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Subject: U.S. TRADEMARK APPLICATION NO. 76616320 - POWER BOND - 3832

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# UNITED STATES PATENT AND TRADEMARK OFFICE

**SERIAL NO:** 76/616320

**MARK:** POWER BOND



**CORRESPONDENT ADDRESS:**

Ken J. Pedersen  
PEDERSEN & COMPANY, PLLC  
PO BOX 2666  
BOISE ID 83701-2666

**GENERAL TRADEMARK INFORMATION:**

<http://www.uspto.gov/main/trademarks.htm>

**TTAB INFORMATION:**

<http://www.uspto.gov/web/offices/dcom/ttab/index.html>

**APPLICANT:** ACCURA BULLETS, LLC

**CORRESPONDENT'S REFERENCE/DOCKET NO:**

3832

**CORRESPONDENT E-MAIL ADDRESS:**

IP@PEDERSENCO.COM

## EXAMINING ATTORNEY'S APPEAL BRIEF

The applicant, ACCURA BULLETS, LLC, has appealed the trademark examining attorney's final refusal to register the proposed mark "POWERBOND." Registration was refused on the ground that the mark as used on the specimen merely identifies a process or system and does not function as a trademark under Trademark Act Sections 1, 2 and 45, 15 U.S.C. §§1051-1052, 1127. Moreover, registration was refused on the ground that the specimen of use does not show the mark as it is used in commerce in connection with the goods under Sections 1 and 45, 15 U.S.C. §§1051, 1127. It is respectfully requested that the refusals to register be affirmed.

### FACTS

The facts of this case as noted in applicant's appeal brief of September 11, 2009 are accurate as of the date of the filing of the applicant's appeal brief.

## **ISSUE**

The two issues on appeal are whether the mark “POWERBOND”, as used on the specimen of record, merely identifies a process or system, and whether it functions as a trademark to identify and distinguish applicant’s goods from those of others and to indicate the source of applicant’s goods under Trademark Act Sections 1, 2 and 45, 15 U.S.C. §§1051-1052, 1127; and, whether the specimen is acceptable to show use in commerce in connection with the goods and not merely as advertising material under Sections 1 and 45, 15 U.S.C. §§1051, 1127.

## **ARGUMENT**

### **1. THE MARK “POWERBOND”, AS USED ON THE SPECIMEN, MERELY IDENTIFIES A PROCESS OR SYSTEM AND NOT FUNCTIONABLE AS A TRADEMARK UNDER SECTIONS 1, 2 AND 45 OF THE TRADEMARK ACT**

#### **A. Rule of Law**

The Trademark Act defines a trademark as “any word, name, symbol, or device, or any combination thereof--used by a person . . . to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.” Trademark Act Section 45, 15 U.S.C. §1127. Not everything that a party adopts and uses with the intent that it function as a trademark actually functions as a trademark. The applicant must demonstrate that it is using its mark in the manner described above before that mark may be registered as a trademark with the United State Patent and Trademark Office

(USPTO). *In re Standard Oil Co.*, 275 F.2d 945, 947, 125 USPQ 227, 229 (C.C.P.A. 1960); TMEP §1202.

A mark may be refused registration, if the applied-for mark, as used on the specimen of record, merely identifies a process or system; it does not function as a trademark to identify and distinguish applicant's goods from those of others and to indicate the source of applicant's goods. Trademark Act Sections 1, 2 and 45, 15 U.S.C. §§1051-1052, 1127; *see In re Griffin Pollution Control Corp.*, 517 F.2d 1356, 1358-59, 186 USPQ 166, 167 (C.C.P.A. 1975) (holding the wording OXINITE as used on the specimen is the name of a process to improve degradation of domestic and industrial organic wastes and does not constitute a trademark for goods identified as a mixture of gases used in that process); TMEP §§904.07(b), 1202; *cf. Congoleum Corp. v. Armstrong Cork Co.*, 218 USPQ 528, 535 n.13 (TTAB 1983) (holding the wording INLAID COLOR as used in advertising and sales promotion literature is the name of a manufacturing process by which a floor covering is made and does not identify the intended floor covering itself).

**B. Applicant's Mark, As Used on the Specimen, Identifies a Process or System**

Applicant submitted a specimen containing several pages with its statement of use that was ultimately described as brochures and used as inserts for every package of goods sold. Of all the specimen pages submitted, the mark "POWERBOND" appears only twice and within the same article or subtitle in successive paragraphs. The mark appears at the bottom of the middle column under the title "Platinum Series" of the promotional article. The specimen shows the applied-for mark used solely to identify a process or system because the goods "utilize" and are "plated using POWERBOND technology, a

proprietary process that creates a smoother, more uniform surface that reduces the standard deviation between shots.” See a copy of the specimen page below. There are no other showings of the mark in the specimen pages submitted.

The applicant’s contention that the “POWERBOND” mark as used on the specimen amounts to trademark use. Contrary to applicant’s arguments, the courts in *In re Griffin Pollution Control Corp.* and *Congoleum Corp. v. Armstrong Cork Co.*, clearly holds that there is no showing of the mark, as used on the specimens, as a trademark other than as a process or system.

Determining whether matter functions solely as the name of a system or process and also as a trademark is based on the manner in which the applied-for mark is used on the specimen and any other information of record pertaining to use of the mark. See TMEP §§1202, 1301.02(e).

The manner in which the mark “POWERBOND” is used on the specimen clearly shows the mark as a technological process in making the platinum series bullets. Technology is defined as “a method, process, etc. for handling a specific technical problem” found in Webster’s New World College Dictionary, 4<sup>th</sup> Edition at [yourdictionary.com](http://yourdictionary.com). See the attached online dictionary definition. The examining attorney asks the Board to take judicial notice of the attached online dictionary definition for “technology”. The Board may take judicial notice of any standard reference works, including technical as well as general dictionaries. See, e.g., *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594, 596 (TTAB 1982). Moreover, a process or system is a way of doing something, and is not generally a tangible product. Thus, the name of a system or process does not function as a trademark

unless it is also used to indicate the source of the goods in the application. *See In re Griffin Pollution*, 517 F.2d at 1358-59, 186 USPQ at 167. It is clear that the mark “POWERBOND” references a technological “proprietary process” rather than indicate a source of the goods.

The applicant also submitted two third party registrations showing trademark use as a process. The applicant references U.S. Registration Nos. 0530361 (CORE LOKT®) and 3188363 (ULTRA BONDED®), both for bullets and ammunition. The applicant merely submitted copies of the U.S. Registrations and information sheets thereto. However, no evidence was submitted to show how the marks were used in commerce. Thus, prior decisions and actions of other trademark examining attorneys in registering different marks have little evidentiary value and are not binding upon the Office. TMEP §1207.01(d)(vi). Each case is decided on its own facts, and each mark stands on its own merits. *See AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 1406, 177 USPQ 268, 269 (C.C.P.A. 1973); *In re Int’l Taste, Inc.*, 53 USPQ2d 1604, 1606 (TTAB 2000); *In re Sunmarks, Inc.*, 32 USPQ2d 1470, 1472 (TTAB 1994).

The manner in which the mark is shown on the specimen does not amount to trademark use. Rather, the mark “POWERBOND”, as used on the specimen, merely identifies a process or system and therefore does not function as a trademark to indicate source of applicant’s goods.

## **2. THE SPECIMEN DOES NOT SHOW TRADEMARK USE IN COMMERCE IN CONNECTION WITH GOODS UNDER SECTIONS 1 AND 45 OF THE TRADEMARK ACT**

### **A. Rule of Law**

A specimen demonstrating use of a trademark in commerce may be tags, labels, instruction manuals, containers, photographs that show the mark on the goods or packaging, or displays associated with the goods at their point of sale. TMEP §§ 904.03 *et seq.*

In contrast, material that functions merely to tell prospective purchasers about the goods, or to promote the sale of the goods, is not acceptable to show trademark use. TMEP §904.04(b). A specimen is found not acceptable because it consists of advertising material for goods. Trademark Act Section 45 requires use “on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto.” 15 U.S.C. §1127; *see* 37 C.F.R. §2.56(b)(1); TMEP §904.04(b), (c). Invoices, business cards, announcements, price lists, listings in trade directories, order forms, bills of lading, leaflets, brochures, advertising circulars and other printed advertising material, while normally acceptable for showing use in connection with services, generally are not acceptable specimens for showing trademark use in connection with goods. *See In re MediaShare Corp.*, 43 USPQ2d 1304, 1307 (TTAB 1997); *In re Schiapparelli Searle*, 26 USPQ2d 1520, 1522 (TTAB 1993); TMEP §904.04(b), (c).

#### **B. Specimen Not Accepted Because It Consists of Advertising Material for Goods**

The specimen consists of several pages of the company’s brochure. The only appearances of the mark on the specimen are two sentences within the text of one page, which partially reads: “PowerBelt Platinum AeroTip Bullets utilize Powerbond™ technology, ...” and “PowerBelt Platinums are plated using Powerbond technology, ...” Throughout this page, the article goes on to tout “Powerbelt bullets” with topics such as “The Powerbelt Difference”, “Powerbelt Advantages” and describing the Powerbelt

bullets as having “Higher Velocities,” “Superior Accuracy,” “Perfect Expansion,” “Harder Hitting,” “Faster Loading,” “Cleaner Shooting,” as well as listing a series of bullets, namely platinum, copper and pure lead series.

The other pages of this brochure have additional information for PowerBelt bullets, such as, accessories, performance specs, loading information and a price list. However, none of these other pages has the mark “POWERBOND”. The mark “POWERBOND” is specific to the platinum series bullets. Therefore, it is clear that the specimen as a whole is merely advertising material for the goods, and much reference is made to the Powerbelt bullets.

The applicant contends that the brochures are package inserts. The applicant’s declaration submitted with the response of December 24, 2008 states that “[e]very customer that purchases the company’s POWER BELT® bullets receives one of these brochures including the POWER BOND™ mark, whether shipped direct from the company’s factory, or picked up at a store.”

If material inserted in a package with the goods is merely advertising material, then it is not acceptable as a specimen of use on or in connection with the goods. Material that is only advertising does not necessarily cease to be advertising because it is placed inside a package. Package inserts such as invoices, announcements, order forms, bills of lading, leaflets, brochures, printed advertising material, circulars, publicity releases, and the like are not acceptable specimens to show use on goods. *See In re Bright of America, Inc.*, 205 USPQ 63 (TTAB 1979). TMEP 904.04(c).

Furthermore, there is no evidence in the record that this specimen functions as a display. The specimen is merely informational material and is not akin to a banner, shelf-

talker, window display, or similar device designed to catch the attention of purchasers and prospective purchasers as an inducement to consummate a sale. See *In re Bright of America, Inc.*, 205 USPQ at 71. Informational materials cannot be considered a display per se; applicant must present evidence of point-of-sale presentation of the specimen. See TMEP §904.06. There must be some indication that the specimen is associated directly with the goods offered for sale, and the specimen must bear the trademark prominently. Here, the mark “POWERBOND” is not prominently displayed. Even where the mark is shown on the specimen, it is nothing more than mere informational material lauding a technological process known as “POWERBOND”.

Applicant has failed to show that the brochures are anything but advertising material. See *In re MediaShare Corp.*, 43 USPQ2d 1304, 1307 (TTAB 1997); *In re Schiapparelli Searle*, 26 USPQ2d 1520, 1522 (TTAB 1993); TMEP §904.04(b), (c). A statement that the specimen brochures are packaged with every goods sold is not sufficient to show trademark use in connection with goods. Material that is only advertising does not necessarily cease to be advertising because it is placed inside a package. Also, applicant has provided no evidence that, in the sale of the goods, the mark is displayed with prominence and associated or related to the goods in such a way that association of the mark and the goods is inevitable. See *In re Bright of America, Inc.*, 205 USPQ 63 (TTAB 1979); TMEP § 904.04(c). Therefore, the specimen is refused for failure to provide evidence of the applied-for mark in use in commerce as a trademark.

## CONCLUSION

Based on the evidence of record, and for the reasons stated above, the examining attorney respectfully submits that the mark “POWERBOND”, when used on the specimen of record does not show trademark use in commerce in connection with “bullets”. The examining attorney respectfully requests that the Board affirm the refusals.

Respectfully submitted,

/William T. Verhosek/  
USPTO  
LO 114  
571-272-9464  
K. Margaret Le  
Managing Attorney  
Law Office 114



# MAKE SABOTS OBSOLETE

## THE POWERBELT DIFFERENCE

PowerBelt® Bullets are the most advanced muzzleloading bullets ever developed, with all of the benefits of sabot bullets but none of the problems. Like sabots, the PowerBelt Bullets' patented snap-on base creates a perfect gas seal, providing consistent pressures and superior accuracy. But unlike sabots, PowerBelt Bullets are full-caliber sized, easier to load and don't require cleaning after every shot. Available in Platinum, Copper or Pure Lead grades, PowerBelt Bullets are legal in almost every state, including Colorado and Pennsylvania.

## POWERBELT ADVANTAGES

**HIGHER VELOCITIES** The perfect gas seal of the PowerBelt® Bullet base eliminates gas blow-by, providing consistently higher velocities.

**SUPERIOR ACCURACY** The consistent gas pressures provided by the PowerBelt base give almost identical bullet velocity and trajectory every time. The PowerBelt base also protects the tail of the bullet from flame cutting, so the bullet's overall ballistic integrity is maintained from the time you load it until it hits your target. Combine all this with the aerodynamic superiority of PowerBelt AeroTips and you've got the ultimate long-range muzzleloader bullet.

**PERFECT EXPANSION** PowerBelt Bullets are available in either Hollow Point, Aero Tip, Flat Point or Steel Tip designs, providing shooters the ability to choose the expansion performance that is best for their hunting situation – from a coyote to an elephant. Each bullet tip design provides varying degrees of expansion on impact – with the Hollow Point producing the most immediate expansion; the Aero Tip, in addition to its aerodynamic benefits, penetrates deeper before expanding; the Flat Point provides the most controlled expansion, with increased weight retention; and the Steel Tip virtually eliminates expansion for maximum penetration. So, by matching tip design with bullet weight, you can choose the perfect bullet for whatever game you're hunting.

- Hollow Point for maximum expansion on lighter skinned game (Varmint, Deer)
- AeroTip for deeper penetration on light or medium weight game (Deer, Elk, Black Bear)
- Flat Point for heavier skinned game (Black Bear, Moose, Grizzly)
- Steel Tip for the really big stuff (Cape Buffalo, Elephant)

**HARDER HITTING** While sabot bullets are under-bore in size to accommodate the sabot, PowerBelt Bullets are full caliber

size and expand upon ignition to a full-bore diameter of .45, .50 or .54 caliber, delivering maximum knockdown power and creating larger diameter wound channels. Plus, they arrive on target with more weight and energy to penetrate heavy bone.

**FASTER LOADING** Unlike sabots, PowerBelt Bullets are easier to load because the bullet itself is one-thousandth of an inch under-bore size, while the pliable plastic base is slightly over-bore. So, the entire PowerBelt bullet base assembly loads easily with the plastic base seating the bullet tightly over the powder charge until, upon ignition, the soft lead bullet expands to fill the rifling. This ease of loading eliminates potential accuracy-robbing damage to the bullet tip.

**CLEANER SHOOTING** With sabots, for maximum accuracy you have to clean your barrel after every shot and sometimes just to get the next sabot down the barrel. Why? Sabots leave a plastic residue in the barrel after every shot. If not thoroughly cleaned, this residue robs your barrel of accuracy and makes loading a quick follow-up shot very difficult. With PowerBelt Bullets, there is no plastic residue left behind in the barrel. That's because the PowerBelt's plastic base follows behind the bullet and drops away when the bullet leaves the muzzle having done its job of providing a perfect gas seal. This means you can shoot 6 to 8 PowerBelts before cleaning the barrel to remove excess powder fouling.

## THREE PERFORMANCE GRADES TO MEET YOUR NEEDS

PowerBelt Bullets are available in three different performance grades, with all three designed to deliver the same benefits that have made PowerBelt the #1 muzzleloading bullet in America. Once you shoot PowerBelts, you'll see why they're the bullets that made sabots obsolete.

### PLATINUM HIGH PERFORMANCE SERIES

## DESIGNED FOR MAGNUM LOADS

### PLATINUM SERIES

PowerBelt Platinum AeroTip Bullets utilize PowerBelt® technology, a more aggressive bullet shape and a fluted gas check design that combine to make the Platinum Series the best performing PowerBelt ever.

PowerBelt Platinum's are plated using PowerBelt's **Proprietary Technology**, a proprietary process that creates a smoother, more uniform surface that reduces the standard deviation between shots. This

plating results in reduced resistance as the bullet travels down the bore, producing faster, more consistent velocities to improve both trajectory and accuracy.

PowerBelt Platinum also deliver an improved ballistic coefficient by utilizing a more aggressive bullet taper design. Not only does the taper provide for a more aerodynamic flight, it also helps control the rate of expansion – regardless of powder charge or distance the bullet travels.

PowerBelt Platinum's feature a fluted gas check that is sized larger than a standard PowerBelt, while still being just as easy to load. The Platinum's larger diameter gas check produces higher and more consistent pressures – further improving both velocity and accuracy.

### COPPER SERIES

Our copper-plated PowerBelts have become the most popular muzzleloading projectiles since the roundball and truly are 'the bullets that made sabots obsolete.' They are #1 for a reason, and if you don't believe us, just ask any hunter who has shot them. The thin copper plating greatly reduces bore friction for higher velocities – while still allowing for optimal bullet expansion within the rifling grooves. Available in four tip designs – AeroTip, Hollow Point, Flat Point and Steel Tip – PowerBelt Coppers offer the widest variety of grain weights in the PowerBelt line-up, with 11 different weights from 175 grains all the way up to 530 grains. With PowerBelt Copper Series bullets you can find the right combination for whatever game you're chasing.

### PURE LEAD SERIES

The original PowerBelt Bullet was the Pure Lead, and it's still a great choice for the economy-minded shooter, whether for hunting or just target shooting. Available in four different grain weights (295, 348 and 405 in the Hollow Points, and 444 in the Flat Point), PowerBelt Pure Lead bullets will get the job done with authority. And in states where copper-plated bullets are not allowed, PowerBelt Pure Leads are the highest tech, best performing bullets you can shoot – and still be legal!

## THESE MUSHROOMS ARE DEADLY FOR GAME.

