

ESTTA Tracking number: **ESTTA373694**

Filing date: **10/18/2010**

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

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
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
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

**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.

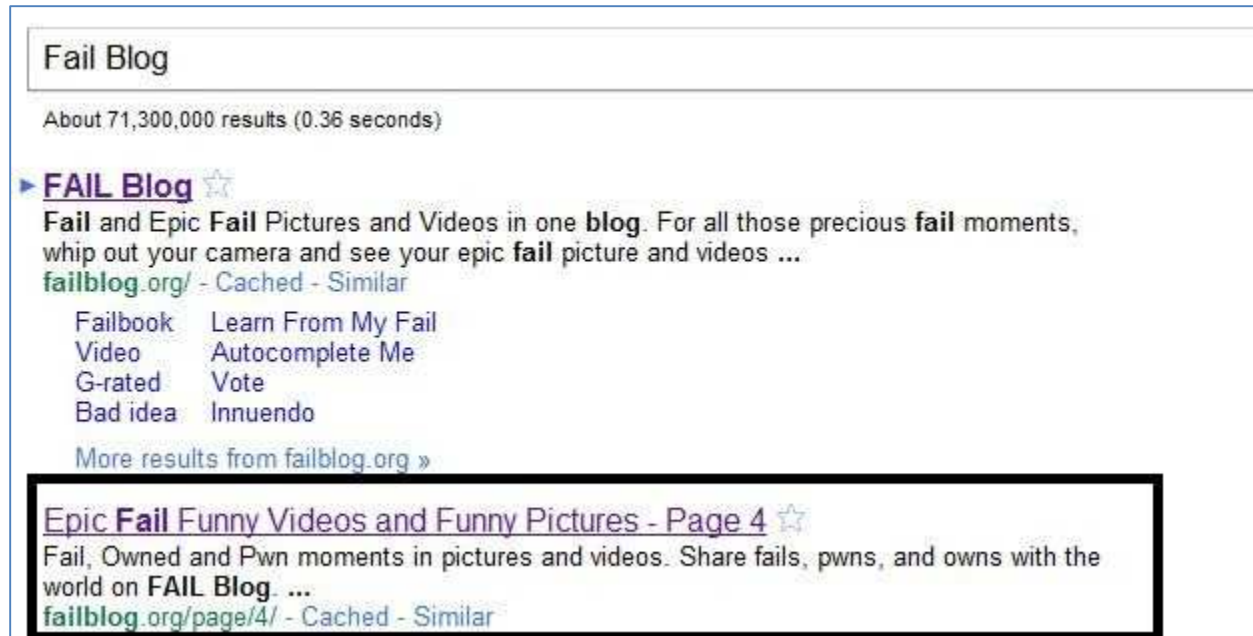


Figure 1

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

From: TMOOfficialNotices@USPTO.GOV
Sent: Tuesday, April 13, 2010 00:38 AM
To: comboventures@gmail.com
Subject: Official USPTO Notice of Publication: Serial Number 77868181

NOTICE OF PUBLICATION

Serial Number: 77-868,181
Mark: EPIC FAIL(STANDARD CHARACTER MARK)
International Class(es): 041
Applicant: Combo Ventures
Attorney Reference Number:

The mark identified above has been published in the *Trademark Official Gazette* (OG) on Apr 13, 2010. Any party who believes it will be damaged by the registration of the mark may file a notice of opposition (or extension of time therefor) with the Trademark Trial and Appeal Board. If no party files an opposition or extension request within thirty (30) days after the publication date, then within twelve (12) weeks of the publication date a certificate of registration should issue.

On the publication date or shortly thereafter, the applicant should carefully review the information that appears in the OG for accuracy (see steps, *below*). If any information is incorrect, the applicant should immediately email the requested correction to **TMPostPubQuery@uspto.gov**. For general information about this notice, please contact the Trademark Assistance Center at 1-800-786-9199.

1. Click on the following link or paste the URL into an internet browser:
http://www.uspto.gov/web/trademarks/tmog/20100413_OG.pdf#page=1
2. Wait for the total OG to download completely (as indicated on bottom of OG page).
3. At the top/side of the displayed page, click wherever the "binoculars" icon appears.
4. Enter in the "search" box the name of the applicant (for individual: last name, first name) or the serial number in this exact format (with hyphen and comma): 77-868,181, e.g.
5. View the retrieved result(s). If multiple results appear in the "results" box, click directly on each "search term" shown in the box to access all separate appearances in the OG.

ESTTA Tracking number: **ESTTA362657**

Filing date: **08/11/2010**

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

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	Pet Holdings Inc.
Granted to Date of previous extension	08/11/2010
Address	190 Queen Anne Ave N Suite 250 Seattle, WA 98109-4968 UNITED STATES
Party who filed Extension of time to oppose	Pet Holdings, Inc. Pet Holdings, Inc.
Relationship to party who filed Extension of time to oppose	Original inclusion of comma was incorrect

Attorney information	VENKAT BALASUBRAMANI FOCAL PLLC 800 FIFTH AVENUE, SUITE 4100 SEATTLE, WA 98104 UNITED STATES venkat@focallaw.com Phone:2065294827
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Applicant Information

Application No	77868181	Publication date	04/13/2010
Opposition Filing Date	08/11/2010	Opposition Period Ends	08/11/2010
Applicant	Combo Ventures 10A 1401 Ocean Avenue Brooklyn, NY 11230 UNITED STATES		

Goods/Services Affected by Opposition

Class 041. First Use: 2009/04/22 First Use In Commerce: 2009/04/22
All goods and services in the class are opposed, namely: Providing an Internet website portal in the field of entertainment, pertaining to the realm of human and animal error, updated daily in the form of pictures, video and text

Grounds for Opposition

Priority and likelihood of confusion	Trademark Act section 2(d)
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Mark Cited by Opposer as Basis for Opposition

U.S. Registration No.	3748736	Application Date	04/08/2009
Registration Date	02/16/2010	Foreign Priority Date	NONE
Word Mark	FAIL BLOG		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 038. First use: First Use: 2008/01/03 First Use In Commerce: 2008/01/03 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 Class 041. First use: First Use: 2008/01/03 First Use In Commerce: 2008/01/03 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 Class 042. First use: First Use: 2008/01/03 First Use In Commerce: 2008/01/03 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		

Attachments	77709571#TMSN.jpeg (1 page)(bytes) NOTICE OF OPPOSITION - FILED VERSION.pdf (9 pages)(437041 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/vb/
Name	VENKAT BALASUBRAMANI
Date	08/11/2010

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

In the Matter of Trademark Application Serial No. 77781021

PET HOLDINGS INC.,

Opposer,

v.

COMBO VENTURES LLC,

Applicant.

Opposition No.

Mark: EPIC FAIL

Filing Date: November 9, 2009

Publication Date: April 13, 2010

NOTICE OF OPPOSITION

In the matter of application Serial No. 77781021 filed November 9, 2009 by Combo Ventures LLC ("Applicant"), a New York limited liability company, to register EPIC FAIL as a trademark for use in connection with "*an internet website portal in the field of entertainment, pertaining to the realm of human and animal error updated daily in the form of pictures, video and text,*" which was published in the Official Gazette on April 13, 2010, the following party believes it will be damaged by registration of the EPIC FAIL mark: Pet Holdings Inc. ("Opposer"), a Washington corporation, having its principal place of business at 190 Queen Anne Avenue North, Suite 250, Seattle, Washington 98109. Accordingly, Opposer files this Notice of Opposition to registration of the EPIC FAIL mark.

The grounds for this opposition are as follows:

1. Opposer has obtained the necessary extension of time within which to file this Notice of Opposition.

2. Opposer owns the registered trademark FAIL BLOG (U.S. Trademark Registration No. 3748736), a standard character mark, in connection with "*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*" in International Class 38; "*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*" in International Class 41; and "*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*" in International Class 42. Opposer has used the FAIL BLOG mark in connection with the above-stated services since at least January 3, 2008. Opposer filed its application to register the FAIL BLOG mark on

April 8, 2009. A copy of the registration information for Opposer's FAIL BLOG mark, obtained from the Trademark Electronic Search System database, is attached hereto as **Exhibit A**.

3. There is no issue of priority concerning application Serial No. 77781021. Applicant began first use of the EPIC FAIL mark and filed its application for registration long after Opposer began first use of its FAIL BLOG mark.

4. FAIL BLOG, as embodied in the market since at least January 3, 2008, is an online website which allows users of the website to upload photos and videos to the site, add captions to the photos and videos, and share the postings by means of various social news and bookmarking applications.

5. On information and belief, EPIC FAIL, as embodied in the market since at least April 22, 2009, is an online website providing almost identical services as those provided under Opposer's FAIL BLOG mark. Consumers are likely to be confused by Applicant's use of the EPIC FAIL mark for services that are nearly identical to those offered by Opposer.

6. Opposer's services and Applicant's services are offered through identical channels of trade. Moreover, the target consumers for both parties' services – consumers seeking to post, view and share humorous photos and videos – are identical. Accordingly, consumer confusion is inevitable.

7. Opposer has continuously used and advertised the FAIL BLOG mark throughout the United States for a significant time.

8. By reason of continuous marketing, advertising and promotion of services in connection with the FAIL BLOG mark, and the quality of those services, the FAIL BLOG mark has extremely valuable goodwill that inures to the benefit of Opposer. This goodwill has been

and will continue to be harmed by the use and registration of the confusingly similar mark EPIC FAIL sought to be registered by Applicant.

9. Applicant's mark is similar in appearance and sound to Opposer's mark. Both are standard character marks, comprised of two four-letter words, with each mark containing the word "fail." The word "fail" is the dominant component of each mark. Consequently, the marks create an extremely similar commercial impression.

10. Applicant's EPIC FAIL mark so resembles Opposer's FAIL BLOG mark as to be likely, when applied to the Applicant's services, to cause confusion, mistake or deception as to the source or origin of Applicant's goods by creating the erroneous impression that Applicant's goods originate with, are sponsored, approved, endorsed or licensed by, are affiliated or associated with, or are in some other way connected to Opposer.

11. The granting of a trademark registration for the EPIC FAIL mark to Applicant would be contrary to 15 U.S.C. § 1052(d) and would violate or diminish the prior and superior rights of Opposer in its FAIL BLOG trademark.

12. Opposer will be damaged if Applicant obtains registration of its mark because Applicant will obtain statutory rights in the mark in violation and derogation of the established prior rights of Opposer in its FAIL BLOG mark.

WHEREFORE, Opposer asks that its opposition to Application Serial No. 77781021 be sustained and that Applicant's proposed registration of the mark EPIC FAIL be refused. Please direct all correspondence to the attention of Venkat Balasubramani, Focal PLLC, 800 Fifth Avenue, Suite 4100, Seattle, Washington 98104. The undersigned is authorized to act on Opposer's behalf.

Opposer submits the required filing fee of three hundred dollars (\$300.00)
contemporaneous with this Notice of Opposition.

DATED: August 11, 2010

Respectfully submitted,

FOCAL PLLC

By: /s Venkat Balasubramani
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Attorneys for Opposer
Pet Holdings Inc.

EXHIBIT A



United States Patent and Trademark Office

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FAIL BLOG

Word Mark FAIL BLOG

Goods and Services

IC 038. US 100 101 104. G & S: 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. FIRST USE: 20080103. FIRST USE IN COMMERCE: 20080103

IC 041. US 100 101 107. G & S: 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. FIRST USE: 20080103. FIRST USE IN COMMERCE: 20080103

IC 042. US 100 101. G & S: 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. FIRST USE: 20080103. FIRST USE IN COMMERCE: 20080103

Standard Characters Claimed

Mark Drawing Code (4) STANDARD CHARACTER MARK

Serial Number 77709571

Filing Date April 8, 2009

Current Filing Basis 1A
Original Filing Basis 1A
Published for Opposition December 1, 2009
Registration Number 3748736
Registration Date February 16, 2010
Owner (REGISTRANT) Pet Holdings, Inc. CORPORATION DELAWARE 190 Queen Anne Ave N., Suite 250 Seattle WASHINGTON 98109
Attorney of Record Sean M. Croman
Disclaimer NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "BLOG" APART FROM THE MARK AS SHOWN
Type of Mark SERVICE MARK
Register PRINCIPAL
Live/Dead Indicator LIVE

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CERTIFICATE OF TRANSMISSION

I hereby certify that a copy of the foregoing NOTICE OF OPPOSITION was submitted electronically via ESTTA on August 11, 2010, to the Trademark Trial and Appeal Board of the United States Patent and Trademark Office.

Dated: August 11, 2010

/s Venkat Balasubramani
Venkat Balasubramani

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing NOTICE OF OPPOSITION was served by certified first-class mail, postage-prepaid, on August 11, 2010, upon Applicant at the following address:

Combo Ventures
1401 Ocean Avenue, Apt 10A
Brooklyn, New York 11230

Dated: August 11, 2010

/s Venkat Balasubramani
Venkat Balasubramani