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

Proceeding	91263649
Party	Plaintiff Traxxas, L.P.
Correspondence Address	GREGORY W CARR CARR LAW FIRM PLLC 6170 RESEARCH RD SUITE 111 FRISCO, TX 75033 UNITED STATES Primary Email: gcarr@carrip.com Secondary Email(s): trademarks@carrip.com 214-760-3030
Submission	Motion to Strike
Filer's Name	Gregory W. Carr
Filer's email	gcarr@carrip.com, trademarks@carrip.com
Signature	/Gregory W. Carr/
Date	02/16/2021
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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TRAXXAS, L.P.	§	
	§	Opposition No. 91263649
Opposer	§	
	§	
v.	§	
	§	
Maxxus Group GmbH & Co. KG	§	
	§	Mark: MAXXUS
Applicant	§	Application No.: 79282117
	§	

OPPOSER'S MOTION TO STRIKE

Pursuant to TBMP § 506.01, Opposer Traxxas, L.P. ("Opposer") moves the Trademark Trial and Appeal Board (the "Board") to strike the First and Second Affirmative Defenses pleaded in the Answer of Applicant Maxxus Group GmbH & Co. KG ("Applicant"). The resolution of this motion will define and potentially narrow the issues for discovery and trial in this opposition proceeding.

ARGUMENTS

I. Applicant's First Affirmative Defense challenging the Notice for failing to state a claim is not a valid affirmative defense.

Under Fed. R. Civ. P. 12(f), the Board may strike from a pleading any insufficient defenses or redundant, immaterial, impertinent, or scandalous matter. *See* TBMP § 506.01 and 506.02; *American Vitamin Products, Inc. v. Dow Brands Inc.,* 22 U.S.P.Q.2d 1313, 1314 (TTAB 1992) (insufficient affirmative defenses stricken). The Board may grant a motion to strike or, on its own initiative, strike from a pleading any insufficient defense and any matter that clearly has no bearing on the issues in the case. *Ohio State University v. Ohio University*, 51 U.S.P.Q.2d 1289, 1292 (TTAB 1999).

Applicant's First Affirmative Defense asserts that Opposer has failed to state a claim for relief. *See* Answer, Defenses, ¶ 1. It is well-established that failure to state a claim is not a cognizable affirmative defense. *Blackhorse v. Pro Football, Inc.*, 98 U.S.P.Q.2d 1633, 1637 (TTAB 2011). In *Blackhorse*, the Board held that failure to state a claim upon which relief can be granted is not an affirmative defense.

In all events, on the face of the Notice of Opposition, Opposer properly alleges a claim for likelihood of confusion. To state a claim, the facts alleged must, if proven, establish that (1) Opposer has standing to maintain the proceeding and (2) a valid ground exists for opposing the registration. *Order of Sons of Ital. in Am. v. Profumi Fratelli Nostra AG*, 36 U.S.P.Q.2d 1221, 1222 (TTAB 1995). It is well-settled that for purposes of ruling on the defense, all well-pleaded allegations in the notice must be accepted as true, and the notice of opposition must be construed in the light most favorable to Opposer. *Id.*

Under this governing standard, Opposer has pled sufficient facts to state a claim for likelihood of confusion. TBMP § 309.03(c). The allegations in the Notice of Opposition allege Opposer's prior use of its TRAXXAS, MAXX, E-MAXX, MINI MAXX, T-MAXX, X-MAXX, and XMAXX marks and prior rights in its TRAXXAS, MAXX, E-MAXX, T-MAXX, X-MAXX, and XMAXX federal registrations (Notice of Opposition, ¶¶ 1-8), and a likelihood of confusion (*Id.* at ¶ 16). These allegations, if accepted as true, establish that Opposer has a real interest in the outcome of the proceeding — that is Opposer has a particular interest in the outcome of the case beyond the general public (i.e., standing) — as well as viable grounds for opposing the above-referenced application. Therefore, on the face of the Notice of Opposition, Opposer has alleged sufficient facts to establish both standing and grounds for opposing the above-referenced application based on a likelihood of confusion.

II. Applicant's Second Affirmative Defense fails to state an applicable defense to Opposer's claims.

Applicant's Second Affirmative Defense asserts Opposer has not and will not be damaged by the registration of the opposed MAXXUS mark. *See* Answer, Defenses, ¶ 2.

There is no requirement that actual damage be pleaded or proved in order to establish standing or to prevail in an opposition proceeding. The Board has held that a "plaintiff does not have to prove claims or actual damages to establish standing." *Enbridge, Inc. v. Excelerate Energy L.P.*, 92 U.S.P.Q.2d 1537, 1543 n.10 (TTAB 2009). All that is required at the pleading stage, is that Traxxas allege facts sufficient to show a "real interest" in the proceeding, and a "reasonable basis" for its belief that it would suffer some kind of damage if the mark were registered.

As discussed above, Opposer has alleged sufficient facts to both establish standing and grounds for opposing the Application based on a likelihood of confusion.

III. Conclusion

Opposer respectfully requests that the Board strike Applicant's First and Second Affirmative Defenses so that the issues for discovery and trial are appropriately limited.

Dated: February 16, 2021

Respectfully Submitted,

/s/ Gregory W. Carr

Gregory W. Carr
Attorney for Opposer
Carr Law Firm PLLC
6170 Research Road, Suite 111
Frisco, Texas 75033
Telephone: (214) 760-3000
Email: gcarr@carrip.com

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury that **on February 16, 2021** a true copy of the foregoing OPPOSER'S MOTION TO STRIKE was served **via email** on Deborah L Shapiro at Moses & Singer LLP, 405 Lexington Avenue, The Chrysler Building, New York, NY 10174, attorney of record for Applicant, sent to the email address noted below:

trademarks@mosessinger.com

/s/ Gregory W. Carr
Gregory W. Carr
Attorney for Opposer