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Filing date: **10/24/2016**

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

Proceeding	91229272
Party	Defendant Dentsply Sirona Inc.
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Attachments	DentsplyMemorandum.pdf(34282 bytes) DentsplyEx1.pdf(148311 bytes) DentsplyEx2.pdf(327370 bytes)

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

Roth Licensing, LLC, a California limited liability company,	:	
	:	Opposition No.: 91229272
Opposer,	:	
v.	:	
	:	
Dentsply Sirona Inc., a Delaware corporation,	:	
	:	
Applicant.	:	
	:	

In re Application of Dentsply Sirona Inc.:

Serial No.:	86/742,723
Filed:	August 31, 2015
Trademark:	RT Rx
Filing Basis:	1(a)
Published:	July 12, 2016

**MEMORANDUM SUPPORTING APPLICANT’S PARTIAL MOTION TO DISMISS
FIRST AMENDED NOTICE OF OPPOSITION FOR FAILURE TO STATE A CLAIM**

INTRODUCTION

After Dentsply Sirona Inc. (“Applicant”) moved to dismiss the claim by Roth Licensing, LLC (“Opposer”) for fraud on the PTO, Opposer apparently recognized at least in part the pleading deficiencies in its original Notice of Opposition (the “Original Notice”), and replaced that notice with a First Amended Notice of Opposition (the “Amended Notice”). The amendments, however, are merely superficial, not substantive, as they still fail to plead particularized *facts* sufficient to meet the heightened pleading standard of Federal Rule of Civil Procedure 9(b). The amendments amount to minor distinctions without a substantive difference. Accordingly, Opposer still fails to state a claim for fraud on the PTO.

Controlling authority is clear that a fraud claim must be supported by factual allegations that explicitly set forth the circumstances of the fraud, including an applicant's subjective intent to deceive. Opposer does not meet that requirement because its conclusory allegations lack the requisite particularized factual support. Opposer does not allege (1) facts that could establish by clear and convincing evidence that Applicant deliberately intended to defraud the PTO or (2) sufficient underlying facts from which the Board could reasonably infer that Applicant acted with deceptive intent. Because Opposer's allegations fall far short of Rule 9(b)'s pleading standard, its fraud claim should be dismissed.

RELEVANT FACTS AND ALLEGATIONS

On August 1, 2016, Opposer filed the Original Notice in opposition to Applicant's application for registration of the "RT Rx" mark. Count Two in that notice is a claim of fraud on the PTO. On September 12, 2016, Applicant moved to dismiss Count Two, noting that it failed to meet the heightened pleading standard of Federal Rule of Civil Procedure 9(b).

Opposer did not respond directly to Applicant's Motion to Dismiss. Instead, on October 3, 2016, Opposer filed the Amended Notice in place of the Original Notice. As discussed below, the changes are superficial and non-substantive.¹

Opposer's fraud claim is premised on two statements by Applicant, one to the PTO and the other on Applicant's website. First, Opposer relies on a statement that Applicant made to the PTO in May 2016 that the designation "RT" was neither a term of art nor of significance in the field of orthodontics. Amended Notice ¶ 13. Opposer alleges that this statement was

¹ Opposer did not attach a redlined comparison copy with its filing. For ease of reference, Applicant attaches a comparison copy hereto as Ex.1.

intentionally false and misleading.² *Id.* Second, in support of its claim that the statement was intentionally false and misleading, Opposer points to a statement on Applicant’s website that identifies the orthodontic prescription values of certain of its products and states in full:

Our RT Rx has values that are equivalent to the Roth® prescription values. No endorsement is implied. Roth® is a registered trademark of Roth Licensing LLC.³

In its Original Notice, Opposer had misleadingly quoted only the first sentence of this statement, omitting the critical second and third sentences. In the Amended Notice, filed after Applicant pointed out the misleading truncation, Opposer acknowledges the complete language, *compare* Original Notice ¶ 10 *with* Amended Notice ¶ 10, but otherwise fails to discuss its meaning or significance. Instead, despite the express language disclaiming any endorsement and recognizing the Roth® trademark, Opposer conclusorily alleges that the statement is intended to draw an association between Applicant’s RT Rx mark and Opposer’s ROTH® mark.

APPLICABLE LEGAL STANDARDS

To survive a motion to dismiss, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). To meet this standard, a plaintiff must provide “more than labels and conclusions, and a formulaic recitation of a cause of action’s elements will not do.” Twombly, 550 U.S. at 555. A plaintiff

² In the Original Notice, Opposer made this contention based on its “belie[f].” In the Amended Notice, Opposer deleted the reference to its “belief” and instead referenced the supposed “context,” *i.e.*, GAC’s status as a prior licensee and its knowledge of the fame of Dr. Roth’s methods, including the Roth prescription. *See* Amended Notice ¶¶ 9, 13. Applicant denies Opposer’s allegation that its statement to the PTO about the absence of significance of RT was false and misleading.

³ *See* Exemplar Webpage, attached as Ex. 2. In evaluating a Rule 12(b)(6) motion, a court may rely on documents outside the pleadings if they are integral to the Plaintiff’s claims and their authenticity is not disputed. Anderson v. Kimberly-Clark Corp., 570 Fed. App’x 927, 932 (Fed. Cir. 2014).

must plead “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* Importantly, a court “is not bound to accept as true a legal conclusion couched as a factual allegation.” Iqbal, 556 U.S. at 678.

Fraud in procuring a trademark registration “occurs when an applicant for registration . . . knowingly makes false, material representations of fact in connection with an application to register.” Media Online Inc. v. El Clasificado, Inc., 88 U.S.P.Q.2d 1285, at *4 (T.T.A.B. 2008). To constitute fraud, the “deception must be willful.” In re Bose Corp., 580 F.3d 1240, 1243, 91 U.S.P.Q.2d 1938 (Fed. Cir. 2009). *See* Meineke Discount Muffler v. Jaynes, 999 F.2d 120 126 (5th Cir. 1993) (“To succeed on a claim of fraudulent registration, the challenging party must prove by clear and convincing evidence that the applicant made false statements with the intent to deceive [the PTO].”). While intent can be inferred from indirect and circumstantial evidence, “such evidence must still be clear and convincing, and inferences drawn from lesser evidence cannot satisfy the deceptive intent requirement.” In re Bose, 580 F.3d at 1245.

The Board follows Federal Rule of Civil Procedure 9(b), which imposes a heightened pleading standard for fraud claims. Asian and Western Classics B.V. v. Selkow, 92 U.S.P.Q.2d 1478, at * 1 (T.T.A.B. 2009). Under Rule 9(b), together with Federal Rule of Civil Procedure 11 and USPTO Rule 11.18, “the pleadings [must] contain explicit rather than implied expression of the circumstances constituting fraud.” *Id.* (quoting King Automotive, Inc. v. Speedy Muffler King, Inc., 667 F.2d 1008, 1009-10, 212 U.S.P.Q. 801 (C.C.P.A. 1981)).

A fraud claim “requires that it be proven ‘to the hilt’ with clear and convincing evidence. There is no room for speculation, inference or surmise, and obviously, any doubt must be resolved against the charging party.” In re Bose, 580 F.3d at 1243 (quotation omitted). Pleadings that lack “specific facts” upon which a belief of fraud is reasonably based are

insufficient. Asian and Western Classics B.V., 92 U.S.P.Q.2d 1478, at * 1. Allegations that an applicant “should have known” that their representation to the PTO was false does not satisfy a fraud claim’s required element of a “willful intent to deceive.” In re Bose, 580 F.3d at 1245-46.

As shown herein, Opposer fails to plead fraud with the requisite particularity.

ARGUMENT

Opposer fails to state a fraud claim because it has not pled particular facts sufficient to establish that Applicant knowingly made a false statement to deceive the PTO. Its claim is based on Applicant’s May 18, 2016 statement to the PTO that the term “RT appearing in the mark has no significance nor is it a term of art in the relevant trade or industry or as used in connection with the goods/services/collective membership organization listed in the application, or any geographical significance.” Amended Notice at ¶ 13. However, Opposer does not plead adequate facts to show that the term “RT” actually *is* a term of art or *has* significance in the relevant trade or industry. Thus Opposer has not even adequately pleaded the statement’s *falsity*, let alone Applicant’s supposed knowledge of falsity or intent to defraud the PTO. As with its Original Notice, thus, Opposer’s Amended Notice fails to identify any particularized facts that would satisfy the heightened pleading standard for claims of fraud.

In its Original Notice, Opposer had claimed that Applicant “knew or should have known” of an intended association between “RT” and the ROTH® mark. Original Notice ¶ 23. After Applicant noted in its initial Partial Motion to Dismiss that such “should have known” allegations do not meet the “willful intent to deceive” standard for a fraud claim, *see In Re Bose*, 580 F.3d at 1245-46, Opposer perfunctorily deleted the phrase “or should have known,” without adding any new facts. *See Amended Notice* ¶ 23. Opposer has also deleted its prior references

to its “information and belief” as the basis of its claims. *Substantively*, though, Opposer’s allegations have not changed.

Opposer posits that, given the “context” of GAC’s status as a prior licensee and the fame of Dr. Roth and his prescription, “GAC *necessarily* understood and intended” to signal an association. See Amended Notice ¶ 9 (emphasis added). This allegation that GAC “necessarily understood,” however, is no different from the earlier assertion that GAC “should have known.” This is an assertion of constructive knowledge, not actual knowledge; its premise is still that, under a supposedly objective standard, GAC should have drawn inferences that Opposer suggests were “necessarily” to be drawn from the “context.” It still does not suffice to allege Applicant’s *subjective* knowledge of falsity or intent to deceive.

Crucially, moreover, neither GAC’s status as a prior licensee nor Dr. Roth’s fame or reputation ever involved the specific mark at issue here, “RT.” Opposer does not allege that GAC ever licensed the mark “RT.” Nor does it allege that Dr. Roth was ever known as or famous as “RT.” Opposer’s assertion of the “context” as the basis for its claim of fraud, thus, does not show falsity – let alone fraud – in the representation that “RT” was neither of significance nor a term of art in the relevant trade or industry.

Thus, Opposer’s assertion that “[i]n the context of the above facts, Applicant knew that [its] response to the PTO was false and misleading,” Amended Notice ¶ 13, is not only conclusory but also lacking in the fundamental requirement of plausibility. See Iqbal, 556 U.S. at 678; Twombly, 550 U.S. at 570. As the statement was not even false – that is, as “RT” is *not* a term of art and has no significance in the relevant trade or industry – Opposer’s claim that Applicant *knowingly* made a false or fraudulent representation lacks even basic plausibility. The Amended Notice, thus, still fails to plead particularized facts sufficient to meet the heightened

standard for pleading fraud. See Intellimedia Sports Inc. v. Intellimedia Corp., 43 U.S.P.Q.2d 1203, at *4 (T.T.A.B. 1997) (“A sufficient pleading of the third element of a fraud claim must consist of more than a merely conclusory allegation that the defendant ‘knew’ about a third party’s superior rights in the mark.”).

Equally importantly, Opposer’s contention that Applicant’s statement was intentionally false and fraudulent ultimately rests on *Opposer’s* contention that “RT” is equivalent to and/or intended to draw an association with “Roth.” A fraud claim, however, can only be premised on the *declarant’s* own knowledge of a statement’s falsity, not a challenger’s knowledge of such falsity – let alone a challenger’s *unilateral contention* of falsity.

In King Automotive, Inc. v. Speedy Muffler King, Inc., 667 F.2d 1008 (U.S. Ct. Cust. Pat. App. 1981), for example, the plaintiff in a cancellation proceeding claimed that the holder of a registered mark had procured the registration by a fraudulent assertion that it was not aware of any prior use by others of the mark in question, “SPEEDY MUFFLER KING.” *Id.* at 1009. The cancellation plaintiff contended that this representation was fraudulent, among other reasons because of the plaintiff’s prior use of the mark “MUFFLER KING.” *Id.* The Board granted a motion to dismiss the fraud claim and was affirmed by the Court of Customs and Patent Appeals.

As the appellate court noted, “MUFFLER KING” was “a different mark from [the] registered” mark, “SPEEDY MUFFLER KING,” and “appellant’s conclusory statement that [the mark holder] knew its declaration to be untrue is not supported by a pleading of any facts which reflect [the mark holder’s] belief that the respective uses of MUFFLER KING and SPEEDY MUFFLER KING would be likely to confuse.” *Id.* at 1011 & n. 4. See also ZAO Odessky Konjatschnyi Zawod v. SIA “Baltmark Invest.” 2013 WL 5945677 (E.D. Va. Nov. 6, 2013) (granting motion to dismiss cancellation claim against registered mark “SHUSTOFF” mark

premised on fraud on the PTO in failing to reference allegedly prior mark of “SHUSTOV” for which an allegedly prior foreign registration application had been filed).

Here, similarly, Opposer’s fraud claim is premised on its contention that Applicant’s “RT Rx” mark is intended to draw an association with Opposer’s mark ROTH®. But, to paraphrase the Court of Customs and Patent Appeals, “ ‘RT Rx’ is a different mark from the registered mark, ‘ROTH®.’” See King Automotive, 667 F.2d at 1011 n. 4. Here, Opposer’s unilateral contention of an alleged similarity or intended association does not suffice to particularly plead *Applicant’s knowledge* of an alleged similarity or intended association. Accordingly, it does not satisfy the pleading requirements. E.g., In re Bose, 580 F.3d at 1245 (fraud “occurs when an **applicant** knowingly makes false material representations”) (emphasis added). Consequently, Opposer does not “point to [clear and convincing] evidence to support an inference of deceptive intent” by Applicant. In re Bose Corp., 580 F.3d at 1246. Because Opposer does not properly plead the essential element of intent, its fundamentally flawed fraud claim should be dismissed.

Opposer also asserts that Applicant’s website statement reflects knowledge of and/or an intent to draw an association between “RT” and “Roth.” Notably, however, as Opposer belatedly and grudgingly acknowledged by the correction of its prior truncation, the website statement expressly *disclaims* any such association; by its plain language, the disclaimer nullifies any possible basis for this statement to support a fraud claim.

As an initial matter, the first sentence of the website statement – *i.e.*, that “Our RT Rx has values that are equivalent to the Roth® prescription values” – does not support a claim of falsity, as it does not reflect that the designation “RT” is either a term of art or of significance in the relevant field. Instead, the statement provides a *clinical reference* point for the products’ prescription values, *i.e.*, that they “are equivalent to the Roth® prescription values.” Opposer

currently has a trademark registration for the name “ROTH®” – but it does not and could not have exclusive rights to the *clinical prescription values* in question, which is all that the statement pertains to.

Even more importantly, Opposer’s claim crumbles of its own accord in light of the complete language of the express disclaimer that Opposer has now belatedly acknowledged. Under Twombly and Iqbal, it is not plausible that Applicant would use a *disclaimer* of any endorsement to draw an *association* between “RT Rx” and “Roth®”; indeed, the very purpose of a disclaimer is precisely the opposite. *See Iqbal*, 556 U.S. at 686 (“Rule 9 merely excuses a party from pleading [state of mind] under an elevated pleading standard. It does not give him license to evade the less rigid – though still operative – strictures of Rule 8.”). As Opposer’s Amended Notice now concedes, Applicant’s disclaimer expressly states “No endorsement is implied,” and identifies Opposer as the owner of the “Roth®” mark. It is therefore implausible that Applicant would know of or seek to create an association between the “RT Rx” and the “ROTH®” marks through a disclaimer.

Far from supporting its claim, Opposer’s reliance on the website statement only undermines Opposer’s already implausible claim of fraud. After now accurately quoting the complete website statement, including the statement that “No endorsement is implied. Roth® is a registered trademark of Roth Licensing LLC,” Opposer simply deletes its prior reference to its “information and belief” and now lurches without explanation from the statement *disclaiming* any endorsement to the conclusory assertion that “[a]ccordingly, GAC intended to use the **RT RX** mark to draw an association with Opposer’s **ROTH®** mark.” Amended Notice ¶ 10 (emphasis added). This amendment, however, simply replaces conjecture with a *non sequitur*. This does not meet the plausibility standard, let alone the heightened pleading standard for fraud.

In sum, Opposer's Amended Notice does not set forth any particularized facts sufficient to meet the plausibility standard of Twombly and Iqbal – let alone the heightened pleading requirements of Federal Rule 9(b). Instead, it is simply a hodgepodge of *non sequiturs*, conclusory allegations and recitation of legal standards. Count Two, thus, should be dismissed.

CONCLUSION

For the reasons set forth herein, Applicant's motion to dismiss Opposer's claim in Count Two for fraud on the PTO should be granted.

Respectfully submitted,

GOODELL, DeVRIES, LEECH & DANN, LLP

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Attorneys for Applicant, Dentsply Sirona Inc.

CERTIFICATE OF SERVICE

I, Richard M. Barnes, hereby certify that a true and complete copy of the Memorandum of Law Supporting Applicant's Partial Motion to Dismiss for Failure to State a Claim has been served on Sheppard, Mullin, Richter & Hampton LLP, counsel for Opposer, Roth Licensing, LLC, by mailing said copy on October 24, 2016, via First Class Mail, postage prepaid to:

Brian M. Daucher
Gazal Pour-Moezzi
Sheppard Mullin Richter Hampton, LLP
650 Town Center Drive, 4th Floor
Costa Mesa, CA 92626

 /s/ Richard M. Barnes
Richard M. Barnes

EXHIBIT 1

[Trademark Trial and Appeal Board Electronic Filing System. http://esta.uspto.gov](http://esta.uspto.gov)

ESTTA Tracking number: **ESTTA774191**

Filing date: **10/03/2016**

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

Proceeding	91229272
Party	Plaintiff Roth Licensing, LLC
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Signature	/Brian M. Daucher/
Date	10/03/2016
Attachments	Roth First Amended Notice of Opposition.pdf(48059 bytes)

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

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Roth Licensing, LLC,
a California limited liability company,

OPPOSITION NO.: [91229272](#)

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Opposer,

v.

FIRST AMENDED NOTICE OF OPPOSITION

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Dentsply Sirona Inc.,
a Delaware corporation,

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Applicant.

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NOTICE OF OPPOSITION

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In re Application of Dentsply Sirona Inc.:

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Serial No.: 86/742,723
Filed: August 31, 2015
Trademark: **RT RX**
Filing Basis: 1(a)
Published: July 12, 2016

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Opposer Roth Licensing, LLC ("Roth" or "Opposer") through its undersigned counsel, hereby moves to amend its Notice of Opposition, filed August 1, 2016, pursuant to Fed.

R. Civ. P. 15(a)(1)(B) and hereby submits its Amended Notice of Opposition.

Roth, a California limited liability company, ("Roth" or "Opposer"), having a mailing address of 4257 Oliver Way, Union City, California 94587, believes that it will be damaged by registration of the mark **RT RX** for goods in International Class 10 filed by

Dentsply Sirona Inc. ("Dentsply" or "Applicant"). Therefore, Roth opposes Dentsply's application for the mark **RT RX** in accordance with the provisions of Section 13 of the Trademark Act (15 U.S.C. § 1063).

Applicant's mark is described as follows:

Mark:	RT RX
Serial No.:	86/742,723
Filed:	August 31, 2015
International Class:	10
Goods:	Orthodontic brackets

The grounds for opposition are as follows:

1. Dr. Ronald Roth was a well-known practitioner and pioneer in the field of orthodontics. As early as 1997, Dr. Roth's name has been used in connection with the sale and advertising of orthodontic products. When Dr. Roth passed away in 2005, his widow became his successor-in-interest. Today, Opposer is Dr. Roth's successor-in-interest and owner of all intellectual property rights pertaining to Dr. Roth.

2. Opposer has obtained a number of federal trademark registrations to protect the value of its well-known **ROTH**[®] mark in connection with orthodontic products, including a registration for the mark **ROTH**[®] in International Class 10 in connection with "orthodontic appliances." See U.S. Reg. No. 3,733,539.

3. Through many efforts on the part of Opposer, the **ROTH**[®] mark has gained a valuable reputation and significant goodwill among the relevant purchasing public.

4. Leading up to his death in 2005, Dr. Roth had a longstanding licensing relationship with GAC International, LLC ("GAC"), Applicant's wholly-owned subsidiary, providing for GAC's right to use the **ROTH**[®] mark. Applicant (and its subsidiary GAC) are in the business of manufacturing orthodontic appliances.

the business of manufacturing orthodontic appliances.

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5. When Dr. Roth passed away in 2005, the licensing agreement automatically terminated, but GAC continued to use the **ROTH**^{ROTH} mark without permission or compensating Dr. Roth's successors.

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6. In 2007, Opposer and GAC negotiated a settlement, under which GAC would pay for its prior, unauthorized use of the **ROTH**^{ROTH} mark and receive a continuing license for five years.

7. Upon expiration of that license's term in 2012, GAC again continued to use the **ROTH**^{ROTH} mark without permission or compensating Opposer. Ultimately, Opposer and GAC entered into a further three-year license agreement, which was effective through December 31, 2014.

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8. Upon expiration of that license's term on December 31, 2014, GAC continued to use the **ROTH**^{ROTH} mark without authorization from Opposer.

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9. In or around spring 2015, Opposer learned that GAC and/or its parent company, Applicant, began using the mark **RT RX** in place of their use of the **ROTH**^{ROTH} mark for products that previously bore the **ROTH**^{ROTH} mark. Believing this change to be in bad faith and a continued violation of Opposer's rights in the **ROTH**^{ROTH} mark, Opposer sent GAC a letter demanding that GAC cease and desist from any further use of the **RT RX** mark. Given GAC's longstanding prior status as a licensee of the **ROTH**^{ROTH} mark and its knowledge of the worldwide fame of the Dr. Roth's methods, including the Roth Prescription, GAC necessarily understood and intended that the mark **RT Rx** signal to the marketplace the ongoing association to Dr. Roth and his **ROTH**^{ROTH} mark. The **RT** portion is short for **ROTH** and the **RX** portion is a known

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9. abbreviation for prescription. In response, GAC denied Opposer's allegations and refused to cease use of the **RT RX** mark.

10. GAC and/or Applicant continue to use the **RT RX** mark in a manner that is likely to cause confusion among the relevant purchasing public. For example, in connection with products bearing the **RT RX** mark, GAC and Applicant make the following statement on their website: "Our RT Rx has values that are equivalent to the Roth® prescription values. No endorsement is implied. Roth is a registered trademark of Roth Licensing LLC."

Accordingly, GAC intended to use information and belief, the **RT RX** mark is intended to draw an association with Opposer's the **ROTH**® mark.

11. On or around August 31, 2015, GAC's parent company, Applicant, filed an application (Serial No. 86/742,723) with the U.S. Patent and Trademark Office ("PTO") for the mark **RT RX** in connection with "orthodontic brackets" in International Class 10 (the "Application"). The Application claims a first-use date of April 1, 2015.

12. On or around December 19, 2015, the PTO issued an Office Action requiring that Applicant "specify whether the letters RT-RT have any significance in the orthodontic trade or industry or as applied to the goods and/or services described in the application, or if such letters represent a 'term of art' within applicant's industry."

13. On or around May 18, 2016, Applicant responded to the Office Action, claiming that "RT appearing in the mark has no significance nor is it a term of art in the relevant trade or industry or as used in connection with the goods/services/collective membership organization listed in the application, or any geographical significance." In Opposer believes and alleges that, in the context of the above facts, Applicant knew that this response to the PTO was false and misleading.

14. Based ~~But, based~~ upon Applicant's this response, the PTO issued a Notice of Publication

14. for the Application on June 22, 2016, and the Application was published for opposition on

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July 12, 2016.

15. In submitting the Application, Applicant also made the following declaration to the PTO:

The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements, and the like, may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered, or, if the application is being filed under 15 U.S.C. Section 1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of his/her own knowledge are true; and that all statements made on information and belief are believed to be true.

Count One — Likelihood of Confusion

16. Opposer realleges and incorporates herein each of the preceding paragraphs as though fully set forth herein.

17. Applicant's proposed mark **RT RX** is similar in sound, appearance and meaning and is confusingly similar to Opposer's **ROTH** mark. Further, the goods offered by Applicant under the **RT RX** mark are identical and/or similar and related to those offered under the **ROTH** mark.

the **ROTH** mark.

18. The **RT RX** mark, as used on Applicant's goods, especially in light of

18. Applicant's longstanding prior status as the sole authorized licensee of the **ROTH** mark, is likely to cause confusion, mistake, or deception as to the source, origin, affiliation, association, connection, or sponsorship with the **ROTH** mark and/or Opposer.

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19. For the foregoing reasons, the registration sought by Applicant is contrary to the provisions of Sections 3 and 43 of the Lanham Act, 15 U.S.C. §§ 1052 and 1125, and Opposer would be damaged thereby.

20. In order to protect the public against confusion and deceit, and to protect the **ROTH**[®] mark from infringement, registration of the **RT RX** mark should be refused.

Count Two — Fraud on the PTO

21. Opposer realleges and incorporates herein each of the preceding paragraphs as though fully set forth herein.

22. Applicant made material ~~misrepresentations~~representations of fact to the PTO in prosecuting

22. the Application, including by representing to the PTO that the term "RT" has no significance in the field of orthodontics or as applied to the goods in the Application.

23. Applicant knew ~~or should have known~~ that the term "RT" was intended to

23. draw an association to the **ROTH**[®] mark and Dr. Roth, a name which is widely recognized in the field of orthodontics. In fact, on its website, Applicant claims that, "Our RT Rx has values that are equivalent to the Roth[®] prescription values" Yet, the Applicant stated to the PTO that "RT appearing in the mark has no significance nor is it a term of art in the relevant trade or industry or as used in connection with the goods/services/collective membership organization listed in the application, or any geographical significance."

~~are equivalent to the Roth[®] prescription values"~~

24. Applicant made these ~~misrepresentations~~representations to the PTO with the intent to deceive and to induce authorized agents of the PTO to publish the Application for opposition and, ultimately, registration.

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25. The authorized agents of the PTO reasonably relied upon Applicant's statements to publish the Application and would not have published the Application but for Applicant's misrepresentations.

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~~Applicant's misrepresentations.~~

26. The Application should be rejected and registration of the **RT RX** mark should be refused because Applicant committed fraud in its attempt to procure registration of its mark.

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~~mark.~~

27. Opposer would be damaged by the registration of the **RT RX** mark in that such registration would give Applicant a *prima facie* exclusive right to the use of **RT RX**.

27. despite the likelihood of confusion, mistake, or deception, and Applicant's fraudulent misrepresentations described above.

28. 28. THEREFORE, Opposer prays that Applicant's proposed trademark for **RT RX** be denied registration.

DATED: ~~October 3~~ August 1, 2016

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Respectfully submitted,

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By /Brian M. Daucher/

BRIAN M. DAUCHER
GAZAL J. POUR-MOEZZI

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
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Costa Mesa, California 92626
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Main Facsimile: 714-513-5130
Direct Telephone: 714-424-8215

Attorneys for Opposer
ROTH LICENSING, LLC

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing **FIRST**

AMENDED NOTICE OF

OPPOSITION has been served on Dentsply Sirona Inc. by emailing

and mailing said copy on **October 3**

August 1, 2016 via First Class Mail postage prepaid to:

Richard M. Barnes
Matthew D. Kohel
Goodell, DeVries, Leech & Dann, LLP
One South St., 20th Floor
Baltimore, Maryland 21202
Tel: (410) 783-4000 Fax: 783-4040
Justin H. McCarthy II
Dentsply Legal Department
221 W Philadelphia St.
York, PA 17401-2991
rmb@gddllegaltrademarks@dentsply.com
mkohel@gddllegal.com

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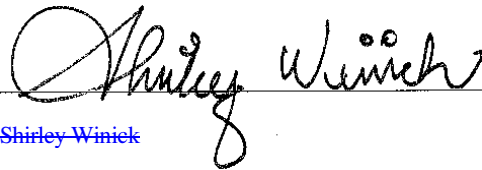
Dated: ~~October 3~~^{August 1}, 2016 /Carole Dubienny/

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Shirley Winick

Shirley Winick

Carole Dubienny

[4825-5218-1050](#)

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Roth Licensing, LLC
Trademark Opposition
RT-RX
Serial No. 86/742,723

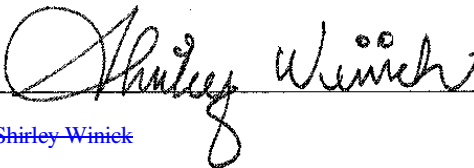
CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing NOTICE OF
OPPOSITION has been served on Dentsply Sirona Inc. by emailing and mailing said copy on:

August 1, 2016 via First Class Mail postage prepaid to:

Justin H. McCarthy II
Dentsply Legal Department
221 W Philadelphia St.
York, PA 17401-2991
trademarks@dentsply.com

Dated: August 1, 2016


Shirley Winick

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EXHIBIT 2



OmniArch MicroProgressive .018 Upper Left 2 14° Torque 9° Angulation 0° Rotation

An Advanced Versatile Twin Design

- Mid-size design for easier handling and placement
- Raised gingival tie-wing for easy ligation - tapered occlusal tie-wing to avoid interference
- Incisal edge of base is designed to be parallel with the incisal edge of the tooth to facilitate placement



SKU 77-221-70

Call



Features and Benefits

Resources

OmniArch is a mid-sized bracket system that combines all the outstanding elements of typical twin systems with a highly advanced bracket design. Clinicians benefit from optimal size, wedged torque in base and easy bonding. Patients benefit from a bracket that is comfortable and esthetically pleasing. Conveniently, OmniArch is available in a wide range of prescriptions and options.

- Aligned angulation - The incisal aspect of OmniArch parallels the tooth's incisal edge, while the tie wings flow with the long, or crown axis. This provides unequalled mesiodistal/incisogingival orientation with precise tipping results
- Wedged Torque - OmniArch's wedged torque provides the aligned slots and placement advantages of torque in the base or diagonal design. It further incorporates a unique tie wing designed to reduce occlusal interference and the resulting discomfort, bond failure, and repositioning.
- The entire mandibular arch has a single scribe line running across the gingival wings, the mandibular second bicuspids have an additional scribe line on the incisal wings, and the maxillary bicuspids have a scribe line running across the incisal wings.
- Low profile design for greater comfort.
- Permanent ID mark for easy bracket identification.
- Chamfered archwire slot - milled for precision.
- OmniArch is the ideal size - small enough to be aesthetically pleasing, yet easy to handle and sized right for rotational and torque control not typically found in minis.

*Our RT Rx has values that are equivalent to the Roth® prescription values. No endorsement is implied. Roth® is a registered trademark of Roth Licensing LLC.