

This Opinion is Not a
Precedent of the TTAB

Mailed: January 26, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Cavalier Rescue of Alabama, Inc.

v.

Christine Bruce Meager
—

Opposition No. 91248564
—

Michael J. Douglas of Leak Douglas & Morano PC for Cavalier Rescue of Alabama, Inc.

Mitchell Ghaneie of Marks Gray, PA for Christine Bruce Meager.

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Before Lynch, Lebow and Cohen,
Administrative Trademark Judges.

Opinion by Cohen, Administrative Trademark Judge:

Christine Bruce Meager (“Applicant”) seeks registration of the standard character mark THE CAVALIER RESCUE for “Animal rescue services, namely, arranging for the adoption of rescued animals” in International Class 45.¹

¹ Application Serial No. 88020862 was filed on June 29, 2018 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s claimed use of the mark anywhere

In its Amended Notice of Opposition,² Cavalier Rescue of Alabama, Inc. (“Opposer”) opposes registration of Applicant’s mark on the grounds that: (1) under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), Applicant’s mark so resembles Opposer’s common law marks THE CAVALIER RESCUE OF ALABAMA, and THE CAVALIER RESCUE in Application Serial No. 88023442³ for “Animal rescue services, namely, arranging for the adoption of rescued animals” as to be likely, when used in connection with the services identified in the Application, to cause confusion, to cause mistake, or to deceive; (2) under Trademark Act Section 1, 15 U.S.C. § 1051, the Application is void ab initio due to nonuse of the mark in commerce in connection with all of the services as of the Application filing date; and (3) fraud based on Applicant’s knowledge of Opposer’s prior use of its marks and nonuse at the time the Application was filed.⁴

Applicant’s Answer denies the salient allegations in the amended notice of opposition and seeks to interpose several affirmative defenses,⁵ namely, that Opposer

and in commerce at least as early as June 23, 2018. Applicant has disclaimed the exclusive right to use RESCUE apart from the mark as shown.

² The Board allowed Opposer time to file an amended notice of opposition which Opposer filed on May 18, 2021. 32-33 TTABVUE. The amended notice of opposition is Opposer’s operative pleading.

³ Application Serial No. 88023442 was filed July 2, 2018 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s claimed use of the mark anywhere and in commerce at least as early as June 23, 2018. Opposer has disclaimed the exclusive right to use RESCUE apart from the mark as shown.

⁴ 33 TTABVUE.

⁵ 34 TTABVUE 7-9.

has failed to allege its first use in commerce or priority with enough particularity;⁶ that Opposer's use is ornamental;⁷ that Opposer has waived its right to pursue this opposition through acts and omissions;⁸ and that Opposer's use is unlawful because it is in violation of the Animal Welfare Act and USDA regulations.⁹ Except for the purported defense of waiver, each of these putative defenses, as also demonstrated by Applicant's arguments,¹⁰ goes to Opposer's likelihood of confusion claim and whether it can establish priority. As discussed below, because we do not reach the claim of likelihood of confusion or the issue of priority, we give no further consideration to these affirmative defenses.

We also give no consideration to the asserted defense of waiver based on acts and omissions, which is a conclusory allegation lacking a factual basis and specific alleged misconduct on the party of Opposer, *see e.g., Midwest Plastic Fabricators Inc. v. Underwriters Labs. Inc.*, 5 USPQ2d 1067, 1069 (TTAB 1987), and thus is not a cognizable defense. Even if it was, Applicant did not present evidence in support of

⁶ 34 TTABVUE 7 at ¶¶ 1-2. Based on the allegations made in these defenses, Applicant appears to assert that Opposer has failed to state a claim of likelihood of confusion which is not a true affirmative defense. *TiVo Brands LLC v. Tivoli, LLC*, 129 USPQ2d 1097, 1101 n.6 (TTAB 2018).

⁷ *Id.* at ¶ 3.

⁸ *Id.* at ¶ 4.

⁹ *Id.* at ¶ 5.

¹⁰ *See, e.g., Applicant's Brief*, 63 TTABVUE 25 ("Opposer's use of the Mark does not satisfy the criteria for establishing a service, and therefore, Opposer does not have priority of use"); *id.* at 35 ("Since Opposer's use of the mark was not in compliance with USDA licensing requirements on June 23, 2018, Opposer's use of the mark at that time may not be considered first use.").

this asserted defense and presented no argument at trial,¹¹ so it is deemed impliedly waived.¹² *See, e.g., Miller v. Miller*, 105 USPQ2d 1615, 1616 n.3 (TTAB 2013).

Applicant also included a reservation of rights to assert further affirmative defenses,¹³ which is improper. *Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at *6 (TTAB 2022) (reservation of rights to add affirmative defenses is improper under the federal rules because it does not give fair notice of the affirmative defense).

Both parties have filed trial briefs. For the reasons set forth below, we sustain the opposition with respect to Opposer's claim of nonuse.

I. The Record

The record consists of the pleadings,¹⁴ and the file history of Applicant's Application, by operation of Trademark Rule 2.122(b)(1), 37 C.F.R § 2.122(b)(1). For this reason, it was unnecessary for the parties to submit additional copies of the

¹¹ Applicant's Brief, *id.* at 12 ("The issues before the board are: (1) whether Applicant has priority ... (2) whether Opposer's use ... qualifies as use ... (3) whether Ms. Meager's Application is valid or void ab initio for non-use; and (4) whether Opposer's use of the Mark is and has been a per se violation of federal USDA rules and regulations ...").

¹² We note the admonition of our primary reviewing court regarding the distinction between waiver and forfeiture. *See In re Google Tech. Holdings LLC*, 980 F.3d 858, 2020 USPQ2d 11465, at *3 (Fed. Cir. 2020) ("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)). Affirmative defenses that were asserted in an answer but then not pursued at trial may be deemed impliedly waived.

¹³ *Id.*

¹⁴ The amended Notice of Opposition can be found at 33 TTABVUE; the Answer can be found at 34 TTABVUE.

pleadings¹⁵ and the file of the Application.¹⁶ In addition, Opposer submitted the following materials under notice of reliance:

- A copy of Opposer’s application for THE CAVALIER RESCUE;¹⁷
- Opposer’s responses to Applicant’s Requests for Production of Documents, Interrogatories and Requests for Admission;¹⁸
- Applicant’s responses to Opposer’s Interrogatories, Requests for Production of Documents and Requests for Admission;¹⁹
- Opposer’s motions for summary judgment and exhibits;²⁰
- Applicant’s amended Rule 30(b)(6) deposition notice of Opposer;²¹
- Transcript of Applicant Christine Meager’s October 6, 2020 discovery deposition;²²
- Transcripts of Opposer’s Co-founder and Secretary Lisa Thompson’s discovery depositions of October 6, 2020 and February 9, 2022 and exhibits;²³
- A copy of Opposer’s pre-trial disclosures;²⁴
- Affidavit of Ms. Thompson;²⁵ and

¹⁵ Exhibit 24, 43 TTABVUE 720-31 (This exhibit is labelled “Exhibit 24” but in Opposer’s Notice of Reliance, it is identified as Exhibit 21. *See id.* at 9 at ¶21, 720); Exhibit 26, 61 TTABVUE 1264-73.

¹⁶ Exhibit 2, *id.* at 65-113; Exhibit 1, 61 TTABVUE 13-61.

¹⁷ Exhibit 1, 43 TTABVUE 13-64.

¹⁸ Exhibits 3-10, *id.* at 114-380.

¹⁹ Exhibits 11-14, *id.* at 381-448.

²⁰ Exhibit 15 and 22, *id.* at 449-96, 732-79.

²¹ Exhibit 16, *id.* at 497-501.

²² Exhibit 17, *id.* at 502-30.

²³ Exhibit 18-20, *id.* at 531-718.

²⁴ Exhibit 23, *id.* at 780-86.

²⁵ Exhibit 24, 53 TTABVUE 14-16.

- A copy of Opposer's certificate of incorporation.²⁶

Applicant duplicated much of Opposer's submissions²⁷ and submitted the following additional materials under notice of reliance:

- Applicant's pre-trial disclosures;²⁸
- Applicant's response to Opposer's motion for summary judgment and exhibits;²⁹ and
- Copies of Opposer's website and Facebook page.³⁰

While neither party raised substantive objections to the evidence submissions,³¹ we find it necessary to address some evidentiary issues.

Each party submitted multiple and duplicative copies of various evidence. Indeed, much of Applicant's submissions are duplicative of Opposer's submissions. Such

²⁶ Exhibit 25, *id.* at 17-20.

²⁷ Applicant submitted a copy of Opposer's application, Exhibit 2, 61 TTABVUE 62-113; Opposer's responses to Applicant's Requests for Production of Documents, Interrogatories, and Requests for Admissions, Exhibits 3-10, *id.* at 114-348; Applicant's responses to Opposer's Interrogatories, Requests for Production of Documents, and Requests for Admissions, Exhibits 11-14, *id.* at 349-462; A copy of Opposer's motion for summary judgment and exhibits, Exhibits 15, *id.* at 463-510; Applicant's amended Rule 30(b)(6) notice of deposition of Opposer, Exhibit 16, *id.* at 511-15; Transcript of Applicant Christine Meager's October 6, 2020 discovery deposition, Exhibit 17, *id.* at 516-78; Transcripts of Ms. Thompson's October 6, 2020 and February 9, 2022 discovery depositions and exhibits, Exhibit 18-21, *id.* at 579-850; Opposer's pre-trial disclosures, Exhibit 24, *id.* at 1243-50; and Opposer's amended notice of opposition, Exhibit 25, *id.* at 1251-63.

²⁸ Exhibit 22, 61 TTABVUE 851-56.

²⁹ Exhibit 23, *id.* at 857-1242.

³⁰ Exhibit 27, *id.* at 1274-92.

³¹ Applicant filed a motion to strike Opposer's May 19, 2022 Notice of Reliance for failure to effectuate service. 55 TTABVUE. The Board denied the motion and extended Opposer's trial period during which Opposer filed an amended notice of reliance on October 14, 2022. 53 and 60 TTABVUE.

duplication is unnecessary and we view the practice of introducing cumulative evidence at trial with disfavor. *See, e.g., Made in Nature*, 2022 USPQ2d 557, at *12 (filing duplicative evidence by different methods of introduction, for example, once by notice of reliance and again by way of an exhibit to a testimony declaration or testimony deposition, unnecessary); *Calypso Tech. Inc. v. Calypso Cap. Mgmt. LP*, 100 USPQ2d 1213, 1218 (TTAB 2011) (with its supplemental notice of reliance, plaintiff resubmitted the first 25 items listed in its first notice of reliance, needlessly adding bulk to the record and wasting Board resources).

Both parties submitted copies of their own discovery depositions³² and responses to interrogatories, requests for admission and produced documents.³³ However,

³² The discovery deposition of *a party* (or of anyone who, at the time of taking the deposition, was an officer, director, or managing agent of a party, or a person designated under Fed. R. Civ. P. 30(b)(6) or 31(a)(4) to testify on behalf of a party) may be offered in evidence by *any adverse party*,³² not the party itself. Trademark Rule 2.120(k)(1); *see also First Int'l Servs. Corp. v. Chuckles Inc.*, 5 USPQ2d 1628, 1630 n.5 (TTAB 1988); *Fort Howard Paper Co. v. C.V. Gambina Inc.*, 4 USPQ2d 1552, 1555 (TTAB 1987). Also, an answer to an interrogatory, or an admission to a request for admission, may ordinarily be submitted and made part of the record by only the inquiring party. Trademark Rule 2.120(k)(1); *see Bell's Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1342-43 (TTAB 2017); *Daniel J. Quirk Inc. v. Village Car Co.*, 120 USPQ2d 1146, 1151 (TTAB 2016); *Calypso Tech. Inc.*, 100 USPQ2d at 1217.

³³ Documents provided as all or part of an answer to an interrogatory under Fed. R. Civ. P. 33 may be made of record, as an interrogatory answer, by notice of reliance filed in accordance with Trademark Rules 2.120(k)(3)(i) and 2.120(k)(5). *See Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476-77 (TTAB 2014) (Board considered documents responsive to interrogatory under Fed. R. Civ. P. 33(d) submitted under notice of reliance); *Kohler Co. v. Baldwin Hardware Corp.*, 82 USPQ2d 1100, 1103-1104 (TTAB 2007). A party that has obtained documents from another party through disclosure or under Fed. R. Civ. P. 34 may not make the produced documents of record by notice of reliance alone, except to the extent that they are admissible by notice of reliance under Trademark Rule 2.122(e) (as official records; or as printed publications, such as books and periodicals, available to the general public in libraries or of general circulation among members of the public or that segment of the public which is relevant under an issue in the proceeding; or Internet documents); or

neither party has objected to this evidence and both parties treat this evidence as being properly of record. As such, we consider this evidence as part of the record. *See, e.g., Exec. Coach Builders, Inc. v. SPV Coach Co.*, 123 USPQ2d 1175, 1179 n.9 (TTAB 2017) (responses to document requests submitted by notice alone treated as being stipulated into record where both parties submitted them in this manner and neither objected); *Bass Pro Trademarks LLC v. Sportsman's Warehouse Inc.*, 89 USPQ2d 1844, 1848 n.6 (TTAB 2008) (because the parties stipulated to the use of discovery depositions as evidence, did not object to respondent's reliance on respondent's answers to petitioner's written discovery, and discovery responses were used as exhibits during depositions, Board considered the responses as having been properly made of record); *Spoons Rests. Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1737 n.11 (TTAB 1990) (no objection to applicant's introduction of discovery deposition of officer of opposer's parent corporation).

Lastly, when citing to the record, the parties used their own numbering system rather than using the TTABVUE docket citations. When referring to the record in an inter partes proceeding before the Board, parties should include a citation to the TTABVUE entry and page number (*e.g.*, 1 TTABVUE 2) to allow the Board and any reader to easily locate the cited materials. TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 801.03 (2023); *see also Turdin*, 109 USPQ2d at 1477 n.6 ("Citations to the record in ... [Board] opinion[s] are to the TTABVUE docket

unless the documents have been authenticated by an admission or stipulation from the producing party.

entry number and the electronic page number where the document or testimony appears.”).

II. Opposer’s Entitlement to a Statutory Cause of Action

“Entitlement to a statutory cause of action is a requirement in every inter partes case.” *Monster Energy Co. v. Lo*, 2023 USPQ2d 87, at *11 (TTAB 2023) (cleaned up) *civil action filed*, No. 5:23-cv-00549-GW-PVC (C.D. Cal. Mar. 28, 2023). “A party in the position of plaintiff may oppose registration of a mark when doing so is within the zone of interests protected by the statute and it has a reasonable belief in damage that would be proximately caused by registration of the mark.” *Id.* (citing *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at * 6-7 (Fed. Cir. 2020)). Opposer must prove its entitlement to oppose by a preponderance of the evidence. *Shenzhen IVPS Tech. Co. v. Fancy Pants Prods., LLC*, 2022 USPQ2d 1035, at *4 (TTAB 2022).

Opposer does not address its entitlement to oppose in its brief, but Opposer’s evidence of use of THE CAVALIER RESCUE,³⁴ a mark which is identical to Applicant’s proposed mark, for services which are identical to those sought to be registered by Applicant, demonstrates Opposer’s entitlement to a statutory cause of action. *See, e.g., Australian Therapeutic Supplies Pty. Ltd.*, 2020 USPQ2d 10837 at *3; *Nahshin Prod. Source Int’l, LLC*, 107 USPQ2d 1257, 1261 (TTAB 2013); *Syngenta Crop Prot. Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1118 (TTAB 2009). Specifically,

³⁴ We note Opposer also asserts use of THE CAVALIER RESCUE OF ALABAMA. 62 TTABVUE 10. For purposes of our entitlement analysis only, we have focused on Opposer’s use of THE CAVALIER RESCUE.

Ms. Thompson avers that Opposer is a non-profit organization “in the business of rescuing, rehabilitating and providing new homes to Cavalier King Charles Spaniels”; has been an “on-going national charity ... involved in the adoptive placement of approximately 606 Cavalier spaniels across the United States since 2015”; and began using THE CAVALIER RESCUE “as early as June 22, 2018 ... and certainly by the morning of July 23, 2018.”³⁵

Based on this common law use, Opposer has asserted a plausible likelihood of confusion claim against the involved Application, thereby showing a real interest in this proceeding beyond that of a mere intermeddler, and a reasonable basis for its belief of damage. *See Lipton Indus., Inc. v. Ralston Purina Co.*, 607 F.2d 1024 , 213 USPQ 185, 189 (CCPA 1982) (plaintiff may establish standing by proving a real commercial interest in its own marks and a reasonable belief that it would be damaged (e.g., a claim of likelihood of confusion that is not wholly without merit)); *Giersch v. Scripps Networks Inc.*, 90 USPQ2d 1020, 1022 (TTAB 2009) (common law use of similar mark sufficient to establish standing). Having established its entitlement to oppose based on this claim, Opposer can assert any other grounds for opposition. *DC Comics v. Cellular Nerd LLC*, 2022 USPQ2d 1249, at *20 (TTAB 2022).

III. Opposer’s Nonuse Claim

We begin with Opposer’s claim that Applicant’s mark was not in use in commerce in connection with the recited services as of the filing of the Application. If Opposer

³⁵ 53 TTABVUE 15 at ¶¶4-6, 8.

prevails on this claim, then the Application is considered void ab initio, and its claims of likelihood of confusion and fraud therefore would be moot. *See Wonderbread 5 v. Gilles*, 115 USPQ2d 1296, 1307 (TTAB 2015).

Where an application filed based on Section 1(a) is successfully opposed on the ground that there was no use of the mark in commerce on any of the goods or services specified when the application was filed, the remedy is to hold the application void ab initio. *See Couture v. Playdom*, 778 F.3d 1379, 113 USPQ2d 2042, 2043-44 (Fed. Cir. 2015); *Aycock Eng'g, Inc. v. Airflite, Inc.*, 560 F.3d 1350, 90 USPQ2d 1301, 1305 (Fed. Cir. 2009) (“The registration of a mark that does not meet the use requirement is void ab initio.”); *see also ShutEmDown Sports Inc. v. Lacy*, 102 USPQ2d 1036, 1045 (TTAB 2012) (considering nonuse by respondent at the time of filing the underlying use-based application); *Grand Canyon v. Hualapai Tribe*, 78 USPQ2d 1696, 1697 (TTAB 2006) (“[H]olding an application to be void is an appropriate remedy when the pleaded ground ... is ... that the applicant has not used the applied-for mark on any of the goods or services identified in the application prior to the filing of the application.”).

“Use in commerce” in this context “means the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark.” Trademark Act Section 45, 15 U.S.C. § 1127. For services in particular,

[A] mark shall be deemed to be in use in commerce ... when it is used or displayed in the sale or advertising of services and the services are rendered in commerce, or the services are rendered in more than one State or in the United States and a foreign country and the person rendering the services is engaged in commerce in connection with the services.

Id. Further, “mere publicity about services to be rendered in the future does not lay a foundation for an application.” *Intermed Commc’ns, Inc. v. Chaney*, 197 USPQ 501, 507 (TTAB 1977). Trademark Act Section 45 “requires not only the display of the mark in the sale or advertising of services but also the rendition of those services in order to constitute use of the service mark in commerce.” *Id.* at 507-08; *see also Couture v. Playdom, Inc.*, 778 F.3d 1379, 113 USPQ2d 2042, 2044 (Fed. Cir. 2015) (“[R]endering services requires actual provision of services[.]”) (citation omitted); *Aycock Eng’g, Inc.*, 90 USPQ2d at 1306 (“Without question, advertising or publicizing a service that the applicant intends to perform in the future will not support registration. Instead, the advertising or publicizing must relate to an existing service which has already been offered to the public[.]”) (citations and internal quotation marks omitted).

IV. Arguments, Evidence and Analysis

Opposer argues that Applicant had not provided her applied-for services, “animal rescue services, namely, arranging for the adoption of rescued animals,” as of the filing date of her Application, June 29, 2018.³⁶ According to Opposer, as reflected in the evidence of record, “Applicant provides for ‘education’ concerning Cavalier rescue organizations and ‘referral’ to other rescuers, but [] the Applicant does not actually provide rescue services and ‘would not rescue the animals.’”³⁷

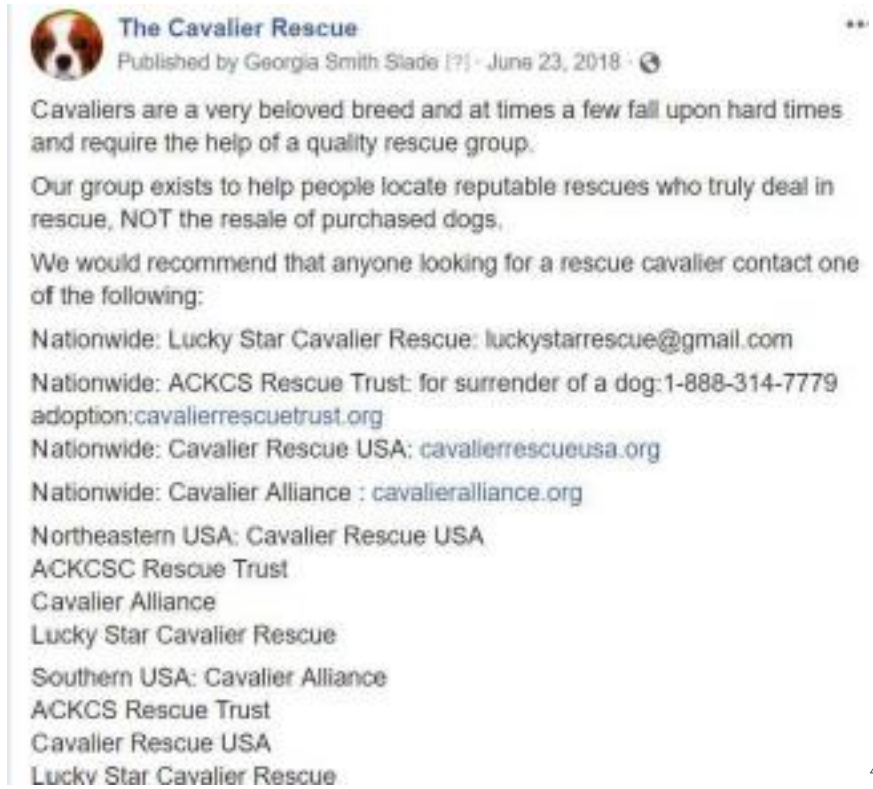
³⁶ 62 TTABVUE 19.

³⁷ *Id.* at 16-18.

In support of her claim of use prior to the June 29, 2018 Application filing date, specifically June 23, 2018, in her Notice of Reliance, Applicant describes her first use as a Facebook post “where a list of reputable cavalier rescue organizations was initially culminated [sic] and provided for adoption seekers to review to find a new member of for [sic] their family,”³⁸ and she submitted a copy of the Application file which includes that Facebook post originally submitted as a specimen of use.³⁹ A portion of the Facebook post is displayed below:

³⁸ 63 TTABVUE 13 at ¶3.

³⁹ The fact that the Application file is automatically part of the record does not mean that the specimens filed therein are evidence on behalf of Applicant. The specimens are not evidence unless the specimens are identified and introduced in evidence as exhibits during the testimony period. See *UMG Recordings, Inc. v. O’Rourke*, 92 USPQ2d 1042, 1047 (TTAB 2009) (dates of use not evidence); *Life Zone Inc. v. Middleman Grp. Inc.*, 87 USPQ2d 1953, 1960 (TTAB 2008) (alleged date of use in application not evidence); *Baseball Am., Inc. v. Powerplay Sports, Ltd.*, 71 USPQ2d 1844, 1848 n.10 (TTAB 2004) (dates of use and specimens not evidence).



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(the “First Facebook Post”).

Additional Facebook posts which Applicant produced on January 31, 2020 in response to Opposer’s Requests for Production display a compressed copy of the above-referenced post in addition to other posts⁴¹ (the “Additional Facebook Posts”).

None of these posts were exhibits to Applicant’s testimony.⁴² There is no testimony that specifically indicates that the First Facebook Post and Additional Facebook Posts are owned and controlled by Applicant or that the information contained therein is accurate. Without corresponding testimony, the probative value of the First Facebook

⁴⁰ 61 TTABVUE 35.

⁴¹ 61 TTABVUE 363-87.

⁴² As noted in the transcript of Applicant’s October 6, 2020 deposition, “[w]hereupon, no exhibits were submitted to said deposition.” *Id.* at 521.

Post and Additional Facebook Posts is limited and Applicant may not use the documents obtained through the Internet to demonstrate the truth of what has been printed. *See, e.g., Ricardo Media Inc. v. Inventive Software, LLC*, 2019 USPQ2d 311355, at *2 (TTAB 2019) (unaccompanied by testimony, articles from the Internet may not be considered for the truth of the matters asserted but are admissible for what they show on their face); *WeaponX Performance Prods. v. Weapon X Motorsports, Inc.*, 126 USPQ2d 1034, 1041 (TTAB 2018) (“[A]ssertions appearing in the printouts submitted by Opposer under notice of reliance cannot be used to demonstrate its priority without testimony corroborating the truth of this matter.”). As such, we treat them as Internet evidence under notice of reliance, and consider them only what they show on their face, not for the underlying truth of any content on the pages.

Notwithstanding, in her discovery deposition, Applicant addressed the Facebook posts when she responded in the affirmative to the questions:

- And when did you start using [The Cavalier Rescue]? Did you start using that name in a public setting by opening up the Facebook page?
- Before that, it was just private conversations with friends of yours getting the idea to start it?
- And it appears you started the Facebook page on the afternoon of June 23rd, 2018; is that right?⁴³

Because there is testimony regarding a Facebook post on June 23, 2018 which seems to refer to the First Facebook Post, albeit vaguely, we will consider the June

⁴³ 43 TTABVUE 513.

23, 2018 date displayed on the First Facebook Post. *See, e.g. Shenzhen IVPS Tech. Co.*, 2022 USPQ2d 1035, at *20 n.26 (possible objection based on failure to identify URL or date accessed of webpages considered waived); *City Nat'l Bank v. OPGI Mgmt. GP Inc./Gestion OPGI Inc.*, 106 USPQ2d 1668, 1672 (TTAB 2013) (“Any shortcomings in respondent’s original submission ... under notice of reliance, such as its failure to identify the URL and when the document was actually accessed (either printed out or downloaded), are procedural deficiencies that were not timely raised by petitioner and thus have been waived.”); *Mag Instrument, Inc. v. The Brinkmann Corp.*, 96 USPQ2d 1701, 1708 (TTAB 2010) (citing *Pass & Seymour, Inc. v. Syrelec*, 224 USPQ 845, 847 (TTAB 1984) (objection on grounds of improper authentication of exhibits waived)). It is the June 23, 2018 date displayed on the First Facebook Post upon which Applicant heavily relies to establish her use of THE CAVALIER RESCUE for the applied-for services as of the Application filing date.

Applicant, in her discovery deposition, also testifies that she started her organization, The Cavalier Rescue, “[s]everal days before [she] applied for the trademark” and describes her activities as “an educational and referral group that could send people to Cavalier rescues that had available animals, and they could go through these reputable groups and adopt a dog.”⁴⁴ She continues that she discussed starting an organization with others⁴⁵ and “formulated the plan that if we could have

⁴⁴ 43 TTABVUE 510.

⁴⁵ The dates of these discussions were not provided nor did Applicant indicate that these discussions were “open, public and notorious use such that the purchasing public is made aware of the availability of the goods [and services] under said mark and of the use of the

an umbrella referral group, that The Cavalier Rescue was an excellent way for people to find my page, become educated. They could message or e-mail me, and I could refer them to a group in their area that would have a dog that was adoptable for them.”⁴⁶

This testimony is vague and nonspecific. Testimony of a single witness may establish use, “but only if it is sufficiently probative,” and the testimony should not be characterized by “indefiniteness but should carry with it conviction of its accuracy and applicability.” *Exec. Coach Builders*, 123 USPQ2d at 1184 (quoting *B.R. Baker Co. v. Lebow Bros.*, 150 F.2d 580, 66 USPQ 232, 236 (CCPA 1945)). Broad general statements by a witness that lack sufficient detail are usually not adequate to establish a date of first use, especially in the absence of corroborating documentary evidence. *See Mars Generation, Inc. v. Carson*, 2021 USPQ2d 1057, at *20 (TTAB 2021) (conclusory testimony consisting of the “bald assertion that he used the marks for the service” that lacked “specifics” was “significantly undermined by lack of detail” and lack of corroborating evidence); *H. Betti Indus., Inc. v. Brunswick Corp.*, 211 USPQ 1188, 1197 (TTAB 1981) (vague, indefinite and inconsistent testimony accompanied by inadequate documentary evidence found insufficient to support priority claim).

Beyond the First Facebook Post, there is no other testimony or evidence of any other use of THE CAVALIER RESCUE as of the Application filing date. Applicant testifies that potential adopters could contact her by message or email but she does

mark as an indication of the origin of those goods [or services].” *See, e.g., Mastic Inc. v. Mastic Corp.*, 230 USPQ 699, 701 (TTAB 1986).

⁴⁶ 43 TTABVUE 513.

not provide any testimony or evidence about whether she actually received any messages or emails, what the contents of that communication might have been or the dates received. There is also no testimony or evidence regarding whether the First Facebook Post or Additional Facebook Posts were accessed by the public on any date prior to or on the June 29, 2018 Application filing date.

Applicant takes the position that her First Facebook Post educates prospective adopters of rescued animals about “reputable third-party adoption organizations offering rescued animals for adoption” which, given the broadly worded applied-for services, “fall[s] within the definition of ‘arranging.’”⁴⁷ In support, she provides a dictionary definition from MERRIAM-WEBSTER.COM for “arrange” defining it as “to bring about an agreement or understanding; to make preparations.”⁴⁸

We disagree with this characterization. The First Facebook Post is akin to a directory which in this case, lists organizations that are involved in animal adoptions and rescues and is, as asserted by Applicant, educational in nature. The listing of these third parties is not the same as arranging for adoptions nor is it bringing about an agreement or understanding about adoptions. To find so would be analogous to finding that a phone book that lists phone numbers and addresses for electricians, for example, is arranging electrical services.

Arguably, Applicant’s Additional Facebook Posts which include descriptions of specific dogs available for adoption and Applicant’s asserted intent to respond to

⁴⁷ 63 TTABVUE 27.

⁴⁸ 61 TTABVUE 1241-42.

emails and messages from potential adopters and putting them in touch with organizations with dogs available for adoption, might qualify as arranging or bringing about an agreement about adoptions of rescued animals. However, the Additional Facebook Posts which include references to dogs available for adoption display dates that are after the Application filing date with most of the posts containing dates in 2019.⁴⁹ Further, while Applicant testifies that potential adopters “**could** message or e-mail me, and I **could** refer them to a group in their area that would have a dog that was adoptable for them”⁵⁰ (emphasis added), as noted, Applicant does not clearly testify that she actually did so as of the Application filing date or otherwise, nor does the record show corroborating evidence of such activities in 2018. *See, e.g., Executive Coach Builders*, 123 USPQ2d at 1184 (testimony of a single witness may be adequate to establish first use if it is sufficiently clear and definite). Her testimony reflects a mere willingness to provide the recited services, or preparation to offer the services, which does not suffice. *See Lyons v. Am. Coll. of Veterinary Sports Med. & Rehab.*, 859 F.3d 1023, 123 USPQ2d 1024, 1029 (Fed. Cir. 2017) (“[W]e have held that mere preparation and publication of future plans do not constitute use in commerce.”). “[R]endition of those services [is required] in order to constitute use of the service mark in commerce.” *Intermed Commc’ns, Inc.*, 197 USPQ at 504. Of further note, the suggestion of coordinating adoptions through messages is inconsistent with one of the

⁴⁹ *See* 61 TTABVUE 363-81. Applicant submitted Facebook posts from June and July 2018 which updated the cover photo or profile picture of the Facebook account. *Id.* at 382-84.

⁵⁰ 43 TTABVUE 513.

Additional Facebook Posts, which discourages any direct contact with Applicant about specific dogs for adoption:



After careful consideration of the parties’ submissions, we find there is insufficient evidence to support bona fide use of the mark in the ordinary course of trade for the recited services as of the Application filing date. The record falls short of demonstrating that Applicant actually provided “animal rescue services, namely, arranging for the adoption of rescued animals.”

V. Conclusion

The evidence of record does not demonstrate that Applicant used THE CAVALIER RESCUE in commerce in connection with the applied-for services as of the filing date of the use-based Application. The Application is therefore void ab initio based on nonuse.

Because we have found that the Application is void ab initio based on nonuse, we need not reach Opposer’s likelihood of confusion or fraud claims. *See Azeka Bldg. Corp. v. Azeka*, 122 USPQ2d 1477, 1478 (TTAB 2017) (the Board has “discretion to decide only those claims necessary to enter judgment and dispose of the case”)

⁵¹ 61 TTABVUE 371.

(quoting *Multisorb Tech., Inc. v. Pactive Corp.*, 109 USPQ2d 1170, 1171 (TTAB 2013)); *Wonderbread 5 v. Gilles*, 115 USPQ2d 1296, 1305 (TTAB 2015) (dismissing as moot petitioner's Section 2(d) and fraud claims after finding that the underlying application of the involved registration was void ab initio as of the application filing date because respondent was not the owner of the mark).

Decision: The opposition is sustained and registration to Applicant is refused.