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Filing date: **04/03/2006**

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

Proceeding	91169340
Party	Defendant Assist-2-Build, L.L.C. Assist-2-Build, L.L.C. 7633 East Brainerd Road, Suite A Chattanooga, TN 37421
Correspondence Address	VALERIE W. EPSTEIN BERKE, BERKE AND BERKE 420 FRAZIER AVE CHATTANOOGA, TN 37405-4117
Submission	Answer
Filer's Name	Valerie W. Epstein
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Signature	/s/Valerie W. Epstein/s/
Date	04/03/2006
Attachments	Reply brief exhibits.pdf (6 pages) Reply brief.pdf (4 pages)

EXHIBIT A

Citation	Status	Class(es)	Owner	Reg/Serial Number	Page	Record of Interest
11. HELP YOU BUILD	Pending	37	ALDRICH JOHN A. III	SN-78-467,858	27	<input type="checkbox"/>
12. HELP-U-BUILD INC.	Registered	37	HELP-U-BUILD, INC.	RN-1,552,267 SN-73-763,657	27	<input type="checkbox"/>
13. TOGETHER WE BUILD	Renewed	36	SUNDAY SCHOOL BOARD	RN-1,118,430 SN-73-150,616	28	<input type="checkbox"/>
GROUP FOUR						
14. ASSIST-2-BUY	Pending	36	ASSIST-2-SELL, INC.	SN-76-575,477	30	<input type="checkbox"/>
15. ASSIST-2-SELL	Renewed	35, 36	ASSIST-2-SELL, INC.	RN-1,744,999 SN-74-076,970	30	<input type="checkbox"/>
16. ASSIST-2-SELL	Renewed	35, 36	ASSIST-2-SELL, INC.	RN-1,743,808 SN-74-076,972	32	<input type="checkbox"/>
17. ASSISTANCE HOMES	Abandoned	37	TERRY HOMES, LLC	SN-75-281,559	33	<input type="checkbox"/>
18. ASSISTANCE FOR AMERICA	Registered	36	REMODELERS ACCEPTANC	RN-2,671,419 SN-76-286,301	34	<input type="checkbox"/>
19. ASSISTED SALE BY OWNER	Abandoned	42	INRESCO PORTFOLIOS L	SN-75-861,666	34	<input type="checkbox"/>
20. MH2BUILD	Registered	37	OLY HOLIGAN, L.P.	RN-2,650,156 SN-76-062,113	35	<input type="checkbox"/>
21. MH2BUILD	Registered	35	OLY HOLIGAN, L.P.	RN-2,640,394 SN-76-024,686	37	<input type="checkbox"/>
22. BID2BUILD	Abandoned	35	PELLEON, L.P.	SN-76-148,974	37	<input type="checkbox"/>

EXHIBIT B

ASSIST-2-BUILD, LLC

(423) 499-2777

Website: www.assist-2-build.com

Email: info@assist-2-build.com

Are you ready to build a new home,
but don't know where to start?

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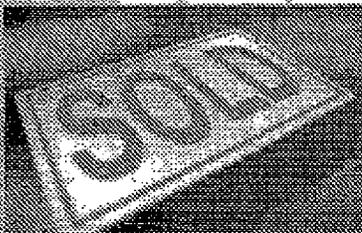
- We bid your house to local contractors to get you the best possible price.
- We take care of your construction and permanent financing.
- We work with you, not the builder.
- We give you a complete guidebook of the building process to help insure your home is built properly.
- We provide three on-site consultations during the construction of your home to answer any questions or concerns you may have.
- We work with Assist-U-Realty, LLC to sell your existing home at a substantial discount.



A home is the largest single investment most of us will ever make. Shouldn't you have someone on your side?

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ASSIST-U-REALTY, LLC



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Website: www.assist-u-realty.com Email: info@assist-u-realty.com

EXHIBIT C



Mitchel Everhart
(423) 629-1955

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Cleveland Office
915 25th Street North West
Cleveland TN 37311
(423) 473-2995 Office
(423) 473-2992 Fax
Email: lhomes@assist2sell.com



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

In the Matter of Trademark application:

Serial No.: 78/91169340

Applicant: Assist-2-Build, L.L.C.

Mark: ASSIST-2-BUILD

Published: October 25, 2005

ASSIST-2-SELL, INC.,)	
)	
Opposer,)	
)	
v.)	Opposition No. 91169340
)	
ASSIST-2-BUILD, L.L.C. ,)	
)	
Applicant.)	

REPLY BRIEF TO NOTICE OF OPPOSITION

Applicant, Assist-2-Build, L.L.C. (“Applicant”) is a Tennessee limited liability company.

The grounds to uphold the application are as follows:

1. The business, Assist-2-Build, L.L.C., was formed as a result of many years in the building industry by Terry Oliver. The business purpose is to assist and consult with homeowners through the process of building a home. As was stated in the Trademark Application “Residential and commercial construction consulting” (emphasis added) is the nature of the business. Construction services are classified in a specific channel of trade under the International Class of 037 in the USPTO Goods and Services Manual which encompasses construction consulting. Assist 2 Sell (“Opposer”) is classified under International Class 036 and 035 which is for real estate sales and

indeed the Opposer is in the business of real estate sales, and Opposer is not in the business of construction consulting.

2. Applicant alleges that the Opposer operates in a different channel of trade, specifically, International Class 036 “real estate and consulting and brokerage services” and International Class 035 “cooperative advertising and marketing services for real estate owners.” See Exhibit A. Well settled law states that: “The channels of trade in which our respective services move is different and the number and nature of similar marks is large so no confusion is likely to occur.” *In re E.I. Du Pont de Nemours & Co.*, 177 U.S.P.Q. 563 (C.C.P.A. 1973)

3. Opposer wants to argue that the two companies operate in “similar channels of trade.” To say that is like saying that contractors, architects and real estate sales professionals do the same job. Clearly Opposer simply does not want to have any competition, even in a channel of trade that relates to building services which is clearly distinguishable from real estate sales. Applicant’s advertising clearly shows that Applicant bids pricing to contractors, does permit work and financing and provides on site consulting during the home building construction. See Exhibit B.

4. With regard to the use of the name “Assist-2- Build” it remains our position that the term “Assist” is merely descriptive and generic. To the extent that a consumer is likely to view the word as a mere explanation, the law will be hesitant to confer exclusive rights. The test is the degree to which imagination is required. No imagination is required to recognize that “Assist” describes simply the process of helping someone. “Assist” is not unique and is unimaginative. In particular, the word “assist” is similar in analysis to the word “cola” that is used in Coca Cola and Pepsi Cola or the word “mart” that is used

in Wal-Mart and K-Mart. Generic words such as “assist”, “cola” and “mart” are incapable of distinctiveness and therefore incapable of protection.

5. The court will also look to the sophistication of the consumers. The law is that the more expensive the goods, the more consumers will pay attention to the mark. More similarity in the mark will be tolerated without risking confusion the more expensive the item. See Barre-National, Inc. v. Barr Laboratories, Inc., 773 F. Supp. 735 (D.N.J. 1991). Considering that the average price of a home in Chattanooga is around \$100,000.00, consumers attempting to build a home will be sophisticated and will be able to distinguish between Assist-2-Build, L.L.C. and Assist 2 Sell, Inc.

6. Not every “strong” mark is automatically entitled to protection. See First Sav. Bank, FSB v. First Bank System, Inc., 101 F. 3d 645 (10th Cir. 1996) and New York Stock Exchange, Inc. v. New York, New York Hotel LLC, 293 F. 3d 550 (2^d Cir. 2002). In addition, under the “sound, sight or meaning” test, the sight of “Build” and “Sell” are different in how they look and the meaning of those terms is different. “Sell” is defined by the Miriam Webster dictionary as: to give up to another for something of value (as money) (2): to offer for sale. “Build” is defined as: to cause to be constructed. The meaning of the two words is entirely different. In addition, the Applicant’s mark has dashes and the Opposer’s mark does not, and the Opposer’s mark has a “house” logo over the “2” and the Applicant’s mark does not. See Exhibit C

7. Finally, the court will look at the “salient” feature of the mark and will give that salient feature more weight than the surrounding elements when determining similarity. In the case at hand, the salient feature will be the word “sell” as compared to the word “build” wherein a court could easily determine that the salient feature of the

respective marks is different. This logic easily applies to the words “sell” and “build.”

See Tornado Industries, Inc. v. Typhoon Industries, Inc., 20 Misc. 2d 43 187 N.Y.S.2d 83 (1959).

8. The trademark laws were not enacted to stifle fair competition. The marketplace is crowded with names using the generic words “Assist” and “2.” For example: “Assist 2 Invest, L.L.C.” (Westlaw I.D. #L11224961), “Assist 2 Loan, Inc.” (Westlaw I.D. # P04000114499), “Assist 2 Rent, LLC” (Westlaw I.D. # S149502) and “Assist 2 Sav “(Westlaw I.D.# 20001143902). Applicants ask that the law be fairly applied and that they be allowed to use the mark in their building consulting business.

Respectfully submitted,

/s/ Valerie W. Epstein
Valerie W. Epstein
Attorney for Applicant