

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

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Mailed: May 23, 2015

Cancellation No. 92060436

Cortera, Inc.

v.

Creditera

**Before Bergsman, Greenbaum, and Goodman,  
Administrative Trademark Judges.**

*By the Board:*

This case now comes up for consideration of Petitioner's motion (filed February 6, 2014) to strike the affirmative defenses from the answer and, in the alternative, "judgment on the pleadings with respect to Respondent's affirmative defenses." Respondent has filed a brief in response.

In support of its motion, Petitioner asserts that the affirmative defenses "lack any legal merit" and should be stricken or, alternatively, the Board should enter judgment on the pleadings with respect to the defenses. Specifically, Petitioner argues that Respondent's first affirmative defense "is a mere redundancy of the denials set forth in Respondent's Answer and/or comprises assertions that do not relate in any way to matters before the Board." Petitioner further argues that Respondent's second affirmative defense, which alleges that the petition fails to

state a claim upon which relief can be granted, is “not a cognizable affirmative defense to a properly pleaded claim in the TTAB.”

The Board may, upon motion or by its own initiative, 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 are not favored, and matter will not be stricken unless it clearly has no bearing upon the issues under litigation. *See, e.g., FRA S.p.A. v. Surg-O-Flex of America, Inc.*, 194 USPQ 42, 46 (SDNY 1976); *Leon Shaffer Golnick Advertising, Inc. v. William G. Pendil Marketing Co., Inc.*, 177 USPQ 401, 402 (TTAB 1977).

With regard to the first affirmative defense comprised of several allegations that there is no likelihood of confusion, the Board finds that such allegations are merely amplifications of Respondent’s position regarding the likelihood of confusion claim. These amplifications of denials are permitted by the Board because they serve to give the plaintiff fuller notice of the position which the defendant plans to take in defense. *See* TBMP Section 311.02(d) and cases cited therein. Therefore, the Board finds that striking these allegations is not appropriate. Petitioner’s motion to strike Respondent’s first affirmative defense is denied.

With regard to Respondent’s second affirmative defense that Petitioner has failed to state a claim upon which relief can be granted, the question to be determined is whether the petition does indeed set forth facts which, if proved,

would entitle Petitioner to the relief it is seeking.<sup>1</sup> Upon careful review of the petition, the Board finds that Petitioner has set forth sufficient allegations to establish, if proven, that Petitioner has standing to bring this proceeding and to support a pleading of likelihood of confusion under Section 2(d) of the Trademark Act.

To properly state a claim under Section 2(d), Petitioner must plead (1) that Respondent's mark, as applied to its goods or services, so resembles Petitioner's mark(s) or trade name as to be likely to cause confusion, mistake, or deception; and (2) priority of use of its pleaded mark(s). *See Herbko International Inc. v. Kappa Books Inc.*, 308 F3d 1156, 64 USPQ2d 1375, 1378 (Fed. Cir. 2002) ("A party petitioning for cancellation under section 2(d) must show that it had priority and that the registration of the mark creates a likelihood of confusion.").

In its pleading, Petitioner alleges that its rights in its pleaded marks arose prior to any alleged rights of Respondent in the subject mark. Petition to Cancel ¶¶1, 3, and 13. Petitioner further asserts that Respondent's mark so resembles its marks "as to be likely, when used on or in connection with Respondent's services, to cause confusion, mistake or to deceive consumers with consequent injury to Petitioner and to the public, in violation of Section 2(d) of the Lanham Act..." Petition to Cancel ¶17. These allegations are sufficient to assert a claim of priority and likelihood of confusion. Respondent's defense of failure to state a claim is,

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<sup>1</sup> A plaintiff may utilize the defendant's assertion of failure to state a claim to test the sufficiency of its pleading by moving under Fed. R. Civ. P. 12(f) to strike this defense from the answer. *S.C. Johnson & Sons, Inc. v. GAF.*, 177 USPQ 720 (TTAB 1973).

therefore, without merit. Accordingly, Petitioner's motion to strike is granted, and the second affirmative defense is hereby stricken.

We turn to consider Petitioner's alternative motion for judgment on the pleadings regarding the first affirmative defense. Petitioner asserts that we should "enter judgment on the pleadings based on the redundancy of Respondent's pleading." Inasmuch as we have construed these allegations as amplifications of Respondent's denials, there exists an express conflict between the parties' respective pleadings such that disputed issues of material fact remain and judgment on the pleadings is inappropriate. Accordingly, the alternative motion for judgment on the pleadings is denied.

We deem the filing of the motion to strike to have tolled the running of all dates herein, and therefore retroactively grant Petitioner's motion to suspend. Proceedings are now resumed. If any discovery requests have been served, the receiving party has thirty days from the mailing date of this order to serve responses.<sup>2</sup> Dates are reset as follows:

Deadline for Discovery Conference	<b>6/14/2015</b>
Discovery Opens	<b>6/14/2015</b>
Initial Disclosures Due	<b>7/14/2015</b>
Expert Disclosures Due	<b>11/11/2015</b>
Discovery Closes	<b>12/11/2015</b>
Plaintiff's Pretrial Disclosures Due	<b>1/25/2016</b>
Plaintiff's 30-day Trial Period Ends	<b>3/10/2016</b>
Defendant's Pretrial Disclosures Due	<b>3/25/2016</b>
Defendant's 30-day Trial Period Ends	<b>5/9/2016</b>
Plaintiff's Rebuttal Disclosures Due	<b>5/24/2016</b>
Plaintiff's 15-day Rebuttal Period Ends	<b>6/23/2016</b>

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<sup>2</sup> This presumes that instead of considering the matter effectively stayed due to the filing of the motion to strike, the parties held their discovery conference and any party who served discovery made its initial disclosures while the instant motion was pending.

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.