This Opinion is Not a Precedent of the TTAB

Mailed: March 19, 2026

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re DEKA Research & Development Corp.

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Serial No. 98354562

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Mark E. Tetreault, for DEKA Research & Development Corp.

Justin Miller, Trademark Examining Attorney, Law Office 114,
Nicole Nguyen, Managing Attorney.

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Before Greenbaum, Pologeorgis, and O'Connor,
Administrative Trademark Judges.

Opinion by O'Connor, Administrative Trademark Judge:

Applicant DEKA Research & Development Corp. has appealed the refusal of its application to register, on the Principal Register, the mark DAISY in standard characters for:

> disposable intradermal injectors for laboratory use, in International Class 9,
>
> and
>
> disposable intradermal injectors for medical purposes sold empty; disposable intradermal injectors for vaccines sold empty; disposable intradermal injectors for pharmaceuticals sold empty; medical devices in the nature of intradermal injection devices for administering drugs,

> vaccines, and therapeutic agents sold empty, in International Class 10.[1]

The basis for the refusal was that Applicant did not provide evidence of use of the mark in commerce under Trademark Act Sections 1(a) and 45, 15 U.S.C. §§ 1051(a) and 1127, because the specimen Applicant submitted did not show the mark used with the goods identified in Classes 9 and 10.

The appeal has been briefed and is ready for decision. We find that Applicant waived its arguments with respect to Class 9 because the arguments in its brief were addressed to different goods than those recited in the Application. We further find that Applicant's specimen does not show use of the mark with the goods identified in Class 10. Therefore, we affirm the refusal to register as to both classes.

I. Background

The application sought to register DAISY for the following goods:

> Class 5: Disposable intradermal injectors sold pre-filled with medication, namely vaccines.
>
> Class 9: Disposable intradermal injectors for laboratory use; disposable pre-filled intradermal injectors for laboratory use.
>
> Class 10: Disposable intradermal injectors for medical purposes; disposable intradermal injectors for vaccines; disposable intradermal injectors for pharmaceuticals;

[1] Application Serial No. 98354562 was filed on January 12, 2024 pursuant to Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on an allegation of use anywhere and in commerce at least as early as December 11, 2023.

Citations to the prosecution file are to entries in the USPTO's Trademark Status & Document Retrieval ("TSDR") system in .pdf format. Citations to the appeal record are to TTABVUE, the Board's online docketing system.

medical devices, intradermal injection devices for administering drugs, vaccines, and therapeutic agents.

With its application Applicant submitted the following specimen, described as "photographs of product:"

[2]

The Examining Attorney issued a Nonfinal Office Action that refused registration in all three classes because "applicant has submitted the same two specimen images for each of the three classes included in the application and it is unclear from the specimen images which particular goods the specimens are intended to depict. Thus, the submitted specimens cannot be accepted because it is unclear which particular

[2] January 12, 2024 Application, TSDR 4, 8-13. It is undisputed that the Application included the identical set of two images three times, once for each class. *See* 9 TTABVUE 3.

goods the specimens depict."[3] The Nonfinal Office Action also required Applicant to amend the identification of goods in Classes 9 and 10, which Applicant did, amending the identifications from:

> Class 9: Disposable intradermal injectors for laboratory use; disposable pre-filled intradermal injectors for laboratory use.
>
> Class 10: Disposable intradermal injectors for medical purposes; disposable intradermal injectors for vaccines; disposable intradermal injectors for pharmaceuticals; medical devices, intradermal injection devices for administering drugs, vaccines, and therapeutic agents.

to

> Class 9: Disposable intradermal injectors for laboratory use.
>
> Class 10: Disposable intradermal injectors for medical purposes sold empty; disposable intradermal injectors for vaccines sold empty; disposable intradermal injectors for pharmaceuticals sold empty; medical devices in the nature of intradermal injection devices for administering drugs, vaccines, and therapeutic agents sold empty.[4]

Applicant also submitted the substitute specimen shown below:[5]

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[3] August 27, 2024 Nonfinal Office Action, TSDR 5. *See* TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 904.01 (Nov. 2025) ("One specimen for each class is required in an application for registration under §1(a) of the Trademark Act … If a single specimen supports multiple classes, the applicant should indicate which classes are supported by the specimen. The examining attorney need not require multiple copies of the specimen…."). The Nonfinal Office Action advised Applicant of response options including submitting a verified substitute specimen or amending the filing basis to Trademark Act Section 1(b), intent to use, as no specimen is required before publication. It also included a refusal in Classes 9 and 10 under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), which was later withdrawn.

[4] September 24, 2024 Response to Office Action, TSDR 2-3.

[5] *Id.* at 14-19. When Applicant submitted the document described as a substitute specimen, it included a statement that the substitute specimen was in use in commerce at least as early as the filing date of the application, but did not submit a supporting affidavit or declaration.

Id. The Examining Attorney considered the substitute specimen without requiring a verified statement as to the date of use, apparently because the specimen was a duplicate of the one already of record. *See* November 22, 2024 Final Office Action, TSDR 2, 6; Trademark Rule 2.59(a), 37 C.F.R. § 2.59(a) (verified statement that substitute specimen was in use in commerce at least as early as application filing date "is not required if the specimen is a duplicate or facsimile of a specimen already of record in the application"). Comparing Applicant's substitute specimen to the specimen included with the application, the images appear to be identical, down to the white flecks appearing on the wooden surface and the light reflections seen in each image. We find the original and substitute specimen to be the same, and references in our analysis are to Applicant's later-submitted substitute specimen.

The substitute specimen was described as "[a] photograph of (1) the actual goods bearing the mark; in the form of (2) actual packaging for the goods bearing the mark as required under 37 C.F.R. §2.56(b)(1),(c); TMEP §904.03(a)-(m)."[6]

The Examining Attorney finally refused registration in Classes 9 and 10 because "applicant has again submitted the same substitute specimens for all three classes of goods, which appears to show a pre-filled injection device ('Confirm applicator is full.'). Thus, applicant's specimen appears to show applicant's Class 5 goods,

[6] September 24, 2024 Response to Office Action, TSDR 2-4.

identified as 'Disposable intradermal injectors sold pre-filled with medication, namely vaccines' but does not show the goods identified in Classes 9 or 10."[7]

II. Analysis

The sole issue in this appeal is whether the substitute specimen, consisting of photographs of packaging containing Applicant's goods, shows use of the mark on the goods identified in Classes 9 and 10. We address each class in turn.

A. Class 9

The argument in Applicant's brief relating to Class 9 (which also touches upon Class 10, emphasis added to show portion relating to Class 9) reads as follows:

> A. The Submitted Specimens Do Show Use in Commerce for Classes 9 and 10
>
> Under the Trademark Act §1(a), a specimen must show actual use of the mark in commerce for the goods identified in the application. **Applicant's goods in:**
>
> **Class 9 include: "Medical software for use in tracking administration of vaccines, ensuring proper dosage delivery, and managing patient vaccination records."**
>
> Class 10 include: "Medical apparatus for use in vaccine delivery, namely, syringes and injectors sold empty for use with vaccines."

[7] November 22, 2024 Final Office Action, TSDR 6 (emphasis omitted). This Final Office Action also made final the refusal to register in Classes 9 and 10 based on likelihood of confusion with two prior registrations. *See id.* at 2.

After filing this appeal, Applicant sought, and obtained, remand and reconsideration based on a consent agreement with the owner of the prior registrations. *See* 5 TTABVUE. The Examining Attorney determined that the consent agreement obviated the Section 2(d) refusal, but because Applicant did not submit additional substitute specimens to address the specimen refusal for Classes 9 and 10, that refusal was maintained and continued. *See* 7 TTABVUE.

> The submitted specimens show product packaging, labeling, and/or promotional materials where the applied-for mark is prominently **displayed in connection with medical software interface screenshots that show the mark in association with software used to track vaccine delivery and patient records (Class 09)**; and empty medical injector packaging and user instructions bearing the mark, with no indication of pre-filled medication, distinguishing them from the Class 5 pre-filled injectors (Class 10).[8]

Because the filing of a notice of appeal has the effect of appealing all refusals or requirements made final by the Examining Attorney, *see In re Citibank, N.A.*, No. 73333063, 1985 TTAB LEXIS 133, at *4, Applicant's appeal included Class 9. However, if an applicant does not assert an argument in its appeal brief, the argument may be deemed waived by the Board. *See, e.g., In re Black Card LLC*, No. 90641690, 2023 TTAB LEXIS 478, at *29 (applicant that did not address identification of services issue in its appeal brief waived ability to contest the refusal based on that ground)*; In re Katch, LLC*, No. 86301765, 2019 TTAB LEXIS 154, at *3-4 (applicant who briefed only the refusal under Section 23(c) waived its appeal of refusal under Trademark Act Sections 1, 2, 3 and 45). *See also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1203.02(g) (2025) ("If an applicant, in its appeal brief, does not assert an argument made during prosecution, it may be deemed waived by the Board.").

[8] 9 TTABVUE 3. *See also id.* at 5 (conclusion to Applicant's brief states: "In Class 9, the specimen shows use of the mark in connection with medical software that manages vaccine administration and records, consistent with TMEP guidance on acceptable specimens for software goods."). Applicant did not file a reply brief.

Here, Applicant's argument about a mark purportedly shown on software screenshots has no bearing on the issue before us, namely, whether the specimen shows use of the mark with "disposable intradermal injectors for laboratory use." Applicant's brief does not address the refusal of the specimen submitted to evidence use of the mark on the Class 9 goods identified in the Application. We have reviewed the entire prosecution record, but will not guess as to arguments Applicant could have, but did not, raise in its brief. Those matters are waived. *See In re Rainier Enters., LLC*, No. 87384516, 2019 TTAB LEXIS 385, at *6 ("When an applicant fails to address a requirement or refusal in its appeal brief, we also have discretion to treat the failure as the equivalent of not filing a brief on that issue and dismiss the appeal, or to consider any challenge to that requirement or refusal waived and affirm. Either way, the application would stand abandoned."); *see also In re Princeton Equity Grp. LLC*, No. 97397212, 2025 TTAB LEXIS 242, at *8 (because "[a]pplicant's appeal brief fails to address the evidentiary or legal basis for the Section 2(e)(2) refusal, notwithstanding its statement that it 'repeats and restates the arguments and evidence set forth in' certain prosecution filings … we could deem Applicant to have forfeited any objection to this refusal"). *Cf. SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006) ("Our law is well established that arguments not raised in the opening brief are waived.").

Because Applicant waived its argument on appeal regarding whether the specimen shows use of the mark for "disposable intradermal injectors for laboratory use" in Class 9, this refusal is affirmed. *See In re Harley*, No. 86409857, 2016 TTAB

LEXIS 383, at *6-7 (affirming refusals to register under Trademark Act Section 2(e)(1) and for failure to comply with information requirement under Trademark Rule 2.61(b) where applicant's brief did not address the merits of those refusals but instead addressed only an advisory statement).

B. Class 10

We next consider whether Applicant's substitute specimen shows use of its mark with the goods in Class 10, "disposable intradermal injectors for medical purposes sold empty; disposable intradermal injectors for vaccines sold empty; disposable intradermal injectors for pharmaceuticals sold empty; medical devices in the nature of intradermal injection devices for administering drugs, vaccines, and therapeutic agents sold empty."

Applicant argues that the device shown in the specimen can be sold either prefilled or empty. According to Applicant,

> [the Examining Attorney's] interpretation overlooks the dual nature of Applicant's product and its marketing.
>
> In practice, the injector device depicted in the specimen is sold both pre-filled (Class 005) and empty (Class 010), depending on the end customer's needs—a fact reflected in the product documentation and marketing. The phrase 'Confirm applicator is full' is not an indicator of how the product is sold, but rather an operational instruction meant to ensure proper use, whether the device is pre-filled or filled manually by the practitioner.
>
> Thus, the specimen showing the marked device in instructional and packaging materials does not limit the product to pre-filled use only, and it clearly applies to empty devices as well, which are properly classified under Class 010. The applied-for mark is therefore used in commerce in connection with goods in Class 010, as

> required by 15 U.S.C. §§1051, 1127 and the relevant sections of the TMEP.
>
> This is consistent with the principles in TMEP §1202.01, which recognize that the context and intended use of the product as shown in the specimen must be considered. Given that the mark is shown on a device capable of being used either filled or empty, and the device is in fact sold in both forms, the specimen qualifies as acceptable evidence of use in both classes.[9]

The Examining Attorney contends that Applicant's substitute specimen does not show injectors sold empty but instead shows "packaging for an injection device that appears to contain some type of medication and displaying instructions for the administration of the medication contained therein,"[10] which would only show use of the mark with Applicant's prefilled injectors in Class 5.

An application based on Trademark Act Section 1(a) must include a specimen showing the applied-for mark as actually used in commerce for each class of goods identified in the application. 15 U.S.C. §§ 1051(a)(1), 1127; 37 C.F.R. §§ 2.34(a)(1)(iv), 2.56(a). The specimen "must show use of the mark on the goods, on containers or packaging for the goods, on labels or tags affixed to the goods, or on a display associated with the goods." 37 C.F.R. § 2.56(b)(1).

> An important function of specimens in a trademark application is, manifestly, to enable the PTO to verify the statements made in the application regarding trademark use. In this regard, the manner in which an applicant has employed the asserted mark, as evidenced by the specimens of record, must be carefully considered in determining whether the asserted mark has been used as

[9] 9 TTABVUE 4.

[10] 12 TTABVUE 4. It is unclear from the specimen whether the device shown actually contains any type of medication.

> a trademark with respect to the goods named in the application.

In re Bose Corp., 546 F.2d 893, 897 (CCPA 1976) (citations omitted) (affirming refusal because specimen showed use of mark on applicant's loudspeaker-testing computer, not on the identified "loudspeaker systems").

Where, as Applicant asserts here, a product has more than one use, a single specimen may support registration of a mark in multiple classes. *See Jean Patou, Inc. v. Theon, Inc.*, 9 F.3d 971, 975-76 (Fed. Cir. 1993); *accord In re Int'l Salt Co.*, No. 72286531, 1970 TTAB LEXIS 162, at *1-2 (owner may "register the trademark for a particular product in a plurality of classes covering the different purposes or uses of the article that happen to fall within two or more classification classes instead of the usual single class"). *See also* TMEP § 1401.05(c) ("A product that has a plurality of uses or aspects is ordinarily classified in a single class.… However, if it can be shown that a product has a plurality of uses or aspects so that two or more classes apply, multiple classification may be permissible."). "The only possible restriction on this right is that the specimens filed in any particular class should reflect use of the mark in connection with the product for the use set forth in the application or, conversely, the specimens should not be of a nature or contain language which would, on their face, restrict the product to but a single purpose or use." *Int'l Salt Co.*, 1970 TTAB LEXIS 162, at *2.

In assessing the specimen, "consideration must be given not only to the information provided by the specimen itself, but also to any explanations offered by Applicant clarifying the nature, content, or context of use of the specimen that are

consistent with what the specimen itself shows." *In re Pitney Bowes, Inc.*, No. 86502157, 2018 TTAB LEXIS 2, at *8. *Cf. Int'l Salt Co.*, 1970 TTAB LEXIS 162, at *2 (if "the specimens are of a general utility, and there is nothing on their surface or in the record to suggest that they cannot possibly be used in connection with a product when employed for the purpose enumerated, the examiner is obligated to accept the statement under oath in the application that the specimens are so being used").

The problem here is that the only evidence in the record, the specimen itself, indicates that the product is not sold empty. It is reasonable to infer from the matter shown in the specimen, particularly the directions on the package, that the product contained therein is prefilled. As seen below, the package includes "Directions" consisting of 5 steps. The first step is to "Confirm applicator is full," presumably referring to the "Fill Check" line indicated on the front of the package. The Directions then proceed with "Open pack and remove applicator, Apply applicator to forearm, Push down on cap," and, lastly, "Wait 10 minutes, then remove applicator."

The Directions say nothing about filling the applicator and provide no instruction as to how this would be done. The specimen therefore does not support an inference that the product is sold empty and is to be filled prior to use.

Applicant's arguments, made for the first time in its brief, fail to persuade us otherwise. Applicant did not make of record any "product documentation and marketing" materials supporting the statement in its brief that the injector shown in the specimen can be sold both pre-filled and empty. Without such evidence, we are left only with the unverified statements of in-house counsel, which are not evidence. *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1371 (Fed. Cir. 2018) (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005) ("Attorney argument is no substitute for evidence.")). Moreover, counsel did not merely provide

an explanation that "corroborates the content of the original specimen." *Pitney Bowes*, 2018 TTAB LEXIS 2, at *5. Instead, the statement that "'confirm applicator is full' is not an indicator of how the product is sold, but rather an operational instruction meant to ensure proper use, whether the device is pre-filled or filled manually by the practitioner"[11] contradicts the plain import of the Directions on the package, which set forth each step for use of the injector but do not say that users must first fill the injector. *See* TMEP § 1401.05(c) (specimen for a product classified in multiple classes "should reflect acceptable use of the mark **for each of the specified classes** and **the record must not indicate that the product has only one use or aspect**") (emphasis added). We find that the Directions on the package for Applicant's product presume that the injector is full and therefore ready for use. The statements by in-house counsel in Applicant's brief, which are inconsistent with the text seen on the specimen, are of no avail.

In short, there is no evidence that the specimen shows use of the mark with any of the Class 10 goods, all of which are "sold empty." *See Bose*, 546 F.2d at 897 (affirming refusal to register where specimens of record failed to support, and indeed contradicted, use of mark for the identified goods); *see also In re Gulf Coast Nutritionals, Inc.*, No. 77980412, 2013 TTAB LEXIS 53, at *4 (affirming refusal where applicant's explanation of the goods was not supported by statements on the specimen).

[11] 9 TTABVUE 4.

Decision:

The refusal to register Applicant's mark in Classes 9 and 10 is affirmed. The Application will proceed solely as to the goods in Class 5.[12]

[12] Applicant's "alternative" request in the conclusion of its brief for "suspension of this appeal and reconsideration of the refusal based on this additional clarification and the specimens of record" 9 TTABVUE 5, is denied. Once an application has been considered and decided on appeal it will not be reopened except for the entry of a disclaimer or upon order of the Director. Trademark Rule 2.142(g), 37 C.F.R. § 2.142(g). *See In re Adlon Brand GmbH & Co. KG*, No. 85831682, 2016 TTAB LEXIS 526, at *30-31 ("Applicant cannot, in effect, make a request for remand conditional on the outcome of the Board's decision in the appeal, i.e., to request, in the event that the Board affirms the refusal, that the application be remanded so that Applicant may submit additional evidence."); *see also* TBMP §§ 1217-1218; TMEP § 1501.06. In addition, Applicant's request to divide the application, 9 TTABVUE 5, which is buried in the brief, is moot.