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

Proceeding	92070634
Party	Plaintiff JNF LLC
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Registration No. 5,008,661 – HAPPIEST HOUR
Registration Date: July 26, 2016

_____)	
JNF, LLC)	
)	
Petitioner,)	
)	
v.)	Cancellation No. 92070634
)	
Harwood International Incorporated)	
)	
Registrant.)	
_____)	

**PETITIONER’S REPLY TRIAL BRIEF IN SUPPORT OF
ITS PETITION TO CANCEL**

I. INTRODUCTION

The Board should grant the Petition to Cancel. Despite Registrant's unsupported claims in its brief, some of the strongest pieces of evidence in this case remain entirely un rebutted. Registrant's brief is silent, for example, with respect to: Petitioner's customer's declaration; a nationwide, September 2, 2014, New York Times article; an August 24, 2014 Grubstreet article; and a September 7, 2014 press release. Registrant also fails to present any credible contrasting evidence of its own. Moreover, Registrant admits that Petitioner has standing, and that there is a likelihood of confusion between the marks.

Instead, Registrant makes a single argument (priority of use), for which its entire argument is built on a single document—an inadmissible Google street view image with an imprecise date. In Registrant's view, the "October 2014" date depicted on that image calls into question not only the restaurant founder's recollection about when the signage was installed, but invalidates this *entire* case. For good measure, Registrant throws in unsupported, false *ad hominem* accusations at Petitioner's founder.

Dates listed on historical Google images of street views are admittedly imprecise. As Google itself makes clear, the listed date "means that the images shown were captured on or before that date." Here, "October 2014" thus could mean either that the signage was installed in September 2014 (while the image was actually captured before the sign went up), or that the sign went up on October 2, 2014 (which still pre-dates Registrant's registration). In short, Google street views are not admissible "evidence" for a good reason, and the Board routinely refuses to consider such unauthenticated internet evidence as proof of priority.

In this case, the evidence speaks for itself. After taking many proactive and

documented steps, Petitioner’s restaurant dream culminated in a September 2014 soft opening—with some 200 guests, paid staff, press releases, printed menus, accepted reservations, publicity from the New York Times and other newspapers, and a successful restaurant journey that continues well into today. Meanwhile, Registrant stood by and did nothing for another year. The timeline of events strongly suggests that Registrant misappropriated Petitioner’s name after reading a New York Times article and rushed to register it. Unfortunately for Registrant, by the time of its registration, Petitioner’s restaurant was already operating.

Most notably, Registrant does not actually dispute that Petitioner’s soft opening took place in September 2014 but argues only that this does not establish priority because it was merely “a gathering of friends who did not pay for their food.” This ignores both the evidence and the precedent. Because Registrant fails to rebut or even address key evidence of Petitioner’s prior use, and Petitioner has met all the requirements to demonstrate priority of use, the Board should grant this Petition for Cancellation.

II. ARGUMENT

A. Petitioner Presented Credible, Unrefuted Evidence of Prior Use

Registrant fails to rebut the overwhelming evidence of Petitioner’s prior use and does not even challenge most of it. *See* Registrant’s Brief, Docket Item 37 at p. 10. Indeed, Registrant does not even address the New York Times or Grubstreet articles, credible testimony from a witness who attended Petitioner’s soft opening, and numerous other articles and press releases. [28 TTABVUE; Exhibit B, at 18-21; Exhibit C, at 22-24; Exhibit E, at 29-46; Exhibit F, at 47-51; Exhibit G, at 53-54]. Instead, Registrant faults Petitioner for not recalling specific details from seven years ago, including “what exactly took place on September 7, 2014.” *Id.* at pp. 9-

10, 13 (attempting to discredit John Neidich's because he could not recall every detail of 2014 events during his 2021 deposition).

In an effort to distract the Board from credible, unrefuted, and extensive evidence of Petitioner's prior use, Registrant resorted to attacking John Neidich's credibility and even improperly and falsely insinuating that Mr. Neidich has a criminal past. *See* Registrant's Brief, Docket Item 37 at p. 9, n. 2. These *ad hominem* attacks are misleading and rest entirely on one single issue. After Mr. Neidich testified that his restaurant had signage before October 2014, Petitioner confronted him with an unauthenticated Google street view map—falsely representing it to be an image definitively taken in “October 2014.” On that image, there was no signage. As discussed below, however, this is not reliable evidence because historical Google images such as this one do not bear precise dates. As Google itself clarifies, and as discussed below, the listed date can actually post-date the image capture date. Registrant's “key” evidence is thus not only unreliable but entirely inadmissible, leaving Mr. Niedich's credibility intact.

In addition to Mr. Niedich's testimony, moreover, there was uncontroverted testimony from another witness, which Registrant **does not even address**. Such deponent's “credible testimony, coupled with corroborating evidence, satisfies petitioner's burden of proof in showing, by a preponderance of the evidence, that it has priority of use.” *Kohler Co. v. Baldwin Hardware Corp.*, 82 USPQ.2d 1100, at 9 (T.T.A.B. 2007). Oral testimony, alone, “if sufficiently probative, is normally satisfactory to establish priority.” *Pamela Mayo a/k/a Gfire*, No. 9205062, 2015 WL 6166660, at *2 (Sept. 28, 2015) (citing cases); *Rlp Ventures, LLC*, No. 91240378, 2021 WL 252691, at *8 (Jan. 4, 2021) (Opposer established priority where “the declarations lack[ed] persuasive detail” but were “consistent and

uncontroverted in asserting personal knowledge of the use.”).¹

As its next diversion, Registrant tried to argue that the soft opening of a restaurant is not use “in the ordinary course of trade” but, rather, can only amount to use-analogous-to-trademark use. *See* Registrant’s Brief, Docket Item 37 at p. 10. This again, is false. To support this argument, Registrant claims that the Board previously considered the significance of the soft opening and outlined clear guidelines, namely: “In the situation where a restaurant is not fully operational, then the analysis shifts to whether there is use-analogous-to trademark use, since traditional use in commerce is not implicated.” *Id.* at p. 11 (citing *LP Global., Inc.*, 2018 WL 1327172, n.13 (Mar. 13, 2018)).

This is false. *LP Global* did not substantively address soft openings in general, but merely mentioned it in *dicta*. In fact, priority was not even in dispute in that case, so the Board simply commented in passing on the signage and on the soft opening—both occurring in January 2008—as being indicative of that date of first use. *LP Global., Inc.*, 2018 WL 1327172, *7-8.

In *LP Global*, use was not at issue because “Applicant [did] not argue that it is the senior user” and “all but concede[d] Opposer’s priority.” This “implicit concession of Opposer’s priority . . . established its priority by a preponderance of the evidence.” *Id.* at *8. Priority was not at issue because Opposer opened its restaurant in December 2007—which was undisputedly an entire month before Applicant. *Id.* at *2. Applicant had a permanent sign installed in January 2008, held a soft opening in January 2008, and held a grand opening in February 2008. *Id.* at *5. Thus the Board noted in passing that “the nature of Applicant’s claimed ‘soft opening’ . . . in

¹ Registrant focuses heavily on the signage of the restaurant. Given the above strong evidence of use, it is immaterial whether or not there was signage prior to October 6, 2014. [*See, e.g.*, 28 TTABVUE; Exhibit B, at 18-21; Exhibit C, at 22-24; Exhibit E, at 29-46; Exhibit F, at 47-51; Exhibit G, at 53-54].

January 2008 [was] unclear, but,” in any case, the “use of exterior signage . . . in January 2008 was sufficient to create rights in the mark as of then[.]” *Id.* at *5, n.13. Nowhere in its analysis did the Board create a “standard,” which somehow renders the soft opening of a restaurant as not being “in the ordinary course of trade.”

Registrant further tries to discredit Petitioner, by claiming that it did not present enough details from what occurred seven years ago and by arguing that the evidence it did present lacks details. For example, Registrant labeled old 2014 paystubs “scant evidence,” implying—without any factual support—that they are false. Yet, the law does not require “perfect” evidence, especially for events occurring seven years ago. Rarely does someone have a perfect recollection and all their documents from that many years ago. That is why the Board can “look at the evidence as a whole, as if each piece of evidence were part of a puzzle which, when fitted together, establishes prior use.” *West Florida Seafood Inc. v. Jet Restaurants Inc.*, 31 F.3d 1122, 31 USPQ.2d 1660, 1663 (Fed. Cir. 1994). And when the evidence is considered here, it is more than enough to show prior use.

Further, Registrant attempted to portray *The Blast Blow* as the case involving use “analogous to service mark use” and not a soft opening, “use in commerce” case. Registrant’s Brief, Docket Item 37 at p. 11. Registrant is wrong and the case speaks for itself. *The Blast Blow Dry Bar, LLC*, No. 91204769, 2014 WL 108522, *5 (Jan. 2, 2014) court clearly stated:

While applicant characterizes the Sikara services not as service mark use, but instead, at best, as use analogous to service mark use, we disagree. In fact, opposer provided hair styling services at the Sikara event and this, coupled with opposer’s earlier and simultaneous advertising of its services under the mark, constitutes ‘use in commerce,’ notwithstanding that the services were provided free of charge.

Id. (emphasis added). Hence, *The Blast Blow* case is about use in commerce. *See id.*

Finally, Registrant even went on to call Petitioner’s soft opening a “small gathering of

friends at no charge.” Registrant’s Brief, Docket Item 37 at p. 11. This flatly disregards uncontroverted evidence that approximately 200 guests attended Petitioner’s soft opening, tips were paid, and staff had been hired and paid. It also disregards *The Blast Blow*’s clear holding that use in commerce can be established even where “the services were provided free of charge.” *The Blast Blow Dry Bar, LLC*, 2014 WL 108522, *5 (emphasis added). There is uncontroverted evidence of prior use in commerce here, which Registrant failed to rebut.

B. In the Alternative, Petitioner’s Use-Analogous-to-Trademark Use Established Priority

Registrant acknowledges, as it must, that Petitioner can establish priority through prior use or, in the alternative, “through prior use analogous to trademark or service mark use, or any other use sufficient to establish proprietary rights.” See Registrant’s Brief, Docket Item 37 at p. 8 (citing *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1162 (Fed. Cir. 2002)). It then devotes the vast majority of its brief to this analysis. As Registrant’s own authority makes clear, this showing does not require direct proof of an association in the public mind. See *T.A.B. Sys. v. Pactel Teletrac*, 77 F.3d 1372, 1375, 37 USPQ.2d 1879, 1882 (Fed. Cir. 1996). And no “particular formality of use or display is necessary to establish trade name rights or rights analogous to a trademark.” 3 McCarthy on Trademarks and Unfair Competition § 20:53 (5th ed.).

Here, Petitioner met its burden to show both prior use and use-analogous-to-trademark use, which had a sufficient impact on the purchasing public. Specifically, evidence shows that, in September 2014 there were: numerous unrefuted, independent articles including the New York Times, Grubstreet, work by a PR agency, a press release, work by a menu design agency, salaries paid to staff, printed menus bearing the name “Happiest Hour,” restaurant visits from approximately 200 guests, a sign being ordered, and reservations being made and accepted.

There was also likely a sign installed, based on the testimony of John Neidich, to the best of his recollection.² Under the law, these are multiple alternative categories of use-analogous-to-trademark use.

In *Witco Corp.*, on which Registrant relies, the TTAB found that product guides and promotional literature “might well establish” priority. *Malcolm Nicol & Co. v. Witco Corp.*, 881 F.2d 1063, 1064 (Fed. Cir. 1989) (affirming TTAB’s grant of petition for cancellation). But the petitioner “can go further than that with direct testimony and evidence.” *Id.* Indeed, *Witco Corp.* went on to hold that “in relying on § 2(d) of the Lanham Act as a ground of opposition, it is not necessary that an opposer prove prior use of a similar term in a strict trademark sense.” *Id.* at 1065. Examples of use analogous to trademark use include use “in advertising brochures, in catalogues and newspapers, and in press releases and trade publications.” *Id.*

Indeed, testimony from only two witnesses regarding use, “corroborated by some of the documentary evidence,” is sufficed to establish priority. *Id.* Identical facts are present here: there were press releases, news articles, and a promotional draft menu, which all established priority. Petitioner’s Brief, Docket Item 36 at pp. 11-15. Additionally, Petitioner provided testimony from two witnesses, corroborated by documentary evidence, such as paystubs and dated menus. *Id.* Under Registrant’s own authority, this undisputed evidence constitutes use-analogous-to-trademark use and is sufficient to establish priority.

Registrant also relies on *T.A.B. Sys. v. Pactel Teletrac*, which similarly does not help its case. 77 F.3d 1372, 1377 (Fed. Cir. 1996). In *T.A.B. Sys.*, in a sharp contrast to this case, there

² Hence, Registrant’s argument of there being no “press release or news article [that] created an association in the minds of the purchasing public” or “any press release or news article [that] created a substantial impact on the purchasing public” is wrong, especially when the publications are as widespread as *The New York Times*. See Registrant’s Brief, Docket Item 37 at p. 16.

was no “air time or any newspaper space was purchased,” no ads placed, and no “indication of ‘readership.’” *See id.* As discussed in Petitioner’s brief at length, meanwhile, there is extensive evidence of both paid PR efforts and independent news articles here—which all predate Registrant’s filing date. *See* Petitioner’s Brief, Docket Item 36 at pp. 11-15. All of this is more than ample evidence of use-analogous-to-trademark-use. *See Grant St. Grp., Inc.*, No. 2005, 2009 WL 4086582, at *8 (Sept. 29, 2009) (“[A]nalogous use” can be shown with “indirect evidence regarding the opposer’s use of the word or phrase in advertising brochures, catalogs, newspaper ads, and articles in newspapers and trade publications”). The mountain of evidence is certainly enough use-analogous-to-trademark use to establish priority here. *See In Re Cedar Point, Inc.*, 220 U.S.P.Q. (BNA) ¶ 533 (T.T.A.B. Dec. 1, 1983) (citing cases) (“‘[U]se analogous to trademark use,’ . . . is sufficient” “for purposes of establishing priority in an inter partes proceeding before the Board,” even if not sufficient to show use in commerce).

When Petitioner’s evidence is viewed as a whole, the totality of circumstances shows both prior use, and use-analogous-to-trademark use, justifying canceling Registrant’s mark. *W. Fla. Seafood*, 31 F.3d at 1125–26 (Fed. Cir. 1994).

C. Google Street View Maps Are Inaccurate and Cannot Be Considered

The Board should deny Registrant’s request for judicial notice of Google Street View maps, which lack foundation, lack proper authentication, are hearsay, and have limited probative value. *See* Registrant’s Brief, Docket Item 37 at p. 11 (34 TTABVUE Exhibits I, J); F.R.E. 801, 901. Registrant attempts to use the alleged “Google Street View on October 2014” for two purposes: (1) to prove that Petitioner’s restaurant did not have signage in October 2014 and (2) to discredit John Neidich, who testified that, as best as he could recall, there was a sign in October.

As Google itself makes clear: the dates stated on its maps are neither precise, nor accurate: “When viewing historical images, *the date indicated on the time slider means that the images shown were captured **on or before that date.***” See “How Images Are Collected,” *Historical Images*, at www.support.google.com/earth/answer/6327779?hl=en#zippy=%2Cstreet-view-images%2Chistorical-images (last visited November 18, 2021) (emphases added). Once Google collects an image, it needs time to process and post it, including blurring faces and personal information. Without proper authentication, it is impossible to know whether the “October 2014” photo was, in fact, taken before October, such as in September (which would support Petitioner’s case and Mr. Neidich’s testimony).

Such materials are unreliable and cannot be considered to establish “use,” especially where they do not even bear a specific date. See 3 McCarthy on Trademarks and Unfair Competition § 20:126.50 (5th ed.) (Internet materials “are not admitted as evidence of the truth of what appears in them”); *Black & Decker Corp. v. Emerson Electric Co.*, 84 USPQ.2d 1482, 1495, 2007 WL 894416, *1 (T.T.A.B. 2007) (web page evidence did not prove use, did not establish that products were actually for sale, and is “normally not acceptable for a notice of reliance”); *Bb Online Uk Ltd.*, No. 91193054 91193815, 2012 WL 10702525, at *5 (Feb. 8, 2012) (internet archive “evidence is not of such a nature that it removes any genuine dispute with respect to priority of use.”).

A “Google Maps image must be authenticated in the same manner as any other photographic evidence before it is admitted in evidence.” *City of Miami v. Kho*, 290 So. 3d 942, 944 (Fla. Dist. Ct. App. 2019) (The plaintiff “did not present any evidence as to the operating capabilities or condition of the equipment used by Google Maps. There also was no testimony as to the procedures employed by Google Maps in taking the photograph.”). This rule is even more

important where the information on the map is used to authenticate not just the location but the *date* on which the image was purportedly taken.

In *Spiritline Cruises LLC*, Opposer sought “to rely on the Wayback Machine evidence ... not only for what these pages show on their face, but also to establish that third-party websites displayed [the name] *on various dates in the past.*” *Spiritline Cruises LLC*, No. 91224000, 2020 WL 636467, at *4 (Feb. 7, 2020) (emphasis in original). The Board made it clear that, to establish that these dates were accurate, “Opposer needed to, and properly did, use appropriate witness testimony to authenticate the printouts and lay the foundation to support that intended evidentiary use.” *Id.* Such authentication is lacking here. *See* 3 McCarthy on Trademarks and Unfair Competition § 20:126.50 (5th ed.) (“[T]o prove that the pages in fact displayed the marks on certain dates in the past, they must be authenticated by an affidavit from an appropriate employee of the Internet Archive.”).

Additionally, these exhibits are inadmissible hearsay because Registrant is attempting to use this map for the truth of the matter—by arguing that the “October 2014” date image is a true and accurate date of when there was no signage on the restaurant. *See id.* (“Because it is hearsay, internet evidence is not proof of the truth of anything stated in it.”). For all these reasons, the Board should strike these Exhibits and exclude Google maps from consideration.

D. Registrant’s Brief Makes Inaccurate and Unsupported Claims

Registrant’s brief is riddled with false assertions. For example, it falsely claims it “is undisputed that the Petitioner’s restaurant was not open for business on the date that Registrant filed its application on October 6, 2014.” Registrant’s Brief, Docket Item 37 at p. 8.

Registrant goes on to attack Petitioner’s credibility for its alleged refusal “to response [sic] to basic interrogatory requests on the opening of its restaurant.” *Id.* In doing so, it loses any

remaining credibility, since it knows full well it never moved to compel these responses. The Board cannot draw adverse inferences as to credibility against a party whose discovery responses were not timely compelled. *Seligman & Latz, Inc. v. Merit Mercantile Corp.*, 222 USPQ 720, 723 (TTAB 1984). Under a well-established precedent, a “party that receives responses it believes inadequate but fails to file a motion to test sufficiency of response, may not thereafter complain about its insufficiency.” *H.D. Lee Co. v. Maidenform Inc.*, 87 USPQ.2d 1715, 1719 (TTAB 2008) (emphasis added); *see also Time Warner Entertainment Co. v. Jones*, 65 USPQ.2d 1650, 1656 (TTAB 2002) (having failed to move to compel, defendant cannot later complain that interrogatory responses were inadequate); TBMP § 523.04 (“If a party that served a request for discovery receives a response . . . it believes to be inadequate, but fails to file a motion to challenge the sufficiency of the response, it may not thereafter be heard to complain about the sufficiency thereof.”).

Next, Registrant argues that the date of Petitioner’s restaurant’s opening must be presumed to fall on the last day of October because the initial registration—since corrected—did not specify the date. Registrant’s Brief, Docket Item 37 at p. 7. This argument is a red herring. As Registrant itself admits, Petitioner’s amendment (accepted by the PTO), “asserted a first use and first use in interstate commerce at least as early as September 7, 2014.” *Id.*

Finally, Registrant improperly challenges Petitioner’s July 2, 2021 Third Notice of Reliance as untimely, falsely claiming it was consented to “only to the extent that it was in response to any late discovery production by Registrant (which there was none).” *Id.* at p. 15, n. 3. This is a misrepresentation. On June 2, 2021, Registrant took a deposition of John Neidich, at which—for the first time—Registrant disclosed the exhibit it now tries to use in these proceedings. (Google maps—34 TTABVUE Exhibits I, J). It was in response to that new exhibit

that the Third Notice of Reliance was filed.

E. Registrant's Registration Is Void *Ab Initio*

The Registrant admits that the date of first use listed in the Registration Certificate is October 3, 2016, which renders its registration void. *See* Registrant's Brief, Docket Item 37 at p. 18. It is immaterial that Registrant *now* seeks to correct it. Registrant's failure to take *any* steps to correct this alleged "error" throughout these entire proceedings caused Petitioner to rely on this stated date, to its detriment. At this stage in the proceedings, this is not a simple error but a material error, which requires cancellation of Registrant's registration. This is because, where "correction of a USPTO error would result in a material change such that republication is required . . . , the error can be corrected only by canceling the registration as inadvertently issued and republishing the mark with the correct information." TMEP § 1609.10(a) (emphasis added). Then, if the new "registration is not successfully opposed, the USPTO will issue a new certificate of registration with a new registration date." *Id.* This is an alternative basis through which Petitioner has successfully established its rights to the mark at issue, and Respondent cannot avoid this bar.

III. CONCLUSION

Petitioner has met its burden to prove prior use in commerce, as well as use-analogous-to-trademark use. Therefore, the Board should grant the Petitioner's Petition for Cancellation and cancel Reg. No. 5,008,661.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **PETITIONER'S MAIN TRIAL BRIEF IN SUPPORT OF ITS PETITION TO CANCEL** was mailed by E-Mail on this 2nd day of December, 2021 to the following:

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