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

Proceeding	91210776
Party	Plaintiff Audemars Piguet Holding S.A.
Correspondence Address	JOHN A GALBREATH GALBREATH LAW OFFICES PC 2516 CHESTNUT WOODS CT REISTERSTOWN, MD 21136-5523 UNITED STATES jgalbreath@galbreath-law.com
Submission	Opposition/Response to Motion
Filer's Name	John A. Galbreath
Filer's e-mail	jgalbreath@galbreath-law.com
Signature	/John A. Galbreath/
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<b>Audemars Piguet Holding S.A.</b>	)	<b>IN THE UNITED STATES</b>
	)	<b>PATENT AND TRADEMARK OFFICE</b>
<b>Plaintiff/Opposer</b>	)	
	)	<b>TRADEMARK TRIAL AND APPEAL BOARD</b>
<b>v.</b>	)	
	)	
<b>OAK73, LLC</b>	)	<b>APPL. NO. 85/776,034</b>
	)	
<b>Defendant/Applicant</b>	)	<b>OPPOSITION NO. 91210776</b>
_____	)	

**OPPOSER’S OPPOSITION TO APPLICANT’S MOTION TO DISMISS**

Audemars Piguet Holding S.A. ("Audemars Piguet", "Plaintiff", or "Opposer"), by and through its below-identified attorneys, hereby opposes OAK73 LLC's ("OAK73", "Defendant", or "Applicant") motion to dismiss, and states as follows:

**I. The Notice of Opposition Sufficiently States the Dilution Claim.**

A complaint need only allege such facts as would, if proved, establish that the plaintiff is entitled to the relief sought. TBMP 503.02 and Note 2 thereto: *Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 188 (CCPA 1982); *et al.* Whether a plaintiff can actually prove its allegations is a matter to be determined not upon motion to dismiss, but rather at final hearing or upon summary judgment, after the parties have had an opportunity to submit evidence in support of their respective positions. TBMP 503.02; *Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc.*, 988 F.2d 1157, 26 USPQ2d 1038, 1041 (Fed. Cir. 1993).

A claimant is not required to set out in detail the facts upon which he bases his claim. *Conley v. Gibson*, 355 U.S. 41, 47 (1957). To the contrary, all the Rules require is a short and

plain statement that gives fair notice of what the claim is and the grounds upon which it rests. *Id.*

Only averments of fraud or mistake require greater particularity. Fed. R. Civ. P. 9(b).

Moreover, the Supreme Court emphasized the following in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002):

"[The] simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz*, supra at 512.

"Given the Federal Rules' simplified standard for pleading, '[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts consistent with the allegations.' *Hishon v. King & Spalding*, 467 U.S. 69, 73 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984). If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding. Moreover, claims lacking merit may be dealt with through summary judgment under Rule 56. The liberal notice pleading standard of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim." *Swierkiewicz*, supra at 514 (emphasis supplied).

"Furthermore, Rule 8(a) establishes a pleading standard without regard to whether a claim will succeed on the merits. 'Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test'." *Swierkiewicz*, supra at 515.

Here, Audemars Piguet's opposition notice alleges that use and registration of OAK73's mark will cause dilution of Audemars Piguet's marks. Opp. Not. at para. 7. Moreover, the notice alleges not only that Audemars Piguet's marks are famous and distinctive in the relevant industry and trade, but also that Audemars Piguet's marks are famous and distinctive with consumers. *Id.* OAK73's motion focuses on Audemars Piguet's allegation that its marks are famous and distinctive in the relevant industry and trade, and assiduously ignores Audemars Piguet's additional allegation that its marks are famous and distinctive with consumers. "Consumer" is a

general term meaning “one who consumes”, and “distinctive” means “serving to distinguish”. Merriam-Webster Online Dictionary, <http://www.merriam-webster.com>. Thus, Audemars Piguet’s allegation is equivalent to stating that its marks are famous with the general consuming public as a source-indicator.

Further, the notice alleges that Audemars Piguet has used its marks in commerce for the goods since at least as early as January 1, 1974 – that is, almost forty years. Opp. Not. at para. 3. This certainly provides an additional factual predicate to support Audemars Piguet’s allegations that its marks are famous and distinctive with consumers, and that use and registration of OAK73’s mark will cause dilution of those marks.

Audemars Piguet is not required to go into further detail concerning the nature of the fame and distinctiveness or the reasons for it. In short, Audemars Piguet does not have to prove its dilution claim in the opposition notice.

## **II. Audemars Piguet’s Amended Notice of Opposition Even Further Supports Its Dilution Claim.**

All the above said, Audemars Piguet has amended its notice of opposition to provide even further support for its dilution claim. Audemars Piguet’s amended notice of opposition even more sufficiently states the dilution claim and gives OAK73 fair notice of the basis for it. Audemars Piguet’s motion to amend, and amended notice of opposition, are being filed contemporaneously with this opposition.

Specifically, the amended notice states that Audemars Piguet’s marks are famous within the meaning of 15 U.S.C. § 1125(c) – that is, they are widely recognized by the general consuming public of the United States as a designation of source of Audemars Piguet’s goods.

Amend. Opp. Not. at para. 7. The amended notice also provides the long history of Audemars Piguet's marks, and states that the marks have been extensively advertised, promoted, and publicized by Audemars in the United States and have achieved significant sales success.

Amend. Opp. Not. at paras. 8-9. These factors are indicators of fame under the dilution statute. 15 U.S.C. § 1125(c)(2)(A).

### **CONCLUSION**

For all the above reasons, OAK73's motion to dismiss should be denied.

Respectfully submitted,

/John A. Galbreath/

John A. Galbreath  
Galbreath Law Offices  
2516 Chestnut Woods Ct.  
Reisterstown, MD 21136-5523  
TEL: 410-628-7770  
FAX: 410-666-7274  
EMAIL: jgalbreath@galbreath-law.com

Attorneys for Opposer

Certificate of Service: I certify that on the date below, the foregoing Opposition to Motion to Dismiss and referenced attachments, if any, were sent by first-class mail to:

JAMES E. GRIFFITH  
FOLEY & LARDNER LLP  
321 N CLARK STREET  
CHICAGO, IL 60654

05 July 2013

/John A. Galbreath/  
John A. Galbreath