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February 7, 2024

Opposition No. 91284323 (parent case)
Cancellation No. 92076704
Cancellation No. 92082036

Welspun India Limited

v.

Cocona, Inc.

J. Krisp, Interlocutory Attorney:

These consolidated proceedings are before the Board for consideration of Welspun India Limited's (Welspun) November 15, 2023 motions to strike Cocona, Inc.'s (Cocona) affirmative defenses asserted in the answers filed on October 26, 2023 in Cancellation No. 92082036 (92082036: 15 TTABVUE), and in Opposition No. 91284323 (16 TTABVUE).[1] The motions are fully briefed.

In view of the prior motions practice and prior orders issued in these proceedings, the Board presumes familiarity with the record in each relevant proceeding.

[1] The Board cites to the records by the TTABVUE docket entry number and TTABVUE page number. In this order such citations refer to the parent case, Opposition No. 91284323, unless otherwise noted. TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) §§ 106.03, 110.02(b) and 801.01 (June 2023). *See also Made in Nature, LLC v. Pharmavite LLC,* 2022 USPQ2d 557, at *15 (TTAB 2022) (the parties' failure to use the Board's method of citation to the record lengthened the time for review of the record and issuance of the Board's decision).

Authorities

Upon motion, or upon its own initiative, the Board may order stricken from a pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. Fed. R. Civ. P. 12(f).[2] *See also* TBMP § 506.01.

Motions to strike are not favored, and matter will not be stricken unless it 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); *Harsco Corp. v. Elec. Sci. Inc*., 9 USPQ2d 1570, 1571 (TTAB 1988). Inasmuch as the primary purpose of pleadings under the Federal Rules of Civil Procedure is to give fair notice of the claims or defenses asserted, the Board may decline to strike even objectionable pleadings where their inclusion will not prejudice the adverse party, but rather will provide fuller notice of the basis for a claim or defense. *See, e.g., Order of Sons of Italy in Am. v. Profumi Fratelli Nostra AG,* 36 USPQ2d 1221, 1223 (TTAB 1995) (amplification of applicant's denial of opposer's claims not stricken). Furthermore, 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. Nonetheless, the Board grants motions to strike in appropriate instances.

A legally sufficient pleading of an affirmative defense must include enough factual detail to provide a plaintiff fair notice of the basis for the defense. Fed. R. Civ. P. 8(b)(1) and 12(f). *IdeasOne Inc. v. Nationwide Better Health Inc*., 89 USPQ2d 1952, 1953 (TTAB 2009); *Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1538

[2] Federal Rules of Civil Procedure cited in Board orders are applicable to Board proceedings under Trademark Rule 2.116(a).

(TTAB 2007); *Midwest Plastic Fabricators, Inc. v. Underwriters Labs. Inc.*, 5 USPQ2d 1067, 1069 (TTAB 1980). *See also* TBMP § 311.02(b).

Analysis - Cancellation No. 92082036

This proceeding involves one claim, namely, likelihood of confusion, with Welspun asserting common law rights in the mark ECO DRY for towels since at least August 2013.

Cocona asserted fourteen affirmative defenses. 92082036: 13 TTABVUE 4. Welspun moved to strike affirmative defenses 1, 2, 3, 4, 5, 6, 7, 10, 11, 12, 13 and 14 with prejudice. 15 TTABVUE 2-3. In its brief, Cocona withdrew affirmative defenses 1, 2, 5, 6, 7, 10, 11, 12, 13 and 14 without prejudice, and responded to the motion with respect to affirmative defenses 3 and 4. 18 TTABVUE 7-10. In reply, Welspun requests that the Board strike Cocona's withdrawn affirmative defenses 1, 2, 5, 6, 7, 10, 11, 12, 13 and 14 with prejudice, and further addresses affirmative defenses 3 and 4. 19 TTABVUE 4-7.

Affirmative Defenses 3 and 4

In these defenses Cocona asserts as follows:

> 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. 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.

In moving to strike, Welspun argues that the doctrine of "file wrapper estoppel" does not apply and is unavailable in trademark cases, and that the fact that it filed an application to register its ECO DRY mark on August 6, 2020 based on intent to use under Trademark Act Section 1(b) is not inconsistent with actual use and is in no way an admission of non-use. 15 TTABVUE 9.

Cocona argues that it is not relying on "file wrapper estoppel," "as evidenced by the fact that those words do not appear in either" defense, and that Welspun mischaracterizes these defenses as such. Cocona states that it "is challenging Welspun's assertion of common law rights in view of its statement Welspun's express, sworn statement to the USPTO stating that it did not use the mark until August 2020. This is factual evidence that must be weighed by the TTAB in the context of the record as a whole to determine the priority date." 18 TTABVUE 10.

In reply, Welspun points out the Board previously struck the identical affirmative defenses from Cocona's answer in Cancellation No. 92076704 in the September 27, 2022 order adjudicating Welspun's May 17, 2021 motion to strike. 92076704: 14 TTABVUE 9-10. Welspun argues, inter alia, that in that order the Board confirmed that the defense of "file wrapper estoppel" is inapplicable in trademark cases, and that an admission against interest, if made, does not bar a likelihood of confusion claim per se. *Id.*

The Board notes that in view of the unclear nature of the manner in which Cocona set forth these defenses, the characterization of the defenses as seeking to assert "file wrapper estoppel" is appropriate. Cocona's arguments regarding mischaracterization

are disingenuous inasmuch as it essentially alleges elements of that defense. Cocona argues the defenses challenge Welspun's assertion of common law rights, yet its defenses specifically allege that Welspun's claims "are barred." To the extent the defenses allege Welspun's reliance on alleged common law is barred by the fact that Welspun filed an unidentified intent-to-use application to register its common law mark, the defense is immaterial and impertinent. An allegation of intent to use a mark is not inconsistent with actual use and is in no way an admission of non-use. *Cf. Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1539 (TTAB 2007) (intent-to-use applicant is entitled to rely upon actual use prior to the constructive use date of application for purposes of priority) (citing *Corporate Document Svcs. Inc. v. I.C.E.D. Mgmt. Inc.*, 48 USPQ2d 1477, 1479 (TTAB 1998)). Furthermore, the Board has held the defense of "file wrapper estoppel" is not available in trademark cases. T*extron, Inc. v. Gillette Co.*, 180 USPQ 152, 154 (TTAB 1973). Moreover, although it has also been held that statements made by a party in an ex parte proceeding may, in appropriate circumstances, be admitted into evidence at final hearing in a subsequent inter partes proceeding as a possible admission against interest, such statements do not operate to bar the claim. *Id.* Even if the Board finds a particular fact, among those on which a legal conclusion rests, has been admitted, the Board may not consider as "admitted" a fact shown to be non-existent by other evidence of record. *Interstate Brands Corp. v. Celestial Seasonings, Inc.,* 576 F.2d 926, 198 USPQ 151, 153 (CCPA 1978) (the decision maker may not consider as "admitted" a fact shown to be non-existent by other evidence of record). Cocona may present relevant

and competent arguments and evidence of statements previously made to support an available theory, though the matters set forth in the answer do not constitute and will not be treated as an affirmative defense barring Welspun's claim.

Welspun's motion to strike is granted. Cocona's affirmative defenses 3 and 4 are stricken with prejudice.

Affirmative Defenses 1, 2, 5, 6, 7, 10, 11, 12, 13 and 14

Welspun requests that these defenses be stricken with prejudice. It argues that in the September 27, 2022 order in Cancellation No. 92076704 the Board struck certain affirmative defenses with prejudice because Cocona lacked any basis in law to allege them. 92076704: 14 TTABVUE 6-7, 9-10, 13-16 (striking with prejudice defenses 1, 3, 4, 7, 8, 11, 13-15). Welspun also argues that in in Cancellation No. 92076704 Cocona took no effort to remedy the defects in the defenses that were stricken therein without prejudice.

Affirmative defenses 1, 7, 10, 12, 13 and 14 are found to be withdrawn with prejudice, and stricken with prejudice, inasmuch as they seek to advance matters which are immaterial or impertinent, unavailable or not within the jurisdiction of the Board.

Affirmative defenses 2, 5, 6 and 11 are found to be withdrawn without prejudice, inasmuch as Cocona is essentially amplifying its denials, or stating matters which must be sufficiently pleaded in order to be given consideration. Cocona is not precluded from moving for leave to amend the defenses to properly and sufficiently

plead the matters asserted, as timely, appropriate and consistent with applicable authorities, including Fed. R. Civ. P. 15(a)(2).[3] TBMP § 507.01.

Addressing Welspun's argument that Cocona did not amend the affirmative defenses the Board struck without prejudice in Cancellation No. 92076704, the argument is noted, though unpersuasive. As explained in the consolidation order, despite being consolidated, each proceeding retains its separate character and requires entry of a separate judgment. The Board adjudicates each proceeding on its merits, taking into account any differences in the issues raised by the respective pleadings. The Board is not inclined to treat Cocona's failure to amend in Cancellation No. 92076704 as per se prohibiting it from seeking leave to amend herein, as timely and appropriate.

Analysis - Opposition No. 91284323 (parent case)

This proceeding involves two claims, namely, likelihood of confusion, and lack of bona fide intent to use the mark in commerce on the identified goods as of the applications' filing dates. Welspun asserts common law rights in the mark ECO DRY for towels since at least August 2013.

[3] Cocona shall note that Fed. R. Civ. P. 11, and U.S. Patent and Trademark Office Rule 11.18, require that all pleadings and papers be made in good faith and with evidentiary support. Specifically, all grounds for relief and allegations in support thereof must have a basis in law or fact, and must not be filed for any improper purpose. TBMP §§ 318, 502.07 and 527.02.

Cocona should note that the availability of certain equitable defenses, such as laches, are severely limited in opposition and cancellation proceedings. TBMP § 311.02(b)(1), and cases cited therein.

Cocona asserted twelve affirmative defenses. 13 TTABVUE 4. Welspun moved to strike affirmative defenses 1, 2, 3, 4, 5, 6, 7, 9, 10, 11 and 12 with prejudice. 16 TTABVUE. In its brief, Cocona withdrew affirmative defenses 1, 2, 5, 7, 9, 10, 11 and 12 without prejudice, and responded to the motion with respect to affirmative defenses 3 and 4. 17 TTABVUE 6. In reply, Welspun requests that the Board strike Cocona's withdrawn affirmative defenses 1, 2, 5, 6, 7, 9, 10, 11 and 12 with prejudice, and further addresses affirmative defenses 3 and 4. 20 TTABVUE 4.

The Board has reviewed all affirmative defenses, and all arguments, in the same manner and to the same extent as the Board reviewed the affirmative defenses, and all arguments, set forth in connection with Cancellation No. 92082036.

Affirmative Defenses 3 and 4

Here, Cocona asserts defenses that are identical to those set forth in Cancellation No. 92082036, and they are set forth above. Under the same authorities and reasoning explained above, Welspun's motion to strike is granted. Cocona's affirmative defenses 3 and 4 are stricken with prejudice.

Affirmative Defenses 1, 2, 5, 6, 7, 9, 10, 11 and 12

Affirmative defenses 1, 7, 10, 11 and 12 are found to be withdrawn with prejudice, and stricken with prejudice, inasmuch as they seek to advance matters which are immaterial, impertinent, unavailable or not within the jurisdiction of the Board.

Affirmative defenses 2, 5, 6,[4] and 9 are found to be withdrawn without prejudice, inasmuch as Cocona is essentially amplifying its denials, or stating matters which

[4] The brief in opposition, and in reply, minimally address affirmative defense 6 (13 TTABVUE 5). Welspun argues that it construes this defense "as a challenge to its standing and pleading

must be sufficiently pleaded in order to be given consideration. Cocona is not precluded from moving for leave to amend the defenses to properly and sufficiently plead the matters asserted, as timely, appropriate and consistent with applicable authorities, including Fed. R. Civ. P. 15(a)(2)

Resumption and Schedule

To maintain order in these consolidated proceedings, and to assure full discovery, the Board deems proceedings to have been suspended as of Welspun's filing of the motions to strike. Proceedings are now resumed, and conference, discovery and trial dates are reset as indicated below:

Deadline for Discovery Conference [91284323, 92082036]	2/26/2024
Discovery Opens	2/26/2024
Initial Disclosures Due	3/27/2024
Expert Disclosures Due	7/25/2024
Discovery Closes	8/24/2024
Plaintiff's Pretrial Disclosures Due	10/8/2024
Plaintiff's 30-day Trial Period Ends	11/22/2024
Defendant's Pretrial Disclosures Due	12/7/2024
Defendant's 30-day Trial Period Ends	1/21/2025
Plaintiff's Rebuttal Disclosures Due	2/5/2025
Plaintiff's 15-day Rebuttal Period Ends	3/7/2025
Plaintiff's Opening Brief Due	5/6/2025
Defendant's Brief Due	6/5/2025
Plaintiff's Reply Brief Due	6/20/2025
Request for Oral Hearing (optional) Due	6/30/2025

of its likelihood of confusion claim." 16 TTABVUE 5-6. However, affirmative defense 6 essentially states Cocona's position that Welspun cannot substantiate its claim of priority in its common law mark.

Generally, the Federal Rules of Evidence apply to Board trials. Trial testimony is taken and introduced out of the presence of the Board during the assigned testimony periods. The parties may stipulate to a wide variety of matters, and many requirements relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125. These include pretrial disclosures, the manner and timing of taking testimony, matters in evidence, and the procedures for submitting and serving testimony and other evidence, including affidavits, declarations, deposition transcripts and stipulated evidence. Trial briefs shall be submitted in accordance with Trademark Rules 2.128(a) and (b). Oral argument at final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a).

It is the responsibility of each party to ensure that the Board has the party's current correspondence address, including an email address. TBMP § 117.07. The Board must be promptly notified of any address or email address changes for the parties or their attorneys.