

**THIS OPINION
IS NOT A PRECEDENT OF
THE TTAB**

Oral Hearing:
November 25, 2008

Mailed:
January 30, 2009

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re *Midwestern Pet Foods, Inc.*

Serial No. 78876346

Timothy D. Pecsenty of Blank Rome LLP for *Midwestern Pet Foods, Inc.*

Jean H. Im, Trademark Examining Attorney, Law Office 101
(Ronald R. Sussman, Managing Attorney)

Before Seeherman, Rogers and Wellington, Administrative
Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Midwestern Pet Foods, Inc. (applicant) has applied to register the mark CHED 'R' WEDGES in standard character form on the Principal Register for "pet food; pet treats" in International Class 31.¹

The Examining Attorney finally refused registration on the ground that CHED 'R' WEDGES merely describes the

¹ Serial No. 78876346, filed May 4, 2006, based on a statement of a bona fide intent to use the mark in commerce.

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identified goods under Trademark Act Section 2(e)(1), 15 U.S.C. § 1052(e)(1). Applicant concurrently filed an appeal and a request for reconsideration. The examining attorney denied the request for reconsideration; applicant and the Examining Attorney then filed appeal briefs.

An oral hearing was requested by applicant and was held on November 25, 2008.

A term is merely descriptive of goods within the meaning of Section 2(e)(1) if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods. *See, e.g., In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987); and *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978).

A term need not immediately convey an idea of each and every specific feature of the applicant's goods in order to be considered merely descriptive; it is enough that the term describes one significant attribute or function of the goods. *See In re MBNA America Bank N.A.*, 340 F.3d 1328, 67 USPQ2d 1778 (Fed. Cir. 2003) (MONTANA SERIES and PHILADELPHIA CARD held merely descriptive of credit card services featuring credit cards depicting scenes or subject matter of, or relating to the state of Montana or the city of Philadelphia); *In re Busch Entertainment Corp.*, 60

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USPQ2d 1130 (TTAB 2000) (EGYPT held merely descriptive of amusement park services; namely an area within an amusement park). See generally *In re H.U.D.D.L.E.*, 216 USPQ 358, 359 (TTAB 1982); and *In re MBAssociates*, 180 USPQ 338, 339 (TTAB 1973).

Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods or services identified in the application, and the possible significance that the term would have to the average purchaser or user of the goods or services. *In re Polo International Inc.*, 51 USPQ2d 1061, 1062 (TTAB 1999); and *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). The question whether a mark is merely descriptive is not determined by asking whether one can guess from the mark what the goods are, but rather by asking, when the mark is seen on or in connection with the goods, whether it immediately conveys information about their nature. See *In re Patent & Trademark Services Inc.*, 49 USPQ2d 1537, 1539 (TTAB 1998).

The Examining Attorney argues that CHED 'R' WEDGES is merely descriptive of pet food and pet treats because it describes the flavor and shape of the food and treats. Specifically, she argues that "CHED 'R' is the equivalent to the word 'cheddar' in both sound and meaning, and

describes the flavor of the goods." Brief, (unnumbered) p. 3. And, relying on a definition of the term "wedge" as "something shaped like a wedge," she argues that the pet food or treats may be wedge-shaped.² She concludes that "the two terms combined as a unitary mark convey the commercial impression of pet food and pet treats that are cheddar-flavored and wedge-shaped, or put another way, are cheddar flavored wedges." Brief, (unnumbered) p. 4.

Applicant, on the other hand, argues that its mark is only suggestive of the identified goods. Applicant contends that the mark is "characterized by an alliterative, lilting cadence and growling sound elements formed between 'CHED' and 'R'...[that] brings to mind the growl of a dog and also creates a pun on that fact that many American families treat their pets like members of the family...the customer is purchasing this product in order to treat their pet to foods that could be enjoyed by humans." Brief, pp. 10-11. Applicant also points to several third-party registrations and argues that these "past PTO determinations favor registration."

² *The American Heritage Dictionary of the English Language*, Third Edition copyright (1992) by Houghton Mifflin Company. Definition incorporated into Office Action dated October 11, 2006. Applicant objected to this definition because it was "taken from a web site dictionary produced from an undisclosed source." Brief, p. 14. This objection is not well-taken as the source of the definition was clearly referenced in the Office Action.

Based on all of the evidence of record and the arguments presented, we conclude that CHED 'R' WEDGES is merely descriptive of pet food and pet treats.

We agree with the examining attorney that applicant's mark is essentially the phonetic equivalent of "cheddar wedges" and we do not believe that consumers will perceive in the mark any "lilting cadence" or "growling sound elements" that may call to mind a growling dog. The terms "cheddar" and "wedges" certainly are not incongruous nor does the mark contain, as applicant contends, "creative spelling [and a] pun." Reply Brief, p. 1. Rather, consumers will view the mark as simply an abbreviation of the word "cheddar" (by leaving out the letters "da") connected to the word "wedges." There is nothing clever in or unique to this combination. Applicant's mark is distinguishable from those third-party registered marks (identified by applicant and the examining attorney during the prosecution of the involved application) for pet food whereby the marks do suggest a dog's growl or a cat's purr by either repeating the "R" several times or combining "purr" with other elements, e.g., GRRRAVY (Reg. 1486380), PURRLICIOUS (Reg. 2800874), and PURR-FECT (Reg. 2963941).

Being the equivalent of the phrase "cheddar wedges," applicant's mark is descriptive because it would

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immediately and directly tell consumers that applicant's pet food or treats are wedge-shaped items that are cheddar-flavored. Applicant's identification of goods is broad enough to encompass such goods. The examining attorney has submitted third-party website evidence showing pet food and pet treats being advertised as containing cheddar cheese or having cheese flavor.³ For example:

Pooch Pizza
Cheese and Pepperoni flavor. 8 pre-cut pieces.
[advertised under the banner "Shopping for Pet Treats at its Best!"]
www.pettreatsplus.com

Purina brand Moist & Meaty Burger with Cheddar Cheese
[and identifying "dried cheese powder (predominantly cheddar cheese)" as one of the ingredients]
www.purina.com

This evidence indicates that pet food or pet treats contain cheddar cheese or have cheese-flavoring. Thus, upon viewing applicant's mark which is the phonetic equivalent of cheddar wedges, in connection with pet food and pet treats, consumers will immediately understand that the mark merely describes the type of food or treats, namely, that they are wedge-shaped food or treats with cheddar cheese flavoring. No mental leap is required here.

Applicant has placed a great deal of emphasis on a few third-party registrations for similarly-constructed marks,

³ Attached to Office Action dated June 7, 2007.

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i.e., CHED`R`BITES (Reg. 1980526) for snack food, CHED-R-CUP (Reg. 2543928) for cheese sauce⁴, and LIV`R`CRUNCH (Reg. 2000775) for pet food and treats. Applicant argues that "the Trademark Office's treatment of [these] similar marks is evidence that applicant's mark is clearly suggestive." Reply, p. 2. However, as the Board and our principal reviewing court have long and often stated, prior actions of examining attorneys in assertedly analogous situations are not binding. See *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ["Even if some prior registrations had some characteristics similar to [applicant's] application, the PTO's allowance of such prior registrations does not bind the board or this court."]; *In re National Novice Hockey League, Inc.*, 222 USPQ 638, 641 (TTAB 1984); and *In re Scholastic Testing Service, Inc.*, 196 USPQ 517, 519 (TTAB 1977). Certainly it is desirable to provide equal treatment to applicants under the Trademark Act; nonetheless, we must make our determination as to whether the involved mark is registrable based on the record before us and regardless of prior decisions by different examining attorneys.

⁴ Cancelled on December 13, 2008, for failure to file a Section 8 declaration.

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Accordingly, we conclude that CHED 'R' WEDGES is merely descriptive of "pet food; pet treats."

Decision: We affirm the refusal under Trademark Act Section 2(e)(1).