UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

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Mailed: June 28, 2013

Opposition No. **91208003**

Red Bull GmbH

v.

Michael F. Ball

Yong Oh (Richard) Kim, Interlocutory Attorney:

This matter comes up on opposer's motion (filed January 18, 2013) to strike four of five "affirmative defenses" asserted by applicant in its answer of December 26, 2012.

A motion to strike is timely if made before responding to the pleading that is the subject of the motion or, if a response is not allowed, within twenty-one days after being served with the pleading plus five additional days if the pleading is served by first-class mail, "Express Mail," or overnight courier. *See* Fed. R. Civ. P. 12(f) and Trademark Rule 2.119(c). As opposer's motion to strike was served and filed within twenty-three days of applicant's answer which was served via first-class mail, the motion is timely.

Pursuant to Fed. R. Civ. P. 12(f), the Board may order stricken from a pleading any insufficient defense, or any redundant, immaterial, impertinent or scandalous matter.

See also Trademark Rule 2.116(a), 37 C.F.R. § 2.116(a); and TBMP § 506.01 (3d ed. rev. 2012). Motions to strike, however, are not favored and matter will not be stricken unless it clearly has no bearing upon the issues in the case. *See Ohio State University v. Ohio University*, 51 USPQ2d 1289, 1292 (TTAB 1999).

The Board now addresses the "affirmative defenses" that are the subject of opposer's motion to strike:

Affirmative Defense No. 1: (*"Opposer's allegation of fame in numbered paragraph 7 of the Notice of Opposition fails to state a claim upon which relief can be granted"*)
This is not an affirmative defense. Further, opposer has confirmed that likelihood of confusion is "the only pleaded claim in the Notice of Opposition." *Opposer's Reply*, p. 2 n.1. Accordingly, this defense is insufficient and immaterial and is hereby **STRICKEN**.

Affirmative Defense No. 2: (*failure to identify federal trademark registrations*)
This is not an affirmative defense. As noted by opposer, applicant appears to be seeking a more definite statement. As such, an affirmative defense is not the proper vehicle for raising the issue of indefiniteness and the defense is hereby **STRICKEN**. **HOWEVER**, that is not to say that applicant does not have a valid concern. In ¶ 3 of the notice of opposition, opposer alleges that it "is the owner of various Federal registrations and common law rights" for marks that opposer collectively refers to as "RED and RED BULL Marks" and which marks form the basis of opposer's claim of priority and likelihood of confusion. Trademark Rule 2.106(b)(1) describes a pleaded registration as "a registration identified by number and date of issuance in an original notice of opposition or in any amendment thereto made under rule 15, Federal Rules of Civil Procedure." Therefore, and not withstanding the liberal pleading requirements of notice pleading, trademark registrations must be specifically

pleaded. **Thus, opposer is ordered to replead its notice of opposition to specifically identify the registrations upon which it bases its claim of priority and likelihood of confusion, failing which any references to its "Federal registrations" will be stricken**.

Affirmative Defense No. 3: ("*Opposer has not and will not suffer any damage from the registration of Applicant's marks opposed in this proceeding*") This is not an affirmative defense. Further, as applicant has already denied the relevant allegations in the notice of opposition and has failed to plead any additional facts in support thereof, the defense is merely redundant and is hereby **STRICKEN**.

Affirmative Defense No. 5: ("*Applicant's opposed marks and Opposer's Marks are so different in sound, appearance, meaning, connotation and commercial impression that their use in connection with Applicant's and Opposer's respective goods and services cannot result in a likelihood of confusion, mistake or deception within the meaning of the Lanham Act, the common law, or any other applicable legal authority*") This is not an affirmative defense. Further, as applicant has already denied the relevant allegations in the notice of opposition and has failed to plead any additional facts in support thereof, the defense is merely redundant and is hereby **STRICKEN**.

In conclusion, opposer's motion to strike is hereby **GRANTED**. However, opposer is allowed until **JULY 31, 2013**, to serve and file an amended pleading in accordance with this order. Applicant is allowed **THIRTY DAYS** from service of any amended notice of opposition to answer or otherwise move with respect thereto.

Proceedings herein **REMAIN SUSPENDED**.[1]

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[1] Opposer's motion (filed June 19, 2013) to suspend this proceeding pending disposition of applicant's *ex parte* appeals is noted but has been given no consideration as it contravenes the Board's suspension order of February 27, 2013. Further, the Board will not consider a renewed motion to suspend prior to opposer's amendment, if any, to its notice of opposition in accordance with this order and applicant's response thereto.