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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	76616320
Applicant	ACCURA BULLETS, LLC
Applied for Mark	POWER BOND
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In Re:	Accura Bullets, LLC	)	Applicant's Representative: Ken J. Pedersen
Mark:	POWER BOND	)	Law Office: 114
Serial No.	76/616,320	)	

The Commissioner for Trademarks
PO Box 1451
Alexandria, VA 22131-1451

APPLICANT'S APPEAL BRIEF

Applicant has appealed the trademark examining attorney's refusal to register the trademark POWER BOND for bullets on the grounds that the mark is a process or system, and that the specimen is advertising material only, citing Sections 1, 2 and 45 of the Trademark Act, 15 U.S.C. § 1051, 1052 and 1127, respectively.

FACTS

Applicant's predecessor-in-interest filed its intent-to-use trademark application for POWER BOND for bullets on October 8, 2004. After an Examiner's Amendment disclaiming "BOND" on May 17, 2005, the application was published on September 27, 2005 and allowed

on December 20, 2005. Four Requests to Extend Time to file a statement of use were filed on or about June 16, 2006, January 2, 2007, May 29, 2007, and October 2, 2007, respectively.

A Statement of Use with copies of a specimen and fee were filed on June 16, 2008. The specimen is an informational brochure about the goods included with every package of the goods. In the brochure, the goods are described as using a combination of "POWER BOND™ technology," a more aggressive bullet shape and a fluted gas check design for optimum bullet performance. "POWER BOND technology" is further described in the brochure as a proprietary process that creates a smoother, more uniform bullet surface.

The Examiner issued an Office Action on June 21, 2008, refusing the Statement of Use and registration because, according to him, POWER BOND relates to a process, and therefore cannot be a trademark for goods. Also, the Examiner objected to the specimen because he considered it to be only advertising material.

Applicant responded to the Office Action on about December 24, 2008, arguing that process names may be used as trademarks for goods. Applicant cited other U.S. trademark registrations, namely CORE LOKT® (530,361) and ULTRA BONDED® (3,188,363) both for bullets, as support. Also, Applicant submitted the Declaration of its employee, Dan Hall, to establish that the submitted specimen adequately appears in commerce in connection with Applicant's goods.

The Examiner was not persuaded by Applicant's arguments, and maintained and made FINAL the refusals in an Office Action dated January 1, 2009. Applicant filed its Notice of Appeal and fee on about July 13, 2009.

ARGUMENT

I. The name of a process may be a trademark for goods.

The *Griffin* and *Congoleum* cases cited by the Examiner do not stand for the proposition that the name of a process may not be used as a trademark for goods. In *Griffin* (In re Griffin Pollution Control Corp., 186 U.S.P.Q. 166 (Cust. & Pat. App. 1975)), the applicant failed to show proper use of the mark OXINITE with a mixture of pollution control gases. The applicant had submitted as specimens descriptive materials distributed to the public in areas where applicant's apparatus and process was used. Because of instability of some of the gases in the mixture, they required preparation in-situ just prior to the time of use. Therefore, it was not possible to package the gases in a container with a label attached. Furthermore, there was no evidence that the applicant displayed OXINITE in any manner on the apparatus for practicing the process. Therefore, the Board held that the specimens did not relate to the mixture of gases, but related to the treatment process instead. *Griffin*, then stands for the principle that the specimen must associate the mark for the purchaser with Applicant's identified goods, and not, as the Examiner contends, that a process name cannot be a trademark for goods. In fact, the *Griffin* decision implies the opposite, that if the apparatus for practicing the process had been marked with OXINITE, the mark would have been considered used with the gases goods. Id, at [1][2].

Likewise, in Applicant's case, the descriptive brochure clearly relates to Applicant's bullets, as the POWER BOND mark is in the section where three different performance grades of bullets are described. Therefore, POWER BOND has been used as a trademark for, and relates to, the goods.

In *Congoleum* (Congoleum Corporation v. Armstrong Cork Company, 218 U.S.P.Q. 528 (TTAB 1983)), the Opposer Congoleum successfully showed that Armstrong's mark INLAID COLOR was descriptive/deceptively misdescriptive, and that Armstrong had not established acquired distinctiveness under Section 2(f) for it. The issues for this case are laid out by the Board at id, 534, and do not relate at all to the Examiner's position that the name of a process may be a trademark for goods. Furthermore, there is no descriptive/deceptively misdescriptive rejection of record for this case, so the Examiner's position on the process-systems refusal is unsupported.

II. Applicant has shown adequate use of its mark in commerce.

Section 45 of the Trademark Act, 15 Section 1127, when defining "use in commerce", states that:

> . . . a mark shall be deemed to be in use in commerce –
>
> 1) on goods when –
>
> (A) it is placed in any manner on the goods or on their containers or the displays associated therewith . . . (emphasis added).

Clearly, Applicant's specimen indicates that Applicant's mark is on a display associated with the goods.

Applicant's employee Dan Hall's declaration clearly establishes that Applicant's mark is always on a display associated with the goods. Because the display is in every package of Applicant's bullets, an association, of the display with the mark with the goods, is inevitable. In re Bright of America, Inc. 205 U.S.P.Q. 63 (TTAB 1979). Furthermore, because the display is in every package of Applicant's bullets, point-of-sale presentation is established. In re Ancha Electronics Inc. , 1 U.S.P.Q. 2d 1318 (TTAB 1986). Furthermore, Applicant's display is not merely advertising, it is also instructional. The brochure describes Applicant's Platinum high-performance series, with the Power Bond™ technology, and distinguishes it from Applicant's

other series, including, for example, a pure-lead series without the Power Bond™ technology, which lead series may be preferable in states where plated bullets may not be legal. This "instructional" feature of Applicant's specimen is another factor which weighs in favor of the specimen being acceptable. In re Ultraflight, 221 U.S.P.Q. 903, 906 (TTAB 1984). Otherwise, the Examiner is requiring more of Applicant than the Statute, quoted above, requires.

Therefore, the decision of the Examiner to refuse registration should be reversed, and Applicant's mark should be registered.

Dated: September 11, 2009

PEDERSEN & COMPANY, PLLC

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cc: client