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

Proceeding	91210863
Party	Defendant Thanco Products & Imports, Inc.
Correspondence Address	D PETER HARVEY HARVEY SISKIND LLP 4 EMBARCADERO CENTER, 39TH FLOOR SAN FRANCISCO, CA 94111-4115 UNITED STATES pharvey@harveysiskind.com, ngray@harveysiskind.com, clee@harveysiskind.com
Submission	Opposition/Response to Motion
Filer's Name	Naomi Jane Gray
Filer's e-mail	pharvey@harveysiskind.com, ngray@harveysiskind.com, kmcknight@harveysiskind.com, clee@harveysiskind.com
Signature	/Naomi Jane Gray/
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1 HARVEY SISKIND LLP  
D. PETER HARVEY (CA SBN 55712)  
2 pharvey@harveysiskind.com  
3 NAOMI JANE GRAY (CA SBN 230171)  
ngray@harveysiskind.com  
4 KATE W. MCKNIGHT (CA SBN 264197)  
kmcknight@harveysiskind.com  
5 Four Embarcadero Center, 39<sup>th</sup> Floor  
San Francisco, CA 94111  
6 Telephone: (415) 354-0100  
7 Facsimile: (415) 391-7124

8 Attorneys for Applicant,  
9 Thanco Products & Imports, Inc.

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

13 \_\_\_\_\_ )  
14 CHRIS ECONOMIDES III, )  
an individual, )

15 Opposer, )

16 v. )

17 )  
18 THANCO PRODUCTS & IMPORTS, INC. )  
a Texas corporation, )

19 Applicant. )  
20 \_\_\_\_\_ )

**MOTION AND MEMORANDUM  
IN SUPPORT OF APPLICANT'S  
MOTION TO DISMISS OPPOSER'S  
AMENDED NOTICE OF OPPOSITION**

Opposition No. 91210863

21 **APPLICANT'S MOTION TO DISMISS AMENDED NOTICE OF OPPOSITION**

22 Applicant Thanco Products & Imports, Inc. ("Thanco") respectfully requests dismissal, with  
23 prejudice, of the Amended Notice of Opposition (the "Amended Opposition") filed by Opposer Chris  
24 Economides III ("Economides" or "Opposer") on November 22, 2013 because (1) Opposer lacks  
25 standing to bring the Amended Opposition pursuant to 15 U.S.C. § 1064 and T.B.M.P. § 309.03(b); and  
26 (2) the Amended Opposition fails to state a claim for relief under Rule 12(b)(6) of the Federal Rules of  
27 Civil Procedure. As discussed in detail below, Opposer's Amended Opposition is legally deficient  
28

1 because he has no real interest in these proceedings or a reasonable belief of damage, and he fails to  
2 properly allege facts sufficient to support any of the claims set forth in his Amended Opposition,  
3 including (a) improper prosecution of the mark; (b) fraud; and (c) false suggestion of a connection with  
4 a national symbol. Because Opposer has now had two opportunities to plead standing and a proper  
5 cause of action, and his pleading is still deficient, Applicant requests that the Amended Opposition be  
6 dismissed with prejudice.

### 7 **BACKGROUND**

8 On May 29, 2013, Opposer filed a Notice of Opposition (the “Opposition”) opposing  
9 registration of Application Nos. 77378572 and 77369646 (the “Applications”) for the mark GOT  
10 OUZO? in connection with “coffee cups, tea cups and mugs” in International Class 021 and “t-shirts,  
11 sweat shirts, and caps” in International Class 025, respectively. The Opposition alleged as grounds  
12 deceptiveness, false suggestion of a connection, geographic indication, descriptiveness, geographic  
13 descriptiveness, “*Torres v. Cantine Torresella S.r.l.* fraud,” improper prosecution, failure to show  
14 secondary meaning, *Papa Ads, LLC v. Gatehouse Media, Inc.*, and “mark interferes with foreign  
15 owner’s mark.” Opposer claimed to be injured by the Applications because “he makes and sells  
16 clothing for numerous customers including Greek Orthodox Churches and Festivals and would be  
17 harmed by the registration of the mark as applied for.” (D.N. 1 at ¶ 1.)

18 Thanco moved to dismiss on the grounds that Opposer had no standing under 15 U.S.C. § 1063,  
19 and that the Opposition otherwise did not state a cause of action. On November 3, 2013, the Board  
20 granted Thanco’s motion to dismiss in its entirety. (D.N. 16 at 13.) The order granting the motion (the  
21 “Order”) permitted Opposer to amend the opposition to allege standing, as well as certain other claims.  
22 (*Id.*) The Order specifically prohibited Opposer from “re-asserting claims of improper prosecution.”  
23 (*Id.*)

24 On November 22, 2013, Opposer filed the Amended Opposition, purporting to allege standing,  
25 and purporting to state claims for (1) improper prosecution (under the heading “Failure to Prove  
26 Secondary Meaning”); (2) fraud; and (3) false suggestion of a connection with a national symbol. The  
27 Amended Opposition repeats many of the shortcomings of the Opposition. Opposer still fails to allege  
28 facts sufficient to show standing, and he still fails to state a cause of action.

**ARGUMENT**

1  
2           “A party opposing a registration pursuant to Section 13 of the Lanham Act must show (1) that  
3 he has standing and (2) a statutory ground which negates the applicant’s entitlement to registration.  
4 Moreover, an opposer must at the pleading stage allege facts in support of both, a conclusion that is  
5 fully consistent with the PTO’s rules.” *Young v. AGB Corp.*, 152 F.3d 1377, 1380 (Fed. Cir. 1998).

6           The Board reviews a Motion to Dismiss by assuming that all well-pleaded allegations in the  
7 opposition are true, and construing those allegations in the light most favorable to the opposer.  
8 *Consolidated Foods Corp. v. Big Red, Inc.*, 226 U.S.P.Q. 829, 831 (T.T.A.B. 1985). Under the  
9 heightened pleading standard announced by the Supreme Court in *Bell Atlantic Corp. v. Twombly*. and  
10 confirmed in *Ashcroft v. Iqbal*, these allegations must consist of ““a short and plain statement of the  
11 claim showing that the pleader is entitled to relief’ in order to ‘give the defendant fair notice of what the  
12 ... claim is and the grounds upon which it rests.”” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555  
13 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 677-678 (2009). The grounds of the complaint must  
14 include “more than labels and conclusions, and a formulaic recitation of the elements of a cause of  
15 action will not do”; the “[f]actual allegations must be enough to raise a right to relief above the  
16 speculative level.” *Twombly*, 550 U.S. at 555; *see also Iqbal*, 556 U.S. at 677-678 (finding that “[a]  
17 claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the  
18 reasonable inference that the defendant is liable for the misconduct alleged.”).

19           Even under this deferential standard, Opposer fails to state a claim upon which relief can be  
20 granted because the Opposition contains no facts that reasonably support standing or the pleaded  
21 grounds. Thanco’s Motion to Dismiss should be granted because “it is clear that no relief could be  
22 granted under any set of facts that could be proved consistent with the allegations.” *Young*, 152 F.3d at  
23 1379.

24 **I. OPPOSER LACKS STANDING.**

25           “Any person who believes that he would be damaged by the registration of a mark upon the  
26 principal register” may file an opposition. 15 U.S.C.A. § 1063; *see also Ritchie v. Simpson*, 170 F.3d  
27 1092, 1095 (Fed. Cir. 1999). However, an opposer’s allegations alone do not establish standing. *Lipton*  
28 *Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1028 (C.C.P.A. 1982). “In addition to meeting

1 the broad requirements of § 13, an opposer must meet two judicially-created requirements in order to  
2 have standing:” the opposer must have (1) a “real interest” in the proceeding; and (2) a “reasonable  
3 basis” for his belief of damage. *Ritchie*, 170 F.3d at 1095. These standing requirements have been  
4 established in order to “prevent litigation where there is no real controversy between the parties, where  
5 a plaintiff, petitioner or opposer, is no more than an intermeddler.” *Lipton Industries*, 670 F.2d at 1028-  
6 29.

7 An opposer has a real interest if he alleges a direct and personal stake in the outcome of the  
8 proceeding. T.B.M.P. § 309.03(b). Though there is no requirement that actual damage be pleaded in  
9 order to establish a real interest in the proceeding, the opposer must show that he has a personal interest  
10 in the outcome of the proceeding that is different than or beyond that of the general public. T.B.M.P. §  
11 309.03(b); *see also Int’l Order of Job’s Daughters v. Lindeburg & Co.*, 727 F.2d 1087, 1092 (T.T.A.B.  
12 1984). For instance, in *Doyle v. Al Johnson’s Swedish Restaurant & Butik, Inc.*, the petitioner sought to  
13 cancel the registrant’s mark featuring goats positioned on a grass roof, claiming he was damaged by  
14 registration of the mark because he was not able to “satisfy his desire to take photographs of goats on  
15 grass roofs.” *Doyle v. Al Johnson’s Swedish Restaurant & Butik, Inc.*, 2012 TTAB LEXIS 30, 1-2  
16 (T.T.A.B. 2012). The Board found that the petitioner did not have a real interest in the proceedings  
17 because he did not allege that the registered mark “somehow prevents petitioner himself from placing  
18 goats on a grass roof and taking their picture, or taking pictures of goats on a sod roof found elsewhere.”  
19 *Id.* at 5-8.

20 In the Order, the Board held that Opposer “fail[ed] to allege sufficient facts that demonstrate he  
21 has a real interest, that is, a personal stake, in opposing registration of applicant’s marks. Specifically,  
22 opposer [did] not affirmatively allege that he sells his clothing items under the mark GOT OUZO? or  
23 any other similar mark.” (D.N. 16 at 5.) The Amended Opposition does nothing to overcome this fatal  
24 flaw. Opposer repeats the insufficient allegation that he “has sold items” under the GOT OUZO? mark,  
25 but nowhere alleges that he is currently doing so. (D.N. 17 at 1.) Moreover, although Opposer alleges  
26 that he sells shirts and other unspecified items, Opposer does not allege that he sells any of the goods  
27 covered by Application No. 77378572 – coffee cups, tea cups, and mugs.  
28

1           Instead, Opposer reiterates an argument already rejected by the Board in its order granting  
2 Thanco’s motion to dismiss. Opposer asserts that he is “the sole owner of Apollo Graphics and  
3 Marketing, a seller of shirts and other items to Greek festivals.” (D.N. 17 at 1.) Apollo Graphics and  
4 Marketing (“Apollo”) brought an earlier cancellation petition, Cancellation Action No. 92053525,  
5 against a different registration for the mark GOT OUZO? (D.N. 17 at 1-2.) As the Board has already  
6 held, however, even if “opposer may have properly alleged his standing in that cancellation ... [e]ach  
7 Board proceeding is based on its individual record. Accordingly, opposer’s contention that he has  
8 already properly set forth his standing in this opposition proceeding is not well taken.” (D.N. 16 at 5  
9 n.3.)

10           Finally, Opposer seeks to establish standing by alleging that he and Thanco are direct  
11 competitors and share the same potential customer base (D.N. 17 at 1.) Where an opposer bases his  
12 opposition on the allegation that the mark sought to be registered is merely descriptive, the opposer may  
13 establish standing by pleading and proving that he is manufacturing or selling goods that are similar to  
14 those of the applicant, of which the mark is equally descriptive. *See, e.g., Consolidated Foods Corp. v.*  
15 *Big Red, Inc.*, 226 U.S.P.Q. 829, 831 (T.T.A.B. 1985); *Federal Glass Co. v. Corning Glass Works.*, 162  
16 U.S.P.Q. 279, 282-83 (T.T.A.B. 1969); McCarthy on Trademarks and Unfair Competition, § 20:11 (4th  
17 ed.2013); D.N. 16 at 5. Here, however, Opposer does not allege in the Amended Opposition that GOT  
18 OUZO? is merely descriptive of the goods sought to be registered (T-shirts, sweatshirts, caps, coffee  
19 cups, tea cups, or mugs). Nor can he do so: as Thanco demonstrated in its motion to dismiss the  
20 Opposition, and as the Board has already held in the Order, GOT OUZO? is not descriptive of those  
21 goods. (D.N. 6 at 8-9; D.N. 16 at 9-10.) Consequently, the allegation that the parties are competitors is  
22 not sufficient to establish standing.

23           Opposer has also failed to establish a reasonable basis for his belief of damage. To have  
24 standing, “[t]he allegations in support of [opposer’s] belief of damage must have a reasonable basis ‘in  
25 fact.’” T.B.M.P. § 309.03(b). An opposer need not prove his case on the merits for standing purposes,  
26 but must allege facts “sufficient to show that [he] is not alone in his belief of damage, *i.e.*, the belief is  
27 not simply the opposer’s subjective view.” *Ritchie*, 170 F.3d at 1098. For example, the opposer in  
28 *Ritchie v. Simpson* had a reasonable basis for his belief that he would be damaged by registration of O.J.

1 SIMPSON, O.J, and THE JUICE in connection with a broad range of goods where he alleged that he  
2 had obtained petitions signed by people from all over the United States who agreed that the marks were  
3 immoral and scandalous. *Id.* at 1098. The Board held these that petitions established that the opposer  
4 had objective proof that he was not alone in his belief that he would be damaged by registration of the  
5 marks. *Id.*

6 Unlike in *Ritchie*, Opposer does not allege any facts that support his belief that he will be  
7 harmed by registration of Thanco’s marks, and provides no reasonable basis for this purely subjective  
8 belief. Based on Opposer’s allegations, it is entirely unreasonable to believe that registration of  
9 Thanco’s marks will harm his ability to make and sell clothing, and Opposer therefore lacks standing to  
10 bring this Opposition.

11 Because Opposer has failed to allege (1) that he is currently selling goods under the mark GOT  
12 OUZO? or confusingly similar marks, and (2) any facts supporting his purported belief that he will be  
13 harmed by registration of the mark at issue, Opposer has failed to establish standing.

14 **II. OPPOSER FAILS TO STATE A CLAIM FOR RELIEF.**

15 Opposer must also allege facts which would, if proved, establish that there is a valid ground for  
16 opposing Thanco’s applications. *Young*, 152 F.3d at 1380. Pursuant to Rule 8(a)(2) of the Federal  
17 Rules of Civil Procedure, made applicable to trademark proceedings by Trademark Rule 2.116(a), the  
18 Amended Opposition must “set forth a short and plain statement showing why [he] believes [he] would  
19 be damaged by the registration of the opposed mark[s] and state the ground[s] for opposition.”  
20 *McDonnell Douglas Corp. v. Nat’l Data Corp.*, 1985 TTAB LEXIS 144, 7-8 (T.T.A.B. 1985). In  
21 determining whether an opposer has stated a plausible claim for relief, the Board will examine whether  
22 “the pleading gives fair notice and states the elements of the claim plainly and succinctly. Sufficient  
23 detail must be given so that the [applicant] may obtain a fair idea of the [opposer’s] complaint and of the  
24 legal basis for recovery.” *Id.* at 8; *see also Iqbal*, 556 U.S. at 677-678 (finding that the pleading  
25 standard “does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the-  
26 defendant-unlawfully-harmed-me accusation.”).

27 Opposer purports to allege the following claims in his Opposition: (1) improper prosecution of  
28 the mark; (2) fraud; and (3) false suggestion of a connection with a national symbol under Section 2(a).

1 As discussed in detail below, Opposer fails to allege sufficient facts to support each and every one of  
2 these claims, and has not successfully pleaded a single claim for which relief may be granted.

3 A. Opposer Cannot Assert a Claim for Improper Prosecution of the Mark.

4 The available grounds to oppose a trademark application are strictly limited by statute. *Flash &*  
5 *Partners S.p.A. v. I. E. Mfg. LLC*, 2010 TTAB LEXIS 306, \*3 (T.T.A.B. 2010); *see also* T.B.M.P. §  
6 309.03(c). As the Board’s Order properly held, “an alleged error on the part of the Office in correctly  
7 prosecuting applicant’s involved applications does not constitute a ground for opposition.” (D.N. 16 at  
8 12); *see also Flash & Partners*, 2010 TTAB LEXIS 306, at \* 3. Indeed, the Order specifically  
9 “precluded [Opposer] from re-asserting claims of improper prosecution.” (D.N. 16 at 13.)

10 Despite the Order, Opposer seeks to re-allege a claim of improper prosecution, disguised under  
11 the heading “Failure to Prove Secondary Meaning.” (D.N. 17 at 3-13.) As he did in the initial  
12 Opposition, Opposer seeks to challenge the “sufficiency of the evidence of secondary meaning  
13 applicant submitted with its response to the examining attorney’s office action.” (D.N. 16 at 11-12.)  
14 This he may not do. (*Id.* at 12.)

15 Because improper prosecution is not a statutory ground for opposition, Opposer fails to state a  
16 claim for which relief may be granted.

17 B. Opposer Fails to State a Claim for Fraud.

18 Fraud in procuring a trademark registration occurs when an applicant “knowingly makes false,  
19 material representation with the intent to deceive the PTO.” *In re Bose Corp.*, 580 F.3d 1240, 1245  
20 (Fed. Cir. 2009).

21 1. Materiality.

22 A fact is “material” if it would have constituted grounds for denial of the registration had the  
23 truth been known.” *Citibank, N.A. v. Citibanc Group, Inc.*, 724 F.2d 1540, 1544 (11th Cir. 1984) (citing  
24 *Giant Food, Inc. v. Malone & Hyde, Inc.*, 5222 F.2d 1386 (C.C.P.A. 1975); *Hollowform, Inc. v. AEH*,  
25 515 F.2d 1174 (C.C.P.A. 1975)); *see also Morehouse Mfg Corp. v. J. Strickland and Co.*, 407 F.2d 881  
26 (C.C.P.A. 1969); *The Ritz Hotel, Ltd. v. Shen Mfg. Co., Inc.*, No. 05-4730, 2009 U.S. Dist. LEXIS  
27 22194, at \*11 (E.D. Pa. Mar. 18, 2009); *Pennwalt Corp. v. Sentry Chemical Co.*, 219 U.S.P.Q. (BNA)  
28 542, at \*38-39 (T.T.A.B. 1983); McCarthy on Trademarks § 31:67.

1           In *Morehouse*, the petitioner sought cancellation of the registrant’s incontestable trademark  
2 registration for the mark BLUE MAGIC for “hair dressing” due to, *inter alia*, alleged fraud.  
3 *Morehouse*, 407 F.2d at 883. In response to an office action rejecting the application because “the  
4 descriptive word ‘blue’ is not disclaimed apart from the mark,” the registrant filed a response stating,  
5 “The word ‘blue’ is not descriptive in any sense of applicant’s goods ...” *Id.* at 885-86. In fact, the  
6 product, when viewed in its packaging, appeared to be pale blue, although small quantities of the  
7 product, when removed from the packaging, appeared colorless. *Id.* The Board found, and the  
8 appellate court affirmed, that the statement regarding color was “untrue, at least in part.” *Id.* at 886.  
9 Nonetheless, the Board “did not consider the misrepresentation of the color of the product (seen only  
10 when it is viewed in a certain way) to be a material misrepresentation or one vital to overcoming the  
11 ground of rejection and hence insufficient to constitute a fraud on the Patent Office.” *Id.* Accordingly,  
12 the appellate court affirmed that although the statement was “in part untrue, [it] was not in this case a  
13 material matter and hence not a basis for a holding of fraud.” *Id.*

14           2.       Knowledge of falsity.

15           The applicant must know that the statement is false. If the applicant “has a reasonable or  
16 legitimate basis for the representations, ... then [it] has not committed fraud.” *Maids to Order of Ohio,*  
17 *Inc. v. Maid-to-Order, Inc.*, 78 U.S.P.Q.2d (BNA) 1899, at \*20 (T.T.A.B. 2006). In *Maids to Order*, the  
18 opposer alleged that the registrant’s representation that it was using its mark in interstate commerce was  
19 fraudulent. *Id.* at \*2. Without deciding the issue whether “the activities relied on by [the registrant]  
20 were sufficient to establish” the truth of that representation, the Board held that it need only decide  
21 whether the registrant had knowingly made a false statement. *Id.* at \*19. The Board found that the  
22 registrant “had a reasonable basis for her belief” that she was using the mark in interstate commerce,  
23 and this belief was “sufficient to negate an inference of fraud upon the USPTO in obtaining and  
24 maintaining the registration.” *Id.* at \*25.

25           3.       Intent to deceive.

26           The applicant must make the misrepresentation with the intent to deceive the U.S. Patent and  
27 Trademark Office. Although both knowledge and intent may be averred generally, the pleadings must  
28 “allege sufficient underlying facts from which a court may reasonably infer that a party acted with the

1 requisite state of mind.” *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1327 (Fed. Cir. 2009).  
2 In *Bose*, for example, where the challenger could not point to evidence to support an inference of  
3 deceptive intent, it failed to establish a fraud claim and the applicant’s false misrepresentation was  
4 found to be an honest misunderstanding without a willful intent to deceive. *Bose*, 580 F.3d at 1246.

5 4. Pleading with particularity.

6 Rule 9(b) of the Federal Rules of Civil Procedure, made applicable to Board proceedings by  
7 Trademark Rule 2.116(a), requires that “[i]n alleging fraud or mistake, a party must state with  
8 particularity the circumstances constituting fraud or mistake ...” *Exergen*, 575 F.3d at 1327. “[T]his  
9 means the who, what, when where, and how of the alleged fraud.” *Id.* (citing and quoting *DiLeo v.*  
10 *Ernst & Young*, 901 F.2d 624, 627 (9th Cir. 1990)). “The very nature of the charge of fraud requires that  
11 it be proven ‘to the hilt’ with clear and convincing evidence. There is no room for speculation,  
12 inference or surmise and, obviously, any doubt must be resolved against the charging party.” *Smith*  
13 *Int’l, Inc. v. Olin Corp.*, 209 U.S.P.Q. 1033, 1044 (T.T.A.B. 1981). A party alleging fraud “bears a  
14 heavy burden of proof.” *In re Bose Corp.*, 580 F.3d 1240, 1243 (Fed. Cir. 2009).

15 5. Opposer fails to state a claim for fraud with respect to any of the statements at  
16 issue.

17 Opposer purports to identify several fraudulent statements submitted in connection with  
18 Thanco’s Response to Office Action dated November 29, 2012 (the “Response”).<sup>1</sup> Opposer fails to  
19 state a claim for fraud with respect to any of these statements.

20 a) Distribution of Thanco catalogue.

21 In support of the Applications, Thanco stated:

22 Every year, Thanco mails copies of its catalogue to every single Greek Orthodox  
23 Church in the United States, and to the sponsors of every single Greek festival  
24 across the country. In total, Thanco’s annual “hard copy” catalogue reaches  
25 approximately 250-300 targeted recipients each year. These targeted recipients  
26 are located in virtually every state in the United States.

27 <sup>1</sup> Thanco filed essentially identical responses, on the same date, to essentially identical office actions  
28 in connection with both Applications. For ease of reference, Thanco cites herein to the respective  
Responses and supporting declarations and other materials as one.

1 (Declaration of Thanos Drimalas dated November 23, 2012, filed in connection with the Response on  
2 November 29, 2012 (“Drimalas Decl.”) ¶ 4.)<sup>2</sup>

3 Opposer asserts that these statements are fraudulent because (1) there is an alleged discrepancy  
4 between the number of targeted recipients who received Thanco’s catalogue and the total number of  
5 Greek Orthodox churches and Greek festivals in the United States; (2) there are festivals in “every state  
6 in the country,” not “virtually every state”; and (3) on its face, Thanco could not have mailed its  
7 catalogue annually. (D.N. 17 at 13-14.)

8 Whether Thanco mailed its catalogue to every single church and festival in the country, as  
9 opposed to a substantial majority of them, in every state or nearly every state, it is clear that Thanco  
10 distributed its catalogue widely to the relevant potential customer base. Moreover, as Opposer himself  
11 acknowledges, the distribution of the catalogue was but one piece of evidence relating to distinctiveness  
12 that Thanco submitted. (Drimalas Decl. and Exhs. A-F thereto.) Indeed, Thanco also submitted  
13 customer declarations, sales invoices, revenue information, and a declaration from the President of  
14 Thanco, all substantiating Thanco’s long history of continuous use and promotion of the mark. (*Id.*)  
15 The insignificant alleged difference in the number of Greek churches and festivals would not have  
16 occasioned rejection of the application, especially where, as here, Thanco submitted ample additional  
17 evidence supporting distinctiveness. Thus, the alleged misrepresentation was not material, and cannot  
18 support a fraud claim. *Citibank*, 724 F.2d at 1544; *Morehouse*, 407 F.2d 881; *Pennwalt*, 219 U.S.P.Q.  
19 542, at \*38-39.

20 Opposer has also failed to plead facts supporting falsity with respect to Thanco’s statement that  
21 it mailed its catalogue annually. Opposer asserts that the catalogue cannot have been mailed annually

22 \_\_\_\_\_  
23 <sup>2</sup> Pursuant to Trademark Rule 2.122(b), the file of “the application against which a notice of  
24 opposition is filed ... forms part of the record of the proceeding without any action by the parties and  
25 reference may be made to the file for any relevant and competent purpose.” Moreover, the doctrine  
26 of incorporation by reference permits a court to consider, on a motion to dismiss, documents that  
27 were referenced in the complaint and are accepted by all parties as authentic. *See, e.g., Van Buskirk*  
28 *v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002); *Chambers v. Time Warner, Inc.*, 282  
F.3d 147, 153 and n.1 thereto (citing cases) (2d Cir. 2002). Accordingly, the Board may consider the  
Drimalas declaration and supporting exhibits, which were referenced in the Amended Opposition and  
which form the basis of Opposer’s purported claim for fraud, without converting this Motion to  
Dismiss into one for summary judgment.

1 because the excerpts submitted in connection with the Applications reflect a business address of  
2 Stafford, Texas, while invoice exemplars show that the business was located in Alvin, Texas, after 2001.  
3 He does not allege that the information in the catalogue or invoice exemplars is false. Instead, Opposer  
4 states “it would be only natural to presume” that the copy of the catalogue that was submitted in support  
5 of the application was the most recent catalogue, and therefore the catalogue was not mailed after 2001.

6 This dubious logic simply does not follow. Thanco submitted *excerpts* of its catalogues in  
7 support of the application, and clearly identified them as excerpts. (Drimalas Decl. ¶ 4.) Thanco never  
8 purported to submit, or stated that it was submitting, a current version of its catalogue. Opposer simply  
9 makes that assumption, devoid of any supporting facts. “There is no room for speculation, inference or  
10 surmise, and obviously, any doubt must be resolved against the charging party.” *In re Bose*, 580 F.3d at  
11 1243 (internal quotations and citation omitted). Opposer’s presumption is tantamount to an allegation  
12 on information and belief. Such allegations “fail to meet the Fed. R. Civ. P. 9(b) requirements as they  
13 are unsupported by any statement of facts providing the information upon which petitioner relies or the  
14 belief upon which the allegation is founded.” *Asian and Western Classics B.V. v. Selkow*, 92 U.S.P.Q.2d  
15 (BNA) 1478, at \*4 (T.T.A.B. 2009).

16 Because Opposer has failed to allege materiality or falsity, he has not stated a claim for fraud  
17 with respect to these statements.

18 b) Sales invoices.

19 In support of the Applications, Thanco submitted invoice exemplars showing sales of GOT  
20 OUZO? merchandise. (Drimalas Decl. ¶ 7 and Exh. D thereto.) These exemplars plainly reflect a line  
21 item for OUZO merchandise (*e.g.*, “Adult T-shirt Black 100% Cotton (OUZO)”), and Thanco’s  
22 President attested to the authenticity and accuracy of these invoices in a sworn declaration. (Drimalas  
23 Decl. ¶ 7 and Exh. D thereto.) Additionally, the catalogue and website excerpts submitted at the same  
24 time plainly reflect corresponding GOT OUZO? merchandise available for purchase. (Drimalas Decl.  
25 Exhs. A, B.) Nonetheless, Opposer speculates that the invoices do not reflect sales of the merchandise  
26 in question, because the relevant line items are titled OUZO rather than GOT OUZO? (D.N. 17 at 15.)  
27 Tellingly, however, Opposer’s allegations do not dispute that Thanco sold, and continues to sell, GOT  
28

1 OUZO? merchandise, or the quantities of merchandise and resulting revenues reflected in the Drimalas  
2 Declaration and supporting exhibits.

3 Opposer’s speculation, like allegations on information and belief, are insufficient to plead falsity  
4 in connection with a fraud claim. *See In re Bose*, 580 F.3d at 1243; *Asian and Western Classics*, 92  
5 U.S.P.Q.2d 1478, at \*4. Moreover, whether the line items listed in the invoices identify the full mark, or  
6 merely refer to the mark in abbreviated fashion (as is common in an invoice), does not affect  
7 registrability of the mark, and is not material.

8 Because Opposer fails to allege facts supporting falsity or materiality, he has failed to state a  
9 claim for fraud based on Thanco’s invoices.

10 c) Third-party declarations.

11 In connection with the Applications, Thanco submitted third-party declarations attesting to its  
12 lengthy and continuous use of the GOT OUZO? mark, and associated distinctiveness. (Drimalas Decl.  
13 Exh. C.) In declarations signed in October, 2012, declarants Spirithula Kostakis (“Kostakis”), Thanasis  
14 Vergos (“Vergos”), and Nikolaos Renesis (“Renesis”) each stated, “I am not aware of any other  
15 individual or entity [other than Thanco] offering merchandise under the GOT OUZO? trademark.”  
16 (Drimalas Decl. Exh. C, Declaration of Spirithula Kostakis ¶4; Declaration of Thanasis Vergos ¶ 4;  
17 Declaration of Nikolaos Renesis ¶4.)

18 Opposer alleges that these statements are false, because (1) Kostakis sold her own GOT OUZO?  
19 merchandise “until at least 2008 or possibly later”; and (2) Vergos and Renesis were aware of Kostakis’s  
20 sales “during the period 2001 until 2008.” (D.N. 17 at 16.) Opposer does not allege, however, that the  
21 statements were untrue as of October, 2012, when the declarations were signed. Indeed, his pleading  
22 acknowledges that these sales had ceased by 2008. Thus, on its face, his pleading alleges no facts  
23 contradicting the truth of these statements. Therefore, he has failed properly to allege falsity.

24 Moreover, although Opposer alleges that Kostakis, Vergos and Renesis knew the statements  
25 were false, he never alleges that *Thanco* knew they were false. In order to state a claim for fraud, an  
26 opposer must allege that the applicant knowingly made a false statement. *Maids to Order*, 78  
27 U.S.P.Q.2d 1899, at \*20. Opposer has failed to do so.

28

1           Because Opposer has failed to allege falsity or knowledge of falsity by Thanco, he has not stated  
2 a claim for fraud with respect to these statements.

3           C.       Opposer Cannot State a Claim for False Suggestion of a Connection.

4           Under 15 U.S.C. § 1052(a), a trademark may be refused registration if, *inter alia*, it “consists of  
5 or comprises ... matter which may disparage or falsely suggest a connection with ... national symbols.”  
6 To establish a claim of false suggestion of a connection under Section 2(a), an opposer must allege a  
7 connection with *itself* as a person, organization, or national symbol. *See McDonnell Douglas*, 1985  
8 TTAB LEXIS at 13; *Heroes, Inc. v. The Boomer Esiason Hero’s Foundation, Inc.*, No. 96-1260 (TAF),  
9 1997 U.S. Dist. LEXIS 12192, 10-12 (D.D.C. 1997). “Under Section 2(a), a contested mark must point  
10 uniquely and unmistakably to the identity or person of the person or institution asserting the claim.”  
11 *Heroes*, 1997 U.S. Dist. LEXIS 12192, at \*9-10 (internal quotations and citations omitted); *see also The*  
12 *Ritz Hotel Ltd. v. Ritz Closet Seat Corp.*, 17 U.S.P.Q.2d (BNA) 1466 (T.T.A.B. 1990); McCarthy,  
13 §20:20 . “In other words, to raise a claim that a mark falsely suggests a connection with an institution  
14 under Section 2(a), the challenger must be the institution *itself*.” *Heroes*, 1997 U.S. Dist. LEXIS 12192,  
15 at \*10 (emphasis added).

16           In *Heroes*, the defendant in an infringement action asserted a counterclaim for cancellation of a  
17 registered mark owned by the plaintiff, a charitable organization based in the District of Columbia that  
18 provided financial assistance to the surviving family members of first responders killed in the line of  
19 duty. *Id.* at \*1-2. The defendant alleged that the mark in question falsely suggested a connection  
20 between the plaintiff and either the United States government or the D.C. police department. *Id.* at \*10.  
21 The court granted the plaintiff’s motion to dismiss the cancellation counterclaim because “the defendant  
22 does not claim that the plaintiff’s mark falsely suggests a connection with itself. Since the defendant is  
23 not either [the U.S. government or the D.C. police department], it is not entitled to raise a claim that the  
24 plaintiff’s mark falsely suggests a connection with them.” *Id.*

1 Here, Opposer does not allege that GOT OUZO? suggests a connection with himself. Rather,  
2 he alleges that ouzo is a “national symbol of Greece” that cannot be registered.<sup>3</sup> (D.N. 17 at 17-18).  
3 Accordingly, Opposer has failed to state a claim for false suggestion of a connection under Section 2(a).

4 **III. THE BOARD SHOULD DISMISS THE AMENDED OPPOSITION WITH PREJUDICE.**

5 “[I]n appropriate cases, that is, where justice does not require that leave to amend be given, the  
6 Board, in its discretion, may refuse to allow an opportunity, or a further opportunity, for amendment” of  
7 a complaint. TBMP 503.03; *see also Bayer Consumer Care AG v. Belmora, LLC*, 90 U.S.P.Q.2d  
8 1587, 1590-91 (T.T.A.B. 2009) (dismissing claim with prejudice where petitioner twice failed to  
9 properly allege prior use); *McDonnell Douglas*, 1986 TTAB LEXIS 144.

10 Opposer has now had two opportunities to plead standing and a proper cause of action. He  
11 has still failed to do so.<sup>4</sup> Accordingly, the Board should dismiss the Amended Opposition with  
12 prejudice.

13 ///

14 ///

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25 <sup>3</sup> To the extent that Opposer intends this claim to serve as an objection to the Examining Attorney’s  
26 failure to refuse registration on Section 2(a) grounds, the claim is one for improper prosecution,  
27 which is barred. *See supra* Section II.A.

28 <sup>4</sup> Additionally, Opposer violated the Board’s Order by failing to serve papers on Thanco’s counsel by  
email. (D.N. 16 at 16.)

1 **CONCLUSION**

2 For the reasons set forth above, the Amended Notice of Opposition is fundamentally legally  
3 deficient and accordingly fails to state a claim on which relief may be granted because (1) Opposer  
4 lacks standing to maintain this proceeding and (2) Opposer fails to plead any valid grounds for  
5 opposition and allege sufficient facts in support thereof. For all of the reasons set forth above, the  
6 Amended Notice of Opposition should be dismissed with prejudice.

7  
8 Dated: December 12, 2013

Respectfully submitted,

9 HARVEY SISKIND LLP

10 */Naomi Jane Gray/*

11 By: Naomi Jane Gray

12 Four Embarcadero Center, 39<sup>th</sup> Floor  
13 San Francisco, CA 94111  
14 Telephone: (415) 354-0100  
Facsimile: (415) 391-7124

15 Attorneys for Applicant,  
16 Thanco Products & Imports, Inc.

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**CERTIFICATE OF TRANSMISSION**

I hereby certify that a true and correct copy of the attached MOTION AND MEMORANDUM IN SUPPORT OF APPLICANT’S MOTION TO DISMISS OPPOSER’S NOTICE OF OPPOSITION (Opposition No. 91210863) is being electronically transmitted to the Trademark Trial and Appeal Board on December 12, 2013.

/Naomi Jane Gray/  
Naomi Jane Gray

1 **CERTIFICATE OF MAILING**

2 I hereby certify that a true and correct copy of the attached MOTION AND MEMORANDUM  
3 IN SUPPORT OF APPLICANT’S MOTION TO DISMISS OPPOSER’S NOTICE OF OPPOSITION  
4 (Opposition No. 91210863) was served on Applicant via the following means:

5 Via first-class mail, postage prepaid, on December 12, 2013, addressed to:

6 Chris Economides III  
7 3953 Avera Avenue  
8 Winston-Salem, NC 27106

9 and

10 Via email, addressed to:

11 TTAB\_Got\_Ouzo@yahoo.com

12 */Cynthia Lee/*  
13 \_\_\_\_\_  
14 Cynthia Lee