

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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RSC

May 20, 2024

Cancellation No. 92083962 (parent)

Cancellation No. 92083963

Bump Health, Inc.

v.

Fresh, Inc.

Rebecca Stempien Coyle, Interlocutory Attorney:

I. Consolidation of Proceedings

It has come to the Board's attention that the parties are involved in Cancellation Nos. 92083962 and 92083963, and there are pending motions filed by Petitioner in both proceedings to strike Respondent's second affirmative defense in each proceeding.

Respondent is the owner of Principal Register Registration Nos. 5633879 and 5633878 for the standard character marks GLOW POWDER and GLOW WATER (respectively), each for "non-medicated skin care preparations" in International Class 3.¹ Petitioner seeks to cancel each of Respondent's registrations on the sole ground of

¹ Each registration issued on December 18, 2018.

priority and likelihood of confusion, and in support Petitioner relies on its pleaded Registration No. 5257987 for the mark GLOW ORGANICS (standard characters).²

When cases involving common questions of law or fact are pending before the Board, the Board may order consolidation of the cases. *See* Fed. R. Civ. P. 42(a); *Regatta Sport Ltd. v. Telux-Pioneer Inc.*, Can. No. 92018142, 1991 WL 326579, at *3 (TTAB 1991); and *Estate of Biro v. Bic Corp.*, Opp. No. 91073600, 1991 WL 325858, at *2 n. 3. (TTAB 1991). In determining whether to consolidate proceedings, the Board will weigh the savings in time, effort, and expense which may be gained from consolidation, against any prejudice or inconvenience which may be caused thereby. TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (“TBMP”) § 511 (2023).

² Cancellation No. 92083962, 1 TTABVUE (petitioning to cancel Registration No. 5633879); Cancellation No. 92083963, 1 TTABVUE (petitioning to cancel Registration No. 5633878). Record citations are to TTABVUE, the Board’s publicly available docket history system. *See, e.g., New Era Cap Co., Inc. v. Pro Era, LLC*, Opp. No. 91216455, at *1 n.1 (TTAB 2020). The number preceding “TTABVUE” corresponds to the docket entry number; the number(s) following “TTABVUE” refer to the page number(s) of that particular docket entry, if applicable.

As part of an internal Board pilot citation program on possibly broadening acceptable forms of legal citation in Board cases, citations in this order differ from the citation form recommended in TBMP § 101.03. This order cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals only by the page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For orders of the Board, this order employs citation to the Westlaw (WL) database. Only precedential decisions are cited. Until further notice, however, practitioners should continue to adhere to the practice set forth in TBMP § 101.03.

Precedential decisions of the Board, and precedential decisions of the Federal Circuit involving Board decisions that issued January 1, 2008, or after may be viewed in TTABVUE by entering the proceeding number, application number, registration number, expungement/reexamination number, mark, party, or correspondent. Many precedential Board decisions that issued from 1996 to 2008 are available online from the TTAB Reading Room by entering the same information. Most TTAB decisions that issued prior to 1996 are not available in USPTO databases.

Cancellation Nos. 92083962 and 92083963

Consolidation is discretionary with the Board, and may be ordered upon motion granted by the Board, stipulation of the parties approved by the Board, or the Board's own initiative. *See, e.g., Venture Out Prop. LLC v. Wynn Resorts Holdings LLC*, Opp. No. 91167237, 2007 WL 39112, at *1 (TTAB 2007) (consolidation ordered *sua sponte*); *Hilson Research Inc. v. Soc'y for Human Res. Mgmt.*, Can. No. 92019007, 1993 WL 290669 (TTAB 1993).

The parties to these proceedings are identical, and the issues are similar or related. Accordingly, Cancellation Nos. 92083962 and 92083963 are hereby **CONSOLIDATED** and may be presented on the same record and briefs. *See Hilson Research*, 1993 WL 290669; and *Helene Curtis Indus. Inc. v. Suave Shoe Corp.*, Opp. No. 91065607, 1989 WL 274411 (TTAB 1989).

The Board file will be maintained in Cancellation No. 92083962 as the "parent case." From this point on, **only a single copy of all motions and submissions should be filed**, and each submission should be filed **in the parent case only**, but caption all consolidated proceeding numbers, listing and identifying the "parent case" first.³

Despite being consolidated, each proceeding retains its separate character and requires entry of a separate judgment. The decision on the consolidated cases shall take into account any differences in the issues raised by the respective pleadings; a copy of the decision shall be placed in each proceeding file.

³ The parties should promptly inform the Board of any other Board proceedings or related cases within the meaning of Fed. R. Civ. P. 42, so that the Board can consider whether further consolidation is appropriate.

II. Petitioner's Motions to Strike

Respondent filed its answer in each of these consolidated proceedings on January 29, 2024, denying the salient allegations of the respective petitions for cancellation and asserting the following affirmative defenses: (1) laches, (2) acquiescence, and (3) that Petitioner's mark is entitled to a narrow scope of protection and Petitioner has no "exclusivity or monopoly over the word GLOW."⁴

On February 16, 2024, Petitioner filed, in each cancellation proceeding, a motion to strike Respondent's second affirmative defense as insufficiently pled. The motions are contested. Inasmuch as the parties present the same arguments in each proceeding, the Board addresses the motions together.

As a preliminary matter, Petitioner's motions to strike are timely. *See* Fed. R. Civ. P. 12(f). Pursuant to Fed. R. Civ. P. 12(f), the Board may order stricken from a pleading any insufficient defense, or any redundant, immaterial, impertinent or scandalous matter. *See Am. Vitamin Prods. Inc. v. Dow Brands Inc.*, Can. No. 92019036, 1992 WL 88051, at *2 (TTAB 1992); TBMP § 506.01. A defense will not be stricken as insufficient if the insufficiency is not clearly apparent, or if it raises factual issues that should be determined on the merits. TBMP § 506.01. Moreover, the primary purpose of the pleadings is to give fair notice of the claims or defenses asserted. *See id*; *see also* TBMP §§ 309.03 and 311.02. Thus, the Board, in its discretion, may decline to strike even objectionable pleadings where their inclusion will not prejudice the adverse party, but rather will provide fuller notice of the basis

⁴ Cancellation No. 92083962, 4 TTABVUE; Cancellation No. 92083963, 4 TTABVUE.

Cancellation Nos. 92083962 and 92083963

for a claim or defense. *Harsco Corp. v. Elec. Sciences Inc.*, Can. No. 92016543, 1998 WL 252330, at *1 (TTAB 1988).

Respondent's second affirmative defense asserts:

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.⁵

"Acquiescence is a type of estoppel that is based on the plaintiff's conduct that expressly or by clear implication consents to, encourages, or furthers the activities of the defendant." *Nahshin v. Prod. Source Int'l LLC*, Can. No. 92051140, 2013 WL 6040375, at *8 (TTAB 2013) (quoting *Panda Travel, Inc. v. Resort Option Enters., Inc.*, Opp. No. 911746767, 2009 WL 5253036, at *9 n. 21 (TTAB 2009)); *see also Christian Broad. Network Inc. v. ABS-CBN Int'l*, Can. No. 92044366, 2007 WL 2253483, at *16 (TTAB 2007).

In particular, to sufficiently set forth the defense of acquiescence, Respondent must allege: (1) an active representation that a right or claim would not be asserted; (2) the delay between the active representation and assertion of the right or claim was not excusable, and (3) the delay caused Respondent undue prejudice. *See Christian Broad. Network Inc.*, 2007 WL 2253483, at *16; *Coach House Rest. Inc. v. Coach and Six Rest. Inc.*, 934 F.2d 1551, 1558 (11th Cir. 1991).

Respondent's second defense lacks any allegation of an affirmative act by Petitioner and thus Respondent has not sufficiently pleaded elements two and three of an acquiescence defense. Nor has Respondent alleged any prejudice caused by

⁵ Cancellation No. 92083962, 4 TTABVUE 4; Cancellation No. 92083963, 4 TTABVUE 4.

Petitioner's delay. Because Respondent has failed to set forth any of the allegations necessary to support the defense of acquiescence, Petitioner's motion is **granted**.

Respondent's second defense is **stricken**. Inasmuch as there no facts in the answer, or Respondent's response to the motion, which indicate support for an acquiescence defense, the Board declines, at this time, to grant Respondent leave to replead the defense. However, Respondent is not precluded from filing a motion for leave to amend its answers pursuant to Fed. R. Civ. P. 15(a), if a sound basis therefor is later discovered.

III. Resumption of Proceedings

These consolidated proceedings are **resumed**. Disclosure, discovery, and trial dates are reset as follows.

Deadline for Discovery Conference	6/4/2024
Discovery Opens	6/4/2024
Initial Disclosures Due	7/4/2024
Expert Disclosures Due	11/1/2024
Discovery Closes	12/1/2024
Plaintiff's Pretrial Disclosures Due	1/15/2025
Plaintiff's 30-day Trial Period Ends	3/1/2025
Defendant's Pretrial Disclosures Due	3/16/2025
Defendant's 30-day Trial Period Ends	4/30/2025
Plaintiff's Rebuttal Disclosures Due	5/15/2025
Plaintiff's 15-day Rebuttal Period Ends	6/14/2025
Plaintiff's Opening Brief Due	8/13/2025
Defendant's Brief Due	9/12/2025
Plaintiff's Reply Brief Due	9/27/2025
Request for Oral Hearing (optional) Due	10/7/2025

IMPORTANT TRIAL AND BRIEFING INSTRUCTIONS

Generally, the Federal Rules of Evidence generally apply to Board trials. Trial testimony is taken and introduced out of the presence of the Board during the assigned testimony periods. The parties may stipulate to a wide variety of matters, and many requirements relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125. These include pretrial disclosures, the manner and timing of taking testimony, matters in evidence, and the procedures for submitting and serving testimony and other evidence, including affidavits, declarations, deposition transcripts and stipulated evidence. Trial briefs shall be submitted in accordance with Trademark Rules 2.128(a) and (b). Such briefs should utilize citations to the TTABVue record created during trial, to facilitate the Board's review of the evidence at final hearing. *See* TBMP § 801.03. Oral argument at final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a).

TIPS FOR FILING EVIDENCE, TESTIMONY, OR LARGE DOCUMENTS

The Board requires each submission to meet the following criteria before it will be considered: 1) pages must be legible and easily read on a computer screen; 2) page orientation should be determined by its ease of viewing relevant text or evidence, for example, there should be no sideways or upside-down pages; 3) pages must appear in their proper order; 4) depositions and exhibits must be clearly labeled and numbered – use separator pages between exhibits and clearly label each exhibit using sequential letters or numbers; and 5) the entire submission should be text-searchable. Additionally, submissions must be compliant with Trademark Rules 2.119 and 2.126. Submissions

Cancellation Nos. 92083962 and 92083963

failing to meet all of the criteria above may require re-filing. **Note:** Parties are strongly encouraged to check the entire document before filing.⁶ The Board will not extend or reset proceeding schedule dates or other deadlines to allow time to re-file documents. For more tips and helpful filing information, please visit the [ESTTA help](#) webpage.

⁶ To facilitate accuracy, ESTTA provides thumbnails to view each page before submitting.