Mailed: March 11, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Openly Human, LLC
v.
B. Cosmetics S.R.L.

Cancellation No. 92078800

Meredith K. Lowry of Wright Lindsey & Jennings LLP,
for Openly Human, LLC.

Nicholas D. Wells of Legends Law Group, PLLC,
for B. Cosmetics S.R.L.

Before Wellington, Coggins, and Cohen;
Administrative Trademark Judges.

Opinion by Coggins, Administrative Trademark Judge:

Respondent B. Cosmetics S.R.L. owns a Principal Register registration for the stylized mark  for:

> Cosmetics; perfumery; perfumes; scented oils; ethereal oils; oils for cosmetic purposes; massage oils; bath oil; moisturizing milk; skin care lotions; moisturising gels; make-up removing preparations; non-medicated soap; cakes of toilet soap; non-medicated soaps in liquid form; bath foam; foams for use in the shower; shampoos; hair

> balsam; hair care lotions; oils for hair conditioning; tints for the hair; hair gel; hair spray; cosmetic creams; moisturising skin creams; exfoliant creams; washing creams; face creams for cosmetic use; facial skin toners; hand creams; shaving cream; after-shave lotions; shaving foam; body powder; depilatory preparations; douching preparations for personal sanitary or deodorant purposes; antiperspirants; sachets for perfuming linen; air fragrancing preparations; dentifrices, in International Class 3.[1]

Petitioner Openly Human, LLC seeks cancellation of Respondent's registration under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on the basis of a likelihood of confusion with its alleged prior common-law rights in the marks OH and OH OPENLY HUMAN for "body spray used as a personal deodorant and as a fragrance."[2]

---

[1] Registration No. 6011553, issued March 17, 2020, from an application with an effective (priority) filing date of April 2, 2019, based on a foreign application under Section 44(d) of the Trademark Act, 15 U.S.C. § 1126(d). The registration includes the following description of the mark: "The mark consists of the stylized wording 'OH.'." Color is not claimed as a feature of the mark.

[2] 1 TTABVUE 6, ¶ 10. Petitioner also pleaded a claim of abandonment (*see* Petition ¶¶ 18-24, 1 TTABVUE 7-9), but moved to withdraw this ground with prejudice (*see* 26 TTABVUE). The motion to withdraw is hereby granted, and the claim of abandonment is accordingly dismissed with prejudice. Trademark Rule 2.114(c), 37 C.F.R. § 2.114(c).

In addition, Petitioner alleged ownership of two later-filed applications, Serial Nos. 90425998 and 90426057 for stylized marks OH OPENLY HUMAN and OH, respectively (*see* Petition ¶ 3, and the accompanying ESTTA Cover Sheet; 1 TTABVUE 2-3, 4-5); however, because Petitioner did not mention the applications in its brief, they were not introduced into evidence, and there is no admission in the Answer as to either application, we give these pleaded applications no further consideration.

Citations to the record and briefs reference TTABVUE, the Board's online docket system. *See, e.g., New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 TTAB LEXIS 199, at *4 n.1 (TTAB 2020). In addition, this opinion cites decisions pursuant to an internal pilot program to broaden acceptable forms of legal citation in Board cases. Decisions of the U.S. Court of Appeals for the Federal Circuit and its predecessor are cited to the Federal Reporter (e.g., F.2d, F.3d, or F.4th), while Board decisions are cited to the Lexis legal database and are all precedents. *See* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) §§ 101.03 *et seq*. (2024).

In its Answer, Respondent denied the salient allegations of the Petition for Cancellation.[3] In its trial brief, "Respondent concedes that there is a likelihood of confusion between Respondent's OH mark and Petitioner's OH mark," and characterizes this proceeding as a priority dispute.[4] Petitioner agrees, stating in its reply brief that "[t]his case hinges on priority – who used the OH logos . . . first."[5]

The case is fully briefed. We deny the petition to cancel.

I. Evidentiary Issues

Petitioner submitted by notice of reliance TSDR print-outs and the registration file histories of unpleaded Registration Nos. 5801660 and 5777104 (each for the mark OPENLY HUMAN) to show "Petitioner's ownership of the registrations, use of the trademark OH, and the prosecution history of the registrations."[6] Petitioner relied on these unpleaded registrations in its brief but did not assert that the petition to cancel should be amended under Fed. R. Civ. P. 15(b) to plead the registrations. However, because Respondent did not object in its brief to Petitioner's reliance on the two unpleaded registrations, and instead affirmatively treated them as being of record,[7] we consider the unpleaded registrations to have been tried by implied consent and

---

[3] *See* 8 TTABVUE.

[4] 28 TTABVUE 14 ("II. There Is a Likelihood of Confusion between the Parties' Marks, but Respondent Has Priority in the OH Mark."). *See also id.* at 7 ("The issue in this dispute is which party has priority in the OH mark in connection with goods in International Trademark Class 003.")

[5] 29 TTABVUE 3.

[6] 15 TTABVUE 2.

[7] *See* 28 TTABVUE 5 (listing the registrations as part of the record), 8, 9-10 (referring to the underlying application files and testimony related to these marks).

we deem the petition for cancellation amended to assert the registrations under Fed. R. Civ. P. 15(b). *See e.g., Shenzhen IVPS Tech. Co. v. Fancy Pants Prods., LLC*, 2022 TTAB LEXIS 383, at *19 (TTAB 2022) ("Implied consent has been found when a party does not object to the submission of evidence and/or argues the evidence in its brief on the case.") (citing *Time Warner Entm't Co. v. Jones*, 2002 TTAB LEXIS 462, at *2 n.2 (TTAB 2002) (unpleaded registrations tried by implied consent where "applicant has raised no objection to opposer's submission of and reliance upon these unpleaded registrations")).

The rebuttal testimony from Petitioner's Chief Executive Officer concerns Petitioner's first use of its mark with supporting exhibits (i.e., archived sales records and Facebook pages).[8] All of Petitioner's evidence relating to priority should have been presented during Petitioner's case-in-chief; however, any objection to this improper rebuttal is waived or forfeited because Respondent did not object and instead treated it as of record and discussed the rebuttal evidence in its trial brief. *See Hunter Publ'g Co. v. Caulfield Publ'g Ltd.*, 1986 TTAB LEXIS 28, at *3 n.2 (TTAB 1986) (improper rebuttal testimony considered where no objection raised); *Gen. Elec. Co. v. Graham Magnetics Inc.*, 1977 TTAB LEXIS 197, at *4 n.5 (TTAB 1977) (case-in-chief evidence improperly submitted under notice of reliance during rebuttal period considered where applicant did not object). Similarly, Respondent waived any objection to Petitioner's introduction of sales records on the grounds of failure to lay

[8] 24 TTABVUE.

a proper foundation under the business records exception to the rule against hearsay. *Moke Am. LLC v. Moke USA, LLC*, 2020 TTAB LEXIS 18, at *19-20 (TTAB 2020).

Both parties introduced pages from the Internet and various social media sites without supporting testimony as to the truth of the assertions made therein.[9] *See 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"). Because both parties submitted and relied on this type of evidence, some of it overlapping and identical, we consider the parties to have stipulated to the admissibility of this evidence and to have waived any hearsay objection thereto.

II. 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 history of Respondent's involved registration. In addition, the parties introduced the following evidence.

A. Petitioner's Evidence

- Notice of Reliance comprising TSDR print-outs and the registration file histories of its Registration Nos. 5801660 and 5777104, as well as Respondent's registration subject to this proceeding (15 TTABVUE).[10]

[9] *See, e.g.*, Kent Decl. Ex. OH1 (16 TTABVUE 7-16); Kent Rebut. Decl. Ex. OH6 (24 TTABVUE 12-50); Respondent's Notice of Reliance Exs. A-R (17 TTABVUE 8-42); Cascella Decl. Ex. 5 (19 TTABVUE 83-99).

[10] In view of Trademark Rule 2.122(b)(1), it was unnecessary for Petitioner to submit the file history of the subject registration.

- Declaration of Alex Kent, Petitioner's Chief Executive Officer, with exhibits (16 TTABVUE).

- Rebuttal declaration of Mr. Kent, with exhibits (24 TTABVUE; confidential version at 23 TTABVUE).

B. Respondent's Evidence

- Notice of Reliance on Internet material from Petitioner's website, Instagram, and Facebook pages (17 TTABVUE).

- Declaration of Chiara Cascella, Chief Executive Officer and co-founder of Respondent, with exhibits (19 TTABVUE; confidential version at 18 TTABVUE).

- Declaration of Luca Sigismondi, co-founder of Respondent, with exhibits (22 TTABVUE; confidential version at 20 TTABVUE).

- Declaration of Respondent's customer Gwen Leo, with an exhibit (21 TTABVUE 2-5).

- Declaration of Respondent's customer Jean Curcio, with an exhibit (21 TTABVUE 6-9).

III. Entitlement to a Statutory Cause of Action

Entitlement to a statutory cause of action is a requirement in every inter partes case. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 1303-05 (Fed. Cir. 2020); *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 1372 (Fed. Cir. 2020) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 n.4 (2014)). Petitioner may attempt to cancel Respondent's registration if Petitioner's interests fall within the zone of interests protected by the statute, and Petitioner has a reasonable belief in damage that is proximately caused by the continued registration of the registration. *Corcamore*, 978 F.3d at 1301; *Spanishtown Enters., Inc. v. Transcend Resources, Inc.*, 2020 TTAB LEXIS 481, at *4 (TTAB 2020);

see also Meenaxi Enter., Inc. v. Coca-Cola Co., 38 F.4th 1067, 1072 (Fed. Cir. 2022) ("While the zone-of-interest test is not especially demanding . . . it nonetheless imposes a critical requirement.") (cleaned up).

Petitioner submitted testimony declarations of its CEO, Alex Kent, with exhibits, who testified that Petitioner has used the mark **Oh** on body spray as a personal deodorant and as a fragrance since at least April 20, 2018.[11] This testimony of use of a pleaded mark is sufficient to establish that Petitioner has a real interest in this proceeding and a reasonable basis for its belief in damage. *See Monster Energy Co. v. Lo*, 2023 TTAB LEXIS 14, at *16 (TTAB 2023) (entitlement found based on declaration of opposer's CEO attesting to opposer's use of allegedly similar pleaded mark); *Fallon v. Brown Innovation, LLC*, 2021 TTAB LEXIS 435, at *4-5 (TTAB 2021) (common law use and plausible likelihood of confusion claim supported finding of entitlement); *Syngenta Crop Prot. Inc. v. Bio-Chek LLC*, 2009 TTAB LEXIS 70, at *16 (TTAB 2009) (testimony that plaintiff uses its pleaded mark "is sufficient to support [plaintiff's] allegations of a reasonable belief that it would be damaged . . . .").

IV. Likelihood of Confusion Not Disputed

"Respondent concedes that there is a likelihood of confusion between Respondent's OH mark and Petitioner's OH mark"[12] and does not otherwise address the issue in its brief. *See, e.g., Major League Baseball Players Ass'n v. Chisena*, 2023 TTAB LEXIS

[11] Kent Rebut. Decl. ¶¶ 2-4, and Ex. OH6 (24 TTABVUE 2, 49); *see also* Kent Decl. ¶¶ 3-5, and Ex. OH1 (16 TTABVUE 2-3, 7-14).

[12] 28 TTABVUE 14.

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."), *see also In re Google Tech. Holdings LLC*, 980 F.3d 858, 862-63 (Fed. Cir. 2020) (a party forfeits or waves arguments that are not presented to the Board). Given the high degree of similarity between the parties' marks and goods at issue in this proceeding, we agree there is a likelihood of confusion between the parties' respective OH marks. Accordingly, the main issue to be decided in this case is whether Petitioner has established priority of use in its OH mark. *Compagnie Gervais Danone v. Precision Formulations, LLC*, 2009 TTAB LEXIS 1, *4 (TTAB 2009) (where parties "conceded that confusion is likely . . . [t]he sole issue that remains is one of priority.")

V. Priority

"Section 2(d) of the Trademark Act provides a ground for cancellation of a registered mark based on likelihood of confusion with a petitioner's mark . . . previously used in the United States and not abandoned." *JNF LLC v. Harwood Int'l Inc.*, 2022 TTAB LEXIS 328, at *9 (TTAB 2022). *See also Kemi Organics, LLC v. Gupta*, 2018 TTAB LEXIS 149, at *9-10 (TTAB 2018) ("Here, the parties stipulated that there is a likelihood of confusion between the parties' marks, so we only need to determine whether Petitioner established proprietary rights in its pleaded common-law mark that precede Respondent's actual or constructive use of its involved mark.") (cleaned up). We turn first to a determination of the relevant date of Respondent's "actual or constructive use of its involved mark." *Exec. Coach Builders, Inc. v. SPV Coach Co.*, 2017 TTAB LEXIS 201, at *19 (TTAB 2017).

A. Respondent's Priority Date

Respondent may assert, and rely without further proof, on the April 2, 2019, priority filing date of the foreign application underlying its registration. *Kemi Organics*, 2018 TTAB LEXIS 149, at *11 (citing Trademark Act Section 44(d), 15 U.S.C. § 1126(d)). However, Respondent asserts an earlier date of December 15, 2018, based on actual use of the registered mark.[13]

Respondent's co-founder and CEO, Chiara Cascella, testified that Respondent first sold cosmetics packaged with its OH mark to a U.S. consumer on December 15, 2018.[14] The testimony is corroborated by a packing slip for the December 15, 2018 sale.[15] In addition, Gwen Leo, Respondent's first U.S. consumer (residing in Arizona), testified that she placed an order online at Respondent's website for three personal care items on December 15, 2018, she thereafter received the three items ordered, and the product packages included the wording OH.[16]

In its reply brief, Petitioner concedes that "Respondent . . . has provided evidence establishing its first use as of December 15, 20[1]8."[17] Based on Respondent's evidence

[13] 28 TTABVUE 7.

[14] Cascella Decl. ¶¶ 8-9 (19 TTABVUE 3). *See also* the identically worded Sigismondi Decl. ¶¶ 8-9 (22 TTABVUE 3).

[15] Cascella Decl. Ex. 1 (19 TTABVUE 6).

[16] Leo Decl. ¶¶ 3-5 (21 TTABVUE 2).

[17] 29 TTABVUE 3. Although Petitioner mistakenly lists the date as "December 15, 2028," the incorrect year is an obvious typographical error and the meaning in context is clearly "2018." *See Cadbury UK Ltd. v. Meenaxi Enter., Inc.*, 2015 TTAB LEXIS 292, at *15 (TTAB 2015) (obvious and inadvertent typographical errors are to be overlooked).

and Petitioner's concession, we find that Respondent may rely on December 15, 2018, as its date of priority.

B. Petitioner's Priority Date

We now analyze whether Petitioner has demonstrated "proprietary rights in its pleaded common-law mark that precede [Respondent's] actual or constructive use of its involved mark." *Kemi Organics*, 2018 TTAB LEXIS 149, at *10 (quoting *Exec. Coach Builders*, 2017 TTAB LEXIS 201, at *19 (TTAB 2017)). Petitioner, the alleged prior user, bears the burden of proving priority by a preponderance of the evidence. *Cerveceria Centroamericana S.A. v. Cerveceria India Inc.*, 892 F.2d 1021, 1023 (Fed. Cir. 1989). In making our determination of priority, we must "look at [Petitioner's] 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 Inc. v. Jet Rests. Inc.*, 31 F.3d 1122, 1125-26 (Fed. Cir. 1994).

In the petition for cancellation, Petitioner alleges first use of its pleaded OH mark "[s]ince at least as early as April 11, 2018" on personal care products.[18] In its main trial brief, Petitioner asserts that its "first use of the OH mark 'in commerce' was at least on January 26, 2018 through a sale of goods."[19] In its rebuttal brief, Petitioner elaborates that its first sale occurred on January 26, 2018, with shipment of that first-sale product "as of April 20, 2018."[20] In the rebuttal brief, Petitioner also asserts that

[18] Petition ¶ 10 (1 TTABVUE 6).

[19] 27 TTABVUE 11.

[20] 29 TTABVUE 3.

it "provided evidence of use of the [OH mark] as of March of 2018 . . . through the records of its trademark registrations for [the mark] OPENLY HUMAN . . . Nos. 5801660 and 5777104 . . . ."[21]

The testimony of Petitioner's CEO, Alex Kent, similarly mentions multiple dates of use. Mr. Kent declares that Petitioner created and sold personal care products since at least as early as April 11, 2018;[22] made its first sale of personal care products that included the OH mark on the packaging therefor on April 20, 2018;[23] and has continually, since the April 22, 2018 filing date of its two trademark applications for the mark OPENLY HUMAN used its OH mark on personal care products.[24]

Respondent argues that Mr. Kent "claimed or implied" multiple dates of first use of the OH mark, and that the testimony of Mr. Kent is unreliable, inconsistent, and contradictory.[25] Sifting through the evidence of record, as we must when piecing together Petitioner's priority puzzle, *W. Fla. Seafood*, 31 F.3d at 1125-26, we agree with Respondent and find multiple unexplained inconsistencies and contradictions within Mr. Kent's testimony and between his testimony and Petitioner's public statements on social media posts of record.

[21] 29 TTABVUE 3.

[22] Kent Decl. ¶ 2 (16 TTABVUE 2); Kent Rebut. Decl. ¶ 2 (24 TTABVUE 2).

[23] Kent Rebut. Decl. ¶¶ 3-4 (24 TTABVUE 2).

[24] Kent Decl. ¶¶ 4-5 (16 TTABVUE 3).

[25] 28 TTABVUE 8. We note that all of the alleged, "claimed or implied" dates of first use of Petitioner's OH mark are earlier than Respondent's December 15, 2018 priority date.

For example, Mr. Kent initially testified that Petitioner created and sold personal care products since at least as early as April 11, 2018,[26] but Mr. Kent did not point to any corroborating evidence with an April 11, 2018 date. In his rebuttal testimony, Mr. Kent again stated (without citing corroborating evidence) that Petitioner created and **sold** personal care products since at least as early as April 11, 2018,[27] but then immediately contradicted that statement by claiming Petitioner's first sale occurred nine days later, on April 20, 2018, to Amy Diaz.[28] The unexplained shift in dates brings the reliability of the testimony into question.

Attached to the rebuttal declaration is an archived record of Petitioner's sales which appears to indicate a first sale made to Ms. Diaz on January 26, 2018, and shipped to her three months later, on April 20, 2018.[29] Nonetheless, because Mr. Kent testified that the sale to Ms. Diaz "occurred on April 20, 2018," it brings the accuracy of either his testimony or the corroborating sales record into question.[30]

It is not until Petitioner filed its main trial brief that its theory shifts to affirmatively assert January 26, 2018, as its date of first use of the OH mark.[31] This date is based on the sale to Ms. Diaz as it appears in the archived sales records (which records also indicate that her order was shipped three months later, on April 20,

[26] Kent Decl. ¶ 2 (16 TTABVUE 2).

[27] Kent Rebut. Decl. ¶ 2 (24 TTABVUE 2).

[28] Kent Rebut. Decl. ¶ 3 (24 TTABVUE 2).

[29] Kent Rebut. Decl. Ex. OH5 (24 TTABVUE 10), indicating a transaction was "paid at" 1/26/2018, and "fulfilled" (i.e., shipped) to Ms. Diaz via First Class Mail on April 20, 2018).

[30] Kent Rebut. Decl. ¶ 3 (24 TTABVUE 2).

[31] 27 TTABVUE 11 ("first use of the OH mark 'in commerce' was at least on January 26, 2018 through a sale of goods.").

2018).[32] As Respondent correctly observes in its main brief, Petitioner's archived sales records indicate that there was no other shipment of any goods for the following 14 months, until an isolated shipment on June 19, 2019, which was then followed by four months on inactivity until regular shipments began October 21, 2019.[33] Based on the 14- and 18-month lags shown in the sales records, Respondent posits that the initial January 26, 2018 sale with an April 20, 2018 shipment could not qualify as a "use in commerce" of the mark (i.e., "a bona fide use of the mark in the ordinary course of trade, and not made merely to reserve a right in a mark"),[34] but instead was merely "a *de minimis* token use that does not establish Petitioner's priority of use."[35]

In support of its argument, Respondent points to multiple posts on Petitioner's Instagram and Facebook pages – all after Petitioner's alleged January or April 2018 date of use – in which Petitioner repeatedly stated that it would "launch" later, at a generally unspecified time.[36] For example, in a June 4, 2018 comment, Petitioner stated its launch was "hopefully late summer/early fall."[37] The next week, Petitioner said it was "[f]ormulating some of our first concepts in the lab in Portland."[38] In July 2018, it said "[w]e're bustin' our buns on the final phases of our formula."[39] On August

[32] Kent Rebut. Decl. Ex. OH5 (24 TTABVUE 9, 10).

[33] 28 TTABVUE 6, 13. *See also* Kent Rebut. Decl. Ex. OH5 (24 TTABVUE 10).

[34] *See* Trademark Act Section 45, 15 U.S.C. § 1127, defining "use in commerce."

[35] 28 TTABVUE 12.

[36] *See* chart summarizing statements at 28 TTABVUE 10.

[37] Respondent's Notice of Reliance Ex. C (17 TTABVUE 12).

[38] Respondent's Notice of Reliance Ex. D (17 TTABVUE 14).

[39] Respondent's Notice of Reliance Ex. L (17 TTABVUE 30).

25, 2018: "Excited to launch my new company @openlyhumanco later this year!"[40] On April 26, 2019: "Just a month or so from launch now! Woo hoo!"[41] There are multiple other similar statements over time, with one as late as September 25, 2019, saying "[o]ur first production run is almost ready. It's been nearly 2 years and so many iterations to create the best natural, vegan spray deodorant in the cosmos!"[42] There is an inference from these public statements that Petitioner did not have a product to sell as of its claimed first sale date (January 26, 2018) or shipment date (April 20, 2018).

Petitioner's Facebook posts attached to the Kent rebuttal declaration show similar statements, all in conflict with his testimony. On May 21, 2018, "we can't wait to launch later this year!"[43]; on May 25, 2018, "Launching soon!"[44]; on August 22, 2018, "Our first line of vegan spray deodorant is almost here!"[45] and on May 18, 2019, "Super close to launch."[46] These public statements were made after Petitioner's alleged first sale and alleged first shipment, indicating that Petitioner had yet no product to sell.

Although Respondent raised in its brief the contradictions and inconsistencies in Petitioner's testimony and between the testimony and the documentary evidence of

[40] Cascella Decl. Ex. 5 (19 TTABVUE 84).

[41] Cascella Decl. Ex. 5 (19 TTABVUE 85).

[42] Respondent's Notice of Reliance Ex. G (17 TTABVUE 20).

[43] Kent Rebut. Decl. Ex. OH6 (24 TTABVUE 46).

[44] Kent Rebut. Decl. Ex. OH6 (24 TTABVUE 45).

[45] Kent Rebut. Decl. Ex. OH6 (24 TTABVUE 40).

[46] Kent Rebut. Decl. Ex. OH6 (24 TTABVUE 31).

record, Petitioner failed to address these issues in its rebuttal brief – and the silence is significant. Petitioner relies on a January 2018 sale for its priority, but never explains (or even expresses indirectly) how it seemingly developed one product – just one unit – to ship three months later, but did not have a single other unit to ship to consumers for another 14 or 18 months while the record shows its products were still being formulated.

Instead, Petitioner opens its rebuttal brief with an assertion that it "provided evidence of use of the [OH mark] as of March of 2018 . . . through the records of its trademark registrations for [the mark] OPENLY HUMAN . . . Nos. 5801660 and 5777104 . . . ."[47] But Petitioner may not rely on the March 2018 dates of use claimed in Registration No. 5801660 as evidence of the date on which it used the OH mark because such dates are not self-proving; first use instead must be established by competent evidence in this proceeding.[48] *See* Trademark Rule 2.122(b)(2); 37 C.F.R. § 2.122(b)(2). Similarly, to the extent Petitioner implies that the specimens submitted during prosecution of the application underlying this registration demonstrate use of the OH mark before Respondent's priority date, we observe that the specimens were filed on April 23 and May 10, 2019.[49] This is later than the December 15, 2018 date

[47] 29 TTABVUE 3.

[48] *See* 15 TTABVUE 6 (showing March 2018 as the dates of use on the registration certificate for Registration No. 5801660).

[49] Petitioner's Notice of Reliance Ex. OH2 (15 TTABVUE 8, 32-39, 54-60). The TSDR record for Petitioner's other pleaded Registration No. 5777104 also indicates that a specimen was filed in that underlying application on April 23, 2019 (and the dates of use are listed as April 23, 2019). *See* Ex. OH3; 15 TTABVUE 83, 108-114.

on which Respondent relies, and we can draw no inference of an earlier date of use than the dates on which the specimens were filed.

Oral testimony, even of a single witness, may be adequate to establish priority if it is sufficiently probative. *See Exec. Coach Builders*, 2017 TTAB LEXIS 201, at *36. "Such testimony 'should not be characterized by contradictions, inconsistencies, and indefiniteness but should carry with it conviction of its accuracy and applicability.'" *Id.* (quoting *B.R. Baker Co. v. Lebow Bros.*, 150 F.2d 580, 583 (CCPA 1945)). Here, Mr. Kent's testimonial declarations are quite short, imprecise, and internally inconsistent. The testimony does not address the glaring contradiction between the purported first sale of a single product (that appears to not have even been developed at that time) and Petitioner's repeated social media statements that it had not yet launched its products, which were still in development. This detracts from the credence of Mr. Kent's testimony so that it has little persuasive value.

The internal inconsistencies, insufficient context, conclusory statements, and contradictions with documentary evidence makes the Kent declaration testimony less persuasive in nature and diminishes the overall credibility, therefor entitling the testimony to little weight. *Cerveceria Centroamericana*, 892 F.2d at 1027 (the testimony of the witness regarding use was afforded little weight because it was "to say the least, vague"); *Hoyle Knitting Mills Inc. v. T.J. Manalo Inc.*, 1989 TTAB LEXIS 38, *18 (TTAB 1989) (testimony marked by internal inconsistencies is much less persuasive). *Cf. Cutting Tools, Inc. v. Custanite Corp.*, 1984 TTAB LEXIS 204, at

*12 (TTAB 1984) (where testimony was definite and there are no inconsistencies, no doubt cast on credibility).

C. Summary on Priority

We have considered all of the evidence pertaining to Petitioner's use of the mark **Oh** in association with body spray used as a personal deodorant and as a fragrance prior to Respondent's first use date of December 15, 2018. *See W. Fla. Seafood*, 31 F.3d at 1125-26. The evidence presents unexplained contradictions and inconsistencies. On this record, we find that Petitioner failed to meet its burden of proving, by a preponderance of evidence, that it made common-law trademark use of the mark prior to Respondent's date of first use.

VI. Decision

Because Petitioner has not established priority, which is "an essential element of any claim under Trademark Act Section 2(d)" that is based on common law use, *Exec. Coach Builders*, 2017 TTAB LEXIS 201, at *88, the petition to cancel is denied.