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

Proceeding	91201830
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

THE CORPS GROUP,

Opposer,

v.

AFTERBURNER, INC.,

Applicant.

Opposition No. 91201830

Application No. 85094889



Mark:

**APPLICANT’S ANSWER TO OPPOSER’S AMENDED NOTICE OF OPPOSITION**

NOW COMES Afterburner, Inc. (“Afterburner”), the Applicant named in U.S. Trademark Application Serial No. 85/094,889 (“Afterburner’s Application”) for its pilot flight suit mark (“Afterburner’s Flight Suit” or the “Flight Suit Mark”), filed on July 28, 2010 and published for opposition on August 30, 2011, and, in accordance with Rules 2.106 and 2.116 of the Trademark Rules of Practice and by and through its undersigned counsel, files Afterburner’s Answer and Affirmative Defenses to the Amended Notice of Opposition filed by The Corps Group (the “Opposer”) on August 30, 2017 (the “Opposition”).

**APPLICANT’S ANSWER**

In response to the introductory unnumbered paragraphs of the Opposition, Afterburner admits that Afterburner is a Georgia company with a principal place of business located at 55 Ivan Allen Jr. Blvd, Suite 525, Atlanta, Georgia 30308; that Afterburner is the owner of U.S. Trademark Application Serial No. 85/094,889; that the Opposer is the Corps Group; and, upon

information and belief, the Corps Group's principal place of business is located at 258 N. West End Blvd, #318, Quakertown, Pennsylvania 18951. Afterburner denies all other allegations set forth in the introductory unnumbered paragraphs.

Afterburner responds to the separately-numbered paragraphs of the Opposition as follows:

1. Afterburner has applied for a registration of a mark consisting of a three-dimensional depiction of an entire pilot flight suit (the "alleged mark") as worn by Afterburner's employees and contractors in rendering Applicant's services. The alleged mark does not contain any distinctive designs or patterns on the flight suit. Rather, the alleged mark is simply a generic flight suit.

Answer: Afterburner admits that it has applied for registration of a mark consisting of a three-dimensional depiction of a pilot flight suit, and that Afterburner's employees and contractors wear said flight suit in rendering Afterburner's services. Afterburner denies all other allegations contained in Paragraph 1 of the Opposition.

2. Afterburner defines its claimed use of the mark as being in connection with the provision of "business management consultancy services, executive search and placement services, [and] personnel placement and recruitment," as well as "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."

Answer: Afterburner admits that it has applied for registration of its Flight Suit Mark in Class 35 for "[b]usiness management consultancy services; executive search and placement services; personnel placement and recruitment," and in Class 41 for "[p]roviding 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.” Afterburner denies all other allegations contained in Paragraph 2 of the Opposition.

3. In the application, Afterburner alleges that it first used the alleged mark in commerce on January 31, 1996.

Answer: Afterburner admits that it stated in Afterburner’s Application that it first used the Flight Suit Mark as early as January 31, 1996. Afterburner denies all other allegations contained in Paragraph 3 of the Opposition.

4. The application is based on a claim that the alleged mark has acquired distinctiveness for use in association with Afterburner’s services in commerce under Section 2(f) of the Lanham Act, 15 U.S.C. §1052(f).

Answer: Afterburner admits that the Examining Attorney that reviewed Afterburner’s Application found that the Flight Suit Mark has acquired distinctiveness. Afterburner denies all other allegations in Paragraph 4 of the Opposition.

5. Like Afterburner, The Corps Group is in the business of “corporate team building” and is comprised of former U.S. military fighter pilots who draw on their military training and experience to perform at speaking engagements and conduct training for business clients. The Corps Group describes on its website that “through keynote addresses, corporate team building events and executive leadership training, [it] can help your business develop a high performing team culture that generates and maintains superior, measurable results.”

Answer: Afterburner admits that The Corps Group is “like Afterburner.” Afterburner further admits that, upon information and belief, The Corps Group is in the business of

“corporate team building” and is comprised of former U.S. military fighter pilots who draw on their military training and experience to perform at speaking engagements and conduct training for business clients. Afterburner is without sufficient knowledge or information to form a belief as to the truth of the other allegations set forth in Paragraph 5. Therefore, Afterburner denies all other allegations in Paragraph 5 of the Opposition.

6. The Corps Group has used flight suits in the course of advertising and making corporate team building presentations for an extended period of time. When making presentations, the individual employees of the Corps Group display logos, titles and headings making it clear that they are with The Corps Group. The Corps Group employees make this point clear whether they are wearing a flight suit or business attire.

Answer: Afterburner admits only that The Corps Group has been using flight suits in a manner similar to Afterburner’s use of flight suits, and have thus been infringing upon Afterburner’s Flight Suit Mark. Afterburner is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth in Paragraph 6. Therefore, Afterburner denies all allegations in Paragraph 6 of the Opposition.

7. The Corps Group is not unique in using flight suits to make presentations to business clients. Various entities, including numerous famous military heroes, have been doing so for decades. The following is a non-exclusive list of individuals and entities who have implemented the same basic idea: Mach 2 Consulting, Bright Consulting Group, Mission Excellence, Check Six, Fighter Pilots USA, Top Gun Teambuilding, Target Leadership, Christian Fighter Pilots, Brian Shul Presentations, Rob “Waldo” Waldman, Ed Rush, John Foley, Vernice Armour, Eileen Collins, Jon McBride, Jeff Espenship, Dan Clark, Bob Shaw, Pete Ross, Mike Heavey, Bill Simmons, Justin Hughes, Martin Richard, Rick White, and Scott O’Grady.

Screenshots of some of the web sites for the individuals and entities in the business are attached hereto as Exhibit A.

Answer: Afterburner is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth in Paragraph 7. Therefore, Afterburner denies the allegations in Paragraph 7.

8. In fact, the principal of Mach 2 Consulting – Anthony “AB” Bourke – is a former partner of Afterburner. Espenship, Waldman, White and the founders of Check Six were also formerly affiliated with Afterburner.

Answer: Afterburner admits that Anthony Bourke, Jeff Espenship, Rob Waldman, and the founders of Check Six were, like the Opposer, formerly affiliated with Afterburner. Afterburner is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations set forth in Paragraph 8. Therefore, Afterburner denies the remaining allegations in Paragraph 8.

9. Practically all of the other entities in the fighter pilot team building business seminar arena utilize flight suits in advertising their services and/or making presentations in which they reference their histories as fighter pilots and use call-signs and military jargon to lead team building seminars for business clients.

Answer: Afterburner is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth in Paragraph 9. Therefore, Afterburner denies the allegations in Paragraph 9.

10. As such, the alleged mark is not distinctive in any way. Rather, it represents the use of a common, well-known uniform by a fraternity of fighter pilots working for themselves and numerous entities.

Answer: Afterburner denies all allegations set forth in Paragraph 10.

11. The other entities listed above have been using flight suit motifs in advertising and making team building seminars for years. Additionally, one or more other entities have been making such presentation in geographic areas that Afterburner has not penetrated.

Answer: Afterburner is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth in Paragraph 11. Therefore, Afterburner denies the allegations in Paragraph 11.

12. The Corps Group is likely to be damaged by the registration of the alleged mark in that the prima facie effect of such registration would impair The Corps Group's right to have its key employees – all of whom are former fighter pilots – make presentations in flight suits. Likewise, numerous other veterans – a number of whom attained a significant degree of notoriety by virtue of their service – would face the prospect of similar damage if the alleged mark were registered.

Answer: Afterburner denies that the Opposer or any other entity will be damaged by registration of Afterburner's Flight Suit Mark. Afterburner is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations set forth in Paragraph 12. Therefore, Afterburner denies the allegations in Paragraph 12.

13. In fact, if the alleged mark is registered, then the Corps Group is even faced with the prospect of its employees and contractors not being able to appear in pictures on the company's web site wearing the flight suits that they wore when they served in the armed forces. The alleged mark is so generic and broad that it would arguably prevent even that basic form of commercial expression on the part of the Corps Group and many other veterans.

Answer: Afterburner denies all allegations in Paragraph 13.

14. Afterburner filed a complaint in the Superior Court of Forsyth County, Georgia in October 2009 alleging, among other claims, that The Corps Group and its employees infringed its trade dress based in part on wearing military flight suits while they made presentations that Afterburner claimed was likely to cause confusion with Afterburner's military flight suit, which is the subject of Application Serial No. 85-094,889.

Answer: Afterburner admits the allegations in Paragraph 14.

15. The Forsyth County Superior Court held a seven day jury trial in April 2014. After Afterburner finished presenting its case-in-chief, The Corps Group and the other defendants moved for a directed verdict with respect to the claim for infringement of Afterburner's flight suit design on the basis that the design was generic and did not have secondary meaning. Initially, the court denied the motion for directed verdict.

Answer: Afterburner admits that a jury trial was held in Forsyth County Superior Court in April 2014, that Opposer moved for a directed verdict, and that the court denied the motion for directed verdict. Afterburner denies the remaining allegations in Paragraph 15.

16. At the close of all evidence, The Corp Group and the other defendants renewed their motion for directed verdict on the claim for infringement of Afterburner's flight suit design. The Corps Group and the other defendants argued that Afterburner's alleged flight suit service mark was generic and unprotectable, citing evidence of third parties who wore flight suits when making presentations and the lack of evidence that anyone identified Afterburner as the source of a "generic" unmarked flight suit.

Answer: Afterburner admits that Opposer renewed its motion for directed verdict. Afterburner denies the remaining allegations in Paragraph 16.



17. The court granted the motion for directed verdict, holding that the purported service mark was “a generic flight suit” and “not a service mark.” Afterburner did not move for reconsideration and did not appeal the judge’s ruling.

Answer: Afterburner admits that the court partially granted Opposer’s renewed motion for directed verdict and that the judge found that Afterburner’s Flight Suit Mark “is not a service mark.” Afterburner denies the remaining allegations in Paragraph 17.

18. As a matter of law, the alleged mark is not entitled to protection as a matter of law because it is not capable of distinguishing Afterburner’s services.

Answer: Afterburner denies all allegations set forth in Paragraph 18.

19. The Corps Group and numerous other entities use motifs similar to that of the alleged mark and have done so for years. There is nothing unique or distinctive about the basic use of a non-descript flight suit in advertising and making a presentation to a business client. The concept should not be exclusively appropriated by any company.

Answer: Afterburner denies all allegations set forth in Paragraph 19.

20. As a matter of law, the alleged mark is not inherently distinctive and therefore is not registrable in the absence of proof of acquired distinctiveness.

Answer: Afterburner denies all allegations set forth in Paragraph 20.

21. Afterburner does not and indeed cannot submit evidence in support of its application that the alleged mark - the simple use of an unmarked flight suit in corporate team building presentations – has acquired distinctiveness as a trademark. Specifically, Afterburner cannot meet its substantial burden of showing that the use of unmarked flight suits in corporate team building presentations has acquired distinctiveness as a symbol of Afterburner’s services in commerce.

Answer: Afterburner denies all allegations set forth in Paragraph 21.

22. Afterburner is not the sole and exclusive user of the alleged mark for use in association with corporate team building presentations. The alleged mark does not function to identify Afterburner's services and distinguish them from identical, similar, or related services offered by The Corps Group or numerous other entities in the business of making corporate team building presentations.

Answer: Afterburner denies all allegations set forth in Paragraph 22.

23. Afterburner is not entitled to register the alleged mark because the alleged mark is not distinctive. Therefore, Afterburner is not entitled to exclusive use of the alleged mark in commerce.

Answer: Afterburner denies all allegations set forth in Paragraph 23.

24. The Corps Group denies that Afterburner's alleged mark has acquired secondary meaning. However, to the extent that it has done so, it acquired secondary meaning after numerous other entities had started advertising and making corporate team building presentations using flight suits.

Answer: Afterburner denies all allegations set forth in Paragraph 24.

25. Many other entities have been advertising and making corporate team-building presentations using flight suits for years.

Answer: Afterburner is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth in Paragraph 25. Therefore, Afterburner denies the remaining allegations in Paragraph 25.

26. The Corps Group denies that Afterburner's alleged mark has acquired secondary meaning elsewhere. However, to the extent that it has done so, it has not acquired secondary meaning throughout the United States.

Answer: Afterburner denies all allegations set forth in Paragraph 26.

27. One or more entities have been using advertising and making corporate team-building presentations using flight suits in geographic areas where Afterburner has a limited presence and therefor has not acquired secondary meaning.

Answer: Afterburner denies all allegations set forth in Paragraph 27.

28. The identical issue of whether the purported mark that is the subject of Application Serial No. 85-094,889 is protectable as a trademark was involved in the civil action in Forsyth County Superior Court.

Answer: Afterburner denies all allegations set forth in Paragraph 28.

29. The identical issue of whether the purported mark that is the subject of Application Serial No. 85-094,889 is protectable as a trademark was actually litigated in the civil action in Forsyth County Superior Court and the court determined that the purported mark was not protectable as a trademark.

Answer: Afterburner denies all allegations set forth in Paragraph 29.

30. The determination that the purported mark that is the subject of Application Serial No. 85-094,889 is not protectable as a trademark was necessary to the resulting judgment.

Answer: Afterburner denies all allegations set forth in Paragraph 30.

31. Afterburner had a full and fair opportunity to litigate the issue in the civil action in Forsyth County Superior Court.

Answer: Afterburner denies all allegations set forth in Paragraph 31.

32. As a result, Afterburner is estopped from arguing that the purported mark that is the subject of Application Serial No. 85-094,889 is protectable as a trademark.

Answer: Afterburner denies all allegations in Paragraph 32.

### **APPLICANT'S AFFIRMATIVE DEFENSES**

Afterburner also submits the following defenses:

33. Opposer fails to state a claim upon which relief can be granted.

34. Opposer is unable to meet any of the elements of issue preclusion because it has not shown that the issue decided in the civil action in Forsyth County Superior Court is identical to the issues in this proceeding.

35. Afterburner's Flight Suit Mark is not generic but is an arbitrary mark that is inherently distinctive.

36. Afterburner's Flight Suit Mark is not a common basic shape or design when viewed in the context of the business management consulting or seminar industry, is unique and unusual in the field in which it is used, and is not a mere refinement of a commonly adopted and well-known form of ornamentation for a particular class of goods and services viewed by the public as a dress or ornamentation for the goods and services, and is thus inherently distinctive.

37. Afterburner has engaged in extended and extensive commercial activities over the past 20 years that have resulted in the acquisition of distinctiveness of Afterburner's Flight Suit Mark as a source-identifier of Afterburner's goods and services, and Afterburner is therefore entitled to registration of Afterburner's Flight Suit Mark.

38. The U.S. Trademark Office's approval of publication of the Afterburner's Flight Suit Mark, along with the Examining Attorney's acceptance of Afterburner's alternative claim of acquired distinctiveness under Section 2(f), refutes Opposer's claim that the mark is generic.

39. Opposer has not met its initial burden to present prima facie evidence or argument upon which the Board could reasonably conclude that Applicant's mark has not acquired distinctiveness.

40. Afterburner's Flight Suit Mark has become distinctive of the Applicant's goods and services by reason of substantially exclusive and continuous use in commerce.

41. The Corps Group's and, to the extent there is third-party use, other third-party use of pilot flight suits in conjunction with goods and services similar to Afterburner does not invalidate Afterburner's alternative claim of acquired distinctiveness, as The Corps Group and such other third parties have engaged in inconsequential and/or infringing use.

42. Afterburner's Flight Suit Mark has priority over the mark that was the subject of Opposer's abandoned Application Serial No. 85/331,417 making the Opposer a subsequent user.

43. To the extent there are other third party users of flight suit marks, Afterburner's Flight Suit Mark has priority over the flight suit marks used by third parties for goods and services similar to Afterburner's goods and services, thus making them subsequent users.

44. The Opposer's use of flight suits in conjunction with goods and services similar to Afterburner's goods and services has caused a likelihood of confusion between the Opposer's flight suits and Afterburner's Flight Suit Mark.

45. The Opposer will not be harmed by the registration of Afterburner's Flight Suit Mark because the Opposer's pilot flight suit, the proposed mark of abandoned Application Serial No. 85/331,417, infringes upon Afterburner's Flight Suit Mark.

Afterburner denies each and every allegation of the Opposition not specifically admitted or otherwise responded to herein. Afterburner further denies that the Application Serial No. 85/094,889 should be rejected for any reason; denies that Opposer has asserted any basis in law

or fact sufficient to sustain Opposer's opposition to the registration of Afterburner's Flight Suit Mark for the goods and services claimed in Afterburner's Application; denies that the Opposition should be sustained in favor of Opposer; and denies that Opposer is entitled to any relief whatsoever against Afterburner.

WHEREFORE, Afterburner respectfully requests that the Trademark Trial and Appeal Board reject Opposer's arguments and relief prayed for, dismiss the Opposition action with prejudice, proceed to grant Afterburner Flight Suit Mark full and proper registration on the Principal Register as requested in Application Serial No. 85/094,889, and grant to Afterburner such other and further relief as the Board deems just and proper.

This 15<sup>th</sup> day of September, 2017.

Respectfully submitted,

By: /s/ Michael C. Mason  
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this correspondence, APPLICANT'S ANSWER TO  
OPPOSER'S AMENDED NOTICE OF OPPOSITION, has been sent via email, with consent to:

J. Kevin Fee  
Jordana S. Rubel  
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This 15th day of September, 2017.

/s/ Michael C. Mason\_\_\_\_\_

Michael C. Mason