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

Proceeding	91263649
Party	Defendant Maxxus Group GmbH & Co. KG
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Trademark Application Serial No. 79/282,117  
For the mark: MAXXUS  
Published in the Official Gazette on June 16, 2020

TRAXXAS, L.P.,

Opponent,

v.

MAXXUS GROUP GMBH & CO. KG,

Applicant.

Opposition No. 91263649

Mark: MAXXUS

Application No.: 79282117

**APPLICANT'S REPLY IN FURTHER SUPPORT OF  
MOTION TO AMEND APPLICATION**

Applicant, Maxxus Group GmbH & Co. KG ("Applicant"), by its attorneys, Moses & Singer LLP, respectfully submits this reply to Opponent Traxxas, L.P.'s ("Opposer" or "Opponent") response to Applicant's Motion to Amend, filed on February 11, 2021 [Dkt. No. 14] ("Opposer's Response"):

1. Applicant's Motion to Amend [Dkt. No. 12] (the "Motion") should be granted as Applicant's proposed amendments to the identification of goods in International Class 28 of its Application Serial No. 79/282,117 ("the Application"), fully addresses Opposer's interest in the Application and wholly resolves the issues identified by Opposer with the Application as set forth in Opposer's Notice of Opposition (the "Notice") [Dkt. No. 1]. Opposer's attempt to state otherwise in its Response is disingenuous and unsupported by the Notice.

By way of background, the Motion proposes deleting the following goods from the Application: "Games equipment, namely playing cards, chips, gaming tables and gaming cloths; toys and playthings, namely scooters, robots, toy gliders." Opposer's registrations in International Class 28 are for: "Radio-controlled model vehicles and parts therefor." Applicant's proposed deletion removes not only all toy products in the Application but the entire group of games equipment, thereby generously accounting for any potential interest Opposer has in the Application. The only kinds of goods left in the Application after the proposed Amendment are "Gymnastics and sporting articles and equipment," with specified goods unrelated to toys or electric vehicles. Applicant's Motion therefore sufficiently resolves any conflict between the parties, their goods or their trademark rights.

2. First and foremost, the proposed amendment deletes all of the goods specifically objected to in the Notice. Opposer's claim that its Notice has sufficiently alleged claims against **all** goods specified in the Application, not just the "Games equipment" specifically complained of in Paragraphs 17 and 18, fails under the law concerning pleading requirements. Under the pleading requirements stated in Federal Rule of Civil Procedure 8 as construed by the Supreme Court, vague and conclusory allegations are insufficient to state or maintain a cause of action. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-563 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 677-683 (2009). The Notice makes specific allegations concerning only the goods Applicant seeks to delete, and fails to state **any** specific allegations concerning Applicant's remaining goods. [Dkt. 1, at ¶¶9, 15-18]. Indeed, insofar as Applicant's remaining goods are concerned, there is not a single allegation in the Notice of Opposition that directly addresses those goods.

In paragraph 9 of the Notice of Opposition, Opposer recites the entire identification of goods in the Application; however, paragraph 9 does not contain any substantive allegation concerning the recited goods showing any likelihood of confusion between Opposer's "Radio-controlled model vehicles and parts" and Applicant's remaining "Gymnastics and sporting equipment and articles."

Paragraph 16 consists of vague and conclusory allegations concerning a likelihood of confusion between Applicant's goods generally and Opposer's goods. This Paragraph does not state a plausible claim of likely confusion as required by *Twombly, supra*. Applicant's remaining goods consist entirely of "Gymnastics and sporting equipment and articles" with specified items in that category. Opposer fails to allege any facts supporting any potential for confusion among consumers between Opposer's radio-controlled toys, which are limited specifically to radio-controlled vehicles and parts, and the gymnastics and sporting equipment and articles, such as weights, basketballs, and treadmills, sought to be offered by Applicant. Opposer further fails to plead any situation where a consumer would encounter Opposer's niche products together with Applicant's remaining goods in such a manner that a consumer would be confused that the source of Applicant's goods was actually Opposer. Opposer does not suggest how a consumer would encounter Opposer's radio-controlled vehicles and Applicant's sporting and athletic equipment in the same trade channels, as indeed there is no such plausible explanation.

The only specific allegations concerning Applicant's goods are contained in paragraphs 17 and 18, where Opposer questions Applicant's *bona fide* intent to use the proposed marks on the following goods: "toys and playthings, namely scooters, robots, and toy gliders" and "Games, toys and playthings." As set forth in the Motion, Applicant addresses Opposer's concerns regarding these goods by seeking to amend the Application to remove them all. Opposer does not deny that the Motion adequately addresses the issues presented by the goods identified in paragraphs 17 and 18 of the Notice.

At Paragraph 15 the Notice states that it is to be "presumed" that Applicant's goods "encompass and travel in the same channels of trade to the same class of purchasers as those of Opposer's Goods." However Opposer provides no legal grounds for such a presumption nor does Opposer provide any factual explanation or analysis leading to such a presumption. For such a presumption to exist, the goods in the Application and Opposer's registrations must be identical

or legally identical. See *Sand CPHA/S v. Xiuling Guo*, Opposition No. 91237844 at pp. 7-8 (citing *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (TTAB 2012); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987)). As Applicant seeks to delete any potential identical or legally identical goods between Applicant and Opposer, there are no grounds for any presumption as to like consumers and channels of trade.

3. The Motion requests removal of all goods genuinely put at issue in the Notice of Opposition, and all goods that Opposer has standing to contest. Additionally, the proposed amendment deletes goods that go beyond the few specific products that Opposer claims to be selling, which are confined to “radio-controlled model vehicles and parts therefore [sic]” by removing all goods in the “Games equipment” group. Notice of Opposition, ¶1. There is no merit to Opposer’s overreaching argument that it has any interest in or standing to interfere with Applicant’s remaining gymnastics and sporting goods, or that its vague allegations as to “Applicant’s goods” generally, in the Notice of Opposition sufficiently asserts a claim against Applicant’s entire Class 28 identification. Therefore, Applicant’s Motion sufficiently addresses and rectifies the issue with respect to the goods at issue in this proceeding.

4. Further, there is no genuine issue concerning the *res judicata* effect of this proceeding. Applicant clearly states in its Motion that it is “consenting to the entry of judgment on the grounds for opposition with respect to the broader identification of goods or services present at publication.” [Dkt.12] This represents a specific and express consent to *res judicata* effect as required by *Johnson & Johnson v. Stryker Corp.*, 109 USPQ2d 1077 (TTAB 2013). Opposer’s reliance on *Drive Trademark Holdings, L.P. v. Inofin* is misplaced because there, the applicant did not consent “to entry of judgment with respect to opposer’s claim of likelihood of confusion between opposer’s marks and applicant’s mark as to the broader recitation of services.” 83 USPQ2d 1433, 1435-36. Here, as noted above, Applicant is specifically so consenting.

5. The proposed amendment here wholly removes the goods put at issue by Opposer and, in fact, the entire group of “Games equipment” that includes those goods. It thereby sufficiently narrows the identification of goods so as to differentiate Applicant’s remaining “Gymnastics and sporting” goods and articles and the intended consumers and trade channels from that intended and encompassed by the limited, niche radio-controlled vehicle toys and parts sold by Opposer – and Opposer does not offer any argument otherwise. As described above, the deletion dispels any potential confusion among consumers between Opposer and Applicant’s marks. In an effort to save its opposition proceeding, Opposer conclusorily states that **some** of Applicant’s remaining goods can be “played with” and therefore the proposed amendment cannot properly be considered. Not only is this classification of Applicant’s equipment in the form of sporting balls a gross mischaracterization of the true nature of the identified goods, it also fails to address Applicant’s remaining goods at large. Opposer fails to offer any insight as to the commonalities between how sporting equipment is “played with” and encountered in the same manner that radio-controlled vehicles are “played with” or encountered so as to warrant Applicant’s amendment insufficient under the standard in *Johnson & Johnson v. Stryker*. There is no merit to Opposer’s overreaching argument that it has interest in or standing to interfere with Applicant’s remaining goods.

Accordingly, as the Motion meets all of the Board's requirements to accept a proposed amendment to an identification on an unconsented motion to amend to resolve an opposition proceeding, as detailed in *Johnson & Johnson v. Stryker Corp.*, 109 USPQ2d 1077 (TTAB 2013), the Motion should be granted. Applicant respectfully submits that the deletion of "Games equipment, namely playing cards, chips, gaming tables and gaming cloths; toys and playthings, namely scooters, robots, toy gliders;" narrows the Application and will avoid a likelihood of confusion as alleged in the Notice of Opposition. Applicant respectfully requests that the Board grant the motion and immediately amend the Application.

Dated: March 2, 2021

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2021, I caused a true and correct copy of the foregoing Applicant's Reply in Further Support of Motion to Amend Application to be served upon Opponent Traxxas, L.P.'s counsel of record at CARR LAW FIRM PLLC, by sending same via electronic mail to:

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