

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

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Mailed: January 13, 2011

Opposition No. 91196629

Gamelink, LLC

v.

Timothy P. Dunnigan

Before Cataldo, Bergsman and Wolfson,  
Administrative Trademark Judges.

By the Board:

Applicant Timothy P. Dunnigan seeks to register the mark GAMELINK and design, shown below, (GAME LINK disclaimed) for "entertainment services, namely, amusement arcades featuring console-based video game systems with multiple stations, each consisting of a large LCD television, leather chair and sound dome, for use in individual and group game play, game tournaments and game leagues" in International Class 41.<sup>1</sup>



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<sup>1</sup> Application Serial No. 77770614, filed June 29, 2009, based on use in commerce under Trademark Act Section 1(a), and asserting a date of first use of June 1, 2008, and date of first use in commerce of June 21, 2009.

Opposer Gamelink, Inc. filed a notice of opposition to registration, pleading ownership of the following two registrations for the mark GAMELINK (standard characters):

- 1) Registration No. 2206576 for "electronic and online retailing services by means of a global computer network, featuring products for adults, namely, videos, CD-ROMs, films, books, rubber goods and adult toys" in International Class 35; and
- 2) Registration No. 3023336 for "on-line retail store services, computerized on-line ordering services, and wholesale ordering services in the field of entertainment goods namely videos, CDs, DVDs and order fulfillment services" in International Class 35, and "Video-on-demand transmission and streaming of audio and video materials on the Internet" in International Class 38.

In lieu of filing an answer, applicant moved to dismiss the opposition pursuant to Fed. R. Civ. P. 12(b)(6).

This proceeding is before the Board for consideration of applicant's motion to dismiss. The motion is fully briefed.

#### Analysis

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 pleading need only allege plausible facts as would, if proved, establish that opposer is entitled to the relief sought, that is, that 1) opposer has standing to maintain the proceeding,<sup>2</sup> and 2) a valid ground exists for denying the registration sought. See *Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752, 1755 (Fed. Cir. 1998). See also TBMP § 503.02 (2d ed. rev. 2004). The "valid ground" for denying registration that must be alleged and ultimately

proved by an opposer must be a "statutory ground which negates the (applicant's) right to the subject registration." *Young, supra*, at 1754.

For purposes of determining the motion, all of opposer's well-pleaded factual allegations must be accepted as true, and the complaint must be construed in the light most favorable to opposer. *See Advanced Cardiovascular Systems, Inc. v. Scimed Life Systems, Inc.*, 988 F.2d 1157, 26 USPQ2d 1038, 1041 (Fed. Cir. 1993).

First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. ... Second, only a complaint that states a plausible claim for relief survives a motion to dismiss.

*See Ashcroft v. Iqbal*, 556 U.S. \_\_\_, 129 S.Ct. 1937, 1949-50, 173 L.Ed.2d 868 (2009), citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555-556, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007). To survive a motion to dismiss, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 570. The pleading must be examined in its entirety, construing the allegations therein so as to do justice. Fed. R. Civ. P. 8(e); *see also Otto Int'l Inc. v. Otto Kern GmbH*, 83 USPQ2d 1861, 1862 (TTAB 2007).

Opposer lists eight grounds for opposition on the cover sheet accompanying its filing via the online ESTTA system.

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<sup>2</sup> Applicant's motion to dismiss does not place opposer's allegation of standing in issue.

However, in the body of its pleading, opposer only sets forth allegations relating to two of the eight grounds. For the reasons set forth below, we find that all of the asserted grounds, except the dilution claim, are insufficiently pled inasmuch as the notice of opposition fails to set forth the factual basis in support of the respective elements of each claim. With regard to the six grounds listed only in the ESTTA cover sheet, opposer has merely recited a series of sections from the Trademark Act without addressing the elements of each claim covered by any section, or alleging relevant facts in support thereof. The following enumerates the elements that, for each claim, must be alleged **and** supported by plausible factual allegations:

1) Deceptiveness under Trademark Act Section 2(a)

A claim of deceptiveness requires opposer to allege that 1) the proposed mark consists of or contains a term that misdescribes the character, quality, function, composition or use of the services, 2) prospective purchasers are likely to believe that the misdescription actually describes the services, and 3) the misdescription is likely to affect the decision to purchase the services. See *In re Budge Mfg. Co.*, 857 F.2d 773, 8 USPQ2d 1259 (Fed. Cir. 1988).

2) False suggestion of a connection under Trademark Act Section 2(a)

A claim of false suggestion of a connection requires opposer to allege that 1) the mark is the same as or a

close approximation of the name or identity of a person or institution, 2) the mark would be recognized as such, 3) the person or institution identified in the mark is not connected with the services performed by applicant under the mark, and 4) the fame or reputation of the named person or institution is of such nature that a connection with such person or institution would be presumed when applicant's mark is used on its services. See *Buffet v. Chi-Chi's, Inc.*, 226 USPQ 428, 429 (TTAB 1985).

3) Mere descriptiveness under Trademark Act Section 2(e)(1)

A mark is unregistrable under Section 2(e)(1) if it merely describes an ingredient, quality, characteristic, function, feature, purpose or use of applicant's specified goods or services. See *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). Opposer's allegations that

"the term 'Game Link' ... is deceptively descriptive of the services of Applicant in that Applicant provides links literally in a physical facility and has other such facilities planned,"<sup>3</sup>

and that

"(I)n each facility applicant's customers play video games on the links set up by a network of connected and linked play stations. Under Section 2(e)(1), and others, Defendant furthermore, (sic) advertises his descriptive services on the internet in a way that is likely to lead Defendant's customers, being mainly 12-26 year olds, to the website of Plaintiff GameLink, L.L.C. which is likely to be injured by the deceptively descriptive mark"<sup>4</sup>

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<sup>3</sup> Notice of opposition, preamble paragraph 2.

<sup>4</sup> Notice of opposition, paragraph 1, under "Likelihood of Confusion."

fail to sufficiently set forth this claim. Opposer has not identified what feature of applicant's services the mark allegedly merely describes, but merely asserts that the mark is "deceptively descriptive." Also, opposer will note that the Trademark Act does not provide for opposition to registration on the basis that a mark is "deceptively descriptive."

4) Deceptive misdescriptiveness under Trademark Act Section 2(e)(1)

A pleading of deceptive misdescriptiveness must allege that 1) the mark misdescribes a characteristic, quality, function, composition or use of the services, and 2) consumers would be likely to believe the misrepresentation. See *In re Woodward & Lothrop Inc.*, 4 USPQ2d 1412 (TTAB 1987).

5) Fraud

Pleadings of fraud on the USPTO, governed by Fed. R. Civ. P. 9(b), must allege with particularity that an applicant knowingly made a false, material representation of fact in connection with an application for registration, with the intent to deceive the USPTO. See *In re Bose Corp.*, 580 F.3d 1240, 91 USPQ2d 1938 (Fed. Cir. 2009).

6) Genericness under Trademark Act Section 23

A pleading of genericness under Trademark Act Section 23 requires opposer to plead that the mark is understood by the purchasing public as the common or class name for the services, and is incapable of indicating a particular

source of the services. *See in re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807 (Fed. Cir. 2001).

In the body of its pleading, opposer sets forth allegations in support of the claims of "I. Likelihood of Confusion," and "II. Dilution."

Regarding the first claim, to plead priority and likelihood of confusion under Trademark Act Section 2(d), opposer must allege that it has made prior use of its pleaded mark(s), and that contemporaneous use of the parties' respective marks for their respective goods and/or services would be likely to cause confusion, mistake or to deceive consumers. *See Hornblower & Weeks, Inc. v. Hornblower & Weeks, Inc.*, 60 USPQ2d 1733, 1735 (TTAB 2001).

Opposer pleads ownership of two registrations, which suggests opposer's allegation of priority of use with respect to the marks registered therein. However, opposer fails to allege that use of its and applicant's marks, for their respective services, is likely to cause confusion, mistake or to deceive. In view thereof, the notice fails to sufficiently set forth a claim under Section 2(d).

Regarding the second claim, to plead dilution under Trademark Act Section 43(c), opposer must allege that 1) opposer's mark is famous; 2) opposer's mark became famous before applicant commenced use of the challenged mark, or in a proceeding opposing an intent-to-use application, that opposer's mark became famous prior to the filing date of the

application; and 3) applicant's use is likely to cause dilution of the distinctive quality of opposer's mark or to lessen the capacity of the mark to identify and distinguish opposer's goods or services. See *Toro Co. v. ToroHead Inc.*, 61 USPQ2d 1164, 1172-1173 (TTAB 2001); *Polaris Industries Inc. v. DC Comics*, 59 USPQ2d 1798 (TTAB 2000).

Opposer alleges, in pertinent part:

3. GameLink, LLC under Trademark Dilution Revision Act of 2006, will be likely injured by diluting the GameLink® mark through blurring, by the potential and likelihood of dilution can occur (sic) if Plaintiff's customers, believing that Plaintiff had, by way of example, left its normal business and become a gaming facility, which would tend to cause GL customers to go to others for adult entertainment. GameLink's mark has become famous in its market and became so long before the other party adopted its mark. The GameLink mark is in fact famous and distinctive in its market, and the other party's use of its mark is likely to dilute the famous GameLink® mark.

4. GameLink will likely be injured by diluting its trademark GameLink® through tarnishment, in that it is likely that the GameLink® mark will become weakened as one of the best places to go for adult entertainment purchases.

We construe these allegations as sufficiently setting forth a claim of dilution.

In view of these findings, applicant's motion to dismiss is denied with respect to opposer's dilution claim, and is granted with respect to the remaining seven claims. Accordingly, paragraphs 1 and 2 within the preamble, and paragraph 1 under the likelihood of confusion claim, are hereby stricken from the notice of opposition for failure to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6); see also TBMP § 506.01 (2d ed. rev. 2004).

The Board may, in appropriate cases and in its discretion, allow an opposer an opportunity to amend its pleading. Opposer is hereby allowed until twenty (20) days from the mailing date of this order in which to file an amended notice of opposition, failing which this opposition will proceed on the sole ground of dilution, on the schedule set forth below. Opposer is reminded that, in proceedings before the Board, Fed. R. Civ. P. 11, and Patent and Trademark Rule 11.18 apply, and require that all pleadings be made in good faith. Specifically, all grounds for relief and allegations in support thereof must have a basis in law or fact, and must not be filed for any improper purpose.

In the event that opposer files an amended pleading, applicant is allowed until thirty (30) days from the date of service of said pleading to file his answer thereto.

In the event that opposer does not file an amended pleading, applicant is allowed until fifty (50) days from the mailing date of this order to file his answer to paragraphs 2 through 9, inclusive, of the original notice of opposition.

Schedule

Proceedings are resumed. Conferencing,<sup>5</sup> disclosure, discovery and trial dates are reset as follows:

Deadline for Discovery Conference	3/31/2011
Discovery Opens	3/31/2011
Initial Disclosures Due	4/30/2011
Expert Disclosures Due	8/28/2011
Discovery Closes	9/27/2011

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<sup>5</sup> In the event that either or both parties request the Board's participation in their required discovery conference, the assigned interlocutory attorney may be contacted at 571-272-9183 in order to facilitate the scheduling of said conference.

Plaintiff's Pretrial Disclosures Due	11/11/2011
Plaintiff's 30-day Trial Period Ends	12/26/2011
Defendant's Pretrial Disclosures Due	1/10/2012
Defendant's 30-day Trial Period Ends	2/24/2012
Plaintiff's Rebuttal Disclosures Due	3/10/2012
Plaintiff's 15-day Rebuttal Period Ends	4/9/2012

In each instance, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.