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

|                        |   |
|------------------------|---|
| Proceeding             | 92063367  |
| Party                  | Plaintiff<br>Serious, Inc.  |
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| Submission             | Opposition/Response to Motion   |
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| Signature              | /Richard M. Klein/  |
| Date                   | 05/18/2016  |
| Attachments            | final opposition to motion to suspend.pdf(115324 bytes )  |

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

In the matter of Trademark Registration No. 4,017,207  
For the mark BASEBOARDERS  
Date registered August 23, 2011

|                                |   |                             |
|--------------------------------|---|-----------------------------|
| Serious Inc.,                  | ) |                             |
|                                | ) |                             |
| Petitioner,                    | ) |                             |
|                                | ) | Cancellation No. 92/063,367 |
| v.                             | ) |                             |
|                                | ) |                             |
| Buss General Partner Co. Ltd., | ) |                             |
|                                | ) |                             |
| Respondent.                    | ) |                             |
| _____                          | ) |                             |

**OPPOSITION TO MOTION TO SUSPEND PROCEEDING**

**I. Introduction**

Petitioner, Serious Inc., opposes Respondent’s Motion to Suspend Proceeding (“Motion to Suspend”). The Motion to Suspend is premised on the mistaken belief that the pending civil action will completely resolve the issues presented to the Board in the Petition to Cancel (TTABVUE Docket Entry No. 5). Petitioner disagrees, because the Court in the civil action is not being asked to cancel the BASEBOARDERS mark at issue (U.S. Trademark Registration No. 4,017,207).

The Petition to Cancel raises issues that are materially different than those presented in the civil action. In this regard, while a determination by the Trademark Trial and Appeal Board that the subject mark is not registrable would resolve some of the issues in the pending civil action, any determinations made in the civil action would not resolve any of the issues in the Petition to Cancel. Consequently, Respondent has

failed to meet its burden of showing that good cause exists for suspending the present Board proceeding, and Respondent's Motion to Suspend should therefore be denied.

## **II. Legal Standard and Arguments**

### **a. Resolution of the Pending Civil Action Will Not Completely Resolve the Issues Presented to the Board in the Petition to Cancel Because the Civil Action and Board Proceeding Involve Materially Different Issues.**

In the Petition to Cancel (TTABVUE Docket Entry No. 1), Petitioner asked that the subject registration be cancelled because it is merely descriptive of the goods to which it is applied, and therefore unable to function as a trademark and gain secondary meaning in the marketplace.

In the pending civil action, Petitioner responded to the Complaint filed by Respondent by filing its Answer and Counterclaims (Exhibit A). There, Petitioner asked the Court for a judgment declaring that it had not infringed any valid federal or common law trademarks of Respondent because Petitioner did not use any confusingly similar marks. See pp. 22. Petitioner's Answer and Counterclaims also included eight affirmative defenses, none of which raised the issue of the non-registrability or unenforceability of Respondent's mark for mere descriptiveness. For example, in the second affirmative defense, Petitioner argued that, "The domain name BaseboardRadiatorCover.com is not identical to or confusingly similar to Buss General's BASEBOARDERS design mark. Use of a domain name that is completely different from a trademark cannot constitute cybersquatting." See *id.* That is, in the pending civil action, Petitioner has denied that it has made any confusingly similar use of Respondent's marks and therefore cannot be liable for trademark infringement.

In summary, resolution of the civil action between Petitioner and Respondent can be predicated upon a finding that Petitioner has not infringed Respondent's mark because Petitioner has not made any confusingly similar use of the mark (i.e., without any determination of the descriptiveness of the subject mark). Petitioner has not asked the Court to cancel Respondent's mark. In other words, resolution of the civil action will not resolve the issue that Respondent's mark is merely descriptive under 15 U.S.C. § 1052(e)(1), which issue was presented to the Board in the Petition to Cancel but is not at issue in the pending civil action.

**b. The District Court's Findings in the Pending Civil Action Would Not Be Binding on the Board.**

In its Motion to Suspend, Respondent misquotes TBMP Section 510.02(a) to support its request for a stay. This section actually reads, "To the extent that a civil action in a Federal district court involves issues in common with those in a proceeding before the Board, the decision of the Federal district court is **often** binding upon the Board, while the decision of the Board is not binding upon the court." TBMP Section 510.02(a) (2014) (emphasis added). As explained in detail above, the pending civil action before the United States District Court for the Northern District of Ohio and the Petition to Cancel before the Board involve issues that are not common to one another. Notwithstanding, and even assuming, *arguendo*, that the civil action and the Board proceeding involved common issues, a decision in the civil action would not necessarily be binding upon the Board. *See, e.g., Boyds Collection Ltd. v. Herrington & Co.*, 65 USPQ2d 2017, 2018 (TTAB 2003) ("[B]oth the permissive language of Trademark Rule 2.117(a) . . . and the explicit provisions of Trademark Rule 2.117(b) make clear that suspension is not the necessary result in all cases."). This is especially true in the

present case, where the only commonality between the civil action and the Board proceeding are the parties and the subject mark, not the issues presented.

**c. Respondent has Failed to Meet its Burden of Showing Good Cause Exists for Suspending the Board Proceeding.**

“All motions to suspend, regardless of circumstances . . . are subject to the ‘good cause’ standard.” *National Football League v. DNH Management LLC*, 85 USPQ2d 1852, 1855, n.8 (TTAB 2008) (citing Trademark Rule 2.117(c)). Again, Respondent’s Motion to Suspend is based on its mistaken belief that resolution of the civil action will have any bearing on the Board proceeding, despite involving materially separate issues. In view of the foregoing, Respondent has failed to show that good cause exists for suspending the Board proceeding.

**III. Conclusion**

For at least the foregoing reasons, suspending the Board proceeding would be unnecessary, inappropriate, and contrary to established law. Respondent’s Motion to Suspend Proceeding in view of Pending Civil Action Pursuant to Trademark Rule 2.117(a) should therefore be **denied** and the Board proceeding involving the Petition to Cancel Registration No. 4,017,207 decided.

Date: May 18, 2016

Respectfully submitted,

/Richard M. Klein/  
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Attorneys for Petitioner

**CERTIFICATE OF SERVICE**

I hereby certify that this OPPOSITION TO MOTION TO SUSPEND PROCEEDING was filed electronically with the United States Patent and Trademark Office, Trademark Trial and Appeal Board on May 18, 2016.

I hereby certify that a true and complete copy of the foregoing OPPOSITION TO MOTION TO SUSPEND PROCEEDING has been served on the following attorneys of record for Respondent by mailing said copy via First Class Mail, postage prepaid, to:

Mark C. Johnson  
Nicholas J. Gingo  
Renner Otto  
1621 Euclid Avenue, Floor 19  
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/Richard M. Klein/  
Richard M. Klein  
Attorney for Petitioner

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# **EXHIBIT A**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

|                                  |                                    |
|----------------------------------|------------------------------------|
| BUSS GENERAL PARTNER CO. LTD., ) |                                    |
| )                                |                                    |
| Plaintiff, )                     |                                    |
| )                                | Civil Action No. 1:15-CV-01256-DCN |
| v. )                             |                                    |
| )                                | Judge Donald C. Nugent             |
| SERIOUS INC. et al., )           |                                    |
| )                                |                                    |
| Defendants. )                    |                                    |
| _____ )                          |                                    |

**ANSWER AND COUNTERCLAIMS OF DEFENDANT GARY FRATIANNE  
(Jury Demand Endorsed Hereon)**

Defendant, Gary Fratianne (“Fratianne”), through his attorneys hereby answers the Complaint filed by Plaintiff, Buss General Partner Co. Ltd. (“Buss General”), as follows:

1. Fratianne lacks knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of the Complaint and therefore denies same.
2. Fratianne admits the allegations of Paragraph 2 of the Complaint.
3. Fratianne admits the allegations of Paragraph 3 of the Complaint.
4. Fratianne lacks knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph 4 of the Complaint and therefore denies same.
5. Fratianne lacks knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph 5 of the Complaint and therefore denies same.
6. Fratianne denies the allegations contained in Paragraph 6 of the Complaint.

7. Fratianne admits that he is an Ohio resident and that Serious Inc. is an Ohio corporation. Fratianne denies all other allegations contained in Paragraph 7 of the Complaint.

8. Fratianne denies the allegations contained in Paragraph 8 of the Complaint.

9. Paragraph 9 of the Complaint does not contain an allegation that requires a response.

10. Fratianne admits that he, as President of Serious Inc., signed an Agreement with Buss General on behalf of Serious Inc., and that Serious Inc. began working as an independent contractor for Buss General. Fratianne denies all other allegations of Paragraph 10 of the Complaint.

11. Fratianne admits that Serious Inc. bought and re-sold Buss General's baseboard heater covers for a period of about four and one-half years. Fratianne denies all other allegations contained in Paragraph 11 of the Complaint.

12. Fratianne admits that Serious Inc. gained some general knowledge of Buss's products while working in an independent contractor relationship with Buss General. Fratianne denies all other allegations contained in Paragraph 12 of the Complaint.

13. Fratianne denies the allegations contained in Paragraph 13 of the Complaint.

14. Fratianne lacks knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph 14 of the Complaint and therefore denies same.

15. Fratianne admits that on or about April 27, 2015, Serious Inc. gave Buss General notice that it would no longer be a distributor for Buss General and was

terminating its relationship with Buss General. Fratianne denies all other allegations contained in Paragraph 15 of the Complaint.

16. Fratianne admits that Serious Inc. began a business relationship with Optimization, Inc. Fratianne denies all other allegations contained in Paragraph 16 of the Complaint.

17. Fratianne denies the allegations contained in Paragraph 17 of the Complaint.

18. Fratianne admits that Serious Inc. uses the domain name BaseboardRadiatorCover.com. Fratianne denies all other allegations contained in Paragraph 18 of the Complaint.

19. Fratianne lacks knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph 19 of the Complaint and therefore denies same.

20. Fratianne denies the allegations contained in Paragraph 20 of the Complaint.

21. Fratianne denies the allegations contained in Paragraph 21 of the Complaint.

22. Fratianne denies the allegations contained in Paragraph 22 of the Complaint.

23. Fratianne denies the allegations contained in Paragraph 23 of the Complaint.

24. Fratianne lacks knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph 24 of the Complaint and therefore denies same.

25. Fratianne denies the allegations contained in Paragraph 25 of the Complaint.

26. Fratianne denies the allegations contained in Paragraph 26 of the Complaint.

27. Fratianne denies the allegations contained in Paragraph 27 of the Complaint.

28. Fratianne denies the allegations contained in Paragraph 28 of the Complaint.

29. Fratianne admits the allegations of Paragraph 29 of the Complaint.

30. Fratianne lacks knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph 30 of the Complaint and therefore denies same.

31. Fratianne denies the allegations contained in Paragraph 31 of the Complaint.

32. Fratianne denies the allegations contained in Paragraph 32 of the Complaint.

33. Fratianne denies the allegations contained in Paragraph 33 of the Complaint.

**FIRST CLAIM FOR RELIEF**

**(Violation of the Ohio Deceptive Trade Practices Act)**

34. Paragraph 34 of the Complaint does not contain an allegation that requires a response.

35. Fratianne denies the allegations contained in Paragraph 35 of the Complaint.

36. Fratianne denies the allegations contained in Paragraph 36 of the Complaint.

37. Fratianne denies the allegations contained in Paragraph 37 of the Complaint.

38. Fratianne denies the allegations contained in Paragraph 38 of the Complaint.

39. Fratianne denies the allegations contained in Paragraph 39 of the Complaint.

40. Fratianne denies the allegations contained in Paragraph 40 of the Complaint.

41. Fratianne denies the allegations contained in Paragraph 41 of the Complaint.

**SECOND CLAIM FOR RELIEF**

**(Violation of the Lanham Act)**

42. Paragraph 42 of the Complaint does not contain an allegation that requires a response.

43. Fratianne denies the allegations contained in Paragraph 43 of the Complaint.

44. Fratianne denies the allegations contained in Paragraph 44 of the Complaint.

- 45. Fratianne denies the allegations contained in Paragraph 45 of the Complaint.
- 46. Fratianne denies the allegations contained in Paragraph 46 of the Complaint.
- 47. Fratianne denies the allegations contained in Paragraph 47 of the Complaint.
- 48. Fratianne denies the allegations contained in Paragraph 48 of the Complaint.
- 49. Fratianne denies the allegations contained in Paragraph 49 of the Complaint.
- 50. Fratianne denies the allegations contained in Paragraph 50 of the Complaint.

**THIRD CLAIM FOR RELIEF**

**(Common Law Trademark Infringement)**

- 51. Paragraph 51 of the Complaint does not contain an allegation that requires a response.
- 52. Fratianne lacks knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph 52 of the Complaint and therefore denies same.
- 53. Fratianne denies the allegations contained in Paragraph 53 of the Complaint.
- 54. Fratianne denies the allegations contained in Paragraph 54 of the Complaint.
- 55. Fratianne denies the allegations contained in Paragraph 55 of the Complaint.
- 56. Fratianne denies the allegations contained in Paragraph 56 of the Complaint.
- 57. Fratianne denies the allegations contained in Paragraph 57 of the Complaint.

**FOURTH CLAIM FOR RELIEF**

**(Misleading Description Under 15 U.S.C. § 1125(a)(1)(A))**

- 58. Paragraph 58 of the Complaint does not contain an allegation that requires a response.
- 59. Fratianne denies the allegations contained in Paragraph 59 of the Complaint.

- 60. Fratianne denies the allegations contained in Paragraph 60 of the Complaint.
- 61. Fratianne denies the allegations contained in Paragraph 61 of the Complaint.
- 62. Fratianne denies the allegations contained in Paragraph 62 of the Complaint.
- 63. Fratianne denies the allegations contained in Paragraph 63 of the Complaint.
- 64. Fratianne denies the allegations contained in Paragraph 64 of the Complaint.

**FIFTH CLAIM FOR RELIEF**

**(Misappropriation of Trade Secrets)**

- 65. Paragraph 65 of the Complaint does not contain an allegation that requires a response.
- 66. Fratianne denies the allegations contained in Paragraph 66 of the Complaint.
- 67. Fratianne denies the allegations contained in Paragraph 67 of the Complaint.
- 68. Fratianne denies the allegations contained in Paragraph 68 of the Complaint.
- 69. Fratianne denies the allegations contained in Paragraph 69 of the Complaint.
- 70. Fratianne denies the allegations contained in Paragraph 70 of the Complaint.
- 71. Fratianne denies the allegations contained in Paragraph 71 of the Complaint.
- 72. Fratianne denies the allegations contained in Paragraph 72 of the Complaint.
- 73. Fratianne denies the allegations contained in Paragraph 73 of the Complaint.
- 74. Fratianne denies the allegations contained in Paragraph 74 of the Complaint.

**SIXTH CLAIM FOR RELIEF**

**(Cybersquatting)**

75. Fratianne notes that there are two paragraphs numbered 75 in the Complaint. Neither of the paragraph numbered 75 contain an allegation that requires a response.

76. Fratianne denies the allegations contained in Paragraph 76 of the Complaint.

77. Fratianne denies the allegations contained in Paragraph 77 of the Complaint.

78. Fratianne denies the allegations contained in Paragraph 78 of the Complaint.

79. Fratianne denies the allegations contained in Paragraph 79 of the Complaint.

**SEVENTH CLAIM FOR RELIEF**

**(Racketeering)**

80. Paragraph 80 of the Complaint does not contain an allegation that requires a response.

81. Fratianne denies the allegations contained in Paragraph 81 of the Complaint.

82. Paragraph 82 of the Complaint does not contain an allegation that requires a response.

83. Fratianne denies the allegations contained in Paragraph 83 of the Complaint.

84. Fratianne denies the allegations contained in Paragraph 84 of the Complaint.

85. Fratianne denies the allegations contained in Paragraph 85 of the Complaint.

86. Fratianne denies the allegations contained in Paragraph 86 of the Complaint.

87. Fratianne denies the allegations contained in Paragraph 87 of the Complaint.

88. Fratianne denies the allegations contained in Paragraph 88 of the Complaint.

**EIGHTH CLAIM FOR RELIEF**

**(Civil Conspiracy)**

89. Paragraph 89 of the Complaint does not contain an allegation that requires a response.

90. Fratianne denies the allegations contained in Paragraph 90 of the Complaint.

91. Fratianne denies the allegations contained in Paragraph 91 of the Complaint.

92. Fratianne denies the allegations contained in Paragraph 92 of the Complaint.

**DEFENDANT SERIOUS' AFFIRMATIVE DEFENSES**

**FIRST AFFIRMATIVE DEFENSE**

1. The Complaint fails to state a claim upon which relief may be granted. Fratianne has not engaged in any conduct as of now or as of the filing date of the Complaint in this matter that could be considered an infringing act. Fratianne does not use Buss General's BASEBOARDERS design mark. Buss General has not identified the trade secrets that are alleged to have been misappropriated.

2. The entirety of the Complaint is directed to alleged violations of Buss General's rights occurring on the Internet domain name baseboardradiatorcover.com. Fratianne does not personally own the Internet domain name "BaseboardRadiatorCover.com" and cannot be held legally responsible for any alleged content contained thereon.

3. The term "baseboard heater cover" is a descriptive term of a product that covers a baseboard heater. No trademark rights can accrue in a descriptive term.

### **SECOND AFFIRMATIVE DEFENSE**

4. Fratianne does not personally own any Internet domain names for which Fratianne could be liable to Buss General for cybersquatting.

5. The domain name BaseboardRadiatorCover.com, which Fratianne does not personally own, is not identical to or confusingly similar to Buss General's BASEBOARDERS design mark. Use of a domain name that is completely different from a trademark cannot constitute cybersquatting.

### **THIRD AFFIRMATIVE DEFENSE**

6. Buss General has identified no rights in the design of its baseboard heater cover. The design is not inherently distinctive and has not acquired secondary meaning, and thus is not a trademark or trade dress of Buss General.

7. Fratianne was never personally in an independent contractor relationship with Buss General. Buss General has not identified the trade secrets that are alleged to have been misappropriated. Fratianne has acquired no trade secrets of Buss General and has never worked for Buss General.

### **FOURTH AFFIRMATIVE DEFENSE**

8. Fratianne does not advertise or sell any baseboard heater cover products in his personal capacity. Fratianne's role as President of co-Defendant Serious Inc. cannot constitute a deceptive trade practice, trademark infringement, racketeering, or civil conspiracy.

9. Advertisements and sales of generic baseboard heater cover products cannot constitute a deceptive trade practice, trademark infringement, racketeering, or civil conspiracy.

#### **FIFTH AFFIRMATIVE DEFENSE**

10. Buss General's claims are barred by laches, waiver, estoppel, and/or acquiescence.

#### **SIXTH AFFIRMATIVE DEFENSE**

11. Buss General's claims are barred by the equitable doctrine of unclean hands. Buss General's domain name baseboardheatercovers.com prominently displays the phrase "USPTO PATENT PENDING." A website capture of the Internet domain name "baseboardheatercovers.com" as of September 16, 2015 was attached as Exhibit S-4 to the Answer and Counterclaims of Defendant Serious Inc., which was filed on September 17, 2015 (Docket# 18-2). Upon information and belief, no such patent application is pending. This false statement is a violation of 35 U.S.C § 292, and is an improper means of attempting to monopolize or restrain trade in baseboard heater covers, just as the present Complaint is attempting to stretch the BASEBOARDERS design mark to monopolize or restrain trade in generic baseboard heater covers.

#### **SEVENTH AFFIRMATIVE DEFENSE**

12. Buss General has brought this suit in bad faith as part of an attempt to harass Fratianne, as Fratianne has never personally engaged in business with Buss General, Fratianne does not personally advertise or sell competing products or services, and Fratianne has made no use of the BASEBOARDERS design mark at all. No reasonable

litigant would realistically expect success on the merits. This action is an attempt to harass Fratianne, though the use of government process.

### **EIGHTH AFFIRMATIVE DEFENSE**

13. Fratianne reserves the right to assert additional defenses at such time and to such extent as warranted by discovery and the factual developments in this case.

### **COUNTERCLAIMS**

Defendant/Counterclaimant Fratianne alleges upon knowledge as to its own facts and upon information and belief as to acts of others that:

#### **The Parties**

1. Defendant Fratianne is an individual domiciled in Avon Lake, Ohio.
2. On information and belief, Plaintiff/Counterclaim-Defendant Buss General Partner Co. Ltd. ("Buss General" for purposes of the counterclaims asserted herein) is a Canadian corporation registered and authorized to do business in the State of Ohio.

#### **Jurisdiction and Venue**

3. There is an actual controversy between Fratianne and Buss General as to the existence of deceptive trade practices, trademark infringement, misleading description, misappropriation of trade secrets, cybersquatting, racketeering, and civil conspiracy as a result of allegations made by Buss General, including but not limited to the allegations of the Complaint.

4. This Court has the subject matter jurisdiction over these counterclaims under the Declaratory Judgment Act, Title 28, U.S.C. §§ 2201 et seq., and under the laws of the United States concerning actions relating to trademarks and unfair competition, 15 U.S.C. §1051 et seq.

5. This Court has personal jurisdiction over Buss General in this counterclaim in that *inter alia*, it voluntarily filed the Complaint in this Court.

6. Venue is proper in this judicial district under 28 U.S.C. § 1391(c)(3) because Buss General is not a United States resident.

**Background Facts Common to All Counterclaims**

7. Fratianne is not the registrant or owner of the Internet domain name “BaseboardRadiatorCover.com.” Rather, co-Defendant Serious Inc. is the registrant organization and the record indicates that the registrant organization is the owner of the domain name. A copy of the record for the Internet domain name “BaseboardRadiatorCover.com” was attached as Exhibit S-2 to the Answer and Counterclaims of Defendant Serious Inc., which was filed on September 17, 2015 (Docket# 18-2).

8. The domain name “BaseboardRadiatorCover.com” was first created and/or registered on March 27, 2012 by Serious Inc.

9. On information and belief, Buss General was registered to do business in Ohio as a foreign corporation on June 8, 2015. A copy of Buss General’s Ohio business

filing was attached as Exhibit S-3 to the Answer and Counterclaims of Defendant Serious Inc., which was filed on September 17, 2015 (Docket# 18-2).

**Count I**

**(Declaration of No Violation of the Ohio Deceptive Trade Practices Act)**

10. Buss General asserts that Fratianne has violated the Ohio Deceptive Trade Practices Act by using exact or confusingly similar imitations of its BASEBOARDERS design mark and product images, and alleges that a false and misleading implication of endorsement by Buss General has thus been created.

11. Fratianne does not personally own the Internet domain name “BaseboardRadiatorCover.com,” upon which the alleged deceptive use of the BASEBOARDERS design mark and Buss General products images is alleged to have occurred. Moreover, Buss General has no rights in the appearance of its products.

12. Fratianne is entitled to a declaration that no violation of the Ohio Deceptive Trade Practices Act has occurred.

**Count II**

**(Declaration of No Violation of the Lanham Act)**

13. Fratianne does not personally own the Internet domain name “BaseboardRadiatorCover.com,” upon which the alleged infringing activity under this Count is alleged to have occurred. As such, Fratianne cannot be held legally responsible for any allegedly infringing content contained thereon.

14. Moreover, the design and word elements comprising Buss General’s federal BASEBOARDERS design mark differ from the accused domain name and logo in numerous respects, including but not limited to:

- The accused domain name and logo do not use the word BASEBOARDERS
- The accused domain name and logo do not use circles above or below any portion of the words thereof as in the design mark
- The accused domain name and logo contain additional words arranged in a different visual appearance
- The accused logo uses a different font and tilts the words to give the overall appearance of a baseboard radiator cover

15. Given the differences between Buss General's BASEBOARDERS design mark and the accused domain name and logo, no likelihood of confusion is present between the BASEBOARDERS design mark and any generic words or terms used by Fratianne.

16. Fratianne is entitled to a declaration that no violation of the Lanham Act has occurred.

### **Count III**

#### **(Declaration of No Common Law Trademark Infringement)**

17. Again, Fratianne does not make any use whatsoever of the alleged Buss General logo, name or trademark in any way.

18. Buss General has no common law trademark rights in its logo, name or trademark. Buss General has not shown that consumers in the State of Ohio associate a particular logo, name or trademark with Buss General.

19. Fratianne is entitled to a declaration that there is no common law trademark infringement by Serious.

#### **Count IV**

##### **(Declaration of No Violation of 15 U.S.C. § 1125(a)(1)(A))**

20. Buss General has only asserted that co-Defendant Serious Inc. has made uses of Buss General's trademark and logo that is diverting Internet traffic for people searching for Buss General's products to co-Defendant Serious Inc.'s website and has attached an Exhibit F of Plaintiff's Complaint in support of this position. Exhibit F shows no use of Buss General's alleged federal or common law trademarks as being searched. Rather, the search involved only the descriptive words "baseboard heater covers," which resulted in returning Serious' website and Buss General's website, amongst 125,000 other results. Moreover, the Complaint is directed solely to alleged violations of Buss General's rights occurring wholly on the Internet domain name "BaseboardRadiatorCover.com," which Fratianne does not personally own.

21. Fratianne is entitled to a declaration that he has made no misleading descriptions that would subject him to liability to Buss General and that no violation of 15 U.S.C. § 1125(a)(1)(A) has occurred.

## Count V

### (Declaration of No Misappropriation of Trade Secrets)

22. Fratianne has never personally engaged in any business with Buss General, let alone an independent contractor relationship.

23. As President of Serious Inc., Fratianne gained knowledge of Buss General's products, but Fratianne had no knowledge of Buss General's customers, contracts, sales strategies, business strategies, or anything else that could constitute trade secrets of Buss General.

24. Under Ohio Revised Code § 1333.61, a trade secret must be the subject of reasonable efforts to maintain secrecy. Buss General has not described its efforts to maintain secrecy.

25. Under Ohio Revised Code § 1333.61, a trade secret also derives its value from not be readily ascertainable by proper means. Buss General has not alleged that its trade secrets could not be ascertained by proper means.

26. If any trade secrets were shared by Buss General during its business relationship with Serious Inc., they were not identified as such to Fratianne, and thus Fratianne cannot be liable for their use afterwards. If any trade secrets were acquired during the business relationship, they were not acquired through improper means.

27. Buss General has not defined the elements of its alleged trade secrets, as required under applicable law. Buss General has also not explained why their trade secrets could not have been independently derived by Fratianne. Finally, Buss General

has not explained how Fratianne is alleged to have received, used, or otherwise infringed upon Buss General's alleged trade secrets.

28. Fratianne is entitled to a declaration that no misappropriation of trade secrets has occurred.

### **Count VI**

#### **(Declaration of No Violation of 15 U.S.C. § 1125(d))**

29. The BASEBOARDERS design mark is not distinctive or famous, and thus is only protectable under 15 U.S.C. 1125(d)(1)(A)(ii)(III).

30. Fratianne does not personally own any Internet domain names that are trademarks owned by Buss General, and thus this section does not apply.

31. Buss General lacks any intellectual property rights in its domain name. Buss General's domain name is not distinctive, famous, or a recognized trademark or other protected name.

32. Fratianne is entitled to a declaration that he has not violated 15 U.S.C. 1125(d) with respect to Buss General and the domain name used by co-Defendant Serious Inc.

### **Count VII**

#### **(Declaration of No Violation of Title 29 of the Ohio Revised Code)**

33. The term “corrupt activity” is expressly defined in Ohio Revised Code § 2923.31(I), and misappropriation of trade secrets or trademark infringement is not included in this definition.

34. Fratianne is thus entitled to a declaration that there is no violation of Title 29 of the Ohio Revised Code.

### **Count VIII**

#### **(Declaration of No Civil Conspiracy)**

35. Fratianne again repeats that he has never personally engaged in any business with Buss General, let alone an independent contractor relationship. If any trade secrets of Buss General were received by Fratianne, they were not identified as such to Fratianne, and thus Fratianne cannot be liable for their use afterwards. If any trade secrets were acquired, they were not acquired through improper means. Buss General has also not explained why their trade secrets could not have been independently derived by Fratianne. Finally, Buss General has not explained how Fratianne is alleged to have received, used, or otherwise infringed upon Buss General’s alleged trade secrets.

36. Buss General has not alleged what, if any, actions taken by Fratianne constituted the alleged conspiracy.

37. Fratianne is thus entitled to a declaration that no conspiracy has occurred.

**Count IX**

**(Violation of the Ohio Deceptive Trade Practices Act)**

38. Buss General has falsely represented as fact that Fratianne is unauthorized to use certain descriptive terms such as “baseboard heater cover” or “baseboard radiator cover”, knowing that Buss General has no rights in those descriptive terms.

39. Buss General has knowingly and falsely represented as fact that Fratianne is using exact or confusingly similar imitations of Buss General’s BASEBOARDERS design mark and product images when Fratianne is not.

40. Upon information and belief, Buss General has attempted to present as fact several falsities to third parties.

41. Buss General’s false representations were and continue to be intentional, willful, and malicious.

42. Buss General’s disparagement of the goods, services, and business of Fratianne by false representation of fact constitutes a deceptive trade practice in violation of Ohio Revised Code § 4165, et. seq.

43. Fratianne has been damaged by this activity in an amount to be determined at trial.

**Count X**

**(Patent Misuse)**

44. Buss General's domain name baseboardheatercovers.com prominently displays the phrase "USPTO PATENT PENDING." A website capture of the Internet domain name "baseboardheatercovers.com" as of September 16, 2015 was attached as Exhibit S-4 to the Answer and Counterclaims of Defendant Serious Inc., which was filed on September 17, 2015 (Docket# 18-2). Upon information and belief, no such patent application is pending. This false statement is a violation of 35 U.S.C 292.

45. Fratianne has suffered a competitive injury as a result of a violation of this section, and has been damaged by this activity in an amount to be determined at trial.

**Count XI**

**(Frivolous Conduct in Filing Civil Claim)**

82. Buss General's claims against Fratianne in this matter involve frivolous conduct in violation of Ohio Revised Code § 2323.51.

83. Buss General's filing of its Complaint serves merely to harass or maliciously injure Fratianne or to otherwise cause unnecessary delay or litigation.

84. Buss General's Complaint consists of factual claims that are not warranted by any evidence or reasonably backed by any information or belief of Buss General including, amongst other things, its alleged common law trademarks or trade secrets, which Buss General has failed to identify, as required by applicable law.

85. As the direct and proximate result of Buss General's frivolous conduct in filing its Complaint, Fratianne has been damaged in an amount to be determined at trial, including an award of court costs, reasonable attorneys' fees, and other reasonable expenses incurred in connection with this civil action.

### **PRAYER FOR RELIEF**

WHEREFORE Fratianne /Counterclaimant prays for a judgment:

1. Declaring that Fratianne has not violated the Ohio Deceptive Trade Practices Act;
2. Declaring that Fratianne has not infringed any valid federal or common law trademarks of Buss General;
3. Declaring that Fratianne has not violated 15 U.S.C. § 1125(a)(1)(A);
4. Declaring that Fratianne has not misappropriated any trade secrets owned by Buss General;
5. Declaring that Fratianne has not violated 15. U.S.C. § 1125(d);
6. Declaring that Fratianne has not committed any corrupt activity in violation of Title 29 of the Ohio Revised Code;
7. Declaring that Fratianne has not committed any act of civil conspiracy;
8. Under Count IX, compensatory damages in an amount to be determined at trial and reasonable attorneys' fees;
9. Under Count X, compensatory damages in an amount to be determined at trial and reasonable attorneys' fees;

10. Under Count XI, compensatory damages in an amount to be determined at trial and reasonable attorneys' fees;
11. Pre- and post-judgment interest on any judgment awarded at the maximum rate permitted by law;
12. Costs of this action; and
13. All other relief as the Court may deem just and equitable.

Respectfully submitted,

Date: December 7, 2015

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**DEMAND FOR JURY TRIAL**

Gary Fratianne, pursuant to Fed. R. Civ. P. 38(b), hereby demands a trial by jury of all issues so triable in this action.

/Richard M. Klein/  
Richard M. Klein  
Attorney for Defendant Gary Fratianne

**CERTIFICATE OF SERVICE**

I hereby certify that on December 7, 2015, a copy of the foregoing **ANSWER AND COUNTERCLAIMS OF DEFENDANT GARY FRATIANNE** was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/Richard M. Klein/  
Richard M. Klein  
Attorney for Defendant Gary Fratianne

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