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

Proceeding	92056543
Party	Defendant Jump Brands, LLC
Correspondence Address	DAVID E KRAUSE KRAUSE & HOVLAND 310 GROVELAND AVENUE MINNEAPOLIS, MN 55403 UNITED STATES dkrause@krausehovland.com
Submission	Motion for Summary Judgment
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Date	05/29/2013
Attachments	MEMORANDUM IN OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT.pdf(774114 bytes)

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

Iron Horse, Brewery I, Inc.,)	Cancellation No.: 92056543
)	
Petitioner,)	Registration No.: 3905691
)	
v.)	Registration Date: January 11, 2011
)	
Jump Brands, LLC,)	Mark: HIGH FIVE & Design
)	
Registrant.)	

**REGISTRANT’S MEMORANDUM OPPOSING
MOTION FOR PARTIAL SUMMARY JUDGMENT**

This cancellation proceeding involves Registration No. 390569 for the mark, HIGH FIVE & Design. The registration, which issued to Registrant on January 11, 2011, states a first use in commerce of October 25, 2009, and describes the goods and services as flavored, brewed malt-based alcoholic beverages in the nature of beer.

Petitioner is a brewery that sells a number of different beers under the name Iron Horse Brewery. One of the beers offered by Petitioner is called High Five Hefe. Petitioner contends that it sold this type of beer prior to October 25, 2009, the first use in commerce stated in the registration. Petitioner moves for partial summary judgment on the issue of priority based on its alleged use prior to October 25, 2009.

Petitioner’s motion for partial summary judgment must be denied. Petitioner’s submission does not present admissible evidence of priority or even that Petitioner used High Five Hefe as a trademark. Furthermore, the motion is premature. The end of discovery is over two months away and discovery is needed to test the assertions made in Petitioner’s moving papers.

I.

Summary Judgment Rules

Summary judgment requires the moving party to show that “there is no genuine dispute as to a material fact and the movant is entitled to judgment as a matter of law.” Federal Rules of Civil Procedure 56(a); TBMP Rule 528.01. The burden of establishing both prongs of this test is on the moving party. TBMP Rule 528.01. The moving party’s evidentiary burden on summary judgment is greater than its burden at trial. TBMP Rule 528.01.

The moving party “always bears the initial responsibility” of demonstrating that there is no genuine factual dispute. Celotex Corp. v. Catrett, 477 U.S. 106 S. Ct. 3548, 2553 (1986). Where the moving party fails to satisfy its initial burden, summary judgment must be denied even if no opposing evidence is presented. Adickes v. S.H. Kress & Co., 398 U.S.144, 157, 90 S. Ct. 1598, 1608 (1970); Foster v. Johns-Manville Sales Corporation, 787 F.2d. 390, 393 (8th Cir. 1986). On summary judgment, the evidence must always be examined “in a light most favorable to the non-moving party....” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S. Ct. 2205, 91 L.Ed.2d 202 (1986).

A motion for summary judgment must be based on admissible evidence. Caldron v. Bank of America, N.A., 2013 WL 1741951, p. 3 (W.D. Tex. 2013). A party has the right to object to improper evidence and have such evidence excluded. Pfingston v. Ronan Engineering Co., 284 F.3d 999, 1003 (9th Cir. 2002).

Generally, a court will not grant summary judgment before discovery closes. The non-moving party is entitled to adequate time to take discovery. See Celotex Corp. v. Catrett, supra at 322.

II.

Petitioner's Evidence Of Use Is Not Admissible

The evidence proffered by the Petitioner consists of the Declaration of Gregory D. Parker. He is the Secretary of the Petitioner. None of Petitioner's evidence regarding its alleged use of its mark is admissible.

In the second paragraph of his declaration, Mr. Parker states that the Petitioner has been using its mark "continuously since at least as early as June 6, 2008." Registrant hereby objects to this statement and moves to strike it. A general conclusory assertion is insufficient to establish a fact for purpose of summary judgment. Colorcon, Inc. v. United States, 2013 WL 1832692, p. 11 (Fed. Ct. Cl. 2013). Rather, an affidavit supporting summary judgment must be based on specific factual information. In Re Department of Justice, 999 F.2d 1302, 1315 (8th Cir. 1993); Calindo v. Precision American Corp., 754 F. 2d 1212, 1222 (5th Cir. 1985).

Attached to the Declaration of Gregory Parker are seven invoices showing seven sales of the hefeweizen beer that Petitioner calls High Five Hefe, between 2008 and 2012.¹ These exhibits to the Declaration of Gregory Parker are hearsay, and Registrant objects to them and moves to strike them on that ground. Petitioner probably contends that these exhibits come within the business records exception to the rule against hearsay. However, the Declaration of Gregory Parker does not allege facts necessary to make the

¹ There is also a purchase order for one of these sales.

exception applicable. Furthermore, it is clear that two of these invoices (number 1112, dated June 6, 2008 and number 2484, dated May 14, 2009) were not prepared in the ordinary course of business because there is no address for the alleged customer on these invoices.

III.

There Is No Evidence Of Use In Interstate Commerce

Petitioner claims priority based on actual use of its mark in commerce. Under Section 45 of the Lanham Act, 15 U.S.C. §1127, “commerce” means interstate commerce. There are seven alleged invoices and one alleged purchase order attached to the Declaration of Gregory Parked submitted by Petitioner. As noted above, there is no customer address on two of the invoices. The customer addresses on all of the remaining invoices and the purchase order are locations within the State of Washington. In its Petition to Cancel in this proceeding, Petitioner admits that it is situated in the State of Washington. Hence, Petitioner’s own evidence shows that all of the alleged sales relied on by Petitioner were in intrastate commerce. Because Petitioner has submitted no evidence that it used its mark in interstate commerce, prior to such use by the Registrant on October 25, 2009, Petitioner has not established priority.

IV.

There Is No Evidence That Petitioner's Mark Was Used In Connection With Petitioner's Alleged Sales Occurring Before October 25, 2009

Four of the invoices attached to the Declaration of Gregory Parker are dated before October 25, 2009.² These invoices indicate sales of small quantities of Petitioner's Hefeweizen beer on June 6, 2008, April 28, 2009, May 11, 2009 and May 14, 2009. Apparently, Petitioner contends that these alleged sales establish its priority.

Even if Petitioner had sales of its Hefeweizen beer prior to October 25, 2009, there is nothing in Petitioner's submission showing that the mark, High Five Hefe, was used in connection with the sales. To the contrary, the proof of Petitioner's mark attached to the Declaration of Gregory Park is dated May 1, 2009, which indicates that the label probably was not available at the time when the sales indicated by the invoices in question were made. Because Petitioner has not submitted evidence establishing that its mark was even used in connection with the sales relied on by Petitioner, Petitioner's evidence does not establish priority.

V.

The Frequency And Volume Of Petitioner's Alleged Use Is Insufficient

Section 45 of the Lanham Act, 115 U.S.C. §1127, provides that use in commerce means the bona fide use of a mark in the ordinary course of trade. Even if Petitioner established that it used the mark, High Five Hefe, in connection with its alleged sales of

² Registrant has moved to strike two of them because there is no address for the alleged customers on these invoices.

its hefe style of beer, Petitioner's sporadic sales of this beer would not satisfy the ordinary course of trade requirement of the Lanham Act.

The exhibits to the Declaration of Gregory Parker show seven sales of Petitioner's hefe beer between 2008 and 2012. The alleged sales are as follows:

1. Invoice No. 1112, dated June 6, 2008, for 11 cases at a price of \$924.
2. Invoice No. 2383, dated April 28, 2009, for five cases at \$430.
3. Invoice No. 2473, dated May 11, 2009, for 30 cases at \$870.
4. Invoice No. 2484, dated May 14, 2009, for six cases at \$174.
5. Invoice No. 3695, dated March 17, 2010, for two cases or barrels at \$76.
6. Invoice No. 5068, dated March 29, 2011 for four cases at \$344.
7. Invoice No. 6171, dated January 11, 2012, for four cases at \$344.

Even if Petitioner could show that it used High Five Hefe as a mark in connection with these sales, the evidence summarized above, shows that any use of the mark involved sporadic isolated small sales. Assuming these sales occurred and that Petitioner's mark was used in connection with them, the infrequent and small nature of the sales causes Petitioner's alleged use of its mark to fall short of being in the ordinary course of business as required for protection under the Lanham Act. Paramount Pictures Corp. v. White, 31 U.S.P.Q. 2d 1768 (T.T.A.B. 1994).

VI.

Petitioner's Mark Is Not Used To Designate The Source Of Its Product

A trademark is a word, symbol or other thing used to designate the source of the owner's products. In this matter, Petitioner is using its name Iron Horse Brewery to

designate the source of the various types of beer that it offers. The alleged mark of Petitioner, i.e. High Five Hefe, is used merely to describe one of its products. When a term is used in that manner, it is not a trademark. Terneco Automotive Operating Company v. Kingdom Auto Parts, 410 Fed. Appx. 841, 853 2010 WL 4365580 (6th Cir. 2010).

Attached to the Declaration of George Parker submitted by Petitioner in support of its motion is a copy of the original proof of the label for Petitioner's hefe beer. In bold, prominent and conspicuous lettering across this label are the words "iron horse brewery." The words "High Five Hefe" also appear on the label but in conjunction with the words "ginger," "honey" and "wheat." Clearly, the words, High Five Hefe describe the type of beer being offered by Petitioner while the words, "iron horse brewery," designate the source of Petitioner's product. Because Petitioner's own label demonstrates that it has not used High Five Hefe as a trademark, it cannot sustain its contention that it has priority to the mark.

VII.

Petitioner's Motion Is Premature

The discovery in this proceeding ends August 15, 2013. Registrant has not completed its discovery. Summary judgments should not be granted where discovery is not complete. The preceding sections show that, at this point, more evidence is needed regarding whether, when and how Petitioner used the mark, High Five Hefe. Because the evidence is incomplete and discovery is ongoing, Petitioner's motion for partial summary judgment on the issue of priority should be denied.

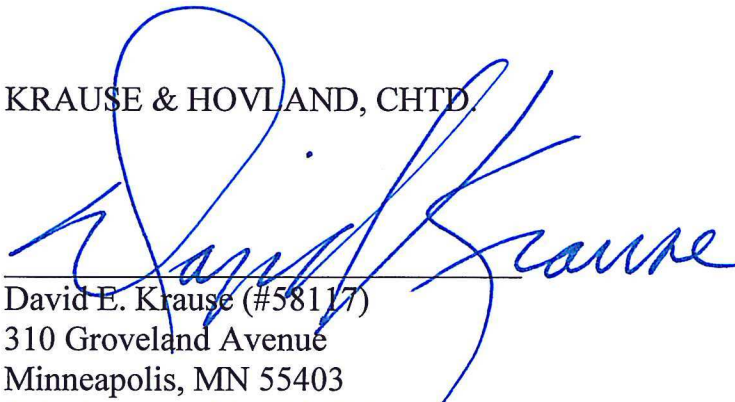
CONCLUSION

For the foregoing reasons, Petitioner's motion for partial summary judgment on the issue of priority must be denied.

KRAUSE & HOVLAND, CHTD.

Dated: May 29, 2013

By:



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ATTORNEYS FOR REGISTRANT
JUMP BRANDS, LLC

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of Registrant's Memorandum Opposing Motion for Summary Judgment was served upon the Petitioner's Attorney of Record via First Class Mail, postage prepaid on May 29, 2013, addressed as follows:

Thomas D. Foster, Esq.
TDFoster – Intellectual Property Law
11622 El Camino Real, Suite 100
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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that a copy of the within Registrant's Memorandum Opposing Motion for Summary Judgment is being electronically transmitted with the United State Patent and Trademark Office, Attn: Trademark Trial and Appeal Board, this 29th day of May, 2013.

s/David E. Krause
Signature