

**FILED**  
**United States Court of Appeals**  
**Tenth Circuit**

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**UNITED STATES COURT OF APPEALS**

**May 10, 2023**

**FOR THE TENTH CIRCUIT**

**Christopher M. Wolpert**  
**Clerk of Court**

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ELEVATE FEDERAL CREDIT  
UNION,

Plaintiff Counterclaim  
Defendant - Appellee

No. 22-4029

v.

ELEVATIONS CREDIT UNION,

Defendant Counterclaim  
Plaintiff - Appellant.

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**APPEAL FROM THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF UTAH**  
**(D.C. NO. 1:20-CV-00028-DAK)**

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Timothy P. Getzoff, Holland & Hart LLP, Boulder, Colorado (Jeffrey S. Pope of Holland & Hart LLP, Cheyenne, Wyoming, with him on the briefs), on behalf of the Defendant, Counterclaim Plaintiff-Appellant.

Nicole M. Deforge, Fabian VanCott (Matthew S. Brahana and Kirsten R. Allen with her on the briefs), Salt Lake City, Utah, on behalf of the Plaintiff, Counterclaim Defendant-Appellee.

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Before **BACHARACH**, **MORITZ**, and **ROSSMAN**, Circuit Judges.

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**BACHARACH**, Circuit Judge.

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This appeal concerns a trademark dispute between two credit unions: “Elevate Federal Credit Union” and “Elevations Credit Union.” Elevate sued for a declaratory judgment of noninfringement, and Elevations counterclaimed for trademark infringement under the Lanham Act.<sup>1</sup> The parties proffered expert witnesses and challenged the admissibility of the adversary’s expert testimony.

The district court excluded opinion testimony by Elevations’ expert witness and granted summary judgment to Elevate on its claim for a declaratory judgment and on Elevations’ counterclaim. Elevations appeals these rulings,<sup>2</sup> and we confront two issues:

1. *Exclusion of expert testimony.* The parties must disclose information considered by their expert witnesses. Elevations’ expert witness expected to testify that internet searches would show both Elevations and Elevate. But Elevations disclosed only two of the expert witness’s searches. Given Elevations’ failure to disclose information that the expert witness considered, did the district court act within its discretion when disallowing Elevations’ expert testimony? We answer *yes*.

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<sup>1</sup> Elevations also claimed common law infringement, cyberpiracy, and violation of Utah’s Truth in Advertising Act. On these claims, the district court granted summary judgment to Elevate. But these claims are not at issue here.

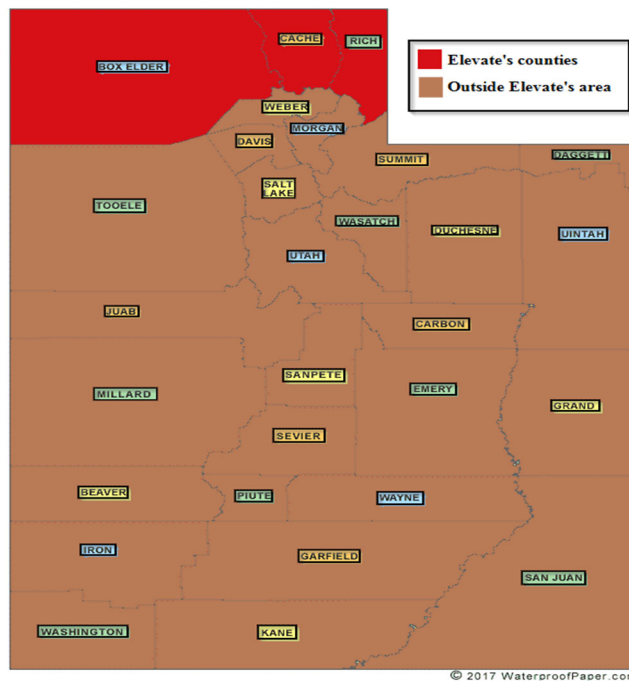
<sup>2</sup> In district court, Elevations moved to exclude opinion testimony by Elevate’s expert witness (Mr. Scott Hampton), who had been designated as a witness on damages and revenue streams. The district court declined to exclude this testimony, and Elevations challenges this ruling. But Elevations concedes that this part of the appeal would become relevant only if we were to reverse the grant of summary judgment to Elevate. We are upholding the grant of summary judgment, so we need not consider the ruling on Mr. Hampton’s testimony.

2. *Trademark infringement.* Under the Lanham Act, infringement exists when a party’s use of a mark creates a likelihood of confusion. When the marks belong to credit unions with differing eligibility restrictions in distinct geographic markets, could the presence of some similarities create a likelihood of confusion? We answer *no*.

**I. Elevate and Elevations focus on different regions.**

Elevations is a state-chartered credit union in Colorado, which owns the marks “ELEVATIONS” and “ELEVATIONS CREDIT UNION.” For membership, this credit union requires connections to Colorado or donations to a related foundation. Over 150,000 individuals have joined as members.

Elevate is a federal credit union that operates in 3 rural counties in northern Utah—Box Elder, Cache, and Rich.



Elevate limits membership to persons connected to these 3 counties. So Elevate’s membership is only about 13,000, less than a tenth of Elevations’.

The vast majority of Elevate’s members live in its 3 Utah counties (92%), and only about 0.2% of Elevate’s members live in Colorado. In contrast, Elevations operates mainly in Colorado and has only 16 active members living in Elevate’s 3 counties (0.01%).

**II. The district court did not abuse its discretion in excluding Elevations’ expert witness.**

Elevations claims that Elevate’s mark creates a likelihood of confusion. For this claim, Elevations engaged an expert witness (Mr. Hal Poret) to conduct a survey and testify about the results. But the district court excluded Mr. Poret’s testimony.

**A. Mr. Poret used a “Squirt survey” to assess potential confusion.**

Mr. Poret conducted a “Squirt survey.”<sup>3</sup> In a Squirt survey, the expert witness generally shows marks to consumers and asks if they think that any of the marks are from the same company. *See* Jerre B. Swann, *Likelihood of Confusion Studies and the Straitened Scope of Squirt*, 98 Trademark Rep. 739, 749–50 (2008) (discussing the types of Squirt surveys); 6 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 32:174.50

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<sup>3</sup> This survey is named after the type used in *SquirtCo v. Seven-Up Co.*, 628 F.2d 1086 (8th Cir. 1980).

(5th ed. Supp. 2023) (“The ‘Squirt’ format presents a survey respondent with both of the conflicting marks.”).

Squirt surveys use “stimuli that carefully replicate the real-world Internet marketplace, such as screenshots of actual search-result listings or screenshots of webpages.” Jerre B. Swann & R. Charles Henn Jr., *Likelihood of Confusion Surveys: The Ever-Constant Eveready Format; the Ever-Evolving Squirt Format*, 109 Trademark Rep. 671, 680–81 (2019). The searches should use terms “commonly used” that would turn up each website “within a manageable number of hits.” *Id.* at 680; *see also* 6 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 32:174.50 (5th ed. Supp. 2023) (“[A] survey asking respondents to compare two trademarks does not bear a reasonable similarity to the marketplace unless it reflects a significant number of real world situations in which both marks are likely to be seen in the marketplace sequentially or side-by-side.”).

Mr. Poret defended his approach based on the proximity of the two credit unions’ marks when consumers searched the internet: “[T]he parties’ marks are reasonably likely to be found in close physical proximity in internet searches.” Appellant’s App’x vol. 8, at 1663. Mr. Poret acknowledged that the marks should appear within a “manageable number of hits” from “commonly used” search terms. *Id.* Mr. Poret claimed that the proximity of the marks was enough to justify a Squirt survey. *Id.* at 1665–

66 (citing Jerre Swann & R. Charles Henn Jr., *Likelihood of Confusion Surveys: The Ever-Constant Eveready Format; the Ever-Evolving Squirt Format*, 109 Trademark Rep. 1 (2019)). But Mr. Poret provided only two examples of searches—one from Bing and another from Apple’s app store. *Id.* at 1658, 1663–65. On these two examples, the results showed Elevate and Elevations in close proximity.

Mr. Poret acknowledged that he had conducted many other searches. For these, Mr. Poret provided some of the search terms that he had used: *Elevate, Elevate Credit Union, Elevations, and Elevations Credit Union.* *Id.* at 1658–59. But he didn’t keep records of the searches, note the actual search terms, or identify the search engines.

**B. Elevations did not comply with its disclosure obligation.**

The district court excluded the testimony in part because Elevations hadn’t disclosed many of Mr. Poret’s internet searches.<sup>4</sup> In excluding the

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<sup>4</sup> The district court excluded the testimony on grounds that

- Elevations hadn’t complied with its disclosure obligation and
- Mr. Poret had used an unreliable method.

Because we conclude that the district court acted within its discretion in enforcing Elevations’ disclosure obligation, we need not assess the reliability of Mr. Poret’s method.

testimony, the court relied on the need for an expert witness’s report to include

- “a complete statement of all opinions the witness will express and the basis and reasons for them” and
- “the facts or data considered by the witness in forming them.”

Fed. R. Civ. P. 26(a)(2)(B). Without disclosure of this information, the expert witness can’t “supply evidence on a motion . . . unless the failure was substantially justified or . . . harmless.” Fed. R. Civ. P. 37(c)(1). In our view, the court didn’t err in enforcing the disclosure obligation.

**1. We review the district court’s exercise of discretion.**

We review the exclusion of expert testimony for an abuse of discretion. *Woodworker’s Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 992 (10th Cir. 1999). Elevations disagrees, asserting that we should conduct de novo review under *United States v. Nacchio*, 555 F.3d 1234 (10th Cir. 2009) (en banc). There we explained that “[w]e review de novo whether the district court employed the proper legal standard and performed its gatekeeper role in determining whether to admit or exclude expert testimony. We review for abuse of discretion the manner in which the district court performs this gatekeeping role.” *Nacchio*, 555 F.3d at 1241 (cleaned up).

Though Elevations argues that the district court didn’t use the correct standard, we disagree. The district court properly acted as a gatekeeper and

enforced Elevations’ discovery obligation. So we apply the abuse-of-discretion standard.

**2. The district court could reasonably view the internet searches as facts or data that Mr. Poret had considered.**

An expert witness’s report must include “the facts or data considered by the witness in forming [his opinion].” Fed. R. Civ. P. 26(a)(2)(B). “[F]acts or data” is interpreted “broadly,” so parties must disclose “any material considered by the expert, from whatever source, that contains factual ingredients.” Fed. R. Civ. P. 26 advisory committee’s note to 2010 amendment.

In his report, Mr. Poret defended his methodology, opining that his survey had replicated the real-world internet marketplace because the parties’ marks appeared close together in his internet searches. Appellant’s App’x vol. 8, at 1662–63. This opinion reflects his reliance on the actual searches. *See id.* at 1663 (“Most importantly, the parties’ marks are reasonably likely to be found in close physical proximity in internet searches.”); *id.* at 1665 (Mr. Poret’s assertion that the parties’ marks “appear[ed] in close proximity in . . . internet searches,” which “is sufficient proximity for a Squirt methodology to be appropriate”); *see also* Jerre B. Swann & R. Charles Henn Jr., *Likelihood of Confusion Surveys: The Ever-Constant Eveready Format; the Ever-Evolving Squirt Format*, 109 Trademark Rep. 671, 679 (2019) (“The mere fact that a senior and



junior user’s marks both appear somewhere on the Internet is, by itself, insufficient to justify use of a Squirt format.”). Mr. Poret thus considered the search results when forming his opinion on what actual consumers would have seen.

Despite the potential importance of Mr. Poret’s search terms, he didn’t provide the specifics of his searches (such as the dates of the search, the precise terms used, the search engines used, the connectors used, and the results of those searches). He instead provided just two examples from searches on Bing and Apple’s app store. The district court could reasonably view the two examples as inadequate to reflect the facts or data that Mr. Poret had considered.

Elevations asserts that Elevate had enough information to replicate Mr. Poret’s searches. But Elevations doesn’t explain how anyone could replicate Mr. Poret’s searches without knowing

- the search engines that he had used or
- the combinations and connectors in the actual searches.

Indeed, Elevations acknowledges that “[i]ndividual searches on the internet have terms, connectors, and potentially Boolean elements. Someone can add modifiers like restricting date ranges or excluding words.” Appellant’s Reply Br. at 5. But Elevate couldn’t have known the choices that Mr. Poret had made in selecting the terms, connectors, Boolean elements, date ranges, or exclusions. Consumers might differ in

their choices, so it's impossible to know whether Mr. Poret's searches were realistic without knowing the choices that he had made in framing his searches.<sup>5</sup>

Elevations suggests that requiring Mr. Poret to provide all of his searches would make the report too big to be useful. The district court could reasonably reject that suggestion, for the problem involves the failure to identify what Mr. Poret had relied upon rather than a failure to compile all of his prior search results. After all, Mr. Poret's opinion turned on what consumers would have seen when searching the internet. *See* Jerre B. Swann & R. Charles Henn Jr., *Likelihood of Confusion Surveys: The Ever-Constant Eveready Format; the Ever-Evolving Squirt Format*, 109 Trademark Rep. 671, 680 (2019) ("To demonstrate sufficient competitive proximity for a Squirt format as to products sold on the Internet: (a) the underlying products or information about them should commonly be sought on the Internet and (b) both sites (or products) typically should be accessed by commonly used search terminology that produces both the senior and junior users within a manageable number of hits."). And Mr. Poret acknowledged that he would need a "solid basis" to believe that his search

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<sup>5</sup> Elevations argues that the district court and Elevate were able to critique Mr. Poret's report without knowing his searches. That's true. But the critiques didn't address whether Mr. Poret had conducted reasonable searches because no one could have known what he had used in his searches.

results would realistically show what consumers would have seen.

Appellant's App'x vol. 9, at 1806. Given this acknowledgement, the district court could reasonably view Mr. Poret's prior searches as facts or data that he had considered.<sup>6</sup>

Given Elevations' failure to disclose those facts or data, the district court considered the possibility of substantial justification or harmlessness. Appellant's App'x vol. 12, at 2649–50 (evaluating the factors in *Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 993 (10th Cir. 1999)); *see* Fed. R. Civ. P. 37(c)(1) (“If a party fails to provide information or identify a witness as required by Rule 26(a) . . . , the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.”). Elevations does not challenge the district court's analysis of substantial justification or harmlessness. So we conclude that the district court acted within its discretion when excluding Mr. Poret's opinion testimony.

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<sup>6</sup> Elevations suggests that the district court confused Elevations' discovery obligations with an assessment of reliability under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). We disagree. Parties must disclose “the facts or data considered by . . . [expert] witness[es]” when forming their opinions. Fed. R. Civ. P. 26(a)(2)(B)(ii). Mr. Poret opined in part that his survey had realistically reflected the marketplace based on what consumers would find when searching the internet. So the district court could reasonably require disclosure of Mr. Poret's actual searches as facts or data that Mr. Poret had considered.

**III. The district court did not err in granting summary judgment to Elevate on likelihood of confusion.**

The Lanham Act imposes liability on anyone who uses a mark in commerce that is “likely to cause confusion.” 15 U.S.C. § 1114(1); *see* 15 U.S.C. § 1125(a)(1). Under the Act, liability turns on “whether the junior user’s mark is likely to cause confusion with the senior user’s mark.” *Water Pik, Inc. v. Med-Sys., Inc.*, 726 F.3d 1136, 1143 (10th Cir. 2013); *see also King of the Mountain Sports, Inc. v. Chrysler Corp.*, 185 F.3d 1084, 1089 (10th Cir. 1999) (“Likelihood of confusion forms the gravamen for a trademark infringement action.”); *Affliction Holdings, LLC v. Utah Vap or Smoke, LLC*, 935 F.3d 1112, 1114 (10th Cir. 2019) (“Claims of trademark infringement require a party to establish that it has a legal right to a mark and that the defendant’s use of a similar mark is likely to generate consumer confusion in the marketplace.”).

The potential for confusion turns here on historical facts that are largely undisputed. Some of those facts, shorn of context, would ordinarily suggest a likelihood of confusion. For example, both entities are credit unions and their marks bear some similarities. But Elevations has elsewhere acknowledged that consumers generally exercise considerable care when making decisions about money or finances, and the two credit unions operate in distinct markets and differ in their restrictions on

membership. These differences render confusion unlikely even when we view the evidence favorably to Elevations.

**A. We conduct de novo review based on the standard for summary judgment.**

“Likelihood of confusion is a question of fact, but one amenable to summary judgment in appropriate circumstances.” *Hornady Mfg. Co. v. Doubletap, Inc.*, 746 F.3d 995, 1001 (10th Cir. 2014). These circumstances exist when “no reasonable juror could find likelihood of confusion between [the] marks.” *Affliction Holdings, LLC*, 935 F.3d at 1114 (cleaned up).

Applying this test, the district court concluded that no reasonable juror could find likelihood of confusion. We conduct de novo review over this conclusion, considering the evidence in the light most favorable to the nonmovant—Elevations. *Sally Beauty Co. v. Beautyco, Inc.*, 304 F.3d 964, 971–72 (10th Cir. 2002).

We review the evidence against the backdrop of the burden of proof. In district court, Elevations bore “the burden of proving a likelihood of confusion at trial.” *Water Pik, Inc. v. Med-Sys., Inc.*, 726 F.3d 1136, 1144 (10th Cir. 2013). And where “the nonmovant bears the burden of persuasion on a claim at trial, summary judgment may be warranted if the movant points out a lack of evidence to support an essential element of that claim and the nonmovant cannot identify specific facts that would create a genuine issue.” *Id.* at 1143–44.

Though we are reviewing a grant of summary judgment, Elevate argues that we should apply the “clear error” standard when assessing likelihood of confusion. Granted, we review for clear error when the district court acts as the fact-finder on likelihood of confusion. *E.g.*, *Beer Nuts, Inc. v. Clover Foods Co.*, 805 F.2d 920, 923 (10th Cir. 1986). But the district court can’t make factual findings when ruling on summary judgment. *Marcus v. McCollum*, 394 F.3d 813, 822 (10th Cir. 2004), *overruled on other grounds by Pearson v. Callahan*, 555 U.S. 223 (2009).

Though the district court couldn’t make factual findings, Elevate points to *Heartsprings, Inc. v. Heartspring, Inc.*, 143 F.3d 550 (10th Cir. 1998). There we reviewed a ruling on summary judgment and treated “[l]ikelihood of confusion [as] a question of fact we review for clear error.” *Id.* at 553.

*Heartsprings* is an outlier. Before deciding *Heartsprings*, we had often recognized that the test for clear error doesn’t apply when we review summary-judgment rulings. *E.g.*, *United States v. Gammache*, 713 F.2d 588, 594 (10th Cir. 1983); *Nat’l Aviation Underwriters, Inc. v. Altus Flying Serv., Inc.*, 555 F.2d 778, 781 n.6 (10th Cir. 1977). So before and after *Heartsprings*, we’ve conducted de novo review of summary-judgment rulings on the likelihood of confusion. *See First Sav. Bank, F.S.B. v. First Bank Sys., Inc.*, 101 F.3d 645, 653 (10th Cir. 1996) (“[W]e apply the appropriate factors de novo in order to determine whether [the defendant]

is entitled to a favorable summary judgment on the likelihood of confusion.”); *Sally Beauty Co. v. Beautyco, Inc.*, 304 F.3d 964, 971 (10th Cir. 2002) (“This court reviews the grant of summary judgment *de novo*.”). And “when faced with an intra-circuit conflict, a panel should follow earlier, settled precedent over a subsequent deviation therefrom.” *Haynes v. Williams*, 88 F.3d 898, 900 n.4 (10th Cir. 1996); *Crowson v. Washington Cnty. Utah*, 983 F.3d 1166, 1188 (10th Cir. 2020). So we follow our pre-*Heartsprings* precedents and conduct *de novo* review rather than use the standard of clear error.

**B. We consider multiple factors that are interrelated.**

In conducting *de novo* review, we consider six factors when considering the potential for confusion:

1. the level of care likely to be exercised by purchasers,
2. the strength or weakness of the senior mark,
3. the degree of similarity between the marks,
4. the intent of the alleged infringer in adopting its mark,
5. the similarity of products and manner of marketing, and
6. the evidence of actual confusion.

*Sally Beauty Co. v. Beautyco, Inc.*, 304 F.3d 964, 972 (10th Cir. 2002).

Similarity of the marks is ordinarily considered the most important factor.

*See Hornady Mfg. Co. v. Doubletap, Inc.*, 746 F.3d 995, 1001 (10th Cir.

2014) (“The similarity of the marks is the ‘first and most important

factor.” (quoting *King of the Mountain Sports, Inc. v. Chrysler Corp.*, 185 F.3d 1084, 1091 (10th Cir. 1999)). But no single factor is dispositive, and the “importance of any particular factor in a specific case can depend on a variety of circumstances, including the force of another factor.” *Water Pik, Inc. v. Med-Sys., Inc.*, 726 F.3d 1136, 1143 (10th Cir. 2013).

**1. Consumers generally exercise great care when choosing a credit union.**

We consider the level of care that consumers generally exercise. If consumers generally exercise great care when choosing a product, they’re less likely to experience confusion. *Sally Beauty Co. v. Beautyco, Inc.*, 304 F.3d 964, 975 (10th Cir. 2002). The level of care often turns on whether consumers choose a product based on impulse or careful study. *See id.* (“[I]tems purchased on impulse are more likely to be confused than expensive items, which are typically chosen carefully.”); *Hornady Mfg. Co. v. Doubletap, Inc.*, 746 F.3d 995, 1006 (10th Cir. 2014) (stating that we “ask whether the item is one commonly ‘purchased on impulse’” (quoting *Sally Beauty Co.*, 304 F.3d at 975)). A consumer’s care generally intensifies with the importance of the product. *See Versa Prods. Co. v. Bifold Co. (Mfg.)*, 50 F.3d 189, 204 (3d Cir. 1995) (“The more important the use of a product, the more care that must be exercised in its selection.”).



When analyzing the level of care, we focus on “the time of purchase.” *Hornady Mfg. Co. v. Doubletap, Inc.*, 746 F.3d 995, 1006 (10th Cir. 2014) (quoting *Sally Beauty Co.*, 304 F.3d at 975). So we assess the degree of care when a consumer opens an account or borrows money from a credit union. See *Universal Money Ctrs., Inc. v. Am. Tel. & Tel. Co.*, 22 F.3d 1527, 1533 (10th Cir. 1994) (analyzing the potential confusion between two banking cards and concluding that the degree of care is measured “at the time [consumers] use their cards rather than when they choose an ATM card provider because the purpose of the inquiry is to determine the degree of care used by consumers at the time of ‘purchase’”).

Consumers ordinarily use great care when selecting their banking services. See *First Nat. Bank in Sioux Falls v. First Nat. Bank, S.D.*, 153 F.3d 885, 889 (8th Cir. 1998) (“[C]onsumers tend to exercise a relatively high degree of care in selecting banking services.”); *Peoples Fed. Sav. Bank v. People’s United Bank*, 672 F.3d 1, 14 (1st Cir. 2012) (upholding the district court’s conclusion that “customers would not likely be confused between the banks because banking customers ordinarily gather information before choosing a bank and make their decision based on substantive factors (other than a bank’s name)” (internal quotation marks omitted)).

Such care is particularly great when consumers choose between a federal credit union and a Colorado credit union because those credit unions bear statutory duties to restrict membership. *See* 12 U.S.C. § 1759(b); Colo. Rev. Stat. Ann. § 11-30-103(2). With these restrictions, applicants must make sure that they qualify for membership. For example Elevations generally restricts membership to Coloradans, and Elevate restricts membership to individuals with ties to 3 Utah counties:

- “Elevations’ membership is limited to persons living or working in Adams, Arapahoe, Broomfield, Boulder, Denver, Douglas, El Paso, Jefferson, Larimer, or Weld Counties, Colorado . . . ; persons who are employed by or associated with approximately 500 companies, schools, and organizations (all of which are tied to Colorado – though their presence may extend further); persons whose immediate family members of Elevations’ members or part of their same household; and any person who donates \$15 or more to the Elevations Foundation.” Appellant’s App’x vol. 12, at 2638.
- Elevate’s membership is limited to those who “live in Box Elder, Cache, or Rich Counties, Utah; persons who work (or regularly conduct business in), worship, attend school, or participate in associations headquartered in Box Elder, Cache, or Rich Counties, Utah; persons participating in programs to alleviate poverty or distress which are located in Box Elder, Cache, or Rich Counties, Utah; incorporated and unincorporated organizations located in Box Elder, Cache, or Rich Counties, Utah, or maintaining a facility in Box Elder, Cache, or Rich Counties, Utah.” *Id.* at 2630.

These restrictions require applicants to consider their eligibility for membership in either credit union. And to get a loan, individuals must apply and participate in an underwriting process.

Elevations argues that this factor should be neutral because neither party presented facts on the level of care. We disagree. Elevate did present evidence on the level of care; that evidence reflected Elevations' defense of its own marks based on the care that consumers take when making financial decisions:

*Consumers take careful consideration when engaging companies in activities relating to their money and finances. In fact, consumers tend to take great care with these types of decisions. These are not impulse decisions. Thus, when comparing these marks in their entireties as to appearance, sound, connotation, and commercial impression, a consumer is unlikely to assume that similar but not identical marks indicate the same source or origin of the services in question. To a consumer interested in banking and financial matters, "EVEVATIONS" [sic] and "ELEVATION PARTNERS" give a distinctly different commercial impression.*

Appellant's App'x vol. 8, at 1604 (emphases added).

This factor weighs against a likelihood of confusion. As Elevations itself had argued, financial decisions are rarely impulsive; and the level of care is magnified when an applicant must satisfy restrictions on membership. These restrictions are particularly narrow for Elevate, which ties membership to three small counties in northern Utah.

**2. Elevations' marks lack strength in Elevate's three small counties.**

"The stronger the mark, the greater the likelihood that encroachment on the mark will cause confusion." *Sally Beauty Co. v. Beautyco, Inc.*, 304 F.3d 964, 975 (10th Cir. 2002). The strength of the mark turns on

(1) conceptual strength, which is “the mark’s place on the spectrum of distinctiveness,” and (2) commercial strength, which is the mark’s “level of recognition in the marketplace.” *Water Pik, Inc. v. Med-Sys., Inc.*, 726 F.3d 1136, 1151 (10th Cir. 2013).

**a. Third-party use has weakened the conceptual strength of Elevations’ suggestive marks.**

Five categories exist for conceptual strength, ranging from the least to the most distinctive: generic, descriptive, suggestive, arbitrary, and fanciful. *Id.* at 1152.<sup>7</sup> In our view, Elevations’ marks are suggestive, falling midway in the range of conceptual strength.

Marks are suggestive when they “require the buyer to use thought, imagination, or perception to connect the mark with the goods.” *Id.* at 1152–53 (quoting *Educ. Dev. Corp. v. Econ. Co.*, 562 F.2d 26, 29 (10th

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<sup>7</sup> We have defined these categories as

(1) generic, meaning that the mark identifies only a general class of goods to which a specific product may belong; (2) descriptive, meaning that it reflects one or more of the product’s characteristics or qualities; (3) suggestive, meaning that it suggests or evokes, rather than describes, the nature of the product, requiring “the consumer to use imagination and perception to determine the product’s nature”; (4) arbitrary, meaning that the mark is a word or symbol already in common use that does not have any apparent relation to the product (as in Apple computers); and (5) fanciful, meaning that the mark is a novel word or design that has been coined for the sole purpose of serving as a trademark (as in Kodak or Exxon).

*Water Pik, Inc.*, 726 F.3d at 1152.

Cir. 1997)). Elevations’ marks are suggestive, for the term *elevation* doesn’t describe a credit union. To the contrary, the term suggests “characteristics of rising up, increasing, excelling, profiting, and so on.” Appellant’s App’x vol. 12, at 2672.

Suggestive marks are considered inherently distinctive. *Water Pik, Inc.*, 726 F.3d at 1152. But “extensive third-party use of a component of a disputed term [can] undermine[] the strength of the term as a whole.” *Id.*; see *First Sav. Bank, F.S.B. v. First Bank Sys., Inc.*, 101 F.3d 645, 654 (10th Cir. 1996) (“[W]e recognize[] the well-established principle that extensive third-party use of the disputed term indicates that the term itself deserves only weak protection.”). “The greater the number of identical or more or less similar marks already in use on different kinds of goods, the less is the likelihood of confusion between any two specific uses of the weak mark.” *First Sav. Bank, F.S.B.*, 101 F.3d at 654.

We consider the frequency in the use of not only the marks themselves but also their root terms. See *Future Proof Brands, L.L.C. v. Molson Coors Beverage Co.*, 982 F.3d 280, 293–94 (5th Cir. 2020) (considering the frequency of third-party use based on the root used in the branding of a product). Here, for example, both credit unions use the root term *Elevat*; and many businesses use this term. For example, Colorado’s database for businesses showed 157 companies using the term *Elevations*. Even more businesses use *Elevation* and *Elevate*, exceeding the record

count for the database. And the Utah business entity database reflects 6 results for *Elevations*, 169 results for *Elevation*, and 763 results for *Elevate*. The uses sometimes involve similar services. For example, there are at least 19 other financial institutions using the root term *Elevat*.<sup>8</sup> And outside of Colorado and Utah, the root term *Elevat* is used by 3 other credit unions.<sup>9</sup>

Given the frequent use of the root term *Elevat*, any reasonable juror would assign relatively weak conceptual strength to Elevations' marks. *See First Sav. Bank, F.S.B. v. First Bank Sys., Inc.*, 101 F.3d 645, 654 (10th Cir. 1996) ("This extensive [third-party] use suggests that FIRST BANK per se is a weak term, at least when applied to the provision of financial services."); *Universal Money Ctrs., Inc. v. AT&T*, 22 F.3d 1527, 1533 (10th Cir. 1994) (regarding the term "Universal" as weak because it is "widely

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<sup>8</sup> These include institutions inside and outside of Colorado. Examples are "Elevation Financial," "Elevation Financial Group," "Elevate Financial," "Elevate Capital Advis[o]rs," "Elevate Wealth Management," and "Elevate Credit." Appellant's App'x vol. 12, at 2642.

<sup>9</sup> The credit unions that use the root word *Elevat* are

- Elevator Federal Credit Union, which uses *Elevat* in the name,
- Notre Dame Federal Credit Union, which uses *Elevat* in connection with the services, and
- True Sky Credit Union, which uses *Elevat* in the application for financial education.

Appellant's App'x vol. 12, at 2641–42.

used by parties other than [the plaintiff]”); *see also Sun Banks of Fla., Inc. v. Sun Fed. Sav. & Loan Ass’n*, 651 F.2d 311, 316 (5th Cir. 1981) (“[W]e find the extensive third-party use of the word ‘Sun’ impressive evidence that there would be no likelihood of confusion between Sun Banks and Sun Federal.”).

Elevations points out that some circuits consider other uses of the mark only when the businesses participate in the same field. *E.g.*, *PlayNation Play Sys., Inc. v. Velex Corp.*, 924 F.3d 1159, 1166 (11th Cir. 2019). But a circuit split exists, and some circuits consider third-party uses in other fields. *E.g.*, *Bd. of Supervisors for La. St. Agric. & Mech. Coll. v. Smack Apparel Co.*, 550 F.3d 465, 479 (5th Cir. 2008). These circuits include ours, for we’ve considered other uses of a term even when they involve different fields. *See, e.g., Vail Assocs., Inc. v. Vend-Tel-Co.*, 516 F.3d 853, 867 (10th Cir. 2008) (considering the strength of a mark based on the number of uses on “different kinds of goods” (quoting *Universal Money Ctrs., Inc. v. AT&T Tel. & Tel. Co.*, 22 F.3d 1527, 1533 (10th Cir. 1994))); *First Sav. Bank, F.S.B.*, 101 F.3d at 653–54 (recognizing that we consider the number of existing uses “on different kinds of goods”).

Given the frequent third-party use of terms bearing the root *Elevat*, Elevations’ marks are relatively weak despite their suggestive character.

**b. Elevations' marks lack commercial strength in Elevate's three counties.**

Elevations' marks are also weak commercially in Elevate's three small counties.

We assess commercial strength in the relevant market, which is where the alleged confusion would arise. *See Brennan's, Inc. v. Brennan's Rest., LLC*, 360 F.3d 125, 132 (2d Cir. 2004) (“[T]o achieve the status of a strong mark, plaintiff must demonstrate distinctiveness in the *relevant* market, for if the mark is not recognized by the relevant consumer group, a similar mark will not deceive those consumers.” (emphasis in original)). When focusing on the relevant market, we consider “(1) the length and manner of [the mark's] use, (2) the nature and extent of advertising and promotion of the mark and (3) the efforts made in the direction of promoting a conscious connection, in the public's mind, between the name or mark and a particular product or venture.” *Water Pik, Inc. v. Med-Sys., Inc.*, 726 F.3d 1136, 1154 (10th Cir. 2013) (quoting *Donchez v. Coors Brewing Co.*, 392 F.3d 1211, 1218 (10th Cir. 2004)).

Elevations has been using its marks since 2007 and spends handsomely to advertise these marks. But Elevations concentrates its marketing in Colorado and presents no evidence tying its marks to consumers in Elevate's three Utah counties.



Despite the ties to Colorado, Elevations urges commercial strength in Utah based in part on credit-card and ATM transactions in Utah. But marks may lack commercial strength despite evidence that

- “[the senior user’s] products had millions of users” and
- the use of “well-known retailers” to sell these products.

*Water Pik, Inc.*, 726 F.3d at 1154–55. We instead consider whether the marks had “stimulated” the sales. *Id.* at 1155.

Elevations points not only to transactions but also to awards and advertising at PAC-12 sporting events. But the awards and advertisements don’t show that Elevations’ marks had stimulated sales. *See id.* at 1155 (“That [the senior user’s] products were shown on the Oprah Winfrey Show on at least one occasion is not enough to establish that consumers thereafter connected the mark and the product.”). So this factor weighs against a likelihood of confusion.

**3. The marks bear similarities, but they’re immaterial in light of the careful attention from consumers and the weakness of Elevations’ marks.**

To assess similarity, we consider each mark’s sight, sound, and meaning. *Sally Beauty Co. v. Beautyco, Inc.*, 304 F.3d 964, 972 (10th Cir. 2002). For our assessment, we give greater weight to the similarities than to the differences. *Jordache Enters. v. Hogg Wyld, Ltd.*, 828 F.2d 1482, 1485 (10th Cir. 1987). But when the senior mark (Elevations) is considered

weak, “the likelihood of confusion is small unless the challenged mark [Elevate] is very similar.” *Water Pik, Inc.*, 726 F.3d at 1155.

When we assess the similarities and differences, we examine the marks as a whole and “as they are encountered by consumers in the marketplace.” *Beer Nuts, Inc. v. Clover Club Foods Co.*, 805 F.2d 920, 925 (10th Cir. 1986) (as encountered by consumers); *Water Pik, Inc.*, 726 F.3d at 1146 (comparing the marks as a whole). For that examination, we view the marks singly rather than side-by-side.<sup>10</sup> See *Sally Beauty Co.*, 304 F.3d at 972 (“This court must determine whether the allegedly infringing mark will confuse the public when singly presented, rather than when presented side by side with the protected trademark.”); *Hornady Mfg. Co. v. Doubletap, Inc.*, 746 F.3d 995, 1005 (10th Cir. 2014) (same).

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<sup>10</sup> We determine how to view the marks based on their presentation in the marketplace: “Usually, the marks should not be considered side by side because in a market context the buyer viewing the defendant’s mark must ordinarily rely upon his memory of the plaintiff’s mark. . . . However, if the parties’ goods are sold side by side, then a side-by-side comparison is a proper way of assessing the similarity of the marks.” Louis Altman & Malla Pollack, 5 Callmann on Unfair Comp., Tr. & Mono. § 21:15 (4th ed. Dec. 2022 Update). Elevations lacks any admissible evidence that consumers would view the marks side-by-side.

For Elevate, consumers would have seen



And for Elevations, consumers would have seen



The marks bear visual similarities. For example, all of the marks share the root *Elevat* and use *Credit Union* in upper-case letters. But we are “not free to focus solely on name similarity” and must “consider the effect of marketplace presentation.” *Hornady Mfg. Co.*, 746 F.3d at 1002 (quoting *Heartsprings, Inc. v. Heartspring, Inc.*, 143 F.3d 550, 555 (10th Cir. 1998)); see *Universal Money Ctrs., Inc. v. Am. Tel. & Tel. Co.*, 22 F.3d 1527, 1531 (10th Cir. 1994) (regarding the marks as dissimilar even when they used the dominant term “Universal” because “significant differences exist[ed] in the overall design . . . [and] markings, including the lettering styles, logos and coloring schemes”). In the marketplace, the visual similarities would mean little because Elevate’s market is so small and distinct from Elevations’.

We addressed the impact of the marketplace in *First Savings Bank, F.S.B. v. First Bank System, Inc.*, 101 F.3d 645 (10th Cir. 1996). There we analyzed the differences between “FirstBank” and “First Bank System.”

We considered the marks visually dissimilar because

- they had different fonts,
- one mark had been arranged left-to-right and the words in the other mark had been vertically stacked, and
- one mark had appeared against a black background and the other mark had included a logo.

*Id.* at 653.

Four comparable differences exist here:

1. Elevate and Elevations use different fonts.
2. In Elevations’ mark with the white background, the text is aligned to the left; and the text in Elevate’s mark is centered.
3. In Elevations’ mark with the white background, the image appears on the left; and Elevate’s image appears above the text.
4. In Elevations’ other mark (blue background), the text appears against a dark blue background; and Elevate’s mark bears a white background.

Two other dissimilarities exist. First, the marks include visually dissimilar images: Elevations’ mark includes an image of three steps or a ladder, and Elevate’s mark includes an image of mountains. Second, the marks differ in capitalization and italics. *See King of the Mountain Sports, Inc. v. Chrysler Corp.*, 185 F.3d 1084, 1090–91 (10th Cir. 1999) (regarding two marks as visually dissimilar—even though both included the phrase

“King of the Mountain”—based on the different fonts, capitalization, vertical orientation of words, imaging on the marks, bolded letters, and color scheme). Elevations uses italics and uppercase letters; Elevate doesn’t use italics and capitalizes only the first letter in “Elevate.”

Elevations points to the similar color scheme between the marks, noting that each mark uses blues and greens. But a similar color scheme may not be enough to render marks visually similar. *See Sun Banks of Fla., Inc. v. Sun Fed. Sav. & Loan Ass’n*, 651 F.2d 311, 317 (5th Cir. 1981) (concluding that the marks “Sun Banks” and “Sun Federal” were visually dissimilar even though both marks were orange).

Nor do the marks sound the same. We have assessed dissimilarities when the “marks have different sounds and cadences.” *Universal Money Ctrs., Inc. v. Am. Tel. & Tel. Co.*, 22 F.3d 1527, 1531 (10th Cir. 1994). Even though *eleva* is pronounced the same, the marks differ in the number of syllables and in the locations of the emphasis.

We assessed differences of this sort in *Water Pik, Inc. v. Med-Systems, Inc.*, 726 F.3d 1136 (10th Cir. 2013). There we concluded that “SinuCleanse” and “SinuSense” sound different: “[B]oth marks feature ‘Sinu,’ and in both marks the second component contains a short ‘e’ sound. But in ‘SinuCleanse’ the short ‘e’ occurs between a hard ‘kl’ sound and a ‘z’ sound, whereas in ‘SinuSense’ it comes between two ‘s’ sounds.” *Id.* at 1156.

We also assessed sound differences in *Hornady Manufacturing Co. v. Doubletap, Inc.*, 746 F.3d 995 (10th Cir. 2014). There we compared “tap” and “double tap” and concluded that “the monosyllabic ‘tap’ [did] not sound like the polysyllabic ‘double tap.’” *Id.* at 1003.

The differences are equally apparent here. “Elevate” has three syllables, with emphasis on the first syllable (“el”). “Elevations” has four syllables, with emphasis on the third syllable (“vey”). Each mark also ends differently. “Elevate” ends with a sharp “ate” sound, and “Elevations” ends with a soft “shuns” sound. So the marks sound different.

The marks do bear similarities in meaning. *Elevation* is the noun for the verb *elevate*; the noun *elevation* is

- defined as “the height to which something is elevated: such as . . . the height above the level of the sea” and
- associated with altitude.

Merriam-Webster, <https://www.merriam-webster.com/dictionary/elevation> (last visited Mar. 14, 2023). The verb *elevate* means “to lift up or make higher.” Merriam-Webster, <https://www.merriam-webster.com/dictionary/elevate> (last visited Mar. 14, 2023). So the meanings bear some similarities and some differences.

We generally weigh the similarities more heavily than the differences;<sup>11</sup> and some similarities exist in the names, color schemes, and meanings. So if we view the marks in isolation, a reasonable juror could find the marks similar. But the factors are interrelated, and the importance of any factor can depend on the impact of another. *See Water Pik, Inc. v. Med-Sys., Inc.*, 726 F.3d 1136, 1143 (10th Cir. 2013); *see also First Sav. Bank, F.S.B. v. First Bank Sys., Inc.*, 101 F.3d 645, 653 (10th Cir. 1996) (concluding that the marks are dissimilar, “particularly when the strength of the mark is considered”).

The significance of the similarities fades away when we consider the careful attention to financial decisions, the differing membership restrictions for Elevate and Elevations, and the weakness of Elevations’ marks in Elevate’s three rural counties. *See Water Pik, Inc.*, 726 F.3d at 1155–56 (concluding that this factor weighs against a likelihood of confusion, for purposes of summary judgment, despite “several visual similarities”).

**4. Elevate did not intend to benefit from Elevations’ reputation when adopting the mark.**

We also consider “whether [the] defendant had the intent to derive benefit from the reputation or goodwill of [the] plaintiff.” *King of the*

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<sup>11</sup> *Sally Beauty Co. v. Beautyco, Inc.*, 304 F.3d 964, 972 (10th Cir. 2002); *see* p. 25, above.

*Mountain Sports, Inc. v. Chrysler Corp.*, 185 F.3d 1084, 1091 (10th Cir. 1999) (quoting *Jordache Enters. v. Hogg Wyld, Ltd.*, 828 F.2d 1482, 1485 (10th Cir. 1987)). The district court assessed this factor as one weighing against a likelihood of confusion. For this assessment, the court pointed out that Elevate had taken five steps in researching the mark:

1. Over several months, Elevate had “researched possible conflicts with [] names, including through internet browser searches, searches with the [U.S. Patent and Trademark Office], and inquiries with the National Credit Union [Administration].” Appellant’s App’x vol. 12, at 2631.
2. Elevate had obtained the National Credit Union Administration’s approval of ten possible names, including “Elevate Federal Credit Union.” *Id.*
3. Elevate had consulted an attorney before selecting the marks. *Id.*
4. Elevate’s chief marketing officer had rechecked the database for trademarks. *Id.* at 2632.
5. This officer had presented the four top names to Elevate’s board and testified that “she [had] not intend[ed] to benefit from Elevations’ goodwill and reputation and that she would not have selected ‘Elevate’ and presented it to the [Elevate] board had she believed that there would be confusion with Elevations’ mark.” *Id.* at 2632, 2666.<sup>12</sup>

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<sup>12</sup> Elevations argues that Elevate ignored a disclaimer from the National Credit Union Administration. The administration informed Elevate that of the twelve proposed names, ten were available (including “Elevate Federal Credit Union”). And the administration “cautioned [Elevate] that, whichever of the other ten names it chose, it was [Elevate’s] responsibility to do its own research to make sure that the name would not infringe on the name of any corporation or credit union in [Elevate’s] trade area.” Appellant’s App’x vol. 12, at 2631. But Elevate heeded the warning by consulting an attorney and “re-check[ing] the TESS USPTO database to



In reviewing the district court’s assessment of intent, we can consider the broader context. *See Universal Money Ctrs., Inc. v. Am. Tel. & Tel. Co.*, 22 F.3d 1527, 1532 (10th Cir. 1994). This context includes Elevate’s expenditure of “hundreds of thousands of dollars to develop, promote, and advertise its own business.” Appellant’s App’x vol. 12, at 2665. These expenditures suggest that Elevate relied “on its own publicity and reputation, and not on that of [Elevations].” *Universal Money Ctrs., Inc.*, 22 F.3d at 1532.

Nor is there evidence of Elevate’s intent to benefit from Elevations’ reputation. Elevations argues that Elevate’s chief marketing officer knew about the existence of a Colorado credit union named “Elevations.” But “mere knowledge [of a similar mark] should not foreclose further inquiry,” and the court focuses on whether Elevate intended to benefit from Elevations’ reputation or goodwill. *Universal Money Ctrs.*, 22 F.3d at 1532 (alteration in original) (quoting *GTE Corp. v. Williams*, 904 F.2d 536, 541 (10th Cir. 1990)); *see also Hornady Mfg. Co. v. Doubletap, Inc.*, 746 F.3d 995, 1004 (10th Cir. 2014) (“Whether [the defendant’s] founder was aware of [the plaintiff] and its products is irrelevant to whether [the defendant] adopted its mark intending to copy the [plaintiff’s] mark.”).

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make ‘double-sure’ that there were no trademarks on Elevate Federal Credit Union or Elevate Credit Union.” *Id.* at 2631–32.

When Elevate learned of Elevations' objection, it consulted the National Credit Union Administration, which regulates federal credit unions. *Am. Bankers Ass'n v. Nat. Credit Union Admin.*, 934 F.3d 649, 658 (D.C. Cir. 2019). The National Credit Union Administration responded by confirming its approval of Elevate's name change: "My advice is to let them know your name change was approved by [the National Credit Union Administration] and you have not infringed on that trademark name." Appellant's App'x vol. 6, at 1213.

Despite regulatory approval of the name change, Elevations points to Elevate's receipt of an article entitled "Top 50 Most Distinctive Credit Union Names." This list of distinctive names included Elevations' name and logo.

But the district court determined that even though "this link [had been] sent in an email, . . . no one [at Elevate] [had] read the article." Appellant's App'x vol. 12, at 2658. Because no one at Elevate had read the article, the court determined that "the substance of this article [was] not admissible." *Id.* at 2665 n.5. And Elevations has not challenged this evidentiary determination. Given the exclusion of the substance of the article, its existence doesn't bear on Elevate's intent.

Elevations also points to a statement from a third-party, expressing concern about using the name "Elevate" because a pest-control company (Elevate Pest Control) had been using the word *Elevate*. Based on this

expression of concern, Elevations argues that Elevate recognized the need to use a different mark. But the third-party had based this concern on use in an unrelated industry. And Elevations doesn't suggest a likelihood of confusion between the marks of a credit union and pest-control company.<sup>13</sup>

Without evidence that Elevate intended to benefit from Elevations' reputation, this factor weighs against a likelihood of confusion.<sup>14</sup>

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<sup>13</sup> Elevations also argues that Elevate's chief marketing officer didn't disclose to the board

- her general awareness of Elevations,
- the article titled "Top 50 Most Distinctive Credit Union Names," or
- the third-party's warning.

In turn, Elevations argues that the chief marketing officer's lack of disclosure shows that she viewed this knowledge as problematic. In our view, the undisclosed information didn't show improper intent.

The chief marketing officer testified that "she [had] not intend[ed] to benefit from Elevations' goodwill and reputation and that she would not have selected 'Elevate' and presented it to the [Elevate] board had she believed that there would be confusion with Elevations' mark." Appellant's App'x vol. 12, at 2666. And we have explained elsewhere that the article and the third-party's warning do not show an intent for Elevate to benefit from Elevations' reputation. *See* pp. 34–35, above.

<sup>14</sup> Elevations argues generally that we should infer bad intent. For this argument, Elevations relies on *Beer Nuts, Inc. v. Clover Club Foods Co.*, where we held that "deliberate adoption of a similar mark may lead to an inference of intent to pass off goods as those of another." 805 F.2d 920, 927 (10th Cir. 1986). But in *Beer Nuts*, we assessed a strong inference of bad intent because the defendant had developed its own product after years of distributing a similar product for the plaintiff. *Id.*

**5. The products are similar, but the marketing is not.**

Under this factor, we “separately consider[] (1) the similarity of products and (2) the similarity in the manner of marketing the products.” *Sally Beauty Co. v. Beautyco, Inc.*, 304 F.3d 964, 974 (10th Cir. 2002). The similarity of products would ordinarily suggest a likelihood of confusion because Elevations and Elevate offer virtually identical services as credit unions.<sup>15</sup> But the two credit unions differ in how they market these services.

When evaluating the marketing, we consider whether the parties are competitors in the same markets. *See id.* The parties don’t compete when they “operate[] in distinctly different markets” and contact “very different people in their marketing efforts.” *Heartsprings, Inc. v. Heartspring, Inc.*, 143 F.3d 550, 557 (10th Cir. 1998).

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No comparable relationship exists between Elevate and Elevations. So a factfinder couldn’t reasonably find that Elevate had intended to benefit from Elevations’ reputation. *See First Sav. Bank, F.S.B. v. First Bank Sys., Inc.*, 101 F.3d 645, 655 (10th Cir. 1996) (concluding that the intent was not improper in the absence of evidence “that [the junior user] [had] adopted [its mark] with the intent to pass off its services as those of [the senior user] or to benefit from the reputation or good will of [the senior user]”).

<sup>15</sup> Elevate does not dispute the similarity of products.

Elevations and Elevate focus their marketing on different geographic areas. All of Elevations' branches are in Colorado, and Elevations markets its product

- in Colorado through "local newspapers, radio, and television" and
- more broadly through the University of Colorado alumni network and PAC-12 sporting events.

Appellant's App'x vol. 12, at 2639, 2669. In contrast, Elevate confines its marketing to three small counties in Utah. *Id.* at 2636, 2669.

Because Elevations and Elevate pursue sales in different regions, the markets are distinct. Given these distinctions, any similarities in products or marks are unlikely to confuse potential consumers. *See John R. Thompson Co. v. Holloway*, 366 F.2d 108, 114 (5th Cir. 1966) ("Where the unauthorized use of a conflicting mark is confined to a distinct and geographically separate market by the junior user, there may be no present likelihood of public confusion.").

The impact is even less likely here because the marketing differences stem from distinct membership requirements for the two credit unions. For Elevate, these restrictions limit membership to individuals tied to three small counties in Utah. *See* Appellant's App'x vol. 12, at 2630.

Elevations' focus is also geographic, but is less rigid. A person has two ways to qualify for Elevations. First, the person can bear one of the recognized ties to Colorado. Second, a person can donate to Elevations'

foundation. The second option creates some flexibility. But this flexibility is itself tempered by the foundation's ties to Colorado. For example, the foundation has never made a grant outside Colorado. Appellee's Supp. App'x vol. 2, at 5431 (deposition of Elevations' Vice President of Community Affairs).<sup>16</sup> Elevations' marketing thus targets Colorado, and Elevate targets three rural counties in Utah.

Elevations acknowledges that the two credit unions focus on different states. But Elevations argues that their markets overlap. For this argument, Elevations claims that

- 41,000 Utah accounts used Elevations' services from 2017–2020 and
- Utah residents were exposed to Elevations' mark through digital marketing, outreach to students and alumni of the University of Colorado, and advertising at PAC-12 sporting events.

But Elevate's market is confined to 3 counties in Utah—not the entire state. And Elevations has few customers in Elevate's 3 counties—only 16 of Elevations' 151,150 active members live there. Appellant's App'x vol. 12, at 2638. For its part, Elevate has few customers in Colorado: Over 90% of Elevate's members live in the 3 Utah counties, and only about 0.2% of the members have a Colorado address.

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<sup>16</sup> One of the foundation's tag lines is: "We give back to Colorado. When you become a member, we ask that you do too. . . . Your \$10 membership goes towards supporting our local Colorado community." Appellee's Supp. App'x vol. 2, at 5380.

Elevations points out that both credit unions use digital advertising. But that advertising targets different areas because of the differences in eligibility for membership: Elevate uses the internet to target Utahans in 3 small counties, and Elevations uses the internet to target Coloradans. Appellant's App'x vol. 12, at 2669 (Elevate); *id.* at 2639–40 (Elevations). And Elevations provided no evidence tying its collegiate outreach to exposure of Elevations' mark in Elevate's 3 counties. So the markets do not overlap.

This factor thus cuts partly towards a likelihood of confusion (similarity of products) and partly against (dissimilarity of marketing).

**6. Actual confusion is de minimis.**

A plaintiff need not “set forth evidence of actual confusion to prevail in a trademark infringement action.” *King of the Mountain Sports, Inc. v. Chrysler Corp.*, 185 F.3d 1084, 1092 (10th Cir. 1999). When actual confusion does exist, it's often the best evidence of a likelihood of confusion. *Id.* But “isolated instances of actual confusion [may] be de minimis.” *Id.* (alteration in original) (quoting *Universal Money Ctrs., Inc. v. Am. Tel. & Tel. Co.*, 22 F.3d 1527, 1535 (10th Cir. 1994)). “De minimis evidence of actual confusion does not establish the existence of a genuine issue of material fact regarding likelihood of confusion.” *Universal Money Ctrs.*, 22 F.3d at 1535.

There are only five examples of actual confusion:

1. An employee of Elevate confused the two credit unions and tried to apply for an online loan with Elevations. The mistake was discovered in the underwriting process.
2. A borrower with Elevations mistakenly sent a car title to Elevate.
- 3.–5. Three individuals tried to sign up with Elevations, but mistakenly contacted Elevate. In one of these instances, the individual caught his own mistake.

The five examples are de minimis. *See King of the Mountain Sports, Inc.*, 185 F.3d at 1092–93 (treating seven examples of actual confusion as de minimis).

The examples of actual confusion must be assessed against “the background of the number of opportunities for confusion before one can make an informed decision as to the weight to be given the evidence.” 4 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 23:14 (5th ed. Supp. 2023) (“If there is a very large volume of contacts or transactions which could give rise to confusion and there is only a handful of instances of actual confusion, the evidence of actual confusion may receive relatively little weight.”); *see also Sun Banks of Fla., Inc. v. Sun Fed. Sav. & Loan Ass’n*, 651 F.2d 311, 319 (5th Cir. 1981) (“Although the record contains several isolated instances of uncertainty whether there was a connection between the two businesses, in light of the number of transactions conducted and the extent of the parties’ advertising, the amount of past confusion is negligible.”).



The parties co-existed for 18 months, and Elevations gets more than 10,000 loan applications every year. So 5 examples of confusion do little to suggest actual confusion.

To the contrary, the small number of mistakes would suggest recognition of the distinction between the two credit unions. Each credit union limits its membership, and a loan requires an application and an underwriting process. So when actual confusion exists, it would likely be documented. As a result, the small number of mistakes weighs against a likelihood of confusion. *See Water Pik, Inc. v. Med-Sys., Inc.*, 726 F.3d 1136, 1151 (10th Cir. 2013) (healthcare products); *Hornady Mfg. Co. v. Doubletap, Inc.*, 746 F.3d 995, 1006 (10th Cir. 2014) (ammunition for firearms); *Heartsprings, Inc. v. Heartspring, Inc.*, 143 F.3d 550, 557–58 (10th Cir. 1998) (educational facility and materials).

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In our view, no reasonable juror could find likelihood of confusion based on the careful attention from consumers, the weakness of Elevations' marks in Elevate's three counties, the lack of Elevate's intent to benefit from Elevations' reputation, the marketing differences, and the de minimis examples of actual confusion. So we affirm the award of summary judgment to Elevate.

**IV. We grant the parties’ motions to seal in part and deny the motions in part.**

Each party moved to seal parts of the appellate appendices. Under the common law, “judicial documents are presumptively available to the public.” *United States v. McVeigh*, 119 F.3d 806, 811 (10th Cir. 1997). But this common law right “is not absolute” and can be outweighed by significant interests of nondisclosure. *JetAway Aviation, LLC v. Bd. of Cnty. Comm’rs of Cnty. of Montrose, Colo.*, 754 F.3d 824, 826 (10th Cir. 2014) (quoting *Mann v. Boatright*, 477 F.3d 1140, 1149 (10th Cir. 2007)); see also *McWilliams v. DiNapoli*, 40 F.4th 1118, 1130 (10th Cir. 2022) (“[T]he party seeking to seal a judicial record must show ‘some significant interest that outweighs’ the public interest in access to the records.” (quoting *Helm v. Kansas*, 656 F.3d 1277, 1292 (10th Cir. 2011))). These interests must be “real and substantial,” and the movant bears a “heavy” burden. *McWilliams*, 40 F.4th at 1130–31 (quoting *Helm*, 656 F.3d at 1292–93).

The district court approved the sealing of some of the documents that were later filed in the appendices. But we do not seal documents just because the district court did. *Suture Express, Inc. v. Owens & Minor Distrib., Inc.*, 851 F.3d 1029, 1047 (10th Cir. 2017). Parties must still show why their interests “justif[y] depriving the public of access to the

records that inform our decision-making process.” *Id.* (quoting *JetAway Aviation*, 754 F.3d at 826).

Both parties insist that some of the documents contain confidential business and financial information. Even though neither party opposed the other’s motion, we must still “independently decide whether sealing is appropriate.” *McWilliams v. DiNapoli*, 40 F.4th 1118, 1131 (10th Cir. 2022). Based on our independent consideration, we grant the motions in part and deny them in part.

We grant the motions to seal for this confidential business and financial information:

- Mr. Hampton’s expert report, Appellant’s App’x vol. 13, at 2681–714,
- Mr. Hampton’s deposition, *id.* at 2715–58,
- emails and text messages discussing consumer confusion, Appellant’s App’x vol. 14, at 2989–96,
- Elevations’ 2020 extracts from an administrative brief (Exhibit K to Elevate’s motion to exclude Mr. Poret), Appellee’s Supp. App’x vol. 2, at 5336–46,
- Elevations’ 2020 administrative brief (Exhibit 32 to Elevate’s motion for summary judgment), *id.* at 5353–81,
- Elevations Credit Union Bylaws, Field Membership (Exhibit 33 to Elevate’s motion for summary judgment), *id.* at 5382–97,
- Elevations’ competitive analysis (Exhibit 35 to Elevate’s motion for summary judgment), *id.* at 5472–75,

- Elevations’ market analysis (Exhibit 36 to Elevate’s motion for summary judgment), *id.* at 5476–79,
- Elevations’ competitive analysis for the second quarter of 2019 (Exhibit 37 to Elevate’s motion for summary judgment), *id.* at 5480–5512,
- Deposition of Christopher LaVelle (Exhibit 40 to Elevate’s motion for summary judgment), *id.* at 5517–30,
- Elevations’ Facebook following (Exhibit 41 to Elevate’s motion for summary judgment), *id.* at 5531, and
- Elevations’ LinkedIn page (Exhibit 42 to Elevate’s motion for summary judgment), *id.* at 5535.

These documents contain some non-public information, but redaction would not be feasible.

We also grant the motions to file redacted versions of

- Rachel Baugh’s declaration, Appellee’s Supp. App’x vol. 1, at 5188–92 (all proposed redactions),
- Elevate’s motion for summary judgment at pages 648 (No. 16), 656 (No. 56), and 678 of volume 3 of the Appellant’s Appendix,<sup>17</sup> and
- Elevate’s Reply Memorandum in Support of Motion for Summary Judgment at pages 5573 (No. 27) and 5612 of volume 4 of the Appellee’s Supplemental Appendix.<sup>18</sup>

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<sup>17</sup> We disallow the other requested redactions in this motion (pages 652–53 (Nos. 41, 43, 46), 654–55 (Nos. 49–55), 656 (Nos. 57–59), 657, 660 (No. 70), 667–69, 671 and 677). These redacted materials appear in unredacted form in other filings and in the summary-judgment order.

<sup>18</sup> We disallow the other requested redactions (pages 5573 (redaction concerning Mr. Suttle’s deposition), 5574, 5580, 5582–84, 5586–87, 5597, and 5599). These redacted materials appear in unredacted form in other filings and in the summary-judgment order.

We deny the motions to seal with respect to the remaining documents. The movant bears a heavy burden to demonstrate a real and substantial interest that outweighs the public interest in accessing the documents. *See McWilliams v. DiNapoli*, 40 F.4th 1118, 1130–31 (10th Cir. 2022). Vague and conclusory statements do not meet this burden. *See Baxter Int’l, Inc. v. Abbott Lab’ys*, 297 F.3d 544, 547 (7th Cir. 2002) (denying a motion to seal when the parties presented a conclusory statement that confidentiality would promote their business interests).

In our view, the parties haven’t justified the sealing of deposition excerpts of Mr. Lance Suttle and Mr. Dennis Mac Paul. For Mr. Suttle, Elevations provided only a conclusory statement that the deposition discusses confidential and proprietary information. Similarly, for Mr. Paul, Elevate stated only that Mr. Paul had testified about Elevations’ finances, memberships, and business and financial strategies.

We also deny the motions to seal four documents because the information is publicly available in unsealed documents or the district court’s order:

1. Elevations’ response to Elevate’s interrogatories, Appellant’s App’x vol. 14, at 2997–3012,
2. Elevate’s motion to exclude Mr. Poret, Appellant’s App’x vol. 5, at 803–38,

3. Elevations First Supplemental Response to Elevate's First Set of Interrogatories, Interrogatory No. 15, Appellant's App'x vol. 8, at 1616,<sup>19</sup> and
4. Elevations' First Supplemental Response to Elevate's Interrogatory No. 1 (Exhibit 38 to Elevate's motion for summary judgment), Appellee's Supp. App'x vol. 4, at 5542.

## **V. Conclusion**

We affirm the district court's grant of summary judgment to Elevate. The district court did not abuse its discretion in excluding Mr. Poret, and a jury couldn't reasonably find a likelihood of confusion between the marks.

We also grant the motions to seal in part and deny the motions in part.

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<sup>19</sup> Elevate didn't provide us with an unredacted version.