

**This Opinion is Not a
Precedent of the TTAB**

Hearing Date: January 12, 2023

Mailed: April 18, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Ultrasun AG

v.

Sun Precautions, Inc.
—

Cancellation No. 92072352
—

David B. Ritchie of Canaanlaw PC and
Robert E. Camors, Jr. of the Law Offices of Bob Camors,
for Ultrasun AG.

Eric A. Lindberg of Corr Cronin LLP,
for Sun Precautions, Inc.
—

Before Goodman, English and Hudis,
Administrative Trademark Judges.

Opinion by Hudis, Administrative Trademark Judge:

On March 4, 2014, Sun Precautions, Inc. (“Respondent”) filed Application Serial No. 86210971 (the “971 Application”) to register the standard character mark ULTRA SUN, based upon Respondent’s allegation of a bona fide intention to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. § 1051(b). So that its intent-to-use application could issue as a registration, Respondent filed a Statement

of Use under Trademark Act Section 1(d), 15 U.S.C. § 1051(d), on October 4, 2018. Respondent's Statement of Use was accepted by the U.S. Patent and Trademark Office ("USPTO") on October 30, 2018. Respondent's resulting U.S. Registration No. 5622939 (the "939 Registration") for the ULTRA SUN mark (with the term "SUN" disclaimed) issued on the Principal Register on December 4, 2018 for "[c]osmetic sunscreen preparations; sunscreen creams; water resistant sunscreen, sunscreen preparations" in International Class 3.

In its Petition to Cancel,¹ Ultrasun AG ("Petitioner") seeks cancellation of Respondent's '939 Registration for the ULTRA SUN mark on the following grounds:

Count I: Respondent's ULTRA SUN mark so resembles Petitioner's common law ULTRASUN mark, which Petitioner uses in connection with goods that are identical to those goods identified in Respondent's '939 Registration, as to be likely to cause confusion, mistake, or deception, in derogation of Trademark Act Section 2(d), 15 U.S.C. § 1052(d);

Count II: Respondent's '939 Registration is void because Respondent is not the owner of the ULTRA SUN mark;

Count III: Respondent procured the '939 Registration by the commission of fraud on the USPTO in violation of Trademark Act Section 14(3), 15 U.S.C. § 1064(3);

¹ Original Petition to Cancel at 1 TTABVUE; Amended ESTTA Cover Sheet for Petition at 4 TTABVUE. Order noting amendment of Petition as of right at 5 TTABVUE. *See CSC Holdings, LLC v. SAS Optimhome*, 99 USPQ2d 1959, 1961-62 (TTAB 2011) ("[T]he ESTTA electronic form, along with any attached supplementary elaboration of the basis for ... [relief], together serve as the operative complaint in the ... proceeding.").

References to the pleadings, the evidence of record and the parties' briefs refer to the Board's TTABVUE docket system. Coming before the designation TTABVUE is the docket entry number; and coming after this designation are the page and paragraph references, if applicable. Page references herein to the prosecution of the '971 Application that issued as the '939 Registration refer to the online database of the USPTO's Trademark Status & Document Retrieval ("TSDR") system. All citations to documents contained in the TSDR database are to the downloadable .pdf versions of the documents in the USPTO TSDR Case Viewer.

Count IV: Respondent did not make use in commerce of the ULTRA SUN mark as of the deadline for filing its Statement of Use [October 6, 2018] (the “Critical Date”) pursuant to Trademark Act Section 1(d), 15 U.S.C. § 1051(d); and

Count V: Respondent made fraudulent use of the registration symbol (“®”) in the specimen it submitted to the USPTO with its Statement of Use.

Respondent denied the salient allegations of the Petition to Cancel in its Answer, and asserted numerous affirmative defenses.²

I. Petitioner’s Untimely Summary Judgment Motion and its Outcome

On June 18, 2021, Petitioner moved for summary judgment, which the parties fully briefed.³ In its Order of September 20, 2021, the Board denied Petitioner’s motion as being untimely filed.⁴

As part of its Order denying summary judgment, the Board exercised its discretion to review the parties’ pleadings. In doing so, the Board struck Counts II, III and V of the Petition to Cancel as having been insufficiently pleaded, leaving Counts I and IV to proceed to trial. The Board also struck the entirety of Respondent’s asserted affirmative defenses as insufficiently pleaded. Neither party subsequently sought to resurrect its stricken claims or defenses.

Finally, the Board’s Order encouraged the parties to proceed to trial via Accelerated Case Resolution (“ACR”). The Board’s ACR invitation noted that the parties could rely on the materials submitted in connection with Petitioner’s

² Answer, 11 TTABVUE.

³ Petitioner’s Summary Judgment Motion, 18 TTABVUE; Respondent’s Opposition to Summary Judgment, 22 TTABVUE; Petitioner’s Reply in further support of Summary Judgment, 23 TTABVUE.

⁴ Board Order of September 20, 2021, 25 TTABVUE.

summary judgment motion, with or without supplementation of additional materials or stipulations.

II. Accelerated Case Resolution

On April 14, 2022, the parties submitted to the Board their Stipulation and proposed schedule to engage in ACR (“ACR Stipulation”).⁵ Among other matters, the parties’ ACR Stipulation provided for: the future submission of stipulated facts, including a schedule therefor; an expert witness disclosure and discovery schedule; a schedule for the submission of further briefing on the merits and the filing of evidentiary objections (to the extent such objections may be asserted pursuant to the parties’ agreement); the parties’ ability to use the materials submitted with their summary judgment briefs; the Board’s ability to resolve disputed facts; the waiver of evidentiary objections except for relevance, materiality and the standards governing the consideration of expert witness testimony; supplementation of the evidentiary record over and above what the parties submitted during summary judgment briefing; the waiver of pretrial disclosures; and the waiver of the right to cross-examine witnesses.

In its Order of April 20, 2022,⁶ the Board approved the parties’ ACR Stipulation, also construing it as providing that: the parties agree to forego trial; the parties’ filings will be treated as the final record and briefs; the Board would issue a final decision on the merits in accordance with the evidentiary burden at trial; the Board

⁵ ACR Stipulation, 34 TTABVUE.

⁶ Board Order of April 20, 2022, 35 TTABVUE.

would decide disputed facts as part of the final decision; and the Board's decision would be final, and judicially reviewable as set forth in Trademark Rule 2.145, 37 C.F.R. § 2.145.

III. Evidentiary Burden and Disposition of this Proceeding

The case is fully briefed. Opposer bears the burden of proving its nonuse claim by a preponderance of the evidence. *United States Shoe Corp. v. J. Riggs West, Inc.*, 221 USPQ 1020, 1022 (TTAB 1984). Having considered the evidentiary record, the parties' arguments and applicable authorities, as explained below, we find that Petitioner has carried this burden, and grant the Petition. Because we resolve this proceeding on Petitioner's nonuse claim, we need not reach Petitioner's priority and likelihood of confusion claim. *CBC Mtg. Agency v. TMRR, LLC*, 2022 USPQ2d 748, at *29 n. 22 (TTAB 2022); *Multisorb Tech., Inc. v. Pactiv Corp.*, 109 USPQ2d 1170, 1171 (TTAB 2013).

IV. The Evidentiary Record

The record consists of the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of the involved '939 Registration. In addition, pursuant to the parties' ACR Stipulation, the record includes the following:

A. Materials filed with Petitioner's Summary Judgment Motion

- Report and Declaration of Petitioner's expert, Nathan A. Beaver ("Beaver SJ Decl."), with exhibits [18 TTABVUE 23-66].
- Report and Declaration of Petitioner's expert, Laurel Mintz ("Mintz SJ Decl."), with exhibits [18 TTABVUE 67-113].
- Declaration of Petitioner's General Manager, Benedikt Irniger ("Irniger SJ Decl."), with exhibits [18 TTABVUE 114-296].
- Declaration of Petitioner's counsel, David B. Ritchie ("Ritchie SJ Decl."), with exhibits [18 TTABVUE 297-475].

- The parties' Stipulation regarding the Ritchie SJ Decl., with an exhibit [24 TTABVUE 2-16].

B. Materials filed with Respondent's Opposition to Petitioner's Summary Judgment Motion

- Declaration of Respondent's President, Shaun Hughes ("Hughes SJ Decl."), with exhibits [22 TTABVUE 28-48].
- Declaration of Respondent's counsel, Eric A. Lindberg ("Lindberg SJ Decl."), with exhibits [22 TTABVUE 49-69].

C. Stipulated ACR Evidence

- The Parties Joint Fact Stipulation ("Fact Stip.") [36 TTABVUE 2-9].

D. Petitioner's Additional ACR Evidence⁷

- Supplement to Report and Declaration of Petitioner's expert, Nathan A. Beaver ("Beaver Suppl. Decl.") [37 TTABVUE 2-4].
- Materials Filed with Petitioner's ACR Brief:
 - Amended Declaration of Petitioner's counsel, David B. Ritchie ("Amend. Ritchie Decl.") [38 TTABVUE 33-36].
 - Declaration of Petitioner's counsel, Robert E. Camors, Jr. ("Camors Decl."), with exhibits [38 TTABVUE 37-306]. The exhibits to Mr. Camors Declaration comprise discovery pleadings and e-mail exchanges between the parties' counsel regarding the scheduling and scope of Mr. Hughes's discovery deposition, as well as the entire (albeit redacted) transcript and exhibits from Mr. Hughes's discovery deposition ("Hughes Depo").
- Second Declaration of Petitioner's counsel, Robert E. Camors, Jr. ("Second Camors Decl."), with an exhibit [39 TTABVUE 2-8]. The exhibit to Mr. Camors Second Declaration is the signed page from the transcript of Mr. Hughes's discovery deposition.
- Third Declaration of Petitioner's counsel, Robert E. Camors, Jr. ("Third Camors Decl."), with exhibits [41 TTABVUE 2-19].
- Second Declaration of Petitioner's General Manager, Benedikt Irniger ("Second Irniger Decl.") [41 TTABVUE 21-23].

⁷ Respondent did not file any additional ACR evidence.

V. Evidentiary and Briefing Issues

Before proceeding to the merits of this cancellation proceeding, we address a few evidentiary and briefing matters.

A. Respondent's Objection to the Report and Declaration of Petitioner's expert, Laurel Mintz

Petitioner's expert, Laurel Mintz, is the founder and CEO of an agency that provides digital strategies (that is, activities directed online) and event production services (such as launch events, trade shows, conferences, and the like) to support the marketing and advertising of consumer-packaged goods in the cosmetic and beauty industry.⁸ In her Report and Declaration, Ms. Mintz offers two opinions: (1) Respondent's actions or inactions concerning its use of the ULTRA SUN mark in the sale and marketing of its sunscreen products should be evaluated within the context of the cosmetics industry,⁹ and (2) Respondent's actions taken in the introduction of its ULTRA SUN sunscreen product to market did not constitute a bona fide use of the ULTRA SUN mark in the ordinary course of trade in the cosmetics industry.¹⁰

Although it does not challenge Ms. Mintz's qualifications "to offer any expert testimony in a hypothetical case,"¹¹ (whatever Respondent intended this to mean), Respondent contends that Ms. Mintz's opinions do not satisfy the standards for the admissibility of expert testimony pursuant to Fed.R.Evd. 702 and *Daubert v. Merrell*

⁸ Mintz SJ Decl., 18 TTABVUE 68, ¶¶ 5-6.

⁹ Mintz SJ Decl., 18 TTABVUE 72-73, ¶¶ 16-18.

¹⁰ Mintz SJ Decl., 18 TTABVUE 73-79, ¶¶ 19-32.

¹¹ Respondent's Brief, 40 TTABVUE 17.

Dow Pharms., Inc., 509 U.S. 579, 27 USPQ2d 1200, 1205-07 (1993).¹² Petitioner responds that Ms. Mintz’s opinions will assist the Board in evaluating whether Respondent’s use of the ULTRA SUN mark significantly diverged from the type of commercial use that is common to the sunscreen, cosmetic or skin treatment products industries – a useful benchmark for determining whether Respondent’s use of its mark was bona fide in the ordinary course of trade.¹³

The Board has “broad discretion in determining whether to admit or exclude expert testimony.” *Corporacion Habanos, S.A. v. Guantanamera Cigars Co.*, 102 USPQ2d 1085, 1094 (TTAB 2012) (quoting *U.S. ex rel. Miller v. Bill Harbert Int’l Constr., Inc.*, 608 F.3d 871, 895 (D.C. Cir. 2010)). In our exercise of this discretion, the opinions of witnesses, even those of experts, cannot and do not serve as a substitute for our own judgment in determining the issues presented in this proceeding. *Frito-Lay N. Am., Inc. v. Princeton Vanguard, LLC*, 124 USPQ2d 1184, 1190 (TTAB 2017); *Edwards Lifesciences Corp. v. Vigilanz Corp.*, 94 USPQ2d 1399, 1401-02 (TTAB 2010) (“[T]he Board ... will not substitute the opinion of a witness, even an expert witness, for ... [its own] evaluation of the facts.”).

The evidentiary record regarding Respondent’s use, or nonuse, of the ULTRA SUN mark in connection with its identified sunscreen products as of the Critical Date in question has been plainly laid out by the parties, extensively and sometimes repetitively so. The Board is perfectly capable of deciding, without the assistance of

¹² Respondent’s Brief, 40 TTABVUE 16-21.

¹³ Petitioner’s Reply Brief, 42 TTABVUE 7-8.

expert testimony, whether Respondent used the ULTRA SUN mark in commerce as of the Critical Date; as defined by the Trademark Act and interpretive decisions. Thus for our purposes, Ms. Mintz's expert opinions are of little assistance.

“That ... [Ms. Mintz's] testimony may have little probative value[, however,] is no reason to strike it. Therefore, ... [Respondent's] objection to ... [Ms. Mintz's Report and Declaration] testimony is overruled.” *Edwards Lifesciences*, 94 USPQ2d at 1401. “The Board ultimately is capable of weighing the relevance and strength or weakness of ... [Ms. Mintz's] objected-to testimony ..., including any inherent limitations, and this precludes the need to strike [it]” *Hanscomb Consulting, Inc. v. Hanscomb Ltd.*, 2020 USPQ2d 10085, at *3 (TTAB 2020) (cleaned up).

B. The Way the Parties Filed and Cited to their Evidence

So that the parties, their counsel and perhaps other parties in future proceedings can benefit and possibly reduce their litigation costs, we take a moment to comment on the way the parties filed and cited to their evidence in this cancellation proceeding. To their credit, the parties filed a detailed factual stipulation as part of the ACR trial record.¹⁴ Having done so, the parties wasted the efficiencies of ACR, their own resources, and the Board's resources by filing the entirety of interrogatory answers (multiple times),¹⁵ the entirety of admissions responses (twice),¹⁶ the entirety of

¹⁴ Fact Stip. 36 TTABVUE 2-9.

¹⁵ Respondent's Interrogatory Answers and Supplemental Answers, 18 TTABVUE 448-57, 462-69; 24 TTABVUE 4-16; 41 TTABVUE 4-17.

¹⁶ Respondent's Admissions' Responses, 18 TTABVUE 418-43; 38 TTABVUE 300-03.

answers to a deposition on written questions,¹⁷ as well as the entirety of Mr. Hughes's discovery deposition transcript and all exhibits¹⁸ containing information that in several instances was duplicative of their fact stipulation. Portions of the parties' testimony declarations also duplicated their ACR factual stipulation.

The Trademark Rules of Practice provide that only portions of the fruits of the above types of discovery need be filed, with the adverse party having the option of filing any additional portions that in fairness present a full picture of the discovery information obtained; entitling all parties to rely on the materials filed, no matter who filed them.¹⁹ The parties elected not to take advantage of the efficiencies afforded them under the Trademark Rules, not only increasing their trial costs by submitting duplicative evidence but also taxing the resources of the Board and thus delaying the issuance of this decision. The Board views the practice of introducing cumulative evidence at trial with disfavor. *Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at *12-13 (TTAB 2022).

Pursuant to the parties' informal understanding,²⁰ portions of Mr. Hughes's discovery deposition transcript and exhibits were submitted as part of the public

¹⁷ Petitioner's Responses to Deposition on Written Questions, 22 TTABVUE 54-60.

¹⁸ Hughes Discovery Deposition Transcript and exhibits, 38 TTABVUE 59-306; 39 TTABVUE 6.

¹⁹ Regarding the parties' ability to file only portions of the fruits of discovery, and the ability to rely thereon at trial, *see* Trademark Rules 2.120(k)(3)-(5), (7); 37 C.F.R. §§ 2.120(k)(3)-(5), (7).

²⁰ Parties' e-mail exchange regarding redactions to Mr. Hughes' discovery deposition transcript. Camors Decl., 38 TTABVUE 55-57, Exh. 7.

record in redacted form.²¹ Unredacted versions of these materials were not filed under seal. Unless the parties, as approved by the Board, provide their own form of protective order, the Board's Standard Protective Order is automatically imposed on parties in all trial proceedings. Trademark Rule 2.116(g), 37 C.F.R. § 2.116(g); *see also*, TRADEMARK TRIAL AND APPEAL BOARD MANUAL PROCEDURE (TBMP) § 412.01 (2022). From our review of the docket entries in this proceeding, there is no indication that the parties submitted their own form of protective order.

Trademark Rule 2.126(c), 37 C.F.R. § 2.126(c), and the Board's Standard Protective Order, provide that, when confidential materials are filed with the Board, redacted portions should be filed as part of the public record while the unredacted versions of those same materials should be filed under seal. *See* discussion at TBMP § 412.04. Petitioner did not follow these directives when filing Mr. Hughes's discovery deposition transcript and exhibits with the Board. This practice is discouraged, as it deprives the Board from having a full picture of what may be disclosed by these materials and their significance to the overall proceeding. *Edwards Lifesciences*, 94 USPQ2d at 1402-03.

Before leaving the subject of their evidentiary **submissions**, we also draw the parties' attention to the following passage from the Board's Manual of Procedure, discussing how evidence should be **cited** in briefs:

For each significant fact recited, the recitation of facts should include a citation to the portion of the evidentiary record where supporting evidence may be found. When referring to the record in an inter partes

²¹ Redacted portions of Hughes Discovery Deposition Transcript and Exhibits, 38 TTABVUE 96, 112-16, 148-49, 215-26, 241-48, 250-51, 254-56, 262.

proceeding before the Board, parties should include a citation to the TTABVUE entry and page number (*e.g.*, 1 TTABVUE 2) to allow the reader to easily locate the cited materials.

TBMP § 801.03; *see also Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1477 n.6 (TTAB 2014) (“Citations to the record in ... [Board] opinion[s] are to the TTABVUE docket entry number and the electronic page number where the document or testimony appears.”).

In its opening brief, Petitioner did not use the TTABVUE docket and page number format at all when citing to the record. In Respondent’s brief, it used a combination of the partial TTABVUE docket and page number system and its own numbering system to cite to the record. Petitioner appears to have mimicked Respondent’s “unique” citation style in Petitioner’s reply brief. “[T]he parties use[of] their own numbering systems ... made it extremely cumbersome to provide evidentiary references for use in this [decision]; lengthening the time for review of the record, drafting of the decision and ultimately for issuance of ... [our] opinion.” *Made in Nature*, 2022 USPQ2d 557, at *15. We encourage the parties and their counsel to use the Board’s accepted evidence citation style in future submissions.

VI. The Parties

Respondent, Sun Precautions, Inc., has been in business since 1992; catering to sun-sensitive customers from the dangers caused by over-exposure to the sun. Respondent’s products include hats, shirts, pants, sun protection accessories, sunscreens and water garment cleaners.²² Petitioner, Ultrasun AG, has been in

²² Hughes SJ Decl., 22 TTABVUE 28-29, ¶¶ 2, 4.

business since 1969;²³ developing, marketing and selling cosmetic products relating to sun-induced aging, including sun protection products, after sun products, hand creams and body lotions.²⁴

VII. Entitlement to a Statutory Cause of Action

Entitlement to a statutory cause of action, formerly referred to as “standing” by the U.S. Court of Appeals for the Federal Circuit and the Board, is an element of the plaintiff’s case in every inter partes case. *See Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at *6-7 (Fed. Cir. 2020), *cert. denied*, 141 S. Ct. 2671 (2021); *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, at *3 (Fed. Cir. 2020), *cert. denied*, 142 S. Ct. 82 (2021); *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014). To establish entitlement to a statutory cause of action, a plaintiff must demonstrate: (i) an interest falling within the zone of interests protected by the statute and (ii) a reasonable belief in damage proximately caused by the registration of the mark. *Corcamore*, 2020 USPQ2d 11277 at *4 (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 109 USPQ2d 2061, 2067-70 (2014)); *Meenaxi Enter., Inc. v. Coca-Cola Co.*, 38 F.4th 1067, 2022 USPQ2d 602, at *2 (Fed. Cir. 2022); *Made in Nature*, 2022 USPQ2d 557, at *16-17.

Stated another way, a plaintiff is entitled to bring a statutory cause of action by demonstrating a real interest in the proceeding and a reasonable belief of damage.

²³ Irniger SJ Decl., 18 TTABVUE 114, ¶ 3.

²⁴ Petitioner’s Responses to Respondent’s Deposition on Written Questions, 22 TTABVUE 54, Answer to Question 1.

Australian Therapeutic, 2020 USPQ2d 10837, at *3; *Empresa Cubana*, 111 USPQ2d at 1062. There is “no meaningful, substantive difference between the analytical frameworks expressed in *Lexmark* and *Empresa Cubana*.” *Corcamore*, 2020 USPQ2d 11277 at *4. Thus, “a party that demonstrates a real interest in cancelling a trademark under [Trademark Act Section 14, 15 U.S.C.] § 1064 has demonstrated an interest falling within the zone of interests protected by [the Trademark Act] Similarly, a party that demonstrates a reasonable belief of damage by the registration of a trademark demonstrates proximate causation within the context of § 1064.” *Id.*, at *7.

Pending with the USPTO are Petitioner’s Application Serial Nos. 88607186, 88607102, 88606984 and 88606946 to register marks comprising or including the term ULTRASUN for sunscreen products and cosmetics intended for protection against the sun. All four of Petitioner’s trademark applications have been refused registration based on a likelihood of confusion with Respondent’s ULTRA SUN mark of the ’939 Registration, and presently are in suspended status awaiting the outcome of this proceeding.²⁵ Additionally, Petitioner in the past has advertised and sold ULTRASUN branded after-tan cosmetic products to customers in the United States, but has refrained from continuing to sell ULTRASUN branded sunscreen and related

²⁵ Fact Stip., 36 TTABVUE 7, ¶¶ 35-39; Irniger SJ Decl., 18 TTABVUE 119-20, 219-96, ¶¶ 15-16, Exh. E; Second Irniger Decl., 41 TTABVUE 22-23, ¶ 6.

cosmetics products in this country until this proceeding is decided; due to a concern that Respondent might accuse Petitioner of trademark infringement.²⁶

Petitioner thus has established its interest in marks similar to the mark registered by Respondent, a reasonable belief in damage proximately caused by the registration of Respondent's mark, and thus Petitioner's entitlement to bring a colorable claim under Trademark Act Section 2(d). *See Empresa Cubana*, 111 USPQ2d at 1062 (“[T]he desire for a registration with its attendant statutory advantages is a legitimate commercial interest, so to satisfy the requirements for bringing a cancellation proceeding.”) (cleaned up); *Books on Tape, Inc. v. Booktape Corp.*, 836 F.2d 519, 5 USPQ2d 1301, 1302 (Fed. Cir. 1987) (“Petitioner, a competitor of respondent, clearly has an interest in the outcome beyond that of the public in general and has ... [entitlement to bring a statutory cause of action].”); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982) (rejection of petitioner's pending application, on the basis of the challenged registration, supports standing to cancel). Once Petitioner established its entitlement to bring a statutory cause of action under Trademark Act Section 2(d), it is entitled to rely on any other statutory grounds set forth in the Trademark Act that negate Respondent's right to its subject registration. *See Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1728 (Fed. Cir. 2012).

²⁶ Irniger SJ Decl., 18 TTABVUE 115-19, 121-218, ¶¶ 5-14, Exhs. A-D; Second Irniger Decl., 41 TTABVUE 21-22, ¶¶ 4-5; Petitioner's Responses to Respondent's Deposition on Written Questions, 22 TTABVUE 55-60, Answers to Questions 3-6, 8-9; Fact Stip., 36 TTABVUE 2-3, 7, ¶¶ 2-4, 7, 34.

VIII. Use in Commerce and the Federal Trademark Registration Process: Applicable Law

“Trademark rights arise from the use of a mark in commerce.” *Bertini v. Apple Inc.*, ___ F.4th ___, 2023 USPQ2d 407, at *2 (Fed. Cir., 2023). “The federal registration of a trademark does not create an exclusive property right in the mark. The owner of the mark already has the property right established by prior use. ... However, ... trademark owners who register their marks with the [US]PTO are afforded additional protection[s] not provided by the common law.” *In re Int’l Flavors & Fragrances Inc.*, 183 F.3d 1361, 51 USPQ2d 1513, 1516 (Fed. Cir. 1999) (discussing the rights afforded by federal registration). Thus, with the exception of registrations issued pursuant to international conventions not relevant to this proceeding,²⁷ a federal trademark registration will not issue until proof of the owner’s proper use of its mark in commerce has been filed with, and accepted by, the USPTO. Trademark Act Sections 1(a)-(d) and 7(a), 15 U.S.C. §§ 1051(a)-(d) and 1057(a); Trademark Rules 2.34(a), 2.88(a)-(c); 37 C.F.R. §§ 2.34(a)(1), 2.88(a)-(c).

A trademark application that is filed based on use of the mark in commerce under Trademark Act 1(a) (which includes a date or dates of first use and one or more specimens demonstrating that use) is examined and, if it meets all the filing and registrability requirements and a statutory basis for refusing registration is not found by the USPTO, the mark is published for potential opposition. If no oppositions are filed, the mark is registered for the goods or services recited in the application.

²⁷ See Trademark Act Sections 44(d) and (e), 15 U.S.C. §§ 1126(d) and (e) (Paris Convention); Trademark Act Sections 66(a) and 69, 15 U.S.C. §§ 1141f(a) and 1141i (Madrid Protocol).

Trademark Rules 2.34(a)(1), 2.61(a), 2.80, 2.81(a), 2.151; 37 C.F.R. §§ 2.34(a)(1), 2.61(a), 2.80, 2.81(a), 2.151.

A trademark application that is filed based on a bona fide intent to use the mark in commerce under Trademark Act 1(b), as in this case, is examined and, if it meets all the filing and registrability requirements and a statutory basis for refusing registration is not found by the USPTO, it is published for potential opposition. If no oppositions are filed, the USPTO will issue a notice of allowance. The owner thereafter has a total of 36 months from the issuance of the notice of allowance – including a first period of six months, followed by (if necessary) five six-month extensions obtained by way of timely-filed extension requests – to file a statement of use of the mark (which includes a date or dates of first use and one or more specimens demonstrating that use). If an acceptable statement of use is not timely filed within the time or times provided therefor, the application is deemed abandoned. On the other hand, once an acceptable statement of use and specimen are accepted by the USPTO, the mark is registered for the goods or services recited in the application. Trademark Rules 2.34(a)(2), 2.61(a), 2.80, 2.81(b), 2.88, 2.89, 2.151; 37 C.F.R. §§ 2.34(a)(2), 2.61(a), 2.80, 2.81(b), 2.88, 2.89, 2.151.

“The ... [Trademark] Act is a comprehensive scheme for regulating economic activity — namely the marking of commercial goods — and the ‘use in commerce’ pre-registration requirement is an ‘essential part’ of the Act.” *Christian Faith Fellowship Church v. Adidas AG*, 841 F.3d 986, 120 USPQ2d 1640, 1645 (Fed. Cir. 2016). Trademark Act Section 45 defines “use in commerce” for goods as:

the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark. ... [A] mark shall be deemed to be in use in commerce ... on goods when — (A) it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto, or if the nature of the goods makes such placement impracticable, then on documents associated with the goods or their sale, and (B) the goods are sold or transported in commerce[.]

15 U.S.C. § 1127. Since “the ... [Trademark] Act defines “commerce’ as ‘all commerce which may lawfully be regulated by Congress[,]’ ... to register a mark ... one must **sell or transport goods bearing the mark** such that the sale or transport would be subject to Congress’s power under the Commerce Clause, which includes its power to regulate interstate commerce.” *Christian Faith Fellowship*, 120 USPQ2d at 1642 (emphasis added); *see also In re Silenus Wines, Inc.*, 557 F.2d 806, 194 USPQ 261, 267 (CCPA 1977) (The “importation of wine bearing ... [the importer’s] trademark from France and intrastate sale of imported wine is a ‘use in commerce’ as defined by the Trademark Act”).

In addition to its reviewing courts, the Board also has had prior occasions to opine on whether certain activities constitute “use in commerce” of a trademark sufficient to support registration — which inform our analysis of the facts and issues involved in this proceeding. *See, e.g., Tao Licensing, LLC v. Bender Consulting Ltd. d/b/a Asian Pac. Beverages*, 125 USPQ2d 1043, 1052-55 (TTAB 2017) (neither importation of vodka from a foreign supplier to the respondent, nor the respondent’s distribution of complimentary vodka samples in the nature of preliminary advisory consultations rather than bona fide sales in the ordinary course of trade, qualified as sufficient use in commerce to support registration); *Clorox Co. v. Salazar*, 108 USPQ2d 1083, 1086

(TTAB 2013) (holding that the applicant did not sell or transport his identified goods bearing the mark in commerce as of the filing date of his use-based application. The depiction of the applicant's mark on his website, unaccompanied by any actual sale or transport of the goods in commerce before his application filing date, constituted mere advertising of his goods. Further, any alleged use subsequent to the filing date of applicant's use-based application was not bona fide use of the mark as of the application filing date.); *Automedx, Inc. v. Artivent Corp.*, 95 USPQ2d 1976, 1982 (TTAB 2010) (finding that, for purposes of establishing its common law trademark priority, the opposer's ventilator sales bearing its mark to the military were for legitimate business reasons (i.e., to test and refine the portable ventilators) and not merely to reserve the right to register its marks).

IX. Circumstances Surrounding the Filing and Prosecution of the Underlying Application resulting in the issuance of Respondent's Trademark Registration

As noted at the beginning of this decision, Respondent filed the '971 Application to register its ULTRA SUN mark on March 4, 2014, on the basis of intent-to-use under Trademark Act Section 1(b).²⁸ Applicant's ULTRA SUN mark and application details were published for potential opposition on August 11, 2015.²⁹ When no oppositions or requests for extension of time to oppose were filed within the period of time to do so, the USPTO issued a Notice of Allowance on October 6, 2015³⁰ – giving

²⁸ Fact Stip., 36 TTABVUE 3, ¶ 8. We note that the parties' Stipulation recites the incorrect Application Serial Number.

²⁹ See Notice of Publication of July 22, 2015, and OG Publication Confirmation of August 11, 2015, advising Respondent of the publication date.

³⁰ Fact Stip., 36 TTABVUE 3, ¶ 9.

Respondent six months, or until April 6, 2016, to file a Statement of Use or a Request for Extension of Time to do so.

Thereafter, Respondent filed the following Requests for Extension of Time to submit a Statement of Use, all of which were accepted by the USPTO (with October 6, 2018 being the Critical Date, or final date by which Respondent had to file an acceptable Statement of Use to keep the '971 Application from going abandoned):³¹

Extension Number	Filing Date	Date Extension Granted	Next Date to file Statement of Use
1	March 28, 2016	March 30, 2016	October 6, 2016
2	October 3, 2016	October 26, 2016	April 6, 2017
3	March 21, 2017	March 23, 2017	October 6, 2017
4	September 26, 2017	September 28, 2017	April 6, 2017
5	April 2, 2018	October 5, 2018	October 6, 2018

Respondent filed its Statement of Use on October 4, 2018.³² Relevant passages from the Statement of Use,³³ signed by Respondent's counsel, provide:

The mark was first used by the applicant, or the applicant's related company, licensee, or predecessor in interest at least as early as 10/03/2018, and first used in commerce at least as early as 10/03/2018, and is now in use in such commerce. The applicant is submitting one specimen for the class showing the mark as used in commerce on or in connection with any item in the class, consisting of a(n) photograph of actual goods bearing the mark.

* * *

³¹ Fact Stip., 36 TTABVUE 3, ¶¶ 9-10.

³² Fact Stip., 36 TTABVUE 3, ¶ 11.

³³ Statement of Use, Hughes Depo., Exh. 1, 38 TTABVUE 197-200; *see also* Fact Stip. 36 TTABVUE 4, ¶ 12. Although it was unnecessary to make the Statement of Use of record because it automatically was in the record, Trademark Rule 2.122(b), we cite to this version of the document simply for convenience in citing to the evidence.

For a trademark or service mark application, the mark is in use in commerce on or in connection with all the goods/services in the application or notice of allowance, or as subsequently modified.

* * *

The specimen(s) shows the mark as used on or in connection with the goods/services/collective membership organization in commerce.

The specimen filed with Respondent's Statement of Use appears as follows:

Solumbra Non-Tinted Ultra Sun™ Mineral Sunscreen 40 SPF

Solumbra®
by Sun Precautions®

800.882.7860 | Customer Service | Sign Up | Sign In | Shopping Bag

Celebrate Sun Protection · New Styles for Women & Men

SHOP CLOTHING SHOP BY ACTIVITY 100+ SPF Sun Protection Clothing

WOMENS
Tops
Cover-ups / Tunics
Button Front
Zip Up
Pullover
Stretch
Swim
Jackets
Hats
Wide Brim
Shade Caps
Solumbra Fabric
Canvas Fabric
Bottoms
Solumbra | Fabric
Leggings and Stretch
Fabric
Accessories

UNISEX / MENS
Tops
Button Front
Zip Up
Pullover
Stretch
Swim
Hats
Wide Brim
Shade Caps
Solumbra Fabric
Canvas Fabric
Straw
Pants
Accessories

KIDS
ACCESSORIES & SUNSCREENS
Accessories
Sunscreens
SPECIALS
NEW STYLES

Solumbra Non-Tinted Ultra Sun™ Mineral Sunscreen 40 SPF
Style #58100
\$39.05
★★★★★ Write Review

Solumbra Ultra Sun SPF 40 is a No Tint sunscreen perfect for hands and face that blends into light colored skin. This mineral, non-greasy formula with Photoplex™ technology leaves a sheer matte finish on the skin. Use as a primer and layer foundation or BB cream on top without worrying about excess oil or shine.

Quantity 1

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Complete your outfit with head-to-toe Solumbra

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Sun Protection Clothing: Sun Protective Clothing for Women Sun Protective Clothing for Men Sun Protective Clothing for Kids Sun Protection Hats	Ordering: Order By Phone View our Online Catalog Sizing Chart Shipping Options	After you Order: Order Status Care Instructions My Account Returns/Exchanges	Company: Our History Solumbra is 100+ SPF and Lasts 10 Reasons to Wear Solumbra Why Wear Sun Protective Clothing
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https://www.sunprecautions.com/product/58100/10/3/2018 1:10:39 PM

Solumbra Non-Tinted Ultra Sun™ Mineral Sunscreen 40 SPF

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The added red arrows within the image above point to the locations on Respondent's specimen of use where the ULTRA SUN mark appears. Respondent's basis for filing the Statement of Use was that the product had been **offered for sale** as of October 4, 2018, the date that the Statement of Use was filed.³⁴

X. Circumstances Surrounding Respondent's Ordering and Subsequent Sale of ULTRA SUN Sunscreen

Shaun Hughes is the President and founder of Respondent.³⁵ According to Mr. Hughes, Respondent typically offers its products to customers and prospective customers by way of an annual Spring/Summer product catalog (which comes out in March); on its website; in its Seattle, Washington retail store; and at the American Academy of Dermatology annual convention (the "Dermatology Convention").³⁶

In March 2018, Hughes met with the president of Respondent's supplier at the Dermatology Convention to discuss Respondent's need for ULTRA SUN branded sunscreen.³⁷ Mr. Hughes followed up with the supplier to discuss the anticipated product order in July 2018, and further exchanged e-mail correspondence with the supplier from August through October 2018.³⁸ All of the ULTRA SUN sunscreen tubes that were to be sold, or ever were sold, by Respondent were purchased from, and produced by, this third-party supplier.³⁹ In fact, in August 2018, Respondent

³⁴ Hughes SJ Decl., 22 TTABVUE 33, ¶ 19.

³⁵ Hughes Depo., 38 TTABVUE 65-66.

³⁶ Hughes SJ Decl., 22 TTABVUE 29-30, ¶¶ 3, 7.

³⁷ Hughes SJ Decl., 22 TTABVUE 31, ¶ 14; Hughes Depo., 38 TTABVUE 82-83.

³⁸ Hughes Depo., 38 TTABVUE 83-84, 136-37, 228-29, 232-34, Depo. Exhs. 7, 10.

³⁹ Respondent's Responses to Petitioner's Admission Request Nos. 71-78, Ritchie SJ Decl., 18 TTABVUE 435-36, Exh. B.

placed a 1,000-tube order of ULTRA SUN branded sunscreen from its supplier;⁴⁰ paid for half of the order on October 4, 2018; and paid for the remaining amount on March 28, 2019.⁴¹ Notably, Respondent admits that, even by well after the Critical Date of October 6, 2018 (that is, by October 17, 2018), none of its first order of ULTRA SUN sunscreen was ready to be shipped to it, nor had it been so shipped by that time.⁴²

As of a few days before the October 6, 2018 Critical Date, October 3 and 4, 2018, Respondent had only one tube of ULTRA SUN sunscreen (the “Single Tube”) in its possession, which Respondent had received from the supplier on October 1, 2018.⁴³ The only product Respondent had in its possession as of the Critical Date was that same Single Tube of sunscreen.⁴⁴ In correspondence exchanged between Mr. Hughes and the supplier in late October 2018, Mr. Hughes referred to this Single Tube as a “prototype.”⁴⁵

On October 3, 2018, a picture of the Single Tube bearing the mark was uploaded to Respondent’s website, and that same tube was displayed for sale at Respondent’s

⁴⁰ Hughes SJ Decl., 22 TTABVUE 31-32, ¶ 14.

⁴¹ Fact Stip., 36 TTABVUE 4, ¶ 17; Hughes Depo., 38 TTABVUE 84; Respondent’s Responses to Petitioner’s Admission Request Nos. 69, Ritchie SJ Decl., 18 TTABVUE 434, Exh. B.

⁴² Respondent’s Responses to Petitioner’s Admission Request Nos. 60-61, Ritchie SJ Decl., 18 TTABVUE 432, Exh. B.

⁴³ Hughes SJ Decl., 22 TTABVUE 32, ¶ 16; Hughes Depo., 38 TTABVUE 72, 75; Respondent’s Supplemental Answer to Petitioner’s Interrogatory No. 1, Third Camors Decl., 41 TTABVUE 7, Exh. 1. The full product name was Solumbra Non-tinted Ultra Sun Mineral Sunscreen SPF 40 (the “Product”). Fact Stip., 36 TTABVUE 6, ¶ 28. For avoidance of doubt, the parties’ references to the “Single Tube” and the “Product” are one in the same thing. Hughes Depo., 38 TTABVUE 78.

⁴⁴ Hughes Depo., 38 TTABVUE 72.

⁴⁵ Hughes Depo., 38 TTABVUE 92-94, 144-46, 289-99, 304-06, Depo. Exhs. 28, 30.

Seattle store the next day (October 4, 2018).⁴⁶ There is no evidence that the Single Tube was sold on or before the Critical Date of October 6, 2018.⁴⁷ According to Respondent's inventory records, the Single Tube that was displayed for sale at Respondent's Seattle store as of October 3, 2018 was still there on December 19, 2018,⁴⁸ and Mr. Hughes took a picture of it on December 21, 2018.⁴⁹

Based on her review of Mr. Hughes's discovery deposition transcript and exhibits, the TRADEMARK MANUAL OF EXAMINING PROCEDURE and other references on the USPTO's website, and her marketing expertise as summarized above,⁵⁰ Petitioner's expert Laurel Mintz opines that Respondent did not make a bona fide use of the ULTRA SUN mark in the ordinary course of trade in the cosmetics industry.⁵¹ Mr. Hughes criticizes Ms. Mintz's declaration testimony regarding her opinion of

⁴⁶ Hughes SJ Decl., 22 TTABVUE 32, ¶¶ 16-17; Hughes Depo., 38 TTABVUE 71, 78-79, 129, 252-53, Depo. Exh. 13; Respondent's Answer to Petitioner's Interrogatory No. 24, Ritchie SJ Decl., 18 TTABVUE 455-56, Exh. D; Respondent's Answer to Petitioner's Interrogatory Nos. 28-29, Ritchie SJ Decl., 18 TTABVUE 462-63, Exh. E; Respondent's Supplemental Answer to Petitioner's Interrogatory Nos. 1, 24, Third Camors Decl., 41 TTABVUE 7, 15, Exh. 1.

⁴⁷ Fact Stip., 23 TTABVUE 6, ¶ 27 ("Respondent Sun Precautions does not have any invoice, sales receipt or other documentation showing the purchase by a customer of the Single Tube Solumbra Non-tinted Ultra Sun Mineral Sunscreen SPF 40 that was in its possession on or before October 6, 2018 or at any time during the year 2018."). None of Respondent's records capturing its ULTRA SUN product sales from telephone or online product orders between October 1, 2018 and April 14, 2020 show any sales of the product before March 28, 2019. Fact Stip., 22 TTABVUE 6, ¶ 29; Hughes Depo., 38 TTABVUE 94-107, 215-27, Depo. Exh. 6.

⁴⁸ Hughes Depo., 38 TTABVUE 111-19, 235-49, Depo. Exh. 11.

⁴⁹ Hughes Depo., 38 TTABVUE 121-22. In its Supplemental Answer to Petitioner's Interrogatory No. 1, Respondent says the picture of the product was taken on December 19, 2018. Hughes Decl., 22 TTABVUE 33, ¶ 21; *see also* Stipulation regarding the Ritchie SJ Decl., 24 TTABVUE 7. This date difference is of no consequence to the issues we are deciding in this proceeding.

⁵⁰ Mintz SJ Decl., 18 TTABVUE 67-72, ¶¶ 3-15.

⁵¹ Mintz SJ Decl., 18 TTABVUE 73-79, ¶¶ 19-32.

Respondent's business practices.⁵² We find Ms. Mintz's opinions to be of low probative value for the purpose of evaluating whether Respondent used the ULTRA SUN mark in commerce for the products of interest as of the Critical Date of October 6, 2018. What we find more edifying are the actions Respondent did or did not take as of the Critical Date, based on our own review of the evidentiary record.

XI. The Parties Contentions

Petitioner asserts that the '939 Registration is void, because Respondent did not use the ULTRA SUN mark in commerce for its identified goods within the meaning of the Trademark Act prior to the expiration of the period by which Respondent was required to prove such use in support of the underlying '971 intent-to-use Application.⁵³ As we discussed above, that Critical Date was October 6, 2018. In support of its assertion, Petitioner contends that, as of the Critical Date, Respondent: (i) had only one item in its possession containing the goods and bearing the mark, which was only a "prototype,"⁵⁴ (ii) had engaged in no more than token efforts to use the ULTRA SUN mark in commerce in connection with Respondent's identified goods,⁵⁵ and (iii) had not sold the goods bearing the mark.⁵⁶

Respondent contends that, by the Critical Date, it had used the ULTRA SUN mark in commerce for its identified goods by virtue of the following activities: (i) displaying

⁵² Hughes SJ Decl., 22 TTABVUE 37, ¶ 30.

⁵³ Petitioner's Brief, 38 TTABVUE 14.

⁵⁴ Petitioner's Brief, 38 TTABVUE 19-20.

⁵⁵ Petitioner's Brief, 38 TTABVUE 26-29.

⁵⁶ Petitioner's Brief, 38 TTABVUE 15.

for sale a picture of a tube of sunscreen bearing the mark on its Internet website,⁵⁷ and (ii) displaying the same tube of sunscreen bearing the mark at its retail store, thereby making it available for sale.⁵⁸ In sum, Respondent argues that, as of the Critical Date, its “trademarked product existed and ... [Respondent] was capable of selling the product.”⁵⁹

In Reply, Petitioner argues that the above-described activities in which Respondent engaged prior to the Critical Date were “mere advertising” that do not qualify as use of the ULTRA SUN mark in commerce as of that date.⁶⁰

XII. Discussion and Analysis

As we explained in greater detail above, the Trademark Act is a comprehensive scheme for regulating the marking of commercial goods, and the “use in commerce” pre-registration requirement is an essential part of that statutory scheme. *Christian Faith Fellowship*, 120 USPQ2d at 1645. The Trademark Act and Trademark Rules of Practice provide for the filing of a trademark application on the basis of an applicant’s intent to use the mark in commerce. Trademark Act Section 1(b); Trademark Rule 2.32; 37 C.F.R. § 2.32. However, an intent-to-use trademark applicant cannot maintain the intent-to-use basis for (or status of) its application forever, and eventually must file a Statement of Use with acceptable proof of use by a certain date. Trademark Rules 2.34(a)(2), 2.61(a), 2.80, 2.81(b), 2.88, 2.89, 2.151.

⁵⁷ Respondent’s Brief, 40 TTABVUE 25.

⁵⁸ Respondent’s Brief, 40 TTABVUE 25-26.

⁵⁹ Respondent’s Brief, 40 TTABVUE 26.

⁶⁰ Respondent’s Reply Brief, 42 TTABVUE 15-20.

The definition of “use in commerce” provided in the Trademark Act is clear and concise. A mark is deemed to be in use in commerce on goods when (1) the mark is placed in any manner on the goods, their containers, displays associated the goods, tags or labels affixed to the goods, or on documents associated with the goods or their sale, and (2) the goods are **sold or transported** in commerce. Trademark Act Section 45 (definition of “use in commerce”). There is absolutely nothing in the evidentiary record demonstrating that, by the Critical Date of October 6, 2018, Respondent had sold or transported its identified goods bearing the ULTRA SUN mark. By the Critical Date, all Respondent had done was to display one tube of ULTRA SUN sunscreen to make the item available for sale on its website, and make that same tube available for sale at its retail store. Neither of these activities constituted a sale or transport of the identified goods bearing the mark in commerce as of the Critical Date. *Clorox Co. v. Salazar*, 108 USPQ2d at 1086.

So there is no misunderstanding, we also wish to address Respondent’s apparent subsidiary argument that, because the supplier shipped (from out-of-state) the Single Tube of sunscreen to Respondent, which Respondent received on October 1, 2018, this constituted Respondent’s use in commerce of the ULTRA SUN mark before the critical date of October 6, 2018.⁶¹ We disagree. “[A] shipment of goods from the manufacturer to the trademark owner ... [does] not satisfy the use or transportation in commerce requirement [for the mark to have been used in commerce], as ... [this constitutes] a [mere] shipment of the goods in preparation for offering the goods for

⁶¹ Respondent’s Brief, 40 TTABVUE 12, 29.

sale.” *Tao Licensing*, 125 USPQ2d at 1052 (citing *Avakoff v. Southern Pac. Co.*, 765 F.2d 1097, 226 USPQ 435, 436 (Fed. Cir. 1985)).

Before closing this decision, we pause for a moment to consider how Petitioner’s nonuse claim, and Respondent’s defense thereto, was litigated. The parties spent an inordinate and unnecessary amount of discovery, trial and briefing time on events that transpired long after the Critical Date of October 6, 2018. All of this was wasted effort that focused on irrelevant facts and issues. Once it was established that Respondent had not used its ULTRA SUN mark in commerce by the Critical Date, all of its activities directed to the ULTRA SUN mark and product(s) after that date were of no consequence. *Clorox Co. v. Salazar*, 108 USPQ2d at 1086.

Decision: The Petition to Cancel is granted, on the ground that Respondent did not make use in commerce of the ULTRA SUN mark as of the deadline for filing its Statement of Use pursuant to Trademark Act Section 1(d). Respondent’s Registration No. 5622939 will be cancelled in due course.