

ESTTA Tracking number: **ESTTA1080437**

Filing date: **09/08/2020**

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

Proceeding	91263877
Party	Defendant Hsu, Fu-Chang
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Submission	Motion to Dismiss - Rule 12(b)
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Attachments	2020.09.08_Applicant's Motion to Dismiss_91263877.pdf(154845 bytes)

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

MICRON TECHNOLOGY, INC.,

Opposer,

v.

FU-CHANG HSU,

Applicant.

Mark: X-NAND

Opposition No.: 91263877

Serial No.: 88540624

**APPLICANT’S MOTION TO DISMISS
NOTICE OF OPPOSITION**

Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

MOTION TO DISMISS

Pursuant to T.B.M.P. § 503 and Fed. R. Civ. P. 12(b)(6), Applicant Fu-Chang Hsu (“Hsu”) hereby moves to dismiss the Notice of Opposition filed by Opposer Micron Technology, Inc. (“Micron”) for failure to state a claim upon which relief may be granted. Opposer’s threadbare and conclusory complaint is deficient as a matter of law and should be dismissed.

A. Legal Standard

“In order to withstand [a motion to dismiss], 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).” T.B.M.P. § 503.02.

The Board applies the same standard as that followed by the federal courts in considering the sufficiency of a pleading. That is, under Fed. R. Civ. P. 8, a complaint must include “enough

facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In determining the plausibility of the claims alleged, the court should not consider allegations that are merely legal conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). 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.” T.B.M.P. § 503.02 (citing *Iqbal*, 556 U.S. at 678)).

The factual allegations in the pleadings in the present case do not establish any plausible claim for opposition of Applicant’s mark, do not raise any genuine issue of material fact, do not raise any good grounds for opposition as a matter of law. Therefore, this Motion should be granted in all regards.

B. Opposer Fails to State a Plausible Claim of Descriptiveness

A mark is considered merely descriptive only if it describes an ingredient, quality, characteristic, function, feature, purpose, or use of the specified goods or services. *See, e.g., In re Gyulay*, 820 F.2d 1216, 3 U.S.P.Q.2d 1009 (Fed. Cir. 1987) (APPLE PIE held merely descriptive of potpourri); *In re Bed & Breakfast Registry*, 791 F.2d 157, 229 U.S.P.Q. 818 (Fed. Cir. 1986) (BED & BREAKFAST REGISTRY held merely descriptive of lodging reservations services); *In re MetPath Inc.*, 223 U.S.P.Q. 88 (T.T.A.B. 1984) (MALE-PA P. TEST held merely descriptive of clinical pathological immunoassay testing services for detecting and monitoring prostatic cancer); *In re Bright-Crest, Ltd.*, 204 USPQ 591 (T.T.A.B. 1979) (COASTER-CARDS held merely descriptive of a coaster suitable for direct mailing).

The determination of whether a mark is merely descriptive must be made in relation to the goods or services for which registration is sought, not in the abstract. T.M.E.P. § 1209.01(b); *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 1300, 102 U.S.P.Q.2d 1217, 1219 (Fed.

Cir. 2012); *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 963-64, 82 U.S.P.Q.2d 1828, 1831 (Fed. Cir. 2007). This rule requires consideration of the context in which the mark is used or intended to be used in connection with those goods or services, and the significance that the mark would have to the average purchaser of the goods or services in the marketplace. *See In re Omaha Nat'l/Corp.*, 819 F.2d 1117, 2 U.S.P.Q.2d 1859 (Fed. Cir. 1987); *In re AbcorDev. Corp.*, 588 F.2d 811, 200 U.S.P.Q. 215 (C.C.P.A. 1978); *In re Venture Lending Assocs.*, 226 USPQ 285 (T.T.A.B. 1985).

Opposer's Notice of Opposition contains virtually no factual matter assessing how Applicant's mark in its entirety, X-NAND, describes an ingredient, quality, characteristic, function, feature, purpose, or use of the specified goods, and nothing in the way of the context in which the mark is intended to be used. Instead, Opposer relies on purely conclusory allegations in attempt to establish the cause of action. For instance, Micron alleges in conclusory fashion that "Manufacturers of NAND flash memory, including Opposer, often use the term "xNAND" in reference to NAND flash memory products where 'x' is a place holder for a specific model number or type of NAND." (Not. of Opp. ¶ 6). This conclusion is not supported by any factual basis whatsoever, not even an example of Opposer's own usage of such term in consumer-facing materials, nor any allegation that the *average consumer* would perceive X-NAND in a descriptive sense.

Opposer goes on to cite Applicant's responses to the Examining Attorney's questions regarding the significance of the mark, as though Applicant somehow admitted the descriptiveness of the X-NAND mark. Nothing could be further from the truth. Opposer alleges "Applicant explicitly admitted that 'NAND is an industry term used for a type of flash memory storage.' Applicant also indicated that 'X' can be merely shorthand for 'express.' Thus, X-

NAND merely describes the products offered under the mark—namely, increased speed NAND flash memory. Despite these admissions, the Examining Attorney allowed the Application to proceed to publication without any disclaimer.” (Not. of Opp. ¶ 10). Again, Opposer’s complaint is completely devoid of factual allegations as to how Applicant’s mark in its entirety, X-NAND, is to be perceived by the average consumer as descriptive, and contains no factual or legal basis to conclude that “express-NAND” is descriptive of the applied-for goods.

Opposer merely presumes and concludes throughout the complaint, without factual basis, that the X-NAND mark is descriptive, alleging “Given the descriptive, general and common usage of the terms NAND and xNAND (where “x” is used as a place holder for a specific model of NAND memory or as shorthand for express), that exists throughout the semiconductor memory industry...” (Not. of Opp. ¶ 12). These conclusory and threadbare allegations though are insufficient as a matter of law and do not raise a plausible claim of descriptiveness.

C. Opposer Fails to State a Plausible Claim of Genericness

A mark is generic if its primary significance to the relevant public is the class or category of goods or services on or in connection with which it is used. *See H. Marvin Ginn Corp. v. Int’l Ass’n of Fire Chiefs, Inc.*, 782 F.2d 987, 989-90, 228 U.S.P.Q. 528, 530 (Fed. Cir. 1986) (citing *Dep’t of Justice, FBI v. Calspan Corp.*, 578 F.2d 295, 299, 198 U.S.P.Q. 147, 149 (C.C.P.A. 1978); *Bellsouth Corp. v. DataNational Corp.*, 60 F.3d 1565, 1570, 35 U.S.P.Q.2d 1554, 1557-58 (Fed. Cir. 1995)) (construing the language in 15 U.S.C §1064(3) regarding when a term is generic in cancellation proceedings to apply prior to registration). The Board applies a two-part test to determine whether a designation is generic: “(1) What is the genus of goods or services at issue? (2) Does the relevant public understand the designation primarily to refer to that genus of goods or services?” T.M.E.P. § 1209.01(c)(i) (citing *H. Marvin Ginn Corp.*, 782 F.2d at 990, 228

U.S.P.Q. at 530)). It is not necessary to show that the relevant public uses the term to refer to the genus. The correct inquiry is whether the relevant public would understand the term to be generic. *In re 1800Mattress.com IP LLC*, 586 F.3d 1359, 92 U.S.P.Q.2d 1682, 1685 (Fed. Cir. 2009).

The Notice of Opposition contains no factual allegations to support the conclusion that the X-NAND mark is generic with respect to the goods stated in the application. Opposer asserts no factual matter as to what the relevant public is or how it would understand the applied-for mark. Again, the complaint states only unsubstantiated conclusions and suppositions. Opposer states nothing more than the unsupported and conclusory claim that Opposer and some others may use “xNand,” but does not allege how Applicant’s mark X-NAND constitutes the class or category of the goods at issue to the relevant public. Opposer’s threadbare allegations cannot stand and should be dismissed.

D. Opposer Fails to State Plausible Allegations of Standing

“A party may establish its standing to oppose or to petition to cancel by showing that it has a ‘real interest’ in the case, that is, a legitimate personal interest in the outcome of the proceeding and a reasonable basis for its belief in damage. To plead a ‘real interest,’ plaintiff must allege a ‘direct and personal stake’ in the outcome of the proceeding.” T.B.M.P. § 303.03. [T]he allegations in support of plaintiff’s belief of damage must have a ‘reasonable basis in fact.’” *Id.*

Opposer’s allegations of standing have no reasonable basis in fact. The mere assertions without factual basis of Opposer’s and other manufacturers’ use of “xNAND” do not establish standing here to oppose. Aside from Opposer failing to support these conclusory allegations with facts, Opposer alleges no factual matter that it will be damaged by Applicant’s actual mark, X-

NAND. Opposer alleges in conclusory fashion that “in order to ensure that these recognized terms remain available for general use in the semiconductor industry and electronics industry in association with the relevant class of semiconductor products, it would be unfair and out of keeping with current usage realities to permit any party to obtain exclusive rights in such descriptors by allowing such party to register the term “X-NAND” as a trademark in association with semiconductor memory products.” (Not. of Opp. ¶ 12). However, the complaint contains no factual allegation that Opposer and Applicant are competitors, and no factual allegations that Opposer or the claimed other manufactures use or have a right to use X-NAND. Opposer’s allegations of standing accordingly fail as a matter of law.

The Notice of Opposition should be dismissed in its entirety as Opposer has failed to allege sufficient factual matter, taken as true, to state a to relief that is plausible on its face. The claims of descriptiveness and genericness are supported by nothing more than legal conclusions and threadbare recitals. Opposer’s claim of standing is similarly conclusory and deficient. Applicant respectfully requests that the Motion be granted and the complaint dismissed.

Dated: September 8, 2020

By: *Kevin Viau*

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CERTIFICATE OF SERVICE

I am over the age of 18 and am not a party to this action. I am employed in the County of Santa Clara, California, and my business address is 1871 The Alameda, Suite 250, San Jose, California 95126.

I hereby certify that on September 8, 2020, I served the foregoing **APPLICANT’S MOTION TO DISMISS NOTICE OF OPPOSITION** on Opposer via email by sending the document to the person(s) at the email addresses listed below.

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Dated: September 8, 2020

By: /Kevin Viau/
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