

THIS ORDER IS NOT A
PRECEDENT OF THE
TTAB

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

ALAO/JK

February 1, 2024

Opposition No. 91281389 (parent case)¹
Opposition No. 91281390

Hangzhou Mengku Technology Co., Ltd.

v.

Shanghai Zhenglang Technology Co., Ltd.

**Before Heasley, Dunn and Allard,
Administrative Trademark Judges.**

By the Board:

These consolidated proceedings are before the Board for consideration of the September 28, 2023 motion for summary judgment filed by *Shanghai Zhenglang Technology Co., Ltd.* (Applicant). 13 TTABVUE. The motion is fully briefed.²

¹ Opposition No. 91281389 is designated as the “parent” case and all TTABVUE citations are to that proceeding unless otherwise specified.

In all orders, the Board cites to the proceeding record by the TTABVUE docket entry number and TTABVUE page number, in accordance with the guidance provided in TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) §§ 106.03, 702.05 and 801.01 (June 2023). The parties should cite to the record in the same manner throughout this proceeding.

² 13, 15-17 TTABVUE. The Board has considered the parties’ arguments and evidence of record and presumes the parties’ familiarity with the factual bases for the motions, and does not recount the facts or arguments here, except as necessary to explain the Board’s order. *Guess? IP Holder L.P. v. Knowlux LLC*, 116 USPQ2d 2018, 2019 (TTAB 2015).

I. Background

On August 4, 2021 and August 5, 2021, Applicant filed application Serial Nos. 90866064 and 90868193, respectively, based on Trademark Act Section 1(a), to register the design marks shown below on the Principal Register for the following goods in International Class 9:

computer game programmes downloadable via the Internet; computer game software downloadable from a global computer network; downloadable computer application software for mobile phones, namely, software for use in database management, use in electronic storage of data, for playing online games; downloadable computer game programmes; downloadable computer game programs; downloadable computer game software; downloadable computer game software for personal computers and home video game consoles; downloadable computer game software for use on mobile and cellular phones; downloadable electronic game programs; downloadable electronic game software; downloadable electronic game software for handheld electronic devices; downloadable electronic game software for use on mobile and cellular phones, handheld computers; downloadable game software; recorded computer game programs

Serial No. 90866064



Serial No. 90868193



Applicant asserts July 30, 2021, as date of first use anywhere and in commerce for application Serial No. 90866064, and July 25, 2021 as its date of first use anywhere and in commerce for application Serial No. 90868193. Application Serial No. 90866064 includes the following description of the mark:

The mark consists of a rectangular background depicting an underwater scene with stylized and shaded marine plants and bubbles; in the bottom left is the stylized design of a fish; across the design are stylized playing cards with a single card on the left, then two stacked card, then three stacked cards, and four stacked cards on the right; the foremost card in each column is face up, each with a “A” in the left top corner and featuring in the center of the card and the upper right, from left to right, a diamond, spade, heart, and club; the cards behind the foremost cards feature a geometric pattern.

Application Serial No. 90868193 includes the following description of the mark:

The mark consists of a rectangular background depicting an underwater scene with stylized and shaded marine plants and bubbles; in the bottom left is the stylized design of a fish; across the design are stylized playing cards with a single card on the left, then two stacked card [sic], then three stacked cards, and four stacked cards on the right; the foremost card in each column is face up, featuring, from left to right, a card with a stylized king, the letter “K”, and a heart design, a card with a design of a queen, the letter “Q”, and a spade design, a card with a stylized jack, the letter “J”, and diamond design, and a card with a two stylized spades and the numeral “10”; the cards behind the foremost cards feature a geometric pattern.

Hangzhou Mengku Technology Co., Ltd. (Opposer) filed essentially identical notices of opposition against each application with claims that the respective applied-for marks are merely descriptive of the goods and, in the alternative, that if “the Opposed mark is found to qualify as a trademark,” it is likely to cause confusion with Opposer’s prior rights in its common law mark. 1 TTABVUE 9-10, and 1 TTABVUE 10-11 in Opposition No. 91281390. Describing the alternate claim first, Opposer pleads:

Opposer has started using the Solitaire Puzzlejoy Mark in connection with its Solitaire Puzzle game as early as April 1, 2021. As such, Opposer’s first use in commerce date is earlier than Applicant’s first use of the Opposed Mark in commerce. In addition, Opposer has not abandoned the Solitaire Puzzlejoy Mark and is currently still using the mark.

1 TTABVUE 10. On the ESTTA filing cover sheet, Opposer pleads common law rights in its pleaded mark for the following goods in International Class 9:

computer game programmes downloadable via the Internet; computer game software downloadable from a global computer network; downloadable computer application software for mobile phones, namely, software for use in database management, use in electronic storage of data, for playing online games; downloadable computer game programmes; downloadable computer game programs; downloadable computer game software; downloadable computer game software for personal computers and home video game consoles; downloadable computer game software for use on mobile and cellular phones; downloadable electronic game programs; downloadable electronic game software; downloadable electronic game software for handheld electronic devices; downloadable electronic game software for use on mobile and cellular phones, handheld computers; downloadable game software; recorded computer game programs

1 TTABVUE 2. Opposer's claimed common law mark appears below:



In support of the Trademark Act Section 2(d) ground in each application, Opposer alleges priority as noted above, and alleges likelihood of confusion as follows:

Specifically, the Opposed Mark is confusingly similar to a mark used by Opposer in connection with a game titled "Solitaire Puzzlejoy"...

[T]he Opposed Mark and Opposer's Solitaire Puzzlejoy Mark have similar arrangement of stacks of cards . . .

Opposition Nos. 91281389 (parent case) and 91281390

The Opposed Mark is highly similar to Opposer's Solitaire Puzzlejoy Mark in appearance and commercial impression.

The scope of Applicant's Goods covers downloadable computer games in Class 9. Opposer's "Solitaire Puzzlejoy" game is a downloadable computer game. Therefore, the parties' goods are similar or identical.

Applicant and Opposer offer their respective games through the same trade channel, e.g., Google Play, and to the same groups of consumers.

1 TTABVUE 9-10.

Opposer's mere descriptiveness claim under Trademark Act Section 2(e)(1), alleges as follows:

The Opposed Mark is merely descriptive under [Section 2(e)(1)] of the Trademark Act because it immediately conveys the knowledge or idea of an important feature of solitaire games, namely, to arrange cards in some order or pair them off in order to discard them.

The scope of Applicant's Goods is broad enough to cover solitaire games.

[T]he Opposed Mark consists merely of an illustration of Applicant's Solitaire Ocean Game.

1 TTABVUE 5-6.

In each answer, Applicant denies the salient allegations in the notice of opposition. 4 TTABVUE in each proceeding. On February 28, 2023, the Board consolidated proceedings (6 TTABVUE) and on September 1, 2023, discovery closed (12 TTABVUE).

Applicant moved for summary judgment under Fed. R. Civ. P. 56(a) with respect to each of Opposer's claims. 13 TTABVUE.

II. Authorities and Analysis

A. Applicable Law

Summary judgment is appropriate only where the movant demonstrates that there is no genuine dispute as to any material fact, and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A factual dispute is genuine if, on the evidence of record, a reasonable fact finder could resolve the matter in favor of the non-moving party. *Opryland USA Inc. v. Great Am. Music Show Inc.*, 970 F.2d 847, 23 USPQ2d 1471, 1472 (Fed. Cir. 1992); *Olde Tyme Foods, Inc. v. Roundy's, Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1544 (Fed. Cir. 1992).

A party asserting that a fact cannot be true or is genuinely disputed must support its assertion by either: 1) citing to materials in the record, or 2) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact. Fed. R. Civ. P. 56(c). Evidence on summary judgment must be viewed in the light most favorable to the non-movant, and all justifiable inferences are to be drawn in the non-movant's favor. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (the nonmoving party must go beyond the pleadings and by affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial); *Lloyd's Food Prods., Inc. v. Eli's, Inc.*, 987 F.2d 766, 25 USPQ2d 2027, 2029 (Fed. Cir. 1993); *Opryland USA*, 23 USPQ2d at 1472. The Board may not resolve genuine disputes as to material facts; it may only ascertain whether genuine disputes as to material facts exist. *Lloyd's Food Prods.*, 25 USPQ2d at 2029;

Olde Tyme Foods, 22 USPQ2d at 1544. See also TBMP § 528.01 and cases cited therein.

B. Analysis

Likelihood of Confusion

To prevail on summary judgment, Applicant must demonstrate that there is no genuine dispute of material fact that 1) Opposer does not own “a mark or trade name previously used in the United States ... and not abandoned...” (Trademark Act Section 2), that is, proprietary rights in its pleaded mark that are prior to the August 4, 2021 filing date of Serial No. 90866064 or the August 5, 2021 filing date of Serial No. 90868193; and/or 2) the contemporaneous use of the parties’ marks in connection with their respective goods is not likely to cause confusion, mistake, or deception as to the source of the goods. *Hornblower & Weeks, Inc. v. Hornblower & Weeks, Inc.*, 60 USPQ2d 1733, 1735 (TTAB 2001). See also *Syngenta Crop Protection Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1119 (TTAB 2009) (applicant may rely without further proof upon the filing date of its application as a “constructive use” date for purposes of priority).

1. Priority

To succeed on a claim under Section 2(d), a plaintiff must plead (and later prove) priority of use. *West Florida Seafood, Inc., v. Jet Rest., Inc.*, 31 F.2d 1122, 31 USPQ2d 1660, 1663 (Fed. Cir. 1994) (in determining whether a party has established prior use, Board should look at the evidence as a whole); *Kemi Organics, LLC v. Gupta*, 126 USPQ2d 1601, 1607 (TTAB 2018) (the question is “whether the mark or trade name

has been ‘previously used in the United States by another and not abandoned’). A plaintiff must prove rights in a mark that is distinctive, inherently or otherwise, and that it used its mark prior to defendant’s actual or constructive first use dates. *ARSA Distrib. v. Salud Nat. Mexicana S.A. De C.V.*, 2022 USPQ2d 887, at *14 (TTAB 2022). See also *DeVivo v. Ortiz*, 2020 USPQ2d 10153, at *3 (TTAB 2020); *Exec. Coach Builders, Inc. v. SPV Coach Co.*, 123 USPQ2d 1175, 1180 (TTAB 2017) (“[B]ecause unregistered marks are not entitled to the presumptions established under Trademark Act Section 7(b)-(c), it is Opposer’s burden to demonstrate that it owns a trademark that was used prior to Applicant’s first use or constructive use of its mark and not abandoned.”); *Giersch v. Scripps Networks Inc.*, 90 USPQ2d 1020, 1023 (TTAB 2009) (to prevail on a claim of likelihood of confusion based on its ownership of common law rights in a mark, a plaintiff’s mark must be distinctive, inherently or otherwise, and plaintiff must show priority of use).

Opposer’s asserted mark consists of a pictorial representation of a solitaire card game. The card game of solitaire is encompassed by “game” in Opposer’s description of the goods with which it uses the pictorial representation.³ See *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1010 (Fed. Cir. 1987) (“The Board implicitly found that purchasers would be ‘immediately conveyed’ knowledge of the scent of apple pie, on

³ We take judicial notice that “solitaire” is defined as “any of various card games that can be played by one person.” *Merriam-Webster.com Dictionary*, <https://www.merriam-webster.com/dictionary/solitaire>. Accessed Jan. 17, 2024. *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co.*, 213 USPQ 594, 596 (TTAB 1982) (Board takes judicial notice of dictionary definitions), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

viewing the term APPLE PIE in association with potpourri, a product sold for its scent.”).

In its brief, Opposer submitted the declaration of Qianan Li, Opposer’s CEO and a game developer for more than twelve years, averring “Because the user interface of electronic solitaire games has often been designed to show several decks of cards arranged in a row on a screen, such an arrangement of decks of cards has become an important feature of electronic solitaire games.”⁴ The declaration included exhibits displaying advertisements for third-party electronic solitaire games showing rows of cards.⁵ Opposer’s asserted mark includes four rows for cards, the first row blank, the next three rows showing two, three, and four cards, all with Ace cards facing up, and below the rows, a King card and a pointing hand indicating the blank row where the King would be placed.

In addition, Opposer’s response to the motion includes evidence that computer games use pointing hand icons or depictions to describe or illustrate the action necessary to play the game:



(15 TTABVUE 33)

⁴ 15 TTABVUE 13, 21-22.

⁵ 15 TTABVUE 45-68.



(15 TTABVUE 35)



(15 TTABVUE 37)



(15 TTABVUE 41)



(15 TTABVUE 47)



(15 TTABVUE 51)



(15 TTABVUE 57)



(15 TTABVUE 67)

The Board has found that a pictorial depiction of a product or service is not an inherently distinctive mark for the goods and services depicted. *See In re Singer Mfg. Co.*, 255 F.2d 939, 118 USPQ 310, 311-12 (CCPA 1958) (“It is, of course, true that a design consisting merely or essentially of a pictorial representation of the goods on which it is used is descriptive, and is not a valid trademark.”); *In re Eight Ball, Inc.*, 217 USPQ 1183, 1184 (TTAB 1983) (“The pictorial representation of a cue stick and ball when used in connection with applicant’s billiard parlor services immediately informs customers that applicant offers services in the nature of providing billiard games. Accordingly, we conclude that the central feature or characteristic of applicant’s billiard parlor services is the availability of billiard games, and the

Opposition Nos. 91281389 (parent case) and 91281390

pictorial representation of the cue stick and ball merely describes said feature or characteristic.”). *See also In re The Ride, LLC*, 2020 USPQ2d 39644, at *9 n.36 (TTAB 2020) (“Just as the name of a process is not registrable as a service mark, the pictorial representation of that process or method itself should likewise not be registrable.”) (internal citation omitted).

In its motion for summary judgment, Applicant contends, “Opposer has not produced any documentary or testimony evidence that it owns or has a proprietary interest in the Solitaire Puzzlejoy mark” and “has not produced any evidence that it used the mark in U.S. commerce prior to the priority dates of the opposed marks.” 13 TTABVUE 3, 10-11. During discovery, Opposer had an opportunity to produce evidence of its proprietary rights in a distinctive mark. Specifically, Applicant propounded, and Opposer responded to Interrogatory No. 10 as follows:

INTERROGATORY NO. 10:

Explain in detail Opposer’s bases for its contention that the Solitaire Puzzlejoy Mark is protectable as a trademark.

RESPONSE TO INTERROGATORY NO. 10:

If the Board finds that the opposed marks are distinctive enough to qualify as trademarks, Opposer’s Solitaire Puzzlejoy Mark would be similarly distinctive to qualify as a trademark.

13 TTABVUE 52.

Of course, Applicant’s marks include fanciful undersea elements missing from Opposer’s pictorial representation of a solitaire card game. In addition, the substance of Opposer’s interrogatory response neither provides an explanation why its mark is distinctive, nor evidence of proprietary rights in a distinctive mark. Opposer’s response merely states a conditional hypothetical based on the Board’s finding that


Opposition Nos. 91281389 (parent case) and 91281390

Applicant's marks are distinctive. Opposer's response does not describe proprietary rights in a distinctive mark that are prior to August 4 or 5, 2021. See *Major League Soccer, LLC v. F.C. Int'l. Milano S.p.A.*, 2020 USPQ2d 11488, at *7 (TTAB 2020) (no allegations of prior proprietary rights in a mark owned by opposer); *Stephen Slesinger Inc., v. Disney Enters. Inc.*, 98 USPQ2d 1890, 1896 n.17 (TTAB 2011) (plaintiff cannot establish priority because it cannot prove ownership of some prior right), *aff'd*, 702 F.3d 640, 105 USPQ2d 1472 (Fed. Cir. 2012) *cert den.* 134 S. Ct. 125 (2013).

In responding to the summary judgment motion, Opposer again had an opportunity to demonstrate priority in a distinctive mark. Opposer submitted a declaration of its CEO which introduces various websites, images, videos, and icons, offered to show matters relevant to the Section 2(e)(1) claim. 15 TTABVUE 13-23. However, the declaration does not address whether and how Opposer's claimed common law mark is distinctive or provide evidence from which we may find the mark is distinctive for purposes of the Section 2(d) claim.

Opposer's declarant Qianan Li attests to use of its mark since 2021 in stating



“Opposer has always owned the mark  (“Solitaire Puzzlejoy Mark”) and has used the mark in connection with the Solitaire Puzzlejoy Game since at least April 1, 2021 in U.S. commerce.” 15 TTABVUE 14. However, the declaration does not provide testimony or evidence that demonstrates that the mark is distinctive.

In paragraphs 5-8 of the declaration, Li discusses evidence Opposer produced during discovery, offered as Exhibit 1, which includes screenshot images of the

Opposition Nos. 91281389 (parent case) and 91281390

Solitaire Puzzlejoy game on Google Play displaying a date of July 27, 2023. Exhibit 1 is offered to show Opposer published the Solitaire Puzzlejoy game on Google Play using the asserted Solitaire Puzzlejoy mark. 15 TTABVUE 14, 25-27. Exhibit 1 also includes an image of “Google Play Console I made on July 29, 2023,” offered to show Opposer conducted a comparison between the asserted Solitaire Puzzlejoy mark and the then existing icon used on Opposer’s Solitaire Puzzlejoy Game from April 1, 2021 to April 9, 2021. 15 TTABVUE 14-15, 28. However, these pictorial representations of a solitaire card game do not establish that Opposer has proprietary rights in a distinctive mark. *In re Universal Filters, Inc.*, 218 USPQ 456, 459 (TTAB 1983) (“We agree with the Examining Attorney’s contention that applicant’s design serves to illustrate functional features of applicant’s fluid flow indicator. In effect, it shows how the flow indicator works and thus, as applied to the flow indicator, is merely descriptive thereof within the meaning of Section 2(e)(1) of the Act.”).

The summary judgment record lacks evidence demonstrating Opposer’s proprietary rights in a distinctive mark predating the application filing dates. Accordingly, there is no genuine dispute of material fact that Opposer has failed to demonstrate a factual basis for this claim. *Celotex*, 477 U.S. at 327 (“Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.”)

Decision

Accordingly, Applicant's motion for summary judgment with respect to Opposer's Section 2(d) claim is **granted**.

Mere Descriptiveness

With respect to each application, to prevail on summary judgment, Applicant must establish that there is no genuine dispute of material fact that its marks are not merely descriptive, that is, do not immediately convey information about an ingredient, quality, characteristic, function, feature, purpose or use of its identified goods. Trademark Act Section 2(e)(1). *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1373 (Fed. Cir. 2018) (quoting *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1709 (Fed. Cir. 2017)).

The determination of whether a mark is merely descriptive must be made in relation to the goods or services for which registration is sought, not in the abstract. The Board "must consider the mark as a whole and do so in the context of the goods or services at issue." *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012); *In re Calphalon Corp.*, 122 USPQ2d 1153, 1162 (TTAB 2017). "The question is whether someone who knows what the goods and services are will understand the mark to convey information about them." *DuoProSS*, 103 USPQ2d at 1757 (quoting *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002)).

Sources for considering the context in which the mark is or may be used include websites, publications, labels, packages, advertising material, and explanatory text

Opposition Nos. 91281389 (parent case) and 91281390

on specimens for the goods and services. *Royal Crown Co. v. Coca-Cola Co.*, 127 USPQ2d 1041, 1046 (Fed. Cir. 2018) (“Evidence of the public’s understanding of [a] term may be obtained from any competent source, such as purchaser testimony, consumer surveys, listings in dictionaries, trade journals, newspapers and other publications.”) (quoting *In re Merrill Lynch*, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987)); *N.C. Lottery*, 123 USPQ2d at 1710; *In re Nett Designs, Inc.*, 236 F.3d 1339, 1342, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001); *In re Abcor Dev. Corp.*, 588 F.2d 811, 814, 200 USPQ 215, 218 (CCPA 1978).

Applicant’s marks both consist of a pictorial representation of a solitaire card game with fanciful undersea elements, i.e., marine plants, bubbles and a fish. Applicant’s marks both include four rows for cards, the first row with one card, the next three rows showing two, three, and four cards. The pictorial representation of the solitaire card game varies only with the face cards shown, with application Serial No. 90866064 showing aces and application Serial No. 90868193 showing a king, queen, jack, and ten. As noted above, the card game of solitaire is encompassed by “game” in Applicant’s description of the goods with which it uses the pictorial representation.

In its motion, Applicant argues Opposer has produced no documentary or testimony evidence that Applicant’s marks are descriptive of the goods identified in the opposed applications. 13 TTABVUE 15. Applicant submitted the declaration of its President, Ruihua Ji, averring “Applicant’s Design Marks are not a reproduction of the opening screen of Applicant’s ‘Solitaire Ocean’ mobile application, or a

reproduction of any of the other screens within Applicant’s ‘Solitaire Ocean’ mobile application” and “None of the electronic games offered within Applicant’s ‘Solitaire Ocean’ mobile application are identical in appearance to Applicant’s Design Marks.”⁶ In response, Opposer contends that Applicant’s goods encompass solitaire games, that Applicant’s games reflect a genre of aquatic theme solitaire games in that they “also feature an underwater background with depictions of seaweed and/or other underwater plants as well as one or more colorful fish such as clownfish,” and the opposed marks convey an immediate knowledge or idea of an important feature of mobile electronic solitaire games. 15 TTABVUE 4-5, 7.

Opposer has come forward with evidence in the form of video snapshots offered to show Applicant’s solitaire games feature images similar to Applicant’s opposed marks. Specifically, the videos include images of anemone fish with multiple card decks arranged in the background. 15 TTABVUE 31. Moreover, the videos show the game of solitaire being played while incorporating significant features of the opposed marks, in particular a similar arrangement of playing cards. *Id.* Opposer’s evidence includes videos and screenshots of “seventeen (17) mobile games featuring solitaires from Google Play,” five being Applicant’s games, to “show the content and features of these mobile games” as including playing cards and a fish.⁷ 15 TTABVUE 17-21. Opposer’s declarant Li attested that the evidence was created by recording the process of downloading, installing, and playing the relevant games on an Android phone with the screen recording function available on the phone. *Id.* at 17.

⁶ 13 TTABVUE 91.

⁷ This evidence also includes videos showing twelve third-party marks.

We find there is, at a minimum, a genuine dispute as to whether Applicant's marks are merely descriptive as a whole for its identified goods, or registrable with a disclaimer of the pictorial representation of the solitaire card game.

Decision

Upon thorough review of the record on summary judgment, having viewed the record evidence in the light most favorable to Opposer and drawing all justifiable inferences therefrom in its favor as the non-movant, we find Applicant has not met its burden to show there is no genuine dispute that its marks do not convey a feature of its goods. Thus, Applicant is not entitled to summary judgment as a matter of law on Opposer's Section 2(e)(1) claim. The motion for summary judgment on Opposer's Section 2(e)(1) claim is **denied**.

Inasmuch as these proceedings present several issues of fact which are not suited to disposition on summary judgment, and which are to be decided at trial, the parties are prohibited from filing any additional motions for summary judgment in these proceedings.

With respect to applicant's motion seeking judgment on the Section 2(e)(1) claim, the evidence submitted in connection with the motion for summary judgment is of record only for consideration of that motion. To be considered at final hearing, any such evidence must be properly introduced in evidence during the appropriate trial period. *Drive Trademark Holdings LP v. Inofin*, 83 USPQ2d 1433, 1438 n.14 (TTAB 2007); *Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993). TBMP § 528.05. Moreover, the fact that we have identified certain issues that

Opposition Nos. 91281389 (parent case) and 91281390

are in dispute and remain for trial should not be construed as a finding that these are necessarily the only issues which remain for trial.

III. Resumption and Schedule

These consolidated proceedings are resumed. In view of the foregoing, this proceeding will move forward based solely on Opposers' Section 2(e)(1) claim.

Remaining dates are reset as follows:

Plaintiff's Pretrial Disclosures Due	3/1/2024
Plaintiff's 30-day Trial Period Ends	4/15/2024
Defendant's Pretrial Disclosures Due	4/30/2024
Defendant's 30-day Trial Period Ends	6/14/2024
Plaintiff's Rebuttal Disclosures Due	6/29/2024
Plaintiff's 15-day Rebuttal Period Ends	7/29/2024
Plaintiff's Opening Brief Due	9/27/2024
Defendant's Brief Due	10/27/2024
Plaintiff's Reply Brief Due	11/11/2024
Request for Oral Hearing (optional) Due	11/21/2024

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

Opposition Nos. 91281389 (parent case) and 91281390

final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a).

It is the responsibility of each party to ensure that the Board has the party's current correspondence address, including an email address. TBMP § 117.07. The Board must be promptly notified of any address or email address changes for the parties or their attorneys

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. 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.