This Opinion is Not a Precedent of the TTAB

Mailed: March 21, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Zhiwei Robotics Corporation

v.

Atlas Scientific LLC

Cancellation No. 92076313

Chintan A. Desai, Matthew D. Asbell, and Tony V. Pezzano of Lippes Mathias LLP for Zhiwei Robotics Corporation.

Stephen P. McNamara of St. Onge Steward Johnston & Reens LLC for Atlas Scientific LLC.

Before Greenbaum, Larkin,[1] and Johnson, Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

Atlas Scientific LLC ("Respondent") owns Registration No. 5943964 (the "'964 Registration") of the mark shown below

[1] Judge Larkin has been substituted on the final decision panel for Judge Hudis, who sat on the panel that decided Petitioner's motion for summary judgment, due to the death of Judge Hudis.

Gravity

for goods identified as "analog pH sensors" in International Class 9. Zhiwei Robotics Corporation ("Petitioner") has petitioned to cancel Respondent's registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), alleging prior use of the common-law mark GRAVITY for analog pH sensors and other sensors, and a likelihood of confusion arising from Respondent's use of its registered mark.

Petitioner previously moved for summary judgment on this claim, and the Board granted the motion in part, holding that

> Petitioner has met its burden of demonstrating that there is no genuine dispute of material fact that 1) it has entitlement to maintain this proceeding, and 2) the parties' contemporaneous use of their GRAVITY marks on analog pH sensors is likely to cause confusion as to the source of the parties' respective goods.

41 TTABVUE 11.[2] The Board held, however, that "[a]s to the issue of priority, Petitioner's summary judgment is **denied**" and that "[t]his case will proceed to trial on the issue of priority." *Id.* at 12 (emphasis in original).

The Board further stated in its summary judgment order that "[t]his case is appropriate for final determination under accelerated case resolution (ACR)," and

[2] Citations in this opinion to the briefs and other materials in the case file refer to TTABVUE, the Board's online docketing system. *See New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *2 n.1 (TTAB 2020). The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear.

urged the parties to consider the use of ACR to resolve the sole remaining issue of priority. *Id.* The parties subsequently filed a stipulation to use ACR (the "ACR Stipulation"), 44 TTABVUE 2-6, which the Board approved and adopted for use in this proceeding. 45 TTABVUE 4.

The case is fully briefed.[3] We grant the Petition for Cancellation.

I. The Record and Evidentiary Issues

A. The Record

The record automatically includes the pleadings,[4] and the file history of the '964 Registration, by operation of Trademark Rule 2.122(b)(1), 37 C.F.R. 2.122(b)(1).[5] In the ACR Stipulation, the parties "agreed that the trial record shall comprise evidence submitted in connection with Petitioner's Motion for Summary Judgment, and any additional evidence submitted with the parties' ACR Trial briefs." ACR Stipulation ¶ 1 (44 TTABVUE 2).

[3] Petitioner's opening ACR brief appears at 46 TTABVUE and its reply ACR brief appears at 48 TTABVUE. Respondent's opening ACR brief appears at 47 TTABVUE. The ACR Stipulation provides that the parties may also rely on the briefs submitted on Petitioner's summary judgment motion. ACR Stipulation ¶ 13 (44 TTABVUE 5). Petitioner's summary judgment brief appears at 34 TTABVUE and its reply brief appears at 40 TTABVUE. Respondent's summary judgment brief appears at 39 TTABVUE as part of a substitute filing for Respondent's original opposition to Petitioner's summary judgment motion, filed at 37 and 38 TTABVUE, which substitute filing was filed by agreement of the parties.

[4] The operative pleadings are Petitioner's Petition for Cancellation, 1 TTABVUE, and Respondent's Answer. 6 TTABVUE. Respondent denied the salient allegations of the Petition for Cancellation, and interposed two self-styled "Affirmative Defenses" based on Respondent's claimed priority of use. 6 TTABVUE 3-4 (Answ. ¶¶ 1-2). We discuss these affirmative defenses below.

[5] Citations in this opinion to the file history of the application that matured into the '964 Registration are to pages in the Trademark Status & Document Retrieval ("TSDR") database of the United States Patent and Trademark Office ("USPTO").

Accordingly, the record includes the following submissions by each party:

Petitioner

- Declaration of Chen Ye in Support of Petitioner's Motion for Summary Judgment ("Ye SJ Decl."), and Exhibits B-I thereto, 34 TTABVUE 27-31, 39-130;

- Declaration of Chintan A. Desai, Esq. in Support of Petitioner's Motion for Summary Judgment ("Desai SJ Decl."), and Exhibits A and J-Z thereto, *id.* at 33-38, 131-619;[6]

- Supplemental Declaration of Chintan A. Desai, Esq. in Support of Petitioner's Reply Brief in Support of Motion for Summary Judgment ("Desai Supp. SJ Decl."), and Exhibits AA-AC thereto, 40 TTABVUE 13-33; and

- Testimonial Declaration of Chen Ye in Support of Petitioner's Opening ACR Brief ("Ye Test. Decl."), and Exhibits C1-C16 thereto. 46 TTABVUE 27-77.[7]

Respondent

- Declaration of Stephen P. McNamara in opposition to Petitioner's motion for summary judgment ("McNamara SJ Decl."), and Exhibits 1-2 thereto, 39 TTABVUE 23-24, 30-50;[8]

- Declaration of Jordan Press in opposition to Petitioner's motion for summary judgment ("Press SJ Decl."), and Exhibit 3 thereto, *id.* at 25-29, 51-214; and

- Testimonial Declaration of Jordan Press ("Press Test. Decl."). 47 TTABVUE 27-28.

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[6] Exhibits T and U to the Chintan Summary Judgment Declaration were designated as Confidential under the Board's Standard Protective Order and were filed under seal at 35 TTABVUE.

[7] The ACR Stipulation provides that "[e]ach party will be provided an opportunity to cross-examine the other party's additional testimony declarant(s) submitted with the other party's Opening ACR Brief." ACR Stipulation ¶ 4 (44 TTABVUE 3). Neither party cross-examined the other's declarants.

[8] As noted above, Respondent requested leave to file a substitute version of its original opposition to the summary judgment, with Petitioner's consent. 39 TTABVUE 2. The summary judgment panel granted the request, 41 TTABVUE 1 n.1, and considered only the substitute version. *Id.* We will do so as well.

B. Evidentiary Objections

The ACR Stipulation provides that evidence in the record is "subject to any evidentiary objections that may be presented in the parties' ACR Briefs." ACR Stipulation ¶ 2 (44 TTABVUE 2-3). In its opening ACR brief, Respondent asserts several objections to Petitioner's evidence.[9] 47 TTABVUE 7-11. We discuss below these objections and Petitioner's responses by category of objection.

1. Evidence Allegedly Not Produced in Discovery

Respondent objects to Petitioner's Exhibits AA, AB, AC, C2, C4, C5, C6, C7, C8, C9, C10, C11, C12, C13, C14, C15, and C16 on the ground that this evidence "was newly provided in the summary judgment and ACR stages, after the close of discovery." 47 TTABVUE 7-8 n.1.

Exhibit AA is a screenshot from the website at robotshop.com that was taken on March 16, 2023, the date on which Petitioner filed reply on its summary judgment motion. Desai Supp. SJ Decl. ¶ 3; Ex. AA (40 TTABVUE 13-14, 15-29). It was offered to show what the webpage states about the company's shipping practices. Exhibits AB and AC are copies of partially redacted versions of invoices in Exhibit E to Mr. Ye's summary judgment declaration, discussed below. Desai Supp. SJ Decl. ¶¶ 4-5; Exs. AB-AC (40 TTABVUE 14, 30-33).

Mr. Ye described Exhibit C2 as "representative samples of Petitioner's advertising and marketing efforts through its social media pages from 2016-2017." Ye Test. Decl.

[9] Respondent asserted many of these objections in its opposition to Petitioner's motion for summary judgment. 39 TTABVUE 11-12. The summary judgment panel did not rule on Respondent's objections in its order granting Petitioner's motion in part.

¶ 7; Ex. C2 (46 TTABVUE 28, 37-45). Exhibit C2 bears production Nos. DF_0018-DF_0025 and the referenced social media pages were submitted by Petitioner on its summary judgment motion. Ye SJ Decl. ¶ 6; Ex. C (34 TTABVUE 28, 41-49).

Exhibits C4-C12, C14, and C16 are archived pages from Petitioner's website at dfrobot.com that were downloaded from the Wayback Machine at archive.org on September 21, 2023, four days before Petitioner filed its opening ACR brief and supporting evidence. Ye Test. Decl. ¶¶ 10-18, 20, 22; Exs. C4-C12, C14, C16 (46 TTABVUE 29-32, 52-69, 72-73, 76-77).

Exhibits C13 and C15 consist of redacted copies of Petitioner's Invoice Nos. 96396 and 108069 to companies with payment and shipping addresses in Indiana and Massachusetts, respectively. Mr. Ye testified at trial that they had previously been produced under production Nos. DF_0016 and DF_0017, respectively. Ye Test. Decl. ¶¶ 19, 21; Exs. C13, C15 (46 TTABVUE 31-32, 70-71, 74-75). More fully redacted copies of these invoices bearing production Nos. DF_0016 and DF_0017 were part of Exhibit E to Mr. Ye's summary judgment declaration. Ye SJ Decl. ¶ 8; Ex. E (34 TTABVUE 28-29, 72-73). Mr. Desai testified in his summary judgment declaration regarding the documents that had been produced to Respondent in discovery, including the invoices bearing production Nos. DF_0016 and DF_0017. Desai SJ Decl. ¶ 12; Ex. S (34 TTABVUE 35, 466-540).

The record shows that Exhibits AB, AC, C2, C13, and C15 were produced to Respondent prior to trial and were submitted on Petitioner's summary judgment motion. We **overrule** Respondent's untimeliness objection to these exhibits.

With respect to Respondent's objections to Exhibits AA, C4-C12, C14, and C-16, Petitioner argues that "'[a] party is not required, in advance of trial, to disclose each document or other exhibit it plans to introduce.'" *Id.* at 11 (quoting TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") Section 414(7) and citing *British Seagull Ltd. v. Brunswick Corp.*, 28 USPQ2d 1197 (TTAB 1993), *aff'd*, 35 F.3d 1527, 32 USPQ2d 1120 (Fed. Cir. 1994)). Petitioner further argues that "to the extent documents are publicly available, '[g]enerally a party does not have an obligation to locate documents that are not in its possession, custody, or control and produce them during discovery.'" *Id.* (quoting TBMP § 406.02). Petitioner also argues that Respondent could have filed a motion to compel to obtain supplementation of any responses that it deemed inadequate, but did not do so. *Id.*

The record shows that Exhibit AA was first provided to Respondent on March 16, 2023 in connection with Petitioner's reply on its summary judgment motion, while Exhibits C4-C12, C14, and C-16 were first provided to Respondent on September 25, 2023 in connection with Petitioner's opening ACR brief and Mr. Ye's testimonial declaration.

Section 414(7) of the TBMP cited by Petitioner discusses the degree of specificity required in a party's pre-trial disclosures, not the circumstances under which a party may rely on documents not produced in discovery, as it states that "a party must provide a general summary or list of subjects about which the witness(es) are expected to testify and a general summary or list of documents and things that may be introduced during the testimony of the witness(es)." TBMP § 414(7). The ACR

Stipulation does not mention pre-trial disclosures and we do not know whether they were served or, if they were, what, if anything, was disclosed by Petitioner about Exhibits AA, C4-12, C14, and C16.

Exhibit AA was disclosed to Respondent in advance of trial as part of Petitioner's evidence on its summary judgment motion. Desai Supp. SJ Decl. ¶ 3; Ex. AA (40 TTABVUE 13-14, 15-29). We **overrule** Respondent's untimeliness objection to Exhibit AA.

Mr. Ye testified that Exhibits C4-12, C14, and C16, archived pages from Petitioner's own website, were downloaded from archive.org on September 21, 2023, Ye Test. Decl. ¶¶ 10-18, 20, 22; Exs. C4-C12, C14, C16 (46 TTABVUE 29-32, 52-69, 72-73, 76-77), four days before Petitioner filed Mr. Ye's testimonial declaration. Respondent elected not to cross-examine Mr. Ye to determine whether the archived pages from Petitioner's website were in Petitioner's possession, custody, or control prior to September 21, 2023, or regarding the substance of the archived pages. These webpages were equally accessible to Respondent through a search on archive.org. We **overrule** Respondent's untimeliness objection to Exhibits C4-12, C14, and C16.

2. Hearsay Objections

Respondent objects generally to "statements from third party websites and blogs pursuant to F.R.E. §801 as hearsay," 47 TTABVUE 8, and specifically to Petitioner's Exhibits A, B, D, F, G, AA, and C1. *Id.* at 8-10.[10] "Hearsay" is defined in the Federal

[10] We have discussed the nature of Exhibit AA above in our discussion of Respondent's untimeliness objections.

Rules of Evidence as "a statement that (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c).[11] The rule against hearsay in Rule 802 of the Federal Rules of Evidence provides that "[h]earsay is not admissible unless" a federal statute, the Federal Rules of Evidence, or other rules prescribed by the Supreme Court provide otherwise. Fed. R. Evid. 802.

Exhibit A is described in Mr. Desai's summary judgment declaration as part of Petitioner's document production to Respondent, Desai SJ Decl. ¶ 12 (34 TTABVUE 35), but its nature is unclear, as it bears the column headings "SKU," Product Name," and "Date Added." Desai SJ Decl. ¶ 12; Ex. A (34 TTABVUE 37-38).

Exhibit B is a press release issued by Petitioner in 2016 regarding Petitioner's launch of its Gravity Starter Kit. Ye SJ Decl. ¶ 6; Ex. B (34 TTABVUE 28, 39-40). It is also Exhibit C1 to Mr. Ye's testimonial declaration and is offered in connection with his trial testimony that "[i]n 2016, Petitioner began advertising and marketing its goods under the GRAVITY mark through social media platforms such as Facebook." Ye Test. Decl. ¶ 7; Ex. C1 (46 TTABVUE 28, 35-36).

Exhibit D is described by Mr. Ye as a copy of "third-party tweets regarding Petitioner's goods under the GRAVITY mark from 2016-2017." Ye SJ Decl. ¶ 7; Ex. D (34 TTABVUE 28, 50-55). It is also Exhibit C3 to Mr. Ye's testimonial declaration and is offered in connection with his trial testimony that "Petitioner's goods under the

[11] Rule 801(b) of the Federal Rules of Evidence defines "declarant" as "the person who made the statement." Fed. R. Evid. 801(b). In the case of the objected-to exhibits, the declarant is the natural or juristic person who prepared and disseminated the materials at issue.

GRAVITY mark were widely publicized and were mentioned on other social media platforms such as Twitter." Ye Test. Decl. ¶ 8; Ex. C3 (46 TTABVUE 28, 46-51).

Exhibit F is described by Mr. Ye as "copies of announcements regarding Petitioner's global distribution agreement with Mouser Electronics," which Mr. Ye testified was entered into in April 2017 and was widely publicized, exposing the GRAVITY brand. Ye SJ Decl. ¶ 9; Ex. F (34 TTABVUE 29, 74-94).

Exhibit G is described by Mr. Ye as "copies of third-party articles and user-generated content as early as 2016-2017" mentioning Petitioner's goods under the GRAVITY mark, and was offered in connection with his summary judgment testimony that "[a]s a result of its growing presence within the community, Petitioner's goods under the GRAVITY mark were mentioned in several third-party articles and user-generated content." Ye SJ Decl. ¶ 10; Ex. G (34 TTABVUE 29, 95-106).

In its reply ACR brief, Petitioner argues that Respondent's hearsay "objections are incorrect because the evidence provided in the exhibits was accompanied by authentic affidavits or declarations of Mr. Chen Ye and Mr. Chintan A. Desai and are admissible." 48 TTABVUE 10.

As discussed above, Petitioner quotes Exhibit AA, the page from the robotshop.com website, for the following statements on the website:

> Shipping in the USA: We do ship everywhere in the USA via UPS and USPS (small packages only). Standard delivery is free for orders of USD 100 or more within the contiguous 48 United States. Standard shipping rates will apply for non contiguous States. Shipping is USD 3.49 for smaller orders shipped with USPS or will vary for larger

> orders shipped with UPS for orders under USD 100 or in non contiguous States. Note that UPS does not deliver to PO boxes.

Desai Supp. SJ Decl. ¶ 3; Ex. AA (40 TTABVUE 13-14, 15-29). Mr. Desai is not an employee of robotship.com, but Petitioner offers these statements as substantive evidence of the shipping practices of robotshop.com. The statements are hearsay when offered for that purpose and Petitioner does not show that they fall within any of the exceptions to the rule against hearsay set forth in Rule 803 of the Federal Rules of Evidence. We **sustain** Respondent's hearsay objection to Exhibit AA.

Petitioner appears to rely on Exhibit A to show when particular products were first offered by Petitioner under the GRAVITY mark. It is hearsay when offered for that purpose, and neither Mr. Desai nor Mr. Ye established that it is a business record of Petitioner for the purpose of application of the exception to the rule against hearsay discussed in Rule 803(7) of the Federal Rules of Evidence. We **sustain** Respondent's hearsay objection to Exhibit A.[12]

All of the other objected-to exhibits are not "hearsay" within the meaning of Rule 801(c) of the Federal Rules of Evidence because they are not offered to prove the truth of any statements made in the exhibits, but instead are offered to show the exposure of the GRAVITY mark at the times and in the manners discussed in Mr. Ye's summary judgment and trial testimony, and to corroborate his testimony. We **overrule** Respondent's hearsay objections to Exhibits B, D, F, G, and C1.

[12] Respondent also objects to Exhibit A as lacking sufficient authentication. 47 TTABVUE 9. We need not discuss that objection because we have sustained Respondent's hearsay objection.

3. Authentication Objections

Respondent objects to Exhibit H, pages from Petitioner's website, as lacking sufficient authentication because of the absence of a capture date and URL. 47 TTABVUE 9.[13] Respondent primarily cites ex parte appeal cases requiring an examining attorney or an applicant to provide a capture date and a URL for Internet materials. *Id.* at 9-10. Respondent argues that "in an opposition [sic] that [sic] the standards for authentication of evidence should be at least as high as that required in an application examination. Since the cited documents lack both the date and the complete URL address, the documents are not authenticated." *Id.* at 10.

Rule 901 of the Federal Rules of Evidence provides that "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must provide evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a). "Testimony that an item is what it is claimed to be" from a witness with knowledge of the item may satisfy the requirement of authentication. Fed. R. Evid. 901(b)(1). Exhibit H was offered on Petitioner's summary judgment motion in connection with Mr. Ye's testimony that "[s]ince 2016, Petitioner has continuously offered for sale its sensors under the GRAVITY mark through its website www.dfrobot.com," and he testified that Exhibit H consists of "true and correct copies of product pages for Petitioner's goods under the GRAVITY mark from Petitioner's website (DF_0070-DF_0073)." Ye SJ Decl. ¶ 11 (34 TTABVUE

[13] As noted above, Respondent also objected to Exhibit A for lack of authentication, 47 TTABVUE 9, but we have excluded it on other grounds.

29). His testimony is sufficient to authenticate Exhibit H and we **overrule** Respondent's lack of authentication objection.[14]

4. Objections to Mr. Ye's Testimony

Respondent objects to paragraphs 6-7 and 9-11 in Mr. Ye's summary judgment declaration and paragraphs 7-8 and 10-22 in his testimonial declaration, 47 TTABVUE 11, which Respondent states discuss the objected-to exhibits. Respondent objects to the testimony on the same grounds on which Respondent objects to Exhibits B, D, F, G, H in Mr. Ye's summary judgment declaration and to Exhibits C1, and C4-C16 in Mr. Ye's testimonial declaration. *Id.* We do not construe these objections to object to Mr. Ye's testimony in the cited paragraphs that could stand on its own without the referenced exhibits.

Paragraphs 6-7 and 9-11 in Mr. Ye's summary judgment declaration authenticate Exhibits B, D, F, G, and H. We have overruled Respondent's objections to the referenced exhibits and also **overrule** Respondent's objection to Mr. Ye's accompanying testimony.

Paragraphs 7-8 and 10-22 in Mr. Ye's testimony declaration authenticate Exhibits C1, and C4-C16. We have overruled Respondent's objections to each of these exhibits and also **overrule** Respondent's objection to Mr. Ye's accompanying testimony.

[14] Respondent's argument and authorities are directed to the requirements of self-authentication of Internet materials in the absence of accompanying testimony, including when they are submitted under a notice of reliance. *See*, *e.g.*, *Spiritline Cruises LLC v. Tour Mgmt. Servs., Inc.*, 2020 USPQ2d 48324, at *3-4 (TTAB 2020) (Internet evidence is self-authenticating when accompanied by a capture date and URL and is admissible only for what it shows on its face, but it can be used to as substantive evidence of its contents if it is accompanied by testimony that authenticates it).

5. Summary of Evidentiary Rulings

We have sustained Respondent's objections to Exhibits A and AA and have given them no consideration in our decision. We have overruled Respondent's objections to Exhibits B, D, F, G, H, AB, AC, C1, C2, and C4-16 and have considered these exhibits for whatever probative value they may have.

II. Priority

As discussed above, as a result of the earlier ruling granting Petitioner's summary judgment motion in part as to entitlement to petition to cancel and likelihood of confusion, "we only need to determine whether Petitioner established 'proprietary rights in its pleaded common-law mark that precede [Respondent's] actual or constructive use of its involved mark.'" *Kemi Organics, LLC v. Gupta*, 126 USPQ2d 1601, 1604 (TTAB 2018) (quoting *Exec. Coach Builders, Inc. v. SPV Coach Co.*, 123 USPQ2d 1175, 1180 (TTAB 2017)).

"Section 2(d) of the Trademark Act provides a ground for cancellation of a registered mark based on likelihood of confusion with a petitioner's mark or trade name previously used in the United States and not abandoned." *JNF LLC v. Harwood Int'l Inc.*, 2022 USPQ2d 862, at *6 (TTAB 2022) (citing *Kemi Organics*, 126 USPQ2d at 1604). "'Because a trademark owner's certificate of registration is prima facie evidence of the validity of the registration and continued use of the registered mark, the burden of proof is placed upon those who seek cancellation . . . .'" *Id.*, at *7 (quoting *Cerveceria Centroamericana S.A. v. Cerveceria India Inc.*, 892 F.2d 1021, 13 USPQ2d

1307, 1309 (Fed. Cir. 1989)). "A party in the position of plaintiff must ordinarily prove priority by a preponderance of the evidence." *Id.*, at *8 (citations omitted).[15]

"'To establish priority, the petitioner must show proprietary rights in the mark that produce a likelihood of confusion.'" *JNF*, 2022 USPQ2d 862, at *3 (quoting *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40, 43 (CCPA 1981)).[16] "'These proprietary rights may arise from a prior registration, prior trademark or service mark use, prior use as a trade name, prior use analogous to trademark or service mark use, or any other use sufficient to establish proprietary rights.'" *Id.* (quoting *Herbko Int'l Inc. v. Kappa Books Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1378 (Fed. Cir. 2002)).

A. Respondent's First Date of Actual or Constructive Use of the Registered Mark

"We turn first to a determination of the relevant date of Respondent's [first] 'actual or constructive use of its involved mark.'" *Kemi Organics*, 126 USPQ2d at 1604 (quoting *Exec. Coach Builders*, 123 USPQ2d at 1180). "For priority purposes, a respondent may rely upon the filing date of the underlying application that matured

[15] In its opening ACR brief, Petitioner reprises its summary judgment argument under a heading that "**There is No Genuine Issue of Material Fact Regarding Petitioner's Priority over Respondent's Contested Mark**," 46 TTABVUE 12 (emphasis supplied by Petitioner), and Petitioner argues in its reply ACR brief that "there is no issue of material fact that Petitioner has priority of use over Respondent's contested mark." 48 TTABVUE 5. Petitioner's burden of proof at trial on the issue of priority is not the exacting one that it faced on summary judgment. As Respondent correctly acknowledges in its opening ACR brief, "Petitioner has the burden to show priority of use by a preponderance of the evidence." 47 TTABVUE 18.

[16] The parties do not dispute that GRAVITY is an inherently distinctive mark for analog pH sensors and other sensors, so the only issue is who used it first.

into its involved registration." *Id.* The application that matured into the '964 Registration was filed on June 11, 2019. This date of constructive use is the earliest use date on which Respondent may rely without sufficient proof of an earlier date of actual use. *See* Trademark Rule 2.122(b)(2), 37 C.F.R. § 2.122(b)(2) ("[t]he 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.").

In the application that matured into the '964 Registration, Respondent claimed first use of its mark in connection with "analog pH sensors," the goods identified in the '964 Registration, at least as early as "August 2018."[17] Respondent's claimed first use in "August 2018" is deemed to be first use on August 31, 2018 because "[w]hen a month and year are given without a specified day, the date presumed for purposes of examination is the last day of the month." *JNF*, 2022 USPQ2d 862, at *3 (citing TRADEMARK MANUAL OF EXAMINING PROCEDURE ("TMEP") Section 903.06)).

As discussed above, the '964 Registration does not cover goods broadly identified as "sensors," but instead covers goods narrowly identified as "analog pH sensors." Respondent admits in its opening ACR brief that its earliest possible actual use of GRAVITY in connection with "analog pH sensors" is August 2018 because "[a]n assertion of use of the mark GRAVITY for 'analog pH sensors' on a date prior to August 2018 would not have been accurate." 47 TTABVUE 22.

[17] June 13, 2019 Application at TSDR 1.

Respondent nevertheless spends multiple pages in its opening ACR brief discussing its claimed use and intended use of the GRAVITY mark between 2006 and 2018 in connection with other types of sensors. *Id.* at 12-16. Respondent states that its "first uses of its mark GRAVITY in 2006-2010 were in connection with soil moisture sensors," *id.* (citing Press Test. Decl. ¶ 3 (47 TTABVUE 27)), which Respondent stresses are different goods from the "analog pH sensors" identified in the '964 Registration. As Respondent puts it, "Respondent's narrative in its testimony and the Statement of Facts consistently states that it began use of GRAVITY in connection with sensor devices in 2006, but that **its use of GRAVITY in connection with 'analog pH sensors' began in August 2018**." *Id.* at 22-23 (emphasis added).[18] Mr. Press supported this "narrative" with trial testimony that these soil moisture sensors "were not the same product as the 'analog pH sensors' which were covered by" the '964 Registration. Press Test Decl. ¶ 3 (47 TTABVUE 28).

Respondent cites no legal authority for its argument that its claimed use of GRAVITY between 2006 and 2018 on goods other than the "analog pH sensors" identified in the '964 Registration gives it priority of use in this proceeding for

[18] Respondent stresses the differences between these sensors in response to Petitioner's argument that if Respondent seeks to prove a date of first use earlier than the August 2018 date alleged in the application that matured into the '964 Registration, it must prove such earlier use by clear and convincing evidence. 47 TTABVUE 22-23 (citing 46 TTABVUE 18). *See Andrusiek v. Cosmic Crusaders LLC*, 2024 USPQ2d 21, at *5 (TTAB 2022) ("When a registrant seeks 'to prove a date of first use earlier than the date alleged in its application for registration . . . its proof of that earlier date must be 'clear and convincing'.") (quoting *Hydro-Dynamics Inc. v. George Putnam & Co.*, 811 F.2d 1470, 1 USPQ2d 1772, 1773 (Fed. Cir. 1987)). Respondent argues that the "cited principle and cases are not applicable here" because Respondent does not seek to prove earlier use of GRAVITY on "analog pH sensors," but rather earlier use of GRAVITY on other sensors. 47 TTABVUE 22-23.

purposes of maintaining its registration for those goods. In its reply ACR brief, Petitioner states that "[a]lthough not clearly articulated, it appears that Respondent is attempting to indirectly establish that it has priority through 'tacking.'" 48 TTABVUE 7. We agree that Respondent appears to be trying to tack its earlier use of GRAVITY on other sensors onto its use of the mark shown in the '964 Registration with "analog pH sensors." We turn now to the issue of whether Respondent can do so.

"Tacking" allows a party to "clothe a new mark with the priority of an older mark" when "the original and revised marks are 'legal equivalents' in that they create the same continuing commercial impression." *Hana Fin., Inc. v. Hana Bank*, 574 U.S. 418, 113 USPQ2d 1365, at *3 (2015). The Board has long held that

> if the tacking of the use of one mark onto the use of a second mark for the purposes of obtaining or maintaining a registration is permitted only when the marks are "legal equivalents" or "indistinguishable," the tacking of the use of a mark for certain goods or services onto the use of the same mark for other goods or services for the purposes of obtaining or maintaining a registration should be permitted only when the two sets of goods or services are "substantially identical."

Big Blue Prods. Inc. v. Int'l Bus. Machs. Corp., 19 USPQ2d 1072, 1075 (TTAB 1991).[19] *See also Am. Hygienic Labs. v. Tiffany & Co.*, 12 USPQ2d 1979, 1984 (TTAB 1989) (the applicant's prior use of its mark on a variety of goods could "not be relied on to

[19] The Board explained in *Big Blue Prods.* that equating the term "'substantially identical goods or services' to the term 'legally equivalent or indistinguishable marks' is supported by cases involving the *Morehouse* [prior registration] defense which have held that 'if an applicant had previously registered the same or a **substantially identical mark** for the same or **substantially identical goods** opposition cannot be sustained because of a lack of possibility of damage to opposer.'" *Big Blue Prods.*, 19 USPQ2d at 1075 n.3 (quoting *Jackes-Evans Mfg. Co. v. Jaybee Mfg. Co.*, 481 F.2d 1342, 179 USPQ 81, 83 (CCPA 1973)) (emphasis in bold here in italics in *Big Blue Prods.*).

establish priority with respect to the specific cosmetic and toiletry products in its application."); *Pro-Cuts v. Schilz-Price Enters., Inc.*, 27 USPQ2d 1224, 1226-27 (TTAB 1993) (tacking applies to the "same goods or services"). Accordingly, for tacking to be possible, the involved marks must be "legal equivalents," *Hana Bank*, 113 USPQ2d 1365, at *3, and the involved goods or services must be "substantially identical." *Big Blue Prods.*, 19 USPQ2d at 1075.

Petitioner argues in a footnote in its reply ACR brief that "[t]o the extent that Respondent is presenting the tacking doctrine to preclude Petitioner from establishing priority, such a theory is inapposite at this stage of the proceeding" because "Respondent must properly plead tacking, which it has not done." 48 TTABVUE 7 n.4 (citations omitted). We agree that tacking must be properly pleaded, *DrDisabilityQuotes.com, LLC v. Krugh*, 2021 USPQ2d 262, at *6 (TTAB 2021), and it is not clear that Respondent properly pleaded it. 6 TTABVUE 3-4.[20] But an unpleaded affirmative defense of tacking may be tried by the implied consent of the parties, *Productos Lacteos Tocumbo S.A. de C.V. v. Paleteria La Michoacana, Inc.*, 98 USPQ2d 1921, 1926-27 (TTAB 2011); *Citigroup Inc. v. Cap. City Bank Grp., Inc.*, 94 USPQ2d 1645, 1655-56 (TTAB 2010), *aff'd*, 637 F.3d 1344, 98 USPQ2d 1253 (Fed. Cir. 2011),

[20] In the "Affirmative Defense" portion of its Answer, Respondent alleged, "[u]pon information and belief," that it "used the mark GRAVITY in connection with its products prior to any use of GRAVITY by Petitioner in connection with its products" and that it "used the mark GRAVITY in connection with its products in United States commerce prior to any use of GRAVITY by Petitioner in connection with its products in United States commerce." Answ. Affirmative Defense ¶¶ 1-2 (6 TTABVUE 3-4). We need not decide whether Respondent's allegations of prior use of GRAVITY in connection with "its products" put Petitioner on notice that Respondent was asserting a tacking defense because, as discussed below, we find that the defense was tried by implied consent.

and to the extent that Respondent did not properly plead tacking as an affirmative defense in its Answer, it is clear that such a defense was tried by implied consent.

In its opening brief on its summary judgment motion, Petitioner addressed certain of Respondent's discovery responses regarding claimed first use of GRAVITY with sensors in 2006. 34 TTABVUE 16-17. Respondent offered and discussed evidence of such pre-2018 use of GRAVITY in its opposition to Petitioner's summary judgment motion, 39 TTABVUE 13-16, 25-27, 59-65, 97-102, 137-39, 172-204 (Press SJ Decl. ¶¶ 2-7; Exs. 3-4), and Petitioner discussed Respondent's evidence and arguments on the merits in its reply brief on that motion, and did not object on the ground that Respondent could not rely on such claimed earlier use. 40 TTABVUE 4-8.[21]

In its opening ACR brief, Petitioner discusses the evidence submitted on its summary judgment motion, which was stipulated into the record for purposes of trial, including Respondent's evidence claiming first use in 2006, and does not object to this evidence on the ground that Respondent could not rely on such claimed earlier use. 46 TTABVUE 19-25.[22] Petitioner's argument in its reply ACR brief that Respondent's tacking defense had not been properly pleaded comes far too late because the defense had already been tried by implied consent.

[21] In its reply brief on its summary judgment motion, Petitioner argued that Respondent was advancing a theory of excusable nonuse in connection with periods of time between 2006 and 2018 during which Respondent admitted that it had not used the GRAVITY mark. 40 TTABVUE 6. Petitioner did not mention tacking in either its main brief or its reply brief on its summary judgment motion.

[22] Petitioner again argued that Respondent was advancing a theory of excusable nonuse. 46 TTABVUE 23.

Respondent's tacking defense fails on the merits, however, because Respondent's admission that the "soil moisture sensors" with which it claims use of the GRAVITY mark prior to 2018 "were not the same product as the 'analog pH sensors' which were covered by" the '964 Registration, Press Test Decl. ¶ 3 (47 TTABVUE 28), precludes a finding that "the two sets of goods . . . are 'substantially identical.'" *Big Blue Prods.*, 19 USPQ2d at 1075. Accordingly, Respondent cannot rely on any use of the GRAVITY mark prior to Respondent's claimed August 2018 first use date on "analog pH sensors" to establish the date of its first use of the mark shown in the '964 Registration in connection with those goods.

We turn next to the issue of whether Respondent proved use of the mark shown in the '964 Registration in connection with "analog pH sensors" prior to its June 11, 2019 constructive use filing date by "competent evidence." Trademark Rule 2.122(b)(2), 37 C.F.R. § 2.122(b)(2). Mr. Press is Respondent's sole witness on that claim. "Testimony of a single witness may establish use, 'but only if it is sufficiently probative,' and the testimony should not be characterized by 'indefiniteness but should carry with it conviction of its accuracy and applicability.'" *The Mars Generation, Inc. v. Carson*, 2021 USPQ2d 1057, at *7 (TTAB 2021) (quoting *Exec. Coach Builders*, 123 USPQ2d at 1184 (internal quotation and citation omitted)).

Mr. Press's trial testimony was merely that "our attorneys used a date of first use and first use of [sic] commerce of August 2018 which is the date we provided them as the date of first use of GRAVITY on analog pH sensors." Press Test. Decl. ¶ 3 (47 TTABVUE 27). This testimony recites what Respondent's attorneys were told for

purposes of preparing the application that matured into the '964 Registration, but it does not establish the truth of what they were told.

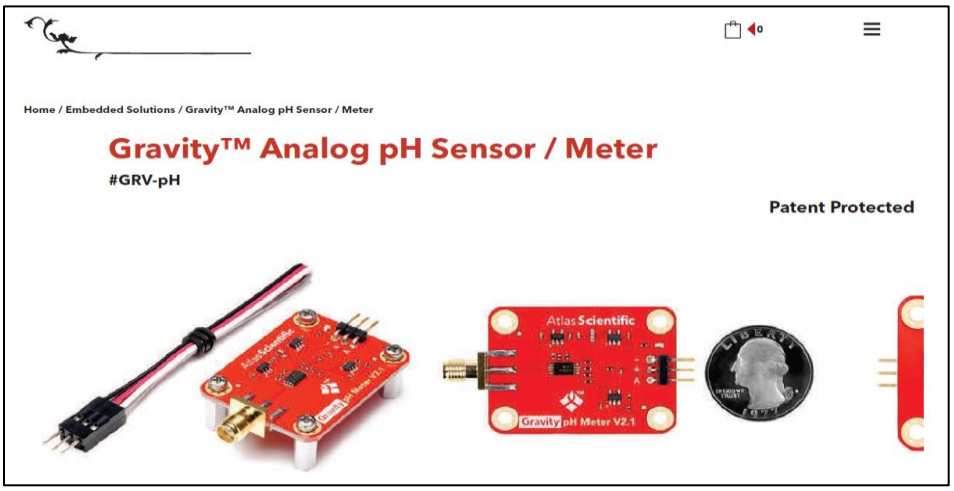
Mr. Press's summary judgment testimony was that "[t]he first Atlas GRAVITY sensor was [sic] released in August 2018 was a pH sensor," that "additional sensors were added to the line and now include analog pH sensors/meters/kits, analog dissolved oxygen sensors/meters/kits, analog ORP sensors/meters/kits, analog temperature sensors, and analog isolators," and that "[t]he Atlas GRAVITY sensors were made available via the atlas-scientific website beginning in 2019." Press SJ Decl. ¶ 9; Ex. 3 (39 TTABVUE 28, 59-96, 103-36, 140-48, 160-71, 205-07, 209).[23]

As discussed above, the '964 Registration does not cover "sensors" or "pH sensors," but only "analog pH sensors." Mr. Press's summary judgment testimony on the date of first use of Respondent's mark on "analog pH sensors" is "far from being a model of clarity or completeness." *Kemi Organics*, 126 USPQ2d at 1608. He testified that the "first GRAVITY sensor was [sic] released in August 2018 was a pH sensor," Press SJ Decl. ¶ 9 (39 TTABVUE 28), but he does not specify that it was an "analog pH sensor." "Analog pH sensors" are instead included by Mr. Press in a list of "additional sensors [that] were added to the line" **after** the August 2018 release of the pH sensor, and as part of his testimony that the line "**now** include[s] analog pH sensors/meters/kits . . . ." Press SJ Decl. ¶ 9 (39 TTABVUE 28) (emphasis added). Mr. Press did not testify that "analog pH sensors" were "added to the line" at any point

[23] Mr. Press refers to "Exhibit 4" in his summary judgment declaration, Press SJ Decl. ¶ 9 (39 TTABVUE 28), but there is no such exhibit. The documents listed in paragraph 9 of Mr. Press's summary judgment declaration appear in Exhibit 3 and are identified by production Nos. AS001-AS038; AS132-165; AS175-178; AS195-AS206; AS242-AS244; AS246.

prior to Respondent's June 11, 2019 constructive use filing date. Press SJ Decl. ¶ 9 (39 TTABVUE 28). His testimony regarding when "analog pH sensors" were first sold under the mark shown in the '964 Registration is "characterized by indefiniteness," *The Mars Generation*, 2021 USPQ2d 1057, at *7, and does not "carry with it conviction of its accuracy and applicability." *Id.*

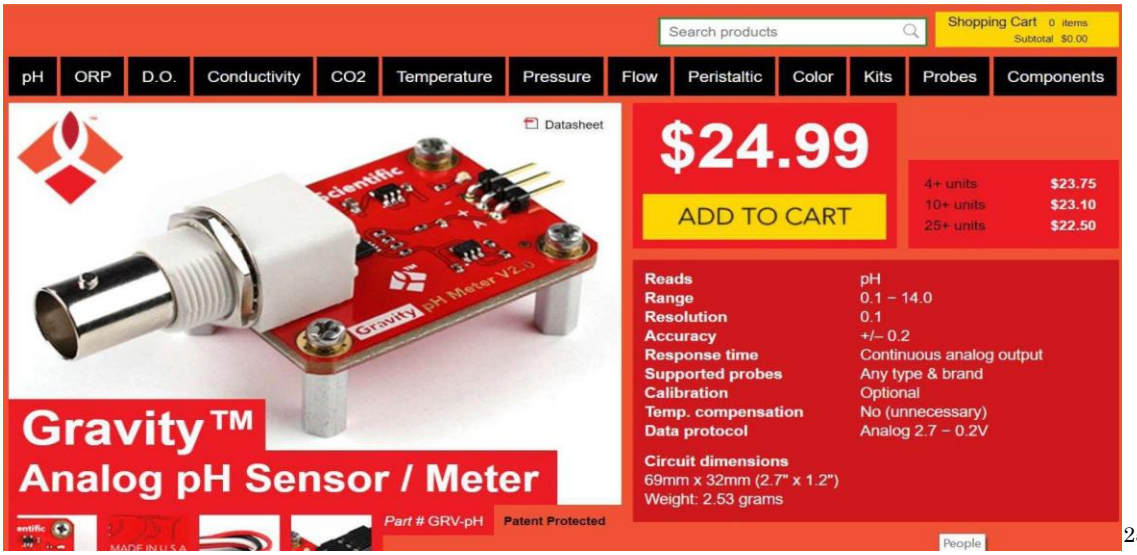
Mr. Press purported to buttress his summary judgment testimony with a number of documents attached as part of Exhibit 3 to his summary judgment declaration. They show and discuss a variety of sensors, but only a few are analog pH sensors. Pages from Respondent's website at atlas-scientific.com that are displayed in pertinent part below



show and describe an analog pH sensor bearing the mark shown in the '964 Registration, but the pages were downloaded on October 1, 2021. Press SJ Decl. ¶ 9; Ex. 3 (39 TTABVUE 63-65). An analog pH sensor bearing the mark shown in the '964 Registration is shown on what appears to be the cover of a brochure that states that it was "Revised 12/20." Press SJ Decl. ¶ 9; Ex. 3 (39 TTABVUE 125-31). Pages from Respondent's website archived on the Wayback Machine at archive.org from July 23,

2020 and August 5, 2020 show analog pH sensors bearing the mark shown in the '964 Registration. Press SJ Decl. ¶ 9; Ex. 3 (39 TTABVUE 160, 165, 170).[24] These documents show use of the mark shown in the '964 Registration on "analog pH sensors" long after Respondent's June 11, 2019 constructive use filing date and do not support Respondent's claimed first use in August 2018.

Respondent's specimen of use, described in the application that matured into the '964 Registration as showing use of the "mark on product", is displayed below:



[25]

"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."

[24] Amazon.com and Robot Shop were identified by Respondent in discovery as two of its distributors of Gravity goods. McNamara SJ Decl. ¶ 3; Ex. 2 (Respondent's Second Supplemental Responses to Petitioner's First Set of Interrogatories No. 20) (39 TTABVUE 23, 42-43). Pages from amazon.com downloaded on June 20, 2022 show a Gravity analog pH kit and a Gravity analog pH sensor. Press SJ Decl. ¶ 9; Ex. 3 (39 TTABVUE 66, 86). A page from robotshop.com also downloaded on June 20, 2022 shows a Gravity analog pH sensor. Press SJ Decl. ¶ 9; Ex. 3 (39 TTABVUE 142).

[25] June 11, 2019 Application at TSDR 3.

Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b). Respondent did not make its specimen of record on Petitioner's summary judgment motion or at trial through the testimony of Mr. Press or otherwise.

Viewing Mr. Press's summary judgment testimony and the accompanying documentary evidence "as a whole, as if each piece of evidence were part of a puzzle which, when fitted together, establishes prior use," *W. Fla. Seafood, Inc. v. Jet Rests., Inc.*, 31 F.3d 1122, 31 USPQ2d 1660, 1663 (Fed. Cir. 1994), we find that Respondent did not show by competent evidence that it used the mark shown in the '964 Registration in connection with "analog pH sensors" prior to Respondent's June 11, 2019 constructive use filing date. June 11, 2019 is thus the date prior to which Petitioner must show use of its GRAVITY mark.

B. Petitioner's First Use of Its Common-Law GRAVITY Mark[26]

"Petitioner bears the burden of proving that its mark was 'previously used in the United States' before Respondent's constructive use priority date." *Kemi Organics*, 126 USPQ2d at 1605 (citing *Exec. Coach Builders*, 123 USPQ2d at 1180). Like Respondent, Petitioner relies on the testimony of a single witness, Mr. Ye. As with

[26] In its brief on its summary judgment motion, Petitioner argued that it had prior use of its GRAVITY mark on various sensors, including "electronic sensors for acidity," and other goods described in the identification of goods in its pending application to register its mark. 34 TTABVUE 6-7. As the summary judgment panel noted in its order granting Petitioner's motion in part, Respondent did not address likelihood of confusion, and therefore did not dispute Petitioner's argument that the goods are competitive and thus related. 41 TTABVUE 11. The panel concluded that "Petitioner thus has established that there is no genuine dispute of material fact that the contemporaneous use of the parties' GRAVITY marks on their goods is likely to cause confusion, mistake, or deception of consumers as to the source of the goods." *Id.* As discussed below, the record shows that Petitioner used its GRAVITY mark in the United States in connection with analog pH sensors and other sensors prior to Respondent's constructive use date.

Mr. Press's testimony, we must determine whether Mr. Ye's testimony "is sufficiently probative" and is "not characterized by indefiniteness but [carries] with it conviction of its accuracy and applicability'" on the issue of prior use. *The Mars Generation*, 2021 USPQ2d 1057, at *7 (quotation and quotation marks omitted).

Mr. Ye testified at trial that "Petitioner commenced use of the mark GRAVITY in connection with a multitude of sensors, inclusive of analog pH sensors, since at least as early as 2016,"[27] Ye Test. Decl. ¶ 5 (46 TTABVUE 28), and that "Petitioner has been in continuous use of the mark GRAVITY in commerce throughout the United States on and in connection with the marketing, distribution, offering for sale, and sale of goods, including sensors, since at least as early as 2016." Ye Test. Decl. ¶ 6 (46 TTABVUE 28).[28] He authenticated a press release and samples of Petitioner's marketing of the goods in 2016-2017 through Facebook. Ye Test. Decl. ¶ 7; Exs. C1-C2 (46 TTABVUE 28). Petitioner's Facebook page displayed a Gravity Analog EMG

[27] As noted above, Petitioner owns a pending use-based application to register GRAVITY for numerous types of sensors and other goods. Desai SJ Decl. ¶ 4; Ex. K (34 TTABVUE 34, 136-99). In its application, Petitioner claims "2016" as the date of first use of its mark. Desai SJ Ex. K (34 TTABVUE 193). As discussed above in connection with Respondent's claimed first use in "August 2018," Petitioner's claimed first use in "2016" is deemed to be claimed first use on December 31, 2016, the last day of that year. *JNF*, 2022 USPQ2d 862, at *3 (citing TMEP § 903.06). To the extent that Petitioner asserts use prior to December 31, 2016, it must prove such use by clear and convincing evidence because "[t]he enhanced burden of proof can apply to either party in an *inter partes* proceeding, plaintiff or defendant." *Id.*

[28] "[C]ontinuous use is not required to establish Petitioner's priority." *Kemi Organics*, 126 USPQ2d at 1607. "Section 2(d) 'does not speak of 'continuous use,' but rather of whether the mark or trade name has been **previously used** in the United States by another **and not abandoned**.'" *Id.* (quoting *W. Fla. Seafood*, 31 USPQ2d at 1665) (emphasis in bold here in italics in *W. Fla. Seafood*). "Petitioner is only required to show 'proprietary rights in its pleaded common-law mark that precede [Respondent's] actual or constructive use of its involved mark,'" *id.* (quoting *Exec. Coach Builders*, 123 USPQ2d at 1180), "which rights were not thereafter abandoned." *Id.* (citing *W. Fla. Seafood*, 31 USPQ2d at 1665). Continuous use, if proven, obviously would defeat any claim of abandonment.

Sensor bearing the mark on November 28, 2017 and a Gravity Analog TDS Sensor bearing the mark on December 4, 2017. Ye Test. Decl. ¶ 7; Ex. C2 (46 TTABVUE 39, 43).

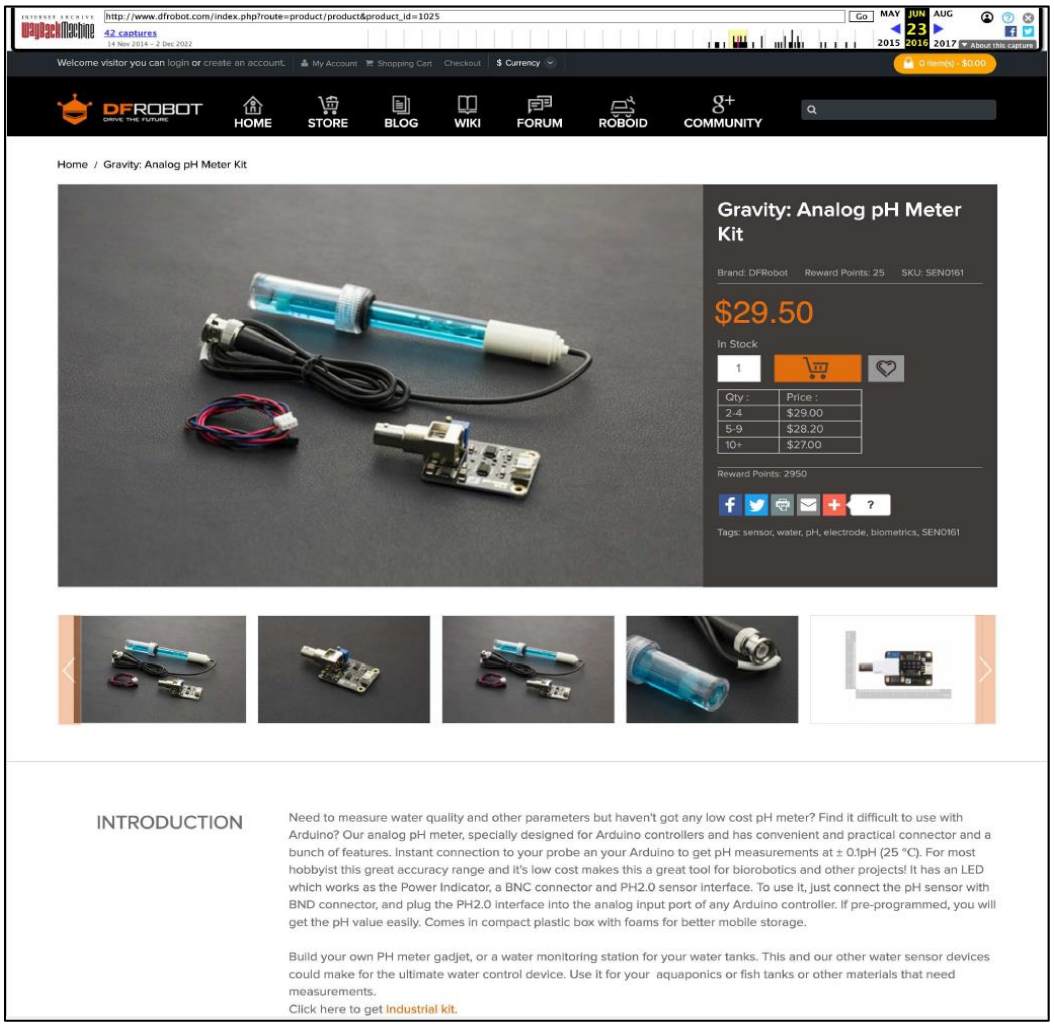
Mr. Ye also testified that "Petitioner's goods under the GRAVITY mark were widely publicized on other social media platforms such as Twitter." Ye Test. Decl. ¶ 8 (46 TTABVUE 28). He authenticated a tweet dated October 14, 2017 mentioning and showing a DFRobot Gravity Analog Ambient Light Sensor. Ye Test. Decl. ¶ 8; Ex. C3 (46 TTABVUE 28-29, 47).

Mr. Ye testified that "[s]ince the launch of Petitioner's GRAVITY mark in 2016, Petitioner has advertised for sale and sold throughout the United States, its goods, including analog pH sensors, under the GRAVITY mark through its website <www.dfrobot.com>." Ye Test. Decl. ¶ 9 (46 TTABVUE 29). He authenticated multiple product pages from Petitioner's website for the year 2016 archived on the Wayback Machine at archive.org. Ye Test. Decl. ¶¶ 10-15; Exs. C4-C9 (46 TTABVUE 29-30, 52-63). These archived webpages offer for sale a "Gravity: Analog Turbidity Sensor" with both analog and digital sensor output modes, Ye Test. Decl. ¶ 10; Ex. C4 (46 TTABVUE 53 (January 10, 2016)), a "Gravity: 9 pcs. Sensor Set for Arduino," Ye Test. Decl. ¶ 11; Ex. C5 (46 TTABVUE 55 (March 15, 2016)), and other "Gravity" sensors. Ye Test. Decl. ¶ 15; Ex. C9 (46 TTABVUE 62-63 (July 29, 2016)).

Two of the sets of archived webpages display and discuss the "Gravity Series," which includes multiple "Gravity" sensors. Ye Test. Decl. ¶¶ 13-14; Exs. C7-C8 (46 TTABVUE 58-61 (June 10, 2016 and November 9, 2016)). They also display several

user comments in which "Gravity" is used to refer to Petitioner's sensors. Ye Test. Decl. Exs. C7-C8 (46 TTABVUE 59, 61).

Mr. Ye testified that "Petitioner advertised and offered for sale its Analog pH Meter Kit under the GRAVITY mark (Model #SEN0161) through its website <www.dfrobot.com> since at least as early as 2016." Ye Test Decl. ¶ 22 (46 TTABVUE 32). He authenticated an archived product page from Petitioner's website showing the product. Ye Test Decl. ¶ 22; Ex. C16 (46 TTABVUE 32, 77 (June 23, 2016)). We reproduced the page in part below:



Mr. Ye testified that "Petitioner continued to advertise and offer for sale its expansive line of goods under the GRAVITY mark in 2017." Ye Test. Decl. ¶ 16 (46 TTABVUE 31). He authenticated two archived pages from Petitioner's website from 2017 that offer for sale a number of Gravity sensors. Ye Test. Decl. ¶¶ 16-17; Exs. C10-C11 (46 TTABVUE 31, 64-67 (May 6, 2017 and May 8, 2017).

Mr. Ye testified that "[s]ince the launch of Petitioner's GRAVITY mark in 2016, Petitioner has continued to expand its offering of goods under the GRAVITY mark including, but not limited to, updated versions of its analog pH sensor as well as updated versions of its other goods offered under the GRAVITY mark," Ye Test. Decl. ¶ 23 (46 TTABVUE 33), and that "[t]oday, Petitioner's goods under the GRAVITY mark are offered for sale and sold to consumers throughout the United States through Petitioner's website <www.dfrobot.com> as well as through its authorized global distributors including, for example, Digi-Key Corporation, Arrow Digital Companies, and Mouser Electronics." Ye Test. Decl. ¶ 24 (46 TTABVUE 33).

Mr. Ye testified at trial about two specific sales of GRAVITY sensors to customers in the United States in 2017.[29] He testified that "Petitioner sold its Sensor Kit for Arduino under the GRAVITY mark (Model #KIT011) to a customer located in Indiana in the United States in 2017." Ye Test. Decl. ¶ 19 (46 TTABVUE 31). He authenticated what he described as a copy of "a partially unredacted version of the customer invoice and purchase order from July 7, 2017 that was previously produced

[29] Petitioner is located in China and ships its goods to customers in the United States. Ye Test. Decl. ¶ 18 (46 TTABVUE 31).

as DF_0016." Ye Test. Decl. ¶ 19; Ex. C13 (46 TTABVUE 32, 70-71). We reproduce this invoice below:

Invoice #96396

Order Details	
Zhiwei Robotics Corp. [redacted] **Telephone** [redacted] **E-Mail**store@dfrobot.com **Web Site:** https://www.dfrobot.com	Date Added07/07/2017 Invoice No. Order ID:96396 Payment MethodPayPal

Payment Address	Shipping Address
[redacted] Indiana 47907 United States [redacted]	[redacted] Indiana 47907 United States [redacted]

Product	Model	Quantity	Unit Price	Total
Analog Sensor Cable for Arduino (10 Pack)	FIT0031	5	$6.00	$30.00
Gravity: 27 Pcs Sensor Kit for Arduino	KIT0011	8	$76.00	$608.00
5mm LED Pack (50 pcs)	FIT0242	4	$3.30	$13.20
			Sub-Total	$651.20
			DHL (United States) 3-5 Days (Weight: 3.25kg)	$0.00
			Total	$651.20

Mr. Ye also testified that "Petitioner sold its Analog pH Meter Kit under the GRAVITY mark (Model #SEN0161) to a customer located in Massachusetts in the United States in 2017." Ye Test. Decl. ¶ 21 (46 TTABVUE 32). He authenticated what he described as a copy of a "partially unredacted version of the customer invoice and purchase order from November 21, 2017 that was previously produced as DF_0017." Ye Test. Decl. ¶ 21; Ex. C15 (46 TTABVUE 32, 74-75). We reproduce this invoice below:

Invoice #108069

Order Details	
Zhiwei Robotics Corp. [redacted] **Telephone** [redacted] **Fax** [redacted] **E-Mail**store@dfrobot.com **Web Site:** https://www.dfrobot.com	Date Added21/11/2017 Invoice No. Order ID:108069 Payment MethodPayPal

Payment Address	Shipping Address
[redacted] assachusetts 02481 United States [redacted]	[redacted] Massachusetts 02481 United States [redacted]

Product	Model	Quantity	Unit Price	Total
Gravity: Analog pH Sensor / Meter Kit For Arduino	SEN0161	20	$27.00	$540.00
			Sub-Total	$540.00
			DHL (United States) 3-5 Days (Weight: 3.20kg)	$5.00
			Total	$545.00

Respondent acknowledges Mr. Ye's testimony, but argues that its evidentiary objections, "if sustained, mean that Petitioner's admissible corroborating evidence is limited to printouts of social media pages from 2016 and 2017 and heavily redacted invoices that do not disclose any United States sales." 47 TTABVUE 19.[30] Respondent attacks this "admissible corroborating evidence" on the grounds that there is no evidence that "any US person viewed or was aware of [Petitioner's] Facebook posting in 2016 or 2017," *id.*, and that a number of Petitioner's invoices do not reflect sales to the United States. *Id.* at 19-21. With respect to the two invoices reproduced above,

[30] As discussed above, we have sustained only two of Respondent's evidentiary objections, and the other objected-to exhibits have been considered for whatever probative value they may have on the issue of priority. Respondent does not address the probative value of the rest of the "corroborating evidence" that we have considered.

Respondent argues only that the customers' addresses are blacked out and that it is "impossible to tell if the package was actually sent to the United States." *Id.* at 21.

Respondent's challenges to Mr. Ye's testimony and "corroborating evidence" are unpersuasive. Although the ACR Stipulation afforded Respondent the right to cross-examine Mr. Ye on his trial testimony, ACR Stipulation ¶ 4 (44 TTABVUE 3), Respondent did not do so. Mr. Ye thus testified, without contradiction, that "Petitioner has been in continuous use of the mark GRAVITY in commerce throughout the United States on and in connection with the marketing, distribution, offering for sale, and sale of goods, including sensors, since at least as early as 2016," Ye Test. Decl. ¶ 5 (46 TTABVUE 28); that "[s]ince the launch of Petitioner's GRAVITY mark in 2016, Petitioner has advertised for sale and sold throughout the United States, its goods, including analog pH sensors, under the GRAVITY mark through its website www.dfrobot.com," Ye Test. Decl. ¶ 9 (46 TTABVUE 29); and that beginning in 2016, Petitioner began advertising its GRAVITY sensors on its English-language social media pages. Ye Test. Decl. ¶¶ 7-8; Exs. C2-C3 (46 TTABVUE 28-29, 39, 43, 47). The record shows that Petitioner received user comments on its English-language website about its GRAVITY sensors in 2016 from persons identifying themselves as "Mike, 41, Maker & Father," "Olivia, 11, Student," and "Ralph, 25, Artist." Ye Test. Decl. Exs. C7-C8 (46 TTABVUE 59, 61). We find that it is more likely than not that these persons were in the United States, and we infer from their comments that they had purchased GRAVITY sensors from Petitioner in 2016.

Petitioner's two 2017 invoices corroborate Mr. Ye's uncontradicted testimony that Petitioner made sales of GRAVITY sensors to customers in the United States in 2017. Ye Test. Decl. ¶¶ 19, 21; Exs. C13, C15 (46 TTABVUE 32, 70-71, 74-75). The invoices contain shipping addresses in Indiana and Massachusetts, respectively, and the November 21, 2017 invoice specifically identifies the product as a "Gravity: Analog pH Sensor / Meter Kit for Arduino." Ye Test. Decl. ¶ 21; Ex. C15 (46 TTABVUE 32, 74-75). Payment in both invoices is expressed in United States dollars and delivery is specified as by "DHL (United States) 3-5 Days."

We find that Mr. Ye's trial testimony is "not characterized by indefiniteness but [carries] with it conviction of its accuracy and applicability" on the issue of prior use. *The Mars Generation*, 2021 USPQ2d 1057, at *7 (quotation and quotation marks omitted). Indeed, in the "absence of any contrary testimony from a discovery [or cross-examination] deposition of Mr. [Ye], any contrary fruits of discovery, any testimony from Respondent's own witnesses, or any documentary evidence establishing non-use of the [GRAVITY] mark or impeaching the testimony of [Mr. Ye], Petitioner's evidence of prior use stands unrebutted." *Kemi Organics*, 126 USPQ2d at 1609.

As discussed above, we must view Petitioner's evidence of priority "as a whole, as if each piece of evidence were part of a puzzle which, when fitted together, establishes prior use." *W. Fla. Seafood*, 31 USPQ2d at 1663. Several of the puzzle pieces would be sufficient standing alone to show use of the GRAVITY mark prior to Respondent's June 11, 2019 constructive use filing date (and, for that matter, its claimed date of first use in August 2018), but when they are fitted together, they establish a clear

picture of Petitioner's first use of its GRAVITY mark with sensors, including analog pH sensors, in the United States no later than in 2017. We find, based on the record as a whole, that Petitioner proved by a preponderance of the evidence that vis-à-vis Respondent, its GRAVITY mark was "previously used in the United States and not abandoned." *JNF*, 2022 USPQ2d 862, at *6.

The Board found on Petitioner's summary judgment motion that Petitioner established its entitlement to petition to cancel and the likelihood of confusion element of its claim for relief under Section 2(d) of the Trademark Act. Petitioner's proof of its priority of use at trial establishes the remaining element of its Section 2(d) claim and entitles Petitioner to relief on that claim.

Decision: The Petition for Cancellation is granted and Registration No. 5943964 will be cancelled in due course.