

No. _____

In the

Supreme Court of the United States

SPRINGBOARDS TO EDUCATION, INC.,
Petitioner

v.

MISSION INDEPENDENT SCHOOL
DISTRICT, Respondent

On Petition for Writ of Certiorari to the United
States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the case met the standard to dismiss on summary judgment because no reasonable jury could return a verdict in favor of the non-moving party, and the Fifth Circuit viewed all factual inferences in the light most favorable to the nonmoving party, as established by *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) and *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986). Considering specifically in trademark cases the “fact-intensive inquiries cannot be conducted properly without a trial. The district court's (summary judgment dismissal was) ... reversed” by the Fifth Circuit. *Society of Financial Examiners v. National Ass'n of Certified Fraud Examiners Inc.*, 41 F.3d 223, 224 (5th Cir. 1995).

2. Whether the Fifth Circuit used the incorrect legal standard for a consumer, which was overly narrow and inconsistent with judgments from other circuits. *See Springboards to Educ., Inc. v. McAllen Indep. Sch. Dist.*, No. 21-40333, (5th Cir. March 8, 2023) at 17. In six other circuits, case law does not limit the definition of a consumer to whom the likelihood of confusion analysis is applied although two circuits have misapplied limiting language in opinions, as detailed in the petition.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, effective January 1, 2023, no parent or publicly owned corporation owns 10% or more of the stock in Springboards to Education, Incorporated.

RELATED PROCEEDINGS

Springboards to Education, Inc. v. McAllen Independent School District, No. 21-40333, Fifth Circuit Court of Appeal, judgment entered March 8, 2023. Petition for writ of certiorari submitted June 6, 2023.

Springboards to Education, Inc. v. IDEA Public Schools, No. 21-40334, Fifth Circuit Court of Appeal, denied rehearing April 26, 2023. Petition for writ of certiorari submitted June 30, 2023.

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I. PETITION FOR A WRIT OF CERTIORARI

Petitioner, Springboards to Education Inc. (Springboards), is an educational program developer, with federally-registered and common-law slogans identifying its reading program (the “Campaign”). Defendant, Mission Consolidated Independent School District (“MCISD”) used, distributed, and marketed a reading program that copied Springboards’ trademarked programs, without permission.

II. OPINIONS BELOW

The decision by the United States Court of Appeals for the Fifth Circuit (“Fifth Circuit”) upholding a summary judgment is unreported as *Springboards to Educ., Inc. v. Mission Independent School District*, No. 21-40337, (5th Cir. April 26, 2023) attached at Appendix B.

The United States District Court for the Southern District of Texas-McAllen (Southern District-McAllen) amended judgment dismissing the Defendant’s counterclaims is unreported as *Springboards to Educ., Inc. v. Mission Independent School District*, No. M-16-527, (S.D.Tx. Mar. 31, 2022) attached at Appendix C.

The Southern District-McAllen original judgment dismissing the case on summary judgment is unreported as *Springboards to Educ., Inc. v. Mission Independent School District*, 7:16-CV-527 (S.D.Tx. Mar. 30, 2021) attached at Appendix D.

III. JURISDICTION

The Fifth Circuit entered judgment on Defendant April 26, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves infringement of several registered trademarks protected by the United States Constitution, Article I, Section 8, Clause 8, giving Congressional power to secure authors and inventors exclusive right to their writings and discoveries. U.S. Const. art. I, § 8, cl. 8. Registered trademark protections codified in 15 U.S.C. § 1114(1)(a)-(b) and in 15 U.S.C. § 1125(a) for claims of false designation of origin, are attached in the Appendix A.

V. STATEMENT OF THE CASE

The basis for federal jurisdiction in the court of first instance, the Southern District-McAllen, was federal trademark infringement. The Fifth Circuit decision conflicts with the United States Supreme Court and Appellate Courts in the Second, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits, respectively.

Springboards holds three¹ registered trademarks for academic reading programs that

¹ At the time the case was filed in 2016 Petitioner held five registered trademarks. Two federal mark registrations are currently active. Springboards missed the deadline to file Section 8 and 9 statements but holds common-law rights in those marks.

are protected by the Lanham Act 15 U.S.C. § 1114 and infringed by the Respondent. *See* App. J. The other two marks are protected by 15 U.S.C. § 1125(a) for claims of false designation of origin. The Respondent knowingly misappropriated the reading program for use in its schools for years, even though Springboards told various educators and administrators working at MCISD to stop their infringement. Springboards sued for trademark infringement.

The United States District Courts in the Southern District of Texas-Houston (Southern District-Houston) and the Southern District-McAllen disposed of five trademark cases² involving Springboards between 2018 and 2021, including the present case. The first was *Springboards to Educ., Inc. v. Houston Indep.*

² The other four cases are:

Springboards to Educ., Inc. v. McAllen Independent School District, 7:16-cv-523 (S.D.Tx. Mar. 30, 2021)(“MISD 523”), *aff’d*. 21-40333 (5th Cir. Mar 8, 2023)(“MISD 21-40333”)

Springboards to Educ., Inc. v. IDEA Public Schools, 7:16-cv-617 (S.D.Tx. Mar. 30, 2021) (“IDEA 617”), *aff’d on unadvised grounds* 21-40334 (5th Cir. Mar 8, 2023)(“IDEA 21-40334”)

Springboards to Educ., Inc. v. PSJA 7:16-cv-524 (S.D.Tx. Mar. 30, 2021)(“PSJA 524”), *aff’d*. 33 F.4th 747 (5th Cir. May 10, 2022)(“PSJA 33”)

Springboards to Educ., Inc. v. Hous. Indep. Sch. Dist., 285 F.Supp.3d 989 (S.D. Tex. 2018) (“HISD 285”) *aff’d. on alt. grounds* 912 F.3d 805 (5th Cir. 2019)(rev. Feb. 14, 2019)(“HISD 912”)

Sch. Dist., 912 F.3d 805 (5th Cir. 2019) (“*HISD*, 912”). The present case³ uses *HISD*, 912 as precedent, with both the District and Appellate rulings using a standard for consumer confusion not used in other trademark cases in six other circuits.⁴ *Springboards to Educ., Inc. v. Mission Independent School District*, 7:16-CV-527 (S.D.Tx. Mar. 30, 2021) (“*MCISD 527*”), *aff’d*. 21-40337 (5th Cir. Mar. 8, 2023)(“*MCISD 21-40337*”) at 3. (“Consistent with our precedent, we affirm.”)

This case presents two questions of great importance. The Fifth Circuit sanctioned the Southern District-McAllen’s departure of summary judgment standards for trademark cases and in doing so entered a decision in conflict with the United States Supreme Court and six circuit courts:

1. When is it appropriate to dismiss a trademark infringement case on summary judgment when a reasonable jury could find for the nonmoving party viewing all inferences in the light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 248 and *Matsushita Elec. Indus. Co.*, 475 U.S. at 587. In trademark cases specifically, when is summary judgment

³ In addition to the present case, the District and Appellate Courts in the three Springboards cases in footnote 2 wrongly use *HISD* 912 as precedent. Bad precedent made it impossible for any of the cases to be treated fairly, as argued in section VI.E.

⁴ January 8, 2019, MCISD filed a notice of Appellate Ruling regarding *HISD* 912. (“MCISD 21-40337”, ROA.3586).

appropriate, if ever. *Society of Financial Examiners v. National Ass'n of Certified Fraud Examiners Inc.*, 41 F.3d 223, 224 (5th Cir. 1995)(“fact-intensive inquiries cannot be conducted properly without a trial. The district court’s [summary judgment dismissal was] ... reversed”.)

2. Who is the proper target in a likelihood of confusion analysis used to determine whether a prima facie case of trademark infringement exists under the Lanham Act and case law. The Fifth Circuit referred to *HISD*, 912⁵ and *MISD*, 21-40333⁶ as precedent in the present case. *MISD*, 21-40333 also refers to *HISD*, 912 as precedent.⁷ When the District Court used *HISD*, 912 as precedent they enforced a standard not used in other trademark cases in other circuits.⁸ *HISD*, 912 departed in identifying who to include in the likelihood of confusion analysis.

Next, we must identify the class of consumers at risk of confusion and the point in the transaction at which the risk

⁵ MCISD 21-40337 at 6.

⁶ MCISD 21-40337 at 5, four references.

⁷ MISD 21-40333 at 16, 17, 18, 19, 20, n. 7, n.8 (referencing *HISD*, 912 for IDEAs likelihood of confusion analysis, “nothing material separates this case from its predecessors” at 18).

⁸ Transcript of Hearing, Doc.# 117 *Springboards v. MCISD* 7:16-cv-527 (S.D.Tx, Mar. 29, 2021) at 9, 10, 11. Hearing granted summary judgment for three cases based on *HISD*, including the present case.

of confusion arises. See *Astra Pharm. Prods., Inc. v. Beckman Instruments, Inc.*, 718 F.2d 1201, 1206 (1st Cir. 1983) ("If likelihood of confusion exists, it must be based on the confusion of some relevant person; i.e., a customer or purchaser."); accord *Elec. Design & Sales, Inc. v. Elec. Data Sys. Corp.*, 954 F.2d 713, 716 (Fed. Cir. 1992). ... The relevant risk of confusion is not as clear in this case. Springboards does not allege that HISD directly competed with it by marketing the Houston ISD Millionaire Club to outside school districts.

HISD, 912 at 812-814 (emphasis added). HISD created an unnecessary matrix of obstacles to survive summary judgment (1) the "class of consumers at risk", (2) "the point in the transaction" and (3) "some relevant person". *Id.* The ambiguous "relevant risk of confusion is not as clear", is sufficient to deny summary judgment considering the light most favorable to the nonmoving party, *Anderson*, 477 U.S. 242 (1986), the Court did the opposite and dismissed. Use of a relevant person is inconsistently applied between the circuits.

Springboards suggests HISD's students and their-parents might have been confused into thinking that HISD was using Springboards' program instead of its own. Regardless of whether that might have been the case, HISD's students and their parents are not

the appropriate focus of the likelihood-of-confusion analysis.

HISD, 912 at 812-813 (emphasis added). *HISD*, 912 excluded students, parents, and other consumers from their confusion analysis. Following their lead, so did the Southern District-McAllen and the Fifth Circuit in the present case. Students are the end users, the most relevant and important consumer in the analysis, and literally the only people who “consume” the product. Parents and teachers have integral roles in the programs. Excluding students from the consumer analysis in a reading program is balderdash. The analysis may be appropriate if Defendants were producing and marketing accounting software or goods and services that are not consumed by students, but it is inappropriate when evaluating the likelihood of confusion analysis for a student reading program. In fact, it is the students and parents who provide demand for the product and service itself. Other Circuits disagree on narrowly defining the consumer and focus on the defendant actions. The Courts exclude community and parents, but MCISD admits marketing to “parents, teachers, administrators, and others invested in the success of the (MCISD) and its students. ... (MCISD) and its campuses promote the educational purpose of teaching students to love reading”. See App. L at #6.

(T)here is some risk that if HISD’s literacy program were inferior to Springboards’ literacy program, then Springboards’ potential customers might be deterred from purchasing Springboards’ products and services by a mistaken association between HISD and Springboards. This would be actionable. We therefore focus our digits-of-confusion analysis on whether there is a probability that HISD’s use of “Houston ISD Millionaire Club” would confuse third-party educators into believing that Springboards is affiliated with Houston’s summer-reading program.

HISD, 912 at 814 (emphasis added). *HISD* further limited the likelihood of confusion analysis to a hypothetical “third party educators” with a “probability of being potential consumers” that were not already doing business with Springboards. This excluded all other users and consumers directly impacted by the infringement. *Id.* There is no support for limiting this analysis—in fact, if those already purchasing Springboards’ program were to see *MCISD*’s inferior products and services and equate them with Springboards’, they may decide to find another vendor for such a reading program—thereby harming Springboards’ reputation and income. HISD’s analysis replaced actual confused consumers with hypothetical people, and the Southern District-McAllen and the Fifth Circuit used this narrow definition and

dismissed the current case. This case can resolve existing conflict in the Circuit and District Courts' analysis of the likelihood of confusion in the minds of potential consumers. This Court should grant certiorari, reverse, and remand to trial.

VI. REASONS FOR GRANTING THE WRIT

The Fifth Circuit upheld summary judgment and used a narrow definition of a consumer, departing from decisions by the United States Supreme Court, as well as the Second, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits and interjected one crucial word that confuses the analysis and sounds a death knell for most Plaintiffs.

A. The Burden for Summary Judgment is not met.

Departing from United States Supreme Court and Appellate Courts in three circuits, the Fifth Circuit upheld summary judgment even though Springboards provided evidence of actual confusion. The Seventh Circuit confirmed and cited the Second Circuit, stating "since reliable evidence of actual confusion is difficult to obtain in trademark and unfair competition cases, any such evidence is substantial evidence of likelihood of confusion." *Tisch Hotels, Inc. v. Americana Inn, Inc.*, 350 F.2d 609, 612 (7th Cir. 1965). citing *Harold F. Ritchie, Inc. v. Chesebrough-Pond's, Inc.*, 281 F.2d 755, 761 (2d Cir. 1960) et seq. Also, a "likelihood of confusion can be proved without any evidence of actual

confusion.” *Id.* at 611 citing *Keller Products, Inc. v. Rubber Linings Corp.*, 213 F.2d 382, 386, 47 A.L.R.2d 1108 (7th Cir. 1954); *Independent Nail Packing Co. v. Stronghold Screw Products, Inc.*, 205 F.2d 921, 925 (7th Cir.), cert. denied 346 U.S. 886, 74 S.Ct. 138, 98 L.Ed. 391 (1953).

Using Supreme Court standards, the present case evidence was sufficient to survive summary judgment. A dispute regarding a material fact is “genuine” if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson*, 477 U.S. at 248. When the Fifth Circuit restricted the consumer definition in the confusion analysis and disregarded evidence of actual confusion, they failed the *Matsushita Elec. Indus. Co.* standard to make “inferences .. drawn from the underlying facts... (that) must be viewed in the light most favorable to the party opposing the (summary judgment) motion.” *Id.* at 587 citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962)

The Ninth Circuit overturned summary judgment based on the District Court’s narrow definition of consumer, exactly like in the present case. In *Rearden LLC v. Rearden Commerce, Inc.*, 683 F.3d 1190 (9th Cir. 2012) the Court of Appeals vacated a trademark summary judgment. “The District Court likewise concluded that it would be unreasonable for a finder of fact to find that the relevant consuming public has experienced any real confusion. It explained, *inter alia*, that nearly every example

of purported confusion in the record involved a vendor or an industry insider of some sort, while the critical determination is whether prospective purchasers are likely to be deceived, regardless of the experiences of vendors, industry insiders, and job-seekers. The District Court therefore went on to reject Appellants' argument that confusion on the part of investors, vendors, and suppliers can support a finding of infringement even in the absence of any evidence of actual consumer confusion." *Rearden LLC* at 1199.(emphasis added). This is the exact erroneous reasoning used in the present case and overturned by the Ninth Circuit because "genuine issues of material fact with respect to both the 'use in commerce' and 'likelihood of confusion' elements of Appellants' Lanham Act trademark claim...". *Id.* at 1219.

Given the open-ended nature of this multi-prong inquiry, summary judgment on "likelihood of confusion" grounds is "generally disfavored in the trademark arena." *Reardon LLC* at 1202. The Ninth Circuit affirmed summary judgment "[i]n cases where the evidence is clear and tilts heavily in favor of a likelihood of confusion, we have not hesitated to affirm summary judgment on this point." ⁹ *Reardon LLC* citing *Au-Tomotive*

⁹ *MCISD*, 21-40337 used *HISD*, 912 as precedent, including the ambiguous "the relevant risk of confusion is not as clear in this case" *HISD*, 912 at 813, falling short of the Supreme Court standard to "tilt heavily in favor of a likelihood of confusion". *Reardon LLC* at 1210

Gold, Inc. v. Volkswagen of Am., Inc., 457 F.3d 1062, 1075 (9th Cir.2006) ((citing *Nissan Motor Co. v. Nissan Computer Corp.*, 378 F.3d 1002, 1019 (9th Cir.2004)); *Surfvivor*, 406 F.3d at 630–35. On the other hand, “[w]e have cautioned that district courts should grant summary judgment motions regarding the likelihood of confusion sparingly, as careful assessment of the pertinent factors that go into determining likelihood of confusion usually requires a full record.” *Thane Int’l, Inc. v. Trek Bicycle Corp.*, F.3d, 894, 901–02 (9th Cir.2002) (emphasis added)(citing *Clicks Billiards Inc. v. Sixshooters Inc.*, 251 F.3d 1252, 1265 (9th Cir.2001); *Interstellar*, 184 F.3d at 1109, superseded by statute on other grounds, Trademark Uniform Dilution Revision Act of 2006, 15 U.S.C. § 1125, as recognized in *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 633 F.3d 1158 (9th Cir.2011)). In other words, “[b]ecause the likelihood of confusion is often a fact-intensive inquiry, courts are generally reluctant to decide this issue at the summary judgment stage.” *Au-Tomotive*, 457 F.3d at 1075 (citing *Thane*, 305 F.3d at 901–02)); see also, e.g., *Fortune*, 618 F.3d at 1039. Despite strong precedent against summary judgment, the Fifth Circuit sustained the present case.

In *Kubota Corp. v. Shredderhotline.com Co.*, Case No. 12 C 6065 (N.D. Ill. Nov. 20, 2013) the Court denied the Plaintiff’s summary judgment motion in a trademark dispute claim. The Seventh Circuit states “that a question of fact may be resolved on summary judgment only

‘if the evidence is so one-sided that there can be no doubt about how the question should be answered.’ *Kubota* 14 citing *AutozZone, Inc. v. Strick*, 543 F.3d 923, 929 (7th Cir. 2008). Unlike *Kubota*, Springboards provided testimony about the likelihood of confusion from an abundance of witnesses, including students, parents, and employees of the Respondent. In fact, nine confusion witnesses were identified. Defendant admits this: “the only persons who were allegedly confused were the witnesses; the witnesses are not potential consumers because (with the possible exception of Maria Vega) they did not have the authority to make or influence school district purchases” *MCISD 527* (S.D.Tx Mar. 29, 2021)(Doc.# 100) at 17. In *Kubota* the confusion witness’s “belief as to the likelihood of confusion among consumers is undercut by the fact that he is not a consumer, but an employee of (the Plaintiff). Equally important, Plaintiffs fail to point to any other evidence or argument that consumers are likely to be confused about the origin of the parties' products, which is ultimately a question of fact for the jury.” *Id* at 14. In Springboards’ cases the confusion witnesses included Defendant employees and end users.

In *Star Buffet, Inc. v. TGB Glory, LLC*, Case No. 4:17CV00533 SWW (E.D. Ark. Mar. 29, 2019) Defendant’s summary judgment was denied in a trademark case because the likelihood of confusion was determined to be a genuine issue of fact. *Id.* at 19. “In the light most

favorable to (the Plaintiff), the Court finds questions for trial as to (intent)” *Id.* at 17. The Eighth Circuit explained factors of a likelihood of confusion analysis “do not operate in a mathematically precise formula; rather, we use them at the summary judgment stage as a guide to determine whether a reasonable jury could find a likelihood of confusion.” *Id.* at 13 (emphasis added). The error in the decision below is clear – Springboards more than made its case that confusion was likely, and in fact, actually apparent.

B. Summary Judgment Evidence

The Court references *HISD*, 912 “digits of confusion” but did not “parse the individual digits here...(because) any conceivable confusion ... is at most exceedingly remote.” *MCISD*, 21-40337 at 5-6.¹⁰ The judgment provides no analysis because the “antecedent error of misidentifying the relevant class”. *MCISD*, 21-40337 at 6. However, six circuits disagree with

¹⁰ *MCISD*, 21-40337 at n2, The “digits of confusion are: (1) type of trademark allegedly infringed, (2) the similarity between the two marks, (3) the similarity of the products or services, (4) identity of retail outlets and purchasers, (5) identity of advertising media used, (6) defendant's intent, (7) any evidence of actual confusion...[and] (8) the degree of care exercised by potential purchasers. *See also Elvis Presley Enters., Inc. v. Capece*, 141 F.3d 188, 194 (5th Cir. 1988), *Conan Properties, Inc. v. Conans Pizza, Inc.*, 752 F.2d 145, 149 (5th Cir.1985). *Id.* at 194. In *Elvis* and *Conan*, the Fifth Circuit references the same first 7 digits of confusion as *MCISD*, 21-40337, neither reference the eighth as a digit of confusion.

the “antecedent error”¹¹, and if the Fifth Circuit had conducted the likelihood of confusion analysis, the case would have survived summary judgment. All other issues were disposed of in Springboard’s favor.¹²

The record shows a multitude of fact issues and evidence not referenced in the judgment that a jury could find in favor of Springboards. At close of discovery witness testimony confirms actual consumer confusion that should have survived summary judgment and given Springboards their day at trial.

Springboards presented at least three witnesses who attested to actual confusion. Craig Verley, Kim Risica, and Guadalupe Elizondo testified they encountered MCISD’s infringing program that copied Springboards’ protected trademarks and trade dress and were confused as to their source. The Court made fact determinations and misapplied summary judgment and the likelihood of confusion standards.

Elizondo, a teacher from a different school district, who lives in Mission, personally witnessed student and parent confusion. MCISD students were denied access to rewards provided by Springboards for legitimate participants. *Id.*

¹¹ Circuit split – see Section C

¹² The Fifth Circuit did not affirm the District Court judgment on commercial use, fair use, intent, good faith, and does not warrant trademark protection. Electronic Record on Appeal, MCISD 21-40337, at 2140337.6899

at ROA.5452, 5465-5466, 5477-5478.¹³ Verley and Risica, MCISD employees, confirmed MCISD included Springboards reading program in their campus improvement plan and curriculum.¹⁴ *Id.* at ROA.5155-5158 and 5399, 5324-25. App. I includes three original trademark registrations, and App. E includes an excerpt from the MCISD Campus Improvement Plan 2011-2013 showing “Millionaire Club” as part of MCISD’s plan to “Provide Student Enrichment Opportunities in order to encourage reading”, plus other internal processes that used Springboards marks. Witness statements confirm MCISD’s use of Springboards’ marks in social media was a source of actual confusion.¹⁵ *Id.* ROA.51-62, ROA.915-919, ROA.929, ROA.935-937, ROA.1976, ROA.5452, ROA.5466, ROA.5477-5478, ROA.5645-5647.

In a *de novo* review the Court need look no further than Defendant’s Renewed Motion for Summary Judgment for evidence of a likelihood of confusion. *See* MCISD’s Motion for Summary Judgment *MCISD*, 527 (S.D.Tx Mar. 29, 2021)(Doc.# 100). The motion made conclusory allegations regarding the strength of the marks, use in commerce, likelihood of confusion and

¹³ Example of Actual Confusion, factor #7, in the likelihood of confusion analysis.

¹⁴ Example of Intent, factor #6, and Similarity of Products or Services, factor #3, in the likelihood of confusion analysis.

¹⁵ Example of Advertising Media, factor #5, in the likelihood of confusion analysis.

other issues, all of which were disposed of in Springboards' favor except for the likelihood of confusion.¹⁶ A relatively modest commercial use of a trademark may be sufficient to establish trademark rights in a particular geographic region, so long as these initial efforts are followed by continuous use of the mark. MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 16:6 (4th ed. 2016).

MCISD admits evidence indicates the district and several schools used Springboards registered marks in reading programs years after two of the marks were first used in Commerce by Springboards.¹⁷ *MCISD* 21-40337 (5 Cir. Apr. 26, 2023) (ROA.2762). Defendant questions the provenance of the evidence, which is within the sole province of the jury, never appropriate for summary judgment. *Id.*

A Library Science Director at an adjoining school district, discussed purchasing reading program medals stated "...if we're going to do millionaire, then it's going to be from Springboards" which could confuse a customer who saw a counterfeit medal with the Springboard mark.¹⁸ *MCISD* 527 (S.D.Tx Mar. 29, 2021)(Doc.# 100, Ex 43 at 317) *See* App. F and J. A reasonable jury could find confusion as

¹⁶ See n. 12

¹⁷ Example of Intent, factor #6, and Similarity of Products or Services, factor #3, in the likelihood of confusion analysis.

¹⁸ Example of Actual Confusion, factor #7, in the likelihood of confusion analysis

to the source, especially among professional colleagues.

An MCISD employee testified schools used confusingly similar marks in reading programs.¹⁹ *See* App. G. MCISD's evidence shows blatantly comingling authorized and counterfeit goods. *See* App. K.²⁰

MCISD insists they do not use marks or any words confusingly similar to Springboard's marks, but they also provide evidence of exactly this abuse in their advertising and promotions.²¹ *See* App. G. Perhaps this is the Defendant's manipulation of the term "in commerce", pleading their non-profit status, an argument that the Fifth Circuit did not affirm in either *HISD*, 912 and *MCISD*, 21-40377.²² The admission stands alone with years of social media and other promotional material confirming infringement.

Another example, an MCISD school principal's e-mail about the counterfeit reading program's success used confusingly similar words to the registered marks. The principal used quotes around the confusing terms. *See* App. L at 3, 7. This admission that MCISD used words confusingly similar to Springboards' mark in

¹⁹ Example of Similarity between two marks, factor #2, in the likelihood of confusion analysis

²⁰ Example of Similarity between two marks, factor #2, in the likelihood of confusion analysis

²¹ Example of Similarity between two marks, factor #2, in the likelihood of confusion analysis

²² *See* footnote 12

context of reading program appears misleading to other employees. Why would the principal use quotes around confusing reading program descriptions, other than to avoid confusion.²³

Evidence provided by MCISD employees and others that would give a reasonable jury sufficient grounds to survive summary judgment.

C. Consumer Confusion Limitations Inconsistent with U.S. Code and Circuits Disagree.

Appellate Courts in the Second, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits used a definition of consumer in the confusion analysis that agrees with the United States Supreme Court, the U.S. Code, and disagrees with the narrow scope applied by the Fifth Circuit and Southern District-McAllen in the present case. The case law split emphasizes the importance of United States Supreme Court oversight defining a consumer for the purposes of the likelihood of confusion analysis.

1. The U.S. Code Does Not Limit the Consumer Definition

Liability for infringement of registered trademarks codified by 15 U.S.C. § 1114(1) does not limit the definition of consumer. In fact, it does the opposite, the language promotes an expansive definition of the consumer in the confusion analysis.

²³ Example of Similarity between two marks, factor #2, in the likelihood of confusion analysis

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 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

15 U.S.C. § 1114(1) (emphasis added). The code does not identify who must be confused and instead focuses on the offending action—which is the opposite of lower courts’ final reasoning in the present case. Confusingly, the District Court cited the above language in the summary

judgment hearing²⁴ and still reached the conclusion that a certain subset of consumers were not confused. However, the Code contains no limiting language defining a consumer²⁵. The Defendant's actions are the subject of sections (a) and (b) of the code, and "likely to cause confusion" is the object. No descriptor ties who must be confused. The Fifth Circuit's interpretation that confusion is limited to a "relevant consumer" *has no basis in the code.

2. Judgments that Do Not Limit the Consumer Definition

The Fifth Circuit states the "threshold question of the identity of the relevant class of 'consumers' is not immediately clear" in the present case "(the Fifth Circuit) has repeatedly rejected the argument (that)"..."the relevant consumers are students, parents, and educators affiliated with Mission". *MCISD*, 21-40337, at 5 (citing *MISD*, 21-40333 at 185 and *PSJA*, 33 at 750) "as held before, the relevant class of consumers is third-party school districts who may be misled into thinking that Mission's reading program is affiliated with Springboards' Campaign." *Id.*

²⁴ Transcript of Hearing, Doc.# 117 *Springboards v. MCISD* 7:16-cv-527 (S.D.Tx, Mar. 29, 2021) at 8 ("the Court is going to find the Defendants are entitled to judgment") at 10 ("The HISD decision noted only one digit weighted clearly in Plaintiff's favor") (see footnote 32, *HISD*, 912 found three factors in Springboards' favor.)

²⁵ *Id.* at 10.

The Fifth Circuit adopts *MISD*, 21-40337 and *HISD*, 912 without qualification. *MCISD* 21-40337 at 5 and 6. *MISD* declares “confusion of (parents, students, and teachers) is ‘not the appropriate focus of the likelihood of confusion analysis’ because they are not ‘purchasers in the ordinary sense’”, and that “third parties in other school districts” are “the relevant class of consumers”. *MISD*, No. 21-40334 at 16-18, *citing HISD*, 912. (emphasis added)

Springboards uses a consumer definition embraced by the United States Supreme Court, and the Appellate Courts in the Second, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits: **“consumers generally familiar with”, “the mind of the public”, “the viewer of an accused mark”, “consumers”, “ordinary prudent purchaser”, “perspective purchasers or viewers”, “consuming public”, “anonymous web posts”, “all potential customers including middlemen”, “ultimate consumers”, “mark holders customers and people in the (industry) trade”, “prospective customers”, “consumers” and “ordinary purchaser”**. *James Burrough Ltd. v. Sign of Beefeater, Inc.*, 540 F.2d 266, 274-275 (7th Cir. 1976), *Armstrong Paint Varnish Works Co. v. Nu Enamel Corp.*, 305 U.S. 315, 59 S.Ct. 191, 83 L.Ed. 195 (1938), *Scott Fetzer Co. v. House of Vacuums Inc.*, 381 F.3d 477, 483 (5th Cir. 2004), *Cliff's Notes, Inc. v. Bantam Doubleday Dell Publishing Group, Inc.*, 718 F. Supp. 1159, 1162

(S.D.N.Y. 1989), *Warner Bros., Inc. v. Amer. Broadcasting, Etc.*, 530 F. Supp. 1187, 1197 (S.D.N.Y. 1982), *World Market Center Venture, LLC v. Ritz*, 597 F. Supp. 2d 1186, 1189 (D. Nev. 2009), *You Fit, Inc. v. Pleasanton Fitness, LLC*, Case No. 8:12-CV-1917-T-27EAJ (M.D. Fla. Feb. 8, 2013) at 9 and n.6, *Caliber Auto. Liquidators, Inc. v. Chrysler*, 605 F.3d 931, 937 and n.22 (11th Cir. 2010), *Mother's Restaurants Inc. v. Mother's Bakery, Inc.*, 498 F. Supp. 847, 850 (W.D.N.Y. 1980), *Old Detroit Burger Bar of Clarkston, LLC v. G & J Am. Grill, Inc.*, No. 20-11952 (E.D. Mich. Jul. 15, 2022) at 10, *Star Buffet, Inc. v. TGB Glory, LLC*, Case No. 4:17CV00533 SWW (E.D. Ark. Mar. 29, 2019) at 18.

The Fifth Circuit's narrow definition of a relevant consumer - third party school districts, not already doing business with the Petitioner, excluding students, parents, and educators - misrepresents and misunderstands the trademarked product and service.

The Seventh Circuit adopted a wider definition of the consumer determining "evidence must be evaluated on the basis of whether it disclosed a likelihood that consumers generally familiar with (Plaintiff's) marks would be likely, upon seeing only (Defendant)'s sign, to believe that (Defendant)'s enterprise was in some way related to, or connected or affiliated with, or sponsored by, (Plaintiff)." *James Burrough Ltd. V. Sign of Beefeater, Inc.*, 540 F.2d 266, 274 (7th Cir. 1976)(emphasis added) citing *G. LeBlanc Corporation v. H. A. Selmer, Inc.*, 310 F.2d 449,

135 USPQ 338 (CA 7 1962); *Jewel Tea Co., Inc. v. Kraus*, 187 F.2d 278, 88 USPQ 507 (CA 7 1951) (citing *Armstrong Paint Varnish Works Co. v. Nu Enamel Corp.*, 305 U.S. 315, 59 S.Ct. 191, 83 L.Ed. 195 (1938))(See Note 11 (b) “That trademarksas to be likely to cause confusion or mistake in the mind of the public or to deceive purchasers shall not be registered.”(emphasis added)).

The Seventh Circuit broadened the likelihood of confusion analysis, “the test is not whether the public would confuse the marks, but whether the viewer of an accused mark would be likely to associate the product or service with which it is connected with the source of products or services with which an earlier mark is connected. *Burroughs*, 524 F.2d at 275. As is the case here, “(t)rademark infringement must be considered in a marketplace context, the test, likelihood of confusion of consumers, does not require that the contending parties before the court be even in competition.” *Burroughs* at 275 citing *Safeway Stores, Inc. v. Rudner*, 246 F.2d 826 (9th Cir. 1957).

In *Scott Fetzer Co. v. House of Vacuums Inc.*, 381 F.3d 477 (5th Cir. 2004) the Fifth Circuit adopted the wider definition of consumer in the likelihood of confusion analysis “to prove trademark infringement and unfair competition under federal law, Scott Fetzer must show that the use of the KIRBY mark by House of Vacuums is likely to cause confusion among consumers as to the source, affiliation, or sponsorship of House

of Vacuums's products or services." *Scott Fetzer* at 483 citing 15 U.S.C. § 1114(1) (West 1997 Supp. 2004); *id.* § 1125(a) (West 1998); *Westchester Media v. PRL USA Holdings, Inc.*, 214 F.3d 658, 663 (5th Cir. 2000). (emphasis added).

In *Cliff's Notes, Inc. v. Bantam Doubleday Dell Publishing Group, Inc.*, 718 F. Supp. 1159, 1162 (S.D.N.Y. 1989) the Court defers to the Second Circuit in a trademark "likelihood of confusion" analysis using an ordinary prudent purchasers standard. "To establish the requisite level of confusion, plaintiff must show a "likelihood that an appreciable number of ordinary prudent purchasers are likely to be misled, or indeed simply confused, as to the source of the goods in question." *Cliff's Notes* at 1162 (emphasis added), citing *Andy Warhol Enterprises, Inc. v. Time Inc.*, 700 F. Supp. 760, 763 (S.D. N.Y. 1988)(quoting *Charles of the Ritz Group Ltd. V. Quality King Distr., Inc.*, 832 F.2d 1317, 1321 (2d Cir. 1987))."

An even wider standard of confusion is applied in *Warner Bros., Inc. v. Amer. Broadcasting, Etc.*, 530 F. Supp. 1187 (S.D.N.Y. 1982). "Thus, "the touchstone of both trademark infringement and unfair competition is the likelihood of confusion among prospective purchasers [or viewers]." *Warner Bros.* at 1197 (emphasis added)(citing *Menley James Laboratories, Ltd. V. Approved Pharmaceutical Corp.*, 438 F. Supp. 1061, 1066 (N.D.N.Y. 1977)).

The S.D.N.Y. gives no further limitation to consumers.

In *World Market Center Venture, LLC v. Ritz*, 597 F. Supp. 2d 1186 (D. Nev. 2009) the Court states “to succeed on the merits of trademark infringement claims under the Lanham Act, Plaintiff must establish that Defendant’s use of Plaintiff’s marks causes a likelihood of confusion among the consuming public. See 15 U.S.C. § 1114(a).” *World Market* at 1189. (emphasis added). In *World Market* the Plaintiff provides showrooms and tradeshowes exclusively to wholesale customers, not to the consuming public. *Id.* at 1188. Springboards’ business model is similar to a wholesaler, selling to a party that provides the product to the end-user. The present case meets the *World Market* standard.

In *You Fit, Inc. v. Pleasanton Fitness, LLC*, Case No. 8:12-CV-1917-T-27EAJ (M.D. Fla. Feb. 8, 2013) confusion expressed in an anonymous web post was considered appropriate because the Court adopted “All potential consumers of the relevant product or service, including middlemen, can inform the inquiry, and the ultimate consumers deserve special attention.” *You Fit*, at 9 and n. 6 (emphasis added)(referencing *Caliber Auto. Liquidators, Inc. v. Chrysler*, 605 F.3d 931, 937 (11th Cir. 2010)). This is the same as some confusion experienced and testified to in Springboards’ case, because evidence of confusion was observed due to posting offending products on webpages

and social media platforms. While such individuals may not be purchasing the product directly, they are in roles like middlemen, informing the school district's decision of what to buy, what works, what is popular. The M.D.Fla. recognized the importance of confusion with the "ultimate consumers". In the instant case, the ultimate consumers are students. The Eleventh Circuit and M.D.Fla. recognize that confusion can exist at every level, while the Fifth Circuit in the instant case focuses only on the last step of the purchase. One reason for trademark protection is the protection of a commercial entity's reputation or goodwill, which can be harmed if any confusion is present.

In *Caliber Auto. Liquidators, Inc. v. Chrysler*, 605 F.3d 931, n.22 (11th Cir. 2010)(citing *Conagra, Inc. v. Singleton* 743 F.2d 1508 (11th Cir.1984)) "the plaintiff ran a seafood packing operation under the name Singleton. The defendant ran a shrimping business under the same name. Plaintiff sued for infringement and put on proof that its customers-food wholesalers-became confused when the defendant entered the market as a competitor, selling directly to restaurants. The court focused on the type of people most likely to become confused-the mark holder's "customers and people in the seafood trade." *Id.* at 1515. (emphasis added) Because MCISD had a direct connection to the end-users of the products and services at issue, it was better-situated to infringe without detection by Springboards.

Mother's Restaurants Inc. v. Mother's Bakery, Inc., 498 F. Supp. 847, 850 (W.D.N.Y. 1980) declined to narrow the scope of the confusion analysis stating “the essence of a claim of trademark infringement or unfair competition is the likelihood of confusion caused by the infringement among prospective customers.” *Mothers* at 850 (emphasis added) citing *Grotrian, Helfferich, Schulz, Th. Steinweg Nachf. V. Steinway Sons*, 523 F.2d 1331 (2d Cir. 1975); *Maternally Yours, Inc. v. Your Maternity Shop, Inc.*, 234 F.2d 538 (2d Cir. 1956).” Certainly students, teachers and parents are prospective customers should they wish to purchase more goods from Springboards after receiving them at school.

In *Old Detroit Burger Bar of Clarkston, LLC v. G & J Am. Grill, Inc.*, No. 20-11952 (E.D. Mich. Jul. 15, 2022) summary judgment was denied in a trademark case. The analysis made no distinction on consumers, drawing straight from the U.S. Code, “To show common law trademark infringement and unfair competition under 15 U.S.C. § 1114, a plaintiff must demonstrate that the use of the allegedly infringing trademark “is likely to cause confusion among consumers regarding the origin of the goods offered by the parties.” *Old Detroit* at 10 (emphasis added) citing *General Motors Corp. v. Lanard Toys, Inc.*, 468 F.3d 405, 412 (6th Cir. 2006) (citations omitted); see also *Daddy’s Junky Music Stores, Inc. v. Big Daddy’s Family Music Center*, 109 F.3d 275, 280 (6th Cir. 1997) (noting

that “[t]he touchstone of liability under § 1114 is whether the defendant’s use of the disputed mark is likely to cause confusion among consumers regarding the origin of the goods offered by the parties”).” *See also Lanard Toys, Inc. And Daddy’s Junky Music.*

In *Star Buffet, Inc. v. TGB Glory, LLC*, Case No. 4:17CV00533 SWW (E.D. Ark. Mar. 29, 2019) analysis of the factors of confusion referenced the Eighth circuit’s “ordinary purchaser” rather than a “relevant consumer” or limiting definition. *Id.* at 18 *citing Techs. Corp. v. Sensory Effects Flavor Co.*, 613 F.3d 754, 769 (8th Cir. 2010)(quoting *Luigino’s Inc. v. Stouffer Corp.*, 170 F.3d 827, 831 (8th Cir. 1999)).

3. Judgments that Limit the Consumer Definition

District and Appellate Courts in the Second and Sixth Circuits used a narrow definition of the relevant consumer, the same modifier used in the present case. In these cases, the application was not as strict as the present ruling.

a) Relevant Explained Rather Than Limited Consumers

In *Kaldy v. Urshow.TV, Inc.*, No. 2:16-CV-54 (E.D. Tenn. Jan. 10, 2017) the Defendants’ motion was denied because, even though the Plaintiff and Defendant are in two separate industries, apparel manufacturing and digital broadcasting respectively, the Court declined to rule on “factual issues that underlie the question of whether a likelihood of confusion exists among

consumers” *Kaldy* at 6. *Kaldy* discusses “(t)he ultimate question [is] whether relevant consumers are likely to believe that the products or services offered by the parties are affiliated in some way.” *Id.* at 4. The Sixth Circuit uses “relevant consumers” to distinguish consumers of athletic apparel from digital broadcasting. In *Kaldy* “relevant consumers” refer to distinct groups of people, while in the present case the Plaintiff and Defendant are in the same business, education, with the same end-users, students. *Kaldy*’s use of the word “relevant” to modify consumers was not intended, as in the present case, to carve out a hypothetical group of people considered consumers to the exclusion of all other people. The Fifth Circuit “relevant consumer” has no precedent in *Kaldy*.

Coach, Inc v. Planet, Civil Action 2:09-cv-00241 (S.D. Ohio May. 7, 2010) analysis used the term “relevant consuming public” but the decision did not differentiate who was (and was not) relevant. *Coach* at 6. In *Coach*, the court asked if “Defendants used in commerce a reproduction, counterfeit, copy, or colorable imitation of Coach’s registered mark in a way that would likely cause confusion among the relevant consuming public”. *Coach* at 117 (emphasis added) referencing *The Sports Authority, Inc. v. Prime Hospitality Corp.*, 89 F.3d 955, 960 (2d Cir. 1996). *Coach* did not define the term “relevant consuming public”. In the *Sports Authority* likelihood of confusion analysis products were identified as inexpensive

and customers were determined to be unlikely to be sophisticated purchasers. *Sports Authority* at 965. *Sports Authority* does not use the *Coach* term “relevant consuming public” but uses “relevant purchaser” to differentiate the Plaintiff and Defendant’s businesses, sporting goods and food, respectively. *Coach* illustrates an appropriate use of the term “relevant” in connection to purchasers or consumers—that is, parties at issue are engaged in different commercial areas, such as sporting goods versus food. *Sports Authority* does not limit who is allowed to be considered a consumer when considering actual confusion, as the Fifth Circuit does in the present case.

b) Relevant Describing How and When, not Who

The handful of outlier cases using the word “relevant” in connection with consumers offer no connection to the reasoning that a portion of the consuming public needs to be confused. The more appropriate explanation is that it was merely used as dicta, perhaps in cases where trademark surveys were conducted for a dilution analysis. In a dilution analysis, the marks at issue must be famous. To show fame, a “relevant universe” must be ascertained. The word “relevant” seems to have been included in a few cases, unfortunately leading to the confusion in the courts below in the instant case. The *Coach* case referenced *Louis Vuitton Malletier v. Dooney Bourke, Inc.*, 454 F.3d 108, 114-15 (2nd Cir. 2006) in the analysis of use of a “registered

mark in a way that would likely cause confusion among the relevant consuming public.” This misquotes the *Louis Vuitton* case in its use of the word “relevant”. *Louis Vuitton* did not use the word “relevant consumer”. The *Louis Vuitton* use of the word “relevant” was in connection with whether a stylized letter was inherently distinctive. This is far from the precision the Fifth Circuit applied in the present case. There is no definition of the word “relevant consumer” in *Coach*, but the reference to *Sports Authority* and *Louis Vuitton* provides valuable insight on the term.

The consumer analysis in *Louis Vuitton*, puts no limits on who qualifies as a consumer, rather only when and how the confusion occurs. In *Louis Vuitton* the case was remanded to trial to resolve the issue of confusion, which is the same relief Springboards requests.

c) Relevant Use is Vague and Not Defined

Another case, *Burberry Limited v. Designers Imports, Inc.*, 07 Civ. 3997 (PAC) (S.D.N.Y. Jan. 19, 2010) used the term “relevant consuming public” in the confusion analysis of a trademark infringement case. *Burberry Limited* at 14. No definition was provided on who was and was not relevant in *Burberry*, but there was a reference to *Cartier Int’l B.V. v. Ben-Menachem*, 2008 WL 64005, at *10 (S.D.N.Y. Jan. 3, 2008). *Burberry* at 14. In *Cartier Int’l B.V.*, the Plaintiff’s summary judgment was granted in a counterfeiting case. *Cartier Int’l B.V.* used the term “relevant consuming public”,

but again with no definition on how to interpret the word relevant. *Cartier Int'l. B.V.* at 30. Comparing *Burberry Limited* and *Cartier Int'l B.V.* there is no clear way to understand how the word relevant limits the consumers, and whether it is consistent with the present case. Tracing the cases back to the first use of the word “relevant” lands with *Star Industries, Inc. v. Bacardi & Co.*, 412 F.3d 373 (2d Cir. 2005), wherein the Court merely uses the word in dicta when determining whether a stylized word or letter is inherently distinctive. Following caselaw and reason, the most likely reason for the use of the word “relevant” is that it was not a modifier dissecting the normal class of consumers that would be exposed to the product or service, but something that excludes those consumers that would never be exposed to such product or service.

D. The Courts Below Erred in Fact-finding and Making Credibility Determinations

In dismissing the case the Fifth Circuit admits that “some of the digits of confusion weigh in Springboards’ favor. *MCISD*, 21-40337 at 6, citing *HISD*, 912 at 814-818. The Court acknowledged actual confusion and summarily dismissed the claim. *Ibid.*

It is the duty of the jury to weigh the evidence and make credibility judgments. *Morales v. American Honda Motor Co.*, 71 F.3d 531, 535 (6th Cir. 1995). It is not the Court’s place during summary judgment to make

credibility determinations or weigh the evidence at hand. See *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 225 (5th Cir.2000) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097, 2110 (2000)). It is the job of a jury to choose among conflicting evidence and make credibility determinations. *Id.* It is incumbent on the trial judge to view the evidence in the light most favorable to the non-moving party. *Swearngin v. Sears, Roebuck Co.*, 376 F.2d 637, 639 (10th Cir. 1967). All the evidence on both sides of the case ought to be considered in making this decision because eventually the court is going to have to pass on it and evaluate it. *Christopherson v. Humphrey*, 366 F.2d 323, 325 (10th Cir. 1966). The jury is entitled to weigh conflicting evidence and inferences and determine the credibility of witnesses. The court should accept as true evidence of the non-moving party. *Anderson v. Hudspeth Pine, Inc.*, 299 F.2d 874 (10th Cir. 1962).

In determining Springboards' witnesses who were confused because MCISD's infringing products were not credible, the District Court took a liberty it was not allowed. *MCISD*, 527 at Doc. 117 at 10. In fact, witnesses the District Court referred to as "friends and family, none of whom would be purchasers outside of the Edinburgh school district" (*Ibid*) included a MCISD school principal, administrators, and librarians. See App. L at 7.

Additionally, "federal registration constitutes prima facie evidence of the

registrant's exclusive right to use the registered mark in commerce." 15 U.S.C. §§ 1057(b), 15 U.S.C.1115(a) (emphasis added)." *Checkers Drive-In Restaurants v. Commissioner*, 51 F.3d 1078, 1085 (D.C. Cir. 1995). In deciding registered marks were "descriptive and certainly no more than suggestive" (Transcript of Hearing, *MCISD-527*, Doc.# 117 at 10), the District Court substituted its opinion in a credibility determination that is the province of the jury.

Only a likelihood of customer confusion, rather than evidence of actual confusion, is necessary to establish a probability of success on the merits in an infringement suit. *Volkswagenwerk Aktiengesellschaft v. Wheeler*, 814 F.2d 812, 816 (1st Cir. 1987); *E. Remy Martin Co., S.A. v. Shaw-Ross International Imports, Inc.*, 756 F.2d 1525, 1529 (11th Cir. 1985); *Baker v. Simmons Co.*, 307 F.2d 458, 461, 463 (1st Cir. 1962). Even excluding the witnesses who testified they were confused by the infringing articles disseminated by MCISD, the similarity between the marks and products and services at issue were enough to show that there was a high likelihood of confusion.

E. Faulty Precedent

The Fifth Circuit affirmed summary judgment on the first of five trademark cases involving the Petitioner, on alternate grounds in 2019. Since *HISD*,⁹¹² the and Fifth Circuit dismissed and affirmed the District Court's decision in this case and three others, failing to use a "framework for deciding when a precedent

should be overruled....(or) factors that should be considered in making such a decision”. *Dobbs v. Jackson Women’s Health Org.*, 142 S.Ct. 2228, 213 L.Ed.2d 545 (2022) at 2264 citing *Janus v. State, County, and Municipal Employees*, 585 U.S. 138 S.Ct. 2448, 2478-2479, 201 L.Ed.2d 924 (2018); *Ramos v. Louisiana*, 590 U.S. ___, 14 S.Ct. 1390, 1414-1416, 226 L.Ed.2d 583 (2020). The Fifth Circuit should have considered whether precedent should be overruled.²⁶ Springboards has objected to use of HISD as precedent for at least three years. *MCISD 527* (S.D.Tx Mar. 29, 2021)(Doc.# 106 at 4)(“ The Mission case is distinguished from the HISD case and Mission cannot rest on the assumption that the likelihood of confusion is transferable.”).

One of many reasons HISD is an unsuitable precedent is that HISD and MCISD are different size districts with different reading programs. HISD’s program encouraging students to read five books over the summer. MCISD had an on-going school year program. *Id.* ROA.5715. A student could easily reach the goal for the HISD program without achieving 1% of the reading goal in the Springboards program and the counterfeit MCISD program. *Id.*

²⁶ The five factors are (1) The nature of the Court’s error. (2) The quality of the reasoning, (3) Workability (4) Effect on other areas of law (5) Reliance interests. *Dobbs*, 19-1392 at Syllabus 4

ROA.3590.²⁷ *HISD*, 912 is a faulty precedent for *MCISD*, 21-40337.

1. First, Nature of the Error

The Fifth Circuit relied on inappropriate limitations on “consumer” used in the District Court’s likelihood of confusion analysis. The likelihood of confusion analysis used in trademark cases is “a mixed question of fact and law.” *General Motors Corp. v. Lanard Toys, Inc.*, 468 F.3d 405, 412 (6th Cir. 2006). For reasons cited above, precedent was abused in the definition of the consumer.

2. Second, Quality of Reasoning

The Fifth Circuit and District Courts do not provide reasoning from the present case, the only reasoning refers to prior Springboards Fifth Circuit decisions: *HISD*, 912; *MISD*-214033, and *PSJA*, 33 (*MISD* and *PSJA* decisions are based entirely on *HISD* 912.) *MCISD* 21-40337 at 5-6. The District Court also provided no or scant reasoning to support the summary judgment. The original judgment totaled three sentences and provided no reasoning beyond “the entire record”. *MCISD*, 527. During the judgment

²⁷ For example, the Doctor Suess book, *The Cat in the Hat*, publ. Penguin Random House, 1957, has 236 words. A student who read 5 books of comparable size and met the *HISD* goal for the summer without completing the Springboards Campaign or the counterfeit *MCISD* program. See <https://www.biography.com/news/dr-seuss-green-eggs-and-ham-bet#:~:text=via%20Getty%20Images-,The%20famous%20children's%20book%20author%20came%20up%20with%20one%20of,Hears%20a%20Who!%2C%20Dr.>

hearing the Court referenced *HISD*, 912. Transcript of hearing *MCISD* 527 Docket #117 at 11. The hearing is the only reasoning provided for the judgment, replete with inappropriate fact conclusions²⁸, misstated references^{29,30} to *HISD*, 912, and inappropriate misstatements of trademark law.³¹

An amended judgment issued a year later addressed a Defendant cross-claim provided no reasoning on the trademark claim.

²⁸ As noted in section VI. D., the District Court inappropriately concluded on fact determinations reserved for a jury to make not a judge.

²⁹ District Court misquotes *HISD*, 912 “as determined by Judge Hittner in the underlying decision in *HISD*, there is no commercial use here”. Transcript of hearing *MCISD* 527, Docket #117 at 11. This is false. Judge Hittner declined to rule on commercial use and affirmed on alternate grounds, stating the District Court relied “on out-of-circuit precedent, ...we express no opinion on the correctness of the district court’s analysis (of commercial use)” *HISD*, 912 at 5. (emphasis added)

³⁰ The District Court incorrectly states “only on digit (of the likelihood of confusion analysis) weighed clearly in Plaintiff’s favor” comparing *HISD* 912 to *MCISD*. Transcript of hearing *MCISD* 527, Docket #117 at 10. This is false. The Fifth Circuit found three factors in favor of Springboards, one factor was not applicable, and four showed a likelihood of confusion. Appellant Brief, *MCISD* 21-40337 Doc. 00516444804 (Aug. 23, 2022) at 28, 29, 32, 33, 35, 36, 37, 38.

³¹ Registration creates a rebuttable presumption of a mark’s validity, the Court wrongly referenced predated use, which has no impact of validity. Transcript of hearing *MCISD* 527, Docket #117 at 10-11. The Court made credibility determinations that are the jury’s domain on Defendant intent, witness credibility, and outdated statements of the market size. Transcript of hearing *MCISD* 527, Docket #117 at 11.

3. Third and Fourth, Workability and Effect on Other Areas of Law

If a rule imposed by precedent can be “understood and applied in a consistent and predictable manner” it is determined to be workable. *Dobbs*, at 2272 citing *Montejo v. Louisiana*, 556 U. S. 778, 792 (2009); *Patterson v. McLean Credit Union*, 491 U. S. 164, 173 (1989); *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U. S. 271, 283–284 (1988). For reasons briefed above, in the present case, summary judgment and trademark standards are abandoned. The decision is not workable and could be used prevent trial access in area of law.

4. Fifth, Reliance Interests

“Reliance interests arise ‘where advance planning of great precision is most obviously a necessity.’” *Dobbs* at 2276 citing *Casey*, 505 U.S. at 856, 112 S.Ct. 2791. Unlike *Casey* concrete reliance interests are present in all intellectual property claims including the present case. Intellectual property rights effect education, commerce, science, and many sectors of the economy. If the circuit split on the likelihood of confusion analysis is not resolved by the United States Supreme Court, precedents based on the circuit split could result in jurisdiction shopping for trademark holders and offenders.

The Fifth Circuit’s incorrect reliance on precedent puts all trademark rights at risk to be ignored and rewards infringers for doing so.

VII. CONCLUSION

The Southern District of Texas courts were the only District Courts that dismissed Springboards' cases on summary judgment. At least one case was imminently set for trial and settled days before a jury was picked. Perhaps it is not ideal, or comfortable, to acknowledge that the institutions that train and educate our nation's children are capable of theft. However, through discovery it became apparent that MCISD's staff and administration flagrantly disregarded the intellectual property rights afforded to Springboards.

The Springboards reading program developed and promoted is of superior quality and came through years of hard work, training, and much expense—monetarily, energetically and emotionally. The Fifth Circuit acknowledged the District Court's errors in dismissing lawsuits related to the instant one: first, the Fifth Circuit “express(ed) no opinion on the correctness of the district court's (commercial) analysis” and called it “relying on out-of-circuit precedent” insinuating school districts do engage in commercial use³², second, the Court confirmed school districts are not afforded sovereign immunity³³. Where it was wrong, is in mistaken

³² See n.31, regarding HISD 912 not affirming commercial use.

³³ MCISD 527, *immunity denial aff'd*. MCISD 21-40337 at 4. MISD 523, *immunity denial aff'd*. MISD 21-40333 at 15. IDEA 617, *immunity grant reversed* IDEA 21-40334 at 13. PSJA 524 *immunity denial aff'd*. PSJA 33

reliance on precedent and affirmation of the district court's wresting away from Springboards its right to a jury trial on certain factual issues including likelihood of confusion.

Plaintiff respectfully requests the Court issue a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals and remand the case for trial with the District Court.

Respectfully submitted,

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July 2023

VIII. APPENDIX

Appendix A – 15 U.S.C. § 1114(1)(a)-(b)

Appendix B – Court of Appeals Decision

Appendix C – District Court Amended Judgment

Appendix D – District Court Original Judgment

Appendix E - Evidence of Trademark
Infringement – MCISD Internal Processes

Appendix F - Evidence of Trademark
Infringement – Medals and Trophies

Appendix G - Evidence of Trademark
Infringement – Defendant Admission

Appendix H - Evidence of Trademark
Infringement – Social Media

Appendix I - Evidence of Trademark
Infringement – Trademark Registration

Appendix J - Evidence of Trademark
Infringement – Counterfeit Program

Appendix K - Evidence of Trademark
Infringement – Comingling Counterfeits

Appendix L - Evidence of Trademark
Infringement – Defendant Communication

A. 15 U.S.C. §§ 1114(1)(a)-(b) and 1125(a)

15 U.S. Code § 1114 - Remedies;
infringement; innocent infringement by printers
and publishers

(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. As used in this paragraph, the term
“any person” includes the United States, all

2a

agencies and instrumentalities thereof, and all individuals, firms, corporations, or other persons acting for the United States and with the authorization and consent of the United States, and any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. The United States, all agencies and instrumentalities thereof, and all individuals, firms, corporations, other persons acting for the United States and with the authorization and consent of the United States, and any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this chapter in the same manner and to the same extent as any nongovernmental entity.

15 U.S.C. § 1125(a) - False designations of origin, false descriptions, and dilution forbidden

(a) Civil action

(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 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.

(2) As used in this subsection, the term “any person” includes any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this chapter in the same manner and to the same extent as any nongovernmental entity.

4a

(3) In a civil action for trade dress infringement under this chapter for trade dress not registered on the principal register, the person who asserts trade dress protection has the burden of proving that the matter sought to be protected is not functional.

B. Court of Appeals Decision

United States Court of Appeals for the Fifth
Circuit No. 21-40337

Springboards to Education, Incorporated,
Plaintiff—Appellant/Cross-Appellee, versus
Mission Independent School District,
Defendant—Appellee/Cross-Appellant.

Appeal from the United States District Court for
the Southern District of Texas USDC No. 7:16-
CV-527

Before Elrod, Ho, and Wilson, *Circuit Judges*.
Per Curiam:*

We must determine whether the district court correctly granted summary judgment dismissing Springboards to Education’s (“Springboards”) trademark infringement claims. Springboards faces an uphill battle, as three of our sister panels have already rejected Springboards’ arguments in near-twin cases. We see no basis to diverge from those opinions, so we affirm.

I.

Springboards offers a suite of products and services to school districts that Springboards

* This opinion is not designated for publication. See 5th Cir. R. 47.5

calls its “Read a Million Words” campaign (“the Campaign”). The Campaign fosters literacy and builds excitement around reading by encouraging students to read a million words during the school year. Each iteration of the Campaign is tailored to the individual school, and successful “millionaire readers” receive an induction party and various prizes to celebrate their accomplishment. To facilitate the Campaign, Springboards registered the trademarks “Read a Million Words,” “Millionaire Reader,” “The Millionaire’s Reading Club,” and “Million Dollar Reader.”

Mission Independent School District (“Mission”) is located in Hidalgo County, Texas. Mission also developed a reading program that encouraged students to read a million words during the school year. It identified students who did so as “millionaire readers” and provided various accolades to successful students that identified them as “millionaire readers.” Additionally, at least one Mission school had its own “millionaire club.”

Springboards sued Mission under the Lanham Act, alleging trademark infringement, counterfeiting, dilution,¹ and false designation of origin. Mission moved to dismiss under Federal Rule of Civil Procedure 12(b)(1), arguing that it was immune from suit under the Eleventh Amendment. The parties then cross-moved for

¹ The dilution claim was dropped and is not at issue in this appeal.

summary judgment on the merits. The district court held that Mission was not immune from suit but granted Mission’s summary judgment motion on the merits. Springboards timely appealed, and Mission cross-appealed the district court’s denial of Eleventh Amendment immunity. Consistent with our precedent, we affirm. *See Springboards to Educ., Inc. v. McAllen Indep. Sch. Dist.*, 62 F.4th 174 (5th Cir. 2023) (“McAllen”); *Springboards to Educ., Inc. v. Pharr-San Juan-Alamo Indep. Sch. Dist.*, 33 F.4th 747 (5th Cir. 2022) (“Pharr-San Juan-Alamo”); *Springboards to Educ., Inc. v. Houston Indep. Sch. Dist.*, 912 F.3d 805 (5th Cir. 2019), as revised (Jan. 29, 2019), as revised (Feb. 14, 2019) (“Houston”).

II.

We review both the district court’s holding regarding Eleventh Amendment immunity and its grant of summary judgment de novo. *McAllen*, 62 F.4th at 178.

A.

We begin with the threshold jurisdictional issue. “The Eleventh Amendment recognizes the background constitutional principle that states, as separate sovereigns, are inherently immune from suit without their consent.” *Id.* Eleventh Amendment immunity extends to “arms of the state,” and we use the “Clark factors” to determine whether an entity is an arm of the state:

- (1) whether state statutes and case law view the entity as an arm of the state; (2)

the source of the entity's funding; (3) the entity's degree of local autonomy; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has the authority to sue and be sued in its own name; and (6) whether it has the right to hold and use property.

Id. at 178–79 (citing *Clark v. Tarrant Cnty.*, 798 F.2d 736, 744–45 (5th Cir. 1986)).

McAllen largely controls our analysis.

There, we considered whether the McAllen Independent School District was an “arm of the state” for the purposes of the Eleventh Amendment. We extensively cited Texas case law and statutes in concluding that factors one and three weighed in favor of immunity, while the rest cut against immunity. *Id.* at 183–84. For the most part, that analysis applies equally here because Mission is bound by the same Texas case law and statutes as the school district in *McAllen*. We must consider, however, one distinction as to the second factor, the source of the entity's funding.

Mission avers that it depends on the state for roughly 72% of its funding, which is a higher proportion than the “roughly half” that the school district in *McAllen* received from the state. *See id.* at 183. But this slight distinction does not flip the second factor in Mission's favor for two reasons. First, Mission still receives a substantial component of its funding from non- state sources. Second, Mission “maintain[s] the power to levy

certain taxes and issue bonds,” *id.* at 183–84 (citing Tex. Educ. Code §§ 45.001, 45.002), and “[t]he ability to self-finance weighs heavily against immunity,” *id.* at 184 (citing *Pendergrass v. Greater New Orleans Expressway Comm’n*, 144 F.3d 342, 346 (5th Cir. 1998)). Therefore, we discern no reason to deviate from our holding in *McAllen*: Mission is not an arm of the state for the purposes of the Eleventh Amendment, so it is not entitled to immunity. *Id.*; see also *San Antonio Indep. Sch. Dist. v. McKinney*, 936 S.W.2d 279, 284 (Tex. 1996) (holding that “an independent school district is more like a city or county than it is like an arm of the State of Texas and is amenable to suit in federal court under the Eleventh Amendment”).

B.

We turn to the merits of Springboards’ trademark claims. We note that Springboards’ briefing in this case is nearly identical to its briefing in *McAllen*, portending a similar result.

The Lanham Act imposes liability on anyone who uses “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” without the consent of the holder of the mark. 15 U.S.C. § 1114(1)(a). To succeed on any of its trademark claims, Springboards must establish “a likelihood of confusion in the minds of

potential customers as to the source, affiliation, or sponsorship” of Mission’s reading program. *McAllen*, 62 F.4th at 184 (quoting *Elvis Presley Enters., Inc. v. Capece*, 141 F.3d 188, 193 (5th Cir. 1988)).

In some cases, such as this one, the threshold question of the identity of the relevant class of “consumers” is not immediately clear. Springboards contends that the relevant consumers are students, parents, and educators affiliated with Mission. We have repeatedly rejected that argument. *See McAllen*, 62 F.4th at 185; *Pharr-San Juan-Alamo*, 33 F.4th at 750. Rather, as we have held before, the relevant class of consumers is third-party school districts who may be misled into thinking that Mission’s reading program is affiliated with Springboards’ Campaign. *McAllen*, 62 F.4th at 185.

Ordinarily, with that threshold question answered, we would analyze the “digits of confusion”² at this juncture. “We need not parse the individual digits here, however, for the practical effect of any conceivable confusion on the sophisticated school districts to which Springboards markets its products is at most

² The “digits of confusion” are: (1) the type of mark allegedly infringed, (2) the similarity between the two marks, (3) the similarity of the products or services, (4) the identity of the retail outlets and purchasers, (5) the identity of the advertising media used, (6) the defendant’s intent, (7) any evidence of actual confusion...[and] (8) the degree of care exercised by potential purchasers. *Streamline Prod. Sys., Inc. v. Streamline Mfg., Inc.* F.3d 440, 453 (5th Cir.)(citation omitted).

exceedingly remote.” *Pharr-San Juan-Alamo*, 33 F.4th at 750. In other words, though some of the digits of confusion weigh in Springboards’ favor, *see Houston*, 912 F.3d at 814–18, its antecedent error of misidentifying the relevant class of consumers severely weakens the viability of its likelihood of confusion argument because Springboards did not present evidence germane to the relevant class of consumers. “One decisive fact” sounds the death knell of Springboards’ case: “[S]ophisticated school- district customers can tell the difference between goods Springboards is selling them and goods and slogans [Mission] is not.” *Pharr-San Juan-Alamo*, 33 F.4th at 751.

III.

For the reasons provided here and in our prior cases, the district court did not err either in concluding that Mission is not entitled to immunity from suit or in granting Mission’s motion for summary judgment on the merits.

AFFIRMED.

C. District Court Amended Judgment

In the United States District Court
Southern District of Texas McAllen Division

Springboards to)	
Education, Inc.)	CIVIL ACTION
<i>vs.</i>)	NUMBER
Mission Consolidated)	
Independent School)	M-16-527

District

AMENDED JUDGMENT

On the 29th ay of March, 2021, came on to be considered “Defendant’s Shortened Renewed Motion for Summary Judgment” (Docket Entry No. 100) which addresses Plaintiff’s remaining claims, and the Court, after having considered said motion, response, arguments of counsel, and the entire record, was of the opinion that said motion should be granted. The Court entered judgment on March 30, 2021, and the case was terminated (Docket Entry No. 115). On April 13, 2021, Defendant filed its “Motion for Attorneys’ Fees” (Docket Entry No. 119). On April 27, 2021, Plaintiff filed a “Notice of Appeal” to the United States Court of Appeals for the Fifth Circuit (Docket Entry No. 123), which appeal was dismissed by the Court of Appeals on August 2, 2021, for lack of jurisdiction (Docket Entry Nos. 133 and 135). On August 24, 2024, Defendant

filed a “Motion to Alter Judgment” requesting that this Court amend the judgment to reflect any pending counterclaims are dismissed without prejudice to reasserting should an appeal result in a remand of the case back to this Court (Docket Entry Nos. 134 and 136). It is, therefore,

ORDERED, ADJUDGED and DECREED that for the reasons stated in the Judgment of March 30, 2021, Defendant’s Motion for Summary Judgment is **GRANTED** and Plaintiff’s remaining claims are **DISMISSED**. It is further, **ORDERED, ADJUDGED and DECREED** that Defendant’s counterclaims and request for attorneys fees in this case are hereby **DISMISSED** without prejudice to reasserting should this action be reinstated in this Court following any appeal.

Any further relief not expressly granted herein is denied.

DONE on this 31st day of March, 2022, at McAllen, Texas.

Ricardo H. Hinojosa
UNITED STATES DISTRICT JUDGE

D. District Court Original Judgment

United States District Court Southern
District of Texas McAllen Division
7:16-CV-527

Springboards to Education, Incorporated,
Plaintiff,
versus
Mission ISD, *Defendant*

JUDGMENT

On the 29th day of March, 2021,
came on to be considered “Defendant’s Shortened
Renewed Motion for Summary Judgment”
(Docket Entry No. 100) which addressed
Plaintiff’s remaining claims, and the Court, after
having considered said motion, the prior and
present arguments of counsel and the entire
record, was of the opinion, for the reasons stated
on the record, that said motion should be
granted. It is, therefore,

ORDERED, ADJUDGED AND DECREED
that Defendant’s Motion for Summary Judgment
is **GRANTED** and the action is **DISMISSED**.

DONE on this 30th day of March, 2021, at
McAllen, Texas.

Ricardo H. Hinojosa
U.S. DISTRICT JUDGE

E. Evidence of Trademark Infringement – MCISD Internal Processes

Invoice to an MCISD school dated March 29, 2016 for 90 “Millionaire Reader” t-shirts. Unauthorized use of the Springboards trademark used to promote an MCISD reading program. Electronic Record on Appeal, *MCISD*, 21-40337, at 23-40337.922.

Case 7:16-cv-00527 Document 23-45 Filed on 03/07/17 in TXSD Page 3 of 3



Original Invoice

DATE	INVOICE #
3/29/2016	50243

BILL TO
 Waite Elementary
 1291 Bryce Dr.
 Mission, Tx 78572

DESCRIPTION	Customer/PO#		TERMS				SALES/PERSON		PHONE
	PO# 011259	Client ref#	Check	Net 30	Net 60	Net 90	ASB	SALES	325-8887
COLOR	3	ONE	MSD	LD	XL	4XV	PRICE	AMT	
Millionaire Reader - 100% Cotton T-shirt/Canvas 14.00 ea. 90									
Jerseys 1 Size: 5000 Yds	Canvas	14	8	35	7	28	0.00	168.00	
Jerseys 1 Size: 5000 Yds	Canvas	14	7	1	3	16	0.00	88.00	
Jerseys 1 Size: 5000 Yds	Canvas	14				1	0.00	6.00	
PO Order Fill more info						40	0.00	0.00	
Order# 011259									
Thank you for your business.								Total	\$273.00
Here is Great Deal! Any changes made to payments will cause delays and will extend any product delivery dates made at time of order. A 10% charge may be applied for late or changed/revisions to orders.								Payments/Credits	\$0.00
								Balance Due	\$273.00

Excerpt from the Mission ISD Campus Improvement Plan for school years 2011-2012 and 2012-2013. Using confusingly similar terms to describe a reading program, the Plan has “Millionaire Club” in section 1.5.9 to “Provide Student Enrichment Opportunities in order to encourage reading”. Electronic Record on Appeal, MCISD, 21-40337, at 23-40337.909

Activity / Strategy	CNA	BWC	Person Responsible	Timeline	Evaluation
1.5.7 Participate in the Texas Adolescent Literacy Academies (TALA) summer training.			Teacher(s)	Yearly	On-Line Follow-Up Sign-In Sheets Certificates of Attendance.
1.5.8 Participate in training on the Texas Middle School Fluency Assessment (TMSFA).			Teacher(s)	Yearly	Sign-In Sheets Certificates of Attendance
1.5.9 Provide Student Enrichment Opportunities in order to encourage reading -A.R. incentives -novel kits -magazines/newspaper -Field trips - Millionaire Club			Department Heads	Daily	A.R. Report Library checkout list
FUNDING SOURCES FOR STRATEGY 1.5.9 199 12 6499 00 041 99 A 00 PROMOTIONS 1,000 199 12 6498 00 041 99 A 00 FOOD 1,000 199 12 6329 02 041 99 A 00 MAGAZINES 1,000 199 11 6499 00 041 11 A 00 STUDENT INCENTIVES 1,000 # OF ACCOUNTS 4 \$4,000					
1.5.10 Provide furniture and equipment -computers (Reading Lab) -software			Principal	Yearly	Student Participation Evaluation Reports
FUNDING SOURCES FOR STRATEGY 1.5.10 175 11 6398 00 041 30 0 TE FURNITURE EQUIPMENT 10,000 199 11 6398 00 041 11 A TE FURNITURE EQUIPMENT 9,500 # OF ACCOUNTS 2 \$19,500					
1.5.11 Continue Patrols Achieving Together (PAT) Academies - Block language class for all 6-8th grade students. 2 English Language Arts teachers per team. Each serves half the students for 2 hour blocks of English Language Arts).		CJ2.SA2	Principal	Yearly	Master Schedule Increased block sections Student Populations Demographic Data



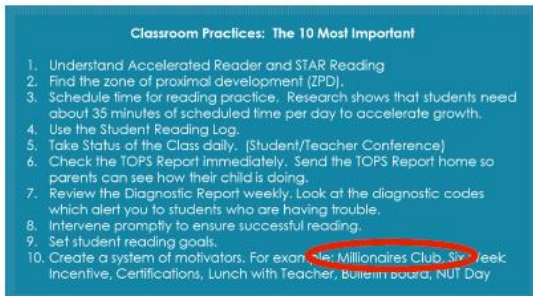
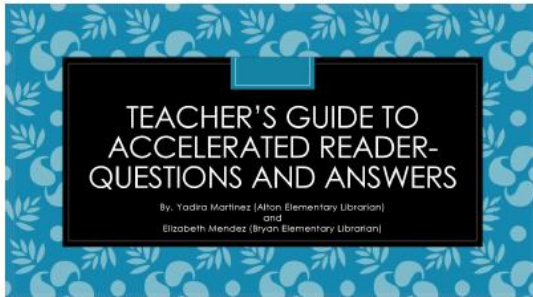
MISSION JR HIGH SCHOOL
CAMPUS IMPROVEMENT PLAN

School Year: 2011-2012
2012-2013
Page 32 of 70
MISSION CISD

Goal 1 CURRICULUM & INSTRUCTION

Obj. 5 90% of our students will meet the state passing standards in the reading and writing of the English language.

MCID internal guide for reading program, includes marks similar to trademarked terms. Electronic Record on Appeal, MCISD, 21-40337, at 23-40337.913.



F. Evidence of Trademark Infringement – Medals and Trophies

Defendant counterfeit trophies and medals, Electronic Record on Appeal, MCISD, 21-40337, at 23-40337.927,937.

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21-40337.937

Case 7:16-cv-00527 Document 23-47 Filed on 03/07/17 in TXSD Page 2 of 2



21-40337.937

Springboards trophies and medals. Electronic Record on Appeal, MCISD 21-40337, at 23-40337.4421



G. Evidence of Trademark Infringement – Defendant Admission

Defendant Motion for Summary Judgment, statement showing MCISD employee admits to using marks confusingly similar to Springboards registered marks. *MCISD 527* (S.D.Tx Mar. 29, 2021)(Doc.# 100 Exh. 58 at 2, 3, and 4).

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

SPRINGBOARDS TO EDUCATION, INC.
Plaintiff,
v
MISSION CONSOLIDATED
INDEPENDENT SCHOOL DISTRICT,
Defendant.

US
SD
TX
MC
ALLEN
DIVISION

CIV. ACTION NO. 7:16-CV-527

DECLARATION OF DRUCILLA PEÑA

1. My full name is Drucilla Peña. I am over 18 years of age, of sound mind, and capable of making this declaration. The facts stated in this declaration are within my knowledge and are true and correct.
2. I submit this declaration in support of the motion for summary judgment filed by Mission Consolidated Independent School District ("Mission CISD").
3. Beginning November 2013, I have been the Coordinator, Instructional Technology and Library Media, for Mission CISD. I have been a school librarian since 2001. Before coming to Mission CISD, I spent 6-7 years with South Texas ISD as Technology Librarian at Beta Magnet School. In this position, I coordinate library services and instructional technology at each of the 22 campus libraries within Mission CISD and visit each campus bi-weekly or tri-weekly.

"Feel Like a Million Bucks" (the "Springboard Trademarks").

5. In this lawsuit, Springboards alleges that "Defendant has sold, offered for sale, and/or advertised at least thousands of Counterfeit Products." The lawsuit defines "Counterfeit Products" as "products and/or services bearing marks and/or branding that is confusingly similar to and/or resembling the Springboards brand and Trademarks."

- a. To the best of my personal knowledge, Mission CISD does not use and has not used the words, terms or phrases "Millionaire Reader," "Million Dollar Reader," "Millionaire's Reading Club," "Read A Million Words," "Feel Like a Million Bucks," or "Springboards," or words confusingly similar thereto, in connection with the sale, offer for sale, manufacture for sale, promotion for sale, or distribution for sale of any goods or services.
- b. To the best of my personal knowledge, Mission CISD does not have and has not had a practice or policy of proposing commercial transactions using the words, terms or phrases "Millionaire Reader," "Million Dollar Reader," "Millionaire's Reading Club," "Read A Million Words," "Feel Like a Million Bucks," or "Springboards," or words confusingly similar thereto, nor would it have any economic motivation to propose such a transaction.

6. Because of my position as Coordinator, Instructional Technology and Library

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a certain number of AR points for scoring well on the tests, and many schools rely solely on AR points to monitor reading progress, comprehension, and reading levels. AR also stores a word count for each of the books and can generate reports based on this word count. Once this became known, schools began using the student's performance on the AR comprehension test to credit the student with the number of words assigned to the book by AR and to set goals for students to read a million words.

7. Regardless of the testing platform, phrases such as "million word," "millionaire reader," "millionaire," or other phrases using the word "million" have been used by schools and libraries to refer to someone who has read a million words since at least the early 2000s and are in common usage in the educational field.

8. Before August 2016, some of the Mission CISD campuses used the words "million" or "millionaire" to identify or reward students who have read a million words. Some campuses identified or described their million-word readers as "AR Millionaires" or "Accelerated Reader Millionaires." Other campuses used the phrase "Century Club." Before August 2016, these decisions about what types of reading incentives to offer students who attain reading targets, and what to name students who attain those reading targets, were made by the administration and educators at the campus-level and were not dictated by the Mission CISD.

H. Evidence of Trademark Infringement – Social Media

Example of three MCISD social media posts that use counterfeit Springboard’s mark “Millionaire Reader”. Electronic Record on Appeal, *MCISD* 21-40337, at 23-40337.51,52, 60. Compare Springboard’s trademark registration on App I.

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I. Evidence of Trademark Infringement – Trademarks

Springboards trademark registration for “Millionaire Reader” registered January 3, 2012, first in use 2005. Electronic Record on Appeal, MCISD 21-40337, at 23-40337.194.

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MILLIONAIRE READER

Reg. No. 4,080,513
Registered Jan. 3, 2012

Int. Cl.: 16

TRADEMARK
PRINCIPAL REGISTER

SPRINGBOARDS TO EDUCATION, INC. (TEXAS CORPORATION)
3802 SOUTH HIGHWAY 281
EDINBURG, TX 78539

FOR: PAPER GOODS, NAMELY, BOND AND DECORATIVE PAPER, PRINTED MATTER, NAMELY, PRINTED LESSONS AND TEACHING MATERIALS FOR KINDERGARTEN THROUGH HIGH SCHOOL STUDENTS; PRINTED INSTRUCTIONAL, EDUCATIONAL, TEACHING MATERIALS IN THE FIELD OF INCENTIVES FOR KINDERGARTEN THROUGH HIGH SCHOOL STUDENTS, STATIONERY, POSTCARDS, STORY BOOKS, BOOKMARKS, POSTERS, CALENDARS, PRINTED CERTIFICATES, PRINTED CHARTS, STICKERS AND IRON ON TRANSFERS, ADVERTISING SIGNS OF PAPER OR CARDBOARD, ANNOUNCEMENT CARDS, ART PRINTS ON PAPER OR CANVAS, INSTRUCTION SHEETS, VINYL LETTERS AND NUMBERS FOR USE IN MAKING SIGNS OR POSTERS, NOTEBOOKS, NOTEPAPER, CATALOGS AND PAMPHLETS IN THE FIELD OF EDUCATION, COLORING BOOKS, PRINTS, PUBLICATIONS, NAMELY, BROCHURES, BOOKLETS, AND TEACHING MATERIALS IN THE FIELD OF EDUCATION; REMOVABLE DATAPAD, DECALS, SCHOOL SUPPLY KITS CONTAINING VARIOUS COMBINATIONS OF SELECTED SCHOOL SUPPLIES, NAMELY, WRITING INSTRUMENTS, PENS, PENCILS, MECHANICAL PENCILS, ERASERS, MARKERS, CRAYONS, HIGHLIGHTER PENS, FOLDERS, NOTEBOOKS, PAPER, PROTRACTORS, PAPER CLIPS, PENCIL SHARPENERS, WRITING GRIPS, GLUE AND BOOKMARKS, SEALS, STUDY GUIDES .IN CLASS 16 (U.S. CLS. 2, 5, 22, 23, 29, 37, 38 AND 50).

FIRST USE 6-1-2005; IN COMMERCE 6-1-2005.

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 “READER”, APART FROM THE MARK AS SHOWN.

SN 77-840,013, FILED 10-2-2009.



David J. Jenkins
Director of the United States Patent and Trademark Office

CHARLES L. JENKINS, EXAMINING ATTORNEY

26a

Springboards trademark registration for “Million Dollar Reader” registered February 19, 2013, first in use 2005. Electronic Record on Appeal, MCISD 21-40337, at 23-40337.193.

Case 7:16-cv-00524 Document 15-2 Filed 07/21/16 Page 2 of 6

United States of America
United States Patent and Trademark Office

MILLION DOLLAR READER

Reg. No. 4,291,796

SPRINGBOARDS TO EDUCATION, INC. (TEXAS CORPORATION)
3862 SOUTH HIGHWAY 281
EDINBURG, TX 78539

Registered Feb. 19, 2013

Int. Cl.: 16

FOR PAPER GOODS AND PRINTED MATTER, NAMELY, PRINTED INSTRUCTIONAL, EDUCATIONAL, TEACHING MATERIALS IN THE FORM OF STATIONERY, POSTCARDS, STORY BOOKS, BOOKMARKS, POSTERS, CALENDARS, CERTIFICATES, CHARTS, STICKERS AND TRANSFERS, ADVERTISING SIGNS OF PAPER OR CARDBOARD, ANNOUNCEMENT CARDS, ARI PRINTS ON PAPER OR CANVAS, INSTRUCTION SHEETS, VINYL LETTERS AND NUMBERS FOR USE IN MAKING SIGNS OR POSTERS, NOTEBOOKS, NOTEPAPER, CATALOGS AND PAMPHLETS IN THE FIELD OF EDUCATION, COLORING BOOKS, PRINTS, PUBLICATIONS, NAMELY, BROCHURES, BOOKLETS, CERTIFICATES TO PROMOTE READING AND LANGUAGE COMPREHENSION FOR KINDERGARTEN THROUGH HIGH SCHOOL STUDENTS, REMOVABLE TATTOOS, DECALS, SEALS, STUDY GUIDES, IN CLASS 16 (U.S. CLS. 2, 5, 22, 23, 29, 37, 38 AND 50).

TRADEMARK

PRINCIPAL REGISTER

FIRST USE 6-1-2005; IN COMMERCE 6-1-2005.

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

OWNER OF U.S. REG. NOS. 4,080,513 AND 4,162,765.

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE “READER”, APART FROM THE MARK AS SHOWN.

SER. NO. 85-660,682, FILED 6-25-2012.

DANIEL BRODY, EXAMINING ATTORNEY



Lina Stewart Ho
Acting Director of the United States Patent and Trademark Office

Springboards trademark registration for “Millionaire’s Reading Club” registered June 26, 2012, first in use 2006. Electronic Record on Appeal, MCISD 21-40337, at 23-40337.195.

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United States of America
United States Patent and Trademark Office

MILLIONAIRE'S READING CLUB

Reg. No. 4,162,765

SPRINGBOARDS TO EDUCATION, INC. (TEXAS CORPORATION)
3802 SOUTH HIGHWAY 281
EDINBURG, TX 78539

Registered June 26, 2012

Int. Cl.: 16

FOR: PAPER GOODS AND PRINTED MATTER, NAMELY, PRINTED INSTRUCTIONAL, EDUCATIONAL, TEACHING MATERIALS IN THE FORM OF STATIONERY, POSTCARDS, STORY BOOKS, BOOKMARKS, POSTERS, CALENDARS, CERTIFICATES, CHARTS, STICKERS AND TRANSFERS, ADVERTISING SIGNS OF PAPER OR CARDBOARD, ANNOUNCEMENT CARDS, ART PRINTS ON PAPER OR CANVAS, INSTRUCTION SHEETS, VINYL LETTERS AND NUMBERS FOR USE IN MAKING SIGNS OR POSTERS, NOTEBOOKS, NOTEPAPER, CATALOGS AND PAMPHLETS IN THE FIELD OF EDUCATION, COLORING BOOKS, PRENTS, PUBLICATIONS, NAMELY, BROCHURES, BOOKLETS, CERTIFICATES TO PROMOTE READING AND LANGUAGE COMPREHENSION FOR KINDERGARTEN THROUGH HIGH SCHOOL STUDENTS, REMOVABLE TATTOOS, DECALS, SEALS, STUDY GUIDES, IN CLASS 16 (U.S. CLS. 2, 5, 22, 23, 29, 37, 38 AND 50).

TRADEMARK

PRINCIPAL REGISTER

FIRST USE 5-1-2006, IN COMMERCE 5-1-2006.

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

SER. NO. 77-839,991, FILED 10-2-2009.

CHARLES L. JENKINS, EXAMINING ATTORNEY



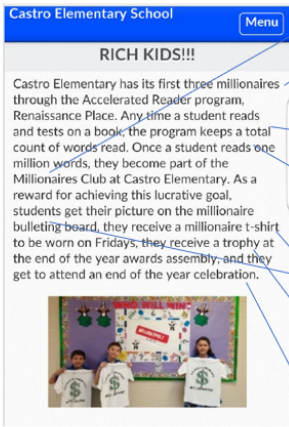
David S. Kappas

Division of the United States Patent and Trademark Office

J. Evidence of Trademark Infringement – Comingling Counterfeits

An MCISD school summarized their counterfeit reading program in this social media post. Compare to excerpts from Springboards catalog starting on the next page. Electronic Record on Appeal, MCISD 21-40337, at 23-40337.915.

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(a) use of the mark, or confusingly similar words,

(b) tracking performance

(c) criteria

(d) customized posters

(e) t-shirts

(f) trophy

(g) end of year award celebration

21-40337.915

While a small extract of the Springboards program, for demonstration purposes the MCISD inferior program, can traced to 7 elements to Springboards as the source:

Elements of the counterfeit MCISD reading program	Springboards' Source Electronic Record on Appeal, MCISD 21-40337, at
(a) use of the mark, or confusingly similar words	See App. H
(b) tracking performance (c) criteria	23-40337.4381
(d) customized posters	23-40337.4382
(e) t-shirts	23-40337.4386
(f) trophy	See App. F
(g) end of year award celebration	23-40337.4376 and 4411


30a

Tools for program criteria and tracking sold in the Springboards catalog. Match to the counterfeit program items (b) tracking performance and (c) program criteria, 23-40337.4381

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Provide Meaningful, Reliable and Researched Based State Aligned Assessments in Grades 1-5!


TEACHERS
WANTS
TO KNOW



- Identifies students in need of additional instruction or intervention programs.
- Prescribes an objective based focus for reteaching or intervention.
- Helps identify professional development needs for individual teachers, schools, or districts.
- Provides data that helps target school and district resources to areas of need.
- Directly aligned to state and national standards!
- Provides a true snapshot of student, classroom and school performance!

Assessment Answer Keys and Student Expectations and Objective Grids are included with every test order.

These grids help teachers and administrators target and identify missed objectives per student and classroom!



"These benchmarks are authentic and exact! I was able to clearly see what objectives my students were having difficulty with. Now that they understand the assessment, I can give my teaching a more precise focus. I strongly encourage my colleagues to buy the information of grids to make adjustments. Having the information of grids is essential for me as a teacher to help every single student!"

—Jessica C. Bradford, Teacher

23-40337.4381

SpringboardsMaster_000330

While there are many others, below is one page of customized posters sold in the Springboards catalog. Match to the counterfeit program items (d) customized posters Electronic Record on Appeal, MCISD 21-40337, at 23-40337.4382

LEAD THE WAY!

Strengthen students' character traits with Springboards to Education's two poster sets. They work together to solidify and infuse character education and values across the curriculum! Placing our character education and values poster sets in highly visible areas in and around your school allows for reinforcement and support of your character education curriculum.

PTM-14 Set A Includes:
Respect, Self-Discipline, Honesty, Integrity, Fairness and Courage

PTM-14 Set B Includes:
Kindness, Citizenship, Honesty, Tolerance, Responsibility and Fairness

Develop Civic Virtue and Moral Character!

At our school, we all value good character!

Together, we value good character!

Add Springboards to Education to Your District's Approved Vendor's List...It's Easy!

Download Our Sole Source Letter and Forms at: www.springboards2edu.com

The advertisement features a central illustration of a girl in a pink shirt and blue pants running while holding a blue banner that reads "Develop Civic Virtue and Moral Character!". Surrounding her are two sets of posters. Set A includes posters for "At our school, we all value good character!", "Respect", "Self-Discipline", "Honesty", "Integrity", "Fairness", and "Courage". Set B includes posters for "Together, we value good character!", "Kindness", "Citizenship", "Honesty", "Tolerance", "Responsibility", and "Fairness". The background is yellow with a red header and footer.

Customized t-shirts sold in the Springboards catalog. Match to the counterfeit program items (e) t-shirts Electronic Record on Appeal, MCISD 21-40337, at 23-40337. 23-40337.4386

**Make Students Active Participants In Learning...
Use Springboards to Education's Incentives!**

Support Your School's Incentive Goals and Reading Programs With Springboards to Education's Incentives!

The catalog displays a variety of award certificates and t-shirt designs, each labeled with a WDEN code:

- W DEN-30: Clean Your Room Award
- W DEN-29: Fall Festival Award
- W DEN-34: Art Star Award
- W DEN-32: Welcome to School Award
- W DEN-31: Celebrate Reading Award
- W DEN-33: All Aboard Reading Award
- W DEN-40: Community Performance Award
- W DEN-38: Celebrate! Happy Birthday!
- W DEN-39: Noteworthy Performance Award
- W DEN-36: Star Reader Award
- W DEN-35: Student of the Week Award
- W DEN-37: Certificate of Appreciation
- W DEN-50: T-shirt design: Celebrate Reading
- W DEN-51: T-shirt design: All Aboard Reading
- W DEN-52: T-shirt design: Celebrate Reading
- W DEN-53: T-shirt design: All Aboard Reading
- W DEN-54: T-shirt design: Celebrate Reading
- W DEN-55: T-shirt design: All Aboard Reading
- W DEN-56: T-shirt design: Celebrate Reading
- W DEN-57: T-shirt design: All Aboard Reading
- W DEN-58: T-shirt design: Celebrate Reading
- W DEN-59: T-shirt design: All Aboard Reading
- W DEN-60: T-shirt design: Celebrate Reading
- W DEN-61: T-shirt design: All Aboard Reading
- W DEN-62: T-shirt design: Celebrate Reading
- W DEN-63: T-shirt design: All Aboard Reading
- W DEN-64: T-shirt design: Celebrate Reading
- W DEN-65: T-shirt design: All Aboard Reading
- W DEN-66: T-shirt design: Celebrate Reading
- W DEN-67: T-shirt design: All Aboard Reading
- W DEN-68: T-shirt design: Celebrate Reading
- W DEN-69: T-shirt design: All Aboard Reading
- W DEN-70: T-shirt design: Celebrate Reading
- W DEN-71: T-shirt design: All Aboard Reading
- W DEN-72: T-shirt design: Celebrate Reading
- W DEN-73: T-shirt design: All Aboard Reading
- W DEN-74: T-shirt design: Celebrate Reading
- W DEN-75: T-shirt design: All Aboard Reading
- W DEN-76: T-shirt design: Celebrate Reading
- W DEN-77: T-shirt design: All Aboard Reading
- W DEN-78: T-shirt design: Celebrate Reading
- W DEN-79: T-shirt design: All Aboard Reading
- W DEN-80: T-shirt design: Celebrate Reading
- W DEN-81: T-shirt design: All Aboard Reading
- W DEN-82: T-shirt design: Celebrate Reading
- W DEN-83: T-shirt design: All Aboard Reading
- W DEN-84: T-shirt design: Celebrate Reading
- W DEN-85: T-shirt design: All Aboard Reading
- W DEN-86: T-shirt design: Celebrate Reading
- W DEN-87: T-shirt design: All Aboard Reading
- W DEN-88: T-shirt design: Celebrate Reading
- W DEN-89: T-shirt design: All Aboard Reading
- W DEN-90: T-shirt design: Celebrate Reading
- W DEN-91: T-shirt design: All Aboard Reading
- W DEN-92: T-shirt design: Celebrate Reading
- W DEN-93: T-shirt design: All Aboard Reading
- W DEN-94: T-shirt design: Celebrate Reading
- W DEN-95: T-shirt design: All Aboard Reading
- W DEN-96: T-shirt design: Celebrate Reading
- W DEN-97: T-shirt design: All Aboard Reading
- W DEN-98: T-shirt design: Celebrate Reading
- W DEN-99: T-shirt design: All Aboard Reading
- W DEN-100: T-shirt design: Celebrate Reading

GET NOTICED!

Get Springboards to Education to Customize a T-Shirt For Your School!
Call 1-888-SBOARDS For Details.

SpringboardsMaster_000335 21-40337.4386

Customized end of year celebration for eligible students, sold in the Springboards catalog. Match to the counterfeit program items (g) end of year award celebration, Electronic Record on Appeal, MCISD 21-40337, at 2140337.4376, 4411



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The advertisement features the Springboards to Education logo in the top left corner. The main text reads "MILLIONAIRES READING CLUB Harness the Power of Words". Below this, it says "GET STAR STRUCK READ!". The central illustration shows a group of children and adults on a red carpet, with a white car in the background. At the bottom, the text reads "Challenge your students to read a million words in one school year. Implement Springboards to Education's Read A Million Words Campaign Today!". Below this, it says "Here's how Springboards to Education's Read A Million Words Campaign Works...".

- Students are challenged to become Star Struck™ Millionaires by taking an oath to read one million words in one school year.
- Students are rewarded for reading and reaching their reading goals throughout the year with Springboards to Education's Exclusive Reading Millionaires' Club incentives. You select the incentives and materials that best suits your campus' needs. Campuses can select from the following Read a Million Words Campaign™ themes: Reading Rocks™, Reading Rules™ (Royalty) and Star Struck Reader™ (Hollywood).

K. Evidence of Trademark Infringement – Mixed Use

MCISD purchased Springboards' goods and copied others. In this photo, legitimate use of the marks includes Springboards' character "Bravo" attending a reading event at a MCISD school, and the librarian (right) wearing a legitimate Springboards' t-shirt. Three students wore counterfeit t-shirts of lesser quality with the Springboard's mark. *MCISD*, 527 (S.D.Tx Mar. 29, 2021)(Doc.# 100 Exh. 23 at 8). See p.75a for legitimate t-shirts to order.



L. Evidence of Trademark Infringement – Defendant Communications

Defendant employee, Craig Varley, Director of Communications, verifying (1) MCISD marketed Springboards’ marks on social media, and (2) MCISD marketed to the broader community, including parents, teachers, administrators, and others invested in the success of the Defendant and its students. *MCISD 527* (S.D.Tx Mar. 29, 2021)(Doc.# 100 Exh. 59 at 2, and 4).

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

SPRINGBOARDS TO EDUCATION, INC.	§	
<i>Plaintiff,</i>	§	
	§	
v	§	
	§	CIV. ACTION NO. 7:16-CV-527
MISSION CONSOLIDATED	§	
INDEPENDENT SCHOOL	§	
DISTRICT,	§	
<i>Defendant.</i>	§	

DECLARATION OF CRAIG VERLEY

1. My full name is Craig Verley. I am over 18 years of age, of sound mind, and capable of making this declaration. The facts stated in this declaration are within my knowledge and are true and correct.
2. I submit this declaration in support of the motion for summary judgment filed by Mission Consolidated Independent School District ("Mission CISD").
3. Beginning July 1998, I have been the **Director of Public Relations and Marketing for Mission CISD**. My joint responsibilities include all media relations, corporate communications, and **marketing activities for Mission CISD**, this includes the use and monitoring of social media and other online references to Mission CISD and its campuses.
4. I have reviewed Exhibit B attached to the Complaint against Mission CISD. Based on my personal knowledge and my experience and knowledge relating to Twitter, social media, and the social media presence of Mission CISD and its campuses, I can say that **some of the materials in Exhibit B originated with Mission CISD or one of its campuses** and some of the

5. The social media and online posts in Exhibit B that originated with Mission CISD or one of its campuses do not advertise for sale, sell, or offer for sale any goods or services, and do not propose any commercial transaction. There is no economic motivation for these social media and online posts by Mission CISD and its campuses. The intended purpose of these social media and online posts by Mission CISD and its campuses is purely educational.

6. Some Mission CISD campuses have previously implemented and/or currently use reading incentive programs that provide rewards or incentives to students based on the number of words that they read, and some of these programs reward students who read a specified number of words. Some of the campuses have used the words "million" or "millionaire" to identify or reward students who have read a million words. One of the rewards or incentives for the students who earn this accomplishment is public recognition within the campus itself and within the broader community that includes parents, teachers, administrators, and others invested in the success of Mission CISD and its students. The sharing of accomplishments through Facebook, Twitter, district webpages, and other media outlets primarily serves as a point of pride for the students and parents, and also serves as a way to help the schools and teachers encourage students to strive for certain goals and accomplishments. Publicizing the accomplishments of our students who have attained educational goals such as reading more than one million words is one of the ways that Mission CISD and its campuses promote the educational purpose of teaching students to love reading.

7. Attached hereto as Exhibit Verley-1 is a true and correct copy of an email I received from the email address of Ester Espericueta on November 15, 2011, when Ms. Espericueta was principal at Waitz Elementary. The email states: "Hi Mr. Verley, We have a goal to see how many of our students can become "millionaires" with our AR program. This

37a

This is the e-mail referred to in #7 of the Declaration above. An MCISD school principal requested recognition for a student in the reading program, using confusingly similar words to the Springboard's mark, placed in quotations, to signify meaning beyond the generic word. *MCISD 527* (S.D.Tx Mar. 29, 2021)(Doc.# 100 Exh. 59 at 2, 4, and 7). Compare Springboard's trademark registration on App I.

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From: Espericueta, Maria Ester <espericueta@mdisd.org>
Sent: Tuesday, November 15, 2011 2:05 PM
To: Verley, Craig
Subject: student

Hi Mr. Verley,

We have a goal to see how many of our students can become "millionaires" with our AR program. This means that the student read over a million words and successfully tested on those books. Today we had our first millionaire become a millionaire for the second time! How can we get him **highlighted at the district level**? Let me know if it is possible. Thanks

Ester Espericueta, **Principal**
Waltz Elementary
Mission Consolidated Independent School District
1201 Bryce Dr
Mission, Texas 78572
(956) 323-6600

