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Subject: U.S. TRADEMARK APPLICATION NO. 86418459 - THRIFTER - N/A - EXAMINER BRIEF

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UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 86418459

MARK: THRIFTER



CORRESPONDENT ADDRESS:

MATTHEW H SWYERS ESQ

THE TRADEMARK COMPANY PLLC

344 MAPLE AVE W STE 151

VIENNA, VA 22180-5612

GENERAL TRADEMARK INFORMATION:

<http://www.uspto.gov/trademarks/index.jsp>

TTAB INFORMATION:

<http://www.uspto.gov/trademarks/process/appeal/index.jsp>

APPLICANT: AXEL LTD, CO.

CORRESPONDENT'S REFERENCE/DOCKET NO:

N/A

CORRESPONDENT E-MAIL ADDRESS:

mswyers@thetrademarkcompany.com

EXAMINING ATTORNEY'S APPEAL BRIEF

Applicant has appealed the examining attorney's final refusal to register the service mark THRIFTER in International Class 35 for "On-line retail store services featuring a wide variety of consumer goods of others" and in International Class 45 for "On-line social networking services" on the grounds that the applied-for mark merely describes the intended audience of applicant's services pursuant to Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1). Additionally, the examining attorney issued a final

refusal to register the applied-for mark as applicant did not provide required information pursuant to 37 C.F.R. §2.61(b).

FACTS

On October 11, 2014, applicant AXEL LTD, CO. filed U.S. Application Serial No. 86418459 to register the mark THRIFTER in standard characters for “On-line retail store services featuring variety consumer goods” in International Class 35 and “On-line social networking services” in International Class 45. On January 30, 2015, the examining attorney refused registration on the grounds that the applied-for mark was merely descriptive of the intended audience of applicant’s services pursuant to Trademark Act Section 2(e)(1). The examining attorney also asked applicant specific questions about how applicant intended to use the applied-for mark in commerce and required applicant to provide additional information about the identified services. The examining attorney also required applicant to amend the identification of services in International Class 35.

In the June 4, 2015, response to the Office action, applicant argued against the Section 2(e)(1) refusal. Applicant amended the identification of services to “On-line retail store services featuring a wide variety of consumer goods of others” in International Class 35 and “On-line social networking services” in International Class 45. Applicant declined to answer the informational request questions and declined to provide any additional information about the services as “there is none as it is an intent-to-use application.” *See Applicant’s Response dated 6/4/2015 at 9.*

On June 19, 2015, the examining attorney made the Section 2(e)(1) refusal final. The examining attorney also made final the requirement to provide additional information about the services. The examining attorney determined that applicant’s amendment to the services in International Class 35 satisfied the requirement to amend the identification of services. This appeal now follows.

ISSUES ON APPEAL

1. Whether the applied-for mark THRIFTER is merely descriptive of the intended audience of applicant's services.
2. Whether applicant failed to provide the additional information regarding the services.

ARGUMENT

- I. THE APPLIED-FOR MARK IS MERELY DESCRIPTIVE WITHIN THE MEANING OF SECTION 2(e)(1) OF THE TRADEMARK ACT BECAUSE IT IMMEDIATELY DESCRIBES THE INTENDED AUDIENCE OF THE SERVICES

A mark is merely descriptive if it describes an ingredient, quality, characteristic, function, feature, purpose, or use of an applicant's services. TMEP §1209.01(b); *see, e.g., In re TriVita, Inc.*, 783 F.3d 872, 874, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015) (quoting *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 1173, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004)); *In re Steelbuilding.com*, 415 F.3d 1293, 1297, 75 USPQ2d 1420, 1421 (Fed. Cir. 2005) (citing *Estate of P.D. Beckwith, Inc. v. Comm'r of Patents*, 252 U.S. 538, 543 (1920)).

The determination of whether a mark is merely descriptive is made in relation to an applicant's services, not in the abstract. *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 1254, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012); *In re The Chamber of Commerce of the U.S.*, 675 F.3d 1297, 1300, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); TMEP §1209.01(b); *see, e.g., In re Polo Int'l Inc.*, 51 USPQ2d 1061, 1062-63 (TTAB 1999) (finding DOC in DOC-CONTROL would refer to the "documents")

managed by applicant's software rather than the term "doctor" shown in a dictionary definition); *In re Digital Research Inc.*, 4 USPQ2d 1242, 1243-44 (TTAB 1987) (finding CONCURRENT PC-DOS and CONCURRENT DOS merely descriptive of "computer programs recorded on disk" where the relevant trade used the denomination "concurrent" as a descriptor of a particular type of operating system). "Whether consumers could guess what the product [or service] is from consideration of the mark alone is not the test." *In re Am. Greetings Corp.*, 226 USPQ 365, 366 (TTAB 1985). The question is not whether someone presented only with the mark could guess what the services are, but "whether someone who knows what the goods and[/or] services are will understand the mark to convey information about them." *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 1254, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012) (quoting *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002)); *In re Franklin Cnty. Historical Soc'y*, 104 USPQ2d 1085, 1087 (TTAB 2012).

Applicant has applied to register the mark THRIFTER for use in connection with "On-line retail store services featuring a wide variety of consumer goods of others" in International Class 35 and "On-line social networking services" in International Class 45.

According to the Urban Dictionary, the term "thrifter" is defined, in part, as "someone that religiously shops at Thrift Stores looking for bargains and often scores amazing deals." *See evidence attached to Office action dated 1/30/2015 at 2.* Articles from the online Urban Dictionary® (urbandictionary.com) may be used to support a refusal or requirement, provided that an applicant has an opportunity to rebut such evidence. *See In re Star Belly Stitcher, Inc.*, 107 USPQ2d 2059, 2062 n.3 (TTAB 2013); TBMP §1208.03. Applicant has not objected to the definition of the term "thrifter" from the Urban Dictionary.

The evidence of record demonstrates that the term "thrifter" is commonly used to describe a person who shops at thrift stores. An article on eBay entitled "10 Questions About Vintage Every Thrifter Should

ask” states “there comes a time in every thrifter’s experience of secondhand shopping when they begin to spot something ‘special’ between the racks.” *See evidence attached to Office action dated 1/30/2015 at 3-11.* TheThiftShopper.com published a “Thrifter of the Month” feature about an individual who bought items at thrift stores which states “Like most hardcore thrifters, I can point to nearly everything in my house and say, ‘I bought that at a thrift store.’” *See evidence attached to Office action dated 1/30/2015 at 12.* Parent’s Press published an article entitled “Kids’ Culture: Finding a Thrifter’s Paradise” about searching for children’s clothing in thrift stores. *See evidence attached to Office action dated 1/30/2015 at 13-14.* The Las Vegas Sun published an article about thrift store shopping which included the passage “Whether you’re an experienced thrifter or a newbie to the trend, these tips can help you master the craft of buying used and save you some serious cash.” *See evidence attached to Office action dated 1/30/2015 at 15-16.* The Houston Chronicle published a feature about “Thriving Thrifter Jen Meneely” which states that “the self-proclaimed ‘big thrifter’ spends at least 20 hours per week haunting the racks of Goodwill, the Cottage Thrift Shop and the Charity Guild to find her prized pieces.” *See evidence attached to Office action dated 6/19/2015 at 49 and attached to the Office action dated 1/30/2015 at 17-19.* “The Spirited Thrifter” and “High Plains Thrifter” and “Beach Thrifter” are the names of different internet blogs about a person who enjoys shopping at thrift stores and then posts articles about the items they bought at thrift stores. *See evidence attached to Office action dated 6/19/2015 at 2-17.*

Excerpted newspaper articles from the LexisNexis® computerized database from major newspapers use the term “thrifter” to describe someone who shops at thrift stores. *See evidence attached to Office action dated 6/19/2015 at 18-27 and 46-51.* For example, an article in *The Sacramento Bee* discussed two shoppers at a thrift store, stating “Both women are committed thrifters, a category of shoppers who buy most of their casual and workday wardrobes from ‘gently used’ clothing stores. Their motivations are partly environmental, partly frugal, partly thrill-of-the-hunt fun.” *See evidence attached to Office*

action dated 6/19/2015 at 25-27. An article in *The Buffalo News* described a competition held by a Salvation Army thrift store and stated “An event like the re-fashionista challenge can reach a wide demographic, Taft said, such as crafters, people who want to recycle clothing and normal thrifters.” *See evidence attached to Office action dated 6/19/2015 at 18-19.* An article in *The Philadelphia Inquirer* discussed a Goodwill thrift store and in describing a shopper at that thrift store stated “Jamie Nix of Tabernacle is a ‘thrifter’ who was combing through shirts Tuesday. She said she usually shops every other week, buying clothing for herself and to sell online.” *See evidence attached to Office action dated 6/19/2015 at 20-21.* An article in *The Boston Globe* stated that that “expert thrifters know that the epic Goodwill Store down the street is the place to haul in big bags of gently used goods.” *See evidence attached to Office action dated 6/19/2015 at 22.* An article in the *Tampa Bay Times* discussed buying clothing at thrift stores on a budget and stated “We asked experienced thrifters to take \$20 and put together a look for a specific occasion. . . . Recently, Goodwill has embraced young thrifters – including Macklemore – and worked to change its image from a refuge for the needy to a place where anyone can find a great deal.” *See evidence attached to Office action dated 6/19/2015 at 23-24.* An article in *The Arizona Republic* described a thrift store as “full of unique finds for the avid thrifter and treasure hunter.” *See evidence attached to Office action dated 6/19/2015 at 46.* An article in the *Chicago Tribune* discussed shopping at a thrift store, stating “age is no barrier among thrifters” and “vintage clothes were so plentiful and cheap that a thrifter could go retro-wild.” *See evidence attached to Office action dated 6/19/2015 at 47-48.* An article in the *Minneapolis Star Tribune* states “Bargain hunters know that Memorial Day sales aren’t usually as enticing as on July 4 or Labor Day, but that’s not true for thrifters, aka thrift store shoppers.” *See evidence attached to Office action dated 6/19/2015 at 50.* An article in the *Kansas City Star* featured a thrift store called Through Our Children’s Lives that is described as “more than a thrifter’s paradise.” *See evidence attached to Office action dated 6/19/2015 at 51.* This evidence establishes that the term “thrifter” is commonly used to describe a person who shops at thrift stores.

In International Class 35, applicant has identified on-line retail store services featuring a wide variety of consumer goods of others. As applicant does not specify the type of online retail store, this wording is broad enough to include all types of retail stores including online retail thrift stores, such as Gone-Tomorrow, ThreadUp, The Attic, WebThriftStore, and Nifty Thrifty. *See evidence attached to Office action dated 1/30/2015 at 20-28 and evidence attached to Office action dated 6/19/2015 at 28-33.* As applicant's identification is broad enough to include online retail thrift stores, the word THRIFTER in the applied-for mark is descriptive of the intended audience of the online retail store services. Specifically, the word THRIFTER describes that the intended audience of the online retail store services are people that regularly shop at thrift stores, in other words, thrifters. A mark that describes an intended user or group of users of a service is merely descriptive. *E.g., In re Planalytics, Inc.*, 70 USPQ2d 1453 (TTAB 2004) (holding GASBUYER merely descriptive of intended user of risk management services in the field of pricing and purchasing natural gas); *see* TMEP §1209.03(i). In particular relevance to the current application, in *In re Camel Mfg. Co.*, 222 USPQ 1031 (TTAB 1984), the Trademark Trial and Appeal Board (TTAB) found that the term MOUNTAIN CAMPER described the intended users of retail services in the field of outdoor equipment and apparel. Just as the term MOUNTAIN CAMPER described the intended shoppers of the retail store in *In re Camel Mfg. Co.*, the term THRIFTER in the applied-for mark is merely descriptive of the intended shoppers of applicant's retail store services.

In International Class 45, applicant has identified online social networking services. Applicant's wording is broad enough to include any form of online social networking services including those for use by people who shop at thrift stores. According to PC Magazine and About.com, shopping is a common subject matter of social networking services. *See evidence attached to Office action dated 1/30/2015 at 29-36 and evidence attached to Office action dated 6/19/2015 at 34-36.* Online social network websites such as Kaboodle, Wanelo, Fancy, and Ownza all feature shopping. *See evidence attached to Office action dated 6/19/2015 at 37-45.* As applicant's identification is broad enough to include social

networks for shopping, the word THRIFTER in the applied-for mark is descriptive of the intended user of the online social networking services. Specifically, the word THRIFTER describes that the intended user of the online social networking services are people that regularly shop at thrift stores, in other words, thrifters. See TMEP §1209.03(i). As a result, the word THRIFTER is merely descriptive of the services in International Class 45 as it describes the intended user of the services.

Material obtained from the Internet is generally accepted as competent evidence. See *In re Leonhardt*, 109 USPQ2d 2091, 2098 (TTAB 2008) (accepting Internet evidence to show descriptiveness); *In re Rodale Inc.*, 80 USPQ2d 1696, 1700 (TTAB 2006) (accepting Internet evidence to show genericness). Specifically, the widespread use of the Internet in the United States suggests that Internet evidence may be probative of public perception in trademark examination. See *In re Nieves & Nieves LLC*, 113 USPQ2d 1639, 1642 (TTAB 2015).

Applicant argues that the applied-for mark is merely suggestive and not descriptive. A mark is suggestive if some imagination, thought, or perception is needed to understand the nature of the services described in the mark; whereas a descriptive term immediately and directly conveys some information about the services. See *Stoncor Grp., Inc. v. Specialty Coatings, Inc.*, 759 F.3d 1327, 1332, 111 USPQ2d 1649, 1652 (Fed. Cir. 2014) (citing *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 1251-52, 103 USPQ2d 1753, 1755 (Fed. Cir. 2012)); TMEP §1209.01(a). The determination of whether a mark is merely descriptive is made in relation to an applicant's services, not in the abstract. *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 1254, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012); *In re The Chamber of Commerce of the U.S.*, 675 F.3d 1297, 1300, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); TMEP §1209.01(b); see, e.g., *In re Polo Int'l Inc.*, 51 USPQ2d 1061, 1062-63 (TTAB 1999) (finding DOC in DOC-CONTROL would refer to the "documents" managed by applicant's software rather than the term "doctor" shown in a dictionary definition); *In re Digital Research Inc.*, 4 USPQ2d 1242, 1243-44 (TTAB 1987) (finding CONCURRENT PC-DOS and CONCURRENT

DOS merely descriptive of “computer programs recorded on disk” where the relevant trade used the denomination “concurrent” as a descriptor of a particular type of operating system). “Whether consumers could guess what the product [or service] is from consideration of the mark alone is not the test.” *In re Am. Greetings Corp.*, 226 USPQ 365, 366 (TTAB 1985).

For the mark THRIFTER for online retail services, those consumers familiar with applicant’s identified retail services would immediately understand that the word THRIFTER described the intended user of the services, specifically, the services are intended to be used by those who shop at thrift stores. For the social networking services, those consumers familiar with applicant’s social networking services would immediately understand that the word THRIFTER described the intended user of the social networking services, specifically, the services are intended to be used by those who shop at thrift stores. As those familiar with applicant’s services would immediately understand that the word THRIFTER describes the intended user of the services, the applied-for mark is not suggestive and is merely descriptive. *See* TMEP §1209.03(i).

Applicant argues that there is no competitor need to use the word THRIFTER. Two major reasons for not protecting descriptive marks are (1) to prevent the owner of a descriptive mark from inhibiting competition in the marketplace and (2) to avoid the possibility of costly infringement suits brought by the trademark or service mark owner. *In re Abcor Dev. Corp.*, 588 F.2d 811, 813, 200 USPQ 215, 217 (C.C.P.A. 1978); TMEP §1209. Businesses and competitors should be free to use descriptive language when describing their own services to the public in advertising and marketing materials. *See In re Styleclick.com Inc.*, 58 USPQ2d 1523, 1527 (TTAB 2001). As the examining attorney has demonstrated, THRIFTER is a term widely used to identify and describe people who shop at thrift stores. Applicant’s identification of services is broad enough to include thrift store related services. A grant to the applicant of exclusive rights to the wording THRIFTER would necessarily inhibit the ability of others to easily

describe their retail or social networking services using the intended user of those services, specifically, people who shop at thrift stores.

In arguing that there is no competitor need to use THRIFTER, applicant suggests that competitors could use the terms “pennypencher” or “frugaler” instead of THRIFTER. *See* Appeal Brief at 12. Applicant did not suggest these alternate terms in applicant’s June 4, 2015 response. There is no evidence in the record defining these terms or establishing whether these terms have any meaning in English or any meaning relevant to the current application. The examining attorney objects to the alternate terms proposed by applicant due to the lack of supporting evidence defining the meaning of those terms. Applicant has not requested that the TTAB take judicial notice of these terms, but as it is not clear what the source of these terms are or if they have any meaning in English, the examining attorney requests that the TTAB does not take judicial notice of the terms “pennypencher” or “frugaler.” TBMP §1208.04. Even if applicant had properly defined these terms and they had some relevant meaning in regards to the services identified in the application, there is no indication that these terms would be acceptable alternatives. The evidence of record demonstrates that THRIFTERS is the common and widely used term for those who shop at thrift stores. A grant to the applicant of exclusive rights to the wording THRIFTER would necessarily inhibit the ability of others to easily describe their retail or social networking services using the intended user of those services, specifically, people who shop at thrift stores.

Applicant argues that there is little evidence of competitor’s current use of the wording THRIFTER for the identified services. The fact that an applicant may intend to be the first or only user of a merely descriptive designation does not necessarily render a word or term incongruous or distinctive; as in this case, the evidence shows that THRIFTER is merely descriptive. *See In re Phoseon Tech., Inc.*, 103 USPQ2d 1822, 1826 (TTAB 2012); *In re Sun Microsystems, Inc.*, 59 USPQ2d 1084, 1087 (TTAB 2001); TMEP §1209.03(c). While competitors may not yet be using the term THRIFTER as part of a service mark, the

evidence of record demonstrates that THRIFTER is a term widely used to identify and describe people who shop at thrift stores. As discussed above, a grant to the applicant of exclusive rights to the wording THRIFTER would necessarily inhibit the ability of applicant's competitors to easily describe that people who shop at thrift stores is the intended user of those services. As a result, the lack of evidence of competitor's current use of the word THRIFTER does not render a word or term incongruous or distinctive.

The evidence of record has established that the word THRIFTER is merely descriptive of the intended audience of the identified services. Applicant does not deny that the services identified in the application are broad enough to include online retail thrift stores and online thrift shopping social networking.¹ Instead, applicant argues that in the context of how applicant intends to use the word THRIFTER with the services the word THRIFTER is suggestive and not descriptive. The record does not include any evidence of how applicant is using the mark in commerce because, as applicant has stated, applicant is currently not using the mark in commerce. There is also no evidence in the record for how applicant intends to use the mark in commerce because, according to applicant, no such evidence exists. Applicant did not respond to requests to specify how applicant intends to use the mark in commerce. As applicant has indicated that there is no evidence of how the mark is used in commerce or will be used in commerce, the only remaining way to determine whether Section 2(e)(1) refusal is appropriate is based on the services identified in the application. Eligibility for registration must be determined on the basis of the facts and evidence in the record at the time registration is sought, which includes during

¹ In the appeal brief, Applicant mentions that "neither class of services deals with "thrift store services" per se or as recited in the recitation of services." Appeal Brief at 12. While the identified services do not specifically "per se" recite "thrift store services," applicant does not deny that the identified services are broad enough to include thrift store related services. Applicant's statement also does not clarify how applicant will be using the applied-for mark in the context of the identified services. The examining attorney is not arguing that the identification of services is "thrift store services." Instead, the wording of the identification of services is broad enough to include online retail thrift store services and social networking related to thrift store shopping. Applicant has neither specified the type of consumer goods that will be sold or the subject matter of the social networking services nor has applicant clearly denied that the applied-for services will have any sort of relationship to thrift store shopping.

examination and any related appeal. *In re Chippendales USA Inc.*, 622 F.3d 1346, 1354, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010); *In re Morton-Norwich Prods., Inc.*, 671 F.2d 1332, 1344, 213 USPQ 9, 18 (C.C.P.A. 1982); *In re Thunderbird Prods. Corp.*, 406 F.2d 1389, 1391, 160 USPQ 730, 732 (C.C.P.A. 1969). As discussed above, the evidence of record has established that the word THRIFTER is merely descriptive of the intended audience of services identified in the application. As a result, based on all the available evidence and the services identified in the application, the Section 2(e)(1) refusal is appropriate as the applied-for mark is descriptive of services identified in the application.

Applicant argues that the examining attorney has assumed that the term THRIFTER is related to applicant's services but as the application is filed under Section 1(d) intent to use there is no evidence that the applied-for mark will be used in relation to people who shop at thrift stores. "A mark may be merely descriptive even if it does not describe the 'full scope and extent' of the applicant's goods or services." *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 1173, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004) (citing *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 1346, 57 USPQ2d 1807, 1812 (Fed. Cir. 2001)); TMEP §1209.01(b). It is enough if a mark describes only one significant function, attribute, or property. *In re The Chamber of Commerce of the U.S.*, 675 F.3d 1297, 1300, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); TMEP §1209.01(b); see *In re Oppedahl & Larson LLP*, 373 F.3d at 1173, 71 USPQ2d at 1371. As discussed above, applicant's services are broad enough to encompass retail store and social networking services in the field of thrift stores and intended for people who shop at thrift stores. Applicant has not clearly denied that the services are intended to be used by people who shop at thrift stores. Nor has applicant provided any information regarding the intended user of applicant's services. As the services identified in the application are broad enough to be targeted at people who shop at thrift stores, the word THRIFTER in the applied-for mark is descriptive of that attribute of the services.

Applicant argues that assumption of descriptiveness is not permitted and a Section 2(e)(1) refusal cannot be maintained without evidence of actual use. However, this argument runs contrary to recent

precedential opinions by the Trademark Trial and Appeal Board. For example, in *In re Positec Group Limited*, 108 USPQ2d 1161 (TTAB 2013), the applicant filed under Section 1(b) intent to use basis and the evidence for descriptiveness was comprised of dictionary definitions, third-party registrations, and one example of third party use. No evidence of the applicant's actual use in commerce was admitted, but the TTAB affirmed the Section 2(e)(1) refusal. *In re Positec Group Limited*, 108 USPQ2d 1161 at 1173. In *In re Accelerate S.A.L.*, 101 USPQ2d 2047 (TTAB 2012), the applicant filed under Section 1(b) intent to use basis and the evidence for descriptiveness was comprised of dictionary definitions, third-party registrations, and third party evidence establishing why the wording of the mark was descriptive. No evidence of the applicant's actual use in commerce was admitted, but the TTAB affirmed the Section 2(e)(1) refusal. *In re Accelerate S.A.L.*, 101 USPQ2d at 2053; *see also In re Cannon Safe, Inc.*, 116 USPQ2d 1348 (TTAB 2015) (Section 2(e)(1) refusal affirmed despite no evidence of applicant's use); *In re The Swatch Group Management Services AG*, 110 USPQ2d 1751 (TTAB 2014) (Section 2(e)(1) refusal affirmed despite no evidence of applicant's use). These recent precedential opinions of the TTAB demonstrate that a Section 2(e)(1) refusal is justified using only evidence establishing that the services identified in the application are merely descriptive and no evidence of actual use is required to support a Section 2(e)(1) refusal.

Moreover, the logical extension of applicant's argument is that no application filed under Section 1(b) may be refused registration under Section 2(e)(1) as any finding of descriptiveness would be an assumption until applicant has established use under Section 1(a). This argument is contrary to the recent precedent of the TTAB. The TTAB has affirmed Section 2(e)(1) refusals in Section 1(b) intent to use applications in six recent precedential opinions: *In re Cannon Safe, Inc.*, 116 USPQ2d 1348 (TTAB 2015); *In re Datapipe, Inc.*, 111 USPQ2d 1330 (TTAB 2014); *In re The Swatch Group Management Services AG*, 110 USPQ2d 1751 (TTAB 2014); *In re Positec Group Limited*, 108 USPQ2d 1161 (TTAB 2013); *In re Sadoru Group, Ltd.*, 105 USPQ2d 1484 (TTAB 2012); *In re Accelerate S.A.L.*, 101 USPQ2d 2047 (TTAB

2012); *In re theDot Communications Network LLC*, 101 USPQ2d 1062 (TTAB 2011); *In re Cox Enterprises*, 2007 TTAB Lexis 6 (TTAB 2007). Contrary to applicant's argument, the applied-for mark may be refused registration under Section 2(e)(1) even though applicant has filed under Section 1(b).

Applicant argues that any doubt regarding the mark's descriptiveness should be resolved on applicant's behalf. *E.g.*, *In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 828 F.2d 1567, 1571 4 USPQ2d 1141, 1144 (Fed. Cir. 1987); *In re Grand Forest Holdings, Inc.*, 78 USPQ2d 1152, 1156 (TTAB 2006). However, in the present case, the evidence of record leaves no doubt that the mark is merely descriptive.

Therefore, the mark THRIFTER, as applied to the identified services, merely describes the intended user of the retail and social networking services, specifically, that the intended user of the retail store services and online social networking services is people that regularly shop at thrift stores. Accordingly, the proposed mark is merely descriptive of the intended audience of the services and the Section 2(e)(1) refusal should be affirmed.

II. REGISTRATION WAS PROPERLY REFUSED BECAUSE APPLICANT FAILED TO PROVIDE THE REQUIRED INFORMATION ABOUT THE SERVICES.

To permit proper examination of the application, applicant was required to submit additional information about the services. *See* 37 C.F.R. §2.61(b); *In re Planalytics, Inc.*, 70 USPQ2d 1453, 1457-58 (TTAB 2004); TMEP §814. Applicant was asked to submit information, such as fact sheets, brochures, and/or advertisements about the services. As the application is an intent to use application and applicant may not have begun using the mark with the services, applicant was instructed that if fact sheets, brochures, and advertisements about applicant's services were unavailable applicant should provide similar documentation for services of the same type, explaining how its own services will differ.

If the services featured new technology and no information regarding competing services was available, applicant was instructed to provide a detailed factual description of the services. The examining attorney also asked specific questions about how applicant intended to use the applied-for mark in commerce. This evidence was necessary to determine how the applied-for mark is or will be used in commerce in order for a more thorough and informed evaluation of the issue of mere descriptiveness.

Applicant did not answer the specific questions and did not provide any additional evidence about the services or how applicant intended to use the mark in commerce. Applicant maintains that as the application is an intent to use application there is no evidence to submit as applicant was not using the mark at the time of the application or at the time of the response to the Office action. However, applicant was instructed that if applicant was not yet using the mark applicant should submit documentation for services of the same type, explaining how its own services will differ. If the services featured new technology and no information regarding competing services is available, applicant could have provided a detailed factual description of the services. Applicant provided none of this information. Additionally, applicant failed to answer the specific questions about how applicant intends to use the applied-for mark in commerce.

Despite repeated requests, applicant has not provided the requested information concerning the identified services and has not answered the questions about the intended use of the applied-for mark. This information is necessary to perform a fair and proper examination of the mark in accordance with Trademark Act Section 2(e)(1), to respond to all of applicant's arguments, and to fully address applicant's specific claim that the term THRIFTER is suggestive in the context of applicant's services.

Therefore, applicant has not satisfied the requirement for additional information. *See In re AOP LLC*, 107 USPQ2d 1644, 1651 (TTAB 2013) ("Failure to comply with a request for information is grounds for refusal..."); *In re DTI P'ship LLP*, 67 USPQ2d 1699, 1701-02 (TTAB 2003); TMEP §814. The applicant

had an opportunity to provide an acceptable response to the request for additional information. Applicant could have also provided the requested information after the final refusal in a request for reconsideration. However, in lieu of providing a clear and complete response, applicant chose to file this appeal. Applicant's failure to provide the required evidence and answer the specified questions required the Examining Attorney to proceed with an incomplete understanding of how the applied-for mark is or will be used, and without materials which would have allowed a more thorough and informed evaluation of the issue of mere descriptiveness. Accordingly, registration was properly refused pursuant to 37 C.F.R. §2.61(b) because applicant did not provide the required information about the services.

CONCLUSION

Therefore, because the applied-for mark immediately describes the intended audience of the services, it is merely descriptive within the meaning of Section 2(e)(1) of the Trademark Act. As such, the refusal to register pursuant to Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1) should be affirmed. Additionally, as applicant refused to provide the necessary requested information, the refusal to register pursuant to 37 C.F.R. §2.61(b) should be affirmed.

Respectfully submitted,

/Timothy Schimpf/

Examining Attorney

Law Office 113

(571) 272-9072

timothy.schimpf@uspto.gov

Odette Bonnet

Managing Attorney

Law Office 113