

Case No. 25-1071

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**United States Court of Appeals  
for the Federal Circuit**

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Titanium, LLC dba Dress Up Bolts,

Appellant

v.

ZSpec Design, LLC

Appellee.

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

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**SECOND CORRECTED COMBINED OPENING BRIEF AND  
APPENDIX OF APPELLANT TITANIUM, LLC**

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March 27, 2025

**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** Titanium, 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.
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Name: \_\_\_\_\_

Andrew P. Connors

FORM 9. Certificate of Interest

Form 9 (p. 2)  
March 2023

| <p><b>1. Represented Entities.</b><br/>Fed. Cir. R. 47.4(a)(1).</p>                            | <p><b>2. Real Party in Interest.</b><br/>Fed. Cir. R. 47.4(a)(2).</p>  | <p><b>3. Parent Corporations and Stockholders.</b><br/>Fed. Cir. R. 47.4(a)(3).</p>  |
|--|--|--|
| <p>Provide the full names of all entities represented by undersigned counsel in this case.</p> | <p>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.</p> <p><input type="checkbox"/> None/Not Applicable</p> | <p>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.</p> <p><input checked="" type="checkbox"/> None/Not Applicable</p> |
| <p>Titanium, LLC dba Dress<br/>In Bolts</p>  | <p>Randall Sass</p>  |  |
|  | <p>Seth McGuire</p>  |  |
|  | <p>Chris Driver</p>  |  |
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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

|                         |  |  |
|-------------------------|--|--|
| Darkhorse Law PLLC      |  |  |
| Andrew P. Connors, Esq. |  |  |
| Jacob P. East, Esq.     |  |  |

**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

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## **I. STATEMENT OF RELATED CASES**

There is no appeal from the same proceeding in the originating tribunal that was previously before this or any other appellate court. Undersigned counsel is not aware of any 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. JURISDICTIONAL STATEMENT**

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1295(a)(4)(B), which gives this Court jurisdiction over appeals from proceedings at the Trademark Trial and Appeal Board like the trademark cancellation proceeding at issue here. Appellant initially filed a cancellation petition asking that the TTAB cancel a trademark registration belonging to appellee, filing the petition on February 22, 2022. After the parties went through the entire trial process, including briefing, the TTAB rendered a decision on August 12, 2024 denying the petition for cancellation. This denial represents a final decision of the TTAB. Thereafter, Titanium timely filed a notice of appeal at the TTAB and with this Court on October 9, 2024. The USPTO subsequently filed its certified list on November 25, 2024. This opening brief followed.

## **III. STATEMENT OF THE ISSUES**

The sole issue before this honorable Court is whether the USPTO erred when it denied appellant's petition to cancel appellee's trademark registration, on

the basis that appellant had failed to properly raise whether a likelihood of confusion existed between the parties' competing trademarks for the same goods.

#### **IV. STATEMENT OF THE CASE**

This action began when appellant, Titanium, LLC dba Dress Up Bolts (“Titanium”) petitioned the Trademark Trial and Appeal Board (the “TTAB”) for the cancellation of Trademark Registration Number 5868348 belonging to appellee, ZSpec Design LLC (“ZSpec”). APPX15-19. As set forth in the petition, and as confirmed by the USPTO’s own records, ZSpec’s registration was for the words “Dress Up Bolts” as used in association with hardware and fasteners. APPX10, APPX17 at ¶ 1. Titanium presented in its petition as a basis for cancellation of ZSpec’s registered trademark the fact that Titanium had two pending trademark applications each covering the term “Dress Up Bolts,” as used in association with structural parts for automobiles, i.e., decorative hardware and metal fasteners. APPX15-16, APPX17 at ¶ 1-4. Titanium also presented in its petition, and repeated in its briefing, that both it and ZSpec sold the exact same goods in the marketplace: namely, decorative hardware and fasteners for automobiles. APPX15-19, APPX26-30. Indeed, recognizing the obvious conflict, the USPTO had rejected both of Titanium’s pending trademark applications on the basis that they presented a likelihood of confusion under § 2(d) of the Lanham Act, and Titanium noted this undisputed fact in its petition. APPX15, APPX19. The

parties went through the entire lengthy litigation process of the TTAB, collectively submitting lengthy evidence directed chiefly at which party had priority of use, although which necessarily demonstrated the obvious likelihood of confusion that existed. *See generally* APPX25-73. For instance, both sides submitted lengthy evidence about who first marked and sold in commerce decorative fasteners and hardware for automobiles with the mark “Dress Up Bolts.” *Id.* Since the competing marks and the goods with which they were used in the market were not genuinely in dispute, neither side argued at any significant length over whether there was a “likelihood of confusion,” although Titanium nevertheless presented in its petition and in its opening brief that a likelihood of confusion existed, based both on the USPTO’s own actions against its trademark applications finding a likelihood of confusion, and the fact that the marks were exactly the same and for the exact same goods and services. *Id.* Nevertheless, the TTAB refused to examine Titanium’s evidence, concluding that Titanium had not sufficiently argued to its liking that a likelihood of confusion existed, and thus it deemed the issue of likelihood of confusion waived. APPX1-9 Accordingly, the TTAB denied the petition without making any factual findings based upon this supposed procedural defect. *Id.* It did so while simultaneously holding that Titanium otherwise had standing to seek cancellation, even though Titanium had not even used the word “standing” in any of its briefing or made any arguments about that issue. *Id.*

## **V. SUMMARY OF THE ARGUMENT**

The TTAB erred when it refused to consider who has priority between these obviously conflicting marks, on the basis that Titanium had not adequately argued that a likelihood of confusion existed, even though the lengthy evidence presented was about use in commerce of the same goods marked with the exact same mark. Because Titanium adequately presented these issues to the TTAB, because the USPTO had rejected two applications by Titanium based on a likelihood of confusion, because the TTAB made a conflicting holding that Titanium nonetheless had standing (but no likelihood of confusion existed), and because this Court should be especially wary of arbitrary and capricious behavior by an administrative agency, like the decision presented here, this Court should reverse the TTAB, hold that a likelihood of confusion exists between these obviously conflicting marks, and remand to the TTAB so it can evaluate the substantial evidence the parties presented and decide as a matter of fact which party has priority in the mark “Dress Up Bolts” as used in association with decorative fasteners and hardware for automobiles.

## **VI. STANDARD OF REVIEW**

This case presents the purely legal question of whether appellant had sufficiently presented during the cancellation proceeding that a likelihood of confusion existed between appellant’s pending applications and appellee’s

registered mark. This Court should review that ruling *de novo*, since it presents the pure legal question of whether the Board’s ruling rests on a legal error. *Brittlex Fin., Inc. v. Dollar Fin. Grp., Inc.*, Nos. 2021-1370, 2021-1449, 2021 U.S. App. LEXIS 34961, at \*6 (Fed. Cir. Nov. 24, 2021) (citing *in re N. Carolina Lottery*, 866 F.3d 1363, 1366 (Fed. Cir. 2017)). Moreover, to the extent the ruling below is predicated on United States Patent and Trademark Office’s interpretation and implementation of the portions of the Lanham Act governing cancellation proceedings, this Court should “exercise [its] independent judgment in deciding whether [this] agency has acted within its statutory authority,” giving no deference to the agency. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412-13 (2024).

## VII. ARGUMENT

The TTAB erred when it refused to evaluate the merits of Titanium’s petition for cancellation on the basis that Titanium’s trial brief allegedly failed to raise whether a likelihood of confusion exists. In coming to this decision, the TTAB relied principally on a rule contained in its manual of procedure stating that “[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,” and ultimately concluded that Titanium had not “mentioned” likelihood of confusion in its brief. APPX8; *see also* TBMP § 801.01 (the manual entry quoted). This manual section—which is itself not law—mentions not elegant “arguments” but

only a failure to “reference” a claim, and other supporting cases the TTAB opinion cites to for the proposition only note that a failure to “mention” a claim results in its waiver. *See* APPX8; *cf. McCauley v. United States*, 38 Fed. Cl. 250, 271 (1997) (holding that even “pleadings [that] are not artful” nonetheless “sufficiently raise[] the issues which . . . exist for [a] court’s consideration”). In the TTAB’s own words, priority is merely the necessary predicate to establish grounds for cancellation, which itself springs forth from a single claim: “likelihood of confusion” between two competing marks. *See Alcatraz Media, Inc. v. Chesapeake Marine Tours, Inc.*, 565 F. App’x 900 (Fed. Cir. 2014) (cited by the TTAB in its decision).

As an initial matter, it is simply false that Titanium did not mention or reference likelihood of confusion in its briefing. It did so explicitly when it said that the USPTO had denied its trademark applications based upon a likelihood of confusion with ZSpec’s mark. Moreover, Titanium’s briefing repeatedly raised the issue of likelihood of confusion, albeit without using that term, by repeatedly explaining that the parties were fighting over *the exact same mark as used in association with the exact same goods*, and both sides presented significant evidence about that fact which the TTAB did not examine or evaluate. Indeed, at no point did ZSpec ever genuinely dispute that a likelihood of confusion existed under the obvious circumstance presented here: two competitors using the exact

same mark in association with the exact same goods. Like Titanium, ZSpec focused its briefing and its argument on who had priority over an obvious conflict that the USPTO had recognized itself by the actions it took in Titanium's applications.

The TTAB noted in its opinion that it has an internal procedure requiring a party to physically attach trademark application proceedings to the petition, or otherwise make them a part of the cancellation record, even though it is a publicly available record that TTAB otherwise relied upon in evaluating the petition. As reflected on the petition, the TTAB requires a petitioner to provide serial numbers for any relevant applications, and in this case, petitioner provided the TTAB with two applications, one for just the words "Dress Up Bolts" and the other for a logo substantially containing those words, and in each case, both covering the same goods as those of the registered mark. In fact, the TTAB petition form, once provided with serial numbers, automatically fills out the rest of the information, effectively entering its existence and identifying criteria into the record. The TTAB even acknowledged these applications when in concluding that Titanium had standing to bring the cancellation proceeding. But, for some reason, it was unwilling to recognize for the purpose of likelihood of confusion the obvious thing that had been alleged and practically agreed to over-and-over: these were the same marks, used in association with the same goods, and as a result, even the USPTO

had rejected an application by Titanium for the mark “Dress Up Bolts.” In short, the TTAB found what it thought was a sufficient technicality to make no ruling at all. Since the TTAB made no factual determinations, even now Titanium would be free to file another cancellation petition, paying all the fees and going through another two-year litigation process, so long as this time it rigidly and excessively observed all the forms, regardless of the substance.

This cannot possibly be the law, especially considering that these are rules wholly made up by the TTAB and without any statutory predicate, other than the general authorization that the USPTO may entertain petitions to cancel a registered trademark. 15 U.S.C. § 1064. Yet, under its own process, it is apparently unwilling to take judicial notice of its own records and proceedings, and further, to address those issues that are plainly in dispute while accepting those that are not.

Ultimately, in this case it is the litigation process that the TTAB set up which naturally progressed toward an obvious conclusion: the fight was about priority, not confusion, because this was not a case involving similar marks or similar goods and services. Thus, this Court should make a simple ruling: in a cancellation proceeding where a petitioner and a registrant are fighting over ownership of the exact same mark used in association with the exact same goods, it was error for TTAB to deny cancellation on the basis it did, especially when the USPTO’s own process had denied Titanium’s applications as creating a likelihood of confusion

with ZSpec's identical trademark registration. This is the exact kind of arbitrary and capricious conduct that a reviewing court must reign in, as the Supreme Court recently explained in *Loper Bright Enters. v. Raimondo*. See 603 U.S. 369, 391-92 (2024) (discussing the importance of judicial review to guard against arbitrary and capricious action by administrative agencies). This Court should do so here.

### VIII. CONCLUSION

For the foregoing reasons, Appellant respectfully requests this honorable Court to reverse the Trademark Trial and Appeal Board and remand this case with directions to the Board to consider the parties evidence regarding priority.

March 27, 2025

Respectfully submitted,  
BY COUNSEL

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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

**Instructions:** When computing a word, line, or page count, you may exclude any items listed as exempted under Fed. R. App. P. 5(c), Fed. R. App. P. 21(d), Fed. R. App. P. 27(d)(2), Fed. R. App. P. 32(f), or Fed. Cir. R. 32(b)(2).

The foregoing filing complies with the relevant type-volume limitation of the Federal Rules of Appellate Procedure and Federal Circuit Rules because it meets one of the following:

- the filing has been prepared using a proportionally-spaced typeface and includes 2015 words.
- the filing has been prepared using a monospaced typeface and includes \_\_\_\_\_ lines of text.
- the filing contains 9 pages / 2015 words / 169 lines of text, which does not exceed the maximum authorized by this court's order (ECF No. \_\_\_\_\_).

Date: 02/06/2025

Signature: /Andrew P. Connors/

Name: Andrew P. Connors

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| <b>Titanium's Rebuttal Brief</b><br>(TTABVUE33 below)   | <b>APPX73</b> |

This Opinion is Not a  
Precedent of the TTAB

Mailed: August 12, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

—  
Trademark Trial and Appeal Board  
—

*Titanium, LLC*  
*v.*  
*ZSPEC Design LLC*  
—

Cancellation No. 92079042  
—

Jacob P. East, and Andrew P. Connors, of Darkhorse Law PLLC,  
for Titanium, LLC.

Todd Wengrovsky, of Law Offices of Todd Wengrovsky, PLLC,  
for ZSPEC Design LLC.

—  
Before Lykos, Casagrande, and Stanley,  
Administrative Trademark Judges.

Opinion by Casagrande, Administrative Trademark Judge:

Petitioner Titanium, LLC (Petitioner) petitions to cancel Registration No.  
5868348 for the mark DRESS UP BOLTS (“BOLTS” disclaimed), in standard

Cancellation No. 92079042

characters, for goods identified as “Metal bolts; Metal hardware, namely, washers,” in International Class 6.<sup>1</sup> Respondent ZSPEC Design LLC owns the ’348 Registration.

The Petition asserts a single claim, alleging priority and likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), in light of two trademarks as to which Petitioner alleges prior common law rights in the marks



DRESSUPBOLTS and , in connection with “decorative fasteners, including metal bolts and hardware” beginning in 2010.<sup>2</sup> The Petition further alleges that Petitioner has filed two applications to register its two asserted trademarks<sup>3</sup> and that both applications have been initially refused registration by the USPTO under Trademark Act Section 2(d) in view of Respondent’s registration.<sup>4</sup>

Respondent filed an answer denying the salient allegations in the Petition.<sup>5</sup>

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<sup>1</sup> Respondent’s ’348 Registration issued on September 24, 2019, on the Principal Register based on an application filed on March 25, 2019, and claims a date of first use anywhere and in commerce of January 1, 2014.

<sup>2</sup> See 1 TTABVUE 1-2, 4. Citations in this opinion to filings in proceedings before the Board are to TTABVUE, the Board’s online docketing system. The number preceding “TTABVUE” corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry, as paginated by TTABVUE, where any specifically cited portions of the document appear.

<sup>3</sup> See 1 TTABVUE 4. Application Serial No. 90505678 is for the composite mark



, and was filed on February 2, 2021, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a) and seeks registration on the Principal Register. It concerns goods identified as “Structural parts for automobiles,” and lists a date of first use and first use in commerce of January 1, 2010. Application Serial No. 90508223 was also filed under Section 1(a), but a day later on February 3, 2021. It asserts the same dates of first use and identifies the same goods, and is for the standard character mark DRESSUPBOLTS.

<sup>4</sup> See 1 TTABVUE 5.

<sup>5</sup> See 5 TTABVUE.

Cancellation No. 92079042

Both parties filed trial briefs,<sup>6</sup> and Petitioner filed a rebuttal brief.<sup>7</sup> The case is now ready for decision. Petitioner, as plaintiff, bears the burden of establishing its entitlement to a statutory cause of action and Section 2(d) claim by a preponderance of the evidence. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 945 (Fed. Cir. 2000) (“The party seeking cancellation must prove two elements: (1) that it has standing; and (2) that there are valid grounds for canceling the registration.”); *Jansen Enters. Inc. v. Rind*, Canc. No. 92042871, 2007 WL 809857, at \*2 (TTAB 2007) (same).<sup>8</sup> For the reasons explained below, we deny the petition.

## I. The Record

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of the challenged registration. During its trial period, Petitioner also submitted:

- Declarations from Randall Sass, Seth McGuire, Christopher Driver, and Lewis Bishop, all testifying as to prior use by Petitioner and its predecessors-in-interest of Petitioner’s asserted common law marks;<sup>9</sup>
- A declaration from Robert Demers purporting to opine as an expert on the “legitimacy” of Respondent’s evidence of pre-2014 use of Respondent’s marks;<sup>10</sup> and

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<sup>6</sup> See 31 TTABVUE (Petitioner’s trial brief); 32 TTABVUE (Respondent’s trial brief).

<sup>7</sup> See 33 TTABVUE.

<sup>8</sup> This opinion is issued as part of an internal Board pilot citation program on broadening acceptable forms of legal citation in Board cases. It cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals only by the page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). Westlaw (WL) citations are used for decisions of the Board, and only precedential Board decisions are cited. This opinion thus conforms to the practice set forth in TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (“TBMP”) § 101.03 (2024).

<sup>9</sup> See 6 TTABVUE 2-117.

<sup>10</sup> See *id.* at 118-39.

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- A Notice of Reliance attaching print-outs of results from the Internet Archive's Wayback Machine purporting to reflect webpages and articles bearing on Respondent's claim of priority dating back to 2008, screenshots of Petitioner's Facebook posts, excerpts from certain of Respondent's discovery responses, and the transcripts of discovery depositions of Respondent's founder (Christopher Karl) and Respondent's Chief Executive Officer (Karen Karl).<sup>11</sup>

Respondent submitted:

- The Testimony Declarations of Christopher Karl and Karen Karl testifying as to Respondent's pre-2014 use of its marks;<sup>12</sup> and
- A Notice of Reliance attaching evidence of Respondent's purported use of its mark before 2014, Respondent's articles of incorporation, and the application that matured into the registration Petitioner seeks to cancel.<sup>13</sup>

## II. Petitioner's Entitlement to Institute a Cancellation Proceeding under Section 14.

In every inter partes case, the complaining party case must establish that it is entitled to invoke the statute on which the proceeding is based. *See, e.g., Meenaxi Enter., Inc. v. Coca-Cola Co.*, 38 F.4th 1067, 1071-72 (Fed. Cir. 2022). This cancellation proceeding is based on Trademark Act Section 14, 15 U.S.C. § 1064. To establish that it is entitled to bring a cancellation proceeding, Petitioner must demonstrate: (i) an interest falling within the zone of interests protected by Section 14; and (ii) proximate causation. *See, e.g., Corcamore, LLC v. SFM, LLC*, 978 F.3d

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<sup>11</sup> *See* 7 TTABVUE.

<sup>12</sup> *See* 17 TTABVUE (Christopher Karl); 18 TTABVUE (Karen Karl). Because these declarations were submitted a day after Respondent's testimony period ended, Petitioner moved to strike them, but the Board denied the motion and extended the time for Respondent to re-file and re-serve the two declarations. *See* 26 TTABVUE (Board order); 27 TTABVUE (re-filed Christopher Karl Decl.); 29 TTABVUE (re-filed Karen Karl Decl.).

<sup>13</sup> *See* 28 TTABVUE.

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1298, 1303 (Fed. Cir. 2020) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 120-37 (2014)); *id.* at 1305 (applying *Lexmark* to inter partes TTAB cases). Demonstrating a real interest in cancelling a registration satisfies the zone-of-interests requirement, and demonstrating a reasonable belief in damage by the registration of a mark demonstrates proximate cause. *Id.* at 1305-06.

Petitioner alleges it is entitled to petition under Section 14 based in part on its ownership of the two previously-identified pending trademark applications and in part on its prior common law use of its two pleaded marks.<sup>14</sup> Petitioner also alleges that its applications have been refused registration based on a likelihood of confusion with Respondent's mark.<sup>15</sup> Petitioner, however, failed to make of record a copy of either pleaded pending application, nor did it make of record any evidence showing the current status and title of the applications or the Office Actions refusing registration. Thus, Petitioner has only alleged, but not proved, that it is entitled to invoke the cancellation statute based on the status of its pending applications. *See, e.g., WeaponX Performance Prods. Ltd. v. Weapon X Motorsports, Inc.*, Opp. No. 91221553, 2018 WL 1326374, at \*5-6 (TTAB 2018).

Petitioner also alleges its entitlement to pursue this statutory cancellation proceeding in part based on its prior common law use of its marks and because of alleged demands made by Respondent that Petitioner's distributors cease and desist

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<sup>14</sup> *See* 1 TTABVUE 4-5.

<sup>15</sup> *See id.* at 5.

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selling Petitioner's products.<sup>16</sup> In contrast to its failure to introduce its applications and the alleged refusals, Petitioner has, in fact, introduced evidence of its use of its



alleged common law marks DRESSUPBOLTS and in connection with washers, nuts, and bolts.<sup>17</sup> This suffices to demonstrate that Petitioner is entitled to have filed this statutory cancellation proceeding. *See, e.g., Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1029 (CCPA 1982) (petitioner establishes entitlement (formerly called "standing") to bring a cancellation proceeding by showing "a real commercial interest in its own marks, and a reasonable basis for its belief that it would be damaged" by the subject registration); *Giersch v. Scripps Networks Inc.*, Canc. No. 92045576, 2009 WL 706673, at \*4-6 (TTAB 2009) (plaintiff's continuous common law use of designation similar to the subject registered mark entitled it to petition to cancel).<sup>18</sup>

### III. Analysis

Having determined that Petitioner is entitled to file this Section 14 cancellation proceeding, we turn to the merits. As noted, Petitioner's sole claim is under Section

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<sup>16</sup> *See id.*

<sup>17</sup> *See* exhibits to Testimony Declarations of Randall Sass, Seth McGuire, Christopher Driver, and Lewis Bishop, 6 TTABVUE 2-117.

<sup>18</sup> We do not see any evidence in the record of the alleged demands made by Respondent to Petitioner's distributors. Were there such evidence, that alone would have satisfied the statutory entitlement requirement. *See, e.g., Books on Tape, Inc. v. Booktape Corp.*, 836 F.2d 519, 520 (Fed. Cir. 1987) (finding standing because the petitioner, as a competitor of the respondent, had an interest in the outcome beyond that of the general public). But in the absence of such evidence, the allegation alone does not suffice.

Cancellation No. 92079042

2(d) of the Trademark Act, which prohibits registration of a mark that “so resembles ... a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.” 15 U.S.C. § 1052(d).

There are two elements to a claim under Section 2(d). “[A] party petitioning for cancellation under section 2(d) must show [1] that it had priority and [2] that registration of the mark creates a likelihood of confusion.” *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1162 (Fed. Cir. 2002) (bracketed numbers added); *see also Hornby v. Tjx Cos.*, Canc. No. 92044369, 2008 WL 1808555, at \*9 (TTAB 2008) (“In order to prevail on her claim of likelihood of confusion (Section 2(d) of the Trademark Act), petitioner must prove both the elements of priority of use and likelihood of confusion.”).

Here, 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). Respondent’s trial brief correctly states that the “[t]he issues presented are whether Petitioner ... has proven that it used its mark ... prior to Registrant ZSPEC Design’s ... usage of

Cancellation No. 92079042

its mark, and whether the marks at issue are likely to be confused with one another.”<sup>19</sup> Respondent further succinctly points out, however, that Petitioner has not “proven that the marks at issue are likely to be confused with one another.”<sup>20</sup>

We agree with Respondent. 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 (“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 or forfeited.”). Because Petitioner’s claim necessarily fails due to Petitioner’s failure even to address the element of likelihood of confusion, we need not resolve whether Petitioner has established the element its trial briefs did address: priority. *See, e.g., Syngenta Crop Protection, Inc. v. Bio-Chek, LLC*, Opp. No. 91175091, 2009 WL 691309, at \*6 (TTAB 2009) (“We need not reach the issue of likelihood of confusion because without proof of priority, opposer cannot prevail.”); *Life Zone Inc. v. Middleman Grp., Inc.*, Opp. No.

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<sup>19</sup> *See* 32 TTABVUE 5.

<sup>20</sup> *See id.* Our review of the filings and evidentiary record confirms that Respondent, who denied all the salient allegations in the Petition, nowhere agreed that confusion is likely.

Cancellation No. 92079042

91160999, 2008 WL 2781162, at \*8 (TTAB 2008) (same).<sup>21</sup> Accordingly, Petitioner has failed to establish by a preponderance of the evidence its Section 2(d) claim.

**Decision:** The petition is denied.

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<sup>21</sup> We need not reach Petitioner's request that we reverse the Board's prior order denying Petitioner's motion to strike the declarations of Christopher and Karen Karl, *see* 31 TTABVUE 17-19, because these declarations concern only priority and the request is therefore moot in light of our disposition of the claim.

# United States of America

United States Patent and Trademark Office

## Dress Up Bolts

**Reg. No. 5,868,348**

**Registered Sep. 24, 2019**

**Int. Cl.: 6**

**Trademark**

**Principal Register**

ZSPEC Design LLC (OHIO LIMITED LIABILITY COMPANY)  
8845 Hikers Trl  
Chardon, OHIO 44024

CLASS 6: Metal bolts; Metal hardware, namely, washers

FIRST USE 1-1-2014; IN COMMERCE 1-1-2014

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT STYLE, SIZE OR COLOR

No claim is made to the exclusive right to use the following apart from the mark as shown:  
"BOLTS"

SER. NO. 88-354,823, FILED 03-25-2019



*Andrei Iancu*

Director of the United States  
Patent and Trademark Office

Form PTO 55 (12-80)

**U.S. DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office**

November 25, 2024  
(Date)

**THIS IS TO CERTIFY** that the annexed is an accurate statement of the content entries in the file of the trademark cancellation proceeding identified below. The list was taken from the TSDR and TTABVue electronic databases of the United States Patent and Trademark Office and comprises the record before this Office.

*Titanium, LLC*

v.

*ZSPEC Design LLC*

**Cancellation No. 92079042  
Serial No. 88/354,823  
Registration No. 5,868,348  
Mark: DRESS UP BOLTS**



By authority of the  
DIRECTOR OF THE UNITED STATES  
PATENT AND TRADEMARK OFFICE

*Orchideh Rushenas*  
\_\_\_\_\_  
*Certifying Officer*

**PROSECUTION HISTORY OF U.S. REGISTRATION NO. 5,868,348**  
**Federal Circuit Appeal No. 2025-1071**  
**Mark: DRESS UP BOLTS**

| <b>DATE</b> | <b>DESCRIPTION</b>   |
|-------------|--|
| 03/25/2019  | Application  |
| 03/25/2019  | Specimen   |
| 03/25/2019  | Drawing  |
| 05/08/2019  | XSearch Search Summary                                     |
| 05/08/2019  | [Non-Final] Office Action                                  |
| 05/16/2019  | Examiner's Amendment                                       |
| 05/17/2019  | Trademark Snap Shot Amendment & Mail Processing Stylesheet |
| 05/18/2019  | Trademark Snap Shot Publication Stylesheet                 |
| 06/19/2019  | Notification of Notice of Publication                      |
| 06/19/2019  | Notice of Publication                                      |
| 07/09/2019  | Official Gazette Publication Confirmation                  |
| 09/24/2019  | Registration Certificate                                   |
| 09/24/2024  | Courtesy E-Reminder of Sec. 8 (6-yr)                       |

**HISTORY OF CANCELLATION PROCEEDING NO. 92079042**  
**Federal Circuit Appeal No. 2025-1071**  
**Mark: DRESS UP BOLTS**

| <b>DATE</b> | <b>DESCRIPTION</b>  |
|-------------|---|
| 02/11/2022  | Petition for Cancellation   |
| 02/11/2022  | Order: Notice and Trial Dates Sent; Answer Due  |
| 02/28/2022  | Respondent's Notice of Appearance of Counsel  |
| 02/28/2022  | Respondent's Answer   |
| 01/14/2023  | Petitioner's Declaration of Randall Sass, and Exhs. RS1 – RS7; Declaration of Seth McGuire, and Exhs. SM1 – SM7; Declaration of Christopher Driver, and Exhs. CD1 – CD6; Declaration of Lewis Bishop, and Exhs. LB1 – LB6; Declaration of Robert Demers, and Exh. RD1 |
| 01/14/2023  | Petitioner's Notice of Reliance; Exhs. NR1 – NR12   |
| 01/18/2023  | Order Regarding Service and Form of Submissions   |
| 01/20/2023  | Petitioner's Certificate of Service   |
| 03/16/2023  | Respondent's Motion for Extend Time   |
| 04/05/2023  | Petitioner's Opposition to Motion to Extend; Exhs. A – D  |
| 04/25/2023  | Respondent's Reply in Support of Motion to Extend   |
| 06/30/2023  | Petitioner's Notice of Appearance of Counsel  |
| 06/30/2023  | Petitioner's Opening Brief (Not Considered)   |
| 06/30/2023  | Petitioner's Opening Brief, with Cover Letter (Not Considered)  |
| 07/07/2023  | Order: Motion to Extend Time Denied; Trial Dates Reset  |
| 07/18/2023  | Respondent's Testimony of Christopher Karl  |
| 07/18/2023  | Respondent's Testimony of Karen Karl  |
| 07/20/2023  | Order Regarding Service   |
| 07/21/2023  | Petitioner's Motion to Strike Testimony   |
| 07/31/2023  | Respondent's Certificate of Service   |
| 07/31/2023  | Respondent's Certificate of Service   |
| 08/09/2023  | Respondent's Opposition to Motion to Strike; Exhs. A – D  |
| 08/18/2023  | Petitioner's Reply in Support of Motion to Strike   |

| <b>DATE</b> | <b>DESCRIPTION</b>  |
|-------------|---|
| 08/21/2023  | Order: Proceedings Suspending Pending Disposition of Outstanding Motion                     |
| 10/31/2023  | Order: Respondent Allowed to Refile Trial Documents; Proceedings Resumed; Trial Dates Reset |
| 11/06/2023  | Respondent's Testimony of Christopher Karl  |
| 11/06/2023  | Respondent's First Notice of Reliance; Exhs. A – H  |
| 11/06/2023  | Respondent's Testimony of Karen Karl  |
| 11/06/2023  | Respondent's Certificate of Service   |
| 02/22/2024  | Petitioner's Trial Brief  |
| 03/24/2024  | Respondent's Trial Brief  |
| 04/05/2024  | Petitioner's Rebuttal Brief   |
| 08/12/2024  | Board Decision: Cancellation Denied   |
| 10/09/2024  | Petitioner's Notice of Appeal to the Federal Circuit  |

Trademark Trial and Appeal Board Electronic Filing System. <https://esta.uspto.gov>ESTTA Tracking number: **ESTTA1190414**Filing date: **02/11/2022**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**Petition for Cancellation**

Notice is hereby given that the following party has filed a petition to cancel the registration indicated below.

**Petitioner information**

|         |   |             |          |
|---------|---|-------------|----------|
| Name    | Titanium, LLC d/b/a Dress Up Bolts                                    |             |          |
| Entity  | Limited Liability Company   | Citizenship | Virginia |
| Address | 1030 MCCONVILLE RD.<br>STE. 6<br>LYNCHBURG, VA 24502<br>UNITED STATES |             |          |

|                            |   |
|----------------------------|---|
| Correspondence information | JACOB P. EAST<br>DARKHORSE LAW PLLC<br>7331 TIMBERLAKE RD., STE. 201A<br>LYNCHBURG, VA 24502<br>UNITED STATES<br>Primary email: info@darkhorse.law<br>Secondary email(s): jacob@darkhorse.law, andrew@darkhorse.law<br>5405538149 |
|----------------------------|---|

**Registration subject to cancellation**

|                  |   |                   |            |
|------------------|---|-------------------|------------|
| Registration no. | 5868348   | Registration date | 09/24/2019 |
| Register         | Principal   |                   |            |
| Registrant       | ZSPEC Design LLC<br>8845 HIKERS TRL<br>CHARDON, OH 44024<br>UNITED STATES |                   |            |

**Goods/services subject to cancellation**

|   |
|---|
| Class 006. First Use: Jan 1, 2014 First Use In Commerce: Jan 1, 2014<br>All goods and services in the class are subject to cancellation, namely: Metal bolts; Metal hardware, namely, washers |
|---|

**Grounds for cancellation**

|                                      |                                       |
|--------------------------------------|---------------------------------------|
| Priority and likelihood of confusion | Trademark Act Sections 14(1) and 2(d) |
|--------------------------------------|---------------------------------------|

**Marks cited by petitioner as basis for cancellation**

|                      |           |                  |            |
|----------------------|-----------|------------------|------------|
| U.S. application no. | 90505678  | Application date | 02/02/2021 |
| Register             | Principal |                  |            |
| Registration date    | NONE      | Foreign priority | NONE       |

|                     |  |      |  |
|---------------------|--|------|--|
|                     |  | date |  |
| Word mark           | DRESS UP BOLTS   |      |  |
| Design mark         |    |      |  |
| Description of mark | The mark consists of A partial outline of a nut around the first two letters "DR" with the words DRESSUPBOLTS formed together as one word. |      |  |
| Goods/services      | Class 012. First use: First Use: Jan 1, 2010 First Use In Commerce: Jan 1, 2010 Structural parts for automobiles                           |      |  |

|                      |  |                       |            |
|----------------------|--|-----------------------|------------|
| U.S. application no. | 90508223   | Application date      | 02/03/2021 |
| Register             | Principal  |                       |            |
| Registration date    | NONE   | Foreign priority date | NONE       |
| Word mark            | DRESSUPBOLTS   |                       |            |
| Design mark          |                              |                       |            |
| Description of mark  | NONE   |                       |            |
| Goods/services       | Class 012. First use: First Use: Jan 1, 2010 First Use In Commerce: Jan 1, 2010 Structural parts for automobiles |                       |            |

|             |  |
|-------------|--|
| Attachments | 90505678#TMSN.png( bytes )<br>90508223#TMSN.png( bytes )<br>Dress Up Bolts - Petition to Cancel Final.pdf(568638 bytes ) |
|-------------|--|

|           |                 |
|-----------|-----------------|
| Signature | /Jacob P. East/ |
| Name      | Jacob P. East   |
| Date      | 02/11/2022      |

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Registration No.: 5868348  
For the Mark “Dress Up Bolts”  
Registered: September 24, 2019

|                                   |   |                  |
|-----------------------------------|---|------------------|
| TITANIUM, LLC dba DRESS UP BOLTS, | ) |                  |
|                                   | ) |                  |
| Petitioner,                       | ) | Cancellation No. |
|                                   | ) |                  |
| v.                                | ) |                  |
|                                   | ) |                  |
| ZSPEC DESIGN LLC,                 | ) |                  |
|                                   | ) |                  |
| Registrant.                       | ) |                  |

**PETITION TO CANCEL**

Petitioner Titanium, LLC dba Dress Up Bolts (“Petitioner”) is a Virginia limited liability company with an address at 1030 McConville Rd. Ste 6, Lynchburg, VA 24502.

Registrant ZSPEC Design LLC (“Registrant”) is an Ohio limited liability company with an address at 8845 Hikers Trl., Chardon, Ohio 44024.

Petitioner believes that it will be damaged by the above-identified registration, and hereby petitions to cancel it.

Grounds for the cancellation are as follows:

1. Registrant is the owner of federal trademark registration 5868348 for the wordmark “Dress Up Bolts” as used in association with decorative metal bolts and hardware under international classification 006.
2. Registrant alleges use in commerce of the registered wordmark beginning on January 1, 2014, at the earliest.

3. Petitioner has been engaged in the sale of decorative fasteners, including metal bolts and hardware of the exact same variety which Registrant's trademark is associated, under the registered fictitious name "Dress Up Bolts" since as early as 2010.
4. Registrant's registered mark is identical to the mark used by Petitioner since 2010.
5. Petitioner regularly engages in both in-person and online sales across the country through its website <https://dressupbolts.com/>.
6. These sales include interstate transactions spanning a large geographic territory, including sales in the state of Ohio where Registrant is located and operates as early as 2014.
7. By using the mark "Dress Up Bolts" in commerce as a source indicator for its products, Petitioner has established priority use of its unregistered trademark, providing Petitioner with rights that are superior to those held by other users providing similar goods or services after the date of first use in commerce, including Registrant.
8. Registrant uses its registered trademark in association with the sale of the exact same goods which Petitioner has sold under its mark since 2010.
9. Registrant sells its products through the exact same marketing and distribution channels that have been utilized by Petitioner since 2010, in some instances using the exact same distributors.
10. Given Petitioner's use of the mark in association with the sale of metal bolts and fasteners began in 2010, four years prior to Registrant's alleged first use in commerce, Petitioner has superior rights in the mark "Dress Up Bolts."
11. On February 3, 2021, Petitioner filed trademark applications with the USPTO for the wordmark "DRESSUPBOLTS" and the design mark "Dress Up Bolts."

12. Despite Petitioner's superior rights in the mark, Petitioner received a non-final office action from the USPTO denying its application in part on the grounds of likelihood of confusion with Registrant's registered trademark.
13. Registrant's registration will cause harm to Petitioner by preventing Petitioner from exercising its trademark rights in its own fictitious name, "Dress Up Bolts," and creating the threat of liability if Petitioner continues to use its mark.
14. Petitioner will be damaged by the denial of its own federal trademark applications for the wordmark and design mark.
15. Petitioner has been further damaged by Registrant's demands that distributors cease selling Petitioner's products, resulting in loss of sales by Petitioner and damage to Petitioner's relationship with its distributors.

Therefore, Petitioner believes that it is now and will be damaged by the continued presence of federal trademark registration number 5868348 for "Dress Up Bolts" on the principal register. Accordingly, Petitioner respectfully requests that trademark registration number 5868348 be cancelled and that this petition be granted in favor of Petitioner.

Dated: February 11, 2022

Respectfully submitted,  
BY COUNSEL

/Jacob P. East/  
Jacob P. East, Esq. (VSB No. 96959)  
Andrew P. Connors, Esq. (VSB No. 80248)  
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[jacob@darkhorse.law](mailto:jacob@darkhorse.law)

*Counsel for Petitioner*

Trademark Trial and Appeal Board Electronic Filing System. <https://esta.uspto.gov>ESTTA Tracking number: **ESTTA1193451**Filing date: **02/28/2022**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

|                        |   |
|------------------------|---|
| Proceeding no.         | 92079042  |
| Party                  | Defendant<br>ZSPEC Design LLC   |
| Correspondence address | ZSPEC DESIGN LLC<br>8845 HIKERS TRL<br>CHARDON, OH 44024<br>UNITED STATES<br>Primary email: info@zspec.us<br>No phone number provided |
| Submission             | Answer  |
| Filer's name           | Todd Wengrovsky   |
| Filer's email          | contact@twlegal.com   |
| Signature              | /Todd Wengrovsky/   |
| Date                   | 02/28/2022  |
| Attachments            | ZSPEC Answer.pdf(136322 bytes )   |

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Proceeding Number: **92079042**

Registration No.: **5868348**

Mark: **DRESS UP BOLTS**

BOX TTAB  
Commissioner for Trademarks  
P.O. Box 1451  
Alexandria, VA 22313-1451

**REGISTRANT'S ANSWER TO  
PETITION TO CANCEL**

Registrant ZSPEC Design LLC, by attorney Todd Wengrovsky, hereby responds to the Petition to Cancel filed by Titanium, LLC d/b/a Dress Up Bolts, as follows:

1. Registrant admits the allegations of this Paragraph of the Petition to Cancel.
2. Registrant denies each and every allegation of this Paragraph of the Petition to Cancel.
3. Registrant denies each and every allegation of this Paragraph of the Petition to Cancel.
4. Registrant denies each and every allegation of this Paragraph of the Petition to Cancel.
5. Registrant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this Paragraph of the Petition.
6. Registrant denies each and every allegation of this Paragraph of the Petition to Cancel.
7. Registrant denies each and every allegation of this Paragraph of the Petition to Cancel.
8. Registrant denies each and every allegation of this Paragraph of the Petition to Cancel.
9. Registrant denies each and every allegation of this Paragraph of the Petition to Cancel.
10. Registrant denies each and every allegation of this Paragraph of the Petition to Cancel.
11. Registrant admits the allegations of this Paragraph of the Petition to Cancel.
12. Registrant admits the allegation regarding Petitioner's application being denied, and denies the remaining allegations of this Paragraph of the Petition to Cancel.
13. Registrant denies each and every allegation of this Paragraph of the Petition to Cancel.
14. Registrant denies each and every allegation of this Paragraph of the Petition to Cancel.
15. Registrant denies each and every allegation of this Paragraph of the Petition to Cancel.

**WHEREFORE**, Registrant requests that the Petition to Cancel be dismissed in its entirety with prejudice.

Dated: Calverton, New York  
February 28, 2022

/s/ Todd Wengrovsky  
Todd Wengrovsky  
Law Offices of  
Todd Wengrovsky, PLLC.  
285 Southfield Road, Box 585  
Calverton, NY 11933  
Tel (631) 727-3400  
*Attorney for Registrant*

**CERTIFICATE OF SERVICE**

I hereby certify that on February 28, 2022, a copy of the foregoing Registrant's Answer to Petition to Cancel was electronically filed with the United States Patent and Trademark Office and that a copy was sent electronically to Petitioner's attorney of record:

JACOB P. EAST  
DARKHORSE LAW PLLC  
7331 TIMBERLAKE RD., STE. 201A  
LYNCHBURG, VA 24502  
[info@darkhorse.law](mailto:info@darkhorse.law)  
[jacob@darkhorse.law](mailto:jacob@darkhorse.law)  
[andrew@darkhorse.law](mailto:andrew@darkhorse.law)

/s/ Todd Wengrovsky  
Todd Wengrovsky  
Law Offices of  
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285 Southfield Road, Box 585  
Calverton, NY 11933  
Tel (631) 727-3400  
*Attorney for Registrant*

ESTTA Tracking number: **ESTTA1341920**  
Filing date: **02/22/2024**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

|                        |   |
|------------------------|---|
| Proceeding no.         | 92079042  |
| Party                  | Plaintiff<br>Titanium, LLC d/b/a Dress Up Bolts   |
| Correspondence address | ABBI WHITE HARRIS<br>DARKHORSE LAW PLLC<br>7331 TIMBERLAKE RD<br>SUITE 201A<br>LYNCHBURG, VA 24502<br>UNITED STATES<br>Primary email: info@darkhorse.law<br>Secondary email(s): abbi@darkhorse.law, jacob@darkhorse.law, andrew@darkhorse.law<br>540-553-8149 |
| Submission             | Brief on Merits for Plaintiff   |
| Filer's name           | Jacob P. East   |
| Filer's email          | jacob@darkhorse.law, andrew@darkhorse.law, info@darkhorse.law   |
| Signature              | /Jacob P. East/   |
| Date                   | 02/22/2024  |
| Attachments            | Titanium LLC - Petitioners Opening Brief.pdf(613698 bytes )   |

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Registration No.: 5868348  
For the Mark “Dress Up Bolts”  
Registered: September 24, 2019

|                                   |   |                           |
|-----------------------------------|---|---------------------------|
| TITANIUM, LLC dba DRESS UP BOLTS, | ) |                           |
|                                   | ) |                           |
| Petitioner,                       | ) | Cancellation No. 92079042 |
|                                   | ) |                           |
| v.                                | ) |                           |
|                                   | ) |                           |
| ZSPEC DESIGN LLC,                 | ) |                           |
|                                   | ) |                           |
| Registrant.                       | ) |                           |

**PETITIONER’S OPENING BRIEF**

**I. SUMMARY OF THE CASE**

Petitioner, Titanium, LLC dba Dress Up Bolts (“Titanium”), by counsel, hereby submits its Opening Brief. Titanium has superior rights in the trademark “Dress Up Bolts” (the “Trademark”) arising from nationwide use in commerce beginning on May 24, 2010 by its predecessor-in-interest, Fortune Ventures, LLC. Titanium presented over 200 pages of evidence demonstrating a clear chain-of-title tracing Titanium’s acquisition of these rights and their accompanying goodwill from their first user, Fortune Ventures, LLC, beginning with continuous use in commerce nationwide by Fortune Ventures, LLC at its website, <http://dressupbolts.com/> (the “Dress Up Bolts URL”), at various auto shows across the country, and in auto magazines with nationwide distribution. Fortune Ventures, LLC later sold its trademark and accompanying goodwill, along with its website, the Dress Up Bolts URL, contractual relationships, and the rest of the assets of its business, to Timeless Enterprises, LLC, in 2017. Completing the chain-of-title, Titanium acquired these assets from Timeless Enterprises, LLC and continued, as its

predecessors had, to use the Trademark in association with decorative hardware and fasteners sold nationwide at car shows, in auto magazines, and at the Dress Up Bolts URL.

The evidence submitted at trial clearly shows that Titanium, through its predecessors-in-interest, has continually used in commerce the contested Trademark in association with decorative hardware and fasteners since about four years before Registrant's claimed first use in commerce of January 1, 2014 (as presented in its registration certificate). Although Registrant claims in its Answer to have a priority date before May 24, 2010, such evidence greatly lacks in credibility and furthermore fails to provide any proof of bona fide use of the Trademark in commerce. Because Petitioner's uncontested, credible evidence presented at trial demonstrates that Titanium used the Trademark nationwide several years before Registrant's first use in commerce claimed in its Registration certificate, Titanium has superior rights in the Trademark. Therefore, the Board should cancel Registrant's trademark under registration number 5868348.

## II. STATEMENT OF FACTS

Titanium is a Virginia limited liability company with its principal place of business in Lynchburg, Virginia. 1 TTABVUE 3. It owns and operates a business selling decorative titanium automotive fasteners and hardware for use on a variety of vehicles under the Trademark. *Id.* Registrant, ZSPEC Design LLC, is an Ohio limited liability company owning and operating a similar business to Titanium, where it also sells decorative automotive fasteners and hardware online. *Id.* On May 24, 2010, the original owner of the Trademark, Fortune Ventures, LLC was founded by Lewis C. Bishop ("Bishop"), adopting the Trademark as its trade name at its inception. 6 TTABVUE 86. At that time, Fortune Ventures, LLC began selling decorative automotive fasteners and hardware under this trademark, focusing immediately on building this brand of decorative fasteners and hardware by selling them nationwide. *Id.* This included

launching an online sales website at the Dress Up Bolts URL, creating a logo including the Trademark, and marking its products, packaging, and associated documents with the logo when distributed to purchasers nationwide. *Id.* at 92, 94, 96-97. Titanium's claim of continuous use in commerce since May 24, 2010 rests largely on the fact that Fortune Ventures, LLC, Timeless Enterprises, LLC, and Titanium have continuously used the Trademark in commerce on the Dress Up Bolts URL since May 24, 2010. 7 TTABVUE 10-21.

From its formation, Fortune Ventures, LLC engaged in the sale of decorative automotive fasteners on a national scale, advertising both online and in national magazines and other publications directed at the automotive industry, and frequently attending car shows and other events focused on the automotive industry throughout the country. 6 TTABVUE 99-101, 103-105. Fortune Ventures, LLC continued these practices, actively using the Trademark until September 22, 2014, when Fortune Ventures, LLC sold its rights in the Trademark, the associated goodwill, and its other business assets used in association with the Trademark, including the Dress Up Bolts URL, to Timeless Enterprises, LLC in an asset purchase agreement. *Id.* at 89, 59-68, 107-116. Timeless Enterprises, LLC was formed by Chris Driver on June 4, 2010. *Id.* at 54. At all times throughout this asset purchase and immediately afterwards, the Trademark was continuously used in association with the sale of decorative automotive fasteners and hardware and was marked on the packaging of the products sold. *Id.* at 54-55. Bishop has provided sworn, uncontroverted testimony affirming that, from the inception of Fortune Ventures, LLC until the asset sale to Timeless Enterprises, LLC, Fortune Ventures, LLC has continuously used the Trademark on the Dress Up Bolts URL, at auto shows, through other marketing channels, and on decorative automotive fasteners and hardware sold to consumers. *Id.* at 86-90.

Following the sale of the Trademark and all associated rights and goodwill, Timeless Enterprises, LLC continued operating the business as it had been operated before, continuing the marketing and branding endeavors of Fortune Ventures, LLC. *Id.* at 70, 72. Timeless Enterprises, LLC continued marking the packaging of its decorative fasteners with the Trademark, also marking invoices and documents associated with their sale. *Id.* at 72. Timeless Enterprises, LLC also continued its branding and sales efforts directed through its website. *Id.* at 74. Timeless Enterprises, LLC also attended and sponsored automobile shows as a vendor and partnered with vehicle owners to promote the Trademark and the related products. *Id.* at 76. Timeless Enterprises, LLC continuously operated and sold decorative automotive fasteners under the Trademark until February 25, 2017, when it sold its rights in the Trademark, its goodwill, and all associated assets to Titanium via another formal asset purchase. *Id.* at 7-13, 33-39, 78-84. Christopher Driver, who was a managing member of Timeless Enterprises, LLC, from its formation until the time of the asset transfer to Titanium, has provided sworn, uncontroverted testimony stating that Timeless Enterprises continually used the Trademark in commerce by maintaining the presence of the Trademark on the website located at the Dress Up Bolts URL, selling decorative automotive fasteners and related hardware to consumers with the Trademark affixed to the packaging of those products, and attending and sponsoring automobile shows and drivers using the Trademark. *Id.* at 54-57.

Titanium has continued the sale of decorative automotive fasteners in association with the Trademark from the date of the asset purchase to the present day. *Id.* at 15, 41. Titanium has also continued the practices of marking its packaging with the Trademark, attending automobile showcases, and advertising through print and online means from the asset purchase until present. *Id.* at 15, 20, 24, 26, 46, 50, 52. Randall Sass, a managing member of

Titanium, has provided sworn, uncontroverted testimony to this effect. *Id.* at 2-4. Titanium has also used the Trademark in commerce via its Facebook page, which previously belonged to Timeless Enterprises, LLC, and therefore has been continuously used in commerce since 2010. 7 TTABVUE 35-50. In February of 2021, Titanium filed a trademark application with the USPTO for the Trademark and its associated logo, and in September of the same year received a non-final office action rejecting the application based on a likelihood of confusion with Registrant's mark. 1 TTABVUE 4. In support of this office action, the USPTO cited the Trademark which had been registered on September 24, 2019, under registration number 5868348. *Id.* at 4-5. In Registrant's application, it alleged that its first use in commerce was January 1, 2014, approximately 4 years after Titanium's predecessor began using the Trademark in commerce. 7 TTABVUE 92-93. Registrant has otherwise failed to submit any evidence during its trial period.

#### **IV. ARGUMENT**

##### **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.**

The evidence Titanium has submitted demonstrates a clear, unbroken chain-of-title in the Trademark, as used in associated with decorative hardware and fasteners, and including the Trademark's associated goodwill, dating back to at least May 24, 2010. Despite submitting documents and testimony alleging an earlier date of first use in commerce, the only actual evidence Registrant has of its first use in commerce is its first use in commerce date listed on its registration certificate of January 1, 2014, and, of course, that is not particularly compelling evidence without any corroboration, which Registrant has failed to provide. In any event, Petitioner has met its burden, showing by a preponderance of the evidence that Titanium has the benefit of a priority date approximately four years before that date, and therefore it is the rightful

owner of the Trademark. Therefore, the Trademark Trial and Appeal Board should cancel the registration so that Titanium may rightfully claim it.

Titanium's first use in commerce of the Trademark occurred at least as early as May 24, 2010, approximately four years before Registrant's demonstrated first use date in 2014. The date that a mark is first used in commerce is determined based on the point in time when the associated goods were first sold or transported under the mark in interstate commerce. 15 U.S.C. § 1127; TMEP § 903.02. Where there is a sale of goods involved, use in commerce occurs when (A) the mark is affixed onto the goods themselves or containers, displays, tags, labels, or documents associated with sale of the goods themselves; and (B) the goods are transported or sold in commerce. 15 U.S.C. § 1127; TMEP § 901.01. As explained in TMEP § 904.03(i), electronic displays may serve as proof that a mark has been used in commerce involving a sale of goods, provided that the electronic display does all the following: (1) contains a visual depiction or text description of the goods in question; (2) shows the mark being used in association with the goods; and (3) provides consumers with a way of purchasing the identified goods. *See In re Sones*, 590 F.3d 1282, 1288 (Fed. Cir. 2009) (explaining that a website is simply "an electronic retail store").

Under the Lanham Act, a current trademark owner can obtain the benefit of prior use in commerce from its predecessor in title. 15 U.S.C. § 1055; *see* TMEP § 903.05 (explaining that when "first use in commerce was by a predecessor in title," an applicant may claim the benefit of the first use date of the predecessor). "To acquire title to a trademark and to prove priority of use to an earlier user in the chain of title, a person or company must be able to prove a chain of title extending back to the original user of the mark." *CTRL Sys. v. Ultraphonics of N. Am., Inc.*, Civil No. CCB-99-3139, 2001 U.S. Dist. LEXIS 11250, at \*10 (D. Md. Aug. 6, 2001) (quoting 2

J. Thomas McCarthy, Trademarks and Unfair Competition § 18:15, p. 18-28 (4th ed. 1996)). Proving that such a chain of title exists depends on the validity of the assignment(s). *CTRL Sys. v. Ultraphonics of N. Am., Inc.*, Civil No. CCB-99-3139, 2001 U.S. Dist. LEXIS 11250 at \*9 (D. Md. Aug. 6, 2001). Because trademark rights do not exist “in gross,” that is, apart from the goodwill generated from the trademark as used in association the sale of a good or serve, a valid trademark assignment requires a seller to transfer to a buyer not just the trademark but the ability to sell those same goods or services in the same manner as the seller did. *See Sugar Busters LLC v. Brennan*, 177 F.3d 258, 265 (5th Cir. 1999) (holding that the seller of a trademark must transfer both the mark itself and the accompanying goodwill); *Universal City Studios, Inc. v. Nintendo Co.*, 578 F. Supp. 911, 922-23 (S.D.N.Y. 1983) (explaining this in detail).

Here, Titanium has submitted ample evidence of its ownership of the Trademark and its accompanying goodwill, including asset purchase agreements, testimony, and other evidence (e.g. historical website data), and all of which establish an unblemished chain-of-title to Titanium from its predecessors in title, thereby allowing it to rightfully assert May 24, 2010, as its first use in commerce date. When Fortune Ventures, LLC transferred the Trademark to Timeless Enterprises, LLC, Fortune Ventures, LLC transferred all rights to the Trademark and associated goodwill. 6 TTABVUE 89, 59-68, 107-116. When it transferred the “goodwill,” this was not a mere formality. Fortune did so as part of an asset purchase agreement that included the transfer of all the business assets of the “Dress Up Bolts” business, including the website URL at <http://dressupbolts.com>, the accompanying website, and the national sales system that Fortune had built at this website and through other channels like nationwide auto shows and auto magazines. The same is true of the asset purchase agreement in which Timeless Enterprises, LLC gave Titanium ownership of the Trademark and associated goodwill that it had obtained from its

predecessor in title, Fortune. Therefore, an unbroken chain-of-title to the Trademark exists between Titanium and its predecessors in interest, going all the way back to the Trademark's first user: Fortune Ventures, LLC. Fortune Ventures, LLC began using the Trademark as early as May 24, 2010. This is a true and accurate depiction of what Fortune Ventures, LLC's website looked like on May 24, 2010. *Id.* The website contained text *and* visual descriptions of "dress up bolts," shows the Trademark being used in direct association with decorative hardware and fasteners and provides consumers with a means of purchasing the goods associated with the Trademark, all of which establish priority under the Lanham Act. *Id.*

After purchasing the Trademark and associated goodwill from Fortune Ventures, LLC in 2014, Timeless Enterprises, LLC continued to use the Trademark in commerce in the same manner. Indeed, it is well-known that the entire point of an asset purchase agreement—like the two submitted into evidence—is to acquire an entire business, including valuable trademarks used to sell the goods and services of that business. *See, e.g., Mackenzie-Childs Ltd. v. Mackenzie-Childs*, 477 Fed. Appx. 836, 839-40 (detailing the chain-of-title of a trademark conveyed through multiple asset purchase agreements). Therefore, the most compelling evidence of use in commerce by Titanium and its predecessors in interest is the continuous use of the Dress Up Bolts URL to host a website where decorative bolts have been depicted, described, marketed, and sold without interruption since 2010. Titanium has continued to mark the packaging and documents associated with decorative hardware and fasteners (in more ways than simply the website) with the Trademark, and it has done so in the same way as its predecessors did. This is the obvious reason to have all the asset purchase agreements in the first place. It therefore follows that the use in commerce that Titanium engages in today is substantially similar to the use that Fortune first engaged in back on May 24, 2010.

The uncontroverted evidence at trial establishes, by a preponderance of the evidence, that Titanium has a priority in the Trademark by a clear chain-of-title dating back to May 24, 2010. *Cf. Monster Energy Co. v. BeastUp LLC*, 395 F. Supp. 3d 1334, 1353 (C.D. Cal. 2019) (giving significant weight to uncontroverted evidence in a trademark infringement and cancellation case); *Klique Car Club Inc. v. Klique E.L.A. Car Club*, 2023 TTAB LEXIS 145, 40 (holding that a cancellation petition based upon priority is judged by a preponderance of the evidence and granting the petition for cancellation in that case). Because the asset purchase and corresponding Trademark assignments between Fortune Ventures, LLC, Timeless Enterprises, LLC, and Titanium were all valid, and because Titanium and its predecessors in title have provided evidence and sworn testimony demonstrating priority dating back to its predecessor-in-title, Titanium has a first use in commerce date of May 24, 2010, beating out Registrant by nearly four years.

**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.**

In response to Petitioner's claim of first use in commerce beginning in 2010, Registrant contends that that Registrant' first use of the Trademark in commerce occurred in 2008. To support such contention, Registrant has filed Exhibits A-F of Registrant's Notice of Reliance, showing screenshots of advertisements and a webpage from a third party fundraiser with date stamps in 2008. 28 TTABVUE 7-15. While there is significant reason to doubt the credibility and authenticity of this evidence, such an assessment on credibility is not even necessary as the materials provided cannot properly evidence bona fide use in commerce even if they were credible. Without proper evidence establishing a priority date in 2008, Registrant is limited to the 2014 date established in its original trademark application. Given that this date occurred after Petitioner's established priority date, as set forth above, Petitioner has superior

rights to the Trademark and thus the Trademark Trial and Appeal Board should cancel the registration so that Titanium may rightfully claim it.

Under the Lanham Act, a trademark must be actively used in commerce in order to be registered on the principal register of the USPTO. 15 U.S.C. § 1051. The Lanham Act further states that “use in commerce” 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.” 15 U.S.C. § 1127. As it pertains to the sale of goods, use in commerce occurs when (A) the mark is affixed onto the goods themselves or containers, displays, tags, labels, or documents associated with sale of the goods themselves; and (B) the goods are transported or sold in commerce. 15 U.S.C. § 1127; TMEP § 901.01. The Trademark Manual of Examining Procedure (“TMEP”) elaborates further on the requirement of bona fide use in commerce, stating that this requirement was intended to eliminate “token use,” or “use made solely to reserve rights in a mark” and providing that “(1) the amount of the use; (2) the nature or quality of the transaction; and (3) what is typical use within a particular industry” are to be considered as factors for determining compliance with the statutory requirement of bona fide use in commerce. TMEP § 901.02.

Here, Registrant has only provided digital files described as “advertisements” on which photos of Registrant’s products with the Trademark displayed next to the Trademark and a screenshot from a fundraiser which shows Registrant as a donor. 28 TTABVue 3-15. Contrary to Registrant’s claims, neither item shows acceptable proof of bona fide use in commerce under the Lanham Act. Specifically, the latter may be dispensed with quickly as simply donating to a fundraiser does not demonstrate that Registrant actively sold or attempted to sell any goods in any capacity, let alone used the Trademark in association with the sale of those goods. As such, any evidence relating to Registrant’s participation in the 2008 fundraiser should be disregarded

entirely. Additionally, none of the documents provided as Exhibits B-F of Registrant's Notice of Reliance, *which are explicitly described by Registrant as advertisements*, evidence that the Trademark was ever placed on the packaging of the goods, associated displays, or labels, which is required to prove bona fide use in commerce for the sale of goods under the Lanham Act. Similarly, Registrant makes no mention of any such marking or proper usage of the Trademark in its testimony, instead again referring to such documents as being "advertisements." 27 TTABVUE 5-6; 29 TTABVUE 5-6. These advertisements do definitively show, however, that the Trademark was not placed directly on the goods themselves, as the products included in the photographs bear no markings whatsoever. 28 TTABVUE 11-15. While it is true that use in commerce may be shown through the use of the Trademark on documents associated with the goods, this is only permissible where it is impracticable to place the mark on the goods, their packaging, their labels, or their displays. 15 U.S.C. § 1127. This is clearly not the case here as both Petitioner and Registrant purport to display the mark on the packaging of the goods in the present day, meaning that it is more than practicable to satisfy this marking requirement without the need to display the Trademark on associated documents.

Turning next to the factors set forth in the TMEP, it is again clear that the evidence Registrant has provided is insufficient to show bona fide use of the Trademark in commerce. Based on Registrant's evidence, and assuming such evidence is in fact credible, the only use of the Trademark was in advertising. The TMEP is abundantly clear that "[a]dvertising material is generally not acceptable as a specimen for goods" and that "[a]ny material whose function is merely to tell the prospective purchaser about the goods, or to promote the sale of the goods, is unacceptable to support trademark use." TMEP § 904.04(b). As such, not only is the amount of the use insignificant for purposes of proving bona fide use in commerce under the first factor, but

the overwhelming majority Registrant's evidence is considered *unacceptable to support trademark use* under black letter law. The remaining factors set forth under the TMEP are even less compelling as Registrant has provided no evidence of any transactions occurring at the time that these documents were allegedly created, and the nature of both parties' current practice of marking the packaging of their goods suggests that Registrant's evidence is not in accordance with industry standards. In sum, Registrant's evidence fails to prove bona fide use in commerce in 2008 by anything close to a preponderance of the evidence, and as such, and it should be limited to the priority date of January 1, 2014, which was established in its trademark application.

**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.**

In support of Registrant's contention that its first use of the Trademark in commerce occurred in 2008, Registrant has supplied evidence of a showing advertising materials bearing the Trademark and a sponsorship webpage listing Registrant's name and the Trademark, all of which allegedly date back to 2008. 28 TTABVUE 7-15. While none of these documents actually evidence bona fide use in commerce, as shown above, there is also significant doubt as to their authenticity and credibility. These questions regarding the authenticity of Registrant's evidence suggest that this evidence should not only be closely scrutinized but should ultimately be disregarded for purposes of proving Registrant's date of first use of the Trademark in commerce.

Petitioner retained expert witness, Robert Demers, to assess Registrant's evidence for purposes of determining credibility. Mr. Demers, having 27 years of experience in the computer system and software engineering field and having certifications in numerous areas of such field, conducted a review of Registrant's evidence and prepared an expert report on his findings. 6 TTABVUE 118. Through his review, Mr. Demers was able to determine with a reasonable

degree of professional certainty that the evidence provided in Exhibits A-F of Registrant's Notice of Reliance had been altered and falsified to reflect earlier creation dates and incorrect information. *Id.* at 128. Regarding Exhibit A to Petitioner's Notice of Reliance, Mr. Demers identified Wayback Machine evidence taken from mere days prior to the 2008 Cleveland RockZ event wherein Registrant was not included as a donor on the list, and discrepancies relating to Registrant's link on the webpage provided in Registrant's Notice of Reliance as being reasons for questioning the document's authenticity. *Id.* While Registrant contends that ZSPEC was simply a late addition to the event, and thus was missed by the Wayback Machine, Registrant provides no explanation as to the link discrepancy. Mr. Demers states that when hovering the mouse over each sponsor to which there was a related webpage, a link to that sponsor's webpage would appear. Registrant's listing, despite appearing to have a link associated with it, was the only such listing whose link did not appear. *Id.* In fact, according to Registrant's testimony and the Depositions of Chris Karl and Karen Karl, Registrant did not even have a website until at least 2013, and as such, there should have been no reason for Registrant's listing to appear as a link in the first place. *Id.* Based on these significant discrepancies, Mr. Demers concluded with a reasonable degree of professional certainty that this evidence provided a basis for the conclusion that Registrant was not actually listed as a donor for this event in 2008, and that Registrant had subsequently altered this evidence to the contrary. *Id.*

Moreover, Registrant contends, through its testimony, that the evidence included in Exhibits B-F of Registrant's Notice of Reliance proves that it used the Trademark in 2008 as such documents contain "irrefutable imbedded electronic time stamps" showing such dates. 27 TTABVUE 6; 29 TTABVUE 6. Mr. Demers' report, however, directly contradicts that notion as he explains that one simply needs to change the date on their computer in order to change the

creation date of a document. 6 TTABVUE 129. Mr. Demers goes on to walk through this exact process himself, preparing an example of a file relating to the passing of Queen Elizabeth on September 8, 2022, but having a creation date of September 8, 2008. *Id.* at 129, 138-139. As such, not only is Registrant's contention that its date stamps are "irrefutable" incorrect, but the simplicity of such process and the additional evidence that Registrant falsified or altered other documents strongly suggests that Registrant's evidence is not credible and should not be considered as proof of use in commerce. In light of the conclusions provided in Petitioner's Expert Report and given that Registrant has provided no expert testimony to rebut such findings, the Board should disregard this evidence as being inauthentic and not credible.

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

In Registrant's testimony, Registrant contends not only that it began using the Trademark in commerce in 2008, but that it was used by the same company from that time to the present date. 27 TTABVUE 3-5; 29 TTABVUE 3-5. Registrant, however, acknowledges that its business began as an unregistered sole proprietorship, before forming a new limited liability company in 2014. Registrant fails to acknowledge that, by forming a new limited liability company, Registrant created a new and distinct legal entity from its original sole proprietorship, and thus was required to assign the goodwill and rights in its trademarks and intellectual property to the new entity. By failing to do so, Registrant is unable to claim the priority date associated with the use of the Trademark by the sole proprietorship, and as such, is only permitted to claim the priority date of January 1, 2014, as was set forth in its trademark application.

It is well settled law in both Ohio, the jurisdiction in which Registrant operates, and Virginia, the jurisdiction in which Petitioner operates, that as opposed to sole proprietorships, "[l]imited liability companies are entities separate and distinct from their owners." *Firstmerit*

*Bank, N.A. v. Wash. Square Enters.*, 2007-Ohio-3920, 2007 Ohio App. LEXIS 3561. A sole proprietorship, on the other hand, is not considered to be separate from its owner. *See Firstmerit Bank, N.A. v. Wash. Square Enters.*, 2007-Ohio-3920, 2007 Ohio App. LEXIS 3561; *See Recalde v. ITT Hartford*, 254 Va. 501, 492 S.E.2d 435, 1997 Va. LEXIS 126. As such, a sole proprietorship cannot simply “become an LLC,” rather it is necessary that the individual operating such sole proprietorship form a completely new and separate legal entity in order to be an LLC. Given this separation, Registrant’s assertion that it operated the same business since 2008 is flawed and inaccurate. Instead, based on Registrant’s evidence, Registrant operated as a sole proprietorship between the years of 2008 and 2014, and then Registrant formed a new LLC into which it had to transfer the assets of the sole proprietorship, including the Trademark and its associated goodwill.

Under the Lanham Act, a trademark is “assignable with the good will of the business in which the mark is used.” 15 U.S.C. 1060(a). Any such assignments “shall be by instruments in writing duly executed.” *Id.* In the present case, Registrant has admitted multiple times in both its testimony and its depositions that no assignment of its sole proprietorship’s intellectual property and goodwill was ever executed in order to transfer the Trademark and its goodwill to the new LLC. 7 TTABVUE 61-63; 7 TTABVUE 89-91; 28 TTABVUE 4; 29 TTABVUE 4. Since no assignment was properly executed in writing, the sole proprietorship’s goodwill and rights in the Trademark, to the extent any actually existed, were not transferred to Registrant’s current entity and such entity’s rights only began accruing upon its first use of the Trademark in commerce following the LLC’s formation. As such, Registrant is only entitled to claim the priority date of January 1, 2014, as set forth in its trademark application, and is not permitted to claim the alleged earlier date in 2008.

**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.**

In deciding Petitioner’s Motion to Strike Registrant’s Testimony, the Board erred in a significant manner by instead granting a motion to reopen Respondent’s trial period in favor of Registrant. 26 TTABVUE. In making such a determination, the Board ignored black letter procedure regarding the time in which a party may submit evidence, and also deprive Petitioner of its ability to address Registrant’s allegations in such regard. As such, Petitioner nor requests that the Board overturn its previous decision allowing Registrant to file testimony and evidence after the close of its trial period and thus strike all evidence that Registrant filed after its deadline from the record.

As set forth in Petitioner’s Motion to Strike Registrant’s Testimony, “[a] party may take trial evidence *only during its assigned testimony period*, except by stipulation of the parties approved by the board, or, on motion, by order of the Board.” TBMP §§ 533.01 and 703.01(c) (37 C.F.R. § 2.121) (emphasis added). This section further provides that “[n]o testimony shall be taken or evidence presented except during the times assigned.” *Id.* Where a party takes testimony or evidence outside of its assigned testimony period, and where no approved stipulation or order by the Board exists, “an adverse party may file a motion to strike the testimony deposition in its entirety, as untimely.” *Id.*

It is undisputed that Registrant failed to timely file its trial evidence within its designated trial period, stating that Registrant’s email response regarding technical difficulties was “insufficient to demonstrate that it timely submitted testimony during its assigned trial period.” 26 TTABVUE 3. Instead of then striking such evidence, the Board chose to construe Registrant’s response to Petitioner’s Motion as its own separate motion to reopen Respondent’s

testimony period. Such a determination is patently improper as no such motion was actually made to the Board, and similarly, Petitioner was not presented with an opportunity to properly respond to such a motion, as is provided under the TBMP. TBMP § 502.02(b). Had Petitioner had such an opportunity, Petitioner would have been able to address why Registrant's failure to timely file its trial evidence was in no way caused by excusable neglect, as the Board asserts.

The Board correctly asserts that “[a] determination of excusable neglect considers all relevant circumstances surrounding the omission or delay.” 26 TTABVUE 4 (*citing Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 395 (1993); *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582, 1586 (TTAB 1997)). The Board gives specific emphasis to the factor of whether the reason for the delay was within Registrant's reasonable control, claiming technical issues were out of its control. *Id.* The Board, however, fails to acknowledge that Registrant was ultimately provided with roughly an additional four months of time in which it was able to prepare and file its trial evidence by virtue of Registrant's original motion to extend its trial period, which was denied by the Board. As such, there is no reason whatsoever why Registrant had to wait until the evening of its trial period deadline to file its evidence, and Registrant should have simply planned ahead, as the TBMP instructs, and filed its evidence ahead of its deadline in order to avoid these issues. Having such time to prepare its evidence was certainly within Registrant's control, however, Registrant chose to gamble with filing on the night of its deadline.

Similarly, the Board asserts that the length of the delay in submitting Registrant's evidence was minimal without considering that Registrant's original trial period was supposed to end on March 18, 2023. Registrant was provided with additional time following the denial of its motion to extend its trial period four months later in order to be fair to Registrant, however, Registrant was still unable to meet its deadline. Therefore, the delay resulting from Registrant's

neglect is not simply one day, but rather four months. Given these factors weigh heavily against the notion that Registrant's neglect was excusable, the purported motion to reopen Registrant's trial period should have also been denied, had it been properly made. The TBMP states that the Board "may, on its own initiative, reconsider and modify one of its orders or decisions if it finds error therein and the Board may also, in its discretion consider an untimely request for reconsideration or modification." TBMP § 518. As such, Petitioner respectfully requests that the Board reconsider its previous ruling on Petitioner's Motion to Strike Registrant's Testimony and grant such motion in favor of Petitioner.

#### **V. CONCLUSION**

Because Titanium has clear priority to the Trademark, Titanium's petition to cancel Registrant's registration for the Trademark should be granted.

Dated: February 22, 2024

Respectfully submitted,  
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**CERTIFICATE OF SERVICE**

I hereby certify that on February 22, 2024, I served the foregoing Petitioner's Opening Brief upon all counsel of record by email as follows:

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

|                        |   |
|------------------------|---|
| Proceeding no.         | 92079042  |
| Party                  | Defendant<br>ZSPEC Design LLC   |
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| Submission             | Brief on Merits for Defendant   |
| Filer's name           | Todd Wengrovsky   |
| Filer's email          | Contact@twlegal.com   |
| Signature              | /Todd Wengrovsky/   |
| Date                   | 03/24/2024  |
| Attachments            | ZSPEC TTAB BRIEF3.pdf(304703 bytes )  |

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

-----X  
Titanium, LLC d/b/a Dress Up Bolts,

Petitioner,

-against-

ZSPEC Design LLC,

Respondent.  
-----X

**Proceeding No: 92079042  
Registration No: 5868348  
Mark: DRESS UP BOLTS**

**RESPONDENT'S TRIAL BRIEF**

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## **I. INTRODUCTION**

Respondent hereby submits this Trial Brief in the above-referenced Proceeding. The Petition to Cancel Respondent's Registration should be denied because Petitioner has not proven, by a preponderance of the evidence, that Petitioner used its mark in Interstate commerce prior to Registrant's usage of its mark, nor has it proven that the marks at issue are likely to be confused with one another.

## **II. ISSUES PRESENTED**

The issues presented are whether Petitioner Titanium, LLC d/b/a Dress Up Bolts (hereinafter "Petitioner") has proven that it used its mark in Interstate commerce prior to Registrant ZSPEC Design's (hereinafter "Registrant" or "ZSPEC") usage of its mark, and whether the marks at issue are likely to be confused with one another.

## **III. DESCRIPTION OF THE RECORD**

The file histories for Registrant's and Petitioner's respective applications and marks are of record by Trademark Rule 2.122(b)(1), 37 C.F.R. §2.122(b)(1).

Registrant has filed the following Exhibits:

**EXHIBIT A** hereto: Cleveland Rockz Z Event sponsor document, bearing a date of 2008 in two different places;

**EXHIBIT B** hereto: A series of ZSPEC's advertisements for products under the mark DRESS UP BOLTS including the "Z32 300zx Chromed Hard Fuel Line Kit," bearing an electronic time stamp of October 16, 2008 at 8:12pm;

**EXHIBIT C** hereto: A series of ZSPEC's advertisements for products under the mark DRESS UP BOLTS including the "300zx (Z32) Battery Hold-Down Polished Stainless Steel Kit," bearing an electronic time stamp of November 27, 2008 at 2:51pm;

**EXHIBIT D** hereto: A series of ZSPEC's advertisements for products under the mark DRESS UP BOLTS including the "'90-96 Nissan 300zx Throttle Body & Linkage Stainless Fastener Kit," bearing an electronic time stamp of December 16, 2008 at 8:51am;

**EXHIBIT E** hereto: A series of ZSPEC's advertisements for products under the mark DRESS UP BOLTS including the "Z32 300zx Chromed Hard Fuel Line Kit," bearing an electronic time stamp of January 8, 2009 at 6:51pm;

**EXHIBIT F** hereto: A series of ZSPEC's advertisements for products under the mark DRESS UP BOLTS including the "300zx (Z32) Battery Hold-Down Polished Stainless Steel Kit," bearing an electronic time stamp of February 3, 2009 at 2:32pm;

**EXHIBIT G** hereto: ZSPEC's Limited Liability Company Articles of Organization;

**EXHIBIT H** hereto: Registrant's trademark application;

Registrant has also filed the trial testimony affidavit of Christopher Karl dated July 17, 2023 submitted herewith (hereinafter “Christopher Karl Decl.”), and the trial testimony affidavit of Karen Karl dated July 17, 2023 submitted herewith (hereinafter “Christopher Karl Decl.”).

#### **IV. BACKGROUND AND FACTS**

ZSPEC sells products, including automobile fasteners and hardware, at the national and international level, and has been doing so since 2008. (Christopher Karl Decl., Par. 2) (Karen Karl Decl., Par. 2).

One of ZSPEC’s trademarks is DRESS UP BOLTS. ZSPEC selected this mark in 2008 as a catchy phrase that was relevant to its products, and ZSPEC adopted the mark due to no conflicts being found in a trademark search conducted by LegalZoom. Karen Karl and Christopher Karl were responsible for the creation, selection, and adoption of the mark. (Christopher Karl Decl., Par. 3) (Karen Karl Decl., Par. 3).

ZSPEC’s first logo for the brand started simply as “ZSPEC” with the tagline “Dress Up Bolts and Hardware” and was produced in 2008. (Christopher Karl Decl., Par. 4) (Karen Karl Decl., Par. 4).

ZSPEC has been using “DRESS UP BOLTS” since 2008 to refer to its hardware products, such as stainless steel, billet, and titanium products. (Christopher Karl Decl., Par. 5) (Karen Karl Decl., Par. 5).

ZSPEC’s DRESS UP BOLTS / DRESS UP HARDWARE products have been integral to differentiating its company from pure-play vendors that do either accessories without customization, or only limited styles of hardware. ZSPEC bolsters its accessories with its hardware and also offers

the widest range of hardware types and finishes. (Christopher Karl Decl., Par. 6) (Karen Karl Decl., Par. 6).

To provide examples of usage of the mark, starting in 2008, ZSPEC has used print advertisements for car shows, the website [www.zspec.us](http://www.zspec.us), the website [www.zspecdesign.com](http://www.zspecdesign.com), Facebook, Instagram, and promoted the mark at a variety of national events at which ZSPEC was a vendor / sponsor, a variety of regional events such as Midwest Z Heritage, Branson Z Fest, East Coast Z Nationals, and a variety of regional “dealer” shows. (Christopher Karl Decl., Par. 7) (Karen Karl Decl., Par. 7).

ZSPEC filed Trademark Application Serial Number 88354823 for the mark DRESS UP BOLTS on March 25, 2019. (Christopher Karl Decl., Par. 8) (Karen Karl Decl., Par. 8).

ZSPEC was then granted Registration Number 5868348 for the mark DRESS UP BOLTS, used in connection with “Metal bolts; Metal hardware, namely, washers”, on September 24, 2019. (Christopher Karl Decl., Par. 9) (Karen Karl Decl., Par. 9).

As stated, ZSPEC had used the mark DRESS UP BOLTS since 2008, and this predates Petitioner’s alleged first usage by years. (Christopher Karl Decl., Par. 10) (Karen Karl Decl., Par. 10).

In 2008, ZSPEC happened to have been initially set up as a sole proprietorship. (Christopher Karl Decl., Par. 11) (Karen Karl Decl., Par. 11).

In 2014, ZSPEC elected to convert ZSPEC to a limited liability company. The LLC formation was simply the result of a recommendation from ZSPEC’s tax accountants, and had little effect on its day-to-day business affairs. (Christopher Karl Decl., Par. 12) (Karen Karl Decl., Par. 12).

Prior to the LLC formation, the company was known as ZSPEC and was operated by Karen Karl and Christopher Karl. As the company grew, it evolved into “ZSPEC Design.” The LLC was filed to create “ZSPEC Design LLC” in 2014. (Christopher Karl Decl., Par. 13) (Karen Karl Decl., Par. 13).

The creation of the LLC version of the company did not require any formal documentation, as no new individuals or parties were involved. (Christopher Karl Decl., Par. 14) (Karen Karl Decl., Par. 14).

All assets simply remained with the company from its previous form to its present form as a limited liability company. (Christopher Karl Decl., Par. 15) (Karen Karl Decl., Par. 15).

As such, the limited liability company obviously maintained full rights in and to the mark DRESS UP BOLTS, which had built up substantial common law trademark rights due to its usage in commerce for six years prior to the LLC formation. (Christopher Karl Decl., Par. 16) (Karen Karl Decl., Par. 16).

ZSPEC’s usage of the mark has always been made in the ordinary course of business and not for the purpose of reserving rights in the mark. (Christopher Karl Decl., Par. 17) (Karen Karl Decl., Par. 17).

Starting from 2008, ZSPEC has always expended significant advertising dollars to promote its mark. (Christopher Karl Decl., Par. 18) (Karen Karl Decl., Par. 18).

ZSPEC used the mark on its <http://zspec.us/> website in 2013. ZSPEC’s domain name <http://zspec.us/> was registered on April 19, 2013, per GoDaddy.com. (Christopher Karl Decl., Par. 19) (Karen Karl Decl., Par. 19).

ZSPEC also used the mark on its domain name <https://zspecdesign.com/>, which was registered on September 29, 2015, per GoDaddy.com. (Christopher Karl Decl., Par. 20) (Karen Karl Decl., Par. 20).

ZSPEC's trademark application had listed January 1, 2014 as the date of first use in commerce. This was only intended to refer to the first use by the *limited liability company*. As stated, the first use in commerce by ZSPEC was in 2008, as shown in the documents ZSPEC has submitted, and ZSPEC Design LLC was the same company. (Christopher Karl Decl., Par. 21) (Karen Karl Decl., Par. 21).

To provide one clear example of ZSPEC's 2008 usage of the mark, in the Fall of that year ZSPEC was a sponsor of an annual car show in Cleveland, Ohio known as the Cleveland Rockz Z event. (Christopher Karl Decl., Par. 22) (Karen Karl Decl., Par. 22).

ZSPEC donated fastener kits bearing the DRESS UP BOLTS mark and other products for use in raffles and auctions at the Cleveland Rockz Z event, and a sponsorship document showing this appeared on the event website in 2008. As is clearly shown on the first page of this event listing (which ZSPEC produced in discovery), ZSPEC was a sponsor and was using the tag-line "Dress Up Bolts" at the time. The final page of this event listing shows a clear copyright date of 2008, so there can be no question that ZSPEC was using the mark during that year. (Christopher Karl Decl., Par. 23) (Karen Karl Decl., Par. 23).

The Petitioner has argued that ZSPEC does not appear on an old snapshot of the Cleveland Rockz Z website that the Petitioner recently accessed. However, the system the Petitioner used for this purpose (Internet Archive's "Wayback Machine") had only been taking snapshots of old websites *every two months*. Because ZSPEC was a late addition to the sponsorship for the Cleveland Rockz Z event, the Petitioner's snapshot is simply from the wrong time frame and should be entitled

to no weight whatsoever. In fact, per an article in Computer World magazine, it is well known that interim changes to websites are often missed by the Wayback Machine (See <https://www.computerworld.com/article/2532083/the-internet-archive-s-wayback-machine-gets-a-new-data-center.html>). (Christopher Karl Decl., Par. 24) (Karen Karl Decl., Par. 24).

To provide additional clear examples of ZSPEC's 2008 usage of the mark (all produced in discovery), ZSPEC had a host of advertisements with irrefutable imbedded electronic time stamps, including:

A series of advertisements for products under the mark including the "Z32 300zx Chromed Hard Fuel Line Kit." The electronic time stamp for this document was October 16, 2008 at 8:12pm;

A series of advertisements for products under the mark including the "300zx (Z32) Battery Hold-Down Polished Stainless Steel Kit." The electronic time stamp for this document was November 27, 2008 at 2:51pm; and

A series of advertisements for products under the mark including the "'90-96 Nissan 300zx Throttle Body & Linkage Stainless Fastener Kit." The electronic time stamp for this document was December 16, 2008 at 8:51am;

A series of ZSPEC's advertisements for products under the mark DRESS UP BOLTS including the "Z32 300zx Chromed Hard Fuel Line Kit." The electronic time stamp for this document was January 8, 2009 at 6:51pm;

A series of ZSPEC's advertisements for products under the mark DRESS UP BOLTS including the "300zx (Z32) Battery Hold-Down Polished Stainless Steel Kit." The electronic time stamp for this document was February 3, 2009 at 2:32pm. (Christopher Karl Decl., Par. 25) (Karen Karl Decl., Par. 25).

All of the above-referenced documents were produced in discovery, and each such document is original, true, accurate, and not altered in any way. (Christopher Karl Decl., Par. 26) (Karen Karl Decl., Par. 26).

The Petitioner in this case has claimed that they have rights to the mark, yet they never applied for registration of the mark. Regardless, ZSPEC's usage of the mark pre-dates any usage by the Petitioner by years. (Christopher Karl Decl., Par. 27) (Karen Karl Decl., Par. 27).

ZSPEC's registration is presumed to be valid, and the Petitioner has not shown nearly enough evidence to cancel ZSPEC's registration. (Christopher Karl Decl., Par. 28) (Karen Karl Decl., Par. 28).

The Petitioner has also acted in bad faith during this conflict, such as by registering ZSPEC's business name as a domain name with obvious intent to unfairly curtail ZSPEC's business or otherwise damage ZSPEC. (Christopher Karl Decl., Par. 29) (Karen Karl Decl., Par. 29).

**V. ARGUMENT: THE REGISTRATION IS VALID AND SHOULD NOT BE CANCELED**

**A. REGISTRANT USED ITS MARK PRIOR TO  
PETITIONER'S USAGE OF ITS MARK**

**1. ZSPEC's Registration Is Presumed To Be Valid**

Pursuant to 15 U.S.C. §1057(b), “A certificate of registration of a mark upon the principal register provided by this chapter shall be prima facie evidence of the validity of the registered mark and of the registration of the mark, of the owner’s ownership of the mark, and of the owner’s exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate, subject to any conditions or limitations stated in the certificate” (emphasis added). Indeed, the Registrant is granted a presumption of ownership under the Lanham Act. *Sengoku Work Ltd. v. RMC Intern., Ltd.*, 96 F.3d 1217, 1219-20 (9th Cir. 1996).

Consistent with the above, the challenger must overcome this presumption by a preponderance of the evidence. *Sengoku Work Ltd.*, 96 F.3d 1217, 1219-20 (9th Cir. 1996); “One who seeks to prove priority of ownership and use of a trade-mark over the application date of a registered mark must do so by a preponderance of the evidence” (emphasis added). *B. R. Baker Co. v. Lebow Bros.*, 32 C.C.P.A. 1206, 1211, 150 F.2d 580 (C.C.P.A. 1945); *Vuitton et Fils S.A. v. J. Young Enterprises, Inc.*, 644 F.2d 769, 775-76 (9th Cir. 1981); *Tie Tech, Inc. v. Kinedyne Corp.*, 296 F.3d 778, 783 (9th Cir. 2002).

It is respectfully submitted that Petitioner in the present case has failed to meet this very high standard, thus the Petition to Cancel must be denied.

## **2. ZSPEC Has Proven Priority**

In the present Proceeding, Petitioner states that “*In response to* Petitioner’s claim of first use in commerce beginning in 2010, Registrant contends that that Registrant’ first use of the Trademark in commerce occurred in 2008” (emphasis added). However, ZSPEC’s contention of 2008 usage is not “*in response to*” anything said by Petitioner – it is the true and actual year of first usage, which has now been proven several times over.

A simple review of the record confirms that Registrant ZSPEC has absolute priority to the mark, as presumed under the Lanham Act. To begin with, ZSPEC contests the Petitioner’s alleged “chain of title” from Fortune Ventures LLC to the Petitioner. It is ZSPEC’s position that such chain of title has not been proven by a preponderance of the evidence, such that Petitioner’s alleged date of first usage is questionable at best.

Similarly, Petitioner has not established, by a preponderance of evidence, that the goodwill in and to the mark passed to Petitioner, as required for Petitioner to even have standing to bring their present claim. Specifically, it has not been properly established that Petitioner had the ability to sell the same goods in the same manner as the alleged assignor did. *Sugar Busters LLC v. Brennan*, 177 F.3d 258, 265 (5th Cir. 1999); *Universal City Studios, Inc. v. Nintendo Co.*, 578 F. Supp. 911, 922-23 (S.D.N.Y. 1983).

Regardless, ZSPEC has rights superior to Petitioner anyway, for the simple reason that ZSPEC’s usage of its mark easily predates that of both Petitioner and Fortune Ventures LLC. As such, Petitioner’s pages and pages of description regarding Petitioner’s (and its alleged predecessor’s) 2010 to present usage is, frankly, irrelevant. Likewise, Petitioner’s pages of description regarding the alleged assignment is equally irrelevant.

### **3. ZSPEC's 2008 Usage Of The Mark: Date-Stamped Advertisements**

As noted herein, ZSPEC had a host of advertisements from 2008 with irrefutable imbedded electronic time stamps, including:

A series of advertisements for products under the mark including the "Z32 300zx Chromed Hard Fuel Line Kit" (**EXHIBIT B**). The electronic time stamp for this document was October 16, 2008 at 8:12pm;

A series of advertisements for products under the mark including the "300zx (Z32) Battery Hold-Down Polished Stainless Steel Kit" (**EXHIBIT C**). The electronic time stamp for this document was November 27, 2008 at 2:51pm;

A series of advertisements for products under the mark including the "'90-96 Nissan 300zx Throttle Body & Linkage Stainless Fastener Kit" (**EXHIBIT D**). The electronic time stamp for this document was December 16, 2008 at 8:51am;

A series of ZSPEC's advertisements for products under the mark DRESS UP BOLTS including the "Z32 300zx Chromed Hard Fuel Line Kit" (**EXHIBIT E**). The electronic time stamp for this document was January 8, 2009 at 6:51pm;

A series of ZSPEC's advertisements for products under the mark DRESS UP BOLTS including the "300zx (Z32) Battery Hold-Down Polished Stainless Steel Kit" (**EXHIBIT F**). The electronic time stamp for this document was February 3, 2009 at 2:32pm. (Christopher Karl Decl., Par. 25) (Karen Karl Decl., Par. 25).

All of the above-referenced documents were produced in discovery, and each such document is original, true, accurate, and not altered in any way. (Christopher Karl Decl., Par. 26) (Karen Karl Decl., Par. 26).

In fact, the electronic files themselves confirm that they have not been modified in any way since before 2010, which is Petitioner's alleged first year of usage of the mark. Specifically, each electronic file displays both a "Modified" date and an "Accessed" date. For the purposes of example, **EXHIBIT B** (a series of ZSPEC's advertisements for products under the mark DRESS UP BOLTS including the "Z32 300zx Chromed Hard Fuel Line Kit") expressly states that **the last "Modified" date for the file was Tuesday, January 6, 2009 at 6:07.27pm**. Each and every one of ZSPEC's pre-2010 advertising Exhibits are perfectly consistent with this, and each and every one proves that the files were not only in existence since 2008 and 2009, but that they have not been modified since (or, for that matter, were not even *accessed* until this Proceeding).

**EXHIBIT C** (a series of ZSPEC's advertisements for products under the mark DRESS UP BOLTS including the "300zx (Z32) Battery Hold-Down Polished Stainless Steel Kit") expressly states that the last "Modified" date for the file was Monday, December 22, 2008 at 2:51.21pm.

**EXHIBIT D** (a series of ZSPEC's advertisements for products under the mark DRESS UP BOLTS including the "'90-96 Nissan 300zx Throttle Body & Linkage Stainless Fastener Kit") expressly states that the last "Modified" date for the file was Tuesday, July 14, 2009 at 4:34.52pm.

**EXHIBIT E** (a series of ZSPEC's advertisements for products under the mark DRESS UP BOLTS including the "Z32 300zx Chromed Hard Fuel Line Kit") expressly states that the last "Modified" date for the file was Thursday, April 9, 2009 at 6:51.29pm.

**EXHIBIT F** (a series of ZSPEC's advertisements for products under the mark DRESS UP BOLTS including the "300zx (Z32) Battery Hold-Down Polished Stainless Steel Kit") expressly states that the last "Modified" date for the file was Tuesday, March 3, 2009 at 2:32.20pm.

As far as the mark not appearing *on the products themselves* in the photographs produced by ZSPEC, it is simply imprudent to have the mark appear on this type of actual product. Here, both Petitioner and ZSPEC are in the field of selling clean, visually-appealing washers, bolts, and other fasteners to car-enthusiast customers. It is not uncommon for there to be hundreds of such fasteners in a single engine bay. Upon information and belief, car-enthusiast customers do not want trademarks to appear on each and every piece. As such, neither the Petitioner nor ZSPEC sell their fasteners with the trademark appearing on the items themselves. Instead, it is customary for companies in this field to include decals/stickers that the customer can optionally put on their vehicle. Therefore, it is of no consequence that Petitioner and ZSPEC do not use the marks on the products themselves. When coupled with the Declaration of Chrisopher Karl, and the Declaration of Karen Karl, and the deposition testimony of Christopher Karl, and the deposition testimony of Karen Karl, and the 2008 sponsorship documentation (discussed below), the date and time stamped exhibits are more than enough to establish the ZSPEC had its mark in 2008, especially since the Registration is entitled to a legal presumption of validity.

#### **4. ZSPEC's 2008 Usage Of The Mark: Sponsor Document**

Even without all of the evidence described above, ZSPEC's 2008 participation in the Cleveland Rockz Z Event (with a variety of donated products bearing the mark) is, in itself, enough to confirm ZSPEC's priority to the mark. Specifically, in the Fall of that year, ZSPEC was a sponsor of an annual car show in Cleveland, Ohio known as the Cleveland Rockz Z event. (Christopher Karl Decl., Par. 22) (Karen Karl Decl., Par. 22). In **EXHIBIT A**, the Cleveland Rockz Z Event sponsor document, the date of 2008 appears in not one, but two different places. This creates extra credibility, and there is nothing to suggest that it is inaccurate twice.

ZSPEC donated fastener kits bearing the DRESS UP BOLTS mark and other products for use in raffles and auctions at the Cleveland Rockz Z event, and a sponsorship document showing this appeared on the event website in 2008. As is clearly shown on the first page of this event listing (which ZSPEC produced in discovery), ZSPEC was a sponsor and was using the tag-line "Dress Up Bolts" at the time. The final page of this event listing shows a clear copyright date of 2008, so there can be no question that ZSPEC was using the mark during that year. (Christopher Karl Decl., Par. 23) (Karen Karl Decl., Par. 23).

It is of no consequence to this legal analysis that ZSPEC's products under the mark happened to have been donated and not sold. It is clear that ZSPEC had the products under the mark in 2008, and distributed such products. In fact, it is well established that "the existence of sale or lack thereof does not by itself determine whether a user of a mark has established ownership rights therein" (emphasis added). *Planetary Motion v. Techplosion*, 261 F.3d 1188 (11th Cir. 2001). Instead, "the determination of whether a party has established protectable rights in a trademark is made on a case by case basis, considering the totality of the circumstances." *Johnny Blastoff, Inc. v. L.A. Rams Football Co.*, 188 F.3d 427, 433 (7th Cir. 1999)), cert. denied, 528 U.S. 1188, 120 S.Ct. 1241, 146

L.Ed.2d 100 (2000).

It should be noted that the Petitioner has argued that ZSPEC does not appear on an old snapshot of the Cleveland Rockz Z website that the Petitioner recently accessed. However, the system the Petitioner used for this purpose (Internet Archive’s “Wayback Machine”) had only been taking snapshots of old websites *every two months*. Because ZSPEC was a late addition to the sponsorship for the Cleveland Rockz Z event, the Petitioner’s snapshot is simply from the wrong time frame and should be entitled to no weight whatsoever. In fact, per an article in Computer World magazine, it is well known that interim changes to websites are often missed by the Wayback Machine (See <https://www.computerworld.com/article/2532083/the-internet-archive-s-wayback-machine-gets-a-new-data-center.html>). (Christopher Karl Decl., Par. 24) (Karen Karl Decl., Par. 24). As such, Petitioner’s theory is not nearly enough to threaten a Registration that is presumed valid.

#### **5. ZSPEC’s 2008 Usage Of The Mark: ZSPEC’s Sworn Testimony**

Generally, Petitioner is treating ZSPEC’s testimony as though it *does not exist*. However, priority may be proven by Registrant’s testimony, provided that the testimony is clear, consistent, convincing and uncontradicted. *Bass Pro Trademarks, L.L.C. v. Sportsman’s Warehouse, Inc.*, 89 U.S.P.Q.2D 1844, 1856 (TTAB 2008) (citing *National Bank Book Co. v. Leather Crafted Products, Inc.*, 218 USPQ 827, 828 (TTAB 1993) (emphasis added); *Liqwacon Corp. v. Browing-Ferris Industries, Inc.*, 203 USPQ 305, 316 (TTAB 1979); *GAF Corp. v. Anatox Analytical Services, Inc.*, 192 USPQ 576, 577 (TTAB 1976).

Such is exactly the case here – ZSPEC’s testimony regarding priority is clear and convincing, and ZSPEC has significant evidence to prove it. Again, for the purposes of example only, ZSPEC produced a collection of advertisements from 2008 with irrefutable imbedded electronic time stamps.

These documents clearly show bona fide usage of ZSPEC's mark from 2008 and 2009, which easily predate any usage of Petitioner's mark. The documents are corroborated by not one, but two sworn Declarations. The documents were also corroborated by not one, but two depositions.

In fact, it is important to note here that ZSPEC's testimony confirmed usage of the mark in 2008 well beyond that reflected in the aforementioned Exhibits. Again, to provide examples of usage of the mark, starting in 2008, ZSPEC has used print advertisements for car shows, the website www.zspec.us, the website www.zspecdesign.com, Facebook, Instagram, and promoted the mark at a variety of national events at which ZSPEC was a vendor / sponsor, a variety of regional events such as Midwest Z Heritage, Branson Z Fest, East Coast Z Nationals, and a variety of regional "dealer" shows. (Christopher Karl Decl., Par. 7) (Karen Karl Decl., Par. 7).

Petitioner asserts that ZSPEC's evidence of usage well prior to 2010 "greatly lacks in credibility." This argument is very unpersuasive because ZSPEC's evidence includes many examples of advertisements that are date and time stamped. If Petitioner is suggesting that ZSPEC *doctored the evidence* or *recently created* such evidence, such accusations of fraudulent and criminal activity are offensive and uncalled for. Petitioner has no evidence to suggest that ZSPEC's exhibits - and ZSPEC's corroborating sworn testimony - are *fraudulent*, and under no circumstances should Petitioner's new and unsupported conspiracy theory threaten a Registration that is presumed to be valid under the law.

#### **6. The Date Of Usage Listed In ZSPEC's Application**

Petitioner is (conveniently) basing its entire case on the notion that the date of first usage can not possibly be *anything* besides the date listed in the Registration. This is flawed logic, and is also contrary to the trademark laws.

Per Trademark Rule 2.122(b)(2), “The allegation in an application for registration, or in a registration, of a date of use is not evidence on behalf of the applicant or registrant; a date of use of a mark must be established by competent evidence. Specimens in the file of an application for registration, or in the file of a registration, are not evidence on behalf of the applicant or registrant unless identified and introduced in evidence as exhibits during the period for the taking of testimony. Statements made in an affidavit or declaration in the file of an application for registration, or in the file of a registration, are not testimony on behalf of the applicant or registrant. Establishing the truth of these or any other matters asserted in the files of these applications and registrations shall be governed by the Federal Rules of Evidence, the relevant provisions of the Federal Rules of Civil Procedure, the relevant provisions of Title 28 of the United States Code, and the provisions of this part.”

Furthermore as noted in *Threshold.TV, Inc. and Blackbelt TV, Inc. v. Metronome Enterprises, Inc.*, No. 91152662 (T.T.A.B. July 27, 2010), “an applicant is entitled to prove an earlier date of use than the date alleged in its application, but its proof must be clear and convincing and must not be characterized by contradiction, inconsistencies or indefiniteness. See *Hydro-Dynamics, Inc. v. George Putnam & Co., Inc.*, 811 F.2d 1470, 1 USPQ2d 1772, 1773 (Fed. Cir. 1987)” (emphasis added).

Per the above, the date of first usage listed in the ZSPEC trademark application is not set in stone. The application was designed to assert that ZSPEC had used the mark *at least as early as* the date listed. This does not preclude earlier usage. In fact, Registrations are frequently re-issued to claim earlier usage dates where appropriate.

Here, earlier usage did in fact take place, and this only serves to support the validity of the Registration, not in any way damage it. ZSPEC provided a host of evidence that perfectly corroborated their 2008 usage of the mark, and further supported this with repeated sworn testimony. There was zero “contradiction, inconsistencies or indefiniteness” with regard to ZSPEC’s testimony and evidence, thus ZSPEC is clearly entitled to the earlier priority date.

### **7. ZSPEC Design LLC Is Entitled To Its 2008 Priority Date**

With regard to Petitioner’s argument that ZSPEC’s limited liability company can not enjoy the priority date of its prior self proprietor, all assets simply remained with the company from its previous form to its present form as a limited liability company. (Christopher Karl Decl., Par. 15) (Karen Karl Decl., Par. 15). As such, the limited liability company obviously maintained full rights in and to the mark DRESS UP BOLTS, which had built up substantial common law trademark rights due to its usage in commerce for six years prior to the LLC formation. (Christopher Karl Decl., Par. 16) (Karen Karl Decl., Par. 16).

Under these circumstances, there is clearly an implied license from the sole proprietorship to the limited liability company that, of course, allows the latter to utilize the mark and enjoy its original priority date. There can be no doubt that the entities in question are in total and complete agreement as to the use and ownership of the trademark, as the very same person owned the sole proprietorship and limited liability company. As noted in *Villanova University v. Villanova Educational Foundation Inc.*, 123 F. Supp.2d 293, 58 USPQ2d 1207, 1219 (E.D. Pa. 2000), “It is irrelevant whether the parties thought of the arrangement at the time in terms of an implied license. The test for whether or not an implied license existed is based solely on the objective conduct of the parties.” Here, the objective conduct makes it quite clear that there was an implied license.

If Petitioner wants to label this scenario as one with a “predecessor-in-interest,” such predecessor is simply the 100% owner of the resulting small business in question. “If the first use of the mark was by a predecessor in title or by a related company . . . and the use inures to the benefit of the applicant, the dates of first use . . . may be asserted with a statement that the first use was by the predecessor in title or by the related company . . . .” 27 C.F.R. §2.38(a).

Therefore, there is no issue regarding prior usage by “someone other than” the applicant, and Petitioner’s argument falls far short of the standard to invalidate a Trademark Registration. Simple notions of fairness and equity dictate that the limited liability company (having received all *other* assets from the sole proprietorship) should, of course, naturally be deemed to have received the sole proprietorship’s common law rights and priority date as well.

#### **8. Petitioner Neglected To Oppose ZSPEC’s Filings, And Neglected To Seek Protection**

Finally, Petitioner claims to have used its mark prior to ZSPEC’s usage, yet Petitioner completely neglected to file an Opposition to ZSPEC’s mark when ZSPEC’s application was published for opposition on July 9, 2019. Such is the mechanism created by the USPTO precisely for parties like Petitioner to have their claims heard before an applicant invests additional funds into the mark and its related business. In reality, Petitioner did not oppose at that time because it was not using its mark at that time, and had no interest in the resulting Registration. ZSPEC’s mark was then Registered on September 24, 2019, but Petitioner still took no action. Moreover, if the mark is so important to Petitioner, it is also highly suspicious that Petitioner waited so many years to file for protection for the first time. As such, this is a classic case of acquiescence, if not laches, and the Petition to Cancel should be denied.

**9. Summary: ZSPEC's Registration Is Valid**

Given the presumption of validity, Registrant's proof of usage is more than sufficient to maintain his Registration. The evidence of usage presented by Registrant speaks for itself. For example, the Exhibits offered by Registrant contain more than enough information under 37 CFR §2.122(e) and 704.08(b), TBMP. Moreover, the statements offered by Registrant also speak for themselves, corroborating Registrant's testimony entirely. Under these circumstances, canceling the Registration would be terribly unfair to a small business that paid all fees to obtain and maintain the Registration and used the mark in commerce continuously since the date of inception.

**B. BAD FAITH ON THE PART OF PETITIONER**

ZSPEC has acted in good faith throughout this Proceeding, including by making multiple good faith settlement proposals. To the contrary, Petitioner has acted in bad faith during this conflict, such as by *registering ZSPEC's business name as a domain name* with obvious intent to unfairly curtail ZSPEC's business or otherwise damage ZSPEC. (Christopher Karl Decl., Par. 29) (Karen Karl Decl., Par. 29). Specifically, a principal of Petition actually registered the domain name "zspecdesignllc.com" on February 3, 2021. Petitioner, whose business name is Titanium LLC, clearly has *zero* interest in protecting or using any name or domain name that comprises "zspec." Petitioner's conduct in registering the Respondent's domain name as that of its own is unethical, fraudulent, and a clear form of unfair competition for which there can be no defense. Petitioner should be harshly penalized for this conduct.

Furthermore, upon information and belief, Randy Sass of Petitioner Titanium LLC approached Christopher Karl of ZSPEC at the SEMA trade show in Las Vegas on November 4, 2022. Mr. Sass was aggressive, and made false accusations regarding ZSPEC in public. Christopher Karl therefore ended the conversation and left feeling very uncomfortable about Mr. Sass' conduct.

In addition, Petitioner's conduct in this Proceeding itself is highly questionable, particularly with regard to unnecessary motion practice. For example, ZSPEC's counsel encountered a technical problem with the TTAB's electronic filing system when attempting to file testimonial affidavits on July 17, 2023. At such time, ZSPEC's counsel directly e-mailed such testimonial affidavits to Petitioner's counsel, and explained, as a courtesy, that the electronic filing system was down at such time. ZSPEC's counsel even provided clear proof that the electronic filing system was down at such time, by providing multiple screenshots of error messages that the system displayed, all clearly dated July 17, 2023.

ZSPEC's counsel ensured that Petitioner received the documents in a timely manner, so that Petitioner could begin working on any response immediately if they so chose. In an abundance of caution and persistence, ZSPEC's counsel even e-mailed its testimonial affidavits to the TTAB *directly*, with proof that the electronic filing system was down.

*Shockingly*, Petitioner's reaction was to file a motion to strike ZSPEC's papers as "untimely" – a motion which, of course, failed. **Amazingly, despite knowing all of the above and despite receiving my e-mails on July 17, 2023 (with timely service of all documents), Petitioner mentioned none of this in its motion, and instead acted as though ZSPEC's electronic filings were late *for no reason*.** Petitioner's conduct during this Proceeding has been disturbing to say the least. In no way should Petitioner's conduct be rewarded.

**C. THE BOARD'S DECISION DATED OCTOBER 31, 2023 WAS PROPER**

Petitioner argues that the decision denying Petitioner's Motion To Strike Registrant's Testimony was improper. ZSPEC opposes this argument for all of the reasons articulated in ZSPEC's Opposition to Motion dated August 9, 2023 and Exhibits thereto, and for all of the reasons articulated in the Order dated October 31, 2023.

**VI. CONCLUSION**

It is clear from the foregoing that Petitioner has not met its heavy burden of proving earlier usage by a preponderance of the evidence. The Registration is presumed valid, and the standard to invalidate is very strict. Due to all of the foregoing information and testimony referred to herein, the Petition to Cancel should be denied in its entirety.

Dated: Calverton, New York  
March 24, 2024

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 24, 2024, a copy of the foregoing Registrant's Trial Brief was electronically filed with the United States Patent and Trademark Office and that a copy was served via electronic mail on Petitioner's attorney of record:

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ESTTA Tracking number: **ESTTA1350629**  
Filing date: **04/05/2024**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

|                        |   |
|------------------------|---|
| Proceeding no.         | 92079042  |
| Party                  | Plaintiff<br>Titanium, LLC d/b/a Dress Up Bolts   |
| Correspondence address | ABBI WHITE HARRIS<br>DARKHORSE LAW PLLC<br>7331 TIMBERLAKE RD<br>SUITE 201A<br>LYNCHBURG, VA 24502<br>UNITED STATES<br>Primary email: info@darkhorse.law<br>Secondary email(s): abbi@darkhorse.law, jacob@darkhorse.law, andrew@darkhorse.law<br>540-553-8149 |
| Submission             | Rebuttal Brief  |
| Filer's name           | Jacob P. East   |
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| Signature              | /Jacob P. East/   |
| Date                   | 04/05/2024  |
| Attachments            | Titanium LLC - Petitioners Response Brief.pdf(229787 bytes )  |

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Registration No.: 5868348  
For the Mark “Dress Up Bolts”  
Registered: September 24, 2019

|                                   |   |                           |
|-----------------------------------|---|---------------------------|
| TITANIUM, LLC dba DRESS UP BOLTS, | ) |                           |
|                                   | ) |                           |
| Petitioner,                       | ) | Cancellation No. 92079042 |
|                                   | ) |                           |
| v.                                | ) |                           |
|                                   | ) |                           |
| ZSPEC DESIGN LLC,                 | ) |                           |
|                                   | ) |                           |
| Registrant.                       | ) |                           |

**PETITIONER’S BRIEF IN RESPONSE TO  
RESPONDENT’S TRIAL BRIEF**

**I. SUMMARY OF THE CASE**

Petitioner, Titanium, LLC dba Dress Up Bolts (“Titanium”), by counsel, hereby submits its Brief in Response to Respondent’s Trial Brief. In Petitioner’s Opening Brief, Petitioner provided evidence showing that Petitioner has superior rights in the trademark “Dress Up Bolts” (the “Trademark”) arising from nationwide use in commerce beginning on May 24, 2010 by its predecessor-in-interest, Fortune Ventures, LLC. Petitioner presented over 200 pages of evidence demonstrating a clear chain-of-title tracing Petitioner’s acquisition of these rights and their accompanying goodwill from their first user, Fortune Ventures, LLC, and its showing its continuous use of the Trademark in commerce in association with the sale of decorative automotive fasteners.

In response, Registrant contends that Petitioner’s evidence is insufficient to prove its priority date and chain of title. Registrant, however, provides no evidence or support for this

assertion, choosing instead to rely on conclusory statements regarding Petitioner's evidence. Registrant also alleges that, contrary to the information that is presumed valid in its trademark registration, Registrant's priority date occurred in 2008. Petitioner now argues that Registrant has provided no support for its conclusions regarding Petitioner's chain of title, and that the evidence filed by Registrant is facially insufficient to prove bona fide use of the Trademark in commerce at all, let alone in 2008. Furthermore, Petitioner argues that Registrant is only entitled to a presumption of validity with regard to the information that was specifically claimed in its trademark registration, limiting, limiting its priority date to the 2014 date claimed therein. Lastly, Petitioner asserts that Registrant has further provided insufficient information to support its own chain of title back to its alleged 2008 priority date, and thus is not entitled to claim its predecessor's alleged priority date. In light of the foregoing and for the reasons discussed below, the Board should cancel Registrant's trademark under registration number 5868348.

#### **IV. ARGUMENT**

##### **A. Petitioner has Proven its Priority and Its Chain of Title by More Than The Required Preponderance of The Evidence.**

Registrant argues in support of its priority claim that Petitioner has not proven its chain of title and its ownership of the goodwill associated with the Trademark. Specifically, Registrant claims that Petitioner's chain of title dating back to 2010 and Petitioner's ownership of the goodwill have "not been proven by a preponderance of the evidence" and that Petitioner's chain of title is "questionable at best." 32 TTABVUE 14. These statements, however, serve as mere conclusions, absent of any facts, evidence, or good faith arguments to support the notion that Petitioner has failed to meet its burden.

On the contrary, Petitioner has provided a robust portfolio of evidence supporting the fact that not only the chain of title in the Trademark is well documented, but that the goodwill in

the Trademark was clearly transferred by the language of each asset purchase agreement within the chain of title. 6 TTABVUE. Specifically, both the asset purchase agreement between Petitioner and its predecessor, Timeless Enterprises, LLC, and between Timeless Enterprises and Dress Up Bolts' founder, Fortune Ventures, LLC, contain language indicating that both the domain, [www.dressupbolts.com](http://www.dressupbolts.com), and the "goodwill and all slogans or trade names used by Seller in Seller's business, including the name 'Dress Up Bolts'" would transfer to the purchaser. 6 TTABVUE 7, 33, 59, 78, and 107. Not only is this language expressly included in each asset purchase, but it is also corroborated in the testimony of members of Titanium, LLC and both of Petitioner's predecessors in interest who have no direct interest in the outcome of this dispute. *Id.* at 3, 29, 55, and 89. Such evidence is certainly sufficient to meet the mere "more likely to be true than untrue" standard that is required under a preponderance of the evidence. *Hale v. Department of Transp., Federal Aviation Admin.*, 772 F.2d 882, 1985 U.S. App. LEXIS 15268, 120 L.R.R.M. 2421. (citing 5 C.F.R. § 1201.4).

Furthermore, Petitioner's chain of title and acquisition of the goodwill in the Trademark have gone entirely unrebutted and uncontested as Registrant has failed to cross examine any of Petitioner's witnesses or submit any evidence to contradict Petitioner's evidence. Registrant instead intends to rely solely on conclusory statements regarding Registrant's opinion on Petitioner's evidence. Such conclusory statements in no way diminish or dilute the concrete and uncontradicted chain of title established in Petitioner's Brief. As such, the Board should find that Petitioner has established its chain of title and ownership of goodwill in the Trademark dating back to 2010 by more than the required preponderance of the evidence. The Board should thus cancel Registrant's trademark as Petitioner's priority date pre-dates Registrant's presumed priority date by roughly four years.

**B. Registrant Has Not Provided Sufficient Evidence to Prove Bona Fide Use of the Trademark in Commerce in 2008, and Thus Registrant's Registration is Only Presumed to be Valid as to the Date Claimed in its Application.**

Registrant next alleges that it has sufficiently proven bona fide use in commerce occurring in 2008. Specifically, Registrant claims that the “advertisements” and evidence it filed, in addition to its oral testimony, proves that Registrant has priority ownership of the Trademark over Petitioner. 32 TTABVUE 12-23. Turning first to Registrant’s so-called advertisements and sponsorship document, referred to as Exhibits A-F in Registrant’s brief, Registrant seeks to rely solely on the alleged date stamps on each document in order to prove Registrant’s bona fide use of the trademark in commerce. Registrant, however, seems to entirely ignore the actual requirements to prove bona fide use in commerce under the clear terms of the Lanham Act. As indicated in Petitioner’s brief, in order for a trademark to receive protection, it must be actively used in commerce. 31 TTABVUE 11 (citing 15 U.S.C. § 1051). Such use in commerce must be bona fide use in the ordinary course of trade, which, as it pertains to the sale of goods, means “(A) when the mark is affixed onto the goods themselves or containers, displays, tags, labels, or documents associated with the sale of the goods themselves; and (B) the goods are transported or sold in commerce.” 31 TTABVUE 11 (citing 15 U.S.C. § 1127; TMEP § 901.01) (emphasis added).

When examining Petitioner’s evidence, it is abundantly clear that, even assuming Registrant’s claimed 2008 date is credible (and that is doubtful), Registrant did not properly mark its goods as required by law. In fact, in Registrant’s own brief Registrant outright admits that it was not marking its goods in accordance with this section, seeking to rely on the notion that it is “imprudent” to mark the goods themselves. 32 TTABVUE 16. Registrant completely ignores the reality that simply marking the packaging of the goods, as both parties presently do,

and as Petitioner and its predecessors have done since 2010, easily satisfies these requirements by affixing the Trademark to the displays, tags, labels, or documents associated with the goods. It is also worth noting that, despite the fact that Registrant argues that it is customary for companies in this field to include decals and stickers with the goods that bear the Trademark, nowhere in Registrant's testimony or brief does it state that Registrant actually engages in such a practice. Registrant attempts to downplay the significance of this admission to not marking its goods, stating that "it is of no consequence" that Registrant does not mark its goods. *Id.* The reality is that failing to actually use the Trademark in commerce as required by law is absolutely fatal to its contention that its use in commerce began in 2008.

Even if the above were not true, Registrant's evidence is not sufficient to prove its use in commerce as associated with the sale of fasteners. Exhibits B-F of Registrant's brief, aptly titled by Registrant as "advertisements," constitute nothing more than advertising materials that fail to show bona fide use in commerce. Again, Registrant seems to completely ignore established black letter law which states that "[a]dvertising material is generally not acceptable as a specimen for goods" and that "[a]ny material whose function is merely to tell the prospective purchaser about the goods, or to promote the sale of the goods, is unacceptable to support trademark use." 31 TTABVUE 12 (citing TMEP § 904.04(b)). As such, Registrant's contention that its advertising materials, which are purely informational documents serving to tell consumers about its products, are sufficient to prove its use in commerce in 2008 is facially incorrect and contrary to law.

Similarly, Registrant's sponsorship document, referred to as Exhibit A in Registrant's brief, and its corresponding testimony do not evidence bona fide use of the Trademark in commerce. Registrant contends that its participation in a charity sponsorship event, unrelated to

the sale of decorative fasteners, somehow equates bona fide use of the trademark in commerce in association with the sale of decorative fasteners. Even assuming that this documentation is credible, a charitable donation for an event such as the one described in no way shows that Registrant was actively using the Trademark in commerce in association with the sale of decorative fasteners. Rather, it is merely another conclusory statement that is unsupported by any facts or competent evidence.

Finally, Registrant contends that Registrant's testimony is sufficient to prove that Registrant was actively using the Trademark in commerce in 2008. 32 TTABVUE 19. Registrant claims that priority may be proven by testimony where the testimony is "clear, consistent, convincing and uncontradicted." *Id.* Registrant then simply concludes that Registrant's testimony is clear and convincing due to the evidence described above. *Id.* In drawing these conclusions, Registrant again entirely ignores Petitioner's entire expert report, which directly impeaches the authenticity and credibility of Registrant's evidence and testimony. 6 TTABVUE 128-140.

Specifically, Petitioner's expert, having more than thirty years of experience with computer systems and web design, methodically assesses each of the items which raise questions as to the authenticity of Petitioner's evidence and testimony. *Id.* Petitioner's expert details the exact process, complete with examples and step-by-step screenshots, by which Petitioner could easily edit the so-called "irrefutable imbedded time stamps" that are located within the advertising documents, and further details the many abnormalities which are present on the sponsorship document which raise suspicions regarding such document's authenticity. *Id.* Instead of providing any documentation or rebuttal regarding this report, Registrant simply ignores the overwhelming majority of the information contained therein, and unfairly refers to the expert report as a new "conspiracy theory." 32 TTABVUE 20. Petitioner's "conspiracy theory" has

been well documented in this matter since discovery and is backed by sound evidence and years of experience in the relevant field. On the contrary, Registrant attempts to rely on two testimonial declarations that are identical down to the letter, contain statements and claims that are improper and not within either individual's knowledge, and were executed by the husband and wife that own Registrant's legal entity. 29 TTABVUE; 27 TTABVUE. As such, not only is Registrant's testimony heavily contradicted, but is also neither clear not convincing to prove any of the allegations that registrant is asserting.

**C. Registrant's Presumption of Validity Applies Only to the Date of First Use in Commerce Claimed in Registrant's Trademark Application and Registrant Fails to Meet the Higher Burden of Clear and Convincing Evidence Which is Required to Prove an Earlier Date of Use in Commerce.**

Registrant also argues that its rights in the Trademark are presumed valid based on its registration with the USPTO. 32 TTABVUE 13. While it is true that a registered trademark enjoys a presumption of validity under the law, Registrant fails to properly emphasize that the presumption extends solely to the mark, "subject to any conditions or limitations stated in the certificate." 15 U.S.C. § 1057(b) (emphasis added). As such, Petitioner is not required to prove its priority of ownership based on Registrant's alleged date of first use in commerce in 2008, rather it only has to prove priority by a preponderance of the evidence over the 2014 date that is shown in Registrant's trademark registration certificate, which it quite easily does for the reasons set forth in Petitioner's brief. 31 TTABVUE.

Registrant again correctly asserts that Petitioner is only required to prove its priority by a preponderance of the evidence, however, Registrant incorrectly claims that such standard is a "very high standard." On the contrary, the preponderance of the evidence standard only requires that the facts alleged be "more likely to be true than untrue," or in other words, that it be more likely than not, that Petitioner's argument is correct. *Hale v. Department of Transp.*,

*Federal Aviation Admin.*, 772 F.2d 882, 1985 U.S. App. LEXIS 15268, 120 L.R.R.M. 2421. (citing 5 CFR 1201.4). Practically speaking, it is only required that the Petitioner's position be just barely more than 50% likely in order to satisfy Petitioner's burden of proof, a far cry from being a very high standard.

Registrant on the other hand, aptly points out that it is held to a much higher "clear and convincing" standard of proof. 32 TTABVUE 21. Specifically, Registrant states that "an applicant is entitled to prove an earlier date of use than the date alleged in its application, but its proof must be clear and convincing and must not be characterized by contradiction, inconsistencies, or indefiniteness. See *Hydro-Dynamics, Inc. v. George Putnam & Co. Inc.*, 811 F.2d 1470, 1 USPQ2d 1772, 1773 (Fed. Cir. 1987) (emphasis added). Unlike the lower preponderance of the evidence standard, the clear and convincing standard requires that the evidence produce "in the mind of the trier of fact an abiding conviction that the truth of the factual conviction is 'highly probable.'" *i3 Cable & Harness LLC v. United States*, 132 Fed. Cl. 495, 2017 U.S. Claims LEXIS 761 (emphasis added).

As mentioned above, Registrant's evidence and testimony falls well short of meeting even a preponderance of the evidence standard, let alone the higher clear and convincing standard. Assuming such materials are in fact credible, Registrant's advertising materials are insufficient to prove use in commerce as a matter of black letter law and its sponsorship documents provide, at most, proof that Registrant participated in a charity event and provide no evidence that Registrant was actively using the Trademark in commerce in association with the sale of decorative fasteners. Moreover, Registrant outright admits that it did not properly mark its goods with the Trademark, which is the bare minimum required in order for a mark to receive protection when used in association with the sale of goods. Registrant alleges that its testimony

should be sufficient to meet its burden, stating that there was zero contradiction, inconsistency, or indefiniteness, but in doing so blatantly ignores Petitioner's uncontradicted and unrebutted expert report which directly rebuts and contradicts each item of Registrant's evidence.

If this alone were not enough, Registrant's own arguments serve as rebuttal for the proposition that its evidence is sufficient to meet the clear and convincing standard. Registrant argues that the 262 pages worth of documented and corroborated asset purchases; website database screenshots showing product marking, online sales, and digital displays in association with the Trademark running from 2010 to the present date; and thorough testimony by the two current owners of the Trademark as well as their predecessors, is insufficient to establish bona fide use of the Trademark in commerce in 2010. Simultaneously, Registrant argues that its advertisement screenshots in word document format, sponsorship website screenshot, and identical testimonial declarations by its members, all of which are addressed and contradicted by Petitioner's expert report, are somehow sufficient to meet the much higher clear and convincing standard required for its 2008 priority date. The fact that Registrant attempts to simultaneously push such contradictory arguments in the weight of the evidence that has been provided is nothing short of nonsensical. As such, and for the reasons outlined above, the Board should reject Registrant's argument that its priority began in 2008 and hold Registrant to the 2014 date claimed in its registration.

**D. Registrant Has Supplied No Evidence Supporting Its Chain of Title Between Distinct Legal Entities.**

In support of Registrant's argument that it is entitled to its alleged priority date in 2008 wherein it used the Trademark in association with its sole proprietorship, Registrant argues that all of its assets, including the Trademark, simply "remained with the company." 32 TTABVue 22. Registrant seems to simply disregard the fact that it is well established law that

an LLC “is an entity that is separate and distinct from its members.” *Riesterer v. Porter*, 2022-Ohio-1698, 2022 Ohio App. LEXIS 1570, 2022 WL 1599887. On the contrary, “a sole proprietorship has no legal identity separate from that of the individual who owns it.” *Patterson v. V & M Auto Body*, 63 Ohio St. 3d 573, 589 N.E.2d 1306, 1992 Ohio LEXIS 837. As such, Registrant’s predecessor sole proprietorship and its registered limited liability company, which was formed in 2014, are treated as being completely distinct from each other. Given that these entities are completely distinct and separate, it is not possible for the assets to simply “remain with the company” as Registrant alleges, such assets need to be transferred, whether by informal transfer or by written asset assignment. 32 TTABVUE 22.

Registrant also completely ignores the black letter law outlined in Petitioner’s brief which clearly states that a transfer of the goodwill in a trademark “shall be by instruments in writing duly executed.” 31 TTABVUE 16. Given that Registrant admits to having not executed a written assignment of the Trademark and its associated goodwill, it is not permissible that Registrant can claim the alleged priority date of Registrant’s predecessor LLC. Knowing this to be true, Registrant now argues that instead of owning the goodwill in the Trademark, Registrant has an implied license to use the Trademark from Registrant’s predecessor sole proprietorship. Not only is this assertion contrary to the facts alleged in Registrant’s testimony and Registrant’s trademark application, but the notion that Registrant holds a license at all is contrary to a claim of Trademark ownership entirely as the owner of a trademark has no need for a license. Given the utter lack of factual support for this position, and the fact that Registrant failed to adhere to the minimum requirements set forth by law for transferring the goodwill associated with a trademark, Registrant’s argument that it may assert its predecessor’s priority date must fail.

**E. The Failure to Oppose or Register the Trademark is of no Consequence and Has no Reflection on Petitioner's Rights in the Mark or Bona Fide Use In Commerce.**

Registrant's claims that Petitioner's failure to oppose Registrant's application during the provided window and failed to register its trademark are not only contrary to established law and procedure, but are also contrary to established facts in the record. As justification for the position that Petitioner's failure to oppose Registrant's application somehow means that Petitioner has no rights in the mark, Registrant simply claims that the opposition is "the mechanism created by the USPTPO precisely for parties like Petitioner to have their claims heard before an applicant invests additional funds into the mark and its related business." 32 TTABVUE 23. By that logic, a cancellation proceeding is the mechanism created by the USPTO for the exact same scenario with the only difference being the fact that the canceling party somehow missed the opposition window. Whether a party is required to pursue a cancellation or an opposition has absolutely no bearing on whether a party holds rights in a trademark. The designated procedure is only a function of the party's timing and nothing else. Registrant's claim that Petitioner did not oppose Registrant's application because "it was not using its mark at that time" is contrary to all of the evidence that Petitioner has submitted and is not supported by any facts within the record. Registrant cannot simply make up facts on a whim to support its position and must rely solely on those facts which are within the record, all of which support Petitioner's continuous use of the Trademark since purchasing it from its predecessor.

Similarly, the timing upon which a party files for a trademark registration is only a function of the party's planning and timing. If, as Registrant suggests, the failure to apply for a registration indicates that the party is either not using the mark or does not value the mark, then the entire body of law surrounding common law trademark protection cannot stand. On the contrary, it is incredibly common for new business owners to prioritize other items before

registering their trademark. The simple fact that Petitioner waited until a later date to register its Trademark is purely a matter of business management and has absolutely no bearing on Petitioner's rights in the Trademark. As such, the Board should reject this argument in its entirety.

**F. Registrant's Claims that Petitioner has Acted in Bad Faith Are Meritless And Are Not Supported by Any Facts That Have Been Introduced in This Proceeding.**

Finally, Registrant alleges that despite Registrant's good faith throughout this proceeding, Petitioner has engaged in bad faith. 32 TTABVUE 24. It is first worth noting that Registrant's claims of acting in good faith by making multiple settlement offers is patently false. Petitioner, throughout this process, has made many settlement offers, almost all of which have been ignored entirely by Registrant. Registrant, however, has extended one settlement offer, and when invited by Petitioner to set a conference to discuss further settlement possibilities, Registrant again ignored such propositions. Registrant's conduct throughout this proceeding has been such that even the Board indicated that Registrant's ignoring Petitioner's counsel and failures to address issues "reflects a lack of diligence." 16 TTABVUE 5.

Regarding Registrant's other allegations of supposed bad faith, such allegations are entirely supported by facts that are patently false in nature and are not in the record. Registrant's contention that Petitioner registered Registrant's business as a domain is a clear example of such a false statement. Registrant claims both in its brief and in its testimony that Petitioner has engaged in this course of conduct, but neither document provides any evidence supporting this contention. 32 TTABVUE 23. Upon investigation in the Whois domain registration database, it is clear that the domain "zspecdesignllc.com" is owned by an entity named Fast Domain Inc. As it is clear to see, this entity is not Petitioner's legal entity Titanium, LLC, but rather is a completely unknown and unaffiliated entity. As such, Registrant's claim that Petitioner engaged

in this conduct is not only unsupported by facts in the record, but appears to be entirely fabricated. Similarly, Registrant alleges that Petitioner's member, Randy Sass, approached and had an aggressive conversation with Christopher Karl of Registrant's company. The record in this proceeding is absolutely devoid of any facts that support the notion that such a conversation ever occurred nor that Mr. Sass was aggressive towards Mr. Karl if it did occur. As such, Registrant's claims of bad faith are again baseless and should not be considered by the Board.

### V. CONCLUSION

Because Titanium has clear priority to the Trademark, Titanium's petition to cancel Registrant's registration for the Trademark should be granted.

Dated: April 5, 2024

Respectfully submitted,  
BY COUNSEL

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 5, 2024, I served the foregoing Petitioner's Response to Respondent's Trial Brief upon all counsel of record by email as follows:

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I hereby certify that on March 27, 2025, I served the foregoing Second Corrected Brief upon all counsel of record by email as follows:

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