

Case No. 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

Cancellation Proceeding No. 92079042

BRIEF OF APPELLEE ZSPEC DESIGN, LLC

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February 24, 2025

FORM 9. Certificate of Interest

Form 9 (p. 1)
March 2023

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF INTEREST

Case Number 25-1071

Short Case Caption Titanium, LLC v. ZSPEC Design LLC

Filing Party/Entity ZSPEC Design LLC

Instructions:

1. Complete each section of the form and select none or N/A if appropriate.
2. Please enter only one item per box; attach additional pages as needed, and check the box to indicate such pages are attached.
3. In answering Sections 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance.
4. Please do not duplicate entries within Section 5.
5. Counsel must file an amended Certificate of Interest within seven days after any information on this form changes. Fed. Cir. R. 47.4(c).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 10/31/2024

Signature: /s/ Todd Wengrovsky

Name: Todd Wengrovsky

FORM 9. Certificate of Interest

Form 9 (p. 2)
March 2023

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	2. Real Party in Interest. Fed. Cir. R. 47.4(a)(2).	3. Parent Corporations and Stockholders. Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. <input checked="" type="checkbox"/> None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. <input checked="" type="checkbox"/> None/Not Applicable
ZSPEC Design LLC		

Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

None/Not Applicable Additional pages attached

5. Related Cases. Other than the originating case(s) for this case, are there related or prior cases that meet the criteria under Fed. Cir. R. 47.5(a)?

Yes (file separate notice; see below) No N/A (amicus/movant)

If yes, concurrently file a separate Notice of Related Case Information that complies with Fed. Cir. R. 47.5(b). **Please do not duplicate information.** This separate Notice must only be filed with the first Certificate of Interest or, subsequently, if information changes during the pendency of the appeal. Fed. Cir. R. 47.5(b).

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

None/Not Applicable Additional pages attached

TABLE OF CONTENTS

TABLE OF AUTHORITIES	6
I. STATEMENT OF RELATED CASES	7
II. SUMMARY OF THE ARGUMENT	7
III. ARGUMENT	8
A. The TTAB Procedural Rules Are Very Clear	8
B. Appellant’s TTAB Trial Brief Clearly Contained No Likelihood Of Confusion Argument.....	9
C. The TTAB Decision Was Thorough And Correct.....	10
D. Appellant’s Argument Regarding The Omitted Argument Being “Obvious” Must Fail.....	12
E. Appellant’s Argument Equating Standing With A Trial Argument Must Fail.....	13
F. Appellant’s Argument That Appellee’s Brief Somehow Preserves Appellant’s Omitted Argument Must Fail.....	13
G. Appellant’s Cited Cases Are Off Point And Inapplicable.....	14
H. Public Policy Considerations Dictate That This Appeal Should Be Denied.....	15
IV. CONCLUSION	17

TABLE OF AUTHORITIES

Cases:

Alcatraz Media, Inc. v. Chesapeake Marine Tours, Inc.,
565 F. App'x 900 (Fed. Cir. 2014)8

Cf. Rolex Watch U.S.A. Inc. v. AFP Imaging Corp.,
101 USPQ2d 1188, 1189 (TTAB 2011).....9

Knight Textile Corp. v. Jones Investment Co.,
75 USPQ2d 1313, 1314 n.4 (TTAB 2005).....8

Loper Bright Enters. v. Raimondo,
603 U.S. 369 (2024)14

McCauley v. United States,
38 Fed. Cl. 250, 271 (1997).....14

Statutes

15 U.S.C. §1052(d).....10

Other Authorities

TBMP § 801.018

I. STATEMENT OF RELATED CASES

As noted by Appellant, there is no appeal from the same proceeding in the originating tribunal that was previously before this or any other appellate court. There is no other case pending in this Court or any other tribunal that will directly affect or be directly affected by this Court's decision in the pending case.

II. SUMMARY OF ARGUMENT

The TTAB Decision dated August 12, 2024, that Appellant waived the likelihood of confusion argument at trial, was not in error and should be upheld by this Court.

As outlined herein, TTAB procedural rules are very clear. Specifically, TBMP 801.01 provides that if a party fails to reference a pleaded claim in its Trial Brief, the TTAB will deem the claim to have been waived.

Appellant's TTAB Trial Brief clearly contained no likelihood of confusion argument. Therefore, in simply applying TBMP 801.01 to the facts and circumstances, the TTAB denied Appellant's Petition to Cancel. The TTAB's Decision was lengthy, thorough, and well-articulated with supporting case law and specific citations to the record.

Appellant argues that the omitted argument was “*obvious.*” This argument must fail because it is not the TTAB’s job to “*read between the lines*” and *assume* what Appellant *meant to* argue.

Likewise, Appellant makes an argument equating *standing* with preserving a claim at trial. This argument must also fail because (using Appellant’s logic) TBMP 801.01 would be superfluous, which is highly illogical.

Next, Appellant argues that *Appellee’s* responsive Trial Brief did not discuss likelihood of confusion either, and that this somehow preserves Appellant’s omitted argument. This argument must also fail, because Appellee was filing a responsive brief (addressing each and every point that was raised by Appellant). In no way can the contents of *Appellee’s* Trial Brief cure the defects in Appellant’s Trial Brief.

Finally, public policy considerations dictate that this Appeal should be denied. Overturning the TTAB Decision in this case would be condoning ignoring TTAB rules, and it would be promoting a waste of judicial resources.

For all of the foregoing reasons, it is respectfully submitted that the instant Appeal should be denied in its entirety.

III. ARGUMENT

A. The TTAB Procedural Rules Are Very Clear

Section 801.01 of the Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) governs the issue on appeal here, and it could not be more clear: “If 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.”

TBMP 801.01 then refers to a Note which cites no fewer than fifteen example cases of this ordinary rule being followed. For the purposes of example, in *Alcatraz Media, Inc. v. Chesapeake Marine Tours, Inc.*, 565 F. App’x 900 (Fed. Cir. 2014), the Court stated: “Insofar as petitioner has not argued the descriptive or geographically descriptive claims in its brief, we find, in accordance with the Board’s usual practice, that those claims have been waived. See, e.g., *Knight Textile Corp. v. Jones Investment Co.*, 75 USPQ2d 1313, 1314 n.4 (TTAB 2005)” (emphasis added).

Notably, another example, *Cf. Rolex Watch U.S.A. Inc. v. AFP Imaging Corp.*, 101 USPQ2d 1188, 1189 (TTAB 2011) (citing *Knight Textile Corp.*), dealt with the identical issue as the present case. The Plaintiff in the *Cf. Rolex Watch* case did not argue its likelihood of confusion claim in its Trial Brief, and was deemed to have waived the claim.

More recently, in a precedential opinion in *Coca-Cola Co. v. Meenaxi Enterprise., Inc.*, 2021 WL 2681898, at *2–3 (T.T.A.B. 2021), the TTAB again determined that pleaded claims were waived because they were not pursued in the trial brief.

The above is clear proof of the TTAB’s regular procedure to treat claims that are not argued in trial briefs to be waived. It is respectfully submitted that there is nothing special about the present case that would warrant a sudden and radical departure from the TTAB’s usual practice.

Appellant argues that Appellant’s presentation to the TTAB was not “*to their liking*.” The analysis, however, is not regarding the TTAB’s “*liking*.” Rather, there is an express requirement under TBMP 801.01 that a Petitioner must include a likelihood of confusion claim in its trial brief. Appellant simply did not satisfy this requirement, thus the instant appeal must be denied.

B. Appellant’s TTAB Trial Brief Clearly Contained No Likelihood Of Confusion Argument

Appellant’s Trial Brief filed with the TTAB on February 22, 2024 featured an “ARGUMENT” section that was broken into the following five subheadings:

“A. Petitioner Has Clear Priority of Use over Respondent as Established by its Clear and Unbroken Chain of Title in the Trademark Dating back to 2010”;

“B. Registrant’s Evidence is Insufficient to Establish Actual Use In Commerce Under the Lanham Act and Thus Cannot Establish Rights in the Trademark Prior to 2014”;

“C. Registrant’s Evidence Lacks Credibility and Thus Should be Disregarded as Being Probative of Registrant’s Bona Fide Use of the Trademark in Commerce”;

“D. Registrant’s Evidence Shows, at Most, a Broken Chain of Title and Thus Respondent Cannot Claim a Priority Date Occurring in 2008”; and

“E. The Decision Denying Petitioner’s Motion to Strike Registrant’s Testimony Was Improper and Thus Registrant’s Testimony Should Not be Considered as Part of the Record for Purposes of Deciding This Matter”.

APPX21-32. There were no other subheadings in Appellant’s “ARGUMENT” section of its Trial Brief. The above makes it abundantly clear that Appellant completely ignored the likelihood of confusion argument.

As this Court and the TTAB know full well, likelihood of confusion is typically an exhaustive analysis that takes into consideration a host of factors including the appearance of the marks, the sound of the marks, the meaning or connotation of the marks, the commercial impression of the marks, the parties’ respective goods and services, their channels of trade, price points, product quality, the sophistication of the relevant consumer, bad faith, and actual confusion.

Appellant discussed precisely none of the above in its Trial Brief before the TTAB. As such, there can be no dispute that the likelihood of confusion argument was

omitted from Appellant’s Trial Brief.

C. The TTAB Decision Was Thorough And Correct

The TTAB Decision was anything but “arbitrary and capricious” as argued by Appellant. In fact, the TTAB ruling was articulated with significant details in a nine-page Decision and Order which cited the parties’ respective trial briefs as well as the most applicable case law. Not surprisingly, the TTAB stated the following in its Decision:

“Petitioner’s opening brief fails to make any mention, let alone argument, of the second element: that confusion is likely. Instead, it is entirely devoted to the issue of priority. Priority of use, however: is not a stand-alone claim, but rather one element of a likelihood of confusion claim under Section 2(d) of the Lanham Act, 15 U.S.C. §1052(d). Thus, in order to prevail on its pleaded likelihood of confusion claim, Petitioner must prove both priority of use of its pleaded mark and a likelihood of confusion. *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, Canc. No. 92025859, 2022 WL 17844056, at *21 n.7 (TTAB 2022) (citations omitted; emphasis added).”

APPX85. Importantly, the TTAB continued by noting the following:

“In adversary proceedings like this one, it is not the Board’s responsibility to create plaintiffs’ arguments for them. Because Petitioner failed to make any argument at trial on the second required element of its Section 2(d) claim—likelihood of confusion—its petition, which asserts only a Section 2(d) claim, necessarily fails. See, e.g., *WeaponX Performance Prods.*, 2018 WL 1326374, at *2 (claims not mentioned in briefs deemed waived); *Alcatraz Media, Inc. v. Chesapeake Marine Tours, Inc.*, Canc. No. 92050879, 2013 WL 5407315, at *2 TTAB 2013) (same), *aff’d mem.*, 565 F. App’x 900 (Fed. Cir. 2014); see also TBMP § 801.01” (emphasis added).

APPX86. The TTAB Decision was clear, concise, comprehensive and perfectly consistent with all of its prior holdings. The Decision was obviously well thought out, cited many different cases to support the TTAB’s conclusion, and articulated the reasons for the TTAB’s ruling perfectly. As such, it is respectfully submitted that this Court should deny the present Appeal in its entirety.

D. Appellant’s Argument Regarding The Omitted Argument Being “Obvious” Must Fail

In multiple places on Page 2 of its Appeal Brief to this Court, Appellant argues that it made a likelihood of confusion argument *in its original Petition to Cancel back in 2022*.

Similarly, on Page 3 of its Appeal Brief to this Court, Appellant argues that it made a likelihood of confusion argument *during the TTAB Proceeding leading up to the Trial*.

Furthermore, on Page 3 of its Appeal Brief to this Court, Appellant argues that their *pending applications were rejected*. According to Appellant, this somehow comprises a satisfactory likelihood of confusion argument in a Trial Brief.

The above, of course, is not nearly enough to satisfy the requirement to include in the Trial Brief a likelihood of confusion argument. In fact, using Appellant's logic, there would be little need for Trial Briefs in TTAB Proceedings. Appellant's arguments are therefore not only illogical, they treat TBMP 801.01 as non-existent. Because this Court has no basis to selectively ignore TBMP 801.01, the instant Appeal must be denied.

E. Appellant's Argument Equating Standing With A Trial Argument Must Fail

Appellant argues that because it apparently met the threshold requirement for *standing*, its likelihood of confusion claim must have been automatically preserved *two years later*. This is a significant leap being made by Appellant. Standing is not an equivalent of properly preserving a claim in the trial stage. Again, using Appellant's logic, TBMP 801.01 would be entirely superfluous. Such can not be the case, so

Appellant's arguments must fail as a matter of law.

F. Appellant's Argument That *Appellee's* Brief Somehow Preserves Appellant's Omitted Argument Must Fail

Appellant argues that Appellee did not discuss likelihood of confusion in its Trial Brief either. To begin with, such is inaccurate. Appellee expressly stated in its Trial Brief that Petitioner has not "proven that the marks at issue are likely to be confused with one another."

Regardless, Appellant's argument makes little sense for the simple reason that Appellee was filing a responsive brief. Indeed, in its Trial Brief, Appellee addressed each and every point *that was raised by Appellant*. Such was all that Appellee was required to do. In no way can the contents of *Appellee's* Trial Brief cure the defects in *Appellant's* Trial Brief. Therefore, this argument is a great reach by Appellant and is not a valid basis to overturn the TTAB's carefully-articulated Decision.

G. Appellant's Cited Cases Are Off Point And Inapplicable

Appellant cites *McCauley v United States*, 38 Fed. Cl. 250, 271 (1997), arguing that such case provides that a "non-artful" brief is sufficient if there is reference to the claim at issue. However, *McCauley* was regarding **a pro se litigant**, namely a woman who brought a variety of claims against her former employer including sexual

harassment and discrimination. In this disturbing context, the *McCauley* Court stated “Although plaintiff’s pleadings are not artful in the legal sense, in her complaint and additional pleadings, she has sufficiently raised the issues which she believes exist for the court’s consideration.”

Needless to say, the circumstances of the present case are entirely different than those of the *McCauley* case. Here, the party seeking relief (Appellant) is a large company that manufactures and distributes automotive parts, not an abused individual. (Appellant’s website states: “*Some of the largest retailers in the world now offer our products*”). Here, Appellant is represented by a law firm with two offices in Virginia that specializes in trademarks and intellectual property litigation. Here, the defect in Appellant’s Trial Brief is inexcusable.

Next, Appellant cited *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 391-92 (2024), in an attempt to argue “*the importance of judicial review to guard against arbitrary and capricious action by administrative agencies.*” However, in *Loper Bright*, the Supreme Court was discussing arbitrary and capricious interpretations made by administrative agencies in the context of there being statutory ambiguity. Here, there is no statutory ambiguity at issue. Rather, what this Court is reviewing is an agency’s adherence to its own long-standing internal procedures – measures that are logical, reasonable, and have been followed by litigants for many years. Clearly,

the TTAB did not abuse its authority or violate the separation of powers by adhering to its own published and accepted procedural rules in the ordinary course of business. Such is the furthest thing from “arbitrary or capricious” behavior. Stated simply, the recent *Loper Bright* holding is of no consequence to this case and it does nothing to advance Appellant’s awkward arguments.

H. Public Policy Considerations Dictate That This Appeal Should Be Denied

Appellant had every opportunity at the trial stage of the TTAB Proceeding to make any and all arguments it desired. Appellant neglected to argue likelihood of confusion. Appellant is now essentially arguing, on appeal, that the TTAB should have *read between the lines* and *assumed* that Appellant *meant to* put forth a likelihood of confusion argument in its Trial Brief.

Giving Appellant yet another chance at this very advanced stage would have an adverse effect on public policy. It would condone and encourage a lack of attention to detail, and it would promote the waste of resources – both judicial resources and the parties’ resources. It would also condone ignoring the TBMP.

Moreover, allowing Appellant to cure the defect (that Appellant voluntarily created) would create an unnecessary additional hardship to Appellee in particular, who has already been forced to incur unexpected legal fees and inconveniences

associated with defending its Registered Trademark, which is presumed to be valid.

Finally, Appellant apparently argues that the TTAB's procedures are *unfair*. Specifically, Appellant notes that the TTAB has an "internal procedure requiring a party to physically attach trademark application proceedings to the petition, or otherwise make them a part of the cancelation record..." Appellant proceeds to *complain* about this long-standing TTAB procedure. However, there can be no doubt that the TTAB procedure is in place and all parties are required to adhere to it. If Appellant's argument is that the USPTO *lacks the authority* to make its own procedural rules, Appellant is wildly incorrect. If Appellant thinks that the TTAB *should change its existing rules*, Appellant should write to the USPTO Commissioner or to Congress with its plea, not to this Court.

IV. CONCLUSION AND RELIEF SOUGHT

For all of the foregoing reasons, Appellee respectfully requests this honorable Court to uphold the decision of the Trademark Trial and Appeal Board denying the Appellant's Petition to Cancel.

Dated: Calverton, New York
February 24, 2025

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**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Case Number: 25-1071

Short Case Caption: Titanium, LLC v. ZSpec Design LLC

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Signature: /s/ Todd Wengrovsky

Name: Todd Wengrovsky

CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2025, I served the foregoing Appellee's
Brief upon all counsel of record by e-mail as follows:

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