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OF THE TTAB

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**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Sunkist Growers, Inc.

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Serial No. 75/277,895

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Kevin G. Smith of Sughrue Mion, PLLC for Sunkist Growers, Inc.

Linda M. King, Trademark Examining Attorney, Law Office 101 (Jerry Price, Managing Attorney).

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Before Walters, Chapman and Rogers, Administrative Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

Sunkist Growers, Inc. filed, on April 21, 1997, an application to register the mark THE ULTIMATE DIET DRINK on the Principal Register for "fresh fruit" in International Class 31. Applicant based its application on Section 1(b) of the Trademark Act, asserting a bona fide intention to use the mark in commerce. The mark was published for opposition on November 25, 1997, and as no opposition was

filed, the Office issued a notice of allowance on February 17, 1998. Following the grant of several extensions of time to file a statement of use, applicant filed its statement of use on August 3, 2000, claiming dates of first use and first use in commerce of September 1997.

The Examining Attorney required a new specimen, citing Trademark Rule 2.56 and contending that the specimens of record are unacceptable because they fail to show use of the mark on or in connection with "fresh fruit." In response, applicant argued that the photograph of a point-of-purchase display, as well as the hangtag/coupon submitted as specimens each clearly depict the goods and the mark and are sufficient to show use in connection with the identified goods, as required by Trademark Rule 2.56(a). Applicant further argued that merely because the specimens show that the mark is also used in association with a brand of spring water does not disqualify the specimens as supporting applicant's use of the mark for "fresh fruit."

In the Final Office action, the Examining Attorney again required that applicant submit a specimen showing use of the mark on or in connection with the identified goods under Trademark Rule 2.56. She explained, "the proposed mark is clearly used *in connection* with the applicant's

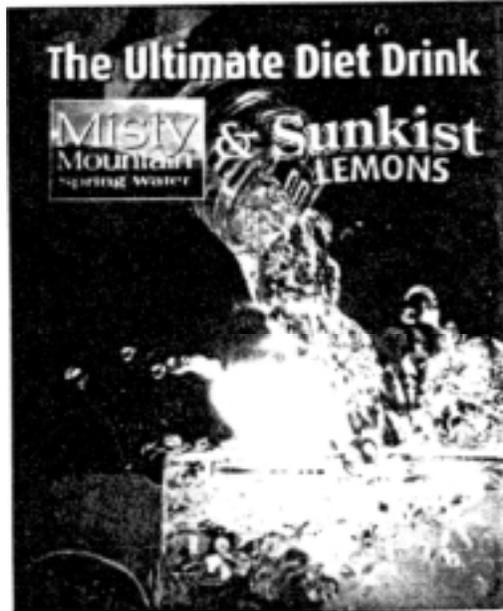
lemons used with the Misty Mountain spring water to make lemon water. It does not show valid trademark use for the lemons standing alone." (Emphasis in original)(Final Office action, p. 1.)

Applicant has appealed, and briefs have been filed. Applicant did not request an oral hearing.

As explained above, the specimens submitted by applicant are a photograph of a point-of-purchase display, and a hangtag/coupon, photocopies of which are reproduced below (in reduced form):



Two Sides of Hangtag/Coupon



Point-of-Sale Display

The sole issue before the Board is whether either of the two specimens submitted with applicant's statement of use is an acceptable specimen of use of the mark THE ULTIMATE DIET DRINK for the goods set forth in the application, "fresh fruit."<sup>1</sup>

Trademark Rule 2.56(a) reads as follows:

An application under section 1(a) of the Act, an amendment to allege use under §2.76, and a statement of use under §2.88 must each include one specimen showing the mark as used on or in connection with the goods, or in the sale or advertising of the services in commerce.

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<sup>1</sup> To be clear for the record, neither the issue of whether this slogan, THE ULTIMATE DIET DRINK, functions as a trademark, nor the issue of whether applicant, Sunkist Growers, Inc., is the sole owner of the mark, is before the Board. The only basis for refusal the Examining Attorney has chosen to articulate, citing Trademark Rule 2.56, is her requirement for a substitute specimen on the ground that both specimens are inadequate to show use of the mark in connection with the identified goods.

Applicant contends that both specimens submitted with its statement of use comply with the rule in that they each show use *in connection with* the goods.

The Examining Attorney contends that the specimens are unacceptable because neither specimen shows use of the mark for applicant's goods standing alone; that consumers are likely to perceive the mark as referring to the drink which results from combining applicant's lemons with another party's spring water; that the mark is "more of a marketing slogan for this arrangement [a joint promotion with the owner of Misty Mountain spring water], rather than being a trademark for applicant's goods" (brief, unnumbered p. 3); and that the mark THE ULTIMATE DIET DRINK is used only to promote the use of the two goods together to create a soft drink, but there is no specimen showing use of the mark for lemons standing alone.

As explained previously, the Examining Attorney acknowledged that the specimens show the mark used *in connection with* applicant's goods "fresh fruit" (more specifically, lemons), but she rejects the specimens because they do not show use only for lemons. We find no statutory citation, case law<sup>2</sup> or other authority to support

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<sup>2</sup> The Examining Attorney cited the case of *In re Packaged Ice Inc.*, 50 USPQ2d 1361 (TTAB 1999). However, that case involved a

such a requirement for specimens. The specimens submitted by applicant meet the criteria set forth in Trademark Rule 2.56(a). See also, TMEP §§904.04 and 904.06 (Third edition 2002). Applicant's point-of-sale display, as well as its hangtag/coupon, are both associated directly with applicant's goods "fresh fruit," albeit the mark THE ULTIMATE DIET DRINK is apparently also associated with Misty Mountain spring water. Further, on the specimens, the mark is prominently displayed and is associated with or related to applicant's goods; the specimens are designed to catch the attention of purchasers; and the purchasing public will associate the mark with applicant's goods (even if there is also an association with the other named entity's spring water).

**Decision:** The refusal to register based on a requirement for an acceptable specimen is reversed.

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statutory refusal to register the mark under Sections 2 and 45 of the Trademark Act on the ground that the matter did not function as a mark.