

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Hearing: July 9, 2024

Mailed: July 26, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board
—

Paradise Holdings, Inc.

v.

Neo Nyc inc

—
Cancellation No. 92078182
—

Robert Zarco and Branda Phang of Zarco Einhorn Salkowski, P.A.,
for Paradise Holdings, Inc.

Christian Sanchelima and Liany Estevez of Sanchelima & Associates, P.A.,
for Neo Nyc inc.

—
Before Shaw, Dunn, and Elgin,
Administrative Trademark Judges.

Opinion by Elgin, Administrative Trademark Judge:

Neo Nyc inc (“Respondent”) owns a Principal Register registration for the mark shown below for “Bottoms as clothing for pants, shorts, skirts, mini skirts; Tops as clothing for shirts, dresses, pullovers, coverups, rompers,” in International Class 25:¹

¹ Registration No. 6467151 issued August 31, 2021 under Trademark Act Section 1(a), 15 U.S.C. § 1051(a), claiming January 1, 2018 as the date of first use anywhere and the date of first use in commerce. “RESORT WEAR” is disclaimed. The mark is described as “the blue



In its Petition for Cancellation, Paradise Holdings, Inc. (“Petitioner”) seeks cancellation of Respondent’s registration under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on the basis of likelihood of confusion with Petitioner’s common law mark SEASPICE in prior use on “Bottoms as clothing for pants, shorts, shirts; and Tops as clothing for shirts, t-shirts, and caps” and “the provision of restaurant services.”²

wording ‘SEASPICE’ below the blue wording ‘RESORT WEAR’ with a stylized sail boat containing shades of yellow and blue surrounding the wording.” The colors blue and yellow are claimed as a feature of the mark. We note that, in its filings, Respondent refers to itself as “Neo NYC Inc.” *See, e.g.*, Resp. Br. at 2 (38 TTABVUE 2). We use Respondent’s name as it appears on the subject registration certificate.

Citations in this opinion to the briefs and other materials in the case docket refer to TTABVUE, the Board’s online docketing system. *See New Era Cap Co. v. Pro Era, LLC*, 2020 TTAB LEXIS 199, at *4 n.1 (TTAB 2020). As part of an internal Board pilot program on broadening acceptable forms of legal citation in Board cases, the citation form in this opinion is in a form provided in Section 101.03 of the TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) (June 2024). This opinion cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals only by the page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board, this opinion employs citation to the Lexis (“LEXIS”) database. Practitioners should also adhere to the practices set forth in TBMP § 101.03.

² Petition for Cancellation ¶ 2 (1 TTABVUE 3). To the extent Respondent cites one of the two paragraphs in the petition that refer only to “goods” in support of the position that use with restaurant services was not pleaded, we note that in addition to plainly pleading use of the mark with restaurant services in paragraph 2, the petition also refers to “services and goods” in paragraphs 3, 8, and 10 (*id.* at 3-5).

We note that Petitioner erroneously entered Respondent’s registration as a pleaded registration when it filed the Petition for Cancellation. We have corrected the record.

In its Answer, Respondent denied the salient allegations of the Petition for Cancellation.³ Respondent also filed, without Petitioner's consent, a motion to amend the first use and first use in commerce dates of the mark in its involved registration, and the Board deferred consideration of the motion to trial.⁴ We consider the motion to amend in the course of our discussion of priority, below.

The case is fully briefed, and counsel for Petitioner and Respondent appeared at an oral hearing before the panel on July 10, 2024.

For the reasons set forth below, we deny the Petition for Cancellation and grant the motion to amend the subject registration.

I. The Record

The record consists of the pleadings and, pursuant to Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1), the prosecution file for Respondent's involved registration.

In addition, Petitioner introduced the following evidence under a Notice of Reliance:

1. Discovery deposition transcript of Petitioner's owner, Maryam Miranda and referenced exhibits;⁵
2. Declaration of Maryam Miranda and attached exhibits;⁶ and

³ Respondent also asserted "affirmative defenses/amplified denials" in its Answer, *see* 4 TTABVUE 3-4. Because they are merely amplified denials, we need not address them. *JNF LLC v. Harwood Int'l Inc.*, Can. No. 92070634, 2022 TTAB LEXIS 328, at *4 n.8 (TTAB 2022) (citing *Mars Generation, Inc. v. Carson*, Opp. No. 91224726, 2021 TTAB LEXIS 386, at *4 (TTAB 2021)).

⁴ 9 and 12 TTABVUE (motion to amend and fee); 17 TTABVUE 3-4 (Board order). Respondent paid the required fee and submitted the required declaration. 12 TTABVUE.

⁵ 20 TTABVUE 23-135 ("M. Miranda Dep.").

⁶ 20 TTABVUE 136-308 ("M. Miranda Decl.").

3. Declaration of Carlos Miranda, owner and manager of Petitioner and Petitioner's restaurant, Seaspice Brasserie & Lounge.⁷

Respondent introduced the following evidence:

1. First and Second Declarations of Respondent's President, Elad Danieli, and attached exhibits;⁸
2. Notice of Reliance No. 1 on Petitioner's Answers to Respondent's First Set of Interrogatories Nos. 10-12, 14, 21, 28, 30, 34, and 43-45;⁹
3. Notice of Reliance No. 2 on Petitioner's responses to Respondent's Requests for Admission ("RFA") Nos. 12, 14-16, 23, 33, 35 of Part A and Nos. 1-2 of Part B;¹⁰ and
4. Notice of Reliance No. 3 on copies of documents produced by Petitioner during discovery in support of its priority claim.¹¹

II. Evidentiary Issues

Before proceeding to the merits of the refusal, we address several evidentiary matters.

A. Respondent's Objections

Respondent objects and moves to strike Petitioner's arguments and testimonial evidence to Petitioner's unpleaded registration for SEASPICE BRASSERIE &

⁷ 20 TTABVUE 309-23 ("C. Miranda Decl.").

⁸ 24 TTABVUE ("First Danieli Decl."); 25 TTABVUE ("Second Danieli Decl.").

⁹ 26 TTABVUE.

¹⁰ 27 TTABVUE.

¹¹ 28 TTABVUE. Documents produced during discovery that are not printed publications, official records, or Internet materials generally may not be submitted under a Notice of Reliance. Trademark Rule 2.120(k)(3)(ii), 37 C.F.R. § 2.120(k)(3)(ii); *see also* TBMP § 704.11. However, Respondent made of record Petitioner's Responses to Respondent's Admissions indicating that the documents comprised of invoices and email messages are "genuine." *See* Pet. Resp. to RFA No. 55(B) (27 TTABVUE 11). Petitioner also did not move to strike the evidence as improper, and therefore it waived or forfeited any such objection. *Moke Am. LLC v. Moke USA, LLC*, 2020 TTAB LEXIS 18, at *13-21 (TTAB 2020).

LOUNGE (Reg. No. 5013617) for “Bar services; Restaurant services.”¹² Respondent argues that the registration was not pleaded in support of Petitioner’s claim and is not relevant.¹³ A review of the Petition for Cancellation confirms that Petitioner did not plead this registration in support of its Section 2(d) claim.

Petitioner also attached to Ms. Miranda’s declaration a registration certificate for a second registration that it contends that it owns, namely Reg. No. 4828764 for the mark SEASPICE for “Restaurant and bar services,” though she does not authenticate it.¹⁴ Although Respondent did not specifically object to this second registration, we note that it suffers from the same defect as Reg. No. 5013617, having not been pleaded. Although an unpleaded registration cannot be a ground for cancellation of the subject mark, like third-party registrations, it may be considered for “whatever probative value” it may lend to the plaintiff’s showing under the *DuPont* factors in its case in chief. *Safer, Inc. v. OMS Invs., Inc.*, 2010 TTAB LEXIS 51, at *9 (TTAB 2010) (admitting non-pleaded registration for whatever probative value it may have); *see also* TBMP § 704.03(b)(1)(A) (distinguishing between a federal registration owned by the plaintiff in an opposition or cancellation proceeding and one pleaded by the

¹² Resp. Br. at 6-8 (38 TTABVUE 7-9). The Board’s decision on the parties’ cross-motions for summary judgment informed Petitioner that it could not rely on its unpleaded registrations. 17 TTABVUE 13. On July 19, 2023, Respondent filed a motion to strike this evidence. 29 TTABVUE 2. The Board deferred consideration of the motion to trial and instructed Respondent to raise the matter in its brief. 31 TTABVUE 2.

¹³ Resp. Br. at 6-8 (38 TTABVUE 7-9).

¹⁴ M. Miranda Decl. Exh. A (20 TTABVUE 143).

plaintiff in its complaint).¹⁵ Accordingly, we have considered the registrations for whatever probative value they have.

Respondent also objects to news articles identified only by URLs in Petitioner's Declarations and not submitted as evidence, and the testimony evidence supporting Petitioner's allegation of actual confusion as untimely and hearsay.¹⁶ Providing an Internet link to an article is insufficient to make the article of record. *TV Azteca, S.A.B. de C.V. v. Martin*, 2018 TTAB LEXIS 417, at *11 n.14 (TTAB 2018). Thus, we have not accessed the links in Petitioner's brief and do not consider any evidence purportedly found at the links.

Because, as shown below, Petitioner's failure to prove its priority makes it unnecessary to reach whether there is any likelihood of confusion, we need not address Respondent's objections to the testimony evidence supporting Petitioner's allegation of actual confusion.¹⁷

¹⁵ In addition to being unpleaded, Petitioner did not introduce copies of its registrations with current status and title information. *See* M. Miranda Decl. Exh. A (*id.* at 141-43); C. Miranda Decl. Exh. A (*id.* at 314). In fact, both 2015 certificates list the owner not as Petitioner Paradise Holdings, Inc. but as another entity, Hemingway's Warehouse LLC. *See* Trademark Rule 2.122(d)(1), 37 C.F.R. § 2.122(d)(1) (to be received in evidence, a pleaded registration must show current status and title). Nor did Petitioner introduce any testimony that it is the current owner of either of the registrations, or that they are subsisting.

¹⁶ Resp. Br. at 9-10 (*id.* at 10-11). Respondent also objected to Petitioner's submission of its own discovery responses, which was unnecessary because the Board previously granted a motion to strike the discovery responses, *see* 23 TTABVUE. We have not considered this evidence.

¹⁷ *See* Resp. Br. at 8-9 (*id.* at 9-10).

B. Stipulated Evidence

Testimony declarations filed by both parties were signed outside of the parties' respective testimony periods. *See* Declaration of Maryam Miranda (signed August 25, 2022);¹⁸ First Declaration of Elad Danieli (signed July 15, 2022);¹⁹ Second Declaration of Elad Danieli (signed September 23, 2022).²⁰ Because neither party moved to strike the opposing party's untimely declarations, we treat the declarations as stipulated into the record. *L.C. Licensing Inc. v. Berman*, 2008 TTAB LEXIS 756, at *4 n.6 (TTAB 2008) (letters and emails considered as stipulated into the record because opposer treated materials as being of record, setting forth in its brief that such materials are part of the evidence of record).

Similarly, Petitioner offered the discovery deposition of its own witness, Ms. Miranda, under a notice of reliance.²¹ Under Trademark Rule 2.120(k)(1), 37 C.F.R. § 2.120(k)(1), the discovery deposition of a party may be offered in evidence only by an adverse party. However, Respondent lists the Miranda deposition under its own evidence of record and also relies upon the deposition in its brief.²² Accordingly, we find the deposition also has been stipulated into the record.

¹⁸ M. Miranda Decl. (20 TTABVUE 136-308).

¹⁹ First Danieli Decl. (24 TTABVUE).

²⁰ Second Danieli Decl. (25 TTABVUE). Mr. Danieli's second declaration incorporated and affirmed his allegations in this declaration. Second Danieli Decl. ¶ 3 (*id.* at 2). Mr. Miranda's declaration was signed during Petitioner's testimony period. *See* 20 TTABVUE 313 (signed April 17, 2023).

²¹ M. Miranda Dep. (20 TTABVUE 23-135).

²² *See* Resp. Br. at 5, 27-28 (38 TTABVUE 6, 28-29).

C. Requests for Admission

Respondent made of record certain of Petitioner's responses to its Requests for Admission.²³ Only admissions in response to Requests for Admissions are admissible by Notice of Reliance. Trademark Rule 2.120(k), 37 C.F.R. § 2.120(k). "[U]nlike an admission (or a failure to respond which constitutes an admission), the denial of a request for admission establishes neither the truth nor the falsity of the assertion, but rather leaves the matter for proof at trial." *Peterson v. Awshucks SC, LLC*, 2020 TTAB LEXIS 520, at *2 n.9 (TTAB 2020) (citation omitted). *See also* TBMP § 704.10. Thus, the denials have no evidentiary value.

D. Illegible and Missing Evidence

The evidence submitted by both parties suffers from significant defects. Some exhibits attached to the declarations submitted by Ms. Miranda and Mr. Miranda on behalf of Petitioner (in addition to incorrectly having been submitted under a notice of reliance) are missing, and some are mixed up. We have endeavored to piece together the evidence from the context of the declarations and Petitioner's argument.

Many of the exhibits supporting the first declaration submitted by Mr. Danieli on behalf of Respondent are illegible. It is the responsibility of the party making submissions to the Board via the electronic database to ensure that the evidence has, in fact, been properly made of record. Trademark Rule 2.126(a)(2), 37 C.F.R. § 2.126(a)(2) ("Exhibits pertaining to an electronic submission must be made

²³ 27 TTABVUE.

electronically as an attachment to the submission and must be clear and legible.”). See *RxD Media, LLC v. IP Application Dev. LLC*, 2018 TTAB LEXIS 37, at*13 n.16 (TTAB 2018) (“Illegible evidence is given no consideration.”), *aff’d*, 377 F. Supp. 3d 588 (E.D. Va. 2019), *aff’d*, 986 F.3d 361 (4th Cir. 2021). Nonetheless, as we discussed above, Mr. Danieli’s first declaration and exhibits were submitted previously in support of Respondent’s summary judgment motion, and that copy is far more legible.²⁴ We have exercised our discretion to consult these copies where necessary to decipher unclear evidence.

III. Entitlement to a Statutory Cause of Action

Entitlement to a statutory cause of action (formerly termed “standing”) is an element of the plaintiff’s case in every inter partes proceeding. See *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 1303 (Fed. Cir. 2020); *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 1274 (Fed. Cir. 2014); *Illyrian Imp., Inc. v. ADOL Sh.p.k.*, 2022 TTAB LEXIS 91, at *19 (TTAB 2022). “A party in the position of plaintiff may [oppose] registration of a mark when such [opposition] is within the zone of interests protected by the statute, 15 U.S.C. § 106[3], and the plaintiff has a reasonable belief in damage that is proximately caused by registration of the mark.” *JNF LLC*, 2022 TTAB LEXIS 328, at *5 (citing *Meenaxi Enter., Inc. v. Coca-Cola Co.*, 38 F.4th 1067, 1070 (Fed. Cir. 2022) and *Corcamore*, 978 F.3d at 1303).

Petitioner argues that it has established “standing because the operative pleading (i.e. October 7, 2021 Petition for Cancellation) establishes that Petitioner possesses a

²⁴ See 10 TTABVUE 17-412.

real interest, a personal stake, in the outcome of the proceeding beyond that of a mere intermeddler . . . [and] a reasonable basis in fact exists that Petitioner stands to be damaged unless Respondent's registration of the Infringing Mark is canceled."²⁵ However, none of these averments were admitted by Respondent in its answer. Statements made in pleadings cannot be considered as evidence on behalf of the party making them; such statements must be established by competent evidence during the time for taking testimony. *Philanthropist.com, Inc. v. Gen. Conference Corp. of Seventh-Day Adventists*, 2021 TTAB LEXIS 205, at *21 (TTAB 2021); *see also* TBMP § 704.06(a).

Respondent does not contest Petitioner's entitlement to maintain the proceeding. In any event, Petitioner has "assert[ed] a likelihood of confusion [claim] which is not wholly without merit[.]" *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1029 (CCPA 1982), and has made evidence of "record establish[ing] at least the minimum requirements [for entitlement to a cause of action] pertinent to this case." *Id.* at 1030. In particular, Petitioner made of record testimony and evidence (most notably, Ms. Miranda's and Mr. Miranda's declarations and attached exhibits)²⁶ supporting its claim that its SEASPICE mark was in use prior to Respondent's filing date or date of first use; that Petitioner's and Respondent's marks are similar; and that use of Respondent's mark is likely to cause confusion with Petitioner's mark. This evidence establishes Petitioner's entitlement to bring and maintain this

²⁵ Pet. Main Br. at 7 (37 TTABVUE 8).

²⁶ M. Miranda Decl. (20 TTABVUE 23-135); C. Miranda Decl. (*id.* at 309-23).

proceeding. *See Giersch v. Scripps Networks, Inc.*, 2009 TTAB LEXIS 72, at *7 (TTAB 2009) (proof of common law rights in plaintiff's mark establishes entitlement to bring proceeding).

IV. Priority for Likelihood of Confusion Claim

To establish priority on a likelihood of confusion claim brought under Trademark Act §2(d), a party must prove that it owns “a mark or trade name previously used in the United States . . . and not abandoned” Trademark Act Section 2(d), 15 U.S.C. §1052. Petitioner bears the burden of proving priority by a preponderance of the evidence. *Genesco Inc. v. Martz*, 2003 TTAB LEXIS 123, at *22 (TTAB 2003). “To establish priority, the [pleaded] mark must be distinctive, inherently or otherwise, and [the plaintiff] must show proprietary rights in a mark as to which [the defendant's] mark gives rise to a likelihood of confusion.” *DeVivo v. Ortiz*, 2020 TTAB LEXIS 15, at *7 (TTAB 2020).²⁷

These proprietary rights may arise from a prior registration, prior trademark or service mark use, prior use as a trade name, prior use analogous to trademark or service mark use, or any other use sufficient to establish proprietary rights. *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1162 (Fed. Cir. 2002) (internal citations omitted); *Otto Roth & Co. v. Univ. Foods Corp.*, 640 F.2d 1317, 1320 (CCPA 1981).

²⁷ Respondent has not disputed the inherent distinctiveness of Petitioner's mark.

A. Respondent's Priority Date

We turn first to Respondent's asserted priority date and its motion to amend its registration. Respondent may rely for priority purposes on the constructive use filing date of its underlying application (that is, September 14, 2020). Trademark Act Section 7(c), 15 U.S.C. § 1057(c); *see also Brewski Beer Co. v. Brewski Bros. Inc.*, 1998 TTAB LEXIS 116, at *10 (TTAB 1998), cited in *Tao Licensing, LLC v. Bender Consulting Ltd.*, 2017 TTAB LEXIS 437, at *11 (TTAB 2017). Respondent asserted dates of first use in its registration as early as January 1, 2018. However, Respondent now claims in both its motion to amend the dates of first use in its registration and in opposition to Petitioner's claim of priority that the actual dates of first use of its SEASPICE RESORT WEAR composite mark are as early as June 10, 2015.²⁸

Under Section 7(e) of the Trademark Act, 15 U.S.C. § 1057(e), a registration may be amended "for good cause." When a registrant seeks "to prove a date of first use earlier than the date alleged in its application for registration . . . , its proof of that earlier date must be 'clear and convincing.'" *Bass Pro Trademarks LLC v. Sportsman's Warehouse, Inc.*, 2008 TTAB LEXIS 16, at *31 (TTAB 2008) (citing *Hydro-Dynamics Inc. v. George Putnam & Co.*, 811 F.2d 1470, 1473 (Fed. Cir. 1987)). The standard is the same whether a party moves to amend its registration or seeks to rely at trial on dates of use earlier than those in the registration. *See TiVo Brands LLC v. Tivoli, LLC*, 2018 TTAB LEXIS 439, at *16 n.38 (TTAB 2019) ("To prove a

²⁸ *See* Resp. Br. at 11 (38 TTABVUE 12). For convenience and brevity, because the evidence supporting the motion to amend (9 TTABVUE) and Respondent's trial evidence are identical, we refer to the trial evidence.

date of first use of a mark that is earlier than the date stated in an application, the applicant must provide clear and convincing evidence.”) (citations omitted). This is a “heavier burden” than a preponderance of the evidence and “requires enhanced substantiation,” because an earlier date of first use than that alleged in the application is “a change of position from one ‘considered to have been made against interest at the time of filing the application.’” *Hydro-Dynamics*, 811 F.2d at 1473 (quoting *Stanspec Co. v. Am. Chain & Cable Co.*, 531 F.2d 563, 567 (CCPA 1976)).

Clear and convincing proof may consist of declaration testimony, if it is sufficiently probative. Oral testimony, if sufficiently probative, normally is satisfactory to establish priority of use in a trademark proceeding. *Daniel J. Quirk, Inc. v. Village Car Co.*, 2016 TTAB LEXIS 474, at *18-19 (TTAB 2016) (quoting *Powermatics, Inc. v. Globe Roofing Prods. Co.*, 341 F.2d 127 (CCPA 1965)). Such testimony should not be characterized by contradictions, inconsistencies, or indefiniteness, but should carry with it conviction of its accuracy and applicability. *Threshold.TV Inc. v. Metronome Enters. Inc.*, 2010 TTAB LEXIS 314, at *11 (TTAB 2010) (a party “is entitled to prove an earlier date of use than the date alleged in its application, but its proof must be clear and convincing and must not be characterized by contradiction, inconsistencies or indefiniteness.”). The testimony of even a single witness with personal knowledge of the facts may be sufficient to prove first use if it is clear, convincing, consistent, uncontradicted, and sufficiently circumstantial to convince the Board of its probative value. *See Bass Pro Trademarks LLC*, 2008 TTAB LEXIS

16, at *32 (citing cases). Nonetheless, it is well established that “testimony given long after the event, while entitled to consideration, should be carefully scrutinized” *Elder Mfg. Co. v. Int’l Shoe Co.*, 194 F.2d 114, 118 (CCPA 1952). “[T]estimony is obviously strengthened by corroborative documentary evidence.” *Id.*; see also *Exec. Coach Builders, Inc. v. SPV Coach Co.*, 2017 TTAB LEXIS 201, at *36 (TTAB 2017) (same).

Respondent relies on Mr. Danieli’s testimony to establish its priority and amended dates of first use. Mr. Danieli attested that Respondent has sold beach and casual resort wear bearing Respondent’s SEASPICE RESORT WEAR mark since June 10, 2015.²⁹ Respondent’s initial sales were as a wholesaler selling clothing bearing the mark to business and commercial customers, but later it expanded into direct-to-consumer sales.³⁰ Mr. Danieli testified that all articles of clothing sold by Respondent to customers include the mark on affixed clothing tags or labels, such as the following, which show Style Nos. GZ1003 and GZ3102 (explained below):³¹

²⁹ First Danieli Decl. ¶ 6 (24 TTABVUE 3).

³⁰ First Danieli Decl. ¶ 7 (*id.*).

³¹ First Danieli Decl. ¶ 8, Exh. ED-1 (*id.* at 3, 20, 21, 28). The pictures of the tags affixed to the clothing appear to be front and reverse, and one side bears the mark that is the subject of Respondent’s registration. The label sewn into to the clothing appears to bear a different mark, as the registered mark includes a color claim.






Respondent's preparations for sales began in October 2014. Mr. Danieli authenticated invoices and shipping bills of lading from Respondent's manufacturer, M&S Pima Cotton, S.A.C. ("M&S"), for clothing bearing the subject mark. He testified:

In October 2014, [Respondent] contacted M&S and ordered pants, shorts, and shirts bearing [Respondent's] SEASPICE Mark in the amount of 1,697 for \$11,395.55. On October 18, 2014, [Respondent] received Proforma Invoice 0002-2014 from M&S for this order... [which has Respondent's] SEASPICE Mark on the top right of the invoice; and photographs depicting the clothing products manufactured by M&S and subsequently sold by

[Respondent] in June 2015, which bear [the] SEASPICE Mark on the tags and labels.³²

The exhibits to his declaration include the referenced invoice dated October 18, 2014, which includes style numbers; and photos of clothing showing tags purportedly associated with those style numbers. The invoice includes the style numbers in the photos above (GZ1003 and GZ3102) (relevant text in this photo and following are boxed in red):³³

| M&S Pima Cotton | | PROFORMA INVOICE 0002-2014 | | | | Resort Wear SEASPICE | | | | | |
|----------------------------------|-------|--|--------|---|------------------------|----------------------|---------|-------------|------------------|-----------------|----------------|
| DATE: 18-10-14 | | CUSTOMER: NED NYC, INC | | | | | | | | | |
| CONTACT PERU: SIXTO ORTIZ AVALOS | | CONTACT: Ebad Danieli | | | | | | | | | |
| sortho@indumet.pe | | MAIL: edanieli@neonyc.net | | | | | | | | | |
| EXPORT | | DESTINATION: UNITED STATES- MIAMI | | | | | | | | | |
| 1.- CONDITION | | 2.- TIPO DE PRODUCCION | | 3.- INCOTERMS | | 4.- SHIPPING DATE | | | | | |
| 30% TO ORDER | | FULL PACKAGE | | EX INCLUDES | | MARCH 31-2015 | | | | | |
| 70 % THE SHIPPING | | INCLUDES: FABRIC - CUTTING - GARMENT STAMPING - FINISHED-TAG-PACKAGING | | AIRPORT: JORGE CHAVEZ | | | | | | | |
| 5.- DETAILS FOR PAYMENT | | 6.- BANK PERU | | 7.- COMPANY: | | | | | | | |
| TO ORDER 30% : \$0.00 * | | BANCO: BIVAL BANCO CONTINENTAL DEL PERU | | M&S PIMA COTTON SAC | | | | | | | |
| THE SHIPPING 70% : \$0.00 | | CODIGO SWIFT: BCOMPE | | DIRECCION JR. TILIBESCO TERRY 1558-1562 USB. PARQUE UNION - CERCAJO DE LIMA | | | | | | | |
| TOTAL \$0.00 | | EMPRESA: M&S PIMA COTTON SAC | | RUC: 2003770603 | | | | | | | |
| | | CTA.AHORROS LUS- 0011-0566-0100004099-75 | | MAIL: ampan1411@gmail.com - sortho@indumet.pe - ampan1411@gmail.com | | | | | | | |
| SIZES: S-M-L-XL-XXL | | | | DELIVERY: MARCH 31-2015 | | | | | | | |
| ITEM | STYLE | COLOR | GRAFIC | FABRIC | PRICE | QUANTITY | PARTIAL | OPTIONS PRI | DETAILS- ENGLISH | DETAILS SPANISH | |
| STYLE 1 | 1 | NM101001 - PANTS - GZ3201 | WHITE |  | NANZU 20/1 100% COTTON | \$7.50 | 270 | \$2,025.00 | | TROUSERS | PANTALON |
| STYLE 2 | 3 | NM101002 - SHORT - GZ3102 | WHITE |  | NANZU 20/1 100% COTTON | \$6.35 | 349 | \$2,216.15 | | SHORT | PANTALON CORTO |
| STYLE 3 | 5 | NM101003 - SHIRT - GZ1003 | WHITE |  | NANZU 20/1 100% COTTON | \$6.65 | 265 | \$1,762.25 | | SHIRT | POLO |

Mr. Danieli also testified that on May 30, 2015, once the clothing ordered on October 18, 2014 was completed and ready to ship, he “received Invoice No. 001-

³² First Danieli Decl. ¶ 10 (*id.* at 3) (citing Exh. ED-2).

³³ First Danieli Decl. Exh. ED-3 (*id.* at 24).

000018 from M&S for the pants, shorts, and shirts bearing [Respondent’s] SEASPICE Mark.”³⁴ The invoice bears “SEASPICE,” as shown below:³⁵

| Style # | Description | Quantity per Size | | | | | | Color | Quantity | Quantity | UNIT | TOTAL |
|---------|---|-------------------|----|----|----|-----|------|---------|----------|----------|------|----------|
| | | S | M | L | XL | XXL | 32XL | x Color | X STYLE | PRICE | | |
| GZ9201 | FABRIC NANZU 100% COTTON PANTS / PANTALON CABALLERO TEJIDO PLANO COLOR SOLIDO UNIFORME 100% ALGODÓN | 59 | 60 | 59 | 58 | 29 | 0 | WHITE | 265 | 265 | 7.50 | 1,987.50 |
| GZ9102 | FABRIC NANZU 100% COTTON-SHORT / SHORT DE CABALLERO TEJIDO PLANO COLOR SOLIDO UNIFORME 100% ALGODÓN | 70 | 69 | 70 | 70 | 35 | 35 | WHITE | 349 | 349 | 6.35 | 2,216.15 |
| GZ1003 | FABRIC NANZU 100% COTTON-POLO SHIRT SUEVE / POLO BOX DE CABALLERO MANGA CORTA CUELLO MISMA TELA. ABERT. FARCIAL DELANTERO COLOR SOLIDO UNIFORME 100% ALGODÓN TEJIDO PLANO | 66 | 67 | 68 | 34 | 30 | | WHITE | 265 | 265 | 6.65 | 1,762.25 |
| GZ1004 | FABRIC NANZU 100% COTTON-POLO BOX TANK MENS / POLO BOX DE CABALLERO | 60 | 60 | 60 | 34 | 34 | | | | | | |

He also attaches an “Air Waybill” (shipping receipt) dated June 4, 2015 for the shipment relating to Invoice Nos. 001-000017, 18 and 20.³⁶ An attached packing list, also dated June 4, 2015, includes the style numbers referenced above.³⁷

³⁴ First Danieli Decl. ¶ 11 (*id.* at 4). He testified that the style numbers have remained consistent on tags, invoices, and Respondent’s website “since the beginning.” First Danieli Decl. ¶¶ 28-29 (*id.* at 8-9).

³⁵ First Danieli Decl. Exh. ED-3 (*id.* at 30; *see also* 10 TTABVUE 44 (more legible copy)).

³⁶ First Danieli Decl. ¶ 12, Exh. ED-4 (*id.* at 4, 31-42; 10 TTABVUE 45-56 (more legible copy)).

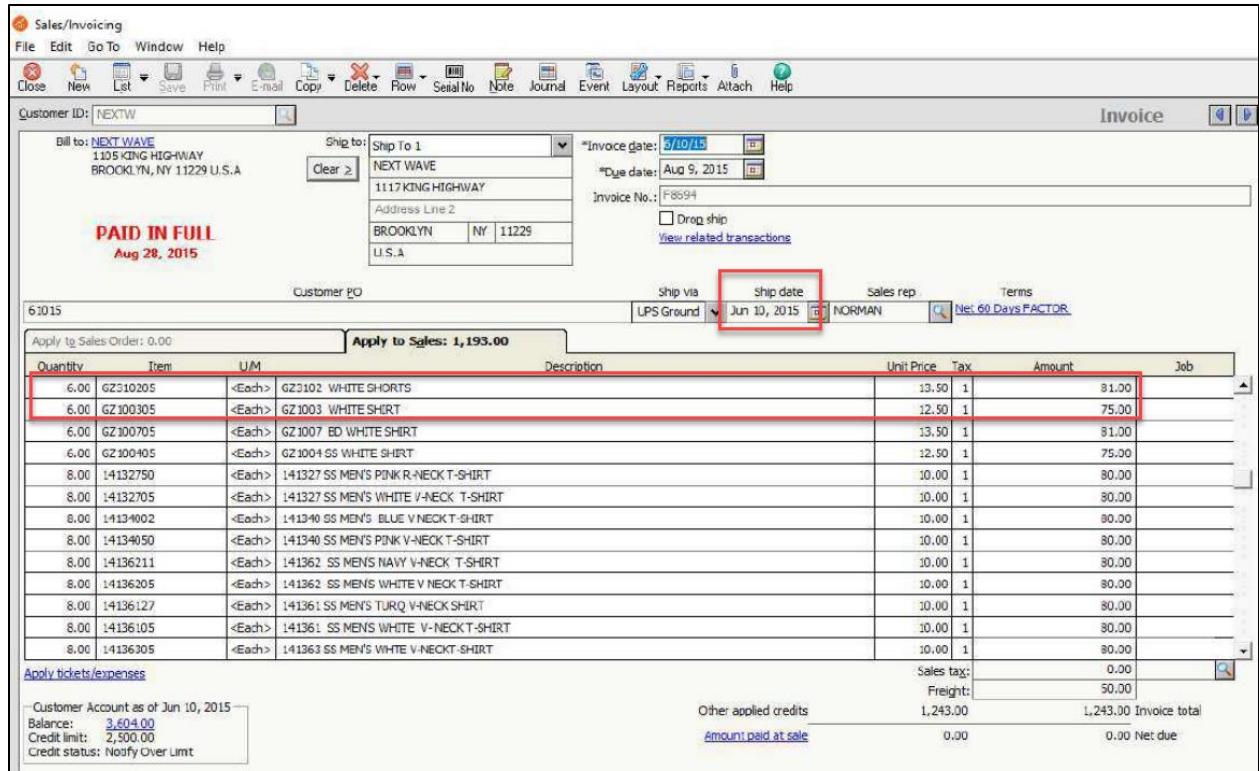
³⁷ First Danieli Decl. Exh. ED-4 (24 TTABVUE 41; 10 TTABVUE 55 (more legible copy)).

| SUMMARY | | |
|-------------------|-------|--------------|
| ESTILO | COLOR | CANT. |
| GZ3102 | WHITE | 349 |
| | TOTAL | 349 |
| GZ1003 | WHITE | 265 |
| | TOTAL | 265 |
| GZ1004 | WHITE | 275 |
| | TOTAL | 275 |
| GZ1008 | WHITE | 268 |
| | TOTAL | 268 |
| GZ1007 | WHITE | 270 |
| | TOTAL | 270 |
| GZ3201 | WHITE | 265 |
| | TOTAL | 265 |
| GRAN TOTAL | | 1,692 |

Mr. Danieli testified that on June 10 and 11, 2015, Respondent sold and shipped clothing bearing the subject mark to Que Padre Beach & Surf in South Padre Island, Texas; Next Wave Clothing 91, Inc. in Brooklyn, New York; El Waterloo Inc. in Union City, New Jersey; and Hot Exclusive in San Juan, Trinidad.³⁸ He attached documentary proof of some of these sales, which appear to be in the form of printouts from Respondent's internal financial system, and indicate ship dates of June 10 and 11, 2015. An example (Next Wave) is shown below:³⁹

³⁸ First Danieli Decl. ¶¶ 13-16 (*id.* at 4-5).

³⁹ First Danieli Decl. Exh. ED-5 to ED-8 (*id.* at 44, 52, 56, 58; 10 TTABVUE 58, 66, 70, 72 (more legible copies)).



He provided additional testimony about Respondent’s sales of clothing bearing the mark during the remainder of 2015 to various customers, in total selling 616 units amounting to \$7,646.50 in gross sales.⁴⁰ He testified about other sales to various retailers from 2016 to 2021, and supplied supporting documentary evidence (invoices from manufacturer showing tags with mark and style numbers; printouts from Respondent’s internal system; printouts from Respondent’s website showing products and style numbers with mark; and a sales summary).⁴¹ Finally, Mr. Danieli testified

⁴⁰ First Danieli Decl. ¶¶ 17-18, Exhs. ED-9, ED-10 (*id.* at 5, 59-83; 10 TTABVUE 73-97 (more legible copies)).

⁴¹ First Danieli Decl. ¶¶ 19-26, Exhs. ED-11 to ED-18 (24 TTABVUE 5-7, 84-286; 10 TTABVUE 98-299).

that Respondent sells its branded clothing items on its website at seaspiceresortwear.com.⁴²

Petitioner does not address Respondent's detailed evidence of priority. Instead, Petitioner first points to the subject registration, noting that it states a date of first use in 2018.⁴³ The dates of first use in a registration may be used as evidence against the applicant or registrant, that is, as admissions against interest and the like; however, Respondent has moved to amend the dates and provided an unchallenged explanation of why they are mistaken. In particular, Mr. Danieli submitted a declaration explaining that he submitted the application without the guidance of an attorney and did not understand "that we had to be specific to our actual earliest use and what actually constituted 'use' of a trademark."⁴⁴

Next, Petitioner argues that, Respondent's website states that Respondent did not begin to use its mark until 2016.⁴⁵ In support, Petitioner supplies the following Internet evidence, evidently a screenshot from the Google search engine:⁴⁶

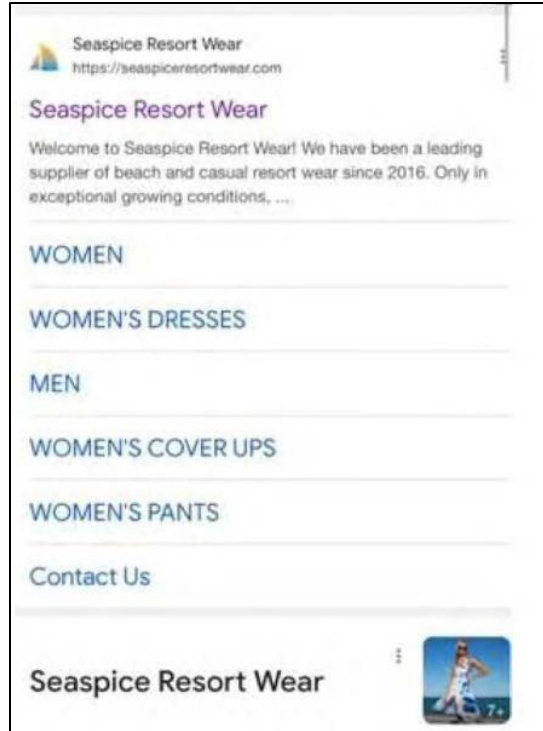
⁴² First Danieli Decl. ¶ 27 (*id.* at 7); *see* Exh. ED-19 (*id.* at 287-338).

⁴³ Pet. Br. at 9 (37 TTABVUE 10) (citing C. Miranda Decl. ¶ 21, Exh. F). Exhibit F is not attached to Mr. Miranda's declaration, but we have located this exhibit at 20 TTABVUE 229.

⁴⁴ First Danieli Decl. ¶ 33 (24 TTABVUE 9-10).

⁴⁵ Pet. Br. at 9 (37 TTABVUE 10) (citing C. Miranda Decl. ¶ 21, Exh. F). Exhibit F is not attached, but we have located this exhibit at 20 TTABVUE 229.

⁴⁶ This screenshot comprises search engine results which have not been authenticated. In addition, we may consider Internet evidence only as to what the documents show on their face, but not to demonstrate the truth of what has been printed because it constitutes hearsay. *See, e.g., Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 2022 TTAB LEXIS 454, at *10 (TTAB 2022) (where "the parties seek to rely on the contents of the webpages for the truth of any assertion made therein, the statements in the websites are hearsay unless supported by testimony or other evidence.") (citations and subsequent history omitted); *Spiritline Cruises LLC v. Tour Mgm't Servs., Inc.*, 2020 TTAB LEXIS 3, at *7 (TTAB 2020) (Internet printouts and other materials properly introduced under a notice of reliance



Mr. Danieli responds to this evidence as follows:

[Respondent's] website says, "We have been a leading supplier of beach and casual resort wear since 2016" not 2015 because it was in 2016 when [Respondent] began focusing more on end consumers. [Respondent] had already sold a good amount of clothing bearing its SEASPICE RESORT WEAR mark in 2015 to some end consumers and retailers, but [Respondent] figured the "2016" was more in line and relevant to end consumers which were targeted on their website-but it was not meant to be or represent its date of first use if the SEASPICE RESORT WEAR mark.⁴⁷

Petitioner did not avail itself of the opportunity to cross-examine Mr. Danieli regarding his testimony and supporting documentation (even though Ms. Miranda

without supporting testimony considered only for what they show on their face rather than for the truth of the matters asserted). In this regard, the Internet evidence is double hearsay (i.e., hearsay within hearsay). Nonetheless, as discussed below, Mr. Danieli verifies that Respondent's website actually says what Petitioner claims.

⁴⁷ Second Danieli Decl. ¶ 7 (25 TTABVue 3-4).

openly questioned the authenticity of Respondent's evidence during her deposition).⁴⁸ Nor did Petitioner make of record any contrary evidence from Respondent's third-party manufacturers or customers referenced in Mr. Danieli's testimony and documentary evidence. Thus, Respondent's testimony and evidence is clear and consistent, uncontradicted, and supports a finding that Respondent started preparations for use of its mark in October 2014 and commenced use of its mark in commerce in connection with clothing on June 10, 2015.

In view thereof, we find that Respondent has established dates of first use and first use in commerce in connection with clothing as early as June 10, 2015 by clear and convincing evidence. Respondent's motion to amend its registration is **granted**.

B. Petitioner's Priority Date

Petitioner must prove by a preponderance of the evidence that it has priority in its pleaded mark for clothing prior to June 10, 2015. Petitioner argues and avers that use of the SEASPICE mark began on January 1, 2015 in connection with its restaurant services and on clothing.⁴⁹ Respondent argues Petitioner's response to Request for Admission No. 2 states as follows:

⁴⁸ See M. Miranda Dep. at 58-60 (20 TTABVUE 80-82).

⁴⁹ 37 TTABVUE 6 (brief); 20 TTABVUE 137-138, 310-311 (declarations). Petitioner's brief does not contend that its restaurant services and Respondent's clothing are related in support of its likelihood of confusion claim, but rather uses the commencement of the SEASPICE mark for restaurant services as support for its priority date for its SEASPICE clothing.

REQUEST NO. 2: Admit that the mark SEASPICE was first used in commerce by Petitioner on, or in connection with, clothing on or after July 12, 2015.

RESPONSE: SEASPICE was first used in commerce by Petitioner on, or in connection with, clothing on July 12, 2015.⁵⁰

Petitioner counters that its evidence of record (invoices, testimony) actually shows an earlier date of first use of January 1, 2015.⁵¹ Its narrative response to the request for admission, however, adopts Respondent's request in total, and thus we construe it as an admission under the Fed. R. Civ. P. 36⁵² and "conclusively established unless the court, on motion, permits the admission to be withdrawn or amended." Fed. R. Civ. P. 36(b). Petitioner did not move to withdraw or amend the admission. *See* Fed. R. Civ. P. 36(b). We may not ignore its conclusive value, even in the face of contrary evidence. *See, e.g., Am. Automobile Ass'n (Inc.) v. AAA Legal Clinic of Jefferson Crooke, P.C.*, 930 F.2d 1117 (5th Cir. 1991) (court may not sua sponte withdraw or ignore admissions without a motion to withdraw or amend) (citing Advisory Comm.'s

⁵⁰ *See* Resp. Br. at 18 (38 TTABVUE 17) (citing Pet. Resp. to RFA No. 2 (27 TTABVUE 6)). Respondent also points to Petitioner's Petition for Cancellation, in which Petitioner averred that it "has been using the Mark in interstate commerce in the United States in connection with these goods and services since at least as early as July 12, 2015," and "[s]ince at least July of 2015, Petitioner has continuously and exclusively used the Mark in connection with the sale of clothing and merchandise" Petition for Cancellation ¶¶ 2, 7 (1 TTABVUE 3-4). *See, e.g., Kellogg Co. v. Pack'Em Enters.*, 1990 TTAB LEXIS 3, at *4 n.6 (TTAB 1990) (pleadings have evidentiary value to the extent they contain opponent's admissions against interest), *aff'd*, 951 F.2d 330 (Fed. Cir. 1991).

⁵¹ Pet. Rebuttal Br. at 4-5 (40 TTABVUE 5-6). To the extent Petitioner also argues that "promotional items" given away can establish priority, *id.*, Petitioner has not made of record any evidence that promotional clothing items branded with its pleaded mark were given away. "Attorney argument is no substitute for evidence." *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1371 (Fed. Cir. 2018) (citation omitted).

⁵² *See* Fed. R. Civ. P. 36(a) ("If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it.").

Note, 48 F.R.D. 487, 534 (1970) (“In form and substance a Rule 36 admission is comparable to an admission in pleadings or a stipulation drafted by counsel for use at trial, rather than to an evidentiary admission of a party.”)).

Even if we were to consider Petitioner’s response to the request for admission as an evidentiary rather than a binding judicial admission, however, the other evidence of record does not sway us to adopt Petitioner’s position. That evidence shows that, up through 2014, a predecessor, related, or affiliated company to Petitioner – which is an intellectual property holding company – operated a restaurant called SEASALT & PEPPER in Miami, Florida.⁵³ On January 1, 2015, the name of the restaurant was changed to SEASPICE BRASSERIE & LOUNGE.⁵⁴ The restaurant currently is operated by Seaspice, LLC – but the relationship of this company to Petitioner, which is owned by Ms. Miranda and/or Mr. Miranda (or others), is not clear.⁵⁵

⁵³ See Pet. Resp. to Request for Admission No. 12 (27 TTABVUE 7).

⁵⁴ M. Miranda Dep. at 17 (20 TTABVUE 39); Pet. Resp. to RFA Nos. 12, 13 (27 TTABVUE 7-8).

⁵⁵ M. Miranda Dep. at 9-10 (*id.* at 31-32). Ms. Miranda testified that she is the sole owner of Petitioner. M. Miranda Dep. at 7 (*id.* at 29). Ms. Miranda stated that Petitioner has no subsidiaries; she was asked about, but did not explain any corporate relationship between Petitioner and Seaspice, LLC. M. Miranda Dep. at 7-10 (*id.* at 29-32). She testified that the mark is not licensed by Petitioner to Seaspice, LLC. M. Miranda Dep. at 9 (*id.* at 31). Ms. Miranda’s testimony is couched in the first person (e.g., M. Miranda Decl. ¶ 3 (20 TTABVUE 136) (“I have been in continuous use of the mark . . .”)) rather than referring to Petitioner as a corporate entity, or differentiating between Petitioner, any of its affiliated companies, or Seaspice, LLC. Mr. Miranda testified that he is “an owner and manager of Petitioner, as well as an owner and manager of Petitioner’s restaurant, Seaspice Brasserie Lounge.” C. Miranda Decl. ¶ 1 (*id.* at 309). This testimony contradicts Ms. Miranda’s statements. Moreover, at Ms. Miranda’s deposition, counsel for Petitioner objected to a line of questioning about ownership of Seaspice, LLC and how it relates to Petitioner. See M. Miranda Dep. at 92-93 (20 TTABVUE 114-15). Thus, we have no unambiguous explanation of the relationships, if any, between the various entities mentioned in the record.

As a related matter, at the oral hearing, counsel for Respondent raised two arguments that were not included in its pleadings or briefs: (1) use of the pleaded mark by Seaspice, LLC did

The evidence of record indicates that the restaurant's change of name to SEASPICE BRASSERIE & LOUNGE was the result of a November 17, 2014 permanent injunction entered against the operator of the restaurant precluding use of the mark SEASALT.⁵⁶ On November 7 and 19, 2014, a company called Hemingway's Warehouse, LLC filed applications to register the marks SEASPICE and SEASPICE BRASSERIE & LOUNGE, both in standard characters, in connection with bar and restaurant services.⁵⁷ There no record of any assignment of the resulting registrations from Hemingway's Warehouse LLC to Petitioner, and, as we discussed above, those registrations were not pleaded and are not properly of record.

Ms. Miranda also testified that:

3. I have been in continuous use of the mark SEASPICE (the "Mark") in commerce in connection with clothing, such as shirts, caps, and polos since January 1, 2015.

....

16. On November 25, 2014, shortly after registering the "SEASPICE BRASSERIE & LOUNGE" mark for bar and restaurant services, I purchased 500 custom caps for sale with the Seaspice Logo on the front of the cap, and the Mark "SEASPICE" embroiled [sic] both inside of the cap, and on the back of the cap [Exhibit B].

not inure to Petitioner due to lack of control; (2) use of Petitioner's mark on clothing is ornamental and has no trademark significance. Respondent's attempt to raise these issues at the last possible moment in this case is untimely. Nonetheless, the arguments are not necessary to our decision and we see no need to address them here. For purposes of this opinion, we presume that any use of the SEASPICE mark in 2015 inured to Petitioner and was not ornamental.

⁵⁶ Pet. Resp. to RFA No. 13 (27 TTABVUE 8).

⁵⁷ M. Miranda Dep. at 15, Exh. 2 (20 TTABVUE 37, 124); M. Miranda Decl. Exh. A (*id.* at 141-43).

17. Upon selling the first 500 caps, on October 13, 2015, I purchased another 500 custom caps with the Mark embroidered [sic] on the cap [Exhibit C].⁵⁸

18. From 2015 through the present, I have continuously sold caps, t-shirts, and polos containing the Mark at both the restaurant as well as online and on social media.

19. Since January 1, 2015, I have continuously offered clothing under the Mark. From 2015 through the present day, I have regularly sold and transported shirts and caps to customers. The capacity to use the Mark in commerce through invoices, documents, and sales receipts are attached hereto . . . as Composite Exhibit D.⁵⁹

The record contains a sales order (No. 1808-1) from Hitex Marketing Group, dated November 5, 2014 and directed to “Seasalt and Pepper” and Ms. Miranda, for the order of 500 navy caps with estimated delivery of “Friday, December 12, 2014.”⁶⁰ A check from “Seasalt and Pepper Miami LLC” in the amount of half of the sales order dated November 14, 2014 and referencing the order number also is of record.⁶¹ The corresponding printer’s proof for this order (Job # 1808), depicting the caps below with SEASPICE in stylized font on the inside label and back of the cap, is dated November 25, 2014.⁶²

⁵⁸ M. Miranda Decl. ¶¶ 16-17 (*id.* at 138). Ms. Miranda’s testimony regarding registration of the mark in November 2014 is in error. The registrations purportedly owned by Petitioner issued on October 6, 2015 (SEASPICE) and August 2, 2016 (SEASPICE BRASSERIE & LOUNGE). *See* M. Miranda Decl. Exh. A (*id.* at 141-43).

⁵⁹ M. Miranda Decl. ¶¶ 3, 16-19 (*id.* at 138-39). She does not define what “use . . . in commerce” refers to.

⁶⁰ M. Miranda Decl. Exh. D (*id.* at 215).

⁶¹ M. Miranda Decl. Exh. D (*id.* at 216).

⁶² M. Miranda Decl. Exh. B (*id.* at 136, 146-47).



A second order for 500 caps was placed October 13, 2015.⁶³

The referenced Exhibit D to Ms. Miranda’s testimony declaration includes proofs and invoices for shirts and caps dated from November 4, 2015 through 2022;⁶⁴ except for the caps and one shirt (which is partially obscured), there are no pictures of any of these items, but invoices do state that ordered shirts have “SEASPICE – Front Left Chest.” At least one of these documents, on its face, indicates that the ordered shirts are for employees of the restaurant.⁶⁵ Ms. Miranda’s declaration also references documents (apparently sales receipts and summaries) dated from March 1, 2018 to

⁶³ M. Miranda Decl. Exh. C (*id.* at 148-49).

⁶⁴ M. Miranda Decl. Exh. D (*id.* at 151-196).

⁶⁵ *See* M. Miranda Decl. Exh. D (*id.* at 194-96 (subject line: “Seaspice Uniforms” and referring to shirts for “bussers”)). At oral hearing, counsel for Petitioner argued that use of the SEASPICE mark on clothing worn by employees of the restaurant (i.e., marketing activities giving rise to use analogous to trademark use) prior to June 2015 established priority. We have not considered this argument, which was raised for the first time at the hearing. Reliance on priority through analogous use must be pleaded. *JNF LLC*, 2022 TTAB LEXIS 328, at *39 (citing *Cent. Garden & Pet Co. v. Doskocil Mfg. Co.*, 2013 TTAB LEXIS 439, at *19 (TTAB 2013)). Nor has Petitioner offered any evidence demonstrating that use of the pleaded mark on clothing worn by employees was so widespread and repetitive in nature such to create an association in the mind of the relevant consumers between the mark and the goods, or that technical trademark use followed within a commercially reasonable time. *See id.*

December 31, 2021, purportedly showing that caps and shirts were purchased at Seaspice restaurant; there is no testimony or other evidence demonstrating that the SEASPICE mark appeared on the purchased items.⁶⁶ In any event, all of these documents are dated after Respondent's established priority date.

Turning to Ms. Miranda's deposition testimony, she testified that sales of clothing branded with SEASPICE to customers began on January 1, 2015,⁶⁷ but she later contradicted this testimony:

You know, I don't know when the first sale happened, but I know January 1st we were ready – we already had the marking on the merchandise prior to that because, you know, to be able to get ready for that, we had to work with our vendors prior to that to design and select fabrics and logos and coloring and, you know, all the specifics that goes with designing clothing and merchandise.⁶⁸

She stated that she had "probably" given records of sales for clothing in 2015 to her counsel for production, but then hedged this response by testifying that the restaurant had changed its point of sales system "a few times . . . it could have been 2015 . . ." and sales records from that time period were difficult to retrieve.⁶⁹

Mr. Miranda's declaration testimony is highly similar (and in some cases, identical) to Ms. Miranda's declaration testimony. He testified that "Petitioner and/or its affiliates have been in continuous use of the mark SEASPICE (the 'Mark') in commerce in connection with clothing, such as shirts, caps, and polos since January

⁶⁶ M. Miranda Decl. Exh. D. (*id.* at 197-211).

⁶⁷ M. Miranda Dep. at 17 (*id.* at 39)

⁶⁸ M. Miranda Dep. at 20 (*id.* at 42).

⁶⁹ M. Miranda Dep. at 42, 46-48 (*id.* at 64, 68-70).

1, 2015.”⁷⁰ Like Ms. Miranda’s testimony, Mr. Miranda’s declaration does not define what the purported “use in commerce” consisted of. He attested that sales of caps, t-shirts, and polos with the mark occurred “from 2015 through the present,” but keyed the January 1, 2015 start date to undefined “continuous[] offer[s of] clothing under the Mark.”⁷¹ He also cited to the invoices, documents and sales receipts in “Composite Exhibit D” to show the “capacity” to sell the shirts and caps.⁷²

Having viewed the record as a whole, we find the evidence of Petitioner’s use of SEASPICE for clothing prior to June 10, 2015 to be contradictory and vague. *See Exec. Coach Builders, Inc.*, 2017 TTAB LEXIS 201, at *36 (“[H]ere, the testimony is indefinite and internally inconsistent; and unsupported by documentary evidence . . .”). Although Ms. Miranda and Mr. Miranda both testified that sales to customers were made “from 2015,” this testimony is vague and not keyed to a specific date, or even a specific month. Both testimony declarations regarding “continuous use” of the mark from January 1, 2015 conspicuously refer to clothing “offered,” not clothing sold. Notably, both witnesses testify that the evidence of record shows their “capacity” to sell clothing. None of this ambiguous testimony regarding sales prior to June 10, 2015 is supported by any documentation such as sales invoices, sales summaries, pictures, or testimony from customers who purchased clothing items.

⁷⁰ C. Miranda Decl. ¶ 3 (*id.* at 309).

⁷¹ C. Miranda Decl. ¶¶ 18-19 (*id.* at 311).

⁷² C. Miranda Decl. ¶ 18 (*id.*). Again, Exhibit D is not attached to the declaration, but we presume Mr. Miranda is referring to the same Exhibit D relied upon by Ms. Miranda.

We find that Petitioner has failed to prove its priority of common law use of SEASPICE in connection with clothing by a preponderance of the evidence. Having failed to establish priority, Petitioner cannot prevail on its likelihood of confusion claim under Section 2(d). *Moke Am. LLC*, 2020 TTAB LEXIS 18, at *29 (“We need not reach the merits of the likelihood of confusion claim because without proof of priority, Opposer cannot prevail.”) (citations omitted).

V. Decision

Respondent’s motion to amend the dates of first use and first use in commerce in Registration No. 6467151 to June 10, 2015 is **granted**. The registration file will be forwarded to the Post Registration Section for action in accordance with this decision.

The Petition for Cancellation is **denied**.