

**This Opinion is not a  
Precedent of the TTAB**

Hearing: January 24, 2019

Mailed: May 13, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Creative Edge Design Group, Ltd.*  
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Serial No. 87287662  
—

Sandra M. Koenig and Brendan J. Goodwine of Fay Sharpe LLP  
for Creative Edge Design Group, Ltd.

Jonathan R. Falk, Trademark Examining Attorney, Law Office 111,  
Chris Doninger, Managing Attorney.

—  
Before Kuhlke, Greenbaum and Goodman  
Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

A typographical error in the May 9, 2019 decision of the Board is corrected. On page one of the attached decision, the designation is amended to indicate the decision is not a precedent. The period for filing any appeal of this opinion continues to run from the date of the original mailing.

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Before Kuhlke, Greenbaum and Goodman  
Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Creative Edge Design Group, Ltd. (Applicant) seeks registration on the Principal Register of the trade dress shown below for “milk,” in International Class 29.<sup>1</sup>

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<sup>1</sup> Application Serial No. 87287662 filed on January 3, 2017, based upon Applicant’s allegation of first use and first use in commerce on January 11, 2002 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a).



The mark is described as follows:

The mark consists of a three-dimensional configuration of product packaging in the form of a bottle. The bottle is generally cuboidal in shape and has a substantially flat and square shaped top surface and generally flat sides. A handle forms the upper part of the corner defined by two of the side walls and extends to the flat top surface of the bottle. The matter shown in phantom lines is not claimed as a feature of the mark.

Color is not claimed as a feature of the mark.

The Examining Attorney has refused registration under Section 2(e)(5), 15 U.S.C. § 1052(e)(5), on the ground that the proposed mark is functional. When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed, and an oral hearing was held on January 24, 2019. We affirm the refusal to register.

#### I. Functionality

Under the statute, functional matter is unregistrable. 15 U.S.C. § 1052(e)(5) (“No trademark by which the goods of the applicant may be distinguished from the goods

of others shall be refused registration on the principal register on account of its nature unless it ... (e) Consists of a mark which ... (5) comprises any matter that, as a whole, is functional”). Matter is functional if “it is essential to the use or purpose of the article or if it affects the cost or quality of the article.” *TraFFix Devices Inc. v. Marketing Displays Inc.*, 532 U.S. 23, 58 USPQ2d 1001, 1006 (2001) (citation omitted). “To support a functionality rejection in proceedings before the Board, the PTO examining attorney must make a *prima facie* case of functionality, which if established must be rebutted by ‘competent evidence.’” *In re Becton, Dickinson and Co.*, 675 F.3d 1368, 102 USPQ2d 1372, 1376 (Fed. Cir. 2012) (quoting *In re Teledyne Indus.*, 696 F.2d 968, 217 USPQ 9, 11 (Fed. Cir. 1982)). In making our determination of functionality we apply the test first set forth in *In re Morton-Norwich Products, Inc.*, 740 F.2d 1550, 213 USPQ 9 (CCPA 1982). *See Becton, Dickinson and Co.*, 102 USPQ2d at 1377, (citing *Morton-Norwich*, 213 USPQ at 15-16). These factors are not exclusive, however, for functionality “depends upon the totality of the evidence.” *Valu Engineering Inc. v. Rexnord Corp.*, 278 F.3d 1268, 61 USPQ2d 1422, 1424 (Fed. Cir. 2002). *Morton-Norwich* identifies the following factors to be considered in determining whether a particular design is functional: (1) the existence of a utility patent disclosing the utilitarian advantages of the design; (2) advertising materials in which the originator of the design touts the design’s utilitarian advantages; (3) the availability to competitors of functionally equivalent designs; and (4) facts indicating that the design results in a comparatively simple or cheap method of manufacturing the product. *Morton-*

*Norwich*, 213 USPQ at 15-16. It is not required that all four factors be proven in every case, nor do all four factors have to weigh in favor of functionality to support a refusal. Nevertheless, in reaching our decision, we will review all four factors. See *AS Holdings, Inc. v. H & C Milcor, Inc.*, 107 USPQ2d 1829, 1833 (TTAB 2013).

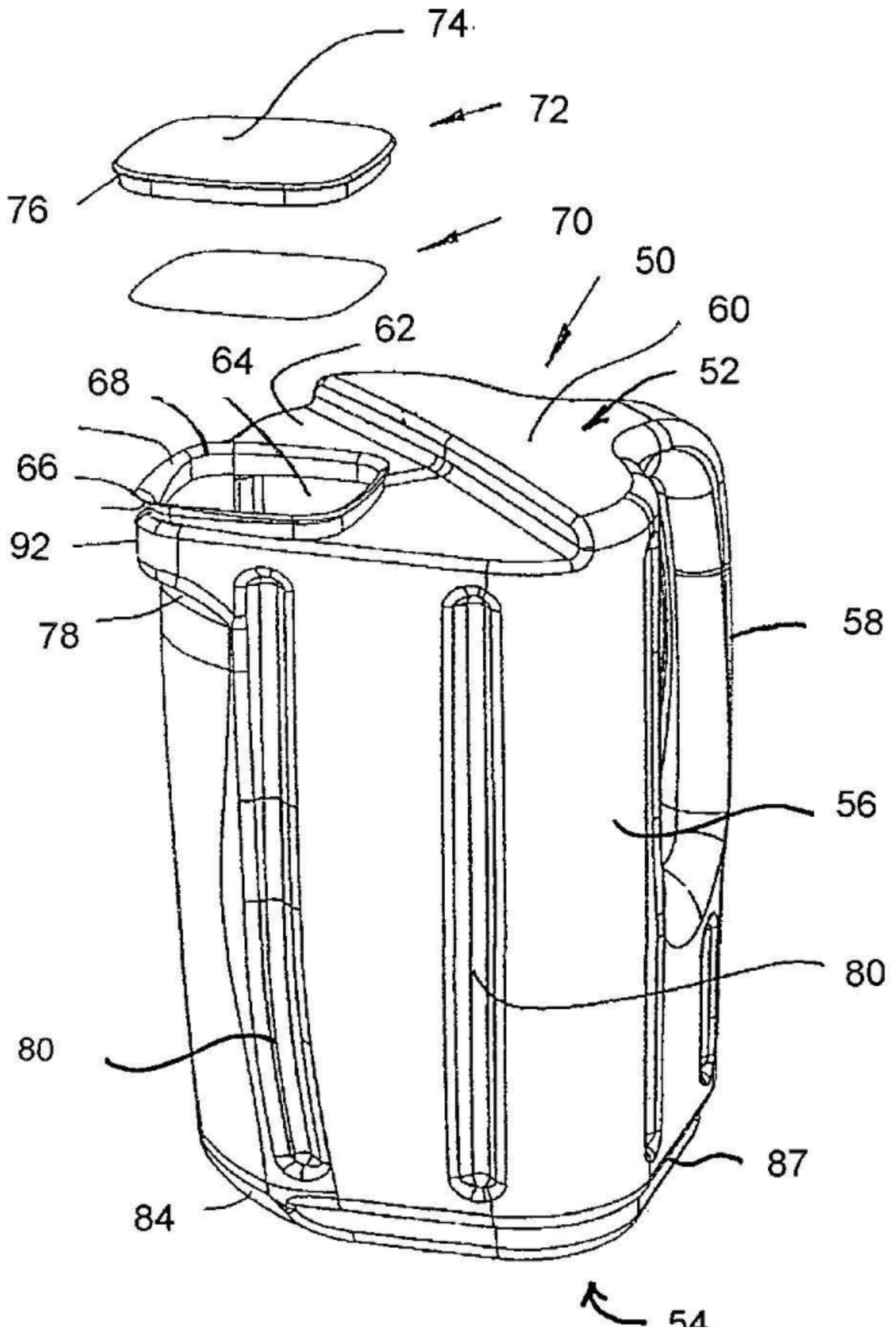
A. Utility Patent

With regard to the first factor, the existence of a utility patent “is strong evidence that the features claimed therein are functional” and “[w]here the expired patent claimed the features in question, one who seeks to establish trade dress protection must carry the heavy burden of showing that the feature is not functional, for instance by showing that it is merely an ornamental, incidental, or arbitrary aspect of the device.” *TrafFix*, 58 USPQ2d at 1005. Moreover, “statements in a patent’s specification illuminating the purpose served by a design may constitute equally strong evidence of functionality.” *Becton, Dickinson and Co.*, 102 USPQ2d at 1377.

The Examining Attorney relies on United States Patent No. 6068161 owned by Applicant, for “Stackable, Thin-walled Containers Having a Structural Load Distributing Feature Permitting Caseless Shipping” as shown in the drawing below.<sup>2</sup>

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<sup>2</sup> March 30, 2017 Office Action at 2-49. Citations to the record are to the Trademark Status and Document Retrieval (TSDR) database.



The Examining Attorney and Applicant disagree as to whether the patent claims the specific design features at issue. Applicant contends that its expired patent does not “discuss the utilitarian advantages of the cuboidal shape, size, and appearance of the packaging design shown in Applicant’s Mark.” Reply Br. 10 TTABVUE 3. Applicant further explains that the “‘central advance’ of the 161 Patent is the structural load distributing features that transfer loads from the top surface to the base, which allows for the containers to be efficiently stacked on top of one another.” *Id.* at 4. But here, Applicant asserts, it “does not seek to protect these features or to prevent competitors from the legitimate use of such features outside of the utility patent [and] [t]hese features, in fact, were removed in an amended drawing submitted on April 24, 2018.” *Id.*

The abstract of the patent describes the patent as:<sup>3</sup>

A liquid container for a comestible product such as milk or juice includes a base having a substantially planar region, a top surface having a substantially planar region, a top surface having a substantially planar region parallel to the substantially planar region of the base and having a pour spout. A sidewall is integrally formed with and extends between the base and top surface, and includes a structural load distributing feature that transfers loads from the top surface to the base. A handle is interposed between the base and top surface and integrally formed with the base, top surface, and sidewall. The containers can be arrayed into units and stacked on top of one another.

The invention is summarized as follows:<sup>4</sup>

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<sup>3</sup> March 30, 2017 Office Action at 2.

<sup>4</sup> *Id.* at 44-45.

The present invention contemplates new and improved containers which eliminate the need for cases or shippers and which provide increased strength for supporting static or dynamic vertical loads, thereby facilitating stacking on pallets without the use of cases while maintaining costs for manufacture.

While some of the patent claims concern the ribs that are not part of Applicant's claimed trademark (e.g., claims 2, 3, 4), many bear directly on the applied-for trademark, including a cuboidal shape:<sup>5</sup>

1. A molded plastic container used in caseless shipping of a product, such as milk or juice, the plastic container comprising: a base having a substantially planar region; a top surface having a substantially planar load bearing region parallel to the substantially planar region of the base; a sidewall integrally formed with and extending between the base and top surface generally parallel to a longitudinal axis of the container, the sidewall enclosing an internal cavity; a pour spout disposed in the top surface offset from the longitudinal axis of the container; a handle extending from the sidewall and defining a finger receiving region, the handle interposed between the base and top surface and integrally formed with the base, top surface, and sidewall; and a structural load distributing feature formed therein for conveying bearing loads from the top surface to the base.

5. The container of claim 1 wherein the sidewall includes a series of side walls and selected ones of the sidewalls include substantially planar regions for abutting against substantially planar regions of sidewalls of like containers.

6. This container of claim 1 further comprising a rounded region along an edge portion of the base beneath the pour spout to facilitate pouring.

7. The container of claim 1 further comprising a structural load distributing feature formed therein for conveying bearing loads from the top surface to the base, the handle extending downwardly from the top surface toward the base and the

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<sup>5</sup> *Id.* at 49.

structural load distributing feature substantially aligned with the handle for transferring loads from the handle to the base.

8. The container of claim 1 further comprising a resealable lid operatively associated with the pour spout.

9. The container of claim 1 wherein the container is a thin-walled material.

11. The container of claim 1 wherein the pour spout includes an air opening disposed in spaced relation to a pour opening.

12. The container of claim 1 wherein the pour spout is disposed opposite the handle adjacent an edge of the container.

13. The container of claim 1 wherein the pour spout is disposed opposite the handle adjacent an edge of the container.

14. A blow-molded plastic dairy container comprising: a base having a substantially planar load bearing region; a top surface having a substantially planar load bearing region parallel to the substantially planar region of the base and having a pour spout spaced from the substantially planar region of the top surface and disposed adjacent an edge of the top surface; a sidewall extending between the base and top surface, the sidewall enclosing an internal cavity in fluid communication with the pour spout; a handle interposed between the base and top surface; and a structural load distributing feature formed in at least the sidewall for conveying bearing loads from the top surface to the base.

16. The container of claim 14 wherein the handle is disposed at a juncture of contiguous side wall portions and has a finger receiving region.

17. The container of claim 14 wherein the handle is integrally formed with the base, top surface, and sidewalls.

18. The container of claim 14 wherein the structural load distributing feature is integrally formed in at least the sidewall.

In addition, disclosures in the patent reference the cost effectiveness of stackability in containers:<sup>6</sup>

The present invention relates generally to receptacles and container structures. Specifically, the invention relates to molded, thin-walled containers that are capable of being stacked upon one another for storage and shipping purposes. For the purpose of clarification, caseless shipping is the ability to deliver products in a shipping container which requires no returnable, disposable, or replaceable cases. ...

It is envisioned that caseless shipping would have enormous benefits and labor savings associated with, for example, the distribution ... The current mode of handling cases have a per unit distribution expense which can be drastically reduced. Based on simple arithmetic, it has been estimated that the improvement might be as much as 30. ... It would, therefore, be desirable to provide a container structure which provides for stackability and which eliminates the need for cases or shippers during bulk transport. It would be further desirable to provide a container structure which provides enhanced strength, as well as the above-mentioned consumer benefits, without adding to the material costs involved in its manufacture.

Figures 13 and 21 show embodiments very similar to the applied-for design:<sup>7</sup>

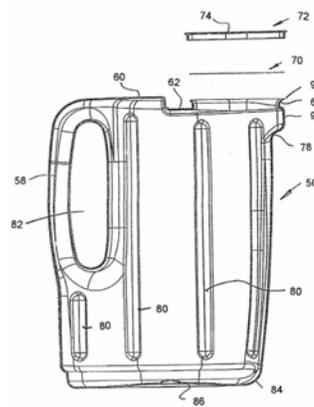


Fig. 13

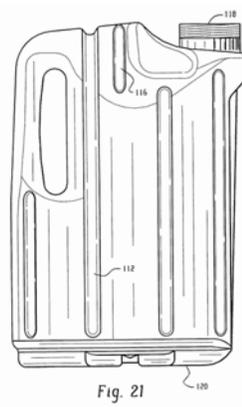


Fig. 21

<sup>6</sup> *Id.* at 43-44.

<sup>7</sup> *Id.* at 12, 20.

The patent discloses that “Fig. 36 shows a stacking arrangement for these types of containers. The dimensions of the rectangular prism ... are selected such that the height of the container is preferably twice the width and depth of the container. This construction lends itself to the stacking arrangement illustrated in Fig. 36.”<sup>8</sup>

We take judicial notice of the following definitions:<sup>9</sup>

Cuboidal: resembling a cube in form.

Cube: a solid bounded by six equal squares, the angle between any two adjacent faces being a right angle.

Planar: of or relating to a geometric plane; flat or level.

Clearly, the cuboidal feature in Applicant’s design is directly described by the following wording in the patent:

Claim 1. ... a base having a substantially planar region; a top surface having a substantially planar load bearing region parallel to the substantially planar region of the base; a sidewall integrally formed with and extending between the base and top surface generally parallel to a longitudinal axis of the container, the sidewall enclosing an internal cavity ...

Claim 5 The container of claim 1 wherein the sidewall includes a series of side walls and selected ones of the sidewalls include substantially planar regions for abutting against substantially planar regions of sidewalls of like containers.

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<sup>8</sup> *Id.* at 35, 47.

<sup>9</sup> RANDOM HOUSE UNABRIDGED DICTIONARY (2019) retrieved from [www.dictionary.com](http://www.dictionary.com). The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

Moreover, while such packaging could be in a square rather than rectangular form, as shown above with Figure 36, the patent discloses that a rectangular form is preferable.

The utility patent need not “claim the exact configuration for which trademark protection is sought in order to undermine an applicant’s assertion that an applied-for mark is not” functional. *Becton, Dickinson and Co.*, 102 USPQ2d at 1377. Rather, as noted above, “a patent’s specification illuminating the purpose served by a design may constitute equally strong evidence of functionality.” *Id.* The claims set forth above taken together with the disclosures and preferred embodiments reveal the functionality of the design. The applied-for aspects in the application, “generally cuboidal in shape,” “substantially flat and square shaped top surface,” “generally flat sides” and “handle form[ing] the upper part of the corner defined by two of the side walls and extend[ing] to the flat top surface of the bottle,” are all referenced in the utility patent and are not “merely an ornamental, incidental, or arbitrary aspect of the packaging.” *TrafFix* 52 USPQ2d at 1005. All aspects are functional, and the sum of individually functional parts does not result in a protectable mark. The patent claim includes any three dimensional rectangular shape; i.e., a cuboidal shape. The utilitarian advantage of the cuboidal configuration is explicitly set out in the patent; it facilitates stackability, which in turn, substantially reduces the costs to distribute and sell milk.

We find the ’161 patent discloses the utilitarian advantages of the applied-for packaging. Given the strong weight to be accorded patent evidence under *TrafFix*,

we find that the patent is sufficient to establish *prima facie* that the design is functional.

## B. Advertising

Under this factor, we consider evidence regarding “advertising materials in which the originator of the design touts the design’s utilitarian advantages.” *Valu Engineering v. Rexnord*, 61 USPQ2d at 1426 citing *Morton-Norwich*, 213 USPQ at 15-16. The Examining Attorney submitted excerpts from news articles posted during the release of Applicant’s milk jug on the market that contain photographs of the applied-for mark and include claims of the benefits of the design. The representative sampling from the Examining Attorney’s brief is reproduced below:

Attached evidence from Wikipedia that states: “Square milk jugs are stackable and 9% more can be shipped in the same space. [1] They also eliminate the need for milk crates, which are required for traditional bell-shaped jugs,” “Because more milk fits on each truck, shipping costs can be reduced by half; this reduces the number of trucks on the road each year by 11000 (US estimate). Stores that required five shipments per week in traditional containers now only require two, resulting in lower fuel consumption. [4] Instead of being packed in reusable crates, the square jugs are shrink wrapped for shipment.” [Attachment to Final Office action dated 10/24/17 at page 2].

- Attached evidence from the *New York Times* that states: “The jugs are cheaper to ship and better for the environment, the milk is fresher when it arrives in stores, and it costs less.” “Sam’s Club said that was a savings of 10 to 20 cents a gallon compared with old jugs.” “Today, they bottle and ship two different ways. The old way is inefficient and labor-intensive, according to members of the family. The other day, a worker named Dennis Sickafoose was using a long hook to drag plastic crates loaded with jugs of milk onto a conveyor belt. The crates

are necessary because the shape of old-fashioned milk jugs prohibits stacking them atop one another. The crates take up a lot of room, they are unwieldy to move, and extra space must be left in delivery trucks to take empty ones back from stores to the dairy. But with the new jugs, the milk crates are gone. Instead, a machine stacks the jugs, with cardboard sheets between layers. Then the entire pallet, four layers high, is shrink-wrapped and moved with a forklift.” “The company estimates this kind of shipping has cut labor by half and water use by 60 to 70 percent. More gallons fit on a truck and in Sam’s Club coolers, and no empty crates need to be picked up, reducing trips to each Sam’s Club store to two a week, from five — a big fuel savings. Also, Sam’s Club can now store 224 gallons of milk in its coolers, in the same space that used to hold 80.” [Attachment to Final Office action dated 10/24/17 at page 3].

- Attached evidence from *Daily Tech* that states: “The square design allows it to be packed more tightly saving shelf space and shipping costs...On average they were around 1- to 2-cents a gallon cheaper than traditional jugs.” “Another benefit is that filling the jugs at the farm processing facilities takes less labor as they can be stacked. With traditional designs, crates were used during filling and shipping, which were unwieldy and space consuming. There were also sanitary concerns about the crates used to transport the classic design.” [Attachment to Final Office action dated 10/24/17 at page 4].

- Attached evidence from *Serious Eats* that states: “The gallon milk container has a new look at Wal-Mart and Costco—one that’s designed to cut shipping costs, be more environmentally friendly, and keep milk fresher. It also costs less, at \$2.18 at one Sam's Club, down from \$2.58.” [Attachment to Final Office action dated 10/24/17 at page 5].

- Attached evidence from *Sustainable is Good* that states: “The square jug packaging will help retailers significantly reduce resources and materials used to package and transport milk. The square container jug reduces waste compared to the currently standard #2 HDPE gallon milk jug which can only be stacked in layers if it’s inside another plastic returnable case or a corrugated box.” “The

square or case-less milk jugs do not require crates or racks for shipping and storage. Instead, the newly designed milk gallon is selfstacking.” [Attachment to Final Office action dated 10/24/17 at page 6].

- Attached evidence from *Adweek* that states: “It’s a more eco-friendly design that allows jugs to be stacked for shipment instead of loaded into plastic crate.” [Attachment to Final Office action dated 10/24/17 at page 7].

- Attached evidence from *Environmental Leader* that states: “Wal-Mart says the new milk jugs require no crates or racks for shipping and storage (which saves on water to clean the racks and crates), and are self-stacking because the spout is flatter and each gallon can rest on another during transport, as well as while on display.” “Trucks can also accommodate 4,704 more gallons per truck or nine percent of their capacity. The jugs are cheaper to ship and better for the environment. The milk is fresher when it arrives in stores, and it costs less. Sam’s Club says it is saving 10 to 20 cents a gallon.” [Attachment to Final Office action dated 10/24/17 at page 8].

- Attached evidence from *The Human Factor Blog* that states: “A square milk jug has lots of benefits; because of its square shape, they stack more efficiently compared to existing milk jugs. The shape makes it so that cartons of milk won’t require milk crates. The net result is reduced transportation costs.” [Attachment to Final Office action dated 10/24/17 at page 8].

Applicant’s response to the evidence is to point out that it has applied for use in connection with “milk” and not for the jug itself, so the advantages to the distribution of the milk brought about by the jug’s shape are not functional for milk. Applicant points to the commentary in the articles noting the difficulty in pouring from this jug. In other words, its stacking functionality is complete once it arrives at the store, and when the milk consumer arrives to buy milk, the appearance of the

packaging, the “cuboidal” container, is inherently distinctive and perceived as a trademark.

The fact that the configuration is for packaging for milk does not remove its utilitarian aspect from the applied-for goods. The stackability feature is a utilitarian advantage whether the applied-for goods are containers for milk or milk. This advantage begins when the containers are filled with milk, and continues as the milk is distributed to and then sold at the store. In *In re Mars, Inc.*, 105 USPQ2d 1859 (TTAB 2013), the applicant applied for registration of the three-dimensional configuration of packaging for “pet food.” The Board found it to be generic, in part, because the attributes “permit[ed] stacking of containers.” *Id.* at 1866.

While this evidence is not Applicant’s advertising, it does tend to show consumer exposure to the touting of these functional aspects, which supports a finding that Applicant’s mark is functional.

### C. Alternative Designs

Applicant argues that there are “a multitude of alternatives to the applied-for configuration available to competitors” and submitted the following third-party products as examples of alternative designs.<sup>10</sup>

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<sup>10</sup> April 24, 2018 Response at 4-5, 7.



However, based on these pictures, it is not clear if they all have the same caseless stackability feature, and they may have aspects that would not be amenable to caseless stacking. These third-party examples do not strongly support Applicant’s argument regarding the availability of other designs. Moreover, once 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.” *Becton, Dickinson and Co.*, 102 USPQ2d at 1378. See also *TrafFix*, 58 USPQ2d at 1006 (“Where the design is functional ... there is no need to proceed further to consider if there is a competitive necessity for the

feature.”). The fact that other competitive alternatives may exist does not alter the initial finding that the configuration is functional and, thus, unregistrable. *See also In re Bose Corp.*, 772 F.2d 866, 227 USPQ 1, 5-6 (Fed. Cir. 1985).

Accordingly, we conclude that the evidence of alternative designs does not support a finding of non-functionality.

#### D. Cost of Manufacturing

The information regarding the comparative costs of manufacturing for different designs resides with the Applicant. Applicant argues without evidentiary support that “[i]n order to manufacture a milk container bearing the applied-for configuration, a manufacturer must make significant changes to its existing manufacturing and production lines, all at great expense.” The patent and articles show that the cost advantage comes not from the manufacturing process, but because the configuration provides “increased strength for supporting static or dynamic vertical loads, thereby facilitating stacking on pallets without the use of cases while maintaining costs for manufacture.”<sup>11</sup> Thus, while the manufacturing cost may not be less, the resulting product reduces costs for distributing and selling milk. Overall we find that the record is not sufficient for us to make a determination on this factor and we consider it neutral in our analysis. Moreover, even if the container is not “comparatively simple or cheap” to manufacture, this does not mean that the design is not functional. *In re Dietrich*, 91 USPQ2d 1622, 1637 (TTAB 2009); *In re American National Can Co.*, 41 USPQ2d 1841, 1844-45 (TTAB 1997).

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<sup>11</sup> March 30, 2017 Office Action at 45.

## II. Analysis

As noted above, the statute prohibits registration of a configuration that, “as a whole, is functional.” 15 U.S.C. §§ 1052(e)(5) and 1091(c). The record shows the applied-for features, “generally cuboidal in shape,” “substantially flat and square shaped top surface,” “generally flat sides” and “handle form[ing] the upper part of the corner defined by two of the side walls and extend[ing] to the flat top surface of the bottle,” are directed by utilitarian concerns to make distributing and selling milk more efficient. *Becton, Dickinson and Co.*, 102 USPQ2d at 1376. Applicant’s container provides specific utilitarian advantages to milk in that it is stackable and facilitates caseless shipping. *See In re Bose Corp.*, 227 USPQ 1 (shape of loudspeaker system enclosure that conforms to the shape of the sound matrix held functional); *Mars, Inc.*, 105 USPQ2d at 1059 (packaging for pet food functional due to stacking attribute); *In re Dietrich*, 91 USPQ2d 162 (TTAB 2009) (spoke arrangement of bicycle wheel more stable with better performance than wheels with other spoke arrangements).

In short, the Examining Attorney has satisfied his burden in making a *prima facie* case and Applicant has not rebutted it with “competent evidence,” defined as “proof by preponderant evidence.” *Becton, Dickinson and Co.*, 102 USPQ2d at 1379.

In making our determination, we keep in mind the guidance from the Supreme Court that “[t]he functionality doctrine ... protects competitors against a disadvantage (unrelated to recognition or reputation) that trademark protection might otherwise impose, namely their inability reasonably to replicate important

non-reputation-related product features.” *Qualitex Co. v. Jacobson Products Co., Inc.*, 514 U.S. 159, 34 USPQ2d 1161, 1165 (1995). To afford registration to functional designs would inhibit legitimate competition by, in effect, granting a monopoly to a non-reputational, or non-source-identifying, feature of a product. *Id.*, 34 USPQ2d at 1163-64. As emphasized in *Morton-Norwich*, which sets out the four analytical factors, “the effect on competition ‘is really the crux of the matter,’” and a balance must be struck “between the ‘right to copy’ and the right to protect one’s method of trade identification.” *Morton-Norwich*, 213 USPQ at 15-16. Based on the evidence, competitors would need this cuboidal shape to achieve the same advantages for distributing and selling milk. To afford registration to Applicant’s design would inhibit legitimate competition by in effect extending the lifespan of its monopoly previously afforded by its now expired utility patent. *Mars Inc.*, 105 USPQ2d at 1866.

Based on all of the record evidence and arguments in relation to the *Morton-Norwich* factors, we find that the overall design of Applicant’s packaging is “essential to the use or purpose of the device” as used for milk. *TrafFix*, 58 USPQ2d at 1006. Thus, we find that the packaging design functional and not registrable on that basis.

**Decision:** The refusal to register the trade dress on the ground that it is functional is affirmed.