

THIS DISPOSITION IS NOT
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Mailed:
March 10, 2003

Paper No. 9
Bottorff

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re *Dritex, Inc.*

Serial No. 76/120,514

Keith A. Vogt of *Niro, Scavone, Haller & Niro, Ltd.* for
Dritex, Inc.

Christopher L. Buongiorno, Trademark Examining Attorney,
Law Office 109 (*Ronald R. Sussman*, Managing Attorney).

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

Opinion by *Bottorff*, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register
of the mark DRITEX (in typed form) for "installation of

drywall and painting of residential homes and commercial buildings.”¹

The Trademark Examining Attorney has issued a final refusal of registration on the ground that, as it appears on the specimens of record, the matter applicant seeks to register would not be perceived as a service mark but merely as applicant’s trade name. Trademark Act Sections 1, 2, 3 and 45.

Applicant has appealed the final refusal. Applicant and the Trademark Examining Attorney filed main appeal briefs, but applicant did not file a reply brief and has not requested an oral hearing.

We reverse the refusal to register.

A designation used merely as a trade name cannot be registered under the provisions of the Trademark Act. See *In re Diamond Hill Farms*, 32 USPQ2d 1383 (TTAB 1994). However, a designation may function both as a trade name and as a mark, and if it functions as a mark it may be registered, even if it also functions as a trade name. See *In re Walker Process Equipment Inc.*, 233 F.2d 329, 110 USPQ

¹ Serial No. 76/120,514, filed August 31, 2000. The application is based on use in commerce under Trademark Act Section 1(a), 15 U.S.C. §1051(a); April 30, 1981 is alleged as the date of first use of the mark anywhere, and August 31, 1992 is alleged as the date of first use of the mark in commerce.

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41 (CCPA 1956). The question of whether a designation functions as a mark as well as a trade name is one of fact, and is determined from the manner in which the designation is used on the specimens of record and its probable impact on purchasers and potential purchasers. *In re Diamond Hill Farms, supra.*

Applicant's specimens consist of copies of proposals to install drywall and provide painting services, such as the example reproduced on the next page:

AUG-29-2000 14:57

P.05/05

PROPOSAL

DRITEX, INC.
322 Neville Dr.
Grayslake, Illinois 60030
(708) 223-3005

PROPOSAL NO.: 7-3-1034PT
PAGE NO.: 1
DATE: July 21, 1993

Proposal Submitted To _____ Work To Be Performed At _____

NAME: CONCORD DEVELOPMENT CORP. PROJECT NAME: CONCORD LAKE
STREET: 1540 East Dundee Rd. ADDRESS: UNIT "A" END
CITY: Palatine, JOB NUMBER:
STATE/ZIP: Illinois 60067 DATE OF PLANS: 6/4/93
PHONE NUMBER: 776-0350 Jim Vanderploeg

PAINTING

WORK INCLUDED: **INTERIOR:** Walls and ceilings to be spray-rolled off white flat. Walls will be rerolled upon completion of trim and before carpet is installed. Trim to receive a semi-gloss finish as per plan. Caps on half walls and Oak Rails will receive a semi-gloss finish. Two (2) hours touch-up will be allowed upon completion of carpet.

EXTERIOR: Exterior trim to receive 1 coat solid body stain as per specs. Service Doors and Front Doors to receive a satin finish as per specs.

WORK EXCLUDED: Patio Doors to be pre-finished, Windows and Grills to be pre-finished. Closet Shelves to be pre-finished. Nothing in Garage as per specs. Exterior Treated Lumber is not to be painted as per specs.

- ALTERNATE: #1...Optional Colonist Trim.
- #2...Optional Oak Trim.
- #3...Optional Library in lieu of Bedroom.
- #4...Optional Library Colonist Trim.
- #5...Optional Library Oak Trim.

Prices subject to change upon notice after 6/1/94.

BASIC PRICE: ONE THOUSAND FIVE HUNDRED FORTY-THREE & NO/100...(\$1,543.00)

ALTERNATES :	#1...\$ 466.00 ADD	#4...\$ 42.00 ADD
	#2...\$ 104.00 ADD	#5...\$ 24.00 ADD
	#3...\$ 37.00 DEDUCT	

Respectfully submitted by Dritex, Inc.

Per C. James Powell
C. James Powell

ACCEPTANCE OF PROPOSAL

COMPANY _____

DATE _____ SIGNATURE _____

The acceptance of this proposal constitutes the acceptance of the terms and conditions on the reverse side.

TOTAL P.05

After careful review of these specimens and consideration of the arguments presented by applicant and by the Trademark Examining Attorney, we conclude that the specimens suffice as evidence that applicant uses DRITEX as

a service mark as well as a trade name. In the heading of the document, the wording DRITEX, INC. appears in substantially larger type than the address and phone number, and it is further set apart by being presented flush left rather than being indented like the address and telephone number. DRITEX, INC. prominently stands out from the presentation of the merely informational matter in the address and telephone number lines of text, and purchasers accordingly are likely to view it as serving more than the mere informational purpose of identifying applicant's name.²

It is true that DRITEX appears in conjunction with, and in the same size and style as, the corporate designator INC.³ Although that fact weighs in favor of a finding that DRITEX is merely a trade name, it is not dispositive. Likewise, it is not dispositive that no logo or other design element appears in conjunction with DRITEX. In

² The language appearing toward the end of the document, i.e., "Respectfully submitted by Dritex, Inc.," clearly is merely trade name usage. However, the presence of that wording does not detract from the service mark usage of DRITEX in the document's heading, and it is that usage upon which we base our reversal of the refusal to register in this case.

³ We are not persuaded by applicant's contention that the word DRITEX would be perceived as being separate from the word INC. due to the presence of an extra space between the comma after DRITEX and INC. Any such "extra" space is not readily apparent; there appears to be one space, as would be proper after the comma. If such extra space exists and would be perceived, it likely would be viewed merely as a typographical error rather than as an attempt to separate DRITEX from INC.

short, neither the presence of the INC. nor the absence of a design element, nor both of those facts together, mandates a finding that applicant is not using DRITEX as a service mark as well as a trade name.

The determination of whether DRITEX would be viewed as a service mark as well as a trade name is, necessarily, somewhat subjective. Our impression, and the impression we believe purchasers will have upon viewing the specimens, is that the designation DRITEX appears thereon in a manner which is sufficiently prominent and distinguishable from the other, merely informational, matter on the specimens that it would be viewed as a source indicator as well as applicant's trade name.

Decision: The refusal to register is reversed.