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

Proceeding	92071578
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

UT Vapes, LLC Petitioner, <p style="text-align: center;">v.</p> We Sell Re Sell LLC, Registrant.

Cancellation Proceeding No. 92071578

 Registration No. 4,704,912
 Trademark: DAB LAB

REGISTRANT'S RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGEMENT

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I. Introduction

On November 12, 2020, UT Vapes, LLC (“Petitioner”) filed a Motion for Summary Judgement under Rule 56 of the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 56(a); 37 C.F.R. §2.127. Registrant, We Sell Re Sell LLC, (“Registrant”) by and through its counsel, Sturman Law, LLC, files this Response to Opposer’s Motion for Summary Judgement. As detailed infra, Petitioner has not met their legal burden in seeking Summary Judgment in their favor. Therefore, Petitioner respectfully asks the Board to deny Registrant’s Motion for Summary Judgement.

II. Argument

A. Legal Standard for Summary Judgment

Summary judgment is appropriate when the record shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See Fed. R.

Civ. P. 56(c); Lincoln Logs Ltd. v. Lincoln Pre-Cut Log Homes, Inc., 971 F.2d 732, 734 (Fed. Cir. 1992). The party moving for summary judgment has the initial burden of proof to demonstrate that there is no genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Sweats Fashions Inc. v. Pannill Knitting Co., 833 F.2d 1560, 4USPQ2d 1793 (Fed. Cir. 1987). Petitioner's Motion for Summary Judgment is based entirely on conjecture and contains false assertions, and statements which have no bearing on the Motion, nor the proceeding itself.^{1 2} A dispute as to a material fact issue is genuine only if a reasonable fact finder viewing the entire record could resolve the dispute in favor of the nonmoving party. See Olde Tyme Foods Inc. v. Roundy's Inc., 961 F.2d 200, 22 USPQ2d 1542, 1544 (Fed. Cir. 1992); Opryland USA Inc. v. Great American Music Show Inc., 970F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992). The evidentiary record must be viewed in a light that is most favorable to the non-movant, and all inferences must be drawn in favor of the non-movant. See Lloyd's Food Products Inc. v. Eli's Inc., 987 F.2d 766, 25USPQ2d 2027 (Fed. Cir. 1993).

B. Petitioner's Stated Issues

1. Was the Application for Registration filed by Registrant void ab initio?

Registrant objects to the inclusion of new allegations that were not part of the Petition to Cancel filed in this matter. Making suching allegations for the first time in a motion seeking summary judgment does not provide a party with fair notice. See P.A.B. Produits et Appareils de Beaute v. Satinine Societa In Nome Collettivo di S.A. e.M. Usellini, 570 F.2d 328, 196 USPQ 801, 804 (CCPA 1978); Freki Corp. v. Pinnacle Entertainment, Inc., 126 USPQ2d 1697, 1702

¹ Petitioner did not "need" to file a Motion to Compel, and was advised by the Board that a good faith effort, (ie. more than a single email) should be made prior to filing such a motion. See TTABVUE 17, pg. 2 (citing Trademark Rule 2.120(f)(1). Hot Tamale Mama...and More, LLC v. SF Investments, Inc., 110 USPQ2d 1080, 1081-82 (TTAB 2014); Giant Food, Inc. v. Standard Terry Mills, Inc., 231 USPQ 626, 632 (TTAB 1986)).

² Petitioner's states in their Motion that Registrant's decisions related to representation by legal counsel, and decision to enter an appearance pro se at one point is "noteworthy". However, this statement is set forth without any rationale as to how this is noteworthy, nor how such matters are germane to this instant motion or this proceeding.

(TTAB 2018). The Board continues to refuse to hear unpleaded allegations in the manner that Petitioner has set forth such claims. UVeritech, Inc. v. Amax Lighting, Inc., 115 USPQ2d 1242, 1244 (TTAB 2015); Hornby v. TJX Companies Inc., 87 USPQ2d 1411, 1415 (TTAB 2008). Registrant was not provided with a fair opportunity to defend against such claims. See Levi Strauss & Co. v. R. Josephs Sportswear Inc., 28 USPQ2d 1464, 1471 n.11 (TTAB 1993). As Petitioner's claims are "manifestly untimely", Registrant objects to any consideration given to such claims in this matter. Kohler Co. v. Baldwin Hardware Corp., 82 USPQ2d 1100, 1103 n.3 (TTAB 2007). Registrant addresses Petitioner's arguments without waiving any objections.

Petitioner did not plead any allegations related to the dates of first use, nor has any amended Petition been filed. Further, the time to file any such amendments has passed. A motion for leave to amend should be filed at the time that such grounds for amendment become apparent. See Media Online Inc. v. El Clasificado Inc., 88 USPQ2d 1285, 1286 (TTAB 2008); Trek Bicycle Corp. v. StyleTrek Ltd., 64 USPQ2d 1540, 1541 (TTAB 2001). Dilatorily filings in such a manner are contrary to the spirit of Rule 15(a) of the Federal Rules of Civil Procedure. See Capital Speakers Inc. v. Capital Speakers Club of Washington D.C. Inc., 41 USPQ2d 1030, 1033 (TTAB 1996).

Registrant filed an intent to use trademark application under Section 1(b) of the Lanham Act. On December 10, 2014, Registrant filed a Statement of Use and accompanying specimen, which were accepted by the USPTO and resulted in the issuance of U.S. Registration Number 4704912. These dates are "immaterial to [the] registration application", and no evidence has been presented to the contrary that shows that the trademark was not being used in connection with the applied for goods at the time the Statement of Use was filed. Pony Exp. Courier Corp. of Am. v. Pony Exp. Delivery Serv., 872 F.2d 317, 319 (9th Cir. 1989); see also Hiraga v. Arena, 90 USPQ2d 1102, 1107 (TTAB 2009); CarX Serv. Sys., Inc. v. Exxon Corp., 215 USPQ 345, 351 (TTAB 1982). Even if Registrant had filed on an intent to use basis, the USPTO "gives no consideration to alleged dates of first use in determining whether conflicting marks should be

published for opposition.” Colt Industries Operating Corp. v. Olivetti Controllo Numerico S.p.A., 221 USPQ 73, 76 (TTAB 1983).

Registrant objects to Petitioner’s attacks on its registration based upon allegations that were not made on the record prior to in Petitioner’s Motion. Registrant again addresses such allegations without waiving any objections. Nonetheless, such ex-parte matters would have no bearing on this proceeding. 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); Century 21 Real Estate Corp. v. Century Life of America, 10 USPQ2d 2034 (TTAB 1989).

2. Has Registrant failed to have sales in interstate commerce for more than three years?

Despite continued assertions by Petitioner as detailed and objected to supra, the dates listed on the Statement of Use that Petitioner continues to reference are not at issue in this matter. Furthermore, Petitioner has made of record the entire deposition of Mr. Griewing, yet neglects to mention why the evidentiary record and documents produced in discovery were so limited. Mr. Griewing explained in his deposition testimony that records which he had in storage were discarded, however, not by Mr. Griewing himself, and he stated that he “lost pretty much everything I had” including invoices.³ ⁴ Petitioner asserts that “[s]ince 2016, there are no provable uses of the mark by Registrant”. Petitioner had the opportunity to ask Mr. Griewing questions regarding any such concerns, and they did. However, 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 2019.⁵ 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

³ Dep. Trans. P. 16, ¶¶ 19-21, 23-25.

⁴ Id. at 18-19 ¶¶ 20-3.

⁵ Id. at 19 ¶¶ 4-16.

has been clear and has not been contradicted by Petitioner. See Kemi Organics, LLC v. Rakesh Gupta, 126 USPQ2d 1601, 1608 (TTAB 2018).

Petitioner further takes issue with the specific locations that such goods were sold or offered for sale. The scope of federal trademark jurisdiction is commerce that may be regulated by the U.S. Congress. TBMP §901.03 (citing 15 U.S.C. §1127). Petitioner's arguments regarding interstate commerce vs. intrastate commerce are improper. The United States Supreme Court long ago made clear that the issue is the impact on commerce taken in the aggregate. See Wickard v. Filburn, 317 U.S. 111 (1942). The Federal Circuit has recently reinforced this principle. See Christian Faith Fellowship Church v. Adidas AG, 841 F.3d 986, 993 120 USPQ2d 1640, 1645 (Fed. Cir. 2016); see also Larry Harmon Pictures Corp. v. Williams Rest. Corp., 929 F.2d 662, 18 USPQ2d 1292 (Fed. Cir. 1991).

3. Has Registrant abandoned the mark by virtue of three years of non-use without any evidence of intent to resume use?

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 circumstances." W.D. Byron & Sons v. Stein Bros. Mfg. Co., 54 CCPA 1442, 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 USPQ 356 (CCPA 1958) (citing May Dept. Stores Co. v. Schloss Bros. Co. 234 F.2d 879, 880 (CCPA 1956)).

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. 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). See also 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, 144 USPQ 435, 438 (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, 31 USPQ2d 1660, 1662 (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 a registrant. See Rivard v. Linville, 133 F.3d at 1448, 45 USPQ2d 1374; 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 registration. As a result, Petitioner has not met their required burden.

III. Conclusion

Registrant is entitled to the presumptions afforded to them on the basis of their valid and subsisting registration with the United States Patent and Trademark Office, Registration Number 4704912. This registration “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., 30 CCPA 1046, 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)).

As Petitioner has failed to meet their burden in establishing a prima facie case of abandonment by a preponderance of the 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. Abandonment is a question of fact, therefore, any inference of abandonment must be based on proven fact. Cerveceria Centroamericana, 13 USPQ2d at 1311. 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 Motion for Summary Judgements and Petition to Cancel Registrant’s trademark registration.

Dated: November 22, 2020

Respectfully submitted,

We Sell Re Sell LLC
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CERTIFICATE OF SERVICE

I, Jeffrey Sturman, as attorney for Registrant, We Sell Re Sell LLC, hereby certify that a true and complete copy of Registrant's Response to Petitioner's Motion for Summary Judgement has been served upon Petitioner by sending the filed documents on November 22, 2020 to Petitioner's legal counsel via the correspondence email address as listed on TTABVue, aweintraub@weintraubgroup.com.