

I. **Refusal – Section 2(d) Likelihood of Confusion Refusal**

The Examiner has refused registration of Applicant's ENDURE mark ("Applicant's Mark") alleging a likelihood of confusion with U.S. Reg. No. 5,482,250 (the "'250 Registration") for the mark ENDUR BY ASCEND & DESIGN; and U.S. Reg. No. 4,709,649 for the mark ENDURE (the "'649 Registration") (collectively, the "Cited Marks"). In view of the arguments made herein, Applicant respectfully submits that its ENDURE mark is not likely to be confused with the Cited Marks.

The In re E.I. Du Pont de Nemours & Co., 476 F.2d 1357 (C.C.P.A. 1973) decision provides a number of factors to be considered in testing for likelihood of confusion. All of the Du Pont factors must be considered by the Examining Attorney when they are of record. Id. at 1361. The Du Pont factors especially applicable here are:

- (1) The dissimilarity of the marks in their entireties as to appearance, sound, meaning, and commercial impression;
- (2) The dissimilarity and nature of the goods and services described, consumers, and channels of trade;
- (3) Sophistication of purchasers; and
- (4) Other probative factors.

Applicant respectfully submits that an examination of the aforesaid factors compels the conclusion that Applicant's Mark is not likely to be confused with the Cited Marks.

A. **Applicant's Mark and the mark of the '250 Registration are different in overall appearance, sound, meaning, and commercial impression.**

Applicant submits that there is no likelihood of confusion between Applicant's Mark and the ENDUR BY ASCEND & DESIGN mark of the '250 Registration because of the overall differences in the marks themselves. In determining likelihood of confusion, marks in their entireties must be analyzed as to appearance, sound, meaning and commercial impression. Du Pont, supra. It is the impression that the mark as a whole creates on the average reasonably prudent buyer and not the parts thereof which is important. In other words, a determination on the issue of likelihood of confusion must be made upon consideration of the respective marks in their entireties and should not be broken into component parts to reach a conclusion of confusing similarity. Colgate-Palmolive Co. v. Carter-Wallace, Inc., 432 F.2d 1400 (C.C.P.A. 1970).

For example, in Colgate-Palmolive, supra, the opposer, the registrant of the mark PEAK for dentifrice, appealed a decision by the TTAB dismissing its opposition against the applicant who was seeking to register the mark PEAK PERIOD for personal deodorants. The CCPA affirmed the TTAB's dismissal of the opposition, stating:

[T]he mere presence of the word "PEAK" in the trademark PEAK PERIOD does not by reason of that fact alone create a likelihood of confusion or deception. That determination must arise from a consideration of the respective marks in their entireties. The difference in appearance and sound of the marks in issue is too obvious to render detailed discussion necessary. In their entireties they neither look nor sound alike.

Id. At 530.

In Industrial Adhesives Co. v. Borden, Inc., 218 U.S.P.Q. 945 (TTAB 1983), the TTAB considered the applicant's application to register the mark WONDER BOND PLUS for adhesives against the prior registration of the opposer's BOND PLUS mark as used with industrial adhesives. The opposer contended that the applicant's mark so resembled its mark so as to be likely to cause confusion. The TTAB held that despite certain similarities in appearance, sound and connotation (i.e., the opposer's mark BOND PLUS being completely encompassed within the applicant's WONDER BOND PLUS mark), contemporaneous use of the marks would not likely cause confusion. Id. at 951.

Here, the ENDUR BY ASCEND & DESIGN mark of the '250 Registration and Applicant's Mark must be analyzed in their entireties in determining any likelihood of confusion. In doing so, it is clear that Applicant's Mark and the mark of the '250 Registration are not similar in appearance, sound, meaning and commercial impression, despite the common element. Using the reasoning of the TTAB in Colgate-Palmolive and Industrial Adhesives, supra, the mere presence of a portion of Applicant's Mark in the mark of the '250 Registration does not, in and of itself, create a likelihood of confusion. In this regard, there are significant differences between Applicant's Mark and the mark of the '250 Registration such that the overall appearance, sound, meaning and commercial impression of each of the marks are significantly different.

For example, the presence of the element "ASCEND" in the cited mark of the '250 Registration renders it significantly different in appearance, meaning, sound, and commercial impression than those of Applicant's Mark. ASCEND is the house mark of the registrant Ascend Performance Materials Operations, LLC. Accordingly, consumers would give much weight to the phrase "BY ASCEND" as being associated to the Registrant as the source of its goods. Those in the industrial field of textile fibers and filaments would likely be familiar with Ascend Performance and would know the source of the goods under such mark. Moreover, the addition of the term "ASCEND" in the cited mark invokes a commercial impression of "ascending" or "rising" or "lifting," which is not present in Applicant's Mark. The cited mark further includes additional design elements, such as the stamp with the lines shaped as a slanted Z that are not present in Applicant's Mark. Furthermore, Applicant's ENDURE mark consists of two syllables while the cited ENDUR BY ASCEND & DESIGN mark consists of five syllables. In the cited mark, the "e" is removed from the word "endure," which was done intentionally by the registrant to provide it with a further different commercial impression than the full word. Based upon all the above, Applicant's Mark and this Cited Mark are different in appearance, meaning and commercial impression and not likely to be confused with one another.

**B. The respective goods, consumers, and channels of trade of Applicant's Mark and the mark of the '469 Registration are not similar or related and other probative factors render the marks not likely to be confused.**

Applicant's goods are:

"Fabrics for textile use; non-woven textile fabrics; woven fabrics; knitted fabrics."

Applicant's fabrics are supplied and used for further making and finishing products at a manufacturing and industrial level, such as wearing apparel and footwear, automotive, bedding, filtration and home goods. See, for example, Exhibit A, Applicant's website. Accordingly, these fabrics are specialized products and are not standard products that are simply picked and chosen from a catalog, advertisement or the like. They are technically engineered to be specially processed, cut, tailored and finished for use in further manufacturing other products. Applicant's goods are not consumer end products and are not sold to consumers either online or in stores or the like.

The goods covered by the '469 Registration are "table linen."

Applicant's goods are clearly not similar or related to the goods covered by the '469 Registration, despite table linen being made of fabric. Applicant's goods and fabrics are for **manufacturing** finished products as indicated above. The goods covered by the '469 Registration are **end consumer, high end table linen, i.e., tablecloths and napkins** sold to and used by, for example, premier hotels, spas, restaurants, resorts, cruise ships, and the like. See Exhibit B, the specimen submitted for the '469 Registration and website of Registrant showing the Endure table linens. Thus, the goods covered by the '469 Registration are finished goods. Therefore, Applicant's goods and the goods covered by the '469 Registration are completely different, have different uses, purposes, and functions. Moreover, the goods covered by the '469 Registration are table linens such as table cloths and napkins sold to premier hotels, resorts, restaurants, spas, cruise ships, and the like through completely different channels of trade, and not to manufacturers or industrial entities. See Exhibit B. Because of their different uses, Applicant's goods and goods under the '469 Registration are used in different markets, and as such, they are unlikely to be marketed to the same types of consumers. That is, purchasers of the registrant's table linens for premier hotels, resorts, restaurants, spas, cruise ships, and the like would not ever encounter Applicant's Mark which is used in an industrial and manufacturing setting, and vice-versa. Therefore, in view of these differences, Applicant respectfully submits that Applicant's goods and goods covered by the '469 Registration are not similar or related, the consumers are different, and the trade channels are different. Accordingly, Applicant respectfully submits that there is no likelihood of confusion between Applicant's Mark and the ENDURE mark of the '469 Registration.

**C. The purchasers of the respective goods are sophisticated.**

The issue of likelihood of confusion must be determined from "the perspective of an ordinary consumer of the goods" and services in question. Ford Motor Co. v. Summit Motor Products, Inc., 930 F.2d 277, 293 (3<sup>rd</sup> Cir. 1991). The degree of caution used by such ordinary consumers of such goods and services is dependent upon the relevant buying class. Id. Professional buyers will be held to a higher standard of care than buyers within the general public. Id. The assumption is that the more sophisticated the buyers, the more careful and discriminating the buyers will be, and the less likely the chance they will be misled or confused by similarities of marks in appearance and sound. See, In re N.A.D., Inc., 244 U.S.P.Q. 969, 971 (Fed. Cir. 1985). Since persons who purchase industrial goods and goods used for manufacturing other goods include primarily industry professionals, such as engineers, manufacturing and production technicians, purchasing agents, and contractors, the buying class is expected to exercise a high standard of care when considering making such purchases. Barre-National, Inc. v. Barr Laboratories, Inc., 21 U.S.P.Q.2d 1755, 1760 (D.N.J. 1991).

The goods covered by Applicant's Mark are not "impulse" goods, but are unique and sophisticated goods that must meet rigorous standards of quality due to their inherent nature. Applicant's goods are marketed and sold to industry professionals, such as manufacturers, textile engineers, technicians, and purchasing agents and contractors. Such individuals would exhibit extraordinary care when purchasing Applicant's goods and would not be confused with the goods of the Cited Marks.

Similarly, the goods covered by the '250 Registration are not goods used by ordinary consumers, but by manufacturers, textile engineers, and their associated purchase agents and contractors. They, too, would exhibit care when purchasing the goods covered by the mark of the '250 Registration and would not be confused by Applicant's goods. Moreover, Applicant's goods and the goods of the '250 Registration are not off-the-shelf products, are relatively expensive, and not cheap. Because of this, Applicant's goods and the goods covered by the '250 Registration are not the sort of products bought on impulse. Accordingly, purchasers of the respective goods are highly sophisticated, and this factor cuts strongly against a finding of any likelihood of confusion between Applicant's Mark and the '250 Registration.

In addition, the goods covered by the '649 Registration are not goods used by ordinary consumers, but by premier hotels, resorts, restaurants, spas and cruise ships, and their associated purchase agents and buyers who are looking for luxury style table cloths and napkins for formal dinners, presentation of décor and the like. They, too, would exhibit care when purchasing the goods covered by the mark of the '649 Registration and would not be confused by Applicant's goods for use in further manufacturing and industrial settings. Because of this, Applicant's goods and the goods covered by the '649 Registration are not the sort of products bought on impulse. Accordingly, purchasers of the respective goods are highly sophisticated, and this factor also cuts strongly against a finding of any likelihood of confusion between Applicant's Mark and the '649 Registration.

## **II. Prior Pending Application**

The Examining Attorney has indicated that prior pending application serial no. 87/638,228 for the mark ENDUR TECHNOLOGY may cause a conflict with Applicant's Mark if registered. For similar reasons with respect to the '250 Registration provided above, Applicant submits that the mark of the cited application is not likely to be confused with Applicant's Mark.

## **III. Conclusion**

Applicant respectfully submits that its ENDURE mark is not likely to be confused with the Cited Marks. In view of the foregoing, it is respectfully submitted that the present application is in condition for publication, and such action is respectfully requested. If, however, such action cannot be taken, the Examining Attorney is cordially invited to contact Applicant's attorney in order that any outstanding issue may be resolved without the issuance of a further Office Action. No fees are believed to be required in connection with the submittal of this Response. Should there be any fees due in connection with the submission of this Response, the Examining Attorney is authorized to charge them to Deposit Account No. 50-1561.