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

Proceeding	91208003
Party	Plaintiff Red Bull GmbH
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Date	02/26/2013
Attachments	Michael Ball RED Applns-91208003-Reply in Support of Mtn to Strike.pdf (5 pages)(22283 bytes)

**CERTIFICATE OF ELECTRONIC FILING AND
STANDBY AUTHORIZATION TO CHARGE DEPOSIT ACCOUNT**

I hereby certify that this Motion to Strike is being filed with the TTAB via ESTTA on the date set forth below.
Date: February 26, 2013 /Leah Z. Halpert/
Leah Z. Halpert

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

RED BULL GMBH,	)	Opposition No.: 91-208,003
)	
Opposer	)	Serial Nos.: 85/400,933
v.	)	85/400,941
	)	85/400,955
	)	85/406,652
	)	Trademarks:
MICHAEL F. BALL,	)	+RED DETOX ELIXIR (#85/400,933)
	)	+RED DREAM ELIXIR (#85/400,941)
Applicant.	)	+RED SUN REPAIR ELIXIR
	)	(#85/400,955)
	)	+RED RESCUE ELIXIR (#85/406,652)

**OPPOSER’S REPLY BRIEF IN SUPPORT OF ITS MOTION TO STRIKE
APPLICANT’S AFFIRMATIVE DEFENSES**

Opposer, RED BULL GMBH, (“Red Bull” or “Opposer”) submits the following Reply Brief, supporting its Motion to Strike (“Motion”) Applicant, MICHAEL F. BALL’s (“Applicant”) first, second, third and fifth affirmative defenses as pleaded in Applicant’s Answer and Affirmative Defenses (“Answer”) as they are redundant, legally insufficient and improper as a matter of law

ARGUMENT – GENERAL

At the outset, both parties are in agreement that pleadings must provide enough detail to provide the other party with a fair notice of the basis for each claim. *See* Motion at 2; Opposition to Opposer’s Motion to Strike (“Applicant’s Response”) at 2. However, Applicant’s conclusions from this tenet, are incorrect. Applicant’s Response provides absolutely no factual support as to why any of its conclusions apply to the situation at hand, and baldly state that the affirmative defenses at issue are appropriate. As discussed further below, and in Opposer’s Motion,

Applicant's assertions are mistaken and its first, second, third and fifth affirmative defenses should be stricken.

A. Applicant is Mistaken that an Allegation of Fame Must be Tied to a Dilution Claim.

Applicant's Response states that its first affirmative defense is proper¹, arguing that Opposer's allegation of fame is insufficient because it is not adequately tied to a claim of dilution.² Not only is this completely illogical as it is clear the only claim put forth in this opposition is likelihood of confusion, but Applicant provides no support for how or why it makes the inference that Opposer must be asserting a dilution claim at all. Dilution and fame are separate concepts, and while a claim of dilution may require a showing of fame, fame does not necessarily imply or infer a claim of dilution. Nothing in the Notice of Opposition pleads or suggested a claim of dilution, and nothing in Applicant's Response provides any clue as to why it relies on such an unsupported conclusion. Rather, in an attempt to maintain this affirmative defense, Applicant ignores the logical and well-supported fact that Opposer's allegation of fame further bolsters its likelihood of confusion claim. *See In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973); *B.V.D. Licensing Corp. v. Rodriguez*, 83 USPQ2d 1500, 1505 (TTAB 2007); TBMP § 309.03(c)(B) (fame of the prior mark is one of the evidentiary factors the Board considers in determining likelihood of confusion). As the allegation of fame provides Applicant with fuller notice of Opposer's sole claim in this matter, Applicant's first affirmative defense should be stricken.

B. Applicant Does Not Contest that Its Second "Affirmative Defense" is Not a Defense.

¹ Opposer notes that if Applicant had an issue with the allegation of fame, the proper vehicle to address its sufficiency is a 12(b)(6) Motion, not an affirmative defense. However, as the fame is a well-settled factor when determining likelihood of confusion – the only pleaded claim in the Notice of Opposition – simply striking the first affirmative defense, rather than going through another Motion will prevent the parties from wasting the Board's time, money, and effort in this matter on frivolous matters.

² In its summary of its arguments, Applicant's Response at 1, Applicant states that its first affirmative defense is proper, alleging that Opposer's allegation of fame is not "adequately tied [to] a dilution claim . . . or its likelihood of confusion claim" (emphasis added). At no point in Applicant's Response beyond this, does Applicant argue or support the bare conclusion that the fame allegation is not tied to the likelihood of confusion claim, and rather focuses entirely on its completely illogical and baseless conclusion that it must be an attempt to plead dilution. As such, Applicant's unsupported (and unmentioned) assertion that the fame allegation is not tied to likelihood of confusion should be ignored in its entirety.

Applicant's Response does not actually respond to Opposer's Motion regarding the second "affirmative defense", and rather skirts the issue that this is not a defense at all and should be stricken, delving instead into a non-responsive argument which should have been raised earlier in a Motion for a More Definite Statement. As Applicant's entire argument regarding the second "affirmative defense" is non-responsive to the issue at hand – whether the defense should be maintained or not – it should be disregarded in its entirety.

Notwithstanding the above, it is clear – as stated in Opposer's Motion to Strike – that Opposer's descriptions of the marks upon which this opposition is based were adequate for Applicant. Again, had Applicant found these descriptions to be so ill-defined that an answer could not be provided, it could – and should – have filed a Motion for a More Definite Statement. Instead, Applicant timely filed its Answer, fully responding to each and every one of Opposer's allegations. Applicant only argues that Opposer's clear descriptions of the rights upon which it intends to rely, rather than a listing of specific federal registration, might affect Applicant's opportunity to file compulsory counterclaims. Applicant's Response at 4. Applicant's argument and claim of prejudice, *Id.*, however, is not well taken, as compulsory counterclaims need not necessarily be filed with the answer, but can be filed throughout a proceeding if the grounds for such a counterclaim are learned through discovery or otherwise. TBMP § 313.04 (and cases cited therein). Additionally, Applicant clearly has the ability to file permissive counterclaims, *See* Fed. R. Civ. P. 13(b); *Cf.* 37 C.F.R § 2.114(b)(2)(i); TBMP § 313.05, but ultimately decided no counterclaim was necessary, and that the descriptions were not so prejudicial that an Answer could not be filed.

Opposer's clear descriptions of its rights in the Notice of Opposition provided Applicant with sufficient notice of the basis for this opposition. To the extent that Opposer intends to rely on its extensive common law rights, any federal registrations are irrelevant, and to the extent that Opposer intends to rely on federal registrations, Applicant is not prejudiced by Opposer's

descriptions. Rather, had Applicant had raised any issue it had earlier – which it did not – Opposer would have and should have had the right to amend its Notice of Opposition accordingly prior to the filing of Applicant’s complete Answer.

C. Applicant is Mistaken that Merely Restating Denials Set Forth in the Answer Constitute “Amplifications”.

Opposer agrees that an amplification of a denial, while not a proper affirmative defense, is typically maintained by the Board as it provides fuller notice for the denials. However, as discussed (with support) in Opposer’s Motion, an amplification must include additional facts to support the defendant’s position, while a defense that adds nothing to the denials and merely restates them is considered redundant and should be stricken. Applicant’s Response, however, again baldly asserts without any support whatsoever, that its defenses are amplifications. At no point does Applicant elucidate what “additional facts” are being provided to Opposer, and Opposer is left without any inkling as to what makes these defenses more than repetitions of the denials put forth in the Answer. Merely stating that a defense is an “amplification” does not make it so, and without any support or factual basis for this assertions, Applicant’s affirmative defenses must be stricken.

Conclusion

For the foregoing reasons, in addition to those put forth in Opposer’s Motion to Strike, Opposer respectfully requests that Applicant’s first, second, third, and fifth affirmative defenses as seen in the Answer be stricken.

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Dated: February 26, 2013

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **OPPOSER'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO STRIKE APPLICANT'S AFFIRMATIVE DEFENSES** is being served on February 26, 2013, by deposit of same in the United States Mail, first class postage prepaid, in an envelope addressed to Applicant's Counsel at their Correspondent address given on the TARR website, with a courtesy copy via email to cwcdocketing@roylance.com.

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