THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Hearing: December 16, 2021 Mailed: December 23, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Belay Mortgage Group, Inc.
v.
FB Corporation

Opposition No. 91251959

Tim Billick of Tbillick Law PLLC,
for Belay Mortgage Group, Inc.

Peter W. Salsich III of Capes Sokol,
for FB Corporation.

Before Kuczma, Lynch, and Allard,
Administrative Trademark Judges.

Opinion by Allard, Administrative Trademark Judge:

FB Corporation ("Applicant") seeks registration on the Principal Register of the mark BELAY FINANCIAL in standard characters for

> Banking services; Financial trust operations; Mortgage banking; Mortgage lending, all in International Class 36.[1]

[1] Application Serial No. 88311089 was filed on February 21, 2019, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant's allegation of a bona fide intention to use the mark in commerce.

Belay Mortgage Group, Inc. ("Opposer") has opposed registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the basis of priority and likelihood of confusion with its common law mark BELAY MORTGAGE GROUP for use with mortgage brokerage services. In its Answer, Applicant denied the salient allegations of the Notice of Opposition.[2] The parties fully briefed the issues and appeared for oral argument.

To prevail on its Section 2(d) claim, Opposer must prove, by a preponderance of the evidence, that it has priority in the use of its pleaded mark and that use of Applicant's mark is likely to cause confusion, mistake, or deception as to the source or sponsorship of Applicant's services. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000). As discussed more fully below, we find that Opposer has met its burden of proof and therefore sustain the Opposition.

I. The Record

The record consists of the pleadings, and, by operation of Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1), the application file for Applicant's mark.

Opposer made the following evidence of record:[3]

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[2] Answer, p. 1-2 (4 TTABVUE).

Citations in this opinion to the briefs, the record, and other filings in the case refer to TTABVUE, the Board's online docket system. Specifically, the number preceding TTABVUE corresponds to the docket entry number, and any number following TTABVUE refers to the page and paragraph references, if applicable.

[3] Opposer alleged in its Notice of Opposition ownership of a pending application to register its BELAY MORTGAGE GROUP mark. Notice of Opposition ¶2 (1 TTABVUE 3) ("Not. Oppos."). However, Opposer's pleaded application is not automatically of record and was not made of record under a notice of reliance or through testimony. *WeaponX Performance Prods Ltd. v. Weapon X Motorsports, Inc.*, 126 USPQ2d 1034, 1040 (TTAB 2018) (plaintiff's pleaded pending application is not automatically of record).

- Declaration of Ms. Jodi L. White, founder,[4] owner and principal mortgage broker of Opposer, who testified about the formation of Opposer, advertising and marketing of Opposer's mark, and services rendered under the mark, together with related exhibits.[5]

- Declaration of Mr. Carlos Caicedo, who served as a career coach to and advisor for Ms. White for several years and who testified about his personal knowledge of use of Opposer's mark.[6]

- Declaration of Mr. Matthew Molenar, owner and operator of MGM Design, a company that specializes in website design, graphic design, web hosting and social media management, and who discussed with Ms. White possible alternatives for Opposer's website.[7]

- Declaration of Mr. Scott Huotori, who testified about his knowledge of Opposer's mark and services rendered under the mark.[8]

- Declaration of Ms. Maranda Cole, who testified about her longtime working relationship with Ms. White and her personal experience working with Opposer to secure financing for her father-in-law's property.[9]

Applicant did not make any evidence of record.[10]

II. Entitlement to a Statutory Cause of Action

Entitlement to a statutory cause of action, formerly referred to as "standing," is an element of the plaintiff's case in every inter partes case. *See Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d

[4] In paragraph 1 of her declaration, Ms. White states that she is "the founder" of Opposer, but in paragraphs 8 and 15 she explains that she "co-founded" Opposer with her partner Mr. Jeremy Irish. We refer to Ms. White herein as a "founder" for the sake of simplicity. 12 TTABVUE 2-12.

[5] 12 TTABVUE 2-150 ("White Decl.").

[6] 12 TTABVUE 151-55 ("Caicedo Decl.").

[7] 12 TTABVUE 156-59 ("Molenar Decl.").

[8] 12 TTABVUE 160-63 ("Huotori Decl.").

[9] 12 TTABVUE 164-87 ("Cole Decl.").

[10] We note that Applicant did not make any objections as to the admissibility of any evidence.

10837, *3 (Fed. Cir. 2020) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 109 USPQ2d 2061, 2067 n.4 (2014)). A party in the position of plaintiff may seek to oppose the registration of another's mark where such opposition is within the zone of interests protected by the statute, 15 U.S.C. § 1063, and the plaintiff's reasonable belief in damage is proximately caused by registration of the defendant's mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, *6-7 (Fed. Cir. 2020).[11]

As explained in more detail in the discussion below, Opposer, through its testimony and related exhibits, has established that it uses BELAY MORTGAGE GROUP as a service mark in connection with mortgage brokerage services. *See Giersch v. Scripps Networks Inc.*, 90 USPQ2d 1020, 1022 (TTAB 2009) (common-law use sufficient to establish standing). Opposer has asserted a plausible claim of likelihood of confusion with the BELAY FINANCIAL mark of the involved application for related services. Thus, Opposer has demonstrated that it possesses a real interest in this proceeding beyond that of a mere intermeddler, and a reasonable basis for its belief of damage. Applicant does not dispute Opposer's entitlement to a statutory cause of action.[12] We find, therefore, that Opposer has established an entitlement to a statutory cause of action to bring the instant opposition proceeding.

[11] Our decisions previously have analyzed the requirements of Sections 13 and 14 of the Trademark Act, 15 U.S.C. §§ 1063-64, under the rubric of "standing." Mindful of the Supreme Court's direction in *Lexmark*, 572 U.S. at 125- 26, we now refer to this inquiry as entitlement to a statutory cause of action. Despite the change in nomenclature, our prior decisions and those of the Federal Circuit interpreting Sections 13 and 14 remain equally applicable.

[12] 14 TTABVUE.

III. Discussion

Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), prohibits the registration of a mark that

> [c]onsists of or comprises a mark which 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 services of the applicant, to cause confusion, or to cause mistake, or to deceive.

Opposer alleges that its mark was "previously used". To prevail on the ground of likelihood of confusion under Section 2(d) based on a previously used mark, Opposer must prove both priority of use and likelihood of confusion. *Cunningham*, 55 USPQ2d at 1848. Opposer must also prove that it has proprietary rights in the term it relies upon to demonstrate likelihood of confusion as to source. *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40, 43 (CCPA 1981). Opposer may establish its prior proprietary rights in a trademark through ownership of a registration, through actual use, or through use analogous to trademark use.[13] *Id.* Here, Opposer has asserted "actual use", i.e., prior common law rights.[14]

[13] Opposer did not plead "use analogous to trademark use" in its Notice of Opposition, present evidence in support of this claim, or argue it in its brief. *Central Garden & Pet Co. v. Doskocil Mfg. Co.*, 108 USPQ2d 1134, 1142 (TTAB 2013)("reliance on priority through analogous use must be pleaded"); *Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1539 (TTAB 2007) ("Opposer['s] … alleg[ation] of 'analogous use …' [should] provide[] applicant with ample notice of the basis upon which it seeks to establish priority in this case for its Section 2(d) claim.").

[14] Not. Oppos. ¶4 (1 TTABVUE 4).

A. Priority

Applicant did not submit evidence of use, and therefore must rely on its application filing date, February 21, 2019, as its constructive use priority date. *See Syngenta Crop Prot. Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1119 (TTAB 2009) ("applicant may rely without further proof upon the filing date of its application as a 'constructive use' date for purposes of priority"); *Zirco Corp. v. Am. Telephone and Telegraph Co.*, 21 USPQ2d 1542, 1544 (TTAB 1991) ("[T]here can be no doubt but that the right to rely upon the constructive use date comes into existence with the filing of the intent-to-use application and that an intent-to-use applicant can rely upon this date in an opposition brought by a third party asserting common law rights.").

Accordingly, Opposer must show "use" of its mark BELAY MORTGAGE GROUP prior to Applicant's constructive use date, i.e., February 21, 2019. *See Otto Roth & Co.*, 209 USPQ at 43. To be considered "use" in commerce, the mark be (1) used or displayed in the sale or advertising of the services, and (2) the services must be actually rendered. *See* 15 U.S.C. § 1127 (definition of "use in commerce"); *see also Aycock Eng'g, Inc. v. Airflite, Inc.*, 560 F.3d 1350, 90 USPQ2d 1301, 1305 (Fed. Cir. 2009). Therefore, we review the evidence in light of this two part analysis to establish the date of first use of Opposer's mark so that we may, in turn, establish priority between the parties. In doing so, we must "look at the evidence as a whole, as if each piece of evidence were part of a puzzle which, when fitted together, establishes prior use." *W. Fla. Seafood Inc. v. Jet Rests. Inc.*, 31 F.3d 1122, 31 USPQ2d 1660, 1663

(Fed. Cir. 1994) (finding priority of use of mark for restaurant services on the basis of three advertisements in local newspapers, a Florida state service mark registration, three regulatory licenses, and a food service inspection report), *quoted in Kemi Organics, LLC v. Gupta*, 126 USPQ2d 1601, 1605-06 (TTAB 2018).

i. Display of Opposer's Mark in Advertising

By way of background, Ms. White testified that she founded Belay Mortgage Group, Inc. in January 2018,[15] that she is Opposer's "principal mortgage broker,"[16] and that Opposer "helps individuals secure financing for residential homes and investment properties – whether it be for purchasing a new property or refinancing an existing one."[17] Ms. White also testified Opposer's website is configured in such a manner that a potential customer could access a loan application online and request Opposer's brokerage services, and that it has been so configured since it was launched.[18] Accordingly, we find that Opposer offers mortgage brokerage services.

Ms. White testified that Opposer applied for its lending licenses in California, Washington and Oregon in April 2018 and was approved as Belay Mortgage Group, Inc. in Oregon and Washington that same month, and in California a few months later (in June 2018).[19] Although "the mere act of incorporation, in itself, does not establish [ ] priority of use," *Liqwacon Corp. v. Browning-Ferris Inds., Inc.*, 203 USPQ

[15] White Decl. ¶8 (12 TTABVUE 4) and Exhibit A.

[16] White Decl. ¶1 (12 TTABVUE 12).

[17] White Decl. ¶10 (12 TTABVUE 4).

[18] White Decl. ¶16 (12 TTABVUE 6).

[19] White Decl. ¶8 (12 TTABVUE 4) and Exhibit B.

305, 309 (TTAB 1979), nor does the act of obtaining any necessary licenses, these documents are just the first piece of the puzzle and serve to corroborate Ms. White's testimony.

Ms. White further testified that, in the months and years following Opposer's licensing, Opposer has marketed and advertised its mark.[20] This includes, for example, establishing Opposer's online presence.[21] As part of Opposer's online presence, Ms. White testified that Opposer has maintained an active Facebook page "since about February 15, 2018."[22] A screen capture of Opposer's Facebook page[23] is shown below, which displays Opposer's mark, and Applicant acknowledges that Opposer's Facebook page "appear[s] to show trademark usage":[24]

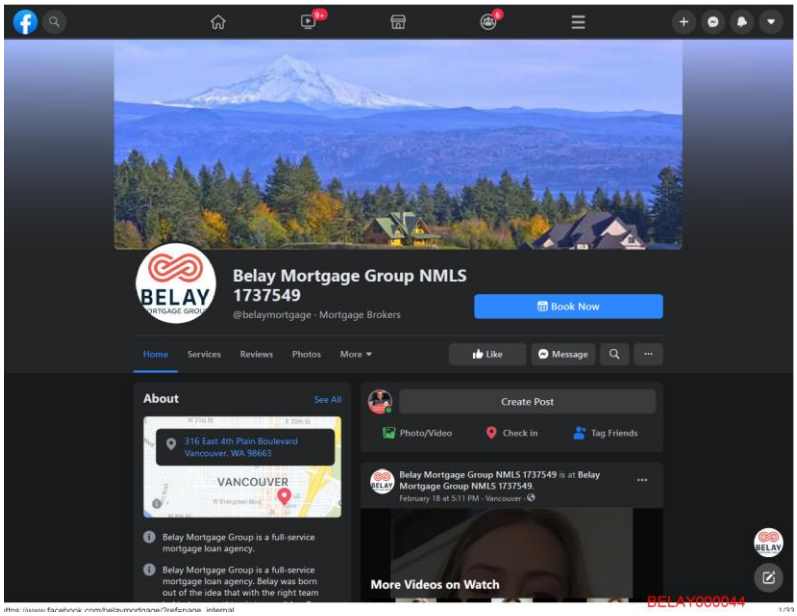
[20] White Decl. ¶¶23, 31 (12 TTABVUE 8, 10).

[21] White Decl. ¶¶16-22 (12 TTABVUE 6-8). Opposer also created a website and Ms. White testified that Opposer's website was launched "around April 2018" (White Decl. ¶16 (12 TTABVUE 6)) and that it has been active and operational since its launch date. *Id*. Indeed, Mr. Molenar, a web designer, who consulted with Ms. White about possible changes to Opposer's site, testified that in April 2018, Opposer's site was active and "displaying Belay's services for mortgage brokering." Molenar Decl. ¶5 (12 TTABVUE 157). However, there is no testimony or evidence that the Opposer's mark was displayed on the site prior to Applicant's constructive use date.

[22] White Decl. ¶21 (12 TTABVUE 7).

[23] Exhibit H to the White Decl. (12 TTABVUE 71-84).

[24] Applicant's brief, p. 9 (14 TTABVUE 13).



Although not shown on the screen shot above, Exhibit H does show that on September 13, 2018, i.e., prior to Applicant's constructive use date, Chris Hendrickson, another mortgage broker, posted, "Use **Belay Mortgage** for your **home loan**, you will be glad you did."[25] The Opposer's Facebook page and this comment from Mr. Hendrickson together make it clear that Opposer's mark was advertised in connection with mortgage brokerage services prior to Applicant's constructive use date.

Additionally, Ms. White testified that as part of her marketing efforts she has handed out her business cards to prospective clients and referral sources at charity,

[25] Exhibit H to the White Decl. (12 TTABVUE 83-84) (emphasis added). In this Facebook comment and in the Yelp reviews discussed later in this decision, customers sometimes use a shortened form of the BELAY MORTGAGE GROUP mark. Indeed, it is not uncommon for consumers to shorten a mark, particularly one like Opposer's which is relatively long, and because the term GROUP is a descriptive entity type and has little trademark significance. As this reviewer and others use the predominant term BELAY together with the term MORTGAGE, we believe this usage is intended to be a shortened form of Opposer's mark and we find that it serves to indicate Opposer as the source of the services. *See Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1819 (TTAB 2015); *Marshall Field & Co. v. Mrs. Fields Cookies*, 25 USPQ2d 1321, 1333 (TTAB 1992).

networking and social events[26] "countless times"[27] since 2018. Opposer's mark is prominently displayed on Opposer's business card (shown below):



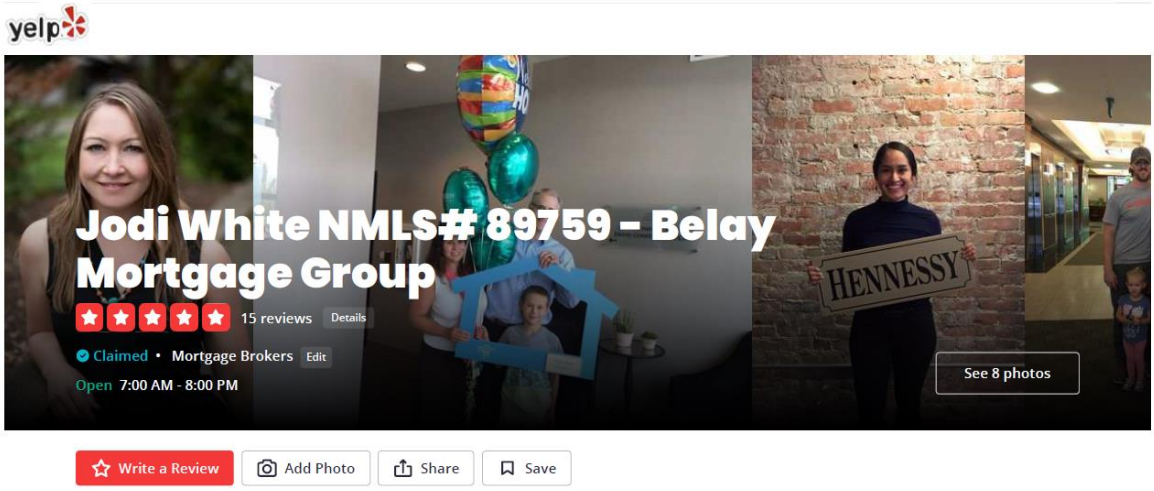
Although a description of Opposer's mortgage brokerage services is not explicitly and separately recited on the business card, we find that the use of the terms "mortgage group" as part of the mark is sufficient to cause the mark to be associated with mortgage brokerage services. *See, e.g., In re Ralph Mantia Inc.*, 54 USPQ2d 1284, 1286 (TTAB 2000) ("Stated differently, in this case, it is enough that the word 'design' appears on applicant's letterhead stationery, envelope and business card. It is not necessary that the specific field of design, i.e., commercial art, also appear thereon.").

Ms. White also testified that Opposer maintains an active Yelp page and that it was launched on or about August 29, 2018.[28] Opposer's mark is shown on its Yelp page, with Ms. White's name and NMLS number, as shown below:

[26] White Decl. ¶31 (12 TTABVUE 10).

[27] White Decl. ¶¶14, 23, 31 (12 TTABVUE 5, 8, 10-11).

[28] White Decl. ¶¶18, 19 (12 TTABVUE 6-7).



The Yelp reviews of record establish that customers associated Opposer's mark with mortgage brokerage services prior to Applicant's constructive use date:

- On May 24, 2018, Roby G. wrote: "Jodi White from **Belay Mortgage** saved my Buyer's money by finding a lower interest rate on their loan …. I would recommend her for … helping anyone **find the right financing for their life style and home**."[29]

- On July 31, 2018, Liv N. wrote: "Jodi IS INCREDIBLE at her craft…. Her knowledge in this profession, not only was impressive but gave us the confidence we needed to trust Jodi and the **Belay Mortgage Group** with our future…. Choose **Belay Mortgage Group** to help you with your **mortgage needs** …."[30]

- On August 4, 2018, Brian L. wrote: "Jodi and **Belay Mortgage** were amazing to work with. They kept on top of every aspect of the process and were able to save me a lot of money in the end. I recommend **Belay** to anyone **in need of a mortgage** …."[31]

- On December 8, 2018 Kat H. wrote: "As a first time **home buyer the process** can be extremely terrifying …. **Belay Mortgage Group** is professional, friendly and they are FAST from the start of **an application** to getting your keys!"[32]

[29] 12 TTABVUE 51 (emphasis added).

[30] 12 TTABVUE 50 (emphasis added).

[31] 12 TTABVUE 50 (emphasis added).

[32] 12 TTABVUE 37 (emphasis added).

Each of the above reviews expressly mention Opposer's mark BELAY MORTGAGE GROUP or a shortened form thereof and either implicitly or explicitly refers to Opposer's mortgage brokerage services. For example, Brian L. states that he recommends Belay to "anyone in need of a mortgage," thus confirming that Opposer offered mortgage brokerage services under the mark and was doing so before the Applicant's constructive use date.

As the Federal Circuit stated in *West Florida Seafood*, where it found priority of use of a mark for restaurant services on the basis of, inter alia, three advertisements in local newspapers:

> As is evident, each of these advertisements shows the mark "FAST EDDIE'S" used in association with restaurant services, and there can be no question that a potential customer would have regarded these advertisements as notices to the public that there was a restaurant operating under the name "FAST EDDIE'S" at the advertised location at the time that they were published. Particularly persuasive is that two of these advertisements include maps showing the restaurant's location, and that the January 19 advertisement even includes coupons for use at the restaurant.
>
> ….
>
> [T]o establish use of a service mark, the mark must be "used or displayed in the sale or advertising of services" in such a way as to identify and distinguish the services of one person . . . from the services of others and to indicate the source of the services, even if that source is unknown.

W. Fla. Seafood, 31 USPQ2d at 1663 & n.8. Here, in a like manner, Opposer's Facebook page, business card and Yelp reviews show Opposer's mark was displayed in advertising and promotional material for Opposer's mortgage brokerage services prior to Applicant's constructive use date. The Yelp reviews discussed above also

confirm that consumers associated Opposer's mark with such services. Consequently, we find that Opposer's mark was displayed in advertising in connection with mortgage brokerage services prior to Applicant's constructive use date. As such, the pieces of the puzzle fit together. *W. Fla. Seafood*, 31 USPQ2d at 1663.

ii. Rendering of Services Under the Mark

We turn now to the second prong of the definition of "use" and review the evidence of record regarding Opposer's "rendering of services" prior to Applicant's constructive use date.

Ms. White's declaration and supporting exhibits contain details of various transactions, some of which occurred after the Applicant's constructive use date.[33] For purposes of priority, however, we focus only on those transactions that occurred prior to February 21, 2019.

To this end, Ms. White testified that she, as principal broker of Opposer, assisted Ms. Maranda Cole in July 2018 with refinancing a piece of property for Ms. Cole's father-in-law.[34] The refinancing closed around July 30, 2018.[35] The Deed of Trust and the Final Refinance Statement relating to this transaction are attached to Ms. White's declaration as Exhibits L and M, respectively; while neither of these

[33] The Huotori transaction, for example, took place in March 2020 (White Decl. ¶25 (12 TTABVUE 8-9), and Exhibit K) and the transaction involving Mr. Huotori's daughter took place in April 2019. White Decl. ¶25 (12 TTABVUE 8-9). Similarly, the loan application for Mr. Brett Dolnick was finalized in October 2020. White Decl. ¶27 (12 TTABVUE 9).

[34] White Decl. ¶26 (12 TTABVUE 9). The record also includes a mirror declaration by Ms. Cole (12 TTABVUE 164).

[35] White Decl. ¶26 (12 TTABVUE 9).

documents constitute advertising, they identify "Belay Mortgage Group, Inc."[36] and "Belay Mortgage Company,"[37] and thus serve to corroborate Ms. White's testimony and to establish the date that the services were rendered.

Similarly, the Yelp reviews discussed above confirm that mortgage brokerage services were rendered prior to Opposer's constructive use date, i.e., on or before May 24, 2018 (Roby G.),[38] July 31, 2018 (for Liv N),[39] August 4, 2018 (for Brian L.)[40] and December 8, 2018 (for Kat H.).[41]

Consequently, we find that Opposer rendered mortgage brokerage services at least as early as July 30, 2018 and prior to Applicant's constructive use date. Indeed, even Applicant admitted that the Cole transaction occurred prior to Applicant's constructive use date.[42]

Applicant made other notable admissions that Opposer's mark was used prior to its constructive use date. For example, in its brief, Applicant wrote that (1) "Opposer adopted its BELAY mark for its Vancouver, Washington mortgage lending business just **over ten months prior** to Applicant's Application Date for its own BELAY mark

[36] 12 TTABVUE 122.

[37] 12 TTABVUE 125.

[38] 12 TTABVUE 51.

[39] 12 TTABVUE 50.

[40] *Id*.

[41] 12 TTABVUE 37.

[42] Applicant's brief, p. 5 (14 TTABVUE 9)("Opposer has submitted evidence of only one sale in the State of California during the period between forming Belay Mortgage Group and Applicant's Application Date.").

for banking and lending services[;]"[43] (2) "at best Opposer can claim prior common law trademark rights in the State of Washington, specifically Clark County (the Vancouver metropolitan area)[;]"[44] and (3) "Opposer's evidence shows some prior common law trademark usage of BELAY in the Vancouver, Washington metropolitan area …".[45]

Based on the foregoing discussion of the testimony and evidence of record, we find that Opposer advertised its mark BELAY MORTGAGE GROUP in connection with mortgage brokerage services and that these services were rendered prior to Applicant's constructive use date. Thus, Opposer has established priority of use. Indeed, Applicant admitted that "[t]echnical priority is not in dispute[,]"[46] that Opposer "began using the name Belay Mortgage Group in connection with its mortgage lending services in April 2018[,]"[47] and that the services were rendered during the relevant time period, i.e., prior to Applicant's filing date.[48]

Despite Applicant's admissions, it advances several arguments to discredit Opposer's evidence. First, Applicant asserts that Opposer's Yelp landing page fails to show Opposer's mark in a manner sufficient to indicate source, but rather refers to Belay Mortgage Group descriptively as the place that Ms. White works and not as a

[43] Applicant's brief, p. 6 (14 TTABVUE 10) (emphasis added).

[44] Applicant's brief, p. 6 (14 TTABVUE 10).

[45] Applicant's brief, p. 7 (14 TTABVUE 11).

[46] Applicant's brief, p. 6 (14 TTABVUE 10).

[47] Applicant's brief, p. 2 (14 TTABVUE 6).

[48] Applicant's brief, p. 7 (14 TTABVUE 11).

trademark.[49] While it is true that on the Yelp landing page of record, Ms. White's name appears first, followed by her NMLS number and then the term BELAY MORTGAGE GROUP, we find that the Yelp landing page combined with the explicit references to Opposer's mark in the above-discussed reviews, establish that the mark was sufficiently displayed in a manner to indicate source and that, indeed, consumers understood the mark to indicate source.

Second, at the hearing, Applicant sought to discredit the Yelp reviews by asserting that (1) the reviewers were not verified and that they could, consequently, be completely false, and (2) while the Yelp evidence was not refuted, it was not clear evidence. However, Applicant did not make these arguments in its brief. Consequently, Applicant's arguments are deemed waived. *See Alcatraz Media*, 107 USPQ2d at 1753.

Third, Applicant seeks to discredit the Yelp reviews because some reviewers acknowledge that they sought out Ms. White due to a prior personal relationship with her and may not have even been aware of the mark.[50] This argument is also not persuasive. Many business deals are referred to persons because of a personal relationship. The initiation of a transaction due to a personal relationship such as we have here does not negate the use of the mark in connection with the services that are ultimately rendered.

[49] Applicant's brief, p. 10 (14 TTABVUE 14).

[50] Applicant's brief, p. 10 (14 TTABVUE 14).

Finally, Applicant advances several arguments in an attempt to defeat Opposer's claim of priority, seeking to discredit the assertedly small geographic scope of Opposer's trading area and its lack of "market penetration".[51] However, in doing so, Applicant admitted that "Opposer can claim prior common law trademark rights in the State of Washington, specifically Clark County (the Vancouver metropolitan area)."[52] In the context of this opposition proceeding, "market penetration" is not relevant for purposes of establishing priority; consequently, these arguments are not persuasive. It is well settled that the Trademark Act does not require any degree of market penetration; rather, it only requires "prior use". To this end, case law makes it clear that Opposer's mark may be used in either interstate commerce or intrastate commerce, so long as the use is "prior use". *Corp. Document Servs, Inc. v. I.C.E.D. Mgmt., Inc.*, 48 USPQ2d 1477, 1479 (TTAB 1998) ("Moreover, whether or not this prior use is strictly intrastate in nature is inconsequential. While interstate use is a prerequisite to federal registration, and applicant must file evidence of the same before any registration will issue, rights in the mark itself are not dependent upon interstate use. It is well established that rights in and to a trademark are created by use of the mark in either intrastate or interstate commerce."); *Maids to Order of Ohio,*

[51] Applicant's brief, p. 10 (14 TTABVUE 14).

[52] Applicant's brief, p. 6-11 (14 TTABVUE 10-15). Applicant also acknowledged that "[t]he evidence on the record in this matter demonstrates that, at best, Opposer's limited use of the mark prior to the Application Date may have established common law rights in the Vancouver, Washington metropolitan area, but no further." Applicant's brief, p. 2 (14 TTABVUE 5).

Inc. v. Maid-to-Order, Inc., 78 USPQ2d 1899, 1908 (TTAB 2006) (priority established on the basis of intrastate use of a service mark).

Having established that Opposer has priority, we now turn to the issue of likelihood of confusion.

B. Likelihood of Confusion

Applicant concedes that the "[t]he similarity of the marks, the services provided, and the channels of trade are not at issue here."[53] We agree that confusion is likely.

We base our determination of likelihood of confusion under Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors enunciated in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (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). In the course of applying the *DuPont* factors, we bear in mind the fundamental purposes underlying Section 2(d), which are to prevent confusion as to sources and relationships, and to protect mark owners from damage caused by registration of confusingly similar marks. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985).

We have considered each *DuPont* factor that is relevant, and have treated any other factors as neutral. *See M2 Software, Inc. v. M2 Commc'ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *Citigroup Inc. v. Capital City*

[53] Applicant's brief, p. 6 (14 TTABVUE 10).

Bank Group Inc., 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011). Two key considerations are the similarities between the marks and the similarities between the services. *Primrose Ret. Cmtys, LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1032 (TTAB 2016).

i. Similarity of the Marks

The first *DuPont* factor is the similarity of the parties' marks. In a likelihood of confusion analysis, we compare the marks in their entireties for similarities and dissimilarities in appearance, sound, connotation and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014).

Applicant's mark is BELAY FINANCIAL. The term FINANCIAL is merely descriptive of Applicant's services and, as a result, Applicant was required to disclaim this term before the application was allowed to advance to the publication stage. As BELAY is both the distinctive component of Applicant's mark and its first term, we find that it is the predominant term. *In re Detroit Athletic Co.,* 903 F.3d 1297, 128 USPQ2d 1047, 1049-50 (Fed. Cir. 2018) (finding "[t]he identity of the marks' two initial words is particularly significant because consumers typically notice those words first" and additional descriptive wording "do[es] little to alleviate the confusion that is likely to ensue").

Opposer's mark is BELAY MORTGAGE GROUP. The terms MORTGAGE and GROUP are at least merely descriptive when considered in light of Opposer's services.

Consequently, they have little trademark significance. Here, BELAY is the predominant term in Opposer's mark.

The parties' marks have identical predominant terms, share similar connotations and make similar commercial impressions; they differ somewhat in sight and sound to the extent that Applicant's mark incorporates the term FINANCIAL while Opposer's incorporates the terms MORTGAGE GROUP, but these descriptive terms are not sufficient to prevent any likelihood of confusion. Based on the foregoing, we find that the marks are very similar. *See, e.g., In re Detroit Athletic Co.*, 128 USPQ2d at 1049 (affirming TTAB's finding that the marks DETROIT ATHLETIC CO. and DETROIT ATHLETIC CLUB are nearly identical in terms of sound, appearance and commercial impression); *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En* 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (affirming TTAB's holding that contemporaneous use of appellant's mark, VEUVE ROYALE, for sparkling wine, and appellee's marks, VEUVE CLICQUOT and VEUVE CLICQUOT PONSARDIN, for champagne, is likely to cause confusion, noting that the presence of the "strong distinctive term [VEUVE] as the first word in both parties' marks renders the marks similar, especially in light of the largely laudatory (and hence non-source identifying) significance of the word ROYALE").

Thus, the *DuPont* factor of similarity of marks weighs heavily in favor of Opposer.

ii. Similarity of the Services and Channels of Trade

We next consider the second and third *DuPont* factors, the similarity or dissimilarity of the parties' services and channels of trade, keeping in mind that

where, as here, the parties' marks are very similar, the lesser the degree of similarity between the parties' services that is required to support a finding of likelihood of confusion. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993); *Time Warner Entmt. Co. v. Jones*, 65 USPQ2d 1650, 1661 (TTAB 2002).

Our analysis is based on the identification of services as set forth in the application. *Stone Lion*, 110 USPQ2d at 1162. In this case, we compare Applicant's identified services to the services for which Opposer has proven its priority. *See Bell's Brewery, Inc. v. Innovation Brewing,* 125 USPQ2d 1340, 1344 (TTAB 2017) (finding prior proprietary rights in opposer's registered and common-law marks). The test is not whether consumers are likely to confuse the services, but rather whether they are likely to be confused as to their source. *See, e.g., Bond v. Taylor*, 119 USPQ2d 1049, 1053 (TTAB 2016). Therefore, to support a finding of likelihood of confusion, it is not necessary that the services be identical or even competitive. It is sufficient that the services are related in some manner, or that the circumstances surrounding their marketing are such that they would be encountered by the same persons in situations that would give rise, because of the marks, to a mistaken belief that they originate from the same source or that there is an association or connection between the sources of the services. *See Apple Comput. v. TVNET.net Inc.*, 90 USPQ2d 1393, 1397 (TTAB 2007).

As discussed above, the evidence of record shows that Opposer offered "mortgage brokerage services" prior to the Applicant's filing date. Applicant's pertinent services are "mortgage lending" services. We take judicial notice of the fact that a "mortgage

broker" acts as an intermediary who brokers mortgage loans to people or companies on behalf of lenders.[54] Consumers would engage both types of services together for the same real estate financing transaction. Opposer's mortgage brokerage services facilitate Applicant's mortgage lending services. Accordingly, we find that the parties' services are highly complementary and therefore related. *Cf. In re Detroit Athletic*, 128 USPQ2d at 1052 ("we have held that confusion is likely where one party engages in retail services that sell goods of the type produced by the other party . . . ."); *see also Martin's Famous Pastry Shoppe,* 223 USPQ at 1290 (holding bread and cheese to be related because they are often used in combination and noting that "[s]uch complementary use has long been recognized as a relevant consideration in determining a likelihood of confusion"); *In re Toshiba Med. Sys. Corp*., 91 USPQ2d 1266, 1272 (TTAB 2009) (holding medical MRI diagnostic apparatus and medical ultrasound devices to be related, based in part on the fact that such goods have complementary purposes because they may be used by the same medical personnel on the same patients to treat the same disease); *Polo Fashions, Inc. v. La Loren, Inc.,* 224 USPQ 509, 511 (TTAB 1984) (holding bath sponges and personal products, such as bath oil, soap, and body lotion, to be related because they are complementary goods that are likely to be purchased and used together by the same purchasers).

[54] COLLINS DICTIONARY (2021). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *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); *Threshold.TV Inc. v. Metronome Enters. Inc.*, 96 USPQ2d 1031, 1038 n.14 (TTAB 2010).

If confusion is likely as to one of Applicant's identified services, we need not consider the remaining identified services. It is sufficient for a finding of likelihood of confusion if relatedness is established for any service listed in the identification of services within a particular class in an application. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp., Inc.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *see also, e.g., Orange Bang, Inc. v. Olé Mexican Foods, Inc.*, 116 USPQ2d 1102, 1117 n.28 (TTAB 2015).

As for channels of trade, there are no restrictions or limitations in Applicant's identification of services, so we presume that Applicant's mortgage lending services will move in all channels of trade normal for such services and will be offered to and purchased by all potential customers. The record reflects that Opposer's mortgage brokerage services and lending services such as Applicant's are part of the same real estate transactions for the same consumers. Thus, we find that the parties' services travel in some of the same channels of trade to some of the same classes of customers. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012).

Thus, the *DuPont* factors of similarity of services and the channels of trade each weigh heavily in favor of Opposer.

iii. Conclusion as to Likelihood of Confusion

The parties' marks are very similar, the services are related and the trade channels overlap. Accordingly, we find that Opposer has carried its burden to establish by a preponderance of the evidence that Applicant's mark is likely to cause

consumer confusion with Opposer's mark when used in connection with the services in the subject application.

IV. Decision

The opposition to registration of the mark is sustained on the ground of priority and likelihood of confusion under Section 2(d), 15 U.S.C. §1052(d).[55]

[55] We reject Applicant's request that, if the present opposition is not dismissed, in the alternative, Applicant's involved application should be amended to a concurrent use application. Applicant's brief, p. 12 (14 TTABVUE 16). It is well established that a concurrent use proceeding may be generated only by filing an application with the USPTO for registration as a lawful concurrent user. *See Chichi's, Inc. v. Chi-Chi's, Inc.*, 222 USPQ 831, 832 (Comm'r 1984) (Commissioner has no power to order the commencement of a concurrent use proceeding absent a concurrent use application). Applicant faces additional hurdles. For example, Applicant's application was filed based on a bona fide intent to use to the mark but Applicant may not amend its application to seek a concurrent use registration until after an acceptable allegation of use has been filed. See 37 C.F.R. §§2.73, 2.99(g); TMEP 1207.04(b).