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

Proceeding	91196025
Party	Defendant Combo Ventures
Correspondence Address	COMBO VENTURES 1401 OCEAN AVENUE APARTMENT 10A BROOKLYN, NY 11230-3911 UNITED STATES jmacmull@goetzfitz.com, mostermann@goetzfitz.com, rcoleman@goetzfitz.com
Submission	Answer and Counterclaim
Filer's Name	Joel G. MacMull, Esq.
Filer's e-mail	jmacmull@goetzfitz.com, mostermann@goetzfitz.com, rcoleman@goetzfitz.com
Signature	/jgm/
Date	10/18/2010
Attachments	EPIC FAIL Answer as ESTTA FILED 18 Oct 10.pdf (7 pages)(119313 bytes)

Registration Subject to the filing

Registration No	3748736	Registration date	02/16/2010
Registrant	Pet Holdings, Inc. 190 Queen Anne Ave N., Suite 250 Seattle, WA 98109 UNITED STATES		

Goods/Services Subject to the filing

<p>Class 038. First Use: 2008/01/03 First Use In Commerce: 2008/01/03 All goods and services in the class are requested, namely: Communications services, namely, providing facilities for users of computers, mobile and handheld computing devices, and wired and wireless communication devices to post, transmit, receive, retrieve, organize, search and review text, voice, audio and visual content and data via optical and electronic communication networks; telecommunication services, namely, transmission of text, voice, audio and visual content and data via optical and electronic communication networks; mobile media services in the nature of electronic transmission of online entertainment media content in a wide variety of subject matter for others</p>
<p>Class 041. First Use: 2008/01/03 First Use In Commerce: 2008/01/03 All goods and services in the class are requested, namely: Electronic publishing services, namely, publishing of online works of others featuring text, voice, audio and visual content; entertainment services in the nature of non-downloadable music, voice, audio and visual content and data</p>
<p>Class 042. First Use: 2008/01/03 First Use In Commerce: 2008/01/03 All goods and services in the class are requested, namely: Providing temporary use of non-downloadable computer software for use in posting, transmitting, receiving, retrieving, organizing, searching and reviewing text, voice, audio and visual content and data via computers, mobile and handheld computing devices, and wired and wireless communication devices; application service provider (ASP) services featuring software used for the dissemination, distribution and review of text, voice, audio and visual content and data via optical and electronic communication networks; providing temporary use of non-downloadable computer software for social networking; hosting an online website featuring web portals, web logs, blogs, electronic bulletin boards, collaboration and wiki sites related to the dissemination, distribution and review of online content in a wide variety of subject matter</p>

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

In the Matter of Trademark Application Serial No. 77/868181
Published in the *Official Gazette* April 13, 2010

PET HOLDINGS INC.,

Opposer,

v.

COMBO VENTURES LLC,

Applicant.

Opposition No.

91196025

**APPLICANT'S ANSWER
TO NOTICE OF OPPOSITION, AFFIRMATIVE DEFENSES AND COUNTERCLAIM**

Applicant, Combo Ventures LLC (“Combo Ventures”), for its answer to the Notice of Opposition filed by Pet Holdings Inc. (“Pet Holdings”) against application for registration of Combo Ventures’ trademark EPIC FAIL, Serial No. 77/868181 filed November 9, 2009, and published in the Official Gazette of April 13, 2010 (the “Mark”), pleads and avers as follows:

1. Applicant denies knowledge and information sufficient to admit or deny the allegations of ¶ 1.
2. Applicant denies knowledge and information sufficient to admit or deny the allegations of ¶ 2.
3. Applicant denies knowledge and information sufficient to admit or deny the allegations of ¶ 3.
4. Applicant denies knowledge and information sufficient to admit or deny the allegations of ¶ 4.

5. Applicant denies each and every allegation contained in ¶ 5.
6. Applicant denies each and every allegation contained in ¶ 6.
7. Applicant denies knowledge and information sufficient to admit or deny the allegations of ¶ 7.
8. Applicant denies each and every allegation contained in ¶ 8.
9. Answering ¶ 9 of the Notice of Opposition, Applicant admits that the Mark and Opposer's alleged trademark are standard character marks, comprised of two four-letter words, with each mark containing the word "fail," but otherwise denies each and every allegation contained therein.
10. Applicant denies each and every allegation contained in ¶ 10.
11. Applicant denies each and every allegation contained in ¶ 11.
12. Applicant denies each and every allegation contained in ¶ 12.

AFFIRMATIVE DEFENSES

First Affirmative Defense

Opposer fails to state a claim upon which relief can be granted.

Second Affirmative Defense

As a result of Applicant's continuous use of the Mark since the time of Applicant's adoption thereof, the Mark has developed significant goodwill among the consuming public and consumer acceptance of the services offered by Applicant in conjunction with the Mark. Such goodwill and widespread usage has caused the Mark to acquire distinctiveness with respect to Applicant, and caused the Mark to become a valuable asset of Applicant.

Third Affirmative Defense

There is no likelihood of confusion, mistake or deception because, *inter alia*, the Mark and the alleged trademark of Opposer are not confusingly similar.

Fourth Affirmative Defense

Alternatively, any similarity between the Mark and Opposer's alleged trademark is restricted to that portion of the Mark consisting of the word "fail," which is not distinctive. As a result, under the antidissection rule any secondary meaning Opposer may have in its alleged FAIL BLOG trademark is narrowly circumscribed to the exact trademark alleged and does not extend to any other feature of the trademark beyond the word "fail."

Fifth Affirmative Defense

Opposer's rights in and to the portion of its alleged FAIL BLOG trademark are generic or, in the alternative, merely descriptive of the goods or services offered under the mark. Opposer's alleged mark is therefore inherently unprotectable absent acquired distinctiveness, which the alleged FAIL BLOG mark lacks.

Sixth Affirmative Defense

Applicant has been using the Mark and developing consumer recognition and goodwill therein since at least April 10, 2009, such use being open, notorious and known to Opposer and such knowledge, in turn, being known to Applicant. During this time Opposer failed to take meaningful action to assert the claims on which it bases this Opposition, on which inaction Applicant has relied to its detriment. Opposer's claims are consequently barred by the doctrines of laches, acquiescence and estoppel.

Seventh Affirmative Defense

Opposer has unclean hands, by virtue of the measures taken by Opposer, beginning on or around October 1, 2010, to intentionally and wrongfully divert Applicant's internet-based

consumers to Opposer’s website through a campaign meant to cause consumer confusion, including, *inter alia*, by the use of the same Mark in the titles of web pages on Opposer’s own website such that the words comprising the Mark, EPIC FAIL, appear in organic search results for the term “Fail Blog” and link to Opposer’s “Fail Blog” website located at www.failblog.org, as demonstrated, by way of example, in Figure 1 below.

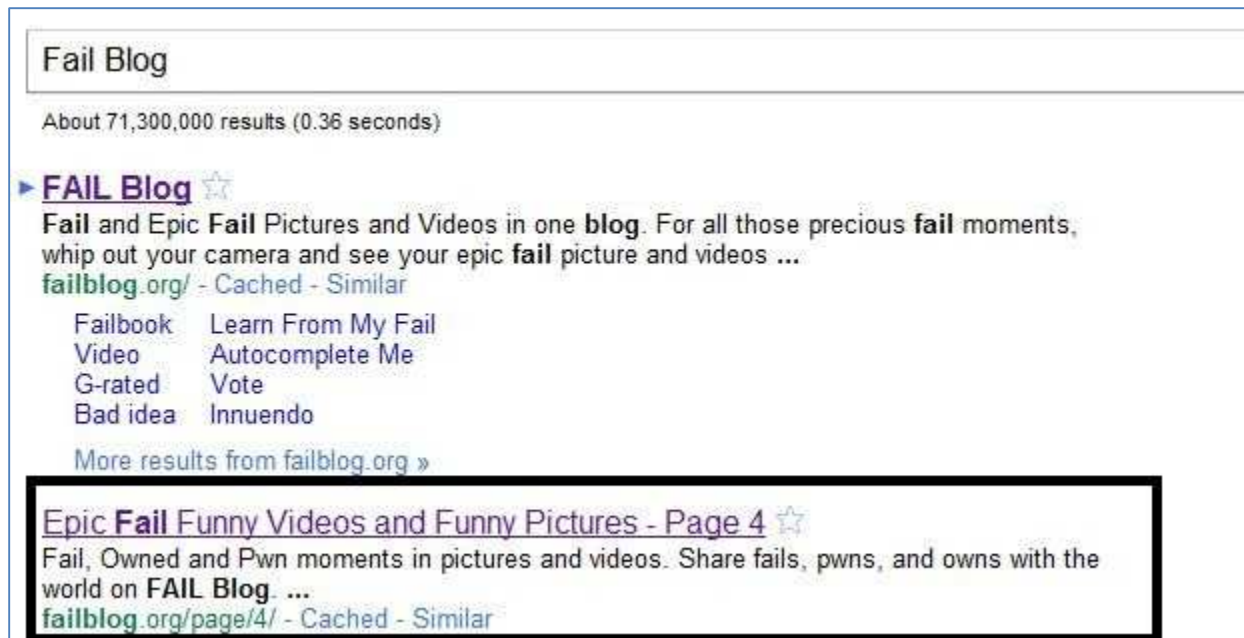


Figure 1

COUNTERCLAIM TO CANCEL REGISTRATION

1. Applicant repeats and realleges each and every allegation set forth in the foregoing paragraphs as if fully set forth herein.
2. Applicant hereby seeks cancellation of Opposer’s Registration (Registration No. 3748736) issued February 16, 2010 for the mark FAIL BLOG in International Classes 38, 41 and 42 for the application filed April 8, 2009.
3. The term “FAIL” is not a term coined by Opposer. Rather, the term “FAIL” is a generic term to denote an event of failure.

4. Therefore, Opposer's alleged FAIL BLOG trademark is a generic reference to the services offered under the mark, i.e., a "blog" with the theme of "failures" or, in its current usage, one's "failings."

5. Alternatively, Opposer's alleged FAIL BLOG trademark is merely descriptive of the services offered under the mark, i.e. a "blog" with the theme of "failures" or, in the current usage, one's "failings."

6. Opposer's alleged FAIL BLOG trademark is thus not distinctive.

7. Opposer's alleged FAIL BLOG trademark has not acquired distinctiveness.

8. Consequently, Opposer's alleged FAIL BLOG trademark has no secondary meaning and cannot function as a trademark.

9. On information and belief, Applicant's use of the Mark was used by Applicant's predecessor in interest prior to the April 8, 2009 filing date of Opposer's in-use trademark application which matured into Registration No. 3748736 before any actual, lawful use by Opposer.

10. Opposer made an effort to purchase Applicant's mark from Applicant on or about March 1, 2010 after obtaining Registration No. 3748736.

11. For the foregoing reasons, Applicant believes that it will be damaged by the continued registration of the mark shown in Registration 3748736.

Applicant is filing by credit card the statutory filing fee of \$900.00 for its counterclaim for cancellation.

WHEREFORE, Applicant prays as follows:

- (a) this opposition be dismissed;
- (b) that Registration No. 3748736 be cancelled; and
- (c) a registration for the term EPIC FAIL be issued to the Applicant.

Dated: October 18, 2010

Respectfully Submitted,

COMBO VENTURES LLC



By: _____

Ronald D. Coleman

Joel G. MacMull

GOETZ FITZPATRICK, LLP

One Penn Plaza, 44th Floor

New York, New York 10119

(212) 695-8100

Attorneys for Applicant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 18th day of October, 2010, a true copy of the foregoing ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIM was served in the following manner, per the prior written agreement of counsel:

VIA EMAIL AND FIRST CLASS MAIL

Venkat Balasubramani
Focal PLLC
800 Fifth Avenue, Suite 4100
Seattle, WA 98104

Email: Venkat@focallaw.com

CERTIFICATE OF ELECTRONIC FILING

The undersigned certifies that this submission (along with any paper referred to as being attached or enclosed) is being filed with the United States Patent and Trademark Office via the Electronic System for Trademark Trials and Appeals (ESTTA) on this 18th day of October, 2010.



By: _____
Joel G. MacMull

Goetz Fitzpatrick, LLP
GOETZ FITPATRICK LLP
One Penn Plaza, 44th Floor
New York, New York 10119
(212) 695-8100

Attorneys for Applicant