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Paper No. 10
PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Chi-Chi's, Inc.

Serial No. 75/536,690

Corrine M. Freeman of Lyon & Lyon LLP for Chi-Chi's, Inc.

Anna Erenburg, Trademark Examining Attorney, Law Office 115
(Tomas Vlcek, Managing Attorney).

Before Hairston, Wendel and Bottorff, Administrative
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

An application has been filed by Chi-Chi's, Inc. to
register the term SALSAFIED for "restaurant services."¹

The Trademark Examining Attorney has refused
registration under Sections 1, 2, 3 and 45 of the Trademark
Act on the ground that the term, as used on the specimens
of record, fails to function as a mark for the identified
services.

¹ Serial No. 75/536,690, filed August 14, 1998, alleging dates of
first use of March 1997.

When the refusal was made final, applicant appealed. Applicant and the Examining Attorney have filed briefs in the case.²

The specimens of record consist of applicant's menu.³ Applicant maintains that the term SALSAFIED functions as a mark for its restaurant services because the term is unique and fanciful, and is used repeatedly and in a prominent manner on the menu. Also, applicant argues that in addition to the term SALSAFIED, it uses other variations of the word "salsa" on the menu, e.g., SALSAFY and SALSAFICATION, and this will cause customers to identify all the variations, including SALSAFIED, with applicant.

There is no dispute that the term SALSAFIED appears in the menu a number of times. As applicant points out in its brief, the term SALSAFIED appears as part of the menu heading "Salsafied Specialties;" in text which applicant

² Applicant, for the first time with its reply brief, submitted the affidavit of its Senior Vice-President for Marketing along with several exhibits. Under Trademark Rule 2.142(d), evidence submitted for the first time with a brief on appeal is generally considered untimely and therefore usually given no consideration. In view thereof, we have not considered this evidence in reaching our decision herein.

³ We note that the menu is a substitute specimen and that the specimen submitted with the application consists of an advertisement. Applicant, however, has not argued that the term SALSAFIED, as used on the advertisement, functions as a mark. In view thereof, and since both applicant and the Examining Attorney have focused their arguments on use of the term SALSAFIED on applicant's menu, we likewise have considered only applicant's menu in reaching our decision.

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denotes as "The Declaration of Salsafication;" as part of a description provided under the "Lexicana de Chi-Chi's;" and several times in the descriptions of various food items.

Reproduced below are examples of some of these uses.

As noted by the Board in *In re Remington Products Inc.*, 3 USPQ2d 1714, 1715 (TTAB 1987):

To be a mark, the term, or slogan, must be used in a manner calculated to project to purchasers or potential purchasers a single source or origin for the goods [or services] in question. Mere intent that a term function as a trademark [or service mark] is not enough in and of itself, any more than attachment of the trademark symbol would be, to make a term a trademark.

A critical element in determining whether a term is a trademark is the impression the term makes on the relevant public.

In this case, we disagree with applicant that the term SALSAFIED, as used on the menu, functions as a mark for applicant's restaurant services. Contrary to applicant's contention, the only fairly prominent use of the term on the menu is as part of the phrase "Salsafied Specialties" which even applicant acknowledges is a menu heading. The menu heading serves to identify the type of specialty dishes applicant offers in its restaurant, rather than the restaurant services themselves. The remaining uses of SALSAFIED in the menu are decidedly less visible as they are buried in text. These uses simply do not stand out among the over fifty appetizer and entrée listings and accompanying descriptions. While it is not necessary that the term be more prominent than everything else on the menu, where as here, it is so intermingled among text,

customers would be unable to discern that this particular term is a service mark. Further, because applicant has used the term SALSAFIED in so many diverse ways on the menu, e.g., as part of a menu heading; within food and drink descriptions; and to describe the nature of applicant's patrons, i.e., "salsafied people;" we believe that customers and potential purchasers would view the term SALSAFIED, as used on the menu, as simply a clever play on the word salsa, and not as a source of origin of applicant's restaurant services.

In reaching our decision, we have not overlooked the fact that applicant uses other "variations" of the word salsa in the menu. However, we are not persuaded that such uses would cause customers and prospective purchasers to regard the term sought to be registered here, SALSAFIED, as denoting source. In this regard, we note that there is no evidence properly before us of applicant's promotion of the term SALSAFIED and the other variations of the word salsa in connection with applicant's restaurant services.

Decision: The refusal to register is affirmed.