

This Opinion is Not a
Precedent of the TTAB

Mailed: December 23, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board

In re Monogram Health, Inc.

Serial No. 97412872

Anne M. Turner of Hitchcock Evert LLP,
for Monogram Health, Inc.

Barbara Wold, Trademark Examining Attorney, Law Office 114,
Nicole Nguyen, Managing Attorney.

Before Adlin, Allard and Lavache, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Applicant Monogram Health, Inc. seeks registration of the composite mark
shown below:



for:

medical services in the field of nephrology; behavioral health services in the nature of in-home and telehealth services in the field of nephrology; nutrition and diet counseling services for individuals experiencing chronic kidney disease or renal failure; providing wellness services, namely, personal assessments for individuals experiencing chronic kidney disease or renal failure that takes into

consideration the individual's medical diagnoses, biometrics, medications and other health-related information to create a customized healthcare plan that takes into consideration the physical and behavioral health of the individual; healthcare services, namely, monitoring the biometric information of an individual experiencing chronic kidney disease or renal failure to timely intervene with medical care and medical interventions to improve the individual's medical outcome, all of the foregoing in connection with the diagnosis and treatment of renal disease and/or the provision of renal benefit management services, including the treatment and management of conditions that are co-morbid with renal disease, namely, cardiovascular disease, hypertension, lung disease, or neurological disease; none of the foregoing including the provision of medical or diagnostic testing services, or the development of diagnostic tests, to determine the drug sensitivity and drug resistance of others for diagnostic or treatment purposes, in International Class 44.¹

The 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 so resembles the registered mark shown below



for:

medical testing services for diagnostic or treatment purposes marketed and sold to healthcare providers and insurers, namely, third-party testing of patient urine, blood and/or oral fluids; medical services, namely, medication monitoring and drug detection services to evaluate patient treatment plans and improve clinical

¹ Application Serial No. 97412872, filed May 16, 2022 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on first use dates on November 2, 2020. The application includes this description of the mark: "The mark consists of an 'M' with the right side forming the left side of an 'H' inside a circle."

outcomes and patient safety; drug use testing services, namely, testing patient urine, blood and/or oral fluid for medication or drug abuse and/or compliance with patient prescriptions; pharmacogenetic testing service for diagnostic or treatment purposes that predict a patient's genetic predisposition to metabolizing medications; medical services, namely, providing medication therapy management based on predictive modeling of patient population data, in International Class 44,²

that it is likely to cause confusion. After the refusal became final, Applicant appealed and filed a request for reconsideration that was denied. The appeal is fully briefed.

I. Examining Attorney's Objection Sustained

The Examining Attorney's objection, 11 TTABVUE 3-4,³ to evidence Applicant attached to its Appeal Brief, 9 TTABVUE 18-80, is sustained. Evidence should not be submitted with briefs. *See* Trademark Rules 2.142(b)(3), 37 C.F.R. § 2.142(b)(3) ("Citation to evidence in briefs should be to the documents in the electronic record for the subject application or registration by date, the name of the paper under which the evidence was submitted, and the page number in the electronic record."); and 2.142(d), 37 C.F.R. § 2.142(d) ("The record should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice of appeal.").

² Registration No. 4760034, issued June 23, 2015; Section 8 declaration accepted, Section 15 declaration acknowledged (the "Registration"). The Registration includes this description of the mark: "The mark consists of the letters 'MH', in caps, slanted relative to horizontal. A partial circle encloses a portion of the letters 'MH'. The circle has a three-petal flower as part of its circumference, the flower being located after the letters 'MH'."

³ Citations to the appeal record are to TTABVUE, the Board's online docketing system. The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear.

Parties to Board cases occasionally seem to be under the impression that attaching previously-filed evidence to a brief and citing to the attachments, rather than to the original submission is a courtesy or a convenience to the Board. It is neither. When considering a case for final disposition, the entire record is readily available to the panel. Because we must determine whether attachments to briefs are properly of record, citation to the attachment requires examination of the attachment and then an attempt to locate the same evidence in the record developed during the prosecution of the application, requiring more time and effort than would have been necessary if citations directly to the prosecution history were provided.

In re Michalko, Ser. No. 85584271, 2014 WL 2531202, at *1 (TTAB 2014).⁴

II. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on the likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (“*DuPont*”) (setting forth factors to be considered); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 1315 (Fed. Cir. 2003). We must consider each *DuPont* factor about which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 1381 (Fed. Cir. 2019). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (CCPA 1976) (“The fundamental inquiry

⁴ As part of an internal Board pilot program to broaden acceptable forms of legal citation in Board cases, citations in this opinion are in the form recommended in TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (“TBMP”) § 101.03 (2024). This opinion cites U.S. Court of Appeals decisions by the page numbers on which they appear in the Federal Reporter (e.g. F.2d, F.3d, or F.4th). For Board opinions, this decision cites to the Westlaw legal database.

mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

A. The Services, and Their Channels of Trade and Classes of Consumers

Applicant’s and Registrant’s services are in-part legally identical. Specifically, Applicant’s “medical services in the field of nephrology”⁵ are identified broadly, and encompass Registrant’s “medical services, namely, medication monitoring and drug detection services to evaluate patient treatment plans and improve clinical outcomes and patient safety,” at least to the extent that Registrant’s “medication monitoring and drug detection services ...” are offered to kidney patients, or are otherwise offered “in the field of nephrology.” In other words: (1) Applicant’s nephrology-focused medical services do not specify any particular type of medical service, and thus include “medication monitoring” in the field of nephrology; and (2) Registrant’s “medication monitoring” services are not limited to any particular medical field(s), and thus include “medication monitoring” in the field of nephrology. It is sufficient for a finding of likelihood of confusion if legal identity is established for any item encompassed by the identification of services in a particular class. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp. Inc.*, 648 F.2d 1335, 1336 (CCPA 1981).

Because some of Applicant’s services are legally identical to services identified in the cited registration, we presume that the channels of trade and classes of

⁵ “Nephrology” is “a branch of medicine concerned with the kidneys.” merriam-webster.com/dictionary/nephrology. The Board may take judicial notice of dictionary definitions. *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, Opp. No. 91061847, 1982 WL 52012, at *3 (TTAB 1982), *aff’d*, 703 F.2d 1372 (Fed Cir. 1983).

purchasers for those legally identical services also overlap. *In re Viterra Inc.*, 671 F.3d 1358, 1362 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *Am. Lebanese Syrian Associated Charities Inc. v. Child Health Rsch. Inst.*, Opp. No. 91190361, 2011 WL 4090447, at *6 (TTAB 2011).

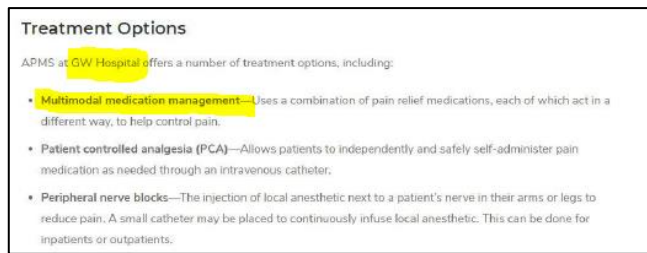
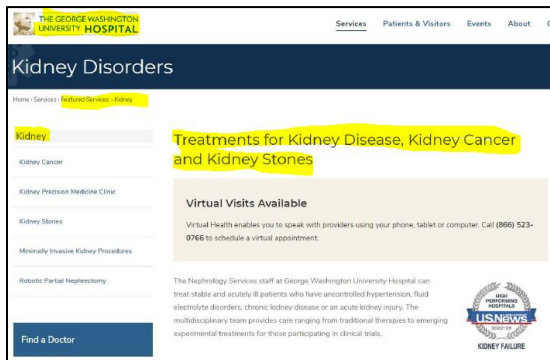
The legal identity of the services and their overlapping channels of trade and classes of purchasers not only weigh heavily in favor of finding a likelihood of confusion, but also reduce the degree of similarity between the marks necessary to conclude that there is a likelihood of confusion. *In re Viterra*, 671 F.3d at 1360; *In re Mighty Leaf Tea*, 601 F.3d 1342, 1348 (Fed Cir. 2010).

Moreover, the Examining Attorney has introduced evidence establishing that Applicant's and Registrant's services are related and that their channels of trade and classes of consumers overlap. For example, Johns Hopkins Medicine provides "medical services in the field of nephrology," identified in the involved application, and medication management, which encompasses the "medication monitoring" services identified in the cited Registration, as shown below:



July 7, 2023 Office Action TSDR 25, 29 (highlighting added).⁶

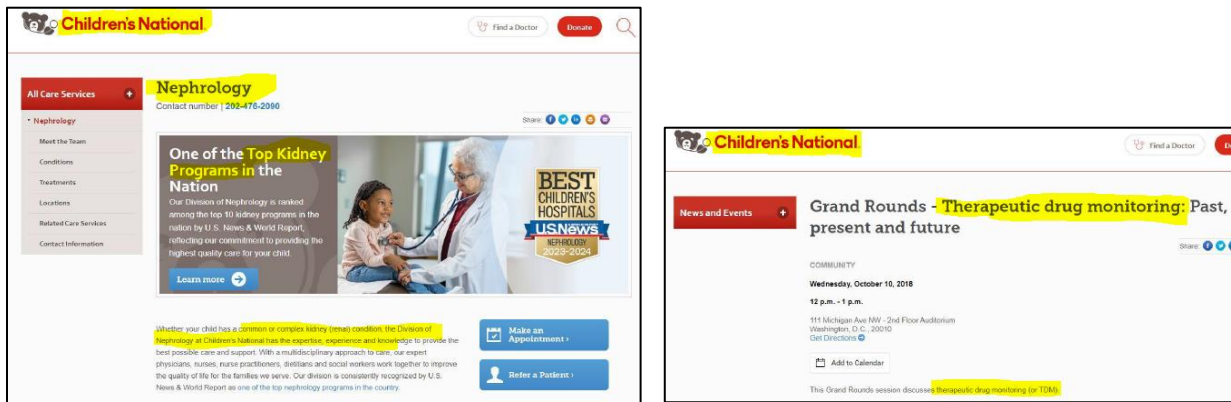
Similarly, The George Washington University Hospital provides “medical services in the field of nephrology,” identified in the involved application, and, through its Acute Pain Management Service, “medication monitoring ... to evaluate patient treatment plans and improve clinical outcomes and patient safety,” identified in the cited Registration, as shown below:



⁶ Citations to the application file are to the USPTO's Trademark Status & Document Retrieval ("TSDR") online database, by page number, in the downloadable .pdf format.

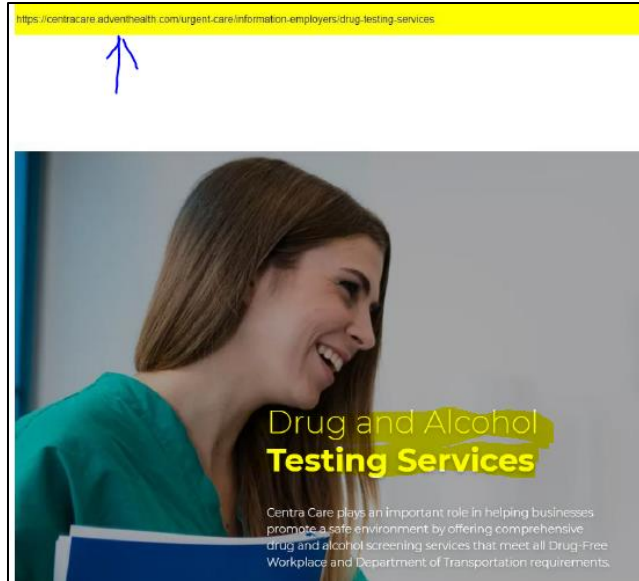
Id. at 33, 42 (highlighting added).

Like Applicant, Children’s National Hospital provides “medical services in the field of nephrology,” and it offered a “Grand Rounds” program on “therapeutic drug monitoring,” which at least suggests that, like Registrant, it provides “medication monitoring,” as shown below:



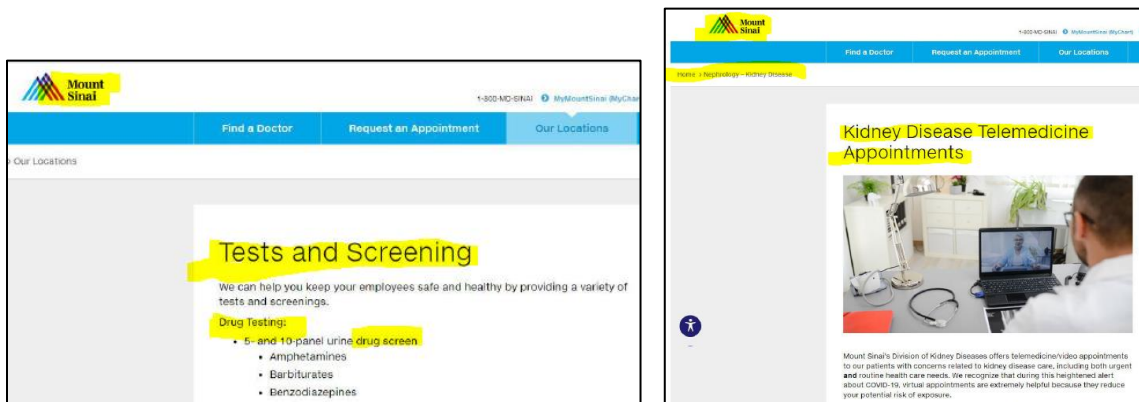
Id. at 45, 50 (highlighting added).

Advent Health offers services falling within Registrant’s identification of “drug detection services,” and services that do not just fall within Applicant’s identification of services, but **are** Applicant’s services. Specifically, Advent Health offers “drug detection services,” and, through a partnership with Applicant itself, in-home nephrology services, as shown below:



February 22, 2024 Denial of Request for Reconsideration TSDR 11, 14 (highlighting and arrow added).

Mount Sinai offers “drug detection services,” identified in the cited Registration, and “medical services in the field of nephrology,” identified in the involved Application, as shown below:



Id. at 34, 36 (highlighting added).

In addition, UVA Health offers “drug testing” services, which are the same as Registrant’s “drug detection services,” as well as “home dialysis” services, which are encompassed by Applicant’s “medical services in the field of nephrology.” *Id.* at 41, 44. Ballad Health offers a “nephrology clinic,” which is encompassed by Applicant’s “medical services in the field of nephrology,” as well as “drug screening,” which is the same as Registrant’s “drug detection services.” *Id.* at 29, 31. Finally, AHN (Allegheny Health Network) offers “home dialysis” services, which are encompassed by Applicant’s “medical services in the field of nephrology,” and “drug testing,” which is similar to or the same as Registrant’s “drug detection services.” *Id.* at 19, 23.

As shown above, these third parties offer, on the same healthcare-focused websites, services encompassed by Applicant’s identified services, as well as services encompassed by Registrant’s identified services. This shows that these services travel in the same channels of trade and are offered to the same classes of consumers. While Applicant has specifically excluded from its identification testing services “to determine the drug sensitivity and drug resistance of others for diagnostic or treatment purposes,” consumers will not be aware of this limitation. They will, however, be aware that third parties offer, under the same mark, services encompassed by Applicant’s identification of services, and services encompassed by Registrant’s identified services, leading to confusion.

Applicant’s argument that the Examining Attorney has “staked a position that any type of medical service is closely related to any other type of medical service

because some hospitals will offer a multitude of medical services,” 9 TTABVUE 7, is not well taken. This appeal does not involve “any type of medical service.” Rather, it involves the specific services identified in the involved application and cited Registration, which have been shown to be legally identical and related, and to travel in the same channels of trade to the same classes of consumers.

In fact, the Examining Attorney’s position is that Applicant’s specific services – “medical services in the field of nephrology” – are related to Registrant’s specific “medication monitoring and drug detection services.” The evidence discussed above is sufficient to establish this specific point. *In re Detroit Athletic Co.*, 903 F.3d 1297, 1306 (Fed. Cir. 2018) (crediting relatedness evidence showing that third parties use the same mark for the goods and services at issue because “[t]his evidence suggests that consumers are accustomed to seeing a single mark associated with a source that sells both”); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 1267 (Fed. Cir. 2002) (evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”); *Made In Nature, LLC v. Pharmavite LLC*, Opp. No. 91223352, 2022 WL 2188890, at *25 (TTAB 2022) (third-party websites offering both types of goods establish relatedness); *In re Integrated Embedded*, Ser. No. 86140341, 2016 WL 7368696, at *12 (TTAB 2016) (website evidence “demonstrate[s] that services of the type offered by both Applicant ... and Registrant are marketed and sold together online under the same marks ... [and] is sufficient to find that the services at issue are related”).

In many ways, Applicant’s arguments about the services misapprehend the

applicable law, which is focused on the identifications of services in the involved application and cited registration, rather than “real world” conditions. Indeed, when the issue is registration, as opposed to use, we are constrained to focus on the services as they are identified in the involved application and cited Registration, without regard to Applicant’s or Registrant’s actual use of the marks. *See In re i.am.symbolic, LLC*, 866 F.3d 1315, 1323 (Fed. Cir. 2017) (“It is well established that the Board may not read limitations into an unrestricted registration or application.”) (citing *SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 1043 (Fed. Cir. 1983)).

It was proper, however, for the Board to focus on the application and registrations rather than on real-world conditions, because “the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application ... regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed.” Even assuming there is no overlap between Stone Lion’s and Lion’s current customers, the Board correctly declined to look beyond the application and registered marks at issue.

Stone Lion Cap. Partners, LP v. Lion Cap. LLP, 746 F.3d 1317, 1323 (Fed. Cir. 2014) (quoting *Octocom Sys., Inc. v. Houston Comp. Servs. Inc.*, 918 F.2d 937, 942 (Fed. Cir. 1990)); *In re Jump Designs LLC*, Ser. No. 76393986, 2006 WL 1968602, at *5 (TTAB 2006) (unrestricted and broad identifications are presumed to encompass all goods of the type described).

B. Strength of Registrant’s Mark

Before addressing the marks themselves, we consider the strength of the cited mark, to ascertain the scope of protection to which it is entitled. There are two types

Serial No. 97412872

of strength: conceptual and commercial. *In re Chippendales USA, Inc.*, 622 F.3d 1346, 1353-54 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength ... and its marketplace strength”).

Here, Applicant argues, based solely on a number of third-party registrations, that “[s]ince M and MH are so commonly used, consumers will focus on other aspects of the marks.” 9 TTABVUE 14 (Applicant’s argument); January 8, 2024 Request for Reconsideration TSDR 51-90 (third-party and other registrations). We are not persuaded. The third-party registrations, accompanied by “no evidence of the extent of the use of the marks in commerce, [does] not diminish the commercial strength of” the cited mark. *In re Embiid*, Ser. No. 88202890, 2021 WL 2285576, at *16 (TTAB 2021) (quoting *Tao Licensing, LLC v. Bender Consulting Ltd.*, Canc. No. 92057132, 2017 WL 6336243, at *14 (TTAB 2017)). See also *In re Mighty Leaf Tea*, 601 F.3d at 1347.

While the third-party registrations Applicant introduced “may bear on conceptual weakness if a term is commonly registered for similar goods or services,” *id.* at *17, here, with only one exception, the registrations upon which Applicant relies do not identify “similar goods or services.” The two closest third-party registrations upon

which Applicant relies are: (1) Registration No. 5416084 ( MARYHAVEN Helping People Restore Their Lives) for

addiction treatment services; and (2) Registration No. 7012217 () for “drug use

testing services.” January 8, 2024 Request for Reconsideration TSDR 61-63, 87-90. Even if we considered both of these marks to be similar to the cited mark, which we

do not, and found that addiction treatment services are related to drug testing services, which we do not, a mere two probative third-party registrations would be quantitatively insufficient to establish that the cited mark is conceptually weak. *See In re Inn at St. John's, LLC*, Ser. No. 87075988, 2018 WL 2734893, at *4 (TTAB 2018), *aff'd* 777 Fed. Appx. 516 (Fed. Cir. 2019).

Accordingly, we find that the cited mark is entitled to the typical scope of protection afforded inherently distinctive marks.

C. The Marks

We consider the marks “in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 1371 (Fed. Cir. 2005) (quoting *DuPont*, 476 F.2d at 1361). Here, the marks are similar because they both include the initials “MH” inside a circle (or partial but almost complete circle), and different because Registrant’s mark includes a flower design and slants the initials “MH.” We find that the similarities significantly outweigh the differences.

Indeed, the marks will sound identical, because their literal element – “MH” – is identical. *See L.C. Licensing, Inc. v. Berman*, Opp. No. 91162330, 2008 WL 835278, at *3 (TTAB 2008) (“In terms of sound, obviously the design portion of opposer’s mark will be not be spoken, and thus, the marks are identical in this respect.”). It is settled that similarity in sound alone may be enough to establish that the marks are confusingly similar. *In re 1st USA Realty Prof., Inc.*, Ser. No. 78553715, 2007 WL 2315610, at *5 (TTAB 2007); *In re White Swan Ltd.*, Ser. No. 617169, 1988 WL 252416, at *2 (TTAB 1988); *Re/Max of Am., Inc. v. Realty Mart, Inc.*, Opp. No.

91059684, 1980 WL 30159, at *5 (TTAB 1980) (“Turning first to the similarities between the respective marks, we note that applicant’s mark ‘REMACS’ and the mark of opposer, namely ‘RE/MAX’ are indistinguishable in sound; and it has been consistently held that similarity in any one of the elements of sound, appearance, or meaning is sufficient to indicate a likelihood of confusion.”). *See generally Krim-Ko v. Coca-Cola Bottling Co.*, 390 F.2d 728, 732 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”).

Turning to how the marks look, neither the flower design in Registrant’s mark, the lettering’s font⁷ or slanted orientation, nor the “partial” circle meaningfully distinguish Registrant’s mark from Applicant’s, as the essence of both Applicant’s and Registrant’s marks is the initials “MH” in a circle.⁸ Indeed, the circle in Registrant’s mark is almost complete and the flower design is pedestrian and merely

⁷ Applicant characterizes the font in its mark as “a monogram-like serif font,” and the font in Registrant’s mark as “a standard sans serif font.” 9 TTABVUE 3.

⁸ Applicant argues that “most consumers who encounter these logos will see each parties’ (sic) full name at the same time.” 9 TTABVUE. Even if this was true, it would be irrelevant. We must compare Applicant’s mark, as presented in the drawing submitted with its application, to Registrant’s mark depicted in the cited registration. *SCM Corp. v. Royal McBee Corp.*, 395 F.2d 1018, 1020 n.4 (CCPA 1968) (“Certain exhibits reflect the parties’ *current* practice of associating their house marks ‘SCM’ and ‘Royal’ with ‘ELECTRA’ and ‘ELECTRESS’, respectively. However, our concern here, of course, is whether ‘ELECTRA’, the mark actually registered, and ‘ELECTRESS’, the mark for which registration is sought, are confusingly similar when applied to the instant goods.”); *Denney v. Elizabeth Arden Sales Corp.*, 263 F.2d 347, 348 (CCPA 1959) (“In determining the applicant’s right to registration, only the mark as set forth in the application may be considered”); *Bellbrook Dairies, Inc. v. Hawthorn-Melody Farms Dairy, Inc.*, 253 F.2d 431, 433 (CCPA 1958) (“The fact that each of the parties applies an additional name or trademark to its product is not sufficient to remove the likelihood of confusion. The right to register a trademark must be determined on the basis of what is set forth in the application rather than the manner in which the mark may be actually used.”).

decorative. These distinctions therefore may not be noticed or if they are noticed they would be unlikely to be remembered.

More specifically, while consumers who see the marks side-by-side would notice the relatively minor differences between them, that is not how consumers typically encounter marks. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1368 (Fed. Cir. 2012) (quoting *Leading Jewelers Guild, Inc. v. LJOW Holdings, LLC*, Opp. No. 91160856, 2007 WL 749713, at *5 (TTAB 2007)). Rather, we must consider whether the differences between the marks are likely to be recalled by purchasers seeing the marks “at spaced intervals,” i.e. consumers who encounter one of the marks first, and do not encounter the other until later. *Grandpa Pidgeon’s of Mo., Inc. v. Borgsmiller*, 477 F.2d 586, 587 (CCPA 1973). In other words, we must keep in mind: (1) “the fallibility of memory over a period of time;” and (2) that the “average” purchaser “normally retains a general rather than a specific impression of trademarks.” *Sealed Air Corp. v. Scott Paper Co.*, Ser. No. 391022, 1975 WL 20752, at *3 (TTAB 1975); see also *In re St. Helena Hosp.*, 774 F.3d 747, 751 (Fed. Cir. 2014) (“marks must be considered in light of the fallibility of memory”) (citation, internal quotation marks, and ellipsis omitted).

As for meaning and commercial impression, the marks are essentially the same. They both convey that medical services are being provided by an entity with the initials “MH.”

In short, because the marks look alike, sound identical, convey the same meaning and create the same commercial impression, this factor also weighs heavily in favor

of finding a likelihood of confusion.

D. Consumer Sophistication and Care

We accept Applicant's argument that consumers of Applicant's and Registrant's services will exercise at least some care, because the services are healthcare-related, and implicate potentially serious medical conditions. This factor weighs against finding a likelihood of confusion.

E. Lack of Actual Confusion

Applicant's claim that there has been no actual confusion, 9 TTABVUE 15, is unpersuasive. There is no evidence regarding the extent of Applicant's use of its mark, or the extent of Registrant's use of the cited mark. Therefore, we cannot gauge whether or the extent to which there has been an opportunity for confusion to occur if it were likely to occur. *See Nina Ricci S.A.R.L. v. E.T.F. Enters. Inc.*, 889 F.2d 1070, 1073 (Fed. Cir. 1989) ("The absence of any showing of actual confusion is of very little, if any, probative value here because (1) no evidence was presented as to the extent of ETF's use of the VITTORIO RICCI mark on the merchandise in question in prior years"); *In re Kangaroos U.S.A.*, Ser. No. 319021, 1984 WL 63596, at *2 (TTAB 1984). In any event, a lack of evidence of actual confusion carries little weight in an ex parte case such as this. *Majestic Distilling*, 315 F.3d at 1317. "[I]t is unnecessary to show actual confusion in establishing likelihood of confusion." *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 1571 (Fed. Cir. 1983). This factor is neutral.

III. Conclusion

The services are in-part legally identical, and thus presumed to travel in the same channels of trade to the same classes of consumers. Even if the services were not

Serial No. 97412872

legally identical, the evidence shows them to be related and to travel in the same channels of trade to the same classes of consumers. The marks are quite similar. These factors outweigh any consumer sophistication or care in purchasing. *See In re Rsch. Trading Corp.*, 793 F.2d 1276, 1278-79 (Fed. Cir. 1986); *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 754-55 (CCPA 1970); *see also, HRL Assocs., Inc. v. Weiss Assocs., Inc.*, Opp. No. 91075632, 1989 TTAB LEXIS 33 (TTAB 1989), *aff'd*, 902 F.2d 1546 (Fed. Cir. 1990) (similarities of goods and marks outweighed sophisticated purchasers, careful purchasing decision, and expensive goods). Confusion is likely.

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