

T.C. PHARMACEUTICAL INDUSTRIES CO., LTD., }  
Opposer, }

-versus-

L&C POWERPLUS, INC., }  
Respondent-Applicant. }

IPC No. 14-2014-00013

Opposition to:

Appln. Serial No. 4-2012-003619

Date Filed: 22 March 2012

TM: BARAKO BULL  
ENERGY DRINK

X-----X

**NOTICE OF DECISION**

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**GREETINGS:**

Please be informed that Decision No. 2017 - 168 dated 24 May 2017 (copy enclosed) was promulgated in the above entitled case.

Pursuant to Section 2, Rule 9 of the IPOPHL Memorandum Circular No. 16-007 series of 2016, any party may appeal the decision to the Director of the Bureau of Legal Affairs within ten (10) days after receipt of the decision together with the payment of applicable fees.

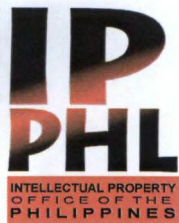
Taguig City, 25 May 2017.

**MARILYN F. RETUAL**  
IPRS IV

Bureau of Legal Affairs

**Republic of the Philippines**  
**INTELLECTUAL PROPERTY OFFICE**

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- versus -

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IPC No. 14-2014-00013  
Opposition to:

Appln. No. 4-2012-003619  
Date Filed: 22 March 2012  
Trademark: "**BARAKO BULL  
ENERGY DRINK**"

Decision No. 2017 - 168

## DECISION

T.C. PHARMACEUTICAL INDUSTRIES CO. LTD. ("Opposer")<sup>1</sup> filed a verified opposition to Trademark Application Serial No. 4-2012-003619. The application, filed by L&C POWERPLUS, INC. ("Respondent-Applicant")<sup>2</sup>, covers the mark "BARAKO BULL ENERGY DRINK" for use on "*energy drink, non-alcoholic drink and other preparations for making beverages*" under Class 32 of the International Classification of Goods and Services.<sup>3</sup>

The Opposer alleges that it is the owner of trademarks which incorporate BARAKO, Bull Device and RED BULL as prominent parts (collectively referred to herein as "BULL" marks) which are used and promoted by the Opposer all over the world. These include the marks BARAKO & DOUBLE BULL, DOUBLE BULL DEVICE, and RED BULL. On the other hand, Respondent-Applicant's subject mark "BARAKO BULL ENERGY DRINK" has yet to present proof of use of said mark. Opposer's BULL marks, some of which were granted registration as early as in 1995, were filed and registered much earlier than the filing of the subject mark. It has also registrations in foreign countries including Thailand, Hongkong, Indonesia, Singapore, China, Cambodia, Myanmar, Vietnam, Taiwan, Korea, Australia, Brunei, Malaysia and Laos. Thus, Opposer asserts that as the holder of valid and subsisting registration for BULL marks, it has the right to use the same to the exclusion of all others, including the subject mark. In fact, the Opposer holds valid and subsisting registrations for a host of other BULL marks, all of which pre-date the application of Respondent-Applicant.

The Opposer further alleges that it has been using BULL marks for 20 years. Apart from its home country, Opposer's goods are also sold and distributed worldwide for many years. In

<sup>1</sup> A corporation duly organized and existing under the laws of Thailand with principal office at 288 Ekachi Road, Bangbon Sub-District, Bangkok, Thailand.

<sup>2</sup> With address at 80 Marcos Highway, Mayamot Antipolo City, Rizal, Philippines.

<sup>3</sup> The Nice Classification is a classification of goods and services for the purpose of registering trademark and service marks, based on the Nice Agreement Concerning the International Classification of Goods and Services for the Purpose of the Registration of Marks, which was concluded in 1957 and administered by the World Intellectual Property Organization.

the Philippines, Opposer first used BULL marks on 30 June 1993 through its distributor Energy Food and Drinks, Inc., which are available to retail consumers in malls, supermarkets, convenience stores and sari-sari stores.

Moreover, Opposer claims that its BULL marks enjoy global acclaim and are internationally well-known and should be declared as well-known marks under the rules. It extensively and continuously advertises its products, trademarks and name in various newspapers and magazines worldwide. It has online presence through its website, [www.redbull.com](http://www.redbull.com). In fact, Red Bull was included in the Official Top 500 Consumer Superbrands.

According to the Opposer, Respondent-Applicant's mark has the dominant feature, "BARAKO BULL" which is conceptually, aurally and visually similar to Opposer's "BARAKO & DOUBLE BULL" mark. Both parties stamp their respective marks on the containers of their goods with the image of a bull, an element for which Opposer's BULL marks are well-known for. The marks are applied on the same or similar kind of product, offered to the same target market and sold through the same channels. The goods involved are common every day foods of relatively inexpensive value purchased over-the-counter without much thought or analysis by the typical buyer. This raises the propensity of the Respondent-Applicant's mark being mistaken by the public to be affiliated with the Opposer. In point of fact, this Honorable Office appreciated the distinctiveness of the Opposer's BULL marks in Decision Nos. 07-49 dated 30 April 2007, 2008-139 dated 18 July 2008 and 2008-141 dated 23 July 2008.

The Opposer submitted the following evidence:

1. Authenticated Affidavit-Testimony of Ms. Pavana Langthara and Mr. Saravoot Yoovidhya, authorized directors of T.C. Pharmaceutical Industries Co.;
2. Invoices showing the early stage of the use of the RED BULL marks in the Philippines in 1993;
3. Invoices covering years 1993-2005 on the use of the RED BULL marks in the Philippines;
4. Listings of applications and registrations of the mark RED BULL and its variants in various countries (inclusive of English translation);
5. Invoices covering years 1999-2005 on the use of the RED BULL marks in foreign countries;
6. Photographs of sales and advertisements of RED BULL products;
7. Superbrands List of Official Top 500 2012;
8. Certificates of Registration of the RED BULL marks in various countries;
9. Certificate of Registration Nos. 60086 for the mark RED BULL; 4-2003-002535 for the mark RED BULL; 60093 for the mark DOUBLE BULL DEVICE; and, 4-2003-002534 for the mark BARAKO & DOUBLE BULL;
10. Decision No. 2008-141 for the mark BULL FIGHTER and DESIGN;
11. Decision No. 2008-139 for the mark EL TORO and DEVICE;
12. Decision No. 2009-110 for the mark TORO Inside a Dark Rectangular DEVICE";
13. Decision No. 2007-49 for the mark DEVICE OF A BULL;
14. Advertisements and articles relating to the products bearing the RED BULL marks in the SOFTDRINKS WORLD magazines in the period 2001-2007; and,

15. Special Power of Attorney and Secretary's Certificate executed by Ms. Pavana Langthara and Mr. Saravoot Yoovidhya.

On 16 April 2014, Respondent-Applicant filed its Answer. It avers that its mark is not identical to, or confusingly similar to, or constitutes a translation of, the marks cited by the Opposer so as to likely to deceive or cause confusion. The full description of the mark states, "The word mark consists of combinations of capitalized words 'BARAKO', 'BULL', 'ENERGY' and 'DRINK' that are slanted across from lower left to upper right. The words 'BARAKO' and 'BULL' are yellow color (Pantone 3945C) with black outline/shadow. The word 'ENERGY' and 'DRINK' are color black." According to Respondent-Applicant, attention should be accorded to the Opposer's habit of sweepingly referring to its registered marks as the "BULL" marks and subsequent self-serving conclusion that since Opposer is the owner of the "BULL" marks, Respondent-Applicant's use of the mark BARAKO BULL ENERGY DRINK results in the likelihood of confusion.

Respondent-Applicant sets forth the following Special and Affirmative Defenses:

1. The Applicant's mark does not resemble the Opposer's marks.
2. The use of the word "BULL" will not cause confusion, mistake or deception.
3. The Opposer's marks are used for goods which are unrelated to that which uses the Applicant's mark.
4. The Opposer's marks are not well-known marks.
5. The Honorable Intellectual Property Office has already allowed the registration of the mark "BARAKO BULL" and even issued a Certificate of Registration in favor of the Applicant for its trademark "BARAKO BULL ENERGY DRINK".

The Respondent-Applicant submitted the following evidence:

1. Photocopy of the Declaration of Actual use for the mark BARAKO BULL ENERGY DRINK;
2. Copy of Entry of Judgment/Execution of Order dated 04 September 2012 in an opposition to Trademark Application for BARAKO BULL ENERGY DRINK;
3. Copies of the Certificate of Registration dated 11 June 2012 and Notice of Allowance for BARAKO BULL ENERGY DRINK'

The Preliminary Conference was held and terminated. Respondent-Applicant submitted its position paper. The Opposer, on the other hand, failed to appear on said conference and has therefore waived its right to submit its position paper. This case is deemed submitted for decision.

Prefatorily, 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.<sup>4</sup>

Records reveal that at the time the Respondent-Applicant filed an application for registration of the subject mark on 22 March 2012, the Opposer already has valid and existing registrations of its "RED BULL" marks issued as early as 14 March 1995 under Certificate of Registration No. 60086, "BARAKO and DOUBLE BULL" mark issued on 02 October 2006 under Certificate of Registration No. 4-2003-002534 and, "RED BULL EXTRA LABEL" mark issued on 19 March 2007 under Certificate of Registration No. 4-2003-002533.<sup>5</sup>

But are the competing marks, as shown below, confusingly similar?



Opposer's Trademark



Respondent-Applicant's Trademark

When one looks at the Opposer's mark, what is retained in the eyes and mind are the words "RED BULL" and the picture of two bulls facing each other. Respondent-Applicant's mark contain the same word "BULL" as prominent element of its entire mark. While Respondent-Applicant's mark has the word "BARAKO" which connotes a male animal or a stud<sup>6</sup>, it appears to describe or relate to a bull, which is an animal used for breeding or rodeo riding, similar to the picture in Opposer's mark. Thus, it is likely that consumers will be confused or have the wrong impression that the contending marks and/or the parties are connected or associated with one another. The dissimilarities are almost negligible that one cannot help but at least be reminded of the Opposer's "RED BULL" or "BULL". After all, 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.<sup>7</sup> As held by the Supreme Court in **Del Monte Corporation vs. Court of Appeals**<sup>8</sup>:

<sup>4</sup> Pribhdas J. Mirpuri vs. Court of Appeals, G.R. No. 114508, 19 November 1999.

<sup>5</sup> IPPHL Philippine Trademark Database, available at <http://www.wipo.int/branddb/ph/en/> (last accessed 23 May 2017).

<sup>6</sup> Tagalog English Dictionary, available at <http://www.bansa.org/dictionaries/tgl/?type=search&data=stud> (last accessed 24 May 2017).

<sup>7</sup> Societe des Produits Nestle, S.A. vs. Court of Appeals, GR No. 112012, 04 April 2001.

<sup>8</sup> G.R. No. L-78325, 25 January 1990.

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“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.”

Further, the illustrated marks cover similar and/or related goods, more particularly class 32 for various kinds of beverages. Indeed, these goods are found in the same channels of business and trade and/or cater its products to the same segment of consumers. Thus, the consumers will have the impression that these products originate from a single source or origin or they are associated with one another. The likelihood of confusion therefore, would subsist not only on the purchaser's perception of goods but on the origin thereof as held by the Supreme Court, to wit:<sup>9</sup>

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. 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.

Furthermore, it is noteworthy that the mark “RED BULL” has been declared well-known by the Director General in the decision promulgated on 16 September 2010 in Appeal No. 14-07-21 (IPC No. 14-2006-00029) entitled “T.C. Pharmaceutical Industries Co., Ltd. vs. Osborne Y Compania S.A.”, to wit:

“Accordingly, considering that at least a combination of the criteria set forth under the Trademark Regulations were met, RED BULL is deemed a well-known mark.”

Corollarily, Section 123.1 paragraphs (d), (e) and (f) of Republic Act No. 8293, also known as the Intellectual Property Code of the Philippines (“IP Code”), provides 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;

(e) Is identical with, or confusingly similar to, or constitutes a translation of a mark which is considered by the competent authority of the Philippines to be well-known internationally and in the Philippines, whether or not it is registered here, as being already the mark of a person other than the applicant for registration, and used for identical or similar goods or services: Provided, That in determining whether a mark is well-known,

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<sup>9</sup> Id.

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account shall be taken of the knowledge of the relevant sector of the public, rather than of the public at large, including knowledge in the Philippines which has been obtained as a result of the promotion of the mark;

(f) Is identical with, or confusingly similar to, or constitutes a translation of a mark considered well-known in accordance with the preceding paragraph, which is registered in the Philippines with respect to goods or services which are not similar to those with respect to which registration is applied for: Provided, That use of the mark in relation to those goods or services would indicate a connection between those goods or services, and the owner of the registered mark: Provided further, That the interests of the owner of the registered mark are likely to be damaged by such use;  
xxx”

Hence, the registration of the mark applied for registration by the Respondent-Applicant must not be allowed pursuant to Section 123.1 of the IP Code.

**WHEREFORE**, premises considered, the instant Opposition to Trademark Application No. 4-2012-003619 is hereby **SUSTAINED**. Let the filewrapper of the subject trademark application be returned, together with a copy of this Decision, to the Bureau of Trademarks for information and appropriate action.

**SO ORDERED.**

Taguig City. 24 MAY 2017



**Atty. GINALYN S. BADIOLA, LL.M.**  
*Adjudication Officer, Bureau of Legal Affairs*