

03/30/01

**THIS DISPOSITION
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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. 75/537,251

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 SALSAFICATION 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. 75/537,251, 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. Applicant maintains that the term SALSAFICATION functions as a mark for its restaurant services because the term is unique and fanciful, which is in contrast to much of the other wording on the menu which is ordinary and/or descriptive. In addition, applicant points out that the term is used on the menu three times; once on the cover and twice on an inner panel. Further, applicant argues that in addition to the term SALSAFICATION, it uses other variations of the word "salsa" on the menu, e.g. SALSAFY and SALSAFIED, and this will cause customers to identify all the variations, including SALSAFICATION, with applicant.

As noted by the Board in *In re Remington Products, Inc.*, 3 USPQ2d 1714, 1725 (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 of origin for the goods [or services]

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 a decision herein.

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 SALSAFICATION, as used on the menu, functions as a mark for applicant's restaurant services. On the menu cover, the term is intermingled with various designs, e.g., a woman, cactus, and guitar, and such words as "fiesta" and "chips". The term SALSAFICATION as well as the other words and designs are in yellow on a red background. The menu cover in reduced size is reproduced on the next page.

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Although applicant makes much of the fact that the term is close to the outstretched arm of the woman, as the Examining Attorney points out, there is nothing to draw customers or prospective purchasers attention to the term SALSAFICATION over the many other pictures and words on the cover of the menu. In fact, the term is so intermingled in the whole milieu that it is hardly likely to make any impact, much less a significant impact on applicant's customers and prospective purchasers. Rather, it is the term CHI-CHI'S and the phrase "Life Always Needs A Little Salsa" which customers and prospective purchasers are likely to notice on the menu because they are depicted in contrasting white letters.

On the inner panel of the menu, the term is used as part of the phrase "The Declaration of Salsafication" and within the text which appears thereunder. Neither use is particularly prominent, and to the extent that customers and prospective purchasers would notice the term, they would view it 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

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uses would cause customers and prospective purchasers to regard the term sought to be registered here, SALSAFICATION, as denoting source. In this regard, we note that there is no evidence properly before us of applicant's promotion of the term SALSAFICATION and the other variations of the word salsa in connection with applicant's restaurant services.

Decision: The refusal to register is affirmed.

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