

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF
THE TTAR

Mailed: September 30, 2003
Paper No. 34
PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Kellogg Company
v.
The Earthgrains Company

Opposition No. 91110121
to application Serial Nos. 75213336; 75213338;
and 75213340
filed on December 16, 1996

Jeffrey H. Kaufman and Jonathan Hudis of Oblon, Spivak,
McClelland, Maier & Neustadt, P.C. for Kellogg Company.

Bryan K. Wheelock of Harness, Dickey & Pierce, P.L.C. for
The Earthgrains Company.

Before Simms, Hairston and Bucher, Administrative Trademark
Judges.

Opinion by Hairston, Administrative Trademark Judge:

On December 16, 1996 The Earthgrains Company filed the
following intent-to-use applications: Serial No. 75213336
for the mark MORNING GOODS ("GOODS" is disclaimed) for
"refrigerated bakery products, namely, biscuits, cookies,
english muffins, dinner rolls, pie crust, breadsticks, pizza
crust, frozen garlic bread, cinnamon rolls, danish and
toaster pastries"; and Serial No. 75213340 for the mark

Opposition No. 91110121

MORNING GOODS ("GOODS" is disclaimed} and Serial No. 75213338 for the mark MORNING GOODNESS, both for "bread, muffins, buns, rolls, croissants, danish, cakes, snack cakes, donuts, bagels and bakery products."

Registration of each application has been opposed by the Kellogg Company. As grounds for opposition, opposer alleges that since prior to the filing date of applicant's application, opposer has been engaged in the manufacture, distribution, sale, advertising and promotion of food products, including food products typically consumed in the morning; that opposer has a business interest in using the words "morning," "goods," and/or "goodness"; that "MORNING GOODS" and "MORNING GOODNESS" are merely descriptive of the goods recited in applicant's respective applications; and that "[u]pon information and belief, the *bona fides* of Applicant's intent-to-use the alleged MORNING GOODS and MORNING GOODNESS trademarks in commerce is not apparent from the materials of record in the subject applications, and Opposer therefore challenges same and leaves the Applicant to its proofs with regard to the nature and sufficiency of its intent-to-use its alleged marks in commerce at the time of filing [its applications]."

Applicant, in its answer, denied the salient allegations of the notice of opposition.

Opposition No. 91110121

The record consists of the pleadings; the file of the involved application; and the testimony (with exhibits) of opposer's witnesses Andrew Weinstein, Beth Ann Zalner, and David Herdman.¹ In addition, opposer submitted a notice of reliance on dictionary definitions of the words "good," "goodness," and "morning"; copies of articles from the NEXIS database; and certain of applicant's responses to opposer's interrogatories and requests for admission.

Applicant did not take testimony, but it submitted a notice of reliance on copies of third-party registrations of marks that include the words "morning," or "goodness;" and copies of registrations owned by opposer of marks that include the words "morning" or "good."

¹ Applicant's motion to strike exhibits 2, 3, and 4 introduced during the testimonial deposition of opposer's witness Mr. Weinstein and the testimony relating thereto is denied. The exhibits and testimony at issue concern third-party uses of the words "morning," "good," and/or "goodness." Applicant maintains that during discovery, it requested that opposer produce all documents relating to third-party uses of these words; that after the close of discovery opposer obtained additional materials relating to third-party uses; that opposer was under a duty to supplement its responses; and that opposer did not supplement its responses by producing the materials which are the subject of opposer's exhibits 2, 3, and 4. Fed. R. Civ. P. 26(e)(2) provides that a party who has responded to a request for discovery has a duty to supplement its response to include information thereafter acquired "if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other part[y] during the discovery process or in writing." The record shows that opposer did produce a number of documents relating to third-party uses in response to applicant's request for production of documents. Although opposer obtained additional materials, opposer's response was not incorrect or incomplete in any material respect.

Opposition No. 91110121

Briefs have been filed, but an oral hearing was not requested.

At the outset, we note that it is clear from the record that opposer is a competitor in the field of breakfast foods. Thus, opposer has established its standing in this proceeding.

We consider first opposer's claim that applicant does not have a bona fide intent to use the marks in commerce on the identified goods. Opposer argues that applicant's failure, during trial, to produce documentary evidence regarding applicant's actual or planned use of the marks proves that applicant lacks a bona fide intent to use the marks in commerce. In support of its position, opposer relies on *Commodore Electronics Ltd. v. CBM Kabushiki Kaisha*, 26 USPQ2d 1503 (TTAB 1993).

Applicant, in its brief on the case, argues that it does have a bona fide intent to use the marks in commerce, but has delayed going forward with its plans because of the opposition.

In *Commodore*, at page 1507, the Board stated:

... in evaluating an applicant's bona fide intent to use a mark in commerce on the basis of a myriad of objective factors, certain circumstances may support or confirm the bona fide nature of an applicant's intent while others may cast doubt thereon or even completely disprove it. Although admittedly a close question, we hold that absent other facts which adequately explain or outweigh the failure of an applicant to have any

Opposition No. 91110121

documents supportive of or bearing upon its claimed intent to use its mark in commerce, the absence of any documentary evidence on the part of an applicant regarding such intent is sufficient to prove that the applicant lacks a bona fide intention to use the mark in commerce as required by Section 1(b).

The evidence of record regarding applicant's intent, apart from the declaration in applicant's application, consists of applicant's responses to opposer's interrogatories. Among its responses, applicant indicated that it had not prepared any advertising or promotional materials; that it had not prepared any sales or budget projections; that it had not conducted any market research; and that it had not entered into any licensing agreements. However, we note that in response to opposer's interrogatory no. 3, applicant stated that "applicant has prepared labels for use during test marketing for the product" and in response to interrogatory no. 7, applicant stated that "applicant has used the mark MORNING GOODNESS in conjunction with the EARTHGRAINS mark on packaging for test marketing the product." Opposer did not request applicant to produce these materials.

Under the circumstances, we cannot say that applicant failed to have any documentary or other evidence supportive of or bearing on its intent to use the applied-for marks in commerce. We should add that it is certainly not unreasonable for applicant to delay its plans until the

Opposition No. 91110121

opposition has been decided. In view of the foregoing, we find that opposer has not proven its claim that applicant does not have a bona fide intent to use the marks in commerce.

We consider next the issue of whether MORNING GOODS and MORNING GOODNESS, when applied to the identified goods, are merely descriptive thereof.

A mark is descriptive if it forthwith conveys an immediate idea of the ingredients, qualities or characteristics of the goods. In re Abcor Development Corp., 616 F.2d 525, 200 USPQ 215 (CCPA 1978). See also: Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 189 USPQ 759, 765 (2d Cir. 1976). Moreover, in order to be descriptive, the mark must immediately convey information as to the ingredients, qualities or characteristics of the goods with a "degree of particularity." Plus Products v. Medical Modalities Associates, Inc., 211 USPQ 1199, 1204-1205 (TTAB 1981). Whether a term is merely descriptive is determined not in the abstract, but rather in relation to the goods for which registration is sought, the context in which it is being used in connection with those goods and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use. In re Bright-Crest, Ltd., 204 USPQ 591 (TTAB 1979).

Opposer's evidence

Opposer took the testimony of its paralegal/licensing coordinator Beth Ann Zalner. Ms. Zalner testified that opposer is in the business of producing and marketing ready-to-eat cereals, cereal-based food products, snack bars, waffles and pancakes. Opposer promotes its products through television, radio, and print advertising. Opposer also uses "end cap displays" and "shelf talkers" in grocery stores. Ms. Zalner testified that, based on her experience, the term "morning goods" is used in the food industry to describe a category of products purchased by consumers for consumption at breakfast or the early part of the day. Mr. Zalner identified examples of opposer's and third-parties' use of the words "morning," "good(s)," and "goodness" in advertising, including television commercials, and on product packaging. For example, opposer has used the phrase "Kellogg's Crispix Cereals for Good Mornings" on its cereal cartons. Third parties have used the phrases "Breakfast with Post® Grape Nuts: Helps keep you going strong all morning long" and "Great Tasting Wholesome Goodness From Quaker®" on cereal cartons.

In addition, opposer took the testimony of its corporate counsel David Herdman who testified that the term "morning goods" is used in the food industry to describe the

Opposition No. 91110121

category of products purchased by consumers for consumption at breakfast or the early part of the day.

Opposer also took the testimony of Andrew Weinstein, a legal assistant with the law firm representing opposer. Mr. Weinstein canvassed several grocery stores in the Washington, D.C. area to locate third-party breakfast-style products with packaging containing the words "morning," "good" and/or "goodness." Among those identified by Mr. Weinstein testimony include: "Enjoy the goodness of the Grape-Nuts® family of cereals"; "The whole grain goodness of Cheerios is food for your whole family"; and "With the taste inspired by Fresh Baked Cinnamon Raisin Bread, every spoonful of delicious Post Cinna-Cluster Raisin Bran gets the whole family crunching on the morning goodness they need."

Further, opposer submitted with its notice of reliance the following excerpts from Merriam Webster's Collegiate Dictionary (10th ed. 1996):

good: plural: something manufactured or produced for sale: wares, merchandise.

goodness: the quality or state of being good; the nutritious, flavorful, or beneficial part of something.

morning: the time from sunrise to noon.

Lastly, opposer submitted with its notice of reliance, twenty articles from the NEXIS database that show use of the

term "morning goods" in the food industry to describe bakery products. The following are representative excerpts:

Country oven organic improver, is an all purpose improver in powdered form, formulated for production of organic bread, rolls and **morning goods**.

(Food Manufacture, February 2000);

The bread sector dominates the scene, accounting for almost 82% of global volume sales (at 88.3 million tons) and 61% of value (US\$ 109 billion). Breakfast (or **morning goods**) were listed as the most dynamic sector, growing by 18% to exceed...

(Quick Frozen Foods International, October 1, 1999);

Morning goods (such as croissants, brioches and muffins), cakes and pastries have benefited from the snacking trend, according to Euromonitor, (Food Engineering International, April 1, 1997);

All types of retail bakers benefit from the higher visibility these products command. Where specialty shops haven't gained a foothold, retailers find that there's increased demand for bagels. Not only are they making inroads as **morning goods**, but they're also gaining popularity as a sandwich roll. (Bakery Production and Marketing, June 24, 1994);

Instead, the entire range of other products normally offered in bakeries is up, with the exception of Danish and sweet goods. While these **morning goods** contributed 11% to overall sales in 1988, the most recent ... (Bakery Production and Marketing, November 24, 1993);

Of course, no one can accurately predict just how many customers will come in each day, although the Ortmeires keep careful records to hold their daily projections. They try to make sure all **morning goods** sell out each day. However, Sandra,

Opposition No. 91110121

Susanne and Kathleen alert the bakers when **morning goods** start running low too early.
(Bakery Production and Marketing, April 24, 1993);

The recent launch of the Pillsbury Hotbake range is a fascinating example of positioning a food brand as a total experience, rather than just a product. Hotbake is a chilled, ready-to-bake dough for Danish Whirls, bread twists etc and a wide range of **morning goods** to bake at home.
(Marketing, April 2, 1992); and

The store's self-service areas include 1) packaged bread case; 2) **morning goods** and sweets case; 3) bagel case; ...
(Bakery Production and Marketing, May 24, 1989).

Applicant's evidence

As indicated, applicant did not take testimony. However, applicant did submit copies of over forty third-party registrations of marks that include the words "morning," or "goodness" for food products and copies of four registrations owned by opposer that include the words "morning" or "good." The words at issue are not disclaimed in any of these registrations.

Arguments & Analysis

With respect to the mark MORNING GOODS, it is opposer's position that such mark merely conveys that the identified goods are products that are for consumption by consumers during the earliest part of the day. Opposer argues that,

Opposition No. 91110121

as evidenced by the NEXIS excerpts, the term is already in use in the food industry to describe this category of products.

Applicant, on the other hand, argues that the mark MORNING GOODS has no established meaning and that it is not merely descriptive of the identified goods.

As previously noted, in determining whether a mark is merely descriptive, we must consider the significance that the term would have to the average purchaser of the goods. In re Bright-Crest, Ltd. supra. See also In re Nett Designs, Inc., 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ["The perception of the relevant purchasing public sets the standard for determining descriptiveness"]. In this case, there are no restrictions as to the purchasers of applicant's goods. In other words, applicant has not restricted its goods to persons in the food industry such as wholesalers and distributors. In the absence of any restrictions, we must assume that applicant's goods will be purchased by all the normal purchasers of these types of goods which would include ordinary consumers. Indeed, it is ordinary consumers who are the relevant purchasing public or "average purchasers" of these types of goods. Because ordinary consumers will not have been exposed to the use of the term "morning goods" in food industry publications, the NEXIS excerpts submitted by opposer are of little probative

Opposition No. 91110121

value in determining the issue of mere descriptiveness. We note also that the twenty NEXIS excerpts are spread out over a period of ten years, and seven of the excerpts were taken from the same publication, albeit different issues. This hardly evidences widespread use of the term "morning goods" even in the food industry. Moreover, the testimony of opposer's witnesses that the term is used in the food industry to describe a category of products is entitled to little weight because there is no evidence that ordinary consumers have been exposed to such use.

Further, notwithstanding the admittedly descriptive nature of the word "goods," we are not persuaded that the combined mark MORNING GOODS is merely descriptive when applied to applicant's goods. No information about any quality or characteristic of the goods is conveyed with a degree of particularity. Some, albeit minimal, thought or perception would be required on the part of prospective purchasers in order to perceive the significance of the mark MORNING GOODS as it relates to applicant's goods.

Turning then to the mark MORNING GOODNESS, opposer argues that this mark merely conveys that applicant's goods are of good quality and may be consumed during the earliest part of the day.

Opposition No. 91110121

Applicant, on the other hand, again argues that the mark MORNING GOODNESS has no established meaning and that it is not merely descriptive of the identified goods.

It is well settled that terms which are laudatory are also regarded as being merely descriptive because these laudatory terms are viewed as a form of describing the quality of the goods. See J. Thomas McCarthy, Vol. 2, Trademarks and Unfair Competition, Section 11:17 (4th ed. 1998), and cases cited therein.

We find that the mark MORNING GOODNESS, when applied to applicant's goods, is suggestive and not merely descriptive. There is a certain ambiguity about the mark, and again no information about any quality or characteristic of the goods is conveyed with a degree of particularity. To some purchasers the mark may suggest that applicant's goods will add "goodness" to their morning; to others it may suggest that applicant's goods are of a desirable quality. That quality, however, is not defined. Compare *In re Dos Padres Inc.*, 49 USPQ2d 1860 (TTAB 1998) [The mark QUESO QUESADILLA SUPREME is merely descriptive of applicant's goods because it immediately conveys to purchasers that applicant's cheese is of high quality].

Decision: The opposition is dismissed as to each of the involved applications.