

THIS ORDER IS
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OF THE TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

coggins

Mailed: September 6, 2017

Opposition No. 91225576

Cards Against Humanity, LLC

v.

Vampire Squid Cards, LLC

Before Bergsman, Hightower, and Coggins,
Administrative Trademark Judges.

By the Board:

Now before the Board are Opposer's motions for partial summary judgment (filed December 5, 2016) and to strike (filed February 10, 2017). Applicant filed briefs in opposition to each motion.¹

I. Relevant Background

Applicant is the owner of application Serial No. 86620191 and seeks to register the mark CRABS ADJUST HUMIDITY (in standard characters) on the Principal

¹ Applicant's change of correspondence address (filed March 2, 2017) and Opposer's change of correspondence address (filed May 15, 2017) are noted and entered.

Register for “card games; game cards.”² Applicant is also the owner of Application Serial No. 86622129 and seeks to register the composite mark shown at right on the Principal Register for “card games; game cards.”³



On December 30, 2015, Opposer filed a consolidated notice of opposition, opposing registration of the marks in both of Applicant’s applications. Applicant filed a timely answer in which it denied the salient allegations of the notice of opposition and asserted various affirmative defenses. On the last possible day before trial, Opposer filed the outstanding motion for partial summary judgment.⁴ After receiving two extensions of time to file a response to the motion for summary judgment, Applicant filed a brief in opposition on the last possible day, as extended, and then filed two declarations in support of its brief the following day (i.e., one day after the deadline to respond).⁵

² Application Serial No. 86620191, filed May 5, 2015, asserting a date of first use and use in commerce as of July 1, 2013.

³ Application Serial No. 86622129, filed May 5, 2015, asserting a date of first use and use in commerce as of July 1, 2013. The description of the mark states: “The mark consists of the words ‘CRABS’, ‘ADJUST’, and ‘HUMIDITY’, appearing in that order with each subsequent word following immediately below the prior word, and a dial appearing below the said words, and a crab claw appearing below the said dial.” Color is not claimed as a feature of the mark.

⁴ Under Trademark Rule 2.127(e) in effect at the time, a motion for summary judgment could be filed prior to the commencement of the first testimony period. This rule was amended effective January 14, 2017, to require such a motion to be filed prior to (i.e., the day before) the deadline for pretrial disclosures for the first testimony period. *See* “Miscellaneous Changes to Trademark Trial and Appeal Board Rules of Practice,” 81 Fed. Reg. 69950 (Oct. 7, 2016); “Miscellaneous Changes to Trademark Trial and Appeal Board Rules of Practice; Clarification,” 82 Fed. Reg. 33804 (July 21, 2017) (clarifying that “prior to the deadline for pretrial disclosures” means “before the day of the deadline for pretrial disclosures”).

⁵ The Declaration of Heidi Klein (20 TTABVUE) was filed as confidential without an accompanying public copy of that submission. *See* TBMP § 412.04 (June 2017) (“If a party submits any . . . filing containing confidential information . . . under seal, the party must also

II. Motion to Strike

Opposer moves to strike Applicant's brief in opposition to the motion for summary judgment as both over length and untimely. Applicant admits that its brief in opposition is over length by two pages and that while the brief itself was timely filed, the declarations and exhibits thereto straddled the midnight (Eastern time) deadline thereby making the declarations and exhibits late (i.e., filed one day after the deadline).

While there are two acknowledged flaws with Applicant's brief, we need only address its length.⁶ Briefs in response to a motion for summary judgment are limited to twenty-five pages. Trademark Rule 2.127(a); *Cooper Techs. Co. v. Denier Elec. Co.*, 89 USPQ2d 1478, 1479 (TTAB 2008). The Board will not consider briefs that exceed the page limitation, nor will the Board dissect a party's brief to bring it within the allowable page limit. *Saint Gobain Corp. v. Minn. Mining & Mfg. Co.*, 66 USPQ2d 1220, 1222 (TTAB 2003). In view thereof, Applicant's brief in opposition will be given **no further consideration**. Similarly, because the brief in opposition will not be considered, we will give no consideration to Opposer's reply brief in support of the

submit for the public record a redacted version of said submission.”). It is odd that Applicant would do this because the Board raised a similar issue with Opposer's declaration of Eleanor Lackman, just one month earlier. *See* 12 TTABVUE 1. Given our treatment of the declaration (i.e., non-consideration, discussed *infra*), Applicant will not be required to submit a public copy since the declaration and exhibits thereto play no substantive role in our determination of the issues raised by the motion for summary judgment.

⁶ Notwithstanding our treatment of the brief on the sole issue of its length, Applicant is reminded that Eastern Time controls the timeliness of filing dates. *See* “Miscellaneous Changes to Trademark Trial and Appeal Board Rules of Practice,” 81 Fed. Reg. 19296, 19296 (Notice of Proposed Rulemaking April 4, 2016) (describing ongoing practice of using Eastern Time to determine the timeliness of ESTTA filing dates). *See also* Trademark Rule 2.195(a)(2); TBMP §§ 108, 109, 110.01, 302.01, and 502.02(a).

motion for partial summary judgment. Although we give no further consideration to the brief, we decline to treat Opposer's motion for summary judgment as conceded inasmuch as it is clear that Applicant contests the motion. *See* TBMP § 502.04.

III. Motion for Summary Judgment

As an initial matter, we note that the text of Opposer's motion for summary judgment is difficult to read: some letters appear to run together, some letters appear incomplete, some letters appear bolder and thicker than others, and some letters appear to have extraneous marks. The overall effect is blurry and dizzying. A filer is responsible for ensuring that all Board submissions are legible. Trademark Rule 2.126(a)(2); TBMP § 110.02(b).

Opposer moves for partial summary judgment on the issues of standing; priority; the similarity of the parties' goods, trade channels, and class of purchasers; Applicant's parody defense; and all of Applicant's other affirmative defenses. *See* Motion, p. 2 (10 TTABVUE 3).

A. The pleadings

A decision on summary judgment necessarily requires a review of the operative pleadings. *Asian & Western Classics B.V. v. Selkow*, 92 USPQ2d 1478, 1478 (TTAB 2009). Generally, only well pleaded issues may be the basis for grant of summary judgment. *Id.* at 1480 (citing *Intermed Commc'ns, Inc. v. Chaney*, 197 USPQ 501, 503 n.2 (TTAB 1977) ("If a claim has not been properly pleaded, one cannot obtain summary judgment thereon")); *Consolidated Foods Corp. v. Berkshire Handkerchief Co.*, 229 USPQ 619, 621 (TTAB 1986). In view thereof, the Board must examine the

notice of opposition and answer to determine if Opposer's grounds and Applicant's affirmative defenses are well pleaded.

1. Notice of opposition

The ESTTA cover sheet identifies two grounds for opposition: likelihood of confusion and dilution. 1 TTABVUE 2. Opposer confirms that these are the two grounds for opposition in its motion for summary judgment, as Opposer states that it opposes the subject applications "based upon a likelihood of confusion with and dilution of Opposer's" marks. 10 TTABVUE 2. A review of the notice of opposition itself, however, reveals that Opposer included an allegation that the subject marks "falsely suggest a connection with Opposer," implicating Trademark Act Section 2(a). Notice, para. 11.b. (1 TTABVUE 7). The Board will review the sufficiency of the allegations supporting these three grounds.

a. Priority and likelihood of confusion

In order to properly state a claim of likelihood of confusion, Opposer must plead that (1) Applicant's marks, as applied to its goods, so resembles Opposer's marks as to be likely to cause confusion, mistake or deception; and (2) Opposer has either priority of use or a federal registration of Opposer's pleaded marks. *See* Fed. R. Civ. P. 8(a); *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

On the ESTTA cover sheet, Opposer lists only the following two "Marks Cited by Opposer as Basis for Opposition:" Registration No. 4304905 for the mark CARDS AGAINST HUMANITY and Registration No. 4623613 for a mark consisting of

product packaging incorporating the wording CARDS AGAINST HUMANITY. ESTTA cover sheet (1 TTABVUE 2-3). See “Miscellaneous Changes to Trademark Trial and Appeal Board Rules of Practice,” 81 Fed. Reg. 69950, 69957 (Oct. 7, 2016) (The ESTTA cover sheet is considered part of the complete opposition pleading). In the body of the notice of opposition attached to the ESTTA cover sheet, Opposer alleges that since 2009 it has used the trademark CARDS AGAINST HUMANITY and a distinctive trade dress incorporating the wording CARDS AGAINST HUMANITY for a card game (para. 2); that it owns Registration No. 4304905 for the mark CARDS AGAINST HUMANITY and Registration No. 4623613 for a trade dress mark incorporating the wording CARDS AGAINST HUMANITY for card games and game cards (para. 2); that the public readily identifies the term “CAH” as signifying “Cards Against Humanity,” a common law term (para. 5); and that Applicant’s marks “so resemble Opposer’s previously-registered Cards Against Humanity Marks . . . [that t]hey are likely to cause confusion” with Opposer (para. 11.a.). 1 TTABVUE 5, 7. In view of these allegations, Opposer has clearly and sufficiently alleged priority and likelihood of confusion with its mark CARDS AGAINST HUMANITY and trade dress (i.e., product packaging) mark incorporating the wording CARDS AGAINST HUMANITY.

However, Opposer has not sufficiently alleged either priority or likelihood of confusion with the referenced common law CAH mark. Specifically, Opposer failed to allege (either generally or specifically), a date of priority of use for the purported common law mark CAH, and failed to allege that Applicant’s marks so resembles

Opposer's common law mark CAH as to be likely to cause confusion, mistake, or deception.⁷ In view thereof, Opposer may not obtain summary judgment on any element of priority or likelihood of confusion with respect to its purported common law mark CAH. *See Asian & Western Classics B.V. v. Selkow*, 92 USPQ2d at 1480.

b. Dilution

In order to properly state a claim of dilution, Opposer must plead that its marks are distinctive and famous and that its marks became famous prior to Applicant's first use of its applied-for marks in commerce. *See Omega SA (Omega AG) (Omega Ltd.) v. Alpha Phi Omega*, 118 USPQ2d 1289 (TTAB 2016); *Gen. Mills Inc. v. Fage Dairy Processing Indus. SA*, 100 USPQ2d 1584, 1595 n.13 (TTAB 2011), *judgment set aside on other grounds, opinion not vacated*, 110 USPQ2d 1679 (TTAB 2014) (non-precedential); *Toro Co. v. ToroHead, Inc.*, 61 USPQ2d 1164, 1174 (TTAB 2001).

The notice of opposition does not allege that Opposer's marks are famous, does not allege that Opposer's marks became famous prior to Applicant's first use in commerce, and does not directly allege that the marks are distinctive. Opposer's allegation of dilution is, therefore, legally insufficient. *See Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1745 (TTAB 2014); *Polaris Indus. Inc. v. DC Comics*, 59 USPQ2d 1798, 1800 (TTAB 2000); *Toro Co.*, 61 USPQ2d at 1174. In view thereof, the ground of dilution is **stricken** without prejudice from the notice of opposition.

⁷ Because the common law CAH mark is not alleged to be registered and is identified only as a common law mark, Opposer's allegation that Applicant's marks "so resemble Opposer's *previously-registered* Cards Against Humanity Marks" does not contemplate the common law CAH mark. Notice, para. 11 (1 TTABVUE 7) (emphasis added).

c. False suggestion of a connection

In order to properly plead a claim of false suggestion of a connection, Opposer must allege that 1) Applicant's mark is the same or a close approximation of the name or identity of a person or institution; 2) Applicant's mark would be recognized as such by purchasers, in that the mark points uniquely and unmistakably to the person or institution named or identified; 3) the person or institution named or identified is not connected with the goods sold by Applicant under the mark; and 4) the name or identity of the person or institution identified is of sufficient fame or reputation that when Applicant's mark is used in connection with its goods, a connection with the person or institution identified would be presumed. *Nike, Inc. v. Palm Beach Crossfit Inc.*, 116 USPQ2d 1025, 1031 (TTAB 2015) (citing *In re Nieves & Nieves LLC*, 113 USPQ2d 1629, 1632-33 (TTAB 2015)). A "person" includes a juristic entity as well as a natural person.

Even when construed liberally and favorably to Opposer, the notice of opposition fails to allege a single one of the four required elements of the claim.⁸ Indeed, it appears that Opposer either conflates the ground of false suggestion of a connection with likelihood of confusion or simply summarily recited in the final paragraph of the notice of opposition that Applicant's marks "falsely suggest a connection with Opposer." *See* Notice, para. 11.b. (1 TTABVUE 7). Opposer's ground of false

⁸ The closest Opposer comes to alleging any element of this ground is in paragraph 6, which alleges, *inter alia*, that Opposer's marks are an integral part of Opposer's corporate identity. 1 TTABVUE 6.

suggestion of a connection is legally insufficient. In view thereof, the ground of false suggestion of a connection is **stricken** without prejudice from the notice of opposition.

2. Answer

Applicant alleged the following numbered paragraphs under the “Affirmative Defenses” heading in its answer:

11. Opposer learned of Applicant’s intent to use the marks for which registration is now sought, and acquiesced to Applicant’s use of the marks. Accordingly, Opposer has waived whatever opposition basis it may have had, and is estopped from opposing the instant application.
12. Opposer has unreasonably delayed, to Applicant’s detriment, in revoking Opposer’s consent of Applicant’s use of Applicant’s marks for which registration is now sought. Accordingly, Opposer’s allegations are barred by laches.
13. Applicant’s Marks are a parody of Opposer’s Marks.
14. Applicant’s Marks do not and cannot dilute Opposer’s Marks.
15. Applicant’s Marks do not falsely suggest a connection with Opposer’s Marks.
16. Applicant’s Marks are unique and distinctive.
17. Applicant’s Mark do not, and are not likely to, cause confusion, or mistake, or deception with Opposer’s Marks.
18. Applicant’s Marks have been in use by Applicant for over two (2) years without any instance of actual confusion.
19. Opposer’s allegations are barred in whole or in part by the equitable doctrines of laches, estoppel, waiver, and acquiescence as a result of plaintiff’s acts and omissions.
20. Opposer’s allegations are barred by the doctrine of unclean hands or other applicable equitable principles.

Paragraph 11 (acquiescence, waiver, and estoppel) is **stricken** without prejudice because the defenses therein are nakedly pleaded. Moreover, the availability of acquiescence is severely limited in an opposition proceeding because this defense, in Board proceedings, starts to run from the time of knowledge of the application for registration (that is, from the time the mark is published for opposition – not from the time of knowledge of use). See *Nat'l Cable Television Ass'n v. Am. Cinema Editors, Inc.*, 937 F.2d 1572, 19 USPQ2d 1424, 1432 (Fed. Cir. 1991); *Bausch & Lomb Inc. v. Karl Storz GmbH & Co. KG*, 87 USPQ2d 1526 (TTAB 2008); *Barbara's Bakery, Inc. v. Landesman*, 82 USPQ2d 1283, 1292 n.14 (TTAB 2007); *Krause v. Krause Publ'ns Inc.*, 76 USPQ2d 1904, 1914 (TTAB 2005); *Warner-Lambert Co. v. Sports Solutions Inc.*, 39 USPQ2d 1686, 1697 (TTAB 1996). In the answer, Applicant has not alleged any facts or events occurring between the time its marks was published for opposition (i.e., November 3, 2015) and the filing of the notice of opposition (i.e., December 30, 2015). Inasmuch as the opposition was filed within the time allowed therefor, it does not appear that these affirmative defenses will be available to Applicant. Further, to the extent Applicant intended to allege estoppel separately from acquiescence, the Board notes that this defense is otherwise not pleaded with the appropriate particularity. Trademark Act § 19, 15 U.S.C. § 1069, provides, in relevant part, that the equitable principles of estoppel may be considered and applied. However, there are various types of estoppel recognized by law, including: collateral estoppel,

estoppel by laches, equitable estoppel,⁹ licensee estoppel, and contract estoppel. Applicant has not indicated which type of estoppel it is asserting affirmatively nor provided enough information concerning the nature of the purported estoppel and the underlying factual circumstances, even in general terms, which may give rise to the purported estoppel. Applicant has not provided sufficient allegations of fact to put Opposer on notice of the bases upon which the estoppel defense is being asserted. *See Heller Finance, Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1294 (7th Cir. 1989) (upholding motion to strike affirmative defenses because they were bare bones, conclusory allegations); *Fleet Business Credit Corp. v. National City Leasing Corp.*, 191 F.R.D. 568, 570 (N.D. Ill. 1999) (bare bones waiver and estoppel defenses fail to sufficiently plead the affirmative defenses).

Paragraph 12 (laches) is **stricken** without prejudice because, in addition to being nakedly pleaded, the availability of laches (like acquiescence, explained *supra*) is severely limited in an opposition proceeding as it is triggered only by the date the mark is published for opposition – not by the date of knowledge of use. *See* TBMP § 312.02(b); and cases cited in the paragraph above (*Nat’l Cable Television Ass’n, Bausch & Lomb., Barbara’s Bakery, Krause, and Warner-Lambert*).

Paragraph 13 (parody) does not raise a true “defense” to a claim of likelihood of confusion; instead, parody is simply another factor which is relevant to the analysis of likelihood of confusion. Indeed, the Board will usually assess alleged parody as part

⁹ “Conduct which occurs prior to the publication of the application for opposition generally cannot support a finding of equitable estoppel.” *Bausch & Lomb Inc. v. Karl Storz GmbH & Co. KG*, 87 USPQ2d at 1531.

of the circumstances in determining whether a plaintiff has made out its claim. *See, e.g., Research in Motion Ltd. v. Defining Presence Marketing Grp. Inc.*, 102 USPQ2d 1187, 1191-92 (TTAB 2012); *cf. N.Y. Yankees P'ship v. IET Prods. & Servs., Inc.*, 114 USPQ2d 1497, 1509-10 (TTAB 2015) (explaining why the parody exclusion does not apply in dilution proceedings before the Board). Because parody is merely another way of arguing that confusion is not likely (*see, e.g., Starbucks U.S. Brands v. Ruben*, 78 USPQ2d 1741, 1754 (TTAB 2006); *Columbia Pictures Indus., Inc. v. Miller*, 211 USPQ 816, 820 (TTAB 1981)), this paragraph informs Opposer of one way Applicant will defend against the ground of likelihood of confusion.¹⁰

Paragraphs 14 (no dilution), 15 (no false suggestion of a connection), and 17 (no confusion, mistake, or deception) do not add anything to Applicant's earlier denials in the answer, and do not apprise Opposer with greater particularity of any position Applicant is taking in the defense of its right of registration. In view thereof, these defense paragraphs are redundant and are **stricken**, without prejudice. *See, e.g., Order of Sons of Italy in Am. v. Profumi Fratelli Nostra AG*, 36 USPQ2d 1221, 1223 (TTAB 1995).

Paragraph 16 (Applicant's marks are unique and distinctive) does not allege an affirmative defense. Although such allegation might be relevant to an opposition grounded in mere descriptiveness, lack of acquired distinctiveness, or genericness,

¹⁰ Although we have stricken Opposer's dilution claim, *supra*, inasmuch as Opposer is allowed time in which to file an amended notice of opposition (*see* discussion *infra*), we alert the parties to the *N.Y. Yankees P'ship* cite earlier in this paragraph explaining that parody does not apply to a dilution claim.

the allegation does not appear relevant to the grounds in this opposition. In view thereof, this paragraph is **stricken**, without prejudice.

Paragraph 18 (no actual confusion) provides Opposer with more information as to at least one way Applicant may try to defend its right of registration (i.e., the seventh *du Pont*¹¹ factor, the “nature and extent of any actual confusion”).

Paragraphs 19 (laches, estoppel, waiver, and acquiescence) and 20 (unclean hands or other applicable equitable principles) are nakedly pleaded. Affirmative defenses, like claims in a notice of opposition, must be supported by enough factual background and detail to fairly place Opposer on notice of the basis for the defenses. *See IdeasOne Inc. v. Nationwide Better Health Inc.*, 89 USPQ2d 1952, 1953 (TTAB 2009); *Ohio State Univ. v. Ohio Univ.*, 51 USPQ2d 1289, 1289 (TTAB 1999) (primary purpose of pleadings “is to give fair notice of the claims or defenses asserted”). Applicant must allege sufficient facts beyond a tender of “naked assertion[s]” devoid of “further factual enhancement,” to support its claims and defenses. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). These nakedly pleaded defenses fail to meet that standard and are therefore insufficient. Moreover, as explained above, the availability of laches and acquiescence is severely limited in an opposition proceeding at the Board. In view thereof, Paragraphs 19 and 20 are **stricken**, without prejudice.

¹¹ *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973).

3. Summary of pleading issues

Opposer has sufficiently pleaded a single ground for opposition, namely, likelihood of confusion with its mark CARDS AGAINST HUMANITY and its mark consisting of product packaging incorporating the wording CARDS AGAINST HUMANITY. Opposer's grounds of dilution and false suggestion of a connection are **stricken** without prejudice from the notice of opposition.

Applicant has alleged that its marks are a parody of Opposer's marks and that the parties' marks have been in use for over two years without any instance of actual confusion, defensive allegations which inform Opposer of how Applicant will defend against the ground of likelihood of confusion; however, Applicant's defense paragraph Nos. 11, 12, 14, 15, 16, 17, 19, and 20, are **stricken** from the answer, without prejudice.

B. Substance of the motion

We now turn to the substance of the motion for partial summary judgment. As noted above, Opposer seeks summary judgment on the issues of standing; priority; the similarity of the parties' goods, trade channels, and class of purchasers; Applicant's parody defense; and all of Applicant's other affirmative defenses. *See* Motion, p. 2 (10 TTABVUE 3). Inasmuch as we have stricken all true affirmative defenses from the answer, the motion is **moot** to the extent it seeks summary judgment on "all of Applicant's other affirmative defenses."

For purposes of this order, we presume the parties' familiarity with the pleadings as discussed *supra*, the history of the proceeding, and the arguments and evidence

submitted with respect to Opposer's motion for partial summary judgment. Therefore, for the sake of efficiency, we address the record on summary judgment only to the extent necessary to set forth our analysis and findings. We do not repeat or address all of Opposer's arguments and evidence. *See Guess? IP Holder LP v. Knowluxe LLC*, 116 USPQ2d 2018, 2019 (TTAB 2015).

1. Summary judgment standard

Summary judgment is appropriate where the movant shows that there is no genuine dispute as to any material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A party asserting that a fact cannot be or is genuinely disputed must support its assertion by either (1) citing to particular parts of materials in the record, or (2) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact. Fed. R. Civ. P. 56(c).

A movant for summary judgment carries the burden of proof in regard to its motion. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). In deciding the motion, the function of the Board is not to try issues of fact, but to determine if there are any genuine disputes of material fact to be tried. *See* TBMP § 529.01 and cases cited therein. The nonmoving party must be given the benefit of all reasonable doubt as to whether genuine issues of material fact exist, and the evidentiary record on summary judgment, and all inferences to be drawn from the undisputed facts, must be viewed in the light most favorable to the nonmoving party. *See Opryland USA*,

Inc. v. Great Am. Music Show, Inc., 970 F.2d 847, 23 USPQ2d 1471, 1472 (Fed. Cir. 1992).

a. Standing

We first consider whether Opposer has standing to bring this opposition proceeding. Standing is a threshold issue that must be proven by a plaintiff in every *inter partes* case. See *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014); *John W. Carson Found. v. Toilets.com Inc.*, 94 USPQ2d 1942, 1945 (TTAB 2010). Opposer submitted with its motion a printout from the USPTO's TSDR electronic database showing that one of its pleaded registrations, namely, Registration No. 4304905 for CARDS AGAINST HUMANITY, is valid and subsisting. See Lackman Decl'n, Exhibit 2 (15 TTABVUE 18-21). Opposer's standing to bring this opposition is established by the TSDR printout. See Trademark Rule 2.122(d)(1); see also *Cunningham v. Laser Gold Corp.*, 222 F.3d 943, 945, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Edwards Lifesciences Corp. v. Vigilanz Corp.*, 94 USPQ2d 1399, 1408 (TTAB 2010). Accordingly, we find that there is no genuine dispute of material fact regarding Opposer's standing.

b. Priority

We turn next to the issue of whether there is a genuine dispute of material fact regarding Opposer's asserted priority of use. There is no genuine dispute of material fact regarding Opposer's priority in this case as to Opposer's use of the mark CARDS AGAINST HUMANITY for "card games; game cards" because Opposer submitted a TSDR printout of Opposer's pleaded Registration No. 4304905 for the standard

character mark CARDS AGAINST HUMANITY showing that the registration is valid and subsisting and owned by Opposer. Because Opposer's pleaded registration is of record, priority is not at issue with respect to the goods covered by that registration vis-à-vis the involved applications. *Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1469 (TTAB 2016) (citing *King Candy Co. v. Eunice King's Kitchen, Inc.*, 182 USPQ at 110); TBMP § 309.03(c). Accordingly, there is no genuine dispute of material fact as to Opposer's priority as to the mark CARDS AGAINST HUMANITY for card games and game cards, as shown by Registration No. 4304905.

However, a genuine dispute remains as to pleaded Registration No. 4623613 for the trade dress mark incorporating the wording CARDS AGAINST HUMANITY. Although Opposer states that it has done so, Opposer failed to submit a TSDR printout of pleaded Registration No. 4623613. There is no such printout in either the confidential or public copy of the Lackman Declaration (11 and 15 TTABVUE 22-24); there is only a copy of the registration certificate itself. The registration certificate itself is insufficient to make this registration of record under Trademark Rule 2.122(d) because it does not show the current status and does not appear to have been issued at a time reasonably contemporaneous with Opposer's motion for partial summary judgment. *See United Global Media Group, Inc. v. Tseng*, 112 USPQ2d 1039, 1042 (TTAB 2014); TBMP § 704.03(b)(1)(A).

c. Goods, trade channels, and class of purchasers

Consideration of the similarity of the parties' goods is based on the goods recited in Applicant's applications vis-à-vis the goods identified in Opposer's pleaded

registration which is of record. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1783, 1815 (Fed. Cir. 1992). Applicant's description of goods in both subject applications is "card games; game cards." The description of goods in Opposer's pleaded Registration No. 4304905 is also "card games; game cards." The parties' goods are, therefore, identical. Because the goods are identical, and there are no restrictions on channels of trade in either the subject applications or the registration that is of record, it is presumed that Applicant's goods and Registrant's goods move in the same channels of trade normal for those goods and are offered to the same classes of purchasers. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (legally identical goods are presumed to travel in same channels of trade to same class of purchasers) (citing *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002)); *Am. Lebanese Syrian Associated Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011); *Tea Board of India v. Republic of Tea, Inc.*, 80 USPQ2d 1881, 1897 (TTAB 2008) ("Because the goods are identical and there are no restrictions in the identification of goods, the channels of trade as well as the purchasers for such goods are deemed identical" and include the same purchasers.). Accordingly, we find there is no genuine dispute of material fact that that the parties' goods are identical, travel in the same channels of trade, and are purchased by the same classes of consumers.

d. Defense of no actual confusion

Opposer asks us to either strike Applicant's defense paragraph 18 (that "Applicant's [m]arks have been in use by Applicant for over two (2) years without any instance of actual confusion") or give it no separate consideration because it merely amplifies Applicant's denial of the ground of likelihood of confusion. *See* Mot., p. 20 (10 TTABVUE 21). We decline to do either. As noted *supra*, defense paragraph 18 provides Opposer with more information as to at least one way Applicant may try to defend its right of registration. We are unable to determine on the partial summary judgment record now before us whether Applicant's allegation of the absence of actual confusion may be relevant or have probative value to the larger analysis of likelihood of confusion. *See, e.g., Citigroup Inc. v. Capital City Bank Grp., Inc.*, 94 USPQ2d 1645, 1660 (TTAB 2010) (stating that absence of reported instances of confusion may be meaningful "if the record indicates appreciable and continuous use by applicant of its mark for a significant period of time in the same markets as those served by opposer under its marks"), *aff'd*, 637 F.3d 1344, 98 USPQ2d 1253 (Fed. Cir. 2011). Opposer has not met its burden of demonstrating that no genuine dispute of material fact remains as to the relevance or probative value of the lack of actual confusion.

e. Defense of parody

Parody is a potential defense only if the involved marks otherwise would not be found confusingly similar. For this reason, the Board will assess alleged parody as part of the circumstances in determining whether Opposer has made out its claim. *See, e.g., Research in Motion Ltd. v. Defining Presence Marketing Grp. Inc.*, 102

USPQ2d at 1191-92. In the present motion for partial summary judgment, Opposer does not move for summary judgment on the ground of likelihood of confusion; instead, as discussed *supra*, Opposer moved for partial summary judgment only as to the similarity of the parties' goods, trade channels, and class of purchasers.

While we have found no genuine dispute of material fact that the parties' goods are identical, travel in the same channels of trade, and are purchased by the same classes of consumers, Opposer has not moved for, and we have not determined that no genuine dispute exists as to whether prospective purchasers of Applicant's goods might believe that both parties' goods come from the same source. *See id.* at 1192 (acknowledging that usually, if the Board "should find under the *du Pont* factors that the parties' respective goods are not readily distinguishable, that they might be targeted to the same consumers through overlapping trade channels, and *in the event that prospective purchasers of an applicant's goods might well believe that both parties' goods come from the same source*, then a likelihood of confusion will usually trump any" parody defense) (emphasis added).

Parody is a potential defense only if the involved marks otherwise would not be found confusingly similar. *See Boston Red Sox Baseball Club LP v. Sherman*, 88 USPQ2d 1581, 1592 (TTAB 2008) ("In finding that the marks are not similar, we have given no weight to applicant's argument that his mark is a parody. Parody is not a defense if the marks would otherwise be considered confusingly similar."). Because Opposer has not made out its full claim of likelihood of confusion (i.e., Opposer has not shown on summary judgment that no genuine dispute of material fact exists as

to whether prospective purchasers of Applicant's goods might believe that both Applicant and Opposer's goods come from the same source), Opposer has not met its initial burden to show that no genuine dispute of material fact remains as to the applicability of an alleged parody defense.

2. Summary

Opposer's motion for partial summary judgment is **granted** as to Opposer's standing; Opposer's priority of use of the mark CARDS AGAINST HUMANITY for card games and game cards, as shown by Registration No. 4304905; and the similarity of the parties' goods, channels of trade, and classes of consumers. There are no genuine disputes of material fact as to these issues.

Opposer's motion for partial summary judgment is **denied** as to Opposer's priority of use of the trade dress mark incorporating the wording CARDS AGAINST HUMANITY, as shown in Registration No. 4623613; and Applicant's "defenses" of lack of actual confusion and parody. Opposer has not met its initial burden of showing that there are no genuine disputes of material fact as to these issues. The fact that we have identified the aforementioned genuine disputes of material fact as a basis for denying the partial motion for summary judgment should not be construed as a finding that these necessarily are the only issue which remains for trial. *See, e.g., Am. Express Mktg. & Dev. Corp. v. Gilad Dev. Corp.*, 94 USPQ2d 1294, 1301 n.5 (TTAB 2010).

Opposer's motion for partial summary judgment is **moot** as to Opposer's priority of use of the common law mark CAH; and all of Applicant's affirmative defenses

except the “defenses” of no actual confusion and parody. These matters (except actual confusion and parody) have been stricken from the pleadings.

The parties are reminded that evidence submitted in support of or in opposition to a motion for summary judgment is of record only for consideration of that motion. Any such evidence to be considered at final hearing must be properly introduced during the appropriate trial period. *See, e.g., Levi Strauss & Co. v. R. Joseph Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993).

IV. The Parties May Replead

Inasmuch as we have stricken dilution, false suggestion of a connection, Opposer’s allegations of common law rights, and Applicant’s affirmative defenses (except actual confusion and parody) from the pleadings, Opposer is allowed until **September 20, 2017**, in which to file and serve an amended notice of opposition, if it has a reasonable basis therefor; and Applicant is allowed until **October 5, 2017**, in which to file and serve an answer to the prospective amended notice of opposition, if an amended notice of opposition is filed, or to file an amended answer, if it has a reasonable basis therefor and if no amended notice of opposition is filed; failing which, this case will proceed under the pleadings as stricken (i.e., under the sole ground of likelihood of confusion, and under the only two “defenses” of no actual confusion and parody). *See Musical Directions v. McHugh*, 104 USPQ2d 1157, 1160 (TTAB 2012) (party allowed to replead after Board struck claims *sua sponte*).

V. Schedule

Proceedings are **resumed**. Dates are **reset** on the following schedule:

Amended Notice of Opposition Due, if Filed	9/20/2017
Answer to Amended Notice of Opposition; or Amended Answer Due, if Filed	10/5/2017
Opposer's 30-day Trial Period Ends	11/27/2017
Applicant's Pretrial Disclosures	12/12/2017
Applicant's 30-day Trial Period Ends	1/26/2018
Opposer's Rebuttal Disclosures	2/10/2018
Opposer's 15-day Rebuttal Period Ends	3/12/2018

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

In view of treatment of the pleadings and the motion for partial summary judgment, the late stage at which Opposer moved for summary judgment, and Trademark Rule 2.127(e)(1) as now amended,¹² the Board **will not entertain** another motion for summary judgment. This case should proceed to trial once the pleadings are settled.

VI. Civil Action Information

If the parties are together involved in a civil action, Opposer must so inform the Board in writing within **ten days** of the mailing date of this order and provide the Board with the status of; and a copy of the operative complaint, answer, and any counterclaim complaint and answer (without exhibits) from; the civil action. *See* Trademark Rule 2.117(a).

¹² *See* footnote 4, *supra*, explaining that this rule was amended effective January 14, 2017, to require a motion for summary judgment be filed prior to the deadline for pretrial disclosures for the first testimony period – a date that passed in this case on November 20, 2016. *See* also

VII. Requirement for Future Motions

Because there have been negative procedural or substantive issues with each of the major filings in this case (i.e., complaint, answer, motion for summary judgment, and brief in opposition), the Board **imposes** the following procedural requirement upon the parties: For any future unconsented motion to be filed in this case by either party, the filing party must first telephone the assigned Interlocutory Attorney to seek permission to file the unconsented motion. The Board attorney may, in exercising her discretion, determine that a telephonic case conference with opposing counsel (i.e., the non-filing party) is required. *See Schering-Plough Animal Health Corp. v. Aqua Gen AS*, 90 USPQ2d 1184, 1185 (TTAB 2009) (Board required party obtain permission before filing any unconsented or unstipulated motion); *Carrini Inc. v. Carla Carini S.R.L.*, 57 USPQ2d 1067, 1071 (TTAB 2000) (“Board possesses the inherent authority to control the disposition of cases on its docket, which necessarily includes the inherent power to enter sanctions.”).