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

Proceeding	91218846
Party	Defendant Tri-Coastal Design Group, Inc.
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

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Seaside Community Development Corp.,

Opposer,

Opposition No.: 91218846
Serial No. 86/188,378

-v-

Tri-Coastal Design Group, Inc.

Applicant.

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REPLY TO OPPOSITION TO MOTION FOR RECONSIDERATION

Applicant, by its attorneys, hereby replies to Opposer's Opposition to Applicant's Motion for Reconsideration.

ARGUMENT

1. Contrary to Opposer's contention that Applicant fails to articulate the relief sought, Applicant's motion clearly requests, "APPLICANT SHOULD BE GRANTED THE RIGHT TO INCLUDE THE AFFIRMATIVE DEFENSE OF "FAILURE TO STATE A CAUSE OF ACTION UPON WHICH RELIEF MAY BE GRANTED".

2. Contrary to Opposer's view that the motion should be denied because Applicant does not point to any error by the Board, as explained and documented in Applicant's motion papers, the TTAB has consistently recognized and, in actuality, requires that there be a timely assertion of pleading *failure to state a claim* in the form of an *affirmative defense*. So regardless of the Board's reliance on, *inter alia*, *Hornblower & Weeks, Inc. v. Hornblower & Weeks, Inc.*, 60 U.S.P.Q2d 1733, 1738 n.7 (TTAB 2001), a *failure to state a claim* is commonly

accepted in practice as an affirmative defense. Applicant cites numerous cases in its motion to support this tenet.

3. The Opposer’s contention that the Notice of Opposition clearly states a cause of action, fails to consider what was actually pleaded. The following facts demonstrate that the Notice of Opposition is void of the requisite allegation(s) and the affirmative defense of failure to state a cause of action is appropriate:

- a) The following is the *only* registration cited by Opposer that purportedly covers bath & body products:

Mark	Class, Goods or Services, and dates of first use	Registration Number
THE SEASIDE STYLE	IC 035. US 100 101 102. G & S: On-line retail store services featuring <i>gifts</i> , housewares, home furnishings, clothing, shoes <i>and sundries</i> ; Promoting the goods and services of others via a global computer network. FIRST USE: 20100400. FIRST USE IN COMMERCE: 20100400	3846308

As noted below, the terms “gifts” and “sundries” included in the description of the goods do not refer to nor is there any reason to suggest they refer to the goods covered by Applicant’s Mark. In fact, the reference in the description of the goods is to “housewares, home furnishings, clothing, [and] shoes.”

- b) The following relevant allegations are made in the Notice of Opposition:

Allegation ¶1: Over thirty years ago, Seaside began using and over the years has continued to use its SEASIDE® marks and name as a source identifier. Seaside uses the SEASIDE® marks and name for a wide range of products and services, including but not limited to clothing, retail store services, and various gift and sundries, among other goods and services.

Comment: There is absolutely no indication that Opposer used its supposed “SEASIDE” marks in connection with *bath & body products*, which are the goods at issue. Moreover, the statement “[o]ver thirty years ago, Seaside began using . . .” does not even come close to addressing when Opposer started using its claimed marks in connection with the relevant goods, if at all; in fact, it could have started using the purported marks the day before the filing of the Notice of Opposition. The truth is the plain reading of the claim that “Seaside uses the . . . marks”, means it currently uses the marks. This allegation is painfully lacking.

Allegation ¶3: Moreover, Seaside offers, promotes and provides information about the SEASIDE® retail stores and the various gifts and sundries, including SEASIDE® bath, body and fragrance products, on Seaside's websites at www.seasidefl.com and at www.theseasidestyle.com.

Comment: Nothing in this allegation even suggests a timeframe when Opposer began selling “bath, body and fragrance products”. The truth is the referenced websites could have been launched the day before the filing of the Notice of Opposition.

Allegation ¶4: Seaside has owned and used its SEASIDE® marks and name, and the other marks and names containing the SEASIDE® mark (collectively referred to as the "SEASIDE Marks and Name") in interstate commerce since well prior to the February 8, 2014 filing date of the opposed designation, including for various bath, body and fragrance products.

Comment: As noted above, the only registration cited by the Opposer in its Notice of Opposition that Opposer argues covers the goods covered by Applicant's Mark is Opposer's registration of THE SEASIDE STYLE, Registration No. 3846308. Putting aside for this purpose that the applied for mark is sufficiently different, with regard to THE SEASIDE STYLE, use of **the terms “gifts” and “sundries” included in the description of the goods do not refer to nor is there any reason to suggest they refer to the goods covered by Applicant's Mark.** In fact, the specific goods referred to in the registration for the SEASIDE STYLE are housewares, home furnishings, clothing, and shoes, none of which have any relationship to the goods covered by Applicant's Mark.

Furthermore, nothing in this allegation states that Opposer used its marks in connection with bath and body products prior to Applicant's filing for registration. It states only that “Seaside owned and used its SEASIDE® marks and name, and the other marks and names containing the SEASIDE® mark (collectively referred to as the ‘SEASIDE Marks and Name’) in interstate commerce since well prior to the February 8, 2014 filing date of the opposed designation.” Despite what Opposer now wants the Board to believe, **the allegation addressing “bath, body and**

fragrance products” in this paragraph refers NOT to Opposer’s marks but to the goods listed in the “opposed designation.”¹

Again, this is an allegation is painfully lacking.

Allegation ¶5: Seaside has expended substantial time and effort in promoting the SEASIDE® Marks and Registrations. Through continuous and extensive use, the SEASIDE Marks and Registrations have become identified exclusively with Seaside, its retail store services, and the goods it offers and sells as part of its retail services and its other services. For example, at THE SEASIDE STYLE® website Seaside offers soaps, body lotions, candles, and bath salts for purchase. All products bear the SEASIDE® marks for these products.

Comment: Again, nothing stated in this allegation even remotely suggests that Opposer used its purported marks in connection with the goods covered by Applicant’s Mark prior to Applicant’s filing for registration.

Allegation ¶10: The goods identified in the Applications directly compete with and relate to the goods and services Seaside promotes and offers under its SEASIDE® Marks and Name As a result, consumers are likely to believe that Applicant's goods emanate from Seaside, or are affiliated with, sponsored by or endorsed by Seaside, when they are not.

Comment: Likewise, nothing stated in this allegation even remotely suggests that Opposer used its purported marks in connection with the goods covered by Applicant’s Mark prior to Applicant’s filing for registration.

CONCLUSION

The factual allegations in a complaint must make entitlement to relief plausible and not merely possible; hollow allegations do not suffice. What is clear is that none of the registrations cited by Opposer nor the referenced websites bolster or add any credence to Opposer’s fundamental contention that it used any Seaside mark in connection with Applicant’s goods prior

¹ Under the governing pleading standard, the “complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” See *Ashcroft v. Iqbal*, 556 U.S. 662, 677–680, 129 S.Ct. 1937, 173 L.Ed.2d 868, and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554–563, 127 S.Ct. 1955, 167 L.Ed.2d 929. To that end, none of Opposer’s cited registrations and nothing in the referenced websites even remotely suggests relevant prior use.

to Applicant's filing for registration. Moreover, not a single allegation in the Notice of Opposition clearly avers prior relevant use. Thus, for the reasons stated the decision of the Board should be reversed as to the right of Applicant to plead the affirmative defense of *failure to state a cause of action upon which relief may be granted*.

DATED: May 5, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I TEDD S. LEVINE hereby certify that on the 5th day of May 2015, I served a copy of APPLICANT'S REPLY TO OPPOSITION TO MOTION FOR RECONSIDERATION by U.S.

Mail, postage prepaid, to the following:

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