

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

Mailed: January 30, 2017

Opposition No. 91201830

The Corps Group

v.

Afterburner, Inc.

Geoffrey M. McNutt, Interlocutory Attorney:

On December 13, 2016, the United States Department of the Air Force filed a motion for leave to file an amicus brief together with the proposed brief. *See* 25 TTABVUE. For the reasons set forth below, the motion is **denied**.

1. Background

Applicant, Afterburner, Inc., has applied to register the mark shown below comprising a three-dimensional depiction of an entire pilot flight suit as worn by Applicant's employees and contractors in the course of rendering Applicant's services.¹

¹ The application contains the following description of the mark: "Color is not claimed as a feature of the mark. The mark consists of a three-dimensional depiction of an entire pilot flight suit as worn by applicant's employees and contractors in rendering applicant's services. The broken lines in the drawing are not part of the mark but are merely intended to show the position of the mark."



In the application, Applicant's services are identified as follows:

Business management consultancy services; executive search and placement services; personnel placement and recruitment;

Providing seminars in motivational and management training; educational and entertainment services, namely, providing keynote motivational and educational speakers and providing personal and group coaching and learning forums in the field of leadership development;

in International Classes 35 and 41, respectively.²

Opposer, The Corps Group, has opposed registration of Applicant's mark on the grounds that the mark is not capable of distinguishing Applicant's services and has not acquired distinctiveness. *See* 1 TTABVue 4–5.

2. The Air Force's Motion

The Air Force states that the purpose of its proposed amicus brief is “to advise the Board of the legal framework restricting the unauthorized wear of a military uniform for commercial purposes, which may be relevant to activities alleged to be covered by the mark-in-dispute [in the present opposition].” *See* 25 TTABVue 2. Specifically, the Air Force states that its proposed brief is intended to “provide expert insight” into the laws and regulations that govern the wear of military uniforms in order to

² Application Serial No. 85094889, filed on July 28, 2010, based on use in commerce under Trademark Act Section 1(a), 15 U.S.C. § 1051(a), and a claim of acquired distinctiveness in the mark as a whole.

“invite[] the Board to investigate” whether Applicant’s mark or activities conflict with the federal regulations restricting the unauthorized wear of military uniforms for commercial purposes. *See* 25 TTABVUE 3.

3. Analysis and Determination

The Board, in its discretion, may grant a non-party leave to submit an amicus brief. *See Harjo v. Pro Football, Inc.*, 45 USPQ2d 1789, 1791 (TTAB 1998) (citing *Midwest Plastic Fabricators Inc. v. Underwriters Labs. Inc.*, 5 USPQ2d 1067 (TTAB 1987)). In determining whether to grant leave, the Board considers whether the proposed brief will aid the Board in resolving issues of law, whether the moving party is effectively seeking a role in the proceeding beyond arguing questions of law, and whether the moving party is asserting prejudicial and partisan arguments of fact. *See Harjo*, 45 USPQ2d at 1791. An amicus brief may not be used as a substitute for a timely notice of opposition filed with the Board. TBMP § 538 (2017). Nor may it substitute for a letter of protest filed with the Deputy Commissioner for Trademark Examination Policy. *See* TMEP § 1715 (January 2017).

Through the proposed amicus brief, the Air Force seeks to inject into this opposition an issue that has not been raised by Opposer as a ground for opposing registration of Applicant’s mark, namely, whether Applicant’s mark conflicts with the federal regulations restricting the unauthorized wearing of military uniforms. As discussed above, Opposer has pleaded as grounds for the opposition that Applicant’s mark is not capable of distinguishing Applicant’s services and has not acquired distinctiveness. The proposed amicus brief will not aid the Board in resolving any

issue of law germane to Opposer's claims. Further, the proposed amicus brief would be prejudicial to Applicant insofar as the Air Force is attempting to put before the Board questions of the lawfulness of Applicant's mark and activities that are beyond the scope of the opposition. Ultimately, the Air Force seeks to litigate its own interests and potential claims by means of its proposed amicus brief, rather than by means of a timely filed notice of opposition or petition for cancellation.³

For these reasons, the Air Force's motion for leave to file an amicus brief is **denied**, and the proffered amicus brief will be given no consideration. Discovery and trial dates remain as set in the Board's July 16, 2016, order.

A copy of this order has been issued to the parties' respective counsel of record, and also mailed to counsel for the Air Force at the address below.

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³ Specifically, to the extent that the Air Force attempts to object that registration of Applicant's mark would be based on unlawful use of the mark in commerce and therefore barred from registration, that claim was available to it through timely filing of an opposition and, should registration issue, remains available to it through timely filing of a petition to cancel. Either procedure assures that the claim may be fully and fairly litigated before the Board. Additionally, during the pendency of the subject application, the Air Force could have alerted the Office to asserted unlawful use of the mark by filing a letter of protest.