

UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 76684704

MARK:

76684704

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GENERAL TRADEMARK INFORMATION:
<http://www.uspto.gov/main/trademarks.htm>

APPLICANT: Supermax Incorporated

CORRESPONDENT'S REFERENCE/DOCKET
NO:

N/A

CORRESPONDENT E-MAIL ADDRESS:

REQUEST FOR RECONSIDERATION DENIED

ISSUE/MAILING DATE:

Applicant is requesting reconsideration of a final refusal issued/mailed January 5, 2010. Applicant has filed a Notice of Appeal and a response on June 17, 2010.

After careful consideration of the law and facts of the case, the examining attorney must deny the request for reconsideration and adhere to the final action as written since no new facts or reasons have been presented that are significant and compelling with regard to the point at issue.

Applicant's response filed June 17, 2010 recites text from the case, *In re Clarke*, 17 USPQ2d 1238 (TTAB 1990). The holding in the Clarke case is that a non-functional scent can be registered under Section 2(f) of the Trademark Act where sufficient evidence of distinctiveness has been provided. The case is of little avail to applicant because applicant has not sought registration under Section 2(f) of the Trademark Act.

An excerpt from the Trademark Manual of Examining Procedure is directly on point:

1202.13 Scent, Fragrance, or Flavor

Scent. The scent of a product may be registrable if it is used in a nonfunctional manner. See *In re Clarke*, 17 USPQ2d 1238 (TTAB 1990) (Trademark Trial and Appeal Board held that a scent functioned as a mark for "sewing thread and embroidery yarn)." Scents that serve a

utilitarian purpose, such as the scent of perfume or an air freshener, would be functional and not registrable. See *seq.* regarding functionality. When a scent is not functional, it may be registered on the Principal Register under §2(f), or on the Supplemental Register if appropriate. The amount of evidence required to establish that a scent or fragrance functions as a mark is substantial. *Cf. In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 227 USPQ 417 (Fed. Cir. 1985).

The declaration of the Vice President/Manager of applicant indicates applicant's intention that the scent be seen as a trademark, but provides no claim of acquired distinctiveness nor evidence of distinctiveness. Even if the declaration were construed as a claim of acquired distinctiveness, applicant's declaration would be insufficient.

Thus, it is clear that the present application is not in condition for allowance.

Accordingly, applicant's request for reconsideration is *denied*. The time for appeal runs from the date the final action was issued/mailed. 37 C.F.R. §2.64(b); TMEP §715.03(c). If applicant has already filed a timely notice of appeal, the application will be forwarded to the Trademark Trial and Appeal Board (TTAB).

/Chris Wells/
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STATUS CHECK: Check the status of the application at least once every six months from the initial filing date using the USPTO Trademark Applications and Registrations Retrieval (TARR) online system at <http://tarr.uspto.gov>. When conducting an online status check, print and maintain a copy of the complete TARR screen. If the status of your application has not changed for more than six months, please contact the assigned examining attorney.