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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	78734308
Applicant	Tomberlin Product Group, LLC
Applied for Mark	ANVIL
Correspondence Address	TIMOTHY E. MOSES, ESQ. HULL, TOWILL, NORMAN, BARRETT & SALLEY 801 BROAD ST STE 700 AUGUSTA, GA 30901-1251 UNITED STATES TEMoses@hullfirm.com, dhdupree@hullfirm.com
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Filer's Name	Timothy E. Moses, Esq.
Filer's e-mail	TEMoses@hullfirm.com, dhdupree@hullfirm.com
Signature	//TEMoses/20070702//
Date	07/02/2007

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Mark	:	ANVIL
Ser. No.	:	78/734308
Filing Date	:	Oct. 17, 2005
Applicant	:	Tomberlin Product Group, LLC
Correspondent	:	Timothy E. Moses
Phone	:	706.722.4481
Email	:	TEMoses@hullfirm.com
Examining Attorney	:	Mrs. A.D. Saunders
Law Office	:	109

REPLY BRIEF OF APPLICANT

NOW COMES Applicant in the above matter and files this reply brief in response to the Examining Attorney's Appeal Brief dated June 12, 2007, and shows the Trademark Trial and Appeal Board (the "**TTAB**") the following:

1. Examining Attorney incorrectly stated that "there is no evidence in the record that registrant's tires are not used for 'electric utility cars.'" (*See* Examining Attorney's Appeal Brief, Section B.) In Applicant's Response to Office Action filed October 06, 2006, Applicant clearly argued that "the goods covered by the marks at issue are sufficiently dissimilar that no likelihood of confusion exists." More specifically, Applicant asserted evidence that "the goods covered by the registered mark are *indoor*, *industrial*, non-marking, *white tires* specifically for forklifts." Further, Applicant cited the following web page:

http://www.lesschwab.com/tires/industrial/nonmark.asp.

The web page depicted at that URL clearly shows that registrant's tires are limited to industrial forklifts. Even the name of the web page given by the registrant indicates that the tires are designed for **industrial** use. Applicant's goods are *outdoor*, **recreational** vehicles. While the Trademark Trial and Appeal Board may have repeatedly held that the use of identical names or similar marks on *automobiles and automobile tires* is likely to cause confusion, the use of similar names of (*x*) tires for indoor, industrial forklifts and (*y*) outdoor, recreational vehicles should be permissible as there is **no likelihood of confusion**.

2. The Examining Attorney has indicated that "the applicant has attempted to limit the registrant's goods to tires for forklifts." (Examining Attorney's Appeal Brief, Section B.) However, Applicant shows that it is the *registrant* who has limited the *use* of the registered mark to industrial, non-marking forklift tires. (*See* Applicant's argument, as well as the web site cited, above.) Applicant has neither asserted, nor argued, that the registration for the registered mark is limited. However, the point Applicant was trying to make is that, considering how the registered mark is actually used in commerce, which use is limited to industrial, non-marking forklift tires, and considering how Applicant uses the proposed mark in commerce, this *du Pont* factor weighs in favor of finding **no likelihood of confusion**.

3. In the Examining Attorney's Appeal Brief, a number of third-party registrations were referenced to support the proposition that "tires and land vehicles often originate from a single source." While such may "often" be the case, it is *not always* the case. Applicant's Appeal Brief cited not less than seven (7) instances in which identical marks have been registered to different parties for vehicles and tires. (*See, e.g.,* Applicant's Appeal Brief, Section 2.a. referencing Registrations 1,127,226 and 679,617 for "EAGLE;" 2,769,867 and 1,342,457 for "PILOT").

Furthermore, the third-party registrations *cited by the Examining Attorney* are clearly and readily distinguishable from the registered mark because the registered mark only covers tires, while the third-party registrations all specifically mention *vehicles and tires*, as well as many other vehicle parts or tire-related goods. The similarity between passenger vehicles and tires for passenger vehicles, or the similarity between tires and racing cars on which such tires are used, creates *much more* of a likelihood of confusion than the similarity between (*x*) industrial forklift tires and (*y*) personal, recreational low speed vehicles. Indeed, by comparison, Applicant's proposed mark is *extremely remote* from the use of the registered mark on industrial forklift tires. As a result, there is **no realistic likelihood of confusion** between the two marks.

4. The Examining Attorney has asserted that "applicant and registrant's goods are sold in the same channels of trade and encountered by the same consumers because tires are used on electric utility vehicles and tires are often sold in the same location where vehicles are sold." This statement is flawed and shows a fundamental misunderstanding of the relevant channels of commerce involved in this matter. First, the channels of commerce for tires are entirely distinct from the channel of commerce for vehicles. One channel of commerce for tires would be where tire dealers could market their goods to manufacturers of vehicles. Another channel of commerce for tires is where tire dealers market and sell their goods to consumers looking to upgrade or replace existing tires on vehicles. Applicant markets its goods in neither of these channels. Instead, Applicant markets its vehicles to recreational consumers who come into Applicant's stores to shop for recreational vehicles, such as all-terrain vehicles, jet-skis, golf carts, mini-bikes and motorcycles.

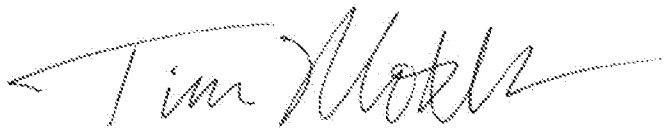
Furthermore, the Examining Attorney ignores altogether the fact that the owner of the registered mark is a straight-independent, tire dealer of some notoriety. Thus, the trade channel in

which tires bearing the ANVIL mark are sold is very limited. The Examining Attorney also ignores the fact that Applicant's goods are *not* sold at tire dealerships or tire service centers anywhere. Consumers looking for replacement tires for industrial forklifts simply would not consider retailers who are in the *personal*, *recreational* vehicle business. Thus, there is virtually *no likelihood* that Registrant and Applicant would be soliciting the same customers, and no likelihood of confusion or mistake by potential customers.

5. The Examining Attorney attempts to discount the fact that there have been **no instances of actual confusion** between the registered mark and Applicant's mark. *du Pont* dictates that consideration should be give to "the nature and extent of any actual confusion." DuPont, 476 F.2d at 1361. While this factor alone is not determinant, it certainly should be considered in weighing the *likelihood* of confusion. The fact that there have been no instances of actual confusion during the preceding fifteen (15) months is notable, especially considering that the proposed mark has been advertised by Applicant both in print and via the Internet, and that Applicant's low speed vehicles have been covered as news by various media outlets.

Accordingly, Applicant respectfully requests that its appeal be *granted*, that the Examining Attorney's refusal be *reversed* and that the application to register the proposed mark be allowed to proceed toward registration.

Respectfully Submitted, this 2nd day of July, 2007.



Attorney for Applicant