

This Opinion is Not a
Precedent of the TTAB

Hearing: April 25, 2023

Mailed: April 28, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Kohler Co.
—

Serial No. 88796957
—

Bradley L. Cohn, Brett A. Manchel (argued), and Novaira Paul, of
Pattishall, McAuliffe, Newbury, Hilliard & Geraldson LLP, for Kohler
Co.

Ronald McMorrow, Trademark Examining Attorney, Law Office 118,
Michael Baird, Managing Attorney.

—
Before Zervas, Heasley, and Johnson,
Administrative Trademark Judges.

Opinion by Johnson, Administrative Trademark Judge:

Kohler Co. (“Applicant”) seeks registration on the Principal Register of the
standard character mark, POWERZONE, for “Shower heads” in International Class
11.¹

¹ Application Serial No. 88796957 was filed on February 13, 2020, 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.

Citations to the appeal record are from the publicly available documents in TTABVUE, the
Board’s electronic docketing system. *See, e.g., Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473,
1476 n.6 (TTAB 2014). The number preceding “TTABVUE” corresponds to the docket entry

On February 4, 2021, Applicant filed a Statement of Use alleging August 3, 2020 as its date of first use anywhere and in commerce, along with a specimen. Soon thereafter, the Examining Attorney issued an office action, refusing to register Applicant's mark under Sections 1 and 45 of the Trademark Act, 15 U.S.C. §§ 1051 and 1127, on the ground that Applicant's specimen did not show use of the proposed mark on or in connection with any of the goods specified in Class 11.² On June 18, 2021, Applicant responded to the refusal and submitted a substitute specimen. The Examining Attorney then issued another office action, amending the ground for refusal to failure to function as a trademark under Sections 1, 2, and 45 of the Trademark Act, 15 U.S.C. §§ 1051, 1052, and 1127, "because [POWERZONE] clearly identifies one of the three spray settings for the showerheads. Consumers encountering the applied-for mark used in this manner would not perceive it as an indicator of the source of the goods."³

After the refusal was made final, Applicant requested reconsideration and filed an appeal. The Examining Attorney denied the request for reconsideration and the appeal proceeded. The appeal has been fully briefed. A hearing was held. We affirm the refusal to register.

number; the number(s) following "TTABVue" refer to the page number(s) of that particular docket entry, if applicable. All citations to prosecution history documents contained in the Trademark Status and Document Retrieval (TSDR) database are to the downloadable .pdf versions of the documents.

² Mar. 2, 2021 Nonfinal Office Action at 1.

³ July 29, 2021 Nonfinal Office Action at 1-2.

I. Applicable Law

An applicant seeking registration under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), must submit with its statement of use a specimen showing actual use of the proposed mark in connection with the applied-for goods or services. Trademark Rules 2.56(a) and 2.88, 37 C.F.R. §§ 2.56(a) and 2.88. Section 45 of the Trademark Act, 15 U.S.C. § 1127, states that a mark is deemed to be in “use in commerce”

(1) on goods when--

(A) it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto, or if the nature of the goods makes such placement impracticable, then on documents associated with the goods or their sale, and

(B) the goods are sold or transported in commerce.

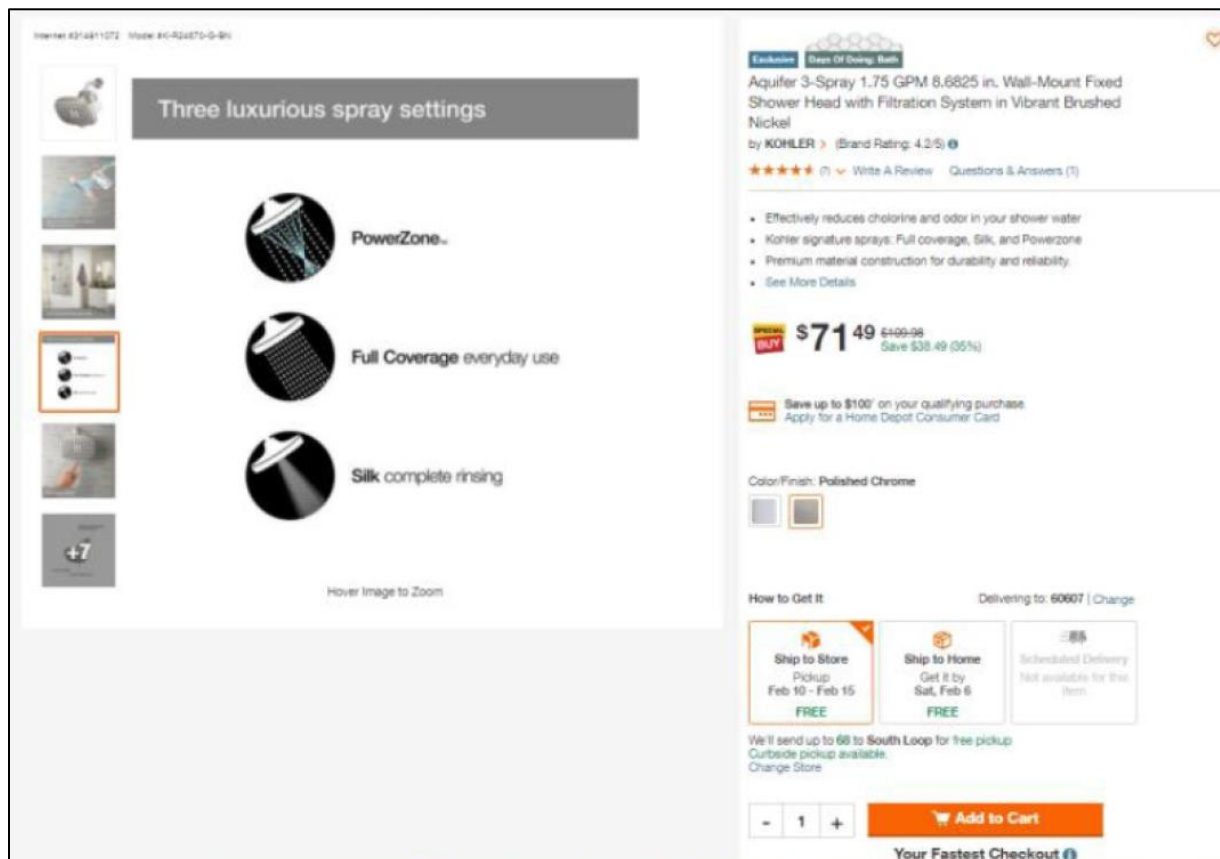
Trademark Rule 2.56(b)(1), 37 C.F.R. § 2.56(b)(1), provides, in pertinent part, that “[a] trademark specimen must show use of the mark on the goods, on containers or packaging for the goods, on labels or tags affixed to the goods, or on a display associated with the goods.”

“[T]he manner in which an applicant has employed the asserted mark, as evidenced by the specimens of record, must be **carefully considered** in determining whether the asserted mark has been used as a trademark **with respect to the goods named in the application.**” *In re Fallon*, 2020 USPQ2d 11249, at *4 (TTAB 2020) (quoting *In re Bose Corp.*, 546 F.2d 893, 192 USPQ 213, 216 (CCPA 1976)) (emphasis added). To function as a mark for the identified goods, there must be “a direct association between the mark sought to be registered and the goods

specified in the application, that is, that the mark be used in such a manner that it would be readily perceived as identifying the specified goods and distinguishing a single source or origin for the goods.” *In re Minerva Assocs., Inc.*, 125 USPQ2d 1634, 1638-39 (TTAB 2018); *see also In re Sones*, 590 F.3d 1282, 93 USPQ2d 1118, 1123 (Fed. Cir. 2009) (The test for an acceptable specimen “is simply that it must in some way evince that the mark is ‘associated’ with the goods and serves as an indicator of source.”); *BellSouth Corp. v. DataNational Corp.*, 60 F.3d 1565, 35 USPQ2d 1554, 1557 (Fed. Cir. 1995) (“The primary function of a trademark is to identify and distinguish the goods or services of one source from those sold by all others, although this may be accomplished anonymously.”(citing 1 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 12.01[1] (3d ed. 1992))); TRADEMARK MANUAL OF EXAMINING PROCEDURE § 904.07(a) (July 2022) (explaining that a specimen must show use of the mark for the goods identified in the application). We “must consider the evidence as a whole” to determine if the specimens sufficiently associate Applicant’s mark with its goods “so as to ‘identify and distinguish the goods.”” *In re Sones*, 93 USPQ2d at 1123 (citations omitted); *see also In re Fallon*, 2020 USPQ2d 11249, at *4 (Board considers specimens and “other evidence bearing on the question of what impact applicant’s use is likely to have on purchasers and potential purchasers”); *In re Settec, Inc.*, 80 USPQ2d 1185, 1189 (TTAB 2006) (“looking to all the evidence of record” in assessing “whether applicant is using the proposed mark in connection with [the identified] goods in a manner that potential consumers would perceive as a trademark for such goods”).

II. Applicant's Specimens

In support of its Statement of Use, Applicant first submitted a page from The Home Depot website, reproduced below. The proposed mark appears on the left side of the webpage under the heading "Three luxurious spray settings."



The relevant text on the right side of the webpage reads as follows (emphasis added):

Aquifer 3-Spray 1.75 GPM 8.6825 in. Wall-Mount Fixed Shower Head with Filtration System in Vibrant Brushed Nickel by Kohler (Brand Rating: 4.2/5)

- Effectively reduces chlorine and odor in your shower water

⁴ Feb. 4, 2021 Specimen (<https://www.homedepot.com/p/KOHLER-Aquifer-3-Spray-1-75-GPM-8-6825-in-Wall-Mount-Fixed-Shower-Head-with-Filtration-System-in-Vibrant-Brushed-Nickel-K-R24670-G-BN/314811072>) (cropped image).

- Kohler **signature sprays**: Full coverage, Silk, and **Powerzone**
- Premium material construction for durability and reliability

The webpage clearly identifies POWERZONE as a “signature” spray and one of “three luxurious spray settings.” Notably, the AQUIFER mark — not POWERZONE — is used on the specimen to identify Applicant’s shower head.

Applicant contested the Examining Attorney’s refusal to accept its original specimen and submitted a substitute specimen, reproduced below:



⁵ June 18, 2021 Specimen.

Again, this specimen, which appears to be product packaging or a point-of-sale display, clearly and unmistakably identifies POWERZONE and two other settings as “spray settings.”

III. Discussion

This case is on all fours with *In re Bose*. There, the predecessor court to the United States Court of Appeals for the Federal Circuit was presented with the same basic issue: sufficiency of the specimens of record. The appellant filed an application to register SYNCOM for “loudspeaker systems for high-fidelity music reproduction,” but the appellant’s specimens clearly showed SYNCOM being used for a “speaker testing computer,” and INTERAUDIO being used for “speakers,” “loudspeakers,” and “speaker cabinets.” 192 USPQ at 214. The examining attorney argued that the specimens “fail to demonstrate the use of SYNCOM to indicate the origin of the goods in the application ... instead, SYNCOM ... indicates origin, only with respect to a speaker-testing computer.” *Id.* at 215.

The court, agreeing with the Office, opined:

An important function of specimens in a trademark application is, manifestly, to enable the PTO to verify the statements made in the application regarding trademark use.

...

The point is, however, that an application for registration must be judged in light of the specimens of record. ... The specimens which are of record fail to support, indeed they contradict, the use of SYNCOM as a trademark with respect to loudspeaker systems for high-fidelity music reproduction, and the decision of the board is, accordingly, affirmed.

192 USPQ at 216 (citations omitted) (emphasis added).

After careful consideration, we find, as the court did in *In re Bose*, that Applicant's specimens fail to support the use of Applicant's mark for Applicant's goods. Both specimens expressly identify POWERZONE as a spray setting; thus, consumers are likely to perceive POWERZONE as a source identifier for "spray settings," not "Shower heads." We also find, based on Applicant's original specimen, that consumers will use the AQUIFER mark to ask for Applicant's "Shower heads" instead.

Applicant argues that the POWERZONE mark is used as a source identifier and is distinctive. Specifically, Applicant contends that POWERZONE "stands out – it is bold, next to a 'TM' symbol, and stands alone rather than being buried in text." (6 TTABVUE 9). So do the other two spray settings identified in the specimens, for which Applicant does not claim trademark rights. Although use of the "TM" designation with POWERZONE "lends a degree of visual prominence" to the proposed mark, such use of the designation is not dispositive: here, the specimens of record show POWERZONE, as well as the additional two settings of the three settings identified, being used only for "spray settings." *See, e.g., In re Sones*, 93 USPQ2d at 1124 (citing *In re Dell Inc.*, 71 USPQ2d 1725, 1729 (TTAB 2004)).

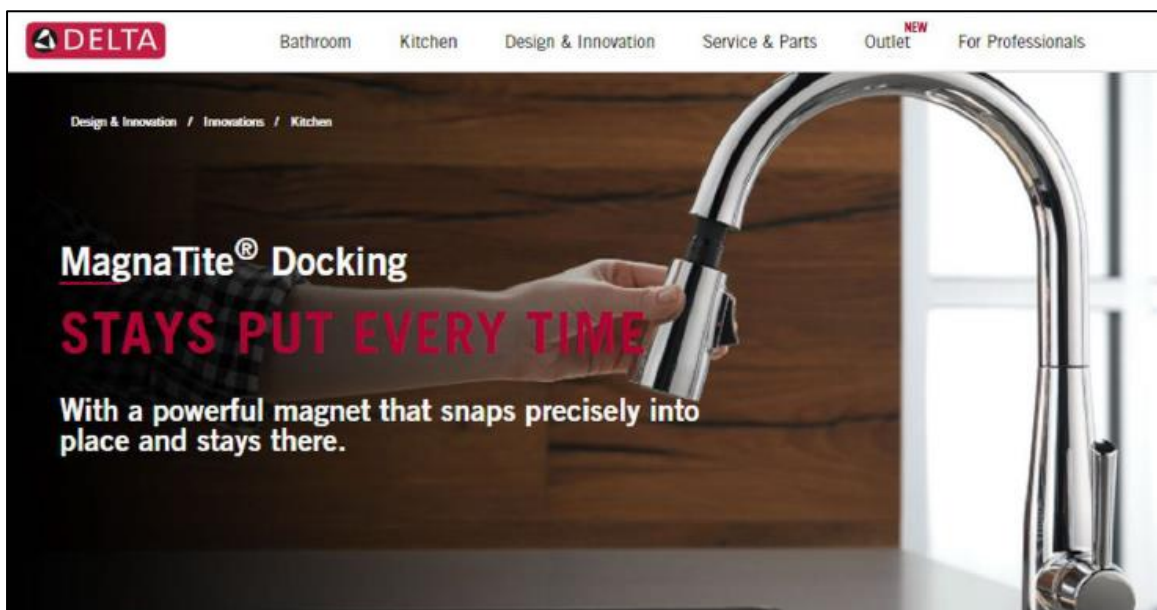
Further, Applicant contends that "consumers of showerheads are ... conditioned to look for and see, as source identifiers, distinctive terms used for features of the showerheads... ." (6 TTABVUE 9). In support of its position, Applicant points to registrations and specimens for a variety of plumbing products, including faucets, shower heads, valves, and drains.⁶ For example:

⁶ *See* Aug. 9, 2022 Request for Reconsideration ("RFR") at 9-12, 14-100.

MAGNATITE, Reg. No. 3,729,228, for “Plumbing products, namely, spouts for faucets,” in Class 11:



7



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⁷ RFR at 16 (cropped image).

⁸ *Id.* at 17 (cropped image).

SPOT DEFENSE & Design, Reg. No. 6,011,399, for “Plumbing fittings and fixtures, namely, shower heads, faucets, valves, spouts, shower arms, pop-up drains, aerators for faucets, fittings for sinks in the nature of sink strainers, lavatories, showers and bath tubs, faucet filters, faucet handles, faucet levers being faucet handles, shower sprayers, sink sprayers, faucet sprayers,” in Class 11:



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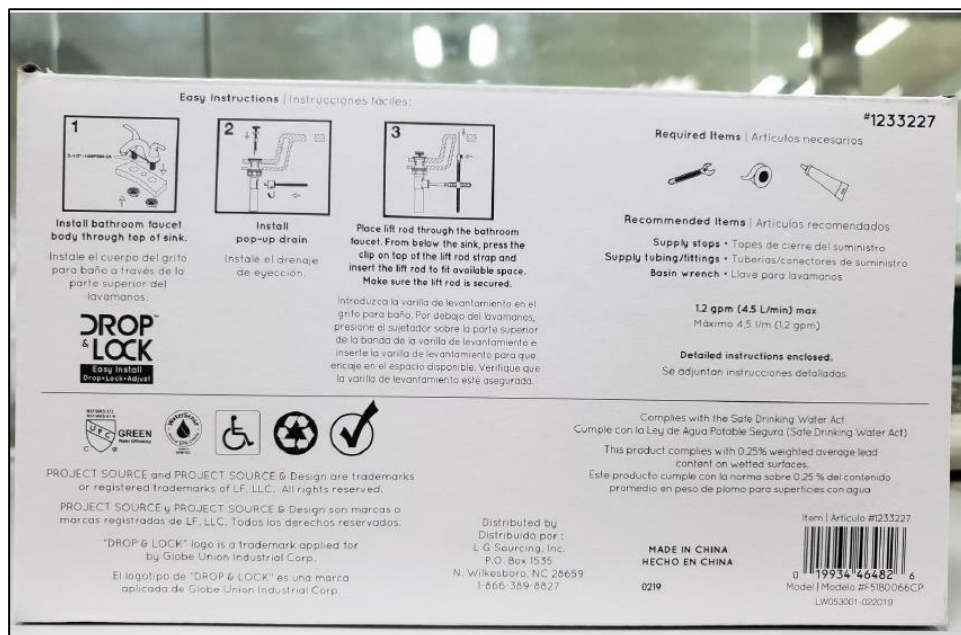
⁹ *Id.* at 28 (cropped image).

¹⁰ *Id.* at 30 (cropped image).

DROP & LOCK (Stylized), Reg. No. 5,939,803, for “Faucets, drains, bath drains, pop-up drains,” in Class 11:



11

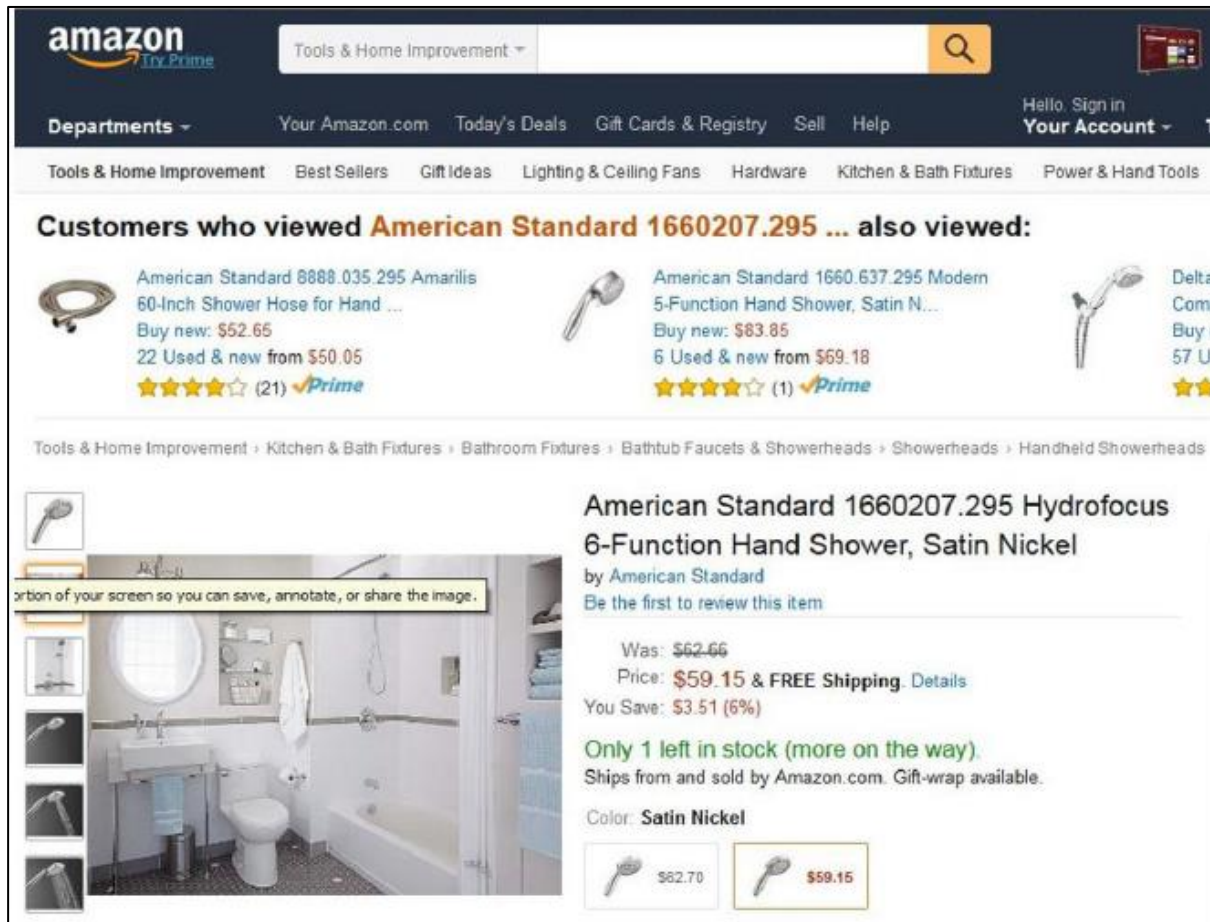


12

11 *Id.* at 49 (cropped image).

12 RFR at 50 (cropped image).

HYDROFOCUS, Reg. No. 5,065,078, for “Shower heads” in Class 11:



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¹³ *Id.* at 57 (cropped image).

What's in the box

- showerhead

From the manufacturer



HydroFocus 6-Function Hand Shower

The HydroFocus 6-function Hand Shower from American Standard adjusts for a revitalizing experience that is personalized for your individual needs. Select from a wide variety of options from a full drench, to a focused pulsing massage for the best shower of your life. Featuring 6 power zones equipped with 8 nozzles, the HydroFocus hand shower is equipped for an invigorating shower, using a maximum of 2.0 gallons per minute to help save water. A pressure compensating flow control device provides a consistent flow from start to finish.

- WaterSense Certified
- Variety of 5 Spray Patterns
- Shower adjusts from massage to full/massage combination to full spray to HydroFocus concentrating spray to HydroFocus/full combination spray
- 2.0 gallons per minute (2.0 gpm) helps to save water

6-Function Hand Shower



Pause




Massage





Massage + Drench







¹⁴ *Id.* at 60 (cropped image).


Drench


Hydro Focus


Hydro Focus + Drench

Compare with similar items

			
<p>This item American Standard 1660207.002 Hydrofocus 6-Function Hand Shower in Polished Chrome</p> <p style="text-align: center;">Add to Cart</p>	<p>American Standard 8888.035.002 Amarilis 60-Inch Shower Hose for Hand Shower, Polished Chrome</p> <p style="text-align: center;">Add to Cart</p>	<p>American Standard 9035154.002 Spectra Plus Handheld 4-Function Hand Shower, 2.5 GPM, Polished Chrome</p> <p style="text-align: center;">Add to Cart</p>	<p>All Metal Handheld Shower Head with Hose and Brass Holder - Polished Chrome - High Pressure 2.5 GPM Detachable Hand Held Showerhead - 6ft Long Flexible Extension - Adjustable Spray Wand Bracket</p> <p style="text-align: center;">Add to Cart</p>
Customer Rating	★★★★☆ (20)	★★★★☆ (112)	★★★★☆ (32)
Price	\$48 ⁹⁹	\$30 ⁷²	\$60 ⁴⁵
Shipping	FREE Shipping. Details	FREE Shipping. Details	FREE Shipping. Details
Sold By	Amazon.com	Amazon.com	Amazon.com
Color	Polished Chrome	Polished Chrome	Polished Chrome
Item Dimensions	4.5 x 4.5 x 10.13 inches	7.28 x 5.16 x 2.95 inches	9.94 x 4.94 x 1.75 inches

Product Description

→ The hydrofocus 6-function hand shower from American Standard adjusts for a revitalizing experience that is personalized for your individual needs. Select from a wide variety of options from a full drench, to a focused pulsing massage for the best shower of your life. Featuring 6 power zones equipped with 8 nozzles, the hydrofocus hand shower is equipped for an invigorating shower, using a maximum of 2.0 gallons per minute to help save water. A pressure compensating flow control device provides a consistent flow from start to finish.

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MEASUREFILL, Reg. No. 5,587,897, for “Plumbing fixtures, namely, lavatories, toilet bowls, toilet tanks, bathtubs, shower stalls, urinals being sanitary fixtures, bidets, hand wash basins in the nature of sinks, vanity basins in the nature of sinks, and kitchen sinks; plumbing fittings, namely, faucets, bathtub spouts and shower heads,” in Class 11:

¹⁵ *Id.* at 61 (cropped image). Continuation of evidence from previous page.

American Standard


INSTALLATION INSTRUCTIONS

4931360

BEALE® MeasureFill™ KITCHEN FAUCET

Thank you for selecting American Standard...
the benchmark of fine quality for over 100 years.

To ensure that your installation proceeds smoothly-please read these instructions carefully before you begin.




Certified to comply with ANSI A112.18.1M

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American Standard Bathroom Kitchen Commercial Learn Support Search Where to Buy

Don't Delay buy today: 35% off on select products. Discount applied.

Home | Kitchen Faucets | Single Hole Pull Down Faucets | BEALE



BEALE

Beale MeasureFill™ 2-Handle Pull-Down Dual Spray Kitchen Faucet
1.5 gpm/5.7 L/min With MeasureFill™ Dial ★★★★★ 4.7 (49)

List Price: \$ 702.00 Model: 4931360.002

- Sleek, contemporary tube style design features a comfortable rounded handle shape and coin edge knurling on the faucet dial for extra grip - Blue LED Light illuminates when the faucet is in use
- MeasureFill Technology: Delivers a precise set volume of water—on demand up to 5 cups/40 ounces. Turn the dial to your desired volume of water, then touch to turn on the water flow.

Buy Now Price: \$ 596.70 Finish: Polished Chrome

Quantity: Add To Cart

Compare

Product Description

With stand-out style and impressive ingenuity, the Beale MeasureFill™ Touch Kitchen Faucet by American Standard showcases the latest in kitchen technology. With the unique MeasureFill feature that delivers a precise set volume of water on demand, you can take the guess work out of baking and cooking, – filling a desired amount of water with ease. Simply use the dial to select an amount of water – up to 5 cups or 40 oz – and then touch the dial window to turn on the water flow. A blue LED light illuminates on the dial window and measuring mark when the measure function is in use. In addition to this stunning technology, the Beale MeasureFill Pull-Down Kitchen Faucet provides touch on and off functionality using the dial, but also has the ability to be used as a manual faucet with a beautifully designed comfortable handle. The sleek and contemporary style of Beale MeasureFill is accentuated with coin-edge knurling on the dial, providing extra grip and reliability.

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¹⁶ *Id.* at 69 (cropped image).

¹⁷ RFR at 70 (cropped image).

COMFORT GLIDE, Reg. No. 5,703,905, for “Faucets; showers; sanitary valves for controlling flow and spout for bathtubs and showers; manually and automatic controlled valves, namely, valves for manually and automatically controlling flow and spout for bathtubs and showers; mixing valves for bathtubs and showers,” in Class 11:

<p>TOTO 18.11.16 TLP02301U #CP COMFORT GLIDE ZL SINGLE HANDLE LAVATORY FAUCET, CHROME PLATED ZL GRIFO DE LAVABO INDIVIDUAL, CROMO PULIDO ZL ROBINET DE LAVABO À POIGNEE UNIQUE, CHROME POLI ZL TORNEIRA DE LAVATÓRIO DE ALÇA ÚNICA, CROMADO POLIDO</p>   <p>7 39268 34146 3 1 pc.</p>	   <p>MAX 1.2GPM(4.5L/min) ASME A112.18.1/CSA B125.1</p> <p>MADE IN JAPAN HECHO EN JAPÓN FABRIQUÉ EN JAPON FEITO NA JAPÃO</p> 
<p>TOTO 18.11.27 TLP02304U #CP COMFORT GLIDE ZL SINGLE HANDLE LAVATORY FAUCET (M), CHROME PLATED ZL GRIFO DE LAVABO INDIVIDUAL (M), CROMO PULIDO ZL ROBINET DE LAVABO À POIGNEE UNIQUE (M), CHROME POLI ZL TORNEIRA DE LAVATÓRIO DE ALÇA ÚNICA (M), CROMADO POLIDO</p>   <p>7 39268 34148 7 1 pc.</p>	   <p>MAX 1.2GPM(4.5L/min) ASME A112.18.1/CSA B125.1</p> <p>MADE IN JAPAN HECHO EN JAPÓN FABRIQUÉ EN JAPON FEITO NA JAPÃO</p> 
<p>TOTO 18.11.27 TLP02307U #CP COMFORT GLIDE ZL SINGLE HANDLE LAVATORY FAUCET (L), CHROME PLATED ZL GRIFO DE LAVABO INDIVIDUAL (L), CROMO PULIDO ZL ROBINET DE LAVABO À POIGNEE UNIQUE (L), CHROME POLI ZL TORNEIRA DE LAVATÓRIO DE ALÇA ÚNICA (L), CROMADO POLIDO</p>   <p>7 39268 34149 4 1 pc.</p>	   <p>MAX 1.2GPM(4.5L/min) ASME A112.18.1/CSA B125.1</p> <p>MADE IN JAPAN HECHO EN JAPÓN FABRIQUÉ EN JAPON FEITO NA JAPÃO</p> 

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¹⁸ *Id.* at 80.

TOTO EN

TECHNOLOGY HIGHLIGHTS

SPECIAL COATING FOR PROLONGED COMFORT.

The ceramic disc, a core valve component, is covered with a special DLC (Diamond Like Carbon) coating. This ensures long-lasting quality over conventional faucets that use a greased valve.

✉️ 🐦 f 📌 in

COMFORT GLIDE®

EASE OF USE, BASED IN SENSATION

For TOTO, comfort does not simply mean comfort of movement. Ease of use, when it lasts a long time, becomes comfort in itself. For this purpose, TOTO has developed the internal valve based on the user's touch. Designed from the ground up to provide fundamental comfort in operation.

EASY TO USE FOR A LIFETIME OF COMFORT.

The graph shows the number of years in use and its operating force. It is evident that comfort lasts for a long time with models featuring

COMFORT GLIDE

¹⁹ *Id.* at 81.

COMFORT WAVE, Reg. No. 5,703,906, and **ACTIVE WAVE**, Reg. No. 5,703,907, both marks for “Faucets; showers; sanitary valves for controlling flow and spout for bathtubs and showers; manually and automatic controlled valves, namely, valves for manually and automatically controlling flow and spout for bathtubs and showers; mixing valves for bathtubs and showers,” in Class 11:



²⁰ *Id.* at 92.


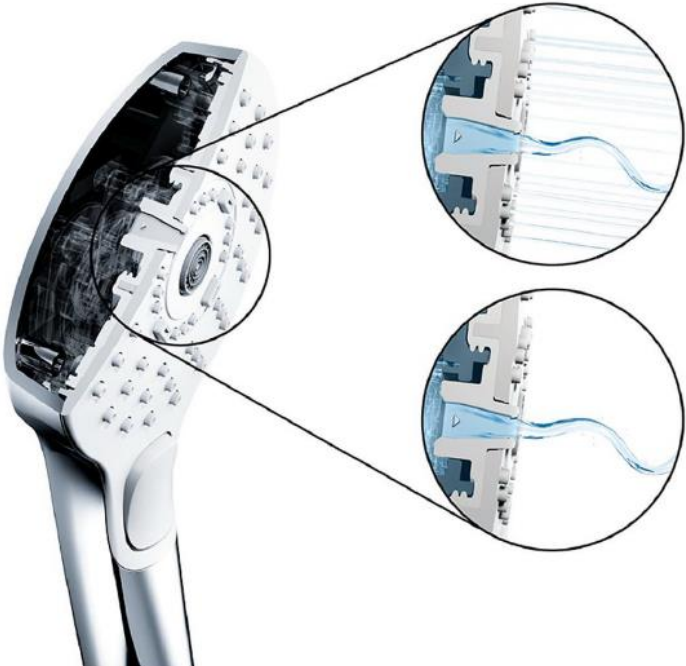
TOTO **EN** ☰

TECHNOLOGY HIGHLIGHTS

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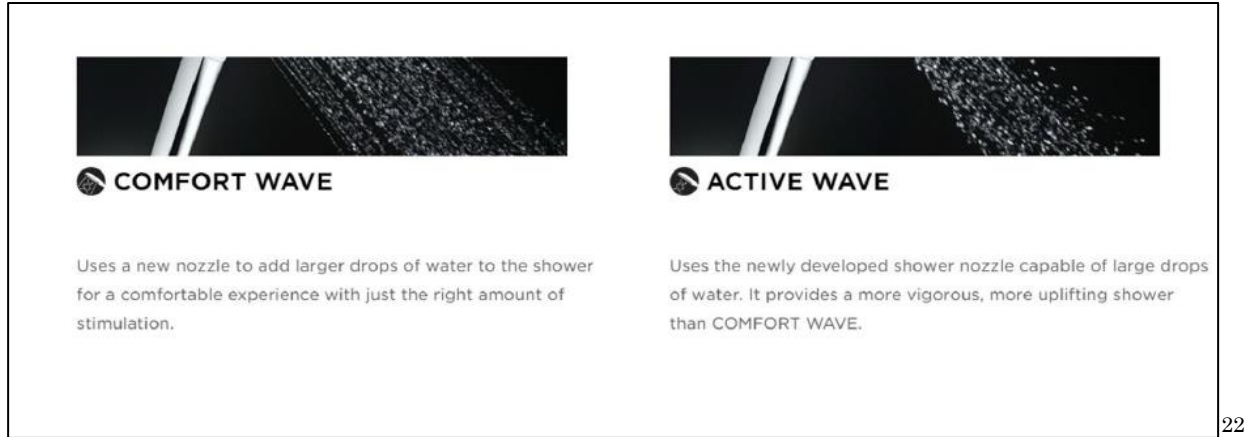
COMFORT WAVE® & ACTIVE WAVE® A NEWLY DEVELOPED NOZZLE FOR GREATER COMFORT.

We newly developed our original shower nozzles with bigger droplets than conventional showers. Large drops of water swing and flow with power, delivering a comfortably stimulating shower while saving water. Feel refreshed with the moderate-intensity of COMFORT WAVE, and invigorated with the high-intensity flow of ACTIVE WAVE.



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²¹ *Id.* at 93.



We are unconvinced by Applicant’s comparison of the “Shower heads,” supposedly offered under its POWERZONE mark (and the specimens relating thereto), with the third-party registrations and specimens. Unlike Applicant’s specimens, nearly all of the third-party specimen evidence shows use of a registered mark for goods that are encompassed by the identification of goods on the corresponding registration certificate.²³ Moreover, each case is decided on its own facts, and each mark stands on its own merits. *In re USA Warriors Ice Hockey Program, Inc.*, 122 USPQ2d 1790, 1793 n.10 (TTAB 2017) (quoting *In re Boulevard Entm’t*, 334 F.3d 1343, 67 USPQ2d 1475, 1480 (Fed. Cir. 2003)).

²² RFR at 94.

²³ The specimens for only one of the registered marks, DOCK-TITE, Reg. No. 5,286,195, for “Faucets” in Class 11, do not appear to show use of that mark for faucets. One of the specimens shows the mark used for a “magnetic docking system.” See RFR at 24. On the other specimen, DOCK-TITE is displayed over an image of a pull-down faucet, but the faucet appears to be offered under the KERRIS mark. See *id.* at 26. We do not find the DOCK-TITE registration and specimens to be probative here, considering all of the evidence of record.

The record also includes documents which appear to show faucets offered for sale under various unregistered marks and names, as well as unregistered marks and names used to describe spray settings. See RFR at 5, 51-55, 33-36, 99. We are unpersuaded that this evidence, which is hardly probative, demonstrates “consumers are exposed to a variety of plumbing fixtures like shower heads that are sold in packaging or with labels that feature descriptive terms as well as trademarks for features of the products” (6 TTABVUE 11).

IV. Conclusion

Again, an application for registration must be judged in light of the specimens of record. *In re Bose*, 192 USPQ at 216; *In re Fallon*, 2020 USPQ2d 11249, at *4. Considering the specimens of record, as well as all of the other evidence of record, we find that consumers and prospective consumers will perceive POWERZONE as identifying a “shower setting,” not “Shower heads.” See *In re Sones*, 93 USPQ2d at 1123; *In re Fallon*, 2020 USPQ2d 11249, at *4; *In re Settec*, 80 USPQ2d at 1189.

Our finding is not that POWERZONE is not prominently displayed on Applicant’s specimens, or that POWERZONE is incapable of being a mark. We find, simply, that Applicant’s specimens do not show POWERZONE being used in association with the goods identified in the application, namely, “Shower heads.”

Decision: We affirm the refusal to register Applicant’s mark, POWERZONE, Application Serial No. 88796957, on the ground that the specimens of record fail to show that POWERZONE serves as an indicator of source for “Shower heads.”