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

Proceeding	92059685
Party	Plaintiff SBG Revo Holdings, LLC
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Attorney Docket No.: 438430US35

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

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

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITIONER'S MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES

SBG Revo Holdings, LLC ("SBG" or "Petitioner") submits its Reply Brief pursuant to Trademark Rule 2.127(a).[1] The Trademark Trial and Appeal Board ("Board") is urged to grant Petitioner's Motion to Strike Respondent's Affirmative Defenses Nos. 1-6.

Respondent acknowledges (Respondent's Memorandum in Opposition to Petitioner's Motion to Strike, page 4) that SBG sets forth three grounds for cancellation in its Petition for Cancellation: (1) fraud (in obtaining and maintaining the registrations), (2) non-use (of the marks

[1] Petitioner's Motion to Strike Respondent's Affirmative Defenses was timely filed with the Board on August 20, 2015, in accordance with the Board order dated August 5, 2015. FTI Corporation Limited's ("FTI" or "Respondent") counsel states FTI did not consent to extending time for motions related to FTI's Answer. However, FTI did not question or object to Petitioner's Consented Motion (filed July 16, 2015) or the Board's August 5, 2015 order. Nor did Respondent question or object to the further Consented Motion to Extend Due Dates filed with the Board on August 18, 2015. Importantly, FTI acknowledges the Motion to Strike "is technically timely" (Respondent's Memorandum in Opposition to Petitioner's Motion to Strike, footnote 1), and Respondent responded to Petitioner's Motion to Strike.

on all goods identified in the registrations) / abandonment, and (3) invalid assignment of one of the three involved registrations.[2]

SBG's Motion to Strike FTI's "Affirmative Defense" - Failure to State a Claim

Respondent acknowledges that 'failure to state a claim' is not an affirmative defense (Respondent's Memorandum, page 5). Pursuant to Fed.R.Civ.P Rule 12(b)(6) the failure to state a claim defense may be raised by motion, which Respondent did by filing its pending Partial Motion to Dismiss for Failure to State a Claim. Noting that Respondent's Partial Motion to Dismiss is pending, the inclusion of this defense in FTI's Answer is redundant, unnecessary, and prejudicial to Petitioner. The Board will consider and determine the merits of Respondent's Partial Motion to Dismiss in due course.

Petitioner respectfully requests the Board strike Respondent's "Affirmative Defense" No. 1.

SBG's Motion to Strike Affirmative Defenses - Laches, Estoppel, Acquiescence, Unclean Hands, and *Morehouse* Defense

In Respondent's Memorandum at page 8, Respondent states the following: "FTI acknowledges that laches, estoppel, unclean hands, acquiescence, and the *Morehouse* defense are inapplicable to claims of fraud and abandonment."[3] In Board proceedings, public policy reasons support the limitation of the applicability of affirmative defenses such as laches, estoppel, acquiescence and the *Morehouse* defense to various claims - including genericness, mere

[2] FTI's pending Partial Motion to Dismiss is vague and ambiguous as to what specific claims and/or what specific paragraphs Respondent seeks to dismiss from SBG's Petition for Cancellation, despite the fact that the Board set forth Petitioner's claims on page 2 of its June 2, 2015 order.

[3] Even though Respondent made statements such as the above quoted statement from page 8 of its Memorandum, acknowledging the inapplicability of five of its pleaded affirmative defenses, Respondent erroneously makes statement such as on page 11 of its Memorandum that "...the motion to strike is baseless... ."

descriptiveness, functionality, fraud, abandonment, and likelihood of confusion if confusion is inevitable. See TBMP §311.02(b), Note 7 (and cases cited therein) (June 2015). Section §311.02(b) of the TBMP specifically explains: "...the availability of laches and acquiescence is severely limited in opposition and cancellation proceedings." The same public policy concerns stated and explained in the cases cited in TBMP §311.02(b) are equally applicable to the affirmative defense of unclean hands. Accordingly, Petitioner respectfully requests its Motion to Strike be granted as to each of Respondent's five affirmative defenses Nos. 2-6. Alternatively, it is clear that these five affirmative defenses should be stricken at least with regard to Petitioner's fraud and non-use / abandonment claims.[4]

In addition, all five of Respondent's affirmative defenses - laches, estoppel, acquiescence, unclean hands, and the *Morehouse* defense – remain insufficiently pleaded and are mere conclusory statements. Each is asserted in a boilerplate manner, and does not provide Petitioner "fair notice" of the factual basis for each defense. See TBMP §311.02(b), Note 15 (and cases cited therein) (June 2015). Accordingly, Respondent's five involved affirmative defenses (Nos. 2 - 6) should be stricken on this basis.

Finally, Respondent's *Morehouse* defense is not understood as no unchallenged registration has been identified on which to base a *Morehouse* defense. Accordingly, the *Morehouse* defense (No. 6) should be stricken on this basis.

Respondent contends that Petitioner will not be prejudiced by the inclusion of Respondent's Affirmative Defenses regardless of whether the defenses are deficient, and even if they are not applicable in this cancellation proceeding. (See, *e.g.*, Respondent's Memorandum,

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[4] Petitioner pleaded the assignment of Registration No. 3224978 was void as the assignment attempted to transfer the registration without reference to the mark or the goodwill, and Respondent cannot claim ownership of Registration No. 3224978. (See, *e.g.*, SBG's Petition for Cancellation, Paragraphs 12 and 14 – 16.)

page 11.) To the contrary, Petitioner will be prejudiced if Respondent's affirmative defenses remain in Respondent's Answer because Respondent could seek discovery and proceed to trial thereon, even though the defenses are insufficiently pleaded, and are inapplicable to fraud and non-use / abandonment claims, and there is no unchallenged registration pleaded as a basis for the *Morehouse* defense. Such a situation would be judicially wasteful in time and money not only for the parties, but also for the Board.

In summary, SBG respectfully requests that its Motion to Strike be granted in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITIONER'S MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES** was served on counsel for Respondent, this 11th day of September 2015, by sending same via first class mail, postage prepaid, to:

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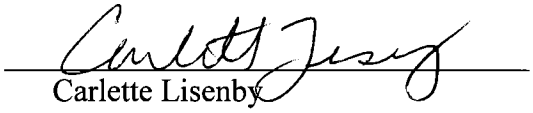

Carlette Lisenby