This Opinion is Not a
Precedent of the TTAB

Mailed: February 9, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Sheet Pile, LLC

Serial No. 90900945

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, 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 PZ 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 of structural joint connectors; and metal connecting profiles and welding corners in

[1] Trademark Examining Attorney Tricia Brown examined the involved application and issued the final refusal to register from which this appeal was taken. The application was assigned to Mr. Murray on appeal and he filed the brief of the United States Patent and Trademark Office ("USPTO"). We will refer to them both as the "Examining Attorney."

the nature of structural joint connectors of metal for sheet piles of metal or plastic" in International Class 6.[2]

The Trademark Examining Attorney has refused registration of Applicant's proposed mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that the proposed mark is merely descriptive of the goods.

Applicant appealed when the Examining Attorney made the refusal final. Applicant and the Examining Attorney have filed briefs.[3] We affirm the refusal to register.

I. Prosecution History and Record on Appeal[4]

We briefly summarize below the prosecution history of the involved application because it provides useful background to our disposition of the appeal.

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. 90900945 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 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 brief appears at 4 TTABVUE and 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.

Examining Attorney initially refused registration of Applicant's proposed mark under Section 2(e)(1) on the ground that "PZ" is a type of sheet pile, required that Applicant amend its identification of goods, and issued an advisory that the proposed mark appeared to be generic for the identified goods and that amendment of the application to seek registration based on acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), or to seek registration on the Supplemental Register, could not be recommended.[6] The Examining Attorney made of record third-party webpages using the letters "PZ" in connection with sheet piling.[7]

Applicant responded to the Office Action by amending its identification of goods and arguing against what Applicant called the "Section 2(E)(1) Refusal – Merely Descriptive and Generic."[8] Applicant argued that the goods shown in the Examining Attorney's third-party webpage evidence were "properly described as z-sheet or z-pile," and that "PZ" was not generic for the goods identified in the application, and that the genericness advisory should be withdrawn so that Applicant could amend its application to seek registration on the Supplemental Register upon the submission of an allegation of use.[9] Applicant did not address the issue of mere descriptiveness.

The Examining Attorney then issued an Office Action accepting Applicant's amendment to its identification of goods, repeating the previous genericness advisory,

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

[7] *Id.* at TSDR 2-10.

[8] October 26, 2022 Response to Office Action at TSDR 2.

[9] *Id.*

and making final the refusal to register under Section 2(e)(1).[10] The Examining Attorney made of record a page from Applicant's website at sheetpilellc.com and additional third-party webpages that she claimed showed that "PZ" described ball-and-socket sheet pile.[11]

II. 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.[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

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

[11] *Id.* at TSDR 2-9.

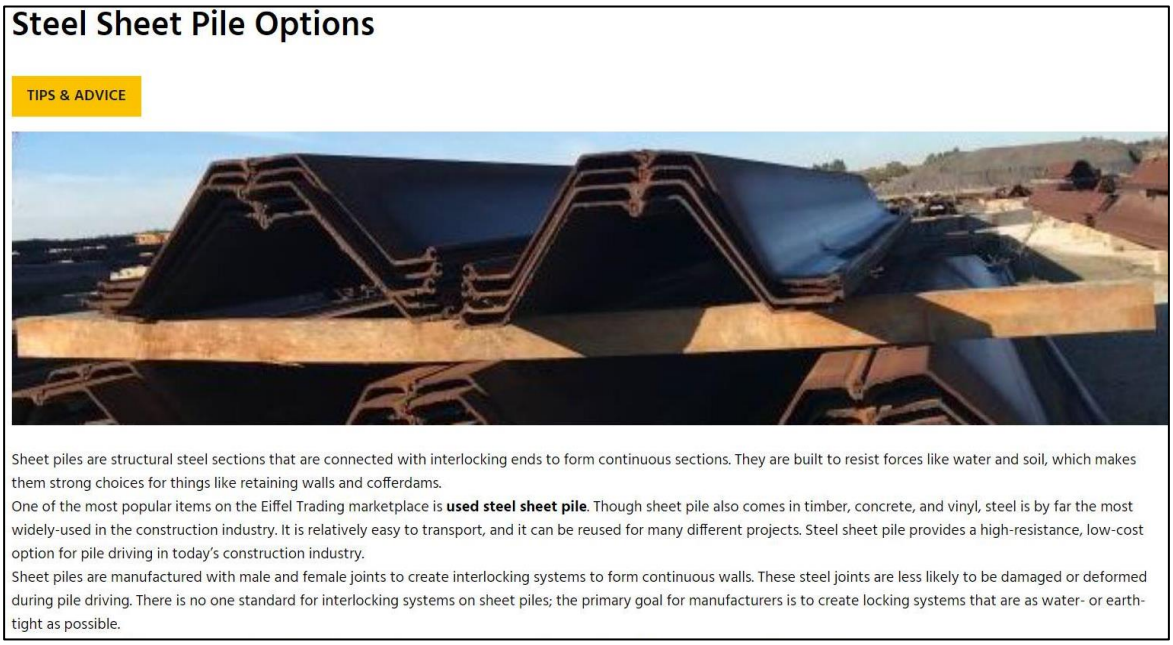
[12] Most of Applicant's brief is devoted to genericness, 4 TTABVUE 2-6, "perhaps because the Examining Attorney gave a genericness advisory," but "the Examining Attorney only refused the mark as merely descriptive, and never added a genericness refusal . . . ." *In re Nat'l Ass'n of Veterinary Technicians in Am., Inc.*, 2019 USPQ2d 269108, at *2 (TTAB 2019). "Advisory statements are not refusals subject to appeal," *id.*, at *2 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).

[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 Com. 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 Com.*, 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)).

Applicant's goods are 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 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," and the Examining Attorney focuses the final refusal to register on the goods identified as "sheet piles, of metal."[14] We reproduce below a webpage in the record showing and describing the nature and use of those goods:



[15]

"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

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

[15] *Id.* at TSDR 10.

USPQ2d at 1090)). Applicant's website identifies the relevant purchasing public as including "the sheet pile contractor and their steel sheet pile suppliers."[16] The record shows that the relevant purchasers also include construction project designers and construction companies.

"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." *Id.* (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).

The Examining Attorney argues that the "wording 'PZ' in the applied for mark describes the shape and form of sheet pile being a specific type of Z shaped sheet pile," that a "Z-type sheet pile is called this because 'the single piles are shaped roughly

[16] *Id.* at TSDR 2.

like a horizontally stretched Z'," and that "the 'P' moniker is to indicate the goods have a 'ball and socket' connection feature which provides numerous benefits." 6 TTABVUE 3 (record citations omitted). The Examining Attorney cites multiple third-party webpages in the record in which "PZ" or a variant is used in connection with sheet pile, *id.* at 4-6, and concludes that "the evidence of record demonstrates convincingly that the wording 'PZ' 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." *Id.* at 6.

Applicant argues that the Examining Attorney's use of the word "type" in the final Office Action in the Examining Attorney's statement that PZ "'describes the type, feature, or characteristic of the goods," 4 TTABVUE 6,[17] is improper because "'type' is not a measure of descriptiveness as recited by the TMEP or cited cases such as 'feature' or 'characteristic.'" *Id.* at 7.[18]

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

[18] The Examining Attorney attached to his brief a definition of the noun "type" from the CAMBRIDGE DICTIONARY as "a particular group of people or things that share similar characteristics," 6 TTABVUE 9, and requests that the Board take judicial notice of the definition. *Id.* at 6-7. Applicant does not object to that request in its brief, and we grant the request and take judicial notice of the definition. *Omniome*, 2020 USPQ2d 3222, at *2 n.17 (taking judicial notice of dictionary definitions attached to the examining attorney's brief). While the word "type" is more appropriately used in connection with a genericness refusal, where the issue is whether the proposed mark identifies a particular genus of goods or services, the Examining Attorney's use of "type" in connection with the descriptiveness refusal in the referenced office action is of no moment. The question before us is whether Applicant's proposed mark immediately describes "an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services," *Zuma Array*, 2022 USPQ2d 736, at *5, and the Examining Attorney argues that PZ describes a "feature" or "characteristic" of the identified goods. 6 TTABVUE 6.

Applicant also argues that the record evidence shows that what the Examining Attorney characterizes as "PZ" sheet piles may be known by other names, such as Larssen sheet piles, *id.*, and that "a ball and socket connection is not information immediately and direct conveyed about sheet piles or sheet pile connectors via PZ." *Id.* Applicant claims instead that "something more is required to understand the sheet piles and sheet pile connections at issue," *id.*, and that the proposed mark is thus suggestive, not merely descriptive. *Id.*

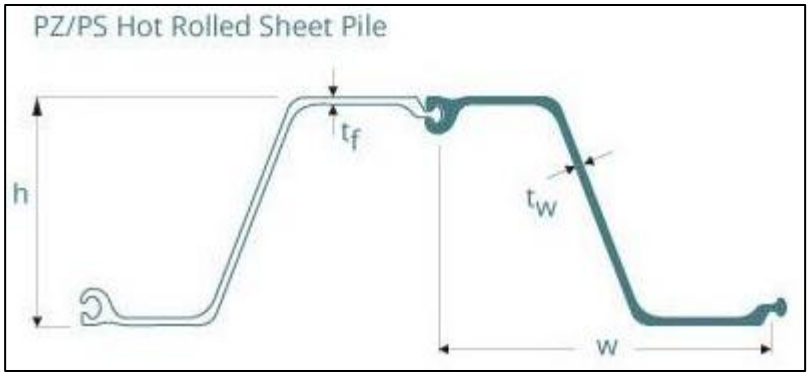
The record shows that the letters "PZ" are used to describe sheet piles that are roughly in the shape of the letter "Z" and that have ball-and-socket connectors. Indeed, Applicant's own website states that its connectors "support all common system connections" including "ball-and-socket (PZ/PZC) . . . ."[19]

A page from the website of Hammer & Steel captioned "HEAVY DUTY 'Z' SHEET PILING – PZ" states that "PZ sheet piles feature mechanical 'ball and socket' connections that allow each sheet to interlock with another and create a rigid barrier for earth and water while resisting the lateral pressure of these forces."[20]

The website of Build Your Vision Metal Products displays "Z-sheet piles" and a schematic drawing regarding "PZ/PS Hot Rolled Sheet Pile" that shows ball-and-socket connectors:

[19] December 1, 2022 Final Office Action at TSDR 2.

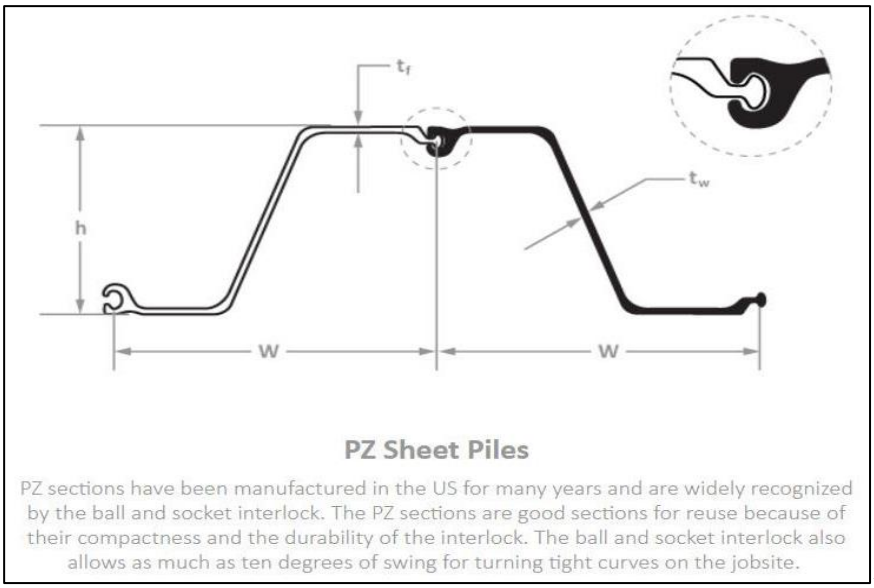
[20] June 8, 2022 Office Action at TSDR 2.



[21]

The website of Chemung Supply Corporation offers structural steel sheet piling identified as "PZ 22" and "PZ 27."[22]

A page from the website of Skyline Steel displays and describes "PZ Sheet Piles" as follows:



[23]

[21] *Id.* at TSDR 5.

[22] *Id.* at TSDR 7.

[23] *Id.* at TSDR 8.

This page states that "PZ sections have been manufactured in the US for many years and are widely recognized by the ball and socket interlock."[24]

The website of Eiffel Trading contains a post discussing "a few of the different types of sheet pile available today, and their defining characteristics and applications" that contains the following section:[25]

PZ/PZC SHEET PILE

PZ/PZC sheet pile are hot-rolled "Z" shaped sections, with ball-and-socket connections.

This type of sheet pile is identified by its type, shape, and a number which denotes the section's weight, in pounds, per square foot. For example, a PZ 22 is a Z-shaped sheet pile that weighs 22 pounds per square foot.

PZ/PZC sheet piles are commonly used for cofferdams, levee strengthening, and as retaining walls.

PZ sheet pile sections are identified by their Z shape and the width of the sections, from the flange tips, end-to-end. **PZC sheet pile** sections are more light-weight, tend to be wider, and as such, are stronger than traditional Z-shaped sheet pile.

The ball-and-socket interlocking connections are durable under driving conditions, but allow for flexibility in setting because it displaces less soil. PZC sheet pile's ball-and-socket connections allow for greater degrees of swing and flexibility, making it easier to drive and set in precise layouts. Sheets are lined up before being placed, to allow the sections to lock together by securing the ball-shaped end into the socket and driving the sheets into place.[26]

A page from the website of Grand Piling, which describes itself as the main sheet piling manufacturer in the world with customers in over 180 countries, including the United States, is captioned "PZC and PZ Steel Sheet Pile" and states that "PZ and PZC sheet piles are also called Larssen sheet piles, mostly used in USA."[27] The page also displays a table of various PZ sheet piles:

[24] *Id.*

[25] *Id.* at TSDR 10.

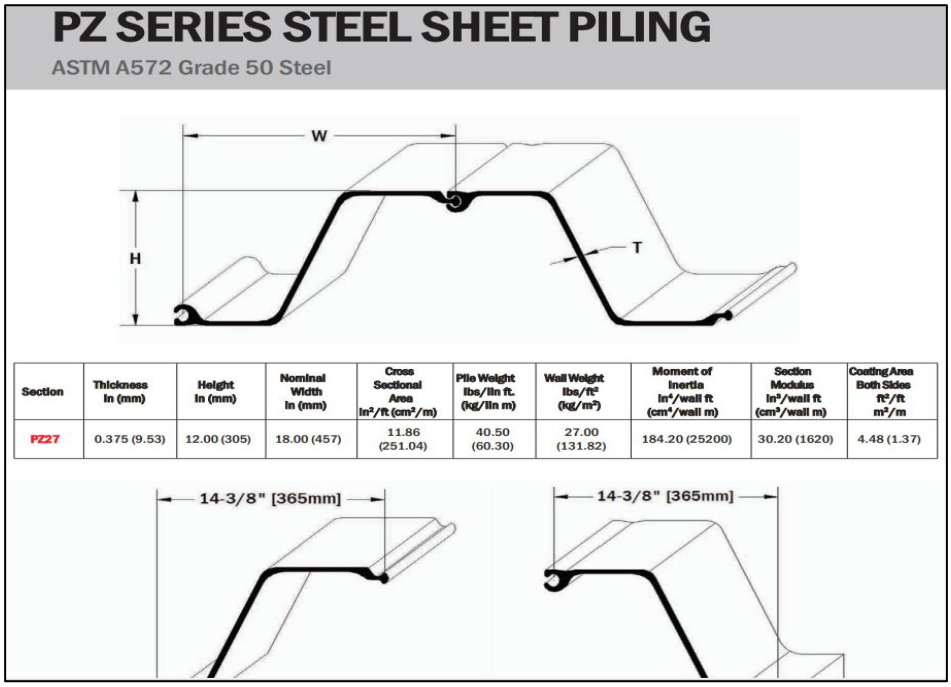
[26] *Id.*

[27] December 1, 2022 Final Office Action at TSDR 3.

Section	Width	Height	Thickness		Weight		Section Modulus	Moment of Inertia	Coating Area	
			Flange	Web	Pile	Wall			Both Sides	Wall Surface
	in.	in.	in.	in.	lb./ft	lb./ft.sq.	in.cu./ft.	in.qu/ft.	ft.sq./foot of single	ft.sq./ft.sq.
PZ22	22	9	0.375	0.375	40.3	22	18.1	84.38	4.48	1.22
PZ27	18	12	0.375	0.375	40.5	27	30.2	184.2	4.48	1.49
PZ35	22.64	16.1	0.6	0.5	66	35	48.5	361.2	5.37	1.42
PZ40	19.69	14.9	0.6	0.5	65.6	40	60.7	490.8	5.37	1.64

[28]

A page from the website of Samuel Roll Form Group captioned "PZ Series Steel Sheet Piling" displays a "PZ27" section:



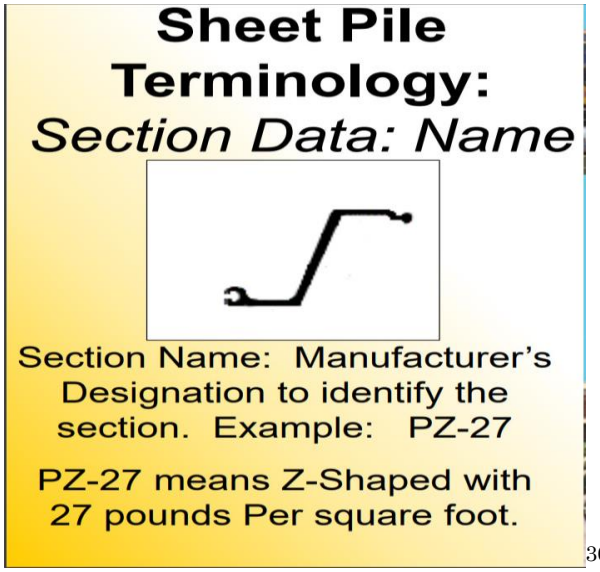
[29]

The schematic drawing shows a Z-shaped pile with ball-and-socket connectors.

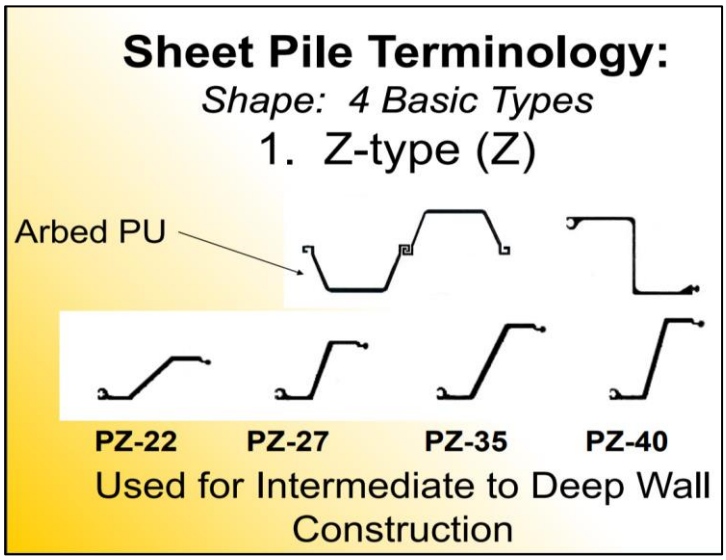
Pages from the website of American Pile Driving captioned "Sheet Pile Terminology" display the following:

[28] *Id.* at TSDR 3.

[29] *Id.* at TSDR 4.



[30]



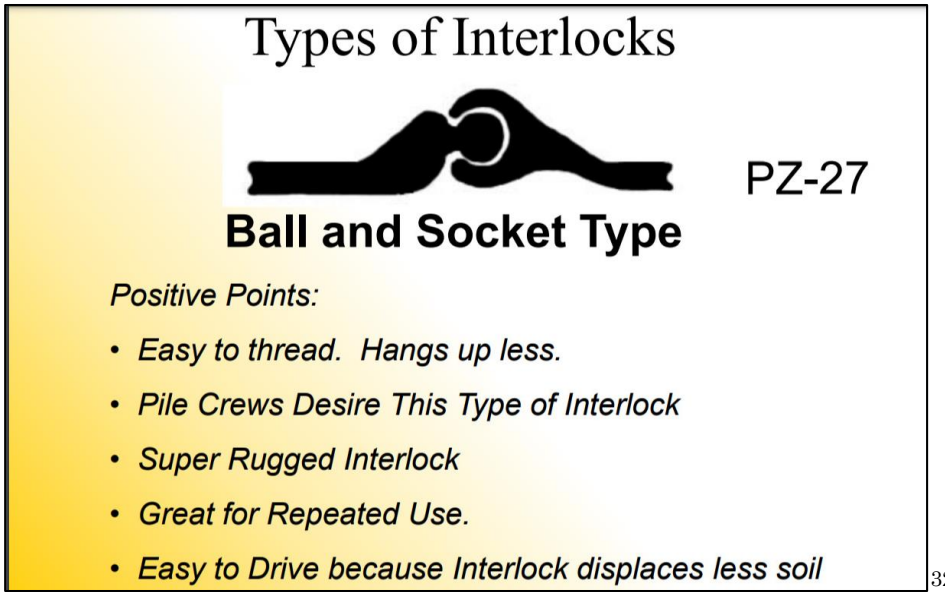
[31]

These pages display Z-shaped piles with ball-and-socket connectors.

The same website displays a page captioned "Types of Interlocks" that displays and discusses the PZ-27 "Ball and Socket Type" of interlocks:

[30] *Id.* at TSDR 6.

[31] *Id.* at TSDR 7.



[32]

The website of R.W. Conklin Steel displays a catalogue page captioned "Sheet Piling" that explains that steel sheet piling has a connection "interlock" at both ends of the section, and states that the company carries "a vast inventory of Sheet Pile," including "Hot-Rolled Sheet Piling, such as PZ, PZC, and PS Shapes . . . ."[33] The catalogue page also explains that PZC sheet piles "are manufactured to be wider, lighter, and stronger than traditional PZ piling . . . ."[34]

The record evidence discussed above leaves no doubt that the relevant purchasers of at least the goods identified in the application as "piling sheets, of metal" and "sheet piles, of metal" will understand Applicant's proposed mark PZ to immediately describe a characteristic or feature of those goods, namely, that they are Z-shaped piles with ball-and-socket connectors. Because the proposed mark is merely

[32] *Id.* at TSDR 8.

[33] *Id.* at TSDR 9.

[34] *Id.*

descriptive of those goods, it is ineligible for registration on the Principal Register in the absence of a showing of acquired distinctiveness.

Decision: The refusal to register is affirmed.