

THIS OPINION IS NOT A  
PRECEDENT OF THE  
TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
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mbm

August 23, 2018

Cancellation No. 92066259

*Lakeside Equipment Corporation*

*v.*

*Evoqua Water Technologies LLC*

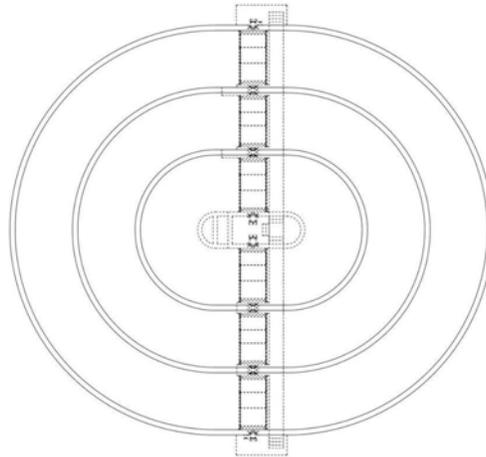
**Before Zervas, Shaw, and Coggins,  
Administrative Trademark Judges.**

**By the Board:**

This proceeding now comes before the Board for consideration of Petitioner's renewed motion (filed March 13, 2018) for summary judgment solely on its pleaded claim that Respondent's involved mark is functional pursuant to Section 2(e)(5) of the Trademark Act, 15 U.S.C. § 1052(e)(5), and therefore is not entitled to registration. The motion is fully briefed.

**I. Background**

Respondent owns U.S. Registration No. 4986479, for the mark displayed below, for "oxidation ditch for wastewater treatment" in International Class 11:



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Respondent's registration includes the following description of the mark: "The mark consists of a configuration of three concentric loops. The matter shown in broken or dotted lines is not part of the mark and serves only to show the position or placement of the mark."

On September 1, 2017, Petitioner filed a motion for summary judgment on its pleaded claim that Respondent's involved mark is functional, which the Board denied on January 19, 2018. On March 13, 2018, Petitioner filed a renewed, second motion for summary judgment on the same pleaded claim of functionality. In support of its second motion for summary judgment, Petitioner submitted some evidence which had not been properly submitted, and therefore not considered, in connection with its first motion for summary judgment.

In support of its second motion for summary judgment, Petitioner submits the declaration of Stephanie G. Stella, counsel for Petitioner, with exhibits, including a

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<sup>1</sup> Registration No. 4986479, issued June 28, 2016, pursuant to a claim of acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), claiming first use and first use in commerce in 1968.

copy of Registration No. 4986479; correspondence from Respondent to Petitioner; correspondence from Petitioner to Respondent; a copy of U.S. Patent No. 3579439 (the “439 patent”); P.G.J. Meiring, et al., *The Orbal Extended Aeration Activated Sludge Plant*, 44 JOURNAL (WATER POLLUTION CONTROL FEDERATION) 221 (1972) (hereinafter, “the Meiring article”); a copy of a 2005 brochure from Envirex Inc., Respondent’s predecessor-in-interest, titled “The Orbal System”; Respondent’s 2015 promotional brochure titled “The Orbal System for TrueSND Biological Treatment”; printouts of materials from Respondent’s website; U.S. Patent No. 4975197 (the “197 patent”) issued to Respondent’s predecessor-in-interest; a printout from the USPTO’s Patent Application Information Retrieval (PAIR) database for the ‘197 patent; a copy of an August 10, 2015 Office Action issued with respect to Respondent’s involved registration and Respondent’s February 10, 2016 response thereto.

## **II. Petitioner’s Motion for Summary Judgment**

For purposes of this order, we presume the parties’ familiarity with the pleadings, the history of the proceeding and the arguments and evidence submitted with respect to Petitioner’s second motion for summary judgment.

As an initial matter, Respondent contends that the Board should strike Petitioner’s second motion for summary judgment because Petitioner previously filed a motion for summary judgment on the same claim of functionality. Respondent’s request is without merit. The Board did not prohibit Petitioner from filing any additional summary judgment motions and, as Respondent acknowledges, nothing in the rules prohibits the filing of a second summary judgment motion. 16 TTABVUE 5.

Moreover, Respondent's argument that Petitioner should have instead sought reconsideration of the Board's January 19, 2018 order is misguided. A request for reconsideration cannot be used to introduce new evidence. TBMP § 518 (June 2018). Here, Petitioner filed its second motion for summary judgment with additional evidence either not previously submitted or not properly submitted with the first motion. Thus, Respondent's request that the Board strike Petitioner's second motion for summary judgment is **denied**.

#### **A. Summary Judgment Standard**

Summary judgment is appropriate where the movant shows that there is no genuine dispute as to any material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A party asserting that a fact cannot be or is genuinely disputed must support its assertion by either (1) citing to particular parts of materials in the record, or (2) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact. Fed. R. Civ. P. 56(c)(1).

A movant for summary judgment carries the burden of proof in regard to its motion. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). In deciding the motion, the function of the Board is not to try issues of fact, but to determine if there are any genuine disputes of material fact to be tried. *See* TBMP § 529.01 and cases cited therein. When the moving party has supported its motion with a sufficient showing that, if unopposed, indicates there is no genuine dispute of material fact and that the moving party is entitled to judgment as a matter of law, the burden then

shifts to the non-moving party to demonstrate the existence of a genuine dispute of material fact to be resolved at trial. *Enbridge, Inc. v. Excelerate Energy LP*, 92 USPQ2d 1537, 1540 (TTAB 2009).

The nonmoving party must be given the benefit of all reasonable doubt as to whether genuine issues of material fact exist, and the evidentiary record on summary judgment, and all inferences to be drawn from the undisputed facts, must be viewed in the light most favorable to the nonmoving party. *See Opryland USA, Inc. v. Great Am. Music Show, Inc.*, 970 F.2d 847, 23 USPQ2d 1471, 1472 (Fed. Cir. 1992).

## **B. Decision**

Respondent's involved mark consists of "three concentric loops," which appear as elongated circles or an elliptical shape (hereinafter the "concentric loop design"). Respondent's involved mark depicts a specific design of an oxidation ditch that employs three channels in the concentric loop design for the treatment of wastewater. 13 TTABVUE 73. Respondent's involved mark shows the image of a structure extending across the center of each of the loops. The structure is shown in dotted lines and is not part of the mark; rather, the dotted lines represent the placement of a center island, a catwalk, and a common aeration shaft extending across the channels. 13 TTABVUE 72.

### **1. Standing**

We first consider whether Petitioner has standing to bring this cancellation proceeding. Standing is a threshold issue that must be proven by a plaintiff in every inter partes case. *See Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270,

111 USPQ2d 1058, 1062 (Fed. Cir. 2014); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982). As interpreted in binding precedent, a plaintiff must have a “real interest” in the outcome of the proceeding and a “reasonable basis” for its belief of damage. *See Empresa Cubana del Tabaco*, 111 USPQ2d at 1062 (citing *Ritchie*, 50 USPQ2d at 1025-26); *Universal Oil Prods. Co. v. Rexall Drug & Co.*, 463 F.2d 1122, 1123, 174 USPQ 458, 459 (CCPA 1972). Here, Respondent admitted that it is a competitor of Petitioner in the field of wastewater treatment. Answer ¶ 4. Moreover, Petitioner submitted a copy of a cease and desist letter sent from Respondent to Petitioner, alleging Petitioner’s infringement of Respondent’s involved registration. 13 TTABVUE 34-35. Accordingly, there is no genuine dispute of material fact as to Petitioner’s standing to bring this cancellation proceeding. *See AS Holdings, Inc. v. H & C Milcor, Inc.*, 107 USPQ2d 1829, 1832-33 (TTAB 2013); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000).

## **2. Functionality**

A mark is unregistrable under Section 2(e)(5) of the Trademark Act where it “comprises any matter that, as a whole, is functional.” Functional matter cannot be registered, even with a showing that consumers recognize the proposed mark as a source identifier. *See TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 58 USPQ2d 1001, 1007 (2001). The functionality doctrine is intended to preserve competition. *See Valu Eng’g Inc. v. Rexnord Corp.*, 278 F.3d 1268, 61 USPQ2d 1422,

1428 (Fed. Cir. 2002). As the Federal Circuit has consistently stated, “functionality rests on ‘utility,’ which is determined in light of ‘superiority of design,’ and rests upon the foundation of ‘effective competition.’” *Id.* (quoting *Brunswick Corp. v. British Seagull Ltd.*, 35 F.3d 1527, 1531, 32 USPQ2d 1120, 1122 (Fed. Cir. 1994)).

Generally, a product design or product feature is considered to be functional in a utilitarian sense if it is (1) “essential to the use or purpose of the article,” or if it (2) “affects the cost or quality of the article.” *TrafFix*, 58 USPQ2d at 1006 (quoting *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 214 USPQ 1, 4 n.10 (1982)). A functional feature is one the “exclusive use of [which] would put competitors at a significant non-reputation-related disadvantage.” *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1164 (1995). In *TrafFix*, the Supreme Court confirmed the “*Inwood* formulation” as the “traditional rule” of functionality. 58 USPQ2d at 1006. In making a determination as to whether a proposed mark is functional in a utilitarian sense, the following factors are often relevant:

- (1) The existence of a utility patent that discloses the utilitarian advantages of the design;
- (2) Advertising by the defendant that touts the utilitarian advantages of the design;
- (3) Facts pertaining to the availability of alternative designs; and
- (4) Facts pertaining to whether the design results from a comparatively simple or inexpensive method of manufacture.

*In re Morton-Norwich Prods.*, 213 USPQ 9, 15-16 (CCPA 1982). *See also In re Becton, Dickinson & Co.*, 675 F.3d 1368, 102 USPQ2d 1372, 1377 (Fed. Cir. 2012); *Valu Eng’g*,

61 USPQ2d at 1426. These well-known “*Morton-Norwich* factors” are “legitimate source[s] of evidence to determine whether a feature is functional.” *Valu Eng’g*, 61 USPQ2d at 1427. However, the Supreme Court has made it clear that the standard for functionality is set forth in *Inwood*, i.e., whether a feature is “essential to the use or purpose of the device or ... affects the cost or quality of the device,” and that if functionality is properly established under *Inwood*, further inquiry into facts that might be revealed by a *Morton-Norwich* analysis will not change the result. *TrafFix*, 58 USPQ2d at 1006 (“Where the design is functional under the *Inwood* formulation there is no need to proceed further to consider if there is a competitive necessity for the feature.”). Functionality is a question of fact and depends on the totality of the evidence in each particular case. *Valu Eng’g*, 61 USPQ2d at 1424; *In re Caterpillar Inc.*, 43 USPQ2d 1335, 1339 (TTAB 1997); TBMP § 1202.02(a)(v). In any given case, any of the four *Morton-Norwich* factors might not necessarily be relevant to a finding of functionality, nor do all four factors have to weigh in favor of functionality to support a finding of functionality. *In re Change Wind Corp.*, 123 USPQ2d 1453, 1456 (TTAB 2017); *In re Heatcon, Inc.*, 116 USPQ2d 1366, 1370 (TTAB 2015).

Based upon a careful review of the parties’ submissions, the Board finds that there is no genuine dispute of material fact that the concentric loop design claimed by Respondent is essential to the use and purpose of the goods and affects the cost and quality of the wastewater treatment system under the standard set forth in *Inwood/TrafFix*.

In support of its motion for summary judgment, Petitioner relies upon two expired utility patents, namely, the '197 and '439 patents. It is Petitioner's contention that the expired patents disclose that Respondent's concentric loop design comprising an oxidation ditch for wastewater treatment is functional. Respondent, on the other hand, contends that neither the '197 nor the '439 patent discloses the utilitarian function of using the concentric loop design in Respondent's mark. Rather, Respondent argues that the patents disclose the utilitarian functions of the methods performed within the channels, but not a utilitarian function with respect to the particular shape or arrangement of the channels. 16 TTABVUE 14.

A utility patent that discloses the utilitarian advantages of a design is strong evidence that the disclosed features are functional. *TrafFix*, 58 USPQ2d at 1005. A utility patent need not "claim the exact configuration for which trademark protection is sought in order to undermine an applicant's assertion that an applied-for mark is not de jure functional." *Becton, Dickinson*, 102 USPQ2d at 1377; *Change Wind Corp.*, 123 USPQ2d at 1456; *In re Loggerhead Tools, LLC*, 119 USPQ2d 1429, 1432 (TTAB 2016) ("We find Applicant's description of the invention in the utility patent, taken together with the drawings therein, to be on point with the relevant portion of the description and drawing of the tool in the present application for this product configuration motion mark.").

Moreover, in considering any patent, the Board is not limited to consideration of the patent claims. See *Kistner Concrete Prods., Inc. v. Contech Arch Techs., Inc.*, 97 USPQ2d 1912, 1920 (TTAB 2011), and cases cited therein; *M-5 Steel Mfg., Inc. v.*

*O'Hagin's, Inc.*, 61 USPQ2d 1086, 1096 (TTAB 2001), and cases cited therein; *cf. In re Shenango Ceramics, Inc.*, 362 F.2d 287, 150 USPQ 115, 120 (CCPA 1966) (a finding of functionality “is not dependent on the precise scope of the patent claims.”). A patent therefore need not require use of a specific design to have demonstrated its utilitarian purpose. *See Kistner Concrete*, 97 USPQ2d at 1920; *In re Edward Ski Prods., Inc.*, 49 USPQ2d 2001, 2003 (TTAB 1999). However, in *TrafFix*, the Supreme Court stated that “the disclosure of a feature in the claims of a utility patent constitutes strong evidence of functionality.” 58 USPQ2d at 1006.

Taken together, the ‘197 and the ‘439 patents disclose the functionality of using multiple chambers, or channels, in an oxidation ditch.<sup>2</sup> The ‘197 patent discloses “an orbital wastewater treatment process including a plurality of concentric, annular basins or channels....” 13 TTABVUE 79. As described in the ‘197 patent, multiple channels are used to perform various steps of the claimed process. Wastewater influent and activated sludge “are introduced into a first channel and homogeneously mixed therein.” *Id.* at 81. The mixed liquor is then transferred to a second zone or channel for oxidation. *Id.* “In one embodiment, the subsequent aeration zone includes second and third aeration zones or channels in series ....” *Id.* As the abstract

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<sup>2</sup> Although the Federal Circuit has found that a finding of functionality should be based on an analysis of the design in its entirety and should not be based solely on a dissection of the individual features of a design, that court has also recognized that it is often necessary to consider functional aspects of individual design elements as part of the determination of the functionality of the overall design configuration. *See Becton, Dickinson*, 102 USPQ2d at 1377 (“[C]laim 4 of the ‘446 patent shows the utilitarian nature of at least two prominent features of BD’s mark”); *In re Teledyne Indus., Inc.*, 696 F.2d 968, 217 USPQ 9, 11 (Fed. Cir. 1982). The Board therefore considers each of the features of Respondent’s mark, namely, the use of concentric loops.

summarizes: “wastewater and recycled activated sludge are mixed in a first channel ... [then] sequentially oxidized in second and third channels ...” *Id.* at 79.

Similarly, the ‘439 patent describes the use of an agitation tank, a settling zone, and an aeration zone. *Id.* at 42. The “settling zone” is defined as a “settling tank adjacent the agitation tank.” *Id.* Both the aeration zone and the agitation tank may be channels “and the channels may be of a nested configuration.” *Id.* The ‘439 patent further specifies that additional channels may be added and that the agitation tank may “extend over several channels.” *Id.* at 43. The ‘439 patent claims an apparatus “suitable for sewage treatment according to the activated sludge process, which includes ... regulating means for directing a portion of the contents of the agitation tank to a separate settling zone distinct from and horizontally spaced apart from the agitation zone, and the remainder of the contents to an aeration zone.” *Id.* Claim 8 of the ‘439 patent specifically claims an apparatus with three separate “horizontally spaced” tanks or zones: an agitation tank, a settling tank, and an aeration zone.

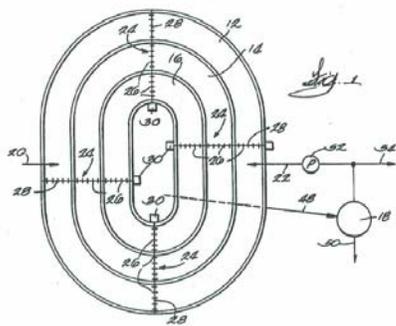
The patents therefore disclose, and the ‘439 claims, a specific utilitarian function for each channel, as well as the functionality of the use of a multiple-channel design in the treatment of wastewater. Both the ‘197 and the ‘439 patents also feature embodiments with three or four channels to practice the methods claimed therein.

Further, the Meiring article discusses the utilitarian function of using multiple channels, specifically three or more. The article states that “the reason for the very good quality of effluent obtained from the orbal plant, with regard to biochemical oxygen demand (BOD) and total nitrogen, is to be found in the multicompartiment

aeration arrangement. Normally **three or four channels are recommended.**" 13 TTABVUE 46 (emphasis added).<sup>3</sup>

Additionally, Respondent's brochure identifies several options for oxidation ditches, including both a two-channel version and a three-channel version. 13 TTABVUE 69. According to the brochure, "[e]ffluent quality can be further improved" through various configurations including several three-channel options. *Id.* at 69. In particular, Respondent advertises its three-channel configuration as capable of a higher percentage of total nitrogen removal than its two-channel configuration. *Id.* The Board therefore finds that there is no genuine dispute of material fact that the use of three channels in an oxidation ditch serves a utilitarian function.

The Board next turns to the Respondent's concentric loops. The abstract of the '197 patent describes the use of "concentric, annular basins or channels" in an "orbital wastewater treatment process" and contains the following drawing of the system:

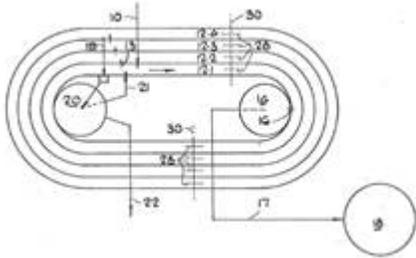


13 TTABVUE 79, 80.

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<sup>3</sup> The Meiring article further explains that the first channel "acts as a shock-absorbing, completely mixed unit, and the subsequent channels help to avoid short-circuiting and cause the system to approach plug-flow, which in part is responsible for the excellent effluent quality." *Id.* at 55.

The '439 patent discloses the use of multiple channels in a "nested configuration." *Id.* at 42. The '439 patent discloses the use of "concentric channels of the geometric pattern shown in the drawing" below:



*Id.* at 40.

The fact that a feature is included in a patent or its drawings does not, in and of itself, make the feature functional. *See In re Howard Leight Indus., LLC*, 80 USPQ2d 1507, 1510 (TTAB 2006). Although both patents demonstrate the use of two, three or four concentric channels in the shape of loops or in an elliptical shape as an example of a means of practicing the claimed inventions, neither patent specifically claims a utilitarian function to the use of the concentric loops shown in the diagrams. However, a review of the '439 patent shows that the concentric loop design enables the flow of wastewater from one zone or channel to another. *Id.* at 43 ("sewage flow may be from the inner channel outwardly, as shown, or vice versa."). The claims also claim a process of treatment involving directing the wastewater from one zone to another. *Id.* Similarly, the '197 patent explains that the wastewater travels between channels through submerged transfer points. *Id.* at 82.

The Meiring article also explains that the orbital system is “subdivided into a number of endless, concentric channels to form a succession of orbital circuits” as shown in the figure below:

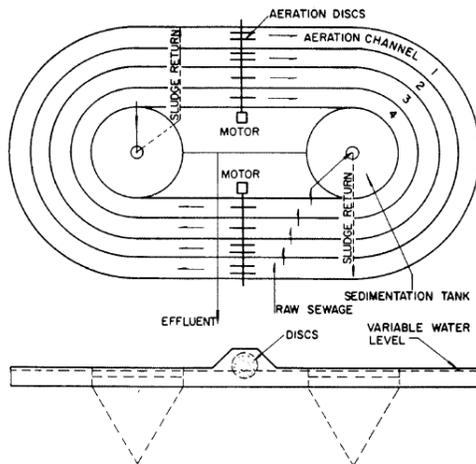


FIGURE 1.—Diagram of plant layout.

*Id.* at 46-47.

In addition to creating an endless circuit for the flow of wastewater from one channel to another, “[t]he concentric arrangement of the channels permits the same shaft to be used for aerating all channels.” 13 TTABVUE 46. This “common shaft” feature is also disclosed in Fig. 2 of the ‘439 patent and the accompanying disclosure: “Agitation in [the agitation channel, aeration channel, and additional concentric channels] may be effected by means of discs 28 mounted for rotation about horizontal axes 30.” *Id.* at 43. Respondent argues that a number of other non-concentric arrangements would also allow for use of a single aeration shaft across all channels. Respondent’s argument does not negate the fact that the concentric design serves a utilitarian function, namely, to allow for the placement of a single aeration shaft over each of the channels. Respondent’s brochure also states that the treatment zones, or

channels, operate in a series which is essential to the wastewater treatment process—specifically a simultaneous nitrification-denitrification process which “is the backbone” of the design. *Id.* at 68.

Moreover, Respondent’s advertising specifically touts the use of concentric channels in the shape of loops as partially responsible for the effectiveness of Respondent’s oxidation ditch. *Id.* at 59, 68 (“The Orbal® system incorporates a unique Concentric Loop™ configuration that creates dedicated zones for specific treatment purposes. ... The volume split of the Concentric Loop configuration naturally applies the correct volume to oxygen input ratio required in the design of a SND plant.”). The use of concentric “orbal” or loop channels also allows for “easy extension of capacity by adding extra channels.” *Id.* at 46.

The record also clearly establishes that the concentric loop design affects the cost of the product. As advertised by Respondent, “[t]he Concentric Loops also save on concrete and construction costs of the aerobic basin volume by using common wall construction.” *Id.* at 59 and 68. Respondent contends that the advertising merely explains that the use of a common wall saves construction costs and that many designs could incorporate use of a common wall to better utilize costs. In other words, Respondent contends that the concentric loops are not the source of the economic advantages touted by the advertisements. 16 TTABVUE 12. However, in totality, the evidence of record establishes that the use of concentric loops creates an endless circuit that can use common walls, a single aeration shaft, and easily allow for the addition of further loops. The fact that there may be other means of accomplishing

these objectives does not diminish the functionality of the design. This is particularly true where, as here, the claimed design is a simple geometric shape, designed to permit the continuous flow of wastewater through a circuit of channels. *Cf. Jay Franco & Sons, Inc. v. Franek*, 615 F.3d 855, 96 USPQ2d 1404, 1408 (7th Cir. 2010) (affirming district court grant of summary judgment finding that defendant’s circular beach towel design was functional in part because of the “rudimentary and general” nature of the circle shape). The Meiring article further explains that the extended aeration orbal plant design is most useful for populations below 4,000, and that for larger populations, the choice between the extended aeration plant and a conventional plant would depend upon factors such as the topography of the area in which the plant is installed. 13 TTABVUE 52. According to the article, the design of the plant is therefore dictated in part by population size and topography. In other words, the orbal irrigation ditch design is dictated by functional considerations.

Upon careful consideration of the arguments and evidence submitted by the parties, we find that there is no genuine dispute of material fact on the issue of functionality. The Board finds that there is no genuine dispute of material fact that the use of three concentric loops is essential to the use or function of the goods and affects their cost.<sup>4</sup> Petitioner is accordingly entitled to judgment on its claim under

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<sup>4</sup> Where functionality is properly established under *Inwood*, further inquiry into the other categories of evidence listed in *Morton-Norwich* is not necessary. *TrafFix*, 58 USPQ2d at 1006 (“Where the design is functional under the *Inwood* formulation there is no need to proceed further to consider if there is a competitive necessity for the feature.”); see *Valu Eng’g*, 61 USPQ2d at 1427 (“once a product feature is found functional based on other considerations there is no need to consider the availability of alternative designs, because the feature cannot be given trade dress protection merely because there are alternative designs available.”). Therefore, although alternative designs may have been relevant to the Board’s determination

Section 2(e)(5) of the Trademark Act, 15 U.S.C. § 1052(e)(5). In view of the foregoing, Petitioner's motion for summary judgment is **granted**.

Insofar as the Board has granted Petitioner's motion for summary judgment and found that Respondent's involved mark is functional pursuant to Section 2(e)(5) of the Trademark Act, the Board need not reach the question of acquired distinctiveness. *See TrafFix*, 58 USPQ2d at 1007 ("Functionality having been established, whether MDI's dual-spring design has acquired secondary meaning need not be considered."); *Becton, Dickinson*, 102 USPQ2d at 1373 ("We need not reach the issue of acquired distinctiveness. Even if the mark had acquired the requisite distinction, it fails registrability because we affirm the Board's conclusion that the mark as a whole is functional."). *See M-5 Steel Mfg. Co.*, 61 USPQ2d at 1097.<sup>5</sup>

Accordingly, judgment is hereby entered against Respondent, the petition for cancellation is granted, and Registration No. 4986479 will be cancelled in due course by the Commissioner for Trademarks.

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of functionality on the limited record of the first motion for summary judgment (*see* 12 TTABVUE 4), where the evidence of record now establishes that there is no genuine dispute of material fact that the design is essential to the use or purpose of the article and/or affects the cost or quality of the article, consideration of alternative designs is no longer necessary.

<sup>5</sup> Petitioner also asserts a claim of "trademark misuse," which appears to be largely duplicative of Petitioner's claim of functionality. Specifically, Petitioner pleads that Respondent's design is the same configuration claimed by the '197 patent. Insofar as the Board has granted Petitioner's motion for summary judgment with respect to its claim of functionality, the Board need not discuss or reach the purported claim of trademark misuse.