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

Proceeding	92071578
Party	Defendant We Sell Re Sell LLC
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Submission	Motion for Summary Judgment **Yes**, the Filer previously made its initial disclosures pursuant to Trademark Rule 2.120(a); OR the motion for summary judgment is based on claim or issue pre-clusion, or lack of jurisdiction. The deadline for pretrial disclosures for the first testimony period as originally set or reset: **11/24/2020**
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Date	11/22/2020
Attachments	Registrants Motion for Summary Judgement_We Sell Re Sell LLC_Cancella tion Proceeding 92071578.pdf(118218 bytes) Declaration for Registrant Jason Griewing.pdf(496815 bytes)

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

UT Vapes, LLC Petitioner, v. We Sell Re Sell LLC, Registrant.	Cancellation Proceeding No. 92071578 Registration No. 4704912 Trademark: DAB LAB

REGISTRANT'S MOTION FOR SUMMARY JUDGEMENT

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We Sell Re Sell LLC ("Registrant"), by and through their undersigned legal counsel submit Registrant's Motion for Summary Judgement in support of the denial of Petitioner's Petition to Cancel Registrant's trademark registration.

I. Introduction

Petitioner seeks cancellation of Registrant's registration for the trademark DAB LAB on grounds of abandonment.[1] Petitioner's contentions are unfounded and Petitioner has failed to meet their initial required burden to show that Registrant has ceased use of the trademark at issue.

II. Issue

Whether Petitioner has demonstrated a prima facie case through a preponderance of the evidence that Registrant has abandoned the trademark DAB LAB in connection with the goods listed on their trademark registration with the United States Patent and Trademark Office (herein USPTO) with no intent to resume use.

III. Argument

A. Legal Standard

A trademark shall be deemed to be abandoned when use of the trademark has been discontinued with intent not to resume such use. See 15 U.S.C. § 1127. "It has often been stated that in a cancellation proceeding, as distinguished from an opposition or an ex parte proceeding, where long established and valuable rights may be involved, cancellation must be granted with due caution and only after a most careful consideration of all the facts and

[1] TTABVUE 1.

circumstances." W.D. Byron & Sons v. Stein Bros. Mfg. Co., 377 F.2d 1001, 1003-04, 153 USPQ 749, 750 (CCPA 1967).

A trademark registered on the Principal Register is presumed to be valid. See 15 U.S.C. § 1057(b). "This court has consistently held that ownership of a trademark registration constitutes prima facie evidence of ownership and use of the mark." The Gillette Co. v. George P. Kempel, Doing Business as Shush Mfg. Co., 254 F.2d 402, 117 U.S.P.Q. 356 (CCPA 1958) (citing May Dept. Stores Co. v. Schloss Bros. Co. 234 F.2d 879, 880 (CCPA 1956)).

> All this leads to the conclusion that the filing of a regular application for the registration of a trademark supported by an affidavit under section 2 and accompanied by specimens of the mark as actually used should be taken as prima facie proof that the applicant was the owner of the mark on the date the application was filed, and that fact having been established the presumption must arise that the applicant continued to own the mark and to use it.
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> General Baking Co. v. Commander-Larabee, 82 F.2d 427, 431 (CCPA 1936) (quoting Rosenberg Co. v. Phillips-Jones Company, Inc., 1921 C.D. 81, 289 O.G. 411).

The same presumption applies after a registration has been granted and, accordingly, a registration is prima facie evidence of continuing use of the registered mark beginning on the filing date of the application on which the registration was granted. Charles of Ritz v. Elizabeth Arden Sales, 161 F.2d 234, 237, 73 USPQ 413 (CCPA 1947). The presumption of use emanating from the fact of registration relates back to the filing date of the application on which the registration is predicated. J.C. Hall Company v. Hallmark Cards, Inc., 340 F.2d 960, 962 (CCPA 1965) (citing American Throwing Co., Inc. v. Famous Bathrobe Co., Inc., 250 F.2d 377, 382 (CCPA 1957)).

As a result of the presumed validity of Registrant's USPTO trademark registration, the burden of persuasion rests with Petitioner, as they are the party seeking to cancel a valid trademark registration. Rivard v. Linville, 133 F.3d 1446, 1449, 45 USPQ2d 1374, 1376 (Fed. Cir. 1998); Cerveceria Centroamericana, S.A. v. Cerveceria India, Inc., 892 F.2d 1021, 1023, 13

USPQ2d 1307, 1311 (Fed. Cir. 1989). Petitioner has a "heavy burden" in order to establish abandonment of a trademark registered with the USPTO. See, e.g., Lipton Indus., Inc. v. Ralston Purina Co., 670 F.2d 1024, 1031, 213 USPQ 185, 191 (CCPA 1982); W.D. Byron & Sons v. Stein Bros. Mfg. Co., 377 F.2d at 1003-04, 153 USPQ at 750. In overcoming this presumption of validity Petitioner "bears the burden of proving a prima facie case of abandonment by a preponderance of the evidence." Yazhong Investing Ltd. v. Multi-Media Tech. Ventures, Ltd., 126 USPQ2d 1526, 1532 (TTAB 2018); OnLine Careline Inc. v. America Online Inc., 229 F.3d 1080, 56 USPQ2d 1471, 1476 (Fed. Cir. 2000). See also West Florida Seafood v. Jet Restaurants Inc., 31 F.3d 1122, 1125 (Fed.Cir.1994). Petitioner must meet their burden by laying an adequate foundation in proven fact. TV Azteca, S.A.B. de C.V. v. Jeffrey E. Martin, 128 USPQ2d 1786, 1789 (TTAB 2018). "Whenever an inference is based on pure speculation and "there is no basis . . . to infer nonuse," a prima facie case of abandonment must fail." Cerveceria Centroamericana, 892 F.2d at 1023, 13 USPQ2d at 1311 (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)).

If the petitioner fails to establish a prima facie case of abandonment by a preponderance of the evidence the burden of production does not shift to the registrant. See Rivard v. Linville, 133 F.3d at 1448; Cerveceria Centroamericana, 892 F.2d at 1023, 13 USPQ2d at 1311. Petitioner has relied upon unsubstantiated and groundless assertions in seeking cancellation of Registrant's trademark. As a result, Petitioner has not met their required burden.

IV. Conclusion

Registrant's trademark registration for DAB LAB is fully subsisting and presumed to be valid by its status with the USPTO. See 15 U.S.C. § 1057(b). Petitioner provides no factual support for their unsubstantiated claims. There can be no disputing that Registrant's trademark

registration for DAB LAB, U.S. Registration Number 4,704,912 is valid and "shall be prima facie evidence of the validity of the registered mark and of the registration of the mark, of the owner's ownership of the mark, and of the owner's exclusive right to use the registered mark in commerce . . .". 15 U.S.C. § 1057(b). "There being no evidence to the contrary, its registration proves ownership, and ownership implies use." See Rosengart v. Ostrex Co., 136 F.2d 249 (CCPA 1943) (citing Ely & Walker Dry Goods Co. v. Sears, Roebuck & Co., 90 F.2d 257 (CCPA 1937)). "The Supreme Court has stated that 'Congress says in a statute what it means and means in a statute what it says there.'" Singer v. Franklin Boxboard Co. (In re Am. Pad & Paper Co.), 478 F.3d 546, 554 (3d Cir. 2007) (quoting Hartford Underwriters Insurance. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000)). "[W]hen the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms." United States v. Ron Pair Enterprises, Inc., 489 U. S. 235, 241 (1989) (quoting Caminetti v. United States, 242 U. S. 470, 485 (1917)). Courts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry 'their ordinary, contemporary, common meaning.'" In Pioneer Investment. Services. Co. v. Brunswick Associates. Ltd. Partnership, 507 U.S. 380, 388 (1993) at 388 (quoting Perrin v. United States, 444 U.S. 37, 42 (1979)).

Contrary to Petitioner's assertions Mr. Griewing stated in his deposition testimony that he sold goods as set forth in the trademark registration in numerous years, including 2017 and 2019.[2] Mr. Griewing's oral testimony is "sufficiently probative" to establish that Petitioner has failed to meet their legal burden. DeVivo, 2020 USPQ2d 10153 at *3 (TTAB 2020). Moreover, Mr. Griewing's testimony has been clear and has not been contradicted by Petitioner. See Kemi Organics, LLC v. Rakesh Gupta, 126 USPQ2d 1601, 1608 (TTAB 2018). As Petitioner failed to meet their burden in establishing a prima facie case of abandonment by a preponderance of the

[2] Id. at 19 ¶ 4-16.

evidence, the burden of production does not shift to the respondent. See Rivard v. Linville, 133 F.3d 1446, 45 USPQ2d 1374, 1376 (Fed. Cir. 1998); Cerveceria Centroamericana, 892 F.2d at 1023, 13 USPQ2d at 1311. Nonetheless, Registrant has included a declaration from Jason Griewing with this instant motion. If any doubt exists regarding the status of Registrant's Trademark Registration and Registrant's intention to resume use of Registrant's Trademark, Mr. Griewing's declaration can only serve to eradicate any such doubt.

Abandonment is a question of fact, therefore, any inference of abandonment must be based on proven fact. Cerveceria Centroamericana, 13 USPQ2d at 1311. The record is clear that Petitioner has failed to meet the heavy burden of demonstrating "a prima facie case of abandonment proven in fact through a preponderance of the evidence." See Yazhong Investing Ltd. v. Multi-Media Tech. Ventures, Ltd., 126 USPQ2d at 1532; TV Azteca, S.A.B. de C.V. v. Jeffrey E. Martin, 128 USPQ2d at 1789. Registrant's certificate of registration constitutes prima facie evidence of ownership and ownership imparts prima facie evidence of use even though there be no evidence of record relative to such use." J.C. Hall Co. v. Hallmark Cards, Inc., 340 F.2d at 962-63. Registrant is entitled to rely upon their valid and subsisting USPTO registration, and should not be penalized for choosing to assert such benefit of their trademark registration.

Therefore, Registrant respectfully asserts that the Board should deny Petitioner's Petition to Cancel Registrant's trademark registration.

Dated: November 22, 2020

Respectfully submitted,

We Sell Re Sell LLC
By its attorney

/Jeffrey Sturman/
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CERTIFICATE OF SERVICE

I, Jeffrey Sturman, as attorney for We Sell Re Sell LLC ("Registrant") hereby certify that a true and complete copy of Registrant's Motion for Summary Judgement have been served upon Petitioner by sending the documents on November 22, 2020 via email to: aweintraub@weintraubgroup.com.

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DECLARATION OF JASON GRIEWING

I, Jason Griewing, declare the following:

1. I am competent to make this declaration.
2. I have personal knowledge of the facts set forth herein and can asset to such facts.
3. I am the owner of the registration for the trademark DAB LAB, in connection with the goods listed on United States Patent and Trademark Office ("USPTO"), U.S. Registration Number 4704912 ("the DAB LAB trademark").
4. I have used the DAB LAB trademark in commerce and made the goods listed in U.S. Registration Number 4704912 available to the consuming public in connection with the DAB LAB trademark since at least as early as December 10, 2014.
5. I have continued to make the goods listed in U.S. Registration Number 4704912 available to the consuming public in connection with the DAB LAB trademark since at least as early as December 10, 2014 through e-commerce and brick and mortar retail stores.

6. Despite allegations to the contrary, at no time have I abandoned the DAB LAB trademark in connection with the goods listed on U.S. Registration Number 4704912.
7. Despite allegations to the contrary, I have continuously maintained my intention to continue such use in commerce of the DAB LAB trademark in connection with the goods listed on U.S. Registration Number 4704912.

Dated this 22 day of November, 2020.

Declarant Signature

Jason Grieving

Declarant Name