

Mailed:
September 29, 2005

This Opinion is Not Citable as Precedent of the TTAB
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

General Pet Supply, Inc.
v.
OurPet's Company

Opposition No. 91158622
to application Serial No. 76435630
filed on July 29, 2002

Michael T. Hopkins of IP Special Counsel, Ltd. for General
Pet Supply, Inc.

John D. Gugliotta of The Law Offices of John D. Gugliotta,
P.E., Esq. for OurPet's Company.

Before Rogers, Drost and Walsh,
Administrative Trademark Judges.

Opinion by Rogers, Administrative Trademark Judge:

OurPet's Company [applicant] has applied to register
the mark OURCAT'S CHOICE LITTER, in standard character form,
for goods identified as "cat litter." The application is
based on applicant's stated intention to use the mark in
commerce. Applicant included a disclaimer of exclusive
rights in the term "Litter," in response to a requirement of
the examining attorney who examined the application.

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In the initial office action on the application, the examining attorney, among other things, refused registration of applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d). Registration no. 1798855 for the mark CAT'S CHOICE (with a disclaimer of "Cat's"), also for goods identified as "cat litter," was cited in support of the refusal of registration. Applicant responded with arguments in support of registration. Applicant's mark subsequently was approved for publication for opposition, without any subsequent office action or comment by the examining attorney.

General Pet Supply, Inc. [opposer], relying on its ownership of the above-referenced registration initially cited by the examining attorney, has opposed issuance of a registration to applicant. Though its notice of opposition is more like a brief at final hearing than a notice of opposition, insofar as it presents both assertions of fact and legal arguments and does not set forth its allegations in separate counts with numbered paragraphs, applicant did not object or file a motion for a more definite statement.

In essence, opposer asserted that its pleaded registration issued October 12, 1993 and that its Section 8 affidavit of use and Section 9 renewal application were "accepted and granted, respectively," by the Office; that opposer has built up extensive good will in its mark; that

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the marks are "nearly, if not completely, identical" and the "minor differences do not change the overall commercial impression of the marks"; that the goods are identical; that there is a likelihood of confusion, mistake or deception of the relevant consuming public; and that if there is any doubt about likelihood of confusion, it must be resolved in opposer's favor. In response, applicant "expressly denies" that there is a likelihood of confusion, "expressly denies" that the goods are identical, and asserts that, the examining attorney "has indicated" that the marks do not create the same commercial impression and the goods are not identical.

Opposer attempted to take discovery, but applicant did not. Specifically, opposer has established that it timely served on applicant 37 specific requests for admission. During its testimony period, opposer timely filed a notice of reliance, introducing thereby a copy of its requests for admission, proof of the timely service and receipt by applicant of those requests, and an affidavit from opposer's counsel attesting to his unsuccessful efforts to obtain responses to the requests for admission.

Opposer and applicant each filed a main brief, and opposer filed a reply brief. Neither party requested an oral hearing. In view of applicant's effective admission of opposer's requests for admission, we sustain the opposition.

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Opposer's requests for admission cover all the integral issues on which opposer has the burden of proof as plaintiff in this proceeding. Specifically, applicant was asked to admit, among other things, the following:

- That opposer is the owner of its pleaded registration;
- That the registration is "Uncontestable under the Lanaham [sic] Act";
- That the goods in opposer's registration and applicant's application are identical;
- That the goods are "sold or intended to be sold at retail through national or regional chain stores including, but not limited to, PetCo, Pet World Warehouse, and PetsMart";
- That opposer's and applicant's products "move in interstate commerce through identical channels of trade";
- That consumers of applicant's goods are "impulse, and therefore unsophisticated, purchasers";
- That consumers of opposer's goods are "unable to distinguish such goods" from applicant's goods;
- That opposer's consumers "likely will be confused" or "could potentially be confused" that applicant's goods originate from the same producer as opposer's goods;

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- That "there is no distinct difference in appearance, sound, connotation or overall commercial impression" between the involved marks; and
- That applicant "has experienced events or incidents of actual confusion of the relevant consuming public" in regard to the involved marks.

In its brief, applicant has not denied opposer's contentions that the requests for admission were timely served, received by applicant, and not responded to by applicant. Applicant did not, in any way, contest or object to opposer's filing of its notice of reliance. Because applicant failed to respond to opposer's requests for admission, each of the requests is deemed admitted by applicant. See Fed. R. Civ. P. 36(a), made applicable to this proceeding by Trademark Rule 2.116(a), 37 C.F.R. § 2.116(a). ("The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing, subject to Rule 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or the party's attorney.")

Any matter admitted under Federal Rule 36 "is conclusively established unless the court on motion permits

withdrawal or amendment of the admission." See Fed. R. Civ. P. 36(b). See also, 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 that is not withdrawn or amended cannot be rebutted by contrary testimony or ignored by the district court..."). Accordingly, we have disregarded arguments set forth by applicant in its brief that the involved marks are dissimilar, the goods are different, and that the goods do not, in fact, move through the same channels of trade.¹ The prejudice that would fall on opposer if we were to countenance applicant's arguments is manifest, for opposer clearly relied on the admissions and did not offer any other evidence at trial. American Automobile Ass'n, 19 USPQ2d at 1145.

We also note that applicant's brief includes many assertions of fact that bear no support in the record, because applicant did not present any evidence. For example, applicant makes representations about marks it owns, about the specific nature of its product and how it differs from and is more expensive than opposer's product, and summarizes information gleaned from certain searches of

¹ We note, too, that applicant did not even try to rebut the effective admissions with contrary testimony or evidence. Rather, it attempts to rebut the admissions only through argument in its brief.

the Internet for references to the parties' involved products. Clearly, a party may not make assertions of fact in its brief that are unsupported by evidence properly put into the record. Martahus v. Video Duplication Services Inc., 3 F.3d 417, 27 USPQ2d 1846, 1849 (Fed. Cir. 1993) ("mere attorney arguments unsubstantiated by record evidence are suspect at best"). Accordingly, even if applicant were not already precluded from making these assertions because of its effective admissions, it would be precluded from making them because of the absence of support in the record. We have not, therefore, accorded any weight to unsupported assertions of fact in applicant's brief.

Applicant's admissions establish opposer's standing, insofar as applicant has admitted that there are no distinct differences in the involved marks, that the goods are identical, and that both parties' goods move in the same channels of trade and are sold in some of the same stores. See Ritchie v. Simpson, 170 F.3d 1092, 50 USPQ2d 1023, 1025-26 (Fed. Cir. 1999) (opposer must show that it has a direct and personal stake in the outcome of the opposition and a reasonable basis for its belief that it will be damaged). See also Time Warner Entertainment Co. v. Jones, 65 USPQ2d 1650, 1657 (TTAB 2002) (opposer held to have established its standing by its presentation of evidence regarding its ownership of pleaded registrations and evidence "sufficient

to show that its likelihood of confusion claim is not wholly without merit").

By applicant's admissions, the validity and ownership by opposer of its pleaded registration has been established. Apart from helping to establish opposer's standing, these admissions remove priority as an issue in this proceeding. King Candy Company v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974); Carl Karcher Enterprises Inc. v. Stars Restaurants Corp., 35 USPQ2d 1125 (TTAB 1995).

Finally, we turn to likelihood of confusion, which is assessed using the factors that were articulated by one of our primary reviewing court's predecessors, the Court of Customs and Patent Appeals, in the case of In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973). See also Recot, Inc. v. Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000). In any likelihood of confusion analysis, two key, although not exclusive, considerations are the similarities of the marks and the similarities of the goods and services. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [and services] and differences in the marks").

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As noted above, applicant has admitted that there are no distinct differences in the involved marks, that the goods are identical, and that both parties' goods move in the same channels of trade and are sold in some of the same stores. Applicant has also admitted that purchasers of the involved goods may make purchases on impulse, that confusion is likely and that there have been instances of actual confusion.² Accordingly, we find a likelihood of confusion to exist.

Decision: The opposition is sustained and registration to applicant is refused.

² We note that the involved application is based on applicant's stated intention to use the mark. However, applicant in its brief discusses its goods as if they are in the marketplace. While it is unclear whether there have, in fact, been instances of actual confusion, applicant remains bound by its admission.