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

Proceeding no.	91281414
Party	Defendant Treedefi Ltd
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Application Serial Number 90881203
Filed: August 13, 2021

Published in the Official Gazette on June 28, 2022
Mark: **TREEDEFI** (International Classes 009 and 042)

NICCOLÒ MASCARO, Opposer, ~ *versus* ~ **TREEDEFI LTD.**, Applicant.	Opposition No.: 91281414 File Number: ESTTA1244091 Serial Number: 90881203 Filing Date of this Motion: Oct. 30, 2023

MOTION TO DISMISS SECOND AMENDED NOTICE OF OPPOSITION
FOR FAILURE TO STATE A CLAIM UNDER FRCP 12(b)(6)

COMES NOW the Applicant, **TREEDEFI LTD.**, through their Counsel Baruch S. Gottesman, Esq. and respectfully Moves to Dismiss the Second Amended Opposition filed by the Opposer **NICCOLÒ MASCARO** pursuant to Federal Rules of Civil Procedure 12(b)(1), (6) and (7)[1] and Section 503 of the Trademark Trial and Appeal Board Manual of Procedure, and other relevant Rules and Procedures and in support does respectfully submit as follow:

[1] Made applicable here pursuant to 37 C.F.R. § 2.116, *See, e.g.*, Roux Labs, Inc. v. La Cade Prods. Co., 558 F.2d 33, 35, 194 U.S.P.Q. (BNA) 542, 544 (CCPA 1977); Young v. AGB Corp., 152 F.3d 1377 n.1 (F.Cir. 1998)

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A. Introduction

1. The Opposer, Niccolò Mascaro, alleges that he entered into an Agreement with the Applicant, TreeDeFi, Ltd. in April 2022, Second Amended Notice of Opposition at ¶ 10. Opposer alleges that the Agreement granted Opposer sole use of the TREEDEFI Mark for its decentralized finance platform and Applicant "would leave the project" and forfeit any rights to the Mark. Second Amended Notice at ¶ 10. [2]

2. The Opposer alleges that they used the Mark in commerce as evidenced through their development of the <app.treedefi.com> platform, Amended Notice at ¶ 13, et seq., and related Treedefi internet properties, Amended Notice at ¶ 2.

3. On that basis, the Opposer submits that the Applicant should be refused registration of the Mark because of:

(a.) the Applicant's lack of ownership of the Mark in Class 042;
(b.) the Applicant's lack of use of the Mark in Class 042;
(c.) Applicant's lack of bona fide intent to use the Mark in Class 009.

Second Amended Notice at ¶ 23 summarizing claim.

4. As will be argued below, the Opposition should be Dismissed based on the allegations in the Second Amended Notice of Opposition itself (as well as evidence incorporated by reference in the Second Amended Notice of Opposition) because plainly

[2] Unless otherwise indicated, when used in this Motion, the Parties to this Opposition are referred to as "**Opposer**" / "**Mascaro**" and "**Applicant**" / "**TreeDeFi, Ltd.**", respectively. Similarly, where it is appropriate, the Notice of Opposition is referred to as the "**Notice**", the Amended Notice of Opposition as the "Amended Notice" and TREEDEFI as the "**Mark**".

the Opposer has no standing to maintain this proceeding and the Opposer failed to state a claim upon which relief can be granted.

B. Procedural History

5. On August 13, 2021, the Applicant filed a TEAS Plus Application for use of the TREEDEFI Mark for Class 042, namely:

> "Authentication of data in the field of financial transaction using blockchain technology; Computer programming; Computer software development; Information technology consulting services; Providing temporary use of on-line non-downloadable software for accessing, reading, and tracking information in the field of financial transaction on a blockchain; Software design and development; Platform as a service (PAAS) featuring computer software platforms for financial transactions using blockchain; Software as a service (SAAS) services featuring software for financial transactions using blockchain".

6. The Class 042 Application was submitted under Section 1(a) and claimed first use on March 27, 2021 and first use in commerce on April 1, 2021.

7. The August 13, 2021 Application also included a submission for use of the TREEDEFI Mark for Class 009, namely:

> "Computer software platforms, downloadable, for blockchain operations; Downloadable computer application software for mobile phones, namely, software for blockchain operation, wallet app; Downloadable computer software for blockchain operations; Downloadable computer software for blockchain-based inventory management; Downloadable computer software for managing cryptocurrency transactions using blockchain technology; Downloadable computer software development tools"

8. The Class 009 Application was submitted under Section 1(b).

9. In support of the Application, the Applicant submitted its website, namely: <https://treedefi.com/>, and a screenshot of the website as of August 13, 2021.

10. On June 28, 2022, the TREEDEFI was published in the TRADEMARK OFFICIAL GAZETTE. The Publication provided:

> "Any party who believes it will be damaged by the registration of the mark may file a notice of opposition (or extension of time therefor) with the Trademark Trial and Appeal Board. If no party files an opposition or extension request within thirty (30) days after the publication date, then eleven (11) weeks after the publication date a notice of allowance (NOA) should issue. (Note: The applicant must file a complete Statement of Use or Extension Request with the required fees within six (6) months after the NOA issues to avoid abandonment of the application.)"

11. Accordingly, assuming no opposition had been filed and no extensions were requested, the earliest that the Applicant would have needed to show use of the TREEDEFI Mark for Class 009, would have been on or about March 15, 2023 (reflecting eleven weeks and six months after the publication date, excluding the publication date itself).

12. The Original Notice of Opposition was filed October 26, 2022 and opposed the application on the following bases:

(a.) the Applicant's alleged fraud on the USPTO;
(b.) the Applicant's lack of ownership of the Mark in Class 009;
(c.) the Applicant's lack of use of the Mark in Class 009; *and*
(d.) Applicant's lack of bona fide intent to use the Mark in Class 042.

13. Applicant moved to Dismiss on December 6, 2022, and on January 18, 2023, the Opposer filed an Amended Motion to Oppose.

14. Applicant moved to Dismiss the Amended Motion. The Trademark Trial and Appeal Board entered an Order granting in part, and denying in part, Applicant's Motion to Dismiss the Amended Motion.

15. On August 18, 2023, the Opposer filed a Second Amended Motion to Oppose, and opposed the application on the following bases:

(a.) the Applicant's lack of ownership of the Mark in Class 042;
(b.) the Applicant's lack of use of the Mark in Class 042; and
(c.) Applicant's lack of bona fide intent to use the Mark in Class 009.

16. The Applicant now respectfully submits this Motion to Dismiss the Second Amended Motion to Oppose in lieu of the Answer. (See Trademark Trial and Appeal Board Manual of Procedure at § 503.01 ("the filing of a motion to dismiss for failure to state a claim upon which relief can be granted tolls the time for filing an answer") *citing Hollowform, Inc. v. Delma*, 180 U.S.P.Q. 284, 286 (TTAB 1973) *aff'd,* 515 F.2d 1174, 185 U.S.P.Q. 790 (CCPA 1975)).[3]

C. Opposers' Allegations and Documents Incorporated by Reference

17. The Opposition alleges that "[i]n or around April 2022" the parties entered into a four-Party agreement between: (i.) Opposer; (ii.) Mr. Morosan; (iii.) Mr. Castagnone; and (iv.) Opposer's other partner under which Messrs. Morosan and

[3] A number of outstanding unopposed Motions to extend time remain pending, and if granted, this Motion would be timely. If those Motions are not granted, then please consider this Motion to be also be a request to file this Motion to Dismiss out of time.

Castagnone would "leave the project" and Opposer would continue to use the TREEDEFI Mark. Second Amended Opposition at ¶ 10.

18. Happily, unlike in the Original Opposition where the Parties to the Agreement and its terms are referred to generally, *See* 4 TTABVUE at ¶ 7, in this Second Amended Opposition the Opposer incorporates the *Conclusione*; and an oral conversation (Second Amended Opposition at Exhibit 1). Rather than guessing at the terms or relying on the Opposer's description, the Board can look to the Agreement itself and not the Opposer's self-serving description of it. Courts in the Federal Circuit (and the Board) are: " 'not limited to the four corners of the complaint' and may consider materials incorporated by reference when deciding a motion to dismiss." *Peterson Indus. Depot, Inc. v. United States*, 140 Fed.Cl. 485 n. 4 (Fed.Cl., Oct. 22, 2018) *citing Dimare Fresh, Inc. v. United States*, 808 F.3d 1301, 1306 (Fed.Cir. 2015) *cert. denied*, 136 S.Ct. 2461 (2016).

19. In addition, the Board may look to: "items subject to judicial notice, [and] matters of public record." *Dimare Fresh, Inc., Id.* at 1306, *citing* 5B Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 1357 (3d ed. 2004)(square brackets in original).

20. For the reasons described below, the Applicant respectfully submits that the code of <app.treedefi.com>, the text of <https://treedefi.store/pages/terms> and other admissions by the Opposer on the websites he claims to have set up, owns and runs.

21. Further the Parties' public corporate filings may be admitted for consideration on this Motion to Dismiss without converting it into a Motion for Summary Judgment.

(a) Incorporation by Reference of the Code for the TreeDeFI App and Terms and Conditions of the TreeDefi Store

22. The Opposer alleges that he is "one of the creators of a decentralized finance platform . . . ." Second Amended Notice at ¶ 1. Similarly, the proposed Marks refer to "Computer software platforms" (Class 009 Application); and "Platform as a service (PAAS) featuring computer software platforms for managing financial transactions using blockchain; Software as aservice *[sic]* (SAAS) services featuring software for managing financial transactions using blockchain" (Class 042 Application).

23. The Opposer further alleges that he owns and operates a portfolio of websites registered through 2022, including <treedefi.store>, Second Amended Notice at ¶ 2.

24. To put a fine point on it: while the Opposer makes reference to the "Opposer's website" and includes a screenshot of <http://www.treedefi.com>, Second Amended Notice at ¶¶ 1 and 13, the allegation in the Amended Notice is that Opposer created and *currently holds all the rights* to the "decentralized finance platform", which provides the basis to oppose the Application.

25. The website screenshots included in the Second Amended Opposition all include links to "launch app" which redirects the "Platform" powered by the TreeDeFi SPDX license and the underlying code.

26. Federal Courts routinely take judicial notice of information on a Party's website (and certainly when referenced in the Complaint itself), *See, e.g.*, *6601 Dorchester Inv. Grp., LLC v. United States*, 154 Fed. Cl. 685, 688 n.2 (2021) citing Dimare Fresh, 808 F.3d at 1306 (on Motion to Dismiss, Court considers "matters incorporated by reference or integral to the claim") *compare F & G Research v. Paten Wireless Tech., Inc.*, No. 2007-1206, 2007 U.S. App. LEXIS 24246, at *5 (Fed. Cir. Oct. 15, 2007)(declining to take judicial notice of party's website only because it was not offered to the district court).

27. Without conceding the Opposer's claim that they own the treedefi.com internet property and code, that code is plainly incorporated by reference in the Amended Notice and publicly listed on the Opposer website (and linked through the "Launch App" function).

28. For these reasons the Applicant respectfully submits that on this Motion to Dismiss, the Board must take judicial notice of the Software Package Data Exchange License for the TreeDeFi, which is the public repository of the "Platform", over whose Mark the Opposer claims ownership.

29. Annexed as Exhibit C of the Castagnone Affidavit, 6 TTABVUE, is a true and accurate screenshot of the SPDX license in the final commit on September 29, 2021, showing the sole license holder of the TreeDeFi platform to be TreeDeFi Ltd., and not any other Party.

30. A direct link to the code for the platform is here: https://bscscan.com/address/0xF2Ad5cACf437a69765eb590271bE86d573CdBF0F#code and a screenshot of

the initial lines showing the License Identifier is available at the Castagnone Affidavit at Exhibit C, available at 6 TTABVUE.

31. For these reasons, the Applicant respectfully submits that the SPDX license showing *sole ownership* of the TreeDeFi platform to be held by TreeDeFi Ltd., to be properly considered on this Motion to Dismiss without converting it into a Motion for Summary Judgment.

32. In addition, annexed as Exhibit A of the supplemental Morosan Affidavit in support of the Motion to Dismiss the First Amended Opposition is a true, accurate and complete printout of the "Terms and Conditions" of <https://treedefi.store/pages/terms>.

33. Annexed as Exhibit B of the Supplemental Morosan Affidavit is a true and accurate printout of the "Terms and Conditions" that is hyperlinked when you click on any item on the Treedefi Store website, to: https://app.termly.io/document/terms-of-use-for-ecommerce/fbf89fc4-4312-41d0-9b11-dfe0f5b59ffb#agreement.

(b) Incorporation by Reference of the Corporate Filings of Hashdev Ltd. and TreeDefi Ltd.

34. Further, the Applicant respectfully submits that the Board may take notice of official government websites that record corporate status. *See e.g.*, *Wells Fargo Bank, N.A. v. Wrights Mill Holdings, LLC*, 127 F.Supp. 3d 156, 166-67 (S.D.N.Y. 2015)(collecting cases where Courts take Notice of filings with Secretary of States in New York, Delaware, California and elsewhere).

35. There is a consistent practice of District Courts taking judicial notice of listings with the United Kingdom Companies House, *See Kaazar Capital Partners Ltd. v. Bactract Techs., LLC*, Case. No. 1:17-cv-02721, 2019 U.S.Dist. LEXIS 246245, n.3 (N.D.Ga. Nov. 1, 2019)(collecting cases nation-wide where Courts took judicial notice of listings with the United Kingdom Companies House).

36. Judicial Notice of this has also been taken in the Federal Circuit of websites maintained by foreign administrative agencies, *See, e.g.*, *United States v. New-Form Mfg. Co.*, 277 F.Supp. 2d 1313, 27 C.I.T. 905 n.14 (C.I.T. 2003)(taking judicial notice of listings on official website of the Office of the Superintendent of Bankruptcy Canada).

37. For these reasons the Applicant respectfully submits that on this Motion to Dismiss, the Board may take judicial notice of the listings with the United Kingdom Companies House for TreeDeFi Ltd, which show the sole owners of that corporation and that the Opposer has no ownership in TreeDefi Ltd.

38. In addition, the Board may take judicial notice of the listings with the U.K. Companies House for Hashdev Ltd., which show that the Opposer has been removed as a "person with significant control" and nothing in the Amended Opposition alleges he has been authorized to act as an agent of Hashdev Ltd.

39. A direct link to the UK Companies House listing for TreeDeFi, Ltd., is here: https://find-and-update.company-information.service.gov.uk/company/13410488.

40. A direct link to the UK Companies House listing for HashDev, Ltd. is here: https://find-and-update.company-information.service.gov.uk/company/14161313.

D. Standard of Review

> "A 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 complaint. In order to withstand such a motion, 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). To survive a motion to dismiss, a complaint must "state a claim to relief that is plausible on its face."
>
> Manual at § 503.02 (notes omitted).

41. This parallels the general *Twombly-Iqbal* standard under which "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). *See also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)("only a complaint that states a plausible claim for relief survives a motion to dismiss.")

42. The Board has confirmed that this Motion is the proper mechanism to dispose of a Notice of Opposition that fails to state a claim. *See, e.g.*, *Miller Brewing Co.*

v. Anheuser-Busch, Inc., 27 U.S.P.Q.2d 1711 (TTAB 1993); *Zirco Corp. v. Am. Telephone and Telegraph Co.*, 21 U.S.P.Q.2d 1542, 1991 WL 332553 (TTAB 1991).

43. As described at length above, the Board accepts well-pleaded factual allegations together with matters incorporated by reference or integral to the claim, items subject to judicial notice, and matters of public record. *Dimare Fresh, Inc.*, *Id.* at 1306; and need not accept Opposer's self-serving allegations at face value when contradicted by documentary evidence incorporated by reference in the Notice of Opposition.

44. For the avoidance of doubt, nothing in this introductory section or the legal argument below is intended as an admission by the Applicant that the claims in the Second Amended Opposition are true. To the contrary, they are rejected entirely by the Applicant.

E. Legal Argument

45. With the factual and legal context provided above, we respectfully submit that the Complaint and public record show that the Second Amended Opposition was filed by the wrong Party for the wrong claim before the wrong forum. Therefore the Second Amended Opposition must be dismissed and with prejudice.

(a.) Opposer Fails to Plausibly Allege that the that Applicant does not own the Mark in Class 042 and did not own the Mark when it filed the '203 Application

46. The Opposer alleges that "Applicant was not the owner of TREEDEFI for the goods identified in Class 42 when it filed the '203 Application", and that "it was

aware that it does not own the TREEDEFI mark for the goods identified in Class 42. Second Amended Notice at ¶¶ 17, 19.

47. The Complaint on its face together with the documents incorporated by reference and material of which this Board may take judicial notice, shows that there are *no allegations that the Applicant does not own the Mark*, and *no allegations that the Applicant did not own the Mark* when it filed the '203 Application.

48. To the contrary, the Opposer expressly that Morosan and Castagnone collaborated in the creation of the treedefi.com website, Second Amended Opposition at ¶ 6.

49. How does the Opposer even make this claim, then? It comes down to the "Agreement" referred to at ¶ 10, Exhibit 1, and the *Conclusione* with translation annexed as Exhibits A and B.

50. But as shown above, following *Broder*, 418 F.3d at 196 and practice across the country, when a claim is based on the terms of a written agreement, the Board must look to the Agreement itself and not the Opposer's self-serving description of the Agreement.

51. The supposed Agreement provides:

> GambleFi agrees to pay $30K to TreeDefi, minus $10K previously paid, and support TreeDefi during the next 3 months with the following expenses:
>
> - Expenses for Ravi developments: $1000 reduction
> - Office rental: $2000/month
> - Reduction of John's salary: $1000 reduction
> - Pailer graphic support: $1000/month

52. That's it.

53. Nothing in the *Conclusione* provides for Opposer to use the Mark exclusively. Nothing in the *Conclusione* provides that the Applicant's owners would leave the project. The *Conclusione* on its face provides no basis to strip Applicant of their rights.

54. If anything, the *Conclusione* confirms that a payment would be made to TreeDefi ("*a TreeDefi*", in the original Italian), which is an acknowledgement of the existence of a corporate form of Treedefi with the rights to the Mark.

55. By way of further context, "GambleFi" which is the party that undertook obligations under the *Conclusione* was never formally incorporated or an entity that could distribute funds directly to TreeDefi. What "GambleFi" refers to is a proposed joint venture between Castagnone and Morosan (the sole owners of TreeDefi Ltd.) that offered operational support to the TreeDefi project. *See* Supplemental Morosan Affidavit – again not necessary for the record but helps provide context of how the *Conclusione* conclusively voids any potential claim by the Opposer.

56. Simply put: notwithstanding the Opposer's self-serving description of the Agreeemnt, a review of the *Conclusione* itself shows nothing that transfers ownership of the Trademark to the Opposer; and it says nothing about the Applicant "leaving" the project.

57. *To the contrary!* The Agreement on its face says that the Applicant provided funds to maintain the project, to remain part of the project, and not to surrender any ownership, control or rights to the Mark.

58. The second factual basis for the claim that the Opposer owns the mark are two random context-less excerpts from conversations, *See* Second Amended Opposition at Exhibit 1.

59. Additionally, without the original document in evidence, a translation of this sort is pure hearsay and inadmissible for consideration even at the Motion to Dismiss stage. All the reasons for the best evidence rule apply doubly here.

60. Further, the exhibits provides no context, no information about the original document, no information about who translated the document (including their qualifications, their possible conflict of interest, or other information), no explanation for what excerpts were chosen and excluded, and there is no basis for the Court to treat the self-described excerpts as anything but self-serving hearsay and it should not be part of the record for this Motion to Dismiss.

61. Further, the self-described "excerpt" indicates that it covers several seconds of conversation beginning at "00:12:37"; and a 90 second conversation beginning at "00:13:40" through "00:15:13".

(i.) At no time does the excerpt show when the conversation began or end.

(ii.) It does not show the context of the conversation, including whether it was part of an effort

(iii.) to settle a disputed matter. It does not show whether the conversation reached any conclusion about the arrangement.

(iv.) And most importantly – it does not show that the Applicant and the Opposer reached any agreement related to the intellectual property at issue here.

62. In summary: the Opposer themselves admit that the Applicant was an owner of the intellectual property. And nothing in the *Conclusione* nor the short, context-free, excerpt of a longer conversation describes any agreement to grant ownership of the Mark to the Opposer or that the Applicant's owners abandoned the project.

63. And to the extent that the Opposer argues that their naked allegations (supported by no evidence, and indeed contradicted by the evidence) supports the existence of an agreement to transfer ownership of the Mark to the Opposer, these bare allegations are insufficient to survive a Motion pursuant to Rule 12(b)(6).

64. Courts consistently dismiss Complaints under Rule 12(b)(6) where allegations about an oral agreement fail to show "an intent to be bound, . . . all material terms, and must not be vague or definite." *Meehan v. Office Prods. Co.*, 251 F.Supp. 2d 77 (D.D.C. 2003)(collecting cases).

65. To focus on the insufficiency of the "all material terms" requirement: The Second Amended Notice contains no allegations that the supposed agreement provided the conditions under which a party to the Agreement may or may not register the Mark – a detail that is extremely material in interpreting its terms. The Second Amended Notice makes no allegation about any dispute resolution process, if any, and whether there is an arbitration clause, a pre-filing mediation requirement, or the designation of a jurisdiction for resolution of disputes related to the ownership of the Mark and other intellectual property.

66. We respectfully submit that the Second Amended Opposition at ¶ 10, the *Conclusione* and context-free excerpt of a translation are simply not enough to allege the existence of a contract, let alone one that transferred ownership to the Opposer. The Opposer's vague and conclusory presentation is a classic "recital of the elements" that cannot substantiate any Opposition to the Application. Opposer's self-serving legal conclusion that "Applicant did not have any rights to file a trademark application for TREEDEFI" – a claim that is contradicted by the Complaint itself – cannot get this Opposition past a Motion to Dismiss, *Twombly*, 550 U.S. at 555; *Iqbal*, 556 US at 678.

67. In addition, the pleadings show that Applicant clearly had ownership (as the sole license holder) of the Mark around the time of the '203 application. Annexed as Exhibit C of the Castagnone Affidavit, 6 TTABVUE, is a true and accurate screenshot of the SPDX license in the final commit on September 29, 2021, showing the sole license holder of the TreeDeFi platform to be TreeDeFi Ltd., and not any other Party.

68. A direct link to the code for the platform is here: https://bscscan.com/address/0xF2Ad5cACf437a69765eb590271bE86d573CdBF0F#code

69. A screenshot of the initial lines showing the License Identifier is available at the Castagnone Affidvit at Exhibit C, available at 6 TTABVUE. For these reasons, the Applicant respectfully submits that the SPDX license showing *sole ownership* of the TreeDeFi platform to be held by TreeDeFi Ltd.

70. In summary, even granting the Opposer every benefit of the doubt, and interpreting the Opposition in a light most favorable for the Opposer there is no and can be no allegation that the Opposer has been granted ownership of the Mark. Rather, its

is clear that Applicant owned the Mark in Class 42 and owned it as of August 13, 2021 when the ‘203 application was filed.

71. For these reasons, the Applicant respectfully submits that the Second Amended Opposition should be dismissed and with prejudice.

(b) **Response to Opposer's Claim of Applicant's lack of use of the Mark on goods identified in Class 042**

72. Opposer makes the naked and unsupported assertion that "Upon information and belief, when Applicant filed the '203 Application it was not using the TREEDEFI mark in commerce, including on the goods identified in Class 42." Second Amended Notice at ¶14.

73. But Applicant was using the TREEDEFI mark in commerce, including on the goods identified in Class 42, at the time of, and prior to, filing the '203 Application. As shown above in paragraph 6, for the Class 042 Application was submitted under Section 1(a) and claimed first use on March 27, 2021 and first use in commerce on April 1, 2021.

74. Further, in support of the Application, the Applicant submitted its website, namely: <https://treedefi.com/>, and a screenshot of the website as of August 13, 2021, showing use of the Mark on goods identified in Class 042.

(c) Response to Opposer's Claim of Applicant's bona fide intent to use the Mark in commerce for the goods in Class 009

75. Opposer attempts to engage in mind-reading games, arguing that Applicant somehow did not have a bona fide intent to use the Mark in commerce for the goods in Class 009.

76. The date for the first use of the Mark for the goods in Class 009 is in March 2023. (See ¶11 above).

77. And in terms of future intent, Opposer makes conclusory statements that Applicant lacked a bona fide intent to use the goods identified in Class 009. Second Amended Notice ¶¶ 18, 21. The sole allegations that arguably might conceivably support of the lack of bona fide intent is at Second Amended Notice ¶¶ 16, 17, where the Opposer alleges upon information and belief:

> "when Applicant filed the '203 Application, it was aware that Opposer had rights in the TREEDEFI mark" and "…when Applicant filed the '203 Application, it was aware that it did not own the TREEDEFI mark for the goods identified in Class 42."
>
> Second Amended Notice ¶¶ 16, 17

78. This mind-reading exercise of the Applicant's future intent is based solely on the supposition that the Opposer had sole rights to use the Mark, and the Applicant knew (or should have known) they had no rights.

79. For the reasons described above, that's inconsistent with the evidence.

80. The record shows that Applicant had a good faith basis to believe that it owned and continues to own rights to the Mark and therefore the mind-reading exercise failed. We respectfully submit that the Board must take the Applicant's intent to use at face value.

81. For these reasons, the Applicant respectfully submits that the Opposition should be dismissed and with prejudice.

F. Conclusion

82. As described in this Motion, the standard for consideration of an Opposition are informed by § 503 of the Manual and *Twombly-Iqbal* line of cases. They require more than conclusions of law and recital of the elements of relevant claims, but allegations that support a claim – and in a fraud claim, to make those allegations with specificity.

83. We respectfully submit that applying the standard of review to the record before the Board, requires the dismissal of the Second Amended Opposition with prejudice because: the Opposer's own websites claim that the owner of the website is Hashdev Ltd., and not the Opposer; there is no plausible allegation that the Mark belongs to Opposer or that the Applicant has not used it for Class 009; there is no plausible allegation that Applicant had no intent to use the Mark for Class 042; and there is no specific allegation to support claim of Fraud on the USPTO.

84. For these reasons, the Applicant respectfully submits that the Opposition must be dismissed with prejudice.

Dated: **October 30, 2023**

RESPECTFULLY SUBMITTED,

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