

6/6/02

**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

Paper No. 10
RFC

UNITED STATES PATENT AND TRADEMARK OFFICE

—————

Trademark Trial and Appeal Board

—————

In re A A A Customer Services, LLC

—————

Serial No. 75/748,475

—————

Faye L. Tomlinson of Christensen O'Connor Johnson & Kindness PLLC for A A A Customer Services, LLC.

Tracy Cross, Trademark Examining Attorney, Law Office 103 (Michael Hamilton, Managing Attorney).

—————

Before Cissel, Hairston and Rogers, Administrative Trademark Judges.

Opinion by Cissel, Administrative Trademark Judge:

On July 12, 1999, applicant filed the above-referenced application to register "EXCLUSIVE BUYERS AGENTS" on the Principal Register for "real estate services," in Class 36. The application was based on applicant's claim of use of this term in connection with the services in interstate commerce since January 2, 1999.

The Examining Attorney refused registration under Section 2(e)(1) of the Lanham Act, 15 U.S.C. Section 1052(e)(1), on the ground that the term is merely

descriptive of the services set forth in the application. The Examining Attorney also made a requirement for applicant to amend the recitation of services in the application to make it more definite.

Submitted in support of the refusal to register were excerpts retrieved from the Nexis database of published articles. Examples include the following:

“Exclusive buyer agent offices work only with the buyer in real estate transactions.” Press Journal (Vero Beach, Florida) December 5, 1999.

“The American Homeowners Foundation offers a number of free tips and publications for home buyers and sellers, including the national listing of screened and monitored exclusive buyers agents, who represent only buyers of real estate.” Chattanooga Times/Chattanooga Free Press, Dec. 28, 1999.

“So why, then, do some consumers sign up only with an exclusive buyer’s agent? Because when making perhaps the most expensive decision of their lives, they want to have the counsel of someone who is dedicated to their interest alone.” Sarasota Herald-Tribune, Dec. 4, 1999.

“Whether you use an exclusive buyer’s agent or a traditional Realtor who is working for you as a buyer’s agent, having that professional on your side can be powerful.” The Washington Times, Aug. 6, 1999.

Applicant responded to the first Office Action by agreeing that the proposed mark “does describe an aspect of applicant’s services” and amending the application to seek registration on the Supplemental Register. Applicant also amended the recitation of services to read as follows: “real estate agencies in International Class 36.”

The Examining Attorney refused registration on the Supplemental Register under Section 23 of the Lanham Act, 15 U.S.C. Section 1091, on the ground that the term applicant seeks to register is generic in connection with the

services specified in the amended application, and hence is incapable of identifying the source of applicant's services and distinguishing them from similar services rendered by others. She concluded that the "mark designates a class of real estate providers and services," and further, that "consumers often encounter 'exclusive buyers agents' and the associated real estate services, thus the public understands that the mark refers to this class of real estate providers."

Submitted in support of the refusal were additional excerpts from various Web pages and published articles. Included in the Internet evidence, for example, is a page which refers to an individual as "an exclusive buyer's agent"; another states that "[o]nly an exclusive buyer's agent seeks the lowest possible purchase price for you, the buyer client." Several individuals are referred to as "Exclusive Buyers Agent[s]." An article from the July 2, 2000 edition of The Santa Fe New Mexican explains that "[t]he advantage touted by exclusive buyer agent firms around the country is that the buyer doesn't have to worry about whose interests his agent holds." Another, from the April 23, 2000 edition of the Chattanooga Times/Chattanooga Free Press, in discussing a Web site, states as follows: "The site also offers a variety of free services including a national directory of exclusive buyers agents, a mortgage rate calculator and mortgage counseling services." The December 10, 1999 edition of the Chicago Tribune states that "[f]ew home buyers work with an exclusive buyer's agent, although it's becoming more common every day."

Applicant responded to the refusal to register "EXCLUSIVE BUYERS AGENTS" on the Supplemental Register by arguing that the "mark specifically designates a combination of real estate agency services," so it is not a generic term. Applicant contended that "[a]lthough applicant's services include performing real estate services, applicant's services also cover a much broader range of services including the management, advertisement, acquisition, and sale of real property. The [materials submitted by the Examining Attorney] are not sufficient to establish that the public views the term 'exclusive buyers agents,' as the common name for the category of services provided by applicant," but rather "leaves something to the imagination." Applicant stated that "EXCLUSIVE BUYERS AGENTS is just one of many terms used to describe the real estate services focused on buyers." Applicant then provided a list of almost forty other terms, such as "accredited buyers agent," "agency for buyers only," "agents for the buyer", "buyers agent," "buyer's agent," and "buyers' agent" which applicant claimed are used to identify real estate services focused on buyers. Applicant argued that the term it seeks to register, "being only one of nearly forty terms used to describe real estate services

focused on buyers, is therefore descriptive and not generic of applicant's services."

Not surprisingly, the Examining Attorney was not persuaded by applicant's arguments, and in the third Office Action, she made the refusal to register the term on the Supplemental Register final. Submitted with the final refusal were still more excerpts retrieved from the Nexis database of published articles. The March 5, 2001 edition of The Palm Beach Post identified an individual as the "president of the Orlando-based National Association of Exclusive Buyer Agents," who explained that members of his group "think the buyer should have representation at that table." The article goes on to state that "[t]hat's what exclusive buyers' agents do. They never represent sellers..." The March 4, 2001 edition of the Boston Globe, in discussing a home-buying seminar, noted that "exclusive buyer agents from the Buyer's Network" were scheduled to make a presentation. The March 4, 2001 edition of the St. Louis Post-Dispatch noted that "Wm French Buyer's Real Estate Services in Chesterfield is one of the largest—if not the largest—exclusive buyer's agents in the nation." Many more examples of this type of usage of the term sought to be registered were also included by the Examining Attorney.

Applicant timely filed a Notice of Appeal, which was followed by applicant's appeal brief. The Examining Attorney filed her brief on appeal, but applicant did not request an oral hearing before the Board, so we have

resolved this appeal based on consideration of the application and written arguments presented.

The test for determining whether a mark is registrable on the Supplemental Register is not disputed by applicant or the Examining Attorney. The Court of Appeals for the Federal Circuit set forth the inquiries to be made in this regard in *H. Marvin Ginn Corp. v. International Association of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528 (Fed. Cir. 1986). First, what is the class of goods or services at issue? Second, does the relevant public understand the designation sought to be registered primarily to refer to that class of goods or services? The burden is on the Examining Attorney to present evidence establishing that the term in question is generic. In *re Analog Devices Inc.*, 6 USPQ2d 1808 (TTAB 1988), *aff'd* 871 F.2d 1097, 10 USPQ2d 1879 (Fed. Cir. 1989).

In the case before us, applicant provides “real estate agencies” services. Without question, the evidence submitted by the Examining Attorney establishes that real estate agents who work exclusively as agents for buyers are referred to as “exclusive buyers agents” or “exclusive buyer’s agents.” The evidence shows that this terminology, singular or plural and with or without an apostrophe, is used to identify a category or class of real estate agents, and that the relevant purchasing public for the services such agents render readily perceives the generic significance of these words when they are used in connection with their services.

Applicant makes no persuasive arguments to the contrary. That applicant's services include a broad range of real estate agency services does not render this generic term capable of identifying applicant as the sole source of exclusive buyers agents services or distinguishing applicant's exclusive buyers agents services rendered under this terminology from similar services rendered by other exclusive buyers agents. Contrary to applicant's contention, when this term is considered in connection with real estate agency services, no "imagination" is necessary to understand, from the proposed mark, the services to which it refers. That a variety of other terms are also used as names for these services does not make the generic term applicant seeks to register any less generic.

The Examining Attorney has met her burden of establishing that the terminology applicant seeks to register is incapable of identifying and distinguishing the services specified in the application.

Decision: The refusal to register under Section 23 of the Act is affirmed.