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

Proceeding	86268913
Applicant	Eveready Battery Company, Inc.
Applied for Mark	BANANA BOAT
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Signature	/TAP/
Date	08/17/2015

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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In re application of: :
Edgewell Personal Care Brands, LLC :
 :
(Formally Eveready Battery Company, Inc.; :
entity conversion and change of name :
recorded on Jul. 24, 2015) :
 :
Serial No.: 86/268,913 : Examining Attorney: Esther Felicia Queen
 :
Filed: May 1, 2014 : Law Office: 111
 :
Mark: BANANA BOAT :

APPLICANT’S REPLY BRIEF

BANANA BOAT is a unitary mark, and is arbitrary in the context of the listed goods. It is improper to dissect a unitary mark for purposes of a distinctive analysis, and is more than the sum of its parts. Even if the unitary mark BANANA BOAT is improperly dissected into its component parts BANANA and BOAT, neither component is descriptive of the applied-for room fragrance products.

The Examining Attorney still does not seem to appreciate that Applicant is not using the term BANANA in an ordinary sense, to refer to a type of fruit, or to the taste or smell of that fruit. The mark BANANA BOAT is unitary by virtue of its incongruity. Consumers are not likely to conclude that BANANA BOAT describes a banana scented or banana flavored BOAT, or a boat made of bananas. Indeed, the phrase “banana boat” is often used to refer to a type of inflatable recreational boat, not for boats having any particular scent. In fact, the Examining Attorney’s appeal brief acknowledges that “boats are not known for scent.”

Nevertheless, the Examining Attorney’s Appeal Brief states that “*evidence* shows that consumers would believe that the goods are banana scented.” However, the only evidence

submitted by the Examining Attorney in the Appeal Brief to support this notion is evidence of third-party marks in which the term BANANA is used to *clearly refer to the scent of the fruit banana* (i.e., BANANA FRAGRANCE OIL, BANANA ROOM SPRAY, BANANA WALNUT CAKE LINEN & ROOM SPRAY, COCONUT AND BANANA ROOM SPRAY, and ROOM SPRAY FEATURING RIPE BANANA). None of these examples submitted as evidence by the Examining Attorney points to third parties' use of the term BANANA in an arbitrary manner or in a way that creates incongruity. To the contrary, in Applicant's mark, the term BANANA and the term BOAT are combined in the mark BANANA BOAT to create an incongruity, which defeats the necessity of entering a disclaimer. *See* TMEP §1213.05(d) (stating: "If two or more terms are combined in a mark to create an incongruity, ... the mark is unitary and no disclaimer of nondistinctive individual element is necessary").

The Examining Attorney also discounts the third party registrations cited by Applicant for marks that contain BANANA *without a disclaimer* (e.g., U.S. Trademark Reg. No. 3,534,514 for BANANA MOON for *room spray* and U.S. Trademark Reg. No. 2,048,367 for BANANA REPUBLIC for *aromatic candles*). Reg. No. 2,048,367 for BANANA REPUBLIC for *aromatic candles* is similar to the present case, in that the mark BANANA REPUBLIC is arbitrary in the context of the listed goods, and is more than the sum of its parts (the phrase "banana republic" is commonly used in political science to refer to any small nation that is politically unstable and whose economy is largely dependent exporting a limited-resource product, e.g., bananas).

Applicant respectfully submits that there is no doubt that BANANA, when used in combination with BOAT, does not convey any *immediate idea* or *concrete information* about the applicant's products. But to the extent there is any doubt precedent compels the Board to resolve such doubt in Applicant's favor.

For these reasons, and the reasons explained in Applicant's opening brief, the Trademark Office's disclaimer requirement for the word BANANA should be withdrawn, and the application should be approved for publication without a disclaimer.

Respectfully submitted,

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