ESTTA Tracking number: **ESTTA921815**

Filing date: **09/12/2018**

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

Proceeding	91238589
Party	Plaintiff American Council on Exercise
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Date	09/12/2018
Attachments	ACE-2018.09.12-HCFI-5190.01-323-2ndMotion to Strike-FINAL.pdf(363860 bytes)

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

Mark: MEDICAL EXERCISE TRAINERS
Application Serial No. 87/064,536
Filing Date: June 8, 2016

AMERICAN COUNCIL ON EXERCISE	)	
	)	
Opposer,	)	
	)	
v.	)	Opposition No. 91238589
	)	
HEALTH CARE FITNESS INTEGRATIONS, LLC	)	
	)	
Applicant.	)	

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

OPPOSER'S (SECOND) MOTION TO STRIKE – APPLICANT'S FIRST AMENDED ANSWER TO NOTICE OF OPPOSITION

Opposer American Council on Exercise ("Opposer") finds itself reluctantly forced to file this Second Motion to Strike because Applicant Health Care Fitness Integrations, LLC ("Applicant") in its First Amended Answer to Opposer's Notice of Opposition ("Applicant's First Amended Answer") either: 1) ignored and did not read the Board's Ruling issued July 26, 2018 (*see Dkt. 11)*(the "July 26, 2018 Ruling"); or 2) read July 26, 2018 Ruling, but consciously or inadvertently failed to follow the directions of the Board.

Specifically, Applicant has re-alleged three (3) affirmative defenses that were specifically stricken by the Board in that July 26, 2018 Ruling, in which the Board not only granted Opposer's [First] Motion to Strike, but also struck several of Applicant's affirmative defenses *sua sponte*. These re-asserted affirmative defenses in Applicant's First Amended Answer have no bearing on

the case, and must be stricken. *See Harsco Corp. v. Elec. Sciences, Inc.*, 9 USPQ2d 1570, 1571 (TTAB 1988*); Leon Shaffer Golnick Advert., Inc. v. William G. Pendill Mktg. Co., Inc.*, 177 USPQ 401, 402 (TTAB 1973); TBMP § 506.01.

Therefore, pursuant to Federal Rules of Civil Procedure § 12(f) and Trademark Trial and Appeal Board Manual of Procedure § 506 *et seq.*, Opposer respectfully requests that the Board strike (again) Paragraphs 63, 64, 65, and Exhibits 1-4 of Applicant's First Amended Answer. *See Dkt. 12, Page 7, Lines 63-65.*

Paragraph 63 of Applicant's First Amended Answer – Failure to Use as a Trademark.

In Paragraph 63 of Applicant's First Amended Answer, Applicant asserts that Opposer has failed to use the ACE MEDICAL EXERCISE SPECIALIST trademark as a mark based on "evidence" from a case involving Opposer and a third party. *See Dkt. 12, Page 7, Line 63*. Applicant's claim of Opposer's "failure to use as a trademark" is a thinly-veiled estoppel argument based on a prior case between Opposer and a third party.

Estoppel was specifically stricken from Applicant's Answer. *See Dkt. 11, Page 6, Section D*. Specifically: "to be legally sufficient, a pleading of any of these defenses [estoppel included] must include enough factual detail to provide Opposer fair notice of the basis for the defense." Fed. R. Civ. P. 8(b)(1); *see e.g., IdeasOne, Inc. v. Nationwide Better Health, Inc.*, 89 USPQ2d 1952, 1953 (TTAB 2009); *H.D. Lee Co., Inc. v. Maidenform, Inc.*, 87 USPQ2d 1715, 1712 (TTAB 2008) (*citing Blonder-Tongue Laboratories, Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 350 (1971)); *Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1538 (TTAB 2007); *Midwest Plastic Fabricators Inc. v. Underwriters Laboratories Inc.*, 5 USPQ2d 1067, 1069 (TTAB 1980)." *Dkt 11, Page 6-7, Section D*. The Board made note of Applicant's "bald pleadings of estoppel" and noted that "estoppel [is] generally… not applicable in opposition proceedings". *See Dkt 11,*

Page 7, Section D; *see also Nat'l Cable Television Ass'n, Inc. v. Am. Cinema Editors, Inc*., 937 F.2d 1572, 19 USPQ2d 1424, 1432 (Fed. Cir. 1991); *Bausch & Lomb Inc. v. Karl Storz GmbH & Co. KG*, 87 USPQ2d 1526, 1531 (TTAB 2008); *Barbara's Bakery, Inc. v. Landesman*, 82 USPQ2d 1283, 1292 n.14 (TTAB 2007); *Krause v. Krause Publ'ns, Inc.,* 76 USPQ2d 1904, 1914 (TTAB 2005).

Here, Applicant has re-pleaded the estoppel defense without adding any significant details or facts to support the defense. *See Dkt. 12, Page 7, Line 63; Dkt. 4, Page 4, Line 12*. Applicant has not submitted sufficient detail such that Opposer is provided with fair notice of the defense. Applicant cites to a case involving Opposer and a third party, but does not assert how that case is relevant nor how that case proves that Opposer has failed to use its pleaded mark as a trademark. *See Dkt. 12, Page 7, Line 63*. Applicant's estoppel defense again consists of "bald pleadings" that are irrelevant and utterly confusing.

Therefore, Opposer respectfully requests that Paragraph 63 of Applicant's First Amended Answer be stricken.

Paragraph 64 of Applicant's First Amended Answer – Non-Ownership.

In Paragraph 64, Applicant claims that Opposer does not own trademark rights in and to the MEDICAL EXERCISE SPECIALIST trademark. *See Dkt. 12, Page 7, Line 64*. Non-ownership is simply a synonym for lack of standing, which was previously plead by Applicant in Applicant's Answer and specifically stricken by the Board in its July 26, 2018 Ruling. *See Dkt. 4, Page 3, Line 8; Dkt. 11, Page 4-5, Section B.* Again, standing is an element of Opposer's claim – it is Opposer's burden to prove ownership in and to its trademark, not Applicant's burden to disprove it. *See Dkt. 11, Page 4-5, Section B; Blackhorse et al. v. Pro Football, Inc.,* 98 USPQ2d 1633 at 1637 (TTAB 2011).

In addition, Applicant once again mentions the case involving Opposer and a third party, thus adding subtle hints of an estoppel argument in this paragraph. *See Dkt. 12, Page 7, Line 64.* Specifically, Applicant appears to argue that Opposer is estopped from pleading its ownership in and to the MEDICAL EXERCISE SPECIALIST trademark because of that prior case. *Id.* Again, the estoppel defense was specifically stricken by the Board in its July 26, 2018 Ruling. *See Dkt. 11, Pages 6-8.*

Therefore, Opposer respectfully requests that Paragraph 64 of Applicant's First Amended Answer be stricken.

Paragraph 65 of Applicant's First Amended Answer – Estoppel.

In Paragraph 65, Applicant didn't even bother to rename the defense – it simply re-alleged "estoppel". *See Dkt. 12, Page 7, Line 65.* Applicant's prior defenses based on estoppel were specifically stricken in the Board's July 26, 2018 Ruling. *See Dkt. 11, Page 6, Section D.*

Again, "to be legally sufficient, a pleading of any of these defenses [estoppel included] must include enough factual detail to provide Opposer fair notice of the basis for the defense." Fed. R. Civ. P. 8(b)(1) *and cases cited above. Dkt 11, Page 6-7, Section D.* Again, the Board made note of Applicant's "bald pleadings of estoppel" and noted that "estoppel [is] …generally not applicable in opposition proceedings". *Dkt 11, Page 7, Section D and cases cited therein.*

Here, Applicant has not asserted any new facts in Applicant's First Amended Answer. *See Dkt. 12, Page 7, Line 65; Dkt. 4, Page 4, Line 12.* Applicant cites to a case involving Opposer and a third party, but does not assert how that case is relevant, why estoppel should apply, how estoppel should apply to the Opposition at hand, or even what theory of estoppel (Promissory estoppel? Issue estoppel, i.e. claim preclusion?). Again, Applicant's estoppel defense consists of "bald pleadings", and does not give Opposer enough factual detail to provide Opposer with fair

notice of the defense.

Therefore, Opposer respectfully requests that Paragraph 65 of Applicant's First Amended Answer be stricken.

Exhibits 1-4.

Finally, Opposer feels compelled to request the Board to strike Applicant's submitted Exhibits 1-4 in Applicant's First Amended Answer. Those documents are impertinent (i.e. not relevant) to this Opposition proceeding in violation of F.R.C.P. 401, F.R.C.P. 12(f), and T.B.M.P. § 506.01.

Therefore, Opposer respectfully requests that Exhibits 1-4 of Applicant's First Amended Answer be stricken.

Conclusion.

Pursuant to the foregoing, and in light of the Board's July 26, 2018 Ruling that struck numerous defenses from Applicant's previous Answer to Opposer's Notice of Opposition, both at the request of Opposer and *sua sponte*, Opposer respectfully requests that Paragraphs 63, 64, 65, and Exhibits 1-4 be stricken from Applicant's First Amended Answer.

Respectfully submitted,

By: /s/ David P. Branfman

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CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing Opposer's Second Motion to Strike is being served by electronic mail upon Applicant at the following address:

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Date: