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

Proceeding	91204522
Party	Plaintiff OFF THE HOOK, LLC DBA Go Fish
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

OFF THE HOOK, LLC dba Go Fish,)	
)	
Opposer,)	
)	
v.)	Opposition No. 91204522
)	
Bumble Bee Foods, LLC ,)	
)	
Applicant.)	Serial No. 85366508
_____)	

**OPPOSER’S MOTION TO STRIKE
APPLICANT’S AFFIRMATIVE DEFENSES**

Pursuant to Rule 12 of the Federal Rules of Civil Procedure, OFF THE HOOK, LLC dba Go Fish, (“Opposer”) hereby moves the Trademark Trial and Appeal Board (the “Board”) to strike the Affirmative Defenses as pleaded by Bumble Bee Foods, LLC (“Applicant”) in Applicant’s Answer to Notice of Opposition, as they are immaterial, insufficient and improper as a matter of law.

ARGUMENT

Under Rule 12(f) of the Federal Rules of Civil Procedure, the Board may strike from a pleading any insufficient defense or any redundant, immaterial, or impertinent allegation. *Harsco Corp. v. Electrical Sciences Inc.*, 9 USPQ2d 1570 (TTAB 1988). Although motions to strike are not favored, *id.*, they are permissible and will be granted when appropriate. Here, as each purported affirmative defense is immaterial, legally insufficient and/or improper, it is appropriate for them to be stricken, which will help to avoid unnecessary discovery, testimony, argument and briefing.

Each and every one of the claimed affirmative defenses in Applicant's Answer to Notice of Opposition does not meet the standards established by Rule 8(b) of the Federal Rules of Civil Procedure. As noted in the TBMP, "the elements of a defense should be stated simply, concisely, and directly. However, the pleading should include enough detail to give the plaintiff fair notice of the basis for the defense." TBMP Sec. 311.02(b); *Cf. McDonnell Douglas Corp. v. National Data Corp.*, 228 USPQ 45, 47 (TTAB 1985) (bald allegations without any further details were found to be insufficient as providing fair notice).

The Applicant clearly did not meet this standard, as the defenses asserted by the Applicant are merely bare and conclusory assertions. These bald allegations do not provide Opposer or the Board with fair notice of the basis for these claimed defenses, and do not plead the elements necessary to establish the affirmative defenses. Nor can a general reservation of rights constitute an affirmative defense. Indeed, such a reservation is contrary to Rule 15 of the Federal Rules of Civil Procedure. As such, each of the so-called defenses is not properly pled as an affirmative defense, not sufficiently founded on rules or case law, and should be stricken.

A. Applicant's First Affirmative Defense That Opposer Lacks Standing Should Be Stricken

Applicant asserts as its First Affirmative Defense a claim that the opposition is barred by Opposer's lack of standing. Applicant's First so-called Affirmative Defense must be dismissed because "[l]ack of standing is not an affirmative defense." *Blackhorse v. Pro Football Inc.*, 98 USPQ2d 1633, 1637 (TTAB 2011).

Opposer must establish standing as part of its cause of action. As discussed in Section B, *infra*, Opposer has made sufficient allegations, which if proved would confirm its standing.

B. Applicant's Second Affirmative Defense That Opposer's Notice Of Opposition Fails To State A Cause Of Action Should Be Stricken

Applicant's Second so-called Affirmative Defense is that Opposer has failed to state a claim upon which relief can be granted. As was the case with its First Affirmative Defense, "[f]ailure to state a claim upon which relief can be granted is not an affirmative defense." *Blackhorse v. Pro Football Inc., supra*. In any event, the Notice of Opposition plainly states a claim upon which relief can be granted.

The ground of "failure to state a claim" is not really an affirmative defense because it relates to an assertion of the insufficiency of the pleading of opposer's claim rather than a statement of a defense to a properly pleaded claim. An applicant who believes that a claim is insufficient to assert a cause of action may test the allegation by filing a motion to strike. *Order Sons of Italy in America v. Profumi Fratelli Nostra AG*, 36 USPQ2d 1221, 1222-23 (TTAB 1995). Applicant has not done so. Similarly, a plaintiff may utilize the defendant's assertion of failure to state a claim to test the sufficiency of its pleading by moving under Rule 12(f) of the Federal Rules of Civil Procedure to strike this defense from the answer. *S.C. Johnson & Sons, Inc. v. GAF.*, 177 USPQ 720 (TTAB 1973).

In determining the sufficiency of the notice of opposition, the Board examines the notice to see if (1) the plaintiff has standing to maintain the proceeding, and (2) a valid ground exists for opposing the mark.

Here, the Notice of Opposition is clearly sufficient, since it identifies trademark rights of the Opposer and asserts a likelihood of confusion under Section 2(d) of the Trademark Act. Opposer alleges in the Notice of Opposition, *inter alia*, it has prior rights in its own pleaded mark and that use of the Applicant's mark would be likely to cause confusion, mistake or

deception among purchasers, users and the public, thereby damaging Opposer. Such a showing clearly establishes that Opposer has standing in this proceeding as Opposer has a “real interest in the outcome of this proceeding; that is, “[O]pposer has a direct and personal stake in the outcome of the opposition.” *Honda Motor Co., Ltd. v. Freidrich Winkelmann*, 90 USPQ2d 1660 (TTAB 2009).

The Notice of Opposition also clearly states a cause of action, as it sets forth allegations and facts, which if proved would entitle Opposer to the relief sought in this proceeding. Accordingly, Applicant’s Second Affirmative Defense should be stricken. *Order Sons of Italy in America, supra* at 1223 (where the allegations of the Notice Of Opposition state a cause of action, affirmative defense of failure to state a claim will be stricken); *American Vitamin Products Inc. v. DowBrands Inc.*, 22 USPQ2d 1313, 1314 (TTAB 1992); *S. C. Johnson & Son, Inc. v. GAF Corp.*, 177 USPQ 720, 720 (TTAB 1973).

C. Applicant’s Third Affirmative Defense Should Be Stricken

Applicant’s Third Affirmative Defense states: “Applicant reserves the right to amend its affirmative defenses based on the evidence developed in the proceeding.”

This reservation of rights clause does not constitute an affirmative defense because it does not respond to any allegation or raise facts which negate Opposer’s claims. If there are new defenses to be asserted, then the Board will ultimately decide whether to grant leave for Applicant to later amend its answer. It is improper for Applicant to relieve itself from later complying with *FRCP 15* governing motions for leave to amend pleadings. Because the reservation of rights clause is not a viable defense, it should be stricken. *See, e.g., Gessele v. Jack In The Box, Inc.*, 2011 U.S. Dist. LEXIS 99419 (D. Ore 2011), citing *U. S. v. Sensient Colors, Inc.*, 580 F Supp2d 369, 389 (D.N.J. 2008).

As another court recently held in *Paducah River Painting, Inc. v. McNational Inc.*, 2011

U.S. Dist Lexis 131201 (W.D. Ky 2011):

Rule 8(c) lists the affirmative defenses that must be included within an answer by a defendant. *Fed. R. Civ. P. 8(c)(1)*. The list does not contain an option for the defendant to raise new defenses through a reservation of right. *Id.*; accord *Avocent Redmond Corp. v. United States*, 85 Fed. Cl. 724, 726 (2009) ("The reservation of rights section is, in effect, an affirmative defense; however, it is not listed in [*Rule 8(c)*] as a proper affirmative defense."). For this reason alone, Defendants' reservation is improper. Furthermore, a reservation of right seeking to preserve unknown affirmative defenses subverts *Federal Rule of Procedure 15*, which allows a party to move for leave to amend a responsive pleading. *E.g.*, *Voeks v. Wal-Mart Stores, Inc.*, No. 07-C-0030, 2008 U.S. Dist. LEXIS 846, 2008 WL 89434, at *7 (E.D. Wis. Jan. 7, 2008) ("The defendant can move to amend its pleadings to add additional affirmative defenses under *Fed. R. Civ. P. 15*."); *Messick v. Patrol Helicopters, Inc.*, No. CV-07-039-BU-CSO, 2007 U.S. Dist. LEXIS 63839, 2007 WL 2484957, at *4 (D. Mont. Aug. 29, 2007) ("If [the defendant] later believes these [reservations of affirmative defenses] have merit, it may move to amend its Answer under the provisions of *Rule 15(a)*"); *Kelley v. Thomas Solvent Co.*, 714 F. Supp. 1439, 1452 (W.D. Mich. 1989) ("[I]f a party wishes to assert additional affirmative defenses, in may seek to amend its answer . . ."). Thus, the Court will strike affirmative defense five; Defendants may assert other affirmative defenses as they arise by amending their Answer.

It is a well-settled rule that a party pleading an affirmative defense must give fair notice of the basis of its claimed defense, and cannot rely on a bare assertion that a claim is barred. *McDonnell Douglas Corp. v. National Data Corp.*, *supra*. Applicant's Answer, however, contains no details setting forth the basis of its alleged defenses, and possible "future" defenses. Contrary to the rules, Applicant fails to plead or state any facts in support of the third (or any of the other) Affirmative Defenses. Thus, the pleading fails to "include enough detail to give the plaintiff fair notice of the basis for the defense." See TBMP Sec. 311.02(b) and cases cited therein. Bald and conclusory allegations are insufficient under that standard, in that they neither

give fair notice of the basis for a claim nor set forth sufficient facts that, if proven, support the claim.

The Third Affirmative Defense - an attempt to reserve rights for some unclear future events - is a prime example of a vague, undefined claim to which no opposer could respond, and which gives absolutely no notice of what it is that Applicant thinks Opposer may have done to give rise to this defense. In truth, this isn't even a defense at all. It is a vague claim or an attempt to claim an ability to assert other defenses later in case Applicant can think of any, without complying with Rule 15 of the Federal Rules of Civil Procedure. For that reason also, it should be stricken.

CONCLUSION

None of Applicant's three Affirmative Defenses satisfy the standards and requirements set forth under Rule 8 (b) of the Federal Rules of Civil Procedure .

Each of Applicant's three Affirmative Defenses is not really an affirmative defense at all. Each is a mere conclusory, unsubstantiated statement, without any consideration of the actual applicability of the defense to the allegations in this case and without any identification or explanation of the factual basis for any of the asserted defenses. As a result, both Opposer and this Board can only speculate as to the predicates for those defenses - hardly the "fair notice" required under the rules.

For the foregoing reasons, Applicant's Affirmative Defenses must be stricken.

Respectfully submitted,

OFF THE HOOK, LLC dba Go Fish

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this OPPOSER'S MOTION TO STRIKE APPLICANT'S AFFIRMATIVE DEFENSES has been served on May 15, 2012, by depositing a copy of the same in the United States mail, first class postage prepaid and properly addressed to the correspondent of record for Applicant at:

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