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

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

Alzheimer's Disease and Related  
Disorders Association Inc.,

Opposer,

v.

Alzheimer's New Jersey, Inc.

Applicant.

Opposition No. 91245121

**ALZHEIMER'S DISEASE AND RELATED  
DISORDERS ASSOCIATION INC.'S TRIAL BRIEF**

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## I. PRELIMINARY STATEMENT

Alzheimer’s Disease and Related Disorders Association Inc. (“Opposer” or “Alzheimer’s Association”) is a nonprofit organization dedicated to providing resources for people suffering from Alzheimer’s Disease and their caretakers, friends, and family. Opposer has continuously used the



marks at issue in this proceeding, WALK TO END ALZHEIMER’S and (“Opposer’s Marks”) since 2011 through today with the help of its local Chapters throughout the U.S. exclusively in connection with its Walk to End Alzheimer’s event, a nationwide walk event to raise money for Alzheimer’s care, support and research. Those same marks are still used today in conjunction with the event. Walk to End Alzheimer’s has become Alzheimer’s Association’s signature fundraising event in all respects. It draws over 500,000 “walkers” annually and raises almost \$100,000,000 per year. Opposer’s Marks have become synonymous with Alzheimer’s Association’s Walk to End Alzheimer’s and Alzheimer’s Association considers those Marks to be critical to the success of the event.

In 2015, Alzheimer’s Association’s former local New Jersey Chapter, n/k/a Alzheimer’s New Jersey Inc. (“Applicant”), cut its ties and disaffiliated from Alzheimer’s Association after having used Opposer’s Marks to organize Walk to End Alzheimer’s events in New Jersey for at least 5 years pursuant to a non-exclusive license agreement. Fully aware of the success of Walk to End Alzheimer’s,



Applicant applied to register (“Applicant’s Mark”) for services identical to those offered under Opposer’s Marks. The similarities between the marks are no coincidence – they were designed by Applicant to give the impression of continuity with Alzheimer’s Association and its event. As explained in detail below, the registration and use of Applicant’s Mark is likely to cause confusion and/or dilute Opposer’s Marks.

## II. THE RECORD

In addition to the file history of the opposed application for the Walk to Fight Alzheimer's Mark ("Applicant's Mark"), which is automatically of record pursuant to 37 C.F.R. § 2.122(b)(1), the following evidence is also of record:

### A. Opposer's Record

Opposer's record consists of the following evidence:

1. The August 21, 2020 trial testimony of Mary Faley Garza,<sup>1</sup> including accompanying Exhibits A-M (public version referred to as "Garza Tr. at ¶ \_\_, 25 TTABVUE \_\_" and confidential submission as "Garza Tr. at ¶ \_\_, 33 TTABVUE \_\_") pursuant to 37 C.F.R. § 2.123 and TBMP § 703.01(b).

2. The August 21, 2020 trial testimony of Wendy Vizek<sup>2</sup> including Exhibits A-AA (public version referred to as "Vizek Tr. at ¶ \_\_, 30 TTABVUE \_\_" or "Vizek Tr. at ¶ \_\_, 31 TTABVUE \_\_" and confidential submission as "Vizek Tr. at ¶ \_\_, 32 TTABVUE \_\_" or "Vizek Tr. at ¶ \_\_, 33 TTABVUE \_\_") pursuant to 37 C.F.R. § 2.123 and TBMP § 703.01(b).

3. The August 21, 2020 trial testimony of Rachel Fuller, Vice President of Marketing at Alzheimer's Association,<sup>3</sup> including accompanying Exhibits A-T (referred to as "Fuller Tr. at ¶ \_\_, 35 TTABVUE ¶ \_\_" and confidential submission as "23 TTABVUE ¶ \_\_") pursuant to 37 C.F.R. § 2.123 and TBMP § 703.01(b).

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<sup>1</sup> Ms. Garza has led the Alzheimer's Association for the past 16 years (since 2004), including as a Field Director for Chapter Relations, Director of Shared Fundraising, and Operations lead for Development. (Garza Tr. at ¶¶ 1-6, 25 TTABVUE 4-5).

<sup>2</sup> Ms. Vizek began working at Alzheimer's Association in 2013 as the Director for Walk to End Alzheimer's and, since submitting her trial testimony, has been promoted to Senior Director of Constituent Events. In her current and past roles, Ms. Vizek oversees strategy for Alzheimer's Association's mass market fundraising events, which include Walk to End Alzheimer's. (Vizek Tr. at ¶¶ 1-4, 30 TTABVUE 4-5).

<sup>3</sup> Ms. Fuller has been involved with marketing at Alzheimer's Association, including for Walk to End Alzheimer's, since 2013 and leads the organization's marketing and advertising initiatives. (Fuller Tr. at ¶¶ 2-7, 35 TTABVUE 4-6). Since submitting her trial testimony, she has been promoted to Vice President of Marketing.

4. Opposer's First Notice of Reliance, dated August 24, 2020, pertaining to the status and



title records for Opposer's WALK TO END ALZHEIMER'S trademark registration and trademark application, including Exhibits 1-7 thereto ("Opp. NOR 1, 27 TTABVUE \_\_\_") pursuant to 37 C.F.R. § 2.122(d) and TBMP § 704.03(a).

5. Opposer's Second Notice of Reliance, dated August 24, 2020, pertaining to Applicant's answers to Interrogatory Nos. 7, 10, and 11 (Ex. 8) and Applicant's responses to Requests for Admission Nos. 1, 2, 33, 40, 41, 51 (Ex. 9) ("Opp. NOR 2, 8 TTABVUE \_\_\_") pursuant to 37 C.F.R. § 2.120(k) and TBMP § 704.10.

6. Opposer's Third Notice of Reliance, dated August 24, 2020 pertaining to Internet materials concerning the use of Applicant's Mark and Opposer's Marks, including Exhibits 11-29 thereto ("Opp. NOR 3, 29 TTABVUE \_\_\_") pursuant to 37 C.F.R. § 2.122(d) and TBMP §704.08.

7. The oral Cross-Examination Testimony of Kenneth Zaentz, dated January 21, 2021 and Exhibits 1-22 (referred to as "Zaentz CX at \_\_, 51 TTABVUE \_\_\_") pursuant to 37 C.F.R. § 2.123(e) and TBMP 703.01(h).

8. Opposer's Fourth (Rebuttal) Notice of Reliance, dated February 5, 2021 pertaining to Internet materials concerning Applicant's use of Opposer's Marks, including Exhibits 30-38 (referred to as "Opp. NOR 4, 49 TTABVUE \_\_") pursuant to 37 C.F.R. § 2.122(d) and TBMP § 704.08.

9. The February 5, 2021 rebuttal trial testimony of Mary Faley Garza, including Exhibits A-N (referred to as "Garza Reb. Tr. at \_\_, 50 TTABVUE ¶ \_\_"), pursuant to 37 C.F.R. § 2.123 and TBMP § 703.01(b).

**B. Applicant's Record**

Applicant's record consists of the following evidence:

1. The trial testimony of Kenneth Zaentz, President of Alzheimer's New Jersey, Inc., dated October 23, 2020, and accompanying Exhibits A-DD (referred to as "Zaentz Tr. at \_\_, 37 TTABVUE ¶\_\_").

2. Applicant's First Notice of Reliance dated October 23, 2020, including Exhibits A-O thereto ("App. NOR 1, 38 TTABVUE \_\_"), pertaining to Opposer's discovery responses, Internet materials, transcripts in unrelated legal proceedings, and documents produced by Applicant.

3. Applicant's Second Notice of Reliance dated October 23, 2020, including Exhibits P-U thereto ("App. NOR 2, 39 TTABVUE \_\_"), pertaining to TSDR records in the U.S. Patent & Trademark Office.

4. Applicant's Third Notice of Reliance dated October 23, 2020, including Exhibits V-X thereto ("App. NOR 3, 40 TTABVUE \_\_"), pertaining to third party trademark registrations and third party use of trademarks.

5. Applicant's Fourth Notice of Reliance dated October 23, 2020, including Exhibits Y-II thereto ("App. NOR 4, 41 TTABVUE \_\_"), pertaining to third party TSDR records in the U.S. Patent & Trademark Office.

### **III. STATEMENT OF ISSUES**

1. Whether Applicant's Mark so resembles the Opposer's Marks that confusion, mistake, or deception is likely.

2. Whether Applicant's Mark is likely to dilute the distinctive quality of the famous Opposer's Marks.

#### IV. STATEMENT OF FACTS

##### A. The Walk to End Alzheimer's Trademarks



Opposer began using its WALK TO END ALZHEIMER'S word mark and logo mark (collectively referred to as "Opposer's Marks") at least as early as 2011 in association with its Walk to End Alzheimer's events across the United States. (Garza Tr. at ¶¶ 17, 20-21, 25 TTABVUE 5-6; Fuller Tr. at ¶ 21, 35 TTABVUE 8). The WALK TO END ALZHEIMER'S mark registered on April 3, 2012 as U.S. Registration No. 4,122,255. (Garza Tr. at ¶ 17 and Ex. A thereto, 25 TTABVUE 8, 16-155 at 44; Opp. NOR 1 at Ex. 1, 27 TTABVUE 5-146). The U.S. Trademark Registration Certificate for WALK TO END ALZHEIMER'S indicates a date of first-use in commerce of June 30, 2009. (*Id.*)

After almost a decade of use, Alzheimer's Association applied for the WALK TO END



ALZHEIMER'S Logo Mark ( ) on November 28, 2018, and that application was assigned Serial No. 88/209,214. (Garza Tr. at ¶¶ 19-20, *citing* Ex. B, 25 TTABVUE 8-9, 156-246 at 157). Opposer is now, and has always owned Opposer's Marks. (Fuller Tr. at ¶ 4, 35 TTABVUE 5).

##### B. The Walk to End Alzheimer's

Walk to End Alzheimer's is a charitable walk event to raise awareness and funds for Alzheimer's care, support, and research. (Vizek Tr. at ¶ 11, Ex. A, 30 TTABVUE 6, 20-25). Since 2011, Walk to End Alzheimer's has been held in over 600 communities throughout the U.S. and, since 2019, recently has expanded even to include Alaska. (Vizek Tr. at ¶ 11, Ex. A, 30 TTABVUE 6, 20-25; Fuller Tr. at ¶ 22, 35 TTABVUE 8). In terms of geographic scope, marketing efforts, participation and fundraising dollars, Walk to End Alzheimer's is the Alzheimer's Association's largest fundraising event. (Vizek Tr. at ¶ 11, 30 TTABVUE 6; Garza Tr. at ¶ 22, 25 TTABVUE 9).

Walk to End Alzheimer's has always been a peer-to-peer fundraising event where funds are raised through participation from walk "teams" that collectively raise money for a specific walk in their community. (Vizek Tr. at ¶ 12, 30 TTABVUE 7). In addition to walk teams, individual participants are also encouraged to sign up, donate or fundraise, and participate in their local walk events. (Vizek Tr. at ¶ 13, 30 TTABVUE 7). Opposer also raises money for Walk to End Alzheimer's from corporate sponsors and corporate teams. (Vizek Tr. at ¶ 14, 30 TTABVUE 7). Because the event occurs in so many communities throughout the U.S., it is organized such that local "Chapters" manage and run Walk to End Alzheimer's events in their designated territories. (Vizek Tr. at ¶ 16, 30 TTABVUE 8). Prior to July 1, 2016, those Chapters operated as independent organizations that were affiliated with Opposer pursuant to agreements that allowed those Chapters to use Opposer's Marks. *Id.* Those Chapters (along with volunteers and participants) also had access to marketing materials displaying Opposer's Marks, in-person training, and guidance from Opposer on organizing and executing Walk events. (Vizek Tr. at ¶¶ 16, 33-35, 30 TTABVUE 8, 13). After July 1, 2016 and through the present day, local Chapters still exist and perform essentially the same functions, but they have merged into Alzheimer's Association and are no longer separate legal entities. (Vizek Tr. at ¶ 17, 30 TTABVUE 8, 13).

### **C. Opposer's Use of the Walk to End Alzheimer's Marks**

For over a decade, Opposer's Marks have been used throughout the U.S. on all marketing material relating to Walk to End Alzheimer's, including on Opposer's website, flyers, social media, billboards, and throughout the Walk to End Alzheimer's events themselves in signage and on t-shirts and other items. (Garza Tr. at ¶ 21, 25 TTABVUE 8; Vizek Tr. at ¶¶ 28-29, 30 TTABVUE 11-12). In fact, Opposer required that Opposer's Marks be used on all such materials. (Vizek Tr. at ¶¶ 23-29, 30 TTABVUE 10-12). Examples of such marketing material are included in the record at: Vizek Tr. at ¶¶ 11, 27, 29, *citing* Exs. A-C, and F-J, 30 TTABVUE 20-41, 44-76; Garza Reb. Tr. at ¶¶ 8, 10, 17, *citing* Exs. C-F and H-L, 50 TTABVUE 6-7, 9, 28-39, 45-54; Opp. NOR 3 at Exs. 12-13, 15-16, 19-

23, 29 TTABVUE 12-18, 25-36, 46-91. This policy is consistent with Opposer’s belief that consumer recognition of Opposer’s Marks is “critical in attracting an maintaining participation in Walk to End Alzheimer’s events.” (Fuller Tr. at ¶ 23, 35 TTABVUE 8).


Purple and white are integral to Opposer’s corporate identity as they represent the colors of the Alzheimer’s Association. Thus, the use of purple and white colors on Opposer’s Marks are central to its marketing efforts. Because the colors are linked to the organization itself, uniformity in the use of



purple and white on Opposer’s logo mark are “critical” to Opposer.<sup>4</sup> (Garza Tr. at ¶ 33, 25 TTABVUE 15; Vizek Tr. at ¶¶ 18, 23 and Ex. D thereto, 32 TTABVUE 8, 10, 33-34).

Due to its longstanding use of Opposer’s Marks, they have become “synonymous with” Walk to End Alzheimer’s (Vizek Tr. at ¶¶ 15, 18, 30 TTABVUE 4). Because “[r]ecognition of [Opposer’s Marks] is critical in attracting and maintaining participants in the Walk to End Alzheimer’s events”, Opposer “work[s] to ensure that these Marks are displayed in such a way that they are among the first things that a potential event participant or supporter notices.” (Fuller Tr. at ¶ 23, 35 TTABVUE 8). As such, not only does Opposer work to ensure that Opposer’s Marks are prominently displayed on all Walk to End Alzheimer’s materials, but it also takes great care to ensure that the use of marketing material featuring Opposer’s Marks and the format for Walk to End Alzheimer’s events (that feature the Marks) are standardized. (Fuller Tr. at ¶¶ 23-24, 35 TTABVUE 8; Garza Reb. Tr. at ¶ 7, *citing* Ex. B, 50 TTABVUE 6, 26-27; Vizek Tr. at ¶¶ 19-20, 26, 30 TTABVUE 6, 11; Zaentz CX at 70:1-24, 51

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<sup>4</sup> Alzheimer’s Association’s use of purple and white is not limited to the Walk to End Alzheimer’s logo mark. As Ms. Vizek testified, Alzheimer’s Association’s use of purple and white extends to its house mark (  ), but

the logos for all of its major fundraising events, including  ,  , and  . (Vizek Tr. at ¶ 18, 30 TTABVUE 8-9).

TTABVUE 75). Examples of template market materials are in the record at: Garza Reb. Tr. at ¶ 7, Ex. B, 50 TTABVUE 6, 26-27; Fuller Tr. at ¶ 25a-b, Exs. A-B, 35 TTABVUE 6-7, 18-22.

In furtherance of this goal, Opposer has, since 2011, provided a repository such as an internal web portal it informally calls the “walk portal” or “walk central”, which makes available all approved Walk to End Alzheimer’s marketing and organizational material bearing Opposer’s Marks to the organization, including local Chapters. (Vizek Tr. at ¶ 21, 30 TTABVUE 9-10; Zaentz CX at 70:25-71:18, 51 TTABVUE 75-76). To maintain uniformity in the use of its Walk to End Alzheimer’s Marks, Opposer also trains local Chapters around use of the Walk to End Alzheimer’s Marks and provides guidance in the form of style manuals that govern such use, including color. (Vizek Tr. at ¶¶ 20-25, 22, *citing* Exs. D-E, 30 TTABVUE 9-10, 33-43). Representative samples of those manuals that were used during and after Opposer’s affiliation with Applicant are attached to Wendy Vizek’s Testimony Declaration as Exhibits D and E. (*Id.*)

#### **D. Fundraising and Public Engagement Under the Walk to End Alzheimer’s Marks**

The funds raised using, and public engagement with, Opposer’s Marks “make the Walk to End Alzheimer’s the Alzheimer’s Association’s largest fundraising event, and [Opposer’s Marks] some of Alzheimer’s Association’s most important intellectual property.” (Garza Tr. at ¶ 22, 25 TTABVUE 9; *see also* Vizek Tr. at ¶¶ 11, 46, 30 TTABVUE 6, 15). Opposer’s records show that since 2011, Walk to End Alzheimer’s has raised over \$500,000,000 in charitable funds through donations and product sales<sup>5</sup> to address causes related to the treatment, cure, and care for those suffering from Alzheimer’s Disease.<sup>6</sup> (Garza Tr. at ¶¶ 23-24, *citing* C-F, 26 TTABVUE 247-55;<sup>7</sup> *see also* Vizek Tr. at ¶ 46a-e, *citing* Exs. P-T, 30 TTABVUE 15-17, 100-33 at 115, 134-76 at 157, 177-218 at 199, 219-60 at 240; 31 TTABVUE 4-49 at 32). Opposer’s internal financial records show that, since Opposer began using

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<sup>5</sup> Sales of products bearing Opposer’s Marks generate over [REDACTED] per year in revenue attributable to Walk to End Alzheimer’s. (Fuller Tr. at ¶ 26, 23 TTABVUE 10). The corresponding public reference is 35 TTABVUE 10.

<sup>6</sup> In FY20, Walk to End Alzheimer’s raised \$98,000,000, bringing that total to over \$500,000,000.

<sup>7</sup> The corresponding public reference is 25 TTABVUE 247-55.





the logo in 2011, overall annual revenue generated by Walk to End Alzheimer's has increased by almost 50% – from just over \$47,000,000 in 2011 to over \$96,000,000 in 2018. (Garza Tr. at ¶ 24, *citing* Exs. C-F, 26 TTABVUE 247-57).<sup>8</sup>

Public engagement with Walk to End Alzheimer's – and corresponding exposure to Opposer's Marks – is consistent with the above-cited figures. In that same time frame, registered walk teams have increased by 67% – from 39,311 teams in 2011 to 65,613 teams in 2018. (Garza Tr. at ¶ 24, 25 TTABVUE 10). Opposer's records show that, since 2011, well over 3,500,000 people across the U.S. have participated in Walk to End Alzheimer's. (*See* Garza Tr. at ¶ 22-23, *citing* Ex. C, 26 TTABVUE 9-10, 250 (showing participation figures of approximately 332,565 (2011), 364,307 (2012), 409,687 (2013), and 458,855 (2014));<sup>9</sup> Vizek Tr. at ¶ 46a-e, *citing* Exs. P-T, 30 TTABVUE 15-17, 100-33 at 115, 134-76 at 157, 177-218 at 199, 219-60 at 240; 31 TTABVUE 4-49 at 32) (noting 500,000+ participants in recent years)).

#### **E. Public Recognition of Walk to End Alzheimer's Marks**

These figures have garnered recognition by Peer-to-Peer Forum (“P2P Forum”), a ‘go to group’ for nonprofits for training resources and information that collects and organizes charitable fundraising data. (Vizek Tr. at ¶¶ 50-54, 30 TTABVUE 17-19). That data is relied upon by non-profit organizations such as Opposer and even industry periodicals such as the Corporate Philanthropy Report to gauge performance and develop fundraising strategies. (Vizek Tr. at ¶¶ 49-50, *citing* Ex. U, 30 TTABVUE 17-18; 31 TTABVUE 50-52). P2P Forum ranked Walk to End Alzheimer's the fifth most successful fundraising event in the U.S. in 2016, and the *third most successful fundraising event in the U.S.* for the time period 2017 through 2019, outperformed only by the American Cancer Society's Relay for

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<sup>8</sup> The corresponding public reference is 25 TTABVUE 247-57.

<sup>9</sup> The corresponding public reference is 25 TTABVUE 9-10, 250.

Life and the American Heart Association’s walk event. (Vizek Tr. at ¶ 52, *citing* Exs. S-T and W-Y, 30 TTABVUE 18, 219-60 at 240, 31 TTABVUE 4-49, at 32, 55-59 at 59, 60-64 at 62, and 55-69 at 67). P2P Forum also recognized Opposer in 2018 as having the largest year to year increase in gross walk revenue. (Vizek Tr. at ¶ 56, *citing* Ex. X, 30 TTABVUE 19, 31 TTABVUE 60-64 at 63).

To complement its own internal marketing efforts and those undertaken by local Chapters and maintain commercial awareness of its marks, Opposer also invests heavily in media spend. The record shows that, from 2013 through 2018, Opposer has spent at least [REDACTED] on print, digital, and television marketing and advertising featuring Opposer’s Marks. (Fuller Tr. at ¶ 31a-h, *citing* Exs. G-N, 23 TTABVUE 11-14, 58-98).<sup>10</sup> As explained by Rachel Fuller’s testimony, Opposer’s Media Plans detail that advertising spend by year on nationally recognized media and print outlets, including NBC Universal, CNN, MSNBC, Fox News, AMC, TLC, USA Network, The Weather Channel, HGTV, People Magazine, Time Magazine, Parade Magazine, and Better Homes and Gardens. (*Id.*)

[REDACTED]  
[REDACTED]  
[REDACTED] (Fuller Tr. at ¶ 34-37, *citing* Ex. T, p. 1, 23 TTABVUE 125-27).<sup>11</sup> [REDACTED]  
[REDACTED] (*Id.*)

**F. Enforcement of the Walk to End Alzheimer’s Marks**

Opposer does not currently license its Walk to End Alzheimer’s Marks. (Garza Tr. at ¶ 25, 25 TTABVUE 10). Any authorized use of the marks has been through local Chapters, who were governed by a non-exclusive license agreement between each local Chapter and the Delaware corporation.<sup>12</sup> *Id.*

<sup>10</sup> The corresponding public reference is 35 TTABVUE 11-14, 58-98.

<sup>11</sup> The corresponding public reference is 35 TTABVUE 125-27.

<sup>12</sup> The Statement of Relationship (“SOR”) between Applicant and Opposer, which governed Applicant’s use of the Walk to End Alzheimer’s Marks is an example of such an agreement. (Zaentz CX at 29:1-30:7 31:13-34:12, *citing* Ex. 7, 51 TTABVUE 34-39, 150-59; Garza Reb. Tr. at ¶ 4, *citing* Ex. A, 50 TTABVUE 5, 16-25). Applicant also expressly acknowledged the proprietary nature of Opposer’s Marks and agreed that it would not “encumber” them. (Zaentz CX at Ex. 7, § 6.1(a), 51 TTABVUE 150-59 at 154-55).

At all times, including through today, Opposer maintains strict standards to ensure uniformity in the use and appearance of Opposer's Marks. Use of Opposer's Marks has always been controlled by Opposer through the use of branding guides, training, and standardized marketing material. (Garza Tr. at ¶ 26, 25 TTABVUE 11; Vizek Tr. at ¶¶ 20-25, *citing* Exs. D-E, 32-34, 32 TTABVUE 1-11, 13-14, 33-43;<sup>13</sup> Zaentz CX at 70:1-6, 51 TTABVUE 75; Garza Tr. at ¶ 32, 25 TTABVUE 12; Garza Reb. Tr. at ¶ 6, 50 TTABVUE 6). Opposer has, at all times, enforced its rights in Opposer's Marks. Attached as Exhibits G through L to Mary Faley Garza's Declaration are cease and desist letters relating to unauthorized use of the Walk to End Alzheimer's Marks. (Garza Tr. at ¶ 28, *citing* Exs. G-L, 25 TTABVUE 11, 258-97).

**G. "Consumers" and Channels of Trade for the Walk to End Alzheimer's Marks**

The people who encounter the Walk to End Alzheimer's Marks are from all age ranges, educational backgrounds, and geographic areas. (Garza Reb. Tr. at ¶¶ 30-31, 50 TTABVUE 14-15). In short, the Walk to End Alzheimer's targets anyone affected by and/or interested in, supporting the fight against Alzheimer's. Because each Walk to End Alzheimer's event is local, each such event is organized and marketed to individuals that live near the "walk" event. (Garza Tr. at ¶ 37, 25 TTABVUE 13). Similarly, the channels of trade for those encountering the mark include the Walk to End Alzheimer's event itself throughout the United States, Opposer's website, media, including print, tv, and billboards and through employers that are corporate sponsors of Walk to End Alzheimer's. (Fuller Tr. at ¶¶ 25-29, *citing* Exs. A-F, 35 TTABVUE 9-11, 18-57).

**H. Applicant's Use of the Walk to End Alzheimer's Marks From 2011-2015**

From 2000 until December 17, 2015, Applicant was affiliated with Opposer as one of those local Chapters – the Greater New Jersey Chapter or Alzheimer's Association's Greater New Jersey Chapter. (Garza Tr. at ¶ 29, 25 TTABVUE 11; Zaentz CX at 12:24-13:11, 51 TTABVUE 17-18;

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<sup>13</sup> The public reference is 30 TTABVUE 1-11, 13-14, 33-43.

Zaentz Tr. at ¶¶ 3, 12, 37 TTABVUE 5-6). Applicant's affiliation with Opposer, including Applicant's use of Opposer's Marks, was governed by a Statement of Relationship. (Zaentz CX 35:5-36:3, 51 TTABVUE 40-41). As the Greater New Jersey Chapter, Applicant was responsible for organizing, promoting and putting on four Walk to End Alzheimer's events in New Jersey every year. (Vizek Tr. at ¶ 37, TTABVUE 13, Garza Tr. at ¶ 31, 25 TTABVUE 11; *see also* Zaentz CX at 61:12-62:14, 51 TTABVUE 66-67). Applicant concedes that, for every one of those walk events, Opposer provided marketing materials displaying Opposer's Marks, and Applicant used those materials from at least 2011 through 2015 pursuant to a non-exclusive license in the parties' Statement of Relationship. (Garza Tr. at ¶¶ 6, 25, 25 TTABVUE 6, 10; Zaentz CX at 29:1-30:7, 51:7-34:4 and Ex. 7 thereto, 51 TTABVUE 34-35, 37-38, 150-59; Zaentz Tr. at ¶ 12, *citing* Ex. A, 37 TTABVUE 6, 22-31).

Opposer provided all marketing material for Walk to End Alzheimer's to Applicant. (Garza Tr. at ¶ 32, 25 TTABVUE 12). Applicant used Opposer's Marks in that marketing material, on a website affiliated with Opposer ([alz.org/nj/walk](http://alz.org/nj/walk)), where donations were solicited and "walk teams" were formed, on signs and plaques at Walk to End Alzheimer's events in New Jersey, and on products provided to Walk to End Alzheimer's participants. (Garza Tr. at ¶¶ 31-32, 25 TTABVUE 12; Zaentz CX at 62:9-63:23, 68:9-20, 70:25-71:18, 51, 72:4-12, 51 TTABVUE 67-68, 73, 75-77). Photos of the 2014 Walk to End Alzheimer's in Liberty State Park, New Jersey, attached to Mary Faley Garza's Rebuttal Testimony as Exhibit C, exemplify Applicant's "on the ground" use of Opposer's Marks. (Garza Reb. Tr. at ¶ 8, *citing* Ex. C, 25 TTABVUE 7, 28-32). Applicant was bound by the same strictures as all other Chapters regarding its use of the Opposer's Marks. Applicant was not authorized to use any marketing material, signage, or promotional material for Walk to End Alzheimer's that did not contain the Walk to End Alzheimer's Marks. (Garza Tr. at ¶ 33, 25 TTABVUE 12). Applicant was also bound by the use guidelines for Opposer's Marks. (Zaentz CX at 70:1-6, 51 TTABVUE 75).

### I. Applicant's Disaffiliation from Alzheimer's Association

In 2014, Opposer began taking steps to merge all of the local (then independent) Chapters into the Alzheimer's Association Delaware corporation to form a single, unified nonprofit. (Garza Tr. at ¶¶ 14, 25 TTABVUE 7). Of the 81 existing local Chapters, Applicant was one of only six Chapters to disaffiliate, and did so on December 17, 2015. (Garza Reb. Tr. at ¶¶ 15, 50 TTABVUE 8; Zaentz Tr. at ¶¶ 31, 37 TTABVUE 9). The following day, Applicant changed its name to Alzheimer's New Jersey, Inc.<sup>14</sup> (Zaentz Tr. at ¶¶ 32, 37 TTABVUE 9). Notably, in the days prior to its disaffiliation, Applicant's employees Julie Schuldner and Rosemarie DeBurgos accessed Opposer's "walk portal" site and downloaded voluminous amounts of marketing material relating to Walk to End Alzheimer's, virtually all of which bore at least one of Opposer's Marks. (Garza Reb. Tr. at ¶¶ 27-29, *citing* Ex. N; 50 TTABVUE 13-14, 61-63); Zaentz CX at 79:5-20, 51 TTABVUE 13-14 (confirming that Ms. Schuldner and Ms. DeBurgos were formerly employed by Applicant).

### J. Applicant's Walk to Fight Alzheimer's Logo Mark

Shortly after its disaffiliation, on February 14, 2018, Applicant filed a trademark application for the Walk to Fight Alzheimer's purple and white logo mark that is the subject of this Proceeding:



(“Applicant’s Mark”). (Zaentz Tr. at ¶ 79, 37 TTABVUE 17). Applicant’s Mark covers Class 36 services that relate to fundraising to support Alzheimer’s care and research. (Zaentz Tr. at 85, 37 TTABVUE 18; Garza Tr. at ¶ 38, *citing* Ex. M, 25 TTABVUE 14, 298-358 at 299).

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<sup>14</sup> It bears noting that, although Applicant now operates as Alzheimer's New Jersey, Inc., on the day it disaffiliated, it filed a business name reservation with the State of New Jersey for *Alzheimer's Disease and Related Disorders Association, Inc.*, Greater New Jersey Chapter that it continued to renew. (Zaentz CX at 42:21-44:24 and Ex. 9 thereto, 51 TTABVUE 47-49, 161-62). Applicant filed and renewed this business name reservation incorporating *Opposer's legal business name* despite its admission that it had no intention of ever using the name. (Zaentz CX at 42:21-45:18, 51 TTABVUE 47-50).

Applicant's Mark is used to promote Applicant's Walk to Fight Alzheimer's event. (Zaentz Tr. at ¶ 85, 51 TTABVUE 18). Like Walk to End Alzheimer's, "[t]he purpose of the Walk to Fight Alzheimer's is to raise funds to promote awareness to those suffering from Alzheimer's Disease, specifically in New Jersey." (Zaentz CX at 53:5-10, 51 TTABVUE 58). The people who participate in Walk to Fight Alzheimer's and encounter Applicant's Mark are of all ages, come from a wide range of socioeconomic statuses, and a wide range of educational backgrounds. (Zaentz CX at 53:11-54:13, 51 TTABVUE 58-59). Like Walk to End Alzheimer's, participants and/or donors to Applicant's Walk to Fight Alzheimer's use Applicant's website to learn about the event, donate to Walk to Fight Alzheimer's, create "walk teams" and monitor team fundraising. (Zaentz CX at 17:8-18:19, 51 TTABVUE 22-23) (describing process on Applicant's website to register for the event; *cf.* Vizek Tr. at ¶¶ 11, 29, *citing* Exs. A, J; 30 TTABVUE 6, 12, 20-25, 68-76).

Since it began using Applicant's Mark, Applicant has organized and held its Walk to Fight Alzheimer's events throughout New Jersey in the fall, including in Point Pleasant Beach, Liberty State Park, Princeton, Morristown, Paramus. (Zaentz CX at 17:2-18:19, and Ex. 2 thereto, 51 TTABVUE 22-23, 139-44). Participants or prospective participants will encounter Applicant's Mark on its website, its social media feeds, items such as bags, t-shirts, and beach balls, marketing materials, and at the Walk to Fight Alzheimer's event itself. (Zaentz CX at 18:20-24, 50:2-52:6, 53:19-25, 51 TTABVUE 23, 55-58).

#### **V. OPPOSER'S STANDING AND ENTITLEMENT TO A STATUTORY CAUSE OF ACTION**

Opposer has established through testimony and related exhibits that it owns the applied-for



mark (Fuller Tr. at ¶ 4, 35 TTABVUE 5, Opp. NOR 1, at Exs. 5-7, 27 TTABVUE 157-258; Garza Tr. at ¶ 19, *citing* Ex. B, 25 TTABVUE 8-9, 156-246). The record demonstrates that Opposer uses, and has used, that mark since at least 2011 in connection with its Walk to End

Alzheimer's events. (See e.g., Garza Tr. at ¶¶ 20-21, 25 TTABVUE 9; Zaentz CX at 9:12-22, 62:9-14 (acknowledging Applicant's use of Opposer's Marks prior to its disaffiliation in December 2015); Vizek Tr. at ¶¶ 27, 29, 38, Exs. F-G, J, and L-M, 30 TTABVUE 11-12, 14, 44-61, 68-76, 82-85; Garza Reb. Tr. at ¶¶ 8, 10, Exs. C-F, 50 TTABVUE 6-7, 28-39). *Hydro-Dynamics, Inc. v. George Putnam & Co. Inc.*, 811 F.2d 1470, 1 U.S.P.Q.2d 1772, 1773 (Fed. Cir. 1987) (common law use sufficient to establish standing). Applicant has also established that it owns U.S. Trademark Reg. No. 4,122,255. (Garza Tr. at ¶ 17, citing Ex. A, 25 TTABVUE 8, 16-155; Opp. NOR 1 at Exs. 1-4, 27 TTABVUE 5-156). In addition to its submission of a status and title copy of its pleaded registration (for WALK TO



END ALZHEIMER'S) and application for registration (for ) that accompanied its Notice of Opposition, Opposer has also introduced into evidence the Trademark Status & Document Retrieval (TSDR) report for each of its pleaded registration and application for registration. (Opp. NOR 1 at Exs. 1-7; 27 TTABVUE 5-258). *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 U.S.P.Q. 108, 109 (CCPA 1974).

Applicant's Mark is similar in appearance, color, sound and layout to Opposer's Marks. The goods covered by Applicant's Mark are identical to those of Opposer. Thus, Opposer has a reasonable belief that it will be damaged by registration of Applicant's Mark.

## **VI. OPPOSER HAS PRIORITY**

For those same reasons, Opposer has also established priority.<sup>15</sup> Applicant has admitted that Opposer's use of Opposer's Marks predates Applicant's use of Applicant's goods and services in connection with Applicant's Mark. (Opp. NOR 2 at Ex. 9 (App. Resp. to RFA Nos. 1-2), 28

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<sup>15</sup> It its ruling on the parties' cross motions for summary judgment, the Board noted that [a]t trial, Opposer may establish its standing, and priority will not be in issue, so long as Opposer demonstrates that it remains the owner of its valid and unchallenged Registration No. 4122255." (19 TTABVUE 12, n. 22). Opposer has done so by introducing into evidence a current status and title copy of its pleaded registration.

TTABVUE 11-17 at 14). Applicant's President and CEO, Kenneth Zaentz also admitted that *Applicant used Opposer's Marks* to organize Walk to End Alzheimer's events prior to its disaffiliation on December 17, 2015 and Applicant did not begin using its mark until September 1, 2017. (Zaentz CX at 8:1-9:22, 51 TTABVUE 13-14; Zaentz Tr. at ¶ 85, 37 TTABVUE 18). Moreover, Applicant has not counterclaimed to cancel Opposer's registration for WALK TO END ALZHEIMER'S, and priority is not a contested issue in this Proceeding. *New Era Cap Co. v. Pro Era LLC*, 2020 U.S.P.Q.2d 10596, 2020 TTAB LEXIS 199, at \*27 (TTAB May 29, 2020).

## VII. ARGUMENT

### A. The WALK TO FIGHT ALZHEIMER'S Mark Creates a Likelihood of Confusion with Alzheimer's Association's WALK TO END ALZHEIMER'S Marks

Likelihood of confusion is determined on a case-by-case basis through consideration of the factors enumerated *In re E.I. duPont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 U.S.P.Q. 563, 567 (CCPA 1973). "No mechanical rule" governs a likelihood of confusion analysis, and the Board need only consider the *duPont* factors relevant to each particular case. *In re Mighty Leaf Tea*, 601 F.2d 1342, 1346, 94 U.S.P.Q.2d 1257, 1259 (Fed. Cir. 2010). Courts are compelled to consider any factor that a party has shown is material and for which evidence has been introduced. *Octocom Sys., Inc. v. Houston Computer Serv's, Inc.*, 918 F.2d 937, 943, 16 U.S.P.Q.2d 1783, 1788 (Fed. Cir. 1990). The relevant *duPont* factors in this case include the: (i) similarity of the marks as to appearance, sound, connotation, and commercial impression; (ii) similarity and nature of the covered goods and services; (iii) similarity of established trade channels; (iv) conditions under which, and buyers to whom, sales are made; (v) strength and fame of the prior marks; (vi) number and nature of similar marks in use on similar goods; (vii) nature and extent of actual confusion; (viii) intent or bad faith; and (ix) any other fact probative of the effect on the prior mark. *duPont*, 476 F.2d at 1361, 177 U.S.P.Q. at 567.

It is also well settled that, if the issue of likelihood of confusion is in doubt, the Board should resolve the question in favor of the senior user. *Recot, Inc. v. Becton*, 214 F.3d 1322, 1327, 54



U.S.P.Q.2d 1894, 1895 (Fed. Cir. 2000). But, even without the benefit of this presumption, likelihood of confusion in this case is inescapable. All relevant *duPont* factors weigh in favor of Opposer. Applicant's intent in adopting a virtually identical logo to that of Alzheimer's Association and using that logo on identical goods and services for competing fundraising "walk events" is clear – to trade on Opposer's goodwill and confuse and divert participants to Applicant's competing walk event.

### **1. The Marks Are Similar in Appearance and Cover Identical Goods and Services**

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services. *See In re i.am.symbolic, llc*, 866 F.3d 1315, 123 U.S.P.Q.2d 1744, 1747 (Fed. Cir. 2017); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103, 192 U.S.P.Q. 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.") Both of these factors overwhelmingly favor Opposer.

#### **a. The Services Offered Under the Parties' Marks Are Identical**

Both parties use their respective marks to promote their respective walk events and fundraise in furtherance of Alzheimer's care and support. (Garza Tr. at ¶ 21, 25 TTABVUE 9; Vizek Tr. at ¶ 29, 30 TTABVUE 11; Zaentz CX at 50:2-6, 51:9-23, 51 TTABVUE 55-56, Zaentz Tr. at ¶ 85, 37 TTABVUE 18). Even setting that fact aside, the services as set forth in the parties' respective trademark applications and Opposer's registration are legally identical. *Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 1323, 110 U.S.P.Q.2d 1157, 1161-62 (Fed. Cir. 2014) ("[T]he question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application") (quoting *Octocom*, 918 F.2d at 942. 16 U.S.P.Q.2d at 1786. Opposer's Marks cover the following Class 36 goods and services:

Charitable fundraising, namely, raising money to support scientific research on Alzheimer's disease; charitable fundraising services in the nature of a pledged walkathon.

and

Charitable fundraising, namely raising money to support educational and information programs on Alzheimer's Disease and to support scientific research on Alzheimer's Disease; charitable fundraising services in the nature of a pledged walkathon.

(Garza Tr. at ¶¶ 17, 29, *citing* Exs. A-B, 25 TTABVUE 8-9; Opp. NOR 1 at Exs. 1 and 5, 27 TTABVUE 5-152, 157-254). Applicant intends for Applicant's Mark to cover the same Class 36 services, including:

Charitable foundation services, namely, providing fundraising activities to support medical research and procedures for those in need; Charitable fundraising; Charitable fundraising services by means of a website where donors search for and make monetary donations to specific charities or projects aimed at Alzheimer's care and research; Charitable fundraising services for Alzheimer's care and research; Charitable fundraising services; Charitable fundraising services by means of organizing and conducting special events; Charitable fundraising services by means of organizing walks and other special events for Alzheimer's; Charitable fundraising services for promoting research, education and other activities relating to Alzheimer's care and research; Charitable fundraising to support Alzheimer's care and research; Charitable services, namely, fundraising services by means of organizing special events for Alzheimer's care and research; On-line charitable fundraising.

(Zaentz Tr. at ¶ 80, 37 TTABVUE 17). The additional and related services sought to be covered by Applicant's Mark do not diminish their similarity to those of Opposer for purposes of this factor. *See In re Midwest Gaming & Entertainment LLC*, 106 U.S.P.Q.2d 1163, 1164 (TTAB 2013) (finding services to be legally identical when applicant's "bar services located in a casino" were similar to, and encompassed by opposer's "restaurant and bar services.") All of Applicant's services are subsumed by, or similar to, Opposer's services, which broadly cover charitable fundraising and walk events.

Even if the goods are not deemed to be identical, the services – charitable fundraising to support Alzheimer's care and research – are related. It is well-accepted as a "general rule" that goods or services need not be identical or even competitive to support a finding of a likelihood of confusion. "Rather, it is enough that goods or services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used thereon to a mistaken belief that they originate from

or are in some way associated with the same producer or that there is an association between the producers of the goods or services.” *Ultratan Suntanning Centers, Inc. v. Ultra Tan Int’l AB*, 49 U.S.P.Q.2d 1313, 1315-16 (TTAB 1998).

Here, the “circumstances surrounding [the] marketing” of the parties’ respective marks is identical. Both parties use their marks to promote walks to benefit those suffering from Alzheimer’s Disease. (Zaentz CX at 50:2-6, 51 TTABVUE 55; Garza Tr. at ¶ 11, *citing* Ex. A, 30 TTABVUE 6, 20-25) Both parties display their marks on their respective websites, where participants and donors are encouraged to donate and register for the events. (Zaentz CX 50:7-14, 51 TTABVUE 55; Garza Tr. at ¶ 11, *citing* Ex. A, 30 TTABVUE 6, 20-25). Both parties use their respective marks on social media to promote their walk events. (*See e.g.*, Zaentz CX 50:15-20, 51 TTABVUE 55; Vizek Tr. at ¶ 28; 30 TTABVUE 11). Both parties use the marks on apparel and event items. (Zaentz CX at 51:9-17, 51 TTABVUE 56; Fuller Tr. at ¶ 26, 23 TTABVUE 10). Both parties organize and execute their respective walk events in New Jersey at the same time of year in the same or close by communities. (Zaentz CX 49:16-18, 71:19-72:3; 51 TTABVUE 54, 76; Vizek Tr. at ¶ 41, 30 TTABVUE 14).

Because the parties’ marks relate to the same or related goods and services, “the degree of similarity necessary to support a conclusion of likely confusion declines.” *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 877, 23 U.S.P.Q.2d 1698, 1700 (Fed. Cir. 1992); *Coach Servs. v. Triumph Learning LLC*, 668 F.3d 1356, 1369, 101 U.S.P.Q.2d 1713, 1721 (Fed. Cir. 2012) (“In this fact-specific inquiry, if the parties’ goods are closely related, a lesser degree of similarity between the marks may be sufficient to give rise to a likelihood of confusion.”) Notwithstanding, an analysis of the appearance, sound, connotation, and commercial impression of Opposer’s Marks and Applicant’s Mark also favors Opposer.

#### **b. The Parties’ Marks are Similar in Appearance**

When assessing the similarity of marks, the question is not whether the marks are distinguishable, but rather whether the marks are sufficiently similar in terms of their overall

commercial impression such that consumers are likely to be confused as to the source of the services offered under the respective marks. “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*, 668 F.3d at 1369, 101 U.S.P.Q.2d at 1721 (internal quotations omitted). *See also Ultratan Suntanning*, 49 U.S.P.Q.2d at 1316 (“The emphasis in determining likelihood of confusion is not on a side-by-side comparison of the marks, but rather must be on the recollection of the average purchaser, who normally retains a general rather than a specific impression of the many trademarks encountered; the purchaser’s fallibility of memory over a period of time must also be kept in mind.”) Here, the marks share strikingly similar characteristics such that the overall impression is that the “walks” (*i.e.*, services offered under the marks) emanate from the same source.

A likelihood of confusion exists where “a competing mark share[s] a core portion” of the Opposer’s mark. *Bose Corp. v. QSC Audio Prods.*, 293 F.3d 1367, 1378, 63 U.S.P.Q.2d 1303, 1311 (Fed. Cir. 2002). In determining likelihood of confusion, relevant marks are compared for similarities in their appearance, sound, connotation, and commercial impression. *duPont*, 476 F.2d at 1361, 177 U.S.P.Q. at 567; *Recot*, 214 F.3d at 1329-30, 54 U.S.P.Q.2d at 1899. A finding of similarity in any one of those elements may be sufficient to conclude that there is a likelihood of confusion. *In re White Swan*, 8 U.S.P.Q.2d 1534, 1535 (TTAB 1988). In this case, **all** salient aspects of the logo marks are strikingly similar – from shape, to font, to structure, to color, to the words. As such, it cannot be credibly disputed that both marks give an identical commercial impression.

Both Opposer’s Marks and Applicant’s Mark have identical commercial impressions:



Opp. NOR 1 at Exs. 1, 5; Garza Tr. at ¶ 20, *citing* Exs. B and M; 25 TTABVUE 9, 156-246 at 169, 298-358 at 310; Zaentz Tr. at ¶ 79, 37 TTABVUE 17).

They are clearly directed to “walks” to combat Alzheimer’s Disease. Most critically, that similar commercial impression is enhanced by the *near identical* visual impressions offered by the marks. The dominant portions of the logo marks are also similar. Both Opposer’s Mark and Applicant’s Mark use only purple and white colors and are encapsulated by a purple rectangle. *See The Youngstown Sheet and Tube Co. v. Missouri Rolling Mill Corp.*, 133 U.S.P.Q. 663 (TTAB 1962) (use of substantially similar colors “create[s] similar visual impressions.”). Both use virtually identical verbiage in large white capital letters (in almost identical font style).<sup>16</sup> The marks share core words with the only difference being the similar action words END and FIGHT. *See Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 1372-73, 73 U.S.P.Q.2d 1689, 1692 (Fed. Cir. 2005) (finding likelihood of confusion exists between VEUVE ROYALE and VEUVE CLICQUOT); *Bose Corp.*, 293 F.3d at 1378, 63 U.S.P.Q.2d at 1311 (holding POWERWAVE mark for amplifiers was similar in sound and connotation to ACOUSTIC WAVE for loudspeaker systems and WAVE for radios and stereos).

However, in this case, Applicant has gone one step further. Not only has it adopted the shape, background color, and font color and sizing of Opposer’s Mark, Applicant’s Mark is also *structurally*

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<sup>16</sup> As the Federal Circuit has recognized, when a mark is registered in standard word characters, it is not limited to any particular depiction and, as such, the Board must consider Alzheimer’s Association’s WALK TO END ALZHEIMER’S word mark may be depicted in stylization identical to the wording Applicant’s (design) Mark. *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 1353, 98 U.S.P.Q.2d 1253, 1259 (Fed. Cir. 2011).

*similar*, with an identical placement of “WALK TO” above an action word (END or FIGHT) with “ALZHEIMER’S” in smaller capital letters underneath that action word. The structural similarity of Opposer’s Mark and Applicant’s Mark is yet another factor relevant to the likelihood of confusion analysis. *In re Detroit Ath. Co.*, 903 F.3d 1297, 1303, 128 U.S.P.Q.2d 1047, 1049 (Fed. Cir. 2018) (“[I]n view of the marks’ structural similarity, the lead words are their dominant portion and are likely to make the greatest impression on consumers.”)

The marks are not only visually similar. WALK TO END ALZHEIMER’S and WALK TO FIGHT ALZHEIMER’S also have a general aural similarity and similarity in cadence. While the words “FIGHT” and “END” are not the same, both have the same overall connotation – beating Alzheimer’s Disease. *See Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.*, 963 F.2d 350, 355, 22 U.S.P.Q.2d 1453, 1458 (Fed. Cir. 1992) (holding that in light of the appearance, sound and meaning of the marks PLAY-DOH and FUNDOUGH, consumers may receive the “same commercial impression” from the marks); *In re Nat’l Data Corp.*, 753 F.2d 1056, 1060, 224 U.S.P.Q. 749, 752 (Fed. Cir. 1985) (finding CASH MANAGEMENT ACCOUNT and CASH MANAGEMENT EXCHANGE confusingly similar, including in overall connotation).

The differences in the design elements between the marks are not sufficient to overcome the conclusion that the marks give the same commercial impression as to source especially when guided by the principle that the general recollection of consumers is paramount. As an initial matter, the design elements are not the prominent portions of the marks. What is most noticeable are the virtually identical colors, white capital lettering, and structural identity of the marks. The notion that an ordinary consumer would differentiate source based on sneakers or an arrow is unfounded. *Ultratan Suntanning*, 49 U.S.P.Q.2d at 1316 (consumers retain a general, and not specific recollection).

That Applicant’s Mark provides additional information purportedly indicating the source of goods and services, as emanating from “Alzheimer’s New Jersey”, does not decrease the similarity of the marks. As an initial matter, the stylization of “Alzheimer’s New Jersey” is similar to that of

“alzheimer’s association” in Opposer’s Mark, with a design element inserted between “Alzheimer’s” and “New Jersey” or “association” as it were. Moreover, “Alzheimer’s New Jersey” is not sufficiently descriptive so as to definitively broadcast that it is an entity distinct from Alzheimer’s Association, which operates in New Jersey – especially in this case, where Applicant operated as a local Chapter of the Alzheimer’s Association for at least 18 years before its disaffiliation and used Opposer’s Marks for Walk to End Alzheimer’s events in New Jersey. (Zaentz Tr. at ¶ 12, 37 TTABVUE 6). Indeed by its own admission “irrespective of Applicant’s name changes over the years, the Applicant has always maintained the same federal ID number and has always been the same corporate and operational organization.” (Zaentz Tr. at ¶ 21, 37 TTABVUE 7; Zaentz CX at 11:7-13, 51 TTABVUE 16).

The expectation that ordinary consumers would see “Alzheimer’s New Jersey” and take the care to parse out Applicant’s involvement with Alzheimer’s Association’s Walk to End Alzheimer’s and its now-involvement with Walk to Fight Alzheimer’s is unrealistic to say the least. This is especially true given that Applicant’s Mark no longer contains the identifying “green” color that it admits is a signature color of its organization. (Zaentz CX at 16:16-24, 56:8-19, 51 TTABVUE 21, 61). Instead, the use of purple and white exclusively only suggests the mark is related to Opposer given its historic use of those colors in Opposer’s Mark, the fact that virtually all marketing material related to Walk to End Alzheimer’s (and displaying Opposer’s Marks) uses purple and white, Opposer, and the connection of those colors to its organization as a whole. (Garza Reb. Tr. at ¶ 33, 50 TTABVUE 15; Vizek Tr. at ¶¶ 11, 18, 23, 27, 29-30, *citing* Exs. A-D and F-J, TTABVUE 8, 10, 20-21, 33-34, 44-76; Garza Reb. Tr. at ¶¶ 8, 10, 17, *citing* Exs. C-F and H-L, 50 TTABVUE 6-7, 9, 28-39, 45-54; Opp. NOR 3 at Exs. 12-13, 15-16, 19-23, 29 TTABVUE 12-18, 25-36, 46-91).

These factors weigh substantially in favor of Opposer.

## **2. The Conditions Under Which Participants Register and Donate Are Identical**

It is undisputed that the participants who encounter Opposer’s Marks and Applicant’s Mark are identical – that is, without limitation as to age, education, or socio-economic background. (Garza

Rebuttal Tr. at ¶¶ 30-31, 50 TTABVUE 14-15; Zaentz CX at 53:11-9, 51 TTABVUE 58). There is nothing in the nature of the services offered under either party's marks that would suggest potential participants are particularly sophisticated or careful nor is there any evidence that participants must meet a certain financial threshold to donate or to participate in either party's walk event.

All of these uncontroverted facts suggest that there are no "conditions of sale" or facts that require a level of sophistication or care such that potential participants are not likely to be confused by the similarities between the marks. Potential participants will not take the time to study the differences between the marks rather than rely on their commercial impression Applicant's conclusory and unsupported statement its donors act on "careful and sophisticated communications with Applicant" is unavailing. (See Zaentz Tr. at ¶ 91; 27 TTABVUE 19). When pressed as to what evidence Applicant's CEO had to support the statement, he was forced to admit that he had "nothing specific." (Zaentz CX at 89:6-21; 51 TTABVUE 94).

This factor weighs in favor of Opposer.

### **3. The Parties Services are Offered to the Same Consumers and Through the Same Channels of Trade**

Because Applicant's services are identical to those of Opposer, it is presumed that the same consumers are exposed to the parties' marks and that the services offered under the marks travel through the same trade channels. *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086, 56 U.S.P.Q.2d 1471, 1475 (Fed. Cir. 2000). Moreover where, as here, there are no restrictions in the applications or registration, goods and services are presumed to travel in the same channels of trade to the same class of purchasers. *Hewlett-Packard v. Packard Press, Inc.*, 281 F.3d 1261, 1268, 62 U.S.P.Q.2d 1001, 1004 (Fed. Cir. 2002).

In any event, there is no factual dispute as to whether the services offered under Opposer's Marks and Applicant's Marks are to the same consumers and through the same channels of trade. As noted previously, participants who encounter Opposer's Marks at its Walk to End Alzheimer's events



are of all ages, educational backgrounds, and socioeconomic status. (Garza Reb. Tr. at ¶¶ 30-31, 25 TTABVUE 14-15). The same is true for Applicant. (Zaentz CX at 53:11-54:13, 51 TTABVUE 58-59) (conceding that individuals “who encounter Applicant’s Mark at Walk to Fight Alzheimer’s events are from a wide range of ages, educational background and socioeconomic status.”)

Similarly, there is no factual dispute that Opposer’s Marks and Applicant’s Mark are used and displayed in the same manner – that is, on marketing material promoting their respective walk events and on their respective websites. (See Vizek Tr. at ¶¶ 11, 27, 29, *citing* Exs. A-C, and F-J, 30 TTABVUE 20-41, 44-76; Garza Reb. Tr. at ¶¶ 8, 10, 17, *citing* Exs. C-F and H-L, 50 TTABVUE 6-7, 9, 28-39, 45-54; Opp. NOR 3 at Exs. 12-13, 15-16, 19-23, 29 TTABVUE 12-18, 25-36, 46-91; Zaentz CX at 17: 8-18:24; 50:15-52:6, 51 TTABVUE 22-23, 56-57). The marks are also displayed at the parties’ respective walk events, both of which are directed to the same case – to promote awareness and raise funds to address issues related to Alzheimer’s Disease. (Zaentz CX at 53:11-54:9, 51 TTABVUE 58-59); Garza Reb. Tr. at ¶¶ 8, 10, 17, *citing* Exs. C-F and H-L, 50 TTABVUE 6-7, 9, 28-39, 45-54).

Finally, there is no dispute that the parties offer the same services under their competing marks in the same geographic area. Notably, Applicant used *Opposer’s Marks* in the New Jersey area until 2016, including in Princeton, Paramus, Liberty State Park, and Point Pleasant Beach. (Vizek Tr. at ¶ 40, 30 TTABVUE 14; *see also* Zaentz CX at 61:12-62:14, 51 TTABVUE 66-67). In 2017, Applicant began using Applicant’s Mark *in the same locations*, including Point Pleasant Beach, Liberty State Park, Princeton, Paramus, and Morristown *in the same time frame* as it had in the past and as Opposer has continued to do. (Vizek Tr. at ¶ 41, 30 TTABVUE 14; Zaentz CX at 47:24-49:18, 51 TTABVUE 52-54).

These factors weigh in favor of a finding of likelihood of confusion.

#### 4. The Commercial Strength of Opposer's Marks

Fame or commercial strength, for purposes of likelihood of confusion, “is a matter of degree along a continuum” and is not an all or nothing measure when assessed in a likelihood of confusion analysis. *Coach Servs.*, 668 F.3d at 1373, 101 U.S.P.Q.2d at 1724. Relevant factors of commercial strength include sales, advertising, length of use of the mark, brand awareness, and licensing activities. *Id.*; see also *Bose Corp.*, 293 F.3d at 1371, 63 U.S.P.Q.2d at 1305 (noting that fame for likelihood of confusion purposes “may be measured indirectly” by the volume of sales of the goods or services sold under the mark, advertising expenditures, and other factors such as length of time of use of the mark, widespread critical assessments, notice by independent sources of the products identified by the marks, and the general reputation of the products and services.) Sales and advertising statistics are consistently accepted as indicia of fame. *China Healthways Inst., Inc. v. Wang.*, 491 F.3d 1337, 1341, 83 U.S.P.Q.2d 1123, 1125-26 (Fed. Cir. 2007). The record in this case is replete with evidence showing all of these indirect indicia of fame.

***Length and Breadth of Use.*** It is undisputed that Opposer has used its Marks nationwide for at least a decade in association with its Walk to End Alzheimer's fundraising events. (Garza Tr. at ¶ 21, 25 TTABVUE 9; Vizek Tr. at ¶ 18, 30 TTABVUE at 8-9; Zaentz CX at 61:11-62:14, 51 TTABVUE 66-67). The use of Opposer's Marks has been widespread. Opposer's Marks have been displayed, advertised, and used nationally continuously since 2011 in over 600 communities annually to promote its Walk to End Alzheimer's events. (Vizek Tr. at ¶ 11, *citing* Ex. A, 30 TTABVUE 6, 20-25). It is not disputed that Opposer's Marks appear on all materials promoting Walk to End Alzheimer's. (Garza Tr. at ¶ 21, 25 TTABVUE at 9; Fuller Tr. at ¶ 10, 35 TTABVUE 6). As a result, upwards of 3,500,000 people have been exposed to Opposer's Mark. (Garza Tr. at ¶ 24, *citing* Exs. C, F, 25 TTABVUE 10, 247-50, 256-57; Vizek Tr. at ¶ 46a-e, *citing* Exs. P-T, 30 TTABVUE 16-17, 100-33 at 115, 134-76 at 157, 177-218 at 199, 219-60 at 240; 31 TTABVUE 1-49 at 32).

**Fundraising Under Opposer's Marks.** This factor unequivocally establishes the strength of Opposer's Marks. By virtue not only of the name of the event, but the fact that all marketing material displayed Opposer's Marks, those Marks are "synonymous" with Walk to End Alzheimer's. (Vizek Tr. at ¶¶ 15, 18, 30 TTABVUE 7-8). When a participant signs up for the event, attends the event, or receives or views any marketing material related to the event, that participant sees Opposer's Marks. In total, since 2011, Walk to End Alzheimer's (for which Opposer's Marks are exclusively used) has raised over \$500,000,000.<sup>17</sup> Opposer's business records show its revenues as follows:

- 2011: approx. \$47,000,000
- 2012: approx. \$51,800,000
- 2014: over \$67,000,000
- 2015: over \$78,600,000
- 2016: \$83,600,000
- 2017: \$88,900,000
- 2018: \$97,000,000

(Vizek Tr. at ¶ 46a-e, *citing* Exs. P-T, 30 TTABVUE 15-17, 100-33 at 115, 134-76 at 157, 177-218 at 199, 219-60 at 240; 31 TTABVUE 4-49 at 32; *see also* Garza Tr. at ¶¶ 23-24, *citing* C-F, 26 TTABVUE 247-55).<sup>18</sup> Sales of products bearing the [Opposer's] Marks generate over [REDACTED] per year in revenue attributable to Walk to End Alzheimer's. (Fuller Tr. at ¶ 26, 23 TTABVUE 10).<sup>19</sup> These figures are on par with other cases where courts have found similar sales to be sufficient indicia of fame. *See Bose*, 293 F.3d at 1373, 63 U.S.P.Q.2d at 1307 (finding fame based on \$250 million in sales), *citing Nina Ricci S.A.R.L. v. E.T.F. Enters., Inc.*, 889 F.2d 1070, 1072, 12 U.S.P.Q.2d 1901, 1902 (Fed. Cir. 1989) (finding fame based on \$200 million in sales and over \$37 million in advertising over 27 years); *Kimberley-Clark Corp. v. H. Douglas Enter., Ltd.*, 774 F.2d 1144, 1146-47, 227 U.S.P.Q. 541, 542 (Fed. Cir. 1985) (finding fame based on over \$300 million in sales over 9 years);

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<sup>17</sup> Opposer's Annual Reports show that in FY20, Walk to End Alzheimer's revenues were \$98,000,000.

<sup>18</sup> The corresponding public reference is 25 TTABVUE 247-55.

<sup>19</sup> The corresponding public reference is 35 TTABVUE 10.

*Specialty Brands Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 674-75, 223 U.S.P.Q. 1281, 1284 (Fed. Cir. 1984) (finding fame based on \$25 million annually in sales of spices).

The P2P Forum publication, which is relied upon by those in the nonprofit sector as a source of data also provides a context for the funds raised using Opposer's Marks. *See Bose*, 293 F.3d at 1375-76, 63 U.S.P.Q.2d 1309. To put those figures in context, Peer-to-Peer Forum ranked Alzheimer's Association as the fifth most successful fundraising event in the U.S. in 2016. (Vizek Tr. at ¶ 51, *citing* Ex. S, 30 TTABVUE 18, 219-60 at 240). That evidence unquestionably demonstrates the significance of the fundraising figures upon which Opposer relies to establish fame. In the years following – 2017 through 2019, P2P Forum ranked Walk to End Alzheimer's as the third most successful fundraising event in the U.S. (Vizek Tr. at ¶ 52, *citing* Exs. S-T, and W-Y, 30 TTABVUE 18, 219-60 at 240; 31 TTABVUE 4-49 at 32, 55-69). Those rankings, which show the performance of Walk to End Alzheimer's vis-à-vis other charitable walk events, removes any doubt as to the significance of Opposer's fundraising using Opposer's Marks. *See also See Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 1325, 122 U.S.P.Q.3d 1733, 1735 (Fed. Cir. 2017) (reversing Board decision that the mark was not famous for likelihood of confusion purposes in light of evidence such as repeated rankings in wine magazines). The success of Walk to End Alzheimer's is due, in large part “to the marketing efforts and consistent use of [Opposer's] Marks.” (Vizek Tr. at ¶ 52, 30 TTABVUE 18).

***Participation in Walk to End Alzheimer's Events.*** The levels of participation in Walk to End Alzheimer's events is also a significant factor in assessing the strength of the mark because every participant is exposed to Opposer's Marks at least at the event and likely prior to the event to sign-up, form a team, or donate money. Participation alone (not just exposure to Opposer's Marks through media and website or social media views) is in the hundreds of thousands annually, and has only increased year-to-year:

- 2011: approx. 332,565
- 2012: approx. 364,307
- 2013: approx. 409,687
- 2014: approx. 458,855
- 2015: nearly 500,000
- 2016: nearly 500,000
- 2017: over 500,000
- 2018: at least 526,000

(See Vizek Tr. at ¶ 46a-e, *citing* Exs. P-T, 30 TTABVUE 15-17, 100-33 at 115, 134-76 at 157, 177-218 at 199, 219-60 at 240; 31 TTABVUE 4-49 at 32; Garza Tr. at ¶ 22-23, *citing* Ex. C, 26 TTABVUE 9-10, 250).<sup>20</sup> These numbers are indicia of indirect and direct consumer awareness of Opposer’s Marks. *Bose*, 293 F.3d at 1375, 63 U.S.P.Q.2d at 1309 (finding that the sheer numbers reflected in similar data (for sales and advertising) “display[ed] consumer awareness.”)

**Advertising and Media.** Opposer has also made of record its Media Plans, which show substantial investment from 2013 through 2020 on print, digital, and television marketing and advertising featuring Opposer’s Marks During that time frame, Opposer has spent approximately [REDACTED]. (Fuller Tr. at ¶¶ 30-31a-h, *citing* Exs. G-N, 23 TTABVUE 11-14, 58-98).<sup>21</sup> See *Nina Ricci*, 889 F.2d at 1072, 12 U.S.P.Q.2d at 1902 (fame based on \$37 million in advertising over a multi-year period). These Media Plans detail that advertising spend by year on nationally recognized media and print outlets, including NBC Universal, CNN, MSNBC, Fox News, AMC, TLC, USA Network, The Weather Channel, HGTV, People Magazine, Time Magazine, Parade Magazine, and Better Homes and Gardens. (*Id.*) Opposer’s Marks have also been featured in third party media articles and press releases, including by the NFL team, the Denver Broncos. (Fuller Tr. at ¶ 32, *citing* Exs. O-S, 35 TTABVUE 15-16, 99-124).

**Brand Recognition Surveys.** [REDACTED]

<sup>20</sup> The corresponding public reference is 25 TTABVUE 4-49 at 32.

<sup>21</sup> The corresponding public reference is 35 TTABVUE 11-14, 58-98.

[REDACTED] (Fuller Tr. at ¶¶ 35-37, 23 TTABVUE 16, 125-27).<sup>22</sup> [REDACTED]

[REDACTED] (*Id.*)

Less evidence than this has supported a finding that a mark has “at least a high degree of recognition” that renders it “distinctive and strong and entitled to a broad level of protection.” *Midwestern Pet Foods, Inc. v. Societe Des Produits Nestle S.A.*, 685 F.3d 1046, 1052-53, 103 U.S.P.Q.2d 1435, 1440 (Fed. Cir. 2012) (quoting *Palm Bay*, 396 F.3d at 1375). In *Midwestern*, the Federal Circuit affirmed the Board’s ruling of likelihood of confusion, including its finding that Opposer had submitted “substantial evidence” that demonstrated its mark has enjoyed at least a high degree of recognition such that it was entitled to a broad level of protection. *Id.* at 1053. In doing so, the court noted that products bearing the mark “have been advertised, marketed, and sold throughout the nation” for over a decade, and cited to opposer’s evidence of sale and advertising. *Id.* at 1052. The Federal Circuit agreed that, despite shortcomings in opposer’s evidence, such as the absence of any context for its sales or a clear connection between its asserted mark and reported sales, opposer’s considerable investment in advertising and other indicia of commercial awareness was sufficient to support a finding that the fame and strength of the mark favored the opposer. *Id.* at 1053.

Here, the record shows extensive recognition of, and participation in, the Walk to End Alzheimer’s events, which feature Opposer’s Marks. Unlike *Midwestern*, the Peer-to-Peer Forum annual publications provide a context for the funds raised (here, the equivalent of sales) using Opposer’s Marks. Like *Midwestern* and other cases, where fame was found to favor the Opposer, Applicant has demonstrated significant investment in advertising that has resulted in national media exposure over a several years. *Id.* at 1053. Certainly, when taken together, this evidence of fame, like that in *Bose*, demonstrates “that the consuming public has been exposed frequently and nationwide” to

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<sup>22</sup> The corresponding public reference is 35 TTABVUE 16, 125-27.

Opposer's Marks. 293 F.3d at 1375-76, 63 U.S.P.Q.2d at 1309. Both participation figures and the comparison studies undertaken by Peer-to-Peer Forum provide the requisite "confirmatory context" to Opposer's advertising spend and fundraising success. *Id.*

There is no evidence of uncontrolled use of Opposer's Marks. Opposer has also introduced evidence to demonstrate that participants and potential participants of services offered under the WALK TO END ALZHEIMER'S Marks recognize Opposer's Marks as a source indicator for Alzheimer's Association's Walk to End Alzheimer's. *Palm Bay*, 396 F.3d at 1374-75, 173 U.S.P.Q.2d at 1695. ("[T]he proper legal standard for evaluating the fame of a mark under the fifth DuPont factor is the class of customers and potential customers of a product or service, and not the general public.").

Accordingly, this factor weighs in favor of Alzheimer's Association.


#### **5. There are No Significant Third-Party Registrations or Evidence of Third Party Use**

Opposer is unaware of any third party marks (registered or otherwise) that are similar to Opposer's Marks. (Garza Reb. Tr. at ¶ 33; 50 TTABVUE 15). There are no significant third party registrations at issue in this proceeding. Notwithstanding, Opposer attempts to introduce third party marks through its President, Mr. Zaentz, and its Notice of Reliance that have little to no relevance and for which it offers no foundation as to knowledge or – more importantly – use. (Zaentz Tr. at ¶¶ 92-95, *citing* Exs. O, S-AA, BB and CC; 27 TTABVUE 19-20, 1465-158737 TTABVUE 19; App. NOR 4, 41 TTABVUE 1-928).

Absent from the record is any evidence of *use* of the alleged registered third party marks cited by Applicant and Mr. Zaentz. Notably, the utility of that "evidence" is guided by the proposition that "[t]he probative value of third-party trademarks depends entirely upon their usage." *Palm Bay*, 396 F.3d at 1373, 73 U.S.P.Q.2d at 1693. Applicant has not introduced any evidence of the extent of use of those third party marks or the public awareness of those marks. *Han Beauty, Inc. v. Alberto-Culver*

*Co.*, 236 F.3d 1333, 1338 , 57 U.S.P.Q.2d 1557, (Fed. Cir. 2001) (“[T]he record includes no evidence about the extent of [third-party] uses. The probative value of this evidence is thus minimal.”)

Applicant’s attempt to establish the relevance of these third party marks is misguided because it ignores all of the factors relevant to a likelihood of confusion analysis, including similarity of goods and services, visual similarity, and commercial impression.<sup>23</sup> The likelihood of a consumer experiencing confusion as to the source of a walk (for example to against human trafficking) directed to other, distinct causes, is non-existent. Of the eleven TSDR records cited by Mr. Zaentz, only one

relates to Alzheimer’s Disease –  – and it is markedly distinct from Opposer’s Marks. (See Zaentz Tr. at ¶ 92, *citing* Ex. X; 27 TTABVUE 19, 1052-1201 at 1061). Even if Applicant can overcome its lack of evidence as to use, this mark is so visually distinct from Opposer’s Marks, that it does not have any measurable effect on the confusion analysis. Given Opposer’s evidence of the commercial strength of its Marks, the “peripheral” third party use” of “Alzheimer’s” and “walk” do not change the outcome of this factor. *The Guardian Life Ins. Co. of Am. v. Ike Grupo Empresarial D de RL de CV*, Opp. No. 91228519, 36 TTABVUE 7-11, at 11, 2018 TTAB LEXIS 118 (TTAB Mar. 22, 2018) (noting the “substantial” operations of the opposer, and concluding that “Some degree of peripheral third-party use, not in direct competition with Opposer, can exist without detracting in a commercially meaningful way from the strength of Opposer’s mark.”)

To be sure, Opposer does not have (nor does it claim to have) a monopoly on the word “walk”. However, the existence of other registrations that apply to causes unrelated to Alzheimer’s but contain the word “walk” does not alter the analysis. The Board’s opinion in *Guardian Life Ins.* is instructive on this issue. In that case, the Board noted 34 uses of marks in the insurance and financial fields that

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<sup>23</sup> To the extent the Board considers the documents that comprise Exhibit BB and CC as Internet based evidence, because Mr. Zaentz has not properly laid a foundation for any of it, the Board should disregard that evidence that does not contain any source indicator as to a URL or date. (See *e.g.*, Zaentz Tr. at ¶ 94, Exs. BB-CC, 37 TTABVUE 1466-69, 1504, 1506-08, 1517-20, 1524-28, 1587). The Board should also disregard evidence that relates to use of marks outside the U.S. (See *e.g.*, Zaentz Tr. at ¶ 94, Ex. CC, 37 TTABVUE 1509-1516 (use of a mark in Australia)).



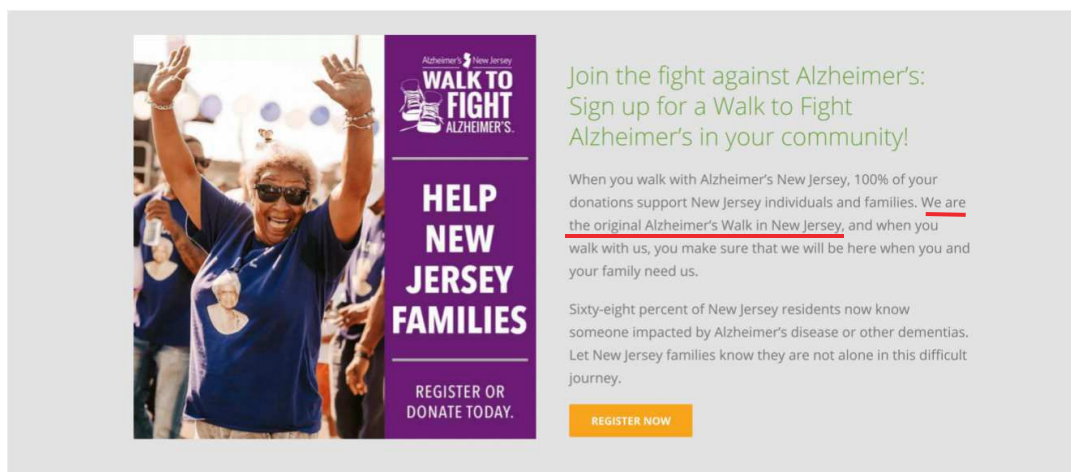
used “guardian”, but ruled that only relevant marks were those that directly intersected with the services covered by opposer’s mark. 36 TTABVUE 10, *Id.* at \*12-13 (“[I]t is the strength of Opposer’s mark in the insurance field that is of most significance.”).

Accordingly, this factor weighs in favor of Opposer.

**6. Applicant’s Intent in Adopting Applicant’s Mark was to Confuse Participants as to the Source of its Walk to Fight Alzheimer’s**

A party’s intent or bad faith in adopting a mark is relevant to the thirteenth *duPont* factor, which includes “any other established fact probative of the effect of use.” *duPont*, 476 F.2d at 1361, 117 U.S.P.Q. at 565. Applicant’s prior association with Opposer and its longstanding prior use of Opposer’s Marks both informs and enhances the likelihood of confusion. In this case, Applicant was a former licensee and user of Opposer’s Marks. (Zaentz CX at 33:7-18 and Ex. 7 thereto; 51 TTABVUE 28, 150-59). Having raised substantial monies using Opposer’s Marks, Applicant knew well the cachet and consumer recognition that the Marks carried.

Having previously licensed and used Opposer’s Marks, Applicant was indisputably familiar with Opposer’s Marks when it applied for Applicant’s Mark. Moreover, Applicant planned and executed its Walk to Fight Alzheimer’s events in the same locations during the same time frame as the Walk to End Alzheimer’s thus increasing the likelihood of confusion. (Zaentz CX at 48:4-49:18, 51 TTABVUE 53-54; Vizek Tr. at ¶¶ 40-41, 30 TTABVUE 14). Applicant also engaged in strategic misleading marketing to confuse prospective walk participants and donors. In a link to “register or donate” to the event, Applicant placed its confusingly similar mark directly next to text stating “We are the original Alzheimer’s Walk in New Jersey....”:



(Zaentz CX at 9:23-10:20, 51 TTABVUE 139-146 at 140; Opp. NOR 3 at Ex. 14, 29 TTABVUE 19-24; Garza Reb. Tr. at ¶ 26, *citing* Ex. M, 50 TTABVUE 12, 55-60).

It is undisputed that the first year of Applicant’s Walk to Fight Alzheimer’s event was in 2016 *after* Applicant has disaffiliated from Opposer, Alzheimer’s Association. Prior to 2016, Applicant organized *Alzheimer’s Association’s* Walk to End Alzheimer’s using Opposer’s Marks. (Zaentz CX at 61:12-62:14, 51 TTABVUE 66-67). Before Applicant disaffiliated from Opposer, the only Alzheimer’s walks in New Jersey were Opposer’s Memory Walk (the predecessor to Walk to End Alzheimer’s) and Walk to End Alzheimer’s. (Garza Reb. Tr. at ¶¶ 16, 26, *citing* Ex. M, 50 TTABVUE 7-8, 12, 55-60).<sup>24</sup> Applicant has admitted that the only charitable fundraising walks it ever operated in relation to Alzheimer’s awareness through and including 2015 were “Memory Walk and Walk to End Alzheimer’s.” Opp. NOR 2, Ex. 8 (App. Ans. to Int. No. 11); 28 TTABVUE 9. No doubt Applicant hoped that prospective donors would see the strikingly similar mark and assume (mistakenly) that they were registering or donating to Walk to End Alzheimer’s.

Equally suggestive of its bad faith is the fact that Applicant used Opposer’s Marks after its disaffiliation to advertise and promote its Walk to Fight Alzheimer’s. Applicant has admitted that it

<sup>24</sup> Ms. Garza’s Testimony Declaration contains a typo in the date of Applicant’s disaffiliation. The date is December 17, 2015. The Testimony Declaration mistakenly provides that it was December 17, 2018. (Garza Reb. Tr. at ¶ 26, 50 TTABVUE 12).

selected and authorized numerous social media posts promoting Walk to Fight Alzheimer's in which it displayed Opposer's Mark. Indeed, Applicant's social media is replete with photos promoting its Walk to Fight Alzheimer's event that prominently display individuals wearing t-shirts bearing Opposer's Marks. (Zaentz CX at 83:14-84:16, 87:11-89:5, 89:24-90:24, 90:25-94:4, 94:5-95:17, 100:21-103:9, 103:12-105:4 and Exs. 14-18, 21-22 thereto, 51 TTABVUE 88-89, 92-100, 105-10, 175-84, 189-92). The use of social media posts displaying Opposer's Marks to tout Walk to Fight Alzheimer's is indicative of bad faith.

Further, by its own admission purple, green, and white are the "signature colors of Alzheimer's New Jersey, Inc."

Q. And is it fair to say that purple, green, and white are the signature colors of Alzheimer's New Jersey, Inc.?

Counsel. Objection. This is beyond the scope of direct testimony. You can answer.

A. Yes.

Q. I'm sorry. I didn't hear that, sir?

A. Yes.

(Zaentz CX at 16:16-24, 51 TTABVUE 21). Applicant had no reason to change its color scheme or diverge from its "signature colors" other than to trade off Opposer's goodwill and confuse potential participants as to the source of its walk event. Due to the prior relationship between the parties, there can be, and is, no dispute that Applicant had prior knowledge of Opposer's Marks (as well as its use of purple and white on all of its major fundraising marks) before it applied for Applicant's Mark. (Zaentz CX at 60:5-9, 61:12-22, 51 TTABVUE 65-66). Moreover, following its disaffiliation, Applicant made no attempt to distinguish its Walk to Fight Alzheimer's event, holding it in the same locations and during the same time of year as Opposer's Walk to End Alzheimer's traditionally had been held. . (Zaentz CX 49:16-18, 71:19-72:3; 51 TTABVUE 54, 76).

Mr. Zaentz attempts to explain this uncanny similarity away and claims that the Applicant's Board of Directors selected the design for the Applicant's Mark in part because it was substantially identical to the Applicant's First Design Mark, fully incorporated the Applicant's Word Mark and Applicant's Third Prior Mark, incorporated elements of the Applicant's Prior Mark, Applicant's Second Prior Mark, and Applicant's Fourth Prior Mark and included a portion of Applicant's design marks with a purple background. (Zaentz Tr. at ¶ 82, 51 TTABVUE 17). Applicant's *post hoc* attempts to place a veneer of propriety over its selection of Applicant's mark by identifying the purported reasons it was chosen by Applicant's board were undermined by its President's own testimony.

Setting aside the fact that Mr. Zaentz's "statement" regarding Applicant's board is fundamentally hearsay, and thus inadmissible, Mr. Zaentz's justification for the selection of Applicant's Mark does not account for the shift to a solely purple and white mark. Nor could Mr. Zaentz establish any actual facts to substantiate that testimony. When questioned as to the basis for this representation, Applicant could not identify the number of board members that supposedly made the decision to use Applicant's Mark, could not recall how Applicant's Mark was presented to its board, the circumstances under which the mark was presented to the board, or whether it was presented in a written communication. (Zaentz CX at 56:20-6, 57:16-59:5, 51 TTABVUE 61-64). In fact, Mr. Zaentz had no knowledge of any actual salient facts regarding the board's decision to adopt Applicant's Mark:

Q. You don't know the basis upon which any single member of the board decided to approve the mark that's the "Walk to Fight Alzheimer's" logo?

A. No, I'm just -- no.

(Zaentz CX at 59:12-16, 51 TTABVUE 64).

Also relevant to this factor are Applicant's actions just prior to its disaffiliation from Opposer. The last Walk to End Alzheimer's event organized by Applicant as the Alzheimer's Association Greater New Jersey Chapter was on October 25, 2015. (Garza Reb. Tr. at ¶¶ 27-28, 50 TTABVUE 13). Less than two months later, on December 17, 2015, Applicant disaffiliated from Opposer. (Zaentz Tr.

at ¶ 31, 37 TTABVUE 9). Notwithstanding the fact that its disaffiliation was looming, and that it had no need for additional Walk to End Alzheimer’s marketing materials as the “walk season” was over, Applicant accessed Opposer’s internal web portal just before its disaffiliation downloaded numerous marketing materials that displayed Opposer’s Marks. (Garza Reb. Tr. at ¶¶ 27-28, *citing* Ex. N, 50 TTABVUE 13, 61-63).

There is only one conclusion that can be drawn from these actions. Applicant took those materials in an effort to copy Opposer’s modus operandi with regard to its Walk to End Alzheimer’s. Applicant’s shift from a green and purple mark on a white background to a rectangular purple and white mark with white lettering was simply in furtherance of that attempt and possibility that Applicant could divert unknowing participants and donors to its event.

This factor thus favors Opposer.

#### **7. There is Evidence of Actual Confusion**

Applicant admits that it “does not document or otherwise maintain a record” of instances where Applicant was contacted by an individual seeking to participate in Opposer’s Walk to End Alzheimer’s event. (Opp. NOR 2, at Ex. 8 (App. Ans. to Int. No. 7), 28 TTABVUE 9). But it does, only in the form of its social media posts. At a minimum, the social media posts for Walk to Fight Alzheimer’s that show that *Applicant itself* was confused as to the marks at issue, and participants allegedly at Applicant’s Walk to Fight Alzheimer’s event wearing clothing displaying Opposer’s Marks also evidence some level of confusion as to the sponsorship or source of Walk to Fight Alzheimer’s. (Zaentz Tr. at ¶ 83:14-84:16, 87:11-89:5, 89:24-90:24, 90:25-94:4, 94:5-95:17, 100:21-103:9, 103:12-105:4 and Exs. 14-18, 21-22 thereto, 51 TTABVUE 88-89, 92-100, 105-10, 175-84, 189-92). While evidence of confusion is not necessary to a finding of likelihood of confusion, actual confusion can constitute strong proof of a likelihood of confusion. *Weiss Assocs. v. HRL Assocs.*, 902 F.2d 1546, 1549, 14 U.S.P.Q.2d 1840, 1842 (Fed. Cir. 1990).

This factor favors Opposer.

## **B. Balancing of the *duPont* Factors**

An assessment of all of the relevant *duPont* factors demonstrates that a likelihood of confusion exists. The marks are visually, conceptually and aurally similar. Applicant cannot credibly dispute that the services offered under the marks are identical and that those services are offered in the same channels of trade – two critical factors in an likelihood of confusion analysis. The fame and strength of the mark under a Section 2(d) analysis is indisputable when considered both in isolation and in the context of other, similar fundraising walks. The third party marks upon which Applicant relies do not alter this analysis. The only similarity between those third party marks and the marks at issue is that they relate to charitable “walks”. Otherwise, they bear no similarity to Opposer’s Marks. When considered in the context of the parties’ prior relationship and Applicant’s prior use of Opposer’s Marks, the Applicant’s intent in selecting a purple, rectangular mark with similarly placed white capital lettering and virtually identical wording is clear. The evidence demonstrate that Applicant intended to benefit from the goodwill associated with Opposer’s Marks. The evidence also demonstrates that consumers have clearly believe that the services (here, the Walk events) emanate from the same source. To the extent there is any ambiguity as to confusion, it must be decided in favor of Opposer. “[A] party which knowingly adopts a mark similar to one used by another for the same or closely related goods does so at its own peril; all doubt on the issue of likelihood of confusion must be resolved against the newcomer.” *TBC Corp. v. Holsa Inc.*, 126 F.3d 1470, 44 U.S.P.Q.2d 1315, 1318 (Fed. Cir. 1997).

## **VIII. APPLICANT’S MARK IS LIKELY TO DILUTE THE WALK TO END ALZHEIMER’S MARK**

Assuming the Board finds a likelihood of confusion, it need not consider Opposer’s dilution claim. Nonetheless, Opposer can demonstrate that it satisfies all of the element necessary to prevail on its dilution claim.<sup>25</sup> As a threshold matter, Opposer can satisfy the indicia required to demonstrate

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<sup>25</sup> To prevail on a dilution claim under 15 U.S.C. § 1125(c) (Section 43(c) of the Lanham Act), a plaintiff must show that: (1) it owns a famous mark that is distinctive; (2) the defendant is using a mark in commerce dilutes the plaintiff’s

that its marks became famous before September 1, 2017, when Applicant began using Applicant's Mark.<sup>26</sup> (Zaentz Tr. at ¶ 85, 37 TTABVUE 18).

It is undisputed that Opposer has been using its marks for at least a decade and that Opposer's Marks are used in over 600 communities in every single state in the U.S. (Fuller Tr. at ¶ 22, 35 TTABVUE 8). Opposer's Marks have received considerable public exposure through its significant national and local marketing campaigns. Those national marketing campaigns, which have yielded exposure in national media such as CNN, MSNBC, Fox News, AMC, TLC, USA Network, The Weather Channel, HGTV, People Magazine, Time Magazine, Parade Magazine, and Better Homes and Gardens, is the result of Opposer's substantial [REDACTED] investment in such advertising from 2011 through September 1, 2017. (Fuller Tr. at ¶¶ 31a-e, *citing* Exs. G-N thereto, 23 TTABVUE 11-14, 58-98).<sup>27</sup> See *Nat'l Pork Board v. Supreme Lobster & Seafood Co.*, 96 U.S.P.Q.2d 1479, 1496, 2010 TTAB LEXIS 225, at \*60 (TTAB June 11, 2010 (citing advertising spend "in the neighborhood of" \$25 million per year as an indicia of fame)).

This extensive exposure and investment in Opposer's Marks has also given rise to recognition of the success of Opposer's Walk to End Alzheimer's by Peer-to-Peer Forum, a resource relied upon by nonprofit organizations. In 2016, the year before Applicant began using Applicant's Mark, Opposer's Walk to End Alzheimer's event (at which Opposer's Marks are featured) garnered a ranking as the fifth most successful walk even in the U.S. by fundraising dollars. (Vizek Tr. at ¶ 51, *citing* Ex. S, 30 TTABVUE 18, 219-60 at 240). All of these efforts are also reflected in the funds raised using Opposer's Marks throughout the U.S. From 2011 to through September 1, 2017, funds raised using

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famous mark; (3) the defendant's use of its mark began after the plaintiff's mark became famous; and (4) the defendant's use of its mark is likely to cause dilution by blurring or tarnishment. *Coach Servs.*, 668 F.3d at 1372.

<sup>26</sup> As the Board is well aware, the standard for fame for purposes of dilution is distinct from "fame" in a likelihood of confusion analysis. "Fame for likelihood of confusion purposes and fame for dilution purposes...are different concepts....While dilution fame is an either/or proposition – fame either does or does not exist – likelihood of confusion fame 'varies along a spectrum from very strong to very weak.'" *Palm Bay*, 396 F.3d at 1374-75, 73 U.S.P.Q.2d at 1694 (quoting *In re Coors Brewing Co.*, 343 F.3d 1340,1344, 68 U.S.P.Q.2d 1059, 1061, (Fed. Cir. 2003)).

<sup>27</sup> The corresponding public reference is 35 TTABVUE 11-14, 58-98.

those marks exceeds \$500,000,000.<sup>28</sup> (Garza Tr. at ¶¶ 23-24, *citing* C-F, 26 TTABVUE 247-55;<sup>29</sup> *see also* Vizek Tr. at ¶ 46a-e, *citing* Exs. P-T, 30 TTABVUE 15-17, 100-33 at 115, 134-76 at 157, 177-218 at 199, 219-60 at 240; 31 TTABVUE 4-49 at 32).

Also relevant to a claim for dilution is the extent of actual recognition of the mark. *TiVo Brands LLC v. Tivoli, LLC*, 129 U.S.P.Q.2d 1097, 1117 (TTAB 2018). Facts relevant to this consideration include the number participants who are exposed to Opposer's Marks on a year-to-year basis prior to September 1, 2017. A conservative estimate of that figure (that excludes 2017 entirely) is approximately 2,500,000. (*See* Garza Tr. at ¶ 22-23, *citing* Ex. C, 26 TTABVUE 9-10).<sup>30</sup> From 2015 through 2019, participation ranged from 500,000 to 526,000 people per year. Vizek Tr. at ¶ 46a-e, *citing* Exs. P-T, 30 TTABVUE 15-17, 100-33 at 115, 134-76 at 157, 177-218 at 199, 219-60 at 240; 31 TTABVUE 4-49 at 32). Complementing those figures is Opposer's own survey, which shows that aided awareness of Walk to End Alzheimer's amongst the general U.S. population was 24% in 2016. (Fuller Tr. at ¶¶ 35-37, 23 TTABVUE 16, 125-27).

As to the final element of dilution, Opposer's WALK TO END ALZHEIMER'S word mark has been registered on the Principal Register since April 3, 2012 and it has held common law rights in the WALK TO END ALZHEIMER'S Logo Mark since at least 2011. 15 U.S.C. § 1125(c)(2)(A).

#### **IX. APPLICANT'S AFFIRMATIVE DEFENSES HAVE NO MERIT**

The vast majority of Applicant's "Affirmative Defenses" are merely amplifications of its defenses. (*See* App. Am. Ans. ¶¶ 23, 25- 38, 21 TTABVUE 7). Applicant's remaining affirmative defenses are procedurally barred and/or legally impermissible. To the extent any of those remaining

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<sup>28</sup> This is a conservative estimate that assumes first use in 2011 and does not take into account funds raised between January 1, 2017 through September 1, 2017, which would account for a portion of the approximately \$89,000,000 raised in 2017 using Opposer's Marks.

<sup>29</sup> The corresponding public reference is 25 TTABVUE 247-55.

<sup>30</sup> The corresponding public reference is 25 TTABVUE 9-10.



affirmative defenses have been properly alleged, Applicant cannot meet the burden of proof to sustain them.

On April 27, 2000, the Board issued its order on the parties' cross motions for summary judgment and granted, in part, Opposer's Motion to Strike Applicant's named affirmative defenses. 19 TTABVUE 7. The Board also expressly noted that "Applicant's attempted reservation of the right to raise defenses in the future is also stricken." *Id.* at 8. In so ruling, the Board allowed Applicant "to replead its aforementioned affirmative defense(s), if the facts so warrant." *Id.* The Board did not allow Applicant to plead new affirmative defenses, which is consistent with the procedural posture of the case and the close of fact discovery months prior.

Nonetheless, Applicant, in its amended Answer and Affirmative Defenses, improperly pleaded numerous new – previously unpleaded – affirmative defenses, including the "noncommercial use defense", abandonment for "failure to police", and the "*Morehouse* defense". (App. Am. Ans. at ¶¶ 18-19, 24, 12 TTABVUE 5). As a threshold matter, those affirmative defenses are untimely pleaded and should not be considered by the Board.

**A. There Is Still No Basis Upon Which to Assert Affirmative Defenses of Laches, Estoppel or Acquiescence**

Aside from the procedurally defective attempt to introduced new defenses into the case, those defenses are legally unsound. The Board has already ruled that Applicant has no basis upon which to assert a laches, estoppel or acquiescence defense. The Board already addressed these issues in its ruling on the parties' cross motions for summary judgment. 19 TTABVUE 6-7. In short, as noted by the Board, these equitable defenses do not spring into being upon knowledge of the prior mark. Rather, they only apply to conduct occurring after the application has been published. *Nat'l Cable Television Ass'n Inc. v. Am. Cinema Editors, Inc.*, 937 F.2d 1572, 19 U.S.P.Q.2d 1424, 1432 (Fed. Cir. 1991) (laches does not run from knowledge of use; it runs from the date the application was published for opposition); *Bausch & Lomb Inc. v. Karl Storz GmbH & Co. KG*, 87 U.S.P.Q.2d 1526, 1531 (TTAB

2008) (“Conduct which occurs prior to the publication of the application for opposition generally cannot support a finding of equitable estoppel.”); *Barbara’s Bakery, Inc. v. Landesman*, 82 U.S.P.Q.2d 1283, 1292 n.14 (TTAB 2007) (defenses of laches, acquiescence or estoppel generally not available in opposition proceedings); TBMP § 311.02(b).

Notwithstanding, Applicant re-pleaded its laches, estoppel, and acquiescence affirmative defenses alleging as the factual basis for each of these defenses, the absence of an opposition *against a different mark*. (App. Am. Ans. ¶¶ 20-22, 21 TTABVUE 5-6). Opposer timely filed its Opposition to Applicant’s Mark.<sup>31</sup> That fact remains as true today as it was when the parties moved for summary judgment. Applicant has no bases upon which to allege those affirmative defenses.

#### **B. The Non Commercial use Exception is Not a Recognized Defense**

Applicant’s purported affirmative defense (to Opposer’s dilution claim) of “noncommercial use” is similarly legally defective. (App. Am. Ans. ¶ 24, 21 TTABVUE 7). Applicant fails to allege any facts to support the affirmative defense, but even if it did, the defense is unavailable. It too ignores established Board precedent that the noncommercial use exception as an affirmative defense to a dilution claim does not apply here. *Am. Express Marketing & Devel. Corp. v. Gilad Devel. Corp.*, 94 U.S.P.Q.2d 1294, 1297-99 (TTAB 2010) (“[W]e find that the “noncommercial use” exception set out in Trademark Act § 43(c)(3)(C) does not apply in a Board proceeding involving a mark sought to be registered as a trademark or service mark, because an applicant seeking registration is necessarily relying on a claim of use of its mark, or intended use of its mark, in commerce.”)

#### **C. Abandonment is Not a Proper Affirmative Defense**

Also legally uncognizable is Applicant’s “affirmative defense” of abandonment. (App. Am. Ans. ¶ 19, 21 TTABVUE 5). A claim of abandonment is not available as an affirmative defense.

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<sup>31</sup> 19 TTABVUE 7 (“Here, Applicant’s involved Application ‘112 was published for opposition on August 7, 2018, and the opposition was initiated timely on December 4, 2018, pursuant to Opposer requesting and being granted a 90-day extension of time to oppose for good cause, which extended the deadline until December 5, 2018. Based on these facts, the Board cannot conceive of a basis for Applicant to plead any of the listed equitable affirmative defenses.”)


Because it is an attack on the validity of Applicant’s registration, abandonment is only properly pleaded as a compulsory counterclaim. *Mango’s Tropical Cafe LLC v. Paradise Restaurant Group, Inc. of St. Augustine*, Cancellation No. 92055268, 37 TTABVUE 15, 2014 TTAB LEXIS 273, at \*21, n. 28 (TTAB July 3, 2014) (“Respondent also alleges failure to police, but without a counterclaim for cancellation due to abandonment, this argument constitutes an impermissible collateral attack on the validity of Petitioner’s registration. Trademark Rule 2.114(b)(2)(ii).”)

To the extent this “defense” is not a collateral attack on Opposer’s Marks, it is merely an amplification of Applicant’s denial that a likelihood of confusion exists and it is not a proper affirmative defense. *The Solomon-Page Group LLC v. Clinical Resources Network*, Opp. No. 91195692, 25 TTABVUE 11, 2012 TTAB LEXIS 124, at \*12 (TTAB Mar. 12, 2012) (striking purported affirmative defenses that of abandonment for failure to police as merely an amplification of applicant’s defenses).

**D. The *Morehouse* Defense Is Not Available Because the Marks are Significantly Different**

The *Morehouse* defense is only available in very limited circumstances – that is, where the marks in question are legally equivalent. *O-M Bread, Inc. v. U.S. Olympic Comm.*, 65 F.3d 933, 938-

39, 36 U.S.P.Q.2d 1041, 1045-46 (Fed. Cir. 1995). Here, Applicant’s prior mark () is

not substantially similar to Applicant’s Mark at issue in this proceeding ().<sup>32</sup>

Applicant’s prior and applied-for mark are markedly visually distinct. The use of purple and white transformed the applied-for-mark. It is that visual distinction – the change to an enclosed rectangular



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<sup>32</sup> Opposer filed an Opposition to Applicant’s application for the black and white version of Applicant’s Mark, which was filed without regard to color (Serial No. 88/115856). That proceeding is stayed pending the outcome of this one. *See* Opp. No. 91251201, 8 TTABVUE 1-5.

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purple and white mark – in addition to the similar wording, typeface, and layout of Applicant’s Mark to Opposer’s Mark that precludes the application of the *Morehouse* defense. Indeed, while Applicant claims substantial similarity for purposes of alleging the affirmative defense, Applicant itself deemed its prior mark sufficiently distinct such that it filed a new application for Applicant’s Mark. Also notable is the fact that Applicant specifically claimed purple and white as features of Applicant’s Mark. (Garza Tr. at ¶ 39, *citing* Ex. M; 25 TTABVUE 14, 298-358 at 299).

Opposer’s signature colors are purple and white. ((Vizek Tr. at ¶¶ 18, 23, 30 TTABVUE 8, 10; Garza Reb. Tr. at ¶ 33, 50 TTABVUE 33). Since its inception, Opposer has used those colors to distinguish itself. All of Opposer’s significant trademarks are displayed in purple and white as is Opposer’s website. (Vizek Tr. at ¶¶ 11, 18, 30 TTABVUE 6, 8-9, 20-29). As Ms. Garza testified, Applicant’s prominent use of green and white in its prior mark was not troubling to Opposer. (Garza Reb. Tr. at ¶ 32, 50 TTABVUE 15). However, the decision by Applicant to use a purple background with white lettering, combined with the similarity in the wording of the respective marks constituted, for Opposer, a significant departure from Applicant’s prior mark. (*Id.*) This is because the change materially alters the commercial impression of Applicant’s prior mark, thus eliminating the availability of the *Morehouse* defense. *See Disney Enter., Inc. v. Ronica Holdings Ltd.*, Opp. No. 91218136, 29 TTABVUE 6-7, 2015 TTAB LEXIS 128, at \*14-15 (TTAB Apr. 29, 2015) (ruling that the design

differences between the prior mark (  ) and applied-for-mark (  ) precluded application of the *Morehouse* defense); *The Solomon-Page*, 25 TTABVUE 16, (ruling that the applied-for-mark is not identical or substantially similar for purpose of the *Morehouse* defense, in part, because the applied-for-mark contains a design element that did not appear in the prior mark). This view is also consistent with the principle that the Board must consider the mark as a whole.

Stated differently, Opposer is not relying solely on the commonality of the words in Applicant’s Mark with those in its own Marks. It is also arguing that the use of purple and white, including in the

lettering and layout, contributes to the overall similarity. This argument is similar to that made in *Mag Instrument, Inv. v. The Brinkmann Corp.*, 96 U.S.P.Q.2d 1701 (TTAB 2010). There, the applicant argued that the *Morehouse* defense applied because it had prior registration for MAGNUM MAX, which precluded opposer from arguing MAGNUM MAXFIRE was confusingly similar. *Id.* at 1711.

The Board disagreed, noting:

Here, Mag Instrument does not rely solely on the common element, MAGNUM, as the only source of similarity between its MAG-NUM STAR mark and Brinkmann's MAGNUM MAXFIRE mark. Mag Instrument also argues that the addition of the element FIRE in the applied-for mark contributes to the overall similarity because "FIRE is quite close to...STAR in meaning...[the] terms connote burning brightness and illumination." Thus, we cannot conclude that the differences between Brinkmann's registered mark and its applied-for mark are totally irrelevant or that the marks are effectively equivalents for purposes of the *Morehouse* defense.

*Id.* at 1711-12. That same principle applies here as it is the *new* features of Applicant's Mark that give rise to Opposer's Section 2(d) claim.

Finally, the Applicant's Mark and its prior mark do not have identical services. "The presence of overlapping goods and services alone does not support the application of the *Morehouse* defense where the opposed application includes goods and services which are different from those listed in the registration." *Disney*, Opp. No. 91218136, 29 TTABVUE 11, citing *La Fara Importing Co. v. F. Lli de Cecco di Filippo Fara S. Martino S.p.a.*, 8 U.S.P.Q.2d 1143, 1147 (TTAB 1988). Here, in addition to other differences in the recitation of services, the prior mark includes "charitable fundraising services by means of running and walking events" which, while related to the services in the applied-for-mark, still constitute a difference in the goods and services, and thus renders the *Morehouse* defense inapplicable. *Disney*, Opp. No. 91218136, 29 TTABVUE 12, citing *Teledyne Technologies Inc. v. Western Skyways Inc.*, 78 U.S.P.Q.2d 1203, 1209 (TTAB 2006) ("[I]t is clear that 'aircraft log books' and 'repair and maintenance services, namely, aircraft engine overhaul and reconditioning services' covered by respondent's prior registrations are related to the tools, that is, 'aircraft engines,' listed in the registration petitioner seeks to cancel. Nevertheless, the goods in the involved registration clearly

are different from the goods and services listed in the prior registrations.”); *TBC Corp. v. Grand Prix Ltd.*, 12 U.S.P.Q.2d 1311, 1314 (TTAB 1989) (“[I]t is clear that the goods in the five registrations opposer relies upon for its prior registration defense are related to and within the natural scope of expansion of a producer of the goods listed in the three registrations applicant seeks to cancel. Nevertheless, the goods in the registration are different.”)

**X. CONCLUSION**

For the foregoing reasons, Opposer, Alzheimer’s Disease and Related Disorders Association Inc., respectfully requests that this Board deny registration of the application assigned Serial No. 87/797112.

Dated: April 9, 2021

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

Alzheimer's Disease and Related  
Disorders Association Inc.,

Opposer,

v.

Alzheimer's New Jersey, Inc.

Applicant.

Opposition No. 91245121

**APPENDIX A - ALZHEIMER'S DISEASE AND RELATED  
DISORDERS ASSOCIATION INC.'S MOTION TO STRIKE**

Opposer, Alzheimer's Disease and Related Disorders Association Inc., respectfully requests that the Board strike Exhibits G and H to Kenneth Zaentz's trial testimony Declaration, submitted at 37 TSDR 52-83, 84-112 and also incorporated into Applicant's First Notice of Reliance (38 TTABVUE 2). Exhibits G and H purport to be transcripts of trial proceedings in the Superior Court of New Jersey, Chancery Division.

Pursuant to C.F.R. § 2.122(f) and TBMP § 704.13, testimony taken in an action in a court between the same parties may be used in a pending Board proceeding "on motion granted by the Board." The testimony must also be relevant and material. Opposer requests that the Board strike Exhibits G and H for two, independent reasons. First, Applicant, Alzheimer's New Jersey Inc., did not at any time file a motion seeking to use the testimony that is the subject of Exhibits G and H. TBMP § 704.13 requires that a party seeking to introduce such testimony do so by motion.

Second, the subject of those actions has no relevance or probative value to the instant proceeding. Kenneth Zaentz, Applicant's President, testified on cross-examination that the disputes that are the subject of those actions relates to proceeds from the estates of two individuals. (Zaentz CX at 45:19-46:19, 51 TTABVUE 50-51). Mr. Zaentz further testified that neither of the lawsuits that are the subject of Exhibits G and H relate to the trademarks that are the subject of this Proceeding or their respective use. (Zaentz CX at 46:20-47:9, 51 TTABVUE 51-52). Therefore, even assuming Applicant could overcome the procedural defect in seeking to introduce this evidence, it has no relevance to any of the issues in this Proceeding.

WHEREFORE, Opposer respectfully requests that this Court strike Applicants Exhibits G and H, at 37 TTABVUE 52-83 and 84-112 pursuant to 37 C.F.R. § 2,123(e)(3) and TBMP § 707.03(c).

Dated: April 9, 2021

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/Shima Roy/

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and complete copies of Opposer, Alzheimer's Disease and Related Disorders Association Inc.'s: (i) Confidential Trial Brief, (ii) Public Trial Brief, and (iii) Appendix A - Motion to Strike have been served on Lisa D. Taylor at:

Inglesino, Webster, Wyciskala & Taylor  
60 Parsippany Road, Suite 204  
Parsippany, New Jersey 07054

by forwarding said copies on April 9, 2021 by email to: ltaylor@iwt-law.com and ltaylor@iwwt.law.

Dated: April 9, 2021

/Shima S. Roy/  
Shima S. Roy