



OFFICE OF THE DIRECTOR GENERAL

UNITED LABORATORIES, INC.,  
Opposer-Appellant,

APPEAL NO. 14-2012-0023  
IPC No. 14-2009-00211  
Opposition to:  
Application No. 4-2008-014849  
Date Filed: 09 December 2008  
Trademark: ENERGO  
EXTREME (STYLIZED)

-versus-

ALDRTZ CORPORATION,  
Respondent-Appellee.

X-----X

NOTICE

OCHAVE & ESCALONA  
Counsel for Appellant  
No. 66 United Street  
Mandaluyong City

LENY B. RAZ  
Director, Bureau of Trademarks  
Intellectual Property Office  
Taguig City

SIGUION REYNA MONTECILLO  
& ONGSIAKO  
Counsel for Appellee  
4<sup>th</sup> and 6<sup>th</sup> Flrs., Citibank Center  
8741 Paseo de Roxas, Makati City

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NATHANIEL S. AREVALO  
Director, Bureau of Legal Affairs  
Intellectual Property Office of the Philippines  
Taguig City

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GREETINGS:

Please be informed that on 15 September 2014, the Office of the Director General issued a Decision in this case (copy attached).

Taguig City, 16 September 2014.

Very truly yours,

ROBERT NEREO B. SAMSON  
Attorney V

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DATE:           
ROBERT NEREO B. SAMSON  
ATTORNEY V  
Office of the Director General

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



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Appeal No. 14-2012-0023

Inter Partes Case No. 14-2009-00211

Opposition to:

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Date Filed: 09 December 2008

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ALDRTZ CORPORATION,  
Respondent-Appellee.

Trademark: ENERGO EXTREME  
(STYLIZED)

X-----X

DECISION

UNITED LABORATORIES, INC. ("Appellant") appeals the decision of the Director of the Bureau of Legal Affairs ("Director") denying the Appellant's opposition to the registration of the mark "ENERGO EXTREME (STYLIZED)"

Records show that ALDRTZ CORPORATION ("Appellee") filed on 09 December 2008 Trademark Application No. 4-2008-014849 seeking the registration of ENERGO EXTREME (STYLIZED) for use on food supplement – capsule and syrup, energy drink, and powder. On 01 June 2009, the trademark application was published in the Intellectual Property Office Electronics Gazette for Trademarks.

On 26 August 2009, the Appellant filed an opposition to the registration of the Appellee's trademark application claiming that it will be damaged and prejudiced by the registration. The grounds for the opposition are the following:

1. ENERGO EXTREME (STYLIZED) resembles the trademark "ENERVON-C" owned by the Appellant;
2. ENERGO EXTREME (STYLIZED) will likely cause confusion, mistake, and deception on the part of the purchasing public, most especially considering that this mark is applied for the same class and good as that of ENERVON-C;
3. The registration of ENERGO EXTREME (STYLIZED) will violate Sec. 123 of Republic Act 8293, otherwise known as the Intellectual Property Code of the Philippines ("IP Code"), which provides that 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; and



ROBERT NEREO B. SAMSON  
ATTORNEY V  
Office of the Director General

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  
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4. The Appellee's use and registration of ENERGO EXTREME (STYLIZED) will diminish the distinctiveness and dilute the goodwill of the Appellant's ENERVON-C.

The Appellant maintained that it has a valid and subsisting registration for ENERVON-C and that it has extensively used this mark in commerce in the Philippines. It claimed that no less than the Intercontinental Marketing Services (IMS), the world's leading provider of business intelligence and strategic consulting services for the pharmaceutical and healthcare industries, acknowledged and listed ENERVON-C as the leading brand in the Philippines in the category of "Vitamin B Complex" in terms of market share and sales performance. The Appellant averred that it registered its products with the Bureau of Food and Drugs and that it has acquired exclusive ownership of ENERVON-C.

According to the Appellant, ENERGO EXTREME (STYLIZED) is confusingly similar to ENERVON-C and to allow the Appellee to continue to market the products bearing the mark ENERGO EXTREME (STYLIZED) undermines the Appellant's rights to ENERVON-C. The Appellant asserted that ENERVON-C has become well-known and has established valuable goodwill to the consumers and the general public that the registration of ENERGO EXTREME (STYLIZED) will enable the Appellee to obtain benefit from the Appellant's reputation, goodwill, and advertising and will tend to deceive and/or confuse the public into believing that the Appellee is in any way connected with the Appellant.

The Appellant submitted the following evidence to support the opposition:

1. Print-out of trademarks published on 01 June 2009;<sup>1</sup>
2. Certificate of Registration for ENERVON-C;<sup>2</sup>
3. "Assignment";<sup>3</sup>
4. Petition for Renewal of Registration;<sup>4</sup>
5. Affidavits of use;<sup>5</sup>
6. Sample product label for ENERVON-C;<sup>6</sup>
7. Certification and Sales Performance;<sup>7</sup>
8. Certificate of Product Registration for ENERVON-C.<sup>8</sup>

The Appellee filed a "VERIFIED ANSWER" dated 15 January 2010 denying the material allegations of the Appellant. The Appellee claimed that it is the owner of ENERGO EXTREME (STYLIZED) by prior trademark registration and widespread prior adoption and use. According to the Appellee, "ENERGO" is an original coined

<sup>1</sup> Exhibits "A" and "A-1".

<sup>2</sup> Exhibit "B".

<sup>3</sup> Exhibits "C" and "D".

<sup>4</sup> Exhibit "E".

<sup>5</sup> Exhibits "F", "G", "H", "I", and "J".

<sup>6</sup> Exhibit "K".

<sup>7</sup> Exhibit "L".

<sup>8</sup> Exhibit "M".

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ATTORNEY V  
Office of the Director General

mark which it created and first used for its energy drink product. The Appellee maintained that by its prior adoption and continuous use for at least seven (7) years of ENERGO EXTREME (STYLIZED) in the market, this mark has gained a significant amount of fame and goodwill. The Appellant asserted that there are significant and very obvious differences between ENERGO EXTREME (STYLIZED) and ENERVON-C that negate the existence of confusing similarity.

The Appellee submitted the following evidence:

1. Affidavit of Jerome M. Mongcal;<sup>9</sup>
2. Cert. of Reg. No. 4-2002-004205;<sup>10</sup>
3. Copies of trademark applications;<sup>11</sup>
4. List of Places of Distribution of the ENERGO EXTREME (STYLIZED)<sup>12</sup>
5. CD-ROM containing excerpts of the promotion for ENERGO EXTREME (STYLIZED);<sup>13</sup>
6. Endorsements and articles on ENERGO;<sup>14</sup>
7. Trademark details for KUKU BIMA ENER-G, ENER-Z AND ENER-C;<sup>15</sup> and
8. Print out from [www.aldrtz.com](http://www.aldrtz.com) website.<sup>16</sup>

After the appropriate proceedings, the Director denied the opposition and held that there is a fine distinction between ENERVON-C and ENERGO EXTREME (STYLIZED) as to sound and appearance such that confusion or deception is unlikely to occur. The Director ruled that ENERGO satisfied the function of a trademark.

On 31 May 2012, the Appellant filed an "APPEAL MEMORANDUM [Re: Decision No. 2012-67 dated 17 April 2012]" contending that ENERGO EXTREME (STYLIZED) is confusingly similar with ENERVON-C and that the registration of ENERGO will be contrary to Sec. 123.1 (d) of the IP Code. The Appellant maintains that ENERGO EXTREME (STYLIZED) has the dominant features of ENERVON-C and that these marks are practically identical marks in sound and appearance that they leave the same commercial impression upon the public. The Appellant claims that being the owner of ENERVON-C, it has the exclusive right to use and/or appropriate this mark and prevent all third parties not having its consent from using in the course of trade identical or similar marks, where such would result in a likelihood of confusion. The Appellant asserts that to allow the Appellee to use ENERGO EXTREME (STYLIZED) would likely cause confusion or mistake in the mind of the public or deceive purchasers into believing that ENERGO EXTREME (STYLIZED) originate from or is being manufactured by the Appellant, or at the very least, is

<sup>9</sup> Exhibit "1".

<sup>10</sup> Exhibit "2".

<sup>11</sup> Exhibits "3" and "4".

<sup>12</sup> Exhibit "5".

<sup>13</sup> Exhibit "6".

<sup>14</sup> Exhibits "7" to "7-b".

<sup>15</sup> Exhibits "8", "9" and "10".

<sup>16</sup> Exhibit "11".



connected or associated with the ENERVON-C product of the Appellant, when such connection does not exist.

On 26 July 2012, the Appellee filed its "COMMENT (Re: Opposer-Appellant's Appeal Memorandum dated 28 May 2012)" maintaining that there is no confusing similarity between ENERGO EXTREME (STYLIZED) and ENERVON-C and that the Bureau of Legal Affairs correctly denied the Appellant's opposition to the registration of ENERGO EXTREME (STYLIZED). The Appellee argues that the common use of the prefix "ENER" does not make ENERGO EXTREME (STYLIZED) confusingly similar to ENERVON-C because "ENER" is merely suggestive of the word "energy" and when used on vitamins and food supplements, is descriptive of the nature of the products. According to the Appellee, there are other registered marks that use the syllable "ENER" as a component feature which indicates that it is descriptive, generic, and incapable of exclusive appropriation.

The main issue in this case is whether the Director was correct in denying the opposition to the registration of ENERGO EXTREME (STYLIZED).

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

**ENERVON-C**

*Appellant's mark*



*Appellee's mark*

At a glance, one can see that the words "ENERVON" and "ENERGO" are the main features of these marks. In this regard, the relevant question, therefore, is whether the Appellee's use of ENERGO is likely to cause confusion in view of the Appellant's existing use of ENERVON.

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.<sup>17</sup> 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,<sup>18</sup> the complexities attendant to an accurate assessment of likelihood of such confusion requires that the

<sup>17</sup> Emerald Garment Manufacturing Corporation v. Court of Appeals, 251 SCRA 600 (1995).

<sup>18</sup> Esso Standard Eastern, Inc. v. Court of Appeals, 116 SCRA 336 (1982).

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entire panoply of elements constituting the relevant factual landscape be comprehensively examined.<sup>19</sup>

The Appellee is using ENERGO for food supplement – capsule and syrup; and energy drink and powder. On the other hand, the Appellant is using ENERVON for its vitamin products. ENERGO and ENERVON are, thus, being used on related goods belonging to food supplement and vitamin products. Accordingly, the way these marks are presented and used for these related goods gives the impression that the products covered by these marks are owned by the same person. In other words, it is not farfetched that one may consider the Appellee's mark as just a variation of the Appellant's mark that has been registered as early as 1969.

In this regard, to allow the registration of the trademark ENERGO would likely mislead the public to believe that the manufacturer of the products bearing this mark is the same manufacturer of the products bearing the mark ENERVON. The public may be mistaken that one is just a variation of the other which both came from the same manufacturer resulting to the damage of the Appellant who is the originator of the mark ENERVON. The risk of damage is not limited to a possible confusion of goods but also includes confusion of reputation if the public could reasonably assume that the goods of the parties originated from the same source.<sup>20</sup> This is precisely, the reason why trademarks are very important and that before a trademark is allowed registration, it must be shown to be distinct and should be proven that there would not be a likelihood of confusion to the purchasing public.

Thus, Sec. 123.1(d) of the IP Code, states 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;

Under Section 123.1 (d) of the IP Code, in the determination of confusing similarity a likelihood of confusion is the only requirement. In a contest involving registration of trademarks, the determinative factor is not whether the challenged mark would actually cause confusion or deception of the purchasers but whether the use of such mark would likely cause confusion or mistake on the part of the buying public.

Moreover, the Appellant and the Appellee are members of the pharmaceutical industry and it is not unlikely that the Appellee knew of the Appellant's products which have been in the market earlier than the Appellee's products. In this regard, the statement by the Supreme Court in one case is instructive:

<sup>19</sup> Societe Des Produits Nestle, S.A. v. Court of Appeals, G.R. No. 112012, 04 April 2001.

<sup>20</sup> Converse Rubber Corporation vs. Universal Rubber Products, Inc., G. R. No. L-27906, 08 January 1987.



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ROBERT NEREO B. SAMSON  
ATTORNEY AT LAW  
Office of the Director General

Of course, as in all other cases of colorable imitations, the unanswered riddle is why, of the millions of terms and combinations of letters and designs available, the appellee had to choose those so closely similar to another's trademark if there was no intent to take advantage of the goodwill generated by the other mark.<sup>21</sup>

In the case of *Del Monte Corporation vs. Court of Appeals*,<sup>22</sup> the Supreme Court of the Philippines stated that:

It has also been held that it is not the function of the court in cases of infringement and unfair competition to educate purchasers but rather to take their carelessness for granted, and to be ever conscious of the fact that marks need not be identical. A confusing similarity will justify the intervention of equity. The judge must also be aware of the fact that usually a defendant in cases of infringement does not normally copy but makes only colorable changes. Well has it been said that the most successful form of copying is to employ enough points of similarity to confuse the public with enough points of difference to confuse the courts.

The trademark ENERVON was created by the Appellant to distinguish its products. It is a distinctive mark and it would be a very remote possibility that two (2) parties would accidentally adopt the same features of a distinctive mark. This Office is not unmindful of the argument that "ENER" suggests reference to "energy". The Appellee, however, failed to successfully explain why it is not adopting the word "energy" but instead is using "ENER" as part of its mark. The absence of explanation only means that it is riding on the goodwill that ENERVON has created through the years.

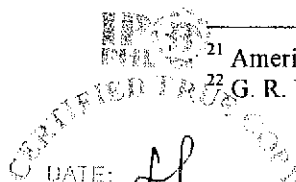
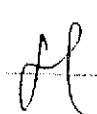
The allowance for publication of a trademark is only a presumption that the trademark application is compliant with the provisions of the IP Code. When a third party adduced contrary evidence, including evidence that it would be damaged by the registration of such trademark, the applicant must present substantial evidence to the contrary. Otherwise, the presumption is deemed overcome.

As the registered owner of the trademark ENERVON-C, the Appellant is entitled to the exclusive right to use it and to prevent other persons from using a trademark that resembles this mark as to be likely to deceive or cause confusion. Being in a business that deals on products related with those of the Appellant's, the Appellee's introduction of similar products bearing the mark ENERGO may cause a likelihood of confusion to the buying public.

The intellectual property system was established to recognize creativity and give incentives to innovations. Similarly, the trademark registration system seeks to reward entrepreneurs and individuals who through their own innovations were able to distinguish their goods or services by a visible sign that distinctly points out the origin and ownership of such goods or services. The trademark registration system should not be used to perpetuate any acts that would undermine the intellectual property system. A person must not be allowed to get a free ride on the reputation and selling

<sup>21</sup> American Wire & Cable Company vs. Director of Patents, G. R. No. L-26557, 18 February 1970.

<sup>22</sup> G. R. No. L-78325, 25 January 1990.


  
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ATTORNEY IN LAW  
Office of the Director General

power of the products of another, for a self-respecting person or a reputable business concern does not remain in the shelter of another's popularity and goodwill.<sup>23</sup>

WHEREFORE, premises considered, the instant appeal is hereby GRANTED. Let a copy of this Decision as well as the trademark application and records be furnished and returned to the Director of the Bureau of Legal Affairs for appropriate action. Further, let also the Director of the Bureau of Trademarks and the library of the Documentation, Information and Technology Transfer Bureau be furnished a copy of this decision for information, guidance, and records purposes.


SO ORDERED.

. 15 SEP 2014 Taguig City

  
RICARDO R. BLANCAFLOR  
Director General



Philippine Nut Industry, Inc. vs. Standard Brands Incorporated, G. R. No. L-23035, 31 July 1975.

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