

ESTTA Tracking number: **ESTTA615390**

Filing date: **07/14/2014**

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

Proceeding	91215657
Party	Plaintiff Goya Foods, Inc.
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Date	07/14/2014
Attachments	Reply to Response.pdf(98714 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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Goya Foods, Inc.,)	
)	Opposition No. 91215657
Opposer,)	
)	
)	
)	Mark:
v.)	Serial No.: 86060111
)	
Goyogo Frozen Yogurt, LLC,)	Mark: GOYOGO FROZEN YOGURT OUR
)	INGREDIENTS YOUR CREATION
Applicant.)	Serial No.: 86037364
)	

**REPLY TO APPLICANT’S RESPONSE TO OPPOSER’S
MOTION TO STRIKE THE FIRST, SIXTH AND SEVENTH SEPARATE DEFENSES**

COMES NOW, the Opposer, Goya Foods, Inc., by and through the undersigned and pursuant to 37 CFR §2.127 files this, its Reply to Applicant’s Response to Opposer’s Motion to Strike the First, Sixth and Seventh Separate Defenses, and in support thereof states as follows,

BACKGROUND

The Opposer, Goya Foods, Inc. (“Goya”) is owner of the well-known trademark GOYA.

The instant Applicant seeks registration of two marks, both which include the term “GOYOgo” for self-serve frozen yogurt shop services.

Goya is opposing registration of these marks because GOYOgo is confusingly similar to GOYA and because the Applicant committed fraud, among other things. Goya has moved to strike the first, sixth and seventh defenses asserted by the Applicant, for reasons as stated in Opposer’s motion to strike filed June 2, 2014. Applicant has responded to the motion, thus prompting this Reply.

With regards to Applicant's First Defense:

Applicant responds that Goya does not "properly plead 'likelihood of confusion' or 'dilution'" (see *Response to Opposer's Motion to Strike the First, Sixth and Seventh Separate Defenses*, p. 5 at last paragraph). The question to be determined is whether the notice of opposition does indeed set forth facts which, if proved, would entitle Goya to the relief it seeks. (See *S.C. Johnson & Sons, Inc. v. GAF.*, 177 USPQ 720 (TTAB 1973)(A plaintiff may utilize the defendant's assertion of failure to state a claim to test the sufficiency of its pleading by moving under Rule 12(f) of the Federal Rules of Civil Procedure to strike this defense from the answer.) Goya requests that the Board find it has set forth sufficient allegations to establish, if proven, that Opposer has standing to bring this proceeding and to support a likelihood of confusion under Section 2(d) of the Trademark Act. Upon doing so, Opposer requests the Board find that Applicant's defense of failure to state a claim is without merit and strike same.

With regards to the Sixth Defense:

Applicant's position is not only duplicative to its Answer, but it is neither an affirmative defense nor a meaningful allegation and should be stricken accordingly.

- Applicant has already denied that it promotes "[s]ervices through the same channels of trade as Opposer" (see *Goya's Notice of Opposition*, ¶16 and Applicant's *Answer to Notice of Opposition*, ¶16);
- Services in both the opposed applications and Goya's registrations are unrestricted as to trade channels, so all appropriate channels of trade are in play;
- Applicant is not permitted to define and/or restrict food services to "yogurt" when Goya's registrations (for e.g., GOYA) and the opposed applications (i.e., having root term "GOYOgo") are unrestricted; and,

- Frozen yogurt self-serve shops are well-known to exist in retail food services outlets located channels like shopping malls, strip malls, supermarkets, and kiosks, in the same unrestricted channels as Goya’s asserted registrations, including,

MARK	REGISTRATION NO.	SERVICES
GOYA	3825092	Computerized on-line retail store services in the field of foods and beverages; Retail grocery stores; Retail store services featuring foods and beverages.
GOYA LATIN CAFÉ	3654004	Carry-out restaurants; Fast-food restaurants; Fast-food restaurants and snackbars; Food preparation services; Restaurant services; Snack bars.
GOYA	3640777	Carry-out restaurants; Catering; Catering in fast-food cafeterias; Catering of food and drinks; Restaurant and catering services; Restaurant, bar and catering services; Fast-food restaurants; Food preparation services; Preparation of food and beverages; Restaurant services; Coffee-house and snack-bar services; Snack bars; Serving food and drinks; Contract food services.

Although Applicant denies its services are conducted in same channels of trade, the statement is disingenuous. Because the recitation of services in both the opposed applications and Goya’s registrations are unrestricted as to trade channels, we must presume that Applicant’s and Registrant’s services travel in all ordinary trade channels. *Squirtco v. Tomy Corporation*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983). Both Applicant’s and Goya’s services will be encountered by the same prospective consumers. The alleged defense should be stricken.

With regards to the Seventh Defense:

Applicant makes particular reference to Goya’s Opposition Counts III and IV, which allege fraud on the USPTO at the time of filing. In its Response, the Applicant argues that because its “...Marks have been and continue to be used in commerce” the statement should

stand as an affirmative defense to Counts III and IV. (*See Applicant's Response to Motion to Strike*, p. 8).

Applicant's allegation of use however is not a defense to an opposition and is ambiguous. The applications at issue were filed as a 1(b). So while there is a presumption that at the time of filing Applicant did not have use, this has no merit based on what later happened. By stating it now has use may be insightful as to current behavior, the alleged defense is not a testament to any fraudulent behavior and/or intent *at the time of filing* its "GOYOgo" applications for the confusingly similar marks.

While the Board may still accept an affirmative defense, by downgrading it to a mere allegation, it still makes no sense. The defense should be stricken, or at least further explained by the Applicant in order to give Goya proper notice of how its statement regarding subsequent use is anything but impertinent.

WHEREFORE, Goya Foods, Inc. respectfully requests that its motion to strike Applicant's First, Sixth and Seventh Separate Defenses be granted.

Dated: July 14, 2014

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Reply To Applicant's Response To Opposer's Motion To Strike The First, Sixth And Seventh Separate Defenses* was forwarded by first class postage prepaid mail by depositing the same with the U.S. Postal Service on this 14th day of July, 2014 to counsel for Applicant, Dennis F. Gleason, Esq. at the following address:

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/Jason DeFrancesco/
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