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

Proceeding	91223239
Party	Defendant Green Regimen
Correspondence Address	RON LAZEBNIK LINCOLN SQUARE LEGAL SERVICES INC 150 W 62ND ST FL 9 NEW YORK, NY 10023-7407 UNITED STATES rlazebnik@lsls.fordham.edu
Submission	Opposition/Response to Motion
Filer's Name	Ron Lazebnik
Filer's e-mail	rlazebnik@lsls.fordham.edu
Signature	/Ron Lazebnik/
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**UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD**

Bayer HealthCare LLC,

Opposer,

v.

Green Regimen,

Applicant.

Opposition No.: 91223239

Application Serial. No.: 86486647

Mark: A SMOOTHIE A DAY KEEPS
THE DOCTOR AWAY

**RESPONSE IN OPPOSITION TO OPPOSER'S
MOTION TO STRIKE APPLICANT'S UNCLEAN HANDS DEFENSE**

Green Regimen submits this Response in opposition to Bayer HealthCare LLC's ("Bayer") Motion to Strike Applicant's Unclean Hands Defense ("Mot. to Strike"). The affirmative defense alleges that Bayer is barred from opposing Green Regimen's registration due to Bayer unfairly forcing small businesses to abandon their applications because they could not afford to litigate an opposition for marks comprising "a day" for goods in class 5, regardless of how dissimilar they were to Bayer's marks. Bayer requests that Green Regimen's defense be stricken because in order to plead it, Green Regimen had to allege that the merits of Bayer's previous oppositions were questionable. As Bayer is on notice of the basis for Green Regimen's defense, and discovery is required to test its merits, Bayer's motion should be denied and Green Regimen should be given the opportunity to prove the merits of its defense after discovery is completed.

Moreover, Bayer's motion should be viewed with skepticism because "motions to strike are not favored" by the Board. TBMP § 506; *Harsco Corp. v. Electrical Sciences Inc.*, 9 U.S.P.Q.2d 1570, 1571 (T.T.A.B. 1988). "A defense should only be stricken if it clearly has no bearing upon the issues in the case" *Id.* To succeed on a motion to strike, the opposer must

demonstrate that the affirmative defense being challenged is either insufficient or is redundant, immaterial, impertinent, or scandalous. *See* TBMP § 506.01; *see also Harjo v. Pro Football, Inc.*, 30 U.S.P.Q.2d 1828 (T.T.A.B. 1994) (stating that a defense will not be stricken if the insufficiency of the defense is not clearly apparent, or if it raises factual issues that should be determined on a hearing on the merits); *Harsco Corp.*, 9 U.S.P.Q.2d at 1571 (holding that affirmative defenses need not be stricken if there is no prejudice to the adverse party, or if evidentiary facts are pleaded that give a fuller understanding of the complaint as a whole). As detailed below, Bayer does not meet this burden and its motion should be denied.

I. GREEN REGIMEN HAS SUFFICIENTLY PLEADED UNCLEAN HANDS

The United States Patent and Trademark Office allows a defendant to include any defense in its answer to a trademark registration opposition proceeding, including the affirmative defense of unclean hands. *See* TBMP § 311.02(b); 37 C.F.R. § 2.106(b)(1). When pleading this affirmative defense, a defendant is “not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion.” *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 245-46 (1933) (holding that five patents-in-suit were unenforceable due to unclean hands because of plaintiff’s conduct concerning a related patent). It is sufficient to plead that the plaintiff through “unfair means has gained an advantage.” *Id.* at 245; *see Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814-15 (1945) (stating that the unclean hands defense is to help assure plaintiffs “have acted fairly and without fraud or deceit as to the controversy in issue.”). The unfair conduct giving rise to an unclean hands defense may be action previously taken before the U.S.P.T.O. *See Consol. Aluminum Corp. v. Foseco Int’l Ltd.*, 910 F.2d 804, 812 (Fed. Cir. 1990) (“To hold that unclean hands applies only to conduct before a court would be contrary to our precedent applying the doctrine to conduct before the PTO.”). To sufficiently plead the conduct, the defendant need only include a short and plain

statement giving the plaintiff fair notice of the basis for the defense. *See* TBMP 311.02(b); 37 C.F.R. § 2.106(b)(1). Whether that defense is ultimately successful is immaterial to whether it can be included in a pleading. *See Central MFG. Co. v. Stealth, LTD*, Opposition No. 91158263, 2004 WL 1447639, at *1-2 (T.T.A.B. 2004) (noting that the applicant sufficiently pleaded the defense of unclean hands based on a theory of “aggressive filing of suits” and that “proving the defense should be preserved for trial.”).

By not raising it in its motion, Bayer concedes that Green Regimen has given Bayer fair notice of the basis for the unclean hands defense. Instead, Bayer complains that part of two of the allegations in Green Regimen’s Answer to the Notice of Opposition, ¶¶ 20 and 23, are conclusory. Mot. to Strike at 2. The first allegation states that Bayer’s grounds for the opposition of registration of marks comprising “a day” are often dubious, weak, or exaggerated, and the second alleges that Bayer is attempting to unfairly raise the cost of entry for Green Regimen to compete in the marketplace by filing this and other groundless oppositions with the T.T.A.B. *See* Answer To Notice of Opposition (“Answer”) ¶¶ 20, 23. Essentially, Bayer disagrees with Green Regimen’s allegations regarding the merits of Bayer’s previously filed claims. The merit of a claim of likelihood of confusion, however, is not a factual question – it is a question of law. *See Giant Food, Inc. v. Nations Food Service, Inc.*, 710 F.2d 1565, 1569 (Fed. Cir. 1983) (holding that “the issue of likelihood of confusion is the ultimate conclusion of law to be decided by the court.”). Legal allegations may be pleaded in a conclusory nature and should not be stricken from a pleading. *See* 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1383 (3d ed.) (“the rules do not condemn the pleading of conclusions of law and occasionally encourage them as the clearest and simplest way of stating a claim for relief.”). Just as Bayer was allowed in its Notice of Opposition (“Opp.”) to state that it believes Green Regimen’s mark

is “likely to cause confusion, mistake or deception as to the source of origin,” (Opp. ¶ 8) or “likely to dilute the distinctiveness of [Bayer’s]” mark (Opp. ¶ 9), so too can Green Regimen plead legal conclusions to assist it in putting Bayer on notice as to the basis for its affirmative defense of unclean hands.

Bayer also attempts to say that the allegation questioning the merits of Bayer’s previous claims are false by noting that its prior oppositions have never been found invalid, nor dismissed for failure to state a claim, nor had a previous affirmative defense against it based on unclean hands or other inappropriate behavior ever succeeded. Mot. to Strike, at 2. In doing so, Bayer fails to admit that the proceedings it lists were never resolved on the merits. Bayer’s recitation of previous actions only shows instances where it has asserted a claim which lead to the applicants’ eventual abandonment of the opposed registrations, regardless of how strong the Board may have ultimately found Bayer’s claim.

Moreover, Bayer’s reliance on cases dismissing an unclean hands defense based on an opposer’s right as a trademark owner to file oppositions is premature given the difference between the procedural posture of those proceedings and the one here. In *Avia Group Int’l Inc. v. Faraut*, the unclean hands defense was not originally pleaded, but rather requested by the respondent after discovery was well underway, and the respondent thought it found a conspiracy between the petitioner and a third-party to force the respondent out of business when the respondent discovered a relationship between the two entities through means outside of the litigation. *Avia Group Int’l Inc. v. Faraut*, 25 U.S.P.Q.2d 1625, 1626 (T.T.A.B. 1992). In refusing respondent’s request, the Board noted that respondent had not effectively participated in discovery and had not alleged that there was any fault with the petitioner’s claim that the respondent’s mark was confusingly similar. *Id.* at 1627. The unclean hands defense in *Time*

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