

This Opinion is Not a  
Precedent of the TTAB

Mailed: February 20, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Kronebusch Industries, LLC*  
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Serial No. 86706847  
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Danielle I. Mattessich, of Merchant & Gould PC,  
for Kronebusch Industries, LLC.

Allison P. Schrody, Trademark Examining Attorney, Law Office 115,  
Daniel Brody, Managing Attorney.

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Before Wellington, Kuczma, and Larkin,  
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

Kronebusch Industries, LLC (“Applicant”) seeks registration on the Principal  
Register of the claimed mark shown below



for fire extinguishers, in International Class 9.<sup>1</sup> We depict below one of Applicant's fire extinguishers bearing the claimed mark:



The Trademark Examining Attorney has refused registration of Applicant's mark under Sections 1, 2, and 45 of the Trademark Act, 15 U.S.C. §§ 1051, 1052, and 1127, on the grounds that the claimed mark comprises nondistinctive product configuration that is unregistrable on the Principal Register without proof of acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), and that Applicant has made an insufficient showing of acquired distinctiveness.

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<sup>1</sup> Application Serial No. 86706847 was filed on July 28, 2015 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), on the basis of Applicant's claim of first use of the mark and first use of the mark in commerce in 2008. The mark is described in the application as consisting "of a three-dimensional configuration as depicted in the drawing with claimed features drawn in solid lines that can be generally described as a pistol-shaped handle of a fire extinguisher. The dotted lines representing the trigger pull, release point, screws, safety pin, and the upper portion of the container are not claimed as features of the mark." We will refer to the claimed mark in this opinion as the "Handle Design."

When the refusal was made final, Applicant appealed and requested reconsideration, which was denied. Applicant and the Examining Attorney have filed briefs. We affirm the refusal to register.

### **I. Prosecution History and Record on Appeal**

Applicant initially sought registration of the Handle Design under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), on the basis of its claim that the Handle Design had acquired distinctiveness through Applicant's substantially exclusive and continuous use for the five years preceding the claim. The Examining Attorney rejected Applicant's five-year use claim and required Applicant to submit evidence of acquired distinctiveness.<sup>2</sup>

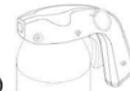
Applicant responded by submitting the declaration of its principal, Allen Kronebusch, and Exhibits A-C thereto, consisting of pictures of competitive fire extinguishers, Applicant's advertising materials, and a list of trade shows attended by Applicant from 2008 to 2016, respectively.<sup>3</sup>

Mr. Kronebusch's declaration bore the following caption:

U.S. Trademark Application Serial No. 86/706870 (LOCATION OF GAUGE)



U.S. Trademark Application Serial No. 86/706847 (HANDLE DESIGN)



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<sup>2</sup> November 13, 2015 Office Action at 1.

<sup>3</sup> May 13, 2016 Response to Office Action at 6-136.

In his declaration, Mr. Kronebusch described the Handle Design mark at issue on this appeal, and a separate “Location of Gauge” mark apparently shown in Application Serial No. 86706870,<sup>4</sup> collectively as the “Design Marks.” Kronebusch Decl. ¶ 3. He discussed these “Design Marks” together throughout his declaration, and concluded that “[a]s a result of the widespread sale and advertising of Our Products, the Design Marks have become well known and familiar to the trade and to the purchasing public throughout the United States as identifying exclusively those products to which it is applied and which emanate from my Company.” Kronebusch Decl. ¶ 16.

The Examining Attorney rejected Applicant’s evidence of acquired distinctiveness as insufficient, and issued a final refusal of registration.<sup>5</sup> Applicant filed a notice of appeal, and simultaneously requested reconsideration and sought to amend the identification of its goods to add “fire extinguishing preparations” and “chemical preparations.”<sup>6</sup> The Examining Attorney denied the request for reconsideration,

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<sup>4</sup> It is apparent that Mr. Kronebusch’s declaration was also submitted in Application Serial No. 86706870, but we have no information regarding that application because it was not made of record here, and we do not take judicial notice of applications or registrations in the Patent and Trademark Office. *In re House Beer, LLC*, 114 USPQ2d 1073, 1075 (TTAB 2015). We obviously express no opinion in our decision in this case regarding the registrability of the “Location of Gauge” mark.

<sup>5</sup> June 5, 2016 Office Action at 1.

<sup>6</sup> December 5, 2016 Request for Reconsideration at 1 (4 TTABVUE). When Applicant filed its notice of appeal, the Board instituted the appeal, but suspended it and remanded the application to the Examining Attorney to consider the request for reconsideration, including the proposed amendment to the identification of the goods. 2 TTABVUE 1. The Board instructed the Examining Attorney that if she “determine[d] that the amendment to the identification is not acceptable, the Examining Attorney should issue an Office Action to that effect, indicating the reasons why the proposed amendment is unacceptable,” and that the “amendment to the identification should be treated as raising a new issue, such that any

continued the refusal to accept Applicant's Section 2(f) evidence, and rejected the proposed amendment to add additional goods on the ground that it exceeded the scope of the original identification.<sup>7</sup>

Applicant responded to the denial of its request for reconsideration by withdrawing its proposed amended identification, and by making of record additional images of competitive fire extinguishers, pages from its website at ake.com, and multiple dealer and customer statements regarding recognition of the claimed mark.<sup>8</sup> The Examining Attorney allowed Applicant to return to its original identification of goods,<sup>9</sup> but denied Applicant's request for reconsideration and continued the final refusal under Section 2(f).<sup>10</sup> The appeal was then resumed. 6 TTABVUE.

## **II. Sufficiency of Proof of Acquired Distinctiveness Under Section 2(f)**

### **A. The Burden of Proving Acquired Distinctiveness in Product Configuration Cases**

"A product configuration such as this one is not inherently distinctive and . . . may be registered on the Principal Register only upon a showing of acquired distinctiveness under Section 2(f)." *In re Change Wind Corp.*, 123 USPQ2d 1453, 1467 (TTAB 2017) (citing *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 54 USPQ2d 1065, 1068-69 (2000)). In *Wal-Mart*, the Supreme Court held that a product's

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refusal to accept the proposed identification cannot be made final until application is given an opportunity to respond." 2 TTABVUE 2.

<sup>7</sup> January 9, 2017 Office Action at 1.

<sup>8</sup> July 7, 2017 Response to Office Action at 2-25.

<sup>9</sup> *Id.* at 1.

<sup>10</sup> July 31, 2017 Office Action at 1 (5 TTABVUE).

design can never be inherently distinctive because “[c]onsumers are aware of the reality that, almost invariably, 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.” 54 USPQ2d at 1069.

“A refusal to register non-distinctive trade dress based on its failure to function as a mark may be overcome by a showing of acquired distinctiveness under Section 2(f) of the Trademark Act. “The applicant . . . bears the burden of proving acquired distinctiveness.” *In re Keep A Breast Found.*, 123 USPQ2d 1869, 1882 (TTAB 2017) (quoting *In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 116 USPQ2d 1262, 1264 (Fed. Cir. 2015)). “An applicant must show that the primary significance of a mark or trade dress in the minds of consumers is not the product or service but the source of that product or service to establish acquired distinctiveness.” *Id.*

“The amount and character of evidence required to establish acquired distinctiveness depends on the facts of each case and the nature of the mark sought to be registered.” *In re Gen. Mills IP Holdings II, LLC*, 124 USPQ2d 1016, 1018 (TTAB 2017). “There is no fixed rule for the amount of proof necessary to demonstrate acquired distinctiveness, however, the burden is heavier for product configurations.” *Stuart Spector Designs Ltd. v. Fender Musical Instruments Corp.*, 94 USPQ2d 1549, 1554 (TTAB 2009).

Applicant argues that the burden of showing acquired distinctiveness with respect to its Handle Design is mitigated in this case because the burden “**is directly proportional to the degree of non-distinctiveness of the mark at issue.**” 7

TTABVUE 10 (emphasis in original) (citing *Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 6 USPQ2d 1001, 1008 (Fed. Cir. 1988)). Applicant claims that it has been using the Handle Design “substantially and [sic] exclusively for over 8 years in commerce” and that the “record does not contain one iota of evidence establishing that [the Handle Design] is one that is a common shape used by other third parties in connection with fire extinguishers.” 7 TTABVUE 11. Applicant contends that “[i]n situations where the record does not support a finding that a design is common and utilized by a number of third parties . . . it follows that a lower level of evidence is needed to establish prima facie acquired distinctiveness.” 7 TTABVUE 10. Applicant’s position is summarized in an argument heading that states that because the Handle Design is “**Utterly Distinguishable From Competing Handles In The Industry,**” Applicant’s use of its claimed mark “**Is Substantially Exclusive, as Required By The Statute For Establishing Distinctiveness,**” and Applicant is thus held “**to a Lower Standard of Requisite Evidence Needed to Establish Its Case for Prima Facie Acquired Distinctiveness.**” 7 TTABVUE 10 (emphasis in original). We disagree.

In *Stuart Spector Designs*, the Board held that because the burden of showing acquired distinctiveness is “heavier for product configurations . . . even long periods of substantially exclusive use may not be sufficient to demonstrate acquired distinctiveness,” 94 USPQ2d at 1554, noting that the burden “is particularly heavy when . . . use has not been exclusive.” *Id.* Accordingly, even assuming, without deciding, that Applicant has been using the Handle Design “substantially and [sic]

exclusively for over 8 years in commerce,” 7 TTABVUE 11, and that Applicant’s burden is thus not “particularly” heavy, Applicant nevertheless bears a heavy burden of showing that its claimed mark has acquired distinctiveness. We turn now to an analysis of the evidence offered by Applicant to carry its burden.

## **B. Applicant’s Evidence of Acquired Distinctiveness**

Acquired distinctiveness may be shown by direct or circumstantial evidence. Direct evidence includes actual testimony or declarations of consumers as [to] whether they view the proposed mark primarily as a source identifier, or surveys. Circumstantial evidence is evidence from which such consumer perception might be inferred, such as years of continuous and substantially exclusive use, sales and advertising data, and any similar evidence showing wide exposure of the mark to consumers in a manner that would educate consumers to view the proposed mark as a source indicator.

*Keep A Breast Found.*, 123 USPQ2d at 1882. “In cases of product configuration, the evidence provided to establish acquired distinctiveness must relate to the promotion and recognition of the specific configuration embodied in the applied-for mark and not the goods in general.” *Kohler Co. v. Honda Giken Kogyo K.K.*, 125 USPQ2d 1468, 1506 (TTAB 2017).

### **1. Direct Evidence**

Applicant’s direct evidence consists of Mr. Kronebusch’s declaration and the customer and dealer statements referenced above. 7 TTABVUE 12-13.

#### **a. Mr. Kronebusch’s Testimony**

Applicant relies upon Mr. Kronebusch’s declaration principally to establish that “Applicant purposely designed its fire extinguishers with a unique, pistol-shaped handle design to be distinctive and to be readily able to identify Applicant as the

product source among consumers.” 7 TTABVUE 13 (citing Kronebusch Decl. ¶¶ 10-11).<sup>11</sup> Applicant’s intent and sweat equity in designing the Handle Design “to be distinctive and to be readily able to identify source” are irrelevant to whether its claimed mark has acquired distinctiveness because “the ultimate test in determining whether a designation has acquired distinctiveness is applicant’s success, rather than its efforts, in educating the public to associate the proposed mark with a single source.” *Apollo Med. Extrusion Techs., Inc. v. Med. Extrusion Techs., Inc.*, 123 USPQ2d 1844, 1856 (TTAB 2017).<sup>12</sup>

**b. Dealer and Customer Statements**

Applicant also made of record three dealer statements and eight customer statements,<sup>13</sup> both of which consist of printed forms undoubtedly prepared by Applicant’s counsel. The dealers filled in their names and addresses, but did not state how long they had sold Applicant’s products or the volume of their sales. The customers filled in their names and, in one case, an address, and how long they have purchased fire extinguishers from Applicant. Neither the dealers nor the customers

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<sup>11</sup> May 13, 2016 Response to Office Action at 8-9.

<sup>12</sup> Mr. Kronebusch claimed that as a result of Applicant’s efforts, the Handle Design is “unique” and “distinctive,” and he claimed that “no other companies in the industry manufacture fire extinguishers with a ‘pistol’ shaped handle.” Kronebusch Decl. ¶¶ 10-11. This portion of his declaration is also irrelevant to the extent that it claims that the Handle Design is inherently distinctive.

<sup>13</sup> July 7, 2017 Response to Office Action at 14-25. Mr. Kronebusch explained that dealers “are the type of accounts that would sell on to other parties,” and do not “include the number of customers who would purchase Our Products for their own use.” Kronebusch Decl. ¶ 15. The dealer statements thus are from resellers, while the customer statements are from end users, although one person signed both a dealer statement and a customer statement.

swore under oath to the truth of their adopted statements.<sup>14</sup> We reproduce below a completed and signed example of each type of statement:

**CUSTOMER STATEMENT**

To Whom It May Concern:

I have been, a customer of the company Kronebusch Industries, LLC ("Kronebusch ") for 4 years and have purchased from them such products as fire extinguishers (e.g.,  ) which bore the trademark design  ("pistol shaped handle").

I have come to look upon this trademark as a symbol identifying the products of the Kronebusch company only, and not of any other company in this field.

Date: 12-20-14  
Signature: Joel A Hoover  
Printed Name: Joel A Hoover

**DEALER STATEMENT**

To Whom It May Concern:

I am a dealer in Sheldon, IA, doing business at O'Brien County Farm Mart. In the course of my business, I have had occasion to become familiar with many fire extinguishing products, and am familiar with  products designed as  produced by the company of Kronebusch Industries, LLC ("Kronebusch").

It is my understanding that the unique handle design,  ("pistol shaped handle"), on such products indicates products produced by the Kronebusch and not by any other company. It is also my understanding that the pistol shaped handle has acquired in the trade the meaning of products produced only by Kronebusch.

Many of my retail customers ask for products by the pistol shaped handle mark, and expect that all products marked with this design will come from the same source and are of equal quality with all other products from that source.

Date: 12-20-14  
Signature: Joan Edwards  
Printed Name: Joan Edwards

<sup>14</sup> "[I]t is not necessary that [form statements] include a declaration as provided in Trademark Rule 2.20. However, this does not mean that all form statements and all forms without declarations will have equal probative value with personal statements and those signed with the safeguards of a Rule 2.20 declaration." *In re Lorillard Licensing Co.*, 99 USPQ2d 1312, 1319 (TTAB 2011).

“Form statements may be used to show acquired distinctiveness,’ . . . but the ones here suffer from multiple deficiencies that vitiate their probative value on the issue of acquired distinctiveness.” *Kohler*, 125 USPQ2d at 1507 (quoting *In re Florists’ Transworld Delivery Inc.*, 106 USPQ2d 1784, 1794 n.9 (TTAB 2013)).

“First, ‘they are all essentially identical in form and were clearly not composed individually. . . . [S]uch statements are less persuasive than statements expressed in the declarants’ own words.’” *Id.* (quoting *In re Pohl-Boskamp GmbH & Co.*, 106 USPQ2d 1042, 1051 (TTAB 2013)).

Second, they are “conclusorily worded [and] fail to explain what is it about [the applied-for mark] that is unique or unusual, or distinctive from those of [Applicant’s] competitors.” *In re Pacer Tech.*, 338 F.3d 1348, 67 USPQ2d 1629, 1633 (Fed. Cir. 2003). The language in the customer statement that “I have come to look upon this trademark as a symbol identifying the products of the Kronebusch company only, and not of any other company in the field,” and the language in the dealer statement that “[i]t is my understanding that the unique handle design . . . on such products indicates products produced by the Kronebusch [sic] and not by any other company,”<sup>15</sup> is nearly

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<sup>15</sup> The dealer statements contain the additional statements that “[i]t is also my understanding that the [Handle Design] has acquired in the trade the meaning of products produced only by Kronebusch” and that the dealer’s retail customers “expect that all products marked with this design will come from the same source and are of equal quality with all other products from that source.” None of the dealers establish that they are competent to opine about the understanding of others in the trade, or about the state of mind of their retail customers, including those who they claim “ask for products by the pistol shaped handle mark.” *Cf. Frito-Lay N. Am., Inc. v. Princeton Vanguard, LLC*, 124 USPQ2d 1184, 1205 (TTAB 2017) (statements of distributors of PREZTEL CRISP pretzel crackers “regarding consumer perceptions and comments amount to speculation and inadmissible hearsay, and thus have little probative value in our analysis.”).

identical in substance to the language in the affidavits in *Pacer* that each affiant “identif[ied] the source of the product to be Pacer Technology” upon seeing the claimed mark. *Id.*<sup>16</sup> The Federal Circuit found in *Pacer* that the affidavits were not competent evidence of acquired distinctiveness. *Id.*; *see also Kohler*, 125 USPQ2d at 1508 (language in form declarations regarding the declarants’ “understanding” of significance of engine mark’s appearance and shape in various industries and that the engine was “known to” the declarants as being sold by applicant “underscore[d] the formulaic nature of the declarations” and was “more in the nature of a statement that counsel would hope for than a statement of spontaneous personal knowledge.”); *In re Udor U.S.A., Inc.*, 89 USPQ2d 1978, 1987 (TTAB 2009) (“the existence of a relatively small number of people who have stated that they associate the alleged mark with applicant is simply insufficient in this case for us to find that the term functions as a trademark for applicant’s goods.”).

Finally, the dealer and customer statements do not reflect representative samples of either group. “While we would neither expect nor require scientific sampling in the use of customer declarations, some degree of geographic and customer diversity is necessary for the declarations to have significant probative value.” *Kohler*, 125 USPQ2d at 1508. Mr. Kronebusch testified that when Applicant’s application was filed in July 2015, Applicant “had more than 74 Dealers in the United States,” Kronebusch Decl. ¶ 15, but Applicant submitted statements from only three dealers,

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<sup>16</sup> The dealer statements are also remarkably similar in form and substance to the dealer statements in *Lorillard Licensing*, 99 USPQ2d at 1319-20, which the Board found wanting.

which represents about 4% of Applicant's claimed dealer base, and two of the dealers are located in the same state. We cannot find that three declarations from dealers in two states are representative of the views of Applicant's entire nationwide dealer base. *Florists' Transworld Delivery*, 106 USPQ2d at 1784 (criticizing four form declarations as too few in number and lacking geographic diversity).

Mr. Kronebusch also stated that Applicant "has sold tens of thousands of units to customers that include fire departments, farmers, homeowners, manufacturers, tractor pullers, [and] car owners, among others," Kronebusch Decl. ¶ 6, and that "[a]s a result of the widespread sale and advertising of Our Products," the Handle Design has "become well known and familiar to the trade and to the purchasing public throughout the United States . . . ." Kronebusch Decl. ¶ 16. But only one of the eight customer statements provides an address (in Applicant's home state of Minnesota),<sup>17</sup> and none of them identify the nature of the customer (farmer, fire department, etc.). We cannot find that the customer statements reflect even minimal geographic and customer diversity. *Pacer*, 67 USPQ2d at 1633 (criticizing five form affidavits because they "at most purport to represent the views of a small segment of the relevant market.").

For the reasons discussed above, the customer and dealer statements fall far short of "establish[ing] that Applicant has succeeded in educating the public to associate the claimed mark with a single source." 7 TTABVUE 14.

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<sup>17</sup> As noted above, one customer also signed a dealer statement in which he gave an address in Iowa.

## 2. Circumstantial Evidence

Applicant offers as circumstantial evidence of acquired distinctiveness its advertising, unsolicited news articles regarding its fire extinguishers, the display of its fire extinguishers at trade shows and during product demonstrations, industry recognition of its fire extinguishers, product reviews and testimonials, trade and industry association memberships, and other forms of exposure of the Handle Design to the public. 7 TTABVUE 15-22.

### a. Advertising and Promotion

Mr. Kronebusch stated that Applicant “has spent well over \$1,000,000 to promote Our Products since 2008.” Kronebusch Decl. ¶ 12. Over a period of about eight years, these expenditures average about \$125,000 per year, a fairly modest sum,<sup>18</sup> and according to Mr. Kronebusch, the expenditures were divided among numerous activities: “tradeshow advertising, promotional costs, traditional advertising expenses, press releases, product donations to many non-profit organizations, fire safety educational teaching meetings, web development, social media brand building, search engine optimization costs, telesales, air and radio commercials, numerous dealer network advertising methods, association sponsorship and membership costs.” Kronebusch Decl. ¶ 12. It is self-evident that activities such as telesales, radio commercials, and search engine optimization did not involve exposure of the claimed mark to consumers, and Mr. Kronebusch did not explain how or how much the

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<sup>18</sup> There is nothing in the record regarding Applicant’s sales revenues or market share, or the size of its sales and advertising expenditures relative to those of its competitors. In “the absence of context for these figures, it is difficult to evaluate the significance of the total amount expended.” *Kohler*, 125 USPQ2d at 1516.

claimed mark was exposed to consumers through other activities such as “press releases, web development, social media brand building, association sponsorship and membership costs.” On this record, the volume and composition of Applicant’s advertising and promotional expenditures have little, if any, probative value in showing that its claimed mark has acquired distinctiveness.

Even “compelling sales and advertising figures do not always amount to a finding of acquired distinctiveness,” however, because “the more important question is how the alleged mark is being used, i.e., in what manner have consumers been exposed to the alleged mark so that we can impute consumer association between the configuration[] and the product producer.” *Kohler*, 125 USPQ2d at 1516 (quoting *Stuart Spector Designs*, 94 USPQ2d at 1572). “When advertisements are submitted as evidence of acquired distinctiveness, they must demonstrate the promotion and recognition of the specific configuration embodied in the applied-for mark and not of the goods in general.” *Id.* (quoting *AS Holdings, Inc. v. H & C Milcor, Inc.*, 107 USPQ2d 1829, 1838 (TTAB 2013)). “The sort of advertising that can demonstrate that a trade dress has acquired distinctiveness is commonly referred to as ‘look for’ advertising; that is, advertising that directs the consumer to ‘look for’ the particular feature(s) claimed as a trademark.” *Id.*

Applicant argues that its “extensive advertising pointing to the ‘pistol grip’ handle and also featuring photographs of the uncommon Pistol Shaped Handle Design trademark has further cemented this source-identifying feature among consumers.”

7 TTABVUE 23. Applicant points to the materials attached as Exhibit B to Mr.

Kronebusch's declaration, which he stated comprise "advertising materials showing use of the Design Marks in connection with fire extinguishers,"<sup>19</sup> and "promotional items distributed to customers and potential customers since 2008." Kronebusch Decl. ¶ 13. As discussed above, Mr. Kronebusch explained that the end users of Applicant's fire extinguishers "include fire departments, farmers, homeowners, manufacturers, tractor pullers, [and] car owners, among others," Kronebusch Decl. ¶ 6, but it is not clear how or to what extent these materials were exposed to these consumers.<sup>20</sup>

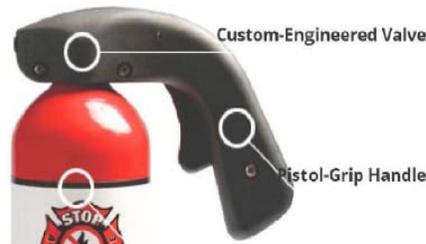
In the final analysis, of course, regardless of the manner and scope of the exposure of these materials, the key question is whether they "demonstrate the promotion and recognition of the specific configuration embodied in the applied-for mark and not of the goods in general." *Id.* Applicant argues that its "promotional efforts have virtually all included a **direct reference** to the 'pistol grip' design feature of the handle . . . and/or product **pictures featuring** the [Handle Design] distinctively . . . ." 7 TTABVUE 15-16 (emphasis in original). Applicant reproduces in its brief a number of materials showing its fire extinguishers. 7 TTABVUE 15-20. We assume that these

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<sup>19</sup> As noted above, these materials are offered to show that **both** the Handle Design and what Mr. Kronebusch describes as the "Location of Gauge" mark are features of Applicant's fire extinguishers that are associated exclusively with Applicant.

<sup>20</sup> The materials are divided into categories by cover pages entitled "Sample Newspaper & Magazine Advertisements" (May 13, 2016 Response to Office Action at 34); "Sample New Dealer Solicitation Tools" (*id.* at 35-87, 93-95); "Sample Dealer-Used Rack Card Advertising Tool" (*id.* at 88-92); "Sample Think-It-Over Tradeshow Advertising Tools" (*id.* at 96-98); "Sample Tri-Fold Brochure Advertising Tools" (*id.* at 99-101); "Sample Video Advertisement (Screen Shot)" (*id.* at 102-103); and "Additional Advertising Materials (Media, Customer Review)" (*id.* at 104-127). There are no materials behind the page entitled "Sample Newspaper & Magazine Advertisements," and it is self-evident that some of the other materials are directed to dealers, prospective dealers, and others in the trade, not to end users.

materials are what Applicant considers to be the best examples of advertisements and promotional materials that “demonstrate the promotion and recognition of the specific configuration embodied in the applied-for mark and not of the goods in general.” *Id.* We reproduce samples of those materials below.



7 TTABVUE 15. This image appears to be cropped from an image of Applicant’s entire fire extinguisher that Applicant made of record during prosecution. Because the larger image more accurately reflects the exposure of the claimed mark to consumers, we reproduce it below.



July 7, 2017 Request for Reconsideration at 11.



## 6. Pistol-Grip Handle

7 TTABVUE 16. This image also appears to be cropped from a larger image of Applicant's entire fire extinguisher, with accompanying text, that Applicant made of record during prosecution. Because the larger image and the accompanying text more accurately reflect the exposure of the claimed mark to consumers, we reproduce them below.



### 1. Straightforward Operation

Because of our simple design, you get a fire extinguisher which is:

- Easy to Use – you can just pull the pin, squeeze the trigger, and put out your fire
- Fast – allows you to put out a fire quickly
- Intuitive – STOP-FYRE® is the easiest and most effective fire extinguisher you will ever use

### 2. Lightweight Extinguisher

- Easy to Use – anyone can quickly extinguish a fire

### 3. Compact-Sized Unit

- Versatile – You can store it virtually anywhere

### 4. Environmentally-Resistant Components

Because we use only the most durable components available, you get an extinguisher which can last a lifetime:

Seamless Aluminum Canister, Stainless Steel Screws/Pin, and Specialized Paint

- Flexibility – you can mount in any location
- Worry-Free – you don't have to worry about corrosion for a lifetime



**Shock-Resistant Plastic**

- Durable – gives you “Peace-of-Mind” knowing your extinguisher is protected from damage

**Long-Lasting Label**

- Long-Term Readability – ensures safe operation

**5. Custom-Engineered Valve**

Because our valve won't leak, you get the features and benefits of an extinguisher which is:

- Multi-Shot – you can fight multiple fires with the same unit
- Maintenance Free – ready to use when you need it most
- Versatile – you can mount in any direction

**6. Pistol-Grip Handle**

- Easy to Use – extinguishing a fire can be easily done by anyone – even a child, someone with severe arthritis, or a disabled person

**7. Clean Extinguishing Agent**

Because of our proprietary blend of fire suppression gasses, you get an extinguisher which is:

- Non-Corrosive – will not harm your machinery, electronics, or skin
- No Mess – saves you from a dry-chemical clean-up hassle

**8. Liquefied Gas Agent**

Because of our trade secret, proprietary extinguishing agent, you get an extinguisher which is:

- Maintenance Free – dry chemical powder can solidify if not shaken monthly, with our agent you can avoid this hassle
- Multi-Shot – won't clog the valve like dry chemical powder will, which can allow you to fight multiple fires and save you the hassle and expense of replacing or servicing your unit
- Drawn to the Heat – do not need a direct shot at the fire to put it out
- Prevents Re-ignition – gas is drawn to the heat source and stays there until it dissipates
- Multi Purpose – effective at extinguishing class A, B, and C fires
- Operator Safety – safe on skin and does not conduct electricity

July 7, 2017 Request for Reconsideration at 12-13.

**Don't Get Burned™!**

Ask About Getting On the Automatic Pre-Order List!

Can you risk a fire extinguisher that may not work?

This farmer didn't buy STOP-FYRE™ for 2 years, he'd never had a fire, had dry chemical fire extinguishers already, and he had insurance. His dry chemical units did not work. After his loss, his deductible cost him \$50,000+. He bought STOP-FYRE™ right away and sent us this photo.

See STOP-FYRE™ work at:  
**Farm Progress Show  
Varied Industries Tent  
Booth # 9302**  
SAVE 15% on 3 or more units.

New Financing Options Available!

Get Yours Before the October 1st Price Change!

AKE Safety Equipment is your fire safety expert. It is our passion. Because of this, we have developed STOP-FYRE™, The World's BEST Fire Extinguisher.

NO MESS • NON-CORROSIVE • MAINTENANCE FREE • MULTI-SHOT • LIFE TIME NO-HANDLE GUARANTEE!

**STOP-FYRE™**  
The World's BEST Fire Extinguisher  
AKE.com • 888.673.4734

See a STOP-FYRE™ demo at the Farm Progress Show! Bring this ad for special show pricing! - SAVE 15%

7 TTABVUE 16.

**Come see a STOP-FYRE® Demo at these pulls in 2014!**

August 15-17  
Bowling Green, OH  
September 4-6  
Sandwich, IL  
September 13  
Urbana, OH

Keep an eye out for the new STOP-FYRE® pulling Sted in 2014.

Dealer Inquiries Welcome! Ask about our new financing options!

To meet NFPA requirements, selling companies must purchase our Premium and Element, which has a pressure gauge.

NO MESS • NON-CORROSIVE • MAINTENANCE FREE • MULTI-SHOT • LIFETIME NO-HASSLE WARRANTY

**STOP-FYRE®**  
The World's BEST Fire Extinguisher™  
AKE.com • 888.673.4734  
Firefighter Owned, Operated, and Endorsed

Visit our booth at one of these pulls to see STOP-FYRE® in action and learn about the world's best fire extinguisher!

7 TTABVUE 17.

**Paying it Forward:**  
A portion of **STOP-FYRE™** profits are donated to help youth programs

AKE's President & Founder, Allen Kronebusch, is dedicated to doing his part in building and nurturing healthy communities by supporting three key youth groups.

A portion of the profits from each sale of STOP-FYRE™ is donated to The Boy Scouts of America, the FFA (Future Farmers of America), and 4H.

7 TTABVUE 17.

## STOP-FYRE™ WORKS SO YOU CAN KEEP WORKIN'



### What is STOP-FYRE™?

STOP-FYRE™ is the only multi-shot, clean agent fire extinguisher on the market. Firefighters love it because it quickly gets to those hard-to-reach fires that traditional methods don't. Farmers love it because it's so effective and does not cause damage to machinery. Our customers love it because it works — PERIOD. STOP-FYRE™ saves lives and property, saving you money, hassle, and tragedy. And with a lifetime guarantee, STOP-FYRE™ gives you Peace-of-Mind. Our customers call it **The World's BEST Fire Extinguisher™** for a reason.

### The STOP-FYRE™ Advantage

STOP-FYRE™	Dry Chemical Powder
1. No monthly service required	1. Must be shaken monthly
2. No yearly service required	2. Must be serviced annually
3. Multi-shot unit	3. Must be serviced after each use
4. No mess or clean up	4. Messy & expensive clean-up
5. Non-corrosive	5. Corrosive to electronics & metal
6. Spray near fire & gas expands	6. Need direct shot at base of fire
7. Compact & lightweight	7. Bulky & heavy
8. So easy a 4-year-old can use it	8. Complicated & intimidating
9. Lifetime Durability Guarantee	9. Not Durable/No Replacement

## TEN REASONS STOP-FYRE™ IS THE OFFICIAL FIRE EXTINGUISHER OF THE NTPA

**REASON #1**  
STOP-FYRE IS EASY TO USE

**STOP-FYRE**  
Because of our simple design, STOP-FYRE's operation is intuitive making it faster and easier for you to put out a fire. It is so easy even a 4-year-old can use it.

**VS. DRY CHEMICAL**  
Proper usage of dry chemical extinguishers can be very difficult. The problem comes you **TIME** — which can make the difference between your fire being a minor inconvenience or a major tragedy.

**REASON #9**  
STOP-FYRE'S LIFETIME NO-HASSLE GUARANTEE

**STOP-FYRE**  
AKE Safety Equipment is the only manufacturer that protects your purchase with a lifetime guarantee. When you own STOP-FYRE, you can feel confident knowing you made the right choice.

**VS. DRY CHEMICAL**  
Other fire extinguishers come with limited warranties. If those manufacturers don't believe in their products enough to guarantee them, why should YOU trust them to protect what matters most to you?

**REASON #10**  
STOP-FYRE GIVES YOU PEACE-OF-MIND

**STOP-FYRE**  
STOP-FYRE will do the job that needs to be done. Our customers love it because they don't have to worry whether it will work or not when they need it most.

**VS. DRY CHEMICAL**  
Now that you know the facts, don't get burned by anything less than the best.



Order Today!  
888-673-4734  
-or-  
goo.gl/TI9ypS



**NOW THAT YOU HAVE THE FACTS**

**STOP-FYRE™**  
The World's BEST Fire Extinguisher™  
AKE.com • 888.673.4734

7 TTABVUE 19.

April 2, 2012 HIGH PLAINS JOURNAL Page 7

## 2012 GREAT BEND FARM & RANCH EXPO

Expo Complex • Great Bend, Kansas • April 11-13, 2012

### STOP-FYRE is 'worth its weight in gold'

*Small fire extinguisher is filled with 20 years of technology*

In 1992, Minnesota farmer Dave Goetke was driving his combine through his fields when he got a panicked call from his wife. Smoke, she told him, was pouring from the corn dryer. "I lightailed it up there," Dave says, "and it was already on fire."

A fire in a corn dryer can mean more than just devastating crop and equipment losses. It means toxic gases rising with deadly smoke—a combination that kills farmers fighting the fire. Unchecked, it means burning propane tanks and explosives.

Goetke knew that, and knew he had one chance to stop the fire. But here's all he had with him: A fire extinguisher not much bigger than, well, a good-sized can of corn. Dave aimed the extinguisher at the fire. He pulled the trigger...

**'The world's best fire extinguisher'**  
Allen Kromeloch is standing in his kitchen with his wife Debbie and their two young sons, Ethan and Aiden. He seizes lighter fluid into a giant pan, then lights a match and tosses it in. Flames—a few feet high—shoot straight up...



homes and their livelihoods and their lives, but the credit goes to God. I'm just a guy who knows a ten. Mine. "It only took five shots to put it out."

"Then we reek the fire and STOP-FYRE: their official extinguisher."

"Like farmers, tractor pullers it. It finds the fire and fights it." It's not just talk—Kromeloch backs every AKE extinguisher.

7 TTABVUE 17.



# STOP FYRE

The World's BEST Fire Extinguisher™

888-673-4734 • AKE.com

Trusted by Farmers Across America to Protect What Matters Most

7 TTABVUE 19.

“‘Look-for’ advertising refers to advertising that directs the potential consumer in no uncertain terms to look for a certain feature to know that it is from that source. It does not refer to advertising that simply includes a picture of the product or touts a feature in a non-source identifying manner.” *Kohler*, 125 USPQ2d at 1517 (quoting *Stuart Spector Designs*, 94 USPQ2d at 1572). Applicant’s various materials almost invariably include a picture of its fire extinguisher, which is usually prominently featured, but “simply show[ing] the product like any advertising would,” *Stuart Spector Designs*, 94 USPQ2d at 1572, is not enough to call attention to Applicant’s claimed mark. To the extent that the materials refer to the Handle Design at all (or, as Applicant puts it, “include a **direct reference** to the ‘pistol grip’ design feature of the handle,” 7 TTABVUE 15), it is to tout the Handle Design’s utilitarian benefits, not to encourage people to recognize it as one of Applicant’s trademarks, like Applicant’s claimed word marks “STOP-FYRE™” and “The World’s BEST Fire Extinguisher™,” or as otherwise uniquely associated with Applicant.

For example, in the first of the two pieces reproduced above in which there is an explicit reference to the “Pistol-Grip Handle,” it is depicted and treated in exactly the same manner as other features of the product, such as its “Custom-Engineered Valve,” “Straightforward Operation,” “Compact-Sized Unit,” and “Liquefied Gas Agent.” There is no effort to call out the “Pistol-Grip Handle” as Applicant’s

trademark. In the second piece, the “Pistol-Grip Handle” is touted in accompanying text as follows:<sup>21</sup>

- Easy to Use – extinguishing a fire can be easily done by anyone – even a child, someone with severe arthritis, or a disabled person

Nothing in the record shows that Applicant has ever encouraged consumers to “look for” the Handle Design, “to fight fire with fire’ (as pistols fire ammunition),” as Applicant’s counsel describes the intended purpose of the Handle Design, 7 TTABVUE 12, or to contrast the Handle Design to what Applicant’s counsel describes as “the common nutcracker shaped handles of standard fire extinguishers currently in the marketplace,” 7 TTABVUE 12, as depicted below.



7 TTABVUE 12. We agree with the Examining Attorney that “none of the advertisements applicant submitted as evidence demonstrate that applicant actively promotes the pistol-shaped handle as a trademark.” 9 TTABVUE 9. *See Kohler*, 125 USPQ2d at 1517 n. 97 (discussing examples of “look-for” advertising). “On this record, the absence of advertising directing consumers to the specific features of the applied-for mark undermines Applicant’s claim of acquired distinctiveness based upon its advertising.” *Id.* at 1517.

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<sup>21</sup> Other materials make more oblique references to the Handle Design’s ease of use. One states that “[b]ecause of our simple design, STOP-FYRE’s operation is intuitive making it faster and easier for you to put out a fire. It is so easy, even a 4-year old can use it.” May 13, 2016 Response to Office Action at 106.

**b. Unsolicited Media Coverage and Customer Testimonials and Product Reviews**

As further evidence of acquired distinctiveness, Applicant cites “dozens of unsolicited, sample news articles featuring Applicant’s Pistol Shaped Handle Design mark,” 7 TTABVUE 20, and “[o]ver 50 product reviews and testimonials by customers,” 7 TTABVUE 22.

Like the advertising and promotional materials discussed above, many of the referenced news articles display and discuss Applicant’s fire extinguishers, but Applicant does not point to any that refer to or describe the Handle Design as a product feature that serves to identify the source of Applicant’s fire extinguishers.<sup>22</sup> The articles do not support a finding that the Handle Design has become recognized as Applicant’s mark. *See Change Wind*, 123 USPQ2d at 1468 (article regarding applicant’s product focused on its utilitarian advantages, “and not on the configuration mark”); *Keep A Breast Found.*, 123 USPQ2d at 1884 (“There is no evidence that any of the asserted media exposure directs viewers to perceive the breast cast as identifying Applicant as the source of the services or as something other than the cast of an individual woman’s breasts and torso.”).

We reproduce below representative examples of the product reviews and customer testimonials in the record.

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<sup>22</sup> One article echoes the discussion of the Handle Design in some of the promotional pieces reproduced above without specifically referring to the handle. This article states that “[t]he design makes it easy for anyone to put out their fire, including children, elderly, or even someone with arthritis.” May 13, 2016 Response to Office Action at 107. Another article states that the fire extinguisher is easy to use because of the small size of the entire unit (“roughly 12-by-3 inches”), not the handle per se. May 13, 2016 Response to Office Action at 105.

*"My microwave is directly above the stove. I removed a plastic plate cover from the microwave and set it on a burner, which I mistakenly thought was cold. BIG MISTAKE! The plastic plate cover caught fire displaying small flames. I immediately turned on the fan, which was directly above the burner, to take away the black smoke. At first I thought that the flames would go out but I grabbed my AKE, which was less than three feet away, and sprayed. Within a few seconds the fire was out, with minimal residue left from the spray and no damage except melted plastic. I am SO GLAD that I bought the AKE extinguishers three years ago! They are another form of "insurance" for my most valuable possession: my home! But unlike homeowners insurance, which is reactive, high-quality fire extinguishers PREVENT catastrophe."*

**Barbara S., Pennsylvania**

May 13, 2016 Response to Office Action at 113.

*"We purchased these extinguishers about two years ago. On November 15th, 2015, our corn dryer started on fire. These extinguishers were used and the fire was put out quickly and without mess. The fire department wasn't even needed. We will definitely be getting these refilled and have them on hand at all times. The AKE STOP-FYRE extinguishers are just like described – snuffs out the fires without mess."*

**J. Hoffman, Downing, WI**

May 13, 2016 Response to Office Action at 113.

*We had our 600 quad-track pulling a manure applicator down the highway from one job to another in the middle of the night, when the cornstalks from the field and the friction and heat of the tracks started on fire. We were able to stop and put the fire out with one extinguisher, but when we started to try to clean the ash and stalks out of the rubber track, it started back up, and we used a half of another extinguisher. We were thankful they worked.*

*Thanks for a great extinguisher!"*

**M. Fehr, West Bend, IA**

May 13, 2016 Response to Office Action at 116.

*"The #1 reason I purchased 11 STOP-FYRE™ units for my farm is simple – I don't want to have to shake them each month or have them serviced every year. This saves me precious time and money. STOP-FYRE™ is hassle free and over time will more than pay for itself."*

**Justin F., Kensett, IA**

May 13, 2016 Response to Office Action at 120.

*"Last year at the 2013 Grand National Tractor Pull in Bowling Green, Ohio, my two wheel drive truck detonated, blew the super charger off, and caught on fire.*

*Basically it was an alcohol / methanol fire so it took a while for the track officials to realize there was a fire.*

*My son realized there was a fire. The STOP-FYRE was shot in my face, the fire was put out successfully, it drew out the oxygen – some coughing and wheezing – but other than that, no effects, which is very important because I have existing asthma."*

*Don & Marcie W., Croton, OH*

May 13, 2016 Response to Office Action at 125.

The reviews and testimonials suggest that Applicant's fire extinguishers work effectively to prevent loss of life and property damage from fires, but we agree with the Examining Attorney that none of them "reference the shape of the product's handle," 9 TTABVUE 6, much less identify it as an indicator of the source of Applicant's fire extinguishers. The product reviews and testimonials do not establish that the Handle Design has acquired distinctiveness as Applicant's mark.

**c. Other Circumstantial Evidence**

Finally, Applicant cites as evidence of acquired distinctiveness the designation of its fire extinguishers as the official extinguishers of the National Tractor Pullers Association, the Illini State Pullers, and the Lucas Oil Monster Truck Nationals, Kronebusch Decl. ¶ 7; the exposure of the extinguishers through the display of the extinguishers in or on materials such as banners, flags, and video commercials, Kronebusch Decl. ¶ 7; Applicant's membership in associations such as the National Fire Protection Association and the Minnesota Association of Farm Mutual Insurance Companies, Kronebusch Decl. ¶ 8; and Applicant's appearance at nearly 200

tradeshows between 2008 and 2016 at which Applicant displayed its extinguishers and demonstrated their use. Kronebusch Decl. ¶ 14; Ex. C.<sup>23</sup>

Mr. Kronebusch's testimony on these matters suggests significant exposure of Applicant's fire extinguishers to consumers and potential consumers, but there is nothing in the record showing that such exposure has conditioned consumers to recognize the Handle Design as Applicant's trademark.<sup>24</sup> This evidence does not establish that the Handle Design has acquired distinctiveness.

We find, on the basis of the record as a whole, that Applicant has failed to carry its burden of showing that the Handle Design has acquired distinctiveness.

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

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<sup>23</sup> 7 TTABVUE 6-7.

<sup>24</sup> For example, the record contains an announcement of the status of Applicant's fire extinguisher as the official fire extinguisher of the National Truck Pullers Association, May 13, 2016 Response to Office Action at 43, and a photograph of Mr. Kronebusch at the NTPA 2011 National Convention, May 13, 2016 Response to Office Action at 51, but there is no mention of the Handle Design. There is also a screenshot from a video that is described as a "Fire Extinguisher Comparison" and sub-titled "STOP-FYRE versus Dry Chemical Fire Extinguisher," May 13, 2016 Response to Office Action at 103, but there is no indication that the comparison contrasted the Handle Design with the design of the handles of the other extinguisher.