

This Opinion is not a
Precedent of the TTAB

Mailed: December 1, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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NextHome, Inc.

v.

Mainstreet Property Group, LLC

—
Opposition No. 91231109
—

Dwight D. Lueck and Caitlin R. Byczko of Barnes & Thornburg LLP
for NextHome, Inc.

Bradley M. Stohry of Reichel Stohry LLP for
Mainstreet Property Group, LLC.

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Before Zervas, Cataldo and Adlin,
Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Mainstreet Property Group, LLC (“Applicant”) seeks to register on the Principal Register the standard character mark NEXT HOMES for “providing assisted living facilities” in International Class 43 and “providing long-term care facilities for senior

care; providing short-term rehabilitation services for senior care” in International Class 44.¹

NextHome, Inc. (“Opposer”) asserts, *inter alia*, ownership of (i) Registration No. 2192807² (hereinafter “the ’807 Registration”) for the typed³ mark NEXTHOME for “financial services, namely, real estate brokerage services and mortgage brokerage services” in International Class 36; and (ii) Registration No. 4837666⁴ for the standard character mark NEXTHOME for services including “financial services, namely, real estate brokerage services and mortgage brokerage services; real estate service, namely, rental property management; real estate consultation; real estate brokerage services; real estate procurement for others” in International Class 36. As grounds for opposition, Opposer alleges a likelihood of confusion between its marks and Applicant’s mark under Trademark Act Section 2(d), 15 U.S.C. § 1052(d).

Applicant, in its answer, denied the salient allegations in the amended notice of opposition.

¹ Application Serial No. 87009536, filed April 21, 2016, pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), asserting a *bona fide* intent to use the mark in commerce.

² Registered September 29, 1998, renewed September 24, 2008.

³ Prior to November 2, 2003, “standard character” marks were known as “typed” drawings. A typed mark is the legal equivalent of a standard character mark. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 n.2 (Fed. Cir. 2012) (“until 2003, ‘standard character’ marks formerly were known as ‘typed’ marks.”).

⁴ Registered October 20, 2015.

Accelerated Case Resolution

On February 2, 2017, the parties filed a Stipulation “to have the case resolved pursuant to the Board’s Accelerated Case Resolution (‘ACR’) procedure.”⁵ The parties tried the case pursuant to the Stipulation, which provides in relevant part:

4. Opposer files its brief and supporting evidence no later than June 19, 2017.

5. Applicant files its brief and supporting evidence no later than July 19, 2017.

6. Opposer files its rebuttal brief and supporting evidence no later than August 3, 2017.

7. Applicant files its rebuttal brief and supporting evidence no later than August 18, 2017.⁶

15. The parties will utilize summary judgment format for their briefs.

Briefing and Motion to Strike

On August 11, 2017, Opposer moved to strike⁷ evidence Applicant filed for the first time with a second notice of reliance submitted on the same day as, and discussed in, its rebuttal brief. Opposer maintains that permitting evidence to be filed with Applicant’s rebuttal brief is “inapposite to the standard rules of evidence and Board procedure. ... It does not make logical sense that a party in the position of the

⁵ 5 TTABVUE.

⁶ 5 TTABVUE 2-3.

⁷ 38 TTABVUE.

defendant would be allowed to raise new and never before disclosed evidence in a sur-reply. Opposer maintains that the Stipulation does not grant Applicant this right.”⁸

Because the Stipulation allows for the submission of supporting evidence with each brief that may be filed, Opposer and Applicant each filed new evidence with their main briefs, and the Stipulation provides that the parties will use the summary judgment format for briefs (rebuttal evidence may be filed with a rebuttal brief in the summary judgment context), we find that Opposer’s interpretation of the Stipulation is erroneous, and deny its motion to strike the evidence filed with Applicant’s rebuttal brief.

The Record

In addition to the pleadings, the record automatically includes the involved application file pursuant to Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), and the parties’ Stipulation⁹ which sets forth certain agreed facts and makes of record, *inter alia*, various file histories, press releases, third-party registrations, webpages, agreements, financial information, responses to discovery requests (Interrogatory Requests, Requests for Admissions and Requests for Production), emails and news articles. In addition, the evidence of record consists of the following:

⁸ 38 TTABVUE 3; Stip. ¶¶ 3-4, 5 TTABVUE 3.

⁹ 7-28 TTABVUE.

- Opposer’s first and second notices of reliance, submitting the declaration of James Dwiggins, its Chief Executive Officer, and exhibit,¹⁰ and Mr. Dwiggins supplemental declaration and exhibit.¹¹

- Applicant’s first notice of reliance submitting the affidavit of Christopher J. Lukaart, its Executive Vice President, and exhibits;¹² and second notice of reliance (discussed above) submitting definitions of various terms, CDC website information regarding nursing homes and assisted living facilities and an article on aging.

Standing

Standing is a threshold issue that must be proven by a plaintiff in every *inter partes* case. To establish standing in an opposition or cancellation proceeding, a plaintiff must show “both a ‘real interest’ in the proceedings as well as a ‘reasonable basis’ for its belief of damage.” *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014) (quoting *ShutEmDown Sports, Inc., v. Lacy*, 102 USPQ2d 1036, 1041 (TTAB 2012)); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982).

Opposer has established its standing through its submission of printouts from the USPTO’s TSDR database of its pleaded registrations for NEXTHOME, which

¹⁰ 29 TTABVUE.

¹¹ 30 TTABVUE.

¹² 33 TTABVUE.

demonstrate that the registrations are valid and subsisting, and owned by Opposer.¹³ *See, e.g., Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000) (party's ownership of pleaded registration establishes standing). Applicant has not contested Opposer's standing.

Priority

Because Opposer's pleaded registrations are of record, including the '807 registration, and because Applicant has not filed a counterclaim to cancel Opposer's pleaded registrations, priority is not an issue with respect to the services covered by the registrations. *Penguin Books Ltd. v. Eberhard*, 48 USPQ2d 1280, 1286 (TTAB 1998) (citing *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974)).

Likelihood of Confusion

We now consider Opposer's claim of likelihood of confusion pursuant to Section 2(d) of the Trademark Act. We focus on the '807 registration for the mark NEXTHOME in typed form because the services identified in that registration are closest to the services set forth in the subject application. If there is no likelihood of confusion with respect to the mark of this registration, there will be no likelihood of confusion with respect to Opposer's other pleaded marks. *See The North Face Apparel Corp. v. Sanyang Indus. Co.*, 116 USPQ2d 1217, 1225 (TTAB 2015).

Our determination is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I.*

¹³ See Complaint, 1 TTABVUE 7-44.

du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that “[t]he fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). We also consider other *du Pont* factors which the parties have discussed in their briefs and about which they have introduced evidence.

The Marks

We consider the marks in their entireties as to appearance, sound, connotation and commercial impression to determine the similarity or dissimilarity between them. *In re Viterra*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *du Pont*); *Palm Bay Imp., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). “The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citing *Leading Jewelers Guild, Inc. v. LJOW Holdings, LLC*, 82 USPQ2d 1901, 1905 (TTAB 2007)).

The only difference between the marks is the space between the terms NEXT and HOME(S) and the additional letter “S” in Applicant’s mark. These minute changes do not distinguish the marks. *See, e.g., Weider Publications, LLC v. D & D Beauty*

Care Co., LLC, 109 USPQ2d 1347, (TTAB 2014) (“It is well established that trademarks and/or service marks consisting of the singular and plural forms of the same term are essentially the same mark.”). Thus, we find the marks to be very similar in appearance, sound, connotation and commercial impression. Applicant does not dispute this, and states, “[t]he only factor that arguably favors a finding of likelihood of confusion is the factor that considers the similarity of the marks.”¹⁴

Services and Purchasers

Turning next to the relationship between Opposer’s and Applicant’s services, it is well established that the services need not be similar or competitive, or even offered through the same channels of trade, to support a holding of likelihood of confusion. It is sufficient that the respective services are related in some manner, and/or that the conditions and activities surrounding the marketing of the services are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source. *See Hilson Research, Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993); *In re Int’l Telephone & Telephone Corp.*, 197 USPQ 910, 911 (TTAB 1978). The issue, of course, is not whether purchasers would confuse the services, but rather whether there is a likelihood of confusion as to the source thereof. *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984). Additionally, “the greater the degree of similarity between the applicant’s mark and the cited registered mark, the lesser the degree of similarity between the

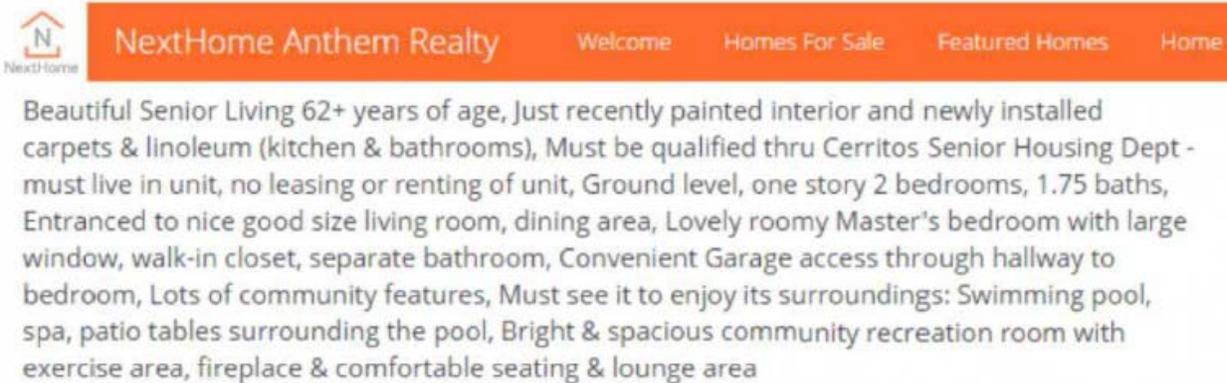
¹⁴ Applicant’s rebuttal brief at 5, 37 TTABVUE 7.

applicant's goods or services and the registrant's goods or services that is required to support a finding of likelihood of confusion.” *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650, 1661 (TTAB 2002) (citing *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993); *In re Concordia Int’l Forwarding Corp.*, 222 USPQ 355 (TTAB 1983)).

The ‘807 registration recites, *inter alia*, “financial services, namely, real estate brokerage services” and Applicant’s identified services are “providing assisted living facilities” and “providing long-term care facilities for senior care; providing short-term rehabilitation services for senior care.” We focus on these services.

Opposer made of record various webpages that demonstrate Opposer offering its services as they concern senior citizens making future housing decisions:

1.¹⁵



¹⁵ 23 TTABVUE 8.

2.16

The screenshot shows the NextHome CityModerne website. The header includes the NextHome logo and navigation links for Welcome, About, and Home Valuations. Below the header is a carousel of images showing various interior and exterior views of the property. A sidebar on the right contains a 'Get price' button and a note '* = Required'. The main content area features a 'Property Description' section followed by two columns of 'Listing Details' and 'Interior Features'.

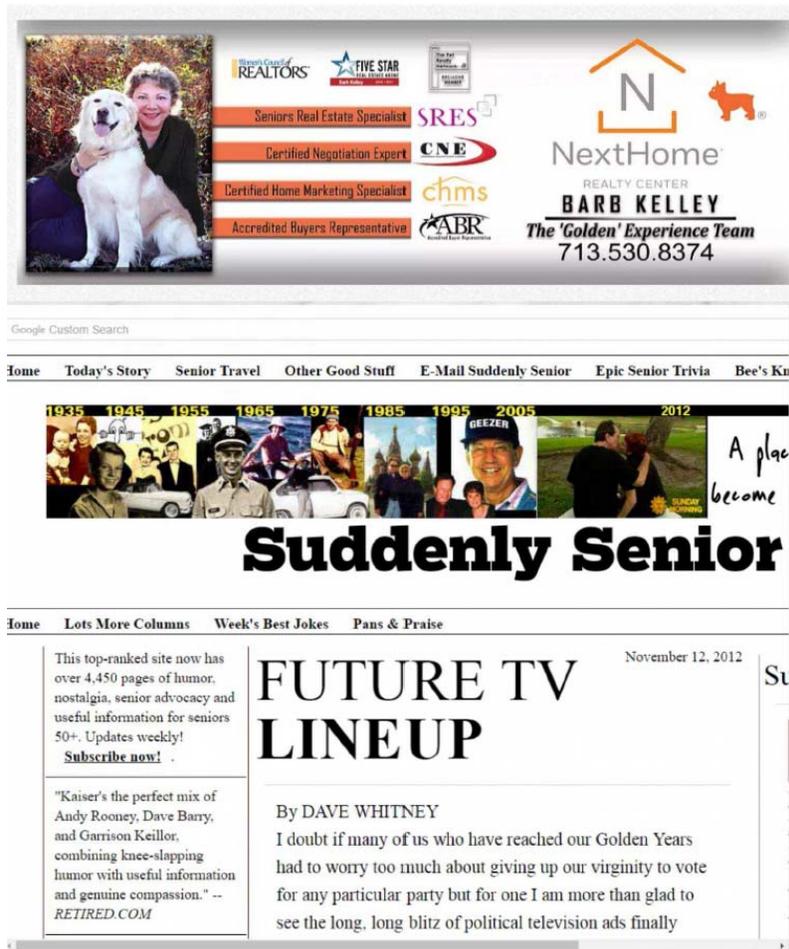
Property Description

Elk Creek Senior Living offers apartments for Assisted Living & Memory Care. Recently completed construction has immediate occupancy of spacious, accommodating, modern and professionally maintained facilities. Included are activity areas, walking garden, sitting areas, snack facilities, quiet reading or visiting nooks, activity rooms, therapy room, & spacious dining facilities. The apartments are up-to-date, beautiful, & safe for loved ones.

Listing Details		Interior Features	
Price	\$3,950 (lease)	Square Feet	528
Bedrooms	1 Bed	Floors	Ceramic Tile
Bathrooms	1 Full Bath	Heating and Cooling	Central Air-Elec, Central Heat-Elec
Year Built	2016	Fireplace	Brick, Decorative
Property Type	Rental		

¹⁶ 23 TTABVUE 429.

3.17



Further, Opposer submitted the testimony of Mr. Dwiggins who explains the intersection of Applicant's and Opposer's services:

Dwiggins Declaration

18. NextHome franchisees work with both buyers and sellers of all ages, backgrounds, real estate experience levels and socioeconomic statuses.

19. NextHome franchisees routinely work with consumers through the process of selling their homes for purposes of downsizing. Part of that process is assisting the sellers in

17 23 TTABVUE 23.

relocating to new homes, which will often be assisted living or transitional care facilities.

20. The consumers targeted by Mainstreet's [Applicant's] assisted living facilities, long-term facilities for senior care and short term rehabilitation for senior care overlap with the consumers who interact with and use the NextHome and NextHome franchisee services.¹⁸

Dwiggins Supplemental Declaration

3. REALTORS who want to specialize in the real estate needs of the older population of consumers have the opportunity to earn the Seniors Real Estate Specialist (SRES) designation by taking the SRES course designed and conferred by the Center for Specialized REALTOR (CSRE) of the National Association of REALTORS®.

5. The NEXTHOME agents who have received the SRES certification are often very focused on specifically marketing to seniors in the real estate market.

6. As part of a consultation with a potential consumer, an SRES certified agent is likely to walk through a list of housing options for the consumer, including assisted living facilities and long-term/short-term care facilities.¹⁹

See also:

- <http://www.ageinplace.org/Local-Chapters/GreaterAtlanta/Local-Resources/provider/coldwell-bankerresidential-brokerage> stating:

I have been actively involved in the senior Provider Community in Atlanta since 1998. I started working with seniors who were friends of the family and quickly added more clients who were interested in downsizing and families who needed to move loved ones to assisted living communities. My knowledge of the real estate market and my circle of senior provider professionals have made my services invaluable to my clients.

¹⁸ 29 TTABVUE 7.

¹⁹ 30 TTABVUE 4.

During my time working in this specialty I have worked with active seniors looking to downsize or move to our area to be closer to children and grandchildren. I have particularly specialized in working with families who are struggling with the process of moving aging parents to a home that better suits their needs. Many of my clients are dealing with these issues from out-of-town and need the specialized services I provide more than ever.²⁰

- <http://www.remax.com/realestateagentoffice/pleasanthill-ca-94523-donald-flaskerud-id25967189.html>

We represent all types of sellers: move-up sellers, retirees, and owners that are moving into assisted living.²¹

In addition, Opposer made of record the following third-party registrations which demonstrate that the same mark is registered for both Applicant's services and some of Opposer's identified services:

Trademark	Reg. No.	Services
	4956286	<p>Class 36: Real estate services, namely, real estate brokerage services in the areas of residential real estate, assisted living, and long term care facilities, and real estate management; property acquisition and property management services for senior housing, including independent living, assisted living and memory care assisted living communities.</p> <p>Class 43: Providing retirement living and assisted living facilities; ... providing independent living residences and living facilities; ... retirement living and assisted living facility services, namely, providing retirement homes and assisted living homes; providing assisted living housing, assisted living for those requiring memory care, and retirement housing for seniors.</p>

²⁰ Stip. of Facts, Exh. D(27), 21 TTABVUE 127.

²¹ Stip. Exh. D(28), 21 TTABVUE 139.

		<p>Class 44: Nursing homes; providing long term care facilities; ... nursing home services</p>
	<p>2748010</p>	<p>Class 35: Providing operational management of health care facilities for others, namely, nursing home facilities, retirement home facilities, and residential long term health care facilities.</p> <p>Class 36: Providing property management services, namely, leasing of real property and real estate brokerage services</p> <p>Class 42: Providing housing and accommodation services, namely, retirement and nursing home services, health care services, and on-premises assisted living and skilled nursing care services.</p>
	<p>3539425</p>	<p>Class 36: Leasing of real estate; Leasing of real property; Real estate brokerage</p> <p>Class 43: Providing assisted living facilities; Retirement homes</p>
<p>VALIDUS SENIOR LIVING</p>	<p>4956285</p>	<p>Class 36: Real estate services, namely, real estate brokerage services in the areas of residential real estate, assisted living, and long term care facilities ... property acquisition and property management services for senior housing, including independent living, assisted living and memory care assisted living communities.</p> <p>Class 43: Providing retirement living and assisted living facilities; providing elder care services; ... providing independent living residences and living facilities; ... retirement living and assisted living facility services, namely, providing retirement homes and assisted living homes</p> <p>Class 44: Nursing homes; providing long term care facilities; providing healthcare for elderly, disabled and retired persons; nursing home services; providing memory care facilities, namely, health care services in the field of memory care.</p>

<p>EXCELLENCE THAT TRANSFORMS LIVES</p>	<p>4221964</p>	<p>Class 36: Land acquisition, namely, real estate brokerage</p> <p>Class 43: Providing assisted living facilities; providing congregate living facilities; public housing services; consultancy services in the field of menu planning for others; providing assistance to senior citizens seeking to determine assisted living facilities appropriate for their needs</p> <p>Class 44: Nursing care; nursing homes</p>
	<p>5102354</p>	<p>Class 36: Real estate services, namely, ... real estate agency services</p> <p>Class 43: Retirement homes; management and provision of retirement accommodation facilities, namely, providing assisted living facilities...</p> <p>Class 44: Convalescent homes, nursing homes, rest homes ... domiciliary care services facilities, namely, home health care; nursing services</p>

Although third-party registrations, which are based on use in commerce, “are not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, [they] may [however] have some probative value to the extent that they may serve to suggest that such goods or services are the type which may emanate from a single source.” *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

Applicant argues that “the services are not competitive, are not used together, do not perform the same or related purposes, have no viable relationship, and are simply not the sorts of services that emanate from the same source.”²²

We do not agree with Applicant and find that the evidence establishes a relationship between Applicant’s services of “providing assisted living facilities”²³ and “providing long-term care facilities for senior care” and Opposer’s “real estate brokerage services.” Many elderly persons, as well as younger disabled persons, reach a point in their lives when they are no longer capable of independent living, and must move into assisted living facilities or long-term care facilities. They, and perhaps younger family members, will address their housing needs and may even concurrently seek to sell the family home and locate a future home of the type provided by Applicant,²⁴ perhaps through the same agent.²⁵ If the need for care is

²² Applicant’s brief at 7, 34 TTABVUE 12.

²³ We take judicial notice of the definition of the term “assisted living” from the *Random House Dictionary* (Random House, Inc. 2017) at dictionary.com (accessed November 15, 2017): “housing or living arrangements for the elderly, infirm, or disabled, in which housekeeping, meals, medical care, and other assistance is available to residents as needed.” The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006). Assisted living facilities are not limited to use by senior citizens, as Applicant maintains in its reply brief at p. 4. 34 TTABVUE 9.

²⁴ Applicant’s franchisees may assist senior citizens in the transition to an assisted living facility. See Stip. Exh. F(6), 22 TTABVUE 175, stating, “Let Rene Gibbs, Senior Care Specialist, be your personal advisor throughout the process to keep you informed and make your transition smoother and more efficient” and “Like a growing number of individuals age 50 and up, you might be considering selling your home to pursue a simpler lifestyle, free from the worries of home maintenance. Such a decision could entail moving closer to family, downsizing to a condo or apartment, or moving to a senior community.”

²⁵ See Mr. Dwiggins Supplemental Declaration at ¶ 6; Stip. of Facts, Exh. D(27), 21 TTABVUE 127; Stip. Exh. D(28), 21 TTABVUE 139.

sudden and immediate, the individual may even find himself or herself permanently in a long term care facility while using the services of a real estate broker, perhaps with the assistance of a family member. In sum, purchasers of Applicant's and Opposer's services overlap and may use Applicant's and Opposer's services at the same time.

Further, Opposer's third-party registration evidence suggests that consumers may consider Applicant's and Opposer's services to emanate from a single source. *See In re Mucky Duck Mustard Co.*, 6 USPQ2d at 1470. Applicant's argument to the contrary at p. 8 of its brief²⁶ regarding these registrations is not persuasive because the evidence does not reveal which are a third party's "main" services and which are subsidiary, nor would that matter in any event. It is also irrelevant – as Applicant contends – that Opposer's admitted competitors (*e.g.*, Century 21, Coldwell Banker, RealtyOne, Berkshire Hathaway)²⁷ do not own any trademark registrations that cover International Class 43 or 44 services.

In addition, as the Federal Circuit pointed out, "even if the goods [or services] in question are different from, and thus not related to, one another in kind, the same goods [or services] can be related in the mind of the consuming public as to the origin of the goods [or services]. It is this sense of relatedness that matters in the likelihood of confusion analysis." *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000).

²⁶ 34 TTABVUE 13.

²⁷ Mainstreet Exhibit AA, Opposer's Response to RFP No. 10, 28 TTABVUE 564.

Trade Channels

Opposer's and Applicant's identified services do not contain restrictions regarding the channels of trade or classes of purchasers. Accordingly, the Board must assume that these services are available in all the normal channels of trade to all the usual purchasers for such services, which, the evidence reveals, overlap. *See Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 56 USPQ2d 1351, 1357 (Fed. Cir. 2000); *Octocom Sys., Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *Paula Payne Prods. v. Johnson Publ'g Co.*, 473 F.2d 901, 177 USPQ 76, 77-78 (CCPA 1973). The record includes the following evidence:

- <https://www.eventbrite.com/o/the-ihara-team-thecomplete-solutiontm-4108834911>

“Dan Ihara (RA) & Julie Ihara (RA) along with their team of Real Estate Professionals have been listed in the Top 100 Real Estate Agents in Hawaii for the last 10 years in a row by Hawaii Business Magazine,” with a link to “FREE Senior Living Options Seminar” at “Hawaii Kai Retirement & Assisted Living Community, Honolulu.”²⁸

- <http://bullerhomes.com/senior-living-communities>

Burnhill Realty Brokerage of Coldwell Banker, listing long term care and assisted living communities, such as La Salle Park Retirement Community, as “a resource to help you identify the various senior-oriented communities that are available locally.”²⁹

²⁸ Stip. Exh. D(2); 19 TTABVUE 68. *See also* 19 TTABVUE 197, regarding the Dan and Julie Ihara RA webpages stating “The Ihara’s Free Senior Living Options Seminar will provide information that will help you with this challenging transition”; and “Hawaii *** will offer a free seminar Senior Living Options designated to address ... ‘What are my choices in Senior Living Communities and what [illegible] are the differences?’”

²⁹ Stip. Exh. D(28), 21 TTABVUE 133-134.

- [http://www.berkshirehathawayhs.com/pages/senior advisor](http://www.berkshirehathawayhs.com/pages/senior%20advisor)

“Find senior care you can trust with a comprehensive directory listing all the assisted living, nursing homes, and in-home care services available in the U.S.” and “View Articles related to Seniors and Senior Care.”³⁰

- <http://smmhawaii.com/aboutus.html>

“Senior Move Managers, LLC understands that there are many physical, psychological, and emotional issues that arise when downsizing our lives. We serve as caring and compassionate consultants to seniors and their family with the goal for minimizing stress for everyone. We’re a one stop shop that helps seniors make a stress-free move from their old house to their new home. We understand your needs are unique and we’re trained to create a customized plan that addresses your specific situation.”³¹

- <https://www.thepreferredd Realty.com/senior-services/>

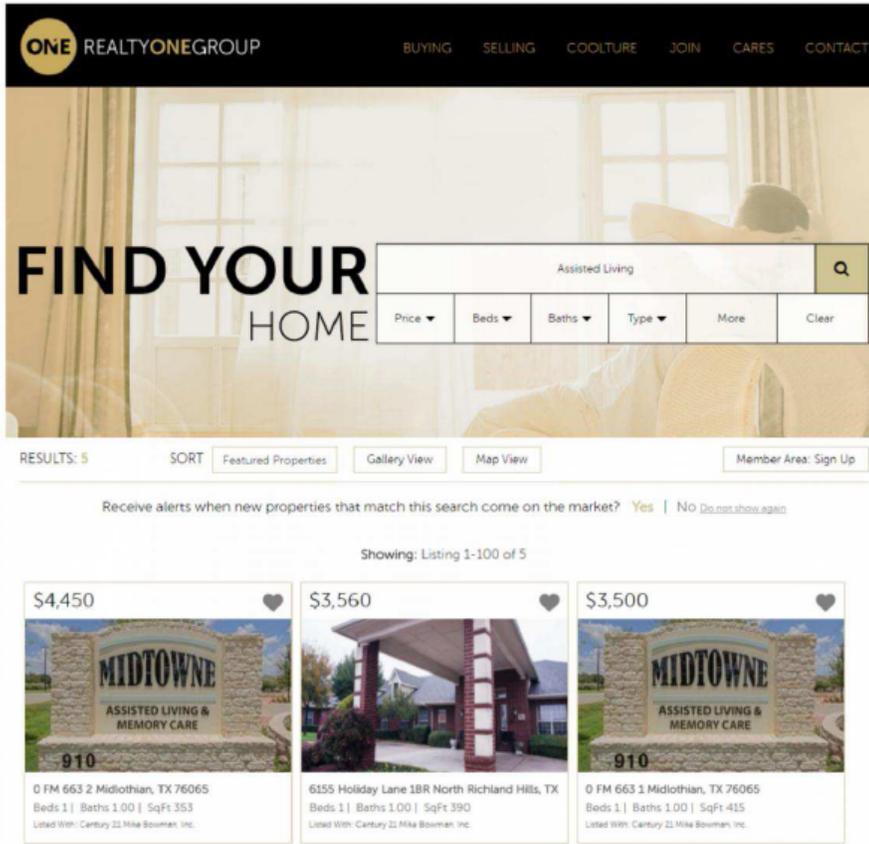
“In an effort to better serve those who might desire a change in lifestyle, we have nurtured a relationship with several area retirement communities. Our goal is to become acquainted with as many communities as possible so we may help our customers to find a community that is just right for them. We can arrange for a consultation or even an overnight visit at the center of your choice. Listed below is an overview of the types of care available.”³²

³⁰ Stip. Exh. D(34), 22 TTABVUE 41.

³¹ Stip. Exh. D(10), 20 TTABVUE 12.

³² Stip. Exh. D(35), 22 TTABVUE 60.

- https://www.realtyonegroup.com/site/search_v5/33



Applicant argues that the trade channels are not related:

The only commonality between Applicant's and Opposer's marketing approaches is that both companies use websites and other internet resources to promote their services. However, the same could be said of most any reasonably sophisticated company. As a result, the fact that both parties advertise their services via the internet is of no consequence. *See Parfums de Couer Ltd. v. Lazarus*, 83 U.S.P.Q.2d 1012, 1021 (TTAB 2007) ("[T]he mere fact that goods and services may both be advertised and offered through the Internet is not a sufficient basis to find that they are sold through the same channels of trade. The

³³ Stip. Exh. D(35), 22 TTABVUE 67, depicting RealtyOneGroup advertising units at Midtown Assisted Living and Memory Care.

Internet is such a pervasive medium that virtually everything is advertised and sold through the Internet.”³⁴

This internet evidence, however, demonstrates that real estate brokerage services, particularly brokerage services directed to seniors, are promoted in the same webpages, or through links to other webpages, as assisted living facility services. We therefore find that Opposer has established that the trade channels for real estate brokerage services and Applicant’s services overlap.

Strength of Opposer’s Mark

Marks vary along a spectrum from very strong to very weak. *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017). In determining strength of a mark, we consider both inherent strength, based on the nature of the mark itself, and commercial strength. *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1476 (TTAB 2014); *see also In re Chippendales USA Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning).”). Evidence of the extensive registration and use of a term by others can be “powerful” evidence of weakness. *See Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015), *cert. denied*, 136 S. Ct. 982 (2016); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015).

³⁴ Applicant’s brief at 15, 34 TTABVUE 20.

With regard to inherent strength, we agree that Opposer's mark is suggestive in that Opposer's services involve assisting home buyers in locating and purchasing their "next home." Opposer acknowledged in its brief that the parties' marks "share the common suggestive meaning of a consumer finding a new place to reside or live."³⁵ The mark is therefore not inherently strong.

With regard to commercial strength, Opposer argues:

The NEXTHOME Marks are strong by virtue of Opposer's extensive use and promotion of the marks in connection with its services. The evidence in the record confirms that the NEXTHOME Marks have significant commercial strength. Opposer has more than 200 NEXTHOME franchisees in 42 states. ... Opposer's rapid growth further indicates the strong consumer recognition of the NEXTHOME Marks.

Since 2014, Opposer has spent more than \$1.5 million in advertising and promoting the NEXTHOME Marks. This \$1.5 million does not include the amounts spent by Opposer's 200 plus franchisees. As evidenced by the websites and promotional materials of Opposer's franchisees, the franchisees have spent significant amounts of money to further advertise and promote the brand. In addition, NEXTHOME agents close more than 7,000 transactions annually, worth more than \$2 billion in volume.

Further, Opposer is the beneficiary of significant goodwill that it acquired with U.S. Reg. No. 2192807. Opposer's predecessor in interest began use of the NEXTHOME mark nearly 20 years ago, and the relevant consuming public now attributes that goodwill to Opposer.³⁶ (citations to the record omitted.)

³⁵ Applicant's brief at 17, 34 TTABVUE 22.

³⁶ Opposer's brief at 14-15, 31 TTABVUE 20-21.

Opposer's own use of its mark prior to trial was for just two and one half years, and there is limited evidence regarding the extent of use by Opposer's predecessor-in-interest.³⁷ Also, Opposer provides no contextual evidence regarding, for example, the sales and advertising figures for its leading competitors or its ranking in market share with regard to its services, and has provided little or no probative evidence of the general reputation or critical assessments in the consumer marketplace. *Cf.*, *Bose Corp. v. QSC Audio Products, Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1309 (Fed. Cir. 2002) ("some context in which to place raw statistics is reasonable"); *Lebanon Seaboard Corp. v. R&R Turf Supply Inc.*, 101 USPQ2d 1826, 1831 (TTAB 2012) ("[w]e have no context for opposer's advertising and sales figures," or its other evidence of commercial strength, "such as how the figures for the [NEXT HOME services] compare with that for other brands of" competing services).

Applicant argues that the "evidence demonstrates that the NEXTHOME Mark is entitled to a very narrow scope of protection because of ... the number of similar marks in use."³⁸ Applicant introduced: (i) a "Next Home Program Guide"³⁹ from the Indiana Housing & Community Development Authority regarding "a down payment assistance ('DPA') that can be used with either FHA or Conventional financing"⁴⁰; (ii) a webpage identifying NEXTHOUSE as "a superior modern design" of a house;⁴¹

³⁷ See Dwiggins Decl. ¶ 9, 29 TTABVUE 5; Dwiggins Exh. A, 29 TTABVUE 9-11.

³⁸ Applicant's brief at 16, 34 TTABVUE 21.

³⁹ Stip. Exh. S, 28 TTABVUE 393 - 416.

⁴⁰ Stip Exh. S, 28 TTABVUE 396.

⁴¹ Stip Exh. S, 28 TTABVUE 422.

and (iii) a webpage identifying NEXTHOME, which is a “living lab’ within NextEnergy’s testing and validation platforms.”⁴² This evidence has limited probative value because it pertains to goods and services that differ from Opposer’s services. The remaining six webpages are from government authorities and third-party businesses using “Next Home” or “Next” combined with generic terms (*e.g.*, NEXT REALTY, NEXT RE and NEXT SALES & MARKETING) in connection with real estate brokerage and a government loan program that assists homebuyers in obtaining down payment or other assistance in purchasing a new home.⁴³ These websites indicate that NEXT is not infrequently used in the housing field, including for real estate brokerage services. However, this evidence is quantitatively limited and thus does not establish any significant commercial weakness in the term NEXT.

Applicant also introduced third-party Principal Register registrations to demonstrate that the registered mark is weak, including the following:⁴⁴

⁴² Stip Exh. S, 28 TTABVUE 421.

⁴³ Stip. Exh. S, 28 TTABVUE 417 – 420, 422 – 424.

⁴⁴ Applicant’s brief at 18, 34 TTABVUE 23. *See also* Stip. Exh. R(1), 28 TTABVUE 338-60.

Mark	Reg. No.	Owner	Services
NextHouse	5,114,528	Trudeau Homes International	Manufactured homes
YOUR NEXT PLACE	4,631,826	Your Next Place LLC	Real estate listing services for apartments
MyNextCondo.com	4,284,729	Virani International Holdings Inc.	Real estate brokerage
NEXT	2,383,949	Next Realty, LLC	Real estate brokerage services
NEXT REALTY MID-ATLANTIC	3,141,788	Next Realty, LLC	Real estate brokerage services
NEXT REALTY MIDWEST	3,141,792	Next Realty, LLC	Real estate brokerage services
NEXT DEVELOPMENT	3,414,957	Next Realty, LLC	Real estate development services
NextAge	3,706,892	NextAge Realty International, LLC	Real estate brokerage franchise
NextOn	5,105,348	MWV Community Development and Land Management, LLC	Real estate management services
NEXT GEN	4,286,663	Lennar Pacific Properties Management, Inc.	Real estate management services
YOUR HOME, NEXT EXIT	4,309,485	Exit Realty Corp. International	Real estate brokerage services

Third-party registrations may be relevant to show the sense in which a mark is used in ordinary parlance; that is, an element common to both parties' marks may have a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is inherently weak. *Jack Wolfskin* 116 USPQ2d at 1136. The quantity of this evidence is much less than the evidence of registrations and actual use in *Juice Generation* and *Jack Wolfskin*. In *Juice Generation*, there were at least twenty-six relevant third-party uses or registrations of record, 115 USPQ2d at 1672 n.1, and in *Jack Wolfskin*, there were at least fourteen, 116 USPQ2d at 1136 n.2.

Thus, although we have found that Opposer's mark is not inherently strong, we point out that even weak marks are entitled to protection. *See Matsushita Elec. Co. v. National Steel Co.*, 442 F.2d 1383, 170 USPQ 98, 99 (CCPA 1971) ("Even though a mark may be 'weak' in the sense of being a common word in common use as a trademark, it is entitled to be protected sufficiently to prevent confusion from source arising").

Purchaser Care

Opposer has not addressed the *du Pont* factor regarding purchaser care in any meaningful way, while Applicant maintains:

Opposer's consumers are also making a major life decision in deciding to buy and/or sell a home. The decision regarding which realtor to assist the consumer with this process is likewise an important decision and not one that most consumers would make without some research and consideration, particularly as a realtor obtains a significant percentage of the sale price of a home. Moreover, like Applicant's services, Opposer's services cannot be obtained off the shelf or bought on impulse, but can only be obtained after contacting and working directly with Opposer.⁴⁵

With regard to its services, Applicant states:

[T]he simple fact is that Applicant's consumers are going to take extra care in making the decision regarding Long-Term Care Facility Services, as it is a major life decision that involves significant cost. Because of the great importance in making the right choice for care of an elderly patient, consumers considering Applicant's Long-Term Care Facility Services will be well informed about such services. Moreover, these consumers will need to work directly with Applicant on availability of space and the specifics of the arrangement, including how the costs will be handled. ... These informed consumers who are working

⁴⁵ Applicant's brief at 14, 34 TTABVUE 19.

directly with Applicant on logistics are not going to be confused about who they are dealing with.⁴⁶

Opposer's and Applicant's services involve significant life decisions for their purchasers; we therefore find that purchases of Opposer's and Applicant's services will be made with care. *See Primrose Ret. Cmty., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1038-39 (TTAB 2016) ("We find that even in the case of the least sophisticated purchaser, a decision as important as choosing a senior living community will be made with some thought and research, even when made hastily.").

Conclusion

After considering all of the evidence of record as it pertains to the relevant *du Pont* factors, including all of the parties' arguments and evidence, even if not specifically discussed herein, we find that despite the fact that Applicant's potential purchasers will likely exercise a high degree of care and that Opposer's mark is not inherently strong, in view of the facts that the marks are very similar, Applicant's services and Opposer's services are related and move in the same channels of trade and are sold to the same purchasers, Applicant's mark NEXT HOMES for "providing assisted living facilities" and "providing long-term care facilities for senior care; providing short-term rehabilitation services for senior care" is likely to cause confusion with the registered mark NEXTHOME for "financial services, namely, real estate brokerage services and mortgage brokerage services." These factors outweigh the degree of care that customers will exercise and the lack of inherent strength of Opposer's mark.

⁴⁶ Applicant's rebuttal brief at 7, 37 TTABVUE 9.

Decision: The opposition is sustained and registration to Applicant of its mark is refused for the International Classes 43 and 44 services.