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PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **DDS Environmental, Inc.**

Serial No. 76/**317,128**

Mark Levy of **Salzman & Levy** for **DDS Environmental, Inc.**

Barbara A. Gaynor, Trademark Examining Attorney, Law Office
115 (**Tomas Vlcek**, Managing Attorney).

Before **Hairston**, **Walters** and **Chapman**, Administrative
Trademark Judges.

Opinion by **Hairston**, Administrative Trademark Judge:

DDS Environmental, Inc. has filed an application to
register the mark DUALSAND for "water and wastewater
filters."¹

Registration has been finally refused under Section
2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e(1)), on the

¹ Serial No. 76/317,128, filed on September 26, 2001, alleging a
date of first use of March 1, 1997 and a date of first use in
commerce of June 22, 2001.

ground that, when used in connection with applicant's goods, the mark DUALSAND is merely descriptive of them.

Applicant has appealed. Briefs have been filed, but no oral hearing was requested. We affirm the refusal to register.

Before turning to the merits of the case, there are two matters we must discuss. First, applicant submitted with its response to the Examining Attorney's first Office action a typed list of third-party registrations of marks containing the word "DUAL" or "SAND." The Examining Attorney, in her next office action, advised applicant that "[s]ince copies of the registrations were not provided, these registrations are not part of the record and have not been considered." The Examining Attorney also cited to several Board decisions in support of her position. Applicant, in its appeal brief, again listed the third-party registrations and the Examining Attorney, in her appeal brief, has now objected thereto. In its reply brief, applicant argues that the Examining Attorney's objection is unjustified because the list of third-party registrations was taken from the USPTO's Trademark Electronic Search System (TESS). A mere list of third-party registrations is insufficient to make them of record. In re Duofold, 182 USPQ 638, 640 (TTAB 1974). Rather,

copies of the actual registrations or the electronic equivalent thereof, i.e., printouts of the registrations which have been taken from the USPTO's computerized data base must be submitted. Under the circumstances, the Examining Attorney's objection is well taken and we will not consider applicant's list of third-party registrations. We hasten to add that even if we had considered these registrations, our decision herein would be the same.

Second, for the first time in its appeal brief, applicant argues that the mark DUALSAND is registrable under the provisions of Section 2(f) of the Act. Applicant points to evidence which it maintains is sufficient to support registration under Section 2(f). Applicant's evidence is clearly untimely under Trademark Rule 2.142(d), and has not been considered. Thus, the only issue in this case is whether the mark DUALSAND is merely descriptive of the identified goods.

We turn then to the merits of the case. The Examining Attorney contends that the term "dual sand" is used in the water and wastewater treatment industries to describe a specific filtration process and the filters used in that process. Thus, it is the Examining Attorney's position that DUALSAND immediately conveys information about a feature or characteristic of the identified goods, namely

that they are for use in the "dual sand filtration process." In support of the refusal, the Examining Attorney points to Utility Patent No. 5,843,308 owned by applicant for a "Wastewater Management System." The patent reads in pertinent part:

The use of sand-filtering systems to treat wastewater has become a preferred means of eliminating harmful materials from contaminated effluent. The present invention employs a double sand filtering system in order to substantially reduce phosphorous, pathogens and protozoan from wastewater effluents. To the best of the inventor's knowledge, this is the first time that an up flow, continuously-cleaning, continuously-backwashed filtration system uses double sand-filters in series.

The dual sand-filtration system affords an outstanding level of removal of phosphorous, total suspended solids, turbidity and biochemical oxygen demand. (BOD5).

Further, the Examining Attorney submitted a copy of Utility Patent No. 4,104,164 owned by a third party which reads in relevant part:

Waste water from cleaning establishments containing large amounts of contaminants, such as salt, dirt, soils, organic compounds, soaps, detergents, waxes, chemicals and conditioning agents, enters through the inlet 1 into the dual sand removal chamber means 2 where the gross solids are removed.

In addition, the Examining Attorney submitted a number of printouts of articles from the Internet which make

reference to "dual sand" in connection with water and wastewater treatment. The following excerpts (with **dual sand** highlighted) are representative examples:

Testing Equivalence of Microfiltration and Continuous-Backwater-Upflow, **Dual-Sand** Filtration Technologies.

Accordingly, NYC DEP [New York City Department of Environmental Protection] developed and implemented protocols for a study that compares the pathogen removal capabilities of microfiltration and continuous backwash-upflow, **dual-sand** (CBUDS) filtration by operating a facility of each system, side by side, with the same influent and testing methods.
(www.epa.gov/region02/water/nycshed, August 3, 2002).

. . .

Dual Sand Filters are utilized to remove any small floc (i.e. suspended solids) that passes through the clarifiers.
(www.durrenvironmental.com, August 3, 2002).

. . .

The new system is a **dual sand** filtration system with chlorine treatment, much like the old plant.
(thames.northnet.org, August 5, 2002).

. . .

The design/build team chose an innovative **dual sand** filtration process that will follow advanced secondary treatment of the wastewater.
(www.dufresne-henry.com, August 5, 2002).

. . .

"The main thing we're doing is installing a **dual sand** filtration system," he said "The **dual sand filters** are basically two containers filled with sand. The water is pumped to the bottom of the

first and percolates up to the top. Then it is pumped to the bottom of a second container filled with finer sand," Curly said.

(www.thedailystar.com, August 5, 2002, from the February 7, 2002 issue of The Daily Star).

Applicant, in urging reversal of the refusal to register, argues that its mark is at most suggestive; that neither word, "dual" or "sand," connotes water or filters; that the average consumer would not understand what is meant by the mark DUALSAND; and that the combined term DUALSAND is incongruous.

The test for determining whether a mark is merely descriptive is whether the involved term immediately conveys information concerning a quality, characteristic, function, ingredient, attribute or feature of the product or service in connection with which it is used, or intended to be used. In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217 (CCPA 1978). It is not necessary, in order to find a mark merely descriptive, that the mark describe each feature of the goods or services, only that it describe a single, significant quality or property thereof. In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). Further, it is well established that the determination of mere descriptiveness must be made not in the abstract or on the basis of guesswork, but in relation to the goods or services for which registration is sought,

the context in which the mark is used, and the impact that it is likely to make on the average purchaser of such goods or services. In re Recovery, 196 USPQ 830 (TTAB 1977).

We conclude that the evidence establishes that DUALSAND is merely descriptive of applicant's water and wastewater filters in that it immediately conveys that the filters are for use in the "dual sand filtration" system or process. It is clear from the evidence that "dual sand" is a term used in the water and wastewater treatment industries to describe a type of filtration process. As the Examining Attorney has noted, where, as here, the evidence demonstrates that applicant's combined mark DUALSAND conveys information about applicant's goods, it is unnecessary to engage in an analysis of each individual component in an effort to ascertain whether, when used together, said words convey information about the goods. See In re Shiva Corp., 48 USPQ2d 1957 (TTAB 1998). Thus, this case is distinguishable from those cases relied on by applicant involving marks that were found to be incongruous or create a unique commercial impression because of the combination of words therein. Far from being unique in commercial impression, applicant's term is already in use by others in the water and wastewater treatment industry to

describe a type of filtration process and the filters used therein.

Finally, as pointed out by the Examining Attorney, the purchasers of applicant's goods are unlikely to be ordinary consumers, but rather individuals with some knowledge of the water and wastewater treatment industry. Such purchasers would readily recognize the descriptive significance of DUALSAND as used in connection with the identified goods.

In view of the foregoing, we find that on the record before us, the term DUALSAND would be immediately recognized by prospective purchasers as a term that is merely descriptive of a feature or characteristic of applicant's identified goods.

Decision: The refusal to register under Section 2(e)(1) is affirmed.