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

Proceeding	92050143
Party	Defendant Brauhaus Incorporated
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Attachments	Brauhaus Reply Supporting Motion to Dismiss.pdf (4 pages)(110892 bytes)

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

BROWHAUS PTE LTD.,

Petitioner,

v.

BRAUHAUS INCORPORATED,

Respondent.

Cancellation No. 92/050,143

Registration No. 3,420,788

**REPLY IN SUPPORT OF RESPONDENT'S
MOTION TO DISMISS PETITION TO CANCEL**

Petitioner's argument that its baseless and legally deficient claims should proceed to discovery is nothing more than a thinly veiled attempt to finance Brauhaus out of its federal registration for BRAUHAUS. If Petitioner had a valid legal or factual basis to sustain its Petition, it had ample opportunity to present them in its Response. Instead of doing so, in the hope that the high costs associated with discovery will cause Brauhaus to capitulate to its baseless claims, Petitioner resorted to asking the Board to open discovery based on an inapposite attack on Brauhaus' supporting affidavit and reference to other fraud cases proceeding to discovery. Petitioner is essentially attempting to win this case via attrition because it has no tenable legal or factual position.

However, this is a simple, straightforward case that can be easily resolved without the need for costly discovery. Accordingly, pursuant to TBMP § 503.04, Brauhaus respectfully requests that the Board treat the pending Motion as one for summary judgment. Brauhaus is entitled to summary judgment because the uncontradicted affidavit of Zoey Van Jones ("Van Jones Affidavit") shows that Brauhaus was using the BRAUHAUS mark in commerce prior to

the filing of the Statement of Use.

The Van Jones Affidavit presents credible, substantive evidence that Brauhaus was using the BRAUHAUS mark in commerce prior to filing the Statement of Use. However, Petitioner asks the Board to disregard the Van Jones Affidavit for vagueness and relies on *Joseph M. Ivins v. Chix Rhul*, 2001 WL 208760 (T.T.A.B. Mar. 2, 2001) for support. Petitioner's Response at 6-7. Petitioner's reliance on *Ivins* is misplaced. In *Ivins*, the Board held that two affidavits submitted by the respondent were not detailed enough to prove a first use date of the mark at issue *prior to* the first use date it had originally claimed in its application. *Ivins*, 2001 WL 208760 at *2 (emphasis added). The Board noted that "to carry the date of first use back to a prior date, the proof of such earlier use must be clear and convincing..." *Id.* Brauhaus is not attempting to establish an earlier first use date and no such heightened evidentiary standard exists in this case. Indeed, Brauhaus does not bear any burden of proof in this proceeding. Moreover, the Board in *Ivins* did not actually exclude or disregard the affidavits as Petitioner asserts but simply found that those particular affidavits did not satisfy the rigorous evidentiary standard necessary in those circumstances. *Id.* Accordingly, there is no basis to disregard the Van Jones Affidavit.

Ultimately, despite the insufficient attack described above, Petitioner is unable to refute or contradict the Van Jones Affidavit in any meaningful way. If Petitioner had any evidentiary support for its Petition (which it is required to have pursuant to FRCP 11(b)), it could have and likely would have raised it in Petitioner's Response to create a factual issue to be resolved in this case. However, Petitioner did not refute the fact that Brauhaus was using the BRAUHAUS mark in commerce before it filed the Statement of Use as set forth in the Van Jones Affidavit. Therefore, the Board should grant summary judgment in favor of Brauhaus.

WHEREFORE, for the foregoing reasons, Brauhaus respectfully requests that the Board enter an order (i) denying the Petition to Cancel, and (ii) granting such other and further relief as the Board deems appropriate.

Respectfully submitted,

Date: April 20, 2009

/s/Lee J. Eulgen
One of the Attorneys for Respondent,
Brauhaus, Inc.

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CERTIFICATE OF SERVICE

I, Gregory J. Leighton, an attorney, state that I caused a copy of the foregoing, Respondent's Motion to Dismiss Petition to Cancel, to be served upon the following via U.S. Mail on this 20th day of April, 2009:

Jack L. Most
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/s/Gregory Leighton
Gregory J. Leighton