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

| | | |
|--------------------------|-----------------------------|---|
| In re: | |) |
| Application Serial No.: | 78/181,744 |) |
| Applicant Name: | Cashflow Technologies, Inc. |) |
| Application Filing Date: | November 5, 2002 |) |
| Mark: | MISCELLANEOUS DESIGN |) |
| Class: | 28 |) |

NOTICE OF APPEAL

Applicant, pursuant to Trademark Rule 2.141, hereby appeals to the Trademark Trial and Appeal Board from the Examining Attorney's refusal of registration dated December 23, 2004. Pursuant to §§2.141 and 2.6 please charge our deposit account (19-3878) \$100.00 for the appeal fee, for which purpose a duplicate copy of this sheet is enclosed.

Please stamp and date the enclosed postcard to acknowledge receipt of this document and return it to us.

Respectfully submitted,
SQUIRE, SANDERS & DEMPSEY L.L.P

Dated: 6-23-05

By: David E Rogers

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CERTIFICATE OF MAILING PURSUANT TO 37 C.F.R. §1.8

I, Caillin Gardner, hereby certify that this correspondence, pursuant to 37 C.F.R. §1.8, is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451, on:

Date: June 23, 2005

By Caillin Gardner

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CERTIFICATE OF MAILING PURSUANT TO 37 C.F.R. §1.8

I, Caitlin Gardner, hereby certify that this correspondence, pursuant to 37 C.F.R. §1.8, is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451, on:

Date: 6/23/05

By Caitlin Gardner

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**IN THE UNITED STATES PATENT AND
TRADEMARK OFFICE**

Applicant(s): Cashflow Technologies, Inc. Docket No.: 20832.00443
Serial No.: 78/181,744 Examining Attorney: Teresa Rupp
Filing Date: November 5, 2002 Law Office No.: 106
Mark: MISCELLANEOUS DESIGN

RESPONSE

Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

Commissioner:

Cashflow Technologies, Inc. ("Applicant") hereby responds to the Office Action mailed December 23, 2004, in the above-identified application and amends the application as follows:

REMARKS.

A. Drawing.

The Examining Attorney has indicated that the drawing submitted with Applicant's communication mailed October 12, 2004 is unacceptable. In response, Applicant submits herewith as Exhibit 1 a new drawing which conforms to 37 CFR § 2.52.

B. Failure To Function As A Mark.

The Examining Attorney has refused to register the pending application and still contends that the mark shown in the present application is merely an ornamental color, but continues to overlook the fact that there is a shape in the center of the colored section and also rectangular boxes arranged on a diagonal to one another. The mark sought to be registered is thus a design mark and not merely a color. Applicant respectfully traverses this rejection because (1) the mark is not merely color, but a design that includes color, (2) the mark is fanciful when used in

connection with the goods listed in this application, and (3) Applicant is not aware of, and the Examining Attorney still has not cited, any goods similar to the type listed in the present application that include Applicant's design.

U.S. trademark law is very liberal – perhaps the most liberal in the world as to what is registerable subject matter. In re Paramount Pictures Corp., 213 USPQ 1111, 1113 (TTAB 1982). The broad and liberal interpretation of our law is that, when a mark is part of the aesthetic ornamentation, but also serves as a source indicating function, it should be registered. Id. (citations omitted); see also In re Paramount Pictures Corp., 217 USPQ 292, 293 (TTAB 1983); In re Watkins Glen International, Inc., 227 USPQ 727 (TTAB 1985) (matter that serves as part of the aesthetic ornamentation of goods **may nevertheless be registered as a trademark** if it also serves a source-indicating function); In re Astro-Gods, Inc., 223 USPQ 621 (TTAB 1984); In re Olin Corp., 181 USPQ 182 (TTAB 1973).


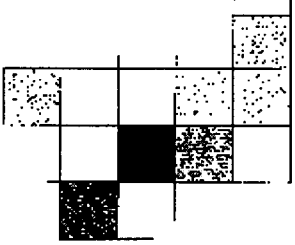
In this application, the matter sought to be registered is fanciful in connection with the goods (e.g., the design on a box used to package board games for financial education), is not used by others, draws attention to the goods and hence functions to indicate source. See In re Olin, 181 USPQ at 182-83; In re Dimitri's, 9 USPQ 2d 1666, 1667 (TTAB 1988). Thus, it is registerable as a trademark.

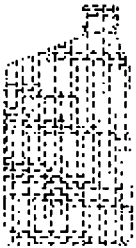
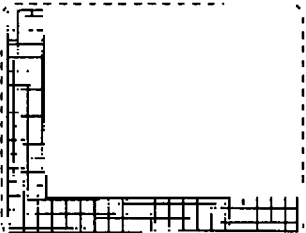
As previously mentioned, the Examiner no longer relies on In re Petersen Manufacturing Co., 2 USPQ 2d 2032 (TTAB 1987), In re J. Kinderman & Sons Inc., 46 USPQ 2d 1253, (TTAB 1998), Wal-Mart Stores Inc. v. Samara Bros. Inc., 54 USPQ 2d (TTAB 2000), nor Qualitex Co. v. Jacobson Products Co., 30 USPQ 2d 1161 (1995). The Examining Attorney has apparently also abandoned reliance on Seabrook Foods Inc. v. Bar-Well Foods Ltd., 196 USPQ 289 (CCPA 1977) and In re E.S. Robbins Corp., 30 USPQ 2d 1540 (TTAB 1992). Applicant further notes that the Examining Attorney has only commented on Applicant's citation of In re Astro-Gods, Inc., and on no other cases cited by Applicant.

In this case, Applicant's design is not a product nor a color, it is the design on its box, which is displayed to the public to distinguish Applicant's goods from the goods of others. The mark is plainly non-functional and fanciful.

There Are Numerous Third-Party Registrations Supporting the Conclusion that Applicant's Mark is Registerable.

Following is a list of registered marks that have less distinctive character than Applicant's mark. Details of these respective registrations as found on the USPTO Trademark Electronic Search System (TESS) database are attached as collective Exhibit 2. These registrations are persuasive authority that Applicant's design mark is also registerable.

| <u>Mark</u> | <u>Goods/Services</u> | <u>Registration No.</u> |
|--|---|-------------------------|
|  | <p>International Class: 028 Equipment sold as a unit for playing parlour games, card games or board games.</p> | <p>1,942,234</p> |
|  | <p>International Class: 041 PUBLICATION OF TEXTBOOKS, BOOKS AND JOURNALS; PUBLICATION OF THE TEXT, DIAGRAMS, IMAGES AND PHOTOGRAPHS OF OTHERS ON THE INTERNET; EDUCATIONAL SERVICES, NAMELY, CONDUCTING CLASSES, SEMINARS, CONFERENCES AND WORKSHOPS IN THE FIELD OF TELECOMMUNICATIONS, COMPUTERS, COMPUTER PROGRAMS, AND WEB SITE DESIGN; ENTERTAINMENT PROVIDED VIA ELECTRONIC INTERACTIVE MEDIA, NAMELY, PROVIDING A COMPUTER GAME THAT MAY BE ACCESSED NETWORKWIDE BY NETWORK USERS; ENTERTAINMENT SERVICES, NAMELY, PROVIDING AN ON-LINE COMPUTER GAME VIA THE INTERNET; ARRANGING AND CONDUCTING EDUCATIONAL CONFERENCES; PROVIDING INFORMATION IN THE FIELD OF LIVE MUSIC</p> | <p>2,836,302</p> |

| <u>Mark</u> | <u>Goods/Services</u> | <u>Registration No.</u> |
|---|--|-------------------------|
| | ENTERTAINMENT AND MUSIC EDUCATION VIA THE INTERNET; PROVIDING AN ONLINE COMPUTER DATABASE IN THE FIELD OF LIVE MUSIC ENTERTAINMENT AND MUSIC EDUCATION; PROVIDING ONLINE, NONDOWNLOADABLE DIGITAL MUSICAL SOUND RECORDINGS VIA THE INTERNET; PROVIDING ONLINE, NONDOWNLOADABLE DIGITAL MUSICAL SOUND RECORDINGS VIA MP3 WEBSITES LOCATED ON THE INTERNET | |
|  | International Class: 004 Motor oil | 2,029,575 |
|  | International Class: 005 Veterinary vaccines, veterinary medicines and pharmaceutical preparations, namely, vaccines for the prevention of enteric, respiratory, reproductive, erysipelas, and clostridial diseases in livestock; and vaccines for the treatment of feline infectious peritonitis ("FIP"), feline leukemia; and feline viral rhinotracheitis ("FVR") and rabies in cats; rabies; kennel cough; distemper; parvo virus; coronavirus; parainfluenza; leptospira bacteria; and bordetella in dogs; and encephalomyelitis; tetanus; rhinopneumonitis; and influenza in horses; medicines, namely, | 2,470,816 |

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