

This Opinion is not a
Precedent of the TTAB

Mailed: October 8, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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BrightView LLC
v.
BrightView Behavioral Health Center, Inc.

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Opposition No. 91281647
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Brett A. Schatz, of Wood, Herron & Evans, L.L.P.,
for BrightView LLC.

Seth W. Wiener, of Law Offices of Seth W. Wiener,
for BrightView Behavioral Health Center, Inc.

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Before Adlin, Casagrande, and O'Connor,
Administrative Trademark Judges.

Opinion by Casagrande, Administrative Trademark Judge:¹

¹ This opinion is issued as part of an internal Board pilot citation program on broadening acceptable forms of legal citation in Board cases. Westlaw (WL) citations are used for decisions of the Board. Only precedential Board decisions are cited. Decisions of the U.S. Court of Appeals for the Federal Circuit and its predecessor, the U.S. Court of Customs and Patent Appeals, are cited only to the Federal Reporter (e.g., F.2d, F.3d, or F.4th). This opinion thus conforms to the practice set forth in TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (“TBMP”) § 101.03 (2024).

BrightView Behavioral Health Center, Inc. (“Applicant”) filed an application to register the mark BRIGHTVIEW BEHAVIORAL HEALTH (in standard characters, with the words “BEHAVIORAL HEALTH” disclaimed) on the Principal Register for “Behavioral health services; Behavioral health services in the nature of child disability services” in International Class 44.²

BrightView LLC (“Opposer”) filed a Notice of Opposition to registration of Applicant’s mark.³ The Notice of Opposition alleges that Opposer made prior common law use of the mark BRIGHTVIEW in connection with “addiction treatment services.”⁴ The Notice of Opposition alleges a likelihood of consumer confusion between its BRIGHTVIEW mark and Applicant’s mark. Opposer also pleads ownership of an application to register BRIGHTVIEW for addiction treatment services, in International Class 44. Opposer further alleges that the USPTO suspended Opposer’s application pending a determination whether Applicant would obtain a registration based on its earlier-filed application, due to a likelihood of confusion with Applicant’s mark.⁵

² Application Serial No. 97184155 was filed on December 22, 2021, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use anywhere and in commerce since at least as early as October 3, 2018.

³ See 1 TTABVUE. References to the briefs, other filings in the case, and the record cite the Board’s TTABVUE docket system. The number preceding “TTABVUE” is the docket number assigned to the cited filing in TTABVUE and any number immediately following “TTABVUE” identifies the specific page(s) to which we refer.

⁴ See *id.* at 3-5.

⁵ See 1 TTABVUE at 5. During its trial period, Opposer made its pleaded Appl. Ser. No. 97310734 (“Opposer’s ’734 Application”) of record. See 5 TTABVUE 8-16. Opposer filed the ’734 Application on March 14, 2022, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging a date of first use and first use in commerce at least as early as December 31, 2015. Consistent with Opposer’s allegations of common law use, the ’734 Application

Applicant's Answer to the Notice of Opposition denied most of the salient allegations in the complaint.⁶ Applicant also purported to interpose several affirmative defenses.⁷

The parties filed trial briefs⁸ and Opposer filed a reply brief.⁹ For the reasons explained below, we sustain the opposition.

I. The Record

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of the challenged application. During its trial period, Opposer filed a Notice of Reliance with several exhibits in addition to the file history of its pleaded application, including the following documents:

identifies "Addiction treatment services." The '734 Application is for the mark in standard characters. *See id.*

⁶ *See* 4 TTABVUE 2-4. Applicant's Answer admitted that Opposer filed the '734 Application and that the USPTO suspended that application in view of Applicant's previously-filed application. *See id.* at 3.

⁷ *See id.* at 3-4. Applicant forfeited its asserted defenses of unclean hands, waiver, laches, estoppel, and acquiescence by not pursuing them at trial. *See, e.g., WeaponX Performance Prods. Ltd. v. Weapon X Motorsports, Inc.*, Opp. No. 91221553, 2018 WL 1326374, at *2 (TTAB 2018). Under the heading "Affirmative Defenses," Applicant's Answer also included an allegation that there is no likelihood of confusion between the parties' marks. This is not an affirmative defense, but rather just an amplification of Applicant's denial of Opposer's allegations. *See, e.g., Illyrian Import, Inc. v. ADOL Sh.p.k.*, Opp. No. 91234244, 2022 WL 970321, at *2 (TTAB 2022). *See generally Germain v. US Bank Nat'l Ass'n*, 920 F.3d 269, 273 n.14 (5th Cir. 2019) (an affirmative defense "assumes the plaintiff proves everything he alleges and asserts, even so, the defendant wins") (citation omitted). Applicant also included a statement that it "reserves the right to plead additional affirmative and other defenses should any such defenses be revealed by discovery in this case." 4 TTABVUE 4. This, too, is improper. *See Made in Nature, LLC v. Pharmavite LLC*, Opp. No. 91223352, 2022 WL 2188890, at *3 (TTAB 2022) (Applicant's "attempt to reserve the right to add defenses is improper under the Federal Rules of Civil Procedure, because that would not give ... Opposer fair notice of such defenses.") (cleaned up; citations omitted).

⁸ *See* 15 TTABVUE (Opposer's trial brief); 16 TTABVUE (Applicant's trial brief).

⁹ *See* 17 TTABVUE.

- Printouts of pages taken from the Internet Archive’s Wayback Machine of Opposer’s website during the period from 2015 – 2023;¹⁰
- Printouts of news articles and other third-party publications from various dates ranging from January 2018 to February 2023 that mention Opposer’s BrightView treatment centers;¹¹
- Printouts of well over one hundred (100) third-party registrations in which the identified services include both addiction-treatment services (Opposer’s identified services) and behavioral-health services (one of Applicant’s identified services);¹²
- Printouts of pages of third-party websites, many of which offer both addiction or substance-abuse-treatment services and additional types of behavioral-health services, or which refer to addiction-treatment services as a form of behavioral-health services;¹³ and
- Documents from the websites of various medical and other social service organizations, as well as government manuals and publications, stating that addiction-treatment services are a type of behavioral-health service.¹⁴

Opposer also submitted two trial declarations with exhibits: the declaration of Chad Smith, Opposer’s Chief Executive Officer;¹⁵ and the declaration of Colin Jeffries, Opposer’s Vice President of Marketing.¹⁶

During its trial period, Applicant submitted the trial declarations of Rita Mason, Applicant’s Chief Executive Officer, and Sean Mason, Applicant’s Secretary and Chief

¹⁰ See 5 TTABVUE 17-77.

¹¹ See *id.* at 79-211; 7 TTABVUE 2-69.

¹² See 7 TTABVUE 71-332.

¹³ See *id.* at 334-439; 8 TTABVUE 2-192.

¹⁴ See 6 TTABVUE 2-123.

¹⁵ See 9 TTABVUE (public filing); 11 TTABVUE (confidential exhibits filed under seal).

¹⁶ See 12 TTABVUE (public filing); 13 TTABVUE (confidential exhibits filed under seal).

Financial Officer.¹⁷ These declarations are substantively identical and attach the same five (5) exhibits.

II. Opposer is Entitled Under the Trademark Act to Initiate an Opposition Proceeding.

In every inter partes case, the plaintiff must establish that it is entitled to have invoked the statute authorizing the proceeding it filed. Here, that statute is Section 13 of the Trademark Act, 15 U.S.C. § 1063. The plaintiff must demonstrate: (i) an interest falling within the zone of interests protected by the opposition statute; and (ii) proximate causation. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 1303 (Fed. Cir. 2020) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 120-37 (2014)); *id.* at 1305 (applying *Lexmark* to inter partes TTAB cases). Demonstrating a real interest in opposing registration of a mark satisfies the zone-of-interests requirement, and demonstrating a reasonable belief in damage by the registration of a mark establishes damage proximately caused by registration of the mark. *Id.* at 1305-06.

Opposer has made its '734 Application of record.¹⁸ Opposer further alleged that the USPTO suspended examination of the '734 Application due to a likelihood of confusion with the mark in Applicant's prior-filed application.¹⁹ Applicant's answer

¹⁷ See 14 TTABVUE.

¹⁸ See 5 TTABVUE 8-16.

¹⁹ See 1 TTABVUE 5 ¶ 8.

admitted this allegation.²⁰ In light of this judicially-admitted fact, we find that Opposer has a reasonable belief in damage proximately caused by the registration of the mark in Applicant's application. *See, e.g., Life Zone Inc. v. Middleman Grp. Inc.*, Opp. No. 91160999, 2008 WL 2781162, at *6 (TTAB 2008) (opposer's evidence of the suspension of its pending trademark application based on the applicant's application establishes "standing"); *see also Lipton Indus. Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1029 (CCPA 1982) (statutory entitlement (formerly called "standing") may be established by "assert[ing] a likelihood of confusion which is not wholly without merit ... or, as here, a rejection of an application during prosecution"). Accordingly, Opposer has proven its entitlement to file an opposition proceeding under Section 13.

III. Analysis of Opposer's Claim under Section 2(d)

Having determined that Opposer is entitled to bring this opposition proceeding, we turn to the other elements of Opposer's claim under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d). Section 2(d) prohibits registration of a mark that "so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive." 15 U.S.C. § 1052(d). Thus, the statute requires proof both of priority and likelihood of confusion, and Opposer's burden is to prove both by a preponderance of the evidence. *See, e.g., Araujo v. Framboise*

²⁰ *See* 4 TTABVUE 3; *see also* 16 TTABVUE 12 n.2 ("Applicant does not dispute that Opposer [is statutorily entitled] to contest Applicant's Application by reason of the USPTO's refusal of Opposer's application to register the BrightView mark.").

Holdings Inc., 99 F.4th 1377, 1380 (Fed. Cir. 2024) (“The opposer has the burden to prove its prior use by a preponderance of the evidence.”) (citation omitted); *Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 998 (Fed. Cir. 2020) (“In opposition proceedings, the opposer has the burden of proving a likelihood of confusion by a preponderance of the evidence.”) (citation omitted).

A. Priority

Under Section 2(d), an opposer must prove either ownership of a prior-filed application or registration or priority of use. Here, Opposer bases its Section 2(d) claim on prior common law use. To establish prior common law rights, Opposer must prove by a preponderance of the evidence that its mark is distinctive, inherently or otherwise, and that it acquired rights in the mark prior to any date on which Applicant can rely. *ARSA Distrib., Inc. v. Salud Natural Mexicana S.A. de C.V.*, Opp. No. 91240240, 2022 WL 459244, at *6 (TTAB 2022); *see also Bertini v. Apple Inc.*, 63 F.4th 1373, 1377 (Fed. Cir. 2023) (“The party who first uses a distinctive mark in connection with particular goods or services has priority over other users.”) (citation omitted); *Towers v. Advent Software, Inc.*, 913 F.2d 942, 946 (Fed. Cir. 1990) (“As to an unregistered term, such a likelihood of confusion results when there are trade identity rights in the prior user’s term. Those trade identity rights arise when the term is distinctive, either inherently or through the acquisition of secondary meaning.”).

In this case, “Applicant ... does not dispute that Opposer has priority of use”²¹ As to the requirement that Opposer’s allegedly earlier-used trademark must be distinctive, Opposer notes that Applicant’s trial brief does not address the issue.²² We therefore find Opposer’s BRIGHTVIEW mark distinctive. *See, e.g., Giersch v. Scripps Networks Inc.*, Canc. No. 92045576, 2009 WL 706673, at *3 (TTAB 2009) (“Respondent has not raised an issue as to the distinctiveness of petitioner’s mark or otherwise put petitioner on notice of this defense, and therefore we find that the mark is distinctive.”) (citing *Wet Seal Inc. v. FD Mgmt., Inc.*, Opp. No. 91157022, 2007 WL 458529, at *4 (TTAB 2007) (absent argument or evidence from applicant, opposer’s mark deemed distinctive)) (further citation omitted).

We therefore find that Opposer has established priority.

B. Likelihood of Confusion

We now address the remaining element of Opposer’s claim under Section 2(d): likelihood of confusion. To determine whether Opposer has proved a likelihood of confusion, we evaluate evidence bearing on the factors listed in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973). *See, e.g., Stratus Networks*, 955 F.3d at 998. The Board considers “each ... factor for which there is evidence and argument.” *Spireon, Inc. v. Flex Ltd.*, 71 F.4th 1355, 1362 (Fed. Cir. 2023) (quoting Bd. Decision); *In re Guild Mortg. Co.*, 912 F.3d 1376, 1380 (Fed. Cir. 2019). But we “may focus on dispositive factors, such as similarity of the marks and relatedness of

²¹ *See* 16 TTABVUE 12 n.2.

²² *See* 17 TTABVUE 8.

the goods.” *Oakville Hills Cellar, Inc. v. Georgallis Holdings, LLC*, 826 F.3d 1376, 1379 (Fed. Cir. 2016) (cleaned up; citations omitted); *see also Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1366 (Fed. Cir. 2012). After assessing all relevant factors, our last step is to “weigh the ... factors used in [our] analysis and explain the results of that weighing” and “the weight [we] assigned to the relevant factors.” *In re Charger Ventures LLC*, 64 F.4th 1375, 1383-84 (Fed. Cir. 2023) (citation omitted).

1. The similarity or dissimilarity of the goods and services

We will begin our analysis of the likelihood-of-confusion factors with the second-listed factor, which assesses the “similarity or dissimilarity and nature of the goods or services as described in an application or registration.” *du Pont*, 476 F.2d at 1361. Opposer uses its mark for addiction-treatment services.²³ Applicant accepts this characterization of Opposer’s common law rights in its BRIGHTVIEW mark.²⁴ While Applicant emphasizes that its child-disability services are different from addiction-treatment services, that argument overlooks that Applicant also identifies “Behavioral health services” more generally. And Opposer points to evidence showing that addiction-treatment services are considered a specific sub-type of behavioral health services. *See, e.g.*, 6 TTABVUE 3 (American Medical Association document states “Behavioral health generally refers to mental health and substance use disorders”); *id.* at 6-7 (Volunteers of America Southwest document stating “behavioral

²³ *See, e.g.*, 9 TTABVUE 3-4.

²⁴ *See, e.g.*, 16 TTABVUE 8, 9, 16, 19.

health can refer to a wide range of services including and related to mental health treatment, counseling, addiction and withdrawal treatment, recovery, counseling, marriage and family counseling, preventative care and more”); *id.* at 9; *id.* at 16 (Indiana Family & Social Services Administration document discussing “Mental Health and Addiction Treatment” under Behavioral Health Services”); *id.* at 120 (Missouri Division of Behavioral Health document discussing “substance use prevention, treatment, and recovery” as part of the “behavioral health services” it provides). Thus, the parties’ services are identical-in-part. *See, e.g., In re Fat Boys Water Sports LLC*, Ser. No. 86490930, 2016 WL 3915986, at *10 (TTAB 2016) (“Inasmuch as Registrant’s goods are encompassed within the scope of Applicant’s goods, the respective goods are legally identical in part.”); *see also San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 684 (CCPA 1977) (registration for “capacitors” without limitation encompassed and was therefore legally? identical to “electrical capacitors” in application regardless of what kind of capacitors registrant was actually selling); *Int’l Paper Co. v. Valley Paper Co.*, 468 F.2d 937, 938 (CCPA 1972) (where “registration description is broad enough to cover the goods [of the applicant], ... the legal effect of this fact is that the goods and channels of trade are to be considered the same for the purposes of this opposition”).

That the parties’ services are identical in part is important because the opposition must be sustained even if likelihood of confusion is found as to one listed service in the application. *See, e.g., Tuxedo Monopoly, Inc. v. General Mills Fun Group, Inc.*, 648 F.2d 1335, 1336 (CCPA 1981) (“[L]ikelihood of confusion must be found if the public,

being familiar with appellee's use of MONOPOLY for board games and seeing the mark on **any item** that comes within the description of goods set forth by appellant in its application, is likely to believe that appellee has expanded its use of the mark, directly or under a license, for such item.") (emphasis in original); *SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 1041 (Fed. Cir. 1983) ("It is not necessary that appellant prove likelihood of confusion with respect to usage of its mark on all of the goods set forth in the pleadings. Rather, the opposition must be sustained if Tomy's use of SQUIRT SQUAD is so similar to use of SQUIRT for a single product with respect to which SquirtCo has established prior rights that there is likely to be confusion as to their source.").

Even if there were no evidence that addiction-treatment services are considered a sub-type of behavioral-health services, we would find them closely related based on the copious evidence submitted by Opposer in the form of third-party registrations that list both addiction-treatment services and behavioral-health services. *See, e.g.*, 7 TTABVUE 71-332. "As a general proposition, third-party registrations that cover goods and services from both the cited registration and an Applicant's application are relevant to show that the goods and services are of a type that may emanate from a single source under one mark." *In re Country Oven, Inc.*, Ser. No. 87354443, 2019 WL 6170483, at *5 (TTAB 2019) (citations omitted).

Thus, the parties' services are identical-in-part and otherwise closely related.

2. The similarity or dissimilarity of the marks

We next turn to “[t]he similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.” *du Pont*, 476 F.2d at 1361. This is always one of the most important considerations. *See, e.g., Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1165 (Fed. Cir. 2002) (“the ‘similarity or dissimilarity of the marks in their entirety’ is a predominant inquiry”) (citation omitted). “Marks are compared along the axes of their ‘appearance, sound, connotation and commercial impression.’” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1340 (Fed. Cir. 2015) (citation omitted); *accord In re i.am.symbolic, llc*, 866 F.3d 1315, 1323 (Fed. Cir. 2017). But the comparison is not a “side-by-side” comparison, *see, e.g., In re St. Helena Hosp.*, 774 F.3d 747, 751 (Fed. Cir. 2014); rather, it takes into account that “[t]hose who comprise the purchasing public for these goods [or services] ordinarily must depend upon their past recollection of marks to which they were previously exposed.” *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 1007 (CCPA 1981) (citation omitted).

While we must compare the marks in their entirety and not dissect them, there is nothing wrong with giving more weight to certain features or aspects of the marks where there is a rational reason to do so. *See, e.g., QuikTrip West, Inc. v. Weigel Stores, Inc.*, 984 F.3d 1031, 1035 (Fed. Cir. 2021); *In re Detroit Athletic Co.*, 903 F.3d 1297, 1305 (Fed. Cir. 2018). For example, consumers tend to notice and recall first terms more readily, *see, e.g., Detroit Athletic*, 903 F.3d at 1303; *Edom Lab’ys, Inc. v. Llichter*, Opp. No. 91193427, 2012 WL 1267961, at *7 (TTAB 2012), and terms that are

descriptive or generic (and for that reason often disclaimed) generally don't contribute as much to the overall source-identifying impression of a mark, *see, e.g., In re Chatam Int'l Inc.*, 380 F.3d 1340, 1342-43 (Fed. Cir. 2004); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 876 (Fed. Cir. 1992).

Finally, we note that it is well settled that where, as here, “the goods at issue are identical, the degree of similarity [between the marks] necessary to support a conclusion of likely confusion declines.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1373 (Fed. Cir. 2018) (citation omitted); *Lincoln Nat'l Corp. v. Anderson*, Opp. No. 91192939, 2014 WL 879506, at *17 (TTAB 2014) (“in cases such as this where applicant's services are legally identical (in part) to opposer's services, the degree of similarity between the marks which is required to support a finding of likelihood of confusion declines”) (citations omitted).

Here, the only word in Opposer's mark and the first word of Applicant's mark is BRIGHTVIEW. The additional two terms in Applicant's mark obviously means that the marks do not sound the same. But those terms are not only not the first terms in Applicant's mark, they are also descriptive of Applicant's services,²⁵ which is why Applicant disclaimed them. As a consequence, they don't contribute as much to the overall commercial impression of Applicant's mark. We therefore find that the term “Brightview” dominates in creating the overall commercial impression of Applicant's mark.

²⁵ To the extent consumers notice and remember “BEHAVIORAL HEALTH,” these terms would not decrease the likelihood of confusion because, as we found in the preceding subsection, they are descriptive of Opposer's services as well.

Applicant argues that we should take into account that, on the parties' respective websites, the marks are presented in different typefaces and with different graphics.²⁶ That distinction might have mattered if the application reflected those additional features and Opposer's asserted common law rights were limited to a specific graphic portrayal.²⁷ But where, as here, the asserted marks are simply the words themselves, use in the marketplace of additional graphics or differing typefaces does not matter, not only because the rights asserted encompass any typeface, but also because graphics and typefaces can be changed at the owner's whim at any time. *See, e.g., In re Majestic Distilling Co.*, 315 F.3d 1311, 1315 (Fed. Cir. 2003) (typefaces); *Tuxedo Monopoly*, 648 F.2d at 1337 (graphics).

Overall, we find the marks very similar.

3. The parties' trade channels and the classes and characteristics of their customers

The third likelihood-of-confusion factor considers "[t]he similarity or dissimilarity of established, likely-to-continue trade channels." *du Pont*, 476 F.2d at 1361. The fourth factor examines the "conditions under which and buyers to whom sales are made, i.e. 'impulse' vs. careful, sophisticated purchasing." *Id.* Where the parties' goods or services are identical, or are identical-in-part, there is a presumption that, absent any restrictions in the application at issue, the services will move in the same channels of trade to the same classes of customers. *See, e.g., Cai*, 901 F.3d at 1372;

²⁶ *See* 16 TTABVUE 14-15.

²⁷ Opposer's pamphlets and other marketing materials refer to its BRIGHTVIEW services using both regular typeface and a stylized typeface that is integrated with a sunrise design in its logo. *See, e.g.*, 12 TTABVUE 31-38, 47-90.

Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP, 746 F.3d 1317, 1323 (Fed. Cir. 2014).

We agree with Opposer that the presumption applies in this case because Applicant's "behavioral health services" encompass Opposer's "addiction treatment services," i.e., they are legally identical in part.

Applicant insists that the parties' trade channels and classes of customers are different, pointing to declarations of Rita and Sean Mason.²⁸ The Masons aver that their clients are in the greater Los Angeles area and that their typical purchasers are "insurers."²⁹ Putting aside whether an insurance company that ultimately pays some or all of a health insurance claim for reimbursement of costs incurred by its insureds is the "customer,"³⁰ the problem with Applicant's argument is that there are no restrictions of this sort, or of any other sort, in the identification of services in the application. The comparison of the parties' channels of trade and classes of customers:

must be resolved ... on consideration of the normal and usual channels of trade and methods of distribution. The description of the goods in an application for registration is critical because any registration that issues will carry that description. Moreover, although a registrant's current business practices may be quite narrow, they may change at any time from, for example, industrial sales to individual consumer sales.

CBS Inc. v. Morrow, 708 F.2d 1579, 1581 (Fed. Cir. 1983). Thus, based on the application at issue, we find that the parties' trade channels and classes of customers overlap.

²⁸ See 16 TTABVUE 17.

²⁹ See 14 TTABVUE 3, 28.

³⁰ Elsewhere in their largely identical declarations, the Masons both aver that their clients are "children and young adults who range in age from 2 to 22 years old." See *id.* at 2, 27.

The parties disagree whether their “consumers” exercise sophistication and care in choosing behavioral health and addiction treatment services.³¹ While, due to the unrestricted nature of its identification of services, we disagree with Applicant that “insurers” are its targeted class of customers for its behavioral health services, the inherent nature of the services is such that consumers (i.e., patients/client) generally will exercise care in identifying and procuring behavioral health services.

4. The absence of evidence of actual confusion

Applicant argues that there are no known instances of actual consumer confusion and that this should weigh against a conclusion that confusion is likely.³² This assertion implicates the eighth likelihood-of-confusion factor: “[t]he length of time during and conditions under which there has been concurrent use without evidence of actual confusion.” *See du Pont*, 476 F.2d at 1361. Opposer correctly notes in reply,³³ however, that evidence of actual confusion is not necessary to find a likelihood of confusion. *See, e.g., Weiss Assocs., Inc. v. HRL Assocs., Inc.*, 902 F.2d 1546, 1549 (Fed. Cir. 1990) (“It is unnecessary to show actual confusion in establishing likelihood of confusion.”) (citation omitted).

In assessing this factor, we are required “to look at actual market conditions, to the extent there is evidence of such conditions of record.” *In re Guild Mortgage Co.*,

³¹ See 16 TTABVUE 18 (Applicant says its “insurer” purchasers are “discriminating”); 17 TTABVUE 14 (Opposer urges that its consumers are “mixed,” with some more and some less sophisticated).

³² See 16 TTABVUE 18-19.

³³ See 17 TTABVUE 15.

Ser. No. 86709944, 2020 WL 1639916, at*8-9 (TTAB 2020). The reason for this is that the absence of any reported instances of confusion is meaningful only if the record indicates appreciable and continuous use by Applicant of its mark for a significant period of time in the same markets as those served by Opposer under its marks. *Citigroup, Inc. v. Cap. City Bank Grp., Inc.*, Opp. No. 91177415, 2010 WL 595586, at *17 (TTAB 2010), *aff'd*, 637 F.3d 1344 (Fed. Cir. 2011); *Gillette Can. Inc. v. Ranir Corp.*, Opp. No. 91082769, 1992 WL 215312, at *6 (TTAB 1992). In other words, for the absence of actual confusion to be probative, there must have been a reasonable opportunity for confusion to have occurred. *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 1338 (Fed. Cir. 2001) (averments of no actual confusion discounted due to absence of evidence of length of time and circumstances under which the parties' goods under their respective marks were sold); *Barbara's Bakery Inc. v. Landesman*, Opp. No. 91157982, 2007 WL 196406, at *5 (TTAB 2007) (probative value of the absence of actual confusion depends on whether there has been a significant opportunity for actual confusion to have occurred). If there wasn't such an opportunity, then there's no basis to infer that the lack of any evidence of confusion means confusion is unlikely.

Here, Applicant's testimony declarations stress that most of its clients are in the greater Los Angeles area and that Opposer's facilities are located elsewhere, such as in states on the East Coast and in the Ohio River Valley.³⁴ In fact, the Masons' declarations urge that confusion is unlikely in part because the parties have operated

³⁴ See 14 TTABVUE 3, 28.

at a geographical remove from one another.³⁵ Under these circumstances, the absence of any evidence of actual confusion is of little probative value. We therefore find the eighth factor to be neutral.

5. Applicant's alleged good faith adoption of its mark

“A party’s bad faith in adopting a mark is relevant to the thirteenth *DuPont* factor, which includes any other established fact probative of the effect of use. It requires an intent to confuse.” *QuikTrip W.*, 984 F.3d at 1036; *see du Pont*, 476 F.2d at 1361. Here, Opposer does not argue that Applicant adopted its mark in bad faith. But Applicant urges that its good faith adoption should weigh against a conclusion that confusion is likely.³⁶ While bad faith—i.e., intent to trade on a senior user’s goodwill—tends to show that confusion is likely, *see, e.g., Jewelers Vigilance Committee, Inc. v. Ullenberg Corp.*, 853 F.2d 888, 891 (Fed. Cir. 1988), the converse is not true: evidence that a party acted in good faith in adopting a mark has little probative value. *See, e.g., Lebanon Seaboard Corp. v. R&R Turf Supply Inc.*, Opp. No. 91197241, 2012 WL 953406, at *8 (TTAB 2012) (good faith adoption has “very little, if any, persuasive value”); *see also J & J Snack Foods Corp. v. McDonald’s Corp.*, 932 F.2d 1460, 1462 (Fed. Cir. 1991) (“Whether there is evidence of intent to trade on the goodwill of another is a factor to be considered, but the absence of such evidence does not avoid a ruling of likelihood of confusion.”). We therefore find this factor to be neutral. *See,*

³⁵ *See id.* at 5, 30.

³⁶ *See* 16 TTABVUE 19-20.

e.g., Eveready Battery Co. v. Green Planet, Inc., Opp. No. 91180015, 2009 WL 2176668, at *5 (TTAB 2009) (good faith adoption neutral).³⁷

6. Weighing all our findings on the relevant likelihood-of-confusion factors together

As we mentioned earlier, the last step in analyzing a claim under Section 2(d) is to “weigh the *DuPont* factors used in [our] analysis and explain the results of that weighing” and “the weight [we] assigned to the relevant factors.” *Charger Ventures*, 64 F.4th at 1383-84 (citation omitted). Here, the marks are very similar (factor 1). Applicant’s “behavioral health services” encompass Opposer’s addiction treatment services (factor 2) and otherwise are closely related. These two factors are generally considered key or fundamental inquiries in the analysis. *See, e.g., Herbko Int’l*, 308 F.3d at 1165; *In re Max Cap. Grp. Ltd.*, Ser. No. 77186166, 2010 WL 22358, at *1 (TTAB 2010) (“In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services.”) (citations omitted). We do not see anything in the record that causes us to doubt the salience of these two factors here: they weigh heavily in favor of a conclusion that confusion is likely. The presumed overlap in the parties’ trade channels and classes of consumers of their services only adds additional support to

³⁷ Applicant also argues that the extent of potential confusion is de minimis because it would not provide services to anyone who approached it seeking addiction-treatment services (i.e., the services that Opposer provides). *See* 16 TTABVUE 19 (citing 14 TTABVUE 6). The point is not Applicant’s current intention, but instead its identification of services, which defines the scope of any resulting registration. *See CBS Inc. v. Morrow*, 708 F.2d at 1581. Because addiction-treatment services are within the scope of Applicant’s identified “behavioral health services,” any resulting registration would cover addiction-treatment services notwithstanding Applicant’s promise to the contrary.

that conclusion. In a case such as this where there is no proof that the parties' respective behavioral health-care businesses ever operated in the same geographic markets or overlapped in any other way, the lack of any evidence of actual confusion is neutral. The only factor that weighs against a conclusion that confusion is likely is that consumers of behavioral health care likely tend to exercise some modicum of care in selecting service providers. But, here, we think that the close similarity of the marks, together with the overlapping services, channels of trade, and classes of customers, far outweigh the fact that consumers tend to exercise care in selecting behavioral health care services, *see, e.g., Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 948-49 (Fed. Cir. 2000) (Court upheld Board determination that confusion was likely, noting: "The alleged sophistication of golfers is outweighed by the Board's findings of strong similarity of marks and identity of goods") (citations omitted), and so, on the evidence here, we are convinced that confusion is likely.

Decision: For the reasons set forth above, we sustain the opposition to registration of Applicant's mark.