

ESTTA Tracking number: **ESTTA74915**

Filing date: **04/06/2006**

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 | Invacare Corporation |
| Granted to Date of previous extension | 04/15/2006 |
| Address | One Invacare Way Elyria, OH 44036 UNITED STATES |

| | |
|----------------------|--|
| Attorney information | Brendon P. Friesen Mansour, Gavin, Gerlack & Manos 55 Public Square Suite 2150 Cleveland, OH 44113-1994 UNITED STATES bfriesen@mggmlpa.com Phone:216-523-1500 |
|----------------------|--|

Applicant Information

| | | | |
|------------------------|--|------------------------|------------|
| Application No | 78637957 | Publication date | 02/14/2006 |
| Opposition Filing Date | 04/06/2006 | Opposition Period Ends | 04/15/2006 |
| Applicant | Patient Care Solutions, Inc. 1810 6th Street Berkeley, CA 94710 UNITED STATES | | |

Goods/Services Affected by Opposition

| |
|---|
| Class 044. All goods and services in the class are opposed, namely: Providing health information services to patients and health care professionals via the internet, telephony, direct mail, and other channels |
|---|

| | |
|-------------|--------------------------------------|
| Attachments | Notice of Opposition.pdf (5 pages) |
|-------------|--------------------------------------|

| | |
|-----------|----------------------|
| Signature | /Brendon P. Friesen/ |
| Name | Brendon P. Friesen |
| Date | 04/06/2006 |

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

In the Matter of Trademark Application Serial No. 78637957
For the mark “VIVACARE” in Int’l Class 044
Published in the Official Gazette on February 14, 2006

Invacare Corporation
One Invacare Way
Elyria, Ohio 44035

Opposer,

v.

Patient Care Solutions, Inc.
1810 6th Street
Berkeley, CA 94710

Applicant.

NOTICE OF OPPOSITION

Invacare Corporation, an Ohio corporation
One Invacare Way
Elyria, Ohio 44035

A first extension of time to oppose the above-identified application was granted until April 15, 2006. By and through legal counsel, Invacare Corporation (“Opposer”) now files its Notice of Opposition, as it believes that it would be damaged by registration of the mark VIVACARE that is the subject of U.S. Trademark Application Serial No. 78637957 filed on May 26, 2005 and published for opposition on February 14, 2006 (“the VIVACARE Application”), and hereby opposes registration of the VIVACARE Application.

In support of its opposition, Opposer states as follows:

1. Opposer is the owner of all right, title and interest in and to the trademark INVACARE for use in conjunction with a wide variety of products and services, including, but

not limited to, durable medical equipment and marketing services related thereto (“the Goods and Services”).

2. Opposer is the owner of all right, title and interest in and to the following U.S. Trademark Registrations for the word mark INVACARE and the word and design mark INVACARE (“the Registrations” and “the INVACARE marks”):

| Registration No. & Reg. Date; First Use in Interstate Commerce | Goods/Services/ Int’l Class |
|---|--|
| 1243496 June 28, 1983 (Word Mark); At least as early as June 30, 1971 | (Int’l Class 10) Patient Care and Safety Apparatus-Namely, Patient Lifts, Bed Rails, Bath Tub Safety Bars, Walkers, and Canes; (Int’l Class 12) Wheelchairs |
| 2840082 May 11, 2004 (Word & Design Mark); At least as early as October 1, 1998 | (Int’l Class 09) Oxygen sensing devices, namely, sensors to measure oxygen output concentration, for concentrators; electric batteries for wheelchairs and battery chargers; electronic components, namely, driving control modules for powered wheelchairs; computer software for designing custom-molded seating; (Int’l Class 10) Medical goods, namely, patient care and safety apparatus in the nature of motorized and manually adjustable beds for home and institutional patient care for invalids and physically disabled persons, overbed tables, patient and invalid lifts, stand-up patient and invalid lifts, full-body slings, bed rails, mattresses for rotation therapy; orthopedic support devices for therapeutic use, namely, hand held shower devices in the nature of shower heads and sprayers, tub spouts, diverter valves for showers, lumbar cushions, seating cushions, positioning rolls for patients, invalids and physically challenged persons, grab bars, tub safety bars, shower chairs, toilet safety frames adapted for patients and disabled persons, adjustable toilet seats adapted for patients and disabled persons, raised toilet seats adapted for patients and disabled persons, commodes adapted for patients and disabled persons, bathing seats, bathing benches, tub islands and tub grips; mobility equipment for medical purposes, namely, canes, cane tips, patient and invalid walkers and accessories therefor, rollators, crutches, crutch pads and tips. respiratory products for medical purposes, namely, aerosol therapy products in the nature of compressors, nebulizers and accessories, aspirators, compressed oxygen systems primarily comprised of oxygen cylinders, regulators, conserving devices and refilling units, |

| | |
|--------------------|---|
| 2840082 (cont.) | liquid oxygen systems primarily comprised of oxygen dewars and portable oxygen dispensers, oxygen concentrators, oxygen conserving devices in the nature of demand, variable, volume and fixed volume devices, nebulizers, nebulized compressors for respiratory therapy, patient monitoring systems primarily comprised of pulse oximeters and capnometers, sleep therapy products in the nature of positive airway pressure devices and accessories therefor, portable demand oxygen delivery devices for respiratory therapy; (Int'l Class 12) Adult and pediatric wheelchairs, adult and pediatric custom manual wheelchairs, adult and pediatric power wheelchairs and parts and accessories for all the aforementioned goods; tilt and recline mechanisms and electronic controls therefor, all sold as a unit, and all for wheelchairs; motorized personal mobility vehicles, namely, scooters; seating and positioning products for wheelchairs and home healthcare use, namely, individual seat supports and back support combinations, anti-thrust cushions, solid seats, solid seats with fluid inserts, head supports, hip and thigh stabilizers, hip abductors, pelvic stabilizers, thoracic supports, shoulder retractors, support belts, and wheelchair trays; bicycles and tricycles; (Int'l Class 35) Providing an incentive marketing program to dealers of home health care products, namely, assistance with advertising, merchandising, reimbursement monitoring, and accreditation assistance; computerized on-line ordering services in the field of durable medical equipment; (Int'l Class 40) Molding and shaping of wheelchair cushions individually for each user; (Int'l Class 41) Providing an on-line catalog in the field of durable medical equipment. |
|--------------------|---|

3. The Registrations constitute *prima facie* evidence of the validity of the registered marks, of Opposer's ownership of the INVACARE marks and of Opposer's exclusive right to use the INVACARE marks in commerce or in connection with the goods and services specified in the Registrations.

4. Opposer has used its word mark INVACARE in conjunction with one or more of the Goods and Services since at least as early as June 30, 1971 and Opposer has used its word and design mark INVACARE in conjunction with one or more of the Goods and Services since at least as early as October 1, 1998.

5. Through its long-standing use of the INVACARE marks in conjunction with the specified Goods and Services in the Registrations, the purchasing public has come to associate the term INVACARE exclusively with Opposer.

6. Through its long-standing use of the INVACARE marks in conjunction with the specified goods and services in the Registrations, Opposer has developed substantial and valuable goodwill in and to the INVACARE marks.

7. Patient Care Solutions, Inc. (“Applicant”), through the VIVACARE Application, seeks to register the mark VIVACARE in International Class 44 for “providing health information services to patients and health care professionals via the internet, telephony, direct mail, and other channels” (“Applicant’s Services”).

8. The VIVACARE Application is an intent-to-use application, for which no Statement of Use has been filed; there is no evidence in the record indicating that Applicant has used the VIVACARE mark in commerce.

9. There is no issue as to priority, as Opposer has used its INVACARE marks prior to the filing date of the VIVACARE Application.

10. Applicant’s Services for which Applicant intends to use the VIVACARE mark are the same as or closely related to Opposer’s Goods and Services and will occur in the same channels of trade as those used by Opposer for Opposer’s Goods and Services where Opposer has long-standing use of its INVACARE marks, including but not limited to the shared trade channels of resellers, distributors, hospitals, nursing homes and institutions.

11. Opposer will be damaged by registration of the VIVACARE Application by Applicant because such registration would grant to Applicant *prima facie* evidence of the exclusive right to use the mark in conjunction with Applicant’s Services and such use would be

likely to cause confusion or mistake or to deceive as to the affiliation, connection or association of Applicant with Opposer (where none exists), and as to the origin, sponsorship, and approval of Applicant's Services and other commercial activities by Opposer (where none exists).


12. Such confusion would cause irreparable harm to Opposer in that any defects or fault found with Applicant's Services or other commercial activities could erroneously be attributed to Opposer, thereby harming Opposer's reputation and damaging its substantial goodwill in the INVACARE marks.

13. Opposer's Invacare marks are famous pursuant to 15 U.S.C. Section 1125(c).

14. Opposer will be damaged by registration of the VIVACARE mark by Applicant because such registration would grant to Applicant *prima facie* evidence of the exclusive right to use the VIVACARE mark in conjunction with Applicant's Services and such use would cause dilution of the distinctive quality of Opposer's Invacare marks, and further would cause irreparable harm to Opposer's valuable goodwill in and to the INVACARE marks.

WHEREFORE, Opposer respectfully requests that the Board deny registration of Applicant's VIVACARE mark sought through the VIVACARE Application and award Opposer all other relief to which it is entitled.

This Notice of Opposition is being filed electronically with the United States Patent and Trademark Office.

By: 
Jeffrey M. Embleton (Ohio Reg. #0006480)
Brendon P. Friesen (Ohio Reg. #0076694)
Mansour, Gavin, Gerlack & Manos Co., LPA
55 Public Square, Suite 2150
Cleveland, OH 44113
Phone: 216/523-1500; Fax: 216/523-1705
Email: bfriesen@mggmlpa.com
Attorneys for Opposer Invacare Corporation

Date: 04/06/2006