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

Proceeding no.	91269584
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Date	09/27/2022
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

REPUBLIC BRANDS L.P.

Opposer,

v.

KRETEK INTERNATIONAL, INC.
Applicant.

Opposition No. 91269584

Mark: VENTURA CIGAR

Serial No.: 88/499,702

**OPPOSER’S REPLY IN SUPPORT OF ITS MOTION TO STRIKE
APPLICANT’S SECOND AMENDED AFFIRMATIVE DEFENSES**

An affirmative defense assumes the allegations in the complaint to be true but nevertheless constitutes a defense to the allegations. An affirmative defense does not negate the elements of the cause of action; it is an explanation that bars the claim. *Blackhorse v. Pro Football, Inc.*, 2011 TTAB LEXIS 142, *13-14, (TTAB May 5, 2011), citing *Gwin v. Curry*, 161 F.R.D. 70, 71 (N.D. Ill. 1995). In its Response to Opposer’s Motion, Applicant fails to explain how any of its proffered affirmative defenses meet this standard. Further, while Applicant repeatedly invokes notice pleading standards, its allegations fall far short of even the most lenient interpretation of the requirements of *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)) and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Indeed, Applicant fails to make any affirmative factual allegations whatsoever, offering nothing more than a few conclusory statements. More fundamentally, Applicant’s purported affirmative defenses are fatally deficient because they are improper regardless of how they are pleaded. Each is either unavailable as a matter of law, or is redundant or immaterial such that it only serves to clutter the proceedings and waste the parties’ and the Board’s resources, and should accordingly be stricken.

First Affirmative Defense

Applicant's First Affirmative Defense alleges that Opposer does not have continuous use of its VENTURA WHITES mark. Applicant admits that it is not attempting to—indeed, it cannot—pursue a claim of abandonment disguised as an affirmative defense and expressly concedes that continuous use is not relevant to priority. Resp. at 4. Instead, Applicant appears to claim that its First Affirmative Defense is an amplification or explanation of its denial that a likelihood of confusion exists between its and Opposer's marks. *Id.* However, Applicant fails to explain how an alleged lack of continuous use is relevant to a likelihood of confusion analysis and offers no precedent supporting this proposition. If, as Applicant concedes, it is not contesting the validity and priority of Opposer's rights in its marks, this purported affirmative defense does not and cannot “amplify” any position relevant to the proceeding.

Further, even if an alleged lack of continuous use were somehow relevant to and amplifying of a likelihood of confusion analysis, Applicant cannot salvage the First Affirmative Defense by simply invoking the notice-pleading standard. The federal standard of notice pleading, followed by the Board, includes the requirement that the allegations “state a claim to relief that is plausible on its face,” and this plausibility standard is met when “the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Lewis Silkin LLP v. Firebrand LLC*, 2018 TTAB LEXIS 436, *3, 129 U.S.P.Q.2D (BNA) 1015, 1016 (TTAB Dec. 21, 2018) (citing *Iqbal*, 556 U.S. at 678, and *Twombly*, 550 U.S. at 570). It is met not by making conclusory statements but by pleading specific facts that, if established at trial, support Applicant's legal position. Here, Applicant offers only a single conclusory statement: “Opposer does not have continuous use.”

Applicant’s explanation that “[t]hrough its First Affirmative Defense, Applicant has provided notice to Opposer that Applicant may also attack allegations Opposer made in its Notice of Opposition, for lack of evidence supporting Opposer’s Notice of Opposition allegations,” Resp. at 4, shows that the First Affirmative Defense is really nothing more than a redundant statement of Applicant’s intent to contest Opposer’s allegations on the merits. It alleges no specific facts from which any reasonable inference can be drawn, much less facts that if proven, and assuming “the allegations in the complaint to be true, ... nevertheless [constitute] a defense to the allegations in the complaint.” *Blackhorse*, 2011 TTAB LEXIS 142, *13-14.

This defense, therefore, is immaterial under Federal Rule of Civil Procedure 12(f) and deficient as a matter of law under federal pleading standards, and should be stricken.

Second Affirmative Defense

Applicant’s Second Affirmative Defense is unequivocally unavailable as a matter of law in the present proceeding. The defense states, “Opposer’s claims are barred in whole or in part by estoppel, acquiescence, and/or waiver, based on Applicant’s use of the marks VENTURA CIGAR and V VENTURA CIGAR VENTURACIGAR.COM and Design.” Answer at 3. While Opposer did cite a nonprecedential Board order in its Motion for purposes of illustration, the principle that equitable defenses are generally unavailable as a matter of law in trademark opposition proceedings is so uncontroversial as to be black-letter law. *See, e.g., Brooklyn Brewery Corp. v. Brooklyn Brew Shop, LLC*, 17 F.4th 129, 2021 USPQ2d 1069, at *8 (Fed. Cir. 2021) (“Laches and acquiescence are generally not available as defenses in an opposition proceeding, given that the clock for laches begins to run from the date the application is published for opposition”); *National Cable Television Association v. American Cinema Editors Inc.*, 937 F.2d 1572, 19 USPQ2d 1424, 1432 (Fed. Cir. 1991); *Coach House Restaurant Inc. v. Coach and Six Restaurants Inc.*, 934 F.2d

1551, 19 USPQ2d 1401, 1404-05 (11th Cir. 1991); *Bausch & Lomb Inc. v. Karl Storz GmbH & Co. KG*, 87 USPQ2d 1526, 1531 (TTAB 2008) (conduct which occurs prior to publication of application for opposition generally cannot support a finding of equitable estoppel); *Barbara's Bakery Inc. v. Landesman*, 82 USPQ2d 1283, 1292 n.14 (TTAB 2007) (defenses of laches, acquiescence or estoppel generally not available in opposition proceeding); *see also* TBMP 311.02(b)(1). *See also Ohio State Univ. v. Ohio Univ.*, 51 U.S.P.Q.2D (BNA) 1289, 1295 (TTAB Mar. 18, 1999) (“[L]aches can only begin from the first time when opposer could object to registration; *i.e.* the date when an application is published for opposition”).

Applicant claims that its Second Affirmative defense of “estoppel, acquiescence, and/or waiver” meaningfully differs from the “laches and estoppel” defense at issue in the *Kelman v. Hardin* order originally cited by Opposer and in each of the cases cited above. However, Applicant fails to explain how this could be the case, as each of these legal principles – whatever the terminology used to describe them – involves a relinquishment of rights by inaction or delay. Here, Opposer cannot have delayed in bringing the instant Opposition, *see Brooklyn Brewery, et al., supra*, because notice of Opposer’s opportunity to bring an Opposition (and therefore the clock for laches, waiver and estoppel) runs from the time of publication of the Subject Application, and no time before. *Id.* Opposer is thus timely pursuing its right to oppose Applicant’s attempted registration of the Subject Mark, and Applicant’s previous use of the mark is irrelevant.

To the extent that Applicant implies that it would be theoretically possible to plead some set of facts that could make laches, waiver or estoppel lie despite a timely filed opposition, due to conduct occurring between publication of an application and the filing of the opposition, Applicant has made no such allegations here. Applicant’s Second Affirmative Defense therefore fails as a matter of law and should be stricken.

Third Affirmative Defense

In support of Applicant's Third Affirmative Defense, which merely asserts "[a]bsence of likelihood of confusion," Answer at 3, Applicant states that the defense "explain[s] Applicant's denial of Opposer's allegations," Resp. at 6. However, Opposer's relevant allegation is precisely a "likelihood of confusion," and this five-word affirmative defense merely asserts the "[a]bsence" of the same. This is merely a reiteration, not an "explanation," and surely cannot be said to meet the federal notice pleading standards set forth in *Lewis Silkin LLP, Iqbal* and *Twombly*, given that Applicant alleges no facts whatsoever.

Moreover, the *Leon Shaffer Golnick Adver., Inc.* quotation provided by Applicant is wholly misleading in that Applicant removes the quotations "central issue in the instant case" and "pertinent to [Applicant's] rights to register" entirely from context. Resp. at 7 (quoting 177 U.S.P.Q. 401, 402 (TTAB 1973)). *Leon Shaffer* was a cancellation action based on priority and likelihood of confusion, in which no affirmative defenses were involved. The respondent moved to strike the petitioner's allegation relating to the respondent's intent in adopting the mark, arguing that "this allegation relates to a question of unfair competition and thus has no material bearing on respondent's right to register or an actual or potential damage to petitioner." *Id.* The Board declined to strike the allegation on the basis that it related to likelihood of confusion, which was indeed "a central issue in the instant case." *Id.* This context is wholly different from the rote denial of Opposer's likelihood of confusion allegations presented in Applicant's purported Third Affirmative Defense.

Applicant's Third Affirmative Defense is entirely redundant to its denial of Opposer's allegations and will merely serve to clutter the proceedings. It should therefore be stricken.

Fourth Affirmative Defense

Applicant's Fourth Affirmative Defense, alleging that Applicant "lacks sufficient knowledge or information to ascertain whether as yet unstated additional affirmative defenses are available," Answer at 3, is also redundant. Rather than providing any potential defense to Opposer's allegations (taken as true), or providing any explanation barring Opposer's claims, *Blackhorse*, 2011 TTAB LEXIS 142, *13-14, this purported affirmative defense merely points to the present *absence* of such defenses or explanations. Applicant's right to timely raise additional defenses is set forth by the Federal Rules of Civil Procedure and the Board, and Applicant cannot use a purported defense to extend any of these rights. Applicant argues only that this affirmative defense "does not prejudice Opposer in any way," Resp. at 7. That is true to the extent that the purported affirmative defense is merely a reiteration of Applicant's existing rights under the Federal Rules. However, that does not cure the fact that it is not a proper affirmative defense and should be therefore be stricken.

CONCLUSION

In the interests of clarity and economy, and for all of the reasons set forth above, Opposer respectfully submits that each of Applicant's Second Amended Affirmative Defenses should be stricken.

WHEREFORE, Republic Brands requests that the Board enter an Order consistent with this Response, striking Applicant's Second Amended Affirmative Defenses from its Answer.

Respectfully submitted,

Dated: September 27, 2022

By: /s/ Antony J. McShane

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing REPLY IN SUPPORT OF OPPOSER'S MOTION TO STRIKE APPLICANT'S SECOND AMENDED AFFIRMATIVE DEFENSES to be served upon:

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via email this September 27, 2022.

/s/Antony J. McShane

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