

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: January 30, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Avalon Apparel, LLC

v.

Brandon R. Kilson

—
Cancellation No. 92080171
—

Philip Nulud and Matthew L. Seror of Buchalter, a Professional Corporation,
for Avalon Apparel, LLC.

Brandon R. Kilson, *pro se*.

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Before Wellington, Allard, and Lavache,
Administrative Trademark Judges.

Opinion by Allard, Administrative Trademark Judge:¹

¹ This opinion cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals by the pages on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board, this opinion cites to the LEXIS legal database and cites only precedential decisions, unless otherwise noted. *See* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03(a)(2) (Jun. 2024). For reference, precedential decisions of the Board, and precedential decisions of the Federal Circuit involving Board decisions that issued on January 1, 2008, or thereafter, may be viewed in TTABVUE by entering the proceeding number, application number, registration number, expungement/reexamination number, mark, party, or correspondent. Many precedential Board decisions that issued from 1996 to 2008 are available online from the TTAB Reading Room by entering the same information. Most TTAB decisions that issued prior to 1996 are not available in USPTO databases.

Brandon R. Kilson (“Respondent”) owns a registration on the Principal Register for the mark DISORDERLY FASHION (in standard characters, FASHION disclaimed) for “Clothing, namely, neck warmers; Belts; Bottoms as clothing; Coats; Headwear; Hooded sweatshirts; Jackets; Shoes; Tops as clothing,” in International Class 25.²

In its operative Petition for Cancellation, Avalon Apparel, LLC (“Petitioner”) alleges as grounds for cancellation: (1) nonuse of the mark as of the filing date of the statement of use of the subject registration’s underlying application; (2) abandonment based on nonuse of the mark in commerce for a period of more than three consecutive years, without an intent to resume use; and (3) fraud.³

In response, Respondent filed an “Objection to Amended Petition for Cancellation.”⁴ Rather than admitting or denying the twelve numbered allegations of the Amended Petition for Cancellation, Respondent provided eight numbered narrative responses. Although Respondent’s submission does not simply admit or deny each allegation as required under our rules, Trademark Rule 2.114(b)(2), 37 C.F.R. § 2.114(b)(2) (“An answer shall ... admit or deny the averments upon which

² Registration No. 5740651, issued on April 30, 2019. The application was originally filed based on intent to use under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). Respondent’s Statement of Use, filed February 24, 2019, alleges use of the mark anywhere on September 22, 2017 and use in interstate commerce on December 3, 2017.

Citations to the record on appeal cite to TTABVUE, the Board’s online docket system. *See, e.g., New Era Cap Co., Inc. v. Pro Era, LLC*, Opp. No. 91216455, 2020 TTAB LEXIS 199, at *4 n.1 (TTAB 2020). Specifically, the number preceding TTABVUE corresponds to the docket entry number, and any number following TTABVUE refer to the page number(s) of the docket entry where the cited material(s) appears.

³ 12 TTABVUE.

⁴ 15 TTABVUE.

the petitioner relies.”), or use mirrored numbering as recommended, *see* TBMP § 311.02(a) and authorities cited therein, it is clear that Respondent denies the allegations of the amended petition. Therefore, we construe this submission as an Answer generally denying the salient allegations of the amended petition.⁵ *See* Fed. R. Civ. P. 8(e) (“Pleadings must be construed so as to do justice.”).

Petitioner filed a brief but Respondent did not. However, the filing of a brief on the case is optional, not mandatory, for Respondent as party in the position of defendant. Therefore, we do not construe Respondent’s failure to file a brief as a concession of the case. Trademark Rule 2.128(a)(1), 37 C.F.R. § 2.128(a)(1). *Yazhong Investing Ltd. v. Multi-Media Tech. Ventures, Ltd.*, Can. No. 92056548, 2018 TTAB LEXIS 168, at *12 n.13 (TTAB 2018) (as defendant in cancellation, respondent not required to submit evidence or a brief, so failure to do so not treated as concession of case); *see also* TBMP § 801.02(b) and authorities cited therein.

For the reasons explained below, we deny the petition for cancellation.

I. The Record

The record consists of the operative pleadings,⁶ and, by operation of Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1), the file history of Respondent’s registration. Additionally, Petitioner introduced the following evidence during its case-in-chief:

⁵ The Board acknowledged that Respondent’s Answer did not include the mandatory certificate of service and advised Respondent that any future submissions that failed to include proof of service would be denied consideration. 16 TTABVUE.

⁶ The operative pleadings are the Amended Petition for Cancellation, 12 TTABVUE, and Respondent’s Answer thereto, 15 TTABVUE.

- Testimony Affidavit of Matthew L. Seror, counsel for Petitioner (“Test. Aff. Seror”).⁷
- Petitioner’s Notice of Reliance on (1) Petitioner’s pending trademark application and the related Office Action refusing its registration, (2) Petitioner’s discovery requests served on Respondent, and (3) website printouts evidencing the results of Petitioner’s investigation into Respondent’s trademark usage.

Although Mr. Seror testified in detail about service of Petitioner’s discovery requests on Respondent and his investigation into Respondent’s trademark usage, the documents referenced in this portion of his testimony were submitted under the Notice of Reliance. These documents clearly corroborate portions of Mr. Seror’s testimony: Mr. Seror’s testimony itself refers to these documents by exhibit number and as attached to the Notice of Reliance. Because their reference is clear, and because there is no objection from Respondent, we consider these documents as if they are part of Mr. Seror’s testimony. For reference, the better practice is to attach documents that corroborate testimony to the testimony affidavit itself, rather than filing them separately under a notice of reliance.

Respondent did not make of record any testimony or other evidence during his testimony period. However, this, like Respondent’s failure to submit a brief, does not result in a concession of the case because Respondent is under no obligation to submit evidence. *Yazhong*, 2018 TTAB LEXIS 168, at *12 n.13.

⁷ 18 TTABVUE.

II. Entitlement to a Statutory Cause of Action

Even though Respondent did not file a brief and, therefore, does not dispute Petitioner's entitlement to invoke a statutory cause of action, it is an element of the plaintiff's case in every inter partes proceeding. 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) proximate causation. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 1307 (Fed. Cir. 2020).

Here, Petitioner properly made of record its pleaded application seeking to register its DISORDERLY KIDS mark,⁸ together with evidence of the USPTO's refusal to register the mark based on a likelihood of confusion with the mark of Respondent's involved registration.⁹ The USPTO's refusal to register the mark of Petitioner's pleaded application based on a likelihood of confusion with the mark of Respondent's involved registration demonstrates that Petitioner has a real interest in the proceeding and a reasonable belief that it will be damaged by the continued registration of Respondent's mark, thus establishing its entitlement. *See Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 1375 (Fed. Cir. 2020) ("A petitioner may demonstrate a real interest and reasonable belief of damage where the petitioner has filed a trademark application that is refused registration based on a likelihood of confusion with the mark subject to cancellation."); *Empresa Cubana del Tabaco v. General Cigar Co.*, 753 F.3d 1270, 1275-76 (Fed. Cir. 2014)

⁸ 17 TTABVUE 11-16.

⁹ *Id.* at 18-35.

(plaintiff entitled to statutory cause of action based on the USPTO's refusal of its application based on defendant's registrations); *Vans, Inc. v. Branded, LLC*, Can. No. 92066859, 2022 TTAB LEXIS 294, at *23-24 (TTAB 2022).

III. Nonuse

We address first Petitioner's claim of nonuse. In its Amended Petition for Cancellation, Petitioner alleges that "Registrant had not made bona fide use in commerce of the Mark on the specified goods at the time the Registration was issued and has never made use of the Mark in commerce."¹⁰ Petitioner also alleges that Respondent has "never used" the mark in connection with the goods identified in the involved registration.¹¹ Focusing on Respondent's specimen of record filed in support of its statement of use, Petitioner alleges that

"[t]he specimen does not reflect the use of the Mark on the goods identified in the Registration, but rather appears to be a placard with the Mark simply resting in a sweatshirt where one would expect a label to be. There is no indication that the label was actually ever affixed the garment or that Registrant made any use of the Mark at any time on the goods identified in the Registration."¹²

As a result, Petitioner contends that the involved registration should be cancelled.¹³

Thus, Petitioner's nonuse claim is based on allegations that Respondent's mark was not used in commerce as of February 24, 2019, the date the statement of use was filed, or on any other date. Petitioner must establish the case for cancellation by a

¹⁰ 12 TTABVUE 3 (para. 5).

¹¹ *Id.* (para. 6).

¹² 12 TTABVUE 4 (para. 12).

¹³ *Id.* (para. 6).

preponderance of the evidence. *Cerveceria Centroamericana S.A. v. Cerveceria India, Inc.*, 892 F.2d 1021, 1023 (Fed. Cir. 1989); *see also On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1087 (Fed. Cir. 2000).

Under Section 1(a) of the Act, a mark may not be registered unless it is “used in commerce.” 15 U.S.C. § 1051(a)(1). “The term ‘use in commerce’ means the bona fide use of a mark in the ordinary course of trade” 15 U.S.C. § 1127. The “use in commerce” requirement is met “when a mark is (1) placed on the good or container, or on documents associated with the goods if the nature of the goods makes placement on the good or container impracticable, and (2) that good is then ‘sold or transported in commerce.’” *Aycock Eng’g, Inc. v. Airflite, Inc.*, 560 F.3d 1350, 1357 (Fed. Cir. 2009); *Paramount Pictures Corp. v. White*, Opp. No. 91090130, 1994 TTAB LEXIS 14, at *16-17 (TTAB 1994), *aff’d*, 108 F.3d 1392 (Fed. Cir. 1997).

In its brief, Petitioner states:

As a result of Respondent’s refusal to participate in this proceeding, the only evidence of use of Respondent’s DISORDERLY FASHION Mark is the evidence offered in connection with its trademark application. But a closer look at the specimens of use submitted by Respondent reveals that they do not reflect the bona fide use of the DISORDERLY FASHION Mark in commerce.¹⁴

Petitioner then proceeds to criticize the specimens filed with the statement of use, arguing that the specimens do not show a tag or label affixed to a garment, “but rather what appears to be a business card and a sticker PLACED on a garment for the

¹⁴ 19 TTABVUE 14.

purposes of taking the photograph submitted to the USPTO.”¹⁵ Petitioner also seeks to cast suspicion on the specimens by pointing out that the same business card with a distinctive crease was used in both of the photographs submitted as specimens.¹⁶

These arguments are unavailing. While these possible defects in the specimens could ultimately lead to evidence to support Petitioner’s nonuse claim, the problem is that, without more, such as deposition testimony establishing that mark was not in use on the identified goods at the time the statement of use was filed, Petitioner’s arguments seeking to discredit the specimens is not sufficient to establish nonuse.

Accordingly, Petitioner has failed to prove its nonuse claim by a preponderance of the evidence.

IV. Abandonment Resulting from Three Years Nonuse with No Intent to Resume Use

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

- (a) When its use has been discontinued with intent not to resume such use. Intent not to resume may be inferred from circumstances. Nonuse for 3 consecutive years shall be prima facie abandonment. “Use” of a mark means the bona fide use of such mark made in the ordinary course of trade, and not made merely to reserve a right in the mark.

There are two elements to an abandonment claim: non-use of the mark and intent not to resume use. Because registrations are presumed valid under 15 U.S.C. § 1057, the party seeking cancellation based on abandonment bears the burden of proving a

¹⁵ *Id.*

¹⁶ *Id.*

prima facie case by a preponderance of the evidence. *Quality Candy Shoppes/Buddy Squirrel of Wisconsin, Inc. v. Grande Foods*, Can. No. 92044407, 2007 TTAB LEXIS 85, at *13 (TTAB 2007) (citing *On-Line Careline*, 229 F.3d at 1087). If plaintiff can show three consecutive years of nonuse, it has established a prima facie showing of abandonment, creating a rebuttable presumption that the registrant has abandoned the mark without intent to resume use. *Id.* The burden of production (i.e., going forward) then shifts to the respondent to produce evidence that it has either used the mark or that it has intended to resume use (e.g., a convincing demonstration of “excusable non-use” that would negate any intent not to resume use of the mark). *Id.* The burden of persuasion remains with the plaintiff to prove abandonment by a preponderance of the evidence. *See On-line Careline*, 299 F.3d at 1087; *Cerveceria Centroamericana*, 892 F.2d at 1023-24.

Petitioner alleges that “Registrant had not made bona fide use in commerce of the Mark on the specified goods **at the time the Registration was issued** and has never made use of the Mark in commerce.”¹⁷ Because Respondent’s mark became registered on April 30, 2019, we consider the three-year period of nonuse to begin on April 30, 2019. The nonuse period is thus April 30, 2019–April 30, 2022 (the “Nonuse Period”).

To show nonuse of the mark, Petitioner submitted the testimony of its own counsel, Mr. Seror, on two topics: (1) Respondent’s failure to respond to certain

¹⁷ 12 TTABVUE 3 (Amended Petition for Cancellation, paras. 5, 7) (emphasis added).

discovery requests, and (2) Mr. Seror's own investigation into Respondent's use of the mark.¹⁸

Regarding the first topic, i.e., Respondent's failure to respond to discovery requests, Mr. Seror testified that Respondent failed to respond to both Petitioner's requests for production of documents and its interrogatories.¹⁹ Based on this, Petitioner argues that "a reasonable inference to be drawn therefrom is that Respondent has no such evidence of use."²⁰ We acknowledge Respondent's failure to cooperate and to participate fully in the proceeding, some details of which were acknowledged by the Board itself in its previous order.²¹ Nonetheless, for us to draw any conclusions about Respondent's failure to respond to Petitioner's document requests and interrogatories, Petitioner must have filed a motion to compel their responses. *See, e.g., Vans*, 2022 TTAB LEXIS 294, at *13 ("Because Petitioner did not file [a motion to compel], we will not consider Petitioner's complaints regarding the sufficiency of Respondent's responses."); *Anosh Toufigh v. Persona Parfum, Inc.*, Can. No. 92048305, 2010 TTAB LEXIS 237, at *8 (TTAB 2010) (Because Petitioner's motion to compel was denied as premature and never renewed, "we can draw no conclusions from respondent's failure to respond to petitioner's discovery requests."). Inasmuch as Petitioner failed to file a motion to compel, "it may not thereafter be heard to complain about the sufficiency thereof." TBMP § 523.04 and cases cited

¹⁸ 18 TTABVUE.

¹⁹ 18 TTABVUE 2 (Test. Aff. Seror, pars. 2, 3).

²⁰ 19 TTABVUE 15 n. 8, 16.

²¹ *See e.g.*, 11 TTABVUE 1-3 & n.1 (Order, dated February 13, 2023).

therein. Further, Mr. Seror did not testify as to the service of any requests for admissions that would assist in establishing Petitioner's prima facie case of nonuse for at least three consecutive years. For these reasons, we can draw no conclusions from Respondent's failure to respond to Petitioner's discovery requests. *Id.*

We now consider in detail the results of Mr. Seror's investigation into Respondent's use of his mark. Mr. Seror testified that "[o]n or about March 13, 2024, at my direction, my office conducted various searches of public records and databases to ascertain what business, if any, Respondent was engaged in using the DISORDERLY FASHION Mark at issue in this proceeding."²² These searches ranged in scale from local and state to nationwide. To the extent searches were city- or state-wide, Mr. Seror centered his searches on Philadelphia and/or Pennsylvania, because Respondent's address is listed as "6239 N. Camac Street, Philadelphia, PA." Respondent has consistently associated this address with the present proceeding and his underlying application: this is the address provided in Respondent's original application, he set out this same address in his signature block in both his original Answer and his Answer to the Amended Petition for Cancellation, and he has not filed a change of correspondent's address in the present proceeding.²³

First, Mr. Seror's office conducted a series of searches for business licenses issued by the city of Philadelphia: (1) to an individual with the name "Kilson,"²⁴ (2) any

²² 18 TTABVUE 3 (Test. Aff. Seror, para. 4).

²³ *Id.*; 7 TTABVUE 2, 15 TTABVUE 2; 19 TTABVUE 10 nn.3, 4;

²⁴ 18 TTABVUE 3 (Test. Aff. Seror, para. 4(a) and Exhibit 5); 17 TTABVUE 56 (Exhibit 5).

entity with the legal name “Disorderly Fashion;”²⁵ (3) any entity “doing business as DISORDERLY FASHION;”²⁶ and (4) to any entity using the business address of “6239 N. Camac;”²⁷ In response to each search, Petitioner got no “hits.”

Other searches were conducted, including a search of the Pennsylvania state records for (1) any business entity located in Pennsylvania using the name “Disorderly Fashion;”²⁸ and (2) any trademark application for the DISORDERLY FASHION mark filed in the state of Pennsylvania,²⁹ but both searches came up empty. Uniform Commercial Code searches in the state of Pennsylvania for “the name DISORDERLY FASHION”³⁰ and “Kilson”³¹ were similarly fruitless.

Based on these search results, Petitioner argues that “[t]here is no evidence of Respondent’s use of the DISORDERLY FASHION Mark in the market”³² Accordingly, Petitioner maintains that this evidence is sufficient to create a rebuttable presumption that Respondent has abandoned its rights in the DISORDERLY FASHION Mark.³³

²⁵ 18 TTABVUE 3 (Test. Aff. Seror, para. 4(b) and Exhibit 6); 17 TTABVUE 58 (Exhibit 6).

²⁶ 18 TTABVUE 3-4 (Test. Aff. Seror, para. 4(c) and Exhibit 7); 17 TTABVUE 60 (Exhibit 7).

²⁷ 18 TTABVUE 4 (Test. Aff. Seror, para. 4(d) and Exhibit 8); 17 TTABVUE 62 (Exhibit 8).

²⁸ 18 TTABVUE 5 (Test. Aff. Seror, para. 4(h) and Exhibit 12); 17 TTABVUE 75 (Exhibit 12).

²⁹ 18 TTABVUE 5-6 (Test. Aff. Seror, para. 4(i) and Exhibit 13); 17 TTABVUE 78 (Exhibit 13).

³⁰ 18 TTABVUE 6 (Test. Aff. Seror, para. 4(j) and Exhibit 14); 17 TTABVUE 81 (Exhibit 14).

³¹ 18 TTABVUE 6 (Test. Aff. Seror, para. 4(k) and Exhibit 15); 17 TTABVUE 84 (Exhibit 15).

³² 19 TTABVUE 6.

³³ *Id.*

As an initial matter, these searches are insufficient to establish a prima facie showing of abandonment because there is no evidence that Respondent is required to register his mark with any of these local or state agencies/entities whose databases Petitioner searched. For example, there is no evidence that registration of a mark with an individual state, such as Pennsylvania, is required. While we acknowledge that registration may have certain advantages in some situations, we cannot find on this record that registration in any of the databases searched is mandatory and, as a result, we cannot find that Respondent's failure to register his mark so that it appears in the searched databases is sufficient to create a rebuttable presumption that Respondent has abandoned his mark.

Additionally, even assuming that these searches are sufficient to reveal trademark use, because each search was conducted on the same day, i.e., on or about March 13, 2024,³⁴ they fail to show that Respondent has not used the mark DISORDERLY FASHION for his identified goods for a period of at least three consecutive years. Mr. Seror did not testify to having checked on multiple occasions nor is there any evidence that he checked them over a period of at least three years or that the databases contain information dating back at least three years from the date of the search. To the contrary, the exhibits corroborating his testimony are all dated the same day, i.e., March 13, 2024.

³⁴ 18 TTABVUE 3 (Test. Aff. Seror, para. 4).

We acknowledge that Petitioner conducted a series of searches for a business license and that the results from this search shows activity dating back to 2005.³⁵ However, the record does not establish that Respondent was required to register his mark as a “business license”. Respondent’s failure to use his mark as the business or legal name of his entity, or as a dba, does not preclude him from using DISORDERLY FASHION as a trademark. Therefore, this evidence is not sufficient to establish a rebuttable presumption that Respondent has abandoned his mark.

We also acknowledge that Petitioner conducted a search for a Federal Trade Commission (FTC) Registration Number (“RN Number”),³⁶ and that this is the type of database that may show historical filing information and, as a result, may show filings made over three years ago. Mr. Seror testified that a FTC Registration Number is required to sell apparel in the United States.³⁷ Petitioner states in its brief that “Federal Trade Commission regulations require that any person or entity that manufactures, imports, sells, offers to sell, distributes or advertising products covered by the Textile and Wool Acts must include a label identifying the manufacturer or another business responsible for marketing or handling the item.”³⁸ Petitioner argues that Respondent’s identified goods “fall squarely within FTC regulations and therefore to lawfully sell these goods, Respondent is required to comply with

³⁵ 17 TTABVUE 56.

³⁶ 18 TTABVUE 4-5 (Test. Aff. Seror, para. 4(e)-(g)).

³⁷ *Id.* at 4 (Test. Aff. Seror, para. 4(e)).

³⁸ 19 TTABVUE 11.

applicable FTC regulations, including labelling requirements.”³⁹ If Respondent was engaging in the bona fide use of its DISORDERLY FASHION mark with his identified goods, Petitioner argues that Respondent should have an RN number.⁴⁰ But, as Petitioner’s search results reveal, no RN number was issued to any individual using the name Kilson or to any business using the name “Disorderly Fashion.”⁴¹ Because these initial searches did not produce any pertinent results, this led counsel to conduct an expanded search, looking for any RN numbers issued to any business sharing Respondent’s 19141 zip code. Although five RN numbers were issued to businesses or individuals with this zip code, none corresponded to Respondent.⁴²

We exercise our discretion and take judicial notice of the FAQ page for the Federal Trade Commission, as it is an official government publication. *See e.g., In re Nieves & Nieves LLC*, Ser. No. 85179263, 2015 TTAB LEXIS 12, at *8 (TTAB 2015) (“We take judicial notice of recent official U.S. government publications concerning Internet use in the United States: [from the government websites of www.census.gov and www.ntia.doc.gov].”). It appears, however, to contradict Mr. Seror’s testimony in that it indicates that RN numbers are **not** required:⁴³

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ 18 TTABVUE 4 (Test. Aff. Seror, para. 4(e), (f) and Exhibits 9 and 10); 17 TTABVUE 65-69 (Exhibits 9 and 10).

⁴² 18 TTABVUE 5 (Test. Aff. Seror, para. 4(g) and Exhibit 11); 17 TTABVUE 71 (Exhibit 11).

⁴³ <https://www.ftc.gov/business-guidance/industry/registered-identification-number-frequently-asked>, accessed on January 23, 2025.

The screenshot shows a web browser window with the URL ftc.gov/business-guidance/industry/registered-identification-number-frequently-asked. The page title is "Registered Identification Number: Frequently Asked Questions". Below the title is a breadcrumb trail: [Home](#) / [Business Guidance](#) / [Selected Industries](#). On the left side, there is a "By Industry" section with a list of categories: Alcohol, Appliances, Automobiles, Clothing and Textiles, Finance, Franchises, Business Opportunities, and Investments, Funerals, Human Resources, Jewelry, Non-Profits, Real Estate and Mortgages, and Tobacco. On the right side, there are "Tags" for "Consumer Protection" and "Clothing and Textiles". The main content area contains two questions:

1) What is an RN?
RN stands for Registered Identification Number. It is a number issued by the FTC to U.S. businesses that manufacture, import, distribute, or sell products covered by the Textile, Wool, and Fur Acts. Businesses can use this number on product labels instead of the company name.

2) Do I have to use an RN?
No. You are required to label covered products to identify the business responsible for marketing the products in the United States or the manufacturer. Therefore, you may put your company business name on the label instead of an RN. The business name is the full name that appears on business documents, such as purchase orders and invoices. It is not a trademark, brand, or designer name, unless that is also the name under which the company conducts business. Alternatively, products may be labeled with the RN or business name of the company that is buying the goods from you, such as a distributor or retailer marketing them in the United States. If you are acquiring finished products from an importer or distributor that markets them in the United States, or a manufacturer, the products can remain labeled with that company's RN or business name. RNs are available only to businesses residing in the United States. However, imported goods can be labeled with the name of the foreign exporter or distributor that markets them in the United States, or the manufacturer.

As shown above, a business that manufactures, imports, distributes, or sells products covered by the Textile, Wool, and Fur Acts is required to label covered products.⁴⁴ The RN is not required, however, because the business can put its business name on the label instead of an RN. Consequently, because Respondent is not required to obtain an RN, his failure to obtain one is insufficient to create a rebuttable presumption that Respondent has abandoned his mark.

After consideration of all of Petitioner's evidence, we find that the evidence does not establish Respondent's nonuse of his mark for a three-year period or that

⁴⁴ 16 C.F.R. §§ 300.4-300.5, 303.16, 303.19-303.20.

Respondent otherwise discontinued use of his mark with no intent to resume use. The record consists of at best circumstantial evidence raising the mere possibility of an unspecified period of nonuse. Abandonment is a question of fact; thus, any inference of abandonment must be based on proven fact. *Quality Candy Shoppes v. Grande Foods*, Can. No. 92044407, 2007 TTAB LEXIS 85, (TTAB 2007).

In short, Petitioner has failed to prove nonuse of three consecutive years.

V. Fraud

Petitioner argues that Respondent made an intentionally false statement in procuring his registration when he represented in his statement of use that “The [DISORDERLY FASHION] mark is in use in commerce on or in connection with the goods/services in the application.”⁴⁵ As a result, Respondent argues, the involved registration should “be cancelled based on Respondent’s fraud perpetrated on the USPTO.”⁴⁶

Fraud in procuring or maintaining a trademark registration occurs when an applicant for registration knowingly makes a false, material representation of fact in connection with an application to register with the intent of obtaining a registration to which it is otherwise not entitled. *In re Bose Corp.*, 580 F.3d 1240, 1245 (Fed. Cir. 2009). A party seeking cancellation of a trademark registration for fraudulent procurement bears a heavy burden of proof. *Id.* at 1243; *W.D. Byron & Sons, Inc. v. Stein Bros. Mfg. Co.*, 377 F.2d 1001, 1004 (CCPA 1967).

⁴⁵ 19 TTABVUE 8, 17.

⁴⁶ *Id.* at 17.

Respondent executed and filed his statement of use on February 24, 2019, stating that the mark was in use in commerce on the goods identified therein. Petitioner has argued but has not submitted evidence at trial that shows that Respondent's mark was not in use on the goods listed in the Registration on that date, or that Respondent filed his statement of use with the intent to deceive the USPTO. Since Petitioner has failed to show that the statements made in Respondent's statement of use were false, let alone made with the intent to deceive the USPTO, Petitioner's claim of fraud fails.

Decision

The Amended Petition for Cancellation is denied.