

**NOTICE OF OPPOSITION**

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

In re Application Serial No. : 76-435,630  
For the Mark : OURCAT'S CHOICE LITTER  
Filed : July 29, 2002  
Published in the Trademark  
Official Gazette on : September 16, 2003



11-18-2003

U.S. Patent & TMOtc/TM Mail Rcpt Dt. #22

-----

General Pet Supply, Inc.  
7711 N. 81<sup>st</sup> Street  
Milwaukee, WI 53224-9531  
Registration No. 1,798,855

Opposer,

v.

OurPet's Company  
1300 East Street  
Fairport Harbor, OH 44077-5573

Applicant.

Opposition No.

-----  
BOX TTAB - FEE  
Assistant Commissioner for Trademarks  
2900 Crystal Drive  
Arlington, VA 22202-3513

**NOTICE OF OPPOSITION**

Dear Sir or Madam:

General Pet Supply, Inc., a Wisconsin corporation (the "Registrant"), whose address is 7711 N. 81<sup>st</sup> Street, Milwaukee, WI 53224-9531 believes that it will be damaged by registration of the mark shown in the above-identified application, and hereby opposes same.

## FACTS

On October 12, 1993, the U.S. Patent and Trademark Office (the PTO) issued registration number 1,798,855 to the Registrant for the mark "CAT'S CHOICE" for cat litter in international Class 31. Registrant's Section 8 Affidavit of Continued Use and Section 9 Renewal Application were accepted and granted, respectively, by the PTO on August 15, 2003. Registrant has built up extensive goodwill for the mark in association with the specified goods during the term of the registration.

On July 29, 2002, OurPet's Company (the Applicant) applied for registration of the mark "OURCAT'S CHOICE LITTER" for cat litter in International Class 31 based on an intent to use the mark in commerce. Applicant's mark was Published for Opposition on September 16, 2003.

## GROUND FOR OPPOSITION

Registrant opposes registration of Applicant's mark "OURCAT'S CHOICE LITTER" on the grounds that registration is likely to cause confusion, mistake, or deceive the relevant consuming public. Trademarks must be analyzed in two steps to determine whether a likelihood of confusion exists. First, they must be viewed for similarities in sound, appearance, connotation and commercial impression. *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Second, the goods or services associated with each mark must be compared to determine if they are related or if marketing activities for the marks would cause confusion as to the origin of each mark. *In re August Storck KG*, 218 USPQ 823 (TTAB 1983); *In re International Telephone and Telegraph Corp.*, 197 USPQ 910 (TTAB 1978).

### **Likelihood of Confusion**

Likelihood of confusion is not based on distinguishing the marks in a side-by-side comparison. Rather, the heart of the test is whether the marks create the same overall commercial impression. *Visual Information Institute, Inc. v. Vicon Industries, Inc.*, 209 USPQ 179 (TTAB 1980). The focus is on the average purchaser's recollection, who retains a general, rather than specific, impression of the trademarks. *Chemetron Corp. v. Morris Coupling & Clamp Co.*, 203 USPQ 537 (TTAB 1979); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975); TMEP Sec. 1207.01(b).

In light of the above, Applicant's proposed mark is nearly, if not completely, identical to Registrant's mark. Applicant combines the words "OUR" with "CAT'S" to form one word then adds the disclaimed word "LITTER" to the core of Registrant's mark "CAT'S CHOICE." These minor differences do not change the overall commercial impression of the marks. The average purchaser is most likely to recollect the general core of the mark, "CAT'S CHOICE", rather than the more lengthy combination of "OUR" with "CAT'S" and the addition of "LITTER."

### **Similarity of Goods**

If the marks of the respective parties are identical or highly similar, the commercial relationship between the goods of the respective parties must be considered carefully to determine a likelihood of confusion. *In re Concordia International Forwarding Corp.*, 222 USPQ 355 (TTAB 1983). The goods of the parties need not be identical nor directly competitive to find a likelihood of confusion. They need only be related in some manner, or the conditions surrounding their marketing be such that they could be encountered by the same purchasers under circumstances that could give rise to

; the mistaken belief that the goods come from a common source. *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984); *Guardian Products Co., Inc. v. Scott Paper Co.*, 200 USPQ 738 (TTAB 1978); *In re International Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978). If the goods of the respective parties are so closely related, the degree of similarities between the marks required to support a finding of likelihood of confusion is not nearly as great as would apply with distinct goods.

Registrant and Applicant both use their respective marks on identical goods, cat litter. Notwithstanding whatever difference may exist between various types of cat litter (e.g., clumping vs. non-clumping, clay vs. non-clay based, etc.), the relevant consuming public is unlikely to make these distinctions sufficiently enough to distinguish between Registrant's and Applicant's goods.

#### CONCLUSION

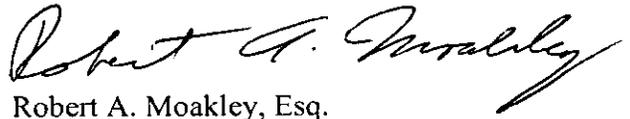
The Applicant's mark so closely, if not exactly, matches the Registrant's mark in sound, appearance, connotation and commercial impression as to cause a likelihood of confusion in the relevant consuming public. Applicant's goods are identical to Registrant's which, when coupled with the similarity of the marks, further contributes to a likelihood of confusion between Registrant and Applicant as to the source or origin of those goods. Applicant has spent considerable time and money maintaining its registered mark and developing the associated goodwill and will be damaged by registration of Applicant's mark. Any doubt regarding a likelihood of confusion must be decided in favor of the Registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025

(Fed. Cir., 1988). Therefore, in light of all of the above, Registrant respectfully requests that Applicant's registration for the mark "OURCAT'S CHOICE LITTER" be denied.

A duplicate copy of this Notice of Opposition is enclosed.

FEE: A check in the amount of \$300.00 for the required fee is enclosed.

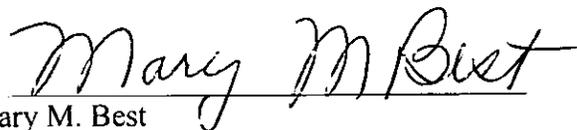
Respectfully submitted,

  
Robert A. Moakley, Esq.

Enclosures  
Our Ref.: 00181

Mary M. Best, being first duly sworn on oath, deposes and says that she mailed a true copy of the Notice of Opposition at the address stated hereinafter, by enclosing the same in an envelope which bore the sender's return address of Beck, Chaet & Bamberger, S.C., Two Plaza East, Suite 1085, Milwaukee, WI 53202, and which she mailed on the \_\_\_ day of November, 2003.

TO: BOX TTAB - FEE  
Assistant Commissioner for Trademarks  
2900 Crystal Drive  
Arlington, VA 22202-3513

  
Mary M. Best

Subscribed and sworn to before me this  
\_\_\_ day of November, 2003

\_\_\_\_\_  
Notary Public, State of Wisconsin  
My commission is \_\_\_\_\_

F:\Data\WPDATA\G\GEN-PET\PTO\CatsChoiceOpp.doc



BECK, CHAET & BAMBERGER, S.C.

TTAB

Two Plaza East, Suite 1085  
330 East Kilbourn Avenue  
Milwaukee, Wisconsin 53202

414.273.4200

Fax 414.273.7786

November 17, 2003

11-18-2003  
U.S. Patent & TMO/TM Mail Rpt Dt. #22

**VIA UPS OVERNIGHT**

Box TTAB – FEE  
Assistant Commissioner for Trademarks  
2900 Crystal Drive  
Arlington, Virginia 22202-3513

Re: *OURCAT'S CHOICE LITTER*  
*Notice of Opposition*

Dear Sir or Madam:

Enclosed please find an original and one (1) duplicate of a Notice of Opposition to Application Serial No. 76-435,630. Also enclosed is a check in the amount of \$300.00 to cover the filing fee of the Notice. In accordance with 37 C.F.R. § 2.105, please serve a copy of the Notice on the Applicant. Should you have any questions, please feel free to contact me.

Very truly yours,

BECK, CHAET & BAMBERGER, S.C.

Robert A. Moakley

RAM:mmb

Enclosures

cc: Robert Merar (w/o encl.)  
Michael S. Polsky, Esq. (w/o encl.)

File No. 00181