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

Proceeding	91212931
Party	Defendant Donnenfeld, Gregg
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Submission	Motion to Strike
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Date	12/03/2013
Attachments	Applicants Response to Opposers Motion to Strike Applicants Affirmative Defenses.pdf(231058 bytes)

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

In the Matter of:
Application Serial No. 85/877,499
Mark: EGG WHITE DELIGHT
Publication Date: October 1, 2013

MCDONALD'S CORPORATION,	X	
	:	
Opposer,	:	Opposition No. 91212931
	:	
v.	:	
	:	
GREGG DONNENFELD,	:	
	:	
Applicant.	:	
	X	

**APPLICANT'S RESPONSE TO
OPPOSER'S MOTION TO STRIKE APPLICANT'S AFFIRMATIVE DEFENSES**

Applicant Gregg Donnenfeld ("Applicant") respectfully responds to Opposer's Motion to Strike Applicant's Affirmative Defenses ("McDonald's Motion to Strike") as follows:

1. Opposer McDonald's Corporation ("McDonald's") is in the "fast" food business but, by its filing of an unnecessarily long and completely meritless motion, early on has evidenced its intent to do anything and everything within its power to "slow" down what otherwise would and should be a straight-forward opposition proceeding. This Board should see McDonald's motion for what it is, and not countenance McDonald's transparent effort to over-lawyer, outspend and over-burden the undersigned pro se Applicant.

2. At issue in this case is that Applicant was first to file a U.S. trademark application for the trademark EGG WHITE DELIGHT. After Applicant made his filing, McDonald's engaged in what may have been a multi-million dollar national product launch for a breakfast

food branded under the mark EGG WHITE DELIGHT McMUFFIN, and McDonald's now seeks to use its strength, market power and high-powered attorneys to force Applicant to abandon his first-filed good-faith filing. It is quite ironic that McDonald's makes the present motion purporting to have a mastery of Board pleading procedure, yet at the same time was not sophisticated enough to have made a simple intent-to-use trademark filing prior to its national multi-million dollar product launch. It is also rather absurd to hear McDonald's (a public company with a market cap approaching \$1 Billion dollars) argue that an individual applicant's 5 sentences of otherwise legitimate affirmative defenses should be stricken due to a purported extra expense of discovery; *albeit* discovery that hasn't even yet commenced.

3. In responding to Opposer's Notice of Opposition, Applicant filed an Answer to Notice of Opposition comprised of 13 short paragraphs (perfectly corresponding to the paragraphs in Opposer's Notice of Opposition) coupled with 5 additional short and simple paragraphs setting forth clear and straight-forward affirmative defenses. Applicant's Answer, and the affirmative defenses contained therein, conform in all respects to the requirements of the Trademark Trial and Appeal Board Manual of Procedure (the "TBMP") as well as standard Board practice.

4. Applicant is confident that, upon the quickest of reads, the Board will understand the purpose and nature of each of Applicant's affirmative defenses, and find them all to be reasonably tailored to the legal and factual issues reasonably likely to arise in the course of this proceeding. McDonald's claim that Applicant's affirmative defenses serve "only to confuse the issues in the case and unnecessarily increase the expense of discovery" should be dismissed out of hand.

5. The TBMP in multiple places make plain that each of Applicant's affirmative defenses were properly pled and entitled to stand as written so as to avoid any potential waiver of rights. Applicant respectfully calls the Board's attention to the following governing rules, (all of which were conspicuously ignored in McDonald's moving papers):

a. TBMP 311.02(b) provides that “[a]n answer may also include a short and plain statement of any defenses, including affirmative defenses that the defendant may have to the claim or claims asserted by the plaintiff” (emphasis added). . . . “The elements of a defense should be stated simply, concisely, and directly.”

b. TBMP 311.02(d) provides that “An answer may include affirmative assertions that, although they may not rise to the level of an affirmative defense, nevertheless state the reasons for, and thus amplify, the defendant's denial of one or more of the allegations in the complaint. These amplifications of denials, whether referred to as “affirmative defenses,” “avoidances,” “affirmative pleadings,” or “arguments,” are permitted by the Board because they serve to give the plaintiff fuller notice of the position which the defendant plans to take in defense of its right to registration” (emphasis added).

c. TBMP 506.01 provides that “Motions to strike are not favored, and matter will not be stricken unless it clearly has no bearing upon the issues in the case. The primary purpose of pleadings, under the Federal Rules of Civil Procedure, is to give fair notice of the claims or defenses asserted. Thus, the Board, in its discretion, 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. 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” (emphasis added).

6. By any review of the above-quoted rules, it readily becomes clear that McDonald's arguments in support of its motion to strike are not only wrong on their facts (e.g., Applicant's affirmative defenses are in fact short, plain, simple, concise, direct and clear), but also fail as a matter of law (e.g., even if Applicant's affirmative defenses constituted nothing more than conclusory restatements of Applicant's denials, as McDonald's claims, Applicant nonetheless would be fully entitled to assert them as pled).

7. Finally, it bears noting that McDonald's made this motion without ever consulting with Applicant. If McDonald's truly believed any of Applicant's affirmative defenses to have been unclear, McDonald's could have asked Applicant for an explanation and/or restatement, which in turn would have resolved McDonald's purported concerns without the need for Board time and intervention. That McDonald's never approached Applicant for a good-faith dialogue about McDonald's concerns only highlights that McDonald's stated concerns are pretextual, and instead the motion before this Board was merely designed by McDonald's for the intended purpose of adding time, cost and burden onto the Applicant.

WHEREFORE, Applicant respectfully submits that the Board should (a) deny Opposer's Motion to Strike, and (b) grant to Applicant such additional and further relief as the Board deems just and proper.

Dated: December __, 2013

Respectfully submitted,



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Certificate of Service

I hereby certify that on December 3, 2013, a true and correct copy of the foregoing Applicant's Response to Opposer's Motion to Strike Applicant's Affirmative Defenses was served by United States first class mail, postage prepaid, on counsel for Opposer at the following address:

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Gregg Donnenfeld