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

Proceeding	91215266
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

TRADEMARK TRIAL AND APPEAL BOARD

PREMIER SYSTEMS USA, INC.)
)
)
) *Opposer,*)
) **Opposition No. 91/215,266**
v.) **Mark: OLLI**
) **Serial No. 85/939,010**
GRIFFIN TECHNOLOGY, INC.,)
)
)
) *Applicant.*)

REPLY MEMORANDUM
IN FURTHER SUPPORT OF MOTION TO DISMISS

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and Section 503 of the Trademark Trial and Appeal Board Manual of Procedure, Griffin Technology, Inc. (“Griffin”) respectfully submits this Reply Memorandum in further support of its Motion to Dismiss (the “Motion”) the Opposition filed by Premier Systems USA, Inc. (“Premier”). Griffin continues to rely on all of the arguments set forth in the Motion and will not restate those arguments in this Reply Memorandum. Instead, Griffin submits this Reply Memorandum for the sole purpose of responding to the misleading and unsupported arguments in Premier’s Response to the Motion.

Premier’s Response acknowledges that “[t]o survive a motion to dismiss, a complaint must contain sufficient **factual matter**, accepted as true, to ‘state a claim to relief that is **plausible** on its face.’” (Response at 2 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (emphasis added).) Premier further acknowledges that its Opposition must “allege such **facts** which, if proved, would establish . . . a valid statutory ground . . . for [denying] the registration.” (Response at 2 (quoting *Corporacion Habanos, S.A. v. Rodriguez*, 99 U.S.P.Q.2d 1873, 1874 (T.T.A.B. 2011); T.B.M.P. § 503.02) (emphasis added).) After Premier acknowledges that it

was required to plead factual matter demonstrating a likelihood of confusion, Premier remarkably attempts to distract the Board from the dearth of factual allegations in the Opposition by repeatedly referencing evidentiary burdens, summary judgment and judgment on the pleadings. Premier should not be permitted to skirt the pleading standard by making irrelevant arguments about the standards for other types of motions.

A. The Opposition Consists Entirely of Conclusory Statements and Threadbare Recitals of Elements.

The Response cites three conclusory allegations in the Opposition that Premier contends “set forth plausible facts in support of a likelihood of confusion”:

- “[b]y virtue of Opposer’s continuous and substantial use, the OLLOCLIP and OLLO marks have become identifiers of Opposer and its goods and distinguish Opposer’s goods from the goods and services of others.” (Response at 4 (quoting Opp’n ¶ 8).)
- “goods listed in Applicant’s OLLI Application are related to Opposer’s goods sold in connection with Opposer’s OLLOCLIP and OLLO marks.” (Response at 4 (quoting Opp’n ¶ 11).)
- Opposer “will be damaged by the registration of Applicant’s alleged mark OLLI subject of Applicant’s OLLI Application, in that the alleged mark OLLI so resembles Opposer’s OLLOCLIP and OLLO marks registered and applied for in the PTO, and in which Opposer owns common law trademark rights, as to be likely, when used on or in connection with the goods identified in Applicant’s OLLI Application, as to cause confusion, or to cause mistake or to deceive within the meaning of Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d).” (Response at 4-5 (quoting Opp’n ¶ 12).)¹

However, these portions of the Opposition simply do not contain any **factual** allegations related to the purported similarity of the marks, the similarity of the goods and services, or any other factors relevant to a claim of likelihood of confusion. *See In re Thor Tech, Inc.*, 90 U.S.P.Q.2d (BNA) 1634, 2009 TTAB LEXIS 253, at *2 (T.T.A.B. 2009) (“In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities

¹ In an attempt to artificially increase the number of conclusory allegations in the Opposition, the Response also separately quotes a duplicative excerpt from this same portion of Paragraph 12.

between the services.”).

Of course, Premier’s Response cites no authority for the proposition that the conclusory allegations in the Opposition are sufficient to state a claim – and for good reason. It is well established that “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice’ and are not accepted as true.” *Doyle v. Al Johnson’s Swedish Rest. & Butik, Inc.*, 101 U.S.P.Q.2d (BNA) 1780, 2012 TTAB LEXIS 30, at *5 (T.T.A.B. 2012) (quoting *Iqbal*, 556 U.S. at 678). Although Premier may have alleged the *conclusion* of likelihood of confusion, it has failed to allege *facts* plausibly showing likelihood of confusion.

Disregarding Premier’s conclusory allegations and threadbare recitals of the elements, as the Board must, Premier has failed to allege facts sufficient to show likelihood of confusion. Accordingly, the Opposition should be dismissed.

B. Premier’s Arguments Regarding Summary Judgment and Judgment on the Pleadings are Red Herrings.

Premier does not dispute that the thirteen *Du Pont* factors establish the test for establishing likelihood of confusion. *See In re E.I. Du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (C.C.P.A. 1973); *see also Citigroup Inc. v. Capital City Bank Group, Inc.*, 637 F.3d 1344, 1348 (Fed. Cir. 2012). Instead, Premier argues that Griffin’s Motion improperly demands “proof” of the *Du Pont* factors at the motion to dismiss stage and that Griffin’s Motion “is merely an improper attempt for summary judgment and judgment on the pleadings.” (Response at 5-7.) Contrary to Premier’s strained argument, however, Griffin’s Motion clearly does not demand “proof” of the *DuPont* factors at this stage of the proceedings. Instead, Griffin simply and correctly argues that Premier’s Opposition must contain sufficient factual allegations to support a plausible claim of likelihood of confusion. Without such plausible factual allegations,

the Board should not permit the proceedings to advance to the proof stage. It is black letter law that the pleading standard “does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.” *Iqbal*, 556 U.S. at 678-79.

Moreover, Premier’s arguments about judgment on the pleadings are both disingenuous and misleading. The face of the Opposition demonstrates that Griffin’s OLLI mark is spelled and pronounced differently from Premier’s alleged OLLOCLIP and OLLO marks. These are key considerations in the likelihood of confusion analysis and, accordingly, the face of the Opposition contains factual allegations inconsistent with likelihood of confusion. *See Citigroup*, 637 F.3d at 1350 (citing *Champagne Louis Roederer, S.A. v. Delicato Vineyards*, 148 F.3d 1373, 1374-75 (Fed. Cir. 1998)) (noting that the Federal Circuit “has found mark dissimilarity when the words are spelled differently”). A plaintiff certainly does not “nudge[] [its] claims across the line from conceivable to plausible” by alleging facts inconsistent with its claim for relief. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Peters v. District of Columbia*, 873 F. Supp. 2d 158, 187-209 (D.D.C. 2012) (dismissing claims where the complaint alleged facts that “undercut” the plaintiffs’ claims for relief). Contrary to Premier’s contrived argument, Griffin is not seeking judgment on the pleadings. Instead, Griffin has properly demonstrated that Premier’s allegations are inconsistent with the relief it seeks, and therefore, Premier has not stated a plausible claim of likelihood of confusion.

C. The Board Should Consider the Exhibits to Griffin’s Motion.

Premier argues that Griffin “improperly attempts to submit evidence that is outside the pleadings.” (Response at 7.) However, Premier’s argument reflects an overbroad interpretation of the rules relating to motions to dismiss, and it fails to appreciate significant nuances.

First, Griffin properly refers to matters of public record from the Trademark Electronic

Search System. The authority cited in Premier's own Response recognizes that "[d]espite the requirement that the Board must treat all well-pleaded allegations as true, there are facts the Board may consider when a party has filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6)," including certain records of the U.S. Patent and Trademark Office. *Compagnie Gervais Danone v. Precision Formulations, LLC*, 89 U.S.P.Q.2d (BNA) 1251, 2009 TTAB LEXIS 1, at *14-*15 (T.T.A.B. Jan. 5, 2009) (cited in Premier's Response at 7).

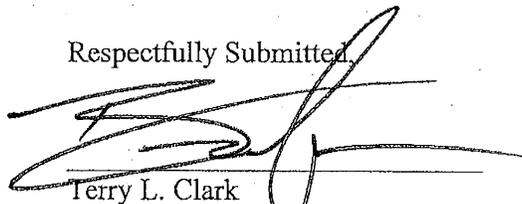
Second, Griffin properly asks the Board to take judicial notice of the fact that "ollo" means "eye" in the Galician language, a fact which gives the "OLLO" portion of Premier's alleged marks a connotation or commercial impression of the comparison between a camera lens and an eye. Premier argues that the Board should not consider this fact because it is a matter outside the pleadings and because the Board may not take judicial notice of this fact. (Response at 7-8.) These interrelated arguments are unpersuasive. It is well settled that the Board may consider facts properly subject to judicial notice in considering a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). *See, e.g., Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1030-31 (9th Cir. 2008) (quoting *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 899-900 (9th Cir. 2007)). Accordingly, the core of Premier's argument is that the translation of "ollo" from Galician to English is not properly subject to judicial notice. Although Griffin's Motion cited substantial authority for the proposition that on-line translations are subject to judicial notice (*see* Motion at 7 n.3), Premier apparently argues that the translation submitted as Exhibit B to the Motion should not be considered because it was not retrieved from a dictionary in print form. (*See* Response at 8.) Without conceding the point, therefore, Griffin further cites the following print authority demonstrating that "ollo" means "eye" in the Galician language. Jaine E. Beswick, REGIONAL NATIONALISM IN SPAIN: LANGUAGE USE AND ETHNIC IDENTITY IN

GALICIA 274 (2007) (excerpted hereto as Exhibit A). Premier's alleged "OLLO" marks convey a connotation and commercial impression of the comparison between an eye and a camera lens, and Griffin's OLLI mark conveys no such connotation or commercial impression. Therefore, Premier has failed to state a claim for likelihood of confusion.

CONCLUSION

For each and all of the foregoing reasons, in addition to the reasons set forth in Griffin's Motion, Premier's Opposition should be dismissed for failure to state a claim upon which relief can be granted.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing REPLY MEMORANDUM IN FURTHER SUPPORT OF MOTION TO DISMISS has been served on the Attorneys of Record for Opposer, by mailing said copy on the 22nd day of May, 2014, via First Class U.S. Mail, with a courtesy copy being sent by email, to the following:

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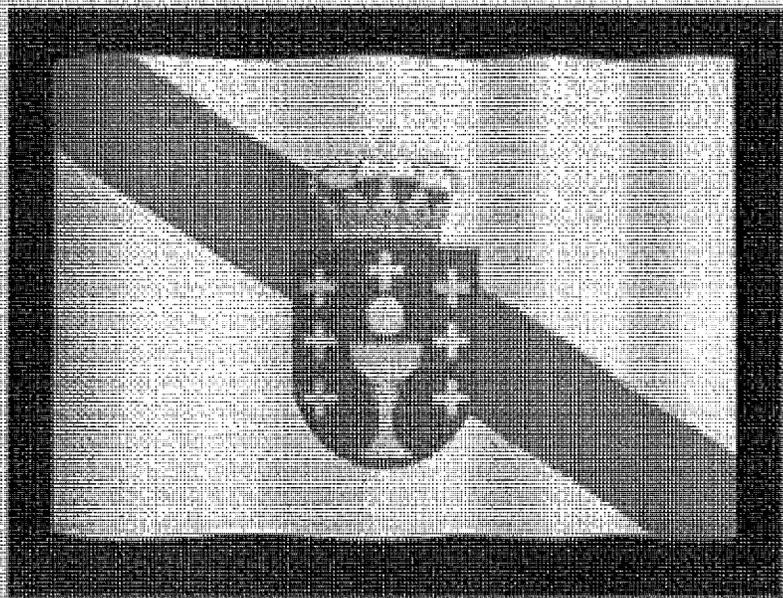

Marian Moore - Paralegal

EXHIBIT A

LINGUISTIC DIVERSITY AND LANGUAGE RIGHTS

REGIONAL NATIONALISM IN SPAIN

*Language Use and
Ethnic Identity in Galicia*



Jaine E. Beswick



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Appendix I

**Major Orthographic Differences
between the Galician Standard,
Castilian and Portuguese**

Symbol in Galician	Galician Standard	Castilian	Portuguese	Gloss
x	xeral	general	geral	'general'
	xema	yema	gema	'yolk'
	xaneiro	enero	janeiro	'January'
	peixe	pez	peixe	'fish'
nh	unha	una	uma	'one' (fem. sing.)
	algunha	algunas	algumas	'some' (fem. sing.)
ll	ollo	ojo	olho	'eye'
	telha	teja	telha	'material, cloth'
ñ	teño	tengo	tenho	'I have'
l	castelo	castillo	castelo	'castle'
ch	chama	llama	chama	'flame'
m	home	hombre	homem	'man'