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

Proceeding	91219299
Party	Defendant MEUNDIES, INC.
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Submission	Motion to Dismiss - Rule 12(b)
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Date	12/18/2014
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**  
**BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Application No. 85/776,657  
For the Trademark MEUNDIES.COM  
Published November 4, 2014

DREW MASSEY	)	
	)	
Opposer,	)	
	)	Opposition No. 91219299
v.	)	
	)	
MEUNDIES, INC.,	)	
	)	
Applicant.	)	
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**APPLICANT’S MOTION TO DISMISS, MOTION TO STRIKE,**  
**AND MOTION FOR A MORE DEFINITE STATEMENT**

Pursuant to Fed. R. Civ. P. 12(b)(6) and Trademark Trial and Appeal Board Manual of Procedure (“T.B.M.P.”) § 503, Applicant MeUndies, Inc. (“Applicant”) asks that the Board dismiss the opposition proceeding for failure to state a claim upon which relief can be granted. In view of Opposer’s pattern of filing improper and vexatious pleadings *pro se* over the last two years, Applicant respectfully requests that the dismissal of the Notice be with prejudice so that Applicant and the Board are not further burdened by Opposer’s actions.

In the alternative, Applicant requests that the Board strike the Notice of Opposition (“Notice”) in its entirety pursuant to Fed. R. Civ. P. 12(f) and T.B.M.P. § 506, as the Notice is replete with immaterial and impertinent matter. Further, if the Board does not dismiss the

opposition, Applicant asks the Board to require Drew Massey (“Opposer”) to file a more definite statement pursuant to Fed. R. Civ. P. 12(e) and T.B.M.P. § 505, because the Notice is so vague and ambiguous that Applicant cannot reasonably prepare a response.

**I. The Opposition Should Be Dismissed For Failure to State a Claim**

In the Notice, Opposer has not pled enough detail to give MeUndies fair notice of the basis for its claim, so the opposition proceeding should be dismissed. In view of Opposer’s pattern of submitting improper pleadings over the last two years, justice does not require the granting of leave to amend, and the dismissal of the opposition should be with prejudice.

**A. Legal Standard for Motion to Dismiss Under Fed. R. Civ. P. 12(b)(6)**

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted is a test solely of the legal sufficiency of a complaint. T.B.M.P. § 503.02 (citing *Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc.*, 988 F.2d 1157, 26 U.S.P.Q.2d 1038 (Fed. Cir. 1993)). Federal Rule of Civil Procedure 8(a)(2) requires “a short and plain statement of the claim showing that the pleader is entitled to relief,” in order to “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” Accordingly, in order to withstand a motion under Rule 12(b)(6), a pleading need allege such facts as would, if proved, establish that the plaintiff is entitled to the relief sought, that is, that (1) the plaintiff has standing to maintain the proceeding, and (2) a valid ground exists for denying the registration sought (in the case of an opposition). T.B.M.P. § 503.02 (citing *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 U.S.P.Q. 185 (C.C.P.A. 1982)).

For purposes of determining a motion to dismiss for failure to state a claim upon which relief can be granted, all of the Opposer’s well pleaded allegations must be accepted as true, and the complaint must be construed in the light most favorable to the Opposer. T.B.M.P. § 503.02

(citing *Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc.*, 988 F.2d 1157, 26 U.S.P.Q.2d 1038 (Fed. Cir. 1993)).

However, “labels and conclusions, and a formulaic recitation of the elements of a cause of action will not [survive a motion to dismiss],” and “courts are not bound to accept as true a legal conclusion couched as a factual allegation.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks and citation omitted). Rule 8(a) “contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented” and does not authorize a pleader’s “bare averment that he wants relief and is entitled to it.” *Id.* at fn. 3 (citation omitted).

After accepting the well-pleaded allegations, a court then determines whether a complaint alleges a “plausible” claim to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) (quoting *Twombly*, 550 U.S. at 556). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’” *Id.* (quoting *Twombly*, 550 U.S. at 557).

Whenever the sufficiency of any complaint has been challenged by a motion to dismiss, it is the duty of the Board to examine the complaint in its entirety, construing the allegations therein liberally to determine whether it contains any allegations which, if proved, would entitle the opposer to the relief sought. T.B.M.P. § 503.02 (citing *Miller Brewing Co. v. Anheuser-Busch Inc.*, 27 U.S.P.Q.2d 1711 (T.T.A.B. 1993)).

**B. The Notice Does Not State A Claim Upon Which Relief Can Be Granted**

While the Notice itself is not organized by separate claims, the coversheet filed with the Notice states that Opposer is relying on seven different grounds in the opposition: immoral or scandalous matter, deceptiveness, false suggestion of a connection, priority and likelihood of confusion, dilution, fraud, and “other.” Dkt. 1.

Section 2(a) of the Lanham Act bars the registration of a mark that “consists of or comprises immoral, deceptive, or scandalous matter.” The Notice contains no allegations that the opposed mark itself is immoral, deceptive, or scandalous.

The allegations relating to fraud in the Notice are not related in any way to “fraud on the PTO” as the ground for opposition requires. *See Torres v. Cantine Torresella S.r.l.*, 1 U.S.P.Q.2d 1483, 1483 (Fed. Cir. 1986).

A claim for dilution requires, among other things, an allegation that a “famous” mark has been diluted under Section 43(a) of the Lanham Act, but nowhere in the Notice is there an allegation that the Opposer has a famous mark.

The claims for priority and likelihood of confusion under Section 2(d) of the Lanham Act appear to be based on alleged rights in an unregistered MYUNDIES mark. The Notice claims in a conclusory fashion that “Opposer still has priority and common law usage rights dating back to 2009,” that “Opposer had the mark approved and in use in commerce for over two years prior to the infringing Applicant’s company even being in existence,” and that Opposer’s mark has been “proven to be in use in commerce long before Applicant’s company even existed.” However, no *facts* are alleged in the Notice which would plausibly lead to the conclusion that Opposer had use of its mark in commerce or use analogous to trademark use prior to MeUndies’ filing the opposed application. Pleading the *conclusion* that Opposer enjoys common law usage rights and

that the mark has been proven to be in use in commerce does not satisfy the requirement under Rule 8(a) to plead factual content that establishes the plausibility of Opposer's claims.

While the grounds of "false suggestion of a connection" and "other" appear on the coversheet to the Notice, they are not discussed in the body of the Notice.

The Notice simply does not contain enough factual matter to suggest that the claims therein are plausible or that the right to relief rises above the speculative level. Therefore, the Notice should be dismissed.

### **C. The Dismissal Should Be With Prejudice**

The present Notice is a variation of a pleading that was repeatedly filed by Opposer between May 2012 and June 2014 in a cancellation proceeding involving the same litigants as the present opposition. *See MeUndies, Inc. v. Drew Massey dba myUndies Inc.*, Cancellation No. 92055585 (the "Prior Cancellation"). In the Prior Cancellation, Massey's improper filings and disregard for the rules and procedures regarding practice before the Board resulted in several admonishments from the Board, culminating in a order that "[MASSEY] IS **PROHIBITED FROM FILING ANY FURTHER PRE-TRIAL DOCUMENTS WITH THE BOARD WITHOUT THE WRITTEN CONSENT OF THE ASSIGNED INTERLOCUTORY ATTORNEY.**" Prior Cancellation, Order dated June 24, 2014, Dkt. 29 at 2 (emphasis in original), available at <http://ttabvue.uspto.gov/ttabvue/v?pno=92055585&pty=CAN&eno=29> (a copy of this order is attached hereto as Exhibit A). Ultimately, Applicant prevailed in that cancellation action. *See* Prior Cancellation, Order dated August 13, 2014, Dkt. 30 at 9, available at <http://ttabvue.uspto.gov/ttabvue/v?pno=92055585&pty=CAN&eno=30>.

"[I]n appropriate cases, that is, where justice does not require that leave to amend be given, the Board, in its discretion, may refuse to allow an opportunity, or a further opportunity,

for amendment.” T.B.M.P. § 503.03; *see also NSM Res. Corp. v. Microsoft Corp.*, Cancellation No. 92057932, Opinion dated November 25, 2014, Dkt. 10 at 13-14 (T.T.A.B. 2014) (precedential) (dismissing cancellation petition with prejudice where amendment would be futile, and noting that the Board would “not, in any event, have granted petitioners leave to amend the pleading” in view of petitioner’s history before the Board which included previously filed petitions “solely brought to harass and burden [respondent],” which were “calculated to waste Board and party resources.”).

Applicant anticipates that the Board’s granting of leave to amend would result in Opposer continuing to file improper documents *pro se*, just as Opposer did in the Prior Cancellation, and continuing to disregard the rules and procedures applicable to practice before the Board, harassing and burdening Applicant, and wasting Board and party resources. Justice does not require granting leave to amend in this case, and Opposer respectfully requests that the dismissal of the Notice be with prejudice.

**II. In the Alternative, The Board Should Strike the Notice as It Is Full of Immaterial and Impertinent Matter**

Pursuant to Federal Rule of Civil Procedure 12(f), “the Board may order stricken from a pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” T.M.E.P. § 506.01. The Notice is replete with allegations regarding Applicant’s founder and CEO that have no connection with Applicant itself nor any proper basis for being included in an opposition to the registration of a trademark. Further, the Notice contains references throughout to Opposer’s now cancelled registration that is not a valid basis for an opposition. In the event that the Board does not dismiss this action, Applicant requests that the Board strike the Notice in its entirety on the basis that the Notice is full of such impertinent and immaterial matters.

**III. If the Board Does Not Dismiss or Strike the Notice, the Board Should Require a More Definite Statement**

If the Board does permit the opposition to continue, the Board should require a more definite statement because the Notice is so vague and ambiguous that Applicant cannot reasonably be required to submit a responsive pleading.

**A. Legal Standard for a Motion For a More Definite Statement Under Fed. R. Civ. P. 12(e)**

If, in an *inter partes* proceeding before the Board, a pleading to which a responsive pleading must be made is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the responding party may move for a more definite statement. T.B.M.P. § 505.01 (citing Fed. R. Civ. P. 12(e), and Wright & Miller, Federal Practice and Procedure: Civil 2d § 1376 (1990) (hereinafter “Wright & Miller”)). The motion must point out the defects complained of, specify the details which the movant desires to have pleaded, and indicate that the movant is unable to frame a responsive pleading without the desired information. T.B.M.P. § 505.01 (citing Fed. R. Civ. P. 12(e), and Wright & Miller § 1378). A motion for a more definite statement is appropriate in those cases where the pleading states a claim upon which relief can be granted, but is so vague or ambiguous that the movant cannot make a responsive pleading in good faith or without prejudice to itself. T.B.M.P. § 505.01 (citing Wright & Miller § 1376-77).

A pleading should include enough detail to give the defendant fair notice of the basis for each claim. T.B.M.P. § 309.03(a)(2). The elements of each claim should be stated simply, concisely, and directly, and taken together “state a claim to relief that is plausible on its face.” *Id.* All averments should be made in numbered paragraphs, the contents of each of which should

be limited as far as practicable to a statement of a single set of circumstances. *Id.* Each claim founded upon a separate transaction or occurrence should be stated in a separate count whenever a separation would facilitate the clear presentation of the matters pleaded. *Id.*

**B. The Notice Is Too Vague and Ambiguous to Require a Response**

The pleading does not include enough detail to give Applicant fair notice of the basis for each claim—for example, there are no facts alleged regarding the circumstances under which the Opposer’s mark has been in use that support Opposer’s position that it enjoys common law trademark rights. The Notice does not set forth the elements of each claim simply, concisely, and directly. The Notice contains no numbered paragraphs each limited to a statement of a single set of circumstances. Each claim founded upon separate transactions and occurrences is not stated in a separate count. Taken as a whole, the Notice is so vague and ambiguous that Applicant cannot make a responsive pleading in good faith or without prejudice to itself.

If the Board does not dismiss or strike the Notice, the Board should require a more definite statement because the Notice is so vague and ambiguous that Applicant cannot reasonably be required to submit a responsive pleading.

\* \* \*

**WHEREFORE**, Applicant prays that the Notice of Opposition be dismissed in its entirety, with prejudice, and that Application No. 85/776,657 be allowed. In the alternative, Applicant prays that the Board strike the Notice of Opposition in its entirety and/or require a more definite statement.

Respectfully submitted,

Date: December 18, 2014

By: *John Paul Oleksiuk*  
John W. Crittenden  
John Paul Oleksiuk  
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Washington, DC 20004  
Telephone: (310) 883-6400

Attorneys for Applicant MeUndies, Inc.

# Exhibit A

Board's Order dated June 24, 2014 from  
*MeUndies, Inc. v. Drew Massey dba myUndies Inc.*, Cancellation No. 92055585

<http://ttabvue.uspto.gov/ttabvue/v?pno=92055585&pty=CAN&eno=29>

**UNITED STATES PATENT AND TRADEMARK OFFICE**  
**Trademark Trial and Appeal Board**  
**P.O. Box 1451**  
**Alexandria, VA 22313-1451**  
General Contact Number: 571-272-8500

EJW

**Mailed: June 24, 2014**

**Cancellation No. 92055585**

**MeUndies, Inc.**

**v.**

**Drew Massey dba myUndies Inc.**

**ELIZABETH J. WINTER, INTERLOCUTORY ATTORNEY:**

It is noted that respondent filed on June 23, 2014, a document entitled “Registrant’s Response to Petitioner’s Motion for Summary Judgment; and Registrant’s Request for Summary Judgment to Immediately Deny and Dismiss Petitioner’s Petition to Cancel.” To the extent said document constitutes a response to petitioner’s reply brief filed in support of petitioner’s motion for summary judgment, said document constitutes an impermissible sur-reply. *See* Trademark Rule 2.127(a). Further, to the extent respondent requests that the petition to cancel be dismissed based on argument and allegations unrelated to a summary judgment motion under Fed. R. Civ. P. 56, respondent’s submission is essentially a motion to dismiss, the filing of which was prohibited by the Board in its order mailed on October 15, 2013 (see pp. 8-9). In view of the foregoing, respondent’s submission filed June 23, 2014, shall not be considered and no response thereto from petitioner is

required. Additionally, RESPONDENT IS **PROHIBITED** FROM FILING ANY FURTHER PRE-TRIAL DOCUMENTS WITH THE BOARD WITHOUT THE WRITTEN CONSENT OF THE ASSIGNED INTERLOCUTORY ATTORNEY.

This proceeding remains SUSPENDED. Petitioner's motion for summary judgment shall be considered in due course.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and complete copy of the foregoing **APPLICANT'S MOTION TO DISMISS, MOTION TO STRIKE, AND MOTION FOR A MORE DEFINITE STATEMENT** has been served on Drew Massey by mailing said copy on December 18, 2014, via First Class Mail, postage prepaid to:

Drew Massey  
3387 Xanthia Street  
Denver, CO 80238

Date: December 18, 2014

*/John Paul Oleksiuk/*  
John Paul Oleksiuk