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

Proceeding	91194369
Party	Defendant United Football League, LLC
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Attachments	Motion for Recon. Req. for stay.PDF (5 pages)(17939 bytes)

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

<u>Upward Unlimited,</u>)	
)	Opposition No. 91194369
Opposer,)	
)	
v.)	
)	
United Football League, LLC,)	Application Serial Nos. 77/838,780;
)	77/838,783; 77/838,785; 77/838,787
)	and 77/838,790
<u> Applicant.</u>)	

Applicant’s Motion for Reconsideration and Request for Stay

I. Introduction

Applicant United Football League (“Applicant”) respectfully requests the Trademark Trial and Appeal Board (the “Board”) reconsider the Order issued on May 17, 2010 (the “May 17, 2010 Order”) by Interlocutory Attorney George Pologeorgis, who has construed Applicant’s Motion to Dismiss Opposition No. 91194369 for failure to state a claim under Fed. R. Civ. P. 12(b)(6) as one for summary judgment and, therefore, deemed the motion premature. As set forth below, Applicant’s Motion to Dismiss should be determined on the merits, once Opposer Upward Unlimited (“Opposer”) submits a response, if any, because the case law regarding motions to dismiss shows that the instant matter is appropriate and ripe for dismissal at this stage, and to do so would be not only be consistent with three other dispositive motions regarding ten other Oppositions lodged by Opposer against Applicant which are now pending before the Board, but would also further the interests of justice and efficiency.

II. Applicant’s Request for Stay



Pending resolution of Applicant’s Motion for Reconsideration, Applicant requests an immediate stay of this proceeding. Specifically, Applicant requests that the current deadline of Monday, June 7, 2010 for Applicant to Answer, as well as the remaining deadlines and schedule

set forth in the May 17, 2010 Order, be suspended until the Motion for Reconsideration is decided.

III. The Instant Matter Is Ripe To Be Determined On A Motion To Dismiss.

While the May 17, 2010 Order ruled that this matter is more appropriate for summary judgment, Applicant submits that the facts and law set forth in Opposition No. 91194369 are appropriate and ripe for determination on a Motion to Dismiss. The cases cited in the May 17, 2010 Order are helpful in this regard. Opposer must not only make a rote allegation of standing and a statutory ground negating registration, but must *also allege facts which could reasonably support the foregoing*. See *Advanced Cardiovascular Systems, Inc. v. SciMed Life Systems, Inc.*, 988 F.2d 1157, 1160, 26 USPQ2d 1038, 1041 (Fed. Cir. 1993) (motions under Rule 12(b)(6) challenge the legal theory of the complaint, not sufficiency of evidence). As the Federal Circuit stated, the purpose of Rule 12(b)(6) “is to allow the court to eliminate actions that are fatally flawed in their legal premises and destined to fail, and thus to spare litigants the burdens of unnecessary pretrial and trial activity.” *Id.*, citing *Neitzke v. Williams*, 490 U.S. 319, 326-327 (1989). If the facts as alleged on the face of the pleading do not support the legal, statutory ground asserted, the Motion to Dismiss should be granted. *Young v. AGB Corp.*, 152 F.3d 1377, 1380 (Fed. Cir. 1998) (opposition dismissed for failure to assert facts sufficient to show 2(d) likelihood of confusion as statutory ground in support of claim).

In this case, Applicant is alleging in its Motion to Dismiss that Opposer has failed, on the face of its pleading (Opposition No. 91194369), to establish that there is a likelihood of confusion between its marks and Applicant’s cited mark as a matter of law. Because Applicant is asserting the marks are sufficiently dissimilar on their face, the Board does not need any other facts, evidence, or extraneous material to reach its conclusion. Thus, the May 17, 2010 Order’s

ruling that this determination can only be made at the summary judgment stage is misplaced. Indeed, the Board has routinely granted dispositive Motions (including to Dismiss or for Judgment on the Pleadings) based on dissimilarity of the marks alone. *See, e.g., Ava Enterprises, Inc. v. P.A.C. Trading Group, Inc.*, 2008 TTAB LEXIS 39, *4, 86 U.S.P.Q.2d (BNA) 1659 (TTAB 2008) (judgment on pleadings granted where confusion “cannot exist as a matter of law” based on first *du Pont* factor alone when terms share common letters but marks, as a whole, are entirely different); *Fashion Boom, Inc. v. Gap (Apparel) Inc.* 2002 TTAB LEXIS 60, *10 (TTAB April 11, 2002) (Motion to Dismiss supported by exhibits granted where the mark  “GAP and square” held not confusingly similar to  “AC and square” and opposer provided no evidence to the contrary); *Inspiration Software, Inc. v. Teacher Inspired Practical Stuff, Inc.*, 2007 TTAB LEXIS 154, *5 (TTAB March 7, 2007) (motion to dismiss with evidence from TTABVUE granted where dissimilarity of marks in their entireties substantially outweighed all other *du Pont* factors which were assumed in opposer’s favor); *Big O Tires, Inc. v. 67 and Latham, LLC*, 2008 TTAB LEXIS 501, *4 (TTAB November 18, 2008) (motion to dismiss converted to summary judgment determined in applicant’s favor on single factor of dissimilarity of marks alone where applicant conceded other *du Pont* factors in opposer’s favor).¹

In this case, both the Applicant’s mark and Opposer’s marks are set forth on the face of Opposition No. 91194369. As a consequence, the Board has all it needs to decide the substantive merits of Applicant’s Motion to Dismiss. Nothing Opposer or Applicant could add during the discovery process would assist, change, or circumvent the Board’s determination of that issue.

¹ The *Fashion Boom*, *Inspiration Software*, and *Big O Tires, Inc.*, decisions are not citable precedent of the TTAB and are provided for informational purposes only.

Moreover, as this Board may be aware, Opposer has submitted eleven total Oppositions related to Applicant's various applications, all of which concern the same marks asserted by Opposer in the present Opposition. In response to each of the eleven Oppositions, Applicant has filed either a Motion to Dismiss or for Judgment on the Pleadings (consolidated).² In every other instance, the Board has allowed the Motions to proceed substantively. As a result, ten of the eleven proceedings (all but Opposition No. 91194369) have been stayed pending resolution of Applicant's motions. There is no procedural difference which distinguishes this matter from the ten other pending matters before the Board.

IV. Conclusion

Based upon the foregoing, Applicant respectfully requests that its Motion for Reconsideration be granted, and that Applicant's Motion to Dismiss Opposition No. 91194369 be permitted to proceed substantively in accordance with the law and in the interests of justice and efficiency. In addition, Applicant requests an immediate stay of the proceedings until resolution of the pending Motion for Reconsideration.

Respectfully submitted,

Applicant United Football League, LLC,

By Its Attorneys,

/Laura L. Carroll/

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Date: June 4, 2010

² The other ten proceedings are Opposition Nos. 91194368 and 91194370 (which were filed concurrently with the instant matter and are now the subjects of Motions to Dismiss); and Opposition Nos. 91191159, 91191160, 91191161, 91191162, 91191163, 91191164, 91191165 (all filed July 21, 2009), and 91192776 (filed on November 23, 2009) (which have been consolidated into parent 91191159 and are now the subject of a consolidated Motion for Judgment on the Pleadings).

CERTIFICATE OF MAIL AND CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of Applicant's Motion for Reconsideration has been served upon counsel for Opposer by electronic filing through ESTTA, as well as by mailing said copy on June 4, 2010 via First Class Mail, postage prepaid to:

Tim F. Williams, Esquire
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UNITED STATES

/Diane Noël/ _____
Diane A.D. Noël