

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: April 10, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

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*My Organic Zone*

v.

*Eric Shawgo and Michael Bast*

Cancellation No. 92068377

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Ruth S. Khalsa of Legalforce RAPC Worldwide PC,  
for My Organic Zone.

Jeffrey Sturman of Sturman Law, LLC,  
for Eric Shawgo and Michael Bast.

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Before Kuhlke, Wellington, and Johnson,  
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Eric Shawgo and Michael Bast (“Respondents”) own a registration on the Principal Register for the standard character mark **Organic Zone** (ORGANIC disclaimed) for the following services:

On-line retail store services featuring food, retail apparel stores, retail bakery shops, retail candy stores, retail clothing boutiques, retail clothing stores, retail convenience stores, retail delicatessen services, retail department stores, retail florist shops, retail fruit stands, retail furniture stores, retail gift shops, retail grocery stores, retail jewelry stores, retail music and record stores, retail stores featuring gifts, retail variety stores, with all of the foregoing services featuring organic goods in International

Class 35; and

Cafe-restaurants featuring organic goods, cafes featuring organic goods in International Class 43.<sup>1</sup>

My Organic Zone (“Petitioner”) filed a petition to cancel Respondents’ registration on the ground of abandonment under Sections 14(3) and 45 of the Trademark Act, 15 U.S.C. §§ 1064(3) and 1127.<sup>2</sup> Petitioner alleges that “for at least three years, since at least April 2015, the [registered mark] has not been used in commerce as a trademark” by Respondents; “the [registered mark] is not currently being used in commerce as a trademark” by Respondents; and that Respondents “discontinued use of the [registered mark] in connection with the services in Class 035 and Class 043, prior to April 2015, with no intent to resume use.”<sup>3</sup>

Petitioner also pleads that the USPTO refused to register its mark MY ORGANIC ZONE in its pending application “under Section 2(d) of the Lanham Act, 15 U.S.C. §

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<sup>1</sup> Registration No. 3335800, issued on November 13, 2007 to Suzanne M. Sebion-Huber. On June 16, 2014, an assignment was recorded (at reel/frame 5366/0233) and ownership of the registration was transferred to Eric Shawgo and Michael Bast.

<sup>2</sup> In addition to the abandonment ground, Petitioner argues in its trial brief that the registration should be cancelled because “Respondents committed fraud in the procurement and maintenance” of the registration. 12 TTABVUE 22. Petitioner also argues that the registration should be cancelled because “the 2018 assignment of the abandoned mark was void.” *Id.* at 24. It is unclear what “2018 assignment” Petitioner is referring to as the only assignment of record was recorded in 2014 (see Note 1). Respondents objected to Petitioner’s “unpleaded claims of fraud in their trial brief.” 16 TTABVUE 15.

The only pleaded ground properly before the Board in this proceeding is abandonment. This was explicitly stated to the parties in the Board’s Discovery Conference order (7 TTABVUE 2 “The only claim in this proceeding is abandonment.”) Accordingly, we give no further consideration to Petitioner’s assertions of fraud or the registration being cancelled on the putative claim that an assignment was void.

<sup>3</sup> 1 TTABVUE 6; ¶ 19-21.

1052(d) because of a likelihood of confusion with [Respondents' registration]."<sup>4</sup> Petitioner alleges that it "will continue to be damaged, as a result of the continued registration of [Respondents' Registration], and remains concerned about the risk of similar refusals or charges on the basis of the Registration in the future, as Petitioner develops and markets other products under its MY ORGANIC ZONE brand."<sup>5</sup>

Respondents filed an answer denying the salient allegations of the abandonment claim in the Petition for Cancellation.<sup>6</sup> However, Respondents admit Petitioner's allegation that the USPTO refused registration of Petitioner's mark based on a likelihood of confusion with Respondents' registered mark.<sup>7</sup>

The parties have fully briefed this proceeding, including a reply brief filed by Petitioner.<sup>8</sup>

## **I. Record**

The record includes the pleadings and, pursuant to Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), Respondent's subject registration file.

Petitioner filed a notice of reliance on the following materials:<sup>9</sup>

- Respondents' responses to Petitioner's first set of interrogatories (nos. 1-10);

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<sup>4</sup> *Id.* at 5-6; ¶ 6.

<sup>5</sup> *Id.* at 5; ¶ 10.

<sup>6</sup> 5 TTABVUE.

<sup>7</sup> *Id.* at 3-4; ¶ 6-7.

<sup>8</sup> 12 TTABVUE (Petitioner's main brief); 16 (Respondents' brief); and 19 TTABVUE (Petitioner's reply brief).

<sup>9</sup> 9 TTABVUE. Petitioner also identifies materials from the involved registration file in its notice of reliance; however, as noted above, those materials are already of record pursuant to Trademark Rule 2.122(b).

- Documents that were purportedly produced by Respondents in response to discovery requests served by Petitioner;<sup>10</sup> and
- Various screenshots or internet printouts from: the ICANN WHOIS website involving a search for “sibbyozone.com” and internet domain information for “myorganiczone.com”; Google searches for terms “myorganiczone” and “organic zone”; and a “GoFundMe” website involving “Organic Zone.”<sup>11</sup>

## II. Standing

Standing is a threshold issue that must be proven by the plaintiff in every inter partes case. *See Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014). Our primary reviewing court, the U.S. Court of Appeals for the Federal Circuit, has enunciated a liberal threshold for determining standing, namely that a plaintiff must demonstrate that it possesses a “real interest” in a proceeding beyond that of a mere intermeddler, and “a reasonable basis for his belief of damage.” *Id.* (citing *Ritchie v. Simpson*, 170 F.3d 1902, 50 USPQ2d 1023, 1025-26 (Fed. Cir. 1999)). A “real interest” is a “direct and personal stake” in the outcome of the proceeding. *Ritchie*, 50 USPQ2d at 1026.

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<sup>10</sup> Petitioner did not provide copies of the discovery requests or Respondents’ responses that correlate to these documents.

<sup>11</sup> Respondents raised an objection to these materials, for the first time in their trial brief, because they do not contain the date they were accessed and their source, e.g., website address. 16 TTABVUE 6-7. We find, however, that Respondents have waived this objection because the alleged deficiencies constitute procedural defects that can be cured so Respondents should have raised this objection before final briefing. *City Nat’l Bank OPGI Management v. GP Inc./Gestion OPGI Inc.*, 106 USPQ2d 1668, 1672 (TTAB 2013) (“Any shortcomings in respondent’s original submission ... under notice of reliance, such as its failure to identify the URL and when the document was actually accessed (either printed out or downloaded), are procedural deficiencies that were not timely raised by petitioner and thus have been waived.”); *see also* Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) § 707.02(b) (2019).

As noted above, Petitioner pleads that it has a personal interest in this proceeding because it owns a trademark application that was refused registration by the Office based on Respondents' registration, and that it will be damaged by the continued existence of Respondents' registration.<sup>12</sup> Although Petitioner did not submit any evidence to prove these allegations, Respondents' admission that the USPTO refused registration of Petitioner's mark based on a likelihood of confusion with Respondents' registered mark is sufficient to establish Petitioner's standing. *See Empresa Cubana del Tabaco*, 111 USPQ2d at 1062; *ShutEmDown Sports Inc. v. Lacy*, 102 USPQ2d 1036, 1041 (TTAB 2012) (evidence of Office action showing petitioner's pending application refused registration based on respondent's registration established standing); Trademark Rule 2.122(d).

### **III. Abandonment**

#### **A. Applicable Law**

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

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

15 U.S.C. § 1127.

Because a registration is presumed valid, 15 U.S.C. § 1057(b), the party seeking its cancellation must rebut this presumption by a preponderance of the evidence. *Cold*

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<sup>12</sup> 1 TTABVUE 3-6, ¶¶ 1, 3.

*War Museum v. Cold War Air Museum*, 586 F.3d 1352, 92 USPQ2d 1626, 1628 (Fed. Cir. 2009); *W. Fla. Seafood Inc. v. Jet Rests., Inc.*, 31 F.3d 1122, 31 USPQ2d 1660, 1665-66 (Fed. Cir. 1994). “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. 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). The burden of persuasion remains with the plaintiff to prove abandonment by a preponderance of the evidence.” *Noble House Home Furnishings, LLC v. Floorco Enters., LLC*, 118 USPQ2d 1413, 1417 (TTAB 2016) (citing *Imperial Tobacco Ltd. v. Philip Morris Inc.*, 899 F.2d 1575, 14 USPQ2d 1390, 1393 (Fed. Cir. 1990)).

We also point out that abandonment is a question of fact. *See Stock Pot Rest., Inc. v. Stockpot, Inc.*, 737 F.2d 1576, 222 USPQ 665, 667 (Fed. Cir. 1984). Any inference of abandonment must be based on proven fact. Section 45 of the Trademark Act. *See also Cerveceria Centroamericana S.A. v. Cerveceria India Inc.*, 892 F.2d 1021, 13 USPQ2d 1307, 1310 (Fed. Cir. 1989) (“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.”) (quoting *P.A.B. Produits et Appareils de Beaute v. Satinine Societa in Nome Collettivo di S.A. e. M.*

*Usellini*, 570 F.2d 328, 332-33, 196 USPQ 801, 804-05 (CCPA 1978)); *Stetson v. Howard D. Wolf & Assoc's*, 955 F.2d 847, 21 USPQ2d 1783, 1785 (2d Cir. 1992) (A party claiming that a mark has been abandoned must show “non-use of the mark by the legal owner and no intent by that person or entity to resume use.”).

### **B. No Prima Facie Showing of Abandonment**

Taken as a whole, the record falls far short of establishing any period of nonuse. The evidence does not support a finding that Respondents have abandoned the involved registered mark.

With respect to Respondents’ interrogatory responses, Petitioner argues that they “establish Respondent has not used its mark in commerce for many years, and still is not using its mark in commerce for the identified services in Class 35 . . . [and] are relevant to establishing the prima facie elements of Petitioner’s claim of abandonment.”<sup>13</sup> However, upon careful review of these responses, we do not find they support, let alone establish, a showing of abandonment. To the contrary, the responses actually support Respondents’ contention that the registered mark has not been abandoned and remains in use in commerce. For example, Respondents state the following:

[H]istorically products [sold, offered for sale, or intended to be offered for sale in connection with the term ORGANIC ZONE] included ice cream branded with Organic Zone (OZ) and featured the OZ logo. Currently Organic Zone branded hats, coffee mugs, organic coffee, and organically grown, Amish food safe wood products are for sale. We intend to raise funding and/or make an agreement to create an Organic Zone online either as a standalone aggregator type website or as marketing for a current site that carries organic goods. We intend to sell organic goods that include baby products,

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<sup>13</sup> 9 TTABVUE 3 (Petitioner’s Notice of Reliance, ¶ 3).

food and produce, cleaners and household products, clothes, and potentially all other organic products and brands that exist now or will exist in the future.

[Response to Interrog. No. 4];<sup>14</sup>

Marketing by the original registrants was to consumers seeking “Old Fashioned Organic Ice Cream” and other goods through the OZ café and to Organic food retailers including but not limited to food co-ops, Kwik Trip stores, grocers, and customers that purchase organic products. We now are targeting the vegan and vegetarian population as well with a focus on ecommerce. Our ideal target demographic is a family that believes in the benefits an organic lifestyle. Target demographics include consumers seeking organically grown, non GMO, pesticide, herbicide, and antibiotic free foods, household goods, and all other organic products carried by online and offline retailers or to create an online platform for organic goods.

[Response to Interrog. No. 5];<sup>15</sup>

The current registrants have made phone calls and emails to groups in violation reaching out to departments warning of cease and desist letters and/or emails that would be sent. Michael Bast contacted a nationwide retail grocery company on their use of the mark without permission and offered to negotiate with the company. This ultimately stopped their usage of registrants mark. He also contacted the Ofshtein Lawgroup in connection with an Organic Zone Café in New York. Michael Bast also used a service called “Jungle Scout” to track and identify products sold with “Organic Zone” and “My Organic Zone” in the name, did searches on Google, Bing, Ebay, Walmart.com, and the site “myorganiczone.com.” Michael Bast contacted Vio Ivanescu of My Organic Zone in regards to his use of the Mark using sources detailed above, and attempted to come to an amicable resolution. Registrants periodically search for new violators of their Mark.

[Response to Interrog. No. 7];<sup>16</sup> and

B) Products sold included but were not limited to ice cream branded with Organic Zone and using the OZ logo. One of the original creators Sue Sebion, an original registrant, has some information regarding the Mark, the ice cream, the ice cream recipe, and branding. Currently Organic Zone branded hats, coffee mugs, organic coffee, and organically grown Amish food safe wood products are for sale. We intend to create an Organic Zone online either as a standalone aggregator type website or as marketing for a current site that carries organic goods. We intend to sell goods including but not limited to baby products, food and produce, cleaners, household products, clothes, and potentially all other organic products that exist now or in the future.

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<sup>14</sup> *Id.* at 154-155.

<sup>15</sup> *Id.* at 156-157.

<sup>16</sup> *Id.* at 157.

C) Registrants use and have used the internet to promote the Mark Organic Zone. Social Media, websites, blogs, competitions at state and local fairs are all used to market and bring attention to the Organic Zone Mark. Registrants are continuing the pursuit of the best ways to market the Organic Zone Mark.  
[Response to Interrog. No. 10].<sup>17</sup>

These responses include specific information from Respondents regarding their own, and their predecessor-in-interest's, prior and current use of the involved mark. Respondents provide a list of past products and current products offered for sale, their marketing efforts, as well as efforts to police their mark. None of the responses persuades us that Respondents, or their predecessor-in-interest, have ceased use of the mark or that the involved mark was abandoned at any point. To the extent Petitioner believed there is ambiguity or inaccurate statements within the interrogatory responses, it had the option of serving additional discovery to flesh out such issues or taking the testimony of Respondents themselves.

The additional materials Petitioner submitted via the notice of reliance also do not support Petitioner's abandonment claim. The website printouts and internet screenshots are only probative for what they show on their face and we cannot rely on any statements contained within these documents for their truth. *WeaponX Performance Prods. Ltd. v. Weapon X Motorsports, Inc.*, 126 USPQ2d 1034, 1041 (TTAB 2018) ("Internet evidence is only admissible for what it shows on its face, and because it does not fall within an exception to the hearsay rule, will not be considered to prove the truth of any matter stated therein.") *See also* TBMP § 704.08(b) (2019)

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<sup>17</sup> *Id.* at 159-160.

“The probative value of Internet documents is limited. They can be used to demonstrate what the documents show on their face. However, documents obtained through the Internet may not be used to demonstrate the truth of what has been printed.”). Thus, the Facebook and ICANN WHOIS website printouts, without more, do not show that Respondents are not using their mark in commerce.

Petitioner’s arguments that Respondents have not come forward with “evidence that the Abandoned Mark was used between 2013 and 2018” or with “evidence [that] shows that respondents ever used the abandoned mark in connection with the services identified in the organic zone registration” miss the point that it is Petitioner that has the initial burden of establishing a prima facie case of abandonment.<sup>18</sup> In other words, if Petitioner cannot make such a showing, Respondents need not come forward with any evidence because their registration is presumed valid. 15 U.S.C. § 1057(b); *Cold War Museum*, 92 USPQ2d 1628. That is the case here. As indicated, the interrogatory responses do not assist Petitioner in helping show that Respondents, or their predecessor-in-interest, ceased using the mark in commerce in connection with the services listed in the registration. Rather, as mentioned, the responses contain information from Respondents regarding past and present use the mark in commerce.

Finally, we address Petitioner’s abandonment claim based on the sufficiency of the specimens of use submitted by Respondents’ predecessor-in-interest during the prosecution of the registration and Respondents’ specimen of use filed in connection

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<sup>18</sup> 12 TTABVUE 20-21.

with their Section 8 declaration in maintaining the registration.<sup>19</sup> As to the statement of use specimens, the question of their acceptability is solely an ex parte examination issue and does not constitute a valid ground for cancellation. *See Saint Gobain Abrasives Inc. v. Industrial Automation Systems, Inc.*, 66 USPQ2d 1355, 1359 (TTAB 2003); *Phonak Holding AG v. ReSound GmbH*, 56 USPQ2d 1057, 1059 (TTAB 2000); and *Century 21 Real Estate Corp. v. Century Life of America*, 10 USPQ2d 2034 (TTAB 1989). With respect to the adequacy of the specimen submitted with Respondents' Section 8 declaration, the Board does not have jurisdiction to review the propriety of a decision made by the Director of the USPTO in reviewing registration pursuant to Section 8. *Cf. Century 21 Real Estate Corp. v. Century Life of America*, 10 USPQ2d 2034, 2035 (TTAB 1989) (a plaintiff may not base a claim on purported error by the examining attorney reviewing an application).

In any event, the question of whether the specimens show the mark being used in commerce in connection with the services is not determinative of the abandonment claim. There is no presumption that the specimens constitute all of Respondents' evidence of use in commerce for the respective time periods. In other words, even if we were to find the specimens do not show use of the mark in connection with all or any of the services described in the registration, this does not mean that Respondents are without evidence of use of the mark in commerce for the services or that Respondents ceased using the mark in commerce in connection with the services.

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<sup>19</sup> *Id.* at 17-20.

**C. Conclusion -- Petitioner Has Failed to Carry Its Burden of Proof**

Respondents denied the salient allegations setting forth Petitioner's abandonment claim and thus Petitioner was put on notice that it had the burden of proving this claim. Because the evidence submitted by Petitioner does not support the allegations, we find that Petitioner has not carried its burden of demonstrating, by a preponderance of the evidence, that Respondents have abandoned their registered mark.

**Decision:** The Petition for Cancellation is denied.