

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

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

Serial No.: 76/435630

Filed: 7/29/02

Published: 9/16/03

Mark: OURCAT'S CHOICE LITTER

Opposition No.: 91158622

Filed: November 28, 2003

TTAB

Box TTAB –NO FEE
Assistant Commissioner for Trademarks
2900 Crystal Drive
Arlington, Virginia 22202-3513



09-10-2004
U.S. Patent & TMO/TM Mail Rcpt Dt. #22

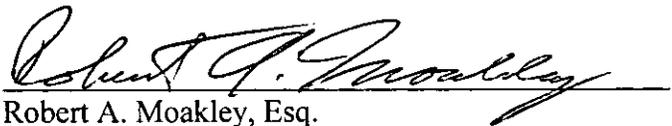
NOTICE OF RELIANCE

Notice is hereby given that Opposer in the above captioned action, General Pet Supply, Inc., offers into evidence the enclosed documents. These documents consist of true and correct copies of Opposer's First Request for Admissions, marked as Exhibit A; Affidavit of Service by Mail evidencing delivery of the First Request for Admissions to Applicant's attorney, marked as Exhibit B; the confirmation of delivery and receipt by Applicant's attorney of the First Request for Admissions, marked as Exhibit C; the Notice of Opposition stating the discovery schedule and deadlines for this Opposition, marked as Exhibit D; Affidavit of Attorney Robert A. Moakley, attorney for Opposer, stating that the Applicant has failed to answer the First Request for Admissions in the time provided by the Federal Rules of Civil Procedure and the rules of the Trademark Trial and Appeal Board, marked as Exhibit E.

Opposer will rely on the above documents as relevant to Applicant's failure to answer
Opposer's First Request for Admissions and all admissions contained therein.

Dated this 7 day of September, 2004.

Respectfully submitted,



Robert A. Moakley, Esq.
Attorney for Opposer

Enclosures

Our Ref.: 00181

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

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

General Pet Supply, Inc.,
Registrant-Opposer,
- v -
OurPet's Company,
Applicant.

Opposition No.: 91158622

Application No.: 76/435630

Mark: OURCAT'S CHOICE LITTER

Filing Date: July 29, 2002

EXHIBIT

"A"

REGISTRANT-OPPOSER'S FIRST REQUEST FOR ADMISSIONS

Registrant-Opposer, General Pet Supply, Inc., pursuant to Section 2.120 of the Rules of Practice in Trademark Cases and Rule 36 of the Federal Rules of Civil Procedure, hereby requests that Applicant, OurPet's Company, within thirty (30) days from the date of service, admit the truth of the following matters in writing.

DEFINITIONS AND INSTRUCTIONS

A. For purposes of these requests, unless otherwise indicated or unless the context otherwise requires:

1. The term "any" shall be construed to include the word "all" and "all" shall be construed to include the word "any" as necessary to bring within the scope of a request all responses which might otherwise be construed to be outside its scope.

2. The term "between" shall be construed to include the word "among" and "among" shall be construed to include the word "between" as necessary to bring within the scope of a request all responses which might otherwise be construed to be outside its scope.

3. The terms "you" or "your" or "OURCAT'S CHOICE LITTER" shall refer to OurPet's Company, and any affiliated corporations or other business entities under its control, any predecessors or successors in interest with respect to the "OURCAT'S CHOICE LITTER" application, any licensees or other entities that have or are intended to use the "OURCAT'S CHOICE LITTER" mark with the consent of OurPet's Company, and any of its directors, officers, employees, agents or representatives.

4. The term "OURCAT'S CHOICE LITTER" or "Application" shall refer to United States Patent and Trademark Office (USPTO) Serial Number 76/435630.

5. The term "Opposition" shall refer to Opposition Number 91158622

6. The term "document" shall mean the original and each non-identical copy (whether different from the original because of notes made on the copy or otherwise) or draft of each writing of every kind and description (together with all worksheets, supporting documents,

and other relevant material), whether inscribed by hand or mechanical, electronic, microfilm, photographic or other means (such as recording, film, tape, videotape, disc, diskette, CD-ROM disc, laser disc, or other means including data processing files and other computer readable records or programs and all other data compilations from which information can be obtained, transcribed and translated), and including, but not limited to, correspondence, letters, telegrams, telefaxes, telexes, E-Mail, messages, TWX's, telephone logs, diaries, teletype messages, memoranda, notes, reports, printouts, records of meetings, conferences or telephone or other conversations or communications, appointment calendars, surveys, studies, statistical analyses, technical analyses, test reports, search reports, tabulations, drawings, plans, blueprints, specifications, graphs, books, magazines, newspapers, publications, articles, booklets, pamphlets, circulars, bulletins, brochures, advertising copy, contract bids, contracts, contract addenda, amendments, changes and modifications.

7. The term "General Pet" shall refer to General Pet Supply, Inc., and, where appropriate in the context, its predecessors in interest, parents, subsidiaries and/or affiliated corporations.

B. The use of a verb in any tense shall be construed as the use of the verb in all other tenses, wherever necessary to bring within the scope of a request all responses which might otherwise be construed to be outside its scope.

C. A plural noun shall be construed as a singular noun, and a singular noun shall be construed as a plural noun, wherever necessary to bring within the scope of a request all responses which might otherwise be construed to be outside its scope.

D. Definitions provided herein apply to any grammatical variant of the term or phrase definition.

E. Unless otherwise indicated, the geographical scope of these requests are limited to the United States of America.

F. For any answer other than an unqualified admission, please identify all persons, whether a party to this opposition or a third party, and all documents that support the denial thereto.

REQUESTS FOR ADMISSION

1. Admit that General Pet Supply, Inc., 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.

2. Admit that OurPet's Company conducted a search or other investigation related to the availability or registerability of the mark "OURCAT'S CHOICE LITTER" prior to submitting the Application at issue in this Opposition.

3. Admit that OurPet's Company received or otherwise reviewed the search or investigation results identified in No. 1 above prior to submission of the Application at issue in this Opposition.
4. Admit that OurPet's Company received or otherwise had issued on its behalf a professional opinion by competent legal counsel regarding the availability of the "OURCAT'S CHOICE LITTER" mark prior to submission of the application at issue in this Opposition.
5. Admit that the search or investigation identified in No.1 above revealed the "OUR CAT'S" trademark Registration number 1,798,855 in International Class 31 for cat litter.
6. Admit that OurPet's Company filed Application number 76/435630 with knowledge of General Pet Supply's registration number 1,798,855.
7. Admit that the International Classification of Goods for the goods claimed in OurPet's Company Application number 76/435630 is International Class 31 for cat litter.
8. Admit that the International Classification of Goods for General Pet Supply, Inc., for the goods in Serial Number 1,798,855 is International Class 31 for cat litter.
9. Admit that the International Classification of Goods for Application number 76/435630 and Serial Number 1,798,855 are identical.
10. Admit that the goods sold or intended to be sold under or otherwise in relation to Application 76/435630 and the goods sold under or otherwise in relation to Serial Number 1,798,855 are identical.
11. Admit that OurPet's Company products under or otherwise related to the "OURCAT'S CHOICE LITTER" mark 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.
12. Admit that General Pet Supply products under or otherwise related to the "CAT'S CHOICE" mark 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.
13. Admit that General Pet Supply, Inc., and OurPet's Company products move in interstate commerce through identical channels of trade.
14. Admit that OurPet's Company products under or otherwise related to the "OURCAT'S CHOICE LITTER" mark have not expanded into any goods other than those indicated on the Application.

15. Admit that OurPet's Company goods sold under or otherwise related to the "OURCAT'S CHOICE LITTER" mark have not expanded into trade channels other than those described in No. 11 above.

16. Admit that consumers of OurPet's Company products sold under or otherwise in relation to the "OURCAT'S CHOICE LITTER" mark are impulse, and therefore unsophisticated, purchasers when purchasing the type of goods sold under or otherwise in relation to the "OURCATS CHOICE LITTER".

17. Admit that consumers of General Pet Supply goods sold under or otherwise in relation to the "CAT'S CHOICE" registered mark are unable to distinguish such goods from the goods sold under or otherwise in relation to "OURCAT'S CHOICE LITTER" mark contained in the Application.

18. Admit that consumers of General Pet Supply goods sold under or otherwise in relation to the "CAT'S CHOICE" mark likely will be confused into believing the goods sold under or otherwise in relation to the "OURCAT'S CHOICE LITTER" registration originate from the same company or producer.

19. Admit that consumers of General Pet Supply goods sold under or otherwise in relation to the "CAT'S CHOICE" mark could potentially be confused into believing the goods sold under or otherwise in relation to the "OURCAT'S CHOICE LITTER" registration originate from the same company or producer.

20. Admit that the USPTO Examining Attorney initially denied Application number 76/435630.

21. Admit that the USPTO Examining Attorney specifically cited Registration number 1,798,855 as a basis for denying Application number 76/435630.

22. Admit that the USPTO Examining Attorney's denial was based on the likelihood of confusion between Registration number 1,798,855 and Application number 76/435630.

23. Admit that the word "LITTER" is specifically disclaimed in Application number 76/435630.

24. Admit that after disclaiming the word "LITTER", the only difference between Application number 76/435630 and Serial number 1,798,855 is the inclusion of the word "OUR" combined with the word "CAT'S".

25. Admit that the disclaimer of the word "LITTER" and inclusion of the word "OUR" combined with "CAT'S" in Application No. 76/435630 results in the marks at issue in this Opposition differing only by the word "OUR".

26. Admit that a disclaimer has the effect of removing the disclaimed term from the appearance, sound, connotation and overall commercial impression of the mark sought to be registered.

27. Admit that a disclaimer has the effect of removing the disclaimed term from the mark for purposes of a likelihood of confusion analysis.

28. Admit that 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 number 76/435630 and Serial number 1,798,855.

29. Admit that there is no distinct difference in appearance, sound, connotation or overall commercial impression between the mark in Application number 76/435630 after the disclaimer, and the mark in Serial number 1,798,899.

30. Admit that there are less than five (5) registered trademarks containing any combination of the words "CAT'S" and "CHOICE".

31. Admit that General Pet Supply's registration of the mark contained in Registration number 1,798,855 predates OurPet's Company's use of the mark contained in Application number 76/435630 by at least three (3) years.

32. Admit that Registration number 1,798,855 is Uncontestable under the Lanaham Act.

33. Admit that General Pet Supply, Inc., and OurPet's Company have attended at least two of the same trade shows in the last eighteen (18) months.

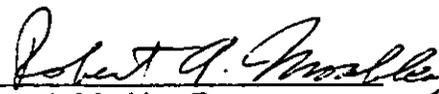
34. Admit that OurPet's Company has experienced events or incidents of actual confusion of the relevant consuming public between the mark "CAT'S CHOICE" and the mark "OURCAT'S CHOICE LITTER".

35. Admit that Application number 76/435630 was signed by an individual with the knowledge that another entity had the right to use a mark with such near resemblance to the mark contained in Application number 76/435630 as to be likely to cause confusion, mistake or to deceive.

36. Admit there is a likelihood of confusion between Registration number 1,798,855 and Application number 76/435630.

37. Admit that any ambiguities, doubts or questions as to the likelihood of confusion between an Application and a Registration are to be resolved in favor of the Registration.

Dated: June 11, 2004.

By: 
Robert A. Moakley, Esq.
BECK, CHAET & BAMBERGER, S.C.
Two Plaza East, Suite 1085
330 East Kilbourn Avenue
Milwaukee, WI 53202
Tel.: (414) 273-4200
Fax: (414) 273-7786

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

General Pet Supply, Inc.,

Opposer,

- v -

OurPet's Company,

Applicant.

Opposition No.: 91158622

Application No.: 76/435630

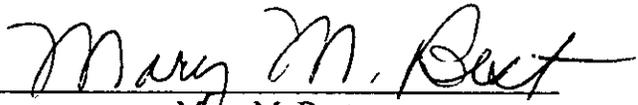
Mark: OURCAT'S CHOICE LITTER

Filing Date: July 29, 2002

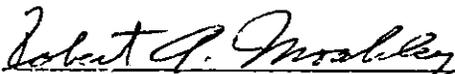
AFFIDAVIT OF SERVICE BY MAIL

Mary M. Best, being first duly sworn on oath, deposes and says that she mailed a true copy of the REGISTRANT-OPPOSER'S FIRST REQUEST FOR ADMISSIONS, OPPOSER'S FIRST SET OF INTERROGATORIES TO APPLICANT OURPET'S COMPANY and OPPOSER'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS TO APPLICANT in the above-entitled action to the person named and at the address stated hereinafter, by enclosing the same in an envelope via UPS-Overnight which bore the sender's return address of BECK, CHAET & BAMBERGER, S.C., Two Plaza East, Suite 1085, 330 East Kilbourn Avenue, Milwaukee, Wisconsin, 53202, and which she mailed on the 11th day of June, 2004.

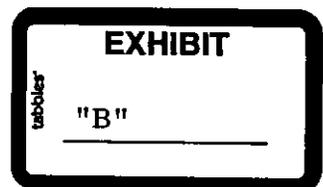
TO: John D. Gugliotta, P.E., Esq.
Law Office of John D. Gugliotta
137 South Main Street, #202
Akron, OH 44308-1416


Mary M. Best

Subscribed and sworn to before
me this 11 day of June, 2004.


Notary Public, State of Wisconsin
My Commission: Permanent

P.O. Address:
BECK, CHAET & BAMBERGER, S.C.
Two Plaza East, Suite 1085
330 East Kilbourn Avenue
Milwaukee, WI 53202
(414) 273-4200





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To see a detailed report for each package, please select the "Detail" link.

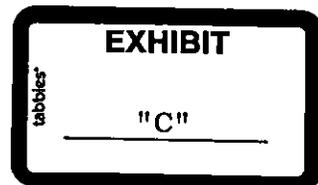
Tracking Number	Status	Delivery Information	
1. 1Z F50 56X 22 1002 261 1 Detail	Delivered	Delivered on:	Jun 14, 2004 9:39 A.M.
		Delivered to:	US
		Signed by:	J YOST
		Service Type:	NEXT DAY AIR

Tracking results provided by UPS: Jun 14, 2004 12:37 P.M. Eastern Time (USA)

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Track by Tracking Number

View Details

Status: Delivered
Delivered on: Jun 14, 2004 9:39 A.M.
Signed by: J YOST
Location: RECEIVER
Delivered to: US

Tracking Number: 1Z F50 56X 22 1002 261 1
Service Type: NEXT DAY AIR

Package Progress:

Date	Time	Location	Activity
Jun 14, 2004	9:39 A.M.	AKRON, OH, US	DELIVERY
Jun 13, 2004	7:52 P.M.	MIDDLEBURG HEIGHTS, OH, US	ARRIVAL SCAN
Jun 12, 2004	11:12 P.M.	ROCKFORD, IL, US	DEPARTURE SCAN
	12:05 A.M.	ROCKFORD, IL, US	ARRIVAL SCAN
Jun 11, 2004	10:10 P.M.	MILWAUKEE, WI, US	DEPARTURE SCAN
	8:59 P.M.	MILWAUKEE, WI, US	ORIGIN SCAN
	7:17 P.M.	OAK CREEK, WI, US	PICKUP SCAN

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UNITED STATES DEPARTMENT OF
COMMERCE
Patent and Trademark Office
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513

Mailed: November 28, 2003

Opposition No 91158622
Serial No. 76435630

JOHN D. GUGLIOTTA
LAW OFFICES OF JOHN D. GUGLIOTTA
137 SOUTH MAIN STREET SUITE 202
AKRON, OH 44308

General Pet Supply, Inc

v.

OurPet's Company

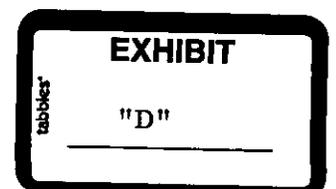
Robert A. Moakley
BECK, CHAET & BAMBERGER, S.C.
Two Plaza East, Suite 1085, 330 East Kilbourn Avenue
Milwaukee, WI 53202

Tracey Fleming, Legal Assistant.

A notice of opposition to the registration sought in the above-identified application has been filed. A copy of the notice is attached.

ANSWER IS DUE FORTY DAYS after the mailing date hereof.
(See Trademark Rule 2.196 for expiration date falling on Saturday, Sunday or a holiday).

Proceedings will be conducted in accordance with the Trademark Rules of Practice, set forth in Title 37, part 2, of the Code of Federal Regulations. The parties are reminded of the recent amendments to the Trademark Rules that affect the rules of practice before the TTAB. See Rules of Practice for Trademark-Related Filings Under the Madrid Protocol Implementation Act, 68 Fed. R. 55,748 (September 26, 2003) (effective November 2,



2003); Reorganization of Correspondence and Other Provisions, 68 Fed. Reg. 48,286 (August 13, 2003) (effective September 12, 2003). Notices concerning the rules changes, as well as the *Trademark Trial and Appeal Board Manual of Procedure* (TBMP), are available at www.uspto.gov.

The parties are particularly referred to Trademark Rule 2.126 pertaining to the form of submissions. Paper submissions, including but not limited to exhibits and depositions, not filed in accordance with Trademark Rule 2.126 may not be given consideration or entered into the case file.

Discovery and testimony periods are set as follows:

Discovery period to open:	December 18, 2003
Discovery period to close:	June 15, 2004
30-day testimony period for party in position of plaintiff to close:	September 13, 2004
30-day testimony period for party in position of defendant to close:	November 12, 2004
15-day rebuttal testimony period for plaintiff to close:	December 27, 2004

A party must serve on the adverse party a copy of the transcript of any testimony taken during the party's testimony period, together with copies of documentary exhibits, within 30 days after completion of the taking of such testimony. See Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

NOTE: The Board allows parties to utilize telephone conferences to discuss or resolve many interlocutory matters that arise in inter partes cases. See the *Official Gazette* notice titled "Permanent Expansion of Telephone Conferencing on Interlocutory Matters in Inter Partes Cases Before the Trademark Trial and Appeal Board," 1235 TMOG 68 (June 20, 2000). The notice is available at <http://www.uspto.gov>. Interlocutory matters which the

Board agrees to discuss or decide by phone conference may be decided adversely to any party which fails to participate.

If the parties to this proceeding are also parties to other Board proceedings involving related marks or, during the pendency of this proceeding, they become parties to such proceedings, they should notify the Board immediately, so that the Board can consider consolidation of proceedings.

New Developments at the Trademark Trial and Appeal Board

TTAB forms for electronic filing of extensions of time to oppose, notices of opposition, and inter partes filings are now available at <http://estta.uspto.gov>. Images of TTAB proceeding files can be viewed using TTABVue at <http://ttabvue.uspto.gov>.

**THE UNITED STATES PATENT AND TRADEMARK OFFICE
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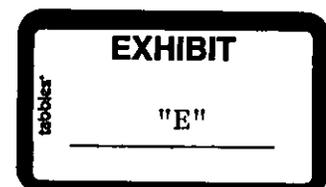
Opposition No.: 91158622

Filed: November 28, 2003

AFFIDAVIT OF ATTORNEY ROBERT A. MOAKLEY

I, Robert A. Moakley, being first duly sworn on oath, state as follows:

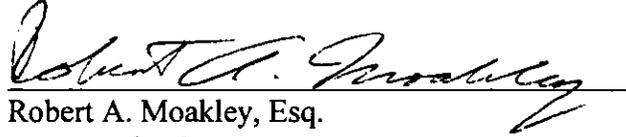
1. I am an attorney licensed to practice law in the State of Wisconsin and have been so licensed since 1999.
2. I am currently employed as an associate with the law firm of Beck, Chaet & Bamberger, S.C., in the City of Milwaukee, Wisconsin.
3. This firm represents General Pet Supply, Inc. ("General Pet").
4. I am primarily responsible for prosecuting Opposition No. 91158622 on behalf of General Pet and am directly aware of all matters contained in this Affidavit.
5. On June 11, 2004, I served upon Attorney John Gugliotta, who represents the Applicant in the above captioned Opposition, a First Set of Requests for Admissions (the "Requests").
6. The Requests were received by Attorney Gugliotta on June 14, 2004, prior to the expiration of the discovery deadline as dictated by the Notice of Opposition dated November 28, 2003. Attached hereto as Exhibit A is a true and correct copy of the UPS delivery confirmation showing Attorney Gugliotta received the Requests.
7. As of the date indicated below, Applicant has failed to answer the Requests.
8. My attempts to contact Attorney Gugliotta have gone unanswered.



9. Applicant's opportunity to answer the Requests has expired under the rules of the Trademark Trial and Appeal Board and the Federal Rules of Civil Procedure.

Dated this 9 day of September, 2004.

Respectfully submitted,



Robert A. Moakley, Esq.
Attorney for Opposer

Subscribed and sworn to before
me this 9th day of September, 2004.


Notary Public, State of Wisconsin
My Commission Expires: 2-4-07