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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Life Partners, Inc.

Serial No. 78891211

Justin R. Blount for Life Partners, Inc.

Vivian Micznik First, Trademark Examining Attorney, Law Office 114 (K. Margaret Le, Managing Attorney).

Before Quinn, Grendel and Cataldo, Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

Life Partners, Inc. filed an application to register the mark THE ARCHITECT OF LIFE SETTLEMENTS for "viatical settlement services."[1]

The trademark examining attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when used in connection with applicant's services, so resembles the

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[1] Application Serial No. 78891211, filed May 24, 2006, alleging first use anywhere and first use in commerce on May 17, 2006.

previously registered mark THE ARCHITECT for "life insurance underwriting services"[2] as to be likely to cause confusion.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs.[3]

Applicant contends that the marks are different, with its mark's conveying the impression of a designer or planner ("THE ARCHITECT") of a specific type of transaction ("OF LIFE SETTLEMENTS"), whereas the registered mark is vague and ambiguous. Applicant asserts that the only commonality between the two marks is the word "ARCHITECT," and that this word is "relatively common and indistinct" and, thus, is an insufficient basis upon which to conclude that the marks are similar. In this connection, applicant submitted a dictionary definition of the term "architect." As to the services, although applicant concedes that "the

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[2] Registration No. 1453525, issued August 18, 1987; Section 8 affidavit accepted, Section 15 affidavit acknowledged.

[3] Applicant submitted, for the first time with its reply brief, numerous exhibits. These exhibits are third-party registrations and applicant's parent company's filing with the Securities and Exchange Commission. As often stated, the record in the application should be complete prior to the filing of an appeal. *See* Trademark Rule 2.142(d). The exhibits attached to applicant's reply brief were not made of record during examination. Accordingly, their submission with the reply brief is manifestly untimely, and we have not considered this evidence in reaching our decision. *See In re U.S. Cargo Inc.*, 49 USPQ2d 1702, 1703 n.2 (TTAB 1998) [third-party registrations submitted with reply brief not considered]; and TBMP §1203.02(e) (2d ed. rev. 2004).

industries of the Applicant and the prior registrant are in some sense related as they both involve life insurance policies" (Brief, p. 4), applicant goes on to argue that it and registrant are not in competing industries, and that they render distinct types of services to different markets and clientele. Further, the registered mark, applicant argues, is suggestive and, thus, entitled to a limited scope of protection. Applicant also states that the registered mark is "not very well known or is not often used by the prior registrant." (Brief, p. 5). Lastly, applicant claims that the services involve a sophisticated purchase by a discriminating clientele.

The examining attorney maintains that the marks are similar in that applicant has adopted the entirety of registrant's mark and merely added subordinate matter to it. The services, the examining attorney contends, are related, both being rendered in the life insurance field. Further, the examining attorney is not persuaded that the services necessarily involve a sophisticated purchasing decision. To show the relatedness of the services, the examining attorney submitted excerpts of third-party websites, and copies of third-party registrations.[4]

[4] The examining attorney submitted, for the first time with her appeal brief, a dictionary definition of the term "viatical

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods and/or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). *See also In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

At the outset, we take judicial notice of the definition of "viatical settlement":

> A written contractual agreement under which the policyholder of a life insurance contract covering the life of a terminally ill person assigns, transfers ownership or otherwise irrevocably designates all control and

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settlement" retrieved from an on-line dictionary. At this late juncture the Board will not take judicial notice of definitions found in on-line dictionaries that do not exist in print or have regular fixed editions; however, it will consider them if made of record during the prosecution of the application. *In re Red Bull* GmbH, 78 USPQ2d 1375, 1377 (TTAB 2006); In *re CyberFinancial.Net Inc.*, 65 USPQ2d 1789, 1791 n.3 (TTAB 2002); and TBMP §1208.04 (2d ed. rev. 2004). Accordingly, this definition has not been considered. As indicated below, however, we have taken judicial notice of a definition found in a dictionary available in a printed format.

> rights in the contract to another person or entity (viatical settlement company) in exchange for the advance payment of a percentage (usually 60 percent to 80 percent) of the eventual death benefit. Under these arrangements, a portion of the proceeds is paid to the insured or policyholder prior to the actual death of the insured person. The settlement company then receives the death benefit when the insured person dies. These settlements are considered taxable income by the government. (Insurance Dictionary (2002))

Life settlements apparently are a fairly recent variation or outgrowth of viatical settlements. A life settlement is the sale of a life insurance policy to a third party, where the insured individual is elderly, but does not have a known life-threatening or terminal illness or condition. In these cases the policy owner also receives cash for the policy. (*See* www.quatloos.com).

With respect to the services, it is not necessary that the respective services be competitive, or even that they move in the same channels of trade to support a holding of likelihood of confusion. It is sufficient that the respective services are related in some manner, and/or that the conditions and activities surrounding the marketing of the services are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to

the mistaken belief that they originated from the same producer. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991).

Applicant's "viatical settlement services" and registrant's "life insurance underwriting services" both involve life insurance; both types of services are rendered in the life insurance field; and the services may be rendered to the same classes of purchasers. The Internet evidence also indicates that life insurance agents may be involved in both types of services. In addition, the examining attorney introduced third-party registrations to establish the relatedness of the services. Three of the use-based registrations show that each registrant adopted a single mark for both life insurance underwriting and viatical settlement services. Third-party registrations that individually cover different items and that are based on use in commerce serve to suggest that the listed goods and/or services are of a type that may emanate from a single source. *See In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); and *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (TTAB 1988).

In view of the above, we find the services are sufficiently related that, if rendered under similar marks, consumers would be likely to be confused.

Insofar as the marks are concerned, we examine the similarities and dissimilarities of the marks in their appearance, sound, meaning, and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). 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 their entireties that confusion as to the source of the goods and/or services offered under the respective marks is likely to result.

The marks involved herein, THE ARCHITECT and THE ARCHITECT OF LIFE SETTLEMENTS are similar in sound, appearance, meaning and overall commercial impression. Both begin with the identical term, and applicant has merely added a highly suggestive or, more likely, a merely descriptive/generic term to its mark.[5]

The addition of "OF LIFE SETTLEMENTS" in applicant's mark does not serve to sufficiently distinguish it from

[5] Given the evidence of record, we are surprised that the examining attorney did not require a disclaimer of the term "life settlements." Applicant itself states that its mark includes a "phrase with a clear meaning" (Brief, p. 3), and that its services involve "life settlements." (Brief, p. 4). Applicant uses the term in a descriptive or generic manner in its promotional materials, consistent with the meaning of "life settlement" as shown, for example, at www.quatloos.com.

registrant's mark. The general rule is that a subsequent user may not appropriate the entire mark of another and avoid a likelihood of confusion by adding descriptive or subordinate matter thereto. Thus, "if the dominant portion of both marks is the same, the confusion may be likely notwithstanding peripheral differences." TMEP §1207.01 (b)(iii) (5th ed. 2007). *See, e.g., Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002) [HEWLETT PACKARD and PACKARD TECHNOLOGIES]; *In re El Torito Restaurants Inc.*, 9 USPQ2d 2002 (TTAB 1988) [MACHO and MACHO COMBOS]; *In re Equitable Bancorporation*, 229 USPQ 709 (TTAB 1986) [RESPONSE and RESPONSE CARD]; and *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985) [CONFIRM and CONFIRMCELLS]. The present case is no exception.

In comparing the marks, we have not ignored the subordinate "OF LIFE SETTLEMENTS" portion of applicant's mark. Indeed, we have considered applicant's mark THE ARCHITECT OF LIFE SETTLEMENTS in its entirety, and find that this mark is substantially similar to registrant's mark THE ARCHITECT in sound, appearance, meaning and commercial impression.

As pointed out by applicant, we recognize the somewhat suggestive nature of the term "architect" as it means "a person who designs and guides a plan or undertaking."

Merriam-Webster's Collegiate Dictionary (11th ed. 1998). The meaning of the term must be considered in the context of the respective services and, in each mark, the term conveys the same idea, that is, the entity designs and guides a plan for you, whether the plan involves life insurance underwriting or viatical settlement services. A relevant consumer familiar with registrant's life insurance underwriting services rendered under the mark THE ARCHITECT is likely to believe that applicant's mark THE ARCHITECT OF LIFE SETTLEMENTS is a brand extension or an additional line of services offered by registrant.

We also are not persuaded by applicant's argument that purchasers are sophisticated. We accept that, due to the nature of life insurance underwriting and viatical settlement services, most customers will make their purchasing decisions with some degree of care. However, even assuming that the purchase of applicant's and registrant's services would involve a deliberate decision, this does not mean that the purchasers are immune from confusion as to the origin of the respective services, especially when, as we view the present case, the similarity between the marks and the similarity between the services outweigh any sophisticated purchasing decision. *See HRL Associates, Inc. v. Weiss Associates, Inc.*, 12

USPQ2d 1819 (TTAB 1989), *aff'd*, *Weiss Associates, Inc. v. HRL Associates, Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) [similarities of goods and marks outweigh sophisticated purchasers, careful purchasing decision, and expensive goods]. *See also In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986), citing *Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) ["Human memories even of discriminating purchasers...are not infallible."].

One final point requires our attention. Applicant states that the registered mark "appears to not be regularly used by the prior registrant, if it is even used at all." (Brief, p. 5). Applicant bases its statement on its purported search of registrant and its affiliates' websites. To the extent that applicant's allegations constitute a collateral attack on registrant's registration, they are impermissible. Section 7(b) of the Trademark Act provides that a certificate of registration on the Principal Register shall be *prima facie* evidence of the validity of the registration, of the registrant's ownership of the mark and of the registrant's exclusive right to use the mark in connection with the goods or services identified in the certificate. During ex parte prosecution, including an ex parte appeal, an applicant

will not be heard on matters that constitute a collateral attack on the cited registration (e.g., a registrant's nonuse of the mark). *In re Dixie Restaurants*, 41 USPQ2d at 1534; and *In re Peebles Inc.*, 23 USPQ2d 1795, 1797 n.5 (TTAB 1992). *See* TMEP § 1207.01(d)(iv) (5th ed. 2007). Accordingly, no consideration has been given to applicant's arguments in this regard.

We conclude that purchasers familiar with registrant's life insurance underwriting services under its mark THE ARCHITECT would be likely to believe, upon encountering applicant's viatical settlement services offered under the mark THE ARCHITECT OF LIFE SETTLEMENTS, that the services originated with or are somehow associated with or sponsored by the same entity.

Lastly, to the extent that any of the points raised by applicant raise a doubt about likelihood of confusion, that doubt is required to be resolved in favor of the prior registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); and *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

Decision: The refusal to register is affirmed.