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

Proceeding	91199117
Party	Plaintiff Merial
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Signature	/bt/
Date	05/06/2011
Attachments	BRIEF IN OPPOSITION TO MOTION TO CONSOLIDATE_1.pdf (20 pages) (870355 bytes)

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

**IN THE MATTER OF TRADEMARK
APPLICATION SERIAL NO. 85/120,994**

MERIAL)	
)	
v. Opposer)	
)	Opposition No. 91199117
SERGEANT'S PET CARE PRODUCTS, INC.)	
)	
Applicant)	

BRIEF IN OPPOSITION TO MOTION TO CONSOLIDATE

Opposer, **MERIAL**, (“Opposer” or “Merial”), by and through its counsel, submits this brief in opposition to the motion to consolidate filed by **SERGEANT’S PET CARE PRODUCTS, INC.** (“Applicant” or “Sergeant’s”) in the above-captioned action Opposition No. 91199117. While the proceedings involve parallel parties, the marks in dispute are different and the questions of law and fact are also dissimilar. Consolidating Opposition Nos. 91197053 and 91199117 would not save the parties time, effort, or expense and would result in prejudice and inconvenience to Opposer. In fact, as will be shown, it is believed that if the proceedings were limited to the marks that Applicant truly intends to use in commerce, the proceedings would involve entirely different marks and entirely different issues of law.

TBMP § 511 provides that the Board may exercise its discretion to consolidate cases involving common questions of law or fact after considering (1) any savings in time, effort, and expense, which may be gained from consolidation and (2) any prejudice or inconvenience that may be caused thereby. Consolidation is most often appropriate where both proceedings involve

the same mark and virtually identical pleadings. *S. Industries Inc. v. Lamb-Weston Inc.*, 45 USPQ2d 1293, 1297 (TTAB 1997).

Sergeant's has misstated the nature of the Notices of Opposition by indicating that the opposition to registration of the four marks at issue in the two proceedings are all based on priority and likelihood of confusion (Motion to Consolidate ¶¶ 2-4). In the Consolidated Opposition (Opposition No. 91197053 hereinafter "Consolidated Opposition") the opposition to registration of two of the marks, "FIPROGUARD" and "FIPROSPOT", is based on priority and likelihood of confusion, but the opposition to registration of "F-PRONIL" is based only on the proposed mark being generic or descriptive or deceptive or deceptively misdescriptive as used in connection with flea and tick control products. The opposition to registration of "PRONYL OTC" in the later filed opposition (Opposition No. 91197053 hereinafter "PRONYL OTC Opposition") is also based solely on it being generic, descriptive, deceptive, or deceptively misdescriptive.

Sergeant's has also misstated the extent of discovery in the earlier filed Consolidated Opposition (Motion to Consolidate ¶ 12). Not only had the parties had a discovery conference and prepared and served Initial Disclosures but Sergeant's had also received by e-mail copies of Merial's Interrogatories, Requests for Production of Documents and Requests for Admission prior to the filing of its Motion to Consolidate. See attached Declaration of Brewster Taylor (hereinafter "Taylor Dec.") ¶¶ 7-8 and Exs. 2-3.

Discovery in the earlier Consolidated Opposition opened on December 30, 2010, and the parties had a discovery conference and exchanged initial disclosures. On January 20, 2011, Sergeant's filed a consent motion for amendment of its applications to narrow the identifications of goods. In an order dated February 3, the Board granted the requested amendments, allowed

Merial thirty days to withdraw the opposition if the amendments resolved the dispute, and otherwise suspended proceedings.

The Board issued an order resuming proceedings on March 23, but the Board then scheduled the opening of discovery for nearly a month from the date of the order. In fact, discovery had opened and initial disclosures had been served before Sergeant's had filed its motion for amendment. Since Merial had become aware that Sergeant's was about to begin use of one of the opposed marks, "FIPROGUARD", for a directly competitive product, and it was important to obtain discovery as quickly as possible, on March 28, Merial filed and served a motion for modification of the Board order. (Taylor Dec. ¶¶ 4-5)

On March 30, the Board issued a new order in the Consolidated Opposition reflecting the fact that the discovery period had long been open, and on March 30, the undersigned counsel sent draft discovery requests for review by Merial. (Taylor Dec. ¶ 6) On Sunday, April 17 Merial's counsel received an e-mail request from Sergeant's counsel inquiring as to whether Merial would agree to consolidation of the proceedings and requesting a response by the close of business on the next day. On April 18, Merial's counsel advised Sergeant's counsel by e-mail that Merial would not agree to consolidation because of the undue delay which would be caused by consolidation and attached copies of the discovery requests served that day. (Taylor Dec. ¶¶ 7-8 and Exs. 2 and 3)

While discovery has been open for more than four months in the earlier-filed Consolidated Opposition, discovery will not open in the PRONYL OTC Opposition until June 1. If the proceedings were to be consolidated, Merial would be seriously prejudiced in that there would be a significant delay in obtaining the discovery which it has sought in the discovery requests served on April 18 in that it would have to change its discovery plan. It is particularly

important to Merial to obtain the discovery as soon as possible since Sergeant's has already begun use of the "FIPROGUARD" mark.

Merial also asks the Board to recognize that though there are common questions of law and fact relating to the opposition to registration of "PRONYL OTC" in the PRONYL OTC Opposition and the opposition to registration of "F-PRONIL" in the Consolidated Opposition, the issues as to "FIPROGUARD" and "FIPROSPOT" are completely different. There is no common question of law or fact. Further, since Merial has already created extensive discovery requests directed to the "FIPROGUARD", "FIPROSPOT" and "F-PRONIL" marks, consolidation would result in a duplication of efforts.

While the Board favors consolidation in cases where consolidation would be equally advantageous to both parties in order to avoid the duplication of effort, loss of time, and the extra expense involved in conducting proceedings alternately (*World Hockey Association v. Tudor Metal Products Corporation*, 185 USPQ 246, 248 (T.T.A.B 1975)), this is not what one those cases. Particularly because the "FIPROGUARD" mark is already in use and is being advertised as the equivalent of Merial's "FRONTLINE" products, Merial would wish to accelerate rather than delay the discovery process.

If Sergeant's were actually interested in streamlining proceedings, it could limit the marks at issue to those which it actually intends to use. Sergeant's has already abandoned applications for registration of "FRONTLINK", "FRONTLINK ADVANCE", "FRONTGUARD", "FRONTSPOT", "FRONTSPOT ADVANCE", "FRONTEDGE", "FIPROLINE", and "PRONYL"¹, all for the same products as in the applications at issue, and it also has still pending applications for registration of "FIRSTLINE", "FRONTPRONIL",

“FRONTSPOT”, and “GOLD FRONTSPOT”, all for the same flea and tick control products. Sergeant’s has elected to use “FIPROGUARD” and “PRONYL OTC” as marks (Taylor Dec. ¶ 4), and it is believed that if Sergeant’s were to limit the marks in the Oppositions to the marks of actual interest, the result would be two separate proceedings against two completely different marks (“FIPROGUARD” and “PRONYL OTC”) involving completely different issues of law (likelihood of confusion and inherent registrability). When there are significant differences in the character of the proceedings and differences in the issues, the Board tends to disfavor consolidation. *Izod, Ltd. v. La Chemise Lacoste*, 178 USPQ 440 (T.T.A.B. 1973) (“In the present instance, although the parties are related...there exists a difference of such character and extent in the issues involved as to militate against consolidation.”)

While the proceedings involve parallel parties, the marks in dispute are entirely different and the issues would be completely different if limited to the marks truly at issue. It would be prejudicial to Opposer to combine the proceedings, and consolidation would not result in a savings of time, effort, and expense. In light of the foregoing, Opposer respectfully requests that the Board deny the motion to consolidate and leave Opposition Nos. 91197053 and 91199117 as separate proceedings.

¹ The Board entered judgment against Sergeant’s on its applications for registration of “FRONTLINK”, “FRONTLINK ADVANCE”, “FIPROLINE” and “FRONTSPOT ADVANCE” in an order dated June 9, 2010, in Opposition No. 91192979.

Respectfully Submitted,

STITES & HARBISON PLLC



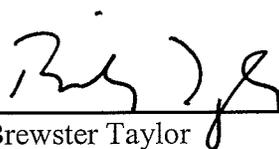
Brewster Taylor
Mari-Elise Gates
1199 North Fairfax Street, Suite 900
Alexandria, Virginia 22314
Telephone: (703) 739-4900
Facsimile: (703) 739-9577
Email: btaylor@stites.com

MAY 6, 2011

Certificate of Service

I hereby certify that a true copy of the foregoing BRIEF IN OPPOSITION TO MOTION TO CONSOLIDATE and accompanying declaration and exhibits were sent this 6th day of May, 2011, by sending it via First Class Mail, postage prepaid, to:

Keith Grady Esq.
Polsinelli Shugart PC
100 S. Fourth Street
Suite 1000
St. Louis, MO 63102



Brewster Taylor

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

**IN THE MATTER OF TRADEMARK
APPLICATION SERIAL NO. 85/120,994**

MERIAL)	
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Opposer)	
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v.)	Opposition No. 91199117
)	
)	
SERGEANT'S PET CARE PRODUCTS, INC.)	
)	
Applicant)	
)	

DECLARATION OF BREWSTER TAYLOR

The undersigned, Brewster Taylor, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements may jeopardize the validity of this document, declares as follows:

- (1) I am a member of the firm of Stites & Harbison, PLLC, attorneys for Opposer in the above-identified proceeding;
- (2) In the initial scheduling order issued by the Trademark Trial and Appeal Board on October 21, 2010, discovery was scheduled to open on December 30, 2010, and in January, 2011, counsel for Applicant and I had a discovery conference and exchanged initial disclosures;
- (3) On February 3, 2011, the Trademark Trial and Appeal Board granted the Applicant's consent motion to amend the identifications of goods in the opposed applications and ordered the suspension of proceedings;

(4) In March, 2011, I became aware that Applicant was about to begin use of the “FIPROGUARD” and “PRONYL OTC” marks for products which were directly competitive with Opposer’s “FRONTLINE” flea and tick control products (samples of advertising of the “FIPROGUARD” and “PRONYL OTC” products are attached hereto as Exhibit 1);

(5) Since it was important to obtain discovery as quickly as possible and since the Trademark Trial and Appeal Board’s order IN Opposition No. 91197053 of March 23, 2011, (which ordered the resumption of proceedings) rescheduled the opening of discovery for April 20, Opposer filed and served a motion for modification of the order on March 28, 2011;

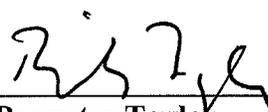
(6) On March 30, the Trademark Trial and Appeal Board issued a new order in Opposition No. 91197053 which reflected the fact that discovery had been open before proceedings were suspended, and on the same date I sent draft interrogatories, document production requests and requests for admission, to Opposer for review;

(7) On Sunday, April 17, I received an e-mail from counsel for Applicant requesting that I advise by the close of business on Monday, April 18, as to whether Opposer would agree to the consolidation of proceedings (copy of e-mail attached as Exhibit 2);

(8) On Monday, April 18, I responded that Opposer would not consent to the consolidation of proceedings because it would cause undue delay and attached to the e-mail copies of the interrogatories, document production requests and requests for admission that were served that day (copy of e-mail attached as Exhibit 3);

(9) All statements made on my own knowledge are true, and all statements made on information and belief are believed to be true.

May 6, 2011



Brewster Taylor

EXHIBIT 1

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22 Apr, 2011 17:41 CET

[Pronyl OTC™](#), [flea and tick](#), [flea](#), [tick](#), [Bob Scharf](#)

Sergeant's Pet Care Products, Inc. Announces Generic Equivalents of Frontline Plus®

FOR IMMEDIATE RELEASE

Media Contact: Kelly Lytle

402.938.7006

klytle@sergeants.com

Sergeant's Pet Care Products, Inc. Announces Generic Equivalents of Frontline Plus®

FiproGuard™ Plus and Pronyl OTC™ Plus Hit Retail Stores May 2011

(Omaha, Neb. – April 22, 2011) Sergeant's Pet Care Products, Inc. today announce their EPA-approved generic equivalents to Frontline Plus®, FiproGuard™ Plus and Pronyl OTC™ Plus. These products bring in a new era of affordable, convenient generic versions of one of the best-selling flea and tick topical treatments available to consumers. Now, however, consumers are able to purchase the generic equivalent at a lower price than the brand-name products. They will be available in a wide range of retail locations in May 2011, making them more convenient.

Both FiproGuard™ Plus and Pronyl OTC™ Plus contain the same veterinary-recommended active ingredients as Frontline Plus® (Fipronil and (S)-methoprene) at the same concentrations. Because they contain the same active ingredients, they provide the same level of protection and safety profile as Frontline Plus®, but are available to consumers at a lower cost and at retail.

Like Frontline Plus®, the products kill adult fleas and tick, flea eggs, flea larvae and prevent the development of flea pupae. Both products also kill chewing lice and mites that may cause sarcoptic mange in dogs.

"The launch of FiproGuard™ Plus and Pronyl OTC™ Plus is exciting news for pet owners. Most consumers trust generic products for themselves and their families. A veterinarian may have prescribed generic medications for their pet. Now, that trend has arrived to flea and tick protection. Lower cost means more pets will be protected from the dangers fleas and ticks present," stated Bob Scharf, president and chief executive officer of Sergeant's. "For more than 140 years, Sergeant's has been a trusted, reliable source of products to improve and protect pets' health. FiproGuard™ Plus and Pronyl OTC™ Plus are the latest offerings in that long line. These products

are one of the many innovative flea and tick products from Sergeant's. Retailers and consumers are very excited about this addition."

Dr. Tony Johnson, a nationally-known professor of veterinary medicine and practicing veterinarian, sees the launch of FiproGuard™ Plus and Pronyl OTC™ Plus as good news for pets and pet owners. "Because these products will be available at a lower cost it really opens them up to more and more pet owners," Dr. Johnson shared. "The active ingredients have shown themselves to be well-tolerated by pets and extremely effective. And, because these new generic versions are less expensive, we can expect higher rates of compliance. More pet owners can afford to use the products and will follow through on their veterinarian's recommendations to treat for fleas and ticks year round. This means better health for the pet."

FiproGuard™ Plus is available through pet specialty retailers, including PetSmart, PETCO, Pet Supplies Plus and independent pet retailers. For more information, visit sentrypetcare.com.

Pronyl OTC™ Plus is available in grocery stores, drug stores and at mass retailers. For more information, visit sergeants.com.

About Sergeant's Pet Care Products, Inc.

Sergeant's Pet Care Products, Inc., is based in Omaha, Neb. USA, and is a leading supplier of pet supplies including flea and tick remedies, health and well-being products, natural and formulated treats, rawhide chews, toys, accessories, dental and aquatics. Sergeant's has been caring for pets since 1868, and is America's oldest full-line pet supplies company with one of the most trusted names in pet care. For more information, visit the Sergeant's website at sergeants.com. To be a part of the ongoing conversation about pet health, join Sergeant's large Facebook fan page, Pet Health Central (facebook.com/phcfans).

**FiproGuard™ Plus contains Fipronil and (S)-methoprene, the active ingredients used in Frontline Plus®. FiproGuard™ Plus is a trademark of Sergeant's Pet Care Products, Inc. Frontline Plus® is a registered trademark of Merial. Frontline Plus® and Merial are not affiliated with Sergeant's Pet Care Products, Inc. Pricing based on MSRP of FiproGuard™ Plus and Retail Price survey of Frontline Plus® as of January 28, 2011.*

***Pronyl OTC™ Plus contains Fipronil and (S)-methoprene, the active ingredients used in Frontline Plus®. Pronyl OTC™ Plus is a trademark of Sergeant's Pet Care Products, Inc. Frontline Plus® is a registered trademark of Merial. Frontline Plus® and Merial are not affiliated with Sergeant's Pet Care Products, Inc. Pricing based on MSRP of Pronyl OTC™ Plus and Retail Price survey of Frontline Plus® as of January 28, 2011.*

###

Media Contact: Kelly Lytle

402.938.7006

klytle@sergeants.com

About Sergeant's Pet Care Products, Inc.

Sergeant's Pet Care Products, Inc., is based in Omaha, Neb. USA, and is a leading supplier of pet supplies including flea and tick remedies, health and well-being products, natural and formulated treats, rawhide chews, toys, accessories, dental and aquatics. Sergeant's has been caring for pets since 1868, and is America's oldest full-line pet supplies company with one of the most trusted names in pet care. For more information, visit the Sergeant's website at sergeants.com. To be a part of the ongoing conversation about pet health, join Sergeant's large Facebook fan page, Pet Health Central (facebook.com/phcfans).

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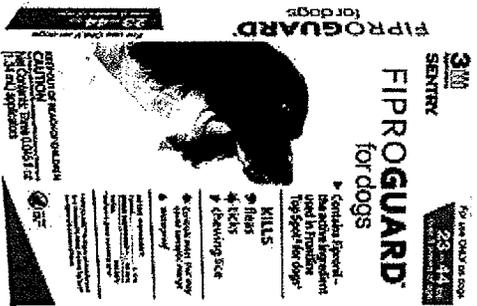
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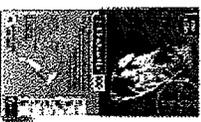
For dogs over 8 weeks of age. Once a month topical squeeze-on kills fleas, ticks and chewing lice. Kills deer ticks that transmit Lyme disease as well as brown dog ticks, American dog ticks and lone star ticks. Also controls mites that may cause sarcoptic mange. Fast-acting and long-lasting, sustained-release formula protects dogs for up to 30 days. Waterproof.

FiproGuard™ contains Fipronil, the same active ingredient used in Frontline® Top Spot® for dogs. FiproGuard™ PLUS contains Fipronil and (S)-methoprene, the same active ingredient in Frontline® Plus.

Item #	Description	Price Each	Qty
08-FA	FiproGuard™ up to 22 lbs - 3 months	Each \$27.99	<input type="text"/>
08-FB	FiproGuard™ 23 to 44 lbs - 3 months	Each \$28.99	<input type="text"/>

Available Date 5/20/2011
Back Order

You May Also Co



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FIPROGUARD Plus for Dogs

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(Sergeant's)
FIPROGUARD Plus for Dogs contains Fipronil and s-methoprene, the same active ingredients used in Frontline Plus for dogs. Provides premium protection against fleas, ticks, and chewing lice. FIPROGUARD Plus kills adult fleas, flea eggs, flea larvae and prevents development of flea pupae to control flea re-infestation for up to 90 days. It kills deer ticks that transmit Lyme disease as well as brown dog ticks, American dog ticks and lone star ticks. It also controls mites that may cause sarcoptic mange. Fast-acting and long-lasting, sustained-release formula protects dogs for up to 30 days.

FIPROGUARD Plus for Dogs can be used on breeding, pregnant and lactating dogs. Waterproof.

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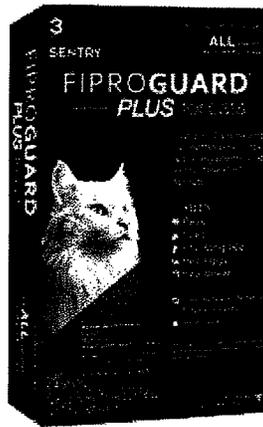
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We are excited to announce our newly designed website!

We hope you find your shopping here a more pleasant and happy experience. You will need to **set up a new user account** to begin tracking your billing and order history -- unfortunately, your previous history was non-transferable. Thank you and enjoy shopping at **Heartland Veterinary Supply & Pharmacy.**



FIPROGUARD Plus

TO BE AVAILABLE APRIL 1ST

E-mail this product to a friend

NEW!

(Sergeant's)

FIPROGUARD Plus for Cats contains Fipronil in Frontline Plus for cats. Provides premium FIPROGUARD Plus kills adult fleas, flea eggs to control flea re-infestation for up to 90 day formula protects cats for up to 30 days.

FIPROGUARD for Cats can be used on breed

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Unfortunately, as of right now, we are unable to ship prescription items to North Carolina



	Over \$75	Under \$75
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Vaccines Only UPS 3-day Select	\$12.95	\$19.95
Vaccines Only 2nd Day	\$19.95	\$26.95
Vaccines Only Next Day Air	\$29.95	\$36.95

Product	SKU	Description	Pri
FIPROGUARD Plus for Cats	517146	3 count	Pri

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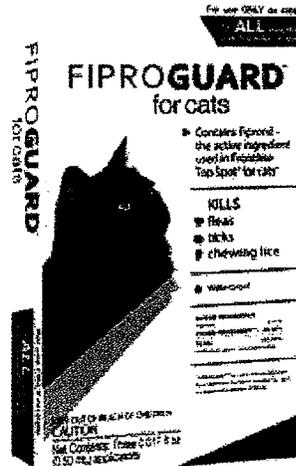
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SKU # 09901
Our Price: ~~\$27.00~~ **\$20.99**

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The first retail generic equivalent to Frontline Top Spot® for cats, FiproGuard™ contains Frontline Top Spot® for cats*. FiproGuard™ topical flea and tick squeeze-on formula that kills fleas, ticks, and chewing lice. It kills deer ticks that may transmit Lyme disease, American dog ticks and lone star ticks. Can be used on breeding, pregnant, and lactating cats. Sustained-release formula protects cats for up to 30 days. *FIPROGUARD™ is a trade name of Merial, Inc. Frontline Top Spot® is a registered trademark of Merial, Inc. Frontline is affiliated with Sergeant's Pet Care Products, Inc.

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Heartgard For Cats
6 x 165 mcg, For cats 5 lbs. and over
SKU #26300A

Heartgard for Cats (ivermectin)
-Used to prevent feline heartworm disease.
-Used to control and remove adult and immature heartworms.
INFO

 Requires a prescription. Click for more info

Feline Focus 3 Drops
One dose with dropper-Duravet
SKU #88968

EXHIBIT 2

Taylor, Brewster

From: Keith Grady [KGrady@Polsinelli.com]
Sent: Sunday, April 17, 2011 6:46 PM
To: Taylor, Brewster
Cc: John Challis; Karen Zelle; Robyn Ast; Michele Kirkman
Subject: RE: Merial v. Sergeant's

Dear Brewster,

Sergeant's intends to move to consolidate the two pending Oppositions, Nos. 91197053 and 91199117, filed by Merial. Please contact me by the close of business tomorrow, April 18, 2011, to discuss whether Merial will consent to the consolidation.

Best regards,

Keith



Keith J. Grady
Shareholder

100 S. Fourth Street
Suite 1000
St. Louis, MO 63102

tel: 314.552.6883
fax: 314.622.6783

kgrady@polsinelli.com
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5/2/2011

EXHIBIT 3

Taylor, Brewster

From: Taylor, Brewster
Sent: Monday, April 18, 2011 3:56 PM
To: 'Keith Grady'
Cc: John Challis; Karen Zelle; Robyn Ast; Michele Kirkman; Gates, Mari-Elise
Subject: RE: Merial v. Sergeant's
Attachments: OPPOSERS_FIRST_SET_OF_INTERROG_ - 1.pdf;
OPPOSERS_FIRST_SET_OF_REQ_FOR_ADMISSION - 1.pdf;
OPPOSERS_FIRST_SET_OF_REQ_FOR_PROD_OF_DOCS - 1.pdf

Dear Keith:

This will acknowledge receipt of your e-mail. We cannot agree to the further consolidation of oppositions, which in our view would unduly delay proceedings. If Sergeant's wishes to avoid unnecessary expense, we would suggest that it abandon any marks involved in the current consolidated proceeding which it does not intend to use. We have attached copies of discovery requests which we have served today.

Best Regards,
Brewster

Brewster B. Taylor, Member
Direct: (703) 837-3906, Cell: (703) 344-4510
Fax: (703) 518-2936, btaylor@stites.com

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From: Keith Grady [<mailto:KGrady@Polsinelli.com>]
Sent: Sunday, April 17, 2011 6:46 PM
To: Taylor, Brewster
Cc: John Challis; Karen Zelle; Robyn Ast; Michele Kirkman
Subject: RE: Merial v. Sergeant's

Dear Brewster,

Sergeant's intends to move to consolidate the two pending Oppositions, Nos. 91197053 and 91199117, filed by Merial. Please contact me by the close of business tomorrow, April 18, 2011, to discuss whether Merial will consent to the consolidation.

Best regards,

5/2/2011

Keith



Keith J. Grady
Shareholder

100 S. Fourth Street
Suite 1000
St. Louis, MO 63102

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5/2/2011