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

TTAB

PERFECT FOODS, INC.
Opposer

v.
JOHN D. GULLAHORN
Applicant

Opposition No. 91160978

In re App.	Serial N. 78/247,326
Mark:	Cool Cat Products and Design
Filed:	May 8, 2003
Class:	18
Applicant	John D. Gullahorn

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APPLICANT'S TRIAL BRIEF

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STATEMENT OF THE ISSUES

1. Whether Applicant acquired ownership of his marks in the United States prior to Opposer's constructive first use date; and

2. Whether Applicant's "COOL CAT PRODUCTS and design (partial tabby cat face)"mark and Opposer's "COOL CAT WHEATGRASS PET TREATS and design (tan cat face/shoulders/upper shirt) mark are to be likely, when applied to Applicant's goods, to cause confusion, or cause mistake, or deceive the purchasing public to believe that Applicant's goods have their origin with Opposer and/or such goods are approved, endorsed, or associated in any way with Opposer.

I. INTRODUCTION

In 1999 Applicant, John D. Gullahorn, ("Applicant") and Applicant's wife prepared to open an Internet business selling cat collars/clothes. Applicant's wife had been manufacturing cat collars since childhood and had named the collars "COOL CAT COLLARS".

Applicant decided to keep the name "Cool Cat" and decided to use "COOL CAT PRODUCTS and design (partial tabby cat face)" as his mark. Applicant's wife designed the trademark image. In December 1999, tags were created with the mark to identify the collar name and size. "Cool Cat Fantasy Collars and design (partial tabby cat face)" which are manufactured by "COOL CAT PRODUCTS and design (partial tabby cat face)"come in different styles and sizes. "COOL CAT PRODUCTS" were and are now marketed and sold under the marks "COOL CAT PRODUCTS and design (partial tabby cat face)", "Cool Cat Collars and design (partial tabby cat face)", "Cool Cat Velcro Collars and design (partial tabby cat face)", Cool Cat Leather Collars and design (partial tabby cat face)"; herein collectively referred to as "Applicant's Cool Cat marks".

Applicant completed his Internet website on or around July 1, 2000. Applicant's first collar sale under the "Cool Cat" mark was in September 2000 to Patty Olczak at 751 Bishop Lane, Webster, New York 14580-2459. Applicant continued selling "Cool Cat Collars" to individuals in

other states and countries but his first sale in the state of Florida was in December 2001, to a news reporter, Kathryn Daniel, who visited Applicant's home in November 1999 to interview Applicant, and had seen Applicant's cats modeling "Cool Cat Collars".

Shortly after Applicant launched his Internet business Applicant received wholesale requests for Applicant's collars. Around September 1, 2000, Applicant created a wholesale page for his Internet website.

September 2000, Applicant's wife began designs on other types of "Cool Cat Collars". Applicant's wife designed 12 styles of velcro collars, known as "Cool Cat Velcro Collars and design (partial tabby cat face)", where the mark would be silk-screened on to the collar as part of the design, and Applicant's wife designed 9 styles of leather collars, known as "Cool Cat Leather Collars and design (partial tabby cat face)". After research, in December 2001 Applicant located a company in China to manufacture Applicant's Velcro collars. Since this was a new venture with the Chinese company, Applicant selected 5 of the 12 styles of the Velcro collar for manufacture in China and started with the minimum order of 15,000 collars. In early 2002 Applicant located a company in India to manufacture leather collars. Since this was a new venture with the Indian company, Applicant selected 4 of the 9 styles of collars for manufacture and ordered the minimum order of 500 leather collars. Since then, Applicant has re-ordered 4,000 leather collars from the Indian company and sells all 9 styles of leather collars under Applicant's "Cool Cat" mark. Applicant's collars are unique in that Applicant's wife created the collar designs/styles and the collars are designed for safety/function. Applicant's website addresses are unique, (www.coolcatcollars.com, www.coolcatproducts.com, and www.fantasycollars.com).

On July 22, 2002, Applicant filed application number 78/145,956, with the Trademark Office, for "COOL CAT COLLARS and design (partial tabby cat face)". This application was returned to Applicant in December 2002. Applicant reviewed Trademark rules and on May 8, 2003 Applicant again filed for the mark, "Cool Cat Products and design (partial tabby cat face)", application number 78/247,326, in connection with "cat collars and cat clothes".

On May 24, 2003 Opposer, Perfect foods, ("Opposer") filed a trademark application seeking to register "Cool Cat Wheatgrass Pet Treat" number 78/254,092, in connection with "fresh vegetables, particularly for use as a pet treat". On February 11, 2004 Opposer's attorney changed Opposer's first use date to allege use of Opposer's mark in commerce to as early as January 2002.

Opposer's attorney served upon Applicant a set of interrogatories, document requests and requests for admission on November 12, 2004, to which Applicant was unable to respond until December 30, 2004, which was 13 days late. Hurricane Ivan and other events precluded Applicant from serving Opposer with interrogatories and document requests in a timely manner as well as prevented Applicant from submitting requests for evidential documents to Opposer. Due to financial constraints at this time, Applicant was forced to dismiss his Attorney and prevent the "hijack" of Applicant's mark pro se.

Applicant submitted to Opposer's attorney copies of Applicant's Florida Annual Resale Certificates for Sales Tax from 2002 to present, Applicant's credit card sales and PayPal account information from 2001 to present, Applicant's "Cool Cat Products" Website, Applicant's eBay Listings and Sales from 2003 to present, Applicant's Internet Advertisement Sites, Applicant's Retail Information including a retailer in Great Britain, In-State/Out-of-State/Out-of-Country Sales Receipts from 2000-2005, Shipping Receipts, Product Samples, Product Tag Samples, Wholesale Requests, Materials Receipts from 1999 to present and Order and Payment information for collars manufactured in China. Applicant notified Opposer's attorney that Hurricane Ivan had destroyed his storage building and that much documentation of Applicant's first use of the mark since 1999 had been lost in the 120 mph winds and rain.

Opposer's attorney reviewed Applicant's documents and realized that Applicant had indeed been the true user of the mark since 1999. Opposer's attorney has devoted his time since then to initiating motions to suppress Applicant's evidence. Through Applicant's inexperience and Opposer's attorney perseverance, Applicant's filing date of May 8, 2003 is the earliest date on which Applicant can rely.

Applicant does not contest that Opposer sells wheat grass. However, Opposer did not begin selling wheat grass as a pet treat under the "Cool Cat" mark until sometime after April 13, 2005. Applicant's first use date of May 8, 2003 precedes both Opposer's filing date of May 24, 2003 and Opposer's first use date in commerce of sometime after April 13, 2005.

Applicant requests an unrestricted registration of "COOL CAT PRODUCTS and design (partial tabby cat face)" in connection with cat collars and cat clothes.

II. DESCRIPTION OF THE RECORD

On May 8, 2003 Applicant filed for the mark, "COOL CAT PRODUCTS and design (partial tabby cat face)", application number 78/247,326, in connection with "cat collars and cat clothes". The application was published in the Official Gazette on May 11, 2004 at TM 433.

On May 24, 2003 Opposer filed application number 78/254,092, seeking to register "Cool Cat Wheat Grass Pet Treat and design (tan cat head, neck and upper shirt)" in connection with "fresh vegetables, particularly for use as a pet treat". Opposer was notified of Applicant's pre-existing Application and noticed that Opposer's application would be subject to refusal. On February 11, 2004 Opposer's new attorney amended Opposer's application to allege first use of Opposer's mark in intrastate commerce to January 2002. Opposer's application was suspended, pending deposition of Applicant's application.

On April 28, 2004 Opposer's attorney sent Applicant a letter demanding Applicant terminate use of the "Cool Cat" mark and instructing Applicant to withdraw Applicant's trademark application. Included in this letter was a copy of Opposer's advertising flyer.

On June 2, 2004 Opposer commenced opposition on the guise that Opposer's has been using the mark since at least 2002 and Applicant's mark so closely resembled Opposer's mark that when applied to Applicant's goods as to be likely to cause confusion, mistakes, deceive the trade and public who may think that Applicant's goods are in some way associated with, approved by, sponsored by, endorsed by or originated with Opposer. Applicant denied the allegations.

Opposer's attorney served Applicant with discovery interrogatories, production requests and requests for admissions on November 12, 2004. Applicant was unable to respond to Opposer's requests until December 30, 2004. And, Applicant was not able to request such evidence from Opposer during this period. Also, on December 30, 2004 Applicant notified Opposer that Applicant was preceding pro se. On December 30, 2004 Opposer's attorney notified Applicant's former counsel that Opposer considered the requests as "deemed admitted".

Opposer's deposition was held on April 5, 2005 where Harley B. Matsil, President of Perfect Foods, Inc, and his wife, Alyce M. Matsil, Vice President of Perfect Foods, Inc, were represented by counsel and testified on behalf of Perfect Foods (Opposer). Trial testimony notes that neither Harley B. Matsil or his wife, Alyce M. Matsil were sequestered during each other's testimony. The deposition transcripts of Harley B. Matsil and Alyce M. Matsil with Exhibits 1-15 were filed with the Board and a copy sent to Applicant on May 3, 2005.

Opposer's evidence also includes Applicant's deemed admissions 1-10, which Opposer's attorney offered by a notice of reliance in rebuttal filed with the Board during Opposer's rebuttal testimony on July 18, 2005. The Board issued an order on August 26, 2005 denying Applicant's motion to strike the notice of reliance.

Applicant's deposition was held on May 26, 2005 where John D. Gullahorn (Applicant) and Jean R. Gullahorn, DVM (Applicant's wife) testified on behalf of Applicant. Counsel did not represent Applicant. The deposition transcripts of John D. Gullahorn and Jean R. Gullahorn, DVM with Exhibits 1-19 were filed with the Board and a copy sent to Opposer's Attorney on June 24, 2005.

June 3, 2005 Opposer filed a motion to strike the testimony of Applicant. On June 17, 2005 Applicant filed a brief in opposition to this motion. This motion remains pending.

Opposer filed a notice of reliance on Applicant's deemed admissions no.1-10 at the conclusion of the rebuttal testimony period. Applicant filed a motion to amend or withdraw the deemed

admissions and a motion to strike the notice of reliance. On August 26, 2005 the Board issued an order denying Applicant's motions.

III. STATEMENT OF THE FACTS

Applicant has been engaged in the domestic and international sales of cat collars, bearing Applicant's mark, through his Internet website, also bearing Applicant's mark, since 2000. Jean R. Gullahorn, DVM Tr. 34:20,21, 35:1,2, Exhibits Nos. 6 and 11. Applicant first used the "Cool Cat" mark in 1999, when Applicant's wife began the manufacture and "tagging" of "Cool Cat Fantasy Collars", for sale over the Internet. John D. Gullahorn Tr. 31:17-25, 32:1-4, Jean R. Gullahorn, DVM Tr. 8:24-25, 10:13-14, 12:8-10, 12:14-23, 18:7-10, Exhibit Nos.11 and 15.

Applicant sold his first "Cool Cat Fantasy Collar" in September 2000, which was also the first out-of-state sale of Applicant's product. John D. Gullahorn Tr. 19:15-23, Jean R. Gullahorn, DVM Tr. 13:3-6, 32:23, 33:2,3,8,10-11,14 and Exhibit 1. The first in-state sale of a collar bearing Applicant's mark was to a news reporter, Kathryn Daniels, who interviewed Applicant at home in November 1999 and had noticed the collars on Applicant's cats. In December 2001 Kathryn Daniels contacted Applicant and purchased 2 "Cool Cat Fantasy Collars". John D. Gullahorn Tr. 26:24-25, 27:1-4, Jean R. Gullahorn, DVM Tr. 13:20-25, 14:1-3, 33:19 and Exhibit 2.

The retail price of "Cool Cat Collars" ranges from $2.99 to $25.00. John D. Gullahorn Tr. Exhibit 6. Applicant accepts cash, check, money order or credit card payment for his products and has had an Internet credit card account since 2001. John D. Gullahorn Tr. 27:13-23, Jean R. Gullahorn, DVM Tr. 14:21-24, Exhibit Nos. 4 and 5. Applicant has copies of Florida sales tax records from 2002 to present. John D. Gullahorn Tr. 38:13-18 and Exhibit 3.

In 2001 and again in 2002, Applicant added to his product line, by increasing the styles, designs and colors of cat collars. John D. Gullahorn Tr. 31:9-16, Exhibit Nos. 12 and 14. Each of Applicant's collars bears Applicant's mark. The "Cool Cat Fantasy Collar" has a tag bearing the mark, and the tag identifies the size and style of the "Fantasy" collar. John D. Gullahorn Tr. 30:17-21, 40:17-22 and Exhibit 11. All 5 designs of the "Cool Cat Velcro Collar" bear a tag upon

which is located Applicant's mark, placed by the Chinese manufacturer, as well as a silk-screened mark made on the collars themselves during the manufacturing process. John D. Gullahorn Tr. 30:22-25, 31:1, Exhibit Nos. 12 and 14. The "Cool Cat Leather Collar", manufactured in India, has a tag bearing the mark and identifying the style. John D. Gullahorn Tr. 30:17-21 and Exhibit 11. "COOL CAT PRODUCTS" are advertised through numerous sites on the Internet. John D. Gullahorn Tr. 29:15-21, 44:13, Jean R. Gullahorn, DVM Tr. 16:6-11 and Exhibit 8.

On May 8, 2003 Applicant filed for the mark, "COOL CAT PRODUCTS and design (partial tabby cat face)", application number 78/247,326, in connection with "cat collars and cat clothes". The application was published in the Official Gazette on May 11, 2004 at TM 433.

On May 24, 2003 Opposer filed application number 78/254,092, seeking to register "Cool Cat Wheat Grass Pet Treat and design (tan cat head and upper shirt)" in connection with "fresh vegetables, particularly for use as a pet treat". On February 11, 2004 Opposer's attorney amended Opposer's application to allege first use of Opposer's mark in commerce as early as January 2002 and Opposer's application was suspended March 4, 2004, pending deposition of Applicant's application.

Through the Internet Applicant has sold "COOL CAT PRODUCTS" all over the world. John D. Gullahorn Tr. 30:5-9, Jean R. Gullahorn, DVM Tr. 32:8-10 and Exhibit 10. Many clients are repeat buyers and upon examination of the receipts (John D. Gullahorn Tr. Exhibit 10), notes from the buyers attesting to such can be read. Jean R. Gullahorn, DVM Tr. 17:14-19. Besides the Internet, Applicant's wife sells "COOL CAT COLLARS" through her veterinary practice. John D. Gullahorn Tr. 30:9-16 and Exhibit 10.

Applicant has had wholesalers selling his products since 2000 but does not maintain a list of wholesalers. John D. Gullahorn Tr. 21:24-25, 22:1, Jean R. Gullahorn, DVM Tr. 15:2-6, 17:20-22, Exhibit Nos. 9 and 13. Applicant has sold collars, with the mark, on eBay since at least 2003. John D. Gullahorn Tr. Exhibit 7. A web search for documents to respond to Opposer's interrogatories revealed Applicant's collars, with the mark silk-screened onto the collar, offered

on British eBay by a wholesaler. John D. Gullahorn Tr. 29:22-25, 30:1-4, 44:25, 45:1-7 and Exhibit 9.

Since Applicant was excluded from Opposer's deposition, Applicant and Applicant's wife decided to research, via the Internet, Opposer's products and use of the mark, as Opposer had claimed under oath during Opposer's deposition that Opposer used a website for advertising and that Opposer had been selling pet wheat grass under the "Cool Cat" mark since 1988. Applicant and Applicant's wife went to Opposer's website, www.800wheatgrass.com, on April 13, 2005 and copied Opposer's advertising website from the Internet. Jean R. Gullahorn, DVM Tr. 19:15-18,21-25, 20:1-9 and Exhibit 16. Opposer's advertising website noted at the end of each of its 10 sections that it was last updated by Opposer on June 2003. Jean R. Gullahorn, DVM Tr. 20:10-13, 22:8-10 and Exhibit 16. No where on the website was the wordage "Cool Cat" used, no where was a pictorial view of the pet wheat grass product, no where was the mark Opposer claims to have used since 1988 or since January 2002, no where was there a mention of the existence of a wheat grass treat for pets. Jean R. Gullahorn, DVM Tr. 20:18-24 and Exhibit 16. Opposer's website was last updated on June 2003 by Opposer, which is after Applicant's constructive first use date. On April 13, 2005, which was 2 years after Opposer's application date, Opposer did not have his "Cool Cat" mark or product on Opposer's advertising website. Jean R. Gullahorn, DVM Tr. Exhibit 16.

On April 13, 2005, Applicant and Applicant's wife performed an Internet search for the wordage "Cool Cat Wheat Grass". Jean R. Gullahorn, DVM Tr. 29:5-6 and Exhibit 18. A Google Internet search for the wordage "Cool Cat Wheat Grass" was not found. Jean R. Gullahorn, DVM Tr. Exhibit 18.

As a veterinarian of 16 years who had practiced in New York on Long Island from 1989 to 1990, Applicant's wife, who is an expert witness, had never heard of feeding kenneled animals grass and further indicated that the feeding of grass would be contra-indicated, especially in a kenneling situation. Jean R. Gullahorn, DVM Tr. 23:9-10,19-25, 24: 1-3.

Applicant received a letter from Opposer's attorney dated April 28, 2004 demanding that Applicant cease using the mark and the withdrawal of Applicant's application for the mark. Jean R. Gullahorn, DVM Tr. 28:4-8. This letter included a copy of the same flyer as the flyer Opposer entered into evidence at Opposer's deposition. Because the copy of the flyer entered into evidence by Opposer during Opposer's deposition was clearer than that sent to Applicant by Opposer's attorney in the letter dated April 28, 2004, Applicant copied the flyer marked as Opposer's Exhibit 14 and entered it into evidence at Applicant's deposition as Applicant's Exhibit 17. John D. Gullahorn Tr. 29:13-16, 30:11-14 and Exhibit 17. Applicant's Exhibit 17 clearly shows that "Cool Cat Wheatgrass Pet Treat" was a novel product for Opposer. The flyer calls "Cool Cat" wheat grass a new treat for pets and uses phrases such as, "is now available", "offered for the first time", "time for pet grass to come to New York". Jean R. Gullahorn, DVM Tr. 28:9-17 and Exhibit 17. Opposer has changed his statement of date of first use of the mark as often as Opposer's attorney has filed motions to suppress Applicant's evidence of first use.

Opposer claims that Opposer's wife made Opposer's advertising posters and cards, by hand, for 13 years, and these advertisements, which displayed Opposer's mark were placed in every wheat grass tray that Opposer sold and above every pet wheat grass display in every store that sold Opposer's pet wheat grass, by Opposer's truck drivers. Opposer is unable to provide affidavits from any of the driver's whom Opposer claims affixed Opposer's poster to the walls or affidavits from any store personnel who Opposer claims sold "Cool Cat Wheatgrass Pet Treat". Opposer has no receipts for the art supplies Opposer claims his wife used in the production of Opposer's advertisements, and Opposer can produce no advertisements or photos of advertisements that Opposer has sworn under oath to have used for 13 years.

Opposer's attorney is aware that Opposer has no competent evidence to submit in this opposition so Opposer's attorney has devoted all of his energies to suppressing Applicant's evidence. Opposer has not been able to "spin" enough evidence to show that he was using the mark prior to filing on May 24, 2003.

Applicant's testimony shows that Applicant was using the mark as early as 1999. Even with Applicant's constructive first use date amended to Applicant's filing date of May 8, 2003, Applicant still precedes Opposer's first use date in commerce. Opposer's advertising website, clearly demonstrates Opposer's use of the mark was in commerce was sometime after April 13, 2005. Opposer's flyer, Applicant's Exhibit 17, clearly states that Opposer's pet wheat grass is "a new treat" and is "offered for the first time to New York". Both Opposer and his current attorney have engaged in inconsistent positions to suit this case.

Applicant's sales receipts show continuous sales of "COOL CAT PRODUCTS" in the United States and Europe, from 2000 to present. John D. Gullahorn Tr. 30:5-9, Jean R. Gullahorn, DVM Tr. 32:8-10 and Exhibit 10. Applicant has used the mark on collar tags, shipping receipts, Applicant's credit card sales, Applicant's advertising website, Applicant's eBay listings and sales and even had the "Cool Cat" mark silk-screened on to "Cool Cat Velcro Collar". John D. Gullahorn Tr. Exhibits 4, 5, 6, 7, 12, and 14. Applicant has established widespread knowledge of and good will for his "Cool Cat" marks, as evident from comments found on the sales receipts of Applicant's Exhibit 10 from repeat buyers. A Google Internet search for the wordage "cool cat collars" shows Applicant's "Cool Cat Collars" are listed in the first 10 sites. John D. Gullahorn Tr. Exhibit 8.

Applicant has been very consistent in his claims and has produced irrefutable documentation that his first use date long precedes Opposer's date and irrefutable evidence that Opposer's first use date was after April 13, 2005, the date when Applicant copied Opposer's advertising website from the Internet, which was over 2 years after Applicant filed for the mark.

Applicant is seeking registration of "COOL CAT PRODUCTS and design (partial tabby cat face)" in connection with cat collars and cat clothes. Applicant has clearly shown first use of the mark. Opposer's opposition to Applicant's use of the mark should be denied.

IV. ARGUMENT - U.S. APPLICATION No. 78/247,326 SHOULD BE APPROVED.

Throughout opposition testimony, Opposer impeaches himself. Opposer's Exhibit 14 clearly describes, "Cool Cat Pet Grass" as a new product for the Opposer. Opposer's flyer uses wordage such as, "A new product", "Now offered for the first time", "is now available", "Now offered for the first time fresh and ready to use!", "It is time for pet grass to come to New York!" Opposer claims that he has been selling "Cool Cat Wheat Grass Pet Treat" in numerous states since 1988, but Opposer's advertising flyer says that pet wheat grass is new. Opposer has handwritten the date, "December 2001", on Opposer's deposition Exhibit 14. Opposer by his own admissions was not selling pet wheat grass in New York in 1988.

Opposer claims that Opposer's wife made handwritten cards that used the words "Cool Cat Wheat Grass" for every tray of cat grass that Opposer sold from 1988 to 2001. Harley B. Matsil Tr. 11;10,11,14, 12:12-14. Opposer also claims that Opposer's wife manufactured handwritten posters bearing Opposer's mark for 13 years. It is unrealistic to believe that any woman would spend every day for 13 years hand drawing signs and cards for advertising, when there are numerous businesses available to perform such tasks cheaply and efficiently. Opposer's evidence is unreliable and inherently incredible.

Opposer has none of the posters or cards used from 1988 to 2001 and claims that the handwritten posters and cards, drawn by his wife are now "a collector's item". Harley B. Matsil Tr. 22: 5-13. Opposer has provided no evidence that Opposer's wife is an artist or that the posters that Opposer claims to have passed out since 1988 are collector's items. Opposer has presented no receipts for any of the art supplies Opposer's wife used for 13 years in the manufacture of Opposer's mark. By Fed. Rules of Evid. 901 (a) the requirement of authentication as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what proponent claims. Further, this testimony is not relevant by Evid. Code § 210 and Fed. Rules of Evid. 401. "If the evidence simply shows that some metaphysical doubt as to the fact exists, or if the evidence is not significantly probative, the material fact issue is not

genuine."*Anderson*, 477 U.S. at 250-51, 106 S. Ct. 2505; *Matsushita Electric Industrial Co., Ltd.*, 475 U.S. at 587-88, 106S. Ct. 1348.

Opposer's Deposition Exhibit Nos. 1, 2, 3, 4, 10, 11, 12 and 13 are collections of receipts for the purchase of wheat grass. Harley B. Matsil Tr. 9:16-17, 14:11-12. There is no mark on the receipts indicating that the wheat grass sold was "Cool Cat Wheat Grass Pet Treat". Applicant does not contest the fact that Oppposer sells wheat grass. These receipts simply support the Opposer's claim that it has a wheat grass business and sells wheat grass. Applicant has no other Internet business other than "COOL CAT PRODUCTS" so Applicant cannot produce documents from other sales and claim them as "Cool Cat" sales. Where the value of evidence for its proper purpose is slight and the likelihood that it will be used for an improper purpose by a finder of fact is great, a court may in its discretion, exclude the evidence even though it would otherwise be admissible. Evid. Code § 352, Fed Rules Evid. 403. There is no evidence of one or more essential elements of a claim or defense on which the adverse party would have the burden of proof at trial. "If the evidence simply shows that some metaphysical doubt as to the fact exists, or if the evidence is not significantly probative, the material fact issue is not genuine."*Anderson*, 477 U.S. at 250-51, 106 S. Ct. 2505; *Matsushita Electric Industrial Co., Ltd.*, 475 U.S. at 587-88, 106S. Ct. 1348. Opposer's evidence that Opposer sold wheat grass is not evidence that Opposer sold wheat grass under the mark. *Blan v. Ali*, 7 S.W.3d 741, 748-49 (Tex. App.-Houston [14th Dist.] 1999, no pet. "A brick is not a wall".

Opposer has no dated receipts for advertising materials either hand made by his wife or commercially manufactured. Opposer's wife stated during deposition (Alyce M. Matsil Tr. 7:4) "we had Gross printers in Brooklyn print the pads up" (referring to Opposer's Deposition Exhibit 7) yet there are no dated receipts from Gross printers, which would be an independent source of date of first use. Opposer provides no receipts for any advertising products, or for the styrofoam boards to which Opposer claims to have mounted Opposer's posters, or for the tape which Opposer claims his drivers used to attach his displays to walls, or for the glue Opposer used to

glue his signs on to Styrofoam. By Fed Rules Evid. 401 Opposer is not able to prove if such products existed or if they did, when they existed.

Opposer claims that during out of state deliveries its drivers affixed a hand drawn cardboard sign with the words "Cool Cat Wheat Grass Pet Treat" and a picture of a cat's head on the wall above each wheat grass display. Harley B. Matsil Tr. 14:15,18,19, 15:8,10-12. Opposer wants us to believe that Opposer's truck drivers delivered the wheat grass trays at the stores on their routes, stood idly while store personnel sorted through the delivered goods and after a location for the display was decided, Opposer's truck drivers would affix Opposer's advertising signs on the walls so that the sign would hang over the wheat grass display. Unless Opposer's drivers waited to see where the displays of Opposer's product were going to be set up they would not know where to affix Opposer's signage. Opposer has produced no evidence that Opposer's adverting posters, which display Opposer's mark, have ever been displayed with Opposer's wheat grass, or that Opposer's advertisements have ever been received and read by store personnel who Opposer claims to have sold "Cool Cat Wheatgrass Pet Treat". Ex Parte Clarke, 7 ALW 31-5 (170242), 188 WL 854831, (Alabama Supreme Court, December 11, 1998) Testimony surrounding Opposer's Exhibits 5, 6, 7, 8 and 14 is strictly hearsay and is not admissible.

"Use" of a mark means the bona fide use of the mark in the ordinary course of trade. Opposer has a collection of wheat grass sales receipts without the mark, no receipts for any of the materials that Opposer allegedly purchased for his hand drawn displays or for any of the commercially prepared advertisements that Opposer claims to have used since 2002. In essence, Opposer has no evidence of selling pet wheat grass under the mark as Opposer has claims to have done for 17 years. Opposer has not met the requirements of TMEP Section 901. By 37 CFR 2.122(b)(2) a date of use of a mark must be established by competent evidence". When one considers that there is no competent evidence supporting Opposer's claim to first use, the vulnerability of Opposer's testimony becomes apparent.

Opposer's Depositon Exhibit 15 is an interesting piece of work. Obviously, J B Brown is a personal friend of Opposer as they are on a first name basis and exchange Christmas cards. JB Brown, a good friend of Opposer, was so anxious to assist Opposer in stealing Applicant's mark, that JB Brown states in Opposer's Exhibit 15 that she purchased wheat grass bearing Opposer's mark "Even before 1988". This is contrary to Opposer's testimony that JB Brown made her first purchase of his wheat grass product on 6/28/88. Harley B. Matsil Tr. 11:4. Perhaps JB Brown was feeding the wheat grass to her cats or perhaps was using it for something else as Opposer's web site indicates that wheat grass is used by florists, photographers, interior designers, and department stores in their displays. Fed. Rules of Evid. Rule 403 excludes Opposer's Exhibit 15 as the probative value is substantially outweighed by the danger of prejudice and confusion. Further under Fed. Rules of Evid. Rule 802 Opposer's Exhibit 15 is hearsay. However, if the letter from JB Brown was genuine and Opposer did in fact sell his wheat grass under the mark as JB Brown states, Opposer has not shown continuous use of the mark and by trademark rules the mark is considered abandoned.

Opposer's evidence is not relevant as it does not prove or disprove Opposer's claim to an earlier use of the mark. Opposer's advertising exhibits are not accompanied by invoices or receipts to establish when such items were ordered, Opposer's claims that Opposer's driver's distributed the advertising materials bearing the mark are not accompanied by affidavits from Opposer's drivers that they did indeed distribute said advertising material, and Opposer has produced no affidavits from anyone at the businesses allegedly carrying Opposer product confirming that they indeed did receive and sell Opposer's product. Opposer's wheat grass receipt evidence does not bear the mark. Opposer's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 are barred by the exclusionary rule. Evid. Code, § 351

Opposer's own wheat grass advertising website was copied from the Internet by Applicant on April 13, 2005. Opposer's website (www.800wheatgrass.com) was clearly marked at the conclusion of each website section, with a last change date of June 2003. (Opposer's website is

Exhibit 16 from Applicant's wife's Deposition.) Opposer's website does not list "Cool Cat Wheatgrass Pet Treat" anywhere on the website under any section. Additionally, there are no pictures of a product called "Cool Cat Wheat Grass Pet Treats", which Opposer claims to have sold interstate since 1988 or at least since January 2002. No where on the site does it say that wheat grass is provided to any sort of an animal facility. The site mentions feeding wheat grass to your dog or cat and letting them nibble on it, but it never mentions the existence of a product exclusively for pets under the "Cool Cat" mark. "Cool Cat Wheatgrass Pet Treat" was not in existence at the time the website was last updated, June 2003, or at the time that Opposer's advertising website was copied from the Internet by Applicant, which was April 13, 2005. Jean R. Gullahorn, DVM Tr. Exhibit 16. Opposer's advertising website impeaches Opposer's credibility. Evid Code § 1101(b), Fed. Rules Evid. 404(b).

An Internet search by Applicant on April 13, 2005 for "Cool Cat Wheatgrass" reveals no information. By Fed. Rules Evid. 401 this exhibit acts as an aid to understanding that Opposer was not advertising his pet wheat grass on the Internet on April 13, 2005, yet Opposer states during deposition that he uses his Internet website for advertising his products.

Opposer's photo (Exhibit 9 Tr. Harley B. Matsil) in itself is not proof of the date its product was developed. Opposer claims that the date of the photo was some time in 2004 but has submitted no competent proof of date. Opposer's Deposition Exhibit 9, has since April 13, 2005, appeared on Opposer's advertising website, www.800wheatgrass.com.

Opposer and Opposer's wife stated that they have been operating a wheat grass business since 1982 (Harley B. Matsil Tr. 5:11, Alyse M. Matsil Tr. 4:25, 5:12) and Opposer's wife, who is vice president of the business, stated that they had incorporated their wheat grass business in January 1983 (Alyse M. Matsil Tr. 4:25, 5:1), less than a year after opening the business, but it waited 15 years to file for the mark. The Opposition has wholly failed to carry out its burden of demonstrating that date of first use preceded that of Applicant and Opposer has given inaccurate information to the TTAB. 2005. Compliance with the Trademark Rules of practice and the

applicable Federal Rules of Civil Procedure is expected of all parties in Board proceedings, whether or not they are represented by counsel. Opposer has provided no *Prima facie* evidence of validity of his mark. Applicant has shown that Opposer was not using the mark on the dates Opposer claimed. Applicant's errors in this procedure were due to a lack of knowledge in how to proceed and Applicant's errors do not cure Opposer of fraud. Opposer knew when he signed the Statement of Use that he had not used the mark in 1988, still had not used the mark in January 2002, and wouldn't start using the mark in commerce until 2005. In Medinol Ltd. v. Neuro Vasx (67 USPQ 2d 1205, TTAB, May 2003) the date of Statement of Use was incorrect and the entire registration was lost. Opposer's wheat grass may have been sold for pet use, but Opposer has failed to show that its wheat grass was sold under the "Cool Cat" mark prior to April 13, 2005.

A. APPLICANT HAS PRIOR RIGHT'S IN HIS "COOL CAT" MARKS

Applicant has produced evidence establishing Applicant's first use date of the mark as late 1999. By default, Applicant has a constructive first use date of the "Cool Cat" mark of May 8, 2003. Even so, the Opposition has failed to carry out its burden of demonstrating that its date of first use preceded that of Applicant. Clear and convincing evidence denotes proof that is clear, explicit and unequivocal. Applicant's first use date precedes Opponent's date of April 13, 2005.

B. APPLICANT'S "COOL CAT" MARK CREATES NO LIKELIHOOD OF CONFUSION WITH OPPOSER'S "COOL CAT" MARK

i. THE MARKS ARE DISSIMILAR ENOUGH TO PREVENT CONFUSION

In E. I. duPont De Nemours & Co., 476 F.2d 1357, 1361, 177 U.S.P.Q. 563, 567 (C.C.P.A. 1973) the first duPont factor involves the similarity or the dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.

Applicant's mark, "COOL CAT PRODUCTS and design (partial tabby cat face)" as shown in Applicant's Application, and Opposer's mark, "COOL CAT WHEAT GRASS PET TREAT and design (tan cat head, neck and blue t-shirt)" as shown in Opposer's Application, each use the words "COOL CAT" and each have some portion of a cat in their design. Applicant's cat is a

partial outline of a tabby cat's face. Opposer's cat has a fully drawn tan face with no striping, a long tan neck and wears a blue t-shirt. Other than being cats, the drawings are dissimilar.

"Cool" is a common slang term used by English speaking persons. Applicant's Deposition Exhibit 8 clearly demonstrated the use of the word "Cool" in describing merchandise. Applicant has applied for "COOL CAT PRODUCTS" and Opposer has applied for "COOL CAT WHEATGRASS AND PET TREATS". After removing the slang term "Cool" both names are dissimilar enough as not to create confusion.

ii. THE GOODS OFFERRED UNDER THE MARKS ARE VERY DIFFERENT AND THE LIKELIHOOD OF CONFUSION IS REMOTE

The second duPont factor to consider is the similar or dissimilar nature of the goods described in an application or registration. In this case, the respective goods are very different. Applicant is using the mark on cat collars. Opposer is using the mark on pet wheat grass. Applicant's mark is for use on cat collars and cat clothing. Opposer's wheat grass is a pet treat, suggested for "birds, rabbits, mice and lizards", or "your pet cat, bird, rabbit, lizard, mouse or mountain gorilla", or "pet cats, dogs, birds, reptiles, rabbits, guinea pigs, mice, and all small animals". Opposer's "PET WHEAT GRASS" is not just for cats, but for many species of animals, birds and reptiles.

Applicant's cat collars are designed for safety and function. Applicant's collars will stretch off should a cat be caught and are made of non-toxic materials. Applicant's cat collars and Opposer's wheat grass are similar in the fact that if consumption of either occurs, emesis is likely.

Applicant's cat collars provide a service to the public as most counties in the United States have laws requiring rabies vaccinations. These laws mandate that rabies tags be worn. Cats and dogs must by law, display tags, which means that a collar must be purchased on which to attach the tags. Two of the three types of Applicant's cat collars have attachment sites for tags.

In contrast, Opposer's product is a poisonous plant. John M. Kingsbury, Professor of Botany, New York State College of Agriculture, Lecturer in Phytotoxicology, New York State Veterinary

College, Cornell University, cites wheat grass as a poisonous plant on page 81 of his book, *Poisonous Plants of the United States and Canada.*

Opposer's attorney is not a licensed veterinarian. Applicant's wife, a veterinary author in both veterinary journals and hobbyist magazines, is an expert witness and indicated on page 23 and 24 of Applicant's wife's deposition that the product was not safe to feed pets. Hairball control foods and lubricants are the methods used to pass hairballs within the stool. Scooping a litter box is an accepted task of cat owners. Vomiting is one of the top 5 reasons that owners relinquish their cats to animal shelters. No one likes to step in vomit or clean vomit off the floor or carpet. Wheat grass can become lodged above the palate during emesis. Applicant has assisted Applicant's wife in the surgical removal of grass from the nasal cavity of indoor cats.

Wheat grass type products are generally purchased once by uneducated individuals. After the pet begins vomiting, the consumer discontinues purchase. Cat collars aide in complying with ordinances and are a frequent purchase.

iii. THE CHANNELS OF TRADE ARE THE SAME

The third duPont factor to consider when determining whether a likelihood of confusion exists is the similarity or lack of similarity in trade channels. Opposer sells his pet grass to individuals, health food stores and supermarkets. Applicant primarily sells "COOL CAT COLLARS" directly to consumers via the Internet and eBay (John D. Gullahorn Tr. Exhibit Nos. 6, 7, 8, 9 and 10) but does have wholesalers at pet stores and on the Internet.

Wheat grass is perishable, lasting 5 to 6 days; needs watering and refrigeration to prevent desiccation. (Harvey B. Matsil Tr. Exhibit's 5 & 7) Pet grass is sold in refrigerated or humidified zones of supermarkets, health food stores, Lowe's Hardware, or other gardening stores. Cat collars are non-perishable items and would be displayed for sale in a pet section.

Since Opposer's product is perishable it cannot be transported or kept for more than a few days, limiting Opposer's client base to Opposer's immediate Metropolitan area. Many department stores and pet stores carry grass-growing kits. Opposer's wheat grass is not a novel item.

iv. CAT COLLARS VS. WHEAT GRASS

The fourth duPont factor is the conditions under which buyers purchase products. Applicant sells cat collars. Rabies vaccination requirements and laws requiring tag wear necessitate collar wear. Pet owners place identification tags on pet collars to facilitate return if lost.

The price of Applicant's collars ranges from $2.99 to $25.00, depending on the style. John D. Gullahorn Tr. Exhibit 6. Most of Applicant's collars are sold retail over the Internet, so there is little if any "impulse" buying. Internet shoppers are generally shopping for a specific item, which they have not been able to find in local stores.

Opposer's grass is an impulse item. Opposer makes claims that its product is a healthy treat for pets, rich in vitamins and minerals, etc. Harley B. Matsil Tr. Exhibits 5, 6, 7 & 8. Dietitians tell us that we need to eat more green vegetables in our diets. An uneducated pet owner would think that they were promoting their pet's health by providing wheat grass. Opposer prices his grass at $1.99, which is inexpensive. Coupling price with health claims, pet grass is an impulse purchase.

v. OPPOSER HAS USED THE MARK FOR LESS THAN A YEAR IN COMMERCE; OPPOSER'S TERRITORY IS VERY SMALL

There are many companies selling pet grass. Wheat grass is perishable and cannot be cheaply transported great distances and maintain product freshness. Opposer's territory is limited to his market share of the New York City Metropolitan area.

Pet grass is an impulse purchase. Impulse shopping is unplanned and not researched. Shoppers purchasing Opposer's product have not researched pet grass and did not plan to purchase pet grass when setting out on their shopping trip. This hardly constitutes a strong trade reputation.

Applicant or his wholesalers have sold "Cool Cat Collars" all over the world. John D. Gullahorn Tr. Exhibits 9 & 10. Receipts from Applicant's Deposition Exhibit 10 contain comments such as, "This is the third time I have purchased from you in a 3 year period. I love your Fantasy Collars", "love your collars. We used to get them in Gereome, AZ."

Because of Applicant's long-term use of the mark and the uniqueness and quality of each collar, "Cool Cat" and "Cool Cat and design (partial tabby cat face)" are recognized by the trade and by the purchasing public as being associated with Applicant.

vi. THERE ARE SIMILAR THIRD PARTY MARKS

The sixth duPont factor is the number and nature of similar marks on similar goods. TESS, on the U.S. Patent and Trademark website, shows a number of third parties utilizing a mark similar to that of Applicant. Under the wordage "Cool Cat", a user of the mark, "Kool Katz", No. 78694406 was a pet supplies business, another, "The Ultimate Vacation Spot for Cool Cats and Hot Dogs", No. 2709498 was a boarding facility for dogs and cats. "Kool Kat Muscat", No. 2948050 (wine), "Cool Cat", No. 2789983 (cappuccino), and "Cool Cat", No. 2020834 (seafood), are marks that could be found in supermarkets along with Opposer's mark.

vii. THERE IS NO EVIDENCE OF ACTUAL CONFUSION

The seventh duPont factor is the nature and extent of any confusion. Consumers know the difference between pet grass and cat collars and would not accidentally purchase pet grass when shopping for a cat collar or vice versa.

viii. THE LENGTH OF CONCURRENT USE IS TOO SHORT

The eighth duPont factor concerns the length of time and conditions under which there has been concurrent use without evidence of confusion. Applicant has sold collars all over the United States and Europe since 2000. Opposer did not start selling pet grass under the mark until 2005. The time period is not enough to determine if there has been any confusion.

ix. THE VARIETY OF GOODS ON WHICH THE MARK IS DISPLAYED

The ninth duPont factor is the variety of goods on which the mark is used. Opposer strictly uses its mark on pet wheat grass. Applicant's use of the mark is restricted to cat collars and cat clothes.

x. MARKET INTERFACE BETWEEN APPLICANT AND OPPOSER

Opposer's product has a limited market as the nature of Opposer's goods limits point of sale to nearby locations with refrigeration services. Applicant's collars are "dry goods". Opposer sales its

product through supermarkets and health food stores and Applicant sells his product primarily through the Internet. The likelihood of confusion is very small.

xi. MISCELLANEOUS FACTORS

The final duPont factors are neutral in this matter.

xii. ANY DOUBT SHOULD BE RESOLVED IN FAVOR OF APPLICANT

Applicant has presented overwhelming evidence that Applicant is truly the first user of the mark in this opposition. Opposer has no evidence of use of the mark in 1988 or in January 2002. Opposer did not use the mark in commerce until 2005. Opposer is the newcomer.

V. CONCLUSION

The function of the judicial system is the search for the truth. The Interlocutory attorney is permitted to make any order that is "just". In nonjury cases, the court can commit reversible error by excluding evidence but it is almost impossible for it to do so by admitting evidence. Wright, Miller & Kane, *Federal Practice and Procedure*, §2885, p. 454 (2d ed. 1995)

Opposer's attorney, Mr. Grigg's, requested in the "Conclusion" of OPPOSER'S TRIAL BRIEF an order from the Board "refusing U.S. App. Serial No. 78/254,092, and denying registration." Opposer's serial No. is 78/254,092.

Applicant has demonstrated previous first use and ownership of his "Cool Cat" marks. Opposer has requested the Board to refuse its own application. Applicant requests the Board over rule this opposition and grant Applicant use of the mark in U.S. App. No. 78/247,326.

Respectfully submitted,

John D. Gullahorn, dba Cool Cat Products

Date: October 22, 2005

By: _____

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VI. EVIDENTIARY OBJECTIONS

1. Applicant objects to the trial testimony and exhibits of Harvey B. Matsil offered on April 5, 2005, under Rule 615 of Fed. Rules of Evid. Mr. Matsil's wife was present during Mr. Matsil's deposition. Mrs. Matsil's presence was not essential to the presentation of Opposer's cause.

2. Applicant objects to the trial testimony of Alyce M. Matsil offered on April 5, 2005, under Rule 615 of Fed. Rules of Evid. Mrs. Matsil's husband was present during Mrs. Matsil's deposition. Mr. Matsil's presence was not essential to the presentation of Opposer's cause.

3. Applicant objects to the admission of Exhibit Nos. 1, 2, 3, 4 10, 11, 12, and 13 of the deposition of Harvey B. Matsil offered on April 5, 2005 on the grounds of the Exclusionary Rule, Evid. Code § 351, Fed. Rules of Evid. Rule 401, Rule 403 and Rule 901(a) as the receipts do not indicate that they are for the purchase of "Cool Cat" grass, only that they were for the purchase of wheat grass, which Opposer is already known to sell. "A brick is not a wall".

4. Applicant objects to the admission of Exhibit Nos. 5, 6, 7, 8, 9 and 14 of the deposition of Harvey B. Matsil offered on April 5, 2005 on the grounds of relevancy by Evid. Code § 210. Exhibits do not possess independent dating. Opposer cannot show that its Evidence was manufactured or used prior to Applicant's first use date, only that such evidence exists.

5. Applicant objects to the admission of Exhibit 15 of the deposition of Harvey B. Matsil offered on April 5, 2005 as deposition transcript of Harvey B. Matsil page 11 line 4 impeaches his own evidence and it is hearsay. Rule 403 and 801 of Fed. Rules of Evid. exclude this exhibit.

VII. RESPONSE TO OPPOSER'S OBJECTION'S

1. Applicant's Exhibits 1, 8 and 9 of the deposition of John D. Gullahorn offered on May 26, 2005 are protected by Rule 1001 of the Fed. Rules of Evid. as data stored in a computer is considered original. Rule 803(8) of Fed. Rules of Evid. further protects Exhibits 8 and 9.

CERTIFICATE OF MAILING (37 C.F.R. §1.8a)

I hereby certify that APPLICANT'S TRIAL BRIEF is being deposited with the United States Postal Service on the date shown below with sufficient postage as first class mail in an envelope addressed to: U.S. Patent and Trademark Office, Trademark Trial and Appeal Board, POB 1451, Alexandria, VA 22313-1451.

John D. Gullahorn

Date: October 22, 2005

CERTIFICATE OF SERVICE

I hereby certify that a true copy of APPLICANT'S TRIAL BRIEF has been forwarded this 22nd day of October 2005, by first class mail, postage prepaid and addressed to: Dennis T. Griggs, Griggs Bergen LLP, 17950 Preston Road, Suite 1000, Dallas, TX 75252.

By:

John D. Gullahorn, dba Cool Cat Products

Applicant