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

Proceeding	91239011
Party	Plaintiff Amgen Inc.
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Attachments	Amgen - Reply to Response to Motion to Dismiss.pdf(18457 bytes)

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

AMGEN INC.,)	
)	Opposition No. 91239011
Opposer,)	
)	Mark: EXCIVA
)	
v.)	Serial No. 87/195,766
)	
EXCIVA UG,)	
)	
Applicant.)	

**OPPOSER’S REPLY TO APPLICANT’S RESPONSE TO OPPOSER’S MOTION TO
DISMISS THE COUNTERCLAIM**

Pursuant to Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) § 502.02(b), *et. seq.*, Amgen Inc. (“Opposer”), through its counsel, hereby files this reply to Applicant’s Response to Opposer’s Motion to Dismiss the Counterclaim (the “Response”).

At the outset, Opposer notes that reply briefs are often disfavored by the Board where they merely reargue points in the movant’s original brief. TBMP 502.02(b). This reply, however, is necessary to address two important issues in the Response: (i) the failure of the Response to meaningfully address the issues in Opposer’s Motion to Dismiss; and (ii) the apparent new or amended Answer and Counterclaim filed in connection with the Response, which should be disregarded or stricken.

I. **THE RESPONSE FAILS TO SHOW THAT APPLICANT PROPERLY PLEADED ITS FRAUD CLAIM.**

The Response fails to meaningfully allege with particularity a primary element of a properly pleaded fraud claim - that the applicant made a false, material representation of fact with an intent to deceive. *In re Bose Corp.*, 580 F.3d 1240, 1243 (Fed. Cir. 2009). Applicant’s Response makes a conclusory statement that Opposer made a “fraudulent statement and a lie.”

DE #11, p. 3. However, Applicant's Response fails to set forth any factual basis whatsoever for this claim. Such conclusory statements pleaded without particularity are insufficient to meet the heightened pleading standards under Fed. R. Civ. P. Rule 9(b). *See Stauffer v. Brooks Bros., Inc.*, 619 F.3d 1321, 1328 (Fed. Cir. 2010).

Because Applicant's Response fails to support its position that the fraud claim was properly pleaded, the Board should grant Opposer's Motion to Dismiss the Counterclaim.

II. **APPLICANT'S NEW OR AMENDED ANSWER SHOULD BE DISREGARDED OR STRICKEN.**

Applicant improperly filed a new or amended Answer with the Response. *See* DE #11, p. 8 – 111. It is not styled or captioned as an Amended Answer, but this filing appears to be attached as part of the Response. It is unclear why, or under what rule, the pleading was filed. Regardless, Applicant's new or amended Answer should be disregarded or stricken.

The rules regarding the filing of an amended answer are explicit. Specifically, a party may amend its answer as a matter of course within 21 days after serving it, Fed. R. Civ. P. 15(a)(1)(A); TBMP 507.01. After such time, a party may amend its answer only upon leave from the Board. Fed. R. Civ. P. 15(a)(2); TBMP 507.01. On February 25, 2018, Applicant filed its Answer and Counterclaim. [DE #4]. Fifty-two days later, on April 19, 2018, Applicant filed its new or amended Answer and Counterclaim in connection with the Response. [DE #11].

Applicant filed its new or amended answer much later than 21 days after service of its Answer and Counterclaim on Opposer. Thus, Applicant could not amend its pleading as a matter of course. *See* Fed. R. Civ. P. 15(a)(1)(A); TBMP 507.01. Furthermore, Applicant has not requested leave from the Board to amend its Answer. Applicant's new or amended Answer filed on April 19, 2018 should therefore be disregarded or stricken.

III. **OPPOSER'S ADDITIONAL REPLIES.**

Opposer notes that, on April 19, 2018, Applicant also filed responses to Opposer's Motion to Strike and Motion for Summary Judgment. Given the Board's disfavor for reply briefs, Opposer confirms that it has not filed replies to Applicant's responses. Opposer merely notes that these latest filings by Applicant fail to address the clear deficiencies addressed in Applicant's original filings, and Opposer relies on its written submissions in its briefs dated March 19, 2018. *See* DE #6, 8.

WHEREFORE, Opposer prays that the Trademark Trial and Appeal Board grant Opposer's Motion to Dismiss the Answer and Counterclaim and disregard or strike the new or amended Answer filed in connection with the Response.

Dated: May 9, 2018

Respectfully Submitted,

AMGEN INC.

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing **OPPOSER'S REPLY TO APPLICANT'S RESPONSE TO APPLICANT'S MOTION TO DISMISS THE COUNTERCLAIM** has been served on the following by forwarding said copy on May 9, 2018, via email to:

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Michael Geller
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May 9, 2018
Date