


ESTTA Tracking number: **ESTTA1343357**Filing date: **03/01/2024**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding no.	91287935
Party	Plaintiff Genesco Brands LLC
Correspondence address	TYWANDA HARRIS LORD KILPATRICK TOWNSEND & STOCKTON LLP 1100 PEACHTREE STREET NE, SUITE 2800 ATLANTA, GA 30309 UNITED STATES Primary email: tlord@ktslaw.com Secondary email(s): tbillups@ktslaw.com, kteilhaber@ktslaw.com, tmad- min@ktslaw.com, spdesai@ktslaw.com 404-815-6500
Submission	Motion to Strike Pleading/Affirmative Defense
Filer's name	Erica C. Chanin
Filer's email	tlord@ktslaw.com, echanin@ktslaw.com, tbillups@ktslaw.com, kteil- haber@ktslaw.com, tmadmin@ktslaw.com
Signature	/Erica C. Chanin/
Date	03/01/2024
Attachments	2024.03.01 Motion to Strike_91287935.pdf(151301 bytes)

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

GENESCO BRANDS, LLC,)	
)	Serial No.: 97/338,936
Opposer,)	Mark:
)	
v.)	
)	Opposition No. 91287935
CHALK WARRIOR, LLC,)	
)	
Applicant.)	

MOTION TO STRIKE

Pursuant to Federal Rule of Civil Procedure 12(f) and Sections 506.01 and 506.02 of this Board’s Manual of Procedure (TBMP), Opposer Genesco Brands, LLC (“Opposer” or “Genesco”) respectfully requests the Board to enter an order striking Chalk Warrior, LLC’s (“Applicant”) Affirmative Defense (“Motion to Strike”).

I. INTRODUCTION AND PROCEDURAL BACKGROUND

On March 30, 2022, Applicant filed the Subject Application on the basis of Applicant’s use of the mark in commerce pursuant to 15 U.S.C. § 1051(a), and on May 2, 2023, the United States Patent and Trademark Office published the Subject Application in the Official Gazette in connection with “athletic apparel, namely, leotards, hooded sweatshirts, sweatpants, leggings, shirts” in International Class 25 and “providing a website that gives gymnasts the ability to create customized webpages featuring user-defined profiles and information about their careers” in International Class 42. On May 31, 2023, Genesco timely took a 90-day extension of time to oppose the Application. On August 28, 2023, Genesco took a second extension of time with Applicant’s consent. On October 30, 2023, Genesco timely filed a Notice of Opposition. *See*

Dkt. 1. On December 8, 2023 Applicant filed a consented motion to extend its deadline to file an Answer. *See* Dkt 5. On February 7, 2024 Applicant filed its Answer. *See* Dkt. 7. In its Answer, Applicant asserts a single affirmative defense, that suffers from defects, as described below. Genesco respectfully requests that this Board enter an order striking the affirmative defense from Applicant’s Answer.

II. ARGUMENT AND CITATION TO AUTHORITY

The Board may strike from any pleading any insufficient or impermissible defense or any redundant, immaterial, impertinent or scandalous matter. Fed. R. Civ. P. 12(f); TBMP § 506.01. Affirmative defenses are subject to the same pleading requirements as complaints, and must be pled “with enough specificity or factual particularity to give the plaintiff ‘fair notice’ of the defense that is being advanced.” *Woodfield v. Bowman*, 193 F.3d 354, 362 (5th Cir. 1999). As the Supreme Court clarified, the pleading standard of Rule 8 “demands more than an unadorned...accusation.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). A pleading that offers “labels and conclusions” is insufficient. *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)).

Under TBMP Rule 311.02(b), “[t]he elements of a defense should be stated simply, concisely, and directly,” and “should include enough detail to give the plaintiff fair notice of the basis for the defense.” *Id.* Bald or conclusory allegations do not give the opposer fair notice of the basis for the affirmative defenses. *See id.* (citing *McDonnell Douglas Corp. v. Nat’l Data Corp.*, 228 U.S.P.Q. 45 (TTAB 1985)); *see also Caymus Vineyards v. Caymus Medical, Inc.*, 107 U.S.P.Q. 2d 1519 (TTAB 2013) [Precedential] (“claimant must allege well-pleaded factual matter and more than threadbare recitals of the elements of a cause of action, supported by mere conclusory statements”). Thus, affirmative defenses “which amount to nothing more than mere

conclusions of law and are not warranted by any asserted facts have no efficacy.” *Shechter v. Comptroller of City of New York*, 79 F.3d 265, 270 (2d Cir. 1996).

A. Applicant’s Affirmative Defense Is Not an Affirmative Defense and Should Be Stricken

Applicant asserts a single affirmative defense, that “Opposer fails to state a claim on which relief may be granted.” Answer at 3, Dkt. 7. “[F]ailure to state a claim 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.” *John W. Carson Found. v. Toilets.com, Inc.*, 94 U.S.P.Q.2d 1942, 1949 (T.T.A.B. 2010) (failure to state a claim 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”); *Hornblower & Weeks, Inc. v. Hornblower & Weeks, Inc.*, 60 U.S.P.Q.2d 1733 at *6 n.7 (T.T.A.B. 2001) (same). If a Notice of Opposition is deficient, the proper vehicle by which to challenge it is by bringing a motion to dismiss under Federal Rule of Civil Procedure 12, which Applicant has not done.

In addition, if the pleadings are sufficient on their face, that is a basis for striking this defense. *See Order Sons of Italy in Am. v. Marofa S.A.*, 38 U.S.P.Q.2d 1602 (T.T.A.B. 1996) (“the striking of the defense that a complaint fails to state a claim upon which relief could be granted may be appropriate when the legal insufficiency of this defense is readily apparent”). Here, it is apparent that the Notice of Opposition sufficiently states Genesco’s claims. The Notice alleges that Genesco owns common law rights and federal registrations for its Handprint Design Mark, thereby conferring standing, and states the bases on which Genesco alleges that Applicant’s registration should be refused, including supporting factual allegations of confusion.

Because the Notice of Opposition is adequate on its face, Applicant's single affirmative defense of failure to state a claim should be stricken. *See id.*

III. CONCLUSION

For the foregoing reasons, Genesco respectfully requests that Applicant's Affirmative Defense be stricken in its entirety.


Dated: March 1, 2024

Respectfully Submitted,

/Erica C. Chanin/
Tywanda H. Lord
Erica C. Chanin
Ta'lor Billups
Kilpatrick Townsend & Stockton LLP
1100 Peachtree Street NE, Suite 2800
Atlanta, Georgia 30309
(404) 815-6500
tlord@ktslaw.com
echanin@ktslaw.com
tbillups@ktslaw.com

Attorneys for Opposer

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

GENESCO BRANDS, LLC,)	
)	Serial No.: 97/338,936
Opposer,)	Mark:
)	
v.)	
)	Opposition No. 91287935
CHALK WARRIOR, LLC,)	
)	
Applicant.)	

CERTIFICATE OF SERVICE

This is to certify that the foregoing document was served on Applicant's counsel via its email addresses of record:

John H. Platt
Snell & Wilmer LLP
jplatt@swlaw.com,
mhallerman@swlaw.com,
sschahn@swlaw.com,
ipdocket@swlaw.com.

/Kris Teilhaber/
Kilpatrick Townsend & Stockton LLP