

**THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB**

Mailed:  
December 21, 2007  
Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Choice First Distribution, LLC

v.

John L. Brown

Cancellation No. 92044116  
Against Registration No. 2780780

Michael Cerrati and John Alumil of Patel & Alumil, PC for  
Choice First Distribution, LLC.

John L. Brown, *pro se*.

Before Bucher, Zervas and Kuhlke, Administrative Trademark  
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Choice First Distribution, LLC (petitioner) has  
petitioned to cancel the following registration owned by  
John L. Brown (respondent) for the mark **CHRONIC 187** for  
"non-alcoholic carbonated and non-carbonated beverages,  
namely soda and energy drinks" in International Class 32.<sup>1</sup>

As grounds for cancellation petitioner asserts that  
respondent fraudulently submitted an Allegation of Use in  
order to induce the Trademark Examining Attorney to approve

his mark for registration; that any use of respondent's mark prior to filing his Allegation of Use was merely "token use" of the mark and not in fact a *bona fide* use in the ordinary course of trade, making the registration void *ab initio*; and that respondent's nonuse of the mark for at least three years created a rebuttable presumption that respondent had abandoned his mark.

Respondent, in his answer, denies the salient allegations in the petition for cancellation.

Petitioner did not take any testimony, but filed three separate notices of reliance on December 28, 2005,<sup>2</sup> December 30, 2005<sup>3</sup> and January 4, 2006.<sup>4</sup> Under the original trial dates, petitioner's testimony period closed on December 27, 2005. Based upon an earlier order of the board, petitioner knew that these submissions were to be accorded no

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<sup>1</sup> Registration No. 2780780 issued November 4, 2003.

<sup>2</sup> Prosecution entry #9, filed via ESTTA on December 28, 2005, relying upon all of Respondent's "Responses to Petitioner's First Set of Interrogatories to Respondent." (21 pages including the ESTTA cover sheet).

<sup>3</sup> Prosecution entry #10, received by the United States Patent and Trademark Office on December 30, 2005 (absent a certificate of mailing), relying upon certain of Respondent's "Responses to Petitioner's First Set of Admissions to Respondent," with the attached documents authenticated by admission. (134 pages).

<sup>4</sup> Prosecution entry #12, received by the United States Patent and Trademark Office on January 4, 2006 (also absent a certificate of mailing), submitting for the record a status and title copy of Opposer's Registration No. 2886508.

consideration, and that under reset trial dates, its testimony period closed on May 30, 2006, opening thirty days prior thereto. Nonetheless, petitioner did not re-file these three notices of reliance again until June 15, 2006.<sup>5</sup> Again, they were late. Inasmuch as these notices were never filed within any of petitioner's testimony periods, none of petitioner's evidence can be given any consideration.

As to respondent's several notices of reliance filed September 5, 2006, copies of pages of the printed publication *Wheels Magazine* from the years 2000, 2002, 2003, 2004 and 2005 are properly of record as printed publications available to the general public. However, inasmuch as petitioner has failed to submit in a timely manner during its testimony period any portion of respondent's "Responses to Petitioner's First Set of Interrogatories to Respondent," respondent cannot rely upon its own discovery responses.<sup>6</sup>

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<sup>5</sup> With prosecution entry #16, petitioner resubmitted respondent's "Responses to Petitioner's First Set of Interrogatories to Respondent," prosecution entry #9 (now 22 pages including the second ESTTA cover sheet); with prosecution entry #17, petitioner resubmitted for the record a status and title copy of petitioner's Registration No. 2886508, prosecution entry #12, (now five pages including the second ESTTA cover sheet); and with prosecution entry #18, petitioner resubmitted respondent's "Responses to Petitioner's First Set of Admissions to Respondent," with the attached documents authenticated by admission, prosecution entry #10, (now 135 pages including the second ESTTA cover sheet).

<sup>6</sup> Prosecution entry #20 contains many of the same documents contained in petitioner's untimely submissions of prosecution entries ##9, 10, 16 and 18.

Accordingly, the evidence of record includes the pleadings, as amended, the file of the registration sought to be cancelled and copies of pages of five editions of *Wheels Magazine*. Both parties filed trial briefs.

Because Mr. Brown's certificate of registration is *prima facie* evidence of the validity of the registration and continued use of the registered mark, the burden of proof is placed upon Choice First Distribution, LLC, the petitioner who seeks cancellation herein. 15 U.S.C. § 1057(b) (1988); and *J. C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 962-63, 144 USPQ 435, 437 (CCPA 1965). In any cancellation proceeding, the petitioner bears the burden of proof by a preponderance of the evidence, whatever the alleged grounds for cancellation.

However, in light of petitioner's failure to offer into the record during its testimony period any evidence, we enter judgment against petitioner for its failure to prove its case.

*Decision:* The petition to cancel is dismissed.