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TTAB

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AD

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Grupo Bimbo, S.A. B. de C.V.<sup>1</sup>

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Serial No. 78859187

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Russell N. Rippamonti of Fish & Richardson P.C. for Grupo Bimbo, S.A. B. de C.V.

Robert Clark, Trademark Examining Attorney, Law Office 101 (Ronald R. Sussman, Managing Attorney).

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Before Walters, Holtzman, and Drost, Administrative Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On April 11, 2006, applicant Grupo Bimbo, S.A. B. de C.V. applied to register the mark TORTILLA BREAD (in standard character form) on the Principal Register for goods identified as "food products, namely flat bread" in Class 30. The application (Serial No. 78859187) is based

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<sup>1</sup> By change of name from Grupo Bimbo, S.A. de C.V. See Reel and Frame 3500/0952.

on applicant's allegation of a bona fide intention to use the mark in commerce.

The examining attorney has refused to register applicant's mark on the ground that the mark, when applied to the goods, is either merely descriptive or, in the alternative, deceptively misdescriptive. 15 U.S.C. § 1052(e)(1). After the examining attorney made the refusal final, this appeal followed.<sup>2</sup>

The examining attorney argues that "TORTILLA BREAD is a recognized term for a type of bread" and if it is not a recognized term, "the combination results in a composite that is itself descriptive." Brief at unnumbered pp. 3-4. The examining attorney also argues that:

In the present application, applicant's product does not fit any of the standard or traditional recipes for a TORTILLA BREAD. As such, applicant's goods are not technically a TORTILLA BREAD. Nevertheless, the examining attorney asserts that it's very plausible that applicant's flat bread would be perceived as a TORTILLA BREAD or at least a simulated version of one, based on the usage of the term in the bread industry and known to consumers based on the computerized evidence from GOOGLE. Thus, the mark is at least deceptively misdescriptive.

Brief at 12.

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<sup>2</sup> While applicant's brief was mailed in a timely manner, it was untimely received in the Office because it was not properly addressed. Nonetheless, inasmuch as applicant has explained this clerical error, we will consider its appeal brief. TBMP § 1203.02(a) (2d ed. rev. 2004).

In response, applicant argues that the "terms comprising Applicant's mark are *suggestive* of Applicant's goods. A tortilla is 'a thin round of unleavened cornmeal or wheat flour bread usually eaten hot with a topping or filing (as of ground meat or cheese)'... Applicant's mark is intended to suggest the mobility of a tortilla and the thickness and leavened quality of bread." Brief at 3. Furthermore, "Applicant's mark suggests the pliability of a tortilla but consumers are not likely to believe that the goods are tortillas." Brief at 4.

When the refusal was made final, applicant filed this appeal.<sup>3</sup>

"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 Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007). *See also In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987). To be merely descriptive, a term need only describe "a significant feature or characteristic" of the goods or

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<sup>3</sup> We sustain the examining attorney's objection to applicant's untimely submission of pictures of its goods that it attached to its brief. 37 CFR § 2.142(d). *See also In re First Draft Inc.*, 76 USPQ2d 1183, 1192 (TTAB 2005) ("Submission of the TARR printout with its appeal brief, however, is an untimely submission of this evidence").

services. *In re MBNA America Bank N.A.*, 340 F.3d 1328, 67 USPQ2d 1778, 1781 (Fed. Cir. 2003). See also *Meehanite Metal Corp. v. International Nickel Co.*, 262 F.2d 806, 120 USPQ 293, 294 (CCPA 1959). Descriptiveness of a mark is not considered in the abstract, but in relation to the particular goods or services for which registration is sought. *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978) ("Appellant's abstract test is deficient - not only in denying consideration of evidence of the advertising materials directed to its goods, but in failing to require consideration of its mark 'when applied to the goods' as required by statute").

The examining attorney has submitted two recipes from the internet for TORTILLA BREAD to support his arguments. These references show that the term "Tortilla Bread" can refer to different bread products that have the characteristics or features of tortillas.

Title: **Tortilla Bread..**  
2¾ cup All purpose flour  
1 T Sugar  
1 pk Dry yeast  
2 ts Salt  
2 c. Warm Water  
2 c. White cornmeal (masa hanna)

[www.ocbtracker.com](http://www.ocbtracker.com)

**Tortilla Bread**

- 3 medium sized flour tortilla shells
- ½ tsp. garlic salt

- 1 tsp. mexican oregano
- 2 tbs. vegetable oil
- 1 tsp. parmesan cheese
- pinch cayenne pepper

<http://www.geocities.com/smartcook/>

The examining attorney also submitted the following definitions and arguments with its final Office action

(second page, footnotes omitted):

Applicant describes its goods as flat bread. Flatbread is defined as: Any of various breads made from usually unleavened dough and baked in flat, often round loaves.<sup>4</sup> This would include tortilla bread. Tortilla is defined as: A thin disk of unleavened bread made from cornmeal or wheat flour, baked on a hot surface, and usually served topped with or rolled around beans, ground meat, or cheese.

We also take judicial notice of the following definitions of "tortilla."<sup>5</sup>

A thin, round, unleavened bread prepared from cornmeal or sometimes wheat flour, baked on a flat plate of iron, earthenware, or the like.  
*The Random House Dictionary of the English Language (unabridged)* (2d ed. 1987).

A round thin unleavened bread, usu. made from cornmeal or flour and served hot with toppings of ground meat or cheese.  
*Webster's II New Riverside University Dictionary* (1984).

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<sup>4</sup> We add a similar definition of "flat bread" as "any of various often unleavened breads baked in round, flat loaves or cakes, as those eaten in India, the Middle East, and Italy." *The Random House Dictionary of the English Language (unabridged)* (2d ed. 1987).

<sup>5</sup> *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

It is clear from these definitions that the "tortilla" is a bread. Therefore, while perhaps not as commonly used together as "white bread" or "rye bread," there is nothing incongruous about the term "Tortilla Bread." Furthermore, applicant's goods are flat breads and tortillas are described as thin, round, unleavened bread prepared from cornmeal or sometimes wheat flour, baked on a flat plate. Thus, tortillas would be included within the definition of applicant's flat breads. Therefore, tortillas can accurately be described as a flat bread and the term TORTILLA BREAD would at the very least be merely descriptive for tortilla flat breads.

However, applicant argues (Brief at 3) that its mark is not descriptive apparently because it assumes its actual goods are more limited than its identified goods.

Applicant's mark suggests the roundness, pliability and manipulability of a tortilla, without being a tortilla; Applicant's mark suggests the fluffy thickness and sink-your-teeth-into depth of bread without being bread.

In effect, applicant maintains that its actual goods are not tortillas but rather a food product that combines characteristics of tortillas and leavened bread. Even if applicant's goods were to be limited in this manner, we still conclude that term TORTILLA BREAD would be merely

descriptive of a tortilla-like product that has a more traditional bread-like thickness.

When purchasers would see the mark TORTILLA BREAD used with a tortilla-like, leavened bread product, they would immediately understand that the product has the combined characteristic of tortillas and leavened bread. *In re Orleans Wines, Ltd.*, 196 USPQ 516, 517 (TTAB 1977) ("The only rational, logical reaction by a normal person to the term 'BREADSPRED' when used in association with jellies and jams would in our opinion be a spread made for bread"). See also *In re Bongrain International (American) Corp.*, 894 F.2d 1316, 13 USPQ2d 1727, 1728 (Fed. Cir. 1990) ("The evidence of record clearly indicates that 'BABY BRIE' is merely descriptive of the product and hence is not registrable. Addition of the modifier 'baby' signifies simply small size"); *Cummins Engine Co., Inc. v. Continental Motors Corp.*, 359 F.2d 892, 149 USPQ 559, 561 (CCPA 1966) ("We think 'turbodiesel,' to be naturally and adequately nominative of engines having exhaust driven turbine superchargers"); and *In re Tekdyne Inc.*, 33 USPQ2d 1949, 1952 (TTAB 1994) ("Consequently, when applied to applicant's surgical clamps, the term 'MICRO-RETRACTOR' directly describes, without conjecture or speculation, the

nature, function or use of applicant's goods, namely, that the product is a small retractor").

In this case, there is nothing unique or incongruous about the combined term TORTILLA BREAD. Applicant has simply combined the words that best describe its specific bread product, i.e. that its bread has some of the characteristics of tortillas.

Based on this record, we conclude that applicant's mark is merely descriptive when used with applicant's goods inasmuch as applicant's mark identifies a feature or characteristic of applicant's goods, i.e., they are bread products that are similar to tortillas.

Decision: The examining attorney's refusal to register the term TORTILLA BREAD on the ground that the mark is merely descriptive for food products, namely flat breads is affirmed.<sup>6</sup>

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<sup>6</sup> Inasmuch as we have found that the mark is merely descriptive both as to the goods described in the application and as to the goods as applicant refers to them in its papers, we do not reach the alternative, deceptively misdescriptive refusal. Applicant has not argued that its mark would not be used on a product that did not have the characteristics of tortillas.