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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91225576
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
TRADEMARK TRIAL AND APPEAL BOARD**

CARDS AGAINST HUMANITY, LLC,

Opposer,

- *against* -

VAMPIRE SQUID CARDS, LLC,

Applicant.

Opposition No.: 91225576

**TRIAL BRIEF OF OPPOSER CARDS AGAINST HUMANITY, LLC**

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## INTRODUCTION

Opposer Cards Against Humanity, LLC (“Opposer”) has brought this consolidated proceeding in opposition to the registration of applicant Vampire Squid Cards, LLC’s (“Applicant”) applications to register the name “CRABS ADJUST HUMIDITY” (in standard characters) (Serial No. 86/620,191) and corresponding logo (Serial No. 86/622,129), which are confusingly similar to, and admittedly intended to be associated with, Opposer’s famous marks.

Opposer is the creator of the highly successful card game entitled “CARDS AGAINST HUMANITY,” which has grown from the original “base set” of cards to include a variety of “expansion packs” and “specialty packs” by the same name. Through years of exclusive use, promotion, media attention, and commercial success, Opposer’s CARDS AGAINST HUMANITY brand and products have gained enormous popularity, reaching an audience of tens of millions around the world, and earning ██████████ dollars in revenue. Opposer is the exclusive owner of all intellectual property rights in and to the game, including, but not limited to, federal trademark registrations in the name CARDS AGAINST HUMANITY (in standard characters) (U.S. Reg. No. 4,304,905), the acronym CAH (in standard characters) (U.S. Reg. No. 5,245,938), and the distinctive look of the game’s packaging (U.S. Reg. No. 4,623,613).

The evidence of record convincingly demonstrates that registration of Applicant’s applied-for CRABS ADJUST HUMIDITY marks will cause confusion with, dilute the distinctiveness of, and falsely suggest a connection to, Opposer’s CARDS AGAINST HUMANITY marks. The Board has already held that “the parties’ goods are identical, travel in the same channels of trade, and are purchased by the same classes of consumers,” strongly indicating that a likelihood of confusion exists. As will be shown below, consideration of the remaining factors establishes that confusion is inevitable. Indeed, Applicant admittedly selected the CRABS ADJUST HUMIDITY

marks due to their confusing similarity with Opposer's marks, and uses them on products which are marketed as "add-ons" to Opposer's CARDS AGAINST HUMANITY-brand games, causing a substantial amount of actual confusion in the marketplace to date. Applicant's obvious attempt to imitate Opposer's marks, and to associate its products with Opposer's famous brand, similarly results in a likelihood of dilution and false suggestion of a connection.

Accordingly, Opposer's opposition should be sustained and registration should be refused with respect to each of the marks at issue.

### **DESCRIPTION OF THE RECORD**

The evidence of record consists of the pleadings in this proceeding; the opposed applications and corresponding file histories (37 CFR § 2.122(b)(1)); and additional evidence offered by the parties during their respective testimony periods, as described in detail below.

Opposer has made the following evidence of record during its respective testimony periods:

#### *Trial Testimony:*

- Transcript of Testimony Deposition of Jenn Bane, Community Manager, Cards Against Humanity, LLC, held on November 17, 2017 ("Bane Tr."), and Exhibits 1-11 thereto ("Bane Ex."). See 35 TTABVUE.
- Expert Testimony Declaration of Jon G. Rygh, dated November 27, 2017, and Exhibit 1 thereto ("Rygh Expert Decl."). See 36 TTABVUE.

#### *Notices of Reliance:*<sup>1</sup>

- First Notice of Reliance, and Exhibits 1-3 thereto, containing certificates of registrations for three of Opposer's valid and subsisting registrations for the CAH Marks (U.S. Reg. Nos. 4,304,905, 4,623,613, and 5,245,938) and corresponding printouts from the U.S. Patent and Trademark Office's ("USPTO") Trademark Status and Document Retrieval ("TSDR") system showing the current status and title of such registrations. See 29 TTABVUE.

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<sup>1</sup> Unless otherwise indicated, Opposer's Notices of Reliance and the exhibits attached thereto are cited herein as "NOR \_\_, Ex. \_\_."

- Second Notice of Reliance, and Exhibit 4 thereto, containing a copy of Opposer’s trademark application (U.S. Serial No. 87/428,307) and a corresponding printout from the USPTO’s TSDR system showing the current status and title of such application. *See* 30 TTABVUE.
- Third Notice of Reliance, and Exhibits 5-8 thereto, containing copies of certain of Applicant’s Responses to Opposer’s First Set of Interrogatories (Nos. 3-5, 7-8, and 15) and First Set of Requests for Admission (Nos. 1-5, 33, and 37-38). *See* 31 TTABVUE.
- Fourth Notice of Reliance, and Exhibits 9-79 thereto, containing the following Internet materials: screenshots of Opposer’s website; screenshots of Applicant’s website; a representative sampling of articles referencing Opposer and/or its CAH Marks; screenshots of social media websites referencing Opposer and/or its CAH Marks; and printouts of archived versions of the page on Amazon’s website listing Opposer’s Game for sale. *See* 32 TTABVUE.
- Fifth Notice of Reliance, and Exhibits 80-84 thereto, containing copies of certain documents produced by Applicant in this proceeding, including email communications and a spreadsheet related to Applicant’s sales of the Crabs Game. *See* 33 TTABVUE.
- Sixth Notice of Reliance, dated November 27, 2017, containing portions of the transcript from the discovery deposition of Michael Kohler, as Applicant’s designated Fed. R. Civ. P. 30(b)(6) representative, held on October 20 and 21, 2016, and Exhibits 6, 7, 10, 14, 25-28, 30, 32-34, and 36 thereto. *See* 34 TTABVUE.
- Seventh Notice of Reliance, dated March 12, 2018, containing additional portions of the transcript from the discovery deposition of Michael Kohler, as Applicant’s designated Fed. R. Civ. P. 30(b)(6) representative, held on October 20 and 21, 2016, and Exhibits 15-18 and 37 thereto. *See* 40 TTABVUE.<sup>2</sup>
- Eighth Notice of Reliance, and Exhibits 85-86 thereto, containing copies of certain of Applicant’s Responses to Opposer’s First Set of Interrogatories (Nos. 9-11 and 14). *See* 41 TTABVUE.

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<sup>2</sup> The transcripts from the discovery deposition of Michael Kohler and the accompanying exhibits, introduced under Opposer’s Sixth and Seventh Notices of Reliance, are cited herein as “NOR \_\_, Kohler Depo. Tr. \_\_” and “NOR \_\_, Kohler Depo. Ex. \_\_.”

- Ninth Notice of Reliance, and Exhibits 87-90 thereto, containing the following Internet materials: articles referencing Opposer and/or its CAH Marks; and printouts of the “Cards Against Humanity” Wikipedia page. *See* 42 TTABVUE.
- Tenth Notice of Reliance, and Exhibits 91-96 thereto, containing copies of certain documents produced by Applicant in this proceeding, including email communications and screenshots showing keyword advertising terms used by Applicant on various websites. *See* 43 TTABVUE.

Applicant has made the following evidence of record:

- Transcript of Testimony Deposition of Michael Kohler, held on January 11, 2018 (“Kohler Test. Tr.”), and Exhibits 1-5 thereto. *See* 47 TTABVUE.
- Testimony Declaration of Ben Hantoot, dated January 24, 2018, containing responses to Applicant’s written questions. 48 TTABVUE.
- Transcript of Testimony Deposition of Shari Spiro, held on January 18, 2018, and Exhibits 10-11 thereto. *See* 49 TTABVUE.
- Transcript of Testimony Deposition of Jon G. Rygh, held on January 18, 2018, and Exhibit 12 thereto. *See* 50 TTABVUE.

### **STATEMENT OF ISSUES**

1. Do Applicant’s Crabs Marks so closely resemble Opposer’s CAH Marks as to be likely, when applied to Applicant’s goods, to cause confusion, or to cause mistake, or to deceive the public into believing that the goods bearing marks comprising or containing Applicant’s Crabs Mark originate with Opposer and/or are approved, endorsed, or sponsored by, or in some way associated with, Opposer under Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d)?

2. Do Applicant’s Crabs Marks so closely resemble Opposer’s CAH Marks as to be likely, when applied to Applicant’s goods, to cause dilution through blurring of the distinctive quality of Opposer’s CAH Marks under Section 43(c) of the Lanham Act, 15 U.S.C. § 1125(c)?

3. Do Applicant’s Crabs Marks falsely suggest an association or connection with Opposer under Section 2(a) of the Lanham Act, 15 U.S.C. § 1052(a)?

**STATEMENT OF FACTS**

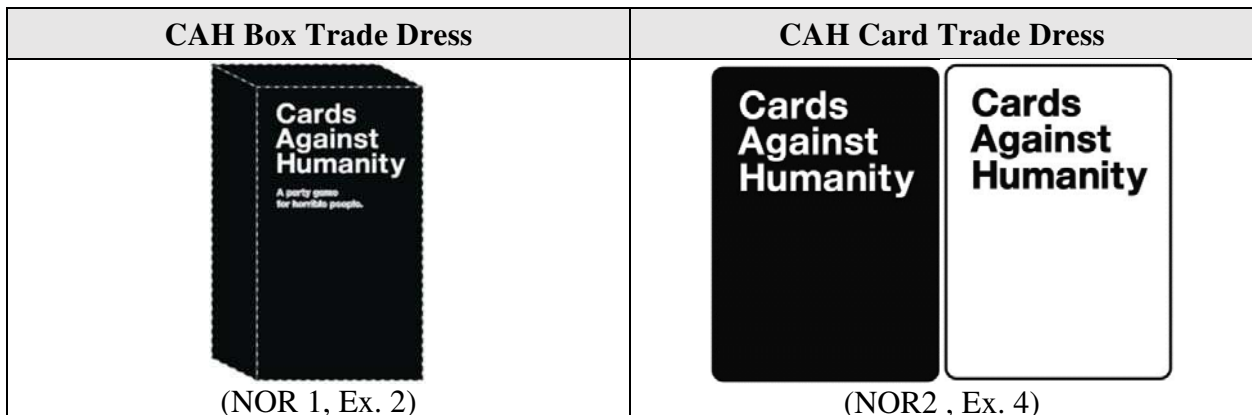
**I. OPPOSER’S CARDS AGAINST HUMANITY BRAND AND PRODUCTS**

**A. The CARDS AGAINST HUMANITY Marks and Game**

Since December of 2009, Opposer has designed, manufactured, marketed, and sold its “Cards Against Humanity” game as a “base set” of cards, which can be augmented by cards sold by Opposer in “specialty packs” and “expansion packs,” as well as other related products and merchandise sold under the CARDS AGAINST HUMANITY brand (collectively, the “Game”).

In order to distinguish its Game from those offered by others, Opposer has continuously used various trademarks in conjunction therewith, including, but not limited to, (i) the word mark CARDS AGAINST HUMANITY; (ii) the acronym CAH; (iii) the distinctive trade dress on the Game’s packaging, consisting of white lettering spelling “Cards Against Humanity” on a black background with vertically aligned text in Helvetica Neue font, shown in Figure 1 below; and (iv) the distinctive trade dress in the overall look-and-feel of the Game’s cards, including the card-backs spelling “Cards Against Humanity” in white lettering on black cards or in black lettering on white cards, also shown in Figure 1 below. (Opposer’s box trade dress and card trade dress shown in Figure 1 below are together, the “CAH Trade Dress,” and all of the foregoing marks collectively, the “CARDS AGAINST HUMANITY Marks” or “CAH Marks”).

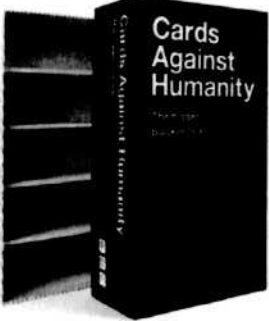
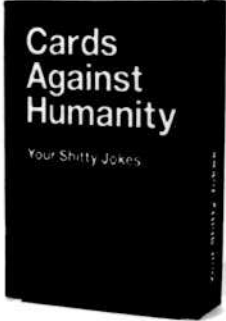
Figure 1



Opposer and its Game have gained enormous popularity over the years, allowing Opposer to significantly expand its CARDS AGAINST HUMANITY-brand products well beyond the original “base” set. Opposer currently offers a wide variety of products, all of which are branded with the CARDS AGAINST HUMANITY Marks, including, but not limited to, “expansion packs” such as the Green Box, Red Box, and Blue Box; “specialty packs” such as the Period Pack, College Pack, 90s Nostalgia Pack, Weed Pack, Food Pack, Jew Pack, Fantasy Pack, Sci-Fi Pack, Geek Pack, Science Pack, Design Pack, 2012 Holiday Pack, 2013 Holiday Pack, 2014 Holiday Pack; a pack of blank cards entitled “Your Shitty Jokes;” a bundle of products referred to as the “Back to School Bundle;” and an empty storage case referred to as “The Bigger Blacker Box” that can hold all of the cards Opposer has ever made. A representative sampling of CARDS AGAINST HUMANITY-brand products is shown in Figure 2 below.

Figure 2

The “Base” Set		The “Red Box”	
			
(NOR 4, Ex. 19 at 1)		(NOR 4, Ex. 19 at 2)	
Opposer’s “Specialty Packs”			
			
(NOR 4, Ex. 19 at 7)	(NOR 4, Ex. 19 at 5)	(NOR 4, Ex. 19 at 9)	(NOR 4, Ex. 19 at 8)

“The Bigger Black Box”	“Your Shitty Jokes”
 <p data-bbox="391 611 646 642">(NOR 4, Ex. 19 at 3)</p>	 <p data-bbox="976 611 1247 642">(NOR 4, Ex. 19 at 10)</p>

**B. Distribution and Sale of Opposer’s Game**

Opposer’s CARDS AGAINST HUMANITY Game is sold worldwide through a variety of tightly-controlled trade channels, including, in particular, through Opposer’s official website located at [www.cardsagainsthumanity.com](http://www.cardsagainsthumanity.com) (NOR 4, Ex. 10), Opposer’s official Amazon account (Bane Ex. 11), and in licensed retail stores, such as Target, that have purchased the Game through Opposer’s wholesale program. *See* Bane Tr. at 22:12-17. Opposer’s Game is sold at a relatively low price-point, with the current retail prices for the various iterations of the Game ranging between \$5.00 and \$29.00. *See* NOR 4, Ex. 10.

Opposer has achieved great commercial success under the CARDS AGAINST HUMANITY Marks. Between 2010 and mid-2016 alone, Opposer sold approximately [REDACTED] CARDS AGAINST HUMANITY-brand products, amounting to [REDACTED] dollars in revenue. *See* Bane Ex. 3; *see also* Bane Tr. at 22:18-23. In addition, the PDF version of Opposer’s Game, which is made available on Opposer’s website free of charge, has been downloaded several millions of times. *See id.* at 6:17-22, 102:8-14. *See* NOR 4, Ex. 13 (noting on August 27, 2012 that, within the first few months, the PDF “was downloaded tens of thousands of time”); *id.*, Ex. 20 (noting on May 18, 2013 that “in the past year alone,” the PDF “was downloaded 1.5 million times from [Opposer’s] website”).



### C. Marketing and Promotion of Opposer's Game

Opposer has invested substantial time and resources in developing and promoting its card game business and its corporate identity under the CARDS AGAINST HUMANITY Marks. Most notably, Opposer supports the sale of the CARDS AGAINST HUMANITY Game with non-traditional, strategic, and highly visible marketing and promotional campaigns, which are typically carried out during the holiday season and around major events, such as the United States presidential election and the Super Bowl®, and often involve a charitable or philanthropic component. *See Bane Ex. 3 at 2* (providing a list of Opposer's various advertising expenditures between 2010 and mid-2016). Opposer also advertises its Game through more traditional means, for example, by placing advertisements on social media and podcasting platforms, and through keyword advertising. *See id.*

Between 2010 and mid-2016 alone, Opposer distributed nearly [REDACTED] promotional items (*see id.* at 1) and spent approximately [REDACTED] in marketing and promoting its CARDS AGAINST HUMANITY brand and products (*see id.* at 2). This figure includes approximately [REDACTED] in charitable donations made using revenues derived from sales of Opposer's Game. *See id.* For instance, as of mid-2016, Opposer donated approximately [REDACTED] using revenues derived from sales of Opposer's 2012 Holiday Pack; and funded approximately [REDACTED] in full-tuition scholarships for women in science, technology, engineering, or math through sales of Opposer's Science Pack. *See id.* at 2. *See also Bane Tr.* at 19:7-12 (noting Opposer had "raised [REDACTED] dollars" through the Science Pack).

Opposer's marketing campaigns and philanthropic initiatives routinely attract widespread media attention, as described in more detail below (*see infra*, pp. 10-13), generating enormous goodwill and consumer recognition of the CARDS AGAINST HUMANITY Marks.

#### **D. Fame of the CARDS AGAINST HUMANITY Marks**

Opposer and its Game have become a worldwide phenomenon. It has become increasingly apparent over the years that CARDS AGAINST HUMANITY has moved beyond the boundaries of a traditional brand to become an established, famous mark. *See* Bane Tr. at 9:17-21, 11:2-3.

##### **1. Consistently Ranked As Best-Seller**

Since at least as early as 2011, the Opposer's Game has been consistently ranked by Amazon.com as a "Best Seller" in the "Toys & Games," "Games," and "Card Games" departments, frequently occupying the number one spot in all three. *See* Bane Tr. at 11:3-5. *See, e.g.,* NOR 4, Ex. 75 (ranked by Amazon.com as "#1 Best Seller" in "Toys & Games," "Games," and "Card Games" departments in 2013); *id.*, Ex. 76 (same, in "Games" and "Card Games" in 2017). Opposer's Game been ranked as a "Best Seller" on Amazon's international websites, including in the United Kingdom and Canada. *See, e.g., id.*, Ex. 77 (ranked by Amazon.co.uk as "#1 Best Seller" in "Games" and "Card Games" in 2017); *id.*, Ex. 78 (same, by Amazon.ca).

Opposer's Game is often recognized as a "top-trending" and "most popular" item in various third-party publications as well. For example, the *New York Times* recognized the Game's popularity in an article regarding the top-trending gift-related searches, noting that "according to Google, the whole country is [ ] obsessed with a game called Cards Against Humanity." *Id.*, Ex. 35 at 1-2. *See also, e.g., id.*, Ex. 47 (listed among the "Top-Trending Toys and Games of the 2016 Holiday Season"); *id.*, Ex. 54 (listed among "The 14 Most Popular Board Games for Adults").

##### **2. Widespread Unsolicited Media Attention**

Since releasing the Game to the public in or around 2010, Opposer's CARDS AGAINST HUMANITY Marks and Game have been continuously featured and identified in nationally circulated publications, including, but not limited to, *The New York Times*, *Huffington Post*,

*Washington Post, New York Post, New York Magazine, Chicago Tribune, Business Insider, USA Today, Adweek, The Guardian, The Economist, Time, Fortune, Bloomberg, and Bustle. See, e.g.,* NOR 4, Exs. 13-72; NOR 9, Exs. 87-88. *See also* Bane Tr. at 11:10-14.

These publications specifically recognize the fame and success of Opposer’s CARDS AGAINST HUMANITY brand and Game, which have been described as “famous” by the *New York Post* and *The Guardian* (NOR 4, Exs. 39, 59, 61), “hugely popular” by *The New York Times* and *Adweek* (*id.*, Exs. 25, 33), “incredibly popular” by *The Baltimore Sun* (*id.*, Ex. 13), and a “worldwide phenomenon” by *Chicago Tribune* (*id.*, Ex. 21). Opposer’s Game becoming such a “mainstay of modern life” (*id.*, Ex 53) that “if you haven’t heard of [it], you haven’t been to a party at someone’s house in the last decade” (*id.*, Ex. 49). A representative sampling of article excerpts commenting on Opposer’s fame is shown in Figure 3 below.

Figure 3

<b>Articles Commenting on Opposer’s Fame</b>
<p>Amanda Holpuch, <i>Cards Against Humanity game donates \$70,000 holiday hole to Wikipedia</i>, <i>The Guardian</i> (Dec. 19, 2012). (NOR 4, Ex. 16.)</p> <p>“The [Cards Against Humanity] became a success on the online fundraising site Kickstarter” and “[o]n Tuesday, it was the best selling Toys and Games product on Amazon, where it regularly sells out.”</p>
<p><i>Is Cards Against Humanity the most un-PC Christmas present you’ll get this year?</i>, <i>Metro</i> (Dec. 23, 2013). (NOR 4, Ex. 28.)</p> <p>“Cards Against Humanity is the game that’s <b>taking the world by storm . . .</b>”</p>
<p>Christine Lagorio-Chafkin, <i>The Humans Behind Cards Against Humanity</i>, Inc. (Jan. 6, 2014). (NOR 4, Ex. 29.)</p> <p>The CARDS AGAINST HUMANITY Game is a “very successful product, and seems well poised to be the <b>break-out party game of this decade</b>. When it’s not out of stock, it’s the No. 1 game on Amazon.com . . .”</p>
<p>Lauren Effron, <i>Cards Against Humanity: One of the most requested wedding gifts on Amazon</i>, <i>ABC News</i> (May 10, 2014). (NOR 4, Ex. 30.)</p> <p>“Cards Against Humanity . . . has “bec[o]me a <b>smashing success . . .</b>”</p>

<p>Nick Summers, <i>Cards Against Humanity, the Most Offensive - and Lucrative - Game on Earth</i>, Bloomberg (Apr. 24, 2014). (NOR 4, Ex. 31.)</p> <p>Cards Against Humanity has “the <b>top five bestselling products</b> in the toys and games category at Amazon.com, where customers have given them <b>more than 14,000 five-star reviews</b>. That’s a level of devotion that can’t be explained by shock value alone.”</p>
<p>Casey Portas, <i>College students find inspiration with Cards Against Humanity game</i>, USA Today College (Oct. 31, 2014). (NOR 4, Ex. 34.)</p> <p>“Since [2011], the game has <b>spread rapidly nationally and internationally, growing in popularity</b> especially on college campuses and among the college age demographic.”</p>
<p>Klara Granger, <i>If You Like Cards Against Humanity, Check Out These 8 Games</i>, Huffington Post (Jan. 1, 2016). (NOR 4, Ex. 41.)</p> <p>“The phenomenon that is Cards Against Humanity (CAH) seems to have <b>reached a critical point where it’s effectively in the mainstream</b>,” and it has “become <b>wildly popular</b> among diverse folks of all ages and identities.”</p>
<p>Melissa Dahl, <i>What It Means to Be Uncommonly Good at Cards Against Humanity</i>, New York Magazine (May 16, 2016). (NOR 4, Ex. 45.)</p> <p>“If you have been to a smallish party in, oh, the last five years or so, chances are someone at that party has at some point brought out the little rectangular box that holds the game Cards Against Humanity. . . . [T]he card game is a hit . . .”</p>
<p>Brenna Williams, <i>Cards Against Humanity seeks new CEO (who sounds an awful lot like our last President)</i> CNN Politics (Jan. 25, 2017). (NOR 4, Ex. 49.)</p> <p>“[I]f you haven’t heard of [Cards Against Humanity], you haven’t been to a party at someone’s house in the last decade and I can’t help you.”</p>
<p>Dan Brooks, <i>Letter of Complaint: Cards Against Humanity</i>, The New York Times Magazine (Oct. 7, 2017). (NOR 4, Ex. 57.)</p> <p>“[Cards Against Humanity] has become a mainstay in the households of young professionals.”</p>
<p>Peter Gasca, <i>The Company Has This year’s Most Auspicious Holiday Campaign: To Save America</i>, Inc. (Nov. 16, 2017). (NOR 4, Ex. 62.)</p> <p>“Cards Against Humanity [is] the <b>wildly popular card game</b> that gained <b>nationwide visibility</b> after a highly successful Kickstarter campaign in 2010 . . .”</p>

### 3. High-Profile Marketing Stunts and Philanthropic Initiatives

Opposer has become famous for its non-traditional marketing campaigns in the nature of high-profile stunts and philanthropic initiatives, which routinely attract widespread media attention and cultural discussion. *See* Bane Tr. at 5:4-11. Most recently, Opposer received

worldwide media attention through its promotion entitled “Cards Against Humanity Saves America,” wherein Opposer purchased land on the U.S.-Mexico border in attempt to thwart President Donald Trump’s border wall. This promotion was immediately picked up by nearly every major media outlet, including, but not limited to, *The New York Times*, *Washington Post*, *New York Post*, *Business Insider*, *USA Today*, *The Guardian*, *Time*, *Vice*, *Vox*, CNN, CBS News, and Fox News. *See* Bane Tr. at 13:19-14:20. *See also, e.g.*, NOR 4, Exs. 58-71.

Opposer’s earlier campaigns received extensive media coverage as well, including, for example, its 2012 “Pay What You Want” holiday promotion, in which consumers paid whatever they wanted for specialty CARDS AGAINST HUMANITY-brand holiday packs, generating \$70,000.00 in profits which were donated to the Wikimedia Foundation (*see* Bane Tr. at 24:4-25:2; *see, e.g.*, NOR 4, Exs. 14-18); Opposer’s 2013 Black Friday promotion, in which Opposer raised the price of all of its CARDS AGAINST HUMANITY-brand products by \$5.00 (*see* Bane Tr. at 12:19-24; *see, e.g.*, NOR 4, Exs. 26-27); and its 2013 “12 Days of Holiday Bullsh\*t” promotion, in which Opposer sent twelve random gifts for \$12.00 and sold out of 100,000 spaces in less than a day (*see* Bane Ex. 9; *see, e.g.*, NOR 4, Exs. 24-25). *See also* Bane Tr. at 13:5-16.

Opposer has become known for these attention-grabbing campaigns; in fact, Opposer’s unique marketing approach has itself been the subject of unsolicited media attention. *See, e.g.* NOR 4, Ex. 40 (Opposer’s “marketing approach is carefully crafted, making it one of the most disruptive brands today.”); *id.*, Ex. 42 (“The people behind Cards Against Humanity have proven to be marketing geniuses[.]”); *id.*, Ex. 59 (Opposer has “become famous for [its] anti-Black Friday campaigns” and “known for its outlandish stunts[.]”); *id.*, Ex. 63 (“Cards Against Humanity [is] an irreverent company known for its attention-seeking pranks . . .”); *id.*, Ex. 69 (“Cards Against Humanity is known for holiday stunts . . .”). *See also id.*, Exs. 46, 50, 55.

#### **4. Online Following**

The CAH Marks have received extensive exposure through Opposer's website, [www.cardsagainsthumanity.com](http://www.cardsagainsthumanity.com), and its social media pages on Twitter, Instagram, Facebook, and Tumblr, all of which prominently feature the CAH Marks. *See* NOR 4, Ex. 9; Bane Tr. at 17:18-20:17, Ex. 2. Opposer's Twitter account has approximately 107,000 followers (Bane Ex. 2 at 1), and its Facebook page has nearly 672,000 likes (*id.* at 4). *See also* Bane Tr. at 17:17-18:11, 20:5-17. Opposer also connects with its customers by email, and has a mailing list that has grown to approximately one million subscribers. *See* Bane Tr. at 11:21-23, 12:11-14.

#### **5. Celebrity Endorsements and Brand Partnerships**

Opposer's Game is popular among celebrities. Celebrities such as Kim Kardashian, Ellen DeGeneres, Lance Armstrong, Anne Hathaway, Seth Rogen, Daniel Radcliffe, James McAvoy, and Jessica Biel, and the casts of shows such as *Glee*, have mentioned Opposer's Game as their favorite game or played it on television (*see* NOR 4, Exs. 22, 73-74; Bane Tr. at 15:13-16:3, 103:5-14, Ex. 1), bringing substantial unsolicited media attention to the CAH Marks. *See* Bane Tr. at 15:13-16:3 (These are not paid endorsements; celebrities mention the Game "because they like the game, and it's so popular that it makes them seem cool and young and hip if they talk about it on the internet."). Opposer's Game has also been played by members of the U.S. Congress. *See* NOR 4, Ex. 36. Opposer's partnerships with well-known brands, including Netflix's "House of Cards" television series, have also resulted in widespread attention. *See* Bane Tr. at 106:10-107:8.

#### **E. Opposer's Registrations for the CARDS AGAINST HUMANITY Marks**

In connection with Opposer's efforts to protect its world renowned name and brand, Opposer has obtained several federal trademark registrations for the CARDS AGAINST

HUMANITY Marks. In this proceeding, Opposer has asserted ownership of the following federal trademark registrations (collectively, the “Registrations”) and application:

- U.S. Registration No. 4,304,905 for CARDS AGAINST HUMANITY (in standard characters) for use in connection with “card games; game cards” in International Class 28, which issued on March 19, 2013, and is based on first use in commerce on January 30, 2011 (NOR 4, Ex. 1);
- U.S. Registration No. 5,245,938 for CAH (in standard characters) for use in connection with “card games; game cards” in International Class 28, which issued on July 18, 2017, and is based on first use in commerce on January 31, 2012 (*id.*, Ex. 3);
- U.S. Registration No. 4,623,613 for Opposer’s box trade dress (shown in Figure 1 above) for use in connection with “card games; game cards” in International Class 28, which issued on October 21, 2014, and is based on first use in commerce on January 30, 2011 (*id.*, Ex. 2); and
- U.S. Serial No. 87/428307 for Opposer’s card trade dress (the black card with white text shown in Figure 1 above) for use in connection with “card games; game cards” in International Class 28, which was filed on April 27, 2017, and is based on first use in commerce on January 30, 2011 (*id.*, Ex. 4).

As shown in the title and status copies of Registration Nos. 4,304,905, 5,245,938, and 4,623,613 submitted by Opposer (*see* NOR 1, Exs. 1-3), all of these Registrations are valid and subsisting on the Principal Register, and Registration No. 4,305,905 has become incontestable (*see id.*, Ex. 1).

## **II. APPLICANT’S CONFUSINGLY SIMILAR MARKS AND PRODUCTS**

### **A. Applicant’s CRABS ADJUST HUMIDITY Marks and Game**

Applicant decided to create an expansion pack to Opposer’s Game in 2013. *See* Kohler Test. Tr. at 6:13-19. Applicant brainstormed various combinations of words for the name of its game and, on March 4, 2013, selected “CRABS ADJUST HUMIDITY” and a logo to go along with it (*see* NOR 3, Ex. 6 at Response No. 5), shown in Figure 4 below (the “Crabs Design Mark” and, the foregoing marks together, the “CRABS ADJUST HUMIDITY Marks” or “Crabs Marks”).

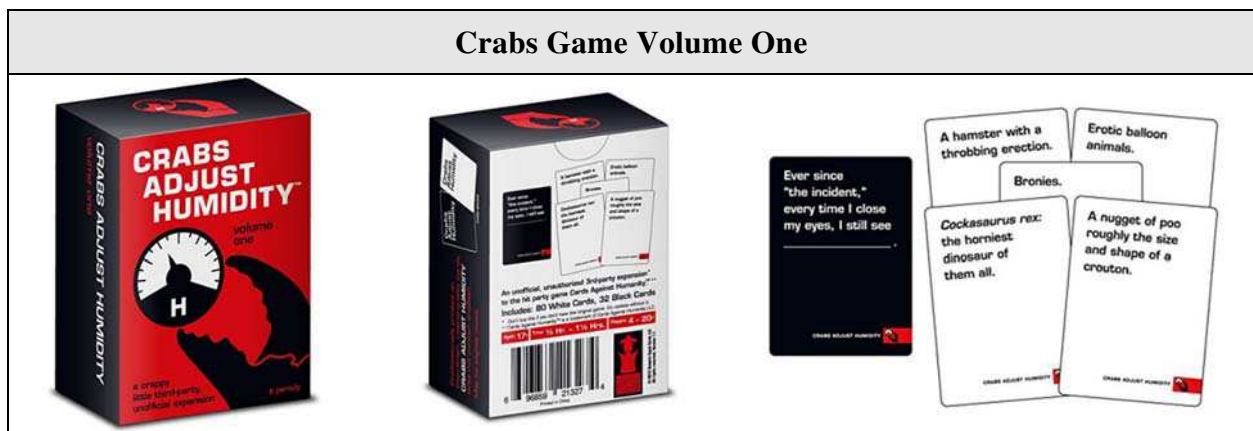
Figure 4



Applicant admittedly was aware of the CAH Marks when it selected the Crabs Marks. *See id.*, Ex. 8 at Response No. 3.

Applicant uses the Crabs Marks primarily in connection with card games it describes as “unauthorized” “third-party expansion” packs (collectively, the “Crabs Game”) that are meant to be played with Opposer’s “original,” “hit party game Cards Against Humanity.” NOR 6, Kohler Depo. Ex. 30. *See also* NOR 4, Ex. 11. To date, Applicant has created and is promoting, offering for sale, and selling various iterations of the Crabs Game, including seven “volumes” of the Crabs Game, a “blank deck” of cards, and a “combined special edition containing all the cards from Volumes One [through] Five” of Applicant’s Crabs Game called the “Omniclaw Edition.” *See id.* The foregoing products are branded with the name CRABS ADJUST HUMIDITY and the Crabs Design Mark, as shown, for example, in Volume One of the Crabs Game in Figure 5 below.

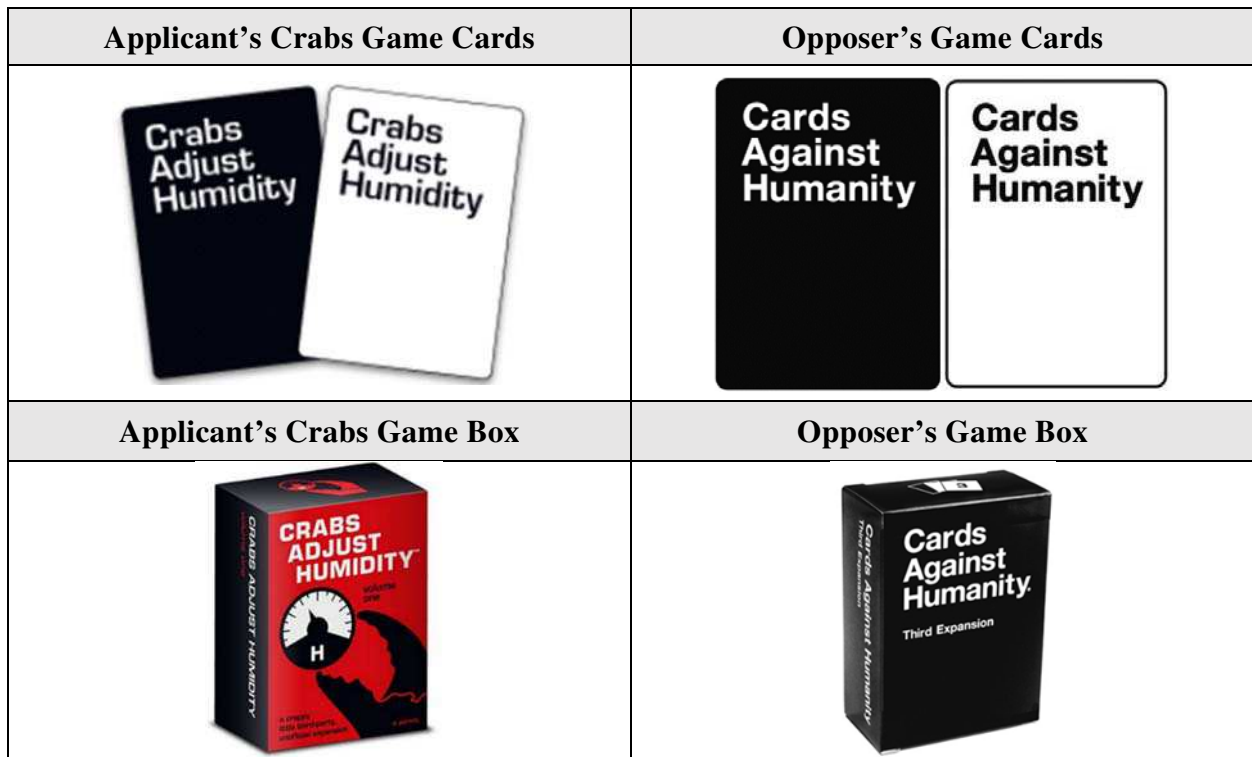
Figure 5





Applicant’s Crabs Game bears an obvious resemblance to Opposer’s Game. As is clear from the side-by-side images in Figure 6 below, the Crabs Game mimics the distinctive look of Opposer’s Game, including insofar as it contains black-and-white game cards with the words “Crabs Adjust Humidity” stacked so that “C-A-H” features prominently and is packaged in a similar-looking box.

Figure 6



**B. Applicant’s Applications for the CRABS ADJUST HUMIDITY Marks**

Applicant is the owner of following trademark applications (together, the “Applications”):

- U.S. Serial No. 86/620,191 for CRABS ADJUST HUMIDITY (in standard characters) for use in connection with “card games; game cards” in International Class 28, which was filed on May 5, 2015, and is based on first use in commerce on July 1, 2013; and
- U.S. Serial No. 86/622,129 for the Crabs Design Mark (shown in Figure 4 above) for use in connection with “card games; game cards” in International Class 28,

which was filed on May 7, 2015, and is based on first use in commerce on July 1, 2013.

*See also* NOR 3, Ex. 6 at Response Nos. 7-8. Applicant was admittedly aware of the CAH Marks before filing the Applications. *See id.*, Ex. 8 at Response Nos. 4-5; 28 TTABVUE 9 at ¶ 46.

### **III. THE OPPOSITION PROCEEDING**

On December 30, 2015, Opposer filed a consolidated notice of opposition (1 TTABVUE), opposing registration of the Crabs Marks in Applicant's Applications. Applicant filed a timely answer (4 TTABVUE) in which it denied the salient allegations in the notice of opposition and asserted various affirmative defenses.

On December 5, 2016, Opposer moved for partial summary judgment (10 TTABVUE), which the Board granted in part and denied in part on September 6, 2017 (26 TTABVUE). In particular, the Board granted the motion "as to Opposer's standing; Opposer's priority of use of the mark CARDS AGAINST HUMANITY for card games and game cards, as shown by Registration No. 4,304,905; and the similarity of the parties' goods, channels of trade, and classes of consumers." *Id.* at 21. The Board also struck a number of Applicant's affirmative defenses. *See id.* at 9-14 (striking affirmative defenses alleged in the answer at ¶¶ 11-13, 15-17, 19-20).

On September 20, 2017, Opposer filed an amended consolidated notice of opposition (27 TTABVUE), asserting three grounds for opposing registration of the Applications: likelihood of confusion under Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d) (*id.* at 9-11, ¶¶ 42-59); likelihood of dilution under Section 43(c) of the Lanham Act, 14 U.S.C. § 1125(c) (*id.* at 11-12, ¶¶ 60-68); and false suggestion of a connection under Section 2(a) of the Lanham Act, 15 U.S.C. § 1052(a) (*id.* at 12-15, ¶¶ 69-87). Applicant filed an answer thereto on October 5, 2017 (28 TTABVUE), again denying Opposer's salient allegations and asserting several affirmative defenses, including, but not limited to, parody (*id.* at 16-17, ¶¶ 100-102). For the reasons set forth

below, Opposer maintains that, based on the evidence of record, that its opposition to Applicant's Applications for registration of the Crabs Marks should be sustained on the grounds of likelihood of confusion, likelihood of dilution, and false suggestion of connection.

## **ARGUMENT**

### **I. OPPOSER HAS ESTABLISHED STANDING AND PRIORITY**

#### **A. Opposer Has Standing To Bring This Opposition Proceeding**

The Board has already decided that Opposer has standing to bring this opposition proceeding. *See* 26 TTABVUE 16 (holding Opposer's standing is established by the TSDR printout of pleaded "Registration No. 4,304,905 for CARDS AGAINST HUMANITY, which is valid and subsisting"). This threshold requirement is further established by Opposer's submission by notice of reliance of Opposer's three pleaded registrations, all of which are valid and subsisting. *See* NOR 1, Exs. 1-3 (TSDR printouts for Reg. Nos. 4,304,905, 4,623,613, and 5,245,938). *See also United Global Media Grp., Inc. v. Bonnie Tseng*, 112 U.S.P.Q.2d 1039, 1044 (T.T.A.B. 2014) ("Because opposer has properly made [its pleaded registrations] of record . . . , opposer has established its standing."). Standing is therefore established.

#### **B. Opposer Has Prior Rights In The CARDS AGAINST HUMANITY Marks**

The Board has already determined that Opposer is the prior user of the name CARDS AGAINST HUMANITY for "card games; game cards" through its ownership of the valid and subsisting Registration No. 4,304,905 for CARDS AGAINST HUMANITY in standard characters. 26 TTABVUE 16-17. *See also* NOR 1, Ex. 1 (TSDR printout of Reg. No. 4,304,905).

Opposer's priority as to CAH Trade Dress and CAH acronym for "card games; game cards" is also not in issue because Opposer has properly submitted in evidence Registration Nos. 4,623,613 and 5,245,938. *See* NOR 1, Exs. 2-3 (TSDR printouts of Reg. Nos. 4,623,613 and

5,245,938). *See Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 U.S.P.Q.2d 1464, 1469 (T.T.A.B. 2016) (precedential) (citing *King Candy, Inc. v. Eunice King's Kitchen, Inc.*, 182 U.S.P.Q. 108, 110 (C.C.P.A. 1974)). In any event, inasmuch as Applicant admits that it was aware of the CAH Marks prior to selecting the Crabs Marks (NOR 3, Ex. 8 at Response No. 3), and the record shows Opposer's use of the CAH Trade Dress and CAH acronym well before any priority date on which Applicant can rely, Opposer has established priority. *Compare* NOR 1, Exs. 2-3 (CAH Trade Dress and CAH acronym first used in commerce on January 30, 2011 and January 31, 2012, respectively) *with* NOR 3, Ex. 6 at Response No. 5 (Crabs Marks selected on March 4, 2013). *See Herbko Int'l, Inc. v. Kappa Books, Inc.*, 64 U.S.P.Q.2d 1375, 1378 (Fed. Cir. 2002).

## **II. APPLICANT'S CRABS ADJUST HUMIDITY MARKS ARE LIKELY TO CAUSE CONFUSION WITH OPPOSER'S CARDS AGAINST HUMANITY MARKS**

To prevail on its claim of likelihood of confusion under Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d), Opposer must first establish priority, and then that a likelihood of confusion exists. *See Bose Corp. v. QSC Audio Prods. Inc.*, 63 U.S.P.Q.2d 1303, 1305 (Fed. Cir. 2002); *Venture Out Props. LLC v. Wynn Resort Holdings, LLC*, 81 U.S.P.Q.2d 1887, 1891 (T.T.A.B. 2007). Opposer's priority over the CAH Marks is established, as set forth in Section I.B above.<sup>3</sup>

In determining whether confusion is likely, the Board considers all probative evidence bearing on the thirteen factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (C.C.P.A. 1973), to the extent those factors are relevant to the case at hand. *See Opryland USA Inc. v. The Great Am. Music Show Inc.*, 23 U.S.P.Q.2d 1471, 1472-73 (Fed. Cir. 1992) (explaining that “[n]ot all of the *du Pont* factors are relevant or of similar weight in every case”). Although the weight given to the relevant *du Pont* factors may vary, “[i]n any likelihood of

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<sup>3</sup> The subsections within the “Argument” section of this brief are cited herein as “Section \_\_\_.”

confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods.” *Mini Melts*, 2016 WL 3915987, at \*4 (citing *Federated Foods, Inc. v. Fort Howard Paper Co.*, 192 U.S.P.Q.2d 24, 29 (C.C.P.A. 1976)).

Here, the Board has already resolved key *du Pont* factors in Opposer’s favor, holding that “the parties’ goods are identical, travel in the same channels of trade, and are purchased by the same classes of consumers.” 26 TTABVue 18. Apart from these, the relevant *du Pont* factors in this case are: (1) the similarity of the marks; (2) the fame of the senior mark; (3) the conditions under which sales are made; (4) the nature and extent of actual confusion; (5) the variety of goods on which the senior mark is used; and (6) the applicant’s intent in adopting its mark. As set forth below, each of these factors weighs in Opposer’s favor, leading to the inescapable conclusion that Applicant’s Crabs Marks so resembles Opposer’s CAH Marks as to be likely, when used on or in connection with the identical goods, to cause confusion, to cause mistake, or to deceive.

**A. The Parties’ Marks Are Highly Similar**

The first *du Pont* factor examines the similarity or dissimilarity of the marks in their entireties as to appearance, sound, and commercial impression. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 73 U.S.P.Q.2d 1689, 1692 (Fed. Cir. 2005). In any particular case, any one of these means of comparison may be sufficient to find the marks to be similar. *See In re White Swan Ltd.*, 8 U.S.P.Q.2d 1534, 1535 (T.T.A.B. 1988). In comparing the marks, “the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression so that confusion as to the source of the goods offered under the respective marks is likely to result.” *H.D. Lee Co. v. Maidenform Inc.*, 87 U.S.P.Q.2d 1715, 1727 (T.T.A.B. 2008) (precedential) (collecting cases). The proper focus is on the recollection of the average

customer, who retains a general rather than specific impression of marks encountered in the marketplace. *Id.* (collecting cases).

Notably, the examination under the first *du Pont* factor is not conducted in a vacuum. Rather, where, as here, the marks are used on virtually identical goods, “the degree of similarity necessary to support a conclusion of likely confusion declines.” *Century 21 Real Estate Corp. v. Century Life of Am.*, 23 U.S.P.Q.2d 1698, 1700 (Fed. Cir. 1992) (collecting cases). The necessary degree of similarity declines even further when the senior mark is famous, as will be established in Section II.B below. *See Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.*, 22 U.S.P.Q.2d 1453, 1456 (Fed. Cir. 1992) (“[T]he Lanham Act’s tolerance for similarity between competing marks varies inversely with the fame of the prior mark.”); *Nike, Inc. v. Peter Maher*, 100 U.S.P.Q.2d 1018, 2011 WL 3828723, at \*4 (T.T.A.B. Aug. 9, 2011) (precedential) (“[A] purchaser is less likely to *perceive* differences from a famous mark.”) (citations omitted and emphasis in original).

Here, Applicant’s Crabs Marks and Opposer’s CAH Marks are highly similar in appearance and sound. Applicant’s CRABS ADJUST HUMIDITY word mark, in particular, is highly similar to Opposer’s CARDS AGAINST HUMANITY word mark, in that both contain a combination of three words, the first being a monosyllabic word with five letters, four of which are the same, beginning with “C” and ending in “S;” the second being a two-syllable word beginning with the letter “A” and ending in “ST;” and the last being a three-syllable word with eight letters, beginning with “HUM” and ending in “ITY.” *See also* 28 TTABVUE 9 at ¶ 47 (admitting similarities). They have the same rhythm, cadence, and nearly the same number of letters. These similarities as to the marks’ overall form and spelling are alone sufficient to support a finding of likelihood of confusion. *See Interstate Brands Corp. v. McKee Foods Corp.*, 53 U.S.P.Q.2d 1910, 1913 (T.T.A.B. 2000) (precedential) (“Similarity in either form, spelling or

sound alone may be sufficient to support a finding of likelihood of confusion.”). *See, e.g., id.* (finding YO-YO’S and HOHOS confusingly similar in sound because they rhyme); *Emilio Pucci Int. B.V. v. El Corte Ingles, S.A.*, Opp. No. 91177724, 2010 WL 1502449, at \*13 (T.T.A.B. Apr. 1, 2010) (non-precedential) (finding EMIDIO TUCCI and EMILIO PUCCI confusingly similar because they “have the identical number of letters,” which “are identical except for two,” “a similar structure consisting of a four-syllable word followed by a two-syllable word,” “sound similar and rhyme”); *In re DeRoyal Indus., Inc.*, Serial No. 74665896, 2001 WL 227289, at \*2 (T.T.A.B. Mar. 7, 2001) (non-precedential) (finding KALGINATE and CALCONATE confusingly similar because they “are structured quite similarly,” both having the same number of letters, vowels, consonants, and syllables, with the vowels and consonants in the same placement); *In re Cargill, Inc.*, Serial No. 75456123, 2000 WL 1876598, at \*3 (T.T.A.B. Dec. 22, 2000) (non-precedential) (finding CARMELYX and CARMILAX similar because both were three-syllable words, beginning with the letters “CARM” and ending with the letter “X”).

The confusing similarity arising from Applicant’s use of a three-word mark beginning with the letters “C,” “A,” and “H,” is underscored by the fact that customers regularly use the same “CAH” abbreviation to refer to both parties’ marks. *See, e.g.,* NOR 6, Kohler Depo. Ex. 30 (multiple customer reviews of Crabs Game on Applicant’s website using “CAH” to refer to both parties’ games, including one stating, “Love CAH and I also love CAH. I’ll leave it to you to sort out which is which.”).<sup>4</sup> The Board has recognized that the public is prone to abbreviate trademarks,

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<sup>4</sup> Even Mr. Kohler admits that he sometimes does not know which parties’ game is being referred to when customers use “CAH.” *See, e.g.,* NOR 6, Kohler Depo. Tr. at 305:20-306:8 (admitting he “can’t guess” which parties’ game is being referred to in customer email to Applicant with the subject line “Making a CAH game in another language,” shown in Ex. 28); *id.* at 312:18-313:1 (admitting he is “not sure which” game is being referred to in customer reviews on Applicant’s website using “CAH,” shown in Ex. 30 at 1). *See also id.* at 157:7-16 (admitting he is “not quite sure which” company or product was being referred to when he was asked in an interview article to “describe the

particularly ones that are recognized or lengthy, in determining whether two marks are similar under the likelihood of confusion analysis. *See, e.g., The Saul Zaentz Co. dba Tolkien Enters. v. Joseph M. Bumb*, Serial No. 78083685, 2010 WL 2783893, at \*4 (T.T.A.B. June 28, 2010) (non-precedential) (finding LORD OF THE RINGS and LOTR confusingly similar, and noting “the designation LOTR is commonly recognized and used by the public and press as an acronym for that phrase mark”); *Saks & Co. v. TFM Indus., Inc.*, 5 U.S.P.Q.2d 1762, 1764 (T.T.A.B. Dec. 30, 1987) (finding FOLIO and FOLIO BY FIRE ISLANDER confusingly similar, and noting that purchasers may “abbreviate the rather lengthy four word trademark FOLIO BY FIRE ISLANDER to simply FOLIO”). *See also* McCarthy, *McCarthy on Trademarks and Unfair Competition*, §7:18 (4th ed. 2009) (“Americans are prone to abbreviate recognized trademarks . . .”).

Comparing Applicant’s Crabs Design Mark to Opposer’s CARDS AGAINST HUMANITY word mark leads to the same result. While marks must be compared in their entireties, in the case of a composite mark containing “both a word and a design, [ ] the word is normally accorded greater weight.” *In re Appetito Provisions Co.*, 3 U.S.P.Q.2d 1553, 1554 (T.T.A.B. 1987). *See also In re Viterra Inc.*, 101 U.S.P.Q.2d 1905, 1911 (Fed. Cir. 2012); *In re Nat’l Data Corp.*, 224 U.S.P.Q. 749, 751 (Fed. Cir. 1985) (noting there “is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of the mark”). In this case, the term CRABS ADJUST HUMIDITY is, without question, the dominant, source-identifying portion of Applicant’s Crabs Design Mark, and should therefore be accorded greater weight in determining whether the marks are similar. *See, e.g., M.C.I. Foods, Inc. v. Bunte*,

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type of human who feels alive playing CAH,” as shown in Ex. 14 at 1). In fact, Mr. Kohler admits that if a customer contacted Applicant and said “I’d like to by CAH,” he “would have to ask [the customer] to clarify what [she] meant.” NOR 6, Kohler Depo. Tr. at 74:2-10. *Accord* Bane Tr. at 75:4-75:19 (stating with regard to use of “CAH” on social media that “it takes [her] a minute to understand what the person . . . is trying to say”); *id.* at 78:21-79:20.



96 U.S.P.Q. 2d 1544, 1551 (T.T.A.B. 2010) (precedential) (finding literal element to be dominant based on well-settled “principle that if a mark comprises both a word and a design, the word is normally accorded greater weight because it would be used by purchasers to request the goods or services”). The design element in the Crabs Design Mark is correspondingly less important, and does very little to detract from the overwhelming similarity between the mark’s literal element, CRABS ADJUST HUMIDITY, and Opposer’s CARDS AGAINST HUMANITY mark.

The commercial impression made by the parties’ marks only adds to their confusing similarity. In determining a mark’s commercial impression – that is, its “probable impact [ ] on the ordinary purchaser in the marketplace,” *T. W. Samuels Distillery, Inc. v. Schenley Distillers, Inc.*, 173 U.S.P.Q. 690, 691 (C.C.P.A. 1972) – a review of the associated trade dress is often instructive. *See Specialty Brands, Inc. v. Coffee Beans Distribs., Inc.*, 223 U.S.P.Q.2d 1281, 1284 (Fed. Cir. 1984); *American Rice, Inc. v. H.I.T. Corp.*, 231 U.S.P.Q. 793, 797 (T.T.A.B. 1986) (The Board “may take into account whether the trade dress of packages or labels in the application file as specimens, or otherwise in evidence, may demonstrate that the trademark projects a confusingly similar commercial impression.”) (citation omitted). As exemplified in Figure 6 above, the trade dress used in association with Applicant’s Crabs Marks mimics the distinctive and well-recognized CAH Trade Dress, thereby enhancing the marks’ inherently similar commercial impression. *See, e.g., Kenner Parker Toys*, 22 U.S.P.Q.2d at 1458 (holding “[t]he trade dress of the marks enhance their inherently similar commercial impression”). Moreover, Applicant often uses images of its look-alike Crabs Game cards in promotional materials (*see, e.g., NOR 4, Ex. 11*) brings the commercial impression created by its Crabs Marks even closer to that of Opposer’s CAH Marks.

Accordingly, the first *du Pont* factor strongly supports a likelihood of confusion.

## **B. The CARDS AGAINST HUMANITY Marks Are Famous**

The fifth *du Pont* factor considers the fame of the senior mark. A famous mark is one “with extensive public recognition and renown.” *Kenner Parker Toys*, 22 U.S.P.Q.2d at 1456. Fame, if it exists, plays a dominant role in the likelihood of confusion analysis because famous marks are more likely to be remembered in the public mind, and are thus more attractive targets for would-be copyists. *See id.* *See also Bose Corp.*, 63 U.S.P.Q.2d at 1305; *Recot Inc. v. M.C. Becton*, 54 U.S.P.Q.2d 1894, 1897 (Fed. Cir. 2000); *Opryland*, 23 U.S.P.Q.2d at 1472-73 (“a well-known mark enjoys an appropriately wider latitude of legal protection, for similar marks tend to be more readily confused with a mark that is already known to the public”). The Federal Circuit has repeatedly cautioned that a famous mark “casts a long shadow which competitors must avoid,” holding that “[t]here is no excuse for even approaching the well-known trademark of a competitor.” *Kenner Parker Toys*, 22 U.S.P.Q.2d at 1457 (quoting *Nina Ricci S.A.R.L. v. E.T.F. Enters.*, 12 U.S.P.Q.2d 1901, 1904 (Fed. Cir. 1989) (citation omitted)). Applied in the likelihood of confusion analysis, this means that as the fame of a mark increases, the Lanham Act’s tolerance for similarities in competing marks declines. *Kenner Parker Toys*, 22 U.S.P.Q.2d at 1456.

Here, Opposer’s CAH Marks are unquestionably strong and famous and have been for many years. The fame of a mark may be measured indirectly by, among other things, the volume of sales and advertising expenditures of the goods traveling under the marks, and by the nature and extent of media attention. *See Bose Corp.*, 63 U.S.P.Q.2d at 1308; *Weider Pubs., LLC, v. D & D Beauty Care Co., LLC*, 109 U.S.P.Q.2d 1347, 1354 (T.T.A.B. Jan. 21, 2014) (precedential) (fame “may be measured indirectly by the volume of sales and advertising expenditures of the goods sold under the mark, for example, and other factors such as length of time of use of the mark;

widespread critical assessments; notice by independent sources of the products identified by the marks; and the general reputation of the products and services”) (citation omitted).

As demonstrated above, the CAH Marks are famous by many of these measures. In an approximately six-year period, Opposer sold approximately [REDACTED] CARDS AGAINST HUMANITY-branded products, amounting to [REDACTED] dollars in revenue, distributed nearly [REDACTED] in promotional items, and spent [REDACTED] in marketing and promoting its card game business and products under the CAH Marks. *See* Bane Ex. 3. Moreover, references to CARDS AGAINST HUMANITY in third-party publications, popular culture, lists of famous brands, and unsolicited national news media coverage have been pervasive, reflecting the extreme popularity of the CAH Marks and the goods with which they are used. *See generally* NOR 4, Exs. 13-72. *See National Pork Bd. v. Supreme Lobster & Seafood Co.*, 96 U.S.P.Q. 1479, 1495 (T.T.A.B. 2010) (precedential) (“an extensive amount of third-party advertising, in-store retail promotions, and unsolicited national news media coverage” cited in support of conclusion the opposer’s mark was famous); *Nike*, 2011 WL 3828723, at \*7(same).

Accordingly the fifth *du Pont* factor supports a likelihood of confusion.

**C. The Parties’ Products Are Relatively Inexpensive and Subject to Impulse Purchases**

The fourth *du Pont* factor examines the conditions under which, and to whom, sales are made. As a general proposition, “[w]hen products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers are held to a lesser standard of purchasing care.” *Recot*, 54 U.S.P.Q.2d at 1899 (citations omitted). *See also Palm Bay*, 73 U.S.P.Q.2d at 1376 (greater risk of confusion for “impulse purchases of inexpensive items”). Purchasers are thought to exercise even “less care . . . in purchasing a product under a famous name.” *Specialty Brands*, 223 U.S.P.Q.2d at 1284.

In this case, the parties' products are relatively inexpensive, with Opposer's products costing between \$5.00 and \$29.00 (NOR 4, Ex. 10), and Applicant's between \$7.00 and \$14.00 (NOR 4, Ex. 11). Due to their nature, the relevant products, namely, card games, are likely to be purchased without great customer scrutiny of the products or their packaging. Moreover, customers will likely make assumptions about the quality of the products based on what they perceive to be an association with Opposer's famous brand. The circumstances surrounding the purchase of the parties' products are thus typified by impulse, thereby increasing the risk of confusion. *See, e.g., Mattel, Inc. v. Patricia Briden*, Opp. No. 91160087, 2008 WL 885894, at \*9 (T.T.A.B. Jan. 30, 2008) (non-precedential) (holding the parties' games at \$14.99 price point are likely to be purchased impulsively, thereby increasing the likelihood of confusion); *Calvin Broadus v. Kristyn Kelley Allen dba Passive Devices*, Opp. No. 91176834, 2009 WL 5118318, at \*\*9-10 (T.T.A.B. Dec. 16, 2009) (non-precedential) (same, for \$30 music-related goods).

Accordingly, the fourth *du Pont* factor also weighs in favor of Opposer

**D. There Is Substantial Evidence of Actual Consumer Confusion Between The Parties' Marks**

The seventh *du Pont* factor considers the nature and extent of any actual consumer confusion. Although "it is unnecessary to show actual confusion," *In re Big Pig Inc.*, 81 U.S.P.Q.2d 1436, 1439 (T.T.A.B. 2006) (precedential) (citing *Weiss Assocs., Inc. v. HRL Assocs., Inc.*, 14 U.S.P.Q.2d 1840 (Fed. Cir. 1990)), "[t]he existence of actual confusion is normally very persuasive evidence of likelihood of confusion and undercuts any possible claim that the marks are so dissimilar that there can be no likelihood of confusion." *Nanny Poppins, LLC v. Deneane Maldonado*, Opp. No. 78865864, 2013 WL 3188900, at \*8 (T.T.A.B. May 16, 2013) (non-precedential) (citing *Thompson v. Haynes*, 64 U.S.P.Q.2d 1650 (Fed. Cir. 2002)). *See also In re Majestic Distilling Co., Inc.*, 65 U.S.P.Q.2d 1201, 1205 (Fed. Cir. 2003) ("A showing of actual

confusion would of course be highly probative, if not conclusive, on a high likelihood of confusion.”); *International Kennel Club of Chicago, Inc. v. Mighty Star, Inc.*, 846 F.2d 1079, 1090 (7th Cir. 1988) (While likelihood of confusion “can be proven without any evidence of actual confusion, such evidence if available, is entitled to substantial weight.”) (citation omitted).

The existence of actual confusion may be proven in a variety of ways, including, but not limited to, “attempts to purchase goods or services actually offered by the other party,” “inquiries regarding possible affiliations between the parties,” and “customer communications” such as “misdirected calls or emails.” *Popular Bank of Fla. v. Banco Popular de Puerto Rico*, 9 F. Supp. 2d 1347, 1360 (S.D. Fla. 1998). See, e.g., *Lyons P’ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 802 (4th Cir. 2001) (accepting as evidence of actual confusion articles misidentifying the parties’ products); *International Kennel*, 846 F.2d at 1089-91 (actual confusion established based on, among other things, communications expressing confusion as to the plaintiff’s relationship with defendant, and letters requesting information about purchasing defendant’s product).

There is considerable evidence of actual confusion between the parties and their games, including multiple instances in which consumers mistakenly purchased Applicant’s Crabs Game believing that they were in fact purchasing Opposer’s Game. For example, a customer who purchased the Crabs Game from Applicant on Amazon.com requested authorization for a return, stating that it was an “[a]ccidental order,” as he “[w]anted Cards Against Humanity, not Crabs Adjust Humidity.” NOR 6, Kohler Depo. Ex. 27. Two other instances of mistaken purchases are reflected in customer reviews of the Crabs Game on Amazon.com, with one customer stating, “When I bought [the Crabs Game], I misread it and thought it said Cards Against Humanity . . .” (NOR 4, Ex. 79 at 2); and the other stating, the Crabs Game is a “[c]rappy copy of the real game, I wasn’t paying attention and got taken! Don’t let it happen to you . . .” (*id.* at 3).

Opposer receives emails on an ongoing basis from customers confused as to the source of Applicant's Crabs Game – to the point that Ms. Bane, Opposer's Community Manager, testified that she trains CAH's customer service team on how to respond.<sup>5</sup> *See* Bane Tr. at 29:18-30:16 (describing customer emails to Opposer asking about Applicant's Crabs Game and Opposer's protocol for response); *id.* at 64:22-65:23 (“The confusion happens all the time.”). For example, multiple customers have emailed Opposer to ask whether Applicant's Crabs Game is one of Opposer's products. *See, e.g.*, Bane Ex. 5 (three customer emails to Opposer, asking questions such as “are the cards against humidity [*sic*] cards one of your products[?]”). *See also, e.g.*, Bane Ex. 4 (four customer emails to Opposer reflecting mistaken belief that Applicant's Crabs Game originated with Opposer). Another customer contacted Opposer in attempt to purchase Applicant's Crabs Game, realizing that doing so was a “screw up” only after Opposer informed him that Opposer does not make the Crabs Game. *See id.* at 1.

Additionally, many customers have contacted Opposer to inquire about a possible affiliation or licensing arrangement between Opposer and Applicant. *See, e.g.*, Bane Ex. 6 (six customer emails to Opposer, asking questions such as, “Do you have any connection with the cards ‘crabs adjust humanity [*sic*]’” and “what kind of licencing [*sic*] agreement [are you] doing with the like of crabs adjust humidity”); Bane Ex. 7 (four customer emails to Opposer, reflecting confusion as to whether the Crabs Game is “legal,” “allowed,” or “approve[d]” by Opposer).

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<sup>5</sup> This evidence is admissible the extent that the evidence reflects the present sense impression of the declarants. *See* Fed. R. Evid. 803(1); *Edom Labs., Inc. v. Glenn Lichter*, 102 U.S.P.Q.2d 1546, 2012 WL 1267961, at \*\*8-9 (T.T.A.B. Mar. 30, 2012) (precedential). In addition, statements of customer confusion in the trademark context fall under the “state of mind” exception to the hearsay rule. *See* Fed. R. Evid. 803(3); *National Rural Elec. Coop. Ass'n v. Suzlon Wind Energy Corp.*, 78 U.S.P.Q.2d 1881, 1887 n. 4 (T.T.A.B. 2006).

Even Applicant admits to receiving at least a “handful” of communications “where there seems to have been at least some degree of confusion.” NOR 3, Ex. 6 at Response No. 15. For example, in an email exchange with Applicant, a customer indicated she was interested in purchasing one of Opposer’s products, to which Applicant replied, “You’re probably thinking of Cards Against Humanity.” NOR 6, Kohler Depo. Ex. 26 at 1. *See also, e.g., id.*, Kohler Depo. Ex. 36 (customer comment to Applicant reflecting mistaken belief that Applicant was “giving away islands,” when he was in fact referring to one of Opposer’s high-profile marketing stunts).

Furthermore, the record is replete with communications in which customers interchange or combine words in the parties’ marks, resulting in brand mash-ups such as “Crabs Adjust Humanity” and “Cards Adjust Humidity.” *See* NOR 3, Ex. 6 at Response No. 15 (admitting that “customers or prospective customers have misstated Applicant’s product’s name as some combination of the [Crabs] Word Mark and the Opposer’s mark, for example, ‘Crabs *Against* Humidity’ or ‘Crabs *Against* Humidity.’”) (emphasis added).<sup>6</sup> *See, e.g.*, NOR 6, Kohler Depo. Ex. 34 (three customer emails to Applicant, referencing “crabs against humidity,” “Crabs Adjust Humanity,” and “crabs against humanity”); Bane Ex. 5 at 3-4 (two customer emails to Opposer, referencing “crabs against humanity” and “cards against humidity”); Bane Ex. 6 at 1 (same, “crabs adjust humanity”). *See Coryn Grp. II, LLC v. O.C. Seacrets, Inc.*, No. Civ. WDQ-08-2764, 2011 WL 862729, at \*3 (D. Md. Mar. 10, 2011) (“Misspellings may show actual confusion when their context demonstrates that the source or sponsorship of the two marks is confused.”) (citations and internal quotation marks omitted). In one instance, upon realizing his erroneous reference to

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<sup>6</sup> Even Applicant’s own attorney has mixed up the parties’ marks, referring to Applicant’s name as “Cards Adjust Humidity.” Kohler Test. Tr. at 92:16-21 (referring to Applicant’s Crabs Game as “Cards Adjust Humidity,” and correcting the name after being put on notice of the mistake).

“Crabs Against Humanity” in an email to Applicant, a potential purchaser stated, “my brain is so hardwired from Cards Against Humanity I wrote Humanity instead of Humidity.” NOR 5, Ex. 82.

Opposer is aware of additional instances of confusion other than those mentioned above, including on social media (*see, e.g.*, Bane Tr. at 36:14-37:14), in person (*see, e.g., id.* at 65:7-23), and in the media (*see, e.g., id.* at 65:24-66:17). For example, *BuzzFeed* “constantly mixes up the [parties’] cards,” publishing articles that mistakenly identify Applicant’s Crabs Game cards as Opposer’s CARDS AGAINST HUMANITY Game cards. *Id.* at 66:7-11. *See also id.* at 33:19-34:14, 99:15-100:18. Recently, the title of the “Cards Against Humanity” Wikipedia page was revised to state “Cards Against *Humidity*” instead. *See* NOR 9, Ex. 90 at 1 (emphasis added).

It is recognized that “evidence of actual confusion is notoriously difficult to come by,” *General Mills, Inc., et al. v. Fage Dairy Processing Indus. S.A.*, 100 U.S.P.Q.2d 1584, 1604 (T.T.A.B. Sept. 14, 2011) (precedential), and in this case it is especially difficult, given the near impossibility of discerning what is meant by customers’ use of “CAH.” *See supra* Section II.A. Many instances of actual confusion have likely gone undetected as a result. For example, as is frequently noted, the evidence does not account for customers who, despite being confused, did not make inquiries. *See General Mills*, 100 U.S.P.Q.2d at 1604 (noting that “where relatively inexpensive items . . . are involved, confusion about sponsorship or affiliation would not necessarily be brought to the attention of either [party]”); *Henry I. Segal Co., Inc. v. Highlander Ltd.*, 183 U.S.P.Q. 496, 1974 WL 20010, at \*4 (T.T.A.B. 1974 (noting that evidence of actual confusion “generally is by no means easy to come by” and “confusion could have occurred without being reported by the customers for various reasons”); *Allied Domecq Spirits & Wine USA, Inc. v. Richards.*, Opp. No. 91116378, 2005 WL 363413, at \*7 (T.T.A.B. Jan. 25, 2005) (non-precedential) (noting that evidence of actual confusion is “usually difficult to discover” because,



for example, a customer who mistakenly purchased applicant's product believing it was opposer's but enjoyed it after purchase "might have no reason to complain").

Overall, while the instances of actual confusion described above may not be exhaustive, they are no doubt overwhelming in number in light of the common scarcity of actual confusion evidence, and are therefore highly probative – if not conclusive – of a finding of a likelihood of confusion in this case. *See, e.g., Dan Foam Aps v. Sleep Innovations, Inc.*, Cancellation No. 8205420, 2015 WL 7772751, at \*14 (T.T.A.B. Nov. 13, 2015) (precedential) (finding actual confusion factor "strongly favors a finding of likelihood of confusion" based on the "totality of evidence," including one customer's testimony and transcripts of inquiries from "about a half-dozen" other customers who believed they ordered a "Tempur-pedic" mattress when they had actually ordered a "Bodipedic" mattress; and transcripts of customer inquiries to third party retailer regarding Bodipedic product, with references to "tempur," "tempurpedic," or "tempur-pedic"); *Cutlery & More, LLC v. Dasalla Trading Co.*, Opp. No. 91201666, 2014 WL 5908010, at \*8 (T.T.A.B. Oct. 31, 2014) (non-precedential) (same, where evidence included six instances of actual confusion in the form of customer emails and phone calls).

Accordingly, the seventh *du Pont* factor strongly supports a likelihood of confusion.

**E. The CARDS AGAINST HUMANITY Marks Are Used On A Variety of Goods**

The ninth *du Pont* factor considers the variety of goods on which the opposer's mark is used. The record establishes that Opposer uses its mark on a wide variety of products, including "base" sets as well as "expansion" and "specialty" packs in a variety of styles. *See* NOR 4, Ex. 10. Not only does Applicant seek to register its Crabs Marks for identical goods, but it uses such marks for expansion packs, which are likely to be viewed as an extension of Opposer's product line. *See* NOR 4, Ex. 11. *See, e.g., Treasures & Trinkets, Inc. v. Janet Hess, et al.*, Opp. No.

91124237, 2004 WL 1294391, at \*6 (T.T.A.B. May 25, 2004) (non-precedential) (finding the “variety of goods” factor favors confusion because “the certificates, posters and postcards identified in applicant’s application are similar to opposer’s greeting cards and other gift shop items, and are likely to be viewed as an extension of opposer’s product line”); *Corning Inc. v. Vitrocrisa S.A. DE C.V. Co.*, Opp. No. 91119107, 2005 WL 847430, at \*7 (T.T.A.B. Mar. 14, 2005) (non-precedential) (same, because even though the opposer’s “mark is used only on goods related to the glass industry,” it “is used on a variety of cookware and kitchen items” which “are the same items for which applicant seeks to register its mark”).

Accordingly, the ninth *du Pont* factor favors a finding of likelihood of confusion.

**F. Applicant Intentionally Adopted Confusingly Similar Marks**

Evidence of applicant’s bad faith adoption of its mark is probative of a likelihood of confusion under the thirteenth *du Pont* factor. *See du Pont*, 476 F.2d at 1361 (permitting consideration of “[a]ny other established fact probative of the effect of use”). *See also J & J Snack Foods Corp. v. McDonald’s Corp.*, 18 U.S.P.Q.2d 1889, 1891 (Fed. Cir. 1991) (“Whether there is evidence of intent to trade on the goodwill of another is a factor to be considered, but the absence of such evidence does not avoid a ruling of likelihood of confusion.”); *L.C. Licensing Inc. v. Berman*, 86 U.S.P.Q.2d 1883, 1890 (T.T.A.B. 2008) (precedential) (“bad faith is strong evidence that confusion is likely, as such an inference is drawn from the imitator’s expectation of confusion”). *Cf. Mag Instrument, Inc. v. Brinkmann Corp.*, 96 U.S.P.Q.2d 1701, 1713 (T.T.A.B. 2010) (precedential) (“bad faith is certainly not necessary” to find confusion is likely).

In addition to the striking similarity between the parties’ marks, which is itself probative of intentional copying, Applicant was admittedly aware of Opposer’s CAH Marks prior to filing the Applications (*see* NOR 3, Ex. 8 at Response Nos. 4-5; 28 TTABVUE 10 at ¶ 46), and

deliberately selected the name CRABS ADJUST HUMIDITY due to its confusing similarity to Opposer's CARDS AGAINST HUMANITY Marks. *See id.*, Ex. 6 at Response No. 5. Applicant has repeatedly explained that it selected the name CRABS ADJUST HUMIDITY (with the identical abbreviation "CAH") in order to "preserve the pseudo anonymity" of Applicant's game cards when shuffled into a deck of Opposer's game cards. *See, e.g.*, NOR 6 Kohler Depo. Tr. at 71:3-72:12, 95:15-96:10; NOR 3, Ex. 6 at Response No. 5 (selected mark because "the shape of the words when stacked made the backs of the cards blend in with the Cards Against Humanity game cards"). *See also* NOR 7, Kohler Depo. Tr. at 79:7-15 (selected the designs in the packaging and font "to communicate nonverbally that this game was meant to blend in with [Opposer's Game]"). Applicant's intentional selection of a name that would appear virtually identical to Opposer's when printed on card-backs is illustrated by the fact that Applicant considered a number of other three-word "C-A-H" marks for the name of its game. *See* NOR 3, Ex. 6 at Response No. 3 (listing rejected marks such as "Crab's Armpit Humidity," "Crabs Adore Humidity," "Crabs Applaud Humidity," "Crabs Applaud Humility," "Crabs Amend Humility," "Crabs Append Humidity," "Crabs Append Humility," "Crabs Across Hungary," and "Crabs Attend Humility").

Applicant accomplished its goal of "pseudo anonymity" by selecting the Crabs Marks: customers reportedly cannot tell the difference between Applicant's Crabs Game cards and Opposer's official Game cards during game play, despite the fact that they are branded with the parties' respective marks (as shown in Figure 6 above). *See, e.g.*, NOR 4, Ex. 79 (customer review of Crabs Game on Amazon.com, stating "I honestly didn't even notice that [the Crabs Game cards] weren't part of the original [CAH] game until [another player] pointed it out to the group"); NOR 6, Kohler Depo. Ex. 33 (same, stating "No one really knows the difference [between the Crabs Game and the CARDS AGAINST HUMANITY Game] . . . even when they look at the name on

the cards!!”); NOR 5, Ex. 80 (eight similar customer reviews of Crabs Game on Amazon.com, including statements such as the Crabs Game cards “blend in with the original CAH cards so well that you never really notice the difference unless you’re REALLY looking for them”).

Applicant, as “a newcomer,” had “both the opportunity and obligation to avoid confusion” with Opposer’s famous mark, and yet, it knowingly adopted a mark highly similar to Opposer’s for identical goods, with the express goal of ensuring that those goods “blend in” with the original. *L’Oreal S.A. v. Marcon*, 102 U.S.P.Q.2d 1434, 1442 (T.T.A.B. 2012) (“[A] party which knowingly adopts a mark similar to one used by another for related goods should not be surprised to find scrutiny of the filer’s motive.”). This amounts to bad faith. *See, e.g., Playboy Enters. Int’l, Inc. v. Adam Bennett*, Opp. No. 91173441, 2008 WL 2385980, at \*6 (T.T.A.B. June 2, 2008) (non-precedential) (finding bad faith where the applicant intended create an association between his services and opposer, and was aware of the opposer’s marks before filing his application).

Accordingly, Applicant’s bad-faith intent is yet another factor that favors a finding of likelihood of confusion.

**G. The Balance of Factors Strongly Favors A Likelihood of Confusion, and As Such, Parody Provides No Defense**

Consideration of the relevant *du Pont* factors discussed above, together with those already resolved in Opposer’s favor, conclusively establishes a likelihood of confusion in this case.

Accordingly, the Board should sustain this opposition on grounds of likelihood of confusion.<sup>7</sup>

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<sup>7</sup>To the extent there is any doubt, the Federal Circuit consistently finds that all doubts as to whether confusion is likely should be resolved in favor of the senior user. *See Century 21 Real Estate*, 23 U.S.P.Q.2d at 1701; *Planter’s Nut & Chocolate Co. v. Crown Nut Co., Inc.*, 134 U.S.P.Q. 504, 511 (C.C.P.A. 1962) (“[A]ll doubt as to whether confusion, mistake, or deception is likely is to be resolved against the newcomer, especially where the established mark is one which is famous and applied to an inexpensive product bought by all kinds of people without much care.”).

Applicant has sought to argue throughout this proceeding that there can be no likelihood of confusion because “Crabs Adjust Humidity parodies Cards Against Humanity.” NOR 3, Ex. 6 at Response No. 14. *See also, e.g.*, 18 TTABVUE 12-16 (arguing parody defense raises triable issues of fact); 28 TTABVUE 17 (asserting parody as affirmative defense).

But it is well-established that parody is not a defense where, as here, the marks are confusingly similar. *See Research in Motion Ltd. v. Defining Presence Mktg. Grp. Inc., et al.*, 102 U.S.P.Q. 2d 1187, 1191-92 (T.T.A.B. 2012) (precedential); *Boston Red Sox Baseball Club Ltd. P’ship v. Sherman*, 88 U.S.P.Q.2d 1581, 1592 (T.T.A.B. 2008) (“Parody is not a defense if the marks would otherwise be considered confusingly similar.”); *DC Comics v. Gotham City Networking, Inc.*, Opp. No. 91194716, 2015 WL 4464694, at \*17 (T.T.A.B. July 17, 2015) (non-precedential) (“parody defense fails because [a]pplicant’s mark is likely to cause confusion with [o]pposer’s marks”); *Columbia Pictures Indus., Inc. v. Miller*, 211 U.S.P.Q. 816, 820 (T.T.A.B. 1981) (“The right of the public to use words in the English language in a humorous and parodic manner does not extend to use of such words as trademarks if such use conflicts with the prior use and/or registration of the substantially same mark by another”). Whether construed as an element of Opposer’s claim or an affirmative defense, the Board need not entertain an assertion of parody in this case.

In any event, Applicant’s Crabs Marks do not legitimately parody the CAH Marks. According to Applicant, “Crabs is a parody” because it “take[s] the humor of [C]ards [Against Humanity]” and “push[es]” it to the next level. NOR 7, Kohler Depo. Tr. at 273:23-274:7. *See also* NOR 3, Ex. 6 at Response No. 14 (“Crabs Adjust Humidity parodies Cards Against Humanity by taking the mildly offensive, offbeat humor of the latter and pushing it to absurdly offensive and surreal extremes.”). This is not a parody because, as Applicant admits, it does not target Opposer

or its CAH Marks (*see* NOR 7, Kohler Depo. Tr. at 77:13-78:17, 121:7-24), nor is the alleged parody apparent from the Crabs Marks themselves (*id.* at 78:9-17, 97:8-98:4). *See Nike*, 2011 WL 3828723, at \*5 (where the applicant appropriates a mark “not to parody the product or company symbolized by the trademark, but only as a prominent means to promote, satirize or poke fun at [something else in society], this is not ‘parody’ of a trademark”) (citation omitted). *See also Stokely-Van Camp, Inc. v. William Wooten*, Opp. No. 91183146, 2009 WL 1017294, at \*\*4-5 (T.T.A.B. Mar. 24, 2009) (non-precedential) (“Although applicant relies upon one of his product labels to show the intended parody and the context in which his mark is used, we must determine likelihood of confusion based solely on the marks at issue *without regard to additional matter with which those marks are used.*”) (emphasis added). Moreover, “parodic use is sharply limited” when the “alleged parody of a competitor’s mark [is being used] to sell a competing product,” as it is here. *Harley Davidson Inc. v. Grottanelli*, 164 F.3d 806, 813 (2d Cir. 1999) (citation omitted). For these reasons, if the Board were to consider a claim of parody despite the marks’ confusing similarity, it should nevertheless reject it on the merits.<sup>8</sup>

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<sup>8</sup> Although styled as an “affirmative defense,” the Board has made clear that “parody is simply another factor which is relevant to the analysis of likelihood of confusion” (26 TTABVUE 11), and so Opposer has addressed the alleged parody herein. Opposer notes, for the sake of completeness, that Applicant asserts three other affirmative defenses in its answer to Opposer’s amended consolidated notice of opposition – namely, estoppel by consent (28 TTABVUE 15-16 at ¶¶ 88-93); estoppel by acquiescence (*id.*, 16-17 at ¶¶ 94-99); and unclean hands (*id.*, 17-19 at ¶¶ 103-109). Applicant will likely argue in its forthcoming opposition brief that Opposer’s claims are barred by these defenses. This is not the case. Applicant’s so-called “license” was limited to a one-off limited-run expansion pack to be distributed to a small group of fans on Reddit in 2013, and has since been revoked. In any event, as Applicant admits, Opposer never consented to Applicant’s *registration* of the Crabs Marks. *See* NOR 7, Kohler Depo. Tr. at 125:21-25, 126:11-22. Opposer will provide an in-depth explanation as to why Applicant’s affirmative defenses must fail in its reply brief, if necessary.

### **III. APPLICANT'S CRABS ADJUST HUMIDITY MARKS ARE LIKELY TO DILUTE THE DISTINCTIVE QUALITY OF OPPOSER'S CARDS AGAINST HUMANITY MARKS BY BLURRING**

Applicant's Applications for registration of the Crabs Marks should be rejected for the additional independent reason that they will cause dilution by blurring the distinctiveness of Opposer's CARDS AGAINST HUMANITY Marks in violation of Section 43(c) of the Lanham Act, 15 U.S.C. § 1125(c). *See* 15 U.S.C. § 1125(c) (defining dilution as the "lessening of the capacity of a famous mark to identify and distinguish goods and services"). To prevail on its claim of likelihood of dilution by blurring, Opposer must show: (1) that its CAH Marks became famous prior to the date that Applicant first used its Crabs Marks in commerce; and (2) that Applicant's Crabs Marks are likely to blur the distinctiveness of Opposer's famous CAH Marks. *See UMG Recordings, Inc. v. Mattel, Inc.*, 100 U.S.P.Q.2d 1868, 1886 (T.T.A.B. 2001) (precedential).

#### **A. The CARDS AGAINST HUMANITY Marks Became Famous Before Applicant First Used The CRABS ADJUST HUDMITY Marks In Commerce**

A mark is "famous" for dilution purposes if there is evidence of widespread recognition of the mark. *See* 15 U.S.C. § 1125(c)(2)(A). In determining whether a mark possesses the requisite degree of recognition, the Board may consider all relevant factors, including the following four non-exclusive statutory factors: (i) the duration, extent, and geographic reach of advertising and publicity of the mark; (ii) the amount, volume, and geographic extent of sales of goods or services under the mark; (iii) the extent of actual recognition of the mark; and (iv) whether the mark is registered on the USPTO's principal register. *See* 15 U.S.C. § 1125(c)(2)(A)(i)-(iv).

Opposer has shown that its CARDS AGAINST HUMANITY Marks are famous and have been since Applicant first used its applied-for Crabs Marks in commerce on July 1, 2013 for at least the reasons set forth in Section II.B above in the context of likelihood of confusion. The evidence of record convincingly demonstrates that the CARDS AGAINST HUMANITY Marks

are widely recognized by the general consuming public of the as a designation of source for Opposer's goods, and therefore is a famous mark entitled to protection.

Each of the above-identified statutory factors supports a finding of fame. First, Opposer's CARDS AGAINST HUMANITY Marks have been extensively promoted and advertised nationwide through a variety of means for many years. *See, e.g.*, NOR 4, Exs. 13-72. Second, Opposer's sales of CARDS AGAINST HUMANITY-branded products have been substantial. *See* Bane Ex. 3. And, Opposer owns multiple registrations for its CARDS AGAINST HUMANITY Marks, and each is registered on the USPTO's principal register. *See* NOR 1, Exs. 1-3.

Finally, with regard to the third statutory factor, Opposer's CARDS AGAINST HUMANITY Marks have achieved substantial actual recognition. Opposer's CARDS AGAINST HUMANITY brand and products receive widespread unsolicited media attention, which not only contributes to but also reflects the extensive public recognition and renown of the CARDS AGAINST HUMANITY Marks existing before Applicant's first use of the Crabs Marks in commerce on July 1, 2013. As early as 2012, Opposer's Game was described as "massively popular." NOR 4, Ex. 19. *See also* NOR 9, Exs. 87-88. By the time Applicant started use in commerce, Opposer's Game had been ranked as the best-selling game on Amazon.com for months. *See, e.g.*, NOR 4, Ex. 75. In fact, Mr. Kohler admits that Applicant launched the Crabs Game only after it was confirmed to his satisfaction that CARDS AGAINST HUMANITY was so well known in the marketplace "that there would be enough people out there who would be interested in an add-on to Cards Against Humanity to make [his] efforts worthwhile." Kohler Test. Tr. at 45:2-18. *Id.* at 45:2-46:23 (Mr. Kohler "discovered or determined to [his] satisfaction," through research regarding "the popularity and size of the market" for Opposer's Game conducted in or around



“early spring” of 2013, that Opposer’s Game “was growing very rapidly at that time,” such that his “efforts” creating an “add-on” to the Game would be “worthwhile”).

The fame of Opposer’s CARDS AGAINST HUMANITY Marks prior to Applicant’s first use is underscored by the fact that Applicant set out to copy them in the first place – allegedly for the purpose of parody. *See* 28 TTABVue 16-17 at ¶¶ 94-99. Indeed, “a mark has to be well known in the first place to be parodied.” *In re Serial Podcast, LLC*, 126 U.S.P.Q.2d 1061, 2018 WL 1522217, at \*15 (T.T.A.B. Mar. 26, 2018) (precedential) (citing *Louis Vuitton Malletier S.A. v. Haute Diggity Dog LLC*, 507 F.3d 252, 261 (4th Cir. 2007) (“It is a matter of common sense that the strength of a famous mark allows consumers immediately to perceive the target of the parody, while simultaneously allowing them to recognize the changes to the mark that make the parody funny or biting.”); D.S. Welkowitz, *Trademark Parody after Hustler Magazine v. Falwell*, 11 Comm. & L. 65, 72 (Dec. 1989) (“Hence, a parody, to be effective, virtually requires that it parody a well-known trademark.”)).

**B. The CRABS ADJUST HUMIDITY Marks Are Likely to Blur the Distinctive Quality of The CARDS AGAINST HUMANITY Marks**

Dilution by blurring is an “association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark.” 15 U.S.C. § 1125(c)(2)(B). “Dilution by blurring occurs when a substantial percentage of consumers, on seeing the junior party’s use of a mark on its goods, are immediately reminded of the famous mark and associate the junior party’s mark with the owner of the famous mark, even if they do not believe the goods emanate from the famous mark’s owner.” *New York Yankees P’ship v. IET Prods. & Servs., Inc.*, 114 U.S.P.Q.2d 1497, 1506 (T.T.A.B. May 8, 2015) (precedential) (citation omitted); *UMG Recordings*, 100 U.S.P.Q.2d at 1888.

In determining whether a mark is likely to cause dilution by blurring, the Board may consider all relevant factors, including the following six non-exclusive statutory factors: (i) the degree of similarity between the marks; (ii) the degree of inherent or acquired distinctiveness of the famous mark; (iii) the extent to which the owner of the famous mark is engaging in substantially exclusive use of the mark; (iv) the degree of recognition of the famous mark; (v) whether the user of the mark intended to create an association with the famous mark; and (vi) any actual association between the marks. *See* 15 U.S.C. § 1125(c)(2)(B)(i)-(vi).

The first statutory factor presents “an important question in a dilution case,” namely, “whether the two involved marks are sufficiently similar to trigger consumers to conjure up a famous mark when confronted with the second mark.” *National Pork*, 96 U.S.P.Q.2d at 1497. *See also Starbucks Corp. v. Wolfe’s Borough Coffee, Inc.*, 588 F.3d 97, 108 (2d Cir. 2009) (holding marks need to be “substantially similar” for purposes of the dilution analysis); *Nike*, 2011 WL 3828723, at \*14 (noting the similarity between the famous mark and allegedly blurring mark need not be substantial in order for the dilution by blurring claim to succeed) (citation omitted). As discussed in Section II.A above, Applicant’s Crabs Marks and Opposer’s CAH Marks are highly similar in appearance, sound, and commercial impression. Accordingly, this factor strongly favors a finding of a likelihood of dilution. *See, e.g., Research in Motion*, 102 U.S.P.Q.2d at 1198 (finding BLACKBERRY and CRACKBERRY are highly similar for dilution purposes based on the same evidence establishing similarity of the marks for likelihood of confusion); *Nike*, 2011 WL 3828723, at \*\*14-15 (same, JUST DO IT and JUST JESU IT); *National Pork*, 96 U.S.P.Q.2d at 1497 (same, THE OTHER RED MEAT and THE OTHER WHITE MEAT).

The remaining statutory factors all weigh in favor of a finding of dilution. As for the second factor, Opposer’s CAH Marks are inherently distinctive: they are registered on the Principal

Register without a Section 2(f) claim (*see* NOR 1, Exs. 1-3), and have also acquired distinctiveness as a result of many years of extensive usage. Moreover, Opposer's Registration No. 4,304,905 for CARDS AGAINST HUMANITY in standard characters is incontestable (*see* NOR 1, Ex. 1). *See* 15 U.S.C. § 1064(3). Third, there is no evidence in the record of third-party use in commerce of the CAH Marks for any goods or services, let alone those offered by Opposer. Fourth, the record reflects that Opposer's CAH Marks have achieved a high degree of public recognition. *See supra*, pp. 9-14. Finally, with regard to the last two factors, the evidence of record shows that Applicant clearly intended to create an association with Opposer's CAH Marks (*see supra* Section II.F), and includes numerous instances of actual association between the parties' marks (*see supra* Section II.D (collecting examples of actual confusion, many reflecting customers' mistaken belief that the parties are associated)).

Taken together, these factors weigh heavily in favor of finding that the Applications for registration of the Crabs Marks should be denied because they will likely dilute the distinctiveness of Opposer's famous CAH Marks by blurring. *Accord* Rygh Expert Decl. at Section V.D (finding registration of Applicant's "derivative name [] would dilute the strength of [Opposer]'s trademarks and weaken [its] ability to expand and protect future product developments").

#### **IV. APPLICANT'S CRABS ADJUST HUMIDITY MARKS FALSELY SUGGEST AN ASSOCIATION OR CONNECTION WITH OPPOSER**

Applicant's Crabs Marks also falsely suggest an association or connection with Opposer, and thus, registration of the Applications should be refused under Section 2(a) of the Lanham Act, 15 U.S.C. § 1052(a) as well. In order to establish grounds for opposition on this basis, Opposer must show that: (1) the Crabs Marks are the same as or a close approximation of Opposer's previously used name or identity; (2) the Crabs Marks would be recognized as such by purchasers of Applicant's goods, in that it points uniquely and unmistakably to Opposer; (3) Opposer is not

connected with the goods that are sold by Applicant under the Crabs Marks; and (4) Opposer's name or identity is of sufficient fame or reputation that when the Crabs Marks are used by Applicant on its goods, a connection with Opposer would be presumed. *See University of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, 217 U.S.P.Q. 505, 509 (Fed. Cir. 1983); *The Bd. of Trs. of The Univ. of Ala. v. Pitts*, 107 U.S.P.Q.2d 2001, 2025 (T.T.A.B. 2013) (precedential).

As a threshold matter, CARDS AGAINST HUMANITY and CAH have long been used to identify and refer to Opposer. These marks have functioned as Opposer's name and identity since well before Applicant's adoption of the Crabs Marks, including, for example, as Opposer's corporate name (*i.e.*, Cards Against Humanity, LLC), Opposer's domain name (*i.e.*, www.cardsagainsthumanity.com), and Opposer's username on various social media accounts (*e.g.*, @CAH on Twitter, and @cardsagainsthumanity on Instagram) (*see* Bane Ex. 2). The media and consumers regularly use these marks to identify and refer to Opposer as well. *See, e.g.*, NOR 4, Ex. 41 (*Huffington Post* article referring to Opposer as "Cards Against Humanity" and "CAH"). *See also, e.g.*, Bane Ex. 6 (customer email to Opposer, stating "Dear Cards Against Humanity"); Bane Ex. 7 at 3 (same, "Hello CAH Humans"); *id.* at 4 (same, "Hey CAH Staff"). Given the extensive public exposure to CARDS AGAINST HUMANITY and CAH as identifying Opposer, there can be little doubt that the consuming public readily associates these marks with Opposer.

Turning to the relevant four-factor test, as discussed in Section II.A above, it is clear that Applicant's Crabs Marks are the same as or a close approximation of Opposer's previously used name and identity, *i.e.*, CARDS AGAINST HUMANITY and CAH, such that purchasers will recognize Applicant's Crabs Marks as pointing uniquely and unmistakably to Opposer. The first two elements are therefore met. As to the third element, Opposer is not connected in any way with Applicant or the goods by Applicant under its Crabs Marks. Indeed, Applicant concedes as much.

See 28 TTABVUE 15 at ¶ 85 (“Applicant admits that neither Opposer or [sic] Opposer’s corporate identify [sic] is connected with Applicant’s goods.”). Finally, the evidence of record shows that CARDS AGAINST HUMANITY and CAH are of sufficient fame and reputation that the use of the Crabs Marks as a trademark by an unauthorized user will falsely suggest a connection with Opposer. The fact that Applicant uses the Crabs Marks in conjunction with identical goods only enhances the likelihood that consumers will perceive a connection.

Simply put, upon seeing Applicant’s Crabs Marks on card games or game cards, consumers will be likely to assume – and, in fact, have already assumed – that these goods are in some way associated or connected with Opposer, when that is not the case. Accordingly, the opposition should also be sustained on the ground of false suggestion of an association connection as well.

### **CONCLUSION**

For the foregoing reasons, the Board should find that the Opposition should be sustained on at least one, if not all three, of the aforementioned grounds.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I, Marissa B. Lewis, hereby certify that a true and complete copy of the foregoing  
Opposer's Trial Brief has been served on counsel of record for applicant Vampire Squid Cards,  
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