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

Proceeding	92066758
Party	Plaintiff Drayson Technologies (Europe) Limited
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Submission	Motion to Strike Pleading/Affirmative Defense
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Date	09/29/2021
Attachments	Drayson v. Paftec - CLEANSPACE cancellation- Petitioner Motion to strike.pdf(136049 bytes)

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

DRAYSON TECHNOLOGIES (EUROPE)
LIMITED,

Petitioner,

v.

PAFTEC TECHNOLOGIES PTY LTD,

Registrant.

Cancellation No.: 92066758

DKT. NO. 091938.000047

MOTION TO STRIKE

Pursuant to Fed. R. Civ. P. 12(f), Trademark Rule 2.116(a), and TBMP § 506, Petitioner, Drayson Technologies (Europe) Limited, moves to strike matter from Registrant, PAFtec Technologies Pty Ltd.'s, Answer and Affirmative Defenses to the First Amended Petition for Cancellation, served September 11, 2021. (30 TTABVUE.)

The Board has discretion to strike from a pleading “an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). The Board may act *sua sponte* or else on motion of a party made within 21 days after being served with the pleading. *Id.* Petitioner’s motion to strike is timely.

Registrant’s “affirmative defenses” are legally insufficient and should be stricken from the Answer with prejudice.

I. First “Affirmative Defense”

Registrant’s “first defense” in its Answer is that “Applicant [sic] denies each and every allegation of the Petition not specifically admitted herein.” This is not an affirmative defense. An

affirmative defense is “[a] defendant’s assertion raising new facts and argument that, if true, will defeat the plaintiff’s or prosecution’s claim, even if all allegations in the complaint are true.”

H.D. Lee Co. v. Maidenform Inc., 87 USPQ2d 1715, 1720 (TTAB 2008). A general denial does not meet this standard, and is redundant to the denials contained in the Answer. Registrant’s “first defense” should therefore be stricken pursuant to Fed. R. Civ. P. 12(f).

II. Second “Affirmative Defense”

Registrant’s “second defense” is that “Petitioner’s claims are barred in whole or in part under the doctrines of estoppel, waiver, acquiescence and/or laches.” This is a bare and conclusory allegation, without pleading any of the elements of any of those defenses. A pleading must “include enough detail to give the plaintiff fair notice of the basis for the defense,” TBMP § 311.02(b)(1), and Registrant’s “second defense” fails to do so here. Affording Registrant an opportunity to plead these defenses in further detail would be futile, given that Petitioner’s application was refused a final refusal based on a likelihood of confusion with Registrant’s registration on February 23, 2017, and Petitioner commenced this cancellation proceeding on August 23, 2017. (28 TTABVUE 6, First Amended Petition for Cancellation at paragraph 6; 1 TTABVUE, Petition for cancellation filed August 23, 2017). There has been no undue delay by Petitioner or prejudice to Registrant in bringing this action that would support a laches, estoppel, or acquiescence defense. *See Gaming and Leisure Props., Inc. v. Global Logistic Props. Ltd.*, 2017 WL 3670414, at *3 (TTAB April 11, 2017) (setting forth elements of laches and equitable estoppel defenses and granting motion to strike those defenses as futile). Moreover, the Board has recognized that affirmative defenses of estoppel, laches, and acquiescence are not available against claims of fraud or abandonment because of the public policy interest in removing marks from the register that were procured or maintained by fraud or have been abandoned. *See Harjo*

v. Pro Football Inc., 30 USPQ2d 1828 (TTAB 1994); *see also DSM IP ASSETS B.V. v. Neurohacker Collective, LLC*, 2019 WL 912221, at *2 (TTAB Feb. 21, 2019) (granting motion to strike affirmative defenses).

The very fact that Petitioner is prosecuting both this action and a concurrent opposition proceeding against Registrant inherently undermines any defense on the basis of waiver, which requires an existing right, knowledge of the right, and an actual intention to relinquish the right. *Travel Warrior v. TW Travel*, 2021 WL 389278, at *2 (TTAB Jan. 29, 2021) (granting motion to strike affirmative defense of waiver and other affirmative defenses). All of the “defenses” raised in Registrant’s “second defense” should be stricken with prejudice.

III. Third “Affirmative Defense”

Registrant’s “third defense” states that “Petitioner’s claims are unfounded and unsupported. Petitioner cannot show, by clear and convincing evidence, that the Registrant knowingly made a false, material representation with the intent to deceive the USPTO.” This “defense” merely states that Petitioner cannot meet its burden of proof, and is not a proper affirmative defense. It should be stricken as immaterial pursuant to Fed. R. Civ. P. 12(f). Attacks on the sufficiency of the pleadings are properly asserted by separate motion filed prior to or with the answer, *see* Fed. R. Civ. P. 12(b)(6), and are otherwise waived if not so asserted.

Amendment of this defense would be futile in any event, because Petitioner’s claim for cancellation on the grounds of fraud on the USPTO as pleaded in the First Amended Petition for Cancellation adequately pleads each of the elements of fraud: (1) that the Registrant knowingly made a false, material representation of fact (paragraphs 22-25), (2) that Registrant intended to deceive the USPTO (paragraph 26), (3) that the USPTO relied on Registrant’s misrepresentation

(paragraph 27), and (4) that Petitioner is being harmed as a result (paragraph 31). *See In re Bose Corp.*, 580 F.3d 1240 (Fed. Cir. 2009).

For the foregoing reasons, Registrant's pleaded "affirmative defenses" are legally insufficient, redundant, immaterial, and futile. They should be stricken from Registrant's answer without leave to re-plead.

**REQUEST FOR PARTICIPATION OF INTERLOCUTORY ATTORNEY IN
DISCOVERY CONFERENCE**

Pursuant to Trademark Rule 2.120(a)(2)(i), Petitioner respectfully requests that the Interlocutory Attorney participate in the parties' discovery conference by telephone in order to review the sufficiency of Registrant's pleading. Petitioner's counsel will telephone the Interlocutory Attorney to discuss scheduling of the conference.

Dated: September 29, 2021

Respectfully submitted,

BAKER & HOSTETLER LLP

By: /s/ Lesley M. Grossberg

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CERTIFICATE OF FILING AND OF SERVICE

I hereby certify that on September 29, 2021, a true and correct copy of the foregoing MOTION TO STRIKE has been filed electronically using ESTTA, and Registrant's counsel of record has been served via email at fredwmeyers@ipsolved.com and Chicago.officialmail@ipsolved.com.

/Lesley M Grossberg/ _____
Lesley M. Grossberg