

5/2/01

**THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF
THE TTAB**

Paper No. 12
PTH

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Ralston Purina Company
v.
Grain Processing Corporation
—

Cancellation No. 29,441
—

Alpheus E. Forsman for Ralston Purina Company

Thomas P. Arden of McBride Baker & Coles for Grain
Processing Corporation

Before Hairston, Chapman and Wendel, Administrative
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Ralston Purina Company has petitioned to cancel a
registration owned by Grain Processing Corporation for
WORLD'S BEST CAT LITTER for "cat litter."¹

As grounds for cancellation petitioner alleges that
the phrase WORLD'S BEST CAT LITTER is incapable of

¹ Registration No. 2,236,298 issued March 30, 1999. The words "CAT LITTER" have been disclaimed apart from the mark as shown.

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functioning as a trademark and therefore the mark is not entitled to registration on the Supplemental Register.

Respondent, in its answer, denied the allegations of the petition to cancel.

The record consists of the pleadings; the file of the involved registration; and a stipulation of facts accompanied by photographs of respondent's goods. In addition, petitioner has submitted by way of notice of reliance dictionary definitions of the words "best" and "world" and a copy of an advertisement of respondent's goods from a periodical. In its notice of reliance, respondent submitted third-party registrations of marks incorporating the phrase "WORLD'S BEST." Neither party took testimony. Both parties filed briefs, but an oral hearing was not requested.

Petitioner argues that WORLD'S BEST CAT LITTER is a geographically defined superlative coupled with the name of the involved goods, and as such is incapable of functioning as a trademark for the goods under Section 23 of the Trademark Act. Petitioner further argues that the phrase cannot function as a mark because it is an ordinary laudatory expression that lacks even a low level of originality or distinctiveness.

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Respondent, on the other hand, argues that laudatory terms are capable of functioning as marks and that the phrase WORLD'S BEST CAT LITTER connotes a vague characteristic rather than a specific quality or attribute, such that the phrase is capable of functioning as a mark. Respondent further argues that the mark is used on packaging for respondent's cat litter in such a way as to distinguish the source of respondent's product.

Before turning to the merits of the case, we must first consider an evidentiary matter. Respondent has objected to the copy of an advertisement for respondent's goods introduced by petitioner on the ground that the advertisement has not been authenticated. Respondent's objection is not well taken, however, because the advertisement appeared in a publication available to the general public and was therefore appropriately introduced into evidence by way of petitioner's notice of reliance under Trademark Rule 2.122(e). See TBMP Section 708. We note also respondent's contention that "the advertisement itself is not probative as promotional material or in showing [respondent's] promotional activity." While we do not exactly understand what respondent means by this, we find the advertisement to be probative of the manner in which respondent advertises its goods. In sum,

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respondent's objections to the copy of the advertisement are not well taken.

We turn then to the merits of this proceeding. Section 23 of the Trademark Act (15 U.S.C. § 1091) states that a mark capable of distinguishing an applicant's goods or services and not registrable on the Principal Register may be registered on the Supplemental Register.

At the outset, we note that there is no dispute that WORLD'S BEST CAT LITTER is a laudatory phrase. There is nothing in Section 23 that bars laudatory marks as a whole from registration. See *In re Bush Brothers & Co.*, 12 USPQ2d 1058, 1060 (Fed. Cir. 1989) ("Laudation is not inimical to a term's capability of functioning as a trademark.") However, for a laudatory phrase to be registrable, it must have some element of originality or uniqueness that would render the expression capable of distinguishing respondent's goods from like goods of others. *Ex parte I. Lewis Cigar Mfg. Co.*, 95 USPQ 224 (Exam. In Chief 1952). The issue here is whether WORLD'S BEST CAT LITTER is capable of indicating origin, i.e., whether WORLD'S BEST CAT LITTER is of such a nature that ordinary purchasers would be likely to consider that the phrase indicated such origin. *In re Helena Rubenstein, Inc.*, 410 F.2d 438, 441, 161 USPQ 606, 608 (CCPA 1969).

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The phrase WORLD'S BEST CAT LITTER is a combination of the common laudatory phrase WORLD'S BEST and the generic wording CAT LITTER. Our primary reviewing court, the Court of Appeals for the Federal Circuit recently held that a phrase similar to the one now before us, namely THE BEST BEER IN AMERICA, was not capable of functioning as a trademark for beer. The Court stated:

The proposed mark is a common, laudatory advertising phrase, which is merely descriptive of Boston Beer's goods. Indeed, it is so highly laudatory and descriptive of the qualities of its product that the slogan does not and could not function as a trademark to distinguish Boston Beer's goods and serve as an indication of origin.

In re Boston Beer Company L.P., 198 F.3d 1370, 1373, 153 USPQ2d 1056, 1058 (Fed. Cir. 1999) *affirming In re Boston Beer Co. L.P.*, 47 USPQ2d 1914 (TTAB 1998).

We find similarly that WORLD'S BEST CAT LITTER is such a highly laudatory and descriptive phrase that it cannot function as a trademark. Consumers would view WORLD'S BEST CAT LITTER as mere puffery and not as a source indicator of respondent's goods. See e.g., *In re Carvel Corp.*, 223 USPQ 65 (TTAB 1984) (AMERICA'S FRESHEST ICE CREAM found not capable of distinguishing goods from like goods of others within the meaning Section 23); and *Kotzin v. Levi Strauss & Co.*, 111 USPQ 161, 162 (Comm. 1956) (AMERICA'S FINEST represents mere "puffing" or "touting" in advertising and

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seeking customers for respondent's overalls, and as used, it neither identifies nor distinguishes respondent's products).

We are not persuaded by respondent's argument that WORLD'S BEST CAT LITTER is used in such a manner that it serves to identify and distinguish respondent's goods. Reproduced below are copies of a photograph of the front of a package for respondent's cat litter and an advertisement for respondent's cat litter that appeared in Cat Fancy.

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It is respondent's position that, in the absence of any other product designation on the package, purchasers would view WORLD'S BEST CAT LITTER as a source indicator. We disagree. The mere fact that no other indicia appears on the package does not mean that WORLD'S BEST CAT LITTER is capable of functioning as a mark.

Here, WORLD'S BEST is such a common superlative, highly descriptive phrase that, even assuming respondent's cat litter has been determined to be the "world's best," if a better or equally good cat litter is produced in the future, the new producer(s) should be entitled to use that designation in selling its goods. See *Carvel* at 69. Stated differently, WORLD'S BEST is the type of superior claim that should be freely available to all competitors in any given field to refer to their products or services subject to the limits of the law. *In re Boston Beer Co. L.P.*, *supra*.

With regard to the third-party registrations relied on by respondent, while uniformity under the Trademark Act is desired, we would point out that the Board is not bound by the underlying decisions to grant those registrations. Rather, we must look to the statute and the precedent of our primary reviewing court.

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In sum, we find that WORLD'S BEST CAT LITTER is not capable of identifying and distinguishing respondent's goods from like goods of others within the meaning of Section 23.

Decision: The petition to cancel is granted and Registration No. 2,236,298 will be cancelled in due course.