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

Proceeding	91233994
Party	Plaintiff TRAXXAS, L.P.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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TRAXXAS, L.P.	§	Opposition No.: 91233994
	§	
Opposer	§	
	§	
v.	§	
	§	
JAKKS Pacific, Inc.		
	§	
Applicant	§	Application No.: 86/748,683
	§	
	§	

OPPOSER TRAXXAS, L.P.'S MOTION TO STRIKE AFFIRMATIVE DEFENSES OF APPLICANT AND MOTION TO SUSPEND

Pursuant to TBMP § 506.01, Opposer Traxxas, L.P. ("Traxxas") moves the Trademark Trial and Appeal Board (the "Board") to strike the first, second, and sixth "Affirmative Defense" pleaded in the Answer of Applicant JAKKS Pacific, Inc. ("JAKKS"). Inasmuch as the resolution of this motion will define and potentially narrow the issues for discovery and trial in this opposition proceeding, Traxxas requests that the Board suspend these proceedings pursuant to TBMP § 510.03(a) pending the ruling on the motion to strike. In support, Traxxas states the following:

BACKGROUND

On April 13, 2017, Traxxas timely opposed JAKKS's application to register ANIMAL TRAXX, filed on September 4, 2015, (Serial No. 86/748,683) for "toys games and playthings, namely, toy animals, plush toy animals, collectable toy figures, toy figures and playsets for all of the foregoing; electronic learning toys, pet toys" because of a likelihood of confusion between the applied for ANIMAL TRAXX designation and Traxxas's pre-existing and in some cases

incontestable rights in the TRAXXAS, MAXX, E-MAXX, MINI MAXX, T-MAXX, and X-MAXX federal registrations. *See* Notice of Opposition, Dkt. No. 1.

On June 20, 2016, JAKKS filed its answer (the "Answer") to the Notice of Opposition in which JAKKS alleges six purported "Affirmative Defenses" (*see* Answer, Dkt. No. 6, pp. 3-4). At least the first, second, and sixth Affirmative Defenses in the Answer are boilerplate, invalid, and/or inapplicable in this case and should be stricken. JAKKS's first Affirmative Defenses is not cognizable under the facts alleged in Traxxas's Notice of Opposition. JAKKS's second Affirmative Defense consists of only legal conclusions without any facts sufficient to give Traxxas fair notice. And JAKKS's sixth Affirmative Defenses is not a valid Affirmative Defense because it fails to state a defense to Traxxas's properly pleaded claims.

ARGUMENTS

I. JAKKS's First Affirmative Defenses Challenging the Sufficiency of Traxxas's Pleadings is Not a Valid Affirmative Defenses

Under Fed. R. Civ. P. 12(f), the Board may strike from a pleading any insufficient defenses or redundant, immaterial, impertinent, or scandalous matter. See TBMP § 506.01 and 506.02; *American Vitamin Products, Inc. v. Dow Brands Inc.*, 22 U.S.P.Q.2d 1313, 1314 (TTAB 1992) (insufficient affirmative defenses stricken). The Board may grant a motion to strike or, on its own initiative, strike from a pleading any insufficient defense and any matter that clearly has no bearing on the issues in the case. *Ohio State University v. Ohio University*, 51 U.S.P.Q.2d 1289, 1292 (TTAB 1999).

JAKKS's First Affirmative Defenses asserts that Traxxas's Notice of Opposition "fails to state a claim upon which relief can be granted." *See* the Answer, First Affirmative Defense. It is well-established that failure to state a claim is not a cognizable affirmative defense. *Blackhorse*

v. Pro Football, Inc., 98 U.S.P.Q.2d 1633, 1637 (TTAB 2011). In *Blackhorse*, the Board held that failure to state a claim upon which relief can be granted is not an affirmative defense.

In all events, on the face of the Notice of Opposition, Traxxas properly alleges a claim for likelihood of confusion. In order to state a claim, the facts alleged must, if proven, establish that (1) Traxxas has standing to maintain the proceeding and (2) a valid ground exists for opposing the registration. *Order of Sons of Ital. in Am. v. Profumi Fratelli Nostra AG*, 36 U.S.P.Q.2d 1221, 1222 (TTAB 1995). It is established that for purposes of ruling on the defense, all well-pleaded allegations in the opposition must be accepted as true, and the notice of opposition must be construed in the light most favorable to Traxxas. *Id.*

Under this governing standard, Traxxas has pled sufficient facts to state a claim for likelihood of confusion. The allegations in the Notice of Opposition allege Traxxas's prior rights in its TRAXXAS, MAXX, E-MAXX, MINI MAXX, T-MAXX, and X-MAXX federal registrations (Notice of Opposition, ¶¶ 1-7), and a likelihood of confusion (*Id.* at ¶¶ 8-12). *See* TBMP § 309.03(c). These allegations establish that Traxxas has a real interest in the outcome of the proceeding — that is Traxxas has a personal interest in the outcome of the case beyond the general public (i.e., standing) — as well as viable grounds for opposing the Application. On the face of the Notice of Opposition, Traxxas has alleged sufficient facts to both establish standing and grounds for opposing the Application based on a likelihood of confusion.

II. JAKKS's Second Affirmative Defense is Insufficiently Pled

Fed. R. Civ. P. 8(d)(1) requires a defense in a pleading to "be stated simply, concisely, and directly," and "include enough detail to give the plaintiff fair notice of the basis for the defense." *See* TBMP § 311.02(b); *Ideas One Inc. v. Nationwide Better Health Inc.*, 89 U.S.P.Q.2d 1952, 1953 (TTAB 2009) (Trademark Act § 18, 15 U.S.C. § 1068 claim or defense

must be specific enough to provide fair notice to adverse party of restriction being sought). Affirmative defenses are "subject to all pleading requirements of the Federal Rules of Civil Procedure, and must set forth a 'short and plain statement' under Fed. R. Civ. P. 2 8(a)." *Heisch v. Katy Bishop Productions Inc.*, 45 U.S.P.Q.2d 1219, 1221 (N.D. Ill. 1997). Like all allegations in a pleading, affirmative defenses must also be sufficiently pled and consist of something more than mere conclusory statements and must contain allegations of specific conduct that, if proven, would prevent Petitioner from prevailing on its claim. *Lincoln Logs Ltd. V. Lincoln Precut Log Homes, Inc.*, 971 F2d 732, 23 U.S.P.Q.2d 1701 (Fed. Cir. 1992).

In this case, JAKKS's Second Affirmative Defense merely pleads, "Opposer's claims are barred by waiver or estoppel or acquiescence or laches." *See* the Answer, Second Affirmative Defense.

JAKKS's bald statements do not even begin to meet the pleading requirements and fall short of providing Traxxas fair notice. *Reis Robotics USA, Inc. v. Concept Indus., Inc.,* 462 F.Supp.2d 897, 904 (N.D. Ill. 2006); *McDonnell Douglas Corp. v. Nat'l Data Corp.*, 228 U.S.P.Q. 45 (TTAB 1985) (bald allegations in the language of the statute did not provide fair notice of basis of petitioner's claim).

In *Reis Robotics USA*, Plaintiff Reis Robotics USA, Inc. ("Reis) filed a complaint against Defendant Concept Industries, Inc. ("Concept") seeking redress for breach of contract. Concept answered the complaint asserting six affirmative defenses. Concept's fifth affirmative defense alleged that "Reis's claims are barred or limited by laches, waiver, estoppel, unclean hands, or similar legal or equitable doctrines." Reis subsequently filed a motion to strike Concept's affirmative defenses.

The Court in *Reis Robotics USA* granted Reis's motion and struck Concept's fifth affirmative defense, without prejudice, for being insufficiently pled. The Court held that "Laches, waiver, estoppel, and unclean hands are equitable defenses that must be pled with the specific elements required to establish the defense." *State Farm Mut. Auto. Ins. Co. v. Riley,* 199 F.R.D. 276, 279 (N.D. Ill. 2001). Furthermore, the Court in *Reis Robotics USA* also affirmed that merely stringing together a long list of legal defenses is insufficient to satisfy Rule 8(a), and stated "It is unacceptable for a party's attorney simply to mouth [affirmative defenses] in formula-like fashion ('laches,' 'estoppel,' 'statute of limitations' or what have you), for that does not do the job of apprising opposing counsel and this Court of the predicate for the claimed defense-which after all is the goal of notice pleading." *Id.*

What Concept's counsel did in *Reis Robotics* is exactly what JAKKS has done here. No other facts are provided in the responsive pleading of JAKKS, other than admissions or denials of the facts alleged in the Notice of Opposition by Traxxas. Traxxas is also given no notice of the factual bases for the Second Affirmative Defense alleged by JAKKS. Traxxas has no notice of the factual bases regarding the acts of Traxxas JAKKS believes caused waiver, estoppel, acquiescence or laches. Rather, the Second Affirmative Defense pled in the Answer constitutes textbook "conclusory allegations" and as such, must be stricken.

III. JAKKS Sixth Affirmative Defense Fails to State a Defense to Traxxas's Pleaded Claims

JAKKS's Sixth Affirmative Defenses are as follows:

> Various paragraphs of the Notice of Opposition do not comply with Fed. R. Civ. P. 8(a) and (e), which require a 'short and plain statement' of the claims showing that Opposer is entitled to relief and 37 C.F.R. § 2.104(a) and T.B.M.P. § 309.03(a)(2), which require 'a short and plain statement showing why the opposer believes he, she or it would be damaged by the registration of the opposed mark….' As such Applicant is not

required to separately admit or deny each of the allegations contained therein."

See Answer, Sixth Affirmative Defense.

The asserted affirmative defense fails to state any applicable defense to Traxxas's claims. As previously discussed, Traxxas properly alleges a claim for likelihood of confusion in its Notice of Opposition. In its Sixth Affirmative Defense, despite having already done so in its Answer, JAKKS attempts to provide an excuse as to why it should not be required to admit or deny the allegations in the Notice of Opposition in its Answer. The purported Sixth Affirmative Defense therefore does not state a defense of any kind and should be stricken.

IV. Motion to Suspend Is Proper So That the Issues Can Be Properly Framed for Discovery and Trial

Because the determination of this motion should materially narrow the issues for discovery and trial, this Opposition should be suspended pending the Board's ruling on Opposer's Motion to Strike Affirmative Defenses of Applicant.

CONCLUSION

Traxxas respectfully requests that the Board strike the Applicant's first, second, and sixth Affirmative Defenses so that the issues for discovery and trial can be appropriately limited, and this proceeding may focus on the issue properly before the Board: whether the federally registered and in use marks owned by Traxxas are confusingly similar to JAKKS's application for the ANIMAL TRAXX designation.

Dated: July 11, 2017

Respectfully Submitted,

/s/ Gregory W. Carr_____

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CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury that **on July 11, 2017** a true copy of the foregoing **OPPOSER TRAXXAS, L.P.'S MOTION TO STRIKE AFFIRMATIVE DEFENSES OF APPLICANT AND MOTIONTO SUSPEND** was served **via email** on **Larry Miller** at Feder Kaszovitz LLP, 845 3rd Ave Fl. 11, New York, NY 10022-6601, attorney of record for Registrant.

/s/ Gregory W. Carr
Gregory W. Carr
Attorney for Opposer