This Opinion is Not a
Precedent of the TTAB

Mailed: November 7, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Sheet Pile, LLC

Serial No. 90900931

Tim D. Chheda of Selman Munson & Lerner for Sheet Pile, LLC.

George Murray, Trademark Examining Attorney,[1] Law Office 121,
Richard White, Managing Attorney.

Before Shaw, Acting Deputy Chief Administrative Trademark Judge, and Larkin and Cohen, Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

Sheet Pile, LLC ("Applicant") seeks registration on the Principal Register of the proposed standard-character mark OZ for goods ultimately identified as "Piling sheets, of metal; sheet piles, of metal; profiled piling sections, of metal; connecting elements for sheet piles of metal, namely, metal sheet pile connectors in the nature

[1] Trademark Examining Attorney Tricia L. Brown examined the involved application and issued the final refusal to register from which this appeal was taken. After Applicant appealed, the application was reassigned to Mr. Murray, who filed the brief of the United States Patent and Trademark Office ('USPTO"). We will refer to both Ms. Brown and Mr. Murray as the "Examining Attorney."

of structural joint connectors; and metal connecting profiles and welding corners in the nature of structural joint connectors of metal for sheet piles of metal or plastic" in International Class 6.[2]

The Examining Attorney refused registration of Applicant's proposed mark on the ground that it is "merely descriptive" of the goods identified in the application within the meaning of Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1).

Applicant appealed when the Examining Attorney made the refusal final. The appeal is fully briefed.[3] We affirm the refusal to register.

I. Prosecution History and Record on Appeal[4]

We briefly summarize the prosecution history of the involved application because it provides useful background for our discussion of the refusal to register.

Applicant originally applied to register its proposed mark for goods identified as "Piling sheets, of metal; sheet piles, of metal; profiled piling sections, of metal; connecting elements for sheet piles of metal, namely, metal sheet pile connectors; and metal connecting profiles and welding corners for sheet piles of metal or plastic."[5] The

[2] Application Serial No. 90900931 was filed on August 25, 2021 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant's allegation of a bona fide intention to use the proposed mark in commerce.

[3] Citations in this opinion to the briefs refer to TTABVUE, the Board's online docketing system. *See New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *2 n.1 (TTAB 2020). The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear. Applicant's appeal brief appears at 4 TTABVUE and its reply brief appears at 7 TTABVUE. The Examining Attorney's brief appears at 6 TTABVUE.

[4] Citations in this opinion to the application record are to pages in the USPTO's Trademark Status & Document Retrieval ("TSDR") database.

[5] August 25, 2021 Application at TSDR 1. The Examining Attorney found that the original identification of goods was indefinite, June 8, 2022 Office Action at TSDR 1, and Applicant

Examining Attorney refused registration under Section 2(e)(1) of the Trademark Act, finding, among other things, that "the wording 'OZ' is descriptive of applicant's piling sheets of metal, sheet piles of metal, and profiled piling sections of metal because the wording describes the type, feature, or characteristic of the goods."[6] The Examining Attorney also noted that "[i]n addition to being merely descriptive, the applied-for mark appears to be generic in connection with the identified goods and/or services," and that she could not recommend that Applicant amend its application to proceed based on a showing of acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f) or to seek registration on the Supplemental Register.[7] The Examining Attorney made of record Internet webpages that she claimed demonstrated that "OZ" is "a type of sheet pile, namely, a combination of a steel tube and a Z-type sheet pile."[8]

Applicant responded by arguing that the Examining Attorney's evidence showed that OZ is not generic for the identified goods.[9] Applicant requested withdrawal of the genericness advisory "such that Applicant may amend to the supplemental register upon submitting the allegation of use."[10] Applicant made no evidence of record and never amended its application to allege use.

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subsequently amended the application to include the current identification. November 17, 2022 Response to Office Action at TSDR 1.

[6] June 8, 2022 Office Action at TSDR 1.

[7] *Id.* at TSDR 1.

[8] *Id.* at TSDR 1, 2-17.

[9] November 17, 2022 Response to Office Action at TSDR 2.

[10] *Id.*

The Examining Attorney then issued an Office Action making final the mere descriptiveness refusal and repeating the genericness advisory.[11] The Examining Attorney made of record additional webpages regarding the use of "OZ" in connection with sheet piling and other goods identified in the application. This appeal followed.

II. Analysis of Mere Descriptiveness Refusal[12]

Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), prohibits registration on the Principal Register of "a mark which, (1) when used on or in connection with the goods of the applicant is merely descriptive . . . of them," unless the mark has acquired distinctiveness under Section 2(f) of the Act, 15 U.S.C. § 1052(f).[13]

"A term is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services." *In re Zuma Array Ltd.*, 2022 USPQ2d 736, at *5 (TTAB 2022) (internal quotations and citations omitted). "A mark need not immediately convey an idea of each and every specific feature of the goods in order to be considered merely descriptive; it is enough

[11] December 9, 2022 Final Office Action at TSDR 1.

[12] Applicant's appeal brief is devoted entirely to genericness, 4 TTABVUE 2-6, "perhaps because the Examining Attorney gave a genericness advisory," but "the Examining Attorney only refused the mark as merely descriptive, and never added a genericness refusal . . . ." *In re Nat'l Ass'n of Veterinary Technicians in Am., Inc.*, 2019 USPQ2d 269108, at *2 (TTAB 2019). "Advisory statements are not refusals subject to appeal," *id.*, n.11 (citations omitted), and, as a result, "genericness is not at issue in this appeal." *Id.*, at *2. *See also* TRADEMARK MANUAL OF EXAMINING PROCEDURE ("TMEP") Section 1209.02(a) (Nov. 2023) (discussing advisory statements that a mark appears to be generic). In his brief, the Examining Attorney "addresses any of applicant's arguments that could perceivable [sic] also be used to argue against a Trademark Act Section 2(e)(1) descriptive refusal," 6 TTABVUE 6, and Applicant addresses the mere descriptiveness refusal in its reply brief.

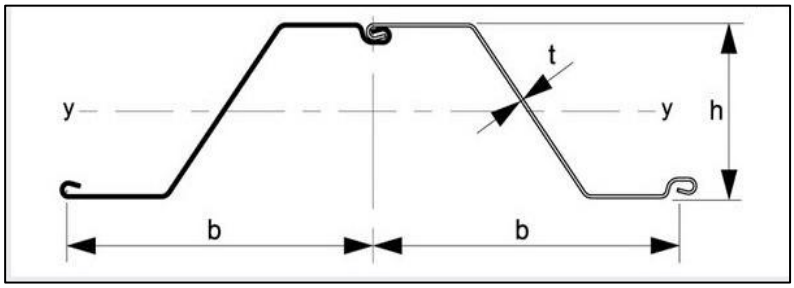
[13] Applicant does not claim that its proposed mark has acquired distinctiveness.

if it describes one significant attribute, function or property of the goods." *Id.* (quoting *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1513 (TTAB 2016) (citing *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1010 (Fed. Cir. 1987)). In addition, "'a mark need not be merely descriptive of all recited goods or services in an application. A descriptiveness refusal is proper 'if the mark is descriptive of any of the [goods] for which registration is sought.'" *Id.*, at *5-6 (quoting *In re Chamber of Commerce of the United States*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *In re Stereotaxis Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005)).

"Whether a mark is merely descriptive is evaluated in relation to the particular goods for which registration is sought, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use," *In re Fallon*, 2020 USPQ2d 11249, at *7 (TTAB 2020) (quoting *Chamber of Commerce*, 102 USPQ2d at 1219), and "'not in the abstract or on the basis of guesswork.'" *Id.* (quoting *Fat Boys*, 118 USPQ2d at 1513) (citing *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978)). "We ask whether someone who knows what the goods and services are will understand the mark to convey information about them." *Id.* (quoting *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1374 (Fed. Cir. 2018) (quoting *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012)).

"Whether a mark is merely descriptive or not is determined from the viewpoint of the relevant purchasing public." *Zuma Array*, 2022 USPQ2d 736, at *8 (quoting *In re Omniome, Inc.*, 2020 USPQ2d 3222, at *5 (TTAB 2020) (quoting *Stereotaxis*, 77 USPQ2d at 1090)). The goods identified in Applicant's application are "Piling sheets, of metal; sheet piles, of metal; profiled piling sections, of metal; connecting elements for sheet piles of metal, namely, metal sheet pile connectors in the nature of structural joint connectors; and metal connecting profiles and welding corners in the nature of structural joint connectors of metal for sheet piles of metal or plastic." The Examining Attorney focuses the final refusal to register on the goods identified as "piling sheets, of metal" and "sheet piles, of metal." Representative pictures and schematic drawings of these goods that appear in the record are reproduced below:

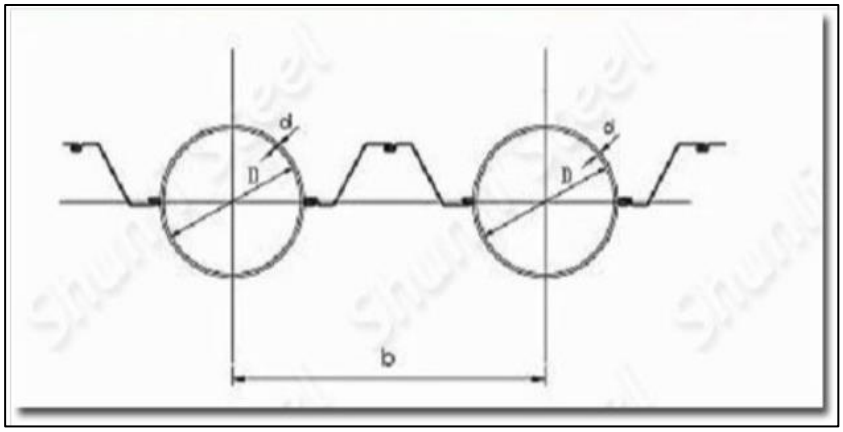
[14]



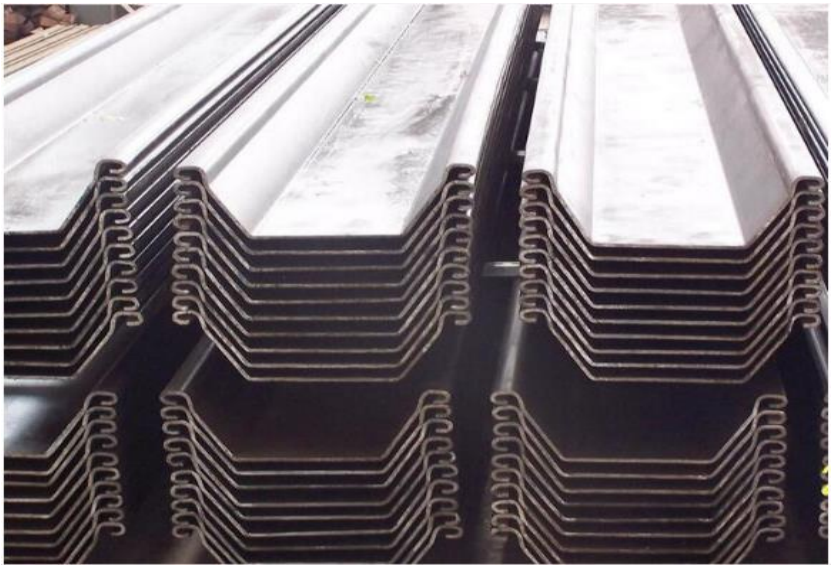
[15]

[14] June 8, 2022 Office Action at TSDR 15.

[15] *Id.* at TSDR 5.



[16]


[17]

According to Applicant, the relevant purchasers for these goods are "typically businesses rather than individuals," 4 TTABVUE 4, and the record shows that "piling sheets, of metal" and "sheet piles, of metal" are marketed to and used by construction project designers and construction companies.[18] We will assess the possible mere

[16] December 9, 2022 Final Office Action at TSDR 5.

[17] *Id.* at TSDR 7.

[18] For example, one webpage in the record states that "[s]heet piles are steel sections that have interlocking edges. They are driven into the ground to provide excavation support. These sheet piles are used to support walls, enable land reclamation, create underground structures, and riverbank or coast protection." June 18, 2022 Office Action at TSDR 14.

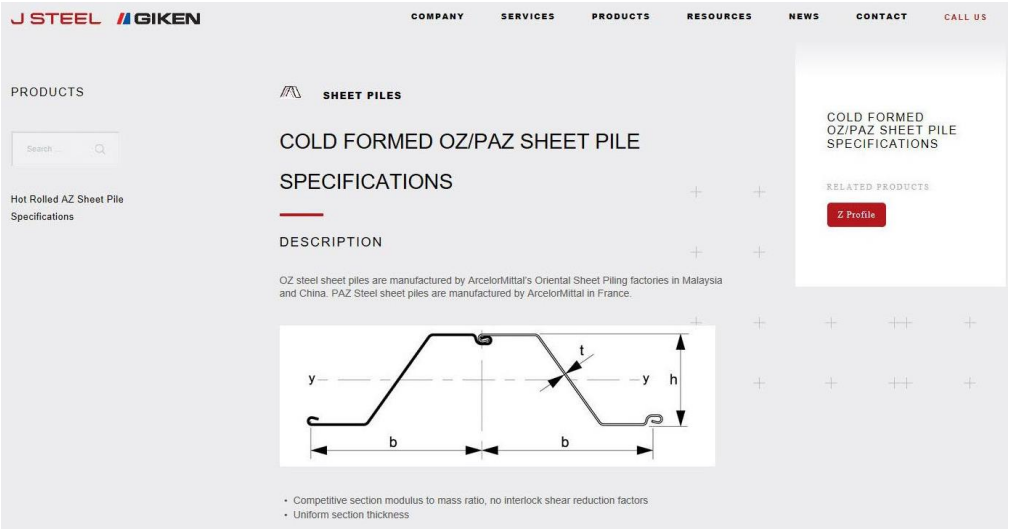
descriptiveness of OZ for "piling sheets, of metal" and "sheet piles, of metal" from the standpoint of these purchasers.

"Evidence of the public's understanding of [a] term . . . may be obtained from any competent source, such as purchaser testimony, consumer surveys, listings in dictionaries, trade journals, newspapers[,] and other publications." *Zuma Array*, 2022 USPQ2d 736, at *8 (quoting *Fallon*, 2020 USPQ2d 11249, at *7 (quoting *Real Foods*, 128 USPQ2d at 1374)). "These sources may include [w]ebsites, publications and use in labels, packages, or in advertising materials directed to the goods." *Id.* (quoting *Fallon*, 2020 USPQ2d 11249, at *7-8 (quoting *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1710 (Fed. Cir. 2017) (internal quotation omitted)).

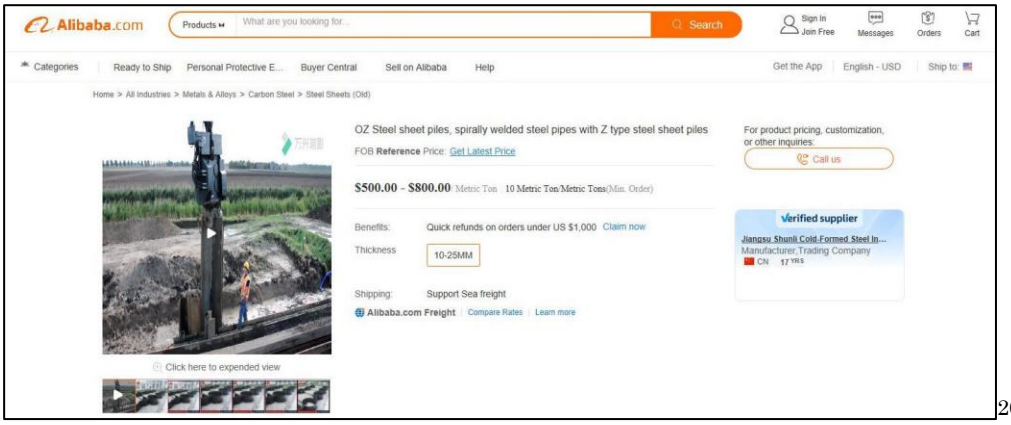
"It is the Examining Attorney's burden to show, prima facie, that a mark is merely descriptive of an applicant's goods or services." *Id.* (internal quotation and quotation marks omitted). "If such a showing is made, the burden of rebuttal shifts to the applicant." *Id.* (internal quotation and quotation marks omitted). "The Board resolves doubts as to the mere descriptiveness of a mark in favor of the applicant." *Id.* (internal quotation and quotation marks omitted).

According to the Examining Attorney, "[t]he wording 'OZ' in the applied for mark describes the shape and form of sheet pile being a specific type of Z sheet pile," and "[a] Z-type sheet pile is called this because 'the single piles are shaped roughly like a horizontally stretched 'Z'.'" 6 TTABVUE 3. He argues that "the 'O' moniker is to indicate the piles are made of steel, a subcategory of the Z-type sheet pile," *id.*, pointing to Internet evidence in the record that he claims "demonstrates that 'OZ' is

a widely known and frequently used term in applicants [sic] industry describing the shape and form of applicant's applied for sheet pile goods." *Id.* We reproduce below examples from the record of the use of OZ in this manner:



[19]



[20]

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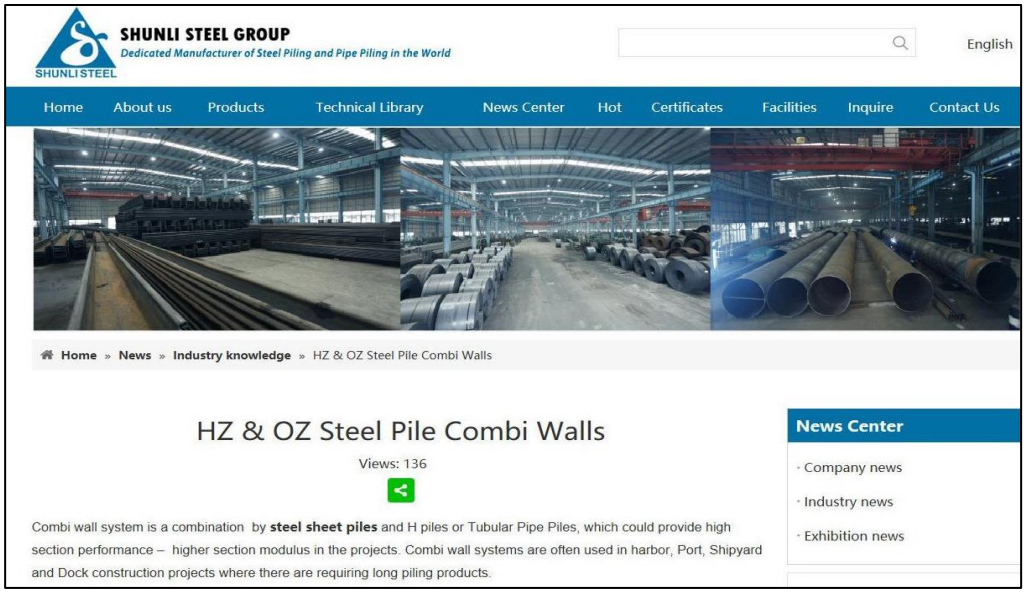
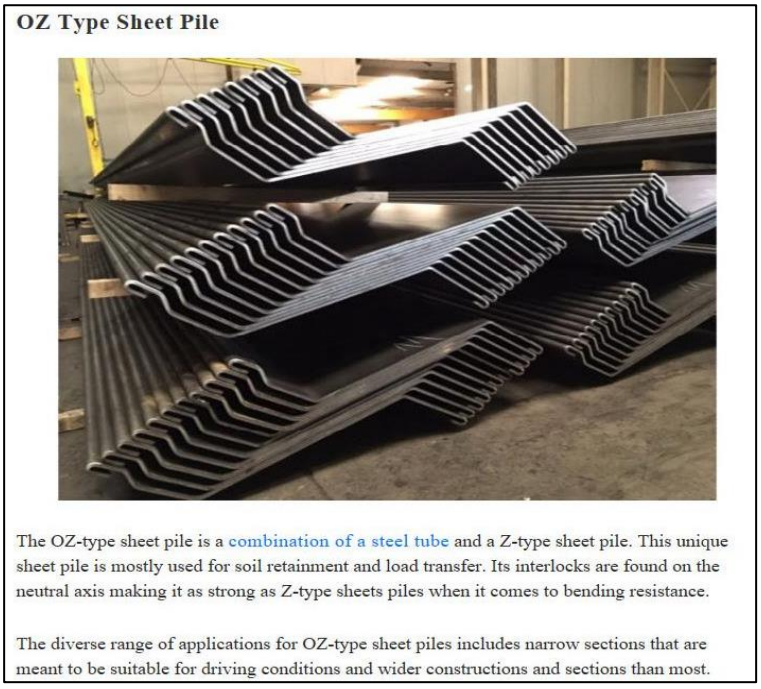
[19] June 8, 2022 Office Action at TSDR 5 (jsteel.com.au). The record, which consists largely of websites of foreign companies that are entirely in English, shows that sheet pile is commonly fabricated outside the United States and is marketed and sold to purchasers in the United States. "[I]t is settled that '[i]nformation originating on foreign websites . . . that are accessible to the United States public may be relevant to discern United States consumer impression of a proposed mark.'" *In re Well Living Lab Inc.*, 122 USPQ2d 1777, 1781 n.10 (TTAB 2017) (quoting *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1835 (Fed. Cir. 2007)). The foreign websites here are clearly directed, in whole or in part, to United States purchasers of sheet pile, and the manner of use of OZ on these websites is probative of the understanding of the proposed mark by those consumers.

[20] *Id.* at TSDR 8 (alibaba.com).



[21]

The website shown above also describes the referenced "OZ combi wall" as "a combination of Tubular Pipe Piles (SSAW/SAWH Pipe Piles) and Z sheet piles."[22]



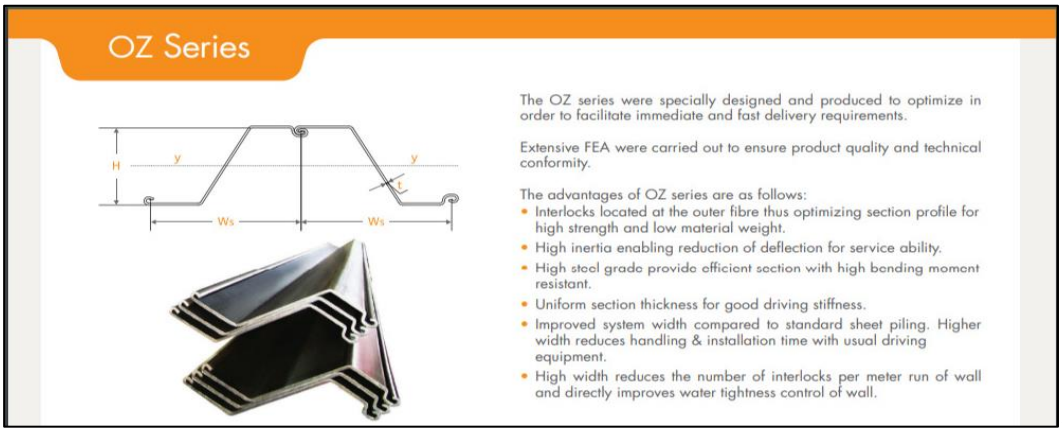
[23]

[21] *Id.* at TSDR 10 (sheet-piles.com).

[22] *Id.* at TSDR 11.

[23] *Id.* at TSDR 15 (reganindustrial.com).

The website shown above also states that "OZ-type Sheet piles are mostly used because of how they enable extremely long and strong foundations, barriers, and walls. Aside from that, OZ-type sheet piles are also known for their cost-effectiveness."[24]



[25]

[26]

[24] *Id.* at TSDR 16.

[25] December 9, 2022 Final Office Action at TSDR 3 (orientalsheetpiling.com).

[26] *Id.* at TSDR 4 (hiseamarine.com).

[27]

The Examining Attorney concludes that "the evidence of record demonstrates convincingly that the wording 'OZ' in the applied-for mark primarily describes a feature or characteristic of applicant's sheet pile goods, namely, the shape or form of these products." 6 TTABVUE 5-6.

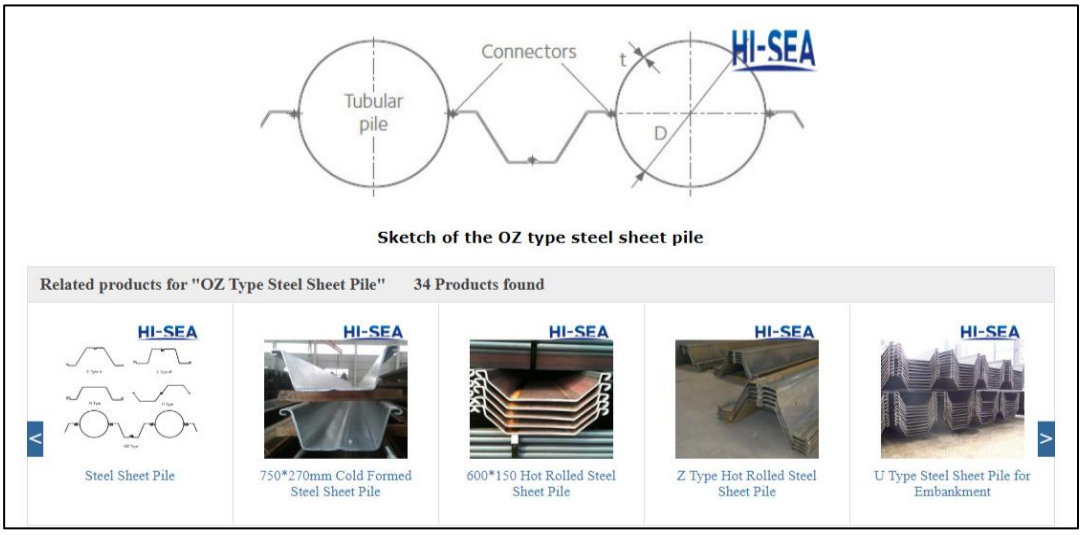
As discussed above, Applicant's appeal brief focuses on genericness. The Examining Attorney correctly notes that Applicant's arguments regarding the common descriptive name of its goods are unavailing where the evidence shows that OZ "describes a type of sheet pile." *Id.* at 7. Applicant's reply brief does address the mere descriptiveness refusal, but argues only that certain steel sheet piles are referred to by designations other than OZ on one of the websites made of record in

[27] *Id.* at TSDR 5 (hiseamarine.com).

the first Office Action,[28] and two of the websites made of record in the final Office Action. 7 TTABVUE 2-3.[29]

The website made of record in the first Office Action, shown above on page 9, states that "PAZ Steel sheet piles are manufactured by ArcelorMittal in France,"[30] but the preceding sentence states that "OZ steel sheet piles are manufactured by ArcelorMittal's Oriental Sheet Piling factories in Malaysia and China."[31] Applicant does not address the significance of that descriptive use of OZ.

The first of the two referenced websites made of record in the final Office Action displays the following schematic drawing and photographs of steel sheet pile:



[32]

Applicant cites the phrase "U Type Steel Sheet Pile for Embankment" below the photograph in the lower right-hand corner of the page, 7 TTABVUE 2, but does not

[28] June 8, 2022 Office Action at TSDR 5.

[29] December 9, 2022 Final Office Action at TSDR 4,7.

[30] June 8, 2022 Office Action at TSDR 5.

[31] *Id.*

[32] December 9, 2022 Final Office Action at TSDR 4.

address the descriptive use of OZ in connection with the schematic drawing above it. The website of Huaye Steel at wxhy.com made of record in the final Office Action shows a "Cold Rolled U Type Steel Sheet Pile," but describes its shape as U/C/Z/T/HZ/OZ Sheet Pile."[33] Applicant does not address this descriptive use of OZ.

The fact that there may be terms in addition to OZ that describe steel sheet pile does not mean that OZ is not merely descriptive of those goods if it immediately describes, for purchasers of the goods, a quality, characteristic, or feature of the goods. There may be more than one term that merely describes certain goods, and the Trademark Act prohibits registration on the Principal Register of each and all of them. *See Philip Morris Inc. v. Liggett & Myers Tobacco Co.*, 139 USPQ2d 240, 244 (TTAB 1963) ("[W]hile there may be other names which may be used in lieu of 'COUPON' by opposer with the same effect in connection with its premium promotions, this does not alter the descriptive character and significance of 'COUPON' in the tobacco industry nor can it serve as a basis for applicant to appropriate said term to its exclusive use.").

The Examining Attorney made a prima facie case that OZ is merely descriptive of the shape and materials composition of the goods identified in the application as "piling sheets, of metal" and "sheet piles, of metal," and this showing shifted the burden to Applicant to rebut the Examining Attorney's prima facie case with persuasive countervailing evidence and argument. *Zuma Array*, 2022 USPQ2d 736, at *8. Applicant provided neither, and thus did not carry its burden of rebuttal. We

[33] *Id.* at TSDR 7.

find, based on the record as a whole, that Applicant's proposed mark OZ is merely descriptive of the goods identified in the application as "piling sheets, of metal" and "sheet piles, of metal," and Applicant's proposed mark is thus ineligible for registration on the Principal Register for any of the goods identified in the application in the absence of a showing of acquired distinctiveness.

Decision: The refusal to register is affirmed.