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

Proceeding no.	91284323
Party	Plaintiff Welspun India Limited
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

WELSPUN INDIA LIMITED Opposer, v. COCONA, INC., Applicant.	Consolidated Opposition No. 91284323 (Parent) Serial No. 97364941 Mark: ECO-DRI Filed April 15, 2022 Serial No. 97364950 Mark: Eco-Dri Issued: April 15, 2022

OPPOSER'S MOTION TO STRIKE APPLICANT'S
AFFIRMATIVE DEFENSES IN OPPOSITION NO. 91284323

Applicant Cocona, Inc. wastes Board resources by reasserting the same affirmative defenses that the Board already struck in the consolidated case, *Welspun India Limited v. Cocona, Inc.*, Cancellation No. 92076704 (TTAB 2021). Specifically, Applicant copies (in all material respects) eleven of the fifteen affirmative defenses that it raised previously. Adding insult to injury, Applicant changes *nothing substantive* about these affirmative defenses, despite the Board striking seven of those defenses with prejudice in its September 27, 2022 Order (Cancellation No. 92076704). Moreover, Applicant disregards the Board's clear instructions to cure pleading deficiencies in three of the remaining defenses.

Accordingly, Opposer Welspun India Limited submits this motion to strike eleven of Applicant's affirmative defenses as insufficient, redundant, immaterial, improper, and/or unavailable under Fed. R. Civ. P. 12(f), and requests that the Board strike each with prejudice in light of the Board's September 27, 2022 Order (Cancellation No. 92076704).

RELEVANT FACTUAL BACKGROUND

Opposer is a leading supplier to many of the top retailers and has continuously used its ECO DRY mark in commerce for towels since at least as early as August 2013 (*see* ¶¶3-4 of Notice of Opposition).

On April 15, 2022, Applicant filed intent-to-use Application Serial No. 97364941 for ECO-DRI for "beds for household pets" in Class 20; and "carpets, rugs, mats and matting for covering existing floors" in Class 27.

On April 15, 2022, Applicant filed intent-to-use Application Serial No. 97364950 for 

for "beds for household pets" in Class 20; and "carpets, rugs, mats and matting for covering existing floors" in Class 27.

On April 5, 2023, Opposer filed a Consolidated Notice of Opposition against Application Serial No. 97364941 for ECO-DRI and Application Serial No. 97364950 for 

alleging priority and likelihood of confusion on the basis of its prior common law rights in the mark ECO DRY in connection with towels. 1 TTABVUE.

On October 26, 2023, Applicant filed its Answer and the following "affirmative defenses" 13 TTABVUE:

Affirmative Defenses

1. The Opposition, and each and every count, allegation, and prayer for relief set forth therein, fails to state a claim upon which relief can be granted.

2. Welspun's claims are barred and/or limited by one or more of the equitable doctrines of laches, equitable estoppel, waiver, and unclean hands.

3. Welspun's claims, including its assertion of common law rights, are barred by its prior admissions to the United States Patent and Trademark Office, including its express statement that it was not using and did not intend to use the ECO DRY mark until August 6, 2020.

4. Opposer Welspun's claims, including its assertion of common law rights based on historical prior use, are barred by its prior admissions to the United States Patent and Trademark Office, including its express statement in an application filed on August 6, 2020 that it only had a bona fide intention to use the ECO DRY mark in Class 24 in the future.

5. Opposer Welspun does not have common law rights in the ECO DRY mark sufficient to oppose Application Serial No. 97364941 and Application Serial No. 97364950 because Opposer Welspun's ECO DRY mark is generic and/or descriptive.

6. Welspun does not have common law rights in the ECO DRY mark sufficient to oppose Application Serial No. 97364941 and Application Serial No. 97364950 because Opposer Welspun cannot substantiate its claimed prior use of the ECO DRY mark.

7. The Opposition fails because Welspun does not meet all statutory requirements to oppose a trademark registration, including those contained or referenced in 15 U.S.C. § 1064.

8. The Opposition fails because Cocona's common law trademark rights and/or prior trademark registrations are protectable marks with priority over Welspun's asserted ECO DRY mark.

9. Welspun is not the real party in interest to prosecute some or all of its asserted claims.

10. Welspun's claims are barred and/or limited by its failure to mitigate damages.

11. Any damages suffered by Welspun were caused by its own acts or omissions, including without limitation, Welspun's failure to register its asserted ECO DRY mark to put others on notice of its rights.

12. Cocona reserves the right to plead all additional affirmative defenses which may be available to it.

ARGUMENT

Affirmative defenses must be supported by sufficient factual background and detail to fairly place a plaintiff on notice of the basis for the defense. *See IdeasOne Inc. v. Nationwide Better Health Inc.*, 89 USPQ2d 1952, 1953 (TTAB 2009). Federal Rule of Civil Procedure 12(f), applicable to Board proceedings under Trademark Rule 2.116(a), provides that the Board "may strike from a pleading an insufficient defense or any redundant, immaterial [or] impertinent . . . matter." Fed. R. Civ. P. 12(f); *see also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF

PROCEDURE ("TBMP") § 506. 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 Univ. v. Ohio Univ.*, 51 USPQ2d 1289, 1292 (TTAB 1999). Motions to strike should be granted where appropriate to "streamline the ultimate resolution of the action." 5C Charles Alan Wright & Arthur Miller, FEDERAL PRACTICE AND PROCEDURE § 1380 (3d ed. 2019).

As demonstrated below, striking Applicant's insufficient, redundant, immaterial, improper, and/or unavailable affirmative defenses will allow the Board and the parties to focus on the properly pleaded issues to be resolved in this case without wasting judicial resources.

1. Applicant's First, Sixth, and Seventh Affirmative Defenses Are Not True Affirmative Defenses and Must Be Stricken

In support of its first affirmative defense, Applicant alleges that the Notice of Opposition fails to state a claim. 13 TTABVUE 4. However, failure to state a claim does not constitute an affirmative defense. *See Sabhnani v. Mirage Brands, LLC* 2021 USPQ2d 1241, at *4, n.5 (TTAB 2021) (citing *U.S. Olympic Comm. v. Tempting Brands Neth. B.V.*, 2021 USPQ2d 164, at *4 (TTAB 2021)); *Blackhorse et al. v. Pro Football, Inc.*, 98 USPQ2d 1633, 1637 (TTAB 2011). "'Failure to state a claim' is not a true affirmative defense because it asserts that [plaintiff's] pleading is insufficient, rather than states a defense to a properly pleaded claim." *Topco Holdings, Inc. v. Hand 2 Hand Indus., LLC*, 2022 USPQ2d 54, at *10-11 (TTAB 2022) (citing *John W. Carson Found. v. Toilets.com, Inc.*, 94 USPQ2d 1942, 1949 (TTAB 2010)); *see also Hornblower & Weeks, Inc. v. Hornblower & Weeks, Inc.*, 60 USPQ2d 1733, 1738 n.7 (TTAB 2001).

Applicant also alleges by way of its sixth affirmative defense that Opposer "cannot substantiate its claimed prior use of the ECO DRY mark" and by way of its seventh affirmative

defense that Opposer "does not meet all statutory requirements to oppose a trademark registration, including those contained or referenced in 15 U.S.C. § 1064." 13 TTABVUE 5. Given that Opposer filed the Notice of Opposition within five years from the date the subject registrations issued, Opposer construes Applicant's allegations as a challenge to its standing and pleading of its likelihood of confusion claim.[1] As addressed above, these "affirmative defenses" are unavailable to the extent that each challenges the sufficiency of the pleadings and should be stricken with prejudice.

Should the Board exercise its discretion to examine the sufficiency of the pleadings, Opposer's allegations easily withstand a motion under Fed. R. Civ. P. 12(b)(6). *Major League Soccer, L.L.C. v. F.C. Internazionale Milano S.P.A.*, 2020 USPQ2d 11488. *4 (TTAB 2020) (plaintiff need only allege sufficient factual matter that if proven, would allow the Board to conclude a likelihood of confusion exists). To state a claim upon which relief can be granted under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), Opposer need only allege such facts which, if proved, would establish that it has (1) an entitlement to a statutory cause of action under Section 14 of the Trademark Act; and (2) a valid statutory ground for denying the registration sought. *See DrDisabilityQuotes.com, LLC v. Krugh*, 2021 USPQ2d 262, *4 (TTAB 2021) (citing *Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998); *Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1538 (TTAB 2007)); TBMP § 503.02.

Opposer sufficiently pleads its entitlement to a statutory cause of action by pleading a claim of likelihood of confusion based upon its prior use of the confusingly similar ECO DRY mark (*see* ¶¶4, 5, 11, 12 of Notice of Opposition). *Giersch v. Scripps Networks Inc.*, 90 USPQ2d

[1] If, by its seventh affirmative defense, Applicant does not mean to challenge the sufficiency of Opposer's pleading, then Applicant has not provided fair notice of the basis for this amorphous "defense" pursuant to Fed. R. Civ. P. 8(b)(1) and this "defense" must be stricken. *See* TBMP § 311.02(b)(1) (defenses must be described in sufficient detail to give plaintiff fair notice of the basis for the defense).

1020, 1022 (TTAB 2009) (common-law use sufficient to establish standing); *see also* TBMP § 309.03(b). Additionally, Opposer properly states a claim of likelihood of confusion by pleading (1) its prior use of the distinctive mark ECO DRY (*see* ¶¶4, 5, 11 of Notice of Opposition); and (2) Applicant's ECO-DRI and ECO-DRI and design Marks, as applied to the goods identified in Application Nos. 97364941 and 97364950, are nearly identical to Opposer's ECO DRY mark as to be likely to cause confusion, mistake, or deception as to the source of the parties' goods (*see* ¶14 of Notice of Opposition). *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 1110 (CCPA 1974). Accordingly, Opposer has sufficiently pleaded both its entitlement to a statutory cause of action as well as a claim of likelihood of confusion, and Applicant's first, sixth, and seventh affirmative defenses should be stricken with prejudice.

2. Applicant's Second Affirmative Defense is Insufficiently Pleaded and Must Be Stricken

Applicant's second affirmative defense alleges that Opposer's claims are "barred and/or limited by one or more of the equitable doctrines of laches, equitable estoppel, waiver, and unclean hands." 13 TTABVUE 4. While the equitable principles of laches, equitable estoppel, waiver, and unclean hands, where applicable, may be considered and applied in *inter partes* proceedings, 15 U.S.C. § 1069, here, Applicant's bald pleading of these defenses includes no factual support whatsoever and must be stricken. Fed. R. Civ. P. 8(b)(1); *see e.g., IdeasOne, Inc. v. Nationwide Better Health, Inc.*, 89 USPQ2d 1952, 1953 (TTAB 2009); *H.D. Lee Co., Inc. v. Maidenform, Inc.*, 87 USPQ2d 1715, 1712 (TTAB 2008) (citing *Blonder-Tongue Labs., Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 350 (1971)); *Fair Indigo*, 85 USPQ2d at 1538; *Midwest Plastic Fabricators Inc. v. Underwriters Labs. Inc.*, 5 USPQ2d 1067, 1069 (TTAB 1980).

Moreover, to the extent this defense attempts to assert "one or more of" these equitable defenses, Applicant's second affirmative defense is vague and indefinite, does not provide fair notice of the nature and basis for the defense, and must be stricken with prejudice. Fed. R. Civ. P. 8(b)(1); *cf. Phillies v. Philadelphia Consol. Holding Corp*., 107 USPQ2d 2149, 2153 (TTAB 2013) (finding language in the notice of opposition such as "including, but not limited to" or "wide variety of goods and services" as vague and indefinite).

3. Applicant's Third and Fourth Affirmative Defenses Are Unavailable

Applicant's third and fourth affirmative defenses are based on "prior admissions to the United States Patent and Trademark Office." 13 TTABVUE 4. These defenses must be stricken to the extent that the doctrine of "file wrapper estoppel" does not apply in trademark cases. *Anthony's Pizza & Pasta Int'l, Inc. v. Anthony's Pizza Holding Co., Inc.*, 95 USPQ2d 1271, 1281 (TTAB 2009); *Giant Food, Inc. v. Standard Terry Mills, Inc.*, 229 USPQ 955, 963 (TTAB 1986); *Textron, Inc. v. Gillette Co.*, 180 USPQ 152, 154 (TTAB 1973).

Moreover, to the extent Applicant's file wrapper estoppel defenses are based on the fact that Opposer filed an application to register the ECO DRY mark on August 6, 2020 based on an allegation of intent to use under Section 1(b) of the trademark Act, 15 U.S.C. § 1051(b)(1), an allegation of intent to use is not inconsistent with actual use and is in no way an admission of non-use. *Cf. Fair Indigo*, 85 USPQ2d at 1539 (intent to use applicant may rely on its use prior to application for purposes of priority) (citing *Corp. Document Servs. Inc. v. I.C.E.D. Mgmt., Inc.*, 48 USPQ2d 1477, 1479 (TTAB 1998)). Accordingly, Applicant's third and fourth affirmative defenses are unavailable, futile, and should be stricken with prejudice.

4. Applicant's Fifth Affirmative Defense Is Unavailable

Applicant's fifth affirmative defense alleges that Opposer's ECO DRY mark is "generic and/or descriptive." 13 TTABVUE 4. Applicant's fifth affirmative defense is unavailable to the

extent it is directed to Opposer's pending application Serial No. 90097661. Such allegation would constitute a collateral attack on Opposer's pending application, which the Board cannot entertain, to the extent that it does not have jurisdiction over an application that is still pending before an examining attorney. *See, e.g., Home Juice Co. v. Runglin Cos. Inc.*, 231 USPQ 897, 898 n.7 (TTAB 1986).

Additionally, Applicant's fifth affirmative defense alleges that ECO DRY is "generic *and/or* descriptive," and thus Applicant's pleading is vague and indefinite and does not provide fair notice to Opposer of the basis for its defense. Fed. R. Civ. P. 8(b)(1); *cf. Phillies*, 107 USPQ2d at 2153 (finding language in the notice of opposition such as "including, but not limited to" or "wide variety of goods and services" as vague and indefinite); *Fair Indigo*, 85 USPQ2d at 1538 ("the elements of each claim should be stated concisely and directly, and include enough detail to give the defendant fair notice"). In sum, Applicant fails to plead *any* facts relating to *any* of the elements of its defense.

In view of the foregoing, Applicant's fifth affirmative defense is unavailable as against Opposer's pending application, is insufficiently pleaded, and should be stricken with prejudice in light of the Board's Order in the child proceeding.

5. Applicant's Ninth Affirmative Defense is Inapplicable

Applicant alleges that Opposer is not the real party in interest to pursue its pleaded claims. 13 TTABVUE 5. However, Applicant has failed to include any allegations supporting its conclusion. As such, Opposer lacks sufficient notice as to the basis of this allegation. *See, e.g., In re Tong Yang Cement Corp.*, 19 USPQ2d 1689, 1690 (TTAB 1991) (where one entity owned the mark, but the application was filed by another legal entity, the application was found

void ab initio). Thus, Applicant failed to adequately plead this affirmative defense and the Board should therefore strike it with prejudice.[2]

6. Applicant's Tenth and Eleventh Affirmative Defenses Are Unavailable in Board Proceedings

Applicant's tenth and eleventh affirmative defenses concern Opposer's mitigation of damages. 13 TTABVUE 5. However, actual damage is not required under Section 2(d) of the Trademark Act,[3] and Opposer is therefore not required to plead or establish actual damages in order to prevail in an opposition or cancellation proceeding. *See Books on Tape Inc. v. Booktape Corp*., 836 F.2d 519, 5 USPQ2d 1301 (Fed. Cir. 1987); *Jewelers Vigilance Committee Inc. v. Ullenberg Corp*., 823 F.2d 490, 2 USPQ2d 2021 (Fed. Cir.1987); *Int'l Order of Job's Daughters v. Lindeburg & Co*., 727 F.2d 1087, 220 USPQ 1017 (Fed. Cir. 1984). Nor does the Board have authority to determine damages. *Enbridge, Inc. v. Excelerate Energy Ltd. P'ship*, 92 USPQ2d 1537, 1543 n.10 (TTAB 2009) ("there is no requirement that opposer prove its claims or prove actual damage in order to establish its standing"); *see also NSM Res. Corp.*, 113 USPQ2d at 1035 n.10; *General Mills, Inc. v. Fage Dairy Processing Indus. S.A.*, 100 USPQ2d 1584, 1591 (TTAB 2011) (Board is an administrative tribunal and has no authority to determine infringement or damages); *Luehrmann v. Kwik Kopy Corp.*, 2 USPQ2d 1303, 1305 n.4 (TTAB 1987) (the Board has no authority to award monetary relief). Accordingly, Applicant's tenth and eleventh affirmative defenses should be stricken with prejudice.

[2] Further, and to the extent Applicant challenges Opposer's entitlement to a statutory cause of action by means of this "affirmative defense," such a defense is unavailable. Statutory cause of action is an element of Opposer's claim, and Opposer must prove it as part of its case-in-chief. *See Blackhorse*, 98 USPQ2d at 1637.

[3] Again, to the extent Applicant challenges Opposer's allegations in support of its standing to bring this opposition, this "affirmative defense" is unavailable to the extent that it challenges the sufficiency of the pleadings and should be stricken. *See* Section 1 *supra*.

7. Applicant's Twelfth Affirmative Defense Is Improper

Applicant's attempt to "reserve[] the right to plead all additional affirmative defenses which may be available to it" (*see* 13 TTABVUE 5) at some unspecified time in the future is improper under the Federal Rules of Civil Procedure. *See Philanthropist.com, Inc. v. Gen. Conf. Corp. of Seventh-Day Adventists*, 2021 USPQ2d 643, at *4 n.6 (TTAB 2021), *appeal docketed*, No. 21-2208 (Fed. Cir. Aug. 6, 2021); *see also FDIC v. Mahajan*, 923 F.Supp.2d 1133, 1141 (N.D. Ill. 2013). A defendant cannot reserve unidentified defenses because it does not provide a plaintiff fair notice of such defenses. *See id*. Whether Applicant may, at some future point, amend its answer to include additional defenses or counterclaims is a matter to be raised by means of a timely motion for leave to amend under Fed. R. Civ. P. 15. Accordingly, Applicant's twelfth affirmative defense is improper and should be stricken with prejudice.

CONCLUSION

In the interest of efficiency and to streamline resolution of this proceeding, Opposer respectfully requests that the Board strike Applicant's affirmative defenses with prejudice. In the interim, Opposer requests that the Board suspend proceedings pending disposition of Opposer's motion to strike.

Respectfully submitted,

Dated: November 15, 2023

By: / Naresh Kilaru /

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing OPPOSER'S MOTION TO STRIKE APPLICANT'S AFFIRMATIVE DEFENSES was served by e-mail on November 15, 2023, on counsel for Applicant at the following address of record:

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