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Mailed:
December 22, 2011

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Luby's Fuddruckers Restaurants, LLC

Serial No. 77877292

Pamela B. Huff of Cox Smith Matthew Incorporated for Luby's Fuddruckers Restaurants, LLC.

Ronald McMorro, Trademark Examining Attorney, Law Office 105 (Thomas G. Howell, Managing Attorney).

Before Rogers, Bergsman and Shaw,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Magic Brands, LLC ("applicant") filed an intent-to-use application to register the mark BETTER TOPPINGS. BETTER BURGER., in standard character form, for "restaurant services."¹ Applicant disclaimed the exclusive right to use the term "Better Burger."

¹ During the prosecution of the application Magic Brands, LLC assigned its entire right, interest and goodwill in the mark and to the application to Luby's Fuddruckers Restaurants, LLC. The assignment was recorded on August 13, 2010, at reel 4260, frame 0567.

The trademark examining attorney refused registration under Section 2(e)(1) of the Trademark Act of 1946, 15 U.S.C. §1052(e)(1), on the ground that applicant's mark, proposed for use in connection with applicant's restaurant services, is merely descriptive. The examining attorney maintains that applicant's mark "very clearly and directly attributes superior quality to two significant features of its services, TOPPINGS and BURGERS."²

Applicant argues that its mark is suggestive of the services because consumers may believe that applicant's mark is associated with numerous goods and services in the context of restaurant-related services and, therefore, no immediate connection would be formed between the mark and the services, or, in the alternative, consumers might associate the word "toppings" with scantily clad women featured in restaurants such as HOOTERS, TILTED KILT and TWIN PEAKS. Moreover, applicant argues that its mark is not descriptive because it is "catchy, clever, alliterative and has a unique aural cadence" which makes the mark more than descriptive. Furthermore, because there are no similar marks registered or in use, competitors do not have a need to use applicant's mark. Finally, applicant asserts

² Examining Attorney's Brief, unnumbered page 2.

that its mark is not laudatory because its use of the word "Better" identifies a vague standard as opposed to a definite grade or standard. Applicant concludes by stating that any doubts about mere descriptiveness must be resolved in favor of publication of the mark.

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 Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007); and *In re Abcor Development*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). A term need not immediately convey an idea of each and every specific feature of the applicant's goods or services in order to be considered merely descriptive; rather, it is sufficient that the term describes one significant attribute, function or property of the goods or services. *In re H.U.D.D.L.E.*, 216 USPQ 358, 359 (TTAB 1982); and *In re MBAssociates*, 180 USPQ 338, 339 (TTAB 1973). Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with the goods or services, and the possible significance that the term

Serial No. 77877292

would have to the average purchaser of the goods or services because of the manner of its use. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). It is settled that "[t]he question is not whether someone presented with only the mark could guess what the goods or services are. Rather, the question is whether someone who knows what the goods or services are will understand the mark to convey information about them." *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002). The "average" or "ordinary" consumer for a particular applicant's goods or services defines the class or classes of actual or prospective customers for such goods or services. *In re Omaha National Corporation*, 819 F.2d 1117, 2 USPQ2d 1859, 1861 (Fed. Cir. 1987). In this case, the general restaurant going public comprises the class of actual or prospective customers for applicant's services.

According to the *MSN ENCARTA DICTIONARY* definition (encarta.msn.com), the "core meaning" of the word "better" is defined as "indicating that somebody, something, or an action is superior in some way to something or somebody else or is an improvement upon a situation."³ The word "topping" is defined as "something that forms a top,

³ March 1, 2010 Office action.

Serial No. 77877292

especially: a garnish (as a sauce, bread crumbs, or whipped cream) placed on top of a food for flavor or decoration."⁴

Finally, the word "burger" is defined as a "Food: *Same as hamburger.*"⁵

We found the following internet evidence submitted by the examining attorney in his September 15, 2010 Office action to be relevant:

1. An excerpt from the South St. Burger Co. (southstburger.com) advertising "YOUR BURGER is better with OVER 25 TOPPINGS" and advertising "Better Sides."

2. An article posted on the *Restaurant News Resource* website (restaurantnewsresource.com) (October 12, 2009) reporting on Denny's new "Better Burger" noted its "Better toppings: Cool, crisp, fresh shredded iceberg lettuce to improve texture and color replaces leaf lettuce, and is accompanied by crunchy, thick-cut pickles, fresh tomatoes and sliced red onion."

3. An article posted on the *Drovers* website (drovers.com) (September 16, 2009) entitled "Better beef makes a better burger." The first sentence reads as

⁴ *Merriam-Webster Online Dictionary* (merriam-webster.com) attached to the March 1, 2010 Office action.

⁵ *MSN ENCARTA DICTIONARY* (encarta.msn.com) attached to the March 1, 2010 Office action.

Serial No. 77877292

follows: "Better beef makes a better burger, and consumers are willing to pay more for it ..."

4. An article posted on the *Rapid City Journal* website (rapidcityjournal.com) (July 7, 2010) entitled "Better beef makes better burgers."

5. An advertisement for the Blues Burger Bar posted on the *Seneca Niagara Casino & Hotel* website (senecaniagracasino.com) stating that "Better Beef builds better burgers."

6. A review of the Labriola Bakery Café posted on the *a ham **burger** today* website (aht.seriousseats.com) (December 3, 2009) entitled "Great Burgers, Better Buns at Labriola Bakery Café in Oak Brook, Illinois."

In his April 4, 2011 Office action, the examining attorney submitted copies of three "Better Ingredients. Better Pizza." registrations owned by Papa John's International, Inc. The most relevant being Registration No. 2158076 for the mark BETTER INGREDIENTS. BETTER PIZZA. for, *inter alia*, restaurant services registered under the provisions of Section 2(f).⁶

⁶ The April 4, 2011 Office action was the response to applicant's request for reconsideration filed after the notice of appeal was filed. Applicant objected to this evidence on the ground that evidence submitted after a notice of appeal is untimely. (Applicant's Brief, p. 14). However, evidence attached to a request for reconsideration submitted with a notice of appeal, and evidence attached to a denial of the request for

Serial No. 77877292

Applicant describes its mark as "a distinguishing slogan."⁷ A slogan can be merely descriptive if it directly refers to a quality or characteristic of the goods or services. See *In re Boston Beer Co.*, 198 F.3d 1370, 53 USPQ2d 1056, 1058 (Fed. Cir. 1999) (THE BEST BEER IN AMERICA so highly laudatory and descriptive as applied to beer and ale that it is incapable of acquiring distinctiveness); *In re David Crystal, Inc.*, 145 USPQ 95, 95 (TTAB 1965) (slogan is registrable on the Principal Register unless it is merely descriptive).

Furthermore, a term that identifies a food item prepared and sold in restaurants may be descriptive of restaurant services. See *In re Pencils Inc.*, 9 USPQ2d 1410, 1412 (TTAB 1988) (PENCILS held merely descriptive of office supply store services); *In re The Paint Products Co.*, 8 USPQ2d 1863, 1866 (TTAB 1988) ("PAINT PRODUCTS CO.' is no more registrable for goods emanating from a company that sells paint products than it would be as a service mark for the retail paint store services offered by such a company"). See also *In re Tires, Tires, Tires, Inc.*, 94

reconsideration, are considered to have been filed prior to appeal, and are part of the application record on appeal. See *In re Davey Products Pty Ltd.*, 92 USPQ2d 1198, 1200-01 (TTAB 2009), citing TBMP §§ 1204 and 1207.04 (3rd ed. 2011). In view of the foregoing, applicant's objection is overruled.

⁷ Applicant's Brief, p. 10.

Serial No. 77877292

USPQ2d 1153 (TTAB 2009) (TIRES TIRES TIRES generic for retail tire store services); *In re Lens.com, Inc.*, 83 USPQ2d 1444 (TTAB 2007) (LENS generic for "retail store services featuring contact eyewear products rendered via a global computer network"); *In re Eddie Z's Blinds & Drapery, Inc.*, 74 USPQ2d 1037 (TTAB 2005) (BLINDSANDDRAPERY.COM generic for retail store services featuring blinds, draperies, and other wall coverings, conducted via the Internet).

In view of the foregoing, we find that the slogan BETTER TOPPINGS. BETTER BURGER. is merely descriptive of restaurant services because it is a laudatory term that directly conveys to consumers that applicant's restaurant services feature high quality hamburgers with high quality toppings. The Federal Circuit has held that "[l]audatory marks that describe the alleged merit of the goods are descriptive because they simply describe the characteristics or quality of the goods in a condensed form." *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (THE ULTIMATE BIKE RACK is a laudatory descriptive phrase). *See also Burmel Handkerchief Corp. v. Cluett, Peabody & Co., Inc.*, 127 F.2d 318, 53 USPQ 369, 372 (CCPA 1942) (HANDKERCHIEFS OF THE YEAR is a laudatory descriptive phrase). Thus, we find the

Serial No. 77877292

term BETTER TOPPINGS. BETTER BURGER. to be an expression of high quality that immediately describes, without the need for any imagination, conjecture or speculation, a food item of outstanding quality featured in applicant's restaurants. *See In re Best Software Inc.*, 58 USPQ2d 1314 (TTAB 2001) (the words "best" and "premier" are merely descriptive laudatory words that indicate high quality or importance).

We disagree with applicant's argument that the word "Better" is vague. Applicant likens its use of "Better" to the word "Super" which the Board found to be suggestive when used in the mark RALSTON SUPER SLUSH for a concentrate used to make a slush type soft drink. *In re Ralston Purina Co.*, 191 USPQ 237 (TTAB 1976). The Board held that the word "Super" is not merely descriptive when it is used as mere puffery and not to describe size or other attributes of the product. In *Ralston*, the Board found that "Super" did not describe "any real or specific item or characteristic or quality and is therefore not merely descriptive." 191 USPQ at 238. However, when supported by relevant evidence of use, commonly used words such as "premium," "royal," and "best" have been found to be descriptive laudatory terms. *In re Belanger, Inc.*, 218 USPQ 742, 743 (TTAB 1983). *See also In re Duvernoy & Sons, Inc.*, 212 F.2d 202, 101 USPQ 288, 289 (CCPA 1954)

("CONSISTENTLY SUPERIOR" is a laudatory statement used to indicate that applicant's goods are always superior in quality). In this regard, the terms "better" and "best" are readily understood comparative terms. The Random House Dictionary of the English Language (Unabridged), p. 200 (2nd ed. 1987) ("**better**" ... *adj., compar. of good with best as suprl.*") and p. 198 ("**best**" *adj. superl. of good with better as compar.*") (emphasis in the original).⁸ Based on the record before us, we find that the mark BETTER TOPPINGS. BETTER BURGER. in its entirety is a definite statement of superior quality and it is not vague or nebulous. Unlike applicant, we decline to analyze the word "Better" as a separate and distinct element rather than as a part of the entire mark.

Further, we disagree that the use of the word "Toppings" in applicant's mark might be associated with "various means of clothing ... particularly, the proliferation of restaurants featuring scantily clad employees."⁹ There is no reference to the word "toppings" in any of the articles submitted by applicant to show that

⁸ "Compar." is the abbreviation for "comparative" and "suprl." is the abbreviation for "superlative." *Id.* at xxxix.

⁹ Applicant's Brief, p. 9.

Serial No. 77877292

scantily clad female servers have become a common feature of trade dress for restaurant services. Moreover, the argument that the word "Toppings" in the mark BETTER TOPPINGS. BETTER BURGER. engenders the commercial impression of scantily clad women stretches credulity.

Also, we disagree with applicant's assertion that its mark is not descriptive because it is "catchy, clever, alliterative and has a unique aural cadence." The Papa John's International BETTER INGREDIENTS. BETTER PIZZA. registrations under Section 2(f) have the same structure as applicant's mark. In addition, the articles regarding hamburgers show that the purported "catchy, clever, alliterative ... unique aural cadence" is a common way to refer to the quality of the hamburgers (e.g., "Better beef makes a better burger," "Better Beef builds better burgers," and "Great Burgers, Better Buns") from which we may infer that there is a competitive need to use that term.

Finally, applicant points to the existence of its recently registered marks with the same structure: BETTER VALUE, BETTER BURGER. (Registration No. 4009984), BETTER TIME, BETTER BURGER. (Registration No. 4009985), BETTER VARIETY, BETTER BURGER. (Registration No. 4009986) and BETTER EVERYTHING, BETTER BURGER. (Registration No.

Serial No. 77877292

4013052). Although we have considered these registrations, the Board is not bound by the actions of the examining attorney based on records that are not before us. See *In re Nett Designs Inc.*, 57 USPQ2d at 1566 ("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."). Each case must stand on its own record, and we find that, in this case, the examining attorney has established that applicant's mark is merely descriptive of applicant's services.

When we view the proposed mark in its entirety, we conclude that BETTER TOPPINGS. BETTER BURGER. is merely descriptive of applicant's restaurant services. The mark immediately informs prospective customers that applicant's restaurant services feature hamburgers with toppings that are of superior quality. No imagination is required to discern this feature of applicant's restaurant services.

Decision: The refusal to register is affirmed.