v. QSC Audio Products Inc.*, 63 USPQ2d at 1307-1308.

Opposer has designated its revenues and advertising expenditures as confidential so we many only refer to them in general terms. The revenues are substantial but the advertising is not substantial. In any event, as indicated above, LIFE INSURANCE FOR LIVING is never presented without MoneyGuard so we have no basis on which to assess the consumer recognition and renown of LIFE INSURANCE FOR LIVING. Furthermore, opposer failed to introduce any evidence demonstrating the context in which to place opposer's revenues and advertising expenditures (*e.g.*, where opposer's MoneyGuard policy stands in terms of market share, how opposer's advertising expenditures relate to the expenditures of competitors, how many consumers encounter opposer's mark, etc.).

Finally, we note that opposer failed to introduce any evidence regarding critical attention or unsolicited media referencing the mark and thereby demonstrating its renown.

When the record is fully considered, it is evident that opposer not only failed to show that its mark LIFE INSURANCE FOR LIVING is famous, but opposer failed to show that the mark has any particular marketplace strength.

B. 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. In a particular case, any one of these means of comparison may be critical in finding the marks to be similar. *In re White Swan Ltd.*, 9 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 (TTAB 1988). In comparing the marks, we are mindful that the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression so that confusion as to the source of the goods and services offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd unpublished,* No. 92-1086 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than a specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB

1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). As noted above, the relevant consumers are consumers with life insurance needs and long-term care needs who are between the ages of 55-80, financially secure, with at least $300,000 in assets and who want to preserve their retirement income and assets in the event that they need long-term care.

The marks are similar in appearance and sound because they share the same structure beginning with the word "Life," followed by the word "For," followed by the word "Living" (LIFE INSURANCE FOR LIVING vs. LIFE FOR THE LIVING). As indicated in the determination of whether LIFE INSURANCE FOR LIVING is generic, opposer's mark suggests that a life insurance policy may do more than just pay a death benefit; it may have useful benefits during the owner's life, hence, LIFE INSURANCE FOR LIVING. By the same token, applicant's mark LIFE FOR THE LIVING connotes "life insurance and the living benefits associated with it."[39] Thus, the two marks engender the same commercial impression. We find, therefore, that the marks are more similar than dissimilar.

Applicant contends that the marks engender different commercial impressions. Applicant's mark suggests that applicant's services "provide life insurance benefits for

[39] Sharrock Testimony Dep., p. 11.

people and their families before they pass. … Applicant's mark suggests that 'THE LIVING' can benefit from life insurance too. … [A]nd also to 'living' life and enjoying it in the present rather than receiving benefits solely upon death."[40] On the other hand, applicant contends that opposer's mark engenders the commercial impression "living benefits before death."[41] Applicant's argument presents a distinction without a difference. Both interpretations presented by applicant suggest life insurance policies providing living benefits.

In view of the foregoing, we find that the marks are similar in terms of appearance, sound, meaning and commercial impression.

C. The similarity or dissimilarity and nature of opposer's services and the services described in the application, the established likely-to-continue trade channels and classes of consumers.

It is well settled that likelihood of confusion is determined on the basis of the services as they are identified in the application and in the pleaded registration. *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983).

> The authority is legion that the question of registrability of an

[40] Applicant's Brief, pp. 39-40.
[41] Applicant's Brief, p. 40.

> applicant's mark must be decided on the basis of the identification of goods set forth in the application ***regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed***. (Emphasis added).

Octocom Systems, Inc. v. Houston Computers Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). *See also Crocker National Bank v. Canadian Imperial Bank of Commerce*, 228 USPQ 689, 690 (TTAB 1986).

Applicant is seeking to register its mark for "insurance agency services in the field of life insurance." "Insurance agency services" involve a "business office whose function is the sales of insurance and insurance products."[42] An "insurance agent" is "the person who sells insurance by contacting the policy holder."[43] Opposer's services are "universal life insurance underwriting that prepays the death benefit for long-term care." "Underwriting" services are defined as "the process of selecting, classifying, evaluating, rating and assuming risks."[44]

In determining whether the services of the parties are related, we are mindful that there is no *per se* rule that

[42] Insurance Words & Their Meanings, p. 98 (21st ed. 2006).
[43] *Id. See also* Dictionary of Insurance Terms, p. 244 (4th ed. 2000) defining an "insurance agent" as the "representative of an insurance company in soliciting and servicing policy holders."
[44] Insurance Words & Their Meanings, p. 181.

services sold in the same field or industry are similar or related for purposes of likelihood of confusion. *Cooper Industries, Inc. v. Repcoparts USA, Inc.*, 218 USPQ 81, 84 (TTAB 1983) ("the mere fact that the products involved in this case (or any products with significant differences in character) are sold in the same industry does not of itself provide an adequate basis to find the required 'relatedness'"). "[T]he inquiry should be whether they appeal to the same market, not whether they resemble each other physically or whether a word can be found to describe the goods of the parties." *Harvey Hubbell Inc. v. Tokyo Seimitsu Co., Ltd.*, 188 USPQ 517, 520 (TTAB 1975). Thus, it is not necessary that the services of the parties be similar or competitive in character to support a holding of likelihood of confusion; it is sufficient for such purposes that a party claiming damage establish that the services are related in some manner and/or that conditions and activities surrounding marketing of these services are such that they would or could be encountered by same persons under circumstances that could, because of similarities of marks used with them, give rise to the mistaken belief that they originate from or are in some way associated with a single source. *See Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618, 1624 (TTAB 1989); *Chemical New York*

Corp. v. Conmar Form Systems, Inc., 1 USPQ2d 1139, 1143 (TTAB 1986).

Based on the evidence of record, consumers encounter life insurance agents rendering life insurance agency services and life insurance companies rendering insurance underwriting services in the same transaction. In other words, consumers will encounter the marks identifying both insurance agency services and underwriting services at the same time. For example, when a life insurance agent finds a suitable life insurance policy for a customer, the life insurance agent will present a policy underwritten by the insurance company. Thus, a prospective life insurance customer could encounter a LIFE FOR THE LIVING insurance agent and a LIFE INSURANCE FOR LIVING insurance underwriter.

Although applicant contends that it is rendering life insurance agency services, in both of Mr. Shorrock's depositions, he explained that applicant was not rendering traditional life insurance agency services because applicant intends to market the LIFE FOR THE LIVING life insurance "concept" to life insurance agents or wholesalers, not to the ultimate consumer.[45] However, this is a fact that we may not consider. As indicated above, we must consider the recitation of services as set forth in the application and

[45] Shorrock Discovery Dep., pp. 16-19, 24-26, 43-44, 46, 50-51, 68-69, 72-73, 91-92, 99-103; Shorrock Testimony Dep., pp. 11-18, 33-34, 42-43, 48, 53.

not on what the extrinsic evidence reveals about the nature of the actual services. Because there are no limitations as to channels of trade or classes of purchasers in the description of services in the application, we must presume that applicant's insurance agency services move in all channels of trade normal for those services, and that they are available to all classes of purchasers for those services. *See In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992). *See also Octocom Systems Inc. v. Houston Computer Services Inc.*, 16 USPQ2d at 1787.

As previously discussed, Jodi Dodson testified that opposer's relevant consumers are between the ages of 50 and 80 with $500,000 or more in assets. "We would consider them mass affluent, kind of middle income, or we also market to the high net worth and high (sic) affluent."[46] Opposer's 2007 MoneyGuard Reserve Advisor Guide brochure describes prospective clients as "astute adults, ages 55-75," "financially secure," "have at least $300,000 in assets," and "are concerned about the impact long-term care could have on their retirement income security."[47] Applicant identifies the ultimate consumers for its life insurance agency services as people who are concerned about out-living assets, preserving retirement assets and not becoming a

[46] Dodson Dep., p. 53.
[47] Applicant's Notice of Reliance, Exhibit 3.

burden on their families.[48] In its response to opposer's Interrogatory No. 10, applicant stated that its "purchasers may be anyone eligible for life insurance products or related products."[49]

Based on the record before us, we find that the conditions and activities surrounding marketing of life insurance agency services and underwriting universal life insurance policies are such that they would or could be encountered by same persons under circumstances that could, because of similarities of marks used with them, give rise to the mistaken belief that they originate from or are in some way associated with the same source.

D. Degree of consumer care.

Applicant argues that because the services at issue involve insurance, health care costs and the consequences of death, "consumers are likely to demonstrate sophistication in the field of life insurance with living benefits." There is no evidence that prospective consumers will be "sophisticated" in the field of life insurance with a living benefit. However, we recognize that the purchasers of the services are likely to be financially well-to-do and will exercise a high degree of care when they make a decision regarding the purchase of life insurance. Nevertheless,

[48] Sharrock Discovery Dep., Exhibits 10 and 11; Sharrock Testimony Dep., Exhibit 4.
[49] Opposer's Notice of Reliance, Exhibit 5.

even sophisticated consumers are not immune to trademark confusion especially, where as here, the marks are similar and the services are related. While the degree of care factor weighs in favor of applicant, it is not sufficient to outweigh the other factors.

E. Balancing the factors.

In view of the similarity of the marks, services, channels of trade and classes of consumers, we find that applicant's mark LIFE FOR THE LIVING for "insurance agency services in the field of life insurance" is likely to cause confusion with the mark LIFE INSURANCE FOR LIVING for "universal life insurance underwriting that prepays the death benefit for long-term care."

Decision

Applicant's counterclaim to cancel opposer's pleaded registration on the ground that it is generic is dismissed with prejudice

Applicant's counterclaim to cancel opposer's pleaded registration on the ground of abandonment is dismissed with prejudice.

The opposition is sustained and registration to applicant is refused.