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

Proceeding	91267155
Party	Plaintiff Commvault Systems, Inc.
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Attachments	Commvault Reply ISO Motion to Dismiss Entrust Counterclaims.pdf(311556 bytes)

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Commvault Systems, Inc.,

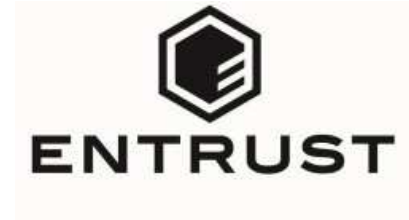
Opposer/Counterclaim
Respondent,

v.

Entrust Datacard Corporation,

Applicant/Counterclaimant.

Opposition No.: 91267155



Mark:

App. Ser. No.: 88/790,292

**OPPOSER’S REPLY IN SUPPORT OF
MOTION TO DISMISS APPLICANT’S COUNTERCLAIM**

Commvault Systems, Inc. (“Opposer”) respectfully submits this Reply in support of its Motion to Dismiss Applicant’s Counterclaim (6 TTABVUE) (“Motion”) in response to Applicant Entrust Datacard Corporation’s (“Applicant”) Opposition to Opposer’s Motion filed April 19, 2021 (8 TTABVUE) (“Response”).

Nothing in Applicant’s Response fixes the underlying defect in Applicant’s Counterclaim: the Counterclaim still contains no factual allegations. In its Response, Applicant did not even attempt to point to any specific facts in the Counterclaim that “raise a right to relief above the speculative level.” *Totes-Isotoner Corp. v. United States*, 594 F.3d 1346, 1354 (Fed. Cir. 2010) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). The reason for this is clear -- there are none.

Instead, Applicant attempts to rescue its flawed Counterclaim by presenting the newly-generated declaration of Applicant’s counsel. (8 TTABVUE 11.) This effort fails. “[A] court may not consider extrinsic evidence outside the pleadings for the purposes of a motion to dismiss,” unless specific limited exceptions apply. *Hotel Emps. & Rest. Emps. Loc. 2 v. Vista Inn Mgmt. Co.*, 393 F. Supp. 2d 972, 979 (N.D. Cal. 2005); *see also Parker v. Am. Brokers Conduit*, 179 F. Supp. 3d 509, 515

(D. Md. 2016) (stating that, although there are exceptions to the rule, “[i]n general, the Court does not consider extrinsic evidence at the Rule 12(b)(6) stage”); *Hotel Emps. & Rest. Emps. Loc. 2*, 393 F. Supp. 2d at 979 (explaining that exceptions to the general prohibition against consideration of extrinsic evidence outside the pleadings include: (1) matters of public record that may be judicially noticed; and (2) documents whose authenticity cannot be questioned and on which plaintiff’s complaint “necessarily relies”). There is no recognized exception to the general prohibition against extrinsic evidence that would apply here. Applicant’s counsel’s declaration should be disregarded, and the Board should grant Opposer’s Motion based solely on the (lack of any factual) allegations in the Counterclaim and the applicable principles of law set forth by Opposer in its Motion.

Finally, even if the Board were to determine that an exception to the general prohibition against extrinsic evidence somehow applies here, and that Applicant’s counsel’s declaration or the statements therein should be taken into consideration, the Counterclaim still fails to state a claim upon which relief can be granted. Specifically, the declaration does not address why Applicant concluded that Opposer lacked a *bona fide* intent to use its mark in connection with the goods and services in its applications when they were filed in 2015, or why it thinks that Opposer’s Statements of Use (“SOU”) misstated the scope of Opposer’s use of its marks at the time the SOUs were filed in 2017. Nor does the declaration specify and put Opposer on notice as to which of Opposer’s goods and services Applicant’s allegations apply. Accordingly, because both the Counterclaim and Applicant’s counsel’s declaration fail to notify the Applicant of the general “circumstances, occurrences, and events” causing the alleged flaw in its applications, Applicant’s Counterclaim should be dismissed. *See Aktieselskabet AF 21. Nov. 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 21-22 (D.C. Cir. 2008).

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Given the foregoing, and for the reasons expressed in Opposer's Motion, Opposer requests that the Board grant the Motion and dismiss Applicant's Counterclaim with prejudice pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and Section 503.02 of the Trademark Trial and Appeal Board's Manual of Procedure.

DATED: May 7, 2021

Respectfully submitted,

PERKINS COIE LLP



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing OPPOSER'S REPLY IN SUPPORT OF MOTION TO DISMISS APPLICANT'S COUNTERCLAIM has been served on counsel for Applicant/Counter-claimant Entrust Datacard Corporation by forwarding said copy on May 7, 2021 via email to bgrahn@foxrothschild.com, ipdocket@foxrothschild.com, drodrigue@foxrothschild.com, and mleonard@foxrothschild.com.

Signature: 