

NESTLE PHILIPPINES, INC.
and SOCIETE DES PRODUITS
NESTLE S.A.,

Opposer,

- versus -

INTER PARTES CASE NOS.
3111 AND 3194

OPPOSITION TO:

Application Serial No.: 39705
Filed: October 15, 1979
Applicant: Malaysia Dairy Industries
Private Limited
Trademark: VITAGEN
Used On: Mineral and aerated waters and other
non-alcoholic drinks; syrups and other
preparations for making beverages

MALAYSIA DAIRY INDUSTRIES
PRIVATE LIMITED,
Respondent-Applicant.

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DECISION NO. 90-26 (TM)
July 5, 1990

DECISION

This is a consolidated case of opposition filed by Societe des Produits Nestle S.A. and Nestle Philippines, Inc. (herein Opposers) against Application Serial No- 39705 for the trademark "VITAGEN" applied for by Malaysia Dairy Industries Private Limited (herein Respondent-Applicant).

Societe des Produits Nestle S.A., a company organized under the laws of Swiss confederation and domiciled in Switzerland, is acting in the capacity of the registered owner of the trademark "VITA" under Certificate of Registration No. 31168 issued by this Bureau on October 1, 1982, while Nestle Philippines, Inc., a corporation organized and existing under the laws of the Philippine with domicile in this country, acts in the capacity of a licensee of the former.

The sole issue raised by Opposers is that Respondent-Applicant's trademark "VITAGEN" covering goods under Class 14, i.e., mineral and aerated water and other non-alcoholic drinks, syrups and other preparations for making beverages, is confusingly similar to the trademark "VITA" which covers the goods under the same Class 14, i.e., vegetable-based meat extender and soya-based food products, especially beverage soya drinks.

Respondent-Applicant failed to file an Answer to the Opposition despite due notice and was declared in default. Thus, this case proceeded ex parte.

Opposers presented as evidence sales slips and invoices covering the sale of the products bearing the trademark "VITA", all dated October 25, 1979, to show actual use in the Philippines (Exhs. "B-1" to "B-12"). Opposers likewise presented promotional materials for the trademark "VITA" as used on soya-based food products and soya-based beverage drinks to establish goodwill over the mark (Exhs. "C-1" to "C-3").

This Bureau takes notice of its decision in Inter Partes Case No. 1859 (Decision No. 86-46 dated June 1, 1986) where the parties, the trademark and the issue involved are squarely applicable to this case. In the cited case, Societe des Produits Nestle S.A. opposed the trademark Application Serial No. 39704 for "VITA" applied for by Malaysia Dairy Industries

Private Limited on the ground of confusing similarity with the registered mark "VITAGEN" of the Opposer. The decision states that:

"This Office, in spite of the cited differences, did not give great significance to them. Differences or variations in the details of one trademark and of another are not the legally accepted tests of determining whether a trademark is confusingly similar to another. In deciding whether one of two trademarks infringes the other, consideration should be given to the impression, created by each mark as a whole, not as dissected. This is because the consuming public is not expected to analyze or to dissect respective marks carefully. Moreover, as what is well settled in foreign jurisprudence, the addition of a house mark, trade name or other matter to a term which, in the absence of the added matter, would be the same as or confusingly similar to another mark is generally not sufficient to preclude confusion in trade. It must be noted that had the letters G, E and N been omitted in the trademark 'VITAGEN' then, obviously, Respondent-Applicant would be using the trademark 'VITA'.

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In the case at bar, this Office cannot close its eyes to the great possibility that, due to the extensive promotions and advertisements of the Opposer, the trademark 'VITA' is already impressed in the mind of the consumers. Also, this Office could not disregard the reasonable possibility that, in case Respondent-Applicant is allowed to use the trademark 'VITAGEN' on its goods, the word 'VITA' may become the dominant feature of the mark.

It is, thus, logical to surmise that an ordinary purchaser who has been influenced by the advertisements of Opposer may, upon seeing the Respondent-Applicant's goods, be misled or be mistaken to believe that said goods are associated or originated from the Opposer.

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By and large, this Office concludes that allowance of Respondent-Applicant's application for registration of the trademark 'VITAGEN' would be violative of Section 4(d) of Republic Act 166, as amended, hereinbefore quoted."

We find no cogent reason to disturb this previous finding of confusing similarity. Respondent-Applicant in the present case must have realized the propriety of the decision in the cited case for, instead of defending its right, if any, over the mark, it did not bother to file an answer to the Oppositions lodged by the Opposers. Thus, Respondent-Applicant was declared in default throughout the proceedings.

WHEREFORE, the consolidated Oppositions filed by Opposers Societe des Produits Nestle S.A. and Nestle Philippines, Inc. is, as it is hereby, GRANTED. Accordingly, Respondent-Applicant's application for registration of the trademark "VITAGEN" filed on October 15, 1979 under Serial No. 39705 is hereby REJECTED.

Let the records of this case be forwarded to the Trademark Examining Division for proper action pursuant to this Decision.

SO ORDERED.

IGNACIO S. SAPALO
Director