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

Proceeding	92052576
Party	Plaintiff Cinque Moda GmbH
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Submission	Opposition/Response to Motion
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Date	06/22/2011
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of the U.S. Trademark Registration No. 3,104,426  
Date of Registration: June 13, 2006  
Mark: CINQUE

_____	)	
	)	
CINQUE MODA GMBH	)	
	)	<b>Cancellation No. 92052576</b>
Petitioner,	)	
	)	
v.	)	
	)	
LESTER M. GRIFFIN and LAVANIEL	)	
W. GRIFFIN, a California Partnership,	)	
	)	
Respondent.	)	
_____	)	

**PETITIONER'S RESPONSE TO RESPONDENT'S MOTION FOR SUMMARY**

**JUDGMENT**

**I. Introduction**

*Posture of the case*

This cancellation was filed on June 3, 2010 as a result of Petitioner's failed attempts to contact Respondents in the case to discuss a possible consent. On August 11, 2008 Petitioner had filed a trademark application for "CINQUE and Design" for clothing which was rejected on the basis of two registrations, one for the mark "Cinq" (Reg. No.: 2,164,766), the other for "Cinque", Respondent's mark both for clothing items. Petitioner negotiated with the owner of the mark "Cinq" and obtained consent to proceed with its application, but was unable to reach Respondent. Respondent's Summary Judgment Motion was filed on April 22,

2011 after close of discovery and during Petitioner's trial period. The instant proceeding is currently suspended. Note that the term "Respondent" includes both, the parties named and the current owner of the mark.

## **II. The Summary Judgment Standard**

Summary judgment is appropriate when the record shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c). A dispute as to a material fact is genuine only if a reasonable fact finder viewing the entire record could resolve the dispute in favor of the nonmoving party. Olde Tyme Foods, Inc. v. Roundy's, Inc., 961 F.2d 200, 22 USPQ2d 1542, 1544 (Fed. Cir. 1992). In deciding a motion for summary judgment, the court must consider the evidence in the light most favorable to the nonmovant and must draw all reasonable inferences from the underlying facts in favor of the same. Id.

## **III. Background Facts**

Petitioner is a German business that specializes in the sale of high-quality apparel with an established use of "CINQUE and design" as a mark in commerce abroad. In 2008, Petitioner learned that Respondent's registration for a United States trademark of the mark in question ("the '426 mark"), which features the word "CINQUE." was cited against Petitioner's application. In recognition of the disparity between clothing styles, Petitioner conducted an industrial search to find respondent's products and geographic location with a view towards obtaining a

mutual understanding between the parties as to shared use, assuming that a likelihood of confusion in the marketplace was essentially impossible. (See Day Decl.) Since no products were found through the search and any attempt to contact respondent by telephone had failed, with these efforts rebuffed, Petitioner filed this cancellation proceeding. Hoping anew to be able to negotiate through the attorneys, Petitioner offered a variety of options at settlement which would represent a “win-win” situation for both parties.

Respondent is a California business that currently holds the '426 mark and claims sales via the Internet and through small businesses in the states of California and Illinois. The application for the '426 mark indicated an intent to use the mark with several forms of apparel, including pants, shirts, jackets hats and t-shirts. Respondent has presented scant evidence of any production of t-shirts featuring the '426 mark, and in extremely limited quantities. Petitioner's evidence indicates sales of t-shirts, the only apparel item claimed to be sold other than a few hats, were made on consignment to several businesses, including an automotive repair shop and a mortgage lender (See Ex-C), claims based on contracts featuring no specification of the type, quantity or price of the goods in question. In addition, Respondent alleges marked items were made available for sale on the Internet for several years, though evidence collected by Petitioner appears to contradict this statement (See Day Decl.). Petitioner has repeatedly attempted to negotiate terms for the purchase of the '426 mark, on the theory that Respondent would prefer to enjoy the proceeds from a sale more than these

nominal and often peculiar transactions, though these efforts have proven unsuccessful.

Discovery responses show in respondent's Exhibit C, attached to the Summary Judgment Motion that no pants were ever sold, no shirts were ever sold, no jackets were ever sold, no shoes were ever sold; hats were allegedly sold for a year and t-shirts from 2004 to present. No documentary evidence was produced to show that hats were produced and sold, much less that they were sold in interstate commerce.

In Exhibit 1 attached to Exhibit E of the Summary Judgment Motion, respondent attached documentary evidence it produced during discovery on sales of its products. None of these documents show sale of a single item to the public. Exhibit 1 consists of 4 Consignment Agreements, three of which bear a transactional date of August 2010, a date which is after the date the cancellation proceeding was filed. The other Consignment Agreement bears a transactional date of April, 2004, which appears peculiar when considering that the "CandleBusinessCorner.com" from which the form originates was operational only as of October of that year.

Also part of Exhibit 1 are 2 sales receipts from the "Barry Kay Enterprises. Inc." to Lester Griffin. The sales receipts for \$115 and 110 respectively bearing the date of February 2006, do not show what product was sold. They are thus not probative of the sales of any item marked with the '426 mark.

Next in Exhibit 1 is an invoice from Coastline Graphics from June 22, 2010 for \$240 referring to a "Cinque job". This is one of only 2 documents produced by

respondent which refers to a product printed with the '426 mark. The date of the invoice is June 22, 2010, which is a date after the date this cancellation proceeding was filed. Next in Exhibit 1 appears a "Purchase Order" from "Kathy's Uniforms" dated May 2005 referring to a "digiting disk fee"[sic] and the words "Cinque Freedom" . A price of \$75 is indicated. Next in Exhibit 1 appears a page showing three "receipts" dated May 2006, June 2008 and August 2010 (after the cancellation was filed). Each of the receipts is for \$750 and specifies each 1 box of "Cinque T-shirts". Aside from the names of respondent, the name "Owens Community and Development Group" appears. On receipt No. 498814 the addition "cornerstone lending" appears under "Owens Community and Development Group". These receipts also do not show sales to the public. Next in Exhibit 1 appears a "receipt" which seemingly has no bearing on the case. It refers to a Whirlpool fridge purchased for about \$200.

Exhibit 2 refers to 6 pages of color photos showing t-shirts. One of the pictures picture shows a pink t-shirt and black t-shirt together and single with the writing "Cinque" in front. All others do not show the mark or are duplicates. No references to any dates are either on the photos or are referred to in the answers to interrogatories. Exhibit 3 shows a piece of plastic (2"x 1") bearing CINQUE. No explanation or dates are given.

Exhibit 4 is a 2006 tax form titled "Net Profit from Business". The form lists \$750 in gross receipts from business. No other tax forms have been produced. While respondent claims \$2,250.00 in sales since 2006, no documentary evidence that supports that claim was ever produced. No evidence produced

shows where marked merchandise, if any, was sold. If Respondent refers to the “receipts” of Exhibit 1, only 2 receipts would tentatively show that Respondent consigned 2 boxes of t-shirts to the “Owens Community and Development Group” amounting to consignment merchandise in the amount of \$1500 within 4 years. No documentary evidence, such as remittances to Respondent shows any sales to the public.

For the reasons outlined below and the evidence as set forth above, it is clear that Respondent has not engaged in sufficient commercial use of the ‘426 mark to justify continued protection under federal trademark law. The evidence provided by Respondent indicates that the activities conducted were either nominal in character or outside of the boundaries of “bona fide use of a mark in the ordinary course of trade,” as required by statute. 15 U.S.C. § 1127. Given these facts, Petitioner contends that a *prima facie* case of abandonment can be made and that a reasonable jury would support this proposition. As a result of this evidentiary support and the existence of contested material facts Petitioner urges the court to find that summary judgment is inappropriate in the present circumstance.

#### **IV. Argument**

##### **1. The Abandonment Standard**

As stated by the United States Supreme Court, “there is no such thing as a property right in a trademark except as a right appurtenant to an established business or trade in which the mark is employed. United Drug Co. v. Theodore

Rectanus Co., 248 U.S. 90 (1918). Protection arises from the recognized adoption of a mark and its proper use in commerce; following the 1988 revision to the Lanham Act, “use in commerce” is now defined as “the bona fide use of a mark in the ordinary course of trade and not made merely to reserve a right in a mark.” 15 U.S.C. § 1127. This tenet is central to trademark law, and as such transactions and activities that fail to satisfy this threshold do not constitute “use” sufficient to initiate or prolong trademark protection. A failure to appropriately “use” a trademark can be grounds for cancellation of the mark through a claim of abandonment. Under the Lanham Act a federally registered trademark is considered abandoned if its “use has been discontinued with intent not to resume,” with nonuse for three consecutive years constituting “*prima facie* abandonment.” Id. In a cancellation for abandonment, as for any other ground, a petitioner bears the burden of proof. That being said, “a petitioner’s burden is to establish the case for cancellation by a preponderance of the evidence.” Cerveceria Centroamericana, S.A. v. Cerveceria India, Inc., 892 F.2d 1021, 1023 (Fed. Cir. 1989).

## 2. The Modern Definition of “Use in Trade”

The courts have frequently been asked to decide whether transactions satisfy the modern “use” threshold. “Evaluating whether a use is in ‘the ordinary course of trade’ is often an intensely factual undertaking.” Electro Source, LLC v. Brandess-Kalt-Aetna Group, Inc., 458 F.3d 931, 940 (9th Cir. 2006). “Because the abandonment inquiry is tied to the unique circumstances of each case, it is

appropriate to look at the totality of the circumstances to determine if genuine, albeit limited, usage of the mark qualifies as trademark use 'in the ordinary course of trade' under § 1127." Id. Use in commerce is determined "on a case by case basis, considering the totality of circumstances" surrounding the alleged use of the mark. Johnny Blastoff, Inc. v. L.A. Rams Football Co., 188 F.3d 427, 433 (7th Cir.1999). See New England Duplicating Co. v. Mendes, 190 F.2d 415, 417–18 (1st Cir.1951) ("[T]he question of use ... remains one to be decided on the facts of each case."). As a result, summary judgment is widely viewed as an inappropriate means to resolve claims of abandonment. Despite the fact-specific nature of this type of inquiry, certain general themes are apparent: token use of a mark and transactions outside the scope of normal industry customs are frequently cited as insufficient use, both before and after the 1988 revision to the Lanham Act. "[R]ights are not created by sporadic, casual and nominal shipments of goods bearing a mark. There must be a trade in the goods sold under the mark or at least an active and public attempt to establish such a trade." La Societe Anonyme des Parfums Le Galion v. Jean Patou, Inc., 495 F.2d 1265, 1274 (2d Cir.1974). Petitioner contends that any transaction that can be imputed to the 2 "receipts" were sporadic, casual and nominal shipments to a seller under established law. Although evidence of sales is highly persuasive evidence of a trademark's commercial use, the "existence of sales or lack thereof does not by itself determine whether a user of a mark has established ownership rights therein." Planetary Motion, Inc. v. Techsplosion, Inc., 261 F.3d 1188, 1196 (11th Cir. 2001). Reliance on alleged sales data alone is not a total defense against an

abandonment claim. See Momentum Luggage & Leisure Bags v. Jansport, Inc., 2001 WL 830667, (S.D.N.Y. July 23, 2001), *aff'd*, 45 F. App'x. 42 (2d Cir. 2002). In Momentum, the court found the plaintiff's marketing and sales efforts insufficient to constitute continuous use of the mark, despite exhibition of marked products at an industry trade show, magazine advertisements, and sales of approximately \$3,000 over two years. Id. at \*6. As demonstrated in Momentum, evidence of sales does not serve as a total defense against a claim of abandonment. Respondent relies heavily on Person's Co., Ltd. v. Christman, 900 F.2d 1565 (1990), and Electro Source as support for the proposition that intermittent and small-scale sales are sufficient to constitute use of a mark in commerce. However, no sales from the consignment partners have been recorded or shown. Since no advertisement of any product has ever been carried out it is highly doubtful any sales to the public were ever made. Furthermore, Respondent draws attention to an often-cited quote from Carter-Wallace, Inc. v. Proctor & Gamble co., 434 F.2d 794, 804 (1970), which states "[e]ven a single instance of use is sufficient against a claim of abandonment of mark if such use is made in good faith. Respondent fails to recognize the fact that the cited opinions refer to "good faith" use. Given the ambiguities present in this fact-specific inquiry, it is far from clear that Respondent's activities would satisfy the threshold of good faith. In particular, Respondent has provided little in the way of evidence regarding the manufacture of marked items; purchase orders indicate that approximately \$300 of marked items were produced, yet receipts claim over \$2500 worth of sales (See Ex. E-1; Ex. E-4). Given that

Respondent presents itself as a struggling small business, a tenfold rate of return on investment is peculiar, and almost enviable. When a party asserting a mark was in use relies exclusively on incomplete or minimal documentation and fails to provide evidence from arms length sources such as customers, producers and distributors the documentary evidence may be discounted. See Auburn Farms Inc. v. McKee Foods Corp., 51 U.S.P.Q.2d 1439, 1999 WL 588247 (Trademark Trial & App. Bd. 1999). "Documents must be considered in the context of the entire record," weighed against objective evidence provided by a petitioner seeking cancellation of a mark. Id. at 1444. This conclusion is logical, as "[e]specially when a party must prove a negative, as in proving abandonment through nonuse, without resort to proper inference the burdened party could be faced with an insurmountable task." Cerveceria at 1310. In the instant scenario, In support of its motion for summary judgment, Respondent relies heavily upon indefinite contracts for consignments, all of which fail to describe the quantity, price and type of goods sold; in addition, these agreements fail to encompass the periods of claimed use in commerce. No reasonable jury could find the submitted purchase orders come close to accounting for the amount of claimed goods sold. As such, many material facts remain contested and cannot be settled by summary judgment on this issue.

### 3. Abandonment in the Instant Scenario

Petitioner Cinque Moda GMBH intends to build a *prima facie* case of abandonment against Petitioner, as ample evidence indicates that Petitioner's

activities between registration and the current proceedings fail to satisfy the threshold of “bona fide use in the ordinary course of trade.” Respondent’s answers to interrogatories are frequently incomplete and fail to be self-consistent with regard to claimed sales and the provided evidence alleging both sales and production of marked items is either grossly inaccurate or at the periphery of fraud, as the quantities and dates are incompatible.

Respondent claims that sales of marked products occurred as early as April of 2004, citing a consignment agreement with Walter Owens, Jr., “a small business owner in East St. Louis, Illinois (See Ex. A; Ex. B at Response No. 1; Ex. E-1). The agreement provided as support for this assertion fails to state the quantity or type of item being consigned, while stipulating that the item(s) in question will be left with the consignee for a minimum of “seven years” and that 65% of the sale price will be remitted to Respondent within 60 days of sale (See Ex. E-1). Notably, the document also contains text indicating that it was taken from a website that provides free legal forms (“[candlebusinesscorner.com](http://www.candlebusinesscorner.com)”), a relevant fact since this site claims to have began offering forms in October of 2004, several months after the date indicated on this agreement (“<http://www.candlebusinesscorner.com/aboutus.htm>”). The agreement fails to identify the consignee’s business, however, Respondent has indicated that “Walter Owens” may be called as a witness for sales to Freedom Mortgage (See Ex. C at Response 16) so it is reasonable to assume that this agreement is with that business. That being said, is it fair to consider sales of clothing on consignment to a mortgage lender as a sale done in the “ordinary course of

trade?”. When the “use in commerce” definition was amended, the Senate Judiciary Committee stated that the revised definition requires “commercial use which is typical in a particular industry.” S. Rep. 100-515, 100th Cong., 2d Sess., pp. 44-45 (Sept. 15, 1988), Vol. 5, Pt. VI. This finding is frequently cited to defend the idea that infrequent sales are acceptable in industries where such activity is the norm, but it can be extended to form a general comment on the required nature and scope of sales. Both the nature of the purchaser (a mortgage lender) and the term of the agreement (a seven year consignment) are well outside the typical sales terms for the sale of clothing. A transaction that is so unusual or uncommon “as to render it an aberration in the relevant industry” is outside of the domain of “ordinary business terms.” In re Jan Weilert RV, Inc., 315 F.3d 1192, 1198 (9th Cir. 2003). In addition, Respondent has failed to provide any evidence of money collected from the sale of these consigned items during the period from 2004 to the present, despite the agreement calling for remittance of 65% of the sale within sixty (60) days. The evidentiary issues and facts surrounding this transaction cannot be said to clearly support a finding of *bona fide* use in commerce. If anything, the extended term of the consignment, coupled with a lack of evidence indicating any actual sales, supports the proposition that this is a sham sale designed to have the appearance of an arms-length transaction. A claim that this is not an arms-length transaction is further supported by the fact that both respondents Lester and Lavaniel Griffin have a “mortgage loan specialist” named Walter Owens listed as a friend on the social networking site www.facebook.com (see Day Decl.).

Respondents have provided similar consignment agreements claiming a sale to "Cosa Monsuni Apparel" in Carlson, CA from January 1, 2009 to the present (See Ex. C at Response No. 2; Ex. E-1), as well as to a "Teal Marchande" on August 23, 2010 (See Ex. E-1). Both agreements fail to identify the quantity or type of goods sold on consignment, with the latter unreferenced at any other point in the materials provided by Respondent. And as with the previous transaction, no evidence is provided to indicate any remittance of proceeds from these consignments, despite terms calling for the transfer of monies within 60 days of sale. A search of businesses within Carlson, CA has failed to identify any retail store matching the name identified by Respondent, though a clothing retailer named "Cosa Monsuni Epparel" has been found in the area (See Day Decl.). As before, the provided Consignment Agreement fails to encompass the period of time for the alleged sales to this retailer, as this agreement is ostensibly limited to one year from the date of signing (August 14, 2010) and fails to cover the prior year, wherein Respondent claims sales to this retailer (See Ex. C at Response No. 2). Respondent has provided photographs that allegedly show marked items for sale within a clothing retailer (See Ex. E-2); given that "Cosa Monsuni Epperal" is the only clothing retailer listed within Respondent's Response to Interrogatories, it is assumed that the pictures were taken at this location (See Ex. C at Response No. 2). Examination of these photographs reveals that at a minimum only two shirts are present and in one photo the shirts are placed on a rack with different (but similarly colored) shirts in what appears to be an attempt to give the appearance of larger quantities. Given

the lack of quantitative or descriptive data in the consignment agreement, and the fact that these photos show a minimum of two shirts, it is debatable whether this transaction contains anything more than a token amount of marked items.

In addition to the preceding sales, for which Respondent has offered evidence, additional retail sales are claimed that lack any supporting documentation. This includes sales to "Topstyles Barbershop Beauty Salon" and "Northend Motors," both during the period from April 1, 2004 to present (See Ex. C at Response No. 2). Lacking any supporting documentation, Petitioner cannot challenge the quantitative scope of these agreements, however, as with the case of Freedom Mortgage, it remains debatable whether sale of clothing in a barbershop and automotive repair shop constitutes "bona fide use in the ordinary course of trade." Financial data supporting the existence of these transactions, either directly or via consignment has not been presented.

Respondent has alleged that sales took place over the Internet during the period from January 7, 2007 to present through "www.Hometownprods.com", citing a consignment agreement signed by Robert Roach on August 14, 2010 (See Ex. C at Response No. 2; Ex. E-1). The agreement fails to encompass the claimed length of sales and fails to identify the quantity, price or type of goods being consigned, as in the case of all of Respondent's consignment agreements. In response to Petitioner's interrogatories, Respondent acknowledged that sales through this website took place via the intermediary PayPal (See Ex. C at Response No. 10); however, no financial data has been provided, despite readily available access to these records through PayPal. This website,

"www.Homestyleprods.com" has been inaccessible to the public during the two weeks prior to the filing of this response (see Day Decl.). In addition, Petitioner has sought to verify the claim that sales of marked items took place during the 2007 to 2010 period by viewing saved snapshots of this address at the Internet Archive ("www.archive.org"). The Internet Archive is a service run by a non-profit organization that is attempting to catalog the evolution of the Internet by crawling the web and storing time-stamped copies of sites that are open to public viewing. This court has previously considered evidence provided by this service. See Kathleen Hiraga, 90 U.S.P.Q.2d 1102 (Trademark Tr. & App. Bd. Mar. 18, 2009); Physicians Formula Cosmetics, Inc. Small Giant, LLC, Assignee of Physicians Select, Inc., CANCELLATION 9204055, 2005 WL 1787254 (Trademark Tr. & App. Bd. July 1, 2005). The archive contains saved copies of the site in question, "www.homestyleprods.com", from the following dates: January 12, October 22, and December 15 from 2007, as well as from several dates in 2008 ranging from January through October.(See Day Decl.) The site was accessible to the public on all of these dates and did in fact contain a sales area, however, no items featuring the '426 mark were present for sale at any of these times. In fact, there is no indication that anything was sold through this website other than comic-related merchandise. This evidence stands in sharp contrast to Respondent's claim that marked items were present for sale during the two-year period from 2007 to 2008 (See Ex. C at Response No. 2).

Respondent has offered one other source of sales, beyond the putative consignment agreements and Internet sales: three handwritten sales receipts on

printed stock receipt forms issued to the "Owens Community and Development Group," in the years 2006, 2008 and 2010 (See Ex. E-1). Each of these receipts indicates a sale of "(1) Box of Cinque T-shirts" for a price of \$750 per box. No agent or officer of this organization is listed, and no other documentation clarifies the scope of the transaction or parties involved. Petitioner has searched for the existence of an organization with this name and found no evidence that such a group exists. Respondent has provided a tax return for the year 2006 indicating that Lester Griffin served as the sole proprietor of a business that received a total of \$750 in gross receipts during that fiscal year (See Ex. E-4). If this \$750 corresponds to one of these alleged sales it calls into question Respondent's claim that marked items were for sale at the other locations during this same year, as the sale of even a single additional item at any of these locations would have resulted in additional gross sales for the corporation. Therefore, it must be accepted that Respondent made this one sale during the year and no others, or the opposite conclusion. The discrepancy is material to the instant proceedings, as it challenges the validity of Respondent's sales records and the quantity of transactions made using these marked goods.

The only evidence that marked items were manufactured for sale by Respondent is found in five receipts provided during pre-trial discovery (See Ex. E-1). Chronologically, the first two reference purchases of \$215 worth of goods from "Barry Kay Enterprises" in California. The receipt lacks any identifier of the type or quantity of the goods purchased by Respondent. A third purchase was made in 2005 for an item listed as "Cinque Freedom" with a quantity of one (1),

though as with the first pair of receipts this document is unclear as to what exactly was ordered. Following these purchases, Respondent notes the purchase of twenty (20) shirts featuring the CINQUE mark in 2010. Finally, there is a fifth receipt presented that appears to indicate that "(1) Whirlpool" was ordered in 2010, though information regarding the nature of the item and the seller's identity is absent. This evidence highlights the fact that there is an enormous discrepancy between the claimed sales and the relatively few marked items produced by Respondent. This discrepancy is material to the issue at hand, as it directly bears upon Respondent's alleged use of the mark in commerce. As noted above, trademark protection is earned and continues with the bona fide sale of marked items in the ordinary course of trade, and not by token or sham transactions orchestrated purely to maintain a trademark. A reasonable fact finder may view this evidence as insufficient to support Respondent's defense of use in commerce and find for Petitioner. In either event, contested facts of this type must go before a jury and not be disposed of by summary judgment.

## **V. Conclusion**

Clearly, there are many unresolved and disputed facts relating to the time and location of goods sold, as well as the nature of these transactions. Given the paucity of sales data and these potential inconsistencies Petitioner argues that summary judgment is inappropriate, as at trial a reasonable jury may find these disputed facts support a claim that certain sales should fail to constitute proper

use of the mark. As such, it is possible and even likely that a *prima facie* case of abandonment can be made in Petitioner's favor based upon a preponderance of the evidence.

Respectfully submitted



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Date: June 20, 2011

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

In the matter of the U.S. Trademark Registration No. 3,104,426  
Date of Registration: June 13, 2006  
Mark: CINQUE

CINQUE MODA GMBH	)	
	)	
Petitioner,	)	<b>Cancellation No. 92052576</b>
	)	
v.	)	
	)	
LESTER M. GRIFFIN and LAVANIEL	)	
W. GRIFFIN, a California Partnership,	)	
	)	
Respondent.	)	
	)	

**DECLARATION OF URSULA B. DAY**

I, Ursula B. Day, declare as follows:

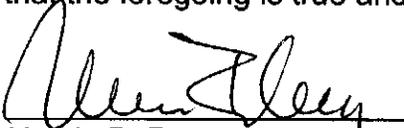
1. I am the principal of the Law Office of Ursula B. Day and my address is at 708 Third Avenue, suite 1501 in New York, NY 10017.
2. I make this declaration in support of PETITIONER'S RESPONSE TO RESPONDENT'S MOTION FOR SUMMARY JUDGEMENT relating to facts as set forth therein.
3. On or about Spring of 2008, my office undertook to search for use of Respondent's mark "Cinque" and the owners of this mark, Lester and Lavaniel Griffin, located at 314 W 223 St., unit #12, in Carson, CA 90745.

4. In May of 2008 we engaged industrial research firm Kelly Pioneer Group LLC, located at 601 Pennsylvania Avenue in Washington, DC, to search for use of the "Cinque" mark and to contact the Griffin brothers.
5. In a report dated May 29, 2008 we were informed that the researchers had made eight (8) attempts to speak with either Lester or Lavaniel Griffin at their telephone number 310-328-6615 and that messages were left. See attached Ex-1.
6. Subsequent to this attempt I myself tried to reach the Griffins, without success.
7. On June 3, 2010 my office filed the current Cancellation because I never received a response to the messages that were left and our research found no evidence of the use of their products in commerce anywhere in the United States.
8. In preparing the response to Respondent's Summary Judgment motion, I conducted a number of internet searches to follow up on the statements made by Respondent that are the basis of the Summary Judgment motion relating to sales of alleged items marked with "Cinque".
9. With respect to the Consignment Agreements, each of these documents contains text indicating that the template form was provided by the website, "CandleBusinessCorner.com" and at least two forms indicate that the physical copy submitted as evidence was printed directly from the site. I visited the website myself on June 18, 2011 and discovered that the site's "About Us" page states that the site was created in "October 2004," six months after the earliest signature date on Respondent's consignment agreements.

10. On June 12, 2011 I visited the website, "www.hometownprods.com", which Respondent had indicated as the source of online sales of its marked products, from 2007 to the present. The main page of the site states that the site is "under construction," with any potential sales area inaccessible to the public. I visited the site several times between this date and the date of submission of this response and at all times the website remained inaccessible.
11. On June 20, 2011 I visited a website known as the Internet Archive, located at "www.archive.org". This nonprofit organization catalogs web content by utilizing a program known as a web crawler that archives publicly accessible pages at various time-points. I submitted "www.hometownprods.com" as a query and found over a dozen archived copies of the website, including areas that are presently inaccessible to the public. I visited both the main area and the section of the site where items were offered for sale and noted that neither contained any products featuring the mark at issue. In fact, all merchandise offered for sale was related to comic books.
12. On June 20, 2011 I queried respondent Lester and Lavaniel Griffin's names at several social networking sites, in order to see if they had relationships with any of the parties listed in their putative transactions. I observed that on the social networking site, "www.facebook.com" that both of the Griffin brothers have listed an individual named Walter Owens is a friend; this individual is a mortgage lender in the same geographic locality as the one referenced in Respondent's evidence supporting their motion.
13. The e-mail attached to Respondent's Summary Judgment motion as exhibit J was the only knowledge I have ever obtained relating to retailer Chasalla Fashion.

I declare under penalty of perjury that the foregoing is true and correct.

Date: June 22, 2011

  
Ursula B. Day

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

In the matter of trademark Registration No.  
For the mark CINQE 3,104,426

Date registered:

----- X  
Cinque Moda GmbH )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
Lester M. Griffin )  
Lavaniel W. Griffin )  
A California Partnership )  
 )  
Respondent. )  
----- X

Cancellation No. 92052576

**Certificate of Service**

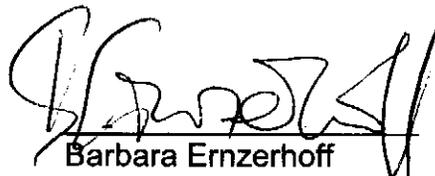
This is to certify that on June 22, 2011 a true copy of

**PETITIONER'S RESPONSE TO RESPONDANT'S SUMMARY JUDGMENT  
MOTION INCLUDING DECLARATION OF URSULA B. DAY**

By mailing in a sealed, first-class postage-prepaid envelope, addressed to the last-known office address of the respondent, and deposited with the United States Postal Service at New York City to:

Lester Griffin  
314 West 223 Street #12  
Carson, CA 90745

and by e-mailing the copy to the following e-mail address: lester.griffin@att.net

  
Barbara Ernzerhoff