

THIS ORDER IS NOT A
PRECEDENT OF THE
TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500
General Email: TTABInfo@uspto.gov

Ferrell

June 20, 2024

Cancellation No. 92078934

Monster Energy Company

v.

*Golden Global Innovations Besloten
Vennootschap and Golden Global Group BV*

**Before Cataldo, Wellington, and Allard,
Administrative Trademark Judges.**

By the Board:¹

¹ As part of an internal Board pilot citation program on broadening acceptable forms of legal citation in Board cases, citations in this order differ from the citation form recommended in TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (“TBMP”) § 101.03 (2023). This order 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 page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board, this order employs citations to the LEXIS legal database and cites only precedential decisions, unless otherwise specified. Until further notice, however, practitioners should continue to adhere to the practice set forth in TBMP § 101.03.

Precedential decisions of the Board, and precedential decisions of the Federal Circuit involving Board decisions that issued January 1, 2008, or after may be viewed in TTABVUE by entering the proceeding number, application number, registration number, expungement/reexamination number, mark, party, or correspondent. Many precedential Board orders and decisions that issued from 1996 to 2008 are available online from the TTAB reading room by entering the same information. Most TTAB orders and decisions issued prior to 1996 are not available in USPTO databases.

This proceeding comes before us on Golden Global Innovations Besloten Vennootschap and Golden Global Group BV's (together, "Respondent")² motion, filed February 22, 2024, for summary judgment on Monster Energy Company's ("Petitioner") claims of abandonment and lack of bona fide intent to use as of the application filing date.³ The motion is fully briefed.⁴

The Board has fully considered the parties' briefs and evidence, and addresses the parties' arguments and the record only to the extent necessary to set forth the Board's analysis and conclusions.⁵ *Guess? IP Holder LP v. Knowluxe LLC*, Can. No. 92060707, 2015 TTAB LEXIS 482, at *4-5 (TTAB 2015).

I. Background

Respondent, a company based in the Netherlands, is the record owner of Registration No. 5193363 for the mark

² For purposes of this order, the joint defendants are considered a single entity in that Golden Global Innovations Besloten Vennootschap is the predecessor in interest to Golden Global Group BV, with the latter being the same entity after a name change. *See* 9 TTABVUE. Citations to the Board record refer to TTABVUE, the Board's online docketing system. *See Turdin v. Trilobite, Ltd.*, Conc. Use No. 94002505, 2014 TTAB LEXIS 17, at *6 n.6 (TTAB 2014). The number preceding TTABVUE corresponds to the docket entry number, and any number following TTABVUE refers to the page number of the docket entry where the cited materials appear.

³ 36 TTABVUE (confidential version); 37 TTABVUE (redacted version). Going forward, the Board will generally cite to the redacted version of Respondent's motion.

⁴ *See* 39 TTABVUE (Petitioner's redacted response); 40 TTABVUE (Petitioner's confidential response); 41 TTABVUE (Respondent's reply). Going forward, the Board will generally cite to the redacted version of Petitioner's response.

⁵ We will endeavor to discuss any confidential material only in general terms.



for use in connection with “mineral and aerated waters and other non-alcoholic beverages, namely, soft drinks and energy drinks made with natural ingredients” in International Class 32 (“Respondent’s Registration”). Respondent filed the underlying application on September 27, 2015, and Respondent’s Registration issued on May 2, 2017, pursuant to Trademark Act Section 66(a), 15 U.S.C. § 1141f(a).⁶

In its petition for cancellation, Petitioner alleges the following claims: (1) Respondent has abandoned its mark pursuant to Trademark Act Section 14(3), 15 U.S.C. § 1064(3), and (2) Respondent lacked a bona fide intent to use its mark at the time it filed the underlying application for Respondent’s Registration under Section 66(a).⁷ In support of its entitlement to a statutory cause of action, Petitioner alleges that its application to register the standard character mark PREDATOR has been refused based on a likelihood of confusion with the mark in Respondent’s Registration.⁸

⁶ The wording “NATURAL ENDURANCE DRINK” is disclaimed. The colors gold, yellow, brown, black and white are claimed as a feature of the mark. The mark consists of a white pentagon bordered in bands of gold, yellow, brown and white. In the interior of the pentagon is the head of a stylized gold, yellow, brown, and white lion. Beneath the pentagon design are the words “PREDATOR” in gold, brown and yellow stylized letters and “NATURAL ENDURANCE DRINK” in black letters.

⁷ See 1 TTABVUE.

⁸ *Id.* at 4 ¶¶ 3-4.

Respondent filed an answer denying the salient allegations of the petition for cancellation.⁹

On February 22, 2024, Respondent filed its motion for summary judgment.¹⁰

II. Legal Standard

Summary judgment is an appropriate method of disposing of cases in which there are no genuine disputes as to any material facts and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In reviewing a motion for summary judgment, the evidentiary record must be viewed in the light most favorable to the non-moving party, and all justifiable inferences to be drawn from the undisputed facts must be drawn in favor of the non-moving party. *See Mayer/Berkshire Corp. v. Berkshire Fashions, Inc.*, 424 F.3d 1229, 1234 (Fed. Cir. 2005); *Lloyd's Food Prods., Inc. v. Eli's, Inc.*, 987 F.2d 766, 767 (Fed. Cir. 1993); *Olde Tyme Foods, Inc. v. Roundy's, Inc.*, 961 F.2d 200, 202 (Fed. Cir. 1992). We may not resolve disputes of material fact; we may only ascertain whether a genuine dispute regarding a material fact exists. *See Lloyd's Food Prods.*, 987 F.2d at 767-69; *Olde Tyme Foods*, 961 F.2d at 202-03.

The movant's burden at summary judgment is greater than the burden of proof at trial, which is a preponderance of the evidence, and which permits appropriate inferences to be drawn from the evidence of record. *See, e.g., Gasser Chair Co. v. Infanti Chair Mfg. Corp.*, 60 F.3d 770, 773 (Fed. Cir. 1995); *see also* TBMP § 528.01.

⁹ *See* 6 TTABVUE 7-8.

¹⁰ *See* 37 TTABVUE.

Only when the movant has supported its motion with sufficient evidence that, if unopposed, indicates there is no genuine dispute of material fact and that the moving party is entitled to judgment as a matter of law, does the burden then shift to the non-movant to demonstrate the existence of a genuine dispute of material fact to be resolved at trial. *Enbridge, Inc. v. Excelebrate Energy LP*, Opp. No. 91170364, 2009 TTAB LEXIS 642, at *6-7 (TTAB 2009).

The party moving for summary judgment has the burden of demonstrating that the material facts are not genuinely in dispute by:

1. citing to the record, including affidavits or declarations, admissions, or interrogatory answers, and showing the cited materials do not establish a genuine dispute; or,
2. showing that the non-moving party cannot produce admissible evidence sufficient to create a genuine dispute.

Monster Energy Co. v. Tom & Martha LLC, Opp. No. 91250710, 2021 TTAB LEXIS 458, at *6-7 (TTAB 2021) (citing Fed. R. Civ. P. 56(c)(1)). If the moving party carries this part of its burden, the nonmoving party may not rest on mere allegations, but must designate specific portions of the record or produce additional evidence showing the existence of a genuine dispute of material fact for trial. *See, e.g., id.* at *7; *Venture Out Props. LLC v. Wynn Resort Holdings, LLC*, Opp. No. 91167237, 2007 TTAB LEXIS, at *10-11 (TTAB 2007).

Moreover, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, the moving party may discharge its burden by showing that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Copelands' Enters. Inc. v. CNV Inc.*, 945 F.2d 1563,

1565 (Fed. Cir. 1991). In that case, the summary judgment motion may properly be made in reliance solely on the “pleadings, depositions, answers to interrogatories, and admissions on file” and “requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial.” *Celotex Corp. v. Catrett*, 477 U.S. at 324.

III. Analysis and Order

Respondent seeks summary judgment that it (1) had a bona fide intent to use its mark as of its application filing date and (2) did not abandon its mark for the registered goods.¹¹ In this case, the issues of bona fide intent to use as of the application filing date and abandonment of Respondent’s mark are intertwined because both require consideration of if and when Respondent’s intent to use transformed into actual use.

Trademark Act Section 66(a) is the statutory registration basis for Respondent’s Registration.

Section 66(a) requires that, at the time of filing of the international application with the International Bureau (“IB”) of the World Intellectual Property Organization (“WIPO”), an applicant requesting for extension of protection to the United States include a declaration of bona fide intention to use the mark in commerce. 15 U.S.C. §1141f(a). The declaration must specify that the applicant (or “holder”¹²) has a bona fide intention to use the mark in commerce on or in connection with the goods specified in the international application. Trademark Act

¹¹ See generally 37 TTABVUE.

¹² “A ‘holder’ of an international registration is the natural or juristic person in whose name the international registration is recorded on the International Register.” Trademark Act Section 60(7), 15 U.S.C. § 1141(7). See also Trademark Rule 2.33(e)(1), 37 C.F.R. § 2.33(e)(1).

Sections 45 and 60(5), 15 U.S.C. §§ 1127, 1141(5); *see also* Trademark Rules 2.33(e)(1), 2.34(a)(5), 37 C.F.R. §§ 2.33(e)(1), 2.34(a)(5).

Societe Des Produits Nestle S.A. v. Taboada, Opp. No. 91232597, 2020 TTAB LEXIS 267, at *8 (TTAB 2020). “To prove intent to begin use, Respondent must produce evidence showing that, under its particular circumstances, its activities are those that a reasonable business with a bona fide intent to use the mark in United States [“U.S.”] commerce would have undertaken.” *Wirecard AG v. Striatum Ventures B.V.*, Can. No. 92069781, 2020 TTAB LEXIS 12, at *21 (TTAB 2020) (citing *Rivard v. Linville*, 133 F.3d 1446, 1449 (Fed. Cir. 1998); *Reynolds Televator Corp. v. Pfeffer*, 173 USPQ 437, 439 (TTAB 1972) (“A resolution of this question [of intent to commence use] involves a consideration of a number of factors including the nature and character of the goods, the feasibility of producing the goods, the actual or potential market for the goods, and the steps taken by respondent which could possibly result in the movement of the goods under the registered mark ‘in commerce’ within the foreseeable future.”)).

The standards used to assess whether a respondent had a bona fide intent to use the mark as of the application filing date are the same for determining whether a mark has been abandoned. *See Wirecard*, 2020 TTAB LEXIS 12, at *20 (citing *Imperial Tobacco Ltd. v. Philip Morris Inc.*, 899 F.2d 1575, 1581-82 (Fed. Cir. 1990); *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377, 409 n.53 (TTAB 2019) (“Although the term ‘excusable nonuse’ in abandonment cases pertains to either the resumption or commencement of use . . . the same standard for abandonment under

Section 45 of the Act applies.”)). Under Trademark Act Section 45, 15 U.S.C. § 1127, 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 circumstances. Nonuse for 3 consecutive years shall be prima facie 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 the mark.

Thus, there are two elements to a non-use abandonment claim: non-use of a mark and intent not to resume use. *Exec. Coach Builders, Inc. v. SPV Coach Co.*, Opp. No. 91212312, 2017 TTAB LEXIS 201, at*22 (TTAB 2017); *see also Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 1367 (Fed. Cir. 2015). Because registrations are presumed valid under Trademark Act Section 7(b), 15 U.S.C. § 1057(b), the party seeking cancellation based on abandonment bears the burden of proving a prima facie case at trial by a preponderance of the evidence. *See On-Line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1087 (Fed. Cir. 2000); *Imperial Tobacco*, 899 F.2d at 1579; *Cerveceria Centroamericana, S.A. v. Cerveceria India, Inc.*, 892 F.2d 1021, 1023-24 (Fed. Cir. 1989); *Quality Candy Shoppes/Buddy Squirrel of Wisconsin Inc. v. Grande Foods*, Can. No. 92044407, 90 2007 TTAB LEXIS 85, at *13 (TTAB 2007). With respect to a registration issued under Section 66(a), the three-year period for the statutory presumption of abandonment begins no earlier than the date of registration, in this case, that date is May 2, 2017. *Wirecard*, 2020 TTAB LEXIS 12, at *14 (citing *Dragon Bleu (SARL) v. VENM, LLC*, Opp. No. 91212231, 2014 TTAB LEXIS 352, at *22-24 (TTAB 2014)).

As Respondent is the party moving for summary judgment, Respondent has the initial burden of establishing that (1) there is no genuine dispute of fact that it had a bona fide intent to use its mark in U.S. commerce as of the application filing date and (2) there is no genuine dispute of fact that its use of the involved mark has not been discontinued or, if such use has been discontinued or never began, that there is no genuine dispute that it has no intent not to resume or commence such use. *See* Trademark Act Section 45, 15 U.S.C. § 1127; *Wirecard*, 2020 TTAB LEXIS 12, at *20 (citing *Rivard*, 133 F.3d at 1449).

Respondent argues that it continuously had a bona fide intent to use and intent to commence use of its mark since it adopted the mark in 2014, including through the September 27, 2015 filing date of its underlying application and the statutory abandonment period that began no earlier than May 2, 2017 (the “Abandonment Period”).¹³ Furthermore, Respondent argues that it began using the mark in U.S. commerce as early as 2016, but no later than 2021.¹⁴ In particular, Respondent states that shortly after adopting the mark it launched its Instagram® page featuring its goods bearing the mark and purchased a .com internet domain in 2014.¹⁵ Thereafter, in 2015, Respondent alleges that it began producing its goods bearing the mark, purchased a second .com internet domain, and launched its Facebook® page featuring its goods bearing the mark.¹⁶ While the goods were initially produced and sold in only

¹³ 37 TTABVUE 6-16.

¹⁴ *Id.* at 6, 17-27.

¹⁵ *Id.* at 8-9.

¹⁶ *Id.* at 7-9.

non-U.S. markets, Respondent argues that its mark is in English and the label always contained information about the goods in English “because Respondent . . . intended from the start to expand sales beyond the Netherlands to the U.S.”¹⁷ Additionally, Respondent states that it selected a production facility that was already registered with the U.S. Food and Drug Administration (“FDA”) and approved to manufacture and ship products to the U.S.¹⁸ Similarly, Respondent states that “[m]any of the posts on [its social media] accounts were and continue to be in English to attract U.S. customers.”¹⁹

Following the filing of its application in the U.S., Respondent argues that it, through its co-founders, Natasha and Bianca de Jong (the “Co-Founders”), began using its mark in U.S. commerce and/or engaged in various activities of a reasonable business in its position with an intent to commence use of the mark in U.S. commerce between late 2015 through 2022 including, inter alia:

2015: sponsoring a BMX bike racer from California²⁰

2016:

- sending the aforementioned BMX bike racer a gift box including cans of goods bearing the mark²¹
- engaging in negotiations with various U.S. distributors, including shipping samples of its goods bearing the mark to those distributors²²

¹⁷ *Id.* at 7-8.

¹⁸ *Id.* at 13.

¹⁹ *Id.* at 8.

²⁰ *Id.*

²¹ *Id.* at 8.

²² *Id.* at 9-10.

- hiring a company to review its labeling to ensure compliance with U.S. laws²³
- launching its online retail store featuring its goods bearing the mark, which included pages in English²⁴
- beginning contact and negotiation with its eventual U.S. broker, Tom Malave, including shipping samples bearing the mark to him²⁵
- choosing a track sprinter and fitness instructor based in the U.S. as its brand ambassador and shipping samples bearing the mark to her²⁶

2017:

- attending a Smorgasburg NYC festival and handing out samples bearing the mark²⁷
- beginning contact with KeHE Distributors to bring its goods to the U.S.²⁸

2018:

- attending the Natural Products Expo West in California and meeting with several U.S. distributors including Dennis Hoth and Blake Cornwell, who were a sales director and an account manager, respectively, for UNFI, another U.S. distributor, and handing out samples bearing the mark to various vendors and grocery store representatives²⁹
- selling goods bearing the mark to Mr. Hoth and providing samples of goods bearing the mark to Mr. Cornwell³⁰

²³ *Id.* at 9.

²⁴ *Id.*

²⁵ *Id.* at 9-10.

²⁶ *Id.* at 10.

²⁷ *Id.* at 18.

²⁸ *Id.* at 10.

²⁹ *Id.* at 10-12, 18.

³⁰ *Id.* at 11, 18.

- engaging with Mr. Cornwell about establishing business operations in the U.S. and negotiating a partnership agreement therewith³¹
- selling goods bearing the mark to Neil Mylet, who found the goods on social media and had interest in assisting Respondent in distributing the goods throughout Indiana³²
- touring around Indiana and Illinois to provide samples of goods bearing the mark and meet with various potential retailers and consumers, meet with a state agent in Indiana to identify potential manufacturers, warehouses, and distributors, and attend the Forbes AgTech Midwest Summit in Indiana to provide samples of goods bearing the mark³³
- attending the Forbes 30 Under 30 Summit in Massachusetts to give a presentation about its goods, meet with various beverage industry professionals, and hand out samples of goods bearing the mark³⁴
- beginning contact with Nicholas Clemente, a national supplier manager at UNFI, to provide samples of goods bearing the mark and discuss launching Respondent's goods in the U.S.³⁵
- shipping additional samples of goods bearing the mark to Beril Ancel, a UNFI Next supplier manager for California³⁶
- attending UNFI North Atlantic Showcase in Connecticut to provide samples of goods bearing the mark to exhibitors and attendees³⁷
- having an article about Respondent and its goods bearing the mark published in a Purdue University student newspaper³⁸

³¹ *Id.* at 11-12.

³² *Id.* at 18-22.

³³ *Id.* at 20-22.

³⁴ *Id.* at 22.

³⁵ *Id.* at 22-23.

³⁶ *Id.* at 23.

³⁷ *Id.* at 22.

³⁸ *Id.* at 20.

- beginning consultation with 37 Celsius, a marketing company, to discuss positioning the brand to launch in the U.S., which continued through the first half of 2019³⁹

2019:

- attending the Natural Products Expo West in California to hand out samples of its goods bearing the mark to attendees, visit the offices of various retailers to deliver samples, deliver samples to a marketing influencer, a potential investor, and various celebrities, and meet with a UNFI account manager, retail vendors, and grocery store representatives to pitch the goods and provide samples⁴⁰
- attending the University of California Berkely Program for Innovation in Agrifood Supply chains to provide samples of its goods bearing the mark and discuss its business⁴¹
- sending samples to Gelson's Markets and then pitching the goods to the same, including providing additional samples⁴²
- receiving a certificate of registration and origin for FDA approval to import the goods to the U.S.⁴³
- being featured speakers at the 74th Session of the United Nations General Assembly Sustainable Development Group in New York and providing samples of its goods bearing the mark to attendees⁴⁴
- meeting with Mr. Malave and a representative from Fairway Market in New York to provide samples of Respondent's goods bearing the mark and discuss selling the goods in Fairway Market⁴⁵
- founding Golden Global, Inc., in Delaware—the U.S. arm of Respondent's business⁴⁶

³⁹ *Id.* at 12.

⁴⁰ *Id.* at 24.

⁴¹ *Id.*

⁴² *Id.* at 13-14, 25.

⁴³ *Id.* at 13.

⁴⁴ *Id.* at 25.

⁴⁵ *Id.*

⁴⁶ *Id.* at 13.

2020:

- signing a representation agreement with Mr. Malave's company⁴⁷
- flying to California to attend the Natural Products Expo West in March with samples of its goods bearing the mark to meet with representatives from KeHE, UNFI, and various grocery stores, all of which was cancelled due to the COVID-19 pandemic⁴⁸
- meeting with a representative from Gelson's Markets to provide additional samples of Respondent's goods bearing the mark and discuss bringing the goods to Gelson's Markets by the year's end⁴⁹
- sending samples to at least 61 retailers between August 2020 and November 2021, despite the COVID-19 pandemic, which otherwise made travel to the U.S., opening a bank account in the U.S., pitching to retailers, and production and transportation of goods difficult⁵⁰

2021:

- selling its goods bearing the mark to Golden Global, Inc. for distribution through UNFI and KeHE⁵¹
- beginning sale of its goods through various retailers in the KeHE and UNFI distribution networks⁵²

2022: beginning sale of its goods at Wakefern, a retailer that purchased Fairway Market⁵³

Respondent supports its motion with the deposition testimony and declarations of its Co-Founders, the deposition testimony of Mr. Malave, and the deposition testimony

⁴⁷ *Id.*

⁴⁸ *Id.* at 14.

⁴⁹ *Id.* at 14, 25.

⁵⁰ *Id.* at 14, 26.

⁵¹ *Id.* at 13-15, 25-26.

⁵² *Id.* at 14-15, 25.

⁵³ *Id.* at 13.

of Mr. Mylet.⁵⁴ Further, attached to the deposition testimony and declarations are additional exhibits in the nature of, inter alia, screenshots of websites showing the mark and goods, screenshots of social media pages showing the goods bearing the mark, photographs showing the goods bearing the mark and/or the Co-Founders at various locations in the U.S. and at the aforementioned conferences and events, various email and text communications with suppliers, distributors, retailers, and marketing/business strategists, sponsorship agreements, agreements with its various suppliers, distributors, and marketing/business strategists, records of sales and shipments of its goods, itineraries for the aforementioned conferences and events, articles about Respondent, its goods, and/or the Co-Founders, certificates and licenses of its producers and distributors, and the articles of incorporation for Golden Global, Inc.⁵⁵

In response, Petitioner has not submitted any contradictory evidence. Instead, Petitioner merely argues that none of the activities described in Respondent's motion, deposition testimony, or declarations demonstrate use in commerce during the Abandonment Period because they are "token" uses and/or are internal rather than "open" uses of the mark.⁵⁶ Additionally, Petitioner argues that the activities do not demonstrate an intent to resume or commence use because the activities were "sporadic" and "half-hearted," which Petitioner argues are not the activities of a

⁵⁴ *Id.* at 29-120, 134-145, 468-547, 574-618, 624-686, 701-702, 713-780.

⁵⁵ *Id.* at 122-132, 146-466, 549-572, 619-622, 687-699, 703-711, 781-802.

⁵⁶ 39 TTABVUE 3, 10, 12-15.

reasonable business.⁵⁷ Petitioner also contends that the Board should ignore that Respondent has actually been distributing its goods in U.S. commerce since 2021 because, it argues, this cannot be used to show that Respondent had an intent to resume or commence use.⁵⁸ The only evidence attached to Petitioner's response is a single declaration of one of its attorneys in which the attorney verifies the validity of additional excerpts of the deposition testimony of Respondent's Co-Founders, Mr. Malave, and Mr. Cornwell, and screenshots of Respondent's social media pages and websites.⁵⁹ Petitioner argues that much of Respondent's evidence is only the word of its Co-Founders, and Petitioner essentially questions whether any of the activities Respondent describes actually took place.⁶⁰

However, Petitioner's mere argument is not sufficient to raise a genuine dispute of material fact regarding its claims. *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1371 (Fed. Cir. 2018) ("Attorney argument is no substitute for evidence.") (citation omitted). Factual assertions, without evidentiary support, are insufficient to defend against a motion for summary judgment. *See Hornblower & Weeks Inc. v. Hornblower & Weeks Inc.*, Opp. No. 91110043, 2001 TTAB LEXIS 562, at *22-23 (TTAB 2001) ("[A]pplicant has produced no evidence, or raised any expectation that at trial it could produce evidence.") (citing *Kellogg Co. v. Pack'Em Enterprises Inc.*, Opp. No. 91080586, 1990 TTAB LEXIS 3, at *15 (TTAB 1990) (Summary judgment on

⁵⁷ *Id.* at 2-3, 12, 14-21.

⁵⁸ *Id.* at 23.

⁵⁹ *Id.* at 26-169.

⁶⁰ *See generally id.* at 3-23.

opposition granted in favor of applicant because opposer, in responding to motion, did not set out any evidence that it could produce at trial which could reasonably be expected to cause Board to come to a different conclusion.), *aff'd* 951 F.2d 330 (Fed. Cir. 1991)). Furthermore, Petitioner's contention that the Board should not consider Respondent's use of its mark following the Abandonment Period is contrary to the clearly established law. The Board may consider evidence regarding Respondent's activities that occurred before and after the filing date of the application and the Abandonment Period to infer Respondent's requisite intent. *See Crash Dummy Movie, LLC v. Mattel, Inc.*, 601 F.3d 1387, 1392 (Fed. Cir. 2010); *Societe Des Produits Nestle*, 2020 TTAB LEXIS 267, at *42-43. The only time the Board does not consider such evidence is where there is **no evidence** of an intent to commence use **during** the Abandonment Period, which is not the case here. *See id.*

In view of Respondent's unrefuted declarations, testimony, and exhibits, we find that Respondent's activities are the type that would be undertaken by a reasonable business under Respondent's particular circumstances with a bona fide intent to use the mark in U.S. commerce in association with beverage goods both as of the application filing date and during the Abandonment Period. As a relatively small operation consisting of only the two Co-Founders based in the Netherlands, prior to the application filing date Respondent created globally accessible social media pages and began producing its goods using a production facility that was registered with the U.S. FDA. Following the application filing date and continuing through and after the registration date, Respondent, inter alia, sponsored U.S.-based athletes, engaged

in various negotiations with U.S. distributors, suppliers, retailers, and marketing/business strategists, pitched its goods and provided many samples at various exhibitions, conferences, and festivals, actively pursued the proper labeling, registration, and licensing to sell its goods in the U.S., created a U.S. entity, and, ultimately, entered into contracts for U.S. marketing strategies, U.S. distribution, and sale of its goods bearing the mark in U.S. retailers. All of these activities demonstrate at least an intent to commence use in U.S. commerce as of the application filing date and through the Abandonment Period. Furthermore, the activities following the Abandonment period in which Respondent began selling its goods through U.S. distributors and retailers support the declarations, testimony, and evidence regarding Respondent's intent to commence use during the Abandonment Period. *See Crash Dummy Movie*, 601 F.3d at 1392; *Societe Des Produits Nestle*, 2020 TTAB LEXIS 267, at *42-43.

Upon careful consideration of the record, we find that Respondent has carried its burden of proving that there are no genuine disputes of material fact that it had a bona fide intent to use its mark in U.S. commerce as of the application filing date and an intent to commence use in U.S. commerce during the three-year statutory period of nonuse.⁶¹

Accordingly, Respondent's motion for summary judgment is **granted** and the petition for cancellation is **denied**.

⁶¹ Because Respondent has demonstrated that it at least had an intent to commence use, the Board need not and does not reach the issue of whether Respondent's activities during the Abandonment Period constituted actual use in commerce.