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

Proceeding no.	92083962
Party	Defendant Fresh, Inc.
Correspondence address	NICK BARNHORST FRESH, INC. 3/F 19 EAST 57TH STREET NEW YORK, NY 10022 UNITED STATES Primary email: trademarks@fresh.com 347-897-6423
Submission	Opposition/Response to Motion
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Date	03/04/2024
Attachments	GLOW POWDER Cancellation Action - Response to Motion to Strike 3.4.24 .pdf(264014 bytes)

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

BUMP HEALTH, INC. Petitioner, v. FRESH, INC., Registrant.	Cancellation No. 92083962 Reg. No. 5633879 Mark: GLOW POWDER

RESPONSE TO MOTION TO STRIKE

Fresh, Inc. ("Registrant"), owner of Reg. No. 5633879 for the mark GLOW POWDER in International Class 3, respectfully opposes the Motion to Strike filed by Bump Health, Inc. ("Petitioner") in relation to Registrant's second affirmative defense. The affirmative defense of acquiescence is adequately pled and Petitioner has suffered no prejudice. Moreover, the acquiescence defense raises factual issues that should be determined on the merits following discovery.

I. Legal Standard

Pursuant to Federal Rule of Civil Procedure 12(f), a court or the Board "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." (Fed. R. Civ. P. 12(b)(6).) It is "well established that the courts should sparingly use the action of striking a pleading. It is a drastic remedy to be resorted to only when required for the purposes of justice." *North Penn Transfer v. Victaulic Co.*, 859 F. Supp. 154, 158 (E.D. Pa. 1994), "A motion to strike should only be granted if there is a clear showing that the challenged defense has no

bearing on the subject matter and that permitting the defense to stand would prejudice the plaintiff." *Beattie v. CenturyTel, Inc.*, 234 F.R.D. 160, 174 (E.D. Mich. 2006). Motions to strike are generally disfavored, and an affirmative defense should not be stricken unless it clearly has no bearing upon the issues under litigation. *See*, e.g., *FRA S.p.A. v. Surg-O-Flex of America, Inc.*, 194 USPQ 42, 46 (SDNY 1976); *Leon Shaffer Golnick Advertising, Inc. v. William G. Pendil Marketing Co., Inc.*, 177 USPQ 401, 402 (TTAB 1977); *Ohio State University v. Ohio University*, 51 USPQ2d 1289, 1293 (TTAB 1999). Further, a defense should 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. *See generally*, Charles Alan Wright & Arthur R. Miller, *5C Federal Practice and Procedure* § 1381 (3d ed. 2008).

II. Analysis

Petitioner asserts that Registrant's affirmative defense of acquiescence is insufficiently and inadequately pleaded. Federal Rule of Civil Procedure 8 requires a defendant, when pleading an affirmative defense, to put forth a short and plain statement giving the opposing party fair notice of the defense and the grounds on which it rests. (Fed. R. Civ. P. 8). Registrant has pled the affirmative defense of acquiescence, asserting that Petitioner's claims are barred on the grounds that Petitioner has relinquished its claims by a course of conduct over a period of years. Registrant has pleaded a short and plain statement, as required by FRCP 8, and Petitioner has sufficient notice of the nature of the defense.

In accordance with Section 506.01 of the TBMP, 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 for a claim or defense. TBMP § 506.01 (2023). *See also Harsco Corp. v. Electrical Sciences Inc.*, 9 USPQ2d 1570, 1571 (TTAB 1988).

Furthermore, any alleged deficiency in the pleading is not facially apparent, and the defense raises factual issues regarding Petitioner's conduct over the course of the last five-plus years that should be determined on the merits. Charles Alan Wright & Arthur R. Miller, *5C Federal Practice and Procedure* § 1381 (3d ed. April 2022 update). Registrant submits that striking this defense at such a preliminary stage without allowing for proper fact-finding would undermine the principles of justice and due process inherent in our legal system.

Finally, Petitioner's claims of prejudice—related solely to its prospective participation in the discovery process—are without merit. Petitioner asserts that "…to get to the basic core of Registrant's affirmative defense, Bump Health would have to engage in costly discovery*." Bump Health, Inc.*, Motion to Strike Pleading/Affirmative Defense, No. 92083962, p.4 (TTAB Feb. 16, 2024). The need for discovery does not inherently impose undue burden or prejudice upon Petitioner beyond what is customary and necessary in litigation—a process designed to bring forth all relevant facts before reaching any judicial decision. In this case, both parties will need to engage in ordinary discovery to draw out the facts relevant to their claims and defenses, including with respect to Bump Health's implicit consent—over a period of several years of uninterrupted coexistence—to Registrant's continued use and registration of its marks.

WHEREFORE, Registrant requests that the Motion to Strike be denied and that the Board grant other and further relief as appropriate. Alternatively, if the Board chooses not to deny the Motion to Strike, Registrant requests that the Board grant Registrant leave to amend the affirmative defense in question.

Respectfully submitted.

Dated: March 4, 2024

Fresh, Inc.

By: 

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Registrant's Response to Motion to Strike has been forwarded via email to Petitioner at jtdb@pb-iplaw.com.

Dated: March 4, 2024

By: 

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