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Mailed: 11/13/07

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Jonathan Davey

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Serial No. 78/752384

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Patricia S. Kramer, Patricia A. Walker and Ralph E. Jocke  
of Walker & Jocke for Jonathan Davey.

Dannean J. Hetzel, Trademark Examining Attorney, Law Office  
106 (Mary I. Sparrow, Managing Attorney).

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Before Quinn, Kuhlke and Mermelstein, Administrative  
Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

Jonathan Davey filed an application to register the  
mark SAFE HARBOR for "accounting services."<sup>1</sup>

The trademark examining attorney refused registration  
under Section 2(e)(1) of the Trademark Act, 15 U.S.C.  
§1052(e)(1), on the ground that applicant's mark, if used  
in connection with applicant's services, would be merely  
descriptive thereof.

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<sup>1</sup> Application Serial No. 78752384, filed November 11, 2005,  
alleging a bona fide intention to use the mark in commerce.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs.

The examining attorney maintains that the term "safe harbor" describes accounting services utilizing safe harbor techniques to reduce tax liabilities. According to the examining attorney, "safe harbor" is a general accounting method that uses simplistic accounting techniques, rather than the complex techniques prescribed by tax codes, to calculate tax consequences and reduce tax liabilities. In support of the refusal the examining attorney submitted several definitions of "safe harbor" from a variety of sources on the Internet.

Applicant contends that the mark sought to be registered does not immediately describe the nature of applicant's services, but that it requires some imagination, thought, or perception to reach a conclusion about the services. The term "safe harbor" is used in everyday life simply to mean "a place of protection." Thus, applicant argues, the term is just suggestive, conveying the idea that "your financial information is safe with us," "we will properly handle your accounting matters," or "we will not overcharge you for our accounting services." Applicant responds to the examining attorney's Internet evidence by contending that it "should be given de

minimis weight and treated as possibly suspect." Applicant reasons that Internet articles must be understood in their context, and that use of "safe harbor" in them does not establish that the consuming public is familiar with the term or is applying to such term the same meaning found in the articles. Applicant is critical, in particular, of the Wikipedia evidence.

A term is deemed to be merely descriptive of goods or services, within the meaning of Trademark Act Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. See, e.g., *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); and *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215 (CCPA 1978). A term need not immediately convey an idea of each and every specific feature of the applicant's goods or services in order to be considered merely descriptive; it is enough that the term describes one significant attribute, function or property of the goods or services. See *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); and *In re MBAssociates*, 180 USPQ 338 (TTAB 1973).

Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which it

is being used or is intended to be used on or in connection with those goods or services, and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of its use or intended use. The term need not describe all of the goods or services set forth in the identification, as long as it merely describes one of them. See *In re Sterotaxis Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005).

That a term may have other meanings in different contexts is not controlling. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). It is settled that:

....the question of whether a mark is merely descriptive must be determined not in the abstract, that is, not by asking whether one can guess, from the mark itself, considered in a vacuum, what the goods or services are, but rather in relation to the goods or services for which registration is sought, that is, by asking whether, when the mark is seen on the goods or services, it immediately conveys information about their nature.

*In re Patent & Trademark Services Inc.*, 49 USPQ2d 1537, 1539 (TTAB 1998).

The term "safe harbor" is defined in the context of accounting as follows:

SAFE HARBOR RULE: tax provision enacted as part of the Economic Tax Recovery Act of 1981 to guarantee sale/leaseback treatment to certain

transactions if specific requirements are met. The purpose of this provision was to make it easier for loss companies to "sell" their tax benefits accruing on new asset purchases by entering into sale/leaseback transactions with profitable companies. The intent was to generate an immediate cash flow for such loss companies, rather than deferring the benefits through carryover provisions.

Dictionary of Accounting Terms (4<sup>th</sup> ed. 2005).

Other sources define the term "safe harbor" as follows:

In taxation, guidelines provided by the IRS for certain transactions, indicating specific parameters a taxpayer can observe to ensure favorable tax treatment or to avoid an unfavorable one.  
(Dictionary of Business Terms (3d ed. 2000))

In accounting, the term *safe harbor* may refer to the method by which corporations would rather (typically) incur tax consequences than follow the precise requirements of their respective tax codes.  
(www.answers.com)

An accounting method that avoids legal or tax regulations and allows for a simpler method (usually) of determining a tax consequence than those methods described by the precise language of the tax code. Here's an example of an accounting safe harbor: a firm is losing money and therefore cannot claim an investment credit, so it transfers this claim to a company that is profitable and can therefore claim the credit. Then the profitable company

leases the asset back to the unprofitable company and passes on the tax savings.

(www.investopedia.com)

Tax regulations that allow a (usually) simpler method of determining a tax consequence than is available following the precise language of the Code or regulations. An example is the simplified method for determining the taxable portion of pension distributions.

(www.bookkeeperlist.com "Accounting for Everything")

#### SAFE HARBOR METHOD

The [IRS] will not challenge the use of this safe harbor method of accounting by a taxpayer within the scope of this revenue procedure provided the taxpayer follows all of the requirements of this section 5 and, if the taxpayer is changing from another method to the safe harbor method, the provisions of section 6 of this revenue procedure regarding changes in method of accounting. Under the safe harbor method, the taxpayer must amortize creative property costs properly written off by the taxpayer under SOP 00-2 ratably over an amortization period of 15 years beginning on the first day of the second half of the taxable year in which the taxpayer properly writes off the costs under SOP.

(IRS Bulletin: 2004-24, June 14, 2004)

Revenue Procedure 2004-36 provides a safe harbor method of accounting under which a taxpayer within the scope of this revenue procedure may amortize creative property costs (as defined) ratably over a 15-year period. This revenue procedure also provides procedures for taxpayers to obtain the

automatic consent of the Commissioner of Internal Revenue to change to the safe harbor method of accounting provided in this revenue procedure. (IRS Guidance Issued (unknown date))

Further, Wikipedia defines the term "safe harbor" within the "accounting" field as follows; "In accounting, the term safe harbor may refer to the method by which corporations would rather (typically) incur tax consequences than follow the precise requirements of their respective codes."

We find the record establishes that the term "safe harbor" describes, among other things, a method of accounting relating to tax liability. We must make our determination on the issue of mere descriptiveness based on the identification of services set forth in the application. *Cf. Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002). Here, applicant has broadly identified his services as "accounting services." Thus, we must presume that the identification encompasses all types and methods of accounting services, including the safe harbor method of accounting. The term "safe harbor" immediately describes, without conjecture or speculation, a significant characteristic or feature of the services, namely that applicant's accounting services utilize the safe harbor

method of accounting to reduce tax liability. That the term "safe harbor" has a meaning in everyday life (as "a place of protection") is immaterial in view of its use as a term of art in the accounting field.

Applicant's criticisms of the Internet evidence (including the Wikipedia excerpt) submitted by the examining attorney are not persuasive. The Board generally takes a somewhat more permissive stance with respect to the admissibility and probative value of evidence in an ex parte proceeding. See TBMP §1208 (2d ed. rev. 2004). Internet evidence is generally admissible and may be considered for purposes of evaluating a trademark. *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828 (Fed. Cir. 2007). See also TMEP §710.01(b) (5<sup>th</sup> ed. 2007) ["Articles downloaded from the Internet are admissible as evidence of information available to the general public, and of the way in which a term is being used by the public. However the weight given to this evidence must be carefully evaluated because the source is often unknown."]. In the present case, the term "safe harbor" has been exposed to the public, and we have no reason to question the reliability of the Internet definitions, especially given the use of the term by the Internal Revenue Service. See TBMP §1208.03 (2d ed. rev. 2004) ["Material obtained

through the Internet or from websites is acceptable as evidence in ex parte proceedings."].

Insofar as Wikipedia is concerned, the Board recently addressed the admissibility and probative value of this resource:

[T]he Board will consider evidence taken from Wikipedia so long as the non-offering party has an opportunity to rebut the evidence by submitting other evidence that may call into question the accuracy of the particular Wikipedia information. Our consideration of the Wikipedia evidence is with the recognition of the limitations inherent with Wikipedia (e.g., that anyone can edit it and submit intentionally false or erroneous information).

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As a collaborative online encyclopedia, Wikipedia is a secondary source of information or a compilation based on other sources. As recommended by the editors of Wikipedia, the information in a particular article should be corroborated. The better practice with respect to Wikipedia evidence is to corroborate the information with other reliable sources, including Wikipedia's sources.

*In re IP Carrier Consulting Group*, 84 USPQ2d 1028, 1032-33 (TTAB 2007). In the present case, applicant had an opportunity to rebut the Wikipedia evidence, not to mention the other Internet evidence, if he believed that the entries of "safe harbor" in the materials were incorrect. Applicant did not submit any contravening evidence

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whatsoever, and the other evidence of record corroborates the Wikipedia evidence. The record, when viewed as a whole, is persuasive of a finding of mere descriptiveness.

We conclude that the term SAFE HARBOR is merely descriptive of accounting services that may utilize the safe harbor method of accounting.

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