

**DECISION
of the Fifth Board of Appeal
of 8 June 2018**

In Case R 2661/2017-5

D ET VE ET ÜRÜNLERİ GIDA PAZARLAMA TICARET ANONİM SİRKETİ

Dikilitas Mahallesi, Üzengi Sokak No:8

Besiktas/Istanbul

Turkey

Applicant / Appellant

represented by SILEX IP, Poeta Joan Maragall 9, Esc. Izq., 3º Izq., 28020 Madrid,
Spain

APPEAL relating to European Union trade mark application No 16 433 369

THE FIFTH BOARD OF APPEAL

composed of G. Humphreys (Chairperson), V. Melgar (Rapporteur) and A. Pohlmann
(Member)

Registrar: H. Dijkema

gives the following

Decision

Summary of the facts

- 1 By an application filed on 4 March 2017, D ET VE ET ÜRÜNLERİ GIDA PAZARLAMA TICARET ANONİM SİRKETİ ('the applicant') sought to register the motion mark



for the following list of goods and services :

Class 25 - Clothing, namely, trousers, jackets, overcoats, coats, skirts, suits, jerseys, waistcoats, shirts, ready-made leather linings (parts of clothing), T-shirts, sweatshirts, dresses, bermuda shorts, shorts, pajamas, pullovers, jeans, tracksuits, rainwear, beachwear, bathing suits, swimming suits; clothing for sports (for exclusive use for sports), clothing for babies, namely, shirts, pants, coats, dresses; underclothing, namely, boxer shorts, brassieres, briefs, pants; socks; footwear, namely shoes excluding orthopedic shoes, sandals, waterproof boots, walking boots, booties, sporting shoes, slippers; shoe parts namely heelpieces, insoles for footwear, footwear uppers; headgear, namely caps, skull caps, sports caps, hats, berets; gloves (clothing), stockings, belts (clothing), camisoles, sarongs, scarves, neck scarves, shawls, collars, neckties, ties, suspender belts;

Class 30 - Coffee, cocoa, artificial coffee, vegetal preparations for use as coffee substitutes, cocoa-based beverages, coffee-based beverages; chocolate based beverages; noodles, macaroni, ravioli; bread, pastry and bakery products, namely, pies, cakes, donuts, muffins, tarts, pizzas, sandwiches, puddings, ready cake mixes, desserts, namely, bakery desserts, chocolate desserts, desserts confectionery and desserts made of flour; honey, royal jelly for human consumption, propolis for human consumption; flavorings, other than essential oils, vanilla flavorings, sauces, tomato sauce, spices; yeast, baking powder; flour for food, semolina, starch for food; granulated sugar, cube sugar, powdered sugar; teas, iceteas; confectionery, chocolates, candies, biscuits, chocolate wafers, crackers; chewing gums not for medical purposes; ice, ice creams, edible fruit ices; salt; processed cereals and cereal products; snacks made of cereals, namely, corn flakes, oatmeal; rice; molasses syrup for food;

Class 43 - Services for providing of food and drink; restaurants, self-service restaurants, cafeterias; cafés, canteen services, cocktail lounges, snack bars, catering, pubs; rental of food service equipment used in services providing food and drink; arranging temporary housing accommodations, namely hotels, motels, holiday camps, boarding houses, rental of tents, youth hostel services, room reservation services; reservation of temporary accommodation, rental of banquet and social function facilities for special occasions, namely, wedding receptions, conferences and meetings; providing day care centers; pet day care services, pet and animal boarding services.

The applicant claimed the colours:

Black, White, Silver, Light brown, Dark brown, Red, Pink; Golden; Ochre; Grey

The applicant described the mark as follows:

This is a motion mark in color representing a cinematic sequence with a duration of 3 seconds approximately. The stills in the sequence are spaced approximately 0.5 seconds apart. The initial still of the sequence is located at the upper left corner of the row at the top and the last still is located at the lower right corner of the row at the bottom. The motion progresses from left to right within each row, before moving down to the next row. The whole scene takes place in a kitchen, as it is apparent from the images shown in the stills. The scene describes the movements made by a chef while adding salt to a piece of meat located on a tray placed at the height of his waist. The initial still shows a chef standing up, over the piece of meat, looking at it. The chef's body is placed perpendicular to the piece of meat, where the right side of the body of the chef is near the tray, whereas the left side of his body is distant to the tray. His right arm is above the piece of meat and the fingers of his right hand are all together holding a pinch of salt, over the piece of meat. His left arm is almost besides his torso, whereas his left forearm is in a 90 degree angle in relation to his left arm. The second still shows that the chef has moved his torso advancing slightly his right side over the piece of meat. He has raised up his right arm in such a manner in which now it follows the line of his shoulder, horizontally over the tray containing the piece of meat. His right forearm is placed vertically over the piece of meat, where his fingers –now located above and slightly behind his right elbow- are sprinkling salt while the chef lays his head over his shoulder. His left arm has slightly moved away from his torso. Stills third, fourth, fifth and sixth recreate the movement of the fingers of the right hand of the chef at the time of sprinkling salt over the meat, with the peculiarity that the chef stands still with the exception of the fingers of his right hand, which progress the process of sprinkling salt, with the natural effect of opening his fingers in the last two frames, allowing the last remains of salt to fall over the piece of meat, which ends the motion. The rest of the body of the chef barely moves during the process of sprinkling the meat, mostly maintaining the position described in the second still.

- 2 The applicant maintained its request for registration notwithstanding the objections raised by the examiner.
- 3 On 16 October 2017, the examiner took a decision ('the contested decision') partially refusing the trade mark applied for, under Article 7(1)(b) EUTMR. The decision was based on the following main findings:
 - The mark applied for has been found to be devoid of any distinctive character in respect of some of the services claimed in Class 43 namely:

‘Services for providing of food and drink; restaurants, self-service restaurants, cafeterias; cafés, canteen services, cocktail lounges, snack bars, catering, pubs; rental of food service equipment used in services providing food and drink; reservation of temporary accommodation, rental of banquet and social function facilities for special occasions, namely, wedding receptions, conferences and meetings’;
 - The mark applied for consists of a short 3 second video that is represented in 6 sequential views.
 - The objectionable services are for general consumption and are aimed at both average consumers and professional public. In view of the nature of the services in question, the awareness of the relevant public will be at least that of the average consumer who is reasonably well-informed and reasonably observant and circumspect.
 - The sign, portraying a chef salting a piece of meat, even taking into account the position of the given chef's arm or hand at the moment of salting the meat, will be seen by the relevant public as nothing more than a banal and ordinary scene of a *chef preparing meat with a pinch of salt*. The salting of meat is a very normal and standard practice within world of cooking, and

whilst different chefs may vary in their salting technique, the predominant perception of one observing such an action will be seen as nothing more than watching a chef preparing food. As such, the characteristics and elements of this motion mark applied for does not possess any feature, as regards the way in which it is presented to allow the mark to fulfil its essential function in relation to the services covered by the trade mark application on the basis that the mark lacks the minimum degree of distinctive character required.

- In order to depart from the norms in the sector, the mark applied for need not be artistic or particularly imaginative. However, novelty and originality of the mark are not criteria to be taken into account. It may well be the case, that the content of the motion mark (cinematic sequence) is not commonplace on the market, but this does not negate the fact that the given subject matter is one of a banal or commonplace scene.
- The applicant submitted the following evidence in support of its claim for acquired distinctiveness:
 - Exhibit 1: Includes photos and related promotional material taken at the Laureus World Sports Awards in Monaco, dated 14 February 2017. The chef that figures in the applicant's proposed motion mark appears in some of these photos, and furthermore, in a small number of these photos, the chef is clearly seen holding up his hand, performing a similar gesture to that seen in the given mark. Finally, the exhibit includes various extract from online sites, which again includes photos of the given chef with some known personalities.
 - Exhibit 2: Includes references to well-known social media sites, including Twitter, YouTube and Instatagram. Some of the exhibits include an indication of the date of the given postings, which have taken place in 2017. In this case, both the chef and other sports personalities are seen performing similar, but certainly not always identical, gestures to that seen in the applicant's proposed motion mark. Additionally, a set of statistics indicating the number of followers that may have viewed the given material is provided.
- The applicant has provided some exhibits pertaining to how some of contents of applicant's mark are promoted online in several European territories and at a specific event in Monaco, including the promotion of the chef, who is the main subject of the mark, and that of a similar arm and/or hand gestor that appears in the motion mark, i.e. a *chef preparing meat with a pinch of salt*. It should be noted that a considerable proportion of the evidence provided is referencing to events or promotions that have taken place after the given filing date, and as such, will not be taken into account as part of this examination.
- The evidence provided in Exhibits 1 and 2 shows that a similar hand gestor to that that appears in the motion mark is known, but there is no evidence provided that a significant proportion of the relevant public identifies the contested services as originating from a particular undertaking, namely the applicant because of the mark.
- As regarding the use of the mark on websites, what is clear from the applicant's social media/website use is that the sign applied for is used.

However evidence is lacking to see how large a part of the relevant public accessed these sites and from which Member States they originate from. Therefore, such findings are not sufficient to lift the sign above being a merely non-distinctive sign in relation to the contested services for which registration is sought.

- Article 7(3) EUTMR not only requires intense use of the sign by the applicant but goes further than that. The result of the use made of the sign must be such that the sign originally incapable of performing the function of indicating origin, which is the central function of a trade mark, now fulfils this function as a result of that use. The evidence should also include the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant class of persons who, because of the mark, identify services as originating from a particular undertaking.
 - In the present case, the evidence provided is far too scant or has not been provided at all to establish acquired distinctiveness.
- 4 On 18 December 2017, the applicant filed an appeal against the contested decision, requesting that the decision be set aside. The statement of grounds of the appeal was received on 13 February 2018.

Grounds of appeal

- 5 The arguments raised in the statement of grounds may be summarised as follows:
- The sign departs significantly from the norms of the market. The way of salting food shown in the motion mark is far from the usual way food is salted in restaurants, even by common people at home.
 - The original movement shown in the sign went viral at the beginning of 2017, spreading rapidly internationally and being frequently shared with thousands of individuals. As shown in Exhibits 1 and 2, many people started to imitate this particular way of salting food, celebrities started to show in public such movement, and even well-known athletes celebrated their achievements with the movement consisting of this particular way of salting, so it became quite famous, as well as its creator, a chef called Salt Bae.
 - The link made by people to the owner of the company D ET VE ET ÜRÜNLERİ GIDA PAZARLAMA TİCARET ANONİM ŞİRKETİ, was then clear: Someone running a particular undertaking (a well-known restaurant) in which the food has a particular quality, and in which it is prepared in a particular way.
 - Nusret Gökçe, nicknamed Salt Bae, is a [Turkish](#) chef who owns ‘Nusr-Et’, a chain of [steak houses](#). His art of cooking and preparing meat became an [internet sensation](#). Gökçe became more widely known [via the internet](#) from January 2017 for the way he ‘suavely’ cut his meat and an image of him sprinkling salt in a very particular way. His fame came from a [viral video](#), ‘Ottoman Steak’, posted on 7 January 2017 on his restaurant’s [Twitter](#) account. It was viewed 10 million times on [Instagram](#), after which he was dubbed ‘Salt Bae’ because of his iconic way of sprinkling salt: Letting salt to

fall down on his forearm then spread on the meat. The ‘Salt Bae’ can be seen at https://en.wikipedia.org/wiki/Salt_Bae.

- Article 3(3)(h) EUTMIR defines motion marks as ‘trade mark(s) consisting of, or extending to, a movement or a change in the position of the elements of the mark’. One of the possible forms of motion marks is a gesture mark, usually made by hand movements and combination by a physical person, as in the refused application. Gesture marks sometimes involve acquired distinctiveness and are often associated and registered by celebrities as they have the possibilities to start a frenzy and thereby acquire distinctiveness by time.
- There is no link at all with the image of a person salting food and ‘reservation of temporary accommodation’, which is among the refused services and, as a result, we argue against the refusal of the rest of the services, which are related to providing food and drink.
- The movement made by the chef when executing the ‘saltbae’ technique is quite unique and, in our view, it contains elements which convey a message that consumers can remember due to the unusual manner in which salt is added. Such scene (‘saltbae technique’) is sufficiently far removed from that produced by the act of adding salt in an ordinary manner.
- On 7 January 2017, the chef Nusret Gökçe (‘Salt Bae’) posted a video on his Instagram page showing him slicing an ‘Ottoman steak’. He finished the 36-second long video sprinkling a handful of salt crystals with such a characteristic style that it seemed like fantasy dust as the salt fell onto the steaming meat. In just five days, the original video was viewed nearly four million times and received over 20,000 comments.
- The Office states that, whilst the sign applied for may attract the attention of consumers, it will not provide them with any specific information or clear message regarding the commercial origin of the services. However, as shown in Exhibits 1 and 2 that have already been submitted, the particular movement of salting food is related to a chef commonly known as Salt Bae, and this chef is the owner of a particular chain of restaurants belonging to the applicants company. These restaurants are associated with a particular quality and characteristics which help them to be differentiated from others by the relevant consumers.
- Assuming that the representation of a way of salting food is not *prima facie* perceived as a trade mark unless the depicted images depart significantly from the norm or customs of the economic sector concerned, it is clear in this case that the way Salt Bae is shown in this motion mark departs significantly from the customs of the economic sector concerned. The motion mark shows a sequence of six stills. These stills show the image of a famous chef, recognizable by the public because of his unique facial features and personal style. He wears sunglasses and is not dressed as an ordinary cook. In addition, the usual manner of salting meat consists of sticking out the arm horizontally and pouring some salt over a piece of meat. The right forearm of the cook is placed vertically over the piece of meat, where his fingers, located above and slightly behind his right elbow, are sprinkling salt.

- The Office is requested to examine the acquired distinctive character of the trade mark applied for, on the basis of the information and evidence already provided (Exhibit 1 and 2, which contents were already explained) and the additional documents which are submitted:
 - Exhibit 3: A Wikipedia printout on Salt Bae;
 - Exhibit 4: A printout obtained from the website www.bustle.com;
 - Exhibit 5: A printout obtained from the website of ‘Business Insider UK’;
 - Exhibit 6: An article obtained from ‘The Telegraph’ in which football stars are shown celebrating their goals with an imitation of the Salt Bae salting technique;
 - Exhibit 7: An article obtained from the website of The Independent concerning a video that went viral of a Turkish butcher sensually and flamboyantly seasoning and slicing a steak;
 - Exhibit 8: An article obtained from the “Daily Mail”, in which Sassy Salt Bae is named among the most-shared viral stars of 2017.
- The documents submitted show that the trade mark has acquired a high level of distinctiveness prior to being filed, taking into account that the referred name went viral and has become famous to a great part of the European population. This is not simply use of the mark, but it shows that distinctiveness can be acquired quite quickly through the sharing on the Internet, which is one of the most common and effective ways of promoting a brand nowadays, and that it even became well-known.
- Overall, sufficient evidence has been provided to demonstrate that use of the mark in the relevant territories has occurred in such a way as to conclude that the mark has acquired distinctiveness according to the requirements of Article 7(3) EUTMR. It is requested that the appeal be upheld in its entirety and the application allowed to proceed for all the goods and services.

Reasons

- 6 All references made in this decision should be seen as references to the EUTMR (EU) No 2017/1001 (OJ 2017 L 154, p. 1), codifying Regulation (EC) No 207/2009 as amended, unless specifically stated otherwise in this decision.
- 7 The appeal complies with Articles 66 and 67 and Article 68(1) EUTMR. It is, therefore, admissible.

Article 7(1)(b) EUTMR

- 8 According to Article 7(1)(b) EUTMR, trade marks which are devoid of any distinctive character are not to be registered. Pursuant to Article 7(2) EUTMR, a sign shall not be registered if it is ineligible for protection with regard to only part of the European Union.
- 9 According to settled case-law, the distinctiveness of a mark within the meaning of that article means that the mark serves to identify the product in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish that product from those of other undertakings. According to settled

case-law, such distinctiveness can be assessed only by reference, first, to the goods or services in respect of which registration is sought and, second, to the relevant public's perception of that sign (12/07/2012, C-311/11 P, *Wir machen das Besondere einfach*, EU:C:2012:460, § 23).

- 10 However, it is apparent from case-law that, while the criteria for the assessment of distinctive character are the same for different categories of marks, it may be that, for the purposes of applying those criteria, the relevant public's perception is not necessarily the same in relation to each of those categories and it could therefore prove more difficult to establish distinctiveness in relation to marks of certain categories as compared with marks of other categories (21/10/2004, C-64/02 P, *Das Prinzip der Bequemlichkeit*, EU:C:2004:645, § 34).
- 11 A mark must be recognised as having distinctiveness if, apart from its promotional function, it may be perceived immediately as an indication of the commercial origin of the goods or services in question (25/03/2014, T-539/11, *Leistung aus Leidenschaft*, EU:T:2014:154, § 29).

The targeted public

- 12 For the challenged services in Class 43, it is the general consumer who is primarily targeted, specifically those consumers interested in the provision of food and drink or reservation of temporary accommodation services. However, the services are also in part aimed at commercial customers, for example for furniture rental, food and drink, and for special events.
- 13 Account must be taken of the manner in which a public with experience in the sector of these goods that is reasonably well-informed and reasonably observant and circumspect will probably interpret the sign (16/07/1998, C-210/96, *Gut Springenheide*, EU:C:1998:369, § 31; 22/06/1999, C-342/97, *Lloyd Schuhfabrik*, EU:C:1999:323, § 26; 15/09/2005, C-37/03 P, *BioID*, EU:C:2005:547, § 68).
- 14 As the services in target both general consumers and traders and also only traders, the level of attention ranges from normal to a high.

Lack of distinctive character

- 15 Although motion marks have already been filed before as figurative marks (see cases R 0443/2010-2, 23/09/2010 or R 772/2001-1, 23/09/2001), they are now being filed as such since EU Trade Mark Regulation No 2015/2424 ('EUTMR') entered into force on 23 March 2016.
- 16 The mark applied for must be defined as a motion mark. Article 3(3)(h) EUTMIR describes a motion mark as a trade mark consisting of, or extending to, a movement or a change in the position of the elements of the mark.
- 17 The Board considers that the mark portraying a chef salting a piece of meat, will be seen by the relevant public – for certain goods and services – as nothing more than a banal and ordinary scene of a chef preparing meat with a pinch of salt, rather than as an indication of commercial origin.
- 18 However the Board does not agree with the extent of the objection of the contested decision in relation to some of the services in Class 43.
- 19 The process of salting meat is a necessary step in in the preparation of most meat-based meals. Different cooking practices are applied for this process, and some

cooking traditions salt the meat before cooking, others after. There are those who would argue that salt will leach the juices out of the meat and therefore should be left to the last minute; others argue that by salting early, this allows the salt to penetrate the meat cells all the way through (not just on the surface).

- 20 Whatever the practice chosen for salting a piece of meat, the Board agrees with the examiner that this process is very normal and standard practice within the world of cooking.
- 21 Therefore, the motion mark applied for should only be objected to for the services with relate to the provision of food.
- 22 The Board agrees therefore with the applicant that for some of the objected services the mark is distinctive. This is the case for ‘services for providing of drink; rental of food service equipment used in services providing food and drink; reservation of temporary accommodation, rental of banquet and social function facilities for special occasions, namely, wedding receptions, conferences and meetings’.
- 23 These services are either related to services provided by a hotel, or events planner services; this is the case for ‘reservation of temporary accommodation or ‘ rental of food service equipment used in services providing food and drink; rental of banquet and social function facilities for special occasions, namely, wedding receptions, conferences and meetings’.
- 24 Services providing drink is not the same as the provision of food, therefore the Board considers that the mark applied for is distinctive for these services.
- 25 As regards the objected services ‘Services for providing of food; restaurants, self-service restaurants, cafeterias; cafés, canteen services, cocktail lounges, snack bars, catering, pubs’, the Board concurs with the examiner that the mark applied for shows a common practice in relation with these services, i.e. the act of applying salt to a piece of meat.
- 26 Different chefs may apply salt to a piece of meat in various ways and at different times in the preparation of food, however the relevant public looking at the sequence of scenes that constitutes the mark will perceive the mark as nothing more than a chef preparing food.
- 27 Therefore, there is nothing fanciful, imaginative or striking in the motion mark that will create a link in the consumer’s mind between the sequence of the chef salting the piece of meat and the services applied for.
- 28 The applicant claims that the arm’s movement in the mark is original and has been a success on the Internet making the chef internationally known. The Board considers that the fact that the chef became known through the special way of moving his arm to salt a piece of meat, and that no other competitors make use of the same combination, is not a convincing argument.
- 29 The mark applied for is a motion where a chef is salting a piece of meat, the arm’s movement is not the mark itself. The Board agrees with the contested decision that the representation of a chef preparing the meat with a pinch of salt, produced in a sequence of movements is not distinctive, on the basis that the representation is unable to convey any message that can be remembered by consumers as it will merely be seen as nothing more than a chef performing one of the more elementary tasks in the preparation of food. Consequently, the Office

is of the opinion that whilst the sign applied for may attract the attention of consumers, it will not provide them with any specific information or clear message regarding the commercial origin of the services.

- 30 As such, the Board finds that the characteristics and elements of the motion mark applied for do not possess any feature which will allow it to fulfil its essential function in relation to some of the services covered by application, on the basis that the mark lacks the minimum degree of distinctive character required.

Article 7(3) EUMTR

- 31 According to Article 7(3) EUMTR, the absolute grounds for refusal, as set out in Article 7(1)(b) and (c) EUMTR, shall not apply if the trade mark has become distinctive in relation to the goods or services for which registration is requested in consequence of the use which has been made of it.

- 32 Article 7(3) EUTMR not only requires intensive use of a sign by the applicant, but goes much further. The result of the use of a sign must be that the sign, which originally was not able to fulfil the function of indicating origin, which is the essential function of a trade mark, now performs this function as a result of its use. The fact that the relevant public identifies goods as originating from a given undertaking must be as a result of the use of the sign as a trade mark, and thus as a result of its nature and effect, which make it capable of distinguishing the goods concerned from those of other undertakings. It must be assessed in relation to the goods or services in respect of which registration is applied for, and the following may inter alia also be taken into account: the market share held by the trade mark; how intensive, geographically widespread and long-standing use of the trade mark has been; the amount invested by the undertaking in promoting the trade mark; the proportion of the relevant class of persons who, because of the trade mark, identify goods as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (18/06/2002, C-299/99, Remington, EU:C:2002:377, § 59, 60 and 64).

- 33 Furthermore, for Article 7(3) EUTMR to apply, a trade mark must have become distinctive through use before the application was filed (12/12/2002, T-247/01, Ecopy, EU:T:2002:319, § 36; 11/06/2009, C-542/07 P, Pure Digital, EU:C:2009:362, § 42, 52) in the case at hand before the 4 march 2017.

- 34 The mark applied for is a non-verbal mark and as such, acquired distinctiveness must be shown for the whole of the EU (15/12/2016, T-112/13, 3D mark shape of a chocolate bar, EU:T:2016:735) or at the very least for a substantial part of the EU. In this respect, the Court has held that, despite the fact that acquired distinctiveness must be shown throughout the European Union, it would be unreasonable to require proof of acquired distinctiveness for each individual Member State (judgment of 24/05/2012, C-98/11 P, Shape of a chocolate rabbit with a red ribbon, EU:C:2012:307, § 62).

- 35 The applicant filed the following evidence at the examination stage of the proceedings:

Exhibit 1: Includes photos and related promotional material taken at the Laureus World Sports Awards in Monaco, dated 14 February 2017. The chef that figures in the applicant's proposed motion mark appears in some of these photos, and

furthermore, in a small number of these photos, the chef is clearly seen holding up his hand, performing a similar gesture to that seen in the given mark. Finally, the exhibit includes various extracts from online sites, which again includes photos of the given chef with some known personalities.

Exhibit 2: Includes references to well-known social media sites, including Twitter, YouTube and Instagram. Some of the exhibits include an indication of the date of the given postings, which have taken place in 2017. In this case, both the chef and other sports personalities are seen performing similar, but certainly not always identical, gestures to that seen in the applicant's proposed motion mark. Additionally, a set of statistics indicating the number of followers that may have viewed the given material is provided.

- 36 Further evidence was filed with the statement of grounds:
- Exhibit 3: A Wikipedia printout on Salt Bae;
 - Exhibit 4: A printout obtained from the website www.bustle.com;
 - Exhibit 5: A printout obtained from the website of 'Business Insider UK';
 - Exhibit 6: An article obtained from 'The Telegraph' in which it is shown football stars celebrating their goals with an imitation of Salt Bae salting technique;
 - Exhibit 7: An article obtained from the website of The Independent concerning a video that went viral of a Turkish butcher sensually and flamboyantly seasoning and slicing a steak;
 - Exhibit 8: An article obtained from the Daily Mail, in which it is stated that Sassy Salt Bae is named among the most-shared viral stars of 2017.
- 37 Some of the evidence filed is dated after the filing date of the application. This is the case of the Exhibit 1, which furthermore concerns an event in a non-EU Member State. The Wikipedia article refers to a viral video from the applicant's Twitter account that was posted in January 2017, so a few weeks before the filing date. The article of the web site www.bustle.com is dated 18 January 2017, again only a few weeks before the filing date (Exhibit 4). As for the article from Business Insider, this is dated 25 January 2017 (Exhibit 5). The article on Daily Mail online (Exhibit 8) is dated December 2017. There is no document that can be dated back to 2015, 2016, etc.
- 38 As for the place, it is difficult to make a link between the EU territory and the evidence. The popularity claimed by the applicant through its Twitter and Instagram accounts is insufficient to show use in a particular territory of the European Union, no evidence is brought on where these accounts were based. The claimed popularity was made possible through internet and press articles. The video behind the motion mark took place in Turkey in the applicant's restaurant. The press coverage in the United Kingdom reports on the internet success of the video, but does not report of an event that took place in this territory.
- 39 claiming the acquired distinctiveness of the motion mark applied for implies showing not only that you have a number of followers, or that your video has been seen millions time but that at least a significant proportion of the relevant section of the public identifies the services at issue as originating from a

particular undertaking because of the trade mark (judgment of 15/12/2015, T-262/04, Briquet à Pierre, EU:T:2005:463, § 61 and the case-law cited therein). Furthermore, the evidence submitted must relate to each of the services claimed in the application.

- 40 Acquired distinctiveness must be demonstrated with respect to the sign applied for. The evidence should show examples of how the trade mark is actually used (brochures, magazines, pamphlets, etc.) and in respect to all the services contested. The Board is of the opinion that the applicant has failed to demonstrate that the hand gestor that appears in the motion mark is recognised by consumers of these services and identifies the contested services as originating from a particular undertaking, namely the applicant because of the mark.
- 41 In relation to the applicant's submissions concerning use of the mark on Facebook, Twitter and other websites, it is usual for service providers to use social media and websites, etc., as most businesses nowadays do so in order to advertise/promote their services. However, the applicant did not show consumers recognition and identification of the services but merely the number of followers or the number of views the videos had.
- 42 Therefore, from the evidence provided, it is not possible to extrapolate with any certainty how large a part of the relevant public it was that accessed these websites (and more particularly, accessed before the given filing date), and which Member States the relevant public originate from. What is clear from the applicant's social media/website use is that the sign applied for is used. However, such findings are not sufficient to lift the sign above being a merely non-distinctive sign in relation to the contested services for which registration is sought.
- 43 However, the proof of acquired distinctiveness implies that the applicant shows, as a result of the use made of the sign, that it is originally incapable of performing the function of indicating origin, which is the central function of a trade mark, and that this function is fulfilled as a result of that use. The identification by the relevant public of the services as originating from the applicant must be the result of the use of the mark as a trade mark which makes it capable of distinguishing the services concerned from those of other undertakings.
- 44 This assessment must be done in relation to the services in respect of which registration is applied for and by assessing the evidence which relates inter alia to the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; and the proportion of the relevant class of persons who, because of the mark, identify services as originating from a particular undertaking.
- 45 The Board agrees with the contested decision that it is clear that the evidence required is either not provided at all or, in the case where it is provided, it is far too scant to establish acquired distinctiveness.

Conclusion

- 46 For the reasons stated above the contested decision is partially annulled and the contested mark must be rejected under Article 7(1)(b) EUTMR only for part of the services in Class 43. Furthermore, the Board finds that the exception laid down by Article 7(3) EUTMR does not apply in the present case.
- 47 Thus, the appeal is partially founded and partially dismissed.

Order

On those grounds,

THE BOARD

hereby:

1. **Annuls the contested decision in part, namely for the following services in Class 43:**

‘Services for providing of drink; rental of food service equipment used in services providing food and drink; reservation of temporary accommodation, rental of banquet and social function facilities for special occasions, namely, wedding receptions, conferences and meetings’;

2. **Dismisses the appeal for the remainder.**

Signed

G. Humphreys

Signed

V. MELGAR

Signed

A. POHLMANN

Registrar:

Signed

H. DIJKEMA

