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ESTTA Tracking number: **ESTTA1127259**

Filing date: **04/15/2021**

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

Proceeding	91267633
Party	Plaintiff CCA Global Partners, Inc.
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Submission	Motion to Strike Pleading/Affirmative Defense
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Date	04/15/2021
Attachments	Motion to Strike Affirmative Defenses - Woodone.pdf(254914 bytes)

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

CCA GLOBAL PARTNERS, INC.	)	
	)	
Opposer,	)	
	)	Opposition No. 91267633
v.	)	Serial No. 79/267992
	)	
WOOD ONE CO., LTD.,	)	
	)	
Applicant.	)	

OPPOSER'S MOTION TO STRIKE APPLICANT'S AFFIRMATIVE DEFENSES

Opposer CCA Global Partners, Inc. ("Opposer") moves to strike the affirmative defenses set forth in Applicant Wood One Co., Ltd.'s ("Applicant") Answer to Opposer's Notice of Opposition in the above-referenced proceeding, on the grounds that they are insufficient, redundant, irrelevant, and/or immaterial under Fed. R. Civ. P. 12(f) and Sections 311.02(b) and 506 of the Trademark Trial and Appeal Board Manual of Procedure.

I. INTRODUCTION

On February 9, 2021, Opposer timely filed a Notice of Opposition against Application Serial No. 79/267992 for the trademark WOODONE and design (the "Opposed Application"), which was published in the Official Gazette on January 12, 2021. Applicant filed its Answer on March 25, 2021, asserting three affirmative defenses, one of which is a "catch-all" reservation of rights to assert "all further Affirmative Defenses that are or may become available." Because this motion is filed within 21 days after being served the Answer, this motion has been timely filed with the Board. TBMP § 506.

As discussed below, each of Applicant's purported affirmative defenses should be stricken, as they amount to nothing more than a distraction from the merits of this case. Given the insufficiency and immateriality of the affirmative defenses pled in Applicant's Answer to the

Notice of Opposition, Opposer hereby moves to strike all of the asserted affirmative defenses, based on the following reasons and authority.

II. ARGUMENT

The Board may, upon motion or upon its own initiative, "order stricken from a pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f); Trademark Rule 2.116(a), 37 C.F.R. § 2.116(a); TBMP § 506 (June 2019). An affirmative defense assumes the allegations in the complaint to be true; but nevertheless, constitutes a defense to those allegations. *Blackhorse v. Pro Football, Inc.*, 98 USPQ2d 1633, 1637 (TTAB 2011). "An affirmative defense does not negate the elements of the cause of action; it is an explanation that bars the claim." *Id.*

The Board may grant a motion to strike, or on its initiative, strike from a pleading any insufficient defense and any matter that clearly has no bearing upon the issues in the case. *See, e.g., Ohio State Univ. v. Ohio Univ.*, 51 USPQ2d 1289, 1293 (TTAB 1999). Motions to strike should be granted when doing so will "streamline the ultimate resolution of the action." 5B Charles Alan Wright & Arthur Miller, Federal Practice and Procedure § 1380 (3d ed. 2004). Indeed, motions to strike may be granted to "remove unnecessary clutter from the case," and "serve to expedite, not delay" the proceeding. *See Heller Fin. Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1294 (7th Cir. 1989).

Because the affirmative defenses pled in Applicant's Answer are not true affirmative defenses and/or bald assertions which lack merit, the Board should grant Opposer's motion to strike these affirmative defenses to streamline this Opposition proceeding, avoid needless discovery, and expedite the ultimate resolution of this proceeding without unnecessarily wasting further judicial resources.

A. The Board Should Strike Applicant's First and Third Purported Affirmative Defenses Because They Are Not True Affirmative Defenses.

i. Applicant's First Affirmative Defense – Failure to State a Claim

Applicant's first affirmative defense, that "[t]he Notice of Opposition should be dismissed for "failure to state a claim upon which relief can be granted," is not a true 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. *See Hornblower & Weeks Inc. v. Hornblower & Weeks Inc.*, 60 USPQ2d 1733, 1738 n.7 (TTAB 2001). Moreover, Applicant's bald assertion of this defense does not identify any basis for its allegation that the complaint fails to state a claim upon which relief may be granted, and therefore, it is insufficiently pleaded.

Nevertheless, because Applicant is permitted under Fed. R. Civ. P. 12(b)(6) to assert such a defense, Opposer may test the sufficiency of its pleading prior to trial by moving under Fed. R. Civ. P. 12(f) to strike this defense from the answer. *See Order of Sons of It. in Am. v. Profumi Fratelli Nostra AG,* 36 USPQ2d 1221, 1222 (TTAB 1995). In order to withstand Applicant's assertion that Opposer has failed to state legally sufficient grounds for sustaining the opposition, Opposer need only allege such facts that would, if proved, establish that (1) Opposer has standing to maintain the proceeding, and (2) a valid ground exists for opposing Applicant's marks. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000).

On the question of standing, Opposer need only demonstrate that it has a "real interest," i.e., a personal stake, in the outcome of the proceeding and a reasonable basis for its belief of damage. *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999). A belief in likely damage can be shown by establishing a direct commercial interest. *See Int'l Order of Job's Daughters v. Lindeburg & Co.*, 727 F.2d 1087, 220 USPQ 1017, 1019 (Fed. Cir. 1984). The purpose of the standing requirement is to avoid litigation where there is no real controversy

between the parties, i.e., to weed out intermeddlers. *See Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982). In this case, Opposer has met its burden.

Here, Opposer has pled ownership of the following ten federal registrations, as well as common law trademark rights in its family of ONE___ Marks (1 TTABVUE ¶¶ 7-11).

Mark/Owner	**Reg. No.**	**Goods/Services**
CARPET ONE	1,422,989	(Int'l Class: 27) Carpeting (Int'l Class: 42) Carpet dealership services
CARPET ONE FLOOR & HOME and Design 	3,321,489	(Int'l Class: 200) Indicating membership in an association of flooring and home decor retailers
CARPET ONE FLOOR & HOME and Design 	3,321,491	(Int'l Class: 35) retail store services, catalog services, mail order catalog services and retail services via a global computer network, all featuring rugs, carpeting, tile, flooring, and other floor coverings, and home decore
CARPET ONE FLOOR & HOME	3,472,182	(Int'l Class: 200) Indicating membership in an association of flooring and home decor retailers
CARPET ONE FLOOR & HOME	3,566,786	(Int'l Class: 35) Retail store services, catalog ordering services, mail order catalog services and on-line retail store services, all featuring rugs, carpeting, tile, flooring, and other floor coverings, and home décor
CARPET ONE FLOOR & HOME and Design 	4,115,805	(Int'l Class: 35) Retail store services and wholesale distributorships featuring rugs, carpeting, tile, flooring, other floor coverings, and home decor
FLOORING ONE	4,767,562	(Int'l Class: 35) Retail store, and on-line retail store services featuring carpeting, floor covers and accessories

Mark/Owner	Reg. No.	Goods/Services
LIGHTING ONE	3,438,408	(Int'l Class: 11) Electric lighting fixtures and accessories, namely, mirrors, ceiling fixtures, wall fixtures, lamps, electric track lighting, electric lanterns, halogen lamps, chandeliers, electric light bulbs, fluorescent lighting tubes (Int'l Class: 35) Retail store and wholesale distributorships in the fields of lighting fixtures and related accessories therefor
LIGHTING ONE	3,610,531	(Int'l Class: 35) On-line retail and wholesale services in the fields of lighting fixtures and related accessories therefor
L1 LIGHTING ONE	5,715,618	(Int' Class: 35) On-line wholesale and retail store services featuring lighting fixtures and related accessories therefor; Wholesale and retail store services featuring lighting fixtures and related accessories therefor

Opposer's registrations and common law rights are sufficient to demonstrate its direct commercial interest in this proceeding, and therefore, Opposer's standing. *See Cunningham*, 55 USPQ2d at 1844; *Ritchie*, 50 USPQ2d at 1025. Opposer furthermore has properly pled legally sufficient grounds for opposition based on its claims of priority and likelihood of confusion under Section 2(d) of the Trademark Act.

Accordingly, Applicant's bald defense that Opposer has failed to state a claim for which relief may be granted is not only lacking in merit, but it is insufficiently pleaded and not even a true affirmative defense, and thus should be stricken.

ii. Applicant's Third Affirmative Defense – "Catch-All" Reservation

Applicant has pled a "catch-all" reservation of rights, situated under the "Affirmative Defenses" heading, which states in pertinent part: "Applicant reserves all further Affirmative Defenses that are or may become available."

The Board has held that such a statement is "not an affirmative defense but merely an advisory statement that Applicant may amend its pleading at some future date." *See, e.g., Meeshaa Inc. v. Anaya Gems*, Opp. No. 91219631, 2017 WL 3670301, at *1 n.3 (TTAB 2017). The Board should strike this reservation of rights as insufficient and immaterial as it does not constitute proper matter for a pleading and does not provide Opposer with fair notice of any such affirmative defense that is or may become available. *See The Solomon-Page Grp. LLC & The Clinical Res. Network LLC*, Opp. No. 91195692, 2012 WL 1267963, at *5 (TTAB Mar. 12, 2012) ("A defendant cannot reserve unidentified defenses since it does not provide a plaintiff fair notice of such defenses."); *see also* TBMP § 311.02(c) (*citing H.D. Lee Co. v. Maidenform Inc.*, 87 USPQ2d 1715, 1720 (TTAB 2008) ("the reason for requiring an affirmative defense to be pleaded is to give the plaintiff notice of the defense and an opportunity to respond.")).

Moreover, with the exception of limited circumstances under Fed. R. Civ. P. 12(b) and 12(h)(2), a defendant may not rely on an unpleaded defense unless and until the defendant's pleading is amended to assert the matter. *See* TBMP § 314; Fed. R. Civ. P. 15. Thus, Applicant may not rely on unidentified defenses in an attempt to circumvent the proper procedure of seeking leave to amend its Answer to include those defenses. If Applicant becomes aware of facts that it believes could support an affirmative defense, then Applicant should timely seek leave to amend its Answer to assert those new claims or defenses.

As such, the Board should strike Applicant's "catch-all" reservation of right to assert additional, unidentified affirmative defenses.

B. The Board Should Strike Applicant's Second Affirmative Defense for Lack of Requisite Specificity.

Applicant's second affirmative defense recites the common equitable defense that "Opposer's Opposition is barred by principles of equity and fairness, including estoppel and/or laches." But such a threadbare iteration of these abstract principles of equity and/or the actual named defenses of estoppel and/or laches fails to provide sufficient or fair notice of Applicant's grounds for any equitable defense. Moreover, the equitable defenses of estoppel and laches are generally unavailable in opposition proceedings.

Affirmative defenses, like claims in a notice of opposition, must be supported by enough factual background and detail to fairly provide notice of the basis for the defenses. *See IdeasOne Inc. v. Nationwide Better Health Inc*., 89 USPQ2d 1952, 1953 (TTAB 2009); *Ohio State Univ.*, 51 USPQ2d at 1292 (noting that the primary purpose of pleadings "is to give fair notice of the claims or defenses asserted"); *see also* TBMP § 311.02(b). A defendant must state its defenses in "short and plain terms," stating any elements of the defense "simply, concisely, and directly" to provide fair notice of the defendant's basis for such defense. Fed R. Civ. P. 8(b); TBMP § 311.02(b). Bald and conclusory allegations are insufficient under the Federal Rules and the TBMP, as they neither provide fair notice nor set forth sufficient facts that, if proven, support the defendant's claim. TBMP § 311.02(b) (citing *McDonnell Douglas Corp. v. Nat'l Data Corp*., 228 USPQ 45, 47 (TTAB 1985)).

The Board routinely strikes bare and conclusory assertions of estoppel and laches in defense of opposition claims as insufficient and inadequately pleaded. *See e.g., Pure & Simple Concepts Inc. v. Gryphon Grp., LLC*, Opposition No. 91238034, 2019 WL 975116, at *4 (TTAB

Feb. 26, 2019) (non-precedential) (striking affirmative defenses of estoppel and laches because they consist of "bald, conclusory allegations insufficient to provide opposer with adequate notice of the bases for the defenses"); *Meeshaa Inc.*, Opposition No. 91219631, 2017 WL 3670301, at n.3 (striking affirmative defenses, upon *sua sponte* review, of laches and estoppel because Applicant failed to assert any facts to support the defenses) (citing *Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1538 (TTAB 2007)); *see also RLP Ventures, LLC v. NLDA Assocs. Inc.,* Cancellation No. 92066135, 2018 WL 5920950, at *4 (TTAB Nov. 2, 2018) (non-precedential) (striking affirmative defenses of laches and estoppel as insufficient because respondent did "no more than list these defenses by name, unaccompanied by any factual allegations upon which the defenses might plausibly be based"); *Sw. Specialty Food Inc. v. Crazy Uncle Jester's Inferno World, LLC*, Cancellation No. 92060809, 2016 WL 3771779, at *3 (TTAB June 24, 2016) (non-precedential) (striking affirmative defenses of laches and estoppel as insufficiently pleaded because they "consist of bald allegations" without "sufficient facts beyond a tender of naked assertions devoid of further factual enhancement" to support the defenses).

Moreover, it is well settled that when the right to register a mark is at issue, as is the case here, the affirmative defenses of estoppel and laches do not begin to run until the application is published for opposition. *See Nat'l Cable Television Assoc., Inc. v. Am. Cinema Editors, Inc.*, 937 F.2d 1572, 19 USPQ2d 1424, 1431-32 (Fed. Cir. 1991); *Barbara's Bakery, Inc. v. Barbara Landesman*, 82 USPQ2d 1283, 1292 n.14 (TTAB 2007) ("…to the extent that applicant is attempting to assert the defenses of laches, acquiescence or estoppel, such defenses generally are not available in an opposition proceeding...."); *DAK Indus., Inc. v. Daiichi Kosho Co., Ltd.*, 25 USPQ2d 1622 (TTAB 1992). In this case, the Opposed Application was published for opposition on January 12, 2021. Opposer timely filed its Notice of Opposition against the Opposed

Application after publication of the mark, but before the publication period had expired. Thus, the defenses of estoppel and/or laches are not available to Applicant in the present case.

Given that these defenses are generally not available in cases such as the one at hand, and because Applicant merely recites its equitable defenses of estoppel and laches by name, without alleging their required elements or any factual support, the Board should strike Applicant's second affirmative defense.

III. CONCLUSION

In the interest of efficiency, and for the reasons and authority provided above, Opposer respectfully requests that the Board strike all of Applicant's affirmative defenses from the Answer filed in the above-captioned proceeding.

Dated: April 15, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via electronic mail, e-mail, on April 15, 2021, to:

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