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

Proceeding	91196629
Party	Plaintiff Gamelink, LLC
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**IN THE
TRADEMARK TRIAL AND APPEALS BOARD**

GameLink, L.L.C.,
Plaintiff/Opposer
vs.
Timothy Dunning,
Defendant/Respondent

IN RE: GAMELINK
Opp. No. **91196629**
Ser. No. **77770614**
POINTS AND AUTHORITIES IN
OPPOSITION TO RESPONDENT'S
SECOND MOTION TO DISMISS

OPPOSITION TO MOTION TO DISMISS #2

Notice of Opposition is Clear

GameLink, L.L.C. , a Private Media Company, hereby files its opposition to Respondent Dunning's Motion under 12(b)(6).

This Court, in its Order on the first Motion to Dismiss on dated January 13, 2011, denying the originally filed Notice of Opposition, invited Opposer to file an amended Notice. That Order denied the first Motion as to Opposer's claims based on Dilution. Opposer carefully re-crafted the Amended Notice along the lines of the detailed review of Opposer's original counts. That is what the Amendment process is all about. The new Amended Notice includes the allegations as recommended by the Court.

Respondent's filing of a new Motion and an almost verbatim Motion under FRCivP 12(b) is a waste of the Court time and of judicial resources; the Respondent should have filed an Answer denying if need be the allegations of the Amended Notice and get on with the case.

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1 The Amended notice is based on the careful analysis and well taken criticism of the
2 original Notice contained in the Order denying Respondent’s first Motion to Dismiss. That
3 order carefully delineated the elements and facts needed to sustain such a motion; and all of
4 those suggestions were followed in the Amended Notice.

5
6 **Respondent’s Arguments Are Erroneous**

7 As stated in the Opposition to Motion to Dismiss filed in response to the Respondent’s
8 original Motion, a Notice of Opposition does not require minutia and detailed factual
9 allegations. The “(f)actual allegations must be enough to raise a *right to relief above the*
10 *speculative level* ... on the assumption that all the allegations in the complaint are true (even if
11 doubtful in fact).” In short, it must allege “enough facts to state a claim that is *plausible on its*
12 *face*.” Bell Atlantic Corp. v. Twombly (2007) 550 US 544, , 127 S.Ct. 1955, 1965, 1974
13 (parentheses in original; emphasis added).

14 If there are needed to be several sentences to describe the facts as they are in a particular
15 case, there is no limit on the number of sentences in a paragraph of an Amended pleading, and
16 certainly 4 sentences in a paragraph are not excessive for a “short and plain statement.”

17 In U.S. v. Jerome the court stated that “Rule 10(b) makes two requirements as to
18 paragraphing: “(1) that all averments of claim or defense be made in numbered paragraphs;
19 (2) that the contents of each paragraph be limited ‘*as far as practicable*’ to a statement of a
20 single set of circumstances. While the first requirement is mandatory in terms, *the second,*
21 *because of its general language, lends itself to discretionary handling.* So, while separate
22 elements of a claim *should usually be stated in separate paragraphs, minute subdivision of the*
23 *pleading is not required*”. U.S. v. Jerome, 115 F.Supp. 818 at 822 (D.C.N.Y. 1953).

24 [Emphasis Supplied] .

25 Respondent alleges that the motion is based on 37 CFR § 2.116(a). This section states
26 that “§ 2.116 Federal Rules of Civil Procedure. (a) Except as otherwise provided, and
27 wherever applicable and appropriate, procedure and practice in inter partes proceedings shall
28

1 be governed by the Federal Rules of Civil Procedure.” 37 CFR 2.127 merely says that the
2 filer may include a Brief.

3 Opposer agrees that it filed its Amended Notice that contains five distinct counts. They
4 are distinct since they were re-written for the purpose of amendment alleging carefully the
5 facts Opposer stated to support the five claims. They are set forth in numbered paragraphs and
6 are separated appropriately.

7 McDonnell Douglas Corp. v. National Data Corp., 228 U.S.P.Q. 45 (T.T.A.B. 1985);
8 and Heroes, Inc. v. Boomer Esiason Hero's Foundation, Inc., 43 U.S.P.Q.2d 1193 (D.D.C.
9 1997) held that a Cancellation under § 14(3) required proof of blatant, aggressive misuse of a
10 registered mark; If the registrant was not trying to “pass off its services as those of the
11 [challenger], the [challenger] lacks standing to raise a claim under Section 14(3)”, so there, a
12 Cancellation was dismissed under a Rule 12(b) contest. That case does NOT address the
13 requirements of proper Opposition fact pleading, but the proof offered to show a mark should
14 be cancelled. Here, we have an Opposition that is clearly pleaded.

15 **Standards for Notice; Short and Plain Statement**

16 Before the Board has stated a claim upon which relief can be granted, "we must assume
17 that the facts alleged in the petition are true." Stanspec Co. v. American Chain & Cable Co.,
18 531 F.2d 563, 566, 189 U.S.P.Q. (BNA) 420, 422 (CCPA 1976) (petition for cancellation of a
19 registered mark). The facts are clear here. The facts include that due to Respondent’s heavy
20 use of Internet advertising for its gaming hall business and his use of the identical mark, his
21 uses of the proposed mark will likely cause consumer confusion.

22 The TTAB Rules state that along with the standardized electronic form filing on ESTTA,
23 there may be a Statement, so that there are factual allegations to backup the check-box
24 statements in the standardized form. The facts are clearly set forth as argued herein. The
25 standards set forth for the Statement are set forth at 37 CFR § 2.104 Contents of opposition.
26 This simply provides. “(a) The opposition must set forth a short and plain statement showing
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1 why the Opposer believes he, she or it would be damaged by the registration of the opposed
2 mark and state the grounds for opposition.” We have met that standard here.

3 Gilson also states the rule as, “**Substantive Requirements of Complaint.** Oppositions
4 and cancellation petitions need only satisfy the liberal "notice pleading" requirements of the
5 Federal Rules. They must include a "short and plain statement" establishing (a) that the
6 pleader is or will be damaged and (b) the grounds for opposing or seeking cancellation. "In
7 inter partes proceedings before the Board, as in civil cases before the ... district courts; all
8 pleadings are so construed as to do substantial justice." Where the Federal Rules require more
9 specificity, as in pleading acts of fraud, the party before the T.T.A.B. must comply.” See 3-9
10 Gilson on Trademarks § 9.02.

11 Rule 10 of the Federal Rules of Civil Procedure is titled Form Pleadings. Subsection (b)
12 is titled Paragraphs; Separate Sentences and provides, “A party must state its claims or
13 defenses in numbered paragraphs, *each limited as far as practicable* to a single set of
14 circumstances.” Fed. R. Civ. P. 10(b). [Emphasis Supplied].

15 One would not want a minimal approach if the facts are such that explanation is required.
16 However, “no technical form is required”. Fed. R. Civ. P. 8(d)(1). “Threadbare recitals of
17 the elements of a cause of action, supported by mere conclusory statements, do not suffice.”
18 Ashcroft v. Iqbal, 129 S. Ct. 1937 at 1949 (2009). As for the issue of the Filed Receipt sheet,
19 the logic is that the Certificate of Service is executed prior to the filing. Therefore the filing
20 Sheet is not always available to serve. Notice is certainly provided by the service of the
21 Amended Notice.

22 The facts alleged are clearly set forth in the Notice filed herein. Opposer gave enough
23 detail to give Respondent a clear and fair notice for the basis of each claim.

24 **The ‘Preamble’**

25 Respondent wants to have the Court to turn this into a motion to strike. He wants to have
26 this Court strike the Preamble, and the statements throughout that incorporate its allegations
27 and thus hopes to whittle away and have the Notice invalidated.
28

1 The use of “incorporating” language is common and is designed to save pages rather than
2 re-pleading every sentence of the prior allegations. “...A later pleading may *refer* by number
3 *to a paragraph in an earlier pleading. If* doing so would promote clarity, each claim founded
4 on a separate transaction or occurrence — and each defense other than a denial — must be
5 stated in a separate count or defense.” (FRCivP Rule 10(b). Incorporating the operative
6 phrases from the online ESTTA form is not uncommon and is necessary to include in the
7 Notice such language or outlines as are contained in the online form.

8 **Count I**

9 Count 1 is entirely clear. Paragraph 4 contains 5 sentences that provide a short history of
10 the respective uses of both of Opposer’s registered marks. The next paragraph (¶5) sets forth
11 the fact dates of Respondent’s use and compared it to the 16 years of use of Opposer’s
12 identical mark. Notice Paragraph 6 delineates the facts of the Internet uses of Respondent’s
13 mark and the facts that his mark can be found in an Internet search, along with Opposer’s
14 mark, which is one of the essential facts here. Paragraph 7 discusses the facts regarding the
15 PTO Examiner’s Action that stated Respondent’s mark was likely to cause confusion and ¶ 8
16 sums up the reasons for the issues of confusion.

17 **Count II**

18 Respondent here is using the incorporation by reference technique to strike this count due
19 to the Preamble argument. In its Order on the First 12 (b) Motion, this Court stated “1) the
20 mark is the same as or a close approximation of the name or identity of a person or institution,
21 2) the mark would be recognized as such, 3) the person or institution identified in the mark is
22 not connected with the services performed by applicant under the mark, and 4) the fame or
23 reputation of the named person or institution is of such nature that a connection with such
24 person or institution would be presumed when applicant’s mark is used on its services. See
25 Buffet v. Chi-Chi’s, Inc., 226 USPQ 428.” All of these four factual allegations or elements,
26 are pleaded in the Amended Notice. How and why the public would presume a connection
27 here is stated carefully: “The fame or reputation of Opposer, having been using the mark
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1 GAME LINK for its famous Adult online retail services since 1993, is of such nature that a
2 connection between or with the proposed Applicant’s Game Link would be presumed when
3 Applicant’s mark is used on its services.” In the basic facts (in the “preamble”) that are
4 incorporated in this Count by reference, users on the Internet are likely to be confused. They
5 are just as likely to be associated falsely with each other. Respondent can deny this Count.

6
7 **Count III**

8 Descriptiveness is carefully pleaded here also. Respondent seems to understand that
9 because GAME LINK describes a gaming hall that links its users to the internet. It does not
10 describe an adult retail website that sells racy videos. Opposer’s use is fanciful; Respondent’s
11 is descriptive. If one strikes all the facts incorporated by reference in ¶14 of the Amended
12 Notice, one may have to re-read the whole Notice.

13
14 **Count IV**

15 Opposer alleges that Respondent made false statements to the PTO to get his mark
16 registered. We will not know for certain if he was trying to deceive until we take his
17 deposition, however he, on the record did minimize the Internet aspects of his advertising. In
18 the Amended Notice, ¶ 21 recites briefly the history of the first statement of goods/services in
19 the Application’s Description thereof. ¶ 22 states that the Applicant received a PTO Action
20 and what it said. ¶ 23 states the facts of Applicant’s lengthy reply on the Action and his
21 statements that it was a physical location and not an internet one, ¶ 24 that Applicant told the
22 PTO that the photos of his shop were proof of the physical aspect of his business and that he
23 hid that he uses the mark online extensively to advertise online. Respondent therefore tried to
24 mislead the PTO. He tried to convince an examiner who reviews the record in front of them.
25 Respondent’s evidence added in his Reply to Action shows that his mark is only used on a
26 storefront. If that were true, we might not be here. The Amended Notice at ¶ 25 alleges that
27 Respondent also gave a falsely different Description of G/S to stress the arcade aspect, but
28 again this belies the facts alleged that he does a lot of internet advertising.

1 Here we have what was asked for in the beginning of Respondent’s Motion, that we
2 break up the thoughts into coherent paragraphs.

3
4 **Count V**

5 The Dilution count is identical to the one upheld in the First Order on the First Motion to
6 Dismiss. It has not materially changed. The argument is the same here as it was for the
7 original Motion and Opposer respectfully requests that the Dilution count should remain even
8 if all the others are ruled dismissed.

9 Every Answer requires the dissection of the paragraphs, sentences and avoidance of
10 “negative pregnant” and the like that plague Answering parties. Respondent should,
11 respectfully, now examine the counts, admit what he can and deny what he desires.

12 **Timing**

13 According to TBMP §§ 502.02(b), 509, if the Motion is served by mail, the opponent to
14 the Motion has 15 days to file its brief. 37 C.F.R. § 2.119(c); TBMP § 502.02(b). There is no
15 stipulation to receive a Motion by any other means. The Motion was allegedly mailed
16 February 28, 2011. The response to the Motion therefore is due March 19, 2011.

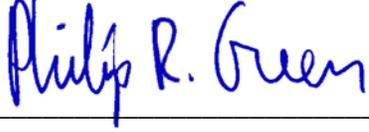
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18 **Conclusion**

19 Opposer respectfully requests the Board Deny the Defendant’s Motion to Dismiss.

20 Should the Board decide that the pleadings of Opposer are not as clear as Rule 12 (b) (6)
21 would require, then Opposer respectfully seeks leave and time to Amend its Notice or Short
22 and Plain Statement, to clear up any issues.

23 Should this Court consider entry of any dismissal, it has been held that this is generally
24 not on the merits and does not prevent amendment of the complaint or reassertion of the claim
25 in the same or a different court if the defect can be cured. Sweeney v. Greenwood Index-
26 Journal Co., D.C.S.C.(1941), 37 F.Supp. 484. If this should occur, Opposer respectfully seeks
27 leave and time to amend the Notice of Opposition. Opposer also reserves its rights to file in
28 Court, an Action for Infringement pending this Action or thereafter.

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2 Dated: March 10, 2011

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4 _____

5 Philip Green attorney for GameLink, L.L.C., a Private Media Company
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8 **CERTIFICATE OF SERVICE**

9 I hereby certify that a true and complete copy of the foregoing
10 POINTS AND AUTHORITIES IN OPPOSITION TO SECOND MOTION TO DISMISS
11 has been served by sending said copy on March 10, 2011 via First-Class Mail, postage
12 pre-paid, to:

13
14 Morris E. Turek, Esq.
15 YourTrademarkAttorney.com
16 167 Lamp & Lantern Village, #220
17 Chesterfield, MO 63017-8208

18 ___/Philip Green/___

19 Philip Green, Attorney for Opposer
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