

**THIS OPINION IS NOT A
PRECEDENT OF THE T.T.A.B.**

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

200 Kelsey Associates, LLC
v.
Delan Enterprises Incorporated and One Step Up, Ltd.

Cancellation No. 92044571

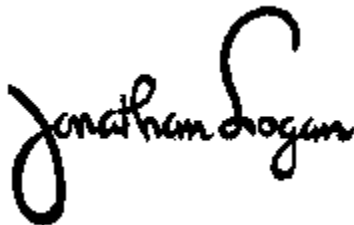
Edmund J. Ferdinand, III, Esq. of Grimes & Battersby, LLP
for 200 Kelsey Associates, LLC.

Harlan M. Lazarus of Lazarus and Lazarus, P.C. for Delan
Enterprises Incorporated and One Step Up., Ltd.

Before Cataldo, Bergsman and Wellington, Administrative
Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Delan Enterprises Incorporated was the registrant for
the mark JONATHAN LOGAN, in a script format shown below, for
"women's dresses"¹ and "women's dresses, pant suits, pants,
shorts, culottes, blouses, jackets, vests and coats."²

A handwritten signature in black ink that reads "Jonathan Logan". The signature is written in a cursive, script style. The first letter 'J' is large and loops around the first part of the name. The last letter 'n' also has a large loop. The signature is centered on the page.

¹ Registration No. 0549924, issued October 23, 1951; Sections 8 and 15 affidavits accepted and acknowledged; third renewal.

² Registration No. 0937651, issued July 1, 1972; Sections 8 and 15 affidavits accepted and acknowledged; second renewal.

On April 6, 2006, Delan Enterprises Incorporated assigned its ownership of the JONATHAN LOGAN trademark, the associated registrations, and the goodwill associated therewith to One Step Up, Ltd. The assignment was recorded in the Assignment Branch of the U.S. Patent and Trademark Office on July 20, 2006, at Reel 3367, Frame 0535. In the Board's Order dated February 6, 2007, One Step Up, Ltd. was joined as a party defendant. Delan Enterprises Incorporated and One Step Up, Ltd. are referred to as respondents.

200 Kelsey Associates, LLC ("petitioner"), has petitioned to cancel respondents' registrations on the ground of abandonment.

Respondents denied the essential allegations in the petition for cancellation.

Evidentiary Issues

Through the testimony deposition of Stacy Haigney, in-house counsel for Burlington Coat Factory Warehouse Corporation, a purported purchaser of JONATHAN LOGAN clothing, respondents sought to introduce the following documents:

1. A form provided by "Jonathan Logan" to buyers for notes regarding purchases;³

³ Haigney Dep., p. 39, Exhibits 3 and 4.

2. A "Jonathan Logan" invoice to Burlington Coat Factory dated March 9, 2005;⁴

3. A copy of a computer generated purchase order from "Jonathan Logan," vendor, to Modecraft Fashions⁵ dated March 31, 2005;⁶ and,

4. A computer printout of a "Vendor Payment History Report" for "Jonathan Logan" listing invoices dated August, October, November, and December 2004 and February through May 2005.⁷

Petitioner objected to introduction of the above-noted documents on the grounds that they are hearsay, that they were not properly authenticated and that Mr. Haigney is not a qualified witness. Petitioner argued that Mr. Haigney was not qualified to authenticate the documents because, as in-house counsel, he is not involved in buying or selling merchandise, and therefore he does not have personal knowledge regarding the documents.⁸

Rule 803(6) of the Federal Rules of Evidence excepts from the hearsay rule "a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from

⁴ Haigney Dep., Exhibit 5.

⁵ Modecraft Fashions is a dba used by Burlington Coat Factory to make wholesale purchases. (Haigney Dep., p. 23).

⁶ Haigney Dep., Exhibit 6.

⁷ Haigney Dep., Exhibits 7 and 8.

⁸ Petitioner's Brief, p. 9.

information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, . . . unless the source of information on the method or circumstances of preparation indicate lack of trustworthiness."

Thus, the rule requires: (a) a memorandum, etc. in any form; (b) of acts, etc., (c) made at or near the time; (d) by, or from information transmitted by, a person with knowledge; (e) that the memorandum, etc. was kept in the course of a regularly conducted business activity; (f) that it was the regular practice of that business activity to make the memorandum, etc.; and (g) that the fulfillment of the preceding conditions is shown by the testimony of the custodian of the memorandum, etc. or another qualified witness.

The "qualified witness" does not have to have personal knowledge of the contents of the records. It is sufficient if the witness has personal knowledge regarding the records and how they are kept in the regular course of business. In other words, the witness may not simply testify about what he has read or has been allowed to review. *Olin Corporation v. Hydrotreat, Inc.*, 210 USPQ 63, 67 (TTAB 1981). Although

Mr. Haigney has no duties relating to sales and marketing, his testimony establishes that he is familiar with his company's business processes. For example, on cross-examination, Mr. Haigney testified, in detail, regarding how the buyers for Burlington Coat Factory visit vendor showrooms (e.g., "Jonathan Logan") and select merchandise using the forms identified as Exhibits 3 and 4.⁹ Mr. Haigney further testified that after selecting merchandise from a vendor, the buyers give their notes to a staff person who enters them into the company computer system that generates purchaser orders (Exhibit 6).¹⁰ Finally, Mr. Haigney testified that exhibits 7 and 8 were reports produced at his request from his company's computer system.¹¹

In view of the foregoing, we are satisfied that the documents introduced by Mr. Haigney are authentic records of regularly conducted business of the Burlington Coat Factory Warehouse Corporation. Petitioner's objection to respondents' Exhibits 3-8 on the grounds that they are hearsay, that they were not properly authenticated and that Mr. Haigney is not a qualified witness, is overruled.

Petitioner also objected to the Jonathan Logan/Modecraft Fashions purchase order and the Burlington

⁹ Haigney Dep., pp. 26 - 27 and 39.

¹⁰ Haigney Dep. pp. 28 - 29.

¹¹ Haigney Dep., pp. 50 - 52.

Coat Factory Warehouse Corporation "Vendor Payment History Report" for "Jonathan Logan" on the ground that these documents were not produced by respondents during discovery. During discovery, petitioner sought documents evidencing respondents' sales of JONATHAN LOGAN brand clothing for each year from 2000 to 2006. Two days before the Haigney deposition, and long after the close of discovery, respondents served petitioner with a copy of the Jonathan Logan/Modecraft Fashions purchase order. Respondents produced the Burlington Coat Factory Warehouse Corporation "Vendor Payment History Report" for "Jonathan Logan" for the first time at the Haigney deposition.¹²

First, we note that respondents' Exhibits 6, 7 and 8 are the records of Burlington Coat Factory Warehouse Corporation, not records of the respondents. Second, in response to petitioner's request for production of documents, respondents lodged the general objection that the requests "seek information which is not within Registrant's possession, custody, or control."¹³ By their objection, respondents put petitioner on notice that they were producing whatever documents were in their possession, custody, or control and that they were not producing

¹² Petitioner's Brief, p. 5.

¹³ General Objection No. 7 in response to petitioner's request for production of documents, attached as Exhibit 2 to the Declaration of Edmund J. Ferdinand, III, petitioner's counsel, submitted in support of petitioner's motion to strike.

documents over which they did not have possession, custody, or control. Thus, petitioner was not deceived or misled by the response of the respondents that there were no other documents that might prove the use of the JONATHAN LOGAN trademark other than what respondents produced.

Finally, respondents deposed Mr. Haigney to rebut the testimony of petitioner's witness, Michael Reich, regarding whether Burlington Coat Factory stores sold JONATHAN LOGAN brand clothing. When Mr. Michael Reich, testified that he conducted an investigation regarding the sale, or the lack of sales, of JONATHAN LOGAN clothing at Burlington Coat Factory stores, petitioner opened the door for respondents to introduce testimony and evidence that they, in fact, sold JONATHAN LOGAN clothing to Burlington Coat Factory Warehouse Corporation.

Under these circumstances, respondents are not estopped from introducing the testimony of Mr. Haigney and the documents from Burlington Coat Factory Warehouse Corporation for whatever probative value they may have. Therefore, petitioner's objection to respondents' Exhibits 6, 7, and 8 on the ground that they were not produced during discovery is overruled.

Petitioner objected to respondents' Exhibits 11-13 introduced through the testimony of Harry Adjmi, the President of One Step Up, Ltd., on the grounds of hearsay,

lack of foundation, and that they were not introduced by a qualified witness. Respondents' Exhibits 11-13 consist of the following documents:

1. Respondent's Exhibit 11 is a package of documents consisting of the following documents:

- A. An invoice from Maklihon Mfg. Corp., a licensee of Delan Enterprises Incorporated, to Value City Department Stores, in Columbus, Ohio, dated August 3, 2005, for unidentified merchandise;
- B. A Value City Department Stores purchase order dated May 11, 2005; and,
- C. An unidentified document that appears to be a photocopy of a business card displaying the JONATHAN LOGAN trademark;¹⁴

2. Respondents' Exhibit 12 is a package consisting of a number of different documents. However, respondents only identified a Value City Department Store purchase order dated May 11, 2005. The vendor is identified as "Jonathan Logan."¹⁵ The other documents in Exhibit 12 were not identified except for Mr. Adjmi's testimony that the

¹⁴ This document was not clearly identified.

Q. Do you see that Bates stamp document number 90 appears to be a Jonathan Logan label with the name Steve Lippert printed beneath it?

A. I see that.

(Adjmi Dep., p. 11).

¹⁵ This is not the same as the purchase order in Respondents' Exhibit 11.

documents were received from Delan Enterprises Incorporated; and,

3. Respondents' Exhibit 13 is a cover letter dated August 19, 2005, addressed to Joel Yunis, an attorney at Katten Muchin Zavis Roseman, from Kenneth Blair, Senior Vice President of Wells Fargo Century, that transmits "fifteen (15) 2005 invoices from Broadway Garment, which they say were for Jonathan Logan goods." Attached to the August 19, 2005 cover letter are a "BGC, Inc." sales journal summarizing the information on the 15 attached invoices. The attached invoices are from Broadway Garment Company to Sam's Club. They are dated in January, February, and March 2005. Neither the JONATHAN LOGAN trademark or trade name appear on the sales journal or invoices.

Petitioner's objection to respondents' Exhibits 11 - 13 is well taken because there is no evidence that Mr. Adjmi has any personal knowledge regarding the documents and whether and how they were kept in the regular course of business by the various entities identified on those documents. In other words, Mr. Adjmi was merely testifying about what the documents say on their face. In view of the foregoing, petitioner's objection to respondents' Exhibits 11 - 13 is sustained and Exhibits 11 - 13 have been given no consideration.

Petitioner objected to respondents' Exhibit 14 introduced through the testimony of Harry Adjmi. The relevant portion of Exhibit 14 is paragraph No. 4 of the Rudy Del Vecchio declaration in support of respondents' motion for summary judgment. Petitioner objected to the admissibility of Exhibit 14 on the ground that the statements in the Del Vecchio declaration are hearsay. The statements in the Rudy Del Vecchio declaration are hearsay because Mr. Del Vecchio did not make himself available to testify at trial and the statements were made to prove the truth of the matter asserted (*i.e.*, that Delan Enterprises Incorporated sold JONATHAN LOGAN clothing to many retailers, including Annie Sez, JC Penney, Burlington Coat Factory, Value City, Steinmart, Symm's, Bolton's, Strawberry, and Ashley Stewart). In view thereof, petitioner's objection is sustained and the statements in the Del Vecchio declaration have been given no consideration.

The Record

By operation of Trademark Rule 2.122, 37 CFR §2.122, the record includes the pleadings and the registration files for respondents' marks. The record also includes the following testimony and evidence:

A. Petitioner's Evidence.

Petitioner submitted the testimony deposition of Michael Reich, petitioner's founder and Managing Member,

with attached exhibits, including a copy of "One Step Up, Ltd.'s Verified Responses to Petitioner's First Set of Interrogatories as Successor-In-Interest By Assignment to Delan Enterprises, 'Registrant'."¹⁶

B. Respondents' Evidence.

1. The testimony deposition of Stacey J. Haigney, in-house counsel, Assistant Secretary, and Chief Compliance Officer of Burlington Coat Factory Warehouse Corporation, a customer of JONATHON LOGAN branded merchandise, with attached exhibits; and,

2. The testimony deposition of Harry Adjmi, President of One Step Up, Ltd., with attached exhibits, subject to the evidentiary objections discussed *supra*.

Standing

On August 19, 2004, petitioner filed an intent to use application to register the mark JONATHAN LOGAN for women's clothing, in Class 25 (Serial No. 78469921).¹⁷ In an Office Action dated March 24, 2005, the Trademark Office refused to register petitioner's mark pursuant to Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), because petitioner's mark, when used in connection with women's clothing, is likely to cause confusion with respondents'

¹⁶ Respondents stipulated to the admissibility of its discovery responses. Reich Dep., p. 17.

¹⁷ Reich Dep., pp. 10 - 11, Exhibit 2.

JONATHAN LOGAN mark.¹⁸ By proving that its application to register the mark JONATHAN LOGAN was refused because of respondents' registrations is sufficient to establish petitioner's standing. *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982).

Abandonment

Under Section 45 of the Trademark Act of 1946, 15 U.S.C. 1127, a mark shall be deemed abandoned *inter alia*:

(a) 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 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 the mark.

Under the Act, *prima facie* abandonment is established by proof of its nonuse for three consecutive years. To overcome that *prima facie* case, the respondent must come forth with evidence that it did not "discontinue" use of the mark, or if such use had been discontinued, the nonuse of the mark was without "an intent not to resume" use.

Imperial Tobacco Ltd. v. Philip Morris Inc., 899 F.2d 1575, 14 USPQ2d 1390, 1393 (Fed. Cir. 1990).

¹⁸ Reich Dep., pp. 13 - 15, Exhibit 3.

- A. Whether petitioner has made a *prima facie* case of abandonment by proving that respondents have failed to use the JONATHAN LOGAN mark for three consecutive years?

Petitioner asserts that respondents' registrations should be cancelled because of the nonuse of the JONATHAN LOGAN mark for the three consecutive years preceding the filing of the petition for cancellation on May 31, 2005.¹⁹ To prove the nonuse of respondents' mark petitioner relied on responses of One Step Up, Ltd., on behalf of respondents, to Interrogatory Nos. 3 and 4 wherein One Step Up, Ltd. stated that it did not know the extent of the sales revenues and advertising expenses associated with JONATHAN LOGAN brand clothing.

Interrogatory No. 3. Set forth the advertising expenses incurred by Registrant related to the marketing, advertising and promotion of JONATHAN LOGAN brand women's clothing in the United States for each year from 2000 to the present.

RESPONSE 3. For periods prior to the Assignment to Registrant, unknown. For periods subsequent to the Assignment to Registrant, to be supplied.

Interrogatory No. 4. Set forth the U.S. sales (or distribution) figures in units and dollars for JONATHAN LOGAN brand women's clothing for each year from 2000 to the present.

RESPONSE 4. For periods prior to the Assignment to Registrant, unknown. For

¹⁹ Petitioner's Brief, pp. 1 and 6.

periods subsequent to the Assignment to Registrant, to be supplied.²⁰

Petitioner also relied on the testimony of its founder and Managing Member, Michael Reich, who testified that since the year 2000, the JONATHAN LOGAN brand was no longer in the marketplace because he had not seen the product in stores or in advertising.²¹ Prior to filing its application, petitioner had not undertaken any investigation to determine the availability of the JONATHAN LOGAN mark.²² However, after filing the petition for cancellation (May 31, 2005), Mr. Reich visited one or two Annie Sez stores and two or three Burlington Coat Factory stores to see if any JONATHAN LOGAN brand clothing was being sold.²³ One of the Burlington Coat Factory stores was in West Chester and the other(s) were in New Jersey (although Mr. Reich could not remember whether he visited one or two in New Jersey).²⁴ He selected these stores because they were close to his office.²⁵ Even though Burlington Coat Factory has several

²⁰ Reich Dep., Exhibit 4.

²¹ Reich Dep., pp. 9-10. See also Reich Dep., pp. 11-12 (at the time petitioner filed its application, Reich "was under the impression that [the JONATHAN LOGAN mark] was no longer in the marketplace and there were no sales").

²² Reich Dep., p. 12 ("I don't specifically recall what I did prior to the filing").

²³ Reich Dep., pp. 15 - 17, 19. Mr. Reich testified that respondents told him that JONATHAN LOGAN branded clothing could be found at Annie Sez and Burlington Coat factory stores. (Reich Dep., p. 16).

²⁴ Reich Dep., p. 19. Mr. Reich did not take any notes during his visit to the stores. (Reich Dep., p. 20).

²⁵ Reich Dep., p. 21.

hundred stores,²⁶ Mr. Reich did not make an inquiry at the corporate level of Burlington Coat Factory to determine whether that retailer sold JONATHAN LOGAN brand clothing.²⁷ Instead, Mr. Reich relied on an inquiry made to an unidentified store employee.²⁸

With respect to his visits to the Annie Sez stores, Mr. Reich could not recall whether he visited one or two stores.²⁹ Again, Mr. Reich relied on an inquiry made to an unidentified store employee,³⁰ rather than making an inquiry at the corporate level of Annie Sez regarding whether that retailer sold JONATHAN LOGAN brand clothing.³¹

Mr. Reich did not make any specific inquiry as to whether the Burlington Coat Factory or Annie Sez stores sold JONATHAN LOGAN brand clothing between the years 2001 through 2004.³²

Mr. Reich's testimony regarding his purported market investigation is not sufficiently probative to prove that there was three consecutive years of nonuse of the JONATHAN LOGAN mark by respondents. First, petitioner's decision to adopt the mark JONATHAN LOGAN was based on Mr. Reich's "impression" that the mark was no longer in use. Mr. Reich

²⁶ There are approximately 370 Burlington Coat Factory stores in 43 states. (Haigney Dep., p. 6).

²⁷ Reich Dep., p. 21.

²⁸ Reich Dep., p. 27.

²⁹ Reich Dep., p. 22.

³⁰ Reich Dep., p. 27.

³¹ Reich Dep., p. 22.

has no specific experience in the clothing industry.

Petitioner is a brand management and licensing company.³³

Prior to forming petitioner, Mr. Reich manufactured cosmetics.³⁴ By virtue of the fact that Mr. Reich manufactured cosmetics under licenses with other companies, he developed skills and experience negotiating licenses.³⁵ However, Mr. Reich's experience in manufacturing cosmetics and negotiating licenses does not form a reasonable basis for his impression that respondents were no longer using the JONATHAN LOGAN mark.

Second, Mr. Reich's purported investigation comprising visits to one or two Annie Sez stores and two or three Burlington Coat Factory stores in close proximity to his office is insufficient considering that Burlington Coat Factory Warehouse Corporation has approximately 370 stores in 42 or 43 states. Moreover, Mr. Reich's testimony that he spoke to unidentified store employees at the retail units he visited, rather than checking with corporate level representatives, highlights the cursory nature of his investigation.

Finally, Mr. Reich's testimony is not credible. Mr. Reich does not remember whether he visited one or two Annie Sez stores or whether he visited two or three Burlington

³² Reich Dep., pp. 23 - 25.

³³ Reich Dep., p. 5.

³⁴ Reich Dep., p. 6.

Coat Factory stores. In addition, Mr. Reich conveniently neglected to take any notes to refresh his memory regarding his investigatory visits.

In view of the foregoing, our determination of whether petitioner has made a *prima facie* case of abandonment by proving that respondents have not used the JONATHAN LOGAN mark for women's clothing for three consecutive years solely on respondents' responses to Interrogatory Nos. 3 and 4. As indicated above, respondents were unaware of the sales revenues or advertising expenses prior to the 2006 assignment of the JONATHAN LOGAN mark and registrations involved in this proceeding. Because respondents were unaware of the sales or advertising figures prior to the 2006 assignment, petitioner could not introduce into evidence respondents' annual sales and advertising records in connection with the mark. Moreover, there is no explanation why respondents do not have such information. Accordingly, we find that petitioner has made a *prima facie* case that there has been three consecutive years of nonuse prior to the 2006 assignment.

B. Whether respondents proved that they did not discontinue use of the mark JONATHAN LOGAN?

To support their continued use of the JONATHAN LOGAN trademark, respondents relied on the testimony of Stacy J. Haigney, in-house counsel for Burlington Coat Factory

³⁵ Reich Dep., p. 7.

Warehouse Corporation, regarding the sale of products from "Jonathan Logan" to Burlington Coat Factory Warehouse Corporation. Mr. Haigney introduced the following records into evidence:

1. A newspaper insert advertising the sale of clothing distributed in March 2002 good through April 6, 2002, that included an advertisement for JONATHAN LOGAN suit;³⁶

2. A form provided by "Jonathan Logan" to buyers for notes regarding purchases.³⁷ The date on the form is a facsimile transmission date of April 1, 2005. On the form, "Jonathan Logan" is identified as a vendor. Therefore, this document displayed "Jonathan Logan" used as a trade name, not as a trademark;

3. A "Jonathan Logan" invoice to Burlington Coat Factory dated March 9, 2005.³⁸ "Jonathan Logan" is used to identify the company name. It is not used in connection with any clothing products. Therefore, as displayed on the invoice, "Jonathan Logan" is used a trade name, not as a trademark;

4. A copy of a computer generated purchase order from "Jonathan Logan," vendor, to Modecraft Fashions³⁹ dated

³⁶ Haigney Dep., p. 37, Exhibit 2.

³⁷ Haigney Dep., p. 39, Exhibits 3 and 4.

³⁸ Haigney Dep., Exhibit 5.

³⁹ Modecraft Fashions is a dba used by Burlington Coat Factory to make wholesale purchases. (Haigney Dep., p. 23).

March 31, 2005.⁴⁰ As displayed in the purchase order, "Jonathan Logan" is used as a trade name, not used as a trademark; and,

5. A computer printout of a "Vendor Payment History Report" for "Jonathan Logan" listing invoices dated August, October, November, and December 2004 and February through May 2005. In the printout, "Jonathan Logan" is identified as the vendor. Therefore, "Jonathan Logan" is used as a trade name, not as a trademark;⁴¹

Respondents also relied on the testimony of Harry Adjmi, President of One Step Up, Ltd., the current owner of the JONATHAN LOGAN trademark registrations at issue. Mr. Adjmi introduced respondents' Exhibit 10 consisting of the following documents:

1. Copies of the JONATHAN LOGAN trademark assignment to One Step Up, Ltd. from Delan Enterprises Incorporated;
2. Two One Step Up purchase orders for the manufacture of merchandise with JONATHAN LOGAN labels. The purchase orders are undated. However, the purchase order identified by Bates No. 00135 has a delivery date before July 23, 2006 and the purchase order identified by Bates No. 00136 has a delivery dated before September 1, 2006. However, the purchase order is for the manufacture of clothing outside of the United States;
3. Four invoices from One Step Up for merchandise sold to the following companies:

⁴⁰ Haigney Dep., Exhibit 6.

⁴¹ Haigney Dep., Exhibit 7. Haigney Dep. Exhibit 8 appears to be another version of Exhibit 7 in a different format. Could not identify Exhibit 8 page 13.

- A. Conway stores in New York, New York, dated December 13, 2006;
- B. DD's Discounts in Moreno Valley, California, dated October 26, 2006;
- C. JCPenney in Sunrise, Florida, dated September 28, 2006; and,
- D. Rue 21 in Weirton, West Virginia, dated October 27, 2006.

None of the invoices display the JONATHAN LOGAN trademark or trade name;

- 4. A photograph of a JONATHAN LOGAN label in a sweater; and,
- 5. A copy of a JONATHAN LOGAN hang tag.

Respondents have only shown use of the JONATHAN LOGAN trademark as of April 6, 2002 through the Burlington Coat Factory Warehouse Corporation newspaper insert advertising the JONATHAN LOGAN suit. None of the other documents introduced by respondents show JONATHAN LOGAN used as a trademark.⁴² As indicated in the discussion describing the remainder of the documents introduced through the Stacy Haigney deposition, those documents showed use of "Jonathan Logan" as a trade name, not as a trademark. In fact, Mr. Haigney testified that the documents he produced at his deposition did not necessarily show that his company purchased JONATHAN LOGAN branded clothing, only that the

⁴² Even if we had admitted respondents' Exhibits 11-13, respondents would not have proven use of the JONATHAN LOGAN trademark after April 6, 2002 because none of those exhibits showed use of the JONATHAN LOGAN trademark.

documents showed that the clothing came from the Jonathan Logan company.⁴³

Q. And as a result of your investigation, as you've referred to it, were you able to ascertain additional purchasers of the items bearing the Jonathan Logan mark?

A. Yes. Or at least purchases of product from the Jonathan Logan company, the same vendor from whom we were buying under PO 7035403.⁴⁴

Moreover, with respect to the probative value of the Burlington Coat Factory Warehouse Corporation documents produced by Mr. Haigney, we note that there was no evidence on behalf of respondents regarding the practice of placing the JONATHAN LOGAN trademark on every item of clothing sold by the "Jonathan Logan" company. In other words, respondents are asking us to improperly infer that any clothing sold by the "Jonathan Logan" company featured a label displaying the JONATHAN LOGAN trademark.

The invoices introduced through respondents' Exhibit 10 through the Harry Adjmi deposition do not show use of "Jonathan Logan as either a trade name or a trademark. Accordingly, based on this record, there is no evidence of any use of the JONATHAN LOGAN trademark after April 6, 2002. In other words, there is more than three consecutive years of nonuse.

⁴³ Haigney Dep., p. 11.

⁴⁴ *Id.*

The only evidence that might be construed as respondents' intent to resume use is the fact that One Step Up, Ltd. acquired the JONATHAN LOGAN trademark as of April 6, 2006, presumably to revive the brand. However, there is no testimony or evidence from any officer or employee of Delan Enterprises Incorporated, the predecessor of One Step Up, Ltd., regarding the use of the JONATHAN LOGAN brand from April 6, 2002 through April 6, 2006, including what plans, if any, Delan Enterprises Incorporated had to market JONATHAN LOGAN brand clothing. It is also noteworthy that respondents were unable to produce any evidence of advertising or sales for JONATHAN LOGAN brand clothing subsequent to April 6, 2002.

Respondents' contention that it has shown continued use of the JONATHAN LOGAN trademark subsequent to April 6, 2002 is based on the false premise that the Haigney and Adjmi documents displaying use of the "Jonathan Logan" trade name is analogous to trademark use. As mentioned above, the problem with respondents' position is that there is no testimony or supporting evidence that every item of clothing sold by the "Jonathan Logan" company featured the JONATHAN LOGAN trademark. Therefore, we have no basis to infer that clothing sold by the "Jonathan Logan" company necessarily was branded with the JONATHAN LOGAN trademark.

Based on this record, respondents have not introduced sufficient evidence that they have used the JONATHAN LOGAN trademark between April 6, 2002 and April 6, 2006 to rebut petitioner's *prima facie* case of abandonment.

Decision: The petition for cancellation on the ground of abandonment is granted.