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

Proceeding	91239139
Party	Plaintiff San Pasqual Casino Development Group, Inc.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

SAN PASQUAL CASINO DEVELOPMENT GROUP, INC.,	)	Opposition No. 91239139
Opposer,	)	
v.	)	
3 SQUARE, INC.,	)	
Applicant.	)	

MOTION TO STRIKE ANSWER TO NOTICE OF OPPOSITION

Pursuant to Fed. R. Civ. P. 12(f) and TBMP 506.01, Opposer San Pasqual Casino Development Group, Inc. ("Opposer") hereby moves to strike the Answer filed by Applicant 3 Square, Inc. ("Applicant'), on the grounds that the Answer is legally insufficient and prejudicial to Opposer. Although this Motion is filed more than 21 days after service of the Answer (*see* Fed. R. Civ. P. 12(f)(2)), the Board may at any time order matter stricken from a pleading and accordingly may, in its discretion, entertain an untimely motion to strike. *See* Fed. R. Civ. P. 12(f)(2); *Order of Sons of Italy in Am. v. Profumi Fratelli Nostra AG*, 36 USPQ2d 1221, 1222 (TTAB 1995). Opposer respectfully requests that the Board exercise its discretion to entertain the instant Motion, and order the Answer stricken pursuant to Fed. R. Civ. P. 12(f).

INTRODUCTION

On January 25, 2018, Opposer filed the Notice of Opposition and the next day the Board issued a Notice of Institution setting the time to answer for March 7, 2018. (3 TTABVUE at 3.) On the Board-set answer date, Applicant filed an unconsented motion for an extension of time, and subsequently filed the Answer on April 6, 2018. (5-6 TTABVUE.)

Despite helping itself to an extra month in which to prepare and file its Answer, Applicant's answer is legally insufficient and as a result, prejudicial to Opposer, as it fails to provide fair notice to Opposer of what allegations in the Notice of Opposition are admitted, what allegations are denied, and the scope of the numerous denials made because Applicant supposedly lacks sufficient knowledge to respond to the allegation. The Answer's threadbare affirmative defenses further fail to provide fair notice to Opposer of Applicant's asserted defenses. *Accord Ohio State Univ. v. Ohio Univ.*, 51 USPQ2d 1289, 1292 (TTAB 1999) (primary purpose of pleadings "is to give fair notice of the claims or defenses asserted"). Accordingly, Opposer moves to strike the Answer in its entirety for the reasons set forth herein.

ARGUMENT

In accordance with Fed. R. Civ. P. 12(f), "[u]pon motion, or upon its own initiative, the Board may order stricken from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." TBMP § 506.01. In addition, the Board "has authority to strike an impermissible or insufficient claim or portion of a claim from a pleading." *Id.* The Answer is legally insufficient at least because its fails to give fair notice of the claims or defenses asserted by Applicant, making entry of the Answer into the record prejudicial to Opposer.

"The primary purpose of pleadings, under the Federal Rules of Civil Procedure, is to give fair notice of the claims or defenses asserted." TBMP § 506.01. Substantively, an answer "must contain admissions and/or denials of the allegations in the complaint and may include any defenses to those allegations." TBMP § 311.01(a). "The defendant should not argue the merits of the allegations in a complaint but rather should state, as to each of the allegations contained in the complaint, that the allegation is either admitted or denied." TBMP § 311.02(a); Fed. R. Civ. P. 8(b); 37 C.F.R. §§ 2.106(b)(2), 2.114(b)(2); *Turner Entm't Co. v. Nelson*, 38 USPQ2d 1942, 1943

(TTAB 1996) (answer was argumentative and nonresponsive and Board was ultimately forced to interpret the answer); *Nat'l Football League v. Jasper Alliance Corp.*, 16 UPSQ2d 1212, 1214 n.2 (TTAB 1990) (answer was more in the nature of argument than answer); *Thrifty Corp. v. Bomax Enters.*, 228 USPQ 62, 63 (TTAB 1985) (refusing to accept putative answer that was "basically argumentative rather than a proper responsive pleading to the notice of opposition"). If a defendant does not have sufficient information to admit or deny an allegation, the defendant may so state, which will have the effect of a denial as to that allegation. TBMP § 311.02(a).

"A denial must fairly respond to the substance of the allegation." Fed. R. Civ. P. 8(b)(2). "A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest." Fed. R. Civ. P. 8(b)(4). As explained in TBMP 311.02(a), "[a]n answer that fails to deny a portion of an allegation may be deemed admitted as to that portion. *See* Fed. R. Civ. P. 8(b)(6). Thus, if a defendant intends in good faith to deny only a part or a qualification of an allegation, the defendant should admit so much of the allegation as is true and material and should deny only the remainder."

The Answer contains argumentative and non-responsive responses that fail to make it clear whether Applicant is fully or partially admitting or denying the allegation, and what is being admitted or denied. *See* Answer, ¶¶ 5, 8, 13, 18, 19, 20, 69, 80, 82, 87, 88 (6 TTABVUE). Applicant's argumentative and non-responsive responses fail to fairly respond to the substance of the allegation, in contravention of Fed. R. Civ. P. 8(b)(2).

The Answer also contains responses that do not fairly respond to the substance of the allegation because the allegation is about information Applicant must know, yet Applicant responded to the allegation claiming it did not have sufficient knowledge to admit or deny the allegation. *See* Answer, ¶¶ 33, 34-38, 39, 44, 45-46, 48-54, 74 (6 TTABVUE).

- Applicant claims to be "without sufficient knowledge to form a belief" as to the allegation at ¶ 33 that no restaurant, either under Applicant's BLD Marks or any other mark, is currently operating at 7450 Beverly Boulevard. Applicant must know whether a restaurant under Applicant's BLD Marks is currently operating at 7450 Beverly Boulevard.
- Applicant claims to be "without sufficient knowledge to form a belief" as to allegations at ¶¶ 34-38 and 45-46 concerning public statements made by Applicant's principle, Amy Knoll Fraser, and things said and done by Applicant in the cancellation proceeding Applicant brought against Opposer. Applicant must know what its principle said, and what Applicant said and did in the cancellation proceeding.
- Applicant claims to be "without sufficient knowledge to form a belief" as to the allegation at ¶ 39 that two third party concessionaires have been responsible for the operation and rendering of services at the BLD location at Los Angeles International Airport since that location opened. Applicant must know who has operated and rendered services at that location since its opening, particularly since Applicant denied the allegations at ¶¶ 40-43 that Applicant does not now and has not operated or rendered services at that location.
- Applicant claims to be "without sufficient knowledge to form a belief" as to the allegation at ¶ 44 that no catering services have ever been rendered by anyone at or with respect to the BLD location at Los Angeles International Airport. Applicant also claims to be "without sufficient knowledge to form a belief" at to the allegation at ¶ 74 that Applicant has not now, nor has it ever, used Applicant's BLD Marks for "catering services" at the BLD location at Los Angeles International Airport. Applicant must know whether or not "catering services" have ever been rendered at that location and whether they have been rendered at or with respect to that location under Applicant's BLD Marks, particularly

since Applicant denied the allegations at ¶¶ 40-43 that Applicant does not now and has not operated or rendered services at that location.

- Applicant claims to be "without sufficient knowledge to form a belief" as to the allegations at ¶¶ 48-54 regarding statements made by Ms. Knoll Fraser and statements made on Applicant's social media accounts regarding the closure of its 7450 Beverly Boulevard location, as well as the status of Applicant's website and social media accounts. Applicant must know what its principle said, what Applicant said on its social media accounts, and what the status is of it social media accounts and website.
- Applicant claims to be "without sufficient knowledge to form a belief" as to the allegation at ¶ 58 regarding Applicant's failure to timely file the necessary paperwork with the California Secretary of State's Office to maintain Applicant's status in the State of California as an active domestic corporation. Applicant must know whether it did or did not timely file its own corporate renewal paperwork.

Because each of these allegations is about information Applicant must know, Applicant's responses to these allegations do not fairly respond to the substance of the allegation, in contravention of Fed. R. Civ. P. 8(b)(2).

The Answer also contains responses that do not fairly respond to the substance of the allegation because the allegation includes things Applicant cannot possibly deny, and yet Applicant denied all or part of the allegation. *See* Answer, ¶¶ 24, 28, 29.

- Applicant denied the entire allegation set forth at ¶ 24, yet Applicant cannot possibly deny that "Opposer was the first to seek and obtain federal registrations of Opposer's BLD Marks, several years before Applicant applied to register Applicant's BLD Marks." *See* Notice of Opposition, ¶¶ 5, 8 (setting forth the dates in 2006 and 2009 when Opposer filed

for U.S. Trademark Reg. Nos. 3,726,776 and 3,736,766); Answer, ¶¶ 5, 8 (admitting Opposer obtained U.S. Trademark Reg. Nos. 3,726,776 and 3,736,766); Notice of Opposition, ¶ 15 (setting forth April 2012 as the date when Applicant filed the challenged applications); Answer, ¶ 15 (admitting Applicant filed the challenged applications in April 2012).

- Applicant denied the entire allegation set forth at ¶ 28, yet Applicant cannot possibly deny that in its reply brief filed January 18, 2017, it stated as a fact of the case that "[t]he restaurant on Beverly Boulevard has operated at that location continuously for 10 years." *See* Petitioner's Reply Brief, *3 Square, Inc. v. San Pasqual Casino Development Group, Inc.*, Cancellation No. 92056703, 74 TTABVUE at 1 (filed Jan. 18, 2017).
- Applicant admitted that Opposer filed a request for judicial notice as alleged at ¶ 29 but claimed to be "without sufficient knowledge to form a belief" as to the remainder of the allegation. Applicant cannot possibly deny that on February 1, 2017, "Opposer filed a request for judicial notice of the closure of 7450 Beverly Boulevard, attaching articles and social media posts concerning the same." *See* Registrant's Request for Judicial Notice of the Closing of Petitioner's Restaurant, *3 Square, Inc. v. San Pasqual Casino Development Group, Inc.*, Cancellation No. 92056703, 82 TTABVUE (filed Feb. 1, 2017).

Because Applicant's responses to each of these allegations contain denials about things Applicant cannot possibly deny, they are in contravention of Fed. R. Civ. P. 8(b)(2) and (4).

With respect to the inclusion of affirmative defenses, "[t]he elements of a defense should be stated simply, concisely, and directly. However, the pleadings should include enough detail to give the plaintiff fair notice of the basis for the defense." TBMP § 311.02(b); *see also* Fed. R. Civ. P. 8(d)(1); *IdeasOne Inc. v. Nationwide Better Health Inc.*, 89 USPQ2d 1952, 1953 (TTAB 2009)

(section 18 claim or defense must be specific enough to provide fair notice to adverse party of restriction being sought); *Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1538 (TTAB 2007) (elements of each claim should include enough detail to give fair notice of claim).

Here too the Answer falls short. The Answer includes four bald allegations set forth under the heading "AFFIRMATIVE DEFENSES," with no information or explanation as to why or how the defenses supposedly apply to this proceeding. As a result, the Answer fails to give Opposer fair notice of the basis for the affirmative defenses, in contravention of Fed. R. Civ. P. 8(d)(1).

CONCLUSION

For the reasons set forth above, Opposer requests that Applicant's Answer be stricken.

Dated this 22nd day of May, 2018.

Respectfully submitted,

BROOKS QUINN, LLC

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CERTIFICATE OF ELECTRONIC FILING

The undersigned hereby certifies that the **MOTION TO STRIKE ANSWER TO NOTICE OF OPPOSITION** was electronically filed with the Trademark Trial and Appeal Board on May 22, 2018.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **MOTION TO STRIKE ANSWER TO NOTICE OF OPPOSITION** was served upon Applicant on May 22, 2018, by forwarding said copy via email to counsel for Applicant at the following email addresses:

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By: /Delfina S. Homen/
Delfina S. Homen