

This Opinion is Not a  
Precedent of the TTAB

Oral Hearing: October 9, 2018

Mailed: February 28, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*Cards Against Humanity, LLC*  
*v.*  
*Vampire Squid Cards, LLC*  
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Opposition No. 91225576  
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Eleanor M. Lackman and Marissa B. Lewis of Cowan, DeBaets, Abrahams & Sheppard, LLP  
for Cards Against Humanity, LLC.

Thomas E. Moore, III of Royse Law Firm, PC  
for Vampire Squid Cards, LLC.

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Before Wellington, Wolfson, and Kuczma,  
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Vampire Squid Cards, LLC (“Applicant”), seeks registration on the Principal Register of the standard character word mark CRABS ADJUST HUMIDITY<sup>1</sup> and the following word and design composite mark:

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<sup>1</sup> Application Serial No. 86620191 was filed on May 5, 2015 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), on the basis of Applicant’s claim of first use of the mark and first use in commerce at least as early as July 1, 2013.



,<sup>2</sup> both marks for “Card games; Game cards” in International Class 28.

Cards Against Humanity, LLC (“Opposer”) has opposed registration of Applicant’s marks on the grounds of priority and likelihood of confusion under Section 2(d) of the Trademark Act (“the Act”), 15 U.S.C. § 1052(d), based on, inter alia, pleaded registrations for the standard character marks CARDS AGAINST HUMANITY and CAH, as well as a product packaging configuration mark (depicted below), and alleged prior common law use of these marks.<sup>3</sup> Opposer also opposes registration of Applicant’s marks on the grounds that they are likely to dilute Opposer’s purported famous word mark CARDS AGAINST HUMANITY, under Section 43(c) of the Act, 15 U.S.C. § 1125(c), and that they may falsely suggest a connection to Opposer under Section 2(a) of the Act, 15 U.S.C. § 1052(a).

Applicant filed an answer wherein it made certain admissions, but otherwise denied the salient allegations of likelihood of confusion, dilution, and false suggestion

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<sup>2</sup> Application Serial No. 86622129 was filed on May 7, 2015 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), on the basis of Applicant’s claim of first use of the mark and first use in commerce at least as early as July 1, 2013.

<sup>3</sup> Pursuant to a Board order (26 TTABVUE), Opposer was given leave to file an amended notice of opposition, which it did on September 20, 2017 (27 TTABVUE). Applicant filed an amended answer thereto (28 TTABVUE). These are the operative pleadings.

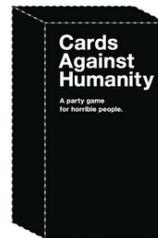
of a connection.<sup>4</sup> Applicant also sets forth various “affirmative defenses” in its answer, including estoppel (by consent and acquiescence) and unclean hands.

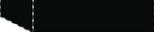
Opposer and Applicant submitted trial evidence and have fully briefed the opposition. Both parties were represented by counsel at an oral hearing held before the Board on October 9, 2018.<sup>5</sup>

## I. Evidentiary Record

The record consists of the following.

1. The pleadings, as amended;
2. The file histories of Applicant’s applications, by operation of Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1).
3. Opposer’s 1<sup>st</sup> Notice of Reliance on copies of its pleaded registrations, each for “Card games; Game cards” in International Class 28:<sup>6</sup>
  - (a) Registration No. 4304905 for the mark CARDS AGAINST HUMANITY;<sup>7</sup>



- (a) Registration No. 4623613 for the mark ;<sup>8</sup> and

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<sup>4</sup> 28 TTABVUE (amended answer).

<sup>5</sup> 65 TTABVUE (oral hearing appearance record).

<sup>6</sup> 29 TTABVUE.

<sup>7</sup> Issued on March 19, 2013; Section 8 and 15 affidavits accepted.

<sup>8</sup> Issued on October 21, 2014. The mark is described in the registration as: “consist[ing] of a three-dimensional black rectangular product packaging featuring the words CARDS AGAINST HUMANITY in white letters located in the upper left-hand corner of the rectangular design, with the phrase A PARTY GAME FOR HORRIBLE PEOPLE in white letters directly below. The dotted lines along the perimeter of the rectangular product packaging show the mark’s position on the goods and are not a feature of the mark.”

(b) Registration No. 3354769 for the mark CAH.<sup>9</sup>

4. Opposer's 2<sup>nd</sup> Notice of Reliance on a copy of its application (Serial No.



87428307) for .<sup>10</sup>

5. Opposer's 3<sup>rd</sup> Notice of Reliance on responses from Applicant to certain interrogatories and admission requests propounded by Opposer.<sup>11</sup>

6. Opposer's 4<sup>th</sup> Notice of Reliance on:<sup>12</sup>

(a) printouts from Opposer's and Applicant's websites;

(b) copies of print and online articles involving Opposer's goods;

(c) screenshots from various websites involving Opposer's goods;

(d) screenshots of archived Amazon website pages involving Opposer's goods;

(e) screenshots from Amazon's U.S., Canadian and U.K. websites involving Opposer's goods, including customer review pages.

7. Opposer's 5<sup>th</sup> Notice of Reliance on documents produced by Applicant in response to Opposer's discovery requests for production and authenticated by way of an admission by Applicant.<sup>13</sup>

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<sup>9</sup> Issued on July 18, 2017.

<sup>10</sup> 30 TTABVUE. The application, filed on April 27, 2017, matured into a registration (Reg. No. 5473183) on May 22, 2018.

<sup>11</sup> 31 TTABVUE.

<sup>12</sup> 32 TTABVUE.

<sup>13</sup> 33 TTABVUE.

8. Opposer's 6<sup>th</sup> and 7<sup>th</sup> Notices of Reliance on portions of the transcript of the deposition of Michael Kohler, one of founders, taken pursuant to Fed. Rule Civ. P. 30(b)(6).<sup>14</sup>
9. Opposer's submission of the testimony declaration or testimonial deposition transcript, with exhibits, for the following individuals:
  - (a) Jon G. Rygh, a self-proclaimed "expert in the field of branding and marketing";<sup>15</sup> and
  - (b) Jenn Bane, Community Manager for Opposer.<sup>16</sup>
10. Opposer's (rebuttal) 8<sup>th</sup> Notice of Reliance on Applicant's responses to Opposer's interrogatories nos. 9-11 and 14.<sup>17</sup>
11. Opposer's (rebuttal) 9<sup>th</sup> Notice of Reliance on Internet printouts concerning Opposer's CARDS AGAINST HUMANITY goods.<sup>18</sup>
12. Opposer's (rebuttal) 10<sup>th</sup> Notice of Reliance on documents produced by Applicant during discovery and authenticated by Applicant's admissions.<sup>19</sup>
13. Applicant's submission of the following testimony:
  - (a) Declaration (upon written questions pursuant to stipulation of the parties) of Ben Hantoot, one of Opposer's founders, with exhibits;<sup>20</sup>
  - (b) Testimonial deposition transcript, with exhibits, of Michael Kohler;<sup>21</sup>
  - (c) Testimonial deposition transcript, with exhibits, of Shari Spiro, founder and CEO of Ad Magic Incorporated, a third party;<sup>22</sup> and

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<sup>14</sup> 34 TTABVUE; 40 TTABVUE (filed during Opposer's rebuttal testimony period) and confidential material submitted at 44 TTABVUE.

<sup>15</sup> 35 TTABVUE.

<sup>16</sup> 36 TTABVUE; testimony and exhibits designated "confidential" at 37 TTABVUE.

<sup>17</sup> 41 TTABVUE and confidential material submitted at 44 TTABVUE.

<sup>18</sup> 42 TTABVUE.

<sup>19</sup> 43 TTABVUE and confidential material submitted at 44 TTABVUE.

<sup>20</sup> 45-46 TTABVUE (designated confidential).

<sup>21</sup> 47 TTABVUE and 48 TTABVUE (confidential copy).

<sup>22</sup> 49 TTABVUE.

(d) Testimonial deposition (second, taken on January 18, 2018) transcript of Mr. Rygh.<sup>23</sup>

Applicant has moved to strike the “expert report” attached as an exhibit to the declaration of Mr. Rygh, as submitted by Opposer.<sup>24</sup> Specifically, Applicant objects because “Mr. Rygh’s opinion [whether there is a likelihood of confusion] is not helpful to the trier of fact because he has relied on less evidence than the Board has before it.”<sup>25</sup> Applicant also contends that Mr. Rygh does not have “specialized knowledge on the issue of what is and is not parody and does not qualify to render an expert opinion on the subject.”<sup>26</sup> Opposer has contested Applicant’s motion to strike Mr. Rygh’s report.

We decline to strike the “expert report” attached to Mr. Rygh’s declaration. However, we accord the report only the weight it is entitled to and, in this regard, we have considered Applicant’s reasons for striking the report and why Mr. Rygh’s opinions have little, or no, value. To be clear, we do not allow Mr. Rygh’s opinion to serve as a substitute for our own judgment in this opposition. *Frito-Lay N. Am., Inc. v. Princeton Vanguard, LLC*, 124 USPQ2d 1184, 1190 (TTAB 2017). *See also Yamaha Int’l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 6 USPQ 1001 (Fed. Cir. 1988); *see also Edwards Lifesciences Corp. v. Vigilanz Corp.*, 94 USPQ2d 1399, 1401-1402 (TTAB 2010) (“[T]he Board is responsible for determining whether the marks are

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<sup>23</sup> 50 TTABVUE.

<sup>24</sup> 55 TTABVUE (Applicant’s statement of objections).

<sup>25</sup> *Id.* at p. 2-3.

<sup>26</sup> *Id.* at p. 3.

similar, and we will not substitute the opinion of a witness, even an expert witness, for our evaluation of the facts.”) (citing *The Mennen Co. v. Yamnouchi Pharma. Co., Ltd.*, 203 USPQ 302, 305 (TTAB 1979) (holding the “opinions of witnesses, including those qualified as expert witnesses, on the question of likelihood of confusion are entitled to little if any weight and should not be substituted for the opinion of the tribunal charged with the responsibility for the ultimate opinion of the question.”)).

## II. Background

In 2010, Opposer began marketing a game called CARDS AGAINST HUMANITY as a Kickstarter (crowd-source funded) project.<sup>27</sup> The game, itself, is described as “a party game for horrible people” and is played by “one player ask[ing] a question from a black card and everyone else answer[ing] with their funniest white card.”<sup>28</sup> The game encourages irreverent or risqué answers that are humorous, with a variety of “specialty” packs of cards.

Since 2010, Opposer has engaged in unconventional marketing schemes and its CARDS AGAINST HUMANITY game has gained some notoriety. Opposer has also been active promoting the game through its website and social media accounts on Twitter, Instagram, Facebook and Tumblr, with a significant number of followers and activity. It has received unsolicited attention in the media, including “CNN, MSNBC, Fox News, Ad Week, Time, Bustle, [and] Teen Vogue.”<sup>29</sup> In various articles from 2012 to 2015, the game has been regarded as very successful and growing in popularity –

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<sup>27</sup> 36 TTABVUE 9.

<sup>28</sup> 32 TTABVUE 18.

<sup>29</sup> 36 TTABVUE 11.

being described in terms such as “taking the world by storm”<sup>30</sup> or “a smashing success”<sup>31</sup> or “the breakout party game of this decade.”<sup>32</sup> Various celebrities have also given unprompted mention on their social media of their like of the game, *e.g.*, Kim Kardashian West tweeting “Playing ‘Cards Against Humanity’ with the crew!”<sup>33</sup> The game was also played by the cast of Glee (TV show) on The Ellen (DeGeneres) Show television program.<sup>34</sup>

In terms of sales and commercial success, sales of Opposer’s CARDS AGAINST HUMANITY game have grown dramatically since between 2011 up to 2016 and are impressive.<sup>35</sup> The online retailer Amazon.com has consistently listed the game as a “best seller” since 2010.<sup>36</sup>

Applicant, whose members are the husband and wife team of Michael and Amber Kohler, describes itself as “founded on the idea that it could create a set of cards with an even more off-beat sense of humor that could add to and complement the original [Opposer’s] Cards Against Humanity game.”<sup>37</sup> Indeed, Applicant’s game cards are considered an “expansion pack” to Opposer’s card game and are used in conjunction with Opposer’s card game. Mr. Kohler testified that in early 2013 he was very familiar

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<sup>30</sup> 32 TTABVUE (Exhibit 28).

<sup>31</sup> *Id.* (Exhibit 30).

<sup>32</sup> *Id.* (Exhibit 29).

<sup>33</sup> 36 TTABVUE (Bane Exhibit 1).

<sup>34</sup> *Id.*

<sup>35</sup> The figures for sales for products and number of promotional items distributed have been designated “confidential.” 37 TTABVUE; Bane Ex. 3.

<sup>36</sup> 36 TTABVUE (Bane 11:2-5).

<sup>37</sup> 58 TTABVUE 11.

with Opposer's game and wanted to create "a series of cards that could be added to the Cards Against Humanity game that would give a different or enhanced, expanded experience."<sup>38</sup> In deciding on a mark for its expansion pack of cards to Opposer's game, Mr. Kohler "wanted a phrase that would evoke [CARDS AGAINST HUMANITY] by rhyming with it, but in an absurdist and surreal way."<sup>39</sup>

On or about July 1, 2013, Applicant began using CRABS ADJUST HUMIDITY with an expansion game card pack and launched a website.<sup>40</sup> At about the same time, Mr. Kohler contacted Opposer via email regarding Applicant's plans for the expansion pack of game cards. Also, at or around the same time, Applicant contacted a printer, AdMagic, which was the same printing company that Opposer used for its game cards.

The parties' 2013 email communications and the testimony regarding them have mostly been designated "confidential."<sup>41</sup> Thus, without divulging any of the specific content of the testimony and exhibits, we make some generalized factual findings based on the testimony and exhibits. The communications began with Applicant's principal, Mr. Kohler, sending an email to Opposer on July 23, 2013.<sup>42</sup> In the email, Mr. Kohler expressed Applicant's interest to use its CRAB ADJUST HUMIDITY mark without violating Opposer's intellectual property rights. On the same day, Max

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<sup>38</sup> 47 TTABVUE (Kohler 7:8-10).

<sup>39</sup> *Id.* 8:14-16.

<sup>40</sup> *Id.* 10:19-23.

<sup>41</sup> 48 TTABVUE (Kohler "confidential" testimony and exhibits).

<sup>42</sup> *Id.* (Kohler Exhibit 1).

Temkin, one of Opposer's principals, responded to Mr. Kohler by email, mentioning a possible licensing agreement that would include a provision prohibiting the sale of any confusingly similar game; Mr. Temkin further suggested in the same email that, as an alternative to the licensing agreement, Opposer would consider a re-design of Applicant's marks and packaging whereby Applicant could sell its game cards without violating Opposer's rights.<sup>43</sup>

On August 14, 2013, Mr. Kohler sent Mr. Temkin an email with an attachment showing re-designed game card designs containing the CRABS ADJUST HUMIDITY mark.<sup>44</sup> On the same day, Mr. Temkin responded by email stating, albeit in a single sentence and somewhat informally, that Applicant's re-design was acceptable to Opposer.<sup>45</sup>

In September 2013, Applicant placed an order with AdMagic to have 10,000 of its game cards printed for \$22,700.<sup>46</sup> Prior to accepting the order from Applicant, AdMagic's principal, Ms. Spiro, confirmed with Opposer that it had given permission to Applicant to have the cards printed.<sup>47</sup> Specifically, Ms. Spiro testified:<sup>48</sup>

So my understanding is that the guys from Cards Against Humanity were giving Michael [Applicant] permission to sell this game on his website in a specific channel of trade, for lack of a better definition. That was my understanding. He had approval to run this run and sell the cards in the Crabs Adjust Humidity website.

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> 49 TTABVUE (Spiro Exhibit 1).

<sup>47</sup> *Id.*; Spiro 8:14-10:23.

<sup>48</sup> *Id.*; Spiro 10:12-20.

When Applicant placed its first order with AdMagic to print its game cards, Applicant's primary trade channel was through its own website.<sup>49</sup> Later in 2013 and into 2014, Applicant experienced "explosive growth" in sales that peaked during Christmas 2014,<sup>50</sup> and Applicant began selling through the large online retailer Amazon.com, as well as other online retailers and smaller retail hobby stores.<sup>51</sup>

On two separate occasions, Applicant attempted to sell its cards through Target, a chain of large retail department stores. First, in late 2014,<sup>52</sup> Applicant was close to placing an order with the printer, AdMagic, for game cards to be sold to Target. However, AdMagic's principal, Ms. Spiro, contacted Applicant and said she was uncomfortable printing Applicant's cards "without signoff" from Opposer.<sup>53</sup> Applicant contacted Opposer who ultimately did not approve Applicant's sale of cards to Target in late 2014.<sup>54</sup> On the second occasion, in 2015, Applicant's distributor was approached by Target regarding the sale of Applicant's game cards in the Target stores.<sup>55</sup> Applicant again contacted Opposer to get its approval of Applicant's sale of cards to Target; however, the parties were unable to reach an agreement and Applicant ultimately did not sell any of its cards through to Target.

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<sup>49</sup> 47 TTABVUE (Kohler 22:19-20).

<sup>50</sup> *Id.*; Kohler 82:18-23.

<sup>51</sup> *Id.*; Kohler 23:1-21.

<sup>52</sup> *Id.*; Kohler 27:9-25.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*; Kohler 28:2-3.

<sup>55</sup> *Id.*; Kohler 28-18-22.

The involved applications were filed in May, 2015, published for opposition on November 3, 2015, and Opposer timely filed the instant opposition on December 30, 2015.<sup>56</sup> During this time and at least up to January 2016, the parties continued their negotiations regarding a possible written agreement regarding Applicant's use of its marks.

### **III. Applicant's Affirmative Defenses**

#### **A. Estoppel by acquiescence and express consent**

In its brief, Applicant relies upon from the aforementioned email correspondence in 2013 between Applicant's principal, Mr. Kohler, and Max Temkin, a principal of Opposer. Applicant asserts that, based on that correspondence, it "received Opposer's consent to proceed to market Applicant's game" and that it "did so for two years without any complaint from Opposer." Applicant argues that it received Opposer's "express, not implied," consent to "market" its game.<sup>57</sup> Applicant further argues that this consent was "followed by Applicant's detrimental reliance [and] creates the defense of estoppel."<sup>58</sup> Applicant also contends that "an express consent to use necessarily includes a consent to register," citing *Richdel, Inc. v. Mathews Co.*, 190 USPQ 37, 42 (TTAB 1976) and MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32:106 (5<sup>th</sup> ed. 2018 update).

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<sup>56</sup> Opposer filed a request for an extension of time to oppose (on December 3, 2015) which was granted by the Board on the same day, allowing Opposer until January 2, 2016 to file a notice of opposition.

<sup>57</sup> 58 TTABVUE 45.

<sup>58</sup> *Id.*

Opposer, on the other hand, admits that it “had given Applicant a limited permission to use the name Crabs Adjust Humidity as part of an overall design back in 2013.”<sup>59</sup> However, Opposer contends that such consent “only extended to a small print run for a one-off expansion pack to be sold on Applicant’s website with a specific design,” asserting that “at that time, [Applicant’s website] was the only place the ‘Crabs Adjust Humidity’ game was available....”<sup>60</sup>

Applicant’s defense, as articulated in its brief, is essentially estoppel by acquiescence. “Acquiescence is a type of estoppel that is based upon the plaintiff’s conduct that expressly or by clear implication consents to, encourages, or furthers the activities of the defendant, that is not objected to.” *Christian Broadcasting Network Inc. v. ABS-CBN International*, 84 USPQ2d 1560, 1573 (TTAB 2007). Acquiescence requires proof of three elements: (1) that plaintiff actively represented that it would not assert a right or a claim; (2) that the delay between the active representation and assertion of the right or claim was not excusable; and (3) that the delay caused defendant undue prejudice. *Coach House Restaurant Inc. v. Coach and Six Restaurants, Inc.*, 934 F.2d 1551, 19 USPQ2d 1401, 1409 (11<sup>th</sup> Cir. 1991) (acquiescence requires active consent). *See also Hitachi Metals International, Ltd. v. Yamakyu Chain Kabushiki Kaisha*, 209 USPQ 1057 (TTAB 1981).

Acquiescence is generally unavailable in opposition proceedings because the start date for which Opposer can be charged with inexcusable delay begins to run from the

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<sup>59</sup> 59 TTABVUE 9.

<sup>60</sup> *Id.*

date the mark is published for opposition. *Bausch & Lomb Inc. v. Karl Storz GmbH & Co. KG*, 87 USPQ2d 1526, 1531 (TTAB 2008) (“Conduct which occurs prior to the publication of the application for opposition generally cannot support a finding of equitable estoppel.”); *see also Krause v. Krause Publications Inc.*, 76 USPQ2d 1904 (TTAB 2005). Here, Opposer timely filed its notice of opposition (see Note 56) and thus we cannot find any unreasonable delay. Without a showing of non-excusable delay on Opposer’s part in asserting its rights, we necessarily do not find acquiescence is applicable.

To the extent that Applicant is asserting estoppel by express consent, such a defense is also unavailing given the circumstances. Specifically, although Opposer’s principal Mr. Temkin informally conveyed Opposer’s approval of Applicant’s use of its marks in an email, there is considerable ambiguity as to the extent of this consent. As demonstrated by Applicant’s unsuccessful efforts to obtain approval from Opposer to sell its game cards through the retailer Target, Applicant itself evidently did not believe it could pursue any sale without Opposer’s consent. Indeed, the facts herein are quite different from those in the Board decision, *Richdel, Inc. v. Mathews Co.*, upon which Applicant seeks to rely in asserting estoppel. In *Richdel*, there was no such ambiguity and the Board found “there can be no question but that the agreement between the parties including the payment to opposer of two thousand dollars and applicant’s cessation of use of [a logo] in return constituted acquiescence by opposer to applicant’s use of [applicant’s mark].” *Richdel, Inc. v. Mathews Co.*, 190 USPQ 42. Moreover, the Board noted that the opposer in that case indicated an

acknowledgement of the involved goods being unrelated because it filed an application with a declaration that “can only be accepted as true if it is deemed that opposer did not believe that the contemporaneous use of [the marks on the different respective goods, i.e., mowers versus sprinkler controls and valves] was not conducive to confusion or mistake in trade as to source.” *Id.* Here, in contrast, there is no dispute that Applicant’s game cards are identical to Opposer’s game cards, and they are specifically designed to be played as an accessory pack to Opposer’s card game.

Even if we were to construe Mr. Temkin’s email as clearly representing that Opposer was unconditionally consenting to Applicant’s **use** of its marks, there is no evidence showing Opposer had no objection to Applicant’s **registration** of these marks. In making this distinction, we keep in mind the Eleventh Circuit’s admonition to the Board:

“... We conclude that the TTAB abused its discretion by failing to observe the distinction in this case between acquiescence as to use and acquiescence as to registration. Although petitioner actively represented that the registrant could use its logo, petitioner did not represent or imply that it would allow registrant to register the petitioner’s service mark on the federal Principal Register. Therefore, no period of delay could have begun running as to registration, until petitioner had notice that registrant was doing something that would generate a claim or right of petitioner.”

*Coach House*, 19 USPQ2d at 1404.

For the aforementioned reasons, Applicant’s assertions of estoppel by acquiescence or express consent fail.

## **B. Unclean Hands**

Applicant argues that the affirmative defense of “unclean hands” is applicable to this case because Opposer is attempting to “use of its senior mark as a means of

restraining trade and bolstering pricing, as opposed to any legitimate concern about mitigating any likelihood of confusion between the two marks.”<sup>61</sup> Applicant also argues that “Opposer’s attempt to engage Applicant in an unlawful restraint of trade speaks directly to this Board’s jurisdiction to make a determination of the likelihood of confusion between the two marks.”<sup>62</sup>

We disagree. Because Applicant’s defense is predicated on making a determination as to what constitutes unlawful trade practices, including restraints on trade, we find the basis for this defense is beyond the Board’s jurisdiction. Contrary to Applicant’s assertion, the Board’s decision in *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335 (TTAB 1980) is relevant because it also involved alleged inappropriate restraints on trade and, as the Board noted, we “do[] not have jurisdiction to consider issues involving [unfair trade] violations.” *Id.* at 342. Accordingly, the unclean hands defense presented by Applicant is unavailing in this proceeding.

#### **IV. Board’s Partial Summary Judgment Grant – Standing and Priority**

On September 19, 2017, the Board granted partial summary judgment in Opposer’s favor deciding, inter alia, that Opposer has standing in this opposition.<sup>63</sup> The Board also decided that Opposer has priority of use with respect to its Registration No. 4304905 for the mark CARDS AGAINST HUMANITY for game

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<sup>61</sup> 58 TTABVUE 48.

<sup>62</sup> *Id.* at 50.

<sup>63</sup> 26 TTABVUE 21.

cards.<sup>64</sup> The Board's summary judgment decision regarding standing and priority are incorporated into this decision.

## V. Likelihood of Confusion

Our determination of the issue of likelihood of confusion under Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). In every likelihood of confusion analysis, two key factors are the similarities between the marks and the similarities between the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.").

We focus our likelihood of confusion determination on Opposer's standard character mark CARDS AGAINST HUMANITY in Registration No. 4304905 for "card games; game cards," in International Class 28. If we find a likelihood of confusion as to this mark and those goods (vis-à-vis Applicant's marks), we need not find it as to Opposer's other marks; conversely, if we do not find a likelihood of confusion based on this registered mark, we would not find it as to Opposer's other marks. *See, e.g., In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

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<sup>64</sup> *Id.*

**A. Identity of the Goods, Trade Channels, Conditions of Purchase, and Classes of Consumers**

With regard to the parties' goods, channels of trade, conditions of purchase, and classes of consumers, we must make our determinations under these factors based on the goods as they are identified in the application and cited registration. *See In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); *see also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Hous. Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). "This factor considers whether 'the consuming public may perceive [the respective goods or services of the parties] as related enough to cause confusion about the source or origin of the goods and services.'" *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1086 (Fed. Cir. 2014) (quoting *Hewlett-Packard*, 62 USPQ2d at 1004).

In this case, Opposer's and Applicant's goods are identified in the pleaded registration and opposed applications exactly the same, namely, "game cards; card games." Indeed, as already discussed, the parties' games are identical to the extent that they are played in the same manner and Applicant's game was admittedly designed as an expansion set of cards to be played with Opposer's original game.

Because the goods are identical, we must presume that the channels of trade and classes of purchasers for these goods are also the same. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012). In any event, the identity of trade channels is established by the evidence – both Opposer and Applicant sell their

game cards through the online retailer Amazon.com, and Applicant has sought on more than one occasion to sell through the retail chain Target stores where Opposer's game cards can be purchased.<sup>65</sup>

The parties' game cards are relatively inexpensive and this lends them to being purchased on impulse. Opposer's game cards can be purchased for \$5-29 and Applicant's game cards were initially being sold for approximately \$15.<sup>66</sup> The game cards may be sold to an individual member of the general public, who is not a sophisticated purchaser. The subject matter of these card games is somewhat whimsical and they are for casual amusement. With these factors in mind, we find the parties' game cards are likely to be the subject of impulse purchasing rather than made after careful deliberation.

Accordingly, the *du Pont* factors regarding the identity of the goods, channels of trade and consumers weigh heavily in favor of likelihood of confusion. In addition, the goods are highly susceptible to being purchased on impulse and this too makes confusion more likely.

### **B. Similarity of the Marks**

This *du Pont* factor considers "the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression." *Palm Bay Imps. Inc. v. Veuve Cliquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567).

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<sup>65</sup> 36 TTABVUE (Bane Exhibit 11); 47 TTABVUE (Kohler 33:1-34:7).

<sup>66</sup> 47 TTABVUE (Kohler 11:13-19); 32 TTABVUE (Exhibit 10).

“Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014) (citing *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988)). “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) (quotation omitted). “The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks.” *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018).

We also keep in mind that when marks appear on identical goods, as they do here, the degree of similarity between the marks necessary to support a finding of likely confusion declines. *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *In re Viterra Inc.*, 101 USPQ2d at 1908); *Century 21 Real Estate v. Century Life*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

Here, we find the marks are overall quite similar. Applicant’s marks CRABS ADJUST HUMIDITY (with and without the design element) and Opposer’s CARDS AGAINST HUMANITY each have three words, employ the same syntax, and, as Opposer points out in its brief, the words in each mark are arranged as follows:<sup>67</sup>

the first being a monosyllabic word with five letters, four of which are the same, beginning with “C” and ending in “S;” the second being a two-syllable word beginning with the letter “A” and ending in “ST;” and the last being

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<sup>67</sup> 51 TTABVUE.

a three-syllable word with eight letters, beginning with “HUM” and ending in “ITY.”

By Applicant’s own admission, this similarity is no coincidence as one of the factors going into Applicant’s thought process in adopting its mark was that the mark “would evoke [Opposer’s mark] by rhyming with it.”<sup>68</sup> Applicant describes its mark as an “homage” to Opposer’s mark and Applicant stated that its mark “enhanced the pseudo-anonymity of the gameplay,” given that Applicant’s cards could be played with Opposer’s cards.<sup>69</sup>

As the Board has noted before, there is “the penchant of consumers to shorten marks,” *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1961 (TTAB 2016), and the evidence shows that this is true with respect to the parties’ marks. Here, most likely due to the length of the wording in the marks, the record shows that consumers often abbreviate the parties’ marks to the same initial letters, CAH.<sup>70</sup> Applicant has acknowledged this abbreviation of the marks in addressing a consumer and describing itself as “the ‘other’ CAH.”<sup>71</sup> Another example is from Applicant’s website in a customer review that includes the following, “Love CAH and I also love CAH. I’ll leave it to you to sort out which is which.”<sup>72</sup>

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<sup>68</sup> 47 TTABVUE (Kohler 8:14-15).

<sup>69</sup> *Id.*; Kohler 39:23-40:8.

<sup>70</sup> The record is replete with “CAH” references made by the parties and third parties as an abbreviation of the parties’ marks. See, e.g., 34 TTABVUE (Notice of Reliance Exhibits 10, 14, and 30).

<sup>71</sup> *Id.*; Exhibit 10 (Applicant responding on the Reddit website (www.reddit.com) to an individual who stated “If CAH was a stupid idea, I’d love to see a good one.”).

<sup>72</sup> *Id.*; Exhibit 30.

To be clear, our comparison is of the marks as they appear in the involved applications and the pleaded registration. Nevertheless, the demonstrated ability of each of the parties' marks to be shortened to the letters CAH by consumers is a relevant factor in comparing the similarity of the marks. That is, we must consider this common attribute, namely that the public is likely to abbreviate the marks in the same manner, in determining whether the marks are similar. *See also Big M. Inc. v. U.S. Shoe Corp.*, 228 USPQ 614, 616 (TTAB 1985) (“[W]e cannot ignore the propensity of consumers to often shorten trademarks....”).

In its brief, Applicant argues that CRABS ADJUST HUMIDITY “necessarily calls [Opposer’s mark] to mind,” but asserts that this is because it is a “parody.”<sup>73</sup> Applicant likens this case to the decision in *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, 84 USPQ2d 1969 (4th Cir. 2007), a case applying the parody defense to use of the mark “Chewy Vuiton” for dog toys, which the plaintiff alleged diluted its LOUIS VUITTON mark for luxury goods. However, we have long held that parody is a viable defense in a likelihood of confusion analysis only if the involved marks are otherwise not found confusingly similar. Here, as already discussed, we find the marks are similar. *See Boston Red Sox Baseball Club LP v. Sherman*, 88 USPQ2d 1581, 1592 (TTAB 2008) (“Parody is not a defense if the marks would otherwise be considered confusingly similar.”); *see also McCarthy, supra* § 31.153 (“a successful parody [means] the ordinary observer can perceive that the defendant is not connected in any way with the owner of the target trademark.”). Moreover, as

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<sup>73</sup> 58 TTABVUE 32.

Professor McCarthy noted with respect to the *Louis Vuitton* decision, one key reason for finding a parody in the defendant's mark was the fact that it "is highly unlikely to mistakenly think that famous high-fashion houses [like the plaintiff] are making or authorizing the dog accessories [like the defendant]" and such parody based on this difference would "amuse, not confuse." *Id.* In this case, the parties' goods are identical and the marks are similar in their overall commercial impressions due to the shared elements in each. For these reasons, Applicant's argument that its applied-for marks constitute a parody are unavailing.

We do not ignore the design of a crab claw turning a dial, presumably a humidistat, in Applicant's composite mark. Suffice to say, this is an element not present in Opposer's mark. However, as we have long held, a design element generally is accorded less weight in determining whether the marks are similar when it is combined with a literal element because the latter is more likely to be impressed upon a customer's memory and used by customers to request or reference the involved goods, here, game cards. *CBS Inc. v. Morrow*, 218 USPQ at 200; *In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261, 1267-68 (TTAB 2011); *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999). Applicant's composite mark falls within this generalization. As the record demonstrates, consumers are accustomed to referencing Applicant's goods as CRABS ADJUST HUMIDITY or abbreviating them to CAH. Thus, although we note the design element in Applicant's mark is a point of difference, it does not play such a significant role to overcome the aforementioned similarities of the respective word portions.

Ultimately, we agree with Applicant when it states that its marks are “sufficiently imitative of [Opposer’s mark] to create an association” between the marks; however, we disagree with Applicant’s assessment that the “absurdity level” and “humorous” nature of its marks create a “separation.”<sup>74</sup> Applicant’s marks CRABS ADJUST HUMIDITY, with and without the design element, and Opposer’s CARDS AGAINST HUMANITY mark are each somewhat absurd. Taking the words literally in each of these mark creates nonsensical expressions. Opposer’s mark will likely be understood as an irreverent play on the more serious subject “crimes against humanity,” but suggests that game cards are being used against humanity. Applicant’s CRABS ADJUST HUMIDITY wording may be interpreted as being more nonsensical in that crustaceans do not adjust the humidity level; however the differences in the literal connotations of the marks do not overcome their similarities in appearance, pronunciation and overall commercial impression.

In sum, Applicant’s CRABS ADJUST HUMIDITY marks, with and without the crab design element, are overall quite similar in appearance and sound with Opposer’s CARDS AGAINST HUMANITY mark. While the literal meaning of the words in Applicant’s mark is different from that of Opposer’s mark, they share a whimsical or nonsensical nature. Applicant admits its mark “necessarily calls ... to mind” Opposer’s mark. Accordingly, this *du Pont* factor also supports a finding of a likelihood of confusion.

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<sup>74</sup> 58 TTABVUE 36.

**C. The Fame of the CARDS AGAINST HUMANITY Mark**

The fifth *du Pont* factor involves the fame of the prior mark. “[L]ikelihood of confusion fame ‘varies along a spectrum from very strong to very weak.’” *Joseph Phelps Vineyards, LLC v. Fairmount Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed Cir. 2017) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee en 1772*, 73 USPQ2d at 1694 (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003))).

Fame may be measured indirectly by the volume of sales and advertising expenditures for the goods and services identified by the marks at issue, “the length of time those indicia of commercial awareness have been evident,” widespread critical assessments and through notice, by independent sources, of the products identified by the marks, as well as the general reputation of the products and services. *Bose Corp. v. QSC Audio Prods. Inc.*, 63 USPQ2d 1303, 1305-06, 1309 (Fed. Cir. 2002); *Weider Publ'ns, LLC v. D&D Beauty Care Co.*, 109 USPQ2d 1347, 1354 (TTAB 2014). Raw sales and advertising numbers alone may be misleading, however, and some context in which to place the numbers may be necessary. *See Omaha Steaks Int'l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1690 (Fed. Cir. 2018) (citing *Bose*, 63 USPQ2d at 1309).

Finally, 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. *Coach Servs., Inc. v. Triumph Learning LLC*, 101

USPQ2d at 1720, citing *Leading Jewelers Guild Inc. v. LJOW Holdings LLC*, 82 USPQ2d 1901, 1904 (TTAB 2007).

Based on the record as a whole, we find that Opposer's CARDS AGAINST HUMANITY mark is very strong and has received significant publicity. Although the numbers for units sold and distributed for promotion have been designated as "confidential," we find them particularly impressive for the years 2013 to date.<sup>75</sup> Opposer has also publicized its game under the mark through non-conventional advertisement events that have received attention.<sup>76</sup> Opposer is also active in social media, with over 100,000 Twitter followers<sup>77</sup> and a Facebook page with nearly 700,000 "likes."<sup>78</sup>

Perhaps most telling with respect to the degree of renown of Opposer's CARDS AGAINST HUMANITY game is the amount and type of unsolicited publicity it has received in the media and mentions by celebrities (as already discussed supra in the "background").<sup>79</sup> For example, the New York Times online ([www.nytimes.com](http://www.nytimes.com)) featured the game in August 2014, describing it as "ha[ving] become hugely popular over the last three years, popping up at birthdays and bachelorette parties, happy hours and Hamptons gatherings" and acknowledging how it is often "sold out" on

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<sup>75</sup> 37 TTABVUE (Bane Declaration Exhibit 3).

<sup>76</sup> 36 TTABVUE

<sup>77</sup> *Id.*; Bane 84:18-85:4.

<sup>78</sup> *Id.*; In its answer, as amended, Applicant admits that Opposer has "more than 640,000 Facebook users that follow Opposer's page and Opposer has more than 93,100 Twitter followers." 28 TTABVUE 3 (Answer ¶ 6).

<sup>79</sup> 32 TTABVUE (Fourth Notice of Reliance).

Amazon.com because it is “has been consistently been the No. 1 best-selling toy or game on Amazon since it debuted there in 2011, ahead of Jenga, Legos and Disney’s ‘Frozen’ dolls.”<sup>80</sup> While we cannot, and do not, take the statements made in the articles for their truth, the amount and type of press coverage for Opposer’s CARDS AGAINST HUMANITY game establishes an elevated degree of public recognition. Without being prompted or paid, well-known persons, such as Kim Kardashian West, Lance Armstrong, Jessica Biel and others, expressed their like of the game to their followers via Twitter.<sup>81</sup>

Applicant, in its answer, has also made the following admissions to Opposer’s allegations that involve public exposure to Opposer’s Cards Against Humanity game:

- “Some of the cast members of Glee and Keeping up with the Kardashians have played Opposer’s game on television.”<sup>82</sup>
- Members of Congress played Opposer’s game after President Obama’s State of the Union address in January 2015 (clip available here: <http://www.cnn.com/videos/politics/2015/01/21/...>).<sup>83</sup>
- [T]he New York Times published one article on August 13, 2014 titled “For a Well-Played Hand, Far From P.C.” written by Shiela Marikar that references Opposer’s game as “hugely popular,” that the New York Times Magazine published one article on October 7, 2016 titled “Letter of Complaint: Cards Against Humanity” written by Dan Brooks that states “[Opposer’s game] has become a mainstay in the households of young urban professionals,” and that CNN published one article on January 25, 2017 titled “Cards Against Humanity seeks new CEO (who sounds an awful lot like our last President)” written by Brenna Williams that states, “Cards Against Humanity is usually described as a filthy version of Apple to Apples. And if you haven’t heard of either of those games, you

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<sup>80</sup> *Id.*; Exhibit 34.

<sup>81</sup> 36 TTABVUE (Bane Declaration Exhibit 1); Bane 15:13-16.

<sup>82</sup> 28 TTABVUE (Answer ¶ 7).

<sup>83</sup> *Id.* at ¶ 8.

haven't been to a party at someone's house in the last decade and I can't help you.”<sup>84</sup>

Taken in its entirety, the record persuades us that Opposer's mark CARDS AGAINST HUMANITY enjoys a high degree of recognition in the relevant United States market. This renown increases the likelihood that consumers would perceive a similar mark as being associated with Opposer.

Accordingly, the *du Pont* fame factor supports a finding of a likelihood of confusion. *Joseph Phelps Vineyards*, 122 USPQ2d at 1734-35; *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1056 (TTAB 2017).

#### **D. Instances of Actual Confusion**

Finally, we address the seventh *du Pont* factor, the nature and extent of any actual confusion. A showing of actual confusion may be highly probative, if not conclusive, of a likelihood of confusion. *Majestic Distilling*, 65 USPQ2d at 1205. Evidence of actual confusion is difficult to obtain, however, and is not necessary to show a likelihood of confusion. *See In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017); *Weiss Assocs. Inc. v. HRL Assocs. Inc.*, 902 F.2d 1546, 14 USPQ2d 1840, 1843 (Fed. Cir. 1990); *Lebanon Seaboard Corp. v. R&R Turf Supply Inc.*, 101 USPQ2d 1826, 1834 (TTAB 2012).

Opposer argues that there is “substantial evidence of actual consumer confusion between the parties' marks.”<sup>85</sup> Specifically, in its brief, Opposer points to:

1. Printout of a message from Amazon.com notifying Applicant that an authorization for a return has been issued to a buyer with the following

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<sup>84</sup> *Id.* at ¶ 13.

<sup>85</sup> 51 TTABVUE 36.

information – “Return reason: Accidental order ... Buyer comments: Wanted Cards Against Humanity, not Crabs Against [sic].”<sup>86</sup>

2. Printouts of two different customer reviews of Applicant’s game cards on the Amazon.com website that include the following messages:
  - a. “When I bought [the Crabs Game], I misread it and thought it said Cards Against Humanity . . .”<sup>87</sup>
  - b. “Crappy copy of the real game, I wasn’t paying attention and got taken! Don’t let it happen to you . . .”<sup>88</sup>

Opposer also relies on the testimony, with exhibits, of its Community Manager, Ms. Bane. She testified that Opposer’s customer service team has received communications since 2013 indicating a level of confusion amongst consumers indicating that they believe there is a relationship between the parties.<sup>89</sup> She testified that this “confusion happens all the time ... over email, on social media, and it also happens in person.”<sup>90</sup> Copies of several emails indicating this type of confusion were attached to Ms. Bane’s deposition as exhibits.

In its brief, Applicant acknowledges that the “comments from the Amazon website [ ] indicate that a customer purchased the Applicant’s game when they intended to buy the Opposer’s game.”<sup>91</sup> However, Applicant argues that this was a case of “inattention” and that “Opposer has not submitted any declarations from customers explaining the context that might show actual confusion rather than a

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<sup>86</sup> 34 TTABVUE (4<sup>th</sup> Notice of Reliance, Kohler Exhibit 26).

<sup>87</sup> 35 TTABVUE (6<sup>th</sup> Notice of Reliance, Exhibit 79).

<sup>88</sup> *Id.*

<sup>89</sup> 36 TTABVUE; Bane 29:10-30:16.

<sup>90</sup> *Id.* ; Bane 64:22-65:9.

<sup>91</sup> 58 TTABVUE 39.

simple mistake.”<sup>92</sup> Applicant further argues that “the instances of accidental purchases put before the Board is no more than a half dozen” and that “the scale of Opposer’s evidence of actual confusion is microscopic when compared to the number of Opposer’s games and Applicant’s games that have been sold and the number of communications that each company has received.”<sup>93</sup>

Although Applicant takes issue with the number of “instances of accidental purchases,” we find the evidence of consumer confusion to be probative in our likelihood of confusion analysis. Indeed, the amount and type of evidence of confusion is substantial and cannot be classified as de minimis or insignificant. *Cf. Petro Stopping Centers, L.P. v. James River Petroleum, Inc.*, 130 F.3d 88, 44 USPQ2d 1921, 1927 (4th Cir. 1997) (“In light of its huge volume of commerce, [plaintiff’s] meager evidence of actual confusion is at best de minimis.”); *National Rural Elec. Coop. Ass’n v. Suzlon Wind Energy Corp.*, 78 USPQ2d 1881, (TTAB 2006), *aff’d*, 214 Fed. Appx. 987 (Fed. Cir. 2007) (One instance of an e-mail asking if the defendant’s mark might be an infringement was not sufficient evidence of a likelihood of confusion. “We are not persuaded that this single instance of alleged actual confusion is significant.”)

Even were we to consider the known instances of actual confusion and accidental purchases as being few in number when compared to the number of sales of the parties’ game cards, we find them to be at least “illustrative of how

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<sup>92</sup> *Id.* at 39-40.

<sup>93</sup> *Id.* at 40.

and why confusion is likely.” *Molenaar, Inc. v. Happy Toys Inc.*, 188 USPQ 469,471 (TTAB 1975) (internal citation omitted) (involving “a single instance of actual confusion, albeit there is testimony which indicates that there have been more instances of actual confusion.”) The record demonstrates that, because Applicant’s game cards are designed to be an accessory pack to Opposer’s card game, many, if not all, consumers of Applicant’s goods are already aware of Opposer’s CARDS AGAINST HUMANITY card game and game cards. Moreover, the confusion evidence indicates possible consumer inattention as to the differences in the respective composite words of the marks and an ability to confuse the wording CRABS ADJUST HUMIDITY with CARDS AGAINST HUMANITY making accidental purchases more likely.

In sum, the evidence of actual confusion before us has clear probative value and helps show that confusion among consumers is likely, and the *du Pont* factor is weighed accordingly.

#### **E. Bad Faith**

Opposer argues in its brief that “Applicant’s bad-faith intent is yet another factor that favors a finding of likelihood of confusion.”<sup>94</sup> Opposer points to circumstances of Applicant’s adoption of its mark, including Mr. Kohler’s acknowledgement that Applicant deliberately sought a mark that would “evoke” Opposer’s CARDS AGAINST HUMANITY mark “by rhyming with it.”<sup>95</sup>

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<sup>94</sup> 51 TTABVUE 44.

<sup>95</sup> 47 TTABVUE (Kohler 8:14-15).

Bad faith, or intent to confuse, falls under the thirteenth *du Pont* factor regarding “any other established fact probative of the effect of use.” *L.C. Licensing Inc. v. Berman*, 86 USPQ2d 1883, 1890 (TTAB 2008) (“[A] party which knowingly adopts a mark similar to one used by another for related goods should not be surprised to find scrutiny of the filer’s motive.”). A finding of bad faith must be supported by evidence of an intent to confuse, rather than mere knowledge of another’s mark or even an intent to copy. *See, e.g., 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 McCarthy, § 23:113)). *See also J & J Snack Foods Corp. v. McDonald’s Corp.*, 18 USPQ2d 1889, 1891 (Fed. Cir. 1991) (“Whether there is evidence of intent to trade on the goodwill of another is a factor to be considered, but the absence of such evidence does not avoid a ruling of likelihood of confusion.”).

Here, while there is evidence Applicant clearly had prior knowledge of Opposer’s CARDS AGAINST HUMANITY game, we do not find this record supports, by a preponderance of the evidence, a conclusion of bad faith adoption. Particularly, we note that Applicant did make efforts to obtain Opposer’s approval to use the CRABS ADJUST HUMIDITY mark and the evidence shows that Applicant had reason to believe it received Opposer’s approval to adopt the mark. We therefore find the *du Pont* factor regarding bad faith adoption to be neutral.

## **F. Conclusion**

All of the *du Pont* factors for which there is evidence either support a finding of a likelihood of confusion or are neutral. The parties’ goods are identical and are sold in

the same channels of trade to the same classes of customers. Applicant's game cards are designed to be played as an addition to Opposer's card games. These goods are relatively inexpensive and may be purchased on impulse. Opposer's CARDS AGAINST HUMANITY mark is very strong and, although it is comprised of different words than those found in Applicant's marks, the marks are overall similar to one another for the reasons mentioned herein.

Opposer has proven by a preponderance of the evidence that Applicant's use of its marks for game cards is likely to cause consumers of those goods to believe mistakenly that they originate with, or are licensed, sponsored, or authorized by, Opposer. "The intention of [A]pplicant was to get as close to [O]pposer's mark as possible and it is our opinion that it has succeeded to the extent that there is a likelihood of confusion." *Molenaar*, 188 USPQ 471.

**Decision:** The opposition is sustained on the ground of likelihood of confusion.<sup>96</sup>

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<sup>96</sup> In view of our likelihood of confusion decision, we need not reach Opposer's dilution and false suggestion of a connection claims. "Like the federal courts, the Board has generally used its discretion to decide only those claims necessary to enter judgment and dispose of the case. . . . [T]he Board's determination of registrability does not require, in every instance, decision on every pleaded claim." *Multisorb Tech., Inc. v. Pactiv Corp.*, 109 USPQ2d 1170, 1171 (TTAB 2013) (citations omitted).