

This Opinion is Not a  
Precedent of the TTAB

Mailed: April 4, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*Carousel Productions, Inc.*

*v.*

*Michael R. Stafford*

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Cancellation No. 92076712

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Paul A. McLean of Greenberg Traurig, LLP  
for Carousel Productions, Inc.

Rexford Brabson, Alexandra Berkowitz and Jorge Franco of T-Rex Law, P.C.  
for Michael R. Stafford.

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Before Adlin, English and Cohen, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Respondent Michael R. Stafford owns a registration for the mark TEEN EARTH, in standard characters (“TEEN” disclaimed), for “entertainment in the nature of beauty pageants,” in International Class 41 (the “Registration”).<sup>1</sup> Petitioner Carousel Productions, Inc. seeks to cancel the Registration, alleging, *inter alia*, prior use and registration of MISS EARTH for identical “entertainment in the nature of beauty

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<sup>1</sup> Registration No. 5486051, issued June 5, 2018.

pageants” services, also in International Class 41.<sup>2</sup> As grounds for cancellation, Petitioner alleges that Respondent has abandoned his involved mark, and that use of that mark would be likely to cause confusion with Petitioner’s marks and falsely suggest a connection with Petitioner. In his answer, Respondent denies the salient allegations in the petition for cancellation, and asserts a few affirmative defenses which he did not pursue or prove at trial and which are accordingly forfeited/waived. *In re Google Techs. Holdings, LLC*, 980 F.3d 858, 2020 USPQ2d 11465, at \*4 (Fed. Cir. 2020); *NT-MDT LLC v. Kozodaeva*, 2021 USPQ2d 433, at \*5 n.8 (TTAB 2021).<sup>3</sup>

### **I. The Record and Evidentiary Objections**

The record consists of the pleadings, and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of Respondent’s involved Registration. In addition, Petitioner introduced:

Testimony Declaration of Ramon Monzon, its President, and the exhibits thereto (“Monzon Dec.”). 18 TTABVUE.

Testimony Declaration of Lorraine Schuck, its Executive Vice President and Mr. Monzon’s wife, and the exhibits thereto (“Schuck Dec.”) 20 TTABVUE.

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<sup>2</sup> Registration No. 3987564, issued July 5, 2011; renewed. Petitioner also pleads ownership of an application to register MISS EARTH USA, in standard characters (“USA” disclaimed), for the same services (Serial No. 90563402).

<sup>3</sup> This proceeding was consolidated with Cancellation No. 92077232 (involving Respondent’s registration for UNITED STATES TEEN EARTH), until that case was dismissed as moot. See 29 TTABVUE. Citations to the record are to TTABVUE, the Board’s online docketing system. Specifically, the number preceding “TTABVUE” corresponds to the docket entry number(s), and any number(s) following “TTABVUE” refer to the page number(s) of the docket entry where the cited materials appear.

Testimony Declaration of Laura Clark, its licensee Earth Pageants Productions, LLC's President, and the exhibits thereto ("Clark Dec.") 22 TTABVUE.

Testimony Declaration of Paul A. McLean, its attorney, and the exhibits thereto ("McLean Dec."). 23 TTABVUE.

Rebuttal Testimony Declaration of Mr. Monzon ("Reb. Monzon Dec."). 37 TTABVUE.

Rebuttal Testimony Declaration of Ms. Schuck ("Reb. Schuck Dec."). 38 TTABVUE.

Rebuttal Testimony Declaration of Ms. Clark, and the exhibit thereto ("Reb. Clark Dec."). 39 TTABVUE.

Rebuttal Testimony Declaration of Mr. McLean, and the exhibits thereto ("Reb. McLean Dec."). 40 TTABVUE.

Respondent introduced:

Testimony Declaration of Respondent Mr. Stafford, and the exhibits thereto ("Stafford Dec."). 31 TTABVUE 2-98.

Testimony Declaration of Evan Skow, Petitioner's former franchisee and former owner of Earth Pageant Productions, LLC, and the exhibits thereto ("Skow Dec."). 31 TTABVUE 99-142.

Testimony Declaration of Dr. Corrine Devin, a dentist, Naval officer and former pageant contestant, and the exhibits thereto ("Devin Dec."). 31 TTABVUE 143-162.

Testimony Declaration of Kristina Tenerowitz, Mr. Skow's sister and former coworker, who is "currently on staff for Nation of States pageant," and the exhibits thereto ("Tenerowitz Dec."). 31 TTABVUE 163-178.

The parties' evidentiary objections are voluminous, boilerplate and in many instances misguided. Petitioner filed 19 pages of objections with its 36 page Trial Brief. Respondent countered with 37 pages of its own objections and responses to

Petitioner's objections, in addition to its 36 page Trial Brief. And with its 25 page Trial Reply Brief, Petitioner then filed an additional 46 pages of responses to Respondent's objections and replies in further support of its own evidentiary objections. While the parties' objections may provide a great example of overkill to those searching for one, they are otherwise unhelpful.

Fortunately, there is no need for us to rule on the parties' many repetitive, but not outcome-determinative, evidentiary objections. We are able to, *inter alia*: identify hearsay and apply its exceptions; determine whether witnesses have provided a "proper foundation" or sufficiently authenticated documents; assess relevance; and, more generally, apply the Federal Rules of Evidence and Trademark Rules. And while Respondent is correct that Petitioner's attorney's testimony goes well beyond the types of testimony parties' attorneys typically provide (i.e. authenticating documents not in dispute), *see* 56 TTABVUE 48-50, the attorney's substantive testimony is largely cumulative, repetitive and unnecessary.

Suffice it to say, "we simply accord the evidence whatever probative value it deserves, if any at all ... Ultimately, the Board is capable of weighing the relevance and strength or weakness of the objected-to testimony and evidence in this specific case, including any inherent limitations, and this precludes the need to strike the testimony and evidence." *Hunt Control Sys. Inc. v. Koninkijke Philips Elecs. N.V.*, 98 USPQ2d 1558, 1564 (TTAB 2011). *See also Grote Indus., Inc. v. Truck-Lite Co.*, 126 USPQ2d 1197, 1200 (TTAB 2018) ("We also remind the parties that our proceedings are tried before judges not likely to be easily confused or prejudiced. Objections to

trial testimony on bases more relevant to jury trials are particularly unnecessary in this forum.”) (citing *U.S. Playing Card Co. v. Harbro LLC*, 81 USPQ2d 1537, 1540 (TTAB 2006)); *RxD Media, LLC v. IP Application Dev. LLC*, 125 USPQ2d 1801, 1804 (TTAB 2018); *Kohler Co. v. Honda Giken Kogyo K.K.*, 125 USPQ2d 1468, 1478 (TTAB 2017) (quoting *Luxco, Inc. v. Consejo Regulador del Tequila, A.C.*, 121 USPQ2d 1477, 1479 (TTAB 2017)).

## II. The Parties’ Pageants, Marks and Interactions

Each party introduced testimony from several witnesses. While the witnesses agree on some facts, others are in direct dispute. Moreover, in many ways the witnesses “talk past each other,” and much of their testimony is irrelevant to the claim we ultimately decide. Thus, rather than attempting to tell the story of this case in a straight chronological line, we lay out the themes that run through the parties’ relevant testimonial evidence, and point out where witnesses contradict each other concerning relevant facts.

### A. Petitioner

Petitioner is a Philippines corporation that “operates the international MISS EARTH beauty pageant and the MISS PHILIPPINES EARTH beauty pageant.” 18 TTABVUE 2 (Monzon Dec. ¶¶ 1-2).<sup>4</sup> It “has been using, by itself and/or through its authorized licensees, the trademark MISS EARTH in the United States” for beauty

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<sup>4</sup> Ms. Schuck’s testimony is essentially identical to Mr. Monzon’s, and Petitioner’s attorney’s testimony overlaps with Mr. Monzon’s to a significant extent. In describing Petitioner and its activities, we cite primarily to Mr. Monzon’s testimony.

pageants since 2001, and MISS EARTH USA for beauty pageants since 2018. *Id.* at 3 (Monzon Dec. ¶ 3).

Petitioner has also used variations of MISS EARTH in the United States, including TEEN MISS EARTH, but does not indicate when or how it used any of these additional marks. *Id.* (Monzon Dec. ¶ 6). Petitioner’s “MISS EARTH pageants have created a platform for women and girls to experience the glamour of the beauty pageant industry while making an impact on the most pressing environmental issues around the globe.” *Id.* at 5 (Monzon Dec. ¶ 7).

**B. Petitioner’s Franchisees, Their United States Activities, and Uses and Registration of TEEN EARTH**

Since 2016, Petitioner’s “franchisee in the United States has been Earth Pageant Productions operated by Laura Clark. Prior to Ms. Clark, [Petitioner’s] U.S. franchisee was Evan Skow, and/or his related companies from 2006-2015.” *Id.* at 11-12 (Monzon Dec. ¶ 14).

[A]ll of [Petitioner’s] franchise agreements [include] a provision regarding [Petitioner’s] ownership of the MISS EARTH and related trademarks which reads as ... “In the adoption of a corporate or partnership name, Franchisee shall not use the name ‘Miss Earth’ or any variations, abbreviations, or confusingly similar name without notice or permission from [Petitioner]. Franchisee shall not make any application for registration of the Mark, or other marks, name or indicia used by [Petitioner], or any other marks confusingly similar thereto, in any country.”

*Id.* at 12, 79-84 (Monzon Dec. ¶ 15 and Ex. C).

Nonetheless, “after [Petitioner] and Evan Skow parted ways in 2015 and Mr. Skow was no longer [Petitioner’s] U.S. franchisee for the MISS EARTH pageant, Mr. Skow and his colleague [and sister], Kristina Tenerowitz, filed without authorization a

trademark application” for TEEN EARTH that eventually matured into the involved Registration. *Id.* at 12, 13 (Monzon Dec. ¶¶ 16, 18); 31 TTABVUE 163 (Tenerowitz Dec. ¶ 2) (“I am aware of [Petitioner] and their MISS EARTH pageants through assisting my brother when he was the franchisee and National Director for [Petitioner’s] MISS EARTH USA pageants for about 10 years, from 2006-2015.”). The specimen of use Skow and Tenerowitz filed with their application references a domain name that “resolves to” Petitioner’s website. 18 TTABVUE 13, 85 (Monzon Dec. ¶ 16 and Ex. D).

**C. Petitioner’s Efforts to Cancel the Involved Registration Based on Abandonment**

By the time Petitioner filed this case against Skow and Tenerowitz as co-owners of the involved TEEN EARTH Registration, Skow and Tenerowitz had already assigned the involved Registration to Respondent.<sup>5</sup> *Id.* at 14, 86-93 (Monzon Dec. ¶ 20 and Ex. E). Thus, while the original petition for cancellation named Skow and Tenerowitz as defendants, the amended petition names only Respondent Mr. Stafford.<sup>6</sup> 1 and 7 TTABVUE.

In any event, at the time Petitioner filed this case “it was not aware of nor could it find any use of [the involved mark] by Mr. Skow, Mr. Stafford, or by any other

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<sup>5</sup> Reel 7265/Frame 0671, recorded March 17, 2021, two days after Petitioner filed this case against Mr. Skow and Ms. Tenerowitz. Strangely, Ms. Tenerowitz’s name is spelled “Tenerowicz” on the assignment and assignment cover sheet recorded with the USPTO. And, perhaps stranger still, while her signature on the assignment is not entirely legible, it even appears that Ms. Tenerowitz spelled her name “Tenerowicz” when she executed the assignment.

<sup>6</sup> Mr. Stafford is also known as “Mykhael Michaels.” 22 TTABVUE 6 (Clark Dec. ¶ 15). According to his involved Registration, he does business as “Earth Pageants International LLC.”

party, for at least three consecutive years prior to the filing date of the” petition to cancel. 18 TTABVUE 14 (Monzon Dec. ¶ 21). And after learning of the Registration’s assignment to Respondent, Petitioner again “could not find any evidence of use of TEEN EARTH or UNITED STATES TEEN EARTH by Mr. Skow, Mr. Stafford, or by any other party, for the three years prior to date (sic) Mr. Skow and Mr. Stafford signed the Assignment” (January 9, 2021 for Skow and Tenerowitz and February 5, 2021 for Respondent). *Id.* at 14, 92 (Monzon Dec. ¶ 21 and Ex. E). Mr. Monzon contends that “[b]ecause the MISS EARTH pageants and other pageants like it are very well advertised online and typically rely on extensive publicity to promote the events, it is very odd that no such use of TEEN EARTH or UNITED STATES TEEN EARTH could be found online or elsewhere.” *Id.* at 14 (Monzon Dec. ¶ 21).

Similarly, while Ms. Clark is “aware of how pageants are run and promoted,” she is “not aware that a TEEN EARTH or UNITED STATES TEEN EARTH pageant was held in the years 2018, 2019, 2020 or 2021 by Mr. Stafford, Evan Skow (the MISS EARTH franchise holder for the U.S. until 2016) or anyone else.” 22 TTABVUE 6 (Clark Dec. ¶ 11). Ms. Clark “understood” that Respondent “announced a 2019 MISS TEAN EARTH pageant,” but to her knowledge, “no such pageant was ever held.” *Id.* Furthermore, “through discovery in this cancellation action, [Petitioner] has requested but Respondent Stafford has not provided any evidence of use by Respondent Stafford or by Skow of TEEN EARTH in commerce in the United States during the period starting at least the three years prior to March 2021.” 23 TTABVUE 6 (McLean Dec. ¶ 14).



According to Ms. Clark, President of Petitioner's franchisee for MISS EARTH beauty pageants in the United States since January 2016, "[s]ince at least 2016, the Miss Earth USA program has also included a division for Teens aged 13-19 called TEEN MISS EARTH USA." 22 TTABVue 2, 3 (Clark Dec. ¶¶ 2, 5). Ms. Clark has "used the TEEN MISS EARTH trademark consistently since 2016." *Id.*

#### **D. Respondent**

Respondent Mr. Stafford is "President and CEO of Earth Pageants International, LLC ... an organization that hosts beauty pageants for teenage boys and girls, married and single adult women, and young girls." 31 TTABVue 2 (Stafford Dec. ¶ 1). Respondent "wanted to start a pageant organization that promoted keeping the Earth clean, something I am very passionate about." *Id.* He "started Earth Pageants International, LLC in 2006," and the company held its first pageant for married women, called MRS. EARTH, in 2007; later, the company "started awarding a MS. EARTH title at the request of other women who wanted to compete." *Id.* at 3 (Stafford Dec. ¶ 2-4).

#### **E. Respondent's Work with Skow and Clark, Acquisition of the Involved Registration, and Claimed (and Later Disavowed) Uses of TEEN EARTH**

"In 2017, Mr. [Evan] Skow and Mrs. [Laura] Clark became National Directors" for Respondent, with Mr. Skow sending "delegates from Mrs. US Earth and MS. US Earth," and Mrs. Clark sending "delegates from Ms. USA Earth." *Id.* (Stafford Dec. ¶ 5). According to Respondent:

[t]hat same year, Mrs. Clark, informed me that Mr. Skow held a trademark for TEEN EARTH and made me aware that if I were to get that trademark she would send more

delegates to me for TEEN EARTH.<sup>7</sup> Later, Mr. Skow informed me that he held a trademark for TEEN EARTH – at that time, he was considering leaving the pageant industry, so I inquired if I could assume the TEEN EARTH title. Mr. Skow and I agreed that I would waive certain fees due by him to me as payment for his trademark. Consequently, he did not have to pay me certain fees to send a delegate to my pageant. I ran his trademark, TEEN EARTH, alongside mine, MS. EARTH and MRS. EARTH. When he decided to leave the pageant industry, I acquired control of the TEEN EARTH and UNITED STATES TEEN EARTH trademarks, until the marks were assigned to me.

*Id.* at 3-4 (Stafford Dec. ¶ 5).<sup>8</sup>

Thus, “[b]y 2018, [Respondent] assumed control of the TEEN EARTH title from Mr. Skow,” but “due to timing constraints, [Respondent was] not able to market the title enough for it to be profitable if a pageant was held. Thus, we decided to appoint a title holder, Sidney Clemens, and she was our inaugural queen.” *Id.* at 5 (Stafford Dec. ¶ 9). At some point after acquiring “the right to use the TEEN EARTH mark, [Respondent] began marketing the TEEN EARTH title, but, unfortunately, in early 2020, the COVID-19 pandemic caused a worldwide shutdown.” *Id.* at 5 (Stafford Dec. ¶ 8). As a result, Respondent was “unable to hold any pageants that year.” *Id.* In 2021, Respondent held its TEEN EARTH, JUNIOR TEEN EARTH and UNITED STATES TEEN EARTH “pageants as virtual competitions ... We are now transitioning back to a live format where we are advertising” TEEN EARTH JR. and

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<sup>7</sup> Ms. Clark denies that this conversation took place. 39 TTABVUE 3 (Clark Reb. Dec. ¶ 4).

<sup>8</sup> According to Respondent, “Mr. Skow started the TEEN EARTH pageants after the expiration of his franchise agreement with [Petitioner] and he was strategic in setting himself apart in his use of only TEEN and EARTH and not using the word MISS.” *Id.* at 4-5 (Stafford Dec. ¶ 7).

TEEN EARTH pageants “scheduled to take place live on July 18-23, 2023, in Manila, Philippines.” *Id.*

While Respondent did not offer a TEEN EARTH beauty pageant in 2017, 2018 or 2020, and only offered a “virtual competition” in 2021, Respondent testified that “[i]n July 2019, we held a TEEN EARTH pageant in Las Vegas, Nevada. At that time, we also held a TEEN EARTH, JUNIOR TEEN EARTH, and a LITTLE EARTH competition.” *Id.* at 11 (Stafford Dec. ¶ 22). In his Trial Brief, however, after Petitioner filed Ms. Clark’s testimony denying Respondent’s and Mr. Skow’s claims that she was at the 2019 pageants, Respondent changed his tune. In fact, eight months after testifying to 2019 use of the TEEN EARTH mark, Respondent claimed in his Trial Brief that “Respondent did not use the mark in 2019 or 2020 due to the COVID-19 pandemic, but resumed use in 2021 with a virtual pageant.” 56 TTABVUE 18. *Compare* 31 TTABVUE 11 (Stafford Dec. ¶¶ 22-23) and 31 TTABVUE 104 (Skow Dec. ¶ 18) *with* 39 TTABVUE 3-4 (Clark Reb. Dec. ¶ 7). Suffice it to say, Respondent’s position on his alleged 2019 use of TEEN EARTH has been inconsistent, and thus his testimony on this topic is unclear and entirely unconvincing at best, perhaps especially because Respondent’s eventually stated excuse for nonuse in 2019 – the COVID-19 pandemic – did not start until 2020. We cannot credit testimony from witnesses or parties that cannot keep their stories straight. *See Exec. Coach Builders, Inc. v. SPV Coach Co., Inc.*, 123 USPQ2d 1175, 1184 (TTAB 2017) (discounting testimony that “is indefinite and internally inconsistent” and “unsupported by documentary evidence”).

**F. Mr. Skow's and Mr. Monzon's Competing Narratives**

Mr. Skow is “no longer involved in any pageantry,” and he has “not been a director or licensee of any pageants ... since 2017.” 31 TTABVUE 99-100 (Skow Dec. ¶ 2). However, 10 years earlier, after holding his first national pageant, Mr. Skow sought to “bring the MISS EARTH to a new level” by adding a teen division, and took the idea to Petitioner. *Id.* at 101 (Skow Dec. ¶ 9). According to Mr. Skow, Petitioner agreed that Mr. Skow could proceed, and that he would solely own the TEEN EARTH pageant, apart from Petitioner's MISS EARTH franchise agreement with Mr. Skow. *Id.*

Mr. Skow claims to have held a UNITED STATES TEEN EARTH pageant in 2016, and that a UNITED STATES TEEN EARTH pageant was held in 2017, but it is unclear by who. *Id.* at 102, 104 (Skow Dec. ¶¶ 12, 18). According to Mr. Skow, and contrary to Respondent's claims in its Trial Brief and Ms. Clark's testimony, “[i]n July of 2019, [Respondent] held a TEEN EARTH pageant in Las Vegas, Nevada,” where he “crowned a winner;” and that pageant was “attended by Laura Clark.” *Id.* at 104 (Skow Dec. ¶ 18). Again, however, Respondent's Trial Brief essentially retracted the argument that there was a 2019 TEEN EARTH pageant in the United States. 56 TTABVUE 18.

According to Mr. Monzon, Petitioner merely gave Mr. Skow “permission to operate a teen beauty program ... because having a Teen Earth program would further promote the MISS EARTH brand in the United States.” 37 TTABVUE 4 (Reb. Monzon Dec. ¶ 5). Petitioner “did not agree” to Mr. Skow filing a trademark application for TEEN EARTH UNITED STATES. *Id.* “After Mr. Skow and Carousel parted ways at

the end of 2015 and Mr. Skow was no longer [Petitioner's] franchisee in the United States, he was no longer authorized by [Petitioner] to use the TEEN EARTH mark on any beauty pageants, including a TEEN EARTH UNITED STATES pageant." *Id.* at 4-5 (Reb. Monzon Dec. ¶ 6). To Mr. Monzon's knowledge, "Mr. Skow did not hold a TEEN EARTH UNITED STATES or a TEEN EARTH pageant after he left [Petitioner] in 2015." *Id.* at 5 (Reb. Monzon Dec. ¶ 6).

Since Ms. Clark became Petitioner's United States franchisee, she "has used the TEEN MISS EARTH trademark consistently since 2016," holding TEEN MISS EARTH UNITED STATES pageants from 2016-2018 and TEEN MISS EARTH USA pageants in 2019, 2021, 2022 and 2023 "with the authorization and permission" of Petitioner. *Id.* (Reb. Monzon Dec. ¶ 7).

**G. Skow's, Tenerowitz's and Respondent's Claimed Uses of the TEEN EARTH Mark**

In 2017, Mr. Skow and Ms. Tenerowitz filed the application to register TEEN EARTH that matured into Respondent's involved Registration. 31 TTABVUE 102 (Skow Dec. ¶ 12). According to Mr. Skow, "[i]t was shortly after that, in 2018, I began discussing with Mr. Stafford about him taking over the TEEN EARTH mark to go with his MS. EARTH and MRS. EARTH marks." *Id.*

There was a UNITED STATES TEEN EARTH pageant held in 2016 and 2017. In 2018, there was no TEEN EARTH pageant held, or UNITED STATES TEEN EARTH pageant. In July of 2019, Mr. Stafford held a TEEN EARTH pageant in Las Vegas, Nevada and crowned a winner. In 2020, no pageant was held due to the nationwide lockdown from COVID-19 pandemic. The TEEN EARTH pageant Mr. Stafford held in 2019 was attended by Laura Clark.

*Id.* at 104 (Skow Dec. ¶ 18).<sup>9</sup> According to Dr. Devin, Respondent “didn’t have a Teen division until 2019,” but she did not elaborate or indicate that Respondent held a TEEN EARTH pageant in 2019. *Id.* at 144 (Devin Dec. ¶ 5).

Ms. Tenerowitz worked with her brother Mr. Skow when he was Petitioner’s MISS EARTH USA franchisee and National Director from 2006-2015. *Id.* at 163 (Tenerowitz Dec. ¶ 2). When Ms. Clark took over as Petitioner’s new MISS EARTH franchisee and National Director in January 2016, “there was no TEEN EARTH at the time,” and “Mr. Skow decided to go ahead and apply for registration” of the TEEN EARTH mark. *Id.* at 164 (Tenerowitz Dec. ¶ 3). Ms. Tenerowitz testifies that “[w]e awarded TEEN EARTH every year that we did the pageant,” but does not indicate what years those were, or provide any information about the pageants, such as where they were held. In fact, even though Ms. Tenerowitz testified that she did not remember whether Petitioner “was made aware of our use of the TEEN EARTH or UNITED STATES TEEN EARTH marks,” *id.* (Tenerowitz Dec. ¶ 4), thereby suggesting some type of use of UNITED STATES TEEN EARTH, there is no evidence that any TEEN EARTH or UNITED STATES TEEN EARTH pageants took place in the United States, as opposed to other countries, after 2017. In any event, at some unspecified time, Respondent “had the MS. EARTH and MRS. EARTH, and it made sense for him to also have the TEEN EARTH. When we decided, we were no longer going to do the TEEN EARTH pageants, Mr. Skow and [Respondent] began

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<sup>9</sup> Respondent’s Trial Brief essentially retracted his argument that there was a 2019 TEEN EARTH pageant in the United States. 56 TTABVUE 18.

discussing the possibility of [Respondent] taking over the TEEN EARTH mark, which he did, officially, in February of 2021,” via the assignment of the involved Registration. *Id.* (Tenerowitz Dec. ¶ 3).

### **III. Entitlement to a Statutory Cause of Action**

Entitlement to a statutory cause of action is a requirement in every inter partes case. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, at \*3 (Fed. Cir. 2020) (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 (2014)). To establish entitlement to a statutory cause of action, a plaintiff must demonstrate: (i) an interest falling within the zone of interests protected by the statute; and (ii) a reasonable belief in damage proximately caused by continued registration of the involved mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at \*4 (Fed. Cir. 2020).

Here, Petitioner is not only Respondent’s competitor in the beauty pageant industry, but, like Respondent, offers pageants with an environmental focus under service marks that include the terms “TEEN” and “EARTH.” 18 TTABVUE 3-5 (Monzon Dec. ¶¶ 6-7). This establishes Petitioner’s entitlement. *Am. Vitamin Prods. Inc. v. DowBrands Inc.*, 22 USPQ2d 1313, 1314 (TTAB 1992) (petitioner was entitled to seek cancellation on ground of abandonment because it “is engaged in the manufacture and sale of goods which are related to those identified in the subject registrations” under a similar mark).

### **IV. Abandonment**

Under Section 45 of the Act, 15 U.S.C. § 1127, a mark is considered abandoned when “its use has been discontinued with intent not to resume such use,” and

“[n]onuse for 3 consecutive years shall be prima facie evidence of abandonment.” *See also Exec. Coach Builders*, 123 USPQ2d at 1180-81 (“There are two elements to a nonuse abandonment claim: nonuse of the mark and intent not to resume use ... Introduction of evidence of nonuse of a mark for three consecutive years constitutes a prima facie showing of abandonment and triggers a rebuttable presumption that a mark was abandoned without intent to resume use.”) (citations omitted); *ShutEmDown Sports Inc. v. Lacy*, 102 USPQ2d 1036, 1042 (TTAB 2012). “Use” of a mark “means the bona fide use of such mark made in the ordinary course of trade, and not merely to reserve a right in a mark.” 15 U.S.C. § 1127.

Because registrations are presumed valid under the law, a party seeking to cancel a registration on the ground of abandonment bears the burden of proof to establish its case by a preponderance of the evidence. *See On-Line Careline, Inc. v. Am. Online, Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1476 (Fed. Cir. 2000); *Cerveceria Centroamericana, S.A. v. Cerveceria India, Inc.*, 892 F.2d 1021, 13 USPQ2d 1307, 1309 (Fed. Cir. 1989). If Petitioner makes a prima facie case of abandonment, the burden of production, i.e., of going forward, then shifts to Respondent to rebut the prima facie showing with evidence. *Id.* “The burden of persuasion remains with the plaintiff to prove abandonment by a preponderance of the evidence.” *ShutEmDown Sports*, 102 USPQ2d at 1042.

Here, Respondent’s Trial Brief lays out the proper framework for our analysis of whether Petitioner has established a prima facie case by showing three years of nonuse, as follows:



Since abandonment requires three consecutive years of non-use, it is essential to establish when the clock began ticking ... The presumption of validity of a registration under 15 U.S.C. § 1057(b) entitles Respondent to rely on the filing date of the application to claim use of his mark, and sets the critical period for petitioner to make a prima facie showing of abandonment ... Since the registration at issue originated from a use-based application, the three-year period of nonuse, proof of which would constitute a prima facie case of abandonment, is deemed to have commenced on October 31, 2017, with the filing of the application.

56 TTABVUE 16 (citing *ShutEmDown Sports*, 102 USPQ2d at 1042). However, as explained below, while Petitioner focuses on establishing the presumption of abandonment arising out of three years of nonuse, the record in this case also calls on us to determine, independent of any presumption, whether abandonment has been established by simply showing that use of the involved mark was discontinued with an intent not to resume use.

#### **A. The Nature of Nonuse Abandonment Claims**

Before addressing whether the record establishes abandonment based on the three year presumption or otherwise, we should point out that by their nature, “nonuse abandonment” claims such as Petitioner’s in this case are typically difficult or impossible to prove by direct evidence. Indeed, in a country of hundreds of millions people and substantial, constantly churning commerce, which comprises a large portion of North America, obtaining negative evidence from, for example, each potential pageant contestant, audience member or other potential witness that could encounter the pageant services in question would not be feasible. If doing so were

required, it would be essentially impossible to ever prove nonuse abandonment. The law expressly recognizes and explains how to deal with this problem:

Although *Centroamericana* suggests that “inference” and “implication” are inappropriate in establishing prima facie abandonment, we cannot agree. Especially when a party must prove a negative, as in proving abandonment through nonuse, without resort to proper inferences the burdened party could be faced with an insurmountable task. The protection due the registrant is provided by requiring that the inference have an adequate foundation in proven fact. Whenever an inference is based on pure speculation and “there is no basis ... to *infer* nonuse,” a prima facie case of abandonment must fail.

*Cerveceria Centroamericana*, 13 USPQ2d at 1310 (citing *P.A.B. Produits et Appareils de Beaute v. Satinine Societa in Nome Collettivo di S.A. e. M. Usellini*, 570 F.2d 328, 196 USPQ 801, 804-05 (CCPA 1978)).

Relatedly, “[a] registrant’s proclamations of his intent to resume or commence use in United States commerce during the period of nonuse are awarded little, if any, weight.” *Rivard v. Linville*, 133 F.3d 1446, 45 USPQ2d 1374, 1376 (Fed. Cir. 1998). In fact, “[i]n every contested abandonment case, the respondent denies an intention to abandon its mark; otherwise there would be no contest.” *Imperial Tobacco Ltd. v. Philip Morris, Inc.*, 899 F.2d 1575, 14 USPQ2d 1390, 1394 (Fed. Cir. 1990).

**B. Petitioner Has Established Three Years of Nonuse Following October 31, 2017**

We find that there was no use of TEEN EARTH by the Registration’s original owners, Mr. Skow and Ms. Tenerowitz, for a three year period between October 31, 2017, “when the clock began ticking,” and March 15, 2021, when the original petition for cancellation was filed. We focus on the filing date of the petition for cancellation

at the “back end” of the three year period of nonuse because “nonuse of a mark pending the outcome of litigation to determine the right to such use or pending the outcome of a party’s protest to such use constitutes excusable nonuse sufficient to overcome any inference of abandonment.” *Penthouse Int’l, Ltd. v. Dyn Elec., Inc.*, 196 USPQ 251, 257 (TTAB 1977). Here, there is no evidence that Mr. Skow or Ms. Tenerowitz, separately or together, used the TEEN EARTH mark at all after October 31, 2017.

Petitioner and Ms. Clark, who are in a position to know about pageants, perhaps especially those with an environmental focus, searched for, but could not find, any evidence of United States use of TEEN EARTH or UNITED STATES TEEN EARTH by Mr. Skow, Ms. Tenerowitz or anyone else (including Respondent) during the three years prior to the filing of the petition for cancellation. 18 TTABVUE 14 (Monzon Dec. ¶ 21); 22 TTABVUE 6 (Clark Dec. ¶ 11). Furthermore, during discovery Petitioner requested evidence of use of TEEN EARTH by Mr. Skow or Respondent “during the period starting at least the three years prior to March 2021,” but Respondent failed to provide any. 23 TTABVUE 6 (McLean Dec. ¶ 14).<sup>10</sup>

We recognize that: (1) Mr. Monzon testified only about the period between March 15, 2018 and the March 15, 2021 filing of the original petition for cancellation, 18 TTABVUE 14 (Monzon Dec. ¶ 21); (2) Petitioner’s discovery requests only covered the

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<sup>10</sup> A better practice would have been for Petitioner to not merely summarize its discovery requests and Respondent’s lack of a substantive response thereto through its attorney’s testimony, but to also provide the actual discovery requests, and any evidence showing Respondent’s failure to respond thereto.

same period; and (3) Ms. Clark testified to nonuse only between January 1, 2018 and December 31, 2021. 22 TTABVUE 6 (Clark Dec. ¶ 11). Thus, this evidence does not cover the period between the October 31, 2017 filing date of the application underlying the involved Registration and 2018. Nonetheless, this uncontradicted evidence establishes nonuse of TEEN EARTH for a three year period prior to the March 15, 2021 filing date of the original petition for cancellation.<sup>11</sup>

**C. Even Without the Presumption Arising Out of Three Years of Nonuse, the Record Establishes That Use Was Discontinued with Intent Not to Resume Use**

When given the opportunity to establish any use of the involved mark after 2017 through his own direct testimony, Mr. Skow declined. 31 TTABVUE 99-100 (Skow Dec. ¶ 2) (“I am no longer involved in any pageantry; I have not been a director or licensee of any pageants, and haven’t been since 2017.”). While this testimony perhaps leaves open the possibility that Mr. Skow or his sister or company could have used TEEN EARTH sometime between October 31, 2017 and the end of that year, there would still be three years of nonuse prior to the filing date of the original petition for cancellation, as explained above.

In any event, Skow and Tenerowitz decided they “were no longer going to do the TEEN EARTH pageants” in 2018, at which point they “began discussing the possibility of [Respondent] taking over the TEEN EARTH mark. *Id* at 102 (Skow Dec. ¶ 12) and 164 (Tenerowitz Dec. ¶ 3). Their stated 2018 decision to no longer “do the

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<sup>11</sup> Again, however, there is simply no evidence of use of TEEN EARTH by Mr. Skow or Ms. Tenerowitz on or after October 31, 2017.

TEEN EARTH pageants” and to turn them over to Respondent, *id.*, including by assigning the involved Registration to him, is about as unequivocal a statement of discontinuance of use of a mark with an intention not to resume use as there could be.

Furthermore, as Petitioner points out, because Skow testified that he is “no longer involved in any pageantry” and has “not been a director or a licensee of any pageants ... since 2017,” 31 TTABVUE 99-100 (Skow Dec. ¶ 2), “there is no other reasonable explanation as to why he would file to register TEEN EARTH [in late 2017] except to try to reserve a right to the mark to which he was not entitled and despite having no intent to resume use of the mark himself.” 49 TTABVUE 27. *See e.g.* 15 U.S.C. § 1127 (“‘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.**”) (emphasis added); *Imperial Tobacco*, 14 USPQ2d at 1394 (“[T]he Lanham Act was not intended to provide a warehouse for unused marks.”).

In short, in addition to not using the TEEN EARTH mark for more than three years prior to the filing of the original petition for cancellation, Mr. Skow and Ms. Tenerowitz discontinued use of the mark with an intent not to resume use shortly after filing their TEEN EARTH application that issued as the involved Registration.

**D. Respondent Has Not Rebutted Petitioner’s Prima Facie Case of Abandonment**

Respondent has not met its “burden of production, i.e., of going forward ... to rebut [Petitioner’s] prima facie showing with evidence.” *ShutEmDown Sports*, 102 USPQ2d at 1042. The evidence Respondent introduced does not show use of the TEEN EARTH

mark by his predecessors-in-interest Mr. Skow and Ms. Tenerowitz during the relevant time period.

Indeed, Mr. Skow testifies in conclusory fashion only that “[t]here was a UNITED STATES TEEN EARTH pageant held in 2016 and 2017.” *Id.* at 104 (Skow Dec. ¶ 18). Even if we could presume that the alleged 2017 UNITED STATES TEEN EARTH pageant was held after October 31<sup>st</sup> of that year, which we cannot, there is no evidence that Mr. Skow, his company or his sister or any combination thereof are the ones who “held” the pageant. Furthermore, while Mr. Skow submitted “pictures from the pageant held in 2017” with his testimony, *id.* at 104, 140-142 (Skow Dec. ¶ 18 and Ex. K), reproduced below, they do not establish United States use of TEEN EARTH on or after October 31, 2017:





*Id.*

There is no way to determine when in 2017 the first two pictures were taken. Moreover, it is not clear that either picture demonstrates use of the mark in the United States. In fact, the background of the first picture bears the MISS TEEN INTERNATIONAL mark, calling into question whether the contestant wearing the UNITED STATES TEEN EARTH sash was participating in an international competition held outside the United States, or whether the mark for the pageant was MISS TEEN INTERNATIONAL and the UNITED STATES TEEN EARTH mark on the sash merely identified the particular, presumably American, contestant depicted. The third picture is less mysterious but even more unhelpful because the sash bears the wrong mark (YOUNG PRETEEN EARTH) and an irrelevant year (2016).

Ms. Tenerowitz merely testifies that she and her brother “awarded TEEN EARTH every year that we did the pageant.” *Id.* at 164 (Tenerowitz Dec. ¶ 3). This is hopelessly vague. There is no indication when “we did the pageant,” much less that it was after October 31, 2017. Nor is there any indication that Skow, Tenerowitz or their company used TEEN EARTH to identify “the pageant” itself, as opposed to the title awarded at the pageant.

The point is that there is no evidence that Mr. Skow, Ms. Tenerowitz or any entity affiliated with them used TEEN EARTH after October 31, 2017. And, “[m]erely not intending to abandon a mark is not enough to sustain rights in it.” *First Nat’l Bank of Omaha v. Autoteller Sys. Serv. Corp.*, 9 USPQ2d 1740, 1742 (TTAB 1988). *See also Imperial Tobacco*, 14 USPQ2d at 1394.



**E. Respondent’s Alleged Use in 2019 is Irrelevant**

Finally, while Respondent introduced some evidence that he used TEEN EARTH in 2019, Respondent disavowed that evidence in his Trial Brief. 56 TTABVUE 18. And, even if we could find that Respondent used the TEEN EARTH mark in the United States in 2019, despite his denying doing so in his Trial Brief, that would not be relevant to Petitioner’s abandonment claim.

Indeed, as Petitioner points out, “[a]ny alleged use by [Respondent] prior to the effective date of the Trademark Assignment would have been, and could only have been, his own separate and independent use ... not through any rights that could have been derived from (or in support of) the TEEN EARTH [R]egistration,” which in 2019 was still owned by Skow and Tenerowitz.<sup>12</sup> 49 TTABVUE 18-19. There is no evidence of a license between Skow and Tenerowitz (the TEEN EARTH mark’s co-owners), and Respondent, the mark’s alleged user in connection with the alleged 2019 TEEN EARTH pageant.<sup>13</sup> Thus, by the time the involved Registration was assigned

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<sup>12</sup> According to its preamble, the assignment was “made and entered into on September 21, 2020 (the ‘Effective Date’).” 18 TTABVUE 14, 86-93 (Monzon Dec. ¶ 20 and Ex. E). But Skow and Tenerowitz did not execute it until January 9, 2021 and Respondent did not execute it until February 5, 2021. *Id.* Moreover, there is no indication or even allegation that the assignment was nunc pro tunc. In any event, following the assignment Respondent did not use the TEEN EARTH mark for “entertainment in the nature of beauty pageants” until 2021 at the earliest, by which time it had already been abandoned by Skow and Tenerowitz.

<sup>13</sup> Respondent is of course correct that “[t]he absence of a written license agreement is not fatal” in all cases. 56 TTABVUE 17. But here, there is no evidence of an oral license either, there is only attorney argument vaguely alleging some type of license, unsupported by any testimony or facts of record. *Id.* at 17-19. And mere claims that “Respondent took control of the TEEN EARTH Mark in 2018, appointing an inaugural queen,” *id.* at 17, do not help. “Taking control” of a mark is vague and does not establish a license (for which the licensor rather than the licensee must exercise control), and even if it did, “appointing an inaugural

to Respondent years later, the mark had already been abandoned by its owners Skow and Tenerowitz, and any use by Respondent in 2019 was irrelevant to the question of abandonment by Skow and Tenerowitz. *See Auburn Farms, Inc. v. McKee Foods Corp.*, 51 USPQ2d 1439, 1444 (TTAB 1999) (“Campbell’s abandonment of the mark JAMMERS a number of years prior to the assignment resulted in an invalid assignment (that is, an assignment in gross) since ‘[a]n abandoned trademark is not capable of assignment.’”); *Parfums Nautee Ltd. v. Am. Int’l Indus.*, 22 USPQ2d 1306, 1309 (TTAB 1992) (“In view of respondent’s predecessor’s nonuse for at least three years prior to the assignment to respondent, we find, as a matter of law, that the assignor/predecessor had abandoned the registered mark NAUGHTY for perfumes and toilet waters. This abandonment resulted in an invalid assignment ....”) (citations omitted).

To the extent that Respondent may have used or planned to use the TEEN EARTH mark in 2021, that too “would have constituted a new and separate use that did not cure the abandonment” by Skow and Tenerowitz in 2020 (at the latest). *See Exec. Coach Builders*, 123 USPQ2d at 1199; *Stromgren Supports Inc. v. Bike Athletic Co.*, 43 USPQ2d 1100, 1112 (TTAB 1997); *Parfums Nautee*, 22 USPQ2d at 1310

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queen” is not the same thing as “entertainment in the nature of beauty pageants.” Beauty pageants typically feature contestants competing onstage before a live or television audience, whereas “appointing” a queen is the opposite of a competition, and an appointment can be made privately in an office or by telephone, which could not reasonably be considered “entertainment.” Thus, the facts do not support Respondent’s argument. Finally, Respondent’s reliance on *Vans, Inc. v. Branded, LLC*, 2022 USPQ2d 742 (TTAB 2022) is hopelessly misplaced. Not only was abandonment found in that case, but the respondent’s alleged licensing efforts were found “too general and too vague” to be convincing, not unlike Respondent’s licensing argument in this case.

“Abandonment of a registered mark cannot be reversed by subsequent re-adoption of a mark ... Respondent’s later efforts, of whatever nature and quality, represent a new and separate use, and cannot serve to cure the prior abandonment.”).

## V. Conclusion

Mr. Skow and Ms. Tenerowitz filed the application underlying the involved Registration years after Mr. Skow was replaced as Petitioner’s franchisee. There is no evidence that either of them, or any company they are affiliated with, used the mark after filing the application. More to the point, the record establishes both three years of nonuse and that use was discontinued with intent not to resume use.

When we consider the record in its entirety, we find that it “is consistent with a subjective desire to reserve a right in the [TEEN EARTH] mark.” *Exec. Coach Builders*, 123 USPQ2d at 1192. That is not sufficient to overcome Petitioner’s prima facie showing of abandonment. In fact, when Respondent acquired the mark and Registration by assignment in 2021, the mark had already been abandoned, and thus the transaction was nothing more than a “naked” assignment without accompanying goodwill. *Auburn Farms*, 51 USPQ2d at 1441.<sup>14</sup>

**Decision:** The petition to cancel is granted.

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<sup>14</sup> Because we have resolved this proceeding on Petitioner’s abandonment claim, we need not reach Petitioner’s other claims. *Yazhong Inv. Ltd. v. Multi-Media Tech Ventures, Ltd.*, 126 USPQ2d 1526, 1540 (TTAB 2018); *Multisorb Tech., Inc. v. Pactiv Corp.*, 109 USPQ2d 1170, 1171 (TTAB 2013).