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

Proceeding no.	91282337
Party	Defendant MD Audio Engineering, Inc.
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**UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Murvin D. Persuad
Opposer,

v.

Opposition No. 91282337

MD Audio Engineering, Inc.
Applicant,

_____)

**APPLICANT’S MOTION TO DISMISS
OPPOSER’S SECOND AMENDED NOTICE OF OPPOSITION**

Applicant, MD Audio Engineering, Inc. (“Applicant”), moves to dismiss the Second Amended Notice of Opposition (17 TTABVUE) filed by Opposer, Murvin D. Persuad (“Opposer”), for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) or, alternatively, moves for a more definite statement under Rule 12(e), and in support states as follows:

I. INTRODUCTION

On December 15, 2022, Opposer filed a Notice of Opposition (1 TTABVUE) objecting to the registration of Applicant’s mark application (U.S. Serial No. 88501889) for MD AUDIO ENGINEERING (the Opposed Mark), which it then amended the following day (5 TTABVUE). The purported claims raised in the Notice of Opposition were insufficiently pled and Applicant moved to dismiss for failure to state a claim. The Board granted Applicant’s motion to dismiss but allowed Opposer leave to file a second amended Notice of Opposition. 16 TTABVUE.

On June 8, 2023, Opposer filed an amended Notice of Opposition¹. 17 TTABVUE. Opposer's Notice of Opposition should be dismissed because it is insufficiently pled and Opposer has not stated a cause of action for an opposition. It is rather a vague recitation of irrelevant patent decisions and secondary references.

II. ARGUMENT

To properly state a claim upon which relief can be granted, a plaintiff (here, Opposer) must allege "sufficient factual content that, if proved, would allow the Board to conclude, or to draw a reasonable inference, that (1) the plaintiff has standing to maintain the proceeding, and (2) a valid ground exists for opposing or cancelling the registration." *Dragon Bleu (SARL) v. VENM, LLC*, 112 U.S.P.Q.2d 1925, 1926 (TTAB 2014); *Order of Sons of Italy in Am. v. Profumi Fratelli Nostra AG*, 36 USPQ2d 1221, 1222 (TTAB 1995); and TBMP § 503.02. Specifically, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). 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. 662, (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

1. Opposer's claims are improper.

Opposer states he is "filing an amended motion to cancel under 2016 Fraud, Inequitable Conduct, or Violation of Duty of Disclosure Affects All Claims [R-09.2017]. 17 TTABVUE 2. This is a citation to §2016 of the Manual of Patent Examining Procedure. The Trademark Trial

¹While Applicant refers to the document as notice of opposition, the document is actually titled by Opposer as an Amended Petition to Cancel.

and Appeal Board does not have jurisdiction over claims relating to fraud with respect to patents. Nor is there a patent involved in this opposition.

2. Opposer's grounds are not sufficiently pled.

Opposer's Notice of Opposition fails to set forth any factual allegations much less any to plausibly support any grounds for relief to prevent the registration of the Opposed Mark.

In order to properly plead a claim of fraud in a trademark proceeding, an opposer must allege with particularity that the applicant knowingly made a false, material misrepresentation when applying for a trademark registration, or when renewing a registration, with intent to deceive the USPTO. *See Dragon Bleu (SARL) v. VENM, LLC*, 112 U.S.P.Q.2d 1925, 1926 (TTAB 2014); *Enbridge Inc. v. Excelerate Energy LP*, 92 USPQ2d 1537, 1540 (TTAB 2009); *see also Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 91 USPQ2d 1656, 1668 (Fed. Cir. 2009) (allegation of fraud on the USPTO “must include sufficient allegations of underlying facts from which a court may reasonably infer that a specific individual (1) knew of the withheld material information or of the falsity of the material misrepresentation, and (2) withheld or misrepresented this information with a specific intent to deceive the PTO”). And Applicant must allege 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).

Here, Opposer's Notice of Opposition is utterly devoid of facts—it consists entirely of citations to irrelevant case law. And it is readily apparent that Opposer has not pled which representations by Applicant were allegedly false nor material and likewise has failed to plead facts to support that Opposer intended to deceive the USPTO.

3. Opposer's allegations are indefinite.

Under the pleading rules followed by the courts and the Board, claims must be separately stated. Fed. R. Civ. P. 10(b). TBMP § 309.03(a)(2) further provides, "All averments should be made *in numbered paragraphs*, the contents of each of which should be limited as far as practicable to a statement of a single set of circumstances. Each claim founded upon a separate transaction or occurrence should be stated *in a separate count* whenever a separation would facilitate the clear presentation of the matters pleaded." TBMP 309.03(a)(2)(emphasis added). *See also Isle of Aloe, Inc. v. Aloe Creme Laboratories, Inc.*, 180 USPQ 794, 794 (TTAB 1974) (while paragraphs were numbered, none of the paragraphs were limited to a statement of a single set of circumstances); *Wise F&I, LLC v. Allstate Ins. Co.*, 120 USPQ2d 1103, 1107 n.9 (2016) (where opposer set forth a single set of broad allegations regarding pleaded marks and registrations, Board directed opposer, if amended notices of opposition were filed, to set forth each pleaded mark and registration in a separate paragraph so that Applicant could separately admit or deny the allegations with respect to each mark and registration); *O.C. Seacrets Inc. v. Hotelplan Italia S.p.A.*, 95 USPQ2d 1327, 1329 (TTAB 2010) ("claims must be separately stated We will not parse an asserted ground to see if any of the elements that go to pleading that ground would independently state a separate ground").

Here, Opposer's paragraphs are not numbered nor limited to single statements for each circumstance. Instead, Opposer's notice consists entirely of quotations and citations to case law. Plain and concise statements in consecutively numbered paragraphs are necessary in order to provide sufficient notice to Applicant of the claims and relief sought, as well as to be able to adequately respond to what is being alleged.

4. Related cancellation proceeding was terminated.

In his amended Notice, Opposer ends with a request for the USPTO to reinstate his trademark MD AUDIO. However, that cancellation proceeding² has been terminated and Opposer's request for reconsideration was denied—accordingly, Applicant's mark registration remains properly cancelled.

III. CONCLUSION

Because Opposer's Notice of Opposition is insufficiently pled and Opposer's intent is merely to delay and obstruct the Applicant in this case. Applicant's Motion to Dismiss should be granted and the notice of opposition dismissed with prejudice.

Dated: July 12, 2023,

Respectfully submitted,

/s/ Jesus Sanchelima

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² Cancellation No. 92074565

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing document has been served on Opposer by forwarding said copy on July 12, 2023, via email to:

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By: /s/ Jesus Sanchelima
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