

THIS ORDER IS NOT A  
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TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
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GMM

October 6, 2020

Opposition No. 91245529


*DSM IP Assets B.V.*

*v.*

*Hhealth Inc.*

**Before Wellington, Heasley, and Hudis,  
Administrative Trademark Judges.**

**By the Board:**

Hhealth Inc. (“Applicant”) seeks registration of the mark  (“HEALTH”  
disclaimed) for the following goods:<sup>1</sup>

Dietary supplemental drinks in the nature of vitamin and mineral beverages; Dietary and nutritional supplements; Glucose dietary supplements; Health food supplements; Liquid nutritional supplement; Mineral food supplements; Nutritional supplements; Protein dietary supplements; Royal jelly dietary supplements; Soy protein dietary supplements, in International Class 5;


Algae food beverages, namely, seaweed drinks; Almond milk-based beverages; Coconut milk-based beverages; Dairy-based beverages; Dairy-based chocolate food

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<sup>1</sup> Application Serial No. 87891972 was filed on April 25, 2018, based on Applicant’s alleged bona fide intent to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. § 1051(b). The application contains the following description of the mark: “Color is not claimed as a feature of the mark. The mark consists of the wording ‘HHEALTH’ in stylized font with the first letter ‘H’ encompassed in a leaf.”

beverages; Dairy-based food beverages; Dairy-based food beverages also containing cocoa; Dairy-based powders for making dairy-based food beverages and shakes; Fruit-based food beverage; Milk based beverages containing fruit juice; Milk beverages containing fruits; Peanut-based food beverages; Vegetable-based chocolate food beverages; Vegetable-based food beverages; Yogurt-based beverages, in in International Class 29; and,

Honey substitutes; Honey; Propolis for human consumption; Propolis for food purposes; Royal jelly for food purposes; Sugar, honey, treacle, in International Class 30.

DSM IP Assets B.V. (“Opposer”) opposes registration of Applicant’s mark on the following grounds: (1) priority and likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. § 1052(d); (2) Applicant was not the owner of the mark as of the filing date of the application; and (3) fraud based on non-ownership.<sup>2</sup> In support of its likelihood of confusion claim, Opposer pleaded ownership of Application Serial No. 87680617 for the mark  (“HEALTH” disclaimed) for “dietary supplements” in International Class 5.<sup>3</sup>

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<sup>2</sup> See Notice of Opposition, 1 TTABVUE ¶¶ 2–5 (1 TTABVUE 3–6). Citations to the record or briefs in this opinion also include citations to the publicly available documents on TTABVUE, the Board’s electronic docketing system. See, e.g., *Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n. 6 (TTAB 2014). The number preceding “TTABVUE” corresponds to the docket entry number; the number(s) following “TTABVUE” refer to the page number(s) of that particular docket entry.

<sup>3</sup> *Id.* ¶ 1¶ (1 TTABVUE 3).

Opposer’s pleaded application was filed on November 10, 2017, based on Opposer’ alleged bona fide intent to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. § 1051(b). The application contains the following description of the mark: “Color is not claimed as a feature of the mark. The mark consists of a circle around ‘M’ with a vertical line touching the right side of the circle and ‘HEALTH’ to the right of the vertical line.”

Applicant answered by denying the salient allegations in the notice of opposition, and asserting three putative affirmative defenses that actually are amplifications of its denial of Opposer's claims.<sup>4</sup>

On March 27, 2020, Applicant timely filed a motion for partial summary judgment in its favor on Opposer's Section 2(d) claim.<sup>5</sup> On April 27, 2020, Opposer responded by filing a "cross-motion for summary judgment [on all of its claims] or motion for discovery of Applicant pursuant to [Fed. R. Civ. P.] 56(d)."

## **I. Preliminary Matters**

Before addressing the merits of the parties' cross-motions for summary judgment, we address certain preliminary matters.

### **A. Opposer's Alternative Rule 56(d) Motion**

Opposer's motion for Rule 56(d) discovery should have been supported by an affidavit or declaration establishing that Opposer requires specific discovery in order to present facts essential to its opposition to Applicant's summary judgment motion. *See* Fed. R. Civ. P. 56(d); *Opryland U.S.A. Inc. v. Great Am. Music Show Inc.*, 970 F.2d 847, 23 USPQ2d 1471, 1474–75 (Fed. Cir. 1992); *Keebler Co. v. Murray Bakery Prods.*, 866 F.2d 1386, 9 USPQ2d 1736, 1739 (Fed. Cir. 1989); *see also* TRADEMARK

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<sup>4</sup> *See* 9 TTABVUE.

We do not, strike Applicant's putative affirmative defenses. The amplifications of Applicant's denials provide Opposer with fuller notice of how Applicant intends to defend the case. *See, e.g., Morgan Creek Prods. Inc. v. Foria Int'l Inc.*, 91 USPQ2d 1134, 1136 (TTAB 2009) (applicant's "affirmative defenses" for the most part amplified its denials of opposer's allegations regarding likelihood of confusion); *Order of Sons of Italy in Am. v. Profumi Fratelli Nostra AG*, 36 USPQ2d 1221, 1223 (TTAB 1995) (amplification of applicant's denial of opposer's claims not stricken).

<sup>5</sup> *See* 10 TTABVUE.

TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 528.06 (June 2020). Opposer's motion for Rule 56(d) discovery was not supported by the required affidavit or declaration, and did not specify what discovery Opposer required. The lack of proper support is a sufficient ground, by itself, for denying the Rule 56(d) motion. Moreover, Opposer filed a combined request for Rule 56(d) discovery and a response to the merits of Applicant's motion in the form of a cross-motion for summary judgment. In the cross-motion, Opposer seeks summary judgment on, inter alia, the Trademark Act Section 2(d) claim that is the subject of Applicant's summary judgment motion. This also warrants denial of Opposer's Rule 56(d) motion. *See Bad Boys Bail Bonds, Inc. v. Yowell*, 115 USPQ2d 1925, 1930 (TTAB 2015); *Ava Ruha Corp. v. Mother's Nutritional Ctr., Inc.*, 113 USPQ2d 1575, 1578 (TTAB 2015). Accordingly, the motion for Rule 56(d) discovery is **denied**.

**B. Opposer's Evidence**

Applicant filed its motion for partial summary judgment on March 27, 2020. Therefore, Opposer's response to Applicant's motion was due by April 26, 2020. *See* Trademark Rule 2.127(e)(1), 37 C.F.R. § 2.127(e)(1). Because April 26, 2020, was a Sunday, Opposer's response would be deemed timely if filed on Monday, April 27, 2020. *See* Trademark Rule 2.196, 37 C.F.R. § 2.196. On April 27, 2020, Opposer filed its combined cross-motion for summary judgment and alternative motion for Rule 56(d) discovery.<sup>6</sup> On the next day, April 28, 2020, Opposer submitted evidence in

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<sup>6</sup> *See* 12 TTABVUE.

support of its cross-motion for summary judgment.<sup>7</sup> Opposer's combined cross-motion for summary judgment and motion for Rule 56(d) discovery are timely. However, Opposer's evidentiary submissions were filed untimely. Accordingly, we have considered Opposer's cross-motion, but not Opposer's untimely evidentiary submissions.

**C. The Parties' Briefing on Their Cross-Motions**

As noted above, Applicant filed a motion for partial summary judgment on Opposer's likelihood of confusion claim, and Opposer cross-moved for summary judgment on its claims of likelihood of confusion, non-ownership, and fraud. Applicant then filed a motion and two corrected motions for an extension of time to respond to Opposer's cross-motion, which were contested by Opposer.<sup>8</sup>

We need not decide the motion for an extension. Further briefing on the parties' cross-motions is not necessary. As discussed above, Opposer's cross-motion was not supported by timely evidence. Additionally, to the extent Opposer's cross-motion also can be construed as a response to Applicant's motion for partial summary judgment on the likelihood of confusion claim, and because Applicant's motion is limited to arguing that the parties' mark are dissimilar, we can decide Applicant's motion based on the arguments and evidence currently of record. Further briefing would only delay matters.

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<sup>7</sup> See 13 TTABVUE and 14 TTABVUE.

<sup>8</sup> 15–20 TTABVUE.

#### **D. Opposer's Trademark Act Section 2(d) Claim**

In the ESTTA cover sheet submitted with the notice of opposition, Opposer indicated that it opposes registration of Applicant's mark in Classes 5, 29, and 30.<sup>9</sup> In the notice of opposition, Opposer's allegation of likelihood of confusion is not limited to any one class of goods.<sup>10</sup> Opposer's arguments in its cross-motion, however, are limited to Applicant's Class 5 goods.<sup>11</sup> Opposer did not argue that there is a likelihood of confusion as to Applicant's goods in Classes 29 and 30. Similarly, Applicant's arguments and evidence in its motion for partial summary judgment appear limited to likelihood of confusion only as to the Class 5 goods.<sup>12</sup> We will presume that Opposer's likelihood of confusion claim is directed to all classes, as reflected in Opposer's pleadings.<sup>13</sup>

### **II. The Cross-Motions for Summary Judgment<sup>14</sup>**

#### **A. Legal Standard for Summary Judgement**

Summary judgment is an appropriate method of disposing of cases in which there are no genuine disputes as to material facts, thus allowing resolution as a matter of

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<sup>9</sup> See 1 TTABVUE 1–2.

<sup>10</sup> Notice of Opposition ¶¶ 2, 4 (1 TTABVUE 3–6).

<sup>11</sup> See 12 TTABVUE 2, 8.

<sup>12</sup> See 10 TTABVUE 7–8 (arguments and evidence purporting to establish the term “HEALTH” is descriptive of goods in Class 5).

<sup>13</sup> We recognize that the ESTTA cover sheet may indicate that the non-ownership and fraud claims are directed to all three classes of goods. However, in the notice of opposition the likelihood of confusion claim is broadly pleaded without limitation to any class of goods.

<sup>14</sup> For purposes of this order, we presume the parties' familiarity with the pleadings, the history of the proceeding, and the arguments and evidence submitted by each party in connection with the cross-motions for summary judgment. We have carefully considered all of the parties' arguments and the evidence of record, but for the sake of efficiency do not repeat or discuss all of them. See *Omega SA (Omega AG) (Omega Ltd.) v. Alpha Phi Omega*,

law. *See* Fed. R. Civ. P. 56(a). A party moving for summary judgment has the burden of demonstrating the absence of any genuine dispute as to a material fact, and that it is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Sweats Fashions, Inc. v. Pannill Knitting Co. Inc.*, 833 F.2d 1560, 4 USPQ2d 1793, 1796 (Fed. Cir. 1987). A factual dispute is genuine if, on the evidence of record, a reasonable fact finder could resolve the matter in favor of the nonmoving party. *See Opryland USA*, 23 USPQ2d at 1472; *Olde Tyme Foods Inc v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992).

The burden is on the party moving for summary judgment to demonstrate the absence of any genuine dispute of material fact and that it is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56(c). The evidence of record must be viewed in the light most favorable to the nonmoving party, and all justifiable inferences must be drawn from the undisputed facts in favor of the nonmoving party. *See Lloyd's Food Prods. Inc. v. Eli's Inc.*, 987 F.2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993); *Opryland USA*, 23 USPQ2d at 1472; *Bad Boys Bail Bonds*, 115 USPQ2d at 1929. Only when a movant sufficiently demonstrates that there is no genuine dispute of material fact, and that it is entitled to judgment as a matter of law, does the burden shift to the non-movant to demonstrate the existence of specific genuinely disputed facts that must be resolved at trial. *Freki Corp. N.V. v. Pinnacle Entm't, Inc.*, 126

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118 USPQ2d 1289, 1292 n.11 (TTAB 2016) (presuming parties' familiarity with issues raised in summary judgment motion); *Guess? IP Holder LP v. Knowluxe LLC*, 116 USPQ2d 2018, 2019 (TTAB 2015) (Board not required to repeat or discuss irrelevant arguments).

USPQ2d 1697, 1700 (TTAB 2018); *Enbridge, Inc. v. Excelerate Energy L.P.*, 92 USPQ2d 1537, 1540 (TTAB 2009).

On cross-motions for summary judgment, the movant in each motion has the burden as to its own motion, and the Board evaluates each motion on its own merits and resolves all doubts and inferences against the party whose motion is being considered. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987); *Drive Trademark Holdings LP v. Inofin*, 83 USPQ2d 1433, 1437 (TTAB 2007). The fact that the parties have cross-moved for summary judgment on a claim does not necessarily mean that there are no genuine disputes of material fact and that trial is unnecessary. *See Univ. Book Store v. Univ. of Wisconsin Bd. of Regents*, 33 USPQ2d 1385, 1389 (TTAB 1994)

## **B. Analysis and Determination**

### **1. Non-ownership and Fraud**

We first consider Opposer's cross-motion for summary judgment on its claims of non-ownership and fraud based on non-ownership.

Under Trademark Act Section 1(a), 15 U.S.C. § 1051(a), only the owner may apply to register a mark. *Lyons v. Am. Coll. of Veterinary Sports Med. & Rehab.*, 859 F.3d 1023, 123 USPQ2d 1024, 1027 (Fed. Cir. 2017); *Huang v. Tzu Wei Chen Food Co.*, 849 F.2d 1458, 7 USPQ2d 1335, 1336 (Fed. Cir. 1988); *Wonderbread 5 v. Gilles*, 115 USPQ2d 1296, 1303 (TTAB 2015); *see also* Trademark Rule 2.71(d), 37 C.F.R. § 2.71(d) ("An application filed in the name of an entity that did not own the mark as of the filing date of the application is void."). Whoever controls the nature and quality of goods sold under a mark is the owner of that mark. *See Smith Int'l. Inc. v. Olin*



*Corp.*, 209 USPQ 1033, 1044 (TTAB 1981); *Noble House Home Furnishings, LLC v. Floorco Enters., LLC*, 118 USPQ2d 1413, 1421 (TTAB 2016).

Because we do not consider Opposer's untimely filed evidence, there are no materials of record to support Opposer's claim that Applicant was not the owner of the subject mark when the subject application was filed. Opposer therefore failed to meet its initial burden of establishing the absence of a genuine dispute of material fact that Applicant was not the owner of the subject mark when Applicant filed the involved application. Due to this failure of proof, it necessarily follows that Opposer did not establish that Applicant committed fraud when it asserted ownership of the subject mark in its application. Accordingly, Opposer's cross-motion for summary judgment on its claims of non-ownership and fraud based on non-ownership is **denied**.

## **2. Priority and Likelihood of Confusion**

We now consider the parties cross motions for summary judgment on Opposer's priority and likelihood of confusion claim.

To prevail on its claim under Trademark Act Section 2(d), Opposer must establish that (1) there is no genuine dispute of material fact that it is entitled to a statutory cause of action;<sup>15</sup> (2) it has priority of use; and that (3) contemporaneous use of the

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<sup>15</sup> Our decisions have previously analyzed the requirements of Trademark Act Sections 13 and 14, 15 U.S.C. §§ 1063–64, under the rubric of “standing.” We now refer to this inquiry as entitlement to a statutory cause of action. Despite the change in nomenclature, our prior decisions and those of the U.S. Court of Appeals for the Federal Circuit interpreting Sections 13 and 14 remain equally applicable. To establish entitlement to a statutory cause of action under Trademark Act Sections 13 or 14, a plaintiff must demonstrate a real interest in the proceeding and a reasonable belief of damage. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837 at \*3 (Fed. Cir. 2020); *see also Empresa*

parties' marks on their respective goods and services would be likely to cause confusion, mistake, or to deceive consumers. *See* 15 U.S.C. § 1052(d); *Hornblower & Weeks, Inc. v. Hornblower & Weeks, Inc.*, 60 USPQ2d 1733, 1735 (TTAB 2001).

Whether there is a likelihood of confusion between two marks and their respective goods or services presents an issue of law based on underlying facts, namely, findings under the factors set forth in *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (the “*DuPont* factors”). The determination of a Trademark Act Section 2(d) claim does not necessarily require examination and findings as to each *DuPont* factor. *See Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992). In an opposition against an application having multiple classes, as is the case here, the Board must make a separate determination as to each class. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 28 (CCPA 1976).

Applicant's motion for partial summary judgment is predicated on its contentions that the word “HEALTH,” which is contained in both parties' marks, is weak and entitled to a narrow scope of protection, and that the parties' marks in their entireties are so dissimilar that based on this factor alone there can be no likelihood of confusion as a matter of law.<sup>16</sup> For purposes of its motion, Applicant concedes that Opposer

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*Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058 (Fed. Cir. 2014); *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1727 (Fed. Cir. 2012); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999).

<sup>16</sup> *See* 10 TTABVUE 5–10.

owns a valid trademark and has priority based on the filing dates of the parties' respective applications.<sup>17</sup>

Applicant submitted copies of third-party registrations from the USPTO Trademark Status and Document Retrieval system (TSDR) for marks covering dietary and nutritional supplements, and other goods in Class 5, in which the term "HEALTH" has been disclaimed or registered based on a claim of acquired distinctiveness.<sup>18</sup> Based on these registrations, and the fact that the term "HEALTH" has been disclaimed by both Applicant, in its involved application, and by Opposer, in its pleaded application, Applicant argues that the word "HEALTH," is weak and entitled to a narrow scope of protection.<sup>19</sup>

Descriptive or disclaimed matter typically is less significant or less dominant when comparing marks. *See Juice Generation, Inc. v. GS Enters.*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000). However, while "a disclaimed term ... may be given little weight ... it may not be ignored." *M2 Software Inc. v. M2 Commc'ns Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1948–49 (Fed. Cir. 2006); *see also Juice*

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<sup>17</sup> *Id.* at 4–5.

<sup>18</sup> *See* 10 TTABVUE 33–96. Applicant submitted a list of 558 third-party registrations for marks containing the word "HEALTH," printed from the TSDR database. *Id.* at 16–32. The list of registrations is insufficient to introduce the registrations into evidence. *See, e.g., Edom Labs. Inc. v. Lichter*, 102 USPQ2d 1546, 1550 (TTAB 2012) (listing of third-party marks downloaded from Office database does not make registrations of record); *see also* TBMP § 704.03(b)(1)(B) and authorities collected in note 7. Moreover, we cannot determine from this mere listing of registrations the nature of the goods or services for which these marks have been registered. *Edom Labs.*, 102 USPQ2d at 1550.

<sup>19</sup> 10 TTABVUE 5–10.

*Generation*, 115 USPQ2d at 1676 (Board failed to show that it did not give no significance to the disclaimed term “JUICE” when comparing the marks in their entirety). The disclaimed elements of a mark are relevant to the assessment of similarity “because confusion is evaluated from the perspective of the purchasing public, which is not aware that certain words or phrases have been disclaimed.” *Shen Mfg. v. Ritz Hotel, Ltd.*, 393 F.3d 1238, 73 USPQ2d 1350, 1355 (Fed. Cir. 2004).

In this instance, the parties’ respective marks both contain the word “HEALTH” immediately preceded by a single letter (“M” in Opposer’s mark vs. “H” in Applicant’s mark) in an encircling design. The commercial impression of the “circle” in Applicant’s mark looks more like the fanciful representation of an apple than a perfect circle as shown in Opposer’s mark. On this record, Applicant has not met its burden of establishing the absence of a genuine material dispute that the parties’ marks are so dissimilar that as a matter of law there can be no likelihood of confusion. Accordingly, Applicant’s motion for partial summary judgment on Opposer’s Trademark Act Section 2(d) claim is **denied**.

We now turn to Opposer’s cross-motion for summary judgment on its Trademark Act Section 2(d) claim.<sup>20</sup> The only word common to the parties’ respective marks is “HEALTH.” The fact that both parties have disclaimed the term in their respective applications, combined with Applicant’s evidence of third-party registrations in which the term HEALTH has been disclaimed or registered based on a claim of

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<sup>20</sup> We again note that Opposer’s evidentiary submissions were untimely, and have not been considered.

acquired distinctiveness, raises a genuine dispute of material fact as to the strength or weakness of the term “HEALTH” and the scope of protection to be afforded to it. Accordingly, there is genuine dispute regarding the similarity or dissimilarity of the parties’ marks in their entireties. *Cf. Kellogg Co. v. Pack’em Enters., Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991) (affirming Board’ summary judgment determination of no likelihood of confusion based on the dissimilarity of “the marks in their entireties”). Therefore, Opposer’s motion for summary judgment is **denied**.

### III. Summary Determination & Case Schedule

In sum, Opposer’s motion for Rule 56(d) discovery and the parties’ cross-motions for summary judgment are **denied**.<sup>21</sup> Because this case is on the eve of trial, the Board will not entertain any further motions for summary judgment.

Proceedings are resumed on the schedule set forth below:

Plaintiff’s Pretrial Disclosures Due	11/30/2020
Plaintiff’s 30-day Trial Period Ends	1/14/2021
Defendant’s Pretrial Disclosures Due	1/29/2021
Defendant’s 30-day Trial Period Ends	3/15/2021
Plaintiff’s Rebuttal Disclosures Due	3/30/2021
Plaintiff’s 15-day Rebuttal Period Ends	4/29/2021
Plaintiff’s Opening Brief Due	6/28/2021
Defendant’s Brief Due	7/28/2021
Plaintiff’s Reply Brief Due	8/12/2021
Request for Oral Hearing (optional) Due	8/22/2021

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<sup>21</sup> The fact that we have identified certain genuine disputes of material fact as a sufficient basis to deny Respondent’s motion for summary judgment should not be construed as a finding that these are necessarily the only disputes that remain for trial. Also, evidence submitted with a summary judgment motion and in opposition thereto is of record only for consideration of the motion. To be considered at final, such evidence must be properly introduced during the appropriate trial period. *See Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993).

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 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).