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PTH

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB FEB. 12, 99

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Energy Absorption Systems, Inc.

Serial No. 74/478,686

Philip A. Jones of Brinks Hofer Gilson & Lione for Energy
Absorption Systems, Inc.

Frances G. Smith, Trademark Examining Attorney, Law Office
103 (Kathy Erskine, Managing Attorney).

Before Cissel, Hairston and Walters, Administrative
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

This is an appeal from the Trademark Examining
Attorney's final refusal to register the mark CUSHIONWALL
for "vehicle crash barriers made primarily of rubber."¹

The Examining Attorney refused registration under
Section 2(e)(1) of the Trademark Act on the ground that the

¹ Application Serial No. 74/478,686 filed January 12, 1994 under
Section 1(b) of the Trademark Act; amended to allege dates of
first use of June 10, 1994.

mark is merely descriptive of applicant's goods. Applicant and the Examining Attorney have filed briefs and an oral hearing was held.

In support of the refusal, the Examining Attorney has made of record dictionary definitions² of "cushion" and "wall," of which we quote the most pertinent:

cushion: an elastic body for reducing shock.

wall: something resembling a wall (as in appearance, function, or effect); *esp:* something that acts as a barrier or defense.

In addition, she submitted two stories from the NEXIS data base. While one story mentions one of applicant's vehicle crash barriers and refers to it as a "cushion wall barrier," this story is of limited probative value because it was taken from a wire service and there is no evidence that the story was ever published, and therefore exposed to the public. The other story concerns the development of a light concrete which is being used to make highway crash cushions. Excerpts of this story (with the word "**cushion(s)**" highlighted) are set forth below:

Don Ivey, associate director of the Texas Transportation Institute, says a light concrete he invented will be installed in 4,000 highway crash **cushions** around the country by 1995 and will save about 900 drivers from serious injury and death by the same year.

. . . .

² Webster's Ninth New Collegiate Dictionary (1990).

The **cushions** made from Ivey's invention look like normal freeway walls before a crash but resemble little more than a big pile of white powder after one.

(The Houston Chronicle, July 20, 1992)

Applicant, in urging reversal of the refusal to register, argues that its mark creates an incongruity because "cushion" means soft or elastic and "wall" means a hard surface. Further, applicant maintains that CUSHIONWALL is not merely descriptive of its goods because the term is not listed in a dictionary, there is no evidence that competitors use the term to describe their goods, and other parties have registered marks which include the word "cushion." Applicant submitted copies of Registration No. 787,448 for the mark CUSHIONWALL for plastic surfaced wall coverings; Registration No. 1,378,262 for the mark CUSHIONFLOR; Registration No. 766,248 for the mark CUSHIONFLOR (stylized) and Registration No. 912, 586 for the mark CUSHIONFLOR SUPREME, all for plastic coverings of solid surfaces such as floors, walls, countertops and the like.

A mark is merely descriptive if, as used in connection with the goods, it immediately describes an ingredient, quality, characteristic, or feature thereof, or if it directly conveys information regarding the nature,

function, purpose or use of the goods. In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215 (CCPA 1978). Moreover, the question of whether a mark is merely descriptive must be determined not in the abstract, but rather in relation to the goods for which registration is sought, including the context in which the mark is used on the goods or in advertising therefor, and the possible significance that the mark would have, seen in such context, to the average purchaser of the goods. In re Abcor Development Corp., supra.

In the present case, the record includes a product sheet for applicant's vehicle crash barriers. The top half of the front page of the sheet features a photograph of one of applicant's vehicle crash barriers. The barrier consists of several sections which are joined together and resembles a wall. Underneath the photograph is the following description of the goods:

The new longitudinal energy-absorbing wall

The CushionWall is a new solution for high-frequency lateral impact areas, such as severe highway curves. This energy-absorbing, longitudinal wall gradually dissipates the kinetic energy of an errant vehicle during a lateral impact and safely reflects it back onto the roadway at a shallow angle. This

cushioning reduces the severity of impact and helps keep the driver in control of his vehicle, reducing the risk of secondary accidents.

Considering applicant's mark CUSHIONWALL as used in the above context, we agree with the Examining Attorney that it directly conveys to purchasers information regarding the nature of applicant's vehicle crash barriers, namely that they are walls which cushion the impact of being struck by a vehicle. Applicant itself uses the term "wall" to refer to its vehicle crash barriers, as well as the term "cushioning" to describe the operation of the barriers. Thus, purchasers and prospective purchasers of applicant's vehicle crash barriers would be likely to think of these barriers as walls which cushion. As evidenced by the dictionary definition, the term "wall" does not necessarily mean a hard surface, and we find no incongruity when CUSHIONWALL is used to refer to applicant's vehicle crash barriers.

With respect to the third-party registrations for marks which include the term "cushion," we note that these registrations are for unrelated goods and are, therefore, of no value in deciding the issue in this appeal. In any event, as has often been stated, each case must be decided on its own set of facts.

Finally, it is not necessary that a designation be in common usage in the particular industry in order for it to be merely descriptive. In re National Shooting Sports Foundation, Inc., 219 USPQ 1018, 1020 (TTAB 1983). The absence, therefore, on this record of evidence of any third-party uses of the term CUSHIONWALL does not mean, contrary to applicant's contentions, that prospective competitors of applicant would not need to use such term to describe their vehicle crash barriers. Similarly, the absence of CUSHIONWALL in the dictionary is not evidence that it is not merely descriptive of applicant's goods.

Accordingly, we conclude that applicant's mark, when applied to its specified goods, is merely descriptive of them.

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Decision: The refusal to register is affirmed.

R. F. Cissel

P. T. Hairston

C. E. Walters
Administrative Trademark
Judges, Trademark Trial and
Appeal Board

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