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

In re Application:

Applicant:	T. Marzetti Company
Serial No.	87/245,540
Filed:	November 22, 2016
Trademark:	THE BETTER FOOD COMPANY
Trademark Attorney:	Cimmerian Coleman
Trademark Law Office:	102

**APPLICANT'S APPEAL BRIEF**

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COMES NOW the Applicant, T. Marzetti Company (“Marzetti” or “Applicant”), by and through counsel, and hereby respectfully appeals the Examining Attorney’s refusal to register the mark THE BETTER FOOD COMPANY.

### **INTRODUCTION**

This appeal presents a very straight forward issue for the Board’s consideration: is THE BETTER FOOD COMPANY merely descriptive of dips, salad dressing, pasta and bakery products. While Marzetti concedes that the word BETTER has laudatory significance, Marzetti respectfully submits that the Examining Attorney has failed to follow the strictures of *In re Phillips-Van Heusen*, which provides that 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. *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1052 (TTAB 2002) (emphasis added). In this case, Applicant has combined the words “THE BETTER” with a general descriptor of its line of business, namely, “FOOD COMPANY.” As “food company” does not name the goods, or a principal component, grade or size of the goods, the mark must be regarded as suggestive. *Id.*

#### **A. PROSECUTION HISTORY**

Marzetti filed the present application for THE BETTER FOOD COMPANY on an intent to use basis for use on dips in International Class 29 and salad dressing, caramel dips, frozen pasta, frozen breads, bakery products and croutons in International Class 30. On March 7, 2017,

the Examining Attorney refused registration of the mark, citing Section 2(e)(1) of the Act. (the “Initial Refusal”). Applicant timely filed a Response to the Office Action on September 7, 2017, arguing that the mark is not merely descriptive/laudatory (the “Initial Response”).

On October 13, 2017, the Examining Attorney issued an office action maintaining the refusal to register under Section 2(e)(1) of the act (the “Final Refusal”).

On April 13, 2018, Applicant timely filed both a Notice of Appeal and a Request for Reconsideration, (“RFR”), which the Examining Attorney denied on May 23, 2018 (the “Reconsideration Letter”).

## **B. ARGUMENT**

The Examining Attorney has maintained the refusal to register the mark THE BETTER FOOD COMPANY for use on dips, salad dressing, caramel dips, frozen pasta, frozen breads, bakery products and croutons. In issuing and maintaining the refusal, the Examining Attorney relied, almost exclusively, on submitted definitions of “better,” “food,” “company” and “food company.” March 7, 2017 Office Action, TSDR pp. 2-53; October 13, 2017 Office Action, TSDR pp. 20 – 31.

With respect to the definitions submitted by the Examining Attorney, Applicant agrees that “better” has a laudatory significance. The Federal Circuit, however, has repeatedly held that “laudation does not *per se* prevent a mark from being registrable.” *In re Boston Beer Co. L.P.*, 53 USPQ2d 1056, 1058 (Fed. Cir. 1999); citing *In re Bush Brothers & Co.*, 12 USPQ2d 1058 (Fed. Cir. 1989). Applicant can also agree that a “food company” is a “company that processes and

sells food.” October 13, 2017 Office Action, TSDR p. 27. Applicant does not use “The Better Food Company” as a trade name, corporate name or entity designation.<sup>1</sup>

In relying on the definitions to support the initial refusal, the Examining Attorney stated that “the mark THE BETTER FOOD COMPANY, as applied to the identified goods, merely describes a feature of the services, namely, a food company that attributes a higher quality to its goods.” March 7, 2017 Office Action, TSDR p. 1, *emphasis added*. The Examining Attorney further stated that THE BETTER FOOD COMPANY “refers to the higher quality of the applicant’s food and of the business enterprise, namely, a food company.” October 13, 2017 Office Action, TSDR p. 1, *emphasis added*.

Had Marzetti applied for the mark THE BETTER FOOD COMPANY for use in connection with food production services, the Examining Attorney’s refusal would have been well-grounded. Applicant, however, did not apply for the mark for use on such services, but for use on salad dressings, dips, pasta and baked products, such as breads and croutons.

The Board has set forth the proper legal analysis when determining whether a laudatory term like BETTER is merely descriptive, or suggestive. When analyzing the use of a similar term, “super,” in a composite mark, the Board stated:

A general proposition which may be distilled from the foregoing cases is 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.

*In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1052 (TTAB 2002) (*emphasis added*). Per this clearly established precedent, THE BETTER SALAD DRESSINGS, THE BETTER DIPS,

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<sup>1</sup> Applicant would be willing to disclaim “company” should the Board find the mark otherwise not to be merely laudatory.

and THE BETTER CROUTONS would all be laudatory and merely descriptive of the applied for products. FOOD COMPANY, however, is not the name of the goods. FOOD COMPANY is not a component of the goods. FOOD COMPANY is not a grade or size of the goods. Accordingly, as FOOD COMPANY does not meet the standards of the strictly applied test, namely that it must be the name of the goods or a component, grade or size thereof, the mark must be regarded as suggestive of the products. *Id.*

In this case, the Examining Attorney's above quoted arguments actually support registration. To be merely descriptive as a laudatory mark, the record must demonstrate that THE BETTER FOOD COMPANY would be viewed by consumers of Applicant's dressings, dips and croutons as describing, with particularity, only a quality of excellence of those products. The Examining Attorney has repeatedly and tacitly conceded, however, that the mark clearly does not just describe a quality of excellence in the products, but actually is a step removed from the products in describing a quality about their source. In that regard, THE BETTER FOOD COMPANY is a quintessential trademark as consumers will immediately associate it with the origin of the products and not as a description of the products themselves. As the laudation in this instance describes the source of the goods as "the better food company," the mark then suggests that products made by "the better food company" may also have "better" attributes; but the mark does not directly describe any such attributes, leaving the consumer to wonder what the mark might mean in relation to the goods.

As in the *Phillips-Van Heusen* case, and the subsequent *In re Positec Group Ltd.*, 108 USPQ2d 1161 (TTAB 2013) case, an analysis of the principal registry demonstrates that, while never a model of pure consistency, the USPTO has followed the principles of these cases and has not found the term "better" to be laudatory where the words modified by "better" do not name

the goods or a component, grade or size thereof (indeed, in many instances the USPTO did not find “better” to be laudatory in cases where it did precede the name of the product). For example, all of the following marks are registered on the principal registry without any disclaimer of “better” and without any claim of acquired distinctiveness under Section 2(f) (copies of TESS printouts for each were submitted with the Initial Response, September 7, 2017 Response to Office Action, TSDR pp. 10 - 53):

**BETTER PROSTATE-** U.S. Reg. No. 5,250,492 for use on nutritional supplements (“prostate” disclaimed);

**BETTER BUTLER-** U.S. Reg. No. 5,222,632 for use in connection with cleaning services;

**BETTER SLEEP SHOP** - U.S. Reg. No. 5,245,019 for use on consumer product advice and retail store services relating to mattresses;

**BETTER BLADDER-** U.S. Reg. No. 5,224,730 for use on nutritional supplements (“bladder” disclaimed);

**A BETTER PERIOD** - U.S. Reg. No. 4,987,867 for use on menstrual cups, (“period” disclaimed);

**BETTER BEARD** - U.S. Reg. No. 5,247,033 for use on hair care preparations (“beard” disclaimed);

**BETTER HEART** - U.S. Reg. No. 5,158,844 for use in connection with providing health information (“heart” disclaimed);

**A BETTER WAY TO HIRE** - U.S. Reg. No. 5,147,007 for employment agency services;

**SIMPLY A BETTER BURGER** - U.S. Reg. No. 5,082,069 for use on restaurant services;

**BETTER WATER MAKER** - U.S. Reg. No. 5,081,326 for use on water treatment equipment (“water” disclaimed);

**A BETTER WAY TO SEE** - U.S. Reg. No. 5,265,895 for use on ophthalmology services;

**BETTER, HEALTHIER SNACK-** U.S. Reg. No. 5,259,887 for use on bagel chips, crackers and snack foods (“snack” disclaimed);



**WHEY BETTER TASTING PROTEIN** - U.S. Reg. No. 5,262,131 for use on nutritional supplements containing protein;

**BETTER MEDICINE WITH PSYCHOLOGY** - U.S. Reg. No. 5,255,900 for use in connection with promoting public awareness of using psychology in medicine;

**THE BETTER BOTTLE** - U.S. Reg. No. 5,253,849 for use on baby bottles, (“bottle” disclaimed);

**BETTER BRANDS FOR A BETTER HUMAN CONDITION** - U.S. Reg. No. 5,241,516 for use on marketing services;

**A BETTER LIFE RECOVERY** - U.S. Reg. No. 5,235,882 for use on addiction treatment service, (“recovery” disclaimed);

**BETTER DISPLAY CASES DISPLAY YOUR STORY** - U.S. Reg. No. 5,208,301 for use on display cases (“display cases” disclaimed);

**BETTER SOLUTIONS. BETTER LIFE.** - U.S. Reg. No. 5,189,696 for use in connection with financial and investment services;

**WAY BETTER SNACKS** - U.S. Reg. No. 5,166,577 for use on snacks (“snack” disclaimed);

**BETTER SEED, BETTER LIFE** - U.S. Reg. No. 5,150,895 for use in connection with promoting the interests of the seed industry;

**BETTER PROCESS ... BETTER FOOD** - U.S. Reg. No. 5,027,889 for use on food preparation appliances;

**BETTER DENTISTRY BY DESIGN** - U.S. Reg. No. 4,559,847 for use in connection with manufacturing dental instruments (“dentistry” disclaimed);

**BETTER BUSINESS COACH** - U.S. Reg. No. 5,071,890 for use in connection with business development services (“business coach” disclaimed);

**BETTER FAMILY INTERNET** - U.S. Reg. No. 5,189,283 for use in connection with internet filtering and security software and related services (“internet” disclaimed);

**EAT BETTER SAUSAGE** - U.S. Reg. No. 5,156,877 for use on sausages (“sausage” disclaimed);

**BETTER EQUIPMENT, BETTER SERVICE, BETTER EXPERIENCE!** - U.S. Reg. No. 5,094,842 for use in connection with equipment rentals;

**BETTER MEAT FOR ALL** - U.S. Reg. No. 5,083,692 for use on processed meat and retail stores;

**SIMPLY MADE BETTER-** U.S. Reg. No. 4,948,010 for use on milk products;  
and

**EVERYDAY FOOD MADE BETTER-** U.S. Reg. No. 4,984,293 for use on oils  
and herbs.

The USPTO permitted the registration of all of these “better” marks, without disclaimers of the laudatory term “better” because laudation does not, per se, prevent a mark from being registrable. *In re Boston Beer Co. L.P.*, 53 USPQ2d 1056, 1058 (Fed. Cir. 1999); *citing In re Bush Brothers & Co.*, 12 USPQ2d 1058 (Fed. Cir. 1989). Rather, the USPTO, in registering the above “better” marks without disclaimers conducted a proper examination of the marks in the context of the listed goods or services. Where “better” was not “combined with a word which names the goods or services, or a principal component, grade or size thereof” the USPTO permitted registration. *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1052 (TTAB 2002) (*emphasis added*).

When refusing registration on the basis that a mark is merely descriptive, the examining attorney should support the refusal with appropriate evidence. *See In re Stereotaxis Inc.*, 429 F.3d 1039, 77 USPQ2d 1087 (Fed. Cir. 2005); TMEP 1209.02. In the instant case the Examining Attorney, in support of the Initial Refusal, provided nothing more than definitions of “better,” “food,” and “company.” The Examining Attorney then made the leap of concluding that “better food company” is descriptive of Applicant's services (even though Applicant has not applied for use of the mark in connection with any services, but for use on goods). March 7, 2017 Office Action, TSDR p. 1. After Applicant responded with evidence of thirty (30) third-party “better” registrations to evidence that the USPTO has, in fact, generally followed the very clear and strict test set forth in *In re Phillips-Van Heusen Corp.*, the Examining Attorney responded by citing to six (6) “better” registrations owned by only four parties, all of which agreed to disclaimers or the

Supplemental Registry without any appeal to the Board. October 13, 2017 Office Action, TSDR pp. 2 – 19.

To further evidence that THE BETTER FOOD COMPANY does not merely laud or describe a quality of Applicant's products, but is a reference to the quality of the source, Applicant submitted evidence of its use of "The Better Food Company" in other contexts. For instance, Applicant's LinkedIn page notes:

We strive to deliver sustainable long-term growth and provide continued dividend growth to our shareholders while making an impact on our local communities. We accomplish this with Better People, that Make Better Products, in a Better Corporate Culture, that Work in Unison to Make the World a Little Bit Better Place – The Better Food Company.

April 13, 2018 TEAS Request for Reconsideration after FOA, TSDR pp. 17 – 20. In addition, the information page on employment at T. Marzetti states:

T. Marzetti Company's associates contribute to the Company's success every day, and in turn, we are committed to our associates' success. We truly believe in our commitment to you, to our customers, and to our communities. Join us as we continue to be "The Better Food Company".

April 13, 2018 TEAS Request for Reconsideration after FOA, TSDR pp. 15 – 16.

Applicant will extend this slogan it has used to identify its corporate culture onto 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 products. Rather, there is a two-step thought process upon encountering the mark that the Examining Attorney has tacitly recognized: (1) the mark clearly refers to a food company, not

the product in the consumer's hand; and (2) then the consumer must do mental gymnastics to figure out what, if anything, that mark conveys about the product itself. Does the mark tout better ingredients? Better taste? Or does the company that makes the product simply pride itself on being a good corporate citizen? A great place to work? Or a food company with better manufacturing standards? At the end of the day, the consumer simply will not know, as the Examining Attorney does not know, whether the mark is trying to convey something about the product or about Applicant's business enterprise as a whole. This "mental pause" involved in connecting the meaning of the mark with the goods makes the mark suggestive, and not merely descriptive/laudatory. See *In re Getz Found.*, 227 USPQ 571, 572 (TTAB 1985); *In re Shutts*, 217 USPQ 363, 364-65 (TTAB 1983); *In re Tennis in the Round Inc.*, 199 USPQ 496, 498 (TTAB 1978).

None of the Examining Attorney's evidence shows THE BETTER FOOD COMPANY to be merely laudatory or merely descriptive of salad dressings, dips, baked products or pasta. The burden is on the USPTO to make a *prima facie* showing that Applicant's mark is descriptive from the vantage point of purchasers of Applicant's products. *In re Box Solutions Corp.* 79 U.S.P.Q.2d 1953 (TTAB 2006). If there is any doubt as to descriptiveness, it must be resolved in favor of Applicant. *Id.* The Examining Attorney provided no evidence that THE BETTER FOOD COMPANY has ever been used to describe in a laudatory manner salad dressings, dips, breads or pasta.

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:

## **THE DICTIONARY TEST**

While the Examining Attorney has definitely proved that “better” is a laudatory term, the fact that the definition of “food company” nowhere indicates that a food company is defined as a salad dressing, or is 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*; see also *In re Ralston Purina Co.*, 191 USPQ 237 (TTAB 1976).

## **THE IMAGINATION TEST**

While a descriptive term directly and clearly conveys information about ingredients, qualities or characteristics of the product, a suggestive term only indirectly suggests them. While BETTER SALAD DRESSING is clearly merely descriptive/laudatory of salad dressings, THE BETTER FOOD COMPANY used on salad dressings requires some imagination as to what exactly that conveys, if anything, about the salad dressing. As noted above, the mark may suggest that the product has better ingredients or tastes better, but the mark does not directly state that. Indeed, the mark may simply relate to a corporate culture and not impart anything at all about the goods. There is zero evidence in this record that consumers will immediately perceive the THE BETTER FOOD COMPANY to be conveying information about the ingredients, qualities or characteristics of the croutons.

## **COMPETITORS’ NEED TEST**

It has long been held that terms like “better taste” or “the best crouton” should be left freely available to all competitors in a given field as they directly describe the product. The

Examining Attorney, who bears the burden, has entered no evidence showing that dip manufacturers need the ability to describe dips as “the better food company.”

### **COMPETITORS’ USE TEST**

Akin to the competitors’ need test is the competitor’s use test. In *Boston Beer*, the Examining Attorney loaded the record with numerous instances of competitors using “best beer” to describe their beer. *In re Boston Beer Co, L.P. supra*. The record in this case does not have a single instance of a competitor using “the better food company” to market croutons, pasta, dips, breads or salad dressings.

The burden is on the USPTO to make a *prima facie* showing that Applicant’s mark is descriptive from the vantage point of purchasers of Applicant’s products. *In re Box Solutions Corp.* 79 U.S.P.Q.2d 1953 (TTAB 2006). The distinctiveness inquiry is both product and context specific. *See Borinquen Biscuit Corp. v. M V Trading Corp.*, 443 F.3d 112, 119 (1st Cir. 2006). Marks that have dictionary definitions and may be merely descriptive in one context, may not be in another. *Id.*

Here the Examining Attorney completely divorced the analysis from both the products and the context at issue. The Examining Attorney merely concluded that “better” is laudatory (in the context of a dictionary definition) and that Applicant is a food company, so THE BETTER FOOD COMPANY is merely descriptive/laudatory of Applicant’s “business enterprise.”

Had the Examining Attorney done the correct product specific and context specific analysis, the focus would be on the identified products (dips, breads, etc.) and the context in which consumers will encounter the mark (while in a grocery store picking up a bag of croutons). In that product specific analysis and context, the mark conveys nothing directly about

the products. Rather, the consumer is left to ponder on what “the better food company” may mean with respect to its use on frozen pasta.

As the USPTO bears the burden in this case, if the record does not demonstrate that THE BETTER FOOD COMPANY is merely laudatory for salad dressings, all doubt must be resolved in Applicant’s favor and the mark published for opposition. *See, e.g., In re Rank Organization, Ltd.*, 222 USPQ 324, 326 (TTAB 1984); *In re Conductive Systems, Inc.*, 220 USPQ 84, 86 (TTAB 1983); *In re Morton-Norwich Products, Inc.*, 209 USPQ 791, 791 (TTAB 1981); and *In re Gourmet Bakers, Inc.*, 173 USPQ 565, 565 (TTAB 1972). The Board, in *Shutts*, stated this principle clearly:

We recognize that the suggestive/descriptive dichotomy can require the drawing of fine lines and often involves a good measure of subjective judgment. Indeed, this case may well present such a challenge in making the necessary classification. At the very least, however, we have doubts about the “*merely descriptive*” character of the mark before us and, unlike the situation in determining likelihood of confusion under Section 2(d) of the Trademark Act, it is clear that such doubts are to be resolved in favor of the applicants.

*In re Shutts*, 217 U.S.P.Q. 363, 365 (TTAB 1983). Moreover, in *Phillips-Van Heusen*, the Board specifically held that unless a laudatory term is combined with words that name the product or a component, grade or size thereof, the mark falls on the suggestive side. *Phillips- Van Heusen*, 63 USPQ2d 1047, 1052 (TTAB 2002). In all of the cases cited by the examiner, the laudatory term was followed by the name of the products ( e.g. THE BEST BEER IN AMERICA for beer; THE ULTIMATE BIKE RACK for bike racks, etc.). Applicant is not selling food companies or food company services, Applicant is selling dips, salad dressings and croutons.

Unlike a refusal under Section 2(d) of the Trademark Act, all doubts as to whether a portion of a mark is merely descriptive must be resolved in favor of the Applicant and the mark published for opposition. *In re Bed-Check Corp.*, 226 U.S.P.Q. 946 (TTAB 1985). In reversing an examiner's refusal to register the service mark CODE & SYMBOL for product identification journals, the Board stated:

Our decision is assisted by the fact that we have no information that anyone will be damaged by the registration of the mark but that anyone who would be injured will have an opportunity to file a notice of opposition and to develop a factual record upon which any question of descriptiveness could be adjudicate with more confidence than it can be on the basis of *a priori* assumptions.

*In re Distribution Codes, Inc.*, 199 U.S.P.Q. 508, 511 (TTAB 1978). In the present case, the THE BETTER FOOD COMPANY for use on dressings, dips, breads and pastas deserves the benefit of this presumption.

Dated: July 20, 2018

Respectfully submitted,



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