

**THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB**

Mailed:  
December 5, 2011

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In Revolution Energy Solutions LLC

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Serial No. 76696032

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Robert C. Bertin of Bingham McCutchin LLP for Revolution Energy Solutions LLC.

William Breckenfeld, Trademark Examining Attorney, Law Office 116 (Michael W. Baird, Managing Attorney).

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Before Cataldo, Mermelstein, and Ritchie, Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Revolution Energy Solutions LLC ("applicant") filed an application to register the mark REVOLUTION E BUILDING,<sup>1</sup> in standard character format, for the following goods:

International Class 6: Metal prefabricated buildings and building modules having rigid, non fabric roofs for renewable energy producing building and energy conservation in buildings, including those for use on swine, dairy and poultry farms; metal prefabricated buildings and building modules having rigid, non fabric roofs including solar photovoltaic and/or solar thermal technologies, and solar roofing and siding elements for electricity, heat, light and/or hot water generation; metal

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<sup>1</sup> Serial No. 76696032, filed February 27, 2009, pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. §1051(b), alleging a *bona fide* intent to use in commerce.

prefabricated buildings and building modules having rigid, non fabric roofs including wind turbines for electricity generation; metal prefabricated buildings and building modules having rigid, non fabric roofs for specific agricultural uses, including dairy production, swine production, and/or poultry production,"

International Class 19: Non-metal prefabricated buildings and building modules having rigid, non fabric roofs for renewable energy producing building and energy conservation in buildings, including those for use on swine, dairy and poultry farms; non-metal prefabricated buildings and building having rigid, non fabric roofs modules [sic] including solar photovoltaic and/or solar thermal technologies, and solar roofing and siding elements for electricity, heat, light and/or hot water generation; non-metal prefabricated buildings and building modules having rigid, non fabric roofs including wind turbines for electricity generation; non-metal prefabricated buildings and building modules having rigid, non fabric roofs for specific agricultural uses, including dairy production, swine production, and/or poultry production.

The Trademark Examining Attorney refused registration of applicant's mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), on the ground that applicant's mark so resembles the registered mark REVOLUTION, also in standard character format, for "primarily non-metal, transportable, semi-permanent, span fabric roofed buildings," in International Class 19,<sup>2</sup> that when used on or in connection with applicant's identified goods, it is likely to cause confusion or mistake or to deceive. The examining attorney also made final a requirement to disclaim the term "building" under Section 6(a) of the Trademark Act, 15 U.S.C. §1056.

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<sup>2</sup> Registration No. 324110, issued May 15, 2007.

Upon final refusal of registration under Section 2(d) and requirement of disclaimer under Section 6(a), applicant filed a timely appeal. Both applicant and the examining attorney filed briefs. For the reasons discussed herein, the Board affirms the refusal to register as well as the requirement of disclaimer.

#### **Disclaimer Requirement**

We first discuss the requirement to disclaim the term "BUILDING." A term must be disclaimed apart from the mark as shown if it is deemed to be merely descriptive of the subject goods or services. Trademark Manual of Examination Procedure §1213.08(b) (8<sup>th</sup> ed. 2011) (TMEP); *See in re Grass GmbH*, 79 USPQ2d 1600, 1603 (TTAB 2006). A term is deemed to be merely descriptive within the meaning of Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. *See, e.g., In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987), and *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). A term need not immediately convey an idea of each and every specific feature of the applicant's goods or services in order to be considered merely descriptive; it is enough that the term describes one significant attribute, function or property of the goods or services. *See In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); *In re MBAssociates*, 180 USPQ 338 (TTAB 1973).

Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with those goods or services, and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of its use. That a term may have other meanings in different contexts is not controlling. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). Moreover, it is settled that "[t]he question is not whether someone presented with only the mark could guess what the goods or services are. Rather, the question is whether someone who knows what the goods or services are will understand the mark to convey information about them." *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002). See also *In re Patent & Trademark Services Inc.*, 49 USPQ2d 1537 (TTAB 1998); *In re Home Builders Association of Greenville*, 18 USPQ2d 1313 (TTAB 1990); and *In re American Greetings Corporation*, 226 USPQ 365 (TTAB 1985). On the other hand, if a mark requires imagination, thought, and perception to arrive at the qualities or characteristics of the goods or services, then the mark is suggestive. *In re MBNA America Bank N.A.*, 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003).

The examining attorney submitted a dictionary definition of the term "BUILDING," as meaning "something that is built, as for

human habitation; a structure.”<sup>3</sup> Applicant’s goods in both recited classes include buildings of various types. Accordingly, we find the term “BUILDING” to be highly descriptive of the goods that applicant seeks to register. Applicant has submitted no evidence to the contrary. Rather, applicant simply argues that “E” and “E BUILDING” are suggestive, (appl’s brief at 10), and that “E BUILDING” is unitary (appl’s brief at 14). Applicant argues that there is a “double entendre or incongruity. In particular, E might suggest the Internet or an electronic type of business that operates without a building, while the term building connotes a structure that is the antithesis of a virtual business.” (appl’s brief at 10). A composite term is registrable if as a unitary mark it has a separate, non-descriptive meaning. *In re Colonial Stores, Inc.*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968) (holding SUGAR & SPICE not merely descriptive of bakery products). However, there is no evidence that the public will view “E BUILDING” as a unitary term, having a separate meaning. We have no doubt that the relevant public will immediately understand the term “BUILDING” to convey information about applicant’s identified buildings. The requirement to disclaim the term “BUILDING” is affirmed.

#### **Likelihood of Confusion**

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<sup>3</sup> American Heritage Dictionary (4<sup>th</sup> ed. 2000).

We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); see also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks"). We discuss each of the *du Pont* factors as to which applicant or the examining attorney submitted argument or evidence.

#### The Marks

We consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties. *In re E. I. du Pont De Nemours & Co.*, 177 USPQ at 567. The question is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in their entireties that confusion as to the source of the goods or services offered under the respective marks is likely to result. The focus is on

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the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *In re Jack B. Binion*, 93 USPQ2d 1531 (TTAB 2009); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

The cited registration consists solely of the word REVOLUTION. Applicant's mark incorporates this word and adds the terms "E" and "BUILDING." As discussed earlier regarding the requirement for the term "BUILDING," we have found the term to be highly descriptive of the goods for which applicant seeks registration. By contrast, we find the term "REVOLUTION" to be arbitrary for the goods in both the application and cited registration. The term "E" likewise adds little to the analysis, providing minimal change to the look, sound, and commercial impression of applicant's mark. Applicant argues that "E" in its mark may suggest that its buildings "might be for electronic commerce or internet access, or might be for energy generation or energy efficiency...." (appl's brief at 14) To the extent we accept applicant's argument, the term "E" would be highly suggestive of the goods that applicant seeks to register.

We therefore find REVOLUTION to be the dominant term in applicant's mark. *See In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 750 (Fed. Cir. 1985) (descriptive or disclaimed matter is generally considered a less dominant portion of a

mark). Applicant argued that the term "REVOLUTION" is weak, and is incorporated in "1775 registrations," including in "11 active registrations in International Class 19." (appl's brief at 6) However, applicant has not provided any evidence in support of this argument. Accordingly, we can provide it no further consideration.

Likelihood of confusion is often found where the entirety of one mark is incorporated within another. As our precedent dictates, the mere addition of a term to a registered trademark is generally not sufficient to obviate a likelihood of consumer confusion. *See In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004) (GASPAR'S ALE and JOSE GASPAR GOLD); *Cola-Cola Bottling Co. v. Joseph E. Seagrams & Sons, Inc.*, 526 F.2d 556 188 USPQ 105 (CCPA 1975) (BENGAL and BENGAL LANCER); *Lilly Pulitzer, Inc. v. Lilli Ann Corp.*, 376 F.2d 324, 153 USPQ 406 (CCPA 1967) (THE LILLY and LILLI ANN); *In re U.S. Shoe Corp.*, 229 USPQ 707 (TTAB 1985) ("CAREER IMAGE" AND "CREST CAREER IMAGES"); *In re Riddle*, 225 USPQ 630 (TTAB 1985) ("ACCUTUNE" and "RICHARD PETTY'S ACCU TUNE").

We find that applicant's mark REVOLUTION E BUILDING is very similar to registrant's mark REVOLUTION, and the presence of E BUILDING in applicant's mark does not significantly change the commercial impression thereof from that of the mark in the cited registration.



Viewing the marks in their entireties, we find that the strong similarities in commercial impression outweigh the differences of the marks as to their sight and sound, and this *du Pont* factor weighs in favor of finding a likelihood of consumer confusion.

The Goods and Channels of Trade

Next we consider the similarities or dissimilarities of the goods. Applicant argues that the goods on which it intends to use its marks are unrelated to those in the cited registration. In particular, applicant asserts that it does not offer fabric or span fabric roofs whereas the goods in the cited registration are for span fabric roofed buildings. Also, applicant claims its goods are for particular uses as set forth in the application, including "for specific agricultural uses, including dairy production, swine production, and/or poultry production" in both Class 6 and 19. The examining attorney correctly notes, however, that the goods in the cited registration are not limited to specific uses, and thus may also be implemented for those same uses. See *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("[t]he authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to

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the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed." [citations omitted]).

To show the relatedness of the goods and how the goods as broadly identified in the cited registration may be used for the same agricultural uses as those identified in the cited registration, the examining attorney submitted into the record Internet evidence showing third parties offering semi-permanent fabric roofed buildings, as identified by the cited registration, for the agricultural uses identified by both classes in the application.

Web excerpts include the following:

We Cover: Fabric Dairy Roof Buildings: Milking Parlor, We Cover provides all the room you need for installing state-of-the-art milking systems. [www.wecover.net](http://www.wecover.net).

ClearSpan Fabric Structures: Agricultural & Farming: Livestock are healthier in our fabric covered buildings, which allow sunlight to filter through the cover and have many ventilation options available. [www.clearspan.com](http://www.clearspan.com).

ARMADA-VINGIDA: Flexible solutions, solid structures: [w]e supply our portable buildings and fabric structures to almost any country and for any industry or sector: Agricultural Solutions: Livestock housing, grain & feed storage, hay storage, livestock facilities, temporary barns, hog plants and cattle buildings. [www.armada-vingida.com](http://www.armada-vingida.com).

Silverstream Shelters: Steel truss-type arches available in 30 to 65-foot widths and any length you want. Cover with 12.5-ounce fabric to protect hay, livestock or equipment. [www.farmingmagazine.com](http://www.farmingmagazine.com).

In reviewing this evidence, we keep in mind that the test is not whether consumers would be likely to confuse the goods, but rather would be likely to be confused into believing that the goods emanate from a single source. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992).

In this regard, we find the Internet evidence persuasive of the relatedness of the goods. This evidence is made even more compelling given the strong, arbitrary nature of registrant's mark and the high degree of similarity between the respective marks.

Applicant has submitted into the record pages from the web site of the registrant, purportedly to show that registrant does not in fact offer its buildings for agricultural use. We note again that we are bound by the identification of goods as stated in the cited registration. *Octocom Systems, Inc. v. Houston Computers Services Inc.*, *supra*, 16 USPQ2d at 1787. The relevant goods are those identified in the cited registration, not those that the registrant may actually offer. The fact that the registrant may not now offer buildings specifically for agricultural use is irrelevant in this proceeding. The buildings identified in the cited registrations are not limited

to any particular use, and the examining attorney's evidence demonstrates that buildings of that type can be put to agricultural use.

Regarding channels of trade, we note again that applicant's goods are more specific than those in the cited registration, and may be sold through more specific channels of trade, for example those for "agricultural uses." However, since the goods in the cited registration do not have any such limitations, we must presume that they travel in "all normal and usual channels of trade" for such goods. See *Squirtco v. Tomy Corporation*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983).

In other words, the cited registration covers buildings offered through the same channels of trade and to the same consumers who purchase registrant's buildings "for agricultural uses" and vice-versa. Accordingly, we find that these *du Pont* factors also weigh in favor of finding a likelihood of consumer confusion.

#### Consumer Sophistication

Applicant urges us to consider consumer sophistication. However, applicant has offered no evidence of the discerning nature of consumers of the buildings of the type in the application or the cited registration.

There is nothing in the record that would give us insight as to the possible sophistication of consumers of these goods.

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To the extent we accept that the overlapping goods may be marketed to more careful purchasers with some advanced knowledge of agricultural needs, we expect that with highly similar marks used on similar goods, even a careful, sophisticated consumer of these goods is not likely to note the differences in the marks. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 948-949 (Fed. Cir. 2000). Furthermore, careful purchasers who do notice the difference in the marks will not ascribe it to differences in the source of the goods, but will see the marks as variations of each other, pointing to a single source. Accordingly, we deem this *du Pont* factor to be neutral.

#### Balancing the Factors

In summary, we have carefully considered all of the evidence of record pertaining to the *du Pont* likelihood of confusion factors, as well as applicant's arguments with respect thereto. We conclude that there is a likelihood of confusion between applicant's REVOLUTION E BUILDING mark for the goods sought to be registered and the registered mark REVOLUTION for "primarily non-metal, transportable, semi-permanent, span fabric roofed buildings."

**Decision:** The refusal to register is affirmed, and the requirement for a disclaimer of the term "building" is affirmed.