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**THIS DISPOSITION
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Paper No. 10
EWH/krd

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Silver Creek Bottling Co.**

Serial No. 75/549,508

Dennis A. Gross of Hill & Simpson for Silver Creek Bottling Co.

Zhaleh Sybil Delaney, Trademark Examining Attorney, Law Office 101 (Christopher Wells, Managing Attorney).

Before Hanak, Hairston and Chapman, Administrative Trademark Judges.

Opinion by **Hanak**, Administrative Trademark Judge:

Silver Creek Bottling Co. (applicant) seeks to register GINSENG LIFT in the stylized form shown below for a "bottled non-alcoholic beverage containing ginseng extract and tea extract." The intent-to-use application was filed on September 8, 1998. The word "ginseng" is disclaimed.

Citing Section 2(d) of the Trademark Act, the examining attorney has refused registration on the basis that applicant's mark, if applied to applicant's goods, would be likely to cause confusion with the mark LEMON LIFT, previously registered in the stylized form shown below for "tea." Registration No. 771,201. The word "lemon" is disclaimed.

In addition, the examining attorney refused registration on the basis that applicant's description of its goods -- bottled non-alcoholic beverage containing ginseng extract and tea extract -- was indefinite.

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 considerations are the similarity of the goods and the similarity of the marks. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

Considering first the goods, we find that they are only slightly related. It is very clear what registrant's goods are, namely, the common beverage tea. We simply do not share the examining attorney's totally unsupported contention that registrant's goods (tea) are broad enough to include "tea extract" as well as "other non-alcoholic tea-based or tealike beverages such as the applicant's." (Examining attorney's brief page 10). Tea does not encompass, to use the examining attorney's words, "tealike beverages such as the applicant's." Tea certainly does not encompass ginseng, which is defined as a medicinal substance made from the root of the ginseng plant. Webster's New World Dictionary (2d ed. 1970). Indeed, the examining attorney has essentially admitted that applicant's product is medicinal in nature when she

suggested that applicant adopt, as one possible identification of its goods, the following: "bottled non-alcoholic beverage containing ginseng extract and tea extract for medicinal purposes." (Emphasis added).

In short, we find that there is only a minimal relationship between registrant's goods and applicant's goods in that the former is tea and the latter contains, among other ingredients, tea extract.

Turning to a consideration of the marks, we find that in their entirety they are clearly different in terms of visual appearance, pronunciation and connotation. In terms of visual appearance, not only is the word GINSENG distinctly different from the word LEMON, but in addition both marks are depicted in distinctly different manners.

As for pronunciation, the words LEMON and GINSENG are likewise distinctly different.

Finally, in terms of connotation, we find that the marks are clearly different. When used in conjunction with tea, registrant's mark LEMON LIFT clearly suggests to purchasers that the tea has lemon flavoring and that it will serve, to use the words of the examining attorney, to "create a lift or boost in energy." (Examining attorney's brief page 7). On the other hand, the presence of the word GINSENG in applicant's mark causes consumers to view

applicant's bottled non-alcoholic beverage as being medicinal in nature, a point which the examining attorney has essentially conceded. While the presence of the word LIFT in applicant's mark will most likely cause consumers to view applicant's medicinal beverage as likewise providing a lift or boost in energy, said boost in energy would come about as a result of the medicinal properties of applicant's goods.

In short, given the fact that registrant's goods and applicant's goods are only slightly related and the significant differences in the two marks, we find, based on this record, that their contemporaneous use is not likely to result in confusion.

Finally, as for the refusal to register on the basis that applicant's identification of its goods is indefinite, we reverse. We are at a loss to understand why applicant's identification of goods (bottled non-alcoholic beverage containing ginseng extract and tea extract) is indefinite, and yet one of the other suggested identifications of goods set forth in the examining attorney's brief at page 12 is virtually the same, namely, "bottled non-alcoholic soft drinks containing tea extract and ginseng extract."

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Decision: The refusal to register on both grounds is reversed.

E. W. Hanak

P. T. Hairston

B. A. Chapman
Administrative Trademark
Judges, Trademark Trial
and Appeal Board