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

Proceeding	92059685
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**  
**BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

_____	)	
SBG REVO HOLDINGS, LLC,	)	Cancellation No. 92/059685
	)	Registration Nos. 3224978, 3476081
Petitioner,	)	and 3476082
	)	
v.	)	Marks:
	)	
FTI CORPORATION LIMITED,	)	
	)	REVO, revo and 
Respondent.	)	
_____	)	

**PETITIONER'S MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES  
AND MEMORANDUM IN SUPPORT**

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Pursuant to Rule 12(f) of the Federal Rules of Civil Procedure and Sections 506.01 and 506.02 of the Trademark Trial and Appeal Board Manual of Procedure (“TBMP”), SBG REVO HOLDINGS, LLC (“SBG” or “Petitioner”) hereby moves to strike FTI CORPORATION LIMITED’s (“FTI” or “Respondent”) six Affirmative Defenses set forth in FTI’s Answer to SBG’s Petition for Cancellation (“Answer”). SBG respectfully requests that the Trademark Trial and Appeal Board (“Board”) enter an Order striking all six of the affirmative defenses in FTI’s Answer.

**I. INTRODUCTION**

Respondent insufficiently pleaded all of the affirmative defenses set forth in its Answer under FED. R. CIV. P. 8(b) and Trademark Rule 2.114(b)(1). FED. R. CIV. P. 8(b) and (c), and TBMP §311.02(b) (June 2015) require and explain that Respondent must identify the basis for its affirmative defenses with sufficient detail to provide both Petitioner and the Board with fair notice of the predicate for those defenses. However, Respondent’s affirmative defenses are simply conclusory assertions that provide *no* notice (even less “fair notice”) of the bases for the claimed defenses, and do not plead the elements necessary to establish the affirmative defenses. Furthermore, Respondent’s affirmative defense of failure to state a claim is redundant with its concurrently filed Partial Motion to Dismiss. Finally, several of the equitable defenses recited by Respondent are not available in light of the grounds for cancellation set forth in the Petition. Accordingly, Petitioner respectfully requests the six affirmative defenses set forth in Respondent’s Answer be stricken.

**II. LEGAL STANDARD**

Affirmative defenses are to be stated in short and plain terms. FED. R. CIV. P. 8(b), and Trademark Rule 2.114(b)(1). However, affirmative defenses must be supported by enough

factual background and detail to fairly place the claimant on notice of the bases for the defenses. *See IdeasOne Inc. v. Nationwide Better Health Inc.*, 89 USPQ2d 1952, 1953 (TTAB 2009). *See also* TBMP §311.02(b) (“The elements of a defense should be stated simply, concisely, and directly” and “should include enough detail to give the plaintiff fair notice of the basis for the defense.”) Respondent’s conclusory allegations are insufficient under that standard, in that they neither give fair notice of the basis for a defense nor set forth sufficient facts that, if proven, support the defense. *See* TBMP §311.02(b), Note 15 (and cases cited therein, *e.g.*, *McDonnell Douglas Corp. v. National Data Corp.*, 228 USPQ 45 (TTAB 1985)).

Regardless of the sufficiency of a pleading, not all affirmative defenses are available in all instances. For example, equitable defenses are not available against claims of genericness, descriptiveness, fraud, and abandonment for public policy reasons. *Saint-Gobain Abrasives Inc. v. Unova Industrial Automation Systems, Inc.*, 66 USPQ2d 1355, 1359 (TTAB 2003) (citing *Bausch & Lomb, Inc. v. Leupold & Stevens Inc.*, 1 USPQ2d 1497, 1499 (TTAB 1986) with respect to fraud, and citing *TBC Corp. v. Grand Prix Ltd.*, 12 USPQ2d 1311, 1313 (TTAB 1989) with respect to abandonment); *see also Ultra-White Co. v. Johnson Chem. Indus., Inc.*, 465 F.2d 891, 175 USPQ 166 (CCPA 1972) (public interest prevails over a laches defense). Furthermore, the *Morehouse* defense, an equitable defense similar to laches, estoppel, or acquiescence, is not available in all cases. *See* TBMP §311.02(b) (and cases cited therein referring to abandonment and fraud, *inter alia*).

When affirmative defenses are insufficiently pleaded or are otherwise inappropriate, they can be stricken. Under FED. R. CIV. P. 12(f), any insufficient defense or redundant, immaterial, impertinent, or scandalous matter may be stricken from a pleading. *See also* TBMP §506.01; *Ohio State University v. Ohio University*, 51 USPQ2d 1289, 1292 (TTAB 1999). The Board

may grant a motion to strike or, on its own initiative, strike from a pleading any insufficient defense and any matter that clearly has no bearing on the issues in the case. *Id.*

### **III. ARGUMENT**

#### **A. “Affirmative Defense” 1 – Failure to State a Claim**

As an initial matter, this “affirmative defense” must be stricken because “failure to state a claim upon which relief can be granted is not an affirmative defense.” *See Blackhorse v. Pro Football Inc.*, 98 USPQ2d 1633, 1637 (TTAB 2011) (striking failure to state a claim because it is not an affirmative defense).

Even assuming failure to state a claim was an appropriate affirmative defense, it is insufficiently pleaded, as Respondent’s Answer simply states “Petitioner fails to state a claim on which relief can be granted.” Answer at page 18, paragraph 1. This is conclusory boilerplate language without any consideration of the applicability to the allegations in this case, and lacking any identification of the factual basis for the defense. As a result, both SBG and the Board can only speculate as to the predicates for this “defense” – hardly the “fair notice” required under the rules. *See IdeasOne*, 89 USPQ2d at 1953; TBMP §311.02(b) (“The elements of a defense should...include enough detail to give the plaintiff fair notice of the basis for the defense”). As such, Respondent’s failure to state a claim “affirmative defense” should be additionally stricken as insufficiently pleaded. TBMP §506.01 (“the Board may order stricken from a pleading any insufficient defense...”).

Furthermore, this “affirmative defense” is redundant with Respondent’s concurrently filed Partial Motion to Dismiss. Under FED. R. CIV. P. 12(f), any redundant matter may be stricken from a pleading. *See also* TBMP §506.01 (“the Board may order stricken from a pleading any...redundant...matter). This issue will be sufficiently addressed in the briefing

associated with Respondent's Partial Motion to Dismiss. Therefore, this "affirmative defense" should be stricken from the Answer.

In summary, "failure to state a claim" must be stricken as it is not an affirmative defense, it is insufficiently pleaded, and it is redundant.

**B. Affirmative Defense 2 – Laches**

Respondent's second affirmative defense states "The Petition for Cancellation is barred by the doctrine of laches as, on information and belief, Petitioner was aware of Respondent's use of and registration of the trademarks at issue and failed to act." Answer at page 18, paragraph 2. This affirmative defense is without any consideration of the applicability of the defense to the allegations in this case, and lacks any identification of the factual basis for the defense.

Laches is unavailable in response to a petition for cancellation based on fraud. *See Saint-Gobain*, 66 USPQ2d at 1359 (citing *Bausch*, 1 USPQ2d at 1499) (equitable defenses including laches are not applicable in response to fraud claims); *see also Ultra-White*, 465 F.2d 891, 175 USPQ 166 (public interest prevails over a laches defense). Laches is also unavailable in response to a petition for cancellation based on abandonment. Abandonment (through nonuse) is set forth in SBG's Petition for all three registrations. *See Saint-Gobain*, 66 USPQ2d at 1359 (citing *TBC Corp.*, 12 USPQ2d at 1311) (equitable defenses including laches are not applicable in response to abandonment claims). Fraud and abandonment (through nonuse) are asserted by Petitioner against all three registrations. As a result, the affirmative defense of laches is impermissible and is therefore considered immaterial or impertinent to the cancellation proceeding. Under FED. R. CIV. P. 12(f), any immaterial or impertinent matter may be stricken from a pleading. *See also* TBMP §506.01 ("the Board may order stricken from a pleading any...immaterial [or] impertinent...matter).

In summary, in addition to striking laches as insufficiently pleaded, since laches is not a permissible defense to claims of fraud or abandonment (applicable to all three of the registrations challenged by the Petition), it should be stricken from the Answer.

**C. Affirmative Defense 3 – Estoppel**

Respondent's third affirmative defense states "Petitioner is estopped from pursuing its claims by reason of the Petitioner's own actions and course of conduct, as on information and belief, Petitioner filed its application with knowledge of Respondent's superior rights." Answer at page 18, paragraph 3. It appears that this defense is intended to refer to some form of equitable estoppel. However, this is simply a conclusory statement without any consideration of the applicability of equitable estoppel to the facts in this case, and lacks any identification of the factual basis for the defense. Nothing in the Answer suggests that the elements of equitable estoppel are met. *See Panda Travel Inc. v. Resort Option Enterprises Inc.*, 94 USPQ2d 1789 (TTAB 2009) ("The elements of equitable estoppel are (1) misleading conduct, which may include not only statements and action but silence and inaction, leading another to reasonably infer that rights will not be asserted against it; (2) reliance upon this conduct; and (3) due to this reliance, material prejudice if the delayed assertion of such rights is permitted," citing *Lincoln Logs Ltd. v. Lincoln Pre-Cut Log Homes, Inc.*, 971 F.2d 732, 734, 23 USPQ2d 1701, 1703 (Fed. Cir. 1992)). Notably, the Answer does not provide specific information supporting the assertion that Petitioner believes that Respondent had or has superior rights. Relying on information and belief without providing any factual basis does not provide the "fair notice" required under the rules. *See IdeasOne*, 89 USPQ2d at 1953; TBMP §311.02(b) ("The elements of a defense should...include enough detail to give the plaintiff fair notice of the basis for the defense"). As

such, the affirmative defense of estoppel should be stricken as insufficiently pleaded. TBMP §506.01 (“the Board may order stricken from a pleading any insufficient defense...”).

Furthermore, as with laches, the equitable defense of estoppel is unavailable in response to a petition for cancellation based on fraud or abandonment. *See Treadwell’s Drifters, Inc. v. Marshak*, 18 USPQ2d 1318, 1320 (TTAB 1990). SBG’s Petition relies on allegations of fraud and abandonment (through nonuse) as the basis for cancelling all three registrations, so estoppel is not applicable. Since the affirmative defense of estoppel is impermissible, it must be considered immaterial or impertinent to the cancellation proceeding. Under FED. R. CIV. P. 12(f), any immaterial or impertinent matter may be stricken from a pleading. *See also* TBMP §506.01 (“the Board may order stricken from a pleading any...immaterial [or] impertinent...matter”).

In summary, in addition to striking estoppel as insufficiently pleaded, since estoppel is not a permissible defense to claims of fraud or abandonment (applicable to all three of the registrations challenged by the Petition), it should be stricken from the Answer.

**D. Affirmative Defense 4 – Acquiescence**

Respondent’s fourth affirmative defense states “Petitioner has acquiesced in the use and registration of Respondent’s marks and marks similar to those of which the Petitioner now complains.” Answer at page 18, paragraph 4. This conclusory recitation does not provide any factual basis, and does not provide the “fair notice” required under the rules. *See IdeasOne*, 89 USPQ2d at 1953; TBMP §311.02(b) (“The elements of a defense should...include enough detail to give the plaintiff fair notice of the basis for the defense”). As such, the affirmative defense of acquiescence should be stricken as insufficiently pleaded. TBMP §506.01 (“the Board may order stricken from a pleading any insufficient defense...”).

Furthermore, as with laches and estoppel, the equitable defense of acquiescence is unavailable in response to a petition for cancellation based on fraud or abandonment. *See Saint-Gobain*, 66 USPQ2d at 1359 and cases cited therein (acquiescence not available against claims of fraud and abandonment). SBG's Petition relies on allegations of fraud and abandonment (through nonuse) as the basis for cancelling all three registrations, so acquiescence is not applicable. Since the affirmative defense of acquiescence is impermissible, it must be considered immaterial or impertinent to the cancellation proceeding. Under FED. R. CIV. P. 12(f), any immaterial or impertinent matter may be stricken from a pleading. *See also* TBMP §506.01 ("the Board may order stricken from a pleading any...immaterial [or] impertinent...matter).

In summary, in addition to striking acquiescence as insufficiently pleaded, since acquiescence is not a permissible defense to claims of fraud or abandonment (applicable to all three of the registrations challenged by the Petition), it should be stricken from the Answer.

**E. Affirmative Defense 5 – Unclean Hands**

Respondent's fifth affirmative defense states "Petitioner has unclean hands due to its knowing filing of false allegations in connection with its Petition for Cancellation, and attempts to register its mark with full awareness of Respondent's superior rights." Answer at page 18, paragraph 5. No facts were alleged indicating Respondent has superior rights, that Petitioner believes Respondent has superior rights, or that Petitioner knowingly filed false allegations.

The Board has clearly enunciated the pleading requirements for the defense of unclean hands, requiring "specific allegations of conduct by petitioner that, if proved, would prevent petitioner from prevailing on its claim" whereas statements that are "unclear, non-specific, irrelevant to a pleading of unclean hands, or merely conclusory in nature" are insufficient. *See*

*Midwest Plastic Fabricators Inc. v. Underwriters Labs. Inc.*, 5 USPQ2d 1067, 1069 (TTAB 1987). Furthermore, failing to provide any factual basis does not provide the “fair notice” required under the rules. *See IdeasOne*, 89 USPQ2d at 1953; TBMP §311.02(b) (“The elements of a defense should...include enough detail to give the plaintiff fair notice of the basis for the defense”). TBMP §506.01 (“the Board may order stricken from a pleading any insufficient defense...”). As such, the affirmative defense of unclean hands should be stricken as insufficiently pleaded.

**F. Affirmative Defense 6 – *Morehouse* Defense**

Respondent’s sixth affirmative defense states “Under *Morehouse Manufacturing Corp. v. J. Strickland & Co.*, 407 F.2d 881, 166 U.S.P.Q. 715 (C.C.P.A. 1969), the Petitioner will not be damaged by any of Respondent’s registrations individually due to Respondent’s ownership and superior rights in substantially similar registrations.” Answer at page 18, paragraph 6. Aside from being an unclear pleading, Respondent *has no superior rights in substantially similar registrations to those being challenged here* – indeed, Respondent points to none. Therefore, *Morehouse* does not apply. *See, e.g., Green Spot (Thailand) Ltd. v. Vitasoy International Holdings Ltd.*, 86 USPQ2d 1283, 1285 (TTAB 2008) (“The *Morehouse* defense is an equitable doctrine that applies where an applicant owns a prior registration for essentially the same mark identifying essentially the same goods (or services) that are the subject mark and goods of the proposed application” ... because the plaintiff “cannot be further injured because there already exists an injurious registration.”) (internal citations omitted). SBG has petitioned to cancel all three of FTI’s involved registrations. Since *Morehouse* does not apply, this affirmative defense must be considered immaterial or impertinent to the cancellation proceeding. Under FED. R. CIV. P. 12(f), any immaterial or impertinent matter may be stricken from a pleading. *See also* TBMP

§506.01 (“the Board may order stricken from a pleading any...immaterial [or] impertinent...matter).

Furthermore, as with laches, estoppel, and acquiescence, the equitable defense of *Morehouse* is unavailable in response to a petition for cancellation based on fraud or abandonment. See TBMP §311.02(b), Notes 9 and 10 (cases cited therein - *Morehouse* not applicable in proceedings based on abandonment and fraud, *inter alia*). Since the *Morehouse* defense is impermissible, it can separately be considered immaterial or impertinent to the cancellation proceeding. As noted in the previous paragraph, under FED. R. CIV. P. 12(f), any immaterial or impertinent matter may be stricken from a pleading. See also TBMP §506.01.

In summary, the *Morehouse* defense is completely inapplicable to this case, and in any event, is not a permissible defense to claims of fraud or abandonment (pleaded by Petitioner against all three of Respondent’s registrations). As such, it should be stricken from the Answer.

**IV. CONCLUSION**

For the foregoing reasons, Petitioner respectfully requests that the Board strike all six (6) affirmative defenses from Respondent’s Answer.

Respectfully submitted,

SBG REVO HOLDINGS, LLC

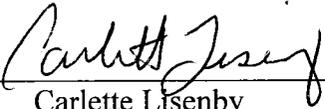
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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing **Petitioner's Motion to Strike Respondent's Affirmative Defenses and Memorandum in Support** was sent this 20th day of August 2015, via First Class mail, postage prepaid, to:

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