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

Proceeding	91216808
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Auratone LLC	)	
	)	Opposition No. 91216808
	)	
Opposer,	)	Serial No. 85/647325
	)	
v.	)	
	)	
MUSIC Group IP Ltd.,	)	
	)	
Applicant.	)	Attorney Docket No. 900195.837
_____		)

**APPLICANT MUSIC GROUP IP LTD.'S**  
**REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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## **I. INTRODUCTION**

In its memorandum of opposition to MUSIC Group IP Ltd.'s ("MUSIC Group") motion for summary judgment, Auratone LLC ("Opposer") argues that the heirs to Opposer's predecessor-in-interest continued to use the AURATONE mark in commerce from 2007 to 2013, before Opposer began its own use in commerce. (Opposition Br. 25.) Opposer argues that factual issues prevent summary judgment (*id.* at 19) and that MUSIC Group has not presented evidence of Opposer's "intent not to resume" use of the mark. (*Id.* at 20.) Opposer's arguments are based on irrelevant facts and misconceptions of the law.

MUSIC Group has met its burden for summary judgment. The facts are undisputed, and the facts show—as a matter of law—no trademark use in commerce of the AURATONE mark for more than three years. Opposer has presented no evidence from the three-year-period of non-use of intent to resume use of the mark. The fact that Opposer is generating commercial sales is irrelevant. And Opposer is not entitled to any trademark rights based on the old AURATONE mark because there is no written assignment to Auratone LLC. Because Opposer cannot rely upon any earlier trademark use, Opposer has no priority over MUSIC Group's application and the opposition should be dismissed.

## **II. LEGAL STANDARD FOR ABANDONMENT**

In an effort to avoid an adverse ruling based on the undisputed facts, Opposer mangles the standards for summary judgment and for determining whether a mark has been abandoned under the Lanham Act.

First, Opposer incorrectly states that the burden of proof is "clear and convincing evidence." (Opposition Br. 6 (citing *H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs*,

*Inc.*, 782 F.2d 987, 989–90 (Fed. Cir. 1986)).) But Opposer’s authority provides no support and is not even applicable here. *Int’l Ass’n of Fire Chiefs*, 782 F.2d at 989–90 (defining the test for genericness at trial in a petition to cancel). The correct burden of proof to show abandonment in an opposition proceeding is the preponderance standard. *Cerveceria Centroamericana, S.A. v. Cerveceria India, Inc.*, 892 F.2d 1021, 1023–24 (Fed. Cir. 1989) (“Moreover, we are unable to discern from the legislative history of the Lanham Act any intention by Congress to raise the burden of proof for cancellation for abandonment above the normal civil burden of a preponderance of the evidence.”).

Second, Opposer incorrectly asserts—without citation to any case law—that MUSIC Group must provide proof of Opposer’s specific intent not to resume use of the mark, such as with evidence of an attempt to sell the company. (Opposition Br. 18.) No such evidentiary requirement exists. The party asserting abandonment (MUSIC Group) bears the burden of establishing no “use in commerce” of a mark for three consecutive years in order to create a presumption of no intent to resume use. *Agler v. Westheimer Corp.*, -- F. Supp. 3d ----, No. 1:14-CV-099 JD, 2015 WL 6511711, at \*5 (N.D. Ind. Oct. 28, 2015) (citing, e.g., *Sprecht v. Google Inc.*, 747 F.3d 929, 934 (7th Cir. 2014); 15 U.S.C. § 1127). Once MUSIC Group establishes that the undisputed facts show no trademark use in commerce for three years, it is the **Opposer’s burden** to introduce **objective evidence** of intent to resume use. *Imperial Tobacco Ltd. ex rel. Imperial Grp. PLC v. Philip Morris, Inc.*, 899 F.2d 1575, 1581 (Fed Cir. 1990). Declarations of subjective intent, unsupported by documents, are insufficient. (Opening Br. 8 (citing cases).) And the Opposer must introduce evidence of “the intent to resume use in commerce . . . formulated within the three years of non[-]use.” *Agler*, 2015 WL 6511711, at \*5 (citing *Sprecht*, 747 F.3d at 934).

Third, Opposer incorrectly asserts that MUSIC Group must provide evidence of the absence of fame or residual goodwill of the mark. (Opposition Br. 18.) But neither the

statute nor the case law provides any such requirement. (*See infra* Section VI.) In fact, as demonstrated in the opening brief, a mark’s residual goodwill is not relevant if there is no evidence of any trademark use or of intent to resume use. (Opening Br. 10–11.)

Fourth, Opposer incorrectly asserts that it should be relieved of its burden to prove its intent to resume use because “factual question[s] of intent [are] particularly unsuited to disposition on summary judgment.” (Opposition Br. 22.) Opposer misleadingly cites inapposite cases to support its attempt to avoid the evidentiary burden. *See Copelands’ Enterprises, Inc. v. CNV, Inc.*, 945 F.2d 1563, 1566 (Fed. Cir. 1991) (reversing summary judgment of registration symbol misuse); *Giant Food, Inc., v. Standard Terry Mills, Inc.*, 229 U.S.P.Q. 955 (T.T.A.B. 1986) (denying summary judgment on mere descriptiveness and fraud). Well-settled law requires the Opposer to present objective evidence of its intent in order to show that there is any triable issue. *Exxon Corp. v. Humble Exploration Co.*, 695 F.2d 96, 99 (5th Cir. 1983). Failure to present such evidence, as is the case here, means that the prima facie case of abandonment has been un rebutted and that abandonment has been established.

### **III. THE MATERIAL FACTS ARE NOT IN DISPUTE**

Despite Opposer’s pronouncements to the contrary, the essential facts for purposes of this Summary Judgment Motion are not in dispute. MUSIC Group does not dispute that Ms. Hysell posted pictures of leftover inventory in 2007, that she informally posted the link on some discussion boards in 2007, and that her email address was on the website. (Opening Br. 2–3.) Opposer does not dispute that manufacturing stopped in 2004 and didn’t resume until late 2012. (Opposition Br. 9, 15.) Opposer does not dispute that nobody associated with Opposer made *any* sales between 2007 and 2012 (Opposition Br. 12 (contesting whether or not Ms. Hysell’s actions in the absence of sales constitute

“promotion”).) Much of the opposition brief is simply Opposer’s difference of opinion as to whether Ms. Hysell’s actions in 2006 and 2007 and the dormant website she set up in 2007 constitute promotion and trademark use as a matter of law. (*E.g.*, Opposition Br. 19 (arguing that MUSIC Group has not shown trademark non-use because the dormant website constituted continued offers to sell).)<sup>1</sup>

Regarding Opposer’s laundry list of MUSIC Group’s alleged “misstatements and false claims” on pages nine and ten of the opposition brief, MUSIC Group simply points out that Opposer is mischaracterizing disagreements about legal conclusions as contested facts. (*E.g.*, Opposition Br. p. 10 (accusing MUSIC Group of falsely stating that there were no sales or promotion, but only because Opposer argues that the same facts support a legal conclusion of promotion); *id.* at 15 (accusing MUSIC Group of incorrectly arguing that no business plans demonstrating intent to resume use existed during the 2007 to 2012 time period by citing evidence from 2012).) In any event, reviewing the record will demonstrate that MUSIC Group’s factual statements are supported and are not false.

Opposer repeatedly accuses MUSIC Group of mischaracterizing Ms. Hysell’s website (*E.g.*, Opposition Br. 11, 20, 21), but MUSIC Group did nothing of the sort. Page three of the Opening Brief discusses Ms. Hysell’s admissions that individuals could not purchase products on the website and that the only promotion of the website occurred in

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<sup>1</sup> Ms. Hysell’s testimony that she and her sister decided that Mr. Jacobsen “could just take over” once her graduated from college is self-serving and not corroborated by any evidence until Mr. Jacobsen actually graduated and took over in 2012. (*See* Opening Br. 4; Opposition Br. 15.) Opposer has produced no emails, written agreements, business plans, or any other document that would permit a reasonable jury to conclude that Ms. Hysell and Ms. Jacobsen formulated this intent at any point in 2010 or 2011. In any event, the three years of non-use would already have run. *Imperial Tobacco*, 899 F.2d at 1581.

2007 in the form of posting a few links. Contrary to Opposer's protest, the **Opening Brief states that Ms. Hysell's email address was on the webpage.** (Opening Br. 3; *see also* Exhibit D.)<sup>2</sup> Opposer does not contradict the fact that the products were listed without prices, without commercial terms, and without any transactional features (e.g., shopping cart).

#### IV. OPPOSER'S DORMANT WEBSITE IS NOT TRADEMARK USE

Opposer's argument boils down to this: that Ms. Hysell's website, which she set up in 2006 or 2007 and renewed at least one time, which did not change after 2007, and which generated no sales from 2007 to 2010 and beyond, constitutes trademark use that is sufficient to avoid abandonment. (*E.g.*, Opposition Br. 21.) Opposer argues that because the website displayed products bearing the mark and Ms. Hysell's email address, the website was somehow "promoting" the mark and offering products for sale. Opposer also argues that it is irrelevant that Ms. Hysell made no sales from 2007 on. (Opposition Br. 12.) Opposer is wrong as a matter of law.

Opposer's website, in the absence of any sales, is not advertising and promotion sufficient to qualify as trademark use. The Lanham Act states that "a mark shall be deemed to be in use in commerce" on goods when "the goods are sold or transported in commerce." 15 U.S.C. § 1127. Mere advertising is not sufficient to show that goods are used in commerce. *See Central Mfg., Inc. v. Brett*, 492 F.3d 876 (7th Cir. 2007); *see also*

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<sup>2</sup> MUSIC Group's Exhibit D is a true and accurate copy of [http://hysellstuff.com/auratone/auratonespeakerinventory/speaker\\_inventory.php](http://hysellstuff.com/auratone/auratonespeakerinventory/speaker_inventory.php). Opposer provided MUSIC Group with the url to the speaker inventory page that it castigates MUSIC Group for including as Exhibit D. (Decl. of Eric A. Lindberg ¶ 3, Exhibit G (Interrogatory Response).) Opposer has added to the confusion by attaching a printout of a **different webpage**: <http://hysellstuff.com/auratone/gallery/>. In fact, the webpage that Opposer has submitted into evidence actually links directly to MUSIC Group's Exhibit D.

*Couture v. Playdom, Inc.*, 778 F.3d 1379, 1382 (Fed. Cir. 2015) *cert. denied*, 136 S. Ct. 88 (2015) (mere advertising of services insufficient to constitute trademark use without the actual provision of any services).

Opposer relies upon *Daybrook-Ottawa*, *Carter Wallace*, and *In re Sones* to argue that its dormant website was trademark use. But those cases do not support Opposer's position. In *Daybrook-Ottawa*, the record showed that the respondent repeatedly quoted prices and attempted to sell his product and that failure to make sales was based on lack of demand—but here Opposer has no evidence of quoted prices or attempts to sell, and Opposer has put into the record evidence of some demand during the period of non-use.<sup>3</sup> *Daybrook-Ottawa Corp. v. F.A.B. Mfg. Co.*, 152 U.S.P.Q. 441 (T.T.A.B. 1966). In *Carter Wallace*, the court relied upon token sales in the 1960s; that case says nothing about websites or what actions in the absence of any sales can constitute trademark use. *See Carter Wallace v. P&G Co.*, 434 F.2d 794 (9th Cir. 1970). And in *In re Sones*, the court ruled on the proper test for a website-based specimen, not on whether mere advertising or promotion of a mark on a web page could be “use in commerce.” *In re Sones*, 590 F.3d 1282, 1288 (Fed. Cir. 2009).

The undisputed facts show that after Opposer set up the website and posted it to a few discussion boards, Opposer made no sales and made no attempts to sell products for 2007, 2008, 2009, 2010, and beyond. The facts of Opposer's activities during the period are undisputed, and as a matter of law Opposer did not engage in trademark use for at least three years.

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<sup>3</sup> Opposer put into evidence a 2009 email inquiring after a product. (Opposition Br. 11.) But Opposer admits that they made no sales in 2008, 2009, or 2010. Further, the email remarks that Ms. Hysell hadn't responded to a previous email, and there is no evidence that Ms. Hysell ever responded at all.

**V. OPPOSER HAS PROVIDED NO EVIDENCE TO REBUT PRIMA FACIE ABANDONMENT**

Once MUSIC Group establishes continuous non-use as a matter of law, the burden shifts to Opposer to prove intent to resume use of the mark. Opposer has failed to provide any objective evidence or disputed facts, and has failed to rebut the prima facie case of abandonment.

Opposer argues that it can meet its burden because it maintained the inventory and fulfilled outstanding orders in 2007, maintained a website, and resumed manufacture and sale of goods within a reasonable time period. (Opposition Br. 22.) But the undisputed evidence shows that Ms. Hysell maintained the business assets and set up the website before 2007, before the period of non-use.<sup>4</sup> And Opposer purportedly made sales in 2013, after the three-year period of non-use had already run. Allegedly “Resuming” use at a later date cannot cure abandonment that has already happened. *See Hornby v. TJX Companies Inc.*, 87 USPQ2d 1411, 1422 (T.T.A.B. 2008) (subsequent use after abandonment does not retroactively cure the past abandonment; later use represents a new and separate use). Opposer has presented no evidence of intent to resume use during the three-year-plus period of non-use—everything Opposer relies upon occurred before 2007 or after 2012.

**VI. RESIDUAL GOODWILL IS LEGALLY IRRELEVANT**

Opposer’s final argument is that the mark is well-known and has residual value, so that abandonment does not apply. Opposer’s argument is without any statutory basis; the Lanham Act provides for abandonment of marks without regard to existing goodwill. 15 U.S.C. § 1127.

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<sup>4</sup> Because the website itself was not a trademark use, renewal of the website is neither a trademark use nor evidence showing intent to engage in trademark use.

Further, the cases cited by Opposer provide no support. First, Opposer cites inapposite preliminary injunction cases. See *Cumulus Media, Inc. v. Clear Channel Commc'ns, Inc.*, 304 F.3d 1167, 1174–75 & n.10 (11th Cir. 2002) (reviewing preliminary record under clearly erroneous standard and explicitly noting that upon full review the asserted trademark use may be considered token use); *Peter Luger Inc. v. Silver Star Meats Inc.*, No. CIV.A.01-1557, 2002 WL 1870066, at \*15 (W.D. Pa. May 17, 2002) (granting preliminary injunction in light of brand transition evidence); *Indianapolis Colts, Inc. v. Metro. Baltimore Football Club Ltd. P'ship.*, 34 F.3d 410, 414 (7th Cir. 1994) (ruling at preliminary injunction stage on likelihood of confusion and personal jurisdiction). Second, *Defiance* provides no support because the facts in that case supported non-abandonment and the case reinforces the legal principle that residual goodwill is meaningless once a mark is abandoned—“others are no longer restrained from using it.” *Defiance Button Mach. Co. v. C&C Metal Products Corp.*, 759 F.2d 1053, 1059 (2d Cir. 1985).

## VII. OPPOSER HAS NO PROPRIETARY RIGHTS IN THE OLD MARK

Transfer of proprietary trademark interests must be made in writing and with specificity. 15 U.S.C. § 1060(a)(3); *Fed. Treasury Enter. Sojuzplodoimport v. SPI Spirits Ltd.*, 726 F.3d 62, 74 (2d Cir. 2013). Opposer attempts to rely upon Jack Wilson’s will to argue that Auratone LLC is the successor-in-interest of Jack Wilson and his heirs. (Opposition Br. 13.) But the will does not clearly identify the AURATONE mark, and the will does not provide for any transfer of rights to Auratone LLC. In fact, Opposer has admitted that the only assignment from Ms. Hysell and Ms. Jacobsen to Alex Jacobsen and/or Auratone LLC was **verbal**. (Opening Br. 5.) Opposer has simply failed to prove any proprietary interest in the mark that pre-dates MUSIC Group’s application.

## VIII. CONCLUSION

For the reasons in MUSIC Group's opening brief and in this reply, MUSIC Group respectfully requests summary judgment and dismissal of Auratone LLC's opposition. The prior AURATONE mark was abandoned and Opposer has no standing based on prior use in the absence of a written agreement transferring rights.

DATED this 4th day of January, 2016.

Seed IP Law Group PLLC

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MUSIC Group IP Ltd.

**CERTIFICATE OF SERVICE**

I hereby certify that the above **APPLICANT MUSIC GROUP IP LTD.’S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** was served on Opposer’s counsel on January 4, 2016, addressed as follows:

Anne W. Hulecki  
Ahulecki@suffolk.edu

/Anne Calico/  
\_\_\_\_\_  
Anne Calico

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

Auratone LLC	)	
	)	Opposition No. 91216808
Opposer,	)	
	)	Serial No. 85/647325
v.	)	
	)	
MUSIC Group IP Ltd.,	)	
	)	
Applicant.	)	Attorney Docket No. 900195.837
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**DECLARATION OF ERIC A. LINDBERG IN SUPPORT OF MUSIC GROUP IP  
LTD’S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

I, Eric A. Lindberg, hereby declare and state as follows:

1. I am a citizen of the United States and of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled proceeding.
2. I am an attorney with the law firm of Seed IP Law Group PLLC, counsel for Petitioner MUSIC Group IP Ltd. (“MUSIC Group” or “Applicant”) in the above-captioned proceeding. I make the following statements from personal knowledge, unless otherwise noted, and am competent to testify regarding the matters herein.
3. Attached hereto as Exhibit G is a true and correct copy of Opposer’s response to Interrogatory No. 13.

I declare under penalty of perjury under the laws of the United States of America and the State of Washington that the foregoing is true and correct.

Dated and executed this 4th day of January, 2016, at Seattle, Washington.

/Eric A. Lindberg/  
Eric A. Lindberg

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**CERTIFICATE OF SERVICE**

I hereby certify that the above **DECLARATION OF ERIC A. LINDBERG IN SUPPORT OF REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** was served on Opposer's counsel on January 4, 2016, addressed as follows:

Anne W. Hulecki  
Ahulecki@suffolk.edu

/Anne Calico/  
Anne Calico

---

# EXHIBIT

G

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

<b>Auratone LLC,</b>	)
<b>Opposer,</b>	) <b>Opposition No. 91216808</b>
	)
<b>v.</b>	) <b>Application Serial No. 85647325</b>
	)
<b>MUSIC Group IP Ltd.</b>	) <b>Published in the Official Gazette on</b>
<b>Applicant.</b>	) <b>May 13, 2014</b>

**AURATONE LLC’S RESPONSES AND OBJECTIONS TO MUSIC GROUP IP LTD.’S  
FIRST SET OF INTERROGATORIES**

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure, Opposer, Auratone LLC, submits these responses and objections to the First Set of Interrogatories submitted by Applicant, MUSIC Group IP Ltd. (“Applicant”).

**GENERAL OBJECTIONS**

1. Auratone LLC objects to Applicant’s definitions and instructions to the extent they exceed the requirements of the Federal Rules of Civil Procedure.

2. To the extent any Interrogatory may be construed as calling for documents or information subject to a claim of privilege or protection including, without limitation, the attorney-client privilege or attorney work-product protection, Auratone LLC asserts such privilege and will not produce privileged documents or provide privileged information.

3. To the extent any Interrogatories may be construed as calling for documents or information that constitute trade secrets, proprietary information or competitive business data, Auratone LLC objects to such Interrogatories on that basis and will produce such information only pursuant to the terms of the Protective Order agreed to in this proceeding.

4. The responses set forth below represent Auratone LLC’s present knowledge, based on discovery, investigation and trial preparation to date. Discovery, investigation and trial

interrogatory, including without limitation the accounting records, tax records, marketing and advertising records, records of expenditures for advertising and marketing of goods and services, and internet website records for any domain names owned by any successors in interest of Jack Wilson and his company.

**RESPONSE:** Marlaine Hysell

**INTERROGATORY NO. 11:**

Identify all domain names owned by Auratone LLC.

**RESPONSE:** auratonesoundcubes.com

**INTERROGATORY NO. 12:**

Identify all domain names controlled by Auratone LLC.

**RESPONSE:** auratoneproaudio.com, auratonesoundcubes.com

**INTERROGATORY NO. 13:**

Identify all domain names owned by any of the alleged successors in interest to Jack Wilson that are related in any way to Opposer's asserted rights in the AURATONE Mark.

**RESPONSE:** auratoneproaudio.com, auratonesoundcubes.com,  
<http://hysellstuff.com/auratone/>,  
[http://hysellstuff.com/auratone/auratonespeakerinventory/speaker\\_inventory.php](http://hysellstuff.com/auratone/auratonespeakerinventory/speaker_inventory.php)

**INTERROGATORY NO. 14:**