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

Proceeding	91269443
Party	Plaintiff Fuse, LLC
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

FUSE, LLC,		
	Opposer,	
v.		
Tastemade, Inc.,		Opposition No. 91269443
	Applicant.	
Mark:	STRUGGLE MEALS	
Serial No.:	88/748,174	
Filed:	January 6, 2020	
Published:	January 19, 2021	

OPPOSER FUSE, LLC'S RESPONSE IN OPPOSITION TO APPLICANT TASTEMADE, INC.'S MOTION TO DISMISS AND ALTERNATIVE MOTION TO STRIKE

In the matter of Application Serial No. 88/748,174 filed on January 6, 2020, in the name of Tastemade, Inc., a Delaware corporation (hereinafter, "Applicant"), published for opposition in the *Official Gazette of the U.S. Patent & Trademark Office* on January 19, 2021 for the mark STRUGGLE MEALS (hereinafter, the "Opposed Application"), FUSE, LLC (hereinafter "Opposer") filed Notice of Opposition (hereinafter, the "Opposition"). On June 25, 2021, Applicant filed a Motion to Dismiss and Alternative Motion to Strike (hereinafter, the "Motion") pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(6) and TBMP §503. Opposer responds to the Motion as set forth herein.

I. INTRODUCTION

Contrary to the contentions of Applicant set forth in the Motion, Opposer has stated a valid claim for the relief it seeks: refusal of registration for STRUGGLE MEALS in application serial number 88/748,174 (hereinafter, the "Mark"). In its Motion (Dkt. 4), Applicant improperly seeks to argue the merits of this dispute and misstates the bases for Opposer's claims. As Opposer's pleading is clearly sufficient under the liberal pleading requirements of Federal Rules of Civil Procedure 8, the motion should be denied.

II. LEGAL STANDARD

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the notice of opposition "need [not contain] detailed factual allegations" but must contain "enough facts to state a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007); see also Fed. R. Civ. P. 12(b)(6); TBMP 503. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations omitted). When evaluating a Rule 12(b)(6) motion, the Board accepts the notice of opposition's well-pleaded factual allegations as true and draws all reasonable inferences in the plaintiff's favor. Twombly, 550 U.S. at 555–56.

III. ARGUMENT

A. Opposer's First Ground for Opposition – Genericness – Meets the Pleading Requirements

As pled in the Opposition (Dkt. 1), STRUGGLE MEALS is a generic expression referring to meals which can be prepared on a limited budget. Applicant misapplies the first Marvin Ginn

factor in an effort to distort the direct connection between the commonly understood definition of "struggle meals" and the subject matter of Applicant's entertainment services in International Class 041. See *H. Marvin Ginn Corp. v. International Association of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 531-32 (Fed. Cir. 1986). As Applicant states, the genus of goods or services is determined by looking at the goods/services covered by the application at issue. Applicant appears to ignore the fact that the educational and entertainment services identified in the Opposed Application refer to "food, cooking, recipes, budgeting tips, shopping tips, food preparation education and lifestyle choices" [emphasis added]. As such, the identification of services in the Opposed Application does include reference to the genus of the goods and services associated with the Mark, namely, educational and entertainment programming on the subject of struggle meals.

Furthermore, because the Opposed Application was filed under Section 1(A) of the Trademark Act, Applicant already has provided the U.S. Patent & Trademark Office ("USPTO") with evidence of the subject matter of its programming. While Opposer cannot introduce evidence at this stage of the Opposition, equity demands that that the proceeding be allowed to go forward, so that such evidence can be introduced, together with the substantial third party evidence to be introduced at the appropriate stage of the proceeding.

Applicant also misconstrues and misstates Opposer's argument. Contrary to Applicant's contentions, Opposer does not allege that "struggle meals" are a products which Applicant sells under the Mark. Rather, the Opposition makes clear that "struggle meals" are the subject matter of Applicant's educational and entertainment programs. See Dkt. 1 ¶ ¶ 20, 28,-30. In short, the Opposed Application for STRUGGLE MEALS deceptively describes the associated entertainment

programming in deliberately vague terms, in an attempt to avoid a refusal under Sections §§1, 2, 3, and 45 of the Trademark Act.

B. Opposer's Second Ground for Opposition – Failure to Function as a Mark Due to Genericness – Is Legally Sufficient 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 sufficient and states a claim upon which relief may be granted because Opposer has met the minimum requirements for a claim of genericness, as set forth in the preceding section hereof. Accordingly, as stated in the Opposition, because consumers in the United States perceive "struggle meals" as a generic term for meals which can be prepared on a limited budget, is incapable of functioning as a trademark for Applicant's educational and entertainment programming have precisely that subject matter. Registration therefore should be refused under the provisions of Section 1, 2, 4, and 45 of the Lanham Act, 15 U.S.C. §§ 1051, 1052(e)(1), 1054, 1127. (Dkt. 1 ¶ 32)

C. Conclusion

The fact that Applicant disagrees with Opposer's position does not form the basis of a motion to dismiss. The purpose of a Rule 12(b)(6) motion is to test the sufficiency of the complaint against the liberal pleading standards of Rule 8 of the Federal Rules of Civil Procedure, not to resolve the case on the merits. Nalco Co. v. Chem-Mod, LLC, 883 F.3d 1337, 1350 (Fed. Cir. 2018) quoting Gibson v. City of Chicago, 910 F.2d 1510, 1520 (7th Cir. 1990).

For the foregoing reasons, the Notice of Opposition should not be dismissed failure to state a claim upon which relief may be granted. Opposer has sufficiently pled each of the required elements to survive the present motion.

The Opposition clearly meets the Rule 8 pleading standard by putting the Applicant on notice of the claims brought against it. *ABB Turbo Sys. AG v. Turbousa, Inc.*, 774 F.3d 979, 984 (Fed. Cir. 2014) (A well-pled complaint must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.") (quoting Twombly, 550 U.S. at 555.) Accordingly, the motion to dismiss should be denied.

IV. ALTERNATIVE MOTION TO STRIKE

Applicant includes in the motion an alternative motion to strike certain paragraphs from the Opposition as filed, claiming that the paragraphs are "irrelevant, improper and entirely unrelated to the grounds on which the above-captioned opposition is based". (Dkt. 4, III) In the paragraphs to which Applicant objects, specifically Paragraphs 27-30, Opposer did not attempt to introduce any evidence in the proceeding. To the contrary, the paragraphs serve to provide the basis for the allegation that the Mark is generic. Evidentiary support for the allegations will be provided in later stages of the proceeding.

Likewise, Paragraphs 33-36 are directly applicable to the grounds on which the Opposition is based. Opposer has alleged that the Mark fails to function as a trademark due to genericness, and these four paragraphs directly support that contention. (Dkt. 1, §§33-36) If the Board agrees with Applicant that these Paragraphs should be characterized as a claim that the Mark is incapable of functioning as a source identifier or trademark, Opposer respectfully requests leave to amend the Opposition accordingly to so allege.

V. CONCLUSION

For the foregoing reasons, Opposer respectfully requests that the Board deny the motion to dismiss and alternative motion to strike, or in the alternative, grant Opposer leave to amend its Notice of Opposition to cure any purported deficiencies raised by Applicant's motion.

Date: July 15, 2021

Respectfully Submitted,

FUSE, LLC

By Opposer's Attorney

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing OPPOSER FUSE, LLC'S RESPONSE IN OPPOSITION TO APPLICANT TASTEMADE, INC.'S MOTION TO DISMISS AND ALTERNATIVE MOTION TO STRIKE is being served on July 15, 2021 by email to MRG@TechMark.com

Date: July 15, 2021 By: /s/ Don Thornburgh
Don Thornburgh