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Subject: U.S. TRADEMARK APPLICATION NO. 77878602 - BETTER BUNS.  
BETTER BURGER. - 3470.288 - EXAMINER BRIEF

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**UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)**

**APPLICATION SERIAL NO.** 77878602

**MARK:** BETTER BUNS. BETTER BURGER.



**CORRESPONDENT ADDRESS:**

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COX SMITH MATTHEWS INCORPORATED  
112 EAST PECAN STREET SUITE 1800  
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**GENERAL TRADEMARK INFORMATION:**

<http://www.uspto.gov/main/trademarks.htm>

**TTAB INFORMATION:**

<http://www.uspto.gov/web/offices/dcom/ttab/index.html>

**APPLICANT:** LUBY'S FUDDRUCKERS  
RESTAURANTS, LLC

**CORRESPONDENT'S REFERENCE/DOCKET NO.:**

3470.288

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**EXAMINING ATTORNEY'S APPEAL BRIEF**

The applicant has appealed the examining attorney's refusal to register the mark, BETTER

BUNS. BETTER BURGER, on the ground that it is merely descriptive within the meaning of

Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1).

**FACTS**

Applicant, LUBY'S FUDDRUCKERS RESTAURANTS, LLC, seeks registration of the mark,

BETTER BUNS. BETTER BURGER, on the Principal Register for use in connection with

“restaurant services.” On March 1, 2010, registration was refused because the proposed mark is

merely descriptive of the services within the meaning of Section 2(e)(1) of the Trademark Act, 15

U.S.C. §1052(e)(1). This appeal follows a final refusal on that ground.

## **ARGUMENT**

The proposed mark attributes superior quality to features of the applicant's services.

It is well settled that laudatory terms, phrases and slogans are nondistinctive and unregistrable

on the Principal Register without proof of acquired distinctiveness. *See In re The Place, Inc.*, 76

USPQ2d 1467 (TTAB 2006). In this case, the applicant's proposed mark very clearly and directly

attributes superior quality to two significant features of its services, BUNS and BURGERS.

Applicant has conceded that the BETTER BURGER portion of its mark is descriptive by submitting a disclaimer thereof. The addition of the laudatory phrase BETTER BUNS to the

laudatory phrase BETTER BURGER does not create a mark with a non-descriptive meaning.

Laudatory words or terms that attribute quality or excellence to goods and/or services are considered merely descriptive. TMEP §1209.03(k). The word BETTER is a laudatory term that is

commonly used to indicate that something is superior in some way to something else. The

evidence of record shows that this term has consistently been determined to be merely descriptive

when combined with additional descriptive wording and used in connection with similar services.

For example:

- Registration Nos. 2,158,076 and 2,168,845 for the well known mark BETTER INGREDIENTS, BETTER PIZZA used in connection with restaurant services are both registered pursuant to Trademark Act Section 2(f).

- Registration No. 3,172,693 for the mark BIGGER BETTER PIZZA used in connection with restaurant services is registered on the Supplemental Register.
- Registration No. 3,243,193 for the mark EASILY BETTER used in connection with restaurant services is registered on the Supplemental Register.

Applicant has argued the evidence attached to the Office Action denying the request for

reconsideration dated April 4, 2011 is untimely and should be disregarded. However, evidence

submitted with a response to a request for reconsideration that is filed with a notice of appeal has

been determined to be part of the application record. *See In re Davey Products Pty Ltd.* 92 USPQ

2d 1198 (TTAB 2009); TBMP 1207.04. Applicant also argues that this evidence should not be

considered because the file histories of the third-party registrations are not part of the record. The

file histories are unnecessary. Third-party registrations featuring the same or similar services as

applicant's services are probative evidence on the issue of descriptiveness where the relevant word

or term is disclaimed, registered under Trademark Act Section 2(f) based on a showing of acquired

distinctiveness, or registered on the Supplemental Register. *See In re Finisar Corp.*, 78 USPQ2d

1618, 1621 (TTAB 2006).

The term "BUNS" clearly identifies one of the components used to make the hamburgers that

are featured at the applicant's restaurants. Despite the obvious meaning of the term when

considered in relation to BURGERS, the applicant contends that consumers may associate the term

with different meanings such as a bakery, a wholesale bread supplier or a person's backside.

Applicant further asserts that the term "BUNS" could be perceived by consumers as a reference to

a hamburger restaurant featuring female employees wearing revealing clothing. These arguments

are completely without merit since descriptiveness is considered in relation to the relevant services.

When the term BUNS is considered in relation to burgers and restaurants that feature burgers, it is

easily recognized as referring to the roll that the burger is served on. The fact that a term may have

different meanings in other contexts is not controlling on the question of descriptiveness. *In re*

*Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979); TMEP §1209.03(e). It should also be noted

that while applicant does refer to articles in the record that refer to restaurants featuring female

employees wearing revealing clothing, none of them refer to the employees or their apparel as

buns.

Applicant also argues that the terms BETTER and BUNS have routinely been determined to be

non-descriptive when used in connection with restaurant-related goods and services and services.

Applicant's Brief at Pgs. 13-14. This argument is not supported by the record which includes

copies of several current Registrations and pending applications for restaurant-related goods and

services that include a disclaimer of the terms BETTER and BUNS.

Applicant argues that since the proposed mark is not necessary to describe restaurant services,

it is not descriptive under the “competitor’s need” test. This argument is disproven by the evidence

of record including the numerous websites advertising restaurant services featuring BETTER

BUNS and BETTER BURGERS and the numerous third-party registrations for similar services

including a disclaimer of BETTER BURGER. For example, web pages attached to the final Office

Action of September 15, 2010 include a page from [www.southstburger.com](http://www.southstburger.com) depicting a hamburger

roll and the caption nice buns!” The web page from [www.detnews.com](http://www.detnews.com) features a picture of burger

being prepared and a caption reading “Higher-grade beef, fresher or more creative toppings and

better buns are luring customers at Five Guys and other hamburger restaurants” and the article goes

on to state that “better buns are bringing customers in the door.” These pages clearly show that the

terms combined to create the applicant’s proposed mark are commonly used by the applicant’s

competitors to promote their services. These competitors should be free to use the descriptive

language that comprises the applicant’s mark when describing their services to the public in

advertising and marketing materials. *See In re Styleclick.com Inc.*, 58 USPQ2d 1523, 1527 (TTAB

2001).

Applicant also argues that multi-stage reasoning would be necessary in order for consumers to

determine the meaning of the proposed mark in the context of its services. Again, this argument is

without merit. Absolutely no mature thought or significant reasoning whatsoever would be

required for a consumer to determine the meaning of the proposed mark in this context. It very

clearly and unmistakably indicates that the applicant's restaurant services feature BUNS and

BURGERS that are superior in quality to those of its competitors. As such, the proposed mark is

not registrable on the Principal Register absent proof of acquired distinctiveness.

The applicant further contends that the refusal in this case should be reversed because the

proposed mark is a distinguishing slogan. However, slogans that are considered to be common

laudatory phrases are not registrable. *See In re Boston Beer Co. L.P.*, 198 F.3d 1370, 53 USPQ2d

1056 (Fed. Cir. 1999). Only where the combination of descriptive terms creates a unitary mark

with a unique, incongruous, or otherwise nondescriptive meaning in relation to the goods and/or

services is the combined mark registrable. *See, e.g., In re Colonial Stores, Inc.*, 394 F.2d 549, 551,

157 USPQ 382, 384 (C.C.P.A. 1968). In this case, both the individual components and the

composite result are descriptive of applicant's services and do not create a unique, incongruous or

nondescriptive meaning in relation to the goods and/or services.

Applicant finally argues that any doubt regarding the mark's descriptiveness should be

resolved on applicant's behalf. *E.g., In re Grand Forest Holdings, Inc.*, 78 USPQ2d 1152, 1156

(TTAB 2006). However, in the present case, the evidence of record leaves no doubt that the mark

is merely descriptive.

#### Conclusion

For the foregoing reasons, the refusal pursuant to Section 2(e)(1) of the Trademark Act, 15 U.S.C.

§1052(e)(1), should be affirmed.

Respectfully submitted,

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