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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Ex Parte Appeal - Serial No.	97605021
Appellant	Metabev LLC
Applied for mark	META
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Submission	Appeal brief
Attachments	TTAB Brief META 32.pdf(166007 bytes)
Appealed class	Class 032. First Use: None First Use In Commerce: None All goods and services in the class are appealed, namely: Energy drinks
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Serial No.: 97605021
Mark: META
Applicant: Metabev LLC
Examining Attorney: Leslee Friedman
Law Office 120

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APPLICANT'S STATEMENT OF THE CASE

A. Prosecution History

On September 23, 2022, Applicant filed an application with the United States Patent and Trade Office for the standard character word mark META in Class 32 for "Energy drinks; Non-alcoholic carbonated beverages."

On July 11, 2023 the Examining Attorney for the USPTO issued an Office Action refusing the applied-for mark on the basis that it would create a likelihood of confusion with the marks embodied in four prior pending applications and two registrations as set forth in the table below:

Number	Mark	Goods & Services
Serial No. 90494305	ALCHEMY METAWATER	Flavored bottled water in Class 32
Serial No. 97126331	METAWATER & Design	Bottled drinking water; Flavored waters; Mineral and aerated waters; Seltzer water; Sparkling water; Spring water; Water beverages in Class 32
Serial No. 97253452	METAVITA	Beverages with a tea base in Class 32

Serial No. 79347008	METABREWSOCIETY	Non-alcoholic malt, carbonated, fruit juice beverages; non-alcoholic preparations for making beverages, namely, non-alcoholic aperitifs, non-alcoholic cider, non-alcoholic cocktail mixes; beer and brewery products in the nature of beer, sake; beers and non- alcoholic beverages in the nature of non-alcoholic cider, non- alcoholic aperitifs, non- alcoholic beer; flavoured carbonated beverages, namely, fruit-flavored carbonated beverages, non-alcoholic flavored carbonated beverages; nut- and soya- based beverages, not being milk substitutes; waters, namely, drinking waters, carbonated waters, still waters; juices, namely, orange juice, fruit juice, guava juice in Class 32
Reg. No. 5160751	METABREW	Energy drinks in Class 32
Reg. No. 7038674	META MOON	Energy drinks in Class 32

Applicant timely filed a Response to the Office Action on October 11, 2023, noting that certain of the prior pending applications and registrations had been abandoned or cancelled and arguing that there was no likelihood of confusion given the significant differences in commercial impressions between the META and META MOON marks. Applicant further limited the description of the goods with which the mark is to be used to “energy drinks.” Applicant addressed all issues raised in the Office Action.

On October 17, 2023, the Examining Attorney issued the final Office Action in which the Examiner noted that the refusal as related to Registration No. 5160751 for

METABREW and Serial No. 90494305 for ALCHEMY METAWATER had been obviated because they had been canceled and abandoned, respectively. The Examining Attorney also withdrew the refusals and advisories for Serial No. 79347088 for METABREWSOCIETY, Serial No. 97126331 for METAWATER & Design and Serial No. 97253452 for METAVITA. The Examining Attorney made the refusal final with respect to Registration No. 7038674 for the META MOON mark.

On January 3, 2024, Applicant timely filed this Appeal to the Trademark Trial and Appeal Board.

B. Examining Attorney's Evidence

July 11, 2023 Office Action

The Examining Attorney attached U.S. Registration and Application Serial Nos. 90494305, 97126331, 97253452, 79347008, 5160751, 7038674.

October 17, 2023 Final Office Action

The Examining Attorney did not attach evidence to the final office action.

C. Applicant's Evidence

October 11, 2023 Response to Office Action

Applicant attached evidence showing that Registration No. 5160751 for METABREW had been canceled and Serial No. 90494305 for ALCHEMY METAWATER had been abandoned. Applicant also attached evidence of the definition of the word "meta" along with excerpts from its business plan demonstrating how the META mark is used in connection with Applicant's goods. Lastly, Applicant attached evidence showing that "vita" translates from Latin to "life" in English.

QUESTION PRESENTED

Whether the standard character mark META creates a likelihood of confusion with META MOON such that consumers are likely to be confused, mistaken, or deceived as to the source of the goods at issue.

ARGUMENT

Determination of likelihood of confusion under Section 2(d) is made on a case-by-case basis and the factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973), aid in this determination. Although, depending on the evidence of record, not all of the *du Pont* factors are necessarily relevant or of equal weight in a given case, here the following factors are the most relevant: the similarity or dissimilarity of the marks in question, including appearance, connotation, commercial impression and auditory resemblance. *See In re Viterra Inc.*, 671 F.3d 1358, 1361-62, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012). With respect to that *du Pont* factor, the distinguishing points between the marks warrant registration of the Applicant's mark.

Differences Between the Marks

There is no likelihood of confusion between Applicant's META mark and the META MOON mark. It is well-settled that when determining likelihood of confusion, the examiner should look not at a single aspect of a mark but should view the mark as a whole. *See, e.g., Columbian Steel Tank Co. v. Union Tank & Supply Co.*, 125 U.S.P.Q. 406 (CCPA 1960); *see also Vitarroz Corp. v. Borden, Inc.*, 209 U.S.P.Q. 969, 976-77 (2nd Cir. 1981) (no likelihood of confusion with BRAVO and BRAVO'S due to the different contexts in which the marks are presented). The central issue is whether the marks create the same overall impression. *Visual Information Institute, Inc. v. Vicon Industries, Inc.*, 209 U.S.P.Q. 179, 189 (TTAB 1980). Marks are compared in their entireties for

similarities in appearance, sound, connotation, and commercial impression. *du Pont* at 1358, 1362. While both Applicant's mark and the Registrant's mark contain the word META the marks are vastly different in sight, sound, meaning, and commercial impression.

Differing connotations can themselves be determinative, even where identical words with identical meanings are used. *Revlon, Inc. v. Jerrell, Inc.*, 713 F. Supp. 93, 11 U.S.P.Q. 2d 1612, 1616 (S.D.N.Y. 1989) (No likelihood of confusion because the meaning and connotation of the marks THE NINES and INTO THE NINETIES are not related. THE NINES suggests the number nine, or nine of something in a group. INTO THE NINETIES is a reference to the decade of the 1990's, and more generally the future) (citing *Clarks of England, Inc. v. Glen Shoe Company*, 465 F. Supp. 375, 379, 209 USPQ 852, 854-55, (S.D.N.Y. 1960) (TREK and STAR TREK for shoes; TREK connotes hiking across the Himalayas; STAR TREK connotes space travel.)).

As used by Applicant in its business and marketing plan, META has these varied meanings:

META has several meanings... Its origin is Greek and translates simply to "beyond" or "what's next" and going beyond is our stated objective...beyond generic commoditized flavors, beyond just acceptable taste, beyond nonexistent customer engagement. META by definition is beyond... that means constant innovation, our flavors will cycle creating higher demand and scarcity; scarcity creates value, future flavors will be user generated, they will be influenced by the zeitgeist. META is a lifestyle brand that is shaped by the users. META is also a popular acronym used in the gaming universe "Most Effective Tactic Available" we expect immediate and substantial engagement with this cohort which will help propel our digital assets. META is also defined as "showing or suggesting an explicit awareness of itself or oneself as a member of its category cleverly self-referential...the META liquid is self-referential. META drinkers are smart, clever, "on the inside." META is cerebral... we will play on words like "Metaphor, metamorphosis, Metaphysical or relating to the transcendent" in our marketing.

October 11, 2023 Resp. to Office Action at pp. 5, 14-18. Applicant does not know how Registrant intends META to be interpreted in META MOON, but the addition of the word MOON to META creates a completely different commercial impression from the word META by itself. While both marks share the term META, the addition of MOON in META MOON creates a notable point of distinction. That addition alters the overall commercial impression of the mark, evoking different associations or themes related to lunar imagery or celestial concepts, concepts that are completely absent from META standing alone. Such differentiation is crucial in mitigating confusion among consumers.

Further, the META MOON mark consists of two words and three syllables, whereas Applicant's mark consists of a single word comprised of one syllable, creating a clear auditory distinction between the marks.

CONCLUSION

Similarity "is not a binary factor but is a matter of degree." *In re Coors Brewing Co.*, 343 F.3d 1340 (Fed. Cir. 2003). When evaluated from the perspective of the purchasing public, META by itself could not reasonably be confused with the META MOON mark. The marks are sufficiently dissimilar in appearance, connotation, commercial impression and auditory resemblance such that the Examining Attorney's decision to refuse registration of META should be reversed.

Dated March 1, 2024.

By: /s/ Hank Fasthoff
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CERTIFICATE OF SERVICE

I hereby certify that the above document was served on all parties and counsel of records through the ESTTA system on March 1, 2024.

/s/ Hank Fasthoff
Hank Fasthoff