



WESTMONT PHARMACEUTICALS, INC.,
Opposer,

-versus-

ALDRTZ CORPORATION,
Respondent –Applicant.

x-----x

}
} IPC No. 14-2013-00391
} Opposition to:
} Appln. Serial No. 4-2013-004805
} Date Filed: 23 April 2013
} TM: "CEZINC"

NOTICE OF DECISION

OCHAVE & ESCALONA
Counsel for Opposer
66 United Street
Mandaluyong City

ALDRTZ CORPORATION
Respondent-Applicant
23 Lacson Extension corner Alijis Road
Bacolod City, Negros Occidental

GREETINGS:

Please be informed that Decision No. 2014 - 63 dated February 28, 2014 (copy enclosed) was promulgated in the above entitled case.

Taguig City, February 28, 2014.

For the Director:


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



WESTMONT PHARMACEUTICALS, INC.,	}	IPC No. 14-2013-00391
Opposer,	}	Opposition to:
- versus -	}	Application No. 4-2013-00004805
ALDRTZ CORPORATION,	}	Date Filed: 26 April 2013
Respondent-Applicant.	}	Trademark: CEZINC
x-----x	}	Decision No. 2014 - <u>63</u>

DECISION

WESTMONT PHARMACEUTICALS, INC.¹ ("Opposer") filed on 20 September 2013 a Verified Notice of Opposition to Trademark Application No. 4-2013-00004805. The subject application, filed by ALDRTZ CORPORATION² ("Respondent-Applicant"), covers the mark CEZINC for use on "food supplement capsule" under Class 05 of the International Classification of goods³.

The Opposer alleges, among other things, that:

"7. The mark CEZINC owned by Respondent-Applicant so resembles the trademark E-ZINC owned by Opposer and duly registered with the IPO prior to the publication for opposition of the mark CEZINC and thus, will likely cause confusion, mistake and deception on the part of the purchasing public.

"8. The registration of the mark CEZINC 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:

(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; x x x

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

1 A domestic corporation duly organized and existing under the laws of the Philippines, with office address at 4th Floor Bonaventure Plaza, Ortigas Avenue, Greenhills, San Juan City, Philippines.

2 A domestic corporation with address at 23 Lacson Extension corner Alijis Road, Bacolod City, Negros Occidental, Philippines.

3 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.

Republic of the Philippines
INTELLECTUAL PROPERTY OFFICE

Intellectual Property Center, 28 Upper McKinley Road, McKinley Hill Town Center
Fort Bonifacio, Taguig City 1634 Philippines
T: +632-2386300 • F: +632-5539480 • www.ipophil.gov.ph

The Opposer submitted in evidence a copy of the pertinent page of the IPO e-Gazette⁴ bearing publication date of 22 August 2013, certified true copy of Certificate of Registration No. 4-2008-009646 for the trademark CEZINC⁵, certified true copy of the Declaration of Actual Use⁶, sample product label bearing the trademark E-ZINC⁷, Certification issued by IMS⁸, and a certified true copy of the Certificate of Product Registration issued by the FDA for E-ZINC⁹.

This Bureau issued a Notice to Answer and served a copy thereof upon the Respondent-Applicant on 30 October 2013. The Respondent-Applicant, however, did not file its Verified Answer. Thus, this Bureau issued Order No. 2014-137 dated 28 January 2014 declaring the Respondent-Applicant in default and submitting the case for decision on the basis of the opposition, affidavit of witness and documentary or object evidence submitted by the Opposer.

Should the Respondent-Applicant be allowed to register the trademark CEZINC?

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.¹⁰ Thus, Section 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 and evidence show that at the time the Respondent-Applicant filed its trademark application, the Opposer already has an existing registration (No. 4-2008-009646) for the trademark E-ZINC issued on 01 November 2009. The Respondent-Applicant's trademark application indicates that the mark is for use on "*food supplement capsule*" under Class 05 while the Opposer's registration is also for goods under Class 5, namely, "*medicinal preparations for use as co-treatment in the management of diarrhea and pneumonia*".

But do the marks, as shown below, resemble each other that confusion, or even deception, is likely to occur?

Opposer's Mark

Respondent-Applicant's Mark

4 Exhibit "A".

5 Exhibit "B".

6 Exhibit "C".

7 Exhibit "D".

8 Exhibit "E".

9 Exhibit "F".

10 See *Pribhdas J. Mirpuri v. Court of Appeals*, G. R. No. 114508, 19 Nov. 1999.

Both marks adopted the word or suffix "ZINC". "ZINC" obviously represents a chemical element or an essential mineral that is naturally present in some foods, added to others, and available as a dietary supplement.¹¹ Thus, "ZINC" is not really unique if used as a trademark or as part of a trademark for food supplement or pharmaceutical product. Indeed, "ZINC" as a component of a mark is merely suggestive as to the kind of goods it is attached to. Aptly, what would make such trademark distinctive are the suffixes or appendages to the word or suffix "ZINC" and/or the devices, if any.

In this regard, the Opposer's "ZINC" is preceded by the letter "e" and a dash while the Respondent-Applicant's with the letters "C" and "E". It is apparent, therefore, that the Respondent-Applicant copied all the letters comprising the Opposer's mark. The addition of the letter "C" in the Respondent-Applicant's mark and a slight variation in the font style or manner of display did not give such mark a distinct character as that of the Opposer's. Indeed, confusion cannot be avoided by merely dropping, adding or changing some of the letters of a registered mark. Confusing similarity exists when there is such a close or ingenuous imitation as to be calculated to deceive ordinary persons, or such resemblance to the original as to deceive ordinary purchaser as to cause him to purchase the one supposing it to be the other.¹² Also, since both marks have two syllables with emphasis on the suffix "ZINC" and the fact that "E" and "CE" are phonetically the same, the marks give the same sounding effect when pronounced. As trademarks are intended not only for the consumption of the eyes but also for the faculty of hearing, the Court has taken into account the aural effects of the words and letters contained in the marks in determining the issue of confusing similarity.¹³ Thus, in *Marvex Commercial Co., Inc. v. Petra Hawpia & Co., et al*¹⁴, the Court held:

The following random list of confusingly similar sounds in the matter of trademarks, culled from Nims, *Unfair Competition and Trade Marks*, 1947, Vol. 1, will reinforce our view that "SALONPAS" and "LIONPAS" are confusingly similar in sound: "Gold Dust" and "Gold Drop"; "Jantzen" and "Jass-Sea"; "Silver Flash" and "Supper Flash"; "Cascarete" and "Celborite"; "Celluloid" and "Cellonite"; "Chartreuse" and "Charseurs"; "Cutex" and "Cuticlean"; "Hebe" and "Meje"; "Kotex" and "Femetex"; "Zuso" and "Hoo Hoo". Leon Amdur, in his book "Trade-Mark Law and Practice", pp. 419-421, cites, as coming within the purview of the idem sonans rule, "Yusea" and "U-C-A", "Steinway Pianos" and "Steinberg Pianos", and "Seven-Up" and "Lemon-Up". In *Co Tiong vs. Director of Patents*, this Court unequivocally said that "Celdura" and "Cordura" are confusingly similar in sound; this Court held in *Sapolin Co. vs. Balmaceda*, 67 Phil. 795 that the name "Lusolin" is an infringement of the trademark "Sapolin", as the sound of the two names is almost the same.

Succinctly, since the Respondent-Applicant's mark dealing with food supplement may include vitamins, minerals, fatty acids, among other substances, it is wide enough as to cover the Opposer's medicinal preparations. As held in some authorities, these supplements may be classified as foods, drugs or other products.¹⁵ Therefore, the addition of letter "C" in

11 <http://ods.od.nih.gov/factsheets/Zinc-HealthProfessional>

12 *Societe Des Produits Nestle S. A. v. Court of Appeals*, G. R. No. 112012, April 4, 2001.

13 *Prosource International Inc. v. Horphag Research Management S. A.*, G. R. No. 180073, 25 November 2009.

14 G. R. No. L-19297, 22 December 1966.

15 http://en.wikipedia.org/wiki/Dietary_supplement

the Respondent-Applicant's mark and a slight variation in the font style did not diminish the likelihood of the occurrence of mistake, confusion or even deception.

It is stressed that the determinative factor in a contest involving trademark registration is not whether the challenged mark would actually cause confusion or deception of the purchasers but whether the use of such mark will likely cause confusion or mistake on the part of the buying public. To constitute an infringement of an existing trademark, patent and warrant a denial of an application for registration, the law does not require that the competing trademarks must be so identical as to produce actual error or mistake; it would be sufficient, for purposes of the law, that the similarity between the two labels is such that there is a possibility or likelihood of the purchaser of the older brand mistaking the newer brand for it.¹⁶ The likelihood of confusion would subsist not only on the purchaser's perception of goods but on the origins thereof as held by the Supreme Court.¹⁷

Callman notes two types of confusion. The first is the confusion of goods in which event the ordinarily prudent purchaser would be induced to purchase one product in the belief that he was purchasing the other. In which case, defendant's goods are then bought as the plaintiff's and the poorer quality of the former reflects adversely on the plaintiff's reputation. The other is the confusion of business. Here, though the goods of the parties are different, the defendant's product is such as might reasonably be assumed to originate with the plaintiff and the public would then be deceived either into that belief or into belief that there is some connection between the plaintiff and defendant which, in fact does not exist.

Accordingly, this Bureau finds that the Respondent-Applicant's trademark application is proscribed by Sec. 123.1 (d) of the IP Code which provides that a mark cannot be registered if it is identical with a registered mark belonging to a different proprietor or if it nearly resembles such a mark as to be likely to deceive or cause confusion.

WHEREFORE, premises considered, the instant opposition is hereby **SUSTAINED**. Let the filewrapper of Trademark Application Serial No. 4-2013-00004805 be returned, together with a copy of this Decision, to the Bureau of Trademarks for information and appropriate action.

SO ORDERED.

Taguig City, 28 February 2014.


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

¹⁶ *American Wire and Cable Co. v. Director of Patents et al.*, G.R. No. L-26557, 18 Feb. 1970.

¹⁷ *Converse Rubber Corporation v. Universal Rubber Products, Inc., et al.*, G.R. No. L-27906, 08 Jan. 1987.