

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB      SEPT. 8,99

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re *J. R. Simplot Company*

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Serial No. 74/735,210

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*Aaron Retzer* of *Epstein, Edell & Retzer* for *J. R. Simplot Company*.

*Henry S. Zak*, Trademark Examining Attorney, Law Office 108  
(*David Shallant*, Managing Attorney).

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Before *Seeherman*, *Hairston* and *Bottorff*, Administrative  
Trademark Judges.

Opinion by *Hairston*, Administrative Trademark Judge:

J. R. Simplot Company has appealed the final refusal of the Trademark Examining Attorney to register the phrase BIG SKY ANIMAL HEALTH, with the words "ANIMAL HEALTH" disclaimed, for distributorship services in the field of veterinary products.<sup>1</sup> Registration has been refused under

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<sup>1</sup> Application Serial No. 735,210, filed September 28, 1995 asserting a bona fide intention to use the mark in commerce, and

Sections 1, 2, 3, and 45 of the Trademark Act on the ground that applicant uses the phrase as a trade name, rather than as a service mark.

A designation used merely as a trade name cannot be registered under the provisions of the Lanham Act. See *GAF Corporation v. The Tappan Company*, 197 USPQ 696 (TTAB 1977) and cases cited therein. Applicant submits that, assuming *arguendo*, the phrase sought to be registered functions as a trade name as it is used on the specimens of record, it also functions as a service mark and is, therefore, entitled to registration. Applicant points out that a term may function as both a trade name and a service mark. *Martahus v. Video Duplication Services Inc.*, 3 F.3d 417, 27 USPQ2d 1846 (Fed. Cir. 1993).

The question of whether a designation used as a trade name also functions as a service mark is one of fact, and is determined from the manner in which the designation is used and the possible impact on purchasers and prospective purchasers. In *re Univar Corp.*, 20 USPQ2d 1865 (TTAB 1991). In this case, we must make that determination from the specimens of record which are advertising flyers. One of the flyers is reproduced below, in reduced size.

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subsequently amended to allege first use and first use in commerce in October 1995.

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In support of his position that the phrase BIG SKY ANIMAL HEALTH is used only as a trade name, the Examining Attorney points out that the address information appears directly under the designation; that the lettering style of BIG SKY ANIMAL HEALTH is not distinctive; and that no logo or design element appears therewith. Thus, the Examining Attorney argues that the phrase is used only as a trade name.

In this case, however, we agree with applicant that BIG SKY ANIMAL HEALTH performs a service mark function. First, BIG SKY ANIMAL HEALTH appears at the top of the flyer in slightly larger and darker lettering than the address information and is somewhat removed therefrom. Also, no corporate designation, e.g., "Co." or "Inc.", appears with BIG SKY ANIMAL HEALTH.<sup>2</sup> Further, we note that applicant's name, J. R. Simplot Company, appears in the bottom right-hand corner of the flyer and customers and prospective customers are likely to regard this as the name

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<sup>2</sup> The inclusion of a corporate designator in a name sought to be registered is a factor which often leads to a finding solely of trade name use, especially when the name appears near a corporate address. See *In re Univar Corp.*, 20 USPQ2d 1865 (TTAB 1991) and cases cited therein.

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of the business and use BIG SKY ANIMAL HEALTH when calling for and referring to the services.

We find, therefore, that BIG SKY ANIMAL HEALTH identifies and distinguishes applicant's distributorship services in the field of veterinary products.

**Decision:** The refusal to register is reversed.

E. J. Seeherman

P. T. Hairston

C. M. Bottorff  
Administrative Trademark Judges  
Trademark Trial and Appeal Board