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

Proceeding	91228578
Party	Plaintiff Ansell Limited
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Date	10/03/2016
Attachments	SOLSKYN - 204 - Opp to Motion to Strike.pdf(20119 bytes)

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

Serial No.: 86-749204
Mark: SOLSKYN
Filing Date: September 7, 2015

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ANSELL LIMITED,

Opposer/Counter-Registrant, Opposition No. 91228578

v.

SOLSKYN PERSONAL CARE LLC,

Applicant/Counter-Petitioner.

---x

ANSELL LIMITED'S OPPOSITION TO
SOLSKYN'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

Opposer, Ansell Limited ("Ansell"), hereby responds to and opposes the Motion to Strike Affirmative Defenses filed in this proceeding by Applicant Solskyn Personal Care LLC ("Solskyn").

Solskyn's Motion to Strike Ansell's Affirmative Defenses against Solskyn's Counterclaims ("Motion to Strike") should be denied in all respects. Solskyn has failed to meet the considerable burden required to grant a Motion to Strike; namely, to establish that the challenged affirmative defenses are wholly unrelated to the facts framed by the Counterclaims, and that Solskyn will consequently suffer undue prejudice as a result of the affirmative defenses raised by Ansell in its Answer. In the event that the Board finds that Ansell has not plead its

affirmative defenses in sufficient detail, Ansell respectfully requests that the Board grant it leave to amend the relevant affirmative defenses as stated within its Answer to Solskyn's Counterclaims.

ARGUMENT

Pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, a court "may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. Proc. 12(f). See also Trademark Rule 2.116(a), 37 C.F.R. § 2.116(a). Motions to strike are disfavored, and matter will not be stricken unless it clearly has no bearing upon the issues within the case. See, e.g., Ohio State University v. Ohio University, 51 U.S.P.Q.2d 1289, 1293 (TTAB 1999); Harsco Corp. v. Electrical Sciences Inc., 9 U.S.P.Q.2d 1570 (TTAB 1988).

Given that the primary purpose of pleadings under the Federal Rules of Civil Procedure is to provide fair notice of the claims and defenses asserted, the Board may decline to strike even objectionable pleadings where their inclusion will not cause prejudice to the adverse party, but will in fact provide notice of the basis for a claim or defense. See, e.g., 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). Further, a defense will 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. See, generally, Wright & Miller, 5C Fed. Prac. & Proc. Civ.3d § 1381 (2008).

To succeed on a Motion to Strike Affirmative Defenses from an Answer, the movant must show that the allegations being challenged are so unrelated to the movant's claims as to be spurious as a potential defense, and that the continued presence of such allegations in the pleadings would cause undue prejudice to the moving party. The Board has previously held that matter will not be

stricken from a pleading unless it is clear that it has no possible bearing upon the subject matter of the litigation, and that its inclusion shall prejudice the moving party. Harsco Corp. v. Electrical Sciences Inc., 9 U.S.P.Q.2d at 1571. Further, a defense will not be stricken as insufficient if said insufficiency is not clearly apparent, or if the defense raises factual issues more appropriately determined on the merits. Wright & Miller, supra.

Accordingly, to prevail in its motion, Solskyn must meet the burden of establishing that Ansell's affirmative defenses are wholly unrelated to any claim raised in Solskyn's Counterclaims, that allowing Ansell's affirmative defenses to remain would be unfairly prejudicial to Solskyn, and that there are no pertinent factual issues raised by the affirmative defenses. Solskyn has not succeeded in meeting this burden.

Solskyn claims that Ansell's affirmative defenses should be stricken from its Answer as conclusory and insufficiently plead. The Federal Rules of Civil Procedure, however, require that a party merely set forth its allegations, including affirmative defenses, in a "simple, concise, and direct" manner. Fed. R. Civ. Proc. 8(d). The primary purpose of pleadings under the Federal Rules of Civil Procedure is to provide fair notice of the claims or defenses being asserted. Ohio State University, 51 U.S.P.Q.2d at 1292. Further, even in instances in which affirmative defenses may be considered deficient, the Board may, in its discretion, decline to strike objectionable material if its inclusion will not prejudice the moving party, but will instead provide fuller notice of the basis of the non-moving party's defenses. Harsco Corp., 9 U.S.P.Q.2d at 1571. Finally, the permissive treatment of affirmative defenses under the Federal Rules of Civil Procedure insures that parties will be afforded an opportunity to assert all legally available defenses, which otherwise would be deemed to have been waived.

Ansell's affirmative defenses are all related directly or inferentially to the claims raised by Solskyn in its Counterclaims; namely Fraud and Mere Descriptiveness. Given the inherent factual disputes between the parties on these claims, striking Ansell's affirmative defenses would be inappropriate, as it would prevent Ansell from asserting all available, cognizable defenses.

CONCLUSION

WHEREFORE, Ansell respectfully requests that Solskyn's Motion to Strike be denied in all respects. Alternately, to the extent that the Board concludes that Ansell has not satisfied applicable pleading requirements with respect to one or more of its affirmative defenses, it respectfully requests that the Board grant it leave to amend its Answer to Counterclaims to replead those affirmative defenses. Finally, to the extent that the Board strikes one or more of Ansell's affirmative defenses, it respectfully requests that the Board do so without prejudice to Ansell's right to replead such defenses should additional facts become available.

Dated: October 3, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing **ANSELL LIMITED'S OPPOSITION TO SOLSKYN'S MOTION TO STRIKE AFFIRMATIVE DEFENSES** was served upon Applicant/Counter-Petitioner this 3rd day of October, 2016 by USPS First-Class Mail, postage prepaid, as follows:

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