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

Proceeding	91254834
Party	Plaintiff Rivian IP Holdings, LLC
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

RIVIAN IP HOLDINGS, LLC	§	
Opposer,	§	Mark: RIV FUEL
	§	Serial App. No.: 88/630,075
vs.	§	Published February 4, 2020
	§	
Amalachukwu Ifediora	§	
Rukevwe Ojakovo	§	
Kara Snyder	§	
Applicants.	§	Opposition No.: 91254834
	§	

OPPOSER'S COMBINED MOTION TO STRIKE CERTAIN OF APPLICANTS' AFFIRMATIVE DEFENSES

AND MOTION FOR A MORE DEFINITE STATEMENT

Pursuant to Rule 12(f) of the Federal Rules of Civil Procedure and Sections 506.01 and 506.02 of the Trademark Trial and Appeals Board Manual of Procedure ("TBMP"), Opposer Rivian IP Holdings, LLC (hereinafter, "Rivian") respectfully requests the Board to strike as insufficient Applicants', Amalachukwu Ifediora, Rukevwe Ojakovo and Kara Snyder (hereinafter, "Applicants"), First Affirmative Defense from their Answer.

Pursuant to Rule 12(e) of the Federal Rules of Civil Procedure and Sections 505.01 and 505.02 of the TBMP, Opposer respectfully requests the Board to deem Paragraph 17 of Applicants' Answer as being vague and ambiguous and failing to affirm or deny Opposer's allegations in the Notice of Opposition, and to require a more definite statement of that paragraph.

Additionally, as the Board's determination of Opposer's motion will affect the scope of the discovery in this proceeding, Opposer moves that the proceeding be suspended pending

consideration of this motion and that, after the Board decides the motion, the deadlines for initial discovery conference, discovery, and trial be reset.

I. PROCEDURAL BACKGROUND

On September 25, 3019, Applicants filed an application to register the mark RIV FUEL (Serial App. No. 88/630,075)(hereinafter, "Applicants' Mark). Applicants' Mark was published for opposition in the Official Gazette on February 4, 2020. Opposer timely filed its Notice of Opposition on March 23, 2020. On May 4, 2020, Applicants filed their Answer. In their Answer, in addition to specific admissions and denials, Applicants assert, in a general and conclusory fashion, three affirmative defenses, namely, (1) failure to state a claim upon which relief can be granted; (2) no likelihood of confusion, mistake or deception between Opposer's mark and Applicants mark; and (3) an allegation "that as a result of opposer's own acts and/or omissions, that due to third parties use of the "RIV" first and dominate element of Opposer and Applicants mark is similar to other pending registered marks for similar goods of Opposer, thus the marks first dominate element is weak and entitled to a narrow scope and thus if barred remove any argument of issue and thus making Opposers opposition mute [sic]."

II. MOTION TO STRIKE APPLICANTS' FIRST AFFIRMATIVE DEFENSE

The Board may, upon motion or its own initiative, strike from any pleading an insufficient defense. Fed. R. Civ. P. 12(f); see also TBMP § 506.01. In this case, because Applicants' affirmative

defenses are legally insufficient and/or improper, it is appropriate for them to be stricken before the parties expend their time and resources, and the Board's time and resources, on unnecessary discovery, testimony, argument and briefing. Accordingly, Opposer requests that the Board strike Applicants' First Affirmative Defense.

A. Applicants' First Affirmative Defense Is Not an Affirmative Defense and Should Be Stricken.

Applicants' first affirmative defense alleges that "[t]he notice of opposition fails to state a claim upon which relief can be granted." The Board has noted that 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 defense to a properly pleaded claim." Castro v. Cartwright, Opposition No. 91188477 (T.T.A.B. Sept. 5, 2009). In this respect, failure to state a claim is more properly asserted as a motion to dismiss, rather than as an affirmative defense. Motion Picture Ass'n of Am. Inc. v. Respect Sportswear Inc., 83 U.S.P.Q.2d 1555, 1557 n.5 ("Inasmuch as applicant did not file a motion to dismiss the instant opposition on the basis of Fed. R. Civ. P. 12(b)(6), we treat this 'defense' as having been waived."). Moreover, an opposer in an opposition proceeding may use an applicant's "defense" of failure to state a claim upon which relief can be granted to test the sufficiency of the defense in advance of trial, by moving pursuant to Fed. R. Civ. P. 12(f) to strike the defense. Order of Sons of Italy in Am. v. Profumi Fratelli Nostra AG, 36 U.S.P.Q.2d 1221, 1222 (T.T.A.B. 1995). To strike an affirmative defense for failure to state a claim, the Board need only determine if the opposer has adequately pled both

its standing and a ground for opposing registration of the applicant's mark. See id. at 1223; Cartwright, Opposition No. 91188477.

Opposer has pled adequately both of these elements in its Notice of Opposition. In terms of standing, the Notice of Opposition states that Opposer owns various marks that incorporate Opposer's house mark - RIVIAN, which were in use and filed long prior to the filing date of Applicants' 1(b) intent-to-use application. These facts establish that Opposer has standing through its direct and personal stake in the outcome of the opposition. Honda Motor Co. v. Winkelmann, 90 U.S.P.Q.2d 1660, 1662 (T.T.A.B. 2009) (citing Ritchie v. Simpson, 170 F.3d 1092, 50 U.S.P.Q.2d 1023, 1097 (Fed. Cir. 1999)). The Opposition also sets forth grounds for opposing Applicants' Mark that, if proved, entitle Opposer to refusal of Applicants' application. Specifically, the Opposition alleges that Applicants' RIV FUEL Mark – "RIV", is identical to the first and dominant element of the RIVIAN Marks; that Opposer has priority over Applicants' Application; that the vehicle fueling services identified by Applicants' mark are identical or highly related to Opposer's goods and services (which include vehicles and related goods, vehicle-related retail services, and electrical battery charging goods and services); and finally, that Opposer would be harmed by registration of Applicants' Mark by creating a likelihood of confusion and dilution. See Notice of Opposition ¶¶ 14-23. Opposer has clearly asserted valid grounds to oppose under sections 2(d) and 13(a) of the Lanham Act, 15 U.S.C §§ 1052 and 1063. Accordingly, Applicants' First Affirmative Defense of failure to state a claim should be stricken. Order of Sons of Italy in Am., 36 U.S.P.Q.2d at 1223; Embarcadero Techs., Inc. v. Delphix Corp., Opposition No. 91197762 (Jan. 10, 2012) (striking applicant's affirmative defense for failure to state a claim for lack of merit in the proceeding).

III. APPLICANT'S MOTION FOR A MORE DEFINITE STATEMENT

A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. Fed. R. Civ. P. 12(e); see also TBMP § 505. In this case, Applicants' Answer is vague and ambiguous in places, specifically with respect to Paragraph 17 of the Answer, which is confusing, does not address, affirm or deny Opposer's allegation in corresponding Paragraph 17 of the Notice of Opposition, and is information necessary for Opposer to address Applicants' allegations in the Third Affirmative Defense and determine whether a 12(e) motion is required.

Specifically, Opposer's allegation is that the first and dominant element of Applicants; Mark – "RIV," is identical to the first and dominant element of the RIVIAN and POWERED BY RIVIAN Marks. See Notice of Opposition ¶ 17. The Applicants' response is unintelligible, vague, ambiguous, and does not affirm or deny the allegation. See Answer ¶ 17. In addition, the Applicants' Third Affirmative Defense alleges that by Opposer's own acts and/or omissions, the "RIV" element is "weak and entitled to a narrow scope." Opposer cannot consider whether a responsive 12(e) pleading is necessary to the Third Affirmative Defense without a complete and intelligible Answer, especially as to Paragraph 17 which relates directly to the affirmative defense. Because the Answer is vague and ambiguous, and alleges acts and/or omissions by Opposer relating to the substance of the incomplete response, it is appropriate for the Board to order a complete response to Paragraph 17 of the Notice of Opposition.

A. Applicants' Answer is Vague and Ambiguous and Applicant Should Be Required to Provide a More Definite Response.

A motion for a more definite statement under Fed. R. Civ. P. 12(e) is only appropriate where a pleading states a claim upon which relief can be granted but is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading. See 5C Charles Alan Wright et al., Federal Practice and Procedure § 1377 (3d ed. 2018). In this case, it is clear that Paragraph 17 of Applicants' Answer is vague and ambiguous as to one of the key allegations in Opposer's Notice of Opposition and fails to affirm or deny Opposer's allegation, namely whether the dominant and sole distinctive element of Applicant's Mark is identical to the dominant element of Opposer's Marks.

Opposer understands that motions for a more definite statement are to made only to enable a responsive pleading. Opposer submits that Applicant's allegation of Opposer's acts and/or omissions in its Third Affirmative Defense meets that bar, and requests that Applicants affirm or deny the allegations in Paragraph 17 of the Notice of Opposition. Specifically, the Applicants allege that by Opposer's own acts and/or omissions, the dominant element "RIV" has become weak and is afforded a narrow scope of protection. By tying the affirmative defense that "RIV" is afforded only a narrow scope of protection to the action or inaction of the Opposer, the affirmative defense is then akin to a counterclaim, giving rise to the possibility of filing a Rule 12(e) motion. See 5C Wright, Miller, Kane, Marcus, Spencer and Steinman, Federal Practice and Procedure Civil 3d §§ 1376 (Jan. 2017)("an answer that contains a counterclaim, a cross-claim, or a third-party claim is subject to a Rule 12(e) motion, at least with regard to that portion of the

pleading setting forth the affirmative claim"); see also CBS Inc. v. Mercandante, 23 USPQ2d 1784, 1787 n.8 (TTAB 1992).

IV. CONCLUSION

Opposer respectfully requests that Applicants' First Affirmative Defense should be stricken as lacking merit, insufficiently pled or immaterial. Opposer also respectfully requests that Applicants provide a more definite statement as to Paragraph 17 of its Answer on the basis that it is vague and ambiguous, and the response could give rise to a 12(e) motion based on Applicants' allegations in its Third Affirmative Defense.

Respectfully submitted,
RIVIAN IP HOLDINGS, LLC

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