

**This Opinion is Not a
Precedent of the TTAB**

Mailed: August 26, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Phoenix Intangibles Holding Company
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Serial No. 85355964
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David V. Radack of Eckert Seamans Cherin & Mellot LLC,
for Phoenix Intangibles Holding Company.

Brian Pino, Trademark Examining Attorney, Law Office 114,
K. Margaret Le, Managing Attorney.

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Before Bucher, Bergsman and Kuczma,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Phoenix Intangibles Holding Company (“Applicant”) seeks registration on the Principal Register of the mark ANOTHER GIANT EAGLE ADVANTAGE (in standard characters) for

Supermarket services, in International Class 35.¹

¹ Application Serial No. 85355964 was filed on June 24, 2011, based upon applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act.

The application was published for opposition on November 15, 2011 and the USPTO issued a Notice of Allowance on January 10, 2012. On January 10, 2013, Applicant filed a Statement of Use. Applicant's specimen of use is set forth below:



The Trademark Examining Attorney has refused registration of Applicant's mark under Sections 1 and 45 of the Trademark Act of 1946, 15 U.S.C. §§ 1051 and

1127, on the ground that the above-noted specimen of use does not show the mark ANOTHER GIANT EAGLE ADVANTAGE used in connection with supermarket services.

After the Examining Attorney made the refusal final, Applicant appealed to this Board. We reverse the refusal to register.

A “service” is defined as ‘the performance of labor for the benefit of another.’ *In re Canadian Pacific Ltd.*, 754 F.2d 992, 224 USPQ 971, 973 (Fed. Cir. 1985), *citing Webster’s Collegiate Dictionary* (5th ed.). The term “service mark” is defined, in relevant part, as any word, name, symbol, or device, or any combination thereof ... used by a person ... to identify and distinguish the services of one person, including a unique service, from the services of others and to indicate the source of the services, even if the source is unknown.” Section 45 of the Trademark Act of 1946, 15 U.S.C. § 1127. A service mark is deemed to be in use in commerce “when it is displayed in the sale or advertising of the services and the services are rendered in commerce.” Section 45 of the Trademark Act of 1946, 15 U.S.C. § 1127. Service mark use includes use of the mark in rendering the service. *In re Eagle Fence Rentals, Inc.*, 231 USPQ 228, 231 (TTAB 1986). Whether a mark sought to be registered as a service mark has been used “to identify” the services specified in the application is a question of fact to be determined on the basis of the specimens submitted by the applicant, together with any other evidence. *See In re Adair*, 45 USPQ2d 1211, 1214 (TTAB 1997).

An applicant for registration must submit a specimen showing the mark as used in commerce. Section 1(a) of the Trademark Act of 1946, 15 U.S.C. § 1052(a); Trademark Rule 2.34(a)(1)(iv), 37 CFR § 2.34(a)(1)(iv). A service mark specimen “must show the mark as actually used in the sale or advertising of the services.” Trademark Rule 2.56(b)(2), 37 CFR § 2.56(b)(2). A service mark specimen must show an association between the mark and the services for which registration is sought although the services need not be expressly referenced. *In re Adair*, 45 USPQ2d at 1214 (the mark must be used in such a manner that it would be readily perceived as identifying the source of the services); *In re Metriplex, Inc.*, 23 USPQ2d 1315 (TTAB 1992); TMEP § 1301.04(a) (2014). Accordingly, we must look to the specimen to determine how consumers would perceive applicant’s use of ANOTHER GIANT EAGLE ADVANTAGE. *In re The Signal Companies, Inc.*, 228 USPQ 956, 957 (TTAB 1986); *In re Wakefern Food Corp*, 222 USPQ 76, 77 (TTAB 1984).

Thus, the issue before us is whether the mark ANOTHER GIANT EAGLE ADVANTAGE as used on the above-noted advertisement identifies supermarket services. According to the Trademark Examining Attorney, the specimen does not support the use of the mark in connection with supermarket services because the advertisement is limited to beer, not supermarket services.² While conceding that the advertisement only references the sale of beer, Applicant contends that beer is a product often sold in supermarkets and that “many, if not all, supermarkets have advertisements featuring only a portion of the products they sell, and that because

² Trademark Examining Attorney’s Brief, pp. 4-5 (unnumbered).

GIANT EAGLE is a well-known supermarket in its trading area, consumers encountering Applicant's advertisement for beer will perceive it as promoting supermarket services.³

We have only counsel's statements as to the renown of Applicant. The better practice would have been for counsel to introduce evidence supporting Applicant's arguments into the record. *See In re U.S. Tsubaki, Inc.*, 109 USPQ2d 2002, 2006 (TTAB 2014). Nevertheless, it is common knowledge that beer and wine may be sold in supermarkets and that supermarkets often advertise a few of the products they sell (*e.g.*, a supermarket advertising a special sale on beer, meats, or produce) in any one advertisement.

The gravamen of the Trademark Examining Attorney's objection to the specimen is that it does not make reference to supermarket services. However, our case law does not require that specimens must, in all cases, contain a statement as to the nature of the services to be acceptable. *See In re Metriplex Inc.*, 23 USPQ2d 1315 (TTAB 1992), *In re Eagle Fence Rentals, Inc.*, 231 USPQ 228 (TTAB 1986), and *In re Red Robin Enterprises, Inc.*, 222 USPQ 911 (TTAB 1984).

The advertisement submitted as a specimen promotes the sale of beer at a store such as the GIANT EAGLE MARKET DISTRICT shown in the logo at the bottom of the advertisement. A market includes a supermarket.⁴ Thus, we have a connection between the mark and a store that offers a variety of goods. As noted above,

³ Applicant's Brief, pp. 1-2.

⁴ A supermarket is defined as "a large self-serve market that sells food and household goods." Yahoo! Education (yahoo.com) attached to the Jun 12, 2013 Office action.

supermarkets sell beer and supermarkets often advertise the sale of less than all of their products. The crux of our analysis is that a purchaser or prospective purchaser of Applicant's supermarket services would view the mark in the above-noted advertisement as promoting the sale of a wide selection of beers at Applicant's supermarket. We find that the advertisement at issue shows direct use of the mark in connection with the rendering of services and the context within which the specimen is used creates an association between the mark and the supermarket services in the minds of purchasers.

In view of the foregoing, we find that Applicant's specimen is acceptable.

Decision: The refusal to register Applicant's mark is reversed.