25-1071

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

TITANIUM, LLC, DBA DRESS UP BOLTS,
Appellant

v.

ZSPEC DESIGN LLC,
Appellee.

Appeal from the United States Patent and Trademark Office,
Trademark Trial and Appeal Board, Proceeding No. 92079042

BRIEF FOR THE DIRECTOR – U.S. PATENT AND TRADEMARK OFFICE AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

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April 14, 2025

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I. STATEMENT OF INTEREST

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, the Director of the United States Patent and Trademark Office ("USPTO") respectfully submits this brief as *amicus curiae* in support of appellee. The USPTO, an agency of the United States Department of Commerce, is the agency responsible for, *inter alia*, the registration of trademarks under the Lanham (Trademark) Act, Pub. L. No. 79-489, 60 Stat. 427 (July 5, 1946), 15 U.S.C. § 1051 *et seq*. This appeal concerns the Trademark Trial and Appeal Board's ("TTAB" of "Board") procedure regarding forfeiture of claims not addressed in a party's trial briefs, as set forth in Trademark Trial and Appeal Board Manual of Procedure ("TBMP") § 801.01, and the requirements of for introducing evidence in TTAB proceedings set out in 37 C.F.R. § 2.122.

The Director files this amicus brief to provide context and explanation of the relevant rules and procedures that relate to this appeal. The USPTO has a direct interest in defending its rules and the TTAB's procedures.

II. STATEMENT OF THE ISSUES

Titanium LLC dba Dress Up Bolts ("Titanium") appeals from the Board's decision denying its petition for cancellation of a trademark registration owned by ZSpec Design LLC ("ZSpec"). On appeal, Titanium argues that it did not forfeit its likelihood of confusion claim. Part and parcel of its argument, Titanium challenges

the Board's determination that it did not properly submit its pleaded pending trademark application file histories into the record.

The Director files this amicus brief in support of Appellee to address, in particular, the basis and support for the Board's rules and procedures at issue in this case. Specifically, the Director addresses the following issues: 1) the policy and practice underlying the Board's forfeiture practice, 2) the rationale and application of 37 C.F.R. § 2.122 in Board proceedings, and 3) the proper standard of review applicable to the Board's application of its rules and procedures. The Board's decision is consistent with its rules and procedures.

III. STATEMENT OF THE CASE

This appeal arises from a trademark cancellation proceeding under 15 U.S.C. § 1064 brought by Titanium against ZSpec's registration for the mark DRESS UP BOLTS for metal hardware. *See* Appx1-9.

ZSpec owns Trademark Registration No. 5868348 for the mark DRESS UP BOLTS for "metal bolts; metal hardware, namely, washers." Appx15. Titanium petitioned to cancel the registration under Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d). Appx15-19. Titanium's petition alleged priority and likelihood of confusion. Appx17-19. The Board's Electronic System for Trademark Trial and Appeals filing cover sheet ("ESTTA Cover Sheet")[1] listed its pleaded applications for

[1] The ESTTA Cover Sheet is automatically generated as part of the electronic

the marks DRESSUPBOLTS and 

, both for "structural parts for automobiles" (collectively, "DRESSUPBOLTS Marks"). Appx15-16.

In its petition for cancellation, Titanium pleaded ownership of two pending federal applications for the DRESSUPBOLTS Marks. Appx18 ¶11. It did not, however, submit the applications or their file histories into the record in its Notice of Reliance or via trial testimony, a fact that Titanium does not dispute. Nor did it request that the Board take judicial notice of the applications or the file histories. Appx25-45, Appx73-87. In its trial briefs, Titanium focused on the priority element of its Section 2(d) claim, making no explicit arguments regarding the likelihood of confusion element. Appx25-44, Appx73-88. ZSpec likewise focused on the priority element in its brief. Appx46-72. ZSpec also identified likelihood of confusion as an issue in the case, noting that Titanium had not "proven that the marks at issue are likely to be confused with one another." Appx50.

The Board denied Titanium's petition for cancellation without reaching the merits. Appx8-9. The Board first addressed whether Titanium established its entitlement to a statutory cause of action. Appx4-6. Relying on evidence that Titanium introduced regarding its alleged common law use of the DRESSUPBOLTS Marks, the Board determined that Titanium demonstrated entitlement to a statutory cause of

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filing process. The cover sheet forms part of the complaint in the proceeding. *See* TBMP § 309.02(a).

action. Appx6.

Turning to the Section 2(d) claim, the Board explained that the claim requires proof of both priority and a likelihood of confusion. Appx7 (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1162 (Fed. Cir. 2002)). The Board determined that Titanium argued only one element of the claim: priority. Appx7 (Titanium's brief was "entirely devoted to the issue of priority"). The Board agreed with ZSpec that Titanium had not "proven that the marks at issue are likely to be confused with one another." Appx8 (quoting Appx50). The Board noted that it reviewed the full evidentiary and procedural record and concluded that the ZSpec had not conceded that confusion between the marks was likely. Appx8, n.20. Thus, the Board found that the Section 2(d) claim necessarily failed because Titanium did not make any arguments, or point to any evidence, regarding likelihood of confusion during the trial phase of the case. Appx8 (citing TBMP § 801.01; *WeaponX Performance Prods. v. Weapon X Motorsports, Inc.*, 126 USPQ2d 1034, 1036 (TTAB 2018); *Syngenta Crop Protection, Inc. v. Bio-Check, LLC*, 90 USPQ2d 1112, 1119 (TTAB 2009)). Finding that Titanium had not proven or even argued likelihood of confusion, the Board denied the petition for cancellation, explaining that Titanium "failed to make any argument at trial on [a] required element of its Section 2(d) claim." Appx8.

IV. SUMMARY OF THE ARGUMENT

The Board's decision is consistent with its rules and procedures, which are clearly established and well-founded. Contrary to Appellant's arguments, there is a

reasonable basis for both the Board's treatment of forfeited arguments, as that policy is set out in TBMP § 801.01, and the rules and practice requiring parties to introduce evidence related to pending trademark applications that are not the subject of an opposition proceeding, *see* 37 C.F.R. § 2.122; TBMP § 704.03.

Here, the Board acted consistently with its rules and precedents, and because the Board did not abuse its discretion in so acting, this Court should affirm the Board's decision. There is no basis for the Court to disturb the Board's forfeiture practice, or the procedures set out in 37 C.F.R. § 2.122 and TBMP §§ 704.03 and 704.12.

V. ARGUMENT

A. The relevant rules and procedures are well-established.

1. The Board treats claims not raised during the trial period as forfeited.

In its decision denying Titanium's petition for cancellation, the Board relied on its precedent and TBMP § 801.01 setting out the practice regarding forfeiture[2] to find that Titanium's Section 2(d) claim failed because Titanium failed to present arguments regarding a required element—likelihood of confusion—in its briefing. Appx7 (finding the brief "entirely devoted" to priority). The Board's procedure on forfeiture

[2] Except when quoting a case, this brief addresses the failure of the party to raise a claim or argument in terms of "forfeiture," consistent with the Federal Circuit's recent decisions distinguishing between "waiver" and "forfeiture." *See*, *e.g., In re Google Tech. Holdings LLC,* 980 F.3d 858, 862 (Fed. Cir. 2020).

states: "[i]f a party fails to reference a pleaded claim or affirmative defense in its brief, the Board will deem the claim or affirmative defense to have been waived or forfeited." Appx8; TBMP § 801.01. The Board's practice is clear and unequivocal. And the TBMP sets out a substantial list of precedential Board cases in which it has applied this practice. *See, id.* at n.6. Consistent with this practice, the Board cited and relied on *WeaponX Performance Prods. v. Weapon X Motorsports, Inc.*, 126 USPQ2d 1034, 1036 (TTAB 2018), *Alcatraz Media, Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1753 (TTAB 2013), and *Syngenta Crop Protection, Inc. v. Bio-Check, LLC*, 90 USPQ2d 1112, 1119 (TTAB 2009), in its decision. Appx8.

The Federal Circuit has favorably recognized the Board's forfeiture rule in two recent non-precedential decisions. *See Universal Life Church Monastery Storehouse v. American Marriage Ministries*, in the 2023 WL 8104848, *1, *3-4 (Fed. Cir. Nov. 22, 2023) (discussing the Board's "established practice of deeming unargued claims waived"); *Sunbio Corp. v. Biogrand Co.*, 2021 WL 5896525, at *3 (Fed. Cir. Dec. 14, 2021) (noting that the Board's rules address waiver). This Court observed that, under the "established waiver practice for inter partes proceedings," the Board has identified "a party's failure to identify, pursue, argue, or discuss a claim as a sufficient basis for finding that this party waived the claim." *Universal Life*, 2023 WL 8104848, *1, *3-5. Indeed, in *Universal Life*, this Court faulted the Board for not treating a claim as forfeited when the plaintiff failed to make arguments about that claim during the trial period of the case. *Id.* at *4

The TTAB's forfeiture practice is also consistent with this Court's precedent. In the context of inter partes review, this Court explained that "the Board must base its decision on arguments that were advanced by a party, and to which the opposing party was given a chance to respond." *In re Magnum Oil Tools Int'l, Ltd.*, 829 F.3d 1364, 1381 (Fed. Cir. 2016). For the Court or the Board "to reach the merits of an issue on appeal, it must be adequately developed," and arguments not developed are "deemed waived" or forfeited. *Monsanto Co. v. Scruggs*, 459 F.3d 1328, 1341 (Fed. Cir. 2006); *see also Vermont Yankee Nuclear Power Corp. v. Entergy Nuclear Vermont Yankee, LLC*, 683 F.3d 1330, 1351 (Fed. Cir. 2012) (refusing to consider an issue where the appellant has "failed to develop an argument"); *In re Baxter Int'l, Inc.*, 678 F.3d 1357, 1362 (Fed. Cir. 2012) ("We agree with the PTO that Baxter waived its arguments regarding the [means for] limitation in claim 30 by failing to timely raise them before the Board."). Conclusory statements simply do not amount to an argument that merits attention. *See Trading Techs. Int'l, Inc. v. IBG LLC*, 921 F.3d 1084, 1095 (Fed. Cir. 2019).

It should therefore be beyond dispute that the Board is entitled to treat arguments as forfeited. And Titanium's factbound contention that the Board should not have found forfeiture in this case is meritless. Titanium's unsupported assertions, Br. at 6-7, that it made mention of likelihood of confusion in various places do not excuse its failure to make an argument on that score. The Board also acted within its discretion not to presume a likelihood of confusion merely because the parties

appeared to argue the case on that premise, and reasonably insisted that the elements of a claim be affirmatively demonstrated.

2. The Board does not treat trademark applications of a plaintiff as automatically part of the record, nor does it take judicial notice of them.

Rule 2.122 sets forth the Board's procedure for introducing evidence into the record, providing that in a cancellation proceeding, only the "registration against which a petition … for cancellation is filed forms part of the record proceeding without any action by the parties." 37 C.F.R. § 2.122(b)(1). TBMP § 704.03 further explains: "A party to a proceeding before the Board may introduce, as part of its evidence in the case, a copy of an application that is not the subject of the proceeding, by filing, during its testimony period, a copy of the application file, or of the portions which it wishes to introduce, together with a notice of reliance thereon specifying the application and indicating generally its relevance as well as associating the application with one or more issues in the case." TBMP § 704.03(b)(2).

The Board has consistently required parties to follow its procedures to introduce their pleaded applications and registrations of record. *E.g., WeaponX Performance Prods.*, 126 USPQ2d at 1040 ("In order for Opposer's pleaded pending application to be received in evidence and made part of the record, Opposer had to file a copy of its pleaded pending application showing the current status and title under its notice of reliance during its assigned testimony period."). "The fact that completion of the ESTTA filing form results in the creation of electronic records in

the Board's TTABVUE system, and that such records contain links to information on a pleaded registration, is for administrative ease and it is insufficient to make the pleaded registrations [or applications] of record." *Melwani v. Allegiance Corp.*, 97 USPQ2d 1537, 1540 (TTAB 2010).

This Court affirmed the Board's application of Rule 2.122 in *Hewlett-Packard Co. v. Olympus Corp.*, 931 F.2d 1551, 1554 (Fed. Cir. 1991), under similar circumstances to those in this case. Noting that the rule is "simple and clear," the court explained that the plaintiff failed to submit its registrations under the then-applicable requirements of 37 C.F.R. 2.122(d). *Id.* Plaintiff's failure to submit that record in accordance with the rules was fatal to its case. The Court concluded that "[t]hrough neglect, [plaintiff] failed to present a case . . . in opposition to Olympus' mark." *Id.* a 1555.[3]

The Board's policy of not taking judicial notice of USPTO records, including pending applications or registrations, is also both well-documented and well-established in its manual of procedure, TBMP § 704.12(a), and its precedent applying Rule 2.122(e). *See, e.g., Flame & Wax, Inc. v. Laguna Candles, LLC*, 2022 USPQ2d 714,

[3] In this case, even if the Board had treated the application files as admitted, Titanium's lack of argument regarding the likelihood-of-confusion element of its claim was independently fatal to its case. Titanium seems to posit that the USPTO's determination during examination that there was a likelihood of confusion between the marks in its applications and ZSpec's registration was necessarily determinative of the cancellation proceeding. Br. at 7-8. But, the determinations of a single examining attorney are not binding on the Board. *In re Nett Designs, Inc.,* 236 F.3d 1339, 1342 (Fed. Cir. 2001) ("The Board must decide each case on its own merits."). Even if they were, Titanium made no showing that the facts of the application files and the facts before the Board in the cancellation proceeding were identical.

at *12 n.57 (TTAB 2022) ("The Board's well-established practice is not to take judicial notice of USPTO records."); *Cities Serv. Co. v. WMF of Am., Inc.*, 199 USPQ 493, 498 n.4 (TTAB 1978) (no judicial notice taken of third-party registrations); *Beech Aircraft Corp. v. Lightning Aircraft Company Inc.*, 1 USPQ2d 1290, 1293 (TTAB 1986) ("[W]e do not take judicial notice of application and registration files that reside in the Patent and Trademark Office on the basis of their mere identification in briefs, pleadings and evidentiary submissions.").

In setting out the justification for this policy, the agency explained that taking judicial notice of USPTO records is contrary to its "obligation to preserve a complete written record of the proceeding that contains all evidence presented by the party in documentary form." MISCELLANEOUS CHANGES TO TRADEMARK TRIAL AND APPEAL BOARD RULES, 81 Fed. Reg. 69950, 69955 (October 7, 2016) (adopting the current Rule 2.122). The dual obligations for a party to build its record and for the USPTO to preserve the complete record is particularly important because under 15 U.S.C. § 1071(a), this Court's review is constrained to the four corners of the administrative record. *Id.* In addition, "[t]he burden of creating a complete evidentiary record by introducing in documentary form information contained in the USPTO's trademark file records is most appropriately borne by the party wishing to introduce such evidence rather than by the Board." *Id.*

Here, the Board's finding that the pleaded applications were not properly of record is consistent with the Board's precedent and rules. Titanium's perception of

the procedures and rules as "informal" or "internal," Reply Br. at 4, is incorrect for the reasons discussed above. Titanium argues that the Board was "apparently unwilling" to take judicial notice in its decision, Br. at 8, seemingly complaining about the Board's failure to sua sponte take judicial notice. However, Titanium never asked the Board to take judicial notice of its pleaded applications. Appx25-45, Appx73-88. With the Board's clear policy regarding taking judicial notice of USPTO records set forth in TBMP § 704.12, and no request before it, the Board had no obligation to explain why it was following its policy of not taking judicial notice of pleaded applications.

B. The correct standard of review is abuse of discretion.

This Court will only "set aside actions of the Board that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and set aside factual findings that are unsupported by substantial evidence." *In re Sullivan*, 362 F.3d 1324, 1326 (Fed. Cir. 2004); 5 U.S.C. § 706(2)(A). This Court reviews applications of the Board's rules, like the waiver and evidentiary rules at issue here, for an abuse of discretion. *See, e.g.*, *Tiger Lily Ventures Ltd. v. Barclays Cap. Inc.*, 35 F.4th 1352, 1359 (Fed. Cir. 2022) ("[w]e review the Board's evidentiary rulings for abuse of discretion."); *Qualcomm Inc. v. Broadcom Corp.*, 548 F.3d 1004, 1019 (Fed. Cir. 2008) (reviewing district court's finding of waiver for abuse of discretion); *Collabo Innovations, Inc. v. Sony Corp.*, 802 F. App'x 568, 571 (Fed. Cir. 2020) ("the Board's decision to find an argument waived, as it did in this case, is reviewed for an abuse of discretion.");

Sunbio Corp. v. Biogrand Co., 2021 WL 5896525, at *3 (Fed. Cir. 2021) (Board's application of waiver is reviewed for an abuse of discretion because the Board is given deference related to the application of its rules).

Although Titanium asserts that the Board decision "rests on a legal error" and is due no deference, Br. at 5, Titanium challenges only the application of forfeiture and evidence rules, which are subject to abuse-of-discretion review. Titanium asserts no legal challenge that would entitle it to *de novo* review.

VI. CONCLUSION

For the foregoing reasons, the Board properly followed its practice and rules. The Director asks that the Court not disturb the practices and procedures set out in TBMP §§ 704.03, 704.12(a), and 801.01, and 37 C.F.R. § 2.122.

Dated: April 14, 2025

Respectfully submitted,

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