

This Opinion is not a  
Precedent of the TTAB

Mailed: September 11, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*Mathew E. Fraser*

*v.*

*Maurice Jackson, III and Enos Watts*

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Cancellation No. 92081235

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Albert Bordas of Albert Bordas, P.A.  
for Mathew E. Fraser.

Rexford Brabson of T-Rex Law, P.C.  
for Maurice Jackson, III and Enos Watts.

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Before Goodman, Dunn, and Cohen,  
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

Maurice Jackson III and Enos Watts (“Respondents”) own the mark



for “Clothing namely, shirts, pants, jackets, hats, t-shirts, jerseys, shorts, tracksuits, socks, underwear, hoodies” in International Class 25.<sup>1</sup>

Mathew E. Fraser (“Petitioner”) has petitioned to cancel Respondents’ registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Respondents’ mark for the identified goods so resembles Petitioner’s previously used common-law mark HWPO for “Athletic footwear; athletic footwear for fitness training; Athletic shoes” as to be likely to cause confusion.<sup>2</sup> Petitioner also alleges ownership of a pending multi-class trademark application for the mark HWPO (Serial No. 90657220) for goods that include various types of athletic apparel and athletic footwear under Section 1(a).<sup>3</sup>

Respondents, in their answer, deny the salient allegations in the petition for cancellation.<sup>4</sup> Respondents also assert as affirmative defenses matters that serve as amplifications of their denials of Petitioner’s allegations and have been so construed.

Each party filed a trial brief and Petitioner filed a reply brief.<sup>5</sup>

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<sup>1</sup> Registration No. 5968463 issued January 21, 2020, based on application Serial No. 88122583, with a filing date of September 19, 2018, under Section 1(b). The statement of use alleged a date of first use of September 19, 2018 and a first use in commerce date of January 1, 2019. The description of the mark states: “The mark consists of the wording ‘HARD WORK PAYS OFF’ appearing in stylized font across three lines. A circle design appears around the majority of the wording.” Color is not claimed as a feature of the mark.

<sup>2</sup> 1 TTABVUE, paragraphs 3 and 5.

References to trial record and briefs refer to the Board’s TTABVUE docket system. Before the TTABVUE designation is the docket entry number; and after this designation are the page references, if applicable.

<sup>3</sup> 1 TTABVUE, paragraphs 1, 2. Petitioner has also alleged that Respondents’ registration has been cited against his pending application for Class 25 goods only. *Id.*, paragraph 9.

<sup>4</sup> 5 TTABVUE.

<sup>5</sup> 34 TTABVUE; 36 TTABVUE; 37 TTABVUE.

## I. The Record

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of the involved registration. The record also includes the submissions of the parties during their respective trial periods.

The entire record has been considered and relevant evidence is discussed throughout this opinion, although we do not list its contents. *See Quiktrip W., Inc. v. Weigel Stores, Inc.*, 984 F.3d 1031, 1036 (Fed. Cir. 2021) (“We have held ‘on multiple occasions that failure to explicitly discuss every issue or every piece of evidence does not alone establish that the tribunal did not consider it.’”) (citation and internal quotation marks omitted); *In re Miracle Tuesday LLC*, 695 F.3d 1339, 1348 (Fed. Cir. 2012) (“[T]he mere fact that the Board did not recite all of the evidence it considered does not mean the evidence was not, in fact, reviewed.”) (citation omitted).

Petitioner and Respondents over-designated some testimony and exhibits as confidential.<sup>6</sup> The Board needs to be able to discuss the evidence of record, unless there is an overriding need for confidentiality, so that the parties and a reviewing court will know the basis of the Board’s decisions. Therefore, in this opinion, we will treat only testimony and evidence that is truly confidential or commercially sensitive as such.<sup>7</sup> *Noble House Home Furnishings, LLC v. Floorco Enters., LLC*, Can. No. 92057394, 2016 TTAB LEXIS 100, at \*11 (TTAB 2016).

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<sup>6</sup> For example, Petitioner redacted testimony in total relating to the use in commerce of the HWPO mark on athletic shoes, which shoes were sold to the public.

<sup>7</sup> Petitioner filed a redacted notice of reliance on certain of Respondents’ discovery responses but did not file a confidential version without the redactions. 20 TTABVUE. Because Respondent did not object, we presume that Petitioner served an unredacted version on

## II. Implied Consent on Unpled Issues

Generally, parties in proceedings before the Board may not rely on unpleaded claims, issues or defenses, and the Board will not consider them. *See Kohler Co. v. Baldwin Hardware Corp.*, Can. No. 92041434, 2007 TTAB LEXIS 3, at \*3 n.3 (TTAB 2007) (raising claim for first time in plaintiff's brief is manifestly untimely; belated fraud claim given no further consideration); *see also H.D. Lee Co. v. Maidenform, Inc.*, Opp. No. 91168309, 2008 TTAB LEXIS 21, at \*10 (TTAB 2008) (an unpleaded defense cannot be relied on by defendant unless the defendant's answer is amended or deemed amended pursuant to Fed. R. Civ. P. 15(a) or 15(b)).

“Implied consent to the trial of an unpleaded issue can be found only where the non-offering party (1) raised no objection to the introduction of evidence on the issue, and (2) was fairly apprised that the evidence was being offered in support of the issue.” *Hangzhou Mengku Tech. Co. v. Shanghai Zhenglang Tech. Co.*, Opp. No. 91272143, 2024 TTAB LEXIS 575, at \*16 (TTAB 2024). “Fairness issues are paramount in assessing whether an issue has been tried by implied consent—there must be an absence of doubt that the non-offering party is aware that the issue is being tried.” *Iron Balls Int’l Ltd. v. Bull Creek Brewing, LLC*, Can. No. 92079099, 2024 TTAB LEXIS 205, at \*27-28 n.52 (TTAB 2024).

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Respondent. But in any event, since they are Respondents’ discovery responses, they are in possession of all of them. From the nature of the redactions, the evidence, if of record, would not affect the outcome of this proceeding.

Respondents' brief argues priority for apparel at least as early as January 2018 based on the mark identified in the registration given the "large amount of evidence."<sup>8</sup> On the other hand, Respondents also provided evidence and testimony regarding their use of HARD WORK PAYS OFF for t-shirts prior to January 2018 in admittedly different forms ("various stylized forms") than the involved registered mark.<sup>9</sup>

Although not articulated, it appears that Respondents may have been attempting to indirectly establish that they have priority through "tacking," which is the determination that earlier and later versions of a mark are legal equivalents for the purpose of establishing priority of use. *Van Dyne-Crotty Inc. v. Wear-Guard Corp.*, 926 F2d 1156, 1159 (Fed. Cir. 1991). That is, because the marks are considered to be legally the same, the successful tacking proponent may tack its use of the different marks together, and date its priority from first use of the first version of the mark. *Id.* Tacking is available only where the previously used mark is "the legal equivalent of the mark in question or indistinguishable therefrom, and the consumer should consider both as the same mark." *Id.*

Tacking is a defense that must be pleaded to put Petitioner on notice that Respondents are placing at issue a legally equivalent mark used by Respondents "that provides the basis for [Respondents] to claim prior use." *H.D. Lee Co. v. Maidenform, Inc.*, 2008 TTAB LEXIS 21, at \*11. Respondents provided an amplified

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<sup>8</sup> Respondents' brief, 36 TTABVUE 9.

<sup>9</sup> Enos Watts declaration (Watts declaration), paragraphs 2 & 9, 32 TTABVUE; interrogatory response nos. 24 & 25, Petitioner's notice of reliance 20 TTABVUE 35-37; Respondents' brief, 36 TTABVUE 9.

denial that reads “Applicant has priority of use of both the HWPO acronym and the HARD WORK PAYS OFF trademark.”<sup>10</sup> “This denial is not sufficient “to put petitioner on notice that any priority petitioner will attempt to prove will have to predate the priority that respondent will attempt to prove through tacking.” *Productos Lacteos Tocumbo S.A. de C.V. v. Paeteria La Michoacana, Inc.*, Can. No. 92047438, 2011 TTAB LEXIS 164, at \*14-15 (TTAB 2011) *aff’d* 188 F. Supp. 3d 22 (D.D.C. 2016), *aff’d*, 743 F. App’x 457 (D.C Cir. 2018). We have considerable doubt that the issue was tried because Petitioner’s position in its trial and reply brief is that Respondents’ earlier use involved different marks, and Petitioner did not submit rebuttal evidence or argue Respondents’ priority based on the earlier use. *See e.g.*, *Morgan Creek Prods. v. Foria Int’l Inc.*, Opp. No. 91173806, 2009 TTAB LEXIS 445, at \*16-17 (TTAB 2009). Therefore, to the extent that Respondents’ seek to establish tacking, such defense is unpleaded, was not tried by consent, and will not be considered.

Turning to Petitioner’s claims in the petition to cancel, the burden rests on Petitioner to establish its statutory entitlement to petition to cancel and to prove his claims. *Cerveceria Centroamericana S.A. v. Cerveceria India Inc.*, 892 F.2d 1021, 1023 (Fed. Cir. 1989) (“Because a trademark owner’s certificate of registration is ‘prima facie evidence of the validity of the registration’ and continued use of the registered mark, the burden of proof is placed upon those who seek cancellation.”) (internal citations omitted). *See also Massey Junior Coll., Inc. v. Fashion Inst. of Tech.*, 492

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<sup>10</sup> Answer, second affirmative defense, 5 TTABVUE.

F.2d 1399, 1403 (CCPA 1974) (petitioner must establish that there is a likelihood of confusion by a preponderance of the evidence).

Petitioner only pleaded a likelihood of confusion claim. However, Petitioner also argues an unpleaded claim of failure to function as a mark based on ornamentation.

Our reading of the record shows that a failure to function as a mark claim was tried by the parties by implied consent as contemplated by Fed. R. Civ. P. 15(b)(2). As is apparent from the record and briefs, the parties were aware the claim was being tried and provided argument on the issue; Petitioner also sought discovery on this issue and submitted the discovery responses as evidence. *Conolty v. Conolty O'Connor NYC LLC*, Opp. No. 91206045, 2014 TTAB LEXIS 269, at \*6 (TTAB 2014) (matters will be found as having been tried by implied consent when, even if not expressly raised in the pleadings, the parties introduce evidence regarding the unpled matters without objection and discuss the issues relating thereto in their briefs).

Therefore, Petitioner's petition to cancel is deemed amended to plead the failure to function claim. Fed. R. Civ. P. 15(b). *See, e.g., Giersch v. Scripps Networks, Inc.*, Can. No. 92045576, 2009 TTAB LEXIS 72, at \*12 (TTAB 2009) (Board deemed pleading amended to add an abandonment defense to conform to the evidence under Fed. R. Civ. P. 15(b) where petitioner did not object on that ground in his reply brief, and instead addressed the merits of the defense).

### III. The Parties and Their Marks

Petitioner Mathew Edward Fraser is a retired Canadian-American professional CrossFit athlete, competing from 2014 to 2020, and the winner of five consecutive

CrossFit Games titles from 2016 through 2020.<sup>11</sup> Mr. Fraser is “widely considered to be the most dominant ever male athlete in the sport of CrossFit.”<sup>12</sup> During his period of competing for CrossFit titles, Mr. Fraser entered into a Fitness Athlete Contract with Nike USA, Inc.<sup>13</sup> Mr. Fraser has used his pleaded mark HWPO in collaboration with Nike USA on, among other things, athletic shoes as shown.<sup>14</sup>



Respondent Enos Watts is a performing artist in the rap music genre.<sup>15</sup> Both Mr. Watts and Respondent Maurice Jackson III promote their HARD WORK PAYS OFF brand and sell apparel displaying the mark at their musical events.<sup>16</sup> Excerpted examples of more recent use of the involved mark on clothing and hats from Respondents’ website (webpage dated July 2023) include the following:

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<sup>11</sup> Declaration of Mathew Edward Fraser (Fraser declaration), paragraph 13, 22 TTABVUE.

<sup>12</sup> Fraser declaration, paragraph 13, 22 TTABVUE.

<sup>13</sup> Fraser declaration, paragraph 12, 22 TTABVUE.

<sup>14</sup> Fraser declaration, paragraph 9, with examples of use, exhibit 8, 23 TTABVUE 4 and exhibit 16, 23 TTABVUE 85 and 24 TTABVUE 2.

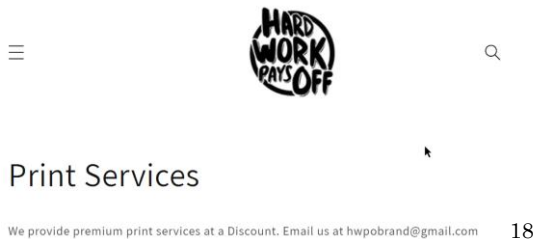
<sup>15</sup> Watts declaration, paragraph 2, 32 TTABVUE.

<sup>16</sup> *Id.*





.<sup>17</sup> In 2019, “to improve efficiency [with their apparel business] and to generate other revenue,” Respondents invested \$30,000 into a custom garment printing business under the name HARD WORK PAYS OFF as shown on this webpage excerpt (dated July 2023):



#### IV. Entitlement to Statutory Cause of Action

A plaintiff’s entitlement to invoke a statutory cause of action for an opposition or cancellation is a necessary element in every inter partes case. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 1304 (Fed. Cir. 2020). To establish entitlement to a statutory cause of action under Trademark Act Section 14, 15 U.S.C., § 1064, a plaintiff must demonstrate “an interest falling within the zone of interests protected

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<sup>17</sup> Watts declaration, paragraph 9e, exhibit 11.

<sup>18</sup> Watts declaration, paragraph 16, exhibit 23, 32 TTABVUE. The webpage shows on its face t-shirt print services, wholesale and bulk pricing, and additional garments available for print services. *Id.*

by the statute and ... proximate causation.” *Corcamore*, 978 F.3d 1303 (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129-134 (2014)); *see also Meenaxi Enter., Inc. v. Coca-Cola Co.*, 38 F.4th 1067, 1070 (Fed. Cir. 2022). 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. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 1374-75 (Fed. Cir. 2020); *see also Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 1275 (Fed. Cir. 2014).

Petitioner provided testimony and evidence relating to his pending HWPO trademark application, including the refusal to register in Class 25 based on Respondents’ registration.<sup>19</sup> This testimony and evidence demonstrates that Petitioner has a reasonable belief that he would be damaged by the continued registration of Respondents’ mark, establishing his entitlement to petition to cancel. *Lipton Indus. v. Ralston Purina Co.*, 670 F.2d 1024, 1029 (CCPA 1982); *Life Zone Inc. v. Middleman Group, Inc.*, Opp. No. 91160999, 2008 TTAB LEXIS 37, at \*17-18 (TTAB 2008). Additionally, Respondents concede Petitioner’s entitlement to petition to cancel.<sup>20</sup>

## V. Likelihood of Confusion Not Disputed

To prevail on its Trademark Act Section 2(d) claim, Petitioner must prove by a preponderance of the evidence priority and likelihood of confusion. *Cunningham v.*

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<sup>19</sup> Fraser declaration, paragraphs 5-6, exhibit 6, 22 TTABVUE.

<sup>20</sup> Respondents’ brief, 36 TTABVUE 7.

*Laser Golf Corp.*, 222 F.3d 943, 951 (Fed. Cir. 2000). At the outset, we note that there is no dispute with respect to the issue of likelihood of confusion. In their trial brief Respondents state:

Registrant does not dispute .... that there is a likelihood of confusion between the marks at issue, though the Board is certainly entitled to determine these issues in its own discretion. Therefore, the outcome of this proceeding turns on the issue of priority.<sup>21</sup>

Additionally, Respondents have not addressed the *DuPont* factors in their trial brief to defend against likelihood of confusion. *See Major League Baseball Players Ass’n v. Chisena*, Opp. No. 91240180, 2023 TTAB LEXIS 117, at \*62 (TTAB 2023) (“Applicant does not address the *DuPont* factors in his brief, apparently conceding likelihood of confusion, should Opposers prevail on priority.”). Therefore, Respondents have conceded likelihood of confusion.

By not defending at trial against Petitioner’s assertion of a likelihood of confusion, and conceding that confusion is likely in their trial brief, Respondents have waived any argument that confusion is unlikely. *See In re Google Tech. Holdings LLC*, 980 F.3d 858, 862 (Fed. Cir. 2020)<sup>22</sup> (“Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.”) (internal quotation marks omitted)); *see also Keystone Consol. Indus. v. Franklin Inv. Corp.*, Can. No. 92066927, 2024 TTAB LEXIS 290, at \*5 (respondent’s

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<sup>21</sup> Respondents’ brief, 36 TTABVUE 7.

<sup>22</sup> We note the admonition of our primary reviewing court regarding the distinction between waiver and forfeiture. *In re Google Tech.*, 980 F.3d at 862.

defense, counterclaim and request to amend impliedly waived because not addressed in its brief).

## VI. Priority

We thus turn to the only remaining issue in resolving Petitioner's Section 2(d) claim, priority. To establish priority of use on a likelihood of confusion claim brought under Trademark Act Section 2(d), a party must prove that, vis-à-vis the other party, it owns "a mark or trade name previously used in the United States ... and not abandoned...." Trademark Act § 2(d), 15 U.S.C. §1052. Petitioner relies on prior common law rights in the mark HWPO for athletic shoes.

Petitioner's common law rights can be established through actual use (technical trademark use), trade name use, or through use analogous to trademark use (non-technical use such as use in advertising which creates a public awareness of the designation as a trademark identifying the party as a source).<sup>23</sup> See *Herbko Int'l Inc. v. Kappa Books Inc.*, 308 F.3d 1156, 1162 (Fed. Cir. 2002); *T.A.B. Sys. v. PacTel Teletrac*, 77 F.3d 1372, 1375 (Fed. Cir. 1996); *Giersch*, 2009 TTAB LEXIS 72, at \*7-8. The common law mark must be distinctive, inherently or by acquired distinctiveness, and use must be before the earliest priority date of Respondents. See *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 1321 (CCPA 1981). Based on the record, we find the HWPO mark is distinctive since there is an absence of evidence or argument

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<sup>23</sup> As Respondents point out, analogous use has not been pleaded. Petition to cancel, 1 TTABVUE; Respondents' brief, 36 TTABVUE 11.

showing otherwise. *DowntownDC Bus. Improvement Dist. v. Clarke*, Opp. No. 91275100, 2024 TTAB LEXIS 412, at \*37 (TTAB 2024) (citation omitted).

Petitioner must prove by a preponderance of the evidence that he has a proprietary interest in the mark HWPO and that the interest was obtained prior to the earliest of either Respondents' constructive use date (application filing date for the registration) or any earlier date on which Respondents can rely. *Hydro-Dynamics Inc. v. George Putnam & Co.*, 811 F.2d 1470, 1472 (Fed. Cir. 1987); *Kemi Organics, LLC v. Gupta*, Can. No. 92065613, 2018 TTAB LEXIS 149, at \*10-11 (TTAB 2018) (citations omitted); *see also W. Fla. Seafood, Inc. v. Jet Rests., Inc.*, 31 F.3d 1122, 1125 (Fed. Cir. 1994) (“[a] presumption of validity attaches to” respondent’s involved registration, and petitioner “must rebut the presumption by a preponderance of the evidence”). We “look at the evidence as a whole, as if each piece of evidence were part of a puzzle which, when fitted together, establishes prior use.” *W. Fla. Seafood*, 31 F.3d at 1125-26.

#### A. Respondents' Priority Date

Respondents' filing date of their application for registration in this case is September 19, 2018, which Respondents may rely on as their priority date. *Cent. Garden & Pet Co. v. Doskill Mfg. Co.*, Opp. No. 91188816, 2013 TTAB LEXIS 439, at \*13 (TTAB 2013) (“when an application or registration is of record, the party may rely on the filing date of the application for registration, i.e., its constructive use date”). Respondents' alleged first use date also is September 19, 2018 and their alleged first use in commerce date is January 1, 2019.

Based on the testimony, and their trial brief, Respondents seek to rely on a priority date earlier than their underlying application filing date (constructive use date) and their alleged first use date stated in the registration, namely, a January 2018 date for apparel.<sup>24</sup> 36 TTABVUE 9.

A party may seek to rely in a proceeding on first use dates earlier than the first use dates stated in its registration, but must prove those earlier first use dates by clear and convincing evidence. *See Hydro-Dynamics Inc. v. George Putnam & Co. Inc.*, 811 F.2d at 1473.<sup>25</sup> Testimony provided in connection with priority

should not be characterized by contradictions, inconsistencies, and indefiniteness, but should carry with it conviction of its accuracy and applicability. Moreover, oral testimony given long after the event, while entitled to consideration, should be carefully scrutinized, and, if it does not carry conviction as to its accuracy and applicability, it should not be sufficient to successfully establish a date of first use prior to that alleged in the trade mark application.

*Elder Mfg. Co. v. Int'l Shoe Co.*, 194 F.2d 114, 114 (CCPA 1952). We reiterate that we “look at the evidence as a whole.” *W. Fla. Seafood, Inc.*, 31 F.3d at 1125-26.

Mr. Watts states that “we have been selling apparel branded with HARD WORK



PAYS OFF since at least as early as 2011, and with specifically since at

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<sup>24</sup> Watts declaration, paragraphs 9, 10 & 12, 32 TTABVUE.

<sup>25</sup> Mr. Watts provided testimony on earlier use under different versions of the mark, but as already discussed, we do not consider these uses for purposes of priority as the tacking defense is unpleaded and untried.

least as early as January of 2018.”<sup>26</sup> Mr. Watts offers testimony for annual sales revenue figures from 2018 through 2024.<sup>27</sup>

Mr. Watts’ testimony indicates sales of “jackets and hats” bearing the registered mark in January 2018.<sup>28</sup> Mr. Watts also testified that Respondents held a “Shoebox Money event” to sell “apparel bearing the mark” in January 2018.<sup>29</sup> Mr. Watts provided documentary evidence (bank statements and cash app payment statements) of some purchases made by Respondents in August and December 2017 in advance preparation for the event, including payments for apparel manufacture.<sup>30</sup> Mr. Watts provided some “photos and promotional images from the event,” which consists of images of people wearing t-shirts bearing the mark and images of advertisements bearing the mark created for the event.<sup>31</sup> Mr. Watts’ testimony references a cash app

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<sup>26</sup> Watts declaration, paragraph 9, 32 TTABVUE.

<sup>27</sup> Watts declaration, paragraphs 9a, 11, and exhibit 7, 32 TTABVUE. Mr. Watts also indicates in his testimony that October 2017 is a date in which the registered mark was used on pants, shorts, tracksuits, and hoodies. *Id.* paragraph 10, 32 TTABVUE. However, he identifies no sales revenue for 2017 in his testimony, offers no images of the goods on pants, shorts, tracksuits and hoodies, or any supporting documentation of sales to corroborate this stated use. Some of the documents referenced in the interrogatory responses to support 2017 use dates were admitted (in responses to requests for admissions nos. 21-23) as not “the exact same design” as the registered mark. Other documents referenced in the interrogatory response are advertisements for a music concert in December 2017; one document is for an apparel sale in December 2018. Petitioner’s notice of reliance, 20 TTABVUE 35-37, 58-65 (interrogatory responses nos. 24-25, responses to requests for admissions nos. 21-23); Petitioner’s notice of reliance, 21 TTABVUE 4-8, 23-28 (bates stamped documents referenced in interrogatory responses). We find that Respondents have not established October 2017 as an earlier priority date by clear and convincing evidence.

<sup>28</sup> Watts declaration, paragraph 10, 32 TTABVUE.

<sup>29</sup> Watts declaration, paragraph 12, 32 TTABVUE; interrogatory response no. 41, Petitioner’s notice of reliance, 20 TTABVUE 70-71.

<sup>30</sup> Watts declaration, paragraphs 12c-12g, exhibits 14-18, 32 TTABVUE.

<sup>31</sup> Watts declaration, paragraph 12a, exhibit 12, 32 TTABVUE. These photos show January 20, 2018, January 22, 2018, and February 2, 2018 dates.

document, exhibit 12, which reflects sales of apparel from the event.<sup>32</sup> Two of the cash app payment entries specifically reference the sale of t-shirts (January 25, 2018 and February 1, 2018).<sup>33</sup>

Petitioner argues that Respondents have not established use prior to their constructive and first use date of September 19, 2018, because of admissions that some of their documentary evidence showing use of HARD WORK PAYS OFF on t-shirts is not in the form of the registered mark.<sup>34</sup>

However, those admissions relate to use earlier than January 2018. In their brief, Respondents indicate that they have a large amount of evidence of use of their registered mark in January 2018 in connection with the sale of apparel and t-shirts.<sup>35</sup> For this earlier priority date, Respondents rely on sales of t-shirts sold at the January 2018 “Shoebox Money event” as reflected in the cash app payment records and images of the t-shirts displaying the registered mark at this event.<sup>36</sup>

Considering the testimony and documentary evidence as a whole, we find that Respondents have established a January 25, 2018 priority date for t-shirts bearing the registered mark by clear and convincing evidence.

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<sup>32</sup> Watts declaration, paragraph 12b, exhibit 13, 32 TTABVUE. This document also reflects some payments by Mr. Watts to others.

<sup>33</sup> *Id.*

<sup>34</sup> Petitioner’s brief, 34 TTABVUE 12-13; Petitioner’s reply brief, 37 TTABUVE 2-3.

<sup>35</sup> Respondents’ brief, 36 TTABVUE 9.

<sup>36</sup> Respondents’ brief, 36 TTABVUE 16.



A. Petitioner's Priority Date

Petitioner was a contracted Nike Fitness Athlete.<sup>37</sup> Petitioner provided confidential documentary evidence of “licenses ... for which Petitioner's [HWPO] Mark is the subject thereof.”<sup>38</sup> Although Mr. Fraser states that his first use and first use in commerce of the HWPO mark was “at least as early as June 5, 2018,” his testimony and evidence also indicates use of the HWPO mark on athletic shoes in 2016 through the contract with Nike and “sales figures [for the shoes] reaching back to at least one year prior to the Respondents' alleged date of first use.”<sup>39</sup>

More specifically, Mr. Fraser testifies that production of a Nike Metcon shoe bearing the HWPO mark began in 2016.<sup>40</sup> In the years 2016-2021, Nike annually produced a Mat Fraser HWPO Nike Metcon shoe that sold globally at Nike.com and select Nike retail stores.<sup>41</sup> The Nike/Mat Fraser HWPO Metcon Shoe products “were marketed through creative packaging (Shoe boxes), signage, email, social media,

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<sup>37</sup> Fraser declaration, paragraph 12, 22 TTABVUE and exhibit 11, 23 TTABVUE (redacted); Fraser declaration exhibit, 25 TTABVUE (confidential).

<sup>38</sup> *Id.* paragraph 21; Fraser declaration exhibit, 25 TTABVUE (confidential).

<sup>39</sup> Fraser declaration, paragraphs 9, 18, 22 TTABVUE; Fraser declaration, paragraph 15, 25 TTABVUE (confidential). The petition to cancel alleges use of HWPO in 2016 on a Nike Metcon shoe. Petition to cancel, paragraph 5, 1 TTABVUE. This use is also reflected in a social media post that accompanied Mr. Fraser's testimony. Fraser declaration, exhibit 7, 22 TTABVUE 198; Fraser declaration, paragraph 15, 25 TTABVUE (confidential).

<sup>40</sup> Fraser declaration, paragraph 18, 22 TTABVUE; Fraser declaration, paragraph 15, 25 TTABVUE (confidential).

<sup>41</sup> Fraser declaration exhibit 7, 22 TTABVUE 198, 223, 224; Fraser declaration, paragraph 15, 25 TTABVUE (confidential). Although this portion of Mr. Fraser's testimony was redacted, it is part of the basis for our conclusion on priority, and can hardly be confidential since the shoes were placed for sale in Nike retail locations and available online at Nike.com. The shoes were offered to the shoe buying public and were mentioned in advertisements and on social media. *See also* Fraser declaration, exhibit 14, 23 TTABVUE 58, 61, 62 (internet articles mentioning use of HWPO on Nike Metcon shoes).

websites and through brick and mortar retailers with Nike, its affiliates and retail partners.”<sup>42</sup>

The Mat Fraser HWPO Nike Metcon shoes were promoted on Petitioner’s social media accounts and were marketed and advertised on Nike’s website, [www.nike.com](http://www.nike.com).<sup>43</sup> Mr. Fraser provided social media posts from his Instagram account with testimony to reflect the advertising and offering of Mat Fraser HWPO Nike Metcon shoes during the time period discussed by Mr. Fraser.<sup>44</sup> He also testified that the HWPO product range with Nike expanded in 2018 to include additional goods apart from athletic shoes.<sup>45</sup>

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<sup>42</sup> Fraser declaration, paragraph 26, and exhibit 7, 22 TTABVUE. *Id.* exhibit 7, 22 TTABVUE 200 (shoebox image), 201 (shoe image), 203 (social media), 205 (shoebox image 2018) 225-228 (shoe image); exhibit 9, 23 TTABVUE 4-5 (shoe image), exhibit 10, 23 TTABVUE 6-9 (internet article, shoe images); exhibit 16, 24 TTABVUE 2-3 (shoe and shoebox images); Fraser declaration, exhibit 14, 23 TTABVUE 58-26 (internet article). Many of the exhibits relate to the shoe produced in 2018; Petitioner references the June 5 and June 8, 2018 use dates in much of his testimony. *See also* Respondents’ notice of reliance 28 TTABVUE, 104, 126-134.

The documents referenced in Respondents’ notice of reliance are the same documents that accompanied Petitioner’s testimony and are from Petitioner’s production. Under notice of reliance these internet documents are self-authenticating because they contain a URL and date. *See* Trademark Rule 2.122(e)(2), 37 C.F.R. § 2.122(e)(2); *Icon Health & Fitness, Inc. v. Eifit LLC*, Opp. No. 91264393, 2022 TTAB LEXIS 119, at \*17 (TTAB 2022) (citing *Safer, Inc. v. Oms Invs.*, Opp. No. 91176445, 2010 TTAB LEXIS 51, at \*22-23 (TTAB 2010)).

Many of the various images of the shoes and shoebox appear to be the Mat Fraser HWPO Nike Metcon 4 shoe from 2018.

<sup>43</sup> Fraser declaration, paragraphs 22 & 25, 22 TTABVUE. Portions of Mr. Fraser’s testimony relating to social media was redacted but it can hardly be confidential since advertisements and social media are necessarily directed to the public, often in a manner specifically intended to maximize public exposure to the goods.

<sup>44</sup> Fraser declaration, exhibit 7, 22 TTABVUE 198 (social media 2016), 224 (social media 2016); 203 (social media 2018), 205 (social media 2018), 211 (social media 2019), 223 (social media 2022); *see also* Respondents’ notice of reliance, 28 TTABVUE 97, 100, 102, 104, 110, 122, 125.

<sup>45</sup> Fraser declaration, paragraph 15, 25 TTABVUE (confidential); Fraser declaration exhibit 14, 23 TTABVUE 63.

Petitioner testified that the Mat Fraser HWPO Nike Metcon shoes were sellouts and produced “millions in revenue.”<sup>46</sup> To further support the sales of the Nike/Mathew Fraser goods bearing the HWPO mark, Mr. Fraser provided confidential documents which support the testimony relating to the 2016 through 2019 sales.<sup>47</sup>

Respondents acknowledge Mr. Fraser’s testimony relating to the 2016 Nike Metcon shoe, but argue that there are inconsistencies in Mr. Fraser’s testimony and there is limited documentary support.<sup>48</sup> Respondents argue that “it is not clear from the record” what the claimed use consisted of because Petitioner’s testimony was only that the mark was used on that date.<sup>49</sup> Respondents also argue that there is no “credible evidence of actual sales from or before June 5, 2018 beyond unsupported testimony of vague use.”<sup>50</sup> In particular, Respondents argue:

Petitioner has not submitted a single receipt or invoice for the sale of its goods. Petitioner states in its declaration that it made use of its mark on athletic footwear on June 5, 2018 ... Petitioner does not explain who these sales were made to, in what manner, or what price. Without any affirmation of how many sales were made, this is not sufficient to prove

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<sup>46</sup> Fraser declaration, paragraph 26, 22 TTABVUE and confidential exhibit, 25 TTABVUE (confidential) (“On information and belief, sell through of my HWPO/Fraser products were minutes traditionally annually, doing Millions in revenue per.”). Exhibit 14, 23 TTABVUE 58 (internet article that mentions sellout of Mat Fraser HWPO Nike Metcon shoes).

<sup>47</sup> Fraser declaration, confidential exhibits, 25 TTABVUE.

<sup>48</sup> Respondents’ brief, 36 TTABVUE 11-12; Respondents’ brief, 35 TTABVUE (confidential). As to the asserted inconsistency relating to 2016, it does not appear to be an inconsistency but an indication there was more than one shoe production run.

<sup>49</sup> Respondents’ brief, 36 TTABVUE 15.

<sup>50</sup> Respondents’ brief, 36 TTABVUE 11. Respondents also complain that “Petitioner did not label their submitted exhibits with the designated numbers or with the identified Bates-stamps.” 36 TTABVUE 12. However, the exhibits do include Bates-stamps, are bookmarked by the exhibit number, and the ESTAA coversheet does identify the Bates-stamp numbers for the various exhibits. Fraser declaration, exhibits, 22, 23 and 24 TTABVUE.

prior use. ... the Instagram posts do not attest to whether any sales were actually made, and even if they did, such attestations would be hearsay without further substantiating evidence. ... Moreover, the validity or circumstances of these posts are not explained or stated...<sup>51</sup>

Although Respondents criticize Mr. Fraser's testimony as vague, it is corroborated by the confidential financial documents as well as documentary exhibits (social media and internet articles), reflective of the relevant time periods Mr. Fraser stated the HWPO Mat Fraser/Nike Metcon shoes were offered and sold by Nike under their agreement, and promoted by Mr. Fraser, adding weight to his testimony. *Elder Mfg.*, 194 F.2d at 114 ("Oral testimony is obviously strengthened by corroborative documentary evidence."). *See also Tao Licensing, LLC v. Bender Consulting Ltd.*, Can. No. 92057132, 2017 TTAB LEXIS 437, at \*59 n.131 (TTAB 2017) (while respondent criticized the lack of documentary evidence of actual use of TAO-formative names, the Board found the testimony and corroborating documentary evidence in the form of promotional materials, menus, and a news article sufficient).

Mr. Fraser identified the provided Instagram posts (Bates 1-29)<sup>52</sup> as being from his social account, indicating his personal knowledge of these posts.<sup>53</sup> He also testified regarding use of his personal social media accounts for marketing the athletic shoes bearing the HWPO mark and provided the context for his posting activities.<sup>54</sup>

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<sup>51</sup> Respondent's brief, 36 TTABVUE 11-12.

<sup>52</sup> The Instagram profile page provided as exhibits in connection with his testimony shows on its face "Mathew Fraser athlete" "mathewfras" and the top left of the pages show "Mathew Fraser (@mathewfras) Instagram." Fraser declaration, paragraph 22, exhibit 7, 22 TTABVUE, 198, 199, 201, 203, 204, 207-212, 215-222.

<sup>53</sup> Fraser declaration, paragraph 22, 22 TTABVUE.

<sup>54</sup> *Id.* and Fraser declaration, confidential exhibits, 25 TTABVUE.

As for the presentation of sales data in summary form, prior Board cases and our reviewing court have indicated that such records may be considered. *Peopleware Sys. v. Peopleware, Inc.*, Opp. No. 91067773, 1985 TTAB LEXIS 84, at \*10 (TTAB 1984) (the Board's reviewing court has commented favorably on the use of summary evidence where complete reports are available for verification purposes) (citing *Squirtco. v. Tomy Corp.*, 697 F.2d 1038, 1042 n.4 (Fed. Cir. 1983)).

Respondents chose neither to cross-examine Mr. Fraser on his statements in his testimony declaration, nor question him about the accompanying exhibits. See Trademark Rule 2.123(a) 37 C.F.R. § 2.123(a). It does not appear from the record that they sought additional documentation from Petitioner relating to the shoe sales. *Peopleware Sys.*, 1985 TTAB LEXIS 84, at \*10 (considering summary records where "no concern was expressed by counsel for applicant at the deposition about authentication, nor was any request made at that time for access to the original documentation from which the records were made.").

Considering the testimony and corroborating evidence as a whole, we find that Petitioner's use in commerce date for HWPO on athletic shoes is at least as early as November 1, 2016 which is prior to Respondents' January 25, 2018 priority date for t-shirts. Petitioner has proven its priority by a preponderance of the evidence.

## VII. Conclusion

Petitioner has established prior trademark use of HWPO before Respondents' priority date, and Respondents have conceded that the parties' marks are likely to be

confused. Both elements of Petitioner's Section 2(d) claim are established, and therefore, Respondents' Registration No. 5968463 must be cancelled.<sup>55</sup>

**Decision:** The petition to cancel is granted.

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<sup>55</sup> Because we have found for Petitioner on his likelihood of confusion claim, we need not reach the merits of his failure to function claim. *Multisorb Techs. Inc. v. Pactiv Corp.*, Can. No. 92054730, 2013 TTAB LEXIS 616, at \*3, 6 (TTAB 2013).