

ESTTA Tracking number: **ESTTA743226**

Filing date: **04/28/2016**

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

Proceeding	92058893
Party	Plaintiff Mayweather Promotions, LLC
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Date	04/28/2016
Attachments	Mayweather-Branch Trial Brief.pdf(322450 bytes)

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

In the matter of Trademark Registration No. 3565960
For the mark MONEY POWER RESPECT ENTERTAINMENT in Class 35
Registered on January 20, 2009.

Mayweather Promotions, LLC

Petitioner,

v.

Branch, Cahleb, Jeremiah, LLC,

Registrant.

Cancellation No.: 92058893

PETITIONER'S TRIAL BRIEF

Petitioner Mayweather Promotions, LLC ("Petitioner"), by and through its attorneys of record, the law firm of Greenberg Traurig, LLP, hereby respectfully submits its Trial Brief as follows.

Respectfully submitted this 28th day of April, 2016.

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DESCRIPTION OF THE RECORD

The evidence of record in this case consists of the following:

A. Application file history of Registrant's trademark registration for the mark MONEY POWER RESPECT ENTERTAINMENT (U.S. Reg. No. 3565960) ("Registrant's Mark") that is the subject of this proceeding on file with the United States Patent and Trademark Office ("USPTO");

B. Documents identified in and attached to Petitioner's Notices of Reliance, which are comprised of (i) various internet articles and materials relating to Registrant's business, website, and nonuse and alleged use of Registrant's Mark in connection with online retail store services in the field of clothing, (ii) application file history for Registrant's trademark application for the MONEY POWER RESPECT ENTERTAINMENT mark (U.S. Ser. No. 86/380,283) in Class 25 ("the '283 Application"), (iii) Registrant's responses to Petitioner's Second Set of Requests for Admissions, and (iv) application file history for Petitioner's application for the mark MONEY POWER RESPECT (U.S. Ser. No. 85/968,214) in Class 25 ("Petitioner's Mark") (collectively hereinafter referred to as "Petitioner's Notices of Reliance").

C. Trial testimony deposition transcript of Cahleb Branch and the exhibits attached thereto, taken by Registrant on January 8, 2016 ("Branch Tr."). Mr. Branch owns and controls Registrant and the use of Registrant's Mark and is a member of Money Power Respect Entertainment, LLC.

D. Documents identified in and attached to Registrant's Notice of Reliance, which are comprised of various internet articles and materials relating to Registrant's business and its use of Registrant's Mark (collectively hereinafter referred to as "Registrant's Notice of Reliance").

I. STATEMENT OF THE ISSUES

The issues before the Board in this Cancellation proceeding are whether Registrant was actually using its MONEY POWER RESPECT ENTERTAINMENT mark in connection with online retail store services in the field of clothing as of the date of first use claimed in its Statement of Use and/or whether Registrant subsequently abandoned use of Registrant's Mark for online retail store services in the field of clothing.

II. RECITATION OF FACTS

A. Procedural History

Registrant is an entertainment management firm specializing in managing performing artists and entertainers. *See* Branch Tr. at p. 8:13-16. On or about January 10, 2006, Registrant filed an application to register the mark MONEY POWER RESPECT ENTERTAINMENT in International Class 35 for "Management of performing artists and entertainers. Advertising, marketing, and promotion services. Retail services in the filed [sic] of clothing." and was assigned Application Serial No. 78/788,752. *See* Application file history for Registrant's Mark on file with the USPTO. Registrant's application was abandoned and subsequently revived on three separate occasions during the registration process. *See id.*

Registrant filed its statement of use with the USPTO on November 25, 2008, claiming use in commerce of the mark MONEY POWER RESPECT ENTERTAINMENT for "management of performing artists and entertainers; advertising, marketing and promotion services; and online retail store services in the field of clothing". *See id.* In connection with its statement of use, Registrant claimed a date of first use of its mark anywhere and a date of first use in commerce of June 2, 2008. *See id.* As its specimen, Registrant submitted a flyer advertising its services and a photograph of a t-shirt featuring the words MONEY POWER

RESPECT ENTERTAINMENT on the front and <myspace.com/moneypowerrespectent.com> on the back. While Petitioner acknowledges that only a specimen for one of the services listed in Class 35 is required, the specimen does not show use of Registrant's Mark for online retail store services in the field of clothing. *See id.* This specimen was accepted by the USPTO and the mark registered in Class 35 on January 20, 2009 for all of the services listed. *See id.* On January 7, 2015, after this proceeding began, Registrant filed its Section 8 Declaration with the USPTO.¹ *See id.*

On June 24, 2013, Petitioner filed an application under Trademark Act § 1(a) for the mark MONEY POWER RESPECT in International Class 25 for "t-shirts and hats," and was assigned Application Serial No. 85/968,214. Petitioner's application was refused registration in International Class 25 by the USPTO trademark examining attorney under Trademark Act § 2(d), 15 U.S.C. §1052(d), as likely to be confused with Registrant's MONEY POWER RESPECT ENTERTAINMENT Registration No. 3565960 in International Class 35. Registrant acknowledged in its answer that Petitioner's application was refused based on a likelihood of confusion with Registrant's Mark. *See Registrant's Answer at ¶ 4, on file herein.* Upon investigation, Petitioner uncovered evidence suggesting that Registrant no longer used Registrant's Mark in connection with online retail store services in the field of clothing. Accordingly, on March 18, 2014, Petitioner initiated this cancellation proceeding.

B. Facts Regarding Registrant

1. Registrant's Business

Registrant's primary business is an entertainment management, promotions and production company based in Arizona. *See Branch Tr. at p. 8:2-16.* Registrant started its

¹ Registrant notably did not file a Section 15 Declaration of Incontestability swearing that Registrant's Mark had been in continuous use in connection with all of the services identified in its registration for the previous five years.

entertainment management, promotion and production business in or around May 2008. *See id.* at p. 10:6-8. In connection with its business, Registrant sold various merchandise, including t-shirts featuring Registrant's Mark, at concerts and other entertainment-related shows. *See generally* Branch Tr. and exhibits attached thereto.

2. *Registrant's Use of Registrant's Mark for Online Retail Store Services in the Field of Clothing*

Although Registrant claims to have always provided online retail store services in the field of clothing under its MONEY POWER RESPECT ENTERTAINMENT mark, it is unclear from the evidence in the record whether and to what extent such services were actually provided. Other than the self-serving trial testimony of Cahleb Branch, the only documents produced in this case that show any possible use of Registrant's Mark in connection with online retail store services are (i) printouts from an online archival website known as the Way Back Machine, <archive.org>, and (ii) two PayPal receipts for sales of clothing that were allegedly made on Registrant's website dated June 25th and 26th, 2014 – after the date that this proceeding was filed. *See* Petitioner's Notices of Reliance at May-B000084-114 and MPRE00296-297; Branch Tr. at Exhibits A and E. Despite Petitioner's repeated requests for documents evidencing use of Registrant's Mark in connection with online retail store services in the field of clothing, Registrant has failed to produce any such documents.

According to the archived webpages available on the Way Back Machine, the earliest date that any online retail store services may have been offered on Registrant's website is December 8, 2008. *See* Registrant's Notice of Reliance at MPRE00307; *see also* Branch Tr. at Exhibit 15. Further, although Registrant's website featured a link to its "MPR Store" until approximately April 2011, it appears that sometime prior to April 26, 2012, the website was

redesigned and no longer featured any links relating to an online retail store. *See* Petitioner’s Notices of Reliance at May-B000094-97; *see also* Branch Tr. at Exhibit A. The next thirteen screen captures available on the Way Back Machine span the period from May 29, 2012 through May 17, 2014, and show that Registrant’s website had no links relating to online retail store services. *See id.* at May-B000098-110; *see also* Branch Tr. at p. 198:13-207:5, Exhibit A. The “Services” page, captured on January 7, 2013, also makes no mention of any online retail store services provided by Registrant. *See id.* at May-B000105; *see also* Branch Tr. at p. 198:13-207:5, Exhibit A. A link for “Gear” is not seen on Registrant’s website until December 18, 2014. *See id.* at May-B000111; *see also* Branch Tr. at p. 198:13-207:5. Coincidentally, this is after the date that this proceeding began. *See id.*; *see also* Branch Tr. at p. 198:13-207:5. While Mr. Branch claims that the website was updated to add the “Gear” tab on or about May 19, 2014, and that even during the period of time where there was clearly no retail services links found on Registrant’s website, Registrant was still providing such services through its social media accounts, Registrant has produced no evidence or other documentation supporting Mr. Branch’s claims. *See* Branch Tr. at p. 210:10-22; 212:4-24.

Although Registrant produced hundreds of pages of documents in this proceeding, the only documents that show any actual sales of clothing items were dated after March 18, 2014, the date that this proceeding began and even then, those documents do not show that the purchase was made online. *See* Petitioner’s Notices of Reliance at MPRE00296-297 and Branch Tr. at Exhibit E; *see also* Branch Tr. at p. 215:20-222:23, Exhibits C-E. Included generally in the documents that Registrant produced in this proceeding are (i) printouts from the Way Back Machine, (ii) photographs of individuals wearing t-shirts featuring the ornamental use of Registrant’s Mark, (iii) copies of flyers and other promotional materials advertising Registrant’s

entertainment management services, (iv) printouts from Registrant's Facebook page advertising Registrant's entertainment management services, (v) receipts showing Registrant's bulk purchases of t-shirts from a third party apparel and screen printing vendor, and (vi) receipts evidencing amounts paid for Registrant's website and changes made thereto. *See* Branch Tr. and exhibits attached thereto; *see also* Registrant's Notices of Reliance. Although Mr. Branch testified that Registrant offered online retail store services under its mark on the social media platform MySpace as early as March of 2008 and has never stopped using the mark for such services, Mr. Branch could not point to one single receipt showing any sales of any clothing items prior to March 18, 2014, let alone any sales for clothing items that may have emanated online. *See* Branch Tr. at p. 26:23-27:11; 47:3-25; 91:9-14; 235:6-237:22, 246:8-24; *see also* Registrant's Notices of Reliance. Although Mr. Branch testified that his MySpace page featured a "buy now" button, he provided no documents supporting this claim and interestingly, it appears that the MySpace Terms of Use specifically prohibit such commercial activities.² *See* Branch Tr. at p. 26:23-27:11. Furthermore, none of the 86 pages of Facebook printouts produced by Registrant show any click to buy feature or shopping cart capability to allow Registrant to provide online retail store services through its Facebook account.

Registrant has also failed to produce any documents showing that it was providing online retail store services during the gap of time between April 2011 and December 2014 as identified in the Way Back Machine printouts where no links to an online store appeared on Registrant's website.

² Section 8.2 of the MySpace Terms of Use, located at <https://myspace.com/pages/terms> states: "Prohibited content includes, but is not limited to, Content that, in the sole discretion of MySpace: (beyond the limited ability of Artists to promote themselves as specifically provided herein) and/or sales without prior written consent from Myspace such as contests, sweepstakes, barter, advertising, or pyramid schemes". Section 8.4 identifies "accepting payment or anything of value from a third person in exchange for your performing any commercial activity through the Myspace Services on behalf of that person, such as placing commercial content on your Profile" as an illegal and prohibited activity on the site.

□ involves comm

Indeed, instead of providing evidence showing the online retail store, or invoices documenting sales in connection with online sales of clothing items, Mr. Branch only pointed to flyers, social media pages, invoices from t-shirt screen printing vendors, and bulk mailing receipts. Mr. Branch claimed that these documents show that he sold clothing and testified that the clothing was sold on his MySpace, Facebook, and other social media pages. *See Branch Tr.* at pp. 93:9-122:19. Put simply, none of these documents evidence any actual sales of clothing, let alone sales of clothing that occurred online.

Petitioner also tried, to no avail, to elicit specific information from Registrant regarding its online retail store services through written discovery. For example, Petitioner's Interrogatory No. 8 seeks facts supporting Registrant's claim that it has used Registrant's Mark in commerce in connection with online retail store services in the field of clothing prior to the date that this cancellation proceeding was filed. *See Petitioner's Notices of Reliance.* Registrant's response is essentially non-responsive and directs Petitioner to the documents produced by Registrant in this proceeding, none of which show *any* use in commerce of Registrant's Mark for online retail store services in the field of clothing prior to the date this proceeding began. *See id.*

Petitioner's Interrogatory No. 9 requests information regarding any lapse in the provision of online retail store services by Registrant. Rather than explain the clear lack of any links to online retail store services shown in the Way Back Machine printouts of Registrant's website, Registrant provides a general answer that could arguably apply to Registrant's entertainment management services. *See Petitioner's Notices of Reliance.*

Interrogatory No. 11 seeks facts regarding each and every online sale of any clothing items completed by Registrant under its mark since June 2, 2008 to the present. *See id.* Again,

Registrant directs Petitioner to its documents, none of which demonstrate any online retail sales of clothing items prior to the date this cancellation proceeding was filed.

Accordingly, Registrant has produced no evidence to dispute Petitioner's claim that it was not actually providing online retail store services in the field of clothing as of the date of first use alleged in its Statement of Use. Further, even if Registrant did subsequently offer retail store services on its website, it ceased doing so in or around April of 2011 with no evidence of any intent to resume such use until after it was on notice of this cancellation proceeding. Based on the evidence before the Board and the arguments herein, Petitioner respectfully requests that the Board cancel Registrant's registration in its entirety, or at a minimum, delete "online retail store services in the field of clothing" from the registration.

III. ARGUMENT

A. Petitioner Has Standing To Bring This Cancellation Proceeding.

Standing is a threshold issue that must be proven by a plaintiff in every *inter partes* proceeding. *See Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 188 (CCPA 1982). To establish standing in a cancellation proceeding, Petitioner must show both a "real interest" in the proceeding as well as a "reasonable" basis for its belief of damage. *See Ritchie v. Simpson*, 170 F.2d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999). A petitioner may establish standing by alleging and proving that its pending application was refused registration based on the respondent's registration. *See Lipton*, 213 USPQ at 189 ("Thus, to have standing in this case, it would be sufficient that [plaintiff] prove that it filed an application and that a rejection was made because of [defendant's] registration."); *Fiat Group Automobiles S.p.A. v. ISM Inc.*, 94 USPQ2d 1953, 1959 (TTAB 2008) ("The filing of opposer's application and the

Office's action taken in regard to that application provides opposer with a basis for pleading its standing...").

Here, Petitioner's pending application was refused registration based on a likelihood of confusion with Registrant's Mark. *See* Petitioner's Notice of Reliance, application file history for Petitioner's MONEY POWER RESPECT mark on file with the USPTO; *see also* Petitioner's Petition for Cancellation on file herein at ¶ 4. In addition, Registrant acknowledges that Petitioner has standing in this cancellation proceeding by expressly admitting that Petitioner's application was refused registration based on a likelihood of confusion with Registrant's MONEY POWER RESPECT ENTERTAINMENT mark. *See* Registrant's Answer at ¶¶ 3-4, on file herein. Accordingly, Petitioner has standing to bring this cancellation proceeding against Registrant's Mark.

B. Registrant Abandoned its Rights in Registrant's Mark for Online Retail Store Services in the Field of Clothing.

A federal trademark registration may be cancelled by the USPTO on the grounds that registrant discontinued use of its mark with no intent to resume use. *See* Lanham Act, 15 U.S.C. § 1064(3). A mark is deemed to be "abandoned" if the following occurs:

When its use has been discontinued with intent not to resume such use. Intent not to resume use may be inferred from the 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.

15 U.S.C. § 1127.

To succeed on a claim of abandonment, a plaintiff must prove (i) nonuse of the mark, and (ii) intent not to resume use. *See id.* "Because registrations are presumed valid under 15 U.S.C. § 1057, the party seeking cancellation based on abandonment bears the burden of proving a

prima facie case.” *ShutEmDown Sports, Inc. v. Car Dean Lacy*, 102 USPQ2d 1036 (TTAB 2012) (citing *Quality Candy Shoppes/Buddy Squirrel of Wisconsin Inc. v. Grande Foods*, 90 USPQ2d 1389, 1393 (TTAB 2007)). A showing of three consecutive years of nonuse establishes a *prima facie* case of abandonment, which creates “a rebuttable presumption that the registrant has abandoned the mark without intent to resume use.” *ShutEmDown Sports*, 102 USPQ2d at *7.

“In effect, the presumption eliminates the challenger’s burden to establish the intent element of abandonment as an initial part of its case.” *Imperial Tobacco Ltd. v. Phillip Morris Inc.*, 899 F.2d 1575, 1579 (Fed. Cir. 1990). Therefore, going forward, the burden of production shifts to the registrant to produce evidence that it has either used the mark, or intended to resume use. *ShutEmDown Sports*, 102 USPQ2d at *7. “The presumption of validity of a registration under 15 U.S.C. 1057(b) entitles [registrant] to rely on the filing date of his application to claim use of his mark, and sets the critical period for petitioner to make a *prima facie* showing of abandonment as the three-year period commencing [on the filing date of the application].” *Id.*

Here, the evidence before the Board shows that even if Registrant provided online retail store services on its website at some point in time, Registrant ceased offering such services and had no intent to resume such use until after Registrant was on notice of the Petition for Cancellation. Indeed, the Way Back Machine indicates that the last date that Registrant’s website featured the “MPR Store” link was April 27, 2011 and, after several updates, did not again feature a “Gear” link until December 18, 2014. Although Registrant claims to have continuously provided online retail store services on its social media pages, no evidence supporting these claims has been produced. For example, while Registrant claims that it continuously provided online retail store services of clothing on its MySpace page and later on

Facebook, Registrant did not provide any evidence showing how a customer could actually make an online purchase through MySpace or Facebook. Further, Registrant was unable to provide any receipts supporting such online sales or any other documents that would even imply that online sales took place during this time period. In addition, the MySpace Terms of Use expressly prohibit such commercial activities without MySpace's consent and Registrant has provided no evidence that it had permission from MySpace to conduct commercial retail store sales through MySpace. Even more puzzling is the fact that Registrant makes this claim when it appears that MySpace does not provide users with the capability to make online sales of goods through its website. Put simply, advertising its services on its social media account is not the same thing as actually providing online retail store services and does not establish use of a trademark in connection with such services.

Furthermore, evidence consisting of printouts from Registrant's Facebook page where consumers cannot readily purchase merchandise directly on the site is not sufficient to show that use of Registrant's mark in connection with online retail store services.³ Indeed, consumers must perceive the mark as a source identifier of such services. Registrant's Facebook profile, even if featuring photos of people wearing t-shirts with Registrant's Mark printed on them, does not lead to the conclusion that consumers will associate the mark with online retail store services, particularly where the page shows no click-to-buy or shopping cart feature. *See* TMEP § 1301.04 (stating that an acceptable specimen for a service mark must show the mark in connection with where the services can be accessed, rendered, and experienced); *see also* TMEP § 904.03(i)(B)(2).

³ Despite testifying that Registrant's MySpace profile featured a "buy now" link, Mr. Branch had no documents evidencing how the MySpace profile actually looked or proving that he provided online retail store services on MySpace. The only social media pages produced were of Registrant's Facebook page and as mentioned, those pages do not show any capability for a customer to purchase clothing directly on the page.

As such, Petitioner submits that the evidence before the Board establishes a *prima facie* case of abandonment through nonuse for at least three years, or alternatively, evidence of abandonment with no intent to resume use. The Board should find in favor of Petitioner on its claim of abandonment.

C. Registrant Fraudulently Obtained its Registration at Time of Filing for Online Retail Store Services in the Field of Clothing.

Fraud in procuring a trademark registration occurs when an applicant knowingly makes false, material representations of fact in connection with its application. *See Torres v. Cantine Torresella S.r.l.*, 808 F.2d 46, 1 USPQ2d 1483, 1484 (Fed. Cir. 1986). In order to prevail on its claim for fraud, Petitioner must prove the following: (1) Registrant made a false representation to the USPTO, (2) the false representation was material to the registrability of the mark, (3) Registrant had knowledge of the falsity of the representation, and (4) Registrant made the representation with intent to deceive the USPTO. *See In re Bose Corp.*, 580 F.3d 1240, 91 USPQ2d 1938, 1941 (Fed. Cir. 2009). “Statements regarding the use of a mark on the identified services are certainly material to issuance of a registration.” *Herbaceuticals Inc. v. Xel Herbaceuticals Inc.*, 86 USPQ2d 1572, 1576 (TTAB 2008) (citing *Hachette Fillipacchi Presse v. Elle Belle, LLC*, 85 USPQ2d 1090 (TTAB 2007)).

In this case, Petitioner can establish each of these four elements. In particular, Registrant submitted its Statement of Use to the USPTO on November 25, 2008, swearing that Registrant used in commerce Registrant’s Mark in connection with all of the services identified in its application since June 2, 2008. Yet, the earliest documented date that Registrant could have provided online retail store services is December 8, 2008, when the “Retail Services” and “Shop” links appear on Registrant’s website, although there is no evidence these links actually worked,

or that Registrant could have actually sold clothing, and no evidence of actual sales. Moreover, Registrant allowed its application to go abandoned on three separate occasions from the time it filed its application in 2006 until the date that it filed its Statement of Use in late 2008, leading to the conclusion that Registrant was not using its mark at all during this period of time. Further, Registrant has produced no receipts supporting its claims that it made any online sales of clothing (other than the two PayPal receipts dated June 25 and 26, 2014). Registrant's flyers, photographs of individuals wearing t-shirts featuring Registrant's Mark, printouts of Registrant's MySpace page, invoices from a screen printing company, etc. simply do not show that Registrant offered online retail store services in the field of clothing at any point in time, let alone as of the date that Registrant filed its Statement of Use with the USPTO.

As such, the evidence shows that (i) Registrant made a false statement to the USPTO when it swore in its Statement of Use that it was using Registrant's Mark in commerce in connection with all of the services identified in its application as of June 2, 2008, (ii) the statement was material to the registrability of the mark because after the Statement of Use was filed, the application proceeded to registration, (iii) Registrant had knowledge of the falsity of this statement made in its Statement of Use as the declaration was signed by Cahleb Branch, the sole individual running Registrant's business, and (iv) the misrepresentation was made with an intent to deceive the USPTO so that Registrant could obtain a federal registration to which it was not entitled. Petitioner respectfully submits that the Board should rule in its favor on the fraud claim.

D. In the Alternative, Registrant's Registration is Void *Ab Initio* Based On Nonuse As Of The Date of First Use Claimed in its Statement of Use.

A trademark registration may be held void *ab initio* if the plaintiff pleads and provide either fraud or nonuse of a mark for all identified goods or services prior to the application filing date.⁴ See *Grand Canyon West Ranch LLC v. Hualapai Tribe*, 78 USPQ2d 1696, 1697 (TTAB 2006); *ShutEmDown Sports v. Lacy*, 102 USPQ2d 1036, 1045 (“The law is clear that an application can be held void if the plaintiff pleads and [later] proves either fraud or nonuse of a mark for all identified goods or services prior to the application filing date.”). The Board has found that a separate claim for nonuse is not required as long as the petition sets out allegations of nonuse and the issue was tried by the parties. See *ShutEmDown Sports, Inc. v. Lacy*, 102 USPQ2d 1036, 2012 WL 684464 (TTAB 2012).

Here, even if the Board finds that Petitioner did not prove its claim of fraud by a preponderance of the evidence, the Board should at least find that Registrant's registration is void *ab initio* because Registrant was not using its mark for online retail store services as of the date of first use alleged in Registrant's Statement of Use. Although Petitioner did not separately plead a claim for Nonuse in its petition, it nevertheless set out sufficient facts to support such a claim. In particular, Petitioner alleged that: (1) “at the time it filed its Statement of Use, Registrant only had use of its mark in connection with its management, advertising and promotion services and did not actually provide online retail sales of clothing under its mark,” and (2) “Registrant knowingly, with the intent to deceive the USPTO, made a material misrepresentation that it was using its mark in United States commerce in connection with all the

⁴ For an intent-to-use application the operative date for determining whether an application is void *ab initio* for nonuse is whether the mark was in use for all the goods and services identified in the application at the time the applicant filed its Statement of Use. See *Avon Products, Inc. v. Something Old, Something New, Inc.*, 2001 WL 1402604 (TTAB 2001).

goods listed in its registration in Class 35 when it was not, and this willful misrepresentation enabled Registrant to obtain a federal registration for Registrant's mark to which it was not entitled." Therefore, Registrant was clearly on notice that Petitioner alleged nonuse of its mark in connection with online retail store services in the field of clothing as of the date of first use, June 2, 2008, claimed in its Statement of Use.

Based on the evidence before the Board, Petitioner has established by a preponderance of the evidence that Registrant had not actually used its MONEY POWER RESPECT ENTERTAINMENT mark in commerce in connection with "online retail store services in the field of clothing" when it filed its Statement of Use with the USPTO, let alone as of the date of first use claimed in its Statement of Use. Further, Registrant has failed to produce any evidence to show that it was indeed using its mark in connection with such services as of the date of first use set forth therein. As such, Petitioner requests that the Board find that the record supports a conclusion that Registrant's Mark was not in use for online retail store services in the field of clothing as of the date of claimed first use and therefore, the registration is void *ab initio* based on nonuse.

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IV. SUMMARY

Based on the foregoing facts and evidence, Petitioner respectfully requests that the Board cancel Registrant's federal registration for the mark MONEY POWER RESPECT ENTERTAINMENT (U.S. Reg. No. 3565960) on the grounds that Registrant was not actually using Registrant's Mark in connection with online retail store services in the field of clothing as of the date of first use alleged Statement of Use. In the alternative, the Board should cancel Registrant's registration on the grounds that Registrant abandoned use of Registrant's Mark for online retail store services in the field of clothing.

Dated this 28th day of April, 2016.

GREENBERG TRAURIG, LLP

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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2016, I served the foregoing **PETITIONER'S TRIAL BRIEF** on:

Frank G. Long
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by causing a full, true, and correct copy thereof to be sent by first class United States mail, postage prepaid.

/s/ Cynthia L. Ney

An employee of Greenberg Traurig, LLP

APPENDIX A

Petitioner's Statement of Objections

Petitioner maintains its objections to documents produced by Registrant outside of the discovery period. In this case, the close of discovery was July 18, 2015. Registrant produced several sets of documents outside of the discovery deadline. In particular, Registrant produced documents bates numbered MPRE00358-439 on or about August 12, 2015, and just one day before the testimony deposition of Cahleb Branch, on January 7, 2016, Registrant produced documents bates numbered MPRE 00440-455. Further, at the testimony deposition of Cahleb Branch held on January 8, 2016, Registrant produced additional documents bates numbered MPRE00456-529.

Registrant used many of these documents as exhibits during the trial testimony deposition of Mr. Branch purportedly to support Registrant's claim that it continuously used its MONEY POWER RESPECT ENTERTAINMENT mark in connection with online retail store services in the field of clothing and did not abandon such use. *See generally*, Branch Tr. and Exhibits 5, 6, 7, 8, 9, 10, 11, 14, 17, and 19. During the deposition of Mr. Branch, Petitioner's counsel made numerous objections to these documents and the testimony based upon these documents on the grounds that the documents were not timely produced during the discovery period. *See generally* Branch Tr. Notably, as set forth in Petitioner's main brief, Petitioner requested that Registrant produce all documents during discovery that evidence use of Registrant's Mark in connection with online retail store services in the field of clothing. Registrant, however, failed to produce these documents in response to Petitioner's requests for production or in conjunction with the documents it identified in response to Petitioner's Interrogatories. *See* Petitioner's Notices of Reliance.

Based upon Registrant's failure to timely produce these documents in response to written discovery or otherwise disclose such documents during the discovery period, Petitioner hereby

maintains and renews its objections to these documents and all testimony of Mr. Branch based thereon. Accordingly, Petitioner respectfully requests that the same be stricken from the record.