

This Opinion is Not a  
Precedent of the TTAB

Hearing: June 2, 2021

Mailed: September 22, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*STX Financing, LLC*

*v.*

*Stacey Michelle Terrazas*  
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Opposition No. 91240829  
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Jill M. Pietrini and Paul A. Bost of Sheppard Mullin Richter & Hampton LLP  
for STX Financing, LLC.

Edd Vasquez for Stacey Michelle Terrazas.  
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Before Taylor, Larkin, and Coggins,  
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

Stacey Michelle Terrazas (“Applicant”) seeks registration on the Principal Register of the standard character mark BAD MOMS UNLIMITED (MOMS disclaimed) for the following goods:

Audio books in the field of parenting, self-help, careers and education; Decorative magnets; Downloadable mobile applications for social networking, resource and information on parenting, self-help, careers and education; E-books featuring information on parenting, self-help, careers and education recorded on computer media;

Prerecorded audio tapes featuring information on parenting, self-help, careers and education; Prerecorded digital audio tape featuring information on parenting, self-help, careers and education; Sunglasses; Visual and audio recordings featuring information on parenting, self-help, careers and education, in International Class 9;

Adhesive-backed cast PVC film for wrapping commercial vehicles for advertising or other promotional purposes; Adhesive labels; Art pictures; Binders; Booklets in the field of parenting, self-help, careers and education; Brochures about parenting, self-help, careers and education; Bumper stickers; Business cards; Calendars; Canvas for painting; Canvas for printing; Catalogs in the field of parenting, self-help, careers and education; Greeting cards; Letterhead paper; Magazines in the field of parenting, self-help, careers and education; Manuals in the field of instructional information on parenting, self-help, careers and education; Memory books; Newsletters about parenting, self-help, careers and education; Note books; Note cards; Pamphlets in the field of parenting, self-help, careers and education; Paper banners; Paper labels; Paper for wrapping and packaging; Picture books; Post cards; Posters; Printed invitations; Printed paper signs; Prints; Song books; Stationery; Stickers; Story books; Art prints; Cardboard boxes; Gift bags; Gift boxes; Graphic art prints; Informational flyers featuring information on parenting, self-help, careers and education; Merchandise bags; Paper bags; Paper boxes; Photo storage boxes, in International Class 16; and

Aprons; Baby bibs not of paper; Caps being headwear; Costumes for use in role-playing games; Coverups; Dresses; Halloween costumes; Hats; Head wear; Headbands; Hoodies; Infant and toddler one piece clothing; Jackets; Jumpsuits; Leg-warmers; Leggings; Lingerie; Pajamas; Pants; Ponchos; Robes; Rompers; Scarves; Shirts; Shoes; Shorts; Skirts; Slippers; Socks; Sweatpants; Sweatshirts; Swimwear; T-shirts; Ties as clothing;

Underwear; Uniforms; Visors being headwear; Wristbands as clothing; Clothing wraps, in International Class 25.<sup>1</sup>

Applicant also seeks registration on the Principal Register of the standard character mark BAD MOMS BIBLE (MOMS disclaimed) for the following services:

Charitable foundation services, namely, providing financial assistance for programs and services of others; Charitable foundation services, namely, providing financial support to mothers in need for payment of educational costs, pregnancy and prenatal costs, childcare costs, utility bills and obtaining medications; Charitable fundraising services; Charitable fundraising services by means of a website where donors search for and make monetary donations to specific charities or projects aimed at helping mothers in need; Charitable fundraising services by means of selling goods to raise funds, in International Class 36.<sup>2</sup>

STX Financing, LLC (“Opposer” or “STX”) opposes the ’487 and ’298 Applications on the grounds that the marks BAD MOMS UNLIMITED and BAD MOMS BIBLE so resemble Opposer’s alleged registered and common-law mark BAD MOMS as to be likely, when used in connection with the goods and services identified in the applications, to cause confusion, to cause mistake, or to deceive, and are likely to dilute the BAD MOMS mark by blurring. Opposer opposes the ’487 Application on the additional ground that Applicant lacked a bona fide intention to use the mark in

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<sup>1</sup> Application Serial No. 87547487 (the “’487 Application”) was filed on July 28, 2017, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a bona fide intention to use the mark in commerce.

<sup>2</sup> Application Serial No. 87547298 (the “’298 Application”) was also filed on July 28, 2017, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a bona fide intention to use the mark in commerce.

commerce in connection with all goods identified in the application except for calendars and notebooks in Class 16 and shirts and T-shirts in Class 25.<sup>3</sup>

The case is fully briefed,<sup>4</sup> and counsel for Opposer appeared at a video hearing before the panel on June 2, 2021.<sup>5</sup> With respect to the '487 Application, we sustain the opposition as to Class 25 on the basis of Opposer's Section 2(d) claim, and we sustain the opposition as to all goods in Class 9, and as to all goods in Class 16 other than calendars and note books, on the basis of Opposer's claim of a lack of a bona fide intention to use. We dismiss the opposition as to the '298 Application.

## **I. The Record and Evidentiary Objections**

### **A. The Record**

The immense record was made almost entirely by Opposer and contains more than 3,000 pages of testimony and documentary evidence. It consists of the pleadings,<sup>6</sup> the

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<sup>3</sup> Opposer's First Amended Consolidated Notice of Opposition (9 TTABVUE 21-28).

<sup>4</sup> Citations in this opinion to the briefs and other docket entries refer to TTABVUE, the Board's online docketing system. *Turdin v. Tribolite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). Specifically, the number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear. Opposer's main brief appears at 48 TTABVUE and its reply brief appears at 53 TTABVUE. Applicant's brief appears at 49 TTABVUE.

<sup>5</sup> Counsel for Applicant advised the Board that he did not intend to be present at the hearing. 61 TTABVUE 2.

<sup>6</sup> The operative pleadings are Opposer's First Amended Consolidated Notice of Opposition, 9 TTABVUE 21-28, and Applicant's Answer to Amended Consolidated Notice of Opposition. 14 TTABVUE 2-7. Applicant denied the salient allegations of Opposer's First Amended Consolidated Notice of Opposition, and interposed two self-styled Affirmative Defenses stating that one or more claims in the First Amended Consolidated Notice of Opposition fail to state a claim upon which relief can be granted, and purporting to reserve the right to amend the Answer to assert additional defenses. Neither of these purported Affirmative Defenses are valid defenses. *See U.S. Olympic Comm. v. Tempting Brands Neth. B.V.*, 2021 USPQ2d 164, at \*4 (TTAB 2021) (failure to state a claim); *Philanthropist.com, Inc. v. Gen.*

file histories of the two opposed applications, by operation of Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1), and the following materials submitted by the parties:

### 1. Opposer's Submissions

Opposer's Notice of Reliance covering Exhibits 1-35 (24 TTABVUE 2-291);<sup>7</sup>

The Testimony Declaration of Rachel Kimbrough, Opposer's Executive Vice President of Business and Legal Affairs and Corporate Counsel, and Exhibits 35-42 thereto (26 TTABVUE 2-573);<sup>8</sup>

The Testimony Declaration of Eddie Egan, a marketing consultant, and previously Opposer's President of Domestic Marketing and Head of Domestic Marketing, and Exhibits 43-60 thereto (28-31 TTABVUE);<sup>9</sup> and

Opposer's Rebuttal Notice of Reliance covering Exhibits 35-76 (45 TTABVUE 2-532).<sup>10</sup>

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*Conf. Corp. of Seventh-Day Adventists*, 2021 USPQ2d 643, at \*4 n. 6 (TTAB 2021), *appeal docketed* (Aug. 6, 2021) (reservation of right to add affirmative defenses).

<sup>7</sup> The parties submitted a Stipulated Protective Order, 7 TTABVUE 2-14, which was accepted by the Board. 8 TTABVUE 1. Exhibit 27 to Opposer's Notice of Reliance was designated as Confidential-Attorneys' Eyes Only under the Stipulated Protective Order, and was filed under seal. 25 TTABVUE.

<sup>8</sup> We will cite the Kimbrough Declaration by paragraph and exhibit number (e.g., "Kimbrough Decl. ¶ 8; Ex. 1") and, where helpful in following our analysis, by TTABVUE page number(s) as well. Exhibit 23 to the Kimbrough Declaration was designated as Confidential-Attorneys' Eyes Only under the Stipulated Protective Order, and was filed under seal. 27 TTABVUE.

<sup>9</sup> We will cite the Egan Declaration in the same manner as the Kimbrough Declaration. Exhibits 45, 49, 54, and 55 to the Egan Declaration were designated as Confidential-Attorneys' Eyes Only under the Stipulated Protective Order, and were filed under seal. 32 TTABVUE.

<sup>10</sup> There was nothing under the page designated as Exhibit 73. 45 TTABVUE 514. "Pursuant to the Board's notice to Opposer . . . that Exhibit 73 to its rebuttal notice of reliance (45 TTABVUE) was incomplete," Opposer submitted a corrected Exhibit 73. 56 TTABVUE 2-6.

## 2. Applicant's Submission

Applicant's Notice of Reliance covering Exhibits A-E (34 TTABVUE 2-82).<sup>11</sup>

### B. Opposer's Evidentiary Objection

Concurrently with the filing of its main brief, Opposer objected to and moved to strike Exhibits A and C to Applicant's Notice of Reliance on the ground that Applicant had failed to produce the referenced materials in discovery. 47 TTABVUE 2-12. Opposer argues that it "specifically requested documents purporting to reflect third-party use during discovery, but Applicant *refused* to produce them." 47 TTABVUE 2 (emphasis in original). Opposer summarizes its argument as follows:

The Federal Rules of Civil Procedure and notions of fairness preclude parties from relying on information not disclosed in response to discovery requests. Applicant's reliance on *Sheetz of Delaware, Inc. v. Doctor's Associates Inc.*, which holds that "[a] party need not investigate third-party use to respond to discovery requests," to exonerate its failure to produce these documents is misplaced. 108 USPQ2d 1341, 1348 (TTAB 2013). Furthermore, the Board should reevaluate and overrule its decision in *Sheetz*, which is inconsistent with the purpose of the Federal Rules governing discovery and evidence and promotes unfairness and gamesmanship.

*Id.* at 2-3.

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<sup>11</sup> Opposer moved to strike all of the exhibits to Applicant's Notice of Reliance on various procedural grounds. 35 TTABVUE 2-6. The Board denied the motion as to Exhibits B, C, and D, 40 TTABVUE 5-9, but granted it as to Exhibits A and E to the extent of requiring Applicant to file an amended notice of reliance "indicating the relevance of the evidence with sufficient specificity." *Id.* at 4, 10. Applicant's Amended Notice of Reliance purported to cure those deficiencies. 41 TTABVUE 2-12, 17-18. Concurrently with the filing of the Amended Notice of Reliance, Applicant moved to reopen her trial period to introduce evidence of USPTO office actions on a number of Opposer's pleaded pending applications to register BAD MOMS, and a notice of opposition filed by Opposer against a third-party application. The Board denied the motion. 46 TTABVUE 3.

Opposer cites Rule 37 (c)(1) of the Federal Rules of Civil Procedure and a number of Board cases for the general proposition that a party may not rely at trial on evidence that it did not produce in discovery in response to requests seeking it. *Id.* at 3-4. Opposer argues that Applicant responded to a request for production seeking “[a]ll documents relating to the third-party marks on which Applicant intends to rely upon [sic] in this proceeding,” *id.* at 4, by stating that “she ‘is unable to comply with [RFP] No. 57 **because no such documents exist**. A diligent search and a reasonable inquiry have been made in an effort to comply with this request.” *Id.* (quoting 24 TTABVUE 263 (emphasis supplied by Opposer)). Opposer also argues that Applicant identified several third-party uses in response to one of Opposer’s interrogatories, but then made of record “entirely *different* third-party uses and registrations she never disclosed in discovery.” *Id.* at 5 (emphasis in original). Opposer concludes that Applicant’s various objections do not support her incomplete discovery responses, *id.*, and that “the Board should strike Applicant’s evidence at issue and preclude her from relying on it.” *Id.*

Opposer further argues that the Board’s decision in *Sheetz*, which permitted an opposer to use evidence of third-party uses to show that the applicant’s mark was generic even though the evidence had not been produced in discovery, is distinguishable because this is not a genericness case. *Id.* at 6. Opposer argues alternatively that the Board should overrule *Sheetz* because it is “inconsistent with the Federal Rules governing discovery and evidence and promotes unfairness and gamesmanship,” *id.*, and because “*Sheetz* and its progeny promote unfair surprise at

trial and cannot be reconciled with the fundamental purpose of inter partes discovery.” *Id.* at 7.

Citing *Sheetz*, Applicant responds that “Opposer was not put at a disadvantage because the materials introduced by Applicant were equally accessible to Opposer inasmuch as they were publicly available via the Internet,” and that “it is common practice for parties to introduce evidence of third-party registrations and other evidence to third-party use to demonstrate that a mark or a portion of a mark is weak.” 50 TTABVue 3. Applicant also argues that “it is well established that, in Board proceedings, a party is under no obligation to investigate third parties in order to respond to discovery requests.” *Id.* (citing *Rocket Trademarks Pty Ltd. v. Phard S.p.A.*, 98 USPQ2d 1066, 1072 (TTAB 2011)). Applicant argues that Exhibits A and C to her Notice of Reliance “were not in the possession of Applicant during the discovery period” and that “all the documents were publicly available and accessible via the Internet.” *Id.* Finally, Applicant argues that “Opposer was not placed at a disadvantage” because its motion to strike Applicant’s notice of reliance “allowed for an extended period of time between the filing of Applicant’s notice of reliance and Opposer’s filing of its [sic] rebuttal notice of reliance,” *id.*, and that Opposer “had notice of the publicly available documents from February, 4, 2020, or nearly nine months prior to filing its [sic] rebuttal notice of reliance on October 25, 2020, and eleven months prior to filing its [sic] opening brief on December 28, 2020.” *Id.* at 4.

In its reply brief on the motion, Opposer argues that “[b]y Applicant’s reasoning, *nothing* available on the internet, which is virtually boundless, can result in unfair



surprise to Opposer. The absurdity of this contention is clear on its face.” 54 TTABVUE 2. Opposer also argues that “Applicant’s argument presumes that Opposer can read Applicant’s mind as to what types of third-party uses she believes to be relevant and may rely upon. The Federal Rules provide for discovery precisely so no such mindreading is necessary.” *Id.* at 3. Opposer claims that Applicant’s position “is particularly unavailing with respect to the third-party registrations made of record as Exhibit A to her notice of reliance” because Applicant offers no “authority holding that it is ‘common practice’ to rely on such registrations” and that “nothing but for timely disclosure during discovery could have prepared Opposer for Applicant’s novel argument based on these third-party registrations.” *Id.*

Opposer also argues that “Applicant does not, and cannot, contend that this evidence was not available to her during the discovery period when Opposer requested its production” and that “due to *Sheetz*, Applicant was incentivized to delay her collection of third-party materials so that she would not have to disclose them during discovery.” *Id.* According to Opposer, “Applicant’s statement that she was not in possession of the relevant materials during the discovery period may be literally true, but it is a fiction that should be disincentivized, not encouraged.” *Id.* at 3-4.

We decline Opposer’s request to overrule “*Sheetz* and its progeny,” 47 TTABVUE 7, because “a party need not investigate third-party use in response to discovery requests.” *Rocket Trademarks*, 98 USPQ2d at 1071. In *Rocket Trademarks*, the Board addressed opposer’s claim that applicant’s mark ZU ELEMENTS for various goods in Classes 16, 18, and 25 was likely to be confused with the opposer’s mark ELEMENT

for similar goods. The opposer objected to the introduction of exhibits to a testimony deposition consisting of “third-party website materials, a list of registrations taken from the USPTO TESS database, and certified copies of third-party registrations” because “these documents were not previously produced in response to opposer’s discovery requests.” *Id.*

The Board rejected that objection, holding that

applicant had no duty to conduct an investigation of third-party use during discovery and, certainly, applicant’s attempt to present evidence of third-party use of the term ELEMENT should not have come as a surprise because it is common practice to introduce third-party use to demonstrate that a mark is weak and, therefore, entitled to only a narrow scope of protection. The documents introduced as exhibits to [the] deposition were equally accessible to opposer, i.e., they were publicly available via the internet. Finally, opposer had thirty days between the close of applicant’s testimony period and the opening of its rebuttal period to prepare any rebuttal against the evidence of third-party use. Accordingly, opposer’s objection to the . . . testimony deposition exhibits on the basis that the documents were not previously produced in response to opposer’s discovery requests is overruled.

*Id.* at 1072. For the reasons set forth in *Rocket Trademarks*, we overrule Opposer’s objections to Applicant’s third-party use and registration evidence, and have considered it in our decision.

## **II. Background and General Factual Findings<sup>12</sup>**

Opposer is in the motion picture industry, and produced and distributed the R-rated motion pictures entitled BAD MOMS (2016) and A BAD MOMS CHRISTMAS (2017). Egan Decl. ¶ 7 (28 TTABVUE 4).

### **The BAD MOMS Motion Picture**

The BAD MOMS motion picture, starring Mila Kunis, Kathryn Hahn, and Kristen Bell, was theatrically released in the United States on July 29, 2016. Egan Decl. ¶ 8.<sup>13</sup> The film is “about a group of mothers sharing humorous adventures while juggling motherhood and work at the same time.” Egan Decl. ¶ 8. On the motion picture website IMDb (imbd.com), a plot summary attributed to Opposer described the storyline as “When three overworked and under-appreciated moms are pushed beyond their limits, they ditch their conventional responsibilities for a jolt of long overdue freedom, fun, and comedic self-indulgence.” Egan Decl. ¶ 8; Ex. 43 (28 TTABVUE 49).

The theatrical release of BAD MOMS in July 2016 was preceded by a marketing campaign involving a media spend in excess of \$23 million. Egan Decl. ¶ 8. We display below two examples of promotional materials for the BAD MOMS motion picture:

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<sup>12</sup> This section includes some general findings regarding the parties and their respective marks, businesses, goods, and services, which we present mostly in chronological order because Opposer must show on its Section 2(d) claim that it acquired proprietary rights prior to Applicant’s July 28, 2017 filing date and Opposer’s dilution claim hinges entirely on whether it can prove that its claimed BAD MOMS mark became famous before that date. We make additional findings below in connection with specific issues.

<sup>13</sup> Although Mr. Egan does not appear to have become employed by Opposer until after the theatrical release of BAD MOMS, Egan Decl. ¶ 4, he testified that he worked on the marketing campaign for the film as an independent marketing consultant for Opposer. Egan Decl. ¶ 5.



Egan Decl. ¶ 12; Ex. 46 (28 TTABVUE 163).



Egan Decl. ¶ 12; Ex. 46 (28 TTABVUE 164).

Some of the promotional materials encouraged women to “Party Like a Mother,” and offered cocktail recipes, drinking games, and other tips for a “Bad Moms Night In.” Egan Decl. ¶ 12; Ex. 46 (28 TTABVUE 166-93). We display an example below:

LADIES: PLAN YOUR GIRLS' NIGHT AT HOME WITH A

# BAD MOMS NIGHT IN

AVAILABLE ON  
DIGITAL HD, BLU-RAY™,  
DVD & ON DEMAND

Whether you're a working mom, a single mom, a stay-at-home mom - or someone who just has a mom - gather together the girls for a fun evening in and watch BAD MOMS now on Digital HD, Blu-Ray™ & DVD.

Don't miss the Deleted Scenes, Gag Reel and Interviews with the Cast and their Moms exclusive to home entertainment!

### 1. BRING BAD MOMS HOME

Own it now on Digital HD, Blu-Ray, DVD & On Demand

### 2. PLAN YOUR NIGHT IN

Getting the girls together for a fun night in is easy with these simple steps:

- ORGANIZE GIRLS' NIGHT IN:** Invite your friends
- ORGANIZE FOOD & COCKTAILS:**
- FUN THINGS TO DO:**
  - Learn How to Make a Hot Mama
  - Watch the Video
  - Play the Bad Moms Drinking Game
  - Play Which Bad Mom Said What?
  - Take the Which Bad Mom Are You? Quiz

### 3. PARTY LIKE A MOTHER:

Make this a night to remember! Have fun with these ideas!

Egan Decl. ¶ 12; Ex. 46 (28 TTABVUE 168).

The theatrical release of BAD MOMS received coverage in various media articles. Egan Decl. ¶ 22; Ex. 57 (30 TTABVUE 71-73, 76-85, 112-15, 123, 127-29, 139-43, 147-50, 168-70, 178-79, 183-89, 193-98, 209-10, 222, 225-30, 239-63, 267-69, 276-84). Opposer also engaged in co-promotions with other brand owners in connection with the release of BAD MOMS. Egan Decl. ¶ 8; Exs. 46-47, 49 (28 TTABVUE 169, 172-73, 177-79, 182, 185-86, 188-90, 192-94, 251-52; 32 TTABVUE 44-95), 52 (29 TTABVUE

32); Kimbrough Decl. ¶ 10; Ex. 37 (27 TTABVUE 86-105, 109-26, 129-39, 158-67, 186-203, 222-30). We display two examples below:<sup>14</sup>



Egan Decl. ¶ 12; Ex. 46 (28 TTABVUE 197).



Egan Decl. ¶ 12; Ex. 46 (28 TTABVUE 195).

The BAD MOMS motion picture grossed over \$113 million in box office revenues in the United States. Egan Decl. ¶ 8. The film and its soundtrack were released on DVD and Blu-Ray on November 1, 2016. Egan Decl. ¶¶ 8, 14; Exs. 46-48 (28 TTABVUE 283-88, 295-308).

Mr. Egan testified that “[s]ince the launch of the BAD MOMS brand in 2016, Opposer has directly, and indirectly through licensees, been continuously using the

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<sup>14</sup> Many of Opposer’s co-promotions discussed and shown in the Egan Declaration involved the sequel to BAD MOMS entitled BAD MOMS CHRISTMAS. We discuss them below.



BAD MOMS mark in U.S. commerce in connection with the *Bad Moms* motion picture and related goods and services, and has expanded use of the mark.” Egan Decl. ¶ 13. Opposer has licensed the use of the mark for creation and sale of merchandise through outlets such as Spencer’s and Zazzle. Egan Decl. ¶ 15; Ex. 52 (29 TTABVUE 73-78, 83-89, 91-101, 104-56).

Opposer first used the BAD MOMS mark in connection with beverageware at least as early as June 14, 2016. Kimbrough Decl. ¶ 10.<sup>15</sup> We display below examples of such beverageware and other goods bearing the BAD MOMS mark that were available in 2016, or at some time prior to Applicant’s July 28, 2017 filing date:



Egan Decl. ¶ 15; Ex. 52 (29 TTABVUE 75).

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<sup>15</sup> Opposer was a party to two agreements providing for the production of promotional merchandise whose terms began prior to Applicant’s July 28, 2017 filing date. Kimbrough Decl. ¶ 10; Ex. 37. These agreements were designated Confidential-Attorneys’ Eyes Only, and were filed under seal. 27 TTABVUE.



Egan Decl. ¶ 15; Ex. 52 (29 TTABVUE 77).



Egan Decl. ¶ 15; Ex. 52 (29 TTABVUE 83).





Egan Decl. ¶ 15; Ex. 52 (29 TTABVUE 84).

Opposer subsequently expanded the collateral licensing of the BAD MOMS mark into various other goods, including t-shirts, an example of which we depict below:



Let's Be Bad Moms T-Shirt

29 TTABVUE 105.

### The Sequel A BAD MOMS CHRISTMAS

Opposer announced in December 2016 that a sequel to BAD MOMS would be made. Egan Decl. ¶ 9.<sup>16</sup> Opposer began promoting the sequel in late December 2016. Egan Decl. ¶ 9. On December 23, 2016, an article entitled “Bad Moms’ Christmas Sequel in the Works for Late 2017 Release” appeared in VARIETY under a scene that appeared in media coverage of the BAD MOMS film:



CREDIT: COURTESY OF STX ENTERTAINMENT

Egan Decl. ¶ 9; Ex. 44 (28 TTABVUE 112). The article stated that “STX Entertainment is launching ‘A Bad Moms Christmas’ as a sequel to its hit comedy ‘Bad Moms,’ with a November 3, 2017 release date.” Egan Decl. ¶ 9; Ex. 44 (28 TTABVUE 112). The article further stated that “Jon Lucas and Scott Moore are returning to direct from their own script with stars Mila Kunis, Kristen Bell and

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<sup>16</sup> Mr. Egan testified that the announcement was made “[s]hortly after release of *Bad Moms* in July 2016,” Egan Decl. ¶ 9, but a December 27, 2016 article in FORBES stated “Since the news dropped on Friday night, I’m a little late to the party. But yeah, STX Entertainment announced that we will be getting a true *Bad Moms* sequel sooner rather than we thought.” Egan Decl. ¶ 9; Ex. 42 (28 TTABVUE 128).

Kathryn Hahn reprising their characters,” that the “film will be produced by Suzanne Todd and executive produced by Bill Block; the duo produced ‘Bad Moms,’” and that “[i]n ‘A Bad Moms Christmas,’ the trio must deal with the stresses of their own mothers visiting for the holidays.” Egan Decl. ¶ 9; Ex. 44 (28 TTABVUE 112).<sup>17</sup> Kristen Bell announced the sequel on the same day via Twitter:



Egan Decl. ¶ 9; Ex. 44 (28 TTABVUE 113).

A December 27, 2016 article in FORBES entitled “Bad Moms Christmas’ Aims to Avoid Trend of Disappointing Comedy Sequels” also displayed the scene from BAD MOMS shown above and stated that in the sequel the “stars of *Bad Moms* (Mila Kunis, Kristen Bell, Kathryn Hahn, etc.) will reunite with writer/directors Jon Lucas and

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<sup>17</sup> This article and others also noted that Opposer had announced the production of a “Bad Dads” motion picture, but that film was never made. A FORBES article in June 2017 stated that “*Bad Dads* is no more (for now).” Egan Decl. ¶ 9; Ex. 44 (28 TTABVUE 135).

Scott Moore along with produces Suzanne Todd and executive producer Bill Block.” Egan Decl. ¶ 9; Ex. 44 (28 TTABVUE 128).

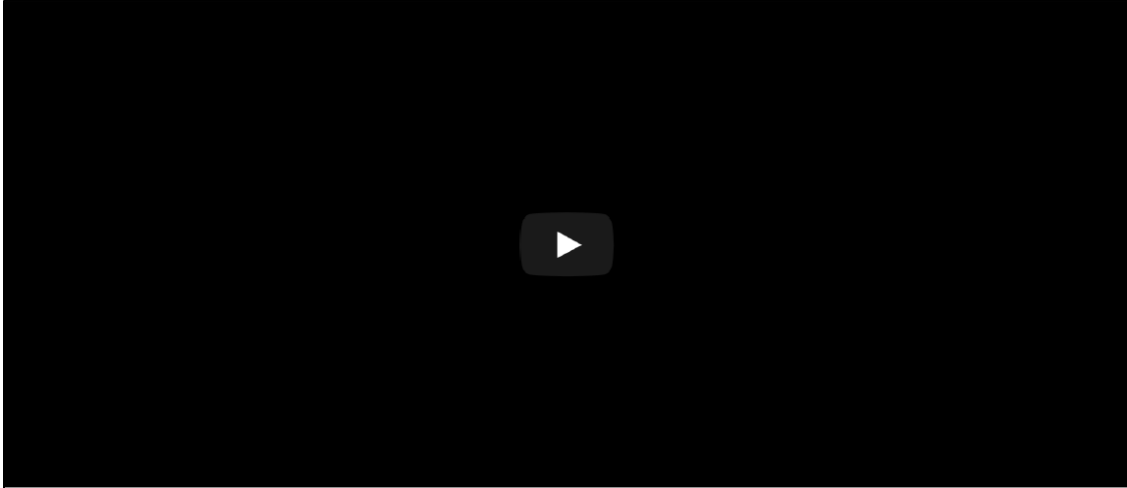
On May 2, 2017, an article on georgiaentertainmentnews.com entitled “Filming Begins on STXfilms’ A Bad Moms Christmas,” stated that filming had begun in Georgia on the sequel, in which “the bad moms receive a holiday visit from their own mothers, in new roles portrayed by Cheryl Hines (Kiki’s mom), with Christine Baranski (Amy’s mom) and Susan Sarandon (Carla’s mom),” and that the sequel would be released domestically on November 3, 2017. Egan Decl. ¶ 9; Ex. 44 (28 TTABVUE 123). On May 3, 2017, an article appeared on the website of slashfilm.com regarding the release of A BAD MOMS CHRISTMAS in November 2017. Egan Decl. ¶ 22; Ex. 57 (30 TTABVUE 119-20).

On June 28, 2017, one month before Applicant’s filing date, an article entitled “Trailer: Mila Kunis and Kristen Bell’s ‘A Bad Moms Christmas’ May be a Breakout Sequel” appeared online in FORBES. Egan Decl. ¶ 9; Ex. 44 (28 TTABVUE 134). The article reported on the trailer for what the article described as the “second installment in what is now STX’s crown jewel,” Egan Decl. ¶ 9; Ex. 44 (28 TTABVUE 134), and displayed the following screenshots from the trailer:





Egan Decl. ¶ 9; Ex. 44 (28 TTABVUE 134-35). The article included a link to the trailer as shown below:



(this is a Red-Band trailer, which means if you're watching this at work do wear headphones)

Egan Decl. ¶ 9; Ex. 44 (28 TTABVUE 136).

The same day, articles about A BAD MOMS CHRISTMAS also appeared in ELLE and USA TODAY. The USA TODAY article was entitled “See ‘Bad Moms’ reject ‘Christmas’ perfection in exclusive first photos” and appeared on usatoday.com. Egan Decl. ¶ 9; Ex. 44 (28 TTABVUE 143-44). In addition to the two pictures displayed in the FORBES article and shown above, the USA TODAY article displayed the scene from BAD MOMS shown below:



Egan Decl. ¶ 9; Ex. 44 (28 TTABVUE 144). The article discussed filming of various scenes from *A BAD MOMS CHRISTMAS* in a shopping mall, and quoted Mila Kunis, Kristen Bell, and Kathryn Hahn about the experience of filming in the presence of young children and after they were removed from the set, giving Santa Clause a lap dance. Egan Decl. ¶ 9; Ex. 44 (28 TTABVUE 143). The article stated that

This is now expected behavior for the stars of *Bad Moms*, whose drink-fueled, rowdy rebellion against the pressures of perfect motherhood was the R-rated breakout hit of 2016. After the low-budget comedy shot to \$113 million, writer/directors Jon Lucas and Scott Moore brought back the trio of mothers — Kiki (Bell), Amy (Kunis) and Carla (Hahn) — who are once again pushed to the point beyond caring. . . . [T]his time the moms are fighting back against holiday stress and the expectation of making the season perfect for their families.

Egan Decl. ¶ 9; Ex. 44 (28 TTABVUE 143).

The ELLE article was entitled “Watch the *A Bad Moms Christmas* Teaser Trailer,” and appeared on elle.com. Egan Decl. ¶ 9; Ex. 44 (28 TTABVUE 157-58). It stated that “The *A Bad Moms Christmas* trailer is out, and frankly, the casting director should get some kind of an award.” Egan Decl. ¶ 9; Ex. 44 (28 TTABVUE 157). Like the article in FORBES, the ELLE article included a link to the trailer. Egan Decl. ¶ 9; Ex. 44 (28 TTABVUE 157). The article also discussed the roles played by new stars Susan Sarandon, Cheryl Hines, Christine Baranski, and others, and described some humorous scenes from the sequel. Egan Decl. ¶ 9; Ex. 44 (28 TTABVUE 157). The author concluded that “I’m slow clapping right now. Somebody give this movie a Mom medal.” Egan Decl. ¶ 9; Ex. 44 (28 TTABVUE 157). An article in THE NEWNAN TIMES-HERALD (GA) entitled “Bad Moms’ filming in Newnan” appeared on the times-

herald.com website on June 9, 2017 and discussed the filming of A BAD MOMS CHRISTMAS at various locations in Georgia. Egan Decl. ¶ 22; Ex. 57 (30 TTABVUE 109-111).

Opposer's media spend promoting the theatrical release of A BAD MOMS CHRISTMAS was nearly \$20 million, Egan Decl. ¶ 9, and the sequel's release received media coverage. Egan Decl. ¶ 22; Ex. 57 (30 TTABVUE 74-75, 86-103, 119-20, 135-38, 144-46, 151-57, 163-65, 173-74, 190-92, 203-08, 211-15, 218-19, 223-24, 235-38, 241-58, 264-66, 270-75, 285-92). Opposer also engaged in a number of cross promotions with other brand owners preceding or in connection with the sequel's release. Egan Decl. ¶ 10; Exs. 44, 46 (28 TTABVUE 93-99, 114-22, 149-54, 200-01, 205, 208-24, 240-43, 246). Opposer entered into multiple promotional and merchandise licensing agreements relating to A BAD MOMS CHRISTMAS. Kimbrough Decl. ¶ 10; Ex. 37 (27 TTABVUE 3-85, 120-28, 140-57, 204-21).

### **Opposer's Registrations and Applications**

Opposer owns three registrations of BAD MOMS in standard characters for "cosmetics" (Registration No. 5567301), "all-purpose carrying bags" (Registration No. 5567305), and "beverageware, bottle stoppers specifically adapted for use with wine bottles, coasters not of paper or textile, cocktail shakers, flasks, and water bottles sold empty" (Registration No. 5567306). Kimbrough Decl. ¶ 8; Ex. 35.<sup>18</sup> At the time of trial, Opposer also owned multiple pending applications to register BAD MOMS in

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<sup>18</sup> Opposer also owns a registration of BAD DADS in standard characters for beer (Registration No. 4922649), which it acquired by assignment, Kimbrough Decl. ¶¶ 8, 12; Exs. 35; 38, but as discussed below, we will focus our analysis on Opposer's BAD MOMS mark.



standard characters for a wide variety of goods in Classes 3, 9, 18, 21, 25, 26, and 33, and for services in Classes 41, and to register BADMOMLIFE in standard characters for a wide variety of goods in Classes 9, 18, and 25, and for services in Classes 41 and 43. Kimbrough Decl. ¶ 9; Ex. 36. Applicant's '487 Application was cited against Opposer's Class 9 and Class 25 applications. Kimbrough Decl. ¶ 21.

### **Applicant and Her Marks**

The record contains virtually no information about Applicant and her business because she did not submit a testimony declaration and Opposer did not depose her. Applicant is an individual who resides in Friendswood, Texas and who filed the '487 and '298 Applications on July 28, 2017, almost exactly one year after the theatrical release of BAD MOMS. Applicant alone was involved in the selection and adoption of the marks. 24 TTABVUE 165 (Applicant's Responses to Opposer's Interrogatory Nos. 6-7). She "was aware of the *Bad Moms* motion picture at the time [she] applied for the trademarks," *id.* at 179 (Applicant's Supplemental Response to Opposer's Interrogatory No. 8), and had "learned and knew about the motion picture after seeing advertising for the movie." *Id.* (Applicant's Supplemental Response to Opposer's Interrogatory No. 8). She was aware of the theatrical release of BAD MOMS before she selected, applied to register, and used her marks. *Id.* at 227-31 (Applicant's Responses to Opposer's Request for Admission Nos. 7-12, 25-36).

### III. Entitlement to a Statutory Cause of Action<sup>19</sup>

A plaintiff's entitlement to a statutory cause of action for opposition or cancellation must be established in every inter partes case. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, at \*3 (Fed. Cir. 2020), *reh'g en banc denied*, 981 F.3d 1083, 2020 USPQ2d 11438 (Fed. Cir. 2020), *petition for cert. filed* (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 109 USPQ2d 2061, 2067 n.4 (2014)). Opposer may oppose Applicant's applications if such opposition is within the zone of interests protected by the statute, 15 U.S.C. § 1063, and Opposer has a reasonable belief in damage that is proximately caused by registration of the marks. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at \*6-7 (Fed. Cir. 2020), *cert. denied*, \_\_\_ U.S. \_\_\_ (2021).

Applicant does not dispute Opposer's entitlement to a statutory cause of action, and we find that it "is established with respect to its likelihood of confusion and dilution claims by its registrations" of its BAD MOMS marks, "which the record shows to be valid and subsisting, and owned by Opposer." *N.Y. Yankees P'ship v. IET Prods. & Servs., Inc.*, 114 USPQ2d 1497, 1501 (TTAB 2015) (citing *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000)), and by the fact that examination of two of Opposer's pending applications to register BAD MOMS

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<sup>19</sup> Board decisions have previously analyzed the requirements of Sections 13 and 14 of the Trademark Act under the rubric of "standing," and Opposer here has done so as well. 48 TTABVUE 21 (arguing that "Opposer Has Standing"). Despite the change in nomenclature, the substance of the analysis of this issue in our prior decisions and those of the Federal Circuit interpreting Sections 13 and 14 remains applicable. *See Spanishtown Enters., Inc. v. Transcend Res., Inc.*, 2020 USPQ2d 11388, at \*2 (TTAB 2020).

has been suspended because the mark in Applicant's '487 Application has been cited as a potential bar to registration of two of Opposer's marks. Kimbrough Decl. ¶¶ 20-21. *See Fiat Grp. Autos. S.p.A. v. ISM Inc.*, 94 USPQ2d 1111, 1112 (TTAB 2010); *cf. Australian Therapeutic Supplies*, 2020 USPQ2d 10837, at \*4 ("A petitioner may demonstrate a real interest and reasonable belief of damage where the petitioner has filed a trademark application that is refused registration based on a likelihood of confusion with the mark subject to cancellation.").

Because Opposer has shown entitlement to a statutory cause of action on its Section 2(d) and Section 43(c) claims, "it has the right to assert any other grounds," including its lack of bona fide intention to use claim. *Id.* (citing *Corporacion Habanos SA v. Rodriguez*, 99 USPQ2d 1873, 1877 (TTAB 2011)).

#### **IV. Opposer's Likelihood of Dilution Claim**

We begin with Opposer's claim of dilution by blurring under Section 43(c) because it potentially provides Opposer the broadest possible relief. Unlike success on Opposer's lack of intention to use claim, success on its dilution and likelihood of confusion claims would preclude Applicant from filing new applications based on use or a bona fide intention to use, and Opposer can prevail on its dilution claim "regardless of the presence or absence of actual or likely confusion [or] of competition . . . ." 15 U.S.C. § 1125(c)(1).

"The Trademark Act provides for a cause of action for the dilution of famous and distinctive marks:

[T]he owner of a famous mark that is distinctive, inherently or through acquired distinctiveness, shall be

entitled to an injunction against another person who, at any time after the owner's mark has become famous, commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark, regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury.

*TiVo Brands LLC v. Tivoli, LLC*, 129 USPQ2d 1097, 1103 (TTAB 2018) (quoting 15 U.S.C. § 1125(c)(1)). “Section 13(a), 15 U.S.C. § 1063(a), makes dilution by blurring or tarnishment under Section 43(c) a basis for opposing registration.” *Id.*

“A successful claim for federal trademark dilution by blurring under Section 43(c) of the Trademark Act requires that a plaintiff plead and prove the following in a Board proceeding:

1. Plaintiff owns a famous mark that is distinctive;<sup>20</sup>
2. Defendant is using a mark in commerce that allegedly dilutes plaintiff's famous mark;
3. Defendant's use of its mark began after plaintiff's mark became famous; and
4. Defendant's use of its mark is likely to cause dilution by blurring.”

*Id.*

“A threshold question in a federal dilution claim is whether the mark at issue is ‘famous.’” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1724 (Fed. Cir. 2012). The requirement of proof of ownership of a “famous” mark is an exacting one following the amendment in 2006 of the dilution provisions of the

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<sup>20</sup> We find below in our analysis of the issue of Opposer's priority on its Section 2(d) claim that the BAD MOMS mark is distinctive for motion pictures because it has been used in a series of motion pictures.

Trademark Act through the Trademark Dilution Revision Act (“TDRA”). “Under the TDRA, a mark is famous if it ‘is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark’s owner.” *Coach Servs.*, 101 USPQ2d at 1724 (quoting 15 U.S.C. § 1125(c)(2)(A)).

“It is well-established that dilution fame is difficult to prove.” *Id.* “An opposer must show that, when the general public encounters the mark ‘in almost any context, it associates the term, at least initially, with the mark’s owner,” *TiVo Brands*, 129 USPQ2d at 1103 (quoting *Coach Servs.*, 101 USPQ2d at 1725), and that the mark has “become a ‘household term [with] which almost everyone is familiar.” *Id.* at 1112 (quoting *Toro Co. v. ToroHead, Inc.*, 61 USPQ2d 1164, 1181 (TTAB 2001)). Here, Opposer has the particularly daunting task of proving that the BAD MOMS mark became a “household term” in a period of a little more than a year before Applicant’s July 28, 2017 filing date.<sup>21</sup>

In determining whether Opposer’s BAD MOMS mark is famous, we “may consider all relevant factors, including the following:

- (i) The duration, extent, and geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties.
- (ii) The amount, volume, and geographic extent of sales of goods or services offered under the mark.
- (iii) The extent of actual recognition of the mark.

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<sup>21</sup> Each claim to fame must be assessed on its own merits, but Opposer has not cited, and we are not aware of, any case in which a mark has been found to be famous for purposes of a dilution claim based on use for a period of that length.

(iv) Whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register.”

*Id.* at 1104 (quoting 15 U.S.C. § 1125(c)(2)(A)). We address each factor below.

**A. The Duration, Extent, and Geographic Reach of Advertising and Publicity of the BAD MOMS Mark**

Opposer argues that it “heavily promoted and publicized the BAD MOMS mark such that it attained fame in a relatively brief timeframe.” 48 TTABVUE 46. Opposer points to its expenditure of “at least \$26 million dollars to advertise, market, and promote *Bad Moms* and more than \$20 million to advertise, market, and promote *A Bad Moms Christmas* for theatrical release and home/on-demand/streaming release,” *id.* (citing Egan Decl. ¶ 20);<sup>22</sup> its social media exposure and following “[a]s of June 13, 2019,” *id.* (citing Egan Decl. ¶ 21; Ex. 56); unsolicited media coverage of the films, *id.* (citing Egan Decl. ¶¶ 9, 22; Ex. 44, 57); Opposer’s licensing and promotional agreements, *id.* (citing Kimbrough Decl. ¶ 11; Ex. 37); and the industry awards received by BAD MOMS. *Id.* (citing Egan Decl. ¶ 9; Ex. 58).<sup>23</sup>

Applicant responds that “Opposer has not proven it’s [sic] BAD MOMS mark ranks among the small amount of marks accorded the ‘famous’ status for purposes of

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<sup>22</sup> The specific figures were designated Confidential-Attorneys’ Eyes Only and were filed under seal. Egan Decl. ¶ 20; Ex. 55 (32 TTABVUE 124-25). Mr. Egan testified that the media spend for each film was “a conservative estimate; the amounts were likely well more than this,” Egan Decl. ¶ 20, but the reported confidential figures are precise to the dollar and we have no basis to find that they “were likely well more than” what was reported.

<sup>23</sup> We will consider the pre-July 28, 2017 media coverage of the BAD MOMS motion picture, and the awards that it has received, under the third fame factor, the extent of actual recognition of the BAD MOMS mark. *See TiVo Brands*, 129 USPQ2d at 1104-05; *Nike, Inc. v. Maher*, 100 USPQ2d 1018, 1024-26 (TTAB 2011).

a dilution claim.” 49 TTABVUE 26. Applicant argues that “[f]ame for dilution purposes requires direct evidence of consumer recognition,” and that “Opposer offered no evidence of a powerful association, that when the public encounters the BAD MOMS trademark in any context, it recognizes and associates it only with Opposer’s motion picture services or goods.” *Id.*

Opposer’s cited evidence of the advertising and promotion of its BAD MOMS mark and its recognition through social media encompasses a time period that begins before Applicant’s filing date and ends afterwards. All of the \$26 million spent in support of the theatrical and home entertainment releases of BAD MOMS was spent between May 4 and November 27 in 2016, but the \$20 million in expenditures in support of the theatrical and home entertainment releases of A BAD MOMS CHRISTMAS occurred between June 28, 2017 (one month before Applicant’s filing date) and October 30, 2017 (theatrical release), as well as between January 22, 2018 and February 18, 2018 (home entertainment release). Egan Decl. ¶ 20; Ex. 55 (29 TTABVUE 181). The home entertainment release expenditures are irrelevant to show that the BAD MOMS mark became famous before July 28, 2017, and we cannot determine what portion of the theatrical release expenditures for A BAD MOMS CHRISTMAS was made prior to that date. Without such information, those theatrical release expenditures have little, if any, probative value in our analysis of whether BAD MOMS became famous before July 28, 2017. *Cf. N.Y. Yankees P’ship*, 114 USPQ2d at 1503 (testimony regarding \$1.5 billion sales figures for period between 1995 and 2015 faulted for not specifying

“how much of that \$1.5 billion in sales was from the time frame most relevant for dilution – that is, before Applicant filed its application in 2008 . . .”).

In addition, as Opposer acknowledges, all of the social media pages list the number of Opposer’s followers as of June 13, 2019. Egan Decl. ¶ 21; Ex. 56 (29 TTABVUE 183-347; 30 TTABVUE 2-69). These figures are hearsay when offered as evidence of Opposer’s social media presence, but even if we accepted them at face value, they tell us nothing about Opposer’s social media presence as of July 28, 2017. Accordingly, Opposer’s social media evidence is not probative of the fame of its mark for dilution purposes.

Opposer’s expenditure of \$26 million in a little more than six months in 2016 for “advertisements and banners, online and social media advertisements, and promotional partnerships with other brands,” Egan Decl. ¶ 12, seems to be substantial, but Mr. Egan did not provide (1) a breakdown of the total media spend among these categories of expenditures, (2) information about the number of such materials, or about when, where, and for how long they were displayed, or, most importantly, (3) information as to how the aggregate figure compares to the expenditures made in support of the numerous other films that were released in 2016, other films released by Opposer, or other successful motion pictures. We thus cannot determine whether Opposer’s expenditures were of such a magnitude to establish



that by July 28, 2017, the BAD MOMS mark stood out from the crowd of the numerous other films that were released in 2016 or in prior years.<sup>24</sup>

Opposer's 2016 expenditures are also neither comparable in absolute terms to the advertising expenditures in several dilution cases in which marks have been found to be famous, nor "long-running," as Opposer claims, 48 TTABVUE 47, in comparison to the expenditures in those cases. *See, e.g., Chanel, Inc. v. Makarczyk*, 110 USPQ2d 2013, 2020-21 (TTAB 2014) (advertising expenditures of \$275 million between 2000-2007 and \$200 million between 2009-2012 found to be substantial and to support a finding that the opposer's CHANEL mark was famous); *Nike*, 100 USPQ2d at 1026 (advertising expenditures of approximately \$6 billion over a 20-year period were "extensive and widespread" and supported a finding that the opposer's JUST DO IT mark was famous); *UMG Recordings, Inc. v. Mattel, Inc.*, 100 USPQ2d 1868, 1887 (TTAB 20011) (extensive nationwide promotion of the opposer's MOTOWN mark for musical recordings and entertainment since the 1960s supported a finding that the mark was famous in 2011); *Nat'l Pork Bd. v. Supreme Lobster & Seafood Co.*, 96 USPQ2d 1479, 1495 (TTAB 2010) (expenditures of more than \$25 million annually, and more than \$550 million dollars total over a 20-year period of use of the opposer's mark THE OTHER WHITE MEAT, supported a finding that the mark was famous).

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<sup>24</sup> As discussed below, published reports ranking BAD MOMS in terms of its box office revenues relative to those of other films released in 2016 stated that BAD MOMS was never the top-grossing film at any time in 2016 and declined over time in rankings against other films.

On this record, we find that Opposer's advertising expenditures do not support a finding that its BAD MOMS mark had become famous by July 28, 2017.<sup>25</sup>

**B. The Amount, Volume, and Geographic Extent of Sales of Goods or Services under the BAD MOMS Mark**

Opposer argues that “[t]he *Bad Moms* Pictures were box office smashes,” 48 TTABUVE 47, but only the revenues from BAD MOMS count in our analysis of dilution fame. According to Mr. Egan, Bad Moms grossed \$113 million in the United States, all of which revenues appear to have been realized prior to Applicant's filing date. Egan Decl. ¶ 8.<sup>26</sup> We credit Mr. Egan's testimony regarding this figure based on his foundational testimony that “[t]he facts set forth herein are based on my own personal knowledge and on information contained in Opposer's business records regularly maintained by Opposer in the normal course of business and to which I have regular access in the course of my job.” Egan Decl. ¶ 3.

Mr. Egan attached to his declaration pages from the websites of imbd.com and boxofficemojo.com, the latter of which he described as “a website that tracks box office revenue for motion pictures,” Egan Decl. ¶ 8; Ex. 43 (28 TTABVUE 74-91), as well as a Wikipedia entry regarding the BAD MOMS motion picture that contains revenue

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<sup>25</sup> The same is true for Opposer's “26 license and copromotional agreements,” 48 TTABVUE 46, about which have no information regarding the level of any supporting advertising expenditures or any revenues realized from the agreements.

<sup>26</sup> Mr. Egan also testified that as of December 6, 2019, “the *Bad Moms* Motion Pictures have grossed approximately \$44 million in revenues from domestic sales of the *Bad Moms* Motion Pictures through physical home media and approximately \$31 million in revenues from domestic cable and internet video-on-demand and electronic sell through.” Egan Decl. ¶ 14. He did not provide a breakdown between the two films, or identify any such revenues for BAD MOMS that were realized before July 28, 2017, so his testimony has little or no probative value regarding the fame of the BAD MOMS mark for dilution purposes.


figures. Egan Decl. ¶ 8; Ex. 43 (28 TTABVUE 66-73). To the extent that Opposer offers these webpages to show the revenues realized by the BAD MOMS films, and exactly when they were realized, they are hearsay. *See Swiss Watch Int'l Inc. v. Fed'n of the Swiss Watch Indus.*, 101 USPQ2d 1731, 1735 (TTAB 2012) (Internet printouts attached as exhibits to testimony “do not prove the truth of the statements made therein,” but are “acceptable to show that the statements were made or the information was reported in the webpages.”).

The business records exception to the rule against hearsay, codified in Rule 803(6) of the Federal Rules of Evidence, “does not require that [a] document actually be prepared by the business entity offering the document.” *Christian Faith Fellowship Church v. Adidas AG*, 841 F.3d 986, 120 USPQ2d 1640, 1643 (Fed. Cir. 2016) (quoting *Air Land Forwarders, Inc. v. United States*, 172 F.3d 1338, 1343 (Fed. Cir. 1999)). “When a business relies on a document that it has not itself prepared, two factors bear on the admissibility of the evidence as a business record: ‘[1] that the incorporating business rely upon the accuracy of the document incorporated[;] and [2] that there are other circumstances indicating the trustworthiness of the document.’” *Id.* (quoting *Air Land Forwarders*, 172 F.3d at 1343). Mr. Egan testified that “[u]nless otherwise noted, the exhibits to which I refer and which are attached to this declaration are copies of documents and other materials from Opposer’s business records kept in the ordinary course of business.” Egan Decl. ¶ 3. Even if Opposer maintained the third-party webpages in its “business records kept in the ordinary course of business,” however, the pages attached to Mr. Egan’s Declaration were

downloaded on May 5, 2018 (28 TTABVUE 74-91), and he did not testify that Opposer ever relied on them to determine its revenues from the BAD MOMS films. Accordingly, the webpages can be considered only “to show that the [revenue] information was reported in the webpages.” *Swiss Watch Int’l*, 101 USPQ2d at 1735.

Opposer’s revenues from BAD MOMS appear to be substantial, but Mr. Egan again did not testify as to how they compared to the revenues generated by other motion pictures that were released in 2016, or by motion pictures that are generally acknowledged as having been commercially successful. As a result, we do not know from his testimony whether BAD MOMS was the box office smash hit of the year, one of many successful films, or merely an average revenue-generator. Persons viewing the revenue reports on [boxofficemojo.com](http://boxofficemojo.com), however, would be far more likely to conclude that BAD MOMS was merely one of many successful films.

The [boxofficemojo.com](http://boxofficemojo.com) webpages reported gross revenue from BAD MOMS for each day during the period between July 29, 2016, when BAD MOMS was theatrically released, and October 27, 2016, when the theatrical exhibition of the film appears to have ended, as well as the rankings of those revenues relative to other films released in 2016, and to films historically. Egan Decl. ¶ 8; Ex. 43 (28 TTABVUE 83-91). We reproduce below a chart from [boxofficemojo.com](http://boxofficemojo.com) reporting revenue metrics during this period:



## Bad Moms

**Domestic Total Gross: \$113,257,297**

Distributor: **STX Entertainment**      Release Date: **July 29, 2016**

Genre: **Comedy**      Runtime: **1 hrs. 41 min.**

MPAA Rating: **R**      Production Budget: **\$20 million**

Summary
Daily
Weekend
Weekly
Foreign
Similar Movies

### 2016

Date <small>(click to view chart)</small>	Rank	Weekly Gross	% Change	Theaters / Change	Avg.	Gross-to-Date	Week #	
<b>Jul 29–Aug 4</b>	2	\$36,846,830	-	3,215	-	\$11,461	\$36,846,830	1
<b>Aug 5–11</b>	3	\$23,164,463	<span style="color: red;">-37.1%</span>	3,215	-	\$7,205	\$60,011,293	2
<b>Aug 12–18</b>	5	\$17,721,135	<span style="color: red;">-23.5%</span>	3,188	<span style="color: red;">-27</span>	\$5,559	\$77,732,428	3
<b>Aug 19–25</b>	7	\$11,960,807	<span style="color: red;">-32.5%</span>	2,811	<span style="color: red;">-377</span>	\$4,255	\$89,693,235	4
<b>Aug 26–Sep 1</b>	8	\$8,093,959	<span style="color: red;">-32.3%</span>	2,565	<span style="color: red;">-246</span>	\$3,156	\$97,787,194	5
<b>Sep 2–8</b>	9	\$6,909,072	<span style="color: red;">-14.6%</span>	2,306	<span style="color: red;">-259</span>	\$2,996	\$104,696,266	6
<b>Sep 9–15</b>	9	\$3,548,662	<span style="color: red;">-48.6%</span>	1,888	<span style="color: red;">-418</span>	\$1,880	\$108,244,928	7
<b>Sep 16–22</b>	12	\$2,427,624	<span style="color: red;">-31.6%</span>	1,486	<span style="color: red;">-402</span>	\$1,634	\$110,672,552	8
<b>Sep 23–29</b>	12	\$1,366,908	<span style="color: red;">-43.7%</span>	986	<span style="color: red;">-500</span>	\$1,386	\$112,039,460	9
<b>Sep 30–Oct 6</b>	16	\$641,379	<span style="color: red;">-53.1%</span>	559	<span style="color: red;">-427</span>	\$1,147	\$112,680,839	10
<b>Oct 7–13</b>	29	\$277,433	<span style="color: red;">-56.7%</span>	265	<span style="color: red;">-294</span>	\$1,047	\$112,958,272	11
<b>Oct 14–20</b>	32	\$169,765	<span style="color: red;">-38.8%</span>	176	<span style="color: red;">-89</span>	\$965	\$113,128,038	12
<b>Oct 21–27</b>	41	\$129,260	<span style="color: red;">-23.9%</span>	114	<span style="color: red;">-62</span>	\$1,134	\$113,257,297	13

Egan Decl. ¶ 8; Ex. 43 (28 TTABVUE 89). Boxofficemojo.com reported that BAD MOMS was ranked in the top-three grossing films between July 29, 2016 and August 11, 2016, after which it began a gradual decline in revenues relative to other films. Boxofficemojo.com reported that BAD MOMS remained in the top 10 in revenues for the period prior to mid-September, but gradually dropped off until the end of October, when it reportedly ranked 41st.

Boxofficemojo.com also reported the revenues from BAD MOMS relative to films historically. Egan Decl. ¶ 8; Ex. 43 (28 TTABVUE 83-84). We reproduce below a portion of the report:

<b>Charts</b>	
<b>Chart</b>	<b>Rank</b>
All Time Domestic	562
Opening Weeks	610
Movies That Never Hit #1	98
Opening Weekends Not At #1	170
Friday to Saturday Drops on Opening Weekends	182
Opening Weekends	716
Opening Weekends - July	97
Labor Day 4-Day Holiday Weekends	189
Smallest Drops, 3,000+ theaters (Super-Saturation)	293
Smallest Drops, 2,500+ theaters (Saturation)	573
Smallest Drops, 2,000+ theaters (Very Wide)	835
Smallest Drops, All Wide Releases	2,073
Rated R	107
Rated R, Opening Weekends	168

28 TTABVUE 83.

In short, Boxofficemojo.com reported that the BAD MOMS motion picture was extremely successful in terms of weekly gross revenue for about two months beginning at the end of July 2016, but then fell back into the pack for the duration of its run in theaters, and that its total revenues did not make a blip in historical terms.

Mr. Egan also testified that the fan base for the BAD MOMS motion pictures consists primarily of mothers, Egan Decl. ¶ 16, that “[f]or the *Bad Moms* theatrical release, the audience was largely comprised of women (89%) ages 25-49, with 75% of the total audience self-identifying as mothers,” and that “[s]imilarly, the DVD audience was largely made up of women ages 25-54.” Egan Decl. ¶ 18. It goes without saying that women and mothers make up a substantial portion of American society, but the fact that the exposure of the BAD MOMS film skewed so heavily toward women and mothers further reduces the probative value of the revenue evidence in showing that the BAD MOMS mark had “become a ‘household term [with] which almost everyone is familiar.” *TiVo Brands*, 129 USPQ2d at 1103.

There is no doubt that BAD MOMS was a commercial success in 2016, but against the backdrop of the revenue rankings reported on [boxofficemojo.com](http://boxofficemojo.com) and the demographics of the film's audience, Mr. Egan's testimony does not support a finding that BAD MOMS had become famous for dilution purposes by July 28, 2017. *Cf. In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1086-87 (TTAB 2016) (1975 motion picture JAWS found to be "a famous movie" for purposes of likelihood of confusion refusal because, inter alia, the IMDb.com website ranked the film as the number 72 top grossing movie of all time as of 2014 and the ENCYCLOPAEDIA BRITANNICA listed the film as "one of the highest-grossing films ever").

### **C. Extent of Actual Recognition of the BAD MOMS Mark**

"Perhaps the most significant of the four elements set forth in the Act to determine fame is the extent of actual public recognition of the mark as a source-indicator for the goods or services in connection with which it is used." *TiVo Brands*, 129 USPQ2d at 1104 (quoting *Nike*, 100 USPQ2d at 1024). Opposer does not offer any direct evidence of actual recognition, such as a consumer survey, but relies instead on its claims that "the Bad Moms Motion Pictures and BAD MOMS mark have been the subject of significant media attention," and that "Opposer's witnesses testified to the public's recognition of the BAD MOMS mark without contradiction." 48 TTABVue 48 (citing Egan Decl. ¶¶ 25, 27; Kimbrough Decl. ¶ 25).<sup>27</sup>

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<sup>27</sup> We give no weight to the uncontradicted but obviously self-serving lay opinions of Opposer's witnesses that the BAD MOMS mark is famous.

Opposer cites the facts that “[m]any news outlets, including Entertainment Weekly, The Hollywood Reporter, and Variety, reported the announcement” in 2016 that Opposer was producing a sequel to BAD MOMS, Egan Decl. ¶ 9; Ex. 44, that its films “have garnered unsolicited media coverage throughout the United States, including critical reviews in” THE NEW YORK TIMES, THE GUARDIAN, THE NEW YORK POST, FORBES, and the LOS ANGELES TIMES, Egan Decl. ¶ 22; Ex. 57,<sup>28</sup> and that BAD MOMS won several awards and appeared on lists of top comedy films. Egan Decl. ¶ 23; Exs. 58-59.

The critical reviews of BAD MOMS are nothing more than the sort of review that any new film might receive from a film critic upon its debut. Egan Decl. ¶ 22; Ex. 57 (30 TTABVUE 71-73, 76-85, 280-84). Subsequent pre-July 28, 2017 articles<sup>29</sup> about BAD MOMS variously described the film as the “first R-rated comedy of the year so far to top \$100 million domestically” and Opposer’s “top-grossing film to date, by far,” 30

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<sup>28</sup> The cited November 3, 2017 review in THE GUARDIAN, Egan Decl. ¶ 22; Ex. 57 (30 TTABVUE 74-75), critiqued A BAD MOMS CHRISTMAS, and is irrelevant on Opposer’s dilution claim.

<sup>29</sup> Opposer cites no authority for its argument that “[a]lthough some of the publicity and accolades listed above may have occurred after July 28, 2017, they are, nevertheless, still relevant to establishing the publicity and advertising necessarily preceding such recognition.” 48 TTABVUE 46-47. But even if we considered the post-July 28, 2017 media coverage of the BAD MOMS motion picture, *cf. Piano Factory Grp., Inc. v. Schiedmayer Celesta GmbH*, \_\_\_ F.4th \_\_\_, 2021 USPQ2d 913, at \*13 (Fed. Cir. 2021) (finding that the Board did not err in relying on recent publications to draw inferences as to the fame of the petitioner’s name or identity on its claim for false suggestion of a connection under Section 2(a) of the Trademark Act), we would not find that such coverage supported a finding of dilution fame. As discussed below in our analysis of Opposer’s claim that its mark is famous for likelihood of confusion purposes, the post-July 28, 2017 did not refer to BAD MOMS (or A BAD MOMS CHRISTMAS) as an iconic film, or as more than just two of the many successful films in 2016 and 2017.



TTABVUE 107-08 (September 3, 2016 HOLLYWOOD REPORTER article);<sup>30</sup> an “unexpected box office hit,” *id.* at 121 (October 11, 2016 article in THE INDEPENDENT); a “hit comedy,” *id.* at 130 (December 23, 2016 VARIETY article); Opposer’s “first \$100 M hit,” *id.* at 133 (September 3, 2016 deadline.com article), and “first big hit,” *id.* at 175 (September 5, 2016 FORBES article); a film that “stormed the box office this summer,” *id.* at 158 (December 19, 2016 ENTERTAINMENT article); a “smash” with “legs” from a relatively modest opening weekend “to a whopping \$113.25m domestic total,” and the “event movie of the year,” *id.* at 171, 177 (December 27, 2016 FORBES article);<sup>31</sup> a “big success specifically within the sandbox in which STX theoretically intends to survive,” *id.* at 179 (August 1, 2016 FORBES article), Opposer’s “crown jewel,” *id.* at 190 (June 28, 2017 FORBES article), and the “R-rated breakout hit of 2016.” *Id.* at 237 (June 27, 2017 USA TODAY article). Some of these articles also discussed other films that ran against BAD MOMS.

The pre-July 28, 2017 articles show that BAD MOMS was viewed as a commercial success, and that its success was viewed as exceeding the expectations of pundits and perhaps even of Opposer itself. But this positive media coverage in 2016 and 2017 is qualitatively different from the type of media coverage that has been found in other

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<sup>30</sup> The article reported that “[m]ost R-rated comedies have struggled of late,” but that the exceptions were BAD MOMS and “Sony’s and Annapurna’s animated adult film *Sausage Party*, which will finish the Labor Day weekend with north of \$90 million domestically on its way to crossing the \$100 million threshold.” 30 TTABVUE 108.

<sup>31</sup> A July 31, 2016 article in FORBES reported that on the first weekend, the film JASON BOURNE “snagged \$60.04 million this weekend to top the box office,” while BAD MOMS brought in \$23 million in a debut that the article stated was “still good,” but “feels like a comedown by comparison” to projected revenues. 30 TTABVUE 147-50.

dilution cases to reflect the iconic status of famous marks. *See TiVo Brands*, 129 USPQ2d at 1105 (discussing news articles describing the opposer’s TIVO mark “as having ‘near household-name recognition’” and as an “iconic brand”); *Chanel*, 110 USPQ2d at 2021 (discussing coverage of the opposer’s CHANEL mark in various publications in which the mark was “consistently ranked as one of the most recognized and famous brands in the United States”); *Nike*, 100 USPQ2d at 1024-26 (fame of opposer’s JUST DO IT mark evidenced by “third-party references to and discussions about the mark,” which “have been pervasive, reflecting the extreme popularity of the mark and the message of compelled action that it represents,” including numerous articles in well-known publications around the United States and listings of the slogan as among the most memorable slogans of the 20th Century). *Cf. Mr. Recipe*, 118 USPQ2d at 1086 (fame of JAWS motion picture for purposes of likelihood of confusion refusal supported in part by a TV GUIDE review of the film characterizing it as a “mega-hit” and “phenomenally successful,” and noting that it has “entered international popular culture” and has been “endlessly parodied by comedians and filmmakers alike;” an article on the Whatculture.com website in 2010 in which the author “characterized JAWS as an ‘instant classic;” and other materials in which JAWS “has repeatedly been spoken of as one of the best movies of all time and a top grossing film.”).

The BAD MOMS motion picture and its stars received several accolades in 2016 and 2017. The film won a People’s Choice Award for “Favorite Comedy Movie,” Egan Decl. ¶ 23; Ex. 58 (31 TTABVUE 24, 34), Mila Kunis, Kristen Bell, Christina Applegate,

Kathryn Hahn, and Annie Mumolo won a CinemaCon award for “Female Stars of the Year,” 31 TTABVUE 24, 26, and Ms. Kunis won a Jupiter Award for Best International Actress. *Id.* at 24, 32. Ranker.com also listed BAD MOMS as the fifth film in its ranking of the “Best New Comedy Movies of the Last Few Years.” *Id.* at 53-54.<sup>32</sup>

BAD MOMS and its stars were also reported to have been nominated for other awards that they did not win. Egan Decl. ¶ 23; Ex. 58 (31 TTABVUE 6, 24 (Artois Award for Outstanding Achievement in Casting-Feature Studio or Independent Comedy), 13-14, 24 (Guild of Music Supervisors Award for Best Music Supervision for Films Budgeted Under \$25 Million), 24, 28, 29 (Golden Trailer Award for Best Comedy and Best Comedy TV Spot and Mila Kunis for the Women Film Critics Award for Mommie Dearest Worst Screen Mom of the Year Award), 34 (Kristen Bell for People’s Choice Award for Favorite Comedic Movie Actress)). There is no evidence of nominations for an Academy Award or a Golden Globes award. *Cf. Mr. Recipe*, 118 USPQ2d at 1087 (fame of JAWS motion picture for likelihood of confusion refusal shown in part by the fact that it “received an Academy Award nomination for best picture, and its ominous soundtrack by John Williams won an Oscar.” (quoting ENCYCLOPAEDIA BRITANNICA)).

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<sup>32</sup> A BAD MOMS CHRISTMAS was listed as the 25th best. 31 TTABVUE 57. The ranker.com website also contained links to “The All-Time Best Comedy Movies,” “History’s Greatest Cult Comedies,” and “The Funniest Movies Ever Made,” *id.* at 53, but pages accessible through those links are not in the record.

The accolades for BAD MOMS again suggest that it was commercially successful and popular, but they do not support a finding that it was recognized as an iconic film by July 28, 2017. *Cf. Mr. Recipe*, 118 USPQ2d at 1086-87 (evidence showed that motion picture JAWS was so well-known “that it set the standard for summer blockbusters.”).

#### **D. Registration of the BAD MOMS Mark**

As discussed above, Opposer owns three registrations of its BAD MOMS mark, and “[e]ach mark registered on the Principal Register as an inherently-distinctive mark without resort to Section 2(f) or subject to a disclaimer.” *TiVo Brands*, 129 USPQ2d at 1112. Ordinarily, this would “favor[ ] a finding of dilution fame,” *id.*, but it does not do so here because all three registrations issued on September 18, 2018, long after Applicant’s filing date,<sup>33</sup> and none covers the goods (motion pictures) for which Opposer claims dilution fame by July 28, 2017 by virtue of common law use.

#### **E. Conclusion Regarding Fame of the BAD MOMS Mark**

None of the four non-exclusive factors probative of whether Opposer’s BAD MOMS mark is famous supports such a finding. We find that Opposer falls far short of showing that by July 28, 2017, BAD MOMS had “become a ‘household term [with] which almost everyone is familiar.” *Id.*

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<sup>33</sup> Only one of the registrations claimed use of the BAD MOMS mark prior to July 28, 2017. Kimbrough Decl. ¶ 8; Ex. 35 (26 TTABVUE 31).

## **F. Conclusion Regarding Opposer's Likelihood of Dilution Claim**

Because Opposer cannot satisfy the threshold requirement of fame under Section 43(c), its likelihood of dilution claim necessarily fails, and we dismiss Opposer's Section 43(c) claim against both applications.

## **V. Opposer's Likelihood of Confusion Claim**

Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), prohibits the registration of a mark that “[c]onsists of or comprises a mark which so resembles a mark registered in the Patent or Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.”

### **A. Priority**

In an opposition under Section 2(d), priority “may arise from a prior registration, prior trademark or service mark use, prior use as a trade name, prior use analogous to trademark or service mark use, or any other use sufficient to establish proprietary rights.” *DeVivo v. Ortiz*, 2020 USPQ2d 10153, at \*3 (TTAB 2020) (citing *Herbko Int'l Inc. v. Kappa Books Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1378 (Fed. Cir. 2002)). “To establish priority, the mark must be distinctive, inherently or otherwise, and Opposer must show proprietary rights in a mark as to which Applicant's mark gives rise to a likelihood of confusion.” *Id.* (citing *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40, 43-45 (CCPA 1981)).

Opposer argues that it has priority based on its pleaded registrations and prior pending intent-to-use applications, and its prior rights under common law. 48 TTABVUE 24-28. At the oral hearing, Opposer's counsel argued that there were multiple "paths" to priority involving Opposer's registrations of BAD MOMS and BAD DADS and Opposer's pending application to register BAD MOMS in Class 33, as well as Opposer's use of BAD MOMS in connection with entertainment-related goods and services relating to the motion pictures themselves, and other goods and services.

Applicant does not directly address the issue of Opposer's priority on any basis. We agree with Opposer that "[a]t most, Applicant – in the context of addressing her intent in adopting her marks – questions whether Opposer used BAD MOMS on a series of motion pictures prior to the date she filed the Applications." 53 TTABVUE 9 (citing 49 TTABVUE 23). In that regard, Applicant argues that "a film or motion picture is considered a single creative work and must be refused registration under §§ 1, 2, and 45 of the Trademark Act, 15 U.S.C. §§ 1051, 1052, and 1127," 49 TTABVUE 23, with the "exception being if the title is used in a series of creative works" and that the "second motion picture Bad Moms Christmas released November 2017, therefore, the BAD MOMS application for motion picture services could not be considered a series until after the second movie was advertised or promoted, which occurred after Applicant applied for its [sic] two marks." *Id.*

### **1. Opposer's Pledged Registrations and Prior Pending Applications**

We start on the path to priority on which the footing is the surest. As discussed above, Opposer made of record three valid and subsisting registrations of BAD

MOMS in standard characters for “cosmetics,” “all-purpose carrying bags,” and “beverageware, bottle stoppers specifically adapted for use with wine bottles, coasters not of paper or textile, cocktail shakers, flasks, and water bottles sold empty.”<sup>34</sup> Because “Opposer properly made of record its valid and subsisting pleaded registrations and Applicant did not counterclaim to cancel them, priority is not at issue for the marks and the goods . . . identified in each individual registration.” *New Era*, 2020 USPQ2d 10596, at \*9 (citing *King Candy, Inc. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 82 USPQ 108 (CCPA 1974)).

As discussed above, Opposer also made of record two applications filed on January 27, 2017 to register BAD MOMS in standard characters for numerous alcoholic beverages in Class 33 and for special events planning for social entertainment purposes in Class 41. Opposer’s Class 41 application has become abandoned, 48 TTABVUE 24, but its Class 33 application remains pending.<sup>35</sup> Opposer may rely on

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<sup>34</sup> Opposer also made of record, and therefore established priority through, its registration of BAD DADS for beer, but we will focus on Opposer’s rights in the BAD MOMS mark. If we find a likelihood of confusion as to the BAD MOMS mark for any of the goods identified in Opposer’s three registrations of the mark and pending application to register it, or as to any of the goods for which Opposer has priority at common law, “we need not find it as to Opposer’s [BAD DADS registration]; conversely, if we do not find a likelihood of confusion as to Opposer’s [BAD MOMS] mark . . . we would not find it as to Opposer’s other registered mark[ ] [BAD DADS].” *New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at \*9-10 (TTAB 2020).

<sup>35</sup> This intent-to-use application was assigned to Opposer as part of the settlement of litigation with Bad Moms, LLC in the United States District Court for the Southern District of Florida. Kimbrough Decl. ¶ 16, Ex. 42 (26 TTABVUE 573). Section 10(a)(1) of the Trademark Act prohibits the assignment of an intent-to-use application prior to the filing of an amendment to allege use or a statement of use unless the assignment is “to a successor of the business of the applicant, or portion thereof, to which the mark pertains, if that business is ongoing and existing,” 15 U.S.C. § 1060(a)(1), but Applicant has not challenged the bona fides of the assignment.

the January 27, 2017 filing date of that application for purposes of proving priority as to the goods identified in the application. *Compagnie Gervais Danone v. Precision Formulations LLC*, 89 USPQ2d 1251, 1253 (TTAB 2009) (citing *Larami Corp. v. Talk to Me Programs Inc.*, 36 USPQ2d 1840, 1845 n.7 (TTAB 1995) (constructive use provisions of Section 7(c) may be used defensively or offensively, but judgment is contingent upon the ultimate issuance of a registration)).

## 2. Opposer's Alleged Common Law Priority

The footing on Opposer's second claimed path to priority is somewhat slipperier. Opposer argues that it "has prior rights based on its use of BAD MOMS as a trademark prior to Applicant's filing date for the Applications or first use date." 48 TTABVUE 24. In its brief, Opposer points to its promotion and theatrical release of the BAD MOMS motion picture in 2016; the licensing of the BAD MOMS mark for use in cross-promotions in 2016 and 2017; the release of BAD MOMS on DVD and Blu-Ray and through online streaming in November 2016;<sup>36</sup> and its use of the BAD MOMS mark "for special event planning for social entertainment purposes and beverageware and related goods before July 28, 2017." *Id.* at 24.

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<sup>36</sup> Opposer acknowledges that the "title of a single work cannot be inherently distinctive," 48 TTABVUE 26 n.3, and that trademark rights in a title spring from its use in a series of works. 53 TTABVUE 9. *See Herbko*, 64 USPQ2d at 1378-79; *Mattel, Inc. v. Brainy Baby Co.*, 101 USPQ2d 1140, 1142-43 (TTAB 2011). The use of BAD MOMS as the title of the film when it was theatrically released and when it was released on and through other media is not use of BAD MOMS in a "series" of works. *Id.* at 1142-43 (use of LAUGH & LEARN mark as title of VHS tape and DVD containing the same featured program was not use of the mark in connection with a "series" of works despite the addition of minor enhancements in the DVD). *Cf. In re Posthuma*, 45 USPQ2d 2011, 2014 (TTAB 1998) (use of title of a theatrical production not registrable as a mark despite variations in the work stemming from live performances).



With respect to the use of BAD MOMS “for special event planning for social entertainment purposes and beverage ware and related goods” before July 28, 2017, “priority can be shown for goods given away as promotional items,” *DeVivo*, 2020 USPQ2d 10153, at \*10 (citations omitted), and we find that Opposer established use of the BAD MOMS mark at common law on promotional glassware, plastic bottles, and cosmetics prior to Applicant’s filing date.<sup>37</sup> Opposer’s claimed use of BAD MOMS for “special event planning for social entertainment purposes,” 48 TTABVue 24, is based solely on Ms. Kimbrough’s testimony that “Opposer first used BAD MOMS for special event planning for social entertainment purposes in September 2016.” Kimbrough Decl. ¶ 10. This statement lacks any detail as to how and to whom the claimed services were rendered, and is not corroborated by any documentary evidence, and we find that it is insufficient to establish prior common law rights in the BAD MOMS mark for those services. *See Kemi Organics, LLC v. Gupta*, 126 USPQ2d 1601, 1607 (TTAB 2018) (oral testimony of a single witness may suffice to show priority, but only if it is sufficiently probative).

Opposer also argues that it “has made of record evidence establishing that BAD MOMS as used for motion pictures had acquired distinctiveness well before Applicant filed the Applications,” and that it “promoted *A Bad Moms Christmas* well before Applicant filed the Applications, such that Opposer used the BAD MOMS mark in a

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<sup>37</sup> We find that BAD MOMS is inherently distinctive when used in connection with the goods for which it has been registered, *see, e.g., New Era*, 2020 USPQ2d 10596, at \*10 (“Opposer’s mark is inherently distinctive as evidenced by its registration on the Principal Register without a claim of acquired distinctiveness under Section 2(f) of the Trademark Act”), and the similar goods for which we find priority of use at common law.

series before Applicant's priority date." 53 TTABVUE 9. As noted above, Opposer acknowledges that the title of a single work cannot be inherently distinctive, but argues that this principle "does not apply to the BAD MOMS mark which has been used in a series of works, namely, *Bad Moms* and *A Bad Moms Christmas*," 48 TTABVUE 26 n.3, citing federal district court cases in which priority of use of film title marks was established through pre-release publicity. Opposer thus appears to argue both that it used the claimed BAD MOMS mark in connection with a series of works even though A BAD MOMS CHRISTMAS, the second film in the series, was not released until November 2017, and that BAD MOMS "acquired distinctiveness as of July 28, 2017." *Id.* at 26.

The Federal Circuit's decision in *Herbko* sets forth the legal principles that govern our analysis of whether Opposer proved that it acquired proprietary rights in the BAD MOMS mark for motion pictures prior to Applicant's July 28, 2017 filing date. In *Herbko*, the respondent owned a registration of the mark CROSSWORD COMPANION and design for crossword puzzle systems. The petitioner sought cancellation under Section 2(d) on the ground that the respondent's mark was confusingly similar to the petitioner's claimed CROSSWORD COMPANION mark for crossword puzzle books. Petitioner's claim turned on whether it had priority based on use of the claimed mark as a book title.<sup>38</sup> The Board granted summary judgment to

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<sup>38</sup> The rule that the title of a single creative work cannot serve as a source identifier and is not registrable also applies to the titles of films and other creative works. See TRADEMARK MANUAL OF EXAMINING PROCEDURE ("TMEP") Section 1202.08 (July 2021) and cases cited therein.

the petitioner on the ground that its sales of CROSSWORD COMPANION books in 1993, prior to the respondent's application filing date in June 1994, followed by sales of a second volume of the books in 1995, established priority because the use in 1993 "constituted a non-technical trademark use that [the petitioner] perfected when it subsequently published a second volume in 1995." *Herbko*, 64 USPQ2d at 1377. In reversing the Board's decision on appeal because it failed to consider a critical element of priority, the Federal Circuit described the Board's rationale as follows: "[T]he proprietary rights for the title of the book series date back to the beginning of the series (i.e., to the date of the first volume in the series) if the second volume in the series is published within a reasonable time." *Id.* at 1378.

The Federal Circuit held that the Board's analysis was "contrary to this court's precedent," which "clearly requires not only timeliness, but also that [the petitioner] use the mark in a manner reasonably expected to create an association between the mark and its goods." *Id.* The court noted that its precedent "clearly holds that the title of a single book cannot serve as a source identifier," *id.* (citing *In re Cooper*, 254 F.2d 611, 117 USPQ 396, 399-400 (CCPA 1958)), and that the "publication of a single book cannot create, as a matter of law, an association between the book's title (the alleged mark) and the source of the book (the publisher)." *Id.* Accordingly, "if a later party uses or applies for a trademark before the creation of a series (i.e., before publication of a second volume), the proprietary rights for the series title date back to the first volume of the series *only* if the second volume is published within a reasonable time with a requisite association in the public mind." *Id.* at 1378-79

(emphasis in original). Proof of such an association “requires more than publication of a single [work].” *Id.* at 1379.

The Federal Circuit found that the petitioner “did not provide evidence of a second volume before [respondent’s] 1994 [intent-to-use] application,” and thus had to rely “on the 1993 sales of its first CROSSWORD COMPANION volume to show the required association between the CROSSWORD COMPANION mark and its puzzle books.” *Id.* The court noted that the petitioner’s sales of its book in 1993 had been very substantial, but held that “[e]ven sales of a large number of copies of a single work cannot create a source identifying association in the public mind unless this court abandons its precedent that a single work cannot serve as a source identifier.” *Id.* The court concluded that “[b]ecause sales of a single book title are insufficient to create proprietary rights and because [the petitioner] provided no other evidence of association creating activities (e.g., use of mark as trade name), the Board erred in holding [the petitioner] established priority to the mark.” *Id.*

*Herbko* forecloses Opposer’s argument that the title of the BAD MOMS film acquired distinctiveness as Opposer’s mark prior to Applicant’s filing date. 48 TTABVUE 26-28 & n.3.<sup>39</sup> The Federal Circuit held in *Herbko* that “the title of a single

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<sup>39</sup> Opposer cites several federal district court cases for the proposition that “[t]itles of motion pictures that are widely promoted and commercially successful are often found to have acquired secondary meaning.” 48 TTABVUE 27 (citing *Tri-Star Pictures Inc. v. Unger*, 14 F. Supp. 2d 339 (S.D.N.Y. 1998); *Paramount Pictures Corp. v. Dorney Park Coaster Co.*, 698 F. Supp. 1274 (E.D. Pa. 1988); *Morgan Creek Prods. Inc. v. Capital Cities/ABC Inc.*, 1991 WL 352619 (C.D. Cal. Oct. 28, 1991)). These cases granted relief on claims for trademark infringement and unfair competition under Section 43(a) of the Lanham Act, which is “outside the Board’s jurisdiction,” *Fiat Grp. Autos.*, 94 USPQ2d at 1116 n.8, and does not apply in Board inter partes cases.

[work] cannot serve as a source identifier,” that “the publication of a single [work] cannot create, as a matter of law, an association between the [work’s] title (the alleged mark) and the source of the [work],” *Herbko*, 64 USPQ2d at 1378, and that “this court’s precedent has treated all single works, such as single book titles, as ‘inherently descriptive’ at best and ‘inherently generic’ at worst.” *Id.* at 1379 (citing *Cooper*, 117 USPQ at 399-400). The court noted, consistent with the civil unfair competition cases that Opposer cites, that “[w]hile titles of single works are not registrable, they may be protected under section 43(a) of the Lanham Act upon a showing of secondary meaning,” *id.* at n.2, but did not apply that principle to the issue of the petitioner’s priority in the registrability dispute before the court. Opposer thus cannot establish priority of use of the BAD MOMS mark in the title of the film BAD MOMS by showing that the mark had acquired distinctiveness by July 28, 2017.

At the same time, however, *Herbko* does not foreclose Opposer’s argument that it used the BAD MOMS mark “in a series of works, namely, *Bad Moms* and *A Bad Moms Christmas*,” 48 TTABVUE 26 n.3, even though the second work in the putative series was not released until after July 28, 2017. We read *Herbko* to permit Opposer to acquire prior rights in the BAD MOMS mark for motion pictures through its use in the titles of the two films if (1) the A BAD MOMS CHRISTMAS sequel was released within a reasonable time after BAD MOMS, and (2) prior to Applicant’s July 28, 2017 filing date, Opposer engaged in “association creating activities” (beyond the theatrical release of BAD MOMS itself) sufficient to create an association “between the [film’s] title (the alleged mark) and the source of the [film].” *Herbko*, 64 USPQ2d at 1379.

The BAD MOMS motion picture was released theatrically on July 29, 2016, Egan Decl. ¶ 8, and the sequel A BAD MOMS CHRISTMAS was released theatrically on November 1, 2017, Egan Decl. ¶ 10, about 15 months later. Taking into account all that is involved in the production of a motion picture, including the “greenlighting” and financing of a film, story and script development, casting, photography, editing, and pre-release advertising and promotion, we find that the sequel A BAD MOMS CHRISTMAS was released within a reasonable time after BAD MOMS.<sup>40</sup>

The production and anticipated November 2017 release of the sequel A BAD MOMS CHRISTMAS was announced and publicized within five months after the release of BAD MOMS, and well in advance of Applicant’s filing of her applications. As discussed above, the media coverage of the sequel in December 2016, May 2017, and June 2017 associated the sequel A BAD MOMS CHRISTMAS with both the BAD MOMS film and Opposer, its producer, by noting that the two films had common direction and production, displaying scenes from BAD MOMS, making references to Mila Kunis, Kristen Bell, and Kathryn Hahn as the “Bad Moms,” and explaining the extension of the storyline in BAD MOMS into A BAD MOMS CHRISTMAS, in which the star “trio must deal with the stresses of their own mothers visiting for the holidays,” Egan Decl. ¶ 9; Ex. 44 (28 TTABVUE 112), and in which “the moms are fighting back against holiday

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<sup>40</sup> Indeed, it appears that A BAD MOMS CHRISTMAS may have been released on something of an expedited timetable for a sequel, as one commentator on the announcement of the production of a sequel stated that “we will be getting a true *Bad Moms* sequel sooner than we had thought,” Egan Decl. ¶ 9; Ex. 42 (28 TTABVUE 128) (December 27, 2016 FORBES article), and another article stated that the “second film came together incredibly fast.” Egan Decl. ¶ 22; Ex. 57 (30 TTABVUE 203) (November 20, 2017 LOS ANGELES TIMES article).

stress and the expectation of making the season perfect for their families.” Egan Decl. ¶ 9; Ex. 44 (28 TTABVUE 143). The publicity also displayed scenes from the trailer for A BAD MOMS CHRISTMAS and provided links so that consumers could view the trailer online.

We find that the availability of the trailer is particularly significant. Unlike the DVD and Blu-Ray editions of BAD MOMS, the trailer for A BAD MOMS CHRISTMAS, the precursor to the full-length film, is itself a separate and distinct work that uses the BAD MOMS title. Even if we do not view the trailer as the second work in the series of BAD MOMS films, its availability and the other publicity of the sequel show that prior to Applicant’s July 28, 2017 constructive use date, the consuming public was aware that a sequel to BAD MOMS entitled A BAD MOMS CHRISTMAS, originating from the same source as the original film, was at least figuratively “in the can.” As noted above, the association of the two films with each other and Opposer is evidenced by media coverage of the progress of the production of the sequel, access to the sequel’s trailer and information about the roles to be played both by the original stars and new characters played by Susan Sarandon, Cheryl Hines, and Christine Baranski, and others, and depictions and descriptions of some of the film’s scenes. Egan Decl. ¶ 9; Ex. 44 (28 TTABVUE 157). We find that this exposure, coupled with Opposer’s publicity of the sequel, created an association “between the [film’s] title (the alleged [BAD MOMS] mark) and [Opposer as] the source of the [film].” *Herbko*, 64 USPQ2d at 1379.

“[I]f a term has been used to identify the source of a series of creative works, it functions as a trademark, and the fact that it may also be included in the title of each work does not destroy its source-originating function.” *Mattel*, 101 USPQ2d at 1142. We find that Opposer established priority of use of the BAD MOMS mark for motion pictures because Opposer used the mark in a series of films consisting of BAD MOMS and A BAD MOMS CHRISTMAS, and the “proprietary rights for the series title date back to the first volume of the series” in 2016. *Herbko*, 64 USPQ2d at 1379.

### **3. Summary of Findings on Priority**

We have found that Opposer proved, by a preponderance of the evidence, that it has priority of use of the BAD MOMS mark for (1) the goods identified in Opposer’s three registrations of, and one pending application to register (contingent on ultimate registration), its BAD MOMS mark, (2) motion pictures, and (3) glassware, plastic bottles, and cosmetics.

#### **B. Likelihood of Confusion**

Our determination of the likelihood of confusion under Section 2(d) of the Trademark Act is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). “[O]pposer has the burden of proving a likelihood of confusion by a preponderance of



the evidence.” *Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, at \*3 (Fed. Cir. 2020).

Two key *DuPont* factors in every Section 2(d) case are the first two factors regarding the similarity or dissimilarity of the marks and the goods or services, because 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.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). Both parties address these two key factors at length. 48 TTABVUE 28-32, 39-40; 49 TTABVUE 11-21; 53 TTABVUE 10-16. One or both of the parties also address the third factor, the “similarity or dissimilarity of established, likely-to-continue trade channels,” *DuPont*, 177 USPQ at 567, 48 TTABVUE 40-41, 49 TTABVUE 20-21; the fourth factor, the “conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing,” *DuPont*, 177 USPQ at 567, 48 TTABVUE 42-43; the fifth and sixth factors, the “fame of the prior mark (sales, advertising, length of use),” and the “number and nature of similar marks in use on similar goods,” *DuPont*, 177 USPQ at 567, 48 TTABVUE 32-38, 49 TTABVUE 15-16, 21-25, 51 TTABVUE 16-20; the eighth factor, the “length of time during and conditions under which there has been concurrent use without evidence of actual confusion,” *DuPont*, 177 USPQ at 567, 48 TTABVUE 43-44; the ninth factor, the “variety of goods on which a mark is or is not used (house mark, ‘family’ mark, product mark),” *DuPont*, 177 USPQ at 567, 48 TTABVUE 44-45; and the thirteenth factor, “[a]ny other established fact probative of the effect of use,” *DuPont*, 177 USPQ

at 567, under which the parties debate whether Applicant acted in good faith in adopting her marks. 48 TTABVUE 41-42, 49 TTABVUE 22-23; 53 TTABVUE 17.

### **1. The Strength or Weakness of Opposer's BAD MOMS Mark**

We begin with the fifth and sixth *DuPont* factors, both of which address the strength or weakness of Opposer's BAD MOMS mark, because they potentially bear on the extent of protection to which it is entitled. We may consider these factors in tandem, *Bell's Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1345 (TTAB 2017), and doing so here makes particular sense because the parties are sharply at odds on them, with Opposer arguing under the fifth factor that the BAD MOMS mark is famous and strong, 48 TTABVUE 32-34, and Applicant arguing under the sixth factor that "BAD MOMS is relatively weak." 49 TTABVUE 20.

#### **a. Strength of Opposer's Mark**

"In determining the strength of a mark, we consider both its inherent strength, based on the nature of the mark itself, and, if there is evidence in the record of marketplace recognition of the mark, its commercial strength." *New Era*, 2020 USPQ2d 10596, at \*10 (citations omitted). As noted above, the BAD MOMS mark is inherently distinctive for the goods for which it has been registered on the Principal Register, and for the similar goods for which we have found priority of use at common law, and we agree with Opposer that BAD MOMS is suggestive for a series of motion pictures humorously depicting the stresses of motherhood.

"Commercial strength or fame is the extent to which the relevant public recognizes a mark as denoting a single source." *New Era*, 2020 USPQ2d 10596, at \*10. If such commercial strength or fame exists, it "plays a dominant role in the likelihood of

confusion analysis because famous marks enjoy a broad scope of protection or exclusivity of use.” *Id.* “Because of the extreme deference that we accord a famous mark in terms of the wide latitude of legal protection it receives,” and the “dominant role fame plays in the likelihood of confusion analysis, it is the duty of the party asserting that its mark is famous to clearly prove it.” *Id.*

We have found above that Opposer’s BAD MOMS mark is not famous for purposes of its dilution claim, but that finding does not preclude a showing that it is famous under the fifth *DuPont* factor because “[t]he commercial strength or fame of a mark is not a binary factor in the context of a likelihood of confusion analysis.” *Id.* (citing *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017)). “While dilution fame is an either/or proposition—fame either does or does not exist—likelihood of confusion fame varies along a spectrum from very strong to very weak.” *Joseph Phelps Vineyards*, 122 USPQ2d at 1734 (citing *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed Cir. 2005)). “[A] mark can acquire ‘sufficient public recognition and renown to be famous for purposes of likelihood of confusion without meeting the more stringent requirement for dilution fame.’” *Coach Servs.*, 101 USPQ2d at 1724 (quoting *7-Eleven*, 83 USPQ2d at 1722).

As the Board recently reiterated,

[c]ommercial strength or fame may be measured indirectly by the volume of sales and advertising expenditures in connection with the goods or services sold under the mark, and supported by other indicia such as length of time of use of the mark; widespread critical assessments; notice by independent sources of the goods or

services identified by the marks; and the general reputation of the goods or services.

*New Era*, 2020 USPQ2d 10596, at \*10-11. Other factors may include market share, licensing activities, and the variety of goods on which a mark is used. *Coach Servs.*, 101 USPQ2d at 1720. Unlike on Opposer's dilution claim, evidence that post-dates July 28, 2017 is relevant to our analysis of strength under the fifth *DuPont* factor. *See Gen. Mills, Inc. v. Fage Dairy Processing Indus. SA*, 100 USPQ2d 1584, 1595 n.13 (TTAB 2011), *judgment set aside on other grounds*, 2014 WL 343267 (TTAB Jan. 22, 2014) (evidence of fame considered up to the time of trial).

Opposer argues that the BAD MOMS mark is commercially strong because the films "were both box office smashes, and STX expended \$23 million and \$20 million to promote the theatrical release of the movies, respectively," and because the films "have grossed approximately \$44 million in revenues from domestic sales of the *Bad Moms* Motion Pictures through physical home media and approximately \$31 million in revenues from domestic cable and internet video-on-demand and electronic sell through." 48 TTABVUE 32-33. As on its dilution claim, Opposer also cites its promotional agreements, media coverage, accolades, and social media following for the films, as well as Applicant's admissions during discovery that BAD MOMS and A BAD MOMS CHRISTMAS was each "well recognized in the U.S. as a title of a movie," and Opposer's enforcement efforts. *Id.* at 33-34.

Applicant does not directly address the fifth *DuPont* factor, but does discuss the fame of the BAD MOMS mark in the section of her brief directed to Opposer's dilution claim. Applicant acknowledges that the BAD MOMS "movie title was heavily promoted

in 2016 and 2017,” 49 TTABVUE 24, but argues that “since then, [it] has not been largely advertised or promoted, as is typical in the motion picture industry.” *Id.* Applicant also argues that “[w]ith new movies constantly being released, the consumer is conditioned to move on to the next big movie,” *id.*, and that “[w]ith BAD MOMS, while the Opposer made reference to advertising and revenue of it’s [sic] BAD MOM movies, that does not in and of itself equal fame or public recognition.” *Id.* Applicant concludes that “Opposer’s unregistered BAD MOMS mark for motion picture services, has not risen to the level of fame, a level reserved for a very select few trademarks.” *Id.* at 25.

As noted above, under the fifth *DuPont* factor we may consider Opposer’s post-July 28, 2017 circumstantial evidence of strength. That is a double-edged sword for Opposer, however, because Opposer must prove that its mark was famous as of the time of trial, which began in early November 2019 and ended in October 2020, even if it was better known in 2016 and 2017, when the two films were in theaters and were the subject of Opposer’s promotional activities. *Cf. TiVo Brands*, 129 USPQ2d at 1113 (fame for dilution purposes must be shown both when the challenged use began and “at the time the claim is adjudicated”).

In addition to the \$26 million spent in 2016 in support of the theatrical and home entertainment releases of BAD MOMS, Egan Decl. ¶¶ 8, 20; Ex. 55 (29 TTABVUE 181), Opposer spent slightly more than \$20 million in 2017 and in January and February 2018 in support of the theatrical and home entertainment releases of A BAD MOMS CHRISTMAS. Egan Decl. ¶¶ 9, 20; Ex. 55 (29 TTABVUE 181). The record shows no

advertising or promotional expenditures of any sort for either film after mid-February 2018.<sup>41</sup> Opposer's intense bursts of advertising from May-December 2016, June-December 2017, and January-February 2018, followed by no further advertising, do not involve the sort of sustained advertising that has been found in other cases to support a finding of fame under Section 2(d). See *Bose Corp. v. QSC Audio Prods., Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1306 (Fed. Cir. 2002) (fame of ACOUSTIC WAVE mark supported by annual advertising expenditures of more than \$5 million over the 17 years of use of the mark prior to 2002); *Omaha Steaks Int'l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1690 (Fed. Cir. 2018) (fame of OMAHA STEAKS mark supported by advertising expenditures of \$45 million in 2011 and over \$50 million in 2012 and 2013); *AutoZone Parts, Inc. v. Dent Zone Cos.*, 100 USPQ2d 1356, 1361-62 (TTAB 2011) (fame of AUTOZONE mark supported by advertising expenditures of over \$750 million during 23-year period of use). Opposer's advertising and promotional expenditures do not support a finding of significant commercial strength of the BAD MOMS mark at the time of trial.

In addition to the \$113 million domestic box office revenues for BAD MOMS, Egan Decl. ¶ 8, A BAD MOMS CHRISTMAS grossed \$72 million at the box office in the United

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<sup>41</sup> In the dilution portion of its reply brief, Opposer argues that it has made of record "evidence reflecting its continued promotion of the *Bad Moms* Motion Pictures to the present date." 53 TTABVUE 21. Opposer cites the facts that the films "are available to stream on Amazon Prime and their soundtracks are available to stream on Spotify," that it "continues to use the social media profiles associated with the Motion Pictures," that it "has announced that it is producing a third movie in the franchise entitled *Bad Moms' Moms*," and that it "has engaged in significant policing activities well after the theatrical release of *A Bad Moms Christmas*. *Id.* (citations omitted). These are not promotional or advertising activities per se, and we address them separately below.

States. Egan Decl. ¶ 10. Boxofficejojo.com reported the film’s weekly box office revenues and rankings vis-à-vis other films as follows:

Summary		Daily	Weekend	Weekly	Foreign			
		<h2 style="text-align: center;">A Bad Moms Christmas</h2>						
<p>Domestic Total Gross: <b>\$72,110,659</b></p>		<p>Distributor: <b>STX Entertainment</b></p>						
<p>Genre: <b>Comedy</b></p>		<p>Release Date: <b>November 1, 2017</b></p>						
<p>MPAA Rating: <b>R</b></p>		<p>Runtime: <b>1 hrs. 44 min.</b></p>						
		<p>Production Budget: <b>\$28 million</b></p>						
2017								
Date (click to view chart)	Rank	Weekly Gross	% Change	Theaters / Change	Avg.	Gross-to-Date	Week #	
Oct 27–Nov 2	9	\$4,526,106	-	3,615	-	\$1,252	\$4,526,106	0
Nov 3–9	2	\$23,837,520	+427%	3,615	-	\$6,594	\$28,363,626	1
Nov 10–16	4	\$15,658,529	-34.3%	3,587	-28	\$4,365	\$44,022,155	2
Nov 17–23	8	\$10,727,887	-31.5%	2,948	-639	\$3,639	\$54,750,042	3
Nov 24–30	8	\$6,601,781	-38.5%	2,306	-642	\$2,863	\$61,351,823	4
Dec 1–7	10	\$4,768,783	-27.8%	2,251	-55	\$2,119	\$66,120,606	5
Dec 8–14	12	\$3,621,333	-24.1%	2,124	-127	\$1,705	\$69,741,939	6
Dec 15–21	16	\$1,616,653	-55.4%	1,038	-1,086	\$1,557	\$71,358,592	7
Dec 22–28	28	\$375,340	-76.8%	275	-763	\$1,365	\$71,733,932	8
Dec 29–Jan 4	30	\$264,708	-29.5%	214	-61	\$1,237	\$71,998,640	9
2018								
Date (click to view chart)	Rank	Weekly Gross	% Change	Theaters / Change	Avg.	Gross-to-Date	Week #	
Jan 5–11	34	\$112,019	-57.7%	144	-70	\$778	\$72,110,659	10

Egan Decl. ¶ 8; Ex. 43 (28 TTABVUE 79). A BAD MOMS CHRISTMAS was reported to be in the top ten films in box office revenues for the first month of its run in theaters, but, like BAD MOMS, it gradually declined in the rankings after its release, to the point where by Christmas week of 2017, it was ranked 28th in weekly gross revenues. The reported figures suggest that A BAD MOMS CHRISTMAS was less successful than BAD MOMS.

Mr. Egan testified that as of December 2019 the two films in the BAD MOMS series had grossed a total of about \$75 million in the United States from physical home

media and cable and Internet video-on-demand and electronic sell through. Egan Decl. ¶ 14. These non-box office revenues suggest ongoing exposure of the films after the end of the theatrical run of A BAD MOMS CHRISTMAS in early January 2018 and thus some degree of continuing awareness of the BAD MOMS mark when trial began in early November 2019. We do not know, however, exactly when during that period these revenues were realized, or how they compare to those generated by other films released in 2016 and 2017, by well-known films generally, or even by other films produced by Opposer, such as THE FOREIGNER, I FEEL PRETTY, and MOLLY'S GAME. Egan Decl. ¶ 5.

When a party's sales and advertising numbers are large enough, the Federal Circuit has "tended to accept them without any further supporting proof," *Bose*, 63 USPQ2d at 1306, but neither Opposer's box office revenues nor its non-box office revenues are so large in absolute terms as to be probative of fame without some context vis-à-vis other films available for viewing in theaters in 2017 and for home viewing in 2018 and 2019. *See id.* (summarizing sales and advertising figures in cases in which marks have been found to be famous under Section 2(d); *see also Promark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1245 (TTAB 2015) ("When the numbers are large, they may suffice to prove fame for likelihood of confusion purposes, assuming relevant contextual indicators support that conclusion."). The absence of such context is particularly important here given the relatively ephemeral nature of most of the numerous films released each year. Without such context,



Opposer's total box office and non-box office revenue figures have limited probative value in establishing the fame of Opposer's mark as of the time of trial.

Opposer's other circumstantial evidence of fame similarly has limited probative value. As noted above, we have no information regarding any revenues realized by Opposer at any time under its licensing and promotional agreements. Opposer's social media webpages are hearsay when offered to show the number of Opposer's followers and the extent of viewing of the films on social media as of June 2019. The awards for the BAD MOMS film and its stars were received in 2016 and 2017, long before trial commenced.

The cited media coverage of the two films themselves appears mostly to have ended in November 2017, about two years before trial, with reviews of A BAD MOMS CHRISTMAS and reports of its early box office revenues. Egan Decl. ¶ 22; Ex. 57 (30 TTABVUE 70-292). One of the reviews dated November 1, 2017 and entitled THE ENDURING ALLURE OF THE *BAD MOMS*, 30 TTABVUE 250-54, discusses the two films in the series and states that when BAD MOMS hit the theaters, "it became a cultural phenomenon" and "resonated big," that "the ticket-purchasing population of America agreed wholeheartedly," that BAD MOMS first weekend gross of \$23 million "was incredibly impressive for a movie with an R-rating," *id.* at 251, and that "[t]he sequel, *A Bad Moms Christmas*, hits theaters this weekend and only expands on everything the first installment did." *Id.* at 252. An article dated November 7, 2017 reported that A BAD MOMS CHRISTMAS was #2 at the box office for the previous weekend, behind Disney's THOR: RAGNAROK. *Id.* at 257-58. Another article dated November 6, 2017

reported that for the period October 30-November 5, 2017, the box office headlines were dominated by THOR: RAGNAROK and that “the US counterprogramming entry *Bad Moms Christmas* made its early November start in second place.” *Id.* at 270-71. An article in VARIETY dated February 16, 2018 reported that A BAD MOMS CHRISTMAS “debuted at No. 1 on both national home video sales charts the week ended Feb. 10.” *Id.* at 124-25.

There is post-November 2017 coverage of the possibility of an unscripted Bad Moms television series on Fox, *id.* at 199-202, 216-17,<sup>42</sup> an undated article discussing the home entertainment release of A BAD MOMS CHRISTMAS, *id.* at 220-21, a December 31, 2018 article entitled “The 10 best Christmas movies on Amazon Prime Video for 2018,” which included A BAD MOMS CHRISTMAS among those movies, *id.* at 43-52, an undated article on familyeducation.com, which includes A BAD MOMS CHRISTMAS as among the “Top 10 Chick Flicks to Watch This Holiday Season,” *id.* at 59-67, and a December 15, 2017 article in TIME entitled “The Best Christmas Movies to Watch Right Now and All Season Long” that lists A BAD MOMS CHRISTMAS among them and among the “Best Christmas Movies of 2017” (but not among the “Best Christmas Movies of All Time” or the “Best Funny Christmas Movies”). *Id.* at 68-75.

There are also several articles regarding Opposer’s April 2019 announcement of the production of a third film in the BAD MOMS series identified as BAD MOMS’ MOMS.

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<sup>42</sup> A FORBES article in October 2016 similarly reported that Opposer was “going forward with ‘a series of film spin-offs, a reality television show, short form digital content, and a robust consumer products program.’” Egan Decl. ¶ 22; Ex. 57 (30 TTABVUE 240). There is no evidence in the record that the television series was ever produced.

*Id.* at 76-109.<sup>43</sup> Most of the articles referenced the success of BAD MOMS in 2016 and were generally positive in their treatment of the film and its sequel. Although one stated that “the first *Bad Moms* may not have been great, and the inevitable holiday sequel, *A Bad Moms Christmas*, may have been worse to endure,” *id.* at 78 (avclub.com), others noted that *Bad Moms* “was one of those comedies that studios love to see” because it was produced on a modest budget and was commercially successful, *id.* at 79 (cinemablend.com), and called BAD MOMS “a soaring success,” *id.* at 84 (bustle.com), “a hit for STX,” *id.* at 87 (ew.com), a “surprise success,” *id.* at 89 (flickeringmyth.com), a “surprise hit,” *id.* at 91 (hnextertainment.com), a “huge moneymaker for STX” together with A BAD MOMS CHRISTMAS, *id.* at 93 (moviefone.com), “a giant sleeper hit back in 2016,” *id.* at 97 (movieweb.com), part of a “popular franchise,” *id.* at 100 (purewow.com), a “surprise hit back in 2016,” *id.* at 101 (reeltalkinc.com), “an unexpected summer box office success,” *id.* at 105 (variety.com), and part of “the most consistent franchise for STX since the first film debuted in 2016.” *Id.* at 108) (yahoo.com).

Unlike most of the articles reviewing or discussing BAD MOMS in 2016 and 2017, however, most of the 2019 articles focusing on a third film in the series did not appear in general circulation publications such as FORBES and USA TODAY, but rather on websites that appear to be directed to the motion picture business specifically or the entertainment industry generally. There is no evidence in the record regarding the

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<sup>43</sup> There is no evidence in the record that this film was ever produced. Several of the articles also noted that there were no developments regarding the BAD DADS project and that it appeared to have been shelved.

extent of any exposure of these articles to the movie-going public at large. This significantly reduces their probative value as evidence that the BAD MOMS mark was as familiar to consumers when trial began in November 2019 as it may have been in 2016 and 2017, when the films were more widely discussed. Considered in its entirety, the media coverage of the two films in the series from 2016 to 2019 does not support a finding that the BAD MOMS mark was famous in November 2019.

With respect to Opposer's enforcement efforts, Opposer successfully pursued infringement claims against uses of Bad Moms Fitness for CDs and digital media, Kimbrough Decl. ¶ 14; Ex. 39 (26 TTABVUE 145-217), and Bad Moms LLC for a Facebook page, 26 TTABVUE 218-25, and the use and registration of BAD MOMS and the use of the trade name Bad Moms, LLC for various goods in Classes 33 and 41. Kimbrough Decl. ¶ 16; Exs. 41-42 (26 TTABVUE 324-573). Opposer also obtained a default judgment in Opposition No. 91247104 to a use-based application to register BAD MOMS BLURB for on-line journals, namely, blogs featuring tips and tricks for single dating women. Kimbrough Decl. ¶ 15; Ex. 40 (26 TTABVUE 236-323). As the Federal Circuit recently explained, however, the fame inquiry "is focused on whether the mark has achieved 'extensive public recognition and renown,' not on enforcement efforts." *Omaha Steaks*, 128 USPQ2d at 1693 (finding that the Board's error in refusing to take judicial notice of 20 lawsuits filed by the opposer was "thus harmless.") (quoting *Coach Servs.*, 101 USPQ2d at 1720). Opposer appears to have succeeded in limiting third-party uses of BAD MOMS as a mark, but that tells us little or nothing about the fame of the mark at the time of trial.

Finally, we consider Opposer's reliance on Applicant's discovery responses served in October 2018, more than a year before trial began, in which she admitted that "Bad Moms" and "A Bad Moms Christmas" are each "well recognized in the U.S. as the title of a movie." 24 TTABVUE 232 (Applicant's Responses to Opposer's Request for Admission Nos. 43-44). The pertinent requests sought admissions that "[t]he motion picture *Bad Moms* is famous" and "[t]he motion picture *A Bad Moms Christmas* is famous." *Id.* Applicant did not go that far, qualifying her responses with objections that "[f]amous is for the Trademark Trial and Appeal Board to decide" and that "[i]n determining whether a *trademark* possesses the requisite degree of recognition, the court considers all relevant factors." *Id.* (emphasis in original). Applicant's responses do not admit the fame of Opposer's BAD MOMS mark for likelihood of confusion purposes. *See Lacoste Alligator S.A. v. Maxoly, Inc.*, 91 USPQ2d 1594, 1597 (TTAB 2006) (finding that "opposer's mark is famous for purposes of likelihood of confusion" based on applicant's admission in its answer that the "opposer's alligator design is a famous trademark" because "it would be unduly prejudicial to require more evidence from opposer in light of applicant's admission"); *see also Nike*, 100 USPQ2d at 1021 & n.7 (applicant's admission that "Opposer's mark 'JUST DO IT' is famous" supported a finding that they "have admitted that opposer's mark is famous of likelihood of confusion purposes."); *Starbucks U.S. Brands LLC v. Ruben*, 78 USPQ2d 1741, 1751 (TTAB 2006) (applicant's admission that the STARBUCKS mark "was well known to the general public and famous for coffee and retail store services featuring coffee prior to the filing date of his application" supported a finding of fame for likelihood of

confusion purposes). Applicant's admissions do support a finding that the BAD MOMS mark was famous for motion pictures as of 2018, much less as of November 2019.

The record as a whole shows that the BAD MOMS mark for motion pictures was strongest before 2018 because Opposer's advertising and promotion of the films, their exposure to the movie-going public, and their coverage in the media, were all concentrated in the years 2016 and 2017. The mark's exposure to the movie-going public waned thereafter because Opposer did not engage in any subsequent advertising and promotion under the mark, and the residual viewing of the films on home media was not shown to be sufficiently extensive relative to that of other films to cause the BAD MOMS mark to remain top-of-mind for the movie-going public. We find that on the "spectrum from very strong to very weak," *Joseph Phelps Vineyards*, 122 USPQ2d at 1734, the BAD MOMS mark for motion pictures retained only modest strength at the time of trial. The fifth *DuPont* factor thus slightly supports a finding of a likelihood of confusion.

**b. The Number and Nature of Similar Marks in Use on Similar Goods and Services**

The sixth *DuPont* factor "considers '[t]he number and nature of similar marks in use on similar goods.'" *Omaha Steaks*, 128 USPQ2d at 1693 (quoting *DuPont*, 177 USPQ at 567). "The purpose of introducing evidence of third-party use is 'to show that customers have become so conditioned by a plethora of such similar marks that customers have been educated to distinguish between different [such] marks on the bases of minute distinctions.'" *Id.* (quoting *Palm Bay Imps.*, 73 USPQ2d at 1694).

Third-party uses may bear on the commercial weakness of a mark, *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017), and may be “relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.” *Omaha Steaks*, 128 USPQ2d at 1693 (quoting *Palm Bay Imps.*, 73 USPQ2d at 1694). Applicant argues that she “produced proof of third party common law trademark use of BAD MOMS as associated with a number of different goods and services,” that “[n]umerous social groups, organizations, articles, and merchandise companies all use BAD MOMS to promote, offer and sell their goods and services,” and that “[t]here is such widespread commercial use of the term ‘bad moms’, consumers could not possibly believe all the goods and services associated with the respective third parties, emanate from Opposer.” 49 TTABVUE 15.

Third-party registrations “may bear on conceptual weakness if a term is commonly registered for similar goods or services,” *Tao Licensing*, 125 USPQ2d at 1057, but not a mark’s commercial strength. Applicant argues that she “provided as evidence, numerous third party registrations where a movie title was registered for motion picture services and similar, even identical marks were allowed to register for non-related goods or services.” 49 TTABVUE 16. She argues that the “numerous registrations of same or similar trademarks, specifically movie titles for motion picture services, show the Trademark Office has a history of allowing the marks to coexist so long as the goods or services are not related, and movie titles are not afforded any special status.” *Id.*

We begin with Applicant's third-party registration evidence. As Applicant acknowledges, these registrations do not involve marks containing the words BAD MOMS (or even BAD or MOMS), but rather are groups of marks consisting of or containing the words ICE AGE, BEAUTY & THE BEAST, TITANIC, JAWS, FAST & FURIOUS, FROZEN, IRON MAN, ALLADIN, BLACK PANTHER, SPECTRE, SKYFALL, THE HANGOVER, and MONSTER, all of which are, or are part of, the titles of motion pictures. 34 TTABVUE 12-39. These third-party registrations have no probative value regarding the conceptual weakness of the BAD MOMS mark because they do not contain any elements of the mark. *In re Embiid*, 2021 USPQ2d 577, at \*37 (TTAB 2021) (holding that pairs of registrations of the marks COBRA and SOLE "do not show that an element of the cited TRUST THE PROCESS mark is conceptually weak because the registered COBRA and SOLE marks do not contain any such element.").

Applicant's third-party use evidence consists of webpages and articles that Applicant claims are "numerous examples of BAD MOMS used as a common law trademark on goods similar to goods recited in Opposer's registrations in classes 03, 18 and 21." 49 TTABVUE 21-22. Applicant argues that "[n]umerous social groups, organizations, articles, and merchandise companies all use BAD MOMS to promote, offer and sell their goods and services," and that there is "such widespread commercial use of the term 'bad moms', consumers could not possibly believe all the goods and services associated with the respective third parties, emanate from Opposer." *Id.* at 15. According to Applicant, the "genie is out of the bottle, 'bad moms'



has taken on a life of its own,” *id.*, and “[t]his evidence establishes that BAD MOMS is relatively weak.” *Id.* at 22.

The third-party uses include:

Facebook pages of the “Bad Moms of Long Island” and “The Bad Moms Club,” 34 TTABVUE 54;

Etsy, Redbubble, Spreadsheet, and Bonfire webpages showing various garments displaying the words “Bad Moms Club,” “Bad Moms Squad,” or “Bad Moms Club,” and “Official Merchandise” of the “Bad Moms Hudson Valley Shop,” *id.* at 55, 63, 65;

The radio.com website, which references a “bad moms podcast,” *id.* at 55;

A page from the eventbrite.com website referring to an October 19, 2019 event entitled “Bad Moms Do Target,” *id.* at 56;

Pages from theatlantic.com referring to articles entitled “What it Means to Be a Bad Mom,” *id.* and “When Bad Moms Get Book Deals,” *id.* at 62;

A page from goodhousekeeping.com referring to an article entitled “Estrangement Doesn’t Just Happen to ‘Bad’ Moms-It Happened to Me Too,” *id.* at 57;

The title of the book *The Bad Moms Club* and a couple of paragraphs from the book, resulting from a Google search on the term “bad moms,” *id.*;

A page from abcnews.go.com with the headline “Real-life ‘Bad Moms’ are embracing imperfections, redefining what it means to be a ‘good mother,’” *id.* at 58;

A page from marvel.com with the headline “6 Bad Moms of the Marvel Universe,” *id.*;

A page from theparentcue.org with the headline “How Bad Moms Can Get a Win,” *id.* at 59;

A page from parenthood.com with the headline “Confessional Tweets From ‘Bad’ Moms” above a picture of Kristen Bell, *id.*;

A page from realclearpolitics.com with the headline “The Data ‘Bad Moms’ Need,” *id.* at 60;

A page from rockawaytimes.com with the headline “‘Bad Moms of Rockaway’ is Anything But Bad,” *id.*;

A page from moonshineink.com with the headline “Bad Moms” accompanied by a picture of numerous women and children, *id.* at 61;

A page from scottsdale.momcollective.com with the headline “We Are All ‘Bad Moms’ (And That’s A Good Thing),” *id.*;

A page from the website of the CBS affiliate in San Diego (cbs8.com) with the headline “Join ‘Bad Moms’ to help serve the homeless,” *id.* at 62;

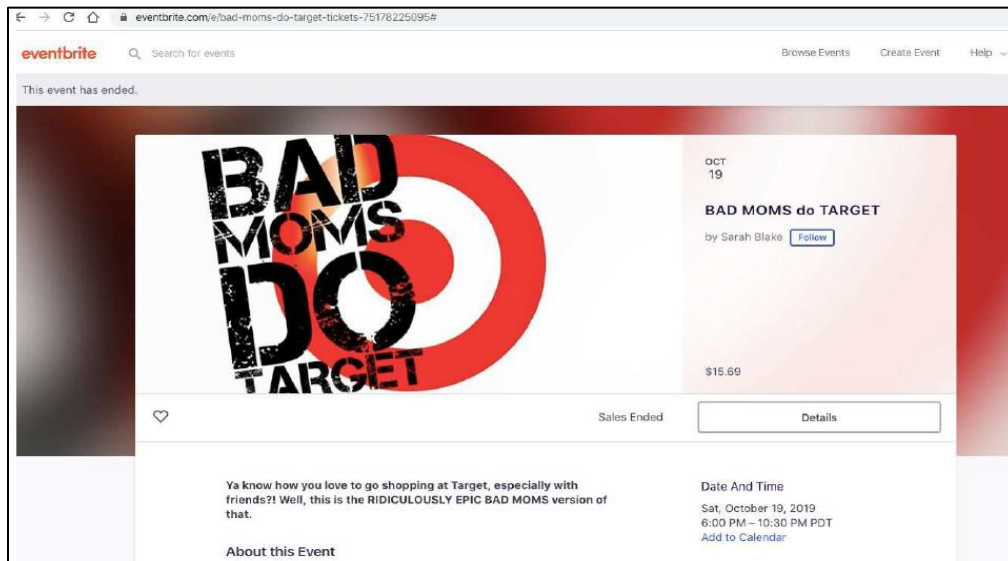
A page from pinterest.com, *id.* at 64; and

A page from herviewfromhome.com with the headline “Confessions of a ‘Bad’ Mom.” *Id.*

Opposer argues that “[n]one of the screenshots are probative of third-party use or the strength of the BAD MOMS Marks, particularly because, in large part, Applicant has not made of record any evidence that the uses at issue have been well promoted or generated any appreciable consumer recognition.” 48 TTABVUE 35. Opposer offers multiple critiques of this evidence, *id.* at 35-38, which we discuss below.

Opposer argues that “certain of Applicant’s cropped screenshots omit information specifically tying the use of ‘Bad Moms’ to the *Bad Mom* [sic] Motion Pictures.” *Id.* at 35. Opposer supports this argument with evidence from its Rebuttal Notice of Reliance consisting of full printouts of Internet webpages cited by Applicant. 45 TTABVUE 492-532. We agree with Opposer that in the articles from abcnews.go.com,

*id.* at 508-11, and scottsdale.momcollective.com, *id.* at 525-26, the term “Bad Moms” is expressly associated with the motion picture. We also agree with Opposer that given the promotion of Bad Moms through materials touting the “Bad Moms Sweepstakes” and the “Bad Moms Night In,” it is more likely than not that the Eventbrite event reference to “Bad Moms Do Target” shown below would be understood by viewers and participants as a reference to the motion picture:



34 TTABVUE 56. Finally, as noted above, and as shown below, the article on the parenthood.com website also associates the term “bad mom” with the BAD MOMS motion picture through the depiction of Kristen Bell in character beneath the headline “Confessional Tweets From ‘Bad’ Moms”:



*Id.* at 59.<sup>44</sup> These uses reinforce, rather than detract from, the association of the BAD MOMS mark with Opposer and its films.

Opposer also argues that “many of Applicant’s alleged third-party uses are non-trademark uses of the phrase ‘bad moms’ in the titles of articles,” including “*What It Means to Be a Bad Mom*; *Estrangement Doesn’t Just Happen to ‘Bad’ Moms – It Happened to Me Too*; *6 Bad Moms of the Marvel Universe*; *How Bad Moms Can Get a Win* (article undated); *When Bad Moms Get Book Deals*; and *Confessions of a ‘Bad’ Mom* (article undated and author identified as residing in Australia),” 48 TTABVUE 36, that “[s]imilarly, the article *The Data ‘Bad Moms’ Need* on *realeclearpolitics.com*

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<sup>44</sup> Opposer argues that this webpage and the one from *radio.com* are no longer on line. 48 TTABVUE 36. Even if this is true, the pages were online at the time of trial, and we have considered them for whatever probative value they may have. In that regard, the *radio.com* webpage displays the term “bad moms podcast” in a red, black, and white color scheme that is reminiscent of the color scheme of the promotional materials for the BAD MOMS and A BAD MOMS CHRISTMAS motion pictures, 34 TTABVUE 55, suggesting that viewers would associate the webpage with the films.

uses ‘bad moms’ in a non-trademark sense,” *id.* at 37, and that “[s]uch non-trademark uses do not narrow the protection afforded to the BAD MOMS Marks.” *Id.* at 36.

We agree with Opposer that the referenced articles do not appear to use the terms “Bad Moms” or “Bad Mom” as source-identifiers. These uses, which are not in connection with goods or services, much less ones that are similar to the goods and services at issue in this case, *see Omaha Steaks*, 128 USPQ2d at 1693-95, have no probative value regarding the strength of Opposer’s BAD MOMS mark.

With respect to what Opposer calls four “‘Bad Moms’ organizations/groups,” 48 TTABVUE 37, Opposer argues that “to the extent that they are making trademark use of their group names, they infringe Opposer’s rights, and Opposer has the right to proceed against them as it has other infringers,” *id.* at 37-38,<sup>45</sup> as it has pursued a claim against the operator of the Bad Moms organization referenced in the article entitled “Join ‘BAD Moms’ to help serve the homeless on cbs.com, who agreed to cease use of the term “BAD Moms.” Kimbrough Decl. ¶ 12; Ex. 39 (26 TTABVUE 218-25). Opposer’s characterization of the four uses as infringements begs the question of what, if anything, Opposer has done to stop them, and on this record they stand unchallenged.

Finally, with respect to the “Bad Moms” garments displayed on the pages from etsy.com, redbubble.com, spreadshirt.com, and bonfire.com, Opposer argues that “[t]hese are all print-on-demand websites, which means there is no inventory of

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<sup>45</sup> In that regard, Opposer notes that a “Bad Moms Club” collection on Pinterest has “a modest number of followers (310)” and that there is little additional information about the collection. 48 TTABVUE 38.

products bearing these terms,” 48 TTABVUE 38, and that “Applicant has not made of record any evidence that these ornamental uses have resulted in actual sales or generated any appreciable consumer recognition.” *Id.* We agree with Opposer that these snapshots of merchandise have little probative value regarding the commercial weakness of Opposer’s BAD MOMS mark.

The record as a whole shows very few pertinent source-identifying uses of “Bad Moms” in connection with goods or services, and Applicant’s evidence thus is a “far cry from the large quantum of evidence of third-party use and third-party registration that was held to be significant in” the Federal Circuit’s seminal decisions in *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v, New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129 (Fed. Cir. 2015) and *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671 (Fed. Cir. 2015). *Embiid*, 2021 USPQ2d 577, at \*39-40 (quoting *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019)). We find that the sixth *DuPont* factor is neutral in our analysis of the likelihood of confusion.

## **2. Similarity or Dissimilarity of the Marks**

Under the first *DuPont* factor, we consider “the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps.*, 73 USPQ2d at 1691. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *Inn at St. John’s*, 126 USPQ2d at 1746 (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)).

The proper test regarding similarity “is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their

commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *Coach Servs.*, 101 USPQ2d at 1721 (internal quotation marks and citation omitted)). “The proper perspective on which the analysis must focus is on the recollection of the average customer, who retains a general rather than specific impression of marks.” *In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1630 (TTAB 2018) (citations omitted).

Opposer argues that “Applicant copied the BAD MOMS mark in its entirety,” 48 TTABVUE 29, and that “[l]ikelihood of confusion is often found where the entirety of one mark is incorporated within another.” *Id.* (quotation omitted). Opposer further argues that “Applicant cannot void the similarity between the marks by appending the word UNLIMITED and BIBLE to BAD MOMS” because “Applicant uses the entirety of the BAD MOMS mark as the first and dominant portion of her mark.” *Id.* According to Opposer, “the terms BIBLE and UNLIMITED are sonically, visually, and conceptually subordinate to the BAD MOMS portion of Applicant’s marks,” *id.* at 30, and “[i]n essence, Applicant is attempting to register a BAD MOMS family of marks.” *Id.* (emphasis removed).<sup>46</sup> Opposer also points to its own “frequent use of

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<sup>46</sup> “A family of marks is a group of marks having a recognizable common characteristic, wherein the marks are composed and used in such a way that the public associates not only the individual marks, but the common characteristic of the family, with the trademark owner.” *New Era*, 2020 USPQ2d 10596, at \*7 (quoting *J & J Snack Foods Corp. v. McDonald’s Corp.*, 932 F.2d 1460, 18 USPQ2d 1889, 1891-92 (Fed. Cir. 1991)). “Simply using a series of similar marks does not of itself establish the existence of a family. There must be a recognition among the purchasing public that the common characteristic is indicative of a common origin of the goods.” *Id.* (quoting *J & J Snack Foods*, 18 USPQ2d at 1891. There is no evidence in the record regarding Applicant’s use of her marks in a manner that would establish a “family” with two members.

BAD MOMS, or permutations thereof, followed by other words,” such as A BAD MOMS CHRISTMAS, BAD MOMS NIGHT OUT, and BAD MOMS BOOK CLUB. *Id.* Opposer claims that “the immediate connotation of BAD MOMS BIBLE is a [sic] the preeminent and authoritative publication or compendium of information regarding *Bad Moms* or the *Bad Moms* Motion Pictures.” *Id.* Opposer also notes that the USPTO has found a likelihood of confusion between the marks in two of Opposer’s pending applications and the BAD MOMS UNLIMITED mark. *Id.* at 31.

Applicant responds that “the mere fact that the marks in issue share elements, even dominant elements, does not compel a conclusion of likely confusion.” 49 TTABVUE 11. Applicant argues that “[t]he marks at issue in this proceeding share words in common, however, the appearance of Applicant’s marks are distinguished by the addition of non-descriptive words BIBLE and UNLIMITED, which changes the appearance, sound, and meaning.” *Id.* at 12. Applicant acknowledges that the “marks at issue in this proceeding share words in common, however, the appearance of Applicant’s marks are distinguished by the addition of non-descriptive words BIBLE and UNLIMITED, which changes the appearance, sound, and meaning.” *Id.*

With respect to the meaning of her marks, Applicant argues that “the word BAD refers to the slang or alternative definition of the word bad (bad meaning very good, great, or excellent),” while the “word BIBLE is meant to connote a book or in Applicant’s case, a resource considered authoritative in it’s [sic] field, or the ultimate resource for moms in need of financial assistance,” and the “the word UNLIMITED is meant to connote ultimate or unrestricted as applied to the various goods sold



under the mark in classes 09, 16 and 25.” *Id.* Applicant also argues that “the examining attorney reviewed the entire mark BAD MOMS BIBLE and BAD MOMS UNLIMITED against all of Opposer’s thirteen applications for BAD MOMS and BADMOMLIFE and correctly determined no likelihood of confusion,” *id.* at 13, apparently because Applicant’s mark BAD MOMS UNLIMITED was cited as a potential bar to only two of the applications.

Applicant further argues that “MOMS is disclaimed in both marks, making BAD and BIBLE the more dominant or source indicating features of the marks.” *Id.* at 14. According to Applicant, “the common element, BAD MOMS is weak and descriptive of Opposer’s services, specifically in the application for motion picture services, featuring a movie about bad moms,” *id.* at 15, and that the weakness of the term is further demonstrated by Applicant’s “proof of third party common law trademark use of BAD MOMS as associated with a number of different goods and services,” *id.*, which we discussed above.

In its reply brief, Opposer argues that Applicant’s claim that the USPTO reviewed Applicant’s marks against “all of Opposer’s thirteen applications for BAD MOMS and BADMOMLIFE” and found no likelihood of confusion is misleading because Opposer filed its applications after Applicant filed her applications. 53 TTABVUE 10. Opposer reiterates that two of its applications were refused registration based on Applicant’s prior BAD MOMS UNLIMITED application. *Id.* Opposer also argues that Applicant “cannot reasonably dispute that BAD MOMS is the dominant portion of its BAD MOMS formative marks” because “BAD MOMS leads both marks, and BAD modifies

MOMS, such that BAD will not be construed alone but with MOMS.” *Id.* Opposer notes that Applicant “neither responds to nor rebuts Opposer’s showing that its BAD MOMS mark is commonly used with other words, e.g., BAD MOMS CHRISTMAS, BAD MOMS SWEEPSTAKES,” such that “consumers are accustomed to seeing Opposer’s BAD MOMS mark used with additional terms appended thereto.” *Id.* at 11.

With respect to Applicant’s arguments regarding the slang meaning of the word “bad” in Applicant’s marks, Opposer argues that Applicant has not shown that she uses the word in accordance with the slang definition, that the public would view the mark as being used in accordance with the slang definition, or that the word means something different in Opposer’s BAD MOMS mark. *Id.* at 11-12.

While the marks must be considered in their entirety, “in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entirety.” *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (quoting *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985)). We agree with Opposer that the term BAD MOMS is the dominant portion of both of Applicant’s marks. The term is the first portion in each mark when it is viewed, heard, spoken, and recalled, and in each mark its position as “the first term in the mark” helps to establish its prominence. *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1185 (TTAB 2018) (citing *Palm Bay Imps.*, 73 USPQ2d at 1682). *See also Detroit Athletic Co.*, 128 USPQ2d at 1049 (“The identity in the

marks' initial two words is particularly significant because consumers typically notice those words first.”); *Presto Prods. Inc. v. Nice-Pak Prods. Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered.”). The fact that Applicant is seeking to register two marks that both begin with BAD MOMS and end with different words reinforces that BAD MOMS is the primary source-identifying feature of both marks, the portion “most likely to make a greater impression upon purchasers, to be remembered by them, and to be used by them to request the goods [and services].” *Aquitaine Wine USA*, 126 USPQ2d at 1184 (citing *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012)). We turn now to the required comparison of the marks in their entireties, giving greater weight in that comparison to the words BAD MOMS in Applicant’s marks than to the words BIBLE and UNLIMITED.

With respect to appearance, Applicant’s marks incorporate Opposer’s BAD MOMS mark in its entirety with the addition of the words BIBLE and UNLIMITED, respectively. Applicant’s BAD MOMS BIBLE and BAD MOMS UNLIMITED marks are standard character marks, and thus “could be used in any typeface, color, or size, including the same stylization actually used or intended to be used by [Opposer], or one that minimizes the differences or emphasizes the similarities between the marks.” *Anheuser-Busch, Inc. v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1823 (TTAB 2015) (citing *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1258-59 (Fed. Cir. 2011)). Mr. Egan testified that he had reviewed Applicant’s website, which he claimed uses “BAD MOMS in much larger font than

the word UNLIMITED, and therefore emphasizes the mark BAD MOMS” in connection with clothing, notebooks, calendars, and magnets. Egan Decl. ¶ 31.<sup>47</sup> Applicant also produced confidential documents displaying hangtags and other materials pertaining to her BAD MOMS UNLIMITED mark in which the words BAD MOMS are combined into “BADMOMS” and are displayed in typeface that is considerably larger than the word UNLIMITED. 25 TTABVUE 30.

Because Applicant’s marks are standard character marks, we must assume that both of them could be displayed in (1) the manner described by Mr. Egan, (2) the manner in which they are displayed on Applicant’s hangtags and other materials, (3) some other manner in which the words BAD MOMS are displayed in what Mr. Egan described as Opposer’s “color palettes and design motifs,” Egan Dec. ¶ 12, an example of which is shown below,



Egan Decl. ¶ 12, or (4) in some combination of these manners. All such possible displays would “minimize[ ] the differences or emphasize[ ] the similarities between

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<sup>47</sup> Because Applicant did not object to Mr. Egan’s testimony regarding Applicant’s website on the ground that it violates the Best Evidence Rule codified in Rules 1001-1008 of the Federal Rule of Evidence, which generally requires that to prove the content of a “writing,” the original writing or an acceptable duplicate must be provided, we have considered his testimony for whatever probative value it may have.

the marks.” *Anheuser-Busch*, 115 USPQ2d at 1823. We find that the marks are similar in appearance.

With respect to sound, Applicant’s marks BAD MOMS UNLIMITED and BAD MOMS BIBLE begin with the dominant portion BAD MOMS, which would be verbalized in exactly the same manner as Opposer’s BAD MOMS mark. There are aural differences between the marks resulting from the presence of additional words at the end of Applicant’s marks, but they are outweighed by the similarities resulting from the dominant words BAD MOMS. We find that the marks are similar in sound.

Finally, with respect to meaning, Applicant’s argument that the word BAD (and thus the dominant phrase “Bad Moms”) in her marks means something different from what it means in Opposer’s mark is based solely on the argument of her counsel, which “is no substitute for evidence.” *Coca-Cola Co. v. Meenaxi Enter., Inc.*, 2021 USPQ2d 709, at \*6 (TTAB 2021), *appeal docketed* (Aug. 9, 2021) (quoting *Cai*, 127 USPQ2d at 1799).<sup>48</sup> The record, including some of the third-party uses discussed above, suggests that the phrase “Bad Moms” was given its greatest currency in the vernacular by Opposer’s use of it in 2016 and 2017 in the titles of BAD MOMS and A BAD MOMS CHRISTMAS, and in collateral uses such as “Bad Moms Night Out” and “Bad Moms Night In.” Regardless of exactly how the phrase is understood, there is no evidence in the record suggesting that it would be understood to mean one thing

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<sup>48</sup> Applicant relies on a dictionary definition of the word “bad” as slang for “very good, excellent” in certain contexts, 34 TTABVUE 68, but even if this is what Applicant intended the word to mean in her marks, there is no competent evidence that this is how the word would be perceived.

in Opposer's mark and something else in Applicant's marks. *Cf. Embiid*, 2021 USPQ2d 577, at \*20. There are differences in the meanings of the marks when they are considered in their entireties, but we find that they are outweighed by the similarities resulting from the use of the dominant phrase BAD MOMS at the beginning of Applicant's marks.

The marks BAD MOMS, and BAD MOMS UNLIMITED and BAD MOMS BIBLE, are similar in appearance, sound, and connotation and commercial impression when they are considered in the entireties, and the first *DuPont* factor supports a finding of a likelihood of confusion against both applications.

### **3. Similarity or Dissimilarity of the Goods and Services, and Channels of Trade**

The second *DuPont* factor "considers '[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,'" *Detroit Athletic Co.*, 128 USPQ2d at 1051 (quoting *DuPont*, 177 USPQ at 567),<sup>49</sup> while the third *DuPont* factor considers "the similarity or dissimilarity of established, likely-to-continue trade channels." *Id.* at 1052 (quoting *DuPont*, 177 USPQ at 567). *See also Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-63 (Fed. Cir. 2014).

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<sup>49</sup> The '487 Application covers multiple goods in three classes, while the '298 Application covers multiple services in a single class. To prevail as to an entire class in each application, Opposer need not show that there is a likelihood of confusion as to each of the identified goods or services because likelihood of confusion must be found as to an entire class if it exists as to any good or service within the identification in that class. *Primrose Ret. Cmtys., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1033 (TTAB 2016) (citing *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981)).

**a. Similarity or Dissimilarity of the Goods and Services**

The goods identified in the '487 Application are:

Audio books in the field of parenting, self-help, careers and education; Decorative magnets; Downloadable mobile applications for social networking, resource and information on parenting, self-help, careers and education; E-books featuring information on parenting, self-help, careers and education recorded on computer media; Prerecorded audio tapes featuring information on parenting, self-help, careers and education; Prerecorded digital audio tape featuring information on parenting, self-help, careers and education; Sunglasses; Visual and audio recordings featuring information on parenting, self-help, careers and education, in Class 9;

Adhesive-backed cast PVC film for wrapping commercial vehicles for advertising or other promotional purposes; Adhesive labels; Art pictures; Binders; Booklets in the field of parenting, self-help, careers and education; Brochures about parenting, self-help, careers and education; Bumper stickers; Business cards; Calendars; Canvas for painting; Canvas for printing; Catalogs in the field of parenting, self-help, careers and education; Greeting cards; Letterhead paper; Magazines in the field of parenting, self-help, careers and education; Manuals in the field of instructional information on parenting, self-help, careers and education; Memory books; Newsletters about parenting, self-help, careers and education; Note books; Note cards; Pamphlets in the field of parenting, self-help, careers and education; Paper banners; Paper labels; Paper for wrapping and packaging; Picture books; Post cards; Posters; Printed invitations; Printed paper signs; Prints; Song books; Stationery; Stickers; Story books; Art prints; Cardboard boxes; Gift bags; Gift boxes; Graphic art prints; Informational flyers featuring information on parenting, self-help, careers and education; Merchandise bags; Paper bags; Paper boxes; Photo storage boxes, in Class 16; and

Aprons; Baby bibs not of paper; Caps being headwear; Costumes for use in role-playing games; Coverups; Dresses; Halloween costumes; Hats; Head wear; Headbands; Hoodies; Infant and toddler one piece clothing; Jackets; Jumpsuits; Leg-warmers; Leggings; Lingerie;

Pajamas; Pants; Ponchos; Robes; Rompers; Scarves; Shirts; Shoes; Shorts; Skirts; Slippers; Socks; Sweatpants; Sweatshirts; Swimwear; T-shirts; Ties as clothing; Underwear; Uniforms; Visors being headwear; Wristbands as clothing; Clothing wraps, in Class 25.

The services identified in the '298 Application are:

Charitable foundation services, namely, providing financial assistance for programs and services of others; Charitable foundation services, namely, providing financial support to mothers in need for payment of educational costs, pregnancy and prenatal costs, childcare costs, utility bills and obtaining medications; Charitable fundraising services; Charitable fundraising services by means of a website where donors search for and make monetary donations to specific charities or projects aimed at helping mothers in need; Charitable fundraising services by means of selling goods to raise funds, in Class 36.

We have found above that Opposer proved priority with respect to (1) “cosmetics,” “all-purpose carrying bags,” and “beverageware, bottle stoppers specifically adapted for use with wine bottles, coasters not of paper or textile, cocktail shakers, flasks, and water bottles sold empty,” the goods identified in its three registrations, and the various alcoholic beverages in its prior-pending Application Serial No. 87315506; (2) motion pictures, and (3) glassware, plastic bottles, and cosmetics, the goods for which Opposer used the BAD MOMS mark at common law.

“The goods need not be identical, but ‘need only be related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.’” *Embiid*, 2021 USPQ2d 577, at \*22 (quoting *Coach Servs.*, 101 USPQ2d at 1722).

Evidence of relatedness may include news articles or evidence from computer databases showing that the



relevant goods are used together or used by the same purchasers; advertisements showing that the relevant goods are advertised together or sold by the same manufacturer or dealer; or copies of prior use-based registrations of the same mark for both [A]pplicant's goods and the goods listed in [Opposer's] registration[s].

*Id.* (quoting *In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, at \*5 (TTAB 2020)). The same type of evidence is probative of the relatedness of goods to services. *In re Country Oven, Inc.*, 2019 USPQ2d 443903, at \*4-5 (TTAB 2019).<sup>50</sup>

**i. '487 Application**

Opposer argues that the goods identified in the '487 Application "are closely related, if not identical, to goods offered by Opposer under the BAD MOMS Marks," 48 TTABVUE 39, because "before the filing date of the Applications, Opposer used the BAD MOMS Marks for motion pictures, music recordings, DVDs, Blu[-]Rays, coasters, and beverageware," and since then Opposer "has used the BAD MOMS marks for, inter alia, cosmetics, all-purpose carrying bags, t-shirts, hoodies, aprons, postcards, phone cases, ornaments, paper napkins, hats, and underwear." *Id.* (citing Egan Decl. ¶ 15; Ex. 52 (29 TTABVUE 74-156)).<sup>51</sup>

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<sup>50</sup> When the issue is the relatedness of goods to services, the Federal Circuit has held that "something more" than that the service at issue uses the product at issue may be required in any context where "the relatedness of the goods and services is not evident, well-known or generally recognized." *Country Oven*, 2019 USPQ2d 443903, at \*12 (quoting *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1087 (Fed. Cir. 2014)).

<sup>51</sup> Opposer improperly relies on its ownership of pending applications covering magnets and physical and downloadable media in a variety of formats, and goods in Class 25, which were filed after the filing date of Applicant's applications. 48 TTABVUE 39. As discussed below, we have considered Opposer's actual use of its BAD MOMS mark on certain of the goods identified in these applications in our analysis under the second and third *DuPont* factors.

Mr. Egan testified that “[b]oth Applicant and Opposer sell women’s apparel bearing the words ‘BAD MOMS’,” and that the goods are “targeted at the same set of consumers, and both sell inexpensive apparel offered for sale to the general public,” Egan Decl. ¶ 31, and that there is “also overlap between Applicant’s Class 9 goods, which include ‘visual and audio recordings,’ and Opposer’s Class 9 goods, which include ‘audio-visual recordings,’ ‘downloadable video recordings,’ and ‘prerecorded electronic media.’” Egan Decl. ¶ 32. Opposer did not make of record any of the types of evidence of relatedness listed in the cases discussed above, or argue that the goods identified in its three registrations and one prior pending application, and the goods identified in the ’487 Application, are intrinsically related on the face of the respective identifications.

Applicant argues that

A consumer is not likely to presume . . . BAD MOMS UNLIMITED for goods are related, in any manner, to Opposer’s marks for motion picture services, it’s [sic] movie title BAD MOMS or it’s [sic] goods sold under BAD MOMS. Compared, Applicant’s goods . . . are not related to Opposer’s goods and services, with the exception of BAD MOMS UNLIMITED mark in classes 09 and 25.

49 TTABVUE 18.<sup>52</sup>

Applicant “once again points to evidence of registrations where a movie title exists for motion picture services, and similar or even identical registrations coexist having

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<sup>52</sup> Applicant’s statement regarding “the exception of BAD MOMS UNLIMITED mark in classes 09 and 25” appears to be a reference to the fact that the examining attorney assigned to Opposer’s pending applications to register BAD MOMS in Classes 9 and 25 cited Applicant’s application to register BAD MOMS UNLIMITED as a potential bar to registration. See Kimbrough Decl. ¶¶ 9, 21.

dissimilar goods or services. See Notice of Reliance, Exhibit A.” *Id.* at 20. As discussed above, these registrations have no probative value under the sixth *DuPont* factor, but they may be considered under the second *DuPont* factor. See *Embiid*, 2021 USPQ2d 57, at \*37 (citing *G.B.I. Tile & Stone, Inc.*, 92 USPQ2d 1366, 1369-70 (TTAB 2009) (stating that in the ex parte context, “applicants may submit sets of third-party registrations to suggest . . . that the Office has registered the same mark to different parties for the goods at issue, suggesting that the goods are not related.”)). We have reviewed the third-party registrations and find that the “dissimilar goods and services” for which the film titles are registered are sufficiently different from the goods and services involved in this case to make the third-party registrations of little or no probative value under the second *DuPont* factor.<sup>53</sup>

Applicant also claims that “[c]onsumers believe movie titles are just that, movie titles, and not trademarks used as a source indicator to identify goods and services.”

49 TTABVUE 20. Contrary to Applicant’s claim, however, the Board has recognized

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<sup>53</sup> By way of example, Applicant made of record an expired registration of JAWS for “entertainment services-namely, the production and distribution of theatrical motion pictures.” 34 TTABVUE 20. Such a “dead” registration has “no probative value at all,” *Embiid*, 2021 USPQ2d 577, at \*35 n.48 (citation omitted), but even if we considered it, the other registrations of JAWS-formative marks are for goods identified as “Gathering utensils, namely, twist ties made of wire encapsulated with a rubberlike sheath, ski wraps to hold a pair of skis together for transport and made of a fabric with a fastener or a twist tie” (JAWS TWIST TIES) 34 TTABVUE 21; “Noise suppressors for guns” (JAWS), *id.*; “Entertainment in the nature of live performances by a musical solo artist” (JAWZ (stylized)), *id.* at 22; “machine tools, namely, water powered nozzles for the clearing of sewers and pipes” (JAWS), *id.*; “pre-recorded computer programs for use in the field of communication” (JAWS), *id.* at 23; “metal ladders” (JAWS LADDER), *id.*; and “Athletic apparel, namely, shirts, pants, jackets, footwear, hats and caps, athletic uniforms; Scientific and technological apparel, namely, shirts, pants, jackets, footwear, hats and caps, uniforms” (JAWS OF LIFE, a term of art in the field of rescue). *Id.* at 24.

that the consuming public has long understood that marks for entertainment properties, such as movie titles, are commonly used as “source indicator[s] to identify goods and services.” *Id.* The Board observed more than 25 years ago that “[i]t is common knowledge and, in the present case, undisputed that video games, t-shirts, beach towels, caps and other logo-imprinted products are used as promotional items for a diverse range of goods and services, not to mention for specific television shows and movies.” *Turner Ent. Co. v. Nelson*, 38 USPQ2d 1942, 1945 (TTAB 1996) (granting summary judgment to owner of GILLIGAN’S ISLAND mark for entertainment services in the nature of a television series in opposition under Section 2(d) to registration of GILLIGAN’S ISLAND for “suntan oil, suntan lotion, sunblock, sunless tanning lotion, after sun moisturizing lotion, lip balm, hand and body lotion, hair shampoo and body bar soap.”). The Board subsequently reiterated that “[i]t is common knowledge, and a fact of which we can take judicial notice, that the licensing of commercial trademarks on ‘collateral products’ has become a part of everyday life.” *L.C. Licensing, Inc. v. Berman*, 86 USPQ2d 1883, 1889 (TTAB 2008) (citing *Turner Ent.*, 38 USPQ2d at 1945-46). We similarly take judicial notice that the licensing of entertainment-related marks for use “on ‘collateral products’ has become a part of everyday life,” *id.*, and will assess the relatedness of the goods in this case against the backdrop of the entertainment-related nature of Opposer’s BAD MOMS mark and the consuming public’s awareness that such marks commonly appear on collateral products.

**(a) Class 25**

We turn first to Applicant's Class 25 goods, which include "T-shirts," goods that the Board has noted are typical collateral products "for specific television shows and movies." *Turner Ent.*, 38 USPQ2d at 1945. *See also In re Phillips-Van Heusen Corp.*, 228 USPQ 949, 951 (TTAB 1986) ("items of clothing (especially shirts, which are included within applicant's identification) appear to represent a particularly natural area for the 'collateral product' use of commercial trademarks . . ."). Mr. Egan and Ms. Kimbrough testified that Opposer has used its BAD MOMS mark on and in connection with a variety of collateral products, including t-shirts and other apparel, Egan Decl. ¶ 15; Ex. 52; Kimbrough Decl. ¶¶ 10-11; Ex. 37, and T-shirts bearing the BAD MOMS mark have been sold through zazzle.com under a license from Opposer. Egan Decl. ¶ 15; Ex. 52 (29 TTABVUE 91-96, 104-12, 127, 130-45). Although Opposer's use of BAD MOMS on t-shirts did not commence until some point after Applicant's July 28, 2017 filing date, it is probative of the relatedness of the "T-shirts" identified in Class 25 to Opposer's motion pictures. *Cf. NASDAQ Stock Mkt., Inc. v. Antartica S.r.l.*, 69 USPQ2d 1718, 1727 (TTAB 2003) (although the opposer, the owner of the registered NASDAQ mark for stock market services, failed to show that it "made prior use of NASDAQ for goods such as those identified in applicant's application, or for opposer's collateral products that are closely related thereto," the Board found "nonetheless that the record establishes that opposer's use of its mark for collateral goods . . . has been a natural outgrowth of its business, has expanded over time," and contributed to the Board's "finding of likelihood of confusion in regard to opposer's Section 2(d) claim based on its pleaded registration" for stock market

services). As the Board has previously observed, t-shirts have long been commonly understood to be core collateral products for entertainment properties, as exemplified by Opposer's own use of its BAD MOMS mark for those goods in the course of the expansion of its collateral licensing, and we find that the second *DuPont* factor supports a finding of a likelihood of confusion as to "T-shirts" and thus as to all of the Class 25 goods in the '487 Application. *See NASDAQ*, 69 USPQ2d at 1732 (finding under the second *DuPont* factor that individuals familiar with opposer, its services, and collateral products, "when confronted with applicant's mark used on at least some of its identified goods, will consider such goods either to be promotional items of opposer or products branded with opposer's mark in conjunction with opposer's sponsorship of an event.").

**(b) Class 9**

Unlike the broadly identified Class 25 goods, almost all of Applicant's Class 9 goods contain a limitation to the "field of parenting, self-help, careers and education," including "Prerecorded audio tapes featuring information on parenting, self-help, careers and education," "Prerecorded digital audio tape featuring information on parenting, self-help, careers and education," and "Visual and audio recordings featuring information on parenting, self-help, careers and education." The only Class 9 goods without such a limitation are "decorative magnets" and "sunglasses."

Opposer argues that it "owns pending applications to register BAD MOMS in, inter alia, Class 9, including magnets and physical and downloadable media in a variety of formats," 48 TTABVUE 39, but as noted above, Opposer cannot rely on its

Class 9 application, which was filed after Applicant's July 28, 2017 filing date, and it did not claim or prove use of its BAD MOMS mark on decorative magnets.

Mr. Egan's testimony that there is "overlap between Applicant's Class 9 goods, which include 'visual and audio recordings,' and Opposer's Class 9 goods, which include 'audio-visual recordings,' 'downloadable video recordings,' and 'prerecorded electronic media,'" Egan Decl. ¶ 32, ignores both the field-of-use limitations in Applicant's Class 9 goods, and the limited nature of Opposer's own visual and audio recordings under the BAD MOMS mark, which featured the BAD MOMS motion pictures and the soundtrack for BAD MOMS, Egan Decl. ¶¶ 8, 14; Ex. 48 (28 TTABVUE 296-325), and which are described in Opposer's Class 9 application as "Audio-visual recordings featuring entertainment in the nature of celebrity interviews, movie clips and outtakes, and comedy performances" and "prerecorded CDs, DVDs and other audio-visual recordings featuring motion pictures in the field of comedy." Kimbrough Decl. ¶ 9 (Serial No. 87562646). Opposer offers no evidence other than Mr. Egan's conclusory testimony that the parties' specific types of audio and video recordings are related, or that Opposer's audio and video recordings are related to the goods identified as "decorative magnets" and "sunglasses."<sup>54</sup> As noted above, the Board has long recognized that marks for entertainment properties are commonly used on a wide variety of collateral goods, but there is no recognition in our cases that such

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<sup>54</sup> As noted above, Applicant acknowledges that the Class 9 goods in the '487 Application may be related to the goods in Opposer's Class 9 application. 49 TTABVUE 18 ("Applicant's goods and services are not related to Opposer's goods and services, with the exception of BAD MOMS UNLIMITED in classes 09 and 25."). We do not view this as a concession of relatedness because Opposer's Class 9 application covers goods, such as "decorative magnets" and "eyewear," that go well beyond those as to which Opposer proved common law use.

marks are commonly used for the Class 9 goods in the '487 Application. *Cf. Parfums de Coeur, Ltd. v. Lazarus*, 83 USPQ2d 1012, 1020 (TTAB 2007) (the Board's decision in *Turner Ent.* "lists a number of items that can be considered the subject of collateral merchandising, e.g., caps, t-shirts, beach towels, linens and glassware, but fragrance products are not among them."). We find that the second *DuPont* factor supports a finding of no likelihood of confusion as to Class 9 in the '487 Application.

**(c) Class 16**

Opposer argues that it has shown priority of use as to coasters, and that after Applicant's filing date, it used the BAD MOMS mark for postcards and paper napkins, but it makes no effort to argue, and points to no evidence to show, that these goods are related to any of Applicant's Class 16 goods, 48 TTABVUE 39-40; 53 TTABVUE 13-14,<sup>55</sup> and our cases do not recognize that entertainment properties are commonly used for those goods. *See Parfums de Coeur*, 83 USPQ2d at 1020. We find that the second *DuPont* factor supports a finding of no likelihood of confusion as to Class 16 in the '487 Application.

**ii. '298 Application**

Opposer argues that "Applicant's services identified in the BAD MOMS BIBLE Application are related to goods and services offered by Opposer under the BAD MOMS Marks," 48 TTABVUE 39, because it "has licensed its BAD MOMS mark for use in conjunction with charitable efforts, such as a promotional contest for *A Bad*

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<sup>55</sup> Opposer has no pending application to register BAD MOMS or another mark for goods in Class 16. Kimbrough Decl. ¶ 9. Opposer's Class 21 registration of BAD MOMS covers "coasters, not of paper or textile." Kimbrough Decl. ¶ 8; Ex. 35 (26 TTABVUE 31-36).



*Moms Christmas* organized by the Alliance of Moms which, unsurprisingly, benefitted mothers.” *Id.* at 39-40 (citing Egan Decl. ¶ 35; Ex. 51 (29 TTABVUE 71-72)). Mr. Egan and Ms. Kimbrough both opine, in almost verbatim language, that “consumers are likely to believe that Applicant’s charitable foundation services are related to or affiliated with Opposer’s entertainment services offered under the BAD MOMS Marks,” and that “a consumer may believe that BAD MOMS BIBLE is a charitable arm of the *Bad Moms* franchise.” Egan Decl. ¶ 35; Kimbrough Decl. ¶ 24.<sup>56</sup>

Opposer further argues that

Applicant’s own activities establish the relatedness of Opposer’s goods with Applicant’s services. Not only does Applicant intends [sic] to offer the goods and services under her marks under the same BAD MOMS family of marks, Applicant attests that she sells goods under the BAD MOMS UNLIMITED mark to promote her BAD MOMS BIBLE services. Applicant, thus, is precluded from arguing that Opposer’s goods – certain of which, as noted above, are identical to Applicant’s – are not related to Applicant’s services.

48 TTABVUE 40.

Applicant responds that a “consumer is not likely to presume BAD MOMS BIBLE for charitable foundation services [is] related, in any manner, to Opposer’s marks for motion picture services, it’s [sic] movie title BAD MOMS or it’s [sic] goods sold under BAD MOMS.” 49 TTABVUE 18. Applicant also argues that her “charitable foundation services are not related or marketed in the same way Opposer would advertise, promote or market it’s [sic] motion picture services or a movie.” *Id.* at 19.

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<sup>56</sup> As with the witnesses’ opinions as to the fame of Opposer’s mark, we give no weight to their opinions as to relatedness.

In its reply brief, Opposer argues that

Applicant is also unable to rebut Opposer's showing of the relatedness of the services identified in the BAD MOMS BIBLE Application to the goods and services offered by Opposer under the unique circumstances of this case, particularly given both parties market and sell their goods and services to the same consumers – namely, women and mothers – through the same channels of commerce.

53 TTABVUE 6. Opposer further argues that “Applicant does not dispute that Opposer licensed its BAD MOMS mark for use conjunction with charitable efforts, such as a promotional contest for *A Bad Moms Christmas* organized by the Alliance of Moms which benefitted mothers.” *Id.* at 14.

Opposer's evidence that it has used its BAD MOMS mark for the “charitable fundraising services” identified in the '298 Application boils down to its claimed participation in a “promotional contest for *A Bad Moms Christmas* organized by the Alliance for Moms” at some point in 2017. Egan Decl. ¶ 35; Ex. 51 (29 TTABVUE 71). An online article describing the contest stated that for every \$10 donated to the Alliance for Moms, which was described as a charity “which works to break the intergenerational cycle of babies born to young girls in foster care,” a donor got “a chance to fly to Chicago with three friends, spend two nights in a hotel, meet the amazing leading ladies of ‘A Bad Moms Christmas’ and get a \$500 shopping spree.” 29 TTABVUE 71.<sup>57</sup> The article further stated that “by combining giving with an

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<sup>57</sup> The article is undated, but refers to “the upcoming release of ‘A Bad Moms Christmas’ this November.” 29 TTABVUE 71. Opposer did not show that its claimed use of its BAD MOMS mark in connection with the contest was prior to Applicant's July 28, 2017 filing date. In any event, we find below that the contest did not involve the use of Opposer's mark, and thus cannot show that these “services” are related to the services identified in the '298 Application.

awesome reward (who wouldn't want to share a Christmas card snapshot with Kristen Bell?), the 'bad moms' of Hollywood are helping these girls get the support they need," *id.* at 72, and that the Crowdrise campaign donation page was organized by Ms. Bell. *Id.* The article contained a link to the trailer for A BAD MOMS CHRISTMAS. *Id.*

As described in the article, the contest was organized by the Alliance for Moms charity and the campaign website was created by Kristen Bell. Opposer's BAD MOMS mark is nowhere mentioned, much less used to identify the source of the contest. In a record replete with detailed "agreements for promotions and merchandise licensing in connection with the BAD MOMS mark," Kimbrough Decl. ¶ 11; Ex. 37, there is no agreement with the Alliance for Moms "allow[ing] the BAD MOMS mark to be used in conjunction with charitable efforts." Egan Decl. ¶ 35. We find that this contest does not show Opposer's use of its BAD MOMS mark in connection with charitable fundraising services. There is no other evidence that Opposer itself ever engaged in, or licensed the BAD MOMS mark for use in, the charitable fundraising or charitable services identified in the '298 Application, and no evidence that any third parties have used or registered the same mark for both motion pictures and collateral goods, and those services.

The relatedness of Opposer's goods and the services identified in the '298 Application "is not evident, well-known or generally recognized," *Country Oven*, 2019 USPQ2d 443903, at \*12, but Opposer makes no effort to argue that any of the goods for which it has registered or used its BAD MOMS mark are related to those

services.<sup>58</sup> We find that the goods and services are not related under either the “something more” test set forth in *St. Helena Hosp.* or the conventional standard for relatedness set forth in *Coach Servs.* The second *DuPont* factor supports a finding of no likelihood of confusion as to the ’298 Application.

**b. Similarity or Dissimilarity of Channels of Trade**

The identifications of goods and services in Opposer’s registrations of, and prior application to register BAD MOMS, and in Applicant’s applications, define the channels of trade and classes of consumers for those goods and services. *Stone Lion*, 110 USPQ2d at 1161-62. In both Opposer’s registrations and application, and in Applicant’s applications, “[t]here are no limitations as to channels of trade or classes of purchasers in the identification[s] of goods [and services],” and “[i]t therefore is presumed that [the] goods [and services] move in all channels of trade normal for those goods [and services], and that they are available to all classes of purchasers for those goods [and services].” *Id.* at 1161. By contrast, the channels of trade for the motion pictures and collateral goods on which Opposer has used its BAD MOMS mark at common law “are limited to the actual goods and channels of trade for which it

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<sup>58</sup> We understand Opposer’s arguments quoted above that Applicant’s own activity itself establishes the relatedness of the parties’ goods and services, 48 TTABVUE 40, to claim that the fact that Applicant seeks registration of her marks for both her goods and her services proves that they are related, in much the same way in which a third-party registration of the same mark for the goods and services would be probative of relatedness. The analogy fails, however, because Applicant does not seek to register the same mark for the goods and services. Applicant also admitted in discovery that a “percentage of proceeds” from the sale of goods under the BAD MOMS UNLIMITED mark would “benefit the BAD MOMS BIBLE charity,” 24 TTABVUE 167 (Applicant’s Response to Opposer’s Interrogatory No. 13), but we do not find this admission sufficient to show that the services identified in the ’298 Application are related to Opposer’s goods, particularly under the “something more” standard set forth in *St. Helena Hosp.*

uses its mark.” *Hunter Indus., Inc. v. Toro Co.*, 110 USPQ2d 1651, 1661 (TTAB 2014). There is precious little record evidence of the channels of trade for any of the involved goods and services, as both parties focus on their actual channels of trade rather than the channels of trade for the identified goods and services.

Opposer argues only that the “parties’ goods are advertised and sold through the same channels of commerce, specifically, the Internet and Twitter, Instagram, and Facebook.” 48 TTABVUE 40. Applicant responds that the “lack of evidence showing an overlap in the channels of trade for applicant’s and registrants’ [sic] products is pivotal,” and the “goods and services offered do not travel in the same channels of trade.” 49 TTABVUE 20. Applicant claims that “[m]others looking for financial assistance will seek out BAD MOMS BIBLE charitable foundation services, not BAD MOMS motion picture services,” that “consumers looking to purchase Applicant’s goods will look to Applicant’s website, or see the goods offered for sale under the BAD MOMS UNLIMITED mark, at charity events or programs,” and that “[d]ifferent trade channels, as well as dissimilar conditions under which the service are offered, makes it unlikely that there will be confusion as to source.” *Id.* Applicant concludes that its “charitable foundation services and Opposer’s motion picture services move through distinct trade channels to distinct classes of consumers, and therefore, they are not likely to be confused as to the source of the services.” *Id.* at 20-21.

Contrary to Opposer’s claim, neither the Internet itself nor the various social media are a distinct “channel of trade.” The Board has long recognized that the “Internet is such a pervasive medium that virtually everything is advertised and sold

through the Internet,” *Bond v. Taylor*, 119 USPQ2d 1049, 1055 (TTAB 2016) (quoting *Parfums de Coeur*, 83 USPQ2d at 1021), and that “the mere fact that goods and services may both be advertised and offered through the Internet is not a sufficient basis to find that they are sold through the same channels of trade.” *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1743 (TTAB 2014) (quoting *Parfums de Coeur*, 83 USPQ2d at 1021). The Board’s analysis that the sale of goods and services through the Internet does not establish that they “are sold through the same channels of trade,” *id.*, applies with equal force to social media such as Twitter and Facebook, which, like the Internet itself, are today “pervasive med[ia]” that are used to promote all manners of goods and services. We find that the channels of trade for the involved goods and services do not overlap merely because they are offered on the Internet and through the parties’ respective social media accounts. Opposer makes no other showing of the channels of trade for the goods and services identified in Applicant’s application, or that they overlap with the channels of trade for the goods identified in Opposer’s registrations and prior application, or for the goods with which Opposer has used BAD MOMS at common law. We find that the third *DuPont* factor supports a finding of no likelihood of confusion with respect to both applications.

#### **4. Purchase Conditions and Sophistication of Purchasers**

The fourth *DuPont* factor considers the “conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing.” *DuPont*, 177 USPQ at 567. Opposer argues that “there is no dispute that the conditions of purchasing goods and services under Applicant’s BAD MOMS formative marks and Opposer’s marks are likely to exacerbate the likelihood of confusion” because

“Applicant’s goods offered under her BAD MOMS UNLIMITED mark are, as a matter of law, not the subject of careful, sophisticated purchasing.” 48 TTABVUE 43. Opposer cites the admitted low price of Applicant’s shirts, note books, and magnets. *Id.* Applicant does not respond to Opposer’s arguments.

Unlike many of the goods identified in Classes 9 and 16, the goods identified in Class 25 do not contain any limitations and thus “include ‘all goods of the type identified, without limitation as to their nature or price.’” *Embiid*, 2021 USPQ2d 577, at \*27 (quoting *Sock It to Me, Inc. v. Fan*, 2020 USPQ2d 10611, at \*8 (TTAB 2020)). Many of the Class 25 goods in the ’487 Application, including shirts, are of the sort that the Board has repeatedly acknowledged may be subject to impulse purchase due to their potential low price. *See, e.g., id.*, at \*32-33. The decorative magnets in Class 9 and the note books in Class 16 are also the sort of goods that may be subject to impulse purchase, or at least purchased without a significant degree of purchaser care. We find that the fourth *DuPont* factor supports a finding of a likelihood of confusion as to all three classes in the ’487 Application.

With respect to the purchase conditions for the services identified in the ’298 Application, one of the charitable services is specifically limited to rendition online, “where donors search for and make monetary donations to specific charities or projects aimed at helping mothers in need,” and must necessarily pay attention to the disposition of their contributions. Other charitable services such as “providing financial assistance for programs and services of others,” and “providing financial support to mothers in need for payment of educational costs, pregnancy and prenatal

costs, childcare costs, utility bills and obtaining medications,” are of such a nature that we can reasonable assume more than an ordinary degree of care in using them. We find that the fourth *DuPont* factor supports a finding of no likelihood of confusion as to the services in the ’298 Application.

### **5. Absence of Evidence of Actual Confusion**

“The seventh and eighth *DuPont* factors consider the nature and extent of any actual confusion among consumers in light of the length of time and conditions under which there has been contemporaneous use of the parties’ subject marks.” *Brooklyn Brewery Corp. v. Brooklyn Brew Shop, LLC*, 2020 USPQ2d 10914, at \*19 (TTAB 2020). The absence of evidence of actual confusion is “meaningful only if the record indicate[s] appreciable and continuous use by [A]pplicant of [her] mark for a significant period of time in the same markets as those served by [O]pposer under its marks.” *Gillette Can. Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). Opposer notes that “Applicant has engaged in very little activity under her marks at issue,” 48 TTABVUE 44, and that she has “only expended \$13,000 to advertise and promote her services, and has earned only \$500 in revenue.” *Id.* There has been no meaningful opportunity for actual confusion to have occurred, and we find that the eighth *DuPont* factor is neutral in our analysis of the likelihood of confusion.

### **6. The Variety of Goods on Which Opposer’s Mark is Used**

“The ninth *DuPont* factor takes into account the variety of goods on which a mark is or is not used.” *DeVivo*, 2020 USPQ2d 10153, at \*14. “If a party in the position of plaintiff uses its mark on a wide variety of goods, then purchasers are more likely to view a defendant’s related good under a similar mark as an extension of the plaintiff’s



line.” *Id.* In *DeVivo*, the Board found that the opposer’s use of her marks “on children’s books, T-shirts, tank tops, sweatshirts, hoodies, coffee mugs, stickers, postcards, greeting cards, tote bags and informational and educational services in the STEM fields” were “insufficient to persuade us that Opposer has used her mark on a variety of goods,” *DeVivo*, 2020 USPQ2d 10153, at \*15, rendering the ninth factor neutral. We similarly find that the factor is neutral in our analysis of the likelihood of confusion based on Opposer’s uses of its BAD MOMS mark in connection with its motion pictures and various other goods.

### **7. Applicant’s Alleged Bad Faith Adoption of Her Marks**

An applicant’s bad faith adoption and use of a mark may be considered under the thirteenth *DuPont* factor. *Tao Licensing*, 125 USPQ2d at 1063-64 (citing *J & J Snack Foods*, 18 USPQ2d at 1891) (“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”)).

The record contains no testimony by Applicant regarding her intent in selecting, adopting, and using her marks.<sup>59</sup> Opposer argues instead that “[t]here is

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<sup>59</sup> Applicant argues in her brief that she “was not seeking to exploit or otherwise take advantage of the reputation of Opposer’s marks or movies.” 49 TTABVUE 22-23. These arguments cannot establish good faith because they are unsupported by testimony. Opposer argues in its reply brief that Applicant “has not made of record any evidence, including testimony from Applicant, corroborating her intent,” that Applicant “made other evidence of record in this case,” and that “a logical conclusion is that Applicant did not testify to her purported intent because she could not honestly do so under the penalty of perjury.” 53 TTABVUE 17. We reject Opposer’s suggestion that we infer Applicant’s bad faith from the

circumstantial evidence that Applicant adopted the BAD MOMS UNLIMITED and BAD MOMS BIBLE marks in order to capitalize on the fame of the *Bad Moms* Motion Pictures and BAD MOMS Marks,” 48 TTABVUE 41, because Applicant “acknowledged that she was aware of *Bad Moms*, and that *Bam Moms* was well recognized in the U.S., before she selected and used her BAD MOMS formative marks and filed the Applications.” *Id.* Opposer further argues that “Applicant did not conduct an adequate search of her marks prior to filing the Applications,” *id.* at 42, that “Applicant produced her clearance search results, which reflect that Applicant only conducted a search of [the] Office’s ‘trademark database,’ not any search of unregistered users,” *id.*,<sup>60</sup> and that this is “particularly egregious in light of her admission that *Bad Moms* was well recognized across the U.S. before she selected her BAD MOMS formative marks.” *Id.* According to Opposer, “[t]his failure constitutes, at a minimum, willful blindness as to the scope and extent of Opposer’s rights in the BAD MOMS Marks,” *id.*, and the “Board should count Applicant’s failure to conduct an adequate search against her.” *Id.*

Applicant essentially agrees with Opposer that Applicant’s intent may be inferred from the record evidence. She argues that

the intention of the applicant at the time of the application  
is a subjective factor which should be determined on the

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fact that she did not testify at trial. Opposer, not Applicant, has the burden of proof on the issue of intent, and could have deposed Applicant to try to establish her bad faith, but did not do so.

<sup>60</sup> Applicant produced the results of the search in response to Opposer’s Interrogatory No. 9. *Id.* at 186-95. Opposer made of record Applicant’s Supplemental Response to Opposer’s Interrogatory No. 9, which stated that the “USPTO trademark database search did not reveal any BAD MOMS trademarks pending or registered by the Opposer.” 24 TTABVUE 180.

basis of the objective circumstances of the particular case. In other words, an overall assessment should be made, taking into account all the relevant factual circumstances as they existed at the time the application was submitted.

49 TTABVUE 22. She further argues that she “initiated a comprehensive search for possible conflicts” prior to filing her applications, and that “[t]he search results appeared clear of conflicts.” *Id.* at 23.

Applicant admitted that she “was aware of the *Bad Moms* motion picture at the time [she] applied for the trademarks,” 24 TTABVUE 179 (Applicant’s Supplemental Response to Opposer’s Interrogatory No. 8), and that she had “learned and knew about the motion picture after seeing advertising for the movie.” *Id.* Her awareness of the film, however, is not enough to show her bad faith because “[t]o show intent, [Opposer] must establish that [A]pplicant had more than mere knowledge of [O]pposer’s prior mark.” *Bd. of Regents, Univ. of Tex. Sys. v. S. Ill. Miners, LLC*, 110 USPQ2d 1182, 1196 (TTAB 2014). An inference of bad faith “requires an intent to confuse.” *Quicktrip W., Inc. v. Weigel Stores, Inc.*, 984 F.3d 1031, 2021 USPQ2d 35, at \*4 (Fed. Cir. 2021) (citing *Starbucks Corp. v. Wolfe’s Borough Coffee, Inc.*, 588 F.3d 97, 92 USPQ2d 1769, 1782 (2d Cir. 2009) (“[T]he only relevant intent is intent to confuse. There is a considerable difference between an intent to copy and an intent to deceive.” (quoting 4 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:113))).

Applicant also admitted that BAD MOMS was well-recognized as a title of a movie before she selected, applied to register, and used her marks. 24 TTABVUE 232-34 (Applicant’s Responses to Opposer’s Request for Admission Nos. 43-50). Given the

difficulty in establishing that the title of an artistic work functions as a trademark, and the fact that BAD MOMS was not such a strong trademark by mid-2017 that the only reasonable inference to be drawn from the adoption of similar marks is an intent to confuse, we find that these admissions do not support a finding of bad faith.

Applicant's limited trademark search of the records of the USPTO similarly does not support an inference of bad faith in view of Applicant's admission that she knew of the BAD MOMS motion picture before she selected, adopted, and applied to register her marks.<sup>61</sup> Even if a more comprehensive search would have disclosed Opposer's common law uses of BAD MOMS, mere awareness of those uses in addition to the use of BAD MOMS as the title of the 2016 film would not establish bad faith. *Quiktrip W.*, 2021 USPQ2d 35, at \*4.

Finally, as discussed above, Mr. Egan testified that on Applicant's website "Applicant's BAD MOMS UNLIMITED mark uses BAD MOMS in much larger font than the word UNLIMITED, and therefore emphasizes the mark BAD MOMS," Egan Decl. ¶ 31, and Applicant produced some documents in which the words BAD MOMS are written together as BADMOMS in larger typeface than the word UNLIMITED. A defendant's use of font styles or trade dress that simulates a plaintiff's use of its

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<sup>61</sup> Opposer cites *Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger, U.S.A., Inc.*, 80 F.3d 1369, 38 USPQ2d 1369 (2d Cir. 1996), for the proposition that the "defendant's failure to conduct an adequate search weighed in favor of reversing a finding of non-willful infringement." 48 TTABVUE 42. That statement accurately captures the Second Circuit's analysis in *Int'l Star Class*, but while we give this regional circuit court opinion respectful consideration, we are not bound by it and must reject its analysis to the extent that it conflicts with the analysis in our precedents or those of the Federal Circuit. Under Federal Circuit law, "even a search report showing opposer's mark is insufficient to establish bad faith." *S. Ill. Miners*, 110 USPQ2d at 1196 (citing *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793, 1798 (Fed. Cir. 1987)).

mark may support a finding of bad faith. *See Tao Licensing*, 125 USPQ2d at 1063-64; *Edom Labs., Inc. v. Licther*, 102 USPQ2d 1546, 1553-54 (TTAB 2012) (bad faith found where applicant took affirmative steps to cause confusion and to associate its mark with the opposer's). But Mr. Egan's testimony is uncorroborated by the referenced webpage, and there is no evidence that the particular display of the BAD MOMS UNLIMITED mark in the documents produced by Applicant was actually used by her in selling goods, so this evidence does not provide a sufficient basis on which to infer Applicant's bad faith intent to confuse.

Considered in its entirety, Opposer's circumstantial evidence of bad faith is unpersuasive. Whether a deposition of Applicant might have enabled Opposer to fill in the gaps in its evidence "is not a subject on which we can, should or do speculate. Rather, we must take the record as [Opposer] made it." *T.A.B. Sys. v. PacTel Teletrac*, 77 F.3d 1372, 37 USPQ2d 1879, 1884 (Fed. Cir. 1996). The record as Opposer made it "does not demonstrate that [Applicant] intended to copy [Opposer's] mark in order to confuse customers." *Quicktrip W.*, 2021 USPQ2d 35, at \*4. We find that the thirteenth *DuPont* factor is neutral in our analysis of the likelihood of confusion.

### **8. Balancing the *DuPont* Factors**

With respect to Class 25 in the '487 Application, the BAD MOMS and BAD MOMS UNLIMITED marks are similar, the goods identified as "T-shirts" in the application are commonly part of a collateral merchandising program for entertainment properties such as motion pictures, as they are here, those goods may be subject to impulse purchase, and the BAD MOMS mark has modest commercial strength, and these *DuPont* factors support a finding of a likelihood of confusion. The third *DuPont*

factor supports a finding of no likelihood of confusion, and all other relevant *DuPont* factors are neutral. We find that the first, second, fourth and fifth *DuPont* factors outweigh the third factor, and that Opposer proved by a preponderance of the evidence that there is a likelihood of confusion as to Class 25 in its entirety.

With respect to Classes 9 and 16 in the '487 Application, the BAD MOMS and BAD MOMS UNLIMITED marks are similar, the goods may be subject to purchase with no more than ordinary purchaser care, and the BAD MOMS mark has modest commercial strength, but there is an absence of evidence that Opposer's motion pictures and collateral goods are related to the involved Class 9 and 16 goods or that those goods travel in the same or similar channels of trade. All other relevant *DuPont* factors are neutral. We find that the second and third *DuPont* factors outweigh the first, fourth, and fifth factors, and that Opposer failed to prove by a preponderance of the evidence that there is a likelihood of confusion as to the goods identified in Classes 9 and 16. We dismiss Opposer's Section 2(d) claim as to Classes 9 and 16 in the '487 Application.

With respect to the '298 Application, the BAD MOMS and BAD MOMS BIBLE marks are similar, and the BAD MOMS mark has modest commercial strength, but there is an absence of evidence that Opposer's motion pictures and collateral goods are related to the involved services and that the goods and services are sold in the same or similar channels of trade, and the services are likely to be purchased and used with more than an ordinary degree of care. All other relevant *DuPont* factors are neutral. We find that the second, third, and fourth *DuPont* factors outweigh the

first and fifth factors, and that Opposer failed to prove by a preponderance of the evidence that there is a likelihood of confusion as to the services identified in the '298 Application. We dismiss Opposer's Section 2(d) claim as to the '298 Application.

**VI. Opposer's Claim That Applicant Lacked a Bona Fide Intention to Use Her Mark**

The '487 Application was filed under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).<sup>62</sup> "Because a bona fide intent to use the mark in commerce is a statutory requirement of a valid intent-to-use trademark application under [Trademark Act] Section 1(b), 15 U.S.C. § 1051(b), the lack of such intent is a basis on which an opposer may challenge an applicant's mark." *Swiss Grill Ltd. v. Wolf Steel Ltd.*, 115 USPQ2d 2001, 2009 (TTAB 2015) (quoting *M.Z. Berger & Co. v. Swatch AG*, 787 F.3d 1368, 114 USPQ2d 1892, 1897 (Fed. Cir. 2015)). An "intent must be 'firm,' 'demonstrable' with 'objective evidence of intent' and 'more than a mere subjective belief.'" *Id.* (quoting *M.Z. Berger*, 114 USPQ2d at 1897-98). Our "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." *Id.* (quoting *M.Z. Berger*, 114 USPQ2d at 1897-98).

Opposer bears "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

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<sup>62</sup> As discussed above, Opposer's claim that Applicant lacked a bona fide intention to use her marks in commerce when she filed her applications is limited to the '487 Application. Because we have sustained the opposition as to Class 25 in the '487 Application based on Opposer's Section 2(d) claim, we need only consider the lack of a bona fide intent to use claim as to the goods in Classes 9 and 16. *See, e.g., Tao Licensing*, 125 USPQ2d at 1064 (in the interest of judicial economy it is not necessary to determine each independent basis for relief).

goods.” *Id.* (quoting *Bos. Red Sox Baseball Club LP v. Sherman*, 88 USPQ2d 1581, 1857 (TTAB 2008)). Opposer may meet this burden by establishing that there is an “absence of any documentary evidence on the part of [Applicant] regarding such intent.” *Id.* (quoting *Commodore Elecs. Ltd. v. CBM K.K.*, 26 USPQ2d 1503, 1507 (TTAB 1993)). If Opposer meets its burden, “Applicant may ‘elect to try to rebut the [O]pposer[’s] prima facie case by offering additional evidence concerning the factual circumstances bearing upon [her] intent to use [her] mark in commerce.’” *Id.* (quoting *Commodore Elecs.*, 26 USPQ2d at 1507 n.11).

In its main brief, Opposer argues that it showed that Applicant lacked a bona fide intention to use her mark with all of the goods in Classes 9 and 16 except for “calendars and notebooks” in Class 16. 48 TTABVUE 52.<sup>63</sup> Opposer argues that “Applicant produced only a smattering of documents *purporting* to reflect her intent to use BAD MOMS UNLIMITED for the goods at issue as of July 28, 2017, the filing

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<sup>63</sup> In a footnote, Opposer hedges and states that its “limitation of its claim to not include these goods should not be construed as an admission that Applicant had a bona fide intent to use BAD MOMS UNLIMITED for these goods but, instead, evidence of Opposer’s prudence.” 48 TTABVUE 52 n.5. Opposer states that it “does not believe that Applicant had a bona fide intent to use BAD MOMS UNLIMITED on *any* of the identified goods at the time of filing that Application.” *Id.* (emphasis in original). At the oral hearing, Opposer’s counsel similarly argued that Opposer had shown that Applicant had no bona fide intention to use the mark as to any goods. Opposer also stated, however, that the record evidence “relate[s] only, and at best, to Applicant’s intent to use BAD MOMS UNLIMITED for calendars, tank tops, t-shirts, and notebooks, which goods are not at issue,” *id.* at 53 n.7, and that the evidence “at most reflects Applicant’s intent to use BAD MOMS UNLIMITED for calendars, tank tops, t-shirts, and notebooks, which goods are not at issue.” 53 TTABVUE 7. In its reply brief, Opposer states that “if the opposition is not sustained on a likelihood of confusion, the Board should find that Applicant lacked a bona fide intent to use the BAD MOMS UNLIMITED mark for all goods identified in the BAD MOMS UNLIMITED Application **except for shirts, t-shirts, calendars, and notebooks.**” *Id.* at 8 (emphasis added). Under the circumstances, we find that Opposer limited its claim in Class 16 to goods other than calendars and notebooks.



date of the BAD MOMS UNLIMITED Application.” *Id.* at 53 (emphasis in original). Opposer describes these documents as ones relating to the development of logos for Applicant’s two marks, *id.*, undated photographs of BAD MOMS UNLIMITED hangtags, “without reference to any particular products,” *id.*, “[u]ndated photographs of a hat bearing the BAD MOMS UNLIMITED mark with a BAD MOMS UNLIMITED hangtag and two pairs of sunglasses with BAD MOMS UNLIMITED hangtags,” *id.*, “emails dating from February 2018 regarding proposed designs for and purchases of prefabricated calendars, tank tops, t-shirts, and notebooks . . . 7 receipts, dating from March 15, 2018 to May 15, 2018, purporting to reflect the sale of shirts, tanktops, notebooks, and calendars . . . and photographs of a tank top and a hat.” *Id.* at n.7.<sup>64</sup> Opposer concludes that based “on the unambiguous evidentiary record, Opposer has established a prima facie case of lack of bona fide intent to use by pointing to the absence of documentary evidence existing as of or sufficiently contemporaneous to the filing date of the BAD MOMS UNLIMITED Application for the goods at issue,” and Applicant has not rebutted that case. *Id.* at 54.

Applicant responds that she

objectively proved intent to use by taking clear steps towards providing charitable foundation services under the BAD MOMS BIBLE trademark, as well as selling goods under the BAD MOMS UNLIMITED trademark. A 501(c) non-profit company was established, a Board of Directors was appointed, a website was created, [and] actual goods in classes 09, 16 and 25 were produced and sold to

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<sup>64</sup> These documents were identified in Applicant’s Response to Opposer’s Interrogatory No. 40. 24 TTABVUE 211. The documents themselves were all designated as Confidential by Applicant and were filed under seal by Opposer. 25 TTABVUE. Opposer and we have described the referenced documents in general terms.

consumers. Additionally, women have used the resources of the charitable foundation services via the website and various events and programs. Applicant produced proof of all these steps in discovery.

49 TTABVUE 28-29. In its reply brief, Opposer argues that Applicant has submitted no evidence to support this response and has thus failed to rebut Opposer's prima facie case. 53 TTABVUE 7-8.

“The particular facts of each case must be carefully considered in their totality, but generally, the strongest documentary proof will have been created prior to, or at the latest on, the filing date of the intent-to-use application.” *Société des Produits Nestlé S.A. v. Cándido Viñuales Taboada*, 2020 USPQ2d 10893, at \*12-13 (TTAB 2020) (citing *Swiss Grill*, 115 USPQ2d at 2009-10). Applicant's documentary evidence all post-dates her July 28, 2017 filing date, and most of it is from 2018. Applicant did not produce any documents to show that as of her filing date, she had the “capacity or experience needed to manufacture or otherwise offer” the numerous goods identified in the '487 Application. *Id.*, at \*12 (quoting *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1443 (TTAB 2012)).<sup>65</sup> The post-July 28, 2017 documents that Applicant produced pertain to the development of a logo to accompany her marks and the font in which they may be displayed, 25 TTABVUE 3-8, and the display of the BAD MOMS UNLIMITED mark on or in connection with calendars, shirts, note books, sunglasses, and hats. *Id.* at 9-31. To the extent that these documents have

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<sup>65</sup> As the Board noted in *Société des Produits Nestlé*, “an applicant's capacity to market and manufacture the identified goods consistent with the natural extension of its current product line can rebut the lack of documentary evidence,” *Société des Produits Nestlé*, 2020 USPQ2d 10893, at \*12, but the record reveals absolutely nothing about Applicant's business (if any) before or as of her filing date.

probative value regarding the bona fides of Applicant's intent at the time of filing, *see Société des Produits Nestlé*, 2020 USPQ2d 10893, at \*12-13 (discussing cases in which documents generated at various times after the filing of intent-to-use applications have been considered relevant on an applicant's intent as of filing), they pertain to only a handful of the goods identified in the '487 Application. They tell us nothing about Applicant's intent with respect to the Class 9 goods,<sup>66</sup> or the vast majority of the Class 16 goods.

Applicant's rebuttal case in her brief is again based on the argument of her counsel, not testimony, and her argument is directed largely to her services in the '298 Application, which are not the subject of Opposer's claim. Given the absence of documentary evidence of Applicant's bona fide intent to use the BAD MOMS UNLIMITED mark on any Class 9 goods and on any Class 16 goods other than calendars and note books, Applicant's response fails to rebut Opposer's prima facie case. We find that Opposer showed that when Applicant filed her application to register BAD MOMS UNLIMITED, she lacked a bona fide intention to use the mark in commerce in connection with all goods in Class 9 and all goods in Class 16 other than calendars and note books.

**Decision:** The opposition to the '487 Application is sustained (1) as to Class 25 in its entirety on the basis of Opposer's Section 2(d) claim, and (2) as to all goods in Class

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<sup>66</sup> One of the documents is a photograph of hangtags bearing the BAD MOMS UNLIMITED mark attached to the earpieces of two pairs of sunglasses. Because a hangtag can be attached to numerous products, and because there is no evidence that Applicant ever purchased sunglasses to which to affix her mark, we find that this photograph does not support a finding that Applicant had a bona fide intention to use her mark on sunglasses when she filed the '487 Application.

9, and all goods in Class 16 other than calendars and note books, on the basis of Opposer's claim that Applicant lacked a bona fide intention to use the mark in commerce, but the dilution claim is dismissed and the Section 2(d) claim is dismissed as to Classes 9 and 16. The opposition to the '298 Application is dismissed on both grounds.