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Mailed:  
July 25, 2006

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Circus Restaurant Group, LLC

Serial No. 78440471

David E. Rook of Thuillez, Ford, Gold, Johnson & Butler,  
LLP for Circus Restaurant Group, LLC.

Khanh M. Le, Trademark Examining Attorney, Law Office 113  
(Odette Bonnet, Managing Attorney)

Before Seeherman, Bucher and Walsh, Administrative  
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Circus Restaurant Group, LLC has appealed from the  
final refusal of the Trademark Examining Attorney to  
register CIRCUS CAFE and design, as shown below:



for "a circus theme restaurant offering a complete lunch and dinner menu."<sup>1</sup> The colors red, orange and blue are claimed as a feature of the mark. Applicant has supplied the following description of its mark:

The mark consists of a crown open at the top consisting of seven points with a ball above each point. The points are blue and orange alternately. The orange in the points shade from light to dark orange from the base of a point to the tip. The ball above the point is blue if the point is orange and orange if the point is blue. The orange in the balls shades from light to dark orange from the center of the ball to its edge. The center portion of the mark includes the stylized lettering Circus Cafe. The letters are red with orange trim. Below the words Circus Cafe are the words Saratoga Springs, NY. No claim is made to the words Saratoga Springs, NY. The bottom portion of the mark is a symmetrical unfurling banner that is red.

The Examining Attorney required, in addition to applicant's voluntary disclaimer of "Saratoga Springs, NY," that applicant disclaim exclusive rights to "Circus Cafe." When applicant refused to submit such a disclaimer, the Examining Attorney made the requirement final and therefore refused registration of the mark. It is the refusal based

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<sup>1</sup> Application Serial No. 78440471, filed June 24, 2004, and asserting first use as of February 1, 2004, and first use in commerce as of May 1, 2004.

on this requirement for a disclaimer that is the subject of this appeal.

Applicant and the Examining Attorney have filed appeal briefs. Applicant did not file a reply brief, nor did it request an oral hearing.

Section 6(a) of the Trademark Act, 15 U.S.C. §1056(a), provides that the Director may require the applicant to disclaim an unregistrable component of a mark otherwise registrable. Section 2(e)(1) of the Act, 15 U.S.C. §1052(e)(1) prohibits the registration of a mark that is merely descriptive of the identified goods or services. Therefore, we must consider whether the term CIRCUS CAFE is merely descriptive of applicant's services, which applicant has identified as "a circus theme restaurant offering a complete lunch and dinner menu."

The test for determining whether a mark is merely descriptive is whether the involved term immediately conveys information concerning a quality, characteristic, function, ingredient, attribute or feature of a product or service. It does not have to describe every one of these. It is enough if it describes a single, significant quality, feature, function, etc. In re Venture Lending Associates, 226 USPQ 2825, 286 (TTAB 1985). See also, In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). Moreover,

the question is not decided in a vacuum but in relation to the goods on which, or the services in connection with which, the mark is used. In re Venture Lending Associations, supra.

In this case, the word CAFE is a generic term for applicant's services, which are identified as a restaurant. The Examining Attorney has made of record a dictionary listing for "café" which defines it as "a coffeehouse, restaurant or bar." The American Heritage Dictionary of the English Language, 4<sup>th</sup> ed., © 2000. As for the word CIRCUS, applicant's own identification describes its services as "a circus theme restaurant," thereby establishing that a circus theme is a significant characteristic of the services. In addition, the Examining Attorney has made of record excerpts from a number of articles taken from the NEXIS database in which restaurants and food are described as having a circus theme. See, for example:

The Circus Drive-In, in Wall, is one of the few remaining drive-in restaurants left and all of the food is circus themed.

"Courier Post" (Cherry Hill, NJ),  
July 5, 2005

Headline: New restaurant opens with  
colorful circus theme

The cafe's grand opening Wednesday included jugglers, clowns and circus-themed food.

"The Times-Union" (Albany, NY),  
May 25, 2004

Sixth Street between Grace and Franklin streets will be tented for the Bravura Bash. Creative black tie is suggested for the circus-theme cocktail buffet catered by Cafe Mosaic.

"Richmond Times Dispatch,"  
July 20, 2003

There's no clowning around when it comes to food at this circus-themed palace of gastronomy.

"Daily News" (New York), April 25, 2003

And Adler at 3 Ring—who was inspired to serve cotton candy in part because of the circus theme of his restaurant...

"San Jose Mercury News" (CA),  
October 4, 2000

Warm and cozy and done with a charming circus theme, this upscale Brazilian restaurant...

"The New York Times," October 25, 1998

Applicant appears to take issue with the NEXIS evidence because "most of the results describe restaurants associated with the more traditional aspects of a 'circus' like a theme park or are simply describing 'circus'-themed events." Brief, p. 2. Applicant appears to take the position that the evidence must show that the word "circus" has been used to describe services that are rendered in the exact same manner as applicant's to be probative. However, the evidence is sufficient to show that consumers will

understand the term "circus-themed," when applied to restaurants or restaurant-type food services, as describing a characteristic of the services. As stated above, it is not necessary, for a term to be merely descriptive, that it describe every feature of the services, only that it describe a significant feature or characteristic of them. Thus, the NEXIS excerpts show that the term "circus-theme" or variations on that term is used to describe (convey information about) restaurants services such as applicant's. Moreover, applicant has identified its own services as having a circus theme, thereby indicating that this is an appropriate way to describe them.

As noted, the term used in both applicant's identification and in the majority of NEXIS excerpts to describe the restaurants and food services is "circus theme," rather than "circus" per se. However, the omission of the word "theme" in applicant's mark does not change the significance of the word CIRCUS. That is, consumers viewing the mark CIRCUS CAFE in connection with "a circus theme restaurant offering a complete lunch and dinner menu" will immediately understand that the restaurant has a circus theme; no imagination, thought or perception is necessary.

Applicant asserts that there is no competitive need for the term "circus" for restaurant services: "As evidenced by the Examiner's NEXIS search there does not appear to be any clamoring past or present for the descriptive use of "circus" in connection with a restaurant." Brief, p. 4. We disagree. The NEXIS evidence shows that a number of restaurants or other food-service operations use a circus theme.

Applicant also argues that CIRCUS CAFE is inherently distinctive.<sup>2</sup> Applicant appears to take this position because a restaurant is not in fact a circus, which it asserts is defined as "a public entertainment consisting typically of a variety of performances, by acrobats, clowns, and trained animals," "a traveling company that performs such entertainment" and "a circular arena surrounded by tiers of seats and often covered by a tent in

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<sup>2</sup> This position contradicts that taken by applicant in a companion application. In response to the first Office action, applicant submitted a copy of a response it had provided in connection with its application Serial No. 78440256 for CIRCUS CAFE which had been refused registration on the ground that it was merely descriptive of the identified restaurant services. We note that applicant ultimately amended this application to the Supplemental Register, thus acknowledging that the mark is not inherently distinctive, and that a registration issued on the Supplemental Register, No. 2009770, on October 25, 2005. While applicant has, by its submission of the response, apprised us of the existence of the application, because neither applicant nor the Examining Attorney submitted the ensuing registration or discussed the registration in their briefs, we have not relied on this registration in reaching our decision herein.

which such shows are performed.”<sup>3</sup> We acknowledge that applicant is rendering restaurant services, and not entertainment services in the nature of a circus. However, as stated above, the determination of whether a term is merely descriptive is made in relation to the services with which the mark is used. When CIRCUS CAFE is used in connection with the identified restaurant services, consumers will immediately understand that the mark describes a restaurant that has the theme of a circus, rather than describing an actual circus.

Applicant also makes the argument that if it used its mark with a restaurant that did not have a circus theme the term CIRCUS CAFE would be inherently distinctive:

[A] restaurant in the absence of circus décor would be permitted registration of the name “Circus Café” as inherently distinctive. In fact, the name would in all likelihood be considered arbitrary. The applicant asserts the overall theme of “circus” is arbitrary for a restaurant serving ordinary lunch

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<sup>3</sup> Applicant did not submit a copy of these definitions during the prosecution of the application and, indeed, did not submit a copy with its brief, but merely included the definitions in the text of its brief, and asserted that they were taken from The American Heritage Dictionary of the English Language, 3d ed. © 1992. While it is customary to submit an actual copy of the dictionary definition in such circumstances, in view of the fact that the Examining Attorney has raised no objection, and because the Board may take judicial notice of dictionary definitions, see, *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), we have considered the definitions set forth in applicant’s brief.

and dinner fare. There, rather than suggestive (or descriptive as the USPTO decided) the name "Circus Café" retains an arbitrary quality in the context of a restaurant.

Brief, p. 8 (emphasis in original).

However, as the Examining Attorney has pointed out, applicant's mark is used in connection with a restaurant having a circus theme. Applicant has acknowledged this in its very identification of services, "a circus theme restaurant," and it is evidenced by its menu (submitted as a specimen) which has on its cover a woman in a ringmaster's outfit sitting on a horse which is on a platform in the air, and lists as food categories "The Main Ring" and "The Big Top," with items such as "Clown Car Turkey Club" and "Ringmaster's Chef Salad."

In *In re Ruffin Gaming LLC*, 66 USPQ2d 1924 (TTAB 2002), the Board stated that the mere fact that a term could thematically describe a trade dress or decor would not make the term merely descriptive if the trade dress or decor is arbitrary, fanciful or suggestive. However, the Board also stated that if the trade dress or decor is descriptive, then a term which describes that thematic manner of use is merely descriptive. In the present case, the Nexis excerpts submitted by the Examining Attorney show that a circus theme can and has been used by restaurants

and other food service operations, such that a circus themed restaurant would not be considered arbitrary, fanciful or suggestive. Consequently, the term CIRCUS CAFE, which is merely descriptive of a restaurant with a circus theme, is merely descriptive of applicant's identified restaurant services, which are specifically identified as "a circus theme restaurant offering a complete lunch and dinner menu."

Decision: The requirement for a disclaimer of CIRCUS CAFE is affirmed, and therefore the refusal of registration is affirmed. However, if applicant submits the required disclaimer within thirty days of the mailing date of this decision, the decision will be set aside. See Trademark Rule 2.142(g).