

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

: :
General Pet Supply, Inc. : :
7711 N. 81st Street : :
Milwaukee, WI 53224-9531 : :
Registration No. 1,798,855 : :
: :
Opposer, : Opposition No. 91158622
: :
v. : :
: :
OurPet's Company : :
1300 East Street : :
Fairport Harbor, OH 44077-5573 : :
: :
Applicant. : :

PLAINTIFF'S MAIN BRIEF

I. Introduction

Pursuant to a Notice of Opposition filed November 18, 2003, Plaintiff General Pet Supply, Inc., a Wisconsin Corporation ("Opposer"), opposed the Trademark Examining Attorney's decision to allow registration of OurPet's Company, Inc. ("Applicant"), application for the mark "OurCat's Choice Litter" for cat litter in International Class 31. Opposer is the owner of incontestable Registration Number 1,798,855 for the mark "Cat's Choice" for cat litter in International Class 31. Opposer bases its opposition to

Applicant's registration on the grounds that the mark will likely cause confusion, mistake or deceive the relevant consuming public with respect Opposer's incontestable Registration and that the application should, therefore be rejected.

II. Relevant Facts

On August 12, 1991, Opposer filed application Serial Number 74193829 for the mark "Cat's Choice" in International Class 31 for cat litter. The application published for opposition on May 12, 1992 with a Notice of Allowance issued on March 23, 1993. The Patent and Trademark Office (PTO) accepted a Statement of Use on August 6, 1993 and the mark subsequently achieved registration on the Principal Register on October 12, 1993. Section 8 and 15 Affidavits were filed on November 11, 1998 and both were accepted and acknowledged on June 14, 1999. A combined Section 8 Affidavit of Continued Use and Section 9 Renewal Application was filed on May 27, 2003. Each of those Affidavits were accepted on August 15, 2003. Opposer's Registration is incontestable under Section 15 of the Lanham Act and has been since before Applicant filed its Intent to Use application. Further, Opposer is unaware of any other use of, or federal trademark registration for a mark that is confusingly similar to the "Cat's Choice" registration for use on cat litter other than Applicant's "OurCat's Choice Litter" mark at issue in this proceeding.

Applicant filed and Intent to Use application for registration of the mark "OurCat's Choice Litter" for cat litter in International Class 31, Serial Number 76435630 July 29, 2002. The assigned Examining Attorney initially refused registration in a Non-Final Action dated February 3, 2003 on the grounds that Applicant's mark so closely resembled Opposer's as to be likely to cause confusion, mistake or to deceive the relevant

consuming public. Applicant responded to the Examining Attorney's Non-Final Action on June 9, 2003 and the mark was Published for Opposition on September 16, 2003.

III. Opposer's Arguments

A. There is likelihood of confusion between Opposer's Registration and Applicant's Mark

Registration of Applicant's mark for "OurCat's Choice Litter" for cat litter will likely cause confusion, mistake or deceive the relevant consuming public. Under Section 2 of the Lanaham Act, 15 U.S.C.A §1052, no trademark by which the goods of an applicant may be distinguished from the goods of others shall be refused registration on the Principal Register on account of its nature unless it consists of or comprises a mark which so resembles a mark previously registered with the PTO " . . . as to be likely, when applied to the goods of the applicant, to cause confusion, or to cause mistake or to deceive . . ." 15 U.S.C.A §1052. Likelihood of confusion is determined on a case-by-case basis by applying the factors identified in *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Only those factors shown to be material or relevant in each individual case are considered in determining a likelihood of confusion. *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 U.S.P.Q.2nd 1783 (Fed. Cir. 1990). Time and again, the Board has held that where, as here, the goods involved are identical, "the sole question to be determined" for establishing likelihood of confusion "is whether the marks . . . are sufficiently similar so that their use on identical goods would be likely to cause confusion as to source." *Kabushiki Kaisha Hattori Tokeiten v. Scuotto*, 228 U.S.P.Q. 461, 462 (T.T.A.B. 1985). It is well settled that if the issue of likelihood of confusion is in doubt, the question will be resolved in favor of the senior user, in this case the Opposer. 3 *McCarthy on Trademarks and Unfair*

Competition §23:64 (1999); *J&J Snack Foods Corp., v. McDonald's Corp.* 932 F.2d 1460, 18 U.S.P.Q.2nd 1889 (Fed. Cir. 1991).

In light of these two primary *DuPont* factors, Applicant's mark "OurCat's Choice Litter" for cat litter is strikingly similar with respect to sound, appearance, connotation and commercial impression to Opposer's registered mark "Cat's Choice" for cat litter. The Board should find a likelihood of confusion on this basis alone, and deny Applicant's registration. Short of finding such confusion on the first *DuPont* factor, an analysis of the second *DuPont* factor, similarity of the goods-cat litter-of both Opposer and Applicant should also result the Board finding a likelihood of confusion and denying Applicant's registration. Finally, because Applicant admits its mark is likely to cause confusion, mistake or deceive the relevant consuming public and that the goods are identical, the Board should deny Applicant's Registration.

B. Similarity of the Marks

Likelihood of confusion is not based on distinguishing two 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). Additionally, "in order for a likelihood of confusion to exist, two marks need not be similar in" sound, appearance, connotation and commercial impression. In appropriate cases, the Board has held that a mark will be refused registration "if the similarity in either form, spelling or sound alone is likely to cause confusion." *E.I. DuPont De Nemours & Co., v. Sunlyra Int'l, Inc.*, 35 U.S.P.Q.2nd 1787 (T.T.A.B. 1995). 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).

By viewing these marks generally rather than specifically, Applicant's mark is nearly, if not completely, identical to Opposer's incontestable Registration. Applicant combines the words "Our" with "Cat's" to form one word then adds the disclaimed word "Litter" to the core of Opposer's mark "Cat's Choice." The addition of the disclaimed "Litter" is immaterial for determining likelihood of confusion and results in Applicant's mark consisting simply of the words "OurCat's Choice" for this likelihood of confusion analysis. Therefore, Applicant's mark differs from Opposer's incontestable registration solely by the word "Our." Further, these minor word play differences do not alter the overall commercial impression of Applicant's mark. The average purchaser is most likely to recollect the general core of the marks, "Cat's Choice," the Opposer's mark, rather than the more lengthy combination contained in Applicant's mark.

C. Similarity of the Goods

If the marks of the respective parties are identical or highly similar, the commercial relationship between the goods of those parties must carefully be considered 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 in the instance of easily distinguished goods.

Opposer and Applicant both use their marks on the identical goods, cat litter. Regardless of whatever difference may exist between various types of cat litter (e.g. clumping or non-clumping, clay or non-clay based, etc.), the relevant consuming public is unlikely to make such distinctions at the point of purchase to sufficiently distinguish Opposer's cat litter from Applicant's cat litter. This is especially true in the instance of Opposer's and Applicant's cat litters potentially sharing shelf space.

D. Applicant Admits its Mark is Likely to Cause Confusion with Applicant's Registration

Applicant admitted its mark is likely to cause confusion with Opposer's Registration and that the goods involved are identical. During the discovery period dictated by the Board, Applicant was properly served with Opposer's Request for Admissions. Applicant failed to answer any of the submitted Requests for Admissions. *Opposer's Notice of Reliance dated September 10, 2004; Opposer's First Request for Admissions dated July 29, 2004 attached hereto as Exhibit "A"*. Under the Federal Rules of Civil Procedure as adopted by the Board, failure to answer properly submitted Requests for Admissions results in the Admissions being deemed admitted. *Fed. R. Civ. P. 36(a)*. Applicant's failure to answer Opposer's Requests results in those Requests being answered in the affirmative. Therefore, notwithstanding similarity of Opposer's

and Applicant's marks and identical nature of the associated goods, Applicant's registration should be denied because Applicant admitted its goods and Opposer's goods are identical and its mark is so similar in appearance, sound, connotation and commercial impression as to be likely to cause confusion with Opposer's Registration.

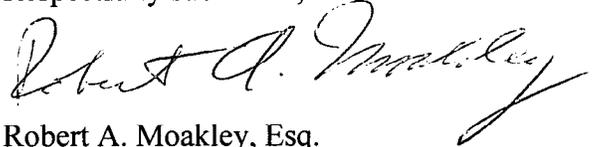
Applicant was asked to admit that there was a likelihood of confusion between the mark "OurCat's Choice Litter" and "Cat's Choice." *Opposer's First Request for Admissions, No. 36.* Applicant was further requested to admit that the goods sold or otherwise represented by its mark are identical to the goods contained in the Opposer's Registration. *Opposer's First Request for Admissions, No. 10.* Under the Federal Rules of Civil Procedure, Rule 36(a), the subject matter of a Request for Admission is admitted unless the party "to whom the request is directed" answers or objects to such request within thirty (30) days of service of the request. Pursuant to a Opposer's Notice of Reliance dated September 10, 2004, Applicant failed to serve either answers or objections to Opposer's Request for Admissions. *Affidavit of Attorney Robert A. Moakley dated September 10, 2004, Exhibit "A"*. Applicant has, therefore, admitted its mark is likely to cause confusion with Opposer's Registration. The application for "OurCat's Choice Litter" should, therefore, be denied registration.

IV. Conclusion

Opposer's Notice of Opposition should be granted and Applicant's attempt to register the mark "OurCat's Choice Litter" should be denied. Opposer has shown that the marks in question are similar, if not identical, as to sound, appearance, connotation and commercial impression so as to be likely to cause confusion, mistake or to deceive the relevant consuming public with respect to Opposer's Incontestable Registration. When

coupled to the fact that Opposer's and Applicant's goods are identical, not just similar, and that Applicant has admitted its mark is likely to cause confusion, Applicant's mark clearly fails to achieve the statutory requirements for registration under the Lanham Act and the Opposition at issue in this case should be granted.

Respectfully submitted,



Robert A. Moakley, Esq.

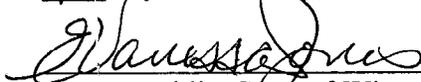
Enclosures
Our Ref.: 00181

Mary M. Best, being first duly sworn on oath, deposes and says that she mailed via Certified Mail, Return Receipt Requested an original and one (1) copy of Plaintiff's Main Brief 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 ~~4th~~ day of February, 2005.


Mary M. Best

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

Subscribed and sworn to before me this
~~4th~~ day of February, 2005


Notary Public, State of Wisconsin
My commission is PERMANENT

CASES SITED

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Chemetron Corp. v. Morris Coupling & Clamp Co., 203 USPQ 537 (TTAB 1979)4

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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

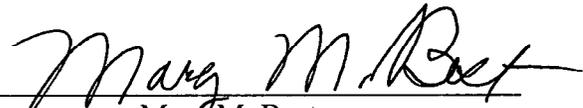
Mark: OURCAT'S CHOICE LITTER

Filing Date: July 29, 2002

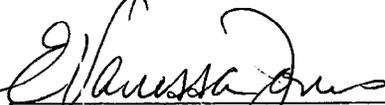
AFFIDAVIT OF SERVICE BY MAIL

Mary M. Best, being first duly sworn on oath, deposes and says that she mailed a true copy of the PLAINTIFF'S MAIN BRIEF in the above-entitled action to the person named and at the address stated hereinafter, by enclosing the same in an envelope via Certified Mail-Return Receipt Requested 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 7th day of February, 2005.

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 7th day of February, 2005.


Notary Public, State of Wisconsin
My Commission: 15 PERMANENT

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

**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

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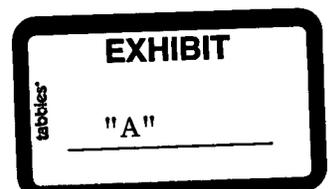
Opposition No.: 91158622

Filed: November 28, 2003

AFFIDAVIT OF ATTORNEY ROBERT A. MOAKLEY

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

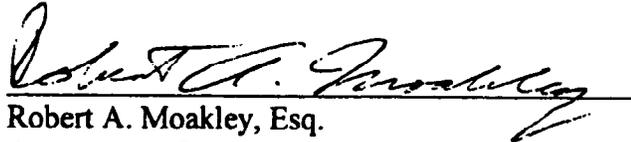
1. I am an attorney licensed to practice law in the State of Wisconsin and have been so licensed since 1999.
2. I am currently employed as an associate with the law firm of Beck, Chaet & Bamberger, S.C., in the City of Milwaukee, Wisconsin.
3. This firm represents General Pet Supply, Inc. ("General Pet").
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.

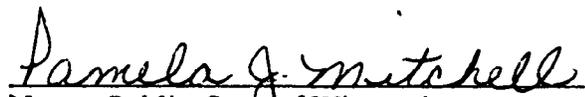
Dated this 9 day of September, 2004.

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



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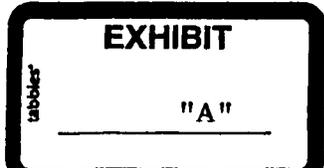
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		Signed by:	J YOST
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Status: Delivered
Delivered on: Jun 14, 2004 9:39 A.M.
Signed by: J YOST
Location: RECEIVER
Delivered to: US

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Service Type: NEXT DAY AIR

Package Progress:

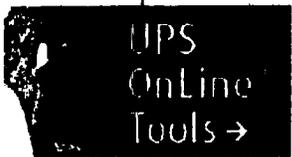
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Jun 12, 2004	11:12 P.M.	ROCKFORD, IL, US	DEPARTURE SCAN
	12:05 A.M.	ROCKFORD, IL, US	ARRIVAL SCAN
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**THE UNITED STATES PATENT AND TRADEMARK OFFICE
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Applicant: 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

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

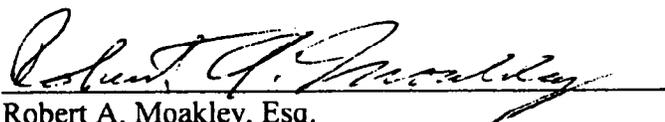
NOTICE OF RELIANCE

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
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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.

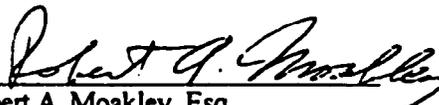
34. Admit that OurPet's Company has experienced events or incidents of actual confusion of the relevant consuming public between the mark "CAT'S CHOICE" and the mark "OURCAT'S CHOICE LITTER".

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

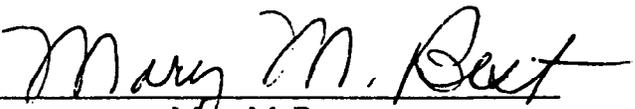
Mark: OURCAT'S CHOICE LITTER

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

EXHIBIT

"B"



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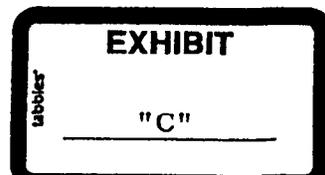
Tracking Number	Status	Delivery Information	
1. 1Z F50 56X 22 1002 261 1 Detail	Delivered	Delivered on:	Jun 14, 2004 9:39 A.M.
		Delivered to:	US
		Signed by:	J YOST
		Service Type:	NEXT DAY AIR

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

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- Request Quantum View Notify
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Log-In User ID:

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Register

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,

EXHIBIT

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
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

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.

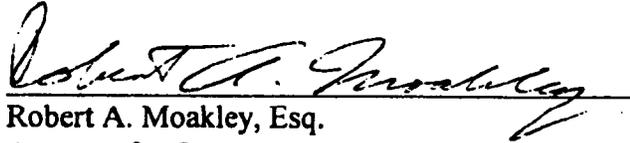
EXHIBIT

"E"

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.

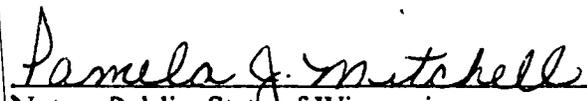
Dated this 7 day of September, 2004.

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



BECK, CHAET & BAMBERGER, S.C.

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

414.273.4200
Fax 414.273.7786

February 4, 2005

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

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

Re: *Opposition No. 91158622*

Dear Sir/Madam:

We have attached hereto the following:

1. Plaintiff's Main Brief and supporting documentation.
2. Affidavit of Service by Mail.
3. Return postcard to acknowledge receipt.

Very truly yours,

BECK, CHAET & BAMBERGER, S.C.

Robert A. Moakley, Esq.

RAM:mmb
Enclosures

cc: John D. Gugliotta, Esq. (w/encl. via Certified Mail-Return Receipt Requested)
Robert Merar (w/o encl.)
Michael S. Polsky, Esq. (w/o encl.)

File No. 00181



02-08-2005

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2/4/05/mmb

GVGEN-PETPTO\Tr\Trial-Appeal-Pls Main Brief 05-204