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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 Reply in Support of Motion to Dismiss and Alternative Motion to Strike is being filed with the TTAB via ESTTA on August 4, 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 REPLY IN SUPPORT OF MOTION TO DISMISS OPPOSITION FOR FAILURE TO STATE A CLAIM AND ALTERNATIVE MOTION TO STRIKE

Pursuant to 37 CFR §2.127(a) and Trademark Trial and Appeal Board Manual of Procedure ("TBMP") §502.02, Applicant, TASTEMADE, INC. ("Applicant"), hereby submits its Reply in Support of Motion to Dismiss Opposition for Failure to State a Claim and Alternative Motion to Strike ("Reply").

I. Motion to Dismiss

While Opposer, Fuse, LLC ("Fuse") has attempted to explain away its failure to meet the minimum pleading requirements, its excuses do not cure the deficiencies upon which Applicant's Motion to Dismiss is based. The opposition simply fails on its face to state a claim upon which relief may be granted. Opposer maintains its request that the Trademark Trial and Appeal Board ("Board") dismiss the above-captioned proceeding for failure to state a claim upon which relief may be granted.

A. Opposer's Genericness Claim is Legally Insufficient

Opposer's Notice of Opposition ("Notice") fails to meet the minimum pleading requirements for a claim of genericness. The Notice does not allege that the STRUGGLE MEALS Mark is generic for the Class 41 educational and entertainment services in the application. The legal standard for genericness involves a two-step inquiry: (1) The genus of services at issue and (2) Whether the relevant public understands the designation primarily to refer to the genus of services at issue. *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 Notice completely fails to identify the genus of services based on

the Class 41 services covered by Appln. No. 88/748,174 – identifying the genus of services at issue is central to application of the first *Marvin Ginn* factor. The second factor is entirely reliant on proper application of the first.

Contrary to Opposer's argument that Applicant is somehow misapplying the first *Marvin Ginn* factor (although Opposer gives no explanation for this position), it is in fact Opposer that has failed to apply this factor to the applicable Class 41 services. The Notice does not identify the genus of services at issue – it only alleges that STRUGGLE MEALS "is generic for meals which can be prepared on a limited budget." Notice of Opposition, ¶17.[1] "Meals which can be prepared on a limited budget" have nothing to do with the Class 41 services covered by this application and most certainly does not represent the genus of services at issue. The Class 41 services at issue are:

> Educational services, namely, providing online instruction in the field of food, cooking, recipes, budgeting, shopping, food preparation and lifestyle choices; Entertainment services, namely, providing a web site featuring photographic, audio, video and prose presentations featuring food, cooking, recipes, budgeting tips, shopping tips, food preparation education and lifestyle choices; Entertainment services, namely, the provision of continuing television, internet TV, online video programming segments, video podcasts, and an ongoing web series featuring food, cooking, recipes, budgeting tips, shopping tips, food preparation education and lifestyle choices delivered by television and the internet, in Int'l Class 41.

Nowhere in the Class 41 identification does "meals which can be prepared on a limited budget" appear.[2] 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]. As supported by case law, the genus at issue is clearly "educational and entertainment services."[3] *See Real Foods,* 906 F.3d 965 (Finding that identifying "popped corn cakes" and "rice cakes" as the genus for the full identifications, "crispbread slices predominantly of corn, namely, popped corn cakes" and "crispbread slices primarily made of rice, namely rice cakes," an improper narrowing of the genus of the goods at issue where "corn cakes" and "rice cakes" are the species, not the genus, and the appropriate genus would be "crispbreads," which is a type of cracker.); *See also Hokie Objective Onomastics Society LLC v. Virginia Polytechnic Institute and State University,* Opposition No. 91207895 (October 20, 2017) [not precedential] (Finding

[1] In its Opposition to Motion, Opposer confusingly states that "Contrary to Applicant's contentions, Opposer does not allege that "struggle meals" are a [sic] products which Applicant sells under the Mark." Applicant never took this position in its Motion and, instead, takes the position that Applicant has failed to identify the genus of services at issue and has failed to allege that STRUGGLE MEALS is generic as to this genus of services.

[2] While "food," "food preparation" and "budgeting" generally are part of the "fields" in the Class 41 identification, nowhere does this identification cover "meals which can be prepared on a limited budget." This is an arbitrary assignment by Opposer as a convenient way to support its argument.

[3] Food, cooking, recipes, budgeting, shopping, food preparation and lifestyle choices" being, at most, the species, which is not what is considered for a genericness analysis. *See Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 US 763, 112 S. Ct. 2753 (1992).

the relevant genus for "education and entertainment services, namely, providing courses of instruction at the university level; educational research; arranging and conducting athletic competitions, organizing exhibitions for educational purposes in the nature of scientific shows and school fairs, conducting educational conferences in the field of math, politics, sociology, physics, chemistry and science and distributing course materials in connection therewith; live performances by a musical band and festivals featuring a variety of activities, namely, arts, music, dance, drama, sports and athletics," in Class 41 to be "educational and entertainment services."); *See also In re Seats, Inc.,* 757 F.2d 274 (Fed. Cir. 1985) (Finding that the proper genus for "ticket reservation and issuing services for various events rendered by means of a computer," in Class 41 to be "ticket reservation services"). It is, at best, an improper narrowing of the genus of the services at issue and at worst (and more likely) an entirely arbitrary selection of language convenient to Opposer's argument for Opposer to apply the first *Marvin Ginn* factor to "meals which can be prepared on a limited budget."

Not once in the Notice does Opposer allege that STRUGGLE MEALS is generic for Class 41 educational or entertainment services. In fact, Opposer goes so far in its Notice as to explicitly state 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]. The Notice simply does not allege that the STRUGGLE MEALS mark is generic as to the Class 41 (or genus of) services at issue. Where the Notice fails to address the first *Marvin Ginn* factor, it is impossible to apply the second factor – these factors are necessary for a genericness claim and failure to address one or both renders the claim legally insufficient.

Even if, *arguendo*, we accept as true Opposer's allegation that the STRUGGLE MEALS mark "is generic for meals which can be prepared on a limited budget," this still does not show that a right to relief exists where "meals which can be prepared on a limited budget" is not applicable to Applicant's Class 41 educational and entertainment services. There is absolutely no reading of Applicant's Class 41 services that would lead to the conclusion that "meals which can be prepared on a limited budget" is the appropriate genus. The Notice fails to meet the pleading requirements for a claim of genericness upon which relief may be granted. Even considering, for the sake of discussion, that "educational and entertainment services in the fields of food, cooking, recipes, budgeting, shopping,

food preparation and lifestyle choices" is the applicable genus (which would be improperly narrowed as identifying the species and not the genus), the Notice is still legally insufficient where the Notice only raises genericness as to "meals which can be made on a limited budget." The Notice fails to state a claim upon which relief may be granted.

B. Without Properly Pleading Genericness, A Viable Failure to Function as a Mark Due to Genericness Claim Is Legally Impossible

Opposer does not contest that its failure to function claim is based entirely on the allegation that STRUGGLE MEALS is generic. As established herein, Opposer has failed to adequately plead genericness. Without a claim of genericness, the entire basis for Opposer's failure to function claim, this second claim is not viable. Where Opposer has asserted no claims upon which relief may be granted, Opposition No. 91-269,443 should be dismissed in full.

C. Opposer Has Not Sought Leave to Amend and An Amendment Would be Futile

Opposer has not sought leave to amend (or expressed any interest in amending) its Notice in an attempt to meet the minimum pleading requirements – Applicant agrees that an amendment would be futile, as established by well settled case law. Opposer argues that "equity demands that the proceeding be allowed to go forward so that … evidence [relating to the specimens submitted in support of Appln. No. 88/748,174] can be introduced." Plaintiff's Opposition to Motion to Dismiss ("Oppo. to Mtn."), Docket No. 7 (July 15, 2021). This supports Applicant's position that Opposer has no viable basis for its claims. Opposer could easily have included in its Notice allegations relating to the public TSDR record for Appln. No. 88/748,174, as applicable, but consciously chose not to include any such allegations where no such applicable evidence exists in the record. To the extent Opposer is alleging that the specimens submitted with Appln. No. 88/748,174 somehow provide a basis for a claim of genericness, this would constitute an allegation of Examining Attorney error, which is not a valid ground for opposition. See *Demon International LC v. Lynch*, 86 USPQ2d 1058 (TTAB 2008); citing *Century 21 Real Estate Corp. v. Century Life of America*, 10 USPQ2d 2034 (TTAB 1989). This is also true of Applicant's irrelevant statement that "the Opposed Applicant for STRUGGLE MEALS deceptively described the associated entertainment programming in deliberately vague terms, in an attempt to avoid a refusal under Sections [sic] §§1, 2, 3 and 45 of the Trademark Act." The USPTO requires a high degree of particularity before an application is approved for publication and any allegation that services are impermissibly vague is an allegation of Examining Attorney error. Again, this is not a valid basis

for an opposition. *See Demon International*, 86 USPQ2d 1058. Due to the futility of an amendment, Applicant agrees with Opposer's decision not to amend.

D. 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. Allowing this Opposition to move forward would be prejudicial to Applicant and a waste of the Board's (and the Parties') time where Opposer has provided no basis for relief and where it is inappropriate to use an opposition as a means for launching a fishing expedition.

II. Alternative Motion to Strike

In the event the Board does not grant Applicant's Motion to Dismiss in full, pursuant to FRCP 12(f) and TBMP §506, Applicant maintains its Alternative Motion 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. In its Oppo. to Mtn., Applicant simply makes unsupported conclusory statements as to the relevancy of these paragraphs. Applicant provides no explanation or reasoning for why these paragraphs are allegedly applicable to the claims being asserted. Applicant is still left guessing as to how these paragraphs and the allegations contained therein are in any way applicable or relevant – this is prejudicial to Applicant and contrary to the Trademark Rules and precedent.

A. Applicant Maintains that Paragraphs 27-30 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.

Applicant maintains that 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. Opposer provides no explanation for how these paragraphs are appropriate or relevant. As previously argued in Applicant's initial Motion to Dismiss and Strike, the unsubstantiated examples of alleged third-party use[4] in

[4] Interestingly, in Notice of Opposition ¶29, Opposer raises third-party Davon Marshall Hill as an example of descriptive or generic use, but failed to

Paragraphs 27-30 (i.e. "menus, dictionaries, magazines, news articles and informational websites") are nearly identical to the examples of inappropriate evidentiary material provided in TBMP§309.03(a)(2) (i.e. "[L]ists of publications or articles in which a term sought to be registered by an applicant is alleged to be used descriptively"). The material in these paragraphs does not provide a fuller understanding of the pleading and should be stricken.

B. Applicant Maintains That Paragraphs 33-36 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 grounds on which this opposition is based and adds no clarity to the pleading as a whole. The material in these paragraphs leads only to unnecessary confusion. Applicant has not provided any explanation as to why these paragraphs should not be stricken – Applicant has only provided unsupported conclusions reflecting its own personal opinion. Notice of Opposition Paragraphs 33-36 are irrelevant, improper and prejudicial and should be stricken as such.

C. Conclusion

Applicant maintains its request that the Board grant Applicant's Alternative Motion to Strike in its entirety in the event the Board does not grant Applicant's Motion to Dismiss in full.

Dated: August 4, 2021

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raise this issue (or even the issue of descriptiveness) in its prior opposition against Hill's Appln. No. 88/376,669 for the mark STRUGGLE MEALS in Class 41.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **APPLICANT'S REPLY IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AND ALTERNATIVE MOTION TO STRIKE** is being served on August 4, 2021 by email to uspto@donthornburgh.com.

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