

<p>This Opinion is Not a Precedent of the TTAB</p>

Mailed: June 10, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Belnick, Inc.

Serial Nos. 85973023; 85973044; 85973069; and 85973100

Walter A. Rodgers of Rodgers & Rodgers,
for Belnick, Inc.

Timothy Finnegan, Trademark Examining Attorney, Law Office 104,
Chris Doninger, Managing Attorney.

Before Quinn, Bergsman and Goodman,
Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

Belnick, Inc. ("Applicant") seeks registration on the Principal Register of the
designations SCHOOLFURNITURE4LESS,¹ CHURCHCHAIRS4LESS,²

¹ Application Serial No. 85973023, filed June 28, 2013 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging first use anywhere and first use in commerce on April 19, 2010.

² Application Serial No. 85973044, filed June 28, 2013 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging first use anywhere and first use in commerce on April 19, 2010.

Application Serial Nos. 85973023; 85973044; 85973069; and 85973100

STACKCHAIRS4LESS,³ and FOLDINGCHAIRS4LESS,⁴ (all in standard characters), all for “on-line retail store services featuring furniture” in International Class 35.

The Trademark Examining Attorney refused registration in each application under Sections 1, 2, 3, and 45 of the Trademark Act, 15 U.S.C. §§ 1051, 1052, 1053, and 1127, on the ground that Applicant’s designation “is merely informational and constitutes a common term or slogan that is commonly used by those in Applicant’s particular trade or industry” and that “it does not function as a service mark to indicate the source of Applicant’s services and to identify and distinguish them from others.” (Brief, 6 TTABVUE 3).⁵

When the refusal was made final in each application, Applicant appealed. Applicant and the Examining Attorney filed briefs.

The appeals involve common issues of law and fact, and there is certain overlapping evidence in the application files. Accordingly, we will decide the appeals in this single opinion. *See In re Binion*, 93 USPQ2d 1531, 1533 (TTAB 2009); TBMP § 1214 (2014).

³ Application Serial No. 85973069, filed June 28, 2013 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging first use anywhere and first use in commerce on April 29, 2010. We note the discrepancy in the first use dates between this application and the other three, but have no way of knowing whether the discrepancy is intentional or a typographical error.

⁴ Application Serial No. 85973100, filed June 28, 2013 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging first use anywhere and first use in commerce on April 19, 2010.

⁵ Citations to the briefs in this opinion refer to the TTABVUE docket entry number, and the electronic page number where the argument appears. TTABVUE is the Board’s electronic docketing system.

The Arguments

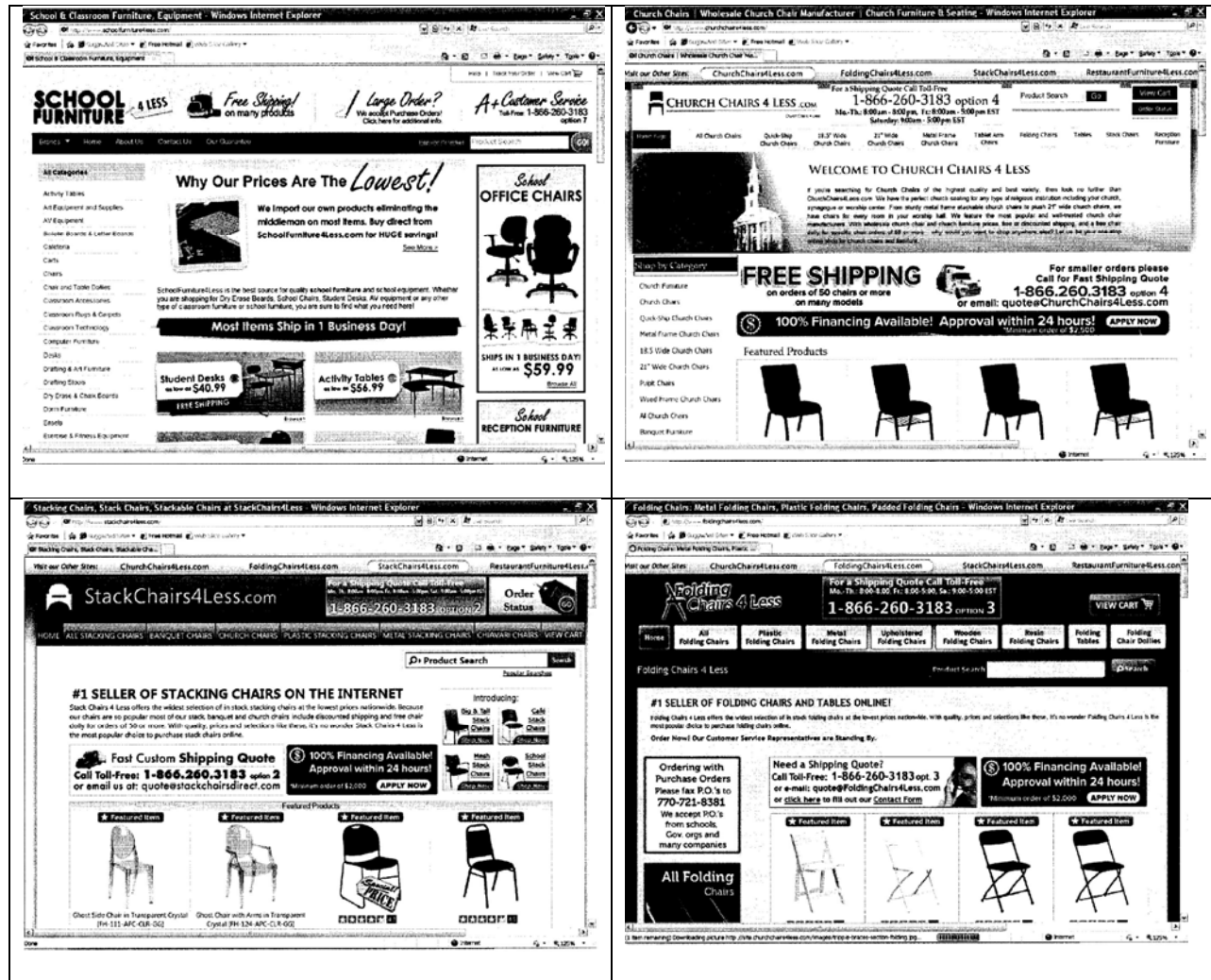
The Examining Attorney maintains in each application that Applicant's designation is commonly used in the furniture industry by retailers to indicate that they offer furniture for sale that is inexpensive; thus, according to the Examining Attorney, customers will perceive each of Applicant's "—4LESS" designations as a common informational phrase and not a source indicator. In support of each refusal the Examining Attorney introduced excerpts of numerous third-party websites showing furniture retailers using similar designations.

Applicant argues that "the threshold of distinctiveness necessary for a mark to qualify as a trademark is quite low" and that "[i]nclusion of '4 LESS' in applicant's mark is believed to present a visual variation from the generic term 'FOR LESS' in that it is capable, at least at some time in the future, to function as a service mark." (Brief, 4 TTABVue 3).⁶ Applicant also relies on the existence of third-party registrations of marks that include the terminology "4 LESS" or "FOR LESS," including some comprising this terminology coupled with a beginning generic term.

⁶ Applicant's contention that each of its designations "is capable, at least at some time in the future, to function as a service mark" is one more appropriate for arguing registrability on the Supplemental Register. Applicant is reminded that it is seeking to register its designations on the Principal Register, which is reserved for marks that are inherently distinctive or that have acquired distinctiveness. In any event, given the nature of the refusal and the Examining Attorney's arguments relating thereto, it is clear that the Examining Attorney would not allow registration on the Supplemental Register either. In this connection it should be noted that an applicant cannot overcome a refusal of registration issued on the ground that the matter is merely informational by attempting to amend the application to seek registration on the Supplemental Register or pursuant to Section 2(f). *See In re Eagle Crest*, 96 USPQ2d 1227, 1229 (TTAB 2010).

Application Serial Nos. 85973023; 85973044; 85973069; and 85973100

The specimen for each application is reproduced below.



In each instance, Applicant claims that it sells furniture at the lowest prices.

The Law

To function as a service mark, a designation must be used in a manner that would be perceived by purchasers as identifying and distinguishing the source of the services recited in the application. *See generally* TMEP §1301.02(a) (2015). Use of a designation or slogan to convey advertising or promotional information, rather

Application Serial Nos. 85973023; 85973044; 85973069; and 85973100

than to identify and indicate the source of the services, is not service mark use. *See In re Standard Oil Co.*, 275 F.2d 945, 125 USPQ 227 (CCPA 1960) (GUARANTEED STARTING found to be ordinary words that convey information about the services, not a service mark for the services of “winterizing” motor vehicles); *In re Melville Corp.*, 228 USPQ 970 (TTAB 1986) (BRAND NAMES FOR LESS found to be informational phrase that does not function as a mark for retail store services); *In re Brock Residence Inns, Inc.*, 222 USPQ 920 (TTAB 1984) (FOR A DAY, A WEEK, A MONTH OR MORE so highly descriptive and informational in nature that purchasers would be unlikely to perceive it as an indicator of the source of hotel services); *In re Wakefern Food Corp.*, 222 USPQ 76 (TTAB 1984) (WHY PAY MORE found to be a common commercial phrase that does not serve to identify grocery store services); *In re Gilbert Eiseman, P.C.*, 220 USPQ 89 (TTAB 1983) (IN ONE DAY not used as source identifier but merely as a component of advertising matter that conveyed a characteristic of applicant’s plastic surgery services); *In re European-American Bank & Trust Co.*, 201 USPQ 788 (TTAB 1979) (slogan THINK ABOUT IT found to be an informational or instructional phrase that would not be perceived as a mark for banking services); *In re Restonic Corp.*, 189 USPQ 248 (TTAB 1975) (phrase NICE TO GET HOME TO used merely to advertise goods manufactured and sold by applicant’s franchisees does not serve to identify franchising services).

Slogans and other terms that are merely informational in nature, or common laudatory phrases or statements that would ordinarily be used in business or in the

Application Serial Nos. 85973023; 85973044; 85973069; and 85973100

particular trade or industry, are not registrable. *See In re AOP LLC*, 107 USPQ2d 1644, 1655 (TTAB 2013) (finding AOP merely informational and not source-identifying for wine as it informs consumers of a certification process); *In re T.S. Designs, Inc.*, 95 USPQ2d 1669 (TTAB 2010) (holding CLOTHING FACTS merely an informational phrase and not a source identifier based on the likely consumer perception of the phrase used on a clothing label in connection with manufacturing information reminiscent of the “Nutrition Facts” label required for food products by the United States Food and Drug Administration); *In re Aerospace Optics, Inc.*, 78 USPQ2d 1861 (TTAB 2006) (holding SPECTRUM fails to function as a mark for illuminated pushbutton switches, where the mark is used in a manner that merely informs potential purchasers of the multiple color feature of the goods, and the coloring and font in which the mark is displayed are not sufficient to imbue the term with source-identifying significance or to set it apart from other informational wording); *In re Volvo Cars of N. Am., Inc.*, 46 USPQ2d 1455 (TTAB 1998) (holding DRIVE SAFELY merely an informational phrase or slogan that would be perceived as an everyday, commonplace safety admonition that does not function as mark); *In re Manco Inc.*, 24 USPQ2d 1938, 1942 (TTAB 1992) (holding THINK GREEN and design for weather stripping and paper products “merely an informational slogan devoid of trademark significance”); *In re Remington Prods., Inc.*, 3 USPQ2d 1714 (TTAB 1987) (holding PROUDLY MADE IN USA, for electric shavers, merely an informational slogan that is incapable of functioning as a mark, notwithstanding use of letters “TM” in connection with prominent display of slogan on packages for

Application Serial Nos. 85973023; 85973044; 85973069; and 85973100

the goods and claim of acquired distinctiveness); *In re Tilcon Warren, Inc.*, 221 USPQ 86 (TTAB 1984) (holding WATCH THAT CHILD for construction material merely informational and not registrable notwithstanding long use); *In re Schwauss*, 217 USPQ 361, 362 (TTAB 1983) (finding FRAGILE for labels and bumper stickers merely informational and devoid of any source-identifying function). *See also* TMEP §1202.04.

The critical inquiry in determining whether a slogan or term functions as a trademark or service mark is how the proposed mark would be perceived by the relevant public. *In re Eagle Crest, Inc.* 96 USPQ2d at 1229-30 (holding ONCE A MARINE, ALWAYS A MARINE to be an “old and familiar Marine expression...that should remain free for all to use”); *see In re Phoseon Technology Inc.*, 103 USPQ2d 1822, 1827 (TTAB 2012) (noting the critical inquiry in determining whether a mark, as used on the specimen, functions as a trademark is the “commercial impression it makes on the relevant public (e.g., whether the term sought to be registered would be perceived as a mark identifying the source of the goods or merely as an informational phrase).”). The more commonly a phrase is used in everyday parlance, the less likely the public will use it to identify only one source and the less likely the phrase will be recognized by purchasers as a trademark or service mark. *In re Eagle Crest*, 96 USPQ2d at 1229-30 (noting that “[a]s a matter of competitive policy, it should be close to impossible for one competitor to achieve exclusive rights’ in common phrases or slogans.” (quoting J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, §7.23 (4th ed. 2010))). Because the function of

Application Serial Nos. 85973023; 85973044; 85973069; and 85973100

a trademark or a service mark is to identify a single commercial source for particular goods or services, if consumers are accustomed to seeing a slogan used in connection with goods/services from many different sources, it is likely that consumers would not view the slogan as a source identifier for such goods/services. *Id.* at 1230.

As indicated earlier, an applicant cannot overcome a refusal of trademark registration issued on the ground that the matter is merely informational by attempting to amend the application to seek registration on the Supplemental Register or pursuant to Section 2(f). *See In re Eagle Crest*, 96 USPQ2d at 1229-30 (noting that “[s]logans and other terms that are considered to be merely informational in nature, or to be common laudatory phrases or statements that would ordinarily be used in business or in the particular trade or industry, are not registrable”). In support of the refusal, the Examining Attorney must provide evidence that the mark is a slogan or term incapable of being perceived as a trademark or service mark. This support may include evidence of decorative or informational use by other manufacturers on goods or services of a similar nature and evidence that the term or slogan is frequently used by parties in connection with the sale of their goods or services. *See id.* at 1230 (noting because consumers would be accustomed to seeing the phrase ONCE A MARINE, ALWAYS A MARINE “displayed on clothing items from many different sources, they could not view the slogan as a trademark indicating source of the clothing only in applicant”); *In re Wakefern Food Corp.*, 222 USPQ 76, 78 (TTAB 1984) (finding the relatively common

Application Serial Nos. 85973023; 85973044; 85973069; and 85973100

merchandising slogan WHY PAY MORE! does not function as a mark which identifies and distinguishes applicant's services from others).

The Board in the past considered a mark very similar to the one at issue herein. In the case of *In re Melville Corp., supra*, the Examining Attorney refused registration, in pertinent part, on the ground that the designation BRAND NAMES FOR LESS, when used in connection with "retail store services in the clothing field," did not function as a mark to identify and distinguish applicant's services and was therefore unregistrable. The Board agreed, finding that the phrase would not be viewed by consumers as a service mark but rather as a merchandising slogan using common ordinary words merely to convey information about applicant's services. In making this determination, the Board relied upon third-party uses such as "Brand name furniture at low low discount prices," and "QUALITY BRAND CLOTHING AT LOW DISCOUNT PRICES," stating that the examples "show that it is a relatively common practice in the retail industry to make the claim that a merchant sells brand name merchandise for less than the usual price." *Id.* The Board observed that in an environment where consumers are accustomed to the use by merchants of similar information phrases, the fact that the applicant conveyed similar information in a slightly different way than others was not determinative.

The Evidence

As indicated above, there is overlapping evidence in the four appeals. The Examining Attorney introduced evidence in each application bearing on third-party usage of the terminology "—4 Less" and "—For Less" in the retail furniture trade.

Application Serial Nos. 85973023; 85973044; 85973069; and 85973100

(Office actions dated 11/3/2013, 3/16/2014, 5/11/2014 in Ser. No. 85973023; Office actions dated 11/3/2013 and 5/26/2014 in Ser. No. 85973044; Office actions dated 11/3/2013 and 5/26/2014 in Ser. Nos. 85973069 and 85973100).⁷ A representative sample includes the following uses:

Furniture 4 Less
<furniture4lessmiami.com>

Great Furniture 4 Less
<gf4l.com>

Offering the best reception furniture at the lowest price
with the fastest shipping is what you can expect from
ReceptionFurniture4Less!
<receptionfurniture4less.com>

Modern Furniture 4 Less
<modernfurniture4less.com>

Furniture For Less
<siouxcityjournal.com>

Furniture 4 A Lot Less
<furniture4.com>

Furniture For Less
<furnitureforlessfargo.com>

Your Furniture 4 Less
Brand New Brand Name Furniture at Everyday Low
Prices
<yourfurniture4less.com>

Furniture & Mattresses 4 Less
Furniture and Mattresses for Less...A LOT LESS!
<furnitureandmattress4less.com>

⁷ To the extent that certain evidence is different in the applications, it is cumulative in nature.

Furniture 4 Less
The True Half Price Store
<furniture-4-less.net>

Restaurant Furniture 4 Less
<restaurantfurniture4less.com>

EZ Home Furnishing For Less
Elegant Furnishing For Less
<ezhomefurnishing4less.com>

Family Furniture 4 Less
<flickr.com>

Bean Bag Chairs for Less
<bedderrest.com>

Furniture 4 Less
At Furniture 4 Less, you can furnish every room in your
home without paying a lot of money.
<furniture4less.com>

Mattress & Furniture For Less
<furnitureandmattressforless.com>

Mid Century Furniture 4 Less
<midcenturyfurniture4less.com>

Premium Furniture For Less
<city-data.com>

Applicant, for its part, introduced the same third-party registration evidence in each application. More specifically, Applicant states that the Office previously registered 102 marks incorporating the terminology “4 LESS” or “FOR LESS.” In this connection Applicant furnished copies of 23 third-party registrations of marks for services in Class 35. Each mark includes the terminology “4 LESS” or “FOR LESS” generally following highly descriptive or generic terminology. Applicant contends that the state of the register is an indication that Applicant’s proposed

marks, which are similar to certain registered marks, are capable of functioning as service marks.

The Examining Attorney also introduced evidence bearing on the specific generic term in each of Applicant's designations sought to be registered. Given that the present refusal pertains to each designation as a whole, and the critical issue centers on the use of similar designations in the industry, we see no reason to focus attention on the genericness of the beginning term in each of Applicant's designations. *See Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, ___F.3d___, No. 14-1517, 2015 WL 2337417 (Fed. Cir. May 15, 2015), citing *H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ2d 528, 530 (Fed. Cir. 1986) (The test for genericness is a two-step inquiry: first, determine the genus of goods or services at issue; and second, determine whether the mark in question is understood by the relevant public primarily to refer to that genus of goods or services). Suffice it to say that the evidence in each case clearly establishes that the beginning term in each designation is the name of a type or category of furniture, and that purchasers clearly would use or understand each of the terms "school furniture," "church chairs," "stack chairs," and "folding chairs" as the name of a type or category of furniture. Applicant does not dispute this point.

The Analysis

Each of Applicant's designations comprises a generic term followed by the designation "4 LESS." The lack of spaces between the components of each designation, and the use of the number "4" rather than the word "FOR" in each of

the designations, either individually or collectively, do not transform each informational designation into a distinctive mark. The record shows pervasive use in the furniture trade of designations that are very similar to Applicant's designations; the designations "4 Less" and "For Less" have been shown to be used interchangeably, and we consider them to be generic equivalents indicating discount pricing.⁸ We find that the Examining Attorney's evidence shows that it is a common practice in the retail furniture industry for a retailer to claim, through use of "—4 Less" and "—For Less" slogans, that it sells furniture for less than the usual price. Given this pervasive use by many different sources, consumers are accustomed to seeing designations comprising the name of a specific type of furniture followed by "4 Less" or "For Less," and they likely will not view such designations as source indicators. Accordingly, consumers will perceive each of Applicant's designations as merchandising slogans to convey information about Applicant's on-line retail store services featuring furniture; namely, that Applicant offers lower furniture prices than its competitors. *See In re Eagle Crest*, 96 USPQ2d at 1229-30; *In re Melville*, 228 USPQ at 971-72; *In re Wakefern Food Corp.*, 222 USPQ at 78-9.

With respect to Applicant's "State of the Register" argument, we initially point out that, in certain registrations, the terminology "4 LESS" or "FOR LESS" (or the entire literary component in a composite mark, *e.g.*, "TIRES 4 LESS" and "SEW 4 LESS") is disclaimed. (*See, e.g.*, Reg. Nos. 2805689; 3723429; 3907178; 3952222; 3999130; and others). These marks contain other distinctive elements, whether

⁸ As indicated earlier, Applicant concedes that "For Less" is generic. (Brief, 4 TTABVUE 3).

Application Serial Nos. 85973023; 85973044; 85973069; and 85973100

additional wording or designs, which serve to distinguish the registrability of those marks as compared to Applicant's designations, which are depicted simply in standard characters. Other marks are registered on the Supplemental Register. (*See, e.g.*, Reg. No. 4348281 for the mark CAR LIGHTS 4 LESS). In any event, given the prevalent third-party usage of the terminology "4 Less" and "For Less" in the furniture trade, we see no reason to focus on how the Office has treated (perhaps, at times, somewhat inconsistently) this terminology in the past. Although administrative consistency is a goal, these third-party registrations are not conclusive on the question of registrability of Applicant's designation inasmuch as each case must stand on its own merits. *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 theDot Commc'ns Network LLC*, 101 USPQ2d 1062, 1067 (TTAB 2011).

We find the present cases to be very similar to the *Melville* decision. Just as with the slogan "Brand Names For Less" which was denied registration in that case, each of Applicant's designations should remain available for others to use in connection with their competing services. Indeed, the record shows common usage of the designation "—4 Less" and "—For Less" in the furniture trade. Further, we are not persuaded by Applicant's reliance on the case of *In re School Book Fairs, Inc.*, 229 USPQ 556 (TTAB 1986) for the reasons expressed by the Examining Attorney. The mark in *School Book Fairs* was stylized and included interlocking

Application Serial Nos. 85973023; 85973044; 85973069; and 85973100

letters “OO”; the Board found that the design elements possessed a sufficient modicum of variation from the ordinary to demonstrate modest potential for distinctiveness and distinguishability needed to qualify for registration on the Supplemental Register. That situation is contrasted with the current applications seeking registration on the Principal Register, wherein Applicant’s designations are depicted in standard characters, with no stylization or design elements.

We conclude that, in a marketplace environment where consumers are accustomed to the use by merchants of similar “—4 Less” and “—For Less” informational phrases, consumers are not likely to view Applicant’s designations as service marks but rather as merchandising slogans using common ordinary words or terminology to convey information about Applicant’s services, namely that Applicant offers lower furniture prices than its competitors.

Decision: The refusal to register the proposed mark on the Principal Register in each application is affirmed.