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

Proceeding	91214492
Party	Plaintiff Under Armour, Inc.
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## ARGUMENT

### **I. APPLICANT’S AFFIRMATIVE DEFENSES ARE INSUFFICIENTLY PLED.**

Applicant fails to plead any facts in support of its Affirmative Defenses. Rule 8(b) requires that any defense to a claim must be stated in short and plain terms. Fed. R. Civ. P. 8(b). Similarly, TMBP § 311.02 makes clear that “[t]he elements of a defense should be stated simply, concisely, and directly. However, the pleading should include enough detail to give the plaintiff fair notice for the defense.” Bald and conclusory allegations are insufficient under this standard, in that they neither give fair notice of the basis for a claim nor set forth sufficient facts that, if proven, support the claim. TMBP § 311.02(b); *see Fair Indigo LLC v. Style Conscience*, 85 U.S.P.Q.2d 1536, 1538 (T.T.A.B. 2007) (elements of each claim should include enough detail to give fair notice of claim); *Ohio State Univ. v. Ohio Univ.*, 51 U.S.P.Q.2d 1289, 1292 (T.T.A.B. 1999) (primary purpose of pleadings “is to give fair notice of the claims or defenses asserted”); *cf. Otto Int’l Inc. v. Otto Kern GmbH*, 83 U.S.P.Q.2d 1861, 1864 (T.T.A.B. 2007) (bald allegations of misrepresentation of source did not provide fair notice). Where a defense contains such bald, conclusory allegations, the defense will be stricken by the Board. *See e.g., Veles Int’l Inc. v. Ringing Cedars Press LLC*, Consolidated Opp. Nos. 91182303 and 91182304 (T.T.A.B. June 2, 2008).

#### **A. Applicant’s First Affirmative Defense of “Opposer’s Own Actions” Is a Conclusory Allegation and Should be Stricken as Insufficient.**

Applicant’s first affirmative defense of “Opposer’s own actions” should be stricken because, as pled, it is merely conclusory and fails to state any facts whatsoever, let alone any facts that would give adequate notice of the basis for such defense. “Opposer’s own actions” is a bald, conclusory statement that does not indicate which of Opposer’s actions are invoked in the defense or how Opposer’s actions might prevent it from attaining the relief

requested in its Notice of Opposition. Indeed, this Affirmative Defense is a boilerplate defense without any consideration of the actual applicability of the defense to the allegations in this case and without any identification of the factual basis for the defense. Consequently, both Opposer and this Board can only speculate as to the predicates for this defense. As such, the first affirmative defense should be stricken as insufficiently pled.

B. Applicant's Second Affirmative Defense of Fraud Consists of a Mere Conclusory Allegation, Lacks the Requisite Particularity, and Should Be Stricken as Insufficient

As with Applicant's first Affirmative Defense, Applicant's second Affirmative Defense of fraud should be stricken because, as pled, it is merely conclusory and fails to state any facts whatsoever, let alone any facts that would give adequate notice of the basis for such defense. While simple and concise, merely listing "Fraud" as an affirmative defense, with nothing more, fails to provide enough, or any, detail to give Opposer fair notice for the defense. Indeed, Applicant has not stated who has been allegedly defrauded. Again, Opposer and the Board are left bereft as to the predicates for this defense.

Moreover, Applicant's defense of fraud is legally insufficient for the additional reason that defenses based on — or consisting of — fraud have a heightened pleading standard in that they must state the factual basis for such a defense with particularity. *See* 37 C.F.R. § 2.106(b)(1); TMBP § 311.02 (when fraud is pleaded, the provisions of Fed. R. Civ. P. 9 governing the pleading of that special matter should be followed). Rule 9 requires a party alleging fraud to "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9. Conclusory statements that an Opposer has committed fraud, absent a recitation of the facts reflecting the basis for the alleged inequitable conduct, do not meet the pleading requirements of Fed. R. Civ. P. 9. Because Applicant does not cite a single underlying fact in

support of its defense of fraud, Applicant's defense does not meet the pleading requirements of Fed. R. Civ. P. 9.

In sum, because Applicant has failed to allege any facts or specific conduct in support of this Affirmative Defense that would, if proven, prevent Opposer from prevailing on its claims, its Affirmative Defense of fraud should be stricken as insufficient.

### **CONCLUSION**

Because Applicant's Affirmative defenses are inadequately pled as demonstrated above, Opposer respectfully requests that the Board (1) grant this Motion; (2) strike Applicant's Affirmative Defenses; and (3) grant such other and further relief as the Board deems appropriate.

Respectfully submitted,

Dated: March 5, 2014

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and complete copy of the foregoing Notice of Opposition, along with all exhibits thereto, has been served on Applicant's counsel of record by mailing said copy on March 5, 2014, via First Class Mail, postage pre-paid to:

Marcus J. Bivines  
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/s/ Aaron Y. Silverstein  
Aaron Y. Silverstein