

**THIS OPINION IS NOT A  
PRECEDENT OF  
THE T.T.A.B.**

Mailed: November 29, 2013

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Zero Emissions Leasing LLC dba Zero Emissions

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Serial No. 77427844

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Zero Emissions Leasing LLC dba Zero Emissions, pro se.

Jason F. Turner, Trademark Examining Attorney, Law Office  
108 (Andrew Lawrence, Managing Attorney).

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Before Grendel, Cataldo and Wolfson,  
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, Zero Emissions Leasing LLC dba Zero Emissions, filed an application, as amended, to register on the Principal Register the mark displayed below for "consultancy concerning financing of energy projects; equipment financing services; facilitating and arranging for the financing of energy-related projects; financing services; project financing" in International Class 36.<sup>1</sup>

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<sup>1</sup> Application Serial No. 77427844 was filed on March 20, 2008, seeking registration on the Principal Register under Section 1(a) of the Trademark Act, asserting June 19, 2007 as a date of first



The trademark examining attorney refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, as used in connection with its services, so resembles the mark shown below,

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previously registered on the Supplemental Register for

business administration and business management; office functions; assistance with business management and office functions of an industrial company dedicated to everything relating to the environment, the control of CO<sub>2</sub> emissions and the reduction of greenhouse gas emissions; computerized file management; compilation of data in a central computer; marketing studies; marketing reports and studies; public opinion polling; business management assistance and marketing of goods in the context of a franchising contract; franchising services, namely, providing technical and business management assistance in implementing and developing a consultancy in the field of climate change; business management, business appraisal, monitoring insurance compliance and business planning in the field of reduction of CO<sub>2</sub> and greenhouse gases, as stipulated in international agreements on climate change

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use of the mark anywhere and in commerce. No claim is made to the exclusive right to use "ZERO EMISSIONS" apart from the mark as shown. Color is not claimed as a feature of the mark. The mark consists of the words "Zero Emissions" and depiction of [a] hydrogen atom.

in International Class 35,<sup>2</sup> as to be likely to cause confusion, mistake or deception. When the refusal was made final, applicant appealed.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *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 Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis two key, though not exclusive, considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 27 (CCPA 1976). See also *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997).

#### The Marks

We first turn our attention to a comparison of the marks. In determining the similarity or dissimilarity of the marks, we must compare the marks in their entireties as

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<sup>2</sup> Registration No. 3895726 issued on the Supplemental Register on September 10, 2010, and recites additional goods in International Class 42. The color(s) orange is/are claimed as a feature of the mark. The mark consists of the letters "ZEROEMISSIONS" in orange text.

to appearance, sound, connotation and commercial impression. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). In comparing the marks, we recognize that "the proper test is not a side-by-side comparison of the marks, but instead 'whether the marks are sufficiently similar in terms of their commercial impression' such that persons who encounter the marks would be likely to assume a connection between the parties." *Coach Services Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012), quoting *Leading Jewelers Guild, Inc. v. LJOW Holdings, LLC*, 82 USPQ2d 1901, 1905 (TTAB 2007).

Because the similarity or dissimilarity of the marks is determined based on the marks in their entireties, the analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). See also *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 23, 234 (CCPA 1981). On the other hand, different features may be analyzed to determine whether the marks are similar. *Price Candy Company v. Gold Medal Candy Corporation*, 220 F.2d 759, 105

USPQ 266, 268 (CCPA 1955). In fact, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re National Data Corp.*, 224 USPQ at 751.

In this case, applicant's mark



is similar to the registered mark



in that the wording in applicant's mark is identical in sound and meaning to the wording that comprises the mark in the cited registration. The examining attorney has made of record the following entry from a user-content-generated internet encyclopedia for the term "zero emissions:" - "an engine, motor, or other energy source, that emits no waste products that pollutes [sic] the environment or disrupts [sic] the climate."<sup>3</sup> Thus, the wording as it appears in

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<sup>3</sup> Wikipedia.org/wiki/Zero\_emissions. We accept this evidence because applicant has had an opportunity to rebut it by submitting other evidence that may have called into question the accuracy of this particular information. See *In re IP Carrier Consulting Grp.*, 84 USPQ2d 1028, 1032-33 (TTAB 2007); and TBMP § 710.01(b) and authorities cited therein.

both marks connotes services that promote non-polluting energy sources.

Applicant argues (brief, p. 3) that inasmuch as the registered mark is presented all in capital letters with no spacing, it "does not invite any emphasis of the literal elements that are similar in both marks, and does not invite any pronunciation at all." However, we are not convinced by applicant's mere assertion that because registrant's mark appears in capital letters without a space between its component terms, consumers encountering such mark will not immediately recognize it as "zero emissions." There is nothing particularly novel about the presentation of the mark such that its component terms would not be immediately evident to consumers. Indeed we find no likely meaning or pronunciation of registrant's mark other than "zero emissions." Furthermore, the presence or absence of a space between virtually the same words is not a significant difference. *Stockpot, Inc. v. Stock Pot Restaurant, Inc.*, 220 USPQ 52, 54 (TTAB 1983), *aff'd*, 737 F.2d 1576, 222 USPQ 665 (Fed. Cir. 1984) ("There is no question that the marks of the parties [STOCKPOT and STOCK POT] are confusingly similar. The word marks are phonetically identical and visually almost identical"); and *In re Best Western Family Steak House, Inc.*, 222 USPQ 827,

827 (TTAB 1984) ("There can be little doubt that the marks [BEEFMASTER and BEEF MASTER] are practically identical"). As a result, we find the wording in both applicant's and registrant's mark to be nearly identical in appearance.

We observe that applicant has disclaimed the wording "zero emissions," and that the cited mark is registered on the Supplemental Register. However, applicant's disclaimer of the wording in its mark does not serve to avoid confusion. See *Cancer Care, Inc. v. American Family Life Assurance Company of Columbus*, 211 USPQ 1005 (TTAB 1981). As the wording of the disclaimer indicates (i.e., "no claim is made to the exclusive use of ... *apart from the mark as shown*" - *emphasis added*), the disclaimed matter is accorded significance as an integral part of the composite mark. See *American Dietetics Company, Inc. et. al. v. Plus Products*, 191 USPQ 146 (DCNY 1976). The disclaimer of matter in a mark does not have the effect of removing the matter from the mark. *Bordon, Inc. v. W.R. Grace & Co.*, 180 USPQ 157 (TTAB 1973). It is well established that a disclaimer is of no legal significance in determining likelihood of confusion, rather, the disclaimed matter must be considered. See *Kellogg Co. v. Pack "Em Enterprises Inc.*, 14 USPQ 2d 1545 (TTAB 1990); and *Glamorene Products Corporation v. Boyle-Midway, Inc., et. al.*, 188 USPQ 145

(DCSDNY 1975). Moreover, the public viewing the mark is unaware of what, if any, portions of a mark may be disclaimed in a federal registration. See *In re National Data Corp.*, *supra*. Similarly, the public is not aware of which marks are registered on the Principal or Supplemental Registers. Furthermore, it is settled that even marks registered on the Supplemental Register are entitled to protection under Section 2(d) of the Trademark Act. See *In re Research & Trading Corp.*, 793 F.2d 1276, 230 USPQ 49 (Fed. Cir. 1986); and *In re Clorox Co.*, 578 F.2d 305, 198 USPQ 337 (CCPA 1978).

With regard to the design of a hydrogen atom in applicant's mark, we find that regardless of whether consumers viewing the mark will perceive the meaning of the design, the wording in applicant's mark is more prominent from a visual standpoint and contributes more to the mark's overall commercial impression. In the case of marks consisting of words and a design, the words are normally given greater weight because they would be used by consumers to request the products [and/or services]. See *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999); *In re Appetito Provisions Co.*, 2 USPQ2d 1553, 1554 (TTAB 1987). See also *Sweats Fashions Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793, 1798 (Fed. Cir. 1987);



*Giant Food, Inc. v. Nation's Food Service, Inc.*, 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983).

For these reasons, we find that, when viewed in their entirety, the marks



and

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are far more similar than they are different and, overall, convey highly similar commercial impressions. That is to say, the marks appear to be variations of each other that nonetheless point to a common source. As such, this *du Pont* factor favors a finding of likelihood of confusion.

#### The Services

We turn now to our consideration of the identified services, noting that it is not necessary that the services at issue be similar or competitive, or even that they move in the same channels of trade, to support a holding of likelihood of confusion. It is sufficient instead that the respective services are related in some manner, and/or that the conditions and activities surrounding the marketing of the services are such that they would or could be encountered by the same persons under circumstances that

could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer. See *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).

In this case, applicant's services are "consultancy concerning financing of energy projects; equipment financing services; facilitating and arranging for the financing of energy-related projects; financing services; project financing" and registrant's services are various business administration, management, marketing and advisory services, including "the control of CO2 emissions and the reduction of greenhouse gas emissions." While some of applicant's services are unrestricted as to any particular field, those that are restricted relate to energy projects. Similarly, while many of the services identified in the cited registration are unrestricted, some specifically relate to carbon dioxide and greenhouse gas emissions. These services appear to be related as identified to the extent that carbon dioxide emissions and greenhouse gasses are a byproduct of energy production and use. Thus, we find that applicant's services in the field of energy projects are at least tangentially related to registrant's services in the field of CO2 and greenhouse gas emissions inasmuch as both concern aspects of energy production on

one hand, and pollution and climate change resulting therefrom on the other.

Furthermore, in support of the refusal to register, the examining attorney has made of record numerous use-based third-party registrations, of which the following show that various entities have adopted a single mark for services identified in the involved application and cited registration:

Registration No. 4054017 for, *inter alia*, business administration and management; business management consulting; financial services, namely, financial consultation, financial analysis, financial planning, financial management;

Registration No. 3596457 for, *inter alia*, business management and consultation; financing services;

Registration No. 3708713 for, *inter alia*, business management and consultation; financing services;

Registration No. 4050081 for, *inter alia*, business administration and management; financing services; and

Registration No. 3407151 for, *inter alia*, business management; financing services.

Third-party registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1786 (TTAB

1993). The evidence of record establishes that applicant's services are related to the services identified in the cited registration, and further may be identified under the same mark. As such, this *du Pont* factor favors a finding of likelihood of confusion.

Channels of Trade

In making our determination regarding the relatedness of the parties' channels of trade, we look as we must to the services as identified in the involved application and cited registration. See *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). See also *Paula Payne Products v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973). It is presumed that applicant's various financial services as well as registrant's business consultation, management, information and advisory services at issue move in all channels of trade normal for such services, and that they are purchased by all of the usual consumers for such services. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981), citing *Kalart Co., Inc. v. Camera-Mart, Inc.*, 119 USPQ 139 (CCPA 1958). Here, the examining attorney's third-party registration evidence clearly suggests that the services are related. Furthermore, and as discussed above, many of the services identified in the involved application and

cited registration do not recite any restrictions as to the channels of trade in which they may be encountered. As such, this *du Pont* factor is, at worst, neutral or slightly favors a finding of likelihood of confusion.

Sophistication of Purchasers

Neither the application nor the cited registration includes any limitation on the customers to whom the respective services are rendered so we must consider the relevant purchasers to include all of the usual customers for the recited services. See *In re Elbaum*, 211 USPQ at 640.

While both business management, information and advisory services and financial services in general and relating to CO2 and greenhouse gas emissions and energy projects in particular, suggest that the relevant customers for the services at issue include businesses exercising a degree of care, we note that even small businesses (including sole proprietorships) and entrepreneurships seek business management and financing services. While some of these customers are undoubtedly sophisticated in such matters, the potential purchasers for these services also include those of more modest means and no more than an ordinary level of sophistication.

Even if we accept, in considering the fourth *du Pont* factor, applicant's assertion that the involved services may be the subject of sophisticated purchases, even careful purchasers are likely to be confused by highly similar marks used in connection with related services. As stated by our primary reviewing court, "[t]hat the relevant class of buyers may exercise care does not necessarily impose on that class the responsibility of distinguishing between similar trademarks for similar goods [or services]. 'Human memories even of discriminating purchasers ... are not infallible.'" *In re Research and Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986), quoting *Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970).

Therefore, the fact that the purchasers may exercise care before purchasing these services does not mean there can be no likelihood of confusion. In the present case, the high degree of similarity between the marks and the similarity between the services as identified outweigh any sophisticated purchasing decision. See *HRL Associates, Inc. v. Weiss Associates, Inc.*, 12 USPQ2d 1819 (TTAB 1989), *aff'd*, *Weiss Associates, Inc. v. HRL Associates, Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (similarities of goods and marks outweigh sophisticated purchasers, careful

purchasing decision, and expensive goods). As such, this *du Pont* factor is, at best, neutral or slightly favors a finding of no likelihood of confusion.

Summary

In light of the foregoing, we conclude that consumers familiar with registrant's services sold under its above-referenced mark would be likely to believe, upon encountering applicant's services rendered under its mark, that the services originate with or are associated with or sponsored by the same entity.

Lastly, to the extent that any of the points raised by applicant raise a doubt about likelihood of confusion, that doubt is required to be resolved in favor of the prior registrant. See *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); and *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 165, 223 USPQ 1289 (Fed. Cir. 1984).

Decision: The refusal under Section 2(d) of the Act is affirmed.