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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 NOTICE OF OPPOSITION

Applicant, MD Audio Engineering, Inc. (“Applicant”), moves to dismiss the (Amended) Notice of Opposition (5 TTABVUE and 1 TTABVUE 7-12) 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

Opposer’s Notice of Opposition should be dismissed because it is insufficiently pled and Opposer has not stated a plausible claim for relief. Opposer’s unnumbered and poorly organized allegations are difficult to parse through and ultimately fall below the required federal and Board pleading standards.

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. In the cover page for the filing, the following grounds were listed: (1) priority and likelihood of confusion under Section 2(d) of the Trademark Act; (2) Applicant not rightful

owner of mark under Section 1; (3) deceptiveness under Section 2(a); and (4) fraud on the PTO. On December 16, Opposer filed an Amended Notice of Opposition (5 TTABVUE), which seems to be substantially similar to the original but missing the exhibits¹. The mark cited by Opposer as the basis for the opposition is the (currently cancelled) MD AUDIO (U.S. Reg. No. 5763880) for audio and related electronic equipment (among other goods).

By way of background, prior to the commencement of the present opposition proceeding, the parties were involved in a cancellation proceeding (No. 92074565). On June 25, 2020, after Applicant's mark application for (U.S. Serial No. 88501889) for MD AUDIO ENGINEERING was rejected under Section 2(d) of the Lanham Act by the USPTO, Applicant filed a petition for cancellation against Opposer's mark registration for MD AUDIO (U.S. Reg. No. 5763880) based on priority and likelihood of confusion. The Board granted a motion to compel discovery after Opposer failed to respond to Applicant's discovery requests. And later granted a motion for discovery sanctions as Opposer failed to respond to either motion or serve discovery responses. Default judgment was entered and Opposer's mark registration was cancelled on August 3, 2022. Opposer filed a motion for relief from judgment on October 14 (for which service was effected on December 20 by the Board), which remains pending.

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.*

¹ Applicant notes that the Board stated, "The exhibits to the amended notice of opposition that were filed as part of the original notice of opposition (1 TTABVUE 7-12; 4 TTABVUE 2) will be considered as part of the amended notice of opposition."

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 grounds are not sufficiently pled.

Opposer’s Notice of Opposition fails to set forth sufficient factual allegations to plausibly support the grounds for relief it originally identified in the Notice, or any claim under which 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 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.

As for deceptiveness under Section 2(a), the Board applies a three-part test: (1) is the term misdescriptive of the character, quality, function, composition or use of the goods? (2) If so, are prospective purchasers likely to believe that the misdescription actually describes the goods? (3) If so, is the misdescription likely to affect a significant portion of the relevant consumers' decision to purchase? *In re White Jasmine LLC*, 106 USPQ2d 1385 (TTAB 2013)(citing *In re Budge Mfg. Co.*, 857 F.2d 773, 8 USPQ2d 1259, 1260 (Fed. Cir. 1988). Opposer has not pled any allegations as to how the opposed mark is deceptive, whether or why purchasers are likely to be misled, or how it would affect purchasing decisions.

And in order to state a claim under Section 2(d) of the Trademark Act, a party must allege (1) priority and (2) likelihood of confusion. *See Herbko International, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1161-62 (Fed. Cir. 2002). While Opposer appears to have made some statements concerning his use of the mark MD AUDIO, no facts have been alleged as to likelihood of confusion.

2. 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 of a stream of consciousness, hodgepodge of allegations—most of which are entirely irrelevant like Opposer's attempts to contact Senator Marco Rubio or Applicant's ownership of other mark registrations—that are difficult to understand. Applicant does not know how to even begin to admit or deny the allegations in the operative notice. 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.

III. CONCLUSION

Because Opposer's Notice of Opposition is insufficiently pled, Applicant's Motion to Dismiss should be granted and the notice dismissed.

Dated: January 10, 2023,

Respectfully submitted,

/s/ Jesus Sanchelima

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing document has been served on Petitioner by forwarding said copy on January 10, 2023, via email to:

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