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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	87245540
Applicant	T. Marzetti Company
Applied for Mark	THE BETTER FOOD COMPANY
Correspondence Address	BRIAN J DOWNEY BARNES & THORNBURG 41 S HIGH STREET, SUITE 3300 COLUMBUS, OH 43215 UNITED STATES brian.downey@btlaw.com, trademarks-ch@btlaw.com 614-628-1424
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Filer's Name	Sarah P. Harrell
Filer's email	oclavio@btlaw.com, sharrell@btlaw.com
Signature	/sharrell/
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In Re Application of:)
T. Marzetti Company.)
) Law Office: 102
Serial No.: 87/245,540)
Filed: November 22, 2016) Examining Attorney:
Mark: THE BETTER FOOD COMPANY) Cimmerian Coleman
)

APPLICANT'S REPLY BRIEF

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ARGUMENTS

The T. Marzetti Company's ("Applicant") mark "THE BETTER FOOD COMPANY" is not merely descriptive of "dips" in International Class 29 and "salad dressing, caramel dips, frozen pasta, frozen breads, bakery products and croutons" in International Class 30 ("Applicant's Goods"). Despite the Examining Attorney's arguments to the contrary, THE BETTER FOOD COMPANY does not have a readily understood meaning among the relevant consumers and would not be considered a significant feature of the goods at issue. At worst, it is a suggestive slogan that says nothing specific about Applicant's particular goods.

The Examining Attorney has provided no relevant evidence to demonstrate that Applicant's mark immediately conveys an impression of any ingredient, quality, characteristic, feature, function, purpose, or use of the food goods themselves. In contrast, Applicant has provided ample evidence that (1) food products are commonly advertised and described as "Best" or "Better," and the USPTO is replete with evidence demonstrating "BETTER" is commonly registered in connection with product brand names or slogans, especially to communicate that food items are made by a company that takes pride in its products, and (2) THE BETTER FOOD COMPANY is a reference to the Applicant's business philosophy, as demonstrated by use of the slogan to identify Applicant's corporate culture on its packaging for products. When consumers see THE BETTER FOOD COMPANY on products, not a single one will believe that it immediately and directly conveys information **about the goods**; rather, a multistage reasoning process, or the utilization of imagination, thought, or perception is required to connect the food to the company/person who manufactures or distributes food in its "end product" form (salad dressing, caramel dips, frozen pasta, frozen breads, bakery products, croutons, and dips).

Applicant’s voluminous third-party registration evidence is significant in showing that “BETTER” is suggestive and, at the very least, raises doubt about mere descriptiveness.¹

Mark	Reg. No.	Goods/Services	Disclaimer
BETTER PROSTATE	5,250,492	nutritional supplements	“PROSTATE”
BETTER BUTLER	5,222,632	cleaning services	
BETTER SLEEP SHOP	5,245,019	consumer product advice and retail store services relating to mattresses	
BETTER BLADDER	5,224,730	nutritional supplements	“BLADDER”
A BETTER PERIOD	4,987,867	menstrual cups	“PERIOD”
BETTER BEARD	5,247,033	hair care preparations	“BEARD”
BETTER HEART	5,158,844	providing health information	“HEART”
A BETTER WAY TO HIRE	5,147,007	employment agency services	
SIMPLY A BETTER BURGER	5,082,069	restaurant services	
BETTER WATER MAKER	5,081,326	water treatment equipment	“WATER”
A BETTER WAY TO SEE	5,265,895	ophthalmology services	
BETTER, HEALTHIER SNACK	5,259,887	bagel chips, crackers and snack foods	“SNACK”
WHEY BETTER TASTING PROTEIN	5,262,131	nutritional supplements containing protein	
BETTER MEDICINE WITH PSYCHOLOGY	5,255,900	promoting public awareness of using psychology in medicine	
THE BETTER BOTTLE	5,253,849	baby bottles	“BOTTLE”
BETTER BRANDS FOR A BETTER HUMAN CONDITION	5,241,516	marketing services	
A BETTER LIFE RECOVERY	5,235,882	addiction treatment service	“RECOVERY”
BETTER DISPLAY CASES DISPLAY YOUR STORY	5,208,301	display cases	“DISPLAY CASES”
BETTER SOLUTIONS. BETTER LIFE.	5,189,696	financial and investment services	
WAY BETTER SNACKS	5,166,577	snacks	“SNACKS”
BETTER SEED, BETTER LIFE	5,150,895	promoting the interests of the seed industry	
BETTER PROCESS ... BETTER FOOD	5,027,889	food preparation appliances	
BETTER DENTISTRY BY DESIGN	4,559,847	manufacturing dental instruments	“DENTISTRY”
BETTER BUSINESS COACH	5,071,890	business development services	“BUSINESS COACH”
BETTER FAMILY INTERNET	5,189,283	filtering and security software and related services	“INTERNET”
EAT BETTER SAUSAGE	5,156,877	sausages	“SAUSAGE”
BETTER EQUIPMENT, BETTER SERVICE, BETTER	5,094,842	equipment rentals	

¹ Copies of TESS printouts for each were submitted with the Initial Response, September 7, 2017 Response to Office Action, TSDR pp. 10 – 53.

EXPERIENCE!			
BETTER MEAT FOR ALL	5,083,692	processed meat and retail stores	
SIMPLY MADE BETTER	4,948,010	milk products	
EVERYDAY FOOD MADE BETTER	4,984,293	oils and herbs	

The Examining Attorney attempted to discredit this evidence by stating that Applicant’s “third-party registrations are distinguishable from applicant’s mark because the third-party marks do not combine a laudatory term, ‘BETTER’, as a modifier for a generic entity designation, as in applicant’s mark.”² This line of reasoning falls short for “BETTER” being a modifying term because, as outlined in Applicant’s Office Action Responses and Brief on the merits,³ Applicant provided ample evidence to demonstrate that, in the right context, “BETTER” has been found to be highly suggestive, but not descriptive, even when combined with generic terms.⁴ *See General Mills Inc. v. Health Valley Foods*, 24 USPQ 1270, 1277 (TTAB 1992) (“Although the registrations are not evidence of use, the registrations show the sense in which the term ‘fiber’ is employed in the marketplace, similar to a dictionary definition.”).

In addition to a lack of examples from the Office demonstrating that Applicant’s mark should not be registered, the Examining Attorney tries to overcome this lack of evidence by simply stating that “in the context of food products, there is absolutely no mental leap or thought process required to perceive that ‘THE BETTER FOOD COMPANY’ describes food products that are greater in excellence or higher in quality and come from a company.” If that were the

² The October 21, 2017, Office Action stated: “In the instant case, the proposed mark identifies a characteristic or feature of the goods. The term ‘BETTER’ refers to the higher quality of the applicant’s food and of the business enterprise, namely, a food company. The combined terms immediately convey a characteristic or feature of the applicant’s goods and business enterprise.”

³ The six registrations made of record by the Examining Attorney are owned by a total of four registrants. Each of those registrants agreed to disclaimers or amendment to the Supplemental Register with very little, or no, argument. On the other hand, Applicant has made of record thirty (30) registrations which evidence the USPTO’s past adherence to the standards set forth in *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1052 (TTAB 2002). While each case is fact specific, those registrations do evidence that “BETTER” when combined with words that do not strictly name the product or service, or an ingredient or quality thereof, are not merely laudatory.

⁴ In this case, Applicant’s evidence of third-party registrations shows “BETTER” combined with the generic wording Prostate, Bladder, Period, Beard, Heart, Water, Snack, Bottle, Recovery, Display Cases, Snacks, Dentistry, Business Coach, and Sausage.

case, none of the above registrations submitted by Applicant would have registered, because, according to the Examining Attorney, no laudatory term could ever be used in this manner with a descriptive or generic term or terms. That is simply untrue, and to deny registration of Applicant's current application would be inconsistent with what the USPTO has determined for both past and current marks.

A pattern of treatment by the USPTO of similar marks is probative of the issue of descriptiveness of Applicant's mark. *In re Waverly, Inc.*, 27 USPQ2d 1620, 1623 (TTAB 1993) (third-party registrations are probative where they illustrate inconsistent past treatment of marks similar to the Applicant's mark). The Board has clearly recognized that third-party registrations provide at least some evidence of a mark's suggestiveness. *See Conde Nast Publications, Inc. v. Miss Quality, Inc.*, 597 F.2d 1404, 184 USPQ 422, 424-25 (CCPA 1975) (thirty-eight third-party registrations provide at least some evidence that thirty-eight applicants consider the suffixes of the parties' marks to be suggestive of electrical products); *In re J.M. Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987) ("Said third party registrations are of use only if they tend to demonstrate that a mark or a portion thereof is suggestive or descriptive of certain goods and hence is entitled to a narrow scope of protection. Used in this proper, limited manner, 'third party registrations are similar to dictionaries showing how language is generally used.'"); *United Foods Inc. v. J.R. Simplot Co.*, 4 USPQ2d 1172, 1174 (TTAB 1987) (the existence of numerous third-party registrations in the food field for marks which include "QUICK" buttresses the conclusion that "QUICK" is a highly suggestive term, and these registrations are entitled to some weight for that purpose).

While each case must be decided on its own facts and the Board is not bound by prior decisions involving different records, the number of registrations on the Principal Register

containing the standalone term “BETTER” with no disclaimer, or combined with merely descriptive or generic matter, cannot be ignored. *See In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). The weight of evidence simply does not support the Examining Attorney’s case or assertions. While the Examining Attorney argues that consumers who encounter Applicant’s mark in commerce in the context of the identified goods would immediately perceive the wording “THE BETTER FOOD COMPANY” as merely describing that the Applicant’s goods are high quality food products from a company, in view of the foregoing evidence, “BETTER” as in Applicant’s mark THE BETTER FOOD COMPANY, renders the mark suggestive rather than descriptive.

For a laudatory term to be unregistrable, it must be “combined with a word which names the goods or services, or a principal component, grade or size thereof . . . , but if such is not **strictly true**, then the composite mark is regarded as suggestive of the products or services. *See In re Phillips-Van Heusen Corp.* The Examining Attorney attempts to skirt this well-established principle by stating that the term “better” refers to applicant’s food and its business enterprise. That is simply not the test. The test is whether the laudatory term is combined with the name of the applied for goods or a component, grade, or size thereof. *In re Phillips-Van Heusen Corp.* cannot be any clearer on this point. While the Examining Attorney has provided evidence that “better” is a laudatory term, the fact that “food company” cannot be defined as a salad dressing, nor is it an ingredient of a dip, or a quality or characteristic of a crouton, demonstrates that the Examining Attorney cannot meet the burden of the dictionary test and the strictures of *In re Phillips-Van Heusen Corp.*

As has often been stated, there is a thin line of demarcation between a suggestive mark and a merely descriptive one, with the determination of which category a mark falls into

frequently being a difficult matter involving a good measure of subjective judgment. *See In re Atavio*, 25 USPQ2d 1361 (TTAB 1992); *In re TMS Corp. of the Americas*, 200 USPQ 57, 58 (TTAB 1978). The distinction, furthermore, is often made on an intuitive basis rather than as a result of precisely logical analysis susceptible of articulation. *See In re George Weston Ltd.*, 228 USPQ 57, 58 (TTAB 1985). Applicant does not believe the Examining Attorney has established that THE BETTER FOOD COMPANY would immediately and forthwith convey significant information about Applicant's goods with any specificity to prospective purchasers. As such, a review of Applicant's evidence and the nature of Applicant's Goods clearly confirm that THE BETTER FOOD COMPANY slogan is not merely descriptive.

For the reasons set forth in Applicant's Appeal Brief and made evident in the record, consumers encountering THE BETTER FOOD COMPANY mark must use imagination, thought, and perception to ascertain its meaning in relation to the goods offered by Applicant. The burden of proof in this matter lies with the USPTO. That burden has not been carried. An examination of the existing evidence under the various tests used by courts and the Board in determining whether a mark is merely laudatory proves Applicant's case. Applicant respectfully requests that the 2(e)(1) refusal to register its mark THE BETTER FOOD COMPANY on the Principal Register be reversed.

Respectfully submitted,

/s/ Olivia M. Clavio

Olivia M. Clavio

Sarah P. Harrell

BARNES & THORNBURG LLP

Attorneys for Applicant

11 South Meridian Street

Indianapolis, Indiana 46204

317-236-1313

oclavio@btlaw.com; sharrell@btlaw.com