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06 MAY 2004

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Wellness Lifestyles Inc.

Serial No. 76428192

Ned Ardagna of Haskins & Associates for Wellness Lifestyles Inc.

Alec Powers, Trademark Examining Attorney, Law Office 105 (Thomas G. Howell, Managing Attorney).

Before Hanak, Hairston and Bucher, Administrative Trademark Judges.

Opinion by Hanak, Administrative Trademark Judge:

Wellness Lifestyles Inc. (applicant) seeks to register in typed drawing form BEYOND JUICE for "nutritional supplements, namely concentrated fruit and vegetable extracts in powder form." The intent-to-use application was filed on July 5, 2002. At the request of the Examining Attorney, applicant disclaimed the exclusive right to use JUICE apart from the mark in its entirety.

Citing Section 2(d) of the Trademark Act, the Examining Attorney has refused registration on the basis that applicant's mark, as applied to applicant's goods, is likely to cause confusion with the mark BEYOND JUICE "A

MEAL IN A CUP", previously registered in the form shown below for "nutritional supplements, namely nutritional fruit based drinks with added vitamins and minerals." Registration No. 2,616,245.

When the refusal to register was made final, applicant appealed to this Board. Applicant and the Examining Attorney filed briefs. Applicant did not request a hearing.

In any likelihood of confusion analysis, two key, although not exclusive, considerations are the similarities of the marks and the similarities of the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)("The fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.").

Considering first the goods, we find that they are extremely closely related. Both are nutritional supplements. Both contain fruit or concentrated fruit. The only difference is that registrant's nutritional supplement appears to be a ready-to-drink product, whereas applicant's nutritional supplement is in concentrated form (powder form) which requires the addition of water. It is common knowledge that many beverage products come in both ready-to-drink form and in concentrated form. Some common examples are orange juice, milk, lemonade, tea and coffee.

In arguing that there are differences in the goods, applicant makes the following statements at page 5 of its brief: "Applicant's goods are dry powder administered as tablets or capsules taken as a nutritional supplement, similar to vitamins. Registrant's goods are juice drinks consumed as a drink, in a cup, fortified with vitamins and minerals."

There is a fundamental problem with applicant's argument. The conclusion of applicant's identification of goods does <u>not</u> read in "tablet or capsule form." Rather, the conclusion of applicant's identification of goods reads "in powder form." In considering the relationship of the goods, we must consider the goods as described in the application and the cited registration, and not consider

what applicant's actual goods may turn out to be. See Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987)(It is well settled that in Board proceedings, "the question of likelihood of confusion must be determined based on an analysis of the mark as applied to the goods and/or services recited in applicant's application vis-à-vis the goods and/or services recited in [the cited] registration, rather than what the evidence shows the goods and/or services to be."). Of course, in this case there is not even any evidence showing that applicant's actual goods will be tablets or capsules.

Turning to a consideration of the marks, we noted at the outset that when the goods of the parties are extremely similar as is the case here, "the degree of similarity [of the marks] necessary to support a conclusion of likely confusion declines." Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1700 Fed. Cir. 1992.

Obviously, we are compelled to compare the marks "in their entireties." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 750 (Fed. Cir. 1985). However, in so doing, it is not at all improper to give weight to the more prominent features of a mark. National Data, 224 USPQ at 751. The most prominent feature of registrant's mark is

the words BEYOND JUICE. Of course, these words are identical to applicant's mark. The words BEYOND JUICE in registrant's mark are depicted in large lettering, whereas the words "A MEAL IN A CUP" are depicted in much smaller lettering. Thus, the most prominent feature of registrant's mark is identical to applicant's mark in terms of pronunciation and connotation.

As for the triangular or pyramid background design in registrant's mark, it is clear that such common geometric shapes have little or no source identifying (trademark) significance. 1 J. McCarthy, McCarthy on Trademarks and Unfair Competition Section 7:29 at page 7-47 (4th ed. 2002). While we acknowledge that the triangle or pyramid background shape in the registered mark causes it to have a somewhat different visual appearance than applicant's mark, this background design would, obviously, not be pronounced. Thus, the background design does not change the fact that the most prominent portion of registrant's mark (BEYOND JUICE) is identical to applicant's mark in terms of pronunciation and connotation.

One final comment is in order. At page 3 of its brief applicant argues that "the dominant portion" of the registered mark is the term "A MEAL IN A CUP." Applicant argues that the registrant itself determined that it was

the most dominant portion of its mark because registrant placed this portion in quotation marks. Applicant acknowledges, "the term ["A MEAL IN A CUP"] has been disclaimed as descriptive." Nevertheless, applicant contends that "it must be assumed that these quotation marks have been placed around this term for a purpose, as a flag to the consumer." Of course, applicant offers no evidence in support of its contention. Moreover, it is common knowledge that quotation marks are common punctuation marks which appear frequently on labels. In short, we fail to see how placing the descriptive term A MEAL IN A CUP in quotation marks has made this subordinate phrase the most dominant portion of the registered mark.

Given the fact that the goods are extremely similar and the fact that the marks are very similar, we find that there exists a likelihood of confusion.

Decision: The refusal to register is affirmed.