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

Proceeding	91263649
Party	Defendant Maxxus Group GmbH & Co. KG
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Date	03/08/2021
Attachments	Opposition to Motion to Strike.pdf(160356 bytes)

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

In the Matter of Trademark Application Serial No. 79/282,117
For the mark: MAXXUS
Published in the Official Gazette on June 16, 2020

TRAXXAS, L.P., Opposer, v. MAXXUS GROUP GMBH & CO. KG, Applicant.	Opposition No. 91263649 Mark: MAXXUS Application No.: 79282117

APPLICANT'S RESPONSE TO OPPONENT'S MOTION TO STRIKE

Applicant, Maxxus Group GmbH & Co. KG, by its attorneys, Moses & Singer LLP, hereby responds, pursuant to 37 C.F.R. §2.133(a), to Opposer, Traxxas, L.P.'s, Motion to Strike defenses stated in Applicant's Answer to Opposer's Notice of Opposition, as follows:

Opposer's Motion to Strike (the "Motion") must be denied in its entirety as it seeks to impermissibly limit Applicant's right to defend itself against Opposer's Opposition. The Motion misconstrues the law concerning affirmative defenses and pleadings under the Federal Rules of Civil Procedure as applied by the Trademark Trial and Appeal Board (the "Board"), and wholly ignores previous motion practice herein, which must be considered with respect to Opposer's continued right to pursue this proceeding.

Opposer filed its Notice of Opposition on July 8, 2020 [Dkt. 1]. Applicant filed its Motion to Amend the application at issue, Application No. 79282117 (the "Application") [Dkt. 12] on January 22, 2021, which motion is currently fully submitted and pending before the Board. Applicant filed its Answer to the Notice of Opposition [Dkt. 13] on January 26, 2021. In its Answer, Applicant asserted two affirmative defenses [Dkt. 13 at p. 3], both of which are challenged by Opposer in the instant Motion.

Applicant's First Defense is Properly Pled

Fed. R. Civ. P. 8 (b) requires that a defendant, in responding to a pleading, "state in short and plain terms its defenses to each claim asserted against it." The TBMP provides that "[a]n answer may also include a short and plain statement of any defenses, that the defendant may

have to the claim or claims asserted by the plaintiff" and that "an unpleaded defense cannot be relied upon by the defendant unless the defendant's pleading is amended". TBMP §§311.02(b)(1) and (c).

For the Board to strike a defense from a pleading, the defense must be "insufficient," meaning that the defense is improper for the proceeding or is not responsive to the allegations in the pleading responded to. *See, e.g. American Vitamin Products, Inc. v. Dow Brands Inc.*, 22 USPQ 2d 1313, 1314 (TTAB 1992) (striking defenses that did not relate to any allegations in the notice of cancellation, and defenses that were legally not available to defendant based on the grounds for cancellation raised by movant). The Board's Manual of Procedure also provides that motions to strike "are not favored" and "[a] defense will not be stricken as insufficient if the insufficiency is not clearly apparent, or if it raises factual issues that should be determined on the merits." TBMP §506.01. As Applicant's defenses are properly pled and within the scope of the allegations proffered by Opposer (and therefore sufficient to constitute a defense), they may not be stricken.

Applicant's first defense is that Opposer's Notice of Opposition fails to state a claim against the Application. [Dkt. 13, p. 3]. We submit that Opposer's Notice of Opposition fails to adequately plead that there is a likelihood of confusion between the Application and Opposer's registrations.

Under the pleading requirements stated in Federal Rule of Civil Procedure 8 as construed by the Supreme Court, vague and conclusory allegations are insufficient to state or maintain a cause of action. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-563 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 677-683 (2009). The TBMP cites those cases and requires a pleading to include enough detail to give the defendant fair notice of the basis for each claim, not a mere recitation of the elements of a claim. TBMP §309.03(a)(2); *see also Rebecca Curtin v. United Trademark Holdings, Inc.*, Opposition No. 91241083, 2018 TTAB LEXIS 524 at *3-*4 (TTAB Dec. 28, 2018) ("In particular, the plaintiff must allege well-pleaded factual matter and more than '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,' to state a claim plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged.") (citing *Twombly*, 550 U.S. at 555-557) (dismissing opposer's claims for genericism and fraud on the grounds that opposer failed to allege specific facts supporting the claims).

Here, the Notice of Opposition fails to meet this standard. The Notice of Opposition merely lists the goods for which Applicant seeks to register, and declares that there is a likelihood of confusion between Applicant's identification and Opposer's registrations. [Dkt. 1, p. 9-11, ¶¶9, 15]. This does not meet the plausibility standard of *Iqbal* and *Twombley* where, as here, Opposer's goods and Applicant's are much different. As previously detailed in Applicant's reply on its Motion to Amend, [Dkt. 16, pp. 3-4, ¶2], Opposer's goods, radio-controlled vehicles and parts, and Applicant's goods, which are only gymnastics and sporting goods and articles

(after removal of the games equipment specified in Applicant's Motion to Amend[1]) are unrelated. The Notice of Opposition fails to allege facts showing how Applicant's unrelated goods can cause a likelihood of confusion. The Notice of Opposition does not allege any facts showing that the customers for the parties' goods are the same, nor any facts showing that the goods move in the same channels of trade. In fact, the Notice of Opposition is void of any facts showing a likelihood of confusion between the entire recitation of goods in the Application, which is what Opposer objects to, and the very specific products offered by Opposer – which are just radio-controlled vehicles and parts.

Because Opposer has not adequately alleged facts showing a likelihood of confusion, Opposer does not have standing to maintain this proceeding. Accordingly, the defense of failure to state a claim is viable in accordance with the requirements set out in Fed. R. Civ. P. 8(b) and TBMP §311.02(b)(1) and (c), and should not be stricken.

Applicant's Second Defense is Properly Pled

Applicant's second defense is that Opposer will not be damaged by Applicant's registration of the proposed mark. [Dkt. 13, p. 3]. Opposer argues that Applicant's defense must be stricken because there is no requirement that "actual damage be pleaded or proved to establish standing or prevail in an opposition proceeding." [Dkt. 15, p. 3] This misconceives the purpose of this affirmative defense. This affirmative defense is directed to the merits of the case, not the content of the Notice of Opposition.

The second affirmative defense does not assert that specific damages must be pleaded. In that defense – specifically, that Opposer will not be damaged by Applicant's registration – Applicant is not stating that Opposer has not pleaded damage. Instead, Applicant is putting Opposer on notice, as is the function of an affirmative defense, that Opposer's failure to be harmed by Applicant's registration is a defense that Applicant may pursue in this Action. *See* TBMP §506.01 ("The primary purpose of pleadings, under the Federal Rules of Civil Procedure, is to give fair notice of the claims or defenses asserted."). Opposer's reliance on *Enbridge, Inc. v. Excelerate Energy L.P.* is misplaced as that decision concerned cross motions for summary judgment and the Board was considering whether an issue of fact remained concerning opposer's standing to bring a claim for likelihood of confusion, and not whether the defendant was entitled to assert a defense in its answer. 92 USPQ2d 1537, 1543 (TTAB 2009).

Conclusion

As Applicant has pled its defenses properly and in accordance with Fed. R. Civ. P. 8(b), and Applicant's pled defenses are directly responsive to Opposer's claims and are not demonstrably without merit, those defenses must remain available to Applicant as grounds for defending against Opposer's allegations. Applicant respectfully requests that Opposer's Motion to Strike be denied in its entirety.

[1] Applicant's Motion to Amend the Application [Dkt. 12] requests the removal from the Application of all of the goods specifically objected to by Opposer in its Notice of Opposition [Dkt. 1, p.11, ¶¶17, 18].

Dated: March 8, 2021

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2021, I caused a true and correct copy of the foregoing Response to Opposer's Motion to Strike to be served upon Opposer, Traxxas, L.P.'s, counsel of record at CARR LAW FIRM PLLC, by sending same via electronic mail to:

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