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

Proceeding	91254456
Party	Plaintiff Foods for Juniors, Inc
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Attachments	Motion to Strike Suspend and Consolidate 56.pdf(25911 bytes )

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

Foods for Juniors, Opposer v. JRS Management LLC, Applicant

Opposition No. 91254456, Serial Number 88219432

Opposer's Motion to Strike Certain Affirmative Defenses  
Asserted by Applicant, Motion to Suspend Pending  
Determination of Motion, and Motion to Consolidate  
Proceedings

I. INTRODUCTION

Opposer hereby moves pursuant to Fed.R.Civ.P. 12(f) and TBMP § 503 to strike Applicant's first, third, fourth, fifth, sixth and seventh affirmative defenses asserted in its Answer. Because the Board's determination of this motion will affect the scope of discovery in this proceeding, Opposer requests that the proceeding be suspended pending consideration of its motion to strike, and that after the Board decides the motion, all pending deadlines in this proceeding be reset. Opposer also moves to consolidate this proceeding with a companion opposition.

II. OPPOSER'S MOTION TO STRIKE APPLICANT'S AFFIRMATIVE  
DEFENSES SHOULD BE GRANTED

A. The Standard for Adjudicating Motions to Strike

Section 506.01 of the TBMP provides that the Board may, upon motion, "order stricken from a pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." See also Fed. R. Civ. P. 12(f) ("The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.").

Motions to strike are granted in appropriate cases, particularly as in the present case where meritless affirmative defenses that will only waste the parties' time and expense at trial can be summarily adjudicated as

insufficient well before then. See American Vitamin Products, Inc. v. Dow Brands Inc., 22 USPQ2d 1313, 1314 (TTAB 1992) (granting motion to strike insufficient affirmative defenses); Heller Fin., Inc. v. Midwey Powder Co., 883 F.2d 1286, 1294 (7th Cir. 1989) ("where . . . motions to strike remove unnecessary clutter from the case, they serve to expedite, not delay.").

B. Applicant's Affirmative Defense of Failure to State a Claim Should Be Stricken

Applicant's affirmative defense of failure to state a claim is not really an affirmative defense "because it relates to an assertion of the insufficiency of the pleading of opposer's claim rather than a statement of a defense to a properly pleaded claim." John W. Carson Foundation v. Toilets.com Inc., 94 USPQ2d 1942, 1949 (TTAB 2010).

Although Fed.R.Civ.P. 12(b)(6) allows an applicant or registrant to raise this defense, an opposer may use the assertion to test the sufficiency of the defense in advance of trial by moving to strike it from the applicant's answer. See S.C. Johnson & Son v. GAF Corporation, 177 USPQ 720, 720 (TTAB 1973). Accordingly, an affirmative defense for failure to state a claim will be stricken if the opposer alleges such facts that would, if proved, establish that (1) the opposer has standing to maintain the proceeding, and (2) a valid ground exists for opposing the application. American Vitamin, 22 USPQ2d at 1314; TBMP § 503.02.

Opposer has properly pleaded rights in its trademark. Accordingly, Opposer has established its standing in this proceeding. Cunningham v. Laser Golf Corp., 222 F.3d 943, 945 (Fed. Cir. 2000); Lipton Industries, 670 F.2d 1024, 1028-29 (CCPA 1982). Also, Opposer has alleged prior rights in its trademark and likelihood of confusion. Accordingly, Opposer has pleaded valid grounds for opposing Applicant's application.

Because Opposer has alleged facts that establish standing and grounds for opposing its application, the Board should strike Applicant's affirmative defense of failure to state a claim.

C. Applicant's Affirmative Defenses of Laches, Estoppel, Waiver, Acquiescence and Unclean Hands Should be Stricken

TBMP § 300 makes clear that "[t]he elements of a defense should be stated simply, concisely, and directly. However, the pleading should include enough detail to give the plaintiff fair notice of the basis of the defense." Where a defense contains mere conclusory allegations that do not give an opposer fair notice as to the specific conduct which provides the basis for the defense, the defense will be stricken by the Board. See Lincoln Logs Ltd. v. Lincoln Precut Log Homes, Inc., 971 F.2d 732, 735 (Fed. Cir. 1992) (affirming dismissal of applicant's asserted defenses of laches and estoppel because applicant failed to allege facts supporting the necessary elements of each alleged defense).

Applicant's affirmative defenses of laches, estoppel, waiver, acquiescence and unclean hands, which it asserts in its answer, should be stricken because, as pled, they are merely conclusory and fail to state facts that would give adequate notice of the basis for such defenses.

III. OPPOSER'S REQUEST TO SUSPEND PROCEEDINGS

Applicant's affirmative defense of failure to state a claim is not really an affirmative defense, but, rather, an attack on the sufficiency of Opposer's pleading of its grounds. As such, the Board should treat the disposition of this motion to strike in the same manner in which it would treat a motion to dismiss. That is, it should suspend all deadlines pending its adjudication. See TBMP § 503.01 (filing a motion to dismiss for failure to state a claim upon which relief can be granted "effectively stays the time for the parties to conduct their required discovery conference because the pleadings must be complete and issues joined before the conference is held."); TBMP § 316 (any potentially dispositive motion, such as a failure to state a claim, directed to the pleadings suspends the case "for decision on the motion and the Board will reset the deadline for the discovery conference as well as all subsequent dates, as appropriate, when the motion is decided.").

Also, as the Board's determination of Opposer's motion will affect the scope of discovery in these proceedings, Opposer

requests that the proceedings be suspended pending consideration of its motion to strike and that, after the Board decides the motion, the pending deadlines in the proceedings, which should be consolidated (see the discussion below), should be reset.

#### IV. OPPOSER'S TWO COMPANION OPPOSITION PROCEEDINGS SHOULD BE CONSOLIDATED

Pursuant to TBMP § 511, Opposer hereby moves to consolidate this opposition proceeding and the companion opposition proceeding, No. 91254454, both of which were filed by Opposer against the same party having overlapping marks (JRS DIPPED SANDWICHES and JRS FRENCH DIPPED SANDWICHES).

In each of Opposer's proceedings against Applicant, Opposer relies on its prior rights in the registered trademark JUNIOR'S and alleges a likelihood of confusion. Applicant has asserted the identical defenses in each proceeding.

Because the allegations and defenses in each of the proceedings pending between the parties are almost identically the same, there are common questions of law or fact. In addition, the parties are identical. Given these facts, consolidation would save time, effort, and expense for all involved.

In view of the substantially identical and overlapping issues involved, Applicant requests that the Board consolidate Opposition No. 91254454 and No. 91254456 pursuant to TBMP § 511, and reset the pre-trial and trial dates.

#### V. CONCLUSION

For the reasons stated above, Applicant's affirmative defense of failure to state should be stricken from its answer in this opposition proceeding. Moreover, Applicant's third, fourth, fifth, sixth and seventh affirmative defenses should be stricken from its answer, this opposition should be consolidated with its companion opposition, and the proceedings should be suspended pending disposition of this motion. After the Board's disposition

of the motion to strike, the pre-trial and trial dates should be reset in one consolidated proceeding.

Respectfully submitted this May 11, 2020,

By: /s/ Nathaniel Kramer

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Certificate of Electronic Transmission

I hereby certify that Opposer's Motion to Strike Certain Affirmative Defenses Asserted by Applicant, Motion to Suspend Pending Determination of Motion, and Motion to Consolidate Proceedings is being transmitted electronically to the Commissioner of Trademarks, Attn: Trademark Trial and Appeal Board through ESTTA pursuant to 37 C.F.R. §2.195(a), on this 11th day of May, 2020.

/s/ Nathaniel Kramer

Nathaniel Kramer

Certificate of Service

I hereby certify that Opposer's Motion to Strike Certain Affirmative Defenses Asserted by Applicant, Motion to Suspend Pending Determination of Motion, and Motion to Consolidate Proceedings is being transmitted electronically to John L. Krieger, Esq., attorney for application, at his email address of record: [jkrieger@dickinsonwright.com](mailto:jkrieger@dickinsonwright.com) on this 11th day of May, 2020.

/s/ Nathaniel Kramer

Nathaniel Kramer

