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

Proceeding	92048012
Party	Plaintiff Wells' Dairy, Inc.
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Submission	Motion for Summary Judgment
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Date	05/09/2008
Attachments	Our Motion for Summary Judgment_05-09-08.pdf (105 pages)(4774986 bytes)

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


<p>WELLS' DAIRY, INC.,</p> <p style="text-align: center;">Petitioner,</p> <p>v.</p> <p>MANHATTAN CONFECTIONERS INC.,</p> <p style="text-align: center;">Registrant.</p>	<p>Cancellation. No: 92048012</p> <p>Registration No. 3166541</p>
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PETITIONER WELLS' DAIRY INC.'S MOTION FOR SUMMARY JUDGMENT

Trademark Trial and Appeal Board
U.S. Patent and Trademark Office
P.O. Box 1451
Alexandria, VA 22313-1451

Petitioner, Wells' Dairy Inc. ("Petitioner"), through counsel, respectfully moves for summary judgment sustaining this opposition pursuant to Federal Rule of Civil Procedure 56, 37 C.F.R. § 2.116 and 37 C.F.R. § 2.127 on the basis that due to over three consecutive years of nonuse, Registrant's Registration No. 3166541 is presumed abandoned under 15 U.S.C. §1127 and should be cancelled. Thus, summary judgment should be entered in favor of Petitioner. A memorandum, affidavit of Christine Lebrón-Dykeman and exhibits attached thereto, are submitted herewith.

Respectfully submitted,



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CERTIFICATE OF FILING

I hereby declare that the foregoing document has been filed via the Electronic System for Trademark Trials and Appeals (ESTTA) this 9th May, 2008.

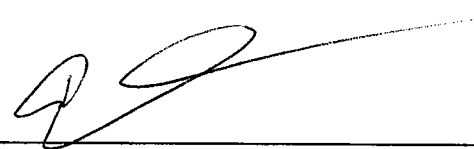


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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

<p>WELLS' DAIRY, INC.,</p> <p style="text-align:right">Petitioner,</p> <p>v.</p> <p>MANHATTAN CONFECTIONERS INC.,</p> <p style="text-align:right">Registrant.</p>	<p>Cancellation. No: 92048012</p> <p>Registration No. 3166541</p>
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**MEMORANDUM IN SUPPORT OF PETITIONER WELLS' DAIRY, INC.'S MOTION
FOR SUMMARY JUDGMENT AND TO STAY ALL PROCEEDINGS**

Trademark Trial and Appeal Board
U.S. Patent and Trademark Office
P.O. Box 1451
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I. INTRODUCTION

Petitioner, Wells' Dairy Inc. ("Petitioner"), has moved this Board for summary judgment on the grounds that Registrant, Manhattan Confectioner's Inc. ("Registrant") has not used its mark in commerce and thus the Registration should be cancelled because it has been abandoned.

There is no genuine factual dispute as to all to the fact that although Registrant, in its trademark application, claims a first use date of March 29, 2005, three years later it is still not selling candy products under the "Gooley Chewy" trademark. Consequently, pursuant to 15 U.S.C. § 1052(d), FED. R. CIV. P. 56, 37 C.F.R. § 2.116 and 37 C.F.R. § 2.127, summary

judgment should be entered in favor of Petitioner and Registrant's registration should be cancelled.

II. BACKGROUND

Petitioner filed Application Serial No. 78/670,433 for the mark "Gooley Chewy Turtle Brownie"; however the application was refused registration as a result of the existence on the Patent and Trademark Office Registry of Registrant's earlier registration. (See Exhibits A, B.) Upon receipt of the rejection, counsel for Petitioner investigated Registrant and the status of its use of the trademark "Gooley Chewy" for candy but was unsuccessful in finding any evidence of current use and thus proceeded to file the present cancellation action. (See Exhibit C.)

Registrant filed an intent-to-use trademark application for its "Gooley Chewy" trademark for use in connection with candy on April 4, 2005. (See Exhibit D.) Thereafter, in August 2006, it filed a statement of use claiming a first use date of March 29, 2005 after which Registration No. 3166541 issued (See Exhibit E, F). However, as of April 5, 2008, Applicant was not selling a candy product under its "Gooley Chewy" trademark. (See Exhibit H.) As over three years have passed since the alleged date of first use and products under the mark have never been sold in commerce, the registration has been abandoned.

III. THE SUMMARY JUDGMENT STANDARD

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting FED. R. CIV. P. 1). An issue may be decided on motion for summary judgment when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S.

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