

ESTTA Tracking number: **ESTTA370639**

Filing date: **09/28/2010**

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

Proceeding	91194379
Party	Plaintiff Cornfields, Inc.
Correspondence Address	RICHARD B. BIAGI NEAL & MCDEVITT, LLC 1776 ASH STREET NORTHFIELD, IL 60093 UNITED STATES pto@nealmcdevitt.com
Submission	Opposition/Response to Motion
Filer's Name	Jeremy M. Roe
Filer's e-mail	pto@nealmcdevitt.com
Signature	/jmr/
Date	09/28/2010
Attachments	20100928 Opposer's Response to Motion to Strike.pdf (4 pages)(18739 bytes)

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

In the matter of Trademark Application No. 77/780,921

For the Mark SKINNY MUNCH – Int. Class 30

Filed on July 14, 2009

Published on December 1, 2009

_____)	
CORNFIELDS, INC.)	
)	
Opposer,)	
)	Opposition No. 91194379
v.)	
)	
ADEENA WEISS,)	
d/b/a SKINNY MUNCH CORP.)	
)	
Applicant.)	
_____)	

**OPPOSER’S RESPONSE TO APPLICANT’S MOTION TO STRIKE
OPPOSER’S AFFIRMATIVE DEFENSES**

Opposer Cornfields, Inc. (hereinafter “Opposer”), by and through its attorneys, hereby responds to Applicant’s Motion to Strike Opposer’s Affirmative Defenses. For the reasons that follow, Applicant’s Motion should be denied.

INTRODUCTION

On June 25, 2010, Applicant Adeena Weiss (hereinafter “Applicant”) filed her Answer and Counterclaim to the Notice of Opposition filed by Opposer. After the Board ordered a reset of response deadlines, Opposer filed its Answer and Affirmative Defenses to the Counterclaim on August 13, 2010. Opposer’s Answer included five substantive affirmative defenses, which are the subject of Applicant’s Motion.

LEGAL STANDARD

Pursuant to the Trademark Trial and Appeal Board Manual of Procedure and Fed. R. Civ. P. 12(f), a party may move the Board to strike from a pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. T.B.M.P. § 506.01. “Motions to strike are not favored, and matter will not be stricken unless it clearly has no bearing upon the issues in the case.” Id., citing Ohio State University v. Ohio University, 51 U.S.P.Q.2d 1289, 1293 (T.T.A.B. 1999); Harsco Corp. v. Electrical Sciences Inc., 9 U.S.P.Q.2d 1570 (T.T.A.B. 1988); Leon Shaffer Golnick Advertising, Inc. v. William G. Pendill Marketing Co., 177 U.S.P.Q. 401 (T.T.A.B. 1973); and Wright & Miller, Federal Practice and Procedure: Civil 2d § 1380 (1990).

The Board should deny a motion to strike a pleading where its inclusion will not prejudice the adverse party, but rather will provide fuller notice of the basis for a claim or defense. T.B.M.P. § 506.01, citing Order of Sons of Italy in America v. Profumi Fratelli Nostra AG, 36 U.S.P.Q.2d 1221, 1223 (T.T.A.B. 1995) (amplification of applicant’s denial of opposer’s claims); Textron, Inc. v. Gillette Co., 180 U.S.P.Q. 152, 153 (T.T.A.B. 1973) (applicant’s affirmative defense amplifies denial of likelihood of confusion). An affirmative defense should not be stricken as insufficient if the insufficiency is not clearly apparent, or if it raises factual issues that should be determined on the merits. Id.

ARGUMENT

Opposer’s affirmative defenses are well pled and provide Applicant with reasonable notice of the defenses set forth. The Federal Rules of Civil Procedure, which apply to this proceeding, require “notice pleading,” not fact pleading. The Rules simply require a short and plain statement of the defenses to give Applicant fair notice of Opposer’s defenses and the

grounds upon which they rest. See Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). Under Fed. R. Civ. P. 8(e)(2), a party may set forth two or more statements of a defense alternately or hypothetically, either in one defense or in separate defenses. Turtle Fur Co. v. Viewpoint Int'l, Inc., 2000 WL 1720065, Cancellation No. 28,238 (T.T.A.B. 2000). A party may state as many separate defenses as it has regardless of consistency and whether based on legal or equitable grounds. Roux Labs., Inc. v. La Cade Products Co., 558 F.2d 33 (C.C.P.A. 1977). Clearly, Opposer has met its pleading burden.

For each of the five affirmative defenses, Opposer provided Applicant with sufficient notice of its defenses. Indeed, Opposer submitted a list of affirmative defenses upon which it has a good faith basis to bring forth and more fully develop during discovery, should this proceeding reach that point. Applicant has utterly failed to state how Opposer's affirmative defenses are insufficient, redundant, immaterial, impertinent, or scandalous. Nor has Applicant stated how the defenses have no bearing upon the issues in the case—indeed, each of the five defenses is intimately related to the validity of Applicant's Counterclaim. The affirmative defenses are not so deficient that they prejudice Applicant in any way. Applicant has cited no law in support of its motion and has provided no explanation of how it would be prejudiced by the inclusion of these defenses.

Consequently, each of the affirmative defenses pled by Opposer is sufficient and should not be stricken.

CONCLUSION

For the foregoing reasons, Opposer respectfully requests that the Board deny Applicant's Motion to Strike Opposer's Affirmative Defenses.

Date: September 28, 2010

Respectfully submitted,

By: /s/ Jeremy M. Roe

Richard B. Biagi
Jeremy M. Roe
NEAL & MCDEVITT, LLC
1776 Ash Street
Northfield, Illinois 60093
Tel. – 847.441.9100
Fax. – 847.441.0911

*Attorneys for Opposer,
Cornfields, Inc.*

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Opposer, hereby certifies that a true and correct copy of the foregoing **OPPOSER'S RESPONSE TO APPLICANT'S MOTION TO STRIKE OPPOSER'S AFFIRMATIVE DEFENSES** was served by deposit with the United States Postal Service, First Class, upon:

Adeena Weiss
28 East Jackson Blvd. #10A
Chicago, IL 60604-2263

Correspondent for Applicant

on this 28th day of September, 2010.

/s/ Jeremy M. Roe

*Attorneys for Opposer,
Cornfields, Inc.*