UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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wbc

Mailed: February 15, 2019

Opposition Nos. 91242713 (parent)
91242810

Defiance Brands, Inc.

v.

Creative Bioscience, L.L.C.

By the Trademark Trial and Appeal Board:

This case now comes up for consideration of Petitioner's motions to strike the affirmative defenses in each of Applicant's answer. *See* Opposition No. 91242713 5 TTABVUE; Opposition Nos. 91242810, 5 TTABVUE. The motions are contested by Applicant.[1]

Motion to Strike

The Board may, upon motion or by its own initiative, order stricken from a pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. *See* Fed. R. Civ. P. 12(f). Motions to strike are not favored, and matter will not be stricken unless it clearly has no bearing upon the issues under litigation. *See, e.g., FRA S.p.A. v. Surg-O-Flex of America, Inc.*, 194 USPQ 42, 46 (SDNY 1976); *Leon Shaffer Golnick Advertising, Inc. v.*

[1] The Board has considered the parties' submissions and presumes the parties' familiarity with the factual bases for the motions, and does not recount them here except as necessary to explain the Board's order.

William G. Pendil Marketing Co., Inc., 177 USPQ 401, 402 (TTAB 1977). Inasmuch as the primary purpose of pleadings under the Federal Rules of Civil Procedure is to give fair notice of the claims or defenses asserted, the Board may decline to strike even objectionable pleadings where their inclusion will not prejudice the adverse party, but rather will provide fuller notice of the basis for a claim or defense. *See, e.g., Order of Sons of Italy in Am,* 36 USPQ2d at 1223. 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*, 5C Wright & Miller, *Fed. Prac. & Proc. Civil 3d* § 1381 (Westlaw update 2018).

In each proceeding, Applicant's answer denies the salient allegations of the notice of opposition and enumerates six affirmative defenses. *See* Opposition No. 91242713, 4 TTABVUE 7-8; Opposition No. 91242810, 4 TTABVUE 7-8. Applicant argues in its "affirmative defenses" that its mark is dissimilar to Opposer's marks; is for dissimilar services; is for different consumers; and is sold in different channels of trade.[2] *See* Opposition No. 91242713, 4 TTABVUE 7-8; Opposition No. 91242810, 4 TTABVUE 7-8. Review of these "affirmative

[2] The parties are reminded that absent restrictions in the identification of goods or recitation of services the Board will presume that a party's goods or services move in all channels of trade normal for the identified goods or services and that they are available to all classes of purchaser for those goods or services. *Harry Winston, Inc. v. Bruce Winston Gem Corp.*, 111 USPQ2d 1419, 1437 (TTAB 2014); *see Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) ("the question of registrability … must be decided on the basis of the identification of goods set forth in the application.") (quoting *Ocotocom Sys., Inc. v. Houston Comp. Servs. Inc.*, 918 F.2d 937, 942 (Fed. Cir. 1990).

defenses" reveals that Applicant is in large part not asserting affirmative defenses but rather, arguing the merits of Opposer's likelihood of confusion claim.

The defendant in a Board proceeding 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. *See* Trademark Rule 2.106(b)(1); TBMP § 311.02 (2018). Notwithstanding the foregoing, inasmuch as Applicant's allegations give Opposer a more complete notice of its position, the Board treats Applicant's allegations in the noted paragraphs as amplifications of its denials. *See Order of Sons of Italy in America*, 36 USPQ2d at 1223; *Harsco Corp. v. Electrical Sciences, Inc.*, 9 USPQ2d 1570 (TTAB 1988).

In view thereof, Opposer's motions to strike these affirmative defenses are **denied**.

Consolidation

It has come to the Board's attention that the parties are also involved in Opposition No. 91242810 concerning the same and/or similar marks at issue in this proceeding – Opposition No. 91242713. When cases involving common questions of law or fact are pending before the Board, the Board may order the consolidation of the cases. Consolidation is discretionary with the Board, and may be ordered upon motion granted by the Board, or upon stipulation of the

parties approved by the Board, or upon the Board's own initiative. *See* Fed. R. Civ. P. 42(a); TBMP § 511.

Accordingly, Opposition Nos. 91242713 and 91242810 are hereby consolidated and may be presented on the same record and briefs. *See, e.g., Hilson Research Inc. v. Society for Human Resource Management*, *supra*; and *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989). The Board file will be maintained in Opposition No. **91242713** as the "parent case." From this point on, only a single copy of all motions and submissions should be filed, and each submission should be filed in the parent case only, but captioned with all consolidated proceeding numbers, listing and identifying the "parent case" first.[3]

Despite being consolidated, each proceeding retains its separate character and requires entry of a separate judgment. The decision on the consolidated cases shall take into account any differences in the issues raised by the respective pleadings; a copy of the decision shall be placed in each proceeding file.

Proceedings are resumed and dates are reset as follows:

Deadline for Discovery Conference	March 13, 2019
Discovery Opens	March 13, 2019
Initial Disclosures Due	April 12, 2019
Expert Disclosures Due	August 10, 2019
Discovery Closes	September 9, 2019
Plaintiff's Pretrial Disclosures Due	October 24, 2019

[3] The parties should promptly inform the Board of any other Board proceedings or related cases within the meaning of Fed. R. Civ. P. 42, so that the Board can consider whether further consolidation is appropriate.

Plaintiff's 30-day Trial Period Ends	December 8, 2019
Defendant's Pretrial Disclosures Due	December 23, 2019
Defendant's 30-day Trial Period Ends	February 6, 2020
Plaintiff's Rebuttal Disclosures Due	February 21, 2020
Plaintiff's 15-day Rebuttal Period Ends	March 22, 2020
BRIEFS SHALL BE DUE AS FOLLOWS:	
Plaintiff's Main Brief Due	May 21, 2020
Defendant's Main Brief Due	June 20, 2020
Plaintiff's Reply Brief Due	July 5, 2020

General Information

Generally, the Federal Rules of Evidence apply to Board trials. Trial testimony is taken and introduced out of the presence of the Board during the assigned testimony periods. The parties may stipulate to a wide variety of matters, and many requirements relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125. These include pretrial disclosures, the manner and timing of taking testimony, matters in evidence, and the procedures for submitting and serving testimony and other evidence, including affidavits, declarations, deposition transcripts and stipulated evidence. Trial briefs shall be submitted in accordance with Trademark Rules 2.128(a) and (b). Oral argument at final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a).