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Filing date: **01/29/2020**

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

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|---------------------------|---|
| Proceeding | 91253060 |
| Party | Defendant ARCHforensic, LLC |
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| Submission | Motion to Dismiss - Rule 12(b) |
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| Date | 01/29/2020 |
| Attachments | 91253060_Motion_to_Dismiss.pdf(38542 bytes) |

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

In the matter of Application Serial No. 88/271,834: ARCHforensic
Application Filing Date: January 22, 2019
Published for Opposition on: October 22, 2019

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| Arch Engineering, LLC, | : | |
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| Opposer, | : | Opposition No. 91253060 |
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| v. | : | |
| | : | |
| ARCHforensic, LLC, | : | |
| | : | |
| Applicant. | : | |
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MOTION TO DISMISS OPPOSITION PURSUANT TO FED. R. CIV. P. 12(b)(6)

Applicant, ARCHforensic, LLC (“Applicant”) moves to dismiss with prejudice the above-captioned Opposition (the “Opposition”) for failure to state a claim, pursuant to Fed. R. Civ. P. 12(b)(6) (“Rule 12(b)(6)”) and Trademark Trial and Appeal Board (“TTAB” or the “Board”) Rules 316, 503 and 503.02.

I. INTRODUCTION

Applicant respectfully submits that Opposer Arch Engineering, LLC’s (“Opposer” or “Plaintiff”) Notice of Opposition does not comply with this Board’s rules of procedure, the Federal Rules of Civil Procedure, and fails to state a claim for relief. Opposer has simply filled out an ESTTA form, selected conclusory “grounds” on the form, and has failed to submit the required accompanying pleading supporting and explaining the factual grounds for opposition. *See* TBMP § 309.03(c)(1). Opposer cites no facts in support of any of its conclusory “grounds” for Opposition selected in the ESTTA form notice of opposition. Thus, Opposer has wholly

failed to concisely and directly state the elements of each claim for relief, as required by Fed. R. Civ. P. 8(a) and (d), the TBMP and decisional authority, thereby failing to provide Applicant with fair notice of the actual basis for Opposer's conclusory "grounds." Thus, Opposer's filing fails to state a claim for relief and must be dismissed. For all and any of the foregoing reasons, and as set forth further herein, Applicant respectfully requests that the Opposition be dismissed in its entirety with prejudice.

II. ARGUMENT

A. **The Notice of Opposition Does Not Contain the Required Accompanying Factual Pleading**

The Notice of Opposition does not contain the required accompanying factual pleading supporting and explaining the grounds for opposition selected on the ESTTA form and should be dismissed for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). For its "opposition filing" Opposer has done nothing more than fill out an ESTTA form and attach to the ESTTA form her response to an Office Action directed to her own trademark application. There is no complaint, no well-pleaded factual matter, no short and plain statement of the claims, no accompanying factual statement supporting and explaining the grounds for opposition and pleading the elements of the claims, and no averments of fact made in numbered paragraphs, each limited to a statement of a single set of circumstances.

This Board's Manual of Procedure calls for the commencement of an opposition by the filing of a complaint. *See* TBMP § 302. "The notice of opposition . . . and the answer correspond to the to the complaint and answer in a court proceeding." TBMP § 302; 37 C.F.R. § 2.116(c). The complaint must ". . . allege such facts as would, if proved, establish that the plaintiff is entitle to the relief sought . . ." TBMP § 503.02. "To survive a motion to dismiss, a complaint must 'state a claim to relief that is plausible on its face.'" *Id. citing Bell Atlantic*

Corp. v. Twombly, 550 U.S. 544, 570 (2007). See also *Ashcroft v. Iqbal*, 556 U.S. 662 *678, 129 S. Ct. 1937, 1949-50, 173 L.Ed. 2d 868, 883-884 (2009) “In particular, the claimant must allege well-pleaded factual matter and more than ‘threadbare recitals of the elements of a cause of action, supported by mere conclusory statements.’” TBMP § 503.02 citing *Ashcroft v. Iqbal*, 556 U.S. at 678; *Dragon Bleu v. Venm, LLC*, 112 U.S.P.Q.2d 1925, 1926 (T.T.A.B. 2014); *Covidien LP v. Masimo Corp.*, 109 USPQ2d 1696, 1697 (T.T.A.B. 2014).

The complaint which must be attached to the ESTTA filing form must include a pleading of the substance, (*i.e.*, standing and grounds) of the complaint. See TBMP § 309.02(a); 309.03 (emphasis added); “Electronic filing through ESTTA requires an opposer to select relevant grounds for opposition or cancellation, with the required accompanying statement supporting and explaining the grounds.” See TBMP § 309.03(c)(1); 37 C.F.R. § 2.104 (“ESTTA required the opposer to select relevant grounds for opposition;” “The required accompanying statement supports and explains the grounds.”) (emphasis added). As set forth by the TBMP and the corresponding regulations:

A notice of opposition must include (1) a short and plain statement of the reasons why opposer believes it would be damaged by the registration sought to be cancelled . . . and (2) a short and plain statement of the grounds for cancellation.

TBMP § 309.03(a)(2) (emphasis added); 37 C.F.R. § 2.104; TBMP § 309.03; Fed. R. Civ. P. 8(a); *Accord, Young v. AGB Corp.*, 152 F.3d 1377, 1380 47 U.S.P.Q.2d 1752, 1755 (Fed. Cir. 1998); *Interstat Corp. v. International Telecommunications Satellite Organization*, 226 U.S.P.Q. 154, 156 (T.T.A.B. 1985).

A pleading should include enough detail to give defendant fair notice of the basis of each claim. The elements of each claim should be stated simply, concisely and directly, and taken together “state a claim to relief that is plausible on its face.”

TBMP § 309.03(a)(2); citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). See also *Bell’s Brewery, Inc. v. Innovation Brewing*, 125 U.S.P.Q.2d 1340, 1349 (T.T.A.B. 2017); *Fair Indigo LLC v. Style Conscience*, 85 U.S.P.Q.2d 1536, 1538 (T.T.A.B. 2007) (elements of each

claim should be stated concisely and directly, and include enough detail to give the defendant fair notice); *McDonnell Douglas Corp. v. National Data Corp.*, 228 U.S.P.Q. 45, 48 (T.T.A.B. 1985) (petitioner's Trademark Act § 2(a), 15 U.S.C. § 1052(a) allegations were merely conclusory and unsupported by factual averments).

Continuing, the TBMP and corresponding regulations instruct that:

All averments should be made in numbered paragraphs, the contents of each of which should be limited to a statement of a single set of circumstances. Each claim founded upon a separate transaction or occurrence should be stated in a separate count whenever a separation would facilitate the clear presentation of the matters presented.

TBMP § 309.03(a)(2) and notes 1-7, *citing* Fed. R. Civ. P. 10(b) and (c); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), *quoting* *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); Fed. R. Civ. P. 8(a). *See also* *Lewis Silkin LLP v. Firebrand LLC*, 129 U.S.P.Q.2d 1015, 1016 (T.T.A.B. 2018) (Board follows federal notice pleading standard which includes the requirement that the complaint "state a claim to relief that is plausible on its face"); *Isle of Aloe, Inc. v. Aloe Creme Laboratories, Inc.*, 180 U.S.P.Q. 794 (T.T.A.B. 1974) (while paragraphs were numbered, none of the paragraphs were limited to a statement of a single set of circumstances); *Wise F&I, LLC v. Allstate Ins. Co.*, 120 U.S.P.Q.2d 1103, 1107 n.9 (2016); *O.C. Seacrets Inc. v. Hotelplan Italia S.p.A.*, 95 U.S.P.Q.2d 1327, 1329 (T.T.A.B. 2010) ("claims must be separately stated We will not parse an asserted ground to see if any of the elements that go to pleading that ground would independently state a separate ground.")

The Supreme Court, Federal Circuit and this Board are in unison regarding the above required factual support and pleading requirements for an opposition.

1. No facts are alleged to support the likelihood of confusion ground selected in the ESTTA form

As set forth above by the Supreme Court, Federal Circuit and this Board's decisions:

To survive a motion to dismiss, a complaint must contain sufficient factual matter . . . to state a claim to relief that is plausible on its face Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.

Ashcroft, 556 U.S. at 678 (citation omitted).

Moreover, legal conclusions are not entitled to the assumption of truth in evaluating whether a claim is sufficiently pled. As explained by the Supreme Court:

The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions

While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.

Id. 556 U.S. at 678, 679 (emphasis added). *See also Young v. AGB Corp.*, 152 F.3d 1377 (Fed. Cir. 1998).

The two main elements of an opposition claim based on likelihood of confusion are priority and likelihood of confusion. TBMP § 309.03(c)(2). As demonstrated above, factual allegations, not conclusions, must be asserted to survive a motion to dismiss. “A plaintiff must allege facts showing proprietary rights in its pleaded mark that are prior to the defendant’s rights in the challenged marks.” *See* TBMP § 309.03(c)(2). Further, facts must also be alleged regarding the evidentiary factors and elements used by the Board to determine likelihood of confusion set out in *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 U.S.P.Q. 563 (CCPA 1973). *See* TBMP § 309.03(c)(2); *Encore Seating Inc. v. Buzz Seating Inc.*, 2017 TTAB LEXIS 491 *6-11 (T.T.A.B. 2017); *Fair Indigo LLC v. Style Conscience*, 85 U.S.P.Q.2d 1536, 1538, 2007 TTAB LEXIS 89 *5-6 (T.T.A.B. 2007) (facts supporting elements of each ground must be concisely and directly alleged.)

Here, there are simply no facts alleged at all regarding priority or any of the factors that relate to likelihood of confusion. There are no facts which support the elements of a likelihood of confusion claim. All that is contained on the ESTTA Notice of Opposition form is the selection of conclusory “grounds” with absolutely no supporting facts, background, or allegations. Plaintiff’s rambling response to an Office Action and hearsay alleged “screenshots” attached to the Office Action do not constitute a complaint and are not properly pled factual allegations giving defendant notice of plaintiff’s claims and setting forth factual matter that

supports the elements of the purported conclusory “grounds” for an opposition. There is no factual pleading and no factual averments that constitute a proper pleading or sufficient factual support for the “grounds” selected in the conclusory ESTTA form. In short, the opposition does not set forth any facts that state a claim for relief that is plausible on its face as is required to withstand a motion to dismiss.

2. No facts are alleged to support the dilution ground selected in the ESTTA form

In order for a claim for dilution to withstand a Rule 12(b)(6) motion to dismiss, facts must be alleged that aver the plaintiff’s mark was famous prior to the earliest date on which defendant can rely for purposes of priority. *See* TBMP § 309.03(c)(1); *see also* Trademark Act § 43(c), 15 U.S.C. § 1125(c); *Omega SA (Omega AG) (Omega Ltd.) v. Alpha Phi Omega*, 118 U.S.P.Q.2d 1289, 1292 (T.T.A.B. 2016) (party alleging fame must show that mark became famous prior to any established, continuous use of defendant’s involved mark as a trademark or tradename, and not merely prior to use in association with the specific goods or services set forth in a defendant’s subject application or registration); *Citigroup Inc. v. Capital City Bank Group Inc.*, 94 U.S.P.Q.2d 1645, 1649 (T.T.A.B. 2010) (party alleging fame must show that mark became famous before applicant’s use of challenged mark), *aff’d*, 637 F.3d 1344, 98 U.S.P.Q.2d 1253 (Fed. Cir. 2011); *Demon International LC v. Lynch*, 86 USPQ2d 1058, 1059-1060 (T.T.A.B. 2008) (dilution claim in pleading must include an allegation that opposer’s mark at issue is famous); *Trek Bicycle Corp. v. StyleTrek Ltd.*, 64 USPQ2d 1540, 1542 (T.T.A.B. 2001) (dilution pleading legally insufficient where opposer failed to allege that its mark became famous before constructive use date of involved intent-to-use application); *The Toro Co. v. ToroHead, Inc.*, 61 U.S.P.Q.2d 1164, 1174 n.9 (T.T.A.B. 2001); *Polaris Industries Inc. v. DC Comics*, 59 U.S.P.Q.2d 1798, 1800 (T.T.A.B. 2000) (must allege when mark became famous).

Here there are no facts whatsoever alleged regarding the fame of plaintiff's purported mark and likewise no facts are alleged that support a claim for dilution on blurring or tarnishment as selected in the ESTTA form.

3. No facts are alleged to support the conclusory ground of "not rightful owner" ground selected in the ESTTA form

As with the other conclusory grounds selected by the plaintiff in the ESTTA form, there is no accompanying complaint of factual allegations supporting this conclusory ground. As aptly demonstrated above, this purported ground has no factual basis or allegations and therefore does not give defendant fair notice of the claim and does not plead any claim that is plausible on its face based on actual averments. This ground, likewise, cannot withstand a motion to dismiss.

III. CONCLUSION

Plaintiff has not submitted the required pleading asserting facts in support of the conclusory grounds selected in the ESTTA form. Such a pleading and averment of factual support is required by this Board's rules and decisions, the Federal Rules of Civil Procedure and the decisions rendered by the Supreme Court, the Federal Circuit, and this Board. All Plaintiff has submitted is the ESTTA form with selected conclusory "grounds" and attached her own Office Action response and piecemeal hearsay screenshots with no factual assertions or allegations supporting any of the conclusory "grounds" selected. As fully demonstrated, the selected conclusory grounds in the ESTTA form do not properly state a claim for relief.

Therefore, for all the reasons herein, Applicant respectfully requests that the opposition be dismissed in its entirety with prejudice for failure to state a claim pursuant to Fed. R. Civ. P.

12(b)(6)

The following e-mail addresses below are provided so that any order on this motion may be issued electronically by the Board.

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Dated: January 29, 2020

Respectfully submitted,

/s/ Celeste M. Butera

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing MOTION TO DISMISS NOTICE OF OPPOSITION PURSUANT TO FED. R. CIV. P. 12(b)(6) was electronically filed with the TTAB using the ESTTA system, and was served by forwarding a copy via e-mail on January 29, 2020 to:

Opposer and *pro se* Plaintiff:

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