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

Proceeding	91176517
Party	Plaintiff JetBlue Airways Corporation JetBlue Airways Corporation ,
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Date	07/03/2007
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE
THE TRADEMARK TRIAL AND APPEAL BOARD**

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JETBLUE AIRWAYS CORPORATION,	:	
	:	
Opposer,	:	Opposition No. 91176517
	:	
v.	:	
	:	
PACIFIC BLUE HOLDINGS PTY LTD,	:	
	:	
Applicant.	:	
-----	x	

**OPPOSER’S MOTION TO STRIKE APPLICANT’S FIRST AND SECOND
AFFIRMATIVE DEFENSES**

Opposer, JetBlue Airways Corporation (“Opposer”), submits this Motion to Strike Pacific Blue Holdings PTY Ltd’s (“Applicant’s”) First and Second Affirmative Defenses set forth in its Answer and Affirmative Defenses to Opposer’s Amended Notice of Opposition, dated May 25, 2007, pursuant to Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) § 506.01 and Federal Rule of Civil Procedure 12(f).

I. PROCEDURAL BACKGROUND

On March 16, 2007, Opposer filed a request for an extension of time to oppose Applicant’s trademark application for PACIFIC BLUE, which request was granted by the Board the same day. On March 22, Applicant filed a request for reconsideration of the Board’s order granting the extension, on the ground that it was untimely filed.. On March 30, 2007, Opposer filed its opposition to the request for reconsideration, along with its Notice of Opposition. The Board instituted the instant proceeding on the same day. On April 25, 2007, the Board issued an

Order denying Applicant's request for reconsideration, thus validating the timeliness of Opposer's filing of its Notice of Opposition. Applicant did not appeal the decision of the Board, and its time to do so has now expired.

Prior to any responsive pleading by Applicant, Opposer filed an Amended Notice of Opposition on April 27, 2007 (the "Amended Notice"). Applicant filed its "Answer and Affirmative Defenses to Amended Notice of Opposition" on May 25, 2007 (the "Answer"), in which it set forth two affirmative defenses, discussed more fully below. In an effort to streamline the issues to be decided in this action, and to narrow the issues for further relevant discovery and testimony, Opposer hereby seeks to have both affirmative defenses stricken.

II. ARGUMENT

Upon motion, the Board may order stricken from a pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. TBMP § 506 (*citing* Federal Rule of Civil Procedure 12(f)). Here, striking both Applicant's First Affirmative Defense, that the "Amended Notice of Opposition fails to state a claim upon which relief may be granted," and its Second Affirmative Defense, that the "Amended Notice of Opposition . . . was untimely filed," is entirely appropriate due to the complete insufficiency of these defenses. See, e.g., American Vitamin Products, Inc. v. Dow Brands Inc., 22 U.S.P.Q.2d 1313 (TTAB 1992) (insufficient affirmative defenses stricken, one of which was the "failure to state a claim upon which relief may be granted").

A. Applicant's First Affirmative Defense Should Be Stricken

TBMP § 309.03(a)(2) sets forth the general required elements of a complaint:

A notice of opposition must include (1) a short and plain statement of the reason(s) why opposer believes it would be damaged by the registration of the opposed mark (i.e., opposer's standing to maintain the proceeding (see TBMP §§ 303.03 and 309.03(b)), and (2) a short and plain statement of one or more grounds for opposition.

As part of its complaint (here, the Amended Notice of Opposition), “[a] plaintiff may raise any available statutory ground for opposition or cancellation that negates the defendant's right to registration.” TBMP § 309.03(c).

Here, Opposer, in its Amended Notice, has undeniably met both requirements for stating a claim upon which relief may be granted. In fact, contrary to Applicant’s First Affirmative Defense, the Amended Notice alleges at least two grounds for relief that are each specifically enumerated in TBMP § 309.03(c) as legitimate grounds for an opposition, namely:

- 1) use of the PACIFIC BLUE mark would create confusion, mistake, and deception with the JETBLUE mark and JetBlue’s services, pursuant to 15 U.S.C. § 1052(d); and
- 2) use of the PACIFIC BLUE mark would dilute the distinctive quality of the famous JETBLUE mark.

Opposer’s Amended Notice, at 1-2 (matching listed examples 1 and 15 of TBMP § 309.03(c)).

Furthermore, Opposer has provided a statement of the reasons why it believes it would be damaged by the registration of Applicant’s opposed mark, as required under 309.03(a)(2). To that end, “[a]ny person who believes it is or will be damaged by registration of a mark has standing to file a complaint.” TBMP § 309.03(b). “A real interest in the proceeding and a reasonable belief of damage may be found, for example, where plaintiff pleads . . . [a] claim of likelihood of confusion . . .” Id.

Here, Opposer has pleaded a likelihood of confusion claim, as well as a dilution claim,

both of which, if proven, would greatly harm Opposer. For further clarity, the irreparable harm allegation appears explicitly in the pleading. See Opposer's Amended Notice, at ¶ 10.

Accordingly, Opposer respectfully requests that Applicant's First Affirmative Defense be stricken, as Opposer has undeniably met its burden of stating a claim upon which relief may be granted. See S.C. Johnson & Son, Inc. v. GAF Corp., 177 U.S.P.Q. 720 (TTAB 1973) (affirmative defense of failure to state a claim upon which relief can be granted stricken because complaint did state such a claim).

B. Applicant's Second Affirmative Defense Should be Stricken

Applicant's Second Affirmative Defense states that "the Amended Notice of Opposition should be dismissed on the grounds that it was not timely filed and therefore the Trademark Trial [sic] and Appeal Board lacks subject matter jurisdiction." Since Opposer timely filed both the Notice of Opposition and the Amended Notice, this Second Affirmative Defense has no merit. Nonetheless, to address any potential argument by Applicant, Opposer can only surmise that Applicant is attempting to assert one of two things: 1) that the Amended Notice is considered untimely under the applicable rules; or 2) Opposer's original Notice of Opposition was untimely, which therefore rendered the subsequent Amended Notice untimely. Both of these assertions are unfounded, and each is addressed in turn below.

1) Opposer Properly and Timely Filed the Amended Notice.

A party may amend its party's pleading once as a matter of course at any time before a responsive pleading is served. TBMP § 507.02. Here, Opposer's Amended Notice of Opposition was filed on April 27, 2007, before Applicant filed any responsive pleading. Therefore, Applicant has no basis from which to claim that Opposer's Amended Notice was untimely.

2) Opposer's Original Notice of Opposition was Timely.

Since Opposer timely filed the Amended Notice, Applicant may be trying to assert — again — that Opposer's *original* Notice of Opposition was untimely, thus rendering any subsequent pleading untimely. However, this issue was explicitly ruled upon already in Opposer's favor by Order of the Board. See Ex. "A". Applicant's two month deadline in which to appeal this Order has expired . 37 CFR 2.145(d)(1) ("In inter partes cases, the time for filing . . . a notice of a cross-appeal expires . . . two months from the date of the decision of the Trademark Trial and Appeal Board or the director."). Therefore, since Applicant has no basis from which to revisit its claim that the original Notice of Opposition was untimely, it certainly then cannot claim that the Amended Notice was untimely. Under any conceivable argument, this Second Affirmative Defense cannot stand.

III. CONCLUSION

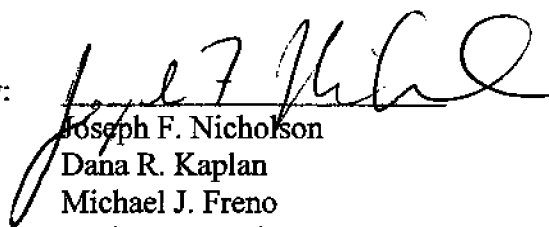
For the above reasons, Opposer respectfully requests that the Board strike Applicant's First and Second Affirmative Defenses in its Answer, as they clearly are deficient as a matter of law, and doing so would to serve the purpose of narrowing the issues for trial.

Dated: July 3, 2007
New York, New York

Respectfully submitted,

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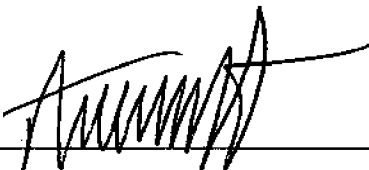
Attorneys for Opposer

JetBlue Airways Corporation

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of OPPOSER'S MOTION TO STRIKE APPLICANT'S AFFIRMATIVE DEFENSES was served on Applicant by service through First Class Mail to the below address on July 3, 2007.

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