PEDIATRICA, INC.,	}	**IPC No. 14-2012-00166**
Opposer,	}	Opposition to:
	}	Appln. Serial No. 4-2011-011436
	}	Date Filed: 22 September 2011
-versus-	}	**TM: "NUTRI 10"**
	}	
	}	
MEDISYS PHARMA, INC.,	}	
Respondent- Applicant.	}	

x----------x

NOTICE OF DECISION

OCHAVE & ESCALONA
Counsel for the Opposer
66 United Street
Mandaluyong City

ATTY. ROLANDO A. VERGARA, JR.
Counsel for the Respondent- Applicant
Unit 2606 Antel Global Corporate Center
No. 3 Dona Julia Vargas Avenue
Ortigas Center, Pasig City

GREETINGS:

Please be informed that Decision No. 2016 - 98 dated April 01, 2016 (copy enclosed) was promulgated in the above entitled case.

Taguig City, April 01, 2016.

For the Director:

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

PEDIATRICA, INC.,
Opposer,

- versus -

MEDISYS PHARMA, INC.,
Respondent-Applicant.
x ---------- x

IPC No. 14-2012-00166
Opposition to:

Appln. No. 4-2011-011436
Date Filed: 22 September 2011
Trademark: **"NUTRI 10"**

Decision No. 2016 - 98

DECISION

PEDIATRICA, INC. ("Opposer")[1], filed an opposition to Trademark Application Serial No. 4-2011-0011436. The application, filed by MEDISYS PHARMA, INC. ("Respondent-Applicant")[2], covers the mark "NUTRI 10" for use on goods under class 05[3] namely: *"pharmaceutical product namely multivitamins."*

The Opposer alleges the following grounds for opposition:

"7. The mark 'NUTRI 10' owned by Respondent-Applicant so resembles the trademark 'NUTRILIN' owned by Opposer and duly registered with this Honorable Bureau prior to the publication for opposition of the mark 'NUTRI 10'.

"8. The mark 'NUTRI 10' will likely cause confusion, mistake and deception on the part of the purchasing public, most especially considering that the opposed trademark 'NUTRI 10' is applied for the same class and goods as that of Opposer's trademark 'NUTRILIN', i.e. Class 05 of the International Classification of Goods as vitamin pharmaceutical product.

"9. The registration of the mark 'NUTRI 10' in the name of the Respondent-Applicant will violate Sec. 123 of the IP Code.

"10. 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.

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1 A domestic corporation duly organized and existing under the laws of the Philippines, with office address at 3rd Floor, Bonaventure Plaza, Ortigas Avenue, Greenhills, San Juan City, Philippines.
2 A domestic corporation, with office address at 2003 Pres. E. Quirino Avenue, Pandacan, Manila, Philippines.
3 The Nice Classification of goods and services is for registering trademark and service marks, based on a multilateral treaty administered by the WIPO, called the Nice Agreement Concerning the International Classification of Goods and Services for 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 •www.ipophil.gov.ph
T: +632-2386300 • F: +632-5539480 •mail@ipophil.gov.ph

The Opposer's evidence consists of the following:

1. Pertinent pages of the IPO E-Gazette;
2. Certified true copy (Ctc) of Certificate of Registration No. 18566 for the trademark "NUTRILIN";
3. Ctc of the Affidavits of Use of the trademark NUTRILIN;
4. Sample product label bearing the trademark NUTRILIN;
5. Ctc of Certificate of Product Registration issued by the BFAD for the trademark NUTRILIN;

On 28 June 2012, Respondent-Applicant filed its Answer alleging, among others, the following:

> "4. The oppositor's alleged trademark 'NUTRILIN' is not confusingly similar to MPI's applied trademark 'NUTRI 10'.
>
> 4.1 'NUTRILIN' consists of alphabets only, while NUTRI 10 is alpha-numeric.
>
> 4.2 The products involved are food supplements. These are not ordinary household items which are of minimal cost. The casual buyer is thus predisposed to be more cautious and discriminating when purchasing these food supplements.
>
> 4.3 Second, the average Filipino consumer generally buys food supplements by the brand, and does not ask the sales clerk for generic food supplements but only those with known brands. The average consumer is more or less knowledgeable and familiar with his preference.
>
> 4.4 The ordinary purchaser of food supplements is not the completely unwary consumer but is the ordinarily intelligent buyer in view of the products involved.
>
> x x x
>
> "5. The oppositor alleges that 'NUTRI' is the dominant feature of its alleged NUTRILIN and respondent-applicants' NUTRI 10. A closer look at said dominant feature, 'NUTRI' would reveal that it is a generic and descriptive prefix, which means nourishment. As such, the oppositor could not possibly have a legally protectable right over the prefix/dominant feature 'NUTRI'.
>
> For being generic and/or descriptive, oppositor cannot acquire exclusive ownership over and singular use of 'NUTRI'. MPI invites the attention of this Honorable Bureau to the fact that food supplement manufactured by other corporations may have also used the prefix 'NUTRI' in its registered products."

The Respondent-Applicant's lone evidence consists of the actual sample packaging of NUTRI 10 Drops, NUTRI 10 Syrup and NUTRI 10 OB Capsules.

Thereafter, the preliminary conference was held and terminated on 24 October 2012[4]. The Opposer submitted its position paper on 24 October 2012; and the Respondent-Applicant submitted its position paper on 06 November 2012. Hence, this decision.

Should the Respondent-Applicant be allowed to register the trademark NUTRI 10?

Records show that the Opposer has obtained registration for its trademark NUTRILIN as early as 29 March 1973 with Registration No. 18566[5]. The registration covers *"essential vitamins plus iron specific for infants needs"*. Obviously, it preceded the application for registration of Respondent-

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4 Minutes of Hearing dated 24 October 2012.
5 Exhibit "B" of Opposer.

Applicant's trademark NUTRI 10 on 22 September 2011, which covers "*pharmaceutical product namely multivitamins.*"[6]

But are the competing marks, shown below, resemble each other such that confusion, or even deception, is likely to occur?

Nutrilin	NUTRI 10
Opposer's Trademark	Respondent-Applicant's Trademark

The foregoing marks contain the identical word NUTRI. The difference of Respondent-Applicant's mark to that of Opposer, consisting of the addition of the numeric "10" appears insignificant to cause distinction of marks. It may appear to ordinary buyers that the numeric "10" indicates the dose of micronutients and medications measured either in milligrams or micrograms on the basis of the medicine's potency. Such that, if either of the marks are spoken, they create an apparent aural similarity creating the likelihood of confusion of one mark as against the other because of the identical word NUTRI.

Further, a scrutiny of the goods covered by the mentioned marks show the similarity and relatedness of the pharmaceutical products covered by the marks in classification no. 5. Opposer's NUTRILIN is a food supplement or vitamins in syrup form for children.[7] Similarly, Respondent-Applicant's NUTRI 10 is a food supplement or vitamins in drops or syrup form for infants and children, and also in capsule form for pregnant women. Obviously, they are intended for the same purpose and use, cater to the same group of purchasers, particularly the children, and available in the same channels of trade.

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 purchaser as to cause him to purchase the one supposing it to be the other.[8] Colorable imitation does not mean such similitude as amount to identify, nor does it require that all details be literally copied. Colorable imitation refers to such similarity in form, context, words, sound, meaning, special arrangement or general appearance of the trademark or tradename with that of the other mark or tradename in their over-all presentation or in their essential substantive and distinctive parts as would likely to mislead or confuse persons in the ordinary course of purchasing the genuine article.[9]

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

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6 Filewrapper records.
7 Exhibit "E" of Opposer.
8 Societe Des Produits Nestle, S.A. v. Court of Appeals, G.R. No. 112012, 04 April 2001, 356 SCRA 207, 217.
9 Emerald Garment Manufacturing Corp. v. Court of Appeals, G.R. No. 100098, 29 December 1995.

constitute an infringement of an existing trademark, 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.[10] 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:[11]

> 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 on 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 of the former reflects adversely on the plaintiff's reputation. The other is the confusion of business. Hence, 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.

WHEREFORE, premises considered, the instant opposition is hereby SUSTAINED. Let the filewrapper of Trademark Application Serial No. 4-2011-011436 be returned, together with a copy of this Decision, to the Bureau of Trademarks for information and appropriate action.

SO ORDERED.

Taguig City, 01 April 2016.

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

10 American Wire and Cable Co. v. Director of Patents, et al., 31 SCRA 544, G.R. No. L-26557, 18 February 1970.
11 Converse Rubber Corporations v. Universal Rubber Products, Inc. et al., G.R. No. L-27906, 08 January 1987.