

**This Opinion is Not a
Precedent of the TTAB**

Mailed: September 14, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board
—

Garan Services Corp.
v.
*Newman and Belle Etoile*¹

Cancellation Nos. 92059231(parent)
 92059244
 92059248
 92059249
 92059393

—
Robert L. Epstein of Epstein Drangel LLP,
for Garan Services Corp.

Aimee M. Allen and Julie B. Seyler of Abelman, Frayne & Schwab,
for Newman and Bell Etoile.

—
Before Bergsman, Gorowitz and Hightower, Administrative Trademark Judges.

Opinion by Gorowitz, Administrative Trademark Judge:

—
¹ Respondent Newman assigned all of its rights in the NEWMAN marks and business to Belle Etoile, a French simplified joint-stock company. Belle Etoile was not substituted in to this proceeding as a party defendant. For that reason we joined Belle Etoile as a party defendant on January 13, 2017. Except where otherwise specified, we refer to the party defendants as “Respondent.”

Garan Services Corp. (Petitioner) has petitioned to cancel the following

registrations for the mark NEWMAN in the stylized form  (NEW MAN 1)

and the composite  (NEW MAN 2)² on the ground of abandonment:

Cancellation No. 92059231

Registration No. 891625 for the NEW MAN 1 mark for articles of clothing, namely, trousers and shirts, in International Class 25;

Registered May 26, 1970, third renewal March 26, 2010;

Cancellation No. 92059244

Registration No. 4284412 for NEW MAN 2 for

Clothing, namely, bathing suits, blouses, boots, boot uppers, half-boots, suspenders, belts, shawls, sweaters, socks, shirts, shirt fronts, underwear, suits, neckties, sashes for wear, scarves, gloves, vests, waterproof coats, skirts, singlets, coats, trousers, overcoats, parkas, capes, pelisses, jumpers, dresses, stuff jackets, jackets, tee-shirts, shorts, Bermuda shorts, tops, tank tops, camisoles, dressing gowns, pajamas, slippers, bathing caps, bath slippers, sandals, stockings, tights, breeches for wear, briefs, underwear, brassieres, bandanas, turbans, house coats, esparto shoes and sandals, petticoats, ascots, fingerless gloves, bedroom slippers; footwear; headgear, namely, hats, knitted caps, caps, cap peaks; leather clothing, namely, shirts, pants, coats, dresses, boots, boots uppers, suspenders, belts, underwear, neckties, gloves, vests, skirts, jackets, shorts, Bermuda shorts, trousers, overcoats, parkas, capes, pelisses, slippers, sandals, fingerless gloves, bedroom slippers; imitation leather clothing, namely, shirts, pants, coats, dresses, boots, boots uppers, suspenders, belts, underwear, neckties, gloves, vests, skirts, jackets, shorts, Bermuda shorts, trousers, overcoats, parkas, capes, pelisses, slippers, sandals, fingerless gloves, bedroom slippers; knitwear, namely, knitted blouses, knitted caps, shawls, sweaters, socks, sashes for wear, scarves, gloves, vests, skirts, dresses, coats, capes, pelisses,

² The description of the mark in Registration No. 4284412 states: "The mark consists of the wording 'NEW' on the top of 'MAN' on a diagonal inside a rounded sided triangle." Color is not claimed as a feature of the mark.

jumpers, fingerless gloves; undershorts, namely, underwear boy shorts in International Class 25;
Registered February 5, 2013, based on Section 66;

Cancellation No. 92059248

Registration No. 1377291 for NEW MAN 1 for articles of clothing, namely, jeans, jean shirts, trousers, shirts, polo shirts, pullovers, belts, t-shirts, sweatshirts in International Class 25;
Registered January 7, 1986; second renewal July 6, 2016;³

Cancellation No. 9209249

Registration No. 1384282 for NEW MAN 2 for articles of clothing, namely, jeans, jean shirts, trousers, shirts, polo shirts, pullovers, belts, t-shirts, sweatshirt, in International Class 25;
Registered February 25, 1986; second renewal August 24, 2016⁴
and

Cancellation No. 92059393

Registration No. 1422928 for NEW MAN 1 for underwear and shoes in International Class 25;
Registered December 30, 1986, Renewal filed June 29, 2017⁵

The actions were consolidated on November 6, 2015. 19 TTABVUE. After consolidation both parties referred to the marks as “the NEW MAN marks.” Despite slight differences in the orientation and design elements, neither the literal elements

³ “Jackets, lumber jackets, hats, caps and suspenders” were deleted from the identification of goods when the registration was renewed on July 6, 2016. Since these goods were deleted without the consent of Petitioner, judgment is entered against Respondent with respect to these goods. Trademark Rule 2.134, 37 CFR § 2.134.

⁴ The registration included goods in International Classes 25 and 18. The petition was restricted to the goods in International Class 25. Of the goods in International Class 25, “hats, footwear, gloves, caps, and suspenders” were deleted from the identification of goods when it was renewed on Nov. 8, 2015. Since these goods were deleted without the consent of Petitioner, judgment is entered against Respondent with respect to these goods. Trademark Rule 2.134, 37 CFR § 2.134.

⁵ “Boots and slippers” were deleted from the identification of goods when the registration was renewed by Belle Etoile on June 29, 2017. Since these goods were deleted without the consent of Petitioner, judgment is entered against Respondent with respect to these goods. Trademark Rule 2.134, 37 CFR § 2.134.

nor the font was modified. Moreover, the difference between the two marks consists of the orientation of the literal elements; in version 1 (NEW MAN 1) the words NEW MAN are stacked vertically and in version 2 (NEW MAN 2), the words NEW and MAN are stacked on an angle and encased in a triangular design. These “minor adjustments” are not sufficient to warrant a finding that consumers would view these as different marks. *See Jack Wolfskin v. New Millennium Sports*, 737 F.3d 1363, 116 USPQ2d 1129, 1133-34 (Fed. Cir. 2015).⁶ In this decision, we refer to the marks jointly as either NEW MAN or the NEW MAN marks.

I. The Record.

The record includes the pleadings, and by operation of Trademark Rule 2.122(b), 37 CFR § 2.122(b), the registration files of the subject registrations. In addition, the parties introduced the following evidence by notice of reliance:

⁶ Change from Version 1  to Version 2  not considered material.

A. Petitioner.

1. The file history for Petitioner's trademark application, Serial No. 86353923, Exhibit A to Petitioner's NOR, 33 TTABVUE 5-101 (PNOR Ex. A);
2. Petitioner's First Set of Requests to Admit to Registrant in Consolidated Cancellations, Exhibit B to Petitioner's NOR, 33 TTABVUE 103-157 (PNOR Ex. B);
3. Registrant's Answers to Petitioner's First Set of Requests to Admit to Registrant in Consolidated Cancellations, Exhibit C to Petitioner's NOR, 33 TTABVUE 159-246 (PNOR Ex. C).

B. Respondent.

1. The file histories of each registration at issue in this action, 34 TTABVUE (RNOR 1);⁷
2. Article from the September 20, 2012 issue of GQ France entitled How has the Logo for the New Man Brand Contributed to Changing the Face of the World? and translation thereof, 35 TTABVUE 6-8 (RNOR 2 – Exhibit 1); Article from French version of Wikipedia about New Man and translation thereof, fr.wikipedia.org/wiki/New_Man, 35 TTABVUE 10-16 (RNOR 2 – Exhibit 2);
3. Web pages from the Official Website of Raymond Loewy – raymondloewy.com/endorsements/, accessed December 12, 2017, 35 TTABVUE 18-46 (RNOR 2 – Exhibit 3);
4. Declaration of Michel Benchetrit, President and Managing Director of Belle Etoile and exhibits thereto (Benchetrit Dec.) 36 TTABVUE;
5. Declaration of Maurice Kammoun, Managing Director of Newman and non-confidential exhibits thereto (Kammoun Dec.) 37 TTABVUE; and
6. Confidential exhibits to Maurice Kaummon Declaration (38 TTABVUE).

II. Background.

Petitioner is the owner of Application Serial No. 86353923 for the mark NEWMAN in the stylized form set forth below:

⁷ As noted above, because the registration files are of record by operation of Rule 2.122(b), it was not necessary for Respondent to introduce them.



for “tops and bottoms” in International Class 25.⁸ Respondent’s registrations, Nos. 4284412 (NEW MAN 2), 1422928 (NEW MAN 1) and 891625 (NEW MAN 1), were cited as bars to registration of Petitioner’s application. Respondent, Newman (a French simplified joint-stock company) is the owner, by assignment, of the marks NEW MAN 1 and NEW MAN 2 as set forth in U.S. Registration Nos. 891625, 1377291, 1384282, and 1422928 (“The Assigned Marks”). Kammoun Dec. ¶¶7-9.⁹ Respondent also owns Registration No. 4284412, which matured from Application Serial No. 79109501. The underlying application, which was filed on November 14, 2011, was an extension of Respondent’s International Registration No. 1107700. The U.S. registration issued on February 5, 2013.

The marks were not being used in the United States at the time of the acquisition. Respondent “understood before the 2010 acquisition that U.S. sales of NEW MAN products had stopped, solely due to the fact that the licenses in the U.S. were not renewed and U.S. subsidiaries had closed.” Kammoun Dec. ¶16, 37 TTABVUE 7.¹⁰

⁸ Application Serial No. 86353923, which was based on Section 1(b) of the Trademark Act (Intent-to-Use), was filed on July 31, 2014.

⁹ Mr. Kammoun’s Declaration clarified vague assertions in Respondent’s Opposition to Petitioner’s Motion for Summary Judgment regarding the ownership of the marks.

¹⁰ Petitioner did not allege that Respondent’s predecessor-in-interest had abandoned the marks, which, if true, would have invalidated the transfer to Respondent. *See Auburn Farms Inc. v. McKee Foods Corp.*, 51 USPQ2d 1439, 1444 (TTAB 1999) (abandonment of a trademark prior to an assignment results in an invalid trademark since abandoned trademarks are not capable of assignment).

While there is no evidence that Respondent used either of the marks in commerce within the United States from the time of acquisition in 2010 until 2016, Respondent asserted that it “maintained an intention to use the NEW MAN marks commercially in the U.S. ... and specifically used them in the United States as recently as 2016.” Kammoun Dec. ¶3, 37 TTABVUE 4-5.

III. Standing.

Standing is a threshold issue that must be proven by a plaintiff in every inter partes case. To establish standing in an opposition or cancellation proceeding, a plaintiff must show “both a ‘real interest’ in the proceedings as well as a ‘reasonable basis’ for its belief of damage.” *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014). Evidence of the refusal of Petitioner’s application on the basis of several of Respondent’s registrations (PNOR Ex. A, 33 TTABVUE 67-92) is sufficient to demonstrate a real interest in the proceedings and a reasonable basis for its belief that it has been damaged. *Empresa Cubana*, 111 USPQ2d at 1062. Because Respondent’s registrations involved herein were cited as a Section 2(d) bar to the registration of Petitioner’s Application Serial No. 86353923 for NEWMAN (stylized), Petitioner has established its standing to bring these proceedings.

IV. Abandonment.

Abandonment of a mark occurs

[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.

Section 45 of the Trademark Act, 15 U.S.C. § 1127. Introduction of evidence of nonuse of the mark for three consecutive years constitutes a prima facie showing of abandonment and shifts the burden to the party contesting the abandonment to show either evidence to disprove the underlying facts triggering the presumption of three years of nonuse, or evidence of an intent to resume use to disprove the presumed fact of no intent to resume use. *See, e.g., Harry Winston, Inc. v. Bruce Winston Gem Corp.*, 111 USPQ2d 1419, 1429 (TTAB 2014).

A. Assigned Marks.

As discussed *supra*, there is no evidence that Respondent used either of the marks in commerce within the United States from the time of acquisition in 2010 until 2016. To the contrary, Respondent qualified its admissions to requests to admit use of each of the marks between 2010 and 2016 by stating that “it maintained an intent to resume sale of NEW MAN products and in 2016 it shipped and sold NEW MAN products in U.S. commerce.” Petitioner’s First Set of Requests to Admit PNOR Ex. C, 33 TTABVUE 161. For each of the subject registrations and for each year between 2011 and 2015, Petitioner asked the following question:

1. Admit that Registrant has no documents that show that any NEW MAN branded products were shipped in U.S. commerce during 2015 under or in conjunction with the mark which forms the subject matter of U.S. Reg. 891,625.

Response: Admit, however Registrant qualifies that it has documents that show that in 2015 it maintained an intent to resume sale of NEW MAN products and in 2016 it shipped and sold NEW MAN products in U.S. commerce.

We infer from these responses that Respondent did not use the mark in commerce with the U.S. until 2016. Therefore, Petitioner has met its burden to establish a prima facie showing of abandonment with respect to the Assigned Marks based on nonuse from the acquisition of the Assigned Marks in 2010 to 2016. Kammoun Dec. ¶16, 37 TTABVUE 4-5. As such, the burden of production shifts to Respondent to rebut the prima facie case, but the burden of persuasion as to abandonment remains with Petitioner. *Cerveceria Centroamericana S.A. v. Cerveceria India Inc.*, 892 F.2d 1021, 13 USPQ2d 1307, 1312 (Fed. Cir. 1989); *Crash Dummy Movie LLC v. Mattel Inc.*, 601 F.3d 1387, 94 USPQ2d 1315, 1318 (Fed. Cir. 2010).

Intent to resume use in abandonment cases has been equated with a showing of special circumstances which excuse a registrant's nonuse. *Imperial Tobacco Ltd. v. Philip Morris Inc.*, 899 F.2d 1575, 14 USPQ2d 1390, 1395 (Fed. Cir. 1990). "Excusable non-use due to 'special circumstances' means a temporary non-use that is beyond the control of the registrant or is forced by outside causes." 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 19:136 (5th ed. 2018) (citing *In re Moorman Manufacturing Co.*, 203 USPQ 712, 714 (Comm'r Pat. 1979)).

If a mark owner's nonuse is excusable, it has overcome the presumption that its nonuse was coupled with an intent not to resume use; if the activities are insufficient to excuse nonuse, the presumption is not overcome. *See Cerveceria Centroamericana*, 13 USPQ2d at 1313. To prove excusable nonuse, Respondent must produce evidence showing that, under the particular circumstances of the case, its activities were those that a reasonable business with a bona fide intent to use the mark in U.S. commerce

would have undertaken. *Rivard v. Linville*, 133 F.3d 1446, 45 USPQ2d 1374, 1376 (Fed. Cir. 1998). To that end, the Board has pointed out that plans must be to resume commercial use of a mark within the “reasonably foreseeable future.” *Exec. Coach Builders, Inc. v. SPV Coach Co.*, 123 USPQ2d 1175, 1198-99 (TTAB 2017). We may consider evidence regarding practices that occurred before or after the three-year period of nonuse to infer intent to resume use during the three-year period. *Crash Dummy Movie LLC v. Mattel Inc.*, 601 F.3d 1387, 94 USPQ2d 1315, 1317 (Fed. Cir. 2010). Evidence of subsequent intent to resume use, however, does not rebut the presumption of abandonment. *See Cervceria Centroamericana*, 13 USPQ2d at 1313. To determine whether Respondent established its intent to resume use within the reasonably foreseeable future, we evaluate actions taken by Respondent during the period of non-use.

As discussed above, NEW MAN mark was not in use in the U.S. at the time that Respondent acquired the mark in 2010. Kammoun Dec. ¶16, 37 TTABVUE 7.

“By 2011 [Respondent was] actively searching for new partners in the U.S. by making contacts at professional trade shows, such as the International Clothing Trade Show WHO’S NEXT, and PANORAMA BERLIN.” *Id.* In 2012, Respondent hired Alexandre Allard, a “U.S. based consultant specializing in the U.S. clothing market ... to perform an analysis of the retail clothing market in order to resume U.S. sales of NEW MAN goods.” *Id.* at ¶¶21-22, 37 TTABVUE 8. Mr. Allard performed the

analysis and on April 2, 2012, he presented the report, “Strategy for Importing to the United States” to Respondent. *Id.* at ¶ 22, 37 TTABVUE 8.¹¹

“[I]n November of 2012, [Respondent was] forced to postpone the plan developed by Mr. Allard, solely due to financial constraints. At that time, we needed to focus primarily on brand development in Europe.” *Id.* at ¶ 23, 37 TTABVUE 8. The November 15, 2012 email informing Mr. Allard of the postponement indicates that Respondent nonetheless intended at that time to commence U.S. use in 2014, stating:

I think it is reasonable and already very ambitious to aim for PE 2014. That postpones our project, without placing it into question but giving us more opportunities to succeed.¹²

This email undercuts any argument that Respondent had the intent at that time not to commence use of the NEW MAN mark in the United States; rather, it strongly suggests that Respondent intended merely to postpone use for a relatively short time of less than two years.

Subsequent emails show that Respondent met with Mr. Allard in July 2013 and continued discussions with him about a U.S. launch of the brand. An August 2, 2013 email with the subject “USA” states: “After a discussion by telephone with Alexandre Allard (I spoke to you about it) who lives in NY, he is sending us a strategic proposal

¹¹ Copies of the presentation in both English and French are at Exhibit G to the Dec. of Kammoun, 38 TTABVUE 156-332. Since the presentation is confidential, we cannot discuss the specific details of the plan.

¹² Confidential Exhibit F to Kammoun Dec., 38 TTABVUE 100. Although filed under seal, Respondent quoted this language at p. 12 of its publicly available brief. 40 TTABVUE 13. We also note that Petitioner did not object to admission of this evidence but discussed it in its own briefs. *See, e.g.*, Reply Brief at 2, 41 TTABVUE 6 (quoting the email and arguing that Respondent did not intend to resume use in the U.S. until 2014).

for establishment of NM in the USA on around August 20.”¹³ From October 2015 until February 2016, Respondent was “involved in advanced negotiations with Mr. Shlomo Azam, shareholder director of the Zbeda Group ... to sell NEW MAN goods at retail in the U.S. ... ” Kammoun Dec. ¶ 29, 37 TTABVUE 9 and Confidential Exhibit L thereto. *Id.*, 38 TTABVUE 386-94.¹⁴ The agreement was “nearly finalized, but negotiations ultimately stalled due to the present action by Garan against Newman.” *Id.* Taken as a whole, this evidence of Respondent’s continuing efforts supports its assertion that it maintained an intent to commence use of the marks within the reasonably foreseeable future throughout the nonuse period from June 2010 to the end of 2015. *See Crash Dummy v. Mattel*, 94 USPQ2d at 1317; *cf. West Fla. Seafood Inc. v. Jet Rests. Inc.*, 31 F.3d 1122, 31 USPQ2d 1660, 1663 (Fed. Cir. 1994) (instructing that “one should look at the evidence as a whole, as if each piece of evidence were part of a puzzle which, when fitted together, establishes prior use”).

Use of the marks in commerce with the United States commenced in January 2016.¹⁵ Additional evidence reflects shipment of NEW MAN goods to a New York retail boutique in March 2016.¹⁶ Petitioner contends that “any sales which are alleged

¹³ Confidential Exhibit F to Kammoun Dec., 38 TTABVUE 121. Portions of this email are discussed at p. 13 of Respondent’s public brief and p. 3 of Petitioner’s reply brief. *See* 40 TTABVUE 14; 41 TTABVUE 7.

¹⁴ Copies of email communications between Respondent and Zbeda Group.

¹⁵ Respondent introduced invoices and other documents evidencing two shipments of goods which were ordered online, one dated January 7, 2016 and the other dated February 2, 2016. *Id.*, at ¶¶26-27, 37 TTABVUE 9 and Confidential Exhibit J thereto, 38 TTABVUE 348-351.

¹⁶ Respondent introduced invoices evidencing several shipments of goods to Les Canebiere, a New York retail boutique, dated March 3, 2016. *Id.*, at ¶28, 37 TTABVUE 9 and Confidential Exhibit K thereto, 38 TTABVUE 354-368.

to have taken place prior to May of 2017 were minimal. These sales were not a bona fide use made in the ordinary course of trade. They were just a feeble attempt to avoid losing right to the NEW MAN marks.” Petitioner’s Brief, 39 TTABVUE 12. However, even though the sales documentation introduced provides evidence of minimal sales, the amount of sales is not determinative.¹⁷ If the sales are made in the ordinary course of trade and not for the purpose of reserving rights in the marks, they satisfy the use requirement and defeat a claim of abandonment. *See Christian Faith Fellowship Church v. adidas AG*, 841 F.3d 985, 120 USPQ2d 1640, 1645 (Fed. Cir. 2016) (“The sale of two ‘ADD A ZERO’- marked hats to an out-of-state resident is regulable by Congress under the Commerce Clause and therefore constitutes ‘use’ in commerce. ... It makes no difference under our cases that any actual or threatened effect on commerce in a particular case is minimal.”); *cf. Electro Source LLC v. Brandess-Kalt-Aetna Group Inc.*, 80 USPQ2d 1161 (9th Cir. 2006) (summary judgment holding that minimal sales from the trunk of a car while winding down business constitutes sufficient use in commerce to defeat an allegation of

¹⁷ Further, all of the NEW MAN branded goods were labeled with tags, tabs, and buttons featuring the registered NEW MAN trademarks. *Id.* at 18 and Exhibit E thereto, 37



TTABVUE 4, 30. Version 1

and Version 2

abandonment). Thus, Respondent's evidence of sales is sufficient to defeat Petitioner's abandonment claims.

Based on the foregoing, we find that Petitioner did not abandon its rights in the Assigned Marks.

B. Registration No. 4284412.

Registration No. 4284412 for NEW MAN 2, which is an extension of Respondent's International Registration No. 1107700 (RNOR 1, 34 TTABVUE 35), covers a large number of clothing items. It issued on February 5, 2013. Petitioner filed the Petition for Cancellation of this registration on May 21, 2014, little more than one year after the issuance of the registration. As discussed above, Respondent submitted evidence of online sales that were shipped to the United States. One of the sales was made on January 7, 2016, almost one month before the third anniversary of Registration No. 4284412. *See id.* at ¶¶26-27, 37 TTABVUE 9 and Confidential Exhibit J thereto, 38 TTABVUE 348-51. In addition, Respondent's NEW MAN goods were offered for sale at a New York retail boutique, Les Canebiers. In support of this use, Respondent submitted invoices of shipments made to Les Canebiers in March 2016. *See id.* at ¶128, 37 TTABVUE 9 and Confidential Exhibit K thereto, 38 TTABVUE 354-68.

Since use was made within three years of the date of registration, Petitioner did not make a prima facie case of abandonment with respect to the mark and goods in Registration No. 4284412.

V. Bona fide intent to use the NEW MAN 2 mark when Respondent requested an extension of International Registration No. 1107700.

To properly file a request for an extension of protection of an international registration to the United States, the request must include a declaration of bona fide intention to use the mark in commerce. Section 66 of the Trademark Act, 15 U.S.C. § 1141f.

Petitioner alleged in its Amended Petition for Cancellation, filed on October 19, 2015, that Respondent never had a bona fide intention to use the trademark NEW MAN and design in commerce on some or all of the above identified goods in Registration No. 4284412. Amended Petition for Cancellation ¶10, 16 TTABVUE 5.

Noting that the underlying application for extension was filed on November 14, 2011, Petitioner contends that

Mr. Kammoun in Paragraph 23 of his declaration admits that in November of 2012 Respondent decided not to enter the U.S. market. That admission is clear and unequivocal evidence the Respondent had no bona fide intent to use the NEW MAN marks in U.S. commerce after the filing date of the application upon which Registration No. 4284412 is based. Respondent has introduced no evidence to the contrary ...no evidence that Responded changed its mind after November of 2012 and decided to enter the market during the pendency of the application upon which the Registration No. 4284412 is based.

Petitioner's Brief, 21 TTABVUE 16-17.

Petitioner misreads Mr. Kammoun's declaration which states that his company was "forced to postpone the plan ... solely due to financial constraints." Further, Petitioner has submitted no evidence supporting its contention.

As fully discussed above, prior to November 14, 2011, the filing date of the extension request, Respondent was actively making plans to commence use of its marks in the United States. Thus, Respondent did have a bona fide intention to use the NEW MAN 2 mark when it filed the extension request. Moreover, as established above, Respondent used the NEW MAN 2 mark within three years of the issuance of Registration No. 4284412 on February 5, 2013.

We find that Petitioner did not establish that Respondent did not have a bona fide intent to use the NEW MAN 2 mark when it filed the extension request.

VI. Conclusion.

We have considered all of the evidence and the arguments, some of which were either unsupported or erroneous. We have given all evidence the weight to which we find it entitled. The probative value of some evidence was discounted and thus was not discussed in our decision.

Further, Petitioner relies heavily on our denial of Respondent's motion for summary judgment. Evidence submitted in connection with a motion for summary judgment is of record only for consideration of that motion. To be considered at final hearing, any such evidence must be properly introduced in evidence during the appropriate trial period. *See Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 28 USPQ2d 1464, 1465 n.2 (TTAB 1993); *Pet Inc. v. Bassetti*, 219 USPQ 911, 913 n.4 (TTAB 1983); *Am. Meat Inst. v. Horace W. Longacre, Inc.*, 211 USPQ 712, 716 n.2 (TTAB 1981).

In accordance therewith, our decision is based on the evidence introduced at trial, not the evidence introduced at summary judgment.

Prima facie cases for abandonment were made with respect to all of the assigned marks. However, Respondent established excusable nonuse and that it maintained an intent to resume use within the reasonably foreseeable future with respect to all goods other than those deleted at times of renewal. As discussed above, the goods deleted at the times of renewal were deleted without the consent of Petitioner. In these situations, Trademark Rule 2.134, 37 CFR § 2.134, requires the entry of judgment against the party deleting the goods, in this case Respondent. As such, the petitions are granted with respect to the deleted goods.

With the exception of the judgments entered with respect to the deleted goods, we deny the petitions to cancel.

Cancellation No. 9205923 is denied in its entirety.

Cancellation No. 92059248 is denied with respect to all goods, other than “jackets, lumber jackets, hats, caps and suspenders.” Judgment will be entered against Respondent with respect to the cancelled goods (“jackets, lumber jackets, hats, caps and suspenders”).

Cancellation No. 92059249 is denied with respect to all goods other than hats, footwear, gloves, caps, and suspenders. Judgment will be entered against Respondent with respect to the cancelled goods (“hats, footwear, gloves, caps, and suspenders”).

Cancellation No. 92059393 is denied with respect to all goods other than hats, footwear, gloves, caps, and suspenders. Judgment will be entered against Respondent with respect to the cancelled goods (“boots and slippers”).

A prima facie case for abandonment was not made with respect to Cancellation No. 92059244. Further, Petitioner failed to establish a lack of a bona fide intent to use the mark at the time that Application Ser. No. 79109501 was filed on November 14, 2011. Accordingly the petition for cancellation is denied.

Decision: The petitions for cancellation in all of the consolidated actions are denied with the following exceptions: (1) in Cancellation No. 92059248, the petition is granted with respect to cancellation of the following goods: “jackets, lumber jackets, hats, caps and suspenders”; (2) in Cancellation No. 92059249, the petition is granted with respect to cancellation of the following goods: hats, footwear, gloves, caps, and suspenders”; and (3) in Cancellation No. 92059393, the petition is granted with respect to cancellation of the following goods: “boots and slippers.”