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

Proceeding	91250263
Party	Plaintiff Ambika Foods
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Submission	Motion to Strike Pleading/Affirmative Defense
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Attachments	Motion to Strike Affirmative Defenses 91250263 10-9-019.pdf(428485 bytes)

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

In the matter of application Serial No. 87/921872
For the mark **AMBIKA APPALAM DEPOT**
Published in the "Official Gazette" of Apr 16, 2019

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Ambika Foods)	
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Opposer,)	
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vs.)	Opposition No. 91250263
)	
Ambika Appalam Company)	
)	
Applicant,)	
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Commissioner for Trademarks
2900 Crystal Drive
Arlington, Virginia 22202-3513

Opposer’s Motion To Strike Affirmative Defenses Nos. 1, 3, 4, 5, 6, 7 and 8

In Applicant’s Answer

Pursuant to Fed. R. Civ. P. 12(c), Opposer, Ambika Foods, (“Opposer”), hereby moves to strike the first, third, fourth, fifth, sixth, seventh, and eighth affirmative defense set forth in Applicant’s, Ambika Appalam Company, (“Applicant”) Answer as immaterial, irrelevant or insufficient claims. This motion is made within the time prescribed in Fed. R. Civ. P. 12(c) and is thereby timely.

Additionally, as the Board’s determination of Petitioner’s motion will affect the scope of discovery in this proceeding, Petitioner moves that the proceeding be suspended pending consideration of its motion to strike and that, after the Board decides the motion, the deadlines for the initial discovery conference, discovery and trial be reset.

MEMORANDUM IN SUPPORT OF MOTIONS

Opposer does not set forth this motion lightly, but feels it will be helpful in narrowing and limiting the issues in this proceedings and thereby also serving as a guide in conducting discovery. As stated in 2 A Moore's Federal Practice paragraph 12.21[3]:

“Although courts are reluctant to grant motions to strike, where a defense is legally insufficient, the motion should be granted in order to save the parties unnecessary expenditure in time and money in preparing for trial.”

Moreover, Section 506.01 of the TBMP provides that the Board may, upon motion or upon its own initiative, “order stricken from a pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” (3d ed. rev. 2011); see also Fed. R. Civ. P. 12(f).

Opposer, thus, moves that the first, fourth and eight affirmative defense be stricken as inadequately pled, as they consists of conclusory statements without the factual allegations required for such a defense.

Additionally, Opposer moves to strike the third, fifth, sixth and seventh affirmative defense set forth in the Answer as immaterial. In *United States Mineral Products Co. v. GAF Corp.*, 197 USPQ 301, 304 n.5 (TTAB 1977) the Board sated that “equitable defenses set forth in Trademark Act § 19, 15 U.S.C. § 1069 are affirmative defenses which must be affirmatively pleaded”. Fed. Civ. P. Rule 8 (b) requires among other things that a response must set forth in short and plain terms the alleged defense.

Applicant merely lists any possible equitable defense as an affirmative defense without any further supporting statement. The defenses of laches, estoppels, acquiescence as set forth in the third, fifth and seventh defense are unavailable in the present opposition proceeding concerning the registrability of Applicant's mark, because it is the publication of the said application that triggers the ability of Opposer to object to the registration of a mark.

Applicant's sixth affirmative defense alleges unclean hands with no accompanying short, plain statement that would indicate that Applicant would be entitled to relief.

Based upon the foregoing, and for the reasons discussed below, the Board should strike the first, third, fourth, fifth, sixth, seventh, and eighth affirmative defense in the Answer.

Additionally, the Board should suspend the proceedings pending resolution of the Motion to Strike. Many of the defenses asserted by Applicant could significantly affect the scope of discovery in the proceeding. The motion should therefore be resolved before the Discovery Conference takes place. Petitioner accordingly requests that the discovery and trial schedule be reset after a decision on the Motion to Strike.

Applicant's Affirmative Defenses Numbers , 1, 3, 4, 5, 6, 7 and 8 Should Be Stricken as Immaterial and/or Insufficiently Pled

Applicant fails to plead any facts in support of its affirmative defenses numbers 1, 3, 4, 5, 6, 7 and 8. Fed. R. Civ. P. 8(b) requires that any defense to a claim must be stated in short and plain terms. Similarly, under TTAB Rule 311.02(b), "[t]he elements of a defense should be stated simply, concisely, and directly" and "should include enough detail to give the plaintiff fair notice of the basis for the defense." Bald and conclusory allegations are insufficient under that standard, in that they neither give fair notice of the basis for a claim nor set forth sufficient facts that, if proven, support the claim. TTAB Rule 311.02(b) (citing *McDonnell Douglas Corporation v. National Data Corporation*, 228 U.S.P.Q. 45 (TTAB 1985)). The case law is clear that even under Rule 8(a)'s notice pleading standard, affirmative defenses "... must be plead with the specific elements required to establish the defense" or else be stricken. *Software Publs. Ass'n v. Scott & Scott, LLP*, 2007 U.S. Dist. Lexis 59814 (N.D. Tex. 2007).

In *Reis Robotics USA, Inc. v. Concept Industries, Inc.*, 462 F. Supp2d. 897 (N.D. III. 2006), the court rejected as insufficiently pleaded affirmative defenses materially similar to the affirmative defenses Applicant purports to raise here. In that case, in striking Applicant's defenses, the court held that "[m]erely stringing together a long list of legal defenses is

insufficient to satisfy Rule 8(a).” *Id.* After all, the court reasoned, “[i]t is unacceptable for a party’s attorney simply to mouth [affirmative defenses] in formula-like fashion, for that does not do the job of apprising opposing counsel and this Court of the predicate for the claimed defense—which after all is the goal of the pleading.” *Id.* (internal citation omitted).

Such unacceptable “boilerplate” pleading is precisely what Applicant uses in this case.

Applicant’s 1st affirmative defense states: “*The notice of opposition fails to state a claim upon which a relief can be granted, and in particular, fails to state legally sufficient grounds for sustaining the opposition.*”

Applicant’s 3rd affirmative defense states: “*Applicant alleges on information and belief that the opposition is barred by the doctrine of estoppel*”

Applicant’s 4th affirmative defense states: “*Applicant alleges on information and belief that as a result of its own acts and omissions, opposer has waived any right to pursue its opposition.*”

Applicant’s 5th affirmative defense states: “*Applicant alleges on information and belief that the opposition is barred by the doctrine of acquiescence.*”

Applicants’ 6th affirmative defense states: “*Applicant alleges on information and belief that the opposition is barred by the doctrine of unclean hands.*”

Applicant’s 7th affirmative defense states: “*Applicant alleges on information and belief that as a result of opposer’s own acts and/or omissions, the opposition is barred by the doctrine of laches.*”

Applicant’s 8th affirmative defense states: “*Any and all acts alleged to have been committed by Applicant were performed with lack of knowledge and lack of willful intent.*”

None of these affirmative defenses passes muster under Rule 8(b) or TTAB Rule 311.02. Each is a mere conclusory, “boilerplate” affirmative defense, without any consideration of the actual applicability of the defense to the allegations in this case and without any identification of the factual basis for the defense. As a result, both Opposer and the Board can only speculate as to the predicates for those defenses—hardly the “fair notice” required under the rules. As such, the affirmative defenses numbered 1, 3, 4, 5, 6, 7 and 8 should be stricken as immaterial and/or insufficiently pled.

CONCLUSION

For the reasons set forth above, Applicant's affirmative defenses numbered 1, 3, 4, 5, 6, 7 and 8 should be stricken. Moreover, the proceeding should be suspended pending consideration of Opposer's motion to strike, and the deadlines for discovery and trial periods should be reset accordingly.

Ambika Foods

By and through its attorney

/R. Peter Spies/ _____

R. Peter Spies

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Dated: October 10, 2019

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing OPPOSER'S MOTION TO STRIKE AFFIRMATIVE DEFENSES was served upon the party by emailing a copy of this document this 10th day of October 2019 to its attorney, Michael A. Bondi, MOSS & BARNETT, via first class mail and email at the following address 150 South Fifth Street, Suite 1200, Minneapolis, MN 55402, michael.bondi@lawmoss.com, ipmab@lawmoss.com

AMBIKA FOODS

/rpspies/_____

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Its Attorney
Dated: October 10, 2019