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

Proceeding	91219162
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

GREAT ADIRONDACK STEAK & SEAFOOD CAFÉ, INC.

Opposer/Counterclaim Defendant,

v.

ADIRONDACK PUB & BREWERY, INC.,

Applicant/Counterclaim Plaintiff.

Opposition No. 91219162

**TRIAL BRIEF OF OPPOSER**

Dated: July 16, 2018

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CAFÉ, INC.

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Opposer Great Adirondack Steak and Seafood Café, Inc. hereby submits its Main Brief in this Opposition Proceeding pursuant to 37 CFR § 2.128.

### **SUMMARY OF THE CASE**

Opposer Great Adirondack Steak and Seafood Café, Inc. (“Opposer” or “Great Adirondack”) is the owner of U.S. Registration No. 4,425,098 for GREAT ADIRONDACK BREWING COMPANY®, in use since December 30, 1997. Great Adirondack seeks to have the Board deny registration of the mark ADIRONDACK BREWERY, Serial No. 86/027,053, applied for by Applicant, Adirondack Pub and Brewery, Inc. (“Applicant”), filed August 2, 2013. Great Adirondack seeks denial of the registration based upon Great Adirondack’s priority of use of the mark in commerce and the likelihood of confusion between the registered mark GREAT ADIRONDACK BREWING COMPANY® and the applied for mark ADIRONDACK BREWERY for identical goods, beer.

This opposition involves a dispute between two craft breweries in upstate New York that sell identical products through identical trade channels to the same classes of consumers under confusingly similar trademarks. In addition to the foregoing facts, sufficient in themselves to sustain the present opposition, this case includes extensive evidence of actual confusion and bad faith, including affirmative steps by Applicant to cause confusion in the market place.



## **DESCRIPTION OF THE RECORD**

Pursuant to Trademark Rule 2.122, 37 CFR §2.122, the evidence of record includes the pleadings, the trial declaration of Robert Charles Kane (the “Kane Testimony”, 44 TTABVUE), the trial declaration of James Pouliot (the “Pouliot Testimony”, 40 TTABVUE), Great Adirondack’s Notice of Reliance and Trial Exhibits 1-40 thereto (41, 42 TTABVUE) (“Opp. Trial Exhibit”), Great Adirondack’s USPTO registration for the mark GREAT ADIRONDACK BREWING COMPANY®, namely, USPTO Reg. No. 4,425,098 (Opp. Trial Exhibit No. 1), and Applicant’s USPTO application for the mark ADIRONDACK BREWERY, namely, USPTO App. Serial No. 86/027,053.

Subject to Great Adirondack’s evidentiary objections, submitted contemporaneously herewith, the record also includes Applicant’s Amended Notice of Reliance dated December 8, 2017 with Trial Exhibits A-GGG (55 TTABVUE) as revised by the Board’s May 22, 2018 Order (62 TTABVUE), the trial declaration of John Carr (the “Carr Testimony”, 45 TTABVUE), the trial declaration of Phil Cassella (46 TTABVUE) and the trial declaration of Larry Nichols (47 TTABVUE).

## **STATEMENT OF THE ISSUE**

Whether Applicant’s ADIRONDACK BREWERY mark creates a likelihood of confusion with the registered mark GREAT ADIRONDACK BREWING COMPANY® for identical goods?

## **STATEMENT OF FACTS**

Opposer Great Adirondack Steak and Seafood Café, Inc. operates the Great Adirondack Brewing Company, a brewery and taproom located at 2442 Main Street, Lake Placid, New York.

(44 TTABVUE, Kane Testimony at ¶1). Great Adirondack has continuously sold beer and ale under the mark GREAT ADIRONDACK BREWING COMPANY® (“Asserted Mark” or “the GREAT ADIRONDACK BREWING COMPANY® Mark”) since approximately December 30, 1997. (*Id.* at ¶2). Great Adirondack is the owner of U.S. Trademark Registration No. 4,425,098 issued on October 29, 2013 for the Asserted Mark in association with beers and ales. (*Id.* at ¶3; Opp. Trial Exhibit No. 1). Great Adirondack sells beer at various locations, including its restaurant and brewery located at 2442 Main Street, Lake Placid, New York. Since December 1997, Great Adirondack’s regular sales activity at its restaurant and brewery in Lake Placid includes selling growlers and kegs of its beer bearing the mark GREAT ADIRONDACK BREWING COMPANY® to customers.

On August 2, 2013, Applicant filed an application for the mark ADIRONDACK BREWERY for beer, Serial No. 86/027,053. Shortly thereafter, on December 4, 2013, Applicant filed a Petition to Cancel U.S. Registration No. 4,425,098 for the mark GREAT ADIRONDACK BREWING COMPANY® Mark (Cancellation No. 92058318). On November 3, 2014, Great Adirondack instituted the present proceeding, filing a Notice of Opposition of Applicant’s U.S. Application Serial No. 86/027,053 for the mark ADIRONDACK BREWERY (“the Opposed Mark”). (Opposition No. 91219162). Great Adirondack opposes the registration of Applicant’s ADIRONDACK BREWERY mark based upon priority and likelihood of confusion with its GREAT ADIRONDACK BREWING COMPANY® Mark.

On March 30, 2015, the Trademark Trial and Appeal Board issued a decision on the parties’ summary judgment motions. (11 TTABVUE). The Board struck Applicant’s cancellation claim based on fraud and provided Applicant until April 18, 2015 to file an amended petition for cancellation with “a properly pleaded claim of fraud”. In its Decision, the Board also

consolidated the cancellation and opposition proceedings, designating Opposition No. 91219162 as the parent case.

Applicant filed an Amended Petition to Cancel on April 18, 2015 asserting claims for cancellation based on fraud, no use in commerce and unlawful use (“Amended Petition”). Great Adirondack filed a Motion to Dismiss on May 8, 2015 arguing that Applicant’s Amended Petition failed to state a claim for cancellation based on fraud, unlawful use or no use in commerce.

On October 1, 2015, the Board issued a decision dismissing Applicant’s cancellation claims based on fraud and unlawful use. (20 TTABVUE). The Board provided Applicant “one final opportunity to file an amended petition that includes adequately pleaded claims of unlawful use and fraud.” (*Id.*). On October 19, 2015, Great Adirondack filed a Second Amended Petition to Cancel asserting claims of cancellation based upon unlawful use and no use in commerce. In a decision dated April 1, 2016, the Board declined to dismiss Applicant’s claim of unlawful use, but stated that the claim may be resolved on summary judgment. (27 TTABVUE).

Discovery in these proceedings closed on December 7, 2016. (30 TTABVUE). In a Decision dated June 8, 2017, the Board granted Great Adirondack’s Motion for Summary Judgment dismissing in its entirety Applicant’s Second Amended Petition for Cancellation. (36 TTABVUE). The decision thereby affirmed Great Adirondack’s registration for GREAT ADIRONDACK BREWING COMPANY® Mark for ales and beers, with a date of first use in commerce of December 30, 1997. (*Id.*).

The GREAT ADIRONDACK BREWING COMPANY® Mark is registered and used for “ales; beers”. (Opp. Trial Exhibit 1, USPTO Reg. No. 4,425,098). Applicant’s USPTO application for the Opposed Mark is for “beer” (USPTO App. Serial No. 86/027,053). Neither

party has restricted the trade channels in its respective registration or application. Applicant admits that its beers are sold in bars, restaurants and beverage centers (45 TTABVUE, Carr Testimony at ¶9). Great Adirondack’s GREAT ADIRONDACK BREWING COMPANY® beers and ales are also sold in all major trade channels for beer, including bars, restaurants and beverage stores. (44 TTABVUE, Kane Testimony at ¶5).

Applicant admits there is “clear confusion between [the] two brands”. (Opp. Trial Exhibit 2). Applicant operates and controls a Facebook page for its business at [www.facebook.com/AdkPubBrewery](http://www.facebook.com/AdkPubBrewery). (Opp. Trial Exhibit 39, Answer to Admission Request No. 35). In a statement published on Applicant’s Facebook page on November 15, 2015, *while these proceedings were pending*, Applicant stated:

**The issue came about when Great Adirondack Steak and Seafood recently attempted to trademark and therefore have sole use of ‘Great Adirondack Brewing Company’. While we’re all for trademark law and believe that it protects creativity, the trademarking of that combination of terms would cause clear confusion between our two brands.**

(Opp. Trial Exhibit 2)(emphasis added). This statement was created by or on behalf of John Carr, the owner of Applicant’s business. (Trial Exhibit 39, Answer to Admission Request No. 37; 45 TTABVUE, Carr Testimony ¶1).

As summarized below, on multiple occasions confused customers have left a review for Applicant’s beer or Applicant’s establishment on Opposer’s social media pages, such as Facebook and Untappd.com, or left a review for Opposer’s beer on Applicant’s social media pages.

December 26, 2015 confused review of Applicant’s beer posted on Great Adirondack Brewing Company’s Untappd.com page.	Opp. Trial Exhibit 3
January 30, 2016 confused review of Great Adirondack Brewing Company’s beer posted on Applicant’s Untappd.com page.	Opp. Trial Exhibit 4

Undated confused review of Applicant's beer posted on Great Adirondack Brewing Company's Untappd.com page.	Opp. Trial Exhibit 5
February 14, 2016 confused review of Applicant's beer posted on Great Adirondack Brewing Company's Untappd.com page.	Opp. Trial Exhibit 6
Excerpt from Untappd.com Website accessed on April 6, 2015.	Opp. Trial Exhibit 7
March 13, 2015 confused review of Applicant's beer posted on Great Adirondack Brewing Company's Untappd.com page.	Opp. Trial Exhibit 8
March 29, 2017 confused review of Applicant's beer posted on Great Adirondack Brewing Company's Untappd.com page.	Opp. Trial Exhibit 9
April 3, 2017 Confused Review of Applicant's establishment posted on Great Adirondack's Facebook Page.	Opp. Trial Exhibit 14

Applicant's retail customer, Four Seasons Tap Room & Grill, hosted an event to promote Applicant's beer and mistakenly identified Great Adirondack as the source of beer for the event. (44 TTABVUE, Kane Testimony at ¶¶33; Opp. Trial Exhibit 15). Other retail accounts have used Applicant's signage and tap handles bearing the Opposed Mark to promote and serve Great Adirondack's beer. (44 TTABVUE, Kane Testimony at ¶¶34; Opp. Trial Exhibit 16). The confusion created by Applicant's use of the Opposed Mark at the retail customer level has interfered with the sale Great Adirondack's beer by its distribution and sales company, Craft Beer Guild. Shortly after Craft Beer Guild started distributing Great Adirondack's beer, they began experiencing difficulty selling Great Adirondack's beer under the GREAT ADIRONDACK BREWING COMPANY® Mark due to confusion being created by Applicant's use of the Opposed Mark. (44 TTABVUE, Kane Testimony at ¶¶ 7, 37; Opp. Trial Exhibit 2, 29).

Applicant has received deliveries at its commercial establishment in Lake George, NY that were intended for Great Adirondack (located more than 80 miles away). (Opp. Trial Exhibit

10; 13; and 37, Discovery Deposition of John Carr (“Carr Depo.”) at pp. 53, 90 and Deposition Exhibit JC4). Similarly, Great Adirondack has received quotes for brewery equipment that were directed to Applicant. (44 TTABVUE, Kane Testimony at ¶¶35; Opp. Trial Exhibit 17). Online publications within the beer and alcohol industry, such as Brewbound.com and TheWhiskeyWash.com, published articles or webpages mistakenly referring Great Adirondack when describing or promoting Applicant’s goods. (44 TTABVUE, Kane Testimony at ¶¶31, 36; Opp. Trial Exhibit 12; 18; and 19).

Applicant took affirmative steps to cause confusion and to associate the Opposed Mark with the GREAT ADIRONDACK BREWING COMPANY® Mark. Applicant admits to registering domain names nearly identical to the GREAT ADIRONDACK BREWING COMPANY® mark (*e.g.*, [www.greatadirondackbrewing.com](http://www.greatadirondackbrewing.com) and [www.greatadirondack.com](http://www.greatadirondack.com)) and redirecting those visitors to Applicant’s own [www.adkbrewery.com](http://www.adkbrewery.com) website. (Opp. Trial Exhibit 33; 34; 37, Carr Depo. at pp. 68-71, 73-75; 39 at Answer to Admission Request No. 33).

Applicant has previously been found to be a willful trademark infringer by a federal jury. In a 2016 trademark infringement lawsuit brought by Moosehead Breweries, Applicant was found by a jury to have engaged in willful infringement of its trademarks for which damages were awarded. *Moosehead Breweries, Limited v. Adirondack Pub & Brewery, Inc.*, Case No. 1:15-cv-00260 (N.D.N.Y. 2016) (Opp. Trial Exhibit 35).

The GREAT ADIRONDACK BREWING COMPANY® Mark is well known. The Asserted Mark has been used by Great Adirondack in conjunction with its award-winning beers and ales for more than 20 years. (44 TTABVUE, Kane Testimony at ¶2). In the more than two decades that Opposer has been offering beer under the GREAT ADIRONDACK BREWING COMPANY® Mark, it has received dozens of awards from some of the most prestigious beer

festivals and competitions in the United States. The high quality of Great Adirondack’s beers has been repeatedly recognized by the Great American Beer Festival in Denver, Colorado, an event that attracts nearly 50,000 attendees each year. (*Id.* at ¶¶19). Other notable organizations that have lauded the outstanding quality of Great Adirondack’s beers include the World Beer Cup (Boulder, Colorado) and the North American Beer Awards (Idaho Falls, Idaho). (*Id.* at ¶¶18-20). Below is a summary of awards bestowed upon Great Adirondack in association with its beers under the GREAT ADIRONDACK BREWING COMPANY® Mark:

<b>Great Adirondack’s Beer</b>	<b>Award</b>
Whiteface Black Diamond Stout	2008 Great American Beer Festival Gold Medal 2009 Great American Beer Festival Bronze Medal 2010 Great American Beer Festival Silver Medal 2012 Great American Beer Festival Silver Medal 2014 World Beer Cup-Foreign Style Stout Silver Medal
Adirondack Abbey Ale	2006 World Beer Cup Silver Medal 2006 Great American Beer Festival Silver Medal 2007 North American Beer Awards Silver Medal
Belgian Saison	2009 Great American Beer Festival Silver Medal 2010 Great American Beer Festival Bronze Medal
White Stout	2014 World Beer Cup Silver Medal
Kolsch	2011 Great American Beer Festival Silver Medal
Wheat Wine	2008 World Beer Cup Silver Medal
John Brown Pale Ale	2001 TAP New York Best Individual Craft Beer in the Hudson Valley Silver Medal 2002 TAP New York Best Individual Craft Beer in the Hudson Valley Silver Medal
Ausable Wolff Red	2001 TAP New York Best Individual Craft Beer in the Hudson Valley Bronze Medal
Wee Heavy Scotch Ale	2004 TAP New York Best Individual Craft Beer in the Hudson Valley Gold Medal
Giant Imperial Stout	2009 TAP New York Best Individual Craft Beer in the Hudson Valley Bronze Medal

(*Id.* at ¶20; *see also*, Opposer’s Trial Exhibit 20). In 2002, Great Adirondack was also awarded The Matthew Vassar Brewers’ Cup as the *Best Craft Beer Brewery in the Hudson Valley* at the TAP New York Craft Beer Festival. (44 TTABVUE, Kane Testimony at ¶22).

Great Adirondack has additionally received unsolicited local, regional and national media coverage of its beer sold under the GREAT ADIRONDACK BREWING COMPANY® Mark. For example, USA TODAY named the Great Adirondack one of the top ten ski resort breweries in the United States. (*Id.* at ¶13; Opp. Trial Exhibit No. 23). Great Adirondack was also featured in an October-November 2015 article in Ale Street News. (*Id.* at ¶13; Opp. Trial Exhibit No. 24).

Great Adirondack regularly attends local, regional and national beer festivals, where it advertises and promotes its beer and ale under the GREAT ADIRONDACK BREWING COMPANY® Mark, including without limitation: the TAP New York Craft Beer and Fine Food Festival in Hunter, New York since 2001; the Great American Beer Festival located in Denver, Colorado since 2006; the Lake Placid Brewfest in Lake Placid, New York since its inception in 2011; and the World Beer Cup Festival located in Boulder, Colorado since 2006. (44 TTABVUE, Kane Testimony at ¶¶14, 22). Great Adirondack also promotes its beer under the GREAT ADIRONDACK BREWING COMPANY® Mark at beer tasting events held at its retail accounts (*e.g.*, bars and restaurants), third party fundraisers and other food and beverage events. (*Id.* at ¶¶15-17; Opp. Trial Exhibit 30; 31).

Great Adirondack also advertises its beer under the GREAT ADIRONDACK BREWING COMPANY® Mark to a broad audience on its websites ([www.adksteakandseafood.com](http://www.adksteakandseafood.com) and [www.adirondackbrewing.com](http://www.adirondackbrewing.com)), Facebook and other social media pages. (44 TTABVUE, Kane Testimony at ¶¶9-10). Great Adirondack has more than 3,300 followers and more than 9,700 visits to its Facebook page. (*Id.* at ¶10).

Great Adirondack has experienced long-term commercial success in association with its beer sold under the GREAT ADIRONDACK BREWING COMPANY® Mark. In just the last



five and a half years, Great Adirondack has sold more than [REDACTED] of beer and ale under the GREAT ADIRONDACK BREWING COMPANY® Mark. (*Id.* at ¶23; Opposer’s Trial Exhibit No. 22).

## **ARGUMENT**

Great Adirondack is entitled to judgment in its favor because (1) Great Adirondack has prior valid trademark rights in its GREAT ADIRONDACK BREWING COMPANY® Mark, and (2) Applicant’s use of the ADIRONDACK BREWERY mark is likely to cause confusion, mistake or deception with the GREAT ADIRONDACK BREWING COMPANY Mark. 15 U.S.C. § 1052(d).

## **POINT I**

### **Great Adirondack Has Priority of Use in its GREAT ADIRONDACK BREWING COMPANY® Mark**

An application to register a mark must be denied if there is a likelihood of confusion with “a mark or trade name previously used in the United States and not abandoned.” 15 U.S.C. § 1052(d). Here, priority is not in dispute. Great Adirondack owns a federal registration for its GREAT ADIRONDACK BREWING COMPANY® Mark for which it applied on March 8, 2013, and has continuously used the GREAT ADIRONDACK BREWING COMPANY® Mark in commerce since at least December 30, 1997. (Opp. Trial Exhibit 1, USPTO Reg. No. 4,425,098). Applicant applied for federal registration of the Opposed Mark on August 2, 2013, and Applicant admits that it never used the Opposed Mark in commerce prior to September 11, 1999, and has no documentary proof of such use until shortly before its application filing. (USPTO App. Serial No. 86/027,053; 45 TTABVUE, Carr Testimony ¶2). In view of Great Adirondack’s ownership of a valid and subsisting registration for its pleaded mark, priority is established with respect to the GREAT ADIRONDACK BREWING COMPANY® Mark and

the goods identified in the registration. *King Candy, Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

## POINT II

### **The GREAT ADIRONDACK BREWING COMPANY® Mark and ADIRONDACK BREWERY Mark are Confusingly Similar**

Section 2(d) of the Trademark Act provides that registration shall be refused for a trademark that “consists of or comprises a mark which so resembles a mark registered in the Patent and 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.” 15 U.S.C. § 1052(d). To determine whether a party’s use of a mark will result in a likelihood of confusion, the Board considers a number of relevant factors, enumerated in *In re E. I. du Pont DeNemours & Co.*, 476 F.2d 1357, 1361, 177 U.S.P.Q. 563 (CCPA 1973) (the “*du Pont* Factors”). Among the *du Pont* Factors are (i) the similarity of the goods described in the application, (ii) the similarity of likely trade channels, (iii) the similarity of the marks, (iv) actual confusion, (v) other facts probative of the effect of use, such as applicant’s bad faith, (vi) the conditions under which, and buyers to whom sales are made, (vii) the fame of the prior mark, and (viii) the number and nature of similar marks in use on similar goods. *Id.*

“[A] new entrant presenting a new mark for registration has an obligation to avoid confusion with established marks in the same market...[t]here is a heavy burden on the newcomer to avoid consumer confusion as to products and their source.” *Bridgestone Americas Tire Operations, LLC v. Federal Corp.*, 673 F.3d 1330, 1333, 1337, 102 U.S.P.Q.2d 1061 (Fed. Cir. 2012); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265, 62 U.S.P.Q.2d

1001 (Fed. Cir. 2002) (“This court resolves doubts about the likelihood of confusion against the newcomer because the newcomer has the opportunity and obligation to avoid confusion with existing marks.”); *In re H.D. Vest, Inc.*, Serial No. 77/599306, 2011 WL 481330 (TTAB Jan. 31, 2011) (“To the extent there are any doubts, we resolve them, as we must, in registrant’s favor.”).

**A. The Goods Are Legally Identical**

The goods at issue, namely, beers, are identical. The Federal Circuit has held that: “the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods or services set forth in the application, regardless of what the record may reveal as to the particular nature of applicant’s goods, the particular channels of trade, or the class of purchasers to which sales of the goods or services are directed.” *Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 1359, 56 U.S.P.Q.2d 1351 (Fed. Cir. 2000), citing, *Octocom Sys., Inc. v. Houston Computer Servs.*, 918 F.2d 937, 942, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). The GREAT ADIRONDACK BREWING COMPANY® Mark is registered and used for “ales; beers”. (Opp. Trial Exhibit 1, USPTO Reg. No. 4,425,098). Applicant’s USPTO application for the Opposed Mark is for “beer” (USPTO App. Serial No. 86/027,053). As a result, there can be no dispute that the parties’ goods are legally identical since they consist of beer and ale. *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1959 (TTAB 2016) (concluding that “the goods are identical insofar as the identifications in the application and in the cited registration both include ‘beer.’ The remaining goods in the cited registration, ‘ale’ and ‘lager,’ are otherwise closely related to, and in fact are types of beer.”). This factor strongly favors a finding of likelihood of confusion.

**B. The Trade Channels Are Also Identical**

The trade channels of the parties’ beers also are identical. Neither party has restricted the trade channels in its respective registration or application. Because the Opposed Mark and the

GREAT ADIRONDACK BREWING COMPANY® Mark will be used on legally identical goods, the Board “must presume that ...the parties’ respective goods...will be travelling through the same channels of trade to the same classes of consumers.” *Starbucks U.S. Brands LLC v. Ruben*, 78 U.S.P.Q.2d 1741, 1751 (TTAB 2006); *Packard Press, Inc.*, 227 F.3d at 1361, 56 U.S.P.Q.2d 1351; *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1028 (TTAB 2011); *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion).

Further, Applicant admits that its beers are sold in bars, restaurants and beverage centers (45 TTABVUE, Carr Testimony at ¶9). Opposer’s GREAT ADIRONDACK BREWING COMPANY® beers and ales are also sold in all major trade channels for beer, including bars, restaurants and beverage stores. (TTABVUE, Kane Testimony at ¶5). Thus, there can be no dispute that Applicant’s trade channels for its ADIRONDACK BREWERY beer overlap with the trade channels in which Opposer sells GREAT ADIRONDACK BREWING COMPANY® beers. This factor also strongly favors a finding of a likelihood of confusion.

**C. The Marks Are Highly Similar In Appearance, Sound, Connotation And Commercial Impression**

Significantly, it is well-established that when the goods at issue are identical, as they are here, “the degree of similarity necessary to support a conclusion of likely confusion declines.” *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enterprises Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007);

*Schering-Plough HealthCare Products Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1325 (TTAB 2007). Despite the lower threshold, the marks at issue are highly similar in terms of appearance, sound, meaning, and overall commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). In considering this factor, “the proper test 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.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Considering the marks in their entireties, the shared term ADIRONDACK BREWING/ADIRONDACK BREWERY stands out as the most prominent element and conveys the strongest commercial impression within each mark. The inclusion of the laudatory word GREAT and descriptive word COMPANY in Opposer’s mark are less significant in the eyes of the purchaser. *Edom Laboratories, Inc. v. Glenn Lichter*, 102 USPQ2d 1546 (TTAB 2012) (finding the dominant portion of mark SUPER CHIRO TEA to be CHIRO since SUPER is laudatory and TEA is generic). Although Opposer’s mark contains this additional laudatory word, any alleged dissimilarity is not sufficient to overcome the near identity of the prominent and most impressionable ADIRONDACK BREWING/ADIRONDACK BREWERY term.

Further, any minor differences in sound between the two marks are unlikely to be noticed when the beer is ordered by name in a bar or restaurant. *E. & J. Gallo Winery v. Wade*, Cancellation No. 92063116, 2017 WL 2876830 (TTAB June 7, 2017). Moreover, the consumer

is unlikely to see the label for the beer if it is served in a glass from a keg. *Id.* In the present case, the similarity in the marks' appearance, sound, meaning and overall commercial impression well-exceed the low threshold required to support a likelihood of confusion. *Century 21 Real Estate Corp.*, 23 USPQ2d at 1700. Thus, this factor favors a finding of likelihood of confusion.

**D. There Is Extensive Evidence And Admissions Of Actual Confusion**

This is a rare case in which Applicant itself has admitted to actual confusion between the marks. In addition, the record contains ample evidence of actual confusion by consumers, sales people, vendors and other members of the beer industry. A showing of actual confusion is highly probative, if not conclusive, of a high likelihood of confusion. *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003). In fact, the existence of actual confusion is very persuasive evidence of likelihood of confusion and undercuts any possible claim that the marks are dissimilar such that there can be no likelihood of confusion. *Thompson v. Haynes*, 305 F.3d 1369, 64 USPQ2d 1650 (Fed. Cir. 2002); *Exxon Corp. v. Texas Motor Exchange, Inc.*, 628 F.2d 500, 208 USPQ 384, 389 (5th Cir. 1980) (“The best evidence of likelihood of confusion is provided by evidence of actual confusion”). Given Applicant’s admission of actual confusion and the additional evidence of confused customers and third parties, this *du Pont* factor heavily favors Great Adirondack.

i. Applicant’s Admission of Actual Confusion

Applicant admits there is “clear confusion between [the] two brands”. (Opp. Trial Exhibit 2). Such an admission is significant and conclusive of likelihood of confusion. *Gideons Int’l, Inc. v. Gideon 300 Ministries, Inc.*, 94 F. Supp. 2d 566, 584 (E.D. Pa. 1999); *see also, Big O Tires, Inc. v. Gale Banks Eng.*, 2006 WL 2513919, at \*1 (TTAB Aug. 16, 2006). Applicant operates and controls a Facebook page for its business at [www.facebook.com/AdkPubBrewery](http://www.facebook.com/AdkPubBrewery).

(Opp. Trial Exhibit 39, Answer to Admission Request No. 35). In a statement published on Applicant's Facebook page on November 15, 2015, *while these proceedings were pending*, Applicant stated:

... The issue came about when Great Adirondack Steak and Seafood recently attempted to trademark and therefore have sole use of 'Great Adirondack Brewing Company'. While we're all for trademark law and believe that it protects creativity, the trademarking of that combination of terms would cause clear confusion between our two brands.

(Opp. Trial Exhibit 2). This statement was created by or on behalf of John Carr, the owner of Applicant's business. (Opp. Trial Exhibit 39, Answer to Admission Request No. 37; 45 TTABVUE, Carr Testimony ¶1). Great Adirondack submits that Applicant's own admission of confusion between the Opposed Mark and the GREAT ADIRONDACK BREWING COMPANY® Mark, sustains Great Adirondack's opposition of the Opposed Mark.

ii. Mistaken Product Reviews by Confused Customers

In addition to Applicant's own admission of confusion, the record contains extensive confusion among the consumers of the parties' goods. On multiple occasions confused customers have left a review for Applicant's beer or Applicant's establishment on Opposer's social media pages, such as Facebook and Untappd.com, or left a review for Opposer's beer on Applicant's social media pages, confusing the marks. (Opp. Trial Exhibit 3-9 and 14).

iii. Actual Confusion by Retail Customers

While the above mistaken product reviews show confusion by end-user customers (i.e., individual beer drinkers), there is also confusion by the parties' retail customers (e.g., bars and restaurants that serve the parties' beer). Multiple retail customers of Applicant, in an effort to promote Applicant's beer, mistakenly identified Great Adirondack as the source of beer for the event. (44 TTABVUE, Kane Testimony at ¶¶33-34; Opp. Trial Exhibit 15; 16).

The confusion created by Applicant's use of the Opposed Mark at the retail customer level has interfered with the sale of Great Adirondack's beer under the Asserted Mark by its distribution and sales company. (44 TTABVUE, Kane Testimony at ¶¶ 7, 37; Opp. Trial Exhibit 2; 29). Confusion in the marketplace creates additional hurdles when selling Great Adirondack's beer, as sales representatives often have to educate consumers and preface sales pitches by distinguishing between Great Adirondack and Applicant. (Pouliot Testimony at ¶¶1-6; *see also*, Opp. Trial Exhibit 28).

iv. Actual Confusion within the Beer Industry

The evidence of actual confusion goes beyond Applicant's admission and the parties' end-user and retail customers. Vendors and other third-parties in the beer industry have also confused Applicant's and Opposer's businesses and goods. On multiple occasions, Applicant has received deliveries at its commercial establishment in Lake George, NY that were intended for Great Adirondack (located more than 80 miles away). (Opp. Trial Exhibit Nos. 10; 13; 37, Carr Depo. at pp. 53, 90 and Deposition Exhibit JC4). Similarly, Great Adirondack has received quotes for brewery equipment that were directed to Applicant. (44 TTABVUE, Kane Testimony at ¶35; Opp. Trial Exhibit 17). Online publications within the beer and alcohol industry have published articles and webpages mistakenly referring Great Adirondack when describing or promoting Applicant's goods. (44 TTABVUE, Kane Testimony at ¶¶31, 36; Opp. Trial Exhibit Nos. 12; 18; and 19).

**E. Applicant Acted In Bad Faith And Took Affirmative Steps To Cause Confusion**

Applicant took affirmative steps to cause confusion and to associate the Opposed Mark with the GREAT ADIRONDACK BREWING COMPANY® Mark. Under the thirteenth *du Pont* factor ("other facts probative of the effect of use"), evidence of Applicant's bad faith is



highly relevant to the likelihood of confusion analysis. *L.C. Licensing Inc. v. Berman*, 86 USPQ2d 1883, 1891 (TTAB 2008) (bad faith is strong evidence that confusion is likely, as such an inference is drawn from the imitator's expectation of confusion); *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889, 1891 (Fed. Cir. 1991).

Applicant admits to registering domain names nearly identical to the GREAT ADIRONDACK BREWING COMPANY® mark (www.greatadirondackbrewing.com and www.greatadirondack.com) and redirecting those visitors to Applicant's own www.adkbrewery.com website. (Opp. Trial Exhibits 33; 34; 37, Carr Depo at pp. 68-71, 73-75; 39 at Answer to Admission Request No. 33). Notably, in *Edom Laboratories, Inc. v. Glenn Lichter*, 102 USPQ2d 1546, 2012 WL 1267961 (TTAB 2012), the Board found precisely this type of conduct to be persuasive evidence that the applicant had a bad faith intent to cause, and profit from, consumer confusion. *Edom Laboratories, Inc.*, 2012 WL 1267961 at \*10-11 (TTAB 2012). In *Edom Laboratories*, the applicant registered a domain name, chiroklenzforless.com, incorporating the prior registrant's mark (CHIRO-KLENZ) that redirected to applicant's website. The Board found this to be strong evidence of bad faith and ultimately sustained the prior registrant's opposition of applicant's mark SUPER CHIRO TEA used on identical goods. *Id.*

Additionally, Applicant has previously been found to be a willful trademark infringer by a federal jury. (Opp. Trial Exhibit 35). In a 2016 trademark infringement lawsuit brought by Moosehead Breweries, Applicant was found by a jury to have engaged in willful infringement of Moosehead's trademarks for which damages were awarded. *Moosehead Breweries, Limited v. Adirondack Pub & Brewery, Inc.*, Case No. 1:15-cv-00260 (N.D.N.Y. 2016) (*Id.*).

Applicant's pattern of acting willfully with respect to third party trademark rights further supports a finding of bad faith. *See, e.g., L'Oreal S.A. and L'Oreal USA, Inc. v. Robert Victor*

*Marcon*, 102 USPQ2d 1434, 2012 WL 1267956, \*10 (TTAB March 20, 2012) (applicant’s “demonstrated pattern of filing applications to register various well-known marks convinces us that applicant’s adoption of [opposer’s] mark was in bad faith”). Applicant’s history of willfully disregarding third party trademark rights, its registration of domain names incorporating the GREAT ADIRONDACK BREWING COMPANY® Mark, and using those domains to redirect visitors to Applicant’s website evidences Applicant’s bad faith intent to cause consumer confusion. This *du Pont* factor weighs heavily in favor of Great Adirondack.

**F. Beer Purchasers Are Inclined To Make Impulse Purchases, Which Increases The Likelihood Of Confusion**

In addition to the goods at issue being identical and sold through identical trade channels, consumers of the parties’ beers are likely to exercise a relatively low degree of care when making purchasing decisions, which increases the likelihood of confusion. The Board has acknowledged that beer is often relatively inexpensive, subject to impulse purchase and often ordered orally in a bar or restaurant. *In Re Clipper City Brewing Co.*, 2017 WL 412405, at \*8 (TTAB Jan. 10, 2017). Thus, purchasers for “beer” include ordinary consumers who may buy inexpensive beer on impulse. *In re Bay State Brewing*, 117 USPQ2d at 1960, n4 (taking judicial notice of these facts). When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care. *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000).

**G. The GREAT ADIRONDACK BREWING COMPANY® Mark Is Well Known**

The GREAT ADIRONDACK BREWING COMPANY® Mark is well known. The fame of a mark may be measured by several indicia of commercial awareness, including long duration of use, unsolicited media coverage, industry recognition, volume of sales and advertising

exposure. *E. & J. Gallo Winery v. Kinney Family Vitners LLC*, 91207656, 2015 WL 1518044, at \*3 (Mar. 10, 2015). The Asserted Mark has been used by Great Adirondack in conjunction with its award-winning beers and ales for more than 20 years. (44 TTABVUE, Kane Testimony at ¶2). In the more than two decades that Opposer has been offering beer under the GREAT ADIRONDACK BREWING COMPANY® Mark, it has received dozens of awards from some of the most prestigious beer festivals and competitions in the United States. (*Id.* at ¶¶18-20, 22; *see also*, Opposer’s Trial Exhibit No. 20). Great Adirondack has received unsolicited local, regional and national media coverage of its beer sold under the GREAT ADIRONDACK BREWING COMPANY® Mark. For example, USA TODAY named the Great Adirondack one of the top ten ski resort breweries in the United States. (44 TTABVUE, Kane Testimony at ¶13; Opp. Trial Exhibit 23; *see also* Opp. Trial Exhibit 24).

Great Adirondack regularly attends local, regional and national beer festivals, where it advertises and promotes its beer and ale under the GREAT ADIRONDACK BREWING COMPANY® Mark (44 TTABVUE, Kane Testimony at ¶¶14, 22), and at beer tasting events held at its retail accounts (e.g., bars and restaurants), third party fundraisers and other food and beverage events. (*Id.* at ¶¶15-17; Opposer’s Trial Exhibit 30; 31).

Great Adirondack also advertises its beer under the GREAT ADIRONDACK BREWING COMPANY® Mark to thousands of followers on its websites ([www.adksteakandseafood.com](http://www.adksteakandseafood.com) and [www.adirondackbrewing.com](http://www.adirondackbrewing.com)), Facebook and other social media pages. (44 TTABVUE, Kane Testimony at ¶¶9-10).

Great Adirondack has experienced long-term commercial success in association with its beer sold under the GREAT ADIRONDACK BREWING COMPANY® Mark. In just the last five and a half years, Great Adirondack has sold more than [REDACTED] of beer and ale under the

GREAT ADIRONDACK BREWING COMPANY® Mark. (*Id.* at ¶23; Opposer’s Trial Exhibit 22). Accordingly, the GREAT ADIRONDACK BREWING COMPANY® Mark is well known and this *du Pont* factor favors Great Adirondack.

#### **H. Third Party Registrations And Internet Printouts**

Applicant attempts to offer into evidence third-party registrations and internet printouts purporting to show third party use of marks that include the term “ADIRONDACK”. However, third-party registrations and internet printouts, alone, provide no basis to consider the *du Pont* factor of “the number and nature of similar marks in use on similar goods.” *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462, 467 (CCPA 1973). These types of evidence do not demonstrate that a term “is so widely used in the parties’ industry” because they are not evidence of actual use at all. *Id.*; *see also, In Re Clipper City Brewing Co.*, 2017 WL 412405, at \*8 (Jan. 10, 2017).

In particular, third party registrations “provide no basis for saying that the marks so registered have had, or may have, any effect at all on the public mind so as to have a bearing on likelihood of confusion.” *Smith Bros. Mfg. Co.*, 177 USPQ 462 at 463; *Productos Lacteos Tocumbo S.A. de C.V. v. Paeteria La Michoacana Inc.*, 98 USPQ2d 1921, 1934 (TTAB 2011). The issuance of a registration by the USPTO provides no insight into the minds of actual customers in the marketplace. *Id.* at 467.

Similarly, an internet printout of a third-party website containing use of the term “ADIRONDACK” is not evidence of that the consuming public has become so familiar with the same or similar marks so as to weaken Great Adirondack’s Asserted Mark. *See, In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010); *In re C. H. Hanson Co.*, 116 USPQ2d 1351, 1353 (TTAB 2015) citing, *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d

1004, 177 USPQ 462, 463 (CCPA 1973); *Carl Karcher Enters. Inc. v. Stars Rests. Corp.*, 35 USPQ2d 1125, 1130-31 (TTAB 1995). In fact, the ample evidence of actual consumer confusion in the present case curtails any argument by Applicant that consumers can distinguish the Opposed Mark from the GREAT ADIRONDACK BREWING COMPANY® Mark. (*See infra*). Thus, Applicant's purported third-party evidence fails to undermine the strength of Great Adirondack's Asserted Mark and this *du Pont* factor favors Great Adirondack.

### CONCLUSION

Given Applicant's own admission of actual confusion, additional consumer and third party evidence of actual confusion, Applicant's bad faith, the parties' identical goods and channels of trade, the high degree of similarity between the marks at issue, the relatively low level of consumer sophistication, and the lack of third party uses and registrations of marks for beer having ADIRONDACK or ADIRONDACK BREW, the likelihood of confusion in this case is extremely high. Accordingly, Great Adirondack respectfully requests that judgment be entered in its favor, and that registration of the Opposed Mark be denied.

Dated: July 16, 2018

Respectfully submitted,

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CAFÉ, INC.

**CERTIFICATE OF FILING AND SERVICE**

I, Shanna K. Sanders, hereby certify that a true and complete copy of **OPPOSER’S TRIAL BRIEF** was electronically filed with the TTAB using the ESTTA system, and served on Attorneys for Applicant, Adirondack Pub & Brewery, Inc., by electronic mail as follows:

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