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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Caliburger

Serial No. 85810919

Bradley J. Walz of Winthrop & Weinstine, P.A. for Caliburger

Jennifer D. Richardson, Trademark Examining Attorney, Law Office 113 (Odette Bonnet, Managing Attorney).

Before Wellington, Wolfson, and Goodman, Administrative Trademark Judges.
Opinion by Wolfson, Administrative Trademark Judge:

Caliburger (“Applicant”) seeks registration on the Principal Register of the mark CALIBURGER (in standard characters) for “restaurant services” in International Class 43.¹

The Trademark Examining Attorney has refused registration of Applicant’s mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), having determined that the applied-for mark merely describes Applicant’s restaurant

¹ Application Serial No. 85810919 was filed on December 27, 2012, based on Applicant’s allegation of a bona fide intent to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. § 1051(b).

services. When the refusal was made final, Applicant appealed and filed a request for reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. We affirm the refusal to register.

Applicable Law

Trademark Act § 2(e)(1) prohibits registration of a mark which is merely descriptive of the applicant's goods or services. A term is deemed to be merely descriptive of goods or services, 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 or services. *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012). *See also, In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007) (*citing In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978)). Whether a particular term is merely descriptive is determined in relation to the goods or services for which registration is sought and the context in which the term is used, not in the abstract or on the basis of guesswork. *In re Abcor*, 200 USPQ at 218; *In re Remacle*, 66 USPQ2d 1222, 1224 (TTAB 2002). The issue is whether someone who knows what the goods or services are will understand the mark to directly convey information about them. *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1316-1317 (TTAB 2002); *In re Patent & Trademark Serv. Inc.*, 49 USPQ2d 1537, 1539 (TTAB 1998); *In re Home Builders Assn. of Greenville*, 18 USPQ2d 1313, 1317 (TTAB 1990).

Applicant's mark is CALIBURGER for "restaurant services." The Examining Attorney contends that "Cali" is a commonly understood abbreviation for "California;" that a "California burger" is a type of burger² that includes fresh ingredients as toppings, most commonly lettuce and tomato; that Applicant's restaurants feature California burgers; and that consumers will immediately perceive Applicant's mark CALIBURGER as merely descriptive of restaurant services featuring California burgers. Applicant, on the other hand, argues that to the extent consumers refer to a particular type of burger, the preferred term used by restaurants is "California-style burger" and not "California burger," but that in any event, "Cali" is not commonly known as "California" in connection with a type of burger. Applicant further argues that its CALIBURGER burgers are not featured food items at its restaurants and that the term "Cali" in its mark suggests a "California lifestyle"³ and not a California-style burger.

The evidence shows that consumers understand that a "California burger" is a type of burger that includes certain vegetable toppings, in addition to the meat and sometimes cheese. The Examining Attorney submitted printouts from blogs supplying recipes for California burgers;⁴ an article about "Freddy's" restaurant

² The word "burger," short for hamburger, is defined both as "a sandwich consisting of a bun, a cooked beef patty, and often other ingredients such as cheese, onion slices, lettuce, or condiments," as well as "a similar sandwich with a nonbeef filling." From THE AMERICAN HERITAGE DICTIONARY, at <http://www.ahdictionary.com>, attached to the first Office Action, dated April 19, 2013.

³ Applicant's Brief, 13 TTABVUE 22.

⁴ For example, the Beantown Baker blog provides a recipe for "California Turkey Burgers" that feature avocado (at <http://www.beantownbaker.com>, attached to first

that sells a “Freddy’s Steakburger California Style;”⁵ and a copy of web pages advertising MorningStar Farms ® Grillers ® California Turk’y Burger that proclaims “A yummy blend of avocados and tomatoes makes this California-style veggie burger worth gobbling.”⁶ The Examining Attorney also provided menus from restaurants that sell “California burgers” or offer to make a sandwich or other food item “California style.” The menus are:

1. Stahley’s Family Restaurant & Sports Bar in Allentown, Pennsylvania serves a “California Hamburger” and offers to make its sandwiches “California style” by adding “lettuce, tomato, raw onions and mayonnaise \$.50 extra, add cheese \$.50 extra.”⁷
2. Another menu, from www.arnoldsmaltshoppe.com, offers burgers and sandwiches; one item reads: “California Style Burger [with] Sauce, sliced avacado [sic], lettuce, tomato and onions \$8.75” Another item offered on this menu is a: “California Style Chicken [with] Sauce, sliced avacado [sic], lettuce, tomato and onions \$9.20.”⁸
3. The Rainbow Café serves a “California Burger” for \$7.95 that is described as a “6 ounce burger [with] lettuce, roma tomato, red onion.”⁹
4. The PiesNPizzeria pizza restaurant displays its menu of “steaks & subs,” including a “California Cheese Steak (beef or chicken)” and the

Office Action); the Food Network website (<http://www.foodnetwork.com>) provides a recipe for a “California Burger” served on whole-grain bread with “sprouts, cucumber, tomato and avocado.” *Id.*

⁵ At <http://www.examiner.com>, attached to Final Office Action.

⁶ *Id.*, at <https://www.morningstarfarms.com>.

⁷ At <http://www.stahleys.com>, attached to Final Office Action dated November 8, 2013.

⁸ *Id.*, at <http://www.arnoldsmaltshoppe.com>.

⁹ *Id.*, at <http://rainbowcareandcatering.com>.

explanation that “California style adds lettuce, tomatoes, and mayo” to the sandwich. The restaurant also offers a “California Hamburger,” “California Cheeseburger” and a “California Bacon Cheeseburger.” The toppings for each of these burgers is listed as “lettuce, tomatoes, onions, pickles, ketchup, and mayo.”¹⁰

5. An online menu for Capitol Café by Milo’s posted January 25, 2013 listed its daily lunch specials, including a “California Double Burger with Gruyere, Bacon, Sprouts, Avocado, Ranch & Tomatoes.”¹¹

Based on the evidence, we find that although companies may offer slightly different versions of “California burgers,” relevant consumers will recognize that “California burger” identifies a particular type of burger.¹²

The evidence also supports the Examining Attorney’s position that CALI would be commonly understood as an abbreviation for “California” in connection with a restaurant selling California burgers. The Examining Attorney submitted printouts from two restaurants that use “Cali” in their names as an abbreviation for California: “Cali Burrito,” promoting itself as a “California style burrito and

¹⁰ *Id.*, at <http://piesnpizzeria.com>.

¹¹ At <http://www.facebook.com/capcafebymilos/posts>, attached to first Office Action dated April 19, 2013.

¹² The fact that the terminology “California style burger” is also used to identify the type of burger known as a “California burger” does not change this result. The terms are basically interchangeable; the addition of the word “style” merely emphasizes that the burgers are a type, or genre, of sandwich. *Cf. In re A La Vieille Russie Inc.*, 60 USPQ2d 1895 (TTAB 2001) (“RUSSIANART” is a generic name for a certain type of art and for services of selling such art); *Greiner & Co. Inc. v. Mari-Med Mfg. Inc.*, 22 USPQ2d 1526 (Fed. Cir. 1992) (there was no contributory infringement of trademark “PHILADELPHIA CERVICAL COLLAR,” even though defendant’s sales representatives and customers referred to defendant’s product as a “Philly Collar,” “Philly Style Collar,” or “Generic Philadelphia Collar.”).

taco joint,”¹³ and “Cali Comfort restaurant and sports bar,” which advertises its evolution as the “amazing life story of how farm boy got rich in California” and includes a picture of a California brown bear in its logo.¹⁴ The Examining Attorney also submitted printouts from the website “CALI People Meet” for a dating service that calls itself “the premier online California dating service” and which uses “Cali” as meaning California in the slogan “meet Cali singles.”¹⁵ This evidence supports a finding that the term CALI would be readily understood as an abbreviation for “California.”

Applicant does not dispute that “Cali” means California, or that a “California-style burger” is a type of burger. Indeed, Applicant uses “Cali” to mean “California.” For example, in an advertisement for franchising opportunities for CaliBurger restaurants, Applicant states: “CaliBurger was established by a passionate group of entrepreneurs from California who set out to bring the finest and freshest ‘Cali’ inspired burgers and chicken sandwiches to the rest of the world.”¹⁶ Applicant contends, however, that because it promotes itself as a California-themed restaurant, its use of the CALIBURGER mark will be perceived as a reference to a California “lifestyle” (as Applicant describes it, exemplified by “laid-back, tanned beach-goers”¹⁷) and not as a reference to a

¹³ *Id.*, at <http://www.caliburrito.com>.

¹⁴ *Id.*, at <http://www.calicomfortsd.com>.

¹⁵ *Id.*, at <http://www.calipeoplemeet.com>.

¹⁶ From <http://www.franchising.com/caliburger/>, attached to Final Office Action.

¹⁷ Applicant’s request for reconsideration dated May 9, 2014.

California burger. Applicant's argument that its use of "Cali" is merely as a reference to a California "lifestyle" is unavailing. While in other contexts the term "Cali," as an abbreviation for California, may conjure a certain California lifestyle, in this case the term is immediately followed by the word "burger," a generic term for hamburgers or similar sandwiches (see footnote 2, *infra.*). In the context of restaurants selling California burgers, the mark as a whole will immediately be perceived as an abbreviation for a "California burger," and will not impart the connotation of a "California lifestyle." See *In re RiseSmart Inc.*, 104 USPQ2d 1931, 1933 (TTAB 2012) ("[T]he fact that a term may have different meanings in other contexts is not controlling on the question of descriptiveness."); *In re Chopper Indus.*, 222 USPQ 258, 259 (TTAB 1984) ("It is well settled that so long as any one of the meanings of a term is descriptive, the term may be considered to be merely descriptive."); *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). The fact that "Cali" may suggest a "California lifestyle" does not change the primary significance of the mark CALIBURGER as referring to a California burger, nor does it present a double entendre such that the merely descriptive significance of the term "Cali" is lost in the mark as a whole.

The evidence also shows that Applicant's restaurants feature California burgers on their menus. Applicant's website displays photos of several varieties

of beef and chicken burgers as featured items.¹⁸ In an article about Applicant's restaurant, "In the Kitchen with the Cali Girls,"¹⁹ Applicant's "CaliBurger girl Candice Nunes" tells the reporter interviewing her that "CaliBurger is an exciting new hamburger restaurant that features fresh, made-to-order, California-style burgers!"²⁰ A review of Applicant's restaurant in "A Hamburger Today" describes Applicant as "the upcoming burger chain aiming to bring a taste of California-style fast food burgers to Shanghai and beyond...."²¹ A mark that consists of a featured food of a restaurant has been held merely descriptive of the restaurant services provided by the restaurant. *See In re Fr. Croissant, Ltd.*, 1 USPQ2d 1238, 1239 (TTAB 1986) (holding LE CROISSANT SHOP merely descriptive of an eating establishment where croissants are the principal attraction, even though other items are available); *In re Le Sorbet, Inc.*, 228 USPQ 27, 28 (TTAB 1985) (holding LE SORBET descriptive of restaurant and carryout shops which serve fruit ices); *In re General Franchising Corp.*, 169 USPQ 55 (TTAB 1971) ("the identification of a restaurant by the name of the food which is the specialty of the house is merely descriptive of the restaurant."). *Cf. Brewski Beer Co. v. Brewski Brothers Inc.*, 47 USPQ2d 1281, 1287 (TTAB 1998) (the words "'beer' and 'brewski' considered highly descriptive as applied to bar services); *In re Pencils, Inc.*, 9 USPQ2d 1410 (TTAB 1988) (Term "pencils,"

¹⁸ From <http://caliburgerintl.com>, attached to Final Office Action.

¹⁹ *Id.*, at <http://www.cityweekend.com>.

²⁰ *Id.*

²¹ From <http://aht.seriousseats.com>, attached to Final Office Action.

when applied to applicant's retail stationery and office supply services, is merely descriptive and must be disclaimed apart from design mark); *In re Registry Hotel Corp.*, 216 USPQ 1104 (TTAB 1983) ("LA CHAMPAGNE" for restaurant services registrable; mark served a different function from that of merely informing customers that champagne was served in applicant's restaurant).

Applicant argues that the dictionary definition for "California" filed by the Examining Attorney does not list CALI among the abbreviations that it provides (they are CA, Cal., and Calif.)²² and that the existence of third-party registrations for over 65 marks on the Principal register containing the term CALI (where CALI has not been disclaimed) show that "Cali" is not descriptive. Applicant's arguments are not persuasive. The dictionary definition does not preclude a slang usage of "Cali" as meaning California. Out of the large number of third-party registrations, only two are for restaurant services: CALIFIRE GRILL²³ and CALIFUSION,²⁴ and only two are for food products:²⁵ TEXACALI for roasted peanuts,²⁶ and CALI for various meat and cheese products.²⁷

²² From The American Heritage dictionary of the English Language, at <http://www.amdictionary.com>; attached to First Office Action dated April 19, 2013.

²³ Reg. No. 4100148, attached to Applicant's request for reconsideration, 5 TTQABVUE 5.

²⁴ Reg. No. 4134112, attached to Applicant's request for reconsideration, 5 TTABVUE 12. The recitation of services includes "catering" as well as restaurant services.

²⁵ A third registration, Reg. No. 3404609 for the mark CALIYOGURT and design, for frozen yogurt, has been cancelled.

²⁶ Reg. No. 1707023, attached to Applicant's response to the first Office Action.

²⁷ *Id.*, Reg. No. 4330321, registered for "Blood sausage; Broth; Butter; Cheese powder; Cheese spreads; Cheese substitutes; Chicken; Chili; Cottage cheese; Cream; Cream

Although third-party registrations can be used to demonstrate that a term may have a commonly accepted meaning, such third-party registrations are only of use if they tend to demonstrate that a particular term has descriptive significance as applied to the goods or services at issue, and not in the abstract. *Institut National Des Appellations D'Origine v. Vintners International Co.*, 958 F.2d 1574, 22 USPQ2d 1190, 1196 (Fed. Cir. 1992). *See also In re J.M. Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987) (“[T]hird party registrations are of use only if they tend to demonstrate that a mark or a portion thereof is suggestive or descriptive of certain goods and hence is entitled to a narrow scope of protection”). In the marks CALIFIRE GRILL, CALIFUSION and TEXACALI, because “Cali” is part of a unitary term it would not be subject to a disclaimer; moreover, these marks as a whole have suggestive meanings unconnected to California. As for the mark CALI, this single registration does not prove that “Cali” is non-descriptive. To the contrary, it is no more probative than the third-party Supplemental register registrations submitted by the Examining Attorney for the mark CALI (stylized) for “dried rice noodle”²⁸ and CALI NATURAL for “dehydrated fruit snacks; fruit-based snack food; snack mix consisting of primarily of processed nuts, seeds, dried fruit and also including chocolate all of

cheese; Dairy products excluding ice cream, ice milk and frozen yogurt; Fish sausages; Frankfurters; Fresh unripened cheeses; Game; Hamburger; Hazelnut spread; Hot dogs; Jerky; Margarine; Margarine substitutes; Meat; Meat extract; Meat jellies; Meat juices; Meat paste; Meat-based spreads; Milk; Mould-ripened cheese; Nut butters; Nut topping; Peanut butter; Pickles; Ripened cheese; Sausages; Sheep cheese; Soups; Unflavored and unsweetened gelatins; Vegetable paste; Vegetable salads; Whipped topping; Yogurt.”

²⁸ Reg. No. 4293711.

the aforementioned goods made from all natural ingredients.”²⁹ As is often stated, each case must stand on its own record and, in any event, the Board is not bound by the actions of prior examining attorneys. *See In re Nett Designs*, 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.”).

Conclusion

Upon careful consideration of the evidence and arguments presented herein, we find that the term CALIBURGER is merely descriptive of restaurant services because it describes a menu item, namely, California burgers. Here, Applicant’s restaurants actually feature California burgers, and the mark CALIBURGER immediately conveys this information without speculation or conjecture.

Decision: The refusal to register Applicant’s mark CALIBURGER under Trademark Act § 2(e)(1) is affirmed.

²⁹ Reg. No. 4072224.