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**UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451**

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Mailed: March 15, 2006

Cancellation No. 92042614

Jackson/Charvel
Manufacturing, Inc.

v.

Lloyd A. Prins

Before Seeherman, Hairston and Kuhlke,
Administrative Trademark Judges.

By the Board:

This case now comes up for consideration of respondent's motion for summary judgment. The motion is fully briefed.

Initially, the Board notes that respondent's motion is technically untimely. A motion for summary judgment should be filed prior to the commencement of the first testimony period, as originally set or reset. See Trademark Rule 2.127(e)(1). Petitioner's testimony period, as last reset, opened on August 17, 2005, and respondent did not file his motion for summary judgment until that day.¹ However,

¹Although respondent's motion is dated August 15, 2005, the motion papers do not include a certificate of mailing. Accordingly, the Board deems the filing date of respondent's motion as the date upon which the Board received respondent's motion, i.e., August 17, 2005. See Trademark Rule 2.195.

inasmuch as no objection has been made by petitioner on this basis and since the delay in filing was relatively insignificant, the Board, in its discretion, shall consider respondent's motion as if timely filed. See *Buffett v. Chi-Chi's, Inc.*, 226 USPQ 428 (TTAB 1985).

Turning now to respondent's summary judgment motion, the Board notes that a party is entitled to summary judgment when it has demonstrated that there are no genuine issues as to any material facts, and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The evidence must be viewed in a light favorable to the nonmoving party, and all justifiable inferences are to be drawn in the nonmovant's favor. *Opryland USA Inc. v. The Great American Music Show, Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992).

Upon careful consideration of the arguments and evidence presented by the parties, and drawing all inferences with respect to the motions in favor of the petitioner as the nonmoving party, we find that respondent has not demonstrated the absence of a genuine issue of material fact for trial.

In light of the parties' conflicting affidavits and other supporting evidence, at a minimum, respondent has failed to show the absence of a genuine issue as to priority. Specifically, the Board finds that, in light of the descriptive nature of the parties' respective marks, a

genuine issue exists as to when (or whether) each party established that its mark had acquired distinctiveness for purposes of priority.

In view thereof, respondent's summary judgment motion is denied.²

Proceedings herein are RESUMED. Trial dates are reset as follows:³

| | |
|--|------------------------|
| DISCOVERY TO CLOSE: | CLOSED |
| Thirty-day testimony period for party in position of plaintiff to close: | May 15, 2006 |
| Thirty-day testimony period for party in position of defendant to close: | July 14, 2006 |
| Fifteen-day rebuttal testimony period to close | August 28, 2006 |

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served

²The parties should note that the evidence submitted in connection with a motion for summary judgment or opposition thereto is of record only for consideration of that motion. Any such evidence to be considered at final hearing must be properly introduced in evidence during the appropriate trial period. See *Levi Strauss & Co. v. R. Joseph Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993); and *Pet Inc. v. Bassetti*, 219 USPQ 911 (TTAB 1983). Additionally, the issues for trial are not limited to those identified by the Board in explaining the denial of this motion for summary judgment.

³Although the Board has reset trial dates, the parties are advised that since petitioner's testimony period had previously opened for one day, the parties may not file any further motions for summary judgment because such filings would be deemed untimely. See Trademark Rule 2.127(e)(1).

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on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b).

An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.
