

IN THE
Supreme Court of the United States

REBECCA CURTIN,

Petitioner,

v.

UNITED TRADEMARK HOLDINGS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

**BRIEF OF *AMICUS CURIAE* ORGANIZATION
FOR TRANSFORMATIVE WORKS (OTW)
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICUS CURIAE*¹

Amicus, Organization for Transformative Works (OTW), is a U.S. 501(c)(3) nonprofit organization founded by fans, whose mission is to serve the interests of fandom by both providing access to and preserving the history of noncommercial fanworks and fan culture in its myriad forms. The OTW believes that consumer standing to oppose registrations under the Lanham Act is important to preserving the creativity that the public domain encourages. The OTW's Archive of Our Own hosts over sixteen million fanworks—works based on existing media or significant figures. The OTW also supports a wiki (a user-edited encyclopedia) named “Fanlore” that is dedicated to fan-related topics, a peer-reviewed open-access journal named Transformative Works and Cultures, and a legal advocacy project to help protect and defend fan works from legal challenge and commercial exploitation. The OTW routinely submits amicus briefs and policy comments to courts, legislatures, and regulators regarding copyright, trademark, and right-of-publicity issues.

The OTW brings a distinctive perspective: it represents a broad community of creators who rework existing material into other forms of commentary that is non-commercial, distributed online, and dependent

1. In accordance with Supreme Court Rule 37.6 undersigned counsel certifies that no counsel for any party authored, in whole or in part, any aspect of this brief. Further, no person or entity, other than *amicus curiae*, made a monetary contribution to the preparation or submission of this brief. All parties were given timely notice regarding the intent to file this brief.

on a legal regime that safely accommodates creative experimentation and expression. The OTW has significant experience with the challenges creators and hosting platforms face when legal uncertainty or liability risk constrains their activity. *Amicus* urges this Court to grant the Petition for Writ of Certiorari to address the issues presented.

SUMMARY OF THE ARGUMENT

*Poetry can only be made out of other poems;
novels out of other novels.*

-- Northrop Frye²

Certiorari is necessary in this case to honor the truth of the above epigraph: that the public – as consumers, artists and creators – have a deep interest in what their government says may be owned or controlled regarding items in the public domain. This Court should grant certiorari to determine the minimal scope of the rights of the *public* to access and use those items in the *public domain*. The specific issue before the Court is whether the Trademark (Lanham) Act of 1946 allows the federal government and courts, without direct authority from Congress, to exclude the public from objecting to the registration of a trademark regarding “Rapunzel,” a character that is indisputably in the public domain.

Imagine a single company being able to monopolize the market for dolls or figurines identified as the “Virgin Mary” or “Santa Claus” or “Cinderella” or “Uncle Sam,” and the public being unable to object. That is what is at

2. ANATOMY OF CRITICISM: FOUR ESSAYS 97 (1957)

stake here. Many of our most iconic symbols, including those mentioned above and many others even when presented in forms of dolls and toys, are themselves poems made of other poems. They comprise the fabric of our collective culture and belong to everyone and no one. This is the essence of the public domain.³

This Court has made clear that commercial entities should not be able to use trademark law to monopolize material within the public domain. *See Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 34 (2003); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237 (1964); *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, 115-17 (1938). However, this Court has never addressed whether the public has standing to oppose an application to register a public domain term as the trademark of an item embodying public domain material under the framework used below as outlined in *Lexmark International Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

Addressing this is necessary because the text, legislative history, and treatment of the Lanham Act’s “zone of interest” provision are all unclear as to who falls within the “commercial” zone of interest for trademark registration purposes. While this Court in *Lexmark* interpreted the coverage of the Lanham Act in the context

3. Although the term “public domain” is often associated with copyright and patent law, this Court’s first usage of the term in the intellectual property context was in a trademark case. *See generally Singer Manufacturing Co. v. June Manufacturing Co.*, 163 U.S. 169 (1896); Tyler T. Ochoa, *Origins and Meanings of the Public Domain*, 28 U. DAYTON L. REV. 215, 243 (2002).

of behavior alleged to violate a private party's right, it did not address the separate context of registration. Registration of Trademark is a distinct process from infringement and false advertising claims based on a registered trademark. The zone of interest in opposing the registration of a trademark regarding an item in the public domain should also be distinct from post-registration claim analysis. In accepting the lower court's analysis, wide swaths of now common items could be privatized in pieces thereby threatening the right of the public to use and create embodiments of characters like the Virgin Mary, Santa Claus, Cinderella, Rapunzel, and others in the public domain.⁴

Only guidance from this Court can answer these important questions and prevent confusion in the lower courts and the public. For this reason, certiorari is necessary and ought to be granted in this case.

REASONS FOR GRANTING THE PETITION

I. This Court Should Clarify the Role of the Public in Trademark Registration.

Certiorari is necessary, in the instant case, as the question of who falls within the Lanham Act's scope — also

4. See, e.g., ARCHIVE OF OUR OWN, <https://archiveofourown.org/works/search>: (search character term "Santa Claus") (retrieve roughly 5,000 works with Santa Claus as a character); *Cinderella*, (search character term "Cinderella") (retrieve roughly 3,000 works with Cinderella as a character); *Rapunzel*, (search character term under "Rapunzel") (retrieve roughly put in order of Frank 6,500 works with Rapunzel as a character); *Virgin Mary*, (search character term under "Mary Mother of Jesus") (retrieve roughly 243 works with Virign Mary as a character).

called its “zone of interest”⁵ — for purposes of opposing a registration for material in the public domain is not yet answered. While it is uncontested that the public has a passionate interest in items in the public domain, the Court has not determined whether the interest the public has in truthfully identifying items in the public domain⁶ falls within a zone of interest of the Lanham Act. In this case, the “commercial” limitation on the zone of interest is in question, and adopting the lower court’s interpretation would undermine the public domain. The public has an interest in receiving truthful information about items like the dolls or toys at issue here. This is particularly evident for items of cultural importance – such as Cinderella, Santa Claus, the Virgin Mary, Uncle Sam, or Rapunzel – where

5. While *Lexmark* is authoritative in its requirement that litigants must fall within the Lanham Act’s “zone of interest” in order to sue, *Lexmark*, 572 U.S. at 127-29, *Lexmark* is not the first to establish this requirement. The “zone of interest” requirement is a “prudential” standing requirement, separate from Article III jurisprudence, that first originated over fifty years ago in *Ass’n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

6. The etymology of the word “domain” originates from early French and Latin roots. See *Domain*, MERRIAM WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/domain> (last visited Nov. 5, 2025). The French word from which “domain” comes, “demeine,” translates to “the land one owns”; meanwhile, the Latin “dominium” or “dominus” translates to “rule,” “ownership,” “master,” or “owner.” See *id.* These roots have developed into the English word “domain,” which now includes multiple definitions, such as a level of control or a high category within a group. See *id.* The use of the term “public domain” as known today was virtually nonexistent up until the end of the nineteenth century, when the Supreme Court used the phrase “public domain” for the first time.

success in applying commercial interest is ill-fitting. Additionally, cultural symbols are entering the public domain at a greater rate than ever before, necessitating this Court's review.⁷

A. This Court has not addressed the role of the public domain in trademark registration.

The existence of a public domain is a general principle of intellectual property law. The U.S. Constitution provides that Congress may “secur[e] for limited [t]imes to [a]uthors and [i]nventors the exclusive [r]ight to their respective [w]ritings and [d]iscoveries.” U.S. CONST. art. I, § 8, cl. 8. As early as 1790, Congress established the first limits on exclusive ownership rights, granting creators a fourteen-year term. *See* Patent Act, ch. 7, § 1, 1 Stat. 109, 110 (1790); Copyright Act, ch. 15, § 1, 1 Stat. 124, 124 (1790). Upon expiration of exclusive rights, items enter the public domain and become available for anyone to reproduce or adapt. *See* § 2, 1 Stat. at 110-11; *see also* Elizabeth L. Rosenblatt, *The Adventure of the Shrinking Public Domain*, 86 U. CO. L. REV. 561, 570-74 (2015) (defining and discussing copyright and trademark public domains and their value to the public). The inclusion of public domain limitations in the Constitution indicates that the Framers were aware of the value of the public domain, as well as the public's passion for accessing items within the public domain.

7. *See* Jennifer Jenkins, Public Domain Day 2025, CTR. FOR THE STUDY OF THE PUB. DOMAIN (2025), <https://web.law.duke.edu/cspd/publicdomainday/2025/> (last visited Nov. 5, 2025).

Trademarks, which Congress has authority to regulate through the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, came about later than copyright and patent protections, making the public perhaps even more directly within their zone of interest. Early protection of trademarks by courts emphasized the “universal recognition” of trademarks as “emblems of commerce.” See *The Trade-Mark Cases*, 100 U.S. 82, 87 (1879). Trademarks serve two important roles: First allow corporations and traders to create memorable insignias for their work.⁸ Second, the Court has acknowledged that trademarks directly benefit the public to “reduce the customer’s cost of shopping and making purchasing decisions.” See *Dastar*, 539 U.S. at 34 (quoting *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163-64 (1995)). For these reasons, now trademark holders may maintain exclusive rights over their mark *forever* as long as they continue renewing their registration, unless and until those rights are abandoned. See 15 U.S.C. § 1058-59. (requiring renewal at ten-year intervals); § 1127 (conditioning trademark ownership on use and defining abandonment).

This Court has also recognized and protected a countervailing interest: the right of others to copy works or creations in the public domain without deceiving or

8. See Peter J. Karol, *Albrecht Dürer’s Enforcement Actions: A Trademark Origin Story*, 25 VAN. J. ENTERT. & TECH. L. 421 (2023) (explaining that Dürer was one of the first pioneers of the trademark). Dürer’s cases of trademark infringement were one of the first of written record in “enjoining the unauthorized use of a famous mark in commerce to protect consumers from mislabeled good and to affirm source-associative power of that mark. *Id.* at 424.

misleading the public. *See Dastar Corp.*, 539 U.S. at 34. This Court emphasized in *Compco Corp.* 376 U.S. at 237-38 that people are free to reproduce unpatented designs — which operate similarly to trademarks — and that state laws cannot contravene this policy. *Dastar* was consistent with longstanding precedent holding that the right of the public to create copies of articles unprotected by patent and copyright laws outweighs concerns producers and manufacturers may hold regarding unfair competition. *See Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 230-31 (1964).

Significantly, this Court has long held that the right to make and use an article also includes the right to call the article by its name. This is as true in trademarks “[s]haring in the goodwill of an article unprotected by patent is the exercise of a right possessed by all, and in the free exercise of which the consuming public is deeply interested.” *Kellogg Co., v. National Biscuit Co.*, 305 U.S. 111, 121-22 (1938). The Court emphasized that goodwill cannot be separated from a product’s identifying features: “the name and form are integral parts of the goodwill of the article. To share fully in the goodwill, it must use the name...” *Id.* A Rapunzel doll is just that: a Rapunzel doll. But the application here, and the ruling below, would allow a single private entity the presumptive exclusivity of a trademark registration as aided by the presumptive validity of a registered trademark, which any challenger would have to overcome in future litigation. *See U.S. Pat. & T. Off. v. Booking.com*, 591 U.S. 549, 552 (Jun. 30, 2020). After five years, that right could become incontestable, meaning that it could no longer be challenged on grounds of mere descriptiveness and possibly not even on the ground that the putative mark failed to function as a trademark but rather identified the

nature of the doll. *See Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 191 (1985). While dollmakers may not be aware of the application or presently in a position to oppose the registration, the public has its own interest in the free functioning of the market, and should be able to oppose the registration in order to preserve the overall possibility of competition.

Lexmark makes clear that to challenge false advertising under the Lanham Act litigants must fall within the relevant zone of interests. *Lexmark*, 572 U.S. at 127-29. Building from this, the Federal Circuit has explained that this same zone of interest requirement exists for litigants challenging an application for trademark registration before the Patent and Trademark Office. *See Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 1304-05 (Fed. Cir. 2020). But the Federal Circuit's mechanistic application of *Lexmark* to the registration context unduly constrained the Lanham Act's zone of interests. *Lexmark* evaluated a claim that one private party violated another party's statutory rights to be free from false advertising. Registration assesses a very different issue: whether the government should grant an exclusive trademark right as against the world. The relevant interests are different, and the application of the concept of the zone of interests should likewise differ.

B. The Federal Circuit's interpretation of the zone of interests for registration is unduly constrained.

In determining whose interest to consider in assessing registration, without including views of the public, the U.S. Trademark Office has no way of knowing how to

account for the public interest. This Court should provide much-needed guidance to the agency. Applying the lower court’s interpretation of the Lanham Act’s ambiguous text will allow for the trademarking of a broad swath of items in the public domain. Even resorting to canons of construction does not resolve the ambiguity at the heart of this matter, thus requiring the Court’s intervention. *See generally Yates v. United States*, 574 U.S. 528 (2015).

i. The Lanham Act does not specify the zone of interest for opposing registration.

Petitioner argued below that members of the public protecting items in the public domain fall within the “commercial” zone of interest. *See Curtin v. United Trademark Holdings, Inc. (Curtin II)*, 137 F.4th 1359, 1368 (Fed. Cir. 2025). As the Trademark Trial and Appeal Board correctly noted, the Lanham Act anticipates several zones of interest explicitly in its text, including “[t]he intent of this chapter is to regulate commerce within the control of Congress . . . [and] to protect persons engaged in such commerce against unfair competition.” *See* 15 U.S.C. § 1127; App.8a. However, this statement of purpose does not explicitly address the purpose of registration, or of the examination process directed by the statute.⁹ Instead, this Court has explained registration is concerned with improving the information environment for consumers and producers. *See generally Jack Daniel’s Props. v. VIP Prods. LLC*, 599 U.S. 140 (2023).

9. The purpose statement does indicate that registered marks are to be protected against state interference. But it does not delineate the nature and function of the registration inquiry committed to the PTO, even though the PTO is required to engage in substantive examination of applications to register trademarks.

Beginning with the plain or ordinary meaning canon, “unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.” *Perrin v. United States*, 444 U.S. 37, 42 (1979). Of significance here are the words “engaged” and “commerce.” To “engage” means “[t]o employ or involve oneself; to take part in; to embark on.” *Engage*, BLACK’S LAW DICTIONARY (12th ed. 2024). “Commerce” means “[t]he exchange of goods and services, [especially] on a large scale involving transportation between cities, states, and countries.” *Commerce*, BLACK’S LAW DICTIONARY (12th ed. 2024).

Both producers and consumers are “engaged” in commerce — they engage with each other. Under these definitions, § 1127 can be rationally construed as defending any person taking part in the exchange of goods and services, which, as *Lexmark* recognizes, encompasses more than direct substitutionary competition. *See, e.g., Unfair Competition*, BLACK’S LAW DICTIONARY (12th ed. 2024). Because “unfair competition” includes business misbehavior that harms the free functioning of the marketplace, it is a flexible concept that can and should be adapted for the special context of registration. *Id.*

The whole text canon requires courts to look beyond a confusing or ambiguous phrase “to the provisions of the whole law, and to its object and policy.” *See United States v. Heirs of Boisdoré*, 49 U.S. 113, 122 (1850). A context-specific analysis of the zone of interests should therefore take account of the special features of registration. It is up to this Court to provide much-needed guidance to the Trademark Office.

Proposed by Representative Fritz Lanham, the Lanham Act represented nearly a half-century of failed attempts by Congress to craft coherent protections for trademark usage. *See* Keith M. Stolte, *A Response to Jerome Gilson’s Call for an Overhaul of the Lanham Act*, 94 TRADEMARK REP. 1335, 1341-42 (2004). The key drafter of what became the Act noted that his predecessors “had a talent for obscurity.” *See* Edward S. Rogers, *The Expensive Futility of the United States Trade-Mark Statute*, 12 MICH. L. REV. 660, 665 (1914). *See generally* Jessica D. Litman, *Edward S. Rogers, the Lanham Act, and the Common Law*, in RESEARCH HANDBOOK ON THE HISTORY OF TRADEMARK LAW (ed. Robert G. Bone & Lionel Bentley 2024). Countless versions of the Act were introduced, debated, and amended by the trademark subcommittee, with some failing to define even what a trademark was or to identify who could own a trademark. *See* E.S. Rogers, “Some Suggestions Concerning a Trade-Mark Registration Statute”, *Report of the 43rd Annual Meetings of the American Bar Association* (Baltimore, 1920) 412, *reprinted in* (1921) 16 Bulletin of the U.S. Trademark Association 45.

At no point did the drafters clarify the standing required to sue for trademark infringement. *See* Kelly Knoll, *Confusion Likely: Standing Requirements for Legal Representatives Under the Lanham Act*, 115 COLUMBIA L. REV. 983, 990 (2015). Nor did they do so for standing to oppose a registration. Beginning in 1958, the Trademark Trial Appeals Board (TTAB)—authorized under the United States Patent and Trademark Office—was allowed to determine “whether an applicant or registrant has the right to register a mark or to retain a registration under challenge.” *About TTAB*, U.S. PAT.

& TRADEMARK OFF., <https://www.uspto.gov/trademarks/trademark-trial-and-appeal-board/about-ttab> (last visited Nov. 5, 2025).

The Lanham Act broadly allows for any symbol that could function as a trademark to be registered as a trademark. Rebecca Tushnet, *Registering Disagreement: Registration in Modern American Trademark Law*, 130 HARV. L. REV. 867, 878 (2013). Registration of a mark creates a legal right of ownership, which is defined by a specification that identifies the claimed mark and the claimed goods and/or services to which the mark is applied, and which is recorded in a publicly accessible registry. *See id.* at 875. A key feature of the registration inquiry is that it is, of necessity, abstracted from actual marketplace decisions. The applied-for mark is analyzed in the abstract, for example, as typed characters that could appear in any font, even if the applicant actually uses only one specific font. The applied-for goods and services are likewise analyzed in the abstract, meaning that two businesses that operate in completely different submarkets might both be engaged in, e.g., “financial services,” and thus might have rights that conflict at the PTO but not in the real world. Or two trademarks might not seem confusing at the PTO, but, in practice, overlap in market contexts and presentation. *See B&B Hardware, Inc. v. Hargis Indus.*, 575 U.S. 138, 161 (2015) (Ginsburg, J., concurring). These abstractions make inquiries about whether registration should be refused because the proposed mark should not be monopolized by a single producer meaningfully different from confusion inquiries, which are conflicts between two specific users assessed in the real world.

Just as the wide-ranging registrability inquiry differs from the confusion inquiry in actual infringement litigation, the analysis of standing should differ. The PTO lacks the resources of private litigants to investigate potential invalidity; it has to rely on relatively limited database searches. Public input is far more valuable and more likely to surface important information than in a case with a specific defendant that can, if justified, challenge the validity of a mark. The many hypotheticals of registration mean that it is not always evident whose interests might be harmed by an unwarranted registration. Potential competitors with legitimate interests in using the putative mark to identify their own goods might not even exist yet. In the registration context, then, there is a need for wide-ranging public input. Although consumers and other members of the public lack standing to *sue* for false advertising under the Lanham Act, they have very different interests when they oppose a potential registration.

C. One of the Lanham Act’s purposes is to protect the public from deceptive practices.

One of the enumerated purposes of the Lanham Act is to prevent “the deceptive and misleading use of marks” in commerce. 15 U.S.C. §1127. But deception is not just a matter of passing off — it can come from disruptive and bullying claims of monopoly rights over terms that should be free for all to use.

Members of the public who wish to make free use of public domain works are not accidental beneficiaries of the copyright system; they are bearers of rights to do so. *See Golan v. Gonzales*, 501 F.3d 1179, 1193 (2007). The Court has previously voiced concerns that without construing

the Lanham Act to restrict claimants' claims over the public domain, a "mutant copyright law" might emerge that severely inhibits the public's ability to engage with and create using the public domain. *See Dastar*, 539 U.S. at 34. Statutory construction should avoid extending "trademark and related protections into areas traditionally occupied by patent or copyright". *Id.*

Since consumers are beneficiaries of items and goods in the public domain, and courts do not want to grant trademark monopolies over such items, the public is an appropriate part of the commercial zone of interest needed to establish standing in Federal trademark registrations. Large corporations with commercial interest clearly in the "zone of interest" are not likely to be concerned if a smaller corporation invests in a trademark in a public domain. This is because those corporations will have no commercial consequences in allowing the smaller company to register, even though that same trademark may greatly harm the public. In identifying uses that would interfere with the public's right to freely use characters and works that are in the public domain, the public may be in the best position to vindicate the enumerated protections of the Lanham Act. However, the lower federal courts have been reluctant to grant standing to members of the public even in situations in which the public is actively being deceived.

Consumers with sufficient commercial interests should be permitted to have standing, as they are the most appropriate party when it comes to the public domain. No corporation is the appropriate party when it comes to deciding the deceptiveness of trademarks on items in the public domain, as they may actively use trademarks to limit the public's use of such items. The opportunity to oppose the grant of trademark registration ultimately

leaves the public to suffer the harms of reduced choice that only they may experience.

E. Economic limitations and trademark bullies will drive out small businesses that participate in commerce and cater to the public.

When only market competitors are permitted to challenge an application for trademark, the ability of the public to access items within the public domain is constrained. As prior cases from this Court suggest, items within the public domain should be accessible to all. *See, e.g., Compro Corp.*, 376 U.S. at 237. Existing market players are unlikely to oppose the registration of putative marks that do not pose an immediate threat. This is a classic collective action problem: opposing an application on a ground that would benefit all competitors in the market is unattractive because each competitor bears the full cost of its opposition but receives only a fractional benefit. Competitors will therefore rationally under-oppose applications that should not be granted, failing to submit the necessary evidence and argument. A representative of the public, by contrast, can advance the public’s interests as a whole.

This economic limitation in challenging trademark applications will result in a limitation of the public’s ability to access these materials on the market. The problem is worsened because trademark owners can and do threaten users of variants of their putative marks, including many small businesses. *See* Jessica Shechtman, Note, *No Bullying Allowed Here: Adopting a Misuse Doctrine to Defeat Trademark Bullies*, 45 *CARDOZO L. REV.* 685, 687-88 (2023). Continuing with the “Virgin Mary” example, trademark bullies may use their trademark on the central

icon “Virgin Mary” to prevent small doll or toy makers to market their products as a depiction of the Virgin Mary for the public to enjoy. This could then occur for other characters, for example Uncle Sam or Santa Claus, as trademark bullies will continue to go beyond the perview of the trademark. In doing so, the public is further constrained in their ability to access items that use terms within the public domain. Accordingly, intervention by this Court is necessary to resolve the Lanham Act’s ambiguous text and prevent the harm to the public domain that the lower court’s decision will cause.

CONCLUSION

For the reasons stated above, *amicus curiae* respectfully submit this brief in support of the Petition for Writ of Certiorari to the United States Supreme Court filed by Petitioner Rebecca Curtin.

Dated: November 10, 2025

Respectfully submitted,

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**APPENDIX A — OPINION OF THE UNITED
STATES TRADEMARK TRIAL AND APPEAL
BOARD, DATED MAY 4, 2023**

OPINION, U.S. TRADEMARK TRIAL
AND APPEAL BOARD
(MAY 4, 2023)

This Opinion is a

Precedent of the TTAB

Hearing: November 15, 2022
Mailed: May 4, 2023

UNITED STATES PATENT AND
TRADEMARK OFFICE

REBECCA CURTIN,

v.

UNITED TRADEMARK HOLDINGS, INC.,

Opposition No. 91241083

Before: ADLIN, LYNCH and DUNN,
Administrative Trademark Judges.

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Opinion by Adlin, Administrative Trademark Judge:

The Board, *sua sponte*, bifurcated this case into “two separate trial phases.” 49 TTABVUE 6-7.¹ The first trial phase concerned, and this decision addresses, only “Opposer’s entitlement to a statutory cause of action.” *Id.*

More specifically, we address a single, threshold question: is Opposer Rebecca Curtin, as a purchaser of goods bearing the challenged mark, entitled to oppose the mark’s registration under Section 13 of the Trademark Act, 15 U.S.C. § 1063, when she alleges the proposed mark is both invalid and the subject of a fraudulent application? Because our answer to this question is “no,” we dismiss the opposition and do not reach the second (merits) trial phase.

I. The Pleadings

Applicant United Trademark Holdings, Inc. seeks registration of RAPUNZEL, in standard characters, for “dolls; toy figures,” in International Class 28.² In her second amended notice of opposition (“NOO”), Opposer alleges that RAPUNZEL is “synonymous with the name

1. Citations to the record are to TTABVUE, the Board’s online docketing system. Specifically, the number preceding “TTABVUE” corresponds to the docket entry number(s), and any number(s) following “TTABVUE” refer to the page number(s) of the docket entry where the cited materials appear.

2. Application Serial No. 87690863, filed November 20, 2017 under Section 1(a) of the Act, based on first use dates of August 2017.

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of a well-known childhood fairytale character,” and that consumers will recognize it as such. 14 TTABVUE 2, 3 (NOO ¶¶ 2, 6). As grounds for opposition, Opposer alleges that RAPUNZEL not only fails to function as a trademark, but also is generic for and merely descriptive of the identified goods, and that Applicant committed fraud. *Id.* at 3, 5, 8 (NOO ¶¶ 8, 13, 20-24).³ In its answer, Applicant denies the salient allegations in the second amended notice of opposition, and asserts “affirmative defenses” that merely amplify its denials.

At this initial stage of this bifurcated case, we need not address the ultimate merits of Opposer’s claims, except to the extent those claims may bear on Opposer’s entitlement to oppose the involved mark. We thus turn to Opposer’s allegations in the second amended notice of opposition intended to support her claim of entitlement to a statutory cause of action.

Opposer alleges that she “is a professor of law teaching trademark law, and is also a consumer who participates amongst other consumers in the marketplace for dolls and toy figures of fairytale characters, including Rapunzel.” 14 TTABVUE 6 (NOO ¶ 16). She claims that she and “other consumers will be denied access to healthy marketplace competition” for “products that represent”

3. Opposer also alleges that Applicant’s mark is “functional under section 2(e)(5) of the Trademark Act,” even though this claim was previously dismissed. 14 TTABVUE 5 (NOO 15); 12 TTABVUE 10; 13 TTABVUE 10 n.1. Opposer claims that she reasserted this dismissed claim “to preserve the right to appeal at a later date the dismissal.” 13 TTABVUE 10 n.1.

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Rapunzel if private companies are allowed “to trademark the name of a famous fairy tale character in the public domain.” *Id.* Opposer further alleges that she “and other consumers will also likely face an increased cost of goods associated with Rapunzel merchandise, given the lack of competition.” *Id.* According to Opposer, “more than 171 petition signatures” support her claims of damage. *Id.* (NOO ¶ 17). To determine whether Opposer proved these allegations of entitlement, we turn to the evidentiary record.⁴

II. The Record

The record consists of the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file

4. Over four years ago, in the pleading phase of this case, the Board issued a decision denying Applicant’s motion to dismiss, stating that Opposer “sufficiently alleged that she has a direct and personal stake in the outcome of the proceeding and that her belief of damage has a reasonable basis in fact.” 12 TTABVUE 7. The order was based in large part, 12 TTABVUE 9, on *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999), a case that addressed a section of the Trademark Act barring registration of “immoral” or “scandalous” matter. 15 U.S.C. § 1052(a). Six months after the Board’s decision on the motion to dismiss issued, the Supreme Court found the bar on registration of “immoral” or “scandalous” matter unconstitutional. *Iancu v. Brunetti*, 139 S.Ct. 2294, 2019 USPQ2d 232043 (2019). Two years after *Brunetti* was decided, and following updates to the “standard for determining whether a party is eligible to bring a statutory cause of action,” the Board denied Opposer’s motion for summary judgment on her entitlement to bring a statutory cause of action, and bifurcated this case requiring that Opposer’s entitlement be tried first, before the merits. 49 TTABVUE 5-7.

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of Applicant's involved application. In addition, Opposer introduced her own declaration, with exhibits ("Curtin Dec."). 53 TTABVUE. Applicant chose to not introduce any testimony or other evidence. 54 TTABVUE.

III. Entitlement-Related Facts of Record

Since 2015 Opposer has purchased "dolls, doll fashions, toys, books, e-books, and other fairytale themed items" for her daughter, "including Rapunzel dolls and toys." 53 TTABVUE 2-3, 11-59, 84 (Curtin Dec. ¶¶ 3-6 and Exs. 1-35, 37). Opposer often purchases these products online, finding them by typing "'Rapunzel' into the online search box." *Id.* at 3 (Curtin Dec. ¶ 9). Similarly, "[w]hen shopping in person [Opposer looks] for the Rapunzel name or image to locate products," or asks for "Rapunzel" dolls. *Id.* (Curtin Dec. ¶¶ 10, 11).

Opposer "believes" that if Applicant registers RAPUNZEL she "and other consumers will be denied access to healthy marketplace competition for products that represent the well-known fictional character." *Id.* at 8 (Curtin Dec. ¶ 48). She also contends that she and "other consumers" will "also likely face an increased cost of goods associated with Rapunzel merchandise, given the lack of competition." *Id.* (Curtin Dec. ¶ 49).

Furthermore, Opposer "believes" that registration of Applicant's mark "could chill the creation of new dolls and toys by fans of the Rapunzel fairytale, crowding out the substantial social benefit of having diverse interpreters of the fairy tale's legacy," and deny Opposer and "other

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consumers” of “access to classic, already existing, Rapunzel merchandise.” *Id.* at 9 (Curtin Dec. ¶¶ 50, 51). Opposer introduced a petition with 432 signatures from people who share Opposer’s “belief that registration of [Applicant’s proposed mark] would adversely impact a consumer’s ability to find dolls depicting the Rapunzel character, and would also harm marketplace competition for dolls personifying the Rapunzel character.” *Id.* at 9, 61-83 (Curtin Dec. ¶ 52 and Ex. 36).

IV. Is Opposer Entitled to a Statutory Cause of Action?

Entitlement to the statutory cause of action invoked (e.g., opposition or cancellation) is a requirement in every inter partes case. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, at *3 (Fed. Cir. 2020), *cert. denied*, 142 S.Ct. 82 (2021) (citing *Lexmark Inta, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26, 109 USPQ2d 2061 (2014)). A plaintiff may oppose registration of a mark when doing so is within the zone of interests protected by the statute and she has a reasonable belief in damage that would be proximately caused by registration of the mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at * 6-7 (Fed. Cir. 2020), *cert. denied*, 141 S.Ct. 2671 (2021) (holding that the test in *Lexmark* is met by demonstrating a real interest in opposing or cancelling a registration of a mark, which satisfies the zone-of-interests requirement, and a reasonable belief in damage by the registration of a mark, which demonstrates damage proximately caused by registration of the mark). *Meenaxi Enter., Inc. v. Coca-Cola Co.*, 38 F.4th 1067, 2022

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USPQ2d 602, at *3-4 (Fed. Cir. 2022) (“While the zone-of-interest test is not especially demanding . . . it nonetheless imposes a critical requirement.”) (cleaned up).

Here, Opposer has failed to prove she is entitled to the statutory cause of action she invoked — opposing registration of Applicant’s mark. The essential problem is that mere consumers such as Opposer are generally not statutorily entitled to oppose registration under 15 U.S.C. § 1063.

A. The Statute Does Not Entitle Opposer to Oppose Registration Unless Her “Real Interest” Is Commercial

In *Lexmark*, the Supreme Court pointed out that “[w]hether a plaintiff comes within the ‘zone of interests’ is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff’s claim.” *Lexmark*, 109 USPQ2d at 2067. Thus we turn, as *Lexmark* did, to the statute conferring the cause of action in question, in our case 15 U.S.C. § 1063, which entitles “[a]ny person who believes that [she] would be damaged by the registration of a mark” to oppose it.⁵

While that language is quite broad, and might seemingly apply to “all factually injured plaintiffs,” it does

5. *Lexmark* involved a false advertising counterclaim under 15 U.S.C. § 1125(a), pursuant to which “any person who believes that he or she is or is likely to be damaged” is entitled to the cause of action.

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not, and 15 U.S.C. § 1063 “should not get such an expansive reading.” *See Lexmark*, 109 USPQ2d at 2067 (addressing similar language in 15 U.S.C. § 1125(a)(1) and quoting *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 266 (1992)). Rather, “a statutory cause of action extends only to plaintiffs whose interests ‘fall within the zone of interests protected by the law invoked,’” in this case, as in *Lexmark*, the Trademark Act. *Lexmark*, 109 USPQ2d at 2068 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

“Identifying the interests protected by” the Trademark Act “requires no guesswork,” *Lexmark*, 109 USPQ2d at 2068, because the Act itself identifies those interests in Section 45, which states the Act’s purpose:

The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trademarks, trade names, and unfair competition entered into between the United States and foreign nations.

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15 U.S.C. § 1127 (emphasis added). Thus, the Trademark Act regulates commerce and protects plaintiffs with commercial interests.⁶

The Supreme Court’s review of this statement of purpose led it to hold, in *Lexmark*, that “to come within the zone of interests in a suit” under Section 43(a)(1) of the Trademark Act, 15 U.S.C. § 1125(a)(1) — which, similar to Section 13, may be invoked only by a plaintiff “who believes that he or she is or is likely to be damaged” by the challenged act — “a plaintiff must allege an injury to a commercial interest in reputation or sales.” *Lexmark*, 109 USPQ2d at 2069 (emphasis added). The Court specifically stated that while consumers “may well have an injury-in-fact” caused by violations of the Trademark Act, they “cannot invoke the protection” of the statute based solely on injuries suffered as consumers, “a conclusion reached by every Circuit to consider the question.” *Id.* (“Even a business misled by a supplier into purchasing an inferior product is, like consumers generally, not under the Act’s aegis.”).⁷ *See also Meenaxi*, 2022 USPQ2d 602, at *7

6. Unlike the plaintiffs ground for opposition in *Ritchie*, 50 USPQ2d at 1023, Opposer’s grounds for opposition in this case arise out of the Trademark Act’s “intent” to “protect persons engaged in . . . commerce against unfair competition.” 15 U.S.C. § 1127. *See generally In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 217 (CCPA 1978) (a “major reason” for not protecting merely descriptive marks is “to prevent the owner of a [merely descriptive] mark from inhibiting competition”).

7. *Lexmark* cites the following circuit court decisions under 15 U.S.C. § 1125(a) that reveal unanimity among “every Circuit to consider the question”: *Phoenix of Broward, Inc. v. McDonald’s*

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(“Coca-Cola failed to explain how its supposed reputational injury adversely affected its commercial interests other than to speculate that a consumer dissatisfied with Meenaxi’s products might blame Coca-Cola.”); *Corcamore*, 2020 USPQ2d 11277, at * 7 (a plaintiff “can satisfy the real-interest test by demonstrating a commercial interest”); *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014) (finding entitlement to the statutory cause of action of cancellation because “Cubatabaco has a legitimate commercial interest in the COHIBA mark”). *Cf. POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 110 USPQ2d 1877, 1880 (2014) (stating, in the context of a false advertising claim, that “[t]hough in the end consumers also benefit from the Act’s proper enforcement, the cause of action [for unfair competition through misleading advertising or labeling] is for competitors, not consumers”). Over 40 years ago, the Board foreshadowed these holdings, finding it “evident that a petitioner must establish a viable commercial interest in the subject matter of cancellation.” *Miller v. B & H Foods, Inc.*, 209 USPQ 357, 360 (TTAB 1981) (emphasis added).⁸ *Cf. Ahal Al-Sara Grp. for Trading v.*

Corp., 489 F.3d 1156, 1170 (11th Cir. 2007); *Made in the USA Foundation v. Phillips Foods, Inc.*, 365 F. 3d 278, 281 (4th Cir. 2004); *Procter & Gamble Co. v. Amway Corp.*, 242 F. 3d 539, 563-564 (5th Cir. 2001); *Barrus v. Sylvania*, 55 F. 3d 468, 470 (9th Cir. 1995); *Serbin v. Ziebart Int’l Corp.*, 11 F. 3d 1163, 1177 (3rd Cir. 1993); *Colligan v. Activities Club of N Y, Ltd.*, 442 F. 2d 686, 691-692 (2nd Cir. 1971).

8. Throughout her Trial Brief, Opposer analogizes entitlement to a Trademark Act cause of action to “standing” under the Clayton Antitrust Act, arguing that consumers have

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American Flash, Inc., 2023 USPQ2d 79, at *7-9 (TTAB 2023) (“a foreign plaintiff cannot establish entitlement to an abandonment or fraud claim based solely on its foreign rights, without any claim or interest related to U.S. commerce”) (emphasis added).

standing under the Clayton Act, and should therefore also be entitled to Trademark Act causes of action. 55 TTABVue 13, 15, 17. We are not persuaded by the analogy or the argument. The analogy is untenable because even if we found the statutes similar or analogous, which we do not, in *Lexmark* the Supreme Court instructs us to focus on the Trademark Act, including 15 U.S.C. §§ 1063 and 1127, in assessing entitlement to a Trademark Act cause of action. Moreover, Opposer’s argument is at best overstated, and it is not clear that Opposer would be entitled to a Clayton Act cause of action. In fact, in *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 529 (1983), the Supreme Court recognized that Section 4 of the Clayton Act, read literally, is “broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation.” Nonetheless, the Court went on to analyze whether the claimed injury “was of a type that Congress sought to address.” *Id.* at 538; *see also Philanthropist.com, Inc. v. The General Conference Corp. of Seventh-Day Adventists*, 2021 USPQ2d 643, at *16 (TTAB 2021) (considering whether it can be “assumed Congress intended to authorize a party in Petitioner’s circumstances to bring and maintain these cancellation proceedings”) (citing *Corcamore*, 2020 USPQ2d 11277, at *7), *aff’d*, 2022 WL 3147202 (Fed. Cir. 2022). To answer this question, the Supreme Court in *Associated Gen. Contractors* specifically considered, *inter alia*, “the directness or indirectness of the asserted injury,” 459 U.S. at 540, and whether the claimed damages were “highly speculative.” *Id.* at 542. Here, as explained below, even if Opposer’s alleged injury is “direct” (despite being merely anticipated, rather than existing), her specific claims of harm are “highly speculative” and unsupported by evidence.

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There is no question that *Lexmark's* holdings on entitlement to a statutory (Trademark Act) cause of action apply to opposition proceedings such as this one. Indeed, not only was *Lexmark* based on the Trademark Act's statement of purpose, but the Federal Circuit recently found "no principled reason why the analytical framework articulated by the Court in *Lexmark* should not apply to [15 U.S.C.] § 1064," *Corcamore*, 2020 USPQ2d 11277, at *6, a statute which concerns cancellation proceedings and, like opposition proceedings under 15 U.S.C. § 1063, is limited to persons "who believe[] that he is or will be damaged" by registration. *See also Spanishtown Ent., Inc. v. Transcend Resources, Inc.*, 2020 USPQ2d 11388, at *1-2 (TTAB 2020).

B. Opposer Has Not Established a Commercial Interest or Injury Merely By Virtue of Being a Consumer of RAPUNZEL Goods

All of the facts Opposer alleged, and all of the evidence she submitted, relate to her being a consumer of fairytale-themed products. Nowhere has Opposer alleged or established the requisite commercial interest or injury. Rather, Opposer has only alleged and proved that she is a purchaser of goods related to the Rapunzel fairytale. *Lexmark* makes clear, however, that "[W]hen a business" that buys goods or services "is, like consumers generally, not under the Act's aegis." *Lexmark*, 109 USPQ2d at 2069. A fortiori, a mere consumer that buys goods or services is not under the Trademark Act's aegis.

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Put simply, the Trademark Act does not provide “consumer standing.” That is, it does not entitle mere consumers to a statutory cause of action; a statutory cause of action is reserved for those with commercial interests. *Id.* at 2071. *See also Conte Bros. Auto, Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 49 USPQ2d 1321, 1327 (3d Cir. 1998) (Alito, J.) (Section 45 of the Trademark Act “makes clear that the focus of the statute is on anti-competitive conduct in a commercial context. Conferring standing to the full extent implied by the text of § 43(a) would give standing to parties, such as consumers, having no competitive or commercial interests affected by the conduct at issue. This would not only ignore the purpose of the Lanham Act as expressed by § 45, but would run contrary to our precedent”).⁹

9. Opposer attempts to rely on two non-precedential decisions by a single interlocutory attorney in *Flanders v. DiMarzio, Inc.*, Cancellation No. 92064181, but appears to have cited the wrong interlocutory decision in two places in her Trial Brief. 55 TTABVUE 11, 18. In any event, to the extent any non-precedential interlocutory decisions in Cancellation No. 92064181 conflict with current Supreme Court or Federal Circuit caselaw, we decline to follow them. We are bound by Supreme Court and Federal Circuit authority, but not by nonprecedential interlocutory decisions. *Cf.* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (“TBMP”) § 518 (2022) (citing *AS Holdings, Inc. v. H & C Milcor, Inc.*, 107 USPQ2d 1829, 1832 (TTAB 2013) and *Harley-Davidson Motor Co. v. Pierce Foods Corp.*, 231 USPQ 857, 859 n.13 (TTAB 1986)). *See also Domino’s Pizza Inc. v. Little Caesar Enters. Inc.*, 7 USPQ2d 1359, 1363 n.9 (TTAB 1988) (“Th[e] statement [that evidence of third-party uses were relevant], made over the signature of a single interlocutory Attorney-Examiner of the Board, is not binding on this three-member panel, and we find ourselves in disagreement with the statement.”).

*Appendix A***C. Opposer’s Alleged Damage is Too Speculative and Remote to Invoke an Opposition Proceeding**

It is not enough for Opposer to have alleged her belief in damage in her notice of opposition. Rather, Opposer “must show economic or reputational injury flowing directly from” Applicant’s registration of RAPUNZEL. *Lexmark*, 109 USPQ2d at 2069. However, “[t]hat showing is generally not made when” a defendant’s conduct “produces injuries to a fellow commercial actor that in turn affect the plaintiff. For example, while a competitor who is forced out of business by a defendant’s false advertising generally will be able to sue for its losses, the same is not true of the competitor’s landlord, its electric company, and other commercial parties” *Id.* at 2069-70.

Here, Opposer’s limited evidence shows that the damage she believes she will suffer is too remote from registration and is entirely speculative.

For example, Opposer merely assumes that registration of RAPUNZEL will harm “healthy marketplace competition,” leading to an “increased cost of goods.” 53 TTABVUE 8 (Curtin Dec. ¶¶ 48, 49). Even if this assumption was an attempt to apply an accepted economic theory, there is no evidence of record about any specific economic theory, and even if there was, there is no evidence that particular markets, much less the market for the fairytale-related products at issue, always perform according to general economic theories.

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Perhaps more importantly, Opposer merely assumes that, notwithstanding 15 U.S.C. § 1115(b)(4) and other defenses and protections available to sellers of the fairytale-related products at issue, Applicant will be so successful in enforcing its asserted rights that it will reduce “marketplace competition,” “chill the creation of new dolls and toys” and prevent “access to classic, already existing, Rapunzel merchandise.” *Id.* at 9 (Curtin Dec. ¶¶ 50, 51). This type of speculation, unsupported by any evidence, is not a basis upon which we can find that Opposer is entitled to a statutory cause of action.¹⁰ *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (“Attorney argument is no substitute for evidence.”) (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 1284, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)); *In re U.S. Tsubaki, Inc.*, 109 USPQ2d 2002, 2006 (TTAB 2014) (finding that there was no proof to support the statements in the record by counsel). *See also TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 2210-12 (2021) (in context of assessing standing under Article III of the U.S. Constitution, noting problems with seeking relief for the risk of potential “future harm”);

10. Registration would not necessarily prevent competitors from manufacturing or selling competing dolls based on Rapunzel, a character from an 1812 Brothers Grimm fairy tale, because a trademark registration has no direct effect on what types of products are available in the marketplace. Rather, it would at most preclude others from using RAPUNZEL as their own source indicator for such products, subject to defenses such as 15 U.S.C. § 1115(b)(4) (creating a defense to infringement where the “term or device . . . is descriptive of and used fairly and in good faith only to describe the goods and services of such party”).

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Meenaxi, 2022 USPQ2d 602 at *7 (“Coca-Cola did present statements regarding future plans to market Thums Up and Limca beverages more broadly in the United States, but nebulous future plans for U.S. sales cannot be the basis for a Lanham Act claim.”). Opposer’s allegations of damage are also too remote, because the alleged damage to Opposer depends first on the alleged effect of registration on other commercial doll makers or sellers.

V. Conclusion

Opposer has not met her burden of proving that she is entitled to invoke the statute authorizing opposition proceedings.

Decision: The opposition is dismissed.