THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: August 1, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Bubble Down, LLC
v.
Thrifty Oil Co.

Cancellation No. 92077451

Woodrow H. Pollack of Shutts & Bowen LLP,
for Bubble Down, LLC.

Thomas A. Dirksen, Attorney at Law,
for Thrifty Oil Co.

Before Heasley, Lebow, and Lavache,
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Respondent Thrifty Oil Co. owns a Principal Register registration for the mark THRIFTY, in standard characters, originally for "gasoline service station services and car washing services," in International Class 37.[1]

Petitioner Bubble Down, LLC has petitioned to cancel Respondent's registration on the ground of abandonment.[2] In its Answer, Respondent denied the salient

[1] Registration No. 3028560, issued December 13, 2005, claiming January 1, 1969 as the date of first use anywhere and the date of first use in commerce. Renewed.

[2] Petition for Cancellation, 1 TTABVUE.

allegations of the Petition for Cancellation.[3]

During the course of this cancellation proceeding, Respondent moved to amend its recitation of services to delete "and car washing services." Respondent consented to entry of judgment as to the deleted services,[4] and Petitioner "agree[d] to the deletion of 'car washing services' from the '560 Registration and entry of judgment in Petitioner's favor with respect to car washing services."[5] The Board accordingly approved and entered the amendment, noting that "Respondent's consent to entry of judgment with respect to 'car washing services' on the ground of abandonment, to which Petitioner agreed, is accepted."[6] After the limiting amendment, the Registration's remaining recitation reads, "gasoline service station services."

Both parties have briefed the case. We deny the petition for cancellation.

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[3] Respondent also asserts seven purported affirmative defenses in its Answer. Answer, ¶¶ 12-18, 9 TTABVUE 9. The first and seventh—claiming, respectively, that the Petition fails to state a claim on which relief can be granted, and that Respondent reserves the right to assert additional defenses—are not true affirmative defenses. *Shenzhen IVPS Tech. Co. Ltd. v. Fancy Pants Prods., LLC*, 2022 WL 16646840, *1 n.5 (TTAB 2022) (failure to state a claim); *Monster Energy Co. v. Jones*, 2024 WL 4275295, *8 (TTAB 2024) (reservation of rights). The second, denying abandonment, does not amplify upon the denials in the Answer, and does not serve as an affirmative defense. *NPG Records, LLC v. JHO IP Holdings LLC*, 2022 WL 3701446, *12 (TTAB 2022). The third and fourth, claiming priority and absence of dilution, are irrelevant, as Petitioner claims abandonment, not likelihood of confusion or dilution. *Am. Vitamin Prods. Inc. v. DowBrands Inc.,* 1992 WL 88051, *3 (TTAB 1992). The fifth and sixth raise the equitable doctrines of laches, estoppel, acquiescence, waiver and unclean hands, which are not available against an abandonment claim. *Id.* at *3 ("Where the ground for cancellation is abandonment, equitable defenses such as laches, bad faith and unclean hands, are not available in light of the overriding public interest in removing abandoned registrations from the register."). In any event, these equitable defenses were not pursued at trial, and are impliedly waived. *Hangzhou Mengku Tech. Co. v. Shanghai Zhenglang Tech. Co.*, 2024 WL 5265081, *1 (TTAB 2025). The purported affirmative defenses are therefore given no consideration.

[4] 29 TTABVUE 4.

[5] 30 TTABVUE 10.

[6] Board Order, 33 TTABVUE 3 (citing Trademark Rule 2.133(a), 37 C.F.R. § 2.133(a); *Drive Trademark Holdings LP v. Inofin*, 2007 WL 616039, *2 (TTAB 2007)).

I. Entitlement

"Under § 14 of the Lanham Act, a cancellation challenge may be filed 'by any person who believes that he is or will be damaged … by the registration of a mark.' § 1064." *Meenaxi Enter., Inc. v. Coca-Cola Co.*, 38 F.4th 1067, 1072 (Fed. Cir. 2022); *see also Curtin v. United Trademark Holdings, Inc.*, 137 F.4th 1359, 1367 (Fed. Cir. 2025). "A party in the position of plaintiff may seek to cancel registration of a mark where such cancellation is within the zone of interests protected by the statute, and the party has a reasonable belief in damage that is proximately caused by registration of the mark." *Look Cycle Int'l v. Kunshan Qiyue Outdoor Sports Goods Co., Ltd.*, 2024 WL 3739358, *3 (TTAB 2024) (citing *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 1303-05 (Fed. Cir. 2020)).[7]

Petitioner Bubble Down LLC offers car wash services at a range of price points, each denominated by a different mark, as shown in the below-shown display of different wash packages from Petitioner's website:[8]

[7] This opinion adheres to the practice set forth in the TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03(a) (2025). It cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals by the pages on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board, this opinion cites to the Westlaw (WL) legal database and cites only precedential decisions, unless otherwise noted.

[8] Declaration of Bryan Zinober, Petitioner's Chief Executive Officer, ¶ 6, 19 TTABVUE 2.



[9]

Petitioner owns Principal Register registrations for the marks denoting the three more expensive wash packages—BESTEST, BESTY, and NIFTY—shown above.[10] It has filed applications to register THRIFTY WASH on the Principal Register in standard characters and in composite form, 

, for "automobile cleaning and car washing" in Class 37.[11] These applications, however, were suspended pending potential refusals under Section 2(d) of the Trademark Act, 15

[9] Screenshot from Petitioner's website at Bubbledown.com, Petitioner's notice of reliance (NOR) ex. 30, 19 TTABVUE 143.

[10] USPTO records of registrations, Petitioner's NOR exs. 20-25, 19 TTABVUE 66-99.

[11] Application Serial Nos. 88890727 and 88895190, filed April 28 and 30, 2020, claiming first use anywhere and in commerce at least as early as April 9, 2018. Both applications disclaim "WASH." The composite mark is described as follows: "The mark consists of a smiley face in white and outlined in black with black eyes, eyebrows and mouth outline, a teal nose outlined in black and with several teal bars within the face. The face design features two arms in black and wearing teal gloves outlined in black, with a teal cap outlined in black and two white stars outlined in black. Below the design appears the wording 'THRIFTY WASH' in white with two white dashes on the side of 'WASH'. All appears on a teal polygon background."

U.S.C. § 1052(d), based on a likelihood of confusion with Respondent's involved THRIFTY mark.[12]

Petitioner has a commercial interest in cancelling Respondent's registration, which has prevented registration of its own marks. *Luca McDermott Catena Gift Trust v. Fructuoso-Hobbs SL*, 102 F.4th 1314, 1326 (Fed. Cir. 2024). It has accordingly established its entitlement to bring and maintain this cancellation proceeding under Section 14 of the Trademark Act.

II. The Record

The record consists of the pleadings, and, by operation of Trademark Rule 2.122(b), the file of Respondent's involved Registration. In addition, the record includes testimony and notices of reliance, as listed in the parties' briefs.[13] Although we do not list the contents of the record, we have reviewed and considered it in its entirety. *In re Miracle Tuesday LLC*, 695 F.3d 1339, 1348 (Fed. Cir. 2012) ("[T]he mere fact that the Board did not recite all of the evidence it considered does not mean the evidence was not, in fact, reviewed." (citing *Plant Genetic Sys., N.V. v. Dekalb Genetics Corp.*, 315 F.3d 1335, 1343 (Fed. Cir. 2003))).

The parties have raised some evidentiary issues, which we consider next.

In its notice of reliance, Respondent submits evidence of seven third-party registrations for marks used in connection with both gas station and car wash

[12] Zinober decl. ¶¶7-8, 13, Petitioner's NOR, 19 TTABVUE 3-4. *See generally* application files for Application Serial Nos. 88895190 and 88890727, Respondent's NOR, 20 TTABVUE 102-208.

[13] 19-20, 27 TTABVUE. 38 TTABVUE 5-6, 39 TTABVUE 6-8.

services.[14] Petitioner moves to strike these third-party registrations on the ground that they were not disclosed in Respondent's pretrial disclosures.[15] Respondent responds that its pretrial disclosures addressed Petitioner's goods and services, as well as Respondent's goods and services;[16] that these third-party registrations show that car wash services are related to gas station services, and are thus relevant to a likelihood of confusion; and that the third-party registrations are public records, as freely available to Petitioner as Respondent.[17] As we have noted earlier,[18] the issue before us is not likelihood of confusion, but abandonment. The motion to strike is granted because Respondent did not disclose this category of evidence in its pretrial disclosures, and the category is, in any event, irrelevant to this cancellation proceeding.

Respondent's trial brief attaches as Exhibit B the declaration of Respondent's counsel, Thomas A. Dirksen, explaining that he was unaware that two of the thirteen gas stations bearing Respondent's THRIFTY mark had changed to another brand.[19] The Board has already granted Petitioner's motion to strike this declaration as untimely.[20] *See* Trademark Rule 2.121(a), 37 C.F.R. § 2.121(a) ("No testimony shall be taken or evidence presented except during the times assigned, unless by

[14] Respondent's NOR, exs. J-P, 20 TTABVUE 231-286.

[15] Motion to strike, 21 TTABVUE, renewed in Petitioner's main brief. 38 TTABVUE.

[16] ¶¶8-9 of Respondent's pretrial disclosures, 21 TTABVUE 9; Respondent's response to motion to strike, 23 TTABVUE 2.

[17] Respondent's revised NOR, 27 TTABVUE 4.

[18] Footnote 3, *supra*.

[19] Dirksen declaration, ex. B, 39 TTABVUE 26-28.

[20] Board Order, 48 TTABVUE.

stipulation of the parties approved by the Board, or upon motion granted by the Board, or by order of the Board."); TBMP § 801.01 ("A brief may not be used as a vehicle for the introduction of evidence.").

In its brief, Respondent also asks us to take judicial notice of its Google search results page for the search term "THRIFTY gas station" and of the fact that gas stations are highly regulated by state and federal authorities.[21] Petitioner argues on reply that even if judicial notice is taken of these matters, they do not absolve Respondent from its duty to control the nature and quality of the goods and services offered under its mark, and "do not cure the fact that Registrant has abandoned quality control of the trademark."[22]

> The Board may take judicial notice of a fact that is not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b). *See also* TBMP § 704.12(a). The Board will take judicial notice of an adjudicative fact not subject to reasonable dispute, as defined in Fed. R. Evid. 201(b), if a party (1) requests that the Board do so, and (2) supplies the necessary information. *See* TBMP § 704.12(b).

Heil Co. v. Tripleye GmbH, 2024 WL 4925901, *10 (TTAB 2024).

We decline to take judicial notice of Respondent's Google search for "THRIFTY gas station," for two reasons. First, it consists of a list of Internet search results, which "often does not contain sufficient surrounding text to show the context in which the term is used on the listed web pages," *Luxco, Inc. v. Consejo Regulador del Tequila, A.C.,* 2017 WL 542344, *11 n. 59 (TTAB 2017), and does not do so here.

[21] Respondent's brief, 39 TTABVUE 9, and exhibits A and C, 39 TTABVUE 22-24, 29-33.

[22] Petitioner's reply brief, 42 TTABVUE 2-3.

Second, Respondent offered these search results to counter Petitioner's assertion that "[w]hen searching 'THRIFTY OIL' in Google Search bar, the results yield little to no evidence of any gas stations."[23] Petitioner's questionable search term suffices to call the probative value of its search results into question—so much so that we need not rely on Respondent's countervailing search. We accordingly decline to take Exhibit A, Respondent's search for "THRIFTY gas station" into account.[24]

Respondent's Exhibit C, regarding California government regulation of gas stations, also consists of a Google search results list, which suffers from the same probative deficiency as Exhibit A.[25] We accordingly decline to take Exhibit C into account, as well.[26]

III. Abandonment

Under Section 45 of the Trademark Act, a mark shall be deemed abandoned "[w]hen 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. "There are two elements to a claim for

[23] Petitioner's main brief, 38 TTABVUE 13.

[24] 39 TTABVUE 22-24.

[25] Exhibit C to Respondent's brief, 39 TTABVUE 30-33.

[26] The exclusion of this evidence has no material effect on the outcome, as the presence of government regulation does not substitute for a trademark owner controlling the nature and quality of his licensee's goods and services. *See* J. Thomas McCarthy, 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 18:55 (5th ed. May 2025) ("McCarthy") ("The fact that all food service establishments are subject to the regulations of the state Department of Health does not mean that the trademark owner is actually controlling the nature and quality of food products served at a licensed restaurant.").

abandonment: (1) nonuse; and (2) intent not to resume use." *Tiger Lily Ventures Ltd. v. Barclays Cap. Inc.,* 35 F.4th 1352, 1360 (Fed. Cir. 2022).

"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, [1356] (Fed. Cir. 2009) (citing *W. Fla. Seafood v. Jet Rests.*, 31 F.3d 1122, 1125 [] (Fed. Cir. 1994))." *Peterson v. Awshucks SC, LLC*, 2020 WL 7888976, *11 (TTAB 2020).

The Board has set forth the ways a petitioner can bear its burden:

> If a petitioner can show three consecutive years of nonuse, it establishes a prima facie showing of abandonment, creating a rebuttable presumption that use of the mark was discontinued with intent not to resume use. … The burden of production (i.e., going forward) then shifts to the respondent to produce evidence that it either used the mark or that it intended to resume use. The burden of persuasion remains with the petitioner, the party attempting to prove abandonment by a preponderance of the evidence. … If Petitioner does not prove three consecutive years of nonuse, it must prove both elements without the aid of a presumption—that is, that Respondent discontinued use of its mark with intent not to resume such use.

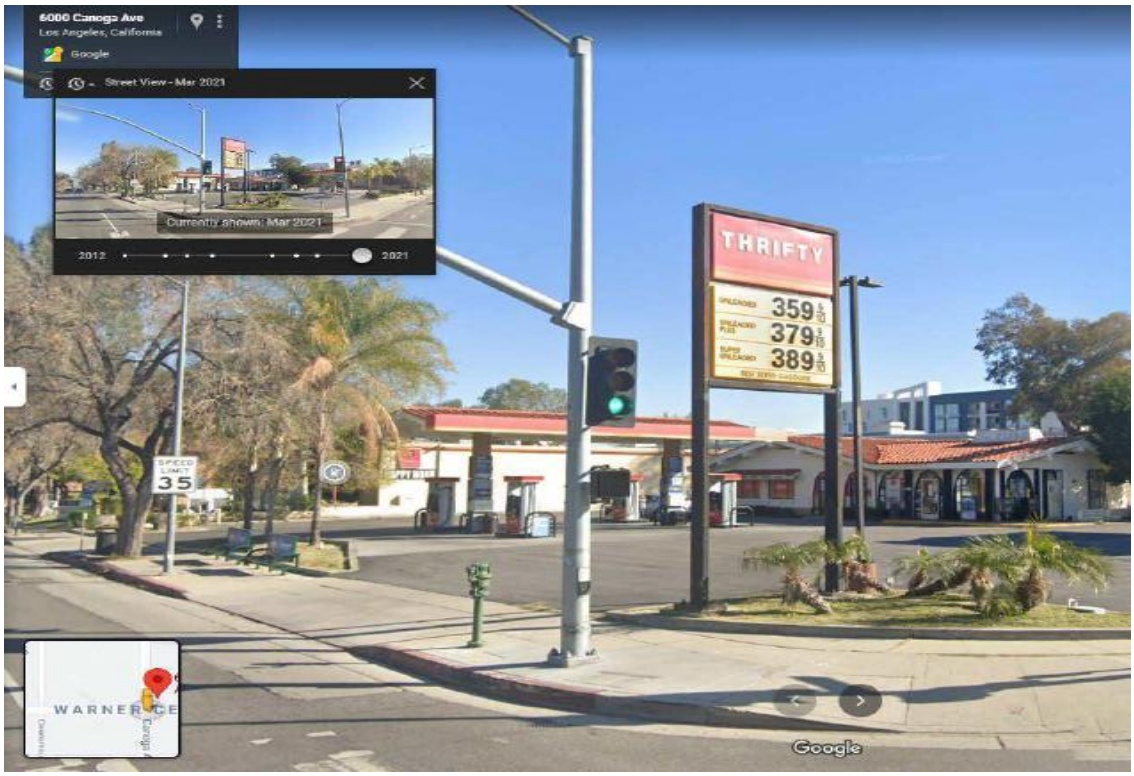
Adamson Sys. Eng., Inc. v. Peavey Elec. Corp., 2023 WL 7274674, *9 (TTAB 2023) (internal citation omitted).

Petitioner fails to carry this burden of proof. Rather than proving a prima facie case, Petitioner attempts to shift the burden of proof to Respondent.

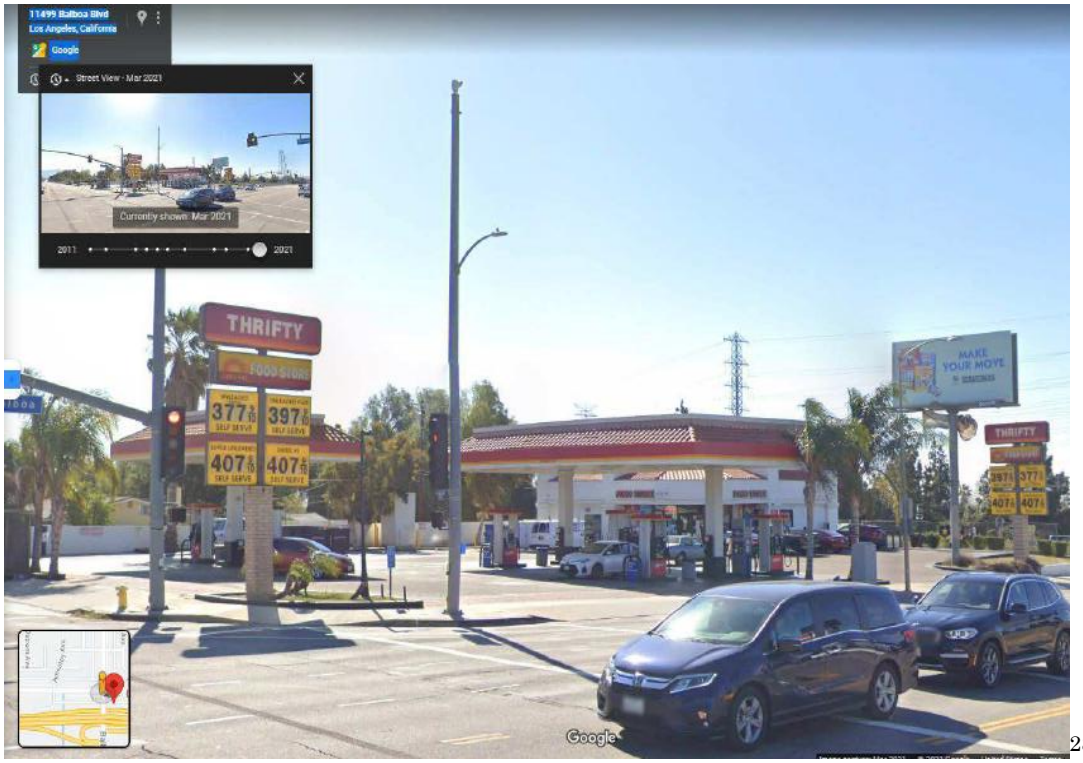
For instance, Petitioner attempts to poke holes in Respondent's discovery responses. Petitioner points to Respondent's interrogatory answers identifying thirteen (13) gasoline service stations offering Respondent's services under the

THRIFTY mark.[27] In connection with these answers, Respondent produced photographs of some of the gas stations at various locations; for example:





[27] Respondent's answers to interrogatory nos. 2, 3, 9. Petitioner's NOR, 19 TTABVUE 10, 12, 17; Petitioner's main brief, 38 TTABVUE 12, 13, 16.



[28]

Petitioner points out, however, that two of the thirteen gas stations were rebranded as ARCO. As proof, Petitioner asks that we take judicial notice of two Google Street View images it attaches to its main brief as Exhibit B.[29] We ordinarily frown on evidence attached to briefs. *See* Trademark Rule 2.121(e), 37 C.F.R. § 2.121(e) ("No testimony shall be taken or evidence presented except during the times assigned, unless by stipulation of the parties approved by the Board, or upon motion granted by the Board, or by order of the Board."). But here, Respondent's counsel concedes that the two gas stations had, in fact, rebranded—a fact of which he was

[28] Attachments to Respondent's answer to interrogatories, 19 TTABVUE 18-30.

[29] Petitioner's main brief, 38 TTABVUE 14 n. 3, 16-17 & nn. 4-6, ex. B, 38 TTABVUE 27-29.

unaware.[30] We take this as a stipulation, and exercise our discretion to consider this evidence, which reduces Respondent's THRIFTY-branded gas stations to eleven. Notably, Petitioner does not challenge Respondent's use of its THRIFTY mark in connection with these eleven remaining gas stations. As Respondent notes, "Petitioner's silence speaks volumes and proves that the other 11 gas stations bear THRIFTY branding…."[31]

Petitioner alludes to a 1997 Los Angeles Times article reporting that "'in recent years, Thrifty has been slowly shedding its locations to outside firms' according to a spokesman."[32] An article of this sort is generally admissible for what it shows on its face, not for the truth of the matter contained in the article. TBMP § 704.08(b). Respondent, however, did not object to the article, and in fact admits that some of its locations were rebranded under the ARCO name.[33] We therefore consider the article for whatever probative value it may have. *See Optimal Chem. Inc. v. Srills LLC*, 2019 WL 4316700, *16 n. 90 (TTAB 2019) (Board considered Internet evidence for the truth of the matters contained therein because the opposing party did not object and indeed commented on it). As Respondent notes, however, it "reduced the number of gas stations it operates, but never ceased use of its THRIFTY Mark in connection with gas station services."[34]

[30] Paragraph four of the otherwise stricken Dirksen declaration. 39 TTABVUE 26.

[31] Respondent's brief, 39 TTABVUE 14.

[32] "Arco to Take Control of 260 More Stations" LA Times, March 4, 1997, Petitioner's NOR, 19 TTABVUE 148-151; Petitioner's main brief, 38 TTABVUE 12.

[33] Respondent's response to request for admission no. 3, Petitioner's NOR, 19 TTABVUE 57.

[34] Respondent's brief, 39 TTABVUE 18.

Petitioner asserts that "[w]hen searching 'THRIFTY OIL' in Google Search bar, the results yield little to no evidence of any gas stations."[35] This assertion fails, first, because it is unsupported by documented evidence of such a search and second, because a search so formulated—focusing on Respondent's trade name, THRIFTY OIL, not its mark, THRIFTY—is not reasonably calculated to lead to accurate results. In short, Petitioner's asserted search does not reliably reflect Respondent's use of THRIFTY in connection with its gas station services.

Petitioner next points to Respondent's discovery responses about how its THRIFTY gas stations are operated by its licensees. One of Petitioner's interrogatories asked Respondent to

> Identify and describe all expenditures incurred by you in connection with the development, production, distribution, promotion, advertisement, and sale of any goods or services under Registrant's Mark, including by identifying the nature, amount, and date of each expenditure from 2010 to present.

Respondent answered, in pertinent part, "Properties bearing Registrant's Mark have been leased to licensees, and as such Registrant does not directly incur expenses of this nature."[36]

In response to Petitioner's request for production of documents "sufficient to show the volume (in dollars and units) of annual sales of, and any service or license fees or royalties for all services sold, offered, or licensed, directly or indirectly, by or on behalf of Registrant under or in connection with Registrant's Mark for each of the last five (5) years," Respondent responded, "All sales occur through licensees. Not applicable.

[35] Petitioner's main brief, 38 TTABVUE 13.

[36] Answer to interrogatory no. 8, Petitioner's NOR, 19 TTABVUE 11-12.

On information and belief of Registrant the 13 [now 11] locations identified in the Supplement to Interrogatory #9 continuously sell branded fuel."[37]

And in response to Petitioner's request for documents "sufficient to show, for each of the last five (5) years, all costs and expenses incurred annually by Registrant to promote, market, and advertise services actually or planned or intended to be sold, offered, or licensed under or in connection with Registrant's Mark," Respondent responded that "[a]ll expenses incurred by licensees. Not applicable."[38]

Petitioner raises a number of pertinent issues about Respondent's discovery responses and its licensing arrangements. As Petitioner observes:

> --"Registrant has not produced a single license agreement for its purported licensed uses of the THRIFTY mark. There is no evidence in the record to suggest that the eleven filling stations are licensed by a single provider of any goods or services."[39]
>
> --"Registrant identified no dealers, agreements, sales plan, strategy, or commitment with any licensee. At best, Registrant has no expenditures relating to gas station services, under the THRIFTY mark and has the same level of sales as someone who has never been in the business."[40]
>
> --[T]he record is devoid of any evidence demonstrating an implied license or even a single written license agreement. Notably, Registrant does not even identify any licensees – is it ARCO? Are the individual gas stations licensees?"[41]

[37] Response to request for production no. 8, Respondent's NOR, 20 TTABVUE 15. Respondent's response to request no. 9, concerning projected sales, was identical. *Id.*

[38] Respondent's response to request for production no. 10, Respondent's NOR, 20 TTABVUE 16.

[39] Petitioner's main brief, 38 TTABVUE 14.

[40] *Id.*, 38 TTABVUE 19.

[41] Petitioner's reply brief, 42 TTABVUE 3-4.

All of these issues are fodder for further investigation and discovery. But Petitioner conducted no follow-up of its own to prove its case. It did not propound interrogatories requiring Respondent to identify its licensee(s) and to state the terms of the agreement(s). It did not propound requests for the license agreement(s). Despite its efforts, it did not secure the deposition of Respondent's principal,[42] the licensee(s), or any other witness to delve further into the issue of Respondent's licensing arrangements. Proof of abandonment is a matter of fact, not speculation. *Cerveceria Centroamericana, S.A. v. Cerveceria India, Inc.*, 892 F.2d 1021, 1024 (Fed. Cir. 1989); *Yazhong Investing Ltd. v. Multi-Media Tech. Ventures, Ltd.*, 2018 WL 2113778, *6 (TTAB 2018). But Petitioner's case is based on speculation, not fact.

Petitioner quotes *Yazhong* for the proposition that a respondent should not be permitted to "rely upon mostly unsubstantiated assertions of vaguely defined efforts, apparently conducted without an operating budget, to license goods and services in order to keep someone else from adopting a mark it has abandoned."[43] *Yazhong,* 2018 WL 2113778, at *12. But in *Yazhong*, a prima facie case of abandonment was proven by testimony—the testimony of officers of the respondent's predecessors in interest and third parties who were retained by them. That prima facie case shifted the burden to the respondent to prove intent to resume use. *Id.*

Here, Petitioner speculates about Respondent's use of its THRIFTY mark, but failed to adduce evidence sufficient to carry Petitioner's burden of proving a prima facie case of abandonment. As the Federal Circuit Court of Appeals has put it,

[42] *See* Board Order, 37 TTABVUE.

[43] Petitioner's reply brief, 42 TTABVUE 5.

"Whenever an inference is based on pure speculation and 'there is no basis ... to *infer* nonuse,' a prima facie case of abandonment must fail." *Cerveceria Centroamericana,* 892 F.2d at 1024 (quoting *P.A.B. Produits et Appareils de Beaute v. Satinine Societa in Nome Collettivo di S.A. e. M. Usellini,* 570 F.2d 328, 332-33 (CCPA 1978)). Having failed to prove a prima facie case of abandonment based on nonuse, Petitioner cannot shift the burden of proof to Respondent.

As a fallback position, Petitioner contends that Respondent has engaged in naked licensing of its THRIFTY mark, arguing that "Registrant allows third parties to use the THRIFTY mark with gas station services without exercising sufficient control over the quality of those services."[44] But Petitioner's shift in position appears to tacitly concede that eleven gas stations remain in operation under Respondent's THRIFTY mark, albeit operated by one or more licensees. The issue now becomes whether this use of the THRIFTY mark inures to Respondent's benefit. Section 5 of the Trademark Act provides:

> Where a registered mark or a mark sought to be registered is or may be used legitimately by related companies, such use shall inure to the benefit of the registrant or applicant for registration, and such use shall not affect the validity of such mark or of its registration, provided such mark is not used in such manner as to deceive the public. If first use of a mark by a person is controlled by the registrant or applicant for registration of the mark with respect to the nature and quality of the goods or services, such first use shall inure to the benefit of the registrant or applicant, as the case may be.

15 U.S.C. § 1055.

[44] Petitioner's main brief, 38 TTABVUE 4.

Section 45 of the Act defines "related company" as follows:

> The term "related company" means any person whose use of a mark is controlled by the owner of the mark with respect to the nature and quality of the goods or services on or in connection with which the mark is used.

15 U.S.C. § 1127.

"A licensee may be a related company. 'It is well-settled that use of a mark by a licensee inures to the benefit of the trademark owner.' *Moreno v. Pro Boxing Supplies*, [2017 WL 3948453, *7] (TTAB 2017); *Pneutek, Inc. v. Scherr*, [1981 WL 40499, *11] (TTAB 1981) ('[R]ights to a mark may be acquired and maintained through the use of that mark by a controlled licensee even when the only use of the mark has been, and is being, made by the licensee.'). 'As a "related company," the licensee's use of the mark inures to the benefit of the licensor-registrant.'" *Sock it to Me v. Aiping Fan,* 2020 WL 3027605, *4 (TTAB 2020) (citing McCarthy § 18:51). A license agreement can be written or implied, formal or informal. *Id.* at *6.

The essence of related-company use is the control the licensor exercises over the nature and quality of the goods or services on or in connection with which the mark is used. *Id.* at *5; *see Noble House Home Furnishings, LLC v. Floorco Enters., LLC*, 2016 WL 3357265, *10 (TTAB 2016). "The rationale behind quality control is that the public has a right to expect a consistent quality of goods or services associated with a trademark or service mark." *Woodstock's Enters. Inc. (Cal.) v. Woodstock's Enters. Inc. (Oregon*), 1997 WL 440268, *8 (TTAB 1997), *aff'd*, 152 F.3d 942 (Fed. Cir. 1998).

Naked, uncontrolled licensing is the antithesis of related-company use. Uncontrolled licensees could provide goods and services of uneven quality, thereby

impairing the public's right to expect consistent quality under a mark and destroying the goodwill associated with the mark. *Stockpot, Inc. v. Stock Pot Restaurant, Inc*., 1983 WL 51866, *7 (TTAB 1983), *aff'd*, 737 F.2d 1576, 1580 (Fed. Cir. 1984). Trademarks "are integral and inseparable elements of the goodwill of the business or services to which they pertain." *Visa, U.S.A., Inc. v. Birmingham Trust Nat'l Bank*, 696 F.2d 1371, 1375 (Fed. Cir. 1982). For that reason, "[a]n uncontrolled license, that is, a licensing arrangement in which the licensor retains no quality control or supervision over the use of the mark by the licensees, results in an abandonment of rights in the mark." *Woodstock's Enters.,* 1997 WL 440268, at *7.

Petitioner must bear the burden of proving naked licensing. "Whether, in fact, sufficient control is exercised is a question of fact in each case and the burden of proving lack of control or insufficient control is on the party claiming the abandonment." *Id*. Petitioner attempts to discharge this burden by alluding, once again, to Respondent's discovery responses, and to the declaration of Respondent's counsel (which was stricken on Petitioner's motion). Specifically, Petitioner contends that: "here there is no evidence that Registrant exercises a shred of control over its licensees; Registrant does not have any sales or expense related information; Registrant apparently has no knowledge of its purported licensee(s)' sales or expense information; and, critically, if counsel's late trial testimony is credited by the Board, previously Thrifty-branded gas stations are being rebranded without Registrant's knowledge."[45]

[45] Petitioner's reply brief, 42 TTABVUE 6.

Respondent responds by asserting that:

> Registrant has in fact existing written trademark license agreements with its licensee ARCO that were not made of record in this case. Nevertheless, it is painfully obvious from the record that ARCO and Registrant have an implied license arrangement. … The record shows that Registrant continued to own the land on which it leased to others, namely ARCO, the right to provide gasoline services under the THRIFTY Mark.[46]

Petitioner notes: "Registrant inconsistently argues that there is 'an implied license arrangement' and 'written trademark license agreements' with its 'licensees.'"[47] This is one of many thought-provoking issues Petitioner raises, but does not resolve. Petitioner acknowledges that it bears the burden of proof,[48] but then tries to cast that burden on Respondent, asserting that "[n]otably absent from Registrant's brief and the record is any evidence about how Registrant itself exercises quality control over the trademark,"[49] and stating that "Registrant does not even identify any licensees – is it ARCO? Are the individual gas stations licensees?"[50] These are legitimate issues, but they call for additional investigation, discovery, and proof by Petitioner. Our review of the record does not reveal testimonial or documentary evidence describing the nature of Respondent's licensing arrangements, nor does it reveal discovery requests requiring Respondent to produce this information and documentation.

[46] Respondent's brief, 39 TTABVUE 16.

[47] Petitioner's reply brief, 42 TTABVUE 3.

[48] Petitioner's main brief, 38 TTABVUE 10.

[49] Petitioner's reply brief, 42 TTABVUE 3.

[50] Petitioner's reply brief, 42 TTABVUE 3-4.

Simply put, the discovery responses of record do not suffice to carry Petitioner's burden of proof. Respondent may not know its licensee(s) sales and expense information, but controlling the nature and quality of the licensee(s) services "does not require control over all of the related company's affairs." *Sock it to Me v. Fan,* 2020 WL 3027605, at *5, *cited in* MCCARTHY § 18:55. "In order to avoid abandonment of its mark, a licensor need not show that its quality control efforts are comprehensive or extensive. … Control may also be adequate where the licensor justifiably relies on the integrity of the licensee to ensure the consistent quality of the services performed under the mark." *Woodstock's Enters.,* 1997 WL 440268, at *7. If, for example, the licensee was indeed ARCO—i.e., Atlantic Richfield, the entity that took over more than 260 Thrifty gas stations—[51], then ARCO arguably has the demonstrated experience, expertise, and wherewithal to maintain and operate the THRIFTY-branded gas stations at a consistent level without a decline in quality. *See Stockpot*, 1983 WL 51866, at *9 ("there is no evidence whatsoever to indicate that there was any decline in quality.").

The trouble is, without further discovery and proof, we are left to guess at who Respondent's licensee(s) might be, how much quality control, if any, Respondent exercises, and whether there has been any inconsistency in the quality of gas station services offered under the THRIFTY brand. The absence of proof is not proof of the absence of adequate control over the nature and quality of the THRIFTY gas stations' services.

[51] Petitioner's NOR ex. 34, 19 TTABVUE 148-52.

Thus, on the record before us, Petitioner has not carried its burden of proving abandonment, either by nonuse or by naked licensing.

IV. Fraud

The Petition for Cancellation, filed in June 2021, was based on the sole ground of abandonment.[52] In March 2024, as noted, Respondent moved to amend its Registration to delete "and car washing services," leaving only "gasoline service station services" in its recitation of services.[53] Four months later, the Board approved and entered the amendment, noting that "Respondent's consent to entry of judgment with respect to 'car washing services' on the ground of abandonment, to which Petitioner agreed, is accepted."[54]

Nonetheless, Petitioner's main brief, filed in December 2024, added the unpleaded claim that Respondent committed fraud in the procurement and maintenance of the Registration because, in the course of discovery, "Registrant admit[ted] that it **never** used the THRIFTY mark for 'car washing services' despite contrary statements made to the PTO in the underlying application and post-registration maintenance filings."[55]

Respondent's brief--noting that Petitioner added this claim without amending its pleadings to allege fraud--responded to the substance of the new claim.[56]

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[52] 1 TTABVUE.

[53] 29 TTABVUE.

[54] Board Order, 33 TTABVUE 3 (citing Trademark Rule 2.133(a), 37 C.F.R. § 2.133(a); *Drive Trademark Holdings LP v. Inofin*, 2007 WL 616039, *2 (TTAB 2007)).

[55] Petitioner's main brief, 38 TTABVUE 23.

[56] Respondent's brief, 39 TTABVUE 11, 17-19.

Then, in February 2025, concurrently with its reply brief, Petitioner filed a motion to amend its pleadings to assert the new fraud claim.[57] Its motion, unaccompanied by a proposed amended pleading, argues that "[e]ven though Registrant objects to the evidence of fraud, Registrant goes on to address the merits in its trial brief" thereby trying the fraud claim by implied consent.[58] Respondent opposes Petitioner's motion, arguing that the last-minute motion was unsupported by the evidence, could have been filed much earlier, and would waste the time of the Board and the parties.[59] Petitioner replies that Respondent never provided the car wash services, that the evidence of fraud was under Respondent's control, and that Petitioner uncovered the fraud during discovery.[60]

"It is well settled that an opposer may not rely on an unpleaded claim in its brief, and that to pursue an unpleaded claim, an opposer's pleading must be amended under Fed. R. Civ. P. 15(b) to assert the claim, or the claim must have been tried by express or implied consent. Fed. R. Civ. P. 15(b)…." *M/S R.M. Dhariwal (HUF) 100% EOU v. Zarda King Ltd. & Global Tech. & Trade Marks Ltd.,* 2019 WL 1915763, *4 (TTAB 2019). At this stage of the proceeding, Petitioner may amend its pleading only with Respondent's written consent, which is not forthcoming, or by the Board's leave. *Republic Techs. (NA), LLC v. Joker Smoker Shop, Inc.*, 2025 WL 1638893, *1 (TTAB 2025). "The Board liberally grants leave when justice so requires unless entry of the

[57] 41 TTABVUE.

[58] 41 TTABVUE 5-6.

[59] 44 TTABVUE.

[60] 46 TTABVUE.

proposed amended pleading would be prejudicial to the rights of the adverse party, would violate settled law, or would serve no useful purpose." *Id.*

In deciding whether to grant leave to amend, the Board may consider undue delay, prejudice to the opposing party, bad faith or dilatory motive, futility of the amendment, and whether the party previously amended its pleadings. *Id.*

We find that Petitioner's motion is too little, too late. Too little because the discovery responses on which Petitioner bases its new claim are insufficient to prove fraud. Too late because Petitioner could have brought the claim much earlier in the course of this proceeding.

We address the latter reason first.

"[A] motion for leave to amend should be filed as soon as any ground for such amendment becomes apparent. ... Any party who delays filing a motion for leave to amend its pleading and, in so delaying, causes prejudice to its adversary, is acting contrary to the spirit of Rule 15(a) and risks denial of that motion." *Topco Holdings, Inc. v. Hand 2 Hand Indus., LLC*, 2022 WL 157880, *3 (TTAB 2022) (citing *Media Online Inc. v. El Clasificado Inc.*, 2008 WL 4419361, *2 (TTAB 2008)).

In this case, Petitioner filed its motion to amend on February 3, 2025, over three and a half years after filing its petition for cancellation.[61] *See Capital Speakers Inc. v. Capital Speakers Club of Washington D.C. Inc.,* 1996 WL 754043, *3 (TTAB 1996) ("petitioner's motion to amend to add a claim of fraud was filed in March 1995, nearly four years after the original petition for cancellation was filed in June 1991.").

[61] 1, 41 TTABVUE.

Petitioner bases its claim of fraud partly on Respondent's December 11, 2015 combined Section 8 and 9 affidavit attesting to continued use of its gasoline station and car wash services.[62] The December 11, 2015 maintenance filing submitted a specimen photograph of a gas station identical to the photograph submitted with Respondent's original October 2004 application and its October 2011 Section 8 and 15 affidavit; Petitioner characterizes this as a "false specimen."[63] Petitioner also bases its fraud claim on Respondent's June 15, 2023 discovery responses: [64] "Specifically, during discovery, Registrant admitted that it never offered car washing services, despite a claim of use of such services since the underlying application was filed, and, following registration, in maintenance documents submitted under penalty of perjury."[65]

Respondent's specimens supporting its application and maintenance filings have been publicly available since they were filed—the last in 2015, well before Petitioner filed its petition for cancellation in 2021.

And Respondent's discovery responses were verified in June 2023.[66] Therefore, as of that time, "petitioner had all the facts that it needed to file a motion to amend its original petition for cancellation to add a claim that respondent committed fraud…." *Capital Speakers,* 1996 WL 754043, at *3. Yet it waited over a year and a half to file its

[62] Petitioner's main brief, 38 TTABVUE 9.

[63] Petitioner's main brief, 38 TTABVUE 7. "*Compare* 19 TTABVUE 133-138 *with* 19 TTABVUE 108-112 *and* 19 TTABVUE 120-126." 38 TTABVUE 9.

[64] Petitioner's NOR, 19 TTABVUE 12, 31, 57, 59, Respondent's NOR, 20 TTABVUE 16-17.

[65] Petitioner's motion to amend pleadings, 41 TTABVUE 2.

[66] Petitioner's NOR, 19 TTABVUE 12, 31, 57, 59, Respondent's NOR, 20 TTABVUE 16-17.

February 2025 motion. The Board will simply not grant Petitioner's motion to amend to add a fraud claim when Petitioner "was fully aware of all the facts that it needed to add such a claim" so long beforehand. *Id*. at *4. "The filing of the motion to amend the petition for cancellation after trial was untimely." *Noble House, LLC*, 2016 WL 3357265, at *2.

In addition to being too late, Petitioner's motion offers too little evidence to support a claim of fraud. To be sure, Petitioner is correct in stating that Respondent's amendment limiting its recited services does not immunize the remaining gas station services from a fraud claim. "Fraud as to any goods in a single class renders the application void as to all goods in that class; so fraud based on nonuse cannot be cured by deleting some goods from a class." *Univ. of Kentucky v. 40-0, LLC*, 2021 WL 839189, *10 (TTAB 2021) (citing *Meckatzer Lowenbrau Benedikt Weib Kg v. White Gold, LLC,* 2010 WL 1946273, *3 (TTAB 2010) and *G&W Labs., Inc. v. G W Pharma Ltd.*, 2009 WL 226025, *2 (TTAB 2009)). And fraud in connection with maintaining, as well as procuring, a registration is actionable in a cancellation proceeding. *Great Concepts, LLC v. Chutter, Inc.*, 90 F.4th 1333, 1338-39 (Fed. Cir. 2024).

"Fraud in procuring or maintaining a trademark registration occurs when an applicant for registration, or a registrant in a post-registration submission, knowingly makes a false, material representation of fact in connection with an application to register, or a post registration maintenance document, with the intent of obtaining or maintaining a registration to which it is otherwise not entitled." *Look Cycle,* 2024 WL 3739358, at *14. A party alleging fraud bears the heavy burden of

proving its claim with clear and convincing evidence. *In re Bose Corp*., 580 F.3d 1240, 1243 (Fed. Cir. 2009). To carry this burden, the party alleging fraud must prove that:

(1) the applicant made a false representation to the USPTO;

(2) the false representation was material to the registrability of the mark;

(3) the applicant had knowledge of the falsity of the representation; and

(4) the applicant made the representation with intent to deceive the USPTO.

Flame & Wax, Inc. v. Laguna Candles, LLC, 2022 USPQ2d 714, *20 (TTAB 2022). "There is no room for speculation, inference or surmise and, obviously, any doubt must be resolved against the charging party." *Bose*, 580 F.3d at 1243 (quoting *Smith Int'l, Inc. v. Olin Corp*., 2022 WL 3083070, *7 (TTAB 1981)).

Petitioner's case, however, is predicated on speculation and surmise. Petitioner points to Respondent's use of the same photograph as its specimen of use for its application and maintenance filings:



[67]

The photo depicts a gas station open for business, with cars pulled up at the pumps, all under THRIFTY signage. It thus serves as a specimen, showing a direct association between the mark and the gas station services that we have found, were not abandoned. *See generally In re JobDiva, Inc.*, 843 F.3d 936, 941 (Fed. Cir. 2016) (creates direct association between mark and services); *In re Keep A Breast Found.*, 2017 WL 3575872, *4 (TTAB 2017) (same); 37 C.F.R. §2.56(a), (b); TMEP § 1301.04(f)(ii) (May 2025) ("direct association may be indicated by the context or environment in which the services are rendered").

Although the photo does not clearly depict carwash services, it did not have to do

[67] Specimen, Oct. 25, 2004 application, Oct. 31, 2011 declaration of use and incontestability, and Dec. 11, 2015 declaration of use and renewal. Zinober decl. ¶¶ 20-21, 19 TTABVUE 4-5.

so. "Generally, if ... more than one service, is specified in one class in an application, the applicant normally need not provide a specimen for each good or service." TMEP § 904.01(a). Only one specimen per class is required. 37 C.F.R. 2.56(a). *Cf. Standard Knitting, Ltd. v. Toyota Jidosha K. K.,* 2006 WL 173463, *13 n.14 (TTAB 2006) ("In general, the Office does not inquire as to the use of the mark on each good listed in a single class and only requires specimens of use as to one of the listed goods, relying on applicant's declaration with regard to use on the other listed goods.). In any event, "[t]he law is settled that the insufficiency of the specimens, per se, does not constitute grounds for cancelling a registration." *Marshall Field & Co. v. Mrs. Fields Cookies*, 1989 WL 297871, *4 (TTAB 1989) (citing *Granny's Submarine Sandwiches, Inc. v. Granny's Kitchen, Inc*., 1978 WL 21248 (TTAB 1978)).

Petitioner next contends, "Registrant admitted that it never offered car washing services, despite a claim of use of such services since the underlying application was filed, and, following registration, in maintenance documents submitted under penalty of perjury."[68] This contention is predicated, however, on Respondent's response to Petitioner's request for admission: "Admit that Registrant has never provided any Freestanding Car Washing Services in connection with Registrant's Mark." [Admitted.]"[69] But Petitioner defined "freestanding car washing services" in its interrogatories: "For purpose of this request, 'freestanding car washing services' means car washing services that are independent and not connected with a gasoline

[68] Petitioner's motion to amend pleadings, 41 TTABVUE 2.

[69] Petitioner's request for admission no. 6 and Respondent's response thereto, Petitioner's NOR 19 TTABVUE 57.

service station."[70] As Respondent correctly points out, these discovery requests do not cover car washes attached to gas stations, and thus do not support Petitioner's conclusion that Respondent never provided car wash services.[71]

Petitioner propounded a request for production of documents "sufficient to show, for the time period of 2015 to present, all facilities offering "car washing services" using Registrant's Mark," to which Respondent responded "[None]."[72] At first glance, this would appear to be inconsistent with Respondent's December 11, 2015 statement of use. But the request, as phrased, refers generally to "2015." When only a year is given as the date of use, the date presumed is the last day of the year, *see Shenzhen IVPS Tech. Co. Ltd. v. Fancy Pants Prods., LLC*, 2022 WL 16646840, at *11 n.32 (TTAB 2022), so the request and response are deemed to refer to December 31, 2015, after the statement of use was filed. *See Osage Oil & Transp., Inc. v. Standard Oil Co.*, 1985 WL 72088, *4 n.22 (TTAB 1985) (evidence established first use in 1968-1969, therefore December 31, 1969 is date of first use), *aff'd* 706 F.2d 1213 (Fed. Cir. 1983). So, the mark may have been in use when the Statement of Use was filed, but not on or after December 31, 2015. The point is, on the record before us, we can't say for sure. Once again, the discovery response fails to demonstrate a material misrepresentation.

More to the point, though, "Absent proof of the requisite intent to mislead the PTO, 'even a material misrepresentation would not qualify as fraud under the

[70] Petitioner's interrogatory no. 10, 19 TTABVUE 12.

[71] Respondent's brief, 39 TTABVUE 12-13.

[72] Response to request for production no. 12, Respondent's NOR, 20 TTABVUE 16-17.

Lanham Act ....'" *U. of Ky. v. 40-0*, 2021 WL 839189, at *12 (quoting *Bose*). "[T]here is a material legal distinction between a 'false' representation and a 'fraudulent' one, the latter involving an intent to deceive, whereas the former may be occasioned by a misunderstanding, an inadvertence, a mere negligent omission, or the like." *Bose*, 580 F.3d at 1243 (internal punctuation and citation omitted). There is "considerable room for honest mistake, inadvertence, erroneous conception of rights, and negligent omission; and any doubts resolved against the charging party." *Yocum v. Covington*, 1982 WL 52024, *8 (TTAB 1982).

Petitioner points to Respondent's statement in its brief that it "has made gas stations services a[] lesser part of its business portfolio. As such Registrant continued to apply for and renew its trademarks based on its historic roots."[73] Petitioner argues that "'intent to deceive' can be inferred by Registrant's repeated conduct of renewing the registration based upon only 'historic roots' and the fraudulent specimen."[74]

Respondent's continuing use of the THRIFTY mark in connection with gas station services offered at eleven stations is more than token use, and it avoids a finding of abandonment. Moreover, Respondent's reference to its "historic roots" has no bearing on whether its maintenance filings contained misrepresentations that it provided car wash services, made with intent to deceive the USPTO. As the Board has declared, "While intent to deceive can be inferred from indirect and circumstantial evidence, such evidence must still be clear and convincing, and inferences drawn from lesser evidence cannot satisfy the deceptive intent requirement. We find that there is

[73] Respondent's brief, 39 TTABVUE 18-19.

[74] Petitioner's reply brief, 42 TTABVUE 6.

insufficient evidence in the record before us to warrant the inference of an intent to deceive the USPTO." *Flame & Wax v. Laguna Candles,* 2022 WL 3083070, at *22 (citing *Bose*).

Petitioner grasps at straws and substitutes supposition and surmise for clear and convincing proof. Its motion to amend its petition to state a claim for fraud is, in consequence, an exercise in futility; it would serve no useful purpose. *Republic v. Joker Smoker,* 2025 WL 1638893, at *1. If the pleadings had been amended as proposed to assert a claim of fraud, no ground for cancellation would, in any event, have been presented. *Colony Foods, Inc. v. Sagemark, Ltd.*, 735 F.2d 1336, 1339 (Fed. Cir. 1984).

V. Decision

On this record, we find that Petitioner has failed to carry its burden of proving abandonment, or for adding a claim of fraud.

The Petition to cancel is denied.