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

|                        |  |
|------------------------|--|
| Proceeding             | 91196629   |
| Party                  | Plaintiff<br>Gamelink, LLC   |
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| Submission             | Opposition/Response to Motion  |
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| Date                   | 12/03/2010   |
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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 MOTION TO DISMISS

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**OPPOSITION TO MOTION TO DISMISS**

**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).

First of all, the Grounds for a Notice of Opposition are filed by electronic means and so the statements made are electronically formed by the TTAB electronic system, through a pre-set template that an inputting user cannot change.

There are several Grounds specified and alleged in the Notice of Opposition. All of those are referenced in the Notice and by the Short and Plain Statement attached and filed with the Notice of Opposition. All the language in the Short and Plain Statement is incorporated into the electronically filed Notice of Opposition, by its terms and expressly.

**The Grounds for Opposition** alleged are:

(1) *Deceptiveness* Trademark Act section 2(a),

- 1 (2) *False suggestion of a connection* Trademark Act section 2(a),
- 2 (3) Priority [of Opposer] and likelihood of confusion Trademark Act section 2(d),
- 3 (4) The mark is *merely descriptive* Trademark Act section 2(e)(1),
- 4 (5) The mark is *deceptively misdescriptive* Trademark Act section 2(e)(1),
- 5 (6) Dilution Trademark Act section 43(c),
- 6 (7) *Torres v. Cantine Torresella S.r.l.*, *Fraud* 808 F.2d 46, 1 USPQ2d 1483 (Fed. Cir. 1986),
- 7 and
- 8 (8) *Genericness* Trademark Act section 23.

9 The Short and Plain Statement is intended to provide the facts for the above grounds and  
10 allegations.

- 11 I. *Deceptiveness*. Trademark Act section 2(a): This is very clear. First, at Paragraph 2 of the  
12 Notice’s Statement, taken with all the other allegations, we Plaintiff stated that the opposed  
13 mark “Game Link”:

14  
15 “...in this instance is *deceptively descriptive* of the services of Applicant in that  
16 Applicant provides links literally in a physical facility and has other  
such facilities planned.”

17 And, we alleged further, at Part I, Paragraph 1, that...

18 “Defendant furthermore, advertises his *descriptive* services on the internet in a way  
19 that is likely to lead Defendant’s customers, being mainly 12-26 year olds, to the  
20 website of Plaintiff GameLink, L.L.C. which is likely to be injured by the deceptively  
descriptive mark.”

- 21 2. *False suggestion of a connection*. Trademark Act section 2(a). The facts of the Dilution  
22 Count are clearly stated in the Notice, at Part II, Paragraph 2, as:

23 “[GL] under Trademark Dilution Revision Act of 2006, will be likely injured by  
24 diluting the GameLink® mark through blurring by the potential and likelihood of  
25 dilution can occur if *Plaintiff’s customers, believing that Plaintiff had, by way of  
26 example, left its normal business and become a gaming facility, which would tend  
to cause GL customers to go to others for adult entertainment.*”

27 It is clear that the Plaintiff/Opposer claims that dilution is likely to occur by the  
28 deceptive and misleading advertising that Defendant does on the Internet using the mark

1 “GameLink.” The Statement of facts goes on to allege that the Opposer’s mark has  
2 become distinctive for Adult (sexually explicit) retail sales, and that Defendant advertises  
3 on the internet in the same channels of trade as Opposer, without any attempt to clarify  
4 that Defendant’s services are separate and to notify potential customers that separates  
5 those services of Defendant from those of Opposer. It is alleged and supported by the  
6 evidence that Defendant heavily advertises in Twitter, Facebook and other Internet places  
7 where the Opposer already advertises, causing likelihood of confusion. At Part II,  
8 Paragraph 5, Opposer alleged:

9 “Customers of GameLink® that see the advertising of Applicant/Defendant and  
10 are likely to believe that GameLink is no longer in the adult entertainment  
11 business, that it has changed its format, that it has become a sponsor or that it is  
12 sponsoring Applicant, or that it has sold its name to another, including, but not  
13 limited to, Applicant. There are other legal implications for Plaintiff GameLink in  
14 that government entities might confuse it with the physical locations of Applicant,  
15 making GameLink, L.L.C. a target for licensing issues, taxation by and other  
16 implications that dilute the value of its trademark GameLink®. The markets for  
17 Applicant’s services and those of Opposer should not mix.”

18 3. *Priority [of Opposer] and likelihood of confusion* . Trademark Act section 2(d):

19 The Notice recites the dates of use and registration for the older GameLink®  
20 mark as “Class 035. First use: First Use: 1993/02/20 First Use In Commerce:  
21 1993/02/20”: all of this is clearly before Applicant/Respondent. In Respondent’s  
22 application he recites “FIRST USE IN COMMERCE DATE At least as early as  
23 06/21/2009.” This is more than 16 years later. Further, Opposer specifically alleged, at  
24 Part II, Paragraph 3, that: “GameLink’s mark has become famous in its market and  
25 became so long before the other party adopted its mark.”

26 4. The mark is *merely descriptive*. Trademark Act section 2(e)(1), and

27 5. The mark is *deceptively misdescriptive*. Trademark Act section 2(e)(1):

28 These Grounds (4) *descriptive* and (5) *deceptively misdescriptive* are clearly pleaded, and  
incorporating the other parts of the Statement and Notice, including, but not limited to the  
Opposer’s statement at Part I, Paragraph 1 of the Notice, that:

“..Defendant ... 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

1 website of Plaintiff GameLink, L.L.C . which is likely to be injured by the  
2 deceptively descriptive mark.”

3 At Paragraph 6, Opposer alleged Defendant describes his own services as:

4 “Gaming – we are [a] gaming lounge” and “promotes communal play by  
5 providing 12 stations of gaming interactivity”. The Defendant’s “gamers” are  
6 linked together, as Defendant states: “Our community is wireless, internet  
7 connected”. For the sake of brevity, Opposer does not seek to restate every  
8 allegation in the original Notice here, however, examples are given for the record.

9  
10 6. *Dilution.* Trademark Act section 43(c), is also alleged in the Notice, as by way of  
11 example, from Part II, Dilution, at Paragraphs 3 and 4, partially quoted follows:

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

21 And “GameLink will likely be injured by diluting its trademarks GameLink®  
22 through tarnishment, in that it is likely that the GameLink® marks will become  
23 weakened as one of the best places to go for adult entertainment purchases.”

24 7. *Torres v. Cantine Torresella S.r.l., Fraud* 808 F.2d 46, 1 USPQ2d 1483 (Fed.  
25 Cir. 1986), and

26 8. *Genericness.* Trademark Act section 23:

27 These Grounds were also addressed in the Notice and Statement. Fraud of this  
28 type may be rare but it did, we allege, occur here. It does not have to be proven at this  
pre-discovery stage but alleged with specificity. The “Torres” case type of fraud is “that  
the appellant in the Torres case had *knowingly attempted to mislead the Patent and  
Trademark Office* by filing a copy of his registered mark with his renewal application  
when *he knew that he had made changes* to the mark as originally registered.” The

1 standard is set forth and is pleaded clearly by the allegation that, Defendant had skirted  
2 the PTO Action by the Examiner by asserting conflicting things about its business.

3 This occurred we believe when Defendant responded to the original PTO Office Action  
4 on 03/17/2010, after the Examiner cited the Opposed Mark as having likelihood to cause  
5 confusion with the Opposer’s prior and registered GameLink® mark, and others that deal with  
6 game linking hardware, by sending to the PTO as evidence of non-confusion: “Three photos  
7 of our *brick and mortar establishment* as further evidence of the distinction of our mark as  
8 compared to the three current registrars - all of which have no physical location to offer  
9 consumers access to their products and/or services.”

10 In the Defendant’s textual reply, it was argued:

11 ““Entertainment services, namely, providing *temporary use of non-downloadable video*  
12 *games*” at the beginning of the description. This enhancement phrase was taken directly, and  
13 written verbatim, from the USPTO classification of goods and services class 041. This phrase  
14 more accurately describes what our service provides, as “arcade” by all definitions researched,  
15 is recognized as coin-operated video game machines. *We are console-based and our clients*  
16 *have no direct access to the consoles themselves.* All game and console preparations are  
17 conducted by a Game Link attendant.” [*Italics emphasis added*].

18 The misleading part is, in part, that this is in arcade service, and the Defendant’s clients  
19 have no direct access to the consoles themselves. If this is true, as stated by the Defendant,  
20 then it is an internet-based or related service. Either one is true the other is not, and  
21 knowingly so. It is either a ‘brick and mortar’ establishment only, with no internet use or  
22 advertising, or it is internet related; both statements cannot be true, but also, in either case,  
23 there IS internet use, and the Opposer has grounds in confusion on the internet, social media,  
24 and in advertising. In the case cited of Space Base, Inc. v. Stadis Corp., 17 U.S.P.Q.2d 1216  
25 (T.T.A.B. 1990), the Court stated, “based on the *Money Store* decision, the Trademark Trial  
26 and Appeal Board has stated that, in order to prove fraud arising from a false oath or the  
27 nondisclosure of other users, parties must prove the following: (1) that there *was in fact a use*  
28 *of the same or a confusingly similar mark* at the time the oath was signed; (2) that the other

1 user had legal rights *superior to the applicant*; (3) that the *applicant knew* the other user had  
2 superior rights in the mark; and (4) that in failing to disclose the other user, the applicant  
3 deliberately attempted to obtain a registration to which it was not entitled. *See McCarthy on*  
4 *Trademarks* § 31.21 [[[3][d] at 31-119.” We may not be able to yet prove (3), the scienter or  
5 knowledge, but we have alleged it. The other facts indicating fraud are as above, and where  
6 there are the Defendant’s two conflicting factual statements in the Response to Office Action.

7 If it is an internet based remote console system that clients have no direct access to, and  
8 then, if it is an internet entertainment system that *links* people with *games* it is descriptive, and  
9 generic. Also, in any event, Defendant’s internet advertising is likely to cause confusion.

10 The Defendant’s Motion to Dismiss is an attempt at avoiding the Internet confusion issue  
11 and the other likelihood of confusion issues that are pleaded in the Notice of Opposition.  
12 There is no lack of notice here; to say that “..Defendant ... advertises his descriptive services  
13 on the internet in a way that is likely to lead Defendant’s customers, being mainly 12-26 year  
14 olds, to the website of Plaintiff GameLink, L.L.C .” Defendant’s internet advertising is so  
15 likely to confuse users on the internet that it is likely to lead them to Opposer’s website. If  
16 many of those users are under 18 years old, as Defendant states the target market is, the net  
17 result of Defendant’s internet advertising is that, as alleged by Plaintiff in this Opposition,  
18 internet use and advertising of Defendant’s junior and nearly identical mark is likely to cause  
19 users to go to Plaintiff/Opposer GameLink’s established adult entertainment website, and not  
20 Defendant’s, or vice versa; either way, with confusing and unhappy results for the public and  
21 for Opposer’s well established, internet based business. It is also likely to lead users to believe  
22 that Defendant sponsors or is sponsored by Plaintiff, further harming Plaintiff/Opposer.

23 It is respectfully submitted that the standards for the Short and Plain statement are met.

### 24 Further Arguments

25 **Disfavored Motion:** Many courts view Rule 12(b)(6) motions with “disfavor” because of  
26 the lesser role pleadings play in federal practice and the liberal policy re amendment: “The  
27 motion to dismiss for failure to state a claim is viewed with disfavor and is *rarely granted.*”  
28 Gilligan v. Jamco Develop. Corp. (9th Cir. 1997) 108 F3d 246, 249 (emphasis added; internal

1 quotes omitted); Colle v. Brazos County, Texas (5th Cir. 1993) 981 F2d 237, 243—challenges  
2 to “bare-bones pleadings” are doomed with respect to attack based on failure to state a claim.

3 Also, it is well established that a Rule 12(b)(6) dismissal is proper only in  
4 “extraordinary” cases. United States v. Redwood City (9th Cir. 1981) 640 F2d 963, 966;  
5 Cauchi v. Brown (ED CA 1999) 51 F.Supp.2d 1014, 1016.

6 **Ambiguities Resolved in Plaintiff's Favor:** At this stage of the proceedings, any  
7 ambiguity in the documents must be resolved in Plaintiff's favor. International Audiotext  
8 Network, Inc. v. AT & T Co. (2nd Cir. 1995) 62 F3d 69, 72; Hearn v. R.J. Reynolds Tobacco  
9 Co. (D AZ 2003) 279 F.Supp.2d 1096, 1102 . See West, Rutter Group, Prac. Guide Fed. Civ.  
10 Proc. Before Trial (Nat Ed.) Ch. 9-D § [9:210].

11 A motion to Dismiss is a drastic procedure and a dismissal of an Opposition must not be  
12 granted unless there is no way the Opposer could be granted relief. The Opposer need not  
13 prove the case now, but only that the pleadings are sufficient to cover factually the grounds  
14 alleged. “...such a motion should not be granted unless it is certain beyond any doubt that the  
15 respondent to the motion cannot, under any circumstances, prevail on the present allegations.”  
16 3 McCarthy on Trademarks and Unfair Competition § 20:133 (4th ed.)§ 20:133, citing  
17 Stanspec Co. v. American Chain & Cable Co., 531 F.2d 563, 189 U.S.P.Q. 420 (C.C.P.A.  
18 1976) . The Stanspec case stated that “[T]he petition for cancellation should not be dismissed  
19 for insufficiency unless it appears to a certainty that [petitioner] is entitled to no relief under  
20 any state of facts which could be proved in support of the claim.” One example of this, which  
21 we do not have here, is the case of Otto International, Inc. v. Otto Kern GMBH, 83  
22 U.S.P.Q.2d 1861, 2007 WL 1577524 (T.T.A.B. 2007) where a motion to dismiss was granted  
23 because § 2(d) cancellation challenge was time-barred; T.B.M.P. § 503 (2007 rev.). See  
24 discussion of federal court precedent on Rule 12(b)(6) motions at § 32:121.25.

### 25 26 **Rule 12(b) (6) Motions are Limited**

27 To survive a motion to dismiss for failure to state a claim (or its equivalent motion for  
28 judgment on the pleadings), *plaintiff* (whether petitioner or Opposer) *need only have alleged*

1 such facts as would, if proven, show that plaintiff has standing and that a statutory ground  
2 preventing or canceling registration exists. Western Worldwide Enterprises Group, Inc. v.  
3 Qingdao Brewery, 17 U.S.P.Q.2d 1137 (T.T.A.B. 1990); Order of Sons of Italy in America v.  
4 Profumi Fratelli Nostra AG, 36 U.S.P.Q.2d 1221 (T.T.A.B. 1995) (to withstand a motion to  
5 dismiss for failure to state a claim upon which relief can be granted, an opposer need only  
6 allege facts which, if proven, “establish that (1) *the Opposer has standing* to maintain the  
7 proceeding, and (2) *a valid ground exists* for opposing registration”).

### 8 Defendant’s Arguments Are Erroneous

9 Arguments made by Defendant referring to the case of are not applicable to our  
10 Opposition. McDonnell Douglas Corp. v. National Data Corp., 228 U.S.P.Q. 45, 46  
11 (T.T.A.B.1985); *see also 2 McCarthy* § 20.15[6], is a Cancellation proceeding. It held merely  
12 that a cancellation claim under § 14(3) “requires a pleading that registrant deliberately sought  
13 to pass off its goods as those of petitioner. Willful use of a confusingly similar mark is not  
14 sufficient.”. The case does not address our issues in the Opposition in that it only was  
15 addressing *Cancellation* proceedings. This Opposition proceeds on a less strict pleading  
16 requirement.

17 A Notice of Opposition does not require minutia and detailed factual allegations. The  
18 “(f)actual allegations must be enough to raise a *right to relief above the speculative level ...* on  
19 the assumption that all the allegations in the complaint are true (even if doubtful in fact).” In  
20 short, it must allege “enough facts to state a claim that is *plausible on its face.*” [*Bell Atlantic*  
21 *Corp. v. Twombly* (2007) 550 US 544, , 127 S.Ct. 1955, 1965, 1974 (parentheses in original;  
22 emphasis added) [emphasis added]. This has been accomplished.

23 McDonnell Douglas Corp. v. National Data Corp., 228 U.S.P.Q. 45 (T.T.A.B. 1985);  
24 and Heroes, Inc. v. Boomer Esiason Hero's Foundation, Inc., 43 U.S.P.Q.2d 1193 (D.D.C.  
25 1997) held that a Cancellation under § 14(3) required proof of blatant, aggressive misuse of a  
26 registered mark; If the registrant was not trying to “pass off its services as those of the  
27 [challenger], the [challenger] lacks standing to raise a claim under Section 14(3)”, so there, a  
28 Cancellation was dismissed under a Rule 12(b) contest. That case does NOT address the

1 requirements of proper Opposition fact pleading, but the proof offered to show a mark should  
2 be cancelled. Here, we have an Opposition that is clearly pleaded.

### 3 **Standards for Notice; Short and Plain Statement**

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

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

19 The facts alleged are clearly set forth in the Notice filed herein.

### 20 **Timing**

21 According to TBMP §§ 502.02(b), 509, if the Motion is served by mail, the opponent to  
22 the Motion has 20 days to file its brief. 37 C.F.R. § 2.119(c); TBMP § 502.02(b). There is no  
23 stipulation to receive a Motion by any other means. The Motion was allegedly mailed  
24 November 3, 2010. The response to the Motion therefore is due November 23, 2010, however  
25 Counsel have stipulated and filed a stipulation to allow Plaintiff until December 3, 2010.

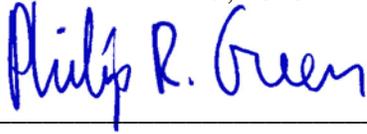
### 26 27 28 **Conclusion - Leave to Amend**

1 Opposer respectfully requests the Board Deny the Defendant's Motion to Dismiss.

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

5 Should this Court consider entry of any dismissal, it has been held that this is generally  
6 not on the merits and does not prevent amendment of the complaint or reassertion of the claim  
7 in the same or a different court if the defect can be cured. *Sweeney v. Greenwood Index-*  
8 *Journal Co.*, D.C.S.C.(1941), 37 F.Supp. 484. If this should occur, again Opposer  
9 respectfully seeks leave and time to amend the Notice of Opposition.

10  
11 Dated: December 3, 2010

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

I hereby certify that a true and complete copy of the foregoing  
POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS  
has been served by sending said copy on December 3, 2010 via First-Class Mail, postage  
pre-paid, to:

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

\_\_\_\_/Philip Green/\_\_\_\_

Philip Green, Attorney for Opposer