

YUNNAN CAMELIZA	}	IPC NO. 14-2008-00205
PHARMACEUTICALS IMPORT	}	Case Filed : 15 September 2008
AND CO., LTD.,	}	
Opposer,	}	Opposition to :
	}	Appl'n No. : 4-2008-002149
-versus-	}	Date Filed : 21 February 2008
	}	
CHITO LU,	}	Trademark : "TIEN CHI"
Respondent-Applicant.	}	
x-----x		Decision No. 2009-58

DECISION

This pertains to a Verified Opposition filed on 15 September 2008 by herein opposer, Yunnan Cameliza Pharmaceuticals Import and Co., Ltd., a company duly registered and existing under the laws of China, with principal address at Lianchi Beicheng Hongta, Yuxi, Yunnan, China, against the application filed on 21 February 2008 bearing Serial No. 4-2008-002149 for the registration of the trademark "TIEN CHI" used for goods in Class 05 namely, pharmaceutical preparations and medicine for the treatment of cardiovascular diseases, cerebrovascular disease, respiratory system disease, emphysema, stomach ache, excessive acid in the stomach, eructation, flatulence, duodenal ulcers and chronic gastritis, cough and cold; for use in the treatment of insomnia, backaches, restlessness, lung trouble, tuberculosis, kidney trouble, liver trouble, heart trouble, stomach trouble, gynecological diseases; skin disease, rhinitis, tracheitis, pneumonia, asthma, esophagitis, enteritis, hepatitis, cardiovascular diseases, stroke, cancer, influenza, cough, fever, rubella, poliomyelitis, dysentery, malaria, tonsillitis, laryngitis, pharyngitis, trachoma, conjunctivitis, headache, sprain, trauma, bruise, eczema, dermatitis; herbal remedies, namely, herbal tea (medicated), herbal granules, dried herbs and herbal extract for medical purposes; plant extract products for medical purposes; bee products, namely, bee pollen for use as dietary food supplement; dietetic foods for medical purposes; vitamin-containing and mineral-containing food supplements; ginseng products, namely, food supplements that enhance human immunity, invigorate cells, lengthen the life span, reduce blood sugar, cut down blood fat, effective tonic good for adjusting the function of the cerebral centre, promoting the biosynthesis of the liver and the medulla, stimulating blood circulation, relieving fatigue and strengthening resistance against attack of diseases, helpful in children's growth, enhance growth of the younger ones, which application was published in the Intellectual Property Office Official Gazette, officially released for circulation on 18 July 2008.

The respondent-applicant in this instant opposition is Chito Lu with address at 137 G/F Malaya St., San Rafael Village, Tondo, Manila.

The allegation of facts and ground for opposition are as follows:

5. Opposer manufactures and distributes primarily tienchi ginseng tablets, powder and related herbal preparations under its internationally well-known trademark "Camella Brand". In the Philippines, Opposer is the registered owner of "Camella Brand & Device of Flower with Chinese Character" under Certificate of Registration No. 4-2005-011311 issued on April 2, 2007 for goods under Class 05, which includes medicated oil, vitamins (tablets), herbal food supplement (capsule) herbal powder for headache, all of which consist primarily of the herbal product called "ginseng", which in Chinese language, generally means: "Tien Chi"; Certified true copy of the Certificate of Registration of Opposer is hereto attached as Annex "B" and "B-1".

x        x        x

7. The registration of the mark “Tien Chi” for goods under Class 05 in the name of the Respondent-Applicant is not permissible under the trademark law and will cause grave and irreparable injury and damage to the Opposer, for which reason it opposes said application.

8. The registration of the mark “Tien Chi” in the name of Respondent-Applicant will violate and contravene the provisions of Section 123.1 (g), (h) and (i) of R.A. 8293 x x x.

9. Opposer manufactures and sells in China, the Philippines and many other countries, tienchi ginseng tablets, powder and related herbal preparations under its “Camella” brand. The registration of the trademark “Tien Chi” in the name of Respondent-Applicant will mislead and confuse the public as to the nature, quality, characteristics or geographical origin of the goods or services;

10. The word “Tien Chi” or “TienChi” refers generally to “ginseng” in Chinese language. Hence, this is a generic word or mark that is merely the equivalent name in Chinese for the goods that they seek to identify.

11. “Tien Chi” or “tienchi” and “ginseng” are similar words that have become customary or usual to designate in the established trade of medical herbal preparations, extracts or formulations;

12. The class of goods for which the trademark “Tien Chi” is sought to be applied or be identified by the Respondent-Applicant, is also so ridiculously broad that it covers practically every type of disease, ailment or condition of human beings;

13. Opposer has long been using the name “Tienchi” in its various products under the Camella Brand, such as the following:

- 13.1 “Raw Tienchi Ginseng Tablets”
- 13.2 “Raw Tienchi Powder”
- 13.3 “Steamed Tienchi Powder”
- 13.4 “Steamed Tienchi Tablets”

Attached hereto is an empty carton package of Raw Tienchi Tablets bearing the Camella Brand, and product leaflets of raw Tienchi Tablets, Steamed Tienchi Tablets, steamed Tienchi-Ginseng Tablets and Raw Tienchi Ginseng Tablets showing the composition, indications and administration/dosage of the products, respectively marked as Annexes “C”, “C-1”, “C-2”, “C-3” and “C-4” hereof;

14. These products have confirmed registrations with the Chinese Medicine Council of Hong Kong; copies of the Notices of Confirmation and hereto attached as Annexes “D”, “D-1”, “D-2” and “D-3”;

15. The Opposer has also signed a marketing and distribution agreement with a Philippine company Maximos Marketing Corporation, a corporation duly organized and existing under Philippine laws with office at A.S. Fortuna St., Banilad, Mandaue City, Cebu. Under the said agreement, Camella will distribute the following products of the Opposer under the “Camella Brand”, to wit:

- 15.1 Raw Tienchi Ginseng Tablets;
- 15.2 Steamed Tienchi Ginseng Tablets;
- 15.3 Raw Tienchi Ginseng Tablets;
- 15.4 Steamed Tienchi Ginseng Powder;

Copy of the authenticated Agreement is hereto attached as Annex "E" (with sub-markings "E1", "E-2", "e-3" and "E-4") hereof;

16. Opposer's ownership and prior right to the trademark "Camella" brand is likewise registered in China under Registration no. 75277 and by reason of which, it has entered into a Trademark License Agreement with Weihe Pharmaceutical Co. Ltd. To, among others, obtain production license from the government and to market its products in their territory; authenticated copy of the Trademark License Agreement is hereto attached as Annex "F";

17. That by reason of the afore-mentioned Trademark License Agreement, Weihe Pharmaceutical Co. Ltd. has secured a Free Sale Certificate from the State Food and Drug Administration of China, authorizing the manufacturing and selling of Opposer's products in China; authenticated copy of the Free Sale Certificate, indicating the authorized products "Raw Tienchi Ginseng Tablets", "Steamed Tienchi Ginseng Tablets"; Raw Ginseng powder" and "Steamed Tienchi Ginseng Powder", is hereto attached as Annex "G";

18. Opposer has also manufactured, sold and distributed the said Tienchi products under the Camella "brand" not only in the Philippines and China, but also worldwide;

19. According to Section 138 of Republic Act No. 8293, the Certificate of Registration is a prima facie evidence of the validity of the registration, the registrant's ownership of the mark and of the exclusive right to use the same in connection with the goods or services and those that are related thereto specified in the certificate.

20. Per Opposer's Certificate (Annex "B-1"), it has the right to use the Camella Brand in such goods as medicated oil, vitamins (tablets), herbal food supplement (capsule), herbal powder for headache;

21. As stated above, the herbal tablets and powder currently being manufactured and sold by Opposer are tienchi ginseng. To allow respondent-applicant to register the mark "tienchi" or "tien chi", which is a generic word will not only confuse and mislead the public, but violate the proprietary rights and interests, business reputation and goodwill of the Opposer;

22. The word "tienchi" or "tien chi" alone is not a mark that is capable of distinguishing the goods of the respondent-applicant or of any enterprise for that matter. It is akin to applying for trademark over the name "ginger" or "luya" in the vernacular. In other words, the name sought to be registered is merely generic and cannot be owned, acquired, usurped, and be vested legally on any person or entity. The word cannot be protected by trademark.

23. According to Wikipedia, tienchi ginseng is the Chinese name of pseudoginseng or Notoginseng, and is a species of the genus Panax. Indeed, tienchi ginseng is a generic name and cannot be covered by trademark. Copy of Wikipedia page downloaded from its website, is hereto attached as Annex "H".

Subsequently, this Bureau issued a Notice to Answer dated 25 September 2008 to herein respondent-applicant's agent, Ms. Perla Ang at respondent-applicant's office address, directing the filing of a Verified Answer within thirty (30) days from receipt. The notice was duly received on 20 October 2008 but despite sufficient lapse of time, this Bureau did not receive on 20 October 2008 but despite sufficient lapse of time, this Bureau did not receive an Answer not any motion relative thereto from respondent-applicant or its agent. Thence, in accordance to Section

11 of Office Order No. 79, series of 2005 or the Amendments to the Regulations on Inter Partes Proceedings, this instant case is deemed submitted for decision on the basis of the opposition and its evidence, offered and admitted as follows: Annexes "A", "A-1", "B", "B-1", "C", "C-1" to "C-4", and "H".

As to Annexes "D" to "G" and its sub-markings which are photocopies of the original documents, they are inadmissible in evidence pursuant to Section 7 of Office Order No. 79, series of 2005 or the Amendments to the Regulations on Inter Partes Proceedings which provides that in filing of petition or opposition, certified copied shall be allowed in lieu of the originals, and Section 33 of Rule 132 of the Rules of Court.

The Issue –

Whether or not respondent-applicant's trademark "TIEN CHI" covering class 05 is registrable under Section 123.1 (g), (h) and (i) of R.A. 8293 or the Intellectual Property Code of the Philippines.

Opposer in the case at bar, posits that respondent-applicant's mark "TIEN CHI" should be denied registration on the basis of Section 123.1 (d), R.A. 8293 or the Intellectual Property Code, which provides the criteria for the registration of a trademark, to wit:

"Sec. 123. Registrability. – 123.1 A mark cannot be registered if it:

x        x        x

(g) Is likely to mislead the public, particularly as to the nature, quality, characteristics or geographical origin of the goods or services;

(h) Consists exclusively of signs that are generic for the goods or services that they seek to identify;

(i) Consists exclusively of signs or of indications that have become customary or usual to designate the goods or services in everyday language or in bona fide and established trade practice;"

Records of this instant case show that respondent-applicant's applied mark consists of the words "TIEN CHI". Said mark is used for pharmaceutical preparations for the above-enumerated illness under Class 05 of the Nice Classification of Goods.

After perusal of the documentary evidence, this Bureau resolves that the applied mark "TIEN CHI" cannot be allowed registration pursuant to Section 123.1 (h) and (i), R.A. 8293 for being a generic mark.

In the case of Societe Des Produits Nestle, et al. vs Court of Appeals, G.R. No. 112012, 4 April 2001, the Supreme Court had the occasion to rule as to what is a generic mark, to wit:

"Generic marks are common words that describe an entire class of goods or services. Generic terms are those which constitute "the common descriptive name of an article or substance," or compromise the "genus of which the particular product is a species," or are "commonly used as the name or description of a kind of goods," or "imply reference to every member of a genus and the exclusion of individuating characters," or "refer to the basic nature of the wares or services provided rather than to the

more idiosyncratic characteristics of a particular product,” and are not legally protectable. On the other hand, a term is descriptive and therefore invalid as a trademark if, as understood in its normal and natural sense, it “forthwith conveys the characteristics, functions, qualities or ingredients of a product to one who has never seen it does not know what it is,” or “if it forthwith conveys an immediate idea of the ingredients, qualities or characteristics of the goods,” or if it clearly denotes what goods or services are provided in such a way that the consumer does not have to exercise powers of perception or imagination.”  
(Emphasis Supplied)

Opposer’s evidence, consisting of product leaflets, marked as Annexes “C”, “C-1” to “C-4” show that “Tienchi” is a world-famous precious herb of Yunnan produce, originally called Sanchi. This is similar to Ginseng which belongs to the Panax family, and is therefore called “Tienchi-Ginseng. It is a remedy for activating blood circulation, dispersing blood clots, enlivening arteries and veins, arresting hemorrhage, eliminating swelling and relieving pain. Further evidence of opposer consisting of downloaded page of Wikepedia, marked as Annex “H” reveals that the herb Panax pseudo-ginseng which is a species of the genus Panax has a Chinese name “Tian qi” or “Tianchi”.

Research findings likewise show that one of the best health preserving herbs with a common name “Noto” or “Pseudo-Ginseng” has a Chinese name “Tienchi” or “Tian San Qi”. ([www.healthymagnets.com/tienchi.htm](http://www.healthymagnets.com/tienchi.htm))

In the case at bar, respondent-applicant’s mark “TIEN CHI” used on goods under class 05 for the treatment of various illness cannot evade the fact that it is the same “TIENCHI” or “TIANCHI” Chinese herb that is famous as a hemostatic herb that both invigorates and builds blood. It is a generic term which belongs to a genus of which the particular product is a specie. Drug consumers particularly the Chinese Community is accustomed to designate this kind of Chinese medicine as “Tienchi” or “Tianchi”. The use of a generic word forming part of a trademark or trade name is always subject to the limitation that the registration does not acquire the exclusive right to the descriptive or generic term or word. Thus, respondent-applicant’s generic mark’s registration is proscribed pursuant to Section 123.1 (h) and (j) of Republic Act No. 8293 known as the Intellectual Property Code of the Philippines.

IN VIEW of all the forgoing, the instant Verified Opposition is, as it is hereby SUSTAINED. Consequently, trademark application bearing Serial No. 4-2008-002149 for the mark “TIEN CHI” filed on 21 February 2008 for goods in Class 05 namely, pharmaceutical preparations and medicine for the treatment of cardiovascular diseases, cerebrovascular disease, respiratory system disease, emphysema, stomach ache, excessive acid in the stomach, eructation, flatulence, duodenal ulcers and chronic gastritis, cough and cold; for use in the treatment of insomnia, backaches, restlessness, lung trouble, tuberculosis, kidney trouble, liver trouble, heart trouble, stomach trouble, gynecological diseases; skin disease, rhinitis, tracheitis, pneumonia, asthma, esophagitis, enteritis, hepatitis, cardiovascular diseases, stroke, cancer, influenza, cough, fever, rubella, poliomyelitis, dysentery, malaria, tonsillitis, laryngitis, pharyngitis, trachoma, conjunctivitis, headache, sprain, trauma, bruise, eczema, dermatitis; herbal remedies, namely, herbal tea (medicated), herbal granules, dried herbs and herbal extract for medical purposes; plant extract products for medical purposes; bee products, namely, bee pollen for use as dietary food supplement; dietetic foods for medical purposes; vitamin-containing and mineral-containing food supplements; ginseng products, namely, food supplements that enhance human immunity, invigorate cells, lengthen the life span, reduce blood sugar, cut down blood fat, effective tonic good for adjusting the function of the cerebral centre, promoting the biosynthesis of the liver and the medulla, stimulating blood circulation, relieving fatigue and strengthening resistance against attack of diseases, helpful in children’s growth, enhance growth of the younger ones is, as it is hereby, REJECTED.

Let the file wrapper of "TIEN CHI", subject matter of this case together with a copy of this Decision be forwarded to the Bureau of Trademarks (BOT) for appropriate action.

SO ORDERED.

Makati City, 28 April 2009.

ESTRELLITA BELTRAN-ABELARDO  
Director, Bureau of Legal Affairs  
Intellectual Property Office