

ESTTA Tracking number: **ESTTA1013907**

Filing date: **11/06/2019**

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	North Carolina Wildlife Federation, Inc.
Granted to Date of previous extension	11/06/2019
Address	1024 Washington Street Raleigh, NC 27605 UNITED STATES

Attorney information	Christopher M. Thomas Parker Poe Adams & Bernstein LLP 301 Fayetteville Street, Suite 1400 Raleigh, NC 27601 UNITED STATES trademarks@parkerpoe.com 919.828.0564
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**Applicant Information**

Application No	88328464	Publication date	07/09/2019
Opposition Filing Date	11/06/2019	Opposition Period Ends	11/06/2019
Applicant	Dr. Angelique Hjarding 6615 Eastfield Park Dr. Charlotte, NC 28269 UNITED STATES		

**Goods/Services Affected by Opposition**

Class 035. First Use: 2014/05/30 First Use In Commerce: 2014/05/30 All goods and services in the class are opposed, namely: Promoting public awareness in the field of community based pollinator programs and wildlife conservation; Charitable services, namely, organizing and developing projects to promote awareness of tree and environmental conservation
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**Grounds for Opposition**

Applicant not rightful owner of mark for identified goods or services	Trademark Act Section 1
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Attachments	notice of opposition.pdf(575916 bytes )
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Signature	/Christopher M. Thomas/
Name	Christopher M. Thomas

Date	11/06/2019
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Class 31

Seeds for planting; seeds for horticultural purposes

Class 44

Habitat restoration and wildlife preservation initiative, namely, encouraging members of the public to plant flowering plants in a manner that supports butterflies, bees, birds, and other pollen- and nectar-dependent wildlife, and providing a method for the public to register such a garden; providing information in the fields of habitat restoration and wildlife preservation

3. Applicant's Application, which was filed on March 6, 2019, covers the following services:

Class 35

Promoting public awareness in the field of community based pollinator programs and wildlife conservation; Charitable services, namely, organizing and developing projects to promote awareness of tree and environmental conservation

4. In an Office Action dated July 1, 2019, the USPTO Examining Attorney assigned to Opposer's Application noted the existence of Applicant's Application and stated that should it register, Opposer's Application "may be refused registration under Trademark Act Section 2(d)."

**A. Standing**

5. Opposer has standing to bring this opposition because Applicant's Application has been cited as a potential bar to Opposer's Application.<sup>1</sup>

6. Opposer has standing to bring this opposition because Opposer's ground for bringing the opposition is that Opposer, not Applicant, is the true owner of the mark THE BUTTERFLY HIGHWAY that is the subject of both Opposer's Application and Applicant's Application.<sup>2</sup>

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<sup>1</sup> See T.B.M.P. § 309.03(b) ("A real interest in the proceeding and a reasonable belief of damage may be found, for example, where plaintiff pleads (and later proves): . . . Plaintiff has been . . . advised that it will be refused registration when defendant's application matures into a registration, or has a reasonable belief that registration of its application will be refused because of defendant's registration.").

<sup>2</sup> See, e.g., *UVeritech, Inc. v. Amax Lighting, Inc.*, 115 U.S.P.Q.2d 1242, 1245 (T.T.A.B. 2015) ("The dispute over ownership of the mark also establishes standing.").

**B. Ground for Opposition: Opposer Is the True Owner of the Mark THE BUTTERFLY HIGHWAY**

7. Opposer, not Applicant, is now, and has been since at least the filing date of Applicant's Application, the true owner of the mark THE BUTTERFLY HIGHWAY.

8. While enrolled in a graduate program at the University of North Carolina at Charlotte in 2015, Applicant worked on her school dissertation about what she called "The Butterfly Highway Project."

9. While still working on her dissertation involving "The Butterfly Highway Project," Opposer hired Applicant as an independent contractor starting on or about July 14, 2015.

10. Opposer's CEO, Tim Gestwicki, sent the email shown below on June 16, 2015, for the purpose of introducing Applicant to Opposer's staff:

NCWF Staff,

I am pleased to let you all know that Angelique (**Angel**) Hjarding is joining the NCWF Team.

A few folks met Angel at the last Board meeting and the rest of you will get to meet her as she segues away from her teaching at UNCC into her role with NCWF leading our Pollinator and Wildlife Habitat Programs. Angel will be working to complete her dissertation on her research with her butterfly highway project [www.butterflyhighway.org](http://www.butterflyhighway.org)

Here is a good piece on the effort

<http://inside.uncc.edu/news-features/2015-06-04/butterfly-highway-graduate-student-creates-citizen-science-network> and one of her published pieces is attached.

Angel can be reached at [angel@ncwf.org](mailto:angel@ncwf.org)

Welcome aboard Angel!

tim

11. Opposer hired Applicant as an independent contractor to lead Opposer's Pollinator and Wildlife Habitat Programs, which included THE BUTTERFLY HIGHWAY program.

12. In or around April 2017, Applicant transitioned from an independent contractor to a salaried employee of Opposer.

13. On April 1, 2019, Applicant emailed her resignation to Mr. Gestwicki:

Hi Tim,

This email serves as my letter of resignation as an employee of the North Carolina Wildlife Federation effective immediately.

In addition, I own the trademark to the Butterfly Highway (US Trademark #88328464) and request that the North Carolina Wildlife Federation discontinue use of my intellectual property effective today April 1, 2019.

If you have questions regarding this matter, please contact my attorney Paula Yost at 704-436-2214.

Sincerely,

Angelique Hjarding

14. Prior to Applicant's resignation email of April 1, 2019, neither Mr. Gestwicki, who made the decision to hire Applicant in 2015, nor anyone else employed by Opposer ever discussed with Applicant who owned the trademark THE BUTTERFLY HIGHWAY or the underlying project.

15. Opposer often refers to itself, and is referred to by others, using the acronym "NCWF."

16. Applicant published a blog post on Opposer's website on May 26, 2016, in which Applicant stated, "The Butterfly Highway is a program of NCWF that aims to create a highway for pollinators and wildlife through the state."<sup>3</sup>

17. In the Spring 2016 edition of Opposer's journal, the *North Carolina Wildlife Federation Journal*, Applicant wrote:

[T]he North Carolina Wildlife Federation has launched its newest campaign to support pollinators and wildlife in North Carolina, *The Butterfly Highway: A Roadmap for Pollinator and Wildlife Conservation*. The Butterfly Highway is a statewide community-based environmental restoration initiative with the aim of restoring native pollinator habitats to areas impacted by urbanization across North Carolina.<sup>4</sup>

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<sup>3</sup> <https://blog.nwf.org/2016/05/community-partnerships-connect-kids-with-nature/>. Opposer recognizes that the provision of links in this Notice of Opposition does not make any evidence of record. These links are provided strictly as a courtesy to the reader, and Opposer will properly introduce this evidence and other evidence at the appropriate time.

<sup>4</sup> <https://ncwf.org/wp-content/uploads/ncwf-journal-spring-2016.pdf>.

18. In January 2017, Applicant authored an article in the journal *Biophilic Cities* titled

*The Butterfly Highway: Connecting People To Nature*. In that article, Applicant wrote:

In 2015, the Butterfly Highway was adopted as an official program of the North Carolina Wildlife Federation. The increased capacity provided by the North Carolina Wildlife Federation has helped the Butterfly Highway grow into a statewide community-based environmental restoration initiative. From backyard ‘Pollinator Pitstops’ to large-scale roadside habitat restoration, the program is working to create a network of native flowering plants to support butterflies, bees, birds, and other pollen and nectar dependent wildlife. While there is still a focus on restoring habitat in urban spaces, the program has opened up opportunities for restoring habitat on farms, roadsides and in utility right of way corridors.<sup>5</sup>

19. In a recorded interview with *The Charlotte Observer* in or around February 2018, Applicant stated on camera as follows:

The Butterfly Highway is a project that started here in Charlotte as one of my research projects at UNC Charlotte, and it has been taken onboard as a program of the North Carolina Wildlife Federation so that we could take it across the state.<sup>6</sup>

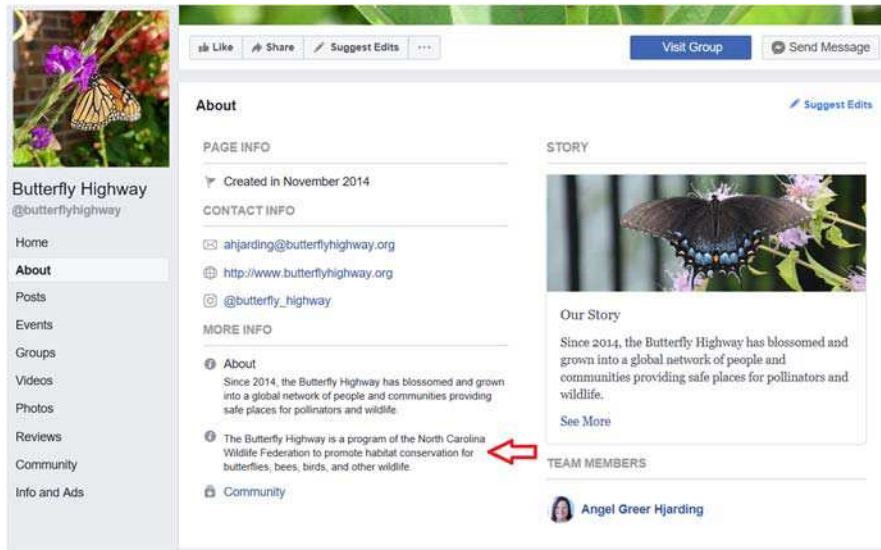
20. At least up until April 18, 2019, Applicant’s Facebook page stated, “The Butterfly Highway is a program of the North Carolina Wildlife Federation . . .,” as shown below (red arrow added):

[this space intentionally left blank]

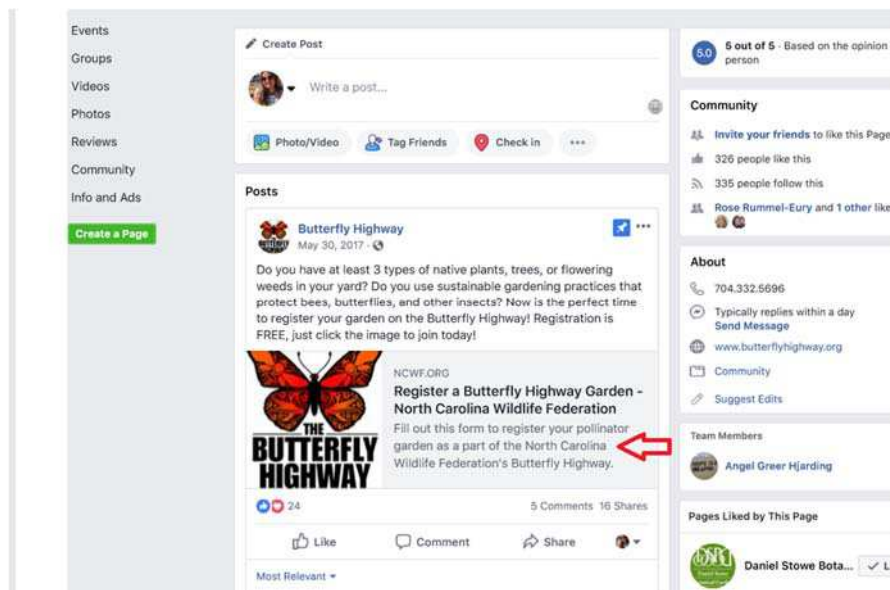
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<sup>5</sup><https://static1.squarespace.com/static/5bbd32d6e66669016a6af7e2/t/5c93ed86c83025e29de055ef/1553198471841/The-Butterfly-Highway-Connecting-People-and-Nature-by-Angelique-Hjarding.pdf>.

<sup>6</sup> <https://www.charlotteobserver.com/news/local/article84991852.html> [video: ~18-33 second mark].



21. The first specimen of use (“Specimen 1”) submitted by Applicant with Applicant’s Application consists of a posting dated May 30, 2017 on Applicant’s Facebook page. A partial screenshot of Specimen 1 is shown below (red arrow added):



22. Specimen 1 contains an embedded link to Opposer’s website and states, “Fill out this form to register your pollinator garden as a part of the North Carolina Wildlife Federation’s Butterfly Highway.”



23. The second specimen of use (“Specimen 2”) submitted by Applicant with Applicant’s Application is a printout from Opposer’s website. A partial screenshot of Specimen 2 is shown below:



24. In Applicant’s Application, Applicant described Specimen 2 as “Applicant’s . . . webpage,” as shown below (red underling added):

ORIGINAL PDF FILE	<a href="#">SPE0-6940198198-20190306170209655188 - The Butterfly Highway - North Carolina Wildlife Federation.pdf</a>
CONVERTED PDF FILE(S) (6 pages)	<a href="#">\\TICRS\EXPORT17\IMAGEOUT17\883\284\88328464\xml1\RFA0006.JPG</a>
	<a href="#">\\TICRS\EXPORT17\IMAGEOUT17\883\284\88328464\xml1\RFA0007.JPG</a>
	<a href="#">\\TICRS\EXPORT17\IMAGEOUT17\883\284\88328464\xml1\RFA0008.JPG</a>
	<a href="#">\\TICRS\EXPORT17\IMAGEOUT17\883\284\88328464\xml1\RFA0009.JPG</a>
	<a href="#">\\TICRS\EXPORT17\IMAGEOUT17\883\284\88328464\xml1\RFA0010.JPG</a>
	<a href="#">\\TICRS\EXPORT17\IMAGEOUT17\883\284\88328464\xml1\RFA0011.JPG</a>
SPECIMEN DESCRIPTION	a screenshot of <u>Applicant's</u> social media and <u>webpage</u> clearly depicting the mark

25. Specimen 2 does not depict Applicant’s webpage.

26. Specimen 2 depicts Opposer’s webpage.

27. At the time Applicant filed Applicant's Application, Applicant knew that Specimen 2 did not depict Applicant's webpage.

28. On or about April 18, 2019, Opposer's attorney sent a letter ("Opposer's Letter") to Applicant's attorney.

29. Among other things, Opposer's Letter pointed out that Applicant falsely described Specimen 2 as "Applicant's . . . webpage."

30. Applicant has taken no steps to correct the record in Applicant's Application to reflect that Specimen 2 does not depict Applicant's webpage, but rather Opposer's webpage.

31. From the time Opposer hired Applicant as an independent contractor starting on or about July 14, 2015 until April 1, 2019 (the "Period"), Opposer's name appeared with the mark THE BUTTERFLY HIGHWAY in connection with the goods and services offered under the mark.

32. To the extent Applicant's name appeared during the Period in connection with the mark THE BUTTERFLY HIGHWAY, Applicant was identified as working for Opposer.

33. During the Period, Opposer maintained the quality and uniformity of the goods and services offered under the mark THE BUTTERFLY HIGHWAY.

34. During the Period, Applicant was acting under the control of Opposer with respect to THE BUTTERFLY HIGHWAY program, either as an independent contractor or an employee.

35. The consuming public believes that Opposer stands behind the goods and services offered under the mark THE BUTTERFLY HIGHWAY.

36. During the Period, Opposer paid for all advertising and expenses related to THE BUTTERFLY HIGHWAY program.

37. During the Period, both Opposer and Applicant publicly represented that The Butterfly Highway was a program of Opposer's.

**C. Conclusion**

Opposer respectfully requests that Applicant's Application be refused, that no registration be issued thereon to Applicant, and that this opposition be sustained in favor of Opposer.

Respectfully submitted,

Date: November 6, 2019

/Christopher M. Thomas/

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