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

Proceeding	87708217
Applicant	Bayco Products, Inc.
Applied for Mark	INTEGRITAS
Correspondence Address	RICHARD L SCHWARTZ WHITAKER CHALK SWINDLE & SCHWARTZ PLLC 301 COMMERCE STREET, SUITE 3500 FORT WORTH, TX 76102 UNITED STATES tgwynne@whitakerchalk.com, rschwartz@whitakerchalk.com 817-878-0500
Submission	Reply Brief
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Filer's Name	Richard L. Schwartz
Filer's email	tgwynne@whitakerchalk.com, rschwartz@whitakerchalk.com, rsanchez@whitakerchalk.com
Signature	/Richard L. Schwartz/
Date	09/30/2019

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

In re Application of:

Bayco Products, Inc.

Serial No. 87/708,217

Filed: December 5, 2017

Mark: INTEGRITAS

Law Office 125

Examining Attorney: Teague Avent

APPLICANT'S REPLY BRIEF

Pursuant to TBMP § 1203.02(c), Applicant Bayco Products, Inc. (“Applicant” or “Bayco”) hereby submits this reply brief to address certain points in the Examining Attorney’s Appeal Brief dated September 12, 2019 (“Responsive Brief”). For the reasons stated below and in Applicant’s opening brief, the refusal to register of Applicant’s mark INTEGRITAS (“Applicant’s Mark”) for use with “flashlights, namely portable, rechargeable lanterns” on the ground that it is likely to be confused with Registration 5,265,635 for ENTEGRITY for use with “Light bulbs; Light bulbs, electric; Lighting fixtures; Lighting installations; Lighting tubes; Electric light bulbs; Fixtures for incandescent light bulbs; Fluorescent electric light bulbs; Halogen light bulbs; Incandescent light bulbs; LED light bulbs” (“Cited Mark”), should be reversed.

I. THE REFUSAL TO REGISTER SHOULD BE REVERSED

A. The Examining Attorney Has Not Met His Burden of Demonstrating That Applicant’s Mark And The Cited Mark Are Confusingly Similar

The Office bears the burden of showing that a mark falls within the statutory bars of Section 2(d). J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* (Fourth Ed.) § 19:75

at 19-230. To refuse registration under Section 2(d), the Examining Attorney “must present sufficient evidence and argument that the mark is barred from registration.” *Id.* § 19:128 at 19-383. Here, respectfully, the Examining Attorney has not met his burden.

1. The Marks are Dissimilar in Appearance, Sound, Connotation and Commercial Impression

a) The Marks are Dissimilar in Appearance

The Responsive Brief fails to rebut, and thereby concedes, Applicant’s assertion that Applicant’s Mark and the Cited Mark are dissimilar in appearance. *See* July 11, 2019, Appeal Brief, 7 TTABVUE 10-12. Accordingly, dissimilarity of appearance of Applicant’s Mark and the Cited Mark weighs against a finding of likelihood of confusion.

b) The Marks are Dissimilar in Sound

The Examining Attorney concedes that Applicant’s Mark and the Cited Mark do not sound identical. September 12, 2019, Examiner’s Statement, 9 TTABVUE 4. In an attempt to find some basis for a similar sound in Applicant’s Mark and the Cited Mark, the Examining Attorney has tried several different approaches. In every single office action and the Responsive Brief, the Examining Attorney has recited the foundational principle that “marks are compared **in their entirety** for similarities in appearance, sound, connotation, and commercial impression.” September 12, 2019, Examiner’s Statement, 9 TTABVUE 3; March 26, 2018, Office Action, TSDR, p. 3; October 14, 2018, Office Action, TSDR, p. 38-39. (emphasis added). Astonishingly, in every single office action and the Responsive Brief, the Examining Attorney has dissected the mark in different ways, in an attempt to shoehorn the mark into a particular category.

Initially, with regard to sound similarity, the Examining Attorney removed the first syllable or prefix and the last syllable or suffix from both Applicant’s Mark and the Cited Mark, arguing that “applicant’s and registrant’s [SIC] share the wording ‘NTEGRIT’, with the only difference

between the initial wording in the mark being applicant's use of the letter 'I' in contrast to registrant's letter 'E'." *See* Oct. 14, 2018, Office Action, TSDR PDF, p. 3; July 11, 2019, Appeal Brief, 7 TTABVUE 10-11. However, to comport with case law holding that "[c]onsumers are generally more inclined to focus on the first word, prefix, or syllable in any trademark or service mark," the Examining Attorney was forced to shift his argument to state that "applicant's and registrant's marks start with the similar sounding "INTEGRIT" and "ENTEGRIT" sounds." September 12, 2019, Examiner's Statement, 9 TTABVUE 3. This analysis still improperly dissects the word by eliminating the "TAS" from the sound analysis of Applicant's Mark and the "Y" from the sound analysis of the Cited Mark. *See id.* In an effort to support his position, in the same paragraph of the Responsive Brief, the Examining Attorney provides a plurality of examples to support his position, however, each of the examples includes the identical word in both marks (VEUVE, CENTURY) – in stark contrast to Examiner's dissection of both Applicant's Mark and the Cited Mark. Indeed, the Responsive Brief cites the Federal Circuit's recitation of the axiomatic principle that "consumers must first notice th[e] identical lead word." The first *word*, not the first mutilated portion of a mark.

INTEGRITAS does not sound like ENTEGRITY. Accordingly, the dissimilarity of sound of Applicant's Mark and the Cited Mark weighs against a finding of likelihood of confusion.

c) The Marks are Dissimilar in Connotation and Commercial Impression

Sensing the weakness of his similarity-of-sound argument, the Examining Attorney cites to case law ". . . for marks that do not physically sound or look alike but that convey the same idea" September 12, 2019, Examiner's Statement, 9 TTABVUE 3. However, Applicant already addressed the issue, citing case law holding that minor differences in spelling can render marks sufficiently distinguishable from each other. July 11, 2019, Appeal Brief, 7 TTABVUE 11-12. Importantly, each of Applicant's cited cases included one-word marks having the identical initial

letters, but different trailing letters (FANCASTER and FANCAST, COLGATE and COLDDATE, ECHODRAIN and ECHOBRAIN, CHLORAPREP and CHLORASCRUB, and ISOPURE and ISOPREME – all with a finding of no likelihood of confusion). *Id.*

Further, “the examining attorney notes there is no correct pronunciation of a mark because it is impossible to predict how the public will pronounce a particular mark.” *Id.*, at p. 4. This is incorrect, given the evidence of record. The Responsive Brief cites to “evidence” of the Latin meaning of the word INTEGRITAS. *Id.*, at p. 4. In the Wiktionary webpage evidence made of record in this proceeding, the Examining Attorney provides a pronunciation for INTEGRITAS:

Pronunciation [[edit](#)]

- (Classical) IPA^(key): /inˈte.ɡri.taːs/, [ɪnˈtɛ.ɡɾɪ.taːs]

October 14, 2018, Office Action, TSDR, p. 43-44; September 12, 2019, Examiner’s Statement, 9 TTABVUE 3. As can be seen in the pronunciation, clearly “IN” is the first syllable – different from “EN.” This (improper) breakup comports with the Cited Mark’s description: “The mark consists of the wording ‘ENTEGRITY’ in stylized font with the ‘en’ in green and ‘tegrity’ in gray. There is a green line below the wording; the bottom of the letter ‘g’ overlaps with the line.” March 26, 2018, Office Action, TSDR, p. 6.

Pursuant to cited webpage evidence made of record in this proceeding by the Examiner, INTEGRITAS can mean (1) chastity, (2) integrity, (3) soundness, (4) principle, (5) rectitude, (6) blamelessness, (7) correctness, (8) purity, and (9) the whole – all quite different impressions. *See* October 14, 2018, Office Action, TSDR, p. 38-44; September 12, 2019, Examiner’s Statement, 9 TTABVUE 3-4. Although Applicant’s INTEGRITAS is a Latin spelling of the word “integrity,” the Cited Mark is not. Examiner erroneously states that ENTEGRITY is a *misspelling* of the shared root word “integrity.” But as discussed above, INTEGRITAS is a Latin word, not a root word.

ENTEGRITY is a made-up word – a portmanteau of “energy” and “integrity.” This is undoubtedly the case, given the description of the Cited Mark and the registrant’s website:



Sep. 20, 2018, Response to Office Action, TSDR PDF, pp. 14 and 26; July 11, 2019, Appeal Brief, 7 TTABVUE 14.

The Examining Attorney also completely ignores the evidence provided in the declaration of Bayco’s representative. Particularly, that “the INTEGRITAS lantern is always presented to the marketplace and sold where the INTEGRITAS brand is closely associated with Bayco’s registered mark, NIGHTSTICK.” July 11, 2019, Appeal Brief, 7 TTABVUE 13; Apr. 11, 2019, Request for Reconsideration after Final Action, TSDR, p. 9-10. Together, the NIGHTSTICK and INTEGRITAS marks form a distinctive commercial impression, quite different from the Cited Mark. *Id.*

Accordingly, the dissimilarity of connotation and commercial impression of Applicant’s Mark and the Cited Mark weighs against a finding of likelihood of confusion.

2. The Goods Differ

The Examining Attorney again misses the mark regarding the goods, by contending that “the goods of the applicant and registrant are related because the goods commonly emanate from the same commercial source and are marketed and sold through the same channels of trade.” September 12, 2019, Examiner’s Statement, 9 TTABVUE 4. This proposition is unsupported. Applicant’s Appeal Brief goes into great detail regarding Applicant’s intrinsically safe goods that are used in very different environments in very different manners. *See* July 11, 2019, Appeal Brief,

7 TTABVUE 15-16. The Examining Attorney's cited evidence is inapposite to Applicant's goods. Should one find themselves in a natural gas-filled environment, in need of light, they would quickly understand how inapposite. That "Applicant's argument about the relationship between the goods rests on conclusory statements" is perplexing given the sworn declaration distinguishing between Applicant's goods and Registrant's goods. *See* July 11, 2019, Appeal Brief, 7 TTABVUE 16; Apr. 11, 2019, Request for Reconsideration after Final Action, TSDR PDF, p. 10-11.

The Examining Attorney complains that "applicant had opportunity to amend the identification to match the limitations present in the affidavit, but the only amendment to the identification of record added merely the wording 'namely portable, rechargeable lanterns.'" September 12, 2019, Examiner's Statement, 9 TTABVUE 6. However, critically, the Examining Attorney fails to provide any evidence or basis for his rejection regarding the "***rechargeable***" limitation in Applicant's description of goods and services.

With regard to the Examining Attorney's "mischaracterization" argument related to Applicant's cited case law, the Examining Attorney misses the point by pointing to the "what" instead of looking at the "how." Interestingly, in his accusation, the Examining Attorney only cites to the background of the case (1271-1272) rather than any discussion in the opinion. September 12, 2019, Examiner's Statement, 9 TTABVUE 6. In looking at the "how", the Federal Circuit discounted the Board's knowledge with those in the relevant industry regarding conditions under which, and buyers to whom, sales are made: "The TTAB's reliance on its own views regarding the banking industry, rather than the views of the parties in question, contravenes the scope and intent of this court's precedent in *DuPont and Bongrain*. In fact, the motions and agreement filed indicated the contrary to the board's opinion." *Amalgamated Bank of N.Y. v. Amalgamated Trust & Savings Bank*, 842 F.2d 1270, 1274-1275, 6 USPQ2d 1305, 1308 (Fed. Circ. 1983). Although it is true that a consent agreement was a major consideration of the *Amalgamated Bank of N.Y.*

case, it is also true that the knowledge of the Board was a major consideration in determining the weight accorded to the consent agreement (evidence). After all, the Federal Circuit reminded the parties that “[d]ecisions of men who stand to lose if wrong are normally more reliable than those of examiners and judges.” *Id.* at 1275. Again, the Examining Attorney missed the relevance in the reasoning for the *In re American Cruise Lines* case – knowledge by those in the industry provide the needed context for consent agreements. Tellingly, the other related cases string cited by Applicant were unaddressed by the Examining Attorney.

Accordingly, the dissimilarity of the goods related to Applicant’s Mark and the Cited Mark weigh against a finding of likelihood of confusion.

3. The Trade Channels Differ

Perhaps most dispositively, the Responsive Brief again rejects Applicant’s weakly-characterized “self-serving” declaration, and again fails to point to any evidence provided in the record for Examiner’s position, by stating “[t]o support this argument, applicant relies exclusively on conclusory statements and a self-serving affidavit. Applicant has provided no evidence demonstrating common consumer trends, statistics, or any other appreciable data to support this claim.” September 12, 2019, Examiner’s Statement, 9 TTABVUE 6. However, the Examining Attorney cites no authority for these requirements placed on Applicant. Similarly, and quite the contrary, the Federal Circuit has rejected the argument that the applicant must prove specifics regarding the extent of sales or promotional efforts surrounding third party marks and what impact the uses have made in the minds of the purchasing public. *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1339 (Fed. Cir. 2015). Whether third-party marks attesting to the strength of a mark, or, as here, a declaration attesting to the sophistication of the buyer or the channels of trade based on very specific facts and considerations, the evidentiary analysis is the same. *See Elec.*

Design & Sales, Inc. v. Elec. Data Sys. Corp., 954 F.2d 713, 718 (Fed. Cir. 1992) (noting the Board's duty to consider all evidence when evaluating the likelihood of confusion between marks).

Regarding the sophistication of the buyer and the channels of trade, the Applicant has provided detailed competent evidence. The Examining Attorney has provided none. *See, e.g.*, Sep. 20, 2018, Response to Office Action, TSDR PDF, p. 23-24; 15, 17; Apr. 11, 2019, Request for Reconsideration after Final Action, TSDR PDF, p. 10 (Applicant only sells this product to specialized distributors and not sold in the specialized lightbulb market); Apr. 11, 2019, Request for Reconsideration after Final Action, TSDR PDF, pp. 10-11 (the ENTEGRITY lightbulbs are not considered by Bayco to be products competitive with Bayco's intrinsically safe INTEGRITAS lantern products).

Accordingly, Applicant and Registrant do not market their respective products/services in the same channel of trade.

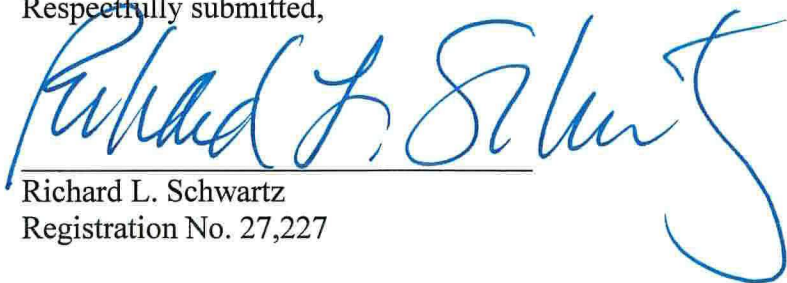
II. CONCLUSION

The evidence of record shows, and the Examining Attorney's response fails to refute, that there is no likelihood of confusion between Applicant's Mark and the Cited Mark because (1) the marks differ in their entireties in appearance, sound, and connotation to create differing commercial impressions; (2) the goods differ; and (3) the trade channels differ.

For at least these reasons, Applicant requests the Board to reverse the decision of the Examining Attorney refusing registration of Applicant's Mark under Section 2(d) and allow Applicant's Mark to be published for opposition.

Dated: September 30, 2019

Respectfully submitted,



Richard L. Schwartz
Registration No. 27,227

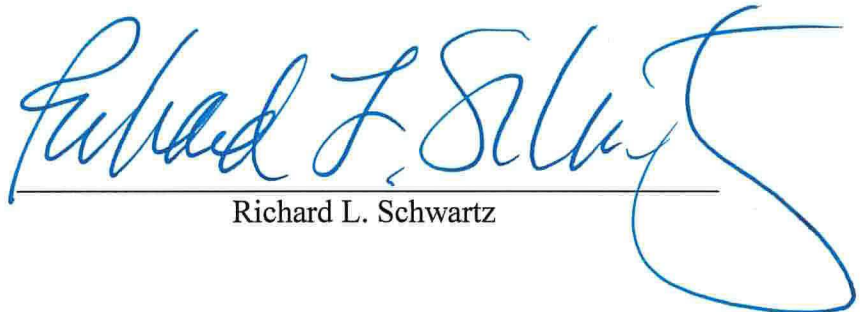
Enrique (Rick) Sanchez, Jr.
Registration No. 76,780

WHITAKER CHALK SWINDLE & SCHWARTZ PLLC
301 Commerce Street
Suite 3500
Fort Worth, Texas 76102
817.878.0500
rschwartz@whitakerchalk.com
rsanchez@whitakerchalk.com

*Attorneys for Applicant
Bayco Products, Inc.*

CERTIFICATE OF FILING

I hereby certify that on September 30, 2019, a true and correct copy of the foregoing APPLICANT'S REPLY BRIEF was submitted electronically via ESTTA to Commissioner for Trademarks, Attn: Trademark Trial and Appeal Board, pursuant to 37 C.F.R. §§ 2.190(b) and 2.195(a).



Richard L. Schwartz