

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Nirvana, Inc.  
v.  
Nirvana For Health Inc.

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Cancellation No. 92042878

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Donna J. Bunton and Sheryl De Luca of Nixon & Vanderhye P.C.  
for Nirvana, Inc.

Nirvana For Health Inc., pro se.

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Before Grendel, Zervas and Taylor, Administrative Trademark  
Judges.

Opinion by Grendel, Administrative Trademark Judge:

**Introduction.**

Nirvana for Health Inc. ("respondent") is the owner of  
Registration No. 2731312, which is of the mark NIRVANA  
(registered in standard character form) for goods identified  
in the registration as "bottled natural spring water." The

registration was issued (on the Principal Register) on July 1, 2003.<sup>1</sup>

On January 15, 2004, Nirvana, Inc. ("petitioner") filed a petition to cancel respondent's registration. Petitioner has alleged abandonment as its ground for cancellation.<sup>2</sup> In its May 18, 2004 answer, respondent denied the salient allegations of the petition to cancel.

Petitioner submitted evidence at trial; respondent did not. Petitioner filed a brief on the case; respondent did not.

After careful consideration of all of the evidence properly made of record, and petitioner's arguments in its brief, we find that petitioner has failed to prove its

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<sup>1</sup> The application (Serial No. 76319172) from which the registration matured was filed on October 1, 2001, claiming use in commerce under Trademark Act Section 1(a), 15 U.S.C. §1051(a), as the basis for registration. August 14, 1970 is alleged in the application to be the date of first use of the mark. August 14, 1990 is alleged in the registration to be the date of first use of the mark in commerce. Respondent filed its Section 8 affidavit for the registration on January 4, 2010 (during this proceeding), and the Office accepted the Section 8 affidavit on March 16, 2010.

<sup>2</sup> In the petition for cancellation, petitioner also alleged as grounds for cancellation (in addition to its abandonment ground): priority and likelihood of confusion under Trademark Act Section 2(d); that respondent has not made a bona fide use of the mark; that the application which matured into the registration involved in this case was void ab initio because respondent was not the owner of the mark when the application was filed; and that respondent committed fraud in averring in the application that it was the owner of the mark and that it had used the mark as of the application filing date. In its brief on the case, petitioner presented arguments relating solely to the abandonment ground for cancellation. We deem petitioner to have waived its right to assert the other pleaded grounds. The petition to cancel as to those other grounds is DENIED.

abandonment claim. We therefore DENY the petition to cancel.

**The Evidence of Record.**

The evidence of record includes the pleadings and, by rule, the file of respondent's involved registration.

Trademark Rule 2.123(b).

Additionally, petitioner submitted at trial its Notice of Reliance ("NOR") on (1) certain USPTO documents (NOR Exh. 1);<sup>3</sup> (2) copies of petitioner's New York State trademark registrations (NOR Exh. 2); (3) certain of respondent's discovery responses (NOR Exh. 3); (4) numerous printed publications (NOR Exh. 4); (5) certain documents identified as "official records" (NOR Exh. 5); and (6) various documents submitted under the heading "Other" (NOR Exh. 6). Petitioner also submitted the transcript of (and exhibits to) the May 22, 2009 testimony deposition of its president Mozafar Rafizadeh ("Rafizadeh depo.").<sup>4</sup>

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<sup>3</sup> In respondent's Notice of Reliance, each exhibit is identified with a "Tab" number, e.g., "Tab 1(a)." We shall refer to these exhibits as "NOR Exh. No.", e.g., "NOR Exh. No. 1(a)."

<sup>4</sup> Initially, we must note that petitioner submitted over 1,300 pages of documents and testimony at trial, of which only a very limited number pertain to respondent and to the merits of petitioner's abandonment claim. The bulk of the 1,300 pages of documents pertain to petitioner and the details of its business operations, documents which in many or most instances are irrelevant to petitioner's abandonment claim and are unnecessarily cumulative even if relevant. These include documents pertaining to petitioner's conception of its mark in 1994, articles about petitioner from petitioner's local

For the reasons discussed below, we find that much of the evidence petitioner has submitted and has specifically relied upon in support of its abandonment claim was not properly made of record under Notice of Reliance. We have given that evidence no consideration.<sup>5</sup>

Specifically and of particular relevance to our decision in this case, we rule as follows with respect to petitioner's proffered evidence:<sup>6</sup>

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newspaper, documents such as certificates from every state in which petitioner is licensed to do business, what appear to be copies of every advertisement petitioner has ever produced since it started doing business in 1995, and even documents such as a certificate showing that an employee of petitioner completed a training course and a copy of a help-wanted advertisement seeking a forklift operator for petitioner's plant. Petitioner's abandonment claim in this case involves the nature and extent of respondent's use of its mark, not the nature and extent of petitioner's use of its own mark. Nor was this volume of evidence necessary to establish petitioner's standing in this case. Petitioner's and petitioner's counsel's expense, time and effort expended in gathering and submitting all of this evidence clearly were unnecessary in this case. Likewise unnecessary were the time and effort expended by the Board in reviewing all of this evidence. Petitioner's counsel is strongly urged to refrain from this type of practice in future cases before the Board.

<sup>5</sup> We acknowledge that respondent did not file a brief on the case with objections to petitioner's improper evidence, nor did it otherwise object to the evidence, but we nonetheless are rejecting it *sua sponte*. See *Hiraga v. Arena*, 90 USPQ2d 1102, 1104 (TTAB 2009). In *Hiraga*, the Board ruled: "Respondent filed no brief, nor has he objected to any of the documents made of record by petitioner. However, we do not deem respondent to have agreed to petitioner's submission of documents not contemplated within the Trademark Rules of Practice and Procedure for such submissions by way of a notice of reliance..." 90 USPQ2d at 1104. We make the same ruling in the present case.

<sup>6</sup> We presume that the parties are familiar with the referenced evidence, and we therefore shall describe it succinctly making these rulings.

1. We shall not consider the documents which are purported to be from the file of a bankruptcy proceeding involving Nirvana Restaurant Inc. (not respondent herein). (NOR Exh. Nos. 6(h), 6(j)-6(o)). These documents do not qualify as "official records" because they are not certified copies of the documents prepared by a public officer.<sup>7</sup> The Board has stated that "[t]he 'official records' referred to by the rule are records prepared by a public officer which are self-authenticating in nature (and hence require no extrinsic evidence of authenticity as a condition precedent to admissibility), such as certified copies of public records." *The Conde Nast Publications Inc. v. Vogue Travel, Inc.*, 205 USPQ 579, 580 n.5 (TTAB 1979). See also *Hiraga v. Arena*, 90 USPQ2d 1102, 1104 (TTAB 2009) ("There are no official markings or signature on this form and it is not a record 'prepared by a public officer'"). Also and in any event, we would not accept the factual statements contained

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<sup>7</sup> These are not official records, nor do they constitute documents which are admissible under any other category of documents which may be submitted via notice of reliance. We note that petitioner (in what appears to be an indication that petitioner is aware that these documents are not official records) has submitted these documents in the Notice of Reliance under the category "Other." Additionally, these documents have not been properly submitted because the Notice of Reliance does not indicate their relevance to this proceeding. The Notice of Reliance states only that each of the documents "relates to Registrant." This statement is so generalized and uninformative (assuming it is even accurate) that it clearly is insufficient as an indication of the relevance of the proffered evidence. See *Safer Inc. v. OMS Investments Inc.*, 94 USPQ2d 1031 (TTAB 2010).

in these documents as evidence of the proof of those facts, as petitioner apparently would have us do.

2. We shall not consider respondent's October 5, 2007 supplemental responses to petitioner's Interrogatory Nos. 3, 8 and 14. (NOR Exh. 3(b)). The Notice of Reliance does not include the interrogatories to which the responses were made, as required by Trademark Rule 2.120(j)(3)(i), 37 C.F.R. §2.120(j)(3)(i).<sup>8</sup>

3. We shall not consider the 2004 and 2005 Internet message board postings. (Exh. Nos. 6(r) and 6(s)). These web postings are not printed publications, nor are they otherwise admissible under notice of reliance. Furthermore, the statements made by these anonymous persons ("asf" and "cj") are hearsay, and on their face they are too vague and unreliable to prove anything relevant to this case.

4. We shall not consider the De Luca summary judgment declaration and exhibits (NOR Exh. No. 6(kkk)), nor the Rafizadeh summary judgment declaration and exhibits (NOR Exh. No. 6(lll)). There is no stipulation in the record that trial testimony may be submitted in the form of

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<sup>8</sup> NOR Exh. 3(a) contains respondent's 2005 answers to certain interrogatories. NOR Exh. 3(b) contains respondent's 2007 supplemental answers to certain interrogatories. The interrogatories corresponding to the supplemental responses to Interrogatory Nos. 3, 8, and 14 are not included in either Exh. 3(a) or Exh. 3(b).

declarations. We note that Mr. Rafizadeh did not testify regarding this declaration during his deposition.

5. The newspaper articles from 1991, 2002 and 2003 which mention respondent (Exh. Nos. 4(c)-4(l), and 6(i)) are hearsay as to the facts asserted in the articles (facts for which petitioner, we note, is specifically citing the articles). We shall give no consideration to the articles as proof of those asserted facts. See *Research in Motion Ltd. v. NBOR Corp.*, 92 USPQ2d 1926 (TTAB 2009); *Blue Man Productions Inc. v. Tarmann*, 75 USPQ2d 1811 (TTAB 2005); *Hard Rock Café International (USA) Inc. v. Elsea*, 56 USPQ2d 1504, 1508 (TTAB 2000); and *Hard Rock Café Licensing Corp. v. Elsea*, 48 USPQ2d 1400 (TTAB 1998).

6. We shall give no consideration to the evidence petitioner has submitted with respect to respondent's predecessor corporation Nirvana Himalaya Water Corporation and its activity (or lack of activity) in the early 1990's.<sup>9</sup> The newspaper articles from 1991 (NOR Exh. Nos. 4(c), 4(d) and 4(k)) are hearsay as to the facts asserted therein. The 1990 business plan (NOR Exh. No. 6(q)) is not admissible under notice of reliance, and Mr. Rafizadeh failed to adequately authenticate it when it was submitted as Exhibit 68 to his deposition. The 1991 Nepal business license (NOR

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<sup>9</sup> As discussed below, we find all of this evidence to lack any significant probative value in any event.

Exh. No. 6(p)) is not admissible under notice of reliance, and Mr. Rafizadeh failed to adequately authenticate it when it was submitted as Exhibit 67 to his deposition. The July 28, 2003 email from the "New York Department of State, Division of Corporations, Entity Information" (received by applicant's counsel, we will assume) regarding the corporate status of Nirvana Himalaya Water Corporation (NOR Exh. No. 5(ii)) is not an official record or otherwise admissible under notice of reliance. Ms. De Luca's statement in her summary judgment declaration regarding her telephone conversation with a customer service agent at the office of the Corporations Division of the New York Secretary of State regarding the corporate status of Nirvana Himalaya Water Corporation (NOR Exh. No. 6(kkk)) clearly is hearsay, and the summary judgment declaration as a whole is not properly of record in any event, as discussed above.

The evidence discussed above having been excluded for the reasons stated,<sup>10</sup> we have considered all of the remaining evidence petitioner has properly submitted under its Notice of Reliance, as well as the Rafizadeh deposition and the exhibits thereto. We shall give to all of these evidentiary materials any probative value to which they are entitled.

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<sup>10</sup> We add that our ultimate decision in this case would be the same even if we were to have considered all of petitioner's evidence and accorded to it whatever probative value it deserves.

**Petitioner's Standing.**

Petitioner Nirvana, Inc. has been manufacturing and selling bottled water under the mark NIRVANA since 1997.<sup>11</sup>

Additionally, petitioner has made of record the file of its application Serial No. 76561979, filed on November 26, 2003, by which it seeks to register the mark NIRVANA (in standard character form) for goods and services identified as "spring water and flavored water" in Class 32, and "bottling and labeling of water for others," in Class 40.<sup>12</sup> Petitioner's application file record shows that, on June 18, 2004, the Office refused registration of petitioner's mark under Section 2(d), based on respondent's prior registration (the registration involved in this cancellation proceeding). Prosecution of petitioner's application has been suspended since August 5, 2005, pending the outcome of this proceeding.

We find that petitioner's evidence of its use of the mark NIRVANA on bottled water, and its evidence of the Office's Section 2(d) refusal to register applicant's NIRVANA mark based on respondent's registration, suffice to establish petitioner's standing to petition to cancel respondent's registration in this case. *Cerveceria Modelo*

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<sup>11</sup> Rafizadeh depo. at 14.

<sup>12</sup> Petitioner's application file. (NOR Exh. No. 1(a).)

*S.A. de C.V. v. R.B. Marco & Sons Inc.*, 55 USPQ2d 1298 (TTAB 2000).

**Petitioner's Abandonment Claim.**

**Applicable Law.**

Section 45 of the Trademark Act, 15 U.S.C. § 1127, provides that a mark shall be deemed to be abandoned

when its use has been discontinued with intent not to resume such use. Intent not to resume may be inferred from circumstances. Nonuse for 3 consecutive years shall be prima facie evidence of abandonment. "Use" of a mark means the bona fide use of such mark made in the ordinary course of trade, and not made merely to reserve a right in a mark.

Abandonment of a registered mark by the owner of the registration is a ground for cancellation of a registration. Trademark Act Section 14(3), 15 U.S.C. §1064(3). Because the registration is presumed to be valid, the party claiming abandonment must rebut this presumption by a preponderance of the evidence. *See On-line Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1476 (Fed. Cir. 2000).

The party claiming abandonment must prove, prima facie, that the registrant has discontinued use of the mark and that the registrant has no intent to resume use of the mark (although intent not to resume use may be inferred from circumstances). However, the party claiming abandonment may

establish a prima facie case of abandonment by presenting evidence which establishes nonuse of the mark by the registrant for three consecutive years. Such a showing creates a rebuttable presumption that the registrant has abandoned the mark without intent to resume use, and relieves the party claiming abandonment from the burden of affirmatively proving the registrant's intent not to resume use.

If the party claiming abandonment establishes a prima facie case of abandonment, then the burden of production shifts to the registrant to rebut that prima facie case by producing evidence showing either that it in fact had used the mark during the relevant time in question, or that it intended to resume use of the mark. Again, however, the party claiming abandonment bears the ultimate burden of proving abandonment by a preponderance of the evidence.

Abandonment is a question of fact; thus, any inference of abandonment must be based on proven fact. *Quality Candy Shoppes/Buddy Squirrel of Wisconsin Inc. v. Grande Foods*, 90 USPQ2d 1389, 1393 (TTAB 2007). "The protection due the registrant is provided by requiring that the inference have an adequate foundation in proven fact. Whenever an inference is based on pure speculation ... a prima facie case of abandonment must fail." *Cerveceria Centroamericana S.A. v. Cerveceria India Inc.*, *supra*, 13 USPQ2d 1307, 1310.

**Findings of Fact.**

The competent evidence which is properly of record in this case (see above for discussion of the evidence) establishes the following facts pertinent to petitioner's abandonment claim.

1. When the application which matured into the registration involved in this proceeding was filed on October 1, 2001, Mr. Shamsheer Wadud, through his solely-owned corporation Nirvana Restaurant Inc. (a sister corporation to respondent, not involved in this proceeding), owned and operated an Indian restaurant in New York City called "Nirvana."<sup>13</sup>

2. At the time the application was filed, respondent Nirvana for Health Inc. was selling bottled water bearing the mark NIRVANA at the Nirvana restaurant.<sup>14</sup>

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<sup>13</sup> Respondent's registration file (September 24, 2001 cover letter, and specimens of use); registration file of Nirvana Restaurant Inc.'s Reg. No. 2205868 (NOR Exh. No. 1(b)).

<sup>14</sup> Respondent's registration file (September 24, 2001 cover letter, and specimens of use). Petitioner contends that respondent's predecessor corporation, Nirvana Himalaya Water Corporation, was not selling NIRVANA bottled water in the early 1990's. As discussed above, the evidence petitioner has submitted to support this contention has not been properly made of record. But even if it had, we find that it does not prove petitioner's contention. More importantly, petitioner's contention that Nirvana Himalaya Water Corporation was not selling NIRVANA bottled water in the early 1990's would not establish that respondent was not using the NIRVANA mark on bottled water at the time it filed its application and thereafter, which is the issue in this case. Indeed, it has little if any probative value on that question at all.

3. On July 1, 2003, the registration involved in this proceeding (of the mark NIRVANA for bottled water) was issued to respondent, Nirvana for Health Inc.<sup>15</sup>

4. At some point in July of 2003, respondent was not selling NIRVANA bottled water because the Nirvana restaurant was closed at that time and because respondent did not have a supplier for its bottled water at that time.<sup>16</sup>

5. On January 15, 2004, petitioner commenced this cancellation proceeding by filing its petition to cancel respondent's registration on the ground of abandonment.

6. Nirvana Restaurant Inc. (the owner of the restaurant, not respondent herein) had owned a registration (Reg. No. 2205868) of the mark NIRVANA for "restaurant and nightclub services." The Section 8 affidavit of continued use for the registration was due on November 24, 2004, but was not filed. The registration was cancelled under Section 8 on August 27, 2005.<sup>17</sup>

7. As of January 21, 2005, respondent's NIRVANA bottled water was being sold "...from a restaurant and distributed to other restaurants in boxes of 12 or 24, in

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<sup>15</sup> Respondent's registration file.

<sup>16</sup> Rafizadeh depo. at 65-66, 78-80. Mr. Rafizadeh's testimony relates to what respondent's president Mr. Wadud told him in a conversation that occurred sometime in July 2003. We will not address the hearsay issues raised by Mr. Rafizadeh's testimony, and we will consider the statements made by Mr. Wadud as admissions of respondent's nonuse of the mark in July 2003.

<sup>17</sup> (NOR Exh. No. 1(b)).

either plastic or glass."<sup>18</sup> Also as of January 21, 2005, "the type of customers that ultimately purchase the bottled water are mainly sophisticated customers who learn of the bottled water when they frequent the restaurant(s),"<sup>19</sup> and "[t]he public becomes aware of Respondent's goods and the Mark bearing it primarily by word of mouth, or when displayed for sale in restaurants, or when mentioned in news feature articles."<sup>20</sup>

8. As of October 5, 2007, respondent was not using the NIRVANA mark on bottled water "at the present time."<sup>21</sup>

9. In his May 22, 2009 testimony deposition, petitioner's president Mr. Rafizadeh testified that he has never seen any evidence of respondent or respondent's NIRVANA bottled water in the bottled water industry and marketplace, and that he did not believe that respondent is in the bottled water business.<sup>22</sup>

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<sup>18</sup> NOR Exh. No. 3(a) (respondent's January 21, 2005 answer to Interrogatory No. 13).

<sup>19</sup> Id.

<sup>20</sup> NOR Exh. No. 3(a) (respondent's January 21, 2005 answer to Interrogatory No. 19).

<sup>21</sup> NOR Exh. No. 3(b) (respondent's October 5, 2007 supplemental answer to Interrogatory No. 13).

<sup>22</sup> Rafizadeh depo. at 78-79.

10. Respondent was not a member of the International Bottled Water Association (IBWA), a bottled water industry trade association, in 2003, nor in 2005.<sup>23</sup>

**Analysis.**

First, we find that petitioner has failed to prove the theory of abandonment it pleaded in its January 15, 2004 petition to cancel.<sup>24</sup> At Paragraph 18 of the petition to cancel, petitioner pleaded: "As an alternative ground for cancellation, Petitioner alleges on information and belief that Respondent has discontinued all use of the mark NIRVANA for bottled water with intent not to resume use and, therefore, has abandoned NIRVANA as a trademark for such goods within the meaning of §45 of the Trademark Act of 1946." We find that this allegation, that prior to or as of January 15, 2004, respondent had discontinued use of the

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<sup>23</sup> Id. at 63-64, Exh. 66 (2003 IBWA member roster); NOR Exh. No. 3(a) (respondent's January 21, 2005 answer to petitioner's Interrogatory No. 23).

<sup>24</sup> See *Otto International Inc. v. Otto Kern GmbH* 83 USPQ2d 1861 (TTAB 2007) (to give fair notice to the registrant, the petitioner's pleading of abandonment must set forth the theory of abandonment petitioner is relying on, i.e., discontinued use without intent to resume use, or the statutory presumption of abandonment arising from three consecutive years of nonuse). We note in this case that even if we were to accept petitioner's repeated but unproven assertion that respondent ceased using the mark on July 23, 2002, that is less than three years prior to the filing of the petition to cancel on January 15, 2004. Thus, petitioner could not have asserted the statutory presumption of abandonment arising from three consecutive years of nonuse in its petition to cancel.

mark without intent to resume use, is unproven by the evidence which is properly of record (and even by the evidence we have excluded).

Nonetheless, in this particular case we will consider petitioner's abandonment claim as if it were also based on the statutory presumption of three consecutive years of nonuse.<sup>25</sup>

We find that the Section 8 cancellation of Nirvana Restaurant Inc.'s registration of the mark NIRVANA for "restaurant and nightclub services" does not establish that

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<sup>25</sup> Arguably and in the interest of fairness, any nonuse of the mark by respondent which occurred after the commencement of this proceeding on January 15, 2004 (nearly seven years ago) should not be counted in determining whether there have been three consecutive years of nonuse. That is, it reasonably might be inferred that any such nonuse of the mark by respondent would be excusable nonuse in view of the pendency of this proceeding and respondent's resulting uncertainty as to its rights in its mark and its registration. See, e.g., *Penthouse Int'l, Ltd. v. Dyn Electronics, Inc.*, 196 USPQ 251, 257 (TTAB 1977) ("Moreover, nonuse of a mark pending the outcome of litigation to determine the right to such use or pending the outcome of a party's protest to such use constitutes excusable nonuse sufficient to overcome any inference of abandonment"). We note that, as pleaded and tried in various prior abandonment cases, the statutory presumption period of three consecutive years of nonuse (or two consecutive years, previously) was alleged to have both commenced and concluded prior to the filing of the petition for cancellation. See, e.g., *Imperial Tobacco Ltd. v. Philip Morris Inc.*, 899 F.2d 1575, 14 USPQ2d 1390 (Fed. Cir. 1990); *General Motors Corp. v. Aristide & Co., Antiquaire de Marques*, 87 USPQ2d 1179, 1182 (TTAB 2008); *Nina Ricci S.A.R.L. v. E.T.F. Enterprises Inc.*, 9 USPQ2d 1061 (TTAB 1988) (*rev'd on other grounds, Nina Ricci S.A.R.L. v. E.T.F. Enterprises Inc.*, 889 F.2d 1070, 12 USPQ2d 1901 (Fed. Cir. 1989); *7-11 Sales, Inc. v. Perma, S.A.*, 225 USPQ 170 (TTAB 1984); and *J.G. Hook, Inc. v. David H. Smith, Inc.*, 215 USPQ 662 (TTAB 1982). We need not consider this point in this case, however, because petitioner has failed to submit competent evidence which would establish that there were ever three consecutive years of nonuse of the NIRVANA mark by respondent, whether before or after the filing of the petition to cancel.

Nirvana Restaurant Inc. ceased using or abandoned its rights in the mark for those services. See *Crash Dummy Movie LLC v. Mattel Inc.*, 601 F.3d 1387, 94 USPQ2d 1315 (Fed. Cir. 2010). It has even less probative value on the issue in this case, which is whether Nirvana for Health Inc., our respondent, abandoned use of the NIRVANA mark for bottled water.

We find that the fact that petitioner's president Mr. Rafizadeh is unaware of respondent and believes that respondent is not in the bottled water business does not establish that respondent is not using the NIRVANA mark on bottled water. See *Threshold.TV Inc. v. Metronome Enterprises Inc.*, 96 USPQ2d 1031, 1040 (TTAB 2010) ("Simply put, we are not persuaded that applicant has not used its mark in commerce simply because Mr. Wexler says he is not familiar with applicant and its television programming services.")

We find that the fact that respondent was not a member of the International Bottled Water Association in 2003 or in 2005 lacks probative value on the issue of applicant's use or abandonment of its NIRVANA mark for bottled water. The record does not establish that membership in this association is mandatory in order to sell bottled water on the scale that respondent does. We also note that respondent's registration covers "bottled water"; it does

not (like petitioner's application) cover "bottling and labeling of water for others," which likely is the primary "bottled water industry" focus of the International Bottled Water Association.

Respondent apparently was not using the mark at some point in July 2003, at the time of Mr. Wadud's conversation with Mr. Rafizadeh. Also, respondent apparently was not using the mark on October 5, 2007 when it made its supplemental answer to Interrogatory No. 13.

However, petitioner has submitted no evidence which would establish that respondent was not using the mark in 2001, 2002, 2004, 2005 (as to which the evidence of record (respondent's answer to Interrogatory No. 13) in fact establishes respondent's use of the mark) or 2006. Absent such evidence, there is no basis for finding three consecutive years of nonuse, whether tied to the apparent nonuse of the mark in July 2003 or to the apparent nonuse of the mark on October 5, 2007.

In order to establish the statutory presumption of abandonment, petitioner bears the burden of proving respondent's nonuse of the mark for three consecutive years. Absent such proof from petitioner, respondent bears no burden of proving use of the mark during the relevant period. In other words, the burden is on petitioner to prove nonuse of the mark; the burden is not on respondent to

prove use of the mark. Petitioner's argument (at pp. 11-12 of its brief) that respondent has failed to present evidence showing use of the mark after the filing of the application, and that therefore "it can only be presumed that such evidence was not available," misstates the parties' respective burdens of proof in this case.

Given the fact-intensive nature of an abandonment claim, and the fact that petitioner bears the burden of proving abandonment, petitioner presumably could have established three consecutive years of nonuse, if such is the case, by propounding specific discovery requests (such as requests for admissions) targeted to each of the relevant years, which would have clearly and affirmatively established respondent's use or nonuse of the mark in each of the relevant years. Likewise, petitioner could have taken a discovery deposition (or even a testimony deposition) through which it could have clearly established respondent's activities with respect to the mark in each of the relevant years. *See, e.g., 7-11 Sales, Inc. v. Perma, S.A.*, 225 USPQ 170, 171-72 (TTAB 1984) ("Petitioner could have propounded additional requests for admission or employed other discovery devices, including discovery depositions of respondent's personnel, in order to adduce further evidence concerning the extent of respondent's use or lack of use of the marks."). *See also Quality Candy*

*Shoppes/Buddy Squirrel of Wisconsin Inc. v. Grande Foods*, 90 USPQ2d 1389 (TTAB 2007). If petitioner took any such targeted year-by-year discovery in this case, it certainly could have made it of record at trial along with all of the other evidence it submitted.

For all of these reasons, we find that petitioner has failed to carry its burden of proving with competent evidence that respondent did not use the NIRVANA mark on bottled water for three consecutive years. The evidence properly of record does not directly establish any such nonuse. Nor does the evidence which is properly of record establish any proven facts upon which the inferences of such nonuse that petitioner asks us to draw might be based. As noted above, "[w]hen an inference is based on pure speculation ... a prima facie case of abandonment must fail." *Cerveceria Centroamericana S.A. v. Cerveceria India Inc.*, *supra*, 13 USPQ2d 1307 at 1310.<sup>26</sup>

Because petitioner has failed to prove either that respondent ever discontinued use without the intent to resume use, or that respondent made no use of the mark for

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<sup>26</sup> Because we find that petitioner has failed to make out a prima facie case of abandonment (whether based on discontinued use without intent to resume use, or on the statutory presumption arising from three consecutive years of nonuse), we need not and do not reach the issue of whether that prima facie case has been rebutted.

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three consecutive years, petitioner's abandonment claim fails.

Decision: The petition to cancel is denied.