

This Opinion is Not a
Precedent of the TTAB

Mailed: July 10, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Translite, LLC

Serial No. 97925710

Stewart L. Gitler of Welsh Flaxman & Gitler LLC,
for Translite, LLC.

Ian Krussman, Trademark Examining Attorney, Law Office 126,
Andrew Lawrence, Managing Attorney.

Before Wellington, Heasley, and Stanley,
Administrative Trademark Judges.

Opinion by Stanley, Administrative Trademark Judge:

Translite, LLC (“Applicant”) seeks registration on the Principal Register of the product configuration shown below for “light emitting diode (LED) apparatus for lighting, incorporated into medical instruments” in International Class 10:¹

¹ Application Serial No. 97925710 was filed on May 8, 2023 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s claim of first use anywhere and use in commerce since at least as early as May 1, 2006.



The Application includes a description of the applied-for mark as follows:

The mark consists of a three-dimensional configuration of a device consisting of a rectangular base that extends up to a curved top, resembling a sideways letter “C”. Below the “C” is a design of an eye with a line through it, and on the side of the device is a button. The features rendered in dotted lines are not claimed as part of the mark.

The Trademark Examining Attorney has refused registration of Applicant’s applied-for mark under Trademark Act Sections 1, 2, and 45, 15 U.S.C. §§ 1051, 1052 and 1127, on the ground that the applied-for mark, as used in connection with the identified goods, is a nondistinctive configuration of the goods that has not acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. § 1052(f).

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the requests for reconsideration, the appeal was resumed. We affirm the refusal to register.²

² Citations to the prosecution file are to the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system in .pdf format. Citations to the appeal record are to TTABVue, the Board’s online docketing system.

I. Preliminary Matters

A. Hyperlinks

In its brief, for the first time, Applicant embeds hyperlinks to two third-party product pages on www.walmart.com.³ The Board does not consider hyperlinks embedded in briefs. *In re ADCO Indus. - Techs., L.P.*, Serial No. 87545258, 2020 TTAB LEXIS 7, at *4 (TTAB 2020) (web addresses or hyperlinks are insufficient to make the underlying webpages of record); *In re Aquitaine Wine USA, LLC*, Serial No. 86928469, 2018 TTAB LEXIS 108, at *27 n.21 (TTAB 2018) (Board does not consider websites for which only links are provided). Further, it is too late to introduce evidence at the briefing stage. Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d) (“The record should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice of appeal.”); *see also, e.g., In re Fitch IBCA, Inc.*, Serial No. 75628232, 2002 TTAB LEXIS 70, at *1 n.2 (TTAB 2002) (new evidence attached to brief not considered; “Applicant did not comply with the established rule that the evidentiary record in an application must be complete prior to the filing of the notice of appeal.”).

Accordingly, we give no further consideration to the hyperlinks in Applicant’s brief.

³ Applicant’s Br., 6 TTABVUE 13.

B. Functionality and Product Configuration

Applicant devotes a significant portion of its brief to its argument that its “applied for design is nonfunctional.”⁴ Applicant misunderstands the Examining Attorney’s prior refusals and the issue on appeal. To help clarify what issue is on appeal, we start by summarizing the prosecution history for the involved application.

Applicant submitted the below image as the original drawing with its application:⁵



At that time, Applicant described its applied-for mark as follows:

The mark consists of a three-dimensional configuration of a device consisting of a rectangular base that extends up to a curved top, resembling a sideways letter “C”, on the device, below the “C” is an “eye logo” with a line through it, and on the side of the device is a button and inside the “C” is a series of LED lights.⁶

On February 12, 2024, the Examining Attorney issued a Non-Final Office Action, refusing to register Applicant’s applied-for mark, explaining “[t]he drawing of

⁴ Applicant’s Br., 6 TTABVUE 4; *see also id.* at 8-14.

⁵ May 8, 2023 Application, TSDR at 7.

⁶ *Id.* at 1.

applicant's applied-for three-dimensional mark is not acceptable because it includes functional elements depicted in solid lines rather than broken or dotted lines.”⁷ Although the Examining Attorney did not find that the configuration as a whole was functional, he identified “the following elements [as] functional: the C-shaped opening at the top of the configuration and the C-shaped ring of lights[.]”⁸ The Examining Attorney required that Applicant “provide (1) a new drawing of the mark showing the functional element(s) in broken or dotted lines, and (2) an amended mark description that references the matter in broken or dotted lines and indicates such matter is not claimed as part of the mark.”⁹ The Examining Attorney also requested information regarding additional elements in Applicant's drawing (e.g., information concerning the inclusion of the word “TRANSLITE,” the nature of the indentation at the bottom of the device, and the significance of the strikethrough-eye design).¹⁰

In response, Applicant “provided a substitute drawing that ... depicted the functional elements in broken or dotted lines. (the C-shaped opening at the top of the configuration and the C-shaped ring of lights)[.]”¹¹ Applicant also “removed the word ‘TRANSLITE’ and the indentation at the bottom of the device”¹² and responded to the Examining Attorney's request for information.¹³ Applicant, however, did not amend

⁷ February 12, 2024 Non-Final Office Action, TSDR at 2.

⁸ *Id.*

⁹ *Id.* at 3.

¹⁰ *Id.* at 3-4.

¹¹ March 12, 2024 Response to Office Action, TSDR at 1.

¹² *Id.*

¹³ *Id.* at 1-2.

the description of the drawing. The substitute drawing submitted with the Response to Office Action is the operative drawing in the application.¹⁴

On July 8, 2024, the Examining Attorney issued a second Non-Final Office Action. Notably, the Examining Attorney stated that “the following requirements have been **satisfied**: provide drawing disclaiming functional elements.”¹⁵ The July 8, 2024 Non-Final Office Action, however, was not a final action because it raised a new issue, namely “[r]egistration [was] refused because the applied-for mark consists of a nondistinctive product design or nondistinctive features of a product design that is not registrable on the Principal Register without sufficient proof of acquired distinctiveness.”¹⁶ The Examining Attorney explained that “Applicant may respond by providing evidence of acquired distinctiveness, such as verified statements of long term use, advertising and sales expenditures, examples of advertising, affidavits and declarations of consumers, and customer surveys.”¹⁷ The Examining Attorney further explained that “[a]s an alternative to claiming acquired distinctiveness, applicant may amend the application to the Supplemental Register.”¹⁸

In response, Applicant requested that the Office “approve the application on the Principal Register as acquiring di[s]tinctiveness under Section 2(f).”¹⁹ In support of

¹⁴ See page 2, *supra*.

¹⁵ July 8, 2024 Office Action, TSDR at 2 (emphasis added).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 3.

¹⁹ August 8, 2024 Response to Non-Final Office Action, TSDR at 1.

its claim of acquired distinctiveness, Applicant submitted marketing materials for Applicant's "Veinlite EMS Pro" product, a declaration of Applicant's President, and the declarations of three different consumers.²⁰ Applicant also embedded the contents of a purported "report" from the Society of Nuclear Medicine & Molecular Imaging.²¹

On August 29, 2024, the Examining Attorney issued a Final Office Action, finding Applicant's evidence of acquired distinctiveness insufficient and maintaining the refusal that the applied-for mark, as used in connection with the identified goods, is a nondistinctive configuration of the goods that has not acquired distinctiveness under Trademark Act Section 2(f).²²

On October 15, 2024, Applicant requested reconsideration, submitting arguments and additional evidence (i.e., an another declaration of a consumer, an undated photograph of Applicant's booth at an unnamed trade show, and a printout of Applicant's products on its website).²³

In response, the Examining Attorney issued another Non-Final Office Action, continuing the refusal of Applicant's applied-for mark as being a nondistinctive configuration of the goods that has not acquired distinctiveness under Trademark Act Section 2(f), but adding a new requirement, namely the submission of a drawing description that "specifically state[s] that the elements represented by dotted lines

²⁰ *Id.* at 4-12.

²¹ *Id.* at 14-16.

²² August 29, 2024 Final Office Action, TSDR at 2-3.

²³ October 15, 2024 Request for Reconsideration, TSDR at 4-10.

are not claimed as part of the configuration mark.”²⁴ The Examining Attorney proposed language that Applicant could submit if accurate.²⁵

On October 31, 2024, Applicant submitted a second Request for Reconsideration, amending the description of the mark (as proposed by the Examining Attorney) to its current form.²⁶

On January 6, 2025, the Examining Attorney found that the requirement for the drawing description was satisfied and maintained the refusal that the applied-for mark, as used in connection with the identified goods, is a nondistinctive configuration of the goods that has not acquired distinctiveness under Trademark Act Section 2(f).²⁷

As reflected in the prosecution history, there is no functionality issue on appeal. The sole issue on appeal is whether Applicant has proven acquired distinctiveness in its applied-for mark. Unlike product packaging trade dress, which can be inherently distinctive, product configuration trade dress is not inherently distinctive because consumers are not predisposed to equate such configurations with particular sources: “even the most unusual of product designs – such as a cocktail shaker shaped like a penguin – is intended not to identify the source, but to render the product itself more useful or more appealing.” *Wal-Mart Stores Inc. v. Samara Bros. Inc.*, 529 U.S. 205, 213 (2000), *cited in In re Slokevage*, 441 F.3d 957, 961 (Fed. Cir. 2006); *In re Change*

²⁴ October 21, 2024 Non-Final Office Action, TSDR at 1-2.

²⁵ *Id.* at 2.

²⁶ October 31, 2024 Request for Reconsideration, TSDR at 1. *See* page 2, *supra*.

²⁷ January 6, 2025 Request for Reconsideration Denied, TSDR at 1-2.

Wind Corp., Serial No. 86046590, 2017 TTAB LEXIS 233, at *32 (TTAB 2017). Hence, product configurations may be registered as marks only upon a showing of acquired distinctiveness. *See, e.g., Slokevage*, 441 F.3d at 961; *AS Holdings, Inc. v. H & C Milcor, Inc.*, Opp. No. 91182064, 2013 TTAB LEXIS 388, at *28 (TTAB 2013); *In re UDOR U.S.A., Inc.*, Serial No. 78867933, 2009 TTAB LEXIS 61, at *25-26 (TTAB 2009). Here, Applicant concedes that it seeks registration of a product configuration.²⁸

We next consider whether Applicant has made the requisite showing of acquired distinctiveness.

II. Acquired Distinctiveness

Applicant bears the burden of proving acquired distinctiveness. *In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 1335 (Fed. Cir. 2015); *In re Fantasia Dist., Inc.*, Serial No. 86185623, 2016 TTAB LEXIS 471, at *20 (TTAB 2016). To show that a proposed mark has acquired distinctiveness, Applicant must demonstrate that the relevant members of the public – persons who purchase or use, or may be in the market to purchase or use, medical instruments that feature an LED apparatus for lighting – understand the primary significance of the applied-for product configuration as identifying the source of the product rather than the product itself. *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 851 n. 11 (1982); *In Re MGA Entm't, Inc.*, Serial No. 76603323, 2007 TTAB LEXIS 78, at *11 (TTAB 2007). This burden is particularly

²⁸ *See, e.g.*, Description of Applied-for Mark, page 2, *supra* (“The mark consists of a three-dimensional **configuration of a device** ...”); Applicant’s Br., 6 TTABVUE 5 (“the particular combination of features embodying [Applicant’s] LED **Instrument design**, as a whole, is not functional and further that the mark has achieved acquired distinctiveness.”); *id.* (“The **product design**, in this case, does not confer any manufacturing advantage or monopoly to [Applicant]”) (emphasis added to each).

heavy where an applicant seeks to establish the distinctiveness of a product configuration, which consumers are predisposed to view as useful or appealing, not source-indicating. *Yamaha Int'l. Corp. v. Hoshino Gakki Co. Ltd.*, 840 F.2d 1572, 1581 (Fed. Cir. 1988); *In re Ennco Display Sys., Inc.*, Serial No. 74439206, 2000 TTAB LEXIS 235, at *14 (TTAB 2008) (“While there is no fixed rule for the amount of proof necessary to demonstrate acquired distinctiveness, the burden is heavier in this case because it involves product configurations.”).

To support a claim of acquired distinctiveness, an applicant may submit evidence falling into two general categories: direct evidence and circumstantial evidence. *See Schlafly v. St. Louis Brewery, LLC*, 909 F.3d 420, 424 (Fed. Cir. 2018) (“both direct and circumstantial evidence may show secondary meaning.”); *Kohler Co. v. Honda Giken Kogyo K.K.*, Opp. No. 91200146, 2017 TTAB LEXIS 450, at *122 (TTAB 2017) (“Direct evidence includes actual testimony, declarations or surveys of consumers as to their state of mind. Circumstantial evidence is evidence from which consumer association may be inferred, such as years of use, extensive amounts of sales and advertising, and any similar evidence showing wide exposure of the mark to consumers.”); *see also In re Snowizard, Inc.*, Serial No. 87134847, 2018 TTAB LEXIS 435, at *15-16 (TTAB 2018) (*quoting Converse, Inc. v. Int'l Trade Comm'n*, 909 F.3d 1110, 1120 (Fed. Cir. 2018)) (in assessing whether the applicant met its burden of establishing acquired distinctiveness, Board considers any evidence bearing on: “(1) association of the trade[mark] with a particular source by actual purchasers (typically measured by customer surveys); (2) length, degree, and exclusivity of use;

(3) amount and manner of advertising; (4) amount of sales and number of customers; (5) intentional copying; and (6) unsolicited media coverage of the product embodying the mark.”). No single type of evidence is determinative, as it is the evidence as a whole that determines whether an applicant has met its burden. To support a showing of acquired distinctiveness, “[t]he evidence must relate to the promotion and recognition of the specific configuration embodied in the applied-for mark and not to the goods in general.” *Change Wind*, 2017 TTAB LEXIS 233, at *33.

We next consider the direct and circumstantial evidence of record.

A. Length and Exclusivity of Use

According to the declaration of Nizar Mullani, Applicant’s President (“Mullani Declaration”), Applicant began selling its “LED apparatus for lighting, incorporated into medical devices,” in 2006.²⁹ There is no evidence in the record showing whether others use the same product configuration, although Mr. Mullani testifies that the product configuration is “proprietary” to Applicant³⁰ and Applicant owns a patent for a “Vein Holder” and a “Transillumination Having Orange Color Light,” both of which appear to cover certain aspects of Applicant’s “Veinlite EMS Pro” product.³¹

The length of time needed to acquire distinctiveness in the mind of the consuming public is proportional to the non-distinctiveness of the applied-for mark. *See UDOR U.S.A.*, 2009 TTAB LEXIS 61, at *26-27 (“We also agree with the Trademark

²⁹ August 8, 2024 Response to Office Action, TSDR at 7 (Mullani Decl. at ¶ 3).

³⁰ *Id.* (Mullani Decl. at ¶ 4).

³¹ February 12, 2024 Non-Final Office Action, TSDR at 20-22 (U.S. Patent No. 8177808) and 23-25 (U.S. Patent No. 7874698).

Examining Attorney that given the nature of this alleged mark, a mere claim of five years of use is insufficient to overcome this showing. Analogizing to the possible registrability of highly descriptive terms which may nevertheless acquire distinctiveness, we note that the lesser the degree of inherent distinctiveness, the heavier the burden to prove it has acquired distinctiveness.”). Because the applied-for mark in this case is a product configuration, which consumers may appreciate for its utility or appearance rather than its putative indication of source, a showing of five or more years’ use is insufficient. *See In re Koninklijke Philips Elecs. N.V.*, Serial No. 85092079, 2014 TTAB LEXIS 349, at *16 (TTAB 2014).

Here, Applicant’s length of use of the product configuration, extending over eighteen years, is insufficient, in itself, to persuade us that the product configuration has acquired distinctiveness in the public mind as an indicator of source. *See In re Van Valkenburgh*, Serial No. 77025789, 2011 TTAB LEXIS 1, at *29-30 (TTAB 2011) (sixteen years’ use insufficient to show acquired distinctiveness for motorcycle stands); *Mag Instrument Inc. v. Brinkmann Corp.*, Opp. No. 91163534, 2010 TTAB LEXIS 322, at *68 (TTAB 2010) (twenty-seven years’ use insufficient to show acquired distinctiveness for dual bands on flashlight); *In re Howard Leight Indus. LLC*, Serial No. 76439661, 2006 TTAB LEXIS 229, at *34 (TTAB 2006) (fifteen years’ use insufficient to show acquired distinctiveness for earplug configuration); *In re Gibson Guitar Corp.*, Serial No. 75513342, 2001 TTAB LEXIS 835, at *9-10 (TTAB 2001) (sixty-six years’ use insufficient to show acquired distinctiveness for guitar configuration). *see also In re R.M. Smith, Inc.*, 734 F.2d 1482, 1485 (Fed. Cir. 1984)

(eight years' use insufficient to show acquired distinctiveness for pistol grip water nozzle configuration).

B. Sales and Advertising Expenditures

According to Mr. Mullani, Applicant has sold over 55,000 apparatuses with the involved product configuration since 2006, totaling more than \$29 million in revenue from the sale of such products.³² In other words, Applicant has averaged approximately 3,055 units sold per year and \$1.61 million in revenue per year. Applicant does not identify its advertising expenditures, although the record establishes that Applicant has advertised its product for sale on at least the Internet (e.g., its own website and Amazon) and at trade shows. Applicant, however, did not indicate how many individuals accessed Applicant's website or attended its trade shows.

While Applicant's sales figures may demonstrate the popularity of Applicant's "Veinlite EMS Pro" product, they do not demonstrate that the purchasing public recognizes the product configuration as a source indicator. *See Braun Inc. v. Dynamics Corp. of Am.*, 975 F.2d 815, 827 (Fed. Cir. 1992) ("Similarly, the fact that there was an apparently large consumer demand for Braun's blender does not permit a finding the public necessarily associated the blender design with Braun."); *In re Bongrain Int'l (Am.) Corp.*, 894 F.2d 1316, 1318 (Fed. Cir. 1990) (growth in sales may be indicative of popularity of product itself rather than recognition as denoting origin); *Stuart Spector Designs, Ltd. v. Fender Musical Instr. Corp.*, Opp. No.

³² August 8, 2024 Response to Office Action, TSDR at 7 (Mullani Decl. at ¶¶ 3-4).

91161403, 2009 TTAB LEXIS 132, at *65 (TTAB 2009) (“[W]hile sales volume figures may demonstrate the growing popularity of the products, mere figures demonstrating successful product sales are not probative of purchaser recognition of a configuration as an indication of source.”).³³

Furthermore, there is nothing about Applicant’s advertisements (e.g., promotion on websites and trade shows) that specifically promotes the applied-for configuration of Applicant’s product as an indicator of source. Rather, each image of Applicant’s product is for the “Veinlite” product and includes the “VeinLite” mark in connection with the product. For example:

³³ Applicant relies on both *In re Black & Decker Corp.*, Serial No. 76570453, 2006 TTAB LEXIS 489 (TTAB 2006) and *In re Haggard Co.*, Serial No. 207017, 1982 TTAB LEXIS 8 (TTAB 1982) to support its argument that Applicant’s \$29 million in sales revenue over an eighteen year period supports acquired distinctiveness. *See* Applicant’s Br., 6 TTABVUE 16. The facts of those cases, however, are easily distinguishable. In *Black & Decker*, the applicant had used its mark for more than twenty years and in the **four-year** period preceding its application, it spent more than \$20 million in advertising and generated more than \$500 million in sales revenue. *Black & Decker Corp.*, 2006 TTAB LEXIS 489, at *3. And in *Haggard*, the applicant had used the same or similar mark for more than twenty years and in the **five-year** period preceding its application, it averaged \$150 million in sales per year (approximately \$750 million total) and spent approximately \$5 million per year on advertising over that same period (approximately \$25 million total). *Haggard*, 1982 TTAB LEXIS 8, at *2. These revenue figures dwarf Applicant’s revenue figures (and were generated over a substantially shorter period of time). And again, Applicant provided no information about its advertising expenditures.

Image from Applicant's Website³⁴

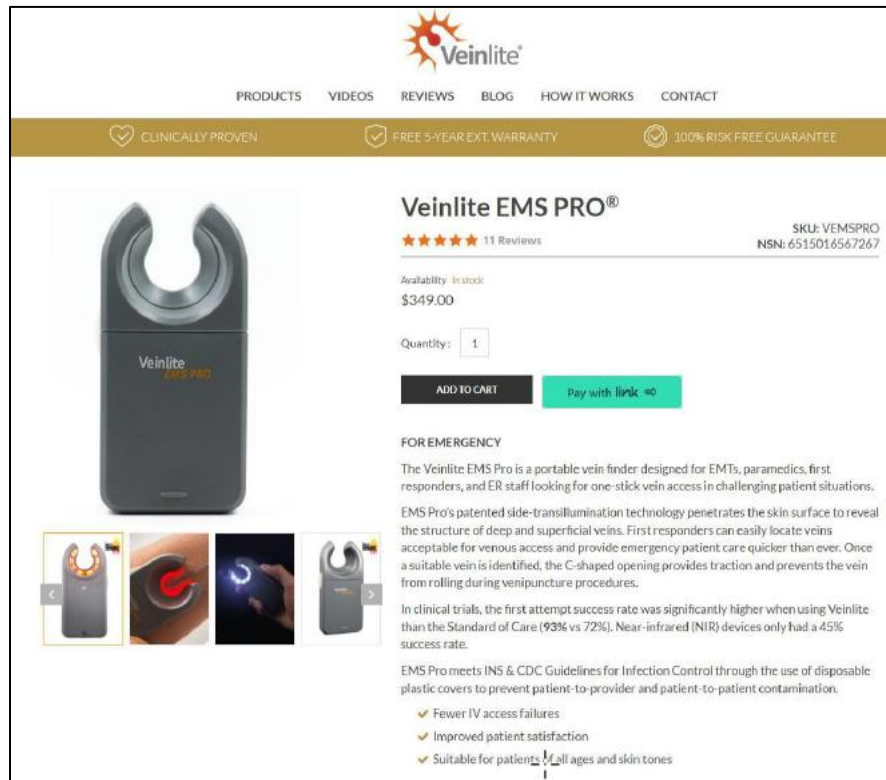
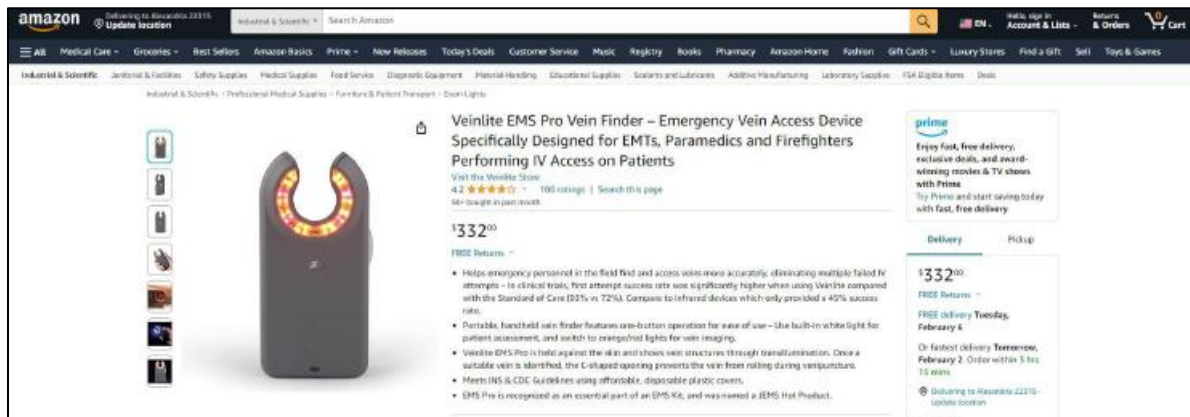


Image from Amazon Product Listing³⁵



³⁴ February 12, 2024 Non-Final Office Action, TSDR at 6.

³⁵ *Id.* at 12.

Image from Applicant's Website³⁶

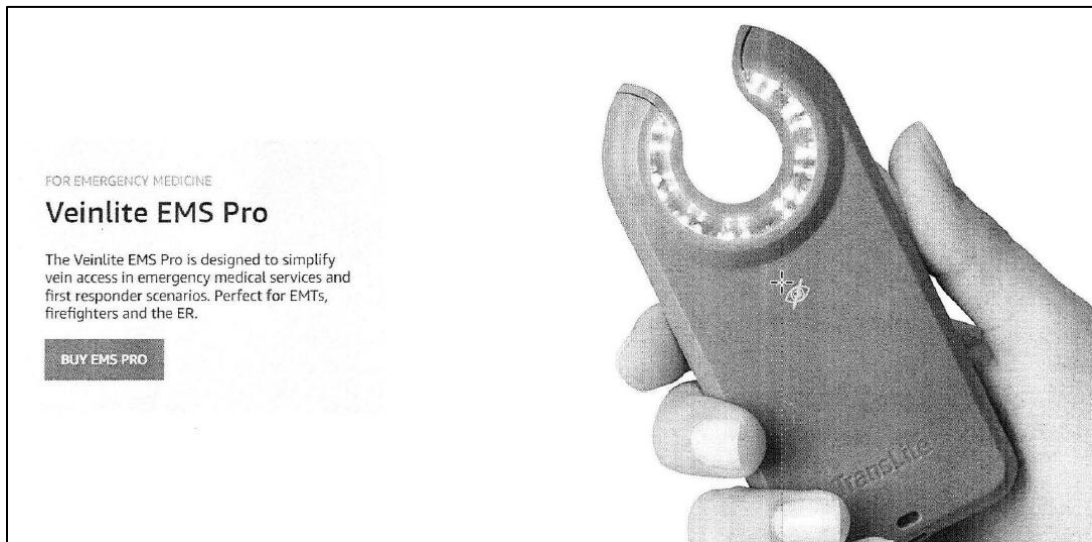


Image from Applicant's Website³⁷



³⁶ August 8, 2024 Response to Non-Final Office Action, TSDR at 5.

³⁷ October 15, 2024 Request for Reconsideration, TSDR at 10.

Image of Applicant's Tradeshow Booth³⁸



“It is well-settled that, where, as here, a party’s advertising and sales data is based on materials and packaging in which the mark at issue is almost always displayed with another mark [e.g., “Veinlite”], such data does not prove that the mark at issue possesses the requisite degree of consumer recognition.”³⁹ *ProMark Brands Inc. v.*

³⁸ *Id.* at 9.

³⁹ Additionally, Applicant failed to provide any context that would help us properly assess its sales figures. Board decisions have long alerted practitioners to the fact that the absence of evidence of competitive contextual information may limit the probative value that might otherwise be accorded sales numbers in the acquired distinctiveness inquiry. *See, e.g., Mini Melts, Inc. v. Reckitt Benckiser LLC*, Opp. No. 91173963, 2016 TTAB LEXIS 151, at *58 (TTAB 2016); *AS Holdings*, 2013 TTAB LEXIS 388, at *32; *Target Brands Inc. v. Hughes*, Opp. No. 91163556, 2007 TTAB LEXIS 94, at *14 (TTAB 2007).

GFA Brands, Inc., Opp. No. 91194974, 2015 TTAB LEXIS 67, at *43 (TTAB 2015) (citing *Bongrain Int'l (Am.)*, 894 F.2d at 1318); *see also In re Mogen David Wine Corp.*, 372 F.2d 539, 541 (CCPA 1967) (promotion of a bottle design bearing other trademarks insufficient to show that the public views the bottle design alone as a trademark); *In re Soccer Sport Supply Co.*, 507 F.2d 1400, 1403 (CCPA 1975) (advertising of soccer ball design with word marks “provide[s] no indication of a nexus between [the] design per se and a single source.”).

C. Consumer Recognition

Applicant did not submit any consumer studies (e.g., surveys) concerning consumer recognition of Applicant’s applied-for mark. Applicant, however, did submit the declarations of four consumers: Tomislav Martan, Dmitri Azbel, Naomi Walcott, and Oscar Rios Orellana.⁴⁰ The Martan, Azbel, and Walcott Declarations are identically worded, each averring that they have been a customer of Applicant’s product for “10 years” and “instantly recognize” the applied-for product configuration as emanating from Applicant.⁴¹ The Martan Declaration is reproduced below:


⁴⁰ August 8, 2024 Response to Office Action, TSDR at 10-12 (Martan, Azbel, and Walcott Declarations); October 15, 2024 Request for Reconsideration, TSDR at 8 (Orellana Declaration).

⁴¹ August 8, 2024 Response to Office Action, TSDR at 10-12 (Martan, Azbel, and Walcott Declarations).

DECLARATION OF CONSUMERS

Sir:

My name is Tomislav Martan, I have been a customer of the "light emitting diode (LED) apparatus for lighting, incorporated into medical instruments" emanating from TRANSLITE, LLC.

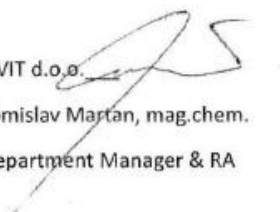


("TRANSLITE") for 10 years. I instantly recognize the e

as emanating from TRANSLITE.

It my understanding that product configuration comes solely from TRANSLITE and has high quality and performance.

Date_8th August 2024. __

By: __ BIOVIT d.o.o. 

Name: Tomislav Martan, mag.chem.

Title: Department Manager & RA

The Orellana Declaration is substantially the same, down to the misplaced "e" before the product configuration image, except that Mr. Orellana avers to have been a customer for "16 years:"⁴²

⁴² October 15, 2024 Request for Reconsideration, TSDR at 8 (Orellana Declaration).



DECLARATION OF CONSUMERS

Sir:

My name is Oscar Rios Orellana, I have been a customer of the "light emitting diode (LED) apparatus for lighting, incorporated into medical instruments" emanating from TRANSLITE, LLC ("TRANSLITE") for 16 years. I instantly recognize the e



as emanating from TRANSLITE.


It my understanding that product configuration comes solely from TRANSLITE and has high quality and performance.

Date August 19th, 2024

By: 

Name: Oscar Rios Orellana
Company: Veinlite Mexico S. de R.L. de C.V.
Title: Gerente Administrador y Representante Legal

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We find Applicant's consumer declarations of minimal probative value for several reasons. First, "proof of distinctiveness requires more than proof of the existence of a relatively small number of people who associate" Applicant's applied-for mark with Applicant, *Roselux Chem. Co. v. Parsons Ammonia Co.*, 299 F.2d 855, 862 (CCPA 1962), and the testimony of four consumers out of an alleged 55,000-plus customers over an eighteen-year period is not convincing to prove widespread recognition of

Applicant's applied-for mark. *See, e.g., In re Palacio Del Rio, Inc.*, Serial No. 88412764, 2023 TTAB LEXIS 183, at *23 (TTAB 2023) ("the [four] customer declarations ... [were] too few in number"); *In re MK Diamond Prods.*, Serial No. 86813875, 2020 TTAB LEXIS 263, at *75 (TTAB 2020) ("[G]iven the highly non-distinctive nature of the mark, we do not find the statements of approximately twelve customers [from the sale of more than 18,000 products] to be sufficient to satisfy Applicant's high burden to establish acquired distinctiveness.").

Second, the consumer declarations are fill-in-the blank forms that were clearly drafted by someone other than the declarants. *See Palacio Del Rio*, 2023 TTAB LEXIS 183, at *23 ("[T]he [four] customer declarations ... [were] in many ways identical or 'cookie cutter,' diminishing their persuasiveness in these appeals" and "have minimal probative value to the extent they purport to espouse legal conclusions on the ultimate issue of distinctiveness."); *MK Diamond Prods.*, 2020 TTAB LEXIS 263, at *74 ("While form statements may be submitted as evidence of acquired distinctiveness, we generally find them – and find them here – to be less persuasive than statements expressed in a declarant's own words."); *Mag Instrument*, 2010 TTAB LEXIS 322, at *67-68 (TTAB 2010) (finding sixteen declarations of "little persuasive value" because "[t]hey [were] nearly identical in wording and thus do not appear to have been prepared in the signer's own words").

Third, although the consumer declarations identify the applied-for configuration with the functional elements represented by dotted lines (which has the effect of

excluding them from claimed portions of the applied-for mark),⁴³ it is not clear whether the declarants understood what the dotted lines in the product configuration drawing mean. In other words, it is unclear whether the declarants considered the functional elements of the product configuration (i.e., the vein holder and LED elements) in rendering their testimony that they recognize Applicant as the source of the product configuration. *See Kohler*, 2017 TTAB LEXIS 450, at *126-27 (“We cannot determine the extent to which the declarants’ professed state of mind about ‘the engine appearance and shape shown in the attached drawing and photograph’ is based solely upon the claimed features of the applied-for mark, as opposed to the engine’s color scheme, the HONDA brand name, or any other visible features of the engine that are not part of the applied-for mark.”).

Taken as a whole, the declarants’ statements are inadequate to demonstrate that the applied-for mark has acquired distinctiveness.

D. Other Factors

Applicant did not submit any evidence of copying by others or unsolicited media coverage. Applicant did include in the argument section of its August 8, 2024 Response to Office Action what it identifies as the text of a “report” published by the Society of Nuclear Medicine & Molecular Imaging.⁴⁴ Applicant did not provide a copy

⁴³ TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMPE) § 1202.02(c)(i)(A) (“Functional elements of a trade dress mark are never capable of acquiring trademark significance and are unregistrable. ... [T]o show that they are not part of the mark, functional elements must be depicted in broken or dotted lines on the drawing to show the position or placement of the claimed portion of the mark.”).

⁴⁴ August 8, 2024 Response to Office Action, TSDR at 14-16.

of this “report” or even the date of its publication. Nevertheless, accepting the content of the “report” for what Applicant claims it to be, the “report” is not probative of the acquired distinctiveness of Applicant’s applied-for mark. The “report” is largely dedicated to identifying and praising Mr. Mullani for his professional accomplishments. While the “report” does identify Mr. Mullani as the “Inventor of Veinlite,” there is no reference to Applicant’s applied-for product configuration mark or how the public views the configuration.

E. Conclusion on Acquired Distinctiveness

At bottom, the critical question is not the length of Applicant’s use, the dollar amount of its sales, or the extent of its advertising; it is the effectiveness of these efforts in “creating a consumer association between the product configuration and the producer.” *Ennco Display Sys.*, 2000 TTAB LEXIS 235, at *19. Based on consideration of all of the evidence of record, and having considered the relevant factors, we find that Applicant has failed to satisfy its burden of proving acquired distinctiveness under Section 2(f) of the Trademark Act. We find that the applied-for mark is a nondistinctive product configuration that has not acquired distinctiveness.

Decision: The refusal to register Applicant’s applied-for mark is affirmed.