

ESTTA Tracking number: **ESTTA690135**

Filing date: **08/18/2015**

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

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	Fractal Analytics, Inc.
Granted to Date of previous extension	08/19/2015
Address	951 Mariners Island Suite 307 San Mateo, CA 94404 UNITED STATES
Attorney information	David E. Weslow Wiley Rein LLP 1776 K Street, NW Washington, DC 20006 UNITED STATES dweslow@wileyrein.com, nseth@wileyrein.com, tmdocket@wileyrein.com

Applicant Information

Application No	86371050	Publication date	04/21/2015
Opposition Filing Date	08/18/2015	Opposition Period Ends	08/19/2015
Applicant	Memez.com, LLC 1309 Flower Street Burbank, CA 91502 UNITED STATES		

Goods/Services Affected by Opposition

Class 009. First Use: 0 First Use In Commerce: 0 All goods and services in the class are opposed, namely: Computer software for web site design and internet marketing analytics; computer software for use in web site analytics, split testing, and pass backs for ad serving; computer software for use in marketing, advertising and online publishing, namely, software for tracking usage of web sites and social sharing activity, and for aggregating statistics to analyze website performance, internet-based social activity, and return on investment; software for analyzing web traffic, split testing, and optimizing the performance of ad servers on global computer networks and other electronic communication networks

Applicant Information

Application No	86371033	Publication date	04/21/2015
Opposition Filing Date	08/18/2015	Opposition Period Ends	
Applicant	Memez.com, LLC 1309 Flower Street Burbank, CA 91502 UNITED STATES		

Goods/Services Affected by Opposition

Class 042. First Use: 0 First Use In Commerce: 0

All goods and services in the class are opposed, namely: software-as-a-service (SaaS) services featuring software for web site and internet marketing analytics; computer services, namely, creating, maintaining, designing, and implementing software for use by others in web site analytics, split testing, and pass backs for ad serving; computer services,, namely, providing temporary use of online non-downloadable software for tracking usage of web sites and social sharing activity, and aggregating statistics to analyze website performance, internet-based social activity, and return on investment in the field of marketing, advertising, and on-line publishing; internet services, namely, providing an interactive web site featuring technology that allows users to analyze web traffic, perform split testing, and optimize the performance of ad servers on global computer networks and other electronic communication networks

Grounds for Opposition

Priority and likelihood of confusion	Trademark Act section 2(d)
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Marks Cited by Opposer as Basis for Opposition

U.S. Application No.	86522232	Application Date	02/03/2015
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	FRACTAL		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 035. First use: First Use: 2005/00/00 First Use In Commerce: 2005/00/00 business data analysis through use of computer software Class 042. First use: First Use: 2005/00/00 First Use In Commerce: 2005/00/00 providing software-as-a-service (saas) for business data analysis		

U.S. Application No.	86522234	Application Date	02/03/2015
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	FRACTAL ANALYTICS		

Design Mark	FRACTAL ANALYTICS
Description of Mark	NONE
Goods/Services	Class 035. First use: First Use: 2005/00/00 First Use In Commerce: 2005/00/00 business data analysis through use of computer software Class 042. First use: First Use: 2005/00/00 First Use In Commerce: 2005/00/00 providing software-as-a-service (saas) for business data analysis

U.S. Application No.	86522236	Application Date	02/03/2015
Registration Date	NONE	Foreign Priority Date	NONE

Word Mark	FRACTAL
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Design Mark	
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Description of Mark	The mark consists of the wording FRACTAL below a unique design.
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Goods/Services	Class 035. First use: First Use: 2005/00/00 First Use In Commerce: 2005/00/00 business data analysis through use of computer software Class 042. First use: First Use: 2005/00/00 First Use In Commerce: 2005/00/00 providing software-as-a-service (saas) for business data analysis
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Attachments	86522232#TMSN.png(bytes) 86522234#TMSN.png(bytes) 86522236#TMSN.png(bytes) WRFMAIN- #13895810-v1-Consolidated_Notice_of_Opposition_-_Memez_com_FRACTAL. pdf(18507 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/David E. Weslow/
Name	David E. Weslow
Date	08/18/2015

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

FRACTAL ANALYTICS, INC.,

Opposer,

v.

MEMEZ.COM, LLC,

Applicant.

E-FILING

Opposition No.: _____

Application No.: 86371050

Mark: FRACTAL

Application No.: 86371033

Mark: FRACTAL

CONSOLIDATED NOTICE OF OPPOSITION

Fractal Analytics, Inc., a corporation organized and existing under the laws of the state of New York, having its office and principal place of business at 951 Mariners Island, Suite 307, San Mateo, California 94404 (“Fractal”), believes that it will be damaged by registration of the mark of Application Serial Nos. 86371050 and 86371033 as it relates to all goods and services identified therein.¹

As grounds for opposition, Fractal hereby alleges:

1. Fractal obtained extensions of time to oppose Application Serial Nos. 86371050 and 86371033 in and through August 19, 2015.
2. Fractal has continuously used the FRACTAL mark in U.S. Commerce from at least as early as 2005.
3. Fractal has continuously used the FRACTAL ANALYTICS mark in U.S. Commerce from at least as early as 2005.
4. Fractal has continuously used the FRACTAL (and Design) mark in U.S.

¹ The applications at issue herein are owned by the same entity, are directed to the same mark, and recite highly similar goods and services. Therefore, Fractal has filed a single Consolidated Notice of Opposition in accordance with 37 C.F.R. § 2.104(b) and TBMP § 305.

Commerce from at least as early as 2005.

5. Fractal's FRACTAL, FRACTAL ANALYTICS and FRACTAL (and Design) marks shall be collectively referred to as the "FRACTAL Marks," and Fractal shall herein rely upon its common law rights in and to the FRACTAL Marks.

6. Fractal is the owner of U.S. Application Serial No. 86522232 for registration of the FRACTAL mark, which is presently directed to "business data analysis through use of computer software; providing software-as-a-service (saas) for business data analysis."

7. Fractal is the owner of U.S. Application Serial No. 86522234 for registration of the FRACTAL ANALYTICS mark, which is presently directed to "business data analysis through use of computer software; providing software-as-a-service (saas) for business data analysis."

8. Fractal is the owner of U.S. Application Serial No. 86522236 for registration of the FRACTAL (and Design) mark, which is presently directed to "business data analysis through use of computer software; providing software-as-a-service (saas) for business data analysis."

9. Fractal's pending U.S. Application Serial Nos. 86522232, 86522234, and 86522236 have been refused registration by the U.S. Patent and Trademark Office based upon *inter alia* the assigned Examining Attorney's assertion that a likelihood of consumer confusion exists between the marks of Fractal's applications and the mark of opposed Application Serial Nos. 86371050 and 86371033.

10. The applications opposed herein were filed by Memez.com, LLC ("Memez.com") on August 19, 2014 on an intent-to-use basis and were assigned Application Serial Nos. 86371050 and 86371033 by the U.S. Patent and Trademark Office.

11. Memez.com's Application Serial No. 86371050 is directed to the mark FRACTAL in association with "Computer software for web site design and internet marketing

analytics; computer software for use in web site analytics, split testing, and pass backs for ad serving; computer software for use in marketing, advertising and online publishing, namely, software for tracking usage of web sites and social sharing activity, and for aggregating statistics to analyze website performance, internet-based social activity, and return on investment; software for analyzing web traffic, split testing, and optimizing the performance of ad servers on global computer networks and other electronic communication networks.”

12. Memez.com’s Application Serial No. 86371033 is directed to the mark FRACTAL in association with “software-as-a-service (SaaS) services featuring software for web site and internet marketing analytics; computer services, namely, creating, maintaining, designing, and implementing software for use by others in web site analytics, split testing, and pass backs for ad serving; computer services,, namely, providing temporary use of online non-downloadable software for tracking usage of web sites and social sharing activity, and aggregating statistics to analyze website performance, internet-based social activity, and return on investment in the field of marketing, advertising, and on-line publishing; internet services, namely, providing an interactive web site featuring technology that allows users to analyze web traffic, perform split testing, and optimize the performance of ad servers on global computer networks and other electronic communication networks.”

13. Upon information and belief, neither Memez.com nor any predecessor or entity related to Memez.com has any constructive or actual right in the FRACTAL mark prior to August 19, 2014, the filing date of the intent-to-use applications opposed herein.

14. The FRACTAL mark identified in opposed Application Serial Nos. 86371050 and 86371033 is identical to Fractal’s FRACTAL Marks.

15. The goods and services identified in opposed Application Serial Nos. 86371050

and 86371033 are highlight similar if not identical to goods and services provided by Fractal under and through the FRACTAL Marks.

16. There is no issue of priority. Fractal has priority by virtue of its longstanding use of the FRACTAL Marks mark well prior to any bona fide use by Memez.com of FRACTAL.

17. If Memez.com is permitted to obtain registration of the FRACTAL mark of Application Serial Nos. 86371050 and 86371033 in association with the opposed goods and services, the Examining Attorney assigned to Fractal's pending applications has indicated that the registrations will bar registration of the FRACTAL Marks under Fractal's Application Serial Nos. 86522232, 86522234, and 86522236 based upon the Examining Attorney's belief that a likelihood of confusion exists between the respective marks within the meaning of Section 2(d) of the Trademark Act (15 U.S.C. § 1052(d)).

18. Due to the Examining Attorney's citation of Application Serial Nos. 86371050 and 86371033 against Fractal's Application Serial Nos. 86522232, 86522234, and 86522236, registration of Application Serial Nos. 86371050 and 86371033 would result in irreparable damage to Fractal.

19. Concurrent registration of the FRACTAL mark of opposed Application Serial Nos. 86371050 and 86371033 by Memez.com in association with the opposed goods and services would result in irreparable damage to Fractal as consumers would be likely to believe, mistakenly, that Memez.com's registered mark is affiliated with or approved by Fractal.

20. Concurrent registration of the FRACTAL mark of Application Serial Nos. 86371050 and 86371033 by Memez.com in association with the opposed goods and services would result in irreparable damage to Fractal as consumers would be likely to consider the goods and services offered under the registered mark as emanating from Fractal, and purchase such

goods or services, resulting in a loss of sales to Fractal.

21. If Memez.com is permitted to obtain registration of the FRACTAL mark in association with the opposed goods and services, confusion within the meaning of Section 2(d) of the Trademark Act (15 U.S.C. § 1052(d)) is likely to result, to the detriment of Fractal.

22. The bona fides of the Memez.com's intent-to-use the FRACTAL mark in U.S. Commerce in association with the goods and services recited in Application Serial Nos. 86371050 and 86371033 are not apparent from the materials of record in the applications. Fractal therefore challenges the same and leaves Memez.com to its proofs regarding the nature and sufficiency of its intent-to-use at the time of execution of the declarations required by 15 U.S.C. § 1141(5).

WHEREFORE, Fractal requests that Application Serial Nos. 86371050 and 86371033 be rejected in their entirety, that no registration be issued in connection with the opposed goods and services of the applications, and that this opposition be sustained in favor of Fractal.

Respectfully submitted,

Date: August 18, 2015

By: /s/ David E. Weslow

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*Attorneys for Opposer
Fractal Analytics, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on this August 18, 2015, a true and correct copy of the foregoing CONSOLIDATED NOTICE OF OPPOSITION was served on the following attorney of record via first class mail:

Anthony J. Patek, Esq.
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San Francisco, California 94111

Attorney for Applicant

/s/ David E. Weslow

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