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Filing date: **05/27/2014**

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

Proceeding	91200643
Party	Defendant Nowlan Family Trust
Correspondence Address	JOHN J OMALLEY VOLPE AND KOENIG PC 30 S 17TH STREET, UNITED PLAZA PHILADELPHIA, PA 19103 UNITED STATES Jomalley@vklaw.com, ktinker@vklaw.com, trademarks@vklaw.com
Submission	Motion to Strike
Filer's Name	John J. O'Malley
Filer's e-mail	trademarks@vklaw.com, jomalley@vklaw.com, ktinker@vklaw.com
Signature	/John J. O'Malley/
Date	05/27/2014
Attachments	Motion Strike Notice of Reliance-20140527.pdf(596767 bytes)

TRADEMARK

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

In the Trademark Opposition of:

Mark: BUCK ROGERS
Serial No.: 77/650,082
Filed: January 15, 2009

Opposition No. 91200643

Dille Family Trust,
Opposer

v.

Nowlan Family Trust,
Applicant

Applicant's Motion to Strike Portions of Opposer's Notice of Reliance

On March 26, 2014, Opposer, Dille Family Trust filed a Notice of Reliance (Dkt. No. 39). Applicant, Nowlan Family Trust, Nowlan Family Trust, hereby moves to strike Opposer's Notice of Reliance Nos. 1 - 13 for the reasons set forth below.

As set forth in the Declaration of John J. O'Malley attached hereto as Exhibit 1, Applicant believed that it had it filed a Motion to Strike Portions of Opposer's Notice of Reliance on April 24, 2014. The Motion to Strike was served that same date on Opposer, but The TTAB's records do not reflect the filing of the Motion to

* * *
Certificate of Mailing and Service

I hereby certify that this correspondence is filed online via ESTTA to: Trademark Trial and Appeal Board on May 27, 2014.

April 24, 2014
Date of Signature
3016051-1

s/John J. O'Malley
John J. O'Malley

Strike. As Applicant does not believe there is any prejudice to Opposer, it is refiling the essentially the same motion.¹ See Exhibit 1.

A. Documents Not Qualifying For Inclusion Into Evidence By Notice Of Reliance

By way of background, Opposer's Notice of Reliance No. 3 purports to be a document appointing Louise Geer as trustee; Notice of Reliance No. 4 purports to be a filed Application for Certificate of Authority; Notice of Reliance No. 5 purports to be a release from Theresa Nowlan; Notice of Reliance Nos. 6 -12 are purported to be partially redacted license agreements²; and Notice of Reliance No. 13 purports to be a copy of pages from *Preview* November 2012 edition.

Each of the above-identified documents (Notice or Reliance Nos. 3 – 13) should be stricken from Opposer's Notice or Reliance because they do not qualify for inclusion into evidence by notice of reliance as these items do not fall into either the category of printed publications or official records under 37 C.F.R. § 2.122(e). See *Colt Industries Operating Corp. v. Olivetti Controllo Numerico S.p.A.*, 221 USPQ 73, 74 n. 2 (TTAB 1983). Moreover, even if some of the documents could conceivably fall under a category of Trademark Rule 2.122(e), none of the documents has had their authenticity established or is self-authenticating pursuant to Rule 2.122(e).

¹ This Motion to Strike is identical to the prior motion except for this paragraph and the Declaration of John J. O'Malley which were added.

² Applicant further objects to Notice of Reliance Nos. 6 -13 because each document is incomplete and/or contains redacted information. See *Safer, Inc. v. OSM Investments, Inc.*, 94 USPQ2d 1031 (TTAB 2010).

Opposer has identified no applicable rule that these documents (Notice of Reliance Nos. 3 – 13) are admissible by notice of reliance and they should be stricken.

B. No Statement Of Relevance In Notice Of Reliance

A party may move to strike certain portions of a notice of reliance on the grounds that the submitting party failed to indicate the relevance of certain materials. *Tri Star Marketing, LLC v. Nino Franco Spumanti S.r.l.*, 84 USPQ2d 1912, 2007 TTAB 81, at *3 (TTAB 2007). Pursuant to Trademark Rule 2.122(e), any document submitted as a printed publication or official record for a notice of reliance must be identified in the notice or reliance with an explanation of the relevance of the material being offered. Opposer's Notice of Reliance Nos. 1 -13 fail to provide any statements regarding the relevance of the identified documents and should be stricken on those grounds.

C. No Showing That Publication Is In General Circulation

Notice of Reliance No. 13 purports to be a copy of pages from Preview November 2012 edition. To the extent that Opposer seeks to claim that this document is the proper subject of Notice of Reliance as a book or a periodical, Applicant submits that it should be stricken on the ground that no showing has been made that the publication is in general circulation in the United States or available in libraries. 37 C.F.R. 2.122(e).

D. Conclusion

Based on the foregoing facts and authorities, Applicant respectfully requests that the Board strike Opposer's Notice of Reliance Nos. 1 -13.

Respectfully submitted,

NOWLAN FAMILY TRUST

Date: May 27, 2014

By s/John J. O'Malley
John J. O'Malley
Volpe and Koenig, P.C.
United Plaza
30 South 17th Street
Philadelphia, PA 19103
(215) 568-6400
Attorney for Applicant

EXHIBIT 1

TRADEMARK

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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DECLARATION OF JOHN J. O'MALLEY

Sir:

I, John J. O'Malley, hereby declare as follows:

1. I am attorney of record in the above-identified opposition proceeding representing the Nowlan Family Trust ("Applicant").

2. On April 24, 2014, I prepared Applicant's Motion to Strike Portions of Opposer's Notice of Reliance ("Motion to Strike").

3. On April 24, 2014, I recall filing the Notice or Reliance with the TTAB using the ESTTA system at approximately 7:30 p.m.

4. That same evening, I emailed and mailed a copy of the motion to opposing counsel. A true and correct copy of my email and the Motion to Strike are attached as Exhibits A and B.

5. On May 8, 2014, I was called by the TTAB Interlocutory Attorney for this case, Benjamin U. Okeke, who informed me that counsel for Opposer had called him regarding the Motion to Strike and that he was confused because the Motion to Strike was not of record at the TTAB.

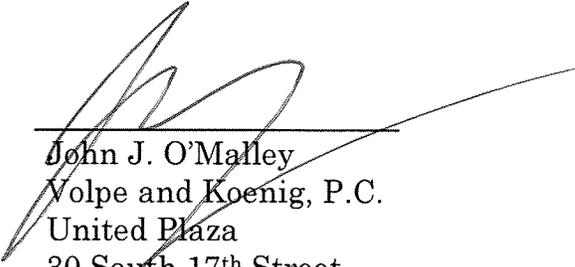
6. After conducting a search of our email records, no record was found of an electronic receipt for the filing of the Motion to Strike and I advised Mr. Okeke of that in a voice mail on May 9, 2014 and asked that he let me know what Applicant's options were.

7. On May 14, 2014. Mr. Okeke left me a voice mail indicating that it was too late to file the Motion to Strike. That same date, I left a voice mail for Mr. Okeke requesting the authority for that position. To date, since no response has been received, I am refiling the motion as I could not locate any authority that it was too late in the proceedings for Applicant to move to strike the notice of reliance.

8. All of the factual statements made herein are either known to me personally and/or based on a review of my firm's records.

9. I declare under the penalty of perjury that the foregoing is true and correct.

Date: May 27, 2014



John J. O'Malley
Volpe and Koenig, P.C.
United Plaza
30 South 17th Street
Philadelphia, PA 19103
(215) 568-6400
Attorney for Applicant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Applicant's Notice or Reliance was served on Applicant's Attorney of Record by electronic and first-class mail, postage pre-paid, to the following:

Vincent G. LoTempio, Esq.
Kloss, Stenger & LoTempio
69 Delaware Avenue, Suite 1002
Buffalo, NY 14202
vglotempio@klosslaw.com

Date: May 27, 2014

By: s/John J. O'Malley
John J. O'Malley, Esquire

EXHIBIT A

John O'Malley

From: John O'Malley <JOMalley@vklaw.com>
Sent: Thursday, April 24, 2014 7:59 PM
To: 'Andrew Olek'; 'Vincent G. LoTempio'
Cc: Katie Tinker
Subject: Dille v Nowlan
Attachments: Motion to Strike.pdf

Dear Vincent:

Attached please find a courtesy copy Applicant's Motion to Strike Notice of Reliance filed with the TTAB today. A service copy has also been served via first class mail.

If you have any questions, please contact me.

Regards,

John

John J. O'Malley
Volpe and Koenig, P.C.
Telephone: 1-215-568-6400
Facsimile: 1-215-568-6499
E-mail: jomalley@vklaw.com

EXHIBIT B

TRADEMARK

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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In the Trademark Opposition of:

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C. No Showing That Publication Is In General Circulation

Notice of Reliance No. 13 purports to be a copy of pages from Preview November 2012 edition. To the extent that Opposer seeks to claim that this document is the proper subject of Notice of Reliance as a book or a periodical, Applicant submits that it should be stricken on the ground that no showing has been made that the publication is in general circulation in the United States or available in libraries. 37 C.F.R. 2.122(e).

D. Conclusion

Based on the foregoing facts and authorities, Applicant respectfully requests that the Board strike Opposer's Notice of Reliance Nos. 1 -13.

Respectfully submitted,

NOWLAN FAMILY TRUST

Date: April 24, 2014

By s/John J. O'Malley
John J. O'Malley
Volpe and Koenig, P.C.
United Plaza
30 South 17th Street
Philadelphia, PA 19103
(215) 568-6400
Attorney for Applicant

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Opposition No. 91200643

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BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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Filed: July 12, 2011

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Vincent G. LoTempio
Kloss, Stenger & LoTempio
69 Delaware Avenue, Suite 1002
Buffalo, NY 14202
vglotempio@klosslaw.com

Date: April 24, 2014

By: s/John J. O'Malley
John J. O'Malley, Esquire

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Date: May 27, 2014

By: s/John J. O'Malley
John J. O'Malley, Esquire