

This Opinion is Not a
Precedent of the TTAB

Mailed: November 7, 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. 85849629
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David V. Radack of Eckert Seamans Cherin & Mellott LLC,
for Phoenix Intangibles Holding Company.

Marilyn D. Izzi, Trademark Examining Attorney, Law Office 112,
Angela B. Wilson, Managing Attorney.

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Before Bucher, Taylor, and Masiello, Administrative Trademark Judges.

Opinion by Masiello, Administrative Trademark Judge:

Phoenix Intangibles Holding Company (“Applicant”) has applied to register on the Principal Register the mark CURBSIDE EXPRESS in standard character form for “retail and on-line grocery store services featuring home delivery,” in International Class 35.¹

¹ Application Serial No. 85849629 was filed on February 14, 2013, on the basis of Applicant’s asserted *bona fide* intent to use the mark in commerce. Applicant claims ownership of Reg. No. 4302974, on the Supplemental Register, of the same mark for “retail and on-line grocery store services featuring pick-up services.”

The Trademark Examining Attorney refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that Applicant's mark merely describes the services. When the refusal was made final, Applicant appealed. Applicant and the Examining Attorney have filed appeal briefs.

The question before the Board is whether the mark CURBSIDE EXPRESS, viewed in its entirety, merely describes the services identified in the application. A term is 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); *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). Whether a mark 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 Development Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978); *In re Remacle*, 66 USPQ2d 1222, 1224 (TTAB 2002).

The Examining Attorney contends that Applicant's mark "merely describes the delivery feature of Applicant's ... services."² She argues that "curbside delivery" is a term of art in the delivery industry and she has submitted substantial evidence to prove her point. An extensive glossary of shipping terms, found on the website of Navis Pack & Ship, includes the following two definitions:

² Examining Attorney's brief, 6 TTABVUE 4.

Curbside + Liftgate

A type of delivery service where the driver transports the items to the curb and uses a liftgate to remove the items from the truck to the curb. ...

Curbside Delivery

A type of delivery service where the driver transports the items to the curb. The customer is responsible for unloading the item from the back of the truck and carrying it into their home or office. When any single piece in a shipment weights over 70 pounds, a lift-gate is required.³

The “Shipping” section of the website of Costco Wholesale provides the following information:

WHAT SHIPPING METHODS DOES COSTCO.COM USE?

...

- **Curbside Delivery**

Curbside delivery service provides delivery of your item(s) to the curb at the end of your driveway. This service does not include set up or assembly of items or removal of packaging materials. Carrier will call to set up appointment.⁴

The website of PackShipUSA offers two forms of delivery, “Curbside Delivery” and “Inside Delivery with Set Up.” It provides a lengthy explanation of each, including the following with respect to “Curbside Delivery”:

The delivery will be made with one driver and the trailer will not have a liftgate. The customer must have someone on hand at delivery to provide assistance to the driver

³ Office Action of March 30, 2013 at 13.

⁴ *Id.* at 25. Contrasting shipping methods offered are identified as “Threshold Delivery” and “White-glove Delivery.” *Id.* at 25-26.

during unloading. ... It is the customer's responsibility to take the furniture inside the home.⁵

The website of eMassageChair offers "Whiteglove" or "Curbside" delivery, and describes "Curbside Delivery" as follows:

Curbside Delivery is also known as Threshold Delivery, or as well call it [*sic*] 'Free Shipping'. This is our standard delivery method and is included when you purchase any massage chair from us. During this shipping method your massage chair will arrive unassembled in its factory boxes. The freight company will deliver your massage chair to your carport or entryway, and you will be responsible for getting it into your residence or business.⁶

The website of Smooth Fitness & Health offers "Standard Curbside Delivery," "Front Door Delivery" and "Room of Choice Delivery," and describes "Curbside Delivery" as follows:

Curbside delivery is our FREE delivery option. The freight company will remove the equipment from their truck and place on your property. You will need to bring the unit into your home so it's a good idea to have someone available to help you carry it in.⁷

The website of Nationwide Safes & Security describes "Curbside Delivery" as follows:

Your items will be transported by a common carrier (freight truck) and delivered curbside at your home or business. The carrier will lower your items to ground level at curbside using a liftgate. The carrier is not responsible for bringing your items inside your home or business.⁸

⁵ *Id.* at 28.

⁶ Office Action of October 25, 2013 at 5.

⁷ *Id.* at 8.

⁸ *Id.* at 11.

The commercial definitions shown above are, except for minor variations, consistent with each other. They convincingly show, as the Examining Attorney contends, that CURBSIDE “is a term of art in the delivery industry meaning delivering goods to a customer’s home, but not bringing them inside the home for the customer.”⁹ Applicant, in its brief, “maintains that it would take some imagination to associate this term [CURBSIDE] with delivery services....”¹⁰ We cannot agree, in view of the abundant evidence that “curbside delivery” is widely used to identify a method of product delivery.

With respect to the word EXPRESS, the Examining Attorney has submitted a dictionary definition showing that it means “to send something using a service that will deliver it very quickly.”¹¹ The Examining Attorney has also submitted copies of nine third-party registrations of delivery service marks that include the term EXPRESS;¹² in each case, the registration either is on the Supplemental Register or contains a disclaimer of EXPRESS or a claim of acquired distinctiveness under Section 2(f) applicable to the word EXPRESS. We note in particular Reg. No. 4167269 for the mark ENVIO EXPRESS and design, in which services are identified as “Express delivery of goods by truck, aircraft, ship”; Reg. No. 4421072 for the mark ALL STATE EXPRESS and design, in which services are identified as “Express delivery of goods by ground and air”; and Reg. No. 3443081 for the mark

⁹ Examining Attorney’s brief, 6 TTABVUE 5.

¹⁰ Applicant’s brief, 4 TTABVUE 2.

¹¹ Definition from <macmillandictionary.com>, Office Action of March 30, 2013 at 31-32.

¹² Office Action of October 25, 2013 at 14-38.

UPS EXPRESS, in which services are identified as “same day shipment services.” These registrations, which include the word EXPRESS in the mark, and in which delivery services are identified as “express” or “same day,” are probative of the descriptive nature of the word EXPRESS. “Such third party registrations show the sense in which the word is used in ordinary parlance and may show that a particular term has descriptive significance as applied to certain goods or services.” *Institut National Des Appellations D'Origine v. Vintners International Co.*, 958 F.2d 1574, 22 USPQ2d 1190, 1196 (Fed. Cir. 1992). We note also the advertisement of UPS, offering a delivery service called “UPS Worldwide Express,” which is described as a “faster one-to-three day shipping service with guaranteed morning delivery times”;¹³ and the website of Costco Wholesale, which offers a shipping method called “Express Delivery.”¹⁴ Overall, the Examining Attorney has demonstrated that EXPRESS is merely descriptive in the field of delivery services.

Our finding that each of the terms CURBSIDE and EXPRESS is descriptive with respect to Applicant’s services does not end our inquiry. We must address whether the mark as a whole merely describes the services. Applicant “maintains ... that the mark, as a whole, is not merely descriptive.”¹⁵

Considering Applicant’s mark as a whole “from the standpoint of the average prospective purchaser,” *In re Abcor*, 200 USPQ at 218, and in the context of grocery stores featuring home delivery, we have no doubt that the mark would immediately

¹³ *Id.* at 12.

¹⁴ Office Action of March 30, 2013 at 25.

¹⁵ Applicant’s brief, 4 TTABVUE 2.

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convey to customers the information that a feature of Applicant's service is the availability of a speedy delivery of the purchased groceries to the customer's home (without the promise that they would actually be carried directly into the home). We therefore find that Applicant's mark is merely descriptive of Applicant's services within the meaning of Trademark Act Section 2(e)(1), 15 U.S.C. § 1052(e)(1).

Decision: The refusal to register is affirmed.