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

Proceeding	92073076
Party	Plaintiff InTouch Technologies, Inc. dba InTouch Health
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Submission	Motion to Strike Pleading/Affirmative Defense
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Attachments	InTouch GlobalMed Motion to Strike Affirmative Defenses in Registrants Answer and to Suspend Proceedings.pdf(194406 bytes)

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

InTouch Technologies, Inc.)	
dba InTouch Health.)	
)	
Petitioner,)	CANCELLATION NO. 92073076
)	Registration No. 5,528,217
v.)	
)	
GlobalMedia Group, LLC)	
dba GlobalMed)	
)	
Registrant.)	
)	

**MOTION TO STRIKE AFFIRMATIVE DEFENSES IN REGISTRANT’S
RESPONSE TO PETITION TO CANCEL AND TO SUSPEND PROCEEDINGS**

INTRODUCTION

Pursuant to Fed. R. Civ. P. 12(f) and TBMP § 506, Petitioner InTouch Technologies, Inc., dba InTouch Health (“Petitioner”) hereby moves to strike affirmative defenses 1, 2, 4, and 5 set forth in Registrant’s Response to Petition to Cancel (the “Answer”) filed by GlobalMedia Group, LLC dba GlobalMed (“Registrant”) as immaterial, irrelevant, insufficient, and impertinent defenses. As the Board’s determination of Registrant’s motion will affect discovery in this proceeding, Petitioner also moves that the proceeding be suspended pending consideration of the motion to strike and that, after the Board decides the motion, the deadlines for the initial discovery conference, discovery and trial be reset.

MEMORANDUM IN SUPPORT OF MOTIONS

The Board may strike from a pleading any insufficient defense, or any redundant, immaterial, impertinent or scandalous matter. Fed. R. Civ. P. 12(f); TBMP § 506 (2017);

Alcatraz Media, Inc. v. Chesapeake Marine Tours, Inc., 107 USPQ2d 1750, 1753 n. 6 (TTAB 2013), *aff'd*, 565 F. App'x 900 (Fed. Cir. 2014); *Ohio State University v. Ohio University*, 51 USPQ2d 1289, 1292 (TTAB 1999); and *Internet Inc. v. Corporation for National Research Initiatives*, 38 USPQ2d 1435, 1438 (TTAB 1996). Similarly, the Board may strike an impermissible or insufficient claim, or portion of a claim, from a pleading. TBMP § 506.01.

Here, Registrant pled the following affirmative defenses:

Affirmative Defense No.	Defense
1	Failure to state a claim upon which relief can be granted.
2	Laches and/or estoppel.
3	Differences in sight, sound, meaning, and commercial impression.
4	Petitioner does not have valid trademark rights.
5	Reservation of rights to plead additional affirmative defenses.

These defenses have no bearing on the issues in this cancellation proceeding or otherwise were inadequately pled. Petitioner, therefore, moves that the Board strike affirmative defenses 1, 2, 4, and 5 from Registrant's Answer. Each of the affirmative defenses is separately addressed below.

A. Registrant's First Affirmative Defense Should be Stricken

Registrant's first affirmative defense states as follows:

1. The Petition to Cancel fails, in whole or in part, to state a claim upon which relief can be granted.

A contention that a pleading fails to state a claim upon which relief can be granted is not an affirmative defense. Instead, a contention that a pleading fails to state a claim upon which relief can be granted is a statement that a pleading is insufficient, and should be the subject of a motion to dismiss under Fed. R. Civ. P. 12(b)(6).

Without limiting the foregoing, Petitioner respectfully submits that it adequately pled a

claim for likelihood of confusion and abandonment. Therefore, Petitioner has properly stated a claim and has standing to file the cancellation proceeding. In order to withstand the assertion that a pleading fails to state a claim, a plaintiff need only allege such facts that would, if proved, establish that (1) the plaintiff has standing to maintain the proceeding, and (2) a valid ground exists for cancelling the registration. The pleading must be examined in its entirety, construing the allegations therein liberally, as required by Fed. R. Civ. P. 8(f), to determine whether it contains any allegations, which, if proved, would entitle the plaintiff to the relief sought. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982); TBMP § 503.02 (3d ed. Rev. 2011).

Petitioner respectfully submits that it adequately pled ownership of common law rights, priority of use, and a valid ground for cancelling Registrant's registration, namely, a likelihood of confusion. *See* Petition for Cancellation, ¶¶ 3-15. More specifically, Petitioner pled the following:

- Petitioner's ownership of common law rights for the XPRESS and INTOUCH EXPRESS marks. Petition to Cancel, ¶¶ 4-6.
- Petitioner's priority with respect to its use of the XPRESS and INTOUCH EXPRESS marks. Petition to Cancel, ¶¶ 13-14.
- Likelihood of confusion between Petitioner's XPRESS and INTOUCH EXPRESS marks and Registrant's XPRESS mark. Petition to Cancel, ¶¶ 7 and 15.

In short, Petitioner pled a real interest and a direct and personal stake in the outcome of the proceeding and a reasonable basis for its belief in damage, including, without limitation, concern that a potential consumer would be confused, mistaken or deceived as to the source of

Registrant's goods and Petitioner's goods. These facts set forth the required factual allegations of a valid ground for cancelling a registration on the ground of priority and likelihood of confusion.

Petitioner also adequately pled a valid ground for cancelling Registrant's registration based on abandonment. *See* Petition for Cancellation, ¶¶ 3-11 and ¶¶ 16-18. More specifically, Petitioner pled the following:

- Registrant's intent to discontinue use of the XPRESS mark. Petition to Cancel, ¶¶ 8-10.
- Registrant's discontinuance of use of the XPRESS mark without intent to resume use. Petition to Cancel, ¶¶ 8-10 and 17.

In short, Petitioner pled a real interest and a direct and personal stake in the outcome of the proceeding and a reasonable basis for its belief in damage, including, without limitation, concern that petition will maintain a registration for mark that it discontinued use of, without intent to resume use. These facts set forth the required factual allegations of a valid ground for cancelling a registration on the ground of abandonment.

Accordingly, Petitioner respectfully requests that the Board strike Registrant's first affirmative defense from the Answer.

B. Registrant's Second Affirmative Defense Should be Stricken

Registrant's second affirmative defenses state as follows:

2. The Petition to Cancel fails, in whole or in part, under principles of laches and/or estoppel.

The affirmative defenses of acquiescence, laches, waiver, and estoppel are generally inapplicable to cancellation proceedings before the Board. *See National Cable Television Ass'n Inc. v. Am. Cinema Editors, Inc.*, 19 USPQ2d 1424, 1432 (Fed. Cir. 1991). In addition,

Registrant failed to plead any factual basis whatsoever in support of any claimed laches or estoppel, which fails to meet the Board's requirement that affirmative defenses be pled with sufficient detail to provide fair notice of the actual basis for the defense.

Accordingly, Petitioner respectfully requests that the Board strike Registrant's second affirmative defense from the Answer.

C. Registrant's Fourth Affirmative Defense Should be Stricken

Registrant's fourth affirmative defense states as follows:

4. The Petition to Cancel fails, in whole or in part, because Petitioner does not have valid trademark rights in any trademark that is the same as or similar to XPRESS.

Registrant failed to plead any factual basis whatsoever in support of any claimed invalidity, which fails to meet the Board's requirement that affirmative defenses be pled with sufficient detail to provide fair notice of the actual basis for the defense.

Accordingly, Petitioner respectfully request the Board strike Petitioner's fourth affirmative defense from the Answer.

D. Registrant's "Catch-all" Fifth Affirmative Defense Should be Stricken

Registrant's fifth affirmative defense states as follows:

5. Registrant expressly reserves the right to assert and pursue any affirmative defenses that may exist now or in the future based upon any information learned, gathered, and/or collected subsequent to the preparation and filing of this Answer.

Registrant's fifth affirmative defense is a catchall provision that purports to allow Registrant to assert any affirmative defense it chooses in the future. This "catch-all" defense

should be stricken because it is not an affirmative defense, it does not plead any affirmative defense, it does not place Petitioner on notice of the factual basis for any affirmative defense, and it seeks to circumvent the applicable procedural rules governing amendment of pleadings. *See* Fed. R. Civ. P. 15 and Trademark Rule 2.107. This so-called affirmative defense should be stricken as insufficient.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that the Board grant this Motion in its entirety, order each of Registrant's affirmative defenses 1, 2, 4, and 5 stricken from the Answer, suspend proceedings pending disposition of this Motion and reset the deadlines for the initial discovery conference, discovery and trial to run after proceedings are resumed.

Dated: February 19, 2020

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CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing MOTION TO STRIKE AFFIRMATIVE DEFENSES IN REGISTRANT'S RESPONSE TO PETITION TO CANCEL AND TO SUSPEND PROCEEDINGS was emailed to each of the following:

GlobalMedia Group LLC
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Dated: February 19, 2020

/NANCY JOHNSON/