

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PERK SCIENTIFIC, INC.,	:	CIVIL ACTION
	:	
Plaintiff,	:	05-1406
	:	
v.	:	
	:	
	:	
EVER SCIENTIFIC, INC.,	:	
REZA ARDEKANI, JOANNE ARDEKANI,	:	
and JAY REINHARDT,	:	
	:	
Defendants.	:	

MEMORANDUM AND ORDER

JOYNER, J.

April 11, 2005

Plaintiff PERK Scientific, Inc. ("PERK") brings this action against its former employee, Defendant Reza Ardekani ("Ardekani"), and affiliates of his new corporation, Defendant Ever Scientific, Inc., ("Ever Scientific") for violations of section 43(a) of the Lanham Act, misappropriation of trade secrets, conversion, unfair competition, tortious interference with contractual and prospective economic relations, and breach of terms of employment. This Court must deny Plaintiff's Motion for a Temporary Restraining Order, because Plaintiff has not demonstrated a likelihood of success on the Lanham Act claim which forms the basis of this Court's jurisdiction. For the same reasons, this action must be dismissed for lack of subject matter jurisdiction.

### Factual Background

Plaintiff PERK is a Pennsylvania corporation which develops and markets products for the medical industry. PERK's president is Mark Bartosh, and the company currently has only one other employee, Mr. Bartosh's secretary. Defendant Ardekani was hired by PERK in 1998 as a sales associate.

In October of 2002, PERK began developing a non-carbonated glucose tolerant beverage product in plastic bottles. While glucose tolerant beverage products have been available since the 1970's as a method of testing for diabetes and other conditions, only one other company was manufacturing such products at the time of PERK's entry into the market. When PERK received FDA marketing approval in November of 2003, the only other glucose tolerant beverage products available to the industry were carbonated and packaged in glass bottles. PERK's product was offered in two flavors, orange and fruit punch.

PERK faced significant competition in marketing its product, and suffered substantial financial losses in February of 2004 when its largest customer chose to contract with PERK's competitor. Mr. Bartosh informed Ardekani that it would be difficult for PERK to continue paying his salary, and Ardekani chose to leave PERK and pursue other opportunities. Defendant Ardekani had established a new corporation, Ever Scientific, while he was still employed by PERK, and received FDA approval to

market his own glucose tolerant beverage product less than nine months after leaving PERK. The product now marketed by Ever Scientific is non-carbonated, packaged in plastic bottles, and is offered in three flavors: orange, fruit punch, and lemon-line.

Plaintiff PERK contends that Defendants have wrongfully appropriated Plaintiff's confidential product and customer information, and are infringing upon the protected trade dress of the PERK product by marketing a beverage product which is substantially similar in both packaging and composition. The PERK product accounts for 90% of Plaintiff's business, and Plaintiff contends that Defendants are intentionally offering their own product at a lower price to lure away Plaintiff's customers. Plaintiffs seek a temporary restraining order prohibiting Defendants from using Plaintiff's trade secrets and confidential information, contacting Plaintiff's customers, or marketing Ever Scientific's line of beverage products.

### **Discussion**

In order to obtain a temporary restraining order, a plaintiff must demonstrate: (1) the likelihood of success on the merits of his case; (2) the extent to which he will suffer irreparable harm without injunctive relief; (3) the extent to which the nonmoving party will suffer irreparable harm if the injunction is issued; and (4) the public interest in the issuance

of the order. See Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co., 290 F.3d 578, 586 (3<sup>rd</sup> Cir. 2002); Bieros v. Nicola, 857 F. Supp. 445, 446 (E.D. Pa. 1994) (the standards for a temporary restraining order are the same as those for a preliminary injunction).

As this Court's jurisdiction is grounded in Plaintiff's Lanham Act claim, we will address it at the outset. To bring a meritorious claim of trade dress infringement under the Lanham Act, a plaintiff must demonstrate that (1) the allegedly infringing design or packaging feature of the product in question is non-functional, (2) the feature is inherently distinctive or has acquired secondary meaning, and (3) consumers are likely to confuse the source of the plaintiff's product with that of the defendant's product. Shire U.S., Inc. v. Barr Labs., Inc., 329 F.3d 348, 353 (3<sup>rd</sup> Cir. 2003) (citing Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205, 210-11 (2000)); See generally, 15 U.S.C. 1125(a). Plaintiff PERK contends that Defendants have infringed upon protected trade dress by bringing to market a glucose tolerance beverage product that is substantially similar to the PERK product. Specifically, Plaintiff points to the fact that both products are non-carbonated and offered in orange and fruit punch flavors, and that both are packaged in plastic bottles and shrink-wrapped. This Court, however, finds no merit to Plaintiff's Lanham Act claim, as none of these similarities

implicate a non-functional design or packaging feature of the beverage product, let alone one that is "inherently distinctive" or has acquired secondary meaning in the marketplace. See Wal-Mart Stores, Inc., 529 U.S. at 210.

Of the four product characteristics identified by Plaintiff, only the plastic bottles and shrink-wrapping are likely to qualify as trade dress under the Lanham Act. Trade dress originally referred to the packaging or "dressing" of a product, but has since been expanded to encompass the design of a product, where such packaging or design serves to identify the product's source. See Wal-Mart Stores, Inc., 529 U.S. at 209-10; Two Pesos v. Taco Cabana, 505 U.S. 763, 771 (1992); Shire U.S., Inc., 329 F.3d at 353. However, to receive Lanham Act protection, the unique design or packaging elements must be purely non-functional, serving "no purpose other than identification." Keene Corp. v. Paraflex Industries, Inc., 653 F.2d 822, 826 (3<sup>rd</sup> Cir. 1981); see also Traffix Devices v. Mktg. Displays, 532 U.S. 23, 32 (2001) (a product feature is functional "if it is essential to the use or purpose of the article or if it affects the cost or quality of the article"). Plaintiff admits in its Complaint that the use of plastic bottles is "beneficial," both in terms of preserving the beverage's taste, stability, and shelf life, and in decreasing shipping costs. Complaint ¶ 13. Furthermore, Plaintiff has made no effort to suggest that the

shrink-wrapping of the PERK product serves a uniquely identifying purpose rather than a functional one. With respect to these two features of the product's packaging, it is clear that Plaintiff cannot satisfy the first element of a Lanham Act claim.

Plaintiff also alleges trade dress violation on the grounds that the Ever Scientific beverage product is offered in two of the same flavors as the PERK product, and is similarly non-carbonated. Plaintiff contends that the lack of carbonation, in particular, serves to distinguish Plaintiff's product from the majority of glucose tolerance beverage products on the market, which since the late 1970's have all been carbonated. However unique they may be, it is doubtful that these inherent product features would qualify as trade dress, which refers to product packaging, design, or labeling. Trade dress protection, unlike patent protection, is not intended to reward creators for their innovation in product engineering or development. Traffix Devices, 532 U.S. at 34-35; see also Shire U.S., Inc., 329 F.3d at 353. Furthermore, even if the flavor and composition of a beverage product qualified as trade dress, this Court cannot find that such features are purely non-functional. While this Court recognizes that Plaintiff may have designed its product to stand out in a market of carbonated glucose tolerant beverage products, the lack of carbonation and unique flavor profiles also have a functional purpose beyond brand identification: namely, making

the product more palatable to the patient. A functional product feature, such as lack of carbonation, will not be protected simply because an investment has been made to encourage the public to associate that feature with a single manufacturer or seller. Traffix Devices, 532 U.S. at 34-35.

Not only has Plaintiff failed to satisfy the first element of a prima facie claim for trade dress protection, but it is unlikely to succeed with respect to the second element, which requires that the trade dress be inherently distinctive or have acquired secondary meaning. There is nothing "inherently distinctive" about packaging a product in plastic bottles and shrink-wrap. Furthermore, a product's design, including its color, can never be inherently distinctive. Wal-Mart Stores, Inc., 529 U.S. at 212-13. We believe that this rule likewise prohibits a finding of inherent distinctiveness in a beverage's flavoring and composition.

This Court also rejects Plaintiff's contention that the unique elements of the PERK beverage product have acquired secondary meaning. To establish secondary meaning, a plaintiff must show that, in the minds of the public, the "primary significance" of a product feature is in identifying the producer of the product, rather than the product itself. Ideal Toy Corp. v. Plawner Toy Mfg. Corp., 685 F.2d 78, 82 (3<sup>rd</sup> Cir. 1982) (citing Inwood Laboratories, 456 U.S. 844, 851, n.11 (1982)).

One of the factors relevant to establishing a product feature's secondary meaning is the length of use. Ideal Toy Corp., 685 F.2d at 82. Given that Plaintiff only received approval from the FDA to begin marketing in November 2003, the PERK product, including its allegedly distinctive features, has been on the market for less than two years. As the market for glucose tolerant beverages originated in the 1970's, it is extremely unlikely that purchasers of Plaintiff's product have, in a matter of months, come to view its plastic packaging and lack of carbonation as a designation of the product's source rather than features of the product itself.

### **Conclusion**

Plaintiff PERK has failed to demonstrate that the trade dress of its glucose tolerant beverage product is non-functional and inherently descriptive of the product's source. Thus, Plaintiff cannot make out a valid cause of action under the Lanham Act, and Plaintiff's Motion for a Temporary Restraining Order must be denied. Furthermore, in the absence of a meritorious federal claim, this Court lacks subject matter jurisdiction over the remaining state law claims.

An appropriate Order follows.

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EVER SCIENTIFIC, INC.,	:	
REZA ARDEKANI, JOANNE ARDEKANI,	:	
and JAY REINHARDT,	:	
	:	
Defendants.	:	

**ORDER**

AND NOW, this 11th day of April, 2005, upon consideration of Plaintiff Perk Scientific, Inc.'s Motion for a Temporary Restraining Order (Doc. No. 2), and all responses thereto, it is hereby ORDERED that the Motion is DENIED.

It is FURTHER ORDERED that Count I of this action, alleging violations of 15 U.S.C. § 1125(a), is DISMISSED, and that this case is DISMISSED for lack of subject matter jurisdiction.

BY THE COURT:

s/J. Curtis Joyner

J. CURTIS JOYNER, J.