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

Proceeding	91249586
Party	Plaintiff Bonobos, Inc.
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

BONOBOS, INC.,

Opposer,

-against-

PETER VELIKIN and KIRIL
ALEXANDROV,

Applicants.

Opposition No. 91249586

**REPLY BRIEF IN SUPPORT OF
OPPOSER’S MOTION TO STRIKE APPLICANTS’ AFFIRMATIVE DEFENSES**

Pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, Opposer Bonobos, Inc. (“Opposer”) submits this reply brief in support of its motion to strike the affirmative defenses asserted by Applicants Peter Velikin and Kiril Alexandrov (“Applicants”) in Applicants’ Answer to Opposer’s Notice of Opposition and Affirmative Defenses, filed on August 20, 2019 (the “Answer”).

ARGUMENT

In their Response to Opposer’s Motion to Strike Affirmative Defenses (“Applicants’ Response”), Applicants do not address any of the arguments in Opposer’s motion. Rather, Applicants employ invective and ad hominem attacks, calling Opposer “shameful,” “abusive,” and “incompetent[.]” and claiming that Opposer filed its motion with the “covert purpose” of delaying resolution of this proceeding. (7 TTABVUE 2, 5, 6, 8.) Such attacks are both inappropriate and unfounded.

The relevant issue on this motion is whether the affirmative defenses set forth in the Answer are properly pleaded. As explained in Opposer’s moving brief, they are not. The Trademark Trial and Appeal Board (the “Board”) routinely grants motions to strike with respect to the very same affirmative defenses pleaded by Applicants in this proceeding. Indeed, Applicants in their response concede this point in part by withdrawing their first and second affirmative defenses. (7 TTABVUE 7.)

Accordingly, only Applicants’ third and fourth affirmative defenses remain. As Opposer argued in its moving brief, the Third Affirmative Defense, namely that “the Notice of Opposition is barred by the doctrines of acquiescence, waiver, consent, laches or estoppel,” is a conclusory statement devoid of supporting facts, and it therefore does not comply with Rule 8(b) of the Federal Rules of Civil Procedure. *See, e.g., Fashion TV Programmgesellschaft mbH v. Fashion One Television LLC*, Opp. No. 91216413, 2015 WL 9906646, at *3 (T.T.A.B. July 29, 2015) (striking affirmative defenses because Registrant “failed to assert a factual foundation for these defenses”).¹ And Applicants’ Fourth Affirmative Defense, reserving the right to raise additional affirmative defenses, fails because (a) it does not provide notice to Opposer of any affirmative defense to Opposer’s claims in its Notice of Opposition, and (b) it is procedurally improper – the only way Applicants may raise additional affirmative defenses during or after discovery is by amending their Answer. *See, e.g., Cervezas Cuauhtemoc Moctezuma SA de CV v. Gateway Holdings LLC*, Opp. No. 91246481, slip op. at 6 (T.T.A.B. Aug. 2, 2019) (*available at* <http://ttabvue.uspto.gov/ttabvue/v?pno=91246481&pty=OPP&eno=9>) (finding that applicant’s

¹ Though Applicants correctly note that some of the defenses pleaded in their Third Affirmative Defense are expressly permitted under Rule 8(c) of the Federal Rules of Civil Procedure (7 TTABVUE 8), they ignore the requirement that the pleading “include enough detail to give the plaintiff fair notice of the basis for the defense.” TBMP § 311.02(b).

reservation of right to assert additional defenses was not an appropriate affirmative defense and striking the defense).

Applicants do not confront these points. Instead, they argue the merits of Opposer's likelihood of confusion claim and allude to extraneous evidence relating to the defenses of acquiescence and estoppel. However, Opposer's Motion to Strike relates solely to whether the asserted affirmative defenses are properly pleaded. As summarized above and explained in detail in Opposer's motion, they clearly are not. In any event, an assertion of no likelihood of confusion is not an "affirmative defense." *See, e.g., ETW Corp. v. Sunburst Prods., Inc.*, Opp. No. 91111490, 2001 WL 12839, at *3 (T.T.A.B. Jan. 5, 2001). And Applicant's purported evidence of acquiescence – a coexistence agreement with an unrelated party concerning different goods and a different (since abandoned) trademark registration – cannot possibly qualify as evidence of acquiescence. *See, e.g., Andersen Corp. v. Therm-O-Shield Int'l, Inc.*, 226 U.S.P.Q. 431, 435 (T.T.A.B. 1985) (“[T]o the extent that applicant is arguing that opposer is estopped from objecting to applicant's registration of the mark involved herein due to past acquiescence in third-party marks . . . it is well settled that estoppel may not be invoked by an applicant against an opposer based on that opposer's acquiescence in a third party's use or registration of a similar mark in the absence of a showing that applicant is in privity with that third party.”); *see also Magnavox Co. v. Multivox Corp. of Am.*, 144 U.S.P.Q. 501, 504 (C.C.P.A. 1965) (“As the board noted, appellee was not in privity with the applicant which registered ‘MULTI-VOX,’ and thus that registration can avail appellee nothing here.”).

Thus, for the straightforward reasons set forth in Opposer's motion to strike – none of which have been contested by Applicants – all the affirmative defenses in Applicants' Answer should be stricken. Opposer further notes that Applicants' personal attacks and baseless claims

of Opposer's bad faith are unwelcome and unhelpful to resolving this dispute and hopes this opposition proceeding will henceforth be litigated in a civil and respectful manner.

CONCLUSION

For the foregoing reasons, Opposer respectfully requests the Board strike all of the purported affirmative defenses in their entirety from Applicants' Answer.

Dated: New York, New York
October 1, 2019

Respectfully submitted,

FROSS ZELNICK LEHRMAN & ZISSU, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of October 2019, I caused a true and correct copy of the foregoing Reply Brief in Support of Opposer's Motion to Strike Applicants' Affirmative Defenses to be served by email on Applicants' counsel of record at *rward@bmwiplaw.com* and *bmwlaw@aol.com*.


Yuoseph Karzoan