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Filing date: **02/27/2006**

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

Proceeding	92044571
Party	Plaintiff 200 Kelsey Associates, LLC
Correspondence Address	Edmund J. Ferdinand, III Grimes & Battersby, LLP 488 Main Avenue, Third Floor New Rochelle, CT 06851  ferdinand@gandb.com
Submission	Opposition/Response to Motion
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Date	02/27/2006
Attachments	SJ Brief.pdf ( 4 pages ) Reich Declaration.pdf ( 2 pages )



[its] favor." *Opryland USA, Inc. v. The Great American Music Show, Inc.*, 23 U.S.P.Q.2d 1471, 1472 (Fed. Cir. 1992) (reversing Board's grant of summary judgment because genuine issues of material fact existed with respect to several *DuPont* factors). "While the non-moving party is not required to present its entire case in response to a motion for summary judgment, to defeat the motion the non-movant must present sufficient evidence to show an evidentiary conflict as to the material fact in dispute . . . with due consideration to the evidentiary burdens." (*Id.*) (Citations omitted).

Here, Petitioner challenges Registrant's undisputed fact number 5, pertaining to the continued use of the JONATHAN LOGAN trademark in commerce by Registrant. In support thereof, Registrant has submitted: (1) a conclusory affidavit of an interested witness; and (2) evidence of one purchase from a retail store (attaching a receipt that does not actually indicate the name of the merchandise purchased at that time). Registrant submits that this evidence is insufficient to establish continued use of the mark and to rebut Petitioner's charge of abandonment as a matter of law. As the Southern District of New York held in *Pilates v. Current Concepts, Inc.*, 120 F. Supp.2d 286 (S.D.N.Y. 2000), "to satisfy the use requirement, application of the trademark must be sufficient to maintain the public's identification of the mark with the proprietor . . . sporadic uses . . . [are] not sufficient to maintain the public's identification of the [mark] with plaintiff or its predecessors." *Id.* at 310.

Here, Petitioner, the non-movant, has come forward with an affidavit raising serious questions about the evidence presented by Registrant on this motion because Petitioner was unable to locate JONATHAN LOGAN merchandise at the very same retail store locations where Registrant's witness claims they are offered for sale. (*See Reich Declaration ¶ 2*). In light of the fact that summary judgment on the issue of abandonment is routinely denied because of the

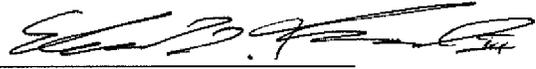
inherent factual nature of the dispute, *see, e.g., Consolidated Cigar Corp. v. Rodriguez*, 65 U.S.P.Q.2d 1153 (T.T.A.B. 2002), Petitioner submits that resolution of this case as a matter of law is not warranted based on the scant evidence of use presented by Petitioner in support of this motion, particularly when Registrant has disputed the very same evidence.

**CONCLUSION**

For the reasons stated herein, Applicant respectfully urges the Board to deny Petitioner's motion for summary judgment in all respects, and for such other and further relief as the Board deems just and proper.

Dated: February 27, 2006

THE APPLICANT,

By: 

Edmund J. Ferdinand, III  
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Attorneys for Applicant 200 Kelsey  
Associates, LLC

**CERTIFICATE OF SERVICE AND FILING**

This certifies that a copy of the foregoing memorandum of law and all supporting papers were served on the Opposer on the date indicated below by depositing the same with the United States Postal Service as first-class mail, postage prepaid, in an envelope addressed to:

Brett J. Danow, Esq.  
Katten Muchin Rosenman, LLP  
575 Madison Avenue  
New York, NY 10022

and further certifies that the aforementioned papers were filed with the Board on the date indicated below via the Board's on-line computer filing system.

Dated: February 27, 2006



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Edmund J. Ferdinand, III

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

-----X  
200 Kelsey Associates, LLC, :  
 :  
 : Cancellation No.: 92/044,571  
 :  
 : Petitioner, :  
 :  
 : v. :  
 :  
 : Delan Enterprises, :  
 :  
 : Respondent. :  
-----X

**DECLARATION OF MICHAEL REICH**

I, MICHAEL REICH, declare pursuant to 28 U.S.C. § 1746 as follows:

1. I am the Managing Member of 200 Kelsey Associates, LLC. I have personal knowledge of all facts stated in this declaration and I could competently testify to the facts stated in this declaration if called to do so. I submit this declaration in opposition to respondent's motion for summary judgment.

2. I have conducted an investigation of the retail marketplace to determine if "Jonathan Logan" brand apparel is being offered for sale, and I have been unable to locate any product on the market bearing that trademark. My investigation has included several of the same retail store chains that respondent claims carry their brand, as follows:

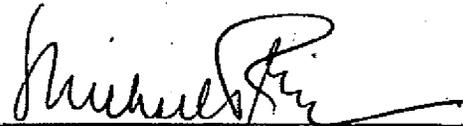
(a) Last fall I contacted two different Burlington Coat Factory store locations.

Neither one carried the "Jonathan Logan" brand at that time. In addition, I am aware that the company's Internet web site, located at [www.burlingtoncoatfactory.com](http://www.burlingtoncoatfactory.com), did not indicate that the company carried "Jonathan Logan" brand apparel in the fall of 2005, nor does it indicate that the company carries such merchandise at present.

(b) I personally visited an Annie Sez location in Milburn, New Jersey, on December 11, 2005. The store did not carry "Jonathan Logan" brand merchandise at that time. Recently I called the "Annie Sez" retail store located on Sunrise Highway in Massapequa, New York. The clerk indicated that while they used to carry the "Jonathan Logan" brand, they haven't carried the brand "for some time."

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 24, 2006



Michael Reich