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

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Mailed: September 17, 2013

Cancellation No. **92056543**

Iron Horse Brewery I, Inc.

v.

Jump Brands, LLC

Before Bucher, Wolfson and Masiello,
Administrative Trademark Judges

By the Board:

This matter comes up on petitioner's motion (filed April 29, 2013) for partial summary judgment on petitioner's claim of priority.[1] The motion is fully briefed.

The Board presumes the parties' familiarity with the issues herein. Therefore, for the sake of efficiency, this order does not summarize the parties' arguments raised in the briefs.

A motion for summary judgment is a pretrial device intended to save the time and expense of a full trial when the moving party is able to demonstrate, prior to trial, that there is no genuine dispute of material fact, and that it is

entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Opryland USA Inc. v. Great American Music Show Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992); and *Sweats Fashions Inc. v. Pannill Knitting Co. Inc.*, 833 F.2d 1560, 4 USPQ2d 1793 (Fed. Cir. 1987). The evidence must be viewed in a light most favorable to the non-moving party, and all reasonable inferences are to be drawn in the non-movant's favor. *Lloyd's Food Products, Inc. v. Eli's, Inc.*, 987 F.2d 766, 25 USPQ2d 2027, 2029 (Fed. Cir. 1993); *Opryland USA*, *supra*.

Since petitioner does not own an existing registration and is, instead, relying upon its common law rights in the mark HIGH FIVE HEFE. for "beer" to assert a claim under Section 2(d), petitioner must prove that it acquired trademark rights prior to respondent's constructive or actual priority date. *See Otto Roth & Co. v. Universal Foods Corp.*, 209 USPQ 40, 44 (CCPA 1981). Upon careful consideration of the arguments and evidence presented by the parties, and drawing all inferences with respect to the motion in favor of respondent as the nonmoving party, we find that petitioner has failed to meet its burden of demonstrating the absence of a genuine dispute of material fact regarding use of its mark on its goods prior to any date that respondent may rely upon

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[1] Petitioner's change of correspondence filed on May 14, 2013,

for priority purposes and whether such use, as shown by the evidence of record, constituted trademark use. In view thereof, petitioner's motion for summary judgment on the question of priority is hereby **DENIED**.[2]

Proceedings herein are **RESUMED** and dates are **RESET** as follows:

Expert Disclosures Due	**12/20/2013**
Discovery Closes	**1/19/2014**
Plaintiff's Pretrial Disclosures Due	**3/5/2014**
Plaintiff's 30-day Trial Period Ends	**4/19/2014**
Defendant's Pretrial Disclosures Due	**5/4/2014**
Defendant's 30-day Trial Period Ends	**6/18/2014**
Plaintiff's Rebuttal Disclosures Due	**7/3/2014**
Plaintiff's 15-day Rebuttal Period Ends	**8/2/2014**

IN EACH INSTANCE, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served on the adverse party within **thirty days** after completion of 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.

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is noted and has been made of record.

[2] The parties are reminded that evidence submitted in support of or in opposition to a motion for summary judgment is of record only for consideration of that motion. Any such evidence to be considered at final hearing must be properly introduced during the appropriate trial period. *See, for example, Levi Strauss & Co. v. R. Joseph Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993).