

ESTTA Tracking number: **ESTTA749001**

Filing date: **05/27/2016**

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

Proceeding	92058893
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Date	05/27/2016
Attachments	Registrants Trial Brief 92058893.pdf(1226975 bytes)

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

MAYWEATHER PROMOTIONS, LLC)	
)	Cancellation No: 92058893
Petitioner,)	
)	Registration Number: 3565960
v.)	
)	
Branch, Cahleb, Jeremiah, LLC)	Mark: MONEY POWER RESPECT
)	ENTERTAINMENT
)	
Registrant)	

REGISTRANT’S TRIAL BRIEF

Registrant Cahleb Branch (“Cahleb”), by and through his undersigned attorneys, hereby respectfully submits his Trial Brief as follows.

Respectfully submitted this 27th day of May, 2016.

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I. INTRODUCTION

Petitioner Mayweather Promotions LLC (“Mayweather”) is an entity owned by professional boxer and multi-millionaire, Floyd Mayweather, Jr.—who, since the beginning of this Proceeding, has sought to bully Registrant Cahleb Branch (“Cahleb”), the sole owner of Money Power Respect Entertainment, LLC (“MPRE”), into giving up his valid and subsisting trademark registration so that Mayweather may proceed with his own registration for t-shirts. Instead of accepting the clear fact Cahleb is using (and has always used) the MONEY POWER RESPECT ENTERTAINMENT trademark, Mayweather continues to pursue this meritless Proceeding in the hopes that Cahleb will run out of the financial resources required to fight these claims. Mayweather seeks cancellation of Cahleb’s Registration No. 3565960 (the “Registration”) for the mark MONEY POWER RESPECT ENTERTAINMENT (the “Mark” or the “MPRE Mark”) on grounds: (A) of abandonment through non-use of the Mark for online retail store services in the field of clothing; (B) of fraud in the procurement of the Registration; and (C) that the Registration is void *ab initio*—a newly asserted claim that was first raised in Mayweather’s Trial Brief.

Mayweather’s claims are a frivolous, bad faith attempt to rob a small-business owner of one of his key assets. As the record demonstrates, Cahleb is entitled to maintain the Registration because Mayweather has not only failed to meet his burden of proof for each of his claims, but more significantly, has also failed to put forth any evidence upon which to base a finding in his favor. In fact, Cahleb has not abandoned the Mark in any respect, and has presented evidence of his continuous use of the MPRE Mark for all services claimed in the Registration. Moreover, Mayweather has failed to prove both his fraud and non-use claims—this is underscored by Cahleb’s evidence proving that he was using the Mark for the identified services when he filed his Statement of Use.

For the reasons set forth below, the Board must deny each of Mayweather's claims.

II. STATEMENT OF ISSUES

There are three issues presented in this Proceeding:

1. Whether Mayweather has proven by a preponderance of the evidence that Cahleb abandoned his Mark for online retail store services in the field of clothing?
2. Whether Mayweather has proven by clear and convincing evidence that Cahleb committed fraud on the United States Patent and Trademark Office ("PTO") in filing his application for the Mark?
3. Whether Mayweather has proven by a preponderance of evidence that, at the time of filing his Statement of Use, Cahleb had not made use of the Mark for online retail store services in the field of clothing?

III. DESCRIPTION OF THE RECORD

The evidence of record consists of the following:

1. The pleadings;
2. The file of Reg. No. 3565960, pursuant to 37 C.F.R. § 2.122(b)(1);
3. Registrant's Testimonial Deposition of Cahleb Branch (hereinafter "Test. Tr."), including Exhibits 1-19 thereto (hereinafter, each Exhibit used in the Deposition will be cited as "Exh.");
4. Registrant's Notice of Reliance; and
5. Petitioner's Notice of Reliance.

IV. FACTS OF THE CASE

A. Cahleb's MPRE Business

Cahleb owns and operates MPRE and uses the Mark for all aspects of his business.

Established in 2008, MPRE is a multifaceted talent-management company for nationally and

internationally recognized hip-hop artists. *See* Exh. 1 at MPRE00299–306; Test. Tr. 8:13–19, 24:8–10 (MPRE has “built . . . [around] 40 or 50 acts that were nationally known in the industry.”).

In 2006, Cahleb began working in the entertainment industry with his cousin, a nationally touring artist, and experienced first-hand the unique financial challenges that musical artists face today:

[I]n the music industry, . . . you have to get creative with your revenue streams. It used to just be put out a song, put out an album. It sells X amount of copies. You make money off of how many albums sell.

Now with digital platforms, with people being able to download music for free, stream music, you don't necessarily need to purchase albums. So [artists have had to get] creative with the revenue streams including touring money. So you're making money off of the shows, including making money off of merchandise, which is the clothing line that comes with it.

Test. Tr. at 8:22–9:9; 43:10–21.

During this time, Cahleb noticed that talent-management firms were neglecting new talent by failing to diversify their services. *See* Test. Tr. at 9:1–6 (“I started the company, and through seeing other firms not represent their clients as well.”). After graduating college, Cahleb created MPRE, a “one-stop shop” talent-management firm that develops young talent into successful artists by addressing all of their professional needs. As Cahleb testified:

If there was a menu of services or options, it would be everything from graphic design to advertising and promotions, to appearances, to merchandise, meaning that we help them create a merchandise line that is then sold at the shows and online and via social media, help them with their social media presence

[We] basically take them from just an idea or a voice to a . . . publicly known act.

Test. Tr. at 10:17–25, 12:12–19; *see also* Test. Tr. at 14:11–19.

MPRE not only gives clients “the necessary means to record . . . music, [and to] create a product,” but it also provides retail services by selling that product, and providing clients with “an additional revenue stream.” Test. Tr. at 12:6–9, 42:1–22, 44:17–22; *see also* Test. Tr. at 10:23–25 (MPRE “sells company merchandise as well as our clients’ merchandise.”).

Specifically, MPRE provides clients with comprehensive retail services, which include access to MPRE’s graphic designer, who helps clients to design their own merchandise. As Cahleb testified in this Proceeding, “[our] in-house graphic designer . . . comes up with a concept, come[s] up with a logo design for the talent,” provides mark-ups of various merchandise options, such as shirts, clothing, or key chains, and “bring[s] those items to life.” Test. Tr. at 15:5–12; *see also* Test. Tr. at 41:23–42:16.

MPRE then gives its clients “the vessel and the avenue to get that product out to the world” by “ultimately [placing those items] on the Web site for sale.” Test. Tr. at 15:5–12; *see also* Test. Tr. at 41:23–42:16, 12:6–9. Cahleb developed this website in 2008, and operates it using the moneypowerrespectentertainment.com and mprent.net domain names.¹ Test. Tr. at 11:5–7. Aside from acting as a “vessel” to sell and purchase goods, the website also advertises and promotes MPRE’s clients. Test. Tr. at 25:16–25, 30:8–11; *see generally* Exh. 15.

MPRE also has an active social media presence, which Cahleb uses to promote his clients, as well as their music and merchandise. *See* Test. Tr. at 23:23–24:21 (describing MPRE’s

¹ When asked whether MPRE’s website has only had one domain name, Cahleb explained:

No, actually I haven't. I think at one point in time, I owned like 25 domains, all different spellings, wrong spellings. If you missed an R typing it in, it would go to it. They were all forwarded to one main domain. Over time I let some of those names go, but, yes, primarily now it's MPRENT.net and MoneyPowerRespectEntertainment.com.

Test. Tr. at 26:1–9.

use of Facebook, YouTube, Twitter, Instagram, and Tumbler); Exh. 3; Exh. 15 (website has continuously had icons linking to MPRE’s various social media accounts).

Cahleb’s unique business model of providing comprehensive talent services has garnered attention in the music industry and in the media. Exh. 2 at MPRE00217–19 (Niki D’Andrea, *Money Power Respect Entertainment Pushes Local Hip-Hop on a Large Scale*, PHOENIX NEW TIMES (July 12, 2011)). Cahleb has been praised in a news feature as capable of “taking local talent to a national scale.” Test. Tr. at 13:8–14:7; Exh. 2 at MPRE00217–19.

B. The PTO Registered the Mark Based on Comprehensive Evidence the Cahleb Was Using the Mark For All Claimed Services, Including Online Retail Store Services

On January 10, 2006, Cahleb filed a Section 1(b) intent-to-use application for the MPRE Mark in class 35 services, including: management of performing artists and entertainers, advertising, marketing and promotion services and retail services in the field of clothing (the “Application”). Exh. 13 at MPRE00115–21.

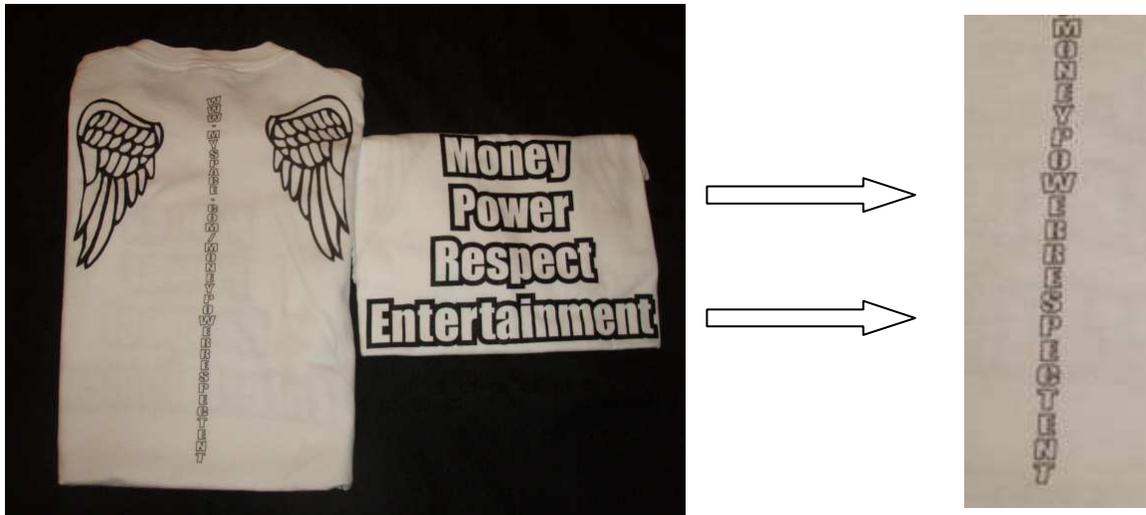
On June 27, 2008, Cahleb amended the Application to include “online retail store services” in place of the aforementioned “retail services” (the “Claimed Services”). Exh. 13 at MPRE00068–69.²

On Nov. 25, 2008, pursuant to Section 1051(d) of the Trademark Manual of Examining Procedure (“TMEP”), Cahleb filed a Statement of Use stating that MPRE first used the Mark for the Claimed Services on June 2, 2008. Exh. 13 at MPRE00046–51; *see also* Test. Tr. at 12:20–13:7, 151:2–6. At that time, Cahleb was using the Mark for all the Claimed Services. 149:1–152:5.

² During prosecution of the Application, it was temporarily deemed abandoned because Cahleb did not receive the office action by its response deadline. *See* Exh. 13 at MPRE00073. The application was appropriately revived. *Id.*

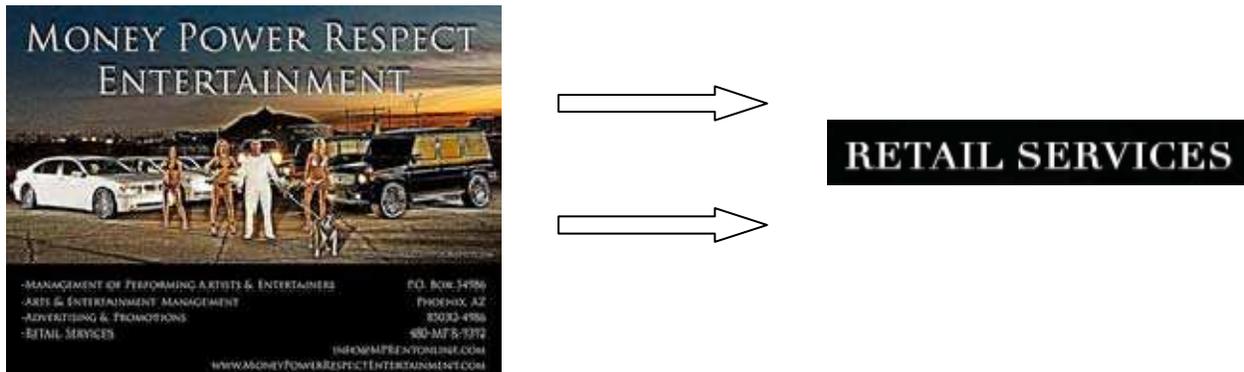
In support of his Statement of Use, Cahleb submitted two specimens showing how MPRE used the Mark in connection with retail services on MPRE’s MySpace Page, as well as in advertising the Claimed Services. Test. Tr. at 152:11–14; Exh. 13.

The first specimen was an image of a t-shirt featuring the URL for MPRE’s MySpace page, where MPRE rendered online retail store services at the time:



Exh. 13 at MPRE00051; *see* Test. Tr. at 152:12–15 (above is the first shirt MPRE had for sale), 153:9–13 (explaining that he chose to submit the shirt as a specimen “[b]ecause ... it had the domain on it. It pointed towards a different online presence, and it was a garment of clothing”); *see also* Test. Tr. at 45:3–14.

The second specimen was an image of an advertisement that explicitly referenced each MPRE’s Claimed Services, including “Retail Services”:



Exh. 13 at MPRE00050 (the “Specimen Ad”); *see* Test. Tr. at 179:8–180:1.

On December 17, 2009, the PTO properly accepted the Statement of Use, Exh. 13 at MPRE00028, and on January 20, 2009, it registered the Mark on the Principal Register. Exh. 13 at MPRE00027 (Reg. No. 3565960). On January 7, 2015, Cahleb filed a Section 8 renewal.³ Exh. 13 at MPRE00007–10.

C. Cahleb Uses the Mark in Advertising and Rendering Online Retail Store Services for Clothing

As mentioned above, Cahleb provides clients with comprehensive merchandising services, which include online and in-person retail store services for clothing (collectively, “Retail Store Services”), and has continuously used the Mark in advertising and rendering those Services, as well as the other Claimed Services. *See* Test. Tr. at 13:1–7 (averring that Cahleb has never stopped providing any of the Claimed Services for his clients at any point in time).

Mayweather has not challenged Cahleb’s use of the Mark in connection with any Claimed Services except online retail store services in the field of clothing. Test. Tr. at 190:2–9 (Mayweather’s counsel explained that his client’s claim was limited to “trademark registration for the [M]ark . . . as it pertains to online retail store services of clothing on the basis that as of that as of the date this [P]roceeding was filed, [Cahleb] had abandoned use of [the M]ark for such services.”). Accordingly, at Cahleb’s January 6, 2016 Testimonial Deposition, Mayweather’s cross-examination only addressed Cahleb’s use of the Mark for online retail store services in the field of clothing. *See* Test. Tr. at 190:10–22 (“With that in mind, my focus here today is really going to be on your online retail store services of clothing . . .”).

³ Mayweather comments that Cahleb did not file a Section 15 declaration along with the renewal and implies that this omission supports Mayweather’s abandonment claims. Mayweather’s counsel should know that a Section 15 declaration cannot be filed while a Petition for Cancellation is pending. TMEP § 1605.04 (citing 15 U.S.C. §§ 1065(1)–(2)). Accordingly, the Section 15 declaration was not filed due to this rule and not because there has not been continuous use of the MPRE Mark.

As outlined below, Cahleb has not stopped providing online retail store services—or any of its other Claimed Services—at any point since Cahleb began using the MPRE Mark in: (1) advertising MPRE’s Retail Store Services to potential clients, and (2) in rendering online Retail Store Services to his Clients. *See* Test. Tr. at 13:1–7.

1. Cahleb Uses the Mark in Advertising All of the Claimed Services, Including Online Retail Store Services

Cahleb “really advertise[s] everywhere. . . . from traditional to nontraditional, from gorilla marketing to word of mouth, everything from radio to TV commercials, to billboards, to print via magazines and newspapers.” Test. Tr. at 16:11–15.

Since June 2, 2008, Cahleb has advertised MPRE’s Retail Store Services, including online retail store services, to potential clients using (i) business cards,⁴ (ii) handbills,⁵ and (iii) print ads.⁶ Test. Tr. at 31:15–32:11.

Each form of advertising prominently displays the Mark and explicitly identifies “retail services,” as well as other Claimed Services. Test. Tr. at 31:4–25, 152:12–15.⁷

a) Business Card

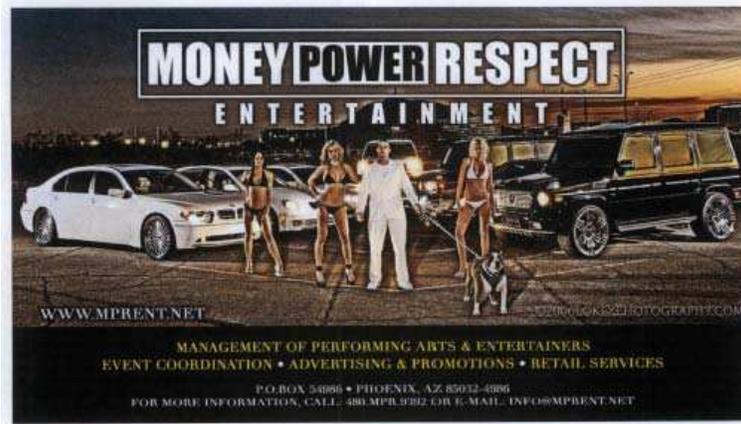
In 2008, Cahleb began using the business card shown below, which (i) prominently displays the MPRE Mark, and (ii) explicitly references MPRE’s “retail services”:

⁴ Exh. 5 at MPRE00439; Test. Tr. at 35:18–36:5 (starting using the card in 2008).

⁵ Exh. 5 at MPRE00437; Exh. 7 (promotional flyers that used on the reverse side of the advertising cards); Test. Tr. at 31:21–32:3, 53:8–54:4, 65:2–12

⁶ Exh. 5 at MPRE00438; Test. Tr. at 31:19–21; Exh. 11 at MPRE00441 (log of dates MPRE ran ads in the Phoenix New Times, 10/6/11–11/19/15); Test. Tr. at 134:2–136:8 (discussing the specific dates MPRE has ran advertisements in the Phoenix New Times).

⁷ The Specimen Advertising Image on most of these, which advertise MPRE’s: (i) Management of Performing Artists & Entertainers; (ii) Event Coordination; (iii) Advertising and Promotions; and (iv) Retail Services. *See* Test. Tr. at 33:9–17 (“So, yeah, we did the photo shoot in preparation for launching the online presence or the marketing for the company, but we started using this early 2008.”).



MPRE00439

**MANAGEMENT OF PERFORMING ARTS & ENTERTAINERS
EVENT COORDINATION • ADVERTISING & PROMOTIONS • RETAIL SERVICES**

Exh. 5 at MPRE00439; *see also* Test. Tr. at 34:6–35:5.

Cahleb uses them to advertise the Claimed Services by handing the cards out to potential clients at music-related events. Test. Tr. at 35:14–25. Cahleb has continuously used these business cards, and still “actively” hands them out. Test. Tr. at 179:8–180:1.

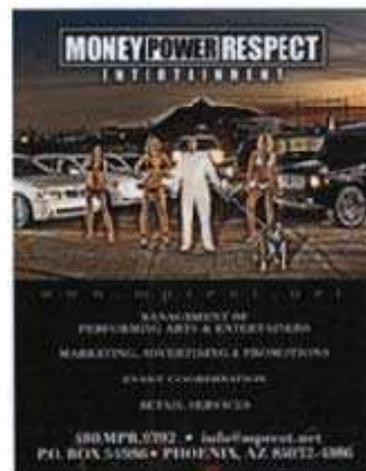
b) Handbills

Cahleb also advertises MPRE’s Retail Store Services on the back of “handbills,” which are 4 x 6” postcards used to promote upcoming client concerts on the front, and identify the Claimed Services on the back, by (i) prominently displaying the MPRE Mark, and (ii) making explicit reference to “retail services”:

FRONT



BACK



MPRE00439

Exh. 5 at MPRE00437; Exh. 7 at MPRE00434; Test. Tr. at 53:8–54:7, 65:2–12.

Cahleb includes MPRE’s Claimed Services on client promotions “[s]o it would be advertising the company at the same time as a[client] event.” Test. Tr. at 31:21–32:3; 53:8–16.

Cahleb distributes the handbills through “[s]treet teams, which is [*sic*] sometimes college interns and sometimes artists themselves would go out and pass them out for a show that was up and coming to make sure that there would be a crowd there, but anywhere that there's a crowd, whether it was the art walk or it was a sporting event or another show, it would be passed out hand to hand or digitally posted online.” Test. Tr. at 53:8–54:4, 65:2–12, 68:3–69:25; *see* Exh. 8 (invoices for flyers/handbills); Test. Tr. at 85:6–9.

c) Other Forms of Advertising

Cahleb also advertises MPRE’s Retail Store Services with “half-page or full-page ad[s] . . . in” the *Phoenix New Times* and similar publications. Test. Tr. at 31:19–21. The print ads (i) prominently display the MPRE Mark and (ii) make explicit reference to “retail services”:



Exh. 5 at MPRE00438; *see* Exh. 11 at MPRE00441. Cahleb ran print ads with the *Phoenix New Times* on the following dates: October 6, 2011; November 21, 2013; January 23, 2014; November 5, 2015; November 12, 2015; November 19, 2015; and November 26, 2015. *See* Exh. 11 at MPRE00441. Cahleb explained that most of the ads he runs with the *Phoenix New Times*

include the above image or something similar to advertise MPRE's Claimed Services. *See* Test. Tr. at 134:2–20, 136:4–8.

Cahleb also advertised the Claimed Services in *Hustler* magazine, Exh. 5 at MPRE00436; Test. Tr. at 35:5–13 (in or around 2010), and through direct mailers. *See* Test. Tr. at 69:24–71:4.

Further, Cahleb often uses the MPRE Mark on wristbands at client concerts to raise brand awareness and exposure. Test. Tr. at 37:18–38:5; Exh. 6 at MPRE00391.

2. Cahleb Uses the Mark in Operating MPRE's Online Retail Store, and an In-Person Retail Store

Additionally, Cahleb sells client merchandise through several distribution channels, including through: (a) various forms of e-commerce, including MySpace and MPRE's website, Test. Tr. at 26:21–27:11, 45:3–5, 46:8–16; Exh. 4; and (b) in-person sales at concert "Merch Booths." Test. Tr. 108:2–10, 132:3–11; Exh. 11 at MPRE00298.

Cahleb consistently orders and restocks inventory of MPRE-brand and client-brand apparel to facilitate these sales. *See* Exh. 10; Test. Tr. at 101:19–102:12, 104:8–21, 105:17–106:10, 107:11–17, 109:13–25.

Cahleb first ordered MPRE-brand apparel in January 2006 when "getting ready to start the company"; he also filed the Application that same month. Test. Tr. 121:14–18; *see* Exh. 10 at MPRE00286; *see also* Exh. 13 at MPRE00015.

Specifically, the January 2006 order was for 50 "beefy white tees" that "said Money Power Respect Entertainment across the front, and on the back, it had angel wings, and down the spine of the T-shirt, it said www.myspace.com/moneypowerrespect" (the "January 2006 Shirts"). Test. Tr. at 121:14–122:19 (noting that the January 2006 invoice was retrieved from Cahleb's e-mail, moneypowerrespectent@gmail.com); *see* Exh. 10 at MPRE00286–87.

Cahleb confirmed that he sold the January 2006 Shirts through MPRE's e-commerce stores. *See* Test. Tr. at 122:12–19. Cahleb also submitted a picture of a January 2006 Shirt with his Statement of Use as a specimen to show use of the MPRE Mark for the Claimed Services, including online retail store services in the field of clothing. *See* Exh. 13 at MPRE00051; *see also* Test. Tr. at 45:3–14; 153:9–13; Section IV(B), *supra*.

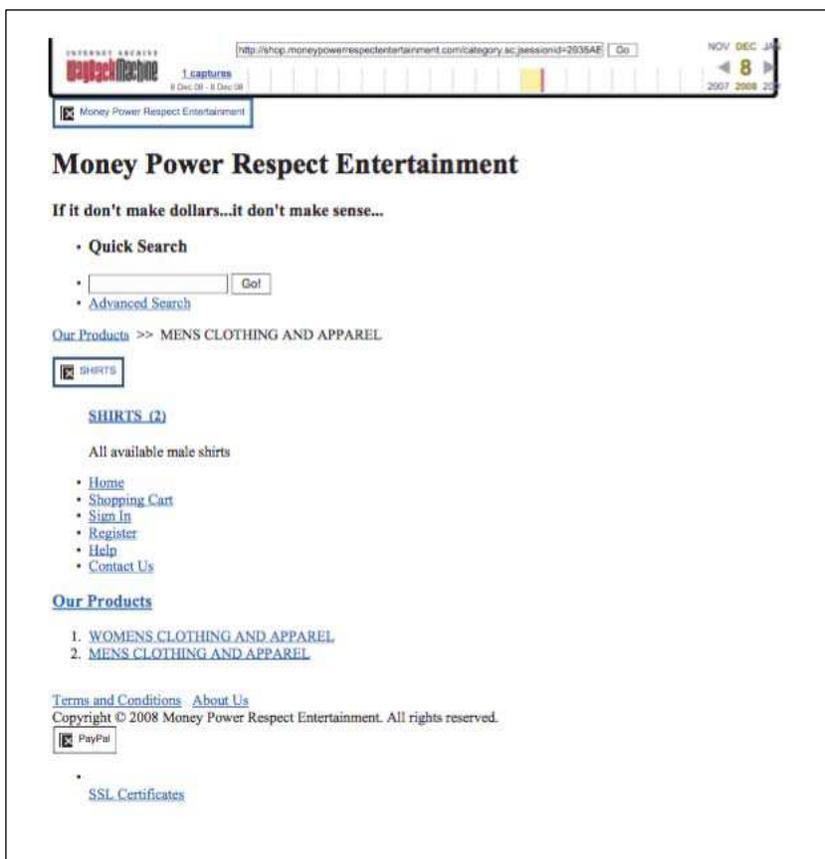
a) Use of the Mark For MPRE's Online Retail Store

In March 2008, Cahleb began operating an e-commerce store on MPRE's MySpace page, located at www.myspace.com/moneypowerrespectent (the "MySpace Page"). Test. Tr. at 12:24–25, 27:6–11, 45:3–46:16. MPRE's MySpace Page had "images of [MPRE's] gear," and visitors to the site could "purchase directly" with a "buy now button facilitated through PayPal." Test. Tr. at 26:16–27:5, 160:12–15.

Cahleb described the MySpace e-commerce store as "more dinosaur" than a traditional e-commerce store operated through a stand-alone website. Test. Tr. at 26:2–24. Accordingly, in May 2008, Cahleb designed a website through GoDaddy to serve as a second location for the MPRE online store. Test. Tr. at 26:25–27:5, 159:22–160:24. However, even after launching the website, Cahleb continued to operate the retail store on the MySpace Page. Test. Tr. at 48:1–15. When asked when he stopped using the MySpace e-commerce store, Cahleb explained, "[w]e didn't stop per se. I think My[S]pace just closed down,⁸ so whenever that took place." Test. Tr. at 47:17–48:15.

⁸ Cahleb was not able to recover screenshots of the MySpace Page: "I don't have a document of what the Myspace looks like because they shut down Myspace. So we're not able to go back and do that, but I do have -- there's images of a T-shirt that we used that we sold on there that directed people back to the Myspace, and it has the Myspace URL on it. I believe it's the one with the wings on the back." Test. Tr. at 45:6–14:

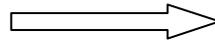
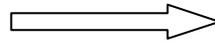
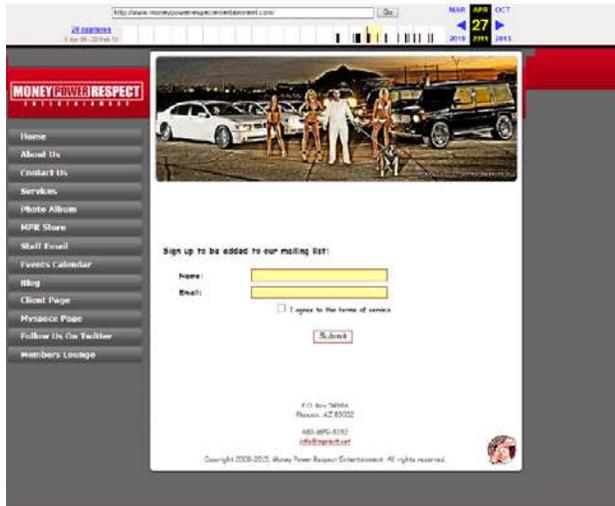
In designing the website, Cahleb added a “shopping cart” upgrade so MPRE could easily sell clothing and other merchandise on the website. *See* Exh. 11 at MPRE00285 (Invoice from GoDaddy to Cahleb Branch, dated May 3, 2008, for addition of “Quick Shopping Cart”); Exh. 14 at MPRE00282 (Invoice from GoDaddy to Cahleb Branch, dated May 4, 2009, for renewal of “Quick Shopping Cart”); Test. Tr. at 159:4–160:7 (confirming invoice was for creation of website). The Shopping Cart was fully functional when the site went live (which was prior to filing the Statement of Use), and allowed visitors to purchase apparel and concert tickets:



Exh. 15 at MPRE00307; Test. Tr. at 26:16–17, 91:19–92:3, 160:23–161:4, *see* Exh. 15 at MPRE00308–33; *see also* Test. Tr. at 25:1–25.

Since launching the website, Cahleb has “constantly” updated it, including its “imagery” and “layout.” Test. Tr. at 161:10–15, 163:5–164:1; Exh. 14 at MPRE00282–85.

In 2011, visitors could still access the “MPR Store” through a tab on the left side of the interface:



Exh. 15 at MPRE00332–33.

In 2012 and 2013, the MPRE website provided—among many other things—descriptions of the Claimed Services, including “Creative Direction,” which expressly grouped in “product design” (i.e., merchandise) and “logo creation”:

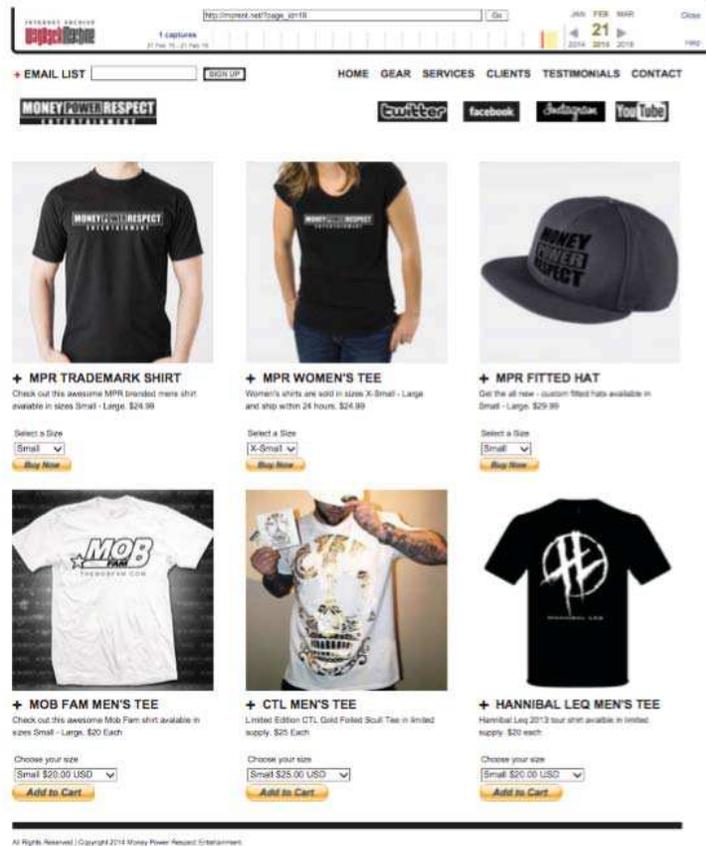


+ CREATIVE DIRECTION

With 15 years collective experience in the print layout, branding, and creative consulting industry our graphic design team which is lead by Jason Hughes carries experience including 8 years in the national advertising department at Gannet's Arizona outfit The Arizona Republic. Our ability to design within different mediums and forms of media such as company fliers, print advertisement, product design, logo creation, packaging, web design, using professional and commercial layouts and much more allows us to take a strong stance in the industry to dominate any competitor through vivid expressions of crisp fine lines and creative influence at competitive pricing.

Exh. 15 at MPRE00340; *see also* Exh. 15 at MPRE00334–45; Test. Tr. at 30:6–11 (noting that MPRE advertises its services on its website).

In 2014, Cahleb updated the website to the following design, which he still uses today:



Exh. 15 at MPRE00349; *see* Exh. 15 at MPRE00343–48, MPRE00350–51; Exh. 4 at MPRE00125–27; Test. Tr. at 28:13–30:7, 51:9–12 57:6–14, 92:14–93:2.

As shown above, website visitors can view available merchandise, select a size, and can purchase an item by clicking “add to cart.” Customers can pay for their purchases online through PayPal or a direct deposit. Test. Tr. at 243:2–25; *see* Exh. 11 at MPRE00296–97, MPRE00456–60; *see also* Exh. 12.⁹

⁹ In his Trial Brief, Mayweather objects to several documents produced by Cahleb outside the scope of discovery; in particular, Mayweather objects to several PayPal invoices that Cahleb produced on January 8, 2016. *See* Exh. 11 at MPRE0456–529. However, these invoices are from

Cahleb produced a spreadsheet generated by PayPal that lists MPRE website transactions from April 12, 2008 to January 6, 2016 (the “PayPal Spreadsheet”). *See* Exh. 12; Test. Tr. at 145:14–20 (explaining that the spreadsheet was “exported from PayPal”). The PayPal Spreadsheet provides more detail for recent transactions than it does for those from several years ago. Test. Tr. at 241:1–25 (describing the differences between PayPal’s invoices from earlier transactions and those from recent ones, and noting that PayPal “change[d] the[ir] data input. They were a lot more vague in the earlier years as to where nowadays there's [a] transaction number. . . . There’s details on almost every single box . . . across the report, but in the earlier years, there wasn't as much detail and dictation next to exactly what the transaction was.”).

However, because PayPal charges a fee for transactions involving the sale of goods, Cahleb was able to identify transactions from the PayPal Spreadsheet that, to the best of his knowledge and recollection, included sales of clothing from the MPRE website. Test. Tr. at 142:19–144:12. Further, Cahleb submitted individual PayPal invoices showing that consumers purchased goods from the MPRE e-commerce store on the following dates: June 25, 2015, June 26, 2014, January 6, 2016, January 7, 2016. *See* Exh. 11 at MPRE00296–97, MPRE0456–60.

Cahleb also allows customers to pay cash for merchandise from the MPRE e-commerce store in person or at client shows because:

a lot of these people don't have a credit card. A lot of times they don't have a PayPal, they don't have a credit card. They . . . saw it online on the computer but don't have a credit card. So they contact me, [asking ‘]How can I get this, where can I get this merchandise,[’] and then it's purchased in person.

purchases made from MPRE’s e-commerce store on January 6, 2016. *See* Test. Tr. at 146:9–147:5. Accordingly, these documents did not exist during the discovery period; thus, because Cahleb disclosed the responsive documents two days after the transactions took place, there was no undue delay in the production of the documents.

Test. Tr. at 243:2–25 (“if it [is] an in-person transaction that was originated from online, it would be a cash purchase”), 144:13–145:2.

Since establishing his online stores, Cahleb has sold various products on the website and at client events, including those depicted in Exhibit 16 to the Deposition Transcription. *See* Exh. 16 (chart of MPRE products sold during the following years: 2008, 2009, 2010, 2011, 2012, 2013, and 2014); *see also* Test. Tr. at 155:19–156:5; Exh. 17 at MPRE00526–29 (stand-alone images of Mob Fam clothes, MPRE clothes, etc.).

(1) Use of the Mark in Advertising the Online Retail Store

In addition to advertising methods outlined in Section I(C)(1) of this Brief, Cahleb “actively promot[es] the sale of clothing on social media,” including on MPRE’s Twitter, Facebook, YouTube, and Tumbler pages. Test. Tr. at 177:19–178:2, 102:10–24, 182:16–183:1.

For example, on July 21, 2014, Cahleb advertised the MPRE website store on MPRE’s Facebook wall, which (i) prominently displayed the MPRE Mark, and (ii) drew a direct connection between the Mark and its “online retail store services” by providing a link to its e-commerce site and stating “Order Your T-Shirt Today!”:

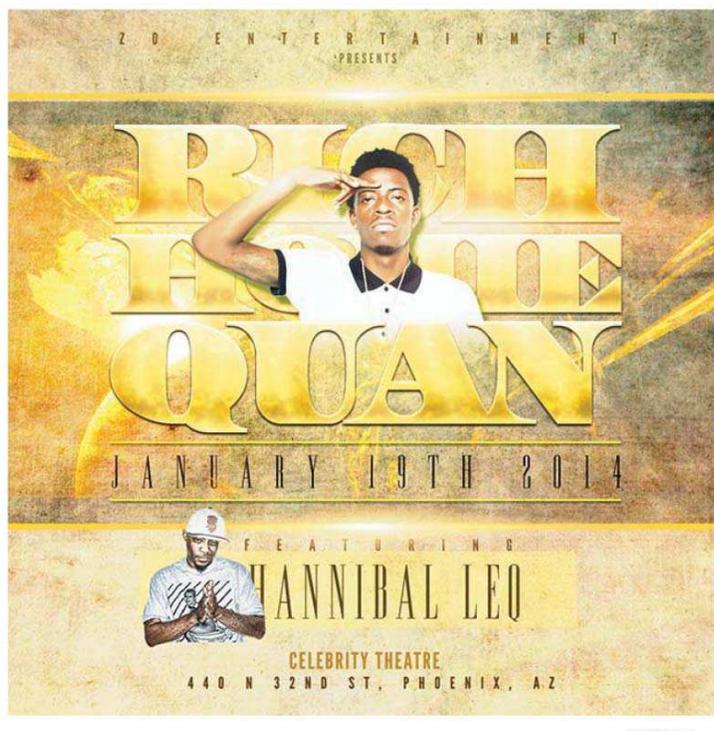


Exh. 3 at MPRE00133; *see also* Test. Tr. at 19:1–11.

b) Use of The Mark in Operating an In-Person Retail Store

Cahleb also sells merchandise at concert “Merch Booths.” Whenever Cahleb uses a Merch Booth at client concerts, the “salesperson at the show . . . send[s] a document of what shirts were there.” Test. Tr. at 132:3–11. Then, MPRE re-inventories unsold merchandise and summarizes sales made in the master “Merch Report” document—which is a record of all sales made at client shows, and includes the following information: date, talent, venue, city, items for sale, quantity sold, and total proceeds. Test. Tr. at 133:2–11; Exh. 11 at MPRE00298.

Cahleb used posters, ads, and handbills to promote shows where MPRE Merch Booths were present—for example, the following images were used to promote a 2012 Mob Fam concert and a 2014 Hannibal Leq concert:



MPRE00249

Exh. 7 at MPRE00239, MPRE00249. As shown in the Merch Report, Cahleb had Merch Booths at both of these shows. Exh. 11 at MPRE00298.

D. This Cancellation Proceeding

In 2013—over five years after Cahleb began using the MPRE Mark for the Claimed Services—Mayweather filed a Section 1(a) application with the PTO for MONEY POWER RESPECT in class 25 for t-shirts and hats. (Serial No. 85968214). On October 2, 2013, the PTO properly refused Mayweather’s application because of its confusing similarity to Cahleb’s Mark. Shortly thereafter, Mayweather filed a petition for partial cancellation of the Cahleb’s Registration on the grounds of abandonment (limited to online retail store services) and fraud. *See* Mayweather’s Petition for Cancellation (“D.E. 1”) at 2–3. Mayweather has never contested Cahleb’s use of the MPRE Mark for the management, advertising, promotional, and marketing services listed in Cahleb’s Registration. Indeed, Mayweather even concedes that he is not challenging MPRE’s use of the Mark for clothing, which pre-dates Mayweather’s application and claimed use. *See* Test. Tr. at 190:2–22.

Mayweather ignored the evidence of use that was presented early in the Proceeding and conducted only limited discovery, which included: (1) Petitioner’s First Set of Requests for Production (May 22, 2015); (2) Petitioner’s First Set of Request’s for Admissions (May 22, 2015); (3) Petitioner’s First Set of Interrogatories (May 22, 2015); and (4) Petitioner’s Second Set of Requests for Admissions (July 17, 2015). Cahleb provided complete and prompt responses to each. *See* Registrant’s Objections and Responses to Petitioner’s First Set of Requests for Admissions (June 22, 2015); Registrant’s Objections and Responses to Requests for Production; Registrant’s Objections and Responses to Petitioner’s First Set of Interrogatories (June 22, 2015); and Registrant’s Objections and Responses to Petitioner’s Second Set of Requests for Admissions (Aug. 21, 2015).

Mayweather limited his discovery to these four requests, and chose not to depose Cahleb. Moreover, Mayweather never: (i) challenged Cahleb’s responses or objections, (ii) sought

additional information or clarification to the responses, (iii) sent any deficiency letter, and (iv) filed any motions to compel discovery.

In effect, Mayweather went silent after serving the discovery requests. Thus, Mayweather's claim that he made "repeated requests for documents" is disingenuous and misrepresents the nature of his discovery. Mayweather's Trial Brief ("D.E. 26") at 4. Cahleb timely responded to Mayweather's discovery requests with necessary objections and service of responsive documents. Cahleb never received any objection or comments from Mayweather indicating that the documents provided were insufficient to establish use of the Mark or otherwise non-responsive to the discovery requests. Accordingly, Cahleb rightfully assumed (and the Board can conclude) that he had fully complied with his discovery obligations.

Further, despite Mayweather's claim that he conducted his own "investigation" of MPRE's use of the Mark, which "uncovered evidence suggesting" that Cahleb "no longer used [the] Mark in connection with online retail store services in the field of clothing," Mayweather has not produced one piece of evidence uncovered from this alleged "investigation." *See* D.E. 26 at 3.

Due to Mayweather's silence during discovery and lack of evidence offered to support his claims, Cahleb assumed that his evidence showing use of the MPRE Mark would convince Mayweather to stop pursuing these meritless claims. Unfortunately, despite the abundant evidence of use, Mayweather has continued this fight, forcing Cahleb to divert resources from other areas of business to protect his Mark.

V. ARGUMENT

The Board should deny Mayweather's Petition because Mayweather has no affirmative evidence to support his abandonment, fraud, and void *ab initio* claims, and, therefore, has failed

to carry his burden in proving them.

Cahleb has no obligation to rebut Mayweather's unproven claims. *The North Face Apparel Corp. v. Baranzyk*, No. 92046488, 2010 WL 985362, at *4 (T.T.A.B. Mar. 10, 2010). However, to remove any doubt, Cahleb has present[ed] a substantial record of evidence proving that he is entitled to maintain his Registration because he: (A) has continuously used the MPRE Mark for all Claimed Services, including online retail store services; (B) did not commit fraud on the PTO in procuring the Registration; and (C) was using the Mark for online retail store services on June 2, 2008, as set forth in his Statement of Use.

A. Mayweather Failed to Prove by a Preponderance of Evidence that Cahleb Abandoned the Mark

Cahleb's certificate of registration is "prima facie evidence" of the Registration's validity and of his continued use of the Mark. *See Cervecería Centroamericana, S.A. v. Cervecería India, Inc.*, 892 F.2d 1021, 1023, 13 U.S.P.Q.2d 1307, 1309 (Fed. Cir. 1989).

Mayweather—as the party seeking to cancel the Registration—must rebut this presumption with proof that Cahleb abandoned the Mark. *See id.*, 13 U.S.P.Q.2d at 1309; *On-Line Careline, Inc. v. Am. Online, Inc.*, 229 F.3d 1080, 1087, 56 U.S.P.Q.2d 1471, 1478 (Fed. Cir. 2000); *Martahus v. Video Dupl. Serv., Inc.*, 3 F.3d 417, 421, 27 U.S.P.Q.2d 1846, 1850 (Fed. Cir. 1993).

"Since abandonment results in a forfeiture of rights the courts are reluctant to find an abandonment." MCCARTHY ON TRADEMARKS § 17:12. Additionally because abandonment is a question of fact, a petitioner can only prove abandonment through affirmative, proven facts. *Quality Candy Shoppes/Buddy Squirrel of Wisc. Inc. v. Grande Foods*, 90 U.S.P.Q.2d 1389, 1393 (T.T.A.B. 2007).

Thus, Mayweather must bear the “heavy burden” of present affirmative evidence proving by a preponderance of evidence that Cahleb (1) discontinued use of the Mark, and (2) intended not to resume use of the Mark; or, alternatively, Mayweather is entitled to a rebuttable presumption of abandonment **only** if he can prove that Cahleb ceased using the Mark for three consecutive years. 15 U.S.C. § 1127; *see Cervceria Centroamericana, S.A.*, 892 F.2d at 1024, 13 U.S.P.Q.2d at 1311 (noting that the “heavy burden” arises out of the greater evidentiary difficulties a petitioner likely faces in a cancellation proceeding).

Mayweather cannot establish abandonment under either scenario because, despite his claim that he’s proven three consecutive years of non-use, he has not presented a shred of affirmative proof that Cahleb ever stopped using the Mark for any period of time, let alone for three consecutive years. Mayweather’s failure to prove that Cahleb stopped using the Mark with intent not to resume use is detrimental to his claim, especially in light of the undisputed evidence that Cahleb *is currently using the Mark*.

Instead of providing direct proof, Mayweather’s claim centers on pure speculation. For example, Mayweather asks the Board to conclude that Cahleb never provided online retail store services on its MySpace Page, but has not presented a piece of evidence supporting this assumption.¹⁰ In fact, as explained in *Forbes*’ 2006 interview of MySpace founders Chris DeWolfe and Tom Anderson, attributed MySpace’s early growth to “the features and what our competitors were not allowing people to do,” which included allowing users to sell merchandise on their MySpace pages:

We recognized from the beginning that we could create profiles for the bands and allow people to use the site any way they wanted to.

¹⁰ Mayweather never produced the purported terms of service in discovery, and did not attach them to any of his Notices of Reliance. Accordingly, Cahleb objects to Mayweather’s reference to the terms of service in his Trial Brief. *See* Appendix A.

We didn't stop people from promoting whatever they wanted to promote on MySpace.

Some people have fun with it, and others try to get more business and *sell stuff*, . . . *and we encourage them to do that*.

Natalie Pace, *Q&A: MySpace Founders Chris DeWolfe & Tom Anderson*, FORBES.COM (Jan. 4, 2006, 11:45AM), http://www.forbes.com/2006/01/04/myspace-dewolfe-anderson-cx_np_0104myspace.html.

At this stage of the Proceeding, Mayweather's unsupported assertions are insufficient to meet his heavy burden of proving his abandonment claim. "Whenever an inference is based on pure speculation . . . a prima facie case of abandonment must fail." *Cerveceria Centroamericana, S.A.*, 892 F.2d at 1024, 12 U.S.P.Q.2d at 1310; *see also On-Line Careline, Inc.*, 229 F.3d at 1085–87, 56 U.S.P.Q.2d at 1476–78 (The Federal Circuit will only affirm a finding of abandonment "if supported by *substantial evidence*.") (emphasis added).

Mayweather has failed to prove that Cahleb either (i) stopped using the mark for three consecutive years, or (ii) discontinued use for a period less than three years with intent not to resume use. While, on the other hand, Cahleb has submitted extensive amounts of evidence detailing his use of the MPRE Mark for online retail store services—including evidence that he uses the Mark in advertising Retail Store Services to potential clients, as well as evidence that he uses the Mark in providing those Services to his clients. The extent of Cahleb's evidence illustrates the unreasonableness of Mayweather's abandonment claim. There is no three-year period of non-use and there is no evidence showing intent not to resume use, because the Mark is in actual use. Indeed, Mayweather does not even argue in his Trial Brief that Cahleb intended not to resume use of the Mark.

Cahleb is "under no obligation to submit evidence either to rebut [P]etitioner's evidence of nonuse or to demonstrate [its] intention to resume use of [the M]ark, such as evidence to

explain any nonuse.” *Baranzyk*, 2010 WL 985362, at *4; *see Nirvana, Inc. v. Nirvana For Health Inc.*, No. 92042878, 2010 WL 5099662, at *6 (T.T.A.B. Dec. 1, 2010) (“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 . . . 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.”); *see also Threshold.TV Inc. & Blackbelt TV, Inc. v. Metronome Enters. Inc.*, 96 U.S.P.Q.2d 1031, 1040 (T.T.A.B. 2010) (“Simply put, we are not persuaded that applicant has not used its mark in commerce simply because [petitioner] says he is not familiar with applicant and its . . . services.”).

In addition, Cahleb undertook the significant financial burden of conducting a testimonial deposition so that he could explain to Mayweather and the Board exactly how he conducts his business and uses the Mark.

Not only does Mayweather ignore the wealth of evidence demonstrating Cahleb’s use of the Mark, but he also dismisses Cahleb’s testimony by simply calling it “self-serving.” D.E. 26 at 4. However, Mayweather cites to no evidence showing that Cahleb’s testimony is not trustworthy. Throughout this Proceeding, Mayweather has willfully ignored the proven facts, and, instead, hopes to win this fight by simply out-spending his opponent. Mayweather’s abandonment claim is on the mat, the bell has rung, and Cahleb is winner by decision.

1. Cahleb Has Continuously Used the Mark for Online Retail Store Services in the Field of Clothing

Cahleb has presented sufficient evidence proving that he has continuously used the Mark for all of the services in the registration including online retail store services in the field of

clothing since at least June 2, 2008. Specifically, Cahleb has produced and submitted evidence that he uses the Mark in (a) advertising his online retail store services, and (b) rendering the services through operating the e-commerce store and Merch Booth.

Mayweather ignores this evidence, and presents unfounded claims as to what forms of evidence are required to show use of a service mark. Specifically, Mayweather argues—without any citation to authority—that Cahleb cannot avoid cancellation without (i) receipts proving the extent to which he’s sold clothing through MPRE’s various channels of e-commerce, and (ii) screenshots proving every means by which he has provided such services for his clients since 2008.

While Mayweather would like to restrict which evidence appropriately proves use of the MPRE Mark, it is well established that a registrant can prove use its mark for retail store services with proof that it “gather[s] together various products, mak[es] available a place for purchasers to select goods, and provid[e] for any other necessary means for consummating purchases.” TMEP § 1301.01.

Specifically, to establish use of a mark for retail store services, online or otherwise, one must “prove that the mark ‘is used or displayed in the sale or advertising of services’ in such a way as to” create a direct association between the mark and the services, meaning that it must “‘identify the services of one person and distinguish them from the services of another.’” MCCARTHY ON TRADEMARKS § 16:33; TMEP § 1301.04 (citing *On-Line Careline, Inc.*, 229 F.3d at 1088, 56 U.S.P.Q.2d at 1476–77).

As set forth in the ample case law before the Board, evidence of use of the Mark is not limited to sales receipts, or historical [archive.org](https://www.archive.org) screenshots for every year the website has been operational. Rather, the Board will accept a wide variety of evidence as proof of rendering

services, so long as the evidence creates a direct association between the mark and the claimed service. *See, e.g., Martahus*, 3 F.3d at 426, 27 U.S.P.Q.2d at 1855 (citing *In re Rep. of Austria Spanische Reitschule*, 197 U.S.P.Q. 494, 498 (T.T.A.B. 1977) (“A service mark application must reflect use of the mark ‘in the sale or advertising of services’ . . . and may include advertisings, brochures, *invoices*, and virtually every form of printed matter.”)); *In re Eagle Fence Rentals, Inc.*, 231 U.S.P.Q. 228, 230–31 (T.T.A.B. 1986) (specimens showing fence in use, bearing the mark, are adequate to support registration of the mark for the service of fence rental); *In re Red Robin Enters., Inc.*, 222 U.S.P.Q. 911, 913–14 (T.T.A.B. 1984) (specimens consisting of photograph of costume in use are adequate to support registration of costume as service mark for entertainment services); *In re Anchor Holdings, LLC*, 79 U.S.P.Q.2d 1218, 1220 (T.T.A.B. 2008) (“in today’s commercial context if a customer goes to a company’s Web site and accesses the company’s software to conduct some type of business, the company may be rendering a service, even though the service utilizes software”).

Additionally, the Board recognizes that “[r]etail stores can sell products under their own brand name that is the same as the store’s name or they can sell goods produced by others.” *In re Supply Guys, Inc.*, 86 U.S.P.Q.2d 1488, 1498 (T.T.A.B. 2008).

Mayweather’s reliance on a purported absence of some evidence is shortsighted. The multiple facets of MPRE’s business complement each other, and demonstrate an interwoven network of services and cross promotion. MPRE offers a package of talent-management and recording services to clients, which includes scheduling and promoting client shows, as well as design services to help artists develop merchandise that MPRE sells at shows and online—all of the MPRE Claimed Services are connected. Test. Tr. at 10:17–25, 12:12–19, 15:5–12, 74:1–23; Exh. 8 at 384; *see generally* Exh. 8 (invoices for promotional materials).

MPRE's online retail store services are an integral facet of MPRE's overall talent-representation and promotional services. By making merchandise available for fans to purchase, Cahleb contributes to the success of his clients. Cahleb created and developed this intricate network of services, and the services comprehensive nature is a reason why clients choose to be represented by MPRE.

Mayweather does not dispute that Cahleb uses the Mark in connection with MPRE's talent-management and promotion services. Mayweather, through his counsel, acknowledges that Cahleb has consistently sold apparel under the MPRE Mark as well. Test. Tr. at 190:2–17, 191:16–20 (“We’re not arguing over whether you continuously sold clothing and apparel items under your trademark.”). Mayweather only challenges use of the MPRE Mark for online retail store services (solely because these services block Mayweather’s own registration), but offers no justification for doing so. Nevertheless, this challenge does not withstand scrutiny when viewed in the context of the MPRE business as a whole.

Cahleb developed the moneypowerrespectentertainment.com website well before filing the Statement of Use. Exh. 14 at MPRE000285. Once it became operational, the website clearly housed a functional e-commerce store where visitors could purchase clothing through a shopping cart, which was accessible from the “MPR Store” tab on the left side of the page. Test. Tr. at 26:16–17, 91:19–2, 160:23–161:4; *see* Exh. 15 at MPRE00307.

MPRE has continuously advertised and promoted these services since 2008. Test. Tr. at 31:4–25; *see* Exh. 15 at MPRE00307. Cahleb was using the Mark for Retail Store Services, including online retail store services, when he filed his Statement of Use, and has never stopped doing so. Moreover, Cahleb clearly is still using the Mark, a fact that Mayweather can verify by simply visiting the MPRE website.

As the MPRE business evolved, the website underwent changes as well, and Cahleb has provided various invoices that reflect these changes. Test. Tr. at 161:10–15, 163:5–164:1; *see generally* Exh. 14. However, changes to a website do not demonstrate abandonment; instead, they show an active effort to keep using the mark through updating the business and services offered under the Mark. What remains consistent throughout all of these changes to the website is that, during each year of its operation, Cahleb was designing, and ordering inventory of, apparel for MPRE’s clients, and was continuously promoting all of the Claimed Services, including all of the Retail Store Services. *See* Exh. 10 (invoices from orders of client merchandise); Test. Tr. at 101:19–102:12, 104:8–21, 105:17–106:10, 107:11–17, 109:13–25; *see also* Test. Tr. at 19:12.

Mayweather challenges the gaps in the third-party archive.org screen captures, but these gaps are beyond Cahleb’s control. Moreover, because Cahleb is the sole owner of MPRE, it was not financially feasible for him to document and keep record of every single instance of use of the Mark for the six years prior to the beginning of this Proceeding.

However, notwithstanding these limitations, Cahleb has still provided evidence showing that, during the purported gap in the archive.org screenshots, he was continuously: (i) advertising his Retail Store Services (which include merchandise creation and development for clients), (ii) ordering and maintaining inventory, and (iii) selling that inventory through e-commerce and at client concerts. Exh. 11 at MPRE00340, MPRE00334–39; Test. Tr. at 30:6–11.

Moreover, while Mayweather claims this evidence is not enough to conclusively prove use to avoid an abandonment finding, Mayweather continually forgets that he has the burden of proving abandonment.

In sum, Cahleb's evidence which includes, but is not limited to, the following, proves that he was using the Mark for Retail Store Services during the alleged period of non-use:

- an image of a t-shirt used to promote MPRE's MySpace Page, where it once provided Retail Store Services, Exh. 13 at MPRE00051, and supporting testimony, Test. Tr. at 27:8–11, 45:3–5, 46:8–16¹¹;
- a GoDaddy invoice establishing that, prior to filing his Statement of Use, Cahleb created a website located at moneypowerrespectentertainment.com, that had a shopping cart to its facilitate online sales, Exh. 14 at MPRE00285, and supporting testimony, Test. Tr. at 26:16–17, 91:19–2, 160:23–161:4;
- screenshots from archive.org showing that customers can (and historically could) purchase gear from MPRE's website through the site's shopping cart feature, Exh. 15 at MPRE00307–33, 348–51, and supporting testimony, Test. Tr. at 25:1–2;
- screenshots of MPRE's current website, which clearly displays the Mark near the top of the page and the location where the MPRE online retail store services are accessed, rendered, and experienced; the screenshot creates a strong mark–services connection because the Mark is sufficiently close in proximity to the rendering of the services, Exh. 4; and supporting testimony, Test. Tr. at 26:26–24, 27:2–11, 45:3–5, 46:8–16, 160:12–15;
- the PayPal Spreadsheet outlining all transactions that Cahleb has conducted through the MPRE PayPal, Exh. 11, Exh. 19 (unredacted version of Exh. 11), and supporting testimony, Test. Tr. at 243:2–25;

¹¹ Mayweather, for the first time in his trial brief, offers evidence concerning MySpace's terms of use. Cahleb objects to this evidence because Mayweather did not disclose his intent to rely on any version of MySpace's terms of use in this Proceeding. See Registrant's Objections to Petitioner's Brief, attached hereto as [Appendix A](#).

- invoices for t-shirts and other merchandise ordered by Cahleb from May 2011 to May 2012 that was used to carry out the MPRE Retail Store Services, Exh. 10, and supporting testimony, Test. Tr. at 93:1–123:25, 14:14–19;
- invoices for revisions and updates to the MPRE website, Exh. 14, and supporting testimony, Test. Tr. at 161:10–15, 163:5–164:1;
- a chart of sales made through Merch Booth, Exh. 11, and supporting testimony, Test. Tr. at 132:3–11; and
- images of merchandise sells (or has sold) on the MPRE website or the MPRE Merch Booths, Exh. 16, Exh. 17, and supporting testimony. Test. Tr. at 153:18–156:5, 49:9–25.

Thus, Mayweather’s claim that “it is unclear from . . . the record whether and to what extent such services were actually provided,” indicates that he must have ignored all the evidence outlined above. *See* D.E. 26 at 4.

Cahleb has provided evidence of: (i) the creation of the website and online store, (ii) what the online store looked like and how it functioned, and (iii) the clothing sold via the website and other channels of distribution. This evidence is quite clear and Mayweather can (or could) confirm how MPRE provides these services to date simply by visiting the website.

Mayweather did nothing to verify the evident facts. Rather, he discounts all of the aforementioned evidence as not representing actual use of the Mark when any of the aforementioned would be accepted by the PTO. Mayweather’s position has no merit and this fight should finally end.

2. Cahleb Has Continuously Used the Mark in Advertising MPRE's Online Retail Store Services in the Field of Clothing

To prove use of its service mark, a registrant may also submit evidence of use in newspaper and magazine advertisements, brochures, billboards, handbills, direct-mail leaflets, menus (for restaurants), press releases that are publicly available (e.g., on the applicant's website), as well as "[l]etterhead stationery, business cards, or invoices bearing the service mark." TMEP § 1304.04(a), (h)(i); *see also DeCosta v. Columbia Broad. Sys., Inc.*, 520 F.2d 499, 505–06, 186 U.S.P.Q. 305, 311–14 (1st Cir. 1975) (holding that use of a mark on a calling card which is distributed to advertise one's services is sufficient to give rise to service mark rights.); *see In re Repub. of Austria Spanische Reitschule*, 197 U.S.P.Q. at 498 ("A service mark application must reflect use of the mark 'in the sale or advertising of services' . . . and may include advertisings, brochures, invoices, and virtually every form of printed matter.").

It is well established that any of the aforementioned forms of advertising are sufficient to show use of a service mark, so long as the ad (a) predominantly displays the mark, and (b) references the advertised services. TMEP § 1301.04(f)(ii) (citing *In re Monograms Am., Inc.*, 51 U.S.P.Q.2d 1317, 1318 (T.T.A.B. 1999)).

A reference to the services "need not be stated word for word." The advertising need only make "a 'sufficient reference' to the services themselves or a general reference to the trade, industry, or field of use is required." TMEP § 1301.04(f)(ii); *see In re Ralph Mantia Inc.*, 54 U.S.P.Q.2d 1284, 1286 (T.T.A.B. 2000) (letterhead and business cards showing the word "Design" are acceptable evidence of use of mark for commercial art design services); *In re Ames*, 160 U.S.P.Q. 214, 214 (T.T.A.B. 1968) (advertisement for phonograph records was sufficient proof of use of mark for musical services).

Cahleb has continuously used the Mark in advertising the MPRE Retail Store Services with the following: (a) business card, Exh. 5 at MPRE00439; Test. Tr. at 35:18–25; (b) handbills used to promote individual events/shows, Exh. 5 at MPRE00437; Exh. 7; Test. Tr. at 31:21–32:3, 53:8–54:4, 65:2–12; *see also* Test. Tr. at 67:6–15 (testifying that last year alone, Cahleb promoted 55 MPRE concerts); (c) newspaper/magazine ads, Exh. 5 at MPRE00438; Test. Tr. at 31:19–21; Exh. 11 at MPRE00441; Test. Tr. at 134:2–20, 136:4–8; and (d) on social media. Test. Tr. at 177:19–178:2, 102:10–20, 182:16–183:1; *see, e.g.*, Exh. 3 at MPRE00133; Test. Tr. at 19:1–11.

Each ad, standing alone, would be sufficient to show use of the Mark because each (a) prominently displays the Mark, and (b) references “retail services” and the location of the retail store services found on the MPRE website. *See* Exh. 5. Further, this evidence is supported by Cahleb’s testimony that: (i) he has used the ads, business cards and flyers in connection with the MPRE business since 2008, (ii) has not stopped using them since then, and (iii) still “actively hand[s] th[em] out.” Test. Tr. at 179:8–180:1, 31:4–25.

Cahleb has also used MPRE direct mailing campaigns (Test. Tr. at 68:15–25, Exh. 8), banner ads in email blasts (Test. Tr. 72:9–24), commercial cable advertising (Test. Tr. 75:2–22, Exh. 8) and radio advertisements (Test. Tr. 77:6–19; 86:7–25 – 87:1–8, Exh. 8).

And, while the advertisements may reference “retail services” rather than “online retail store services,” a general reference to the industry is sufficient to “create an association between the [M]ark and” the MPRE online retail store services. *See In re Ralph Mantia Inc.*, 54 U.S.P.Q.2d at 1286 (letterhead and business cards showing the word “Design” are acceptable evidence of use of mark for commercial art design services). And Mayweather does not challenge whether Cahleb offers MPRE retail services in general. But somehow, according to

Mayweather's logic, the retail store services Cahleb offers at its shows and Merch Booth are sufficiently unrelated to the online retail store services, such that Cahleb has abandoned the MPRE mark for these services. This conclusion is nonsensical and completely unsupported.

Accordingly, Cahleb's proof of use of the Mark in advertising MPRE Retail Services is more than sufficient to defeat Mayweather's abandonment claim. For example, in *Rescue Response Group Inc. v. American Residential Services, L.L.C.*, the Board denied petitioner's asserted abandonment claim—that relied solely on screenshots from an archive website—based on registrant's proof that it used its mark in a postcard advertising its services to a prospective customer. No. 91199269, 2016 WL 552611, at **4–5 (T.T.A.B. Jan. 28, 2016) (the Board noted that it had “no reason to doubt the uncontroverted testimony of [respondent's corporate counsel] that the registered mark is in use, as shown by the postcard.”). Likewise, the respondent in *DLR Licensing, LLC v. Carnival Corp.* successfully showed use of its service mark with evidence that it used pamphlets and its website to advertise its services. No. 92057150, 2014 WL 5788061, at **5–7 (T.T.A.B. Oct. 22, 2014).

Here, just as in *Rescue Response Group* and *DLR Licensing*, Cahleb has submitted uncontroverted evidence that he currently uses and has consistently used the Mark in advertising MPRE Retail Store Services since 2008.

Moreover, while Mayweather discounts the evidence of the images of the online store clearly captured by archive.org, Mayweather asks the Board to infer non-use based on what other screenshots do not show, despite the Board's policy not to do so. See *Safer Inc. v. OMS Investments Inc.*, 94 U.S.P.Q.2d 1031, 1039 (T.T.A.B. 2010) (the probative value of screenshots from an archive source (such as the WayBack Machine) is limited to what the screenshots “show on their face.”)

Accordingly, because Mayweather has failed to prove by a preponderance of evidence that Cahleb ceased using the Mark in advertising MPRE online retail store services, the Mayweather abandonment claim must fail.

3. There is No Evidence of Intent to Not Resume Its Use

Cahleb and MPRE are using the Mark, which is the clearest evidence possible to refute the second element required to establish abandonment. And Mayweather has not provided any authority that establishes that abandonment exists when the Mark is currently in use.

The Board recognizes the “difficulty [of] proving the second element” of abandonment.” *Baranzyk*, 2010 WL 985362, at *4. Accordingly, the Board is unlikely to cancel a registered mark absent an affirmative statement by registrant that he intends to discontinue use of the mark. MCCARTHY ON TRADEMARKS § 17:11 (to show intent registrant’s “public announcement must unequivocally state that the previous mark will no longer be used.”); *see also Barnes Grp., Inc. v. Connell Ltd. P’ship*, 793 F. Supp. 1277, 1305–06 (D. Del. 1992) (court declined to cancel registrant’s marks based on plaintiff’s failure to prove nonuse and intent not to resume use; plaintiff did not attempt to prove intent not to resume use, and relied on statutory inference in § 1127(a) of intent not to resume from three years’ nonuse, but record failed to show three years’ nonuse).

Mayweather concedes that Cahleb and MPRE never abandoned the MPRE Mark for the management, promotion, and retail store services for clothing in general, and this position alone, is enough to prove that Cahleb never intended to abandon the Mark for online retail store services. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 30, cmt. b (1995) (“[c]essation of use [for] a particular [service] will not result in abandonment if use continues on related” services.).

It is well established that a change in use of a mark from one service to another will not constitute abandonment if the services are closely related:

Where a registrant discontinues to use a trademark on a certain [service], he will not be held to have abandoned the mark if he continues to use the mark on related [services], and if the discontinued [service] is one which would still be thought by the buying public to come from the same source and is one which remained in the normal field of expansion of the owner's business.

Robinson Co. v. Plastics Research & Devel. Corp., 264 F. Supp. 852, 863, 153 U.S.P.Q. 220, 231 (W.D. Ark. 1967); *see, e.g., Lucien Piccard Watch Corp. v. 1968 Crescent Corp.*, 314 F. Supp. 329, 332 (S.D.N.Y. 1970) (no abandonment where, despite nonuse of mark on claimed goods for at least two years, the holder had continued to use the mark on other items in the same class and had no intention of abandoning the mark.); *August Wagner & Sons Brewing Co. v. Jos. Wagner Bierbrauerei zum Augustiner*, 49 U.S.P.Q. 328, 329 (C.C.P.A. 1941) (continuing in business under the name in some areas negates an inference of intent to abandon which might otherwise arise from a hiatus in another area) (citing *Baglin etc. v. Cusenier Co.*, 221 U.S. 580, 597–98 (1911) (“But the loss of the right of property in trade mark . . . must be found an intent to abandon, or the property is not lost; and while, of course, as in other cases, intent may be inferred when the facts are shown, yet the facts must be adequate to support the finding.”)); *see also* MCCARTHY ON TRADEMARKS § 17:23.

Even if Mayweather had attempted to prove the intent to not resume use, he would have failed based on Cahleb's consistent use of the Mark in MPRE advertising and rendering Retail Store Services—including online retail store services—in the field of clothing. Accordingly, Mayweather's abandonment claim must fail.

B. Mayweather Has Failed to Prove By Clear and Convincing Evidence that Cahleb Committed Fraud in Registering the Mark

Mayweather asserts that Cahleb fraudulently obtained the MPRE registration. However, fraud in procuring a trademark registration or renewal occurs only when an applicant or registrant knowingly makes a specific false, material representation with the intent to deceive the PTO. *See In re Bose Corp.*, 580 F.3d 1240, 1243, 91 U.S.P.Q.2d 1938, 1941 (Fed. Cir. 2009). The issue presented by a fraud claim in a cancellation proceeding is whether registrant’s “misstatements represent a conscious effort” to maintain “for his business a registration to which he knew it was not entitled.” *Metro Traffic Control, Inc. v. Shadow Network Inc.*, 104 F.3d 336, 341, 41 U.S.P.Q.2d 1369, 1373 (Fed. Cir. 1997).

It is well settled that a party seeking cancellation of a trademark registration for fraudulent procurement bears a heavy burden of proof. *In re Bose Corp.*, 580 F.3d at 1243, 91 U.S.P.Q.2d at 1941 (citing *W.D. Byron & Sons, Inc. v. Stein Bros. Mfg. Co.*, 377 F.2d 1001, 1004, 153 U.S.P.Q. 749, 750 (C.C.P.A. 1967)). Indeed, “the very nature of the charge of fraud requires that it be proven ‘to the hilt’ with clear and convincing evidence. There is no room for speculation, inference[,] or surmise and, obviously, any doubt be resolved against the charging party.” *Id.*, 91 U.S.P.Q.2d at 1941 (citing *Smith Int’l, Inc. v. Olin Corp.*, 209 U.S.P.Q. 1033, 1044 (T.T.A.B. 1981)).

Thus, “[u]nless the challenger can point to evidence to support an inference of deceptive intent, it has failed to satisfy the clear and convincing evidence standard required to establish a fraud claim.” *Id.* at 1245, 91 U.S.P.Q.2d at 1943. Accordingly, “though [fraud on the PTO] is often alleged, is seldom proven.” MCCARTHY ON TRADEMARKS § 31:68.

To prevail on his claim of fraud, Mayweather must show by clear and convincing evidence that: (1) Cahleb made a false representation to the PTO; (2) Cahleb had knowledge of

the falsity of the representation; (3) that the false representation was material to the registration of the Mark; and (4) that Cahleb made the false, material representation with the intent to deceive the PTO. *See id.* at 1243 91 U.S.P.Q.2d at 1941.

Notwithstanding this incredibly high burden, which requires significant evidence of an actual intent to deceive, Mayweather has not cited to a single piece of evidence in support of his fraud claim and merely repeats the allegations from the Petition for Cancellation. It is astonishing that Mayweather would continue to pursue this claim (and create even more costs for Cahleb) without a single citation to any evidence.¹²

1. There is No Evidence that Cahleb Made a False Representation or that Any Purported False Representation was Material to the Registration

First, there is no evidence cited that Cahleb made a false statement in his Statement of Use. Instead, Mayweather disregards his evidentiary burden and instead speculates that there may have been a false statement based on the [archive.org](#) screen captures. Mayweather claims that Cahleb “submitted [his] Statement of Use . . . swearing that [he] used [the MPRE Mark] . . . in connection with all of the [Claimed Services] . . . since June 2, 2008. Yet, the earliest documented date that [Cahleb] *could have provided* online retail store services is December 8, 2008.” D.E. 26 at 12.

Again, Mayweather ignores all of the evidence that Cahleb has provided him with in reaching this unsubstantiated conclusion. Mayweather ignores the advertising evidence, the images of merchandise, the invoices demonstrating the creation of the online retail store, the sales of merchandise at shows and events, and Cahleb’s uncontroverted testimony corroborating the use of the Mark for all of the Claimed Services.

¹² Mayweather misstates the evidentiary burden in his Trial Brief. The standard required to prove a fraud claim is NOT by a preponderance of the evidence, but by clear and convincing evidence. *See* D.E. 26 at 14.

Mayweather also opted not to take Cahleb's deposition on this issue (or any issue for that matter). Mayweather never took any testimony from Cahleb on the issue of fraud, to ascertain whether he made any false representations, despite having the opportunity to do so at Cahleb's January 8, 2016 testimony deposition. *See* Test. Tr. at 190:2–238:4 (Mayweather's examination of witness was limited entirely to questions related to abandonment).

In fact, Cahleb's evidence and testimony prove that he was using the Mark for MPRE Retail Store Services on June 2, 2008. Test. Tr. at 149:10–152:5. Accordingly, Cahleb did not make a false statement in his Statement of Use—and certainly did not make a false statement that was material to the registration of the Mark.

2. There is No Evidence that Cahleb Knowingly Made a False Representation or Had Any Intent to Deceive the PTO

Where a petitioner fails to prove that registrant made a false representation, the inquiry ends and its fraud claim must necessarily fail. However, even if Mayweather could establish that Cahleb made a false representation, there is no evidence demonstrating any intent or knowledge of the false representation.

Cahleb's MPRE business was in full swing when he submitted the Statement of Use: he was managing and promoting artists and their shows, as well as designing, manufacturing, and selling their merchandise. He also was operating an e-commerce store on the MPRE MySpace Page at that time, as well as in the process of building a multifaceted website, which also included an e-commerce store.

It is unclear how Cahleb intended to deceive the PTO when, at the time Cahleb submitted his Statement of Use, the MPRE business was fully operational and was actively providing the Claimed Services to its clients and even Mayweather does not dispute that MPRE was an active business at this time.

Moreover, the PTO accepted the specimens submitted with the Statement of Use as proof that Cahleb was using the Mark for the Claimed Services—and Mayweather does not challenge the authenticity of these specimens. It is therefore unclear how there was any intent or knowledge to deceive the PTO.

Additionally, it is well settled that, “absent the requisite intent to mislead the PTO, even a material misrepresentation would not qualify as fraud under the Lanham Act warranting cancellation.” *In re Bose Corp.*, 580 F.3d at 1243, 1246, 91 U.S.P.Q.2d at 1941, 1944 (“There is no fraud if a false misrepresentation is occasioned by an honest misunderstanding or inadvertence without a willful intent to deceive.”).

Thus, even if Mayweather had proven that Cahleb knowingly made a material, false representation, Mayweather’s fraud claim still must fail because he failed to prove by clear and convincing evidence that Cahleb had subjective intent to deceive the PTO. Mayweather has not pointed to a single piece of evidence showing that Cahleb had intent to deceive—let alone a compilation of evidence that would be sufficient to prove such intent “to a hilt.” *Toufigh v. Persona Parfum, Inc.*, 95 U.S.P.Q.2d 1872, 1877 (T.T.A.B. 2010) (“Petitioner has not submitted any evidence that shows respondent's mark was not in use on its goods on that date. Since petitioner has failed to show that any statements made in respondent's Statement of Use declaration were false, let alone proving this to the hilt, petitioner's claim of fraud fails”); *see also Metronome Enters., Inc.*, 96 U.S.P.Q.2d at 1041–42 (opposer failed to prove to the hilt an intention by applicant to deceive the PTO).

In fact, the only evidence of record on the issue of subjective intent is from Cahleb himself and that evidence establishes that he was using the Mark on June 2, 2008 for all of the

Claimed Services—including online retail store services in the field of clothing. Test. Tr. at 149:10–152:5.

The record is devoid of any evidence establishing that Cahleb committed fraud on the PTO, yet Mayweather asks the Board to infer fraud based solely on the absence of affirmative evidence demonstrating that fraud was not committed. Because Mayweather failed to prove a single element of his fraud claim by clear and convincing evidence—let alone to “a hilt”—his claim must fail.

C. Mayweather Failed to Prove by a Preponderance of Evidence that the registration is void *ab initio*

In his trial brief and for the first time, Mayweather asks the Board to hold the Registration is “void *ab initio* because [Cahleb] was not using [the M]ark for online retail services as of the date of first use alleged in [his] Statement of Use,” and—in a final act of desperation—requests that the entire registration be cancelled when he only alleged abandonment for online retail store services. D.E. 26 at 14.

Mayweather claims that, “[b]ased on the evidence before the Board, [he] has established by a preponderance of the evidence that” Cahleb “had not actually used [his Mark] in commerce in connection with ‘online retail store services in the field of clothing’ when [he] filed [his] Statement of Use with the PTO, let alone as of the date of first use claimed in its Statement of Use.” D.E. 26 at 15.

However, Mayweather’s void *ab initio* claim must fail because: (1) Mayweather failed to give Cahleb notice of this claim prior to file his trial brief; (2) even if Mayweather were allowed to make this claim, (a) his recitation of the law are incorrect and overly expansive, and (b) he has failed to prove by a preponderance of evidence that Cahleb was not using the Mark for online retail store services in the field of clothing on June 2, 2008.

1. **Mayweather Never Gave Cahleb Notice of This Claim**

Mayweather's void *ab initio* claim must fail because he failed to provide timely notice of this claim (especially as it relates to all services in the registration) and the added claim is, in essence, an untimely request to amend the pleadings. *See Black & Decker Corp. v. Emerson Elec. Co.*, 84 U.S.P.Q.2d 1482, 1484–86 (T.T.A.B. 2007) (request to amend pleadings filed during trial period was untimely and denied).

“It is incumbent upon [a] petitioner to identify all claims promptly in order to provide [a] respondent with proper notice.” *Media Online Inc. v. El Clasificado, Inc.*, 88 U.S.P.Q.2d 1285, 1288 (T.T.A.B. 2009). Accordingly, where a petitioner attempts to add claims late in a proceeding, the Board will not entertain such claims absent a showing by petitioner that it “learned of these newly asserted claims through discovery or was otherwise unable to learn about these new claims prior to or shortly after filing its” petition. *Id.*; *Trek Bicycle Corp. v. StyleTrek Ltd.*, 64 U.S.P.Q.2d 1540, 1542–43 (T.T.A.B. 2001) (motion for leave to amend filed prior to close of discovery but based on facts known to opposer prior to institution of the case denied due to unexplained delay).

Mayweather claims that, because he has raised (unsupported and unproven) abandonment and fraud allegations pertaining to just online retail store services, that he may now assert this new claim to cancel the entire registration. *See* D.E. 26 at 15. However, allowing such a claim to proceed would be extremely prejudicial to Cahleb, as he had no way of predicting that Mayweather would tack on an extra claim in the final round of this proceeding—especially in light of his counsel's clear statement that, at the time of Cahleb's testimonial deposition, Mayweather was seeking cancellation of the Mark solely “as it pertains to online retail store services of clothing on the basis that as of the date this proceeding was filed, you had **abandoned**

use of your mark for such services.” In his cross-examination of Cahleb, Mayweather’s counsel did not ask a single question pertaining to conduct prior to registration of the Mark. Test. Tr. at 190:3–10. Based on counsel’s conduct, Cahleb assumed Mayweather had given up on his fraud claim all together. Certainly, Cahleb had no way of knowing that Mayweather would not only maintain his fraud claim, but tack on a similar void *ab initio* claim as well as request that the entire registration be cancelled.

Mayweather had “ample time to file a motion for leave to amend its pleading at an earlier stage in the [P]roceeding,” and Cahleb “would suffer prejudice if [Mayweather] is permitted to add th[is] claim[] at this juncture.” *Media Online Inc.*, 88 U.S.P.Q.2d at 1288. Accordingly, the Board must reject Mayweather’s void *ab initio* claim.

2. Even if Mayweather’s Void *Ab Initio* Claim is Allowed to Proceed, it Still Fails Because Cahleb Was Using the Mark for All Claimed Services on June 2, 2008

Mayweather requests that the Board find that the record supports a conclusion that the 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* in its entirety based on non-use.” D.E. 26 at 15. Mayweather incorrectly states the law.

It is well established that, where a petitioner fails to prove fraud, but does prove that the mark was not used on all claimed goods or services, “the defect can be cured. The whole registration is not in jeopardy.” MCCARTHY ON TRADEMARKS § 31:73. In fact, in *Grand Canyon West Ranch LLC v. Hualapai Tribe*—a case Mayweather cites to—the Board established that, as long as the mark was used on some of the identified goods or services, the application is not void in its entirety, and could be cured by simply deleting the good or service that the mark had not been used for. 78 U.S.P.Q.2d 1696, 1697 (T.T.A.B. 2006) (stating that it is not “appropriate to treat applicant’s nonuse of its mark on some of the identified services in the same manner in

which we would treat an applicant's complete failure to make use of its mark before filing the application on any of its identified services.”).

Mayweather never alleged non-use of all of the Claimed Services, and he has acknowledged use of the MPRE Mark for management, promotion, and advertising services. *See* D.E. 26 at 4. This request to cancel the entire registration on this basis has no merit.

Mayweather’s reliance on *ShutEmDown Sports, Inc. v. Lacy* is likewise misplaced. In that decision, the Board only entertained petitioner's void *ab initio* claim because petitioner had proven by clear and convincing evidence that registrant had not used the mark prior to registration in connection with petitioner's fraud claim—namely, “[r]espondent admitted to nonuse of the mark . . . at the time of filing . . . the application. . . . Respondent clearly made a false representation that the mark was in use on each of [the claimed] items on which he now admits the mark was never used.” *ShutEmDown Sports, Inc. v. Lacy*, 102 U.S.P.Q.2d 1036, 1047–48 (T.T.A.B. 2012). This situation is not present here.

Lastly, Mayweather’s void *ab initio* claim must fail because he has failed to prove by a preponderance of evidence that Cahleb was not using the Mark for online retail store services as of June 8, 2008. Mayweather cites to no evidence in support of this claim.

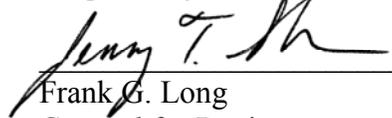
VI. CONCLUSION

Not only has Mayweather failed to prove any of his claims, but he has also been aware of Cahleb’s use of the Mark for the contested services for almost two years. Cahleb provided Mayweather with evidence of use at the commencement of the Proceeding because he assumed Mayweather had filed the Petition for Cancellation based on a misunderstanding, but the evidence was ignored by Mayweather. Cahleb provided evidence of use with his Motion to Dismiss, but it was ignored by Mayweather. Cahleb provided evidence of use during discovery,

but it was ignored by Mayweather. Cahleb testified to his use of the Mark, but it was ignored by Mayweather. And now, in the trial phase of this Proceeding, because Mayweather has failed to identify a single piece of affirmative evidence supporting any of its claims, Mayweather can no longer continue this fight. The Board must deny Mayweather's Petition.

Dated: May 27, 2016

Respectfully submitted,



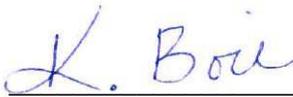
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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of May, 2016, Registrant's Trial Brief was served by e-mail and first-class mail, postage prepaid, on counsel for Petitioner at the following address:

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APPENDIX A

Registrant's Statement of Objections

I. MySpace Terms of Use

Registrant objects to Petitioner's reliance on MySpace's current Terms of Use (<https://myspace.com/pages/terms>) in its Trial Brief, as Petitioner never produced this information during the discovery period, which closed on July 18, 2015. *See* Petitioner's Brief at 6, n. 2. Further, Petitioner failed to include or otherwise reference this information in any Notice of Reliance. *See* Dkt. Nos. 18–21, 25.

Based on Petitioner's failure to timely produce this website source in the discovery period, or otherwise during the testimony period, Respondent objects to this source, and respectfully requests that it be stricken from the record.

However, assuming that the Board is willing to consider the MySpace Terms of Use, the Board should also consider Registrant's rebuttal evidence. *See* Registrant's Trial Brief at 28.

Specifically, Petitioner claims that users were not allowed to sell products on MySpace, and, in response, Registrant has presented various articles confirming that users could, in fact, sell their products on their MySpace pages. For example, in an article published by Forbes in 2006, MySpace founders Chris DeWolfe and Tom Anderson attributed MySpace's early growth to "the features and what our competitors were not allowing people to do":

We recognized from the beginning that we could create profiles for the bands and allow people to use the site any way they wanted to. We didn't stop people from promoting whatever they wanted to promote on MySpace.

Some people have fun with it, and others try to get more business and *sell stuff*, . . . *and we encourage them to do that*.

Natalie Pace, *Q&A: MySpace Founders Chris DeWolfe & Tom Anderson*, Forbes.com (Jan. 4, 2006, 11:45AM), <http://www.forbes.com/2006/01/04/myspace-dewolfe-anderson->

[cx_np_0104myspace.html](#). In the interview, DeWolfe also explained that MySpace “allowed bands to make money on music without having a deal. You can create a professional-sounding CD, sell merchandise, . . . and make a living.” *Id.* DeWolfe made clear that MySpace was an evolving social media platform, which constantly was providing more updates to meet users’ requests and needs:

In the early days, there were a lot of bands signing up. They told us that they’d like to post their lyrics and tour dates. Users told us what they wanted to see, and we just built it. That’s how we do a lot of our updates. We catalog what people tell us that they want. It’s not super-complicated.

II. Improper Submission of Confidential Settlement Letter

Registrant also objects to Petitioner’s improper submission of confidential settlement communication in its Confidential Notice of Reliance (October 15, 2015) (Dkt. No. 18). Specifically, on July 21, 2014, Registrant’s counsel sent Petitioner’s counsel a letter in hopes of settling this matter, and, along with it, attached a chart of evidence proving that Registrant had been using the Mark for online retail store services during the alleged period of non-use; the letter was labeled “**SETTLEMENT COMMUNICATION, SUBJECT TO RULE 408, FRE.**”

Based on Federal Rule of Evidence 408’s prohibition on relying on such confidential settlement communication, Respondent respectfully requests that it be stricken from the record.

III. Void *Ab Initio* Claim

Finally, Registrant maintains its objection to Petitioner’s Void *Ab Initio* claim, as Petitioner did not provide Registrant with proper notice of that claim. *See* Respondent’s Trial Brief at 45–47 (objecting to Petitioner’s Trial Brief at 14–15). Accordingly, because this claim places Registrant at an unfair disadvantage, Registrant respectfully requests that it be stricken from the record.