

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
General Email: TTABInfo@uspto.gov

RSC

April 8, 2022

Opposition No. 91269976

Zion L. Williamson

v.

Zion Athletics Inc.

Rebecca Stempien Coyle, Interlocutory Attorney:

Pursuant to Fed. R. Civ. P. 26(f) and Trademark Rule 2.120(a)(1)–(a)(2), 37 C.F.R. § 2.120(a)(1)–(a)(2), the parties held a discovery and settlement conference on April 7, 2022, at 1:00 pm Eastern Time. *See* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (“TBMP”) § 401.01 (2021). At Opposer’s request the Board participated in the conference. Participating in the conference were Brian Crews, counsel for Opposer, and Michael Cohen, counsel for Applicant. Interlocutory Attorney Rebecca Stempien Coyle participated on behalf of the Board.

1. Settlement/Other Litigation

The parties indicated that there are no related Board proceedings or federal or state court actions between them that may have a bearing on this case. In the event that a civil action or separate Board proceeding between the parties is instituted, the parties are required to promptly advise the Board so that the Board can determine

whether suspension or consolidation is appropriate. *See* TBMP §§ 510.02(a) and 511; *see also* Trademark Rule 2.117(a).

The parties were advised that if they are engaged in settlement discussions, unless a suspension request is filed the Board presumes the parties are preparing for trial. The Board typically will grant a consented or joint motion to suspend proceedings for a reasonable period of time in order to allow the parties to engage in settlement negotiations.¹ *See* TBMP § 510.03(a); *see also* Trademark Rule 2.117(c).

2. Pleadings

The Board then reviewed the sufficiency of the parties' respective pleadings.

a. Notice of Opposition

Turning first to the notice of opposition, Applicant has applied to register the following mark



for “blouses; dresses; hats; hoodies; jackets; jeans; pants; pullovers; scarfs; shirts; shoes; shorts; sports shoes; sweat suits; t-shirts; tights; tops as clothing; track suits” in International Class 25.²

¹ The parties are advised, however, that the Board will not suspend proceedings indefinitely for settlement negotiations. After a period of time, the Board may require the parties to file a detailed report on the progress of their settlement activities. While the Board encourages settlement efforts, it also has an interest in seeing its cases conclude in a timely manner.

² Serial No. 88830307, filed on March 11, 2020, based on Applicant’s asserted bona fide intention to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C.

As grounds for opposition, Opposer pleads: (1) likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on allegations of prior use and rights at common law to the marks ZION, ZION WILLIAMSON, and a stylized Z, and that Applicant's mark is likely to cause confusion with Opposer's previously used marks; (2) false suggestion under Trademark Act Section 2(a), 15 U.S.C. § 1052(a), based on allegations that ZION, ZION WILLIAMSON, and a stylized Z are Opposer's previously used names or identities and Applicant's mark is a close approximation thereto, Applicant's mark would be recognized as Opposer by consumers because it points uniquely and unmistakably to Opposer, Opposer is not connected to the goods to be sold under Applicant's mark, and in view of the fame and recognition of Opposer's names and identities a connection with Opposer would be presumed if Applicant's mark is used on its applied-for goods; and (3) that Applicant's mark comprises the name of a living individual without consent under Trademark Act Section 2(c), 15 U.S.C. § 1052(c), based on allegations that a primary feature of Applicant's mark comprises Opposer's first name, and because of Opposer's widespread publicity and fame, Applicant's mark will be understood by the public as comprising Opposer's name.

Opposer has alleged sufficient facts, which if proved, would establish that he has a reasonable basis for its belief of damage, and therefore, is entitled to bring a

§ 1051(b). The application contains the following description of the mark: "The mark consists of a stylized crown, above a stylized, prominent 'Z' with a shaded line underneath it, all above the stylized words 'Power of Zion', all above the stylized wording between the less-than sign on the left and greater-than sign on the right '(PWR UP SINCE 2018)'." Color is not claimed as a feature of the mark.

statutory cause of action.³ *Lipton v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982); *see also Giersch v. Scripps Networks Inc.*, 90 USPQ2d 1020, 1022 (TTAB 2009); *Estate of Biro v. Bic Corp.*, 18 USPQ2d 1382, 1385 (TTAB 1991). Opposer also sufficiently pleads that Applicant's mark identifies a living individual without his consent under 15 U.S.C. § 1052(c).

As to his Section 2(d) claim, Opposer sufficiently pleads priority and likelihood of confusion as to his alleged rights at common law for the marks ZION and ZION WILLIAMSON for the following goods and services:

- autographs, sports cards and sports memorabilia;
- clothing, fanwear;
- education and entertainment services, namely athletic services and personal appearances and signings by a professional athlete, and video appearances;
- providing information via print publications and websites about Opposer, sports, health, fitness, and nutrition, and video games; and
- endorsement services; promoting the goods and services of others by way of video games, beverages, and clothing, as part of nationally-televised promotional campaigns and marketing via video and on the Internet; and charitable fundraising for the benefit of others.

³ The Board's 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." Mindful of the Supreme Court's direction in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 (2014), the Board now refers to this inquiry as entitlement to a statutory cause of action. Despite the change in nomenclature, the Board's prior decisions and those of the Federal Circuit interpreting Sections 13 and 14 remain equally applicable.

Where a plaintiff has alleged standing as to at least one properly pleaded ground, its allegation of standing satisfies the standing requirement for any other legally sufficient ground. *See Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1377, 101 USPQ2d 1713, 1727-28 (Fed. Cir. 2012); *Corporacion Habanos SA v. Rodriguez*, 99 USPQ2d 1873, 1877 (TTAB 2011). Of course entitlement to a statutory cause of action, as an element of Opposer's case, must be maintained throughout this proceeding and affirmatively proved at trial. *See Lipton Indus.*, 213 USPQ at 189; *see also Apollo Med. Extrusion Techs., Inc. v. Med. Extrusion Techs., Inc.*, 123 USPQ2d 1844, 1848 (TTAB 2017).

However, Opposer fails to indicate the particular stylization of his alleged common law rights in a stylized Z mark, and therefore fails to sufficiently plead common law rights in a stylized Z mark, and similarly has not provided Applicant with sufficient notice of the stylization and appearance of the mark. Accordingly, the Section 2(d) claim is **dismissed in part** solely as to the insufficiently pleaded allegations of prior common law rights in the stylized Z mark.

Similarly, Opposer sufficient pleads false suggestions of a connection under 15 U.S.C. § 1052(a) with respect to his alleged names or identities of Zion and Zion Williamson, but he fails to sufficiently indicate the particular stylization of his alleged identity as a stylized Z, and has not provided Applicant with sufficient notice of the stylization and appearance of this identity. Accordingly, the Section 2(a) claim is **dismissed in part** solely as to the insufficiently pleaded allegations of Opposer's identity as a stylized Z.

At the end of this order the Board has afforded Opposer an opportunity to amend his notice of opposition to attempt to sufficiently plead common law rights and a previously used identity in the stylized Z mark.

b. Applicant's Answer

Applicant, in its answer, has denied the salient allegations in the notice of opposition and asserted certain putative affirmative defenses. Applicant's answer is sufficient in that it fairly responds to the substance of the allegations in the notice of opposition.

Applicant's first and third affirmative defenses assert there is no likelihood of confusion and Opposer has not acquired common law trademark rights. An affirmative defense is an assertion that, if true, will defeat the plaintiff's claim, even if all of the allegations in the complaint are true. *See H.D. Lee Co., Inc. v. Maidenform Inc.*, 87 USPQ2d 1715, 1720 (TTAB 2008) (quoting BLACK'S LAW DICTIONARY, p. 430 (7th ed. 1999)). Applicant's first and third affirmative defenses are not true affirmative defenses, but rather amplifications of Applicant's denial of Opposer's claims. Nevertheless, because these "defenses" provide fuller notice to Opposer of how Applicant intends to defend this opposition, the Board sees no harm in allowing them to remain, and does not strike them. *See 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).

Applicant's second affirmative defense asserts Opposer will not be damaged by registration of Applicant's mark. "There is no requirement that actual damage be pleaded and proved in order to establish [entitlement] or to prevail in an opposition or cancellation proceeding." *Blackhorse v. Pro Football Inc.*, 98 USPQ2d 1633, 1638 (TTAB 2011); *see also Harjo v. Pro Football Inc.*, 30 USPQ2d 1828, 1832 (TTAB 1994). To the extent this defense contends Opposer does not have a reasonable basis of harm this is also not an affirmative defense, because a plaintiff's entitlement is an element of plaintiff's claim that must be proved. *See Lipton Indus.*, 213 USPQ 185; *Blackhorse*, 98 USPQ2d at 1637. Moreover, and in any event, as discussed above the Board has

determined that Opposer has sufficiently pleaded its entitlement and at least some of its claims.

Applicant's fourth affirmative defense consists of the statement "Refusal to register Applicant's mark would unjustly enrich Opposer at the expense of Applicant." A legally sufficient pleading of each defense must include enough factual detail to provide Opposer fair notice of the basis for the defense. Fed. R. Civ. P. 8(b)(1) and 12(f); *see e.g., IdeasOne Inc. v. Nationwide Better Health Inc.*, 89 USPQ2d 1952, 1953 (TTAB 2009); *Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1538 (TTAB 2007); *Midwest Plastic Fabricators, Inc. v. Underwriters Labs. Inc.*, 5 USPQ2d 1067, 1069 (TTAB 1980); *see also* TBMP § 311.02(b). Inasmuch as Applicant's fourth affirmative defenses consists only of a conclusory assertion it is insufficiently pleaded.

Through its fifth defense Applicant attempts to reserve the right to assert additional defenses based on facts learned during discovery or as a result of further investigation. A defendant cannot reserve unidentified defenses, since it does not provide a plaintiff fair notice of such defenses.

For the foregoing reasons, the Board sua sponte strikes Applicant's second, fourth and fifth affirmative defenses. *See* Fed. R. Civ. P. 12(f)(1).

c. Amendment of Pleadings

The parties were reminded that any motion for leave to amend a pleading to add a new claim or defense must be filed promptly after the facts supporting the new claim or defense are discovered. *See generally*, TBMP §§ 315 and 507.

3. Standard Protective Order

The parties were reminded that the Board's Standard Protective Order⁴ is automatically imposed in this proceeding pursuant to Trademark Rule 2.116(g), unless the parties, by stipulation approved by the Board, agree to an alternative order, or a motion by a party to use an alternative order is granted by the Board. *See* TBMP §§ 412.01 and 412.02. Although they are not required to do so, the parties may elect to exchange executed copies of the order.⁵ The terms of the standard protective order may be modified upon motion or stipulation approved by the Board. *See* TBMP § 412.02.

Because of the automatic imposition of the protective order, parties may designate information or documents as confidential but typically cannot withhold properly discoverable information or documents on that basis. *See* TBMP § 412.01.

⁴ The standard protective order is available on the Board's web site at: https://www.uspto.gov/sites/default/files/documents/Standard%20Protective%20Order_02052020.pdf.

⁵ Once a proceeding before the Board has been finally determined, the Board has no further jurisdiction over the parties. It is unclear whether the Board can order parties to enter into a contract that will govern the protection of information after the Board proceeding is concluded. Therefore, it may be advisable for both the parties and their attorneys to sign a stipulated protective order, so that it is clear that they are all bound thereby; that they have created a contract which will survive the proceeding; and that there may be a remedy at court for any breach of that contract which occurs after the conclusion of the Board proceeding. Nonetheless, any determination of whether the agreement establishes contractual rights or is enforceable outside of the Board proceeding is for a court to decide should such matter come before it. *See* TBMP § 412.03.

If the parties agree to modify the terms of the Board's standard protective order and enter into their own stipulated protective order, a copy of the executed agreement should be filed with the Board. The Board will acknowledge receipt of the agreement, but the parties should not wait for the Board's acknowledgement to conduct themselves in accordance with the terms of their agreement. The terms of the agreement are binding as of the date the agreement is signed. *See* TBMP § 412.01.

4. Discovery and Motions Practice

The Board advised the parties that they must make their initial disclosures as required by Fed. R. Civ. P. 26(a) prior to seeking discovery, absent modification of this requirement by the Board. Trademark Rule 2.120(a)(3). A motion to compel initial disclosures must be filed within thirty days after the deadline for initial disclosures. Trademark Rule 2.120(f)(1).

The parties also were advised that they may not file a motion for summary judgment until they have made their initial disclosures, except for a summary judgment motion asserting issue preclusion, claim preclusion, or lack of jurisdiction by the Board. Trademark Rule 2.127(e)(1).

Pursuant to Fed. R. Civ. P. 26(b)(1), “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case[.]”

With respect to discovery, the parties are expected to plan accordingly so that this proceeding is not unduly delayed because Applicant resides outside the United States. Should it become apparent to either party that it will not be able to adhere to

the schedule, that party should promptly contact the other side to discuss a reasonable extension of time or suspension, as appropriate, and file the necessary motion with the Board. As discussed, the subject of how to obtain testimony from witnesses located outside the United States is a subject which the parties should discuss following service of initial disclosures.

Although the Board encourages the parties to consent to extensions of time to accommodate reasonable scheduling difficulties, absent a motion to extend a deadline – based on either the consent of the other party or the requisite showing of good cause for an extension – the parties are expected to adhere the Board’s schedule for this proceeding.

Unless the parties stipulate to an alternate procedure, the discovery deposition of a natural person who resides in a foreign country, and who is a party or an officer, director, or managing agent of a party, or a person designated under Fed. R. Civ. P. 30(b)(6) or 31(a)(3) to testify on behalf of a party, may be taken on notice alone but it must be taken on written question unless the Board, on motion for good cause, orders that the deposition be taken by oral examination. *See* Trademark Rules 2.123 and 2.124; *see also* TBMP § 404.03(b).⁶

⁶ Some countries prohibit the taking of testimony within their boundaries for use in any other country, including the United States, even though the witness is willing; or may permit the taking of testimony only if certain procedures are followed. A party which wishes to take a deposition in a foreign country should first consult with local counsel in the foreign country, and/or with the Office of Citizens Consular Services, Department of State. TBMP § 404.03(b)-(c).

Interrogatories, requests for production of documents and things, and requests for admission must be served early enough in the discovery period, as originally set or as may have been reset by the Board, so that responses will be due no later than the close of the discovery period. Trademark Rule 2.120(a)(3). Similarly, discovery depositions must be properly noticed and taken during the discovery period.⁷ *Id.*

The parties are limited to seventy-five interrogatories, including subparts; seventy-five requests for production of documents and things, including subparts; and seventy-five requests for admission. *See* Trademark Rules 2.120(d), 2.120(e), and 2.120(i). Independent of the limit on the number of requests for admission, a party may make one comprehensive request for admission of any adverse party that has produced documents for an admission authenticating specific documents, or specifying which of those documents cannot be authenticated. Trademark Rule 2.120(i).

The parties should **not** file their initial disclosures, discovery requests, or discovery responses with the Board, except as permitted under Trademark Rule 2.120(k)(8); in connection with a motion to compel discovery, as required by Trademark Rule 2.120(f)(1); or in connection with a motion to determine the

⁷ The discovery deposition of a natural person residing in the United States shall be taken in the Federal judicial district where the person resides or is regularly employed or at any place on which the parties agree in writing. The responsibility rests wholly with the party taking discovery to secure the attendance of a proposed deponent other than a party or anyone who, at the time set for the taking of the deposition, is an officer, director, or managing agent of a party, or a person designated under Rule 30(b)(6) or Rule 31(a) of the Federal Rules of Civil Procedure. Trademark Rule 2.120(b). *See also* TBMP §§ 404.03(a)(2) and 404.05.

sufficiency of an answer or objection to a request for admission, as required by Trademark Rule 2.120(i)(1).

The parties were reminded that they each have a duty not only to make a good faith effort to satisfy the legitimate discovery needs of their adversary, but also to make a good faith effort to seek only such discovery as is proper and relevant to the issues in the case. *See* TBMP § 408.01.

The parties are advised to consult the “Discovery Guidelines” listed in the TBMP § 414 before making or objecting to discovery requests. The Board expects parties to cooperate with one another in the discovery process. *See* TBMP § 408.01. If either party plans to file a motion to compel discovery or a motion to test the sufficiency of a response or objection to a request for admission, the moving party must first confer with the other party in good faith to attempt to resolve or narrow the dispute, and then must demonstrate its good-faith efforts as part of its motion. *See* Trademark Rules 2.120(f)(1) and 2.120(i); *see also* TBMP § 523.02. The obligation to meet and confer in good faith is a mutual obligation.

Motions to compel discovery, motions to test the sufficiency of responses or objections to a request for admission, and motions for summary judgment must be filed no later than the day **before** the deadline for pretrial disclosures for the first testimony period as originally set or as reset. Trademark Rules 2.120(f)(1), 2.120(i)(1), and 2.127(e)(1).

To the extent either party plans to use an expert witness, such party must make their expert witness disclosure by the set deadline, and provide the Board with

notification that the party will be employing an expert. Trademark Rule 2.120(a)(2)(iii). The Board may suspend proceedings as appropriate to allow the parties to take discovery of a designated expert witness or to allow a rebuttal expert witness.

5. Pretrial Disclosures and Trial Procedures

Many requirements relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125.

Pretrial disclosures are governed by Trademark Rule 2.121(e) and Fed. R. Civ. P. 26(a)(3) with one exception: the Board does not require pretrial disclosure of each document or other exhibit that a party plans to introduce at trial as required by Fed. R. Civ. P. 26(a)(3)(A)(iii). Additionally, a party need not disclose, prior to its testimony period, any notices of reliance it intends to file during its testimony period. Trademark Rule 2.121(e).

In making its pretrial disclosures, the party must disclose the name and, if not previously provided, the telephone number and address of each witness from whom it intends to take testimony, or may take testimony if the need arises. The party must disclose general identifying information about the witness, such as relationship to any party, including job title if employed by a party, or, if neither a party nor related to a party, occupation and job title, a general summary or list of subjects on which the witness is expected to testify, and a general summary or list of the types of documents and things which may be introduced as exhibits during the testimony of the witness.

Pretrial disclosure of a witness under Trademark Rule 2.121(e), however, does not substitute for service of a proper notice of examination under Trademark Rule 2.123(c) or 2.124(b). Additionally, if a party does not plan to take testimony from any witness in any form, it must state so in its pretrial disclosures.

For further information regarding pretrial disclosures, the parties should consult TBMP § 702.01.

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 testimony of a witness may be taken upon oral examination and transcribed, or presented in the form of an affidavit or declaration, as provided in Trademark Rule 2.123. If witness testimony is presented in the form of an affidavit or declaration, the adverse party may elect to take oral cross-examination of that witness as provided under Trademark Rule 2.123(c).⁸ A party electing to take oral cross-examination shall bear the expense of such cross-examination.

Trial briefs shall be submitted in accordance with Trademark Rule 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).

Finally, the Board advised the parties of the variety of options available to streamline the introduction of evidence at trial, including, for example, stipulations of fact and stipulations permitting the introduction of various documents (*e.g.*,

⁸ If an affiant or declarant witness is not within the jurisdiction of the United States, then the adverse party may elect to take cross-examination of that witness by written questions. *See* Trademark Rules 2.123(a)(1) and 2.124.

documents produced in response to document requests, business records, etc.) by notice of reliance.

6. Filing and Service of Papers

Except for the initial notice of opposition (as opposed to any amended notice of opposition), every submission filed in a proceeding before the Board **must** be served upon the other party or parties, and proper proof of such service must be made before the submission will be considered by the Board. Trademark Rule 2.119(a)–(b). Service must be made by email unless otherwise stipulated, or unless the filing party has satisfied the requirements for another method of service as set forth in Trademark Rule 2.119(b).⁹

Accordingly, all submissions filed in this proceeding **must** be accompanied by a statement, signed by the attorney or other authorized representative, attached to or appearing on the original submission when filed, clearly stating the date and manner in which service was made, the name of each party or person upon whom service was made, and the email address or address. *See* TBMP § 113.03.

The statement will be accepted as *prima facie* proof of service, must be signed and dated, and should take the form of a Certificate of Service as follows:

I hereby certify that a true and complete copy of the foregoing (insert title of submission) has been served on (insert name of opposing counsel or party) by forwarding said copy on (insert date of mailing), via email to: (set out name, address, and email address of opposing counsel or party).

⁹ The Board also uses email when sending decisions, orders, or other notices to the parties. The Board will send email to the parties at the addresses they have provided, so it is essential that the parties promptly update their email and street addresses with any change. It is the parties' responsibility to take any necessary steps to ensure that papers from opposing counsel or the Board are not rejected by their spam filters. Where possible, it is strongly recommended that the Board's domain and that of opposing counsel be put on a "safe-senders list" of email which should not be rejected by a filter.

Signature: _____
Date: _____

The parties were further advised that they are required to file all pleadings and submissions (including confidential filings) via ESTTA, the Board's electronic filing system.¹⁰ Documents uploaded to ESTTA are deemed filed upon successful completion of transmission to the Board, including the receipt of any required fee. Eastern Time controls the filing date. *See* TBMP § 110.09.

7. Accelerated Case Resolution

The Board advised the parties of the Board's Accelerated Case Resolution ("ACR") process. ACR is an alternative to typical Board inter partes proceedings with full discovery, trial, and briefing. *See Chanel Inc. v. Makarczyk*, 110 USPQ2d 2013, 2016–17 (TTAB 2013) (Board's final decision on ACR); *Chanel Inc. v. Makarczyk*, 106 USPQ2d 1774, 1775 (TTAB 2013) (ACR stipulation approved by Board); *see also Bond v. Taylor*, 119 USPQ2d 1049, 1051 (TTAB 2016); *Swiss Grill Ltd. v. Wolf Steel Ltd.*, 115 USPQ2d 2001, 2002 (TTAB 2015). The form of ACR can vary, but the process generally approximates a summary bench trial or a motions (or cross-motions) for summary judgment and accompanying evidentiary submissions that the parties agree to submit in lieu of creating a traditional trial record and traditional briefs at

¹⁰ The ESTTA user manual, ESTTA forms, and instructions for their use can be found on the Board's website (<http://estta.uspto.gov/>). If the parties have questions about electronic filing or experience difficulties, they may call the Board's main number at (571) 272-8500 or (800) 786-9199 (toll free). The Board's Information Specialists are available to assist filers from 8:30 a.m. until 5:00 pm Eastern time, Monday through Friday. Filers are urged to plan ahead and to attempt to file well before any deadline. The Board cannot guarantee that any technical problem will be resolved quickly, and deadlines will not normally be extended in such a case.

final hearing. As already noted, the Board allows the parties to stipulate to a variety of deviations from the Board's rules in order to streamline discovery and testimony. If the parties stipulate to ACR they could avoid a formal trial altogether. Although the Board may not decide disputed issues of material fact when considering a motion for summary judgment,¹¹ the parties may stipulate to the submission of such briefs and evidence in lieu of trial and agree that the Board may make any factual determinations based on such a record. If the parties agree to ACR relatively early in the proceeding, they could realize a very significant saving in time¹² and cost. More information about the Board's ACR options can be found in the TBMP and on the Board's website, as follows:

1. General description of ACR:

http://www.uspto.gov/trademarks/process/appeal/Accelerated_Case_Resolution_ACR_notice_from_TTAB_webpage_12_22_11.pdf;

2. FAQs on ACR:

https://www.uspto.gov/sites/default/files/trademarks/process/appeal/Accelerated_Case_Resolution_%28ACR%29_FAQ_updates_12_22_11.doc; and

3. TBMP §§ 528.05(a)(2), 702.04, and 705.

As an alternative to the "traditional" ACR process discussed above, the parties also may explore stipulating to facts, evidence, and/or procedures at trial. *See, e.g.,*

¹¹ While Board litigants are permitted to move for summary judgment under Fed. R. Civ. P. 56, the parties are advised that certain claims, such as likelihood confusion, often are heavily fact-bound and ill-suited for summary disposition. As a result, the Board frequently denies motions for summary judgment. If the parties desire a resolution of the case short of a full trial, they are encouraged to consider ACR, rather than a motion for summary judgment.

¹² Because ACR records are usually more compact than those presented on formal testimony and notices of reliance, the Board usually can render a final decision more quickly.

Target Brands, Inc. v. Hughes, 85 USPQ2d 1676, 1678 (TTAB 2007) (parties stipulated to entire record of the case including business records, public records, government documents, marketing materials, materials obtained from the Internet, and thirteen paragraphs of facts; the parties agreed to reserve the right to object to such facts and documents on the bases of relevance, materiality and weight). *See generally* TBMP § 705 regarding evidentiary stipulations.

If the parties have questions about their ACR options, they are encouraged to contact the assigned interlocutory attorney.

8. Leave to Replead and Amended Case Schedule

Upon dismissing an insufficiently pleaded claim or striking an insufficiently pleaded affirmative defense, the Board may exercise its discretion to allow a party the opportunity to cure a defective pleading, particularly where the defective pleading is the initial pleading, and provided amendment of the pleading would not be futile. *See, e.g., Wise F&I, LLC v. Allstate Ins. Co.*, 120 USPQ2d 1103, 1110 (TTAB 2016); TBMP § 503.03. Accordingly, Opposer is allowed until **May 1, 2022** by which to file and serve an amended notice of opposition, in which he may attempt to re-plead the dismissed Section 2(d) and Section 2(a) claims based on rights in a “stylized Z”, failing which the case will proceed solely on the Section 2(c) claim, and Section 2(d) and Section 2(a) claims with the respect to Opposer’s alleged rights to ZION and ZION WILLIAMSON.

Applicant is allowed until **May 21, 2022** in which to file and serve its answer to the amended notice of opposition, if one is filed.

In view of the time afforded to the parties to amend their respective pleadings, disclosure, discovery, and trial dates are reset as follows:

Deadline for Amended Notice of Opposition	5/1/2022
Time to Answer Amended Notice of Opposition	5/21/2022
Discovery Opens	6/20/2022
Initial Disclosures Due	7/20/2022
Expert Disclosures Due	11/17/2022
Discovery Closes	12/17/2022
Plaintiff's Pretrial Disclosures Due	1/31/2023
Plaintiff's 30-day Trial Period Ends	3/17/2023
Defendant's Pretrial Disclosures Due	4/1/2023
Defendant's 30-day Trial Period Ends	5/16/2023
Plaintiff's Rebuttal Disclosures Due	5/31/2023
Plaintiff's 15-day Rebuttal Period Ends	6/30/2023
Plaintiff's Opening Brief Due	8/29/2023
Defendant's Brief Due	9/28/2023
Plaintiff's Reply Brief Due	10/13/2023
Request for Oral Hearing (optional) Due	10/23/2023