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

Proceeding	92065406
Party	Defendant Pharmadel LLC
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of:

Registration No.: 4,581,604
Registered: August 5, 2014
Trademark: KOFAL

Plaza Izalco, Inc.,)	
)	
Petitioner,)	Cancellation No. 92065406
)	
v.)	
)	
Pharmadel, LLC,)	
)	
Registrant.)	
)	

**REGISTRANT’S RESPONSE IN OPPOSITION TO PETITIONER’S
MOTION TO STRIKE REGISTRANT’S AFFIRMATIVE DEFENSES**

Registrant, Pharmadel, LLC (“Registrant”), by and through undersigned counsel, hereby responds to the Motion to Strike Affirmative Defenses (the “Motion” or “Motion to Strike”) filed by Petitioner Plaza Izalco, Inc. (“Applicant”), and in support states as follows:

I. SUMMARY OF ARGUMENT

The weaknesses in Applicant’s arguments can most easily be summarized in a short outline:

- A. Registrant’s first two defenses of failure to state a cause of action as to lack of standing are supported by case law and function as an amplification of the Fourth Affirmative Defense.
- B. Registrant’s Third Affirmative Defense is proper on its face as it raises factual issues that should be determined on the merits.

C. Applicant's Motion to Strike Registrant's *Morehouse* Defense should fail because:

- i) Applicant has proper notice of the defense;
- ii) a debate over the verbiage of the proper standard is not a basis for a strike;
- iii) the KOFAL and KOFAL-T Marks are substantially identical, as the Examiner also argued;
- iv) the goods for all three relevant marks at issue are substantially identical or substantially similar, as the Examiner also found.

D. Registrant's Fifth, Sixth, and Seventh Affirmative Defenses should not be stricken because they provide proper notice and are pled with specificity.

E. The reservation of rights clause should not be stricken because, insofar as Registrant can subsequently amend to add additional defenses, amendments should be freely given in the interest of justice.

Applicant's Motion to Strike cites to a litany of case law that is inapplicable to the affirmative defenses as pled by Registrant, and Applicant's arguments fail to substantiate that any of Registrant's affirmative defenses are "redundant, immaterial, impertinent, or scandalous" as a matter of law. *See* TBMP § 506.01. For the reasons set forth below, Applicant's Motion to Strike should be denied in its entirety.

II. RESPONSE IN OPPOSITION

"Motions to strike are not favored, and matter will not be stricken unless it clearly has no bearing upon the issues in the case." TBMP § 506.01; *see also, Harsco Corp. v. Electrical Sciences Inc.*, 9 USPQ2d 1570 (TTAB 1988). "The primary purpose of pleadings, under the Federal Rules of Civil Procedure, is to give fair notice of the claims or defenses asserted." *Great Adirondack Steak & Seafood Cafe, Inc. v. Adirondack Pub & Brewery, Inc.*, 2015 TTAB LEXIS

321, *8 (TTAB Mar. 30, 2015); TBMP § 506.01. “A defense will not be stricken as insufficient if the insufficiency is not clearly apparent, or if it raises issues that should be determined on the merits.” TBMP § 506.01. “Thus, the Board, in its discretion, 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.” *Id.* Motions such as this, to strike defenses applicable to *inter partes* trademark proceedings pursuant to Trademark Act Section 19 (15 U.S.C. § 1069), are generally not received well by the Board. *Guardian Royalty LLC v. Guardian Prot. Devices, Inc.*, 2000 TTAB LEXIS 855, *8 (TTAB Nov. 30, 2000)(denying motion to strike affirmative defenses).

A. Registrant’s First Affirmative Defense Is Proper, Both On Its Own And As An Amplification.

Failure to state a cause of action *is* an affirmative defense, itself subject to analysis regarding whether it is valid. *See Order of Sons of Italy in America v. Profumi Fratelli Nostra AG*, 36 USPQ2d 1221, 1222-23 (TTAB 1995) (“While Fed. R. Civ. P. 12(b)(6) permits a defendant to assert in the answer the ‘defense’ of failure to state a claim upon which relief can be granted, it necessarily follows that a plaintiff may utilize this assertion to test the sufficiency of the defense in advance of trial by moving under Fed. R. Civ. P. 12(f) to strike the ‘defense’ from the defendant’s answer.”). While Registrant notes that the aforementioned opinion seems to contradict cases cited by Applicant for this point of law, Applicant’s cases are nonetheless inapposite because in this matter Registrant’s affirmative defense of failure to state a cause of action is an amplification of its *Morehouse* defense and is not merely directed at an alleged defect in the pleading. *See* Registrant’s Answer and Affirmative Defenses, Aff. Def. 4.

Where one affirmative defense is seen as an amplification of another, both are addressed together. *See Nebraska Brewing Co. v. Emerald City Beer Company, LLC*, 2015 TTAB LEXIS 359 at *18 (TTAB 2015). Moreover, where an answer provides a “road map” for a party’s defense through allegations that bear on the issues of the case, same will not be stricken. *See Disney Enterprises, Inc. v. Ronica Holdings Limited*, 2015 TTAB LEXIS 128, *6 (TTAB 2015) (“The broad scope of the allegations in Applicant’s answer have a bearing on the issues of the case and will not be stricken. Specifically, Applicant has provided a “road map” for its defense.”). Here, the unchallenged registration for KOFAL-T –cited by the Examiner in refusing registrant’s application—is the foundation for four affirmative defenses in Registrant’s Answer, including Applicant’s failure to properly state a cause of action.

Applicant’s inability to validly state a cause of action stems from its lack of standing, itself the product of Applicant’s inability to achieve any relief in this matter due to the unchallenged registration of KOFAL-T that will continue to subsist and prevent registration of Applicant’s mark COFAL. Therefore, because Registrant’s Fourth Affirmative Defense is valid and not subject to attack (as more fully set forth *infra* and in Registrant’s Motion for Summary Judgment filed contemporaneously with the instant Response), Applicant’s Motion to Strike Registrant’s First Affirmative Defense should be denied.

B. Registrant’s Second Affirmative Defenses Is Similarly Proper Because It Is An Amplification Of The Fourth Affirmative Defense.

Registrant’s Second Affirmative Defense is that Applicant does not have standing because “Petitioner does not have a real interest in this matter and does not have a direct and personal stake in the outcome of this cancellation action (or in the maintenance of the registration of the mark KOFAL).” As with Registrant’s First Affirmative Defense, the Second Affirmative Defense

should not be considered by the Board in a vacuum but, rather, in conjunction with Registrant's Fourth Affirmative Defense under the *Morehouse* Doctrine. Due to Applicant's inherent inability to secure relief in the instant matter given that its mark COFAL cannot proceed to registration as a result of the likelihood of confusion with Registrant's unchallenged KOFAL-T Mark (as cited by the Examiner in refusing Applicant's application), Applicant cannot have standing.

Under TBMP § 309.03(b), "any person who believes it is or will be damaged by the registration of a mark has standing to file a complaint." Although at the pleading stage, "all that is required is that a plaintiff allege facts sufficient to show a 'real interest' in the proceeding, and a 'reasonable basis' for its belief that it would suffer some kind of damage,"¹ such allegations "must later be affirmatively proved by the plaintiff." *Id.* Despite Applicant's contention in its Motion to Strike, courts reject the premise that in a cancellation action "a petitioner should be found to have standing by virtue of its complaint alone." *Lipton Indus. v. Ralston Purina Co.*, 670 F.2d 1024, 1029 (C.C.P.A. 1982).

In this matter, although the cancellation action filed by Applicant is against the mark KOFAL, because COFAL can never register as a result of the likelihood of confusion with the incontestable KOFAL-T, Applicant cannot have a "direct and personal interest" in the outcome of this action. As such, Applicant has no standing because it cannot show "a direct injury to itself,"² and there is no controversy sufficient for Applicant to maintain the action. Plainly, as a result of the pre-existing and subsisting registration for KOFAL-T, Applicant cannot by definition have a personal stake in the outcome of the proceeding given that it cannot be impacted by maintenance of KOFAL. *See e.g., Ritchie v. Simpson*, 170 F. 3d 1092 (Fed. Cir. 1999) (explaining standing in

¹ *Id.*

² *Ritchie v. Simpson*, 170 F. 3d 1092, 1096 (Fed. Cir. 1999).

the context of Board actions and stating that “[t]he crux of the matter is not how many others share one’s belief that one will be damaged by the registration, but whether that belief is reasonable and reflects a real interest in the issue”). Applicant’s Motion to Strike Registrant’s Second Affirmative Defense should be denied.

C. Registrant’s Third Affirmative Defense Is Proper On Its Face And Applicant Misrepresents Same In Its Motion.

In the Motion to Strike, Applicant moves the Board to strike Registrant’s Third Affirmative Defense, which states as follows:

Registrant began use of its trademarks KOFAL and KOFAL-T in commerce prior to Petitioner applying for registration in the United States, and, therefore, Registrant has superior trademark rights to its trademarks over any right that Petitioner may have in its mark.

Applicant’s arguments concerning the Third Affirmative Defense paint said defense as being focused solely on Registrant’s unchallenged registration for the Mark KOFAL-T, which is glaringly inaccurate. As can be easily gleaned from the text of the Third Affirmative Defense, citation is to both KOFAL and KOFAL-T as marks that were in use by Registrant prior to Applicant’s alleged first date of use in commerce for COFAL. Registrant’s affirmative defense of prior use in commerce is –axiomatically—a proper affirmative defense not subject to being stricken as it squarely “raises factual issues that should be determined on the merits.” TBMP § 506.01; *Great Adirondack Steak & Seafood Cafe, Inc. v. Adirondack Pub & Brewery, Inc.*, 2015 TTAB LEXIS 321, *7-8 (TTAB Mar. 30, 2015)(affirmative defense that raise factual issues that should be determined on the merits.) Applicant’s Motion to Strike Registrant’s Third Affirmative Defense should be denied.

D. Registrant's *Morehouse* Defense Is Properly Pled, Applicable, And The Examiner's Conclusions Agree.

Applicant begins its attack upon Registrant's *Morehouse* Defense by arguing that Registrant has cited the incorrect standard. This, according to Applicant, is a supposed basis for striking Registrant's *Morehouse* Defense. Overlooking the fact that, as evinced *infra*, this Board has articulated the verbiage of the *Morehouse* standard in differing forms, Applicant's argument about how Registrant discussed the standard is plainly not a basis to strike an affirmative defense. As this Board points out, "[t]he primary purpose of pleadings under the Federal Rules of Civil Procedure, is to give fair notice of the claims or defenses asserted." TBMP 506.01. Applicant undeniably has full notice of Registrant's reliance on the *Morehouse* Defense regardless of any dispute between the parties as to the proper standard to be employed. Registrant's Fourth Affirmative Defense reads:

Petitioner's Petition to Cancel fails because of the *Morehouse* defense; that is, Petitioner cannot suffer damage within the meaning of Section 14 of the Lanham Act by the maintenance of the registration for KOFAL because Registrant owns an unchallenged registration for the same or similar mark (KOFAL-T) on the same or similar goods. *See Morehouse Mfg. Corp. v. J. Strickland & Co.*, 407 F. 2d 881 (C.C.P.A. 1969).

Applicant cites no case law –nor can it—for the proposition that a dispute over which element is to be employed renders a defense subject to a strike under Fed. R. Civ. P. 12(f) and TBMP 506.01.

The Board should reject Applicant's argument.

Applicant's final argument for striking Registrant's *Morehouse* Defense reads more like a backdoor motion for summary judgment as it tacitly concedes that nothing about Registrant's Fourth Affirmative Defense is redundant, immaterial, impertinent, scandalous, or lacking in relation to the facts or issues of this matter. Applicant's argument is that the unchallenged registration for KOFAL-T and the challenged KOFAL are dissimilar and that the categories of

goods covered by both registrations are not “essentially the same.” Although Registrant has already moved for summary judgment contemporaneously with the instant Response, Registrant will nonetheless address the specifics of Applicant’s incorrect suppositions below.

“The *Morehouse* defense, an equitable affirmative defense... is based on the theory that an opposer cannot be injured by the registration sought because there already exists a similar registration and, therefore, an additional registration for the same or substantially similar mark and goods or services can no more injure the plaintiff than the prior registration.” *See Mag Instrument, Inc. v. The Brinkmann Corporation*, 2010 TTAB LEXIS 322, *23 (TTAB 2010). “It is well settled that ownership of a subsisting registration is a proper defense to a cancellation proceeding when the registration is for the same or substantially identical mark for the same or substantially identical goods or services.” *See Dimitri Valiant v. Carl Karcher Enterprises, Inc.*, 1984 TTAB LEXIS 97 (TTAB 1984) (warning that summary judgment would be entered if the petitioner failed to petition for cancellation of the pre-existing registrations). *See also, Morehouse Manufacturing Corporation v. J. Strickland & Co.*, 407 F 2d 881 (CCPA 1969)); *The Solomon-Page Group LLC and The Clinical Resource Network LLC v. Clinical Resources Network*, 2012 TTAB LEXIS 124 (TTAB 2012).

Applicant’s arguments in the Motion to Strike fail because Applicant cannot be damaged by KOFAL’s listing on the Principal Register due to the pre-existing registration for KOFAL-T, also owned by Registrant. As discussed below, the two requirements for application of the *Morehouse* defense –substantially identical marks and substantially identical or substantially similar goods—are satisfied as a matter of law.

i. The marks are all substantially identical.

“For purposes of the Morehouse defense, two marks are ‘substantially identical’ when they are either literally identical or legally equivalent.” *See O-M Bread Inc. v. United States Olympic Committee*, 65 F.3d 933, 36 USPQ2d 1041 (Fed. Cir. 1995) (OLYMPIC and OLYMPIC KIDS are neither the same nor legally equivalent). In the instant case, and as the Examiner found with relation to the refusal to register Applicant’s confusingly similar COFAL mark, the Marks KOFAL and KOFAL-T are substantially identical because they share the same commercial impression and the differences between them are insignificant. *See Dimitri Valiant v. Carl Karcher Enterprises, Inc.*, 1984 TTAB LEXIS 97 (TTAB 1984).

In *Dimitri Valiant*, the term “star” was held to be “the dominant feature” of the marks STAR HAMBURGER and STAR CHEESEBURGER in much the same way as the dominant portion of the KOFAL and KOFAL-T marks are the word “kofal.” This Board also held in *Dimitri Valiant, supra*, that the addition of the word “cheese” was insignificant, and in this matter the “-T” represents an insignificant difference between KOFAL and KOFAL-T. Thus, the *Morehouse* rationale is applicable because the KOFAL mark to be cancelled is substantially identical to the subsisting and pre-existing registration for KOFAL-T, meaning Applicant cannot be damaged by maintenance of the KOFAL registration. Moreover, and as the Examiner determined through denial of the application for COFAL, there is a likelihood of confusion between COFAL on the one hand and both KOFAL and KOFAL-T on the other, satisfying the first of the two *Morehouse* requirements.

Applicant’s arguments that both KOFAL and KOFAL-T are not substantially identical should be rejected, and the Board should agree with the conclusion previously reached by the Examiner regarding all three marks relevant here: “[a]ccordingly, it is the examining attorney’s

opinion that the marks are similar.” See Jan. 30, 2016 Final Office action in Application No. 86029611 for COFAL, p. 3.

ii. The goods are substantially identical or substantially similar³ between Registrant’s own marks and Applicant’s mark.

Applicant argues in its Motion to Strike that Registrant’s *Morehouse* Defense should also be stricken because the goods on the registration for KOFAL and KOFAL-T are not substantially identical or substantially similar. The Examiner who refused registration of Applicant’s COFAL mark, however, considered the relatedness of all the goods at issue in this matter, finding they were all substantially the same or related in a way that bars registration of Applicant’s mark COFAL (which evinces that Applicant cannot be injured by maintenance of KOFAL given the unchallenged KOFAL-T). The Examiner stated as follows in the Final Office action:

In this case, the identification set forth in the application and registration has no restrictions as to nature, type, channels of trade, or classes of purchasers. Therefore, it is presumed that these goods and/or services travel in all normal channels of trade, and are available to the same class of purchasers. Further, the registrant uses broad wording to describe the goods and this wording is presumed to encompass all goods of the type described, including those in applicant’s more narrow identification. The registrant’s broad identification of “balms for medical purposes” and “balms for pharmaceutical purposes” is seen to include the applicant’s analgesic balm. Similarly, the applicant’s broad identification of “analgesic preparations” is seen to include goods such as the registrant’s analgesic balm and analgesic muscle relaxant pharmaceutical preparations. In addition, see the attached evidence illustrating a producer of both bandages and analgesic cream.

A search of Office records illustrates a more specific connection between the identified goods. The trademark examining attorney has attached evidence from the USPTO’s X-Search database consisting of a number of third-party marks registered for use in connection with the same or similar goods as those of both applicant and registrant in this case. **This evidence shows that the goods listed therein, namely, “analgesic preparations” and “analgesic balm” or “adhesive bandages” goods, are of a kind that may emanate from a single source under a single mark.** See *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015) (citing *In re Mucky Duck Mustard Co.*, 6 USPQ2d

³ As cited in case law within the instant Response, the Board has utilized both terms—substantially identical and substantially similar—when articulating the *Morehouse* standard.

1467, 1470 n.6 (TTAB 1988)); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); TMEP §1207.01(d)(iii).

See Jan. 30, 2016 Final Office action in Application No. 86029611 for COFAL, p. 3 (emphasis added). As discussed below, the Examiner was correct.

“The Morehouse defense requires the goods to be ‘identical, substantially the same, or so related so as to represent in law a distinction without a difference.’” *See Mag Instrument, Inc. v. The Brinkmann Corporation*, 2010 TTAB LEXIS 322, *26 (TTAB 2010). This is precisely what the Examiner found and what Registrant hopes the Board rules in this matter. Registration for KOFAL-T is for *analgesic balm* in International Class 005, and Registrant’s KOFAL and Applicant’s COFAL similarly list *analgesic balm* as a category of goods in the same class. Notably, the goods listed by Applicant for its mark are *Analgesic and muscle relaxant pharmaceutical preparations; Analgesic balm; Analgesic preparations; Curare for use as a muscle relaxant; Medicaments for promoting recovery from tendon and muscle injuries and disorders and sports related injuries; Multipurpose medicated antibiotic cream, analgesic balm and mentholated salve; Muscle relaxants* also in International Class 005. Again, the Examiner found that these goods are related as evidence shows they emanate from a single source and are connected. The Examiner is correct.

The aforementioned goods listed for both COFAL and KOFAL⁴ are indeed related to those in the registration for KOFAL-T because consumers “are likely to believe that the [goods],

⁴ The goods listed in the registration for KOFAL are *Adhesive bandages; Adhesive bands for medical purposes; Analgesic and muscle relaxant pharmaceutical preparations; Analgesic balm; Anti-inflammatory gels; Anti-inflammatory salves; Anti-inflammatory sprays; Balms for medical purposes; Balms for pharmaceutical purposes; Curare for use as a muscle relaxant; Herbal topical creams, gels, salves, sprays, powder, balms, liniment and ointments for the relief of aches and pain; Medicaments for promoting recovery from tendon and muscle injuries and disorders and sports related injuries; Multipurpose medicated antibiotic cream, analgesic balm and mentholated salve; Muscle relaxants; Sports cream for relief of pain; Therapeutic spray to sooth and relax the muscles.*

similarly marked, come from the same source, or are somehow connected with or sponsored by a common company.” See *Daddy’s Junky Music Stores, Inc. v. Big Daddy’s Family Music Ctr.*, 109 F.3d 275 (6th Cir. 1997). As such, the pre-existing KOFAL-T registration bars Applicant’s cancellation action under *Morehouse* and its progeny because, as the Examiner also pointed out *supra*, the goods listed for KOFAL and KOFAL-T qualify as substantially identical and related, preventing COFAL from registering as a result. Applicant was clearly incorrect in its contention that the goods covered by the KOFAL and KOFAL-T registrations are “indisputably not ‘essentially the same’.” Motion to Strike at pgs. 4-5.

Finally, Applicant argued in its Motion that KOFAL and KOFAL-T fail to meet the *Morehouse* standard because KOFAL additionally includes a registration for goods in International Class 10 (drug delivery patches sold without medication; Elastic bandages), as well as adhesive bandages (which are listed in Class 05 and which the Examiner found is sufficiently related to analgesic balm so as to prevent COFAL’s registration).⁵ This argument is a red herring because Applicant never applied in Class 10 and cannot allege an injury with relation to same within the instant cancellation action. A different class of goods not part of the injury alleged in a cancellation action by a petitioner is irrelevant to the central inquiry under *Morehouse*: whether it is true that the petitioner (here, Applicant) cannot be injured by the registration it seeks to cancel (KOFAL) given the existence of an unchallenged similar registration (KOFAL-T). Additionally, Applicant’s off point commentary in the Motion to Strike regarding a pleading in an opposition action for an application that was dismissed voluntarily is wholly immaterial and irrelevant to the question of whether Registrant’s *Morehouse* Defense should be stricken.

⁵ Applicant states in the Motion to Strike: “By way of just a few examples, the ‘KOFAL-T’ Registration’s ‘analgesic balm’ is not essentially the same as the ‘adhesive bandages’ or ‘drug delivery patches sold without medication’ identified in the ‘KOFAL’ registration that is at issue in this proceeding.”

As set forth above, KOFAL-T blocks registration of COFAL under every scenario, showcasing that the *Morehouse* Defense pled in this case is sound, that Applicant can have no interest in the maintenance of the registration for KOFAL, and that Applicant has no standing given the inability to obtain relief in this action.

E. Registrant’s Fifth, Sixth, and Seventh Affirmative Defenses Are Pled With Specificity, Affording Applicant Proper Notice.

As previously outlined, the primary purpose of an answer or defense is to give proper notice to the opposing party. TBMP 506.01. Applicant also admits this is the standard. *See* Motion to Strike at p. 6 (discussing fair notice). Registrant’s Fifth, Sixth, and Seventh Affirmative Defenses are each pled with specificity.

“The elements of a defense should be stated simply, concisely, and directly.” TBMP 311.02(b). “However, the pleading should include enough detail to give the plaintiff fair notice of the basis for the defense.” *Id.* Registrant’s Fifth Affirmative Defense is that “Petitioner’s mark [C]OFAL⁶ is primarily merely a surname and cannot register as a matter of law.” This affirmative defense meets the textbook standard of what a defense is: even taking the allegations in the cancellation action as true, the lack of distinctiveness of Applicant’s mark is a “matter constituting an avoidance” of Applicant’s petition. If it is proven that Applicant’s mark COFAL is primarily merely a surname, the cancellation action necessarily fails given that Applicant could not register its mark regardless of the maintenance of the registration for KOFAL. Registrant’s Fifth Affirmative Defense thus meets the case law and procedural standards cited in TBMP, and Applicant’s Motion to Strike said defense should thus be denied.

⁶ Registrant mistakenly wrote KOFAL instead of COFAL within the Fifth Affirmative Defense. Applicant, however, rightfully assumed same was a small typographical error and proceeded to move to strike the defense, interpreting same as relating to COFAL.

Registrant's Sixth Affirmative Defense (estoppel) is as follows:

Petitioner should be estopped from bringing the instant cancellation action against KOFAL because it never opposed the prior KOFAL-T registration, which has the same commercial impression as Petitioner's COFAL Mark for related goods, relates to the KOFAL registration at issue, and was cited by the Examiner in denying Petitioner's Application for COFAL on the basis of a likelihood of confusion.

This Board has stated outright that both estoppel and laches are valid affirmative defenses. *See* TBMP 311.02(b). As even a cursory glance reveals, Applicant's characterization of the Sixth Affirmative Defense as "mere reference to the doctrine of estoppel" lacking "specific allegations" falls flat on its face. With specificity, Registrant discussed how and why estoppel bars the instant cancellation action. Specifically, Registrant averred that Applicant should be estopped because it failed to oppose the now unchallenged registration for KOFAL-T, which is at the heart of Registrant's Morehouse Defense and which was cited by the Examiner as a bar to the registration of Applicant's mark COFAL. Applicant's Motion to Strike the Sixth Affirmative Defense is simply spurious and unsupported by application of case law to the text of what has been pled. Applicant's Motion to Strike the Seventh Affirmative Defense⁷ (laches) fails for the identical reason.

F. Registrant's Reservation Of Rights Should Be Acknowledged In The Event Of Amendment.

Although Registrant's reservation of rights above its WHEREFORE clause seeks to reserve the right to add further affirmative defenses as a result of facts discovered during the course of this proceeding, Registrant opines that the characterization by Applicant that the reservation of rights functions somehow to prevent notice of a future affirmative defense is nonsensical. As Applicant

⁷ Registrant's Seventh Affirmative Defense reads as follows: "Petitioner's cancellation action should be barred as a result of waiver given that Petitioner never opposed the KOFAL-T registration, which was cited by the Examiner in denying Petitioner's Application for COFAL and which has the same commercial impression on related goods."

correctly points out, Registrant would have to move to amend its Answer in the event it desires to add another defense in the future. Insofar as Applicant's argument seeks to prevent Registrant from being able to later amend its pleading, Registrant prays the Board deny the Motion to Strike as amendments are to be liberally and freely given. *See* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave when justice so requires.").

III. CONCLUSION

Registrant respectfully requests that for the reasons set forth above, the Board deny Applicant's Motion to Strike. Alternatively, to the extent that the Board strikes any defense Registrant asks for leave to amend. Registrant also respectfully requests the Board grant its Motion for Summary Judgment filed contemporaneously with the instant Response.

Dated: May 3, 2017.

Respectfully Submitted,

ESPINOSA TRUEBA MARTINEZ P.L.

By: /s/ Robert R. Jimenez

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CERTIFICATE OF SERVICE

As per TBMP R. 113, I hereby certify that on May 3, 2017 a true copy of this document was served via email upon the following attorney of record for Applicant, Oliver A. Ruiz of Malloy & Malloy, P.L., 2800 SW 3rd Ave., Miami, Florida 33129, to oruiz@malloylaw.com, and jcmalloy@malloylaw.com, jnmcdonaled@malloylaw.com.

By: /s/ Robert R. Jimenez
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