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

|                        |  |
|------------------------|--|
| Proceeding             | 91237356   |
| Party                  | Plaintiff<br>Rocket Sports, LLC  |
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| Submission             | Motion to Dismiss - Rule 12(b)   |
| Filer's Name           | Paul W. Koda   |
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| Date                   | 11/30/2019   |
| Attachments            | Opposers Motion to Dismiss for Failure to State a Claim Upon Which Relief May Be Granted Pursuant to Federal Rule of Civil Procedure 12b6.pdf(122342 bytes ) |

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

|                    |   |                         |
|--------------------|---|-------------------------|
| ROCKET SPORTS, LLC | : |                         |
|                    | : |                         |
| Opposer,           | : |                         |
|                    | : |                         |
| vs.                | : | Opposition No. 91237356 |
|                    | : |                         |
| DEXTER KAN         | : |                         |
|                    | : |                         |
| Applicant.         | : |                         |

**OPPOSER’S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM  
UPON WHICH RELIEF MAY BE GRANTED PURSUANT TO  
FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)**

Pursuant to Federal Rule of Civil Procedure 12(b)(6) and TBMP 503, Rocket Sports, LLC (“Opposer”) respectfully moves the Trademark Trial and Appeal Board (“Board”) to dismiss Applicant’s Counterclaim set forth in Applicant’s Amended Answer to Opposer’s Amended Notice of Opposition for failure to state a claim for which relief may be granted. On June 17, 2019, Applicant filed Applicant’s Motion for Leave to Amend Answer to Notice of Opposition (“Applicant’s Motion”) in which Applicant proposed the addition of several counterclaims. On July 7, 2019, Opposer responded with Opposer’s Response to Applicant’s Motion for Leave to Amend Answer to Notice of Opposition (“Opposer’s Response”). Then, on July 22, 2019, Applicant responded with Applicant’s Reply to Opposer’s Response to Applicant’s Motion for Leave to Amend Answer to Notice of Opposition. On November 9, 2019, the Board issued an order stating that, “[a]pplicant’s motion to amend its answer to include a counterclaim is GRANTED IN PART, that is, only to the extent that it includes a claim of non-use in

commerce.” This Opposer’s Motion to Dismiss for Failure to State a Claim Upon Which Relief May Be Granted Pursuant to Federal Rule of Civil Procedure 12(b)(6) is submitted to challenge the legal sufficiency of the Applicant’s Counterclaim set forth in Applicant’s Amended Answer to Opposer’s Amended Notice of Opposition and, in particular, the counterclaim of non-use in commerce as set forth in Paragraph 9 of Applicant’s Counterclaim. In order to test the legal sufficiency of Applicant’s counterclaim of non-use in commerce, Opposer relies substantially upon the arguments presented in Opposer’s Response filed July 7, 2019.

A motion to dismiss for failure to state a claim upon which relief can be granted is a test solely of the legal sufficiency of a complaint. *Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc.*, 988 F.2d 1157, 26 USPQ2d 1038, 1041 (Fed. Cir. 1993); *Covidien LP v. Masimo Corp.*, 109 USPQ2d 1696, 1697 (TTAB 2014); *Corporacion Habanos SA v. Rodriguez*, 99 USPQ2d 1873, 1874 (TTAB 2011); *Bayer Consumer Care Ag v. Belmora LLC*, 90 USPQ2d 1587, 1590 (TTAB 2009), (quoting, *Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1538 (TTAB 2007)); *Space Base Inc. v. Stadis Corp.*, 17 USPQ2d 1216, 1218 (TTAB 1990); *Consolidated Natural Gas Co. v. CNG Fuel Systems, Ltd.*, 228 USPQ 752, 753 (TTAB 1985). In order to withstand such a motion, a complaint need only 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), or for canceling the subject registration (in the case of a cancellation proceeding). *Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998); *Lipton Industries, Inc. v. Ralston*

*Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 188 (CCPA 1982); *Corporacion Habanos SA v. Rodriguez*, 99 USPQ2d 1873, 1874 (TTAB 2011); *Bayer Consumer Care Ag v. Belmora LLC*, 90 USPQ2d 1587, 1590 (TTAB 2009); *Cineplex Odeon Corp. v. Fred Wehrenberg Circuit of Theaters*, 56 USPQ2d 1538, 1539 (TTAB 2000); *Kelly Services Inc. v. Greene's Temporaries Inc.*, 25 USPQ2d 1460, 1462 (TTAB 1992); *Hartwell Co. v. Shane*, 17 USPQ2d 1569, 1570 (TTAB 1990); *Consolidated Natural Gas Co. v. CNG Fuel Systems, Ltd.*, 228 USPQ 752, 753 (TTAB 1985); *Intersat Corp. v. International Telecommunications Satellite Organization*, 226 USPQ 154, 156 (TTAB 1985); *Springs Industries, Inc. v. Bumblebee Di Stefano Ottina & C.S.A.S.*, 222 USPQ 512, 514 (TTAB 1984). To survive a motion to dismiss, a complaint must “state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007) (retiring the pleading standard set forth in *Conley v. Gibson*, 355 U.S. 41 (1957) that dismissal for failure to state a claim is appropriate only if it appears certain that the plaintiff is entitled to no relief under any set of facts that could be proved in support of its claim). See also *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (plausibility standard applies to all federal civil claims); *Caymus Vineyards v. Caymus Medical Inc.*, 107 USPQ2d 1519, 1522 (TTAB 2013) (considering plausibility); *Dragon Bleu (SARL) v. VENM, LLC*, 112 USPQ2d 1925, 1926 (TTAB 2014) (considering plausibility); *Doyle v. Al Johnson's Swedish Restaurant & Butik Inc.*, 101 USPQ2d 1780, 1782 (TTAB 2012) (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)); *Corporacion Habanos SA v. Rodriguez*, 99 USPQ2d 1873, 1874 (TTAB 2011) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007)). In particular, the claimant must allege well-pleaded factual matter and more than “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory

statements.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555). See, e.g., *Dragon Bleu (SARL) v. VENM, LLC*, 112 USPQ2d 1925, 1926 (TTAB 2014) (motion to dismiss applicant’s fraud, non-use and abandonment counterclaims granted); *Covidien LP v. Masimo Corp.*, 109 USPQ2d 1696, 1697 (TTAB 2014).

In this instance, it is the fact that the Applicant relies upon “facts,” which are not “well-pleaded factual matter,” (i.e. mischaracterizations, misstatements, and false allegations) that render Applicant’s Counterclaim ineffective and therefore, ripe for dismissal.

Earlier, as described in Opposer’s Response, Applicant’s Counterclaim represents to the Board several fact patterns that are misleading in parts and plainly false in others. First, paragraph 9(a) of the Applicant’s Counterclaim states that, “[d]uring the Deposition of Registrant on May 23, 2019, Registrant admitted to non-use of each of the services identified in the RS Application and Registration, both in connection with the ROCKET SPORTS Mark and generally.” This statement is completely false. During the Deposition of Registrant on May 23, 2019, Registrant carefully and completely explained the use of each service recited in the Registrant’s (Opposer’s) ROCKET SPORTS (Reg. No. 5,297,623) Registration. These explanations are highlighted in the deposition transcript of Stephen Koda taken May 23, 2019 and shown in Opposer’s Response Exhibit A. This misstatement by the Applicant demonstrates that Applicant’s Counterclaim does not rely upon *well-pleaded factual matter* and therefore should be dismissed.

Second, paragraph 9(a)(i) of the Applicant’s Counterclaim states that, “[r]egistrant repeatedly denied being “an advertising agency” and admitted that

Registrant was not hired by others to provide advertising or promotional services. (See Exhibit 4.)” This statement utterly misrepresents the Registrant’s (Mr. Stephen Koda’s) testimony during his deposition on May 23, 2019. The context of the testimony shown in Applicant’s Exhibit 4 was a series of questions about the goods and services recited in the third-party ROCKET MEDIA (Reg. No. 4,069,932) Registration. In each of the highlighted instances shown, Mr. Stephen Koda, on behalf of the Registrant, Rocket Sports, LLC, stated that Rocket Sports, LLC did not provide the services as they were recited in the third-party ROCKET MEDIA (Reg. No. 4,069,932) Registration. Opposer’s Response Exhibit B shows the testimony of Mr. Stephen Koda, including pages 134, 135, and 136 of Mr. Koda’s May 23, 2019 deposition, which show that his testimony concerned the third-party ROCKET MEDIA (Reg. No. 4,069,932) Registration rather than the Opposer’s ROCKET SPORTS (Reg. No. 5,297,623) Registration. Furthermore, the services recited in third-party ROCKET MEDIA (Reg. No. 4,069,932) Registration are not the same services recited in the Opposer’s ROCKET SPORTS Mark. Applicant’s counsel seems incredulous that Mr. Stephen Koda “repeatedly denied being ‘an advertising agency.’” On behalf of Rocket Sports, LLC, Mr. Koda did deny that Rocket Sports, LLC was an advertising agency. This is because Rocket Sports, LLC is not an advertising agency. Nor does the ROCKET SPORTS (Reg. No. 5,297,623) Registration recite that it provides advertising agency services. Apparently, Applicant’s counsel was confused about which services were being discussed during the deposition, those services recited in the Opposer’s ROCKET SPORTS (Reg. No. 5,297,623) Registration or those of the third-party ROCKET MEDIA (Reg. No. 4,069,932) Registration. This misstatement by the Applicant demonstrates that Applicant’s

Counterclaim does not rely upon *well-pleaded factual matter* and therefore should be dismissed.

Third, paragraph 9(a)(ii) of the Applicant's Counterclaim states that, "[w]hen asked about the services provided in connection with the ROCKET SPORTS Mark, Registrant described only services which do not qualify as any of "marketing," "advertising," "promotion," or "distributorship" for the primary benefit of others. Rather, the ROCKET SPORTS Mark was described as used in connection with advertising and promoting sales of products solely within Registrant's own inventory, sold solely through Registrant's own website. Registrant is also not paid other than by the end consumer. (See Exhibit 5.)" Contrary to the Applicant's assertion in paragraph 9(a)(ii) of the Applicant's Counterclaim, Mr. Stephen Koda's testimony, on behalf of Rocket Sports, LLC, demonstrates that for each service recited in the ROCKET SPORTS (Reg. No. 5,297,623) Registration, Mr. Koda confirmed that each such service was provided by Rocket Sports, LLC and then proceeded to explain each of those services either in testimony or by directing opposing counsel to the corresponding deposition Exhibit or both. (See Opposer's Response Exhibit A.) In this instance, Applicant is engaging in a sleight of hand only by choosing to use the words "marketing," "advertising," "promotion," or "distributorship" to describe the Opposer's services and then object to those services rather than the Opposer's actual services recited in Opposer's ROCKET SPORTS (Reg. No. 5,297,623) Registration. Using these improperly defined services, Applicant then attempts to plead that Rocket Sports, LLC is somehow not providing such "services" for the benefit of others. Not only does Mr. Koda's deposition testimony contradict this argument, but the very Specimen of Use offered by the Applicant in

Exhibit 3 of Applicant’s Motion shows that Rocket Sports, LLC is promoting and advertising a “Prequel Lacrosse Head,” “Signature Lacrosse Balls,” and “Integra Gloves,” all of which are the products and brands of others. It could not be any more clearly stated that Rocket Sports, LLC is providing “[m]arketing services, namely, promoting or advertising the goods and services of others,” which is one of the recited services in Opposer’s ROCKET SPORTS (Reg. No. 5,297,623) Registration. In addition, page 91 of Mr. Stephen Koda’s May 23, 2019 deposition shows that services provided by Rocket Sports, LLC are done so for the benefit of others – namely Epoch Lacrosse. Despite Applicant’s argument, the fact that the Applicant failed to accurately recite the Opposer’s services in paragraph 9(a)(ii) shows that the Counterclaim is not based upon *well-pleaded factual matter* and therefore should be dismissed.

Considering the numerous mischaracterizations, misstatements, and false allegations described above, which show that the Counterclaim is not based upon *well-pleaded factual matter*, Applicant’s Counterclaim fails as a matter of law and should be dismissed for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6) and TBMP 503.



**CONCLUSION**

For the foregoing reasons and explanations, Opposer hereby respectfully requests that the Board dismiss Applicant's Counterclaim for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6) and TBMP 503.

Dated: November 30, 2019

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

THIS IS TO CERTIFY that on this 30<sup>th</sup> day of November, 2019, a copy of this OPPOSER'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6) was sent by electronic mail at rkl@rklpatlaw.com to:

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