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Mailed:

October 21, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Franchise Payments Network, LLC

Serial No. 78908713

Lane Fisher of Fisher Zucker LLC for Franchise Payments Network, LLC.

Vivian Micznik First, Trademark Examining Attorney, Law Office 114 (K. Margaret Le, Managing Attorney).

Before, Hairston, Grendel and Zervas, Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

On June 15, 2006, Franchise Payments Network, LLC filed an application (Serial No. 78908713) to register the mark



for "electronic payment processing, namely, electronic processing and transmission of bill payment data; credit card transaction processing services" in International Class 36. Applicant has claimed February 1, 2006 as its date of first use anywhere and first use in commerce; and has entered the following description of the mark: "The mark consists of [a] design of a credit card with the letters 'FPN' and the words 'Franchise Payments Network' stacked next to the design."

The examining attorney has refused registration pursuant to Section 6 of the Trademark Act, 15 U.S.C. § 1056, because applicant has not disclaimed FRANCHISE PAYMENTS NETWORK. See also 15 U.S.C. § 1052(e)(1).¹ According to the final Office action, the term is merely descriptive and hence must be disclaimed "because it merely describes the nature of applicant's entity and its purpose." On p. 3 of her brief, the examining attorney states that the term "describes the characteristics of the

¹ The final action also refuses registration in view of requirements regarding the drawing and the identification of services. Subsequent to the mailing of the final Office action, applicant attended to the examining attorney's requirements regarding the identification of services and the drawing to the satisfaction of the examining attorney. Accordingly, the only issue on appeal concerns the examining attorney's disclaimer requirement.

services"; and that "applicant has simply combined descriptive terms into one phrase."

Applicant has appealed the final refusal. Both applicant and the examining attorney have filed briefs. We affirm the refusal to register.

A term is merely descriptive if it immediately describes the ingredients, qualities, or characteristics of the goods or services or if it conveys information regarding a function, purpose, or use of the goods or services. *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215 (CCPA 1978). See also *In re Nett Designs*, 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001). To be merely descriptive, a term need only describe a single significant quality or property of the goods or services. *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). Also, "[t]he perception of the relevant purchasing public sets the standard for determining descriptiveness. Thus, a [term] is merely descriptive if the ultimate consumers immediately associate it with a quality or characteristic of the product or service. On the other hand, if a [term] requires imagination, thought, and perception to arrive at the qualities or characteristics of the goods or services, then the [term] is suggestive." *In re MBNA America Bank*

N.A., 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003)
(citations and internal quotation marks omitted).

We agree with the examining attorney that the phrase FRANCHISE PAYMENTS NETWORK is merely descriptive of a feature or characteristic of applicant's services and must be disclaimed.

Turning first to the term FRANCHISE, applicant's identification of services does not limit applicant's services to a particular field or industry and hence must be construed as identifying the field in which applicant offers its services, namely, the franchising field. Indeed, applicant, in its specimen of use which appears to be a magazine advertisement, offers applicant's services to franchisors, stating:

FPN combines the buying power of all clients to achieve a more cost-effective solution for a franchise system. By partnering with three of the top five credit card processing services in the nation, FPN is uniquely positioned to offer franchisors the ability to select the best possible solutions for their systems.

FPN understands the franchise business model and works to align payment processing solutions to meet individual franchisor's needs. We will customize a truly world-class solution to meet your needs both domestically and internationally.

Applicant has also included the logo of the International Franchise Association on its specimen and has acknowledged

at p. 19 of its brief that a "portion of Applicant's customer base are franchises."

The term PAYMENTS merely identifies the service that applicant provides to franchises. Applicant's identification of services specifies that applicant (i) processes bill payment data and credit card transactions, and (ii) transmits bill payment data. Through such services, applicant facilitates the making of payments.

In the context of applicant's services offered to franchisors, the phrase FRANCHISE PAYMENTS indicates to the purchasing public, which applicant acknowledges includes franchisors, that applicant makes or facilitates payments pertaining to the franchise. Of course, a number of different payments may be covered by the term "franchise payments."² For example, franchisors may be paid by franchisees for products purchased from franchisors, or franchisors may receive payment directly in connection with sales made by franchisees. Applicant touts itself as a "New Force in Payment Processing" in its specimen of use and processing payments made in a franchise relationship would be included in its payment processing.

² We do not consider FRANCHISE PAYMENTS to encompass such a large variety of services that it cannot be merely descriptive of the services set forth in applicant's identification of services.

As for NETWORK, the word is defined in dictionary.com, "based on the *Random House Unabridged Dictionary*, © Random House, Inc., 2006," as "an association of individuals having a common interest, formed to provide mutual assistance, helpful information, or the like."³ In applicant's mark, NETWORK indicates that applicant offers its franchise payment services in a manner that furthers all of its customers' common interests. Indeed, this aspect of applicant's services is promoted in applicant's specimen, which states, "FPN combines the buying power of all clients to achieve a more cost-effective solution for a franchise system. By partnering with three of the top five credit card processing services in the nation, FPN is uniquely positioned to offer franchisors the ability to select the best possible solutions for their systems."⁴

³ Applicant submitted the dictionary.com definition of "network" with its main brief. We take judicial notice of this definition. See *In re CyberFinancial.Net Inc.*, 65 USPQ2d 1789 (TTAB 2002) (the Board may take judicial notice of dictionary definitions, including online dictionaries which exist in printed format). See also *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

⁴ Applicant's partnering with credit card processing services and combining the buying power of all of its clients to achieve "a more cost effective solution" undercuts its argument at pp. 13 and 18 of its brief that it is not arranged as a network and that its services and business model do not revolve around any type of defined network. Whether the use of the credit card processing companies "is no more than [a] practicality of the industry" is not inimical to the fact that applicant, in structuring its services, fits within the definition of record of "network."

The next question is whether the combination of FRANCHISE PAYMENTS and NETWORK is merely descriptive. *In re IP Carrier Consulting Group*, 84 USPQ2d 1028, 1030 (TTAB 2007) ("Finally, in determining whether a mark is merely descriptive, we must consider the mark in its entirety"). When we view FRANCHISE PAYMENTS NETWORK in relation to applicant's services, we conclude that there is nothing incongruous about the term. Applicant's term immediately informs prospective purchasers of a feature or characteristic of the services, i.e., that applicant's services involve the processing of payments concerning franchises in a manner that serves its customers' common interests. *See In re Kronholm*, 230 USPQ 136, 137 (TTAB 1986) ("It is clear that applicant's cable television network services will have, as their subject matter and intended audience, colleges and universities in this country. The term sought to be registered [COLLEGE CABLE NETWORK] comprises a combination of descriptive words which lose no descriptive significance in the expression, one which aptly describes a significant feature or characteristic of applicant's services").

Applicant makes several arguments in support of registration but none of its arguments is persuasive. We address applicant's primary arguments made in its twenty-

page brief (devoted substantially to the disclaimer issue) in turn below.

First, applicant argues that a degree of imagination and "multi-step processing" is required by the average purchaser of applicant's services to make any connection between FRANCHISE PAYMENTS NETWORK and applicant's services. According to applicant, the average purchaser of its services is an individual or a small business entity that seeks consulting or customized solutions for credit card, ATM or other types of electronic money transfer; and most of applicant's customers have not used credit cards or other forms of electronic transmission in their past endeavors. Brief at pp. 11 - 12. Applicant maintains that they would not "directly and immediately perceive what Applicant's services are" from the wording "Franchise Payments Network," and, most readily, would consider the mark as referring to "a network of franchise payments" or a "network which handles franchise payments." Brief at pp. 12 - 13. Applicant's argument is not persuasive largely because the prospective purchasers of applicant's services are not limited to those described by applicant and include purchasers such as franchisors who have accepted credit cards in the past and who may want obtain more favorable

payment terms.⁵ Additionally, the meanings applicant ascribes to the wording in the mark are not likely meanings in the context of applicant's identified services. It is not apparent what "a network of franchise payments" could refer to and applicant has not provided an explanation. Further, a "network which handles franchise payments" is not a meaning as natural as the meaning we ascribe to the wording in the mark for the reasons discussed above.

Second, applicant argues that the combination of the three terms in its mark creates a distinct commercial impression on the average purchaser of applicant's services through its arbitrary word placement. Applicant's mark is not similar to the marks found registrable and referenced by applicant in its brief, namely, SNO-RAKE in *In re Shutts*, 217 USPQ 363 (TTAB 1983); SUGAR & SPICE in *In re Colonial Storage, Inc.*, 157 USPQ 382 (CCPA 1968); THE MONEY SERVICES in *In re TMS Corp of the Americas*, 200 USPQ 57 (TTAB 1978); and EXPRESS SAVINGS in *In re Wells Fargo & Co.*, 231 USPQ 116 (TTAB 1986). FRANCHISE PAYMENTS NETWORK does not have the incongruity in terms or double meanings or commonly used words that suggests a number of things,

⁵ Applicant's contention at p. 18 of its brief that the disclaimer requirement is improper because only "a portion of Applicant's customer base are [sic] franchises" is incorrect. Cf., *In re Hutchinson Technology Inc.*, 852 F.2d 552, 7 USPQ2d

that exist in those marks. In short, we do not find any distinct impression or meaning created by the combination of the three terms in applicant's mark.

Viewing FRANCHISE PAYMENTS NETWORK as a whole, we find the evidence of record sets forth a prima facie case that such phrase is merely descriptive. Thus, we are persuaded that when applied to applicant's services, FRANCHISE PAYMENTS NETWORK immediately describes, without need for conjecture or speculation, a significant feature or characteristic of applicant's services. Nothing requires the exercise of imagination, cogitation, mental processing or gathering of further information in order for prospective consumers of applicant's goods to perceive readily the merely descriptive significance of FRANCHISE PAYMENTS NETWORK as it pertains to applicant's services.

Decision: The refusal to register absent a disclaimer of FRANCHISE PAYMENTS NETWORK is hereby affirmed. However, this decision will be set aside if, within thirty days of the mailing date of this order, applicant submits to the Board a proper disclaimer of FRANCHISE PAYMENTS NETWORK. See Trademark Rule 2.142(g), 37 U.S.C. § 2.142(g); and TBMP § 1218 (2d ed. rev. 2004). A proper disclaimer would be:

1490 (Fed. Cir. 1988). The term need not have significance to all of the potential purchasers of applicant's services.

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"No claim is made to the exclusive right to use FRANCHISE
PAYMENTS NETWORK apart from the mark as shown."