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Mailed:
Aug. 15, 2005

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re DSS Environmental, Inc.

Serial No. 76557930

Mark Levy of Mark Levy & Associates, PLLC for DSS
Environmental, Inc.

Jenny Park, Trademark Examining Attorney, Law Office 104
(Chris Doninger, Managing Attorney).

Before Hairston, Grendel and Drost, Administrative
Trademark Judges.

Opinion by Grendel, Administrative Trademark Judge:

Applicant seeks registration on the Supplemental
Register of the mark **DUALSAND** (in standard character form)
for goods identified in the application as "water and
wastewater filters."¹

¹ Serial No. 76557930, filed November 5, 2003. The application is based on use in commerce under Trademark Act Section 1(a), 15 U.S.C. §1051(a). March 1, 1997 is alleged as the date of first use of the mark anywhere, and June 22, 2001 is alleged as the date of first use of the mark in commerce. Applicant previously applied to register this mark on the Principal Register (Serial

At issue in this appeal is the Trademark Examining Attorney's² final refusal of registration on the Supplemental Register on the ground that the matter sought to be registered is generic and therefore incapable of functioning as a mark for the identified goods. Trademark Act Section 23, 15 U.S.C. §1091.

Applicant and the Trademark Examining Attorney filed main appeal briefs. No reply brief was filed, and no oral hearing was requested. We affirm the refusal to register.

Initially, we sustain the Trademark Examining Attorney's objection, made in her brief, to the evidence submitted by applicant for the first time with its appeal brief. This evidence clearly is untimely and we have given it no consideration. See Trademark Rule 2.142(d), 37 C.F.R. §2.142(d).

To be registrable on the Supplemental Register, the matter sought to be registered must be "capable of distinguishing applicant's goods or services." Trademark Act Sections 23(a), 23(c). "Generic terms are common names that the relevant purchasing public understands primarily

No. 76317128); the Board affirmed the Office's Section 2(e)(1) mere descriptiveness refusal in a decision dated August 22, 2003, resulting in the abandonment of that application.

² A different Trademark Examining Attorney handled the application prior to appeal.

as describing the genus of goods or services being sold. They are by definition incapable of indicating a particular source of the goods or services." *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807, 1810 (Fed. Cir. 2001) (citations omitted). Because they are incapable of identifying source, generic terms are not registrable on the Supplemental Register.

Our primary reviewing court has stated:

The determination of whether a mark is generic is made according to a two-part inquiry: "First, what is the genus of the goods or services at issue? Second, is the term sought to be registered ... understood by the relevant purchasing public primarily to refer to that genus of goods or services?"

In re Dial-A-Mattress Operating Corp., *supra*, 57 USPQ2d at 1810, quoting from *H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 989-90, 228 USPQ 528, 530 (Fed. Cir. 1986). The Office bears the burden of establishing genericness based on clear evidence of generic use. *In re American Fertility Society*, 188 F.3d 1341, 51 USPQ2d 1832 (Fed. Cir. 1999). "Any competent source suffices to show the relevant purchasing public's understanding of a contested term, including purchaser testimony, consumer surveys, dictionary definitions, trade

journals, newspapers and other publications." *In re Dial-A-Mattress Operating Corp.*, *supra*, 57 USPQ2d at 1810.

Our analysis begins with a determination of the genus of the goods at issue. *See H. Marvin Ginn, supra*. We find in this case that the genus of goods is commensurate with applicant's identification of goods in the application, i.e., "water and wastewater filters."

We next must determine whether the relevant purchasing public understands DUALSAND to refer to the genus of goods at issue. *See H. Marvin Ginn, supra*. The Trademark Examining Attorney has made of record printouts of numerous Internet websites and an excerpted article from the NEXIS database. These include the following text (emphasis added):

HEADLINE: New sewer filter fails test; Hartland wastewater plant expansion may be delayed as a result

BODY: ...An alternative approach, said Olney, would be to use a different technology called a **dual sand** filter. The state recently approved a pilot study of that system for a private developer in Northville. Hartland Township did a pilot test on the **dual sand** filter technology three to four years ago, Olney said.³

Accordingly, NYCDEP developed and implemented protocols for a study that compares the pathogen removal capabilities of microfiltration and continous-backwash-upflow, **dual-sand** (CBUDS)

³ The Detroit News, September 6, 2002.

filtration by operating a pilot facility of each system, side by side, with the same influent and testing methods.⁴

The following features make it unique among automotive batch wastewater treatment systems:

...

- Dual inclined parallel plate clarifiers
- **Dual sand** filters for final effluent polishing

...

Dual sand filters are utilized to remove any small floc (i.e. suspended solids) that passes through the clarifiers.⁵

Miami Filter **Dual Sand** Filters⁶

Topics to be presented include updates on various treatment technologies including UV disinfection, centrifuges, and **dual sand** filtration.

...

RCI reviewed, the owner contracted for and DEP funded installation of a Constantly Backwashed Upflow **Dual Sand** Filtration (CBUDSF) system, equalization tank and ultraviolet (UV) disinfection.⁷

A new water treatment facility is scheduled to be on line by the end of May 2002 that will eventually provide up to 1 million gallons of water per day for those residents in Akwesasne. This new system is a **dual sand** filtration system with chlorine treatment, much like the old plant.⁸

⁴ From a May 13, 1998 report to the U.S. Environmental Protection Agency entitled "Testing Equivalence of Microfiltration and Continuous-Backwash-Upflow, **Dual-Sand** Filtration Technologies."

⁵ Technical Article entitled "BMW Goes The Extra Mile To Meet Wastewater Limits," at www.durrenvironmental.com.

⁶ From webpage of Miami Filter, an apparent competitor of applicant's, at www.miamifilter.com

⁷ From The New York Water Environment Association, Inc., Annual Report 2001, at www.nywea.org.

⁸ St. Regis Mohawk Tribe Environment Division, Clean Water Program, at www.thames.northnet.org.

The Anadromous Fish and Aquatic Invertebrate Research Laboratory (AFAIR) is located near the dam site at the Durham reservoir on the campus of the University of New Hampshire. . . . The AFAIR facility is a 72'x26' passive solar-heated frame structure. The flow-through water system (maximum capacity: 10,000 gallons/hr) draws water by pumps from a nearby (70') reservoir through a **dual sand** filter system.⁹

Design Flow Rates, for Continuous Backwash Upflow **Dual Sand** Filter and Microfiltration Units in Sewage Treatment Applications¹⁰

The treatment facility, which serves the Watchtower Educational Center in Patterson, will be the first in the New York City Northern Reservoir System to implement microfiltration-equivalent advanced filtration to comply with the city's drinking water regulations. The design/build team chose an innovative **dual sand** filtration process that will follow advanced secondary treatment of the wastewater.¹¹

Joseph Burgess of Covanta Water Systems said his company is proposing a multistage purification process using aeration and **dual-sand** filtration.¹²

Build a new 135 mgd secondary, tertiary treatment facility on reclaimed "brownfield" property near Metro and using advanced "**Dual Sand** filtration" technology approved by US-EPA, NYDEC, NYDEP and NYDOH in the NYC Watershed to treat all the water before discharging.¹³

⁹ www.unh.edu.

¹⁰ Title of Technical Bulletin No. 1 from New York City Department of Environmental Protection, www.nysefc.org.

¹¹ www.dufresne-henry.com.

¹² "Four Firms Present Plans for Water Treatment Plant," November 15, 2001 Providence Journal-Bulletin as reprinted at www.bv.com.

¹³ www.aslf.org.

A number of options exist for wastewater disposal and a combination of these options may likely be implemented. The Pine Hill wastewater treatment facility currently has capacity to accept additional wastewater. On-site wastewater disposal systems (i.e. **dual sand** filters), and package plants can be constructed on the project site to meet the rigorous standards dictated by the location of the Project.¹⁴

A three-stage, \$7.5 million project at the Delhi Village Waste Water Treatment Plant is on schedule to be running this May, plant officials said. ... "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 filed with finer sand," Curley said.¹⁵

Improving the village water system "is a \$47.4 million project, and we've got two more years to work on it," said Bezio. "And it will take that long." The village relied on a chlorinator to inject chlorine into the water, but when the project is completed, it will have a new **dual-sand**-filtration plant.¹⁶

We find that this evidence clearly establishes that "dual sand" or "dual-sand" is a generic adjective which names a category of water and wastewater filters, and a type of filtration system or technology. See, e.g., In

¹⁴ www.catskillsheritage.org.

¹⁵ The Daily Star (Oneonta, NY), online edition February 7, 2002, at www.thedailystar.com.

¹⁶ Press Republican (Plattsburgh, NY), online edition November 25, 2000, at www.pressrepublican.com.

re Sun Oil Co., 426 F.2d 401, 165 USPQ 718 (CCPA 1970) (CUSTOMBLENDED generic for gasoline); *In re Helena Rubenstein, Inc.*, 410 F.2d 438, 161 USPQ 606 (CCPA 1969) (PASTEURIZED generic for face cream); and *In re Central Sprinkler Co.*, 49 USPQ2d 1194 (TTAB 1998) (ATTIC generic for automatic sprinklers for fire protection). We further find that applicant's compression of the generic words "dual sand" into the compound term DUALSAND does nothing to negate the genericness of the term as applied to applicant's goods; the words retain their generic significance whether considered separately or as a compound. *See, e.g., In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110 (Fed. Cir. 1987) (SCREENWIPE generic for pre-moistened, anti-static cloth for cleaning computer and television screens).

We have carefully considered all of applicant's arguments in support of its claim of non-genericness, but we find them to be wholly unpersuasive. For instance, the fact that there may be several different specific types of "dual sand" filters or filtration systems does not make "dual sand" or DUALSAND any less generic for the category as a whole. The fact that neither "dual" nor "sand" refers on its face to water or wastewater treatment is of no moment; our genericness

determination must be made in relation to the goods at issue, not in the abstract. Finally, the evidence clearly shows that these two words when used together are a generic designation as applied to the goods; there is nothing unique, incongruous or otherwise distinctive about the combination.

In short, we find that DUALSAND is generic as applied to water and wastewater filters, that it therefore is incapable of distinguishing applicant's goods from those of others, and that it therefore is not registrable on the Supplemental Register.

Decision: The refusal to register on the Supplemental Register is affirmed.