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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

GIBSON BRANDS, INC., a	)	Case No. CV 14-00609 DDP (SSx)
Delaware corporation,	)	
	)	<b>ORDER DISMISSING THE THIRD-PARTY</b>
Plaintiff,	)	<b>COMPLAINT AGAINST BANK OF AMERICA</b>
	)	
v.	)	[Dkt. Nos. 58, 59]
	)	
JOHN HORNBY SKEWES & CO.	)	
LTD.,	)	
	)	
Defendant.	)	

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Presently before the Court are motions by Third-Party Defendant Bank of America ("BOA") and Plaintiff Gibson Brands ("Gibson") to dismiss the Third-Party Complaint filed by Defendant John Hornby Skewes & Co. ("JHS"). Having considered the parties' submissions, the court adopts the following order and grants the motions.

**I. BACKGROUND**

Gibson and JHS are manufacturers of electric guitars. Gibson alleges that JHS has infringed its trademarks. JHS, in a counter-claim and third-party complaint, alleges that Gibson's purported marks have become generic through widespread use by other

1 companies, and also that most of the marks were actually owned by  
2 BOA at the time the Complaint was filed.

3 To support its allegation that BOA was, at one point, the true  
4 owner of the marks, JHS has requested that the Court take judicial  
5 notice of a PDF of a series of pages from the website of the United  
6 States Patent and Trademark Office ("USPTO"). (Opp'n, RJN and Ex.  
7 A.) These pages are dated September 29, 2014 and give information  
8 about each mark, including registration date, serial number, a  
9 design sketch, and so on. They also each list "Bank of America,  
10 National Association" in the "Owner Name" field. (Id.) Gibson has  
11 submitted its own PDF of USPTO webpages, dated October 6, 2014,  
12 listing "Gibson Guitar Corp." as the owner of the marks. (Dkt. No.  
13 51-1, Ex. A.) BOA has also submitted a PDF of the page, dated  
14 October 24, 2014, also listing "Gibson Guitar Corp." as the owner  
15 of the marks. (Dkt No. 58-2.)

16 In previous filings, the parties have requested judicial  
17 notice be taken of documentation, also from the USPTO website,  
18 showing that BOA and Gibson entered into a security agreement,  
19 using the marks as collateral, on March 25, 2011, and that that  
20 security agreement was terminated on July 31, 2013. (Dkt. No. 50-  
21 2, Decl. Brent Davis, Ex. B.) The parties have also requested  
22 judicial notice be taken of another security agreement between BOA  
23 and Gibson executed on July 31, 2013. (Dkt. No. 50-3, Decl. Brent  
24 Davis, Ex. C.) No judicially-noticeable document shows that  
25 agreement to have been terminated.

## 26 **II. LEGAL STANDARD**

27 In order to survive a motion to dismiss for failure to state a  
28 claim, a complaint need only include "a short and plain statement

1 of the claim showing that the pleader is entitled to relief." Bell  
2 Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v.  
3 Gibson, 355 U.S. 41, 47 (1957)). A complaint must include  
4 "sufficient factual matter, accepted as true, to state a claim to  
5 relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S.  
6 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544,  
7 570 (2007)). When considering a Rule 12(b)(6) motion, a court must  
8 "accept as true all allegations of material fact and must construe  
9 those facts in the light most favorable to the plaintiff." Resnick  
10 v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000). Rule 8(a) "calls for  
11 enough fact to raise a reasonable expectation that discovery will  
12 reveal evidence to support the allegations." Starr v. Baca, 652  
13 F.3d 1202, 1217 (9th Cir. 2011) (internal quotation mark omitted).

### 14 **III. DISCUSSION**

#### 15 **A. Procedural Deficiencies in the Third-Party Complaint**

16 Gibson's first argument in its motion to dismiss is that JHS  
17 failed to obtain the Court's permission to amend its counterclaim  
18 to add BOA as a party, as required by Rule 15. (Gibson's Mem. P.  
19 & A. at 4:15-5:3.)

20 JHS replies that it *did* obtain the Court's leave when the  
21 Court "specifically granted JHS the right to amend its pleading."  
22 (Opp'n to Gibson's Renewed Mot. Dismiss at 7:21-22.) JHS cites to  
23 "Order at 18" - presumably the Court's order of August 22, 2014.  
24 Although the Court did give JHS leave to amend its counterclaims,  
25 that leave was not a free-ranging permission to add anything or  
26 anyone under the sun. It was, implicitly, leave to amend in order  
27 to cure the deficiencies identified in the order. In particular,  
28 adding third parties requires permission separate from ordinary

1 leave to amend: “[T]he third-party plaintiff must, *by motion*,  
2 obtain the court's leave if it files the third-party complaint more  
3 than 14 days after serving its original answer.” Fed. R. Civ. P.  
4 14 (emphasis added). JHS should have filed a separate motion  
5 seeking leave to file the third-party complaint.

6 **B. Substantive Arguments Regarding Ownership of the Marks**

7 Nonetheless, in the interest of avoiding duplicative filings  
8 only to arrive at the same point, the Court will address the  
9 substantive issues to which the parties devote most of their  
10 briefing.

11 **1. USPTO Documents**

12 As a general matter, in ruling on 12(b)(6) or 12(c) motions,  
13 “a district court may not consider any material beyond the  
14 pleadings.” Hal Roach Studios, Inc. v. Richard Feiner & Co., 896  
15 F.2d 1542, 1555 n. 19 (9th Cir. 1990). The parties agree that the  
16 Court may take judicial notice of USPTO records on a motion to  
17 dismiss, which is true. Lee v. City of Los Angeles, 250 F.3d 668,  
18 688–89 (9th Cir. 2001). However, there is some danger in delving  
19 too deeply into matters outside the pleadings at the motion to  
20 dismiss stage. The purpose of the motion to dismiss is not to  
21 weigh the evidence for or against competing factual claims. It is  
22 to ensure that the pleading does two things: (1) puts parties on  
23 notice as to claims against them so that they may prepare defenses,  
24 and (2) states a plausible entitlement to relief. Starr v. Baca,  
25 652 F.3d 1202, 1216 (9th Cir. 2011). If the Court can determine  
26 that Defendant’s Third-Party Complaint does that, the inquiry is at  
27 an end.

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1 Gibson and BOA argue that JHS "has not plausibly alleged  
2 BofA's ownership" of the marks. (BOA's Mot. Dismiss at 6:10-11.)  
3 They refer the Court to judicially-noticeable evidence that, as of  
4 October 6 or October 24, the USPTO website listed "Gibson Guitar  
5 Corp." as the owner of the marks. If the USPTO's website had, all  
6 along, listed Gibson as the owner of the marks - that is, if the  
7 judicially-noticeable evidence were *unambiguous* - it might well be  
8 enough, on its own, to render JHS's factual allegation that BOA is  
9 or was the owner implausible. "Plaintiff's complaint may be  
10 dismissed only when defendant's plausible alternative explanation  
11 is so convincing that plaintiff's explanation is *implausible*."  
12 Starr, 652 F.3d at 1216.

13 But the evidence is not unambiguous. Gibson and BOA point out  
14 that "both trademarks owners and the USPTO itself make clerical  
15 errors," and they argue that the USPTO webpage listing BOA as the  
16 owner of the marks was "due to a clerical error by the USPTO."  
17 (BOA's Mot. Dismiss at 5:19-20; Gibson's Renewed Mot. Dismiss at 6-  
18 7 n.1.) But that argument could just as easily cut against Gibson  
19 and BOA's own reliance on documents from the same website. Gibson  
20 and BOA essentially ask the Court to weigh the credibility of one  
21 judicially-noticeable iteration of a government website against the  
22 credibility of another. This the Court declines to do.<sup>1</sup>

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26 <sup>1</sup>More-or-less the same arguments apply to the evidence of the  
27 security agreements. If the USPTO is apt to make mistakes, and may  
28 well have made a mistake in this case, the Court will not presume  
that some of the USPTO's documents are more or less reliable than  
others that may contradict them.

1 The judicially-noticeable evidence presented is not so  
2 unambiguous that the Court may, on that ground alone, treat  
3 otherwise well-pled allegations as implausible.

4 **2. Plausible Claim**

5 On the other hand, a complaint does not state a plausible  
6 ground for relief if it is illogical or plainly at odds with common  
7 sense.<sup>2</sup> JHS's theory of the case is that BOA acquired ownership of  
8 the marks via one of the security agreements listed in the various  
9 USPTO documents or the deal to which the security agreement is  
10 ancillary. (Opp'n at 6:19-7:12.) Assuming this to be true, JHS  
11 does not explain why BOA would come before this Court and aver, in  
12 filings subject to Rule 11, that USPTO records "unambiguously  
13 establish" that it "does not, and never has, owned the marks."  
14 (BOA's Mot. Dismiss at 1:22.)

15 What would be the benefit to BOA of pretending that it does  
16 not own the marks? Suppose the Court denies these motions and  
17 continues to the summary judgment stage. BOA, which in this  
18 hypothetical owns the marks, would then be in the position of  
19 having lied to the Court and would have opened itself up to  
20 discovery which would undoubtedly reveal that fact. What could  
21 possibly be its motivation in doing so? The *best* case scenario for  
22 BOA at that point would be that the Court erroneously finds that it  
23 is not the owner - a determination which would likely act as *res*  
24 *judicata* to preclude BOA from asserting its ownership rights in the  
25 marks in the future. Additionally, if JHS's interests were harmed

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27 <sup>2</sup>"[D]etermining whether a complaint states a plausible claim  
28 is context-specific, requiring the reviewing court to draw on its  
experience and common sense." Ashcroft v. Iqbal, 556 U.S. 662,  
663-64 (2009).

1 by BOA's false statements in this matter, JHS could sue BOA for  
2 fraud. JHS does not explain what benefit accrues to BOA, if it is  
3 the owner, in taking such risks. Surely if BOA were the owner of  
4 the marks, and were apprised of a lawsuit that could result in  
5 cancellation of the marks, the rational course of action would be  
6 to intervene as the true owner, or at the very least to inform the  
7 Court in this motion that it is the true owner so that the  
8 counterclaims for cancellation against Gibson would be dismissed.

9 Compared to JHS's narrative, which requires obscure,  
10 gamesmanlike motives and wild risk-taking by a sophisticated  
11 business entity, BOA and Gibson's explanation - a clerical error at  
12 the USPTO, now rectified - has the virtue of being both simple and  
13 likely. This is, indeed, a case where "[the third-party]  
14 defendant's plausible alternative explanation is so convincing that  
15 [the third-party] plaintiff's explanation is implausible." Starr,  
16 652 F.3d at 1216.

17 The Court finds, given everything before it, that the Third-  
18 Party Complaint does not state a plausible claim.

19 **IV. CONCLUSION**

20 The Motions to Dismiss the Third-Party Complaint are hereby  
21 GRANTED.

22 IT IS SO ORDERED.

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25 Dated: December 8, 2014

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DEAN D. PREGERSON  
United States District Judge