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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Market Valuation Institute, LLC

Serial No. 78207995

David A. Lowe of Black Lowe & Graham PLLC for Market Valuation Institute, LLC.

Cimmerian Coleman, Trademark Examining Attorney, Law Office 102 (Thomas V. Shaw, Managing Attorney).

Before Chapman, Bucher and Kuhlke, Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Market Valuation Institute, LLC seeks registration on the Principal Register of the term **THE OPTION VALUE INDICATOR** (standard character drawing) for services recited in the application as "financial services, namely, providing information and analysis in the field of financial investments; [and] providing financial and investment information via the Internet" in International Class 36.[1]

[1] Application Serial No. 78207995 was filed on January 28, 2003 based upon applicant's claim of a *bona fide* intention to use the mark in commerce. On February 1, 2005, applicant filed

This case is now before the Board on appeal from the final refusal of the Trademark Examining Attorney to register these words based upon the ground that the term is merely descriptive when considered in relation to applicant's recited services, i.e., that the term THE OPTION VALUE INDICATOR immediately informs potential purchasers about a feature of, or purpose for, applicant's services.

Both applicant and the Trademark Examining Attorney have fully briefed this appeal, but applicant did not request an oral hearing before the Board.

We affirm the refusal to register.

A mark is merely descriptive, and therefore unregistrable pursuant to the provisions of Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), if it immediately conveys information of significant ingredients, qualities, characteristics, features, functions, purposes or uses of the goods or services with which it is used or is intended to be used. Hence, the ultimate question before us is whether this entire phrase conveys information about a significant feature of, or

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an Amendment to Allege Use, claiming first use anywhere and first use in commerce at least as early as March 13, 2003, which was accepted by the United States Patent and Trademark Office. Its specimen of use consists of several pages from its website, discussed *supra*.

purpose for, applicant's services with the immediacy and particularity required by the Trademark Act.

A mark is suggestive, and therefore registrable on the Principal Register without a showing of acquired distinctiveness, if imagination, thought or perception is required to reach a conclusion on the nature of the goods or services. *See In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987).

The question of whether a particular term is merely descriptive is not decided in the abstract. Rather, the proper test in determining whether a term is merely descriptive is to consider the alleged mark in relation to the goods or services for which registration is sought, the context in which the mark is used, and the significance that the mark is likely to have on the average purchaser encountering the goods or services in the marketplace. *See In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215 (CCPA 1978); *In re Intelligent Instrumentation Inc.,* 40 USPQ2d 1792 (TTAB 1996); *In re Consolidated Cigar Co.*, 35 USPQ2d 1290 (TTAB 1995); *In re Pennzoil Products Co.*, 20 USPQ2d 1753 (TTAB 1991); *In re Engineering Systems Corp.*, 2 USPQ2d 1075 (TTAB 1986); and *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979).

Applicant argues that the Trademark Examining Attorney has failed to meet her burden of establishing that this term, when viewed as a whole, is merely descriptive. In support of its position that this phrase is suggestive, applicant argues that there is no dictionary entry for the four-word phrase, THE OPTION VALUE INDICATOR, and that this fact should weigh in applicant's favor. *See In re Sundown Tech. Inc.,* 1 USPQ2d 1927, 1928 (TTAB 1986) [GOVERNOR is nebulous as applied to amplifier controls, and the dictionary definition "is notable for its absence … as a term of art in the electronics field …"]; and *In re Men's Int'l Professional Tennis Council,* 1 USPQ2d 1917, 1918 (TTAB 1986) [In application to register MASTERS as a service mark for "organizing and conducting an annual tennis tournament," Board found that "the absence of any particular reference to tennis in the dictionary [entry for the word "master"] probably favors appellant's position that the mark should be published rather than that it should be refused *ex parte*."].

On the other hand, the Trademark Examining Attorney counters that whether or not a term is found in the dictionary is not controlling on the question of

registrability provided the composite term has a recognized meaning. *In re Gould Paper Corp*., 834 F.2d 1017, 5 USPQ2d 1110 (Fed. Cir. 1987) [“the PTO has satisfied its evidentiary burden if, as it did in this case, it produces evidence including dictionary definitions that the separate words joined to form a compound having a meaning identical to the meaning common usage would ascribe to those words as a compound”] and *In re Orleans Wines, Ltd*., 196 USPQ 516 (TTAB 1977) [BREADSPRED is merely descriptive of function or use of jams and jellies even if it is not a dictionary term]. Of course, even less likely than would be the case with compound terms like “screen wipe” or “bread spread,” we note that very rarely would a three-word term (“option value indicator”) or a four-word term (“the option value indicator”) appear in any dictionary as a single entry.

In order to make a *prima facie* case of mere descriptiveness, we agree that the Office may rely upon dictionary definitions of individual elements in a multi-word phrase, as the Trademark Examining Attorney has done in the instant case. If each component retains its descriptive significance in relation to the services, the combination results in a composite that is itself merely

descriptive. *See In re Putman Publishing Co.,* 39 USPQ2d 2021 (TTAB 1996) [FOOD & BEVERAGE ONLINE held to be merely descriptive of news and information service for the food processing industry]; *In re Copytele Inc.*, 31 USPQ2d 1540 (TTAB 1994) [SCREEN FAX PHONE held to be merely descriptive of "facsimile terminals employing electro-phoretic displays"]; *In re Serv-A-Portion Inc.,* 1 USPQ2d 1915 (TTAB 1986) [SQUEEZE N SERV held to be merely descriptive of ketchup and thus subject to disclaimer]; and *In re Uniroyal, Inc.,* 215 USPQ 716 (TTAB 1982) [STEELGLAS BELTED RADIAL held merely descriptive of vehicle tires containing steel and glass belts].

The Trademark Examining Attorney, having examined the entire four-word phrase, takes the position that "the composite mark clearly describes the provision of financial information regarding the value of options." Trademark Examining Attorney's appeal brief, p. 3.

In partial support of her position that the entire phrase is merely descriptive, the Trademark Examining Attorney placed into the record definitions of the words "option,"[2] "value,"[3] "option value,"[4] and "indicator."[5] *See*

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[2] The online definition of "option" is: "the right, but not the obligation, to buy (for a call option) or sell (for a put option) a specific amount of a given stock commodity, currency,

Office Action of July 11, 2003. As to the word "indicator," the online definition made of record points to data that provides information about or predicts the future of financial markets. As suggested by the examples listed in this entry, the word "indicator" occurs frequently in the language of economics and finance (technical *indicator*, leading *indicator*, key *indicator*, performance *indicator*, stock market *indicator*, etc.). She argues from the plain meanings of the words that applicant's wording, "option value indicator," "describes services in which information is provided about the financial markets." Trademark Examining Attorney's appeal brief, p. 3.

In further support of her refusal to register, she points to examples from the LEXIS-NEXIS computer database where the term "option value" is used as a term of art in

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index, or debt, at a specified price (the strike price) during a specified period of time." http://www.investorwords.com/

[3] The online definition of "value" is: "worth, desirability or utility." http://www.investorwords.com/

[4] The online definition of "option value" is: "the value of the option based on stock price, strike price, interest rate, days to maturity and volatility into an option valuation model." http://www.blonnet.com/

[5] The online definition of "indicator" is: "data which provide information about or predict the overall health of the economy or the financial markets. See also economic indicator, confidence indicator, coincident indicator, momentum indicator, monetary indicator, overbought/oversold indicator, technical indicator." http://www.investorwords.com/

the financial industry in the context of option pricing models, to describe the value of an option. As applied to equities, for example, “option value” is calculated for a call and a put based upon factors such as strike price, volatility, time frame to expiration, interest rates, dividends data, etc. However, whether applied to stocks, currencies or futures contracts on commodities, the Trademark Examining Attorney contends that these readily understood uses are further evidence that the two-word term “option value” is being used descriptively by applicant, and not as a source identifier.

The Trademark Examining Attorney also relies on the text from applicant’s own website, where applicant explains how its services help the option trader:

> … The ***data*** is presented in an organized, easy-to-read format … [“TOVI Welcome” page]
>
> … evaluating the markets, finding ***options***, and keeping track of every ***option*** you are interested in or are actively trading.
>
> Analyzes, prioritizes and ranks the 42 major commodity markets based on our proprietary trend-strength and trend-potential ***indicators*** …
>
> Ranks approximately 10,000 ***options*** by market every trading day to identify those ***options*** that fit your specific timing and budget criteria.

> Provides a ***Value*** Factor rating for each option using our proprietary ***option***-ranking formula ["What is TOVI" page][6] [***emphasis*** provided by the Trademark Examining Attorney]

The Trademark Examining Attorney argues that from these specimens, "it is readily apparent that applicant provides financial forecasting information about stock values or, *indicators* regarding *option values*." Based upon this evidence, she contends that no mental leap need be made to determine that applicant is providing an indicator related to option values.

By contrast, applicant argues that its trademark is not merely descriptive, while conceding that it may well be suggestive. As noted above, a mark is suggestive if imagination, thought or perception is required to reach a conclusion on the purpose or features of the goods. *See* *In re Gyulay*, *supra*. Accordingly, applicant argues that potential consumers would have to use some imagination or thought in order readily to understand the services being offered by applicant in connection with this alleged mark. Applicant argues that its services "do not provide an indicator of the financial option value." Specifically, as to whether the entire claimed mark herein immediately

[6] http://www.tovionline.com/

conveys information about a significant feature of, or purpose for, the services, applicant points to the same website pages cited above by the Trademark Examining Attorney (i.e., the "What is TOVI" pages reproduced *infra* from applicant's specimen of record), applicant argues that it "provides analytical and reporting services related to a wide variety of aspects of the market."

Applicant's website does tout this analytical tool as the "24/7 trading assistant" for option traders. Applicant claims that its program can analyze, evaluate and rank options; that it helps the options / futures / commodities trader to know which are the best markets in which to trade options, when it is the best time to trade them, and the best ways to trade them. It allegedly provides signals, strategies and advanced statistical tools. It is able to assign each option a "value factor" that is dependent upon the trading style and budget of the trader. It has features such as a "red warning indicator" and a "signal tracker." It is sensitive to present trends, new trends, short-term trends and long-term trends. It is constantly alert to value bias, value

momentum and value movements in dozens of different markets.[7]

Based upon applicant's website (as well as the other evidence of record, e.g., dictionary definitions and other

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[7] **Look at all the valuable market analysis TOVI provides (and this is critical information for any trader, whether you prefer options or futures contracts):**

- Analyzes prioritizes, and ranks the 42 major commodity markets based on has potential indicators. You get a clear picture of the momentum and stage of current market moves
- Analyzes, prioritizes, and ranks the 42 major commodity markets based on our proprietary trend-strength and trend-potential indicators. You get a clear picture of the momentum and stage of current market moves
- Identifies the markets poised to take off and provides an expected time frame
- Provides short-term (less than six months) and long-term market analyses to help you develop a plan that fits your trading style - whether you like to trade the immediate trend momentum, or prefer to establish a position in anticipation of longer-term moves
- Offers technical analyses of Historical Moves data to indicate average timing, length, and strength of moves over the history of each market (vital information to help you anticipate what may happen next)

In addition, TOVI provides special assistance to option traders:

- Ranks approximately 10,000 options by market every trading day to identify those options that fit your specific timing and budget criteria
- Provides a **Value Factor** rating for each option using our proprietary patent pending option-ranking formula
- Allows you to perform a **Budgeted Search** (finding the options that fit your specific timing and budget criteria), a **Max Premium Search** (where staying in a market long-term is not of concern to you and you just want to find the options that fit your budget), or a **Value Factor Search** (where you just want to find the options that offer the best opportunity right now)
- Individualized **Monitoring and Active Portfolios**, tailored for your trading plan, that allow you to track your option trades with updated price information while providing all-important **Time Decay Warnings** for option traders. Option traders will also benefit from the **BudgetMinder**, our unique option trading manager that helps you allocate and budget funds for future option purchases ["What is TOVI" page, www.tovionline.com] [**Bold lettering** in original]

online resources), we find that applicant's applied-for mark would be perceived by the purchasing public as a merely descriptive term for its services rather than as a mark identifying the services' source. *See In re Diagnostic Products Corp.*, 216 USPQ 170 (TTAB 1982) ["On review of [applicant's instructional literature], it is clear to the Board that the references to 'PREMIX' in such literature cease, at some point, to refer to applicant's kit as such and become a descriptor … confirming the descriptive possibilities and tendencies of the term in the context of applicant's actual usage …." 216 USPQ at 172, footnote 4]. While we agree with applicant that the recited services involve more than simply providing raw data on the value of options, we find that applicant's services clearly encompass monitoring the value of financial options.

Applicant expressly agrees with the well-established principle enunciated earlier that the question of whether a particular term is descriptive or suggestive must not be determined in the abstract. Yet applicant goes on to argue that the mark is not merely descriptive because one cannot tell from the mark alone that applicant's services comprise analytical and reporting program services.

We agree with the Trademark Examining Attorney that the standard derived from Lanham Act precedential decisions for a descriptiveness refusal does not require that the prospective customer knows immediately upon seeing or hearing the alleged mark precisely what the goods or services are. Rather, given that applicant's services are identified as providing investment information and financial analysis, the question to ask is whether, for someone who knows generally what these services are, the term "option value indicator" immediately conveys information about applicant's services of providing investment information and financial analysis. *See In re Home Builders Association of Greenville*, 18 USPQ2d 1313 (TTAB 1990) [NEW HOME BUYER'S GUIDE immediately conveys the idea of advertising in a new home guide for buyers]; and *In re American Greetings Corp.*, 226 USPQ 365 (TTAB 1985) [APRICOT identifies the fact that applicant's dolls are apricot scented and that this is a significant characteristic of the goods]. In answer to that question, we find that the designation THE OPTION VALUE INDICATOR fairly succinctly describes the informational benefits one will obtain from this service such that an options trader who knows generally of

applicant's services, when confronted with this alleged mark, would immediately know that the services are designed to provide investment information and financial analysis.

Applicant reminds us repeatedly that this mark is used in connection with its proprietary (i.e., patented) program. Indeed, nothing in the record contradicts applicant's contention that its services may well be different from anything else currently available to option traders. However, applicant's argument that the term is not merely descriptive because the term is not used by anyone else is not well taken. A merely descriptive term used first or only by one party is no less descriptive because of its limited use, nor is it registrable as long as the relevant public perceives of the term as describing the services. *See In re International Game Technology Inc.*, 1 USPQ2d 1587, 1588-89 (TTAB 1986).

Having chosen these informative words, and then having employed them in a context totally consistent with their ordinary meaning, applicant accepted the risk that this particular string of words may be considered merely descriptive of its services rather than as a mark identifying the services' source. We note the analysis

and results of *In re The Standard Oil Company*, 275 F.2d 945, 125 USPQ 227 (CCPA 1960) [GUARANTEED STARTING for winterizing automobile engines].

> In the present case it may be conceded that in using the words "guaranteed starting" in order to bring its services to the attention of the public the applicant intended and hoped, or perhaps expected, that they would distinguish them from similar services offered by others. However, having chosen words which, taken in their normal meaning, do no more than inform the public with reasonable accuracy what is being offered, it did not succeed.
>
> The words are well understood, English words in common use. Taken together, they amount to no more than a sort of condensed announcement that the applicant will guarantee the work done in order to insure the starting of the customer's car. It must be assumed that the ordinary customer reading the advertisements displayed by an automobile service station would take the words at their ordinary meaning rather than read into them some special meaning distinguishing the services advertised from similar services of other station operators. Whatever may have been the intention of the applicant in using them, their use has not accomplished what the applicant wished to do. Hence, they are not a service mark.

Finally, in support of its position that this phrase is, at worst, suggestive, applicant argues that a multi-stage reasoning process, or the utilization of imagination, thought or perception, is required in order to determine what attributes of the services the mark

indicates. *See* *Abcor* *supra at* 218; and *In re Mayer-Beaton Corporation,* 223 USPQ 1347, 1349 (TTAB 1984).

Specifically, applicant claims that this term creates a double entendre or an incongruity, when used in connection with its recited analytical and reporting program services, citing to *In re Tennis in the Round, Inc*., 199 USPQ 496 (TTAB 1978) [TENNIS IN THE ROUND held not merely descriptive of tennis facilities].

However, in the TENNIS IN THE ROUND case, the Board expressly found that this term created a misleading association, and that the mark as a whole was incongruous as applied to the recited services:

> In the instant case, applicant's marks "TENNIS IN THE ROUND" and "TENNIS IN THE ROUND INC." and design evoke an immediate association with the well-known phrase "theater-in-the-round." … This association of applicant's marks with the phrase "theater-in-the-round" creates an incongruity because applicant's tennis facilities are not in fact at all analogous to those used in a "theater-in-the-round" … In contrast, the placement at applicant's facility of 11 tennis courts one next to another in a circular configuration has no real effect upon the manner in which tennis is practiced at such facility, nor upon the rendering of applicant's services. Insofar as the record herein shows, the placement of applicant's tennis courts in a circular configuration, rather than in rows, for example, serves no particular purpose in the performance of applicant's services. Nor does it appear that others engaged in

> the services of providing tennis facilities in the form of courts and tennis ball machines and offering instruction in tennis would have any need to use the phrase "in the round" in describing such service.

In re Tennis in the Round, Inc., 199 USPQ at 498.

In the application now before us, the term at issue, THE OPTION VALUE INDICATOR, is central to the rendering of applicant's services, and there is no association with a known phrase involved in the applied-for mark, such as "theater-in-the-round" or "sugar and spice." *See also In re Colonial Stores, Inc.*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968) [SUGAR & SPICE not merely descriptive for bakery products because this "stimulates an association with the nursery rhyme"]. Hence, we find that the *Tennis in the Round* case does not support applicant's position herein.

Moreover, applicant has failed to explain how this combination of terms creates an incongruous expression when used in connection with the recited services. As discussed *supra*, this combination of terms immediately describes the activities that applicant touts are involved in this service (e.g., quoting, analyzing, modeling, tracking, monitoring, etc., the value of options).

Decision: The refusal to register under Section 2(e)(1) of the Trademark Act is hereby affirmed.