

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: February 14, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Landry's Trademark, Inc.*

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Serial Nos. 97746646 and 98024609

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Jason Paul Blair of Smith, Gambrell & Russell, LLP,  
for Landry's Trademark, Inc.

Sahar Nasserghodsi,<sup>1</sup> Acting Senior Attorney, Law Office 116,  
Elizabeth Jackson, Managing Attorney.

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Before Pologeorgis, Dunn, and Lebow,  
Administrative Trademark Judges.


Opinion by Pologeorgis, Administrative Trademark Judge:

Landry's Trademark, Inc. ("Applicant") seeks registration on the Principal Register of the standard character mark SELECT BY LANDRY'S<sup>2</sup> and the composite


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<sup>1</sup> Ms. Nasserghodsi issued the office actions concerning the involved applications in her capacity as the assigned examining attorney. However, Ms. Nasserghodsi submitted the brief on appeal in her capacity as "Acting Senior Attorney." In this decision, we refer to Ms. Nasserghodsi as the "Trademark Examining Attorney" or the "Examining Attorney."

<sup>2</sup> Serial No. 97746646, filed on January 9, 2023, based upon Applicant's allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

mark  ,<sup>3</sup> both for a “Customer incentive award program, namely, a restaurant and entertainment customer loyalty program that provides discounts and related benefits to reward repeat customers” in International Class 35.

With regard to Applicant’s standard character mark SELECT BY LANDRY’S, the Trademark Examining Attorney refused registration of Applicant’s mark under Section 2(e)(4) of the Trademark Act, 15 U.S.C. § 1052(e)(4), on the ground that SELECT BY LANDRY’S, when viewed in its entirety, is primarily merely a surname. Additionally, the Examining Attorney refused registration on the ground that the wording “and related benefits” in the recitation of services is indefinite and too broad.

With respect to Applicant’s composite  mark, the Examining Attorney refused registration absent a disclaimer of the purportedly merely descriptive term SELECT under Section 6(a) of the Trademark Act, 15 U.S.C. § 1056(a). The Examining Attorney also refused registration on the same identification issue identified in the refusal of Applicant’s standard character SELECT BY LANDRY’S mark.

When the refusals were made final, Applicant appealed. Applicant also moved to consolidate the ex parte appeals of its involved applications,<sup>4</sup> which the Board

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<sup>3</sup> Serial No. 98024609, filed on June 2, 2023, based upon Applicant’s allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). The colors red, blue, green, orange and black are claimed as a feature of the mark.

<sup>4</sup> 5 TTABVUE in both application Serial Nos. 97746646 and 98024609. The TTABVUE and Trademark Status and Document Retrieval (“TSDR”) citations refer to the docket and electronic file database for the involved applications. All citations to the TSDR database are

granted in light of the similarity of the records and issues in these appeals.<sup>5</sup> We therefore decide both appeals in a single opinion.

For the reasons explained below, we affirm the Section 2(e)(4) refusal pertaining to Applicant's standard character SELECT BY LANDRY'S mark, as well as the refusal based on the disclaimer requirement for the term SELECT in Applicant's composite mark. However, we reverse the refusal pertaining to the recitation of services in each application.<sup>6</sup>

**I. Application Serial No. 97746646**

We first turn to the refusals pertaining to Applicant's standard character mark SELECT BY LANDRY'S. As noted, the Examining Attorney refused registration of this mark on the ground that the mark, as a whole, is primarily merely a surname. The Examining Attorney also refused registration on the ground that the wording "and related benefits" in the recitation of services is indefinite and too broad.

**A. Applicable Law – Primarily Merely a Surname**

Section 2(e)(4) of the Trademark Act precludes registration of a mark on the Principal Register which is "primarily merely a surname" without a showing of

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to the downloadable .pdf version of the documents and pertain to Serial No. 97746646, unless otherwise indicated.

<sup>5</sup> 6 TTABVUE.

<sup>6</sup> As part of an internal Board pilot program to broaden acceptable forms of legal citation in Board cases, citations in this opinion are in the form recommended in TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03 (2024). This opinion cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals by the pages on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For opinions of the Board, this opinion uses citations to the Westlaw legal database and cites only precedential decisions, unless otherwise noted.

acquired distinctiveness under Section 2(f) of the Act, 15 U.S.C. § 1052(f).<sup>7</sup> A term is primarily merely a surname if, when viewed in relation to the goods or services for which registration is sought, its primary significance to the purchasing public is that of a surname. *Earnhardt v. Kerry Earnhardt, Inc.*, 864 F.3d 1374, 1377 (Fed. Cir. 2017); *In re Beds & Bars Ltd.*, (Ser. No. 85597669), 2017 WL 2391858, at \*2 (TTAB 2017). Whether the primary significance of a mark is merely that of a surname is a question of fact. *See In re Etablissements Darty et Fils*, 759 F.2d 15, 17 (Fed. Cir. 1985). There is no rule as to the kind or amount of evidence necessary to make out a prima facie showing that the mark would be perceived as primarily merely a surname. This question must be resolved on the specific facts presented in each case. *Id.*; *see also Beds & Bars Ltd.*, 2017 WL 2391858, at \*2. The entire record is examined to determine the primary significance of a term.

The Board has identified five factors to consider in determining whether a mark is primarily merely a surname: (1) the degree of the surname's "rareness"; (2) whether anyone connected with applicant has the mark as a surname; (3) whether the mark has any recognized meaning other than as a surname; (4) whether the mark has the "look and feel" of a surname; and (5) whether the mark is presented in a stylized form distinctive enough to create a separate non-surname impression. *In re Benthin Management GmbH*, (Serial No. 74340080), 1995 WL 789509, at \*2-3 (TTAB 1995).

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<sup>7</sup> Although Applicant claims ownership of the registered marks LANDRY'S, LANDRY'S SEAFOOD HOUSE, and LANDRY'S KITCHEN, *see* 4 TTABVUE 4, Applicant does not claim acquired distinctiveness in whole or in part under § 2(f) of the Trademark Act for either of its involved marks based on those registrations. *See generally* TRADEMARK MANUAL OF EXAMINING PROCEDURE ("TMEP") § 1212.09 (November 2024).

“These inquiries are not exclusive, nor are they presented in order of importance; any of the inquiries—singly or in combination—as well as any other relevant circumstances, may shape the analysis in a particular case.” *In re Six Continents Ltd.*, (Serial Nos. 88430142 and 88430162), 2022 WL 407385, at \*3 (TTAB 2022) (citations omitted).

**i. The degree of the surname’s “rareness.”**

We begin with the first *Benthin* factor, which is the degree of the surname’s rareness. The record contains evidence from the Lexis+ surname database, a weekly updated directory of cell phone and other telephone numbers (such as voice over IP from various providers), which establishes the surname significance of the term “LANDRY.”<sup>8</sup> This evidence shows LANDRY appearing over 101,000 times in the database.<sup>9</sup> Based on this evidence, we find that LANDRY is not rarely used or encountered as a surname, and that the public has been exposed to and will perceive LANDRY as a surname.

**ii. Whether LANDRY is the Surname of Anyone Connected with Applicant**

There is no evidence to indicate that anyone connected with Applicant has the surname LANDRY. But that says nothing about the primary significance of the term to the purchasing public. *See In re Adlon Brand GmbH & Co. KG*, (Ser. No. 85831682), 2016 WL 7385751, at \*7 (TTAB 2016) (“[t]he apparent absence of a person named

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<sup>8</sup> See October 3, 2023 Office Action, TSDR, pp. 7-32.

<sup>9</sup> *Id.*

ADLON in Applicant's current management does not, in itself, reduce the likelihood that the public would perceive the mark as a surname.”).

**iii. Whether LANDRY has any recognized meaning other than as a surname**

In support of her argument that the term LANDRY does not have a recognized meaning other than as a surname, the Examining Attorney provided evidence that the term does not appear in the dictionary.<sup>10</sup> This negative dictionary evidence shows that LANDRY has no other “ordinary language meaning.” *See Darty*, 759 F.2 at 17; *see also Adlon*, 2016 WL 7385751, at \*2 (finding that evidence showing that the applied-for mark did not appear in dictionaries created a “strong inference” that the mark has no other non-surname meaning). Moreover, Applicant has not provided any evidence showing that consumers would attach any other significance to the term. Thus, we find that the primary significance of the term LANDRY is that of a surname with no other recognized meaning.

**iv. Whether LANDRY'S has the Structure and Pronunciation of a Surname**

Evidence that a term has the structure and pronunciation of a surname may contribute to a finding that the primary significance of the term is that of a surname. *In re tapio GmbH*, (Ser. No. 87941532), 2020 WL 6938377, at \*13 (TTAB 2020) (citing *In re Giger*, (Ser. No. 76545470), 2006 WL 639159, at \*7 (TTAB 2006). Here, the record includes not only the phone directory containing entries of people with the last name Landry, but also contains dictionary evidence showing that apostrophes are

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<sup>10</sup> *Id.*, TSDR pp. 33-36.

used to address an absent person as if present.<sup>11</sup> Thus, the structure of the term “LANDRY” in possessive form does not diminish its surname significance, and instead enhances the initial reaction to that of a family’s name.

**v. Whether LANDRY’S is presented in a stylized form distinctive enough to create a separate non-surname impression**

Since the mark SELECT BY LANDRY’S is in standard character form, we do not consider this *Benthin* factor. *In re Yeley*, (Ser. No. 78489186), 2007 WL 3095396, at \*2 (TTAB 2007).

Taking into consideration all relevant evidence of the public’s perception which is of record and applying the relevant *Benthin* factors to such evidence, we find that the primary significance of LANDRY’S to the purchasing public is that of a surname.

**B. Additional Wording**

However, our analysis does not end here. Because SELECT BY LANDRY’S is a combination of three terms, we must consider the mark “in its entirety” rather than merely considering the mark as three separate parts. *Earnhart*, 864 F.3d at 1377. To evaluate whether the commercial impression of a mark that combines a surname with two additional terms is still primarily merely the surname, we must determine whether the primary significance of the mark as a whole in connection with the recited services is that of the surname. *Id.* A key element in such an inquiry is determining the relative distinctiveness of the additional terms in the mark. *Id.* at 1378.

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<sup>11</sup> *Id.*, TSDR pp. 37-41.

The record contains dictionary evidence defining the term “BY” to mean “with respect to” or “on behalf of.”<sup>12</sup> Based on this evidence, we find that inclusion of the term “BY” reinforces the surname significance of LANDRY’S by conveying that the provider of the services is someone from or connected to the surname Landry. This leaves us with the remaining term SELECT in Applicant’s mark.

The Examining Attorney argues that the term SELECT is merely descriptive of Applicant’s identified services and, therefore, the inclusion of SELECT does not detract from the surname significance of Applicant’s SELECT BY LANDRY’S mark.<sup>13</sup> In support of her argument, the Examining Attorney submitted the dictionary definition of the term “select,” which is defined as “chosen from a number or group by fitness or preference” or “of special value or excellence: SUPERIOR, CHOICE.”<sup>14</sup> In her initial office action, the Examining Attorney argues, based on the dictionary definition of SELECT, that the term SELECT “merely indicates that applicant’s customer loyalty program consists of selected brands with customer incentives or loyalty rewards selected or chosen by Landry.”<sup>15</sup> In the final office, the Examining Attorney argues that the term SELECT is “merely laudatory and descriptive of applicant’s services as being of special value or excellent quality.”<sup>16</sup>

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<sup>12</sup> *Id.*, TSDR, pp. 50-58.

<sup>13</sup> 7 TTABVUE 6.

<sup>14</sup> October 3, 2023 Office Action, TSDR pp. 43-49.

<sup>15</sup> *Id.*, TSDR p. 4.

<sup>16</sup> January 4, 2024 Final Office Action, TSDR p. 4. The Examining Attorney also only argues that the term SELECT is laudatory in her appeal brief. 7 TTABVUE 6.



The record includes the following third-party registrations issued on the Principal Register where the term SELECT is disclaimed.<sup>17</sup> The Examining Attorney argues that these third-party registrations demonstrate that the Office has determined that the term SELECT is descriptive for incentive award program services:<sup>18</sup>

- Reg. No. 5975671 – **BENCO SELECT** (standard characters; SELECT disclaimed) for “Providing incentive award programs for customers through free shipping, discounts and rebates, award points, access to manufacturer coupons and offers, equipment support, and inventory support”;

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**SELECT**

- Reg. No. 2913569 – **SELECT** (SELECT disclaimed) for, among other things, “administration of consumer loyalty programs to promote retail services of others; compiling indexes of information for commercial or advertising purposes”;
- Reg. No. 6132057 – **HBS SELECT** (SELECT disclaimed) for “Administration of a consumer membership program for enabling participants to receive product samples and discounts in the field of building materials and supplies; Membership club services in the nature of providing discounts to members in the field of building, construction, and home improvement”;
- Reg. No. 6257715 – **RESY SELECT** (standard characters; SELECT disclaimed) for “Administration of a consumer loyalty program which provides issuance and processing of loyalty coupons for the frequent use of participating business to promote restaurant services and retail services of others”; and

**SELECT**

- Reg. No. 4377164 - **Services** (SELECT SERVICES disclaimed) for, among other things, “Customer incentive award program, namely, a restaurant and entertainment customer

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<sup>17</sup> January 4, 2024 Final Office Action, TDSR pp. 8-18 and 21-23.

<sup>18</sup> Examining Attorney Appeal Brief, p. 9; 7 TTABVUE 9.

loyalty program that provides discounts and related benefits to reward repeat customers”;

- Reg. No. 1940391 – **SELECT GUEST** (registered under Section 2(f), as a whole; GUEST disclaimed) for “hotel incentive program providing special guest services, amenities and awards to members”; and



- Reg. No. 6769942 - registered on the Supplemental Register for, among other things, “administering a wine club by means of selecting wines based on consumer expectations and arranging periodic shipment to club members.”

The Examining Attorney also submitted a status and title copy of Applicant’s prior registration for the standard character mark LANDRY’S SELECT CLUB for the same incentive award program services identified in its involved application where the wording “SELECT CLUB” is disclaimed.<sup>19</sup> The Examining Attorney argues that this evidence demonstrates that Applicant itself has previously conceded that the term SELECT is merely descriptive of Applicant’s identified services.<sup>20</sup>

Additionally, the Examining Attorney submitted screenshots from Applicant’s website showing that Applicant’s customer loyalty program rewards its members when they visit any one of their selected or participating dining, hospitality, gaming and entertainment destinations.<sup>21</sup> The Examining Attorney also contends that Applicant’s website also shows that as part of Applicant’s customer loyalty program,

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<sup>19</sup> *Id.*, TDSR pp. 19-20.

<sup>20</sup> *Id.*, TDSR pp. 19-20.

<sup>21</sup> *Id.*, TDSR pp. 61-64.

its members are rewarded with special values such as “priority seating” and other “exclusive member benefits.”

The Examining Attorney also cites to the following two Board decisions to support her position that the term SELECT is laudatory in nature and, therefore, merely descriptive of Applicant’s services: (1) *In re San Miguel Corp.*, (Ser. No. 79291823), 1986 WL 83670, at \*2 (TTAB 1986) (holding SELECTA, the Spanish equivalent of SELECT, merely laudatory and descriptive of applicant’s beer being of superior quality); and (2) *In re IBP, Inc.*, (Ser. No. 73401618), 1985 WL 71970, at \*2 (TTAB 1985) (holding IBP SELECT TRIM for pork not unitary; refusal of registration in the absence of a disclaimer of “SELECT TRIM” affirmed).

Based on all the foregoing, the Examining Attorney concludes that Applicant’s SELECT BY LANDRY’S, when viewed in its entirety, is primarily merely a surname and that the inclusion of the descriptive terms SELECT and BY does not detract from the mark’s primary significance as a surname.

In countering the refusal, Applicant argues that the Examining Attorney’s arguments and evidence indicate that the term SELECT is “exactly the kind of term that requires a multi-step reasoning process in the present instance, showing that the term is at least suggestive as applied to the services at issue.”<sup>22</sup> More specifically, Applicant maintains that, although the Examining Attorney submitted the dictionary definitions of SELECT, the Examining Attorney nonetheless did not provide any

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<sup>22</sup> Applicant’s Appeal Brief, p. 5, 4 TTABVUE 8.

additional insight into how consumers would immediately understand SELECT to be descriptive of the services, and does not state why consumers would immediately recognize one definition to be the one most pertinent.<sup>23</sup> Moreover, Applicant contends that the Examining Attorney's own rationale as to how consumers would understand the term SELECT shifts from office action to office action.<sup>24</sup>

For example, Applicant maintains that, in the October 3, 2023 Office Action for 98/024,609, the Examining Attorney states that the term SELECT “merely indicates that applicant's customer loyalty program consists of selected superior brands where one may use the customer loyalty rewards towards.” However, in the January 4, 2024 Final Office Action for the same application, the Examining Attorney states, “wording is merely laudatory and descriptive of applicant's services as being of special value or excellent quality.”<sup>25</sup> Applicant argues that the shift in definitions by the Examining Attorney demonstrates that all of the definitions have a meaning if allowed a multi-step reasoning process, but that none of the definitions are immediately descriptive of the services.<sup>26</sup> Citing to TMEP §1213.05(c),<sup>27</sup> Applicant contends that a term that may be understood to have multiple meanings/definitions will not be refused

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<sup>23</sup> *Id.* at p. 6; 4 TTABVUE 9.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at p. 7; 4 TTABUVE 10.

<sup>27</sup> Section 1213.05(c) of the TMEP concerns the registrability of marks that are viewed as double entendres. Applicant, however, does not argue that its SELECT BY LANDRY'S mark is one that constitutes a double entendre.

registration as merely descriptive if one of its meanings is not merely descriptive in relation to the goods or services.

Finally, Applicant maintains that the USPTO routinely treats the term **SELECT** as a distinctive term for marks registered in connection with incentive award programs. In support of this argument, Applicant submitted the following third-party use-based registrations issued on the Principal Register for marks that include the term **SELECT** and are used in association with customer incentive award programs, but where the term **SELECT** is not disclaimed or registered, in part, under Section 2(f).<sup>28</sup>

- Reg. No. 2913569 – **GENERIC SELECT** (standard characters; **GENERIC** disclaimed) for “insurance services, namely, a member incentive program whereby members who choose generic rather than name brand medication receive their prescription at no cost”;
- Reg. No. 3009150 – **FLEXIBLE REWARDS SELECT** (typed drawing;<sup>29</sup> **REWARDS** disclaimed) for “promoting the sale of banking and credit card services through the administration of incentive award programs”;
- Reg. No. 5394931 – **24K SELECT CLUB** (standard characters; **CLUB** disclaimed) for “providing incentive awards programs for frequent casino, hotel resort, and restaurant customers for the purpose of promoting and rewarding loyal patrons”;<sup>30</sup>

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<sup>28</sup> January 2, 2024 Response to Office Action in Serial No. 97746646, Ex. A, TSDR pp. 8-44.

<sup>29</sup> Prior to November 2, 2003, “standard character” drawings were known as “typed” or “typeset” drawings. See *In re Viterra Inc.*, 671 F.3d 1358, 1363 n.2 (Fed. Cir. 2012) (“[U]ntil 2003, ‘standard character’ marks formerly were known as ‘typed’ marks[.]”). A typed or typeset mark is the legal equivalent of a standard character mark. TMEP § 807.03(i).

<sup>30</sup> Because this registration and Reg. No. 5394939 make similar commercial impressions and are owned by the same registrant, we only list one.

- Reg. No. 5442270 – **TRAVEL SELECT** (standard characters; TRAVEL disclaimed) for “promoting the sale of credit card accounts through the administration of incentive award programs”;
- Reg. No. 5704982 – **GROUPON SELECT** (standard characters) for “Promoting the sale of the goods and services of others through customer loyalty and incentive programs; customer loyalty services, for commercial, promotional and/or advertising purposes; customer loyalty program services featuring rewards, discounts, rebates and other incentives in the form of additional discounts on the goods or services of others, discounted shipping services, and access to retail discounts and offers, and cash-back on certain purchases”; and
- Reg. No. 6722427 – **SHOE STATION SELECT** (standard characters; SHOE disclaimed) for “providing incentive award program through the issuance and processing of loyalty points for purchases of a company’s goods, with said points being redeemable for purchases of said company’s goods with free shipping for those purchases.”

Finally, Applicant, in the alternative, argues that if the Board finds SELECT to be merely descriptive of Applicant’s identified services and would require a disclaimer of said term, the SELECT BY LANDRY’S mark, when viewed in its entirety, would still not primarily merely a surname.<sup>31</sup>

### C. Analysis

The addition of a generic or merely descriptive term to a surname does not preclude its surname significance if, when considered as a whole, the primary significance of the mark to the purchasing public is that of a surname. *See, e.g., In re Weiss Watch Co.*, 123 USPQ2d 1200, 1207 (TTAB 2017) (“There can be no dispute that when used in connection with watches, the additional words WATCH

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<sup>31</sup> Applicant’s Appeal Brief, pp. 9-10; 4 TTABVUE 12-13.

COMPANY are incapable of source-identifying function and, viewing the mark as a whole in the context of the identified goods, do not alter the primary significance of the proposed mark WEISS WATCH COMPANY as primarily merely a surname.”). Moreover, if the mark combines a surname with an additional term(s), as is the case here, the mark will be evaluated to determine if the primary significance of the mark as a whole in connection with the applicant’s goods and/or services is still that of a surname. *See Earnhardt*, 864 F.3d at 1377. A key element in this determination is the relative distinctiveness of the additional term(s) in the mark. *Id.* at 1377 (citing *Hutchinson Tech. Inc.*, 852 F.2d 552, 554-55 (Fed. Cir. 1988); TMEP § 1211.01(b)(vi)).

A nondistinctive term is typically accorded less weight and is not likely to detract from the primary surname significance of the mark. *See Six Continents Ltd.*, 2022 WL 407385, at \*20. Although individual components of a mark may be weighed to determine the mark’s overall commercial impression, the combination of the individual parts must be viewed as a whole to determine if the additional term alters the primary significance of the mark to the purchasing public. *Earnhardt*, 864 F.3d at 1378-79.

We have already found that the term LANDRY’S is primarily merely a surname and that the addition of the term BY does not detract from this significance. We therefore must now determine whether or not the term “SELECT” is merely descriptive of Applicant’s customer incentive award programs.

On its face, Applicant’s recitation of services (customer incentive award program, namely, a restaurant and entertainment customer loyalty program that provides

discounts and related benefits to reward repeat customers) involves offering desirable benefits to a desirable subset of customers – those who return frequently. Both definitions of record for the term SELECT are descriptive of the services, and the use of SELECT in the term SELECT BY LANDRY'S describes a set of desirable benefits available not to all customers but a select group of customers, and would be immediately so perceived by the relevant consumers.

Applicant argues that the Examining Attorney errs in finding SELECT is descriptive of both “selected superior brands where one may use the customer loyalty rewards” and “applicant’s services as being of special value or excellent quality.” We see no inconsistency but merely slightly different wording of the same concept – the SELECT quality of the incentives is designed to attract the SELECT frequent customer. Parsing, as Applicant does, the distinction between a term “laudatory” of the services, and designating “superior brands” available through the services, does not convince us that Applicant – or any prospective consumer – was ever in any doubt about the descriptiveness of SELECT for an incentives program, a term which Applicant already has disclaimed in its prior registration for LANDRY'S SELECT CLUB.

While we acknowledge that Applicant has submitted third-party registrations for marks that include the term SELECT for custom award programs, and where the term is not disclaimed, we do not find this evidence sufficient to cast doubt or overcome the other evidence of record which establishes the mere descriptiveness of the term SELECT in Applicant’s SELECT BY LANDRY'S mark. Regardless, previous



decisions by examining attorneys in approving other marks are without evidentiary value and are not binding on the agency or the Trademark Trial and Appeal Board. *In re USA Warriors Ice Hockey Program, Inc.*, Serial No. 86489116, 2017 WL 2572815, at \*4 n.10 (TTAB 2017).

After careful consideration of the evidence of record and the accompanying arguments, we find that the term SELECT is merely descriptive of Applicant's customer incentive award program.

Because we have found, based on the evidence of record, that the Examining Attorney has demonstrated that term SELECT is merely descriptive of Applicant's services, we must now determine whether the descriptive term SELECT in combination with the wording BY LANDRY'S in Applicant's mark, when viewed in its entirety, is primarily merely a surname. We find that it does.

The evidence of record establishes that the word "select" is merely descriptive of characteristics of Applicant's services because it merely describes or touts the premier quality of the incentive programs that provides desirable benefits to a desirable subset of customers. Moreover, there is nothing in the combination of the term SELECT with the wording BY LANDRY'S that diminishes or transforms the immediate connotation that the premier custom incentive award program is being provided by a person named Landry. Thus, inclusion of the descriptive word "SELECT" does not detract from or change the surname significance of the mark SELECT BY LANDRY'S.

Accordingly, we find that the mark SELECT BY LANDRY'S for a "Customer incentive award program, namely, a restaurant and entertainment customer loyalty program that provides discounts and related benefits to reward repeat customers" is primarily merely a surname under Section 2(e)(4) of the Trademark Act.

#### **D. Purported Indefinite Recitation of Services**

Applicant's recitation of services reads as follows: "Customer incentive award program, namely, a restaurant and entertainment customer loyalty program that provides discounts and related benefits to reward repeat customers" in International Class 35. The Examining Attorney refused registration on the ground that the wording "and related benefits" in the recitation of services requires clarification because the wording is too broad and indefinite.<sup>32</sup> More specifically, the Examining Attorney argues the wording "and related benefits" in Applicant's current identification of services is very broad because it may encompass "prepaid stored value cards" as well as other benefits, such as "promotional offers and coupons for dining," "free one night hotel room credit for reservations over four nights", or "a free ride at an amusement park."<sup>33</sup>

We disagree that the recitation is indefinite.

Here, Applicant is providing a customer incentive award program concerning its restaurant and entertainment services. Accordingly, the wording "and related benefits" would only concern Applicant's restaurant and entertainment services. We


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<sup>32</sup> Examining Attorney's Appeal Brief in Serial No. 97746646, 7 TTABVUE 10.

<sup>33</sup> *Id.*, 7 TTABVUE 11.

find that the recitation of services is sufficiently definite even with the wording “and related benefits” because the examples the Examining Attorney provides are related to restaurant and entertainment services.


We additionally note that the Applicant submitted the following acceptable recitation from the Identification Manual: “Providing casino services featuring stored value membership cards for redeeming cash, discounts, **and other benefits.**” (emphasis added.) If the language “and other benefits” is sufficiently definite in the aforementioned recitation of services from the ID manual, then clearly the more limiting language “and other **related** benefits” must be sufficiently definite. (emphasis added).

Moreover, as previously noted, the Examining Attorney submitted a third-party registration for the mark  which lists, in part, the following services: “Customer incentive award program, namely, a restaurant and entertainment customer loyalty program that provides discounts **and related benefits** to reward repeat customers.” (emphasis added). Additionally, the Examining Attorney submitted a status and title copy of Applicant’s registration for the standard character mark LANDRY’S SELECT CLUB where the recitation of services includes the same “and related benefits” language as set forth in the recitation of services in the involved application. These are additional examples that show that the wording “and related benefits” has been found to be sufficiently definite in the context of the provision of customer inventive programs.

There is no requirement that an applicant adopt wording directly from the ID Manual, and pursuant to TMEP § 1402.01(a),<sup>34</sup> deference should be given to the language set forth by an Applicant, as long as it is understood by English speakers and is correctly classified. In this instance, both requirements have already been met, and the requirement for amendment to the recitation of services is unnecessary.

Accordingly, the refusal based on the ground that the wording “and other related benefits” in the recitation of services is indefinite is reversed.

## **II. Application Serial No. 98024609**

As previously noted, the Examining Attorney refused registration of Applicant’s composite mark  absent a disclaimer of the purportedly merely descriptive term SELECT under Section 6(a) of the Trademark Act, 15 U.S.C. § 1056(a). The Examining Attorney also refused registration on the same identification of services issue identified in the refusal pertaining to Applicant’s standard character SELECT BY LANDRY’s mark.

### **A. Disclaimer Requirement**

Because we have found, based on the evidence of record, that the Examining Attorney has demonstrated that the term SELECT is merely descriptive of Applicant’s customer incentive award programs, the refusal to register Applicant’s


composite  mark absent a disclaimer of the term SELECT is affirmed.


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<sup>34</sup> TMEP § 1402.01(a) provides, in relevant part, that “[d]eference should be given to the language set forth by the applicant in the original application.”

## **B. Purported Indefinite Recitation of Services**

The recitation of services identified in this application is identical to the recitation in Applicant's standard character SELECT BY LANDRY'S mark. Since we have found that the wording "and related benefits" is sufficiently definite with regard to the recitation of services in the standard character mark application, we similarly find that the wording is sufficiently definite for this application. Thus, the refusal based on an indefinite recitation of services is reversed.

**Decision:** The Section 2(e)(4) refusal as it pertains to Applicant's standard character mark SELECT BY LANDRY'S is affirmed; (2) the refusal of Applicant's composite mark  on the ground the mark is unregistrable absent a disclaimer of the term SELECT is affirmed; and (3) the refusals regarding the indefinite recitation of services in both of the involved applications are reversed.

Solely with regard to Applicant's composite mark  , if Applicant submits the required disclaimer of SELECT to the Board within **thirty (30) days** from the date of this decision, the decision will be set aside as to the affirmance of the disclaimer requirement, Application Serial No. 98024609 shall be amended to enter the disclaimer, and the application then shall proceed. *See* Trademark Rule 2.142(g), 37 C.F.R. § 2.142(g).