

This Opinion is Not a  
Precedent of the TTAB

Mailed: October 27, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*1645 Restaurant Group, Inc.*

*v.*

*Gregg Alan Buell*  
—

Cancellation No. 92080535  
Cancellation No. 92080536  
(Consolidated)  
—

Caleb Hatch of Lee & Hayes, P.C. for 1645 Restaurant Group, Inc.

Jennifer L. Whitelaw and Chase Burton of Whitelaw Legal Group for Gregg Alan Buell.

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Before Goodman, Larkin, and Cohen,  
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

Gregg Alan Buell (“Respondent” or “Registrant”) owns Registration No. 5153506 (the “506 Registration”) of the standard-character mark FAT KATZ and Registration No. 5153507 (the “507 Registration”) of the composite word-and-design mark shown below



both for “restaurant and bar services” in International Class 43.<sup>1</sup> In these consolidated cases, 1645 Restaurant Group, Inc. (“Petitioner”) has petitioned to cancel the ’506 and ’507 Registrations on the sole ground that Respondent has abandoned the registered marks.

The consolidated cases are fully briefed.<sup>2</sup> We deny the Petitions for Cancellation.

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

### **Record**

The record in these consolidated cases consists of the pleadings,<sup>3</sup> the file histories of the ’506 and ’507 Registrations, by operation of Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1), and four Notices of Reliance submitted by Petitioner during its trial period:

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<sup>1</sup> The ’506 and ’507 Registrations both issued on May 7, 2017. Respondent filed combined declarations under Sections 8 and 15 of the Trademark Act, 15 U.S.C. §§ 1058, 1115, in June 2022, prior to the institution of these proceedings, but the combined declarations have not been acted on by the United States Patent and Trademark Office (“USPTO”).

<sup>2</sup> Citations in this opinion to the briefs and other materials in the dockets of the consolidated cases refer to TTABVUE, the Board’s online docketing system. Except where otherwise indicated, we will cite the TTABVUE docket in the “parent” proceeding (Cancellation No. 92080535). The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear. Petitioner’s main brief appears at 33 TTABVUE and its reply brief appears at 35 TTABVUE. Respondent’s brief appears at 34 TTABVUE.

<sup>3</sup> The operative pleadings are Petitioner’s two Petitions for Cancellation, 1 TTABVUE (Canc. Nos. 92080535 and 92080536), and Respondent’s Answers thereto, 15 TTABVUE (Canc. No. 92080535) and 10 TTABVUE (Canc. No. 92080536). We discuss below some of Respondent’s admissions and denials of Petitioner’s salient allegations.

- First Notice of Reliance, 30 TTABVUE 1-34, on Internet materials that Petitioner states “depict[ ] different third-party entities using the exact marks at issue to advertise catering and restaurant services,” *id.* at 2;
- Second Notice of Reliance, 29 TTABVUE 1-42, on what Petitioner describes as “governmental records related to the third-party uses of the Marks at issue used by third-party entities to advertise catering and restaurant services,” *id.* at 2;
- Third Notice of Reliance, 31 TTABVUE 1-37, on Respondent’s discovery responses; and
- Fourth Notice of Reliance, 32 TTABVUE 1-32, on what Petitioner describes as “(1) The detail of application for U.S. Trademark Registration No. 5,153,507; (2) the TSDR registration certificate of U.S. Trademark Registration No. 5,153,507; (3) the detail of application for U.S. Trademark Registration No. 5,153,506; and (4) he [sic] TSDR registration certificate of U.S. Trademark Registration No. 5,153,507.” *Id.* at 2.<sup>4</sup>

### **Evidentiary Objections**

Respondent objects to the

attempted introduction of Petitioner 1645 Restaurant Group’s evidence submitted in connection with Petitioner’s Trial Exhibits 1645-001 – 1645-006 from Petitioner’s First Notice of Reliance . . . , Trial Exhibits 1645-007 – 1645-020 from Petitioner’s Second Notice of Reliance . . . , and Trial Exhibits 1645-021 – 1645-023 from Petitioner’s Third Notice of Reliance . . . , as all are hearsay, without proper foundation, are improperly submitted for the truth of the matter asserted, are not the best evidence, are not genuine, not authenticated, and are irrelevant and immaterial.

34 TTABVUE 10 (record citations omitted).

Respondent argues that Petitioner’s evidence is

a) inadmissible hearsay; b) being offered as expert testimony or opinion when in fact no experts were ever identified by Petitioner and no testimony of any kind was submitted by Petitioner; c) not properly authenticated; d)

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<sup>4</sup> As discussed above, the file histories of the ’506 and ’507 Registrations are automatically of record under Trademark Rule 2.122(b)(1), and it was unnecessary for Petitioner to file them.

without proper foundation; e) improperly submitted for the truth of the matter asserted; f) not the best evidence; g) not genuine; h) irrelevant; and/or i) immaterial.

*Id.* at 11.

Respondent asserts this laundry list of objections against Petitioner's First, Second, and Third Notices of Reliance in their entirety. *Id.* at 11-13. Respondent objects to Petitioner's superfluous Fourth Notice of Reliance on the ground that it mentions a previously dismissed fraud claim. *Id.* at 13.

In its reply brief, Petitioner responds to Respondent's objections as follows:

Registrant objects to Petitioner's Notices of Reliance using boilerplate, inapplicable objections without any basis asserted therefor. Leaving the Board and Petitioner to try to guess as to the applicability and basis for Registrants' [sic] bare-bones and generic objections. Rather than identifying any legitimate basis for exclusion, Registrant relies on generic, conclusory assertions that Petitioner's evidence is "hearsay", "not properly authenticated", "irrelevant", etc. without citing to authority or explaining how these objections apply to each of Petitioner's specific exhibits. Registrant's "throw it at the wall and see what sticks" type objections should be rejected.

35 TTABVUE 4.

Respondent's boilerplate objections to Petitioner's first three Notices of Reliance are not well taken. We need not rule on Respondent's objections that the evidence submitted under Petitioner's Notices of Reliance is "hearsay" and "improperly submitted for the truth of the matter asserted," 34 TTABVUE 10, because where, as here, Internet materials are submitted under a notice of reliance rather than through witness testimony, we consider such materials only for what they show on their face, and not for the truth of their contents, "whether there is an objection or not."

*WeaponX Performance Prods. Ltd. v. Weapon X Motorsports, Inc.*, Opp. No. 91221553, 2018 WL 1326374, at \*6 n.18 (TTAB 2018) (citing *Safer, Inc. v. OMS Invs., Inc.*, Opp. No. 91176445, 2010 WL 985355, at \*9 (TTAB 2010)). If “supported solely with a notice of reliance, such Internet evidence would be admissible only for what it shows on its face.” *State Permits, Inc. v. Fieldvine, Inc.*, Canc. No. 92075095, 2024 WL 3825297, at \*4 (TTAB 2024) (quoting *Spiritline Cruises LLC v. Tour Mgmt. Servs., Inc.*, Opp. No. 91224000, 2020 WL 636467, at \*4 (TTAB 2020)). *See also Sawstop, LLC v. Felder KG*, Opp. No. 91255905, 2025 WL 2400134, at \*9 n.44 (TTAB 2025).

Respondent’s authentication, foundation, and genuineness objections directed to Petitioner’s first three Notices of Reliance are not well taken because the “Trademark Rules of Practice, which govern inter partes trademark proceedings before the Board, provide that specific types of evidence do not require testimony by a witness, but are considered self-authenticating and may be introduced in evidence by filing a notice of reliance on the material being offered.” *RLP Ventures LLC v. Panini Am., Inc.*, Opp. No. 91268816, 2023 WL 6442609, at \*5 (TTAB 2023) (“[S]o long as a notice of reliance indicates generally the relevance of the evidence and associates the evidence with one or more issues in the proceeding, the notice of reliance may be used to submit trademark registrations (Trademark Rule 2.122(d)(2), 37 C.F.R. § 2.122(d)(2)), printed publications, official records, and Internet evidence (Trademark Rule 2.122(e), 37 C.F.R. § 2.122(e)) . . . and an adverse party’s written initial disclosures, answers to interrogatories, and admissions made in response to a request for admission, together with a copy of the underlying interrogatory and request for

admission (Trademark Rule 2.120(k), 37 C.F.R. § 2.120(k)).”). The Internet materials and discovery responses submitted by Petitioner under its First, Second, and Third Notices of Reliance are self-authenticating and are thus appropriate for submission in that manner.<sup>5</sup>

Respondent’s objection that Petitioner’s first three Notices of Reliance are “being offered as expert testimony or opinion” is not well taken because the Notices of Reliance do not involve witness testimony of any sort.

With respect to Respondent’s objections that the Notices of Reliance are “not the best evidence,” we assume that Respondent is referring to Rule 1002 of the Federal Rules of Evidence, captioned “Requirement of the Original” and commonly called the “Best Evidence Rule,” rather than to the relative quality of the evidence vis-à-vis other possible evidence.

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<sup>5</sup> Respondent’s Second Notice of Reliance purports to make of record “internet evidence of third-party websites” consisting of “printouts of publicly available websites located at the URLs listed below, depicting governmental records related to the third-party uses of the Marks at issue used by third-party entities to advertise catering and restaurant services.” 29 TTABVUE 2. Trademark Rule 2.122(g), 37 C.F.R. § 2.122(g), provides that a party may submit “official records” under a notice of reliance. “Official records’ . . . are records prepared by a public officer which are self-authenticating in nature (and hence require no extrinsic evidence of authenticity as a condition precedent to admissibility), such as certified copies of public records.” *Flame & Wax, Inc. v. Laguna Candles, LLC*, Canc. No. 92072343, 2022 WL 3083070, at \*4 (TTAB 2022) (quoting *Conde Nast Publ’ns Inc. v. Vogue Travel, Inc.*, Opp. No. 91059975, 1979 WL 24922, at \*2 n.5 (TTAB 1979)). As discussed below, what Petitioner calls “governmental records” are uncertified file copies of Annual Reports and Articles of Incorporation prepared by a company called Fat Katz Bistro, Inc. and filed with the Florida Secretary of State and the Florida Department of State Division of Corporations. Inasmuch as these documents were not prepared by a public officer, “[t]hese file copies do not qualify as official records,” *Rsch. in Motion Ltd. v. NBOR Corp.*, Opp. No. 91179284, 2009 WL 4694941, at \*3 (TTAB 2009) (citation omitted), but they do qualify as Internet materials for purposes of submission under Petitioner’s Second Notice of Reliance because they were printed from a Florida government website, [www.sunbiz.org](http://www.sunbiz.org), and the URLs and access dates are provided in the Second Notice of Reliance. 29 TTABVUE 3-5. Subject to our rulings on Respondent’s other objections, we will consider the filings for what they show on their faces.

The “best evidence rule” is a common law proposition that has been codified in Rule 1002 of the Federal Rules of Evidence, which states: “To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.”

*Mag Instrument, Inc. v. Brinkmann Corp.*, Opp. No. 91163534, 2010 WL 3253200, at \*3 (TTAB 2010) (quoting Fed. R. Evid. 1002). “[T]he rule has been described as ‘one of preferences, not absolute exclusion,’” *id.* (quoting 6 Weinstein’s Federal Evidence Section 1004.01 (2nd ed. 1997)), and “there are a string of exceptions to the rule and these are set forth in the subsequent rules.” *Id.* Rule 1003, captioned “Admissibility of Duplicates,” provides that “[a] duplicate is admissible to the same extent as the original unless a genuine question is raised about the original’s authenticity or the circumstances make it unfair to admit the duplicate.” Fed. R. Evid. 1003.

The Trademark Rules expressly contemplate the submission of copies of materials admissible under notice of reliance, and do not require the submission of original documents. For example, Trademark Rule 2.122(e), 37 C.F.R. § 2.122(e), captioned “Printed Publications and Official Records,” provides in pertinent part that printed publications are admissible under notice of reliance if the notice of reliance is “accompanied by . . . the printed publication **or a copy of the relevant portion thereof.**” 37 C.F.R. § 2.122(e)(1) (emphasis added).

Finally, with respect to Respondent’s objections that Petitioner’s evidence is “irrelevant” and “immaterial,” “[b]ecause a cancellation proceeding is akin to a bench trial, the Board is capable of assessing the proper evidentiary weight to be accorded the . . . evidence, taking into account the imperfections surrounding the admissibility

of such . . . evidence,” *Adamson Sys. Eng’g, Inc. v. Peavey Elecs. Corp.*, Canc. No. 92076586, 2023 WL 7274674, at \*6 (TTAB 2023) (quoting *Peterson v. Awschucks SC, LLC*, Canc. No. 92066957, 2020 WL 7888976, at \*4 (TTAB 2020)), and “[a]s necessary and appropriate, we will point out any limitations in the evidence or otherwise note that we cannot rely on the evidence in the manner sought.” *Id.*

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

“Entitlement to a statutory cause of action is an element of the plaintiff’s case in every inter partes proceeding.” *El Roblar Inv. Prop. LLC v. Roe*, Opp. No. 91272200, 2025 WL 2718983, at \*18 (TTAB 2025) (quotations and citations omitted).

Under Trademark Act Section 14, 15 U.S.C. § 1064, “any person who believes that he is or will be damaged . . . by the registration of a mark on the principal register” may petition to cancel that registration. A party in the position of plaintiff may petition to cancel registration of a mark when such cancellation is within the zone of interests protected by the statute, 15 U.S.C. § 1064, and the plaintiff has a reasonable belief in damage that is proximately caused by registration of the mark.

*JNF LLC v. Harwood Int’l Inc.*, Canc. No. 92070634, 2022 WL 4379238, at \*1 (TTAB 2022) (citing *Meenaxi Enter., Inc. v. Coca-Cola Co.*, 38 F.4th 1067, 1072 (Fed. Cir. 2022) (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132 (2014))). A plaintiff must first plead, and then prove at trial, its entitlement to a statutory cause of action, and must maintain its entitlement “for the entirety of the proceeding, from commencement until the end.” *El Roblar*, 2025 WL 2718983, at \*22 (citing *Philanthropist.com, Inc. v. Gen. Conf. Corp. of Seventh-Day Adventists*, Canc. No. 92065178, 2021 WL 2472776, at \*4 (TTAB 2021), *aff’d mem.*, 2022 WL 3147202



(Fed. Cir. Aug. 8, 2022)).<sup>6</sup> A plaintiff must “maintain its entitlement to the statutory cause of action throughout the proceeding and affirmatively prove its existence at the time of trial by introducing evidence to support the allegations in its pleading that relate to such entitlement as an element of its case-in-chief.” *Philanthropist.com*, 2021 WL 2472776, at \*4.

In its main brief, Petitioner does not discuss its entitlement to a statutory cause of action per se, but does describe the background to these consolidated proceedings as follows:

Petitioner filed for U.S. Trademark Application Serial No. 97/060,221 for the mark FAT CAT on October 5, 2021, under Section 1(a) of the Lanham Act (the “Petitioner’s Mark”). Despite its use dating back to 2009, Petitioner’s Mark was issued an office action on July 11, 2022, refusing registration of Petitioner’s Mark due to a likelihood of confusion with Registrant’s Registration Nos. 5153506 for FAT KATZ and 5153507 for FAT KATZ (stylized) (collectively “Registrant’s Marks”). On September 13, 2022, Petitioner filed a separate Notice of Cancellation against each of Registrant’s Marks (which were then consolidated), asserting that Registrant has never used either mark, and accordingly, has abandoned both of Registrant’s Marks.

33 TTABVUE 5.

Petitioner also argues in its main brief that it “has been and will continue to be damaged by Registrant’s Mark, as it has been cited against Petitioner’s Application

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<sup>6</sup> In granting Respondent’s motion to dismiss Petitioner’s fraud claims in its Petitions for Cancellation, the Board held that “Petitioner has adequately pleaded its entitlement to a statutory cause of action by pleading that Respondent’s involved registration has been cited as a bar, under Trademark Act Section 2(d), to Petitioner’s application to register the mark FAT CAT.” 14 TTABVUE 4 (citing Pet. for Canc. ¶¶ 1-2 (1 TTABVUE 3-4 (Canc. No. 92080535)); Pet. for Canc. ¶¶ 1-2 (1 TTABVUE 3 (Canc. No. 92080536))).

as a basis for refusal of registration, pursuant to the Trademark Act, Section 2(d).” *Id.* at 7 (citing 1 TTABVUE 4).

In his brief, Respondent also does not discuss Petitioner’s entitlement to a statutory cause of action per se, but argues that Petitioner’s “assertions as to its alleged application to register its alleged mark [33 TTABVUE 7] have not been made of record in this proceeding and therefore Petitioner’s assertions should be stricken.” 34 TTABVUE 9. Respondent further argues that “Petitioner’s reference to an alleged ‘Office Action’ [33 TTABVUE 7] have [sic] not been made of record in this proceeding and therefore Petitioner’s assertion should be stricken.” 34 TTABVUE 9. Petitioner does not address these arguments in its reply brief.

“There is no question that [a petitioner] whose application has been blocked by [a respondent’s] registration . . . is entitled to be heard on the question of cancellation of that registration,” *JNF*, 2022 WL 4379238, at \*2, but no portion of the file history of the referenced application Serial No. 97060221 is in the record, and argument of counsel in the form of unsupported assertions “is no substitute for evidence.” *Iron Balls Int’l Ltd. v. Bull Creek Brewing, LLC*, Canc. No. 92079099, 2024 WL 2844425, at \*26 (TTAB 2024) (quoting *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1371 (Fed. Cir. 2018) (internal quotation omitted)).<sup>7</sup>

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<sup>7</sup> The proper practice in cases in which a plaintiff’s entitlement to a statutory cause of action is based on a claimed refusal to register is to introduce a copy of the Office Action refusing registration under a notice of reliance, *see, e.g., ShutEmDown Sports, Inc. v. Lacy*, Canc. No. 92049692, 2012 WL 684464, at \*6 (TTAB 2012), or through the testimony of a witness with personal knowledge of the refusal.

Petitioner's main brief instead purports to rely on the allegations made in its Petitions for Cancellation regarding application Serial No. 97060221. 33 TTABVUE 7. Standing alone, such allegations "are not evidence of the matters alleged," *Baseball Am., Inc. v. Powerplay Sports, LLC*, Opp. No. 91120166, 2004 WL 1942057, at \*2 n.6 (TTAB 2004), so we must determine whether they were admitted by Respondent. *See Peterson*, 2020 WL 7888976, at \*6-7.

The pertinent allegations in each Petition for Cancellation are that (1) "Petitioner is the owner of U.S. Trademark Application Serial No. 97/060,221 for the mark FAT CAT, for use in connection with 'Catering services; Restaurant services' in international class 043," Pet. for Canc. ¶ 1 (1 TTABVUE 3 (Canc. No. 92080535); 1 TTABVUE 4 (Canc. No. 92080536)), and (2) "Petitioner has been, and will continue to be, damaged in that Registrant's Mark has been cited against Petitioner's Application as a basis for refusal of registration, pursuant to the Trademark Act, Section 2(d)." Pet. for Canc. ¶ 2 (1 TTABVUE 4 (Canc. No. 92080535); 1 TTABVUE 4 (Canc. No. 92080536)). The allegations that Petitioner owns a pending application to register the FAT CAT mark for restaurant and catering services that has been refused based on the registrations that Petitioner seeks to cancel "gave Respondent notice of Petitioner's intention to rely on [its] refused application to establish a statutory entitlement to a cause of action in [each] proceeding." *Peterson*, 2020 WL 7888976, at \*6.

Respondent answered the pertinent allegations as follows: (1) "Registrant states that the referenced federal public record speaks for itself and denies the remainder

of the allegations of Paragraph 1,” Answ. ¶ 1 (15 TTABVUE 2 (Canc. No. 92080935); 10 TTABVUE 2 (Canc. No. 92080936)), and (2) “Registrant states that the referenced federal public record speaks for itself and denies the remainder of the allegations of Paragraph 2.” Answ. ¶ 2 (15 TTABVUE 2 (Canc. No. 92080935); 10 TTABVUE 2 (Canc. No. 92080936)). Respondent’s responses in each case purported to deny “the remainder of the allegations” in paragraphs 1 and 2 of the Petitions for Cancellation, suggesting that Respondent intended to admit some parts of the allegations through his vague statements that “the referenced federal public record speaks for itself,” but it is not clear which parts of the allegations referring to Petitioner’s application were admitted and which were denied.

The Federal Rules of Civil Procedure govern how a party must respond to the allegations in its adversary’s pleading.<sup>8</sup> A party “must . . . admit or deny the allegations asserted against it by an opposing party,” Fed. R. Civ. P. 8(b)(1)(B), and a “denial must fairly respond to the substance of the allegation.” Fed. R. Civ. P. 8(b)(2). “A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.” Fed. R. Civ. P. 8(b)(4). “An allegation--other than one relating to the amount of damages--is admitted if a responsive pleading is required and the allegation is not denied.” Fed. R. Civ. P. 8(b)(6). Answers that comply with these requirements help to frame the issues to be tried by making clear what allegations are admitted, and what allegations are denied and thus must be proven.

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<sup>8</sup> The Federal Rules of Civil Procedure are made applicable to Board proceedings by Trademark Rule 2.116, 37 C.F.R. § 2.116. *Spanishtown Enters., Inc. v. Transcend Res., Inc.*, Canc. No. 92070340, 2020 WL 6938378, at \*4 n.7 (TTAB 2020).

Respondent's responses that "the referenced federal public record speaks for itself" are improper in the context of the allegations here because they do not expressly "admit or deny the allegations" regarding application Serial No. 97060221 in those paragraphs, as required by Rule 8(b)(1)(B); "fairly respond to the substance of the allegation[s]," as required by Rule 8(b)(2); or state that Respondent "lacks knowledge or information sufficient to form a belief about the truth of" the allegations pursuant to Rule 8(b)(5). *Cf. Peterson*, 2020 WL 7888976, at \*6 (noting that the respondent had "indicated it was 'without sufficient information to admit or deny' the application's refusal based on Petitioner's registrations, and therefore denied that allegation."). As a general matter, a response stating that a document "speaks for itself" may be problematic because it often begs the question "Exactly what does it say?"<sup>9</sup>

This is commonly the case in the context of allegations regarding applications and registrations. Respondent's responses to Petitioner's allegations that it "is the owner of U.S. Trademark Application Serial No. 97/060,221 for the mark FAT CAT, for use in connection with 'Catering services; Restaurant services' in international class 043," Pet. for Canc. ¶ 1 (1 TTABVUE 3 (Canc. No. 92080535); 1 TTABVUE 4 (Canc. No. 92080536)), illustrate the problem. Is the "referenced federal public record" the application as filed, or does it also include its entire prosecution history at the time of answering? Does the "referenced federal public record" "speak" only about

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<sup>9</sup> To the extent that Respondent's particular responses are ambiguous as to whether they admit or deny Petitioner's allegations, or as to what is admitted and what is denied, Rule 8(b)(6), which provides that "[a]n allegation . . . is admitted if a responsive pleading is required and the allegation is not denied," Fed. R. Civ. P. 8(b)(6), suggests that we should resolve such ambiguities against Respondent, and find that he has admitted allegations that he has not clearly denied in one of the manners permitted under Rules 8(b)(3) and 8(b)(5).

Petitioner's ownership of the application, or also about the filing particulars and the status of the application at the time of answering?<sup>10</sup>

Resolving the ambiguities in Respondent's responses that "the referenced federal public record speaks for itself" against Respondent, we find that Respondent admitted at least Petitioner's ownership of "Application Serial No. 97/060,221 for the mark FAT CAT, for use in connection with 'Catering services; Restaurant services' in international class 043" in his responses to the allegations in paragraph 1, and that Respondent admitted at least that "Registrant's Mark has been cited against Petitioner's Application as a basis for refusal of registration, pursuant to the Trademark Act, Section 2(d)" in his responses to the allegations in paragraph 2. Taken together, these admissions are sufficient to establish Petitioner's entitlement to a statutory cause of action to cancel the blocking registrations. *Rapid, Inc. v. Hungry Marketplace, Inc.*, Opp. No. 91236033, 2022 WL 2965804, at \*6 (TTAB 2022).

### **III. Petitioner's Abandonment Claim**

Under Section 45 of the Trademark Act, a mark shall be deemed to be abandoned:

- (1) 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 evidence of abandonment. "Use" of a mark means the bona fide use of such mark made in

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<sup>10</sup> Respondent also "state[d] that the referenced federal public record speaks for itself and denie[d] the remainder of the allegations" in response to allegations in each Petition for Cancellation regarding Respondent's **own** '506 and '507 Registrations that are the subject of these proceedings. Answ. ¶¶ 10-11 (15 TTABVUE 3 (Canc. No. 92080935); 10 TTABVUE 3 (Canc. No. 92080936)). Petitioner's allegations regarding the filing of the applications that matured into the '506 and '507 Registrations, and the issuance of the Registrations, involve matters that are obviously within Respondent's knowledge, and they should have been admitted to the extent that they were true and denied otherwise.

the ordinary course of trade, and not made merely to reserve a right in a mark.

- (2) When any course of conduct of the owner, including acts of omission as well as commission, causes the mark to become the generic name for the goods or services on or in connection with which it is used or otherwise to lose its significance as a mark. . . .

15 U.S.C. § 1127.

Petitioner describes the issue before the Board as “[w]hether Registrant’s Marks have been abandoned due to nonuse by Registrant in his individual capacity and his failure to properly license the Registrant’s Marks.” 33 TTABVue 6. Petitioner thus asserts abandonment under both definitions, first arguing that Respondent did not use the marks personally, and second arguing that he engaged in a “course of conduct . . . including acts of omission as well as commission, [that] cause[d] the mark[s] . . . otherwise to lose [their] significance as . . . mark[s],” 15 U.S.C. § 1127, with respect to the third-party users of the marks shown in the ’506 and ’507 Registrations discussed below.

As discussed below, if Respondent has never personally used the marks shown in the ’506 and ’507 Registrations, that fact alone does not prove nonuse of the marks under the first definition of abandonment if the marks were used by “related companies” under Section 5 of the Trademark Act, 15 U.S.C. § 1055. The Trademark Act creates a legal fiction that use of a registered mark under license from the registrant is the registrant’s use, and makes the registrant the de jure user of the mark even if the registrant is not the de facto user.

Petitioner concedes in its main brief that the marks shown in the '506 and '507 Registrations had been used up to the time of trial for the services identified in the Registrations by third parties in which Respondent has an ownership and management interest. 33 TTABVUE 7 (stating that Respondent “is currently an owner of Fat Katz Sports Bistro, Inc., and has worked alongside various other shareholders since the company’s formation in 2012” and that “while Fat Katz Sports Bistro, Inc. and its subsidiaries use Registrant’s Marks in commerce, Registrant has never used either mark in his own individual capacity since Registrant’s asserted date of first use or at the very least, since March 8, 2017”) (record citations omitted); 9 (stating that the “only users of Registrant’s Marks in commerce have been Fat Katz Sports Bistro, Inc. . . . and its subsidiaries: (1) Fat Katz Sports Bistro, a causal [sic] sports bar and restaurant; (2) Fat Katz Slider Bar, a slider restaurant and bar; and (3) Skinny Dogz Brunchery, a brunch restaurant . . . which are all partially owned by Registrant, an individual.”).

Petitioner argues that the marks shown in the '506 and '507 Registrations have been abandoned by Respondent because they have not been used by what Petitioner calls the “Fat Katz Restaurants,” *id.*,<sup>11</sup> under proper licenses from Respondent through which Respondent controls the quality of the services rendered under the marks, because Respondent and the third parties are not “related companies” and the uses of the marks by the Fat Katz Restaurants do not inure to Respondent’s benefit.

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<sup>11</sup> We will also refer to the restaurants collectively as the “Fat Katz Restaurants.”



“Since a mark registered on the Principal Register is presumed to be valid, 15 U.S.C. § 1057(b), ‘the burden of persuasion in a cancellation proceeding rests on [Petitioner,] the party seeking to cancel the registration[s],’” and Petitioner “must overcome the registration[s]’ presumption of validity by a preponderance of the evidence.” *Adamson Sys. Eng’g*, 2023 WL 7274674, at \*9 (citing *Cold War Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F.3d 1352, 1358 (Fed. Cir. 2009) (internal citation omitted)). See also *On-Line Careline, Inc. v. Am. Online, Inc.*, 229 F.3d 1080, 1087 (Fed. Cir. 2000). Petitioner always bears this ultimate burden of persuasion and Respondent is required to respond with contrary evidence only if Petitioner establishes prima facie abandonment. *Adamson Sys. Eng’g*, 2023 WL 7274674, at \*9 (citation omitted); *TV Azteca, S.A.B. de C.V. v. Martin*, Canc. No. 92068042, 2018 WL 6504575, at \*6 (TTAB 2018) (denying the petition for cancellation because “Petitioner has not established a prima facie case of Respondent’s abandonment of his service mark . . . based on its pleaded claim of nonuse during the three-year period immediately preceding the filing of the petition to cancel.”).

The most obvious potential source of evidence supporting Petitioner’s theories of abandonment would be deposition testimony from Respondent or the Fat Katz Restaurants regarding the circumstances surrounding the use of the involved marks. Cf. *Stockpot, Inc. v. Stockpot Rest., Inc.*, Canc. No. 92013157, 1983 WL 51866, at \*5-9 (TTAB 1983) (discussing witness testimony and a purported written license in the course of addressing the applicant’s naked license defense). But Petitioner offers no such direct evidence. Instead, Petitioner asks us to infer abandonment from indirect

evidence, primarily in the form of Internet webpages and articles.<sup>12</sup> “Because abandonment is a question of fact, any inference of abandonment must be based on proven fact.” *TV Azteca*, 2018 WL 6504575, at \*3 (quoting *Cerveceria Centroamericana, S.A. v. Cerveceria India, Inc.*, 892 F.2d 1021, 1024 (Fed. Cir. 1989)). “The protection due the registrant is provided by requiring that the inference [of abandonment] 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.” *Id.* (emphasis in bold here in italics in *TV Azteca*) (quoting *Cerveceria Centroamericana*, 892 F.2d at 1024) (internal citation omitted)).

Petitioner argues in its main brief that

Fat Katz Sports Bistro, Inc. is a Florida corporation formed in 2012 and is the proprietor of the Fat Katz Restaurants, each with one location in Fort Meyers, Florida. . . . Upon Petitioner’s investigation and provided evidence, it’s apparent that Fat Katz and its subsidiaries are the exclusive users of Registrant’s Marks, which are separate legal entities from that of Registrant, an individual. And while Registrant Gregg Buell may be the President of Fat Katz, there are and have been various other shareholders of Fat Katz throughout the entirety of its existence. . . .

*Id.* at 11 (record citations omitted). Petitioner also cites articles discussing the ownership and management of the restaurants. *Id.* at 12.

Petitioner further argues as follows:

Registrant is not only not the only owner, operator, or individual in control of the entities that actually purport to use the Marks, Registrant has provided no evidence of any kind of license agreement between Registrant himself and Fat Katz or any of the Fat Katz Restaurants. Because none

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<sup>12</sup> Petitioner also offers Respondent’s discovery responses, which we discuss below.

exist. Further, Registrant has not offered any evidence demonstrating his level of control over Fat Katz Restaurants' use of Registrant's Marks in connection with their restaurant services. Without clear evidence of a valid license agreement or Registrant's degree of control over the Fat Katz Restaurants' use of Registrant's Marks, this usage cannot inure to the benefit of Registrant, and rather, is a form of naked licensing.

*Id.* at 13.

Petitioner concludes that

a prima facie case of abandonment has been established by Petitioner, and the burden now shifts to Registrant to produce evidence that he either used the Marks during the statutory period or intended to resume use. Which he cannot do as he failed to respond to discovery requests, produce documents, or file any notice of reliance. There is no evidence upon which Registrant can even attempt to assert or rely.

*Id.* at 14.<sup>13</sup>

Respondent argues that

Petitioner 1645 admits that the Respondent's restaurants are "still actively using" the marks of the FAT KATZ Registrations. . . . Indeed, Respondent Buell's FAT KATZ marks have been in constant use since at least as early as the date of first use set forth in each registration. The marks distinguish a collection of remarkably successful, constantly busy, and fully operational restaurants, which have never closed for business since opening more than a

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<sup>13</sup> Petitioner also argues that the use-based applications that matured into the '506 and '507 Registrations are void ab initio because Respondent did not own the marks when the applications were filed. 33 TTABVUE 14-15. This claim for relief was not pleaded, although Respondent purported to address it in his brief as part of his argument that the company users are related companies to him. 34 TTABVUE 19-21. Any separate claim that the '506 and '507 Registrations are void ab initio because Respondent did not own the marks when the applications were filed is time-barred because the '506 and '507 Registrations were more than five years old when the two Petitions for Cancellation were filed. 15 U.S.C. § 1064(3); *Fuji Med. Instruments Mfg. Co. v. Am. Crocodile Int'l Grp., Inc.*, Canc. No. 92062760, 2021 WL 3286400, at \*1 n.4 (TTAB 2021) (citation omitted)).

decade ago. Inexcusably, Petitioner 1645 has failed to take any testimony or provide any evidence to support its frivolous claim of abandonment.

Literally, after pursuing the Respondent for more than three years, with no depositions taken, no testimony taken, one failed and poorly founded, untimely motion to compel, which was denied, and four Notices of Reliance, all asserting “fraud” and all of which lack even one page of evidence of abandonment, Petitioner 1645, has never proved, and cannot now prove, abandonment. It now appears however that the Petitioner knew this from the start, which may explain the failure to take any testimony whatsoever during the pendency of this case.

34 TTABVue 14 (citation omitted).

Specifically, Respondent argues that the Internet materials submitted under Petitioner’s First Notice of Reliance show Respondent’s use and advertising of the registered marks, *id.* at 14-15, and that the filings submitted under Petitioner’s Second Notice of Reliance “are not able to act as substitutes for actual evidence of abandonment and are hearsay if offered for the truth of the matter asserted,” *id.* at 15, but that “[e]ven if these documents were admitted and considered, they undermine Petitioner’s case, as they would show, not surprisingly, the ongoing conduct of business pertaining to Respondent Buell’s registered marks and the restaurant enterprise which has been in open, continuous, and highly successful usage for over a decade, without exception.” *Id.* With respect to Petitioner’s Third Notice of Reliance on his discovery responses, Respondent argues that his responses undercut rather than confirm Petitioner’s claim of abandonment. *Id.* at 15-18.

With respect to the existence of a license between Respondent and the Fat Katz Restaurants, Respondent argues that “Petitioner has submitted no evidence to

eliminate the equivalent possibility that Respondent used the marks through a related company, a licensee or otherwise,” that the “inquiry in such a case is then whether a registrant controls the nature and quality of the services rendered under the mark,” and that “Petitioner again has submitted no evidence that Respondent has **less than** a controlling interest in the FAT KATZ restaurants and therefore no evidence showing that Respondent does not control the nature and quality of the services rendered under the marks.” *Id.* at 22 (emphasis in bold here in italics in the original). Respondent concludes that “Petitioner has failed to prove that Respondent, as owner of the FAT KATZ Marks, does not exercise control over the nature and quality of services rendered by the FAT KATZ branded restaurants.” *Id.* Respondent also cites a number of cases, including seven non-precedential ones,<sup>14</sup> in which a petitioner’s use of materials submitted under notices of reliance has been held not to prove abandonment. *Id.* at 23-29.

In its reply brief, Petitioner argues that it

has provided a variety of evidence to the Board demonstrating that the only use of Registrant’s Marks in commerce has been by third-party Fat Katz Restaurants. Without a license agreement. There is exactly zero evidence of Registrant’s use of the Marks – and the fact that Registrant has not and cannot provide any proof of his use of the Marks establishes abandonment.

. . .

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<sup>14</sup> “[A] decision or order designated as not precedential is not binding upon the Board, but may be cited for whatever persuasive value it might have,” *DC Comics v. Cellular Nerd LLC*, Opp. No. 91246950, 2022 WL 17832492, at \*3 (TTAB 2022), but the Board generally “discourages the citation to non-precedential opinions,” *id.*, and “[c]iting nonprecedential cases should be done judiciously and rarely.” *Id.* at \*4. Petitioner notes these limitations in its reply brief. 35 TTABVue 8. We do not discuss any of the cited non-precedential decisions.

[T]he evidence shows that Registrant has not used the Marks, and there are multiple shareholders of Fat Katz restaurants such that the third-party use cannot inure to the benefit of Registrant.

35 TTABVUE 6-7.

Petitioner further argues in its reply brief that

[t]he evidence objectively demonstrates that there are multiple individuals as officers, shareholders, owners, of Fat Katz Sports Bistro, Inc. . . . Registrant has provided absolutely no evidence to rebut that there are multiple owners with a controlling interest. Consequently, Petitioner's evidence clearly demonstrates on its face that there are multiple individuals currently and/or previously with an ownership interest in Fat Katz who are not Registrant, and Registrant has not provided any evidence to rebut this evidence and fact.

*Id.* at 8 (record citation omitted).

Petitioner concludes that “[t]he unrefuted evidence objectively shows that Registrant, Gregg Allen Buell, is not the sole owner of Fat Katz and there is nothing in the record to support any contention that he has control over the nature and quality of the services rendered by these restaurants,” and that “no amount of non[-]precedential cases changes the fact that the marks have undeniably been abandoned by Registrant, and he has never used the Marks and has no intention of ever using them.” *Id.* at 9-10.

As discussed above, we can consider the materials attached to Petitioner's First and Second Notice of Reliance only for what is shown on their faces, and thus cannot consider the webpages promoting the Fat Katz Restaurants, 30 TTABVUE 5-24, 33-

34, for the truth of any statements on them.<sup>15</sup> The webpages thus establish no foundational facts regarding the ownership, management, or operation of the Fat Katz Restaurants from which we can reasonably infer that there is no license between Respondent and the Fat Katz Restaurants, or that the Fat Katz Restaurants are not related companies of Respondent.

Petitioner also submitted articles from the websites at gulfshorebusiness.com and totimedia.com, *id.* at 25-32, but “[a]lthough news articles may be used as evidence for what they show on their face, they may not be relied on for truth of the statements contained therein.” *TV Azteca*, 2018 WL 6504575, at \*5 (citations omitted). The articles similarly establish no foundational facts regarding the ownership, management, or operation of the Fat Katz Restaurants from which we can reasonably infer that there is no valid license between Respondent and the Fat Katz Restaurants, or that the Fat Katz Restaurants are not related companies of Respondent.

The final exhibit to the First Notice of Reliance is a private account page from the website at bniswfl.com that displays the name “Aaron Buell” and describes that person as the “Fat Katz Slider Bar Caterer.” 30 TTABVUE 33-34. Based on this

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<sup>15</sup> This limitation applies to Respondent as well. Just as we cannot consider the webpages as substantive evidence regarding the ownership, management, and operation of the Fat Katz Restaurants, we cannot consider the webpages as substantive evidence that Respondent’s “FAT KATZ marks have been in constant use since at least as early as the date of first use set forth in each registration” and that the “marks distinguish a collection of remarkably successful, constantly busy, and fully operational restaurants, which have never closed for business since opening more than a decade ago.” 34 TTABVUE 14. But Respondent does not bear the burden of proof on Petitioner’s abandonment claim, and is required to submit evidence only if Petitioner establishes a *prima facie* case, and Petitioner, who does bear the burden of proof, admitted in its briefs that the Fat Katz Restaurants are owned in part by Respondent and have used the marks shown in the ’506 and ’507 Registrations.

exhibit, Petitioner argues that Aaron Buell “seems to be the provider for all restaurant catering-specific services offered under Registrant’s Marks at Fat Katz Slider Bar.” 33 TTABVUE 12. This Internet exhibit cannot be considered for the truth of the matter asserted by Petitioner, and its contents do not establish the asserted fact or otherwise establish any foundational facts regarding the ownership, management, or operation of the Fat Katz Restaurants from which we can reasonably infer that there is no valid license between Respondent and the Fat Katz Restaurants, or that the Fat Katz Restaurants are not related companies of Respondent.

Petitioner’s Second Notice of Reliance covers Annual Reports for 2013-2024 filed by Fat Katz Bistro, Inc. with the Florida Secretary of State, 29 TTABVUE 7-28, 41-42, and the Articles of Incorporation and Amended Articles of Incorporation filed by Fat Katz Bistro, Inc. in 2012 with the Florida Department of State Division of Corporations. *Id.* at 29-40. With one exception from 2018, *id.* at 17-18, these filings show on their faces that all of the Annual Reports were signed by Respondent, who was listed in every report under the heading “Officer/Director Detail” as “PD” (“President” and “Director”) and who was often listed on the signature line as “Owner,” *id.* at 8, 12, 14, 42, or “President,” *id.* at 16, 20, 22, 24, 26, 28.

On their face, the 2012 Articles of Incorporation listed Respondent as President and Dana Standridge as Secretary and Treasurer. *Id.* at 39. On their face, the Amended Articles of Incorporation from later in 2012 replaced Dana Standridge as



Secretary and Treasurer with Krista Buell. *Id.* at 33.<sup>16</sup> They were signed by Respondent as President and Director. *Id.* at 35.

As noted above, these filings are not “official records” and as Internet materials, they cannot be considered for the truth of their contents. They do not establish foundational facts regarding the management or operation of the Fat Katz Restaurants from which we can reasonably infer that there is no valid license between Respondent and the Fat Katz Restaurants, or that the Fat Katz Restaurants are not related companies of Respondent. *Cf. TV Azteca*, 2018 WL 6504575, at \*5 (official records showing that an establishment had lost its liquor license did not prove that it had closed).<sup>17</sup>

Finally, we turn to Petitioner’s Third Notice of Reliance on Respondent’s discovery responses. In its Third Notice of Reliance, Petitioner introduced all of the discovery responses, not specific ones, to show Respondent’s claimed (1) “failure to use the mark in commerce in connection with the listed goods [sic] and services on or prior to the date of first use;” (2) “failure to use the mark in commerce in connection with the listed goods [sic] and services;” and (3) “Abandonment of Registrant’s mark.” 31

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<sup>16</sup> This listing was confirmed in Respondent’s answer to an interrogatory asking him to “Identify and describe Dana Standridge’s relationship with Fat Katz Sports Bistro, Inc.” in which Respondent stated “**Secretary at the time of formation of Fat Katz Sports Bistro, Inc. for three to four months, replaced in June of 2012.**” Resp. to Int. No. 6 (31 TTABVUE 12-13) (emphasis in original).

<sup>17</sup> Petitioner claims that we can infer the absence of a valid license from the listings showing on their faces that Fat Katz Bistro, Inc. has had officers and shareholders in addition to Respondent. 33 TTABVUE 11. Petitioner cites no authority suggesting that if those facts are true, they alone permit an inference of the absence of a valid license or that the Fat Katz Restaurants are not related companies of Respondent.

TTABVUE 2. In its main brief, Petitioner cites the responses in support of its arguments that Respondent did not produce any documents regarding Respondent's use of the marks shown in the '506 and '507 Registrations, did not personally use the marks, and does not intend to use them personally. 33 TTABUE 10. Petitioner concludes that "Registrant failed to produce or identify even a single use of Registrant's Marks by Registrant, there is no evidence Registrant ever used the Marks, and there is no evidence Registrant intends to use the Marks." *Id.* at 11.<sup>18</sup>

Respondent argues that the Third Notice of Reliance precludes Petitioner's proof of its case because certain responses affirmatively establish the existence of a license from Respondent to the Fat Katz Restaurants. 34 TTABVUE 15-18. Petitioner argues in its reply brief that Respondent cannot rely on his "self-serving" discovery responses to prove the existence of a license. 35 TTABVUE 6-8.

Several of Respondent's discovery responses not only do not support Petitioner's theories of the case, but directly undercut them. Respondent answered an interrogatory requesting that he "[i]dentify every grant of authority or permission, written or oral, granted to Registrant or given by Registrant relating to the use of Registrant's Marks to or from any person, firm, individual, corporation, or other legal entity, including without limitation all license agreements and consent agreements" with the statement that Respondent "**has granted permission to Fat Katz Sports Bistro, Inc. to use the mark of the subject registration.**" Resp. to Int. No. 7 (31

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<sup>18</sup> Petitioner moved to compel responses to its discovery requests, but the Board denied the motion as untimely. 28 TTABVUE 1-2.

TTABVUE 13) (emphasis in original). Respondent identified himself alone in response to interrogatories asking him to “[i]dentify all past and present shareholders or parties having an ownership or decision-making interest in Fat Katz Sports Bistro, Inc.,” Resp. to Int. No. 8 (31 TTABVUE 13), and to “[i]dentify by name, address, job title, business affiliation, and ownership interest (if any) of the person(s) who were and are primarily responsible for marketing and use of trademarks for Fat Katz Sports Bistro, Inc.” Resp. to Int. No. 10 (31 TTABVUE 14).<sup>19</sup>

Respondent also answered an interrogatory asking him to “[i]dentify each variation of Registrant’s Mark used by Registrant, and for each provide the date of first use and, if that use has been discontinued, the rationale behind the discontinuance of such use” with the statement that the use of Respondent’s **“mark FAT KATZ has been continuous since at least as early as Registrant’s first use dates as set forth in the subject Registration of this proceeding, including without limitation the usage on signage, print advertising and internet advertising.”** Resp. to Int. No. 5 (31 TTABVUE 12) (emphasis in original).

Petitioner points to none of Respondent’s other discovery responses that establish foundational facts regarding the ownership, management, or operation of the Fat Katz Restaurants from which we can reasonably infer that there is no valid license between Respondent and the Fat Katz Restaurants, or that the Fat Katz Restaurants are not related companies of Respondent.

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<sup>19</sup> Respondent also identified himself as the sole present shareholder of Fat Katz Bistro, Inc. Resp. to Int. No. 1 (31 TTABVUE 11).

Parties that elect to try to carry their burden of proof on fact-intensive claims such as abandonment based solely on materials, such as Internet webpages, printed publications, and actual official records, that are made of record under notices of reliance run the risk that they will fail because of the limitations on the probative value of such evidence discussed above. We are at a loss to understand why Petitioner did not depose Respondent and representatives of the Fat Katz Restaurants, but whether their testimony might have yielded direct evidence enabling Petitioner to prove either of its theories of abandonment “is not a subject on which we can, should or do speculate. Rather, we must take the record as [Petitioner] made it.” *T.A.B. Sys. v. PacTel Teletrac*, 77 F.3d 1372, 1378 (Fed. Cir. 1996). For the reasons discussed above, the inferences that Petitioner requests us to draw based on the record as Petitioner made it do not “have an adequate foundation in proven fact,” *Cerveceria Centroamericana*, 892 F.2d at 1024, and “[w]henEVER an inference is based on pure speculation and ‘there is no basis . . . to **infer** nonuse,’ a prima facie case of abandonment must fail.” *Id.* (emphasis in bold here in italics in the original) (citation omitted). Because Petitioner did not show, by a preponderance of the evidence, that the Fat Katz Restaurants are not related companies of Respondent, we find that Petitioner did not establish a prima facie case of abandonment on either of its theories of abandonment to overcome the presumption of validity of the ’506 and ’507 Registrations.

**Decision:** The Petition for Cancellation in Cancellation No. 92080535 is denied. The Petition for Cancellation in Cancellation No. 92080536 is denied.