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

Proceeding	91208003
Party	Defendant Michael F. Ball
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

RED BULL GMBH,)	
)	
Opposer,)	
)	
v.)	Opposition No. 91208003
)	
MICHAEL F. BALL,)	
)	
Applicant.)	

OPPOSITION TO OPPOSER’S MOTION TO STRIKE

Applicant, Michael Ball (“Applicant”), hereby responds to and opposes Opposer’s Motion to Strike Applicant’s first, second, third, and fifth affirmative defenses as pleaded in Applicant’s Answer and Affirmative Defenses, as follows:

I. Summary of Applicant’s Argument

Opposer’s Motion to Strike Applicant’s first, second, third and fifth affirmative defenses should be denied. Contrary to Opposer’s assertions, (1) Applicant’s first affirmative defense is proper in that Opposer’s allegation of fame sits in a vacuum and is not adequately tied a dilution claim under Trademark Act section 43(c) or its Likelihood of Confusion claim under Trademark Action section 2(d); (2) Applicant’s second affirmative defense is proper in that Opposer’s failure to identify its pleaded registrations prohibits Applicant from forming a definitive belief about the allegations in Opposer’s Notice of Opposition as to those registrations and/or evaluating compulsory counterclaims to Petition to Cancel any or all of the purportedly pleaded registrations, and (3) Applicant’s third and fifth affirmative defenses are not merely redundant,

rather they are “affirmative” defenses of which Applicant has a clear right to avail itself and which amplify Applicant’s denials in its Answer.

Generally, Motions to strike are disfavored by the Board, and matter will not be stricken unless it clearly has no bearing upon the issues in the case. *Ohio State University v. Ohio University*, 51 USPQ2d 1289, 1292 (TTAB 1999); *Harsco Corp. v. Electrical Sciences Inc.*, 9 USPQ2d 1570, 1571 (TTAB 1988); *Leon Shaffer Golnick Advertising, Inc. v. William G. Pendill Marketing Co.*, 177 USPQ 401, 402 (TTAB 1973); and *C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE Civil 3d § 1380 (2011)*. Here, Applicant’s first, second, third and fifth affirmative defenses serve to give fair notice of the substance of the defenses Applicant has asserted and will employ in this proceeding. *Ohio State University*, 51 USPQ2d at 1292; *Harsco Corp.*, 9 USPQ2d at 1571; *McDonnell Douglas Corp. v. National Data Corp.*, 228 USPQ 45 (TTAB 1985).

As set forth in more detail below, Applicant’s affirmative defenses are legally sufficient and raise issues of fact to be determined on the merits. A defense will not be stricken as insufficient if the insufficiency is not clearly apparent, or if it raises factual issues that should be determined on the merits. *C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE Civil 3d § 1381 (2011)*.

Thus, Opposer’s Motion should be denied.

II. Opposer’s Allegation Of Fame Is Not Adequately Tied To A Dilution Claim.

Opposer is correct that pleadings (just like defense) must also provide enough detail to provide the defendant fair notice of the basis for each claim. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007); *TBMP § 309.03(a)(2)*. However, Opposer’s mere allegation of fame does sit in a sort of vacuum in the Notice of Opposition. While Opposer draws the conclusion

that “when read in conjunction with the rest of Opposer’s Notice of Opposition, it is clear that the paragraph 7 allegation permissibly provides Applicant with fuller notice of Opposer’s likelihood of confusion claim,” Applicant does not perceive such clarity. Rather, Opposer’s allegation in the Notice of Opposition seems to intimate that Opposer is asserting a dilution claim under Trademark Act section 43(c). *Notice of Opposition at 7.* Applicant’s first affirmative defense is therefore only as legally insufficient and illogical as Opposer’s allegation of fame.

To the extent that Opposer is attempting to advance a claim of dilution, 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.

Accordingly, Applicant’s first affirmative defense is proper. Opposer’s Motion to Strike Applicant’s first affirmative defense should therefore be denied.

III. Opposer’s Failure To Identify Its Registrations Prejudices Applicant

Opposer would have the Board believe that its Notice of Opposition gives “Applicant clear, fair notice of the specific trademarks upon which this opposition is based.” *Motion To Strike at 4.* Opposer appears to state that it is relying on its purported common law rights to the RED and RED BULL marks and not its unidentified Federal Registrations. *Id.*

This belies the allegations of its Notice of Opposition. Paragraph 3 of Opposer’s Notice of Opposition reads as follows:

Opposer Red Bull is also the owner of various Federal registrations and common law rights for the trademarks RED, RED BULL, and other marks for or incorporating the words RED and RED BULL for various goods and services, all of which are collectively referred to herein as Red Bull’s **RED and RED BULL Marks**. *Notice of Opposition at 2.*

Clearly, Opposer is advancing its Notice of Opposition (at least in part) on its purported Federal Registrations. By failing to identify the specific Federal Registrations upon which its Notice of Opposition is based, Opposer has prejudiced Applicant at the very least from evaluating compulsory counterclaims to Petition to Cancel any or all of Opposer's purportedly well-pleaded registrations. Applicant can only assume that Opposer is attempting an end run around counterclaims for the cancellation of all or some of its Federal Registrations.

Accordingly, Applicant's second affirmative defense is proper. Opposer's Motion to Strike Applicant's second affirmative defense should therefore be denied.

IV. Applicant's Third And Fifth Affirmative Defenses Amplify Applicant's Denials Of Opposer's Claims

Applicant's third and fifth affirmative defenses are not merely redundant of denials, rather they are "affirmative" defenses of which Applicant has a clear right to avail itself. *See* Fed. R. Civ. P. 8(d)(2).

Further, the Board has discretion to decline to strike pleadings where their inclusion will not prejudice the adverse party, but rather will provide fuller notice of the basis for a claim or defense. *Ohio State University*, 51 USPQ2d at 1292.

A. Applicant's Third Affirmative Defense

In so far as Opposer's Notice of Opposition generally alleged that it would be damaged as a result of registration of Applicant's opposed marks, Applicant's third affirmative defense states that "Opposer has not and will not suffer any damage from the registration of Applicant's marks opposed in this proceeding." *Affirmative Defense 3, Answer at 3.*

This is an amplification of the denial in Applicant's Answer and provides a simple, clear and concise notice to Opposer of Applicant's defense. *See* Fed. R. Civ. P. 8(d)(1).

B. Applicant's Fifth Affirmative Defense

In so far as Paragraph 14 of Opposer's Notice of Opposition generally alleged a likelihood of confusion, Applicant's fifth affirmative defense states that "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."

Affirmative Defense 5, Answer at 4.

This, too, is an amplification of the denial in Applicant's Answer and provides a simple, clear and concise notice to Opposer of Applicant's defense. *See* Fed. R. Civ. P. 8(d)(1). At the very least, Applicant's fifth affirmative defense has provided amplified facts that there is no likelihood of confusion because the marks "are so different in sound, appearance, meaning, connotation and commercial impression." *Affirmative Defense 5, Answer at 4.*

Applicant's third and fifth affirmative defenses will not prejudice Opposer. Rather, these affirmative defenses amplify Applicant's denials of Opposer's claims. *Order of Sons of Italy in America v. Profumi Fratelli Nostra AG*, 36 USPQ2d 1221, 1223 (TTAB 1995) (amplification of applicant's denial of opposer's claims); *Textron, Inc. v. Gillette Co.*, 180 USPQ 152, 153 (TTAB 1973) (applicant's affirmative defense amplifies denial of likelihood of confusion); and *Harsco Corp. v. Electrical Sciences Inc.*, 9 USPQ2d 1570, 1571 (TTAB 1988) (reasonable latitude permitted in statement of claims).

Accordingly, Applicant's third and fifth affirmative defenses are proper. Opposer's Motion to Strike Applicant's third and fifth affirmative defenses should therefore be denied.

V. Conclusion

In view of the foregoing, Applicant requests that Opposer's Motion to Strike be denied.

Respectfully submitted,

MICHAEL F. BALL



Date: February 7, 2013

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing OPPOSITION TO OPPOSER'S MOTION TO STRIKE has been served by first-class mail, postage prepaid, on counsel for Opposer, on this 7th day of February, 2013 as follows:

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