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

Proceeding no.	91278032
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Application No. 90/480,463
For the Trademark: FUNDABILITY
Published: April 19, 2022

<p>CreditSense Business Advisors, LLC,</p> <p style="text-align:center">Opposer,</p> <p style="text-align:center">v.</p> <p>Credit Suite, Inc.,</p> <p style="text-align:center">Applicant.</p>

Proceeding No. 91278032

OPPOSER’S RESPONSE IN OPPOSITION TO APPLICANT’S MOTION TO DISMISS

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

CreditSense Business Advisors, LLC, (“Opposer” or “CreditSense”), hereby responds in opposition to the Motion to Dismiss (“Motion to Dismiss”) filed by Applicant Credit Suite, Inc., (“Applicant” or “Credit Suite”). Applicant’s Motion to Dismiss should be denied for the following reasons:

INTRODUCTION

Opposer is CreditSense Business Advisors, LLC f/k/a CreditSense, LLC, a Utah Limited Liability Company, who is in the business of education and consultation related to personal and business borrowing. Specifically, Opposer provides the following Goods and Services:

Business advice and information relating to finance, credit, credit education, credit repair, and credit restoration; Business management consulting relating to finance, credit, credit education, credit repair, and credit restoration; Business organization consultancy; Assistance, advisory services and consultancy with regard to business, finance, credit, credit education, credit repair, and credit restoration; Business consulting services in the field of finance, credit, credit education, credit repair, and credit restoration; Business management consulting and advisory services for finance, credit, credit education, credit repair, and credit restoration; and Consultancy and advisory services in the field of business and financial strategy.

Financial consulting; Financial advice; Providing business information and financial advice via a website; Financial services, namely, consultation for business, finance, credit, credit education, credit repair, and credit restoration; Credit counseling services; Credit risk management; Credit optimization;

Credit inquiry and consultation; Evaluation of the credit worthiness of companies and private individuals; Financial services, namely, credit education, credit repair, and credit restoration; Educational services, namely, conducting classes, workshops, bootcamps in the fields of business, finance, credit, credit education, credit repair, and credit restoration and distribution of course material in connection therewith; Entertainment services, namely, providing podcasts in the field of business and finance; On-line journals, namely, blogs featuring business, finance, credit, credit education, credit repair, and credit restoration; Educational course materials in the field of business, finance, credit, credit education, credit repair, and credit restoration; Course materials in the field of consultation for business, finance, credit, credit education, credit repair, and credit restoration; Publications, namely, brochures, booklets, and teaching materials in the field of business, finance, credit, credit education, credit repair, and credit restoration; and Providing a website featuring blogs, publications, and articles in the field of business, finance, credit, credit education, credit repair, and credit restoration.

Podcasts, videos, audio, and live streams in the field of business, finance, credit, credit education, credit repair, and credit restoration; Providing podcasts, videos, audio, and live streams in the field of business, finance, credit, credit education, credit repair, and credit restoration; and Entertainment services, namely, providing podcasts, videos, audio, and live streams in the field of business, finance, credit, credit education, credit repair, and credit restoration. (“Opposer’s Goods and Services”)

Opposer is the owner of the common law rights to, associated goodwill, and Use Based Federal Trademark Application, U.S. Application No. 97/552,254, for the FUNDABILITY word mark (“FUNDABILITY Mark”). Opposer is also the current owner of the common law rights to, associated goodwill, and Use Based Application, Application Serial No. 97/082,206, for the GET FUNDABLE! word mark (“GET FUNDABLE! Mark or “FUNDABLE Mark”) (collectively, “Opposer’s Marks”). Opposer uses both marks and the literal elements FUNDABLE, FUNDABILITY, and derivations thereof in its source-identifying branding.

Applicant is Credit Suite, Inc., a Florida Corporation, a competitor of Opposer who filed the Challenged Application, Application Serial No. 90/480,463, for the FUNDABILITY word mark (the “Challenged Application”). The Challenged Application is for the word mark FUNDABILITY (“Applicant’s Mark”) for Business organization and operation consultancy, in International Classification 035 (“Applicant’s Services”).

Opposer believes it will be harmed and damaged by the issuance of a registration by the United States Patent and Trademark Office (“USPTO”) for the Challenged Application in connection with all of Applicant’s Services in International Classification 035. Opposer filed the Notice of Opposition¹ (“Notice

¹ 1 TTABVUE

of Opposition” or “Opposition”) against the Challenged Application on the grounds that (1) Applicant has committed fraud on the USPTO; (2) Applicant is not and was not at the time of the filing of its application the rightful owner; (3) the Challenged Application falsely suggests a connection with Opposer; (4) and the Challenged Application will cause a likelihood of confusion with Opposer’s FUNDABILITY Mark and GET FUNDABLE! Mark, along with derivations of those marks protected under common law.

Applicant has moved to dismiss² Opposer’s Notice of Opposition on the basis that Opposer “does not have standing and that the Notice of Opposition fails to state a claim upon which relief can be granted” under Federal Rule of Civil Procedure 12(b)(6). (5 TTABVUE, p. 1). Specifically, Applicant argues that (1) Opposer is not the owner of the FUNDABILITY and GET FUNDABLE! Marks; (2) Opposer is not the owner of the color blue and green; (3) Opposer has not pled grounds with particularity, where required; and (4) Opposer has not pled material misstatements or that the statements are immaterial as a matter of law.

Opposer submits it clearly alleges and describes sufficient facts in its Notice of Opposition to survive the Motion to Dismiss. Opposer plausibly pleads and demonstrates standing because Opposer is the owner of the GET FUNDABLE! word mark, the FUNDABILITY word mark, other various associated common law marks and goodwill, and uses these marks in commerce. Opposer and Applicant are direct competitors with similar marks, services, markets, and trade channels. Therefore, Opposer has a reasonable belief it will be damaged by the registration of the Challenged Application, exceeding the requirements for the entitlement to file an Opposition.

Moreover, the Notice of Opposition contains facially plausible detailed allegations, when necessary, pled with particularity. As to the first ground, Fraud committed on the USPTO, the Opposition pleads with particularity and states the “time, place, and content of the false representation, the facts misrepresented, and what was obtained,” as required. *W.R. Grace & Co. v. Az. Feeds*, 195 USPQ 670, 672 (CCPA 1977). Opposer’s second, third, and fourth grounds, that applicant is not the rightful owner, false suggestion of connection, and a likelihood of confusion, clearly state and describe sufficient facts to state a

² 5 TTABVUE

facially plausible claim to relief. Valid grounds exist for opposing the Challenged Application, and the Opposition exhaustively demonstrates the plausibility of Opposer's allegations over forty (40) pages of detailed pleading and includes exhibits supporting over two hundred and fifty (250) detailed allegations. Because Opposer exceeds its pleading obligations, Applicant's Motion to Dismiss should be denied.

LEGAL STANDARD

It is well settled that "any person who believes that he would be damaged by the registration of a mark upon the principal register" may "file an opposition in the Patent and Trademark Office, stating the grounds therefor." 15 U.S.C. § 1063(a). A notice of opposition must include (1) a short and plain statement of the reason(s) why opposer believes it would be damaged by the registration of the opposed mark (i.e., opposer's entitlement to a statutory cause of action) and (2) a short and plain statement of one or more grounds for opposition. Fed. R. Civ. P. 8(a)(2); TBMP § 309.03(a)(2).

Except as otherwise provided, procedure and practice in *inter partes* proceedings is governed by the Federal Rules of Civil Procedure. 37 C.F.R. § 2.116. The rules do not require detailed factual allegations, but require more than labels, conclusions, formulaic recitations of the elements of a cause of action, and naked assertions. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). To survive a motion to dismiss, an opposition need only state a claim to relief that is plausible on its face. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007). That is, "enough facts to raise a reasonable expectation that discovery will reveal evidence" in support of its claim. *Id.* In light of *Iqbal*, *Twombly*, and subsequent cases, the Federal Rules' pleading requirements remain minimal to survive a motion to dismiss. *Diedrich v. Ocwen Loan Servicing, LLC*, 839 F.3d 583, 589 (7th Cir. 2016) ("even with the heightened pleading requirements of *Iqbal* and *Twombly*, the pleading requirements to survive a challenge to a motion to dismiss remain low"). Facts in the Opposition must be accepted as true and viewed in the light most favorable to Opposer. *Twombly*, 550 U.S. at 570. Accordingly, with the minimal pleading requirements, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of [the alleged] facts is improbable, and 'that a recovery is very remote and unlikely.'" *Id.* at 556.

A 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted is a test solely of the legal sufficiency of a Notice of Opposition. TBMP § 503.02 (noting *Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc.*, 988 F.2d 1157, 26 USPQ2d 1038, 1041 (Fed. Cir. 1993)). In order to withstand a motion to dismiss, an opposition 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 an entitlement to a statutory cause of action to bring the proceeding (formerly referred to as “standing”), and (2) a valid ground exists for denying the registration sought. TBMP § 309.03(b), 503.02; *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 188 (CCPA 1982). To survive a motion to dismiss, a complaint must “state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 570. In particular, 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.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). “Whenever the sufficiency of any opposition has been challenged by a motion to dismiss, it is the duty of the Board to examine the opposition in its entirety, construing the allegations therein so as to do justice, as required by Fed. R. Civ. P. 8(e), to determine whether it contains any allegations, which, if proved, would entitle the plaintiff to the relief sought.” TBMP § 503.02.

Notably, “[w]hether a plaintiff can actually prove its allegations is a matter to be determined not upon motion to dismiss, but rather at final hearing or upon summary judgment, after the parties have had an opportunity to submit evidence in support of their respective positions.” *Libertyville Saddle Shop Inc. v. E. Jeffries & Sons, Ltd.*, 22 USPQ2d 1594, 1597 (TTAB 1992) (motion to dismiss does not involve determination of case merits); see also *Adv. Cardiovascular*, 26 USPQ2d at 1041. In assessing a Fed. R. Civ. P. 12(b)(6) motion to dismiss, the Board can *only* “eliminate actions that are fatally flawed in their legal premises and destined to fail, and thus to spare litigants the burdens of unnecessary pretrial and trial activity.” *Id.* “Such a motion, which cuts off a claimant at the threshold, must be denied ‘unless it appears *beyond doubt* that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief.’” *Id.* (emphasis added); see also *Stanspec Co. v. Am. Chain & Cable Co.*, 189 USPQ 420, 422 (CCPA 1976) (holding dismissal for insufficiency of a pleading is appropriate only if it “appears *to a certainty* that

[opposer] is entitled to no relief under any set of facts which could be proved in support of the claim”) (emphasis added). Applicant’s Motion to Dismiss fails to demonstrate Opposer can prove *no set of facts* to support a claim which would entitle it to relief and, therefore, should be denied.

ARGUMENT

1. Opposer Has Standing to Oppose the Challenged Application.

Opposer has a reasonable basis to believe and Opposer does, in fact, believe it will be damaged by the registration of the Challenged Application. Therefore, Opposer has standing in this matter. 15 U.S.C. §§ 1063, 1064. The U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) has adopted the U.S. Supreme Court’s framework from *Lexmark International, Inc. v. Static Control Components, Inc.*, establishing that in order to bring a statutory cause of action, a party must demonstrate (i) an interest falling within the zone of interests protected by the statute, and (ii) proximate causation. 572 U.S. 118, 109 USPQ2d 2061 (2014). More specifically, the opposer must demonstrate a “reasonable basis” for its belief that it would suffer some kind of damage if the mark is registered. *Corcamore, LLC v. SFM, LLC*, 2020 U.S. App. LEXIS 33803, at *10 (Fed. Cir. Oct. 27, 2020); TBMP § 309.03. Post-*Lexmark*, the substantive analysis for standing has not changed, and cases interpreting entitlement to bring a cause of action remain viable. TBMP § 309.03(b). The Federal Circuit has maintained a liberal threshold for determining entitlement (standing), that a plaintiff must demonstrate that he possesses a “real interest” in a proceeding beyond that of a mere intermeddler, and “a reasonable basis for his belief of damage.” *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014); *Ritchie v. Simpson*, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999); *Lipton*, 213 USPQ at 189.

Opposer, through its Notice of Opposition, has firmly established its belief it has “a reasonable basis in fact and reflects a real interest in the case.” *Coach House Restaurant, Inc. v. Coach and Six Restaurants, Inc.*, 934 F.2d 1551, 1557 (11th Cir. 1991) (opining that standing was ostensibly satisfied because opposer had “prior identity rights” in the mark and a registration of the mark could give the registrant an incontestable right to own and exclusively use the mark anywhere in the United States). Moreover, Opposer need only show an entitlement to a statutory cause of action on one ground, from which

the right to assert any other grounds may be derived. *See Hole In 1 Drinks, Inc. v. Lajtay*, 2020 USPQ2d 10020, at *3 (TTAB 2020) (once standing shown on one ground, plaintiff has right to assert any other ground in proceeding); and *Corporacion Habanos SA v. Rodriquez*, 99 USPQ2d 1873, 1877 (TTAB 2011) (because petitioners alleged standing as to at least one ground, they may assert any other legally sufficient claims including those for fraud); TBMP § 309.03(b).

The threshold for entitlement may be met in many different ways. For example, entitlement derives from ownership of prior rights in the mark, whether registered rights, common law use of the mark, or intent to use the same mark; or a direct commercial interest in the mark, such as when Opposer and Applicant as competitors in the market. See, e.g., *L.C. Licensing, Inc. v. Berman*, 86 USPQ2d 1883 (TTAB 2008) (standing established by making pleaded registrations of record); *Wet Seal, Inc. v. FD Mgmt., Inc.*, 82 USPQ2d 1629 (TTAB 2007) (standing based on common law use of mark); *Am. Vitamin Prods. Inc. v. Dow Brands Inc.*, 22 USPQ2d 1313 (TTAB 1992) (standing established where plaintiff was about to file an intent-to-use application, had a bona fide intent to use the same mark for related goods, and believed its registration would be refused based on defendant's registration). *Stuart Spector Designs, Ltd. v. Fender Musical Instruments Corp.*, 94 USPQ2d 1549 (TTAB 2009) (standing established where opposers were either competitors or retailers of the goods in the applications); *Southwire Co. v. Kaiser Aluminum & Chemical Corp.*, 196 USPQ 566, 572-73 (TTAB 1977) (being competitors in the marketplace offering the same types of goods and services sufficient to confer standing); *Target Brands Inc. v. Hughes*, 85 USPQ2d 1676 (TTAB 2007) (standing established where opposer was a wholly owned subsidiary of company that had a competitive right to use mark descriptively); and *AT&T Mobility LLC v. Thomann*, 2020 USPQ2d 53785 (TTAB 2020) (opposer had standing where it owned a majority share in a company which held 100% interest in entity that used the term in its trade name and conducts business in the same field).

Furthermore, the bar to establish standing is low so as to not deny access to the courts. An opposer is not required to own a pending application for the mark and is not even required to use the same terms as a mark. See, e.g., *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40, 44 (CCPA 1981) (plaintiff may show standing based on common law rights in mark that is distinctive, inherently or

otherwise); *Grand Canyon West Ranch LLC v. Hualapai Tribe*, 88 USPQ2d 1501, 1502 (TTAB 2008) (standing established by testimony as to prior use); *Eastman Kodak Co. v. Bell & Howell Document Management Products Co.*, 23 USPQ2d 1878, 1879 (TTAB 1992), *aff'd* 994 F.2d 1569 (Fed. Cir. 1993) (a party may establish standing where it is engaged in manufacture or sale of related products).

To demonstrate Opposer's reasonable basis for such belief, Opposer sets forth in detail Opposer's entitlement to file the Opposition. Specifically, Opposer has included plausible allegations in the pleading detailing that Opposer is the owner of prior rights in mark. Notably, Opposer is the owner of the FUNDABILITY Application, both as pled and currently listed at the USPTO, and which was addressed in Applicant's Motion to Dismiss. (1 TTABVUE, ¶ 23). This alone would suffice for entitlement.³ Opposer acknowledges that Opposer's Application for the FUNDABILITY word mark was filed subsequent to Applicant's filing. (5 TTABVUE, p. 5). However, Opposer has claimed priority in usage of the Mark but is not required to supply a prior filing or any filing to satisfy the entitlement requirement. Opposer also details prior usage of the mark in commerce, common law rights in the FUNDABILITY word mark, usage of similar marks in commerce, along with FUNDABILITY as a business name and domain name(s). (1 TTABVUE, ¶¶ 22, 23, 38, 39-43, 53-56, 61-80).

Opposer also includes allegations that Opposer and Applicant are direct competitors in the same industry, specifically business consulting with respect to the financial sector, and Opposer and Applicant offer similar services, similar markets, and operate in similar trade channels under the similar marks. (1 TTABVUE, ¶¶ 29, 34, 36, 49, 77, 91-96, 104, 134). Both Applicant and Opposer utilize social media and YouTube as major platforms for their similar business consulting services, further supporting the similarity of the markets and trade channels. (1 TTABVUE, ¶¶ 83-85, 87-89, 205, 208, 221, 224, 230, 232). Furthermore, Applicant's similar branding choices and Applicant's own argument in its Motion to Dismiss that "green and blue are colors that are commonly used in banking and finance industries" support the fact

³ Applicant, itself, also recognizes the possibility that Opposer's Application will be blocked as a result of a likelihood of confusion on Page 5 of Applicant's Motion to Dismiss. (5 TTABVUE, p. 5).

that Applicant and Opposer are competitors. (1 TTABVUE, ¶¶ 183-193; 5 TTABVUE, p. 19). This direct competition alone would suffice for Opposer’s entitlement to file the Opposition.

Applicant argues that because the USPTO Record attached to Applicant’s Motion to Dismiss shows the GET FUNDABLE! word mark is owned by Fundability, Inc. (“Fundability”) that Opposer is not entitled to file the Notice of Opposition. Even if it was true that Fundability was the current owner of the Application for the GET FUNDABLE! word mark (which it is not), Opposer has very clearly demonstrated Opposer’s entitlement independent of the ownership of the GET FUNDABLE! Application. Opposer points out the allegations in the Notice of Opposition clearly demonstrate that Opposer is the owner of the GET FUNDABLE! Trademark Application. Specifically:

“CreditSense is the owner of the Intellectual Property and associated goodwill for the FUNDABILITY Application, the GET FUNDABLE! Application, and other valuable assets,” (1 TTABVUE, ¶ 38).

Opposer CreditSense is the owner of the currently pending Application for the GET FUNDABLE! word mark. (1 TTABVUE, ¶ 57).

Opposer CreditSense is the owner of U.S. Trademark Application Serial No. 97/082,206 on the Principal Register for the GET FUNDABLE! Mark covering Educational services, namely, providing classes, workshops, bootcamps in the fields of business; Entertainment services, namely, providing podcasts in the field of business; On-line journals, namely, blogs featuring business in International Classification 041 (the “FUNDABLE Mark”). (1 TTABVUE, ¶ 177).

Opposer CreditSense is the owner of substantial and long-standing common law rights in Trademarks for the terms FUNDABILITY and FUNDABLE, used in connection with Opposer CreditSense’s business and covering business consulting and educational services. (1 TTABVUE, ¶ 178).

Opposer CreditSense is the owner of the FUNDABLE Mark and associated Trademark Application for GET FUNDABLE!. Exhibit D. (1 TTABVUE, ¶ 219).

As a result of its widespread, continuous, consistent, and exclusive use of the FUNDABLE Mark to identify Opposer CreditSense’s Services and Opposer CreditSense as their source, Opposer CreditSense owns valid and subsisting federal statutory and common law rights to the FUNDABLE Mark. (1 TTABVUE, ¶ 222).

Applicant points to Paragraphs 2 through 5 of the Opposition for support of its position that Opposer does not own rights in GET FUNDABLE! word mark. However, Applicant disregards the allegations of the Opposition which demonstrate CreditSense as the owner of the GET FUNDABLE! Application and misconstrues Paragraph 4. Fundability has assigned the GET FUNDABLE! Trademark Application to CreditSense, and Fundability has licensed that property, among other property from

CreditSense. Opposer specifically addresses Fundability as licensee. (1 TTABVUE, ¶ 74). There is no confusion or contradiction as to the ownership rights in either the FUNDABILITY word mark or the GET FUNDABLE! Mark. It is clear from the case law that licensees and those with a commercial interest in the mark, have standing. *Syngenta Crop Protection Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1118 n.8 (TTAB 2009) (licensees have standing to oppose, use of mark established by testimony sufficient to show reasonable belief of damage even though use “purportedly based on a license...not [] clearly established in evidence”); *Chicago Bears Football Club Inc. v. 12TH Man/Tennessee LLC*, 83 USPQ2d 1073, 1075 (TTAB 2007) (exclusive licensee has standing); *General Motors Corp. v. Aristide & Co., Antiquaire de Marques*, 87 USPQ2d 1179, 1181 (TTAB 2008) (past use and present licensing); *Kellogg Co. v. General Mills Inc.*, 82 USPQ2d 1766, 1767 (TTAB 2007) (standing based on commercial interest in the mark).

Applicant states “it is unclear whether CreditSense appears to be saying that Fundability owns all the intellectual property in FUNDABILITY and GET FUNDABLE!” (5 TTABVUE, p.6). Applicant has disregarded the additional allegations that clearly state ownership. Usage by Fundability, as a licensee of the GET FUNDABLE! and FUNDABILITY Marks would be usage attributable to and goodwill for Opposer CreditSense and would contribute to the large portfolio of Intellectual Property that Fundability has. Relying on the statement in Paragraph 4 of the Opposition, that “CreditSense and Fundability *have* a large portfolio,” Applicant, throughout its Motion, continuously states that Fundability *owns* certain property. (1 TTABVUE, ¶ 4) (emphasis added). This is an inaccurate characterization of the pleading. Fundability, Inc. is not the owner, but a licensee of the GET FUNDABLE! Mark; Opposer CreditSense is the current owner of the GET FUNDABLE! and FUNDABILITY! Marks. Consequently, both CreditSense and Fundability, Inc., would be harmed by Applicant’s use of the FUNDABILITY and FUNDABLE Mark.

Moreover, it is not necessary for that party to join every other party that might have such an interest. *Piano Factory Grp., Inc. v. Schiedmayer Celesta GmbH*, 11 F.4th 1363, 1376 (Fed. Cir. 2021) (citing *Universal Oil Prods. Co. v. Rexall Drug & Chem. Co.*, 463 F.2d 1122, 1124 (CCPA 1972) (parent company that could demonstrate an interest in the proceeding need not join a subsidiary company that had control of the trade name). There is no requirement to pay a fee for, or join Fundability as a party to this Opposition.

Because CreditSense is the owner and licensor of the FUNDABILITY and GET FUNDABLE! Mark's Applications, use under common law, and use of derivations of those marks, CreditSense has entitlement to file the action and Fundability is not required to be joined as a party, pay fees, nor demonstrate privity.

Opposer therefore has a real interest in opposing the Challenged Application and the entitlement to a statutory cause of action to bring the Opposition. Opposer's own trademark rights may be adversely impacted by the registration of the Challenged Application. As such, Opposer's belief in damage proximately caused by Applicant is reasonable and not speculative. Therefore, the Opposition sufficiently states an entitlement to a statutory cause of action ("standing") and the Motion to Dismiss should be denied.

2. The Opposition Sufficiently Sets Forth Grounds for Opposing the Challenged Application.

"[I]n determining whether a complaint states a claim that is plausible, the court is required to proceed on the *assumption that all the [factual] allegations in the complaint are true.*" *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012), cert. denied, 133 S. Ct. 846 (2013) (emphasis in original) (quoting *Twombly*, 550 U.S. at 556) (internal quotations omitted). Because plaintiff is entitled to the benefit of the doubt, "it is not the province of the court to dismiss the complaint on the basis of the court's choice among plausible alternatives;" rather, "the choice between or among plausible interpretations of the evidence will be a task for the factfinder," assuming that the plaintiff "can adduce sufficient evidence to support its factual allegations." *Id.* at 190. When viewed in the light most favorable to Opposer, and construing the allegations so as to do justice, the Opposition clearly pleads and *describes* enough facts to state a claim to relief that is plausible on its face along with sufficient facts to raise a reasonable expectation that discovery will reveal evidence in support of Opposer's grounds. A claim has "facial plausibility" when the plaintiff pleads "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Twombly*, 550 U.S. at 570. This "plausibility" standard is "not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 570.

a. Opposer has plausibly pled Opposer's First Ground, Fraud, with Particularity Sufficient to Survive Applicant's Motion to Dismiss.

A party may oppose a trademark application on the grounds that the applicant committed fraud on the USPTO in connection with the prosecution of its application. TBMP § 303.03(c)(1); Fed. R. Civ. P. 9(b). Fraud in obtaining a trademark registration occurs “when an applicant knowingly makes false, material representations of fact in connection with his application.” *Torres v. Cantine Torresella S.r.l.*, 808 F.2d 46, 1 USPQ2d 1483, 1484 (Fed. Cir. 1986); *see also In re Bose Corp.*, 580 F.3d 1240, 1243 (Fed. Cir. 2009) (holding that an applicant commits fraud when it knowingly makes false, material representations of fact with an intent to deceive the USPTO). *Qualcomm Inc. v. FLO Corp.*, 93 USPQ2d 1768, 1769-70 (TTAB 2010) (Fraud occurs when an applicant in an application for registration or declaration of use knowingly makes specific false, material representations of fact with the intent of obtaining a registration to which it is not otherwise entitled).

Fraud or fraudulent means conduct that involves a misrepresentation of material fact made with intent to deceive or a state of mind so reckless respecting consequences as to be the equivalent of intent, where there is justifiable reliance on the misrepresentation by the party deceived, inducing the party to act thereon, and where there is injury to the party deceived resulting from reliance on the misrepresentation. 37 C.F.R. § 11.1. Fraud also may be established by a purposeful omission or failure to state a material fact, which omission or failure to state makes other statements misleading, and where the other elements of justifiable reliance and injury are established. *Id.* Reckless disregard for the truth of representations made to the USPTO in the trademark application or during prosecution satisfies the intent required to support a finding of fraud. *Chutter, Inc. v. Great Management Group, LLC.* 2021 USPQ2d 1001 (TTAB 2021). “Reckless disregard” is defined as the “conscious indifference to the consequences of an act.” *Id.*

An opposition pleading fraud survives a motion to dismiss so long as the opposer alleges the elements of fraud with particularity in accordance with Fed. R. Civ. P. 9(b), made applicable to Board proceedings by Trademark Rule 2.116(a). *Asian and Western Classics B.V. v. Selkow*, 92 USPQ2d 1478, 1479 (TTAB 2009); *King Automotive, Inc. v. Speedy Muffler King, Inc.*, 667 F.2d 1008, 212 USPQ 801, 803 (CCPA 1981) (“the pleadings [must] contain explicit rather than implied expression of the

circumstances constituting fraud”); *W.R. Grace*, 195 USPQ at 672 (“The rule necessitates pleading of sufficient facts so that the other party will be apprised of the acts which are alleged to constitute the fraud.”).

Applicant argues the Opposition’s fraud ground is not pled with particularity because they fail to set forth the second element of fraud, materiality. While Opposer must plead with particularity it need not *prove* any of the elements of fraud at this stage. *Adv. Cardiovascular*, 988 F.2d at 1159. Pleading with particularity “means that the pleader must state the time, place, and content of the false representation, the fact misrepresented, and what was obtained or given up as a consequence of the fraud.” *W.R. Grace*, 195 USPQ at 672. Claims of fraud must be pled with particularity as required under Federal Rule of Civil Procedure 9(b); however, knowledge and intent may be alleged generally. Fed. R. Civ. P. 9(b).

The Opposition pleads with particularity Applicant has committed fraud on the USPTO through fraud on the Application Declaration, for the Application and the Original Specimen, and during Prosecution through a Declaration submitted with the Response to the Non-Final Office Action and Substitute Specimen. A plaintiff claiming fraud in the declaration or oath in an application for registration must allege particular facts which, if proven, would establish that: (1) there was in fact another use of the same or a confusingly similar 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 USPTO, intended to procure a registration to which it was not entitled. *See Qualcomm Inc.*, 93 USPQ2d at 1770; *see also Am. Optical Corp. v. U.S.*, 179 USPQ 682, 684 (Ct. Cl. 1973) (fraudulent intent presumed where there was a “knowing misrepresentation of a material fact before [the USPTO]); *Texaco, Inc. v. Allied Chemical Corp.*, 193 USPQ 716, 721 (S.D.N.Y. 1975) (where charge was fraudulent procurement of trademark registration, allegation of false statements by applicant with knowledge of falsity held sufficient under Fed. R. Civ. P. 9(b)).

In the Challenged Application, Applicant represented under oath to the USPTO the following relevant material representations:

Application Representation Excerpts

To the best of the signatory's knowledge and belief, no other persons, except, if applicable, concurrent users, have the right to use the mark in commerce, either in the identical form or in such near resemblance as to be likely, when used on or in connection with the goods/services of such other persons, to cause confusion or mistake, or to deceive. (1 TTABVUE, ¶ 101).

- “The specimen(s) shows the mark as used on or in connection with the goods/services in the application and was used on or in connection with the goods/services in the application as of the application filing date; and
- To the best of the signatory's knowledge and belief, the facts recited in the application are accurate.” (1 TTABVUE, ¶ 119).

Prosecution Representation Excerpts

To the best of the signatory's knowledge and belief, no other persons, except, if applicable, authorized users, members, and/or concurrent users, have the right to use the mark in commerce, either in the identical form or in such near resemblance as to be likely, when used on or in connection with the goods/services/collective membership organization of such other persons, to cause confusion or mistake, or to deceive.” (1 TTABVUE, ¶ 132).

“[I]f the applicant submitted the application or allegation of use (AOU) unsigned, all statements in the application or AOU and this submission based on the signatory's own knowledge are true, and all statements in the application or AOU and this submission made on information and belief are believed to be true.” (1 TTABVUE, ¶ 149).

“If the applicant filed an unsigned application under 15 U.S.C. §1051(a) or AOU under 15 U.S.C. §1051(c), the signatory additionally believes that: the applicant is the owner of the mark sought to be registered; the mark is in use in commerce and was in use in commerce as of the filing date of the application.” (1 TTABVUE, ¶ 150).

A declarant is charged with knowing what is in the declaration being signed, and by failing to make an appropriate inquiry into the accuracy of the statements, the declarant acts with a reckless disregard for the truth. *See Standard Knitting, Ltd. v. Toyota Jidosha K.K.*, 77 USPQ2d 1917, 1928 (TTAB 2006). Reckless disregard for the truth of representations made to the USPTO in a trademark application or declaration satisfies the requisite intent required to support a finding of fraud. *Chutter*, 2021 USPQ2d 1001. “Statements made with such degree of solemnity clearly are or should be investigated thoroughly prior to signature and submission to the USPTO.” *Standard Knitting*, 77 USPQ2d at 1927-28; *see also Duffy-Mott Co. v. Cumberland Packing Co.*, 165 USPQ 422, 425 (CCPA 1970). Furthermore, Applicant's attorney, acting on behalf of Applicant will not mitigate fraudulent intent. *Ets. Lardenois v. Lazarus*, 168 USPQ 604,

605 (TTAB 1970) (that statements had been prepared by registrant's attorneys does not mitigate fraudulent intent where statements respecting ownership on basis of which registration issued were false).

The Opposition clearly alleges the materiality of the Application Representation⁴ in the Opposition. In Paragraph 106, Opposer alleges, "Said Application Representation, that Applicant knew of no other persons with the right to use the mark, was a knowingly false and material statement intended to deceive the USPTO in order to secure a Registration for the FUNDABILITY Mark." (1 TTABVUE, ¶ 106, 125 (similar)). The Opposition continues, in Paragraph 136, regarding the Prosecution Representation⁵ to state, "Said Representation, that Applicant "knew of no one with superior rights", was a knowingly false and material statement intended to deceive the USPTO in order to secure a Registration for the FUNDABILITY Mark." And "Said Prosecution Representation, that "all statements in the application or AOU and this submission based on the signatory's own knowledge are true," and "the signatory additionally believes that: the applicant is the owner of the mark sought to be registered; the mark is in use in commerce", was a knowingly false and material statement intended to deceive the USPTO in order to secure a Registration for the FUNDABILITY Mark. (1 TTABVUE, ¶ 136, 156).

Materiality of any false statement is determined in the context of whether the false statement is critical to the Trademark Examining Attorney's decision to approve a mark for publication. *Standard Knitting*, 77 USPQ2d at 1926; *see also Western Worldwide Enterprises Group Inc. v. Qinqdao Brewery*, 17 USPQ2d 1137, 1141 (TTAB 1990) ("Petitioner [has] a claim based upon fraud by reason of the original respondent's allegedly intentional misrepresentation as to its ownership of the marks at the time the applications which matured into the involved registrations were filed[.]"); *Nationstar Mortg. LLC v. Ahmad*, 112 USPQ2d 1361, 1365 (TTAB 2014) ("[a]n applicant's statements as to its use of a mark for particular goods and services are unquestionably material to registrability.... The applicant's statements are a fundamental statutory precondition to the issuance of a registration covering such goods and services and are relied upon by the USPTO's examining attorney in approving a[n]... application for publication").

⁴ See 1 TTABVUE, ¶ 101.

⁵ See 1 TTABVUE, ¶ 132.

“Gross fraud” has been defined as representations made with a knowledge of their falseness (or so recklessly made as to amount to the same thing), and with the purpose of injuring the plaintiff. *Bell v. Preferred Life Assurance Soc’y*, 320 U.S. 238, 241 (1943).

Applicant specifically cites *Space Base, Inc. v. Stadis Corporation*, for the proposition “it is settled that there can be no fraud by reason of a party’s failure to disclose the asserted rights of another person, including a prior applicant, unless that person is known to possess a superior or a clearly established right to use.” 17 USPQ2d 1216, 1218 (TTAB 1990). As demonstrated by the factual allegations including Opposer and Applicant are competitors, Opposer’s use in commerce, and Opposer’s and Applicant’s presence at the same industry trade show, Opposer has plausibly pled, with particularity, fraud at the USPTO. (1 TTABVUE, ¶¶ 95, 104). Because an Examining Attorney’s role includes refusing Pending Trademark Application on the basis of a likelihood of confusion and false suggestion of connection and determining priority, had Applicant not represented that “knew of no one with superior rights,” “[t]he specimen(s) shows the mark as used,” and “the facts recited in the application are accurate,” as well as the other statement in the Representations, the Examining Attorney would not have approved the mark for publication. TMEP § 702.03(b), 1203.03, 1207. The declaration of the Application Representation and Prosecution Representation, under oath by Applicant, was critical to the USPTO Examining Attorney’s decision to review the Application, Response to the Office Action, and Substitute Specimen, and approve the mark for publication.

Opposer has not “simply alleg[ed] that Applicant was not entitled to the use of the FUNDABILITY Mark in commerce, that other persons, specifically Opposer CreditSense had the right to use the mark in commerce,” as Applicant argues in its Motion (5 TTABVUE, p. 15) (internal quotations omitted). Opposer clearly supports the allegations of materiality of the false statements by Applicant throughout the Opposition. Notably, Opposer has alleged specific facts over one hundred and fifty-nine (159) paragraphs, together with exhibits. The Opposition demonstrates Applicant’s knowledge because CreditSense has invested significant resources in the development for the FUNDABILITY word mark, CreditSense has used the Mark as a major element in its branding, and Opposer and Applicant are direct competitors in the

industry. (1 TTABVUE, ¶¶ 29, 34, 36, 49, 61-73, 77, 90-97, 104, 134). Opposer also sets forth that Applicant did not begin using the FUNDABILITY Mark in its branding until after 2019 (1 TTABVUE, ¶ 82-86). Therefore, Opposer pleads materiality of Applicant's false statements to the requisite level for a claim of fraud.

The only reasonable conclusion from the facts detailed in the Opposition, Opposer's use of Opposer's Marks, the timing of the filing, and Applicant's knowledge, is Applicant made the misrepresentation in the Declaration knowingly, with intent to mislead the USPTO and cause the USPTO to approve the Challenged Application for publication and grant a registration for the Challenged Application. As such, Opposer has exceeded the requirements for pleading fraud with particularity and has properly set forth the second element of a fraud claim, materiality.

b. Opposer has plausibly pled Opposer's Second Ground, that Applicant is not, and was not the rightful owner of the FUNDABILITY word mark at the time of filing.

Opposer provides substantial detailed facts to support its ground that Applicant is not, and was not the rightful owner of the FUNDABILITY word mark at the time of filing. Specifically, Opposer states that Opposer is the true owner of the FUNDABILITY Mark, has priority in use of the Mark, and Applicant did not start using the Mark until after CreditSense began using it. (1 TTABVUE, ¶ 161-170) Furthermore, Opposer details Applicant would have been aware of third-party users and Opposer's usage of the Mark because Opposer and Applicant are competitors. (1 TTABVUE ¶¶ 29-37, 46-52, 116-118).

Applicant, throughout its Motion, merely restates Paragraph 4 of the Opposition: that Fundability has licensed the Intellectual Property and argues Opposer has not provided any evidence of privity with Fundability. (5 TTABVUE, p. 18). As an initial matter, the Board must view the facts in the light most favorable to the Opposer and is not required to prove, nor provide evidence, at this stage of privity. *Twombly*, 550 U.S. at 570 (facts are to be accepted as true and viewed in the light most favorable to Opposer); TBMP § 503.02 (Whether a plaintiff can actually prove its allegations is a matter to be determined not upon motion to dismiss, but rather at final hearing or upon summary judgment, after the parties have had an opportunity to submit evidence in support of their respective positions); see also *Adv.*

Cardiovascular, 26 USPQ2d at 1041. Opposer’s detailed allegations raise a reasonable expectation that discovery will reveal evidence in support of Opposer’s contention that Opposer CreditSense is the owner of the FUNDABILITY Mark and GET FUNDABLE! Mark. (See 1 TTABVUE, ¶ 38) (CreditSense is the owner of the Intellectual Property and associated goodwill for the FUNDABILITY Application, the GET FUNDABLE! Application, and other valuable assets); see also (1 TTABVUE, ¶¶ 57, 177, 178, 219, 222).

Furthermore, an assignment of the GET FUNDABLE! word mark transfers ownership of the GET FUNDABLE! word mark from Fundability, Inc. to CreditSense Business Advisors, LLC. While not dispositive for purposes of this proceeding, Fundability, Inc., a corporation that is associated with CreditSense Business Advisors, LLC, has authority under a non-exclusive license between the two entities to use the GET FUNDABLE! word mark. It seems Applicant has misconstrued Paragraph 4 of the Opposition to mean something different.

Applicant’s only other contention against Opposer’s second ground is that “this allegation alone is not a cognizable claim in an opposition proceeding.” (5 TTABVUE, p. 19). Applicant provides no legal support for this contention. Under TBMP § 309.03(c)(1)(7), it is specifically stated “[t]hat defendant is not (and was not, at the time of the filing of its application for registration) the rightful owner of the registered mark” is an example of one of the available grounds for an opposition and cancellation proceeding. Additionally, *assuming arguendo*, that the Board agrees this is not *alone* a cognizable claim, Opposer has together plausibly pled cognizable claims for fraud, false suggestion of connection, and a likelihood of confusion. Based on Opposer’s entitlement and detailed support of Opposer’s ownership and usage, the Opposition is plausible on its face, *describes* enough facts to notify Applicant of Opposer’s claims, and raises a reasonable expectation discovery will reveal evidence in support of Opposer’s claims.

c. Opposer has plausibly pled Opposer’s Third Ground, that the Challenged Application falsely suggests a connection with Opposer.

Opposer has far exceeded the pleading obligations to demonstrate the Challenged Application falsely suggests a connection with Opposer. In the two hundred (200) paragraphs, relevant and incorporated in Opposer’s third ground, Opposer sets forth numerous reasons why the Challenged Application falsely

suggests a connection with Opposer. The similarity of Applicant's Services to Opposer's Goods and Services, Applicant's usage of the identical FUNDABILITY word mark, Applicant's usage of a mark similar to Opposer's GET FUNDABLE! word mark, Opposer's use of and priority in the FUNDABILITY Mark, among other facts pled suggest a false suggestion of connection with Opposer. (See 1 TTABVue, ¶¶ 194, 200).

The Federal Circuit in *Piano Factory Grp., Inc. v. Schiedmayer Celesta GmbH*, recently reiterated the four-factor test for determining whether a mark should be canceled because it falsely suggests a connection with another person or entity. The four factors, as related to goods, have been identified as follows:

- (1) The mark is the same as, or a close approximation of, the name or identity previously used by another person;
- (2) the mark would be recognized as pointing uniquely and unmistakably to that person;
- (3) the person named by the mark or using the mark is not connected with the activities performed by the applicant under the mark; and
- (4) the prior user's name or identity is of sufficient fame or reputation that a connection with the person would be presumed when the applicant's mark is used to identify the applicant's goods.

Piano Factory, 11 F.4th at 1377 (citing *In re Jackson*, 103 USPQ2d 1417, 1419 (TTAB 2012); see also *In re Wielinski*, 49 USPQ2d 1754, 1757 (TTAB 1998).

It is relevant to the inquiry whether the goods or services provided under the registered mark are similar to goods or services associated with the party complaining of a false association and the intent of Applicant. *Piano Factory*, 11 F.4th at 1380 (internal citations omitted). Furthermore, a party's name may be famous among the particular consumers of those goods and services even if it is not famous among members of the general public. *Id.* Courts have held that "[i]f it can be shown that a defendant adopted a plaintiff's mark with the intention of deriving a benefit from the plaintiff's business reputation, this fact alone may be enough to justify the inference that there is confusing similarity." *Frehling Enters., Inc. v. Int'l Select Grp., Inc.* 192 F.3d 1330, 1340 (11th Cir. 1999).

In contrast to Applicant's argument that Opposer has not established trademark rights in and to the blue and green color scheme, Opposer does not suggest that Opposer has established trademark rights in

the color scheme. (5 TTABVUE, p. 19-20). Here, like *Frehling*, the facts demonstrating the shift in branding further support Opposer's allegations that Applicant is falsely suggesting a connection with Opposer. As with all allegations at the pleading stage, Opposer shall have the opportunity, through discovery, to develop the record for this claim. Here, on the basis of the similarity of Applicant's Services and Opposer's Goods and Services, similarity of the mark, and additionally Applicant's shift to imitating Opposer's branding and color scheme, Opposer has plausibly pled the Challenged Application falsely suggests a connection with Applicant.

d. Opposer has plausibly pled Opposer's Fourth Ground, Likelihood of Confusion.

In support of Applicant's Motion to Dismiss for the Fourth Ground, a likelihood of confusion with the FUNDABILITY Mark, the GET FUNDABLE! Mark, and derivations thereof and the associated goodwill, Applicant revisits the argument that Opposer is not the owner of the Marks and that Opposer has not provided evidence of privity with the Owner of the FUNDABILITY Mark. Applicant states "Fundability is the owner of the FUNDABILITY brand and mark." (5 TTABVUE, p. 20). At no point in the pleading does Opposer state that Fundability is the owner of the FUNDABILITY brand and mark, rather CreditSense Business Advisors, LLC is the owner of the Mark, as stated clearly in Paragraph 38 and supported by Paragraphs 23, 53, and 57, among many others.

"CreditSense is the owner of the Intellectual Property and associated goodwill for the FUNDABILITY Application, the GET FUNDABLE! Application, and other valuable assets." (1 TTABVUE, ¶ 38).

"Because Opposer CreditSense is the owner of the FUNDABILITY Application, and common law trademark rights for the FUNDABILITY Mark, has used and is currently using the Services identified in the Challenged Application in connection with the FUNDABILITY Mark, any resulting Registrations of the Challenged Application interfere with the Opposer CreditSense's current business and trademark rights." (1 TTABVUE, ¶ 23).

"Opposer CreditSense is the owner of the currently pending Application for the FUNDABILITY Mark." (1 TTABVUE, ¶ 53).

"Opposer CreditSense is the owner of the currently pending Application for the GET FUNDABLE! word mark." (1 TTABVUE, ¶ 57).

Other than purported issues of ownership, Applicant brings no other challenges to Opposer's likelihood of confusion claims. The factors to determine a likelihood of confusion between Opposer's

Marks and the Challenged Application are set forth in *In re E.I. du Pont de Nemours & Co.* and include the similarity of the marks, the relatedness of the goods and/or services, the channels of trade and classes of purchasers for the goods and/or services, the number and nature of similar marks in use on similar goods, the nature and extent of any actual confusion, and the fame of the prior mark. 476 F.2d 1357, 177 USPQ 563 (CCPA 1973); TBMP 309.03(c)(2)(B); *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En, 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (to determine whether the marks are similar for purposes of assessing the likelihood of confusion, the Board will consider the appearance, sound, connotation and commercial impression of each mark).

Opposer has, in Paragraphs 202 through 253, included detailed factual allegations as to the ownership of Opposer's Marks, as well as the other *du Pont* factors relevant to and dispositive for a likelihood of confusion claim. For the reasons set forth above, it is clear that the pleadings establish that Opposer is the owner of the FUNDABILITY Mark and the GET FUNDABLE! Mark, has rights in those Applications, as well as common law trademark rights in the terms and an obvious basis for the likelihood of confusion claims against the Challenged Applications.

CONCLUSION

Opposer has met and surpassed the legal requirement of entitlement to file a Notice of Opposition on the basis Opposer has reasonable belief it will be damaged by the registration of the Challenged Application. There exists a reasonable basis of harm to Opposer from the registration of the Challenged Application. Opposer plausibly pleads facts sufficient to survive the Applicant's Motion to Dismiss. The allegations in the Notice of Opposition are detailed, facially plausible, and legally sufficient. Where necessary within the grounds for fraud, Opposer has pled with particularity detailed allegations, including the time, place and content of the false representation, the material facts misrepresented, and what was obtained to more than adequately to survive a Motion to Dismiss. Because Opposer has plausibly pled its Notice of Opposition, Opposer cannot be denied its right to present its claims on a developed record and Applicant's Motion to Dismiss should be denied.

WHEREFORE, Opposer CreditSense Business Advisors, LLC, by and through the undersigned counsel of record, respectfully requests that the Board deny Applicant's Motion to Dismiss.

Dated: October 17, 2022

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of October 2022, a true and correct copy of the OPPOSER'S RESPONSE IN OPPOSITION TO APPLICANT'S MOTION TO DISMISS has been served in its entirety by electronic mail to:

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