

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

Mailed: April 27, 2018

Opposition No. 91236790

Mazama Brewing Company, LLC

v.

Sumerian Brewing Co., LLC

**Before Wolfson, Kuczma, and Gorowitz,
Administrative Trademark Judges.**

By the Board:

Now before the Board is Opposer's motion (filed December 20, 2017) for partial summary judgment on Opposer's claim of likelihood of confusion. The motion is fully briefed.

Background

Applicant seeks to register the mark HOPRUPTION DOUBLE IPA, in standard character form, for beer in International Class 32.¹ In its notice of opposition, Opposer alleges (1) likelihood of confusion based on common law rights accruing from its prior use of the mark HOP ERUPTION for beer since at least as early as May 2013; and

¹ Application Serial No. 87327934, filed on February 8, 2017, and disclaiming "DOUBLE IPA," based on an assertion of use of the mark in commerce under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), as of January 5, 2017.

(2) false suggestion of a connection with Opposer.² In its answer, Applicant denies the salient allegations in the notice of opposition.

Opposer's Motion for Summary Judgment

In support of its motion, Opposer maintains that it has used the mark HOP ERUPTION since at least as early as May 2013 in connection with beer, and such use continues to present day. 5 TTABVUE 3, 7. Meanwhile, Opposer argues that the earliest date Applicant can rely on as its first use of its mark is its February 8, 2017 filing date. *Id.* at 6. As evidence in support of its motion, Opposer has submitted the affidavit of Kathleen Tobin (the "Tobin Affidavit") (5 TTABVUE 21-295), a member of Opposer, which introduces and corroborates the following exhibits, among others:

- a) Articles from the Corvallis Gazette-Times dated May 12, 2013 and May 31, 2013 indicating that Opposer brewed its first beer, an IPA called Hops Eruption, in May 2013 and that Opposer's brewery opens on May 31, 2013 and the first batch of beer "out of the tank" is an IPA called Hop Eruption "in honor

² In order to properly assert a ground of false suggestion of a connection, Opposer must plead that (1) Applicant's mark is the same as, or a close approximation of, Opposer's previously used name or identity; (2) that the mark would be recognized as such, in that it points uniquely and unmistakably to Opposer; (3) that Opposer is not connected with the goods provided by Applicant under the mark; and (4) that Opposer's name or identity is of sufficient fame or reputation that when Applicant's mark is used on its goods, a connection with Opposer would be presumed. *See Nike, Inc. v. Palm Beach Crossfit Inc.*, 116 USPQ2d 1025, 1031 (TTAB 2015). Opposer does not allege, *inter alia*, that Applicant's mark would be recognized as Opposer's name, that Applicant's mark "points uniquely and unmistakably" to Opposer, or that Opposer's name is of sufficient fame or reputation that a connection with Opposer would be presumed. *See Hornby v. TJX Cos., Inc.*, 87 USPQ2d 1411, 1424 (TTAB 2008) (noting requirement that name or image claimed to be appropriated must "point uniquely" to person or institution named or identified); *In re White*, 73 USPQ2d 1713, 1720 (TTAB 2004) ("key is whether the name per se is unmistakably associated with a particular person or institution and, *as used* would point uniquely to the person or institution"). Accordingly, Opposer's claim of false suggestion of a connection is not sufficiently pleaded.

of the brewery's namesake mountain" (Tobin Affidavit at Exs. 3 and 4) (5 TTABVUE 36-49);

- b) Invoices for sales of HOP ERUPTION beer in kegs and bottles to customers in Oregon and Washington dating back to May 19, 2013 (Tobin Affidavit at Exs. 7 and 8) (5 TTABVUE 57-115);
- c) Screen shots of fifty-six Instagram posts using the #hoperuption hashtag, at least forty-three of which clearly reference Opposer's beer, dating back to at least March 27, 2014 (Tobin Affidavit at Ex. 9) (5 TTABVUE 116-124);
- d) Customer reviews from Beer Guy PDX, RateBeer.com, BeerAdvocate, and Untappd from June 8, 2013 to December 1, 2017 (Tobin Affidavit at Exs. 10, 11, 12 and 13) (5 TTABVUE 125-295); and
- e) Opposer's applications for Certification of Label Approval for the HOP ERUPTION brand name and HOP ERUPTION label design dated August 23, 2013 and January 28, 2014, respectively (Tobin Affidavit at Exs. 5 and 6) (5 TTABVUE 50-56).

Opposer further argues that the parties' goods are identical, and inasmuch as the subject application does not include any limitations, the parties' identical goods are presumed to travel in the same channels of trade to the same class of purchasers. 5 TTABVUE at 10-11. Moreover, Opposer argues, beer is an impulse purchase and the risk of likelihood of confusion between the parties' marks is increased because purchasers of such products are held to a lesser standard of purchasing care. *Id.* at 12. With respect to the similarity of the parties' marks, Opposer contends that

inasmuch as “DOUBLE IPA” in Applicant’s HOPRUPTION DOUBLE IPA mark is descriptive of Applicant’s beer and has been disclaimed, it does little to distinguish the marks and should be accorded less weight in comparing the marks. *Id.* at 13-14. The dominant portions of the parties’ marks, HOPRUPTION and HOP ERUPTION, differ only in that Opposer’s mark includes an ‘E’ in ERUPTION as well as a space between the words ‘HOP’ and ‘ERUPTION,’ but are otherwise indistinguishable and differ by only one syllable. *Id.* at 14-15. Finally, Opposer argues that the parties’ marks have the same commercial impression, inasmuch as both marks convey to consumers that when the parties’ beer is tasted, the consumer will experience an explosion or eruption of hop flavor; this impression is also given by the specimen filed with Applicant’s application, which refers to Applicant’s product as “a beer that erupts with fresh aromatics, and balanced hop flavors.” *Id.* at 16-17.

In response, Applicant argues that although Opposer “may have developed some, yet very limited rights to its actual product name Hop Eruption IPA within its geographical territory of Corvallis, Oregon,” Opposer does not have priority in its mark on a federal level and in Washington state in particular,³ and its sales and marketing are sporadic, inconsistent, and infrequent. 7 TTABVUE 5, 7. Applicant contends that there is no likelihood of confusion between the marks in their entireties, inasmuch as Applicant’s marketing and packaging featuring its mark is visually different, and Applicant’s HOPRUPTION mark does not include an ‘E’ in “Eruption” resulting in a “radically different pronunciation.” *Id.* at 4-6. Applicant

³ Geographic limitations will be considered and determined by the Board only in the context of a concurrent use registration proceeding. Trademark Rule 2.133(c).

argues that the parties' goods are dissimilar inasmuch as Opposer's mark is used in connection with a single IPA, while Applicant's mark is used in connection with a double IPA, which are "totally different beer styles." *Id.* at 6.

Additionally, Applicant argues that any likelihood of confusion would be diminished by the fact that Opposer's mark is weak, inasmuch as there are other HOP- and ERUPTION-formative marks in use by third parties in connection with beer, including, *inter alia*:⁴

- a) Hop Eruption by Legacy Brewing Company;
- b) Mount Vesuvius Hop Eruption by O'Boys;
- c) Hopsmack IPA by Cascade Lakes Brewery;
- d) Hop Hearty Ale by New Glarus Brewing Company;
- e) HOPSMACK! by Topling Goliath Brewing Company;
- f) Eruption by Roak Brewing Co.;
- g) Eruption Ale by Dust Bowl Brewing Company; and
- h) Fresh Hop IPA by Eruption Brewing Co.

7 TTABVUE 7-9. In its brief, Applicant also mentions the following applications and registration as evidence of similar marks that may diminish the strength of Opposer's mark, but does not include status and title copies of the applications and registration:

- a) ERUPTION IMPERIAL RED by Worthy Brewing, Registration No.4723951;

⁴ To the extent Applicant relies on argument in its brief unsupported by the Declaration of Mark Ihrig (the "Thrig Declaration") and its attachments, Applicant is advised that attorney argument is no substitute for evidence. *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005).

- b) HOP SQUEEZE by Sierra Nevada Brewing Co., application Serial No. 87055362; and
- c) HOP CENTRAL by POP Brewery, LLC, application Serial No. 87657622 (now abandoned).⁵

Id. Applicant also argues that its craft beer customers are sophisticated “local connoisseurs” and are therefore less likely to be confused between the parties’ marks.

Id. at 10. Finally, Applicant argues, there is no evidence of actual confusion between the parties’ marks. *Id.* at 11.

In support of its arguments, Applicant has submitted the Ihrig Declaration regarding distribution of Applicant’s beer and its (lack of) prior knowledge of Opposer’s HOP ERUPTION single IPA. Applicant also includes an Internet article from Craft Brewing Business regarding the demographics of craft beer consumers, as well as screen shots from a “Beer” app that purport to show third-party use of “eruption-” derivative marks, such as Mount Vesuvius Hop Eruption by O’Boys; Eruption Imperial Red by Worthy Brewing; Fresh Hop IPA by Eruption Brewing Co.; and Hop Eruption by Legacy Brewing Company.

In reply, Opposer notes that Applicant did not claim priority of use of its HOPRUPTION mark, and even concedes that Opposer may have prior rights in the mark HOP ERUPTION. 8 TTABVUE 9. With respect to likelihood of confusion, Opposer notes that Applicant’s argument that its design and product packaging is

⁵ In any event, pending applications and “dead” applications have no probative value. *See In re Kysela Pere et Fils, Ltd.*, 98 USPQ2d 1261, 1264 (TTAB 2011). Third-party applications are evidence only of the fact that they have been filed. *See Interpayment Servs. Ltd. v. Docters & Thiede*, 66 USPQ2d 1463, 1468 n.6 (TTAB 2003).

different in appearance and commercial impression is inapposite inasmuch as Applicant seeks registration of HOPRUPTION in standard character form. *Id.* at 3-4. With respect to Applicant's strength of the mark argument, Opposer argues that Applicant did not make the ERUPTION IMPERIAL RED registration of record, and further that a single registration is not persuasive evidence that Opposer's mark is weak. *Id.* at 6-7.

Evidentiary Issues

To the extent Opposer objects to Applicant's mention of third-party applications and registrations for the first time in its brief, Opposer's objection is **sustained**. The mere mention of applications and registrations in a party's brief does not make the listed applications and registrations of record, and therefore we have not considered any information regarding the listed applications and registration. *See Edom Labs., Inc. v. Lichter*, 102 USPQ2d 1546, 1550 (TTAB 2012) (the Board does not take judicial notice of registrations or applications residing in the Office); *Black & Decker Corp. v. Emerson Elec. Co.*, 84 USPQ2d 1482, 1494 (TTAB 2007); *Nat'l Fidelity Life Ins. v. Nat'l Ins. Trust*, 199 USPQ 691, 694 n.5 (TTAB 1978). Moreover, as noted above, third-party applications have no evidentiary value other than to show that the applications were filed. *Black & Decker*, 84 USPQ2d at 1494.

Ultimately, except as otherwise noted above, we have considered the entire record, and have accorded the evidence whatever probative value it merits.⁶

⁶ The sources of Applicant's Craft Brewing Business article as well as the screen shots featuring third-party marks are unclear inasmuch as no identifying information was included on the attachments to Applicant's brief nor was the evidence otherwise authenticated by declaration. To the extent these attachments contain screen shots from the

Legal Standard

Summary judgment is an appropriate method of disposing of cases in which there is no genuine dispute as to any material fact, thus leaving the case to be resolved as a matter of law. *See* Fed. R. Civ. P. 56(a). The party moving for summary judgment has the initial burden of demonstrating that there is no genuine dispute of material fact remaining for trial and that it is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1987).

In considering the propriety of summary judgment, all evidence must be viewed in a light favorable to the nonmovant, in this case Applicant, and all justifiable inferences are to be drawn in the nonmovant's favor. *Opryland USA Inc. v. Great Am. Music Show, Inc.*, 970 F.2d 847, 23 USPQ2d 1471, 1472 (Fed. Cir. 1992). The Board may not resolve issues of material fact; it may only ascertain whether such issues are present. *See 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; *Olde Tyme Foods, Inc. v. Roundy's, Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1544 (Fed. Cir. 1992).

When the moving party's motion is supported by evidence sufficient to indicate that there is no genuine dispute of material fact, and that the moving party is entitled

Internet or website printouts, they do not identify, on their face, either their dates of publication or the dates they were accessed and printed, and their URL address. *See Safer, Inc. v. OMS Investments, Inc.*, 94 USPQ2d 1031, 1039 (TTAB 2010); Trademark Rule 2.122(e)(2); TBMP § 528.05(e) (June 2017). Notwithstanding the foregoing, Opposer has not objected to Applicant's attachments on the basis of authentication. The 2010 amendments to Fed. R. Civ. P. 56(c)(2) allow a court to consider unauthenticated documents on summary judgment, eliminating the unequivocal requirement that documents submitted in connection with such a motion must be authenticated. Fed. R. Civ. P. 56(c)(2) (Advisory Committee notes) (2010 amendment). Inasmuch as Opposer has not objected to this evidence on the basis that it cannot be admissible at trial, we have considered it.

to judgment as a matter of law, the burden shifts to the nonmoving party to demonstrate the existence of specific, genuinely disputed facts that must be resolved at trial. *Enbridge, Inc. v. Excelerate Energy Ltd. P'ship*, 92 USPQ2d 1537, 1540 (TTAB 2009). The nonmoving party may not rest on the mere allegations of its pleadings and assertions of counsel, but must designate specific portions of the record or produce additional evidence showing the existence of a genuine dispute as to a material fact for trial. *See* Fed. R. Civ. P. 56(c); *Celotex*, 477 U.S. at 324. In general, to establish the existence of disputed facts requiring trial, the nonmoving party “must point to an evidentiary conflict created on the record at least by a counterstatement of facts set forth in detail in an affidavit by a knowledgeable affiant.” *Octocom Sys., Inc. v. Houston Computers Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1786 (Fed. Cir. 1990).

A. Standing

Our primary reviewing court has enunciated a liberal threshold for determining standing, namely that a plaintiff must demonstrate that it possesses a “real interest” in a proceeding beyond that of a mere intermeddler, and “a reasonable basis for his belief of damage.” *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014) (quotation omitted), *cert. denied*, 135 S. Ct. 1401 (2015). A “real interest” is a “direct and personal stake” in the outcome of the proceeding. *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1026 (Fed. Cir. 1999). A claim of likelihood of confusion that “is not wholly without merit,” including

prior use of a confusingly similar mark, may be sufficient. *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982).

Through the Tobin Affidavit, as well as supporting exhibits, Opposer has established with respect to its claim of priority of use and likelihood of confusion that it uses the HOP ERUPTION mark in connection with sales of beer, and as such is a direct competitor of Applicant. Tobin Affidavit at ¶¶6, 9 and 11 and Exs. 3, 4, 7, 8 and 9-13 (5 TTABVUE 22-23, 26, 36-49, 57-115, 116-295); *see also Syngenta Crop Prot., Inc. v. Bio-Chek, LLC*, 90 USPQ2d 1112, 1118 (TTAB 2009) (testimony regarding use of the involved mark is sufficient to support opposer's allegations of a reasonable belief that it would be damaged by registration of applicant's mark); *Kohler Co. v. Baldwin Hardware Corp.*, 82 USPQ2d 1100, 1106 (TTAB 2007). No more is necessary to establish standing. *See Wet Seal, Inc. v. FD Mgmt., Inc.*, 82 USPQ2d 1629, 1635 (TTAB 2007) (citing *Lipton Industries, Inc.*, 213 USPQ at 189).

B. Priority

We turn next to the issue of whether there is a genuine issue of material fact regarding Opposer's asserted priority of use. To establish priority on a likelihood of confusion claim brought under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), a party must prove that, vis-a-vis the other party, it owns a "mark or trade name previously used in the United States ... and not abandoned..." 15 U.S.C. § 1052; *see also Otto Roth & Co., Inc. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40, 43-44 (CCPA 1981); *Giersch v. Scripps Networks, Inc.*, 90 USPQ2d 1020, 1023 (TTAB 2009). A plaintiff may establish its own prior rights in a mark through actual use or

through use analogous to trademark use, such as use in advertising brochures, trade publications, catalogues, newspaper advertisements and Internet websites, which create a public awareness of the designation as a trademark identifying the party as a source. *See* Sections 2(d) and 45 of the Trademark Act, 15 U.S.C. §§ 1052(d) and 1127; *T.A.B. Sys. v. PacTel Teletrac*, 77 F.3d 1372, 37 USPQ2d 1879, 1882-83 (Fed. Cir. 1996), vacating *PacTel Teletrac v. T.A.B. Sys.*, 32 USPQ2d 1668 (TTAB 1994).

The Federal Circuit has emphasized that when an opposer seeks to prove first use prior to that of the applicant, the totality of the evidence of prior use should be weighed. *See West Florida Seafood, Inc. v. Jet Rests., Inc.*, 31 F.3d 1122, 31 USPQ2d 1660, 1663 (Fed. Cir. 1994). Declaration testimony accompanied by corroborating evidence, if sufficiently probative, may suffice to establish priority. *Kohler*, 82 USPQ2d at 1108.

For purposes of determining priority of use, Applicant's date of first use is February 8, 2017, the filing date of the subject application.⁷ *See Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1378 (Fed. Cir. 2002); *Otto Roth*, 209 USPQ at 43; *Automedx, Inc. v. Artivent Corp.*, 95 USPQ2d 1976, 1978 (TTAB 2010); *Miller Brewing Co. v. Anheuser-Busch, Inc.*, 27 USPQ2d 1711, 1714 (TTAB 1993). Through the Tobin Affidavit, Opposer has presented clear, consistent, convincing and uncontradicted evidence which shows that since well before February 8, 2017, Opposer has continuously used the HOP ERUPTION mark in connection with beer. The record shows that before Applicant filed its subject application,

⁷ Applicant did not submit any evidence of earlier use of its mark.

Opposer had sold over five hundred cases of its HOP ERUPTION beer in Oregon and Washington.⁸ Tobin Affidavit at ¶¶9 and 10 and Exs. 7 and 8 (5 TTABVUE 23-26, 57-115). Moreover, Opposer's HOP ERUPTION beer has been featured in the Corvallis Gazette-Times and has been reviewed by customers on beer rating websites such as Beer Guy PDX, RateBeer, BeerAdvocate and Untappd. Tobin Affidavit at ¶¶4, 5 and 12-15 and Exs. 3, 4 and 10-13 (5 TTABVUE 22, 26-27, 36-49, 125-295). Opposer continues to sell its HOP ERUPTION beer as evidenced by its invoices reflecting sales as recent as October 2017 and customer reviews as recent as December 2017. Tobin Affidavit at ¶¶9-11 and 14 and Exs. 7, 8 and 10-13 (5 TTABVUE 23-26, 57-115, 125-295). Accordingly, Opposer has demonstrated its priority of use of the mark HOP ERUPTION in connection with beer.

C. Likelihood of Confusion

Whether there is a likelihood of confusion between two marks presents an issue of law based on underlying facts, namely findings under the *DuPont* factors. Among these factors is the number and nature of similar marks in use on similar goods, which bears on the strength or weakness of an opposer's mark. *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015). "The weaker an opposer's mark, the closer an applicant's mark can come without causing a likelihood of confusion and thereby invading what amounts to its comparatively

⁸ To the extent Applicant argues that Opposer has only used its mark in intrastate commerce, and has therefore failed to establish priority, Applicant is incorrect. *See Christian Faith Fellowship Church v. Adidas AG*, 841 F.3d 986, 120 USPQ2d 1640, 1644-47 (Fed. Cir. 2016); *First Niagara Ins. Brokers, Inc. v. First Niagara Financial Group, Inc.*, 476 F.3d 867, 81 USPQ2d 1375, 1378 (Fed. Cir. 2007).

narrower range of protection.” *Id.*; see also *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005).

As evidence of third-party use, Applicant has submitted screen shots that purport to show third-party use of Mount Vesuvius Hop Eruption by O’Boys; Eruption Imperial Red by Worthy Brewing; Fresh Hop IPA by Eruption Brewing Co.; and Hop Eruption by Legacy Brewing Company. Applicant’s evidence of third-party use is at least sufficient to raise a potentially dispositive issue of fact about the strength of Opposer’s mark, and whether the extent and character of the third-party uses of the term “eruption” in marks such as HOP ERUPTION have lessened the source-identifying significance of Opposer’s mark, thereby precluding summary judgment on likelihood of confusion. See *Lloyd’s Food Prods.*, 25 USPQ2d at 2029.

Upon careful consideration of the parties’ arguments and evidence, and drawing all inferences in favor of Applicant as the non-movant, we find that Opposer has not met its burden of demonstrating that there are no genuine disputes of material fact at least as to the conceptual and commercial strength of Opposer’s mark, the scope of protection to be accorded Opposer’s mark, and whether the parties’ marks are confusingly similar.⁹ Accordingly, Opposer’s motion for partial summary judgment on its pleaded claim of likelihood of confusion is **denied**.¹⁰

⁹ The issues identified for trial are not necessarily the only issues remaining.

¹⁰ The evidence submitted in connection with a motion for summary judgment or opposition thereto is of record only for consideration of that motion. To be considered at final hearing, evidence must be properly introduced during the appropriate trial period. See *Levi Strauss & Co. v. R. Josephs Sportswear, Inc.*, 28 USPQ2d 1464, 1465 (TTAB 1993); *Pet Inc. v. Bassetti*,

Conclusion

Opposer’s motion for partial summary judgment is **granted** as to Opposer’s standing and priority of use with respect to its HOP ERUPTION mark, and **denied** as to its pleaded claim of likelihood of confusion with Applicant’s mark.

Opposer’s Claim Under Section 2(a) of the Trademark Act

As discussed above, Opposer’s claim of false suggestion of a connection is not sufficiently pleaded. However, inasmuch as the Board freely grants leave to amend pleadings if found to be insufficient, *see* TBMP § 503.03, Opposer is allowed until **May 21, 2018** in which to file an amended notice of opposition that properly alleges false suggestion of a connection, if Opposer has a reasonable basis for doing so, failing which this proceeding will go forward on Opposer’s sole claim of likelihood of confusion. Applicant is allowed until **June 10, 2018** in which to file an answer or otherwise respond to the amended notice of opposition, if an amended notice of opposition is filed, or to file an answer to the original notice of opposition if no amended notice of opposition is filed.

Trial Schedule

Proceedings are **resumed**. Remaining dates are reset as follows:

Amended Notice of Opposition Due	May 21, 2018
Amended Answer Due	June 10, 2018
Expert Disclosures Due	October 10, 2018
Discovery Closes	November 9, 2018
Plaintiff’s Pretrial Disclosures Due	December 24, 2018

219 USPQ 911, 913 (TTAB 1983). Additionally, Applicant is advised that, to be admissible at trial, evidence of use of a mark contained in a third-party website must include that website’s full URL and the date accessed or printed. *See* Trademark Rule 2.122(e)(2); *Safer*, 94 USPQ2d at 1039.

Plaintiff's 30-day Trial Period Ends	February 7, 2019
Defendant's Pretrial Disclosures Due	February 22, 2019
Defendant's 30-day Trial Period Ends	April 8, 2019
Plaintiff's Rebuttal Disclosures Due	April 23, 2019
Plaintiff's 15-day Rebuttal Period Ends	May 23, 2019
BRIEFS ARE DUE AS FOLLOWS:	
Plaintiff's Main Brief Due	July 22, 2019
Defendant's Main Brief Due	August 21, 2019
Plaintiff's Reply Brief Due	September 5, 2019

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).