



PEDIATRICA, INC.,  
Opposer,

**-versus-**

NOVAGEN PHARMACEUTICAL, INC.,  
Respondent-Applicant.

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}  
} IPC No. 14-2013-00217  
} Opposition:  
} Appln. Serial no. 4-2012-013191  
} Date filed: 29 October 2012  
} TM: "GROW KIDS"  
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}

### NOTICE OF DECISION

**OCHAVE & ESCALONA**  
Counsel for the Opposer  
No. 66 United Street  
Mandaluyong City

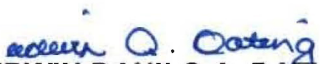
**NOVAGEN PHARMACEUTICAL INC.,**  
Respondent-Applicant  
7 Jose Cruz Street  
Ugong, Pasig City

#### GREETINGS:

Please be informed that Decision No. 2013 - 215 dated November 07, 2013 (copy enclosed) was promulgated in the above entitled case.

Taguig City, November 07, 2013.

For the Director:

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



PEDIATRICA, INC.,	}	IPC No. 14-2013-00217
Opposer,	}	Opposition to:
	}	
- versus -	}	Appln. Serial No. 4-2012-013191
	}	Date Filed: 29 October 2012
NOVAGEN PHARMACEUTICAL, INC.,	}	
Respondent-Applicant.	}	Trademark: <b>GROW KIDS</b>
x-----x	x	Decision No. 2013 - <u>215</u>

## DECISION

PEDIATRICA, INC.<sup>1</sup> ("Opposer") filed on 22 May 2013 an opposition to Trademark Application Serial No. 4-2012-013191. The application, filed by NOVAGEN PHARMACEUTICAL, INC.<sup>2</sup> ("Respondent-Applicant"), covers the mark GROW KIDS used on "multi-vitamins, food supplements" under Class 5 of the International Classification of goods.<sup>3</sup>

The Opposer alleges, among other things, the following:

"7. The mark GROW KIDS owned by Respondent-Applicant so resembles the trademark GROWEE owned by Opposer and duly registered with the IPO prior to the publication for opposition of the mark GROW KIDS.

"8. The mark GROW KIDS will likely cause confusion, mistake and deception on the part of the purchasing public, most especially considering that the opposed mark GROW KIDS is applied for the same class and goods as that of Opposer's trademark GROWEE, *i.e.* Class 05 of the International Classification of Goods as Food Supplements.

"9. The registration of the mark GROW KIDS in the name of the Respondent-Applicant will violate Sec. 123 of the IP Code, which provides, in part, that a mark cannot be registered if it:

x x x

Under the above-quoted provision, any mark, which is similar to a registered mark, shall be denied registration in respect of similar or related goods or if the mark applied for nearly resembles a registered mark that confusion or deception in the mind of the purchasers will likely result."

<sup>1</sup> A domestic corporation duly organized and existing under the laws of the Philippines, with office address at 3<sup>rd</sup> Floor Bonaventure Plaza, Ortigas Avenue, Greenhills, San Juan City, Philippines.

<sup>2</sup> Appears to be a domestic corporation, with office address at 7 Jose Cruz Street, Ugong, Pasig City, Philippines.

<sup>3</sup> Nice Classification is a classification of goods and services for the purpose of registering trademarks and service marks, based on a multilateral administered by the World Intellectual Property Organization. This treaty is called the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks concluded in 1957.

In support of the opposition, the Opposer submits the following evidence:

1. Exhibit "A" - Pertinent page of the IPO e-Gazette bearing publication date of 22 April 2013;
2. Exhibit "B" - Certified true copy of Certificate of Registration No. 4-1995-104490 for the trademark GROWEE;
3. Exhibits "C", "C-1" and "C-2" - Certified true copies of Affidavits of Use and Declaration of Actual Use;
4. Exhibit "D" - Sample product label bearing the trademark GROWEE actually used in commerce;
5. Exhibit "E" - Copy of the Certification and sales performance; and
6. Exhibit "F" - Certified true copy of the Certificate of Product Registration issued by the BFAD for the product bearing the trademark GROWEE.

This Bureau issued a Notice to Answer and served a copy thereof upon the Respondent-Applicant on 13 June 2013. The Respondent-Applicant, however, did not file its Verified Answer. Thus, this Bureau issued Order No. 2013-1399 dated 10 October 2013 declaring the Respondent-Applicant in default and submitting the case for decision based on the opposition, affidavit of witness and documentary or object evidence submitted by the Opposer.

Should the Respondent-Applicant's trademark application be allowed?

The Opposer anchored its opposition on Sec. 123.1 (d) of the Intellectual Property Code ("IP Code"), which provides that a mark cannot be registered if it:

(d) Is identical with a registered mark belonging to a different proprietor or a mark with an earlier filing or priority date, in respect of:

- (i) the same goods or services, or
- (ii) closely related goods or services, or
- (iii) if it nearly resembles such a mark as to be likely to deceive or cause confusion.

In this regard, records and evidence show that at the time the Respondent-Applicant filed its trademark application on 29 October 2012, the Opposer already has an existing trademark registration (No. 4-1995-104490) for GROWEE issued 04 September 2000 for used "*as a dietary supplement to normal growth and development in children food supplement*" under Class 5. The goods, on which the competing marks are used, therefore, are similar or closely related.

But are the competing marks identical or closely resemble each other that confusion or deception is likely to occur?

The only similarity between the competing marks is the first four letters comprising the word or prefix "GROW". "GROW" obviously means "*to increase in size; to expand; gain; to increase in amount or degree; to develop and reach maturity; to be*

*capable of growth*"<sup>4</sup>. Thus, considering that the marks are used on food supplement, "GROW" is not really unique if used as a trademark or as a part thereof for the subject goods. Indeed, "GROW" is clearly suggestive as to the kind of goods a mark with "GROW" as a component is attached to. What would make such trademark distinctive are the suffixes or appendages to the prefix "GROW" and/or the devices, if any.

Moreover, taking judicial notice of the contents and information in the Trademark Registry, it reveals that there are a number of registered marks with the prefix or word "GROW" and which cover goods or products for food supplement, to cite a few:

1. "GROW STAGE 3+" (Registration No. 4-2011-005118)<sup>5</sup> for use on *"nutritional preparations, namely, infant formula for children and ingredients for formulas for infants and children"*;
2. "GROW SCHOOL & DEVICE" (Registration No. 4-2011-004333) for use on *"nutritional preparations, namely, infant formula, formula for children and ingredients for formulas for infants and children"*;
3. "GROW & DEVICE" (Registration No. 4-2011-004331) for use on *"nutritional preparations, namely, infant formula, formula for children and ingredients for formulas for infants and children"*;
4. "PROTECT GROW" (Registration No. 4-2007-12378) for use on *"pharmaceutical and veterinary preparations; sanitary preparations for medical purposes; dietetic substances and foodstuffs for medical and clinical purposes; food and food substances for babies; food and food substances for medical purposes for children and the sick; foods and food substances for nursing mothers for medical purposes; nutritional and dietetic supplements for medical use; vitamin preparations; preparations made with minerals; dietetic confectionary products for medical purposes"*.

The word or prefix "GROW", therefore, is not unusual as part of trademarks for goods or products for food supplement.

Corollarily, while both marks consist of two (2) syllables, the last syllable in the Opposer's mark "WEE" or "EE" is different from the last syllable in the Respondent-Applicant's mark "KIDS". The difference in the last syllable makes a fine distinction between the competing marks as to sound and appearance such that confusion or deception is unlikely to occur. There is a remote possibility for a consumer to assume or conclude that there is a connection between the parties solely because both marks start with the word or syllable "GROW" since, as we discussed above, "GROW" is merely suggestive as to the kind of goods the marks are used.

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

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<sup>4</sup> Taken from the website [www.thefreedictionary.com](http://www.thefreedictionary.com)

<sup>5</sup> Deemed Registered: Verification of payment of issuance and second publication fee.

and imposition; and to protect the manufacturer against substitution and sale of an inferior and different article as his product.<sup>6</sup>

Clearly, the Respondent-Applicant satisfied this function test.

**WHEREFORE**, premises considered, the opposition is hereby **DISMISSED**. Let the filewrapper of Trademark Application Serial No. 4-2012-013191 be returned, together with a copy of this Decision, to the Bureau of Trademarks (BOT) for information and appropriate action.

SO ORDERED.

Taguig City, 07 November 2013.



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

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<sup>6</sup> *Pribhdas J. Mirpuri v. Court of Appeals*, G. R. No. 114508, November 19, 1999.