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

Proceeding no.	91282214
Party	Defendant Obshchestvo s ogranichennoy otvetstvennostyu "Beverages from Chernogo-lovka-Aqualife"
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Date	05/21/2023
Attachments	Fun Wine v Fun_Ola_ Brief in Opposition to Opposers Motion to Strike affirmative defenses .pdf(169019 bytes)

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

FUN WINE (USA) LLC, Opposer, v. Obshchestvo s ogranichennoy otvetstvennostyu "Beverages from Chernogolovka-Aqualife," Applicant.	)	Opposition No. 91282214 Serial No. 90-876,773 Mark: fun+ola Published in the Official Gazette on 6/14/2022

APPLICANT'S OPPOSITION TO OPPOSER'S MOTION TO STRIKE DEFENSES AND AMPLIFICATIONS

Obshchestvo s ogranichennoy otvetstvennostyu "Beverages from Chernogolovka-Aqualife" ("Applicant"), by and through the undersigned counsel, opposes FUN WINE (USA) LLC's ("Opposer") Motion to Strike Affirmative Defenses ("Motion to Strike" or "Motion").

Opposer's Motion to Strike all the "affirmative defenses" is without merit. It is premature and inappropriate at this stage in the proceedings. Discovery has not commenced. There are no facts in the record to serve as a basis to support or reject Applicant's defenses and amplifications.

Instead, after the parties conduct the appropriate discovery, it will become clear that Applicant's defenses are firmly supported by the law and the facts.

The issues in this case may be complex and require fact-intensive inquiries that have not yet taken place. Under these circumstances, it is premature for this Board to decide on the merits of Applicant's defenses. The Motion should be denied.

LEGAL STANDARD FOR MOTIONS TO STRIKE AFFIRMATIVE DEFENSES

In general, motions to strike affirmative defenses are not favored, and matter usually will not be stricken unless it clearly has no bearing upon the issues in the case. TBMP § 506.01, citing *Ohio State University v. Ohio University*, 51 USPQ2d 1289, 1292 (TTAB 1999). 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, *citing* 5C C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE CIVIL § 1381 (3d ed. April 2021 Update).

The primary function of an Answer is to give fair notice of the defenses asserted. TBMP 311.02; *McDonnell Douglas Corp. v. National Data Corp*., 228 USPQ 45, 47 (TTAB 1985). Therefore, even objectionable pleadings may not be stricken where their inclusion will not prejudice the adverse party, but will provide fuller notice of the basis for a claim or defense. TBMP § 506.01; *Ohio State University*, 51 USPQ2d at 1292, citing *Harsco Corp. v. Electrical Sciences Inc.*, 9 USPQ2d 1570, 1571 (TTAB 1988)("Even if the allegations are redundant or immaterial, they need not be stricken if their presence in the pleading cannot prejudice the adverse party.").

As explained below, Applicant's defenses are adequately pleaded, non- objectionable, and provide fuller notice of Applicant's defenses. Further, even if the Board deems any given defense to be redundant or immaterial, its inclusion in the Answer will not result in any prejudice to Opposer. As such, Opposer's Motion to Strike Affirmative Defenses should be denied.

ARGUMENT

In **Paragraph 15**, Applicant states Opposer's Notice of Opposition does not set forth a claim upon which the relief sought may be granted. Applicant's mark  ("Applicant's Mark") identifies "Mineral and aerated waters and other nonalcoholic beverages, namely, water-based beverages also containing herbal extracts or flavored syrup; fruit beverages and fruit juices; syrups for making non-alcoholic beverages" in International Class 32. Opposer's pleaded marks are for the formative FUN (FRIENDS FUN WINE, FUN WINE, and FUN) for wine in a different class. The parties' respective marks **FUN** for wine and  for nonalcoholic beverages such as soda and soft drinks are so dissimilar on their face, so no plausible claim of likelihood of confusion can be made. See *Ava Enterprises Inc. v. P.A.C. Trading Group, Inc.*, 86 U.S.P.Q.2d 1659, 2008 WL 754201 (T.T.A.B. 2008) (Motion to dismiss on a judgment on the pleadings was granted where opposer alleged that the applicant's mark PAC BOOSTER THE PERFECT SOUND for audio and video equipment was confusingly similar to opposer's mark BOSS AUDIO SYSTEMS. The T.T.A.B. rejected the argument that BOOSTER was confusingly similar to opposer's BOSS. Therefore, if the Board is not going to dismiss the Notice of Opposition on its own initiative, the defense stated in Paragraph 15 should stand and should not be stricken.

In **Paragraph 16**, Applicant avers that no likelihood of confusion exists "because, among other reasons, the goods identified in the Application are different, distinct, and unrelated to the goods identified and/or allegedly sold by Opposer in connection with the asserted mark." This directly relates to the evidentiary factors set out in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357 (CCPA 1973) ("Du Pont Factors"). The Du Pont Factors include, but are not limited

to, the similarity of the marks, relatedness of the goods and/or services, the channels of trade and classes of purchasers for the goods and/or services. The TBMP expressly provides that allegations amplifying the denials of Answer are permitted. TBMP 311.02(d). This paragraph amplifies denials as well as places Opposer on fuller notice of the defenses asserted. Thus, it should not be stricken. By contrast, Opposer's Motion contains just a conclusory statement and provides no case law in support. Therefore, this paragraph should stand, not stricken.

In **Paragraph 17**, Applicant states Opposer should be denied all relief because it is before the Trademark Trial and Appeal Board with unclean hands. The Notice of Opposition does not allege any facts that the PTO has cited Applicant's Mark against any of Opposer's pending applications. Given the differences in the respective parties' marks and goods and other factors including the number of oppositions and requests for an extension of time filed by Opposer against third parties, there may be sufficient facts to develop a theory that Opposer brought this case solely for an improper purpose (e.g., harassment). It is premature to strike the defense at this stage.

Opposer erroneously argues that a false/fraudulent statement must be made to assert the doctrine unclean hands. This is simply not true. A defense of unclean hands is adequately pleaded through specific allegations of misconduct by a plaintiff that, if proved, would prevent the plaintiff from prevailing on its claim. See, e.g., *Midwest Plastic Fabricators*, 5 USPQ2d 1067, 1069 (TTAB 1980). Misconduct need not always be fraudulent in nature and can in fact be absent of any fraud. See *Hornblower & Weeks, Inc. v. Hornblower and Weeks, Inc.*, 60 USPQ2d 1733, 1738 (TTAB 2001). Thus, the Motion to strike this defense should be denied.

In **Paragraph 18**, Applicant states Opposer should be denied all relief on the grounds of laches, estoppel, unreasonable delay, and acquiescence. In short, this defense alleges that Opposer's unreasonable delay and/or failure to enforce or otherwise police its alleged rights induced Applicant into believing that Applicant's Mark would be free to proceed to registration without opposition or objection. It is premature to strike the defense at this stage, because this defense raises factual issues that should be explored and developed in the discovery stage of proceedings. Thus, this paragraph should not be stricken, and the Motion should be denied.

In **Paragraph 19**, Applicant states that Opposer lacks standing because the allegations in support of Opposer's belief that it will suffer damage do not have a reasonable basis in fact. To have standing (entitlement to a statutory cause of action), Opposer must show: (1) a real interest in the proceeding, and (2) a reasonable basis for its belief in damage by registration of Applicant's Mark. See TBMP 309.03(b); *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014). Entitlement to the statutory cause of action invoked (e.g., opposition or cancellation) is a requirement in every inter partes case. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, at *3 (Fed. Cir. 2020), cert. denied, 142 S.Ct. 82 (2021) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26, 109 USPQ2d 2061 (2014)). A plaintiff may oppose registration of a mark when doing so is within the zone of interests protected by the statute and she has a reasonable belief in damage that would be proximately caused by registration of the mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at * 6-7 (Fed. Cir. 2020), cert. denied, 141 S.Ct. 2671 (2021).

Here, the parties' respective marks **FUN** for wine and  for soda and soft drinks are so dissimilar on their face, whereas Opposer has pleaded no specific facts that it has a reasonable belief in damage that would be proximately caused by registration of Applicant's Mark. Opposer does not plead any facts that registration of a different mark in a different industry is within its zone of interests. In any event, it is premature to strike the defense at this stage. Thus, this Motion should be denied.

CONCLUSION

Based on the foregoing, Applicant respectfully requests the Board to deny the Motion to Strike in its entirety.

Respectfully submitted,

May 21, 2023

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing APPLICANT'S OPPOSITION TO OPPOSER'S MOTION TO STRIKE DEFENSES AND AMPLIFICATIONS was served on this 21th day of May, 2023 via email and addressed to:

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