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

Proceeding	91207502
Party	Defendant Kaarya, LLC
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Submission	Motion to Dismiss - Rule 12(b)
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8 IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
9 BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

10)
11) Opposition No.: 91207502
EAST WEST BANK,) Serial No.: 85/526,489
12) Mark: EBRIDGE
vs.)
13) **MOTION AND BRIEF TO DISMISS FOR**
KAARYA, LLC,) **FAILURE TO STATE A CLAIM**
14) Applicant.)
15)

16 TO THE COMMISSIONER FOR TRADEMARKS:

17 Applicant Kaarya, LLC., (“Applicant”) pursuant to Fed. R. Civ. P. 12(b)(6) and
18 Trademark Board Manual of Procedure §§502.02(b) and 503, and moves the Trademark Trial
19 and Appeal Board (“TTAB”) to dismiss the fraud claim of East West Bank (“Opposer”).
20 Opposer has failed to allege facts in its Notice of Opposition, which if true establish the elements
21 for a claim of fraud before the TTAB. Opposer’s “information and belief” allegations of fact are
22 insufficient to meet the particularity standards and therefore fail to state a claim of fraud upon
23 which relief may be based. Therefore, the fraud claim should be dismissed and the associated
24 allegations stricken.

1 **INTRODUCTION**

2 The Opposition to the instant Application is based upon a procedural argument that is no longer
3 the law. The Opposition fails to comply with the expressly applicable heightened pleading
4 requirement of FRCP 9(b) laid in in the seminal case *In re Bose Corp.* 580 F.3d 124 (Fed Cir.
5 2009), and instead offers the lone factual allegation that a failed search on Google is a sufficient
6 to state a claim of fraud. That is not the law. The Opposition offers no other factual or legal
7 basis on which it should be granted. Accordingly, it should be denied.

8 **APPLICABLE LAW**

9
10 A dismissal under Fed. R. Civ. P. 12(b)(6) must be correct as a matter of law when the
11 allegations of the complaint are taken as true. *Advanced Cardiovascular Systems Inc. v. SciMed*
12 *Life Systems Inc.*, 988 F.2d 1157, 26 USPQ2d 1038, 1041 (Fed. Cir. 1993). The purpose of the
13 rule is to “allow the court to eliminate actions that are fatally flawed in their legal premise and
14 destined to fail; see also *Bayer Consumer Care Ag v. Belmora LLC*, 90 USPQ2d 1587, 1590
15 (TTAB 2009), quoting, *Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1538 (TTAB
16 2007).

17 Dismissal is proper when the complaint is not plausible on its face, *Ashcroft v. Iqbal*, 556
18 U.S. --, 129 S. Ct. 1937 (2009); see also *Muscigee (Creek) Nation v. Pruitt*, 11-7005 (FED10)
19 (2012), “Indeed, a plaintiff must offer specific factual allegations to support each claim. *Id.*

20 Opposer has filed a Notice of Opposition to Applicant’s registration application for mark
21 EBRIDGE, alleging in part, that “Applicant attempted to obtain registration of the mark
22 “EBRIDGE” fraudulently before the USPTO.” (Opposition at ¶23), and that Applicant’s
23 registration of the mark “EBRIDGE” “would be a source of damage and injury to Opposer.”
24 (Opposition at ¶26) Opposer’s fraud claim, however, must fail because the Notice of

1 Opposition does not state a plausible claim for relief that alleges with sufficient particularity the
2 factual elements necessary to prove such a claim.

3 Opposer claims Applicant committed fraud on the patent and trademark office. Opposer
4 bears the burden of proving the elements of fraud by clear and convincing evidence. Any doubt
5 must be resolved against opposer as the charging party. *In re Bose Corp.*, 580 F.3d 1240, 91
6 USPQ2d 1938, 1939 (Fed. Cir. 2009).

7 The relevant standard for proving fraud, set forth *in re Bose Corp.* requires clear and
8 convincing proof of the following four elements:

- 9 (1) Applicant made a false representation to the USPTO;
- 10 (2) The false representation is material to the registration of a mark;
- 11 (3) Applicant had knowledge of the falsity of the representation; and
- 12 (4) Applicant made the representation with intent to deceive the USPTO

13 *In re Bose, supra*, at 1451.

14
15 Fed. R. Civ. Proc. 9(b), made applicable to Board proceedings by Trademark Rule
16 2.116(a), sets out the standard for pleading fraud, which is that the circumstances constituting the
17 alleged fraud should be stated with particularity. *King Automotive, Inc. v. Speedy Muffler King,*
18 *Inc.* 667 F.2d 1008, 212 USPQ 801 (CCPA 1981) (“[t]he pleadings [must] contain explicit rather
19 than implied expressions of the circumstances constituting fraud”). To satisfy Rule 9(b), any
20 allegation made upon “information and belief” must be accompanied by a statement of facts
21 upon which the belief is founded. *Exergen Corp., v. Wal-Mart Stores, Inc.*, 91 USPQ2d 1656
22 (Fed. Cir. 2009).

1 **OPPOSER ALLEGATIONS OF FACTS**

2 Here, Opposer begins its fraud claim upon an allegation of fact which is not probative or
3 relevant to the claim. Opposer alleges that Opposer’s counsel made an Internet Google search
4 for unspecified terms which allegedly failed to find Applicant’s use of the mark EBRIDGE in
5 commerce for the services listed in the application:

6 21. Upon information and belief, an exhaustive Internet search conducted
7 on October 12, 2012 via Google by Opposer’s counsel reveals that Applicant’s
8 Mark is not currently being used in association with all of the services listed in
9 the application for said mark.
10 (Opposition at ¶21)

11 Regardless of the particularities or results of any Internet Google search, such results are
12 at best speculative regarding Applicant’s use of the mark in commerce.

13 Opposer then alleges 3 more “information and belief” paragraphs in support of its fraud
14 claim, but without the requisite particularity required by Fed. R. Civ. P 9(b):

15 22. Upon information and belief, when Applicant filed its application for
16 the “EBRIDGE” mark, Applicant’s Mark was not used in association with all of
17 the services listed in the application as of the January 26, 2012 filing date of the
18 application.

19 23. Upon information and belief, Applicant attempted to obtain
20 registration of the mark “EBRIDGE” fraudulently before the USPTO.

21 24. Upon information and belief, Applicant knowingly made a false,
22 material representation with the intent to deceive the USPTO in its application for
23 the “EBRIDGE” mark at the time of filing the application.
24 (Opposition at ¶¶ 22-24)

Other than the non-substantive substitution of “knowingly” in place of “known or should
have known”, Opposer’s allegations 22-24 are substantively identical to those rejected by the
board as insufficient to plead fraud in a series of rulings. *See Societe Cooperative Vigneronne
des Grandes Caves Richon-Le-Zion and Zicron-Jacob Ltd. v. Albrecht-Piazza, LLC*, Opposition
No. 91190040 (TTAB Sept. 20, 2009); *Ayush Herbs, Inc. v. Hindustan Lever Ltd. Co.*

1 Opposition No. 91172885 (TTAB Nov. 19, 2009); *E & J Gallo Winery v. Quala S.A.*, Opposition
2 No. 91186763 (TTAB Dec. 7, 2009). *See also Asian and Western Classics B.V. v. Selkow*, 92
3 U.S.P.Q.2d 1478 (TTAB 2009).

4 Finally, Opposer makes its final “information and belief” allegation that Applicant uses
5 the mark in commerce in association with some of the services identified in the application, and
6 then makes the disconnected conclusion that applicant does not use the mark in association with
7 other services without alleging supporting facts:

8 25. Upon information and belief, Applicant’s “EBRIDGE” mark is shown
9 on Applicant’s website (<http://www.kaarya.com>) as being used only in association
10 with Applicant’s products and /or services relating to: Financial services related to
11 automobile services, namely, electronic processing of credit card transactions and
12 debit card transactions between dealerships or other repair facilities and customers
13 using mobile payment systems and Internet payment systems.

14 (Opposition at ¶¶ 25)

15 Again, the allegation even if true is mere speculation and neither proves the falsity of
16 Applicant’s statement, nor is in any manner evidence of Applicant’s intent.

17 Having failed to plead a claim of fraud against the Trademark Office alleging facts with
18 particularity under F.R.C.P. 9(b), Opposer’s claim should be dismissed and the allegations of
19 Opposer paragraphs 21 to 25 should be stricken from the Notice of Opposition.

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CONCLUSION

For the forgoing reasons, the Board should grant Applicant’s Motion to Dismiss
Opposer’s claim of fraud and strike the associated allegations from the Notice of Opposition.

Dated: November 13, 2012

/un /

Ujjual Nath, C.E.O.

/Brian Billett/

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CERTIFICATE OF SERVICE

I certify that this **MOTION AND BRIEF TO DISMISS FOR FAILURE TO STATE A CLAIM** is being served on Opposer by mailing a true and correct copy to the attorney of record, via First Class Mail, Tuesday, November 13, 2012, in an envelope addressed as follows:

Attn: Mr. Tom Chan
FOX ROTHSCHILD LLP
P.O. Box 79159
Los Angeles, CA 90079-0159

/Brian Billett/

Brian Billett