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

Proceeding	92077339
Party	Plaintiff Baidu Online Network Technology (Beijing) Co., Ltd.
Correspondence Address	BEN NATTER HAUG PARTNERS LLP 745 FIFTH AVENUE NEW YORK, NY 10151 UNITED STATES Primary Email: bnatter@haugpartners.com Secondary Email(s): mharris@haugpartners.com, docket@haugpartners.com, ttab@haugpartners.com, mbarer@haugpartners.com 212-588-0800
Submission	Motion to Strike
Filer's Name	Michael Barer
Filer's email	mbarer@haugpartners.com
Signature	/Michael Barer/
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**UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Baidu Online Network Technology (Beijing)	:	
Co., Ltd.,	:	
	:	
Petitioner,	:	Cancellation No. 92077339
	:	
v.	:	
	:	
Apollo Automobile Ltd.,	:	
	:	
Registrant.	:	

PETITIONER’S MOTION TO STRIKE REGISTRANT’S AFFIRMATIVE DEFENSES

Petitioner, Baidu Online Network Technology (Beijing) Co., Ltd. (“Petitioner”), by and through its undersigned counsel, hereby moves to strike the affirmative defenses asserted by Registrant, Apollo Automobile Ltd. (“Registrant”), pursuant to Rule 12(f) of the Federal Rules of Civil Procedure and Section 506 of the Trademark Trial and Appeal Board Manual of Procedure (“TBMP”). Petitioner respectfully requests that the Board strike Registrant’s affirmative defenses pursuant to Rule 12(f). Further, pursuant to Section 510.03(a) of the TBMP and 37 C.F.R. § 2.117(c), Petitioner respectfully requests that the Board suspend the above-captioned proceeding until the Board rules on Petitioner’s Motion to Strike, so that the scope of the proceeding can be properly narrowed and defined for discovery.

I. THE PROCEEDINGS & PLEADINGS

On June 8, 2021 Petitioner filed a Consolidated Petition for Cancellation and Modification (the “Original Petition”) of Registration Nos. 6,035,838 and 6,066,221 (collectively, the “Subject Registrations”) for the marks A APOLLO (plus design) and

APOLLO (stylized) (collectively, the “Subject Marks”), alleging that it has been and will continue to be damaged by continued registration of the Subject Marks, which were cited as a basis for refusal of Petitioner’s Application Serial Nos. 87/515,109, 88/177,266, and 87/514,209, for the marks APOLLO (stylized), APOLLO CYBER RT, and BAIDU APOLLO (collectively, “Petitioner’s Marks”), respectively. (*See* 1 TTABVUE, Original Petition). On June 14, 2021, Petitioner filed an Amended Consolidated Petition for Cancellation and Modification (the “Amended Petition”), wherein Petitioner corrected the basis for cancellation reflected on the Cover Sheet of the Original Petition.¹ (*See* 4 TTABVUE, Amended Petition). In its Amended Petition, Petitioner alleges that Registrant only uses and/or has a bona fide intent to use the Subject Marks with “**hypercars**, namely limited and rare human operated supercars ranking in the top percentile of all automobiles in pricing, acceleration, rarity, handling, speed, sound and appearance.” (*See* 4 TTABVUE, Amended Petition at ¶ 13). Petitioner seeks, in the first instance, cancellation of the Subject Registrations with respect to all goods as to which Registrant lacks a bona fide intent to use the Subject Marks. (*See id.* at ¶ 15). In the alternative, Petitioner seeks modification of the goods and services of the Subject Registration pursuant to 15 U.S.C. § 1068. (*See id.* at ¶ 16).

In support of its claim that Registrant lacks a bona fide intent to use the Subject Marks, Petitioner alleges as follows:

- On information and belief, Registrant is a hyper-car, or high-performance supercar, manufacturer (*id.* at ¶ 5);
- On information and belief, Registrant’s hyper-car products are not available for purchase by the general public in the U.S. (*id.* at ¶ 6);

¹ As explained in Petitioner’s Motion to Amend (*see* 4 TTABVUE), due to an error in the Board’s electronic filing system, Petitioner was not able to select the proper basis for the Original Petition at the time of the filing thereof, and as such, the Cover Sheet did not reflect the proper basis for the Original Petition.

- Registrant’s website, accessed on June 4, 2021, states that its only hyper-car product, the “Intensa Emozione,” is “a new breed of hyper-car [] born out of [Registrant’s] engineering and design precision,” which “is a car that balances form and function,” and “is a precise engineered piece of art” (*id.* at ¶ 7);
- Media coverage of Registrant and its hyper-car products as of February 6, 2020, states that “just 10 examples [of Registrant’s Intensa Emozione] will be built up, and of these only three will reach North America.” Earlier media coverage of Registrant and its hyper-car products states that each of Registrant’s ten example products would be sold “at a price approaching \$2.71 million” (*id.* at ¶ 8);
- The Subject Registrations broadly cover “Sports cars; Parts and fittings for sports cars and racing cars, namely, engines and brakes; Automobiles, namely, racing cars” (*id.* at ¶ 9);
- On information and belief, based upon extensive internet research, Registrant does not use the Subject Marks in connection with the overbroad description of goods and services in the Subject Registrations (*id.* at ¶ 10);
- On information and belief, based upon extensive internet research, Registrant does not have a bona fide intent to use the Subject Marks in connection with the overbroad description of goods and services in the Subject Registrations (*id.* at ¶ 11);
- On information and belief, based upon extensive internet research, Registrant does not have a bona fide intent to use the Subject Marks in connection with “Parts and fittings for sports cars and racing cars, namely, engines and brakes.” Extensive internet research provides no indication or suggestion that Registrant has a bona fide intent to introduce “Parts and fittings for sports cars and racing cars, namely, engines and brakes” into commerce (*id.* at ¶ 12); and
- On information and belief, based upon extensive internet research, Registrant only uses and/or has a bona fide intent to use the Subject Marks in connection with “hypercars, namely limited and rare human operated supercars ranking in the top percentile of all automobiles in pricing, acceleration, rarity, handling, speed, sound and appearance.” (*Id.* at ¶ 13).

On August 3, 2021, Registrant filed an Answer to Petitioner’s Amended Petition, wherein it asserted several purported affirmative defenses. (*See* 10 TTABVUE, Answer at ¶¶ 17-20).

Among them, Registrant asserts that Petitioner’s “Petition fails to state a claim upon which relief may be granted.” (*Id.* at ¶ 18). Registrant also asserts that its use of the Subject Marks is senior to Petitioner’s use of Petitioner’s Marks, and that Registrant’s use of the Subject Marks is senior

to the date that Petitioner filed its applications for Petitioner's Marks. (*Id.* at ¶¶ 19-20). Further, Registrant "reserve[d] the right to amend and/or supplement [its] answer, including, but not limited to, to assert additional defenses upon discovery of further information concerning Petitioner's claims." (*Id.* at ¶ 17).

II. LEGAL STANDARD

Procedure and practice before the Board is "governed by the Federal Rules of Civil Procedure." 37 C.F.R. § 2.116(a); TBMP § 101. Under the Federal Rules, any pleading that asserts an "insufficient defense or any redundant, immaterial, impertinent, or scandalous matter," may be stricken. *See* FED. R. CIV. P. 12(f); TBMP § 506. "The Board also has the authority to strike an impermissible or insufficient claim or portion of a claim from a pleading." TBMP § 506. "The purpose[] of a Rule 12(f) motion is to avoid spending time and money litigating spurious issues." *Joe Hand Promotions v. Davis*, No. 11-6166 CW, 2012 U.S. Dist. LEXIS 145402, at *3-4 (N.D. Cal. Oct. 9, 2012). Although "[m]otions to strike are not favored," the Board will grant a motion to strike "in appropriate cases." *Id.*; *see also Order Sons of Italy in America v. Marofa S. A.*, 38 U.S.P.Q.2d (BNA) 1602, 1603 (1996).

"[T]he striking of the defense that a complaint fails to state a claim upon which relief could be granted may be appropriate when the legal insufficiency of this defense is readily apparent." *Marofa S. A.*, 38 U.S.P.Q.2d at 1603. "[W]hile Rule 12(b)(6) permits a defendant to assert in his answer the 'defense' of failure to state a claim upon which relief can be granted, it necessarily follows that the plaintiff may utilize this assertion to test the sufficiency of the plaintiff's pleading in advance of trial by moving under Rule 12(f) . . . to strike the 'defense' from the defendant's answer." *Id.* (quoting *S. C. Johnson & Son, Inc. v. GAF Corp.*, 177 U.S.P.Q. (BNA) 720 (T.T.A.B. 1973)). "In order to withstand the defense of failure 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.” *Rooibos Limited v. Forever Young (Pty) Ltd.*, Cancellation No. 25,676, 2003 TTAB LEXIS 65, at *13 (T.T.A.B. Feb. 3, 2003). “A petition to cancel an extension of an International Registration based on an alleged lack of a bona fide intent to use the mark in commerce for some or all of the listed goods is a valid claim where it is supported by adequately alleged facts.” *Sandro Andy, S.A. v. Light Inc.*, 2012 U.S. Dist. LEXIS 182401, at *12 (S.D.N.Y. Dec. 27, 2012).

III. ARGUMENT

Registrant’s first affirmative defense for failure to state a claim should be stricken in its entirety, as “the legal insufficiency of this defense is readily apparent.” *See Marofa S. A.*, 38 U.S.P.Q.2d at 1603. Petitioner is only required, at the pleading stage, to “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.” *Rooibos*, 2003 TTAB LEXIS 65, at *13. Petitioner has alleged such facts. First, Petitioner has pleaded sufficient facts to establish standing – or as the Board now refers to it, entitlement to a statutory cause of action. In particular, Petitioner has alleged that it is the owner of Application Serial Nos. 87/515,109, 88/177,266, and 87/514,209 for Petitioner’s Marks, and that the Subject Registrations have been cited as the basis for refusal of Petitioner’s Applications. (4 TTABVUE, Amended Petition at ¶ 2). “When a plaintiff in a Board proceeding pleads and later proves that it has been refused registration of its mark because of the defendant’s registration, it has established a ‘reasonable belief’ of damage, thereby satisfying the standing requirement.” *Christian M. Ziebarth v. Del Taco, LLC*, Cancellation No. 92053501, 2015 TTAB LEXIS 324, at *25-26 (T.T.A.B. Mar. 31, 2015). Thus, Petitioner adequately pleads its entitlement to a statutory cause of action.

Second, Petitioner has adequately stated a claim for lack of bona fide intent to use the Subject Marks in connection with the overbroad description of goods and services listed in the Subject Registrations. In particular, Petitioner alleges, among other facts, that (i) Registrant is a hypercar, or high-performance supercar, manufacturer, (ii) Registrant only has one hypercar product, which it classifies as a “precise engineered piece of art,” (iii) only ten examples of Registrant’s hypercar product will be built, and of these, only three will reach North America, (iv) Registrant does not use or have a bona fide intent to use the Subject Marks in connection with the overbroad description of goods and services listed in the Subject Registrations, which includes “Parts and fittings for sports cars and racing cars,” (v) extensive internet research provides no indication or suggestion that Registrant has a bona fide intent to introduce “Parts and fittings for sports cars and racing cars” into commerce, and (vi) based upon extensive internet research, Registrant only uses or has a bona fide intent to use the Subject Marks in connection with “hypercars, namely limited and rare human operated supercars ranking in the top percentile of all automobiles in pricing, acceleration, rarity, handling, speed, sound and appearance.” (4 TTABVUE, Amended Petition at ¶¶ 5-13). These facts are sufficient to establish a lack of bona fide intent to use the Subject Marks. And, “[a] petition to cancel an extension of an International Registration based on an alleged lack of a bona fide intent to use the mark in commerce for some or all of the listed goods is a valid claim where it is supported by adequately alleged facts.” *Sandro Andy*, 2012 U.S. Dist. LEXIS 182401, at *12.

Additionally, Registrant (i) asserts that its use of the Subject Marks is senior to Petitioner’s use of Petitioner’s Marks, and (ii) that its use of the Subject Marks is senior to the date that Petitioner filed its applications for Petitioner’s Marks, and (iii) reserves the right “to amend and/or supplement [its] answer . . . to assert additional defenses upon discovery of further

information concerning Petitioner’s claims.” (See 10 TTABVUE , Answer at ¶¶ 17, 19-20). All of these matters should be stricken from Registrant’s Answer. First, whether Registrant’s use of the Subject Marks is senior to Petitioner’s use and filing date is irrelevant to the claims at issue here, which are directed to Petitioner’s bona fide intent to use the mark. Thus, these defenses are “immaterial” under Rule 12(f) and should be stricken. Second, any “attempt to reserve affirmative defenses for a future date is not a proper affirmative defense,” and “subverts Federal Rule of Civil Procedure 15, which allows a party to move for leave to amend a responsive pleading.” See *Joe Hand*, 2012 U.S. Dist. LEXIS 145402, at *19; *Paducah River Painting, Inc. v. McNational Inc.*, 2011 U.S. Dist. LEXIS 131291, at *13-14 (W. D. Ky. Nov. 14, 2011). Accordingly, these defenses should be stricken.

IV. CONCLUSION

WHEREFORE, Petitioner respectfully requests that the Board strike Registrant’s affirmative defenses and/or grant such other and further relief as the Board deems just and proper.

Dated: New York, NY
August 5, 2021

Respectfully Submitted,

HAUG PARTNERS LLP

By: /s/ Ben Natter

Ben Natter, Esq.
745 Fifth Avenue
New York, New York 10151
Tel: (212) 588-0800
Email: bnatter@haugpartners.com
docket@haugpartners.com

Attorneys for Petitioner

CERTIFICATE OF SERVICE

On this 5th day of August, 2021, a true and correct copy of the foregoing document was served by e-mailing a copy to Registrant's counsel: Samantha J. Katze, at the addresses of: skatze@manatt.com, mcooke@manatt.com, jwood@manatt.com, jburns@manatt.com, and ipdocket@manatt.com, as required by the Trademark Trial and Appeal Board.

/s/ Michael Barer

Michael Barer