

ESTTA Tracking number: **ESTTA563127**

Filing date: **10/04/2013**

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

Proceeding	92055426
Party	Plaintiff Run It Consulting, LLC
Correspondence Address	MATTHEW H SWYERS THE TRADEMARK COMPANY PLLC 344 MAPLE AVENUE WEST , SUITE 151 VIENNA, VA 22180 UNITED STATES mswyers@thetrademarkcompany.com
Submission	Rebuttal Brief
Filer's Name	Matthew Swyers
Filer's e-mail	mswyers@TheTrademarkCompany.com
Signature	/Matthew H. Swyers/
Date	10/04/2013
Attachments	Reply Brief of Petitioner Run It Consulting.pdf(216393 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
The Trademark Trial and Appeal Board**

In the matter of U.S. Registration 1,962,898,
For the mark AMERICAN MUSCLE,
Registered on the Principal Register on March 19, 1996.

Run It Consulting, LLC,	:	
	:	
Petitioner,	:	
	:	
vs.	:	Cancellation No. 92055426
	:	
Augusto Lodi,	:	
	:	
Registrant.	:	

REPLY BRIEF OF PETITIONER RUN IT CONSULTING, LLC

TABLE OF CONTENTS

PRELIMINARY STATEMENT.....	1
REGISTRANT’S BRIEF.....	1
A. Registrant’s Lack of Evidence of Use from 1998 through 2004.....	1
B. Registrant’s Alleged Use of the Trademark from 2004 or 2006 to the Present.....	3
CONCLUSION.....	6
CERTIFICATE OF SERVICE.....	8

COMES NOW the Petitioner Run It Consulting, LLC (hereinafter “Petitioner” or “Run It Consulting”), by counsel, and respectfully submits its reply brief in support of the instant Petition to Cancel.

PRELIMINARY STATEMENT

On or about September 19, 2013 Registrant Leander Lodi (hereinafter “Registrant”) submitted Registrant’s Trial Brief (hereinafter “Registrant’s Brief”) in opposition to the instant Petition to Cancel. In the brief Registrant effectively conceded that it did not retain objective evidence (e.g., sales receipts, corroborating testimony) of use of the mark at issue between 1998 and 2004 and, curiously, attempts to minimize or refute this fact by blaming the Petitioner for failing to file a motion to compel to produce evidence from this period which Registrant himself concedes does not exist.

This matter being now fully briefed, it is submitted that the evidence establishes that Petitioner ceased of the trademark without an intent to resume use thereof in 1998. Only following the institution of the instant Petition to cancel did Registrant fabricate evidence to make it appear that use had resumed at some time in the past.

As such, it is submitted that Petitioner has carried its burden in the instant matter and that the Petition should be granted by the Board.

REGISTRANT’S BRIEF

A. Registrant’s Lack of Evidence of Use from 1998 through 2004

Registrant generally contends that he began use of the mark at issue in 1987 and has continued to use the same, in interstate commerce, to date. Registrant’s Brief at p 3. However, Registrant concedes that the only evidence of use from 1998 through 2004 is Registrant’s uncorroborated testimony. *Id.* at 8. It is further conceded that Registrant offered no credible

explanation as to why he did not retain records for this 6-year period. *Id.* at 9. Specifically, Registrant testified that he moved offices in 1998 and threw away many of his old records. *Id.* However, as Registrant subsequently realized during the briefing period of this matter, discarding records in 1998 does not explain why there are no records from 1998 through 2004. (emphasis added).

In this regard, there is simply no evidence of record explaining why these records do not exist. Registrant argues that it is a “reasonable inference” that it would have discarded these records after three (3) years on the advice of its accountant. But even Registrant’s “reasonable inference” argument is contradicted by the alleged records Registrant produced from 2004 through 2009. In short, according to Registrant’s “reasonable inference” argument, in order to give the Registrant that reasonable inference, the Registrant should not have retained records prior to 1998 nor from 2004 through 2009. See *id.* But it has records from 2006 to 2009, as suspect as these may be. Even this argument for Registrant must fail.

Somewhat curiously Registrant effectively attempts to blame Petitioner for his lack of evidence during this six-year period because Petitioner did not file a motion to compel evidence that, earlier in Registrant’s Brief, he admits does not exist. Registrant’s Brief at p 14.

Specifically, Registrant argues:

Petitioner never brought a motion challenging the sufficiency of Registrant’s discovery ... Because of this failure by Petitioner, Petitioner cannot now argue for any form of adverse inference against Registrant based upon a failure to produce additional invoices...

Id. Registrant is in error.

Aside from Registrant’s obligation to produce the same, this ill-fated argument can be dispensed with quickly: Registrant admitted throughout his brief he does not have any records for this six-year gap. (emphasis added). As such, despite a somewhat curious effort by

Registrant to twist its failure to explain the six-year gap into one where Petitioner was complicit in the same by “failing” to file a motion to compel, such argument must be given no weight due to Registrant’s repeated admissions that he himself does not retain records for this period.

As such, despite an ill-conceived discovery argument and internally inconsistent “reasonable inference” argument, the Registrant has ultimately offered no credible or corroborating evidence as to whether use continued from 1998 through 2004 and why, if he did, there is not one scintilla of evidence establishing that fact aside from Registrant’s own self-serving testimony.

There is but one logical conclusion: because Registrant was no longer using the trademark at issue during this period of time.

B. Registrant’s Alleged Use of the Trademark from 2004 or 2006 to the Present

Registrant, in an alternative argument should the Board agree with Petitioner regarding the non-use for six years, sets forth that resumed use from 2006 to the present is sufficient to rebut any presumption of an intent not to resume use. Petitioner’s Brief at p 9-10. Given the suspect nature of the testimony on this point, the lack of corroborating evidence, and un-rebutted evidence of tampering with the little evidence which was produced, Registrant cannot and should not be permitted to carry his burden of proof in this regard.

Registrant’s testimony regarding alleged resumption of use from 2006 through 2012 was, in fact, limited to his own testimony coupled with his own computer-generated receipts allegedly showing sales to third parties who exist outside of the State of California. Registrant could have called further witnesses to corroborate this alleged use. He did not. Registrant could have produced evidence of shipping records to establish use. He did not. Registrant could have

provided evidence of credit card receipts or any evidence not within Registrant's exclusive control to corroborate its alleged use from 2006 to 2012. He did not.

Again, Registrant attempts to shift the blame for its lack of evidence stating that Petitioner should have filed a motion to compel documents it did not know existed and could have assisted Registrant in making its case. Registrant ignores that it had an obligation to produce the same. Moreover, discovery issues aside, if they existed, why wouldn't Registrant submit the same into evidence? After all, this mythical corroborating evidence is allegedly in the control of the Registrant outside of any discovery issues Registrant attempts to use to cloud the issues in this case. In the end, peering through the smoke clouds Registrant attempts to hide behind the only evidence Registrant elected, or had, to put before this tribunal to establish alleged use during this period is (1) his own testimony; and (2) receipts his computer, and by extension he, made.

As such, it is the Registrant who is to blame for his lack of evidence and the Board which must now examine this evidence and determine, in light of all of the issues presented therewith as more fully set forth in the Petitioner's main trial brief, whether Petitioner is truly credible.

Registrant states that his distributors are located in California, Virginia, Arizona, and Canada. Registrant's Brief at p. 10. Registrant did not call any of these "distributors" to testify in this matter. The only evidence of record is Registrant's Testimony itself.

Registrant claims "These distributors re-sell Registrant's goods to customers in their states..." Id. Where is the evidence of this? Perhaps Registrant provided some form of self-serving statement on the record to this effect. But there was certainly no corroborating testimony from any of these witnesses. Likewise, Registrant has knowledge of exports to Iran, but did not call any witnesses to actually prove this.

In reality, Registrant conceded virtually all products are, allegedly, picked up in California. In reality, he has no idea, or offered no corroborating testimony, as to whether it ever leaves the state. During his trial testimony he stated, for the first time in this matter, he ships products out of state. He provided no UPS, FedEx, or other shipping records, evidence that could easily have been produced to verify these claims.

In one particularly strange exchange about shipments allegedly sold to his Arizona distributor, on cross-examination Mr. Lodi can never truly pinpoint how the goods even get to this gentleman. Specifically, he cannot figure out which relative of the man allegedly picks up the product in California, if the pick-ups occur through the Registrant or some other third party, and ultimately falls back on the fact his ex-wife is actually the courier used to deliver the product. But again, she was never called to testify to corroborate any of this shifting story.

Lastly, in footnote 9 of Registrant's Brief Registrant attempts to de minimize the out-of-sequence invoices during this period by dismissing the same as a "typographical error." In so doing, Registrant's counsel pokes fun at the undersigned. The only distinction between an alleged error in Petitioner's main brief and the invoice in question is that Petitioner's counsel's trademark rights and credibility are not at issue here, Registrant's are.

This was not merely a typographical error on the part of the Registrant. Registrant, chose not to call any other witness to corroborated his claims in the instant matter. By making this choice, the Registrant himself has placed his testimony and the limited evidence he has submitted under a credibility microscope.

In consideration of the unexplained "gap" for six years Registrant attempts to blame on Petitioner even though it admits to not having records itself, Registrant's failure to call even one corroborating witness among allegedly many that could have simply come forward, if valid, and

authenticated Registrant's story, as well as significant inconsistencies in how products were allegedly delivered in the post-2006 alleged sales era by Registrant, it is submitted that the mis-labeling of the invoice at issue is not a typographical error. It is, in fact, direct evidence that these invoices were completely fabricated for this case as more fully set forth in Petitioner's main brief and the cross-examination of the Registrant.

CONCLUSION

Once again, the sun has set on Respondent's AMERICAN MUSCLE mark. A clear period of non-use existed from 1998 through 2004 arising to the statutory presumption of abandonment. Moreover, Mr. Lodi has failed to establish resumption of use of the mark in interstate commerce or provide any evidence as to when that will occur. Finally, given the tenor and credibility of the testimony and the time line and evidentiary anomalies in this matter, it is suggested that Mr. Lodi has merely done what it takes in an effort to create a perception of continued use but, upon a close inspection thereof, has abandoned the mark at issue.

Registrant's brief does nothing to alter these conclusion based upon the evidence submitted before the Board and not the assumptions or inferences Registrant subtly attempts to rely upon.

Accordingly, Respondent's registration should not prevent Petitioner's registration of its mark. Rather, Registration No. 1,962,898 should be cancelled.

Respectfully submitted this 4th day of October, 2013.

THE TRADEMARK COMPANY, PLLC

/Matthew H. Swyers/

Matthew H. Swyers, Esq.

344 Maple Avenue West, Suite 151

Vienna, VA 22180

Tel. (800) 906-8626

Facsimile (270) 477-4574

mswyers@TheTrademarkCompany.com

Counsel for Applicant

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
The Trademark Trial and Appeal Board**

In the matter of U.S. Registration 1,962,898,
For the mark AMERICAN MUSCLE,
Registered on the Principal Register on March 19, 1996.

Run It Consulting, LLC,	:	
	:	
Petitioner,	:	
	:	
vs.	:	Cancellation No. 92055426
	:	
Augusto Lodi,	:	
	:	
Registrant.	:	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a copy of the foregoing this 4th day of October, 2013, to be served, via first class mail, postage prepaid, upon:

Michael DiNardo, Esq.
Kelley & Kelley LLP
6320 Canoga Avenue, Suite 1650
Woodland Hills, CA 91367

/Matthew H. Swyers/
Matthew H. Swyers