

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

Mailed: November 1, 2015

Opposition No. 91219959

Universal Protein Supplements Corporation
dba Universal Nutrition

v.

Fitness Publications, Inc.

**Robert H. Coggins,
Interlocutory Attorney:**

Now before the Board is Opposer's motion (filed June 24, 2015) to strike Applicant's affirmative defenses from the answer and certain allegations from the counterclaim. The motion is fully briefed.

Motion to Strike

The Board may order stricken from a pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. *See* Fed. R. Civ. P. 12(f). Motions to strike, however, are not favored, and matter will not be stricken unless it clearly has no bearing upon the issues of the case. *See Harsco Corp. v. Electrical Sciences Inc.*, 9 USPQ2d 1570 (TTAB 1988). Since the primary purpose of pleadings is to give fair notice of the claims or defenses asserted, 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 a fuller notice of the basis for a claim or defense. *See* TBMP § 506.01 (2015). It is noted that Opposer pleads, in the First Amended Notice of Opposition, priority and likelihood of confusion as the ground for opposing the subject mark.

Affirmative Defenses

In its Answer, Applicant alleged the following affirmative defenses (at paragraphs 11, 12, and 13) which are subject to the motion to strike:

11. The [subject mark] is an actual likeness of Arnold Schwarzenegger, who is a famous internationally as a professional bodybuilder. The likeness of Arnold Schwarzenegger is inherently distinctive. The average consumer is likely to associate the [subject mark] with Arnold Schwarzenegger.

12. [Applicant] incorporates the allegations of the counter-claims referenced below.

13. [Applicant] hereby reserves the right to amend its Answer to raise additional affirmative defenses as they become available or apparent to [Applicant] through discovery in this matter or otherwise.

With regard to defense paragraph 11, this defense is construed as an amplification of Applicant's denial of Opposer's allegation of likelihood of confusion and serves to apprise Opposer with greater particularity of at least one position which Applicant is taking in the defense of its right of registration. *See Order of Sons of Italy in America v. Profumi Fratelli Nostra AG*, 36 USPQ2d 1221, 1223 (TTAB 1995); and *Textron, Inc. v. The Gillette Co.*, 180 USPQ2d 152, 153 (TTAB 1973). *See also In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (one factor to consider in likelihood of confusion analysis is the similarity or dissimilarity of the marks in their entireties as to appearance, sound,

connotation and commercial impression). In view thereof, the motion to strike is **denied** as to defense paragraph 11.

With regard to defense paragraph 12, this defense is redundant. Applicant pleaded a counterclaim, which will be appropriately considered. In view thereof, the motion to strike is **granted** as to defense paragraph 12.

With regard to defense paragraph 13, the Board notes that this paragraph is merely an advisory statement that Applicant reserves the right to amend its Answer at some future date to add additional affirmative defenses after conducting discovery in this case. While Applicant cannot reserve unidentified defenses, since doing so would not provide opposer fair notice of such defenses, it is possible that Applicant may, in the future, file a motion to amend the answer to add an affirmative defense. Any such motion would, of course, require Board determination. Inasmuch as Opposer will not be prejudiced by the inclusion of this paragraph in the Answer, the motion to strike is **denied** as to defense paragraph 13. Notwithstanding this denial, Applicant is informed that defense paragraph 13 will be given no further consideration by the Board.

Counterclaim

Opposer moves to strike Applicant's counterclaim allegations concerning Applicant's purported rights in certain applications and registrations (Counterclaim paras. 25 and 26) and the name (Counterclaim paras. 21-22 and 25-26) relating to Arnold Schwarzenegger.

It is noted that Applicant alleges in paragraph 20 of the Counterclaim that Arnold Schwarzenegger's name and image are "iconic," and alleges in paragraph 39 that Mr. Schwarzenegger's "fame and reputation is such that, when a mark approximating his likeness and identity is used without his authorization ... a connection with [Mr.] Schwarzenegger and/or [Applicant] would be presumed." Applicant argues in opposition to the motion that the relevance and import of its allegations concerning the celebrity of Mr. Schwarzenegger are "undeniable," and implies that the allegations Opposer seeks to strike contain facts which, if proved, would aid in the establishment of the fame and celebrity of Mr. Schwarzenegger.

It is Opposer's duty, as the moving party, to establish that the matter to be stricken is redundant, immaterial, impertinent, or scandalous. Opposer has not met this burden. In view thereof, and because, as noted above, motions to strike are not favored and matter will not be stricken unless it clearly has no bearing upon the issues of the case, the motion to strike is **denied** as to the various counterclaim allegations.

Schedule

Proceedings are **resumed**. Dates are reset on the following schedule:

<u>Answer to Counterclaim Due</u>	November 19, 2015
<u>Deadline for Discovery Conference</u>	December 19, 2015
<u>Discovery Opens</u>	December 19, 2015
<u>Initial Disclosures Due</u>	January 18, 2016
<u>Expert Disclosures Due</u>	May 17, 2016
<u>Discovery Closes</u>	June 16, 2016
<u>Plaintiff's Pretrial Disclosures</u>	July 31, 2016
<u>30-day testimony period for plaintiff's testimony to close</u>	September 14, 2016

Defendant/Counterclaim Plaintiff's Pretrial Disclosures	September 29, 2016
30-day testimony period for defendant and plaintiff in the counterclaim to close	November 13, 2016
Counterclaim Defendant's and Plaintiff's Rebuttal Disclosures Due	November 28, 2016
30-day testimony period for defendant in the counterclaim and rebuttal testimony for plaintiff to close	January 12, 2017
Counterclaim Plaintiff's Rebuttal Disclosures Due	January 27, 2017
15-day rebuttal period for plaintiff in the counterclaim to close	February 26, 2017
Brief for plaintiff due	April 27, 2017
Brief for defendant and plaintiff in the counterclaim due	May 27, 2017
Brief for defendant in the counterclaim and reply brief, if any, for plaintiff due	June 26, 2017
Reply brief, if any, for plaintiff in the counterclaim due	July 11, 2017

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.