

ESTTA Tracking number: **ESTTA1056579**

Filing date: **05/19/2020**

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

Proceeding	91251536
Party	Plaintiff Alexandria Real Estate Equities, Inc.
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Date	05/19/2020
Attachments	ARE - Reply Br. ISO Mot. to Strike (INCLUSIVE INNOVATION).pdf(144393 bytes)

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

Alexandria Real Estate Equities, Inc.,)	
)	Opposition No. 91251536 (Parent)
Opposer,)	Opposition No. 91251537
)	Opposition No. 91251538
v.)	Opposition No. 91251539
)	
Bugsby Property LLC,)	Serial Nos.:
)	88/284,746; 88/284,752; 88/284,755; 88/284,758
Applicant.)	
)	Mark: INCLUSIVE INNOVATION
_____)	

**ALEXANDRIA REAL ESTATE EQUITIES, INC.’S REPLY IN SUPPORT OF ITS
MOTION TO STRIKE AFFIRMATIVE DEFENSES OF BUGSBY PROPERTY LLC**

I. INTRODUCTION

Applicant Bugsby Property LLC's opposition to the motion to strike its affirmative defenses ("Opposition" or "Opp.") confirms beyond a shadow of a doubt that Applicant has no good faith factual basis under Rule 11 to plead any of its affirmative defenses. Quite literally, the brief points to *no facts* that would give rise to *any* of its affirmative defenses. Instead, Applicant resorts to vitriolic attacks and gross mischaracterizations of the precedents that Opposer Alexandria Real Estate Equities, Inc. ("Alexandria") cited in its moving papers. Tellingly, Applicant cannot point to a single authority for the proposition that this Board or any court allows affirmative defenses to proceed on a record as threadbare and conclusory as this one. Essentially conceding it currently has no supporting facts, Applicant still improperly suggests that it should be allowed to use the discovery process to pursue defenses that it cannot even articulate, much less support with factual allegations. This is the precise abuse of process that this Board has routinely foreclosed. Under these circumstances, the only appropriate response is to strike all seven affirmative defenses. *See* Trademark Trial & Appeal Board Manual of Procedure ("TBMP") § 311.02(b); Fed. R. Civ. P. 12(f). Furthermore, because Applicant continues to demonstrate that it has no good faith basis to assert any of its defenses (many of which are generally barred in opposition proceedings in any event), Opposer respectfully requests that the defenses be dismissed with prejudice.

II. ARGUMENT

A. **Affirmative Defenses That Are Not Supported By Sufficient Facts Should Be Dismissed.**

It is settled law that "affirmative defenses are pleadings, and as a result, must comply with all the same pleading requirements applicable to complaints." *Gomez v. Bird Auto., LLC*, 411 F. Supp. 3d 1332, 1334 (S.D. Fla. 2019); *see also Soos & Assocs. v. Five Guys Enters., LLC*, 425 F.

Supp. 3d 1004, 1010 (N.D. Ill. 2019) (“To survive a motion to strike, an affirmative defense must be adequately pleaded and withstand a Rule 12(b)(6) challenge. . . . The *Twombly* and *Iqbal* pleading standard applies to affirmative defenses.”); Alexandria Real Estate Equities, Inc.’s Mot. to Strike Affirmative Defenses of Bugsby Property LLC (“Motion” or “Mot.”) at 4–6. This Board has repeatedly endorsed that judicial consensus.¹

Applicant takes issue with that consensus and instead urges the Board to apply a more lenient “fair notice” standard that apparently only one federal district court in California has embraced. Opp. at 3 (citing *Rosen v. Masterpiece Mktg. Grp., LLC*, 222 F. Supp. 3d 793 (C.D. Cal. 2016)). And yet, even under the standard as articulated by the district court in *Rosen*, Applicant’s affirmative defenses are still defective, because Applicant has not properly alleged any facts that could give rise to any of the defenses it seeks to pursue in this proceeding. Indeed, the court in *Rosen* held that “affirmative defenses must be supported by *at least some facts indicating the grounds on which the defense is based.*” 222 F. Supp. 3d at 802 (emphasis added). As a result, even under the supposedly more lenient standard, the court struck several affirmative defenses (and denied leave to amend certain of them) because “the[] defenses [were] mere recitations of legal doctrines devoid of any factual allegations, and as such, they fail[ed] to provide

¹ E.g., *Asurion, LLC v. Netsurion, LLC*, Opp. No. 91231568, 2018 WL 1603937, at *2 (T.T.A.B. Mar. 30, 2018) (non-precedential) (citing *Iqbal* and *Twombly* in striking affirmative defenses); *Wellspring Pharm. Corp. v. McCord Research, Inc.*, Opp. No. 91233742, 2018 WL 447512, at *3 (T.T.A.B. Jan. 12, 2018) (non-precedential) (citing *Iqbal* and striking affirmative defense “because it fails to expressly identify, and to set forth any factual basis for, any additional defenses”); *Cards Against Humanity, LLC v. Vampire Squid Cards, LLC*, Opp. No. 91225576, 2017 WL 3948370, at *7 (T.T.A.B. Sept. 6, 2017) (non-precedential) (requiring “sufficient facts beyond a tender of ‘naked assertion[s]’ devoid of ‘further factual enhancement,’ to support its claims and defenses” (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009))). Applicant takes the Motion to task for citing non-precedential decisions of this Board. To the extent that Applicant suggests that non-precedential decisions can be entirely disregarded, Opposer respectfully disagrees. These decisions all cite to governing Federal Circuit case law and provide guidance as to how this Board has dealt with similarly deficient affirmative defenses in the past.

‘fair notice’ to Plaintiff.” *Id.* at 804–05. The same principle applies here, because Applicant’s affirmative defenses do not contain even a shred of factual backing and thus fail to give Opposer the required notice under Rule 8 of the Federal Rules of Civil Procedure.

Alternatively, Applicant implies that affirmative defenses should be struck only if the allegations are found to be “implausible, not insufficient,” suggesting that a defense can be struck when the facts alleged do not plausibly add up to the elements of an affirmative defense, but that a defense that contains *no factual* allegations should somehow survive because it is merely “insufficient.” *See* Opp. at 3 (emphasis omitted) (citing *GEOMC v. Calmare Therapeutics Inc.*, 918 F.3d 92 (2d Cir. 2019)). That is nonsense. Plausibility and sufficiency of pleadings are two sides of the same coin: If allegations lack sufficient factual matter, they necessarily will fail Rule 8’s plausibility standard. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007))).²

The fundamental failing in Applicant’s position, though, is that it misstates the applicable burden here. Repeatedly, Applicant acts as if the Board can strike its defenses only if Opposer identifies a precedential decision of the Board that struck the exact same affirmative defense in the exact same circumstances. But that is precisely backward. As a general proposition, it is *Applicant’s* burden to identify specific facts that, if proven true, would support each affirmative defense. Fed. R. Civ. P. 8(c); *see, e.g., CTF Dev., Inc. v. Penta Hosp., LLC*, 2009 WL 3517617, at *8 (N.D. Cal. Oct. 26, 2009) (“Under the *Iqbal* standard, the burden is on the *defendant* to proffer

² Moreover, the court in *GEOMC* expressly “conclude[d] that the plausibility standard of *Twombly* applies to determining the sufficiency of all pleadings, including the pleading of an affirmative defense.” 918 F.3d at 98.

sufficient facts and law to support an affirmative defense, and not on the plaintiff to gamble on interpreting an insufficient defense in the manner defendant intended.”). Where, as here, the specific facts alleged do not add up to the affirmative defense asserted, the defense is properly dismissed. *See id.* (granting motion to strike certain affirmative defenses).

B. Opposer Does Not Allege Any Legally Sufficient Facts.

A review of the specific allegations of each of Applicant’s affirmative defenses and the arguments raised in opposition to the Motion to Strike further confirms that Applicant has failed to articulate any factual basis for its asserted defenses.

1. ***Failure to State a Claim.*** Applicant concedes that it cannot articulate a basis for its failure to state a claim defense and instead attempts to withdraw it with leave to replead it if Applicant changes its mind. Opp. at 3. In other words, Applicant admits that it had no good faith basis to assert this defense in the first place. *See* Fed. R. Civ. P. 11(b)(3); *see also Cohan v. Genji Novi, Inc.*, 2019 WL 4051747, at *1, *3 (E.D. Mich. Aug. 28, 2019) (Rule 11 governs affirmative defenses and “requires more than speculation that an affirmative defense might exist”) (granting motion to strike affirmative defenses). Critically, Applicant provides ***no factual basis*** to conclude that it could more successfully assert this defense in the future. Under these circumstances, leave to amend should be denied as futile. *See Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 656 (9th Cir. 2017) (“An amendment is futile when no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient . . . defense.”) (quotation marks omitted); *Panther Partners Inc. v. Ikanos Commc’ns, Inc.*, 347 F. App’x 617, 622 (2d Cir. 2009) (“Granting leave to amend is futile if it appears that [the party] cannot . . . allege facts sufficient to support the claim.”).

2. ***Laches.*** Although Applicant does not concede that its laches defense should be withdrawn, it does not make any attempt to explain why laches would apply to the facts

alleged. Opp. at 3–4. To the contrary, Applicant appears to rest on its belief that a general allegation that “Opposer’s own acts and/or omissions” supposedly give rise to laches (Answers at 3) is sufficient to establish laches. It is not. *See Nat’l Cable Television Ass’n v. Am. Cinema Editors, Inc.*, 937 F.2d 1572, 1581–82 (Fed. Cir. 1991) (“[t]he burden [is] . . . on [applicant] to establish both unreasonable delay and prejudice from the delay [with respect to protesting the issuance of the registration]”). Instead, Applicant quibbles with the general principle that the elements of delay and prejudice do not fit neatly in the context of an opposition proceeding (even when those elements are actually articulated). *See* Opp. at 4 (citing *Barbara’s Bakery, Inc. v. Landesman*, 82 U.S.P.Q.2d 1283 (T.T.A.B. 2007)). Again, Applicant is asking the Board to disregard a matter of black-letter law. *See* TBMP § 311.02(b) (“[T]he availability of laches . . . is severely limited in opposition and cancellation proceedings . . . [because] these defenses start to run from the time of knowledge of the application . . . not from the time of knowledge of use.”). Here, however, that principle does not come into play, because Applicant has not done the minimal work to identify *any* of the following: (a) what “acts and/or omissions” allegedly gave rise to the defense; (b) what was the delay; (c) why was it “unreasonable”; or (d) how was Applicant supposedly prejudiced. Because any supporting facts would necessarily be within Applicant’s knowledge or ability to learn now, discovery will not change the calculus. Accordingly, any “amendment of applicant’s answer to assert any such defense therefore would be futile.” *See Barbara’s Bakery, Inc.*, 82 U.S.P.Q.2d at *11 n.14. The Board should thus strike this defense.

3. ***Estoppel.*** Applicant’s estoppel affirmative defense fares even worse. Applicant alleges only that “the Opposition is barred by the doctrine of estoppel” (Answers at 4), and the Opposition does not make any attempt to explain that allegation or how it could apply to a claim that the mark at issue is merely descriptive. *See* Opp. at 4. This allegation is clearly

insufficient under this Board's precedent. *Ohio State Univ. v. Ohio Univ.*, 51 U.S.P.Q.2d 1289, at *6 (T.T.A.B. 1999) ("It is well established that estoppel may not be asserted as a defense against a claim of mere descriptiveness."). At most, Applicant notes that the Board previously struck a similar defense without prejudice. Opp. at 4. But that is not enough to save this defense, or to even begin to explain why it would not be futile to allow Applicant to assert the defense later, when it cannot even articulate a single supporting fact. See *Mr. Dana Kelman v. Mindee K. Hardin dba Nose Better*, Opp. No. 91224275, 2017 WL 1476298, at *3 (T.T.A.B. Mar. 22, 2017) (striking estoppel affirmative defense *sua sponte*).

4. **Waiver.** The pattern repeats itself for Applicant's waiver defense. Applicant only vaguely alleged that "Opposer's own acts and/or omissions" constitute waiver (Answers at 4), and the Opposition does not make any attempt to clarify or justify this bare-bones conclusory assertion. Opp. at 4. Instead, Applicant argues that Opposer's cited case law, including *Tech. Advancement Grp., Inc. v. LVMH Swiss Manufactures SA*, Opp. No. 91202862, 2013 WL 11247274 (T.T.A.B. May 31, 2013) (non-precedential), should be disregarded because the Board struck the affirmative defenses upon a hearing for summary judgment. But Applicant mischaracterizes the holding. In that proceeding, the Board struck the affirmative defenses of "laches, waiver, acquiescence, estoppel and unclean hands" solely because "applicant . . . *pleaded no facts which form the basis for any of these defenses.*" *Id.* at *5 (emphasis added). This defense should similarly be stricken here because Applicant also has pleaded no facts and, again, Applicant has provided no basis to conclude that an amendment would not be futile.

5. **Acquiescence.** Applicant's acquiescence defense fares no better. The *only* allegation is the fact-free assertion that "the Opposition is barred by the doctrine of acquiescence" (Answers at 4), and the Opposition provides no more detail or justification. Opp. at 4. At most,

Applicant argues that *Barbara's Bakery*, TBMP § 311.02, and *Technology Advancement Group* are inapplicable. For all the reasons discussed above, however, Applicant is wrong. The Board in *Barbara's Bakery* specifically observed that acquiescence is “generally [] not available in an opposition proceeding, and that amendment of applicant’s answer to assert” that defense “would be futile.” *Barbara's Bakery*, 82 U.S.P.Q.2d at *11 n.14. Similarly, the Board in *Technology Advance Group* struck the acquiescence defense because the applicant in that proceeding “pleaded no facts which form the basis” for that defense. 2013 WL 11247274, at *5; *see also Cards Against Humanity, LLC*, 2017 WL 3948370, at *5. And again, Applicant provides no basis to conclude that a theoretical amendment would not be futile, and should not be allowed to use the discovery process to hunt for one.

6. ***Unclean Hands.*** Applicant also makes no attempt to rehabilitate its insufficient allegation that “the Opposition is barred by the doctrine of unclean hands.” *Compare* Answers at 4 with Opp. at 4. Strangely, Applicant does not even offer any argument that it has attempted to meet its obligation under Rule 11 to offer a good faith basis for the claim. *See* Opp. at 4. Under these circumstances, the defense should be struck. *See supra.*

7. ***Fraudulent Conduct.*** “Applicant concedes . . . that it does not currently have sufficient evidence to prove this affirmative defense” and even “*requests* that it be stricken.” Opp. at 5 (emphasis added). That ends this defense.

C. Leave To Amend Should Be Denied.

Applicant’s only real dispute with the Motion to Strike is that it should be given free rein to use the discovery process to find evidence for defenses that it cannot articulate. That is incorrect. Where, as here, an Applicant cannot even articulate a “useful purpose,” it should not be allowed “to correct a defective pleading.” *Pure Gold, Inc. v. Syntex (U.S.A.) Inc.*, 221 U.S.P.Q. 151 (T.T.A.B. 1983), *aff'd*, 739 F.2d 624 (Fed. Cir. 1984); *see also Danjaq, LLC v. .007 Percent LLC*,

Opp. No. 91238814, 2019 WL 1377228, at *4 (T.T.A.B. Mar. 25, 2019) (non-precedential) (denying leave to amend where appellant “has not asserted any facts that would support a plausible affirmative defense”). Nothing in Applicant’s brief indicates that it has any good faith basis to allege facts that could sustain any plausible affirmative defenses to the only relevant question, whether the applied-for mark, INCLUSIVE INNOVATION, is merely descriptive. Under these circumstances, amending the affirmative defenses would be futile and should not be allowed. *See generally Foman v. Davis*, 371 U.S. 178, 182 (1962) (“futility of amendment” is a reason to deny a Rule 15(a) motion); *Dragon Bleu (SARL) v. VENM, LLC*, 112 U.S.P.Q.2d 1925, at *5 n.10 (T.T.A.B. 2014) (when there is “no theory by which the recited facts could be plausibly alleged to constitute fraud[, r]epleading these allegations would be futile”) (denying leave to amend); *Am. Express Mktg. & Dev. Corp. v. Gilad Dev. Corp.*, 94 U.S.P.Q.2d 1294, 1300 (T.T.A.B. 2010) (denying as futile leave to amend answer to plead an additional affirmative defense).

Even aside from these general principles, allowing this Applicant leave to replead its affirmative defenses would be particularly dangerous. Applicant’s Opposition repeatedly references discovery as a means to cure its failures to properly allege these defenses. Opp. at 2, 4, 5. But this type of fishing expedition is precisely why courts apply the *Twombly-Iqbal* standard to affirmative defenses and reject a defendant’s attempt to use discovery to bolster its otherwise defective affirmative defenses. *See Vogel v. Huntington Oaks Del. Partners, LLC*, 291 F.R.D. 438, 441 (C.D. Cal. 2013) (describing “*Iqbal*’s message that discovery should not be used as a fishing expedition” where defendant cannot assert “*some* factual support”); *Sprint Nextel Corp. v. Ravitsky*, 2013 WL 12080672, at *2 (W.D. Tex. May 13, 2013) (“applying the *Twombly-Iqbal* standard” to affirmative defenses “reduces discovery fishing expeditions whereby defendants assert every conceivable defense and then use discovery to validate their guesses”). If the Board

were to leave room for Applicant to replead these claims, it would only invite discovery disputes, as Applicant would use the discovery process to search for evidence of laches, unclean hands, fraud, or any of its other unsupported affirmative defenses.³

Furthermore, where a party asserts defenses without any factual basis, it may also be appropriate to infer that the defenses were not asserted in good faith. *See, e.g., Strauss v. Gold*, 1985 WL 1232, at *2 (S.D.N.Y. May 6, 1985) (“[A] finding of bad faith might be appropriate [where] there is also absolutely no basis in law or fact for the proposed amended defenses.”). Indeed, in another action between the exact same parties, the presiding judge in the U.S. District Court for the Southern District of New York found that Applicant “improper[ly] manipulate[ed]” its very corporate organization to “create a back-door entry to federal court.” *Bugsby Prop. LLC v. Alexandria Real Estate Equities, Inc.*, 2020 WL 1974147, at *6 (S.D.N.Y. Apr. 24, 2020) (granting Alexandria’s motion to dismiss after holding that Bugsby engaged in “collusion”). Here, where Applicant now admits that it had no basis to plead affirmative defenses, it should not be given the benefit of the doubt. Applicant has now been given two opportunities to explain the basis for its affirmative defenses: (1) in its initial answer; and (2) in opposition to the pending Motion. Its refusal to provide any justification for its asserted defenses can only be explained by bad faith. Under these circumstances, the liberal policy in favor of amendment does not apply. *See, e.g., Foman*, 371 U.S. at 182.

III. CONCLUSION

For the foregoing reasons, Opposer respectfully requests that its Motion to Strike be granted, striking all seven of Applicant’s affirmative defenses, and that the Board deny Applicant’s

³ Applicant’s statement that “Opposer ignored its obligation to participate in a discovery conference no later than April 19” (Opp. at 2) is incorrect. The Board suspended these proceedings pending the resolution of this Motion as of April 10. Thus, there was no deadline pending.

request for leave to amend its answer to replead its affirmative defenses.⁴

Dated: May 19, 2020

Respectfully submitted,

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⁴ Opposer respectfully notes that Applicant's answers and its oppositions to Opposer's Motion to Strike were not signed by counsel of record in this proceeding. Opposer thus respectfully requests that the Board direct Applicant's counsel to submit a formal notice of appearance or take such other steps as the Board determines to be proper under these circumstances.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of **ALEXANDRIA REAL ESTATE EQUITIES, INC.’S MOTION TO STRIKE AFFIRMATIVE DEFENSES OF APPLICANT BUGSBY PROPERTY LLC** is being served upon counsel for Defendant on this 19th Day of May at the following email addresses:

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