

ESTTA Tracking number: **ESTTA539662**

Filing date: **05/23/2013**

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

Proceeding	92055585
Party	Plaintiff MeUndies, Inc.
Correspondence Address	JOHN W CRITTENDEN COOLEY LLP 777 6TH STREET NW, SUITE 1100 WASHINGTON, DC 20001 UNITED STATES trademarks@cooley.com, jcrittenden@cooley.com, jpo@cooley.com
Submission	Motion to Strike
Filer's Name	John W. Crittenden
Filer's e-mail	trademarks@cooley.com,jcrittenden@cooley.com,jpo@cooley.com
Signature	/John W. Crittenden/
Date	05/23/2013
Attachments	SD-#843357-v1-Motion_to_Strike_under_12(f)_re_MYUNDIES.pdf(137294 bytes)

pleading has been entered on the Docket as an Answer (Dkt. 14) and a Motion to Dismiss under Rule 12(b) (Dkt. 15).

The purported Motion to Dismiss should be denied because, among other reasons, it is not based upon a challenge to the legal sufficiency of the Complaint. Rather, as far as Petitioner can tell, the Motion to Dismiss appears to be based on evidentiary allegations subject to proof.

The purported Answer should be stricken because it does not state in short and plain terms its defenses to each claim asserted against it; it does not admit or deny each allegation asserted against it; it contains impertinent, rambling, and defamatory accusations within the responses to allegations; and it conflates the numbered Answer paragraphs with Motion to Dismiss arguments in such a way that makes it virtually impossible for Petitioner to prepare a response thereto.

The Motion to Dismiss Should Be Stricken, or if Considered It Should Be Denied

Registrant's Motion to Dismiss should be stricken in its entirety under Fed. R. Civ. P. 12(f) because it contains immaterial, impertinent, and scandalous matter throughout. But even if the Board were to consider the Motion to Dismiss, it should be denied because the Petition more than adequately states a claim to relief that is plausible on its face. Registrant improperly introduces and relies upon allegations subject to proof in its Motion to Dismiss rather than attacking the legal sufficiency of the Complaint.

“A motion to dismiss for failure to state a claim upon which relief can be granted is a test solely of the legal sufficiency of a complaint. In order to withstand such a motion, a complaint need only allege such facts as would, if proved, establish that the plaintiff is entitled to the relief sought, that is, that (1) the plaintiff has standing to maintain the proceeding, and (2) a valid ground exists . . . for canceling the subject registration.” Trademark Trial and Appeal Board

Manual of Procedure (“TBMP”) § 503.02; see also *Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc.*, 988 F.2d 1157, 26 USPQ2d 1038, 1041 (Fed. Cir. 1993), *Bayer Consumer Care Ag v. Belmora LLC*, 90 USPQ2d 1587, 1590 (TTAB 2009).

“The Board may order stricken from a pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The Board also has the authority to strike an impermissible or insufficient claim or portion of a claim from a pleading.” TBMP § 506.01.

Registrant does not challenge the legal sufficiency of the Petition. Rather, Registrant relies upon a wide variety of matters outside of the pleadings in support of the purported Motion to Dismiss. Because this material does not address the legal sufficiency of the Petition, it is immaterial and impertinent. Further, the pleading is full of scandalous material in the nature of defamatory comments (e.g., accusations of Petitioner’s counsel having either made false claims under signed testimony or having “illegally advised client to purposely infringe on a LIVE registered trademark”). Thus, Registrant’s pleading should be stricken under Fed. R. Civ. P. 12(f) because it consists of immaterial, impertinent, and scandalous matter.

Even if the Board chooses not to strike Registrant’s pleading, the Motion to Dismiss should be denied. As the parties have not yet had the opportunity to conduct discovery and submit evidence in support of their respective positions, it is premature for the Board to make a determination upon a motion to dismiss whether Petitioner can actually provide its allegations. Because the Amended Petition states a claim to relief that is plausible on its face, the Board should deny the Motion to Dismiss.

The Purported Answer to the Amended Petition Should Be Stricken

The purported Answer should be stricken under Fed. R. Civ. P. 12(f) because it consists of immaterial, impertinent, and scandalous matter, and it does not conform with the requirements of Fed. R. Civ. P. 8(b).

Rule 8(b) provides, in pertinent part, that in responding to a pleading, a party must “(A) state in short and plain terms its defenses to each claim asserted against it; and (B) admit or deny the allegations asserted against it by an opposing party.” A submission consisting of arguments is no substitute for the basic admissions and denials required by the Rule 8(b). See *Thrifty Corporation v. Bomax Enterprises*, 228 USPQ 62, 63 (TTAB 1985) (“the Board cannot accept applicant’s putative answer since a reading thereof reveals that it is basically argumentative rather than a proper responsive pleading to the notice of opposition.”).

Registrant’s pleading fails to admit or deny certain claims of Petitioner (e.g., responses to numbered paragraphs 1 and 2 are “IRRELEVANT”). For the claims where numbered paragraphs contain an admission or denial, the responses also contain impertinent, rambling, and defamatory accusations. The numbered paragraphs in the pleading that make up the Answer are full of legal arguments and factual allegations subject to proof, none of which are necessary or appropriate for a short and plain statement as required under the Rules. Registrant should not be required to parse the pleading in an effort to determine which statements constitute admissions, denials, and Motion to Dismiss arguments.

* * * *

WHEREFORE, Petitioner requests that “Registrant’s Response to Amended Petition for Cancellation and Request for Immediate Dismissal of Petition to Cancel” be stricken under Fed. R. Civ. P. 12(f) in its entirety. In the alternative, should the Board consider the Motion to Dismiss, Petitioner requests that the motion be denied.

Respectfully submitted,

COOLEY LLP

Date: May 23, 2013

By: /John W. Crittenden/

John W. Crittenden
John Paul Oleksiuk
Attorney for Applicant
1299 Pennsylvania Avenue, NW
Suite 700
Washington, DC 20004
Telephone: (415) 693-2000
Fax: (415) 693-2222
Email: jcrittenden@cooley.com,
jpo@cooley.com, trademarks@cooley.com

CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2013, I mailed the foregoing **PETITIONER’S MOTION TO STRIKE ANSWER UNDER FED. R. CIV. P. 12(F) AND RESPONSE TO MOTION TO DISMISS** to Registrant by depositing a true and correct copy of the same with the United States Postal Service, First Class Mail, postage prepaid, in an envelope addressed to:

Drew Massey DBA MyUndies Inc
3387 Xanthia Street
Denver, CO 80238

Date: May 23, 2013

/John Paul Oleksiuk/
John Paul Oleksiuk