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

Proceeding	91248129
Party	Plaintiff Remus Repta
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Attachments	Response to Motion to Dismiss Opposition.pdf(21238 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Application Serial No. 88197995

Applicant:	AAA Plastic Surgery
Filed:	November 17, 2018
Published:	April 30, 2019
Opposition No:	91248129

Remus Repta,

Opposer,

v.

Pablo Prichard

Applicant.

NOTICE OF OPPOSITION

Applicant's Motion to Dismiss must be dismissed. Applicant has been engaged in litigation with Opposer in Arizona since September 2018 relating to the alleged "AAA Plastic Surgery" trademark. Applicant knows the basis of Opposer's objection, which is what Fed. R. Civ. P. 8 and 12 require; mainly, "AAA Plastic Surgery" has been used, if at all, only in the context of a domain owned by Opposer Dr. Repta, and if anyone is the "owner" and user of "AAA Plastic Surgery," it is the parties' jointly-owned entity, Advanced Plastic Reconstruction, PLLC, not the Applicant, Pablo Prichard. *See* Opposition, ¶¶ 4, 6 - 8.

A motion to dismiss under Rule 12(b)(6) is a test of the sufficiency of the complaint. *See 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). To survive a motion to dismiss, a plaintiff need only allege sufficient factual content that, if proved, would allow the Board to conclude, or to draw a reasonable inference, that (1) the plaintiff has standing to maintain the proceeding, and (2) a valid ground exists for denying the registration sought or for cancelling the involved registration. *See Doyle v. Al Johnson's Swedish Restaurant & Butik Inc.*, 101 USPQ2d 1780, 1782 (TTAB 2012) (citing cases). The Board determines whether Opposer's belief "is not wholly without merit." *See Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982). A complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim has facial plausibility when the plaintiff pleads factual content that allows the court or Board to draw a reasonable inference that that the defendant engaged in the conduct alleged. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556-57 (2007). And the plausibility standard does not require that a plaintiff set forth detailed factual allegations. *Id.* Rather, a plaintiff need only allege "enough factual matter . . . to suggest that [a claim is plausible]" and to "raise a right to relief above the speculative legal." *See Totes-Isotoner Corp. v. U.S.*, 594 F.3d 1346, 1354 (Fed. Cir. 2010).

Finally, for purposes of resolving a motion to dismiss, all of the plaintiff's well-pleaded allegations must be accepted as true, and the complaint must be construed in a light most favorable to the plaintiff. *See Advanced Cardiovascular Systems Inc.*, 26 USPQ2d at 1041; *Petroleos Mexicanos v. Intermix SA*, 97 USPQ2d 1403, 1405 (TTAB 2010). Further, "[u]nder simplified notice pleading of the Federal Rules of Civil Procedure, the allegations of a complaint should be construed liberally so as to do substantial justice." *See Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1538 (TTAB 2007).

The Notice of Opposition places Applicant on notice of Dr. Repta's complaints. It explains that Dr. Repta and his business partner, Dr. Prichard (the Applicant) have been

engaged in various business disputes for more a year, and one of those disputes involves ownership rights (if any) to "AAA Plastic Surgery". Dr. Repta is the owner of the aaaplasticsurgery.com domain name, which the parties formerly used to advertise their plastic surgery practice group. *See* Notice of Opposition, ¶ 5-6, 8. The Notice of Opposition highlights that all but one of Applicant's specimens relies on that domain name as proof of "use". *Id.* at ¶¶ 10-11. The Notice of Opposition, relying on the PTO Trademark Manual of Examination Procedure, is clear that a domain name that, as here, is not a source identifier, cannot be registered as a trademark. *Id.* ¶¶ 14-15. If it could, that trademark would belong to Dr. Repta – the owner of the domain name.

Opposer has alleged that he has standing to challenge the "AAA Plastic Surgery" registration (though the examiner has made clear that Applicant may not seek the exclusive right to use "plastic surgery"), and alleged that Applicant is not the exclusive user of "AAA Plastic Surgery". *See* Notice of Opposition, ¶¶ 3-4. What Applicant improperly seeks to do is obtain "AAA Plastic Surgery" in order to try to leverage some ownership over Dr. Repta's domain name. *Id.* at ¶¶ 6-9. Dr. Repta has alleged that "AAA Plastic Surgery" is not a source identifier; Applicant cannot claim exclusive appropriation of a generic term. *Id.* at ¶ 13. The Notice of Opposition sufficiently alleges that "AAA Plastic Surgery" mark is generic, is not inherently distinctive and has not acquired distinctiveness, and Applicant is not the rightful owner of the mark. *See* Notice of Opposition (citing Trademark Act Sections 1, 2, 45 and 2(f). If, however, the Board is inclined to grant the Motion to Dismiss, Opposer respectfully requests that the Board allow Opposer an opportunity to correct the defective pleading. *See Intellimedia Sports Inc. v. Intellimedia Corp.*, 43 USPQ2d 1203, 1208 (TTAB 1997); *Miller Brewing Co. v. Anheuser-Busch Inc.*, 27 USPQ2d 1711, 1714 (TTAB 1993); TBMP § 503.03.

RESPECTFULLY SUBMITTED July 11, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing NOTICE OF OPPOSITION was served on counsel for Application, this 13th date of May, 2019, by sending same via First Class Mail, postage prepaid, to:

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By: /s/ Michelle H. Swann
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