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

Proceeding	92063032
Party	Plaintiff Boston Juicery, LLC
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

BOSTON JUICERY, LLC,

Petitioner,

v.

SQUEEZE JUICE WORKS, LLC,

Registrant.

Cancellation No. 92063032

Registration No. 4,598,400

Mark: SQUEEZE JUICE WORKS

**PETITIONER'S MOTION TO STRIKE REGISTRANT'S AFFIRMATIVE
DEFENSES AND TO SUSPEND PROCEEDINGS**

Petitioner Boston Juicery, LLC, ("Petitioner") hereby moves pursuant to Fed. R. Civ. P. 12(f) and TBMP § 506 to strike the affirmative defenses set forth in Squeeze Juice Works, LLC's ("Registrant") Answer as insufficient.

Pursuant to 37 C.F.R. § 2.117(c), Petitioner also respectfully requests that the proceedings be suspended pending determination of this Motion, in order to preserve the discovery period until the issues raised in this motion are addressed.

A memorandum in support is submitted herewith.

MEMORANDUM IN SUPPORT OF MOTION

Section 506.01 of the TBMP provides that the Board may, upon motion or upon its own initiative, "order stricken from a pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." TBMP § 506.01; *see also* Fed. R. Civ. P. 12(f).

On this basis, Petitioner moves to strike each of Registrant's affirmative defenses as insufficiently pleaded or immaterial under Fed. R. Civ. P. 8(b) and 37 C.F.R. § 2.106(b)(1). These rules require Registrant to 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. All of Registrant's pleaded affirmative defenses fall short of these requirements. Moreover, affirmative defenses 3–5 are beyond the scope of the Board's jurisdiction. Accordingly, Petitioner hereby moves to have affirmative defenses 1–8 stricken from Registrant's Answer.

ARGUMENT

I. REGISTRANT'S AFFIRMATIVE DEFENSES ARE INSUFFICIENTLY PLED, IMMATERIAL, OR BEYOND THE BOARD'S JURISDICTION.

Registrant fails to plead sufficient facts in support of its affirmative defenses 1–2 and 7–8. Rule 8(b) requires that any defense to a claim must be stated in short and plain terms. Fed. R. Civ. P. 8(b). Similarly, TBMP § 311.02(b) makes clear that “[t]he elements of a defense should be stated simply, concisely, and directly. However, the pleading should include enough detail to give the plaintiff fair notice for the defense.” Bald and conclusory allegations are insufficient under this standard, in that they neither give fair notice of the basis for a claim nor set forth sufficient facts that, if proven, support the claim. TBMP § 311.02(b); *see Fair Indigo LLC v. Style Conscience*, 85 U.S.P.Q.2d 1536, 1538 (T.T.A.B. 2007) (elements of each claim should include enough detail to give fair notice of claim); *Ohio State Univ. v. Ohio Univ.*, 51 U.S.P.Q.2d 1289, 1292 (T.T.A.B. 1999) (primary purpose of pleadings “is to give fair notice of the claims or defenses asserted”); *cf. Otto Int’l Inc. v. Otto Kern GmbH*, 83 U.S.P.Q.2d 1861, 1864 (T.T.A.B. 2007) (bald allegations of misrepresentation of source did not provide fair notice). Where a defense contains such bald, conclusory allegations, the defense will be stricken by the Board. *See e.g., Veles Int’l Inc. v. Ringing Cedars Press LLC*, Consolidated Opp. Nos. 91182303 and 91182304 (T.T.A.B. June 2, 2008).

Additionally, several of Registrant's affirmative defenses list defenses which are not within the Board's jurisdiction, and they should therefore be stricken.

A. Registrant's First Affirmative Defense of "Failure to State a Claim" is Conclusory Boilerplate and Not Supported by Any Facts.

Registrant's first affirmative defense of "Failure to State a Claim" should be stricken because, as pled, it is merely conclusory and fails to state any facts whatsoever, let alone any facts that would give adequate notice of the basis for such a defense. "The Petition for cancellation fails to state a claim upon which relief can be granted" is a bald, conclusory statement that does not indicate how Petitioner's pleadings are inadequate. Indeed, this affirmative defense is a boilerplate defense without any consideration of the actual allegations set forth in the Petition for Cancellation and without any identification of the factual basis for the naked statement that Petitioner fails to state a claim upon which relief can be granted. Consequently, both Petitioner and the Board can only speculate as to the predicates for this defense. As such, affirmative defense 1 should be stricken as insufficiently pled.

B. Registrant's Second affirmative defense of "Lack of Standing – No Prior Use" Does Not Provide Notice of Any Recognizable defense and Should be Stricken as Insufficient.

Registrant's second affirmative defense, which appears to allege Petitioner's lack of standing because of no prior use of Petitioner's SQUEEZE JUICE BAR mark, should be stricken because, as pled, it fails to allege facts or reasoning sufficient to provide fair notice of the basis for such defense. In short, this is an incoherently drafted affirmative defense.

Registrant's affirmative defense includes factual allegations regarding Plaintiff's failure to use its SQUEEZE JUICE BAR mark in connection with "Goods or Services similar to those in the Subject Registration prior to Registrant's first use of" SQUEEZE JUICE WORKS. These allegations have nothing to do with standing. To have standing, a petitioner needs to show only that it has a personal stake in the outcome of the case. *See, e.g., Garri Publ'n Assocs., Inc. v. Dabora, Inc.*, 10 U.S.P.Q.2d 1694, 1696 (T.T.A.B. 1988). Registrant's affirmative defense, as pleaded, does not dispute that Petitioner has a personal interest in the continued

registration of the SQUEEZE JUICE WORKS mark, but merely attempts to attack Petitioner's allegations regarding its use of the SQUEEZE JUICE BAR mark. However, Registrant has already done so in its answer in denying Petitioner's allegations regarding its use. *See* Answer, TTABVUE ¶¶ 3–4; Petition for Cancellation, TTABVUE 1 ¶¶ 3–4. Registrant fails to plead any relationship between the recited allegations of Petitioner's use of the SQUEEZE JUICE BAR mark and Petitioner's alleged lack of standing.

Therefore, Registrant has failed to provide adequate notice to Petitioner and the Board as to the precise nature of the claimed affirmative defense of lack of standing. *See* TBMP § 311.02(b); *see also Fair Indigo LLC*, 85 U.S.P.Q.2d at 1538. This affirmative defense should be stricken as insufficient.

C. Registrant's Third, Fourth, and Fifth Affirmative Defenses Should Be Stricken Because They Are Beyond the Scope of the Board's Jurisdiction.

Registrant's third, fourth, and fifth affirmative defenses allege Petitioner's lack of standing due to false advertising, unfair competition, and deceptive trade practices. "The Board is empowered to determine only the right to register." TBMP § 102.01. As such, the Board has no jurisdiction to consider claims for false advertising, deceptive trade practices, or unfair competition. *See Paramount Pictures Corp. v. White*, 31 U.S.P.Q.2d 1768, 1771 n.5 (T.T.A.B. 1994) (Board has no jurisdiction over claims of trademark infringement and unfair competition); *Andersen Corp. v. Therm-O-Shield Int'l, Inc.*, 226 U.S.P.Q. 431, 432 n.5 (T.T.A.B. 1985) (Board may not entertain any claim based on Trademark Act § 43(a)); *Elec. Water Conditioners, Inc. v. Turbomag Corp.*, 221 U.S.P.Q. 162, 163–64 (T.T.A.B. 1984) (unfair competition and Trademark Act § 43(a) claims are outside the Board's jurisdiction); *Hershey Foods Corp. v. Cerreta*, 195 U.S.P.Q. 246, 252 (T.T.A.B. 1977) (determination of whether opposer is guilty of unfair business practices is not within the province of the Board); *see also*

TBMP § 102.01 (“The Board is not authorized to determine the right to use, nor may it decide broader questions of infringement or unfair competition.”).

Accordingly, as these defenses are beyond the scope of the Board’s jurisdiction, they should be stricken.

D. Registrant’s Sixth Affirmative Defense of “Lack of Standing — Fraud” Is Not Pled With Sufficient Particularity.

Registrant’s affirmative defense of “Lack of Standing — Fraud” should be stricken because, as pled, it is incoherent and does not meet the heightened pleading standard required to support a claim of fraud. With a liberal reading of the affirmative defense, Registrant alleges that Petitioner does not have standing to bring the instant cancellation proceeding because “Petitioner lost any proprietary right it might have in the terms ‘SQUEEZE’ AND ‘SQUEEZE JUICE BAR’ as a result of its fraud.” To have standing, a petitioner needs to show only that it has a personal stake in the outcome of the case. *See, e.g., Garri Publ’n Assocs., Inc.*, 10 U.S.P.Q.2d at 1696. Petitioner has made sufficient allegations in its Petition for Cancellation to establish that it has a personal interest in this proceeding, namely, that it has established trademark rights in the SQUEEZE JUICE BAR mark.

Nevertheless, Registrant argues that because of Petitioner’s alleged fraudulent conduct, namely, Petitioner’s use of the registration symbol in connection with the marks SQUEEZE and SQUEEZE JUICE BAR without having federal registrations for those marks, Petitioner has been stripped of its common law rights in the SQUEEZE JUICE BAR mark. This is wholly inaccurate — misuse of a federal registration symbol in connection with a common law trademark does not deprive the trademark owner of rights in the subject mark. Rather, misuse of a registration symbol, if deliberate and intended to deceive the public, serves as a ground for denying the registration of an otherwise registrable mark. *See, e.g., Copelands’ Enters. Inc. v. CNV Inc.*, 945 F.2d 1563, 1566, 20 USPQ2d 1295, 1298 (Fed. Cir. 1991); *Johnson Controls,*

Inc. v. Concorde Battery Corp., 228 U.S.P.Q. 39, 44 (T.T.A.B. 1985). Even if Registrant's allegations were true, Petitioner's rights in its SQUEEZE and SQUEEZE JUICE BAR marks would not be stripped by its misuse of the registration symbol. Petitioner clearly has standing.

On top of this, Registrant's defense of fraud is legally insufficient because it does not meet the heightened pleading standard required by Rule 9 of the Federal Rules of Civil Procedure. *See* 37 C.F.R. § 2.106(b)(1); TBMP § 311.02(b) (when fraud is pleaded, the provisions of Fed. R. Civ. P. 9 governing the pleading should be followed). Rule 9 requires a party alleging fraud to "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9. Conclusory statements that a petitioner has committed fraud, absent a recitation of the facts reflecting the basis for the alleged inequitable conduct, do not meet the pleading requirements of Fed. R. Civ. P. 9. Registrant's statement that Petitioner's use of the registration symbol was "deliberate and intended to deceive or mislead the public", without any factual support, is a naked assertion that does not meet the pleading requirements of Fed. R. Civ. P. 9. Moreover, this alleged so-called "fraud" would not effect Petitioner's standing.

In light of the above, Registrant's Sixth affirmative defense should be stricken as insufficient.

E. Registrant's Seventh Affirmative Defense of "Unclean Hands" is Conclusory Boilerplate and Not Supported by the Facts.

Registrant's seventh affirmative defense of "Unclean Hands" should be stricken because, as pled, it is merely conclusory and fails to state any facts that would give Petitioner adequate notice of the basis for such defense. Where a defense contains mere conclusory allegations that do not give a petitioner fair notice as to the specific conduct which provides the basis for the defense, the defense should be stricken by the Board. "Petitioner's claims are barred in whole or in part [sic] by the doctrine of unclean hands" is a bald, conclusory statement that does not indicate how Petitioner's alleged conduct supports a claim of unclean

hands. Registrant's mere allegations that Petitioner used the registration symbol in connection with its common law marks, *see* TTABVue 4 ¶¶ 17–26, without more are insufficient to support its affirmative defense.

Accordingly, this affirmative defense should be stricken as insufficiently pled.

F. Registrant's Eighth affirmative defense of "Abandonment" is Conclusory Boilerplate and Not Supported by Any Facts

A colorable claim for abandonment requires a party to allege either (i) that the subject mark has not been in use in commerce for three consecutive years, or (ii) use has been discontinued without the intent to resume use. 15 U.S.C. § 1127; *see OnLine Careline, Inc. v. Am. Online*, 56 U.S.P.Q.2d 1471 (Fed. Cir. 2000). Registrant's affirmative defense fails to allege that Petitioner ceased use of the SQUEEZE JUICE BAR mark without the intent to resume use. Additionally, the affirmative defense of abandonment does not provide Petitioner with appropriate notice of whether Registrant intends to rely on the presumption of abandonment after three consecutive years of nonuse, or whether Registrant intends to demonstrate abandonment by discontinued use without intent to resume. Instead, Registrant states that Petitioner has "ceased use of the term SQUEEZE JUICE BAR" and has "abandoned any rights it might have had" in SQUEEZE JUICE BAR.

This is woefully insufficient. A blanket assertion that the mark is not in use and has been abandoned falls considerably short of the pleading requirements for an affirmative defense based on abandonment. Accordingly, Registrant's eighth affirmative defense should be stricken as insufficiently pled.

G. Paragraphs 17–26 of Registrant's Answer Should Be Stricken as Part of Affirmative Defenses 3–7.

Paragraphs 17–26 of Registrant's Answer (the "Paragraphs") should be stricken as part of affirmative defenses 3–7. The Paragraphs are not responsive to any allegation made in

Petitioner's Petition for Cancellation, but are instead expressly incorporated into affirmative defenses 3–7. *See* TTABVUE 4 ¶¶ 31, 34, 37, 40, 44. Respondent even acknowledges that the sole purpose of the Paragraphs is to support Registrant's affirmative defenses. *See* TTABVUE 4 at 3 (stating the Paragraphs are provided “in support of [Registrant's] position”). Accordingly, the Paragraphs are properly considered part of Registrant's affirmative defenses 3–7. As such, the Paragraphs should be stricken from the Answer as part of, and along with, affirmative defenses 3–7, as Petitioner has outlined above¹.

H. Good Cause Exists for Suspension of Proceedings Pending Determination of This Motion and Potential Cure by Registrant

Trademark Rule 2.117(c) provides that proceedings may be suspended on motion for good cause. 37 C.F.R. § 2.117(c). Petitioner respectfully submits that “good cause” exists for suspension of proceedings at this time, so that the parties can better understand the nature of the respective claims and defenses before moving forward into the discovery phase of this proceeding.

CONCLUSION

Because Registrant's affirmative defenses 1–8 are inadequately pled and/or immaterial to this Cancellation Proceeding as demonstrated above, Petitioner respectfully requests that the Board (1) grant this Motion; (2) strike Registrant's affirmative defenses 1–8; and (3) grant such other and further relief as the Board deems appropriate. Petitioner also respectfully requests suspension of proceedings for the reasons discussed above, and that the trial dates

¹ Striking affirmative defenses 3–7 only and leaving the Paragraphs intact would render the Paragraphs wholly immaterial to this Cancellation Proceeding. The Paragraphs point to Petitioner's lack of federal trademark registrations for the marks SQUEEZE and SQUEEZE JUICE BAR, *see* TTABVUE 4 ¶¶ 17–18, and contain naked allegations that Petitioner has used the registration symbol in connection with its common law marks, *see* TTABVUE 4 ¶¶ 19–26 — allegations that have nothing to do with the claims alleged in the Petition for Cancellation or with Registrant's Answer. Under this reasoning, the Board should strike the Paragraphs from the Answer in accordance with TBMP § 506.01.

be reset in accordance with any Order from the Board permitting Registrant to cure these deficiencies.

Respectfully submitted,

Dated: March 25, 2016

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing **Petitioner's Motion to Strike Registrant's Affirmative Defenses and to Suspend Proceedings** has been served on Registrant's correspondent of record by mailing said copy on March 25, 2016, via First Class Mail, postage pre-paid to:

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/s/ Aaron Y. Silverstein
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