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Trademark Trial and Appeal Board
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RSC

June 24, 2020

Opposition No. 91229897

*Carl Walther GmbH and UMAREX GmbH &
Co. KG*¹

v.

Catharina Herriger

**Before Lykos, Goodman, and Coggins,
Administrative Trademark Judges.**

By the Board:

This case comes before the Board for consideration of Opposers' motion for partial summary judgment on the grounds of claim preclusion and likelihood of confusion.

The motion is fully briefed.




I. Background

Catharina Herriger ("Applicant") seeks registration of the standard character mark WALTHER SWITZERLAND (SWITZERLAND disclaimed) for "jewellery and watches" in International Class 14.²

¹ The Board notes the June 2, 2020, appearance of Joshua Paul of Renzulli Law Firm, LLP, as counsel for Opposers. Board records have been updated accordingly.

² Application Serial No. 86824552 was filed on November 18, 2015, based on Applicant's asserted bona fide intention to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. § 1051(b).

Carl Walther GmbH (“Walther”) and its asserted related company UMAREX GmbH & Co. KG (“Umarex”) (collectively “Opposers”) have opposed registration of Applicant’s mark. As grounds of opposition, Opposers allege claim preclusion based on Opposition No. 91215976 (“the prior opposition”), likelihood of confusion, dilution, lack of bona fide intent, deceptiveness, geographic deceptive misdescriptiveness, and geographic descriptiveness. In particular, as to their likelihood of confusion and dilution claims, Opposers have alleged prior use and registration of the following WALTHER marks:

- WALTHER and design,  for “military rifles, hunting rifles, pistols, guns for shooting signals, rockets and flares, adult air guns, adult pistols, and adult cap pistols, adult cap guns” in International Class 13,³
- WALTHER for “hunting and sport rifles, pistols, revolver and shot guns” in International Class 13,⁴
- WALTHER and design,  for “toy weapons and toy replicas of weapons” in International Class 28,⁵
- WALTHER for “toy weapons and toy replicas of weapons” in International Class 28,⁶ and
- WALTHER and design,  for “sport knives, knives for use in hunting and fishing, pocket knives” in International Class 8 and “telescopes, telescopic gun and lens sights, night glasses for use in hunting” in International Class 13.⁷

In her answer, Applicant denies the salient allegations in the notice of opposition.⁸

³ Registration No. 303701, issued October 6, 1932, renewed.

⁴ Registration No. 1120867, issued February 1, 1974, renewed.

⁵ Registration No. 2912154, issued December 21, 2004, renewed.

⁶ Registration No. 2909647, issued December 14, 2004, renewed.

⁷ Registration No. 2714985, issued May 13, 2003, renewed.

⁸ 4 TTABVUE.

II. The Parties' Arguments and Evidence⁹

In their motion¹⁰ Opposers contend Applicant is precluded from registering WALTHER SWITZERLAND for “jewellery and watches” because of a summary judgment order in Opposers’ favor in the prior opposition. Opposers maintain that the parties and their goods at issue in the prior and current opposition are identical. Opposers further argue “[t]he non-disclaimed and non-descriptive portion” of Applicant’s mark in the current proceeding is identical to her mark that was refused registration in the prior opposition, and Applicant’s addition of the geographically descriptive word “Switzerland” is an insignificant modification. In support of their argument, Opposers submitted the following evidence:

- Applicant’s applications at issue in the prior opposition, Serial Nos. 85965933 and 85965968,¹¹
- The notice of opposition filed in the prior opposition,¹² and
- The June 22, 2015 order on summary judgment in the prior opposition.¹³

Opposers further assert that Applicant’s involved mark should be refused on the grounds of priority and likelihood of confusion with the marks in Opposers’ pleaded

⁹ In reaching our decision, all of the parties’ arguments and supporting evidence properly of record were carefully considered, although we do not find it necessary to discuss all of them in our opinion. *See, e.g., Guess? IP Holder L.P. v. Knowluxe LLC*, 116 USPQ2d 2018, 2018 (TTAB 2015).

¹⁰ In their motion, Opposers refer to themselves collectively as “Walther”. When there are multiple plaintiffs or defendants, they should not refer to themselves collectively by an abbreviation that points to one of them.

¹¹ 17 TTABVUE 25-48.

¹² *Id.* at 50-113.

¹³ *Id.* at 14-158.

registrations.¹⁴ Opposers contend that their pleaded marks are famous and entitled to broad protection. Opposers state their fame was acquired through 100 years of use in the United States and “longstanding and prominent presence in both the firearms industry and popular culture.”¹⁵ In support of their assertion of fame, Opposers submitted the following evidence:

- Copies of five third-party publications or Internet printouts,¹⁶
- TSDR printout showing the current status and title of Walther’s unpleaded Registration No. 3924411, for a product configuration of a pistol,¹⁷
- Declaration of Monika Braeutigam, Assistant to the President for Umarex,¹⁸
- Internet printout from, and a video that appears on, the website of Opposers’ asserted United States affiliate,¹⁹ and
- Internet printout of an excerpt from the Facebook page for Opposers’ asserted United States affiliate.²⁰

With respect to the similarity of the marks, Opposers contend Applicant’s disclaimer of SWITZERLAND causes WALTHER to be the dominant portion of

¹⁴ 17 TTABVUE 245-272. Opposers also submitted with their notice of opposition a current copy of information from the TSDR electronic database records of the Office showing the current status and title to each of their pleaded registrations. *See* Trademark Rule 2.122(d)(1).

¹⁵ 17 TTABVUE 15.

¹⁶ 18 TTABVUE 83-158. The printout at 18 TTABVUE 98-106 does not include its source or the date accessed on its face. While the Declaration of Gavin Strube identifies the date the material was accessed (17 TTABVUE 31 n. 6), he does not otherwise authenticate this printout.

¹⁷ 17 TTABVUE 274-278. To the extent Opposers rely on statements in a 2010 Board decision pertaining to this registration, Opposers have not submitted the decision.

¹⁸ 18 TTABVUE 159-162, ¶¶ 5, 6, 7, 9, 10, 11, 14, and 15.

¹⁹ *Id.* at ¶¶ 9, 10; 18 TTABVUE 173-194, 19 TTABVUE.

²⁰ 18 TTABVUE 197-199.

Applicant's mark, which is identical to Opposers' pleaded marks "in every possible respect."²¹

Regarding the relationship of the goods, Opposers argue the parties' goods are closely related, and that because the parties' marks are "materially identical," only a viable relationship between their goods is necessary. Opposers contend that "various firearm and personal defense manufacturers" offer personal defense products as well as jewelry and watches under the same mark, and there are numerous third-party applications and registrations for the same or substantially similar marks with shared ownership for both types of goods.²²

Opposers also argue that neither their pleaded marks nor Applicant's involved application includes a restriction on the channels of trade, and the ordinary channels of trade for the parties' respective goods overlap, including through gun shops, sporting goods stores, and retail outdoor outfitters.

To support their arguments regarding the similarities of the goods and their channels of trade, Opposers submitted the following evidence:

- Printouts of websites from five third-parties offering various firearms and related accessories, as well as jewelry under the same mark,²³
- Registrations from four third-parties for firearms, firearm accessories or knives, and jewelry or watches, under the same mark, or same word mark with different stylization,²⁴ and

²¹ 17 TTABVUE 15.

²² *Id.* at 18.

²³ *Id.* at 280-430.

²⁴ *Id.* at 432-502. Opposers also submitted three registrations for the mark SAAB, however the owner of two of the registrations (Reg. Nos. 3689488 and 4195329) is not identical to the owner of the third registration (Reg. No. 1782300).

- Printouts of websites from seven third-parties that show firearms, firearm accessories or knives being sold in the same online retail store as jewelry or watches.²⁵

Finally, Opposers argue there is an inference that Applicant filed for her mark in bad faith. Opposers contend, relying on Applicant's discovery responses from the prior opposition, that Applicant admitted she was aware of the existence of Opposers' mark prior to filing her application, and that she first saw Opposers' marks as child because Opposers' founder was her great-great-grandfather.²⁶ Opposers further rely on Applicant's filing of the involved application less than five months after the Board's summary judgment decision against her in the prior opposition, and her consent to the suspension of this proceeding pending the conclusion of the prior opposition.²⁷

In response, Applicant argues claim preclusion does not apply because "the prior opposition was based on different marks and different evidence", and the involved WALTHER SWITZERLAND mark is materially different from her mark in the prior opposition, WALTHER.²⁸ Applicant also asserts she did not have a full and complete

²⁵ *Id.* at 504-650.

²⁶ 17 TTABVUE 125, 133.

²⁷ Opposers further submitted four additional exhibits totaling more than 300 pages. Opposers do not refer to these exhibits in their motion, although they do make general references to one 246-page exhibit in their reply brief. The burden is on Opposers to point the Board toward the relevant evidence, and it is improper to "hope that in wading through it, [the Board] might find something probative. This is not productive. 'Judges are not like pigs, hunting for truffles buried in briefs.'" *RxD Media, LLC v. IP Application Dev. LLC*, 125 USPQ2d 1801, 1803 (TTAB 2018) (internal citation omitted).

²⁸ 20 TTABVUE 12, 18. Applicant's reliance on the Examining Attorney's approval of her application, or the Board's February 12, 2019 order resuming proceedings, is misplaced. "A decision by an examining attorney during examination of an application as to whether or not there is likelihood of confusion with another registered mark has no preclusive effect." *Super Bakery, Inc. v. Benedict*, 96 USPQ2d 1134, 1135 n. 1 (TTAB 2010); *see also Formica Corp. v. Saturn Plastics & Eng'g Co.*, 185 USPQ2d 251, 253 (TTAB 1975). Additionally, the Board's order resuming the proceedings was not an order on the merits and has no preclusive effect.

opportunity to be heard in the prior opposition because, due to errors in the presentation of her evidence, the Board did not consider the “plethora of third party marks that included the term ‘Walther’ or its sound-alike equivalent ‘Walter.’”²⁹

Turning to the ground of likelihood of confusion, while Applicant does not dispute Opposers’ standing or priority,³⁰ she does assert that Opposers’ evidence fails to show a likelihood of confusion. Applicant contends Opposers’ evidence of their fame fails to establish that their marks are famous, rather the evidence only pertains to handguns or that the fictional character James Bond used one of Opposers’ hand gun products.³¹ Applicant further contends that Opposers’ marks are weak because WALTHER is a common given or surname, or a commonly used company name, and there are “numerous” third-party registrations for marks including the term WALTHER.³² Applicant further asserts that due to the numerous third-parties using “Walther”, Opposers use “Walther Arms” to distinguish themselves. In support Applicant submitted:

- Seven live registrations where the owner’s name, either as an individual or entity, include “Walther”,³³

²⁹ *Id.* at 9, 10.

³⁰ *Id.* at 12, response to Opposers’ “Alleged Fact No. 23”.

³¹ *Id.* at 4-5. Applicant also objects, on the basis of hearsay, to Opposers’ quotation from a *Popular Mechanics* article. *Id.* at 5. While magazine articles are generally only considered for what they show on their face, and not the truth of the matters contained therein (*Logicon, Inc. v. Logisticon, Inc.*, 205 USPQ 767, 768 n. 6 (TTAB 1980)) we do not construe Opposers’ quotation from the article to be an effort to rely on the truth of the statements in the article.

³² 20 TTABVUE 20-21.

³³ 21 TTABVUE at 17-67. Applicant also offered registrations that were dead, where the attorney of record had the surname “Walther”, or the address for the owner included “Walther”.

- Seven live registrations where WALTHER forms part of the mark, for various goods,³⁴ and
- Internet printout of walther.com.³⁵

Applicant also argues the parties' marks are "visually materially different" and have different meanings. Applicant contends its disclaimer of SWITZERLAND is not relevant, but rather the inclusion of the geographic indicator creates a materially different mark from Opposers' marks. In support Applicant cites to Opposers' evidence which, she contends, emphasizes and promotes Opposers' German heritage and link thereto.³⁶

With respect to the parties' goods, Applicant contends Opposers' own evidence shows that it is extremely rare for a firearms product manufacturer to also sell jewelry and watches, or for a retailer to offer both goods, and that "neither jewelry nor watches" are a listed product category in the trade show catalog submitted by Opposers.³⁷ Applicant specifically notes the 2020 trade show catalog entered into evidence by Opposers identifies 387 exhibitors, including four of the five third-parties identified by Opposers as selling firearms and watches or jewelry under the same

³⁴ *Id.* at 69-99. We note that four of the registrations (Reg. Nos. 4337215, 4630870, 4243239, and 3823591) have the same owner.

³⁵ *Id.* at 101.

³⁶ 20 TTABVUE 16, 19. We note Applicant's citation to the record did not provide the corresponding TTABVUE docket entry and page number. Where possible the parties should cite to material in the record by indicating the TTABVUE docket entry number and the TTABVUE page number. *Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n. 6 (TTAB 2014); TBMP § 106.03.

³⁷ 20 TTABVUE 13, 14, 17, 21, 22.

mark. Applicant contends that even including the fifth third-party identified by Opposers, “5 out of 387 is not ‘many.’”³⁸

Finally, Applicant contends that she chose WALTHER SWITZERLAND to eliminate any possible likelihood of confusion, and relied on advice of counsel in so doing.³⁹

In reply, Opposers assert Applicant only offers unsupported conclusory statements in her attempts to dispute the material facts set out in Opposers’ motion, and the evidence submitted with Applicant’s response is insufficient to establish a genuine dispute of material fact. In regard to claim preclusion, Opposers argue they “established that ‘SWITZERLAND’ is geographically descriptive and must be disregarded,” and that the dominant portion of Applicant’s mark is identical to her previously refused mark.⁴⁰

With respect to likelihood of confusion, Opposers assert Applicant concedes SWITZERLAND is geographically descriptive, and that WALTHER is identical to Opposers’ pleaded marks. Opposers also assert that Applicant’s evidence is insufficient to show WALTHER is a common name or that numerous third-parties own registrations incorporating the term. In addition, Opposers argue Applicant “disregard[s]” the “numerous advertisements for jewelry and watches” in the trade show catalog.⁴¹

³⁸ *Id.* at 13.

³⁹ *Id.* at 22.

⁴⁰ 24 TTABVUE 2, 3.

⁴¹ *Id.* at 5.

III. Evidentiary Objections

Before turning to the merits of Opposers' motion, we address Applicant's objections to Ms. Braeutigam's declaration. Applicant objects to Ms. Braeutigam's statements regarding Opposers' fame on the basis that Ms. Braeutigam has not been designated as an expert, and has failed to present evidence to establish that she is qualified as an expert to render an opinion on Opposers' fame.⁴² Applicant further objects to Ms. Braeutigam's statements regarding the length of Opposers' use of their marks in the United States on the basis that she lacks first-hand knowledge of the marketplace 100 years ago.⁴³ Opposers do not directly address Applicant's objections. Rather, they contend Applicant's argument that expert testimony is needed to prove fame is incorrect.

It is unclear why Applicant presupposes Ms. Braeutigam is being offered as an expert witness. The existence and degree of fame for likelihood of confusion purposes may be measured indirectly in numerous ways, without the use of an expert report. *Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002). As nothing in Ms. Braeutigam's declaration or Opposers' motion indicate she is being offered as an expert, Applicant's objection to her qualification as an expert is moot.

As for Ms. Braeutigam's statements on the history of Opposers, Applicant's argument indicates she considers first-hand knowledge to mean knowledge derived from direct personal observation. However, the Federal Rules of Evidence only

⁴² 20 TTABVUE 4.

⁴³ *Id.* at 6.

require personal knowledge, which may be acquired by a review of files and records in the course of the witness's employment and the discharge of her job duties. Fed. R. Evid. 602; *City Nat'l Bank v. OPGI Mgmt. GP Inc./Gestion OPGI Inc.*, 106 USPQ2d 1668, 1673 (TTAB 2013). In her declaration Ms. Braeutigam states she has been the Assistant to the President of Umarex for thirty years, and her declaration is based on her personal knowledge obtained during her employment with Umarex and familiarity with Walther's history and records following Umarex's acquisition of Walther.⁴⁴ Accordingly, Applicant's objection that Ms. Braeutigam lacks personal knowledge is overruled.

IV. Opposers' Motion for Summary Judgment

A. Standard for Summary Judgment

Summary judgment is an appropriate method of disposing of cases in which there is no genuine dispute as to any material fact, thus allowing the case to be resolved as a matter of law. *See* Fed. R. Civ. P. 56(a). The party moving for summary judgment has the initial burden of demonstrating that there is no genuine dispute of material fact remaining for trial and that it is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1987). All evidence must be viewed in a light favorable to the non-movant, in this case Applicant, and all justifiable inferences are to be drawn in the non-movant's favor. *Lloyd's Food Prods., Inc. v. Eli's, Inc.*, 987 F.2d 766, 25 USPQ2d 2027, 2029 (Fed. Cir. 1993); *Opryland USA Inc. v. Great Am. Music Show, Inc.*, 970 F.2d 847, 23 USPQ2d 1471, 1472 (Fed.

⁴⁴ 18 TTABVUE 159, ¶¶ 1, 2.

Cir. 1992). In deciding a summary judgment motion, the Board may not resolve disputes of material fact; it may only ascertain whether such disputes exist. *Lloyd's Food Prods.*, 25 USPQ2d at 2029; *Opryland USA*, 23 USPQ2d at 1472; *Olde Tyme Foods, Inc. v. Roundy's, Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1544 (Fed. Cir. 1992).


A factual dispute is genuine if, on the evidence of record, a reasonable fact finder could resolve the matter in favor of the non-movant. *Opryland USA*, 23 USPQ2d at 1472; *Olde Tyme Foods*, 22 USPQ2d at 1544. The non-movant must be given the benefit of all reasonable doubt as to whether a genuine dispute as to a material fact exists, 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 non-movant. *Opryland USA*, 23 USPQ2d at 1472.

The movant's burden at summary judgment is greater than the burden of proof at trial, which is a preponderance of the evidence, and which permits appropriate inferences to be drawn from the evidence of record. *See, e.g., Gasser Chair Co. v. Infanti Chair Mfg. Corp.*, 60 F.3d 770, 34 USPQ2d 1822, 1824 (Fed. Cir. 1995); *see also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") § 528.01 (June 2020). Only when the movant has supported its motion with sufficient evidence that, if unopposed, indicates there is no genuine dispute of material fact and that the moving party is entitled to judgment as a matter of law, does the burden then shift to the non-movant to demonstrate the existence of a genuine dispute of material fact to be resolved at trial. *Enbridge, Inc. v. Excelerate Energy LP*, 92 USPQ2d 1537, 1540 (TTAB 2009). Specifically, "[t]he party opposing the motion must point to an

evidentiary conflict created on the record at least by a counter statement of a fact or facts set forth in detail in an affidavit by a knowledgeable affiant.” *Barmag Barmer Maschinenfabrik AG v. Murata Mach., Ltd.*, 731 F.3d 831, 221 USPQ 561, 564 (Fed. Cir. 1984).

B. Claim Preclusion

We first consider whether this opposition is subject to claim preclusion. For claim preclusion, or *res judicata*, to apply, there must be (1) an identity of parties or their privies; (2) an earlier final judgment on the merits of a claim; and (3) the second claim is based on the same set of transactional facts as the first. *See Jet, Inc. v. Sewage Aeration Sys.*, 223 F.3d 1360, 55 USPQ2d 1854, 1856 (Fed. Cir. 2000). “[T]he Board [has] defined the ‘claims’ involved, for *res judicata* purposes, as the applicants’ claims, as asserted in their applications, of entitlement to registration of their marks.” *Institute National Des Appellations d’Origine v. Brown-Forman Corp.*, 47 USPQ2d 1875, 1894 (TTAB 1998).

The record indicates that, in the earlier opposition, Opposers opposed registration of the marks WALTHER in standard character form (application Serial No. 85965933, “Applicant’s prior word mark”) and the following design mark  (application Serial No. 85965968, “Applicant’s prior design mark”), both for “[j]ewellery and watches” in International Class 14. As grounds of the prior opposition Opposers alleged claims of likelihood of confusion with, and dilution of, the same previously used and registered WALTHER and WALTHER and ribbon design marks as pled in the instant proceeding, as well as a registration for just the ribbon design

mark for toy weapons.⁴⁵ On June 22, 2015, after considering a fully briefed motion, the Board granted partial summary judgment in Opposers' favor, establishing Opposers' standing and priority, and sustaining the opposition as to likelihood of confusion with regard to Applicant's prior word mark.⁴⁶ Applicant subsequently filed the involved application in this proceeding on November 18, 2015.

There is no genuine dispute of material fact that the parties in the prior opposition are identical to those in this proceeding, and the first element of claim preclusion is met. Nor is there a genuine dispute that an earlier final judgment on the merits of a claim was entered, so the second element of claim preclusion has been met. While Applicant asserts she "did not have a 'full and complete' opportunity to be heard" in the prior opposition, due to the omission of evidence improperly submitted by her attorney, this argument is not persuasive and fails to cast doubt on or otherwise alter the finality of the Board's ruling on Opposers' summary judgment motion in the prior opposition. That judgement was rendered after both parties had time to present arguments and evidence, and was a final decision on the merits as to likelihood of confusion with Applicant's standard character mark. Any objection Applicant had to the propriety of the prior decision should have been raised through a timely motion for reconsideration or, at the conclusion of the prior opposition in its entirety, an appeal.

⁴⁵ 17 TTABVUE 50-63.

⁴⁶ *Id.* at 140-158. In this same order the Board granted Opposers leave to amend to add a claim of lack of bona fide intent to use the mark in commerce under Trademark Act 1(b), 15 U.S.C. § 1051(b), but summary judgment on this newly added claim was denied.

Accordingly, we turn to the third element, whether the separate opposition proceedings against two applications involve the same “claim” for preclusion purposes. To make this determination we consider “whether the mark involved in the first proceeding is the same mark, in terms of commercial impression, as the mark involved in the second proceeding.” *Be Sport, Inc. v. Al-Jazeera Satellite Channel*, 115 USPQ2d 1765, 1767 (TTAB 2015) (quoting *Institut Nat’l Des Appellations d’Origine*, 47 USPQ2d at 1894-95). Such a determination requires more than that the marks be “similar enough to each other, in terms of commercial impression, to be deemed to be confusingly similar under a likelihood of confusion analysis” *Institut Nat’l Des Appellations d’Origine*, 47 USPQ2d at 1895. “[T]he proper test for determining whether two marks have the same commercial impression, for purposes of the claim preclusion doctrine, is the test used in tacking situations, i.e., whether the marks are legal equivalents.” *Id.* Marks will be considered as legal equivalents if they “create the same, continuing commercial impression so that consumers consider both as the same mark.” *Hana Fin., Inc. v. Hana Bank*, 574 U.S. 418, 113 USPQ2d 1365, 1367 (2015) (internal quotation marks and citations omitted); *see also BE Sport, Inc.*, 115 USPQ2d at 1768 (“where there are material differences, the commercial impression is not the same; the commercial impression is the same, however, where the differences are immaterial.”).

In this case, we find that Opposers have not demonstrated that they are entitled to judgment as a matter of law. At a minimum, there is a genuine dispute as to whether the mark in Applicant’s involved application and her prior word mark are

legal equivalents. While it is undisputed that the goods in Applicant's involved application and prior application are identical, there is a genuine dispute of material fact as to whether the marks create the same, continuing commercial impression, given the addition of the geographically descriptive term SWITZERLAND.

In view thereof, Opposer's motion for partial summary judgment is **denied** with respect to claim preclusion.

C. Section 2(d): Likelihood of Confusion

We now turn to Opposers' motion for summary judgment on the grounds of likelihood of confusion. As the movant for summary judgment on its Section 2(d) claim, Opposers must establish that there is no genuine dispute that (1) they have standing to maintain this proceeding; (2) they own a registration for, or are the prior users of, their pleaded marks; and (3) the contemporaneous use of the parties' respective marks on their respective goods would be likely to cause confusion, or cause mistake, or deceive consumers.

Applicant does not dispute Opposers' standing or priority, so we turn directly to the issue of likelihood of confusion. Determining whether there is a genuine dispute regarding likelihood of confusion involves an analysis of all of the probative facts in evidence that are relevant to the thirteen factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*DuPont* factors"). We look to whether there are genuine disputes as to any facts which would be material to a decision on the merits. "Not all of the [*DuPont*] factors are relevant to every case, and only factors of significance to the particular mark need be considered."

Coach Servs., Inc. v. Triumph Learning LLC, 668 F.3d 1356, 101 USPQ2d 1713, 1719 (Fed. Cir. 2012) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010)). The Board must deny summary judgment if there are genuine disputes as to any of those *DuPont* factors which would be material to a decision on the merits.

Upon careful review of the evidence and arguments presented by the parties, and drawing all inferences with respect to the motion in favor of Applicant as the nonmoving party, we find that Opposers have not demonstrated that they are entitled to judgment as a matter of law. At a minimum, there is a genuine dispute as to the similarity of the parties' marks. Notwithstanding the disclaimer of SWITZERLAND in Applicant's involved application and the parties' common use of WALTHER, the Board must determine likelihood of confusion based on an assessment of the marks as a whole. *DuPont*, 177 USPQ at 567; *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012). Although disclaimed descriptive matter is generally less dominant in creating the commercial impression of a mark (*see Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1257 (Fed. Cir. 2011)), we must consider disclaimed portions of marks in making the ultimate determination as to the similarity of the marks at issue. *Viterra*, 101 USPQ2d at 1911; *see also Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1676 (Fed. Cir. 2015). Further, we have a duty to consider marks on a case-by-case basis. *Viterra*, 101 USPQ2d at 1908. There are also genuine disputes of material fact as to the relatedness of the parties' goods and the strength of Opposers' marks.

Accordingly, Opposers' motion for partial summary judgment on the issue of likelihood of confusion is **denied**.⁴⁷

V. Resumption of Proceedings

Proceedings are resumed, and dates are reset as follows:

Plaintiff's Pretrial Disclosures Due	7/16/2020
Plaintiff's 30-day Trial Period Ends	8/30/2020
Defendant's Pretrial Disclosures Due	9/14/2020
Defendant's 30-day Trial Period Ends	10/29/2020
Plaintiff's Rebuttal Disclosures Due	11/13/2020
Plaintiff's 15-day Rebuttal Period Ends	12/13/2020
Plaintiff's Opening Brief Due	2/11/2021
Defendant's Brief Due	3/13/2021
Plaintiff's Reply Brief Due	3/28/2021
Request for Oral Hearing (optional) Due	4/7/2021

The Federal Rules of Evidence generally apply to Board trials. Trial testimony is taken and introduced out of the presence of the Board during the assigned testimony periods. The parties may stipulate to a wide variety of matters, and many requirements relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125. These include pretrial disclosures, the

⁴⁷ The fact that we have identified and discussed certain genuine disputes of material fact as sufficient bases for denying the motion for summary judgment should not be construed as a finding that these are necessarily the only disputes that remain for trial. In addition, 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 *Levi Strauss & Co. v. R. Joseph Sportswear Inc.*, 28 USPQ2d 1464, 1465, n.2 (TTAB 1993). We note that several of Opposers' exhibits printed from the Internet do not appear complete in some manner. For example, the right hand margins of all of the TSDR copies submitted by Opposers are cut-off such that certain information is missing, and some printouts of third-party websites do not include legible text. The parties should confirm that evidence submitted for final decision is complete and legible.

manner and timing of taking testimony, matters in evidence, and the procedures for submitting and serving testimony and other evidence, including affidavits, declarations, deposition transcripts and stipulated evidence. Trial briefs shall be submitted in accordance with Trademark Rules 2.128(a) and (b). Oral argument at final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a).

TIPS FOR FILING EVIDENCE, TESTIMONY, OR LARGE DOCUMENTS

The Board requires each submission to meet the following criteria before it will be considered: 1) pages must be legible and easily read on a computer screen; 2) page orientation should be determined by its ease of viewing relevant text or evidence, for example, there should be no sideways or upside-down pages; 3) pages must appear in their proper order; 4) depositions and exhibits must be clearly labeled and numbered – use separator pages between exhibits and clearly label each exhibit using sequential letters or numbers; and 5) the entire submission should be text-searchable. Additionally, submissions must be compliant with Trademark Rules 2.119 and 2.126. Submissions failing to meet all of the criteria above may require re-filing. **Note:** Parties are strongly encouraged to check the entire document before filing.⁴⁸ The Board will not extend or reset proceeding schedule dates or other deadlines to allow time to re-file documents. For more tips and helpful filing information, please visit the [ESTTA help](#) webpage.

⁴⁸ To facilitate accuracy, ESTTA provides thumbnails to view each page before submitting.