

ESTTA Tracking number: **ESTTA683621**

Filing date: **07/14/2015**

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

Proceeding	91221493
Party	Plaintiff Shaklee Corporation
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Date	07/14/2015
Attachments	REPLY TO RESPONSE TO MOTION TO STRIKE.pdf(166239 bytes )

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

Shaklee Corporation,	)	
	)	
Opposer,	)	<b>SHAKLEE’S REPLY TO</b>
	)	<b>MANNATECH’S RESPONSE TO</b>
v.	)	<b>SHAKLEE’S MOTION TO STRIKE</b>
	)	<b>MANNATECH’S SECOND, THIRD,</b>
Mannatech, Incorporated,	)	<b>AND FOURTH AFFIRMATIVE</b>
	)	<b>DEFENSES</b>
Applicant.	)	Opposition No. 91221493
	)	(Application Ser. No. 86/128507)

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**REPLY TO MANNATECH’S RESPONSE TO SHAKLEE’S MOTION TO STRIKE**  
**AFFIRMATIVE DEFENSES**

Shaklee Corporation notes that Mannatech has withdrawn its Second Affirmative Defense in response to Shaklee’s Motion to Strike. However, Mannatech maintains its Third and Fourth Affirmative Defenses that:

1. Opposer is barred by estoppel from bringing an opposition; and
2. The Notice of Opposition fails to state a claim upon which relief can be granted.

Mannatech’s response raises no issues that change the conclusion that the Board should strike both of these defenses.

**A. Mannatech’s Response Fails To Explain How It Has Alleged The Elements Of Estoppel**

With regard to Mannatech’s Third Affirmative Defense of estoppel, Shaklee first notes that Mannatech’s Third Affirmative Defense alleged both laches and estoppel. However, Mannatech makes no response regarding laches and only responds concerning estoppel. Thus, Shaklee’s motion to strike the laches portion of Mannatech’s Third Affirmative Defense should be considered conceded.

As concerns the estoppel portion of Mannatech's Third Affirmative Defense, Mannatech argues that Shaklee has allegedly known for years that it allegedly abandoned YOUTH and therefore is estopped from asserting that mark.<sup>1</sup> This argument does not save Mannatech's claim.

Estoppel requires Mannatech's reliance on an action by Shaklee to Mannatech's prejudice – neither of which Mannatech has plead. “The elements of equitable estoppel are (1) misleading conduct, which may include not only statements and action but silence and inaction, leading another to reasonably infer that rights will not be asserted against it; (2) reliance upon this conduct; and (3) due to this reliance, material prejudice if the delayed assertion of such rights is permitted.” *Lincoln Logs Ltd. v. Lincoln Pre-Cut Log Homes Inc.*, 971 F.2d 732, 734 (Fed. Cir.1992). Mannatech failed to plead any action by Shaklee that Mannatech allegedly relied on to its prejudice. Thus, Mannatech fails to allege any facts making out the defense of estoppel and this defense should be stricken.

**B. Mannatech Argues Incorrectly That Its Allegations Affect Whether Shaklee Stated A Claim**

With respect to Mannatech's Fourth Affirmative Defense of failure to state a claim, Mannatech argues that Shaklee allegedly failed to state a claim because Mannatech alleges that Shaklee allegedly abandoned its mark YOUTH®. Mannatech misconstrues the defense of failure to state a claim. The defense is only available if the pleadings fail to state a claim. Shaklee plainly stated a claim in its Notice of Opposition. What Mannatech alleges is irrelevant to whether or not Shaklee has stated a claim.

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<sup>1</sup> Contrary to Mannatech's allegations that Shaklee has abandoned YOUTH®, Shaklee notes that it owns a registration for YOUTH®, is using YOUTH® in commerce, and that the Patent and Trademark Office agreed that Shaklee is using its YOUTH® mark in accepting Shaklee's Declaration of Use.

As detailed in Shaklee's motion, a claim for opposition requires only that an opposer plead that it will be damaged by a registration. This is met by pleading, as Shaklee has done, that it has prior rights and that the opposed application will damage it. 15 U.S.C. §1063(a) ("Any person who believes that he would be damaged by the registration of a mark upon the principal register, ... may ... file an opposition in the Patent and Trademark Office, stating the grounds therefor"); *and see* TBMP § 303.03 ("The term 'damage,' as used in Trademark Act § 13 and Trademark Act § 14, 15 U.S.C. § 1063 and 15 U.S.C. § 1064, concerns specifically a party's standing to file an opposition or a petition to cancel, respectively. A party may establish its standing to oppose or to petition to cancel by showing that it has a 'real interest' in the case.") *and* TBMP § 309.03(b) ("A real interest in the proceeding and a reasonable belief of damage may be found, for example, where plaintiff pleads (and later proves): A claim of likelihood of confusion that is not wholly without merit, including claims based upon current ownership of a valid and subsisting registration or prior use of a confusingly similar mark.") (Citations omitted, emphasis in original).

Shaklee has, without question, plead facts that make out its claims in this case. This is clear from Paragraphs 1-5 of Opposer's Notice of Opposition (alleging that it uses YOUTH and has federally registered YOUTH before the opposed application was filed) and Paragraphs 25 and the WHEREFORE clause of Opposer's Notice of Opposition alleging that the mark of the opposed application is likely to cause confusion and that registration of the opposed application will damage Opposer.

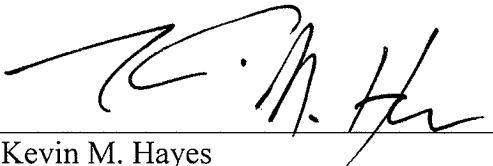
As Applicant's Fourth Affirmative Defense of Failure to State a Claim is both insufficiently plead and plainly wrong on its face, the Board should strike it.

In view of Shaklee's motion and the foregoing, it is clear that Applicant has failed to allege sufficient facts to bring its Third and Fourth Affirmative Defenses. These defenses should be stricken and the Board is respectfully requested to strike them.

Respectfully submitted,

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By   
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on July 14, 2015, a true copy of the foregoing **SHAKLEE'S REPLY TO MANNATECH'S RESPONSE TO SHAKLEE'S MOTION TO STRIKE MANNATECH'S SECOND, THIRD, AND FOURTH AFFIRMATIVE DEFENSES** was served on Applicant by first class mail, postage prepaid, to:

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