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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Modern Builders Supply, Inc.

Serial Nos. 78062665 and 78062671

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:

On May 9, 2001, Modern Builders Supply, Inc. filed
applications to register ENERGYTECH¹ and ENERGYWELD² as
trademarks for "non-metal windows and doors." Each
application was originally based on an asserted bona fide

¹ Application Serial No. 78062665, filed May 9, 2001.

² Application Serial NO. 78062671, filed May 9, 2001.

intention to use the mark in commerce. After notices of allowance issued, applicant filed Statements of Use. After the examination of these Statements of Use, the Examining Attorney refused registration pursuant to 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. When these refusals were made final, applicant filed notices of appeal.

Applicant and the Examining Attorney have filed appeal briefs. Applicant did not request an oral hearing. Because the two appeals involve common questions of fact and law, we are deciding both in a single opinion.

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 specimens show use of the involved marks on the goods, we must

examine the specimens themselves. Each application contains an identical specimen, which applicant has described 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 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 MasterTech MasterWeld OverView HomeView UNISTAR Starbrite True Position ThermalTech™ DYNAGARD WEATHERTECH Thermal King™

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As can be seen on the reproduced specimen, the applied-for marks ENERGYTECH and ENERGYWELD are 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, MASTERTECH,

MASTERCRAFT and EVERVIEW. Included in this list are ENERGYTECH and ENERGYWELD.

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 ENERGYTECH and ENERGYWELD, although marks used by applicant's Polaris division, are not the marks under which the goods to which the label is applied are sold. On the contrary, the label states unequivocally that ENERGYTECH and ENERGYWELD are trademarks for "other" Polaris products. Accordingly, the label which applicant has submitted as its specimens does not show use of the applied-for marks for the goods.

Decision: The refusals of registration are affirmed.