

Request for Reconsideration after Final Action

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<p style="text-align: center;">REQUEST FOR RECONSIDERATION</p> <p>This communication is being filed in response to the Final Office Action mailed July 15, 2013. Pursuant to TMEP § 715.03 and 37 C.F.R. § 2.64(b), Applicant respectfully submits this communication both as a Response to a Final Office Action and as a Request for Reconsideration of the Final Office Action. Applicant respectfully requests that the Examining Attorney reconsider her refusal to register the mark based on the additional information submitted with this communication. Applicant is also filing a Notice of Appeal concurrently with this Response to a Final Office Action and as a Request for Reconsideration of the Final Office Action.</p> <p style="text-align: center;">THE APPLIED-FOR TRADE DRESS IS NOT FUNCTIONAL</p> <p>The Examining Attorney has continued to refuse registration of Applicant's three-dimensional configuration trade dress on the grounds that it is functional. Applicant respectfully disagrees with this objection based on the reasons and evidence previously submitted in Applicant's Response to Office Action, dated June 20, 2013. The Examining Attorney's Final Office Action, mailed July 15, 2013, maintains the functionality objection, reiterating that the applied-for trade dress is functional in light of utility patents owned by Applicant or other Dyson companies. Applicant respectfully submits that while the utility patents cited by the Examining Attorney relate to specific functional features of products bearing the applied-for trade dress, those functional features are not co-extensive with the applied-for design. Indeed, while products bearing the applied-for trade dress offer unique functional characteristics, the design of such products <i>as a whole</i>—i.e., the subject matter of this trade dress application—is not essential to the use or purpose of these products. Moreover, Applicant respectfully notes that the advertising for products bearing the applied-for trade dress does not tout the utilitarian advantages of the products <i>as a whole</i>.</p> <p>As additional support for its position, Applicant submits copies of utility patents owned by Applicant or other Dyson companies to show that they claim only specific aspects of the fans and not the overall design. (<i>See</i> attached Declaration of Jennifer Lee Taylor ("Taylor Decl.") ¶¶ 4-14, Exs. C-L.) Thus, the utility patents are not evidence that the overall design is functional. Applicant also submits copies of design patents for the applied-for design, which are persuasive evidence of the non-</p>	

functionality of the applied-for design as a whole. (Taylor Decl. ¶¶ 14-15, Exs. M-N.) Applicant also submits copies of an order and a hearing transcript from a design patent infringement proceeding before the United States District Court of Arizona, *Cornucopia Products, LLC v. Dyson Technology Limited*, Case No. 2:12-cv-002340-NVW. (Taylor Decl. ¶¶ 2-3, Exs. A-B.) The order grants Dyson, Inc.'s and Dyson Technology Limited's Motion for Preliminary Injunction. The transcript is for the hearing held in connection with the Motion for Preliminary Injunction and includes testimony on the non-functionality of the overall designs. The order's analysis as well as the evidence presented at the hearing in support of the motion for preliminary injunction support a finding that the applied-for trade dress is not functional.

Applicant respectfully submits that the applied-for design is not functional and thus respectfully requests that the Examining Attorney withdraw her objection on grounds of functionality. Applicant concurrently files a Notice of Appeal in the event that this Request for Reconsideration is not granted. Applicant further notes that the only issue ripe for appeal is whether the applied-for trade dress is functional as the Examining Attorney has not yet evaluated Applicant's evidence of acquired distinctiveness regarding the applied-for trade dress.

COMMENTS

If the Examining Attorney has any questions or wishes to discuss any of the information contained herein, so as to expedite matters, the Examining Attorney is requested to telephone Jennifer Lee Taylor at (415) 268-6538.

EVIDENCE SECTION

EVIDENCE FILE NAME(S)

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