

No. 16-

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**In the Supreme Court of the United States**

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LEE JASON KIBLER, d/b/a DJ LOGIC, PETITIONER,

v.

ROBERT BRYSON HALL, II; VISIONARY MUSIC GROUP, INC.;  
WILLIAM MORRIS ENDEAVOR ENTERTAINMENT, LLC;  
THREE OH ONE PRODUCTIONS, LLC; UMG RECORDINGS,  
INC., d/b/a DEF JAM RECORDINGS, RESPONDENTS.

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT*

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

There is a long-standing circuit conflict as to whether balancing likelihood of confusion factors in a trademark infringement case is a question of law for the court or a question of fact for the trier of fact. *Frisch's Restaurants, Inc. v. Elby's Big Boy, Inc.*, 670 F.2d 642 (6th Cir.), *cert. denied*, 459 U.S. 916 (1982) (White, J., dissenting, citing conflicting decisions). Only the courts of appeals for the Second, Sixth, and Federal Circuits balance the factors as an issue of law rather than an issue of fact for the trier of fact.

*Hana Financial, Inc. v. Hana Bank*, 574 U.S. \_\_\_\_ (No. 13-1211, Jan. 21, 2015) holds that a claim of “tacking” in a trademark infringement case is a question of fact for the trier of fact, not a question of law for the court, resolving a similar circuit conflict. Deciding likelihood of confusion is the same kind of fact-intensive inquiry as tacking. The questions presented here are:

1. Whether the courts below erred by balancing the trademark likelihood of confusion factors as an issue of law rather than a question of fact, contrary to this Court’s analysis in *Hana Financial* and the majority of circuits.

2. Whether the court of appeals erred by affirming summary judgment against petitioner where it applied the wrong standard of review for balancing the trademark likelihood of confusion factors.

**RULES 14.1 AND 29.6 STATEMENTS**

All parties are identified in the caption of this petition. Petitioner was the plaintiff in the United States District Court for the Eastern District of Michigan and was the appellant in the court of appeals.

Petitioner is a natural person.

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## **PETITION FOR A WRIT OF CERTIORARI**

Petitioner Lee Jason Kibler respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

### **OPINIONS AND ORDERS BELOW**

The opinion and judgment of the court of appeals (Appendix, *infra*, 1a-30a) (“App.”) is reported at 843 F.3d 1068 (6th Cir. 2016). The order and judgment of the United States District Court for the Eastern District of Michigan (App. 31a-45a) are not yet reported.

### **JURISDICTION**

The judgment of the court of appeals was entered on December 13, 2016. On March 1, 2017, Associate Justice Elena Kagan extended the time within which to file a petition for a writ of certiorari to and including May 12, 2017. This Court has jurisdiction under 28 U.S.C. 1254(1).

### **STATUTES INVOLVED**

The relevant provisions of the Trademark Act are more fully set forth in Appendix J, *infra*.

### **STATEMENT**

The issues presented are of exceptional importance to uniform application of the likelihood of confusion test for trademark infringement under the Trademark Act of 1946 (Lanham Act), 15 U.S.C.

1114(1) and 1125(a)(1). These issues arise in almost every federal trademark infringement case. The application of this important trademark law test in district courts and on appeal should be uniform.

The majority of federal circuits have long held that the balancing of relevant factors in determining likelihood of confusion is a question of fact or mixed question of fact and law which must be decided by the trier of fact, not by judges as a matter of law. 4 J. McCarthy, *Trademarks and Unfair Competition* § 23:71 (4th ed. 2016); 2 Anne Gilson Lalonde, *Gilson on Trademarks* § 8.05, at 8-159-8-173 (2016). These circuits also review the *balancing* of the relevant factors as a question of fact for the trier of fact, not questions of law for *de novo* review by trial or appellate judges.<sup>1</sup>

Only the Second, Sixth, and Federal Circuits still review the *balancing* of the likelihood of confusion

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<sup>1</sup> First: *Boston Duck Tours, LP v. Super Duck Tours, LLC*, 531 F.3d 1, 15 (1st Cir. 2008); Third: *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1024 (3d Cir. 2008); Fourth: *Petro Stopping Centers, L.P. v. James River Petroleum Incorporated*, 130 F.3d 88, 91-92 (4th Cir. 1997); Fifth: *National Business Forms & Printing, Inc. v. Ford Motor Company*, 671 F.3d 526, 532 (5th Cir. 2012); Seventh: *Door-Oliver, Incorporated v. Fluid-Quip, Incorporated*, 94 F.3d 376, 380 (7th Cir. 1996); Eighth: *First National Bank in Sioux Falls v. First National Bank South Dakota*, 679 F.3d 763, 769 (8th Cir. 2012); Ninth: *Levi Strauss & Co. v. Blue Bell, Inc.*, 778 F.2d 1352, 1356 and n. 5 (9th Cir. 1985) (en banc); Tenth: *John Allan Company v. Craig Allen Company L.L.C.*, 540 F.3d 1133, 1139 (10th Cir. 2008); Eleventh: *Frehling Enterprises, Inc. v. International Select Group, Inc.*, 192 F.3d 1330 (11th Cir. 1999); D.C.: *Reader's Digest Association v. Conservative Digest, Inc.*, 821 F.2d 800, 804 (D.C. Cir. 1987).

factors as a question of law or a mixed question of fact and law for decision by the court.<sup>2</sup> 4 *McCarthy* § 23:71, at 23-347; and 2 *Gilson* § 8.03[7][b], at 8-107.

This Court’s decision in *Hana Financial, Inc. v. Hana Bank*, 574 U.S. \_\_\_ (No. 13-1211, Jan. 21, 2015) held that the issue of “tacking” in a trademark infringement case is a question of fact to be determined by the trier of fact, not by judges as a matter of law. *Id.*, slip op. 1, 8. This Court has long held that Fed. R. Civ. P. 52(a) governs appellate ttbetween so-called “subsidiary” facts and “ultimate” facts. *Pullman-Standard v. Swint*, 456 U.S. 263, 287 (1982) (op. of White, J.).

The balancing of likelihood of confusion factors presents the same fact-intensive inquiry as tacking and should be decided by the trier of fact, not by a judge as a matter of law.

This Court has previously declined to review the circuit conflict on this issue.<sup>3</sup> The time is right to

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<sup>2</sup> Second: *Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc.*, 973 F.3d 1033, 1043 (2d Cir. 1992) (acknowledging circuit conflict); Sixth: *Frisch Restaurants, supra*; Federal Circuit: *Juice Generation, Inc. v. GS Enterprises LLC*, 794 F.3d 1334, 1338 (Fed. Cir. 2015) (ultimate conclusion treated as question of law, underlying facts reviewed under “substantial evidence” standard); see *Dickinson v. Zurko*, 527 U.S. 150 (1999) (“substantial evidence” test applies to Fed. Cir. review of PTO fact finding under Administrative Procedure Act, 5 U.S.C. 706).

<sup>3</sup> *L.A. Gear, Inc. v. Thom McAn Shoe Company*, 988 F.2d 1117, 1132 (Fed. Cir.), *cert. denied*, 510 U.S. 908 (1993) (applying New York law); *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1427-1428 (7th Cir. 1985), *cert. denied*, 475 U.S. 1147

apply the *Hana Financial* and *Pullman-Standard* analyses to this issue and resolve the decades-long conflict among the circuits on the proper application of the likelihood of confusion test on appellate review and in the district courts.

The minority rule results in judges improperly deciding factual issues as a matter of law, *i.e.* balancing likelihood of confusion factors, which should be resolved in a plenary trial, either before a jury or judge. Where the plaintiff has demanded a jury trial, the minority rule will deprive that plaintiff of the right to jury trial. U.S. Const. amend. VII.

Petitioner is a musical artist and performer from the Bronx, New York, who has used “DJ Logic” and “Logic” as his trademarks since 1999 as a recording artist and live performer. He performs and records as a turntablist and DJ with his own and others’ musical groups in a variety of styles, including rap, jazz, rock, alternative, funk, pop, and electronic music. He tours extensively in the United States and elsewhere with his own musical groups and those of others.

Respondent Hall is a rap artist in his 20s from Maryland who also records and tours throughout the United States. He originally used the trademarks Young Sinatra and Psychological. In 2009, Hall began using “Logic” alone as a trademark.

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(1986); *Frisch’s Restaurants, Inc. v. Elby’s Big Boy, Inc.*, 670 F.2d 642 (6th Cir.), *cert. denied*, 459 U.S. 916 (1982) (White, J., dissenting, citing conflicting circuit decisions).

As the senior user of his marks DJ Logic and Logic, Petitioner sued junior user Hall and others, claiming that Hall's use of the "Logic" trademark created a likelihood of confusion and injured Petitioner, in violation of the Lanham Act and parallel Michigan law. Petitioner also asserted claims of dilution, unfair competition, and sought a declaratory judgment that respondent Hall's company is not entitled to register "Logic" as a mark. App. 60a-81a.

Petitioner and respondent Hall both sell musical recordings through the same sources and perform in many of the same live venues around the United States. The other respondents assist Hall in the distribution and sale of his recordings and arranging his performances using the mark "Logic." Petitioner established many instances of actual confusion with petitioner's marks resulting from respondents use of "Logic." App. 48a-59a, 67a-68a.

The district court granted summary judgment for respondents, applying the Sixth Circuit's eight-factor likelihood of confusion test. In the Sixth Circuit, the determination of the individual likelihood of confusion factors is considered a question of fact but the *balancing* of those factors is treated as a question of law for the court under *Frisch's Restaurants, Inc. v. Elby's Big Boy, Inc.*, 670 F.2d 642, 648 (6th Cir.), *cert. denied*, 459 U.S. 916 (1982) (White, J., dissenting). App. 35a, 40a-41a.

The district court below cited the correct test for summary judgment, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986),



App. 4a, but in essence made findings of fact on various factors, including strength of the marks, relatedness of goods and services, similarity of the marks, the significance of petitioner's evidence of actual confusion, marketing channels, and others. App. 35a-40a. The judge then *balanced* the *Frisch* factors as a matter of law as required by Sixth Circuit precedent, but contrary to the majority rule in the circuits. Pet. note 1, *supra*.

On appeal, the Sixth Circuit affirmed summary judgment for respondents. App. 1a-30a. The Circuit disagreed with the district court's evaluation of some *Frisch* factors, which it acknowledged as factual issues, but agreed with the district court's balancing of the *Frisch* factors, which the circuit court reviewed *de novo* as a matter of law, citing a subsequent *Frisch* decision applying the same test. *Frisch's Rest., Inc. v. Shoney's Inc.*, 759 F.2d 1261, 1264 (6th Cir. 1985). App. 6a. Both courts below concluded there were no triable issues of fact, though the Sixth Circuit disagreed with the district court's conclusions as to some of the individual factors.<sup>4</sup>

The long-standing conflict among the circuits on the test for likelihood of confusion warrants review by the Court because of its importance and because the minority rule on the issue is entrenched and contrary to this Court's recent decision on trademark "tacking"

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<sup>4</sup> Petitioner did not raise the issue of the conflict among the circuits in the district court or court of appeals. Both courts are bound by the long-standing rule in the Sixth Circuit that balancing the *Frisch* factors is a question of law for the court.

in *Hana Financial* and Fed. R. Civ. P. 52(a). *Pullman-Standard, supra*, 456 U.S. at 287.

### A. Relevant Trademark Law.

The Trademark Act of 1946 (Lanham Act), 15 U.S.C. 1051 *et seq.*, establishes a system for registration and nationwide protection of trade and service marks. 15 U.S.C. 1051, 1114. Actual use ordinarily creates trademark rights.<sup>5</sup> Registration affords additional protection, but the Act also protects common law trade and service marks. 15 U.S.C. 1125(a). *B & B Hardware, Inc. v. Hargis Indus., Inc.*, \_\_\_ U.S. \_\_\_ (No. 13-352, Mar. 24, 2015), slip op. 3, 5. The same likelihood of confusion test applies to claims of infringement of registered and unregistered marks. 15 U.S.C. 1114 and 1125(a). *Id.*

The first to use a mark has “priority over other users.” *Hana Financial, supra*, slip op. 1. The senior user of a mark can prevent a subsequent junior user from using the same or a *similar* mark where that use creates a *likelihood* of confusion with the senior user’s mark, regardless of whether the senior user’s mark is registered or unregistered. 15 U.S.C. 1114, 1125(a).

The Lanham Act and principles of unfair competition recognize, *inter alia*, claims for product and services confusion, source confusion, initial interest confusion, forward confusion, and reverse

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<sup>5</sup> Since 1988, the Lanham Act allows intent to use applications for registration of marks, provided that actual use commences within a specified time after notice of allowance of the mark. 15 U.S.C. 1051(b)(1).

confusion. 4 *McCarthy* §§ 23:5-23:10, at 23-48.2-23-80. Petitioner here asserted initial interest confusion, forward confusion, and reverse confusion. App. 72a, ¶ 50.

The test for infringement of a registered or unregistered mark is the same – the *likelihood* that the junior user’s mark will create confusion among consumers in a variety of different ways. 15 U.S.C. 1114, 1125(a). *KP Permanent Make-up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 117 (2004); *Two Peso, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 780 (1990).

It is not necessary to establish actual confusion in order to obtain relief for infringement of either a registered or unregistered mark; “[e]vidence of actual confusion is the strongest proof of likely confusion.” App. 17a-18a. “[O]nce the party alleging infringement has put forward evidence of actual confusion, the alleged infringer is left ‘fighting an uphill battle in arguing that no reasonable factfinder could find a substantial likelihood of confusion.’” *Dorpan, S.L. v. Hotel Meliá, Inc.*, 728 F.3d 55, 69 (1st Cir. 2013) (internal citation omitted); see 2 *Gilson* § 5.04[1], at 5-72.

The courts of appeals have developed their own lists of factual considerations for determining whether a trademark owner has established likelihood of confusion. The factors are fundamentally the same, even if articulated in somewhat different terms. 2 *McCarthy* § 24:30, at 24-82; 2 *Gilson* § 5.02, at 5-23. The factors derive from the Restatement of Torts (1938). *Polaroid Corp. v.*

*Polarad Electronics Corp.*, 287 F.2d 492 (2d Cir.), *cert. denied*, 368 U.S. 820 (1961) (op. of Friendly, Cir. J.). See *B & B Hardware*, *supra*, at 16.

The majority of circuits also agree that *balancing* the factors is a question of fact for the trier of fact, subject to appellate review under the “clearly erroneous” standard of review. Fed. R. Civ. P. 52(a)(6). 4 *McCarthy* § 23:73, at 23-349 (“clear majority of circuits follow the rule that likelihood of confusion is an issue of fact reviewed on appeal under a deferential ‘clearly erroneous’ standard”). Pet. note 1, *supra*.

The Sixth Circuit’s likelihood of confusion *Frisch* factors are:

1. strength of the plaintiff’s mark
2. relatedness of the products
3. similarity of the marks
4. evidence of actual confusion
5. parties’ marketing channels
6. likely degree of purchaser care
7. defendant’s intent in selecting the mark
8. probability that the product lines will expand.

App. 5a-6a.

The Second, Sixth, and Federal Circuits are alone in holding that *balancing* the relevant likelihood of confusion factors is a question of law to be determined by the trial judge as such and reviewed *de novo* on appeal. 2 *McCarthy* §§ 23:71, 23:73, at 23-347 and 23-349 *ff.* Pet. note 2, *supra*. Cf. *Hana Financial*, *supra*,

at 3 (holding that “tacking” is question of fact, noting that Sixth and Federal circuits erroneously treated the issue as one of law).

The test for summary judgment is well-settled. “[T]he substantive law [governing the claims in the case] will identify which facts are material.” *Anderson, supra*, 477 U.S. at 248. “[A]ll that is required [to defeat summary judgment] is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing versions of the truth at trial.” *Id.* (citation omitted). A judge cannot weigh or resolve disputed facts on summary judgment. *Id.* at 249. The judge “must construe the evidence and all reasonable inferences ... in the light most favorable to the non-moving party.” *Matsushita*, 475 U.S. at 587. “Determining the weight and credibility of the evidence is the special province of the trier of fact.” *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 856 (1982).

While summary judgment is not necessarily disfavored, *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986), “those [circuit] courts holding that likelihood of confusion is a question of fact often conclude that the determination of likelihood of confusion poses a genuine dispute of material fact that should be left for trial.” 3 *Gilson* § 8.03[7][b], at 8-107 (footnote citing cases omitted); *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 155 (4th Cir. 2012) (summary judgment reversed where “district court did not properly apply the summary judgment standard but instead viewed the evidence much as it would during a bench trial”).

## **B. Facts Relevant to Petitioner's Trademark Claims.**

Petitioner Kibler grew up and lives in the Bronx, the original home of hip hop music. He began performing as a DJ in high school and in 1999 adopted the names DJ Logic and the shortened Logic. Kibler Depo. 1-10. He started out as a DJ for neighborhood parties, but soon began performing as a turntablist in a variety of musical styles and groups, “including hip-hop, jazz, rock, alternative, funk, pop and electronic ....” App. 46a-47a, ¶ 2.

Petitioner's performances are recorded on at least nine albums between 1999 and 2013 on various labels, all identifying him as DJ Logic, variously entitled *Project Logic*, *Zen of Logic*, *Popper Project featuring DJ Logic and Jason Miles*, and *Beka & Logic Project*. App. 47a-48a, ¶ 3.

Petitioner's recorded music is available for purchase through Amazon.com, iTunes (Apple's music application), Spotify, Pandora, and YouTube. Kibler Decl. ¶ 11.

In addition to performances with his own group of musicians, petitioner regularly performs and records with other well-known artists.<sup>6</sup> He was also a

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<sup>6</sup> Petitioner has performed and recorded with Carly Simon, John Mayer, Jack Johnson, Widespread Panic, O.A.R, Ben Harper, Maroon 5, Bob Weir, Vernon Reid of Living Colour, John Popper of Blues Traveler, The Roots, Marcus Miller, Billie Holiday (remix), Nina Simone (remix), Warren Haynes, Eldar

performer with Arturo O’Farrill & the Afro Latin Jazz Orchestra, which won a Grammy award for Best Latin Jazz in 2014; petitioner received a Grammy certificate as a result. Kibler Resp. Sum. Judg., Kibler Depo. 88-89, Ex. 27.

Since at least 1999, petitioner has performed widely with his own group using his mark DJ Logic and Logic His performances have been in intimate jazz clubs as well as performing arts centers, stadiums, amphitheaters, and music festivals in at least 46 different states in the United States, including the Bonaroo Music Festival in Tennessee. He has also performed in Canada and Belgium. App. 48a-49a, ¶ 4, Ex. 21 (Pollstar.com record of live performances).<sup>7</sup> Petitioner employs a booking agent for his live performances. App. 51a, ¶ 11.

Petitioner has appeared as a performer as DJ Logic with other artists and groups on various television shows, including The Tonight Show Starring Jimmy Fallon and The Today Show on NBC, Good Morning America on CBS, as well as on CNN, BBC, and TLC Networks, among others. App. 48a-49a, ¶ 4. He is also a featured artist as DJ Logic on a number of music-related films.<sup>8</sup>

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Djangirov, Christian McBride, Medeski, Miles Davis Estate and Miles Electric Band. App. 48a-49a, ¶ 4.

<sup>7</sup> Pollstar.com records show that petitioner performed with his DJ Logic group a total of 490 times between May 2001 and December 2013. App. 48a-49a, ¶ 4, Ex. 21. `

<sup>8</sup> These films include *Yohimbe Brothers*, a film by Jerome de Missolz (2008) and *Wetlands Preserved: The Story of An Activist Rock Club* (2008), *Moogfest 2006 Live* (2007), *Particle*

Petitioner has been recognized as a performing artist using the marks DJ Logic and Logic in a variety of books, newspapers, magazines, and publications and online articles.<sup>9</sup> App. 52a-54a, ¶ 15.

As the importance of the internet emerged, Petitioner established his own website, [www.djlogic.com](http://www.djlogic.com), and pages on MySpace, Twitter, and Facebook, where he promotes his recordings and live performances. App. 51a, ¶ 11.

Petitioner learned of respondent Hall's use of the mark "Logic" and the confusion it was causing when petitioner's then-booking agent Jon Prine received an email asking if DJ Logic was available for a live show at a night club in State College, Pennsylvania. App. 56a-57a. After petitioner's booking agent responded that petitioner was available, the night club agent explained that "I thought you had this DJ Logic. [www.facebook.com/MindOFLogic...](https://www.facebook.com/MindOFLogic...)" *i.e.*, respondent Hall's Facebook page. App. 57a.

In addition, petitioner learned of at least 10 other instances of actual confusion among his fans or

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*Transformations Live* (2006), *The Best of the Jammys, Vol. Two* (2007), and *Warren Haynes: The Benefit Concert: Vol. 8* (2008). These films were originally released on DVD and most are also available online. Kibler Resp. Sum. Judg., Ex. 32.

<sup>9</sup> An article in *Downbeat* magazine discusses petitioner's performances in a variety of musical styles, referring to him as "DJ Logic" and "Logic" throughout the article. Jason Koransky, "First Take: Of Genres and Generations," *Downbeat*, Vol.78, No. 11, pp. 8 *ff.* (Nov. 2006). Kibler Resp. Sum. Judg., Ex. 34.



musical venues because of respondent Hall's confusing use of the mark "Logic." App. 50a-51a, ¶ 6-10.

Petitioner also determined that respondent Hall had performed as "Logic" in at least 16 of the same live venues around the country where petitioner has performed as "DJ Logic" and "Logic." App. 49a-50a, ¶ 5.

Petitioner first registered his mark "DJ Logic" for live performance and entertainment with the United States Patent and Trademark Office ("PTO") in 2000. App. 83a. It was cancelled because of inadvertent non-renewal in 2007. Petitioner reapplied for registration of "DJ Logic" on November 8, 2012; he again obtained registration on July 23, 2013 for sound recordings and live performances. App. 84a-85a.

Respondent Hall is a rapper from Maryland in his 20s. Respondent Three Oh One Productions, LLC is his production company. App. 63a, 86a-90a. He originally performed using the name Young Sinatra and then as Psychological. In 2008 and 2009, Hall shortened his performing and recording name from Psychological to Logic. Decl. of Patricia Carlson, Ex. 6, Hall Depo. 29:15-20.

Hall explained that before he adopted the mark Logic, he did his own search for other users of the name Logic on Facebook, Twitter, and Google. He reportedly found other rappers using the name Logic, but none which he considered "big enough to deter [him] from using the name...." Kibler Resp. Sum. Judg., Ex. 26, Hall Depo. 32-33.

Respondent Visionary Music Group is Hall's management company, established by Chris Zarou in 2011 when he began managing Hall. Zarou Decl. ¶ 2, Doc. 86. Respondent William Morris Endeavour Entertainment, LLC is Hall's booking agent; it books Hall's live performances in various venues using his mark Logic. Respondent Def Jam is a record company which entered a recording agreement with Hall and released his debut album *Under Pressure* in October 2014, referring to Hall as Logic. These respondents have used Hall's infringing mark "Logic" in connection with their promotion and distribution of Hall's recordings and performances. App. 61a, 67a-68a, ¶¶ 3-4, 29-36.

Petitioner's counsel sent a cease and desist demand to Hall's manager and booking agent on September 10, 2012 regarding Hall's infringing use of petitioner's mark. Kibler Resp. Sum. Judg., Ex. 5. Counsel for Hall's manager responded that he would review the matter and get back to petitioner's counsel. Kibler Resp. Sum. Judg., Ex. 6.

Hall stated that he was unaware of petitioner until his manager received the cease and desist demand from 's counsel. Instead of responding to petitioner's cease and desist letter, on October 17, 2012, Hall's company filed an application with the U.S. Patent and Trademark Office to register the mark "Logic" for Hall's performances and recordings. App. 86a-90a.<sup>10</sup>

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<sup>10</sup> Petitioner opposed Hall's application to register "Logic" with the PTO. He has sought a stay of the opposition proceeding

In his company's application, Hall declared under 18 U.S.C. 1001 that "to the best of his ... knowledge and belief no other person ... has the right to use the mark in commerce ...," App. 89a, despite the fact that his manager's counsel had received notice of petitioner's claim of infringement of his mark only three weeks earlier.

**C. The District Court Dismissed  
Petitioner's Claims on Summary  
Judgment, Balancing the Likelihood  
Of Confusion Factors As a Matter of  
Law.**

On January 4, 2014, petitioner filed a verified complaint against respondents in the United States District Court for the Eastern District of Michigan, alleging violations of the Lanham Act, the Michigan Consumer Protection Act, MCL § 445.901, unfair competition, and seeking a declaration that Hall's company was not entitled to register his claimed mark "Logic." App. 60a-81a. Petitioner claimed that respondents' infringement caused initial interest confusion, forward confusion, and reverse confusion. App. 72a, ¶ 50. He sought damages, injunctive relief, costs, and attorney's fees. App. 78a-81a. Venue was based, *inter alia*, on Hall's performance in the district using the mark "Logic."<sup>11</sup>

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pending the outcome of this petition. *Lee Jason Kibler v. Three Oh One Productions LLC*, Opp. No. 91217634 (TTAB).

<sup>11</sup> Petitioner's verified complaint did not contain a jury demand, though he had intended that his case be heard by a

Following discovery, respondents filed separate motions for summary judgment on May 27, 2015, which petitioner opposed. The district court held a hearing on October 30, 2015 and filed an order and judgment dated November 9, 2015 granting summary judgment for respondents. App. 31a-45a.

The district court acknowledged that respondents bore the burden of establishing that there were no genuine issues of fact for trial, that all evidence and inferences must be viewed in the light most favorable to petitioner, and that a genuine issue of fact exists when “a reasonable jury could return a verdict for the nonmoving party.” App. 34a (citation omitted).

The district court recognized that the Sixth Circuit’s “*Frisch* factors” determine whether there is a likelihood of confusion in a trademark infringement case and considered the Michigan statutory and unfair competition claims together with the Lanham Act claim. App. 34a-35a. The court listed and discussed each factor, and weighed the facts it considered relevant to each. App. 35a-41a.

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jury. In his opposition to summary judgment, petitioner did request a jury trial. Kibler Resp. Sum. Judg., p. 25). Under F.R.Civ.P. 39(b), a district court may, on motion, “order a jury trial on any issue for which a jury might have been demanded.” *Moody v. Pepsi-Cola Metropolitan Bottling Co., Inc.*, 915 F.2d 201, 206-208 (6th Cir. 1990); *Kitchen v. Chippewa Valley Schools*, 825 F.2d 1004, 1012-1013 (6th Cir. 1987) (allowing untimely jury demand); 9 Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 2321, at 271 and n. 11 (2008). The courts below did not address petitioner’s request regarding a jury since his complaint was dismissed on summary judgment.

The district court then balanced the factors:

In the Court's estimation, the *Frisch* balancing inquiry in this case boils down to weighing Plaintiff's evidence of actual confusion, which supports Plaintiff, against the strength of Plaintiff's mark and its similarity to Defendant Hall's mark, which support Defendants. Because Plaintiff's evidence of actual confusion does not exceed a handful of instances in the context of the parties' careers, the Court holds it insufficient to overcome the overall weakness of Plaintiff's mark, its dissimilarity from Defendant Hall's mark, and the lack of support from other factors. In other words, the Court holds that Plaintiff has raised no genuine issue of material fact regarding likelihood of confusion. The Court therefore grants Defendants summary judgment on Plaintiff's trademark infringement and related claims.

App. 40a-41a. The judge recognized that under Sixth Circuit precedent, he must balance the factors as a matter of law. App. 35a, 41a.<sup>12</sup> Petitioner filed a timely notice of appeal.

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<sup>12</sup> The court rejected petitioner's dilution claim. It concluded that petitioner's mark was not "famous," finding no evidence from which a jury could find that "DJ Logic is '*widely* recognized by the *general consuming public* .... 15 U.S.C. § 1125(c)(2)(A)" (emphasis in original). App. 42a.

**D. The Sixth Circuit Affirmed Summary Judgment Dismissal, Balancing Confusion Factors As a Matter of Law Under Its Precedent.**

The Sixth Circuit affirmed the judgment of the district court, though it disagreed with the district court's findings as to various *Frisch* factors for determining likelihood of confusion, including on the strength of petitioner's mark and the parties' marketing channels used. App. 12a, 21a.

The court of appeals briefly summarized the background of the case and stated that it reviewed summary judgment *de novo*. App. 3a-4a. It explained that "we affirm summary judgment when there is no evidence that would allow a reasonable jury to find for the nonmoving party..." citing *Anderson v. Liberty Lobby, supra*, but viewed "all facts and inferences in the light most favorable to the nonmoving party..." citing *Matsushita, supra*. App. 5a.

The court explained the two elements of a trademark claim as whether plaintiff has a protectable mark and "whether relevant consumers are likely to confuse the sources of the parties' products." App. 5a. It acknowledged that the parties agreed that petitioner's mark is protectable. *Id.*

The court erroneously concluded that "[t]he relevant consumers are potential buyers of defendant's products..." stating that it would thus "focus on the likelihood that potential buyers of rap music would believe [petitioner's] music is [respondent] Hall's or vice-versa." App. 5a. This focus

was too narrow given the many types of confusion at issue. They involved not only the parties recordings, but their appearances as live performers, where petitioner presented several instances of actual confusion and asserted initial interest confusion, forward confusion, and reverse confusion. App. 72a, ¶ 50.

The Sixth Circuit reviewed the district court’s analysis of its *Frisch* factors for determining likelihood of confusion. App. 5a-27a.<sup>13</sup> It recognized that petitioner need not establish each factor and that each case is unique. App. 6a. It explained that “[a]s part of de novo review, we have a duty to consider and weigh the relevant facts in light of the *Frisch* factors.” App. 27a. It is this minority rule of judicial balancing of the relevant factors which challenged in this case and rejected by the vast majority of courts of appeals. Pet. note 1, *supra*.

1. *Strength of Petitioner’s Marks.* The district court had found that petitioner’s mark “DJ Logic” was “moderately strong conceptually” but had “little commercial strength,” supposedly because petitioner had only moderate album sales in recent years and overall, had no current recording contract, and never had a major contract. App. 10a. The court of appeals agreed that petitioner’s mark was “at least as

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<sup>13</sup> The Sixth Circuit cited *Frisch’s Rest., Inc. v. Shoney’s Inc.*, 759 F.2d 1261, 1264 (6th Cir. 1985) as the source of *Frisch* factors. App. 5a. That case cites an earlier *Frisch* decision as the source of the *Frisch* factors. *Frisch’s Restaurants, Inc. v. Elby’s Big Boy, Inc.*, *supra*. The district court cited this earlier *Frisch* decision. App. 35a.

conceptually strong as a finding of incontestability would...,” but that petitioner’s mark was not commercially strong; despite that, it said the district court’s “analysis was incomplete and at times flawed.” App. 7a, 10a, 12a.

The court of appeals recognized that petitioner submitted evidence of his promotional activities on the internet, was interviewed in publications such as *Downbeat* and the *New York Times*, and had performed widely throughout 46 states, as well as on major television shows. Despite that extensive evidence, the court concluded that petitioner was required to “offer evidence that would permit a reasonable jury to determine that wide segments of the public recognize “DJ LOGIC” as an emblem of his music.” App. 10a. Though the court rejected respondents’ contention that supposedly similar third party marks weakened petitioner’s mark, it ultimately agreed that the first *Frisch* factor supported respondents because it concluded petitioner’s mark was “weak commercially.” App. 14a.

The courts below focused only on petitioner’s registered mark DJ Logic, disregarding evidence that he had long used the unregistered mark “Logic” in addition to the registered mark “DJ Logic.” App. 52a, ¶ 13).

2. *Relatedness of the Goods.* The court of appeals agreed that the relatedness of the goods factor was neutral, “because the record supports that the parties’ products are somewhat related, but not directly competitive.” App. 15a. This erroneous conclusion



disregards the fact that the parties' styles of music do overlap (though petitioner performs in more varied styles), that their recordings are available through many of the same internet-based outlets, including Amazon, and iTunes, and that respondent Hall also performs with a DJ or turntablist. App. 52. 52a, ¶ 14. They perform live in many of the same venues around the United States. App. 49a. This also ignores the closely related evidence of actual confusion directly related to consumer interest their live performances and venues. App. 50a-51a, ¶¶7-10; 56a-59a.

3. *Similarity of the Marks.* Petitioner registered the mark DJ Logic but also used Logic as a common law mark which was widely used, separate from his registered one. App. 52a, ¶ 13. In several press articles the authors refer to petitioner as both DJ Logic and as Logic, including articles in *Downbeat* magazine and *The New York Times*. Kibler Resp. Sum. Judg., Ex. 34.

Both courts below ignored the evidence that petitioner used both DJ Logic and Logic separately. App. 52a, ¶ 13. They instead focused on the so-called anti-dissection rule which they concluded did not permit them to separate "DJ" from "Logic" in petitioner's registered mark. App. 15a-17a.

They refused to compare petitioner's use of Logic with respondent Hall's use of the identical word because petitioner had "not registered 'LOGIC' alone as a separate trademark ...," App. 17a. They ignored the fact that petitioner has been separately using Logic as a common law mark. App. 52a, ¶ 13. It is use, not registration, which creates a mark. Thus,

both courts erroneously concluded that similarity of the marks factor favored respondents, despite petitioner's evidence separate use the identical mark Logic and of actual confusion.

4. *Evidence of Actual Confusion.* The court of appeals recognized that “[e]vidence of actual confusion is the strongest proof of likely confusion.” App. 17a-18a. Petitioner submitted evidence of 10 instances of actual confusion by consumers between petitioner and Hall. App. 52a, ¶¶ 6-10; 56a-57a.

Despite the unique importance of actual confusion, the district court concluded that petitioner's evidence was weak compared to respondent Hall's album sales and online popularity. App. 38a-39a. The court of appeals agreed, characterizing petitioner's evidence of actual confusion as “scant.” App. 18a-19a.

5. *Marketing Channels.* Petitioner and Hall are musicians and performers who both record and sell their recordings and who both perform live around the country in a variety of different venues. Both petitioner and respondents market their recordings and performances using many of the same marketing channels – including Facebook and Twitter, and their sound recordings are downloaded or streamed through many of the same outlets, including Amazon and iTunes. App. The district court concluded this factor was neutral, while the court of appeals concluded that “shared use of the above websites does not help us determine the likelihood of confusion.” App. 22a. It further concludes that this evidence “would not permit a reasonable jury to find that

[petitioner's] and [ Hall's] customers substantially overlap ...," *id.*, though it does not explain why.

6. *Likely Degree of Purchaser Care.* Both courts considered this factor insignificant and petitioner did not address it below. App. 23a-24a, 40a.

7. *Intent in Selecting the Mark.* A party's intent in choosing a particular mark may be relevant to likelihood of confusion. Petitioner Hall testified that, before adopting the mark "Logic," he searched Google, Facebook, and Twitter looking for "any other rappers" using the name "at a level where it wouldn't make sense for two people to coexist with the same name." App. 25a. Petitioner explained that a slightly different search by Hall would have revealed petitioner's use of "DJ Logic" and "Logic" as trademarks in the same field as recording artists and live performers. App. 52a, ¶ 12.

The fact that Hall admittedly conducted an informal, unprofessional search, however limited, shows that he was aware of the significance of trademarks and of the need to avoid likely confusion. However, Hall's testimony and search demonstrated that he did not understand that prior users of trademarks have superior rights; it was not sufficient to conclude, as Hall did, that there was no one at the same "level" using the same mark.

Nevertheless, the court of appeals agreed with the district court that Hall's intent in choosing "Logic" as a mark was neutral. App. 25a. The courts also disregarded the fact that in Hall's declaration in support registration of "Logic" incorrectly stated that

he knew of no conflicting use, shortly after learning of petitioner's cease and desist demand. App. 89a-90a.

8. *Likelihood of Expansion*. The likelihood that either the senior or junior user of a mark may expand their business into competition with the other is a relevant factor. App. 26a. The court of appeals agreed with the district court that this factor was neutral because, in their view, petitioner had not shown that either he or Hall would likely expand to be in competition. App. 26a-27a.

These determinations disregard the fact that Petitioner and Hall were already in competition. Petitioner started out as a traditional hip hop artist and DJ in the Bronx, which certainly competed with Hall as a rapper, who also used a DJ and turntablist. App. a, ¶ 14. Petitioner early on expanded his scope as a musical performer into rock, pop, and jazz over his long career but they both continued to perform in many of the same venues throughout the United States. App. 49a-50a, ¶ 5.

9. *Balancing the Frisch Factors*. The Sixth Circuit explained that “[a]s part of de novo review, we have a duty to consider and weigh the relevant facts in light of the *Frisch* factors...” App. 27a. It briefly concluded that “evidence of actual confusion favors [petitioner] only marginally and both the strength of [petitioner's] mark and similarity of the marks favor [respondents]...,” stating that “these are the ‘most important factors’” (citation omitted). App. 28a.

The panel concluded that [b]ecause no reasonable jury could find a likelihood of confusion based solely

on a few instances of actual confusion, [respondents] are entitled to judgment as a matter of law on [petitioner's] federal trademark infringement and related state law claims.”<sup>14</sup> App. 28a. Accordingly, the court of appeals affirmed summary judgment for respondents.

### REASONS FOR GRANTING THE PETITION

Likelihood of confusion is the core test of liability for trademark infringement under the Lanham Act and unfair competition law. The courts of appeals agree on the relevant factors to determine likelihood of confusion, but articulate them in slightly different ways. The majority of circuits agree that the determination and balancing of these factors is a question of fact for the trier of fact, not a question of law for the court. Pet. note 1, *supra*; 4 *McCarthy* § 23:71; 2 *Gilson* § 8.05, at 8-159-8-173. Only the Second, Sixth and Federal Circuits treat the balancing of these factors as a question of law or a mixed question of fact and law for the court, rather than an issue of fact for the trier of fact. Pet. note 2, *supra*.

The Court should grant certiorari to finally resolve the decades-long conflict among the circuits as to

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<sup>14</sup> The courts below also held that petitioner did not present triable issues of material fact on his federal dilution claim, concluding that DJ Logic “is simply in a different league from the marks that have met this threshold.” App. 30a. Neither court addressed petitioner’s claim for a declaratory judgment that Hall’s mark Logic is not entitled to registration, since the complaint was dismissed in its entirety.

whether the balancing of the likelihood of confusion factors in a trademark infringement case is a question of law for a court or a question of fact for the trier of fact.<sup>15</sup> This is the fundamental issue at the core of virtually every trademark infringement case.

This Court held in *Hana Financial, supra*, that the question of “tacking” is a fact question for the trier of fact in a trademark infringement case. The Court explained: “[b]ecause the tacking inquiry operates from the perspective of an ordinary purchaser or consumer, we hold that a jury should make this determination.”<sup>16</sup> *Hana Financial, supra*, slip op. 1. This analysis is fully applicable to balancing the fact-bound factors relevant to determining likelihood of confusion.<sup>17</sup> This is a task for the trier of fact, either a jury or the judge at a bench trial.

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<sup>15</sup> This Court first denied certiorari in 1982 in another trademark case from the Sixth Circuit case presenting the same issue. *Frisch’s Restaurant, Inc. v. Elby’s Big Boy, Inc.*, 670 F.2d 642 (6th Cir.), *cert. denied*, 459 U.S. 916 (1982) (White, J., dissenting, citing conflicting circuit decisions). The Court denied review in two subsequent cases presenting the issue. Pet. note 3, *supra*.

<sup>16</sup> The Court noted that the Sixth Circuit was in the minority by erroneously concluding that “tacking” was a question of law for the court. *Hana Financial, supra*, slip op. 3.

<sup>17</sup> The Court in *Hana Financial* relied upon the same principle articulated in a criminal case, that “the jury’s constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence.” *United States v. Gaudin*, 515 U.S. 506, 514 (1995). *Accord, Hurst v. Florida*, 577 U.S. \_\_\_, No. 14-7505, slip op. 1

## I. Balancing the Likelihood of Confusion Factors in a Trademark Infringement Case Is a Question of Fact For the Trier of Facts.

The Court should now establish that balancing the likelihood of confusion factors in a trademark infringement case is a question of fact for a jury or the trial judge in a bench trial, not a question of law, based upon its analysis in *Hana Financial*.<sup>18</sup>

The circuits already agree that the determination of each individual likelihood of confusion factor is a question of fact, but only the Second, Sixth and Federal Circuits continue to treat the balancing of these factual factors as a question of law for the court.

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(Jan. 12, 2016) (“Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death”).

<sup>18</sup> 2 *Gilson* § 8.05[1][a], at 8-161-8-162 explained:

The Court’s reasoning in *Hana Financial* that juries are best suited to provide the opinion of an ordinary consumer applies with full force to likelihood of confusion. “Application of a test,” said the Court, “that relies upon an ordinary consumer’s understanding of the impression that a mark conveys falls comfortably within the ken of a jury.” It will now be difficult if not impossible for courts to continue to hold that likelihood of confusion is a question of law.

*Accord*, 4 *McCarthy* § 23:72, at 23-348 (after *Hana Financial*, “difficult for the minority view circuits to continue to adhere to the view that likelihood of confusion is an issue of law”).

This minority view cannot withstand scrutiny after *Hana Financial*.

The Sixth Circuit’s minority view creates legal error in application of the likelihood of confusion test in its district courts and on its judicial review of those determinations on appeal. In the district court, it means that judges are making determinations as a matter of law that rightly belong to a jury or to the judge sitting as trier of fact on a plenary record. *United States v. Gaudin*, 515 U.S. 506, 513 (1995) (“jury decide[s] guilt or innocence on every issue, which includes application of the law to the facts”); *accord, Hurst v. Florida, supra*.

Courts of appeals must review findings of fact in a district court under the deferential “clearly erroneous” rule. Fed. R. Civ. P. 52(a)(6). *Pullman-Standard, supra*, 456 U.S. at 287.

Under minority rule in trademark infringement cases, including this case, the courts of appeals review the factual findings as to the individual factors under the “clearly erroneous” test, but review the *balancing* of these factors *de novo* as questions of law. As a result, the role and findings of the jury or the trial judge in a bench trial is wrongly allocated, contrary to Fed. R. Civ. P. 52(a)(6). In a case where a party has made a jury demand, that party is deprived of the right to a jury trial on the issue of likelihood of confusion under the Seventh Amendment. U.S. Constit. amend. VII



## II. The Minority Rule Prevents Proper Application of the Test for Summary Judgment on Likelihood of Confusion Issues.

Under Fed. R. Civ. P. 56(a), a district court can grant summary judgment only “if the movant shows that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law.” A district judge cannot decide or resolve conflicting issues of material fact on a motion for summary judgment. *Anderson, supra*, 477 U.S. at 249; *accord, Tolan v. Cotton*, 572 U.S. \_\_\_ (No. 15-551, May 5, 2014), slip op. 8.<sup>19</sup>

The materiality of the facts on summary judgment is determined by the governing law applicable to the particular claims in the case. *Anderson, supra*, 477 U.S. at 248. Here, the governing law is the correct test for determining likelihood of confusion in a trademark infringement case.

In the majority of circuits, the jury or judge at a bench trial would find the facts as to each relevant likelihood of confusion factor and would also balance those factors to reach the ultimate conclusion whether there is a likelihood of confusion or not.

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<sup>19</sup> As the Court explained in *Anderson*, “all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties’ different versions of the truth at trial.” *Anderson, supra*, 477 U.S. at 249 (citation omitted).

“The issues of likelihood of confusion, trademark validity, secondary meaning and intention are generally considered to be complex questions of fact requiring trial.” 2 *Gilson* § 8.03[7], at 8-104. While summary judgment may be used in any case where the criteria are properly established, *Anderson, supra*, it is critical that the summary judgment rules and the substantive law be correctly applied.

On a motion for summary judgment in the majority of circuits, the issue whether there were genuine issues of fact as to the substance of the individual factors *and* whether a reasonable jury could conclude that there was likelihood of confusion on the basis of these factors. The judge would not have any role in balancing the factors.

Under the Sixth Circuit’s minority rule, however, the *balancing* of likelihood of confusion factors is *always* a legal question for the judge, either on summary judgment or at trial, and is never an issue for the trier of fact. This also results in erroneous application of the Rule 56 summary judgment test.

This result is contrary to this Court’s analysis and holding in *Hana Financial* and in conflict with the majority of circuits where the trier of facts will determine *and* balance the factors to determine likelihood of confusion. Pet. note 1, *supra*.

### **III. The Issues Are Important and the Circuit Conflict Is Long-Standing.**

The issues presented are of exceptional importance to proper application of the likelihood of confusion test for trademark infringement in district courts and on review in the courts of appeals. The conflict among the circuits has endured for decades without resolution. *See* Pet. notes 1 and 2, *supra*.

This Court's analysis in *Hana Financial* -- that the issue of "tacking" in a trademark case is a fact question, not a legal questions -- should be determinative here. Then the finder of fact in a trademark infringement case will not only evaluate the facts relevant to the likelihood of confusion factors, it will also weigh and balance those factors in determining whether likelihood of confusion has been established. Appellate review of those findings will then be subject to the deferential "clearly erroneous" rule mandated in Fed. R. Civ. P. 52(a)(6). *Pullman-Standard, supra*, 456 U.S. at 287.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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May 12, 2017

## **APPENDIX**

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**APPENDIX A**

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**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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LEE JASON KIBLER, dba DJ Logic,  
*Plaintiff-Appellant,*

*v.*

ROBERT BRYSON HALL, II; VISIONARY  
MUSIC GROUP, INC.; WILLIAM  
MORRIS ENDEAVOR ENTERTAINMENT,  
LLC; THREE OH ONE PRODUCTIONS,  
LLC; UMG RECORDINGS, INC., dba  
Def Jam Recordings,  
*Defendants-Appellees.*

No. 15-2516

Appeal from the United States District Court  
for the Eastern District of Michigan at Detroit.  
No. 2:14-cv-10017—Arthur J. Tarnow, District Judge.

Argued: September 27, 2016

Decided and Filed: December 13, 2016

Before: COLE, Chief Judge; DAUGHTREY and  
MOORE, Circuit Judges.

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**COUNSEL**

**ARGUED:** C. Enrico Schaefer, TRAVERSE LEGAL, PLC, Traverse City, Michigan, for Appellant. David Brafman, AKERMAN LLP, West Palm Beach, Florida, for Hall Appellees. Michael B. Garfinkel, PERKINS COIE LLP, Los Angeles, California, for Appellee William Morris Endeavor. Eric J. Shimanoff, COWAN LIEBOWITZ & LATMAN, P.C., New York, New York, for Appellee UMG Recordings. **ON BRIEF:** C. Enrico Schaefer, Mark G. Clark, TRAVERSE LEGAL, PLC, Traverse City, Michigan, for Appellant. David Brafman, AKERMAN LLP, West Palm Beach, Florida, for Hall Appellees. Michael B. Garfinkel, PERKINS COIE LLP, Los Angeles, California, for Appellee William Morris Endeavor. Eric J. Shimanoff, COWAN LIEBOWITZ & LATMAN, P.C., New York, New York, for Appellee UMG Recordings.

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**OPINION**

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COLE, Chief Judge. Lee Jason Kibler, a disc jockey, brought federal trademark infringement, related state law, and federal trademark dilution claims against Robert Bryson Hall, II, a rapper, and professional entities supporting Hall's work. The district court granted summary judgment to defendants on all claims. Kibler has appealed that judgment, requiring us to answer two questions. First, has Kibler provided evidence sufficient to find

that relevant consumers are likely to confuse the sources of his and Hall's products? Second, has Kibler provided evidence sufficient to find that Hall has diluted Kibler's mark? We conclude no and thus affirm the grant of summary judgment.

### I. BACKGROUND

Kibler uses turntables and others' vocals to produce music containing jazz and funk elements, among others. He has performed and released several albums under the name "DJ LOGIC" since 1999 though he currently has no record deal. Kibler registered "DJ LOGIC" as a trademark in 2000, allowed the registration to lapse in 2003, and re-registered the name in 2013. He has also been known as just "LOGIC."

Hall has performed under the name "LOGIC" since 2009. He previously used the names "Young Sinatra" and "Psychological." Three Oh One Productions is Hall's personal company and Visionary Music Group his management company (with Hall, "the Hall defendants"). UMG Recording d/b/a Def Jam Recordings ("Def Jam") is Hall's record label and William Morris Endeavor Entertainment ("WME") his booking agent.

In September 2012, Kibler's attorney sent Visionary Music Group and WME an email ordering them to stop using the name "LOGIC" and to recall any product or advertisement that did. The attorney maintained that such use infringed on Kibler's mark. The next month, Three Oh One Productions applied to register "LOGIC" as a trademark.



In January 2014, Kibler filed suit against the defendants in the U.S. District Court for the Eastern District of Michigan. He alleged the following claims: 1) trademark infringement in violation of the Lanham Act, 15 U.S.C. § 1125(a) (2012); 2) breach of the Michigan Consumer Protection Act (“MCPA”), Mich. Comp. Laws § 445.901–.922 (1977); 3) unfair competition under Michigan law; and 4) trademark dilution in violation of the Lanham Act, 15 U.S.C. § 1125(c) (2012).

In March 2014, defendants delayed Hall’s tour and first album release due to ongoing settlement negotiations that ultimately collapsed. Def Jam proceeded to release the album in October of that year. It sold over 170,000 copies.

In May 2015, defendants moved for summary judgment on all of Kibler’s claims. The parties fully briefed the matter and the district court held a hearing. In November 2015, the court granted defendants’ motion in all respects.

## II. ANALYSIS

### A. Standard of Review

We review a district court’s grant of summary judgment *de novo*. *Med. Mut. of Ohio v. k. Amalia Enters. Inc.*, 548 F.3d 383, 389 (6th Cir. 2008); *Daddy’s Junky Music Stores, Inc. v. Big Daddy’s Family Music Ctr.*, 109 F.3d 275, 280 (6th Cir. 1997) (clarifying that the rule holds in trademark infringement cases). Summary judgment is appropriate when the record shows “no genuine dispute as to any material fact.” Fed. R. Civ. P. 56(c).

In other words, we affirm summary judgment when there is no evidence that would allow a reasonable jury to find for the nonmoving party, entitling the moving party to judgment as a matter of law. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); Fed. R. Civ. P. 56(c). We view all facts and inferences in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

## **B. Trademark Infringement**

Kibler has made no separate arguments for his state law claims, and they rely on the same allegations as his federal trademark infringement claim. For these reasons, we address the state law claims along with the trademark infringement claim.

This court considers whether trademark infringement has occurred using a two-step test. First, we determine whether plaintiff's mark is protectable. *Innovation Ventures, LLC v. N.V.E., Inc.*, 694 F.3d 723, 728 (6th Cir. 2012). Then, we assess whether relevant consumers are likely to confuse the sources of the parties' products. *Id.*; *Homeowners Grp., Inc. v. Home Mktg. Specialists, Inc.*, 931 F.2d 1100, 1107 (6th Cir. 1991). The relevant consumers are potential buyers of defendant's products. *Maker's Mark Distillery, Inc. v. Diageo N. Am., Inc.*, 679 F.3d 410, 419 (6th Cir. 2012). Here, the parties agree Kibler's mark is protectable. So we focus on the likelihood that potential buyers of rap would believe Kibler's music is Hall's or vice-versa.

In assessing the likelihood of confusion, we

take into account the following eight “*Frisch*” factors: 1) strength of the plaintiff’s mark, 2) relatedness of the products, 3) similarity of the marks, 4) evidence of actual confusion, 5) parties’ marketing channels, 6) likely degree of purchaser care, 7) defendant’s intent in selecting the mark, and 8) probability that the product lines will expand. *CFE Racing Prods., Inc. v. BMF Wheels, Inc.*, 793 F.3d 571, 592 (6th Cir. 2015) (citing *Frisch’s Rest., Inc. v. Shoney’s Inc.*, 759 F.2d 1261, 1264 (6th Cir. 1985)).

Plaintiff need not establish each factor to prevail. *Id.* Each case is unique, so not all of the factors will be helpful. *Homeowners*, 931 F.2d at 1107. Further, there is no designated balancing formula for the factors. *CFE Racing*, 793 F.3d at 592. “The[ir] enumeration is meant ‘merely to indicate the need for weighted evaluation of the pertinent facts in arriving at the legal conclusion of confusion.’” *Id.* (quoting *Frisch*, 759 F.2d at 1264).

### *1. Strength of Plaintiff’s Mark*

The first *Frisch* factor favors defendants. While Kibler has shown that “DJ LOGIC” is moderately strong conceptually, he has failed to provide evidence of the mark’s commercial strength.

The stronger a mark is, the greater the risk of confusion. *Homeowners*, 931 F.2d at 1107. A mark cannot be strong unless it is both conceptually and commercially strong. *Maker’s Mark*, 679 F.3d at 419. And it cannot be conceptually strong unless it is inherently distinctive. *Id.* Arbitrary marks, which convey something unrelated to the product they

announce, *e.g.*, the “Apple” in “Apple computers,” are distinctive. *Therma-Scan, Inc. v. Thermoscan, Inc.*, 295 F.3d 623, 631 (6th Cir. 2002); *see also Maker’s Mark*, 679 F.3d at 420 (finding red dripping wax seal announcing bourbon inherently distinctive, and hence conceptually strong). Descriptive marks, which describe the product they announce, are usually indistinctive. *See, e.g., Therma-Scan*, 295F.3d at 632 (finding “Therma-scan,” which describes the services plaintiff performs, indistinctive, and hence conceptually weak).

Further, courts presume that an incontestable mark is conceptually strong. *Daddy’s*, 109 F.3d at 282. A mark is incontestable when it has not been successfully challenged within five years of its registration. *Id.*; *see Dieter v. B & H Indus. of Sw. Fla., Inc.*, 880 F.2d 322, 328 (11th Cir. 1989) (explaining that merely descriptive marks cannot be registered as trademarks unless they have acquired a secondary meaning).

In this case, the district court found that “DJ LOGIC” is moderately strong conceptually. The court reasoned that while “DJ” describes Kibler’s craft, “LOGIC” is not even “suggestive of the characteristics of [his] music.” *Kibler v. Hall*, No. 14-10017, 2015 WL 6865928, at \*2 (E.D. Mich. Nov. 9, 2015). Defendants concede this. Kibler contends only that the court erred in not considering the mark’s incontestability. We need not address this argument because we agree with the district court’s assessment, which renders “DJ LOGIC” at least as conceptually strong as a finding of incontestability would.

But a mark can be conceptually strong without being commercially strong, and thus weak under *Frisch. Maker's Mark*, 679 F.3d at 419–20. A mark's commercial strength depends on

public recognition, the extent to which people associate the mark with the product it announces. *Id.* at 419.

Survey evidence is not a prerequisite for establishing public recognition, but it is the most persuasive evidence of it. *See, e.g., id.* at 421 (characterizing proof of “extensive marketing” and “widespread publicity” around a mark as abundant evidence of public recognition); *Frisch*, 759 F.2d at 1265 (relying on evidence that around thirty percent of respondents identify non- plaintiff restaurants with plaintiff's mark to conclude mark is commercially weak). Proof of marketing is not a prerequisite either. *Therma-Scan*, 295 F.3d at 632. But plaintiffs lacking such proof must provide other evidence of “broad public recognition.” *Id.*

Conversely, proof that third parties have extensively used a trademark or similar trademarks in the relevant market indicates the trademark is commercially weak. *Homeowners*, 931 F.2d at 1108. The presumption is that the third parties have muddled the mark's source. In *Homeowners*, for example, defendant offered evidence that many “real estate related firms” were using trademarks identical or similar to plaintiff's. *Id.* We found that a reasonable jury could determine that the use had weakened plaintiff's mark because plaintiff sold to real estate brokers and defendant sold to real estate sellers. *Id.*

at 1103, 1108. *Compare id.* at 1108 *with Maker's Mark*, 679 F.3d at 420–21 (denying third-party use of similar marks has weakened plaintiff's mark because it occurred among all distilled spirits rather than the relevant market of tequila).

Here, the district court concluded that “DJ LOGIC” is commercially weak. The court cited Kibler's lack of survey or marketing evidence and limited commercial success. *Kibler*, 2015 WL 6865928, at \*3 (noting sale of fewer than 300 albums in past three years and fewer than 60,000 albums in past sixteen years; current lack of a recording contract; and inability ever to secure a recording contract with a major label). The court found that third parties have weakened the mark even further by marketing music under nearly ninety variations of “logic.”

Kibler admits he offered no survey evidence, but claims that the district court treated it as a prerequisite. He further argues he provided marketing evidence. First is a sworn declaration that he advertises in print and online, including on MySpace, Twitter, and Facebook. Second are a 2006 *Downbeat* article featuring him, a 2001 *New York Times* review mentioning him, and a 1999 *Gig* article featuring him. Third is a sworn declaration that he has appeared on television shows such as *The Tonight Show Starring Jimmy Fallon*, *The Today Show*, and *Good Morning America*. Kibler also points to his tours and online music sales as proof of marketing. Additionally, Kibler insists he is commercially successful, noting that there is no fixed number of album sales establishing commercial success. Kibler

denies that third parties have weakened his mark.

Defendants reinforce the district court's findings. Def Jam and WME argue that Kibler's failure to provide the number of his Facebook "likes" or Twitter followers creates an adverse inference, dismiss the publications as obscure and out-of-print, and question the number of people who have attended Kibler's concerts. All of the defendants highlight Kibler's deposition testimony that he appeared on the television shows to support other, headlining artists.

The district court properly found that Kibler's evidence would prevent a reasonable jury from concluding that "DJ LOGIC" is commercially strong. But its analysis was incomplete and at times flawed. The court did not treat survey evidence as a prerequisite for establishing commercial strength. Rather, it also considered whether Kibler had provided marketing evidence. The court erred, however, in finding that he had not. Promotion on platforms such as Twitter and Facebook not only constitutes marketing, but is among the most popular and effective advertising strategies today. And whether publicity like magazine interviews and television appearances constitutes marketing or a separate form of evidence, it speaks to commercial strength. *See Maker's Mark*, 679 F.3d at 421.

But *some* proof is not enough. Kibler must offer evidence that would permit a reasonable jury to determine that wide segments of the public recognize "DJ LOGIC" as an emblem of his music. This means "extensive" marketing and "widespread" publicity around the music and mark. *Id.* Kibler's evidence may

not create an adverse inference of broad recognition, but it lacks the information jurors would need to find such awareness. For instance, how many and what kind of Twitter followers does Kibler have? A large number of followers, or celebrities likely to re-tweet Kibler's messages to their large number of followers, for example, would suggest that many types of people know his work and mark. We can say the same of the number and kind of Kibler's Facebook fans, likes, posts, and re-posts.

Similarly, Kibler fails to provide the circulations or target audiences of *Downbeat* and *Gig*, which appear to be niche publications. Further, the *New York Times* review focuses on two other artists, placing "DJ Logic" in a series of supporting musicians. This leaves a slim chance that readers noticed and recalled Kibler. In any event, both the *Gig* article and *New York Times* review are over fifteen years old. Even if they suggested broad recognition, Kibler would have to show continuing awareness of his mark to justify a likelihood of confusion.

Kibler has neither refuted nor explained his deposition testimony that he appeared on television shows to support other, headlining artists. For instance, he testified that Carly Simon, "the main act," introduced "the guests she had playing with her" on the Fallon show. (Kibler Dep., R. 92-3, PageID 2930.) We do not know how many guests there were, if Simon introduced them individually, if she said anything other than their names, etc. Kibler did not need to address each of these considerations. But they indicate the sort of information a jury would need to assess the extent to which the public affiliates "DJ



LOGIC” with Kibler’s music.

Finally, Kibler’s performances and songs are his products, not advertisements or publicity. Artists may attract consumers directly through their work, as when someone enjoys a musician’s concert enough to then buy the music online. But treating the products that advertisements are meant to sell as advertisements themselves would mean finding marketing proof in virtually every infringement action, making the consideration superfluous. This is not what *Frisch* intended. Viewing the evidence in the light most favorable to Kibler, we take his tours and online sales as proof of his commercial success, discussed below.

The district court rightly found that Kibler has enjoyed limited commercial success and that this implies that “DJ LOGIC” is not broadly familiar. But the court’s analysis was incomplete. Album sales and even recording contracts are less critical markers of success than before because of widespread internet use. As a result, a plaintiff with low album sales or no representation could nevertheless show commercial success suggesting broad recognition of his mark using web-based indicators of popularity, *e.g.*, YouTube views. Because Kibler has not done that, we have only his low album sales, current lack of a recording contract, and inability ever to secure a recording contract with a major label. Kibler declares that he has participated “in hundreds of live performances held in at least 46 states,” but he does not indicate the number of people who attended, the number of other artists involved, and whether he ever received top billing. (Kibler Decl., R. 91-1, PageID

2702.) Kibler’s silence on his popularity online and general statement about his performances do not allow for a finding that “most people will be familiar” with “DJ LOGIC.” *Therma-Scan*, 295 F.3d at 632.

“DJ LOGIC” lacks commercial strength though we find no proof that third parties have weakened it. Defendants identify the parties’ marks as trademarks in their brief, but do not show they are registered. *See AutoZone, Inc. v. Tandy Corp.*, 373 F.3d 786, 794 (6th Cir. 2004) (involving evidence of 745 trademarks using “ZONE”); *Induct-O-Matic Corp. v. Inductotherm Corp.*, 747 F.2d 358, 362 (6th Cir. 1984) (involving evidence of numerous trademarks using “induct”).

Nor do defendants show that the third parties use the marks in the relevant market. Defendants imply that the market is music sold in the U.S. over Amazon and iTunes. But that is far too broad a market to assume that marks similar or even identical to “DJ LOGIC” weaken it simply by inhabiting the same space. In *Maker’s Mark*, we denied that all distilled spirits was narrow enough of a field to conclude that similar marks in that industry had weakened the mark of a tequila brand. 679 F.3d at 420–21. We found that tequila itself was the relevant market. *Id.* Likewise, the relevant market here is not countless types of music or even hip-hop, but DJ music sold in the U.S. over Amazon and iTunes. Because defendants have not shown which, if any of the marks, operate in that market, no reasonable jury could find the marks have weakened “DJ LOGIC.”

Because the record reflects that “DJ LOGIC” is moderately strong conceptually, but weak commercially, the first *Frisch* factor favors defendants.

## 2. *Relatedness of Products*

This court uses the following test to decide whether relatedness favors either party: 1) if the parties’ products compete directly with each other, consumer confusion is likely if the parties’ marks are sufficiently similar; 2) if the products are somewhat related, but do not compete directly, the likelihood of confusion will depend on other factors; 3) if the products are completely unrelated, confusion is unlikely. *Daddy’s*, 109 F.3d at 282.

Products belonging to the same industry are not necessarily related. *Homeowners*, 931 F.2d at 1109. To be related, they must be marketed and consumed in ways that lead buyers to believe they come from the same source. *Id.* Take *Therma-Scan*, in which we found two thermology services unrelated enough that confusion was unlikely. 295 F.3d at 633. We noted that the parties marketed the services to different populations. *Id.* Compare *id.* with *Maker’s Mark*, 679 F.3d at 423 (concentrating on other *Frisch* factors after finding both products high- end distilled spirits, but not directly competitive given their price differential); *Little Caesar Enters., Inc. v. Pizza Caesar, Inc.*, 834 F.2d 568, 571 (6th Cir. 1987) (finding Italian food services related enough to cause confusion because both concentrate on pizza).

The district court found the relatedness factor

neutral insofar as the parties' products are somewhat related, but not directly competitive. The court reasoned that while both Kibler and Hall perform and sell music, only Hall uses his vocals. Kibler maintains that the factor favors him based on proof that he and Hall both sell hip-hop incorporating turntables and rap. Kibler refers to print and online media about Hall, much of which affiliates him with hip-hop and all of which describes him as a rapper.

The district court correctly found this factor neutral because the record supports that the parties' products are somewhat related, but not directly competitive. The most relevant evidence is a booking notice describing Hall as a "hot upcoming rapper" and two online ads featuring Hall holding a microphone. (Booking Notice, R. 91-4, PageID 127.) They indicate that while both are musicians and perhaps hip-hop artists, Hall markets himself as a rapper and Kibler a disc jockey. The parties' products are comparable to the bourbon and tequila goods we found only to belong to the same broad category of high-end distilled spirits in *Maker's Mark*. 679 F.3d at 423. Incidental overlap of their customers could not sustain a finding of direct competition at trial. *Id.* at 421 (affirming district court's conclusion that products only somewhat related despite district court's finding that indeterminate number of defendant's customers likely patronize plaintiff given drinkers' habits); see *Maker's Mark Distillery, Inc. v. Diageo N. Am., Inc.*, 703 F.Supp.2d 671, 692 (W.D. Ky. 2010). Accordingly, the factor is neutral.

### 3. Similarity of Marks

The more similar the marks are, the more likely it is that relevant consumers will confuse their sources. We determine the similarity of marks by considering whether either mark would confuse a consumer who did not have both marks before her and had only a vague impression of the other mark. *Daddy's*, 109 F.3d at 283. We consider the marks' pronunciation, appearance, and verbal translation. *Id.*; see, e.g., *Maker's Mark*, 679 F.3d at 421–22 (finding factor favors plaintiff because marks are facially similar and some companies offer several kinds of distilled spirits).

The anti-dissection rule requires us not to dwell on the prominent features of a mark and instead consider it as a whole. *Little Caesar*, 834 F.2d at 571–72; see, e.g., *Jet, Inc. v. Sewage Aeration Sys.*, 165 F.3d 419, 423–24 (6th Cir. 1999) (finding distinctions in appearance, syllables, language, and pronunciation prevent “JET” and “AEROB-A-JET” from being confusingly similar despite their common word); *Little Caesar*, 834 F.2d at 572 (finding differences in sound, appearance, and syllables distinguish “Little Caesar” from “Pizza Caesar USA” despite the prominent word they share).

The district court concluded this factor favors defendants based on the anti-dissection rule. The court acknowledged that both marks include the prominent word “logic.” Then it noted that the “DJ” portion not only changes the look and sound of the mark but also describes or suggests certain characteristics of [Kibler's] music.” *Kibler*, 2015 WL 6865928, at \*3. Kibler claims that the district court misapplied the anti-dissection rule in two ways. First,

it overvalued “DJ,” which is merely descriptive. Second, it neglected to compare just “LOGIC,” which Kibler has also gone by, to Hall’s “LOGIC.” Kibler argues that both approaches conflict with *Daddy’s*. Defendants accept the district court’s findings.

The district court properly found this factor favors defendants by correctly applying the anti-dissection rule. This meant examining “DJ LOGIC” as a whole, including its appearance, sound, language, and impression. Kibler’s call for this court to “focus on the dominant features of each mark and disregard the non-dominant features” is precisely what the anti-dissection rule forbids. Kibler Opening Br. 19. Further, the “DJ” in “DJ Logic” is more distinctive than the “Family Music Store” in “Big Daddy’s Family Music Store,” which did raise an issue of fact as to whether “Daddy’s” was sufficiently similar. *Daddy’s*, 109 F.3d at 284.

The district court also correctly declined to compare Kibler’s “LOGIC” to Hall’s “LOGIC.” Kibler’s reliance on *Daddy’s* is again misplaced. There, we faulted the district court for not comparing just the “Daddy’s” in “Daddy’s Junky Music Stores” with defendant’s mark because “Daddy’s” itself was a separate trademark. *Id.* at 278, 284. Here the parties agree that Kibler has not registered “LOGIC” alone as a trademark. Thus, the anti-dissection rule requires the similarity of marks factor to favor defendants here.

#### 4. Evidence of Actual Confusion

Evidence of actual confusion is the strongest

proof of likely confusion. *Frisch*, 759 F.2d at 1267. So any such evidence favors the non-movant. *Therma-Scan*, 295 F.3d at 635. But the weight we give that evidence depends on the amount and type of confusion. *Id.* at 634. On one end of the spectrum are persistent mistakes and confusion by actual customers. *Homeowners*, 931 F.2d at 1110. On the other are relatively few instances of confusion and inquiries rather than purchases. The analysis is, above all, contextual.

In *Therma-Scan*, for example, the court found that six email inquiries implying that plaintiff manufactured the defendant's products provided only weak support for the conclusion that relevant consumers were likely to confuse the two. 295 F.3d at 635–36. The court considered the number of emails against the scale of defendant's operations. *Id.* (noting defendants sold 3,200,000 products and received 11,000 calls per month around the time of the emails). Further, it found that the evidence implied carelessness rather than confusion. *Id.* at 636 (noting that a mistaken internet search could easily yield the wrong email address).

Kibler offers evidence of at most ten instances of actual confusion. These include tweets and webpages advertising a performance by “DJ Logic,” but meaning Hall; an email offering to book “DJ Logic,” but meaning Hall; and inquiries about whether Kibler would be performing somewhere advertising “logic” and referring to Hall. The district court concluded that the evidence of actual confusion favors Kibler only slightly. The court suggested that the ten instances paled in comparison to Hall's

170,000 album sales and popularity on YouTube, Facebook, and Twitter. The court also indicated that computer rather than human error caused the confusion on the webpages. Kibler argues that the court neglected to consider the evidence in the light most favorable to him. The Hall defendants claim that the district court erred in finding that this factor favors Kibler at all. They add that the record shows no mistaken purchases.

Because past confusion is the best proof of future confusion, any evidence at all favors the plaintiff. Kibler has offered some proof, but it is scant. If “LOGIC” really threatened to confuse consumers about the distinctions between Hall and Kibler, one would see much more than ten incidents throughout 170,000 album sales, 1.7 million album downloads, and 58 million YouTube views. The fact that none of the incidents were purchases would further prevent a jury from finding that this factor significantly helps Kibler. *Homeowners*, 931 F.2d at 1110.

In sum, Kibler has not presented the quantity or type of proof that would tilt the actual confusion factor substantially in his favor.

### *5. Marketing Channels*

The marketing channels factor requires us to compare both how the parties market their products and their main customers. *Homeowners*, 931 F.2d at 1110. The more channels and buyers overlap, the greater the likelihood that relevant consumers will confuse the sources of the parties’ products. The reverse is true too. In *Homeowners*, for instance, the



court found little overlap where one party marketed to real estate brokers through telemarketing, brochures, and conventions, and the other marketed to real estate owners through newspaper and direct ads. *Id.* at 1111. That is, the methods used and consumers targeted lessened the chance that a buyer would encounter both products, let alone confuse their sources. *See id.* at 1110–11.

Today, most parties advertise online. *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1151 (9th Cir. 2011) (finding shared use alone of a ubiquitous marketing channel like the internet does not clarify the likelihood of confusion). We consider the following in deciding whether certain online marketing could support a finding of likely confusion. First, do the parties use the internet as a substantial marketing channel? *Therma-Scan*, 295 F.3d at 637 (citing *Entrepreneur Media, Inc. v. Smith*, 279 F.3d 1135, 1151 (9th Cir. 2002)). Second, are the parties' marks used with web-based products? *Id.* *See, e.g., Brookfield Commc'n., Inc. v. W. Coast Entm't. Corp.*, 174 F.3d 1036, 1042, 1057 (9th Cir. 1999) (identifying "MovieBuff," which denoted software, and "moviebuff.com," which denoted a website, as marks used with web-based products). Third, do the parties' marketing channels overlap in any other way? *Therma-Scan*, 295 F.3d at 637. Only one case has conducted this analysis and there it was straightforward: the plaintiff did not produce web-based products or market them online. *Id.*

Here, the district court found the marketing channels factor favors neither party because both Kibler and Hall failed to produce any evidence on it.

The court rejected Kibler's promotion on social media and proof of online sales because it "does not support an affirmative answer to any of [the] three questions." *Kibler*, 2015 WL 6865928, at \*4.

Kibler maintains that he has offered proof that would allow a reasonable jury to find the factor favorable to him. This includes deposition testimony 1) that he advertises on a personal website, MySpace, Twitter, and Facebook; 2) that he sells his music on Amazon and iTunes; and 3) that the parties have played fifteen of the same venues. It also includes tweets promoting Hall's album and performances and screenshots of Hall's Facebook page. Kibler counts his press clippings, use of a booking agent, and sheer length of his career as supporting evidence too.

Defendants reinforce the district court's findings, highlighting Kibler's deposition testimony that thousands of artists have played two of the fifteen venues and noting that Hall has never appeared in *Downbeat* or *Gig*. WME urges us to discount the parties' online advertising, reasoning that such a pervasive channel as the internet cannot clarify the likelihood of confusion.

The district court correctly concluded that this factor is neutral, but underestimated the impact of widespread internet use on the *Therma-Scan* framework. Kibler has shown that the parties market their products on the same websites, Twitter and Facebook, and target the same customers, users of Amazon or iTunes. At first glance, this overlap is compelling. But we must assess the likelihood of confusion in the real-life circumstances of the market.

Under that rubric, most musical artists use those websites to advertise and sell their products today. As a result, most plaintiffs belonging to that group will meet parts one and two of the *Therma-Scan* test. At the same time, the popularity of these channels makes it that much less likely that consumers will confuse the sources of the parties' products. There are just too many other contenders. For these reasons, shared use of the above websites does not help us determine the likelihood of confusion.

Though evidence of the parties' common venues comes closest, it would not permit a reasonable jury to find that Kibler's and Hall's customers substantially overlap. Kibler himself admitted that thousands of artists have played two of the fifteen venues. The more artists there are, the fewer the chances of any one attendee encountering both Kibler's and Hall's songs, let alone confusing their sources. Proof of the remaining venues carries minimal weight without information about their traditional line-ups or patrons, for example.

Kibler's press clippings, moreover, are not probative at all. He has not shown that any of the same publications have featured Hall. Further, shared use of the press cannot support a finding of significantly overlapping marketing channels. The vast majority of artists seek publicity and the medium itself has infinite variations, with everything from amateur zines to well-established newspapers. Similarly, mere use of a booking agent and the length of Kibler's career do not tell us anything about how he has advertised or whom he has targeted.

The marketing channels factor is neutral because there is minimal evidence that the parties' advertising methods or targeted customers substantially overlap beyond shared use of congested websites like Facebook and iTunes.

#### *6. Likely Degree of Purchaser Care*

When consumers are more likely to exercise caution in purchasing items, they are less likely to confuse their origins. *Champions*, 78 F.3d at 1120. This happens when consumers have expertise in the items and when the items are particularly expensive. *Id.*; see, e.g., *Homeowners*, 931 F.2d at 1111 (finding factor weighs against likelihood of confusion where plaintiff's customers, real estate brokers, are savvy commercial buyers, and defendant's customers, people seeking to sell their home, are engaging in one of the most consequential transactions of their lives).

In this case, the district court found this factor unhelpful because the degree of care exercised by music consumers varies greatly by consumer and transaction. The court compared buying a song on iTunes to purchasing an expensive concert ticket, and a "turntabling aficionado" to a "casual fan of rap." *Kibler*, 2015 WL 6865928, at \*4.

Kibler does not address this factor and the Hall defendants agree with the district court. Def Jam and WME, on the other hand, argue that the factor favors the defendants. They reason that "*fans* of each artist know their music" and tend to exercise substantial care in buying recordings. Def Jam Br. 27 (emphasis added); WME Br. 2 n.1 (incorporating the other

defendants' arguments).

The district court was right to disregard this factor. Def Jam and WME artificially narrow the pool of consumers of Hall's music. These consumers range from people seeking a variety of recordings for use in their cars to fans following Hall on tour. Thus, the district court's analysis was sound and the factor is insignificant here. *See Homeowners*, 931 F.2d at 1107 ("not all of the[] factors may be particularly helpful in any given case").

#### *7. Intent in Selecting the Mark*

This court may infer a likelihood of confusion from evidence that defendant chose its mark to confuse consumers about the source of the parties' products. *Therma-Scan*, 295 F.3d at 638. The standard assumes that defendant itself believed that using the mark would divert business from plaintiff. *Daddy's*, 109 F.3d at 286. Circumstantial evidence of intent is sufficient when direct evidence is unavailable (as it often is). *Therma-Scan*, 295 F.3d at 638–39. And evidence that defendant knew of plaintiff's trademark while using its mark constitutes such circumstantial evidence. *Daddy's*, 109 F.3d at 286–87. In *Champions*, the court treated testimony that defendant learned of plaintiff's trademark before using it as slight evidence that could support a finding of intent at trial. 78 F.3d at 1121. The testimony trumped the defendant's identification of independent reasons for choosing the mark, including the "championship" caliber of a local basketball team and horses. *Id.* Conversely, a lack of intent has no effect on the determination of likelihood of confusion.

Having found no evidence of intent, the district court concluded that the factor is neutral in this case. *See Daddy's*, 109 F.3d at 287. On appeal, Kibler asserts that two pieces of evidence create a triable issue here. One is his sworn declaration that a Google or YouTube search for “logic music” or “logic musician” yielded “DJ LOGIC” and Kibler’s picture or music before Hall adopted “LOGIC.” The other is Hall’s deposition testimony that he ran Google, Facebook, and Twitter searches for “any other rappers” using “LOGIC” before adopting it. (Hall Dep., R. 92-2, PageID 2878.) Hall testified that he ran the search “[t]o see if [any rapper] with this name was already at a level where it wouldn’t make sense for two people to coexist with the same name.” (Hall Dep., R. 92-2, PageID 2879.) Def Jam and WME argue that Kibler must show that defendants intended to “usurp [his] goodwill.” Def Jam Br. 22; WME Br. 2 n.1 (incorporating the other defendants’ arguments).

The district court properly found the factor neutral because the record prevents a reasonable jury from inferring intent. As an initial matter, Def Jam and WME cite the wrong legal standard. Evidence that defendants knew of “DJ LOGIC” while using “LOGIC” would be sufficient circumstantial proof of intent. *Daddy's*, 109 F.3d at 286. Def Jam and WME’s reliance on a non-binding and distinguishable case is puzzling given the clear and applicable law. *See Chrysler Grp. LLC v. Moda Grp. LLC*, 796 F.Supp.2d 866, 871 (E.D. Mich. 2011) (“In this case, Plaintiff’s mark has not been deemed protectable. Therefore, it would be unreasonable to infer intent here.”).

Here, we have no proof that Hall searched for

“logic music” or “logic musician,” no reason to believe he had to, and thus no evidence he knew of “DJ LOGIC” before adopting “LOGIC.” Hall’s testimony shows, to the contrary, that he avoided choosing a mark that might lead consumers to confuse his product with that of another musician. The factor is therefore neutral.

#### *8. Likelihood of Expansion*

A strong possibility that either party will expand its business to compete with the other’s increases the likelihood of consumers confusing the sources of the parties’ products. *Daddy’s*, 109 F.3d at 287–88 (finding evidence of preliminary negotiations by plaintiff to buy stores in state where defendant operates could support a finding of likelihood of confusion). As with intent, a finding that neither party will expand its business is irrelevant in determining the likelihood of confusion. *Champions*, 78 F.3d at 1122.

The district court concluded that this factor is neutral after finding it “unlikely that the parties will expand their markets to put them in competition.” *Kibler*, 2015 WL 6865928, at \*4. Kibler identifies book excerpts, press clippings, and deposition testimony describing his experimentation with different musical genres as proof he will expand his reach. He adds there is “no evidence that [Hall] will not continue to expand his musical reach as well.” Kibler Opening Br. 26 (emphasis added). Kibler stresses that the parties’ mutual use of hip-hop predisposes them to

expansion.<sup>1</sup>

The district court rightly concluded that this factor is neutral. But the basis on which it inferred that expansion was affirmatively unlikely is unclear. All we can conclude is that Kibler offered no proof that the parties will expand their businesses. Kibler's supposed evidence says nothing of the potential for competition with Hall, whether Kibler anticipates rapping or working closely with a rapper, for example. Further, Kibler inverts the burden of proof under the factor, which requires plaintiff to present evidence of expansion, not the other way around. With no sign of any future overlap in the market, the parties' mutual use of hip-hop is irrelevant. Thus, the factor is neutral.

### *9. Balance of Factors*

Def Jam and WME claim that Kibler has waived "any challenge" to "the district court's ultimate balancing of the *Frisch* factors." Def Jam Br. 16 n.1; WME Br. 2 n.1 (incorporating the other defendants' arguments). We disagree. As part of de novo review, we have a duty to consider and weigh the relevant facts in light of the *Frisch* factors, which Kibler has amply addressed. *CFE Racing*, 793 F.3d at 592. Surely, Def Jam and WME would not have us consider all of their evidence and contentions only to

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<sup>1</sup> Kibler asserts for the first time on reply that Hall's homage to Sinatra suggests he will begin producing jazz. Kibler has waived this argument. *Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 553 (6th Cir. 2008) ("we have found issues to be waived when they are raised for the first time in . . . replies to responses").



cede the ultimate determination to the district court.

We note then that evidence of actual confusion favors Kibler only marginally and both the strength of plaintiff's mark and similarity of the marks favor defendants. Though the *Frisch* inquiry is flexible and contextual, these are the "most important factors." *Maker's Mark*, 679 F.3d at 424. Further, the remaining factors are either neutral or insignificant here. Because no reasonable jury could find a likelihood of confusion based solely on a few instances of actual confusion, defendants are entitled to judgment as a matter of law on Kibler's federal trademark infringement and related state law claims.

### **C. Trademark Dilution**

Kibler also alleges trademark dilution in violation of the Lanham Act, 15 U.S.C. § 1125(c). The Act entitles "the owner of a famous mark that is distinctive" to an injunction against someone who "commences use of a mark . . . in commerce that is likely to cause dilution . . . of the famous mark" "any time after the owner's mark has become famous." § 1125(c)(1).

The Act specifies that a mark is famous when it is "widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner." § 1125(c)(2)(A). In evaluating whether a mark is sufficiently recognized, courts may consider the duration, extent, and reach of advertising and publicity around the mark; amount, volume, and extent of product sales; and actual recognition of the

mark. *Id.*

Courts have interpreted the Act to require the mark to be a “household name.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1373 (Fed. Cir. 2012). That is, “when the general public encounters the mark in almost any context, it associates the term, at least initially, with the mark’s owner.” *Id.* (internal quotation marks omitted). *See, e.g., Audi AG v. D’Amato*, 469 F.3d 534, 547 (6th Cir. 2006) (finding “AUDI” marks famous under Lanham Act because Audi had spent millions of dollars on them and they are known globally); *see also Starbucks Corp. v. Wolfe’s Borough Coffee, Inc.*, 588 F.3d 97, 105 (2d Cir. 2009) (noting that parties agree that “Starbucks” marks are famous under the Lanham Act); *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, 257, 265 (4th Cir. 2007) (noting that parties agree that “LOUIS VUITTON” marks are famous under the Lanham Act). It is difficult to establish fame under the Act sufficient to show trademark dilution. *Coach*, 668 F.3d at 1373.

The district court concluded that summary judgment was appropriate because no reasonable jury could find “DJ LOGIC” is famous under the Lanham Act. The court cited its finding that Kibler failed to show the mark is commercially strong for trademark infringement purposes. Indeed, it is easier to show public recognition under *Frisch* than it is under the Lanham Act. *Id.* (“While fame for dilution is an either/or proposition . . . fame for likelihood of confusion is a matter of degree”) (internal quotation marks omitted).

Kibler contends that the district court erred in discounting proof of his fame. Kibler cites his sworn declaration describing his experience in the music industry and his deposition testimony that he was a guest contributor on a Grammy-winning album.

Kibler's evidence clearly falls short of the high threshold for fame under the Lanham Act. "DJ LOGIC" is simply in a different league from the marks that have met this threshold. Indeed, having failed to show that his mark is commercially strong for even trademark infringement purposes, Kibler cannot point to a triable issue here. Thus, we do not address Kibler's remaining arguments on his trade dilution claim.

### III. CONCLUSION

Kibler has not provided evidence that would allow a reasonable jury to find relevant consumers are likely to confuse the sources of his and Hall's products, or that Hall's mark has diluted his. For these reasons, we affirm the grant of summary judgment to defendants on Kibler's federal trademark infringement, related state law, and federal trademark dilution claims.

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**APPENDIX B**

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

LEE JASON KIBLER,

Plaintiff,

v.

ROBERT BRYSON HALL, II,  
ET AL.,

Defendants.

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Case No. 14-10017

SENIOR U.S. DISTRICT  
JUDGE ARTHUR J.  
TARNOW

U.S. MAGISTRATE  
JUDGE R. STEVEN  
WHALEN

**ORDER GRANTING DEFENDANTS' MOTIONS FOR  
SUMMARY JUDGMENT [81, 83, 85]**

On May 27, 2015, all defendants moved for summary judgment on Plaintiff's trademark infringement, trademark dilution, and related claims. Defendant UMG Recordings d/b/a Def Jam Recordings (Def Jam) filed a Motion for Summary Judgment [Dkt. #81] along with a supporting Affidavit [82]. Defendant William Morris Endeavor Entertainment (WME) also filed a Motion for Summary Judgment [83] with a supporting Declaration [84]. Likewise, Defendants Hall, Team

Visionary Music Group, and Three Oh One Productions (the Hall Defendants) filed a Motion for Summary Judgment [85] and supporting

Declarations [86, 87]. Plaintiff filed Responses [88, 89, 90] on June 17, 2015, along with supporting Exhibits [91, 92]. On July 1, 2015, Defendant Def Jam filed a Reply [93] and supporting Declaration [94]. The same day, Defendant WME filed its own Reply [95], as did the Hall Defendants [96]. After a hearing held on October 30, 2015, the Court took the motions under advisement.

For the reasons stated below, Defendants' Motions for Summary Judgment [81, 83, 85] are **GRANTED**.

#### **FACTUAL BACKGROUND**

Plaintiff Kibler is a DJ and turntablist (a musician specializing in the use of a turntable and DJ mixer) who has worked under the name DJ Logic since 1999. He does not rap or sing, although he sometimes collaborates with vocal performers. He released albums under the name DJ Logic in 1999, 2001, and 2006, and has participated as DJ Logic on other albums. He currently has no record deal. He registered "DJ Logic" as a trademark in 2000, but inadvertently allowed the registration to lapse some years later. He re-registered the DJ Logic trademark on July 23, 2013.

Defendant Hall is a rapper who began using the stage name Logic in 2009 (he previously used the stage name Psychological). Defendant Three Oh One is Hall's personal company. Defendant Team

Visionary Music Group is Defendant Hall's management. Defendant Def Jam is Defendant Hall's record label. Defendant WME is a booking agent that assists Hall and his management in arranging Hall's public appearances. In September 2012, Plaintiff's counsel sent Defendants Team Visionary and WME an e-mail demanding that they and Defendant Hall stop using the stage name Logic in violation of Plaintiff's DJ Logic trademark. Subsequently, Defendant Three Oh One applied to register Logic as a trademark.

Plaintiff filed the Complaint in this matter on January 3, 2014, and a Motion for Preliminary Injunction [14] on February 27, 2014. At the time, Hall was scheduled to release his first album and go on tour in April 2014. The parties appeared for oral argument on March 28, 2014, but instead participated in a settlement conference. The relevant defendants agreed to postpone the album release and tour pending further settlement efforts, which were unsuccessful. The Court held a hearing on July 21, 2014, and denied the motion for preliminary injunction. Def Jam released Hall's first album on October 21, 2014. Defendants moved for summary judgment approximately seven months later.

#### ANALYSIS

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c).

The moving party has the burden of establishing that there are no genuine issues of material fact, which may be accomplished by demonstrating that the nonmoving party lacks evidence to support an essential element of its case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The Court must construe the evidence and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). A genuine issue for trial exists if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

### **I. Infringement (and Related Claims)**

Count One of Plaintiff’s complaint alleges trademark infringement in violation of the Lanham Act, 15 U.S.C. §§ 1114, 1125(a). Counts Three and Four allege a Michigan Consumer Protection Act (MCPA) violation and unfair competition, respectively. The underlying allegations for all three counts are the same. Accordingly, Defendants rely on their trademark infringement arguments to oppose the MCPA and unfair competition claims as well. Plaintiff has made no attempt to separately argue the MCPA and unfair competition claims. The Court will therefore analyze them together with the trademark infringement claim.

In analyzing a trademark infringement claim under the Lanham Act, the Court must determine whether the plaintiff’s mark is protectable and “whether there is a likelihood of confusion as a result

of the would-be infringer's use of the mark.” *Innovation Ventures, LLC v. N.V.E., Inc.*, 694 F.3d 723, 728 (6th Cir. 2012) (quoting *Tumblebus Inc. v. Cranmer*, 399 F.3d 754, 761 (6th Cir. 2005)). Here, the parties do not dispute that Plaintiff's “DJ Logic” mark is protectable. To determine whether there is a likelihood of confusion, courts in the Sixth Circuit weigh the following “*Frisch* factors:”

1. strength of the plaintiff's mark;
2. relatedness of the goods;
3. similarity of the marks;
4. evidence of actual confusion;
5. marketing channels used;
6. likely degree of purchaser care;
7. defendant's intent in selecting the mark;
- [and]
8. likelihood of expansion of the product lines.

*Maker's Mark Distillery, Inc. v. Diageo North America, Inc.*, 679 F.3d 410, 419 (6th Cir. 2012) (quoting *Frisch's Rests., Inc. v. Elby's Big Boy, Inc.*, 670 F.2d 642, 648 (6th Cir. 1982)). The relevance of each factor varies case by case, but the central question in applying the factors is always “whether relevant consumers are likely to believe that the products or services offered by the parties are affiliated in some way.” *Therma-Scan, Inc. v. Thermoscan, Inc.*, 295 F.3d 623, 630 (6th Cir. 2002) (quoting *Homeowners Group, Inc. v. Home Mktg. Specialists, Inc.*, 931 F.2d 1100, 1107 (6th Cir. 1991)).

### **1. Strength of Plaintiff's Mark**

This factor favors Defendants. The factor concerns both the mark's “conceptual strength,” or its inherent distinctiveness, and its “commercial strength,” or its



recognition in the market. *Maker's Mark*, 679 F.3d at 419 (citing 2 J. MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11.83 (4th ed.)). The parties seem to agree that “Logic” is strong conceptually, since it is “arbitrary” (i.e., not descriptive or even suggestive of the characteristics of Plaintiff’s music). On the other hand, the “DJ” portion of Plaintiff’s mark is descriptive or at least suggestive of Plaintiff’s emphasis on the use of turntables and a DJ mixer. Overall, the “DJ Logic” mark is moderately strong conceptually.

However, the Sixth Circuit has recognized that “a mark can be inherently distinctive but not especially strong if it fails to attain broad public recognition.” *Maker's Mark*, 679 F.3d at 419 (citing *Therma-Scan*, 295 F.3d at 631–32). Plaintiff has produced no survey evidence showing consumer recognition of his mark. Likewise, he has produced no evidence concerning the marketing of his albums. Plaintiff has sold less than 300 albums over the past three years and less than 60,000 since release of his first album sixteen years ago. He currently has no recording contract, and his past recording contracts were not with a major label. In sum, the evidence shows that Plaintiff’s mark has little commercial strength.

Furthermore, the strength of Plaintiff’s mark is reduced by third-party use of similar marks. See *Homeowners*, 931 F.2d at 1108 (holding that evidence of third-party use of marks consisting of or containing the same initials used in plaintiff’s mark should have been considered in assessing the strength of plaintiff’s mark). Defendants have identified various musicians

who, like Plaintiff, market music online under a name incorporating “logic” or a variation thereof—some of whom also incorporate “DJ” into their name.

In sum, Plaintiff’s mark is moderately strong conceptually but commercially weak. The Court concludes that this factor favors Defendants.

## **2. Relatedness of the Parties’ Goods or Services**

This factor is neutral. The parties’ goods and services are somewhat related in that they both perform as musicians and sell recorded music. Relatedness at this level of generality, however, does little or nothing to suggest that consumers will confuse the parties. *See Homeowners*, 931 F.2d at 1109 (acknowledging that coexistence in the same broad industry does not render services “related”). When the parties’ goods and services are looked at more closely, distinctions quickly emerge—perhaps most notably, Defendant Hall is a vocal performer and Plaintiff is not. The Court concludes that the parties’ goods and services are “somewhat related but not competitive, so that likelihood of confusion may or may not result depending on other factors.” *Id.* at 1108.

## **3. Similarity of the Marks**

This factor favors Defendants. It is true that both marks prominently feature the word “logic.” However, the Sixth Circuit has “endorsed the ‘anti-dissection rule,’ which serves to remind courts not to focus only on the prominent features of the mark, or

only on those features that are prominent for purposes of the litigation, but on the mark in its totality.” *Jet, Inc. v. Sewage Aeration Systems*, 165 F.3d 419, 423 (6th Cir. 1999) (citing *Little Caesar Enterprises, Inc. v. Pizza Caesar, Inc.*, 834 F.2d 568, 571–72 (6th Cir. 1987) (holding “Pizza Caesar USA” and “Little Caesars” to be dissimilar despite both prominently featuring “Caesar”)). Considered in its totality, the “DJ Logic” mark is significantly distinct from Defendant Hall’s “Logic” mark. The “DJ” portion not only changes the look and sound of the mark but also describes or suggests certain characteristics of Plaintiff’s music.

#### 4. Evidence of Actual Confusion

Plaintiff has identified at least ten instances in which people appear to have confused Logic with DJ Logic, or vice versa. Accordingly, this factor favors Plaintiff. *Therma-Scan*, 295 F.3d at 635 (“[I]n the context of a motion for summary judgment, any evidence of confusion, regardless of how minimal, weighs in [the plaintiff’s] favor.”).

On the other hand, “the existence of only a handful of instances of actual confusion after a significant time or a significant degree of concurrent sales under the respective marks may even lead to an inference that no likelihood of confusion exists.” *Id.* at 636 (quoting *Homeowners*, 931 F.2d at 1110). Defendants argue that the incidents identified by Plaintiff are only a “handful” in the context of Defendant Hall’s sales—he sold 170,000 copies of his first album in the seven months between its release and the summary judgment briefing—and popularity

on Internet sites such as YouTube, Facebook, and Twitter. Defendants also challenge the weight that should be given to particular incidents of confusion. For instance, they claim that various news postings that confused Logic with DJ Logic all came from the same source and that the error was likely the result of computer error rather than actual (human) confusion.

The Court does not find Plaintiff's evidence of actual confusion to be particularly strong. Nevertheless, it provides some support for Plaintiff at this stage of the case.

### **5. Marketing Channels Used**

Plaintiff has not produced evidence concerning his marketing efforts. At the hearing, Plaintiff's counsel pointed out that both Plaintiff and Defendants sell music online and promote themselves via Internet social media. To determine whether parties' use of the Internet for marketing constitutes overlapping marketing channels, "the relevant questions include : (1) whether both parties use the Web as a *substantial* marketing and advertising channel, (2) whether the parties' marks are utilized in conjunction with Web-based products, and (3) whether the parties' marketing channels overlap in any other way." *Therma-Scan*, 295 F.3d at 637 (quoting *Entrepreneur Media, Inc. v. Smith*, 279 F.3d 1135, 1151 (9th Cir. 2002)). Plaintiff's evidence does not support an affirmative answer to any of these three questions. On the other hand, Defendants have not produced evidence showing that their marketing efforts are so distinct as to weigh against the

likelihood of confusion. The Court finds the factor neutral.

### **6. Likely Degree of Purchaser Care**

The degree of care exercised by music consumers is likely to vary greatly depending on the type of transaction (e.g., purchasing one song on iTunes or purchasing an expensive concert ticket) and the characteristics of the consumer (e.g., a turntabling aficionado or a casual fan of rap). The Court finds this factor unhelpful on the present facts. *See Daddy's Junk Music Stores, Inc. v. Big Daddy's Family Music Center*, 109 F.3d 275, 285 (6th Cir. 1997) (citing *Little Caesar*, 834 F.2d at 572).

### **7. Intent in Selecting the Mark**

There is no evidence that Defendant Hall intentionally chose the stage name Logic to infringe Plaintiff's mark. Accordingly, this factor is neutral. *Therma-Scan*, 295 F.3d at 639 ("This factor, rather than tilting the balance in either direction, does not carry significant weight if no evidence of intentional infringement exists.").

### **8. Likelihood of Expansion of the Parties' Markets**

It appears unlikely that the parties will expand their markets to put them in competition. Accordingly, this factor is neutral. *See Therma-Scan*, 295 F.3d at 639.

### **Balance of Factors**

In the Court's estimation, the *Frisch* balancing

inquiry in this case boils down to weighing Plaintiff's evidence of actual confusion, which supports Plaintiff, against the strength of Plaintiff's mark and its similarity to Defendant Hall's mark, which support Defendants. Because Plaintiff's evidence of actual confusion does not exceed a handful of instances in the context of the parties' careers, the Court holds it insufficient to overcome the overall weakness of Plaintiff's mark, its dissimilarity from Defendant Hall's mark, and the lack of support from other factors. In other words, the Court holds that Plaintiff has raised no genuine issue of material fact regarding a likelihood of confusion. The Court therefore grants Defendants summary judgment on Plaintiff's trademark infringement and related claims.

## II. Dilution

Plaintiff alleges trademark dilution in violation of the Lanham Act, 15 U.S.C. § 1125(c). That subsection provides as follows:

Subject to the principles of equity, the owner of a *famous* mark that is distinctive ... shall be entitled to an injunction against another person who, at any time after the owner's mark has become *famous*, commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the *famous* mark.

15 U.S.C. § 1125(c)(1) (emphasis added). “[A] mark is famous if it is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the

mark's owner." *Id.* § 1125(c)(2)(A). Courts have recognized that the "famous" requirement is difficult to meet. *See, e.g., Coach Services, Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1373 (Fed. Cir. 2012) ("[A] famous mark is one that has become a 'household name.'") (citing *Nissan Motor Co. v. Nissan Computer Corp.*, 378 F.3d 1002, 1012 (9th Cir. 2004)); *Quicken Loans, Inc. v. Nationwide Biweekly Admin., Inc.*, No. 13-13431, 2014 WL 505576, at \*6 (E.D. Mich. Feb. 7, 2014) (unpublished) (finding dilution claim unlikely to succeed on the merits because the Quicken Loans mark, despite enjoying "niche fame," likely was not "famous"). The Sixth Circuit has recognized Audi and Victoria's Secret as "famous" marks. *Audi AG v. D'Amato*, 469 F.3d 534, 547 (6th Cir. 2006); *V Secret Catalogue, Inc. v. Moseley*, 605 F.3d 382, 387 (6th Cir. 2010).

Plaintiff's dilution claim fails because no reasonable jury could find his "DJ Logic" mark "famous" within the meaning of the Lanham Act. As discussed above, the evidence shows that the mark has little commercial strength. It is not a household name, and its recognition is far from comparable to that of Audi or Victoria's Secret. In short, Plaintiff has produced no evidence that would enable a reasonable jury to conclude that DJ Logic is "*widely* recognized by the *general consuming public* of the United States" as a sign that Plaintiff is the source of the relevant goods or services. 15 U.S.C. § 1125(c)(2)(A) (emphasis added). Accordingly, the Court grants Defendants summary judgment on the dilution claim.

**CONCLUSION**

For the reasons stated above, there are no genuine issues of material fact on the merits of Plaintiff's claims. This conclusion renders it unnecessary to resolve other issues raised by Defendants; the Court therefore declines to do so. Accordingly,

**IT IS ORDERED** that Defendants' Motions for Summary Judgment [81, 83, 85] are **GRANTED**.

**SO ORDERED.**

s/Arthur J. Tarnow

Arthur J. Tarnow

Senior United States

Dated: November 9, 2015 District Judge



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**APPENDIX C**

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

LEE JASON KIBLER,

Plaintiff,

v.

ROBERT BRYSON HALL, II,  
ET AL.,

Defendants.

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Case No. 14-10017

SENIOR U.S. DISTRICT  
JUDGE ARTHUR J.  
TARNOW

U.S. MAGISTRATE  
JUDGE R. STEVEN  
WHALEN

**JUDGMENT**

All issues having been resolved by the Court's Order [100] of November 9, 2015, **THIS CASE IS CLOSED.**

Dated at Detroit, Michigan, this 9<sup>th</sup> day of November 2015.

DAVID J. WEAVER  
CLERK OF THE COURT

BY: s/Michael E. Lang  
Deputy Clerk

45a

Approved:

s/Arthur J. Tarnow  
ARTHUR J. TARNOW  
SENIOR UNITED STATES DISTRICT JUDGE

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**APPENDIX D**

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

LEE JASON KIBLER,

Plaintiff,

Case No. 2:14-cv-  
10017

v.

ROBERT BRYSON HALL,  
II, ET AL.,

Defendants.

SENIOR U.S.  
DISTRICT JUDGE  
ARTHUR J.  
TARNOW

U.S. MAGISTRATE  
JUDGE R. STEVEN  
WHALEN

\_\_\_\_\_ /

**DECLARATION OF LEE JASON KIBLER**

Plaintiff, Lee Jason Kibler, in support of his Response to Motion for Summary Judgment ("Response"), states as follows:

1. I am Lee Jason Kibler, the Plaintiff in this action. I have personal knowledge of the following facts and can testify as to such facts.

2. I am a musician and I have written,

recorded and performed music since before 1999 under the name and trademark DJ Logic. I am principally a musician, DJ, turntablist and MC that has produced and played music covering a broad range of genres, including hip-hop, jazz, rock, alternative, funk, pop and electronic, and I have rapping on my albums *The Anomaly* and *Project Logic*, and I have registered the mark DJ Logic with Office. A copy of the most recent registration is attached to the Brief in Response as **Exhibit 3** and the copy of the initial registration achieved in 2000 which lapsed in 2010 without my knowledge of it is attached as **Exhibit 36** to Response Brief. I have used the DJ Logic mark continuously since I first adopted it, and I use mark for writing and recording music, sales and merchandising of my music, and for my live performances in which I have performed for in excess of a million fans in venues that include stadiums, amphitheaters, performing arts centers as well as other venues.

3. I have recorded the following albums under the DJ Logic name and mark:

1999 - *Project Logic* under the Ropeadope Record label

2001 - *The Anomaly* under the Atlantic Records label. This album featured collaborations with established music artists including Vernon Reid, John Medesky and Melvin Gibbs.

2002 - *Front End Lifter* under the Ropeadope Record Label. This album was another

collaboration with Vernon Reid.

2004 - *The Tao of Yo* under the Thirsty Ear Records label.

2006 – *Zen of Logic* under the Ropeadope Record Label.

2006 - *The Popper Project featuring DJ Logic* under the Relics Record Label.

2008 - *Global Noize featuring DJ Logic and Jason Miles* on the Shanachie Record Label.

2013 - *Are You Ready* under the Poppyseed Music Record Label.

2013 - *Beka & Logic Project* under an independent label.

4. Since 1999, I have performed my music under the DJ Logic name and mark in hundreds of live performances held in at least 46 states including the State of Michigan. A list of the venues that held my live performances from the time period of 2001 through August 2014 is attached as **Exhibit 21** to Response Brief. This list does not include venues which I have played at since August 2014. Also listed below are several venues which I had performed at first and then by Defendant Hall. I have also appeared and performed with numerous well-known and respected music artists such as Carly Simon, John Mayer, Jack Johnson, Widespread Panic, O.A.R., Ben Harper, Maroon 5, Bob Weir, Vernon Reid (of the group Living Colour), John Popper (of the group Blues Traveler), The Roots, Marcus Miller,

Billie Holiday (remix), Nina Simone (remix), Warren Haynes, Eldar Djangirov, Christian McBride, Medeski Martin & Wood, Miles Davis Estate and Miles Electric Band. I have performed recently in Utah, North Carolina, South Carolina, California, New York, Tennessee, Philadelphia, Virginia, Louisiana, New Mexico and Colorado. I have upcoming performances scheduled in Michigan, Chicago, New York, Colorado, Utah and Florida. I have appeared on Television shows such as Jimmy Fallon, The Today Show, Good Morning America, CNN, BBC, and TLC Networks, among others.

5. Pollstar.com is a website that tracks musicians' live performances. Though far from complete, the printout from Pollstar.com attached as **Exhibit 21** to the Brief in Response accurately lists shows I have played. I have also reviewed the Pollstar listing of performances by Defendant Robert Hall under the name "Logic," attached as **Exhibit 13** to the Response Brief. According to Pollstar, Defendant Robert Hall and I have both played the following venues:

Hodi's Half Note in Ft. Collins, CO  
Cervantes' Other Side in Denver, CO  
Blind Pig in Ann Arbor, MI  
Beachland Ballroom and Tavern in Cleveland,  
OH  
Stubb's Bar-B-Q in Austin, TX  
Fox Theater in Boulder, CO Aggie Theater in Ft.  
Collins, CO  
House of Blues in West Hollywood, CA The  
Fillmore in San Francisco, CA  
Granada Theater in Lawrence, KS

House of Blues in Chicago, IL  
Irving Plaza, New York, NY  
Belly Up Aspen in Aspen, CO  
Red Rocks Amphitheater in Morrison, CO  
DTE Energy Music Theater in Clarkston, MI  
Masquerade Music Park in Atlanta, GA

6. I have become aware that fans and musical venues have become actually confused between my mark and name, DJ Logic, and Robert Hall's use of "Logic" in relation to his music, recordings and performances.

7. On September 13, 2013, I received a message via Facebook from a fan named Nicola Smith stating, "Hey Jason are you playing tonight in idaho with kid cudie? I saw logic displayed on our tickets." An accurate screenshot of the Facebook post is attached as **Exhibit 12** to the Brief in Response. I did not play in Idaho on September 13, 2013. According to Pollster, Robert Hall played in Idaho on September 13, 2013 under the name "Logic."

8. On October 18, 2013, I was forwarded a tweet from musician Erik Edmonds stating, "Kid cudie, Big Sean, and DJ Logic tour in the works". [sic] An accurate screenshot of the Edmonds tweet is attached as **Exhibit 14** to the Brief in Response. I never toured or planned to tour with either Kid Cudi or Big Sean. It is my understanding that Robert Hall (under the name "Logic") toured with Kid Cudi and Big Sean in 2013.

9. On or around August 5, 2013, I became aware of an article on *The Aspen Times* website with

the headline "DJ Logic plays Belly Up tonight" which displayed my picture. An accurate screenshot of the article is attached as **Exhibit 15** to the Brief in Response. I did not play Belly Up Aspen on September 15, 2013. According to Pollster, Robert Hall played at Belly Up Aspen on September 15, 2013.

10. On or around August 15, 2013, I was forwarded a tweet from the Masquerade Music Park in Atlanta, Georgia stating, "JUST ANNOUNCED: Kid Cudi w/BIG SEAN and DJ Logic Saturday, October 12th in The Masquerade Music Park." An accurate screenshot of the tweet is attached as **Exhibit 16** to the Brief in Response. I did not play, nor was I ever scheduled to play, the Masquerade Music Park on October 12, 2013. According to Pollster, Robert Hall played the Masquerade Music Park on October 12, 2013 under the name "Logic."

11. I promote my music through my website [www.djlogic.com](http://www.djlogic.com), MySpace, Twitter and Facebook. My recorded music is available on popular digital music Internet sites both for streaming and for purchase. These include Amazon.com, Apple's iTunes, Spotify, Pandora and YouTube. I have marketed my music through these popular sites, I believe, since these first became available, and well before 2010. My live performances are promoted through internet advertising as well as print advertising. I recently signed on with a new booking agent, Jon Bell of New Frontier Touring located in Nashville, Tennessee, am currently performing live and included in my upcoming schedule I will perform at the DTE Energy Music Theatre at a music festival in Clarkson, Michigan on July 9, 2015.



12. Until recently, the name DJ LOGIC, my picture and/or my music would prominently appear in Google or YouTube searches for "logic music" or "logic musician." Already, Robert Hall and his promoters have flooded the Internet, such that my DJ Logic mark, my picture and my music are no longer prominently represented in the same Google or YouTube search. Instead, Defendant Hall's music, pictures and/or music prominently appear in the search results.

13. I am also known by the abbreviated version of my trademarked name as "Logic" by others (See testimony of Andrew Palmer, **Exhibit 30** to Response Brief and I have a history dating back into the 1990's of referencing myself as Logic as well as DJ Logic, evidence of which appears on my website (See webpage, **Exhibit 9** to Response Brief).

14. In this June 8, 2015 Billboard interview Defendant Hall explains that he shortened his name from Psychological to "Logic" because calling someone Psychological is "like calling someone by their full name." <http://www.billboard.com/video/logic-at-governors-ball-2015-i-got-my-name-when-i-was-18-6590629#XS6BtUf5tcA4L2ri>. This clip also features a DJ or turntablist prominently featured during Defendant Hall's live performance. This clip also demonstrates Hall's a style of music performance that incorporates vulgar language and profanity and tarnishes my trademark and reputation as I do not use profanity in connection with my music.

15. I have been referenced in connection with my music in books, magazines, and newspaper articles,

several of which I recently found when I visited my parent's home in Bronx, New York, that I had collected over the years and have accurately reproduced and attached and which include the following:

Books:

*All Music Guide to hip-hop. The Definitive Guide to Rap & Hip Hop.* Published October 1, 2003 and available on Amazon.com (**Exhibit 25** to Response Brief).

*Groove Music. The Art and Culture of the Hip Hop DJ.* Published May 1, 2012 by Mark Katz and available on Amazon.com (**Exhibit 25** to Response Brief).

*Jambands.* Published November 2003 by Dean Budnick and available on Amazon.com. (**Exhibit 25** to Response Brief).

*Danny Clinch. Still Moving.* By Danny Clinch 2014. Danny Clinch is a renowned music photographer and my photo appears in his new book (See **Exhibit 25** to Response Brief).

Newspaper/Magazines articles:

*Spinning a New Song. DJ Logic Goes Legit with the Turntables.* By John Murph. Downbeat Magazine, November 2006 (**Exhibit 34** to Response Brief).

*From Behind the Turntable.* By David John Farinella. Gig Magazine August 1999 (**Exhibit 34** to Response Brief).

*Blues With a Scratch* By Ann Powers. The New York Times, July 12, 2001 (**Exhibit 34** to Response Brief).

*Ropeadope, Atlantic form Partnership*. Billboard Magazine announcing release of my Anomaly Album in 2001 (**Exhibit 24** to Response Brief).

Photographs published in Rolling Stone June 16, 2014 from Bonaroo Music Festival (**Exhibit 35** to Response Brief). 16. I am featured and appear in several films/documentaries: *Freedom Now: Yohimbe Brothers* (2008). Available on Netflix (See **Exhibit 32** to Response Brief). *Wetlands Preserved: The Story of an Activist Rock Club*. (See **Exhibit 32** to Response Brief). *Moogfest 2006 live* (2007). Available on Netflix (See **Exhibit 32** to Response Brief). *Particle Transformations Live* (2006). Available on Netflix (See **Exhibit 32** to Response Brief). *The Best of Jammys: Vol. Two* (2007). Available on Netflix (See **Exhibit 32** to Response Brief). *Warren Haynes: The Benefit Concert: Vol. 8* (2008). Available on Netflix (See **Exhibit 32** to Response Brief).

17. I have additional biographical information that includes information on albums and press clippings compiled for promotional purposes by my prior agent and which information is true and accurate, attached as Exhibit 2 to my deposition transcript, and attached as **Exhibit 33** to Response Brief.

18. I have endeavored to protect my trademark by initiation of this court action as well as

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having attorneys on my behalf send cease and desist letters to action as well as having attorneys on my behalf send cease and desist letters to other musicians dating back to 2003 who I perceive infringe on my trademark.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct and that all documents and attachments referenced herein are true and correct copies.

Further Affiant sayeth not.

Executed on this 17 day of June, 2015.

/s/ Jason Lee Kibler  
JASON LEE KIBLER

STATE OF COLORADO)

)ss.

COUNTY OF EAGLE )

Rigoberto Spath  
Notary Public  
State of Colorado

SUBSCRIBED AND  
SWORN to before me this  
17 day of June 2015.

Notary ID  
20134020195  
My Commission  
Expires March 28,  
2017

/s/ Rigoberto Spath  
Notary Public

County of Eagle

My commission expires: March 28 2017

Acting in: Public Notary

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**APPENDIX E**

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**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN**

LEE JASON KIBLER,

Plaintiff,

Case No. 2:14-cv-  
10017

v.

Honorable Arthur J.  
Tarnow

ROBERT BRYSON HALL,  
II, ET AL.,

Defendants.

\_\_\_\_\_/

**DECLARATION OF JON PRINE**

I, JON PRINE, declare as follows:

1. I am an agent at The Progressive Global Agency. I make this declaration based upon personal knowledge. If called upon to testify, I could testify competently to the matters set forth below.

2. I am DJ Logic's booking agent. I arrange DJ Logic's live performances and negotiate the contracts associated with those shows.

3. On January 9, 2014, I was contacted via email by Tim Crockett of the Levels Night Club in State College, Pennsylvania. Mr. Crockett's email stated that "DJ Logic is someone we would be interested in at our venue depending on his rate and availability." See email chain reproduced below.

4. In subsequent correspondence, Mr. Crockett admitted that he was confused by Robert Bryson Hall's competing use of "Logic." Mr. Crockett clarified that he was looking to book "this DJ Logic. [www.facebook.com/MindOfLogic](http://www.facebook.com/MindOfLogic). Sorry for the confusion." See email chain reproduced below.

5. I reviewed [www.facebook.com/MindOfLogic](http://www.facebook.com/MindOfLogic). It is not associated with the DJ Logic that I represent. It appears to be associated with Robert Bryson Hall.

6. The text of my email chain with Mr. Crockett regarding his confusion is reproduced here:

From: **Tim At Levels** [tim@levelsnightclub.com](mailto:tim@levelsnightclub.com)  
Date: Thu, Jan 9, 2014 at 9:41 AM  
Subject: Re: DJ Logic at Penn State  
To: Jon Prine <[jon@pgamusic.com](mailto:jon@pgamusic.com)>

Jon,

When Greg mentioned it, I thought you had this DJ Logic.

[www.facebook.com/MindOfLogic](http://www.facebook.com/MindOfLogic)

Tim

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Hey Tim –

DJ Logic is generally available so let know what date(s) you have in mind. Usually quote in the [redacted] range for college events. For backline he requires 2 Technics Turntables and a mixer. Would like lodging provided but not a must. And would need ground transportation to from airport.

Thanks,  
Jon

Jon Prine  
PGANashville, TN  
615-354-9100  
www.pgamusic.com

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On Thu, Jan 9, 2014 at 8:58 AM, Tim At Levels  
<tim@levelsnightclub.com>wrote:

Hi Jon,

Greg from the State Theatre suggested I email you about Logic and some of your other clients. We're the former Crowbar here at Penn State. Our room has hosted more than 3,000 shows over the last 20 years.

We took over about two years ago and have been booking EDM, Country and Rock. Almost all of our shows have sold out. We're now adding more genres and more shows.

We work with the State Theatre to make sure

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we're not pursuing the same artists. We're more of a nightclub/Live music venue and they're a seated theatre.

Our current capacity is 500 but we're going up to 950 in the coming months. In the past three months we've hosted Laidback Luke, Above & Beyond, Carnage, Reel Big Fish, Zedd, Kip Moore (Country), Fedde LeGrand and many more.

We also host arena shows on campus at the Bryce Jordan Center where we can scale the capacity from 3,000 to 12,000. If you want to send us your roster we'd love to get to work.

DJ Logic is someone we would be interested in at our venue depending on his rate and availability.

Talk to you soon.

Tim Crockett  
Levels Nightclub  
420 E. College Avenue  
State College, PA 16801  
814-308-8773  
[www.LevelsNightclub.com](http://www.LevelsNightclub.com)  
[www.Facebook.com/LevelsBar](http://www.Facebook.com/LevelsBar)

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 27, 2014.

/s/ Jon Prine  
Jon Prine



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**APPENDIX F**

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**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN**

LEE JASON KIBLER, d/b/a DJ LOGIC,  
an individual,

Plaintiff,

v.

ROBERT BRYSON HALL II, an individual,  
TEAM VISIONARY MUSIC GROUP, INC.  
a New Jersey corporation; DEF JAM RECORDS,  
INC. a Delaware corporation; WILLIAM  
MORRIS ENDEAVOR ENTERTAINMENT, LLC,  
a Delaware limited liability company,  
THREE OH ONE PRODUCTIONS, LLC,  
a New York limited liability company,

Defendants.

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**VERIFIED COMPLAINT**

Plaintiff Lee Jason Kibler, a/k/a DJ Logic ("Logic" or "Plaintiff"), for his Complaint against Defendants Robert Bryson Hall, II, ("Hall"), Team Visionary Music Group ("Team Visionary"), Def Jam Records, Inc. ("Def Jam"), William Morris Endeavor Entertainment, LLC ("WME"), and Three Oh One

Productions, LLC (“Three Oh One”), (collectively “Defendants”), hereby states and alleges as follows:

**NATURE OF CASE**

1. Since no later than 1999, Plaintiff Lee Jason Kibler has continuously engaged in the entertainment business in the State of Michigan and beyond under the mark DJ LOGIC (the “Mark”), including the production, composition and re-mixing of original, copyrighted music in an eclectic assortment of genres, including hip-hop and jazz. Since at least 1999, Plaintiff has continually performed his original, copyrighted music at live performances under the Mark, in clubs and for recording, and the sale of recordings and collateral DJ LOGIC merchandise. Plaintiff owns the federally registered mark DJ LOGIC, Registration No. 4371378 (“the Mark”). As a direct result of the foregoing activities, Plaintiff has acquired exclusive rights in the “DJ LOGIC” trade name, trademark and service mark for his musical entertainment goods and services.

2. Defendant Hall has begun to perform and continues to perform entertainment and musical services under the infringing name “Logic.”

3. Defendants Team Visionary, Def Jam, WME and Three Oh One have also infringed on Plaintiff’s Mark through their use and promotion of the infringing name “Logic” in reference to Hall and Hall’s musical recordings and performances.

4. Defendants’ unlawful acts have caused and continue to cause consumers to believe that

Plaintiff is affiliated with Defendants or has endorsed Defendants' products and services, thus jeopardizing the goodwill associated with the Mark, unjustly enriching Defendants, who benefit from the association, and causing confusion for the public seeking Plaintiff's services.

5. On information and belief, Defendants' unlawful acts have lessened the capacity of the Mark to identify and distinguish the services Plaintiff provides under the Mark, thus diluting the Mark's distinctive quality.

6. In addition, on information and belief, Defendants have intentionally profited from their unauthorized use of the Mark and have made unauthorized commercial use of the Mark in Michigan and elsewhere to their benefit and to the detriment of Plaintiff and of consumers, in violation of the laws set forth above.

### **THE PARTIES**

7. Plaintiff Lee Jason Kibler, a/k/a DJ Logic is an individual performance artist who has performed throughout the United States, including in southeastern Michigan, under the Mark DJ LOGIC.

8. Defendant Robert Bryson Hall, II is an individual performance artist who has performed throughout the United States, including in southeastern Michigan under the name "Logic."

9. Defendant Team Visionary Music Group is a corporation organized and existing under the laws of the State of New Jersey, and it is engaged in the

entertainment business throughout the United States, including in southeastern Michigan.

10. Defendant Def Jam Records, Inc. is a corporation organized and existing under the laws of the State of Delaware, and it is engaged in the entertainment business throughout the United States, including in southeastern Michigan.

11. Defendant Three Oh One is a corporation organized and existing under the laws of the State of New York, and, on information and belief, it is engaged in the entertainment business throughout the United States, including in southeastern Michigan.

12. On information and belief, at all relevant times with respect to the offenses alleged in this Complaint, the Defendants were acting in concert, with the knowledge and consent of the other Defendants, such that each and every Defendant is liable and responsible for the acts of the remaining Defendants.

### **JURISDICTION AND VENUE**

13. This action arises, inter alia, under the Trademark Act of 1946, 15 U.S.C. §§ 1051 et seq., as amended (the "Lanham Act"). This Court has subject matter jurisdiction pursuant to Section 39 of the Lanham Act, 15 U.S.C. § 1121(a), 28 U.S.C. § 1331 (federal question jurisdiction) and § 1338(a) (trademark infringement), supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. §§ 1338(b) and 1367(a), and jurisdiction over the declaratory judgment claim pursuant to 28 U.S.C. §

2201.

14. On information and belief, jurisdiction in this Court is proper because Defendants do business in, and/or are subject to personal jurisdiction in this judicial district.

15. Venue is proper in this judicial district under 28 U.S.C. § 1391(b) and (c).

### **BACKGROUND**

#### **Plaintiff's adoption and longstanding use of the DJ LOGIC Mark.**

16. Plaintiff DJ Logic is a nationally recognized musical performance artist. Since at least as early as 1999, Plaintiff has been using the DJ LOGIC name and Mark to identify the source of his musical products and services (and related merchandise) and to distinguish his musical products and services (and related merchandise) from the related products and services (and merchandise) of others.

17. At least as early as 1999, Plaintiff began producing original music and performing live music under the DJ LOGIC name and Mark.

18. At least as early as 1999, Plaintiff began recording, distributing, marketing, promoting, and selling sound recordings under the DJ LOGIC name and Mark.

19. In 1999, Plaintiff released the music album Project Logic under the DJ LOGIC name and

Mark, and under the label of Ropeadope Records.

20. In 2001, Plaintiff released the album Anomoly under the DJ Logic name and Mark, and under the label of Atlantic Records. The Anomoly album featured collaborations with other established music artists, including Vernon Reid, John Medesky and Melvin Gibbs.

21. Plaintiff, under the DJ LOGIC name and Mark, collaborated with Vernon Reid on the 2002 album Front End Lifter under the label of Ropeadope Records, and the 2004 album The Tao of Yo under the label of Thirsty Ear Records.

22. Plaintiff, under the DJ Logic name and Mark, released the 2006 album Zen of Logic, under the label of Ropeadope Records.

23. Since 1999, Plaintiff has consistently toured throughout the United States, performing hundreds of live shows in at least 46 states, including numerous shows in the State of Michigan.

24. Plaintiff has used and prominently displayed the DJ LOGIC name and Mark in commerce throughout the United States since at least as early as 1999.

25. Plaintiff has used and prominently displayed the DJ LOGIC Mark in commerce in collaboration with other nationally recognized performers and recording artists, including John Mayer, Jake Johnson, Widespread Panic, O.A.R., Vernon Reid (of Living Colour), John Popper (of Blues Traveler), The Roots, Marcus Miller, Carly Simon,

Billy Holiday (remix), Nina Simone (remix), Warren Haynes, and Medesky Martin & Wood.

26. As a direct result of Plaintiff's long and extensive experience, care, and skill in performing all of the foregoing activities under the prominently displayed DJ LOGIC Mark, the music industry and its public have come to identify Plaintiff as the sole and exclusive source of original music recordings, compositions, performances and related products to which the DJ LOGIC Mark is applied.

27. As a further direct result of Plaintiff's long and extensive experience, care, and skill in performing all of the foregoing activities under the prominently displayed DJ LOGIC Mark, Plaintiff has earned a reputation and established notoriety, recognition, credibility, and goodwill in the DJ LOGIC Mark.

28. Plaintiff is the owner of the Mark DJ LOGIC, registered with the United States Patent and Trademark Office, Registration No. 4371378 in association with:

pre-recorded audio compact discs featuring music; digital media, namely, pre-recorded digital discs, downloadable audio files, downloadable audio recordings featuring music; digital music downloadable from the internet; downloadable musical sound recordings; musical sound recordings; series of musical sound recordings

and

entertainment services, namely, live performances by a musical band, live performances by a disc jockey, and live performances featuring pre-recorded vocal and instrumental performances.

**Defendants' willful infringement of Plaintiffs' rights in the DJ LOGIC Mark.**

29. Defendants recently began marketing, promoting, and advertising Defendant Hall as a competing musical act referred to as "Logic." Defendants have and intend to continue recording, performing, advertising, marketing and selling recordings and live performances under the name "Logic" in the State of Michigan and throughout the United States.

30. Defendant Hall has performed under the name "Logic" in various venues throughout the United States, including in Michigan, and has announced additional plans to perform under the name "Logic."

31. Defendants have marketed, promoted, advertised and performed under the name "Logic" in many of the same venues at which Plaintiff has performed, including the Blind Pig in Ann Arbor, Michigan and DTE Energy Music Theater in Clarkston, Michigan.

32. Defendants' advertising states that Hall, under the name "Logic," will release his first album under the label of Defendant Def Jam Records in the first quarter of 2014.



33. Defendants' advertising states that Hall, under the name "Logic," will shortly release a single.

34. In conjunction with Defendant WME and Defendant Def Jam Records, Defendant Team Visionary Music Group produces and promotes Hall's recordings, manages and promotes Hall's career, and releases Hall's recordings, all under Hall's infringing name "Logic."

35. In conjunction with Defendant WME and Defendant Team Visionary Music Group, Defendant Def Jam Records produces and promotes Hall's recordings, manages and promotes Hall's career and releases Hall's recordings, all under Hall's infringing name "Logic."

36. In conjunction with Defendant Team Visionary Music Group and Defendant Def Jam Records, Defendant WME manages and promotes Hall's career, and manages and promotes Hall's performances, all under Hall's infringing name "Logic."

37. Defendant Three Oh One has filed an application with the USPTO for registration of the mark LOGIC in association with:

musical sound recordings and musical audiovisual recordings featuring rap and hip hop music; pre-recorded compact discs and dvd's featuring rap and hip hop music; digital media, namely, downloadable audio files and downloadable audio and video files featuring rap and hip hop music; downloadable ring tones and music via the internet and wireless

devices; downloadable sound recordings featuring rap and hip hop music; downloadable video recordings featuring rap and hip hop music; downloadable electronic publications in the nature of books, booklets, magazines, journals, manuals, brochures, leaflets, pamphlets and newsletters, all featuring rap and hip hop music

and

entertainment services in the nature of personal appearances by a rap and hip hop musical group; entertainment services, namely, televised, radio and computer communications network appearances by a rap and hip hop musical group; entertainment services in the nature of audio and visual performances by a rap and hip hop musical group; audio and video recording services; fan club services; entertainment services, namely, providing a website featuring non-downloadable musical performances, musical videos, related film clips, photographs and other multimedia materials featuring a rap and hip hop musical group; entertainment services, namely, providing non-downloadable ringtones, pre-recorded music, and graphics presented to mobile communications devices via a global computer network and wireless networks

38. The application for registration of the LOGIC mark, Serial No. 85755964, specifies that “the wording ‘LOGIC’ identifies the stage name of Sir

Robert Bryson Hall II, a living individual whose consent is of record.”

39. Through an Office Action dated August 9, 2013, the USPTO refused registration of Defendant Three Oh One’s application for registration of the LOGIC mark. Three Oh One has not responded to the August 9, 2013 Office Action refusing registration.

40. Defendants’ use of the “Logic” name began long after Plaintiff’s adoption and use of the DJ LOGIC Mark. Defendants have engaged in, and continue to engage in, all of the foregoing activities without Plaintiff’s consent, permission, or authority. Moreover, Defendants have engaged in, and continue to engage in, all of the foregoing activities with full knowledge of, and intentional disregard for, Plaintiff’s rights in the virtually-identical DJ LOGIC Mark.

41. On information and belief, prior to Defendants’ adoption of name “Logic,” Defendants had knowledge of Plaintiff’s virtually-identical DJ LOGIC Mark.

42. On September 12, 2012, attorney for Plaintiff Michael K. Twersky sent cease and desist correspondence to Defendants Team Visionary and WME. In the September 12, 2012 correspondence, Plaintiff informed Defendants that Plaintiff has exclusive rights to the DJ LOGIC Mark, and Plaintiff specifically demanded that Defendants “immediately discontinue using the name ‘Logic’ in” connection with Defendant Hall.

43. On September 24, 2012, attorney Mark D. Passler responded to Plaintiff’s cease and desist

correspondence, stating that he would “review the matter and be in touch with you shortly.” Neither Mr. Passler nor any other representative of Defendants ever provided a substantive response to Plaintiff’s September 12, 2012 cease and desist demand. However, less than a month later, Mr. Passler, on behalf of Defendant Three Oh One, filed the application for registration of the “Logic” mark with the United States Patent and Trademark Office.

44. Defendants have continued to use the infringing “Logic” name even after being specifically notified of Plaintiff’s ownership of the DJ LOGIC Mark.

45. Despite Plaintiff’s demands, Defendants continue to knowingly and deliberately infringe upon Plaintiff’s DJ LOGIC Mark with complete and total disregard for Plaintiff’s rights. The parties’ respective marks are virtually identical. Defendants’ continuing infringement after being notified of Plaintiff’s ownership of the DJ LOGIC Mark illustrates Defendants’ bad faith intent to willfully infringe on Plaintiff’s DJ LOGIC Mark.

46. Plaintiff and Defendants both use the Mark in connection with identical and/or closely related goods and services.

47. On information and belief, the parties’ marketing channels are identical.

48. On multiple occasions, media outlets and fans of Plaintiff have been actually confused by Defendants’ use of the infringing name “Logic.”

49. Defendants' unauthorized use of Plaintiff's Mark has caused, and is likely to continue to cause, confusion and mistake among consumers as to source, sponsorship, and approval of Defendants' goods, and the affiliation, connection or association between Defendants and Plaintiff, all to Plaintiff's substantial harm.

50. Defendants' use of Plaintiff's Mark has caused and is causing actual confusion and initial interest confusion among consumers. Defendants' conduct creates the likelihood of both forward confusion, whereby the public is deceived into believing that Defendants' name, goods and services are produced, provided, endorsed, or authorized by Plaintiff, and reverse confusion, whereby the public is deceived into believing that Plaintiff's name, goods and services are produced, provided, endorsed, or authorized by Defendants, or, alternatively, that Plaintiff is an imitator and infringer of Defendants and their use of Plaintiff's registered Mark.

51. Defendants' use of Plaintiff's registered Mark deprives, and will continue to deprive, Plaintiff of the benefit of the goodwill Plaintiff has built up in the DJ LOGIC Mark, and threatens to destroy Plaintiff's goodwill.

52. Defendants have continued to use a name that is confusingly similar to Plaintiff's registered Mark in connection with goods and services that are competitive with and closely related to Plaintiff's goods and services, despite Defendants' knowledge and actual notice of Plaintiff's superior rights in the Mark and despite Plaintiff's express

written demand to Defendants to cease all use of Plaintiff's Mark.

**COUNT I**

**False designations of origin and false descriptions in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)**

53. Plaintiff re-alleges and incorporates by reference the allegations set forth in paragraphs 1 through 52 above.

54. Defendants' conduct constitutes the unauthorized use in commerce of the registered DJ LOGIC Mark, or of a false designation of origin, which is likely to cause confusion, or to cause mistake, or to deceive the public as to the origin, sponsorship, or approval of Defendants' goods, services and commercial activities by Plaintiff, and which accordingly constitutes unfair competition and infringement of Plaintiff's registered Mark.

55. Shortly, Defendants' conduct, by virtue of the exposure of the national release of an album under the infringing "Logic" name and under Defendant Def Jam Records' label, will become likely to, and will, create additional confusion, cause mistake and deceive the public as to the origin, sponsorship, or approval of Plaintiff's name and the infringing mark by Defendants – also known as "reverse confusion" – thus irreparably depriving Plaintiff of the benefit of his many years of effort to establish the DJ LOGIC Mark and name in the music industry.

56. On information and belief, Defendants

adopted the “Logic” name with full knowledge of Plaintiff’s prior use of the DJ LOGIC Mark. Accordingly, Defendants’ acts have been and are willful, deliberate and in bad faith.

57. Defendants’ acts complained of above are violative of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

58. Defendants’ violation of this statute has irreparably damaged Plaintiff, and Plaintiff has no adequate remedy at law. Unless enjoined, Defendants will continue the infringement, further injuring Plaintiff and the public.

## COUNT II

### **Federal trademark dilution in violation of Section 43(c) of the Lanham Act, 15 U.S.C. § 1125(c)**

59. Plaintiffs repeat and reallege the allegations set forth in paragraphs 1-58 above.

60. Defendants’ acts violate Section 43(c) of the Lanham Act, 15 U.S.C. § 1125(c).

61. Defendants’ use in commerce of the infringing name “Logic,” which commenced after Plaintiff’s Mark became famous, is likely to cause, and has caused, dilution of the distinctive quality of Plaintiff’s famous Mark.

62. On information and belief, Defendants’ unlawful conduct as set forth herein has been and continues to be willful, deliberate, and in bad faith.

63. Plaintiff has been, and continues to be, irreparably damaged by the violation of this statute, and he has no adequate remedy at law. Unless enjoined, Defendants will continue their infringing use of the name “Logic,” further injuring Plaintiff and the public.

**COUNT III**  
**Violation of the Michigan Consumer  
Protection Act, MCL § 445.901 *et seq* [sic]**

64. Plaintiffs repeat and reallege the allegations set forth in paragraphs 1-62 above.

65. Defendants’ aforesaid acts violate the Michigan Consumer Protection Act, Mich. Comp. Laws § 445.901 *et seq.*, because they have caused, and continue to cause, a probability of confusion or misunderstanding among Michigan consumers as to the source, sponsorship, approval or certification of the goods and services provided.

66. Consumers of the parties’ goods and services are likely to be confused, and in fact have been actually confused, as to whether Defendants are affiliated with Plaintiff. Defendants’ conduct has had, and will continue to have, an adverse impact on Plaintiff and on consumers because it wrongly suggests a cooperative relationship that does not exist in fact. As a direct and proximate result of Defendants’ unfair business practices, consumers have mistakenly believed, and will continue to mistakenly believe, that the recorded music and live performances of Defendant Hall are approved by, endorsed by, or otherwise affiliated with Plaintiff.



67. Defendants' unlawful conduct as set forth herein has been and continues to be willful, deliberate, and in bad faith.

68. On information and belief, Defendants received substantial revenues and substantial profits as a result of their unlawful conduct, to which Defendants are not entitled, and Plaintiff has also suffered damages as a result of the unlawful conduct, for which Defendants are responsible.

68. Defendants' unlawful conduct has and will continue to cause irreparable harm to Plaintiff, for which Plaintiff has no adequate remedy at law. Unless enjoined, Defendants will continue their unlawful conduct, further injuring Plaintiff and confusing the public.

**COUNT IV**  
**Unfair Competition**

69. Plaintiff re-alleges and incorporates by reference the allegations set forth in paragraphs 1 through 68 above.

70. The conduct of Defendants, including the conduct described herein which is contrary to honest practice in industrial or commercial matters, constitutes unfair and unethical trade practices and the tort of unfair competition.

71. As a result of these acts by Defendants, Plaintiff is continuing to suffer damages, in an amount not yet ascertained, and has suffered irreparable harm and loss.

**COUNT V**  
**Declaratory judgment that Defendant Three**  
**Oh One is not entitled to registration of the**  
**mark LOGIC**

72. Plaintiff re-alleges and incorporates by reference the allegations set forth in paragraphs 1 through 71 above.

73. Defendant Three Oh One has filed an application for registration of the mark LOGIC as the stage name for Defendant Hall, USPTO Serial No. 85755964.

74. Although the USPTO has issued an initial refusal to register Defendants' LOGIC mark, the USPTO still lists the application as "Live."

75. Defendant Three Oh One declared under oath when it filed the application for registration of the LOGIC mark that Three Oh One believed it was entitled to use of the mark in commerce and that no one else had the right to use the mark in commerce, either in identical form or in such near resemblance as to be likely to cause confusion or mistake, or to deceive.

76. Plaintiff had been using the DJ LOGIC mark in commerce on identical and/or closely related goods long before Defendant Three Oh One filed its trademark application for the LOGIC mark, and Defendant Three Oh One filed its application for registration of the LOGIC mark less than a month after receiving Plaintiff's cease and desist correspondence demanding that Defendants cease the infringing use of Plaintiff's Mark.

77. Defendant Three Oh One made knowingly false representations in that it knew of Plaintiff's longstanding prior use of the DJ LOGIC Mark when Defendant Three Oh One filed its trademark application for the LOGIC mark.

78. On information and belief, Defendant Three Oh One made these statements with the intent to induce the USPTO to grant Three Oh One a registration to which Defendant Three Oh One knew it was not entitled.

79. If this Court does not declare that Defendant Three Oh One is not entitled to registration of the LOGIC mark for which it applied, the Commissioner of Patents and Trademarks may register the mark for which Defendant Three Oh One fraudulently applied, or at the very least cost Plaintiff a substantial sum of money and years of administrative litigation to avert the fraud upon the Patent and Trademark Office and deny Defendant Three Oh One the registration to which it is not entitled.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays that the Court enter judgment:

1. Preliminarily and permanently enjoining and restraining Defendants, their officers, agents, servants, employees, attorneys, and all others in active concert or participation with Defendants, from:

a. Using, promoting, displaying,

licensing, advertising, offering for sale, selling, transferring, registering, assigning or otherwise employing or exploiting Plaintiff's DJ LOGIC Mark, the LOGIC mark, or any other name, logo, mark or design that that is confusingly or deceptively similar to the Mark, either alone or in conjunction with other words or symbols, as a part of any trademark, service mark, logo, trade name, corporate name, assumed name, domain name, on or in relation to any goods or services performed by Defendant, or in any other manner;

b. Committing any other acts calculated or having the tendency to cause confusion, mistake, or deception between Plaintiff and its goods and services on the one hand, and Defendants or any other party's goods and services on the other;

c. Committing any other acts calculated or having the tendency to create the mistaken impression that there is some association, connection or affiliation with and/or sponsorship or approval of Defendants' goods and services by Plaintiff, and/or of Plaintiff's goods and services by Defendants;

d. Authorizing, assisting, aiding, or abetting any other person or business entity in engaging in or performing any of the activities referred to in the above paragraphs (a) through (c).

e. committing trademark infringement, false advertising, false designation of origin, false descriptions, unfair competition, and /or any other act or making any other statement that infringes Plaintiff's Mark or constitutes an act of trademark

infringement, false advertising, false designation of origin, false descriptions, unfair competition, or deceptive trade practices under federal law, common law, or the Laws of the State of Michigan.

2. Requiring Defendants to deliver up for destruction all labels, signs, prints, packages, wrappers, containers, advertisements, recordings, electronic media, and other materials bearing the LOGIC mark or any other counterfeit, copy, infringing, or substantially indistinguishable designation of Plaintiff's Mark;

3. Requiring Defendants to publish clarifying statements that Defendants are not associated with Plaintiff;

4. Requiring Defendants to account for and pay over to Plaintiff Defendants' profits and all damages sustained by Plaintiff due to Defendants' misuse of Plaintiff's Mark;

5. Trebling the amount of damages awarded Plaintiff pursuant to 15 U.S.C. § 1117;

6. Awarding Plaintiff his attorneys' fees, costs and expenses pursuant to 15 U.S.C. § 1117;

7. Awarding Plaintiff compensatory damages suffered by Plaintiff according to proof;

8. Awarding Plaintiff punitive damages in an amount sufficient to deter and punish Defendants;

9. Awarding Plaintiff interest on the compensatory damages at the highest rate allowed by

law;

10. Awarding Plaintiff the costs of suit incurred herein; and

11. Awarding Plaintiff such other relief as the Court may deem just and proper.

Respectfully submitted,

**KERR, RUSSELL AND  
WEBER, PLC**

By:

/s/ Michael A. Sneyd

Michael A. Sneyd (P52073)

Attorneys for Plaintiff

500 Woodward Ave., Suite

2500

Detroit, MI 48226

(313) 961-0200

Dated: January 3, (313) 961-0388 (Facsimile)

2014

msneyd@kerr-russell.com

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**VERIFICATION**

I verify that the facts stated in the Verified Complaint are true and correct to the best of my information, knowledge and belief.

Lee Jason Kibler d/b/a DJ LOGIC

/s/ Lee Jason Kibler

Dated: 12/27/13

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**APPENDIX G**

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Registration No. 2,374,737 for DJ LOGIC, for Lee Jason Kibler, registered August 8, 2000, Ex. 36 (Doc # 92-12), Kibler Response to Hall motion for summary judgment:

**Int. Cl.: 41**

**Prior U.S. Cls.: 100, 101 and 107**

**Reg. No. 2,374,737**

**United States Patent and Trademark Office**

**Registered Aug. 8, 2000**

**SERVICE MARK**

**PRINCIPAL REGISTER**

**DJ LOGIC**

KIBLER, LEE JASON (UNITED STATES CITIZEN)  
1591 BRUCKNER BLVD. #5F NEW YORK, NY  
10472

FOR: ENTERTAINMENT, NAMELY LIVE  
PERFORMANCES BY A MUSICAL BAND, IN  
CLASS 41 (U.S. CLS. 100, 101 AND 107)

FIRST USE 1-1-1992; IN COMMERCE 2-0-1992. NO  
CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO  
USE "DJ", APART FROM THE MARK AS SHOWN.

SER. NO. 75-662,956, FILED 3-18-1999.

SHANNA BLAUSTEIN, EXAMINING ATTORNEY



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**APPENDIX H**

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Registration No. 4,371,378 for DJ LOGIC, for Lee Jason Kibler, registered July 23, 2013, Ex. 3 (Doc # 91-3), Kibler Response to Hall motion for summary judgment:

**UNITED STATES OF AMERICA  
UNITED STATES PATENT AND TRADEMARK  
OFFICE**

**DJ LOGIC**

**Reg. No. 4,371,378  
Registered July 23, 2013  
Int. Cls.: 9 and 41  
TRADEMARK  
SERVICE MARK  
PRINCIPAL REGISTER**

LEE JASON KIBLER (UNITED STATES INDIVIDUAL) APARTMENT 8H 1591 BRUCKNER BOULEVARD NEW YORK, NY 10472

FOR: PRE-RECORDED AUDIO COMPACT DISCS FEATURING MUSICAL, DIGITAL MEDIA, NAMELY, PRE-RECORDED DIGITAL DISCS, DOWNLOADABLE AUDIO FILES, DOWNLOADABLE AUDIO RECORDINGS FEATURING MUSIC, DIGITAL MUSIC DOWNLOADABLE FROM THE INTERNET; DOWNLOADABLE MUSICAL SOUND RECORDINGS; MUSICAL

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SOUND RECORDINGS; SERIES OF MUSICAL  
SOUND RECORDINGS, IN CLASS 9 (U.S. CLS. 21,  
23, 26, 36 AND 107

FIRST USE 10-12-1999; IN COMMERCE 10-12-1999.

FOR: ENTERTAINMENT SERVICES, NAMELY,  
LIVE PERFORMANCES BY A MUSICAL BAND,  
LIVE PERFORMANCES BY A DISC JOCKEY, AND  
LIVE PERFORMANCES FEATURING PRE-  
RECORDED VOCAL AND INSTRUMENTAL  
PERFORMANCES, IN CLASS 41(U.S. CLS. 100, 101  
AND 107

FIRST USE 1-1-1992; IN COMMERCE 2-28-1992

THE MARK CONSISTS OF STANDARD  
CHARACTERS WITHOUT CLAIM TO ANY  
PARTICULAR FONT, STYLE, SIZE, OR COLOR

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT  
TO USE "DJ" APART FROM THE MARK AS  
SHOWN

SER. NO. 85-774,783, FILED 11-8-2012

WILLIAM ROSSMAN, EXAMINING ATTORNEY

[SEAL]

*/s/ Signature*

**Acting Director of the United States Patent and  
Trademark Office**

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**APPENDIX I**

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Application for Trademark/Service Mark Registration (excerpt), Serial No. 8575964, for LOGIC, by Three Oh One Productions LLC, Declaration signed by respondent Hall, October 15, 2012, Ex. 17 (Doc # 91-7), Kibler Response to Hall motion for summary judgment:

**Trademark/Service Mark Application,  
Principal Register  
Serial Number: 85755964  
Filing Date: 10/17/2012**

**To the Commissioner for Trademarks:**

**MARK:** LOGIC (Standard Characters, see mark) The literal element of the mark consists of LOGIC. The mark consists of standard characters, without claim to any particular font, style, size, or color.

The applicant, Three Oh One Productions LLC, a limited liability company legally organized under the laws of New York, having an address of

102 Tullamore Road  
Garden City, New York 11530  
United States

requests registration of the trademark/service mark identified above in the United States Patent and Trademark Office on the Principal Register established by the Act of July 5, 1946 (15 U.S.C.

Section 1051 et seq.), as amended, for the following:

International Class 009: musical sound recordings and musical audiovisual recordings; pre-recorded compact discs and DVD's featuring musical entertainment; digital media, namely, downloadable audio files and downloadable audio and video files featuring musical entertainment; downloadable ring tones and music via the internet and wireless devices; downloadable sound recordings featuring musical entertainment; downloadable video recordings featuring musical entertainment; downloadable electronic publications in the nature of books, booklets, magazines, journals, manuals, brochures, leaflets, pamphlets and newsletters, all featuring musical entertainment

In International Class 009, the mark was first used by the applicant or the applicant's related company or licensee or predecessor in interest at least as early as 12/00/2005, and first used in commerce at least as early as 12/00/2008, and is now in use in such commerce. The applicant is submitting one(or more) specimen(s) showing the mark as used in commerce on or in connection with any item in the class of listed goods and/or services, consisting of a(n) CD showing use of Applicant's mark.

Specimen File1

International Class 041: entertainment services in the nature of personal appearances by a musical group; entertainment services, namely, televised, radio and computer communications network appearances by a musical group; entertainment services in the nature of audio and

visual performances by a musical group; audio and video recording services; fan club services; entertainment services, namely providing a website featuring non-downloadable musical performances, musical videos, related film clips, photographs, and other multimedia materials featuring a musical group; entertainment services, namely, providing non-downloadable ringtones, pre-recorded music, and graphics presented to mobile communications devices via a global computer network and wireless networks

In International Class 041, the mark was first used by the applicant or the applicant's related company or licensee or predecessor in interest at least as early as 12/00/2005, and first used in commerce at least as early as 12/00/2008, and is now in use in such commerce. The applicant is submitting one(or more) specimen(s) showing the mark as used in commerce on or in connection with any item in the class of listed goods and/or services, consisting of a(n) advertisement showing use of Applicant's mark.  
Specimen File1

The applicant's current Attorney Information:

Mark D. Passler and Peter A. Chiabotti, Rachel Rudensky, Jennifer P. Rabin of Akerman Senterfitt  
222 Lakeview Avenue, 4th Floor  
West Palm Beach, Florida 33401  
United States

The attorney docket/reference number is 10637-2.

The applicant's current Correspondence Information:

Mark D. Passler  
Akerman Senterfitt

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222 Lakeview Avenue, 4th Floor  
West Palm Beach, Florida 33401  
(561) 653-5000(phone)  
(561) 659-6313(fax)  
ip@akerman.com (authorized)

A fee payment in the amount of \$650 has been submitted with the application, representing payment for 2 class(es).

\* \* \*

**Declaration**

The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements, and the like, may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered, or, if the application is being filed under 15 U.S.C. Section 1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of his/her own knowledge are true; and that all statements made on information and belief are believed to be true.

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**Signature Section:**

Signature: /s/ Sir Robert Bryson Hall II

Signatory's Name: Sir Robert Bryson Hall II

Signatory's Position: Owner

Signatory's Phone Number:   

Date Signed: 10/15/2012

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**APPENDIX J**

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Section 32(1) of the Trademark Act of 1946 (Lanham Act), 15 U.S.C. 1114(1), provides, in part:

**Remedies; infringement; innocent infringers**

(1) Any person who shall, without the consent of the registrant—

(a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or

(b) reproduce, counterfeit, copy or colorably imitate a registered mark and apply such reproduction, counterfeit, copy or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive,

shall be liable in a civil action by the registrant for the remedies hereinafter provided. Under subsection (b) hereof, the registrant shall not be entitled to recover



profits or damages unless the acts have been committed with knowledge that such imitation is intended to be used to cause confusion, or to cause mistake, or to deceive.

Section 34 of the Trademark Act of 1946 (Lanham Act), 15 U.S.C. 1116(a) and (b), provides, in part:

**Injunctions; enforcement; notice of filing suit given Director**

(a) The several courts vested with jurisdiction of civil actions arising under this chapter shall have power to grant injunctions, according to the principles of equity and upon such terms as the court may deem reasonable, to prevent the violation of any right of the registrant of a mark registered in the Patent and Trademark Office or to prevent a violation under subsection (a), (c), or (d) of section 1125 of this title. Any such injunction may include a provision directing the defendant to file with the court and serve on the plaintiff within thirty days after the service on the defendant of such injunction, or such extended period as the court may direct, a report in writing under oath setting forth in detail the manner and form in which the defendant has complied with the injunction. Any such injunction granted upon hearing, after notice to the defendant, by any district court of the United States, may be served on the parties against whom such injunction is granted anywhere in the United States where they may be found, and shall be operative and may be enforced by proceedings to punish for contempt, or otherwise, by the court by

which such injunction was granted, or by any other United States district court in whose jurisdiction the defendant may be found.

(b) The said courts shall have jurisdiction to enforce said injunction, as herein provided, as fully as if the injunction had been granted by the district court in which it is sought to be enforced. The clerk of the court or judge granting the injunction shall, when required to do so by the court before which application to enforce said injunction is made, transfer without delay to said court a certified copy of all papers on file in his office upon which said injunction was granted.

Section 35 of the Trademark Act of 1946 (Lanham Act), 15 U.S.C. 1117(a), provides, in part:

(a) When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office, a violation under section 1125(a) or (d) of this title or a willful violation under section 1125(c) of this title, shall have been established in any civil action arising under this Act, the plaintiff shall be entitled, subject to the provisions of sections 1111 and 1114 and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's sale only; defendant must prove all elements of cost or deduction claimed. In assessing damages the court may enter judgment, according to the circumstances of the case, for any

sum above the amount found as actual damages, not exceeding three times such amount. If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty. The court in exceptional cases may award reasonable attorney fees to the prevailing party.

Section 43(a) of the Trademark Act of 1946 (Lanham Act), 15 U.S.C. 1125(a), provides, in part:

**False designations of origin; false description or representation**

(a) (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or

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another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.