

<p>This Opinion is Not a Precedent of the TTAB</p>

Oral Hearing: December 1, 2021

Mailed: February 7, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Solar Foundations USA, Inc.

Serial No. 88206624

Victor J. Baranowski and Alexandra L. Scoville of Schmeiser, Olsen & Watts LLP,
for Solar Foundations USA, Inc.

Laura Golden, Trademark Examining Attorney, Law Office 103,
Stacy Wahlberg, Managing Attorney.

Before Taylor, Greenbaum and Lebow,
Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

Solar Foundations USA, Inc. (“Applicant”) seeks registration on the Principal
Register of the mark SOLAR FOUNDATIONS USA (in standard characters) for

Installation of solar energy systems and alternative energy
products for residential and commercial use, namely,
foundations and racking systems for ground mount solar
arrays, in International Class 37, and

Design of solar energy systems and alternative energy
products for residential and commercial use, namely,

support structure and racking systems for ground mount solar arrays, in International Class 42.¹

The application, as amended, includes a claim of acquired distinctiveness as to the whole mark under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f).

As background, nearly two years ago, Applicant filed an appeal of a final refusal that the mark is primarily merely geographically descriptive of the services under Section 2(e)(2) of the Trademark Act, 15 U.S.C. § 1052(e)(2). After Applicant filed a brief, the Board suspended the appeal and granted the Examining Attorney's Request for Remand so that she could (1) accept Applicant's Section 2(f) claim to SOLAR FOUNDATIONS USA based on Applicant's ownership of Reg. No. 4891858 (registered on the Principal Register, SOLAR FOUNDATIONS disclaimed) (Combined Declaration of Use and Incontestability under Sections 8 & 15 received on January 24, 2022), which obviated the Section 2(e)(2) refusal, and (2) issue a new requirement for a disclaimer of SOLAR FOUNDATIONS under Section 6(a) of the Trademark Act, 15 U.S.C. § 1056(a), because it is generic for the identified services. 6-9 TTABVUE.²

The Trademark Examining Attorney ultimately refused registration of Applicant's mark under Section 6(a) of the Trademark Act, based on Applicant's

¹ Application Serial No. 88206624 was filed on November 27, 2018, based upon Applicant's claim of first use anywhere and use in commerce since at least as early as December 13, 2009, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a).

² Citations to the briefs in the appeal record refer to the TTABVUE docket system. Citations to the prosecution file refer to the .pdf version of the TSDR system record. *In re Consumer Prot. Firm PLLC*, 2021 USPQ2d 238, at *3 n.3 (TTAB 2021). Where applicable, complete URLs can be found at the TSDR cite.

failure to comply with a requirement to disclaim the exclusive right to use SOLAR FOUNDATIONS as to each class of services, because the wording is generic and thus an unregistrable component of the mark.

Upon resumption of the appeal, Applicant filed a Substitute Appeal Brief as permitted by the Board, the Examining Attorney filed a Brief, and Applicant filed a Reply Brief. 14, 16 and 17 TTABVUE. An oral hearing was held on December 1, 2021.

We affirm the refusal to register in both classes.

I. “Alternative” Section 2(f) Claim

In its Appeal and Reply Briefs, Applicant repeatedly asserts a Section 2(f) claim as to the wording SOLAR FOUNDATIONS “in the alternative.” *See* App. Br., 14 TTABVUE 16, 23-24; App. Reply Br., 17 TTABVUE 7. However, because the application already includes a Section 2(f) claim to the entire mark SOLAR FOUNDATIONS USA, which claim was made to overcome a Section 2(e)(2) refusal as summarized above, an additional Section 2(f) claim to a portion of the mark, whether “in the alternative” or not, is not viable.³ We accordingly consider all of Applicant’s arguments, whether made to support its non-viable alternative Section 2(f) claim or its assertions that SOLAR FOUNDATIONS is suggestive and not merely

³ Notably, during the December 1, 2021 oral hearing, the Board advised Applicant that, after a review of the application prosecution history, the Board considers Applicant’s claim of acquired distinctiveness under Section 2(f) to apply to the entire mark. We also point out that the application currently includes a disclaimer of USA, which was offered by Applicant during early prosecution of the application to overcome the Section 2(e)(2) refusal. Because, as just stated, Applicant claims acquired distinctiveness under Section 2(f) as to the entire mark, the disclaimer of USA is not appropriate. At the end of this decision, Applicant will be offered an opportunity to correct the disclaimer.

descriptive, in the context of determining the sole issue on appeal: whether SOLAR FOUNDATIONS is generic for both classes of identified services and therefore must be disclaimed.

II. Disclaimers and Genericness

Section 6(a) of the Trademark Act reads, in relevant part, as follows: “The Director may require the applicant to disclaim an unregistrable component of a mark otherwise registrable.” A disclaimer is a statement that the applicant or registrant does not claim the exclusive right to use a specified element or elements of the mark in a trademark application or registration. The Office may require a disclaimer as a condition of registration if the term in the mark is generic with respect to at least some of the goods or services in the genus, and registration is properly refused in the absence of a disclaimer. *In re Greenliant Sys. Ltd.*, 97 USPQ2d 1078, 1082 (TTAB 2010) (citing *In re Analog Devices, Inc.*, 6 USPQ2d 1808, 1810 (TTAB 1988), *aff’d without pub. op.*, 971 F.2d 1097, 10 USPQ2d 1879 (Fed. Cir. 1989) (registration is properly refused if the subject matter for registration is generic of any one of the goods for which registration is sought)). “[I]t is within the discretion of an Examining Attorney to require the disclaimer of an unregistrable component (such as a common descriptive, or generic, name) of a composite mark sought to be registered on the Principal Register under the provisions of Section 2(f).” *In re Creative Goldsmiths of Wash., Inc.*, 229 USPQ 766, 768 (TTAB 1986). Failure to comply with a requirement for a disclaimer is a basis on which to refuse registration. *See In re Slokevage*, 441 F.3d 957, 78 USPQ2d 1395, 1399-1400 (Fed. Cir. 2006); *In re Stereotaxis Inc.*, 429

F.3d 1039, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005); *In re Omaha Nat'l Corp.*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987); *In re Richardson Ink Co.*, 511 F.2d 559, 185 USPQ 46, 47 (CCPA 1975); *In re Nat'l Presto Indus., Inc.*, 197 USPQ 188, 190 (TTAB 1977); *In re Pendleton Tool Indus., Inc.*, 157 USPQ 114, 115 (TTAB 1968).

The Office must establish by clear evidence that a proposed mark (or as in this case, a component of a mark) is generic and, thus, unregistrable. *In re Hotels.com*, 573 F.3d 1300, 91 USPQ2d 1532, 1533 (Fed. Cir. 2009); *In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110, 1111 (Fed. Cir. 1987); *In re Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141 (Fed. Cir. 1987).

A generic term “is the common descriptive name of a class of goods or services.” *Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827, 1830 (Fed. Cir. 2015) (quoting *H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986)). Because generic terms “are by definition incapable of indicating a particular source of the goods or services,” they cannot be registered. *Id.* (quoting *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807, 1810 (Fed. Cir. 2001)). And, as explained above, if the mark as a whole appears to be registrable under Section 2(f), but it includes an unregistrable component, such as a generic term, the mark may not register without a disclaimer of the unregistrable component. See *In re Am. Inst. of Certified Pub. Accountants*, 65 USPQ2d 1972, 1984 (TTAB 2002) (applicant seeking registration of the mark “UNIFORM CPA EXAMINATION” under Section 2(f) required to disclaim generic term “CPA EXAMINATION”). “The critical issue in genericness cases is

whether members of the relevant public primarily use or understand the term sought to be protected to refer to the genus of goods or services in question.” *Id.* (quoting *Marvin Ginn*, 228 USPQ at 530).

Making this determination “involves a two-step inquiry: First, what is the genus of goods or services at issue? Second, is the term sought to be registered ... understood by the relevant public primarily to refer to that genus of goods or services?” *Marvin Ginn*, 228 USPQ at 530. *See also Princeton Vanguard*, 114 USPQ2d at 1829 (“there is only one legal standard for genericness: the two-part test set forth in *Marvin Ginn*”). “An inquiry into the public’s understanding of a mark requires consideration of the mark as a whole.” *Id.* at 1831 (quoting *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1421 (Fed. Cir. 2005)).

Any term that the relevant public uses or understands to refer to the genus of goods or services, or a key aspect or subcategory of the genus, is generic. *Royal Crown Co., Inc. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1046-47 (Fed. Cir. 2018). “[A] term [may be] generic if the relevant public understands the term to refer to part of the claimed genus of goods or services, even if the public does not understand the term to refer to the broad genus as a whole.” *In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1638 (Fed. Cir. 2016) (holding CHURRASCOS, a word that is generic for a type of grilled meat, to be generic for restaurant services because it referred to a key aspect of those services); *see also In re Nordic Nats., Inc.*, 755 F.3d 1340, 111 USPQ2d 1495 (Fed. Cir. 2014) (CHILDREN’S DHA generic for DHA supplements for children).

“Evidence of the public’s understanding of the term may be obtained from any competent source, such as purchaser testimony, consumer surveys, listings in dictionaries, trade journals, newspapers and other publications.” *Royal Crown*, 127 USPQ2d at 1046 (quoting *Merrill Lynch*, 4 USPQ2d at 1143; *see also Cordua Rests.*, 118 USPQ2d at 1634; *Princeton Vanguard*, 114 USPQ2d at 1830; *In re Reed Elsevier Props. Inc.*, 482 F.3d 1376, 82 USPQ2d 1378, 1380 (Fed. Cir. 2007) (finding third-party websites competent sources for determining what the relevant public understands the mark to mean).

A. What is the Genus of Services?

Because the identification of goods or services in an application defines the scope of rights that will be accorded the owner of any resulting registration under Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b), generally “a proper genericness inquiry focuses on the description of [goods or] services set forth in the [application or] certificate of registration.” *Cordua Rests.*, 118 USPQ2d at 1636 (quoting *Magic Wand Inc. v. RDB Inc.*, 90 F.2d 638, 19 USPQ2d 1551, 1552 (Fed. Cir. 1991)). We find Applicant’s recitation of services, “installation of solar energy systems and alternative energy products for residential and commercial use, namely, foundations and racking systems for ground mount solar arrays,” and “design of solar energy systems and alternative energy products for residential and commercial use, namely, support structure and racking systems for ground mount solar arrays,” adequately defines the genus at issue.

B. Who are the Relevant Purchasers?

We next consider whether the relevant public understands SOLAR FOUNDATIONS primarily to refer to the genus of the services identified above. The “relevant public” is limited to the purchasing or consuming public of the identified services. *Frito-Lay N. Am., Inc. v. Princeton Vanguard LLC*, 124 USPQ2d 1184, 1187 (TTAB 2017) (citing *Magic Wand*, 19 USPQ2d at 1552-53).

Applicant argues that the “relevant purchasing public are those looking to have a ground mount solar array structure installed,” App. Br., 14 TTABVUE 8, while the Examining Attorney posits that the “relevant public” are “ordinary consumers ... who work in the solar foundations industry and purchase such services.” Ex. Atty. 16 Br., 16 TTABVUE 7. We do not take such narrow views of the “relevant public.” The identification of services is limited to “residential and commercial” consumers, but includes no other limitations or restrictions to the channels of trade or classes of consumers. We therefore find the relevant public to consist of ordinary residential and commercial consumers seeking to design or install support structure/foundations and racking systems for ground mount solar arrays, including owners of residential or commercial properties, solar companies, and solar panel installers, technicians and contractors.

C. How Does the Relevant Public Perceive the Designation SOLAR FOUNDATIONS?

As noted above, the evidentiary burden of establishing that a term is generic rests with the Office, and the showing must be based on clear evidence. *Merrill Lynch*, 4 USPQ2d at 1143. Based on the record described below, we find that there is clear

evidence to support a finding that when the relevant public considers SOLAR FOUNDATIONS in conjunction with the identified installation and design services, they readily understand the phrase to mean installation and design of support structure/foundations and racking systems for ground mount solar arrays.

The Examining Attorney argues that the wording SOLAR FOUNDATIONS refers to the type of solar energy systems and alternative energy products for residential and commercial use that Applicant designs and installs, namely, support structure/foundations and racking systems for mounting solar panels on the ground, and therefore the wording is generic for such services. Ex. Atty. Br., 16 TTABVUE 7 and 12-13.

In support of her argument, the Examining Attorney submitted dictionary definitions of “solar” as “of, derived from, relating to, or caused by the sun,” and “utilizing the sun’s rays especially to produce heat or electricity,” and “foundation” as “an underlying base or support.” March 6, 2019 Office Action, TSDR 5-6. Thus, argues the Examining Attorney, the term “solar foundations” means the “support structure for sun-powered installations.”⁴ Ex. Atty Br., 16 TTABVBUE 17.

⁴ A “solar panel,” which is defined as “a panel designed to absorb the sun’s rays as a source of energy for generating electricity or heating,” is one such product. June 4, 2019 Response to Office Action, TSDR 38-40. And, MERIAM-WEBSTER defines “array” as “a group of elements forming a complete unit // an antenna array.” (merriam-webster.com, accessed February 1, 2022). Thus, a “solar array” is a group of solar panels. The Board may sua sponte take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including definitions in online dictionaries that exist in printed format or have regular fixed editions. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016). *See also* TBMP § 1208.04 (2021).

In addition to the dictionary definitions, the Examining Attorney submitted printouts from more than 25 commercial websites, blogs and industry e-magazines to show that “solar foundations” is a recognized term in the relevant industry to refer to a type of support structure for solar arrays that are mounted on the ground. Many of these websites discuss their design and installation of such support structures under the heading “SOLAR FOUNDATIONS.” The most probative evidence follows (emphasis added):

1. A brochure from Maclean Dixie HFS titled “**Solar Foundations**” states:
“MacLean Dixie offers a broad range of deep steel helical piles for **solar foundation** applications. ... **Solar Foundation** Systems can be used to support the strut for connecting solar panels. It is important that the product and installation meet stringent requirements to ensure the quality and workmanship of the manufactured product and that installation is performed by qualified and certified technicians to ensure the **solar foundations** will perform as expected.” The brochure includes several photographs of goods identified in the photograph captions as **solar foundation** piles, and lists several “Features and Benefits” including “Continuous torque monitoring assures each **solar foundation** pile will meet load requirements.” The brochure displays the wording “Building **Solar Foundations**” in the lower left corner of the first page, as a tagline directly below the company’s logo. (premiumtechnical.com). July 15, 2019 Office Action, TSDR 2.

- a. A webpage titled “**SOLAR FOUNDATIONS**” on a related website for MacLean Power Systems advertises the company’s “wide range of steel helical piles for supporting solar panels.” (macleanpower.com). April 14, 2020 Request for Reconsideration Denied, TSDR 8.
 - b. A webpage titled “**Solar Foundations**” on another related website for MacLean Civil Products offers “Solar Product Information.” (macleandixie.com). *Id.*, TSDR 9.
2. The 3C Drilling landing page for “**Solar Foundations**” highlights a project for General Electric: “Designed & installed the **solar foundations** for New York State’s largest solar carport,” and under the heading “Solar Capabilities,” touts that they are “Experts in driven, drilled and shallow pier **solar foundations**.” (3cdrilling.com). July 15, 2019 Office Action, TSDR 3.
3. The Patriot Foundation Systems landing page for “Solar Panel Mounting Foundations” explains: “Solar panels require a strong, durable foundation. In most cases, using helical piles for solar panel foundations and mounting is the best option available. In suitable soils, properly installed helical piles offer substantial benefits and can increase productivity considerably.” The page touts the benefits of the company’s solar foundations under the heading “**ADVANTAGES OF PATRIOT’S SOLAR FOUNDATIONS INCLUDE:**” (patriothelicals.com). *Id.*, TSDR 4-5.

4. An August 31, 2016 post by Fred Greenhalgh on the ReVision Energy Solar Technology blog titled “ReVision Energy Now Offering Ground Screw Installation Services Across the Northeast” describes the company’s “newly forged **Solar Foundations** Division,” which offers installation of solar racking foundations for ground mount solar arrays. (revisionenergy.com). *Id.*, TSDR 6.
5. The REV Drill landing page for “Solar Installations” explains: “REV Drills have been used in many forms to install **solar foundations**.”⁵ (revdrill.com). *Id.*, TSDR 7.
6. An article by Kelly Pickerel posted on “Solar Power World” titled “APA Geoballast uses baskets of rocks rather than concrete for ground-mount **solar foundations**” explains that “APA Solar Racking has introduced a concrete-free ballast design to the ground-mount solar market.” (solarpowerworldonline.com). October 7, 2019 Final Office Action, TSDR 2.
7. The Carolina Foundation Solutions landing page for “Telecommunications, Tower, Pipeline & **Solar Foundations**” highlights a particular “Helical Piles System” as “an ideal solution for solar panel foundations.” (carolinafoundationsolutions.com). *Id.*, TSDR 3.
8. KM McRae Inc. offers drilling and installation services “for both **solar foundations** and wind foundations.” (kmmcraeinc.com). *Id.*, TSDR 4.

⁵ There is also a separate article from the NationalDriller website titled “REV Drill Rigs Install **Solar Foundations**.” (nationaldriller.com). April 14, 2020 Request for Reconsideration Denied, TSDR 6.

9. The Nuance Energy “Solar Blog,” under a heading titled “The Osprey PowerPlatform is Once Again Revolutionizing the Industry by Making Ground Mount Solar Viable for Previously ‘Off Limits’ Sites,” describes the Osprey’s “innovative use of earth anchors”: “What is new is the way Osprey enables this proven technology to be used successfully in ground mount **solar foundations** virtually anywhere, including in previously ‘off limits’ sites.” (nuanceenergy.com). *Id.*, TSDR 5.
10. Sacramento Drilling, Inc. offers “**Solar Foundations**” as one of many services: “Sacramento Drilling has years of knowledge and expertise in the installation of **solar foundations** and provides a ‘turnkey’ service.” (sacramentodrilling.com). *Id.*, TSDR 6.
11. Brilliant Rack offers “**Solar Foundations** and Racking Grounded in Expertise” for “commercial and utility-scale solar projects.” (brilliantrack.com). *Id.*, TSDR 7.
12. ECI Engineers Construction offers various renewable energy services, including “**Solar Foundations**: ECI can also provide and install helical piles for fixed or tracker solar arrays.” (engineersconstruction.com). *Id.*, TSDR 8.
13. SFS **Solar Foundation** Services offers “**Solar Foundation** Solutions,” and touts their “**Solar Foundation** Expertise.” Under the tab for “**Solar Foundation** Options,” SFS provides a “**Solar Foundations** Overview”: “For those unfamiliar with **solar foundations**, SFS invites you to review

the different pile options on our webpage....”
(solarfoundationservices.com).⁶ *Id.*, TSDR 9-10.

14. A brochure for ECP Earth Contact Products’ “ECP **SOLAR FOUNDATION**” describes the “ECP ‘ONE Step’ **Solar Foundation System**” as an alternative to “traditional methods of installing solar bases,” and lists the various advantages and benefits of “One Step” **Solar Foundations.**” (slabjacking.com). *Id.*, TSDR 11.

15. Under the heading “The Future of **Solar Foundations**,” the landing page for Ojjo products touts the company’s “Earth Truss **Solar Foundation System**” and states: “Ojjo offers a new way to approach **solar foundation** design. **Solar foundations** using driven piles are not optimized for solar-specific load conditions, so they require a lot more material than necessary.” (ojjo.com/). *Id.*, TSDR 14.

16. A November 6, 2017 article by Dale Benton on the “Energy Digital” website titled “Terracon: Bringing foundation to an emerging energy market” states: “Terracon has designed a proprietary system to test and evaluate the load forces of the **solar foundations.**” (energydigital.com). *Id.*, TSDR 15-16.

⁶ SFS **Solar Foundation** Services also uses the web address solarfoundations.com. April 14, 2020 Request for Reconsideration Denied, TSDR 16.

17. Rock Solid Specialty Construction offers “**Solar Foundations**” for “solar panel and wind tower foundations” among other “Foundation Repair” services. (rsscga.com). *Id.*, TSDR 17.
18. The landing page for “Helical Pier Applications” on the Earth Anchoring Suppliers website includes a section titled “**Solar Foundations**”: “Earth Anchoring Suppliers offers a broad range of helical foundation piles to support solar energy racks and panels. Helical piles are the fastest and most economical support system available for ground based solar installations. ... From backyard installations to 20 acre solar farms, helical piles are the go-to product for **solar foundation** support.” (earthanchoring.com). *Id.*, TSDR 18.
19. Hennessy International advertises its drill rigs on a webpage for “**SOLAR FOUNDATIONS.**” (henint.com). April 14, 2020 Request for Reconsideration Denied, TSDR 11.
20. Positive Energy offers “Pile Driving Services” and “Screw Anchor Installation” on the webpage titled “**Solar Foundations.**” (renewableenergyconstruction.net). *Id.*, TSDR 12.
21. A press release titled “Turnkey **solar foundations** company TerraSmart adds civil division” posted on the Solrenen Solar Renewable Energy blog discusses the new division and some of its projects. (solrenen.com). *Id.*, TSDR 14.

22. The “**Solar Foundations**” landing page on the Foundation Technologies, Inc. website describes the benefits of using “CHANCE Helical Piles for **Solar Foundations**,” and includes “Quick Downloads” to the “CHANCE **SOLAR FOUNDATIONS BROCHURE**.” (foundationtechnologies.com). *Id.*, TSDR 15.

23. PRI Engineering offers “Geotechnical Services for **Solar Foundations**,” including **Solar Foundation** Design Development, a link to “**Solar Foundation** Articles,” and a webinar on “Solar Racking Foundation Construction Challenges and Common Solutions.” (priengineering.com). March 24, 2021 Subsequent Final Office Action, TSDR 3-4.

24. A webpage titled “**Solar Foundation**” on the Hercules Machinery Corporation website provides a link to “Equipment” for “**Solar Foundation**.” (hmc-us.com). *Id.*, TSDR 9.

The foregoing evidence shows that companies who design and install support structure/foundations and racking systems for solar arrays commonly use the phrase SOLAR FOUNDATIONS on their websites and in their advertising brochures to refer to such products, as do bloggers and reporters in the solar industry. Use by others in the field is strong evidence of genericness. *See, e.g., Royal Crown*, 127 USPQ2d at 1048; *BellSouth Corp. v. DataNational Corp.*, 60 F.3d 1565, 35 USPQ2d 1554, 1558 (Fed. Cir. 1995).

We find prospective consumers therefore would understand the wording SOLAR FOUNDATIONS to refer to the design and installation of support

structure/foundations and racking systems for ground mount solar arrays for residential and commercial use. In other words, consumers seeking such products would look for a company that provides solar foundations, and they would not view the term SOLAR FOUNDATIONS as a source indicator for one company. Based on the Examining Attorney's evidence, we find that the wording SOLAR FOUNDATIONS is generic for the identified services.

Applicant nevertheless argues that SOLAR FOUNDATIONS is not generic because the record includes "numerous examples of media and third-party usage of 'SOLAR FOUNDATIONS' as a source indicator of **Applicant's** goods and services." App. Br., 14 TTABVUE 10. The examples are as follows:

- December 17, 2020 article by Robin K. Cooper in "Albany Business Review" referring to Applicant as "Solar Foundations of Delaware" in the headline, as "Solar Foundations USA Inc. of Delaware" in the first paragraph, and subsequently as "Solar Foundations" (March 1, 2021 Response to Office Action, TSDR 13-15, Exhibit 1);
- Applicant's own blog, in which it refers to itself as "Solar Foundations USA" and "SFUSA" throughout the blog, with one reference to itself as "Solar Foundations" (*Id.*, TSDR 22-24, Exhibit 2);
- Screenshots from the website of Precision Solar Installations, a third-party installation company that advertises itself as a "Certified Solar Foundations USA Groundmount Installer," and refers to the relationship with Applicant as

“Solar Foundations + Precision Solar,” using abbreviated forms of each business name (*Id.*, TSDR 26-29, Exhibit 3);

- “Solar Power World” lists of the “Top Solar Mounting Products” in 2018 and 2019 refer to Applicant by the name “Solar Foundations USA,” and briefly mentions the company as both “SFUSA” and “Solar Foundations.” (June 4, 2019 Response to Office Action, TSDR 48, Exhibit M, and March 1, 2021 Response to Office Action, TSDR 30-50, at 49, Exhibit 4, respectively);⁷ and
- Two articles and an excerpt in Albany, NY newspapers in November and December 2018 about a civil action between Applicant and Monolith Solar in which Applicant is referred to as “Solar Foundations USA,” “Solar Foundations” and/or “Solar Foundations USA Incorporated.” (June 4, 2019 Response to Office Action, TSDR. 49-54, Exhibits N, O and P).

This evidence does not alter our finding that the wording SOLAR FOUNDATIONS is generic for the identified services. Rather, we find the exhibits simply show that Applicant is a business operating under the name SOLAR FOUNDATIONS USA, and that the press, Applicant and a third-party partner of Applicant sometimes refer to Applicant by the shortened name SOLAR FOUNDATIONS.

⁷ Applicant also submitted the 2020 edition of this article, but the page listing Applicant is not legible. March 1, 2021 Response to Office Action, TSDR 51-66, at 65, Exhibit 5. Applicant is reminded that it is Applicant’s responsibility to ensure the legibility of all documents that it uploads. *See In re Loggerhead Tools, LLC*, 19 USPQ2d 1429, 1433 n.5 (TTAB 2016) (filers are responsible for ensuring that all submissions are legible).

Applicant also argues that SOLAR FOUNDATIONS is not generic because “[i]t is incongruous to call a below-ground structure ‘solar,’ because an underground structure is necessarily unable to capture sunlight because sunlight does not typically penetrate the ground. Even in the context of a solar panel support structure, solar energy is not captured underground.” App. Br., 14 TTABVUE 17. This argument is also not persuasive. While the foundation itself does not function as a solar array, it is specifically designed and installed to support solar arrays. The combination of the words “solar” and “foundations” does not have an incongruous meaning or form a unique commercial impression when used in connection with Applicant’s identified services, namely, the design and installation of **support structure/foundations** and racking systems for ground-mounted solar arrays for residential and commercial use, such that the term “solar foundations” loses its ordinary meaning. Accordingly, consumers of such services will perceive the combined term SOLAR FOUNDATIONS in its ordinary dictionary sense. *See Gould Paper*, 5 USPQ2d at 1112 (“the combination of ‘SCREEN’ and ‘WIPE’ does not render Gould’s mark [SCREENWIPE] unique or incongruous, the common descriptive aspect of applicant’s mark is not lost in the combined form.”).

Relatedly, Applicant contends that although the separate terms SOLAR and FOUNDATIONS are dictionary-defined terms, because the phrase SOLAR FOUNDATIONS is not found in the dictionary, it cannot be generic for the identified services. App. Br., 14 TTABVUE 10, 14. Applicant is mistaken. The fact that a word or term is not found in the dictionary is not controlling on the question of

registrability when the word or term has a well-understood or recognized meaning, as the evidence of record demonstrates. *See Gould Paper*, 5 USPQ2d at 1111-12 (SCREENWIPE held generic for wipes that clean computer and television screens although not found in any dictionary).

Throughout its Brief, Applicant contends that the genericness test is whether there is clear evidence that the relevant public understands the wording SOLAR FOUNDATIONS “primarily as **the** common or class name for the goods or services.” *See App. Br.*, 14 TTABVUE 8, 11, and 14 (emphasis in original). Applicant’s consistent emphasis of the word “the” in this argument essentially asks the Board to determine whether SOLAR FOUNDATIONS is the exclusive wording for support structure/foundations and racking systems for ground mounted solar arrays, and the design and installation thereof. However, in making our determination of genericness, we follow the test set forth in *Marvin Ginn*, discussed above. Under this test, a term need not be “the” exclusive descriptor of the goods or services to be found generic.

Thus, while the record includes evidence that a ground mounted solar array support structure might also be referred to as “a ground mount, a solar field, a solar array, driven piles, a helical pile system, and the like,” *App. Br.*, 14 TTABVUE 14, that does not make the term “solar foundations” any less generic for such support structures and the design and installation thereof. *In re 1800Mattress.com IP, LLC*, 586 F.3d 1359, 92 USPQ2d 1682, 1685 (Fed. Cir. 2009) (“any term that the relevant public understands to refer to the genus ... is generic”). There is nothing unusual

about a product or a service having more than one generic name. *Roselux Chem. Co. v. Parsons Ammonia Co.*, 299 F.2d 855, 132 USPQ 627, 632 (CCPA 1962) (“Consider, however, that the product commonly known as tooth paste is also commonly known as dentifrice and dental cream. A gravestone is also commonly known as a headstone, a tombstone and a monument.”). “There is usually no one, single and exclusive generic name for a product. Any product may have many generic designations. Any one of those is incapable of trademark significance.” *Frito-Lay*, 124 USPQ2d at 1201 (quoting 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 12:9 (4th ed. June 2017 Update)).

Here, the record shows the designation SOLAR FOUNDATIONS is used to refer collectively to support structures/foundations/racking systems for ground mounted solar arrays. Moreover, because the designation SOLAR FOUNDATIONS is the name of the products Applicant designs and installs, SOLAR FOUNDATIONS refers to a “key aspect” of Applicant’s services. As such, the term is generic for the services. *See In re Virtual Indep. Paralegals, LLC*, 2019 USPQ2d 111512, at *9 (TTAB 2019) (VIRTUAL INDEPENDENT PARALEGALS found generic for paralegal, litigation support and related services); *In re Emergency Alert Sols. Grp., LLC*, 122 USPQ2d 1088, 1091-93 (TTAB 2017) (LOCKDOWN ALARM found generic for training services focusing on the use of and response to lockdown alarms). Again, any term that the relevant public understands to refer to the genus can be generic even if the term is not the name of a specific service. *Royal Crown*, 127 USPQ2d at 1046 (quoting *Cordua Rests.*, 118 USPQ2d at 1637).

For these reasons, we also find unpersuasive Applicant's attempts to discredit many of the webpages submitted by the Examining Attorney because they display the wording SOLAR FOUNDATIONS as a heading, but then use additional terms to describe the services as well as the products that are being designed and installed. App. Br., 14 TTABVUE 11-13.

The Board's decision in *In re Trek 2000 Int'l Ltd.*, 97 USPQ2d 1106 (TTAB 2010), a case on which Applicant heavily relies, is distinguishable. In *Trek*, the Board held that "where the evidence does not show that competitors use the designation in issue, this may create doubt, depending upon the totality of the record, as to whether a term primarily refers to a genus of goods such that 'sellers of competing brands cannot compete effectively without using the name to designate the product they are selling.'" *Trek*, 97 USPQ2d at 1109 (quoting *Ty Inc. v. Softbelly's Inc.*, 353 F.3d 528, 69 USPQ2d 1213, 1215 (7th Cir. 2003)); *see also KP Permanent Make-Up*, 72 USPQ2d at 1838 ("there [is] no indication that the [Lanham Act] was meant to deprive commercial speakers of the ordinary utility of descriptive words").

The record in *Trek* not only showed "use of the term THUMBDRIVE or THUMB DRIVE to refer to a genus of goods," but also showed: 1) "the origin of the term as a trademark and extensive use of the term as a trademark"; 2) the applicant's use "of other terminology as the name of the goods, e.g., 'external storage device'; 3) successful efforts by the applicant to police the misuse of its claimed mark as a generic term; and 4) no use of the term by competitors "after ten years of these products being on the market" *Id.* at 1112-13. The Board concluded, on the totality

of that record, that “the evidence of generic use is offset by applicant’s evidence that shows not only a significant amount of proper trademark use but also trademark recognition’ by third parties.” *Id.* at 1113 (quoting *In re Am. Online Inc.*, 77 USPQ2d 1618, 1623 (TTAB 2006)). Here, however, the record demonstrates extensive third-party use of the designation SOLAR FOUNDATIONS as the generic name of support structures/foundations for ground mounted solar arrays, and design and installation services for those structures, and this evidence is not offset as it was in *Trek*.

In sum, we find that the wording SOLAR FOUNDATIONS is generic for the identified services.

Decision: The refusal to register Applicant’s mark SOLAR FOUNDATIONS USA based on the requirement, made under Trademark Act § 6(a), for a disclaimer of SOLAR FOUNDATIONS, is affirmed as to each International Class. If Applicant submits a properly worded disclaimer of SOLAR FOUNDATIONS to the Board within 30 days from the date of this decision and prior to filing any appeal of this decision, the disclaimer will be accepted and entered, the refusal to register will be set aside, and the application can proceed for registration.⁸ Trademark Rule 2.142(g), 37 CFR § 2.142(g).

⁸ As noted, the application includes a disclaimer of USA. If Applicant submits a disclaimer of the wording SOLAR FOUNDATIONS within the allotted time, the present disclaimer of USA will be deleted. The standardized printing format for the required disclaimer text is as follows: “No claim is made to the exclusive right to use SOLAR FOUNDATIONS apart from the mark as shown.” *See Omaha Nat’l Corp.*, 2 USPQ2d at 1861.