

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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July 13, 2021

Opposition No. 91267248

Dani Fox, Associates, LLC

v.

Doctors Daughters LLC

By the Trademark Trial and Appeal Board:

This proceeding comes before the Board on Opposer/Counterclaim Respondent Dani Fox Associates, LLC's ("Opposer") motion, filed April 2, 2021, to dismiss Applicant/Counterclaimant Doctors Daughters LLC's ("Applicant") counterclaim. Applicant filed a response.

The Board has considered the parties' briefs, but addresses the record only to the extent necessary to set forth the Board's analysis and findings, and does not repeat or address all of the parties' arguments. *Guess? IP Holder LP v. Knowlux LLC*, 116 USPQ2d 2018, 2019 (TTAB 2015).

I. Background

Applicant seeks to register the standard character mark DOCTOR'S DAUGHTERS, application Serial No. 90049470, in connection with "[s]uperfood rolled oats; dairy-free ice cream; [and] dairy free-ice cream sandwiches" in

International Class 30. The application was filed on July 13, 2020 pursuant to Trademark Act Section 1(b), 15 U.S.C. § 1051(b).

Opposer filed a notice of opposition on January 26, 2021, alleging likelihood of confusion, dilution by blurring, dilution by tarnishment, and false suggestion of a connection. 1 TTABVUE. In support of its entitlement and claims, Opposer alleged ownership of Registration No. 6092249 for the mark DOCTOR'S DAUGHTER, registered in connection with “[b]eauty serums; cosmetic creams for skin care; exfoliant creams; non-medicated facial and eye serum containing antioxidants; non-medicated skin care preparations; skin cleansers; skin conditioners; skin moisturizer; sun screen preparations; [and] cosmetics” in International Class 3.¹

On March 8, 2021, Applicant filed its answer denying the salient allegations of the notice of opposition, pleading five “affirmative defenses,” and asserting a counterclaim to cancel Registration No. 6092249 due to likelihood of confusion. 4 TTABVUE.

In lieu of answering the counterclaim, on April 2, 2021, Opposer filed a motion to dismiss the counterclaim pursuant to Fed. R. Civ. P. 12(b)(6), or in the alternative to strike parts of the counterclaim pursuant to Fed. R. Civ. P. 12(f).

¹ Opposer's underlying application was filed on May 24, 2019 pursuant to Trademark Act Section 1(b), 15 U.S.C. § 1051(b). The registration issued on June 30, 2020. Opposer alleged first use as of February 10, 2020, and first use in commerce as of April 27, 2020.

II. Motion to Dismiss

A. Legal Standard

To survive a motion to dismiss, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 663, 129 S. Ct. 1937, 1949 (2009), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 5470, 127 S. Ct. 1955, 1974 (2007). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged. See *Twombly*, 550 U.S. at 556-57. However, the plausibility standard does not require that a plaintiff set forth detailed factual allegations. *Id.* Rather, a plaintiff need only allege “enough factual matter ... to suggest that a claim is plausible” and “raise a right to relief above the speculative level.” *Totes-Isotoner Corp. v. U.S.*, 594 F.3d 1346, 1354 (Fed. Cir. 2010).

For purposes of determining a motion to dismiss for failure to state a claim upon which relief can be granted, the complaint must be examined in its entirety, construing the allegations therein liberally, as required by Fed. R. Civ. P. 8(e), to determine whether it contains allegations which, if proved, would entitle the plaintiff to the relief sought. *Petroleos Mexicanos v. Intermix SA*, 97 USPQ2d 1403, 1405 (TTAB 2010); *IdeasOne Inc. v. Nationwide Better Health*, 89 USPQ2d 1952, 1953 (TTAB 2009); *Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1538 (TTAB 2007). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice” and are not accepted as true. *Iqbal*, 556 U.S.

at 678 (citing *Twombly*, 550 U.S. at 555). However, all well-pleaded, material allegations in the complaint are accepted as true and construed in the light most favorable to the plaintiff. *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1027 (Fed. Cir. 1999); *Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc.*, 988 F.2d 1157, 26 USPQ2d 1038, 1041 (Fed. Cir. 1993); *Fair Indigo*, 85 USPQ2d at 1538.

Moreover, it is well established that whether a plaintiff can actually prove its allegations is not a matter to be determined upon a motion to dismiss, but rather at final hearing or upon summary judgment, after the parties have had an opportunity to submit evidence. *See Libertyville Saddle Shop Inc. v. E. Jeffries & Sons, Ltd.*, 22 USPQ2d 1594, 1597 (TTAB 1992) (“A motion to dismiss does not involve a determination of the merits of the case...”). Accordingly, in deciding Opposer’s motion, the Board has not considered arguments that go to the merits of the case and whether Applicant ultimately will be able to prove its allegations. *See Covidien LP v. Masimo Corp.*, 109 USPQ2d 1696, 1697 n.3 (TTAB 2017).

B. Analysis and Order

Opposer argues that Applicant failed to state a claim for likelihood of confusion because it has not alleged that it has priority in the mark DOCTOR’S DAUGHTERS in connection with the goods in its involved application. 6 TTABVUE 3-4. Opposer contends that Applicant’s claim of priority is based on its Instagram post and handle (*see* Counterclaim, 4 TTABVUE 8), which does not demonstrate use of the mark in

connection with the applied-for goods, and does not establish use analogous to trademark use. 6 TTABVUE 5-6.²

In response, Applicant argues that it need not prove the merits of its claim on a motion to dismiss. 9 TTABVUE 7-10. Applicant states that the Instagram post included in paragraph six of its pleading is “merely a representative sample of Applicant’s prior use of its DOCTOR’S DAUGHTERS mark, rather than the only use.” *Id.* at 6-7.

For a legally sufficient pleading, Applicant need only allege such facts which, if proven, would establish that: (1) it can demonstrate its entitlement to a statutory cause of action under Trademark Act Section 14;³ and (2) a valid statutory ground exists for cancelling Opposer’s registration. *See Fair Indigo*, 85 USPQ2d at 1538.

Initially, the Board finds that Applicant, as the defendant in the opposition proceeding, is entitled to bring a counterclaim to cancel Opposer’s pleaded

² Opposer submits, as exhibits to its motion, excerpts from Applicant’s Instagram account. 6 TTABVUE 13. Inasmuch as these materials are outside of the scope of the pleadings, they are not considered. *See Covidien LP*, 109 USPQ2d at 1697-98; *Caymus Vineyards v. Caymus Med., Inc.*, 107 USPQ2d 1519, 1522 (TTAB 2013). Further, to the extent Opposer’s arguments address Applicant’s ability to **prove** its claim, they are inappropriate on a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) and accordingly are not considered. *See Advanced Cardiovascular Sys.*, 26 USPQ2d at 1041. *See also Nike, Inc. v. Palm Beach Crossfit Inc.*, 116 USPQ2d 1025, 1028 (TTAB 2015) (“Applicant uses the photographs to argue the merits of Opposer’s claims, rather than the sufficiency of those claims, and the photographs themselves are evidence that would be subject to challenge as to the truth of the matters shown in the photographs. In view thereof, we have not considered those materials that were not part of the notice of opposition.”).

³ Board decisions have previously analyzed the requirements of Sections 13 and 14 of the Trademark Act, 15 U.S.C. §§ 1063-64, under the rubric of “standing.” Despite the change in nomenclature, our prior decisions and those of the Federal Circuit interpreting Section 13 and 14 remain applicable. *See Spanishtown Enters., Inc. v. Transcend Resources, Inc.*, 2020 USPQ2d 11388, at *2 (TTAB 2020).

registration.⁴ See *Johnson & Johnson v. Obschestvo s Ogranitchennoy*, 104 USPQ2d 2037, 2038 (TTAB 2012); *Ohio State Univ. v. Ohio Univ.*, 51 USPQ2d 1289, 1293 (TTAB 1999).

To allege a valid ground of cancellation for likelihood of confusion under Trademark Act § 2(d), 15 U.S.C. § 1052(d) a plaintiff need only allege that it has priority of use and that defendant's mark so resembles plaintiff's mark as to be likely, when used in connection with the goods or services of the defendant, to cause confusion, or to cause mistake, or to deceive. See 15 U.S.C. § 1052(d); *Otto Roth & Co. v. Univ. Foods Corp.*, 640 F.2d 1317, 209 USPQ 40 (CCPA 1981). A party may establish priority in a proceeding based on 'analogous use,' i.e., any non-technical use of a mark which is sufficient to create in the mind of the relevant public an association between the goods and their source. See *Cent. Garden & Pet Co. v. Doskocil Mfg. Co.*, 108 USPQ2d 1134, 1142-43 (TTAB 2013). See also *Fair Indigo*, 85 USPQ 2d at 1538-39 ("a party may establish priority by use analogous to trademark use regardless of how the adverse party seeks to establish priority."). "[T]o claim priority based on analogous use, a party must show that its putative mark essentially functioned as a trademark – identifying the source of the goods in the mind of the consumer – notwithstanding that technical trademark use, such as use on or in connection with the goods, had not commenced." *Cent Garden & Pet. Co.*, 108 USPQ2d at 1142-43.

In this case, the Board finds that Applicant has not stated a claim for likelihood of confusion, because it has not sufficiently pleaded prior common law rights in, or

⁴ In addition, Opposer has not challenged Applicant's entitlement to a statutory cause of action.

prior use analogous to trademark use of, the DOCTOR'S DAUGHTERS mark. Specifically, it is not clear in connection with what goods or services Applicant alleges to have previously used its mark under either of its asserted theories. Nor is it clear whether Applicant alleges that its Instagram post is "a representative example" of its alleged common law use, use analogous to trademark use, or both. *See* 4 TTABVue 8 ¶ 6. While Applicant is not required to prove its allegations at the pleading stage, it must provide Opposer with adequate notice of the factual basis of its claim. *See Fair Indigo*, 85 USPQ 2d at 1538-39.

Accordingly, Opposer's motion to dismiss is **granted**.⁵ At the end of this order, Applicant will be allowed time to replead its counterclaim.

III. Sua Sponte Review

To streamline future proceedings, the Board in its discretion has reviewed Opposer's notice of opposition and Applicant's affirmative defenses and determined the following.

A. Notice of Opposition

1. Entitlement to a Statutory Cause of Action

In Board inter partes proceedings, to sufficiently plead entitlement to a statutory cause of action, a plaintiff must allege (i) that opposition to the application is within the zone of interests protected by the statute and (ii) that the plaintiff has a reasonable belief of damage proximately caused by registration of the mark. *See Peterson v. Awshucks SC, LLC*, 2020 USPQ2d 509515, at *5 (TTAB 2020). *See also*

⁵ In view thereof, Opposer's motion, in the alternative, to strike Applicant's counterclaim pursuant to Fed. R. Civ. P. 12(f) is moot.

Corcamore, LLC v. SFM, LLC, 978 F.3d 1298, 2020 USPQ2d 11277, at *6-7 (Fed. Cir. Oct. 27, 2020); *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837 at *3 (Fed. Cir. 2020); *Empresa 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*, 50 USPQ2d at 1025.

The Board finds that Opposer has adequately pleaded its entitlement to a statutory cause of action by pleading ownership of Registration No. 6092249 for the mark DOCTOR'S DAUGHTER, as well as common law rights in that mark in connection with cosmetic products. *See* 1 TTABVUE 3-4.

2. Likelihood of Confusion

Opposer has pleaded that it owns a registration for an allegedly similar mark to Applicant's involved mark that was filed and registered prior to the filing date of Applicant's application, and that Applicant's use of its mark in connection with its applied-for goods will cause confusion, mistake, or deceive. Opposer also alleged prior common law rights in its DOCTOR'S DAUGHTER mark. The Board finds that these allegations state a claim for likelihood of confusion. *See* 15 U.S.C. § 1052(d); *Time Warner Entm't. Co. v. Jones*, 65 USPQ2d 1650, 1657-58 (TTAB 2002).

3. Dilution by Blurring or Tarnishment

To state a claim of dilution, a plaintiff must allege that: (1) it owns a famous mark that is distinctive; (2) the defendant is using a mark in commerce that allegedly dilutes the plaintiff's famous mark; (3) the defendant began use of its mark after the

plaintiff's mark became famous; and (4) the defendant's use of its mark is likely to cause dilution by blurring or tarnishment. *Coach Servs. Inc.*, 101 USPQ2d at 1723-24. *See also Trek Bicycle Corp. v. StyleTrek Ltd.*, 64 USPQ2d 1540, 1542 (TTAB 2001) (dilution pleading legally insufficient where opposer failed to allege that its mark became famous before constructive use date of involved intent-to-use application).

Opposer's notice of opposition does not plead the required elements of dilution. *See* 1 TTABVUE 6-7. In addition, Opposer's pleading of dilution by tarnishment is insufficient because Opposer's conclusory assertion that Applicant's mark will tarnish the positive associations of Opposer's mark is devoid of any supporting factual allegations that Opposer's mark will suffer some negative association through Applicant's inappropriate use of its mark or due to some negative quality of Applicant's goods. *See Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555); *see also Coach Servs., Inc. v. Triumph Learning LLC*, 96 USPQ2d 1600, 1615 (TTAB 2010).

Accordingly, Counts II and III of Opposer's notice of opposition are **stricken**. *See NSM Res. Corp. et. al. v. Microsoft Corp.*, 113 USPQ2d 1029, 1039 n.19 (TTAB 2014) (Board may sua sponte strike any insufficiently pleaded claim).

4. False Suggestion of a Connection⁶

To properly plead a claim of false suggestion of a connection under Trademark Act Section 2(a), 15 U.S.C. § 1052(a), a plaintiff must allege the following:

⁶ Count IV of the notice of opposition is titled "Deceptive Matter or False Connection." However, the notice of opposition is devoid of allegations that Applicant's mark is deceptive. *See Hoover Co. v. Royal Appliance Mfg. Co.*, 238 F.3d 1357, 57 USPQ2d 1720, 1723 (Fed. Cir. 2001) (A mark is deceptive under Section 2(a) of the Trademark Act where: (1) it consists of

1. defendant's mark is the same or a close approximation of the name or identity of a person or institution;
2. defendant'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 or activities performed by the defendant under the mark; and,
4. the name or identity of the person or institution identified is of sufficient fame or reputation that when the defendant's mark is used in connection with its goods or services, a connection with the person or institution identified would be presumed.

In re Nieves & Nieves, LLC, 113 USPQ2d 1629, 1631-32 (TTAB 2015) (*citing inter alia*, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, 703 F.2d 1372, 217 USPQ 505, 509 (Fed. Cir. 1983). Fundamental to a pleading of false suggestion of a connection under Trademark Act Section 2(a) is the "initial and critical requirement" that the identity being appropriated is unmistakably associated with the person or institution identified. *Springs Indus., Inc. v. Bumblebee Di Stefano Ottina & C.S.A.S.*, 222 USPQ 512, 514 (TTAB 1984) (*quoting Univ. of Notre Dame*, 217 USPQ at 509). Accordingly, for a legally sufficient claim of false suggestion of a connection under Trademark Act Section 2(a), Opposer must assert that Applicant's mark falsely suggests a connection with Opposer's persona, points uniquely to Opposer, and that

or comprises matter that misdescribes the character, quality, function, composition or use of the goods or services; (2) prospective purchasers are likely to believe such matter describes the goods or services; and (3) the misdescriptive matter is likely to affect the decision to purchase of a significant portion of the relevant consumers.) Nor did Opposer indicate on the ESTTA cover sheet that it was alleging deceptiveness. *See PPG Indus. Inc. v. Guardian Indus. Corp.*, 73 USPQ2d 1926, 1928 (TTAB 2005) (ESTTA cover sheet and notice of opposition are read together). In view thereof, the Board does not construe the notice of opposition as pleading a deceptiveness claim.

Opposer's persona is of sufficient fame that a connection with Opposer would be presumed. *See Bd. of Trs. of Univ. of Ala. v. Pitts*, 107 USPQ2d 2001, 2025 (TTAB 2013).

Opposer's pleading is insufficient because it does not allege that DOCTOR'S DAUGHTERS is the same or a close approximation of Opposer's **identity or persona**. There is a distinction between a term being perceived as a company's trademark and being a company's persona. *See, e.g., Embarcadero Techs., Inc. v. Delphix Corp.*, 117 USPQ2d 1518, 1523-24 (TTAB 2016) (Section 2(a) requires allegations that respondent's mark is petitioner's identity or persona and allegations regarding similarities between the parties' marks fall short of this standard; Section 2(a) is not a variation on a likelihood of confusion claim); *Notre Dame*, 217 USPQ at 508 (the purpose of the claim is to protect "the name of an individual or institution which [i]s not a technical 'trademark' or 'trade name' upon which an objection could be made under Section 2(d).") (citation omitted).⁷ Nor has Opposer alleged that its identity or persona is of sufficient fame that a connection with it would be presumed.

⁷ The false suggestion of a connection claim embodies concepts of the rights to privacy and publicity. *Notre Dame*, 217 USPQ at 509; *John W. Carson Found. v. Toilets.com, Inc.*, 94 USPQ2d 1942, 1947 (TTAB 2010) ("A claim of false suggestion of a connection under Section 2(a) of the Trademark Act is merely a codification of a claim of violation of the right of publicity."); *In re Nieves & Nieves*, 113 USPQ2d at 1632 ("The statutory false suggestion of a connection refusal emerged from the right to privacy and right of publicity.") (citing *Pitts*, 107 USPQ2d at 2025).

Accordingly, Count IV of the notice of opposition is **stricken**.

B. Applicant's Affirmative Defenses

The Board next reviews Applicant's affirmative defenses. *See* 4 TTABVUE 6-7. Applicant's first, second, and third affirmative defenses allege that Opposer failed to sufficiently plead its claims. Failure to state a claim is not a true affirmative defense because it asserts a purported insufficiency in Opposer's pleading rather than a statement of a defense to a properly pleaded claim. *Hornblower & Weeks, Inc. v. Hornblower & Weeks, Inc.*, 60 USPQ2d 1733, 1738, n.7 (TTAB 2001). In any event, the Board has addressed the sufficiency of Opposer's pleaded claims in this order. Accordingly, Applicant's first three affirmative defenses are **stricken**.

For its fourth affirmative defense, Applicant alleges that it used its mark "in interstate commerce prior to Opposer's date of first use in interstate commerce and prior to the filing date of Opposer's application [and] [a]s such, Applicant's trademark rights in its DOCTOR'S DAUGHTER [sic] mark is superior to Opposer's trademark rights in its pleaded mark." 4 TTABVUE 7. To the extent this affirmative defense challenges Opposer's priority in its pleaded registration, it constitutes an impermissible collateral attack on the validity of Opposer's pleaded registration. *See* Trademark Rules 2.106(b)(2) and (3); *see also Continental Gummi-Werke AG v. Continental Seal Corp.*, 222 USPQ 822, 825 (TTAB 1984) (motion to strike affirmative defense predicated on same facts alleged in counterclaim granted as representing, in

effect, a collateral attack on registration). Accordingly, the defense is **stricken** to the extent it is directed to Opposer's pleaded registration.

Applicant's fifth affirmative defense states that "Applicant reserves the right to amend its answer, including its affirmative defenses." 4 TTABVUE 7. Inasmuch as this reservation of rights fails to provide Opposer with notice of what defenses Applicant asserts, let alone the factual bases for these defenses, it is insufficient. Whether Applicant may, at some future point, assert additional affirmative defenses would be resolved by way of a motion for leave to amend. *See* Fed. R. Civ. P. 15(a). Accordingly, the fifth affirmative defense is **stricken**.

IV. Summary; Leave to Replead

For the reasons explained above, Opposer's motion to dismiss Applicant's counterclaim is granted. Further, the Board sua sponte finds Counts II, III, and IV of Opposer's notice of opposition to be deficient, and accordingly strikes them. The Board also sua sponte strikes Applicant's affirmative defenses for the reasons, and to the extent, discussed above.

Upon dismissing a plaintiff's claim pursuant to a motion or sua sponte, the Board may exercise its discretion to allow a plaintiff the opportunity to cure a defective pleading. *See Wise F&I, LLC v. Allstate Ins. Co.*, 120 USPQ2d 1103, 1110 (TTAB 2016); *Intellimedia Sports, Inc. v. Intellimedia Corp.*, 43 USPQ2d 1203, 1208 (TTAB

1997); *Miller Brewing Co. v. Anheuser-Busch Inc.*, 27 USPQ2d 1711, 1714 (TTAB 1993).

Accordingly, Opposer is allowed until **August 4, 2021** to file and serve an amended notice of opposition that cures the deficiencies in its stricken claims, failing which the stricken claims will receive no further consideration.

Applicant in turn, is allowed until **August 25, 2021** to file and serve an answer to the amended notice of opposition, along with an amended counterclaim that cures the deficiencies identified therein, failing which the counterclaim will receive no further consideration. If Opposer does not file an amended notice of opposition, Applicant is nonetheless allowed until **August 25, 2021** to file its amended counterclaim.

Opposer, in turn, is allowed until **September 15, 2021** to file and serve its answer, or otherwise respond, to the amended counterclaim (if filed).⁸

V. Board Participation in Discovery Conference

Opposer's request for Board participation in the parties' discovery conference (7 TTABVUE) is **granted**. See Trademark Rule 2.120(a)(2), 37 C.F.R. § 2.120(a)(2). The parties are **ordered** to confer and contact the assigned Interlocutory Attorney by telephone, **no later than 10 days before the deadline for the discovery**

⁸ In the event neither party files amended claims, the parties' original pleadings, both as limited by this order, will constitute the parties' operative pleadings. If Applicant does not reassert its counterclaim, the Board may issue an order resetting the trial schedule.

conference, with three dates and times at which both parties are available to hold the conference.

VI. Proceedings Resumed; Dates Reset

This proceeding is **resumed**. In accordance with leave to amend as discussed above, the remaining dates are reset as follows:

Deadline for Discovery Conference	10/15/2021
Discovery Opens	10/15/2021
Initial Disclosures Due	11/14/2021
Expert Disclosures Due	3/14/2022
Discovery Closes	4/13/2022
Pretrial Disclosures Due for Party in Position of Plaintiff in Original Claim	5/28/2022
30-day Trial Period Ends for Party in Position of Plaintiff in Original Claim	7/12/2022
Pretrial Disclosures Due for Party in Position of Defendant in Original Claim and in Position of Plaintiff in Counterclaim	7/27/2022
30-day Trial Period Ends for Party in Position of Defendant in Original Claim, and in Position of Plaintiff in Counterclaim	9/10/2022
Pretrial Disclosures Due for Rebuttal of Party in Position of Plaintiff in Original Claim and in Position of Defendant in Counterclaim	9/25/2022
30-day Trial Period Ends for Rebuttal of Party in Position of Plaintiff in Original Claim, and in Position of Defendant in Counterclaim	11/9/2022
Pretrial Disclosures Due for Rebuttal of Party in Position of Plaintiff in Counterclaim	11/24/2022
15-day Trial Period Ends for Rebuttal of Party in Position of Plaintiff in Counterclaim	12/24/2022
Opening Brief for Party in Position of Plaintiff in Original Claim Due	2/22/2023
Combined Brief for Party in Position of Defendant in Original Claim and Opening Brief as Plaintiff in Counterclaim Due	3/24/2023
Combined Rebuttal Brief for Party in Position of Plaintiff in Original Claim and Brief as Defendant in Counterclaim Due	4/23/2023

Rebuttal Brief for Party in Position of Plaintiff in Counterclaim Due	5/8/2023
Request for Oral Hearing (optional) Due	5/18/2023

Generally, the Federal Rules of Evidence 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).