

This Opinion is Not a
Precedent of the TTAB

Mailed: February 21, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Baldwin Risk Partners, LLC
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Serial No. 90335197
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Steven E. Kelly and Thomas J. Banks of Hill Ward Henderson, P.A.,
for Baldwin Risk Partners.

Amanda Galbo, Trademark Examining Attorney, Law Office 125,
Heather Biddulph, Managing Attorney.
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Before Bergsman, English and Lebow
Administrative Trademark Judges.

Opinion by English, Administrative Trademark Judge:

Baldwin Risk Partners, LLC (“Applicant”) seeks registration on the Principal Register of the standard character mark BRP for the following services, as amended:¹

Insurance carrier services; Insurance agency and brokerage;
Employee benefits management, namely, processing, administering
and managing employee benefit plans concerning insurance and

¹ Application Serial No. 90335197; filed November 22, 2020 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), claiming May 1, 2013 as the date of first use of the mark anywhere and in commerce.

Citations to the briefs refer to TTABVUE, the Board’s online docket system. Citations to documents contained in the Trademark Status & Document Retrieval (TSDR) database are to the downloadable .pdf versions of the documents.

finance; Insurance consulting in the field of health insurance, life insurance, insurance benefits plans, property and casualty insurance, and commercial property, casualty, cyber liability, executive liability, and mergers and acquisitions insurance; Insurance information and consultancy; Insurance actuarial services; Personal insurance risk management and personal insurance risk management consultation; Financial forecasting and insurance consultancy services, namely, predictive modeling and forecasting of commercial risk and insurance coverage needs; Insurance consultancy services, namely, advisory and risk assessment services in the field of employee benefits for business insurance offered to employees, specifically, medical, dental, and life insurance, short term disability, long term disability, and accidental death and dismemberment insurance; Financial consulting, namely, advisory and risk assessment services in the field of personal asset and personal income protection during long term disability International Class 36.

The Examining Attorney has refused registration of the mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on a likelihood of confusion with the mark set out below registered on the Principal Register for “Insurance services, namely, providing underwriting services and insurance brokerage services in the areas [sic] of professional liability insurance” in International Class 36.²



² Registration No. 3846426; registered September 7, 2010; registration renewed. The registration includes the following description of the mark: “The mark consists of the stylized words ‘Putting risk in its place’ above the stylized letters ‘Brp’ in a rectangle above the stylized words ‘BusinessRisk’ located above the stylized word ‘PARTNERS’.” Color is not claimed as a feature of the mark. (Herein referred to as the “Cited Mark” or “Cited Registration”).

Registrant disclaims the exclusive right to use the term “Business Risk Partners.”

We affirm the refusal to register.

I. Evidentiary Issues

Applicant attached to its appeal brief new evidence in the form of the July 19, 2022 declaration of Seth Cohen, its General Counsel and Corporate Secretary, and accompanying exhibits. The Examining Attorney did not object to the declaration but did not refer to the evidence in her brief.

Trademark Rule 2.142(d) provides that “[t]he record in the application should be complete prior to the filing of the appeal. Evidence should not be filed with the Board after the filing of a notice of appeal.” 37 C.F.R. § 2.142(d); *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1744 (TTAB 2018) (“The evidence submitted with Applicant’s appeal brief that Applicant did not previously submit during prosecution ... is untimely and will not be considered.”), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019). Because the declaration and attached exhibits are untimely and the Examining Attorney did not treat the new evidence as of record, we have not considered it.³

II. Analysis

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 likelihood of confusion. *In re E. I. DuPont de Nemours & Co*, 476 F.2d 1357, 177 USPQ 563, 567

³ If Applicant wished to introduce additional evidence, its recourse was to file a written request with the Board to suspend the appeal and remand the application for further examination. 37 C.F.R. § 2.142(d); *see also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1207.02 (2022).

(CCPA 1973) (“*DuPont*”) cited in *B&B Hardware, Inc. v. Hargis Ind., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We have considered each *DuPont* factor for which there is argument and evidence. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019); *M2 Software, Inc. v. M2 Commc’ns., Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”).

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relatedness of the goods or services. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *In re Embiid*, 2021 USPQ2d 577, at *10 (TTAB 2021) (quoting *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)); *see also In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods [or services].’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)). We address the relevant *DuPont* factors below.

A. Similarity or Dissimilarity of the Services, Trade Channels and Consumers

We first consider “[t]he similarity or dissimilarity and nature of the goods or services.” *DuPont*, 177 USPQ at 567; *see also In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018). The services need not be identical for there to be a likelihood of confusion, but the evidence must establish that the services are related in some manner or that the conditions surrounding their marketing are such that they would be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source. *See Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993); *In re Rexel, Inc.*, 223 USPQ 830, 831 (TTAB 1984).

We must base our comparison of the services on the identifications in the Cited Registration and Applicant’s application. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Hous. Comput. Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). We do not read limitations into the identification of services. *In re i.am.symbolic*, 123 USPQ2d at 1748; *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983) (“There is no specific limitation and nothing in the inherent nature of Squirtco’s mark or goods that restricts the usage of SQUIRT for balloons to promotion of soft drinks. The Board, thus, improperly read limitations into the registration”); *New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d 10596,

at *47 (TTAB 2020); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1638 (TTAB 2009) (“We have no authority to read any restrictions or limitations into the registrant’s description of goods.”).

Applicant’s broadly worded “insurance agency and brokerage” services encompass Registrant’s “insurance brokerage services in the area[] of professional liability insurance” and, therefore, the services are in part legally identical. *Sw. Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015) (where the services in an application or registration are broadly described, they are deemed to encompass all the activities of the nature and type described therein), *quoted in In re Country Oven, Inc.*, 2019 USPQ2d 443903, at *4 (TTAB 2019) and *cited in In re AC Webconnecting Holding B.V.*, 2020 USPQ2d 11048, at *11-12 (TTAB 2020); *In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) (“Applicant’s broadly worded identification of ‘furniture’ necessarily encompasses Registrant’s narrowly identified ‘residential and commercial furniture.’”).

The Examining Attorney further introduced evidence that an “[a]n insurance company, also called an insurance carrier, is ultimately the business that sells an insurance policy to a customer. It is the insurance company [that] underwrites the policy” while an “‘insurance agency’ or ‘insurance brokerage’ is a company (or individual) who is authorized by an insurance company to sell that company’s policies.”⁴ Accordingly, Applicant’s “insurance carrier services” also are broad enough

⁴ May 14, 2022 Denial of Request for Reconsideration, TSDR 62-63 (undated blog on www.matic.com); *see also id.* at TSDR 75-80 (definition of “underwriting” on sproutt.com); *id.* at 81-85 (November 18, 2021 article “What is an Insurance Carrier?” on www.thebalance.com); October 18, 2021 Final Office Action, TSDR 7 (September 23, 2020

to encompass Registrant’s narrower “insurance services, namely, providing underwriting services ... in the areas of professional liability insurance.” Applicant does not contest the Examining Attorney’s finding that its services are overlapping with and in-part identical to those of Registrant.

We need not consider whether Applicant’s remaining services are related to Registrant’s services because it is sufficient for a finding of likelihood of confusion if relatedness is established for any service encompassed in the identification services in a particular class. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, at *6 (TTAB 2019) (“[I]t is sufficient for finding a likelihood of confusion if relatedness is established for any item encompassed by the identification

article “What is an insurance carrier? on coverage.com explaining that an “insurance carrier” is an insurance company that both sells insurance and insures the assets.”). We further take judicial notice of that “insurance carrier” is synonymous with “insurance company,” namely, “a company whose business is providing and selling insurance.” www.dictionary.cambridge.org/us/dictionary/english/insurance-carrier; www.dictionary.cambridge.org/us/dictionary/english/insurance-company (both last visited February 2, 2023).

We further take judicial notice of the following definitions from the Cambridge Dictionary (last visited February 2, 2023): (1) “insurance carrier” is synonymous with “insurance company,” namely, “a company whose business is providing and selling insurance” (<https://dictionary.cambridge.org/us/dictionary/english/insurance-carrier>) and (<https://dictionary.cambridge.org/us/dictionary/english/insurance-company>); and (2) “insurance brokerage” is “the business of giving people independent advice about what insurance is available from different companies and of arranging insurance for them, or a company that provides this service.” (<https://dictionary.cambridge.org/dictionary/english/insurance-brokerage>). The Board may take judicial notice of dictionary definitions. *In re Integra Biosciences Corp.*, 2022 USPQ2d 93, at *2, n.2 (TTAB 2022) (citing *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016)).

of goods within a particular class in the application.”); *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126, n.5 (TTAB 2015).

Turning to the third *DuPont* factor, because the services in the involved application and Cited Registration are in part identical, we must presume that the trade channels and classes of purchasers overlap. *Inn at St. John’s*, 126 USPQ2d at 1745; *United Glob. Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049 (TTAB 2014); *Am. Lebanese Syrian Associated Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011). Applicant does not contest the Examining Attorney’s finding that the trade channels and consumers overlap.

B. Purchaser Sophistication

Under the forth *DuPont* factor we consider “the conditions under which and buyers to whom sales are made, i.e. ‘impulse’ v. careful, sophisticated purchasing.” *DuPont*, 177 USPQ at 567. A heightened degree of care when making a purchasing decision may tend to minimize likelihood of confusion. *See, e.g., In re N.A.D., Inc.*, 754 F.2d 996, 224 USPQ 969, 971 (Fed. Cir. 1985) (because only sophisticated purchasers exercising great care would purchase the relevant goods, there would be no likelihood of confusion merely because of the similarity between the marks NARCO and NARKOMED). Conversely, impulse purchases of inexpensive services may tend to have the opposite effect. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1695 (Fed. Cir. 2005).

Applicant argues that “both the courts and the Board have routinely found that purchasers of insurance are relatively sophisticated and make prudent and

purposeful buying decisions.”⁵ The Examining Attorney counters that “[t]he third-party Internet evidence of record establishes” that consumers of Applicant’s insurance services include the “general purchasing public” and this class of consumer “is not considered a sophisticated potential purchaser.”⁶

The record shows that professional liability insurance, covered by the Cited Registration, is available to a broad range of “professionals” from financial advisors, medical professionals and attorneys to architects, realtors, trustees, property managers, and insurance agents themselves. Applicant’s services are broadly identified to encompass insurance services provided to both businesses and the general public (e.g. health, life, property insurance). We find that Applicant’s and Registrant’s services are targeted to a broad range of purchasers, some of whom might not have any particular sophistication.

That said, insurance services are not subject to “every day” or even frequent purchases and are not low cost, impulse purchase items. The purchase of insurance is a business decision (whether made by a business or individual for personal needs) and likely involves some degree of care on the part of purchasers.⁷ J. Thomas

⁵ Appeal Brief, 9 TTABVUE 16.

⁶ Examining Attorney’s Brief, 11 TTABVUE 20. Applicant attacks the Examining Attorney’s evidence as “unauthenticated.” It is unclear what Applicant means by this, but the Internet evidence the Examining Attorney submitted is properly of record because it bears URL addresses and dates. *See, e.g., In re I-Coat Co.*, 126 USPQ2d 1730, 1733 (TTAB 2018).

⁷ In support of its position, Applicant relies on one Board decision and a decision from the United States District Court of Colorado finding that consumers of health insurance exercise a heightened degree of care in making a purchase. Applicant’s Brief, 9 TTABVUE 16-17. The cited registration, however, is for insurance services in the field of professional liability and Applicant’s services, namely, “insurance carrier services; insurance agency and brokerage” are not limited to any particular type of insurance. A third case Applicant cites was issued as unpublished or nonprecedential, *CDOC, Inc. v. Liberty Bankers Life Ins. Co.*, 844 Fed.

McCarthy, 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:95 (5th ed. December 2022 update) (recognizing that a judge may draw an inference about customer care and sophistication from the nature of the product or its price).

On balance, we find that the fourth *DuPont* factor slightly favors Applicant. We keep in mind, however, that even careful purchasers are not immune from source confusion. *In re Integrated Embedded*, 120 USPQ2d 1504, 1515-16 (TTAB 2016); *see also In re Rsch. Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) (“That the relevant class of buyers may exercise care does not necessarily impose on that class the responsibility of distinguishing between similar trademarks for similar goods.”) (citing *Carlisle Chem. 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.”)).

C. Similarity or Dissimilarity of the Marks

Under the first *DuPont* factor, we consider the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *Stone Lion*, 110 USPQ2d at 1160; *DuPont*, 177 USPQ at 567. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *Inn at St. John’s*, 126 USPQ2d at 1746 (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)).

Appx. 357, 2021 USPQ2d 218 (Fed. Cir. 2021). *See e.g., In re UST Global (Singapore) Pte. Ltd.*, 2020 USPQ2d 10435, at *7 n.23 (TTAB 2020) (non-precedential decisions are not binding on the Board, nor a substitute for evidence); *see also* TBMP § 1203.02(f).

In comparing the marks, we are mindful that where, as here, the services are in part legally identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable differences between the services. *Coach Servs.*, 101 USPQ2d at 1721; *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992); *Jansen Enters. Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007); *Schering-Plough HealthCare Prod. Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1325 (TTAB 2007).

“The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *Coach Servs.*, 101 USPQ2d at 1721); *see also* *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012); *San Fernando Elec. Mfg. Co. v. JFD Elec. Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Rests. Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff’d mem.*, 972 F.2d 1353 (Fed. Cir. 1992).

The focus is on the recollection of the average purchaser, who normally retains a general rather than specific impression of trademarks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). The average purchasers of Applicant’s services are

individuals and businesses that need insurance. As discussed above, purchasers of professional liability insurance comprise a broad range of “professionals” including individuals who serve as trustees or property managers.

We do not predicate our analysis on a dissection of the involved marks; we consider the marks in their entireties. *Stone Lion*, 110 USPQ2d at 1160; *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). But one feature of a mark may be more significant than another, and it is not improper, for rational reasons, to give more weight to a dominant feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *Stone Lion*, 110 USPQ2d at 1161 (finding the Board did not err in reasoning that the term LION was dominant in both applicant’s mark STONE LION CAPITAL and opposer’s marks LION CAPITAL and LION); *Chatam Int’l*, 71 USPQ2d at 1946.

Applicant argues that BRP is “a descriptive initialism for the wording ‘Business Risk Partners’ and, therefore is entitled to less weight in the overall *DuPont* analysis.”⁸ “[A]s a general rule, initials cannot be considered descriptive unless they have become so generally understood as representing descriptive words as to be accepted as substantially synonymous therewith.” *Modern Optics, Inc. v. Univis Lens*

⁸ Appeal Brief, 9 TTABVUE 8. It is not impermissible to argue that a portion of a registered mark is descriptive. *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985) (“The registration affords *prima facie* rights in the mark *as a whole*, not in any component. Thus, a showing of descriptiveness or genericness of *part* of a mark does not constitute an attack on the registration.”).

Co., 234 F.2d 504, 110 USPQ 293, 295 (CCPA 1956); *In re Thomas Nelson, Inc.*, 97 USPQ2d 1712, 1715 (TTAB 2011) (“A word, term, or letters that are a recognized abbreviation for the goods in the application is merely descriptive.”).

To determine whether an initialism is descriptive, we consider whether: (1) the letters in the mark are an abbreviation, initialism or acronym for specific wording; (2) the specific wording is merely descriptive of the goods or service; and (3) relevant consumers viewing the initialism in connection with the goods or services will recognize it as an initialism of the merely descriptive wording that it represents. *Thomas Nelson*, 97 USPQ2d at 1715-16.

The Cited Registration includes a disclaimer of the words “Business Risk Partners.”⁹ That disclaimer by Registrant “constitutes an admission of the merely descriptive nature” of those terms when used in connection with Registrant’s services. *In re DNI Holdings Ltd.*, 77 USPQ2d 1435, 1442 (TTAB 2005). Applicant also introduced numerous third-party use-based registrations for marks for insurance services, including those covering or broad enough to cover professional liability insurance, in which the terms “business,” “risk” and “partners” have been disclaimed.¹⁰ The record further includes examples of third-parties using the words “business,” “risk” and “partners” to describe professional liability insurance:

⁹ In arguing the relevance of the disclaimer, Applicant cites to a purported Office action response filed during prosecution of the application underlying the Cited Registration. Appeal Brief, 9 TTABVUE 12. Although the Cited Registration is of record, the file history was not introduced into evidence and it is not automatically of record. Accordingly, we have disregarded any arguments based on the prosecution history of the Cited Registration.

¹⁰ March 23, 2022 Request for Reconsideration, TSDR 24-220.

- “As professional and financial **risks** evolve, you’ll be prepared with Amwins. Through our expertise, market access and proprietary products, Amwins’ professional lines of insurance specialists find solutions for accounts of all sizes and complexities. ... Our experts across the country, and around the world, collaborate with each other and our carrier **partners** to deliver the right solution for your clients. ... We offer numerous proprietary products tailored to specific classes and lines of **business**...” (October 18, 2021 Final Office Action, TSDR 13).
- “What is professional liability? There are so many external factors beyond your control that can affect your **business** success. Your company can be hit with allegations of misrepresentation, breach of contract or wrongful **business** practices.... Professional liability insurance protects **businesses** against charges of negligence or harm, based on a professional service or advice you provided.” (*Id.* at 20).
- “MMA has a dedicated practice group with the industry knowledge to tailor your **risk** management program and produce meaningful solutions. ... MMA specializes in providing tailored Executive Risk and Professional Liability insurance solutions to mid-market and **risk** management clients. ... We have a large number of products drawn from our experience and partnerships with trusted insurers.” (*Id.* at 40); MMA “serv[es] the **risk** prevention and insurance needs of middle market companies in the United States.... Mid-size companies need a **partner** they can trust and that can provide additional tools for opportunity and growth.” (*Id.* at 44).
- “RLI protects firms from a multitude of exposures through an innovative suite of property, casualty, professional liability and **risk** management solutions.” (*Id.* at 46); “RLI is a specialty property and casualty insurance and surety bond company. We help people and companies safeguard their assets by **partnering** with them to navigate the world of insurance and **risk**.” (*Id.* at 50).

The record supports a finding that the phrase “business risk partners” is merely descriptive of Registrant’s professional liability insurance services, through which Registrant partners with clients and insurers to assist in managing business risk. We further find and agree with Applicant that because the letters BRP in the Cited Mark are positioned directly above the phrase “BUSINESSRISK PARTNERS,” consumers encountering the mark are likely to ultimately perceive BRP as an initialism for

“BUSINESSRISK PARTNERS.” Applicant, however, has not demonstrated that BRP is “substantially synonymous” with the words “business risk partners.”

The record does not include any evidence of third-parties using BRP as an initialism for “business risk partners.” Nor is there evidence of third-party registrations consisting of or incorporating BRP for insurance services.¹¹ *Cf. Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. v. Mew Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (discussing “voluminous evidence” of registration and use of paw print design elements); *Juice Generation*, 115 USPQ2d at 1674-75 (third-party registrations pertinent to conceptual strength of a mark). Indeed, the Examining Attorney introduced search results from the Office’s X-Search database¹² showing that the Cited Mark is the only mark incorporating the initialism BRP registered for services in International Class 36. The Examining Attorney also introduced search results for “BRP” on AcronymFinder.com, Wikipedia.com, FreeDictionary.com, and Abbreviations.com. None of these sources list BRP as an initialism for “business risk partners.” *Cf. Thomas Nelson*, 97 USPQ2d

¹¹ Applicant and the Examining Attorney mistakenly refer to this evidence as evidence of “third-party use.” Appeal Brief, 9 TTABVUE 23. Third-party registrations do not equate to proof of third-party use. *In re Morinaga Nyugyo Kabushiki Kaisha*, 120 USPQ2d 1738, 1745 (TTAB 2016). Third-party registrations are relevant to show the sense in which a term is used in ordinary parlance in the same way dictionaries are used. *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674-75 (Fed. Cir. 2015). The Examining Attorney points to the absence of evidence of third-party registrations incorporating BRP for insurance as support for her assertion that BRP is not a recognized initialism for “business risk partners.”

¹² “X-Search is the USPTO’s computerized search system, containing text and images of registered marks, and marks in pending and abandoned applications. X-Search is used by examining attorneys when searching for conflicting marks during examination.” TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMPEP) § 104 (July 2022).

at 1716 (finding NKJV a recognized abbreviation for “New King James Version” bible where the Examining Attorney introduced evidence from AcronymFinder.com and FreeDictionary.com identifying NHKV as meaning “New King James Version” and “many other references” supporting the same).

Applicant argues that while “there is support for the proposition that certain online databases case provide evidence for consumer recognition of acronyms that are listed in the databased ... it is an error in reasoning to assert that if those databases do not list a certain acronym, then consumers are not familiar with it.”¹³ We must consider the evidence of record – or lack thereof – as a whole. The fact that AcronymFinder.com, Wikipedia.com, FreeDictionary.com and Abbreviations.com do not list BRP as an abbreviation for “business risk partners,” coupled with evidence that there are no third-party registrations for marks incorporating BRP for insurance, is some evidence that BRP is not a recognized initialism for “business risk partners.” *Cf. In re Binion*, 93 USPQ2d 1531, 1537 (TTAB 2009) (noting relevance of absence of dictionary definitions in surname case). Moreover, other than pointing to the Cited Mark itself, Applicant has not introduced any evidence to support its contention that BRP is a recognized initialism for “business risk partners” in the insurance field. To the contrary, Applicant acknowledges that “[t]he letters ‘BRP ... have no particular significance in the insurance ... trade[] such that they have become a term of art within the[] industr[y].”¹⁴

¹³ Reply Brief, 12 TTABVUE 4.

¹⁴ September 17, 2021 Office Action Response, TSDR 2.

We find that BRP is not “substantially synonymous” with the phrase “business risk partners.” Consumers encountering the Cited Mark will need to pause and engage in some reasoning to understand that the letters are an initialism for “business risk partners.” Accordingly, we find that BRP is an inherently distinctive component of the Cited Mark.

Even if, however, we were to find BRP descriptive of Registrant’s services, BRP is the most prominent graphic element of the Cited Mark in terms of size, position and stylization:



The phrase “Putting risk in its place,” shown in small italicized font above the much larger, eye-catchingly stylized term “BRP,” set against a rectangular background, is a subordinate element of the mark serving to introduce and draw attention to the initialism, which is then defined by Registrant’s company name below. 1 MCCARTHY ON TRADEMARKS § 7:20 (“While slogans are capable of serving as trademarks, often they serve a subsidiary role to the merchant’s main product mark or house mark.”).

Given the visual prominence of the initialism BRP in the Cited Mark, it is foreseeable that consumers familiar with the Cited Mark could view Applicant’s mark as shortened version of the Cited Mark identifying an expansion of Registrant’s professional liability insurance services to a broader range of insurance offerings. To this end, the evidence shows that it is common for insurance companies to offer a

range of insurance services, such as professional liability, casualty, commercial property, cyber insurance, under a single mark.¹⁵

Further, because Applicant's mark is in standard characters, Applicant may display it in a stylization identical or similar to the stylized letters BRP in the Cited Mark, further increasing the visual similarity between the marks. *Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB 2018) ("Since Registrant's mark is a standard character mark, we must consider that the literal elements of the mark (the words and the letters) may be presented in any font style, size or color, including the same font, size and color as the literal portions of Applicant's mark. This is because the rights associated with a standard character mark reside in the wording per se and not in any particular font style, size, or color.") (citing *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011)); *see also Squirrtco*, 216 USPQ at 939; *Conopco, Inc. v. Transom Symphony OpCo*, 2022 USPQ2d 504, at *14 (TTAB 2022); *In re RSI Sys., LLC*, 88 USPQ2d 1445, 1448 (TTAB 2008).

Turning to sound, we recognize that if all the literal elements of the Cited Mark are pronounced (14 syllables, eight words and the initialism) there are differences from Applicant's three-letter, three-syllable mark. It appears unlikely, however, that

¹⁵ October 18, 2021 Final Office Action, TSDR 8-11 (Arch Insurance offering property, casualty and professional liability insurance); *id.* at 13-14 (Amwins offering professional liability, property and casualty insurance); *id.* at 15-16 (ProWriters offering cyber and professional and management liability insurance); *id.* at 17-18 (Novus Underwriters offering property, casualty, and professional liability insurance); *id.* at 19-28 (Hub offering professional liability, directors and officers, cyber, commercial and personal insurance); *id.* at 29-35 (Embroker offering professional liability and cyber insurance); *id.* at 36-39 (Lockton offering professional liability and personal insurance); *id.* at 40-45 (MMA offering professional liability, cyber, homeowners and life insurance); *id.* at 46-51 (REI offering property, casualty, and professional liability insurance).

all the literal elements of the Cited Mark would be verbalized each time, or even frequently, given “the penchant of consumers to shorten marks.” *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1961 (TTAB 2016) (consumers may drop the highly descriptive term ‘Blonde’ when calling for TIME TRAVELER BLONDE beer) (citing *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 219 (CCPA 1978) (Rich, J., concurring) (“[T]he users of language have a universal habit of shortening full names—from haste or laziness or just economy of words[.]”)); *Aquitaine Wine*, 126 USPQ2d at 1188 (“[C]onsumers often have a propensity to shorten marks” when verbally asking for them); *Spoons Rests. v. Morrison*, 23 USPQ2d at 1740-41 (recognizing consumers’ “propensity for shortening names with which they have become familiar”); *Big M. Inc. v. U.S. Shoe Corp.*, 228 USPQ 614, 616 (TTAB 1985) (“[W]e cannot ignore the propensity of consumers to often shorten trademarks[.]”). Because of the visual prominence of the initials BRP in the Cited Mark, it is likely that consumers would shorten the mark and ask for or refer to Registrant’s services by the initialism BRP, which is identical in sound to Applicant’s standard-character mark BRP. Indeed, inclusion of the initialism in the Cited Mark encourages consumers to shorten the mark to BRP when they verbalize it and refer to Registrant’s services. That said, even if the Cited Mark is pronounced in its entirety, we find that the shared initialism BRP results in some similarity in sound between the marks.

As to meaning, to the extent consumers encountering the Cited Mark reason that the letters BRP are an initialism for “business risk partners,” consumers could

ascribe Applicant's mark, identifying legally identical services (in part), the same meaning such that the marks share similar connotations of partnering with clients and insurers to manage business risk (or "put risk in its place" as the slogan in the Cited Mark states). *See Presto Prods. Inc. v. Nice-Pak Prods. Inc.*, 9 USQP2d 1895 (TTAB 1988) (The meaning of a mark must be determined, not in a vacuum, but in relation to the goods to which it is applied because this is how the mark is encountered by purchasers) (TTAB 1988).

As a final matter with respect to the first *DuPont* factor, we address Applicant's heavy reliance on *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 73 USPQ2d 1350 (Fed. Cir. 2004) to support the argument that the marks here are sufficiently different to avoid a likelihood of confusion. Applicant focuses on that part of the decision addressing likelihood of confusion as to the marks RITZ for "bathroom towels" and PUTTING ON THE RITZ for "shower curtains." We find the case distinguishable. PUTTING ON THE RITZ is a unitary mark,¹⁶ unlike the Cited Mark that consists of three components creating a composite mark:¹⁷ (1) the tagline "PUTTING RISK IN ITS PLACE"; (2) the initialism BRP; and (3) the descriptor "BUSINESSRISK PARTNERS." Further, the slogan "PUTTING ON THE RITZ" connotes "comfort, sophistication, and wealth" in contrast to Shen's use of RITZ "on kitchen textiles,

¹⁶ In a unitary mark "the elements of [the] mark are so integrated or merged together that they cannot be regarded as separable." TMEP § 1213.03 and cases cited therein. A unitary mark "creates a single and distinct commercial impression." *Id.*

¹⁷ "A 'composite' mark may consist of a word or words combined with a design or designs; it may consist solely of words, when there are separable word elements; or it may consist solely of separable design elements." *Id.* at § 1213.02.

invok[ing] images, if any, of cleaning, cooking or manual labor generally.” *Id.* at 1354. Here, as explained above, Registrant’s and Applicant’s marks create similar connotations and commercial impressions.

In sum, we find that the marks in their entireties are more similar than different in appearance, sound, connotation and commercial impression. In reaching this conclusion, we do not ignore the tagline and descriptive phrase in the Cited Mark, but for the reasons explained above, the BRP portion of the Cited Mark is likely to be impressed upon and remembered by consumers. The likelihood for confusion is further increased by consumers’ propensity to shorten marks such that consumers are likely to refer to Registrant’s services as BRP, the identical initials comprising Applicant’s standard-character mark. The marks also create the same or similar commercial impressions given the marks’ overall similarities and overlapping services. For these reasons, the first *DuPont* factor supports a finding that confusion is likely.

D. Absence of Actual Confusion and Concurrent Use

The seventh and eighth *DuPont* factors are “[t]he nature and extent of any actual confusion” and “[t]he length of time during and the conditions under which there has been concurrent use without evidence of actual confusion.” *DuPont*, 177 USPQ at 567. The eighth *DuPont* factor “requires us to look at actual market conditions.” *In re Guild Mort. Co.*, 2020 USPQ2d 10279, at *6 (TTAB 2020).

Applicant argues that “[t]here is at least five years of concurrent use” of Applicant’s and Registrant’s marks and “[t]here has been no evidence of actual

confusion presented by the Examining Attorney and none that Applicant is aware of[.]”¹⁸ The Examining Attorney, however, is unlikely to be aware of any actual confusion. And because this is an ex parte case, we do not know whether Registrant is aware of any instances of actual confusion. *Guild Mort.*, 2020 USPQ2d 10279, at *7 (“[I]n this ex parte context, there has been no opportunity to hear from Registrant about whether it is aware of any reported instances of confusion. We therefore are getting only half the story.”); *In re Opus One Inc.*, 60 USPQ2d at 1817 (absence of actual confusion in ex parte cases “entitled to limited probative weight” because the Board generally has no information regarding whether registrant is aware of any actual confusion and it is difficult to determine whether there has been a significant opportunity for confusion to have occurred).

Moreover, Applicant relies on the Cohen Declaration to demonstrate that there has been an opportunity for actual confusion to have occurred but, as we have explained, the Cohen Declaration was not timely introduced into evidence so we have not considered it. *See* Section I above. Applicant is left with attorney argument, which “is no substitute for evidence.”¹⁹ *Cai v. Diamond Hong*, 127 USPQ2d at 1799 (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005) (internal quotation marks omitted)).

¹⁸ Appeal Brief, 9 TTABVUE 17-18.

¹⁹ For example, there is no evidence in the record to support Applicant’s assertion that “Applicant is the subsidiary of BRP Group, Inc.” a company with “market assets of nearly \$3 Billion.” *Id.*

“The absence of any reported instances of confusion is meaningful only if the record indicates appreciable and continuous use” of the marks “in the same markets.” *Double Coin*, 2019 USPQ2d 377409, at *9 (quoting *Citigroup v. Capital City Bank Grp.*, 94 USPQ2d 1645, 1660 (TTAB 2010), *aff’d*, 637 F.3d 1344, 98 USPQ2d 1253 (Fed. Cir. 2011)). There simply is not enough evidence in the record for us to ascertain whether there has been a meaningful opportunity for confusion to have occurred. *Id.* (explaining that “for the absence of actual confusion to be probative, there must have been a substantial 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 on there being a significant opportunity for actual confusion to have occurred). In any event, it is well-settled that proof of actual confusion is not necessary to establish a likelihood of confusion. *See, e.g., Detroit Athletic*, 128 USPQ2d at 1053; *Weiss Assocs. Inc. v. HRL Assocs. Inc.*, 902 F.2d 1546, 14 USPQ2d 1840, 1842-43 (Fed. Cir. 1990); *Double Coin*, 2019 USPQ2d 377409, at *8.

The seventh and eighth *DuPont* factors are neutral.

III. Conclusion

The services, trade channels and consumers overlap and the marks, in their entirety, are similar in appearance, sound, connotation and commercial impression. In this case, the higher degree of purchaser care does not outweigh the first, second, and third *DuPont* factors. *See Integrated Embedded*, 120 USPQ2d at 1516 (finding likelihood of confusion where first and second *DuPont* factors “outweighed any

sophisticated purchasing decision”); *HRL Assoc., Inc. v. Weiss Assocs., Inc.*, 12 USPQ2d 1819, 1823 (TTAB 1989), *aff'd*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (similarities of marks and goods and same class of purchasers outweighed consumer sophistication and careful purchasing decisions). The seventh and eighth *DuPont* factors are neutral. Accordingly, we find that Applicant’s standard-character mark BRP for the services identified in the application, including “insurance carrier services; insurance agency and brokerage” services is likely to be confused with the



Cited Mark for “insurance services, namely, providing underwriting services and insurance brokerage services in the area[] of professional liability insurance.”

Decision: The refusal to register Applicant’s mark under Section 2(d) of the Trademark Act is affirmed.