

This Opinion is Not a
Precedent of the TTAB

Mailed: September 14, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Converter Manufacturing, LLC

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Serial No. 87587855

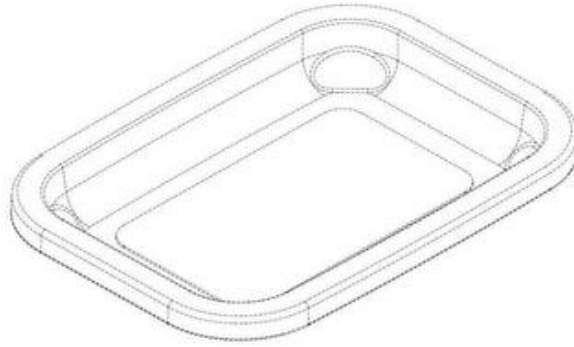
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John J. O'Malley of Volpe and Koenig PC for Converter Manufacturing, LLC.

Gene V. J. Maciol, II, Trademark Examining Attorney, Law Office 103,
Stacy Wahlberg, Managing Attorney.

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Before Mermelstein, Larkin, and Allard,
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

Converter Manufacturing, LLC (“Applicant”) seeks registration on the Principal Register or, alternatively, on the Supplemental Register, of the proposed mark shown below for “Rigid plastic overwrap trays for packaging of uncooked meats,” in International Class 21:



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Applicant’s amended description of its claimed mark reads as follows: “The mark consists of the color translucent/clear as applied to overwrap rigid meat packaging trays, and the matter shown in broken lines is not part of the mark and serves only to show the position or placement of the mark.” The color translucent is claimed as a feature of the mark.

To better illustrate the claimed mark as used in connection with the goods identified in the application, we reproduce Applicant’s specimen of use below:



¹ Application Serial No. 87587855 was filed on August 29, 2017 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s claim of first use of the mark and first use of the mark in commerce at least as early as August 4, 2016.

The Trademark Examining Attorney has refused registration of Applicant's claimed mark on either the Principal Register or the Supplemental Register on the grounds that (1) the claimed mark is functional under Section 2(e)(5) of the Trademark Act, 15 U.S.C. § 1052(e)(5); (2) the claimed mark is a color and thus is not inherently distinctive, and has not acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f); and (3) Applicant failed to respond to all of the Examining Attorney's requests for information under Trademark Rule 2.61(b), 37 C.F.R. § 2.61(b).

When the Examining Attorney made the refusals final, Applicant appealed and advised the Board that it had filed a request for reconsideration of the final refusals, which resulted in the suspension of the appeal. Applicant had not requested reconsideration, however, and the appeal was subsequently resumed. Applicant and the Examining Attorney have filed briefs.²

The information request refusal is moot because we find that the Examining Attorney withdrew it by failing to address it in his brief. We affirm the refusal based on the ground that the claimed mark is not inherently distinctive and has not acquired distinctiveness because Applicant did not address that refusal in its brief. We affirm the functionality refusal on the merits.

² Citations in this opinion to the briefs refer to TTABVUE, the Board's online docketing system. *Turdin v. Tribolite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). Specifically, the number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear. Applicant's appeal brief appears at 13 TTABVUE and the Examining Attorney's brief appears at 15 TTABVUE.

I. Prosecution and Procedural History, and Record on Appeal³

We summarize the prosecution history of Applicant's application and the procedural history of this appeal because they provide useful background to our analysis of the issues.

A. Prosecution History and Record on Appeal

Applicant initially applied to register its claimed mark on the Principal Register for goods identified as "Overwrap meat packaging trays."⁴ Applicant's original description of its claimed mark read as follows:

The mark consists of a translucent overwrap meat packaging tray. Translucence is claimed as a feature of the mark. The dotted lines are intended to show the position of the mark on the goods, and are not claimed as a feature of the mark but are for illustrative purposes only. No claim is made to the design or shape of the overwrap meat packaging tray itself.⁵

The Examining Attorney refused registration on the grounds that the claimed mark was functional, and that it was a color and thus was not inherently distinctive and ineligible for registration on the Principal Register absent a showing that it had acquired distinctiveness under Section 2(f).⁶ The Examining Attorney also requested certain information from Applicant pursuant to Trademark Rule 2.61(b), 37 C.F.R. § 2.61(b), as well as a description of the mark and an amendment to the identification

³ Citations in this opinion to the application record are to pages in the Trademark Status & Document Retrieval ("TSDR") database of the United States Patent and Trademark Office ("USPTO").

⁴ August 29, 2017 Application at TSDR 1.

⁵ *Id.*

⁶ February 16, 2018 Office Action at TSDR 1.

of goods.⁷ The Examining Attorney made of record what he described as “examples of clear/transparent/translucent overwrap used for meat packaging,”⁸ and “packaging trays in a variety of colors.”⁹ With respect to the refusal based on lack of distinctiveness, the Examining Attorney offered Applicant the options of showing acquired distinctiveness for registration on the Principal Register or seeking registration on the Supplemental Register.¹⁰

Applicant responded and argued against the functionality refusal.¹¹ Applicant also denied that the claimed mark was not inherently distinctive, but claimed that the mark had acquired distinctiveness “through Applicant’s use of the mark under section 2(f).”¹² Applicant responded to the Examining Attorney’s information request by stating that “[t]he translucent nature is the result of the manufacturing process,” and that Applicant “is the originator of translucent meat trays,” and “offers trays in other colors as well,”¹³ and by providing copies of Applicant’s advertising materials for the goods identified in the application and photographs showing competitive products in Applicant’s industry.¹⁴ Applicant did not amend its identification of goods or its description of its claimed mark.

⁷ *Id.*

⁸ *Id.* at TSDR 1-56.

⁹ *Id.* at TSDR 1, 59-133.

¹⁰ *Id.* at TSDR 1.

¹¹ August 16, 2018 Response to Office Action at TSDR 1.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at TSDR 2-4.

The Examining Attorney issued a second Office Action in which he stated that the informalities regarding the identification of the goods and the description of the mark had been satisfied.¹⁵ The Examining Attorney continued and maintained the functionality and color mark refusals, denied Applicant's claim of acquired distinctiveness, and requested additional information from Applicant.¹⁶

Applicant responded to the second Office Action by amending the description of its mark to read as follows: "The mark consists of the color translucent/clear as applied to overwrap rigid plastic meat packaging trays, and the matter shown in broken lines is not part of the mark and serves only to show the position or placement of the mark."¹⁷ Applicant also amended its application to seek registration on the Supplemental Register in the alternative.¹⁸ Applicant argued against the functionality refusal, provided responses to the Examining Attorney's additional requests for information,¹⁹ and made of record materials regarding absorbent pads used to soak up liquids that are exuded by meats when they are stored in a package,²⁰ and examples of clear/translucent tray products made by third parties.²¹

¹⁵ September 17, 2018 Office Action at TSDR 1.

¹⁶ *Id.*

¹⁷ March 18, 2019 Response to Office Action at TSDR 1.

¹⁸ *Id.* Applicant claimed that its amendment to the Supplemental Register obviated the color mark refusal. *Id.* at TSDR 5.

¹⁹ *Id.* at TSDR 5-7.

²⁰ *Id.* at TSDR 8.

²¹ *Id.* at TSDR 7, 9-19.

The Examining Attorney issued a third Office Action in response to Applicant's amendment of its application to seek registration on the Supplemental Register. The Examining Attorney refused registration on the Supplemental Register on the ground that the applied-for mark is functional, and thus ineligible for registration on either Register, and continued and maintained the functionality, color mark, and information request refusals, arguing that Applicant had satisfactorily answered only one of the three questions posed in the second Office Action.²² The Examining Attorney made of record articles and webpages regarding the use of see-through food packaging;²³ webpages showing the use of transparent packaging "to impart an aura or sense of being natural and wholesome for food items, and two examples of the color clear/transparent/translucent used to package food items, including meat;"²⁴ "many examples of the color clear/transparent/translucent used for packaging meat;"²⁵ Wikipedia entries and other webpages describing the liquid that "purges" from uncooked meat;²⁶ and a Wikipedia entry "suggest[ing] that the color clear/transparent/translucent is a natural and/or cheaper result of the manufacturing process and/or material used such that competitors would be materially disadvantaged if Applicant was permitted exclusive use of the color."²⁷ The

²² March 25, 2019 Office Action at TSDR 1.

²³ *Id.* at TSDR 2-34.

²⁴ *Id.* at TSDR 1, 35-48.

²⁵ *Id.* at TSDR 1, 49-67.

²⁶ *Id.* at TSDR 68-75.

²⁷ *Id.* at TSDR 1, 76-86.

Examining Attorney also maintained and continued the refusal based on Applicant's failure to adequately respond to two of the three requests for information in the previous office action.²⁸

Applicant responded to the third Office Action by amending the identification of goods to "Rigid plastic overwrap trays for packaging of uncooked meats,"²⁹ arguing against the functionality and lack of distinctiveness refusals, and providing further information in response to the Examining Attorney's requests.³⁰

The Examining Attorney then issued a final Office Action accepting the amendment to the identification of goods, and purporting to make final four refusals: (1) a refusal to register Applicant's claimed mark on the Supplemental Register because it is a functional design for the goods; (2) a refusal to register Applicant's claimed mark (apparently on the Principal Register) because it is a functional design for the goods;³¹ (3) a refusal to register Applicant's claimed mark because it is a color mark that is not inherently distinctive and has not acquired distinctiveness; and (4) a refusal to register based on Applicant's failure to adequately answer one of the three

²⁸ *Id.* at TSDR 1.

²⁹ September 25, 2019 Response to Office Action at TSDR 2.

³⁰ *Id.* at TSDR 2-6.

³¹ Functional matter cannot be registered on either the Principal Register, 15 U.S.C. § 1052(e)(5) and (f), or the Supplemental Register. 15 U.S.C. § 1091(c) ("For the purposes of registration on the supplemental register, a mark may consist of . . . any matter that as a whole is not functional. . ."). There was no need for the Examining Attorney to issue separate refusals for each Register based on the functionality of the claimed mark.

questions in the information request in the second Office Action.³² The Examining Attorney again made of record an article about the use of transparent packaging.³³

B. Procedural History of Appeal

Applicant stated in its Notice of Appeal that it had “filed a request for reconsideration of the refusal to register, and request[ed] suspension of the appeal pending consideration of the request by the Examining Attorney.” 1 TTABVUE 1. The Board instituted and suspended the appeal, and remanded the application to the Examining Attorney because “Applicant has checked the request for reconsideration box on the ESTTA form, thereby indicating that it has filed or is filing today a request for reconsideration of the final refusal to register.” 2 TTABVUE 1. The Board advised Applicant that it “should notify the Board immediately if it has not filed a timely request for reconsideration and does not intend to do so.” *Id.*

Shortly thereafter, however, the Board resumed the appeal because a “review of the record indicate[d] that no request for reconsideration has been filed.” 4 TTABVUE 1. Applicant was allowed 60 days in which to file its appeal brief. *Id.* Applicant subsequently sought and received four 60-day extensions of time to file its brief. 5-12 TTABVUE. Applicant ultimately filed a seven-page appeal brief on the last day for filing under the fourth extension. 13 TTABVUE.

Applicant’s brief states that the sole issue on appeal is “Whether Applicant’s Marks [sic] is Functional,” *id.* at 4, and Applicant addresses only that issue. *Id.* at 4-

³² November 12, 2019 Final Office Action at TSDR 1.

³³ *Id.* at TSDR 2-4.

8. There is no mention of the lack of distinctiveness refusal or the refusal based on the information requests. The Examining Attorney notes in his brief that “Applicant’s Appeal Brief only argues against the functionality refusal, not the additional refusals and requirements made Final in the November 12, 2019 Office action.” 15 TTABVue 4 n.4. The Examining Attorney proceeded to address the functionality and the lack of distinctiveness refusals, but not the information request refusal. Applicant did not file a reply brief.

II. The Refusals Remaining for Decision

“The filing of a notice of appeal has the effect of appealing all refusals or requirements made final,” *In re Harley*, 119 USPQ2d 1755, 1757 (TTAB 2016), but Applicant’s brief fails to address the refusals based on lack of distinctiveness and the single remaining information request. In *In re MK Diamond Prods., Inc.*, 2020 USPQ2d 10882 (TTAB 2020), the examining attorney similarly issued three final refusals based on functionality, lack of distinctiveness, and “the ground that Applicant did not adequately respond to a request for information,” *id.*, at *1, n.2, but the applicant only discussed the functionality and lack of distinctiveness refusals in its brief. *Id.*, at *1. The Board nevertheless considered the information request to have been withdrawn because it was not pursued in the examining attorney’s brief. *Id.*, at *1 n.2 (quoting TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (“TBMP”) Section 1203.02(b) (“Even if the examining attorney does not specifically state in the appeal brief that the refusal or requirement has been withdrawn, the Board may treat the refusal/requirement to have been withdrawn if no mention is

made of it in the brief.”)). Because the Examining Attorney on this appeal does not address the single remaining information request in his brief, we similarly consider it to have been withdrawn.

During prosecution, Applicant sought registration of its claimed mark on the Supplemental Register in the alternative, but did not thereafter pursue registration on the Principal Register through acquired distinctiveness under Section 2(f). Because Applicant failed to address the lack of distinctiveness refusal on appeal, it “has waived its appeal of the Examining Attorney’s refusal of registration on the Principal Register.” *In re Katch, LLC*, 2018 USPQ2d 233842, at *1-2 (TTAB 2019) (where applicant failed to address a final refusal that its mark was highly descriptive and had not acquired distinctiveness, that refusal was affirmed by the Board and the only refusal remaining for decision was a refusal of registration on the Supplemental Register on the ground that the claimed mark was generic). Accordingly, we affirm the refusal to register Applicant’s claimed mark on the Principal Register on the ground that it is not inherently distinctive, and has not acquired distinctiveness, because Applicant did not address that refusal in its brief.³⁴ The only refusal remaining for decision is the refusal of registration of Applicant’s claimed mark on the Supplemental Register because it is functional.

³⁴ As discussed below, we find that it is more appropriate to characterize Applicant’s claimed mark as a feature of its product’s design rather than as a color, but that distinction is ultimately immaterial with respect to the lack of distinctiveness refusal because “design, like color, is not inherently distinctive.” *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 54 USPQ2d 1065, 1068 (2000).

III. Functionality Refusal

A. Defining the Claimed Mark

We begin our analysis by considering exactly what it is that Applicant seeks to register as its trademark. Although Applicant initially described its claimed mark as consisting of “a translucent overwrap meat packaging tray” and stated that “[t]ranslucence is claimed as a feature of the mark,” it amended the description at the suggestion of the Examining Attorney to the “color translucent/clear as applied to overwrap rigid meat packaging trays.”³⁵ Both Applicant and the Examining Attorney have subsequently characterized the claimed mark as a color.

Although Applicant’s product brochure shown and discussed below states that Applicant’s “trays are available in multiple colors, including crystal clear,”³⁶ it does not appear proper to view the claimed mark as consisting of the “color translucent/clear.” We take judicial notice that a “clear” substance “is one which you can see through and which has no color.”³⁷ *See also In re Dolce Vita Footwear, Inc.*, 2021 USPQ2d 478, at *2 & n.2 (TTAB 2021) (“clear” is defined as “easily seen through; transparent”). The word “clear” does not identify anything found on the color spectrum, but instead signals the absence of color, in this instance the “see-through” nature of Applicant’s goods.

³⁵ August 16, 2018 Response to Office Action at TSDR 1.

³⁶ *Id.* at TSDR 2.

³⁷ COLLINS DICTIONARY (collinsdictionary.com, last accessed on September 13, 2021). “The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed form or regular fixed editions.” *In re OEP Enters., Inc.*, 2019 USPQ2d 309323, at *7 n.29 (TTAB 2019).

If Applicant's claimed mark were truly a color, it would be possible for Applicant's competitors to register sufficiently different shades of that color for the same goods if Applicant's mark were registered on the Supplemental Register. See *In re Medline Indus., Inc.*, 2020 USPQ2d 10237 (TTAB 2020) ("the color green (Pantone 2274C)" and "the color green Pantone 7488U" found to be sufficiently dissimilar to both be registrable on the Supplemental Register for medical gloves).³⁸ But we cannot envision a different "shade" of "clear." If Applicant obtains a registration of its claimed mark on the Supplemental Register, its competitors would be limited to registration of opaque overwrap rigid meat packaging trays. The essence of Applicant's mark is thus the transparent nature of its goods,³⁹ not their "color," and we will analyze whether Applicant's mark is functional by reference to that feature of Applicant's goods.

³⁸ As the Board noted in *Medline*, color marks must be shown in a color drawing and described in ordinary language, but the use of a commercial color identification system such as the Pantone system "may be critical in accurately describing the mark and such third-party use is an intended use of commercial color-identification-system terminology." *Medline*, 2020 USPQ2d 10237, at *11 (quoting TRADEMARK MANUAL OF EXAMINING PROCEDURE ("TMEP") Section 808.02). We are unaware of any color described as "clear" in the Pantone system.

³⁹ It appears equally improper to view Applicant's trays as "translucent," which means "letting light pass, but diffusing it so that objects on the other side cannot be clearly distinguished; partially transparent, as frosted glass." COLLINS DICTIONARY (collinsdictionary.com, last accessed on September 13, 2021). Applicant describes its goods as "crystal clear" trays, August 16, 2018 Response to Office Action at TSDR 2, and the Board has held that "crystal" means "clear' and 'transparent.'" *David Crystal, Inc. v. Helene Curtis Indus., Inc.*, 168 USPQ 124, 125 (TTAB 1970). Applicant's goods thus are more accurately viewed as "transparent" because "[i]f an object or substance is transparent, you can see through it." COLLINS DICTIONARY (collinsdictionary.com, last accessed on September 13, 2021). Like "clear," "transparent" is not a color.

B. Applicable Law

Section 2(e)(5) of the Trademark Act prohibits registration of “a mark which . . . comprises any matter that, as a whole, is functional.” 15 U.S.C. § 1052(e)(5).⁴⁰ “A product design or a product feature is considered functional in a utilitarian sense if: (1) it is ‘essential to the use or purpose of the article,’ or (2) it ‘affects the cost or quality of the article.’” *MK Diamond Prods.*, 2020 USPQ2d 10882, at *5 (quoting *TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 58 USPQ2d 1001, 1006 (2001) (quoting *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 214 USPQ 1, 4 n.10 (1982))).

“In making our determination of functionality under *Inwood*, we generally are guided by the analysis first applied in” *In re Morton-Norwich Prods., Inc.*, 671 F.2d 1332, 213 USPQ 9, 18 (CCPA 1982). *MK Diamond Prods.*, 2020 USPQ2d 10882, at *5. As the Board explained in *MK Diamond Prods.*,

Morton-Norwich identifies the following inquiries or categories of evidence that may be helpful in determining whether a particular design is functional: (1) the existence of a utility patent disclosing the utilitarian advantages of the design; (2) advertising materials in which the originator of the design touts the design’s utilitarian advantages; (3) facts indicating the availability to competitors of functionally equivalent designs; and (4) facts indicating that the design results in a comparatively simple or cheap method of manufacturing the product. . . .

⁴⁰ The Section 2(e)(5) bar to registration applies to registration on the Principal Register, but as noted above, Section 23(c) prohibits registration of functional matter on the Supplemental Register as well. “[T]he same legal principles and analysis apply to a determination of functionality, whether on the Principal Register or Supplemental Register.” *Kistner Concrete Prods., Inc. v. Contech Arch Techs., Inc.*, 97 USPQ2d 1912, 1918 (TTAB 2011).

Id. (citing *TrafFix*, 58 USPQ2d at 1006). “[T]here is no requirement that all of the categories of evidence identified in *Morton-Norwich* appear in every case in order to find functionality.” *MK Diamond Prods.*, 2020 USPQ2d 10882, at *17 (quoting *In re Change Wind Corp.*, 123 USPQ2d 1453, 1456 (TTAB 2017)).

C. Analysis of Functionality

The record establishes that transparent packaging is frequently used with foods, including meats, because transparency provides the functional benefit of allowing consumers to see the goods inside the packaging prior to purchase.⁴¹

The Examining Attorney made of record several webpages discussing the functional benefits of transparent packaging of foods.⁴² Webpages at us-hs.com discuss “See-Through Packaging” and state that “[s]ee-through packaging can boost sales; more and more marketers are putting their products in packages that are see-through or have see-through windows” because “[t]ransparency in packaging taps into consumer desire for transparency about how food and beverages are produced, both figuratively and literally,” and “[c]ompanies that are transparent about their

⁴¹ Applicant made of record webpages from sealedair.com that state that “[p]ackaging plays a significant role in influencing a consumer’s decision on whether or not to purchase your product,” that “the appearance of a package and its ability to attract a shopper’s attention also plays a role in the decision-making process,” and that “33% of consumer purchases are made solely based on packaging.” March 18, 2019 Response to Office Action at TSDR 16. Applicant admitted during prosecution that Sealed Air and an Australian company sell “clear/translucent tray products,” *id.* at 6, but dismissed them as “recent attempted imitations of the Applicant’s goods for which registration of the applied-for mark is sought.” *Id.* at 7.

⁴² March 25, 2019 Office Action at TSDR 3-48; November 12, 2019 Final Office Action at TSDR 2-4. One of the websites displays an article by two professors at the University of Oxford in the United Kingdom and an independent researcher. March 25, 2019 Office Action at TSDR 14-34. Because there is no evidence of the extent of any exposure of the article to United States consumers, we have not considered it in our decision.

ingredients, sourcing, and business practices are reaping the benefits in consumer goodwill and trust.”⁴³ The webpages go on to state that “[n]early one-third of shoppers (30%) gauge how fresh a product is by its appearance, rather than by its use-by date,” and that “[c]lear packaging can help increase shoppers’ initial perception of food freshness and demonstrates that what you see is what you get.”⁴⁴ The webpages also acknowledge that transparent packaging is hard to make and may expose food to light, which degrades many foods,⁴⁵ but they cite an academic study indicating that “[m]ore than half of shoppers (54%) agree it’s important to see a product through its packaging” and state that “[m]any manufacturers have taken note, and adjusted their packaging accordingly, using clear film, product windows, or even edible packaging.”⁴⁶

A webpage at vuecraft.com addresses the “Advantages and Disadvantages of Transparent Packaging,”⁴⁷ and concludes that “[t]he benefits of clear packaging outshine its disadvantages.”⁴⁸ The webpage broadly describes the advantages as “What you see is what you get,” “Durable, cheap, quality printing and finishing,” and “Building trust,”⁴⁹ and the disadvantages as “Effects of the sun” and “Clear packaging

⁴³ March 25, 2019 Office Action at TSDR 9.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at TSDR 10.

⁴⁷ *Id.* at TSDR 12-13.

⁴⁸ *Id.* at TSDR 12.

⁴⁹ *Id.*

might appear plain without additional printing.”⁵⁰ The webpage states that the disadvantages can be mitigated by avoiding direct sunlight and by inserting logos to identify particular brands.⁵¹ The webpage displays a consumer comment that states “I would prefer a transparent packaged product. I can actually see what I’m buying and I feel like it shows the transparentness and honesty of the company!”⁵²

The website at packagingtoday.com displays an article entitled “As Companies Struggle to Redesign Food Packaging in the Face of Material Restrictions, NX UltraClear PP Becomes the Clear Choice.”⁵³ The article discusses the use of clear polypropylene (PP) as a material for containers, clam shells, and trays.⁵⁴ Citing THE WALL STREET JOURNAL, the article states that among the benefits of PP is the fact that “[c]lear packaging gives products an aura of being natural, something that more shoppers are increasingly seeking.”⁵⁵

The Examining Attorney also made of record numerous examples of the use of some form of clear packaging in connection with uncooked meats. We display below some examples of such packaging:

⁵⁰ *Id.* at TSDR 13.

⁵¹ *Id.* The webpages display a consumer comment that “[f]ood in transparent packaging can be protected by a cardboard cover or indoor displays.” *Id.*

⁵² *Id.*

⁵³ *Id.* at TSDR 44-48.

⁵⁴ *Id.*

⁵⁵ *Id.* at TSDR 46.



Choice Premium Angus Ground Beef Patties

56



Choice Premium Angus Beef Rib Eye Steaks

57

⁵⁶ February 16, 2018 Office Action at TSDR 37 (all emphasis in materials in the record was supplied by the Examining Attorney). Applicant's rigid plastic overwrap trays hold the uncooked meats and any absorbing pads, and are offered as substitutes for the foam trays that typically hold the goods. August 16, 2018 Response to Office Action at TSDR 2.

⁵⁷ February 16, 2018 Office Action at TSDR 37.



Boneless Skinless Chicken Breasts

58



**Wegmans
90% Lean Ground Beef**

59

⁵⁸ *Id.* at TSDR 40.

⁵⁹ *Id.* at TSDR 52.



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Applicant does not seriously dispute the functionality of transparent packaging for food generally. Indeed, Applicant concedes that “the Examining Attorney’s assertion [of functionality] might be accurate for fully-cooked meat products,” 13 TTABVUE 5, but claims that

it is inaccurate for packages used to contain uncooked meats. Packers of uncooked meats seek trays which are rigid and can contain both packed-meat and juices which might issue from packed meat. In addition, such packers of uncooked meats seek to obscure their customers’ view of juices which issue from uncooked meats, whether the juices be freely-flowing or contained within an absorbent pad within the meat package. For this reason, meatpackers who pack uncooked meats upon rigid trays seek to use opaque trays, through which neither the juices nor a juice-engorged pad can be viewed by their customers.

Id.

⁶⁰ *Id.* at TSDR 127.

Applicant further argues that its

employment of the color ‘clear/translucent’ is therefore ANTI-functional, even in the context of meat-packers displaying packaged uncooked meats to their customers. More to the point of the current application, the Applicant’s employment of the color ‘clear/translucent’ in rigid plastic overwrap trays offered to uncooked-meat-packers defies the common sense in this industry and is distinctive of the Applicant’s trays only. The Examining Attorney previously cited examples of meats (potentially including uncooked meats) which were vacuum-packaged in clear or translucent films. Apart from being outside the scope of goods recited (such films are not “rigid plastic overwrap trays”), meats that are vacuum-packaged in films do not exhibit the disadvantages of overwrap tray-packed meat, in that the vacuum-packaging process tends to trap both meat and fluid in fixed locations within the package, avoiding the issues (unsightly ‘sloshing fluid’ and/or fluid-engorged-pad) that causes meat-packers to choose opaque materials when using rigid trays. The Applicant respectfully suggests that the Examining Attorney’s citation of the clarity of vacuum-packaging films is no more relevant to the functionality of a rigid plastic overwrap meat tray than is the clear film with which known (opaque) rigid plastic overwrap meat trays are typically wrapped. Simply put, any ‘functionality’ inherent in the use of clear plastic vacuum-packaging films is simply irrelevant in the context of packaging uncooked meats atop rigid plastic overwrap trays. If a packer of uncooked meats were to consider clarity of a rigid plastic overwrap tray at all, the packer would consider a clear/translucent tray LESS functional, if anything, than a typical opaque tray.

Id. at 5-6.

Applicant also discusses the first three *Morton-Norwich* inquiries and concludes that they show that its transparent feature is not functional. *Id.* at 6-8. Applicant notes that there are no applicable patents, *id.* at 6, and argues that it “has not distributed any advertising materials that promote the applied-for-mark as having any utilitarian advantages over any other configuration design,” *id.* at 7, and that

“the products/exhibits cited by the Examining Attorney in the Office Action⁶¹ make it clear that there are many alternative designs for the trays.” *Id.* Applicant concludes that the “translucent nature of the trays is not shown to be of any functional advantage and the lack of any similar competing designs suggests that the applied-for design is not functional, but is in fact unique when placed among its competitor’s product.” *Id.*

The Examining Attorney rejects Applicant’s argument that the transparent nature of its goods is “anti-functional” because not all meats “purge” juices, vacuum-packed meats are not susceptible to “purging,” and “[m]eat packers that use rigid overwrap trays for packaging meat would desire the color clear/translucent in order to increase sales of the meat placed inside.” 15 TTABVue 13. The Examining Attorney also argues that the absence of applicable patents or advertising touting the utilitarian advantage of Applicant’s claimed mark, and the availability of trays in other colors, do not rebut his *prima facie* case because “functionality has been found where use of the color yields a utilitarian or functional advantage, or a competitive advantage,” *id.* at 14, and Applicant’s “mark is innately functional when used on packaging for food items, and meat specifically.” *Id.* at 14-15.


There are three serious problems with Applicant’s arguments regarding the “anti-functional” nature of its transparent packaging in the context of the uncooked meat-packing industry. First, the underlying factual “assertions are unsupported by sworn

⁶¹ Applicant’s brief appears to be little more than a recapitulation of a response to one of the several Office Actions, as it refers to “attached advertisements” and an “attached photograph” that do not accompany the brief.


statements or other evidence, and “[a]ttorney argument is no substitute for evidence.” *OEP Enters.*, 2019 USPQ2d 309323, at *15 (quoting *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (internal citation omitted)). We can give no weight to counsel’s arguments about the buying habits and state of mind of meat packers in the absence of competent supporting evidence.

Second, Applicant’s arguments are counter-intuitive. Applicant would be acting contrary to its own economic self-interest in offering transparent overwrap trays if “packers of uncooked meats seek to obscure their customers’ view of juices which issue from uncooked meats,” 13 TTABVUE 5, and “seek to use opaque trays, through which neither the juices nor a juice-engorged pad can be viewed by their customers.” *Id.* It would be irrational for Applicant to “def[y] the common sense in this industry,” *id.*, by producing transparent trays rather than focusing solely on the production of opaque trays to satisfy the claimed demand of meat packers for only such packaging. Yet Applicant has not only developed its transparent packaging as an alternative to opaque packaging, but has sought to register the transparent packaging as its trademark. Applicant’s actions belie its claim that its product is “anti-functional.”

Third, and most importantly, Applicant’s arguments are also belied by its own marketing brochure, which we reproduce below:



100% recyclable



Toll-Free: 888-769-8723
www.clearlyclean.com

ROLL OVER-WRAP™

Patented PET Tray

The Clearly Clean Roll Over-Wrap™ Tray is the WORLD'S ONLY PATENTED recyclable overwrap tray. This PET tray is designed for overwrap and VSP films and features a patented smooth edge that is rolled to prevent leakers during production and transportation.

CLARITY

Clearly Clean's recyclable trays are available in multiple colors, including crystal clear. The latter allows you to make your product the STAR of the package.









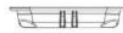






EFFICIENCY

Clearly Clean PET trays can immediately replace all Styrofoam trays on high-speed packaging machinery — no need for an equipment change.



STRENGTH

Clearly Clean PET trays are THREE TIMES STRONGER than Styrofoam and will not break during production or transportation.

PRODUCT TRAY SIZES—colors and ▶ its available

Description:	Size In Inches:			
3S	6.57 x 8.49 x .81			
3D	6.57 x 8.49 x 1.72			
3P	6.57 x 8.49 x 1.25			
4S	7.12 x 9.25 x .75			
11D	7.13 x 11.5 x 1.50			

Customized Sizes and Colors Available: Want to develop your own tray? Let us help. We can work with you to design a tray that meets your needs and is RECYCLABLE.

Clearly Clean Products, LLC • 225 Oakland Road • Suite 401 • South Windsor, CT 06074 • (888) 769-8723
clearlyclean.com

CC-ROWT 9/17

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Applicant’s brochure touts its product’s utilitarian benefits of “Clarity,” “Efficiency,” and “Strength.” We display below an enlarged version of that portion of the brochure:

⁶² August 16, 2018 Response to Office Action at TSDR 2. Applicant subsequently clarified that its products are “associated with the trade name ‘Clearly Clean Products.’” March 18, 2019 Response to Office Action at TSDR 6.

CLARITY	EFFICIENCY	STRENGTH
Clearly Clean’s recyclable trays are available in multiple colors, including crystal clear. The latter allows you to make your product the STAR of the package.	Clearly Clean PET trays can immediately replace all Styrofoam trays on high-speed packaging machinery — no need for an equipment change.	Clearly Clean PET trays are THREE TIMES STRONGER than Styrofoam and will not break during production or transportation.

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Under the benefit captioned “Clarity,” Applicant’s brochure states that its “crystal clear” color “allows you to make your product the STAR of the package,” a clear reference to the fact that the transparent nature of this particular overwrap tray in Applicant’s product line enables the packers’ customers, the ultimate consumers of the uncooked meats, to see the products prior to purchase. This is precisely the functional benefit of see-through packaging that is demonstrated by the record. Applicant’s discussion of this benefit clearly shows that contrary to Applicant’s unsupported arguments, at least some meat packers want to make their meats “the STAR of the package” by showing the goods to their customers, and for those packers, Applicant touts the transparent nature of its goods as a functional benefit.

“If a seller advertises the utilitarian advantage of a particular feature of its product, this constitutes strong evidence of functionality.” *MK Diamond Prods.*, 2020 USPQ2d 10882, at *17 (quoting *Kistner Concrete Prods.*, 97 USPQ2d at 1924). Applicant’s brochure advertises the functional benefits of the transparency of its “crystal clear” trays, and we find that the brochure persuasively demonstrates that Applicant’s claimed mark is functional because “it is essential to the use or purpose” of the trays in displaying the packers’ uncooked meat products to their ultimate consumers in a manner in which the goods can be viewed prior to purchase. *Id.*, at *5

⁶³ *Id.*

(quoting *TrafFix*, 58 USPQ2d at 1006). Accordingly, we need not address the other *Morton-Norwich* categories of evidence because “the Supreme Court has made clear that if functionality is established under *Inwood*, further inquiry into facts that might be revealed by a full analysis of all types of *Morton-Norwich* evidence will not change the result.” *Id.* (citing *TrafFix*, 58 USPQ2d at 1006). Because Applicant’s claimed mark is functional, it is ineligible for registration on the Supplemental Register.

Decision: The refusal to register Applicant’s claimed mark on the Principal Register because it is not inherently distinctive and has not acquired distinctiveness, and the refusal to register Applicant’s claimed mark on the Supplemental Register because it is functional, are affirmed.