

ESTTA Tracking number: **ESTTA868804**

Filing date: **01/03/2018**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	85044106
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Submission	Substitute Appeal Brief
Attachments	Substitute Appeal Brief App No 85044106.pdf(269616 bytes)
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Date	01/03/2018

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

Application of: Rain Bird Corporation

Application No.: 85044106

Filed: May 20, 2010

Mark:



APPLICANT'S APPEAL BRIEF

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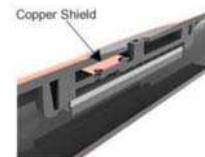
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INTRODUCTION

The Applicant appeals from the examination refusal of its COPPER Color mark, Application No. 85044106, for “Flexible, plastic tubes used in subsurface drip irrigation systems.” The examination refusal alleges that the COPPER Color mark is aesthetically functional under Section 2(e)(5) and merely ornamental under Sections 1, 2 and 45. Rain Bird seeks to register the copper color for its plastic irrigation tubing, noting that the copper color was registered until 2011 for plastic plumbing pipes. In this appeal, Rain Bird asks that the Board withdraw these examination refusals and find the COPPER Color mark entitled to registration; and, particularly, on the Principal Register.

Rain Bird uses the COPPER Color mark for its flexible plastic subsurface drip irrigation tubing, known as both “XFS” and “Copper Shield” drip irrigation tubing. Plant roots naturally grow toward and intrude into drip irrigation tubing holes, always seeking out the source of water. Without intervention, roots will ultimately clog the emitter holes, block the flow of water and defeat irrigation. Before the Applicant’s Copper Shield technology unlocked new options, controlling root intrusion typically involved periodic flushing of subsurface drip irrigation tubing with herbicidal copper-based solutions. However, with the introduction of Copper Shield technology in subsurface drip tubing, intervention against root intrusion is built into the product. The Copper Shield technology is unique in having small rectangular chips of copper metal placed inside the tubing at each emitter hole, as seen in the adjacent cutaway drawing. The Copper Shield chip safely stops roots from blocking critical flow passages in the emitter. Keeping emitters open helps keep water flowing. The Copper Shield technology enables the drip irrigation tubing to be buried underground for years without blockage from root intrusion. In drought stricken California, for example, the Copper Shield technology in subsurface drip tubing irrigates lawns underground at the root level without evaporation loss typical of above ground sprinklers.



To promote its Copper Shield enhanced drip irrigation tubing, the Applicant adopted and began using the COPPER Color mark at least as early as April 2010 applying the mark to the entire exterior of the tubing. The COPPER Color marked product won an Irrigation Association 2010 New Product Contest in the Turf/Landscape Category as well as a Silver Award from the European Irrigation Association in 2013, praising “Rain Bird’s copper-colored XFS Dripline with Copper Shield™ for sub-

surface drip irrigation is recognized as an ideal method of efficiently watering shrubs, plants and turf grass.”

The Applicant implemented “Look for” advertising like the adjacent logo and “The Copper-Color Outside Ensures the Copper Chip is Inside!” slogan. Retailers and other resellers of the XFS product with Copper Shield technology picked up these and comparable marketing pitches associating the COPPER Color mark with Rain Bird’s drip irrigation product. To address both the Section 2(e)(5) refusal and the Sections 1, 2 and 45 refusals during examination, the Applicant submitted competent evidence of such advertising along with numerous declarations from installation contractors and other professionals in the irrigation field who state that the COPPER Color mark is recognizable and different from typical brown and black drip irrigation tubing. These professionals handle drip irrigation products on a regular basis and are accustomed to seeing brown color drip irrigation tubing, which seamlessly blends into landscape and mulch. Rain Bird’s XFS product with the Copper Shield technology in contrast is described as “shiny” or “metallic,” like seen in the adjacent photograph amongst other examples of drip irrigation tubing. It is easy to identify which one is the COPPER Color marked drip tubing.



The COPPER Color mark for plastic tubes is not the first of its kind. During the course of examination, another COPPER Color mark for “plumbing plastic pipes,” Registration No. 2143623, was cited against the Applicant’s applied for mark. The Applicant reasonably believed that by successfully cancelling this Supplemental Registration, which it did in 2011, the Applicant’s own COPPER Color mark for plastic drip irrigation tubes should reasonably assume the space vacated by this prior COPPER Color mark. After all, the guidelines and practice of the Patent and Trademark Office had only become more accommodating to color marks since the 1993 filing of this prior registered COPPER Color mark.

However, the instant application for the COPPER Color mark remains subject to refusals alleging that the mark is aesthetically functional under Section 2(e)(5) and merely ornamental under Sections 1, 2 and 45. On the Section 2(e)(5) refusal, the Applicant seeks the Board’s ruling that the weight of competent evidence of record establishes that the standout COPPER Color mark does not serve an aesthetic function recognized in the irrigation industry. In its July 21, 2017 Request for Remand,

Rain Bird proposes to amend the mark's description to METALLIC COPPER Color, or the like, adding further tangible wording to clarify why irrigation professionals and others so readily distinguish the COPPER Color mark from the typical brown tubing that seamlessly blends into surface landscape.

On the refusals under Sections 1, 2 and 45, Rain Bird submits that the evidence of record establishes that the COPPER Color mark has acquired distinctiveness entitling it to registration on the Principal Register. However, Rain Bird also agrees in the July 21, 2017 Request for Remand, alternatively, to accept registration on the Supplemental Register.

OVERVIEW OF BURDENS OF PROOF IN EXAMINATION

In examining a trade dress mark, the Examining Attorney has the burden of presenting prima facie evidence to establish that the trade dress at issue is functional. To reach this prima facie threshold requires "independent research to obtain evidentiary support for the refusal" and, where absent, "a request for information pursuant to 37 C.F.R. §2.61(b) must be issued to obtain information from the applicant so that an informed decision about the validity of the functionality refusal can be made." TMEP 1202.02(a)(iv).

In response to a refusal, "[t]he burden then shifts to the applicant to present "competent evidence" to rebut the examining attorney's prima facie case of functionality." The burden of proof to overcome a functionality refusal is by the preponderance of evidence. TMEP 1202.02(a)(iv); citing, *In re Becton, Dickinson and Co.*, 102 USPQ2d 1372 (Fed. Cir. 2012). The Ninth Circuit provides a commonly accepted jury instruction for "Preponderance of the Evidence" as "When a party has the burden of proving any claim [or affirmative defense] by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim [or affirmative defense] is more probably true than not true." Manual of Model Civil Jury Instructions, Ninth Circuit Jury Instructions Committee (2017 Edition).

UTILITARIAN FUNCTIONALITY EXAMINATION

During the initial two years of examination, the Examining Attorney pursued requests for information and presented prima facie evidence alleging *utilitarian* functionality pursuant to the *Morton-Norwich* factors based, in part, on patent applications that Rain Bird filed in connection with the Copper Shield technology for drip irrigation tubing and allegations that competitors would be disadvantaged if the registered COPPER Color mark discouraged the provision of metal copper drip irrigation tubing.

In response to requests for information and the assertions of prima facie evidence alleging *utilitarian* functionality, Rain Bird built an evidentiary record establishing, in short, that the XFS tubing itself is flexible plastic without any metal copper coating; and, that the metal chip referred to as “Copper Shield” technology is inserted out of sight within the emitter inside the drip line tubing. The competent evidence establishes that the metal copper is not suitable for drip irrigation tubing and that Rain Bird’s choice of the COPPER Color mark drip irrigation tubing has no utilitarian purpose. Rain Bird adopted and uses the COPPER Color mark to promote the innovative Copper Shield technology inside the XFS tubing. This competent evidence from Rain Bird rebuts prior allegations of utilitarian functionality beyond a reasonable doubt. As this chapter of the examination concluded, all would surely agree that the competent evidence proves the COPPER Color mark has no utilitarian functionality by at least a preponderance of the evidence.

The Examining Attorney discontinued pursuit of the utilitarian functionality refusal and as of the October 21, 2012 Office Action, TSDR p. 1, introduced aesthetic functionality as the new basis for refusing the COPPER Color mark. In the October 21, 2012 Office Action, the Examining Attorney states:

In the initial Office Action, the examining attorney failed to apprise the applicant of a different type of functionality under Section 2(e)(5) that would prohibit registration. The in[sic] initial refusal focused upon the “utilitarian functionality” of the goods whereby the applicant could use the copper color mark to prevent others from producing flexible, metal covered or metal drip irrigation lines, since such lines can be, and have historically been, made of copper. The examining attorney apologizes for this error and issues this Office Action to correct that deficiency.

Registration is refused because the applied-for color mark, which consists of the color copper as applied to the entire surface of the goods is an aesthetically functional feature of these products.

AESTHETIC FUNCTIONALITY EXAMINATION

With this new chapter of examination into aesthetic functionality, the burdens of proof remain the same as discussed above. The Examining Attorney must establish the prima facie case that the trade dress is aesthetically functional. Then the burden shifts to the applicant to overcome the prima facie case by a preponderance of the evidence. In the matter at hand, Rain Bird respectfully submits that the competent evidence of record in examination fully rebuts the prima facie case – and, at least, by a preponderance of the evidence.

The prima facie case of aesthetic functionality set forth in the October 21, 2012 Office Action

presents printouts from websites promoting irrigation tubing of Rain Bird as well as its competitors. The Office Action states that the color of the competitors' irrigation tubing as well as examples of Rain Bird 1/4" drip irrigation tubing are "specifically promoted as allowing irrigation drip tubing to more seamlessly blend into the landscape[".] [Emphasis added] October 21, 2012 Office Action, TSDR p. 1. Since the introduction of the aesthetic functionality issue in 2012, Rain Bird has fully responded to each of several Office Actions. Rather than detail each round of examination, Rain Bird summarizes the evidence developed during examination.

The crux of the refusal alleging aesthetic functionality is centered on how similar or different the COPPER Color mark is relative to other drip irrigation tubing, which the irrigation industry typically identifies as "brown" tubing that seamlessly blends into landscape. If the Applicant's proof by preponderant evidence rebuts the prima facie case of aesthetic functionality, then the Section 2(e)(5) refusal should be withdrawn. Rain Bird respectfully submits that the preponderance of evidence proves that the COPPER Color mark does not serve the asserted aesthetic function of brown tubing.

Use of terms "copper," "copper-brown," "shiny" and "metallic" during examination

In beginning an assessment of the evidence introduced in this matter, Rain Bird first advises that it has objected to characterizations in Office Actions that refer to prior existing irrigation tubing as being the color "copper" or "copper-brown." See, February 13, 2015 Request Reconsideration, TSDR p. 2-4; May 8, 2017 Request Reconsideration, TSDR p. 6 making objections to October 21, 2012 Office Action, TSDR p. 1; August 13, 2014 Office Action, TSDR p. 8, and others. In the extensive examination record, the Examining Attorney's written comments are the exclusive source of the adjectives "copper" or "copper-brown" being applied to brown drip irrigation tubing available prior to Rain Bird's COPPER Color marked drip tubing. Similarly, the Examining Attorney's characterization in the November 8, 2016 Office Action, TSDR p. 1, of typical drip irrigation tubing being "metallic" or "metallic brown" or "shiny" finds no evidentiary support in the record outside the Examining Attorney's comments. The Examining Attorney has never rebutted Rain Bird's objections. Rain Bird also observes that the rendering of colors on drip irrigation tubing seen on websites and in printouts is far from exact. Rather than adopting the Examining Attorney's personal characterizations, the competent evidence of record instead demonstrates

that participants in the irrigation industry call brown drip irrigation tubing by the color “brown” and call only Rain Bird XFS tubing by the color “copper.”¹

And, to be absolutely clear, the examination file history discloses no evidence that competitors or others in the irrigation field describe drip irrigation tubing as being the color “copper,” with the sole exception of when referring to the Applicant’s XFS drip irrigation tubing with the COPPER Color mark. With the same clarity, the examination record discloses no evidence that competitors or others in the irrigation field describe any drip irrigation tubing as being the color “copper-brown.” Again, with the same absolute clarity, the only references in the file history using the terms “metallic” or “shiny” to characterize the appearance of drip irrigation tubing are associated with the COPPER Color marked tubing of Rain Bird.

In the examination record, the Examining Attorney can only point to his own characterizations of irrigation tubing using terms “copper,” “copper-brown,” “shiny,” or “metallic” as adjectives to describe drip line tubing – other than the “copper” color of Rain Bird’s product. Why? Because the irrigation industry does not use these terms to describe typical drip irrigation tubing.

The competent evidence of record proves that the industry only uses “copper,” “shiny,” or “metallic” to articulate the distinctly different appearance of the COPPER Color mark. Rain Bird respectfully requests that the Board recognize there is no support for the prima facie assertion that “copper” or “copper-brown” are color terms used to describe drip irrigation tubing in the relevant industry of irrigation – apart from the color “copper” used to exclusively identify Rain Bird’s COPPER Color marked drip irrigation tubing. Furthermore, the Applicant respectfully requests that the Board find that the competent evidence of record demonstrates that the terms “copper” and “metallic” and “shiny” are used only when characterizing the COPPER Color marked tubing.

The COPPER Color mark does not serve the aesthetically functional goal of brown tubing

The Applicant respectfully submits that the competent evidence of record in examination rebuts the prima facie case alleging that the COPPER Color mark is aesthetically functional. The rebuttal

¹ The July 13, 2017 Denial of Request for reconsideration references a retail website where the term “brown” appears in connection with XFS tubing. In this same reference, the slogan “The Copper-Color Outside Ensures the Copper Chip is Inside!” appears prominently. The Applicant notes that the color “black” has also appeared in connection with XFS tubing on a retail website. The evidence of such occurrences is scant, which indicates that such mistakes in color identification are both inadvertent and de minimis.

evidence is substantial, proving by more than the preponderance of evidence that the COPPER Color mark does not accomplish the aesthetically functional goal of seamlessly blending into surrounding surface landscape.

The prima facie evidence of aesthetic functionality

During examination, the Examining Attorney relies on printouts from the websites of entities providing drip and other irrigation tubing to the U.S. marketplace. The Examining Attorney uses photographs of irrigation tubing and related text seen on these webpages as prima facie evidence that the drip irrigation industry sells brown color tubing to “seamlessly blend into the surrounding surface landscape.” Among these webpages, the Examining Attorney points to Rain Bird 1/4” drip irrigation tubing as being the color brown so that it too can seamlessly blend into mulch and landscape material. August 13, 2014 Office Action, TSDR p. 1.

Rain Bird here notes that it agrees, and has never contested, that the brown colors previously used for drip irrigation tubing are selected to seamlessly blend the tubing into the surrounding surface landscape. By that aesthetically functional characteristic, the typical brown colored drip irrigation tubing is camouflaged so that it visually disappears by seamlessly blending into the surface landscape. The evidence of record demonstrates that, when the color of such drip irrigation tubing is described, the color is simply and typically called “brown.”² Here, the Applicant points to a simple, reasonable definition from the Macmillan Dictionary, which states: “something that is brown is the same colour as wood or coffee.” [emphasis added] May 8, 2017 Request Reconsideration, TSDR p. 10, 59. This ordinary understanding of the color “brown” resonates perfectly with the stated aesthetic function of brown drip irrigation tubing: seamlessly blending into the surrounding surface landscape.

Instead of accepting this reasonable notion of brown colors used in the irrigation industry, the Examining Attorney turns to academic color reference materials that classify colors into just twelve or thirteen basic color groups; and, in these materials the color copper is considered a shade of brown. From there, the Examining Attorney proceeds down the following path to aesthetic functionality: if the color copper is considered a shade of the color brown, and the color brown seamlessly blends into surface

² The file history refers to the colors black and purple used for drip irrigation tubing. The Applicant only discusses the COPPER Color mark relative to the color brown for such tubing.

landscape, then the COPPER Color mark seamlessly blends into surface landscape. Declarations and other evidence contradicting this theory must be wrong. End of story.

Rain Bird strenuously disagrees with this simplistic reduction, and asserts that real people with relevant experience working in the irrigation field reasonably attest to readily identifying the COPPER Color mark as tangibly different and distinctive from prior brown drip irrigation tubing. The COPPER Color marked tubing stands out and apart from the aesthetically functional brown tubing that seamlessly blends into surface landscape.

To further clarify its specified goods and thereby rebut the purported aesthetic functionality, Rain Bird amended the identified goods to “Flexible, plastic tubes used in subsurface drip irrigation systems,” adding “subsurface,” which is the primary installation method for the XFS product. Rain Bird also offers to amend the mark’s description to “metallic copper.” July 21, 2017 Request for Remand, 9 TTABVUE 2. By these proposals, Rain Bird clarifies that the COPPER Color mark serves as a trademark on the Copper Shield tubing until the mark literally disappears out of sight underground.

The Applicant’s competent evidence

To rebut the prima facie case of aesthetic functionality, Rain Bird submits competent evidence that the COPPER Color mark does not fulfill the aesthetic function of seamlessly blending into surface landscape. One need only check a dictionary definition of “camouflage” to find uses of the terms “blend” and “blending” to explain characteristics that help things disappear into the background, such as “An animal’s natural coloring or form that enables it to *blend in* with its surroundings.” [emphasis added] October 13, 2015 Response, TSDR p. 8, 43-44. The evidence of record demonstrates that the COPPER Color mark does not equate to camouflage; it does not blend in with its surroundings like coffee or wood colored browns do.

Competent evidence comes from numerous declarations of experienced professionals in the irrigation industry who purchase COPPER Color marked XFS drip irrigation tubing, primarily for installation at customer sites. April 22, 2013 Response, TSDR p. 6-13; June 4, 2013 Preliminary Amendment, TSDR p. 2-7; May 8, 2017 Request Reconsideration, TSDR p. 17-56.

Among statements extracted from the declarations are the following:

- “The XFS tubing has a surface sheen like the metal copper, whereas the brown colors of other available dripline tubing are generally black or ‘dirt brown’ to blend in with dirt or landscaping.” Mike Garcia, April 16, 2013 declaration
- “Before the XFS dripline was introduced, plastic irrigation dripline tubing available in the U.S. have generally been colored brown. In contrast, Rain Bird XFS plastic tubing is noticeably different from the usual brown tubing. You can immediately see the XFS dripline; it is like it has a sprayed sheen on it.” Nicolas Khoury, April 22, 2013 declaration
- “Compared to the usual brown or black tubing, Rain Bird XFS plastic tubing looks distinctively different, having a coppery color. During installation, this copper color stands out and makes it easy to see that the crew is installing the right product. Using the different copper color also makes sense as a marketing tool to remind us of the copper chip inside.” Paul Hanson, April 23, 2013 declaration
- “In contrast, Rain Bird XFS plastic tubing has a copper color and looks different from the usual brown tubing. With the XFS plastic tubing you can definitely see the shininess of the copper color.” Rob Harvey, May 3, 2013 declaration
- “I can recognize the Rain Bird XFS plastic tubing by its copper color, which is also shiny. The XFS dripline does not look like any other dripline on the market.” Daniel Hanson, April 21, 2017 declaration
- “The shiny and cleaner looking copper color of Rain Bird XFS plastic is noticeably different from the usual brown tubing. XFS is easy to spot.” Jose Ixta, May 2, 2017 declaration
- “The copper color of Rain Bird XFS plastic tubing is noticeably different from the usual brown tubing. The XFS copper color is also shiny. I like the color of XFS. I and others working with dripline can recognize XFS on sight.” Walter May, April 21, 2017 declaration
- “The copper color of Rain Bird XFS plastic tubing looks attractive and is noticeably different from the usual tubing colors. The copper color of XFS is shinier than the usual tubing colors.” Greg Hensen, April 19, 2017 declaration
- “The Rain Bird XFS plastic tubing is easy to identify by its copper color, which is noticeably different from the usual tubing colors. Rain Bird XFS is also shiner than tubing from other companies. The color of XFS stands out. Contractors purchasing the XFS dripline product can usually recognize XFS on sight.” Patrick Moore, April 21, 2017 declaration
- “The copper color of Rain Bird XFS plastic tubing is shiny and noticeably different from the usual brown tubing. I like the copper color of XFS and the copper chip technology of XFS. I and others working with dripline can recognize XFS on sight.” Paul Bird, April 20, 2017 declaration
- “The copper color of Rain Bird XFS plastic tubing is noticeably different from the usual tubing colors. The XFS is also shiny. The color of XFS is recognizable to our customers as well.” “The brown colors of other available dripline tubing generally blend in with dirt or landscaping. The copper color of XFS does not match the ground cover.” Tony Abarca, April 21, 2017 declaration
- “The copper color of Rain Bird XFS plastic tubing looks noticeably different from the usual tubing colors. It has a copper coating and the copper color of XFS is shinier than the usual tubing colors.” Carl Dill, May 4, 2017 declaration

- “The Rain Bird XFS plastic tubing has a copper tint to it that looks noticeably different from the usual tubing colors. The copper color is shinier than the usual tubing colors.” Ed Gibson, May 5, 2017 declaration
- “The recognizable color of Rain Bird XFS plastic tubing looks like copper and is noticeably different from the usual brown tubing colors. The copper color of XFS is shinier than the usual tubing colors.” Jeff Studer, May 1, 2017 declaration

In addition, Rain Bird submits photographs of COPPER Color marked tubing, such as this one taken in sunshine amongst other Rain Bird drip irrigation tubing, including Rain Bird’s brown colored 1/4” drip tubing at the far left. Rain Bird’s tubing with the COPPER Color mark is fourth from the left. October 13, 2015 Response, TSDR p. 77-78.



The Applicant submits other evidence such as “Look for” promotion of the COPPER Color mark supporting that such promotional effort only makes sense if the marketplace participants recognize that the COPPER Color mark is distinct from the typical brown drip irrigation tubing. The declarations provide competent evidence corroborating that Rain Bird’s “Look for” promotional efforts in fact resonate with professionals and others in the irrigation field for the simple reason that the COPPER Color mark is readily recognized as different and distinctive from prior brown drip irrigation tubing.

The treatment of the Applicant’s Declaration evidence

Throughout examination, the Examining Attorney has opted to give little, if any, weight to submitted declarations, expressing suspicions of bias against the professionals in the irrigation industry who provided declarations. Despite the commonsense and reasonable attestation from each declarant that, among other things, he or she recognizes the COPPER Color mark as distinct from prior brown irrigation tubing; despite retailers spontaneously adopting “Look for” the COPPER Color mark promotion; despite full and complete responses to Requests for Information about the Rain Bird Rewards Program; and, despite further declarations attesting that no one received compensation for providing a declaration, these unfounded suspicions of bias continue.

In additional Requests for Information issued after Rain Bird submitted its 2015 Rewards Member Guide, the Examining Attorney set forth a lengthy list of requests for detailed information in the following interrogatories from the February 5, 2016 Office Action, TSDR p. 1:

- (1) A full and complete explanation as to whether there is or has been any form of relationship or

partnership between any individual, person, business or government entity named in the submitted affidavits;

(2) Whether any such person, individual, business or government entity named in the submitted affidavits has participated in or currently participates in any business referral, discount or award program that the applicant operates, provides or oversees;

(3) For each such person, individual, business or government entity named in the submitted affidavits that has participated in or currently participates in any business referral, discount or award program that the applicant operates, provides or oversees the applicant must indicate the years of participation, their status in the program, and their rating or rank relative to other participants in the program;

(4) Whether any person, individual, business or government entity named in the submitted affidavits has ever received an award, discount, or payment from any program that the applicant operates, provides or oversees;

(5) Whether any company or entity named in the submitted affidavits has ever received an award, discount, or payment from any program that the applicant operates, provides or oversees;

(6) The amount of any and all awards, discounts, or payments received by any person, individual, business or government entity named in the submitted affidavits and the amounts of any and all awards, discounts, or payments received by any company or entity named in the affidavits that employs such individuals; and

(7) Whether any person, individual or business named in the submitted affidavits is or has ever been employed by the applicant.

Complete information about the Rain Bird Reward Program is attached to the October 13, 2015 Response TSDR p. 80-91. With its August 5, 2016 Response, TSDR p. 38-41, Rain Bird provided a declaration from Samir Shah, Marketing and International Sales Manager, fully responding to each of these interrogatories as well as fully addressing the stated purpose of the Examining Attorney for the further probing, “whether the affiants’ statements were truly ‘independent’ or whether there was some interest or bias that may color the statements made in, and thus, the weight that should be given to, the affidavits.” The declaration, in part, attests:

4. [N]one of the seven declarants nor their related referenced entity received any gift, benefit, discount, business referral, reward program point or other compensation of any kind related to providing his or her declaration.

This declaration of Samir Shah also attests that all declarants from installation contractors are principals or employees of independently owned and operated businesses in the irrigation field. The Examining Attorney’s suspicion of bias is entirely unfounded and completely incorrect.

When Rain Bird submitted additional declarations from other irrigation professionals as part of its May 8, 2017 Request for Reconsideration, Rain Bird provided a comparable declaration from an officer of the Applicant attesting to the independence of the declarants and the absence of compensation of any kind related to providing the declaration. May 8, 2017 Request Reconsideration, TSDR p. 57-58.

Despite the sworn declarations and corroborating evidence, in the July 13, 2017 Denial of Request for Reconsideration, TSDR p. 1, the Examining Attorney persists in relying on these vague suspicions, dismissing the declarants as “a subset which may not be wholly disinterested due to it[sic] participation in the applicant’s rewards program[.]”

The Declarations of installation contractors are reliable, competent evidence

The declarations from professionals in the drip irrigation field recognize that the COPPER Color mark is different and distinguished from the color of brown tubing traditionally made to blend in with landscape. Instead of cookie cutter copies, each declarant’s differing experience in the irrigation field and familiarity with drip irrigation equipment is detailed – each declarant has years of experience ranging from ten years to 35 years at the time of making his or her declaration. Each declarant describes his or her own familiarity with Rain Bird products as well as their own familiarity with irrigation products coming from sources other than Rain Bird. Almost all the declarants describe purchasing and/or installing drip and other irrigation tubing from companies other than Rain Bird. Each declarant provides differing descriptions of the COPPER Color mark relative to the brown and black drip irrigation tubing previously available.

The Applicant fully addressed the requests for information and provides competent, forthright evidence that should reasonably assuage the suspicions of the Examining Attorney. In *In re Black & Decker Corp.*, 81 USPQ2d 1841 (TTAB 2006), the Board rejects the examining attorney’s unsubstantiated claims of bias against declarants from the hardware retailing field. In giving weight to the declarations provided during examination and finding acquired distinctiveness in the shape of a key head, the Board accepts form letters having fill-in-the-blank fields for the declarant’s name, employer and years in the retail hardware field. Rain Bird respectfully submits that *In re Black & Decker Corp.* provides good guidance for determining the reliability of declarations in examination, whether they be in support of acquired distinctiveness or against aesthetic functionality.

The Applicant has submitted twenty-seven declarations of qualified professionals in the present examination. The Examining Attorney continues to criticize these declarations solely on conjecture, despite the Applicant’s substantial efforts to mollify any concerns. The Board cautions on unfounded and speculative attacks on retailer declarations during examination by stating:

We disagree with the examining attorney's assessment that the eight retailer declarations are biased and therefore entitled to little weight. There is simply no evidence to suggest that these retailers were predisposed to say that applicant's goods are identified by the octagonal key head design. *In re Black & Decker Corp.*, supra.

In the declarations of record for the COPPER Color mark, each individual provides background information that clearly presents substantive professional qualifications, experience and basis for recognizing the COPPER Color mark on plastic drip tubing as distinct and different from the prior brown tubing available in the U.S. marketplace. The declarants also attest that they recognize the COPPER Color mark as a source identifier for drip tubing exclusively from Rain Bird. *In re Flex-O-Glass, Inc.*, 194 USPQ 203, (TTAB 1977) (“[T]he fact that the affidavits may be similar in format and expression is of no particular significance herein since the affiants have sworn to the statements contained therein.” “[T]here is nothing of record to dispute the statements contained therein[.]”).

Based on substantial familiarity with drip irrigation, the declarants are well positioned to provide statements on the color of drip irrigation tubing sold in the United States prior to the XFS product, and well positioned to recognize that the COPPER Color mark has characteristics like a metallic sheen or shininess that makes it stand out from the previous shades of brown and black drip irrigation tubing. The declarations of professional buyers in the trade are entitled to substantive consideration. See generally, *Pic Design Corp. v. Bearings Specialty Co., Inc.*, 168 USPQ 321 (1st Cir. 1971) (“Moreover, plaintiff has clearly satisfied any burden of proving “secondary meaning” by submitting affidavits from the purchasing agents of five of its customers[.]”); *Centaur Communications, Ltd. v. A/S/M Communications, Inc.*, 4 USPQ2d 1541 (2d Cir. 1987) (“[I]t is not always the general public's understanding but--depending upon the product--often only a segment of consumers that need be examined.”) For homeowners or commercial customers, the purchase is of an irrigation system, not drip tubing. The purchase of the irrigation system is almost always through and with the advice of a professional installation contractor. As plainly affirmed in the declarations, the installation contractors and others all have years of experience in the irrigation field and readily distinguish the COPPER Color mark as different from the color brown, or black or purple for that matter. The declarations offer illuminating corroboration of the outdoor photographs of irrigation tubing in the examination record; the Applicant's XFS drip line stands out from other tubing in the sunshine where the drip line is seen from purchase

through installation. Why the difference? The shiny metallic character of the COPPER Color mark separates the color “Copper” in common understanding from the brown color of wood or coffee. Macmillian Dictionary, May 8, 2017 Request Reconsideration, TSDR p. 10, 59. The declarations and the increasing number of third party retailers adopting the “Look for” slogan “The Copper Color Outside ensures that the Copper Shield is inside” reflect this common public understanding of colors, which readily distinguishes the color “Copper” from the color “Brown.” Despite academic references that assign the world of colors into a few tidy Aristotelian groups, these declarations from the real world affirm that the COPPER Color marked tubing is distinct and different from typical brown tubing.

That these declarations support the COPPER Color mark as a source identifier should be of little surprise. The use of color as a source identifier and resulting Registrations for color marks on plumbing and irrigation tubing, conduit and fittings are not uncommon. In its October 13, 2015 Response TSDR p. 48-75, the Applicant submitted examples of such registered marks, identifying both registrations on the Principal Register and Supplemental Register. Among these prior registrations is the COPPER Color mark for “plastic plumbing pipes,” Registration No. 2143623, TSDR p. 72-73, which the Applicant successfully cancelled in 2011 after it was cited for likely confusion in examination. None of the active Registrations describe the registered mark in terms of “brown” or “copper” colors. Evidence that others in the same industry have obtained trademark registrations supports registration of the same type of trade dress. The Board in *In re Black & Decker Corp.*, refers to U.S. registrations for the same types of product configurations and cites earlier cases finding industry practices using colors as source identifiers for wire rope, such as *Wire Rope Corporation of America, Inc. v. Secalt S.A.*, 196 USPQ 312, 315 (TTAB).

Rain Bird respectfully submits that the competent evidence fully rebuts the prima facie assertion of declarant bias; and, therefore, Rain Bird requests that the declarations be accepted as competent evidence and, further, on the other precedent discussed below, accepted as establishing by a preponderance of evidence that the COPPER Color mark is distinctive from prior brown drip irrigation tubing; and, further, that the COPPER Color mark does not serve the aesthetic function upon which the Section 2(e)(5) refusal relies.

Other precedent supports a finding that the COPPER Color mark is not aesthetically functional

Interestingly, *In re Howard S. Leight and Associates Inc.*, 39 USPQ2d 1058 (TTAB 1996), which is raised in the November 8, 2016 Office Action, provides a reversed mirror image of the instant examination that clarifies how the “shiny” or “metallic” or “copper” characteristics of the Applicant’s COPPER Color mark conspire against functionality. The *In re Howard S. Leight and Associates*’ Board states:

After careful review of the record and arguments presented herein, we find that the color coral is de jure functional when applied to applicant's goods. Because of their coral color, applicant's earplugs are more readily visible, allowing for easier and quicker safety checks.

Ironically, the “shiny” and “metallic” and “copper” characteristics of the COPPER Color mark make it stand out, which for earplugs would perhaps be aesthetically functional like the coral color in the *In re Howard S. Leight* decision. However, in the context of drip line irrigation tubing, the standout “shiny” and “metallic” and “copper” nature of the COPPER Color mark defeats its ability to serve the aesthetic function required of brown color drip line tubing –seamlessly blending into surface landscape and mulch.

The Examining Attorney stresses throughout examination that the irrigation industry prefers brown drip irrigation tubing because it seamlessly blends into surface landscape, as in being like camouflage. The competent evidence of record makes abundantly clear that the COPPER Color mark does not act as camouflage in surface landscape – particularly after installation when it literally disappears underground.

The Applicant does not contest that the stand out nature of the metallic COPPER Color mark may be attractive to some people. Some of the declarations of record even include statements about people liking the way the XFS tubing looks. In saying drip irrigation tubing is “attractive,” the declarant voices a term not seen or heard about brown drip irrigation tubing. However, importantly, being attractive does not prevent a feature from functioning as a trademark or source identifier, especially where the product is designed to be buried or where the relevant industry prefers a different color for purposes of blending into surface landscape. As the Supreme Court guides:

[C]ourts will examine whether its use as a mark would permit one competitor (or a group) to interfere with legitimate (nontrademark-related) competition through actual or potential exclusive use of an important product ingredient. *That examination should not discourage firms from creating aesthetically pleasing mark designs, for it is open to their competitors to do the same.* *Qualitex Co. v. Jacobson Products Co.*, 34 USPQ2d 1161 (U.S. 1995)(emphasis added).

W.T. Rogers Company, Inc. v. Keene, et al., 228 USPQ 145 (7th Cir. 1985) (“But the fact that a design feature is attractive does not, to repeat, preclude its being trademarked.”) The file history is devoid of any evidence that brown irrigation tubing is considered attractive. These limited compliments paid to the COPPER Color marked tubing do corroborate the declarations and other evidence demonstrating that the COPPER Color mark looks distinctly different from typical drip tubing and, more importantly, that the mark does not serve the stated aesthetic function of seamlessly blending into landscape and mulch.

During examination, the Examining Attorney refers to *In re Ferris Corp.*, 59 USPQ2d 1587 (TTAB 2000) and suggests that the characteristics of colors intended to blend with human skin tones is applicable to the instant matter involving metallic colors like the COPPER Color mark relative to landscape or dirt. In *Ferris*, the Board states:

There is no question that “flesh color” for wound dressings serves the utilitarian purpose of blending well with the natural color of human skin. [at 1589]

The Board, later in its decision finds:

In our opinion, however, applicant's color “pink” matches human skin color just as well as, or perhaps better than, the “flesh colored” wound dressings used by applicant's competitors. [at 1591]

The *Ferris* examination involved a mark expressly described using the word “Pink” and filed for medical bandages. On appeal, the Board reviewed multiple references to skin color, which show common use of the word “pink” equated to the color of Caucasian skin tones and synonymous with flesh color. With the specific color “pink” so closely associated with skin color, the Board found that granting registration of the color “pink” to one entity would preclude competitors from using similar “flesh colors” on bandages.

As used in the *Ferris* decision, “Blend” and “Blending” are terms to describe the aesthetic function of bandage colors to match skin tones – camouflaging the bandage so as to disappear. Using the Board’s approach from *Ferris*, the preponderant evidence finds that the COPPER Color mark does not blend in with landscaping, as does brown drip tubing. Rather than blending in, the declarations of industry professionals recognize the COPPER Color mark as standing out, as for example, stated in the Declaration of Paul Hanson:

Before the XFS dripline, plastic irrigation dripline tubing products available in the U.S. have generally been colored brown or black. Compared to the usual brown or black tubing, Rain Bird XFS plastic tubing looks distinctively different, having a coppery color. During installation, this

copper color stands out and makes it easy to see that the crew is installing the right product. Using the different copper color also makes sense as a marketing tool to remind us of the copper chip inside.

Extracts of declarations recognizing the COPPER Color mark appear above, pages 11 and 12.

The competent evidence disagrees with the Examining Attorney's position that "the applicant should not be permitted to appropriate exclusively the color 'copper' because it blends so well with mulch and dirt." April 10, 2015 Office Action, TSDR p. 1. The declarations and other evidence of record are clear. The COPPER Color mark stands out from the typical brown drip irrigation tubing that seamlessly blends into mulch, dirt or landscape.

The Applicant is building exclusive rights in the specific COPPER Color mark, with its specific standout distinguishing characteristics, rather than a color group generally called "brown." Courts have recognized the distinction. In *Brunswick Corp. v. British Seagull Ltd.*, 32 USPQ2d 1120 (Fed. Cir. 1994), *cert. denied*, 514 U.S. 1050, the Federal Court quotes the Trademark Trial and Appeal Board analysis with favor:

[W]hen we consider whether a color is functional we must consider whether alternative colors are available in order to avoid the fettering of competition. If competition will be hindered, the color in question is de jure functional. (Internal citation omitted.)

In the instant matter, the color brown has and will remain available for plastic drip irrigation tubing. The file history is devoid of any references describing the color copper as being a viable choice for plastic drip irrigation tubing. Granting registration to the COPPER Color mark would not remove one of the most marketable colors for drip irrigation tubing or otherwise hinder competition. See, *Brunswick Corp.*, *supra*; *Qualitex Co. v. Jacobson Products Co.*, *supra*.³

"Look For" Advertising supports other evidence against aesthetic functionality

The growing number of independent retailers' adopting and using tag lines like "The copper-color outside ensures that the Copper Shield™ is inside" provides compelling, spontaneous corroboration that, like the declarations from irrigation installation contractors, other retail purchasers in the trade

³ Office Actions also refer to *In re Cook Medical Technologies LLC*, 105 USPQ2d 1377 (TTAB 2012), which involves an appeal from a likelihood of confusion refusal under Section 2(d) citing a registered mark designated as "Blue." The Board noted that the record did not contain specimens of actual use of the registered mark for the color simply described as "blue." The Board went on to state "We do not mean to suggest by our decision herein that merely because a party obtains a registration for a single color that such registration will block others from using or registering marks for other colors, even similar colors." In the instant examination, prior conflicting color registrations are not an issue. The Applicant contends that the *Cook Medical* decision expressly recognizes that colors under the broad designation "Blue" can coexist, and were this a Section 2(d) case, Rain Bird would argue that its COPPER Color mark is recognizable, different and distinguishable from the brown drip irrigation tubing that is intended to seamlessly blend into landscape.

recognize and distinguish the COPPER Color mark as different from prior brown drip line tubing, which was colored to make it seamlessly blend into landscape. October 13, 2015 Response, TSDR p. 14-42; August 5, 2016, TSDR p. 15-36.

In practical terms, the Applicant's "Look for" advertising of record makes no sense if the relevant purchasing public did not distinguish between the colors "brown" and "copper." In printouts from the Applicant's website, the Applicant emphasizes the COPPER Color mark prominently with "The Copper-Color Outside Ensures the Copper Chip is Inside!" and adjacent to the phrase "LOOK FOR THE COPPER-COLORED TUBING." The distinct COPPER Color mark is plainly visible on these websites and in conjunction with product packaging, all of which are instantly recognized as a source identifier distinctly different from prior brown drip irrigation tubing.

The Applicant respectfully requests that the Board find on the competent evidence that the COPPER Color mark is not aesthetically functional and withdraw the Section 2(e)(5) refusal.

ACQUIRED DISTINCTIVENESS EXAMINATION

The Examining Attorney maintains the refusal against the COPPER Color mark pursuant to Sections 1, 2 and 45, alleging that the mark is ornamental and that the evidence to support the Applicant's claim of acquired distinctiveness under Section 2(f) falls short. While Rain Bird respectfully submits that the competent evidence of record fully establishes that the COPPER Color mark has acquired distinctiveness, Rain Bird agrees to amend its application to the Supplemental Register, in the alternative. July 21, 2017 Request for Remand, 9 TTABVUE 2.

In the July 13, 2017 Denial of the Request for Reconsideration, TSDR p. 1, the Examining Attorney summarizes the evidence submitted to demonstrate acquired distinctiveness:

The applicant claims that evidence of its longstanding promotional effort to get consumers to "Look for the Copper-Colored Tubing" by using the tagline "The Copper Color Outside ensure that the Copper Shield is Inside" is sufficient to demonstrate that the applicant is the source of the identified dripline products. **When viewed in isolation, the applicant's promotional efforts and evidence in support thereof, would seem sufficient.** The Achilles' heel with the applicant's position is that *it previously used and continues to use promotional materials that refer to copper colored tubing in a non-source indicating manner.* [**Bold underscore** emphasis added.]

This summary provides a good starting place, or perhaps better yet a good head start. The Examining Attorney acknowledges that a longstanding promotional slogan like "The Copper Color Outside ensures

that the Copper Shield is Inside” would seem sufficient to establish Rain Bird as the exclusive source of COPPER Color marked drip irrigation tubing. This acknowledgment goes a long way toward finding that the COPPER Color mark has already acquired distinctiveness required under Section 2(f). Rain Bird respectfully submits that the items mentioned as a purported “Achilles’ heel” fall far short of barring registration on either the Principal or Supplemental Registers.

The first aspect of the purported Achilles’ heel is the Examining Attorney’s observation that Rain Bird’s promotion of the COPPER Color mark evolved over time, particularly after the Examining Attorney critiqued early promotional items in the October 21, 2012 Office Action, over five years ago. The second aspect of the Achilles’ heel is that the Examining Attorney points to certain references on the present Rain Bird website where he asserts that the term “copper-colored” does not promote the color as a trademark. In his comments, the Examining Attorney states that the assessment “wholly neutralizes the source-indicating effectiveness and remedial nature of the applicant’s corrective campaign featuring the ‘look for’ slogan, ‘the copper color on the outside ensures that the Copper Shield is on the inside.’” As quoted above, the Examining Attorney concedes that this slogan and other promotional efforts would otherwise seem sufficient to find the COPPER Color mark an exclusive source identifier for Rain Bird.

This and other Office Actions do not cite Office Guidelines or precedential decisions that 1) penalize marks benefiting from improvements in promotional materials evolved over time;⁴ or, 2) penalize accurate use of the color term in product specifications. The drip irrigation tubing is copper-colored, after all. The Examining Attorney objects to the sentence “Rain Bird’s copper-colored XFS Dripline with Copper Shield™ for sub-surface drip irrigation is the latest innovation in the Rain Bird Xerigation® Family” as “product description.” This same sentence appears alongside the prominent slogan “The Copper-Color Outside Ensures the Copper Chip is Inside!” and “Look for” website promotion of the COPPER Colored mark, seen adjacent, May 8, 2017



⁴ TMEP 1212.01 anticipates that evidence of acquired distinctive will be developed after the application filing date and during examination. Citing, *McCormick & Co. v. Summers*, 148 USPQ 272,276 (C.C.P.A. 1966); *Gen. Foods Corp. v. MGD Partners*, 224 USPQ 479, 486 (TTAB 1984).

Request for Reconsideration, TSDR p. 61-62. Links on the webpage go to the Rain Bird “Online Store” from where the Examining Attorney culls his examples.

Rain Bird’s competent evidence establishes acquired distinctiveness for the COPPER Color mark

During examination, the Applicant submitted substantial competent evidence to establish that the relevant market and purchasers recognize the COPPER Color mark as identifying drip tubing exclusive to Rain Bird. Much of this evidence is reviewed in the prior discussion of the Section 2(e)(5) issue. In addition to refuting aesthetic functionality, the competent evidence also supports acquired distinctiveness and should entitle the COPPER Color mark to registration on the Principal Register.

Recognition in the irrigation industry

Industry attention drawn to an innovative new product provides a springboard to acquiring distinctiveness for a new mark. This is particularly true when the COPPER Color mark is associated with the award winning XFS dripline with the Copper Shield technology. During examination, Rain Bird submits press releases 1) from the Irrigation Association recognizing the XFS dripline as a winner of the 2010 most innovative new product contest and 2) from the European Irrigation Association awarding the “copper-colored XFS Dripline with Copper Shield™” product a Silver Award in 2013 for being an Outstanding Innovation. August 5, 2016 Response, TSDR p. 43-47. References to these achievements appear multiple times throughout the examination file history in news articles discussing the XFS dripline with Copper Shield and on the Applicant and other’s webpages for the product, such as April 22, 2013 Response, TSDR p. 14-18. While the public recognition may not explicitly refer to “copper-colored” as being a trademark, the third-party press releases do draw attention to the color of the product – finding it notable and worth mentioning, which certainly sets the stage for the relevant public to recognize the COPPER Color mark as a source identifier. See generally, *Field Enterprises Educational Corporation v. Cove Industries, Incorporated*, 161 USPQ 243 (E.D.N.Y. 1969)(“A highly praised work is more likely than not to be known to the public by name.”)

“Look for” promotion on Rain Bird website and promotional materials

From the introduction of the COPPER Color marked product and the filing of the instant trademark application, references to “copper-colored” tubing have appeared and, also, evolved. Rain Bird submits evidence of “Look for” promotion of the COPPER Color mark beginning with its January 21, 2011

Response, TSDR p. 2-4. This “Look for” promotion evolved as the “LOOK FOR THE COPPER COLORED TUBING” slogan prominently appeared on the XFS page of the Rain Bird website and in printed promotional brochures. April 22, 2013 Response, TSDR p. 14-18. Rain Bird submits further evolution of “Look for” promotion with the slogan “The Copper-Color Outside Ensures the Copper Chip is Inside!” on its website and elsewhere. February 23, 2015 Request for Reconsideration, TSDR p. 12-13. Rain Bird submitted evidence of expanded distribution of the Copper Shield product into major national retailers like Home Depot, Lowes and Amazon using these same or comparable “Look for” tools and slogans, such as “The Copper-Color Outside Ensures the Copper Chip is Inside!” The retail packaging for a reel of Copper Shield tubing, which is also displayed on these retail websites, includes a prominently placed arrow pointing to the COPPER Color marked tubing with the imperative declaration “LOOK FOR THE COPPER COLOR.” October 13, 2015 Response, TSDR p. 14-42; August 5, 2016, TSDR p. 15-36. The consistent evolution in use of these “Look For” promotions have contributed to and resulted in relevant marketplace recognition of the COPPER Color mark as a source identifier for the Applicant.

Declarations attesting to recognition

The declarations of twenty-seven experienced professionals from the drip irrigation field are fully consistent with and corroborate Rain Bird’s “Look for” promotional efforts. April 22, 2013 Response, TSDR p. 6-13; June 4, 2013 Preliminary Amendment, TSDR p. 2-7; May 8, 2017 Request Reconsideration, TSDR p. 17-56. In sum, each of these irrigation professionals attest that they recognize the COPPER Color marked drip irrigation tubing as coming from Rain Bird. The reason for recognition is simple, the COPPER Color mark is distinguished and distinctly different from the brown colored drip irrigation tubing available before the introduction of the Applicant’s XFS drip irrigation tubing.

Distributors and Retailers spreading the word on the COPPER Color mark

To add more evidentiary weight to the declarations from irrigation professionals and the “Look for” promotion tools and slogans, Rain Bird submitted evidence of additional third-party retailers spontaneously adopting these same “Look for” tools in their own promotion of the COPPER Colored marked drip irrigation tubing and its tie-in to the Copper Shield chip inside.

Rain Bird submitted evidence of additional third-party retailers adopting the “Look for” tag line “Copper color outside ensures that the copper shield is inside” to promote the sale of the Applicant’s drip

irrigation tubing, October 13, 2015 Response, TSDR p. 14-42, supplementing the national retailers, Home Depot, Lowes and Amazon. Subsequently in examination, the Applicant built upon this competent evidence of recognition by submitting webpages showing more independent retailers adopting the same or similar “Look for” tag lines. August 5, 2016 Response, TSDR p. 15-36.

Rain Bird respectfully submits that the spontaneous – and growing – adoption and use of these “Look for” tag lines provides reliable evidence that independent retailers recognize the COPPER Color mark as a valuable marketing tool for promoting the benefits of the Copper Shield technology in protecting against root intrusion.

Precedent supports the competent evidence of acquired distinctiveness

The Applicant’s burden for proving acquired distinctiveness under Section 2(f), like other examination issues, is by a preponderance of the evidence. *Yamaha International Corp. v. Hoshino Gakki Co.*, 6 USPQ2d 1001 (Fed. Cir. 1988). While the amount of evidence needed increases for color marks, the standard of proof remains the same, and the Examining Attorney in the July 13, 2017 Denial acknowledges the sufficiency of Rain Bird’s evidence – subject to his other caveats, all of which Rain Bird rebuts. The Federal Circuit in *In re Owens-Corning Fiberglas Corp.*, 227 USPQ 417 (Fed. Cir. 1985) stated:

An evidentiary showing of secondary meaning, adequate to show that a mark has acquired distinctiveness indicating the origin of the goods, includes evidence of the trademark owner’s method of using the mark, supplemented by evidence of the effectiveness of such use to cause the *purchasing public* to identify the mark with the source of the product. [at 422, emphasis added]

In the instant matter, these independent irrigation equipment retailers are the purchasers buying in the course of their trade, just like the independent contractors who provided declarations. See, *Application of Ideal Industries, Inc.*, 184 USPQ 487 (CCPA 1975) (Letters from electrical contractors using wire connectors accepted to support acquired distinctiveness); *In re Bose Corporation*, 216 USPQ 1001 (TTAB 1983) (“[T]he declarations of retailers are, in our opinion, competent and persuasive evidence of secondary meaning”) *aff’d* 227 USPQ 1 (Fed. Cir. 1985); *In re Black & Decker Corp.*, *supra*.

The totality of these submissions evidence the acquisition of distinctiveness required for registration on the Principal Register. As importantly, the evidence of retailers adopting the COPPER Color mark tag line to promote the drip irrigation tubing corroborates the declarations and supports the reasonable conclusion that independent retailers can and do recognize the COPPER Color mark as a

source identifier for drip tubing exclusively from Rain Bird. TMEP 1212.06(b) states “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.” The preponderance of the evidence proves that professional contractors, retailers and other participants in the marketplace already recognize Rain Bird as the exclusive source of COPPER Color marked drip irrigation tubing, and that the recognition continues to increase.

In addition, Rain Bird submits numerous registered color marks for irrigation, garden hoses and plumbing pipe, particularly the prior registration of a COPPER Color mark for “plastic plumbing pipes” cited as a Section 2(d) block early in examination. October 13, 2015 Response, TSDR p. 48-75. These registrations support a finding that color is recognized as a source identifier in relevant industries. See *Anchor Hocking Glass Corp. v. Corning Glass Works*, 162 USPQ 288 (TTAB 1969)(Color and ornamental elements adopted as a practice in the trade can acquire distinctiveness and be registered marks.)

The increasing level of overall evidence accumulated for the COPPER Color trademark during examination is exactly the kind of evidence that the Office guidelines and case law teach us to recognize as acquired distinctiveness under Section 2(f).

CONCLUSION

Rain Bird respectfully requests that the Board find that the COPPER Color mark is not aesthetically functional under Section 2(e)(5); and, that the COPPER Color mark has acquired distinctiveness entitling it to registration on the Principal Register; or, as Rain Bird agrees to an appropriate amendment in the July 21, 2017 Request for Remand, alternatively, that registration be granted on the Supplemental Register. Rain Bird notes its offer to amend the mark’s description to METALLIC COPPER or the like in the July 21, 2017 Request for Remand.

January 3, 2018

Respectfully submitted,

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