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Subject: U.S. TRADEMARK APPLICATION NO. 85318060 - N/A - EXAMINER BRIEF

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UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 85318060 **MARK:**	
CORRESPONDENT ADDRESS: David M. Kelly KELLY IP LLP SUITE 300 1330 CONNECTICUT AVE NW WASHINGTON DC 20036	**GENERAL TRADEMARK INFORMATION:** http://www.uspto.gov/trademarks/index.jsp **TTAB INFORMATION:** http://www.uspto.gov/trademarks/process/appeal/index.jsp
APPLICANT: Monster Cable Products, Inc.	
CORRESPONDENT'S REFERENCE/DOCKET NO: N/A **CORRESPONDENT E-MAIL ADDRESS:** docketing@kelly-ip.com	

EXAMINING ATTORNEY'S APPEAL BRIEF

The applicant has appealed the Trademark Examining Attorney's Final Refusals to register a three-dimensional configuration mark for "Headphone cables sold as an integral component of

headphones," in Class 9, on the basis that (1) the proposed mark is functional, and (2) the proposed mark is incapable of acquiring distinctiveness. The Final mark description requirement also included in the Final Office action is now satisfied and is not an issue for appeal. *See* Applicant's Brief, at 2 n.1.

FACTS

The applicant filed this application on May 11, 2011, seeking registration on the Supplemental Register for goods then identified as "headphone cables," in Class 9.

In the first Office action, issued on August 17, 2011, the Examining Attorney issued functional and generic refusals[1] and drawing, mark description, specimen, and information requirements. The initial Office action also included an advisory regarding the identification of goods.

On February 13, 2012, the applicant filed a response that satisfied the drawing and information requirements. Based on that response, the Examining Attorney determined that an identification requirement and an additional information requirement were needed, so a second non-Final Office action was issued on February 23, 2012, with these new requirements. The other refusals and requirements were maintained and continued.

On May 9, 2012, the Examining Attorney met in person with two of the applicant's attorneys to discuss all of the refusals and requirements.[2] *See* 5/10/2012 Note to File.

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[1] The Applicant's Brief provides a detailed summary of the content of this first Office action, but does not specifically discuss any of the later Office actions or supporting evidence attached thereto. Applicant's Brief at 6-7. Thus, the applicant's summary of the procedural history appears to suggest that the refusals are based solely on the reasoning and evidence in the initial Office action, which is incorrect.

[2] Although not referenced in the note to file, the applicant's attorneys brought a sample cable with them, and the Examining Attorney had the opportunity to physically examine the cable at that time. Thus, the statement in the applicant's brief that the Examining Attorney only reviewed the cable on the Internet is incorrect. *See* Applicant's Brief, at 6. The Examining Attorney also had several other phone and email conversations with the applicant's current and previous attorneys during the course of examination. *See* Notes to File, 9/27/2011, 10/31/2011, 11/7/2011, 11/17/2011, and 7/29/2013.

On August 22, 2012, the applicant filed a response that satisfied the specimen, identification, and information requirements, and, on September 10, 2012, the Examining Attorney issued Final functional and generic refusals, and a Final mark description requirement.

On March 11, 2013, the applicant noted its appeal, but did not file a request for reconsideration.

On February 6, 2014, the applicant filed its first request for remand, [3] and the request was remanded to the Examining Attorney, who denied it on February 13, 2014.

On June 18, 2014, the applicant filed its second request for remand,[4] and the request was remanded to the Examining Attorney, who denied it on June 19, 2014.

On June 24, 2014, the applicant filed a corrected copy of its second request for remand,[5] and the request was remanded to the Examining Attorney, who denied it on July 8, 2014.

On November 12, 2014, the applicant filed its third request for remand,[6] and the request was remanded to the Examining Attorney, who denied it on November 19, 2014.

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[3] This remand was preceded by five extension requests. On May 10, 2013, the applicant also filed a revocation/appointment of attorney appointing the current attorney of record. Because the request for remand was filed by the new attorney and included new evidence, the requirement for good cause for remand was met. *See* TBMP §§1209.04, 1207.02. This request included a declaration from an individual identified by the applicant as a "technical and industry expert" to address "highly technical patent references" and to "provide his expert opinion on . . . the referenced patent." Request for Remand, 2/6/2014, Cover Letter, at 1. The Examining Attorney objected to this characterization of the declarant as an expert for the stated purpose because the declarant's CV showed limited experience with utility patents and did not include any experience with design of headphone cables (for either utility or aesthetic purposes). Denial of Reconsideration, 2/13/2014, TSDR, at 1.

[4] This request was preceded by one extension, and included new evidence. The Examining Attorney objected to the applicant's stated "good cause" because the "compelling new evidence" provided by the applicant included a declaration from the inventor of the patent referenced in the initial Office action (with no explanation as to why the applicant could not previously obtain a declaration from this employee); a licensing agreement from November, 2012; and a CNN article that predated the applicant's previous request for remand. *See* TBMP §§1209.04 ("No matter what the purpose, the request for remand must include a showing of good cause."), 1207.02 ("Examples of circumstances that have been found to constitute good cause for a remand for additional evidence include the following: . . . The evidence was not previously available.").

[5] The Examining Attorney objected to some of the additional evidence in this corrected request for remand, specifically a web link and excerpts from three websites that did not include identifying data. *See* TMEP §710.01(b).

On January 20, 2015, the applicant filed its appeal brief,[7] and the file has been forwarded to the Examining Attorney for statement.

ISSUES

1) Whether the applicant's three-dimensional configuration mark is functional and therefore unregistrable on the Supplemental Register under Trademark Section 23(c), 15 U.S.C. §1091.

2) Whether the applicant's three-dimensional configuration mark is generic/incapable of acquiring distinctiveness and therefore unregistrable on the Supplemental Register under Trademark Section 23, 15 U.S.C. §1091.

OBJECTIONS

The Examining Attorney maintains her objections to the finding of good cause for the applicant's second and third requests for remand, and the evidence made of record in support thereof.[8] However, even if all of this evidence is considered, the refusals should still be affirmed.

ARGUMENT

I. THE APPLICANT'S THREE-DIMENSIONAL CONFIGURATION MARK IS FUNCTIONAL

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[6] This request was preceded by one extension request. The request included a statement that the remand was needed to provide the identifying data for the evidence in the corrected second request for remand, see the above footnote. However, the request for remand only included one printout corresponding to the previously unauthenticated evidence. Instead, the applicant used the request to "submit[] additional examples of various cable designs for the Examining Attorney to consider." Applicant's Request for Remand, 11/12/2014, at 1. There was no showing that this evidence was previously unavailable. *See* TBMP §1207.02. Accordingly, the Examining Attorney objected on the basis that the required "good cause" for remand was not met. Further, to avoid a subsequent request for remand regarding the still unauthenticated evidence, the Examining Attorney made of record authenticated printouts of that evidence.

[7] The applicant's appeal brief references an "attached declaration," Appeal Brief, at 2, that was not attached. The referenced declaration was made of record in support of the applicant's 6/24/2014 Request for Remand, and later in the same paragraph in the Brief, the Applicant references where in the record the declaration can be found. *See id.* at 3. The applicant is reminded that evidence that is already in the record should not be resubmitted as an attachment to a brief. TBMP §1203.02(e).

[8] Because the Examining Attorney subsequently added authenticated printouts to the record relating to the unauthenticated evidence in the applicant's 6/24/2014 request for remand, that specific objection regarding that evidence is waived.

The applicant has applied for registration of a three-dimensional mark now described as follows:

> The mark consists of a headphone cable having a cross-section in the form of an oblong, wherein the cable features contoured outer edges and is significantly wider than it is thick. The headphone cable is used to connect ear bud devices to a headphone splitter. The ear bud areas shown in dotted lines in the mark are not claimed as part of the mark. Additionally, no claim is made to the length of the cable or the splitting of the cable into two cables.

In other words, the applicant has claimed the shape of a headphone cable, but not the ear buds or splitter to which the cable is attached. The entire configuration claimed as the applicant's mark must be evaluated in determining functionality. Thus, the applicant's statements such as "Monster filed the Application for a contoured edge design for headphone cables," Applicant's Brief, at 6, mischaracterize what the applicant has actually claimed as its mark.

A feature is functional if it is "'essential to the use or purpose of the [product]'" or "'it affects the cost or quality of the [product].'" *TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 33, 58 USPQ2d 1001, 1006 (2001) (quoting *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 165, 34 USPQ2d 1161, 1163-64 (1995)); *Inwood Labs., Inc., v. Ives Labs., Inc*., 456 U.S. 844, 850 n.10, 214 USPQ 1, 4 n.10 (1982); TMEP §1202.02(a)(iii)(A).

Functional matter may not be registered on either the Principal or Supplemental Registers, regardless of evidence of acquired distinctiveness. Trademark Act Sections 2(e)(5) and 23(c), 15 U.S.C. §§1052(e)(5), 1091(c); *see TrafFix Devices, Inc.*, 532 U.S. at 29, 58 USPQ2d at 1006; *In re Controls Corp. of Am.*, 46 USPQ2d 1308, 1311 (TTAB 1998); TMEP §1202.02(a)(iii)(A).

Determining functionality normally involves consideration of one or more of the following factors, commonly known as the "*Morton-Norwich* factors":

(1) The existence of a utility patent that discloses the utilitarian advantages of the product or packaging design sought to be registered.

(2) Advertising by the applicant that touts the utilitarian advantages of the design.

(3) Facts pertaining to the availability of alternative designs.

(4) Facts pertaining to whether the design results from a comparatively simple or inexpensive method of manufacture.

In re Becton, Dickinson & Co., 675 F.3d 1368, 1374-75, 102 USPQ2d 1372, 1377 (Fed. Cir. 2012); *In re Morton-Norwich Prods., Inc.*, 671 F.2d 1332, 1340-41, 213 USPQ 9, 15-16 (C.C.P.A. 1982); TMEP §1202.02(a)(v).

The first three of these factors clearly support a finding that the design contains functional matter. The information in the record regarding the fourth factor also favors a finding that the design contains functional matter.

A. The applicant owns a utility patent that discloses the utilitarian advantages of the product design sought to be registered.

1. The applicant's configuration mark includes features specifically claimed by the applicant's patent.

A utility patent claiming the design features at issue is strong evidence that those features are functional. *TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 29-30, 58 USPQ2d 1001, 1005 (2001); *In re Becton, Dickinson & Co.*, 675 F.3d 1368, 1375, 102 USPQ2d 1372, 1377 (Fed. Cir. 2012); *see* TMEP §1202.02(a)(iv), (a)(v)(A).

The applicant is the owner of utility Patent No. 8068633B2, Headphone Cable Splitter, issued November 29, 2011, which claims the design features at issue. Applicant's 2/13/2012 Response, Exhibit M, TSDR, at 28-33. The following are the patent's entire two claims:

> 1. **A headphone cable having the following sections**: a unitary cable section having left and right audio channel conductors, said unitary cable section having a cross-sectional width and thickness, **said width being substantially greater than said thickness**; and **left and right cable sections** electrically coupled to said left and right audio channel conductors, respectively, of said unitary cable section, and **for connecting to the left and right earpieces of a headphone**, **said left and right cable sections having cross-sectional widths and thicknesses, said widths being substantially greater than said thicknesses**, the left and right cable sections being oriented such that the widths of said left and right cable sections are substantially perpendicular to the width of said unitary cable section.
>
> 2. The headphone cable of claim 1, further having a splitter for splitting said unitary cable section into said left and right cable sections.

Applicant's 2/13/2012 Response, TSDR, at 33. The sections of these claims that reference the same portion of a headphone cable as the applied-for mark have been highlighted in bold. The claims include a comparison of the cable dimensions (width with thickness) that is essentially the same as in the applicant's current mark description.

The applicant's patent specifically states that the matter claimed in the patent

> provides advantages in that its structure is inherently more rigid and therefore less prone to tangling. Moreover, the large cross-sectional area of a flat cable facilitates passage of multiple conductors in a side-by-side configuration. . . . This provides benefits in terms of lower overall cable impedance and faster transient response as compared to conventional headphone cabling. Moreover, the flat cable can accommodate added functionality such as conductors for a microphone.

Applicant's 2/13/2012 Response, TSDR, at 32, Background Art, ¶2.

Therefore, the applicant's patent specifies three significant functional advantages of the applicant's headphone cable design: (1) the resistance to being tangled, (2) the improved quality due to multiple conductors, and (3) the ability to accommodate additional functions, such as a microphone. Accordingly, the trademark examining attorney established a prima facie case that the applied-for mark is functional and the applicant has been unable to meet its burden of demonstrating that the applied-for mark is not functional. *See TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. at 29-30, 58 USPQ2d at 1005; *In re Howard Leight Indus., LLC*, 80 USPQ2d 1507, 1515 (TTAB 2006); *see* TMEP §1202.02(a)(iv), (a)(v)(A).

The applicant has cited *Phillips v. AWH Corp*., 415 F. 3d 1303, 1323 (Fed. Cir. 2005), for the proposition that a specific embodiment in the specification should not be used to limit the scope of the claims. However, the full scope and extent of the applicant's patent is not at issue in this case. Rather, the issue in this case is whether the design shown in the applied-for mark contains features claimed by the applicant's patent. It does—the dimensions of the cable in the mark consist of a width substantially greater than the thickness. Thus, the first *Morton-Norwic*h factor is met—the product design configuration in the applied for mark contains functional matter claimed by the applicant's patent.

2. The curved outer contours of the cable design are minor elements of the overall cable design and do not overcome the finding that the overall design is functional

A few arbitrary or otherwise nonfunctional features included within a product configuration mark do not affect a functionality determination where the evidence shows the overall design to be functional. *See Textron, Inc. v. U.S. Int'l Trade Comm'n*, 753 F.2d 1019, 1024-27, 224 USPQ 625, 628-30 (Fed. Cir. 1985); *In re Vico Prods. Mfg. Co.*, 229 USPQ 364, 368 (TTAB 1985); TMEP §1202.02(a)(v). Specifically, an applied-for mark possessed of significant functional features should not qualify for registration where insignificant elements of the design are non-functional. *In re Becton, Dickinson & Co.*,

675 F.3d at 1374, 102 USPQ2d at 1376. Put another way, when a design includes both functional and non-functional matter, the issue is whether the non-functional matter is so significant that it "save[s] the mark from being deemed overall functional." *Id.* To make this determination, the functional and non-functional features must be weighed against each other. *Id*. In *Becton*, the Board found the spacing and shape of ribs on the cap at issue insufficient to overcome the overall functionality determination because these elements were "incidental to the overall adoption of those features and hardly discernible when viewing the mark." *In re Becton, Dickinson & Co.*, 675 F.3d at 1372, 102 USPQ2d at 1376.

Here, the overall design of the configuration mark, including the curved outer contours, matches the preferred embodiment shown in the patent drawings. Applicant's 2/13/2012 Response, TSDR, at 28-31. However, as the applicant has indicated, this design element is not referenced in the claims (or anywhere else in the patent). Applicant's Brief, at 6. Further, one of the inventors listed in the patent has confirmed that the "contoured edges do not perform any function and are in fact incidental to the functions carried out by the cable." Applicant's 6/18/2014 Request for Remand, Hsiung Declaration, at 2. Thus, because this matter is "incidental to the functions carried out by the cable," it does not overcome the functionality of the design as a whole—the specific embodiment that incorporates the curved contours retains all of the advantages specified in the applicant's patent. Similarly, any aesthetic value[9] possessed by the curved outer contours, *see* Applicant's Brief, at 10, also does not overcome the functionality of the design as a whole.

In *Traffix Devices v. Mktg. Displays*, the Court made the following observation, "In a case where a manufacturer seeks to protect arbitrary, incidental, or ornamental aspects of features of a product found in the patent claims, such as arbitrary curves in the legs or an ornamental pattern painted on the

[9] The "aesthetic value," which the applicant asserts is sufficient to make the design "worthy of trademark protection" *see* Applicant's Brief, at 10), is more appropriately addressed below within the context of the generic refusal.

springs, a different result might obtain." 532 U.S. 23, 34 (U.S. 2001). The applicant has analogized its "curved outer contours" to the "arbitrary curves" discussed by the Court in that case. Applicant's Brief, at 10. However, here, the applicant is not seeking to register just the curved outer contours of its cable as its mark, but that element in combination with matter covered by the patent claims. Thus, the referenced dicta from *Traffix* is not applicable to the applicant's design in this case, and the applied-for mark viewed as a whole is functional.

Had the applicant applied to register just the curved outer contours, the applicant would have been required to amend the drawing of the mark to render all of the elements claimed in the patent (the cable dimensions), in broken or dotted lines. *See* TMEP §1202.02(c)(i)(A). However, because the width dimensions of the cable would include the outermost parts of the curved contours and the thickness of the curves are even with the flat sides of the cable, any dotted lines added to outline the functional dimensions would include the contours. This also demonstrates that the curved contours are less significant than the functional elements in determining the overall functionality of the applied-for mark.

3. The applicant's characterization of its cable design as "flat" in its patent is relevant to the second and third *Morton-Norwich* factors.

The applicant has provided argument that the patent claims do not specifically refer to the cable as "flat" and asserts that it was improper for the Examining Attorney to consider the references to "flat" cables elsewhere in the patent. Applicant's Brief, at 9-10. Since the applicant's trademark description identifies the dimensions of the cable in nearly identical wording to the patent claims, the applicant's characterization of the cable as "flat" elsewhere in the patent is not needed to determine that the applicant's configuration mark contains matter claimed by the patent.

However, the applicant's description in the patent of the cable as "flat" is relevant to the second and third *Morton-Norwich* factors, which involve the consideration of advertising. In the advertising material made of record, neither the applicant nor its competitors refer to their cables as "significantly wider than thick." However, this advertising commonly refers to the shape of such cables as "flat." Thus, the applicant's statements in the patent referring to the claimed patent design as a "flat" cable confirm that the design referenced in the applicant's and its competitors' advertising is the same design shown in the patent and in the applied-for mark.

Specifically, the modes for carrying out the invention include the following definition for a "flat cable":

> For ease of description within the present application, a flat cable is described as having dimensions of length, width, and thickness. The length of a flat cable is that dimension which is parallel to the conductors within the cable. The width and thickness of a flat cable are determined by measuring the dimensions of a cross-section orthogonal to the cable's length. The width is the longer dimension across the cross-section, while the thickness is the shorter dimension perpendicular to the width.

TSDR, at 32.

In determining functionality, the examining attorney is expected to consider both the numbered claims and the disclosures in the written description, drawings, and abstract of the patent. TMEP §1202.02(a)(v)(A). The examining attorney should also consider other evidence described in a patent that is relevant to the functionality of the mark at issue. *Id*.; *In re Pohl-Boskamp GmbH & Co*., 106 USPQ2d at 1046-47. Thus, it was proper for the Examining Attorney to consider the references to the "flat cable" design throughout the patent and to apply those references in evaluating the other *Morton-Norwich* factors.

B. The applicant's advertising touts the utilitarian advantages of the design.

1. The applicant's advertising indicates that the dimensions of the cable are functional.

Applicant's own advertising that extols specific utilitarian advantages of the applied-for product design is strong evidence that the matter sought to be registered is functional. TMEP §1202.02(a)(v)(B); *see, e.g.*, *In re Becton, Dickinson & Co.*, 675 F.3d 1368, 1375-76, 102 USPQ2d 1372, 1377-78 (Fed. Cir. 2012); *Kistner Concrete Prods., Inc. v. Contech Arch Techs., Inc.*, 97 USPQ2d 1912, 1924 (TTAB 2011).

The following are three representative examples of the Applicant's own advertising (including one example made of record by the Applicant) that describe the utilitarian advantages of its design:

> "Tangle-free flat cable. Earbuds are incredibly convenient. But they've got one big problem: they tangle into unbelievable snarls, especially during storage. But Monster has come up with a solution: make 'em flat! Our innovative, patent-pending[10] design is ultra-flexible and tangle-free." Monster, *Monster Headphones: Part Engineering. Part Art. All About the Sound*, http://www.monstercable.com (viewed on Aug-15-2011, 09:27 EDT). Office action, 8/17/2011, TSDR at 3.

> "At Monster, sound has always been the most important to use, but when it comes to the headphones you use everyday, we were determined to get rid of the annoying ritual of untangling your earbuds everytime you want to listen to music. . . . The new Beats Tour flat cable design is so revolutionary it's patent-pending. The . . . flat profile virtually eliminates annoying tangles and snarls. With Beats Tour, you'll spend less time untying knots, and more time enjoying your music. . . . At Monster, we know cable. The Beats Tour cable features Monster's patented magnetic flux tube and Micro-strand construction to provide clear no-loss audio and reduced interference." Amazon.com, *Beats by Dr. Dre Tour High Resolution In-Ear Headphones from Monster*, http://www.amazon.com/Beats-Tour-High-Resolutions-Headphones-Monster/dp/B001MS7JDK (viewed on Aug-15-2011, 09:50 EDT), Office action, 8/17/2011, TSDR at 4.

> The Beats Tour cable features Monster's patented magnetic flux tube and Micro-strand construction to provide clear no-loss audio and reduced interference. The World's First Tangle-Free Earbuds. . . . [W]hen it comes to the headphones you use everyday, we were determined to get rid of the annoying ritual of untangling your earbuds everytime you want to listen to music. . . . [W]e finally found the solution. The new Beats Tour flat cable design is so revolutionary it's patent pending. . . . [T]he flat profile virtually eliminates tangles and snarls.

[10] Advertising attached to the first Office action predates the issuance of the patent on November 29, 2011.

http://www.monstercable.com/productdisplay.asp?pin=5097. Applicant's 2/13/2012 Response, Exhibit A, TSDR, at 3.

Material obtained from applicant's website is acceptable as competent evidence. *See In re N.V. Organon*, 79 USPQ2d 1639, 1642-43 (TTAB 2006); *In re Promo Ink*, 78 USPQ2d 1301, 1302-03 (TTAB 2006); *In re A La Vieille Russie Inc.*, 60 USPQ2d 1895, 1898 (TTAB 2001); TBMP §1208.03; TMEP §710.01(b).

Therefore, the applicant's advertising clearly touts the functional advantage that a flat headphone cable is more resistant to tangling than traditional designs. This advertising also discusses in detail the improved sound quality due to the design.

2. The applicant's advertising demonstrates that the curved outer contours are minor elements that do not impact the functionality of the design as a whole.

The record includes a substantial amount[11] of evidence of the applicant's own advertising, made of record by the Examining Attorney and the Applicant, and the applicant has correctly pointed out that none of this advertising references the "curved outer contours" of the mark. Applicant's Brief, at 11. However, the fact that the applicant's advertising does not reference this design element at all (*i.e.*, even for its asserted aesthetic qualities) demonstrates that this design element is so minor that it does not overcome the overall functionality of the product design.

[11] The applicant has also suggested for the first time that the number and types of examples of the applicant's advertising are insufficient. Applicant's Brief, at 11. The applicant's raising of this claim at this point is untimely since the Examining Attorney cannot supplement the record. Further, the examples of the applicant's advertising include advertising from the applicant's own website, including website advertising made of record by the applicant. Thus, the Examining Attorney disagrees with the assertion that the quality of this evidence is insufficient or that it is somehow an inaccurate sample of the applicant's available advertising. Additionally, any suggestion that the evidence of the applicant's advertising is insufficient should be construed against the applicant, who was required to make any relevant advertising material part of the record. Office Action, 8/17/2011, TSDR, at 1; *In re Teledyne Indus. Inc.*, 696 F.2d 968, 971, 217 USPQ 9, 11 (Fed. Cir. 1982); *see In re Babies Beat Inc.*, 13 USPQ2d 1729, 1731 (TTAB 1990) (holding registration was properly refused where applicant failed to comply with trademark examining attorney's request for copies of patent applications and other patent information); TMEP §1202.02(a)(v).

C. Competitor's advertising demonstrates that there are few alternative designs that include all of the functional advantages of the applicant's cable design.

When functionality is found based on other considerations, there is "no need to consider the [third *Morton-Norwich* factor regarding] availability of alternative designs, because the feature cannot be given trade dress protection merely because there are alternative designs available." *In re Becton, Dickinson & Co.*, 675 F.3d 1368, 1376, 102 USPQ2d 1372, 1378 (Fed. Cir. 2012) (quoting *Valu Eng'g Inc. v. Rexnord Corp.*, 278 F.3d 1268, 1276, 61 USPQ2d 1422, 1427 (Fed. Cir. 2002)); TMEP §1202.02(a)(v)(C). However, the Examining Attorney did make of record evidence showing that to achieve all of the functional advantages as the applicant's design, competitors use essentially the same design shown in the applied-for mark, including the curved outer contours. Thus, this is evidence of the lack of viable alternative designs with the same functional advantages.

As discussed above, the applicant's cable design has three significant functional advantages: (1) the resistance to being tangled, (2) the improved quality due to multiple conductors, and (3) the ability to accommodate additional functions, such as a microphone.

Competitors' advertising and promotional materials that extol specific utilitarian advantages of the applied-for product design or product packaging are strong evidence that the matter sought to be registered is functional. TMEP §1202.02(a)(v)(B); *see, e.g., In re Van Valkenburgh,* 97 USPQ2d 1757, 1763 (TTAB 2011); *In re Gibson Guitar Corp.*, 61 USPQ2d 1948, 1951 (TTAB 2001).

The following is a summary of some of the competitor advertising in the record touting the utilitarian advantages of similar types of flat headphone cables:

> "Here's something we have always despised: tangled cords. Here's something we have always loved: flat HDMI cables. Now, headphone maker JAYS is making what amounts to the perfect product: earbuds with tangle-free, flat cabling. . . . [W]e can't tell you how excited we are to finally grab a set of buds that don't take forever to unwind once shoved in our front pocket. . .

. The cord on all three models is the newly-developed flat, tangle-free 115cm TPE-cord, previously found only on considerably more expensive earphones." Hot Hardware, *JAYS Introduces Tangle-Free Flat Cabling On a-JAYS Earbuds*, http://hothardware.com/News/JAYS-Introduces-TangleFree-Flat-Cabling-On-aJAYS-Earbuds (viewed on Aug-15-2011, 15:40 EDT). Office action, 8/17/2011, TSDR, at 9.

"Tangle-free, ultra-flexible, and convenient flat cable design." Buy.com, *iLuv Ergonomic & Comfort Flat-wire In-Ear Headphone for iPhone, iPad iPod touch, nano, classic – ILV-13332-02*, http://www.buy.com/prod/iluv-ergonomic-comfort-flat-wire-in-ear-headphone-for-iphone-ipad-ipod/q/sellerid/18118498/loc/111/218212625.html (viewed on Aug-15-2011, 15:42 EDT). Office action, 8/17/2011, TSDR, at 10.

"Premium in-ear earbuds with tangle free 3ft flat-cable." Amazon.com, *Puregear 3.5mm Universal Premium Quality Flat-cable In-Ear Headphone / Headset with Mic for Apple iPhone 4 / iPod Touch 4th Generation / Motorola Droid X X2 / Samsung Galaxy S / HTC Sensation 4G / HTC EVO 3D / LG Revolution / Nokia N9 / HTC Thunderbolt (With Protective Box / Case)*, http://www.amazon.com/Puregear-Flat-cable-Generation-Revolution-Thunderbolt/dp/B005890D00 (viewed on Aug-15-2011, 15:47 EDT). Office action, 8/17/2011, TSDR, at 12.

"Tangle-free, ultra-flexible and convenient flat cable design." LG® Limited Goods, *JWIN Headphones IEP314BLK Ergonomic & Comfort Flat-Wire*, http://www.limitedgoods.com/itemView.php?ProdID=819980source=FroogleUSmedium=freecampaign=FroogleUS_InStock (viewed on Aug-15-2011, 15:53 EDT). Office action, 8/17/2011, TSDR, at 13.

"Flat cable design remains tangle-free when stored in pocket or backpack." Ebay®, *Flat 14 Luxmo 3.5mm Black Earphone Flat Cable Design*, http://cgi.ebay.com/FLAT-14-LUXMO-3-5mm-Black-Earphone-Flat-Cable-Design-/130542525949#vi-content (viewed on Aug-15-2011, 15:58 EDT). Office action, 8/17/2011, TSDR, at 15-16.

The applicant previously provided 10 hypothetical alternative designs, that the applicant asserts are functional equivalents to the applicant's design. Applicant's Brief, at 12 (referencing its first request for remand), 3-4 (including a representative sample). However, the applicant did not provide any

examples of third-party use of any of those alternative designs in commerce. Because the design the applicant seeks to register, including the curved outer contours, is so widely used by the applicant's competitors, who advertise the functional advantages of the design, those competitors, who are experts in the applicant's field, apparently view the applicant's design, including the curved outer contours, as superior to all of the applicant's proposed alternatives. Even if, despite their widespread adoption, the curved outer contours do not have functional advantages over other edge treatments, the fact that the applicant's competitors do not reference or highlight cable edge treatments in their advertising demonstrates that this aspect of such goods is a minor design element that does not outweigh the functional design elements that are consistently highlighted in this advertising. [12]

In addition to the 10 hypothetical examples, the applicant has also proffered examples of six competitor headphone cable designs actually in use in commerce: a round cable;[13] a triangular cable; a zipper-style cable; a round, fabric covered cable; a cable shaped like a shoelace; and a yarn covered cable, Applicant's Brief, at 4, 13, which the applicant asserts are designs that provide equivalent tangle-free functionality to the applicant's design.[14] Applicant's Brief, at 12-13. However, the triangular and round cable alternative designs clearly cannot include the multiple side-by-side conductors touted as

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[12] The applicant has argued that the third-party evidence is not sufficiently legible to compare the cable designs in that evidence with the applicant's product design. Applicant's Brief, at 7. As discussed in the generic refusal below, the record was previously supplemented to ensure the evidence in the record accurately represents the competitors' websites. However, to the extent that any of the edge treatments of these competitors' cables as displayed on those websites are not sufficiently legible to compare them with the applicant's design, this further demonstrates that Applicant and its competitors view such edge treatments as insignificant design elements. *In re Becton, Dickinson & Co.*, 675 F.3d at 1372, 102 USPQ2d at 1376 (finding that elements that were "hardly discernible when viewing the mark" were insignificant to overcome the finding that the overall design was functional). Were that not the case, there would be references in the product description and/or close-up views of the edge treatments in this advertising to highlight the inclusion of this element.

[13] The applicant has described the cable as "[c]ontains a ridge in the center of the cable"; however, the cables that connect to the ear buds are round. Applicant's Brief, at 4 n.3. The Examining Attorney notes that in the 11/19/2014 Denial of Reconsideration, this cable design was incorrectly included in the list of flat cables instead of in the list of round cables. The advertising for this product indicates that they are accompanied by a "travel-friendly cord wrap" that "makes it easy to carry the in-ears without tangling the cord," but the cables themselves are not described as tangle free.

[14] Contrary to the applicant's statement in its brief, at 13 ("This evidence stands unrefuted."), the applicant's examples of competitor designs were summarized and discussed in detail in the 11/19/2014 Denial of Reconsideration. Further, the paragraph immediately following this statement acknowledges that the Examining Attorney "dismissed Monster's examples of alternative designs." Applicant's Brief, at 13.

one of the primary functional advantages of the applicant's design. The zipper cable, shoelace cable, and yarn covered cables also do not appear to be wide enough to include the side-by-side conductors. Specifically, the yarn-covered cable appears to be yarn around a round cable, and the shoelace cable, while wide through most of its length, is bunched where it connects to the ear buds. Additionally, the zipper-style cable may scratch the wearer's face or stick to the wearer's clothing. The applicant's patent indicates that it is "desirable to orient the left and right split sections of the cable so that they lay flat against the user's face." Applicant's 2/13/2012 Response, TSDR, at 32, Background Art, ¶3. Thus, the zipper-style cable lacks this desirable quality. The applicant's other examples, attached to the 11/12/2014 Request for Remand, included designs that (1) were essentially the same as the applicant's design, (2) lacked some or all of the advantages of the applicant's design, and/or (3) were examples intended for use with over-the-ear or wireless headphones, and not the ear buds at issue here.[15] Thus, all of the commercially available designs that provide all of the functional advantages of the applicant's design are essentially the same as the applicant's design. As a result, the competitors' advertising, and the absence of real-world use of the applicant's proposed alternative designs, demonstrates that the product design is functional.

D. There is insufficient evidence in the record to support the applicant's assertion that there are viable alternative designs that are no more costly or difficult to manufacture

As discussed above, the applicant provided 10 hypothetical alternative designs, which the applicant has asserted would be no more expensive to manufacture than the applicant's design, and which would provide the same functionality as the applicant's design. Applicant's Brief, at 3-4, 12. The applicant previously asserted that its manufacturing process and costs are a trade secret. Applicant's 2/13/2012 Response, TSDR, at 1, §III.B.4. Thus, there is insufficient evidence in the record to evaluate

[15] The 11/19/2014 Denial of Reconsideration includes a summary of the applicant's evidence organized by category. The most significant examples of flat cables in that summary are also included below in support of the generic refusal.

the applicant's assertions regarding the cost comparisons for these designs. However, as discussed above, the lack of any competitor use of any of these 10 proposed alternative designs and the widespread use of designs that are essentially the same as the applicant's demonstrates that the applicant's competitors (experts in the applicant's field) do not view the alternative designs as providing the same competitive advantages as the applicant's design. Further, the fact that the applicant's manufacturing process and costs are a trade secret suggests they provide some competitive advantage over the hypothetical alternatives.

E. Conclusion

Thus, the applicant's three-dimensional configuration mark contains a number of advantages that are essential to the quality of the design, and the curved outer contours are a minor design element that is insufficient to overcome the overall functionality of the design. As a result the refusal to register the applicant's mark under Trademark Section 23(c), 15 U.S.C. §1091, on the basis that the mark contains functional matter, should be affirmed.

II. THE APPLICANT'S THREE-DIMENSIONAL CONFIGURATION MARK IS GENERIC

The Supreme Court distinguished between two types of trade dress - product design and product packaging. If the trade dress falls within the category of product design, it can never be inherently distinctive. *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 215, 54 USPQ2d 1065, 1069 (2000); TMEP §1202.02(b)(i).

Here, the applicant's goods are product design, and are thus not inherently distinctive. Consequently, the applicant applied for registration of its mark on the Supplemental Register. However, to be registered on the Supplemental Register, marks must be capable of acquiring distinctiveness, *i.e.*, they must not be generic.

In the context of product design, genericness may be found where the design is, at a minimum, so common in the industry that it cannot be said to identify a particular source. *Stuart Spector Designs,Ltd. v. Fender Musical Instruments Corp*., 94 USPQ2d 1549, 1555 (TTAB 2009). "Cases addressing product design suggest that the term 'genericness' covers three situations: (1) if the definition of a product design is overbroad or too generalized; (2) if a product design is the basic form of a type of product; or (3) if the product design is so common in the industry that it cannot be said to identify a particular source." *Id.* (*quoting Walker & Zanger Inc v. Paragon Industries Inc.*, 465 F.Supp.2d 956, 962, 84 USPQ2d 1981, 1985 (N.D. Cal. 2006). Genericness may be demonstrated by showing that competitors use the same or substantially similar product designs. *Id.*

As discussed above, the applicant's product design consists of a headphone cable with an oblong cross section. Specifically, the width of the cable is greater than the thickness and the cable has curved outer contours. The Examining Attorney made of record numerous examples of competitor use of the same or substantially similar product designs. Thus, the third situation applies, the applicant's product design is so common in the industry that it cannot be said to identify a particular source.

The following is a summary of the evidence of record showing that the applicant's product design, including the curved outer contours, is commonly used by its competitors:

- EDM Universe – The evidence includes printouts from the brand owner's website, including close-up images of the curved outer contour. Office action, 7/8/2014, TSDR, at 2-4.

- MEElectronics – The evidence includes printouts from a video advertisement on youtube.com, that include close-ups of the cable's curved outer contour, and a list of retail outlets for the goods from the applicant's website. Office action, 7/8/2014, TSDR, at 5-9.

- Velodyne – The evidence includes printouts from the applicant's website, including close-ups of the cable design, printouts from a video advertisement on youtube.com that clearly show the curved contours, and printouts from amazon.com (also clearly showing contours), and bestbuy.com. Office action, 7/8/2014, TSDR, at 10-17.

- SOUL – The evidence shows goods sold under this mark through the brand owner's website and RadioShack. Office action, 2/23/2012, TSDR, at 13 (curved contours are especially visible in this example); Office action, 9/10/2012, TSDR, at 39; Office action, 7/8/2014, TSDR, at 82, 96 (curved contours are especially visible in this example).

- SONY – The evidence shows goods sold under this mark through the brand owner's website, and other retail websites. The applicant's website states that "Sony Corporation is a leading manufacturer of audio, video, communications, and information technology products for the consumer and professional markets," with "annual sales of approximately $79 billion for the fiscal year ended March 31, 2012." Office action, 2/23/2012, TSDR, at 12; Office action, 9/10/2012, TSDR, at 29, 39-41; Office action, 7/8/2014, TSDR, at 63-65, 68, 85 (reprints of previously attached evidence that applicant indicates was illegible).

- JVC – The record includes printouts from this brand owner's website, which indicate that "the JVC brand name has been associated with the very best in audio and video technology" since 1927, and indicates the goods are available for sale through a variety of retail outlets. Office action, 9/10/2012, TSDR, at 33-36, 39, 41; Office action, 7/8/2014, TSDR, at 56, 57, 62-69, 71, 77, 90, 98-100 (reprints of previously attached evidence that applicant indicates was illegible) (dimensions of cable are included at 98).

- PUREGEAR – The record includes printouts from the brand owner's website showing the flat cable design. This website indicates this brand owner is a "leader in wireless accessory design, manufacturing and distribution." The brand owner's website indicates the goods are available for sale through a variety of well-known retail outlets, and the provided evidence includes an example of the goods available for sale through amazon.com. Office action, 8/17/2011, TSDR, at 12; Office action, 9/10/2012, TSDR, at 12-14.

- JAYS brand (including A-Jays) - The record includes printouts from the brand owner's website, advertising the tangle-free cable design. Although this brand owner is based in Sweden, the goods are sold in the United States and the brand owner's website lists several reviews and awards from U.S. publications and websites. The evidence also included a review of these goods from the Hot Hardware blog. Office action, 8/17/2011, TSDR, at 9; Office action, 9/10/2012, TSDR, at 2-4 (the first of these pages includes a close-up of the curved contours in the a-JAYS One+ model); Office action, 7/8/2014, TSDR, at 18-48 (reprints of previously attached evidence that applicant indicates was illegible).

- ILUV brand (including JWIN and TATZ marks) – The record includes printouts from the brand owner's website, which describes the brand as "a worldwide premium brand," and indicates the products have been featured in a variety of publications and have won awards. The evidence shows that these goods are sold through the brand owner's website and through a variety of well-known retail outlets, including Best Buy. The evidence also demonstrates that these goods are available for sale on third-party sites, such as buy.com, limitedgoods.com, amazon.com. Office action, 8/17/2011, TSDR, at 10, 13-14; Office action, 9/10/2012, TSDR, at 5-

11 (see in particular the iEP314 model, at 9, and the i301 model, iEP374, and Neon Sound models, at 7); Office action, 7/8/2014, TSDR, at 49-54 (reprints of previously attached evidence that applicant indicates was illegible).

- LUXMO – The record includes printouts from the brand owner's website showing earbuds with a flat cable design, and evidence showing goods sold under this mark through EBAY and amazon.com. Office action, 8/17/2011, TSDR, at 15-16; Office action, 2/23/2012, TSDR at 4; Office action, 9/10/2012, TSDR, at 15-16.

- SKULLCANDY – The record includes printouts from the brand owner's website showing ear buds with a flat cable design. The record also shows examples of these goods sold through bestbuy.com. Office action, 9/10/2012, TSDR, at 17-18, 39, 41; Office action, 7/8/2014, TSDR, at 56, 57, 59, 61-62, 64, 68-69, 73, 77, 79, 81, 87 (reprints of previously attached evidence that applicant indicates was illegible).

- GOGROOVE – The evidence shows goods sold under this mark available for sale through amazon.com, and printouts from the brand owner's websites showing examples of ear buds with the flat cable design, and a list of well-known retail outlets where the goods are available for sale. Office action, 2/23/2012, TSDR, at 5; Office action, 9/10/2012, TSDR, at 20-21.

- JLAB brand (including JBUDS) – The evidence shows goods sold under this mark available for sale through amazon.com and similar goods from the brand owner's website. Office action, 2/23/2012, TSDR, at 6-7; Office action, 9/10/2012, TSDR, at 22-23 (see in particular, the JBuds J4 model, at 22).

- ROCKETFISH - The evidence includes printouts of goods from this brand owner's website, and indicates these goods are also available for sale through retail outlets, including Best Buy. Office action, 9/10/2012, TSDR, at 30-32, 41; Office action, 7/8/2014, TSDR, at 56 (reprint of previously attached evidence that applicant indicates was illegible).

- PHILIPS - The evidence includes printouts of goods from this brand owner's website and bestbuy.com. Office action, 9/10/2012, TSDR, at 37, 41; Office action, 7/8/2014, TSDR at 73, 85, 92 (reprints of previously attached evidence that applicant indicates was illegible).

The applicant's own evidence, attached to the 11/12/2014 Request for Remand, includes additional examples of third-party use of the applicant's product design. The following is a summary of some of those examples:

- Ecko Unltd. (from bestbuy.com, Exhibit 5). The curved outer contours are clearly visible in this example.

- Maxell – MaxMusic Earset (from bestbuy.com, Exhibit 8). This example includes a side view of the curved outer contour.

- SYBA Multimedia – Oblanc Earset (from bestbuy.com, Exhibit 11). This design includes the curved outer contours.

- Urbanears – Kransen Earset (from bestbuy.com, Exhibit 13). This design includes curved outer contours.

- GGMM Hummingbird Earphones (from amazon.com, Exhibit 18). This design includes curved outer contours.

- AKG K 375 (from akg.com, Exhibit 29)

- AKG K3003I (from akg.com, Exhibit 31)

- Harman Kardon AE and NI models (from harmankardman.com, Exhibit 45-46)

- Klipsch X11i In-ear Headphones (from klipsch.com, Exhibit 54-55)

The applicant has argued that the evidence made of record by the Examining Attorney in support of this refusal was not sufficiently legible at the time its expert reviewed it (prior to the 2/16/2014 Request for Remand). Applicant's Brief, at 14-15. The applicant was subsequently provided detailed instructions on accessing the evidence using the Download PDF option in TSDR and specific pages of evidence were recaptured and attached to the 7/8/2014 Denial of Reconsideration, as referenced in the summary above. The applicant's brief does not acknowledge the additional copies of the evidence or the detailed instructions for accessing that evidence. The Examining Attorney has also highlighted in the summary above specific instances of evidence where the curved contours are especially clear. Thus, there is significant legible evidence in the record to demonstrate that the applied-for mark is generic.

The applicant has also argued that sales and marketing information for the third-party sources has not been provided. Applicant's Brief, at 12. This argument was provided in a previous request for remand and as indicated in the summary above, the Examining Attorney supplemented the record to

show specific retail and on-line retail outlets where the parties' goods may be purchased, and to include sales and marketing information from the third-party websites, when available. Many of these examples were first attached to the initial Office action issued in 2011 and additional information was added later, thus showing continuous use of these designs by several of these sources. The website belonging to Sony, in particular, includes annual sales data. Almost all of the above examples of headphone cables are available through the Best Buy on-line retail store and/or Amazon.com, and through the mark owner's websites. The majority of the applicant's rebuttal evidence was obtained almost exclusively from Best Buy's on-line retail store, and also included printouts from mark owner websites, printouts from Amazon.com, and printouts from Target's retail store. The applicant also previously included Best Buy in a list of "major retail chains." Applicant's 2/13/2012 Response, TSDR, at 1, §I.B (the second section identified as B) ¶5. Thus, the applicant's own evidence demonstrates that Best Buy and Amazon.com have sufficient market penetration/commercial success for evidence obtained from these websites to be relied upon by the TTAB.

Further, material obtained from the Internet is generally accepted as competent evidence. *See In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202-03 (TTAB 2009) (accepting Internet evidence to show relatedness of goods in a likelihood of confusion determination); *In re Rodale Inc.*, 80 USPQ2d 1696, 1700 (TTAB 2006) (accepting Internet evidence to show genericness); *In re White*, 80 USPQ2d 1654, 1662 (TTAB 2006) (accepting Internet evidence to show false suggestion of a connection); *In re Joint-Stock Co. "Baik"*, 80 USPQ2d 1305, 1308-09 (TTAB 2006) (accepting Internet evidence to show geographic significance); *In re Consol. Specialty Rests. Inc.*, 71 USPQ2d 1921, 1927-29 (TTAB 2004) (accepting Internet evidence to show geographic location is well-known for particular goods); *In re Gregory*, 70 USPQ2d 1792, 1793, 1795 (TTAB 2004) (accepting Internet evidence to show surname significance); *In re Fitch IBCA Inc.*, 64 USPQ2d 1058, 1060-61 (TTAB 2002) (accepting Internet evidence to show descriptiveness); TBMP §1208.03; TMEP §710.01(b).

The applicant has also asserted that the mark cannot be generic because its evidence also includes numerous examples of round headphone cables. There is no requirement that a particular product design be the most widely used design for the design to be generic. In particular, in the *Stuart Spector Designs Ltd. v. Fender Musical Instruments*, 94 USPQ2d 1549, 1555 (TTAB 2009), cited by the applicant, Applicant's Brief, at 14-15, the Board found that three different guitar designs were so widely used that each of the designs was generic. Thus, the fact that some sources sell round cables does not overcome the finding that cables with an oblong cross section are so widely used that this design is incapable of acquiring distinctiveness.

The applicant has asserted that its product design is "worthy of trademark protection" because the curved outer contours have "aesthetic value." Applicant's Brief, at 10. However, the fact that product designs possess aesthetic value is the reason the Supreme Court found that product design can never be inherently distinctive. *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. at 213, 54 USPQ2d at 1069. Product design almost invariably serves purposes other than source identification, and consumers are aware that even the most unusual product design is intended not to identify the source of the goods, but to render the product itself more useful or appealing. *See id.*; *In re Slokevage*, 441 F.3d 957, 962, 78 USPQ2d 1395, 1399 (Fed. Cir. 2006); TMEP §1202.02(b)(i). Thus, the aesthetic value of the applicant's design merely renders the product more appealing, and demonstrates why so many of the applicant's competitors have adopted the same product design, resulting in the design being so commonly used as to be incapable of acquiring distinctiveness.

The applicant has also asserted that its mark is capable of acquiring distinctiveness because Beats Electronics has taken a trademark license for the mark. Applicant's Brief, at 15. However, neither the applicant nor Beats Electronics includes any reference to the design as a trademark in any of the

advertising material made of record either by the Applicant or the Examining Attorney.[16] In particular, the Applicant made of record additional articles discussing the subsequent acquisition of Beats Electronics by Apple, and those articles focus on Beats' "can"-style headphones (not ear buds) and Beats' "ubiquitous" "lower-case 'b'" mark. Applicant's 6/18/2014 Request for Remand, Exhibits B and C.

The widespread competitor use of cables with an oblong cross sectional design is sufficient to show that the applicant's headphone cable design is generic. However, it is noteworthy that even though the applicant claims use of the mark since July, 2008, there is not one example in the record of the applicant even attempting to use "look-for" advertising or in any other way highlight the applied-for product design as a source identifier for the applicant's goods.

As a result, due to the widespread use of the applicant's three-dimensional cable configuration by its competitors, the mark design is incapable of acquiring distinctiveness and the refusal to register the mark under Trademark Act 23, 15 U.S.C. §1091, on the basis that the mark is generic, should be affirmed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the refusal to register the applicant's mark under Trademark Section 23(c), 15 U.S.C. §1091, on the grounds that the applied-for mark is functional, should be affirmed. Additionally, the refusal to register the applicant's mark under Trademark Act Section 23, 15 U.S.C. §1091, on the grounds that the applied-for mark is generic should be affirmed.

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[16] Further, the referenced agreement was entered into as a necessary replacement to a previous licensing agreement to address the signatories' decision to cease cobranding of headphones containing the product design shown in the applied-for mark. *See* Applicant's 8/22/2012 Response, at 1, §I.C. ("To the extent that the BEATS line of products will continue to offer the same design that forms the basis of this Application, it will do so with the authorization of Applicant."); Applicant's 2/13/2012 Response, TSDR, at 1, §I.B ("Applicant notes that there are upcoming changes with respect to its relationship with Dr. Dre, but the Mark will still be embodied in Applicant's products."), Exhibit D, TSDR at 9-11 ("Beats Electronics Is Breaking Up with Monster").

Respectfully submitted,

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