UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:24-cv-000653-GPG-STV

ASCENT CLASSICAL ACADEMIES,

Plaintiff,

v.

ASCENT CLASSICAL ACADEMY CHARTER SCHOOLS, INC.; and **LANDS' END, INC. a/k/a LANDS END DIRECT MERCHANTS, INC.**,

Defendants.

RESPONSE TO DEFENDANTS' MOTION TO DISMISS THREE FEDERAL CLAIMS [ECF NO. 23], FILED JUNE 28, 2024

ACACS and Lands' End seek dismissal of the Lanham Act claims and argue that they court then lacks subject matter jurisdiction over the remaining claims. Defendants' chief argument is that ACACS owns the rights to the trademarks at issue. The plain language of the agreements requires a finding that Ascent owns the subject trademarks and that the *Amended Complaint* states plausible claims for relief for all of its claims arising under the Lanham Act. Defendants' Motion should be denied.

I. BACKGROUND

On October 17, 2017, Ascent entered into a management agreement (the "DC Management Agreement") with ACACS (then known as Ascent Classical Academy of Douglas County, Inc.).[1] They renewed that agreement and entered three more, opening schools in: Northern Colorado on June 30, 2023; Grand Junction on June 21, 2023; and

[1] *Id.* at ¶¶ 30-31. A copy of the DC Management Agreement is attached hereto as Ex. A (Resp. Appx., p. 1).

northern Denver 27J, also on June 21, 2023.[2] The Management Agreements gave Ascent full control of the schools, including management of all school personnel.[3]

ACACS breached the Management Agreements by restricting Ascent's ability to manage its employees, defunding its operations, and improperly terminating the Management Agreements. Ascent was forced to terminate the Management Agreements, because it could not incur un-reimbursable expenses, and Ascent also withdrew consent to use the Ascent trademarks in that termination.[4]

Ascent owns four trademarks as set forth in Exhibit B (Resp. Appx., p. 19), and uses them in interstate commerce including in Colorado.[5] Ascent owns the domain name <www.ascentclassical.org>, operates a website at that domain and on various subdomains, and operates Facebook and LinkedIn pages.[6] The Management Agreements reserve all rights to the Ascent Marks but gives ACACS the right to use the school names.[7]

ACACS has engaged in various infringements upon the Ascent Marks by establishing social media accounts, using the Ascent Marks, using the name "Ascent Classical Academy Charter Schools," using the school name Ascent Classical Academy of Northern Denver,[8] using the Ascent Trade Names, registering the infringing domain

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[2] *Am. Compl.*, ¶¶ 74, 179-80. The four Management Agreements are the "Management Agreements."
[3] Ex. A, Management Agreement, Art. III, §§A and C (Resp. Appx., p. 2 and 3), Art. IV, §A (Resp. Appx., p. 7), Art. VIII, §A (Resp. Appx., p. 13).
[4] *Am. Compl.*, ¶ 272, 280, 281.
[5] *Id.*, ¶¶ 289-294; Exhibits 1 and 2 to *Am. Compl.*
[6] *Id.*, ¶¶ 298-304.
[7] Exhibit 1 to *Am. Compl.* ¶¶ 6-7, 319. Collectively, the "Ascent Trade Names."
[8] *Id.*, ¶ 327.

name <www.ascentcolorado.org> (the "ACACS Domain"), filing registrations with the Colorado Secretary of State, and using "Infringing Marks."[9]

Lands' End has engaged in contributory infringement by fulfilling orders for infringing goods.[10]

II. ARGUMENT

A. The Anti-Dissection Rule

Defendants' *Motion* often parses and conflates the relevant intellectual property, so it is important to begin by once again clarifying the trademarks at issue in this action—the '318 Mark (wordmark) and '351 Mark (word and design mark).

The anti-dissection rule holds that a composite mark is tested for its validity and distinctiveness by viewing it as a whole, as it appears in the marketplace.[11] Both Ascent Marks are composite marks, either made up of multiple word components, or multiple words and design elements. Defendants conflate the Ascent Marks with the Ascent Trade Names addressed in the Management Agreements. These trade names are all some variation of ASCENT CLASSICAL ACADEMY OF [LOCATION]. However, each of the Ascent Marks must be viewed as separate and distinct marks to be considered in their respective entireties as it pertains to validity.[12] It is thus improper to consider the

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[9] *Id*., ¶¶ 218, 226-27, 322, 323, 327-329, 331, 275. The "Infringing Marks" are set forth in Ex. C (Defendant's Appx., p. 20).
[10] *Am. Compl.*, ¶¶ 425-435.
[11] *See Estate of P.D. Beckwith, Inc. v. Commissioner of Patents*, 252 U.S. 538, 545-46 (1920); *King of the Mountain Sports, Inc. v. Chrysler Corp.*, 185 F.3d 1084, 1090 (10th Cir. 1999) (conflicting marks must be compared in their entirety to determine likelihood of confusion); *Official Airline Guides, Inc. v. Goss*, 6 F.3d 1385, 1392 (9th Cir. 1993) ("the validity and distinctiveness of a composite trademark is determined by viewing the trademark as a whole, as it appears in the marketplace.").
[12] *See id.*

Ascent Marks to be one in the same with other word marks simply due to common elements; each mark must be construed in its entirety.

B. Ascent states a plausible claim for trademark infringement.

Defendants correctly identify the elements of a trademark infringement claim under Section 43(a): (1) the plaintiff has a protectable interest in the mark; (2) the defendant has used an "identical or similar mark" in commerce; and (3) the defendant's use is likely to confuse consumers.[13] Ascent satisfies each element.

1. Ascent has protectable interests in the Ascent Marks.

Defendants concede that Ascent sufficiently alleges the Ascent Marks are distinctive.[14] Defendants attack Ascent's "protectable interest" by arguing that ASACS, and not Ascent, owns the ASCENT CLASSICAL mark.[15] *Donchez* does not hold that ownership is a component of protectability, nor do Defendants cite any authority for this proposition.[16] Regardless, the allegations in Ascent's *Amended Complaint* sufficiently support Ascent's ownership of the Ascent Marks to survive Rule 12(b)(6) scrutiny.

a. The Amended Complaint establishes Ascent's ownership.

Priority of use determines ownership of a trademark.[17] Defendants imply that Ascent and ACACS have concurrently used ASCENT CLASSICAL "since their founding

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[13] *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229, 1238 (10th Cir. 2013).
[14] *Mot. to Dismiss* at 10; *see also Donchez v. Coors Brewing Co.*, 392 F.3d 1211, 1216 (10th Cir. 2004); *Jack Daniel's Props. V. VIP Prod., LLC*, 599 U.S. 140, 146 (2023).
[15] Defendants also argue that ACACS owns the mark of ASCENT CLASSICAL ACADEMY. This is not one of the Ascent Marks in Ascent's Amended Complaint. Rather, the mark owned by Ascent is ASCENT CLASSICAL ACADEMIES.
[16] Rather, it appears Defendants' arguments may relate more to Ascent's standing to bring this action.
[17] *See, e.g., Underwood v. Bank of America Corp.*, 996 F.3d 1038 (10th Cir. 2021) (citing 2 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 16:1 (5th ed. Mar. 2021 update)).

just over seven years ago."[18] This is wrong.

Ascent was founded on December 16, 2016, several months before the founding of ACACS in March of 2017.[19] The *Amended Complaint* offers numerous allegations related to Ascent's prior use of the Ascent Marks, establishing Ascent's ownership.[20] The *Amended Complaint* does not allege that ACACS made any lawful use of either of the Ascent Marks prior to the effective date of the first Management Agreement on July 1, 2017, under which Ascent gave ACACS a limited license to use the Ascent Marks for the term of such agreement.[21] Ascent alleges it owned the Ascent Marks prior to the unauthorized acts of ACACS, which form the basis for Ascent's claims.[22] Despite the unsupported argument of ACACS's counsel to the contrary,[23] the *Amended Complaint* sufficiently alleges that Ascent made prior use of the Ascent Marks in interstate commerce, and therefore owns the Ascent Marks pursuant to the Lanham Act.

b. Ascent did not convey the Ascent Marks to ACACS.

The main thrust of ACACS's argument is that the DC Management Agreements conveyed all title to the '318 Mark to ACACS.[24] This position fails under the plain language of the Management Agreements, which demonstrate Ascent owns all right and title to all Ascent Marks, and that the parties did not intend any such conveyance.

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[18] *Mot. To Dismiss* at 10.
[19] *Am. Compl*. ¶¶ 7, 17.
[20] *See Am. Compl*. ¶¶ 288-296.
[21] *Am. Compl.*, ¶¶ 30-32.
[22] *Id.*, ¶ 296.
[23] *City of Fountain v. Gast*, 904 P.2d 478, 482 (Colo. 1995)("Arguments of counsel are not evidence.").
[24] ACACS does not appear to argue that the Management Agreements conveyed title all Ascent Marks; however, such argument would fail for the same reasons argued herein.

The Management Agreements provide that ACACS may use the Ascent Marks and its trade names but do not get any rights or ownership of them.[25] The very next paragraph makes clear that the '318 Mark ("Ascent Classical") include the school names by giving ACACS the right to use the trade name of the school.[26] It does not, despite ACACS's arguments, convey ownership of the '318 Mark.

Under Colorado law, the interpretation of a written contract is a question of law for the court,[27] which "determine[s] and give[s] effect to the intent of the parties."[28] The parties' intent is to be determined from the language of the written contract itself,[29] read as a whole, and not reading its provisions in isolation.[30] When a written contract is free from ambiguity, it is deemed to "represent the parties intent and enforced based on the plain and generally accepted meaning of the words used."[31]

Defendants ask the Court to adopt a twisted interpretation of the DC Management Agreement by misrepresenting the actual language of the contracts when they argue: "[i]t means the parties agreed that 'Ascent Classical Academy' is the 'trade name of the School, and the School shall have the right to use the same after termination of this Agreement.'"[32] The trade name identified in the Management Agreement is ASCENT CLASSICAL ACADEMY OF DOUGLAS COUNTY.[33]

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[25] *Mot. To Dismiss*, Exhibit 1 at 6-7.
[26] *Id*. at 7.
[27] *E.g. People ex rel. Rein v. Jacobs*, 465, P.3d 1, 11 (Colo. 2020).
[28] *Jacobs*, 465 P.3d at 11.
[29] *Klun v. Klun*, 442 P.3d 88, 92 (Colo. 2019).
[30] *Bailey v. Lincoln Gen. Ins. Co.*, 255 P.3d 1039, 1051 (Colo 2011).
[31] *Sch. Dist. No. 1 v. Denver Classroom Teachers Ass'n*, 433 P.3d 38, 41 (Colo. 2019).
[32] *Mot. To Dismiss* at 11.
[33] Ex. A, Art. III, § R (Resp. Appx., p. 5).

It is specifically referred to as a "trade name" while other intellectual property is referred to as "trademarks." The DC Management Agreement places quotations around the trade name, indicating that any rights granted to this trade name were granted only with respect to the trade name in its entirety.[34] Viewing "ASCENT CLASSICAL ACADEMY OF DOUGLAS COUNTY" in its entirety and as separate and distinct from the Ascent Marks comports with the anti-dissection rule. That rule requires that when composite marks are tested for validity and distinctiveness and compared to other marks, the composite marks must be viewed as a whole, as the marks appear in the marketplace.[35] Additionally, the DC Management Agreement addresses this trade name only after the agreement had reserved Ascent's rights to any and all of its other trademarks, whether then-existing or existing in the future, clarified that ACACS needed Ascent's permission for all uses of Ascent's trademarks, and stated that ACACS "shall acquire no rights in the ASCENT trademarks." The Management Agreement, and more importantly, this section of the Management Agreement, must be read and interpreted as a whole.[36] Doing so shows that ACACS's argument fails and at most, the DC Management Agreement bestowed on ACACS a "right to use" ***one*** trade name. Under the clear language of the Management Agreement, this does not result, as Defendants argue, in the conveyance of any marks, let alone the Ascent Marks.

Furthermore, the other Management Agreements,[37] contain virtually identical language, and provided ACACS a "right to use" the following trade names: ASCENT

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[34] *See id.*
[35] *See Estate of P.D. Beckwith*, 252 U.S. at 545-46.
[36] *Bailey*, 255 P.3d at 1051.
[37] *Am. Compl.*, ¶ 319.

CLASSICAL ACADEMY OF GRAND JUNCTION; ASCENT CLASSICAL ACADEMY OF NORTHERN COLORADO; and ASCENT CLASSICAL ACADEMY OF 27J.

Again, this license did not transfer a trademark—all it did was license the use of a trade name. Further, had the parties intended the DC Management Agreement to assign all right and title in the Ascent Marks (or any trademarks or intellectual property) to ACACS, there would be no need to make similar "conveyances" to ACACS in subsequent agreements, as all of Ascent's marks would already have been transferred to ACACS. The intent of the Management Agreements was to provide limited rights to use four specific trade names, as well as a limited license to use Ascent's trademarks for the duration of the Management Agreements, not to convey any marks.

Ascent has alleged sufficient facts to demonstrate that it owns all Ascent Marks.

c. ACACS lost its licenses because it breached the agreements.

ACACS breached the Management Agreements by limiting Ascent's authority in the schools,[38] defunding the Management Agreements for the spring semester of 2024,[39] and terminating the Management Agreements prior to the end of the contract term without justification.[40] These were all material breaches of the Management Agreement, because they go "to the root of the matter or essence of the contract."[41] The *Coors* court also stated, "Whether a breach is material is a question of fact,"[42] meaning that this issue cannot be decided on a motion to dismiss, and in Colorado, a material

[38] *Am. Compl.*, ¶¶ 188, 195, 214, 235, 241, 245, 246, 247, 248, 256, 257, 258, and 268.
[39] *Id.*, ¶ 272.
[40] *Id.*, ¶¶ 236, 265.
[41] *Coors v. Security Life of Denver Ins. Co.*, 112 P.3d 59, 64 (2005).
[42] *Id.*

breach of a contract eliminates the breaching party's right to enforce other terms of the contract.[43] Because it is a question of fact, it cannot be resolved on a motion to dismiss.

ACACS's loss of its right to use the licenses of the school names is especially true with regard to the names for Ascent Classical Academy of Grand Junction and Ascent Classical Academy of J27,[44] which were both signed on June 23, 2023, less than two months before ACACS began breaching the Management Agreements. ACACS signed the new Management Agreements when it almost certainly knew that it intended to breach the Management Agreements and before Ascent could obtain the benefits of those Management Agreements. To allow it to retain the rights to use those names would reward its duplicity.

2. ACACS has used an identical or similar mark in commerce.

Ascent alleges that ACACS's marks are confusingly similar to the Ascent Marks.[45] Defendants argue, based on conclusory argument of counsel, that none of the marks used by ACACS are similar as a matter of law. This contested factual claim fails under Rule 12(b)(6) standards.

Defendants have used various permutations of the Ascent Marks, specifically using the phrases ASCENT CLASSICAL and ASCENT CLASSICAL ACADEMY. ACACS identifies itself as Ascent Classical Academy Charter Schools.[46] ACACS identifies itself under the same moniker on public job boards.[47] Exclusive of the Ascent Trade Names, ACACS uses various other forms of "Ascent Classical Academy of

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[43] *Lawry v. Palm*, 192 P3d 550, 568 (Colo. Ct. App. 2008).
[44] Of course, Ascent Classical Academy of J27 may not use the name "Ascent Classical Academy of Northern Denver" since that name was never licensed to ACACS.
[45] *Am. Compl.* ¶ 343. *See, also,* Ex. C.
[46] *Am. Compl.* ¶ 323.
[47] *Id.*, ¶ 348.

[Location]" on social media.[48] Compared to the Ascent Marks, the uses alleged in the Amended Complaint are essentially identical, incorporating the word elements from each of those marks. Defendants concede this in their *Motion*.[49]

Concerning ACACS's design marks, these are also similar to the Ascent Marks, in addition to their incorporation of the same word elements. Like the '351 Mark, ACACS's marks feature designs within a circular frame, surrounded by the words "Ascent Classical Academy." While the design within the circles may differ, the layout and copy are nearly identical. Ascent's "schoolhouse" logo (the '351 Mark), surrounded by similar copy, could confuse the consuming public into thinking that Ascent's mark is just another permutation of ACACS's Infringing Marks, or *vice versa*. This element is satisfied with respect to the Ascent Marks on the basis of appearance alone.[50]

Beyond appearance, at least one court in this district has considered the relatedness of goods/services when evaluating this element of a trademark infringement claim.[51] Here, each of the registration documents identified in ACACS' filings with the Colorado Secretary of State (of which the Court can take judicial notice) identifies the services, "Education services, namely, providing kindergarten through 12th grade (K-12) classroom instruction; educational services in the nature of charter schools."[52] Comparatively, Ascent offers "education management services and the provision of

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[48] *Id.*, ¶ 327.
[49] *Mot. To Dismiss* at 13.
[50] *1-800 Contacts, Inc.*, 722 F.3d at 1238.
[51] *See Carrick-Harvest, LLC v. Veritas Farms, Inc.*, 2021 WL 7368188, at *7 (D. Colo. Jan. 25, 2021) (analyzing a plaintiff's allegations related to the goods with respect to which the mark was used when making its findings under the "identical or similar mark" element).
[52] The registration at Doc. ID 20241235141 contains slightly different wording, but describes the same services.

classical education schooling."[53] These services are sufficiently related to support a finding that ACACS's Infringing Marks, and use of the Ascent Marks in the Ascent Trade Names and on social media are identical or similar.[54]

3. ACACS' use creates a likelihood of confusion.

"Likelihood of confusion forms the gravamen for a trademark infringement action."[55] Section 43(a) of the Lanham Act provides that any person who

> Uses in commerce any word, term, name, symbol, or device, . . . which . . . is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person . . . shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act.[56]

Although Defendants cite authority discussing the "outer limits of substantial similarity," the cited authority dealt with summary judgment, not dismissal under Rule 12(b)(6).[57] The test for this Court is whether Ascent has *plausibly* alleged likelihood of confusion.[58]

The Tenth Circuit identified six non-exhaustive, inter-related factors to determine whether likelihood of confusion exists:

> (1) the degree of similarity between the marks; (2) the intent of the alleged infringer in adopting its mark; (3) evidence of actual confusion; (4) the relation in use and the manner of marketing between the goods or services marketed by the competing parties; (5) the degree of care likely

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[53] *Am. Compl.*, ¶ 293.
[54] *Carrick-Harvest, LLC*, 2021 WL 7368188, at *7.
[55] *King of the Mountain Sports, Inc. v. Chrysler Corp.*, 185 F.3d 1084, 1089 (10th Cir. 1999).
[56] 15 U.S.C. 1125(a).
[57] *Universal Money Ctrs., Inc. v. American Tel. & Tel. Co.*, 22 F.3d 1527, 1530 n.2 (10th Cir. 1994).
[58] *See Jack Daniel's*, 599 U.S. at 157 n.2.

> to be exercised by purchasers; and (6) the strength or weakness of the marks.[59]

No factor is dispositive, but the degree of similarity is the most important.[60] And this is a fact-intensive inquiry not readily susceptible to a motion to dismiss.[61]

Defendants present argument only under factors (4) and (5), essentially conceding factors (1), (2), (3), and (6). While Defendants argue no likelihood of confusion can exist due to the geographic markets served by Ascent and ACACS, this is not a factor. Furthermore, their claim misstates the *Amended Complaint*, which alleges that Ascent has sold and marketed its services under the Ascent Marks in Colorado, Wyoming, New Mexico, North Carolina, South Carolina, and Tennessee and intends to continue to do so.[62] Here, the *Amended Complaint* plausibly alleges a likelihood of confusion under the *King of the Mountain* factors.

a. ACACS' logos and phrases are very similar to the Ascent Marks.

The degree of similarity is tested on three levels: sight, sound, and meaning.[63] These factors are examined "in the context of the marks as a whole as they are encountered by consumers in the marketplace."[64] Conflicting marks must be compared in their entireties to determine likelihood of confusion.[65] The task of the court is to

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[59] *King of the Mountain*, 185 F.3d at 1089-90. *See also Affliction Holdings, LLC v. Utah Vap or Smoke*, LLC, 935 F.3d 1112 (10th Cir. 2019).
[60] *Affliction Holdings*, 935 F.3d at 11112.
[61] *See, e.g., Mid-State Aftermarket Body Parts v. MQVP, Inc.*, 466 F.3d 630, 634 (8th Cir. 2006).
[62] *Am. Compl.*, ¶¶ 306, 310.
[63] *Id.* at 1090 (citing *First Sav. Bank, F.S.B. v. First Bank System, Inc.*, 101 F.3d 645, 653 (10th Cir. 1996)).
[64] *Id.* (quoting *Beer Nuts, Inc. v. Clover Club Foods Co.*, 805 F.2d 920, 925 (10th Cir. 1986)).
[65] *Id.* (citing 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 23:47 (4th ed. 1996)).

determine whether the alleged infringing mark would be confusing to the public when singly presented; the court does not engage in a side-by-side comparison.[66] Similarities of marks are given more weight than differences.[67]

Here, as discussed above, ACACS uses the phrases "Ascent Classical" and "Ascent Classical Academy" in various unauthorized forms. These are similar in both sight and sound to the Ascent Marks, which employ the wordmarks ASCENT CLASSICAL and ASCENT CLASSICAL ACADEMIES. Further, the meaning is the same, as it relates to the provision of educational services in a classical setting.

Concerning the logos used by ACACS, these logos—just like Ascent's—incorporate Ascent's wordmarks in a circle around a central design. ACACS's uses are sufficiently similar to weigh this factor in favor of a finding of likelihood of confusion.

b. ACACS intended to infringe on Ascent's marks.

The focus under this factor is whether ACACS "had the intent to derive benefit from the reputation or goodwill" of Ascent.[68] Here, ACACS had been doing business using the Ascent Marks from mid-2017 through the end of 2023 and signed the Management Agreements that reserved the rights in the Ascent Marks to Ascent.[69] ACACS therefore knew that the Ascent Marks belonged to Ascent and treated them accordingly for years. In Ascent's termination letter, Ascent specifically withdrew consent to use any of Ascent's trademarks.[70] After that withdrawal, ACACS continued to

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[66] *Universal Money Ctrs.*, 22 F.3d at 1531.
[67] *King of the Mountain*, 185 F.3d at 1090.
[68] *Id.* (citing *Jordache Enters., Inc. v. Hogg Wyld, Ltd.*, 828 F.2d 1482, 1485 (10th Cir. 1987)).
[69] *Am. Compl.*, ¶¶ 30-33, 280.
[70] *Id.*, ¶ 281.

use infringing marks.[71] While ACACS's bad faith intent will be the subject of discovery, bad faith intent can be inferred from these allegations.[72]

c. Ascent has properly alleged evidence of actual confusion.

While a plaintiff need not show evidence of actual confusion to prevail, it is considered the best evidence of likelihood of confusion.[73] Evidence of actual confusion would be subject to additional discovery, but Ascent alleges that actual confusion has occurred, stating that parents have contacted Ascent to enroll in ACACS schools and regarding other issues relating to ACACS schools.[74]

d. ACACS' services are very similar to Ascent's services.

"The greater the similarity between the products and services, the greater the likelihood of confusion."[75] The issue is not whether the goods and/or services will be confused with each other, but whether consumers would be confused as to their source.[76] The goods or services of the applicant and the registrant need only be related in some manner and/or the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.[77]

Here, the services associated with the marks are extremely similar, and the marks are thus related for purposes of this factor. Ascent provides education

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[71] *See, supra* at Section II(B).
[72] *Viacom Int'l Inc. v. IJR Capital Invs., LLC*, 242 F. Supp. 3d 563, 572 S.D. Tex. 2017) ("Because improper motive is rarely, if ever, admitted (and this case provides no exception), the court can only infer bad intent from the facts and circumstances in evidence.")(internal quotations omitted).
[73] *Beer Nuts, Inc.,* 805 F.3d at 928; *Universal Money Ctrs.,* 22 F.3d at 1534.
[74] *See Am. Compl.*, ¶¶ 345-46.
[75] *Universal Monty Ctrs.*, 22 F.3d at 1532 (internal quotations and citations omitted).
[76] *See Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 1329 (Fed. Cir. 2000).
[77] *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369 (Fed. Cir. 2012).

management services for classical education schools, and ACACS is such a school. Whether the services are identical, is not the relevant inquiry. The services are undeniably closely related, and it is plausible to suggest that consumers would be confused as to their source due to both parties occupying the classical education space, and, indeed, they have been confused by parents.[78]

e. The Defendants make unsupported factual claims about consumer's degree of care.

"A consumer exercising a high degree of care in selecting a product reduces the likelihood of confusing similar trade names."[79] However, "careful or sophisticated consumers are not immune from source confusion."[80] Defendants argue without supporting evidence that customers of Ascent and ACACS each exercise "maximal care."[81] Viewing the allegations of the *Amended Complaint* in the light most favorably to Ascent, this factor should not weigh against a finding that Ascent has plausibly stated a claim for relief; Ascent should be permitted to conduct discovery on this fact-intensive factor to support its position that a likelihood of confusion exists.[82]

f. Ascent has properly alleged a strong trademark.

The stronger a trademark, the more likely that encroachment upon it will lead to sponsorship confusion.[83] "A strong trademark is one that is rarely used by parties other than the owner of the trademark, while a weak trademark is one that is often used by other parties."[84] To assess the relative strength of a mark, one must consider the two

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[78] *Am. Compl.*, ¶ 346-46
[79] *Heartsprings, Inc. v. Heartspring, Inc.*, 143 F.3d 550, 557 (10th Cir. 1998).
[80] *In re Charger Ventures LLC*, 64 F.3d 1375, 1383 (Fed. Cir. 2023).
[81] *Mot. To Dismiss* at 14.
[82] *Mid-State Aftermarket Body,* 466 F.3d at 634.
[83] *See First Sav. Bank*, 101 F.3d at 653.
[84] *Id.* (internal quotation marks and citation omitted).

aspects of strength: (1) "Conceptual Strength: the placement of the mark on the [distinctiveness or fanciful-suggestive-descriptive] spectrum;" and (2) "Commercial Strength: the marketplace recognition value of the mark."[85]

Under the conceptual strength prong, the categories, in descending order of strength, are: fanciful; arbitrary; suggestive; descriptive; and generic.[86] "'Fanciful' marks consist of 'coined' words that have been invented or selected for the sole purpose of functioning as a trademark."[87] "Arbitrary marks comprise those words, symbols, pictures, etc., that are in common linguistic use but which, when used with the goods or services in issue, neither suggest nor describe any ingredient, quality or characteristic of those goods or services."[88] Suggestive marks are those that suggest some quality or ingredient of the goods.[89]

Viewed in the light most favorable to Ascent, each of the Ascent Marks is at least suggestive on the spectrum, "classical" and "academies" suggesting traditional education as a characteristic of the services provided, but not being descriptive of Ascent's services. Furthermore, Ascent has alleged that the Ascent Marks have marketplace recognition and are distinctive in the marketplace, an allegation which must be accepted as true.[90]

C. Ascent properly states a claim for cybersquatting.

First, the above discussion refutes Defendants argument that Ascent fails to state

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[85] *King of the Mountain*, 185 F.3d at 1093 (citing McCarthy, § 11:83).
[86] *See id.*; see also *Heartsprings*, 143 F.3d at 555.
[87] *King of the Mountain*, 185 F.3d at 1093 (internal quotations and citations omitted).
[88] *Id.* (internal quotations and citations omitted).
[89] Id. (internal quotations and citations omitted).
[90] *Am. Compl*. ¶ 297.

a claim for cybersquatting under 15 U.S.C. ¶ 1125(d) because Ascent has no protectable interest in the Ascent Marks.

Next, Defendants contend there is no likelihood of confusion as a matter of law. Again, likelihood of confusion is generally a question of fact.[91] In the context of a cybersquatting claim, "[i]t is the challenged domain name and the plaintiff's mark which are to be compared."[92] Thus, the relevant comparison is between the Ascent Marks and <ascentcolorado.org>. Here, the ACACS Domain is confusingly similar because it incorporates the dominant component in each of the Ascent Marks (ASCENT) as the dominant word in the domain.[93] Consumers are more likely to focus on the first word in a mark as the dominant element.[94]

ASCENT is the first word and dominant component of each of the Ascent Marks. Ascent also owns the domain <ascentclassical.org>.[95] Likewise, ASCENT is the first word and dominant component of the ACACS Domain. The presence of "Colorado" in the ACACS Domain Name does not sufficiently distinguish the ACACS Domain, because Ascent has provided services in Colorado and intends to do so in the future.[96], Ascent has plausibly alleged that the ACACS Domain causes a likelihood of confusion.

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[91] *Universal Money Ctrs.,* 22 F.3d at 1530 n.2.
[92] *Coca-Cola Co. v. Purdy*, 382 F.3d 774, 783 (8th Cir. 2004).
[93] *See First Sav. Bank*, 101 F.3d at 653 (finding that dominant element of a mark is given greater weight in determining likelihood of confusion).
[94] *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 1372 (Fed. Cir. 2005); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 876 (Fed. Cir. 1992) (finding similarity between CENTURY 21 and CENTURY LIFE OF AMERICA in part because "consumers must first notice th[e] identical lead word.").
[95] *Am. Compl.,* ¶ 298.
[96] *Id.*, ¶ 310.

Finally, Defendants argue that Ascent does not sufficiently allege ACACS's bad faith intent to profit in registering the ACACS Domain. First, Defendants argue that because ACACS has nonprofit status, it is immune from liability for cybersquatting. Defendants cite no authority for this position, and Ascent is unaware of any. And ACACS recognized the similarity between its website and the Ascent Marks and Ascent's ownership of those marks when it demanded a license of Ascent's website in exchange for ACACS paying money it already owed Ascent.[97]

Most importantly, the Lanham Act says nothing about nonprofit immunity when setting forth the relevant factors to determine bad faith.[98] Ascent meets those factors, which "are not framed as exclusive or mandatory, . . . but are relevant guidelines,"[99] when it alleges that:

- ACACS has no trademark rights in ASCENT, which forms the dominant element of the domain name.[100]
- ACACS made no bona fide use of the ACACS Domain name prior to the infringing use.[101]
- ACACS has no bona fide noncommercial or fair use of the Ascent Marks in the sites accessible under the domain name.[102]
- ACACS registered the ACACS Domain and published the site thereon with the intent to create a likelihood of confusion as to the source sponsorship, affiliation, or endorsement of the site.[103]

Additionally, Ascent makes numerous allegations relating to the longstanding relationship and multiple Management Agreements, under which ACACS was on notice

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[97] *Id.*, ¶ 266.
[98] 15 U.S.C. 1125(d)(1)(B)(i).
[99] *Morrison & Foerster, LLC v. Wick*, 94 F. Supp. 1125, 1131 (D. Colo. 2000)
[100] See 15 U.S.C. § 1125(d)(1)(B)(i)(I); *Am. Compl.*, ¶ 224.
[101] See 15 U.S.C. § 1125(d)(1)(B)(i)(III); *Am. Compl.*, ¶¶ 218, 221-23; 226-228.
[102] See 15 U.S.C. § 1125(d)(1)(B)(i)(IV); *Am. Compl.*, ¶ 227.
[103] See 15 U.S.C. § 1125(d)(1)(B)(i)(V); *Am. Compl.*, ¶¶ 223, 225.

that Ascent would seek to protect its interest in its trademarks.[104] Similarly, ACACS attempted to acquire rights to Ascent's website through June 2024 by withholding money it owed to Ascent unless Ascent agreed to license it.[105] This action demonstrates ACACS's bad faith intent in registering the ACACS Domain, as ACACS never registered the ACACS Domain during all those years until it planned to unlawfully terminate the Management Agreements. For the foregoing reasons, Ascent's allegations cannot be said to be conclusory when it comes to the issue of ACACS's bad faith intent, and Ascent has stated a claim for cybersquatting. ACACS's Motion should be denied.

D. Ascent states a claim for contributory infringement against Lands' End.

Lands' End's claim is derivative of the claim for trademark infringement and survives for the reasons set forth above.

Dated: August 23, 2024.

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CERTIFICATE OF SERVICE

I certify that on this 23rd day of August 2024, the foregoing was electronically served via CM/ECF on all parties via their counsel of record as follows:

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[104] *Am. Compl.*, ¶¶ 32, 33, 181, 183, 250, and 251.
[105] *Id.,* ¶ 143.