



WESTMONT PHARMACEUTICALS, INC.,
Opposer,

-versus-

PENTA LABS AUSTRALIA (PHILIPPINES),
Respondent-Applicant.

}
} IPC No. 14-2013-00471
} Opposition to:
} Application No.4-2013-00010177
} Date filed: 27 August 2013
} TM: "CETRIGEN"
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NOTICE OF DECISION

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

PENTA LABS AUSTRALIA (PHILIPPINES)
Respondent-Applicant
Unit 16016 Cityland 10 Tower 1
H.V. Dela Costa Street, Salcedo Village
Makati City

GREETINGS:

Please be informed that Decision No. 2015 - 21 dated March 06, 2015 (copy enclosed) was promulgated in the above entitled case.

Taguig City, March 06, 2015.

For the Director:

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



WESTMONT PHARMACEUTICALS, INC.,

Opposer,

-versus-

PENTA LABS AUSTRALIA (PHILIPPINES),

Respondent-Applicant.

X ----- X

IPC No. 14-2013-00471

Opposition to Trademark

Application No. 4-2013-00010177

Date Filed: 27 August 2013

Trademark: **"CETRIGEN"**

Decision No. 2015- 21

DECISION

Westmont Pharmaceuticals, Inc.¹ ("Opposer") filed an opposition to Trademark Application Serial No. 4-2013-0010177. The contested application, filed by Penta Labs Australia (Philippines)² ("Respondent-Applicant"), covers the mark "CETRIGEN" for use on "*pharmaceutical preparations (anti-allergy)*" under Class 05 of the International Classification of Goods³.

The Opposer anchors its opposition on Section 123.1 (d) of Republic Act No. 8293, also known as the Intellectual Property Code of the Philippines ("IP Code")⁴. It contends that the Respondent-Applicant's applied mark "CETRIGEN" is confusingly similar with its own mark "ZEPTRIGEN". It claims that it has dutifully filed its Declaration of Actual Use (DAU) and Affidavit of Actual Use and that it likewise registered its product with the Food and Drug Administration (FDA). It prides its brand "ZEPTRIGEN" for being acknowledged and listed by the Intercontinental Marketing Services (IMS) as one of the leading brands in the Philippines in the category of "*J01D – Cephalosporins & Combs Market*" in terms of market share and sales performance.

The Opposer asserts that the competing marks are practically identical in sound and appearance that they leave the same commercial impression upon the public. It argues that the two can easily be confused for one over the other, most especially considering that "CETRIGEN" is applied for the same class and similar

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

² With known address at Unit 1606 Cityland 10 Tower 1, H.V. Dela Costa Street, Salcedo Village, Makati City, Metro Manila, Philippines

³ The Nice Classification is a classification of goods and services for the purpose of registering trademark and services marks, based on the multilateral treaty administered by the World Intellectual Property Organization. The treaty is called the Nice Agreement Concerning the International Classification of Goods and Services for the Purpose of the Registration of Marks concluded in 1957.

⁴ Section 123.1. A mark cannot be registered if it:

xxx

(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"

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goods as that of "ZEPTRIGEN". It posits that the registration and use of the Respondent-Applicant's mark will enable the latter to obtain benefit from its reputation and good will and will tend and/or confuse the public into believing that the Respondent-Applicant is in any way connected with it.

In support of its Opposition, the Opposer submitted the following as evidence:

1. copy of the pertinent page of the IPO E-Gazette publishing Respondent-Applicant's application;
2. certified true copy of Certificate of Registration No. 4-2002-001388;
3. certified true copies of the Declaration of Actual Use and Affidavit of Actual Use;
4. sample product label;
5. certified true copy of the Certificate of Product registration No. DB-002651; and
6. copy of the certification and sales performance issued by IMS.

This Bureau issued a Notice to Answer and served a copy thereof upon the Respondent-Applicant on 08 January 2014. The Respondent-Applicant, however, did not file an Answer. Accordingly, the Hearing Officer issued on 21 April 2014 Order No. 2014-506 declaring the Respondent-Applicant in default and submitting the case for decision.

Records reveal that the Opposer filed an application for its mark "ZEPTRIGEN" as early as 15 February 2002. The Certificate of Registration No. 4-2002-001388 was eventually issued to it on 24 February 2005. On the other hand, the Respondent-Applicant filed its application for the contested mark "CETRIGEN" only on 27 August 2013.

The question is whether the competing marks, as shown below, are confusingly similar:

Zeptrigen

Opposer's mark

CETRIGEN

Respondent-Applicant's mark

The only difference between the two marks is their beginning letters and that the Respondent-Applicant's elimination of the letter "P" in the first syllable of the mark. These dissimilarities notwithstanding, the competing marks still look and sound alike. For one, the letters "Z" and "C" are almost the same sounding. Also, although the Opposer's mark begins with the syllable "ZEP" while that of the

Respondent-Applicant's with the syllable "CE", the omission of the letter "P" in the latter produce negligible difference, if there is at all. More importantly, the common portion of the marks "TRIGEN" does not appear to be connected to cephalosporins or ceftazidime, which are the goods the Opposer's mark cover, and therefore, the said mark is considered distinctive.

Succinctly, confusion cannot be avoided by merely adding, removing or changing some 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 purchased as to cause him to purchase the one supposing it to be the other.⁵ Aply, the Supreme Court held in the case of **Del Monte Corporation vs. Court of Appeals**⁶, thus:

"The question is not whether the two articles are distinguishable by their label when set side by side but whether the general confusion made by the article upon the eye of the casual purchaser who is unsuspecting and off his guard, is such as to likely result in his confounding it with the original. As observed in several cases, the general impression of the ordinary purchaser, buying under the normally prevalent conditions in trade and giving the attention such purchasers usually give in buying that class of goods is the touchstone."

Moreover, it is settled that the likelihood of confusion would not extend not only as to the purchaser's perception of the goods but likewise on its origin. 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 the belief that there is some connection between the plaintiff and defendant which, in fact, does not exist."⁷

In this case, it is noteworthy that both marks cover goods under Class 05. The Opposer's registration covers "*medicinal preparation for use on antibacterial*", which is closely-related, if not similar, to the Respondent-Applicant's "*pharmaceutical preparations (anti-allergy)*". Hence, it is highly likely that consumers of one will confuse or mistake "CETRIGEN" as being a mere variation of or in any way connected to "ZEPTRIGEN", and vice-versa. Furthermore, the field from which a person may select a trademark is practically unlimited. As in all cases of colorable

⁵ Societe des Produits Nestle, S.A. vs. Court of Appeals, GR No. 112012, 04 April 2001.

⁶ G.R. No. L-78325, 25 January 1990.

⁷ Societe des Produits Nestle, S.A. vs. Dy, G.R. No. 1772276, 08 August 2010.

imitations, the unanswered riddle is why of the millions of terms and the combinations of letters and designs available, the Respondent-Applicant has come up with a mark identical or so closely similar to another's mark if there was no intent to take advantage of the goodwill generated by the other mark.⁸

Finally, it is emphasized that 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.⁹ Respondent-Applicant's trademark fell short in meeting this function.

Accordingly, this Bureau finds and concludes that the Respondent-Applicant's trademark application is proscribed by Sec. 123.1(d) of the IP Code.

WHEREFORE, premises considered, the instant opposition is hereby **SUSTAINED**. Let the filewrapper of Trademark Application Serial No. 4-2013-00010177 be returned, together with a copy of this Decision, to the Bureau of Trademarks for information and appropriate action.

SO ORDERED.

Taguig City, 06 March 2015.


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

⁸ American Wire & Cable Company vs. Director of Patents, G.R. No. L-26557, 18 February 1970.

⁹ Pribhdas J. Mirpuri vs. Court of Appeals, G.R. No. 114508, 19 November 1999.