UNITED STATES PATENT AND TRADEMARK OFFICE
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JLE

July 16, 2021

Opposition No. 91267937

Alpha Kappa Alpha Sorority

v.

Stroll to the Polls, Inc. (substituted for Ramona Prioleau)

By the Trademark Trial and Appeal Board:

On March 2, 2021, Opposer Alpha Kappa Alpha Sorority filed a notice of opposition against the registration on the Principal Register for the mark STROLL TO THE POLLS in standard characters for "Aprons; Bibs, not of paper; Bodysuits; Dresses; Footwear; Hats; Jackets and socks; Pants; Shirts; Skirts; Swimwear" in International Class 25.[1] The ESTTA cover sheet states four grounds for opposition: (1) priority and likelihood of confusion pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d); (2) failure to function as a mark; (3) the mark is merely

[1] 1 TTABVUE (opposing registration of Serial No. 90012428, filed June 20, 2020 based on an allegation of use as of 2018 and use in commerce as of 2018 pursuant to Trademark Act Section 1(a), 15 U.S.C. § 1051(a)). Record citations are to TTABVUE, the Board's publicly available docket history system. *See, e.g., New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d 10596, *2 n.1 (TTAB 2020).

ornamental; and (4) fraud on the USPTO in the prosecution of the subject application.[2]

This matter now comes before the Board for consideration of Applicant's fully-briefed motion, filed April 10, 2021, to dismiss the notice of opposition for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).[3] On the same date, Applicant also filed an unopposed motion to substitute Stroll to the Polls, Inc. as party-defendant in this proceeding in light of assignment of the mark.[4]

The Board has considered the parties' submissions and presumes the parties' familiarity with the arguments made therein. The parties' arguments are not summarized herein except as necessary to explain the Board's decision. *Guess? IP Holder LP v. Knowluxe LLC*, 116 USPQ2d 2018, 2019 (TTAB 2015).

I. Motion to Substitute

In support of its motion to substitute, Applicant shows an assignment of the mark from Ramona Prioleau to Stroll to the Polls, Inc. was executed on December 1, 2020 and recorded by the USPTO's Assignment Division on December 12, 2021 at Reel/Frame 7176/0268.[5]

Where there has been an assignment of a mark that is the subject of, or relied upon, in an inter partes proceeding before the Board, the assignee may be joined or substituted as appropriate. *See, e.g., NSM Res. Corp. v. Microsoft Corp.*, 113 USPQ2d

[2] *Id.* at 1-2.

[3] *See* 4 TTABVUE.

[4] 5 TTABVUE.

[5] *See* 9 TTABVUE 9-11 (recordation of assignment).

1029, 1031 (TTAB 2014) (finding joinder rather than substitution appropriate where assignment of pleaded mark was executed one year after proceeding commenced and nothing in the record indicated petitioner or business connected with mark no longer in existence). *See also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 512.01 (2021).

Because the assignment of the involved application was recorded by the Assignment Division and the assignment occurred prior to the commencement of this proceeding, and because Opposer does not oppose the motion, Applicant's motion to substitute is **granted** and Stroll to the Polls, Inc. is substituted as the party defendant herein. *See* Trademark Rule 3.73(b), 37 C.F.R. § 3.73(b). The Board's records and the caption of this proceeding have been updated accordingly.[6]

II. Motion to Dismiss

To withstand 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 is entitled to bring a statutory cause of action[7] and

[6] The Board notes that Stroll to the Polls, Inc. (which filed the motion to dismiss prior to being substituted as party-defendant herein) refers to itself throughout its filings as "the Charity". Because both parties appear to be non-profit corporations, this nomenclature is confusing. Henceforth, Applicant should refer to itself as "Applicant" or "Stroll to the Polls, Inc." Further, to the extent Applicant intends to proceed pro se, Applicant is warned that the first and last name, **and the title or position**, of the person who signs a document in connection with a trademark application, registration, or proceeding before the Board must be set forth immediately below or adjacent to the signature. Trademark Rule 2.193, 37 C.F.R. § 2.193. *See also* TBMP § 106.02. The Board has exercised its discretion to consider Applicant's non-conforming filings in this instance.

[7] Board decisions previously have analyzed the requirements of Sections 13 and 14 of the Trademark Act, 15 U.S.C. §§ 1063-64, under the rubric of "standing." Despite the change in nomenclature, our prior decisions and those of the Federal Circuit interpreting Sections 13

(2) a valid ground exists for opposing or cancelling the registration. *Doyle v. Al Johnson's Swedish Rest. & Butik Inc.*, 101 USPQ2d 1780, 1782 (TTAB 2012) (citing *Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998)); *Order of Sons of Italy in Am. v. Profumi Fratelli Nostra AG,* 36 USPQ2d 1221, 1222 (TTAB 1995). *See also* TBMP § 503.02.

Specifically, a complaint must allege sufficient facts, accepted as true, which "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). An opposer need only allege enough factual matter to "raise a right to relief above the speculative level." *Totes-Isotoner Corp. v. United States*, 594 F.3d 1346, 1354 (Fed. Cir. 2010) (quoting *Bell Atl. Corp.*, 550 U.S. at 555-56)). Whether an opposer will be able to prove its well-pleaded trademark claims is a matter for trial or summary judgment and is not relevant to the Board's assessment of the legal sufficiency of a notice of opposition. *Guess? IP Holder*, 116 USPQ2d at 2019.[8] The Board accepts as true all well-pled, material allegations of the complaint, and construes the complaint in favor of the complaining party. *See Jewelers Vigilance Corp. v. Ullenberg Corp.*, 823 F.2d 490, 2 USPQ2d 2021, 2023 (Fed. Cir 1987) (subsequent history omitted).

and 14 remain applicable. *See Spanishtown Enters., Inc. v. Transcend Resources, Inc.*, 2020 USPQ2d 11388, at *2 (TTAB 2020).

[8] For this reason, the Board disregards the parties' arguments regarding the merits of Opposer's claims.

The Board notes that Opposer submitted exhibits with its notice of opposition, and both parties submitted voluminous exhibits with their briefs. Exhibits submitted with the pleadings may be considered for the sole purpose of ascertaining the plausibility of the allegations. *See Caymus Vineyards v. Caymus Med., Inc*., 107 USPQ2d 1519, 1522 and n.3 (TTAB 2013) (considering the exhibits attached to applicant's first amended answer and counterclaim for the purpose of ascertaining the plausibility of applicant's allegations) (citing Fed. R. Civ. P. 10(c), Trademark Rule 2.116(a); and *cf. In re Bill of Lading Transmission & Processing Sys. Patent Lit.*, 681 F.3d 1323, 103 USPQ2d 1045, 1055 (Fed. Cir. 2012) ("Thus, the district court was required to analyze the facts plead in the amended complaints and all documents attached thereto . . . to determine whether [the claims] were in fact plausible.")). Evidence from outside the pleadings, however, is excluded from consideration in determining the sufficiency of the plaintiff's allegations. *Caymus Vineyards*, 107 USPQ2d at 1522. Therefore, in determining the motion to dismiss, the exhibits submitted with the parties' briefs have been excluded from consideration.[9]

[9] Under Fed. R. Civ. P. 12(d), if matters outside the pleading are presented with a motion under Rule 12(b)(6) and the matters are not excluded by the court or, in this case, the Board, "the motion must be treated as one for summary judgment." Because Applicant's motion to dismiss is not based on issue or claim preclusion or lack of Board jurisdiction, however, consideration of evidence outside the pleading would result in a premature motion for summary judgment. *See* Trademark Rule 2.127(e)(1), 37 C.F.R. § 2.127(e)(1) (party may not file a motion for summary judgment until the party has made its initial disclosures).

A. Entitlement to Bring a Statutory Cause of Action

To establish its entitlement to a statutory cause of action under Section 13 or 14 of the Trademark Act, a plaintiff must demonstrate a real interest in the proceeding and a reasonable belief of damage. *Australian Therapeutic Supplies PTY. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, at *3 (Fed. Cir. 2020); *see also Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058 (Fed. Cir. 2014); *Coach Servs. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1727 (Fed. Cir. 2012); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999). "Proof of [entitlement to a statutory cause of action] in a Board opposition is a low threshold, intended only to ensure that the plaintiff has a real interest in the matter, and is not a mere intermeddler." *Syngenta Crop Protection Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1118 n.8 (TTAB 2009) (citing *Ritchie*, 50 USPQ2d at 1025-26).

Applicant argues Opposer has no "real interest" in the outcome of the proceeding because it "not alleged that it has used or is using [Applicant's] Mark to identify goods in commerce in Class 25."[10] In response, Opposer argues it need not own the subject mark, or have filed an application for registration of the mark for goods in International Class 25, to show its interest in this proceeding – particularly where the mark is challenged on "failure-to-function grounds in violation of Sections 1, 2, 3

[10] 4 TTABVUE 7, ¶ 15; *see also* 7 TTABVUE 7.

and 45 of the Lanham Act . . . ."[11] Opposer also contends the parties are "competitors in the field of voter mobilization."[12]

Although the notice of opposition has been considered in its entirety, Opposer alleges the following relevant allegations in support of its entitlement to bring this proceeding:

> 3. For many years prior to Applicant's 2018 alleged dates of first use, [Opposer] has been using the phrase "STROLL TO THE POLLS" in an effort to get people to the polls to vote.
>
> 8. In addition to the subject application, [Applicant's predecessor] filed Application No. 90248099 for STROLL TO THE POLLS in Class 36 for fundraising services relating to voter registration and mobilization, Class 41 for organizing voter events and Class 42 for a web application for voter registration and participation (the "**Second Application**"). The Second Application directly relates to voter registration and engagement. . . .
>
> 9. As indicated on Applicant's website, the Class 25 apparel is sold in conjunction with Applicant's mission to educate the public about voter registration. **Exhibit F** contains a printout from Applicant's website offering the merchandise for sale.
>
> 11. Opposer has prior use of and rights in the phrase STROLL TO THE POLLS. Opposer has not abandoned and continues to use the phrase STROLL TO THE POLLS.
>
> 12. Because the apparel sold under Applicant's mark is sold in conjunction with Applicant's mission of voter engagement, it is related to Opposer's prior longstanding and continuous use of STROLL TO THE POLLS.
>
> 13. Because the marks are identical, and the goods and services are highly related, the registration of Applicant's Mark is likely to cause confusion, or to cause mistake, or to deceive with respect to Opposer AKA's prior use of and common law rights in STROLL TO THE POLLS, in violation of Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d).[13]

[11] 6 TTABVUE 8.

[12] *Id*.

[13] 1 TTABVUE 4-6, ¶¶ 3, 8, 9, 11-13 (emphasis in original).

Prior use in commerce for the goods recited in the subject application by the party bringing the action is not required for it to establish a real interest in the proceeding and a reasonable belief in damage. *See, e.g., Life Zone Inc. v. Middleman Grp., Inc.*, 87 USPQ2d 1953, 1959-60 (TTAB 2008) (standing established for Section 2(d) claim but opposer failed to prove priority).

Accepting all of Opposer's well-pleaded allegations as true and construing the complaint in the light most favorable to Opposer, Opposer's allegations of likelihood of confusion based on common law use of its mark, are sufficient, if proven, to establish its entitlement to bring a cause of action at the Board. *See First Niagara Ins. Brokers Inc. v. First Niagara Fin. Grp. Inc.*, 476 F.3d 867, 81 USPQ2d 1375, 1378 (Fed. Cir. 2007); *see also Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982) ("To establish a reasonable basis for a belief that one is damaged by the registration sought to be cancelled, a petition may assert a likelihood of confusion which is not wholly without merit ….").[14]

B. First Ground for Opposition: Priority and Likelihood of Confusion

To state a claim pursuant to Trademark Act Section 2(d), a plaintiff must sufficiently allege, in addition to standing, 1) that it has registered or previously used a mark (i.e. priority),[15] and 2) contemporaneous use of the parties' respective marks

[14] If Opposer can show entitlement to a statutory cause of action on one ground, it has the right to assert any other legally sufficient ground. *See Corporacion Habanos SA v. Rodriguez*, 99 USPQ2d 1873, 1877 (TTAB 2011).

[15] Proprietary rights may be based on a prior registration, prior trademark or service mark use, prior use as a trade name, prior use analogous to trademark or service mark use, or any other use sufficient to establish proprietary rights. *Herbko Int'l Inc. v. Kappa Books, Inc.*, 308

on or in connection with their respective goods or services would be likely to cause confusion, mistake or to deceive customers as to the source of the goods or services. *Hornblower & Weeks, Inc. v. Hornblower & Weeks, Inc.*, 60 USPQ2d 1733, 1735 (TTAB 2001). Likelihood of confusion may be pleaded generally. *Wet Seal, Inc. v. FD Mgmt., Inc.*, 82 USPQ2d 1629, 1639-40 n.21 (TTAB 2007).

As shown above, Opposer's allegations as to common law priority of use and likelihood of confusion are set forth in paragraphs 3, 8, 9, 11, 12, and 13 the notice of opposition.[16] Construing the complaint in the light most favorable to Opposer, these allegations state a legally sufficient claim pursuant to Section 2(d) of the Trademark Act.[17]

C. Second and Third Grounds for Opposition: Failure to Function as a Trademark

Opposer's second and third grounds for relief are grounded in Section 45 of the Trademark Act, which defines a "trademark" as "any word, name, symbol, or device, or any combination thereof – (1) used by a person . . . to identify and distinguish his or her goods . . . from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown." 15 U.S.C. § 1127. Claims of failure to function as a mark, whether based on informational matter or mere ornamentation, are based on an assertion that, due to the inherent nature or the manner of use of the matter sought to be registered, such matter does not function as a mark to identify

F.3d 1156, 64 USPQ2d 1375, 1378 (Fed. Cir. 2002) (citing *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40, 43 (CCPA 1981)).

[16] *See supra* note 13 and accompanying text.

[17] *Id.* at 6, ¶¶ 12, 13.

and distinguish a party's goods. *See* Trademark Act Sections 1, 2, and 45, 15 U.S.C. §§ 1051, 1052, and 1127; *see also* TRADEMARK MANUAL OF EXAMINING PROCEDURE § 1202 (Oct. 2018).

1. Informational Phrase

Applicant argues that Opposer's claim of "failure to function" should be dismissed because "there is no inherent connection between the goods, which are essentially clothing, and the mark STROLL TO THE POLLS."[18] Applicant further contends, "The display of the mark on the specimen of record is used in a manner to indicate source identification, insomuch as the mark appears on the inside collar of the article of clothing."[19] Opposer asserts it has properly pleaded that STROLL TO THE POLLS is "a phrase used by the public to mobilize voters."[20]

It is well-settled that not every designation that is placed or used on a product necessarily functions as a trademark and not every designation adopted with the intention that it perform a trademark function necessarily does so. *See In re Bose Corp.*, 546 F.2d 893, 192 USPQ 213, 215 (CCPA 1976) ("The Trademark Act is not an act to register mere words, but rather to register trademarks. Before there can be registration, there must be a trademark, and unless words have been so used they cannot qualify."). Slogans and composite word and design marks that convey information but which do not function as marks are not registrable. *See, e.g., D.C.*

[18] *Id.* at 19, ¶ 48.

[19] *Id.*

[20] 6 TTABVUE 12. The Board notes Opposer relies in part on an office action issued in Applicant's co-pending application Serial No. 90248099, *id.* at 16-17, which is not at issue in this proceeding and therefore cannot be considered in the context of this motion.

One Wholesaler, Inc. v. Chien, 120 USPQ2d 1710, 1716 (TTAB 2016) (finding that I ♥ DC does not create the commercial impression of a source indicator because it would be perceived as informational, where "the marketplace is awash in products that display the term"); *In re Volvo Cars of N. Am., Inc.*, 46 USPQ2d 1455, 1459-60 (TTAB 1998) (refusal to register DRIVE SAFELY affirmed because phrase would not be regarded as indicator of source but as a familiar safety admonition). "The more commonly a phrase is used, the less likely that the public will use it to identify only one source and the less likely that it will be recognized by purchasers as a trademark." *In re Eagle Crest, Inc.*, 96 USPQ2d 1227, 1229 (TTAB 2010) (citation omitted).

Here, Opposer pleads in relevant part that:

> 3. For many years prior to Applicant's 2018 alleged dates of first use, [Opposer] has been using the phrase "STROLL TO THE POLLS" in an effort to get people to the polls to vote. Other members of the Divine Nine also have used the tagline in connection with voter engagement and registration prior to 2018.
>
> 4. [Opposer] has a time-honored tradition of voter engagement and registration. In connection with Sorority member Vice-President Kamala Harris having been on the Presidential ballot, one of [Opposer's] members catapulted the concept of "STROLL TO THE POLLS" onto the national stage by recruiting other members of Divine Nine sororities to create a video that went viral. Exhibit A contains a news article explaining how members of the Divine Nine have mobilized voters to the polls for decades and provides more information about the creation of the "STROLL TO THE POLLS" video that went viral.
>
> 5. With the advent of [Opposer's] member Vice-President Harris having been on the Presidential ballot, there has been an explosion of STROLL TO THE POLLS merchandise for sale. Demonstrating this, Exhibit B contains a screenshot from the "Images" section of a Google search for "STROLL TO THE POLLS MERCHANDISE," showing a large number of T-shirts bearing the STROLL TO THE POLLS tagline.

> 14. . . . Applicant's mark fails to function as a trademark because it provides an informational political message that is not capable of indicating source.[21]

Accepting all of Opposer's well-pleaded allegations as true and construing the complaint in the light most favorable to Opposer, the allegations above are sufficient to plead Applicant's mark does not function as a trademark for "Aprons; Bibs, not of paper; Bodysuits; Dresses; Footwear; Hats; Jackets and socks; Pants; Shirts; Skirts; Swimwear" because it is a commonly used informational phrase.

2. Merely Ornamental

Opposer also pleads the subject mark fails to function as a mark because it is merely ornamental. Applicant argues that this claim is "frivolous, insufficiently pleaded, and is not a typical ground asserted in an opposition."[22] Applicant points to its hangtag specimen of use as proof that its mark is not merely ornamental.[23] Opposer contends in response that "even hangtags can demonstrate ornamental, as opposed to trademark, use of a phrase."[24]

A design is merely ornamental if it is not inherently distinctive and does not function as a source identifier. *See In re Soccer Sport Supply Co.*, 507 F.2d 1400, 184 USPQ 345, 347 (CCPA 1975); *In re Chippendales USA, Inc.,* 622 F.3d 1346, 96 USPQ2d 1681, 1687 (Fed. Cir. 2010).[25] Here, in addition to the above allegations,

[21] 1 TTABVUE 4, 6, ¶¶ 3-5, 14.

[22] 4 TTABVUE 19.

[23] *Id*. at 19-21; *see also* 7 TTABVUE 9.

[24] 6 TTABVUE 13.

[25] An ornamental design may nevertheless function as a trademark if it has acquired distinctiveness or if it serves as a secondary source for other goods or services. *See In re*

Opposer alleges that "Applicant's mark, as applied to the apparel products, also is merely ornamental. As such, the tagline fails to function as an indicator of source and therefore is not registrable."[26]

Construing the pleaded allegations in the light most favorable to Opposer, the Board finds the allegations above are sufficient to plead Applicant's mark does not function as a trademark for "Aprons; Bibs, not of paper; Bodysuits; Dresses; Footwear; Hats; Jackets and socks; Pants; Shirts; Skirts; Swimwear" because it is merely ornamental.

D. Fourth Ground for Opposition: Fraud

Opposer's final claim alleges fraud in the prosecution of the subject application. Applicant argues the fraud claim both is implausible and insufficiently pleaded. Specifically, Applicant contends Opposer, by basing its claim "on information and belief" has failed to allege its claim with particularity under Federal Rule of Civil Procedure 9(b).

In response, Opposer asserts it has "specifically alleged that Applicant's founder, as a member of [Opposer's organization], upon information and belief, knew of [Opposer's] prior rights in STROLL TO THE POLLS before she signed the trademark application's declaration."[27] Opposer argues that, because "Opposer has not yet had the opportunity to take discovery in this proceeding to prove Ms. Prioleau's state of

Lululemon Athletica Canada Inc., 105 USPQ2d 1684, 1686 (TTAB 2013); *In re Paramount Pictures Corp.*, 213 USPQ 1111, 1112 (TTAB 1982).

[26] 1 TTABVUE 6, ¶ 15.

[27] 6 TTABVUE 20.

mind when signing the Declaration, it is acceptable under Rules 8 and 9 to plead her state of mind upon information and belief."[28]

A sufficient pleading of fraud requires allegations that an applicant or registrant knowingly made specific, false representations of material fact in connection with its application with the intent of obtaining (or maintaining) a registration to which it is otherwise not entitled. *See In re Bose Corp.*, 580 F.3d 1240, 91 USPQ2d 1938, 1942 (Fed. Cir. 2009). Under Fed. R. Civ. P. 9(b), fraud must be pleaded with particularity. A pleading that simply alleges the substantive elements of fraud, without setting forth the particularized factual bases for the allegation, does not satisfy Rule 9(b). *See id.* (citing *King Auto., Inc. v. Speedy Muffler King, Inc.*, 667 F.2d 1008, 212 USPQ 801, 802-03 (CCPA 1981)). Knowledge and intent, as conditions of mind of a person, may be averred generally in support of an allegation of fraud. *See* Fed. R. Civ. P. 9(b); *DaimlerChrysler Corp. v. Am. Motors Corp.*, 94 USPQ2d 1086, 1088 (TTAB 2010). However, pleadings must allege sufficient underlying facts from which the Board may reasonably infer that a party acted with the requisite state of mind. *Asian & W. Classics B.V. v. Selkow*, 92 USPQ2d 1478, 1479 (TTAB 2009). Therefore, pleadings of fraud made "on information and belief" without allegation of "specific facts upon which the belief is reasonably based" are insufficient. *Id.*

Further, a legally sufficient claim of fraud based on the statements in an application declaration must include particular facts which, if proven, would establish that: (1) there was in fact another use of the same or a confusingly similar

[28] *Id.* at 21.

mark at the time the oath was signed; (2) the other user had legal rights superior to applicant's; (3) applicant knew that the other user had rights in the mark superior to applicant's, and either believed that a likelihood of confusion would result from applicant's use of its mark or had no reasonable basis for believing otherwise; and that (4) applicant, in failing to disclose these facts to the Patent and Trademark Office, intended to procure a registration to which it was not entitled. *Qualcomm Inc. v. FLO Corp.*, 93 USPQ2d 1768, 1770 (TTAB 2010); *Intellimedia Sports v. Intellimedia Corp.*, 43 USPQ2d 1203, 1205-06 (TTAB 1997).

Although the notice of opposition has been reviewed in its entirety, Opposer pleads the following relevant allegations in support of its claim of fraud based on Applicant's predecessor's declaration:

> 10. Upon information and belief, as a member of the AKA Sorority, Prioleau had prior knowledge of AKA's use of the phrase STROLL TO THE POLLS in connection with voter registration and engagement.
>
> 18. Upon information and belief, as a member of the AKA Sorority, Prioleau knew of Opposer's prior use of and common law rights in and to the mark STROLL TO THE POLLS.
>
> 19. In the alternative, upon information and belief, Prioleau knew of the use of the phrase STROLL TO THE POLLS as a rallying cry by other members of the Divine Nine for voter engagement.
>
> 20. In failing to disclose these facts, Applicant's predecessor-in-title, Prioleau, upon information and belief, knowingly made fraudulent statements to the USPTO in an effort to procure a trademark registration to which Applicant is not entitled. Accordingly, Applicant and/or its predecessor-in-title, committed fraud on the USPTO, and registration of the subject application should be denied.[29]

[29] 1 TTABVUE 5, 7, ¶¶ 10, 18-20.

Opposer's pleading "on information and belief" that Applicant's predecessor knew of Opposer's and third parties' use of the subject mark because she is a member of Opposer's organization does not state sufficient supporting facts from which the Board may reasonably infer that Applicant knew its representations were false and believed confusion would result from Applicant's use of the mark (or had not reasonable basis for believing otherwise). Opposer also does not plead, let alone with particularity, that Applicant intended to deceive the USPTO. *See, e.g., Dragon Bleu (SARL) v. VENM, LLC*, 112 USPQ2d 1925, 1928 (TTAB 2014) (citations omitted).

For the foregoing reasons, Applicant's motion to dismiss is **granted** with respect to Opposer's claim of fraud.

III. Summary; Leave to Replead

In sum, the motion to dismiss is **denied** as to Opposer's claims of (1) priority and likelihood of confusion, and failure to function based on (2) merely informational matter and (3) mere ornamentation. Applicant's motion to dismiss is **granted** as to Opposer's claim of fraud, and the claim (paragraphs 16-20 of the notice of opposition) is **dismissed**, without prejudice.

It is the Board's policy to allow amendment of defective pleadings, particularly where the offending pleading is the initial pleading. *See, e.g.*, *Intellimedia Sports*, 43 USPQ2d at 1208. Accordingly, the Board allows Opposer leave to file an amended notice of opposition which addresses the deficiencies noted herein, to the extent such

claims may be properly asserted based on the facts of the case.[30]

Opposer is allowed until **August 4, 2021** to file an amended notice of opposition pleading a legally sufficient claim of fraud, failing which the proceeding will go forward only as to the remaining claims. Applicant is allowed until **September 3, 2021** to file its answer to the operative notice of opposition.

IV. Proceeding Dates Reset

The proceeding is **resumed**. The remaining dates are **reset** as follows:

Time to Answer	9/3/2021
Deadline for Discovery Conference	10/3/2021
Discovery Opens	10/3/2021
Initial Disclosures Due	11/2/2021
Expert Disclosures Due	3/2/2022
Discovery Closes	4/1/2022
Plaintiff's Pretrial Disclosures Due	5/16/2022
Plaintiff's 30-day Trial Period Ends	6/30/2022
Defendant's Pretrial Disclosures Due	7/15/2022
Defendant's 30-day Trial Period Ends	8/29/2022
Plaintiff's Rebuttal Disclosures Due	9/13/2022
Plaintiff's 15-day Rebuttal Period Ends	10/13/2022
Plaintiff's Opening Brief Due	12/12/2022
Defendant's Brief Due	1/11/2023

[30] Opposer should note that a fraud claim is difficult to prove because the standard of knowledge is highly subjective. *See, e.g., Maids to Order of Ohio, Inc. v. Maid-to-Order, Inc.*, 78 USPQ2d 1899, 1907 (TTAB 2006) (no fraud where applicant had a good faith, reasonable basis for believing that it was using the mark in interstate commerce). Specifically, "the very nature of the charge of fraud requires that it be proven 'to the hilt' with clear and convincing evidence. There is no room for speculation, inference or surmise and, obviously, any doubt must be resolved against the charging party." *In re Bose*, 91 USPQ2d at 1939 (citing *Smith Int'l, Inc. v. Olin Corp.*, 209 USPQ 1033, 1044 (TTAB 1981)). Further, because a declarant in an application declaration, states that to the best of his or her "knowledge and belief" no other firm "has the right to use" the mark or a confusingly similar mark in U.S. commerce. Thus, the verification is phrased in terms of the declarant's subjective belief and is very difficult to prove. *See* 6 Thomas J. McCarthy, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 31:76 (5th ed., March 2021 update).

Plaintiff's Reply Brief Due	1/26/2023
Request for Oral Hearing (optional) Due	2/5/2023

Generally, the Federal Rules of Evidence apply to Board trials. Trial testimony is taken and introduced out of the presence of the Board during the assigned testimony periods. The parties may stipulate to a wide variety of matters, and many requirements relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125. These include pretrial disclosures, matters in evidence, the manner and timing of taking testimony, and the procedures for submitting and serving testimony and other evidence, including affidavits, declarations, deposition transcripts and stipulated evidence. Trial briefs shall be submitted in accordance with Trademark Rules 2.128(a) and (b). Oral argument at final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a).

* * *