ESTTA Tracking number: **ESTTA153345**
Filing date: **07/26/2007**

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

Proceeding	91177192
Party	Plaintiff NAUTICA APPAREL, INC.
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Date	07/26/2007
Attachments	Reply brief for Motion to Strike 7-26-07.pdf (5 pages)(16563 bytes)

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

NAUTICA APPAREL, INC.,		
Opposer,	Mark:	GET NAUTI
v.	Serial No.	78610037
MARTANNA LLC,	Filed:	April 15, 2005
Applicant.		

OPPOSER'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO STRIKE

Opposer, Nautica Apparel, Inc. ("Opposer") respectfully moves this Honorable Board for leave to file a reply brief in support of its Motion to Strike Paragraph 5 and Affirmative Defenses One through Five, and Thirteen through Eighteen of applicant's answer to the Notice of Opposition.

Applicant has conceded Opposer's Motion to Strike Affirmative Defenses 2-5 and 13.

Applicant offers no response to Opposer's request that Applicant's First Affirmative Defense be stricken. Therefore, Opposer's Motion to Strike Applicant's First Affirmative Defense should be granted as conceded.

Applicant has partially conceded Opposer's Motion to Strike Paragraph 5 of Applicant's Answer, namely Applicant's refusal to respond to Opposer's claim of ownership of its registered trademarks, and in the alternative to deny same. Applicant

has admitted Opposer's ownership of its registered marks, but continues to deny Opposer's ownership of eleven (11) pending trademark applications.

Applicant maintains its Affirmative Defenses 14 through 16, which are based on the principals of waiver, laches, estoppel, acquiescence, and Opposer's alleged misconduct and unclean hands. Laches can only begin from the first time when Opposer could object to registration; i.e. the date when the application is published for opposition. *Ohio State University v. Ohio University*, 51 USPQ2d 1289 (TTAB 1999). *See also National Cable Television Association Inc. v. American Cinema Editors Inc.*, 19 USPQ2d 1424, 1431-32 (Fed. Cir. 1991).

It has been consistently held that the doctrine of estoppel may be invoked only by one who has been prejudiced by the conduct relied upon to create the estoppel, and a party may not therefore base its claim for relief on the asserted rights of strangers with whom it is not in privity of interest. *Textron, Inc. v. The Gillette Company*, 180 USPQ 152, 154 (TTAB 1973) Applicant's pleading asserting estoppel is improper since there is no indication that Applicant was induced to select its mark because of Opposer's conduct or that Applicant is in privity with third parties who have assertedly used similar marks for similar goods with Opposer's acquiescence. *Textron* at 154. *See also Andersen Corp. v. Therm-O-Shield International, Inc.*, 226 USPQ 431, 435 (TTAB 1985).

Applicant's Sixteenth Affirmative Defense does not include allegations that properly state a defense of misconduct and unclean hands. There are no specific allegations of conduct by Petitioner that, if proved, would prevent Petitioner from prevailing on its claim; instead, the allegations of the Sixteenth Affirmative Defense are non-specific and merely conclusory in nature, and therefore are improper and insufficient

as a matter of law. See *Midwest Plastic Fabricators Inc. v. Underwriters Laboratories Inc.*, 5 USPQ2d 1067, 1069 (TTAB 1987). In addition, TBMP § 311.02(b) (cited by Applicant in its brief) states: "the pleading should include enough detail to give the plaintiff fair notice of the basis for the defense." Applicant's Sixteenth Affirmative Defense provides no detail whatsoever, and Opposer has no notice of the basis for the defense.

Accordingly, Applicant's affirmative defense of laches, estoppel, acquiescence, and Opposer's alleged misconduct and unclean hands, should be stricken in their entireties.

Applicant has conceded Opposer's Motion to Strike Applicant's Seventeenth Affirmative Defense consisting of abandonment, functionality and fair use. Applicant offers no response to Opposer's request that the remainder of Applicant's Seventeenth Affirmative Defense be stricken, namely the claims of erosion and good faith, other than to state in a footnote that Opposer did not cite any authority that disallows Applicant to assert these defenses. In that respect, registration of a mark on the Principal Register is constructive notice to the world of the registrant's claim of ownership of the mark, thereby eliminating the defense of good faith and lack of knowledge on the part of a junior user. *Nark, Inc. v. Noah's, Inc.*, 212 USPQ 934, 943-44 (TTAB 1981). See also the case of *Miss Universe L.P. v. Community Marketing Inc.*, 82 USPQ2d 1562 (TTAB 2007), where the Board ruled: "even if we accept as true applicant's contention that it adopted its mark in good faith, such good faith adoption does not establish the absence of a likelihood of confusion." Therefore, Opposer's Motion to Strike Applicant's Seventeenth Affirmative Defense should be granted.

Finally, Applicant's opposition brief states that Opposer offers no authority that disallows Applicant to reserve the right to assert the defenses of "fraud, illegality, res judicata, failure to mitigate, preemption, statute of limitations, statute of frauds, or any other matter constituting an avoidance or affirmative defense," and that Opposer is arguing its case on the merits. However, even a cursory look at the undisputed facts reveals that the majority of those defenses are improper. There cannot be res judicata as a matter of law if there is no prior litigation between the parties – and there is none. There can be no failure to mitigate as a matter of law when opposing an intent-to-use application, because there were no past or present damages to mitigate. Obviously the Notice of Opposition was timely filed, so it is preposterous to reserve the right to allege a statute of limitations defense. Finally, this is an opposition proceeding. It is simply impossible to assert a statute of frauds defense.

WHEREFORE, Opposer respectfully demands that its motion set forth herein be granted in all respects.

Respectfully submitted,

By: /stephen baker/

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Dated: July 26, 2007

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Motion to Strike was forwarded by first class postage pre-paid mail by depositing the same with the U.S. Postal Service on this 26th day of July, 2007 to the attorneys for the Applicant at the following address:

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/stephen baker/
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