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

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|------------------------|--|
| Proceeding | 91236715 |
| Party | Plaintiff Robot Wars, LLC |
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Application Serial No.: 87/371,308
Mark: WAR BOT
International Classes: 16 & 28
Applicant: Theatricality LLC
Published in *Official Gazette*: July 18, 2017

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|--------------------|----------------------------------|
| ----- | X |
| ROBOT WARS, LLC | : |
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| Opposer, | : |
| | : |
| v. | : |
| | : |
| THEATRICALITY LLC, | : Opposition No. 91236715 |
| | : |
| Applicant. | : |
| ----- | X |

**OPPOSER ROBOT WARS, LLC’S RENEWED MOTION TO STRIKE AND
FOR JUDGMENT ON THE PLEADINGS**

Robot Wars, LLC (“Opposer”), by and through its undersigned counsel of record, moves pursuant to T.B.M.P. § 506 to strike certain of applicant Theatricality LLC’s (“Applicant”) affirmative defenses and denials and, pursuant to T.B.M.P. § 504 for judgment on the pleadings as to the issue of priority (the “Motion”).

I. INTRODUCTION

As previously stated in its first motion (*see* Opposer Robot Wars, LLC’s Mot. to Strike and for J. on the Pleadings, Dec. 21, 2017, TTABVue No. 7 [“First Motion”]), this is a very straightforward opposition proceeding in which the Board will be required to determine, *inter alia*, the likelihood of confusion. Pursuant to the Board’s Order (Apr. 11, TTABVue No. 11 [the “Order”]), Opposer timely filed its First Amended Notice of Opposition (“FANO”). Applicant again has alleged in its answer to the FANO (Answer to Amended Notice of Opposition, Jun. 18,

2018, TTABVue No. 14 [Applicant’s “Answer”]) improper affirmative defenses and reasserted its claim of priority. If such claims and defenses remain in the proceeding, they will overly complicate the matter. Opposer again must move to streamline the proceeding by eliminating the extraneous defenses and related discovery. Accordingly, Opposer brings this Motion.

As demonstrated below, Applicant’s affirmative defenses are wholly without legal and/or factual foundation, and Applicant’s claim of priority is meritless. Removing the defenses from the action and determining the issue of priority at this early stage will limit the permissible scope of discovery and limit the necessary subject matter for decision. Stated otherwise, Opposer seeks to limit the scope of the proceeding so that it may move forward as efficiently and economically as possible.

II. FACTS

Opposer is the owner of the trademark ROBOT WARS (“Opposer’s Mark”). Opposer has used Opposer’s Mark in commerce, by and through its predecessors in interest, since at least as early as February 1993. Opposer is the owner of U.S. Trademark Registration No. 1,858,931 for Opposer’s Mark (“Opposer’s Registration”). *See* FANO, Ex. 1. An application for Opposer’s Registration was filed on July 21, 1993. *Ibid.* Opposer’s Registration was issued on October 18, 1994. *Id.* Opposer’s Registration is valid and subsisting, and has been registered on the principal register for more than five consecutive years. *Id.*

Applicant is the owner of U.S. Trademark Application Ser. No. 87/371,308 (the “Application”) for the mark WAR BOT (“Applicant’s Mark”). WAR BOT, U.S. Trademark Application Serial No. 87/371, 308 (filed Mar. 14, 2017). The Application states Applicant’s first use date of Applicant’s Mark is March 1, 2008. *Id.* The Application was published for opposition on July 18, 2017. *Id.*

Opposer timely filed its initial notice of opposition against the Application. *See* Notice of Opposition (Sept. 18, 2017, TTABVue No. 1). Applicant filed its answer to the initial notice of opposition and asserted many improper affirmative defenses and denials. *See* Answer to Opposition (Dec. 6, 2017, TTABVue No. 6). In response to Applicant's initial answer, Opposer filed the First Motion. *See* First Motion (Dec. 21, 2017, TTABVue No. 7). Applicant responded to the First Motion. *See* Response to Opposer Robert Wars, LLC's Mot. to Strike and for J. on the Pleadings (Jan. 7, 2018, TTABVue. No. 8). The Board granted, *inter alia*, in part the First Motion and *sue sponte* gave Opposer the opportunity to replead. *See* Order, *passim*.

In response to the Board's Order, Opposer timely filed the FANO. *See* FANO (May 18, 2018, TTABVue No. 12). Applicant timely filed its Answer in response to the FANO. *See* Answer (Jun. 18, 2018, TTABVue No. 14). Within the Answer, Applicant again makes blatantly false denials of certain allegations set forth in the Opposition and alleges improper affirmative defenses that fail on their face. *Ibid, passim*. The first and sixth affirmative defenses (A and F) allege that Applicant has priority. *Id.* 4 at A, 5 at F.

The fourth and fifth affirmative defenses (D and E) assert that Opposer is not damaged by the parties' concurrent uses and prior registrations. *Id.* 5 at D, E. The fifth affirmative defense is also premised upon the allegation that Opposer "never sought to enforce any rights it thought it might have had." *Id.* 5 at E.

Due to the facial and fatal deficiencies of the denials and the affirmative defenses, and to protect Opposer from burdensome, immaterial, and prejudicial discovery and defending against meritless theories in this matter, Opposer brings this instant Motion.

III. ARGUMENT

A. Motion to Strike

“Upon motion, or upon its own initiative, the Board may order stricken from a pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.”

T.B.M.P. § 506.01; *see Id.* n.1. “The Board also has the authority to strike an impermissible or insufficient claim or portion of a claim from a pleading.” *Id.* § 506.01. “Applicant must allege sufficient facts beyond a tender of ‘naked assertion[s]’ devoid of ‘further factual enhancement,’ to support its claims and defenses.” *Cards Against Humanity, LLC v. Vampire Squid Cards, LLC*, 2017 TTAB LEXIS 359, at *20 (T.T.A.B. Sept. 6, 2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). *See Am. Vitamin Prods., Inc. v. Dow Brands, Inc.*, 22 U.S.P.Q.2d 1313, 1314 (T.T.A.B. 1992) (insufficient affirmative defenses stricken); *Harsco Corp. v. Elec. Scis., Inc.*, 9 U.S.P.Q.2d 1570, 1571–72 (T.T.A.B. 1988) (immaterial allegation stricken).

Collateral attacks on a pleaded registration are impermissible when asserted in affirmative defenses and must be stricken from an answer. *See* T.B.M.P § 311.02(b). “The Board will not entertain a defense that attacks the validity of a registration pleaded by a plaintiff.” *Id.* (emphasis added). “The Board cannot entertain an attack upon the validity of a registration pleaded by a plaintiff unless the defendant timely files a counterclaim.” T.B.M.P. § 313.01. *See Finanz St. Honore, B.V. v. Johnson & Johnson*, 85 U.S.P.Q.2d 1478, 1480 (T.T.A.B. 2007) (granting motion to strike an attack on a registration over five years old on grounds that such an attack is not permissible against such a registration pursuant to Section 14); *Textron, Inc. v. Gillette Co.*, 180 U.S.P.Q. (BNA) 152, 153 (T.T.A.B. 1973) (defense attacking validity of pleaded registration must be raised by way of cancellation of registration).

1. The First and Sixth Affirmative Defenses (A and F) and Paragraphs 21 and 22 of the Answer Must be Stricken as They are Insufficient

Applicant again claims to have priority over Opposer and denies that Opposer has priority over Applicant. *See* Answer 3 at ¶¶21, 22, 4 at A, 5 at F. All such claims and denials should be stricken as they are insufficient because they are egregiously false and improper.

a. Applicant's Priority Claim is Insufficient because Opposer has Priority over Applicant

Applicant consistently and repeatedly confuses the issue of priority with the similarity of the parties' respective goods, arguing that Applicant has "priority" because Applicant used its mark on toys prior to Opposer. Whether true or not, this allegation has no bearing on the issue of priority. In the context of a Section 2(d) claim, priority is determined by the first use of the marks, not first use of the goods. *See* Lanham Act, 15 U.S.C. 1052(d) (Lexis 2018) (an applied for mark shall be refused registration when such applied for mark "[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office..."). "Rights in a trademark are determined by the date of the mark's first use in commerce. The party who first uses a mark in commerce is said to have priority over other users." *Hana Fin., Inc. v. Hana Bank*, 135 S. Ct. 907, 909 (2015) (emphasis added).

Opposer's Mark has priority over Applicant's mark in fact and at law. Priority is not an issue in an opposition where opposer pleads that it owns a registration¹ for its pleaded mark. T.B.M.P. § 309.03(c)(A). "The question of priority does not arise against a registered trademark in an opposition proceeding." *David Crystal, Inc. v. Shelburne Shirt Co.*, 465 F.2d 926, 927 (C.C.P.A. 1972) (citing *Contour Chair-Lounge Co. v. Englander Co.*, 324 F.2d 186 (C.C.P.A.

¹ "Any registration ... of a mark registered on the principal register provided by this chapter and owned by a party to an action shall be admissible in evidence and shall be prima facie evidence of the validity of the registered mark and of the registration of the mark, of the registrant's ownership of the mark, and of the registrant's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the registration subject to any conditions or limitations stated therein." 15 U.S.C. § 1115(a).

1963)). *See B.V.D. Licensing Corp. v. Rodriguez*, 83 U.S.P.Q.2d 1500, 1505 (T.T.A.B. 2007) (priority based on prior use and pleaded registrations). *Cf.* Lanham Act, 15 U.S.C. § 1115(a) (Lexis 2018) (registration is prima facie evidence of ownership and the contents listed therein).

Opposer undeniably has paramount and prior rights over Applicant, as established by Opposer's pleaded Registration. *See* FANO, Ex. 1 (a true and correct copy of Opposer's Registration and then current Trademark Status and Document Retrieval Report). Opposer's Registration contains a first use date of 1993. The Registration was issued on October 18, 1994. Applicant's Application claims a first use date of 2008. Applicant admits in its Answer that "Applicant has not used Applicant's [] Mark, in the applied for format ... in the United States prior to March 2, 2008. FANO 4 at ¶19; Answer 2 at ¶19. Applicant also relies upon the Application's first use date as its claim for priority in its first and sixth affirmative defenses. *See* Answer 4 at A, 5 at F. But Based upon Applicant's own admission that it had not used the applied for mark prior to 2008, FANO 4 at ¶19; Answer 2 at ¶19, and that Opposer's Registration is of record, Applicant's defenses with respect to priority are factually flawed, inconsistent, and insufficient, and must be stricken.

The opinion in *Hyundai Motor Am. v. J.E. Snyder Elec., Inc.*, Opp. No. 91222745 (T.T.A.B. May 20, 2016, TTABVue. No. 28), is very similar to this matter and is instructive here. In *Hyundai*, the Board struck certain of applicant's affirmative defenses. *See id.* at 16. One such defense was that opposer did not have priority in the goods for which applicant sought to register. *Id.* at 14 ("[o]pposer has not alleged prior use of the pleaded mark GENESIS on Applicant's identified goods...."). The Board accordingly struck this *priority* defense as improper because "the goods or services at issue do not have to be identical, or even

competitive....” *Id.* (citing *In re Iolo Techs., LLC*, 95 U.S.P.Q.2d 1498, 1499 (T.T.A.B. 2010); T.M.E.P. § 1207.01(a)(i) (April 2016)).

In this opposition, Applicant has asserted the same affirmative defense that applicant J.E. Snyder asserted in *Hyundai* – that Applicant has priority over Opposer in Applicant’s applied for “goods.” Again, this statement may be factually accurate, but fails as a matter of law. Opposer commenced using Opposer’s Mark, and obtained Opposer’s Registration, long before any date of first use claimed by Applicant, which is no earlier than 2008. *See* FANO, Ex. 1 (Opposer’s Registration); FANO 4 at ¶19; Answer 2 at ¶19, 4 at A, 5 at F. The alleged difference between Opposer’s goods and Applicant’s applied for goods are irrelevant in the context of priority. Simply stated, Opposer has priority over Applicant because Opposer used Opposer’s Mark, and obtained Opposer’s Registration, prior to any date claimed by Applicant. Applicant’s claims of priority are meritless, requiring them to be stricken.

b. Applicant’s Priority Claim is Insufficient because Opposer’s Registration Enjoys Section 14 Protections and is an Improper Collateral Attack on Opposer’s Registration

Applicant’s priority claims are also invalid as a matter of law because it is specifically precluded by the Lanham Act, and is an impermissible collateral attack upon Opposer’s Registration. “The grounds for cancellation which are thus available in the case of a petition filed within the five-year period, but not thereafter, include: ... likelihood of confusion under Trademark Act § 2(d).” T.B.M.P. § 307.02(a) (emphasis added). “The five-year time limit specified in Trademark Act § 14, 15 U.S.C. § 1064, barring certain attacks on a Principal Register *registration*, is not dependent on the filing of a declaration under Section 15 which provides incontestable rights of *use*.” T.B.M.P. § 307.02(b) (emphasis in original).

Opposer's Registration has been registered on the principal register for more than five years and is valid and subsisting. The Registration is protected from cancellation (or collateral attack) based upon a Section 2(d) claim, which requires *both* priority and likelihood of confusion. Inherent in Applicant's claims of priority are a poorly pled Section 2(d) claim. Such claims are explicitly barred by Section 14. Furthermore such claims constitute an impermissible collateral attack upon Opposer's Registration. Accordingly, Applicant's first and sixth affirmative defenses (A and F), and paragraphs 21 and 22 of the Answer are insufficient and should be stricken.

c. Applicant's reliance upon its Prior Registration is Insufficient because such Reliance is Unavailable

Applicant's assertion of its prior, expired registration, *see* Answer 5 at F; WAR BOT, Registration No. 3,827,243, does not grant Applicant any rights to rely upon in this proceeding. Moreover, Applicant's prior registration is not the subject of this proceeding and not within the Board's jurisdiction. *See* T.B.M.P. §§ 102.01, 102.02. *Anderson, Clayton & Co. v. Krier*, 478 F.2d 1246 (C.C.P.A. 1973), is a direct parallel to this case, which vitiates any rights claimed in a prior, expired registration when defending a Section 2(d) claim brought against a new application for the same mark by the same mark owner:

[applicant] argues that since he is seeking to reregister a mark, the earlier registration of which had been lost by inadvertence, rather than trying to get an initial registration, it would be inappropriate to deny his application to register. We find no merit to this argument. Under section 2(d), priority determines the right to register in an opposition proceeding only in those cases where the opposer has no registered trademark. There are no other exceptions in the statute, and we see no justification for engrafting one upon it. Whatever benefits a registration conferred upon [applicant] were lost by him when he negligently allowed his registration to become canceled.

Id. at 1248.

Here, just like in *Anderson*, Applicant's reliance upon its prior, expired registration is impermissible.² Applicant's former registration does not grant Applicant any rights and Applicant cannot rely upon it to claim any date of priority, which is still after any date claimed by Opposer. Accordingly, Applicant's reliance upon its prior registration cannot defeat Opposer's claim of priority, rendering Applicant's claims of priority based upon its prior registration insufficient.

* * *

Due to the factual inaccuracies and legal impossibility of Applicant's claim of priority over Opposer, Applicant's denials in paragraph 21 and 22,³ and affirmative defenses A and F, should be stricken from the Answer.

2. The Fourth and Fifth Affirmative Defenses (D and E) Assert That Opposer is Not Damaged and Should Be Stricken as Insufficient

The fourth and fifth affirmative defenses (D and E) are insufficient because they do not state a defense from which relief may be granted, requiring them to be stricken. These defenses assert that Opposer is not, nor will be, harmed or damaged by the registration of Applicant's Mark. Distilled to their essence, these defenses assert that Opposer lacks standing to file the Opposition. Opposer, however, has properly plead and proved standing to file the Opposition.

"Any person who believes it is or will be damaged by registration of a mark has standing to file a complaint." T.B.M.P. § 309.03(b); *see id.* n.1. "At the pleading stage, all that is required is that a plaintiff allege facts sufficient to show a 'real interest' in the proceeding, and a 'reasonable basis' for its belief that it would suffer some kind of damage if the mark is registered." T.B.M.P. § 309.03(b); *see id.* n.2. "To plead a 'real interest,' plaintiff must allege a

² See also *infra* Section III(A)(2) discussing the *Morehouse* defense and how applicant cannot rely upon its former registration in defending against this Opposition.

³ Additionally, because Applicant's denials will be stricken, Opposer's allegations in Paragraphs 21 and 22 of its Opposition should be deemed admitted by Applicant, as Applicant cannot deny that Opposer has priority.

‘direct and personal stake’ in the outcome of the proceeding.” T.B.M.P. § 309.03(b); *see id.* n.3. “The allegations in support of plaintiff’s belief of damage must have a reasonable basis ‘in fact.’” T.B.M.P. § 309.03(b); *see id.* n.4. “There is also no requirement that actual damage be pleaded or proved in order to establish standing or to prevail in an opposition.” T.B.M.P. § 303.03; *see id.* n.5; *Order Sons of Italy in Am.*, 36 U.S.P.Q.2d at 1223 (opposer sufficiently plead standing by alleging that registration of applicant’s application will harm opposer).

Opposer has established its standing based upon the plain reading of the FANO. The preamble and various paragraphs state, and support, that Opposer will be damaged if the Application matures to registration. The plain reading of the Opposition, together with the use dates set forth in Opposer’s Registration and Applicant’s Application, establishes that Opposer has paramount and prior rights over Applicant, and that the Application is seeking to encroach upon those rights – all of which establishes standing. Because the plain reading of the FANO establishes Opposer’s standing, Applicant’s affirmative defenses should be stricken.

Additionally, it would appear that Applicant’s affirmative defenses could be read as relying upon the *Morehouse* defense. “The *Morehouse* defense ‘is related to the equitable defenses of laches or acquiescence.’” *Paleteria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. De C.V.*, 247 F. Supp. 3d 76, 96 (D.D.C. 2017) (quoting *Coach/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 U.S.P.Q.2d (BNA) 1458, 1472 (T.T.A.B. 2014)). “*Morehouse* stands for the proposition that as a matter of law, an opposer cannot be further damaged, within the meaning of Trademark Act Section 13, 15 U.S.C. § 1063, by the issuance to an applicant of a second registration because the *applicant* already owns an existing registration of the same mark for the same goods.” *Hyundai*, Opp. No. 91222745 at 10 (citing *Morehouse Mfg. Co. v. J. Strickland & Co.*, 160 U.S.P.Q. 715, 717 (C.C.P.A. 1969)). The

Morehouse defense does not preclude standing. *See Paleteria La Michoacana, Inc.*, 247 F. Supp. 3d at 99.

As set forth below, Applicant's defenses of acquiescence and laches should be stricken as they are insufficient. Because the *Morehouse* defense is similar to those defenses, Applicant's affirmative defenses relying upon Applicant's prior registration should be stricken.

Applicant's prior registration is expired. *See* WAR BOT, Registration No. 3,827,243. Logically, Applicant cannot rely upon any former rights it may have had in connection with that registration. *Anderson, Clayton & Co.*, 478 F.2d at 1248. Accordingly, the application of the *Morehouse* defense is improper. To the extent Applicant's affirmative defenses rely upon the *Morehouse* defense to assert that Opposer lacks standing or is not harmed, these defenses should be stricken

3. The Fifth Affirmative Defense (E) Asserts Acquiescence and Laches, both of which should be Stricken as Insufficient

Although masked and asserted in a new form, Applicant has once again sought to assert the defenses of acquiescence and laches, in blatant disregard of the Board's Order. The defenses remain insufficient as a matter of law, requiring this defense to be stricken. Applicant's fifth affirmative defense states that "Opposer knew of Applicant's prior registration and mark and never sought to enforce any rights it thought it might have had." Answer 5 at E. This defense essentially reasserts that Opposer had acquiesced, and/or failed to timely object, to Applicant's use of Applicant's Mark. Alternatively, Applicant is again asserting an improper *Morehouse* defense because the relied upon registration is no longer valid. *See supra* p.10. As explained further below, the fifth affirmative defense should be stricken.

a. The Acquiescence and Laches Defenses were Previously Stricken

The Board's Order previously struck both of Applicant's acquiescence and laches claims from its prior answer. *See* Order 4. Applicant's current fifth affirmative defense (E) essentially asserts the same defenses as before. *Compare* Answer to Opposition 3 at D, 4 at E (Dec. 6, 2018, TTABVue 6), *with* Answer 5 at E. For the same reasons set forth in the Order why Applicant's prior defenses were previously stricken, Applicant's current fifth affirmative defense should now be stricken from Applicant's Answer.

b. The Current Acquiescence Defense Fails as a Matter of Law

Applicant's allegation of acquiescence should be stricken as insufficient. Acquiescence "requires that a defendant plead and prove that the: (1) claimant actively represented that it would not assert a right or claim; (2) delay between the active representation and assertion of the right or claim was not excusable; and (3) delay caused the defendant undue prejudice." *Neb. Brewing Co. v. Emerald City Beer Co., LLC*, 2015 TTAB LEXIS 359, at *18 (T.T.A.B. Aug. 26, 2015) (citing *Coach House Rest. Inc. v. Coach and Six Rests., Inc.*, 934 F.2d 1551, 1564 (11th Cir. 1991) (emphasis added)). "[A]quiescence requires active consent." *Prairie Island Indian Cmty. v. Treasure Island Corp.*, 2008 TTAB LEXIS 798, at *28–29 (T.T.A.B. May 15, 2008) (citing *Coach House Rest. Inc.*, 934 F.2d at 1564).

Applicant's defense only asserts that Opposer knew of Applicant's prior use and registration and that Opposer "never sought to enforce any rights...." Answer 5 at E. Applicant then implicitly draws the impermissible conclusion that this allegation equates to an affirmative act by Opposer that satisfies the elements of the acquiescence defense. Without more, Applicant has not satisfied its pleading requirement with respect to the first prong of this defense. Applicant also cannot assert any factual allegations evidencing that Opposer actively represented it would

not object to Applicant's rights. Since Applicant did not plead, nor can it plead, sufficient facts giving rise to this defense, it must be stricken.

c. The Current Laches Defense Fails as a Matter of Law

Applicant's laches defense is insufficiently plead and must be stricken. "The elements of laches are (1) unreasonable delay in assertion of one's rights against another; and (2) material prejudice to the latter attributable to the delay." Order 4 n.2 (citing *Christian Broad. Network Inc. v. ABS-CBN Int'l*, 84 U.S.P.Q.2d 1560, 1572 (T.T.A.B. 2007)); *Bridgestone/ Firestone Research Inc. v. Auto. Club d l'Ouest de la France*, 58 U.S.P.Q.2d 1460, 1462-63 (Fed. Cir. 2001). Opposer has not unreasonably delayed in asserting its rights. Opposer timely filed its opposition against Applicant's Application. Applicant has not alleged material prejudice. Accordingly, this defense must be stricken.

B. Judgment on the Pleadings that Opposer has Priority

Judgment on the pleadings is appropriate in this proceeding. Opposer undeniably has priority over Applicant and the Board should enter judgment on the issue of priority in favor of Opposer. "A motion for judgment on the pleadings is a test solely of the undisputed facts appearing in all the pleadings, supplemented by any facts of which the Board will take judicial notice." T.B.M.P § 504.02. "For purposes of the motion, all well pleaded factual allegations of the nonmoving party must be accepted as true." *Id.* "All reasonable inferences from the pleadings are drawn in favor of the nonmoving party." *Id.* "A judgment on the pleadings may be granted only where, on the facts as deemed admitted, there is no genuine issue of material fact to be resolved, and the moving party is entitled to judgment, on the substantive merits of the controversy, as a matter of law." *Id.*

Applicant claims it has priority over Opposer. This statement is patently incorrect. A review of Opposer's FANO (inclusive of Opposer's Registration) establishes that Opposer commenced using Opposer's Mark in 1993 and registered it in 1994. *See* FANO, Ex 1. Applicant has claimed a first use date in 2008, as set forth in Applicant's Application, and as relied upon by Applicant in Applicant's first and sixth affirmative defenses.⁴ *See* Answer 4 at A, 5 at E. Opposer's first use and registration dates are long before Applicant's first use date of 2008. Notwithstanding Applicant's denials and affirmative defenses set forth in its Answer, the parties' respective records at the Trademark Office, which are of record on this motion, moot any claim of priority that Applicant can allege in its pleading.

Applicant also admitted that "Applicant had not used Applicant's [] Mark, in the applied for format, on Applicant's Goods, in the United States prior to March 2, 2008." FANO 4 at ¶19; Answer 2 at ¶19. Applicant's admission is all that is needed to enter judgment on the pleadings with respect to priority, as it is undisputed that Applicant does not have a use date prior to that of Opposer.

Even if the Board finds conflict between the parties' respective pleadings in their current state, for the reasons stated *supra* Section III(A), certain denials and defenses will be stricken with respect to the issue of priority. If Applicant's denials and defenses are stricken, Opposer's allegations of priority will be deemed admitted by Applicant, which is consistent with Applicant's admission in paragraph 19. Answer 2 at ¶19.

Based upon the foregoing, in either of the above instances, judgment on the pleadings is proper and should be granted to the extent that Opposer has priority over Applicant.

⁴ The file of each application ... of the application against which a notice of opposition is filed ... forms part of the record of the proceeding without any action by the parties and reference may be made to the file for any relevant and competent purpose." 37 C.F.R. § 2.122(b)(1).

IV. CONCLUSION

In light of the above arguments, Applicant's denials in paragraphs 21 and 22 in Applicant's Answer, and the above attacked affirmative defenses, should be stricken in their entirety from Applicant's Answer, and Opposer should be granted judgment on the pleadings as to the issue of priority.

Dated: Scarsdale, New York
June 29, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing documents was served on Applicant via email, addressed to Applicant's counsel of record, as follows:

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