

**THIS OPINION IS NOT A
PRECEDENT OF
THE T.T.A.B.**

Mailed: July 11, 2007

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Ramon E. Jaquez

Serial No. 76597151

Myron Amer of Myron Amer, P.C. for Ramon E. Jaquez.

John Dwyer, Trademark Examining Attorney, Law Office 116
(Michael W. Baird, Managing Attorney).

Before Zervas, Kuhlke and Cataldo,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Ramon E. Jaquez has appealed from the final refusal of the trademark examining attorney to register VIVE LA VIDA LOW CARB as a trademark for "bottled drinking water."¹ On June 16, 2004, applicant filed his application pursuant to Section 1(b) of the Trademark Act, based on an asserted bona fide intention to use the mark in commerce. The application was subsequently approved by the examining

¹ Application Serial No. 76597151. In response to requirements by the examining attorney, applicant disclaimed "LOW CARB" and submitted the following translation: the English translation of VIVE LA VIDA is LIVE THE LIFE.

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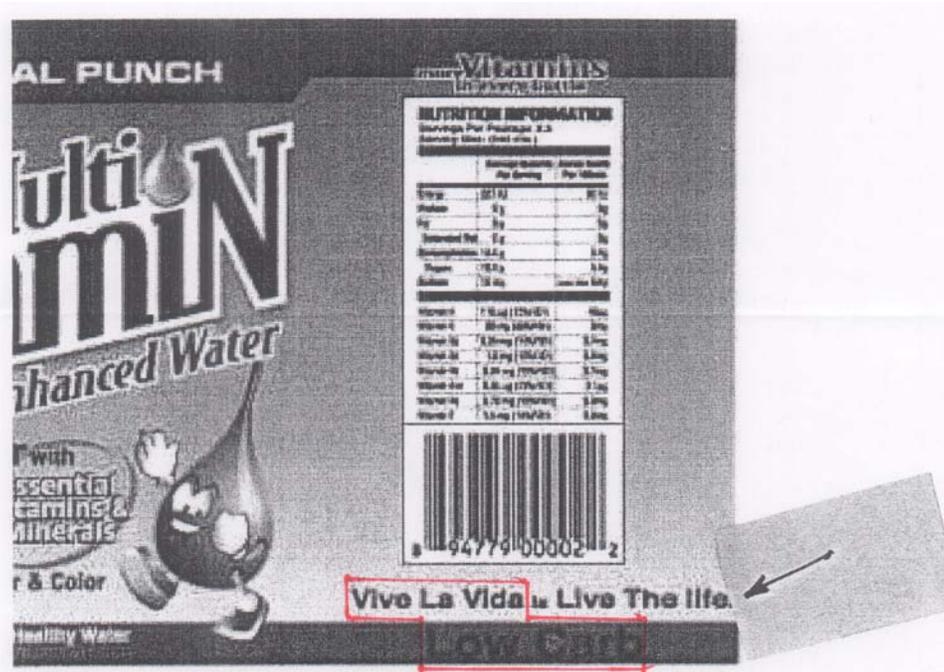
attorney, and was published for opposition. Thereafter, a Notice of Allowance issued, and applicant filed a Statement of Use. When the examining attorney examined the Statement of Use, he determined that the specimen submitted therewith did not support the mark shown in the drawing. He advised applicant that he could not cure this problem by amending the drawing to the mark as it appeared on the drawing, i.e., VIVE LA VIDA IS LIVE THE LIFE. LOW CARB, as this would be a material alteration of the mark shown in the drawing, and required that applicant submit a substitute specimen showing the mark as it appeared in the drawing. When applicant failed to do this, the examining attorney issued a final Office action, and it is from this action that applicant has appealed.

Applicant and the examining attorney filed main briefs on the issue under appeal. In addition, applicant filed a reply brief.

Trademark Rule 2.51(b) requires, in pertinent part, that in an application under section 1(b) of the Act, the drawing of the mark must be a substantially exact representation of the mark as intended to be used on or in connection with the goods and/or services specified in the application, and once a statement of use under §2.88 has been filed, the drawing of the mark must be a substantially

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exact representation of the mark as used on or in connection with the goods and/or services. Thus, the question before us is whether the mark shown in the drawing, VIVE LA VIDA LOW CARB in standard character form, is a substantially exact representation of the mark as used. To determine this, we must look at applicant's specimen, reproduced below.²



² Applicant submitted several copies of the same specimen with its SOU and responses to the examining attorney's Office actions with regard thereto. In addition, applicant submitted with its brief an exhibit that appears to be a photocopy of an additional specimen that displays the mark VIVE LA VIDA IS LIVE THE LIFE but fails to display the words LOW CARB. Inasmuch as this specimen fails to display the applied-for mark and moreover, because it is untimely, it will be given no further consideration. See Trademark Rule 2.142(d) (the record in the application should be complete prior to the filing of an appeal). We note, however, that had we considered this exhibit in our determination of the issue on appeal, the result would be the same.

The words VIVE LA VIDA appear in the same line as the additional wording and punctuation IS LIVE THE LIFE. above the words LOW CARB. It is the appearance of IS LIVE THE LIFE. that has raised the objection by the examining attorney. It is his position that consumers would not perceive VIVE LA VIDA LOW CARB as a separate mark, but would see it only as part of the phrase VIVE LA VIDA IS LIVE THE LIFE. LOW CARB. He asserts that VIVE LA VIDA IS LIVE THE LIFE. is a unitary and grammatically correct sentence that appears in a separate line from LOW CARB. As a result, he argues that the mark VIVE LA VIDA LOW CARB as shown in the drawing does not create a separate and distinct commercial impression from VIVE LA VIDA IS LIVE THE LIFE. LOW CARB. Thus, the mark as it appears in the specimen does not match the mark in the drawing and may not be registered.

Applicant argues that to the Spanish-speaking community, IS LIVE THE LIFE is merely informational, and that the consuming public as a whole otherwise would view such wording merely as an English translation of VIVE LA VIDA and not part of the mark.

The cases which have dealt with the question of whether a mark shown in the drawing is a substantially exact representation of the mark shown in the specimen have

generally been concerned with whether the drawing is a mutilation of that mark. The question of mutilation, in turn, depends on whether the mark shown in the specimen can be considered a composite mark in which the element sought to be registered creates a commercial impression separate and distinct from the other elements of the mark. See *In re San Diego National League Baseball Club, Inc.*, 224 USPQ 1067 (TTAB 1983), and cases cited therein.

Viewing the mark as it appears on the specimen, we agree with the examining attorney that IS LIVE THE LIFE. is displayed on the same line and in the same size and typeface as VIVE LA VIDA, with the exception of IS which is displayed in slightly smaller type. The words LOW CARB appear in a line centered directly below VIVE LA VIDA IS LIVE THE LIFE. The commercial impression, therefore, is that of a unitary phrase, VIVE LA VIDE IS LIVE THE LIFE. LOW CARB.³ Consumers would not view VIVE LA VIDA LOW CARB, as shown in this phrase, as a separate element. See *In re San Diego National League Baseball Club, Inc.*, *supra*, (specimen showing SAN DIEGO PADRES REPORT, with SAN DIEGO, PADRES, and REPORT in three different sizes and styles of

³ The question of whether, as displayed on the specimens of record, VIVE LA VIDA IS LIVE THE LIFE. and LOW CARB form a single mark is not before us.

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lettering, with SAN DIEGO and PADRES grouped together on one line and REPORT on a separate line, does not support PADRES REPORT shown in drawing); and *In re New Yorker Cheese Company*, 130 USPQ 120 (TTAB 1961) (specimens showing words MARKA, DOBRA and SZYNKA in column superimposed on outline of Poland unacceptable to show use of applied-for mark DOBRA).

Applicant has argued that the wording IS LIVE THE LIFE in its specimen is merely an informational translation of VIVE LA VIDA. However, the mark as displayed on the specimens of record clearly displays VIVE LA VIDE IS LIVE THE LIFE. in a sentence directly centered above LOW CARB. Thus, even if LIVE THE LIFE is a translation of VIVE LA VIDA, the impression conveyed by the specimens of record is that of a single, unitary phrase VIVE LA VIDA IS LIVE THE LIFE. LOW CARB. The mere fact that one portion of the mark as it appears on the specimens may translate another portion does not result in the translation creating a separate commercial impression, especially when all of the wording in the mark is displayed as a single expression on two lines in similar size and font. Thus, we are not persuaded that either Spanish-speaking consumers or consumers who cannot read Spanish will view LIVE THE LIFE as merely informational material that is not part of the

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mark.

In summary, we find that VIVE LA VIDA LOW CARB, as used as part of the phrase VIVE LA VIDA IS LIVE THE LIFE. LOW CARB in the specimen, does not create a separate commercial impression, and therefore applicant has not submitted a specimen showing use of the mark VIVE LA VIDA LOW CARB which is depicted in the drawing.

Decision: The refusal of registration is affirmed.