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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Modern Builders Supply, Inc.

Serial No. 78061994

Oliver E. Todd, Jr. of MacMillan, Sobanski & Todd, LLC for
Modern Builders Supply, Inc.

Tonja M. Gaskins, Trademark Examining Attorney, Law Office
112 (Janice O'Lear, Managing Attorney).

Before Seeherman, Hairston and Drost, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Modern Builders Supply, Inc. has appealed from the
final refusal of the Trademark Examining Attorney to
register THERMALTECH as a trademark for "non-metal windows
and doors."¹ Registration has been refused pursuant to

¹ Application Serial No. 78061994, filed May 4, 2001. The
application was originally based on an asserted bona fide
intention to use the mark in commerce. After a notice of

Trademark Rules 2.56 and 2.88(b)(2), on the basis that applicant failed to submit a specimen showing use of the applied-for mark for the identified goods.

Applicant and the Examining Attorney have filed appeal briefs. Applicant did not request an oral hearing.

Trademark Rule 2.88(b)(2) provides that the Statement of Use must include "one specimen of the mark as actually used in commerce." It refers to Trademark Rule 2.56 for the requirements for specimens. Trademark Rule 2.56(a) provides, in part, that a statement of use under Rule 2.88 must include one specimen showing the mark as used on or in connection with the goods. Rule 2.56(b)(1) further provides, in part, that a trademark specimen is a label, tag, or container for the goods, or a display associated with the goods."

In order to determine whether applicant's specimen shows the mark as used on the goods, we must examine the specimen itself. Applicant has submitted what it describes as "a label that is affixed to all windows and doors or their packaging manufactured by Polaris Technologies." Response dated October 8, 2002. Applicant has further

allowance issued, applicant filed its Statement of Use on May 31, 2002. The refusal which is the subject of this appeal stems from the examination of the Statement of Use.

explained that Polaris Technologies is applicant's window and door manufacturing division. The "label" is shown below, in reduced form:

POLARIS
TECHNOLOGIES
WINDOWS & DOORS

WINDOW/PATIO DOOR INSTALLATION INSTRUCTIONS

*POLARIS® WINDOWS AND DOORS MUST BE STORED INSIDE.
STACK AS STRAIGHT AS POSSIBLE TO PREVENT BOWING.*

1. Window must remain locked until installation is complete.
2. Caulk inside surface (face) of nail fin or entire exterior face of rough opening.
3. Set window/door frame plumb and square. Place a level on the sill and adjust the frame until it is perfectly level (this is most important for water resistance). DO NOT twist or bow frame. Leave adequate clearance (1/4" to 3/8") at head, allowing for header sag.
4. Use shims on jambs to keep unit evenly spaced from studs.
5. Block under sill to prevent sill from sagging, bowing, or dipping.
6. Screws are recommended to anchor window in place. Anchor at each corner, then every 12" to 16" using the pre-punched installation holes.
NOTE: IF NAILS ARE USED, CAUTION SHOULD BE TAKEN NOT TO DAMAGE THE WINDOW.
7. Fill interior voids between wood studs (or rough opening) and frame with batt type insulation such as rockwool or fiberglass to eliminate cold drafts.
8. Installation is now complete. Check window operation.

CAUTION: UNLESS SPECIFICALLY ORDERED, POLARIS® WINDOWS ARE NOT PROVIDED WITH SAFETY GLASS. IF BROKEN, THE GLASS COULD FRAGMENT CAUSING INJURY. MANY LAWS AND BUILDING CODES REQUIRE SAFETY GLASS IN LOCATIONS THAT ARE ADJACENT TO OR NEAR DOORS. POLARIS® WINDOWS ARE AVAILABLE WITH SAFETY GLASS. CONSULT YOUR BUILDER.

CLEANING INSTRUCTIONS: USE MILD SOAP AND WATER SOLUTION-NO BLEACH.

Look for these other fine Polaris® products...



ENERGY WALL®
energyTECH®
energyWELD®

MASTER
CRAFT
MasterTech®
MasterWeld®

EverView®
HomeView®

UNISTAR®
Starbrite®
DYNAGARD®

True Position®
ThermalTech™
WEATHERTECH®

Thermal King®

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As can be seen on the reproduced specimen, the applied-for mark THERMALTECH is shown on the label in a box headed, "Look for these other fine Polaris® products..." There follows a list of various trademarks, including ENERGY WALL, ENERGYTECH, ENERGYWELD, MASTERTECH, MASTERCRAFT and EVERVIEW. Included in this list is THERMALTECH.

It is clear to us, as it would be clear to anyone viewing this specimen, that the mark for the product on which the label appears is POLARIS, and that THERMALTECH,

while a mark used by applicant's Polaris division, is not the mark under which the goods to which the label is applied are sold. On the contrary, the label states unequivocally that THERMALTECH is a trademark for an "other" Polaris product. Accordingly, the label which applicant has submitted as its specimen does not show use of the applied-for mark for the goods.

Decision: The refusal of registration is affirmed.