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Paper No. 13
CEW

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Texas Steakhouse of Roanoke, Inc.

Serial No. 74/565,919

Gary S. Morris and William K. Wells, Kenyon & Kenyon for
applicant.

David C. Reihner, Trademark Examining Attorney, Law Office
107 (Thomas Lamone, Managing Attorney).

Before Seeherman, Quinn and Walters, Administrative
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Texas Steakhouse of Roanoke, Inc. has filed a trademark
application to register the mark TEXAS STEAKHOUSE & SALOON,¹
for "restaurant services."

The Trademark Examining Attorney has finally refused
registration under Section 2(e)(3) of the Trademark Act, 15

¹ Serial No. 74/565,919, in International Class 42, filed August 26,
1994, based on an allegation of use of the mark in commerce, alleging
dates of first use and first use in commerce of April 7, 1992. The
application includes a disclaimer of the phrase STEAKHOUSE & SALOON
apart from the mark as a whole and a statement of ownership of
Registration No. 1,801,237.

U.S.C. 1052(e)(3),² on the ground that applicant's mark is primarily geographically deceptively misdescriptive in connection with its services.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested. We affirm the refusal to register.

In order for registration to be properly refused under Section 2(e)(3), it is necessary to show that (i) the mark sought to be registered is the name of a place known generally to the public; and that (ii) purchasers are likely to believe, mistakenly, that the goods or services sold under applicant's mark have their origin in or are somehow connected with the geographic place named in the mark. *In re Nantucket, Inc.*, 677 F.2d 95, 213 USPQ 889 (CCPA 1982). *See also, In re California Pizza Kitchen, Inc.*, 10 USPQ2d 1704 (TTAB 1988), citing *In re Societa Generale des Eaux Minerals de Vittel S.A.*, 824 F.2d 957, 3 USPQ2d 1450 (Fed. Cir. 1987).

Mark Conveys Primarily Geographic Connotation.

² The amendments to Section 2 of the Trademark Act of 1946 made by Public Law 103-183, 107 Stat. 2057, The North American Free Trade Enactment Act, apply to applications filed on or after December 8, 1993. Prior to these amendments, the prohibitions against registration on the grounds that a mark is primarily geographically descriptive or that a mark is primarily geographically deceptively misdescriptive were contained in Section 2(e)(2) of the Act. Under the law as amended, the prohibition against registration on the ground that a mark is primarily geographically deceptively misdescriptive is contained in Section 2(e)(3) of the Act, which is applicable to the case herein. The legal standard for determining this issue has not changed, although marks found to be primarily geographically deceptively misdescriptive are no

With regard to the first prong of the test, we find that the primary significance of TEXAS is geographical. There is no dispute that TEXAS is a state in the southwestern part of the United States and that, as one of the largest states in the United States, it is a place known generally to the public.³

Further, we conclude that this geographic significance is the primary connotation of the mark TEXAS STEAKHOUSE & SALOON. We note that applicant has entered a disclaimer of STEAKHOUSE & SALOON in the application. Notwithstanding the disclaimer of record, the record supports the conclusion that the phrase STEAKHOUSE & SALOON would be perceived as merely informational in connection with the identified services, signifying that applicant's restaurants serve, at least, steak and alcoholic beverages. As such, the addition of the phrase STEAKHOUSE & SALOON to TEXAS does not detract from the primary geographic significance of the composite mark. *See, In re Chalk's International Airlines Inc.*, 21 USPQ2d 1637, 1639 (TTAB 1991).

Origin and Nature of Applicant's Services.

Applicant states (5th unnumbered page of July 28, 1995, response) that it does not operate any restaurants under the mark in TEXAS; that its services do not originate from, and

longer eligible for registration under the provisions of Section 2(f) of the Act, subject to certain grandfather provisions.

³ In support thereof, the Examining Attorney has made of record an excerpt from *Webster's New Geographical Dictionary* (1988).

are not based in, TEXAS; and that "none of [its] goods originate from the State of Texas" (brief, p. 5).⁴ As the Board noted in *California Pizza Kitchen, supra* at 1706:

[R]estaurant services would include the restaurant concept, menu, recipes, etc., and even though a customer in Atlanta, Georgia, would obviously recognize that the particular branch of the restaurant was physically located outside of California, he would be likely to assume that the restaurant services such as the concept, recipes and even possibly the food originated in the state of California.

In this regard, a perusal of the menu from applicant's restaurant, submitted as a specimen, indicates a restaurant concept and menu theme strongly connected to the state of TEXAS. For example, the menu cover includes the restaurant name, the caption "Lunch Menu" and the slogan "A Texas State of Mind." Menu items include "Yellow Rose of Texas - Awesome Onion," "On the Border Favorites," "Naples (TX) Pasta," "Texas Traditions," and "Texas Pheasant on a Stick." Further, the menu includes several items which are touted as coming from TEXAS, for example, "Del Rio Delmonico - a 7 oz. Texas certified Delmonico ribeye..." and "Mustang Island

⁴ If applicant's services or some of the food sold in applicant's restaurants, in fact, originated in TEXAS, the mark herein could be appropriately refused registration under Section 2(e)(2) of the Act, on the ground that such mark would be primarily geographically descriptive in connection with the identified goods. However, in view of applicant's assertions that neither its restaurant services nor the food served in its restaurants originates in TEXAS, the mark is properly refused registration, under Section 2(e)(3), on the ground that the mark is primarily geographically deceptively misdescriptive of the identified services. To the extent purchasers believe that the restaurant services or food served in applicant's restaurants under the mark originate in TEXAS, this belief is mistaken.

Shrimp - Four jumbo Lake Texas shrimp..." Neither applicant's menu nor the photographs of the front of one of applicant's restaurants, both submitted as specimens herein, indicate a concept that is limited to "a romantic image of the Old West." Rather, the restaurant, as evidenced in this record, portrays a timeless state of TEXAS theme.

Goods/Place Association.

We turn to the question of whether purchasers are likely to make a services/place association between the geographic place named in applicant's mark and the identified services. We answer that question in the affirmative. The Examining Attorney has submitted an excerpt from *The University Desk Encyclopedia* (1977) indicating that "Texas is the leading state for cotton, beef-cattle and sheep." (p. 967.) The possibility that restaurant patrons will draw an association between Texas and beef is supported by the very fact that applicant's own previously referenced menu touts its steak as being "Texas Certified." We find a clear likelihood that prospective and existing restaurant patrons are likely to believe, mistakenly in this case, that applicant's services have their origin in or are somehow connected with TEXAS. The record strongly supports the conclusion that applicant's restaurant theme encourages such an association. Further,

we note the Board's discussion of this issue in *California Pizza Kitchen, supra* at 1706-1707:

[R]estaurant services are so ubiquitous and a state is such a large, significant geographic area that it can be treated as a matter of common knowledge that restaurant services are rendered throughout every state of the United States, including California.

In view of the foregoing, we have no hesitation in concluding that consumers would assume restaurant services rendered under the mark "CALIFORNIA PIZZA KITCHEN" have their origin in California.

We believe the same is true in this case with regard to the state of TEXAS. Thus, we find sufficient evidence herein to conclude that a services/place association is likely to be made by purchasers between TEXAS and the restaurant services identified in this application.

Applicant's Argument.

Applicant argues, essentially, that the addition of the phrase STEAKHOUSE AND SALOON to TEXAS serves to mitigate the geographic significance of TEXAS because the mark, viewed in its entirety, "suggests the romance of the open range, gunfights at high noon, and an Old West saloon with swinging doors, an image that is deliberately enhanced by the carefully chosen Old West decor with which applicant has furnished each of his eating establishments." Applicant argues, further, that no association would be made by the public between applicant's services and the state of TEXAS.

The only evidence that applicant has submitted in support of these contentions is three statements signed by patrons of applicant's restaurants. The statements are identical and appear to have been prepared by applicant. In addition to stating that the individual is a regular patron of a specified one of applicant's restaurants, each statement reads as follows:

I have never believed, and do not currently believe, that the food or food services at the Texas Steakhouse & Saloon actually come from the State of Texas. I believe that the food and services probably originate locally.

I patronize the Texas Steakhouse & Saloon because I like the style of the restaurant and the quality of its food and service, not because I think either the food or food services actually come from Texas. I associate the words "Texas" and "Saloon" and the decor used throughout the restaurant with the informal, maverick image of the Western United States originating with the Old West cowboy movie and not with the present-day State of Texas or anything specific to Texas.

Two of the three statements are accompanied by the statements of applicant's restaurant managers to the effect that:

. . . I presented the attached Statement of Patron to a patron in the restaurant and asked him to read it and to sign it if he found it to be truthful and accurate. The patron agreed that the statement is truthful and accurate and has willingly signed the same.

We do not find these three conclusory form statements persuasive of a different result in this case. First, we find the submission of statements from only three of

applicant's patrons to be a woefully small sample which is insufficient to support applicant's contentions. Second, we are not persuaded by the form of the statements. Individual testimonials in the patron's own words would be significantly more persuasive, although three samples would remain too small a number to warrant a different conclusion.

Further, even if applicant had established an association between TEXAS and a particular "image," such association would not contradict the primary geographic significance of the term, as the association may be made precisely because of the primary significance of TEXAS as a state in the western part of the United States.

In conclusion, the Examining Attorney properly considered the facts and correctly refused registration under Section 2(e)(3) of the Act on the ground that the mark herein is primarily geographically deceptively misdescriptive in connection with the identified services.

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Decision: The refusal under Section 2(e)(3) of the Act
is affirmed.

E. J. Seeherman

T. J. Quinn

C. E. Walters
Administrative Trademark Judges,
Trademark Trial and Appeal Board