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

Proceeding no.	92083962
Party	Plaintiff Bump Health, Inc.
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Submission	Motion to Strike Pleading/Affirmative Defense
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Trademark Registration:

Mark: GLOW POWDER

Reg. No.: 5633879

Bump Health, Inc.,

Petitioner,

v.

Fresh, Inc.,

Registrant.

No. 92083962

Motion to Strike

Petitioner, Bump Health, Inc. ("**Bump Health**"), moves the Board under Federal Rule of Civil Procedure 12(f) and TBMP 506 to strike Registrant's "Second Affirmative Defense": acquiescence. This affirmative defense is insufficiently plead, and Bump Health is prejudiced as a result.

I. Background

Bump Health filed its Petition for Cancellation of U.S. Trademark Registration Number 5633879 on December 16, 2023. (1 TTABVue). Registrant filed its Answer on January 29, 2024, which raises the affirmative defense of

acquiescence. (4 TTABVUE p. 3). Specifically, Registrant alleges the following

Second Affirmative Defense

ii. Petitioner's Petition for Cancellation is barred by acquiescence. Petitioner did not seek to cancel respondent's registration for such a long period of time that it amounts to a relinquishment of any claims by Petitioner to cancel it.

(4 TTABVUE p. 3). This Motion to Strike follows.

II. Legal Standard

An affirmative defense is a pleading under Federal Rule 8; it is "[a] defendant's assertion raising new facts and arguments 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). The primary purpose of the pleadings is to provide enough detail to give the opposing party fair notice of the basis of the claims or defenses asserted. Fed R. Civ. P. 8(b)(1); *Ohio State v. Ohio Univ.*, 51 USPQ 2d 1289, 1292 (TTAB 1999). To do so, a party must allege sufficient facts beyond a tender of "naked assertion[s]" devoid of "further factual enhancement," to support its claims or defenses. *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009); quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); see *Academy of Motion Picture*

Arts and Sciences v. Alliance of Professionals & Consultants, Inc., 104 U.S.P.Q.2d 1234, 1236 (TTAB 2012); see also *Smartling, Inc. v. Skawa Innovation Kft*, 2021 TTAB LEXIS 234, *10-12 (TTAB 2021)(non-precedential)(striking affirmative defenses for merely stating the names of the defenses).

Otherwise, the Board may order that the insufficient defense be stricken. Fed. R. Civ. Pro. 12(f); See also TBMP § 506.01. Although motions to strike are not favored, they are appropriate where the insufficiency of the defense is apparent, and the moving party is prejudiced. *Ohio State*, 51 USPQ2d at 1292.

III. Argument

Registrant's Second Affirmative Defense should be stricken. This affirmative defense is insufficiently and inadequately plead, and Bump Health is prejudiced as a result. Bump Health therefore requests that this Court grant its Motion to Strike.

To establish the affirmative defense of "acquiescence", Registrant must prove that 1) Bump Health actively represented that it would not assert a right or a claim; 2) the delay between the active representation and assertion of the right or claim was not excusable; and (3) the delay caused Registrant

undue prejudice. *Brooklyn Brewery Corp. v. Brooklyn Brew Shop, LLC*, 2020 TTAB LEXIS 269, *25 (TTAB August 10, 2020), *aff'd in part, dismissed in part, vacated in part* in 17 F. 4th 129 (the dismissal and remand did not concern the affirmative defense analysis). Notably, the defense “acquiescence” requires a showing that Bump Health provided “active consent”; i.e Bump Health expressly, or by clear implication, assented to, encouraged, or furthered the activity now objected to by Registrant. *Id.*; *Hitachi Metals International, Ltd. v. Yamakyu Chain Kabushiki Kaisha*, 209 USPQ 1057, 1067 (TTAB 1981).

Here, Registrant not only fails to identify the elements of the acquiescence defense it raises, but Registrant also fails to allege facts sufficient to establish that Bump Health provided active consent. And Bump Health believes that Registrant cannot in this case.

As a result, Bump Health is prejudiced. Bump Health does not have sufficient notice of the defense. And Bump Health does not believe Registrant can allege facts that establish the active consent required. Also, to get to the basic core of Registrant’s affirmative defense, Bump Health would have to engage in costly discovery. But Bump Health should not have to spend

valuable resources to further investigate an affirmative defense that lacks merit given the elements of the defense and the facts of this case. As a result, Bump Health is prejudiced, and the defense should therefore be stricken.

IV. Conclusion

Registrant fails to adequately plead its affirmative defense of acquiescence. And Bump Health is prejudiced as a result. Bump Health therefore requests that the Board grant this Motion and strike Registrant's Second Affirmative Defense.

Respectfully submitted,
Bump Health, Inc., by,

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CERTIFICATE OF SERVICE

Undersigned counsel certifies that a true and complete copy of the foregoing was served on Registrant by electronic mail on February 16, 2024, as follows:

Nick Barnhorst
Fresh, Inc.
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