

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

Mailed: January 22, 2014

Opposition No. 91212653

Nautica Apparel, Inc.

v.

Majestique Corporation

Jennifer Krisp, Interlocutory Attorney:

This proceeding is before the Board for consideration of opposer's November 8, 2013 motion to strike six affirmative defenses set forth in applicant's answer to the notice of opposition. The motion has been fully briefed.

Analysis

The Board may strike from a pleading any insufficient defense, or any redundant, immaterial, impertinent or scandalous matter. *See* Fed. R. Civ. P. 12(f); TBMP § 506 (2013); *American Vitamin Products, Inc. v. Dow Brands Inc.*, 22 USPQ2d 1313, 1314 (TTAB 1992); *S.C. Johnson & Son, Inc. v. GAF Corp.*, 177 USPQ 720 (TTAB 1973). The Board has the authority to strike an impermissible or insufficient claim, or portion of a claim, from a pleading. *See* TBMP § 506.01 (2013). 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. *Id.*

Motions to strike are not favored, and matter will not be stricken unless it clearly has no bearing upon the issues in the case. *See Ohio State Univ. v. Ohio Univ.*, 51 USPQ2d 1289, 1292 (TTAB 1999) (citations omitted). The primary purpose of the pleadings is to give fair notice of the claims or defenses asserted. *Id.* *See also* TBMP §§ 309.03 and 506.01 (2013). Thus, the Board may decline to strike even objectionable pleadings where their inclusion will not prejudice the adverse party, but rather will provide fuller notice of the basis for a claim or defense. *See Harsco Corp. v. Electrical Sciences Inc.*, 9 USPQ2d 1570 (TTAB 1988).

The Board now turns to the matters at issue in opposer's motion to strike.

Affirmative defense 1: Opposer incorporates herein by reference all denials and averments contained in the preceding answers to the Opposition and made them part of these affirmative defenses.

Applicant's assertion is not an affirmative defense, does not set forth matters directed to an issue of fact or pleading that is to be proven or that go to the merits of opposer's claims, and is not reasonable or logical inasmuch as it avers an action on the part of opposer.

In view thereof, opposer's motion to strike is granted, and this defense is stricken.

Affirmative defense 2: The Opposition fails to state a claim upon which relief can be granted against Applicant, Majestique Corporation.

An assertion of failure to state a claim upon which relief can be granted is not an affirmative defense, but rather should be presented by means of a formal

motion to dismiss under Fed. R. Civ. P. 12(b)(6), if such motion would be timely and otherwise proper.

To state a claim upon which relief can be granted, a plaintiff need only allege such facts as would, if proved, establish that: 1) it has standing to maintain the proceeding, and 2) a valid ground exists for opposing the registration sought. *See Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998), and cases cited therein.

In its answer, applicant merely sets forth its conclusory “defense,” and in its brief, applicant proffers no arguments challenging the allegations with respect to either standing or grounds.

For completeness, the Board notes that the notice of opposition sufficiently sets forth allegations which, if proven, would establish opposer’s standing.¹ Furthermore, the pleading sets forth grounds for opposition, namely, 1) priority and likelihood of confusion pursuant to Trademark Act § 2(d),² 2) dilution pursuant to Trademark Act § 43(c),³ and 3) false suggestion of a connection pursuant to Trademark Act § 2(a).⁴

¹ *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Selva & Sons, Inc. v. Nina Footwear, Inc.*, 705 F.2d 1316, 217 USPQ 641, 648 (Fed. Cir. 1983); *Lipton Industries Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982);

² *See Hornblower & Weeks, Inc. v. Hornblower & Weeks, Inc.*, 60 USPQ2d 1733, 1735 (TTAB 2001).

³ *See Toro Co. v. ToroHead Inc.*, 61 USPQ2d 1164, 1172-1173 (TTAB 2001); *Polaris Industries Inc. v. DC Comics*, 59 USPQ2d 1798 (TTAB 2000).

⁴ *See Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, 703 F.2d 1372, 217 USPQ 505, 508-10 (Fed. Cir. 1983); *Buffet v. Chi-Chi’s, Inc.*, 226 USPQ at 429.

In view of these findings, opposer's motion to strike is granted, and this defense is stricken.

Affirmative defense 3: Opposer has failed to join indispensable and/or necessary parties.

The matter asserted fails to provide the necessary factual allegations that would give fair notice to opposer of the reasons for applicant's belief that an indispensable party or parties exist that have not been joined. The assertion fails to set forth, for example, either the identity of any entity or entities which are indispensable parties, or the reason for its belief that such entities must be joined in this proceeding.

In view of this, opposer's motion to strike is granted, and this defense is stricken.

Affirmative defense 6: There is no similarity in the marketing methods and channels of distribution used for the respective goods and services.

The matter asserted does not constitute an affirmative defense. Rather, it is merely an amplification of applicant's denial of allegations in the notice of opposition, and merely provides notice of applicant's position with respect to a factual issue that is to be determined on the merits with respect to opposer's grounds for opposition. As such, this assertion will not prejudice opposer. Applicant is left to appropriately present its proofs on its assertion.

In view of this, opposer's motion to strike is denied.

Affirmative defense 8: There is no likelihood of confusion between both brand names Nautica and Sailor and between the Applicant's mark and Opposer's mark.

With respect to applicant's assertion that there is no likelihood of confusion "between both brand names Nautica and Sailor," the matter is impertinent. Trademark rights in the terms "Nautica" and "Sailor" are not at issue in this proceeding. In view of this, opposer's motion to strike is granted, in part, and this assertion is stricken.

With respect to applicant's assertion that there is no likelihood of confusion between applicant's mark and opposer's mark, the matter asserted does not constitute an affirmative defense. Rather, it is merely an amplification of applicant's denial of allegations in the notice of opposition, and merely provides notice of applicant's position with respect to a factual issue that is to be determined on the merits with respect to opposer's grounds for opposition. As such, this assertion will not prejudice opposer. Applicant is left to appropriately present its proofs on its assertion.

In view of this, opposer's motion to strike is denied, in part.

Affirmative defense 10: There is no similarity in the pronunciation of the designations.

The matter asserted does not constitute an affirmative defense. Rather, it is merely an amplification of applicant's denial of allegations in the notice of opposition, and merely provides notice of applicant's position with respect to a factual issue that is to be determined on the merits with respect to opposer's grounds for opposition. As such, this assertion will not prejudice opposer. Applicant is left to appropriately present its proofs on its assertion.

In view of this, opposer's motion to strike is denied.

Summary

In accordance with the findings discussed herein, opposer's motion to strike is granted with respect to the matters set forth in affirmative defenses 1, 2 and 3, is granted in part and denied in part with respect to the matters set forth in affirmative defense 8, and is denied with respect to the matters set forth in affirmative defenses 6 and 10.

Schedule

Proceedings are resumed. Conferencing, disclosure, discovery and trial dates are reset as follows:

Deadline for Required Discovery	
Conference	2/21/2014
Discovery Opens	2/21/2014
Initial Disclosures Due	3/23/2014
Expert Disclosures Due	7/21/2014
Discovery Closes	8/20/2014
Plaintiff's Pretrial Disclosures	10/4/2014
Plaintiff's 30-day Trial Period Ends	11/18/2014
Defendant's Pretrial Disclosures	12/3/2014
Defendant's 30-day Trial Period Ends	1/17/2015
Plaintiff's Rebuttal Disclosures	2/1/2015
Plaintiff's 15-day Rebuttal Period Ends	3/3/2015

In each instance, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125. Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.