Mailed: September 30, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

*Rascal House, Inc.*
*v.*
*Jerry's Famous Deli, Inc.*

Cancellation Nos. 92075125 (parent)
92075180
92075185

John M. Skeriotis of Emerson, Thomson & Bennett LLC,
for Rascal House, Inc.

David. K. Friedland of Friedland Vining P.A.,
for Jerry's Famous Deli, Inc.

Before Wolfson, Heasley, and Coggins,
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

## I. Background

Respondent, Jerry's Famous Deli, Inc., owns Principal Register registrations for the marks:

**WOLFIE COHEN'S RASCAL HOUSE**, in typed drawing form,[1]

[1] Reg. No. 2411646, issued Dec. 12, 2000, renewed. A mark depicted as a typed drawing is the legal equivalent of a standard character mark. *See In re Viterra Inc.*, 671 F.3d 1358, 101

**RASCAL HOUSE**, in typed drawing form,[2] and

**WOLFIE COHEN'S RASCAL HOUSE RESTAURANT** and design (with "RESTAURANT" disclaimed), depicted as follows


.[3]

All three Registrations recite services in International Class 42: "restaurant and carry-out restaurant services" for the typed drawing marks and "restaurant services and take-out food services" for the word and design mark. We will refer to the three marks collectively as the "RASCAL HOUSE" marks.

Petitioner, Rascal House, Inc., filed separate petitions to cancel each of Respondent's RASCAL HOUSE registrations under Trademark Act Section 14, 15 U.S.C. § 1064, on the ground of abandonment. In its Answers, Respondent denied the

USPQ2d 1905, 1909 n.2 (Fed. Cir. 2012); *see also* TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 807.03(i) (2022).

[2] Reg. No. 2406028, issued Nov. 21, 2000, renewed.

[3] Reg. No. 2432479, issued March 6, 2001, renewed.

salient allegations of the petitions for cancellation. The proceedings were consolidated, and all record citations are to the "parent" case, Cancellation No. 92075125.[4]

Respondent then moved for summary judgment on Petitioner's abandonment claim.[5] The Board denied the motion,[6] but suggested that the parties consider resolving this matter by way of the Board's Accelerated Case Resolution ("ACR") procedure. *See generally* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") §§ 528.05(a)(2), 702.04 and 705 (2023). To their credit, the parties agreed to do so. In accordance with their ACR stipulation,[7] which the Board approved,[8] the case is bifurcated for the Board to decide in two stages.

In Stage One, which the Board addresses in this opinion:

> the Board is to consider the parties' summary judgment briefing, including Registrant's initial motion, Petitioner's response, and Registrant's reply brief filed in support thereof, and evidence and testimony submitted therewith in order to determine whether Registrant's purported evidence of use of the marks at issue in this proceeding (the "specimens") constitutes "use in commerce" for restaurant and carry-out restaurant services.[9]

[4] 15 TTABVUE. Record citations are to TTABVUE, the Board's publicly available docket history system. *See, e.g., New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d 10596, *2 n.1 (TTAB 2020). The number preceding "TTABVUE" corresponds to the docket entry number; the number(s) following "TTABVUE" refer to the page number(s) of that particular docket entry, if applicable.

[5] 23 TTABVUE.

[6] 30 TTABVUE.

[7] ACR Stipulation, 33 TTABVUE.

[8] 34 TTABVUE.

[9] ACR Stipulation, 33 TTABVUE 2-3.

The Board's findings in Stage One will determine the parameters of the remaining issues to be tried in Stage Two, which provides for additional direct testimony, cross-examination, stipulations, and supplementation by the parties.[10]

For purposes of this Stage One opinion, we presume the parties' familiarity with the pleadings, the ACR Stipulation, and the arguments and evidence submitted with Respondent's motion for summary judgment,[11] Petitioner's response in opposition thereto,[12] and Respondent's reply in support thereof.[13] In accordance with the parties' ACR Stipulation, we may resolve any genuine disputes of material fact and draw reasonable inferences from any such facts.[14] While we have carefully considered all of the parties' arguments and evidence, we do not repeat or discuss all of them.

The parties' positions may be summarized as follows.

Respondent, Jerry's Famous Deli, Inc., acquired rights in a longstanding restaurant, "Wolfie Cohen's Rascal House" in Sunny Isles, Florida in 1996, and opened another "Rascal House" restaurant in Boca Raton, Florida in 1998.[15] Respondent never owned or operated any other restaurant named "Rascal House" or "Wolfie Cohen's Rascal House."[16]

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[10] *Id.*, 33 TTABVUE 3-5.

[11] 23 TTABVUE.

[12] 28 TTABVUE.

[13] 29 TTABVUE.

[14] ACR Stipulation, 33 TTABVUE 5. Again, the parties are commended for agreeing to proceed by ACR.

[15] Respondent's motion for summary judgment. 23 TTABVUE 4. *See* ex. 5, Rule 30(b)(6) deposition of Jonathan Mitchell, Respondent's corporate designee, 28:12-21, 31:1-12, 23 TTABVUE 65, 66. Petitioner's response to motion for summary judgment. 28 TTABVUE 4. Respondent's reply in support of motion for summary judgment, 29 TTABVUE 4.

[16] Mitchell dep. 31:13-15, 35:8-14, 23 TTABVUE 66, 67.

Respondent obtained the subject registrations for the three RASCAL HOUSE service marks in 2000 and 2001. Both restaurants used the RASCAL HOUSE marks in connection with rendering restaurant and carry-out/take-out services until they closed their doors by 2008.[17]

"Petitioner is not challenging any use of the Petitioned Marks when either ["Wolfie Cohen's Rascal House" or "Rascal House"] Restaurants were open for business."[18] Petitioner takes the position, however, that Respondent discontinued use of the RASCAL HOUSE marks for its identified restaurant and carry-out or take-out services in 2008, when the last of the two RASCAL HOUSE restaurants closed its doors.[19]

Respondent takes the position that after it acquired the original RASCAL HOUSE restaurant in Sunny Isles, Florida, it displayed RASCAL HOUSE marks on menus and indoor and outdoor signage at its "Jerry's" restaurants (Jerry's Famous Deli, Jerry's Restaurant and Deli, and Jerry's Patio Café and Bar) located in Studio City, Encino, and Marina del Rey, California, and two "Epicure" supermarkets in Florida, and continued to do so until the last of these establishments closed in 2020-21 due to

[17] Respondent's motion, 23 TTABVUE 7. *See* Mitchell dep. 277:14-19, 157:5-17, (Petitioner's request for admission to Respondent asks it to "[a]dmit that, since at least January 2009, Registrant has not operated a restaurant where the name of the restaurant includes Rascal House. [DEPONENT:] Yeah, that's true."); *see also* 143:9-11, 17-21, 149:23-24, ("Q On May 25, 2011 was there a restaurant named Wolfie Cohen's Rascal House in existence? A No." "Q But there was no Wolfie Cohen's Rascal House Restaurant offering carry-out restaurant services on May 25, 2011, correct? A Correct." "21 Q And there was no restaurant named Wolfie Cohen's Rascal House on November 18, 2020 open for business, correct? A Correct."), 23 TTABVUE 94-97, 127.

[18] Petitioner's response to motion for summary judgment. 28 TTABVUE 4.

[19] Petitioner's response. 28 TTABVUE 2, 7-8, 14.

the COVID-19 pandemic.[20]

Even if so, Petitioner maintains, any lingering displays in other establishments did not constitute "use in commerce" of the RASCAL HOUSE service marks for the identified restaurant and carry-out restaurant services.[21]

## II. Discussion and Analysis

### A. Applicable Law

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

> (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.

15 U.S.C. § 1127.

Proof of abandonment is a matter of fact, not speculation. *Cerveceria Centroamericana, S.A. v. Cerveceria India, Inc.*, 892 F.2d 1021, 13 USPQ2d 1307, 1310 (Fed. Cir. 1989); *Yazhong Investing Ltd. v. Multi-Media Tech. Ventures, Ltd.*, 126 USPQ2d 1526, 1532-33 (TTAB 2018). "Because a registration is presumed valid under the law, 15 U.S.C. § 1057(b), a party seeking its cancellation bears the burden of proving abandonment by a preponderance of the evidence. *See Cold War Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F.3d 1352, 92 USPQ2d 1626, 1628 (Fed. Cir. 2009) (citing *W. Fla. Seafood v. Jet Rests.*, 31 F.3d 1122, 1125, 31 USPQ2d 1660 (Fed. Cir. 1994))." *Peterson v. Awshucks SC, LLC*, 2020 USPQ2d 11526, *9 (TTAB 2020).

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[20] Respondent's motion, 23 TTABVUE 5-6, 15-17. Petitioner's response, 28 TTABVUE 8. Respondent's reply, 29 TTABVUE 6, 9, 11-12. Mitchell dep. 8:24-9:5, 32:20-22, 35:16-25, 40:6-41:14, 43:1-2, 44:12-15, 45:1-8, 47:2-16, 54:15-:3, 56:19-23, 72:2-6, 126:15-24, 127:3-128:10, 23 TTABVUE 60, 66-70, 72, 76, 90.

[21] Petitioner's response, 28 TTABVUE 2-3, 8, 18-20.

The three registrations in this case are for service marks, defined as follows:

> The term "service mark" means any word, name, symbol, or device, or any combination thereof—
>
> (1) used by a person, …
>
> (2) … to identify and distinguish the services of one person, including a unique service, from the services of others and to indicate the source of the services, even if that source is unknown.

15 U.S.C. § 1127, *quoted in Lyons v. Am. Coll. of Veterinary Sports Med. & Rehab.,* 859 F.3d 1023, 123 USPQ2d 1024, 1027 (Fed. Cir. 2017).

Rights arise from the use of a mark in connection with particular goods or services. *Bertini v. Apple*, 63 F.4th 1373, 2023 USPQ2d 407, *5 (Fed. Cir. 2023) (citing *B & B Hardware, Inc. v. Hargis Indus., Inc.,* 575 U.S. 138, 113 USPQ2d 2045, 2048 (2015)). As the United States Supreme Court has declared, "There is no such thing as property in a trade-mark except as a right appurtenant to an established business or trade in connection with which the mark is employed." *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 97, 39 S. Ct. 48 (1918) *quoted in Meenaxi v. Coca-Cola*, 38 F.4th 1067, 2022 USPQ2d 602, *5 (Fed. Cir. 2022). "A mark is deemed to be in use in commerce 'on services when it is used or displayed in the sale or advertising of services and the services are rendered in commerce….' 15 U.S.C. § 1127." *JNF LLC v. Harwood Int'l. Inc.,* 2022 USPQ2d 862, *23 (TTAB 2022).

"Thus, the statute imposes two requirements: A mark is used in commerce on services when [1] it is used or displayed in the sale or advertising of services and [2] the services are rendered in commerce." *Id.* at *23-24 (citing *Couture v. Playdom, Inc.,* 778 F.3d 1379, 113 USPQ2d 2042 (Fed. Cir. 2015); *Mars Generation, Inc. v. Carson*, 2021 USPQ2d 1057, *21 (TTAB 2021) ("The statute requires not only the display of

the mark in the sale or advertising of services but also the rendition of those services in order to constitute use of the service mark in commerce.")).

### B. Application of Law to This Case

As framed by the parties, the key issue for our determination at this stage is whether Respondent's evidence of its purported use of the marks at issue in this proceeding (which they term the "specimens") constitutes "use in commerce" as defined under the statute, for restaurant and carry-out restaurant services.[22]

Because the parties have adopted the term "specimens" in their ACR Stipulation, we use it as a term of art to refer to Respondent's evidence of how it employed the RASCAL HOUSE marks from 2008-2020 (or 2021), not to refer to the specimens of use Respondent filed with the USPTO in support of its registrations. *Cf. Century 21 Real Estate Corp. v. Century Life of Am.*, 10 USPQ2d 2034, 2035 (TTAB 1989) ("[I]t is not the adequacy of the specimens, but the underlying question of service mark usage which would constitute a proper ground for opposition [or cancellation].").

The term "specimens" nonetheless illuminates our analysis, as it points up the differing ways a mark may be used in connection with services. Because a service mark can be used in a wide variety of ways, the types of specimens that may be submitted as evidence of use are varied. *In re Metriplex, Inc.*, 23 USPQ2d 1315, 1316 (TTAB 1992). The varieties include **advertising** specimens, which show the mark displayed in advertising, marketing, or promoting the services, and **rendering** specimens, which show the mark used in the sale or performance of the services. *See*

[22] ACR Stipulation, 33 TTABVUE 2-3.

*In re WAY Media, Inc.,* 118 USPQ2d 1697, 1698 (TTAB 2016); *see generally* TMEP § 1301.04(f)(ii).

When the RASCAL HOUSE restaurants were open and operating from the late 90s through 2008, Respondent's use of its marks in the restaurants—on menus, signage, and the like—would constitute legitimate **rendering** specimens of use. *See, e.g., Peterson v. Awshucks,* 2020 USPQ2d 11526, *16 ("[T]he evidence of record, including the testimony and documentary evidence, shows use of the mark at the King Street location on window signs, and on menus (as well as on an employee's shirt). *See* TMEP § 1301.04(a) (Acceptable specimens of use for restaurant services may include menus)."); *see also In re Siny Corp.,* 920 F.3d 1331, 1336, 2019 USPQ2d 127099, *3 (Fed. Cir. 2019) (likening menus to point-of-sale counter and window displays previously found acceptable).

While the RASCAL HOUSE restaurants rendered restaurant and carry-out/take-out services under the RASCAL HOUSE services marks, Respondent's use of the marks in its other establishments would constitute legitimate **advertising** of the sister restaurants. *See generally W. Fla. Seafood, Inc. v. Jet Rests., Inc.*, 31 F.3d 1122, 31 USPQ2d 1660, 1664 n. 7 (Fed. Cir. 1994).

For example this portion of a Jerry's restaurant and deli menu displayed:

## PANCAKES & CLASSICS

*Bacon or Sausage add 3.95*
*Add Ice Cream 2.50 or Strawberries 2.95*
*Bananas or Chocolate Chips 1.50*

**PANCAKES** (2) 8.50 (3) 10.50

**CHEESE BLINTZES** (2) 12.95 (3) 16.25
*Fruit, Sour Cream, Preserves*

**FRENCH TOAST & FRUIT** 12.75
**BELGIAN WAFFLES & FRUIT** 13.95
**MATZO BREI & FRUIT** *Pancake Style* 12.95

**ALL AMERICAN** 14.50
*2 Eggs, 2 Pancakes or 1/2 Waffle*
*1 Sausage and 3 Bacon Strips*
*(Whole Waffle Add 2.50)*
*Sub Pancake for French Toast 1.00*

**EGGS BENEDICT** *Poached Eggs on English Muffin, Canadian Bacon, Hollandaise Sauce* 14.25

**BREAKFAST BURRITO** 15.25
*Eggs, Cheese, Onions, Potatoes, Tomatoes*

## BREAKFAST SIDES

**BACON, TURKEYBACON or SAUSAGE** 6.75
**CORNED BEEF HASH** 8.75
**HOME FRIES** 5.75
**TOAST or RYE END** 3.95
**BAGEL, ROLL or ENGLISH MUFFIN** 4.25
**COTTAGE CHEESE or YOGURT** 4.75

## SENIOR'S & CHILDREN'S MENU

*Age 10 and under or 65 and over please*

**SCRAMBLED EGGS** 6.50 *with Hash Browns*
**4 LITTLE PANCAKES** 7.50 *1 Sausage or 2 Bacon*
**FRENCH TOAST** 7.50 *1 Sausage or 2 Bacon*
**SMALL CUP OF SOUP** 5.50
**GRILLED CHEESE** 6.75
**CORN DOG ON A STICK** 6.95 *w/Fries*
**MACARONI & CHEESE** 7.25
**HOT DOG** 6.95 *with Fries*
**HAMBURGER** 7.95 *with Fries*
**CHICKEN TENDERS** 8.75 *with Fries*
**SPAGHETTI & MEATBALLS** 8.50
**BAGEL PIZZA** 6.75
**FROZEN DIRT** 3.85 *Chocolate Ice Cream w/Oreo Crumbs*
**SOFT DRINKS** 2.95
**MILK** 2.95

OWNED AND OPERATED BY JERRYS FAMOUS DELI
Pumpernik's Rascal House

*Where Food and People Mix.*

JERRY'S
restaurant & deli

Established 1978
RESTAURANT-BAR-DELICATESSEN

★ WE DELIVER!
★ OPEN LATE

**Studio City, CA**
12655 Ventura Blvd
(818) 980-4245

**Encino, CA**
16650 Ventura Blvd
(818) 906-1800

Wolfie's Rascal House

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[23] Respondent's motion, ex. 4-1, 23 TTABVUE 45.

The lower left part of the menu, magnified, displays the names of various establishments Respondent claimed to own and operate:


[24]

Jerry's Patio Café and Bar had a poster on the inside of the entrance door:

[24] Petitioner's response, 28 TTABVUE 9, showing magnified image from bottom of Respondent's ex. 4-1. Mitchell dep. 70:9-19, 23 TTABVUE 76.


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[25] Respondent's motion, ex. 8, 23 TTABVUE 246-247, Petitioner's response, 28 TTABVUE 11.

Respondent's Epicure supermarket bore wall signs:

[26]

These uses evidenced Respondent's use of the marks in advertising the RASCAL HOUSE restaurants, as long as the RASCAL HOUSE restaurants were open and operating, rendering services under the marks.[27] (The signage, for example, refers to "restaurant.") As noted, Petitioner does not challenge any use of the RASCAL HOUSE marks when either the "Rascal House" or "Wolfie Cohen's Rascal House"

[26] Respondent's motion, ex. 4-2, 23 TTABVUE 56, 485. Petitioner's response, 28 TTABVUE 10.

[27] The marks displayed in the above examples depict the two standard character RASCAL HOUSE marks, and marks substantially similar to the registered word and design mark.

restaurant was open for business.[28]

But when the RASCAL HOUSE restaurants closed, Respondent no longer rendered services under the RASCAL HOUSE marks. It may have continued to display the RASCAL HOUSE marks at its other establishments, but the necessary second element—that of rendering the services under the RASCAL HOUSE marks—was missing. 15 U.S.C. § 1127 (definition of service mark use). *See Couture v. Playdom*, 113 USPQ2d at 2044 ("Here, there is no evidence in the record showing that appellant rendered services to any customer…, and the cancellation of appellant's registration was appropriate.").

Respondent's corporate designee was asked why it continued to display the RASCAL HOUSE marks at its other establishments after the RASCAL HOUSE restaurants closed:

> Q. Why – Just curious, why would there be a Rascal House logo on a [menu] for Jerry's in California?
> A. Because Rascal House – Several reasons. One is Rascal house was an iconic name in the world of delis, okay, and people – You know, Jews eat in delis. And Jews are in various locations and they travel to different locations. And so it always would help – if a Jew from Miami is visiting Los Angeles and he sees Rascal House on there, he's more likely to buy food, right, because it's something he liked and can relate to. So that's one reason. Another reason is, is that we used recipes from the Rascal House and we wanted to, you know, take advantage of the notoriety that Rascal House had ….[29]

> Q. Do you know why the brands would be in the Epicure Market?
> A. For the reason that I said before. Because these are brands that are important to anybody that's going to be buying food in Miami. They're

[28] Petitioner's response to motion for summary judgment. 28 TTABVUE 4.

[29] Mitchell dep. 45:15-46:5, 23 TTABVUE 69-70, *quoted in* Respondent's reply, 29 TTABVUE 11.

> going to – They're going to associate what they're getting here with these other names.[30]
>
> A. You've got to convince people to come to your restaurant as opposed to going to somebody else's restaurant. Right? So if that helps in bringing people to our restaurant, then it's a service.[31]

That does not constitute rendering of restaurant or carry-out/take-out services under the RASCAL HOUSE marks. It constitutes, at most, an attempt to take advantage of residual good will in a past iconic brand in connection with services rendered under other brands, such as JERRY'S or EPICURE. Notably, Respondent's restaurant menus and signage also displayed PUMPERNIK'S, a brand Respondent **never** used, because it wanted the collective cachet from iconic brands.[32] But residual goodwill does not negate a finding of abandonment based on nonuse. Under Section 45 of the Trademark Act, a mark may be deemed abandoned "(1) [w]hen its use has been discontinued with intent not to resume such use." 15 U.S.C. § 1127. *See Azeka Bldg. Corp. v. Azeka*, 122 USPQ2d 1477, 1485 (TTAB 2017) (finding mark abandoned even though its owner contended that "goodwill associated with the mark has not dissipated since the mark was last used in 2006.").

Respondent relies on nonprecedential Board decisions in its effort to show that its continued display of the RASCAL HOUSE marks in other establishments could constitute "use in commerce."[33] In *Pleasant Travel Serv. v. Marisol, LLC*, 2009 WL

[30] Mitchell dep. 54:2-8, 23 TTABVUE 72.

[31] Mitchell dep. 132:13-16, 23 TTABVUE 91.

[32] Mitchell dep. 51:21-23, 52:14-53:1, 23 TTABVUE 71. 28 TTABVUE 21.

[33] The Board does not encourage citation to its nonprecedential decisions. *See In re Tapio GmbH*, 2020 USPQ2d 11387, *9 n.30 (TTAB 2020) ("Generally, the practice of citing non-precedential opinions is not encouraged."). We will, however, address the principal

1719388 (TTAB 2009) (nonprecedential), for example, the Board found that:

> Although respondent's restaurant and bar services were located within an establishment bearing a "China Bar" sign outside, respondent's signage within the establishment and the menus used are sufficient for purposes of conveying to customers that the restaurant and bar services were being rendered under the mark DON THE BEACHCOMBER.

*Id*. at *5.[34]

As Petitioner correctly observes, however, that decision is distinguishable from the present case.[35] In this case, the brand name of Respondent's other establishment, JERRY'S, is prominently displayed as the source of the restaurant and carry-out/take-out services. There is no representation that services were being rendered under the mark RASCAL HOUSE in any part of the JERRY'S restaurant. Rather, the JERRY'S menu simply alludes to RASCAL HOUSE as another concern owned and operated by Respondent:


[36]

Moreover, the Board's decision in *Pleasant Travel v. Marisol* was later vacated when the case was appealed to a United States District Court and the parties entered

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nonprecedential decisions cited by the parties here, as both parties place particular reliance on them.

[34] *Quoted in* Respondent's motion, 23 TTABVUE 16.

[35] Petitioner's response, 28 TTABVUE 19.

[36] Petitioner's response, 28 TTABVUE 9, showing magnified image from bottom of Respondent's ex. 4-1. Mitchell dep. 70:9-19, 23 TTABVUE 76.

into a consent agreement, which the court ratified. *See Pleasant Travel Serv. v. Marisol, LLC,* 2010 WL 9920851 (TTAB 2010).

As Petitioner rightly notes,[37] the present case is much closer to another Board decision, *Ziebarth v. Del Taco, LLC*, 2015 BL 142166 (TTAB 2015) (nonprecedential). In that case, the service mark owner operated a restaurant under the registered mark NAUGLES, but eventually closed down under that name. *Id*. at *6, 10. After the NAUGLES restaurant closed, the mark owner rendered restaurant services under the name "Del Taco." *Id*. at *9. It contended that it still offered services under the NAUGLES mark because it advertised NAUGLES. *Id*. at *10. The Board found, however, that it had abandoned the mark NAUGLES "because NAUGLES restaurants have been defunct since 1995 and Respondent has not rendered restaurant services under the mark since that time." *Id*. at *10. "[A]dvertising a service is not synonymous with rendering a service." *Id*. at *11 (citing *Couture v. Playdom*). The Board concluded by quoting the Federal Circuit: "[T]he Lanham Act was not intended to provide a warehouse for unused marks." *Imperial Tobacco Ltd. v. Philip Morris Inc.,* 899 F.2d 1575, 14 USPQ2d 1390, 1394 (Fed. Cir. 1990). *Id*. at *14.

So too here. Here, as in *Ziebarth*, Respondent ceased using the RASCAL HOUSE marks in commerce when it closed the last of the RASCAL HOUSE restaurants, and its continued display of those marks in other establishments is not synonymous with rendering a service under those marks.

[37] Petitioner's response, 28 TTABVUE 15.

## III. Decision

The Board finds that Respondent's "specimens," i.e., its evidence of purported use of the three marks at issue in this proceeding after closure of the two Florida RASCAL HOUSE restaurants, do not establish use in commerce of the registered marks in association with their identified services. Respondent discontinued its use of all three RASCAL HOUSE marks in 2008, within the meaning of Section 45 of the Trademark Act, 15 U.S.C. § 1127. Consequently, for purposes of Stage Two, Respondent's position on non-abandonment shall be limited to whether it intended to resume use of its marks.[38]

This decision is final as to the issue addressed, but is not immediately appealable. The final, appealable decision will be rendered as part of Stage Two.

[38] ACR Stipulation, 33 TTABVUE 3.