

This Opinion is Not a
Precedent of the TTAB

Mailed: March 29, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re T. Marzetti Company
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Serial No. 87245540
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Brian Downey, of Lancaster Colony Corporation, and
Olivia Clavio and Sarah Harrell, of Barnes & Thornburg LLP,
for T. Marzetti Company.

Cimmerian Coleman, Trademark Examining Attorney, Law Office 102,
Mitchell Front, Managing Attorney.

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Before Lykos, Hightower, and Coggins,
Administrative Trademark Judges.

Opinion by Coggins, Administrative Trademark Judge:

T. Marzetti Company (“Applicant”) seeks registration on the Principal Register of
the mark THE BETTER FOOD COMPANY (in standard characters) for

Dips, in International Class 29; and

Salad dressing, caramel dips, frozen pasta, frozen breads,
bakery products, croutons, in International Class 30.¹

¹ Application Serial No. 87245540 was filed November 22, 2016, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s allegation of a bona fide intention to use the mark in commerce.

The Trademark Examining Attorney refused registration of Applicant's mark on the ground that it is merely descriptive of the identified goods under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1). When the refusal was made final, Applicant appealed and requested reconsideration. The Examining Attorney denied the request for reconsideration, and the appeal was resumed. We affirm the refusal to register.

I. Applicable Law

Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), prohibits the registration of a mark which, when used on or in connection with the applicant's goods, is merely descriptive of them. "A term is merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used." *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)); see also *In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015) and *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987).

Descriptiveness is analyzed in relation to an applicant's identified goods, "the context in which the [term] is being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use"; that a term may have other meanings in different contexts is not controlling. *In re Bayer*, 82 USPQ2d at 1831. Descriptiveness is not considered in the abstract. *Id.* In other words, we evaluate whether someone who knows what the goods

are will understand the mark to convey information about them. *DuoProSS Meditech Corp. v. Inviro Med. Devices Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012); *In re MBNA Am. Bank N.A.*, 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003).

When two or more merely descriptive terms are combined, the determination of whether the composite mark also has a merely descriptive significance turns on whether the combination of terms evokes a new and unique commercial impression. If each component retains its merely descriptive significance in relation to the goods, the combination results in a composite that is itself merely descriptive. *See, e.g., In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1372, 1374 (Fed. Cir. 2004) (PATENTS.COM merely descriptive of computer software for managing a database of records that could include patents and for tracking the status of the records by means of the Internet).

It is well established that laudatory terms, those that attribute quality or excellence to goods, are merely descriptive under Section 2(e)(1). *See Kotzin v. Levi Strauss & Co.*, 111 USPQ 161, 163 (Comm’r Pat. & Trademarks 1956) (finding AMERICA’S FINEST OVERALL to be used as a laudatory phrase that “represents mere ‘puffing’ or ‘touting’ in advertising and seeking customers for its overalls”); *DuoProSS*, 103 USPQ2d at 1759 (SNAP SIMPLY SAFER merely descriptive for various medical devices); *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001) (finding THE ULTIMATE BIKE RACK to be merely descriptive and, therefore, subject to disclaimer); *see also In re Bos. Beer Co. L.P.*, 198 F.3d 1370, 53

USPQ2d 1056, 1058 (Fed. Cir. 1999) (“Marks that are merely laudatory and descriptive of the alleged merit of a product are also regarded as being descriptive. . . . Self-laudatory or puffing marks are regarded as a condensed form of describing the character or quality of the goods.”) (THE BEST BEER IN AMERICA so highly laudatory and descriptive that it is incapable of acquiring distinctiveness).

II. Arguments and Evidence

The Examining Attorney asserts that the wording THE BETTER FOOD COMPANY is laudatory because it attributes higher quality or excellence to Applicant’s identified food goods. Specifically, she argues that “better” is laudatory, “food company” is generic because it indicates Applicant’s entity type, “the” has no trademark significance, and the combination of these individually descriptive words as THE BETTER FOOD COMPANY results in a composite which is laudatory. Examining Attorney’s Brief, unnumbered p. 4 (9 TTABVUE 5); May 23, 2018 Denial of Request for Reconsideration at TSDR 2. In support of this argument, the Examining Attorney points to (1) a definition of “better” meaning “greater in excellence or higher in quality;”² (2) a definition of “food company” meaning “a company that processes and sells food;”³ (3) six third-party registrations including the term BETTER and an entity designation registered either on the Supplemental Register with a disclaimer of the entity designation, or on the Principal Register with

² From THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, ahdictionary.com, October 13, 2017 Office Action at TSDR 25.

³ From thefreedictionary.com, October 13, 2017 Office Action at TSDR 31. Applicant submitted the same definition from thefreedictionary.com and vocabulary.com with its April 13, 2018 Request for Reconsideration at TSDR 13-14.

a disclaimer of BETTER and the entity designation;⁴ and (4) five third-party registrations including laudatory terms and entity designations registered on the Supplemental Register with a disclaimer of the entity designation.⁵

In response to the refusal, Applicant argues that while “better” has laudatory significance, that alone does not prevent its mark from being registrable; and while “food company” means a “company that processes and sells food,” Applicant does not use its mark THE BETTER FOOD COMPANY as a trade name, corporate name, or entity designation. Applicant posits that had it sought registration of the mark for use in connection with food production services the refusal would have been well-grounded, *see* Brief, p. 3 (7 TTABVUE 6); however, it argues, the application identifies food products – not services – and FOOD COMPANY is not a name, component, grade, or size of the goods. In view of this, Applicant argues, the Examining Attorney should have followed the guidance of *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047 (TTAB 2002), which distilled an analogous “general proposition” in a case concerning the mark SUPER SILK for shirts made of silk-like fabric that

if the word ‘super’ is combined with a word which names the goods or services, or a principal component, grade or size thereof, then the composite term is considered merely descriptive of the goods or services, **but if such is not strictly true**, then the composite mark is regarded as suggestive of the products or services.

63 USPQ2d at 1052. (Emphasis added. *See* Appeal Brief, p. 3, 7 TTABVUE 6; Reply Brief, p. 7, 11 TTABVUE 9; April 13, 2018 Request for Reconsideration, TSDR 4-5.)

⁴ October 13, 2017 Office Action at TSDR 3, 6-23.

⁵ May 23, 2018 Request for Reconsideration Denied at TSDR 2, 4-18.

Applicant also argues that there is no per se rule that laudation prevents a mark from being registrable.⁶

In support of its position, Applicant points to 30 third-party registrations including the term BETTER registered on the Principal Register without a disclaimer of BETTER and without any claim of acquired distinctiveness under Section 2(f).⁷ In an attempt to show that its proposed mark “does not merely laud or describe a quality of [its] products, but is a reference to the quality of the source,” (i.e., the company itself, which, due to its commitment to its customers, shareholders, and communities, strives to be “The Better Food Company”) Applicant points to its LinkedIn page and its own web site which use “The Better Food Company” in other contexts.⁸

III. Analysis

We begin by examining the main component terms in the mark THE BETTER FOOD COMPANY. The definitions of “food company” of record establish that term to be a generic business entity designation for a company that produces or sells food, as

⁶ We agree with Applicant that there is no per se rule that laudation prevents a mark from being registrable. In relying on this proposition, Applicant cites *Boston Beer*, 53 USPQ2d at 1058, see Brief, p. 2 (7 TTABVUE 5), in which the Federal Circuit held that “The Best Beer in America” was so highly laudatory and descriptive of the qualities of beer and ale that the slogan did not and could not function as a trademark. *Bos. Beer*, 53 USPQ2d at 1058. However, that situation does not apply to the current refusal; the Examining Attorney has not determined and does not argue that THE BETTER FOOD COMPANY is incapable of functioning as a trademark for Applicant’s identified goods. While Applicant’s mark was refused registration on the Principal Register, the Examining Attorney advised Applicant that it was possible to seek registration under Section 2(f) or on the Supplemental Register. See October 13, 2017 Office Action, TSDR 4. Applicant instead traversed the refusal.

⁷ Brief, pp. 5-7 (7 TTABVUE 8-10); Reply Brief, pp. 4-5 (11 TTABVUE 5-6); September 7, 2017 Response to Office Action at TSDR 7-10, 14-57.

⁸ Brief, p. 8 (7 TTABVUE 11); Request for Reconsideration at TSDR 3, 17 (company web page), 19 (LinkedIn).

Applicant does. *See* October 13, 2017 Office Action at TSDR 31; April 13, 2018 Request for Reconsideration at TSDR 13-14. In view thereof, “food company” is merely descriptive of food products because it informs consumers that food items bearing the term “food company” emanate from a company specializing in food products. *See In re Phone Co.*, 218 USPQ 1027 (TTAB 1983) (THE PHONE COMPANY merely descriptive of telephones); *see also In re Taylor & Francis [Publishers] Inc.*, 55 USPQ2d 1213 (TTAB 2000) (PSYCHOLOGY PRESS merely descriptive of non-fiction books in the field of psychology); *In re Paint Prods. Co.*, 8 USPQ2d 1863, 1866 (TTAB 1988) (PAINT PRODUCTS CO. is “no more registrable for goods [interior and exterior paints and coatings] 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”); *In re Martin’s Famous Pastry Shoppe, Inc.*, 221 USPQ 364, 367-68 (TTAB 1984) (PASTRY SHOPPE merely descriptive of both goods and services emanating from a bakery and pastry shop; disclaimer requirement affirmed), *aff’d on other grounds*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *cf. Goodyear’s India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U.S. 598, 602-03 (1888) (using examples of “wine company,” “cotton company,” and “grain company,” the Court stated that “[t]he addition of the word ‘Company’ only indicates that parties have formed an association or partnership to deal in such goods, either to produce or to sell them”).

The dictionary evidence of record also shows there is a readily recognized meaning of “better,” and Applicant concedes that “better” has laudatory significance. *See*

October 13, 2017 Office Action at TSDR 25 (definition); April 13, 2018 Request for Reconsideration, TSDR 4, and Appeal Brief, p. 2, 7 TTABVUE 5 (concession). Laudatory terms such as “better,” which attribute superiority to the identified goods, are merely descriptive. *In re Nett Designs, Inc.*, 57 USPQ2d at 1566; *In re Bos. Beer Co.*, 53 USPQ2d at 1058.

Viewing the mark THE BETTER FOOD COMPANY as a whole, we observe that “better” maintains its laudatory nature when it is preceded by the definite article “the” and followed by the generic entity designation “food company.” Particularly, adding the word “the” does not add any source-indicating significance or otherwise affect the mark’s laudatory descriptiveness. *See In re Place Inc.*, 76 USPQ2d 1467, 1468 (TTAB 2005) (holding THE GREATEST BAR merely descriptive of restaurant and bar services; “the definite article THE . . . add[s] no source-indicating significance to the mark as a whole”). Applicant does not contend otherwise. Instead, Applicant’s primary argument is that use of THE BETTER FOOD COMPANY on food products does not immediately and directly convey laudatory information about **goods** themselves; rather, Applicant argues, a multistage reasoning process or the utilization of imagination, thought, or perception is required to connect the food goods to the food **company** that engages in the services of producing or selling the food.

It has long been held that business entity designations indicating the type of goods produced or sold by an applicant are merely descriptive of those goods produced or sold. *See In re Taylor & Francis [Publishers] Inc.*, 55 USPQ2d at 1216 (“We have repeatedly held that ‘a mark which names the type of commercial establishment from

which particular goods come is merely descriptive of those goods.”) (citing *In re Phone Co.*, 218 USPQ at 1028); *see also In re Paint Prods. Co.*, 8 USPQ2d at 1866 (“purchasers encountering the words ‘PAINT PRODUCTS CO.’ on the goods for which registration is sought would view those words not as a trademark, but in their ordinary dictionary sense: a company that sells paint products.”); *In re Martin’s Famous Pastry Shoppe*, 221 USPQ at 367 (PASTRY SHOPPE “conveys a clear and immediate impression of the character of applicant’s baked goods as products likely to emanate from a pastry shop”).

Applicant’s reliance on *Phillips-Van Heusen* is inapposite. The language from *Phillips-Van Heusen* on which Applicant relies (quoted above) was distilled from the Board’s review of seven prior decisions involving SUPER-formative marks. *See Phillips-Van Heusen*, 63 USPQ2d at 1051-52. Neither the mark at issue in *Phillips-Van Heusen* (i.e., SUPER SILK) nor the marks at issue in the prior seven cases (i.e., SUPER BLEND, SUPER BUY, SUPER GEL, SUPERHOSE!, RALSTON SUPER SLUSH, SUPER COLLINEAR, and SUPER IRON) followed the pattern of Applicant’s mark which is a definite article (THE) followed by a laudatory term (BETTER) and ending with an entity designator (FOOD COMPANY). We see no reason to apply *Phillips-Van Heusen* here, where the fact pattern is not analogous. The question of laudatory descriptiveness at issue with THE BETTER FOOD COMPANY is more analogous to the facts of *In re Martin’s Famous Pastry Shoppe*, in which the examining attorney’s requirement for a disclaimer of “pastry shoppe” in an application involving food goods – where the laudatory term “famous” had already

been disclaimed – was upheld by the Board. *See id.*, 221 USPQ at 367. As the Board noted therein, “pastry shoppe” “conveys a clear and immediate impression of the character of applicant’s baked goods as products likely to emanate from a pastry shop.” *Id.*

As mentioned above, “[m]arks that are merely laudatory and descriptive of the alleged merit of a product are also regarded as being descriptive. . . . Self-laudatory or puffing marks are regarded as a condensed form of describing the character or quality of the goods.” *In re Bos. Beer*, 53 USPQ2d at 1058. Based on the evidence in the record, we find the mark THE BETTER FOOD COMPANY is laudatorily descriptive, conveying the superiority of Applicant business entity and, thus, its food products. Each word in the composite mark THE BETTER FOOD COMPANY is descriptive, and the combination also has laudatorily descriptive significance. *See DuoProSS*, 103 USPQ2d at 1756; *see also In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1516 (TTAB 2016). The composite term immediately identifies the source or provider as a “better” source of food products, and the connection between the mark and Applicant’s food goods will be immediately discernable with no imagination, thought, or perception required by average prospective purchasers. We therefore find that THE BETTER FOOD COMPANY is merely descriptive within the meaning of Section 2(e)(1) in association with dips, salad dressing, caramel dips, frozen pasta, frozen breads, bakery products, and croutons, all being food products.

The third-party registrations submitted by Applicant are not persuasive to show that THE BETTER FOOD COMPANY is not laudatory for food products. The marks

in these third-party registrations are distinguishable from Applicant's mark because they do not combine the laudatory term "better" with a generic entity designation, as does Applicant's mark. Moreover, the marks in the registrations for goods – as opposed to services – which Applicant highlighted in its reply brief are unitary such that no disclaimer of "better" would have been required.⁹ See TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1213.05 (Oct. 2018) (citing *Dena Corp. v. Belvedere Int'l, Inc.*, 950 F.2d 1555, 21 USPQ2d 1047, 1052 (Fed. Cir. 1991) ("If the matter that comprises the mark or relevant portion of the mark is unitary, no disclaimer of an element, whether descriptive, generic, or otherwise, is required.")). Further, these prior registrations are not conclusive. While uniform treatment under the Trademark Act is an administrative goal, our task in this appeal is to determine, based on the record before us, whether Applicant's particular mark sought to be registered here is merely descriptive. As often stated, each case must stand on its own record and be decided on its own merits, and the Board is not bound by the actions of prior examining attorneys. See, e.g., *In re Nett Designs*, 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."); *In re Best Software Inc.*, 58 USPQ2d 1314 (TTAB 2001) (affirming required

⁹ The highlighted marks are: SIMPLY A BETTER BURGER (Reg. No. 5082069); BETTER, HEALTHIER SNACK (Reg. No. 5259887); WHEY BETTER TASTING PROTEIN (Reg. No. 5262131); WAY BETTER SNACKS (Reg. No. 5166577); BETTER PROCESS ... BETTER FOOD (Reg. No. 5027889); EAT BETTER SAUSAGE (Reg. No. 5156877); BETTER MEAT FOR ALL (Reg. No. 5083692); SIMPLY MADE BETTER (Reg. No. 4948010); and EVERYDAY FOOD MADE BETTER (Reg. No. 4984293). See Reply Brief 4-5 (11 TTABVUE 5-6).

disclaimers of descriptive laudatory words BEST and PREMIER despite applicant's previous registration for BEST! without disclaimer).

IV. Decision

We have found that Applicant's asserted mark THE BETTER FOOD COMPANY is merely descriptive of the food goods identified in the application. Accordingly, the refusal to register Applicant's mark is affirmed.¹⁰

¹⁰ Applicant's offer to disclaim "company" should the Board find the mark otherwise not laudatory is moot. *See* Brief, p. 3, n.1 (7 TTABVUE 6).