OFFICE OF THE DIRECTOR GENERAL

PEDIATRICA, INC.,
Appellant,

-versus-

NOVAGEN PHARMACEUTICAL, INC.,
Appellee.
x----------x

APPEAL NO. 14-2013-0059
IPC No. 14-2013-00217
Opposition to:

Application No. 4-2012-013191
Date Filed: 29 October 2012
Trademark: GROW KIDS

NOTICE

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IPOPHL LIBRARY
Documentation, Information and
Technology Transfer Bureau
Taguig City

IPOPHL LIBRARY
DATE: 9/25/2014
BY:

GREETINGS:

Please be informed that on 18 September 2014, the Office of the Director General issued a Decision in this case (copy attached).

Taguig City, 18 September 2014.

Very truly yours,

ROBERT NEREO B. SAMSON
Attorney V

OFFICE OF THE DIRECTOR GENERAL

PEDIATRICA, INC.,
Opposer-Appellant,

-versus-

NOVAGEN PHARMACEUTICAL, INC.,
Respondent-Appellee.
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D E C I S I O N

PEDIATRICA, INC. ("Appellant") appeals the decision[1] of the Director of Bureau of Legal Affairs ("Director") dismissing the Appellant's opposition to the registration of the mark "GROW KIDS" in favor of NOVAGEN PHARMACEUTICAL, INC. ("Appellee").

Records show that the Appellee filed on 29 October 2012 Trademark Application No. 4-2012-013191 for GROW KIDS for use on multi-vitamins and supplements. On 22 April 2013, the trademark application was published in the Intellectual Property Office Electronics Gazette for Trademarks. Subsequently, the Appellant filed on 22 May 2013 a "VERIFIED NOTICE OF OPPOSITION" alleging that it will be extremely damaged and prejudiced by the registration of GROW KIDS.

The Appellant maintained that GROW KIDS resembles its mark "GROWEE" which it registered prior to the publication of GROW KIDS. The Appellant claimed that GROW KIDS will likely cause confusion, mistake and deception on the part of the purchasing public, most especially considering that GROW KIDS is applied for the same class of goods as GROWEE. The registration of GROW KIDS will violate Sec. 123 of the Intellectual Property Code of the Philippines ("IP Code") which provides that a mark that 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. According to the Appellant, by virtue of its prior and continued use of GROWEE, this mark has established valuable goodwill to the consumers and general public. The Appellant averred that the registration and use by the Appellee of the confusingly similar mark GROW KIDS will enable the latter to obtain benefit from the Appellant's reputation and goodwill and will tend to deceive and/or confuse the public into believing that the Appellee is in any way connected with the Appellant.

[1] Decision No. 2013-215 dated 07 November 2013.

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On 11 June 2013, the Bureau of Legal Affairs issued a "NOTICE TO ANSWER" requiring the Appellee to file a verified answer to the opposition within thirty (30) days from notice. The Appellee did not file an answer and the case was deemed submitted for decision.[2]

In dismissing the Appellant's opposition, the Director held that the word or prefix "GROW" is not unusual as part of trademarks for goods or products for food supplement. The Director ruled that the difference in the last syllable of the marks of the Appellant and the Appellee makes a fine distinction between these marks as to sound and appearance such that confusion or deception is unlikely to occur. According to the Director, the Appellee's mark satisfied the function of a trademark.

On 09 December 2013, the Appellant filed an "APPEAL MEMORANDUM [Re: Decision No. 2013-215 dated 7 November 2013]" reiterating its position that GROW KIDS is confusingly similar with GROWEE. The Appellant maintains that GROWEE and GROW KIDS are practically identical marks in sound and appearance that they leave the same commercial impression upon the public. According to the Appellant, being the owner of a registered mark, its intellectual property right over this mark is protected and it is entitled to prevent the Appellee from using a confusingly similar mark in the course of trade which would likely mislead the public.

This Office issued on 12 December 2013 an Order giving the Appellee thirty (30) days from receipt of the Order to submit comment on the appeal. The Appellee did not file its comment and the case was deemed submitted for decision.

The main issue in this appeal is whether the Director was correct in dismissing the Appellant's opposition to the registration of the mark GROW KIDS in favor of the Appellee. Moreover, the relevant question to resolve is whether GROW KIDS is confusingly similar with GROWEE.

In trademark cases, particularly in ascertaining whether one trademark is confusingly similar to or is a colorable imitation of another, no set of rules can be deduced. Each case is decided on its own merits.[3] As the likelihood of confusion of goods or business is a relative concept, to be determined only according to the particular, and sometimes peculiar, circumstances of each case,[4] the complexities attendant to an accurate assessment of likelihood of such confusion requires that the entire panoply of elements constituting the relevant factual landscape be comprehensively examined.[5]

Below are the reproductions of the Appellant's and Appellee's marks:

[2] Order No. 2013-1399, 10 October 2013.
[3] Emerald Garment Manufacturing Corporation v. Court of Appeals, 251 SCRA 600 (1995).
[4] Esso Standard Eastern, Inc. v. Court of Appeals, 116 SCRA 336 (1982).
[5] Societe Des Produits Nestle, S.A. v. Court of Appeals., G.R. No. 112012, 04 April 2001.

GROWEE

Appellant's mark

Appellee's mark

While both marks contain the word "GROW", this similarity is not sufficient to conclude that they are confusingly similar. The word "KIDS" differentiated the Appellee's mark from that of the Appellant. The distinction is very obvious that GROWEE cannot be mistaken as GROW KIDS or vice versa. As correctly discussed by the Director:

> 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. 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.[6]

In addition, aurally, the marks are different and the font size and style of the contending marks are also different. An imitation to be considered objectionable must be such as appears likely to mislead the ordinary intelligent buyer who has a need to supply and is familiar with the article that he seeks to purchase.[7] What the law prohibits is that one manufacturer labels his product in a manner strikingly identical with or similar to that of another manufacturer as to deceive or confuse the buying public into believing that the two preparations are one and come from the same source.[8]

The contention that as the registered owner of GROWEE, it has intellectual property right over this mark will not save the day for the Appellant. Significantly, the protection given to the Appellant's registered mark is not to the exclusive right to use the word "GROW" but to GROWEE and to those marks that are confusingly similar. As GROW KIDS is not confusingly similar with GROWEE, the Appellant cannot bar the Appellee from using GROW KIDS and filing an application to register this mark.

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[6]Decision No. 2013-215 dated 07 November 2013.
[7] Dy Buncio v. Tan Tiao Bok, G. R. No. 16397, 03 October 1921.
[8] American Cyanamid Company v. Director of Patents, G. R. No. L-23954, 29 April 1977.

Moreover, a person who would buy the Appellee's products would do so not on the basis of the mistaken belief that the product is that of the Appellants' but because that is the product the person intends to buy. In one case decided by the Supreme Court of the Philippines, it was held that the ordinary purchaser must be thought of, as having, and credited with, at least a modicum of intelligence.[9] Furthermore, the nature of food supplements and multi-vitamins require a prospective buyer to be more aware and cautious in the purchase of the product. Accordingly, a likelihood of confusion that the products bearing the mark GROW KIDS would be mistaken or considered as GROWEE is very remote in this case.

Wherefore, premises considered, the appeal is hereby dismissed.

Let a copy of this Decision be furnished to the Director of Bureau of Legal Affairs and the Director of Bureau of Trademarks for their appropriate action and information. Further, let a copy of this Decision be furnished to the library of the Documentation, Information and Technology Transfer Bureau for records purposes.

SO ORDERED.

18 SEP 2014 , Taguig City.

RICARDO R. BLANCAFLOR
Director General

[9] Fruit of the Loom, Inc. v. Court of Appeals, G.R. No. L-32747, 29 November 1984.