

This Opinion is Not a  
Precedent of the TTAB

Mailed: May 3, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*Chicago Cubs Baseball Club, LLC*

*v.*

*Ronald Mark Huber*

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Opposition No. 91232736

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Mary L. Kevlin, Richard S. Mandel, Timothy J. Buckley, and Joelle A. Milov of  
Cowan, Liebowitz & Latman, P.C. for  
Chicago Cubs Baseball Club, LLC

Daniel M. Northfield for  
Ronald Mark Huber

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Before Bergsman, Shaw and Lynch,  
Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

Ronald Mark Huber (“Applicant”) seeks registration on the Principal Register of  
the mark CUBNOXIOUS in standard characters (the “Application”) for “shirts” in

International Class 25.<sup>1</sup> Chicago Cubs Baseball Club, LLC (“Opposer”) opposes registration of the mark based on Applicant’s alleged lack of bona fide intent to use the mark in commerce at the time he filed the application, rendering the application void ab initio under Trademark Act Section 1(b), 15 U.S.C. § 1051(b), and alleged likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), with Opposer’s following live registered marks, shown below, status and title copies of which were submitted for the record:<sup>2</sup>

Registration Number/ Application Serial Number	Mark	Goods/Services
Reg. No. 869838	 (lined for colors red and blue)	Entertainment services in the nature of baseball exhibitions rendered live and through the media of radio and television in Int. Class 41
Reg. No. 1042652		Includes: T-shirts, sweatshirts, pajamas, ponchos, jackets, pants, and robes in Int. Class 25
Reg. No. 1538033		Flashlights in Int. Class 11
Reg. No. 1538151		Includes: Clothing, namely, t-shirts in Int. Class 25

<sup>1</sup> Application Serial No. 86879907 was filed on January 19, 2016, based on Applicant’s allegation of a bona fide intent to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

<sup>2</sup> 11 TTABVUE (Opposer’s First Notice of Reliance). Citations refer to TTABVUE, the Board’s online docketing system. See *Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). Opposer also introduced Reg. No. 5414341 for the mark THAT’S CUB for a variety of services in Int. Class 41. Because the registration was not pleaded and, as discussed below, we need not rely on it, it is not included in the table.

Reg. No. 1538193	 (CHICAGO disclaimed)	Clothing, namely t-shirts in Int. Class 25
Reg. No. 1544313	CHICAGO CUBS (CHICAGO disclaimed)	Includes: Clothing, namely, t-shirts, sweatshirts, caps and hooded sweatshirts in Int. Class 25
Reg. No. 1548675	CHICAGO CUBS (CHICAGO disclaimed)	Entertainment services in the nature of baseball exhibitions in Int. Class 41
Reg. No. 150472		Paper goods and printed matter, namely, baseball cards in Int. Class 16
Reg. No. 1612016		Publications and printed matter, namely, souvenir programs in Int. Class 16; Entertainment services in the nature of baseball exhibitions in Int. Class 41
Reg. No. 1916572		Clothing, namely, shirts, caps, shorts, T-shirts, hats, uniforms, uniform jerseys, wind resistant jackets, short sets, sweatpants, sweatshirts in Int. Class 25
Reg. No. 1694837	CUBS CARE	Raising, receiving and distributing charitable funds by means of special events in Int. Class 36
Reg. No. 3199968	MR. CUB	Includes: Baseball jerseys in Int. Class 25
Reg. No. 3231135		Clothing, namely, caps, hats, shirts, t-shirts, tank tops, sweaters, pullovers, vests, shorts, pants, dresses, skirts, baseball uniforms, jerseys, warm-up suits, jogging suits, sweatshirts, sweatpants, underwear, robes, sleepwear, swimwear, jackets, ponchos, cloth bibs, infant wear, jumpers, rompers, coveralls, creepers, baby booties, ties, footwear, socks, hosiery, slippers in Int. Class 25
Reg. No. 3231136	CUBS	Entertainment services, namely, baseball games, competitions and exhibitions rendered live and through broadcast media including television and radio, and via a global computer network or a commercial on-line service; information services, namely, providing information in the field of sports, entertainment and related topics, and providing for informational messages relating thereto; educational services in the nature of baseball skills programs, baseball camps and clinics offered live; entertainment services, namely, production of programming broadcast via television, radio and a global computer network or a commercial on-line service; organizing community sporting events; providing facilities for sports tournaments and competitions relating to baseball; organizing and conducting fantasy sports, sports contests and sweepstakes; providing on-line newsletters in the field of baseball in Int. Class 41

Reg. No. 3231137	CUBS	Clothing, namely, caps, hats, visors, knitted head wear, shirts, t-shirts, tank tops, sweaters, pullovers, vests, shorts, pants, dresses, skirts, baseball uniforms, jerseys, warm-up suits, jogging suits, sweatshirts, sweatpants, underwear, robes, sleep wear, swimwear, jackets, ponchos, cloth bibs, infant wear, jumpers, rompers, coveralls, creepers, baby booties, ties, footwear, socks, hosiery, slippers in Int. Class 25
Reg. No. 3320038		Toys and sporting goods, namely, stuffed toys, plush toys, bean bag toys, foam toys, foam novelty items, namely, foam fingers, balloons, checker sets, dominoes, board games, card games, dart boards and dart board accessories, namely, darts, dart shafts and dart flights, toy cars and trucks, jigsaw and manipulative puzzles, yo-yo's, toy banks, toy figures, toy vehicles, toy airplanes, dolls and doll accessories, bobbing head dolls, decorative wind socks, miniature baseball bats, mini batting helmet replicas, toy necklaces, baseballs, holders for baseballs, autographed baseballs, playground balls, golf balls, golf club head covers, golf club bags, billiard accessories, namely, cues, billiard balls, baseball bases, baseball bats, batting gloves, inflatable toys; costume masks; Christmas tree ornaments, excluding confectionery and illumination articles, and Christmas stockings; playing cards in Int. Class 28
Reg. No. 3320039		Athletic bags, overnight bags, backpacks, duffel bags, tote bags, beach bags, knapsacks, attaché cases, briefcases, purses, wallets, billfolds, cosmetic cases sold empty, toiletry cases sold empty, business card cases, luggage, luggage tags, suitcases, umbrellas, dog collars, and dog leashes in Int. Class 18
Reg. No. 3320040		Paper goods and printed matter, namely, trading cards, posters, stickers, decals, temporary tattoos, bumper stickers, score books, scorecards, printed baseball game programs, magazines and books featuring baseball, brochures featuring baseball, writing pads, note paper, notebooks, binders, stationery-type portfolios, stationery folders, book covers, calendars, greeting cards, postcards, printed bank checkbooks, checkbook covers, gift wrapping paper, paper gift and party bags, paper party goods in the nature of paper party decorations; paper napkins, mounted and un-mounted photographs, photograph albums, lithographs, paperweights, pens, pencils, crayons, non-electric erasers, pencil cases, art pictures, and art prints in Int. Class 16
Reg. No. 3320041	CUBS	Toys and sporting goods, namely, stuffed toys, plush toys, bean bag toys, foam toys, foam novelty items, namely, foam fingers, balloons, checker sets, dominoes, board games, card games, dart boards and dart board accessories, namely, darts, dart shafts and dart flights, toy cars and trucks, jigsaw and manipulative puzzles, toy banks, toy figures, toy vehicles, toy airplanes, dolls and doll accessories,

		bobbing head dolls, decorative wind socks, miniature baseball bats, mini batting helmet replicas, toy necklaces, baseballs, holders for baseballs, autographed baseballs, playground balls, golf balls, golf club head covers, golf club bags, billiard accessories, namely, cues, billiard balls and baseball bases, baseball bats, batting gloves, inflatable toys; costume masks; Christmas tree ornaments, excluding confectionery and illumination articles, and Christmas stockings; playing cards in Int. Class 28
Reg. No. 3320042	CUBS	Athletic bags, overnight bags, backpacks, duffel bags, tote bags, beach bags, knapsacks, attaché cases, briefcases, purses, wallets, billfolds, cosmetic cases sold empty, toiletry cases sold empty, business card cases, luggage, luggage tags, suitcases, umbrellas, dog collars, and dog leashes in Int. Class 18
Reg. No. 3320043	CUBS	Paper goods and printed matter, namely, trading cards, posters, stickers, decals, temporary tattoos, bumper stickers, score books, scorecards, printed baseball game programs, magazines and books featuring baseball, brochures featuring baseball, writing pads, note paper, notebooks, binders, stationery-type portfolios, stationery folders, book covers, calendars, greeting cards, postcards, printed bank checkbooks, checkbook covers, gift wrapping paper, paper gift and party bags, paper party goods in the nature of paper party decorations; paper napkins, mounted and un-mounted photographs, photograph albums, lithographs, paperweights, pens, pencils, crayons, non-electric erasers, pencil cases, art pictures, and art prints in Int. Class 16
Reg. No. 3320044	CUBS	Jewelry, namely, bracelets, charms, earrings, rings, belly rings, necklaces, pendants, watches, costume jewelry, silicone or rubber bracelets and wristbands in the nature of bracelets, medallions, ornamental metal pins, lapel pins, cuff links, metal belt buckles of precious metal, money clips of precious metal, key chains of precious metal, key rings of precious metal, clocks, wall clocks, alarm clocks, and non-monetary coins of precious metal in Int. Class 14
Reg. No. 3326192		Pre-recorded videodiscs relating to baseball; cell phone accessories, namely, cases and face plate covers; calculators; electric switch plate covers; luminous signs, neon signs; sunglasses; decorative magnets; video and computer game cartridges, video and computer game discs; computer accessories, namely, mouse pads, computer game programs, and computer application programs downloadable from a global computer network in the field of baseball in Int. Class 9
Reg. No. 3326193	CUBS	Pre-recorded videodiscs relating to baseball; pre-recorded audio discs relating to baseball; cases for personal digital assistants, cell phone accessories, namely, cases and face plate covers; binoculars; calculators; electric switch plate covers; luminous signs, neon signs; sunglasses; decorative magnets;

		protective helmets, video and computer game cartridges, video and computer game discs, video and computer game cassettes computer accessories, namely, mouse pads, computer game programs, and computer application programs downloadable from a global computer network in the field of baseball in Int. Class 9
Reg. No. 3403043		Clothing, namely, caps, hats, headbands, visors, shirts, T-shirts, tank tops, pullovers, baseball uniforms, jerseys, sweatshirts, jackets in Int. Class 25
Reg. No. 3403044		Clothing, namely, caps, hats, shirts, T-shirts, tank tops, pullovers, baseball uniforms, jerseys, sweatshirts, jackets in Int. Class 25
Reg. No. 3644960	CUBBIES	Clothing, namely, caps, hats, shirts, T-shirts in Int. Class 25
Reg. No. 3703178		Clothing, namely, caps, hats, shirts, T-shirts, baseball uniforms, jerseys, sweatshirts, jackets in Int. Class 25
Reg. No. 3854382		Clothing, namely, caps, hats, shirts, T-shirts, tank tops in Int. Class 25
Reg. No. 5424582		Clothing, namely, headwear, shirts, athletic uniforms, jerseys, jackets in Int. Class 25
Reg. No. 5561908	THAT'S CUB	Clothing, namely, shirts, footwear in Int. Class 25

In his answer, Applicant admits that he has not yet used his mark, but otherwise denies the salient allegations in the notice of opposition.<sup>3</sup> The opposition is fully briefed.

## I. Standing and Priority

Applicant does not contest Opposer's standing or priority. Nonetheless, Opposer must prove standing by showing a real interest in the outcome of the proceeding and a reasonable basis for believing that it would suffer damage if the mark is registered. *See* 15 U.S.C. § 1063; *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014). Opposer's pleaded registrations, for which Opposer has proven status and title, establish its standing. *See Coach Servs. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1727-28 (Fed. Cir. 2012); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000).

Also, Section 2(d) priority is not in issue as to the marks and the goods and services covered by these registrations. *See Top Tobacco LP v. North Atlantic Op. Co.*, 101 USPQ2d 1163, 1169 (TTAB 2011) (citing *King Candy, Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 82 USPQ 108 (CCPA 1974)).

## II. Lack of Bona Fide Intent to Use

The Trademark Act provides in pertinent part that “[a] person who has a bona fide intention, under circumstances showing the good faith of such person, to use a trademark in commerce may request registration of its trademark on the principal

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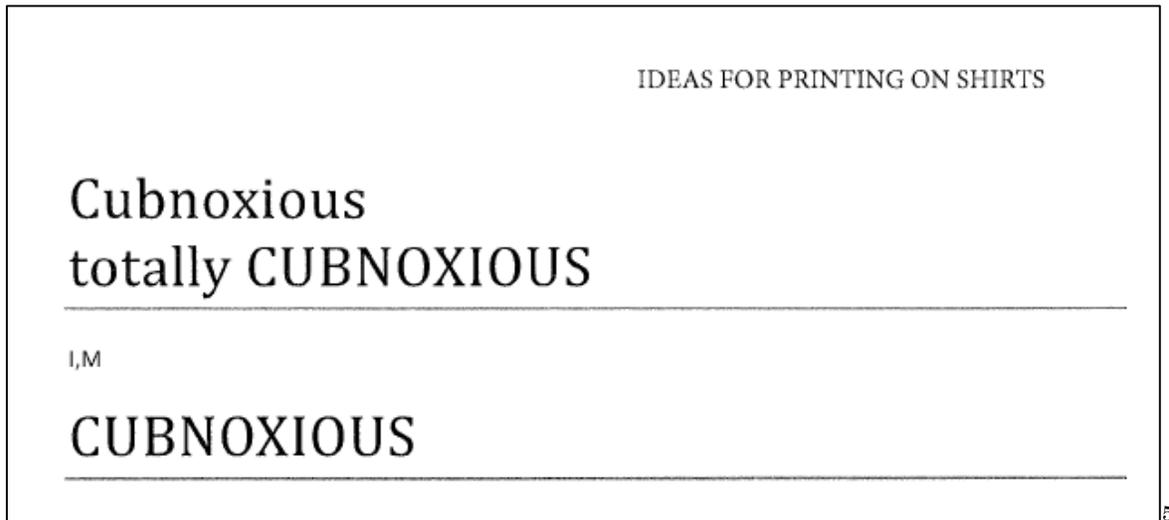
<sup>3</sup> 10 TTABVUE 1 (Applicant's Amended Answer).

register....” Trademark Act Section 1(b)(1), 15 U.S.C. § 1051(b)(1). The bona fide intent requirement “must be read in conjunction with the revised definition of ‘use in commerce’ in Section 45 of the Trademark Act, which the Trademark Law Revision Act of 1988 amended to require that such use be ‘in the ordinary course of trade, and not made merely to reserve a right in a mark.’” *Commodore Elec. Ltd. v. CBM Kabushiki Kaisha*, 26 USPQ2d 1503, 1507 (TTAB 1993).

The “determination of whether an applicant has a bona fide intention to use the mark in commerce is to be a fair, objective determination based on all the circumstances.” *Lane Ltd. v. Jackson Int’l Trading Co.*, 33 USPQ2d 1351, 1355 (TTAB 1994). “Opposer has the initial burden of demonstrating by a preponderance of the evidence that [A]pplicant lacked a bona fide intent to use the mark on the identified goods.” *Boston Red Sox Baseball Club LP v. Sherman*, 88 USPQ2d 1581, 1587 (TTAB 2008). Opposer can establish its prima facie case of no bona fide intent “by proving that [A]pplicant has no documentary evidence to support its allegation in the application of its claimed bona fide intent to use the mark in commerce as of the application filing date.” *Saul Zaentz Co. v. Bumb*, 95 USPQ2d 1723, 1727 (TTAB 2010). If Opposer satisfies this burden, the burden of production shifts to Applicant to offer additional evidence showing its bona fide intent to use its mark in commerce. *Id.*; see also *Commodore Elec.*, 26 USPQ2d at 1507 n.11.

Opposer makes a prima facie case of lack of bona fide intent in this case by establishing that Applicant has essentially no supporting documentary evidence from the timeframe of January 19, 2016, the filing date of his application. In response to

Opposer's Interrogatory No. 18 seeking the identification of such documents, Applicant identified only his intent-to-use application, which does not demonstrate bona fide intent.<sup>4</sup> *Research In Motion Ltd. v. NBOR Corp.*, 92 USPQ2d 1926, 1931 (TTAB 2009) ("If the filing and prosecution of a trademark application constituted a bona fide intent to use a mark, then in effect, lack of a bona fide intent to use would never be a ground for opposition or cancellation, since an inter partes proceeding can only be brought if the defendant has filed an application."). Applicant subsequently identified and produced a single undated page with the following content:



Applicant also submitted this same document as an exhibit to his testimony affidavit, and we note that he did not provide the date of the document, instead merely stating that it constitutes "lettering ideas that I might use on a product in commerce."<sup>6</sup> This undated document with minimal content does not constitute documentary evidence

<sup>4</sup> 12 TTABVUE 33 (Opposer's Second Notice of Reliance).

<sup>5</sup> *Id.* at 33, 42.

<sup>6</sup> 30 TTABVUE 4 (Ronald Huber affidavit).

of a bona fide intent to use the mark contemporaneous with Applicant's January 2016 filing date, and Applicant has provided no other documents as proof. Applicant explicitly stated in discovery responses that he had no other documentation reflecting his bona fide intention at the relevant time:

Interrogatory No. 18: State whether Applicant has any documentation, including, without limitation, business plans, marketing plans, memos, correspondence or draft proposals of any kind, reflecting Applicant's bona fide intention, prior to or as of January 19, 2016, to use the Applied-for Mark in connection with the goods covered by the Application.

Answer: None other than the Applicant's application for trademark.<sup>7</sup>

Given the absence of documentary evidence of Applicant's bona fide intent to use the mark, the burden shifts to Applicant to produce other evidence of the requisite intent. *Saul Zaentz Co.*, 95 USPQ2d at 1729. Apart from what we have discussed above, the only other evidence of alleged bona fide intent Applicant points to in his brief is his three-sentence testimony affidavit consisting of the following content:

If I am granted this trademark for this case, for the mark CUBNOXIOUS (Application serial number 86879907), I plan to use the mark in commerce for the general public, not for any specific geographical region or specific group of persons. I do not intend to specifically target either fans or opponents of the Chicago Cubs or any other sports team. Attached to this Affidavit are lettering ideas that I might use on a product in commerce.<sup>8</sup>

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<sup>7</sup> 12 TTABVUE 33 (Opposer's Second Notice of Reliance).

<sup>8</sup> 30 TTABVUE 4 (Ronald Huber Affidavit).

We do not find Applicant's conclusory statement persuasive to show that on January 19, 2016, Applicant had a bona fide intent to use the mark. *See Research In Motion Ltd.*, 92 USPQ2d at 1931 (applicant's stated belief that the applied-for mark would be "a good mark for future use" does not establish a bona fide intent to use). This type of "mere statement of subjective intention, without more," does not suffice. *See Lane Ltd.*, 33 USPQ2d at 1355; *see also L.C. Licensing Inc. v. Berman*, 86 USPQ2d 1883 (TTAB 2008). Thus, Applicant has not rebutted Opposer's showing.

Moreover, Applicant's own discovery responses corroborate the lack of bona fide intent. For example, in response to Interrogatory No. 1 regarding the date Applicant selected his mark, he characterized the situation as follows: "When Applicant applied for a trademark, 1-19-2016, Applicant selected Applicant's mark for *potential* future use. No specific date was set for date of intended use."<sup>9</sup> We find Applicant's statement in this regard more in keeping with filing an "application merely to reserve a right in the mark." *See Saul Zaentz Co.*, 95 USPQ2d at 1729 (criticizing the applicant's statement that he applied for the mark "just for the opportunity to create something in the future"). Other discovery responses contain similarly noncommittal language, such as that the nature of Applicant's intended use was "undetermined at this time."<sup>10</sup> Finally, we note that Applicant has not shown any established business or relevant experience in the industry that might suggest bona fide intent. *Contrast Rolex Watch USA, Inc. v. AFP Imaging Corp.*, 101 USPQ2d 1188, 1197 (TTAB 2011) (*prima facie*

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<sup>9</sup> 12 TTABVUE 27 (Opposer's Second Notice of Reliance) (emphasis added).

<sup>10</sup> *Id.* at 29.

lack of bona fide intent from no documentary evidence overcome by showing capacity to market and manufacture the goods identified in its application, which applicant proved were an extension of its current product line).

Thus, the preponderance of the evidence establishes that Applicant lacked the requisite bona fide intention to use the CUBNOXIOUS mark in commerce when he filed his intent-to-use application. Applicant lacks documentary evidence to support his bona fide intent claim, which suffices in itself to make Opposer's prima facie case on this ground. *See Saul Zaentz Co.*, 95 USPQ2d at 1730; *Commodore Elec.*, 26 USPQ2d at 1507; *Boston Red Sox Baseball Club*, 88 USPQ2d at 1587; *Research In Motion Ltd.*, 92 USPQ2d at 1931. Applicant presented no persuasive evidence to overcome the prima facie case, and other evidence corroborates the lack of bona fide intent by suggesting that he filed his intent-to-use application merely to reserve a right in the mark "for potential future use." We conclude that Opposer has established this Section 1(b) ground of opposition, such that the application is void ab initio. The opposition on this ground is sustained.

### III. Likelihood of Confusion

The determination under Section 2(d) involves an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, hereinafter referred to as "*DuPont* factors"); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). A likelihood of confusion analysis often focuses on the similarities between the marks and the

similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”). Opposer bears the burden of proving its claim of likelihood of confusion by a preponderance of the evidence. *Cunningham*, 55 USPQ2d at 1848.

We focus our analysis on Opposer’s registrations that include shirts of some kind among the identified goods (hereinafter, “Opposer’s registrations” or “Opposer’s marks”), as follows:

Reg. No. 1544313	<b>CHICAGO CUBS (CHICAGO disclaimed)</b>
Reg. No. 3199968	<b>MR. CUB</b>
Reg. No. 3231137	<b>CUBS</b>
Reg. No. 3644960	<b>CUBBIES</b>
Reg. No. 5561908	<b>THAT’S CUB</b>

We consider the marks and goods in these registrations most relevant for the likelihood of confusion determination. *See Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

A. The Goods, Trade Channels, and Classes of Consumers

The subject application identifies “shirts” and Opposer’s registrations all include shirts, either generally identified as such, or more specifically identified as particular types of shirts, such as sweatshirts, t-shirts, baseball jerseys, etc. Thus, the goods overlap, and are legally identical in part.

We must therefore presume that the channels of trade and potential consumers are also identical in part. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905,

1908 (Fed. Cir. 2012) (finding Board entitled to rely on this legal presumption in determining likelihood of confusion); *Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) (“Given the in-part identical and in-part related nature of the parties’ goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade.”). Thus, the second and third *DuPont* factors weigh strongly in favor of a finding of likely confusion.

#### B. The Strength of Opposer’s Marks

The strength of a mark under the fifth *DuPont* factor rests on the extent to which “a significant portion of the relevant consuming public . . . recognizes the mark as a source indicator.” *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (citing *Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005)). This factor involves assessing the mark “along a spectrum from very strong to very weak.” *Id.* (internal citations omitted). A very strong mark receives a wider latitude of legal protection in the likelihood of confusion analysis. *See Palm Bay Imps.*, 73 USPQ2d at 1694 (strong marks “enjoy wide latitude of legal protection” and are “more attractive as targets for would-be copyists”).

The commercial strength of a mark may be measured indirectly by the volume of sales and advertising expenditures in connection with the goods and services sold under the mark, and other factors such as length of time of use of the mark; widespread critical assessments; notice by independent sources of the goods and

services identified by the marks; and the general reputation of the goods and services. *Weider Publ'ns, LLC v. D & D Beauty Care Co.*, 109 USPQ2d 1347, 1354 (TTAB 2014); *see also Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1308 (Fed. Cir. 2002) (recognizing indirect evidence as appropriate proof of strength).

In addition to its large number of registrations, and long use of its marks, Opposer submitted a wide variety of evidence of significant consumer exposure to its marks.<sup>11</sup> For example, confidential testimony establishing the substantial number of unique visitors to Opposer's website in recent timeframes.<sup>12</sup> Opposer also features some of its marks on social media platforms such as Facebook, Twitter, Instagram, and Snapchat. Opposer's Facebook page has more than three million followers, its Twitter feed has more than two million followers, and its Instagram account has over one million followers.<sup>13</sup>

Opposer also provided evidence of considerable attendance figures at Cubs baseball games where Opposer's marks are displayed.<sup>14</sup> Opposer's Assistant Director of Brand Development and Activation, John Morrison testified that on average, three million fans per season attend games at Wrigley Field, where Opposer's marks are prominently featured, such as in game programs and stadium signage.<sup>15</sup> Also,

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<sup>11</sup> Our analysis of the strength of Opposer's marks includes all of the marks.

<sup>12</sup> 17 TTABVUE 4-7 (confidential declaration of Lara Pitaro Wisch), 16 TTABVUE (public version), 18 TTABVUE 1-38 (exhibits to the declaration).

<sup>13</sup> 25 TTABVUE 12 (Morrison declaration); *see also* 13 TTABVUE 134 (A screenshot of Opposer's Instagram page that shows some of its marks on shirts displays "1.1m followers.").

<sup>14</sup> 13 TTABVUE 10-107 (Opposer's Third Notice of Reliance).

<sup>15</sup> 25 TTABVUE 15 (Morrison declaration).

consumers experience Cubs games broadcast on radio and TV, including digitally streamed TV,<sup>16</sup> with a large number of viewers.<sup>17</sup> Uncontradicted testimony establishes that “Opposer’s CUB marks appear prominently throughout such broadcasts and streams.”<sup>18</sup> In addition, testimony also details a sponsorship program that includes promotion of Opposer’s marks through various industries with companies such as Bank of America, Budweiser, Gatorade, General Motors, Nathan’s Famous, MasterCard International, Nike, Scotts, SiriusXM, Starwood Hotels and Resorts, and T-Mobile.<sup>19</sup> Opposer also advertises and promotes its registered marks in a variety of media, and distributes promotional items bearing the marks. Its confidential advertising and promotional expenses are included in the record.<sup>20</sup>

Opposer’s strength evidence extends more specifically to use of its marks on various clothing items including shirts.<sup>21</sup> Opposer’s Assistant Director of Brand Development and Activation, John Morrison, provided confidential revenue figures for sales of merchandise including clothing bearing Opposer’s marks in the stores at Wrigley Field, Opposer’s home stadium.<sup>22</sup> Confidential testimony regarding

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<sup>16</sup> *Id.*

<sup>17</sup> 20 TTABVUE 7 (confidential declaration of Ethan G. Orlinsky), 19 TTABVUE 7 (public version).

<sup>18</sup> 20 TTABVUE 8 (confidential declaration of Ethan G. Orlinsky), 19 TTABVUE 8 (public version), 21 TTABVUE (exhibits to the declaration).

<sup>19</sup> 19 TTABVUE 8 (Orlinsky declaration).

<sup>20</sup> 26 TTABVUE 11 (confidential declaration of John Morrison).

<sup>21</sup> 18 TTABVUE 39-76, 103-80 (exhibits to Wisch declaration).

<sup>22</sup> 26 TTABVUE 10 (confidential declaration of John Morrison), 25 TTABVUE 10 (public version).

merchandising and licensing of Opposer's marks with clothing brands such as Nike, Under Armour, Levi's & Strauss Co., Vans, and Columbia, among others, reports substantial revenue from these goods.<sup>23</sup> The testimony exhibits include numerous examples of shirts bearing Opposer's marks.<sup>24</sup>

The record includes other examples of consumer exposure to Opposer's marks in connection with shirts. A CBS Sports online article bears the headline "Cubs' Kris Bryant has top-selling MLB jersey of 2015" and includes a picture of the player in his baseball jersey with one of Opposer's marks.<sup>25</sup> An article from Thewrap.com on "10 Best Chicago Cubs Shout-Outs in Movies and TV" shows photo stills from films including "Rookie of the Year," with a boy in a Cubs baseball jersey that displays one of Opposer's marks.<sup>26</sup>

The record contains articles from the Chicago Tribune and the Library of Congress in which renowned Cubs players from the early 1900's, Joe Tinker, Johnny Evers and Frank Chance, are shown wearing Cubs jerseys with some of Opposer's marks.<sup>27</sup>

Applicant acknowledges in its brief that "Opposer has at least some regional fame, and may have used its marks a while."<sup>28</sup> However, presumably in an effort to rebut Opposer's argument about the degree of strength of the marks, Applicant submitted

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<sup>23</sup> 23 TTABVUE 7-8 (confidential declaration of Denis Nolan), 22 TTABVUE (public version), 24 TTABVUE (exhibits to the declaration).

<sup>24</sup> 24 TTABVUE 4-15, 29, 71.

<sup>25</sup> 13 TTABVUE 198-99 (cbssports.com).

<sup>26</sup> *Id.* at 133-34.

<sup>27</sup> 13 TTABVUE 106-113.

<sup>28</sup> 33 TTABVUE 11 (Applicant's Brief).

some of Opposer's responses to requests for admission to establish, *inter alia*, that Opposer does not own or license certain websites, such as www.cub.com, does not own various registrations that include CUB, that certain symbols used on the New York Stock Exchange (NYSE) are not affiliated with Opposer, and that the word "cub" has a defined meaning as a young carnivorous mammal.<sup>29</sup>

Applicant's evidence does not demonstrate weakness because the record lacks the necessary context to evaluate alleged third-party use and registration. Applicant failed to introduce any of the third-party registrations that were the subject of his requests for admission to Opposer, so that although the admissions refer to the marks, there is no evidence of the goods and services covered by those registrations. This negates their probative value to show weakness of Opposer's marks, which would depend on proof of the registration and use of similar marks for similar goods. *Cf. In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1751 (Fed. Cir. 2017) (disregarding third-party registrations for goods in other classes where the proffering party "has neither introduced evidence, nor provided adequate explanation to support a determination that the existence of I AM marks for goods in other classes, ... support a finding that registrants' marks are weak with respect to the goods identified in their registrations"). Similarly, the record lacks evidence of the underlying third-party websites that include "cub" in their domain names, or of the context of any third-party use of NYSE symbols that include "cub." *See Palm Bay*

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<sup>29</sup> 29 TTABVUE.

*Imps.*, 73 USPQ2d at 1693 (“[t]he probative value of third-party trademarks depends entirely upon their usage.”).

Overall, Opposer’s admissions do not equate to proof of a degree of recent consumer exposure to third-party use or registration of similar marks on similar goods to show that consumers generally distinguish among marks containing “cub” based on minor distinctions. *See Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015); *contrast Primrose Retirement Communities, LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030 (TTAB 2016) (weakness found based on at least 85 actual uses of ROSE-formative marks for similar services, eight similar third-party registrations, expert testimony and other evidence regarding the common nature of ROSE-formative marks in the industry, and testimony by opposer that it did not vigorously enforce its mark). Under the sixth *DuPont* factor, the record is devoid of evidence of third-party use or registration of similar marks on similar goods. Thus, Opposer’s marks do not appear to be commercially weak; rather, they are commercially strong.

As to conceptual strength, Opposer has admitted that the ordinary meaning of “cub” refers to a young mammal. However, Opposer correctly points out that in its marks for clothing, as well as other goods and services, CUB is arbitrary as a “known word used in an unexpected or uncommon way.” *Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 71 USPQ2d 1173 (Fed. Cir. 2004) (defining an arbitrary mark as a “known word used in an unexpected or uncommon way” and observing that

such marks are typically strong); *see also Palm Bay Imps.*, 73 USPQ2d at 1692 (arbitrary terms are conceptually strong trademarks).

Opposer's marks are conceptually strong. The evidence of commercial strength of the marks, including Internet and social media consumer exposure, revenue statistics, advertising expenditures and examples, and media coverage, reflects the renown of Opposer's marks through widespread consumer exposure to and recognition of them. The scope of the evidence extends well beyond the mere "regional" strength acknowledged by Applicant. Overall, we find Opposer's marks to be quite strong, weighing in favor of a likelihood of confusion. *See, e.g., UMG Recordings, Inc. v. Mattel, Inc.*, 100 USPQ2d 1868, 1887 (TTAB 2011) (inferring public recognition of MOTOWN mark based on use of mark for almost 50 years, extensive nationwide sales of opposer's recordings as well as numerous concerts and television appearances featuring its music and artists and extensive nationwide promotion of mark through traditional advertising and sale of collateral goods); *Nike, Inc. v. Maher*, 100 USPQ2d 1018, 1024-27 (TTAB 2011) (finding opposer's JUST DO IT mark famous based on pervasive third-party press and media references, substantial advertising, publicity and nationwide sales and ownership of registrations).

### C. Similarity of the Marks

With respect to the marks, we must compare them "in their entireties as to appearance, sound, connotation and commercial impression." *Palm Bay Imps.*, 73 USPQ2d at 1691 (quoting *DuPont*, 177 USPQ at 567). The proper comparison

inquires “not whether the marks can be distinguished when subjected to a side-by-side comparison, but whether they are sufficiently similar in their overall commercial impression,” that source confusion is likely to result. *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012). In fact, “marks ‘must be considered . . . in light of the fallibility of memory’ and ‘not on the basis of side-by-side comparison.’” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (citation omitted).

None of Opposer’s marks is identical to Applicant’s, but, as set forth in the table above, Opposer’s standard-character marks include CUBS, CHICAGO CUBS, CUBBIES, and THAT’S CUB. Opposer’s Assistant Director of Brand Development and Activation, John Morrison, explained as follows:

Opposer’s CUB Marks frequently combine the CUB or CUBS name or mark with other words to form unitary marks and logo designs promoting the Club and various of its goods and services. For example, Opposer has long used and currently owns a registration for MR. CUB in connection with baseball bats, jerseys and trading cards, with the registration claiming a first use date of 1957. Opposer also uses the marks CUBS CARE, CUBS CHARITIES and CUBS SCHOLARS in connection with various of its charitable activities and organizations. In connection with the aforementioned services, Opposer has used CUBS CARE since 1991, CUBS CHARITIES since 1986, and CUBS SCHOLARS since 2013. Opposer has long used the mark CUBS CLUB for its fan club, and since 1985 it has used CUBS CONVENTION to identify its annual two and a half day fan fest, which has been held in Chicago every January for more than three decades. Opposer has used the mark CUBS DESTINATIONS since 2007 as a brand for various travel packages offered to fans in connection with SPRING TRAINING and regular season Cubs’ games. Last season, Opposer’s Class A Minor League

affiliate, the MYRTLE BEACH PELICANS, hosted a CUBS-A-PALOOZA weekend....<sup>30</sup>

We find that this showing by Opposer of the use and registration of CUB- variant marks contributes to the similarity consumers would perceive from the shared string of letters, CUB-, in Applicant's and Opposer's marks. The shared lettering creates a visual resemblance between the marks and renders them phonetically similar, an important consideration in the analysis. *See Viterra*, 101 USPQ2d at 1911. While the endings of the marks differ to such an extent that the marks themselves would not likely be mistaken for one another, the marks nonetheless would be perceived as variants of one another, coming from a common source. Opposer's evidence of registration and use of CUB-variant marks renders such a consumer misimpression likely. *See Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992) (Opposer's use of variations on the dominant portion of its mark "would increase the likelihood that consumers would misconstrue the source of insurance under the mark CENTURY LIFE OF AMERICA").

As to connotation and commercial impression, Applicant's CUBNOXIOUS mark likely would be perceived as a combination of the term CUB<sup>31</sup> and the word "obnoxious," which typically is not a flattering term. However, Opposer provides compelling evidence to show why consumers nonetheless likely would mistakenly

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<sup>30</sup> 25 TTABVUE 7 (Morrison Declaration).

<sup>31</sup> While Applicant did not acknowledge his mark as a reference to the Chicago Cubs, Opposer has noted that Applicant resides in the Des Moines, Iowa home base of Opposer's Minor League affiliate, the Iowa Cubs. 32 TTABVUE 9 (Opposer's Brief); 25 TTABVUE 6 (Morrison Declaration).

believe that it was the source of Applicant's clothing. Opposer's argument derives from the idea that sports teams or their fans may seek to provoke opposing teams and their fans, thereby embracing an offensive, or obnoxious, reputation. As Opposer characterizes it in its Brief:

To a fan base notorious for its undying allegiance to the Cubs, the CUBNOXIOUS designation at issue in this case would surely be taken by many as a badge of honor that fits quite comfortably within the Club's creative and expansive merchandising program, which already offers a wide variety of different marks, designs, stylizations, themes and imagery among its selection of officially licensed products.<sup>32</sup>

Numerous articles from newspapers throughout the country reflect consumer exposure to the idea that fans of the Chicago Cubs are highly committed, using terms such as "loyal," "die-hard," and "faithful," and describing their willingness to travel and attend distant games such as in articles titled "Cubs fans invade the Brewers' back yard" and "Cubs fans get nice and cozy at Chase [Field]."<sup>33</sup> Other articles report on Cubs fan events and activities, such as the Cubs Die Hard Fan Convention of "Cubmaniacs" reported by the Chicago Tribune,<sup>34</sup> and an article on the Bleacher Nation website entitled "Cubs Fans Are Everywhere, and Will Go Anywhere."<sup>35</sup>

Some go further in characterizing the nature of the fan base as obnoxious. One article from the Chicago Daily Herald bears the headline "Cubs fans obnoxious? Of

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<sup>32</sup> 32 TTABVUE 24 (Opposer's Brief).

<sup>33</sup> 14 TTABVUE 1-99 (various newspapers), *id.* at 142-43 (Post-Crescent), *id.* at 146-48 (Arizona Daily Star).

<sup>34</sup> 13 TTABVUE 645-46 (chicagotribune.com).

<sup>35</sup> *Id.* at 647-50 (bleachernation.com).

course,”<sup>36</sup> and another from the Chicago Tribune reports that “[Cincinnati] Reds broadcaster rips ‘obnoxious’ Cubs fans.”<sup>37</sup>

Opposer even has provided some examples of Tweets using “Cubnoxious” to refer to Cubs fans, compiled below from various threads:

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<sup>36</sup> *Id.* at 156-58.

<sup>37</sup> *Id.* at 150-51.

The screenshot shows a vertical list of seven tweets on a light blue background. Each tweet includes a circular profile picture, the user's name and handle, the date, and the text of the tweet. Below each tweet are icons for replying, retweeting, liking, and direct messaging. The tweets are as follows:

- Kristin Martinez** (@kristindm1) - 13 Oct 2017: Replying to @Luke\_DatBoi. They're "**Cubnoxious**".
- Jim McCue** (@JimMcCue2) - 13 Oct 2017: Replying to @ChaceBryson. Don't be **Cubnoxious**.
- Neil Bhandari** (@alorakid) - 21 Apr 2017: Has another fandom coined **Cubnoxious** yet?
- Jen Wielgus** (@jenwielgus) - 4 Oct 2016: Be careful what you look forward to, LOL. #cubnoxious. Includes a quote from **art ehlo** (@Plumsteadrocks) dated 4 Oct 2016: "You're more than welcome Jen! Just in time for playoffs Hopefully the #Cubs win it all for you. Look forward to your tweets about the @Cubs twitter.com/jenwielgus/sta...".
- Caitlin Thompson** (@CaitMThompson) - 11 May 2016: "That's so **cubnoxious**" "Do you mean obnoxious?" "Yea that's what I said, **cubnoxious**".
- 'Big Daddy' Kane** (@KevinFKane) - 5 Apr 2016: Replying to @jenwielgus. @jenwielgus btw I am trademarking "**cubnoxious**" now...
- 'Big Daddy' Kane** (@KevinFKane) - 5 Apr 2016: Replying to @jenwielgus. @jenwielgus I can attest as a loyal follower of JW she tends to get "**cubnoxious**" but somehow it comes off charming... Own it JW!
- moira kelly** (@mo\_malleycat) - 13 Oct 2015: **cubnoxious**.

At the bottom of the thread is a small black bird icon and the text "Back to top ↑".

A Yelp user review of an event at a Chicago park also refers to trying to avoid “Cubnoxious Drunkards.”<sup>39</sup>

We find Opposer’s evidence convincing to demonstrate that the connotation and commercial impression of Applicant’s mark is similar to Opposer’s marks. *See Chicago Bears Football Club, Inc. v. 12<sup>th</sup> Man/Tennessee LLC*, 83 USPQ2d 1073, 1077 (TTAB 2007) (applicant’s 12<sup>th</sup> BEAR mark confusingly similar to opposers’ BEARS and CHICAGO BEARS marks as “12<sup>th</sup>” reinforced the connection with the Chicago Bears football team by specifically identifying a fan of the team as the “twelfth Bear.”).

Especially bearing in mind the strength of Opposer’s marks and the overlapping goods, we deem Applicant’s mark sufficiently similar in appearance, sound, connotation and commercial impression to Opposer’s marks to weigh in favor of likely confusion.

#### D. Lack of Actual Confusion Evidence

While Opposer has acknowledged the lack of actual confusion evidence, given that Applicant has not yet used his proposed mark in commerce, there has been no opportunity for actual consumer confusion to occur. *See DuPont*, 177 USPQ at 567 (identifying seventh and eighth *du Pont* factors as “[t]he nature and extent of any actual confusion,” and “[t]he length of time during and conditions under which there

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<sup>38</sup> 14 TTABVUE 672 (twitter.com); *see also* 15 TTABVUE 49.

<sup>39</sup> 13 TTABVUE 666 (yelp.com).

has been concurrent use without evidence of actual confusion”). Accordingly, we find the seventh and eighth factors neutral.

#### E. Purchasing Conditions

Both parties addressed the *DuPont* factor regarding consumers’ purchasing conditions, relying on the nature of the identified goods without pointing to other evidence. We have no basis to find that ordinary consumers purchasing shirts would exercise more than an ordinary degree of care. This factor is neutral.

#### F. Bad Faith

Opposer argues that Applicant’s alleged evasiveness about his awareness of Opposer’s marks and his lack of explanation why he selected his mark point to bad faith. *See, e.g., J & J Snack Foods Corp. v. McDonald’s Corp.*, 932 F.2d 1460, 1462, 18 USPQ2d 1889, 1891 (Fed. Cir. 1991) (“Whether there is evidence of intent to trade on the goodwill of another is a factor to be considered.”); *Jewelers Vigilance Comm., Inc. v. Ullenberg Corp.*, 853 F.2d 888, 7 USPQ2d 1628, 1630 (Fed. Cir. 1988) (“proof of intent to trade on another’s goodwill” can provide “persuasive evidence of likelihood of confusion”) (citation omitted). Establishing bad faith requires a showing that Applicant intentionally sought to trade on Opposer's good will or reputation. *See Big Blue Prod. Inc. v. IBM Corp.*, 19 USPQ2d 1072 (TTAB 1991). While such intent may be inferred from surrounding circumstances, even “mere knowledge of a competitor’s mark is not equivalent to a deliberate attempt to deceive or to cause confusion.” *Elec. Water Conditioners, Inc. v. Turbomag Corp.*, 221 USPQ 162, 165 (TTAB 1984). We

cannot find based on this record such a showing of Applicant's bad faith. This factor is neutral.

G. Conclusion as to Likelihood of Confusion

Given the similarity of Opposer's strong marks to Applicant's mark, and the overlap of their goods that move in some of the same channels of trade to the same classes of consumers, we conclude that confusion is likely. The opposition on this ground is sustained.

**Decision:** The opposition is sustained both on the ground of lack of bona fide intent to use the mark in commerce as of the filing date of the application and on the ground of likely confusion.