SPC Guiding Case No. 161: Guangzhou Wanglaoji Health Industry Co., Ltd. v. Jiaduobao (China) Beverages Co., Ltd. (False Advertising Dispute)

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Unofficial English translation prepared for reference only. The official Chinese text prevails.

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Keywords

Civil / unfair competition / false advertising / advertising language / misleading / improper appropriation of goodwill

Holding

In determining whether an advertisement constitutes false advertising as prescribed by the Anti-Unfair Competition Law, a people's court shall make its judgment by combining such factors as whether the content of the relevant advertising language is ambiguous, whether it is likely to mislead the relevant public, and whether the actor was at fault for false advertising. Where one party, based on the parties' former trademark license contract relationship and its own contribution to enhancing the goodwill of the relevant trademark, publishes the advertising language in issue to inform consumers of basic facts, which conforms to the objective circumstances, there is no possibility of misleading the relevant public, and there is no fault in improperly appropriating the popularity and goodwill of the relevant trademark, it does not constitute false advertising as prescribed by the Anti-Unfair Competition Law.

Basic Facts

Guangzhou Pharmaceutical Holdings Limited ("GPHL") is the trademark owner of the "Wanglaoji" series of registered trademarks, Nos. 626155, 3980709, and 9095940. The categories of goods for which the above trademarks were approved are all Class 32, including non-alcoholic beverages, fruit juices, and plant beverages. On March 28 and September 14, 1995, Hongdao Group Limited ("Hongdao Group") and the Wanglaoji Food and Beverage Branch of Guangzhou Yangcheng Pharmaceutical Co., Ltd. separately entered into a Trademark License Contract and a Supplementary Agreement to the Trademark License Contract, obtaining the exclusive right to use Trademark No. 626155 to produce and sell red paper-packaged and canned herbal tea beverages bearing the three characters "Wanglaoji." On June 14, 1997, Chen Hongdao was granted a Design Patent Certificate by the State Patent Office, obtaining the design patent for "Wanglaoji" with the design name "can label." On May 2, 2000, GPHL (licensor) and Hongdao Group (licensee) entered into a Trademark License Agreement, stipulating that the licensor authorized the licensee to use registered trademark "Wanglaoji," No. 626155, to produce and sell red canned and red bottled Wanglaoji herbal tea. The licensee could not, without the licensor's written consent, sub-license the trademark to any third party for use, except that this restriction did not apply where an enterprise in which the licensee invested (including wholly-owned or joint-venture enterprises) used the trademark, subject to notifying the licensor; apart from the green paper-packaged "Wanglaoji" herbal tea already produced and sold by the licensor itself and its subordinate enterprises, the licensor could not use the "Wanglaoji" trademark on Class 32 goods (beverages) or authorize a third party to use it; the parties agreed that the nature of the license was an exclusive license, with a term from May 2, 2000 to May 2, 2010. In September 1998, Hongdao Group invested to establish Dongguan Jiaduobao Food and Beverage Co., Ltd., later renamed Guangdong Jiaduobao Beverage and Food Co., Ltd. Jiaduobao (China) Beverages Co., Ltd. ("Jiaduobao China Company") was established in March 2004 and is an affiliated enterprise of the Jiaduobao Group.

Thereafter, through long-term multi-channel marketing, public welfare activities, and advertising by Hongdao Group and its affiliated companies, the red-canned “Wanglaoji” herbal tea brand was cultivated and gained numerous honors, such as: the canned “Wanglaoji” herbal tea beverage being found by the Intermediate People’s Court of Foshan City, Guangdong Province in 2003 to be a well-known commodity, and the packaging decoration of the canned “Wanglaoji” herbal tea being found to be the packaging decoration of a well-known commodity; the canned “Wanglaoji” herbal tea being repeatedly rated as a “Most Influential Brand” by relevant industry associations; and, according to the certification of the China Industry Enterprise Information Release Center, the canned “Wanglaoji” herbal tea ranking first in market sales volume or sales amount in each of the years 2007 to 2012. After its establishment, Jiaduobao China Company began to use the aforementioned “Wanglaoji” trademark to produce red canned herbal tea (with the “Wanglaoji” trademark printed from top to bottom on both symmetrical sides of the can).

On May 9, 2012, the China International Economic and Trade Arbitration Commission rendered a final award in the trademark license contract dispute between GPHL and Hongdao Group: (1) the Supplementary Agreement to the “Wanglaoji” Trademark License and the Supplementary Agreement to the “Wanglaoji” Trademark License Contract were invalid; (2) Hongdao Group shall stop using the “Wanglaoji” trademark.

On May 25, 2012, GPHL and Guangzhou Wanglaoji Health Industry Co., Ltd. (“Health Industry Company”) entered into a Trademark License Contract, licensing Health Industry Company to use the “Wanglaoji” trademark, No. 3980709. Around June 2012, Health Industry Company began producing “Wanglaoji” red canned herbal tea.

In March 2013, Health Industry Company purchased at several supermarkets in Chongqing “Jiaduobao” red canned herbal tea products with the advertising language “The nation’s sales-leading red canned herbal tea renamed Jiaduobao” printed on the outer packaging, and handbags bearing the same advertising language. According to Notarial Certificate (2013) Yu Zheng Zi No. 17516 issued by the Chongqing Notary Office, “Jiaduobao” red canned herbal tea products were sold on the website “www.womai.com” (COFCO Womai.com), and the sales page carried the advertising language “The nation’s sales-leading red canned herbal tea renamed Jiaduobao.” According to Notarial Certificate (2013) Yu Zheng Zi No. 20363, the CCTV.com advertising channel VIP Brand Club also carried advertising for “Jiaduobao” red canned herbal tea products with the language “The nation’s sales-leading red canned herbal tea renamed Jiaduobao.” On May 16, 2012, the food channel of People’s Daily Online reported under the title “Red Canned Wanglaoji Renamed ‘Jiaduobao,’ Formula and Process Unchanged.” On May 18, 2012, Sohu News reported under the title “Red Canned Wanglaoji Renamed Jiaduobao.” On May 23, 2012, the electronic edition of China Food News reported under the title “Jiaduobao Is the Former Wanglaoji”; on the same day, NetEase News also reported under the title “Red Canned ‘Wanglaoji’ Officially Renamed ‘Jiaduobao,’” noting the information source as the Beijing Evening News. On June 1, 2012, China Youth Daily reported under the title “Jiaduobao Herbal Tea Launched Nationwide, Red Canned Wanglaoji Officially Renamed.”

Health Industry Company held that the above advertising content was inconsistent with objective facts and caused consumers to form a mistaken understanding, and requested a finding that the advertisements containing the advertising language in issue published by Jiaduobao China Company constituted unfair competition and false advertising as prescribed by the Anti-Unfair Competition Law, and an order to immediately stop publishing television, online, newspaper, and magazine advertisements containing the advertising language in issue or similar advertising language.

Judgment

The Fifth Intermediate People’s Court of Chongqing rendered Civil Judgment (2013) Yu Wu Zhong Fa Min Chu Zi No. 00345 on June 26, 2014: 1. confirm that the defendant Jiaduobao China Company’s publication of advertising containing the advertising language “The nation’s sales-leading red canned herbal tea renamed Jiaduobao” constituted false advertising as unfair competition; 2. the defendant Jiaduobao China Company shall immediately stop using and shall destroy, delete, and replace the product packaging and

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television, online, video, and print media advertisements containing the advertising language “The nation’s sales-leading red canned herbal tea renamed Jiaduobao”; 3. the defendant Jiaduobao China Company shall, within ten days after this judgment takes effect, publish a statement in Chongqing Daily to eliminate the impact (the content of the statement shall be subject to review by this court); 4. the defendant Jiaduobao China Company shall, within ten days after this judgment takes effect, compensate the plaintiff Health Industry Company for economic losses and reasonable expenses of RMB 400,000; 5. the remaining claims of the plaintiff Health Industry Company were dismissed. After the judgment was pronounced, Jiaduobao China Company and Health Industry Company appealed. The Higher People’s Court of Chongqing rendered Civil Judgment (2014) Yu Gao Fa Min Zhong Zi No. 00318 on December 15, 2015, dismissing the appeal and affirming the original judgment. Jiaduobao China Company, dissatisfied, applied to the Supreme People’s Court for retrial. The Supreme People’s Court rendered Civil Judgment (2017) Zui Gao Fa Min Zai No. 151 on May 28, 2019: 1. revoke Civil Judgment (2014) Yu Gao Fa Min Zhong Zi No. 00318 of the Higher People’s Court of Chongqing; 2. revoke Civil Judgment (2013) Yu Wu Zhong Fa Min Chu Zi No. 00345 of the Fifth Intermediate People’s Court of Chongqing; 3. dismiss the claims of Health Industry Company.

Reasoning

The Supreme People’s Court held: whether Jiaduobao China Company’s use of the advertising language “The nation’s sales-leading red canned herbal tea renamed Jiaduobao” constituted false advertising must be determined by combining the specific facts of the case, according to everyday life experience and the general attention of the relevant public, judging whether the advertising language in issue was one-sided, whether it was ambiguous, and whether it was likely to mislead the relevant public.

First, judging from the meaning of the advertising language in issue, Jiaduobao China Company’s description and promotion of the advertising language “The nation’s sales-leading red canned herbal tea renamed Jiaduobao” was truthful and conformed to objective facts. According to the facts found, Hongdao Group had exclusively produced and sold “Wanglaoji” red canned herbal tea since obtaining the license to use the “Wanglaoji” trademark in 1995, until May 9, 2012, when the China International Economic and Trade Arbitration Commission rendered its arbitral award on the trademark license contract between GPHL and Hongdao Group, after which Hongdao Group stopped using the “Wanglaoji” trademark. During the long period of seventeen years, Jiaduobao China Company and its affiliated companies, as licensees of the “Wanglaoji” trademark, had, through years of advertising and use, already caused the “Wanglaoji” red canned herbal tea to enjoy very high popularity and reputation in the herbal tea market. According to the certification of the China Industry Enterprise Information Release Center, the canned “Wanglaoji” herbal tea ranked first in market sales volume or sales amount in each of the years 2007 to 2012. During the period of the “Wanglaoji” trademark license, GPHL did not produce or sell “Wanglaoji” red canned herbal tea. Therefore, the first half of the advertising language in issue, “the nation’s sales-leading red canned herbal tea,” conformed to the statistical conclusions and contained no falsehood, and its reference was also very clear, referring to the “Wanglaoji” red canned herbal tea produced and sold by Jiaduobao China Company and its affiliated companies. On May 9, 2012, the “Wanglaoji” trademark license agreement was declared invalid by the arbitral award of the China International Economic and Trade Arbitration Commission, and Jiaduobao China Company and its affiliated companies began producing “Jiaduobao” red canned herbal tea. Therefore, the second half of the advertising language in issue, declaring “renamed Jiaduobao,” was also a description of objective facts.

Second, judging from the purpose of the Anti-Unfair Competition Law’s regulation of false advertising, the Anti-Unfair Competition Law maintains fair market competition order by prohibiting false advertising of goods or services. On the one hand, from the perspective of the actor of unfair competition, the infringer, through false advertising of products or services, such as untrue or one-sided advertising of place of origin, performance, use, production period, and producer, obtains competitive advantages and market opportunities and harms the rights and interests of the rights holder; on the other hand, from the consumer’s

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perspective, it is precisely the infringer's false advertising of goods or services that causes consumers to be misled into mistaken purchases, harming the rights and interests of the rights holder. Therefore, the foothold of false advertising under the Anti-Unfair Competition Law lies in misleading false advertising; if the advertising of goods or services does not mislead the relevant public, it is not false advertising regulated by the Anti-Unfair Competition Law. In this case, during the trademark license period, Jiaduobao China Company and its affiliated companies, through years of sustained and large-scale advertising and use, not only significantly enhanced the popularity of Wanglaoji red canned herbal tea but also conveyed to consumers that the actual business operator of Wanglaoji red canned herbal tea was Jiaduobao China Company and its affiliated companies. Because the "Wanglaoji" red canned herbal tea produced by Jiaduobao China Company and its affiliated companies during the trademark license period had already gained very high popularity, what the relevant public generally recognized was the "Wanglaoji" red canned herbal tea produced by Jiaduobao China Company, not the "Wanglaoji" red canned herbal tea produced and sold by Health Industry Company around June 2012. After Jiaduobao China Company and its affiliated companies no longer produced "Wanglaoji" red canned herbal tea, Jiaduobao China Company's use of the advertising language in issue was in fact an exercise of its duty to inform the relevant public, telling them that the former "Wanglaoji" red canned herbal tea now bore the Jiaduobao trademark; otherwise the relevant public would instead mistakenly believe that the "Wanglaoji" red canned herbal tea produced by Health Industry Company was the "Wanglaoji" red canned herbal tea formerly produced by Jiaduobao China Company. Therefore, Jiaduobao China Company's use of the advertising language in issue did not carry a possibility of misleading the relevant public into mistaken purchases; on the contrary, without the use of the advertising language in issue, the relevant public would have the possibility of being misled into mistaken purchases.

Third, whether the advertising language in issue "The nation's sales-leading red canned herbal tea renamed Jiaduobao" improperly and completely appropriated the popularity and good goodwill of "Wanglaoji" red canned herbal tea, causing the "Wanglaoji" red canned herbal tea to intangibly lose its originally held popularity and goodwill and causing the relevant public to mistakenly believe that the "Wanglaoji" trademark had ceased use or was no longer in use. First, although the popularity and good reputation of the "Wanglaoji" trademark were the result of the joint advertising and use of GPHL as trademark owner and Jiaduobao China Company and its affiliated companies, the enhancement of the popularity and the enormous goodwill of the "Wanglaoji" trademark mainly originated from the large amount of advertising and use by Jiaduobao China Company and its affiliated companies during the trademark license period. Even if Jiaduobao China Company's use of the advertising language in issue appropriated part of the goodwill of the "Wanglaoji" trademark, because the goodwill of the "Wanglaoji" trademark mainly originated from the contribution of Jiaduobao China Company and its affiliated companies, such appropriation had a certain reasonableness. Second, after GPHL recovered the "Wanglaoji" trademark, it began to authorize Health Industry Company to produce "Wanglaoji" red canned herbal tea, and this use itself had already obtained the goodwill and reputation of the Wanglaoji trademark. Third, Health Industry Company began producing "Wanglaoji" red canned herbal tea in June 2012, so consumers seeing the advertising language in issue would not objectively mistakenly believe that the "Wanglaoji" trademark had ceased use or was no longer in use; the goodwill condensed in the "Wanglaoji" red canned herbal tea would naturally be enjoyed by Health Industry Company after it produced "Wanglaoji" red canned herbal tea. Fourth, Health Industry Company began producing "Wanglaoji" red canned herbal tea only after the trademark license contract was declared invalid by the arbitral award, and it had not produced red canned herbal tea before that; therefore, the advertising language in issue could not cause the "Wanglaoji" red canned herbal tea it produced to intangibly lose its originally held popularity and goodwill.

In this case, although the advertising language in issue did not completely reflect the relevant facts of why Jiaduobao China Company used, ceased using, and changed the trademark during the trademark license period and after the termination of the trademark license contract, which was indeed somewhat improper,

Jiaduobao China Company, after the termination of the trademark license contract, in order to preserve the rights and interests it enjoyed from its contribution to enhancing the goodwill of “Wanglaoji” red canned herbal tea during the trademark license period, informed consumers of the basic fact of renaming “Wanglaoji” red canned herbal tea to “Jiaduobao,” and it had no obvious impropriety subjectively. Objectively, based on the brevity of the advertising language, the circumstances of the “Wanglaoji” trademark license, the enormous contribution of Jiaduobao China Company and its affiliated companies to enhancing the goodwill of the “Wanglaoji” trademark, consumers’ cognition of the actual business operator of Wanglaoji red canned herbal tea, and combining consumers’ general attention, the facts of misunderstanding, and the actual situation of the advertised object, Jiaduobao China Company’s use of the advertising language in issue did not produce a misleading effect, did not harm fair competition market order or the lawful rights and interests of consumers, and did not constitute false advertising. Even if some consumers, after seeing the advertising language in issue, might form the cognition that the “Wanglaoji” trademark had been changed to the “Jiaduobao” trademark and that the original “Wanglaoji” trademark had ceased use or was no longer in use, this was still a consequence of possible confusion in the relevant market after the separation of the trademark controller from the actual user in a trademark license relationship, especially after the termination of the trademark license relationship, but such a consequence of confusion does not necessarily produce the effect of “misleading” under the Anti-Unfair Competition Law.

Relevant Legal Provisions

Article 8, paragraph 1 of the Anti-Unfair Competition Law of the People’s Republic of China (2019 Amendment) (the case applied Article 9, paragraph 1 of the Anti-Unfair Competition Law of the People’s Republic of China, effective 1993).

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