

ESTTA Tracking number: **ESTTA1338031**
Filing date: **02/04/2024**

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

Proceeding no.	92078240
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Attachments	Respondents Trial Brief.pdf(208903 bytes)

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

Dreams to Reality)
)
 Petitioner)
)
 v.) Cancellation No. 92078240
 Dreams to Reality Foundation)
)
 Respondent)

RESPONDENT'S TRIAL BRIEF

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DESCRIPTION OF THE RECORD

The evidence of record in this case consists of:

1. Petitioner's Notice of Reliance filed on May 19, 2023 consisting of Respondent's Discovery Responses. 28 TTABVUE.
2. Petitioner's Testimony filed on May 19, 2023 consisting of the Testimony Declaration of Helen Faye Zumwalt ("Zumwalt Decl.") and various exhibits attached thereto; the Testimony Declaration of Jaime Waltz ("Waltz Dec.") and various exhibits attached thereto; the Testimony Declaration of Kelly Spann ("Spann Decl.") and various exhibits attached thereto; the Testimony Declaration of Annette Heller ("Heller Decl.") and various exhibits attached thereto. 29 TTABVUE.
3. Respondent's Testimony filed on September 21, 2023 consisting of the Testimony Declaration of Helen Wong ("Wong Decl.") (TTABVUE 35) and refiled with the cited exhibits on September 22, 2023. 39 TTABVUE.
4. Respondent's Testimony filed on September 21, 2023 consisting of the Testimony Declaration of Carmelita Burns ("Burns Decl.") 35 TTABVUE.
5. Respondent's Testimony filed on September 21, 2023 consisting of the Testimony Declaration of Dean Butler ("Butler Decl.") with exhibits; the Testimony Declaration of Jeffrey Chase ("Chase Decl."). 36 TTABVUE.
5. Respondent's Testimony filed on September 21, 2023 consisting of the Testimony Declaration of Christopher Matthew Spencer ("Spencer Decl.") with exhibits. 37 TTABVUE. The Confidential Exhibit C to the Spencer Decl. filed on the same date. 38 TTABVUE.

6. Petitioner's Rebuttal Testimony consisting of the Testimony Declaration of Kelly Spann ("Spann Rebuttal Decl.") was filed on October 4, 2023 prior to serving any Rebuttal Disclosures and prior to the opening of the Petitioner's Rebuttal Testimony so it should be disregarded. 40 TTABVUE. Petitioner served its Rebuttal Disclosures on counsel for Respondent on October 4, 2023 and refiled the Testimony Declaration of Kelly Spann ("Spann Rebuttal Decl.") during its rebuttal period on October 30, 2023. 43 TTABVUE. This version of the testimony filed during Petitioner's Rebuttal period did not include any exhibits so Respondent objects to the consideration of any exhibits included in the prematurely filed rebuttal testimony Declaration of Kelly Spann (40 TTABVUE) and requests that they not be considered by the Board.

I. STATEMENT OF THE ISSUES

The only issue before the Board is whether Petitioner has established that it has priority based on its use of the mark DREAMS TO REALITY vis-à-vis Respondent and its use of the mark DREAMS TO REALITY FOUNDATION and whether there is a likelihood of confusion between the parties' marks and services such that Respondent's mark should be cancelled.

II. RECITATION OF FACTS

1. On March 16, 2016, the application for the mark DREAMS TO REALITY FOUNDATION was filed by Respondent and the mark issued to registration on October 25, 2016. Respondent acquired common law trademark rights for the use of their mark DREAMS TO REALITY FOUNDATION by way of continuous national and international use of the mark since May 25, 1993. See: Lanham Act (15 U.S.C. §§ 1127 et. seq.)

2. This cancellation proceeding was filed by Petitioner on October 15, 2021, ten days prior to the registration becoming incontestable.
3. During this proceeding, both parties filed Motions for Summary Judgment, both of which were denied by the Board. In the February 15, 2023 Order denying Petitioner's Motion for Summary Judgment, the Board held that to the extent Petitioner contended that Respondent didn't use its mark in commerce after March 16, 2016, Petitioner failed to plead abandonment and the Board provided Petitioner a period of 15 days to amend to add such a claim. Petitioner did not amend its pleadings and thus, the **only** basis for cancellation is likelihood of confusion. Any arguments made by Petitioner in its Opening Brief regarding abandonment after Respondent's March 16, 2016 filing date must, as a matter of law, be disregarded by the Board.
4. Petitioner Dreams to Reality, brought this proceeding to cancel Respondent Dreams to Reality Foundation's DREAMS TO REALITY FOUNDATION mark ("Respondent's Mark") based on Petitioner's unfounded allegations of alleged prior common law rights in the DREAMS TO REALITY mark ("Petitioner's Mark"). In the Petition for Cancellation, Petitioner asserted that it used Petitioner's Mark since at least as early as 2000, "long before the filing date of Registrant's Application" [1 TTABVUE 4] and that "Registrant's Mark, when used in connection with its services, so resembles Petitioner's Mark as to be likely to cause confusion, to cause mistake, or to deceive as to the affiliation, connection, or association of Registrant with Petitioner, or as to the origin, sponsorship, or approval of Registrant's services by Petitioner." [1 TTABVUE 5].

5. Respondent has used the mark DREAMS TO REALITY FOUNDATION continuously from May 25, 1993 to the present in connection with the services set forth in the registration, namely “charitable foundation services, namely providing financial support to people in need, who may include but are not limited to, the homeless, families, the vulnerable, victims of circumstance, victims of crime, veterans, youth, and others, for general relief, food, shelter, scholarships, education, and other financial and volunteer assistance.” Petitioner’s sole basis for cancellation of Respondent’s Mark is priority and likelihood of confusion. As noted previously, while Petitioner has argued abandonment in its Opening Brief, Petitioner has not pled any claim of abandonment as a basis for the cancellation of Respondent’s Mark and any such arguments must, as a matter of law, be disregarded by the Board.
6. It should also be noted that this case involves use of Respondent’s mark from May 25, 1993 until its filing date in March of 2016, a period spanning twenty-three (23) years. Many companies do not maintain documents over such a long period of time and this puts Respondent at a disadvantage due to the fact that Petitioner waited until 2021 to file this proceeding. However, Respondent has provided persuasive and impartial testimony declarations to support its continuous use of DREAMS TO REALITY FOUNDATION from May 25, 1993 to the present, and certainly up to Petitioner’s first use date in 2000 and continuing to the Respondent’s filing date in 2016.
7. Respondent is the owner of Reg. No. 5067798 for the mark DREAMS TO REALITY FOUNDATION which was filed on March 16, 2016 and issued on October 25, 2016 for the following services: “Charitable foundation services, namely, providing financial support to people in need, who may include, but are not limited to, the homeless,

- families, the vulnerable, victims of circumstance, victims of crimes, veterans, youth, and others, for general relief, food, shelter, scholarships, education, and other financial, and volunteer assistance” in International Class 36. (“Respondent’s Services”).
- Petitioner claims to be the owner of the mark DREAMS TO REALITY (“Petitioner’s Mark”) in connection with the following services: “Charitable services for providing clothing to woman in transition and operating a resale shop to support its charitable work” for which it claims use since 2000. [1 TTABVUE 4].
8. Petitioner bases its Petition to Cancel on its alleged prior use of Petitioner’s Mark since 2000 which predates the filing date of Respondent’s Registration on March 16, 2016. TTABVUE 1, para. 9. Additionally, Petitioner claimed in its Petition to Cancel that there is a likelihood of confusion between Respondent’s Mark and Petitioner’s Mark. [1 TTABVUE 5].
 9. Petitioner acknowledges that its date of first use for DREAMS TO REALITY is not prior to the year 2000. Zumwalt Decl. ¶ 3. [29 TTABVUE 3-4]
 10. Respondent was formed as DREAMS TO REALITY FOUNDATION on May 25, 1993, filing the articles of incorporation with the California Secretary of State’s office in August of 1993. Butler Decl. and Exhibit A thereto [36 TTABVUE 3].
 11. Christopher Matthew Spencer has been actively and continuously in charge of DREAMS TO REALITY FOUNDATION since May 25, 1993 to the present. Spencer Decl. ¶1 [37 TTABVUE 2]. Respondent has continuously used the DREAMS TO REALITY FOUNDATION trademark from May 25, 1993 to the present. Spencer Decl. ¶ 7 [37 TTABVUE 4].

12. On June 4, 1999, DREAMS TO REALITY FOUNDATION began actively and continuously selling on eBay, a global ecommerce marketplace that reaches 195 countries. Dreams to Reality Foundation's eBay stores receive hundreds of millions of global impressions each year. Dreams to Reality Foundation continues to operate ten eBay Stores to this day. Spencer Decl. ¶ 8. [37 TTABVUE 4].
13. Since 1993, Carmelita Burns, a third-party vendor, has consigned merchandise to Dreams to Reality Foundation for resale and restored and repaired goods sent to her from Dreams to Reality Foundation for resale, all of which were sold under the DREAMS TO REALITY FOUNDATION and proceeds used to provide assistance, food and provisions for low-income families and to provide financial assistance to people in need. [35 TTABVUE 5].

ARGUMENT

Petitioner has failed to meet its burden of proof to establish priority and likelihood of confusion

Because Respondent owns a federally registered mark, this registration is prima facie evidence of the validity of the registration and the continued use of the registered mark so the burden of proof is placed on Petitioner as the party seeking cancellation. *Cerveceria Centroamericana S.A. v. Cerveceria India, Inc.* 892 F.2d 1201, 13 USPQ2d 1307, 1309 (Fed. Cir. 1989). *See also, Major League Baseball Players Association and Aaron Judge v. Michael P. Chisena*, 2023 USPQ2d 444 (TTAB 2023) (“Opposers proceed under Section 2(d) of the Trademark Act, which provides that a mark may be refused registration if it “[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to

cause mistake, or to deceive....” 15 U.S.C. §§ 1052(d), 1063. In order to prevail on their claims under Section 2(d), Opposers must prove both priority of use of their pleaded marks and a likelihood of confusion between those marks and those Applicant has applied to register”), citing *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40, 44-45 (CCPA 1981), cited in *Empresa Cubana Del Tabaco v. General Cigar Co.*, 2022 USPQ2d 1242, at *4 n.7 (TTAB 2022), civil action filed, No. 1:23-cv-00227 (E.D. Va. Feb. 20, 2023).

Petitioner relies on its claimed common law rights for priority purposes, and the clear and convincing evidence that supports these claims. To establish prior common law rights, they must prove by a preponderance of the evidence that their mark is distinctive, inherently or otherwise, and that they acquired rights in the marks prior to any date on which Respondent can rely. *ARSA Distributing, Inc. v. Salud Natural Mexicana S.A. de C.V.*, 2022 USPQ2d 887, at *14- 15 (TTAB 2022); *DeVivo v. Ortiz*, 2020 USPQ2d 10153, at *3 (TTAB 2020); *Kemi Organics v. Gupta*, 126 USPQ2d 1601, 1605-06 (TTAB 2018).

Petitioner relies heavily in its brief about the lack of documentary evidence establishing Respondent’s use of DREAMS TO REALITY FOUNDATION from 1996 through 2016, a period of twenty (20) years. However, Petitioner, ignores the fact that Respondent has offered the testimony declarations of several persons, including that of Christopher Matthew Spencer who has been in charge of Respondent and its activities under the DREAMS TO REALITY FOUNDATION trademark from May 25, 1993 to the present.

Mr. Spencer has testified that he is one of the original founders of Dreams to Reality Foundation and he has been actively and continuously in charge of the organization since 1993. Spencer Decl. ¶ 1 [37 TTABVUE 2]. He has further testified that since the formation of the company, they have raised funds through various methods and used those funds to support the

mission of the organization, including helping the homeless with groceries and essential items as well as donating money to assist youth to continue their education. Spencer Decl. ¶ 2 [37 TTABVUE 2]. Mr. Spencer further testified that they opened their first eBay store in June of 1999 which has been in continuous, uninterrupted, operation since that time using the mark DREAMS TO REALITY FOUNDATION. Spencer Decl. ¶ 3 and 5 [37 TTABVUE 2-3]. Additionally, the net funds from the sales from this eBay store support DREAMS TO REALITY FOUNDATION (as shown in Exhibit B to the Spencer Decl.) which funds are used to help the homeless and to assist youth in continuing their education. As shown in Exhibit B to the Spencer Decl. “All Net Proceeds Will Support Dreams to Reality Foundation®.” [37 TTABVUE 13].

Mr. Spencer’s testimony about the formation of the company in 1993 is consistent with the testimony of Mr. Dean Butler, a co-founder of DREAMS TO REALITY FOUNDATION and world renown celebrity who portrayed Almanzo Wilder in “Little House on the Prairie,” who testified that he was an original founder of the organization and that he used every opportunity in connection with his world-famous television shows to bring awareness to the foundation and its mission of distributing aid to the needy. Butler Decl. [36 TTABVUE 3]. His involvement with the organization ended in 1999. Butler Decl. [36 TTABVUE 5].

The existence of the eBay store that supports the mission of Dreams to Reality Foundation is also supported by the testimony of Mr. Jeffrey Chase who testified that he has personal knowledge that the store was registered in 1999 and that he was aware in 2000 that it listed and sold items on eBay to benefit the foundation. Chase Decl. [36 TTABVUE 13]. He also testified that he has first-hand knowledge of Dreams To Reality Foundation’s continuous operation from at least the year 2000 to the present. Mr. Chase’s testimony is of particular merit because he was

the CEO of eBay's tradeshow general contractor for a period of eight years and acquired firsthand knowledge of Dreams to Reality Foundation's eBay stores. Chase Decl. [36 TTABVUE 13].

Mr. Spencer's testimony about the activities of DREAMS TO REALITY FOUNDATION raising funds to support the homeless and youth through their eBay store is further corroborated with the testimony of Ms. Carmelita Burns. She testified that from 1993 to the present, she continuously consigned merchandise to Dreams to Reality Foundation for resale and she restored and repaired goods sent to her from the Foundation to sell on eBay. Burns Decl. [35 TTABVUE 5]. She further testified that she is aware that these goods were sold under the DREAMS TO REALITY FOUNDATION trademark and the profits were used to support the mission of the Foundation, namely, to provide assistance, food, and provisions for low income families and the homeless, as well as to provide financial assistance to people in need. Burns Decl. [35 TTABVUE 5].

Finally, Ms. Helen Wong testified that she has been a continuous volunteer with Dreams to Reality Foundation from 2007 to the present and she is personally aware that the mark DREAMS TO REALITY FOUNDATION has been in continuous use from 2007 to the present in connection with charitable foundation services which includes providing financial support and direct help to people in need such as the homeless, families, victims of crime, veterans, youth and others, for general relief, food, shelter, scholarships, education and other financial and volunteer assistance. Wong Decl. ¶1 and 2. [39 TTABVUE 2]. She further testified that the eBay store shown in Exhibit A to her Declaration has been in continuous use since she joined in 2007 to the present and that the net funds from the sales on the eBay store are used to provide financial support to people in need, to feed the homeless, and to donate funds to assist youth with their education. Wong Decl. ¶4 and Exhibit A thereto. [39 TTABVUE 3].

Mr. Spencer also testified that the organization filed the required Form 990/Form 990-N with the IRS but that they are only available for the past several years, producing copies from 2016 to 2020 as Exhibits E through I to his Declaration. Spencer Decl. ¶ 9 and Exhibits E through I thereto. [37 TTABVUE 4-5]. While Petitioner states that the documents do not evidence use of the mark, each form identifies the various grants and other donations made at the end of each form. *Id.* Petitioner also relies on the fact that “Registrant’s first tax return was filed in 2016” (45 TTABVUE 18), however, this is directly contradicted by the testimony of Mr. Spencer who testified that the required IRS forms were filed every year from 1993 to the present with the exception of a period from 2008-2010 and when their tax exempt status was revoked in 2011 due solely to a clerical error and upon discovery they reapplied and were granted their tax exempt status back to the revocation date. A tax-exemption status is mutually exclusive of the trademark dispute and moot as far as this proceeding is concerned. Spencer Decl. ¶ 9 [37 TTABVUE 4-5]. More importantly, there was never a time where they ceased use of DREAMS TO REALITY FOUNDATION so there is no period of abandonment as alleged by Petitioner. *Id.* It is important to note that Petitioner’s heavy reliance on the tax records of the company and the missed IRS forms in the 2011 – 2013 time period are completely irrelevant to the issue of whether the mark DREAMS TO REALITY FOUNDATION was in use during that period or any other. As shown by the testimony of Mr. Spencer, one of the founders of Respondent who has worked there from May 25, 1993 to the present, the mark DREAMS TO REALITY FOUNDATION has been in continuous use during that entire time for charitable foundation services, namely providing financial support to people in need. [37 TTABVUE 4]. He even provided a 346 page document showing the most recent almost 38,000 customer transactions from their eBay store where

proceeds to go serve the mission of DREAMS TO REALITY FOUNDATION, 545 of whom are in Petitioner's own state of Missouri. [37 TTABVUE 3 and Exhibit C at 38 TTABVUE].

The testimony of a single witness with personal knowledge of the facts, if sufficiently probative, may establish priority of use if it is clear, convincing, consistent, uncontradicted and sufficiently circumstantial to convince the Board of its probative value. *Powermatics, Inc. v. Globe Roofing Prods. Co.*, 341 F.2d 127, 144 USPQ 430, 432 (CCPA 1965). “Oral testimony (or in this case, testimony in a written declaration), if sufficiently probative, is normally satisfactory to establish priority of use in a trademark proceeding.” *Chutter, Inc. v. Great Management Group, LLC*, 2021 USPZ2d 1001 at *26-27 (TTAB 2021). *Coach Builders, Inc. v. SPV Coach Co.* 123 USPQ2d 1175, 1184 (TTAB 2017) (testimony of a single witness may suffice to establish priority of use); *National Bank Book Co. v. Leather Crafted Pros. Inc.*, 218 USPQ 826, 828 (TTAB 1993) (acknowledging that oral testimony may be sufficient to prove the first use of a party's mark when it is based on personal knowledge, it is clear and convincing, and it has not been contradicted). *Perfect Foods, Inc. v. John D. Gullahorn*, Opp. No. 91160978, [2006 WL 867931](#), at *4 (TTAB Mar. 21, 2006) (non-precedential):

Opposer's testimony regarding the sale of wheatgrass is supported by documentary evidence in the form of sales slips dating from 1988. **While there is no supporting documentary evidence that shows the mark used in conjunction with the goods prior to 2000, the testimony of a single witness can be sufficient to prove priority.**⁴ See 3 J. Thomas McCarthy: McCarthy on Trademarks and Unfair Competition § 16.06(2) (4th ed. 2005).

“While it is certainly preferable for a party's testimony to be supported by corroborating documents, the lack of documentary evidence is not fatal.” *Productos Lacteos Tocumbo S.A. de C.V. v. Paeteria La Michoacana Inc.*, 98 USPQ2d 1921, 1931 (TTAB 2011). See *Liqwacon Corp. v. Browning-Ferris Indus., Inc.*, 203 USPQ 305, 316 (TTAB 1979) (oral testimony can be sufficient to establish prior use “providing the testimony is by a witness or witnesses personally conversant

with the facts, and that it is clear, convincing, consistent, and sufficiently circumstantial to convince the trier of fact of the probative value thereof.”); *GAF Corp. v. Anatox Analytical Servs., Inc.*, 192 USPQ 576, 577 (TTAB 1976) (“The testimony of opposer’s witness is clear, convincing, uncontradicted and probative by virtue of his activities in connection with opposer’s ANTAROX product line and his responsibilities therewith since 1961. As such it is competent to establish opposer’s ownership of the registration of record and opposer’s use of the mark ANTAROX for goods of the character described in the registration continuously since 1961.”); see also Fed. R. Evid. 602 (“A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”).

Respondent has provided sufficient evidence from several witnesses which establishes its priority of use of the mark DREAMS TO REALITY FOUNDATION prior to any use of the mark DREAMS TO REALITY by Petitioner and from 2000 until its filing date in 2016. The fact that Mr. Spencer has been with the Respondent continuously since its formation on May 25,1993 makes his testimony particularly credible as to the use of the mark DREAMS TO REALITY FOUNDATION. As a result, Petitioner has not met its burden of proof on this issue. .

Petitioner has failed to establish a Likelihood of Confusion

In order for Petitioner to prevail in this cancellation proceeding, it must first establish priority of use and then likelihood of confusion. TBMP 309.03 (c)(2). Because Petitioner cannot establish priority of use, its likelihood of confusion claim under Section 2(d) fails. *RxD Media, LLC v. IP Application Development LLC* 125 USPQ2d 1801 (TTAB 2018). As noted above, Petitioner cannot establish prior use as Respondent has conclusively established its use of the mark DREAMS TO REALITY FOUNDATION as of 1993 and continuing to the present. As such, Petitioner cannot prevail on its claim of likelihood of confusion.

Interestingly, Petitioner does not actually claim that there is a likelihood of confusion but instead, relies on the fact that Respondent stated in an answer to an interrogatory that consumers familiar with Respondent “could be confused” if they saw Petitioner’s mark in association with its services. [45 TTABVUE 19]. Even the Executive Director of Petitioner has testified that Petitioner does not believe that there is a likelihood of confusion between Petitioner’s mark DREAMS TO REALITY and Respondent’s mark DREAMS TO REALITY FOUNDATION based on the types of services offered by Petitioner. See Walz Decl. [29 TTABVUE 10].

As the Board held in *Moke America LLC v. Moke USA, LLC* 2020 USPQ2d 10400 (TTAB 2020):

“Prior use is a necessary element of any claim of likelihood of confusion under Section 2(d) of the Trademark Act. We need not reach the merits of the likelihood of confusion claim because without proof of priority, Opposer cannot prevail. *See Life Zone Inc. v. Middleman Grp., Inc.*, 87 USPQ2d 1953, 1960 (TTAB 2008); *see also Exec. Coach Builders, Inc. v. SPV Coach Co.*, 123 USPQ2d 1175, 1199 (TTAB 2017).”

CONCLUSION

The evidence overwhelmingly establishes that Respondent began use of the mark DREAMS TO REALITY FOUNDATION in 1993 and has continuously used that mark from then to the present. Petitioner has failed to meet its burden of proof that Petitioner has priority of use vis-à-vis Respondent and thus, Petitioner’s request for cancellation of Respondent’s mark should be denied.

WHEREFORE, Respondent respectfully requests that the Board hold in favor of Respondent and dismiss this cancellation proceeding.

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CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2024, a true and complete copy of Respondent's Trial Brief was served upon Annette Heller, counsel for Petitioner via email to tmattorneyheller@aol.com.

/Molly Buck Richard/