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**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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*Henri Selmer Paris, S.A.S.*
*v.*
*Karel Goetghebeur*

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Cancellation No. 92074077

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Michael Culver, of Millen, White, Zelano & Branigan, P.C.,
for Henri Selmer Paris, S.A.S.

Kathleen Paisley, of JonesSpross,
for Karel Goetghebeur.

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Before Lykos, Cohen, and Casagrande,
Administrative Trademark Judges.

Opinion by Casagrande, Administrative Trademark Judge:

Karel Goetghebeur (Respondent) owns Registration No. 4868779 for the standard-character mark ADOLPHE SAX & CIE for goods identified as "musical instruments," in International Class 15.[1]

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[1] This registration issued on December 15, 2015, on the Principal Register, based on a November 3, 2014, request for extension of protection of International Registration No. 1228257 under Section 66(a) of the Trademark Act, 15 U.S.C. § 1141f(a). The registration disclaims exclusive rights in the term "CIE," which the registration states translates to "CO." The registration contains a statement that "the name(s) … shown in the mark does not

Henri Selmer Paris, S.A.S. (Petitioner) has petitioned to cancel the registration, claiming that Respondent abandoned the registered mark.[2] In his answer, Respondent admitted that he is a saxophone manufacturer located in Belgium with a showroom in Bruges, but otherwise denied the salient allegations.[3] Only Petitioner submitted evidence during its trial period. Petitioner and Respondent filed trial briefs, and Petitioner filed a Reply.[4] In its Trial Brief, Petitioner limited its abandonment claim to the period between December 15, 2015, and April 28, 2020 (the period between the issuance of the registration and the filing of this Petition).[5] The case is ready for decision. For the reasons set forth below, we deny the Petition.

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identify a particular living individual." The USPTO accepted Respondent's Section 71 Declarations of Use in 2022 and 2026.

[2] *See* 1 TTABVUE 5-6 (Count II, 15 U.S.C. § 1064(3)). References to the record in this case cite to the Board's TTABVUE electronic docket system. The number preceding "TTABVUE" represents the docket number assigned to the cited filing in TTABVUE, and any number immediately following "TTABVUE" identifies any specifically-cited page(s). The Petition attached what was alleged to be a webpage from Respondent's website. But Petitioner did not introduce it during its period for taking testimony, so it is not part of the trial record. *See* Trademark Rule 2.122(c), 37 C.F.R. § 2.122(c).

[3] *See* 5 TTABVUE. Under the heading "Affirmative Defenses," Respondent asserts no actual affirmative defenses. Respondent does state: "The allegations in the Petition fail to state a claim for which relief can be granted." Though a defense, this technically isn't an **affirmative** defense. *Shenzhen IVPS Tech. Co. v. Fancy Pants Prods., LLC*, No. 91263919, 2022 WL 16646840, at *1 n.5 (TTAB 2022). In any event, Respondent didn't assert it at trial, so it's forfeited. *See, e.g.*, *Keystone Consol. Indus., Inc. v. Franklin Invest. Corp.*, No. 92066927, 2024 WL 3771168, at *2 (TTAB 2024).

The Answer also purports to "reserve[ ] all affirmative defenses under Rule 8(c) of the Federal Rules of Civil Procedure and any other defense at law or at equity that may now exist or in the future be available based on discovery and further factual investigation." This, too, is improper. *See, e.g.*, *Made in Nature, LLC v. Pharmavite LLC*, No. 91223352, 2022 WL 2188890, at *3 (TTAB 2022). Fed. R. Civ. P. 15 governs amendment of pleadings. A purported reservation in a pleading is meaningless.

[4] *See* 83 TTABVUE (Petitioner's Trial Brief); 89 TTABVUE (Respondent's Trial Brief); 90 TTABVUE (Reply).

[5] *See* 83 TTABVUE 6, 7, 10, 11. Count I of the Petition alleged that Respondent had not used the mark "in the United States for at least the last three (3) consecutive years," claiming

## I. The Record

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the entire file of Respondent's registration. In addition, Petitioner submitted the following during its trial period:

- The Declaration of John J. O'Malley, the attorney of record for Petitioner's pending Application Serial No. 79258499 filed April 4, 2019, for the mark ADOLPHE SAX, which attaches an Office Action refusing registration under Trademark Act Section 2(d) based on Respondent's registration;[6]

- A First Notice of Reliance attaching, inter alia, a partially redacted copy of Respondent's Responses to Petitioner's First Set of Requests for Admission;[7]

- A copy of the transcript of the trial deposition of Respondent, with exhibits;[8]

- The testimony declaration of Geoffrey Soler, Managing Director of Petitioner;[9] and

- A Second Notice of Reliance attaching a partially redacted copy of Respondent's Answers to Petitioner's First Set of Interrogatories Nos. 5, 27-31, 34, and 41.[10]

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that this, too, was a basis for cancellation under Section 1064(3). That section, however, lists no "non-use" claim. (Section 1064(6) allows cancellation of registrations for marks that have never been used, but Petitioner did not allege Respondent never used the mark.) In any event, Petitioner advanced only its abandonment claim at trial, so any alternative "non-use" claim is forfeited. *See, e.g.*, *WeaponX Performance Prods. Ltd. v. Weapon X Motorsports, Inc.*, No. 91221553, 2018 WL 1326374, at *2 (TTAB 2018). We note that Petitioner checked off "fraud" on the ESTTA cover sheet for the Petition but did not assert any fraud claim.

6 *See* 56 TTABVUE.

7 *See* 57 TTABVUE.

8 *See* 58 TTABVUE.

9 *See* 59 TTABVUE.

10 *See* 60 TTABVUE.

Although Respondent submitted no evidence during its trial period, the parties jointly filed two stipulations, one of which, as we detail below, concerned Respondent's use of the mark.[11]

## II. Entitlement to invoke the cancellation statute

Before we begin, we need to make sure that the cancellation statute entitles Petitioner to have instituted and prosecuted this proceeding. Otherwise, we cannot rule on Petitioner's abandonment claim. Section 14 of the Trademark Act, 15 U.S.C. § 1064, authorizes petitions for cancellation to be filed "by any person who believes that he is or will be damaged … by the registration of a mark." To be so entitled, a party petitioning for cancellation of a registration must plausibly allege and demonstrate: (1) an interest within the zone of interests protected by the cancellation statute, i.e., a direct and personal stake in the outcome of the proceeding; and (2) a reasonable belief in damage proximately caused by registration of the mark in violation of the statute. *Curtin v. United Trademark Holdings, Inc.*, 137 F.4th 1359, 1364-65, 1367 (Fed. Cir. 2025) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 120-37 (2014)).

Petitioner alleges that the USPTO refused registration of its pending Application Serial No. 79258499 for the mark ADOLPHE SAX because of a likelihood of confusion with Respondent's registered mark. At trial, Petitioner submitted a declaration attesting to that fact, attaching the Office Action refusing registration based on

[11] *See* 79 TTABVUE. The other stipulation pertained to the re-designation of invoices as non-confidential and publicly available.

Respondent's registration.[12] Accordingly, Petitioner has established that it is statutorily entitled to pursue this cancellation proceeding. *See, e.g.*, *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 1375 (Fed. Cir. 2020) ("A petitioner may demonstrate a real interest and reasonable belief of damage where the petitioner has filed a trademark application that is refused registration based on a likelihood of confusion with the mark subject to cancellation.").

## III. Analysis

Under Section 14(3) of the Trademark Act, 15 U.S.C. § 1064(3), "[a] petition to cancel a registration of a mark … may … be filed … : (3) [a]t any time if the registered mark … has been abandoned … ." The definitional section of the Act, 15 U.S.C. § 1127, sets forth the definition of "abandoned":

> A mark shall be deemed to be "abandoned" if … : (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 the ordinary course of trade, and not made merely to reserve a right in a mark.

"There are two elements to a claim for abandonment: (1) nonuse; and (2) intent not to resume use." *Tiger Lily Ventures Ltd. v. Barclays Cap. Inc.*, 35 F.4th 1352, 1360 (Fed. Cir. 2022). Abandonment is a question of fact that a petitioner must prove by a preponderance of evidence. *See, e.g.*, *Rivard v. Linville*, 133 F.3d 1446, 1449 (Fed. Cir. 1998). But the statute gives petitioners a potential shortcut: if they can show the

[12] *See* 56 TTABVUE.

mark wasn't used for three straight years, the law presumes abandonment, and the mark owner has to come forward with evidence to overcome that presumption. *See On-Line Careline, Inc. v. Am. Online, Inc.*, 229 F.3d 1080, 1087 (Fed. Cir. 2000) (the statute "create[s] a rebuttable presumption that the trademark owner has abandoned the mark without intent to resume use. The burden then shifts to the trademark owner to produce evidence that he either used the mark during the statutory period or intended to resume use.") (citations omitted). Thus, if Petitioner makes out a prima facie case, it would need to address intent only if Respondent rebutted the prima facie case with evidence that negated such intent. *See, e.g.*, *Rivard*, 133 F.3d at 1449.

Petitioner here does not even attempt to prove the second element of an abandonment claim (intent not to resume use), instead putting all its eggs in the "presumption" basket. Petitioner argues that the evidence in this case "establishes the presumption of abandonment through non-use of the mark … ."[13] The wrinkle here, however, is that there **is**, in fact, evidence of use in the record. As stipulated by the parties:

> The parties jointly stipulate that the registrant sold four saxophones identified by the mark at issue to U.S. residents from the time of the issuance of the registration of the mark until the initiation of this cancellation proceeding, and these four sales are represented by the invoices found at Bates numbers KG 000286 through -289. The parties stipulate that these sales constitute use of the mark in commerce.[14]

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[13] *See* 83 TTABVUE 11; *see also id.* at 9.

[14] *See* 79 TTABVUE 2; 58 TTABVUE 32-34 (attaching KG 000286-89 as exhibits to the deposition of Respondent). KG 000286 shows an invoice dated 2019; KG 000287 shows an invoice dated 2018; KG 000288 shows an invoice dated 2017; and KG 000289 shows an invoice dated at the end of 2016/beginning of 2017. Interestingly, there is another invoice for one

Notwithstanding this stipulation of use, Petitioner insists that the presumption still applies, arguing that these instances of use do not constitute "bona fide use of such mark made in the ordinary course of trade," as set forth in the statutory definition of "abandonment," because they are "de minimis, sporadic, casual, nominal, or isolated."[15]

For support, Petitioner leans heavily on the Board's recent precedential decision in *Adamson Sys. Eng'g, Inc. v. Peavey Elecs. Corp.*, No. 92076586, 2023 WL 7274674 (TTAB 2023).[16] In *Adamson*, the issue was whether the respondent's use of its CS mark from 2015-2020 in connection with amplifiers constituted "bona fide use … in the ordinary course of trade." There, the evidence showed, *inter alia*, that:

- The respondent's amplifiers were made in China since the early 1990s or early 2000s (*see* 2023 WL 7274674, at *12);
- The respondent's product catalogs stopped listing CS amplifiers after 2013 (*see id.*);
- In 2015, one of the respondent's customer service reps recommended another brand of amplifiers because the respondent was "possibly out of stock" (*see id.*);
- The respondent produced no actual invoices but had spreadsheets of domestic sales of three amplifiers in 2016 and 2017, but none in 2018, 2019, or 2020. There was also one sold in 2021 (*see id.*);
- There was also a document listing "single-digit sales to two Puerto Rican dealers—one in 2016 and the other in 2020," but these sales weren't on the domestic spreadsheet (*see id.* at *13);

saxophone appearing at 58 TTABVUE 32 (with Bates-stamp KG 000285) that is dated 2015. While this Bates number is outside the scope of the stipulation, it is in the record and there is nothing indicating that it is not genuine or is disputed in some way.

[15] *See* 83 TTABVUE 9.

[16] *See* 83 TTABVUE 9-11; 90 TTABVUE 10-11.

- Recent notes that were hand-written by two dealers attested that each had one amplifier in stock (*see id.*);

- The respondent's website, in February 2021, "stated that its CS amplifiers were no longer available, and urged customers to 'check out' other products." *See id.*

The Board found, based largely on those facts, that the respondent's sales of amplifiers bearing the mark fell short of the statutory standard of "bona fide use made in the ordinary course of trade." *See id.* at *14.

While the stipulated four saxophone sales during the challenged period (2015-2020) are on par with the sales numbers in *Adamson*, a few key differences in the cases jump out. First, unlike in *Adamson*, there **are** invoices of Respondent's U.S. saxophone sales.[17] Second, in *Adamson*, there was evidence that the respondent stopped advertising the amplifiers with the mark, had a representative recommend another brand because the amplifiers with the mark were out of stock, and stated on its website that the amplifiers with the mark were no longer available. And third, Respondent here is an individual, as opposed to a sizeable company.[18] What is "the ordinary course of trade" for a sizeable company is unlikely to be the same for an individual.

Those facts in *Adamson* undermined the respondent's attempt to prove that its low number of CS amplifier sales were nevertheless "in the ordinary course of trade."

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[17] *See* 58 TTABVUE 32-34.

[18] The Petition alleges that "[t]elephone calls were placed to Registrant" at the Belgium phone number listed on Respondent's website and that "[a]ccording to Registrant, he makes all ADOLPHE SAX & CIE brand saxophones himself by hand." 1 TTABVUE 4-5. At trial, Petitioner did not introduce evidence indicating that Respondent's business was, in fact, significantly larger than the Petition alleged.

Instead, they "evince[d] a purposeful drawing-down of domestic CS amplifier sales." 2023 WL 7274674, at *15. Here, in contrast, while the numbers are low, there's nothing that would show that Respondent's U.S. sales were stopped or were purposefully being "drawn-down." Though Respondent himself put in no evidence, Petitioner put in Respondent's deposition transcript, and there is nothing in that testimony even vaguely intimating that Respondent's sales were made in anything other than the ordinary course of trade. Indeed, Respondent's testimony suggests that his use of the mark continues as it did and there has not been any drawing-down. For instance, he:

- agreed at his February 2024 deposition that prices for his saxophones "**are** posted" on his website;[19] and
- agreed when asked whether his posts about his saxophones "on social media, including YouTube, Facebook, et cetera … **[a]re** intended for a worldwide audience" that includes "the audience in the United States."[20]

It is significant that this testimony is phrased in the present tense. Similarly, Respondent was asked "do you have" employees to assist with manufacturing and marketing—again, present tense—to which Respondent agreed that he does.[21] Use of the present tense is consistent with an ongoing musical instrument manufacturing business, not one being drawn-down.

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[19] *See* 58 TTABVUE 10 (emphasis added).

[20] *Id.* at 20-21. Respondent agreed that he has done no advertising on U.S. radio and television. *See id.* at 23. If Respondent were a sizeable corporation, as was the respondent in *Adamson*, this fact might have been significant. But Respondent is an individual, so it's hard to see how this moves the needle here.

[21] *See id.* at 24-25.

In short, the facts here differ significantly from the key facts that led the Board in *Adamson* to find that the small number of sales weren't bona fide uses of the mark in the ordinary course of trade. Respondent's U.S. sales are small, but, critically, they've never stopped (as Petitioner concedes), and we do not see how they were made in anything other than the ordinary course of Respondent's modest trade. *See, e.g.*, *Tiger Lily*, 35 F.4th at 1360 ("even limited use can be sufficient to avoid a finding that use of a mark has been 'discontinued' under the statute) (citing *Person's Co. v. Christman*, 900 F.2d 1565, 1571 (Fed. Cir. 1990) ("Although sales … were often intermittent and the inventory … remained small, such circumstances do not necessarily imply abandonment. There is also no rule of law that the owner of a trademark must reach a particular level of success, measured either by the size of the market or by its own level of sales, to avoid abandoning a mark.") (citation omitted)); *see also* 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 17:14 (5th ed.) (June 2026 update) ("Intermittent periods of nonuse or low-level use do not result in abandonment if the business is more or less continuous.").

In summary, the record shows, and we find, that Respondent, at minimum, sold one saxophone in 2016 or 2017 (that invoice spans the end of the year into the new year), another in 2017, one in 2018, and one in 2019.[22] There is no three-year consecutive period of nonuse in the roughly four-and-a-half-year period that Petitioner contests. Further, we find that Petitioner has not shown that Respondent's

[22] Only in 2020 did Respondent make no sales to any U.S. customer. *See* 57 TTABVUE 9.

use was not "bona fide use of such mark made in the ordinary course of trade, and not made merely to reserve a right in a mark."

Because Petitioner has failed to show three consecutive years of nonuse or use that was not bona fide use in the ordinary course of trade, it cannot rely on the statute's presumption of abandonment. And because Petitioner has not even attempted to show the second element of abandonment (intent not to resume use), it cannot demonstrate abandonment without the benefit of that presumption.

**Decision:** We deny the Petition for Cancellation.[23]

[23] Because we deny the Petition, we do not need to address Respondent's conditional suggestion, in the last sentence in the brief, that "the registration could be restricted under Section 18 to 'musical instruments; namely saxophones.'" *See* 89 TTABVUE 23. We further note that any such request would be inappropriate not only because the pleadings raise no issue under Section 18, but also because the request comes too late. *See ProQuest Info. and Learning Co. v. Island*, No. 91158016, 2007 WL 616037, at *3 (TTAB 2007); *Personnel Data Sys., Inc. v. Parameter Driven Software, Inc.*, No. 92018719, 1991 WL 326586, at *2 (TTAB 1991).