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

Proceeding	91252740
Party	Defendant Taylor Gilbreath
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Date	02/20/2020
Attachments	FLOWCARE - Answer to Notice of Opposition and Counterclaim - 02.20.pdf(60656 bytes)

Registration Subject to the filing

Registration No.	5059600	Registration date	10/11/2016
Registrant	Red Star Traders, LLC 1891 W 2100 S Salt Lake City, UT 84119 UNITED STATES		

Goods/Services Subject to the filing

<p>Class 019. First Use: 2008/02/16 First Use In Commerce: 2008/02/16 All goods and services in the class are requested, namely: Modular wall mounting kits comprising non-metal wall panels, non-metal slot wall panels, hooks, hangers, shelves and/orbrackets; modular shelving kits comprising non-metal wall panels, non-metal slot wall panels, hooks, hangers, brackets,shelves, bins and/or racks; slot wall storage kits comprising non-metal slot wall panels, hooks, hangers, brackets, shelves, bins and/or racks</p>

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

In the matter of Serial No. 88/221,439
Filed: December 5, 2019

Red Star Traders, LLC,)	
)	Opposition No. 91252740
Opposer,)	
)	Serial Nos. 88/221,439
v.)	
)	Mark: FLOWCARE
Taylor Gilbreath,)	
)	
Applicant.)	

United States Patent and Trademark Office
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

ANSWER TO NOTICE OF OPPOSITION

Applicant Taylor Gilbreath (“Applicant”), by its attorneys, hereby answers the numbered paragraphs of the Notice of Opposition filed by Red Star Traders, LLC (“Opposer”) as follows:

1. Applicant admits the allegations of the first numbered paragraph.
2. Applicant admits the allegations of the second numbered paragraph.
3. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations in the third numbered paragraph, and they are therefore denied.

4. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations in the fourth numbered paragraph, and they are therefore denied.

5. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations in the fifth numbered paragraph, and they are therefore denied.

6. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations in the sixth numbered paragraph, and they are therefore denied.

7. In response to the seventh numbered paragraph, Applicant admits on information and belief that the USPTO database appears to indicate Opposer as the owner of U.S. Registration No. 5,059,600, provides a filing date of April 15, 2016, and provides a registration date of October 11, 2016. Applicant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in the seventh numbered paragraph. To the extent such allegations are legal conclusions to which no response is required, they are denied.

8. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations in the eighth numbered paragraph, and they are therefore denied.

9. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations in the ninth numbered paragraph, and they are therefore denied.

10. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations in the tenth numbered paragraph, and they are therefore denied.

11. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations in the eleventh numbered paragraph, and they are therefore denied.

12. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations in the twelfth numbered paragraph, and they are therefore denied.

13. In response to the thirteenth numbered paragraph, Applicant admits that Opposer is not connected with the goods Applicant offers under the FLOWCARE mark. The remaining allegations in the thirteenth numbered paragraph are legal conclusions, to which no response is required. To the extent a response is required, the remaining allegations in the thirteenth numbered paragraph are denied.

14. The allegations in the fourteenth numbered paragraph are legal conclusions, to which no response is required. To the extent a response is required, the allegations in the fourteenth numbered paragraph are denied.

15. The allegations in the fifteenth numbered paragraph are legal conclusions, to which no response is required. To the extent a response is required, the allegations in the fifteenth numbered paragraph are denied.

16. The allegations in the sixteenth numbered paragraph are legal conclusions, to which no response is required. To the extent a response is required, the allegations in the sixteenth numbered paragraph are denied.

17. The allegations in the seventeenth numbered paragraph are legal conclusions, to which no response is required. To the extent a response is required, the allegations in the seventeenth numbered paragraph are denied.

18. The allegations in the eighteenth numbered paragraph are legal conclusions, to which no response is required. To the extent a response is required, the allegations in the eighteenth numbered paragraph are denied.

19. Applicant denies that Opposer is due to be granted any relief.

AFFIRMATIVE DEFENSES

Applicant does not assume the burden of proof with respect to the defenses as set forth below where the substantive law provides otherwise. Applicant hereby gives notice that it may rely on any defenses that may become available or appear proper during discovery, and hereby reserve the right to amend this Answer to assert any such defenses. For its affirmative defenses, Applicant states as follows:

First Affirmative Defense – Failure to State a Claim

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

Second Affirmative Defense – Failure to State a Claim

2. Opposer should be denied relief under the doctrine of unclean hands.

Third Affirmative Defense – No Likelihood of Confusion

3. No likelihood of confusion, mistake, or deception exists between Opposer's mark and Applicant's mark because the marks are not confusingly similar.

4. No likelihood of confusion, mistake, or deception exists between Opposer's mark is a weak mark and should be afforded limited protection, if any.

5. No likelihood of confusion, mistake, or deception exists between Opposer's mark and Applicant's use of their respective marks because the goods sold by Applicant under Applicant's mark are distinctive from the goods with which Opposer allegedly employs its pleaded mark.

6. No likelihood of confusion, mistake, or deception exists between the Opposer's and the Applicant's use of their respective marks because the class of prospective purchasers of the parties' respective services is sophisticated with respect to purchasing decisions generally and with respect to the source of such services specifically.

7. No likelihood of confusion, mistake, or deception exists between the Opposer's and the Applicant's use of their respective marks, and no likelihood of dilution or blurring of Opposer's mark is likely because the parties' respective marks are clearly different in appearance, sound, and overall commercial impression.

8. No likelihood of confusion, mistake, or deception exists between the Opposer's and the Applicant's use of their respective marks, and no likelihood of dilution or blurring of Opposer's mark is likely because the relevant channels of trade for goods associated with the parties' respective marks are separate and distinct.

Fourth Affirmative Defense – Opposer Cannot Monopolize the Term FLOW

9. There are many active registrations in the USPTO database (at least an estimated 1,279) that include the term FLOW. There are many additional active registrations in the USPTO database (at least an estimated 673) that include pseudo marks of the term FLOW (e.g., FLO).

10. There are many active registrations in the USPTO database that include the term FLOW or a pseudo mark thereof that have been issued in Class 19 and/or for goods related to storage. In Class 19 alone, third party registrations of FLOWCRETE, FLOW-CRETE, HI-FLOW, FLO-FREE, FLOWFRESH, FLOWSTONE, FLOWTITE, FLOWPATCH and many others coexist.

11. There are other pending and allowed registrations in the USPTO database that include the term FLOW or a pseudo mark thereof in Class 19 and/or for goods related to storage.

12. The term FLOW has a generic meaning in relation to materials storage and describes the efficient movement of materials through a supply chain or facility. Similarly, terms such as FLOW RACK, FLOW SHELF, and FLOW RAIL are generically used in relation to industrial storage systems that facilitate the efficient movement of materials.

13. The term FLOW is commonly used in the business environment as a shortened version of “workflow” to describe systematic organization or sequences of operation.

14. Applicant seeks to register the mark FLOWCARE (the “FLOWCARE Mark”) in Class 20 for the goods of “storage and organization systems comprising at least one of shelves, drawer(s), dualdirectional drawer(s), basket(s), dual-directional basket(s), a pass-thru linen hamper in the nature of baskets for transporting goods for commercial purposes, or a dual-directional pass-thru linen hamper in the nature of baskets for transporting goods for commercial purposes, sold as a unit; metal storage cabinets; wood storage cabinets; furniture for use in the health care industry, namely, metal and wood storage cabinets.” Applicant uses the FLOWCARE mark in connection with storage cabinets, specifically nurse server cabinets, for storing medical supplies as evidenced by Applicant’s website <https://www.flowcaresolutions.com/>.

15. Opposer has no right to monopolize the term FLOW to prevent Applicant from using a term that has known meanings in relation to materials storage and workplace organization.

Fifth Affirmative Defense – Merely Descriptive

16. U.S. Registration No. 5,059,600 asserted by Opposer is invalid because the term “FLOW WALL” is merely descriptive and lacks secondary meaning.

COUNTERCLAIM

Taylor Gilbreath (“Applicant”), an individual having an address at 11719 Cooper Circle, Papillion, Nebraska, 68046, believes that it will be damaged by U.S. Registration No. 5,059,600 and hereby petitions to cancel the registration for the FLOW WALL Mark, owned by Red Star Traders, LLC (“Opposer”). The grounds for cancellation are as follows:

1. Opposer is the owner of U.S. Registration No. 5,059,600 for FLOW WALL (the “FLOW WALL Mark”), registered on the Principal Register, and issued by the USPTO on October 11, 2016 for the class 19 goods of “Modular wall mounting kits comprising non-metal wall panels, non-metal slot wall panels, hooks, hangers, shelves and/or brackets; modular shelving kits comprising non-metal wall panels, non-metal slot wall panels, hooks, hangers, brackets, shelves, bins and/or racks; slot wall storage kits comprising non-metal slot wall panels, hooks, hangers, brackets, shelves, bins and/or racks”.

2. Applicant is the owner of U.S. Trademark Application Serial No. 88/221,439 for the FLOWCARE Mark filed on December 7, 2018.

3. Opposer has opposed Applicant’s Mark, alleging that it is likely to cause confusion with the FLOW WALL Mark.

4. Opposer designs and markets modular wall mounting kits including wall panels that are connected in a continuous manner.

5. Merriam-Webster dictionary defines “flow” as “having smooth continuity” and Roget’s 21st Century Thesaurus lists “flow” as a synonym for continuance or continuous.

6. Upon information and belief, the term FLOW is commonly used in the furniture, interior, and exterior design industries as a synonym for a seamless, continuous, and/or uninterrupted appearance.

7. Upon information and belief, companies other than Opposer have recently used the term FLOW as a trademark for, or component of a trademark for wall panels, modular wall systems, and/or building materials.

8. Upon information and belief, the term FLOW, as applied to modular wall panels, is merely descriptive of a characteristic or attribute of some of such goods.

9. During prosecution of the FLOW WALL Mark, Opposer was required to disclaim the term WALL because the wording was determined to be generic in the context of Opposer's goods.

10. The FLOW WALL Mark as a whole is descriptive because it is formed from separate descriptive words that, when joined, form a compound having the same meaning that common usage would ascribe to those words as a compound.

11. Applicant will be damaged if Opposer is permitted to retain the registration sought to be cancelled. Opposer has already sought to use the FLOW WALL Mark to oppose Applicant's application in the instant proceeding, which is evidence of damage to Applicant. Further, the prima facie effect of Opposer's registration tends to impair the rights of users of similar descriptive terms, as the registration affords Opposer the right to assert its rights in these descriptive terms against such users.

12. Opposer has not submitted any evidence of acquired distinctiveness in its application for the FLOW WALL Mark or in this proceeding.

13. FLOW WALL, for modular wall mounting kits including wall panels, is not entitled to registration on the Principal Register because it is merely descriptive under Section 2(e)(1) of the Lanham Act.

14. FLOW WALL has not acquired distinctiveness as a trademark for modular wall mounting kits including wall panels belonging to Applicant, and is therefore not entitled to registration on the Principal Register under Section 2(f) of the Lanham Act.

18. Applicant hereby gives notice that it may rely on any counterclaims that may become available or appear proper during discovery, and hereby reserve the right to amend this Answer to assert any such counterclaims.

WHEREFORE, Applicant believes that Opposer will not be damaged by registration of Applicant's mark and prays that this Opposition be dismissed with prejudice, that Opposer's registration for FLOWCARE be cancelled, and that the registration of the mark shown in Application Serial No. 88/221,439 be granted.

Respectfully submitted,

Dated: February 20, 2020 By: /Mallory M. Henninger/
Mallory M. Henninger
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Taylor Gilbreath

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and complete copy of the foregoing Answer and Counterclaim has been duly served on Opposer's Correspondent by forwarding said copy on this 20th day of February, 2020, via email to:

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February 20, 2020