ESTTA Tracking number: **ESTTA1055922**
Filing date: **05/16/2020**

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

Proceeding	92070823
Party	Plaintiff ICware Systems, Inc. dba BatchTest Corporation
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Submission	Motion to Strike Pleading/Affirmative Defense
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Attachments	20200516 BatchTest Motion to Strike Affirmative Defenses.pdf(572541 bytes)

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

In the Matter of Trademark Registration No. 4,499,170
For the Mark: BATCHTEST

ICWARE SYSTEMS INC. dba BATCHTEST CORPORATION Petitioner, V. IKONIX USA LLC. Registrant.	))))))))))	CANCELLATION NO. 92070823

PETITIONER'S MOTION TO STRIKE REGISTRANT'S AFFIRMATIVE DEFENSES

Pursuant to Fed. R. Civ. P. 12(f) and TBMP § 506, Petitioner BatchTest Corporation ("BatchTest") hereby moves to strike Affirmative Defenses of Registrant IKONIX USA LLC ("Registrant") with prejudice.

REGISTRANT'S AFFIRMATIVE DEFENSES

Registrant has once again wasted the judicial resources of this Board and resources of the Parties. In the "Answer to Second Amended Petition For Cancellation" (the "Second Answer"), Registrant has presented no new facts and merely added verbiage in repeating the same affirmative defenses, which the Board has already stricken in its previous Order on September 7, 2019 (10 TTABVUE) (the "Previous Order").

Once again, Registrant's Affirmative Defenses do not meet the standards established by Rule 8(d) of the Federal Rules of Civil Procedure ("FRCP") and Section 311.02(b) of the TBMP. Each Affirmative Defense contains immaterial or insufficient claims.

FACTS

Registrant has admitted in paragraph 11 of the Second Answer, that its predecessor-in-interest Associated Research, Inc. ("ARI") had not used the BATCHTEST Mark prior to November 21, 2012, when ARI originally filed the application for the Registration (the "Application").

BatchTest has continuously advertised "BatchTest" as its trademark and tradename on its website at www.BatchTest.com (1 TTABVUE Exhibit "C") since at least December 31, 2010, almost two years prior to filing of the Application. The fact is that ARI and its counsel either gravely failed to do due diligence in conducting a most basic Common Law search for the mark "BATCHTEST" on the internet, or blatantly ignored BatchTest's pre-existing use of the trademark altogether, before filing the Application.

The USPTO database has a specimen filed by "BatchTest Corporation" on November 11, 2011 (9 TTABVUE, Exhibit A) under Application Serial Number 85237986, which clearly shows a claim of "BatchTest" as BatchTest's trademark. The said specimen was filed by BatchTest over a year prior to the filing of the Application and it is easily found on the USPTO by searching for "BATCHTEST", yet ARI and its counsel once again either failed gravely in conducting a thorough search on the USPTO database, or blatantly ignored the said evidence altogether, before filing the Application.

RESPONSE

In its Second Answer, without presenting any new fact whatsoever, Registrant has repeated the same affirmative defenses previously stricken by the Board. In paragraphs 71, 72, and 73 of the Second Answer, Registrant has merely recalculated the same timeline which it had presented previously (8 TTABVUE, page 3, paragraph 2.) In paragraphs 74 and 75 of the Second Answer, Registrant has repeated its previous allegations (4 TTABVUE 44) using more words. And lastly in paragraph 76 of the Second Answer, Registrant has repeated its previous affirmative defense (4 TTABVUE 45) of a bare assertion that a claim is barred.

The Board had already stricken all of Registrant's affirmative defenses in its Previous Order, while stating "Mere passage of time does not constitute laches" and that "There must also have been some detriment due to the delay" (10 TTABVUE page 4). Yet once again, Registrant has

repeated the same affirmative defenses without providing enough detail to give BatchTest a fair notice of the basis for the defense.

A party pleading an affirmative defense must give fair notice of the basis of its claimed defense, and cannot rely on a bare assertion that a claim is barred. TBMP Section 311.02. *McDonnell Douglas Corp. v. National Data Corp.*, 228 USPQ 45 (TTAB 1985). Section 311.02(b) of the TBMP requires that a defense "should include enough detail to give the plaintiff fair notice of the basis for the defense." *Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1538 (TTAB 2007); *Ohio State University v. Ohio University*, 51 USPQ 2d 1289, 1292. The vague boiler plate allegation that Petitioner's claim is barred by laches fails to give Petitioner fair notice of the basis this defense. Accordingly, Petitioner is unable to address the sufficiency of this defense due to a lack of specificity. As such, Registrant's pleading is insufficient and its affirmative defenses should be stricken.

As BatchTest had also previously alleged (6 TTABVUE page 2, paragraph 3), the equitable defense of laches cannot serve as a bar against a petition for cancellation based on likelihood of confusion when confusion is, in fact, inevitable. In that event, any injury to the Registrant is outweighed by the public's interest in preventing confusion. E.g., *Hornby v. TJX Cos.*, 87 USPQ2d at 1419 n. 9; *Christian Broadcasting Network Inc. v. ABS-CBN Int'l.*, 84 USPQ2d 1560, 1572 (TTAB 2007). Here, we have use of identical marks on similar goods in a very specialized industry of electrical/electronic test & measurement. In such a situation, where confusion is inevitable, the public interest is the dominant consideration. See *Ultra-White Co., Inc. v. Johnson Chemical Indus., Inc.,* 465 F.2d 891, 175 USPQ 166, 167 (CCPA 1972) (confusion inevitable for nearly identical BRIGHT WHITE and BRIGHTWHITE marks for laundry products). In fact, Registrant has already admitted (22 TTABVUE page 3, paragraphs 3 and 4) that due to an inevitable likelihood of confusion the examining attorney has "rejected the '304 application" and "the '323 application over the present Registration No. 4,499, 170", where both of the said applications have been filed by BatchTest for its BATCHTEST trademark in Classes 9 and 42. As such, Registrant's affirmative defense of laches cannot prevail.

Additionally, BatchTest has requested a reconsideration of the Board's Order striking BatchTest's Fraud Claims against Registrant; In the event that the Board allows BatchTest to

continue pursuing its fraud claims, BatchTest also asserts that affirmative defense of laches is not applicable in cancellation proceedings which contain a claim of fraud.

Accordingly, BatchTest believes that Registrant's Affirmative Defenses are once again immaterial or not sufficiently specific so that it can address these defenses throughout this proceeding. In fact, Registrant has merely repeated previously stricken affirmative defenses without presenting any new supporting facts or arguments. Therefore, Petitioner respectfully requests that each of Registrant's Affirmative Defenses be stricken with prejudice.

Respectfully submitted,

BatchTest Corporation

Dated: __May 16, 2020___

_/Dinesh Patel/______________

Dinesh Patel, President
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the attorney for the other party by email on May 16, 2020 at the following email address:

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By: BatchTest Corporation

Signature: /Dinesh Patel/

Name: Dinesh Patel, President, BatchTest Corporation

Date: May 16, 2020