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

Proceeding	91222404
Party	Plaintiff Under Armour, Inc.
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**B. Applicant's First Affirmative Defense Should Be Stricken Because Opposer Has Stated a Claim Upon Which Relief May Be Granted**

Applicant's First Affirmative Defense, which alleges that Opposer has failed to state a claim upon which relief may be granted, is insufficient and immaterial under the Federal Rule of Civil Procedure 12(f). This is not a true affirmative defense because it relates to the sufficiency of the pleading rather than a statement of a defense to Opposer's properly pleaded claims. On this basis alone, it should be stricken. See *Hornblower & Weeks Inc. v. Hornblower & Weeks Inc.*, 60 USPQ2d 1733, 1738 n.7 (TTAB 2001). Indeed, in *Order of Sons of Italy in Am. v. Profumi Fratelli Nostra AG*, 36 USPQ2d 1221, 1223 (TTAB 1995), a case relied on by Applicant, the Board granted a motion to strike an improper "affirmative defense[]" of purported "failure to state a claim."

Applicant's only support for this alleged defense is that Opposer has failed to adequately plead dilution because "[i]t has not alleged that its purported ARMOUR mark or purported ARMOUR-formative marks, separate and apart from the UNDER ARMOUR marks, are famous marks." (Opp. Br. at 5.) This argument fails for a simple and undeniable reason: Opposer's dilution claim is based only on the fame of its UNDER ARMOUR mark, *not* its other ARMOUR-formative marks. And Applicant does not dispute that Under Armour has sufficiently pled that the UNDER ARMOUR mark "has been well known and famous for years." (Notice of Opposition ¶ 17). Consequently, as detailed in Opposer's opening brief, Opposer has properly plead all the necessary elements of its dilution claim.

**C. Applicant's Fourth, Fifth, Sixth, Seventh, and Eighth Affirmative Defenses Should Be Stricken As Redundant**

Applicant asks the Board not to strike these defenses because they purportedly “amplify” Applicant’s denials. But defenses that merely amplify Applicant’s denials “are not true affirmative defenses.” *Promark Brands Inc. & H.J. Heinz Co.*, 114 USPQ2d 1232, 1236 n.11 (TTAB 2015). And although the Board has sometimes declined to strike such defenses, it has done so only when the defense provides the opposer with further notice/details of how the applicant intends to defend itself on a particular issue. *See Humana Inc. v. Humanomics Inc.*, 3 USPQ2d 1696, 1697 n.5 (TTAB 1987) (allegations under the heading “affirmative defenses” were not true affirmative defenses but rather were arguments in support of denial of claim and were treated as such). The Board, however, strikes such quasi-affirmative defenses when, like here, they are redundant or merely restate a denial in the answer. *Order of Sons of Italy*, 36 USPQ2d at 1223.

Applicant’s Fourth Affirmative Defense is redundant because it merely restates the denials in the answer, i.e., that Opposer’s marks are purportedly not famous and that even if they were famous, such fame arose after Applicant’s first use of the ARMOR GEL mark. Applicant’s Fifth Affirmative Defense is deficient for the same reason. Applicant states that “Opposer’s alleged trademarks and Applicant’s ARMOR GEL mark “are dissimilar in appearance, sound, connotation, and/or overall commercial impression and will not create a likelihood of confusion or dilution when applied to the relevant goods.” This adds nothing to Applicant’s denial of Paragraph 27 of the Notice of Opposition that “Applicant’s ARMOR GEL mark *so resembles* Under Armour’s prior used, filed, and/or registered ARMOUR Marks, as to be likely, when applied to Applicant’s goods, to cause confusion, to cause mistake, or to deceive under Section 2(d) of the Lanham Act, as amended, 15 U.S.C. § 1052(d).” (emphasis added).

Applicant's Sixth and Eighth Affirmative Defenses are not only redundant and merely repeat Applicant's denials of Opposer's likelihood-of-confusion claim, but the Sixth Affirmative Defense is subsumed by the Eighth Affirmative Defense. Both repeat, again, that Opposer's and Applicant's goods are purportedly unrelated and are thus not confusingly similar.

Applicant's Seventh Affirmative Defense fares no better. It states that Applicant's mark would not impair or harm Opposer's trademark rights in any meaningful way and, as such, would not result in dilution. These claims parrot Applicant's denials of Paragraphs 17, 29, 30, and 31 of the Notice of Opposition.

In sum, because these defenses simply regurgitate Applicant's denials, and thus do not amplify or otherwise provide Opposer with a more complete notice of Applicant's position, they should be stricken.

**D. Applicant's Second and Third Affirmative Defenses Fail to Provide Sufficient Detail to Give Opposer Fair Notice and Should Be Stricken**

Although Opposer does not dispute that under Federal Rule of Civil Procedure 8(d)(1) "each allegation must be simple, concise, and direct," a sufficient pleading must also provide enough detail to give the opponent fair notice of the basis for the defense. *See* TBMP § 311.02(b). A defense that is conclusory and not supported by any facts should be given no consideration. *Patterson Enters. d/b/a Suncare Distrib.*, Opp. No. 91207808, 2013 WL 6664933, at \*1 (TTAB Dec. 5, 2013) (citing *Ohio State Univ. v. Ohio Univ.*, 51 USPQ2d 1289, 1292 (TTAB 1999) (noting that the primary purpose of pleadings "is to give fair notice of the claims or defenses asserted")). *See also Levi Strauss & Co. v. Joseph*, 36 USPQ2d 1328, 1330 (TTAB 1994) ("Although the purpose of notice pleading is to obviate the need to allege particular 'magic words,' the pleading must give [...] fair notice of the ground alleged").

Applicant's Second Affirmative Defense merely claims, without any factual support, that Opposer's marks are allegedly "exceptionally weak." Because no reason is given, this conclusory statement provides Opposer with no meaningful notice of Applicant's position or purported "defense." *See, e.g., Midwest Plastic Fabricators Inc. v. Underwriters Labs. Inc.*, 5 USPQ2d 1067, 1069 (TTAB 1987) (finding affirmative defense "obviously insufficient" where defense consisted of allegations that were "merely conclusory in nature").

Similarly, Applicant's Third Affirmative Defense merely states that "[t]he public interest will be harmed if Opposer's Notice of Opposition is granted." What does this mean? Among other things, we don't know what interest will be harmed, let alone why it will be harmed or how it will be harmed.

In its opposition brief, Applicant attempts to prop up this "defense" by belatedly asserting, among other things, that the defense "gives Under Armour notice that Applicant will be seeking discovery on the balance of public interest in free enterprise." (Opp. Br. at 9.) The added rhetoric provides no more insight. We still don't know what public interest is at stake or how "free enterprise" will be damaged by the refusal of a trademark application. If anything, Applicant's explanation telegraphs that it intends to embark on an impermissible fishing expedition in discovery. Moreover, beyond the frailties of Applicant's after-the-fact justification for its "defense," it is fundamentally improper to attempt to remedy a deficient pleading in a responsive brief.

**E. Applicant Ignores That the Ninth Affirmative Defense Is a Personal Defense and This Defense Should Thus Be Stricken**

Respondent's Ninth Affirmative Defense alleges that Opposer purportedly has failed to police and/or acquiesced to the use of third-party marks containing the terms "Armour" and "Armor." As explained in Opposer's opening brief, estoppel by acquiescence is a *personal*

*defense*. Applicant did not assert (nor can it) that it was “prejudiced by the conduct relied upon to create the estoppel.” *Andersen Corp. v. Therm-O-Shield Int’l*, 226 USPQ 431, 435 (TTAB 1985). In its opposition brief, Applicant merely states that its “reliance on opposer’s failure to police can rise to the level of acquiescence and/or estoppel.” (Opp. Br. 9.) Because Applicant has provided no evidence that it was in privity with the “numerous other third parties” who allegedly used similar marks for similar goods with Opposer’s acquiescence, this defense is legally insufficient and should be stricken.

**F. Defendant’s Tenth Affirmative Defense Is Merely A Reservation of Rights and Should Be Stricken Because It Does Not Provide Opposer with Fair Notice**

Applicant’s Tenth Affirmative Defense “reserves all affirmative defenses ... that may now exist or in the future be available.” Applicant argues it should not be stricken because the Board allowed a similar reservation of rights in *American Residential Services LLC v. Rescue Response Group Inc.*, Opp. No. 91199269 (June 12, 2012). (Opp. Br. 10.) But the Board did note there that such a reservation “is really not a defense.” Indeed, as explained in *Solomon-Page Group LLC v. Clinical Res. Network*, “[a] defendant cannot reserve unidentified defenses since it does not provide a plaintiff fair notice of such defenses.” Opp. No. 91195692, 2012 WL 1267963, at \*5 (TTAB Mar. 12, 2012). Moreover, “a defendant may not rely on an unpleaded defense unless the defendant’s pleading is amended (or deemed amended), pursuant to Fed. R. Civ. P. 15(a) or 15(b), to assert the matter.” TBMP § 314. As such, Applicant should not be permitted to reserve unnamed, undefined, and undescribed “defenses” that provide no notice to Opposer as to what Applicant has in mind.

**G. Opposer Is Prejudiced By Applicant's Defenses**

Applicant incorrectly asserts that Opposer has failed to establish prejudice. Opposer is prejudiced by having to deal with defenses that are insufficient, improper, needlessly confuse the issues, and lead to "unnecessary forays into immaterial matters." *Gabapentin Patent Litig.*, 648 F. Supp. 2d at 647. As one court explained, "[t]he possibility that issues will be unnecessarily complicated or that superfluous pleadings will cause the trier of fact to draw unwarranted inferences at trial is the type of prejudice that is sufficient to support the granting of a motion to strike." *Benham v. Am. Servicing Co.*, 2009 WL 4456386, \*8 (N.D. Cal. 2009).

**H. Conclusion**

For the reasons and authorities discussed above, Opposer respectfully requests that the Board strike all of Respondent's Affirmative Defenses in Applicant's Answer.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing OPPOSER'S REPLY IN SUPPORT OF ITS MOTION TO STRIKE APPLICANT'S "AFFIRMATIVE DEFENSES" was served on October 22, 2015 via email on counsel for Applicant at the following email addresses:

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