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

Proceeding	92075281
Party	Plaintiff Nerdio, Inc.
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Submission	Motion to Strike Pleading/Affirmative Defense
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Date	11/20/2020
Attachments	Petitioner Motion to Strike Affirmative Defenses.pdf(40296 bytes)

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

In the Matter of Trademark Registration No. 6153453
For the Mark: NERDIO
Date Registered: September 15, 2020

Nerdio, Inc.,)	
a Delaware corporation,)	
Petitioner,)	Cancellation No. 92075281
)	
v.)	
)	
NerdIO Limited)	
a Hong Kong corporation,)	
Respondent.)	
)	

**PETITIONER’S MOTION TO STRIKE RESPONDENT’S AFFIRMATIVE DEFENSES
AND MEMORANDUM IN SUPPORT**

Pursuant to Rule 12(f) of the Federal Rules of Civil Procedure and Sections 506.01 and 506.02 of the Trademark Trial and Appeal Board Manual of Procedure (“TBMP”), Petitioner Nerdio, Inc. (hereinafter the “Petitioner”) respectfully requests that the Trademark Trial and Appeal Board (the “Board”) enter an order to strike all of the affirmative defenses in Respondent NerdIO Limited’s (hereinafter the “Respondent”) Answer to Petition for Cancellation.

I. MOTIONS TO STRIKE ARE GRANTED WHEN AFFIRMATIVE DEFENSES ARE INSUFFICIENTLY PLEADED

The Board “may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f).

A legally sufficient pleading of each affirmative defense must include enough factual detail to provide Petitioner fair notice of the basis for the defense. *See* Fed. R. Civ. P. 8(b)(1) and 12(f); *see also, IdeasOne Inc. v. Nationwide Better Health Inc.*, 89 U.S.P.Q.2d 1952, 1953 (T.T.A.B. 2009); *Fair Indigo LLC v. Style Conscience*, 85 U.S.P.Q.2d 1536, 1538 (T.T.A.B. 2007); *Midwest*

Plastic Fabricators, Inc. v. Underwriters Labs. Inc., 5 USPQ2d 1067, 1069 (T.T.A.B. 1980); TBMP § 311.02(b) (“[T]he pleading should include enough detail to give the plaintiff fair notice of the basis for the defense.”). If a pleading does not include enough detail to give the plaintiff fair notice of the basis for a defense, the Board may strike it from the pleading. *Id.*

Similarly, the Board may strike an affirmative defense from a pleading if it is not an actual affirmative defense. See *Blackhorse et al. v. Pro Football, Inc.*, 98 U.S.P.Q.2d 1633, 1637 (T.T.A.B. 2011) (striking an affirmative defense of lack of standing from an Answer because lack of standing is not an affirmative defense).

II. ARGUMENT

a. Respondent’s Affirmative Defenses are Insufficiently Pleaded and Should Be Stricken

In its Answer to the Petition for Cancellation, dated November 2, 2020, Respondent raised six affirmative defenses. As demonstrated below, Respondent’s affirmative defenses are insufficiently pleaded under Fed. R. Civ. P. 8(b) and T.T.A.B. Rule 311.02(b). These rules require Respondent to identify the basis for its affirmative defenses with sufficient detail to provide both Petitioner and the Board with fair notice of the predicate for those defenses. The Respondent’s affirmative defenses, however, are bald and conclusory assertions that failed to provide any basis for the claimed defenses nor does Respondent plead any of the elements necessary to establish the affirmative defenses. Accordingly, Petitioner respectfully requests that the Respondent’s affirmative defenses be stricken.

b. Respondent’s Assertion That Petitioner Lacks Standing Should Be Stricken

The Board should strike Respondent’s first affirmative defense, that Petitioner lacks standing, because “[l]ack of standing is not an affirmative defense.” *Blackhorse*, 98 U.S.P.Q.2d

at 1637. Therefore, Petitioner's motion to strike Respondent's first affirmative defense should be granted.

c. Respondent's Assertion That Petitioner's Claims Are Barred By the Doctrines of Waiver, Acquiescence and Estoppel Should be Stricken

The Board should strike Respondent's second, third and fourth affirmative defenses of waiver, acquiescence and estoppel because Respondent failed to provide any factual basis or give any details on the required elements for these affirmative defenses. A bald assertion of waiver, acquiescence and estoppel is insufficient to put Petitioner on notice of these defenses. *See* Fed. R. Civ. P. 8(b)(1) and 12(f); *see also, IdeasOne Inc.*, 89 U.S.P.Q.2d at 1953; *Fair Indigo LLC*, 85 U.S.P.Q.2d at 1538; *Midwest Plastic Fabricators, Inc.*, 5 USPQ2d at 1069; TBMP § 311.02(b) (“[T]he pleading should include enough detail to give the plaintiff fair notice of the basis for the defense.”). Indeed, waiver is not among the affirmative defenses available to Respondent and is not generally recognized as a defense in trademark cases. *See* TBMP § 311.02(b)(1); McCarthy on Trademarks and Unfair Competition § 31:43 (Fifth Ed.). Thus, Petitioner's motion to strike Respondent's second, third and fourth affirmative defenses should be granted.

d. Respondent's Assertion That Petitioner's Claims are Barred on Grounds of Laches Should be Stricken

The Board should strike Respondent's fifth affirmative defense of laches. Respondent alleges, without any support, that Petitioner had “actual and/or constructive knowledge of Registrant and its mark and claimed rights in its mark, prior to Petitioner's purported adoption of the subject mark.” 4 TTABVUE 5. Without any factual basis for this defense, or any supporting evidence, Respondent fails to put Petitioner and the Board on notice of the factual basis for the defense. *See* Fed. R. Civ. P. 8(b)(1) and 12(f); *see also, IdeasOne Inc.*, 89 U.S.P.Q.2d at 1953; *Fair Indigo LLC*, 85 U.S.P.Q.2d at 1538; *Midwest Plastic Fabricators, Inc.*, 5 USPQ2d at 1069; TBMP § 311.02(b) (“[T]he pleading should include enough detail to give the plaintiff fair notice

of the basis for the defense.”). Therefore, Respondent’s affirmative defense of laches is insufficiently pled and Petitioner’s motion to strike Respondent’s fifth affirmative defense should be granted.

e. Respondent’s Assertion That Petition’s Claims are Barred on Grounds of Lack of Common-Law Priority in U.S. Commerce Should Be Stricken

The Board should strike Respondent’s sixth affirmative defense of lack of common-law priority in U.S. commerce. Respondent’s pleading is so unclear as to confuse whether its sixth affirmative defense is an assertion related to Petitioner’s standing or pleading. In either case, assertions related to standing or the sufficiency of a pleading are not affirmative defenses. *Blackhorse*, 98 U.S.P.Q.2d at 1637; *The John W. Carson Found. v. Toilets.com, Inc.*, 94 U.S.P.Q.2d 1942, 1949 (T.T.A.B. 2010). Moreover, Respondent fails to give any factual basis for the defense or provide any evidence supporting its defense. Making a bald assertion of lack of common-law priority in U.S. commerce is insufficient as it fails to give fair notice to Petitioner and the Board of the predicate for the defense. *See* Fed. R. Civ. P. 8(b)(1) and 12(f); *see also*, *IdeasOne Inc.*, 89 U.S.P.Q.2d at 1953; *Fair Indigo LLC*, 85 U.S.P.Q.2d at 1538; *Midwest Plastic Fabricators, Inc.*, 5 USPQ2d at 1069; TBMP § 311.02(b) (“[T]he pleading should include enough detail to give the plaintiff fair notice of the basis for the defense.”). Therefore, Petitioner’s motion to strike Respondent’s sixth affirmative defense should be granted.

III. CONCLUSION

Respondent’s affirmative defenses are insufficiently pleaded or otherwise inappropriate. Accordingly, Petitioner respectfully requests that the Board grant this Motion in full, strike all of Respondent’s affirmative defenses, and grant such and other further relief as the Board deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that a copy of the foregoing Petitioner's Motion to Strike Respondent's Affirmative Defenses and Memorandum in Support has been filed electronically through the Electronic System for Trademark Trials and Appeals ("ESTTA") of the U.S. Patent and Trademark Office, with a copy served upon counsel for Respondent via email on Fri, Nov 20, 2020 at the following address:

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