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

Proceeding	91204070
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD**

<p>Brody Chemical, Inc.</p> <p>Opposer,</p> <p>v.</p> <p>Tammy L. Goldthorpe fka Tammy Price</p> <p>Applicant.</p>	<p>Opposition No. 91/204,070</p>
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APPLICANT'S MAIN BRIEF

Applicant hereby files this main brief in accordance with TBMP § 801.02(b) and 37 CFR 2.128(a), and requests that the opposition be granted in favor of Applicant.

CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that this correspondence is being electronically transmitted to the United States Patent and Trademark Office through ESTTA.

on December 2, 2013

/Nathan S. Winesett/

I. Introduction and Relief Requested

1. Parties and Nature of Action

Applicant, Tammy L. Goldthorpe fka Tammy Price, is an individual with an address of 2750 East 4215 South, Salt Lake City, Utah 84124, and is the owner of the opposed application, Serial No. 85/099,334, for the SLIPPERY WIZARD mark for use in connection with “asphalt release agent” in International Class 1. This application was filed on August 3, 2010. Applicant is also the owner of the related family marks CLEAR WIZARD (Reg. No. 4,086,331) and WHITE WIZARD (Reg. No. 4,086,330) for the identical goods “asphalt release agent” in International Class 1. These registered marks were both filed on November 12, 2010 and published on November 1, 2011. These registered marks have prima facie validity and have not been challenged by Opposer.

Opposer, Brody Chemical Company, Inc., is a Utah corporation with an address of 6215 West Double Eagle Circle, Salt Lake City, Utah 84118. Opposer sells industrial chemicals and products, including its own manufactured products, third-party products, and licensed products.

Opposer claims that it has priority over Applicant and is the owner of the SLIPPERY WIZARD mark. Opposer claims that its owner Jon Liddiard conceived of, adopted, and used the SLIPPERY WIZARD mark and that Applicant had no involvement. Opposer also claims that Jon Liddiard invented the asphalt release agent that is marketed under the SLIPPERY WIZARD mark and that Applicant had no involvement, knowledge, or experience in connection with the invention of the product or asphalt release agents in general. Opposer claims that Applicant was merely an employee.

Applicant shows that Opposer's allegations are untrue and fraudulent, and that Applicant has priority and is the owner of the SLIPPERY WIZARD mark. Applicant further shows that any and all use of the SLIPPERY WIZARD mark by Opposer was pursuant to a license from Applicant. Applicant shows that she was the one who conceived of, adopted, and first used the SLIPPERY WIZARD mark and that she invented the asphalt release agent product that is marketed thereunder, prior to any

business relationship with Opposer. Applicant also shows that she controlled the use of the SLIPPERY WIZARD mark and controlled the quality of the SLIPPERY WIZARD product.

Applicant also shows that its registered CLEAR WIZARD and WHITE WIZARD marks have prima facie validity and have not been challenged by Opposer, and that any use of SLIPPERY WIZARD for “asphalt release agent” by a source other than Applicant would clearly cause a likelihood of confusion with Applicant's already registered marks. Applicant's prior registration of a substantially identical mark for identical goods prevents Opposer from being damaged within the meaning of the Lanham Act, and therefore, Opposer's opposition should not be sustained.

Applicant shows that a license to Opposer has been established through agreement, payment of royalties, and the conduct of the parties. Applicant shows that even if the Board does not find a clear establishment of a license, Applicant reasonably and detrimentally relied upon the express and implied acts, deeds, representations, and promises of Opposer that induced Applicant to disclose proprietary trade secrets and the use and marketing of Applicant's SLIPPERY WIZARD mark and product, and therefore, Opposer should be estopped from sustaining an opposition of Applicant's mark.

Applicant also shows that Opposer has willfully and fraudulently asserted that it adopted the SLIPPERY WIZARD mark and that it owns the mark in order to cease paying Licensor its rightful royalties. Applicant shows that these assertions are fraudulent statements and representations to the Trademark Office and Trademark Trial and Appeal Board and that Opposer has acted unethically and in bad faith in an effort to fraudulently misappropriate Applicant's trade secrets and trademark rights. Accordingly, this fraudulent, inequitable conduct should bar Opposer from maintaining this Notice of Opposition due to its unclean hands.

2. Relief Requested

Applicant requests that the Board enter judgment in favor of Applicant, and that Applicant's SLIPPERY WIZARD mark be registered on the Principle Register as set forth in Application Serial No. 85/099,334.

II. Description of the Record

The record contains the following:

1. In accordance with 37 CFR 2.122(b), the '334 Word Mark application file, namely the application file for Application Serial No. 85/099,334 for the word mark SLIPPERY WIZARD for use in connection with “asphalt release agent” in International Class 1.
2. Applicant's Responses to Opposer's First Set of Interrogatories to Applicant dated September 27, 2012, made of record as Exhibit 1 of Opposer's Notice of Reliance filed February 1, 2013. Note that the remaining exhibits of Opposer's Notice of Reliance (Exhibits 2, 3, and 4) as well as lines 13-18 of Opposer's Notice of Reliance were stricken from the record pursuant to the Board's order dated October 4, 2013.
3. EXHIBIT 1 of Applicant's Notice of Reliance filed June 2, 2013: Certificate of Registration of Tammy Price Goldthorpe, formerly Tammy Price, for CLEAR WIZARD for use in connection with “asphalt release agent” in International Class 1, U.S. Trademark Registration No. 4,086,331 showing both current status and current title to the registration.
4. EXHIBIT 2 of Applicant's Notice of Reliance filed June 2, 2013: Certificate of Registration of Tammy Price Goldthorpe, formerly Tammy Price, for WHITE WIZARD for use in connection with “asphalt release agent” in International Class 1, U.S. Trademark Registration No. 4,086,330 showing both current status and current title to the registration.

5. EXHIBIT 3 of Applicant's Notice of Reliance filed June 2, 2013: TESS printout showing third-party registration for PURPLE POWER, U.S. Trademark Registration No. 2,780,947. This registration is relevant to Opposer's character and habit of misappropriation of trademark rights and the subject of testimony.
6. EXHIBIT 4 of Applicant's Notice of Reliance filed June 2, 2013: TESS printout showing third-party registration for ICE BEATER, U.S. Trademark Registration No. 1,307,590. This registration is relevant to Opposer's character and habit of misappropriation of trademark rights and the subject of testimony.
7. EXHIBIT 5 of Applicant's Notice of Reliance filed June 2, 2013: Opposer's Responses to Applicant's Interrogatories.
8. EXHIBIT 6 of Applicant's Notice of Reliance filed June 2, 2013: December 3, 2012 Decision of the U.S. Tax Court, Docket No. 23918-11 in the matter of Brody Chemical Company vs. Commissioner of Internal Revenue. This matter is relevant to Opposer's character and the subject of testimony.
9. EXHIBIT 7 of Applicant's Notice of Reliance filed June 2, 2013: April 20, 2009 Findings of Fact, Conclusions of Law, and Order in the U.S. District Court for the District of Arizona, Zep, Inc. vs. Brody Chemical Company, Inc. et al. This order granting preliminary injunction is relevant to Opposer's character and the subject of testimony.
10. The testimony deposition of Opposer's witness Jon Liddiard dated January 30, 2013, including Exhibits 1-5 thereto.
11. The testimony deposition of Opposer's witness Buzz Butler dated January 30, 2013.
12. The testimony deposition of Applicant's witness Buzz Butler dated May 20, 2013.
13. The testimony deposition of Applicant's witness Matt Forsgren dated May 20, 2013.
14. The testimony deposition of Applicant's witness Dennis Brunetti dated May 20, 2013.

15. The testimony deposition of Applicant's witness Nancy Ayers dated May 20, 2013.

III. Statement of Issues

1. Priority / Licensed Use.

Opposer seeks to prove that it has priority over Applicant for the SLIPPERY WIZARD mark. Opposer claims that its owner Jon Liddiard conceived of, adopted, and used the SLIPPERY WIZARD mark and that Applicant had no involvement. Opposer also claims that Jon Liddiard invented the asphalt release agent that is marketed under the SLIPPERY WIZARD mark and that Applicant had no involvement, knowledge, or experience in connection with the invention of the product or asphalt release agents in general. Opposer claims that Applicant was merely an employee who had nothing to do with SLIPPERY WIZARD.

However, the evidence clearly shows that Opposer's assertions are untrue and fraudulent. It was Applicant who conceived of, adopted, and first used the SLIPPERY WIZARD mark. It was Applicant who invented the asphalt release agent product that is marketed under the SLIPPERY WIZARD mark. This invention and the adoption of the SLIPPERY WIZARD mark occurred prior to any business relationship with Opposer. The business relationship that was formed between Applicant and Opposer was an oral license from Applicant to Opposer for use of Applicant's SLIPPERY WIZARD mark and asphalt release agent formula. The evidence clearly shows that any and all use of the SLIPPERY WIZARD mark was pursuant to a license from Applicant and therefore inures to the benefit of Applicant. Furthermore, the evidence shows that Applicant controlled the use of the SLIPPERY WIZARD mark and controlled the quality of the SLIPPERY WIZARD product.

Opposer has not met burden of proof by a preponderance of the evidence to establish priority of use or to establish any use that was not subject to a license from Applicant that inured to Applicant's benefit. Opposer has not proffered any invoices, sales records, or any dated materials evidencing sales

of SLIPPERY WIZARD prior to the filing date of August 3, 2010. The catalog materials showing use of the SLIPPERY WIZARD mark submitted by Opposer are shown to have been conceived of and drafted by Applicant prior to her business relationship with Opposer. More importantly, the Opposer has submitted no witness or other evidence to corroborate the testimony of Opposer's owner, Jon Liddiard, that the SLIPPERY WIZARD mark and product were owned by Applicant and licensed to Opposer. The testimony of Opposer's own witness, Buzz Butler, corroborates Applicant's testimony and evidence that the SLIPPERY WIZARD mark and product were owned and controlled by her. Applicant's witnesses Matt Forsgren, Dennis Brunetti, and Nancy Ayers testimony also corroborates and is consistent with Tammy Goldthorpe as the owner and licensor of the SLIPPERY WIZARD mark.

2. Priority / Laches and Acquiescence / Likelihood of Confusion with Registered Marks.

Applicant is also the owner of the related family marks CLEAR WIZARD (Reg. No. 4,086,331) and WHITE WIZARD (Reg. No. 4,086,330) for the identical goods “asphalt release agent” in International Class 1. These registered marks were both filed on November 12, 2010 and published on November 1, 2011. These registered marks have prima facie validity and have not been challenged by Opposer. WIZARD is the dominant element of this family of marks, and notably, SLIPPERY, WHITE, and CLEAR are all disclaimed. Use of SLIPPERY WIZARD for “asphalt release agent” by a source other than Applicant would clearly cause a likelihood of confusion with Applicant's already registered CLEAR WIZARD and WHITE WIZARD marks, and therefore such use by Opposer cannot stand. Applicant's prior registration of a substantially identical mark for identical goods prevents Opposer from being damaged within the meaning of the Lanham Act, and therefore, Opposer's opposition should not be sustained.

3. Estoppel

Applicant conceived of, adopted, and used the SLIPPERY WIZARD mark prior to any use by Opposer. Furthermore, Opposer's use of the SLIPPERY WIZARD mark, and related family marks

CLEAR WIZARD and WHITE WIZARD, were made pursuant to a license from Applicant. This license has been established through agreement, payment of royalties, and the conduct of the parties. Applicant believes that the establishment of a license is clear based upon evidence. However, even if such license is not clearly established, Applicant reasonably and detrimentally relied upon the express and implied acts, deeds, representations, and promises of Opposer that induced Applicant to disclose proprietary trade secrets and the use and marketing of Applicant's SLIPPERY WIZARD mark and product. Accordingly, Opposer should be estopped from sustaining an opposition of Applicant's mark.

4. Fraud, Inequitable Conduct, and Unclean Hands.

Applicant conceived of, adopted, and used the SLIPPERY WIZARD mark prior to any use by Opposer. Furthermore, Opposer's use of the SLIPPERY WIZARD mark, and related family marks CLEAR WIZARD and WHITE WIZARD, were made pursuant to a license from Applicant. Opposer has willfully and fraudulently asserted that it adopted the SLIPPERY WIZARD mark and that it owns the mark in order to cease paying Licensor its rightful royalties. These assertions are fraudulent statements and representations to the Trademark Office and Trademark Trial and Appeal Board. Moreover, Opposer has acted unethically and in bad faith in an effort to fraudulently misappropriate Applicant's trade secrets and trademark rights. Accordingly, this fraudulent, inequitable conduct should bar Opposer from maintaining this Notice of Opposition due to its unclean hands. The evidence shows that Opposer's testimony is not credible.

IV. Argument

- A. *Applicant is the owner of the SLIPPERY WIZARD mark and product and any and all use by Opposer was pursuant to a license from Applicant and therefore inures to the benefit of Applicant.*

The Lanham Act states:

Where a registered mark or a mark sought to be registered is or may be used legitimately by related companies, such use shall inure to the benefit of the registrant or applicant for registration, provided such mark is not used in such a manner as to deceive the public. If first use of a mark by a person is controlled by the registrant or applicant for registration of the mark with respect to the nature and quality of the goods or services, such first use shall inure to the benefit of the registrant or applicant, as the case may be. 15 USC 1055.

As used in the Act, “related company” can refer to a licensee. See McCarthy 18:38. Under this Act, a licensor who controls then nature and quality of goods sold under the mark is the proper party for application and registration of a mark. There is nothing that prevents an individual from being a licensor to a corporation who sells the licensed product or an employee from being a licensor to an employer. Accordingly, there must be a factual determination as to which party owns and controls the mark. Applicant believes that the record clearly shows that Applicant licensed the SLIPPERY WIZARD mark and product to Opposer for a royalty.

In the present case, there is contradicting testimony from Opposer's witness Jon Liddiard, the owner of Opposer, and the remaining five witnesses. One of these five witnesses, Buzz Butler, was called by Opposer during its case-in-chief. Unfortunately, there was no formal written license

agreement at the inception of the business relationship between the parties. Accordingly, the Board must review the testimony and evidence to determine the existence of an oral license or equivalent thereof. In evaluating the testimony and evidence, we believe that the Board should consider the overall credibility of the witnesses and the believability of the testimony. Accordingly, we are summarizing the key parts of witness testimony.

Opposer's brief argues that SLIPPERY WIZARD product was sold only through Opposer, and therefore, only Opposer can acquire trademark rights. However, this argument completely ignores the validity of the concept of licensing which is codified in the Lanham Act.

Opposer's brief also argues that Applicant was merely an employee of Opposer and cites language from McCarthy that is based on generalizations for determination of an "implied" license in the absence of an agreement. Applicant disputes that there was an employer-employee relationship. Applicant also used the mark and product prior to any business relationship with Opposer. Regardless, the evidence shows that there is an "actual" oral license agreement, not implied. Under this situation, employment status would be irrelevant.

Opposer's brief also argues that because marketing materials don't say "Tammy Goldthorpe's" SLIPPERY WIZARD that she somehow cannot be the source of the product. Applicant asserts that the mark itself, SLIPPERY WIZARD, is the indicator of source and Tammy Goldthorpe controlled the use of the mark and the nature and quality of the underlying goods.

Additionally, Opposer's brief does not proffer any evidence or testimony establishing any use by Opposer. They have not submitted the trial depositions of any witnesses other than some excerpts from our witnesses Tammy Goldthorpe and Matt Forsgren. The statements relied on by Opposer are taken out of context and/or are clarified in subsequent testimony, such as rebuttal testimony. We are submitting herewith the complete trial record, and request that the Board review the testimony and

evidence in its entirety.

During Opposer's testimony period, two witnesses testified and Exhibits 1-5 were entered into the record. Opposer called its owner Jon Liddiard first and Buzz Butler second. The credibility of Mr. Liddiard's testimony was called into question by conflicting testimony of other witnesses.

Summary of Jon Liddiard Testimony. Mr. Liddiard testified that he had a degree in qualitative analysis chemistry and how he used his chemistry degree to develop the asphalt release formula. p. 4:4, 22:14. He testified that he hired Applicant in October 2004 as a mere salesman. p. 6:25. Exhibit 1 was introduced as the sales representative agreement that all new salesmen sign and that Applicant signed it in October 2004 and that she was always compensated as a W-2 employee. p. 7:12-9:25. Mr. Liddiard testified that Opposer had never used the mark SLIPPERY WIZARD prior to hiring Applicant and that all marks prior to hiring Applicant were generic names for the product. p. 12:10-13:12. Mr. Liddiard testified that Applicant had no involvement in the selection of SLIPPERY WIZARD name or the creation of the product, and that Buzz Butler came up with it when the two of them were meeting by themselves. p. 13:13-15:9. At 11:13-12:9, Mr. Liddiard described the circumstances of hiring Applicant in such a manner that indicated that he didn't even know her, then later at 15:10-15:18, he seemed to slip up and say that they started marketing SLIPPERY WIZARD “right after Tammy came back.” Then he proceeded to explain how she left Brody Chemical and then came back and it was “right after that” when they starting marketing SLIPPERY WIZARD. At 16:14-18:1, Exhibit 3 is introduced as a SLIPPERY WIZARD marketing material and Mr. Liddiard explains how he wrote it. At 18:20-23:23, Mr. Liddiard testifies that he developed the asphalt release formula and that the only input he got was an idea for an ingredient from Steve Madsen in 2004, who he says wasn't a chemist but a water treatment guy and insinuated may not have had anything to do with asphalt release. He also testified that Applicant did not give him the formula and that she had only a high school education and no degree and absolutely no background or experience in chemistry or

formulating industrial cleansers or degreasers, and how she knew nothing about the product except that it had grease in it. At 23:8-12, Mr Liddiard stated there was no license agreement. At 26:6-41:6, Mr. Liddiard testifies on the manner in which Applicant was paid. He said that until April 1, 2006, when Exhibit 4 was created, she was paid just like every other sales representative and that there was nothing special about her. Starting at p. 29:3, he testifies that Exhibit 4 was negotiated with Applicant because she was selling a lot of SLIPPERY WIZARD and he wanted her to become a sales trainer and pay her \$1 per gallon on all sales of SLIPPERY WIZARD not including her own. He explained how they do this for other territory managers and, at 35:15-24, he explains how Exhibit 4 is exactly identical to the agreements they do for others. At 35:25-36:5, Mr. Liddiard testified that after Exhibit 4 was entered into, all commission payments and overrides were paid as W-2 employee income. At 37:3-38:23, Mr. Liddiard testified that when they started selling WHITE WIZARD and CLEAR WIZARD, that he paid Applicant \$0.50 per gallon on those products and changed the payment of SLIPPERY WIZARD to \$0.50 per gallon. At 39:7, Mr. Liddiard testifies how sales managers, including Buzz Butler and Mark Simmons, get an override as well. At 41:7-42:4, Mr. Liddiard testifies that Applicant never exercised any control over the quality of SLIPPERY WIZARD product and that she didn't even know what was in it.

Summary of Buzz Butler's testimony as a witness for Opposer. At 4:1-8, Mr. Butler testifies that he was in Montana between 1994 and 2006, and didn't move back to the Salt Lake Division until January 2006 when he became National Sales Manager. At 5:19-6:3, he testified that when he first came back in January 2006 she was paid a \$1 per gallon on SLIPPERY WIZARD product to help other people sell it and that she did that "sometimes." At 6:15-17, he testified that he knew and set the payment arrangements for all employees with Opposer. At 6:23-7:13, he testified that he was paid "straight" overrides on all products in a territory and it was Opposer's basic practice with

most all of their managers. At 8:17-10:22, he was asked very narrow questions about whether Applicant claimed any rights in SLIPPERY WIZARD, but he was never asked his understanding of this.

In summary of Opposer's case-in-chief, Mr. Liddiard claimed that he conceived of, adopted, and used the SLIPPERY WIZARD mark and that Applicant had no involvement, and that he invented the asphalt release agent that is marketed under the SLIPPERY WIZARD mark and that Applicant had no involvement, no knowledge, no background, and no experience in connection with the invention of the product or asphalt release agents in general. Opposer claims that Applicant was merely an employee who had nothing to do with SLIPPERY WIZARD except as a mere sales representative until the Exhibit 4 agreement in 2006. Mr. Liddiard claimed that there was no override until the Exhibit 4 agreement in 2006. Mr. Liddiard claimed that Applicant was always paid as a W-2 employee. Mr. Liddiard claimed that Buzz Butler came up with the mark SLIPPERY WIZARD. Mr. Liddiard claimed that he wrote the marketing materials in Exhibit 3. Mr. Liddiard claimed that the Exhibit 4 agreement was identical to other override agreements for managers. Mr. Liddiard claimed that Applicant executed a sales representative agreement in October 2004. Applicant proves through its witnesses and exhibits that each of these claims is false and unbelievable. We already see from Mr. Butler's testimony that he wasn't even there until 2006.

However, it is clear from Opposer's case-in-chief that Opposer admits that the first use of the SLIPPERY WIZARD mark and product coincided exactly with the commencement of Applicant's business relationship with Opposer in October of 2004, and not before she came back. It is also clear that Applicant was paid on all sales of WIZARD products not made by her. It is clear that she was paid a large payment of \$1 per gallon for every SLIPPERY WIZARD product sold other than by her prior to April 1, 2006.

Summary of Buzz Butler's testimony as witness for Applicant. Mr. Butler testified that he was no longer employed by Opposer and was a neutral party. p. 4:19-7:2. He stated Matt Forsgren was the national sales manager in 2003, 2005, and 2005 and that he had very little involvement with Salt Lake City matters prior to his return in January 2006. p. 10:5, 11:25-12:7. He also stated that he only vaguely knew of Applicant prior to 2006 from sales meetings and of the product that “she brought in,” but he was not part of it at that time. p. 12:8-15. Mr. Butler testified that Applicant worked very hard the first two years in 2004 and 2005 and laid all the groundwork for SLIPPERY WIZARD before he came back. p. 13:6-18. He stated that Applicant was paid the \$1 per gallon on all sales but her own, company wide, no matter who sold it. p. 13:22-14:8. He testified that Applicant was not a manager, but that she received an override or royalty for her product. p. 15:20-16:12. At 16:19-18:4, Mr. Butler explains how managers were paid an override as a percentage of gross profit for an area on all products, whereas Applicant was paid a set amount per volume, \$1/gallon. He also explains how override is the term used to refer to royalties for something at the company. Id. At 18:11-19:22, Mr. Butler explains how he knew about the Exhibit 4 agreement, but has never seen one and does not have one like it himself. He testified as follows:

Q. Do you have any knowledge regarding the negotiation or consummation of this agreement?

A. I know they agreed verbally. I heard them -- we'd all talked, and it was verbally agreed upon about her override. And I knew that she -- this was kind of a confirmation, how I was told, on what she had already been receiving as far as her override on that particular product, on Slippery Wizard.

And I think this was just more of a confirmation for Tammy at the time. That was between her and Jon. He kind of dealt with that. But I did hear the negotiations and the conversations, but I wasn't, you know, part of this -- actually typing this up.

Q. Did Tammy Goldthorpe receive the dollar per gallon before 2006?

A. As I understood it. I didn't see it, but I understood that she was from the time she brought it on.

Q. In what year?

A. I was told it was in 2004.

Q. Are you aware of anyone else in the company that has an agreement like this?

A. No, not like this.

At 20:1-23:5, Mr. Butler explains how Mark Simmons was the only other person in the company to be paid a set amount per volume, and that he had a royalty agreement that his attorney drafted for his products that he brought to the company and that he controls the nature and quality of his products. At 24:9-19, Mr. Butler testifies how Exhibit 4 does not state that she has to train others to receive the \$1/gallon, that she gets it as a matter of course.

At 25:1-28:11, Mr. Butler is presented with Exhibit 6, a paystub for Applicant from 5/31/2005 prior to the date of the Exhibit 4 agreement. He reviews the payments and confirms that Applicant was paid only \$392.65 in wages for which employment taxes of \$31.69 were deducted. He also confirmed

that Applicant was paid under the adjustments section the following amounts for which no employment taxes were deducted: \$179.30 for meal reimbursement, \$912.80 for mileage reimbursement, and \$1,515.25 for “other.” He said that he has never seen this “other” amount on his paystubs and that employees normally have employment taxes deducted from the salaries, and he confirmed that employment taxes were not deducted for that particular item. Mr. Butler stated that Applicant had always told him that she brought the SLIPPERY WIZARD product and had a contract with it, and that he knew the history of where she came from so he always assumed that she had knowledge of the formula. Mr. Butler also stated that it was his understanding that Applicant's overrides were royalties or akin to royalties for Opposer to sell the SLIPPERY WIZARD product. *Id.* At 30:18-22, Mr. Butler testifies that Opposer has had run-ins with the IRS and is still running and that there was a judgment against them.

At 33:11-35:3, Exhibit 7 was introduced as an email from Jon Liddiard regarding the change of override in SLIPPERY WIZARD to \$0.50 per gallon. He also confirmed that Jon's stated reason for Applicant agreeing to decrease her override on SLIPPERY WIZARD was to keep the cost of the product the same so that it was competitive in the market. He said he thinks “that was a decision she made, being in charge, actually, of this product and program, to guarantee that she was going to make something and make it possible for that product to still sell and be competitive on the market.” *Id.*

At 36:22-37:5, he explains how Jon Liddiard would try to lower the costs of the product and that her payments were a “big part of the cost.” At 40:20-43:17, Mr. Butler confirms that Tammy Goldthorpe was employed by Opposer in the late 1990's and that the Exhibit 1 Sales Representative Agreement was the original form they used back then and that the footer noted it was from 1994. At 47:6-11, Mr. Butler confirms that he has never signed an agreement with Opposer, but that Jon Liddiard has claimed that he did..

At 43:18-47:5, Mr. Butler testified that he did not come up with the SLIPPERY WIZARD and

that he knows Applicant came up with the name. He testified that Jon Liddiard does not have a chemistry degree to his knowledge. He testified that the original formula was brought to Jon Liddiard by Applicant, that she had a special knowledge of asphalt release agent from her prior sales of the product, that she has the most knowledge at Brody Chemical about the composition and use of the product, and that employees and customers generally associated Applicant as the source of the SLIPPERY WIZARD product. Id at 47:4. He also testified that in 2004 when Applicant came on board with Opposer that she was introduced in connection with the SLIPPERY WIZARD product and mark. Id at 45:13-46:4.

From Mr. Butler's testimony, a reliable witness who no longer has a stake in the matter, we can see that Jon Liddiard's testimony that Applicant was not involved with the SLIPPERY WIZARD mark and had no knowledge or experience of asphalt release agents is false. We have also proved through testimony and the Exhibit 6 paystub that Applicant was paid an override prior to the Exhibit 4 agreement in 2006, and that employment taxes were not paid on those overrides. We also see that Mr. Butler understood that there was a prior oral license and that the purpose of the Exhibit 4 agreement was to consummate the prior oral license. We also learn that Buzz Butler did not come up with the SLIPPERY WIZARD name as claimed by Jon Liddiard and that, in fact, it was Applicant.

Summary of Matt Forsgren Testimony. Mr. Forsgren testified that he was the National Sales Manager for Brody Chemical from 2003-2006. p. 6:7-7:6. Mr. Forsgren explained that in 2003, Opposer did not have an effective asphalt release for truck beds and that they were looking for a new product for that purpose and he was recruiting Applicant was selling ASA-12 through RCAI. p. 9:6-12:21, 22:2-21. He testified that he understood ASA-12 to be Applicant's product. Id. At 22:22-27:9, he testified about the formation of the oral license agreement between Applicant and

Opposer. Specifically, he stated that he represented to Applicant that she would be paid royalties for her product, that she did not want to use the ASA-12 name and that she chose the name SLIPPERY WIZARD prior to negotiating with Opposer and prior to October 2004. He said Applicant proposed a \$1 per gallon royalty and that Opposer counter-offered \$0.50 per gallon, but ultimately accepted the \$1 per gallon royalty. He testified that she did not want to be a sales representative, but that she wanted to do her own thing selling and promoting the SLIPPERY WIZARD product. Id. At 26:22-33:4, Mr. Forsgren testified that Applicant was introduced at the national sales meeting in the spring of 2005 and Jon Liddiard introduced her and SLIPPERY WIZARD as her product. He also played the Exhibit 11 DVD entitled "World of Asphalt" from 2003 that including an interview of Applicant as an expert on asphalt release agents. Id. The text of this interview is included in Matt Forsgren testimony at 30:1. At 33:5-34:4, Mr. Forsgren testified that while he was at Brody Chemical, Applicant controlled the composition and formula and the nature and quality of the SLIPPERY WIZARD product, that she controlled the advertising literature and instructions for the SLIPPERY WIZARD product, that she was the most knowledgeable person regarding the SLIPPERY WIZARD product, that he, employees, and customers generally associated Applicant as the source of the SLIPPERY WIZARD product, and that he still associates Applicant as the source of the SLIPPERY WIZARD product. At 40:22, Mr. Forsgren testified that Applicant refused to sign the sales representative agreement. At 45:22, Mr. Forsgren testified that Jon Liddiard didn't have any idea where to start on the asphalt release agents like ASA-12 because he didn't have sufficient knowledge. At 48:8, Mr. Forsgren testified that Applicant only wanted to sell her product, but that she would sell other Brody products if one of her customers requested something, and she was paid as an employee for those sales.

Summary of Nancy Ayers Testimony. Ms. Ayers testified that Applicant was introduced by Jon Liddiard at the national sales meeting in the spring of 2005 in connection with the SLIPPERY

WIZARD product that Applicant was bringing with her. Ms. Ayers testified that she understood that Applicant was the owner of the SLIPPERY WIZARD product and that Opposer would be selling it. She stated that it was a big deal because Applicant was well known in the industry. p. 5:20-8:7.

Summary of Applicant Tammy Goldthorpe Testimony. Applicant testified that she was the owner of the SLIPPERY WIZARD mark and that there was an at-will license agreement between Applicant and Opposer for \$1 per gallon of SLIPPERY WIZARD sold and that Opposer is in breach of this agreement. 5:7- 6:12. Exhibits 12 and 13 and 14 were introduced as correspondence relating to modification of the license and a cease and desist demand. p. 6:13-8:21. At 8:22-10:13, Applicant testified that she was the inventor of the SLIPPERY WIZARD product and described the circumstances surrounding her invention. Exhibit 15 was introduced at 10:18, which is an assignment for all rights to the formula from Steve Madsen and a declaration that Applicant was the sole inventor and that Mr. Madsen had and will continue to keep the formula confidential. At 11:16, Exhibit 16 was introduced, which is a proposal from Applicant and Mr. Madsen to RCAI in 2002 for Applicant's asphalt release product. Applicant explained that she included Mr. Madsen in exchange for his general chemistry services, and that they sold it through RCAI as ASA-12.

At 12:20, Applicant explains that she is the author of Exhibit 3 marketing materials for asphalt release, which Jon Liddiard claimed he wrote. At 13:4, Exhibit 17 was introduced, which Applicant explains is the same thing but for ASA-12. She testified that she also authored this document when she was selling ASA-12 to RCAI, and that she copied it when writing Exhibit 3. When asked if Exhibit 3 appears to be largely copied from Exhibit 17, she responded "Yes. I pretty much did it the same." Id.

At 13:24, Applicant reviewed the Exhibit 5 asphalt release catalog. She points out her SLIPPERY WIZARD, CLEAR WIZARD, and WHITE WIZARD marks on page 4 as well as the cartoon wizard that she included with the marks. She described how she got the wizard from a coloring

book and required that this cartoon wizard be included with these marks. She stated that she authored page 6 of the catalog explaining to the drivers how the product works and the application instructions and that she has the one for ASA-12 too. At 15:18, Exhibit 18 was introduced, which is the ASA-12 equivalent of page 6 that she authored when selling ASA-12 to RCAI. She explained how she copied Exhibit 18 and that is why page 6 is so similar. She also stated that she authored pages 7, 8, and 9 in Exhibit 5.

At 16:20-19:20, Applicant testifies consistently with Matt Forsgren on her recruitment, her adoption of the SLIPPERY WIZARD mark, and the consummation of the oral license agreement with Opposer.

At 19:21, Applicant testifies that she never signed a sales representative agreement in 2004, and that the Exhibit 1 Sales Representative Agreement came from her 1999 employment. She explains that the address is where she lived in 1999, not 2004, and that the date inserted as 10/5/2004 is not in her handwriting and is a forgery. Furthermore, the document is not signed anywhere by Opposer. At 21:3, Exhibit 19 was introduced, which was Applicant's divorce decree dated 12/31/01 awarding the address listed on the Exhibit 1 agreement to her ex-husband.

At 24:16, Applicant explained the circumstances surrounding the Exhibit 4 agreement in 2006, specifically that Jon Liddiard started wavering about paying the royalty and Collette talked him into putting it in writing.

At 25:11, Exhibit 20 was introduced, which is an approval from the Texas Department of Transportation directed to Applicant in July 2, 2008. She explained that she was the one who had a relationship with them since it was here product and that is why the correspondence was with her. The Texas Department of Transportation refers to it as Applicant's product. At 26:15, Exhibit 21 was introduced, which was a letter dated September 2002 directed to Applicant from one of Applicant's large accounts stating how happy they were with the ASA-12 product.

At 27:14, Applicant testifies that she controlled the composition and formula and nature and quality of the SLIPPERY WIZARD product, that she controlled the advertising literature and instructions for the SLIPPERY WIZARD product, that she was the most knowledgeable person regarding the SLIPPERY WIZARD product, and that employees and customers generally associated Applicant as the source of the SLIPPERY WIZARD product.

At 30:25, Applicant testifies that the “other” amount in her Exhibit 6 paystub was for the SLIPPERY WIZARD product. At 32:20, she explained that when she came back in 2004, she was treated as a private contractor and that she did what she wanted, not having any of the rules that everyone else had. She agreed to sell some of Opposer's products in her existing accounts that she had brought with her.

At 39:21, Applicant testifies that Jon Liddiard has told both her and Mr. Butler that he does not have a chemistry degree, but has one in something to do with dental.

At 57:10, upon examination, Applicant testifies that she is not sure she understands what employment taxes are. When asked about taxes on the “other” amount, she says she has no idea, and that she just gives it all to her accountant and that they take care of it.

Considering the testimony of the witnesses and exhibits in their entirety, the evidence clearly shows that Opposer's assertions are untrue and fraudulent. It was Applicant who conceived of, adopted, and first used the SLIPPERY WIZARD mark. It was Applicant who invented the asphalt release agent product that is marketed under the SLIPPERY WIZARD mark. This invention and the adoption of the SLIPPERY WIZARD mark occurred prior to any business relationship with Opposer. The business relationship that was formed between Applicant and Opposer was an oral license from Applicant to Opposer for use of Applicant's SLIPPERY WIZARD mark and asphalt release agent formula. The evidence clearly shows that any and all use of the SLIPPERY WIZARD mark was

pursuant to a license from Applicant and therefore inures to the benefit of Applicant. Furthermore, the evidence shows that Applicant controlled the use of the SLIPPERY WIZARD mark and controlled the quality of the SLIPPERY WIZARD product. These facts were corroborated by the testimony and exhibits of Buzz Butler, Matt Forsgren, Tammy Goldthorpe, and Nancy Ayers. Dennis Brunetti's testimony was also consistent with these facts. Jon Liddiard's self-serving testimony is the only evidence inconsistent with the fact that Applicant is the owner of the SLIPPERY WIZARD mark and product and that Applicant licensed said mark and product to Opposer.

Opposer has not met burden of proof by a preponderance of the evidence to establish ownership or priority of use or to establish any use that was not subject to a license from Applicant that inured to Applicant's benefit. Opposer has not proffered any invoices, sales records, or any dated materials evidencing sales of SLIPPERY WIZARD prior to the filing date of August 3, 2010. The catalog materials showing use of the SLIPPERY WIZARD mark submitted by Opposer are shown to have been conceived of and drafted by Applicant prior to her business relationship with Opposer. More importantly, the Opposer has submitted no witness or other evidence to corroborate the testimony of Opposer's owner, Jon Liddiard, that the SLIPPERY WIZARD mark and product were owned by Applicant and licensed to Opposer. The testimony of Opposer's own witness, Buzz Butler, corroborates Applicant's testimony and evidence that the SLIPPERY WIZARD mark and product were owned and controlled by her. Applicant's witnesses Matt Forsgren, Dennis Brunetti, and Nancy Ayers testimony also corroborates and is consistent with Tammy Goldthorpe as the owner and licensor of the SLIPPERY WIZARD mark.

Priority / Laches and Acquiescence / Likelihood of Confusion with Registered Marks.

Applicant is also the owner of the related family marks CLEAR WIZARD (Reg. No. 4,086,331) and WHITE WIZARD (Reg. No. 4,086,330) for the identical goods “asphalt release agent” in International Class 1. These registered marks were both filed on November 12, 2010 and published on November 1, 2011. These registered marks have prima facie validity and have not been challenged by Opposer. WIZARD is the dominant element of this family of marks, and notably, SLIPPERY, WHITE, and CLEAR are all disclaimed. Use of SLIPPERY WIZARD for “asphalt release agent” by a source other than Applicant would clearly cause a likelihood of confusion with Applicant's already registered CLEAR WIZARD and WHITE WIZARD marks, and therefore such use by Opposer cannot stand. Applicant's prior registration of a substantially identical mark for identical goods prevents Opposer from being damaged within the meaning of the Lanham Act, and therefore, Opposer's opposition should not be sustained.

Estoppel

Applicant conceived of, adopted, and used the SLIPPERY WIZARD mark prior to any use by Opposer. Furthermore, Opposer's use of the SLIPPERY WIZARD mark, and related family marks CLEAR WIZARD and WHITE WIZARD, were made pursuant to a license from Applicant. This license has been established through agreement, payment of royalties, and the conduct of the parties. Applicant believes that the establishment of a license is clear based upon evidence. However, even if such license is not clearly established, Applicant reasonably and detrimentally relied upon the express and implied acts, deeds, representations, and promises of Opposer that induced Applicant to disclose proprietary trade secrets and the use and marketing of Applicant's SLIPPERY WIZARD mark and product. Accordingly, Opposer should be estopped from sustaining an opposition of Applicant's mark.

Fraud, Inequitable Conduct, and Unclean Hands.

Applicant conceived of, adopted, and used the SLIPPERY WIZARD mark prior to any use by Opposer. Furthermore, Opposer's use of the SLIPPERY WIZARD mark, and related family marks

CLEAR WIZARD and WHITE WIZARD, were made pursuant to a license from Applicant. Opposer has willfully and fraudulently asserted that it adopted the SLIPPERY WIZARD mark and that it owns the mark in order to cease paying Licensor its rightful royalties. These assertions are fraudulent statements and representations to the Trademark Office and Trademark Trial and Appeal Board. Moreover, Opposer has acted unethically and in bad faith in an effort to fraudulently misappropriate Applicant's trade secrets and trademark rights. Accordingly, this fraudulent, inequitable conduct should bar Opposer from maintaining this Notice of Opposition due to its unclean hands. The evidence shows that Opposer's testimony is not credible.

V. Conclusion

In view of the foregoing, it is respectfully requested that the Board enter judgment in favor of Applicant, and allow Applicant's mark registration on the Register.

DATED this 2nd day of December, 2012.

Respectfully submitted,

/Nathan S. Winesett/
Attorney for Opposer

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the APPLICANT'S MAIN BRIEF was served upon Applicant by depositing a copy of the same with the United States Post Office as first class mail, postage prepaid, in an envelope addressed to:

David G. Bray
MARISCAL WEEKS MCINTYRE & FRIEDLANDER PA
2901 N Central, Ste 200
Phoenix, AZ 85012-2705

on the 2nd day of December, 2012.

/Nathan S. Winesett/