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

Proceeding	91158622
Party	Plaintiff General Pet Supply, Inc ,
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

GENERAL PET SUPPLY, INC.,]	
]	Opposition No: 91158622
Plaintiff-Opposer,]	
]	Application Serial No: 76/435630
vs.]	
]	Mark: OURCAT'S CHOICE
OurPet's Company,]	LITTER
]	
Defendant-Applicant]	

PLAINTIFF'S REPLY BRIEF

I. INTRODUCTION

Applicant, OurPet's Company, has filed a Main Brief in which it makes certain factual and evidentiary assumptions with no basis in the record. These assumptions are relied upon by Applicant in applying the likelihood of confusion test found at TMEP § 1207.01. Additionally, in making the assumptions referred to in its Brief, Applicant ignores the record created by Plaintiff in this Opposition, and in particular its failure to respond to duly filed and served Requests for Admissions. Consequently, Applicant's arguments must be ignored and the Board must rely upon the factual and evidentiary record made by Plaintiff herein.

II. DISCOVERY AND ADMISSION OF EVIDENCE

After General Pets filed its Notice of Opposition, the TTAB filed and served a Notice of Discovery Dates on the parties, which was mailed November 28, 2003. The Notice provided that discovery was to open on December 18, 2003 and close on June

15, 2004. Plaintiff's 30-day testimony period was to close on September 13, 2004. Defendant's (Applicant's) 30-day testimony period was to close on November 12, 2004, and the 15-day rebuttal testimony period for Plaintiff was to close on December 27, 2004. The Notice further provided for the filing of briefs pursuant to Trademark Rule 2.128(a) and (b).

Counsel for General Pet Supplies filed and served plaintiff's First Requests for Admissions on June 11, 2004.¹ They were received by counsel for Applicant on June 14, 2004; within the discovery period.² TBMP §403.02 provides that service of written discovery, such as interrogatories and request for admissions, can be made at any time within the discovery period even if the answers thereto would be due after the close of discovery.³ TBMP §407.03(a) indicates that a party properly served Requests for Admissions has 30 days to respond thereto. Section 407.03(a) goes on to provide that Requests to Admit which are not timely responded to are deemed admitted.

Counsel for Applicant was timely served Plaintiff's First Requests for Admissions. Applicant has failed to respond to same, or to offer any explanation whatsoever as to why response was not made. Consequently, the Requests to Admit are deemed admitted and have established the uncontested facts of this case.⁴

In order to be able to rely upon admissions in an Opposition Proceeding, a party must file a Notice of Reliance within its testimony period.⁵ Plaintiff's testimony period

¹ Plaintiff's Notice of Reliance, Exhibit B and Exhibit E, ¶5.

² Plaintiff's Notice of Reliance Exhibit C and Exhibit E, ¶6.

³ See also TBMP §407.01, which advises a recipient of Requests for Admissions that as long as service takes place during the discovery period, they must be responded to even though the responses will be filed after the close of discovery.

⁴ See TBMP §407.04; Fed. R. Civ. P. 36(b); and *American Automobile Ass'n v. AAA Legal Clinic of Jefferson Crooke, P.C.*, 930 F.2d 1117, 19 USPQ2d 1142, 1144 (5th Cir. 1991) (an admission not withdrawn or amended cannot be rebutted by contrary testimony at trial).

⁵ TBMP §704.10.

was to close on November 13, 2004. Counsel for Plaintiff filed an Affidavit and Notice of Reliance, attaching said Requests for Admissions, with the TTAB on September 10, 2004.⁶

On the other hand, Applicant filed no evidence with the Board during its period of testimony. There is not one document, report, pleading, transcript, affidavit or study which in any way backs-up or supports the factual allegations contained in its Brief on file herein. Any factual allegations or assumptions contained in Applicant's Brief must not be considered and should be stricken. TBMP §704.06(b) is entitled "Statements in Briefs," and states:

Factual statements made in a party's brief on the case can be given no consideration unless they are supported by evidence properly introduced at trial. Statements in a brief have no evidentiary value, except to the extent that they may serve as admissions against interest. (footnote omitted).

III. LIKELIHOOD OF CONFUSION

TMEP §1207.01 sets forth the likelihood of confusion test which must be considered by an examiner in deciding whether or not to allow the registration of a mark which may be the same or similar to a pre-existing mark. Section 1207.01 provides:

In *ex parte* examination, the issue of likelihood of confusion typically revolves around the similarity or dissimilarity of the marks and the relatedness of the goods or services. The other factors listed in *du Pont* may be considered only if relevant evidence is contained in the record. See *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003) ("Not all of the *DuPont* factors may be relevant or of equal weight in a given case, and 'any one of the factors may control a particular case,'" quoting *In re Dixie Restaurants, Inc.*, 105 F.3d 1405, 1406-07, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997)); *In re National Novice Hockey League, Inc.*, 222 USPQ 638, 640 (TTAB 1984). In an *ex parte* case, the following factors are usually the most relevant:

⁶ See TTAB Prosecution History, docket entry 6.

- The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.
- The relatedness of the goods or services as described in an application or registration or in connection with which a prior mark is in use.
- The similarity or dissimilarity of established, likely-to-continue trade channels.
- The conditions under which and buyers to whom sales are made, *i.e.* “impulse” vs. careful, sophisticated purchasing.
- The number and nature of similar marks in use on similar goods.
- A valid consent agreement between the applicant and the owner of the previously registered mark.

The Court of Appeals for the Federal Circuit has provided the following guidance with regard to determining and articulating likelihood of confusion:

The basic principle in determining confusion between marks is that marks must be compared in their entireties and must be considered in connection with the particular goods or services for which they are used (citations omitted). It follows from that principle that likelihood of confusion cannot be predicated on dissection of a mark, that is, on only part of a mark (footnote omitted). On the other hand, in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties (footnote omitted). Indeed, this type of analysis appears to be unavoidable.

In re National Data Corp., 753 F.2d 1056, 1058, 224 USPQ 749, 750-51 (Fed. Cir. 1985).

There is no mechanical test for determining likelihood of confusion. The issue is not whether the actual goods are likely to be confused but, rather, whether there is a likelihood of confusion as to the *source* of the goods. *In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993), and cases cited therein. Each case must be decided on its own facts.

In arguing that the registration of Applicant's mark will not cause confusion in the marketplace over Plaintiff's already registered mark, Applicant makes certain statements in its Brief which, as indicated, are either not supported in the record or, given the state of the record, are false. For instance, on page 2 of its Principal Brief Applicant states "The opposer in this case has not indicated any single instance of actual confusion, but bases their entire opposition on a theoretical 'likelihood of confusion'." At page 4 of its Brief Applicant argues that its product (i.e. cat litter) is different from Plaintiff's product (i.e. cat litter) in that Applicant's product fits into a "premium niche". Further, Applicant indicates that its litter is not subject to "impulse buying", but requires a "specific level of sophistication." Applicant also makes the argument that the respective products are not distributed in the same channels of commerce.⁷

As indicated, these factual allegations and assumptions are not borne out by the record. The record as presented by Plaintiff establishes certain uncontested facts, those being:

1. General Pet Supply (Plaintiff-Opposer) is the record owner of U.S. Trademark Registration No. 1,798,855 for the mark "CAT'S CHOICE" for products in International Class 31, namely cat litter.⁸

2. OurPet's Company (Applicant) conducted a search or other investigation relating to the availability or registerability of the mark "OURCAT'S CHOICE LITTER" prior to submitting the application at issue in this Opposition.⁹

⁷ Applicant's Principal Brief, pages 4 and 5.

⁸ See Plaintiff's Notice of Reliance, Exhibit A, Request to Admit 1.

3. Applicant filed application no. 76/435630 with knowledge of General Pet Supply's registration no. 1,798,855. ¹⁰

4. The goods sold or intended to be sold under or in relation to application 76/435630 and the goods sold under or in relation to registration 1,798,855 are identical. ¹¹

5. OurPet's Company's products sold under the "OURCAT'S CHOICE LITTER" mark are sold or are intended to be sold at retail through national or regional chains, including but not limited to Petco, Pet World Warehouse and PetsMart. ¹²

6. General Pet Supply's products sold under the "CAT'S CHOICE" mark are sold or are intended to be sold at retail through national or regional chains, including but not limited to Petco, Pet World Warehouse and PetsMart. ¹³

7. General Pet Supply's and OurPet's Company's products move in interstate commerce through identical channels of trade. ¹⁴

8. The products sold under Applicant's mark are impulse goods, purchased by unsophisticated buyers. ¹⁵

9. Consumers of General Pet Supply's goods sold under the "CAT'S CHOICE" registered mark are unable to distinguish such goods from the goods sold under the Applicant's "OURCAT'S CHOICE LITTER" mark contained in the application at issue. ¹⁶

10. The consumers of General Pet Supply's goods sold under the "CAT'S CHOICE" mark are likely to be confused into believing that the goods sold under

⁹*Id.*, Request to Admit 2.

¹⁰*Id.*, Request to Admit 6.

¹¹*Id.*, Request to Admit 10.

¹²*Id.*, Request to Admit 11.

¹³*Id.*, Request to Admit 12.

¹⁴*Id.*, Request to Admit 13.

¹⁵*Id.*, Request to Admit 16.

¹⁶*Id.*, Request to Admit 17.

Applicant's "OURCAT'S CHOICE LITTER" mark originate from the same company or producer.¹⁷

11. The consumers of General Pet Supply's goods sold under the "CAT'S CHOICE" mark could potentially be confused into believing that the goods sold under Applicant's "OURCAT'S CHOICE LITTER" mark originate from the same company or producer.¹⁸

12. The overall commercial impression of "OURCAT'S CHOICE LITTER" and "CAT'S CHOICE" is likely to cause confusion in the relevant consuming public between application no. 76/435630 and registration 1,798,855.¹⁹

13. There is no distinct difference in appearance, sound, connotation or overall commercial impression between Applicant's mark, *after disclaimer*,²⁰ and Plaintiff's registered mark.²¹

14. There are less than five registered trademarks containing any combination of the words "cats" and "choice."²²

15. General Pet Supply's registration of its mark predates the filing of Applicant's application by at least three years.²³

16. Plaintiff's registered mark is uncontestable under the Lanham Act.²⁴

17. General Pet Supply, Inc. and OurPet's Company have attended at least two of the same trade shows in the last 18 months.²⁵

¹⁷ *Id.*, Request to Admit 18.

¹⁸ *Id.*, Request to Admit 19.

¹⁹ *Id.*, Request to Admit 28.

²⁰ Applicant disclaimed the word "litter" during the prosecution of its application.

²¹ Plaintiff's Notice of Reliance, Exhibit A, Request to Admit 29.

²² *Id.*, Request to Admit 30.

²³ *Id.*, Request to Admit 31.

²⁴ *Id.*, Request to Admit 32.

²⁵ *Id.*, Request to Admit 33.

18. OurPet's Company has experienced events or incidents of actual confusion of the relevant consuming public between the mark "CAT'S CHOICE" and the mark "OURCAT'S CHOICE LITTER."²⁶

19. *There is a likelihood of confusion between registration no. 1,798,855 and Application no. 76/435630.*²⁷

In applying these uncontested facts to the likelihood of confusion test set forth above, it is clear that this registration should not be allowed. Applicant has admitted that the marks are similar in relation to appearance, sound, connotation and commercial impression. Applicant has admitted that the goods associated with the marks are identical. Applicant has admitted that the goods sold under each mark trade in the same commercial channels. Applicant has admitted that cat litter, of whatever brand, is typically an impulse purchase. Applicant has admitted that there are very few similar registered marks. Finally, Applicant has admitted that its mark is likely to cause confusion in the marketplace between consumers of cat litter with Plaintiff's mark, as to the origin of their respective products.

Given Applicant's admissions and the uncontested evidence presented to the Board, but one conclusion can be reached. Congress has provided:

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it—

.....

(d) Consists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely,

²⁶ *Id.*, Request to Admit 34.

²⁷ *Id.*, Request to Admit 36.

