

This Opinion is Not a
Precedent of the TTAB

Mailed: March 28, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Next Phase Enterprises, LLC
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Serial No. 90632171
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Joseph R. Meaney of Venjuris PC,
for Next Phase Enterprises, LLC.

Rebecca A. Smith, Trademark Examining Attorney, Law Office 110,
Chris A. F. Pedersen, Managing Attorney.

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Before Lykos, Adlin and Allard,
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

Next Phase Enterprises, LLC (“Applicant”) has filed an application to register the mark FOODIE COLLECTIVE in standard characters on the Principal Register for “Cheese; Frozen appetizers and entrees consisting primarily of meat, fish, poultry or vegetables” in International Class 29.¹

¹ Application Serial No. 90632171, filed on April 8, 2021, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), alleging a bona fide intent to use the mark in commerce.

Page references to the application record refer to the online database of the USPTO’s Trademark Status & Document Retrieval (TSDR) system in .pdf format. References to the

The Trademark Examining Attorney has refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that the mark is merely descriptive of Applicant's identified goods.

When the refusal was made final, Applicant appealed. The appeal is now fully briefed. We affirm.

In the absence of acquired distinctiveness, Section 2(e)(1) of the Trademark Act prohibits registration of a mark on the Principal Register that, when used in connection with an applicant's goods, is merely descriptive of them. 15 U.S.C. § 1052(e)(1). "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 Aktiengesellschaft*, 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).

The determination of whether a mark is merely descriptive must be made in relation to the goods for which registration is sought, not in the abstract. *Chamber of Commerce*, 102 USPQ2d at 1219; *Bayer*, 82 USPQ2d at 1831. This requires consideration of the context in which the mark is used or intended to be used in connection with those goods, and the possible significance that the mark would have to the average purchaser of the goods in the marketplace. *Chamber of Commerce*, 102

briefs on appeal refer to the Board's TTABVUE docket system. *See Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014).

USPQ2d at 1219; *Bayer*, 82 USPQ2d at 1831; *In re Omaha Nat'l Corp.*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987). In other words, the question is not whether someone presented only with the mark could guess the goods listed in the identification. Rather, the question is 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) (quoting *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002)).

Evidence that a term is merely descriptive to the relevant purchasing public “may be obtained from any competent source, such as dictionaries, newspapers, or surveys,” *Bayer*, 82 USPQ2d at 1831, as well as “labels, packages, or in advertising material directed to the goods.” *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978).

Applicant argues that its proposed mark merely “suggests quality food that a ‘foodie’ would love.”² It further contends that its products are “directed to the entire universe of cheese and frozen item consumers -- not merely a subset of ‘foodie’ consumers,” and that “[t]his incongruous mismatch between the mark and the intended users makes FOODIE COLLECTIVE ‘suggestive’ -- not ‘merely descriptive.’”³

Applicant’s arguments are belied by the record evidence. A mark is suggestive if it “requires imagination, thought, and perception to arrive at the qualities or

² Applicant’s Brief, p. 5; 4 TTABVUE 7.

³ Applicant’s Appeal Brief, p. 5; 4 TTABVUE 6.

characteristics of the goods.”⁴ *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987). The mark at issue here, FOODIE COLLECTIVE, consists of two separate words. We look to “whether the mark as a whole, i.e., the combination of the individual parts, conveys any distinctive source-identifying impression contrary to the descriptiveness of the individual parts.” *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 750-51 (Fed. Cir. 1985). The record contains substantial evidence to show that Applicant’s proposed mark is not suggestive, but rather merely descriptive, when considered in relation to the goods.

According to the record, “foodie,” when used as a noun, is defined as “a person having an avid interest in the latest food fads.”⁵ The word “collective” may be defined as “a business or organization that is owned by the people who work there.”⁶ Taken together, the dictionary evidence shows that Applicant’s mark, FOODIE COLLECTIVE, when considered as a whole, immediately conveys a feature of the identified goods, namely that Applicant’s “Cheese; Frozen appetizers and entrees consisting primarily of meat, fish, poultry or vegetables” are produced by a “foodie collective” i.e. a business organization operated by employees who share an avid interest in food fads.⁷ “Foodie” as used in Applicant’s mark serves as an adjective

⁴ Suggestive marks, unlike merely descriptive terms, are registrable on the Principal Register without proof of secondary meaning. *See Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 71 USPQ2d 1173, 1180 (Fed. Cir. 2004).

⁵ MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/foodie>, accessed on December 1, 2021, submitted with December 2, 2021 Office Action at TSDR 11.

⁶ MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/collective>, accessed on December 1, 2021, submitted with December 2, 2021 Office Action at TSDR 26.

⁷ We need not affirm the refusal based on the reasoning proffered by the Examining Attorney, that the mark FOODIE COLLECTIVE is merely descriptive because it “describes the target

modifying the composition of the entity that produces Applicant's cheese and frozen food items.

Only where the combination of descriptive terms creates a unitary mark with a unique, incongruous, or otherwise nondescriptive meaning in relation to the goods is the mark registrable as suggestive. *Cf. In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968) (SUGAR & SPICE held not merely descriptive of bakery products). Given that the goods in this case are food items and a collective is a commonly known type of business entity, the proposed mark in this case merely describes the producer of the identified goods. There is no evidence that prospective consumers would attribute any other meanings to the mark FOODIE COLLECTIVE. *Compare In re Tennis in the Round Inc.*, 199 USPQ 496, 498 (TTAB 1978) (TENNIS IN THE ROUND held not merely descriptive for providing tennis facilities, the Board finding that the association of applicant's marks with the phrase "theater-in-the-round" created an incongruity because applicant's tennis facilities are not at all analogous to those used in a "theater-in-the-round") *with In re Mecca Grade Growers, LLC*, 125 USPQ2d 1950, 1955 (TTAB 2018) (MECHANICALLY FLOOR-MALTED merely descriptive of malt for brewing and distilling and processing of agricultural grain). Again, the question of whether a proposed mark is merely descriptive is not

audience of the applicant's foods products ...foodies as a group or collective group of people." Examining Attorney's Brief, 6 TTABVUE 5. "The Board need not find that the examining attorney's rationale was correct in order to affirm the refusal to register, but rather may rely on a different rationale." TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") § 1217 (2022). Hence, we need not address the argument raised by Applicant that the mark does not describe "an appreciable number" of the intended users of the goods. *See In re Camel Mfg. Co., Inc.*, 222 USPQ 1031 (TTAB 1984).

determined by asking whether one can guess, from the mark itself, what the goods are, but rather by asking, when the mark is seen on or in connection with the goods, whether it immediately conveys information about their nature. *In re MBNA Am. Bank N.A.*, 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003); *In re Patent & Trademark Serv. Inc.*, 49 USPQ2d 1537, 1539 (TTAB 1998). No imagination or thought is required by prospective consumers to discern this feature of Applicant's goods.

In sum, we find Applicant's proposed standard character mark FOODIE COLLECTIVE to be merely descriptive of the identified goods within the meaning of Section 2(e)(1) of the Trademark Act, and therefore ineligible for registration on the Principal Register in the absence of a showing of acquired distinctiveness.

Decision: The refusal to register is affirmed.