

<p>This Opinion is Not a Precedent of the TTAB</p>
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Hearing: October 21, 2020

Mailed: December 4, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Hydro-Gear Limited Partnership

Serial No. 87641657

Angelo J. Bufalino of Vedder Price P.C.,
for Hydro-Gear Limited Partnership.

Justin Miller, Trademark Examining Attorney, Law Office 125,
Heather Biddulph, Managing Attorney.

Before Taylor, Shaw, and Johnson,
Administrative Trademark Judges.

Opinion by Johnson, Administrative Trademark Judge:

Hydro-Gear Limited Partnership (“Applicant”) seeks registration on the Principal Register of the designation ZT-1800,¹ in standard characters (“the “Applied-For

¹ Application Serial No. 87641657, filed on October 11, 2017, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a bona fide intent to use the mark in commerce.

Page references to the application record are to the downloadable .pdf version of the United States Patent and Trademark Office’s (“USPTO” or “Office”) Trademark Status & Document Retrieval (TSDR) system. Citations to the briefs, motions, and orders on appeal are to TTABVUE, the Board’s online docketing system. *See Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). Specifically, the number preceding TTABVUE corresponds to the docket entry number, and any number(s) following TTABVUE refer to the page number(s) of the docket entry where the cited materials appear.

Mark”), as a mark for “Land vehicle parts, namely, transaxles,” in International Class 12.

The Examining Attorney refused registration under Sections 1, 2, and 45 of the Trademark Act, 15 U.S.C. §§ 1051, 1052, and 1127, on the ground that Applicant’s Applied-For Mark as shown on the original specimens of use fail to function as a trademark because it merely identifies a model designation and in addition, as to the substitute specimens, that they comprise mere advertising and do not function as point-of-sale website displays. After the Examining Attorney made the refusal final, Applicant requested reconsideration and appealed to this Board. The Examining Attorney denied the request for reconsideration and the appeal was resumed. The appeal is fully briefed, and an oral hearing was held on October 21, 2020. We affirm the refusal to register.

I. Evidentiary Issue: Completion of the Record Before Appeal

The Examining Attorney requests that the Board strike the “screen capture” of the community portal for the goods offered under the designation ZT-1800, reproduced for the first time in the body of Applicant’s brief, because the screen capture was not made a part of the record prior to appeal.²

Since the record in an application should be complete before the filing of an appeal, Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d), we sustain the Examining Attorney’s

² Examining Attorney’s Brief, 9 TTABVUE 3-4. The community portal is accessed through Applicant’s website. *See* Applicant’s Appeal Brief, 7 TTABVUE 11-12, 23-24.

objection and decline to further consider the screen capture of the community portal and the legal arguments referring and relating to same.

II. Background

Before we discuss the merits of the appeal, we review Applicant's specimens.

A. Original Shipping Label Specimens

On October 24, 2018, Applicant filed its Statement of Use and six specimens purporting to show Applicant's Applied-For Mark on shipping labels [hereinafter "Shipping Label Specimens"]. The Examining Attorney rejected all of the Shipping Label Specimens because "the mark as used in the submitted specimens only shows the applied-for mark being used to indicate the goods as the transaxle's model number as the 'ZT-1800' and not as an indicator of the source of the goods."³

The six specimens are reproduced below:⁴

³ Dec. 13, 2018 Office Action at 2.

⁴ Oct. 24, 2018 Specimens at 1-6. Applicant's Applied-For Mark is illegible in the last three specimens. Applicant should ensure that all USPTO filings are legible. *Cf.* Trademark Rule 2.126(a)(2), 37 C.F.R. § 2.126(a)(2) ("Exhibits pertaining to an electronic submission must be made electronically as an attachment to the submission and must be clear and legible."). *See infra* notes 8, 9, and 10.

RT NO (P) 1910-1005L 		D	PART NO (P) 1910-1005L 		
PALLET SERIAL # (S) 8257AB0061 			PALLET SERIAL # (S) 8257AB0061 		
	WEIGHT 804 lbs 		TRANSAXLE, HYDROSTATIC ZT-1800 WRAP - 96405 09/15/2018.03:04:07 PM		WEIGHT 804 lbs 
DATE - MMDDYY (2D) 09/14/18 			DATE - MMDDYY (2D) 09/14/18 		
QUANTITY (Q) 36 			QUANTITY (Q) 36 		

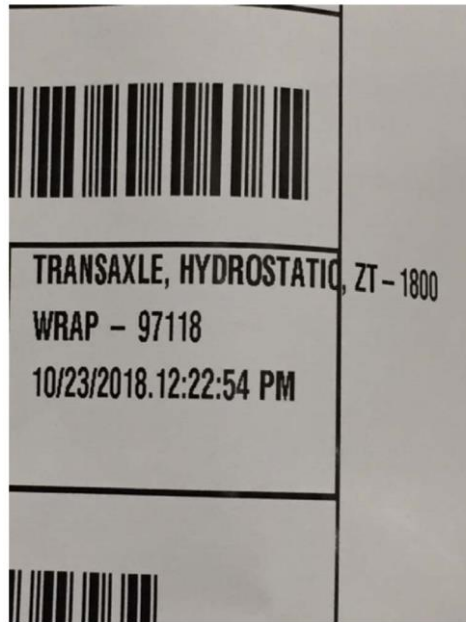
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⁵ Oct. 24, 2018 Specimens at 1.

⁶ *Id.* at 2.



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⁷ *Id.* at 3.

⁸ *Id.* at 4.



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⁹ *Id.* at 5.

¹⁰ *Id.* at 6.

B. Substitute Specimens

On January 17, 2020, in response to the July 18, 2019 Final Office Action, Applicant submitted two substitute specimens comprised of (1) electronic images of Applicant's product brochure, and (2) excerpts from Applicant's website which feature the Applied-For Mark [hereinafter "Substitute Specimens"]. The Examining Attorney maintained and continued the refusal of registration, asserting that the Substitute Specimens are mere advertising: "Specifically, the screenshot specimens do not show any 'Add to Cart,' 'Shopping Cart,' or similar functionality commonly used to purchase goods online, and the inclusion of a link to 'Request Information' is insufficient because it does not show ability to directly order the goods."¹¹ The Substitute Specimens are reproduced below:

¹¹ Feb. 20, 2020 Request for Reconsideration After Final Action Denied at 3.

ZT-1800™

COMPACT ZT
FOR COMPACT YARDS

- Our lightest and most compact integrated unit
- The perfect fit for vehicles weighing up to 667 pounds
- Maintenance-free design for ease of use
- Efficient & reliable 6cc pump & 10cc motor





DESIGNED & ASSEMBLED IN THE USA

SUPERIOR
PERFORMANCE

SPECIFICATIONS	
Pump Displacement	0.37 in ³ /rev [6 cc/rev]
Motor Displacement	0.61 in ³ /rev [10 cc/rev]
Input Speeds	
Max Hi-idle (No Load)	3000 rpm
Min (Loaded)	1800 rpm
Output Torque	up to 100 lb-ft [up to 136 Nm]
Speed	up to 6 mph [up to 10 kph]
Gross Vehicle Weight	up to 667 lbs [up to 302 kg]
Axle Shaft Diameter	0.75 in [19.0 mm]
Axle Shaft Options	DD
Weight of Unit	18 lbs [8.2 kg]

FOR MORE INFORMATION VISIT:
WWW.HYDRO-GEAR.COM



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¹² Jan. 17, 2020 Specimens at 1-2 (two pages).

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Leading Manufacturer of Precision Drive Solutions - Hydro-Gear - ZT-1800


<https://www.hydro-gear.com/zt1800/> 49 captures 21 Nov 2015 - 28 May 2019

SEP OCT NOV 2017 2018 2019 About this capture

Facebook LinkedIn My Hydro-Gear My Supplier Portal SMARTEC Contact

HYDRO-GEAR®

Residential - ZT-1800



NEW ZT-1800™

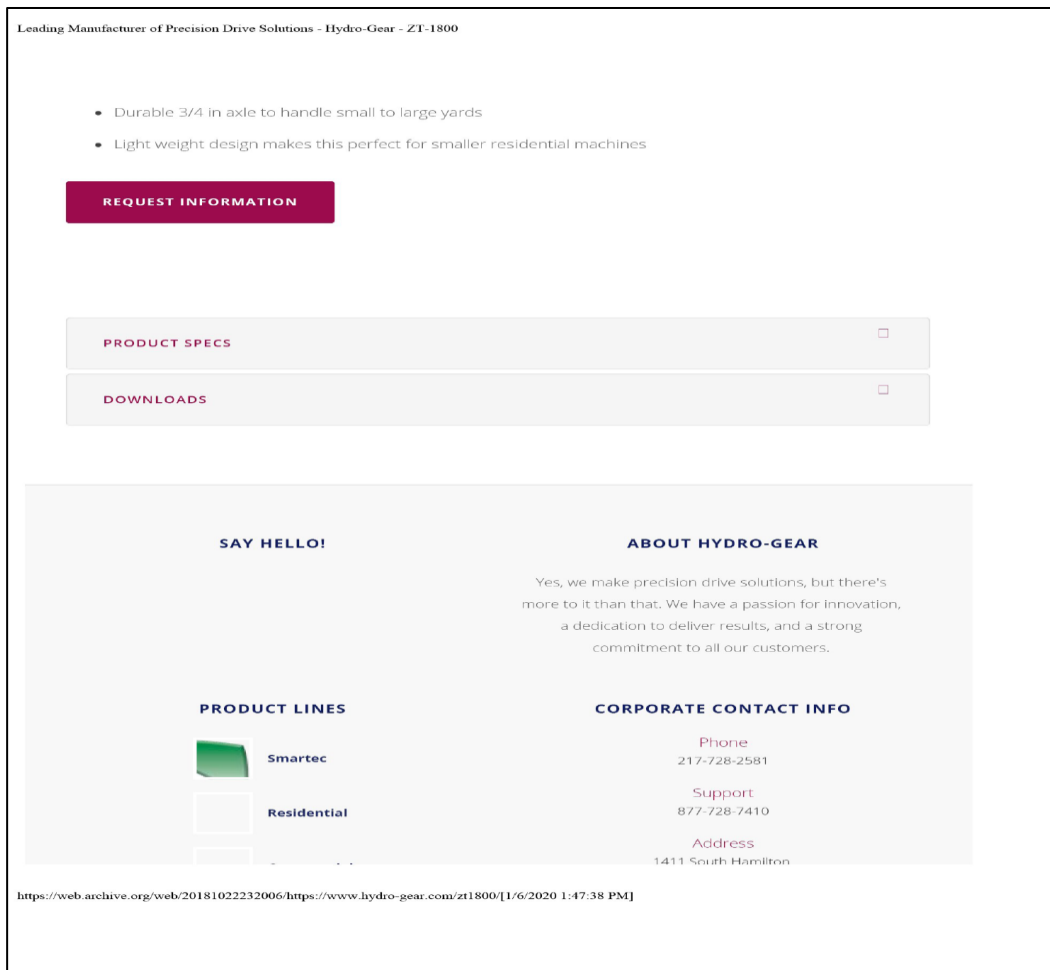
DESCRIPTION

The Micro ZT is Hydro-Gear's most compact integrated transaxle with the proven performance you've come to expect.

<https://web.archive.org/web/20181022232006/https://www.hydro-gear.com/zt1800/> [1/6/2020 1:47:38 PM]

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¹³ *Id.* at 3.



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III. Law and Analysis

A. ZT-1800, as Displayed on the Original Shipping Label Specimens, Is a Model Designation That Does Not Function as a Trademark.

“It is well settled that terms used merely as model, style, or grade designations are not registrable as trademarks because they do not serve to identify and distinguish one party’s goods from similar goods manufactured and/or sold by others.” *In re Dana Corp.*, 12 USPQ2d 1748, 1749 (TTAB 1989). “This is so because such a designation serves as a description of the product, informing one of the quality, size

¹⁴ *Id.* at 4.

or type of the particular product, rather than serving as an identifier of the source of the goods.” *Id.* If a proposed mark is found to be a model number or designation, and “it is shown that the designation in question has attained recognition by the public as a source identifier, in addition to any other function it may perform, then it may be registrable as a trademark.” *Id.* (citing *In re Peterson Mfg. Co., Inc.*, 229 USPQ 466, 468-69 (TTAB 1986)). The determination of whether a proposed mark is unregistrable because it is a model, style, or grade designation is a question of fact. *Id.*

“[T]he central question in determining whether Applicant’s proposed mark functions as a [trademark] is the commercial impression it makes on the relevant public (e.g., whether the term sought to be registered would be perceived as a mark identifying the source of the [goods]).” *In re Keep A Breast Found.*, 123 USPQ2d 1869, 1879 (TTAB 2017).

As shown on the specimen reproduced below, the Applied-For Mark appears on Applicant’s Shipping Label Specimens in nondescript block lettering, which is displayed on the same line and in the same size, font style, and boldness as the other wording or lettering in that part of the specimen.



Indeed, the Applied-For Mark appears in a font size much smaller than most of the other elements on the shipping label; that is, in a manner more befitting informational matter, such as in this case, a model number, rather than an indicator of source. *See Ex Parte the Esterbrook Pen Company*, 109 USPQ 368, 1956 WL 8058, at * 1 (Fed. Cir. 1956) (“2668” does not function as a trademark for applicant’s pen points; style designation was not featured prominently on packaging or in any manner different from applicant’s other style numbers); *see also In re Waldes Kohinoor, Inc.*, 124 USPQ 471, 1960 WL 7206, at *1 (“5131,” “5000,” and “5100,” used for retaining rings, are type or series designations; evidence did not show that applicant promoted the designations as marks for its goods). Furthermore, the record is devoid of any evidence that anyone other than Applicant considers the proposed mark to be an identifier of source of transaxles, rather than a description of a

particular type of transaxle.¹⁵ Based on this evidence, we find that ZT-1800, as it appears on the original Shipping Label Specimens, functions as a model designation and not as a trademark.¹⁶

B. Applicant's Substitute Specimens Are Mere Advertising and Do Not Suffice as a Point of Sale Display.

Under Section 45 of the Trademark Act, 15 U.S.C. § 1127, a trademark is used in commerce when “it is placed in any manner on the goods or their containers or the displays associated therewith” *See also* Trademark Rule 2.56(b)(1), 37 C.F.R. § 2.56(b)(1). The issue on appeal, as argued by both Applicant and the Examining Attorney, is whether any of the Substitute Specimens qualifies as a display associated with the goods, or whether they are mere advertising. *See In re Siny Corp.*, 920 F.3d 1331, 2019 USPQ2d 127099, at *2-3 (Fed. Cir. Apr. 10, 2019) (citing *Powermatics, Inc.*

¹⁵ Applicant cites its purported registrations of ZT-3400 (Reg. No. 3775806) and IZT (Reg. No. 2343905) as bases for registration of its proposed mark. 7 TTABVue 12-15. The registrations are not of record, but even if they were, it is axiomatic that each application must be decided on its own facts. *See, e.g., In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1635 (Fed. Cir. 2016).

¹⁶ Alternatively, Applicant asserts ownership of a family of ZT formative marks: EZT (Reg. No. 3095198), IZT (Reg. No. 2343905), ZT-2100 (Reg. No. 4048995), ZT-2800 (Reg. No. 3243075), ZT-3100 (Reg. No. 3903442), ZT-3400 (Reg. No. 3775806), and ZT-5400 POWERTRAIN (Reg. No. 3903441). Appeal Brief, 7 TTABVue 17-18; June 13, 2019 Response to Office Action at 11-17. However, Applicant fails to proffer any advertising or sales evidence showing extensive usage and promotion of its ZT formative marks. *Cf., J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889, 1891-92 (Fed. Cir. 1991) (“Recognition of the family [of marks] is achieved when the pattern of usage of the common element is sufficient to be indicative of the origin of the family.” Therefore, it is necessary to “consider the use, advertisement, and distinctiveness of the marks, including assessment of the contribution of the common feature to the recognition of the marks as of common origin.”). And mere ownership of a series of similar marks does not establish a family of marks. *See In re LC Trademarks, Inc.*, 121 USPQ2d 1197, 1204 (TTAB 2016). More importantly, however, the Applied-For Mark under consideration for registration here is ZT- 1800 — not ZT. Consequently, Applicant's family of marks argument is entirely without merit.

v. Globe Roofing Prods. Co., 341 F.2d 127, 52 C.C.P.A. 950, 954 (CCPA 1965) (“[I]t [is] well settled that mere advertising and documentary use of a notation apart from the goods do not constitute technical trademark use.”); *accord Avakoff v. S. Pac. Co.*, 765 F.2d 1097, 1098 (Fed. Cir. 1985); *Lands’ End, Inc. v. Manbeck*, 797 F.Supp. 511, 24 USPQ2d 1314, 1316 (E.D. Va. 1992)).

The determination of whether any of the proffered specimens is merely advertising or serves the function of a display associated with the goods is a question of fact. *In re U.S. Tsubaki, Inc.*, 109 USPQ2d 2002, 2003 (TTAB 2014) (citing *In re Shipley Co.*, 230 USPQ 691, 694 (TTAB 1986)). “Factually, we need to ask whether the purported point-of-sale display provides the potential purchaser with the information normally associated with ordering products of that kind.” *Id.* at 2003 (citing *In re Anpath Grp. Inc.*, 95 USPQ2d 1377, 1381 (TTAB 2010)).

Displays associated with the goods, including online displays, must be point-of-sale displays. *Lands’ End*, 24 USPQ2d at 1316 (“A crucial factor in the analysis is if the use of an alleged mark is at a point of sale location. A point of sale location provides a customer with the opportunity to look to the displayed mark as a means of identifying and distinguishing the source of goods.”); *see also In re Sones*, 590 F.3d 1282, 93 USPQ2d 1118, 1122 (Fed. Cir. 2009) (quoting *In re Osterberg*, 83 USPQ2d 1220, 1222-23 (TTAB 2007) (“In [*Lands’ End*], the determinative factor was that the mark was used at the point of sale.”)). We have held:

[T]o be more than mere advertising, a point-of-sale display associated with the goods must do more than simply promote the goods and induce a person to buy them; that is

the purpose of advertising in general. The specimen must be “calculated to **consummate a sale.**”

U.S. Tsubaki, 109 USPQ2d at 2009 (quoting *In re Bright of Am., Inc.*, 205 USPQ 63, 71 (TTAB 1979) (emphasis added)). To be “calculated to consummate a sale,” the specimen must contain sufficient practical information about the goods and a way to order to the goods, so as to put the prospective customer at the point of purchase. Examples include a catalog displaying merchandise offered for sale along with an order form for such merchandise, and a telephone number through which the consumer is invited to call in a purchase, *Lands’ End*, 24 USPQ2d at 1316; or in the case of webpage specimens, a way to “plac[e] orders for the goods via the Internet,” *Anpath Grp.*, 95 USPQ2d at 1381, such as selecting goods and adding them to a virtual shopping cart. Brochures and other advertising material may be acceptable specimens as print displays only if sufficient evidence, such as a photograph of a trade show booth, is provided showing how such specimens are used in an actual display featuring the goods and print advertising material together. *See In re Ancha Elecs., Inc.*, 1 USPQ2d 1318, 1319-20 (TTAB 1986); TRADEMARK MANUAL OF EXAMINING PROCEDURE § 904.03(g) (Oct. 2018).

In contrast, a specimen fails to qualify as a point-of-sale display if it contains more limited information, and would require a prospective customer to “contact applicant to obtain preliminary information necessary to order the goods” before the prospective customer could actually place an order. *Anpath Grp.*, 95 USPQ2d at 1381; *see also U.S. Tsubaki*, 109 USPQ2d at 2005. Notably, the U.S. Court of Appeals for the Federal Circuit has affirmed a Board decision rejecting a webpage specimen that

applicant claimed was a point-of-sale display, where the only ordering information provided on applicant's website was a phone number. The Federal Circuit emphasized that substantial evidence supported our decision:

[The Board] noted the absence of information it considered essential to a purchasing decision, such as a price or range of prices for the goods, the minimum quantities one may order, accepted methods of payment, or how the goods would be shipped. J.A. 8. The Board also considered the "For sales information:" text and phone number contact. It assumed that the phone number would connect a prospective customer to sales personnel, but it found that "if virtually all important aspects of the transaction must be determined from information extraneous to the web page, then the web page is not a point of sale." J.A. 9; *see* J.A. 6 ("A simple invitation to call applicant to get information—even to get quotes for placing orders—does not provide a means of ordering the product." (quoting *In re U.S. Tsubaki, Inc.*, 109 USPQ2d 2002, 2005 (TTAB 2014))). The Board further noted the absence of any evidence (as opposed to attorney argument) of how sales are actually made—e.g., documentation or verified statements from knowledgeable personnel as to what happens and how. J.A. 9.

In re Siny, 2019 USPQ2d 127099, at *3.

Here, we find that the Substitute Specimens, whether used separately or together, are mere advertising for Applicant's transaxles due to the absence of information sufficient enough for consumers to make a basic purchasing decision. Although Applicant's stylized alphanumeric term is prominently featured on these specimens, they lack critical information such as pricing, minimum quantities that can be ordered, accepted methods of payment, shipping information, and direct ordering information. Moreover, a virtual shopping cart is nonexistent on the web page specimen.

Applicant contends that when consumers consider the collective content found through the web page and the supporting Substitute Specimens, orders for the goods can be placed via telephone.¹⁷ However, we reiterate, “if virtually all important aspects of the transaction must be determined from information extraneous to the web page, then the web page is not a point of sale.” *Id.*

Consequently, all of Applicant’s Substitute Specimens fail to serve as point-of-sale displays. They are merely advertising materials.

IV. Conclusion

We find, on the basis of the record as a whole, that consumers would not perceive ZT-1800 as a mark identifying the source of Applicant’s goods. ZT-1800 is no more than a model designation for a transaxle offered by Applicant; it does not function as a mark. Applicant’s Substitute Specimens are mere advertising which do not suffice as displays associated with the sale of Applicant’s identified goods.

Decision: The refusal to register the designation ZT-1800 under Sections 1, 2, and 45 is affirmed.

¹⁷ Applicant’s Appeal Brief, 7 TTABVUE 23.