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Mailed: May 10, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

*In re Arthur Koch Management Consulting, LLC*

Serial No. 88325642

Erik M. Pelton of Erik M Pelton & Associates PLLC,  
for Arthur Koch Management Consulting, LLC.

Robert N. Guliano, Trademark Examining Attorney, Law Office 105,  
Jennifer Williston, Managing Attorney.

Before Lykos, Goodman and Lebow,  
Administrative Trademark Judges.

Opinion by Lebow, Administrative Trademark Judge:

Applicant, Arthur Koch Management Consulting, LLC, seeks registration of the term INVENTORY IS EVIL (in standard characters) on the Principal Register for “business consulting; business consulting, management, and planning services in the field of product distribution, operations management services, logistics, reverse logistics, supply chain and production systems, and distribution solutions,” in

International Class 35 (“the Application”).<sup>1</sup>

The Trademark Examining Attorney refused registration under Sections 1, 2, 3, and 45 of the Trademark Act, 15 U.S.C. §§ 1051-53 and 1127, on the ground that the proposed mark is “a slogan or term that does not function as a trademark or service mark to indicate the source of applicant’s services and to identify and distinguish them from others.”<sup>2</sup> Specifically, he alleges that the term is “a commonplace term, message, or expression widely used by a variety of sources that merely conveys an ordinary, familiar, well-recognized concept or sentiment.”<sup>3</sup>

After the refusal was made final, the application was abandoned following Applicant’s failure to respond to the Examining Attorney’s final office action. Applicant then filed a petition to revive the application, along with a notice of appeal to this Board.<sup>4</sup> The petition to revive was granted, the application was revived, and this appeal was instituted. Applicant then filed its main brief.

Thereafter, the Examining Attorney requested suspension and remand of the

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<sup>1</sup> Application Serial No. 88325642 was filed on March 5, 2019, based on a declared intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

<sup>2</sup> May 14, 2019 Office Action, TSDR 2. Citations to the record or briefs in this opinion are to the publicly available documents on TTABVue, the Board’s electronic docketing system. The number preceding “TTABVue” corresponds to the docket entry number; the number(s) following “TTABVue” refer to the page number(s) of that particular docket entry. Page references herein to the trademark registration record in this proceeding refer to the online database of the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system. All citations to documents contained in the TSDR database are to the downloadable .pdf versions of the documents in the USPTO TSDR Case Viewer.

<sup>3</sup> *Id.*

<sup>4</sup> In the Petition to Revive, Applicant asserted that its failure to respond to the final office action was unintentional and not based on non-receipt of notification of the final action. Accordingly, the petition is treated as a request for reconsideration. See Trademark Rule 2.66(b)(3), 37 C.F.R. § 2.66(b)(3).

application in order to supplement the record with additional evidence that “was not available at the time of the final Office Action.”<sup>5</sup> The Board granted the request for remand and suspension, whereupon the Examining Attorney denied Applicant’s construed request for reconsideration. The appeal was then resumed and the Board allowed Applicant time to file a Supplemental Brief, which it did.<sup>6</sup> The Examining Attorney then filed his appeal brief, which was followed by Applicant’s reply brief.

We affirm the refusal.

## **I. Applicable Law**

“The Trademark Act is not an act to register words but to register trademarks [and service marks]. Before there can be registrability, there must be a trademark (or a service mark) and, unless words have been so used, they cannot qualify for registration.” *In re Standard Oil Co.*, 275 F.2d 945, 125 USPQ 227, 229 (CCPA 1960). Thus, we start our analysis with Section 45 of the Act, which defines a “service mark” as “any word, name, symbol, or device, or any combination thereof” “used by a person ... to identify and distinguish the services of one person ... from the services of others and to indicate the source of the services, even if that source is unknown.” 15 U.S.C. § 1127. *See also In re Bose Corp.*, 546 F.2d 893, 192 USPQ 213, 216 (CCPA 1976) (“[T]he classic function of a [service mark] is to point out distinctively the origin of the [services] to which it is attached”).

Whether the phrase INVENTORY IS EVIL is more than a commonplace message

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<sup>5</sup> 10 TTABVUE 5 (Examining Attorney’s Request for Remand).

<sup>6</sup> Applicant’s Supplemental Brief actually replaced its main brief, rather than supplementing it, so we refer to that brief when citing Applicant’s arguments in this case.

and functions as a mark depends on whether the relevant public, i.e. purchasers or potential purchasers of Applicant's identified business, consulting, planning, distribution, and logistics services would perceive INVENTORY IS EVIL as identifying the source or origin of those services. *See e.g. In re Team Jesus LLC*, 2020 USPQ2d 11489, at \*2 (TTAB 2020) (quoting *In re Texas With Love, LLC*, 2020 USPQ2d 11290, at \*2 (TTAB 2020) ("Whether the term ... falls within this definition and functions as a mark depends on whether the relevant public, i.e., purchasers or potential purchasers of Applicant's [services], would perceive the term as identifying the source or origin of Applicant's [services]."). In this case, because there are no limitations to the channels of trade or classes of consumers, the relevant consuming public comprises all potential purchasers of the identified services. *See In re Yarnell Ice Cream, LLC*, 2019 USPQ2d 265039, at \*5 (TTAB 2019).

As explained in *In re Wal-Mart Stores, Inc.*, 129 USPQ2d 1148 (TTAB 2019), "[n]ot every word or symbol which appears in connection with an entity's services functions as a service mark." *Id.* at 1149.

Thus, a threshold issue in some cases (like this one) is whether the phrase in question in fact functions to identify the source of the services recited in the application and distinguish them from the services of others or, instead, would be perceived merely as communicating the ordinary meaning of the words to consumers. To put this inquiry in context, it is helpful to note that we, our primary reviewing court (the Federal Circuit and its predecessor the Court of Customs and Patent Appeals), and other federal appeals courts, draw a distinction between words used to "identify and distinguish" source, and words used in their ordinarily-understood meaning to convey information other than source-identification. For example:

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THE BEST BEER IN AMERICA was held unregistrable for beer and ale because the mark would be perceived as a common, laudatory advertising phrase and not a trademark. *In re Boston Beer Co.*, 198 F.3d 1370, 53 USPQ2d 1056, 1058-59 (Fed. Cir. 1999);

ONCE A MARINE, ALWAYS A MARINE would not be perceived as a trademark for clothing but rather as an informational slogan “to express support, admiration or affiliation with the Marines.” *In re Eagle Crest*, 96 USPQ2d 1227, 1232 (TTAB 2010);

DRIVE SAFELY was held unregistrable because it would be perceived only as an everyday, commonplace safety admonition and not as a trademark for automobiles and structural parts. *In re Volvo Cars of N. Am.*, 46 USPQ2d 1455, 1461 (TTAB 1998);

PROUDLY MADE IN USA for electric shavers and parts would be perceived not as a source indicator but instead as an informational slogan. *In re Remington Prods.*, 3 USPQ2d 1714, 1715 (TTAB 1987); and

THINK GREEN for mailing and shipping boxes, and for weatherstripping, would not be perceived as an indicator of source, but simply as a slogan of environmental awareness and ecological consciousness. *In re Manco Inc.*, 24 USPQ2d 1062, 1066 (TTAB 1992).

*Id.* “Where the evidence suggests that the ordinary consumer would take the words at their ordinary meaning rather than read into them some special meaning distinguishing the [services] from similar [services] of others, [as they do here,] then the words fail to function as a mark.” *In re Ocean Tech., Inc.*, 2019 USPQ2d 450686, at \*3 (TTAB 2019) (internal punctuation omitted).

Matter that is widely used to convey ordinary or familiar concepts or sentiments, or similar informational messages that are in common use, would not be perceived as indicating source and is not registrable as a mark. *See In re Mayweather Promotions, LLC*, 2020 USPQ2d 11298, at \*1 (TTAB 2020) (addressing the proposed mark PAST

PRESENT FUTURE and noting that “[w]idely used commonplace messages are those that merely convey ordinary, familiar concepts or sentiments and will be understood as conveying the ordinary concept or sentiment normally associated with them, rather than serving any source-indicating function”); *Team Jesus*, 2020 USPQ2d 11489 at, \*7 (holding TEAM JESUS fails to function as a mark for religious themed educational and entertainment services); *Texas With Love*, 2020 USPQ2d 11290, at \*2 (holding that proposed mark TEXAS LOVE “does not fall within the Act’s definition of a mark, including because it would be perceived not as a source identifier, but instead as a widely-used phrase that merely conveys a well-recognized and commonly expressed concept or sentiment”); *see also D.C. One Wholesaler, Inc. v. Chien*, 120 USPQ2d 1710, 1716 (TTAB 2016) (I ♥ DC found not to function as a mark for clothing items because it would be perceived merely as an expression of enthusiasm for the city. “The fact that Respondent has sometimes displayed I ♥ DC on hangtags and labels, in a non-ornamental manner that is conventional for the display of trademarks, does not require a different result.”). “The more commonly a phrased is used, the less likely that the public will use it to identify only one source and the less likely that it will be recognized by purchasers as a trademark [or service mark].” *In re Eagle Crest, Inc.*, 96 USPQ2d at 1229.

In a failure-to-function analysis, we consider all the evidence of record, including an applicant’s specimens of use, if available, as well as other evidence. *See, e.g., D.C. One Wholesaler*, 120 USPQ2d at 1716 (considering third-party use evidence as well as the applicant’s specimens and other examples of use); *In re Eagle Crest*, 96

USPQ2d at 1230 (affirming informational refusal of ONCE A MARINE, ALWAYS A MARINE where third-party evidence showed widespread use of the phrase and use on “applicant’s specimens as well as its other materials would likely reinforce the perception” of the proposed mark as informational in the sense of expressing support, admiration or affiliation with the Marines).

## **II. Evidence, Argument, and Analysis**

The Examining Attorney provided (1) dictionary evidence defining “inventory” as a quantity of goods or materials on hand: stock,”<sup>7</sup> and “evil” as “causing harm,”<sup>8</sup> and (2) printouts from numerous third-party websites, including those shown below (with emphasis added), to support his argument that “[t]he expression INVENTORY IS EVIL is commonly used in the business supply chain and logistics industry as an adage or mantra and, in the context of business consulting, management, and planning services, informs consumers that the principle guiding those services is that having goods on hand causes harm”:<sup>9</sup>

- An April 1, 1985 article from Inc. Magazine (inc.com/magazine) titled “Profit And “Loss [-] Xaloy’s new manufacturing system resorted [sic] the company’s competitive edge -- and turned the shop floor into a battleground” quotes “professor-turned-consultant” Ed Heard’s strategy in providing consulting for Xaloy. Heard explains that when he got to Xaloy, “[i]t was a disaster. Here we are, trying to reduce inventory, and they get an opportunity for a quantity buy, and jump on it with both feet. ... [I]t didn’t occur to them to think, ‘If this buy is offering us this kind of deal, something must be changing in the marketplace.... You

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<sup>7</sup> December 9, 2020 Reconsideration Letter, TSDR 27 (Merriam-Webster Dictionary).

<sup>8</sup> *Id.*

<sup>9</sup> 18 TTABVUE 4 (Examining Attorney’s Brief).

have to be consistent ... **inventory is evil** ... We really want to reduce inventories.”<sup>10</sup>

- A January 26, 2009 article from Marketing Profs (marketingprofs.com) titled “Is Inventory Still Evil” begins with the statement, “Inventory is bad, **inventory is evil**,’ finance and operations professors intone across business schools worldwide.” As the article explains, “with companies hoarding cash—it seems the last thing companies need is to be stuck with unsold finished goods or piecemeal parts.” It cites Apple’s CEO, Tim Cook, who said that inventory is “fundamentally evil” and that in the consumer electronics business, “[y]ou kind of want to manage it like you’re in the dairy business. If it gets past its fresh date you have a problem.” Nonetheless, the article asks whether “[i]n a global financial crisis, is inventory still evil?”<sup>11</sup>
- A March 2009 article from the Association of the Wall and Ceiling Industry (AWCI) (awci.org) titled “4 Surefire Steps to Recession-Proof Your Business” lists “simple things you can do right now to cut the red ink, build customer loyalty and recession-proof your business including “Step 1: Spring Cleaning,” which recommends eliminating unnecessary inventory because “**Inventory is evil**.”<sup>12</sup>
- A July 1, 2009 article from Prairie Business Magazine (prairebusinessmagazine.com) titled “Is your business ready for the recovery” provides steps “to simplify, streamline and optimize your organization for the future” including the recommendation to eliminate unnecessary inventory because “**Inventory is evil**.”<sup>13</sup>
- A December 15, 2009 article posted from Haviland News (havilandusa.com) from USA Today titled “Lean manufacturing helps companies survive recession” explains how the lean movement is driven

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<sup>10</sup> September 24, 2019 Final Office Action, TSDR 24-28.

<sup>11</sup> May 14, 2009 Office Action, TSDR 22.

<sup>12</sup> September 24, 2019 Final Office Action, TSDR 13-14.

<sup>13</sup> *Id.* at 10-12.



by an urgent need to pare inventory, quoting CEO of Marlin Steel Wire, Drew Greenblatt as saying “**Inventory is evil**,” and that by trimming “you find a big pile of cash.”<sup>14</sup>

- A March 10, 2011 article from Schula.com titled “Oprahization of Lean Manufacturing” discusses the concept of lean manufacturing and the principle of “Zero Inventory – target is to eliminate inventory; **inventory is evil**.” The author questions the validity of this concept because while “eliminating inventory is a worthwhile goal because it illustrates that the organization has achieved a pure pull system – no forecasting involved and no guessing customer demand, ... some inventory, depending on your operation, can actually be a good thing.”<sup>15</sup>
- An August 22, 2011 article from IEEE Spectrum (spectrum.ieee.org) titled “How Japanese Chipmaker Renesas Recovered From the Earthquake” quotes the company’s president and CEO of its American division, who explained that “[t]he supply-chain philosophy of the day is that **inventory is evil** and it should be minimized as much as possible,” but “after the earthquake, customers as well as suppliers are in the process of reevaluating that [philosophy].”<sup>16</sup>
- An August 23, 2011 article from DC Velocity (dcvelocity.com) titled “Seven must-have features in a TMS [transportation management system] explains “[a]s the ‘**inventory is evil**’ mentality has taken hold, a lot of customers have begun demanding smaller, more frequent shipments from their suppliers.”<sup>17</sup>
- A May 23, 2012 article from The Motley Fool (fool.com) titled “Apple Lesson of the Day: Inventory is Evil” explains that “[t]here are plenty of lessons to learn from the largest company in the world by market cap” [Apple], and “**Inventory is evil**. Not just evil, but ‘fundamentally evil.’

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<sup>14</sup> May 14, 2019 Office Action, TSDR 5.

<sup>15</sup> September 24, 2019 Final Office Action, TSDR 63.

<sup>16</sup> *Id.* at 29-30.

<sup>17</sup> *Id.* at 21-23.

There's good reason that Tim Cook is now Apple's CEO.... It was his call to withdraw from manufacturing in favor of using contract manufactures, as well as to close down warehouses all over the world.”<sup>18</sup>

- An April 28, 2013 article from the blog of Operations Management (opsmgt.edu) titled “**Inventory is Evil**” discusses Apple, Inc.’s “strategies that have become a benchmark in the electronics industry and examples to many other companies worldwide.” The article explains that “[i]n the electronics business, companies desire to minimize inventory storage as much as possible to avoid the risk that it won’t move to consumer hands. ... Tim Cook, the manager of Apple ... put Apple in front of other competitors, such as Dell, by improving the way of moving inventory, where he claimed that ‘**inventory is evil**.’”<sup>19</sup>
- A May 21, 2015 article from VCFO’s finance and consulting blog (vcfo.com/blog) titled “Discover More Cash in Your Financial Statements,” questions whether inventory is “really a good thing” in order to obtain funding and urges companies to “[c]onsider a new way of thinking that says, ‘**inventory is evil**.’ We know that’s an exaggeration, but consider it from this point of view. Generally, you can only borrow about 50% of the cost of your current inventory.... The remaining 50% of the value is capital that comes out of your cash, not from a bank loan. In the case of old or obsolete inventory, 100% of its cash not available to be used by the company.” The author uses the example of a past VCFO business consultation assignment to improve the performance of the largest solar distributor in North America, which lost over \$22 million in the preceding year due to unmoved inventory. “What did we do? Stopped buying solar panels. And told the manufacturers we wanted them to consign the inventory to us, and we would pay for it at the then current price when they were sold. ... [O]nce the suppliers realized we were serious about cutting the losses on inventory ... they agreed. Of the previous loss, over half was reduced by elimination of inventory write

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<sup>18</sup> May 14, 2009 Office Action, TSDR 23.

<sup>19</sup> September 24, 2019 Final Office Action, TSDR 53-56.

downs.”<sup>20</sup>

- A July 20, 2016 blog posting from The Fastlane Forum (thefastlaneforum.com), on what the website refers to as a “HOT TOPIC [-] **Inventory is Evil**,” states that “Dan Kennedy (and others) say ‘**Inventory is Evil**.’ Noting that “Macy’s has a 50+ day cash conversion cycle,” and Apply [sic] has a NEGATIVE 50 day cash conversion cycle – meaning they GET PAID 50 days before they have to pay their vendors. ... [B]ut this means Apple can grow their business interest-free. ... For many business inventory is a NECESSARY evil which can be used to create value, but it’s still evil.”<sup>21</sup>
- IBM, a provider of business management “solutions and services for the high tech industry,” provides business management advice in a September 5, 2016 article on its Electronics Industry Blog (ibm.com/blogs) titled “Inventory – the key to effective working capital management.” According to the author, “Apple’s Tim Cook is famous for saying ‘Inventory is fundamentally evil’ [] but the phrase ‘**Inventory is evil**’ dates back at least to the 1980s. It’s a least a little curious that people would choose such strong terms to refer to something that is normally is characterized as an asset. ... The harsh words are mostly for effect – a way to get people’s attention. ... Ineffective inventory management can prevent entry into a new market, or hand a market over to a competitor. [] But even if it doesn’t go that far, tying up an excessive amount of a company’s working capital in inventory impacts financial performance. ... There are plenty of techniques that shorten cycle times, improve forecast accuracy, improve visibility, and shorten replenishment cycles, and thereby enable significantly lower inventory and a better use of your working capital.”<sup>22</sup>
- An article from Bull Ant Creative’s blog (bullantcreative.com/blog) titled “What is the Lean approach to inventory buffer sizing?” begins by

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<sup>20</sup> May 14, 2009 Office Action, TSDR 14-16.

<sup>21</sup> September 24, 2019 Final Office Action, TSDR 44.

<sup>22</sup> May 14, 2019 Office Action, TSDR 20-21.

stating “The Lean ethos is that all **inventory is evil**. ‘Inventory is one of the 7 wastes so it must be bad!’”<sup>23</sup>

- An undated article from Stratford Managers Corporation blog (stratfordmanagers.com) titled “**Inventory is Evil** – Except When It Isn’t” explains that “**Inventory is evil**” is “the mantra of lean six sigma practitioners. The professional association for supply chain management, APICS, espoused this back in the 1980’s. And none other than Tim Cook of Apple agrees. ... It seems that everyone agrees that **inventory is evil** because: “It ties up cash that might be better used in marketing efforts or product enhancements to drive more sales”; “It is often used as a crutch for inefficient sales, order management and production processes with uncompetitive cycle times and poor responsiveness”; “It ages with poor turnover, reduction to market write-downs and ultimately obsolescence” and “New product inventory may be subject to design deficiencies which can lead to component scrap or finished goods rework to make the product fit for purpose.”<sup>24</sup>
- People First Planning (demandplanner.com) advertises business management consulting services. On its website, the owner explains: “I will help you build an effective demand planning process resulting in lower inventory waste and higher order fulfillment.” He cites an example of his work, titled “Case Study: Inventory Out of Control,” where the problem was excess inventory and unfilled orders. According to the owner, “**Inventory is Evil**; it costs you to make it; it costs you to ship; it costs to store it; and it costs when you dispose of it.”<sup>25</sup>
- Wasp Barcode Technologies, which provides inventory and asset management services (waspbarcode.com), promotes its services and “Wasp inventory solution” in a “detailed white paper [that] examines the hidden costs associated with managing inventory.” The paper explains that “[i]nventory is both an asset and a liability. “If you think the cost of

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<sup>23</sup> *Id.* at 17-18.

<sup>24</sup> *Id.* at 25-26.

<sup>25</sup> September 24, 2019 Final Office Action, TSDR 15-18.

your inventory is merely the amount you pay for the items, it will not take long for you to discovery the real truth. The most savvy business owners are aware of the hidden inventory costs....” According to the author, “[i]nventory typically loses roughly 1%-2% of its value per week under normal conditions, but can depreciate faster when times are tough (“Apple Lesson of the Day: **Inventory is Evil.**)”<sup>26</sup>

- An Apple Podcast Preview of Supply Chain Brain’s podcast “**Inventory Is ‘Evil’? Not so Fast**” discusses this concept in inventory management and how a lot of manufacturers and retailers do not agree with the concept.<sup>27</sup>
- GBS (startsandends.com), in a blog post by John Gold, purported “sales management expert and mentor” reminisces about how in 1956 while in high school he had to prepare a research paper on Payless Shoes, “and in this first exposure to real business, I first of all learned a life’s lesson – **INVENTORY is EVIL....** [I]n the last decade the management challenges started in the form of changes in competition, computer’s managing inventory, little planning to reflect 25000 stores in US.... In 2017 Payless declared bankruptcy and submitted a reorganization plan (which was unachievable. They were underprepared for the shift to online retailing and burdened with too much debt and too many stores. ... [T]here are ... going to be 13,700 people out of a job.”<sup>28</sup>
- Business management consultant Dan Strongin promotes consulting services on his website (managenaturally.com) and in an article titled “Inventory Costs (part II on Cost Accounting),” he details one of the problems with cost accounting as occurring: It “treats inventory as an asset. From an operational point of view, inventory is a liability, not an asset. **Inventory is evil.** But, sometimes it can be a necessary evil. Any amount of inventory more than what you need to keep production

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<sup>26</sup> November 10, 2020 Examining Attorney’s Motion to Remand, TSDR 11. Citations to documents provided with the motion to remand are to TSDR database because the documents are more legible there than on TTABVUE.

<sup>27</sup> September 24, 2019 Final Office Action, TSDR 62.

<sup>28</sup> *Id.* at 34.

flowing to meet demand, freezes money. Money frozen is money you can't use, is money you don't have; money that is losing value; money that could be making you more money.”<sup>29</sup> The article highlights the term “Inventory is Evil” and attributes the quote to Louis Schultz.

- A February 13, 2018 article from Worldlocity (worldlocity.com), updated December 22, 2019, titled “The \$13 Trillion Question” discusses the amount of inventory currently sitting in various stages around the world and asks and answers the question: “[I]s this too much inventory? Lean doctrine says that **inventory is evil**, but the real answer is more nuanced. ...[I]nventory is like cholesterol – there is good inventory and bad inventory. ... Bad inventory languishes, taking up space, and is ultimately marked down or written off.” The article proposes that “[r]educing global inventory by 10% could free up \$1.3 [trillion] in cash that could be used for investment in new plants, equipment, technologies, and infrastructure.”<sup>30</sup>
- A March 24, 2020 article from Freight Waves (freightwaves.com/news) titled “Amazon Prime suspends delivery promises; future of fast shipping under scrutiny” discusses the subject of fast shipping and responsive inventory that came up during a freight-tech roundtable discussion. According to Brittain Ladd, a former Amazon executive who attended the roundtable and now runs his own consultancy firm, the coronavirus uncovered “a flaw in the supply chains of retailers,” who, in order to reduce costs carried less inventory, yielding efficient supply chains, not responsive supply chains. According to Ryan Petersen (CEO of global freight-forwarding platform Flexport), who also attended the roundtable, “I think we do have a generation of MBAs who think **inventory is evil** and must be rooted out at all costs,” a perspective he believes “will likely undergo a rethink in light of the coronavirus outbreak.”<sup>31</sup>

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<sup>29</sup> *Id.* at 38.

<sup>30</sup> December 9, 2020 Reconsideration Letter, TSDR 11-12.

<sup>31</sup> November 10, 2020 Examining Attorney’s Motion to Remand, TSDR 18.

- An April 15, 2020 article from the Harvard Business review titled “Bringing Manufacturing Back to the U.S. Is Easier Said Than Done” discusses “The rise of lean production and its ‘**inventory is evil**’ principle in the context of describing Toyota’s production system in the decades following World War II that “was predicated on minimal inventory that was pulled quickly from suppliers nearby,” a concept that “has been replicated around the world in many different industrial structures.”<sup>32</sup> According to the article, “[p]ronouncements by industry leaders like Apple’s Tim Cook that inventory is “fundamentally evil’ reflects the current prevailing view that inventory along the supply chain not only risks obsolescence, it represents cash that is tied up that could be used for better purposes.”<sup>33</sup>
- An April 23, 2020 article from Chief Executive (chiefexecutive.net) titled “Manufacturing’s Big Question: Made in America or America Made Resilient” mentions “the Lean ‘**inventory is evil**’ principle” in the context of arguing that “[r]ather than focusing on re-shoring, perhaps the country should shift the focus to becoming less vulnerable to supply chain shocks.”<sup>34</sup>
- A May 1, 2020 Facebook posting by The Wire China quotes Harvard Business School professor Willy Shih as saying “The mantra that ‘**inventory is evil**’ is coming back to bite us as we find out that maybe it would have been nice to have a lot more N95 masks or personal protection equipment sitting around.”<sup>35</sup>
- A May 10, 2020 article from the Brainerd Dispatch (brainerddispatch.com/business) titled “SCORE Column: Challenging Times – but the economy can come back” provides advice to business: “**Inventory is evil**. It causes obsolescence, damage and loss. ... This concept was brought to America and worked. ... Just imagine the cost

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<sup>32</sup> December 9, 2020 Reconsideration Letter, TSDR 7-9.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 13.

<sup>35</sup> November 10, 2020 Examining Attorney’s Motion to Remand, TSDR 14.

saving from less inventory.”<sup>36</sup>

- In a May 17, 2020 blog posting by Jeffrey Jones Photography ([jeffreyjonesphotography.com](http://jeffreyjonesphotography.com)), Jones discusses the concept of inventory, comparing the sale of fine art photography to owning a store, “since they both require that you have a physical product on hand for the customer to see and experience.” He asks and answers the question, “But why is **inventory is evil**, at least for the proprietor? Inventory is speculation...in the process of stocking the booth, good money is put into products that will not sell. Ever. It is lost forever. ... Inventory is space. ... your work often has to be stored in places that are not convenient. Inventory is at risk – the more the work gets handled (in and out of boxes), the more it is at risk for damage.”<sup>37</sup>
- A June 29, 2020 article from Columbia Business School ([8.gsb.columbia.edu](http://8.gsb.columbia.edu)) titled “How to Jump-Start the Global Supply Chain” discusses ways to invigorate the global supply chain in the wake of the Covid-19 pandemic, quoting Ernst & Young’s Global and Americas Supply Chain leader Glenn Steinberg, who agreed that conventional wisdom holds that “too much **inventory is evil**,” citing the auto parts scarcity after the 2011 Japan earthquake and copper shortages following civil unrest in Chile last year. “By design our supply chains are lean and cost optimized for vendor and geographic concentration to reduce costs.”<sup>38</sup>
- A July 20, 2020 article from the blog of Syspro ([sg.syspro.com/blog](http://sg.syspro.com/blog)) titled “How Procurement can Improve Inventory Management” expresses the view that “[o]ne unanticipated effect of the [coronavirus] pandemic is that executives are moving away from the ‘**inventory is evil**’ view, but even so, it’s unlikely in the next few years that ‘lean inventory’ will become a popular practice. Procurement will, therefore, need to look at how to optimize inventory purchases both in quantities and timing as

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<sup>36</sup> *Id.* at 17.

<sup>37</sup> May 14, 2019 Office Action, TSDR 4.

<sup>38</sup> December 9, 2020 Reconsideration Letter, TSDR 16.



inventory holdings grow.”<sup>39</sup>

- Eventbrite (eventbrite.com) identifies a webinar dated July 28, 2020 sponsored by The Follett Family Center for Innovation & Entrepreneurship titled “Does your supply chain need to be re-configured?” that explains, as background to the webinar, that [i]n the last 30 years, global supply chains have been optimized to largely minimize cost by outsourcing and offshoring production to lower cost countries. Total Quality Management, Lean and Six Sigma have taught us that ‘**inventory is evil**’ and that just-in-time production is the best way to deliver products.”<sup>40</sup>
- Wisconsin Indianhead Technical College offered a class in the fall of 2020 titled “**Inventory is Evil**,” for students to learn about a variety of industry concerns, current and emerging issues, trends, technologies, strategies, and planning techniques. According to the “Essential Class Information: There is nothing positive about inventory. This is a timely concept within manufacturing....”<sup>41</sup>

The foregoing evidence overwhelmingly establishes that the term INVENTORY IS EVIL is a common phrase that is widely used in business management and consulting throughout a variety of industries, in news articles, and in academia, as an adage or mantra expressing the concept or sentiment that large inventories of goods can be extremely damaging to the economic well-being of companies in any industry for a variety of reasons, and that reducing inventory can save businesses and even a global crisis brought on by a recession or a pandemic.

Applicant argues that “the articles cited by the Examining Attorney that refer to

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<sup>39</sup> November 10, 2020 Examining Attorney’s Motion to Remand, TSDR 16.

<sup>40</sup> *Id.* at 15.

<sup>41</sup> *Id.* at 19.

the phrase ‘Inventory is evil’ do not refer to the sale or promotion of business consulting services, but rather a broad concept that is not intended to be a source indicator.”<sup>42</sup> The fact that the plethora of evidence in this case shows widespread use and common use of the term INVENTORY IS EVIL as a well-known concept within the industry of business management and consulting, and not as a mark promoting goods or services, does not detract from its probative value; it enhances it. Indeed, the phrase INVENTORY IS EVIL has become so ubiquitous in business management and consulting, and in academia, that this broad concept will not be viewed as a source indicator for business management and consultation services.

While not used **as a mark** in the evidence, the term INVENTORY IS EVIL is routinely used by providers of business management and consulting services, or other services, **in the course of explaining** this well-known business management concept, either to agree or disagree with it, as shown by the evidence. AWCI and Prairie Business Magazine, in their articles/blogs providing business management advice, recommend eliminating unnecessary inventory because “Inventory is evil.”<sup>43</sup> IBM promotes the concept that INVENTORY IS EVIL in providing its business management advice (“The harsh words are mostly for effect – a way to get people’s attention.”).<sup>44</sup> The owner of People First Planning promotes his business

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<sup>42</sup> 16 TTABVUE 15 (Applicant’s Supplemental Brief). As discussed *infra*, the same characterization can be applied to Applicant’s use examples submitted during prosecution. That is, they refer to the broad concept in the promotion of services, or for the title of a “series” promoting the management techniques that utilize that concept.

<sup>43</sup> September 24, 2019 Final Office Action, TSDR 10-14.

<sup>44</sup> May 14, 2019 Office Action, TSDR 20-21.

management consulting services by emphasizing the concept (“Inventory is Evil; it costs you to make it; it costs you to ship; it costs to store it; and it costs when you dispose of it.”),<sup>45</sup> as does management consultant Dan Strongin (“From an operational point of view, inventory is a liability, not an asset. Inventory is evil. But, sometimes it can be a necessary evil.”).<sup>46</sup> And Supply Chain Brain’s “Inventory Is ‘Evil’? Not So Fast” provides a podcast about that concept using the phrase in its title (“Inventory Is ‘Evil’? Not so Fast”).<sup>47</sup> Due to its widespread and ubiquitous use, the term INVENTORY IS EVIL will be viewed as a commonly used message expressing the concept that it represents and not as a source indicator for goods or services discussing that concept. *See Team Jesus*, 2020 USPQ2d at, \*7 (in view of ubiquity of the phrase in connection with educational and entertainment services consumers will not perceive widely-used message as distinguishing applicant’s services and indicating their source).

Applicant contends that the Internet evidence of record is not probative “particularly as the majority of the blogposts and articles submitted by the Examining Attorney are merely discussing a quote said by another individual or addressing the impact COVID-19 has had on inventory of PPE and the supply chain of businesses as a whole.”<sup>48</sup> We disagree that the evidence is not probative for these reasons. Although many of the articles and blog postings quote individuals such as

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<sup>45</sup> September 24, 2019 Final Office Action, TSDR 15-18.

<sup>46</sup> *Id.* at 38.

<sup>47</sup> September 24, 2019 Final Office Action, TSDR 62.

<sup>48</sup> 16 TTABVUE 16 (Applicant’s Supplemental Brief).

Tim Cook, CEO of Apple and other influential persons who argued that INVENTORY IS EVIL, many do not, and most of them provide explanations or background context, many of which specifically discuss the need for reduced or eliminated inventory in business and/or its effect on the product supply chain. Indeed, Applicant concedes that “[t]he concept behind Applicant’s INVENTORY IS EVIL mark stems from a quote by Tim Cook, the current CEO of Apple,”<sup>49</sup> who was quoted widely in the Internet articles of record. As the Examining Attorney points out, “the evidence of a prominent business leader’s adoption of a closely similar phrase as a business principle enhances the mark’s significance as a business mantra and reinforces the commonality of the phrase in the minds of business consulting, management, and planning consumers.”<sup>50</sup>

Additionally, the fact that the most recent articles discuss that term and its supporting sentiment within the context of the current coronavirus pandemic and its effect on not only on individual businesses, but on the marketplace as a whole, does not make them not probative, nor does Applicant explain why that is the case. To the contrary, we find them as relevant and probative as the other articles, which show ongoing use of that term and sentiment within the context of changing economic environments.

Applicant also argues that the refusal is premature “[b]ecause Applicant has yet to submit specimens of use” and “there is no evidence showing how the phrase is

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<sup>49</sup> *Id.* at 14.

<sup>50</sup> 18 TTABVue 8 (Examining Attorney’s Brief).

actually used in the marketplace and/or whether consumers would perceive Applicant's mark as a widely used phrase in connection with business consulting services.”<sup>51</sup> As such, “[t]he evidence submitted by the Examining Attorney neither takes into consideration of how Applicant will use the mark in commerce nor shows use of the phrase ‘inventory is evil’ with respect to business consulting services.”<sup>52</sup>

This argument is unavailing. “Although the failure-to-function refusal is normally a specimen-based refusal, a refusal must be issued, regardless of the filing basis, if the evidence supports a determination that a proposed mark is merely informational [e.g., widely used message] and thus would not be perceived as an indicator of source.” TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1202.17.04 (Oct. 2018); *cf. In re Right-On Co.*, 87 USPQ2d 1152, 1157 (TTAB 2008) (noting that, with respect to § 66(a) applications, “it is appropriate for examining attorneys to issue an ornamentation refusal if the mark is decorative or ornamental on its face as depicted on the drawing page and described in the description of the mark”). This is because “not everything that a party adopts and uses with the intent that it function as a [service mark] necessarily achieves this goal **or is legally capable** of doing so, and not everything that is recognized or associated with a party is necessarily a registrable trademark.” TMEP § 1202 (Oct. 2018) (emphasis added). Even technically acceptable evidence of use cannot obviate a failure to function refusal. *D.C. One Wholesaler, Inc.*, 120 USPQ at 1716 (“Because the nature of the phrase [I ♥ DC] will

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<sup>51</sup> 16 TTABVue 17 (Applicant's Supplemental Brief).

<sup>52</sup> *Id.*

be perceived as informational, and also because the ubiquity of the phrase . . . on apparel and other souvenirs of many makers has given it a significance as an expression of enthusiasm, it does not create the commercial impression of a source indicator, even when displayed on a hangtag or label.”).

Here, there is substantial evidence demonstrating that the designation INVENTORY IS EVIL is a widely used commonplace expression to express a well-known and familiar concept concerning the pitfalls of too much inventory, which supports a finding that the term is not legally capable of functioning as a mark. *See In re Mayweather Promotions, LLC*, 2020 USPQ2d at 11298 (finding that the phrase PAST PRESENT FUTURE in applicant’s intent-to-use application is a widely used commonplace message that merely conveys an ordinary, familiar concept or sentiment and thus fails to function as a mark); *D.C. One Wholesaler, Inc.* 120 USPQ2d at 1716 (I ♥ DC fails “does not create the commercial impression of a source indicator, even when displayed on a hangtag or label”).

Notwithstanding the application’s intent-to-use basis, Applicant provided several examples of its use of the term INVENTORY IS EVIL on its website to show that it is “used in a manner to identify the name of a business consulting series that discusses a business’ potential inventory problems, ranging from increasing inventory velocity to general supply strategy” and “functions as a mark as it categorizes a subset of Applicant’s building consulting specimens.”<sup>53</sup> Excerpts from Applicant’s three use examples are shown below:

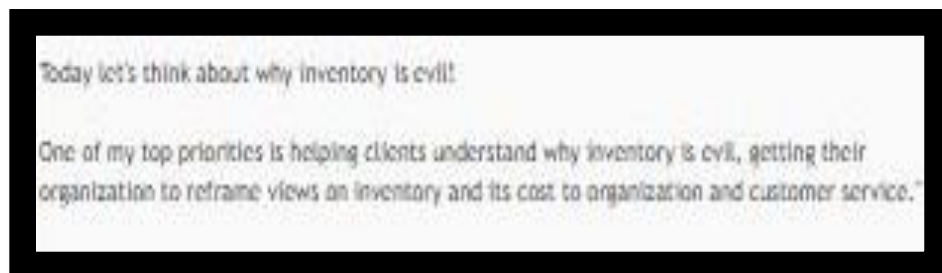
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<sup>53</sup> *Id.*

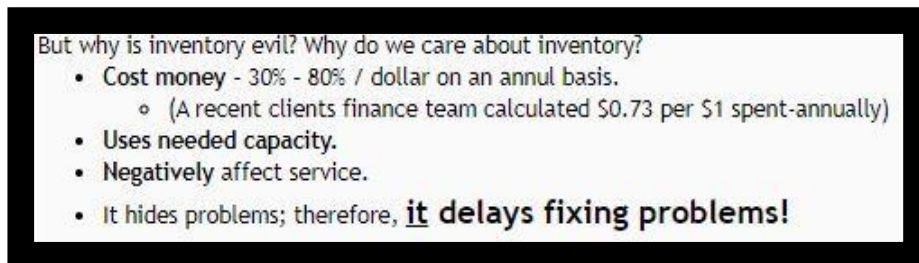
Example 1



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<sup>54</sup> September 3, 2019 Response to Office Action, TSDR 14-16.

Example 2

**Services**  
KEEPING YOUR OPERATIONS RUNNING SMOOTHLY

**Art Koch's Profit Chain™**

Dramatic improvements to inventory velocity, increased customer service and corporate profits

**Inventory Is Evil™**

Inventory delays problem resolution. Delays cost money

**Entropy Busters™**

Stop losing the process manage you! Become the champion of your game plan and achieve sustainable profits.

**Advisory**

While we have the capacity and ability to help you with any management challenge, we are especially well-suited to guide your supply chain management and optimization. We can support you when you are:

**CEO & C-Suite:**

- Art Koch's Profit Chain™ - Turning your value chain into profits
- Profitable Supply Chain Wheel
- Entropy Busters™ - Not getting anticipated results?
- Inventory Is Evil™ - Inventory is not a security blanket
- The Law of 14 - Complexity Rationalization
- Finding Genius and uncovering corridors
- When the "Unfiltered Truth" is needed
- Advisory and sounding board
- Strategy Consulting
- Re-engineering of Supply Chain

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<sup>55</sup> *Id.* at 9. Below the first use of the phrase in this example is the statement, “Inventory delays problem resolution. Delays cost money.” Purple arrows are added for emphasis to highlight where the proposed mark is again shown in the example, which states “Inventory is Evil™ - Inventory is not a security blanket”.



Example 3

## Inventory Is Evil! Series

Inventory Is Evil!

Volume 2 | Number 2 | February 2019

This month let's talk about increasing inventory velocity.

Have you ever wondered why you can't achieve the reduction anticipated?

As leaders we need to develop the ability to see decoupled processes within the supply chain. One such area is the relationship of MRP and pull systems.

What if I were to tell you that your MRP is a push system?

...

**in·?ven·?to·?ry / 'in·v·n·?t·r·e / noun**

Inventory is the term for the goods available for sale and raw materials used to produce goods available for sale.

**in·?ven·?to·?ry is evil! / 'in·v·n·?t·r·e is 'e·v·l / phrase**

Left unchecked inventory has many negative unintended consequences to profitability.

It hides problems; therefore, it delays fixing problems!

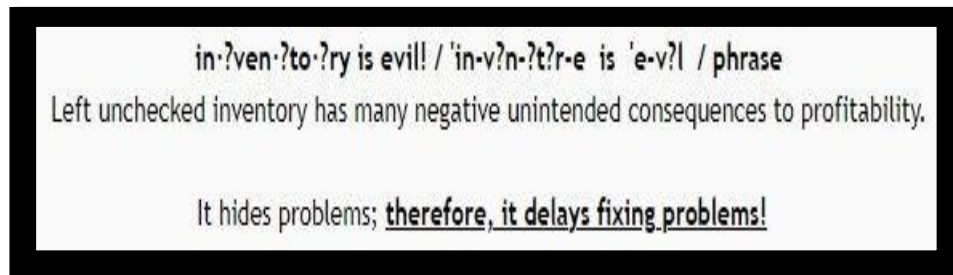
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We are not persuaded by Applicant's arguments. None of these use examples demonstrate that the phrase INVENTORY IS EVIL would be perceived as a source-indicator for business consultation services. At best, Examples 1 and 2 show that Applicant has named a series of classes, publications, or videos, etc., by the same widely-used commonplace message or sentiment used in business management and consulting—a warning about the pitfalls of unnecessary product inventories—that is taught in the series. Notably, after identifying its series by the subject matter of the

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<sup>56</sup> *Id.* at 18-19.

services, the example proposes “Today let’s think about why Inventory is Evil!” and asks “But why is inventory evil? Why do we care about inventory?” Applicant is simply using the ordinary meaning of the phrase INVENTORY IS EVIL to explain this well-known business management concept or sentiment to potential consumers of Applicant’s services. Example 3 even defines the phrase:



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Example Two also fails to show that the term INVENTORY IS EVIL would be perceived as a source-identifier for business management services. Although one use in the example shows technical use in the manner of a mark, “[a]s is the case with any trademark, mere intent that a word, name, symbol or device function as a trademark or service mark is not enough in and of itself.” *In re Vertex Group LLC*, 89 USPQ2d 1694, 1702 (TTAB 2009). Thus, the mere fact that Applicant applies the ™ symbol does not necessarily mean that the phrase in fact performs as a mark. While use of that designation “lends a degree of visual prominence to the term,” *In re Sones*, 590 F.3d 1282, 93 USPQ2d 1118, 1124 (Fed. Cir. 2009) (internal quotations omitted), “[t]he mere use of a superscript ™ cannot transform a nontrademark term into a trademark,” *In re Osterberg*, 83 USPQ2d 1220, 1223 n.4 (TTAB 2007) (internal citations omitted); see also *In re Remington Products Inc.*, 3 USPQ2d 1714, 1715

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<sup>57</sup> *Id.*

(TTAB 1987) (“Mere intent that a term function as a trademark is not enough in and of itself, any more than attachment of the trademark symbol would be, to make a term a trademark.”).

In this example, the phrase INVENTORY IS EVIL is used to promote the widely-used commonplace meaning ascribed to that term in the business management industry that is taught by Applicant in its “series.” Notably, each time the phrase is used in this example, it is immediately defined: (1) “Inventory delays problem resolution. Delays cost problems” (first use), or (2) “Inventory is not a blanket” (second use). “Set in the midst of other clearly informational matter, and far from the mark naming the [business management consultation services themselves], this use of the term [INVENTORY IS EVIL] does indeed convey nothing more than information itself and would not likely be perceived as a mark.” *In re AOP LLC*, 107 USPQ 2d 1644, 1654 (TTAB 2013).

### **III. Conclusion**

The evidentiary record in this case demonstrates that the term INVENTORY IS EVIL, irrespective of whether it is used in the manner of a mark, would be perceived by Applicant’s customers and potential purchasers as a widely used commonplace message that merely conveys information that is devoid of trademark significance. The substantial third-party use evidence establishes that the term INVENTORY IS EVIL is used to signify a warning to businesses that an improperly managed inventory can cause harm to their economic well-being, particularly as applied to business management and consultation services. *Cf. In re Manco Inc.*, 24 USPQ2d at

1062 (“Rather than being regarded as an indicator of source, the term “THINK GREEN” would be regarded simply as a slogan of environmental awareness and/or ecological consciousness, particularly as applied to applicant's paper and weatherstripping products.”). Consequently, the term INVENTORY IS EVIL fails to function as a mark under Sections 1, 2, 3 and 45 of the Trademark Act. 15 U.S.C. §§ 1051-1053, 1127.

***Decision:*** The refusal to register is affirmed.