



BAYER CONSUMER CARE AG,  
Opposer,

-versus-

DBC LLC,  
Respondent-Applicant.

X-----X

} IPC No. 14-2012-00202  
} Opposition to:  
} Appln. Serial No. 4-2009-009650  
} Date Filed: 23 September 2009  
} TM: "ELEVIV and DESIGN"  
}  
}  
}  
}

### NOTICE OF DECISION

#### NORBERTO S. GONZALES & ASSOCIATES

Counsel for the Opposer  
2302 Antel Global Corporate Center  
Dona Julia Vargas, Ortigas center  
Pasig City

#### VERA LAW

#### (DEL ROSARIO RABOCA GONZALES GRASPARIL)

Counsel for Respondent-Applicant  
2<sup>nd</sup> Floor A & V Crystal Tower 105 Esteban St.,  
Legaspi Village, Makati City

#### GREETINGS:

Please be informed that Decision No. 2013 - 163 dated August 08, 2013 (copy enclosed) was promulgated in the above entitled case.

Taguig City, August 08, 2013.

For the Director:

*Edwin O. Dating*  
Atty. EDWIN DANILO A. DATING  
Director III  
Bureau of Legal Affairs



<b>BAYER CONSUMER CARE AG,</b>	}	<b>IPC NO. 14-2012-00202</b>
Opposer,	}	Opposition to:
	}	
-versus-	}	Appln. Ser. No. 4-2009-009650
	}	Date Filed: 23 Sept. 2009
	}	
<b>RDBC LLC ,</b>	}	Trademark: <b>ELEVIV and DESIGN</b>
Respondent-Applicant.	}	
x-----x	}	Decision No. 2013- 163

### DECISION

**BAYER CONSUMER CARE AG**, (Opposer)<sup>1</sup> filed on 18 June 2012 an opposition to Trademark Application Serial No. 4-2009-009650. The application, filed by **DBC LLC** (Respondent-Applicant)<sup>2</sup>, covers the mark “ELEVIV AND DESIGN”, for use on “Dietary and nutritional supplements, nutritional shakes for use as meal substitute” under Class 03, nutritional bar for use as meal substitute” under Class 5 of the International Classification of Goods<sup>3</sup>.

The Opposer anchors its opposition on the following grounds:

“1. Opposer is the originator, true owner and first user of various internationally- known marks used on pharmaceutical preparations and consumer care products including the world’s leading over the counter medications and nutritional supplements, duly registered under Class 5 of the Nice Classification. These marks with sales exceeding 100 million Euros are as follows: BAYER ASPIRIN, ELEVIT, ELEVIT PRONATAL LOGO, ALEVE, CANESTEN, BEPANTHEN, BEPANTHOL, RENNIE and SUPRADYN. .

“2. Bayer Consumer Care AG is a division of Bayer Healthcare, with headquarters in Basel, Switzerland. It currently ranks among the top consumer health care companies in the world. The company supports the nutritionals, dermatological and gastrointestinal units of Bayer Healthcare.

“3. In the Philippines, the Opposer is the owner of the trademark registrations ELEVIT, Reg. No. 4-1997-119125 and ELEVIT PRONATAL LOGO, Reg. No. 4- 2001-001924 covering goods under

<sup>1</sup> A corporation organized and existing under the laws of the Switzerland with business address at Pter merian Str. 84, 4052 Basel, Switzerland

<sup>2</sup> With business address at 2889 Ashton Boulevard, Lehi, Utah, 84043 United States of America

<sup>3</sup> The Nice Classification of Goods and Services is for registering trademarks and service marks based on multilateral treaty administered by the WIPO, called the Nice Agreement Concerning the International Classification of Goods and Services for Registration of Marks concluded in 1957.

Class 5 of the Nice classification. Both registrations are active and in good order.

“4. Opposer has adopted and continuously used the aforesaid marks on its products up to the present. It has already developed an exceedingly valuable goodwill worldwide on the marks ELEVIT and ELEVIT PRONATAL LOGO which are used on pharmaceutical products and preparations, namely vitamin and mineral preparations, dietetic substances adapted for medical use. Therefore, it has every right to exclude others, such as the Respondent-Applicant, from registering or using a similar mark in the Philippines, more so if such use is made on the same class of goods.

“5. The filing of the ELEVIV and DESIGN, Appl. No. 4-2009-009650 under Class 5 by the Respondent-Applicant will cause confusion the part of the consumers or purchasers as it tends to create an impression that its products originate from the Opposer. Consumer familiar with the Opposer’s products would likely buy Respondent-Applicant’s products on the assumption that such products are made by the Opposer, thereby resulting in loss sales to the latter. Confusion as to the Respondent-Applicant’s affiliation, connection, association with the Opposer is likewise probable, considering that its mark is similar to the Opposer’s mark.

“6. The registration of the trademark ELEVIV AND DESIGN under Class 5 in the name of Respondent-Applicant will cause irreparable damage and injury to the petitioner within the contemplation of Section 134 of Republic Act 8293, otherwise known as the new Intellectual Property Code of the Philippines.”

To support its opposition, the Opposer submitted as evidence the following:

1. Print out of registration No. 41997119125 (Exhibit “A”);
2. Print out of registration no. 42001001924 (Exhibit “B”);
3. List of countries with trademark portfolio of ELEVIT (Exhibit “C”);
4. List of Philippine establishments selling ELEVIT and ELEVIT PRONATAL (Exhibit “D”);
5. Print-out of advertisements of ELEVIT (Exhibit “E”);
6. Document showing sales volume (Exhibit “F”);
7. Print-out of advertising over the internet (Exhibit “G”);

8. Copy of Special Power of attorney (Exhibit "H").

This Bureau issued a Notice to Answer and served a copy thereof upon the Respondent-Applicant on 10 August 2012. The Respondent-Applicant, however did not file an Answer. Thus, this Bureau issued Order No. 2013-362 dated 28 February 2013 declaring the Respondent-Applicant to have waived its right to file an Answer.

Should the Respondent-Applicant be allowed to register the trademark ELEVIV AND DESIGN?

The records show that at the time Respondent-Applicant applied for registration of the mark "ELEVIL and DESIGN" on 23 September 2009 for goods under Class 5, the Opposer already has an existing registrations for the marks "ELEVIT" on goods under Class 5, namely: "pharmaceutical products containing vitamins" and "ELEVIT PRONATAL LOGO" on goods under Class 5, namely: "Pharmaceutical and sanitary preparations, namely vitamin and mineral preparations, dietetic substances adapted for medical use".

The essence of trademark registration is to give protection to the owners of trademarks. The function of a trademark is to point out distinctly the origin or ownership of the goods to which it is affixed; to secure to him who has been instrumental in bringing into the market a superior article of merchandise, the fruit of his industry and skill; to assure the public that they are procuring the genuine article; to prevent fraud and imposition; and to protect the manufacturer against substitution and sale of an inferior and different article as his product.<sup>4</sup> Thus, Sec. 123.1 (d) of R. A. No. 8293, also known as The Intellectual Property Code of the Philippines ("IP Code") provides that a mark cannot be registered if it is identical with a registered mark belonging to a different proprietor or a mark with an earlier filing or priority date, in respect of the same goods or services or closely related goods or services or if it nearly resembles such a mark as to be likely to deceive or cause confusion.

In this regard, the records show that at the time the Respondent-Applicant filed its trademark application on 23 September 2009, the Opposer already has an existing registration for the trademark ELEVIT and ELEVIT AND LOGO issued on 23 July 2001 and 21 January 2006 respectively. The goods indicated in the Respondent-Applicant's trademark application are, therefore, similar and/or closely related to those covered by the Opposer's trademark registration.

The question is: Are the competing marks identical or closely resembling each other such that confusion or mistake is likely to occur?

Scrutinizing the composition of the trademarks involved in this case, it is observed that both marks, ELEVIL AND DESIGN and ELEVIT AND ELEVIT AND LOGO are almost identical with respect to the word component except for the last letter. Opposer used the letter 'T' in the last syllables, hence "VIT" while the Respondent-Applicant used 'L', hence its last syllable is "VIL". Both marks differing in last letter

---

<sup>4</sup> *Pribhdas J. Mirpuri v. Court of Appeals*, G. R. No. 114508, 19 November 1999.

are still phonetically similar. When pronounced, the words ELEVIL and ELEVIT sound the same and are *idem sonans*. Opposer's design consists of a sign of disproportionate size surmounting the letter "i" in ELEVIT. Likewise, Respondent-Applicant's design consist of a green leaf as an accent over the letter "i" in ELEVIL.

Although not entirely the same, there are no appreciable disparities between the two marks so as to avoid the likelihood of confusing one for the other especially when used on the same goods under Class 5. While not all the letters are the same, phonetically, there is a possibility that confusion would likely to occur. Moreover, the Opposer's products are pharmaceutical products and dietetic substances containing vitamins and minerals which are closely related to Respondent-Applicant's products which are nutritional and dietary supplements.


It has been held time and again that in cases of grave doubt between a newcomer who by the confusion has nothing to lose and everything to gain and one who by honest dealing has already achieved favour with the public, any doubt should be resolved against the newcomer in as much as the field from which he can select a desirable trademark to indicate the origin of his product is obviously a large one.<sup>5</sup>

In conclusion, the Respondent-Applicant's trademark application is proscribed by Section 123.1 (d) of the IP Code.

**WHEREFORE**, premises considered, the instant Opposition to Trademark Application No. 4-2009-009650 is hereby **SUSTAINED**. Let the filewrapper of the subject trademark application be returned, together with a copy of this Decision, to the Bureau of Trademarks for information and appropriate action.

**SO ORDERED.**

Taguig City, 8 August 2013.

  
Atty. NATHANIEL S. AREVALO  
Director IV  
Bureau of Legal Affairs

---

<sup>5</sup> Del Monte Corporation et. al. v. Court of Appeals, GR No. 78325, 25 January 1990.