

ESTTA Tracking number: **ESTTA662952**

Filing date: **03/25/2015**

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

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	Bloom That, Inc.
Granted to Date of previous extension	03/25/2015
Address	164 Townsend Street Suite 6 San Francisco, CA 94107 UNITED STATES
Attorney information	Holly Pranger Pranger Law 88 Guy Place Suite 405 San Francisco, CA 94105 UNITED STATES hpranger@prangerlaw.com, trademark@prangerlaw.com, jnorberg@prangerlaw.com

Applicant Information

Application No	86060972	Publication date	11/25/2014
Opposition Filing Date	03/25/2015	Opposition Period Ends	03/25/2015
Applicant	Farmgirl Flowers Inc. 2250 Van Ness Ave. #1 San Francisco, CA 94109 UNITED STATES		

Goods/Services Affected by Opposition

Class 031. First Use: 2010/11/07 First Use In Commerce: 2010/11/07 All goods and services in the class are opposed, namely: Live flower arrangements

Grounds for Opposition

The mark is merely descriptive	Trademark Act section 2(e)(1)
The mark comprises matter that, as a whole, is functional	Trademark Act section 2(e)(5)
Genericness	Trademark Act section 23
Other	Lack of use in interstate commerce, Trademark Act Section 45.

Attachments	Farmgirl Flowers Notice of Opposition.pdf(276314 bytes)
-------------	--

Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/s/ Holly Pranger
Name	Holly Pranger
Date	03/25/2015

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

In the matter of Application Serial No.86/060,972

For the Mark described as “three-dimensional product packaging composed of a burlap material for packaging the goods.”

Filed on September 10, 2013

Published in the Official Gazette on November 25, 2014

<p>BLOOM THAT, INC.,</p> <p style="text-align:center">Opposer,</p> <p>v.</p> <p>FARMFIRL FLOWERS INC.,</p> <p style="text-align:center">Applicant.</p>	<p>Opposition No. _____</p>
--	-----------------------------

NOTICE OF OPPOSITION

Bloom That, Inc. (“Opposer”), located at 1409 Minnesota Street, San Francisco California, 94107, a corporation duly organized and existing under the laws of the State of Delaware, believes that it will be damaged by the registration of the mark shown in the above-identified application, and hereby opposes same. The grounds for opposition are as follows:

OPPOSER AND ITS USE OF BURLAP

1. Opposer is an online flower delivery service that provides bouquets in 90 minutes or less. Founded in 2013, Opposer’s mission is to revolutionize the flower industry by simplifying the order process and delivering beautiful bouquets, fast.

2. A flower bouquet by its nature must be held together with something and hydrated to last. Traditional methods to achieve this have included plastic, paper, vases, ribbons, foam and fabrics. Opposer’s flowers are arranged and then wrapped first with a material designed to provide water hydration at the cut stem to the flowers during delivery. This

Ser. No. : 86/060972
Trademark : Burlap wrap packaging
Filed : September 10, 2013
Published : November 25, 2014
Page : 2 of 9

hydration pack is not aesthetically pleasing, nor is it enough to hold the flowers together. To keep the floral arrangement together it is then wrapped in an outer layer of burlap.

3. Opposer considered various other options for its outer wrapping and decided on burlap for a number of reasons. First, burlap can get wet and dry out repeatedly without losing any of its shape, durability or function. Opposer's bouquets are sometimes refrigerated between assembly and delivery. The resulting humidity can cause condensation, and not all material can hold up. Delivery of the arrangements is sometimes by bicycle, and the flowers may get wet in transit. Paper, for example, falls apart and changes in appearance when wet. Mason jars, another option, hold water, but the water sloshes and they are prone to breakage during delivery. Finally, plastic is less environmentally friendly than burlap, and environmental friendliness is an important consideration for Opposer's customers.

4. Burlap is considerably less expensive than other similarly durable fabrics such as canvas and hemp. Canvas, like burlap, is also sturdy and can withstand water without losing function, but it is cost prohibitive. A single wrapping of new burlap costs Opposer between 50 and 65 cents per unit, whereas canvas would cost \$5. Burlap is also sometimes available for free from local coffee roasters.

5. Burlap also provides Opposer's customers with a look that Opposer's customers crave. A bouquet's appearance is among the most important factors considered by consumers of flowers, and burlap is aesthetically appealing, creating a charming and beautiful arrangement. Opposer's typical customer is tech savvy and wants the latest style and trend, quickly, easily, and at a reasonable price. The curated look of burlap is very popular with Opposer's target market.

Ser. No. : 86/060972
Trademark : Burlap wrap packaging
Filed : September 10, 2013
Published : November 25, 2014
Page : 3 of 9

APPLICANT AND ITS ATTEMPT TO MONOPOLIZE BURLAP

6. Applicant is another San Francisco Bay Area flower delivery service that serves the San Francisco market and very recent expanded in the state to offer product deliveries in other parts of California. As discussed further below, there are no products shipped across state lines outside of California, and at the time of this Application, there was only delivery into one city, San Francisco.

7. According to Applicant's website, Applicant was founded in 2010 with the goal of providing a daily delivery of locally grown flowers at a low entry level price point. Applicant offers delivery of a single daily bouquet, which can be delivered in either a burlap wrap or a vase. Customers selecting burlap receive the bouquet wrapped in recycled burlap that was previously used to hold coffee, and which Applicant obtained at no cost from a local Bay Area coffee roaster.

8. Applicant claims to have used burlap to wrap and deliver its bouquets since November of 2010. Applicant's website and its public statements confirm that Applicant benefits from the useful features of burlap in many of the same ways that Opposer has. In published articles, Applicant's founder Christina Stembel is attributed with saying that Farmgirl's burlap is donated by Ritual Coffee roasters, which helps Applicant keep its costs low. This is reflected in Applicant's pricing: a burlap bouquet costs \$35 whereas a vase costs \$50. Applicant also delivers its bouquets by bicycle, even when raining, and the burlap protects an under layer of craft paper during the delivery process. Applicant also benefits from the aesthetic popularity of burlap.

Ser. No. : 86/060972
Trademark : Burlap wrap packaging
Filed : September 10, 2013
Published : November 25, 2014
Page : 4 of 9

9. Despite the clearly functional nature of burlap when used in connection with flower delivery, Applicant claims trade dress rights in its burlap wrap. On June 3, 2013, Applicant sent Opposer a cease and desist letter in which Applicant demanded that Opposer cease using burlap in connection with Opposer's bouquets. Opposer responded to this letter on June 7, 2013, denying any wrongdoing and advising that burlap was not protectable trade dress for use with flowers because, among other reasons, burlap is functional when used in connection with flower delivery, and burlap is a common material that has been used in connection with the delivery of plants and flowers since long before Applicant adopted its use. Applicant responded to this letter on August 6, 2013, and continued to insist that Opposer cease use of burlap. Hearing nothing further, on December 23, 2014, Opposer wrote to Applicant after discovering this Application and insisted that it was not entitled to monopolize burlap from an entire industry when there were others that had prior use of the material with floral arrangements. Opposer further noted that exclusively intrastate use was not enough to support a Federal application and demanded the Application be expressly abandoned.

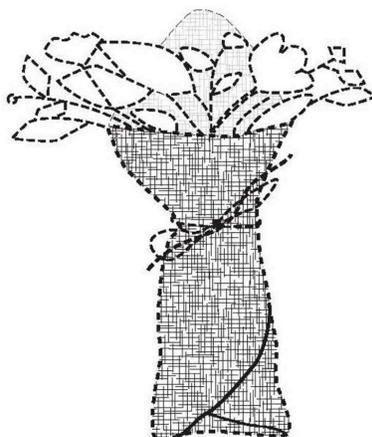
10. According to Applicant's website, it does not provide its product outside of California. Indeed, a historical version of the "FAQ" on Applicant's website, archived on September 23, 2013, includes the following quote:

"Can you deliver to somewhere besides San Francisco? Considering drive time, gas, & bridge tolls, we currently cannot offer an economical delivery option outside of San Francisco for a single order. If you live in the East Bay, North Bay, South Bay, or Peninsula and would like weekly or monthly deliveries to your home or office and can recruit four of your friends to order as well, we can set up a TaskRabbit to get delivery to your door! We can accommodate pick up orders at our workshop at the SF Flower Mart at 640 Brannan (in the 5th Street Annex) between the hours of 9 am and 3 pm, so if you're in SF, feel free to come pick one up!"

Ser. No. : 86/060972
Trademark : Burlap wrap packaging
Filed : September 10, 2013
Published : November 25, 2014
Page : 5 of 9

On information and belief, Applicant has never offered or sold its burlap wrapped flowers outside of the state of California.

11. Notwithstanding the functionality of Applicant's burlap packaging, and the fact that Applicant does not offer its products outside of the state of California, Applicant has sought to register its packaging as trade dress with the USPTO, United States Application Serial No. 86/060,972 (the "Trade Dress Application"). The Trade Dress Application seeks to register the following packaging for use in Class 31 in connection with "live flower arrangements:"



The description of the mark in the Trade Dress Application reads: "The mark consists of three-dimensional product packaging composed of a burlap material for packaging the goods. The drawing is lined to indicate burlap, which is a feature of the mark. The broken lines indicate position and placement of the mark and are not part of the mark."

COUNT 1 – FUNCTIONALITY

12. Opposer re-alleges and incorporates by reference the allegations in the above paragraphs.

Ser. No. : 86/060972
Trademark : Burlap wrap packaging
Filed : September 10, 2013
Published : November 25, 2014
Page : 6 of 9

13. The burlap packaging claimed in the trade dress is functional for at least the following reasons:

- a. Applicant's burlap packaging protects Applicant's flowers from exposure to external sources of moisture, such as rain or condensation, without breaking down or losing shape.
- b. Applicant's burlap packaging is less expensive than other, similarly durable materials, thereby affecting the cost of Applicant's product.
- c. Applicant's burlap packaging is more environmentally friendly than other alternative materials, such as plastic, which is a desirable feature among Applicant's target market.
- d. Applicant's burlap material is aesthetically pleasing, providing a rustic or curated look that is desired by Applicant's customers.
- e. Burlap is a common material that is used for its utilitarian and aesthetic features by many other live flower delivery services.

14. Allowing Applicant a registration for the use of burlap in connection with live flower arrangements will put Opposer and many other flower delivery services at a significant non-reputation based disadvantage.

15. The burlap packaging claimed in the Trade Dress Application is therefore functional and unregistrable as a trademark under Section 2(e)(5) of the Lanham Act.

COUNT 2 – LACK OF DISTINCTIVENESS

16. Opposer re-alleges and incorporates by reference the allegations in the above paragraphs.

Ser. No. : 86/060972
Trademark : Burlap wrap packaging
Filed : September 10, 2013
Published : November 25, 2014
Page : 7 of 9

17. The applied for trade dress is not inherently distinctive because it consists of a common packaging material that consumers do not associate with any particular source.

18. Applicant has failed to demonstrate that its applied for trade dress has acquired sufficient distinctiveness to qualify for a trademark registration under Section 2(f) of the Lanham Act. The evidence submitted by Applicant during prosecution of the Trade Dress Application does not demonstrate that consumers associate burlap with a single source, but rather, at best, demonstrates that consumers generally enjoy live floral arrangements wrapped in burlap.

19. Burlap is a packaging material that has been used for more than 150 years to protect plants and flowers. It was a popular packaging material before 2010. It is widely used by florists other than Applicant, such as Opposer, Little Acre Flowers, Urban Stems, Flowers for Dreams, and others, to package live flowers for delivery. Given this widespread and historic use of burlap, it is incapable of becoming a source indicator.

COUNT 3 – LACK OF USE IN COMMERCE

20. Opposer re-alleges and incorporates by reference the allegations in the above paragraphs.

21. On information and belief, as of the date of the Trade Dress Application, Applicant had not sold or offered to sell any products bearing the claimed trade dress outside of the state of California. Indeed, in a May 14, 2014 declaration that was submitted to the USPTO, Applicant's owner, Christina Stembel, states:

12. The live flower arrangements packaged in the Trade Dress are hand-delivered by courier on bicycle or scooter and the Trade Dress is visible during the delivery process. Currently, delivery of Farmgirl Flowers' live floral arrangements is limited to the Bay Area. However, it will begin

Ser. No. : 86/060972
Trademark : Burlap wrap packaging
Filed : September 10, 2013
Published : November 25, 2014
Page : 8 of 9

shipping floral arrangements throughout California in May, 2014, and plans to expand nationwide later this year.

22. On information and belief, as of today's date, Applicant has not sold or offered to sell any products bearing the claimed trade dress outside of the state of California.

23. The trade dress claimed in the Trade Dress Application is therefore unregistrable under Section 45 of the Lanham Act.

WHEREFORE, Opposer opposes registration of Applicant's Trade Dress Application and requests that registration of Application Serial No. 86/060,972 be refused.

Respectfully submitted,

Date: March 25, 2015

/s/ Holly Pranger

Holly Pranger
Pranger Law Group
88 Guy Place, Suite 405
San Francisco, CA 94105
(415) 855-9800
hpranger@prangerlaw.com
Attorney for Opposer

Ser. No. : 86/060972
Trademark : Burlap wrap packaging
Filed : September 10, 2013
Published : November 25, 2014
Page : 9 of 9

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing NOTICE OF OPPOSITION has this 25th day of March, 2015, been sent by prepaid first class mail to the below-identified Applicant and to the listed correspondent for the Applicant:

APPLICANT

Farmgirl Flowers Inc.
2250 Van Ness Ave. #1
San Francisco, CA 94109

CORRESPONDENT

Adam R. Bialek
Wilson Elser Moskowitz Edelman & Dicker LLP
150 E. 42nd Street
New York, NY 10017-5612

/s/ Holly Pranger

Holly Pranger