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

Proceeding	91216429
Party	Defendant NextLine Manufacturing, Inc.
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD (CORRECTED)**

Proto Labs, Inc.,)	
)	Opposition No. 91216429
Opposer,)	
)	Serial Nos. 86/100,092, 86/100,112
v.)	
)	Marks: NextLine, NextLine
NextLine Manufacturing Corp.,)	Manufacturing
)	
Applicant.)	

**REPLY BRIEF IN SUPPORT OF MOTION
TO AMEND REMAINING TWO APPLICATIONS**

In reply to Proto Labs' response brief filed on August 8, 2014, Applicant states as follows.

(1) Opposer has no grounds to oppose Applicant's motion to amend the remaining two opposed applications, because the Notice of Opposition fails to state a claim, and Opposer has cited no issue, that would be affected by the requested amendment. Paragraphs 5 and 7 of the Amended Notice of Opposition plead priority in the following marks, which would not be affected:

- **PROTOQUOTE**, filed May 9, 2002;
- **PROTOFLOW**, filed Feb. 2, 2004;
- **FIRST CUT**, filed Jul. 27, 2006;
- **FIRSTQUOTE**, filed Jan. 18, 2007; and
- **FINELINE**, filed April 24, 2014.¹

¹ In addition, Paragraph 7 of the Notice of Opposition alleges that Proto Labs is the owner, via assignment, of common law rights associated with FINELINE and FINELINE PROTOTYPING as a result of Proto Labs' predecessor-in-interest's use of the marks in commerce, beginning with a first use date at least as early as June 2001.

(2) The error in the remaining two opposed applications, as filed, has no materiality to any issue raised in the Notice of Opposition:

Mark/App.	First Use	Corrected	First Commerce	Corrected
NextLine , App. No. 86100092	Jan. 15, 2013	May 29, 2013	Oct. 22, 2013	Jan. 28, 2014
NextLine Manufacturing , App. No. 86100112	Jan. 15, 2013	May 29, 2013	Oct. 22, 2013	Jan. 28, 2014

(3) In view of the priority dates alleged by Opposer in the Notice of Opposition, the difference between the first-use dates of the remaining two opposed applications, as filed, and the corrected dates which are the subject of this Motion, are too minor, and are insufficient as a matter of law, to preclude the amendment that Applicant is requesting, much less the draconian result that Opposer is advocating.

(4) Opposer cites *Standard Knitting Ltd. v. Toyota Jidosha Kabushiki Kaisha*, 77 USPQ2d 1917 (TTAB 2006), for the proposition that Applicant’s requested amendment constitutes an admission of fraud. That case, however, is completely inapplicable, because the error in the application involved in that case was material to the issues raised in the opposition. In contrast, the allegations in Opposer’s amended Notice of Opposition are not sufficient to establish the intent element of fraud which must be “proven to the hilt.” *In re Bose Corp.*, 580 F.3d 1240, 91 USPQ2d 1938, 1939 (Fed. Cir. 2009); *see Tyler Perry Studios, LLC v. Kearney*, Cancellation No. 92053298, 2014 WL 2997640, * 4 n. 2 (TTAB June 20, 2014) (“Respondent’s admissions that she ‘has not produced a television program in connection with the WHAT WOULD JESUS DO Mark’ . . . and that she ‘did not intend to produce a television program in connection with the WHAT WOULD JESUS DO Mark in January, 2008’ . . . do not conclusively establish that she made false statements in the procurement of her registration with the subjective *intent to deceive*”) (emphasis in the original)

(5) The only issue raised by the allegations in Opposer's Notice of Opposition is whether there is a likelihood of confusion between the parties' marks. The error in the two remaining opposed applications, while regretted by Applicant, has no arguable materiality to any issue raised in the pleadings.

(6) Opposer notes, "Use of a mark in commerce prior to filing is a requirement for any application filed under 15 U.S.C. 1051(a)," citing 15 U.S.C. 1051(a)(1), and 1051(a)(3)(C). However, it does not follow that "Applicant's admissions are sufficient in and of themselves for the Board to enter judgment in Opposer Proto Labs' favor against each of the four use-based applications being opposed." To begin with, even if the marks had not been used to date, the applications could be amended to allege an intent to use pursuant to Section 1(b) of the Lanham Act, 15 U.S.C. § 1051(b). Moreover, even if the Board were to sustain the opposition on the grounds that the applications were invalid for the reason asserted by Opposer, the judgment would be limited to the applications without prejudice to any claim or defense of Applicant on the issue of likely confusion, as such issue would never have been litigated, leaving Applicant free to file two new applications with the corrected dates.

In summary, Opposer not asserted any rationale as to why the requested amendment is material to any issue raised in the Notice of Opposition. Consequently, Opposer has no basis to oppose Applicant's motion to amend the remaining two applications.

Respectfully submitted,

NEXTLINE MANUFACTURING INC.



by:

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 20, 2014, a copy of the foregoing Reply Brief in Support of Motion to Amend Remaining Two Opposed Applications was served by U.S. mail, first class postage prepaid, on the following counsel of record for Opposer:

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