

This Opinion is Not a  
Precedent of the TTAB

Mailed: March 27, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*Ross Bicycles LLC*  
*v.*  
*Century Sports, Inc.*

Cancellation No. 92067406  
—

Mark Borghese of Borghese Legal Ltd.,  
for Ross Bicycles LLC

Todd Wengrovsky of the Law Offices of Todd Wengrovsky PLLC,  
for Century Sports, Inc.

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Before Ritchie, Pologeorgis, and English,  
Administrative Trademark Judges.

Opinion by English, Administrative Trademark Judge:

This proceeding involves Registration No. 980887, registered on March 26, 1974, for the mark ROSS (typed form), for “bicycles and structural parts thereof,” in International Class 12.<sup>1</sup> Century Sports, Inc. (“Respondent”) acquired the

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<sup>1</sup> Renewed three times. A typed mark is the legal equivalent of a standard character mark. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 n.2 (Fed. Cir. 2012) (explaining that in 2003 there was a non-substantive change in nomenclature from a “typed mark” to a “standard character mark”).

registration on July 23, 2013 through the Chapter 7 bankruptcy of Rand International Leisure Products LLC.<sup>2</sup>

On November 7, 2017, Ross Bicycles LLC (“Petitioner”) filed a petition to cancel the registration alleging that it has filed intent-to-use application Serial No. 87673601 for the standard character mark ROSS for “bicycles” in International Class 12 and that the continued registration of Respondent’s identical mark for identical goods is likely to cause injury to Petitioner.<sup>3</sup> As grounds for cancellation, Petitioner alleges the sole claim of abandonment, pleading “that the mark in the Registration has been discontinued in the United States with no intent to resume such use.”<sup>4</sup>

In its Answer, Respondent admits that “Petitioner has applied for the mark ROSS, Application Serial No. 87673601, for the goods ‘bicycles’ in Class 12” and that Respondent’s involved “Registration is for an identical mark and for identical overlapping goods.”<sup>5</sup> Respondent denies the remaining salient allegations in the petition for cancellation.

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<sup>2</sup> Frame/Reel: 5153/0335-38. The order from the U.S. Bankruptcy Court for the Eastern District of New York states that “effective upon entry of this order” the involved mark and two other marks “shall be deemed abandoned by the Trustee to Century Sports, Inc.” Despite use of the word “abandoned,” it is clear that the order effectuated an assignment of the mark to Respondent.

In a Chapter 7 bankruptcy, the trustee liquidates the debtor’s property. 11 U.S.C. § 704. The court “may authorize the trustee to operate the business of the debtor for a limited period, if such operation is in the best interest of the estate and consistent with the orderly liquidation of the estate.” *Id.* § 721. This is different from a Chapter 11 bankruptcy under which the debtor continues to operate and seeks to reorganize its business. 11 U.S.C. §§ 1101 and 1107(a).

<sup>3</sup> Petition for Cancellation, 1 TTABVUE 2-3, ¶¶ 1 and 4-5.

<sup>4</sup> *Id.* at 3, ¶ 6.

<sup>5</sup> *Id.* at 2-3, ¶¶ 1 and 4; Answer, 6 TTABVUE 2, ¶¶ 1 and 4.

## I. The Record and Evidentiary Objections/Issues

The record consists of the pleadings (but not any attached exhibits) and, by operation of Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1), Respondent's registration file. We address below the evidence the parties submitted and the evidentiary objections raised by each of the parties.

### A. Petitioner's Evidence

Petitioner filed a notice of reliance<sup>6</sup> on:

- The TSDR record and file for Petitioner's pleaded application Serial No. 87673601 for the standard character mark ROSS for "bicycles" in International Class 12;<sup>7</sup>
- Petitioner's First Set of Interrogatories and Respondent's responses;<sup>8</sup> and
- Petitioner's First Requests for Production and Respondent's written responses.<sup>9</sup>

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<sup>6</sup> Petitioner's Notice of Reliance, 7 TTABVUE. Exhibit 1 to Petitioner's notice of reliance is a copy of the file of Respondent's involved registration. *Id.* at 5-54. It was unnecessary to include this exhibit because, as noted, Respondent's registration file is automatically of record. Trademark Rule 2.122(b)(1).

<sup>7</sup> Petitioner's Notice of Reliance, 7 TTABVUE 55-72.

<sup>8</sup> *Id.* at 73-89.

<sup>9</sup> *Id.* at 90-114. Normally a party's responses to document requests are "admissible solely for purposes of showing that a party has stated that there are no responsive documents." *City Nat'l Bank v. OPGI Mgmt. GP Inc.*, 106 USPQ2d 1668, 1674 n.10 (TTAB 2013). In response to three document requests, Respondent stated that there were no responsive documents. In response to the remaining requests, Respondent either asserted objections only or responded that it would produce "relevant, non-privileged documents ... if any." Respondent has not raised this objection, and in its brief, has referred to the document requests and responses as part of the record. Accordingly, we have considered the entirety of Respondent's responses to Petitioner's document requests. *Calypso Tech., Inc. v. Calypso Capital Mgmt.*, 100 USPQ2d 1213, 1216-17 and n.8 (TTAB 2011) (recognizing that if the non-proffering party treats material improperly introduced under notice of reliance as of record, the Board may treat the evidence as stipulated into the record and considering defendant's document responses "consisting of objections or a representation that documents would be produced").

Petitioner also filed: (1) the testimony declaration of Shaun Ross, the CEO and Managing Member of Petitioner, with one exhibit;<sup>10</sup> (2) the rebuttal testimony declaration of Shaun Ross, with two exhibits;<sup>11</sup> and (3) the rebuttal testimony declaration of Randy Ross, also a Managing Member of Petitioner.<sup>12</sup>

## **B. Respondent's Evidence<sup>13</sup>**

Respondent filed a notice of reliance on documents<sup>14</sup> it identifies as:

- “Specification Sheet[s]” for ROSS bicycles;
- “detailed presentation[s] of Registrant’s ROSS product line”;
- “sample photographs of ROSS brand merchandise in Registrant’s inventory”; and
- a screen shot from the website Letgo showing “a current online listing of a ROSS product by Registrant.”<sup>15</sup>

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<sup>10</sup> Shaun Ross Testimony Declaration, 8 TTABVUE.

<sup>11</sup> Shaun Ross Rebuttal Testimony Declaration, 17 TTABVUE.

<sup>12</sup> Randy Ross Rebuttal Testimony Declaration, 18 TTABVUE.

Both rebuttal declarations comprise testimony that Petitioner should have introduced in its case-in-chief, but because Respondent has not objected to the rebuttal declarations on this basis and has treated the rebuttal declarations as part of the record, we have considered them in their entireties. *See Hunter Publ’g Co. v. Caulfield Publ’g Ltd.*, 1 USPQ2d 1996, 1997 n.2 (TTAB 1986) (improper rebuttal testimony considered where no objection raised); *see also cf. Automedx, Inc. v. Artivent Corp.*, 95 USPQ2d 1976, 1977 (TTAB 2010) (“Evidence which should constitute part of an opposer’s case in chief, but which is made of record during the rebuttal period, is not considered when the applicant objects.”); *General Elec. Co. v. Graham Magnetics Inc.*, 197 USPQ 690, 692 n.5 (TTAB 1977) (case-in-chief evidence improperly submitted under notice of reliance during rebuttal period considered where applicant did not object).

<sup>13</sup> During trial, Respondent submitted the testimony declaration of its principal, Steven Goldmeier. 10 TTABVUE. Petitioner moved to strike the declaration on the ground that Respondent did not identify Mr. Goldmeier in pretrial disclosures. 12 TTABVUE. By order dated June 18, 2019, the Board granted Petitioner’s motion to strike so we have not considered the Goldmeier Declaration. 16 TTABVUE.

<sup>14</sup> In the text of the notice of reliance, Respondent also provided a hyperlink to “a current online listing of a ROSS product on eBay.” 11 TTABVUE 4. The Board, however, does “not consider websites for which only links are provided.” *In re Aquitaine Wine USA, LLC*, 126

In addition, Respondent submitted evidence with both its answer<sup>16</sup> and brief.<sup>17</sup>

### C. Respondent's Evidentiary Objection

Respondent asserts a hearsay objection to paragraph 5 of Shaun Ross's main testimony declaration in which Mr. Ross testifies:

[O]n November 1, 2018 ... I contacted [by phone] Millennium Products Group/Rand International Leisure Products, Ltd. now Century Sports, Inc.<sup>18</sup> ... [and] the company representative I spoke with, who identified himself as Steve told me that the Ross bicycle brand has been out of business for some time, that the company has no inventory, and has no plans to manufacture any Ross bikes in the future. The representative also stated that he had no idea where any parts for a Ross bicycle could be obtained.<sup>19</sup>

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USPQ2d 1181, 1195 n.21 (TTAB 2018); *see also In re Change Wind Corp.*, 123 USPQ2d 1453, 1462 n. 8 (TTAB 2017) ("providing only a website address or hyperlink to Internet materials is insufficient to make such materials of record."); *TV Azteca, S.A.B. de C.V. v. Martin*, 128 USPQ2d 1786, 1790 n.14 ("The Board does not accept Internet links as a substitute for submission of a copy of the resulting page.").

<sup>15</sup> Respondent's Notice of Reliance, 11 TTABVUE.

<sup>16</sup> Answer, 6 TTABVUE 6-37. The documents Respondent attached to its answer are included in the documents Respondent submitted under notice of reliance.

<sup>17</sup> The documents Respondent attached to its brief include all of the documents it submitted under notice of reliance plus two emails, a purported sales brochure, and an invoice. Attaching evidence to a brief is neither a convenience, nor a courtesy. When considering a case for final disposition, the entire record is readily available to the panel. Because we must determine whether such attachments are properly of record, citation to the attachment requires examination of the attachment and then an attempt to locate the same evidence in the record developed during trial, requiring more time and effort than would have been necessary if citations were directly to the evidentiary record. *See Life Zone Inc. v. Middleman Grp., Inc.*, 87 USPQ2d 1953, 1955 n.4 (TTAB 2008). A party should cite to the evidence in the trial record by referencing the TTABVUE entry and page number. *See, e.g., RxD Media, LLC v. IP Application Dev. LLC*, 125 USPQ2d 1801, 1804 (TTAB 2018) (Board prefers citations to the TTABVUE record).

<sup>18</sup> In its brief, Respondent asserts that it has "authorized Millennium Products Group ('MPG') to use the mark in commerce (as a distributor using the mark under an oral or implied license)." 21 TTABVUE 59. There is, however, no evidence in the record to support this assertion.

<sup>19</sup> Shaun Ross Testimony Declaration, 8 TTABVUE 3, ¶ 5; Respondent's Brief, 21 TTABVUE 59. Respondent raises the same hearsay objection to the rebuttal declaration of Randy Ross,

Petitioner acknowledges that this is an “out-of-court statement ... being offered to prove the truth of the matter asserted,” but argues that because the statement “was made by Registrant’s representative” and is being offered against Respondent, it is not hearsay under Fed. R. Evid. 801(d)(2).<sup>20</sup> This Rule provides, in pertinent part, that a statement “offered against an opposing party” is not hearsay if the statement: “(1) was made by the party in an individual or representative capacity”; (2) “was made by a person whom the party authorized to make a statement on the subject”; or (3) “was made by the party’s agent or employee on a matter within the scope of that relationship and while it existed.” Fed. R. Evid. 801(d)(2). There is, however, no evidence in the record establishing that “Steve” made the objected-to statement in a representative capacity for Respondent, that Respondent authorized “Steve” to make the objected-to statement, or that “Steve” was an agent or employee of Respondent and made the objected-to statement within the scope of that relationship while it existed. Accordingly, Respondent’s hearsay objection is sustained, and we have not considered paragraph 5 of Shaun Ross’s main testimony declaration.

#### **D. Petitioner’s Evidentiary Objections**

Petitioner objects that the documents Respondent submitted under notice of reliance are not the types of documents that may be introduced in that manner and

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but Randy Ross’s declaration does not recount any telephone conversation. *Id.* at 66; Randy Ross Rebuttal Declaration, 18 TTABVUE.

<sup>20</sup> Petitioner’s Reply Brief, 23 TTABVUE 8-9.

that it was procedurally improper for Respondent to submit evidence with its answer and brief.<sup>21</sup>

1. Notice of Reliance

Petitioner's objections to the specification sheets, marketing presentations and photographs are sustained because these documents do not qualify as printed publications<sup>22</sup> or official records<sup>23</sup> nor do they fall into any other category of documents that may be introduced by notice of reliance. *See, e.g., Life Zone Inc.*, 87 USPQ2d at 1956-1958 (brochures, marketing materials, and periodic newsletters are not printed publications that may be introduced by notice of reliance); *Carefirst of Md. Inc. v. FirstHealth of the Carolinas Inc.*, 77 USPQ2d 1492, 1500 (TTAB 2005) (granting motion to strike "opposer's newsletters and brochures [that] are more in the nature of in-house publications than printed publications generally available; distribution is limited to those purchasers buying opposer's services and goods.").

Petitioner, however, has waived its objection to the Letgo screenshot on the ground that it is undated.<sup>24</sup> A party's failure to provide the URL address or date for

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<sup>21</sup> Petitioner's Brief, 19 TTABVUE 8-10; Petitioner's Reply Brief, 23 TTABVUE 6-7.

<sup>22</sup> "Printed publications" are material such as books, periodicals, and documents from the Internet available to the general public. Trademark Rule 2.122(e)(1) and (2); *Safer, Inc. v. OMS Invests., Inc.*, 94 USPQ2d 1031, 1039 (TTAB 2010) (Internet "document must be publicly available").

<sup>23</sup> "The 'official records' referred to by [Trademark Rule 2.122(e)(1)] are records prepared by a public officer which are self-authenticating in nature (and hence require no extrinsic evidence of authenticity as a condition precedent to admissibility), such as certified copies of public records." *Conde Nast Publ'ns Inc. v. Vogue Travel, Inc.*, 205 USPQ 579, 580 n.5 (TTAB 1979).

<sup>24</sup> Petitioner's Brief, 19 TTABVUE 9. Petitioner mistakenly refers to this exhibit as a screenshot from the eBay website.

Internet material submitted under notice of reliance is a procedural defect that can be cured so Petitioner should have raised this objection before final briefing. *City Nat'l Bank*, 106 USPQ2d at 1672 (“Any shortcomings in respondent’s original submission ... under notice of reliance, such as its failure to identify the URL and when the document was actually accessed (either printed out or downloaded), are procedural deficiencies that were not timely raised by petitioner and thus have been waived.”).

## 2. Documents Attached to Respondent’s Answer and Brief

Petitioner’s objection to the documents Respondent submitted with its answer is sustained. With an exception for pleaded registrations not applicable here, “an exhibit attached to a pleading is not evidence on behalf of the party to whose pleading the exhibit is attached, and must be identified and introduced in evidence as an exhibit during the period for the taking of testimony.” Trademark Rule 2.122(c). As for the documents attached to Respondent’s brief, we consider only the Letgo screenshot because that is the only document that was properly introduced during trial.<sup>25</sup> *Lincoln Nat’l Corp. v. Anderson*, 110 USPQ2d 1271, 1274 n. 5 (TTAB 2014) (giving no consideration to “voluminous evidence” submitted for the first time with applicant’s trial brief); *Life Zone Inc.*, 87 USPQ2d at 1955 (“Evidence submitted outside of the trial periods – including that attached to briefs – is untimely, and will not be considered.”).

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<sup>25</sup> Respondent should not have resubmitted this document with its brief. *Life Zone, Inc.*, 87 USPQ2d at 1955 (“evidence which was timely filed during the parties’ trial periods need not and should not be resubmitted”).

### 3. Summary

Petitioner's objection to Respondent's screenshot from the website Letgo is overruled, but all of Petitioner's other objections are sustained. Accordingly, we have considered Respondent's Letgo screenshot for what it shows on its face, and we do not consider the other evidence Respondent submitted.

## II. Analysis

### A. Standing

Standing is a threshold issue that must be proven by the plaintiff in every inter partes proceeding. *See Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982). To establish standing in a cancellation proceeding, Petitioner must show both "a real interest" in the proceeding as well as a "reasonable" basis for its belief of damage. *Empresa Cubana Del Tabaco*, 111 USPQ2d at 1062 (citing *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025-26 (Fed. Cir 1999)). A "real interest" is a "direct and personal stake" in the outcome of the proceeding. *Ritchie*, 50 USPQ2d at 1026.

Respondent admitted in its answer that "Petitioner has applied for the mark ROSS, Application Serial No. 87673601, for the goods 'bicycles' in Class 12" and that Respondent's involved "Registration is for an identical mark and for identical overlapping goods."<sup>26</sup> Petitioner also introduced the testimony of Shaun Ross,

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<sup>26</sup> Petition for Cancellation, 1 TTABVUE 2-3, ¶¶ 1 and 4; Answer, 6 TTABVUE 2, ¶¶ 1 and 4.

Petitioner's Chief Executive Officer and a Managing Member, as well as records from the Patent and Trademark Office's online databases establishing that it owns pleaded application Serial No. 87673601 for the standard character mark ROSS for "bicycles" which has been suspended pending the disposition of this cancellation proceeding involving Respondent's "conflict[ing]" mark.<sup>27</sup> We find that Petitioner has thus established its standing to bring this proceeding. *See Life Zone Inc.*, 87 USPQ2d at 1959 ("Opposer's evidence of its pending trademark application, and evidence that the application has been suspended pending resolution of the subject application demonstrate that opposer has a reasonable belief that it would be damaged by registration of applicant's mark, thus establishing standing."); *cf. WeaponX Performance Prods. Ltd. v. Weapon X Motorsports, Inc.*, 126 USPQ2d 1034, 1039-40 (TTAB 2018) (standing established through applicant's concessions and admissions that opposer's pending application would be refused registration should applicant's application register).

## **B. Abandonment**

Section 45 of the Trademark Act, 15 U.S.C. § 1127, provides that a mark shall be deemed "abandoned" when:

its use has been discontinued with intent not to resume such use. Intent not to resume may be inferred from the 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.

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<sup>27</sup> Petitioner's Notice of Reliance, 7 TTABVUE 55-58 (TSDR record, Petitioner's application and Office actions); Shaun Ross Testimony Declaration, 8 TTABVUE 3-4, ¶¶ 6-8.

There are two elements to a nonuse abandonment claim: nonuse of a mark and intent not to resume use. *Executive Coach Builders, Inc. v. SPV Coach Co.*, 123 USPQ2d 1175, 1180 (TTAB 2017); *see also Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1131 (Fed. Cir. 2015). Because registrations are presumed valid under Section 7 of the Trademark Act, 15 U.S.C. § 1057, the party seeking cancellation must rebut this presumption by a preponderance of the evidence. *Cold War Museum v. Cold War Air Museum*, 586 F.3d 1352, 92 USPQ2d 1626, 1628 (Fed. Cir. 2009); *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1476 (Fed. Cir. 2000); *ShutEmDown Sports, Inc. v. Lacy*, 102 USPQ2d 1036, 1042 (TTAB 2012).

Evidence of nonuse of a mark for three consecutive years constitutes a prima facie showing of abandonment, and creates a rebuttable presumption that the registrant has abandoned the mark without an intent to resume use. *Rivard v. Linville*, 133 F.3d 1446, 45 USPQ2d 1374, 1376 (Fed. Cir. 1998). The burden of production then shifts to the registrant to produce evidence sufficient to show use of the mark during the relevant period, or an intent to resume use. *Id.* The burden of persuasion, however, always remains with the party asserting abandonment to prove it, by a preponderance of evidence. *Cerveceria Centroamericana S.A. v. Cerveceria India Inc.*, 892 F.2d 1021, 13 USPQ2d 1307, 1309 (Fed. Cir. 1989).

Randy Ross, Managing Member of Petitioner, testified:

- (1) “I have over 40 years of experience in the U.S. bicycle industry,” which is a “relatively small” industry;

- (2) “I launched an outdoor line of fitness bikes using the Ross name in 2007 which Petitioner continues to sell today. The Rand Corporation never contacted me or Petitioner about the use of the Ross name or ever complained.”
- (3) “I have not encountered any new Ross branded bicycles for sale or announced by Registrant or its predecessors in interest in more than ten (10) years. In addition, no Ross bicycles have been reviewed by any industry publications for that same time period.”
- (4) “I have not seen any websites, social media accounts, or any type of online presence for Registrant promoting the Ross bicycle brand.”
- (5) “Based on my extensive knowledge of the industry spanning decades, Registrant, and its predecessors, have not manufactured or otherwise branded new products under the Ross trademark for at least ten (10) years.”<sup>28</sup>

Shaun Ross, Chief Executive Officer and a Managing Member of Petitioner testified:<sup>29</sup>

- (1) “I have over 10 years of experience in the U.S. bicycle industry, including monitoring industry and consumer trends. I am knowledgeable of the bicycle business in the United States through speaking with industry executives and factories, reviewing industry publications, regular contact with bicycle shops, attending bicycle industry events, and monitoring industry associations.”

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<sup>28</sup> Randy Ross Rebuttal Declaration, 18 TTABVUE 2-3, ¶ 2 and 8-10.

<sup>29</sup> Shaun Ross also testified that Petitioner “requested in discovery all of the Registrant’s evidence that it was still using the Ross brand name or intended to resume use. Registrant did not provide any evidence of current or planned use. No evidence of sales, factory names, new bicycle photos, retailer names, referrals, distributor accounts or any online links to show new Ross Bicycles being sold anywhere online.” 17 TTABVUE 4-5, ¶ 12. Respondent, however, did not respond that no such documents existed. Rather, Respondent stated that it would produce documents related to sales, domain names and social media accounts, “if any,” and objected to providing documents regarding distributors and retailers on relevance grounds. Petitioner’s Notice of Reliance, 7 TTABVUE 95-98, 105-106 and 108-113 (document requests and responses 10, 11, 13, 21, 27, 29, 35, 36, 37 and 40). Such responses cannot be construed as admissions that no such documents exist. Fed. R. Civ. P. 34(b)(2)(B)-(C); *Hewlett Packard Enter. Dev. LP v. Arroware Indus., Inc.*, 2019 USPQ2d 158663 \*9-10 (TTAB 2019) (in responding to document requests “a party must state whether or not it has responsive documents in its possession, custody or control and, if it does, state the documents will be produced by a specified date or they are being withheld, based on a claim of privilege or a specified objection”). Petitioner should have filed a motion to compel proper responses and challenge Respondent’s relevancy objections.

- (2) “For several years prior to forming” Petitioner in July 2017, “I reviewed a multitude of industry publications, websites, and bike retailers to determine whether the Ross bicycle brand had been abandoned. At no time during this review did I encounter any Ross branded bicycles for sale or announced. In addition, no Ross bicycles had been reviewed by any industry publications for many years. Moreover, there were no websites, social media accounts, or any type of online presence for the Ross bicycle brand.”
- (3) “Based on my review, Registrant had not used the Ross trademark for more than three (3) years and had no plans to resume use of the Ross trademark.”
- (4) “Starting in the early 2000s, it was apparent to the whole bicycle industry that the Ross brand was no longer a bicycle manufacturer and was not involved in any publications, online sales, events, industry shows or races. From 2002-2007, the Ross name completely faded from new manufacturing.... Starting around 2007 there were no longer any new Ross Bicycles for sale. The Ross brand was nonexistent in the United States retail market[.]”
- (5) Respondent’s predecessor used the domain names RossBicycles.com and RossBikes.com “to promote the Ross Bicycle brand in the late 1990s” but “[s]ince the early 2000s these websites were completely down ... with no brand activity whatsoever.” Petitioner subsequently acquired the domain names.<sup>30</sup> “I am not aware of any domain names owned by the Registrant where Ross bicycles are being promoted.”

In addition, both Shaun and Randy Ross have testified that the technology on Respondent’s bicycles is outdated so various parts, e.g., derailleurs, cranks, and index shifters, have not been used for at least “many years.”<sup>31</sup>

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<sup>30</sup> Shaun Ross Testimony Declaration, 8 TTABVUE 2-3, ¶¶ 2-4; Shaun Ross Rebuttal Testimony Declaration, 17 TTABVUE 3-4, ¶¶ 8-10.

<sup>31</sup> Specifically, Shaun and Randy Ross have testified that “[t]he derailleur and cranks along with the componentry on a [Ross] Mt. Pocono bike have not been used on bicycles since the 1990s”; that the Ross “Mt. Jefferson uses old bicycle technology including the derailleur which has not been manufactured for many years”; that “[t]he Ross Central Park has outdated specifications which have not been used on bicycles for many years including the long since discontinued Shimano EF50 speed synchro index shifter”; and that “[t]he Ross Barracuda [sic], Mr. [sic] St. Helen [sic], Tricycles, Wagon, Cruiser, Tri-Fold, Mount Tandem and Shark all feature old technology that has not been used on bicycles for more than ten (10) years.” Shaun Ross Rebuttal Declaration, 17 TTABVUE 2-3, ¶¶ 3-6; Randy Ross Rebuttal Declaration, 18 TTABVUE 2-3, ¶¶ 4-7.

We have weighed the probative value of the foregoing testimony against any potential bias, *Alcatraz Media, Inc. v. Chesapeake Marine Tours, Inc.*, 107 USPQ2d 1750, 1755 (TTAB 2013), and we find that Petitioner has established a prima facie case of abandonment based on nonuse of the involved mark for “bicycles and structural parts thereof” since at least Respondent’s acquisition of the mark on July 23, 2013 to November 7, 2017 when Petitioner filed the petition for cancellation (“Nonuse Period”). The testimony is clear, definite, and consistent. *Cf. Executive Coach Builders, Inc.*, 123 USPQ2d at 1184 (“The oral testimony even of a single witness may be adequate to establish priority, but only if it is sufficiently probative. Such testimony ‘should not be characterized by contradictions, inconsistencies, and indefiniteness but should carry with it conviction of its accuracy and applicability.’”). Respondent argues that “not being able to find usage on the Internet is not the standard for cancelling another company’s trademark.”<sup>32</sup> We agree, but the lack of an Internet presence for a retail product is not without some probative value. Moreover, both Shaun and Randy Ross have testified that they have longstanding experience in the U.S. bicycle industry and they have not encountered use of the ROSS mark even in non-online forums.

We further find the testimony reliable because it is corroborated by Respondent’s failure to introduce any competent evidence establishing that Respondent used the mark ROSS for bicycles or bicycle parts during the Nonuse Period. In response to interrogatories asking Respondent to identify “all of the products for which

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<sup>32</sup> Respondent’s Brief, 21 TTABVUE 65.

Registrant's mark has been used" and "the specific media outlets through which Registrant has advertised its goods" since January 1, 2010, Respondent asserted that "since 2010," it has "marketed under the mark 'ROSS' ... Central Park, Mt. St. Helens, Tri-Fold, Mount Tandem, Tricycle, Wagon, [and] Cruiser 26" Bicycle[s]" and that "[t]he goods have been marketed in person and via electronic mail."<sup>33</sup> We find Respondent's interrogatory responses insufficient to rebut Petitioner's showing that Respondent did not use its mark during the Nonuse Period because the responses are vague and they are not verified or corroborated by any evidence properly of record. *ShutEmDown Sports*, 102 USPQ2d at 1043-1044 (finding uncorroborated interrogatory response insufficient to rebut presumption of abandonment; "A party's response to an interrogatory is not without evidentiary value, but generally is viewed as 'self-serving.'"); *Cf. Tao Licensing*, 125 USPQ2d at 1053 (noting lack of any records or other documentation corroborating testimony that respondent distributed product samples); *Daniel J. Quirk Inc. v. Village Car Co.*, 120 USPQ2d 1146, n.28 (TTAB 2016) ("It has been stated that unsigned and unverified answers to interrogatories do not qualify as answers under Fed. R. Civ. P. 33.... Courts have also found that unverified answers to interrogatories are not competent evidence or are not a valid basis for factual findings in connection with a motion for summary judgment.").

The screenshot from the Letgo website listing a "Ross Mt Jefferson 15 Speed Mountain Bike" for sale is undated, and in any event, cannot be considered for the

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<sup>33</sup> Petitioner's Notice of Reliance, 7 TTABVUE 77-78, 84 and 86 (Petitioner's interrogatories 2 and 8 and Respondent's responses).

truth of the matter asserted, i.e. that goods are actually being offered for sale under the ROSS mark, and so the screenshot is not probative of whether Respondent was using the ROSS mark during the Nonuse Period.<sup>34</sup> There also is no merit to Respondent's argument that the combined Section 8 and 9 declaration it filed in connection with the involved registration on March 24, 2014 "included proof of usage of the mark at that time, which is presumed to be valid."<sup>35</sup> Trademark Rule 2.122(b)(2) provides: "Specimens in the file of an application for registration, or in the file of a registration, are not evidence on behalf of the applicant or registrant unless identified and introduced in evidence as exhibits during the period for the taking of testimony. Statements made in an affidavit or declaration in the file of an application for registration, or in the file of a registration, are not testimony on behalf of the applicant or registrant."

In view of the foregoing, we find that Petitioner has established a prima facie case of abandonment based on Respondent's failure to use the ROSS mark for "bicycles and structural parts thereof" during the Nonuse Period. The burden of production (i.e. going forward) now shifts to Respondent to present evidence that it had an intent to resume use of the mark.

"In every contested abandonment case, the respondent denies an intention to abandon its mark; otherwise there would be no contest." *Imperial Tobacco Ltd. v. Philip Morris Inc.*, 899 F.2d 1575, 14 USPQ2d 1390, 1394 (Fed. Cir. 1990). So

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<sup>34</sup> Respondent's Notice of Reliance, 11 TTABVUE 46.

<sup>35</sup> Respondent's Brief, 21 TTABVUE 60 and 63.

Respondent must come forward with evidence beyond mere conclusory statements or denials that it lacked an intent to resume use. *Id.*

Intent to resume use in abandonment cases has been equated with a showing of special circumstances which excuse a registrant's nonuse. *Id.* at 1395.

If a mark owner's nonuse is excusable, it has overcome the presumption that its nonuse was coupled with an intent not to resume use; if the activities are insufficient to excuse nonuse, the presumption is not overcome. To prove excusable nonuse, [the registrant] must produce evidence showing that, under the particular circumstances of the case, [the registrant's] activities are those that a reasonable business with a bona fide intent to use the mark in U.S. commerce, would have undertaken. To that end, the Board has pointed out that plans must be to resume commercial use of a mark within the "reasonably foreseeable future."

*Executive Coach Builders, Inc.*, 123 USPQ2d at 1198-99 (internal citations omitted); 3 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 17:16 (5th ed.) ("[A]s soon as the external cause has passed, the user must resume use within a reasonable time.").

The record does not support a finding that Respondent acted in a way reasonable for a business with a bona fide intent to use the mark. Some period of nonuse after Respondent acquired the mark might be expected, but the only competent evidence of record that Respondent took any action with respect to the mark is Respondent's recordation of the assignment on November 13, 2013 and filing of a Section 8 & 9 declaration on March 24, 2014. This evidence is not sufficient for us to find that Respondent's more than four-year period of nonuse was excusable or that Respondent had an intent to resume use of the mark in the foreseeable future. The facts here are different from those in *Crash Dummy Movie, LLC v. Mattel, Inc.*, 601 F.3d 1387, 94

U.S.P.Q.2d 1315, 1317 (Fed. Cir. 2010) where the Federal Circuit found “substantial evidence” to support the Board’s determination that Mattel had an intent to resume use of the mark: Mattel discussed marketing toys under the mark with its predecessor-in-interest, subsequently acquired rights in the mark, recorded the assignment with the Office, and continuously engaged in product research and development that culminated in the actual shipment of goods. Here, the evidence simply is not sufficient to demonstrate that Respondent had plans to resume commercial use of the mark within the “reasonably foreseeable future.” Accordingly, Respondent has not rebutted the presumption of abandonment.

### **III. Conclusion**

Abandonment is a question of fact. After carefully considering all of the evidence properly of record in this proceeding, we find that Petitioner has established by a preponderance of the evidence a prima facie case of abandonment based on three years of nonuse, and that Respondent has not met its burden of rebutting that prima facie case. 15 U.S.C. § 1127. We therefore conclude that Respondent has abandoned the ROSS mark for “bicycles and structural parts thereof.”

**Decision:** The petition to cancel Respondent’s Registration No. 980887 for the mark ROSS (typed form) is **granted**, and the registration will be cancelled in due course.