

Pom Wonderful Likely to Succeed in Infringement Claim Against “p?m”-Branded Beverage: Pom Wonderful LLC v. Hubbard

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Pom Wonderful LLC v. Hubbard

The U.S. Court of Appeals for the Ninth Circuit reversed and remanded a district court decision denying a preliminary injunction motion in a trademark infringement action, holding that the district court committed clear error in determining that the plaintiff was unlikely to demonstrate a likelihood of consumer confusion based on a competitor’s use of the word “p?m” for a pomegranate-flavored beverage. *Pom Wonderful LLC v. Hubbard*, Case No. 14-55253 (9th Cir., Dec. 30, 2014) (Ebel, J.).

Plaintiff Pom Wonderful owns registered trademark rights for a family of “POM” trademarks in connection with various goods, including pomegranate beverages. Upon discovering the defendant’s use of the word “p?m” in connection with the advertising and sale of a pomegranate-flavored energy drink, Pom Wonderful filed a trademark infringement action. Pom Wonderful moved to preliminarily enjoin the defendant from advertising or selling its “p?m” beverage. The district court denied Pom Wonderful’s preliminary injunction motion, reasoning that based on the eight *Sleekcraft* factors (guiding a trademark likelihood of confusion analysis), Pom Wonderful was unlikely to prove a likelihood of consumer confusion between the POM and “p?m” beverages and was therefore unlikely to succeed on the merits of its claim. Pom Wonderful appealed.

On appeal, the 9th Circuit concluded that it was “clear error” for the district court to determine Pom Wonderful unlikely to prove likelihood of consumer confusion as to the source of the POM and “p?m” beverages. The 9th Circuit agreed with the district court that Pom Wonderful’s “POM” trademarks are strong, that the parties’ respective beverage goods are “related” and that consumers are likely to exercise a low degree of care and sophistication in selecting the parties’ goods—*Sleekcraft* factors supporting Pom Wonderful. However, the 9th Circuit disagreed with the district court’s analysis and treatment of the remaining *Sleekcraft* factors.

First, the 9th Circuit reasoned that the district court improperly analyzed the similarity of the parties’ marks by giving greater weight to the marks’ differences when POM and “p?m” are visually similar, phonetically identical, and semantically identical (*i.e.*, each refer to pomegranate flavoring and/or ingredients). Second, the 9th Circuit found that Pom Wonderful would likely be able to prove market convergence as both companies’ products are similar, marketed to a similar audience and are sold

in supermarkets, including in an overlapping supermarket chain. The 9th Circuit explained that the district court used an improper standard to analyze market convergence when it required Pom Wonderful to prove its goods were sold in the same brick and mortar stores as the defendant's, as identical market channels are not required to prove a likelihood of market convergence. Finally, the 9th Circuit explained that the *Sleekcraft* factors pertaining to actual confusion, defendant's intent and product expansion were *neutral* and should not have been weighed against Pom Wonderful.

Concluding that five out of eight *Sleekcraft* factors favored Pom Wonderful, and that the remaining three factors were neutral, the 9th Circuit reversed the district court's finding that Pom Wonderful was unlikely to succeed on the merits of its trademark infringement claim and remanded the case to the district court with instructions to consider the other preliminary injunction factors in light of the Court's decision.

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