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

Proceeding	91269443
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CERTIFICATE OF ELECTRONIC FILING
I hereby certify that this Motion to Dismiss and Alternative Motion to Strike is being filed with the TTAB via ESTTA on the date set forth below.

Date: June 25, 2021 /Angelique M. Riordan/
Angelique M. Riordan

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

Fuse, LLC,		
Opposer,	**Opposition No.:**	**91-269,443**
v.	**Serial No.:**	**88/748,174**
Tastemade, Inc.,	**Trademark:**	**STRUGGLE MEALS**
Applicant.		

APPLICANT'S MOTION TO DISMISS OPPOSITION
FOR FAILURE TO STATE A CLAIM AND ALTERNATIVE MOTION TO STRIKE

Pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(6) and TBMP §503, Applicant, TASTEMADE, INC. ("Applicant"), hereby moves the Trademark Trial and Appeal Board ("Board") to dismiss the above-captioned proceeding for failure to state a claim upon which relief may be granted.

I. Statement of Facts

On May 19, 2021, Opposer, Fuse, LLC ("Opposer") filed the above-captioned opposition against Appln. No. 88/748,174 for the mark STRUGGLE MEALS, owned by Applicant Tastemade. The ESTTA cover sheet to the Notice of Opposition lists the following two grounds for the opposition: (1) the mark is generic and (2) failure to function as a trademark due to the generic nature of the applied-for mark. Opposer's Notice of Opposition fails to meet the minimum pleading requirements for either of these grounds for opposition and fails to provide sufficient facts which, if proven true, would entitle Opposer to the relief sought. Accordingly, Applicant moves to dismiss this proceeding in its entirety for failure to state a claim upon which relief may be granted.

II. Motion to Dismiss

"A motion to dismiss for failure to state a claim upon which relief can be granted is a test solely of the legal sufficiency of a complaint." Petróleos Mexicanos v. Intermix S.A., 97 USPQ2d 1403 (TTAB 2010); Fair Indigo LLC v. Style Conscience, 85 USPQ2d 1536, 1538 (TTAB 2007); TBMP §503.02. Under the Trademark Rules and precedent, a complaint must include a short and plain statement of a claim, the elements of the claim, and enough

factual support to show that the pleader is entitled to relief and to give the defendant fair notice. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007); Fair Indigo LLC, 85 USPQ2d at 1538 (elements of each claim should be stated concisely and directly); McDonnell Douglas Corp. v. National Data Corp., 228 USPQ 45, 48 (TTAB 1985); Ashcroft v. Iqbal, 556 U.S. ___, 129 S.Ct. 1937 (2009), quoting Twombly, 550 U.S. at 570; 37 C.F.R. §2.104(a); TBMP §309.03(a)(2); Fed. R. Civ. P. 8(a)(2). Therefore, to survive a motion to dismiss, a complaint must state more than bare conclusory allegations, such that the facts in the complaint are sufficient enough to make any claim within it plausible on its face. Twombly, 550 U.S. at 570; TBMP §503.02. Each and every allegation must be supported by at least a modicum of details. Id. Such details are necessary not only to give the defendant fair notice of the basis of each claim, but also to show the Board that a right to relief exists assuming all such facts and allegations are taken to be true. See Fair Indigo LLC, 85 USPQ2d at 1538; TBMP §309.03(a)(2). In the instant opposition, Opposer has failed to meet the minimum pleading standards for either of the two grounds listed on the cover sheet, rendering both grounds legally insufficient to raise a right to relief - the entire opposition should be dismissed.

A. Opposer's First Ground for Opposition – Genericness – Does Not Meet the Pleading Requirements and Is Thus Legally Insufficient

Opposer's first ground for opposition, that the applied-for mark is generic, does not meet the minimum pleading requirements and is legally insufficient. Specifically, the Notice of Opposition completely fails to set forth any allegations applicable to the first *Marvin Ginn* factor, and therefore also fails to properly apply the second factor. *H. Marvin Ginn Corp. v. International Association of Fire Chiefs, Inc.* sets the legal standard for genericness – whether a mark is generic "involves a two-step inquiry: First, what is the genus of goods or services at issue? Second, is the term sought to be registered … understood by the relevant public primarily to refer to that genus of goods or services?" *See H. Marvin Ginn Corp. v. International Association of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 531-32 (Fed. Cir. 1986). The genus of goods or services is determined by looking at the **goods/services covered by the application at issue**. *See Marvin* Ginn, 782 F.2d; *see also* Real *Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1379 (Fed. Cir. 2018) [emphasis added]. Opposer completely fails to allege that the applied-for mark is generic for the Class 41 services in the application.

The Notice of Opposition does not set forth any allegations that STRUGGLE MEALS is generic for the applied-for Class 41 educational and entertainment services. Instead, the Notice of Opposition alleges only that

STRUGGLE MEALS "is generic for meals which can be prepared on a limited budget." Notice of Opposition, ¶17. "Meals which can be prepared on a limited budget" have nothing to do with the application at hand or the Class 41 services covered therein. In fact, Opposer explicitly states that consumers will not view Applicant's STRUGGLE MEALS mark as generic for the Class 41 services in the application - "consumers and viewers in the United States perceive the term 'struggle meals,' **not as referring to** … **[Applicant's] entertainment programs**, but to a certain type of meals which can be prepared on a limited budget." *Id.* at ¶31 [emphasis added]. Where the Notice of Opposition fails to address the first *Marvin Ginn* factor, it is impossible to apply the second factor – Opposer's first ground for opposition is legally insufficient and fails to state a claim upon which relief may be granted.

B. Opposer's Second Ground for Opposition – Failure to Function as a Mark Due to Genericness – Is Legally Insufficient and Fails to State a Claim Upon Which Relief May Be Granted

Opposer's second ground for opposition – Applicant's STRUGGLE MEALS Mark is generic and, as such, fails to function as a trademark – is legally insufficient and fails to state a claim upon which relief may be granted where Applicant has failed to meet the minimum requirements for a claim of genericness, as set forth above. Where Opposer's entire failure to function as a trademark claim rests on the issue of genericness, this second ground is also entirely legally insufficient and fails to state any claim upon which relief may be granted.

C. Conclusion

For the foregoing reasons, the Notice of Opposition should be dismissed in its entirety for failure to state a claim upon which relief may be granted.

III. Alternative Motion to Strike Notice of Opposition Paragraphs 27-30 and Paragraphs 33-36

In the event the Board does not grant Applicant's Motion to Dismiss in full, pursuant to FRCP 12(f) and TBMP §506, Applicant moves to strike Paragraphs 27-30 and Paragraphs 33-36 as irrelevant, improper and entirely unrelated to the grounds on which the above-captioned opposition is based. "[T]he Board may order stricken from a pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter." FRCP 12(f) and TBMP §506. While motions to strike are not favored, a matter can be stricken if it has no bearing on the issues in the case. *Id*. "[An] Opposition must set forth a short and plain statement showing why the opposer believes he, she or it will be damaged by the registration of the opposed mark and state the grounds for opposition." 37 C.F.R. §2.104(a) and TBMP §309.03. "Evidentiary matters … should not be pleaded in a complaint. They are matters for

proof, not for pleading." TBMP §309.03(a)(2). The primary purpose of pleadings, under the Federal Rules of Civil Procedure, is to give fair notice of the claims or defenses asserted. *See* TBMP §§ 506.01 and 309.03. There are only two grounds for opposition identified on the ESTTA cover sheet: (1) the mark is generic and (2) failure to function as a trademark due to genericness. Where the purpose of the Notice of Opposition and ESTTA cover sheet is to give fair notice to the defendant of the claims being asserted, adding extraneous arguments and commentary that are entirely inapplicable to the grounds clearly set forth on the cover sheet is prejudicial leaves the defendant guessing as to whether an additional issue is being raised.

A. Notice of Opposition Paragraphs 27-30 Amount to Impermissible and Inappropriate Evidentiary Matters and Should be Stricken

> *27. On information and belief, numerous third parties consistently use the generic expression "struggle meals" to refer to describe meals which can be prepared on a limited budget.*
>
> *28. On information and belief, third parties already use the term "struggle meals" in connection with entertainment services having a focus on meals which can be prepared on a limited budget.*
>
> *29. On information and belief, Applicant has direct knowledge of third party Davon Marshall Hill's use of the term "struggle meals" in connection with entertainment programming having the subject matter of meals which can be prepared on a limited budget.*
>
> *30. On information and belief, the term "struggle meals" also is used in a generic sense in various recipes, menus, dictionaries, magazines, news articles, and informational websites that are readily available to consumers in the United States.*
>
> Notice of Opposition, §§27-30.

Notice of Opposition Paragraphs 27-30 amount to impermissible and inappropriate evidentiary material, which the rules clearly indicate is inappropriate at the pleading stage and should be stricken. TBMP§309.03(a)(2) specifically uses the example of "lists of publications or articles in which a term sought to be registered by an applicant is alleged to be used descriptively" as an example of inappropriate evidentiary material. Paragraphs 27-30 amount to nothing more than lists of unsubstantiated examples of alleged third-party use[1], such as in "menus, dictionaries, magazines, news articles and informational websites" where Opposer claims the applied-for mark is being used in a descriptive sense. The material in these paragraphs is nearly identical to the TBMP example. The purely evidentiary material included in these paragraphs does not, in any way, aid in providing a fuller understanding of the pleading as a whole. Based on the foregoing, Notice of Opposition Paragraphs 27-30 should be stricken.

[1] Interestingly, in Notice of Opposition ¶29, Opposer raises third-party Davon Marshall Hill as an example of descriptive or generic use by a third-party. However, Opposer previously opposed Appln. No. 88/376,669 for the mark STRUGGLE MEALS in Class 41, owned by Davon Marshall Hill (*see* Opposition No. 91-256,453), and did not raise the issue of genericness, or even descriptiveness, in that opposition.

B. Notice of Opposition Paragraphs 33-36 Are Entirely Inapplicable To The Only Two Grounds On Which This Opposition Is Based and Should be Stricken

> *33. Upon information and belief, Applicant has not controlled or limited the use of the proposed "struggle meals" mark in a manner so as reliably to indicate to U.S. consumers and viewers that goods and services bearing the term "struggle meals" meet the requirements for registration of a trademark.*
>
> *34. On information and belief, many companies other than Opposer have used or are currently using the term "struggle meals" in connection with various goods and services relating to meals which can be prepared on a limited budget.*
>
> *35. On information and belief, the widespread use of the term "struggle meals" in connection with goods and services relating to meals which can be prepared on a limited budget precludes Applicant's mark from having significance as an indication of source of such products.*
>
> *36. Accordingly, the term as applied for in standard character form under Serial No. 86/759,759 is incapable of functioning as a source identifier or trademark, and registration should be refused under the provisions of Sections 1, 4 and 45 of the Lanham Act, 15 U.S.C. §§ 1051, 1054, 1127. See also TMEP §§ 1306.04(b)(i), 1306.05(g)(i).*
>
> Notice of Opposition, §§33-36.

Notice of Opposition Paragraphs 33-36 are entirely unrelated to the only two grounds listed as a basis for this Opposition on the ESTTA cover sheet – genericness and failure to function as a trademark due to genericness. Where the primary purpose of the Notice of Opposition is to give fair notice of the claims asserted, these unrelated and irrelevant additional paragraphs, which even include references to unrelated third parties, are improper and prejudicial where Applicant is left guessing whether additional issues are being raised, despite only two grounds for opposition being raised on the ESTTA cover sheet, which must list all grounds for the opposition. These paragraphs provide absolutely no additional clarity as to the pleading as a whole and, instead, leads to unnecessary confusion. Notice of Opposition Paragraphs 33-36 are irrelevant, improper and prejudicial and should be stricken as such.

C. Conclusion

In the event the Board does not grant Applicant's Motion to Dismiss in full, for the reasons set forth above, Applicant respectfully requests that the Board grant Applicant's alternative Motion to Strike in its entirety.

Dated: June 25, 2021

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **APPLICANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AND ALTERNATIVE MOTION TO STRIKE** is being served on June 25, 2021 by email to uspto@donthornburgh.com.

/Angelique M. Riordan/
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