

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500
General Email: TTABInfo@uspto.gov

WINTER

December 28, 2018

Opposition No. 91241083

Rebecca Curtin

v.

United Trademark Holdings, Inc.

Before Lykos, Kuczma, and Heasley,
Administrative Trademark Judges.

By the Board:

This case now comes up for consideration of Applicant's fully briefed renewed motion (filed July 25, 2018) to dismiss Opposer's amended notice of opposition.

We have considered the parties' briefs on the contested motion, but do not repeat or discuss all of the arguments. *Guess? IP Holder LP v. Knowlux LLC*, 116 USPQ2d 2018, 2019 (TTAB 2015). For purposes of this order, we presume the parties' familiarity with the pleadings and the parties' arguments made in connection with the subject motion.

Applicant's First Motion to Dismiss Moot

A plaintiff may amend its complaint once as a matter of course within 21 days after service of a motion under Rule 12(b). Fed. R. Civ. P. 15(a)(1)(B). Thus, the party in position of plaintiff in a proceeding before the Board ordinarily can respond to a

motion to dismiss by filing an amended complaint. Insofar as Opposer filed her amended notice of opposition within 21 days of Applicant's first motion to dismiss, the Board accepts Opposer's amended notice of opposition as her operative pleading. Accordingly, we will consider the subject motion to dismiss solely with respect to Opposer's amended pleading, and determine whether that pleading includes sufficient allegations for standing and proper claims. *See Dragon Bleu (SARL) v. VENM, LLC*, 112 USPQ2d 1925, 1926 (TTAB 2014) (the first motion to dismiss deemed moot and the second motion to dismiss was considered solely with respect to the amended counterclaim); *Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1537 (TTAB 2007).

Applicant's Renewed or Second Motion to Dismiss

Applicant requests that the Board dismiss the amended notice of opposition because Opposer, assertedly, has no standing to pursue the opposition. Specifically, Applicant argues that Opposer has failed to allege that she is a competitor in the doll and toy figure industry, or that she has any other "direct stake in using Applicant's RAPUNZEL mark in a descriptive or generic manner" (8 TTABVUE 4). In view thereof, contends Applicant, Opposer has failed to allege a "real interest" and "reasonable belief in damage," *i.e.*, one that is not wholly without merit. Because Opposer has not set forth sufficient allegations for standing, Applicant argues, all of Opposer's pleaded claims fail. Additionally, Applicant asserts that Opposer's claim under Trademark Act Section 2(e)(5) fails to state a claim upon which relief can be granted because that section is not applicable to standard character marks.

- **Legal Standard**

A motion to dismiss under Rule 12(b)(6) is a test of the sufficiency of the complaint. *Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc.*, 988 F.2d 1157, 26 USPQ2d 1038, 1041 (Fed. Cir. 1993); *Covidien LP v. Masimo Corp.*, 109 USPQ2d 1696, 1697 (TTAB 2014). To survive a motion to dismiss, a plaintiff need only allege sufficient factual content that, if proved, would allow the Board to conclude, or to draw a reasonable inference, that (1) the plaintiff has standing to maintain the proceeding, and (2) a valid ground exists for denying the registration sought or for cancelling the involved registration. *See Doyle v. Al Johnson's Swedish Restaurant & Butik Inc.*, 101 USPQ2d 1780, 1782 (TTAB 2012) (citing *Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998)); *see also Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 187 (CCPA 1982). In other words, the Board determines whether Opposer's belief "is not wholly without merit." *See Lipton*, 213 USPQ at 189. Further, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In particular, the plaintiff 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," to state a claim plausible on its face. *Id.* (citing *Twombly*, 550 U.S. at 555). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged. *See Twombly*, 550 U.S. at 556-57.

However, the plausibility standard does not require that a plaintiff set forth detailed factual allegations. *Id.* Rather, a plaintiff need only allege “enough factual matter ... to suggest that [a claim is plausible]” and “raise a right to relief above the speculative level.” *Totes-Isotoner Corp. v. U.S.*, 594 F.3d 1346, 1354 (Fed. Cir. 2010). Moreover, it is well established that whether a plaintiff can actually prove its allegations is not a matter to be determined upon motion to dismiss, but rather at final hearing or upon summary judgment, after the parties have had an opportunity to submit evidence. *See Libertyville Saddle Shop Inc. v. E. Jeffries & Sons, Ltd.*, 22 USPQ2d 1994, 1597 (TTAB 1992) (“A motion to dismiss does not involve a determination of the merits of the case...”).

For purposes of determining a motion to dismiss, all of the plaintiff’s well-pleaded allegations must be accepted as true, and the complaint must be construed in the light most favorable to the plaintiff. *See Advanced Cardiovascular Systems Inc.*, 26 USPQ2d at 1041; *Petroleos Mexicanos v. Intermix SA*, 97 USPQ2d 1403, 1405 (TTAB 2010). Furthermore, “[u]nder the simplified notice pleading of the Federal Rules of Civil Procedure, the allegations of a complaint should be construed liberally so as to do substantial justice.” *Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1538 (TTAB 2007).

Additionally, with respect to the subject motion, we note that Opposer submitted evidence with her brief in response, *viz.*, a printout of comments from an on-line petition called “Free Rapunzel from the Trademark Tower” (10 TTABVUE 19 *et seq.*).

These materials were submitted outside the pleadings¹ to show that there is a reasonable, objective basis for Opposer's belief in harm should a registration issue for the applied-for mark. Inasmuch as the materials do not constitute matter of which we may take judicial notice, the exhibit is excluded from consideration in determining the sufficiency of Opposer's allegations. *See Internet Inc. v. Corp. for Nat'l Research Initiatives*, 38 USPQ2d 1435, 1436 (TTAB 1996) (materials submitted in response to motion to dismiss excluded). Also, although we have considered the exhibits attached to Opposer's amended notice of opposition for the purpose of ascertaining the plausibility of Opposer's allegations,² they do not affect our decision.

- **Standing**

Standing is a threshold issue that must be proven by the plaintiff in every inter partes case. *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014), *cert. denied*, 135 S. Ct. 1401 (2015). The Board's primary reviewing court, the U.S. Court of Appeals for the Federal Circuit, has enunciated a liberal threshold for determining standing, namely that "[a] petitioner

¹ We do not treat Applicant's motion as one for summary judgment, which would allow us to consider such evidence. *See Compagnie Gervais Danone v. Precision Formulations LLC*, 89 USPQ2d 1251, 1255 (TTAB 2009). ("In inter partes proceedings commenced after November 1, 2007, a party may not file a motion for summary judgment under Trademark Rule 2.127(e)(1) until the party has made its initial disclosures, except for a motion asserting claim or issue preclusion or lack of jurisdiction by the Board."). Here, there is no record that initial disclosures were served by either party; the disclosures were not due until two months after the filing of the first motion to dismiss.

² *See* Fed. R. Civ. P. 10(c); Trademark Rule 2.116(a). *Cf. In re Bill of Lading Transmission and Processing System Patent Litigation*, 681 F.3d 1323, 103 USPQ2d 1045, 1055 (Fed. Cir. 2012) ("district court was required to analyze the facts plead in the amended complaints and all documents attached thereto with reference to the elements of a cause of action").

is authorized by statute to seek cancellation of a mark where it has both a real interest in the proceeding as well as a reasonable basis for its belief of damage.” *Id.* at 1062³ (citing *Ritchie v. Simpson*, 170 F.3d 1902, 50 USPQ2d 1023, 1025-26 (Fed. Cir. 1999)); *see also* *Coach Services Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1727 (Fed. Cir. 2012). A “real interest” is a “direct and personal stake” in the outcome of the proceeding. *Ritchie v. Simpson*, 50 USPQ2d at 1026. Under the “real interest” requirement, a plaintiff must have “a legitimate personal interest in the opposition.” With respect to the second inquiry, the plaintiff’s belief of damage “must have a reasonable basis in fact.” *Coach Servs. v. Triumph Learning*, 101 USPQ2d at 1727 (internal citations omitted); *see generally* 3 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 20:7 (5th ed. & Nov. 2018 update).

Turning to the amended notice of opposition, Opposer alleges the following (7 TTABVUE 16-17) (Board emphasis):

11. **Opposer**, Rebecca Curtin, is a professor of law teaching trademark law, and **is also a consumer who participates amongst other consumers in the marketplace for dolls and toy figures of fairytale characters, including Rapunzel**. Opposer is a **mother of a young girl who has purchased and continues to purchase dolls, including fairy tale dolls**. As such, Opposer has a legitimate interest in the outcome of this proceeding. By allowing an individual private company to trademark the name of a famous fairy tale character in the public domain, **Opposer and other consumers will be denied access** to healthy marketplace competition for products that represent the well-known fictional character. **Opposer and other consumers will also likely face an increased cost of goods associated with Rapunzel merchandise, given the lack of competition**. Opposer

³The linguistic and functional similarities between the opposition and cancellation provisions of the Trademark Act mandate that we construe the requirements of these provisions consistently. *Young v. AGB*, 47 USPQ2d at 1755.

believes that a trademark registration in the fairy tale character's name for dolls could chill the creation of new dolls and toys by fans of the fairy tale, crowding out the substantial social benefit of having diverse interpreters of the fairy tale's legacy. **Opposer and other consumers will also be denied access to classic, already existing, Rapunzel merchandise whose sale may be precluded if Applicant receives a registration for the name "Rapunzel."**

12. Further, Opposer is a member of a community of purchasers of fairy tale dolls and toys that will be similarly damaged by registration of the subject application. Opposer believes that this community includes hundreds of people who purchase fairy tale dolls and toys that will potentially be damaged if the subject mark is registered. Opposer has documented contact with several organizations and interest groups which have expressed their belief that allowing the subject mark to be registered would cause damage. Opposer has also obtained more than 171 petition signatures from other individual consumers who share Opposer's belief, with 157 of those petition signers residing in the United States. *See Exhibit B attached hereto.* A number of the signatures include a statement about the damage that would result from allowing the subject mark to be registered ..."

Thus, Opposer alleges that she is a consumer of dolls and toy figures of fairytale characters, including "Rapunzel," that she has purchased and continues to purchase said goods, and that registration of the applied-for mark by Applicant would constrain the marketplace of such goods sold under the name "Rapunzel," raise prices of "Rapunzel" dolls and toy figures, and deny consumers, such as herself, the ability to purchase "Rapunzel" dolls offered by other manufacturers.⁴ In view thereof, the Board finds that Opposer has sufficiently alleged that she has a direct and personal stake in the outcome of the proceeding and that her belief of damage has a reasonable basis in fact. Insofar as Opposer has alleged that she has purchased and continues to

⁴ The Board has noted that "other doll makers interested in marketing a doll that would depict the character [LITTLE MERMAID] have a competitive need to use that name to describe their products." *In re United Trademark Holdings, Inc.*, 122 USPQ2d 1796, 1800 (TTAB 2017).

purchase goods identified by the names of fairytale characters, the Board is not persuaded by Applicant's contention that Opposer has not differentiated herself from "any other **potential** consumer of dolls" (8 TTABVUE 3) (Board emphasis). Moreover, although being a competitor who needs to use a particular designation to describe its own goods is a well-established basis for alleging and proving standing—*see, e.g., Sheetz of Delaware, Inc. v. Doctors Associates Inc.*, 108 USPQ2d 1341 (TTAB 2013); *Duramax Marine LLC v. R.W. Fernstrum & Co*, 80 USPQ2d 1780, 1787 (TTAB 2006); *Plyboo Am. Inc. v. Smith & Fong Co.*, 51 USPQ2d 1633, 1634 n. 5 (TTAB 1999)—Opposer is not required to allege that she is a competitor in the doll and toy figure industry to support her claims that the applied-for mark fails to function as a trademark, or is merely descriptive of or generic for the identified goods. *Cf. Jewelers Vigilance Committee Inc. v. Ullenberg Corp.*, 823 F.2d 490, 2 USPQ2d 2021, 2024 (Fed. Cir. 1987) ("JVC must have alleged an adverse [e]ffect on its own interests or those of its members which will result from the issuance of the registration to [the defendant]," finding that a trade association "may maintain an opposition ... without asserting that it ... has an interest in using the alleged mark sought to be registered by an applicant" insofar as "the Lanham Act 'requires only a belief of damage resulting from the applicant's registration, and while that belief must have some reasonable basis in fact, this statutory provision ... has been liberally construed") (internal citation omitted).

As the Federal Circuit has stated, "In no case has this court ever held that one must have a specific commercial interest, not shared by the general public, in order

to have standing as an opposer. Nor have we ever held that being a member of a group with many members is itself disqualifying. The crux of the matter is not how many others share one's belief that one will be damaged by the registration, but whether that belief is reasonable and reflects a real interest in the issue." *Ritchie v. Simpson*, 50 USPQ2d at 1027 (citing 15 U.S.C. § 1063). Consumers, like competitors, may have a real interest in keeping merely descriptive or generic words in the public domain, "(1) to prevent the owner of a mark from inhibiting competition in the sale of particular goods; and (2) **to maintain freedom of the public to use the language involved**, thus avoiding the possibility of harassing infringement suits by the registrant against others who use the mark when advertising or describing their own products." *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 217 (CCPA 1978) (internal citation omitted) (Board emphasis). Hence, members of the consuming public may have a real interest in preventing exclusive appropriation of merely descriptive or generic terms by trademark owners. Therefore, if Opposer is able to prove her allegations on summary judgment or at trial, Opposer's allegations indicate that she is not a mere intermeddler, that she has a real interest in this case, and that she has alleged a reasonable basis for her belief in damage resulting from Applicant's registration of the applied-for mark. Additionally, because Opposer has sufficiently alleged standing to pursue her claims that RAPUNZEL is merely descriptive of the identified goods, Opposer has the right to assert any other grounds in the opposition. *Corporacion Habanos SA v. Rodriquez*, 99 USPQ2d 1873, 1877 (TTAB 2011).

- **Opposer’s Claim under Section 2(e)(5) of the Trademark Act, 15 U.S.C. § 1052(e)(5)**

Section 2(e)(5) of the Trademark Act, 15 U.S.C. § 1052(e)(5), bars registration of a mark that comprises any matter that, as a whole, is functional. Examples include grit-indicating color stripes on abrasive disks, *see, e.g., Saint Gobain Abrasives, Inc. v. Unova Indus. Autom. Sys., Inc.*, 66 USPQ2d 1355 (TTAB 2003), or the design or configuration of a product, such as a “dual-spring design” mechanism for road signs, *see, e.g., TrafFix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23, 58 USPQ2d 1001, 1007 (2001). Thus, Trademark Act Section 2(e)(5) has no bearing on an application to register a word mark. *See, e.g., Grote Industries, Inc. v. Truck-Lite Co., LLC*, 126 USPQ2d 1197, 1202 (TTAB 2018) (a product design or product feature is considered to be functional “if it is essential to the use or purpose of the article or if it affects the cost or quality of the article”) (citing *TrafFix Devices Inc.*, 58 USPQ2d at 1006 (internal citations omitted)); *Kohler Co. v. Honda Giken Kogyo K.K.*, 125 USPQ2d 1468, 1488 (TTAB 2017) (“Section 2(e)(5) ... prohibits registration of ‘a mark which ... comprises any matter that, as a whole, is functional’ ... The functionality doctrine prevents trademark law, ... from instead inhibiting legitimate competition by allowing a producer to control a useful product feature”) (citing *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1163-64 (1995)).

Insofar as the applied-for mark, RAPUNZEL, is merely a word mark, Section 2(e)(5) is not a proper ground for refusing registration. Accordingly, Applicant’s motion to dismiss Opposer’s claim under Section 2(e)(5) of the Trademark Act is **GRANTED**, and that claim is **dismissed with prejudice**.

- **Opposer's Fraud Claim**

Although not mentioned by Applicant in its motion to dismiss, the amended pleading also includes a fraud claim (7 TTABVUE 18). *See NSM Resources Corp. v. Microsoft Corp.*, 113 USPQ2d 1029, 1039 n.19 (TTAB 2014) (Board may *sua sponte* dismiss any insufficiently pleaded claim); *Musical Directions v. McHugh*, 104 USPQ2d 1157, 1160 (TTAB 2012) (the Board *sua sponte* reviewed opposer's pleading, determined that certain claims were insufficiently pleaded, and allowed opposer time to file and serve an amended pleading which properly set forth those claims, failing which those claims would be dismissed).

"Fraud in procuring a trademark registration or renewal 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) (citations omitted); *see also In re Bose Corp.*, 580 F.3d 1240, 91 USPQ2d 1938, 1939 (Fed. Cir. 2009); *Harry Winston, Inc. v. Bruce Winston Gem Corp.*, 111 USPQ2d 1419, 1432 (TTAB 2014). To plead a claim of fraud on the USPTO, a plaintiff must allege with sufficient factual specificity in compliance with Fed. R. Civ. P. 9(b) that (1) the defendant made a false representation to the USPTO; (2) the false representation is material to the registrability of the mark; (3) the defendant had knowledge of the falsity of the representation; and (4) the defendant made the representation with intent to deceive the USPTO. *In re Bose Corp.*, 91 USPQ2d at 1941.

Opposer's fraud claim is composed of the following allegations:

14. [U]pon information and belief, the name “Rapunzel” has been associated with dolls and toys depicting the well-known fairy tale figure since at least as early as 1890, and continually since that time ... the Rapunzel name has existed in the public domain as a generic descriptor of a specific fairy tale princess (including on toys and dolls) for numerous decades ...

15. Upon information and belief, Applicant’s statement in the opposed application that “no other persons ... have the right to use the mark in commerce, either in the identical form or in such 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” is a false representation.

16. Upon information and belief, Applicant’s false representation identified above is material to the registrability of the mark at issue.

17. Upon information and belief, Applicant knew that the statement identified above was false at the time Applicant filed [the application].

18. Applicant made the false statement identified above with the intent to deceive the United States Patent and Trademark Office.

Opposer’s fraud claim is insufficiently pleaded because, with respect to her allegation that “upon information and belief, Applicant knew that the statement identified above was false at the time Applicant filed [the application],” Opposer has not set forth allegations of “specific facts upon which the belief is reasonably based.” *See Asian and Western Classics B.V. v. Selkow*, 92 USPQ2d 1478, 1479 (TTAB 2009). Accordingly, Opposer’s fraud claim is **stricken**. *See* Fed. R. Civ. P. 12(f); Trademark Rule 2.116(a).

- **Opposer’s Claim that the term RAPUNZEL is Generic**

Opposer alleges that “[t]he relationship of the name Rapunzel to the goods in the case of Rapunzel dolls is so close that it is the generic name for dolls bearing the description of the fairytale character” (amended not. of opp., ¶ 9) (7 TTABVUE 15); and that “the public knows Rapunzel as the character name of a fictional fairy tale

character, not as a source indicator.” (*Id.*). To the extent that Opposer intends to allege a claim that the mark RAPUNZEL is generic for Applicant’s goods, the allegations fail to state a claim upon which relief can be granted.

To sufficiently plead a claim that a mark is the generic name or adjective for the identified goods or services, the plaintiff must allege that (i) the wording at issue is widely used generically to identify the genus of goods or services identified in the opposed application, and that (ii) consumers primarily understand the wording to be the generic name or identifier of or adjective for the genus of goods or services. *See H. Marvin Ginn Corp. v. Int’l Ass’n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986); *see also Royal Crown Co., Inc. v. The Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1047 (Fed. Cir. 2018) (Board must consider whether term is generic because it refers to a key aspect or a sub-group of the identified goods); *Magic Wand, Inc. v. RDB, Inc.*, 940 F.2d 638, 19 USPQ2d 1551, 1552 (Fed. Cir. 1991) (internal citation omitted) (“... a proper genericness inquiry focuses on the description of services [or goods] set forth in the [application or] certificate of registration”); *Miller Brewing Co. v. G. Heileman Brewing Co., Inc.*, 561 F.2d 75, 195 USPQ 281, 285 (7th Cir. 1977); *Sheetz of Delaware, Inc. v. Doctor’s Assoc. Inc.*, 108 USPQ2d 1341 (TTAB 2013); *Micro Motion Inc. v. Danfoss A/S*, 49 USPQ2d 1628 (TTAB 1998); *In re Central Sprinkler Co.*, 49 USPQ2d 1194, 1199 (TTAB 1998) (the Board held that “attic” was a generic adjective for automatic sprinklers used in attics because “the term ATTIC directly names the most important or central aspect or purpose of applicant’s goods, ... this term is generic and should be freely available for use by competitors”).

Here, Opposer has not alleged that consumers primarily understand the word “Rapunzel” to be the generic name or adjective for dolls and toy figures, the goods identified in the opposed application. In view thereof, the foregoing allegations are also **stricken**. *See* Fed. R. Civ. P. 12(f).

For completeness, Opposer alleges that Applicant’s mark fails to function as a trademark under Sections 1, 2 and 45 of the Trademark Act, 15 U.S.C. §§ 1051, 1052 and 1127, because “it is purely information[al] and highly descriptive, if not a generic descriptor, of Applicant’s goods” (¶ 8, amended not. of opp.) (7 TTABVUE 14). Opposer also alleges that the applied-for mark “is merely informational under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), in that it merely describes and names a well-known fictional character ... [T]he public knows Rapunzel as the character name of a fictional fairy tale character, not as a source indicator.” *Id.* “As a result, the Board should deny registration of the opposed mark under Section 2(e)(1) ... as well as [under] Sections 1, 2 and 45 of the Trademark Act (*Id.* at 7 TTABVUE 15).

Although not clearly delineated, we construe Opposer’s allegations as comprising sufficiently pleaded claims of failure to function as a mark and mere descriptiveness under Trademark Act Sections 1, 2 and 45 and Trademark Act Section 2(e)(1), respectively. *See D.C. One Wholesaler, Inc. v. Chien*, 120 USPQ2d 1710, 1713 (TTAB 2016) (the critical inquiry in determining whether a designation functions as a mark is how the designation would be perceived by the relevant public); *M. Polaner Inc. v. The J.M. Smucker Co.*, 24 USPQ2d 1059, 1060 (TTAB 1992) (petitioner’s allegation

that the term “Simply Fruit” is merely descriptive as applied to respondent’s goods set forth a claim upon which relief may be granted).

Summary; Proceeding Resumed; Trial Dates Reset

Applicant’s motion to dismiss the notice of opposition based on Opposer’s asserted failure to sufficiently allege standing is **denied**; Applicant’s motion to dismiss Opposer’s claim under Section 2(e)(5) of the Trademark Act, 15 U.S.C. § 1052(e)(5), is **granted** and that claim is **dismissed with prejudice**; and Opposer’s fraud and genericness claims are **stricken**. Nonetheless, it is the Board’s general practice to allow a party an opportunity to correct a defective pleading. *See Intellimedia Sports Inc. v. Intellimedia Corp.*, 43 USPQ2d 1203, 1208 (TTAB 1997); *Miller Brewing Co. v. Anheuser-Busch Inc.*, 27 USPQ2d 1711, 1714 (TTAB 1993); TBMP § 503.03 (June 2018). In view thereof, Opposer is allowed until **JANUARY 21, 2019**, to submit a second amended notice of opposition with sufficiently pleaded fraud and genericness claims, failing which the proceeding shall move forward solely on the failure to function as a mark and mere descriptiveness claims.

This proceeding is resumed. The answer due date, conferencing, discovery and trial dates are reset as shown in the following schedule:

Time to Answer	2/20/2019
Deadline for Discovery Conference	3/22/2019
Discovery Opens	3/22/2019
Initial Disclosures Due	4/21/2019
Expert Disclosures Due	8/19/2019
Discovery Closes	9/18/2019

Plaintiff's Pretrial Disclosures Due	11/2/2019
Plaintiff's 30-day Trial Period Ends	12/17/2019
Defendant's Pretrial Disclosures Due	1/1/2020
Defendant's 30-day Trial Period Ends	2/15/2020
Plaintiff's Rebuttal Disclosures Due	3/1/2020
Plaintiff's 15-day Rebuttal Period Ends	3/31/2020
Plaintiff's Opening Brief Due	5/30/2020
Defendant's Brief Due	6/29/2020
Plaintiff's Reply Brief Due	7/14/2020
Request for Oral Hearing (optional) Due	7/24/2020

Generally, the Federal Rules of Evidence apply to Board trials. Trial testimony is taken and introduced out of the presence of the Board during the assigned testimony periods. The parties may stipulate to a wide variety of matters, and many requirements relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125, 37 C.F.R. §§ 2.121-2.125. These include pretrial disclosures, the manner and timing of taking testimony, matters in evidence, and the procedures for submitting and serving testimony and other evidence, including affidavits, declarations, deposition transcripts and stipulated evidence. Trial briefs shall be submitted in accordance with Trademark Rules 2.128(a) and (b), 37 C.F.R. §§ 2.128(a) and (b). Oral argument at final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a), 37 C.F.R. § 2.129(a).

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