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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Templeton and Rodgers

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Serial No. 75544444

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James Phillip Chandler of The Chandler Law Firm for Templeton and Rodgers.

Robert Coggins, Trademark Examining Attorney, Law Office 115 (Tomas Vlcek, Managing Attorney).

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Before Hohein, Chapman and Drost, Administrative Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

On August 28, 1998, Templeton and Rodgers (a Virginia joint venture -- composed of C. Stephen Templeton and Kenneth D. Rodgers, both U.S citizens) filed an application to register the phrase ONE PRICE BUYING on the Principal Register for goods in International Class 16 which were ultimately amended to read as follows:

> "paper, namely, writing paper, memo paper and bond paper; cardboard; printed matter, namely, books, magazines, brochures and pamphlets in

> the field of marketing of goods; cloth, tape and wire for bookbinding; unmounted and mounted photographs; stationery; instructional and teaching materials in the field of marketing of goods; plastic materials for packaging goods, namely, bubble packs."

The application was filed based on Section 1(a) of the Trademark Act, 15 U.S.C. §1051(a), with applicant claiming a date of first use anywhere and first use in commerce of June 1996. During the course of the examination of the application, applicant amended the basis of its application to Section 1(b), 15 U.S.C. §1051(b), with applicant asserting a bona fide intention to use the mark in commerce on the involved goods. (See applicant's responses dated September 13, 1999 and August 7, 2000.) Applicant has voluntarily disclaimed the words "ONE PRICE." See Section 6(a) of the Trademark Act, 15 U.S.C. §1056(a).

The Examining Attorney refused to register the mark as merely descriptive of applicant's goods under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1).

When the refusal to register was made final, applicant appealed to the Board. Both applicant and the Examining Attorney have filed briefs; an oral hearing was not requested.

The Examining Attorney contends that the proposed mark merely describes a significant feature of applicant's

identified goods, specifically their purpose and subject matter, particularly in relation to the items "printed matter, namely, books, magazines, brochures and pamphlets in the field of marketing of goods," and "instructional and teaching materials in the field of marketing of goods. He further argues as follows (brief, p. 7):

> The facts of this case demonstrate that the proposed mark ONE PRICE BUYING, when used in connection with the applicant's goods, will be understood by the relevant class of purchasers to merely describe the goods. The proposed mark ONE PRICE BUYING describes the subject matter of the applicant's books, magazines, brochures, pamphlets, and instructional and teaching materials in the field of marketing of goods; and describes a feature of the other goods, namely their use in marketing or selling goods at a single price.

In support thereof, the Examining Attorney made of record the following definitions from The American Heritage Dictionary (Third Edition 1992):

> (1) **one** adjective 1. Being a single entity, unit, object, or living being; not two or more…;
>
> (2) **price** noun 1. The amount as of money or goods, asked or given in exchange for something else. 2. The cost at which something is obtained…; and
>
> (3) **buy** verb … **buying** 1. To acquire in exchange for money or its equivalent… .

The Examining Attorney also made of record (i) copies of several excerpted stories retrieved from the Nexis database, (ii) printouts of pages from a few web sites, and (iii) printouts of the first few pages of the results of his search on the Google search engine of "one price buying," all to show that "one price buying" is used in marketing to refer to the purchase of goods sold at a single, non-negotiable price. Examples of these materials are reproduced below:

> Headline: It's Xmas: Must Be Pizza; The Domino's Driver May Be America's New Holiday Symbol
> …People buy Saturns because of the savings gained from one-price buying, but end up paying 26 percent above invoice price -- compared with the 8 percent paid by those poor slobs who negotiate. … "Dallas Observer," November 30, 2000;
>
> Headline: Ford Dealership in Salt Lake City Holds Its Own Amid Auto Collection
> …Butterfield argues that the Auto Collections are built on flawed reasoning: the notion that vehicle shoppers prefer one-price buying. The Utah Auto Collection does not negotiate vehicle price and will retain that policy, Roberts, said. … "Automotive News," June 14, 1999;
>
> Headline: Down But Not Out, A Report On 2 Small Station Wagons
> …When the current generation Escort was launched in 1991, Ford soon hit upon a marketing strategy, which sold thousands of Escorts in all its body styles: one-price buying. This allowed the consumer to buy any of the five Escort body styles

with a decent level of equipment for one price. … "The Des Moines Register," December 3, 1995;

Headline: The New Sales Pitch: Dealers Don't Buy All These New Ways To Sell Cars …A survey of 1,253 prospective auto buyers released in February by the Glendale, Calif., research company Dohring Co. said 40 percent of auto buyers now prefer one-price buying, up from 33 percent a year earlier. However, 78 percent said they had negotiated the price of their most recent purchase, suggesting that haggling is still the norm. … , "Crain's Detroit Business," August 25, 1997;

Headline: IBP Says New Law Likely To Produce One-Price Buying
Depending on the Nebraska attorney general's interpretation of a new law, meatpacking giant IBP Inc. may soon change the way it buys hogs in this state. … Packers said the one-price policy was needed to fend off potential lawsuits. … "Omaha World-Herald," July 11, 1999;

CarSuperStore-com
An open letter from Dan Perkins:
…That's why we are changing to ONE PRICE buying at Dan Perkins Chevrolet-Geo, Dan Perkins, Subaru, Saturn…
www.carsuperstore.com;

NMMA Boating Statistics, Challenges, Opportunities
Growth = Better Selling, Marketing
…One of the most surprising findings of the research was the interest of boat buyers to negotiate price rather than be offered a "one-price" system. This is not to say buyers want to haggle, but there is a perception that a negotiated price will be lower than a fixed one. … Despite all the positives attributed to

> "one price" buying, a recent study of "baby boomer" car buyers indicated that 55 percent still prefer to negotiate price. 63.236.237/facts/boatingstats/challenges/growth.html; and
>
> TEMPLETON
> The Regional Dodge-Olds Superstore
> 8598 Leesburg Pike Tysons Corner, Va.[1]
> …website: http//www.onepricebuying.com
> One Price Buying
> …Maybe you've seen it in the paper or on TV, we have an entirely different way of selling cars … … ONE PRICE BUYING. … And it's the same ONE LOW PRICE whether you're the bank president, the bank manager, or a single mother of two. … www.fairfaxguide.com/templetondodgeoldsmobile.html.

In addition, the Examining Attorney refers to applicant's use of the phrase ONE PRICE BUYING as shown on the specimens it filed with the application (although the application is now based on applicant's assertion of a bona fide intention to use the mark in commerce on the identified goods). The specimens are four separate advertisements, three of which are for a Templeton Dodge-Oldsmobile auto dealership (at Tysons Corner, Virginia), and one is for a Ken Rodgers' Ford dealership in Corinth, Mississippi.

[1] The above is the same address as applicant lists in its involved application Serial No. 75544444.

Finally, the record includes the following request for information pursuant to Trademark Rule 2.61(b) by the Examining Attorney (Office action dated February 6, 2001, p. 2):

> "To permit proper consideration of this application, the applicant must submit information as to whether any of its identified goods will be associated with the marketing or selling of automobiles."

Applicant's response includes the following (applicant's August 6, 2001 response, p. 2):

> "The mark 'ONE PRICE BUYING' is arbitrary and not descriptive of any particular articles in commerce. The term is not associated with any particular goods including automobiles."

Applicant urges reversal, arguing that the mark must be viewed in its entirety, not as three separate words; that when so viewed, this combination of words is suggestive rather than descriptive; that the words do not immediately convey information about applicant's goods, but rather consumers would have to use imagination to "reach a certain conclusion" (brief, p. 4); that the phrase "ONE PRICE BUYING" is not descriptive of applicant's identified goods, and the Examining Attorney has not established "any contextual link of the phrase to the class of goods for which registration is sought" (brief, pp. 7-8); that the

mark is wholly arbitrary with regard to the identified International Class 16 goods; that a registration issued to applicant would not preclude competitors "from describing their paper, printed material and other products for what they are" (brief, p. 10); and that doubt is resolved in applicant's favor.

Applicant specifically argues as follows (brief, pp. 5-6):

> This refusal is based on incorrect and conclusory remarks by the examiner. First, the examiner incorrectly states that ONE PRICE BUYING refers to the sale of goods at a single non-negotiable price. Second, the examiner incorrectly concludes that "it is reasonable to assume that the printed matter will contain information on one price buying" and that "in such an event the mark is descriptive of the subject matter of the goods." It is submitted that it is not reasonable to draw such a conclusion. There is no evidence tendered toward this supposition. The examiner's response is conclusory and as such, an inadequate basis for a final refusal to register the proposed mark.

The test for determining whether a term or phrase is merely descriptive is whether the term or phrase immediately conveys information concerning a significant quality, characteristic, function, ingredient, attribute or feature of the product or service in connection with which it is used or is intended to be used. See In re Nett

Designs Inc., 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001); In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215 (CCPA 1978); In re Eden Foods Inc. 24 USPQ2d 1757 (TTAB 1992); and In re Bright-Crest, Ltd., 204 USPQ 591 (TTAB 1979).

Further, it is well-established that the determination of mere descriptiveness must be made not in the abstract or on the basis of guesswork, but in relation to the goods or services for which registration is sought, the context in which the term or phrase is being used or is intended to be used on or in connection with those goods or services, and the impact that it is likely to make on the average purchaser of such goods or services. See In re Consolidated Cigar Co., 35 USPQ2d 1290 (TTAB 1995); and In re Pennzoil Products Co., 20 USPQ2d 1753 (TTAB 1991).

Consequently, "[w]hether consumers could guess what the product [or service] is from consideration of the mark alone is not the test." In re American Greetings Corp., 226 USPQ 365, 366 (TTAB 1985). Rather, the question is whether someone who knows what the goods or services are will understand the term or phrase to convey information about them. See In re Home Builders Association of Greenville, 18 USPQ2d 1313 (TTAB 1990).

A term or phrase need not be merely descriptive of every recited item in the identification of goods (or services). Rather, the term or phrase is properly refused registration as merely descriptive if it is merely descriptive of any of the identified goods (or services). See In re Quik-Print Copy Shop, Inc., 616 F.2d 523, 205 USPQ 505 (CCPA 1980); and In re Patent & Trademark Services Inc., 49 USPQ2d 1537 (TTAB 1998).

In this case, the Examining Attorney has met the burden of establishing a prima facie case of mere descriptiveness, particularly with respect to the phrase "one price buying" in relation to those of applicant's goods identified as "printed matter, namely, books, magazines, brochures and pamphlets in the field of marketing of goods" and "instructional and teaching materials in the field of marketing of goods." In fact, this record includes ample evidence that in the context of those particular goods, the phrase is merely descriptive and would be so understood by purchasers of applicant's goods, as well as by people in the marketing and advertising trade or industry. See e.g., references to "one price buying" in general circulation publications as well as in advertising/marketing trade publications; uses of the phrase on several third-party websites; and

applicant's own use of the phrase as shown on its website and in the specimens originally submitted with its application.

The phrase ONE PRICE BUYING, considered as a whole, when used on applicant's goods (particularly those goods specifically relating to the field of marketing), is merely descriptive of a significant feature thereof -- the marketing of goods via a single, non-negotiable price. In applicant's own words ONE PRICE BUYING relates to a single price -- "No haggling. No games. No hassle." (from its website), and "We won't waste your time or your money. Now just pick the car or truck you want and get the lowest possible price from the start. No negotiating. No haggling. No games." (from its specimens).[2]

We find that the purchasing public would readily understand, without imagination or conjecture, that the phrase ONE PRICE BUYING refers to the marketing and selling of goods at a single, fixed price; and they would certainly

[2] We note with respect to the question asked by the Examining Attorney as to whether applicant's International Class 16 goods will be associated with the marketing or selling of automobiles, applicant answered the question, but applicant did so in an evasive, disingenuous manner, stating that "the term is not associated with any particular goods including automobiles." To the extent that applicant, however, was asserting that the term is not associated solely with the automobile industry, we agree that the record before us shows that such is true inasmuch as the phrase ONE PRICE BUYING is a general marketing concept used in several industries.

understand the phrase to mean that in relation to applicant's printed publications and instructional materials which are identified as being in the field of marketing of goods.

Applicant argues that the Examining Attorney's conclusions that applicant's printed matter and instructional materials will contain information on "one price buying" and thus that the phrase is merely descriptive of the subject matter of these publications which relate to marketing of goods are unsupported and unreasonable. We do not agree. Applicant had the opportunity to clearly explain what these goods will or will not entail, and it opted not to clarify the record with regard thereto. Not only was applicant's response to the Examining Attorney's inquiry about the goods nebulous in nature, but also, applicant did not expressly deny that its involved goods will be about "one price buying." Thus, we find it reasonable to conclude that applicant's printed materials and instructional materials in the field of marketing of goods will involve the marketing concept of "one price buying" as the literal subject matter thereof -- whether used in training applicant's employees in applicant's apparent car dealership, or as marketing to consumers on the showroom floor. Because the marketing

concept of "one price buying" will be the subject matter of applicant's printed materials, it is merely descriptive of those goods. See In re National Recreation Assn., Inc., 181 F.2d 221, 85 USPQ 281 (CCPA 1950); In re Waverly Inc., 27 USPQ2d 1620 (TTAB 1993); In re Gracious Lady Service, Inc., 175 USPQ 380 (TTAB 1972); and In re Nippon Kokan Kabushiki Kaisha, 171 USPQ 63 (TTAB 1971).

Applicant's reliance on the case of In re Dial-A-Mattress Operating Corp., 240 F.3d 1341, 57 USPQ2d 1807 (Fed. Cir. 2001), for the proposition that "the board cannot simply cite definitions and generic uses of the constituent terms of a mark; it must conduct an inquiry into the meaning of the disputed phrase as a whole" (brief, p. 7) is misplaced in the context of the case now before us. The portion of the Court's decision quoted by applicant relates to the Court's discussion of whether the term involved therein (1-888-M-A-T-R-E-S-S) was generic. In the application now before the Board, the Examining Attorney has refused registration on the basis of mere descriptiveness, not genericness.

Based on the record, we find that the phrase ONE PRICE BUYING, when used on the involved goods (particularly the printed matter and instructional materials relating to the field of marketing of goods), immediately conveys to the

purchasing public the idea of the marketing feature of a set, non-negotiable price. See In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); In re Omaha National Corporation, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987); In re Intelligent Instrumentation Inc., 40 USPQ2d 1792 (TTAB 1996); In re Time Solutions, Inc., 33 USPQ2d 1156 (TTAB 1994); and In re Copytele Inc., 31 USPQ2d 1540 (TTAB 1994).

Decision: The refusal to register on the ground that the mark is merely descriptive under Section 2(e)(1) is affirmed.