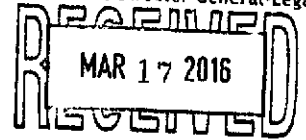


Republic of the Philippines
COURT OF APPEALS
Manila

Intellectual Property Office of the Phils.
Office of the Director General-Legal



BY: TIME: 3:50

ALDRTZ CORPORATION,
Petitioner,

-versus-

CA-G.R. SP NO. 137450

UNITED LABORATORIES, INC.,
Respondent.

x-----x

NOTICE OF JUDGMENT

Sir/Madam:

Please take notice that on March 7, 2016, **DECISION**, a copy of which is hereto attached, was promulgated by the ELEVENTH DIVISION of the Court of Appeals in the above-entitled case, the original of which is now on file in this Office.

You are hereby required to inform this Court within FIVE (5) DAYS from receipt hereof of the date you received this Notice.

Truly yours,


MARIA ISABEL M. PATTUGALAN-MADARANG
Executive Clerk of Court III

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Republic of the Philippines
Court of Appeals
Manila

ELEVENTH DIVISION

ALDRTZ CORPORATION,
Petitioner,

CA-G.R. SP NO. 137450

Members:

VILLON, J., *Chairperson*
ZALAMEDA, &
CORALES, JJ.

- versus -

UNITED LABORATORIES, INC.,
Respondent.

Promulgated:
07 MAR 2016

10:37 am

DECISION

CORALES, J.:

This is a Petition for Review¹ under Rule 43 of the Rules of Court assailing the September 15, 2014 Decision² of the Office of the Director General (ODG) of the Intellectual Property Office (IPO) in Appeal No. 14-2012-0023 entitled "*United Laboratories, Inc. v. Aldrtz Corporation*". The assailed Decision reversed and set aside the April 17, 2012 Decision No. 2012-67³ of the Director of the Bureau of Legal Affairs (BLA) in IPC No. 14-2009-00211 which gave due course to petitioner Aldrtz Corporation's (Aldrtz) application for registration of the trademark "ENERGO EXTREME (STYLIZED)".

¹ *Rollo*, pages 8-33.

² Penned by Director General Ricardo R. Blancaflor, *ibid.*, pages 35-42.

³ Penned by Atty. Nathaniel S. Arevalo, Director IV, Bureau of Legal Affairs, *ibid.*, pages 90-98.

The Antecedents

Aldrtz is a domestic corporation engaged in the manufacture of energy drink products. On December 9, 2008, it applied for the registration of the mark "ENERGO EXTREME (STYLIZED)" for goods falling under Classes 5⁴ and 32 of the Nice Classification.

On August 26, 2009, respondent United Laboratories, Inc. (Unilab), a domestic corporation engaged in the marketing and sales of pharmaceutical products, filed a Verified Notice of Opposition⁵ to Aldrtz' trademark application. It argued that the mark "ENERGO" closely resembles its trademark "ENERVON-C"⁶ which has been registered in its name since June 16, 1969. The resemblance will likely cause confusion, mistake, and deception on the part of the purchasing public considering that the mark "ENERGO" is applied for the same class and goods as Unilab's mark "ENERVON-C". As lawful owner of the mark "ENERVON-C", Unilab is entitled to prevent Aldrtz from using a confusingly similar mark in the course of trade which would likely mislead the public.

Aldrtz filed its Verified Answer⁷ alleging that its mark "ENERGO" is already a well-known mark with an established and independent goodwill and reputation. It added that the mark "ENERGO EXTREME (STYLIZED)" for its energy drink variant is strikingly distinct from Unilab's "ENERVON-C" mark which is registered for goods in Class 5 particularly, "a high-potency therapeutic vitamin formula containing essential Vitamin B Complex plus Vitamin C". It stressed that while there may be similarity in the spelling of the two (2) marks as they both use the letters E-N-E-R, still, the manner of display, style and design of words, their pronunciation, and over-all appearances show that the two (2) marks are in no way identical. "ENERVON-C" mark consists of a simple

⁴ 5. Pharmaceutical, veterinary and sanitary substances; infants; and invalids' foods; plasters, material for bandaging; material for stopping teeth, dental wax; disinfectants; preparations for killing weeds and destroying vermin[.]

⁵ *Rollo*, pages 132-151.

⁶ See Assignment of Registered Trademark and Certificate of Registration No. 14854, *ibid.*, pages 157-158 and 154-155, respectively.

⁷ *Ibid.*, pages 44-65.

and plain word mark while "ENERGO EXTREME (STYLIZED)" mark has various components, *i.e.*, the coined word "ENERGO" with a slight diagonal slant towards the right and the English word "Extreme" with a stylized letter "X" drawn in large font or more dominantly than the other letters. Thus, any confusion, whether as to goods or origin, is unlikely to occur.

The Rulings of the BLA and the ODG

In its April 17, 2012 Decision,⁸ the BLA denied Unilab's opposition and gave due course to Aldrtz' trademark application. It held that the only similarity between the competing marks is the first four (4) letters comprising the first two (2) syllables "ENER", which is derived from the word "energy". "ENER" alone is not unique as a mark and is only suggestive of the components of goods bearing such mark. It is the suffixes or appendages to the prefix "ENER" and/or the devices, if any, which would make the trademark distinctive. The BLA further observed that the last syllable in Unilab's mark "VON-C" is different from the last syllable in Aldrtz' mark "GO". Thus, it concluded that there is a fine distinction between the contending marks as to sound and appearance such that confusion or deception is unlikely to occur. It then disposed the case as follows:

WHEREFORE, premises considered, the instant opposition is hereby **DENIED**. Let the filewrapper of Trademark Application No. 4-2008-014849 be returned, together with a copy of this Decision, to the Bureau of Trademarks for information and appropriate action.

SO ORDERED.

On appeal, the ODG, through its September 15, 2014 Decision,⁹ reversed and set aside the findings of the BLA. It noted that Aldrtz is using "ENERGO" for food supplement, capsule, syrup, and energy drink and powder which are related to Unilab's vitamin products using the trademark "ENERVON-C". It held that the way the two (2)

⁸ *Supra*, at note 3.

⁹ *Supra*, at note 2.

marks are presented and used for related goods gives the impression that the products covered by these marks are owned by the same person and one may consider Aldrtz' "ENERGO" as just a variation of Unilab's "ENERVON-C" that has been registered as early as 1969. It further emphasized that both companies are members of the pharmaceutical industry and it is not unlikely that Aldrtz knew of Unilab's products, still, the former failed to successfully explain why it is using "ENER" as part of its mark instead of adopting the word "energy". The absence of explanation only means that Aldrtz is riding on the goodwill that ENERVON has created through the years. The dispositive portion of the ODG's Decision reads:

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.

Aggrieved, Aldrtz filed the instant petition for review raising the following issues:

I.

ARE PETITIONER'S "ENERGO EXTREME (STYLIZED) MARK" AND RESPONDENT'S "ENERVON-C" MARK CONFUSINGLY SIMILAR?

II.

IS PETITIONER'S USE OF ENERGO EXTREME LIKELY TO CAUSE CONFUSION IN VIEW OF THE RESPONDENT'S EXISTING USE OF ENERVON-C?

Aldrtz insists that whether the court applies the dominance test or the holistic test, the likelihood of confusion would not arise considering that Unilab's "ENERVON-C" mark has no design or other distinctive feature while its "ENERGO EXTREME (STYLIZED)" mark has two (2) dominant features, namely, the coined word "ENERGO", and the large stylized letter "X". Even the common use of the syllables "ENER" would not result in confusion as to the source or origin of the goods because "ENER" in itself does not point to the origin or ownership of the product, but is merely suggestive of the word "energy". An ordinary purchaser would distinguish the difference between an energy drink bearing the "ENERGO EXTREME (STYLIZED)" mark and a multivitamin product bearing the "ENERVON-C" mark. In fact, its ENERGO energy drink and Unilab's ENERVON-C vitamins have successfully co-existed in the market for several years and the consuming public is well-aware that these products are produced by different companies. In refutation of the ODG's ruling that Aldrtz is riding on the goodwill ENERVON has created through the years, it asserts that the ODG cannot dictate it to use "ENERGYGO" instead of "ENERGO" as it undermines its right to choose the mark it prefers. Aldrtz further argues that although "ENER", by itself, cannot be appropriated as a component of trademark to the exclusion of others, it may properly become the subject of a trademark by combining it with another word or phrase. To prove its contention, Aldrtz invokes an earlier ruling of the ODG in IPC No. 14-2008-00348 entitled "*United Laboratories, Inc. v. Aldrtz Corporation*"¹⁰ wherein the ODG gave due course to Aldrtz' application for registration of the mark "ENERGO ALWAYS ON THE GO! OSTRICH LOGO" and ruled that the same is not confusingly similar with Unilab's "ENERVON-C".¹¹

In defense of the assailed ODG Decision, Unilab maintains that the registration of the mark "ENERGO EXTREME (STYLIZED)" would be contrary to Section 123.1(d) of the Intellectual Property Code which prohibits the registration of a mark if, among others, it is

¹⁰ See September 9, 2014 Decision in Appeal No. 14-2012-0022, penned by Director General Ricardo R. Blancaflor, *rollo*, pages 82-88.

¹¹ See Petition for Review, *supra*, at note 1.

identical with a registered mark belonging to a different proprietor in respect of the same goods or services, or closely related goods or services, or if it nearly resembles such a mark as to be likely to deceive or cause confusion. It points out that the dominant word "ENERGO" in the mark "ENERGO EXTREME (STYLIZED)" will likely cause confusion, mistake, and deception on the part of the purchasing public for the following reasons: (a) "ENERGO" appears and sounds almost the same as "ENERVON"; (b) both start with the letter "E"; (c) the first four letters "ENER" are the same; (d) both are composed of three (3) syllables; and (e) the last syllables have the same sound and intonation. Lastly, it argues that there is also likelihood of confusion as to reputation or goodwill between Aldrtz and Unilab, and to allow the former to register a confusingly similar trademark would enable it to obtain benefit from Unilabs' reputation and goodwill.¹²

This Court's Ruling

The petition is meritorious.

Aldrtz' "ENERGO EXTREME (STYLIZED): Not Confusingly Similar with Unilab's "ENERVON-C"

In determining similarity and likelihood of confusion, case law has developed the Dominancy Test and the Holistic or Totality Test. The Dominancy Test focuses on the similarity of the dominant features of the competing trademarks that might cause confusion, mistake, and deception in the mind of the ordinary purchaser, and gives more consideration to the aural and visual impressions created by the marks on the buyers of goods, giving little weight to factors like prices, quality, sales outlets, and market segments. On the other hand, the Holistic or Totality Test considers the entirety of the marks as applied to the products, including the labels and packaging, and focuses not only on the predominant words but also on the other features appearing on both labels to determine whether one is

¹² See Comment/Opposition [To The Petition for Review dated 15 October 2014] and Compliance [To A.M. No. CA-13-51-J], *rollo*, pages 361-380.

confusingly similar to the other as to mislead the ordinary purchaser.¹³

Applying either of the two (2) test, it is clear that the "ENERGO EXTREME (STYLIZED)" mark sought to be registered by Aldrtz is not confusingly similar to the "ENERVON-C" mark already registered by Unilab. Indeed, the two (2) marks are written in upper case letter and bold font, and their first four (4) letters begin in "ENER". However, the similarities end there. We note that each mark bears distinct aural and visual differences. Unilab's mark is a combination of the word "ENERVON", the dash (-) sign, and the letter "C". On the other hand, Aldrtz' mark is a combination of the words "ENERGO" and "EXTREME" which are italicized.¹⁴ The letter "X" in the word "EXTREME" is stylized and drawn in a large font which is dominant than the other letters. The visual dissimilarities between the two (2) marks are evident and significant, negating the possibility of confusion in the minds of the ordinary purchaser, especially considering the distinct aural difference between the marks.¹⁵ Even by pronouncing or by reading both marks, it could hardly provoke a confusion, as to mistake one for the other.¹⁶

Moreover, it is evident that the mark "ENERVON" and not merely the first four (4) letters "ENER" identifies Unilab as the manufacturer or producer of the goods upon which said mark is used in the same manner that "ENERGO" identifies Aldrtz' product. The word "ENER" is derived from the word "energy" which is descriptive of the products of both Unilab's vitamins and Aldrtz's energy drink and food supplement. As the BLA correctly observed, "ENER" alone is not unique as a mark or as a component of the mark for the subject goods. What would make such trademark distinctive are the suffixes or appendages to the prefix "ENER" and/or the devices, if any.¹⁷ Verily, the addition of the syllable "GO" in the prefix "ENER" is sufficient to distinguish Aldrtz' product from that

¹³ See *Great White Shark Enterprises, Inc. v. Caralde, Jr.*, G.R. No. 192294. November 21, 2012.

¹⁴ See copy of Application No. 42008002870, *rollo*, page 70.

¹⁵ See *Great White Shark Enterprises, Inc. v. Caralde, Jr.*, *supra*, at note 13.

¹⁶ See *Fruit of the Loom, Inc. v. Court of Appeals*, G.R. No. L-32747. November 29, 1984.

¹⁷ See page 4 of the April 17, 2012 Decision No. 2012-67, *supra*, at note 3.

of Unilab. The disquisition in the landmark case of *American Cyanamid Co. v. Director of Patents*¹⁸ is instructive:

What is relevant to and decisive of the case at bar is *Mead Johnson & Co. vs. N.V.J. Van Dorp. Ltd., et al., L-17501*, decided on April 27, 1963, barely a year before the appealed decision in the instant case. Van Dorp, Ltd., a Netherlands corporation, filed an application for the registration of its trademark "ALASKA and pictorial representation of a Boy's Head within a rectangular design." Mead Johnson, a corporation organized under the laws of Indiana, U.S.A., being the owner of a trademark "ALACTA" used for powdered half-skim milk, which was registered with the Patent Office on June 12, 1951, opposed the registration on the ground that it will be damaged by the use of the trademark "ALASKA" on milk products, etc., the same being confusedly similar to its trademark "ALACTA". The Director of Patents dismissed the opposition and approved for registration the trademark "ALASKA" on the ground that the applicant's trademark does not sufficiently resemble oppositor's mark as to cause confusion or mistake or deceive purchasers. This Court through Justice Bautista Angelo upheld the findings of the Director of Patents. **The Court held that while there are similarities in spelling, appearance and sound between "ALACTA" and "ALASKA" the trademarks in their entirety as they appear in their respective labels show glaring and striking differences or dissimilarities such as in size of the containers, the colors of the labels, inasmuch as one uses light blue, pink, and white, while Van Dorp containers uses two color bands, yellowish white and red; furthermore the mark "ALACTA" has only the first letter capitalized and is written in black while the mark "ALASKA" has all the letters capitalized written in white except that of the condensed full cream milk which is in red.**

Ethepe vs. the Director of Patents, Westmont Pharmaceutical, Inc. is another case in point. In *Ethepe*, the question was whether the trademark "ATUSSIN" of Westmont may be registered in the Philippines notwithstanding the objection of *Ethepe* which claimed that it would be damaged because "ATUSSIN" is so confusingly similar with "PERTUSSIN" registered in this country on September 25, 1957. The Director of Patents approved the application for the registration of the trademark "ATUSSIN" and his decision was appealed to this Court. In disposing of the appeal, the Court affirmed the decision of the Director of Patents holding, *inter alia*,

¹⁸ G.R. No. L-23954. April 29, 1977.

that a practical approach to the problem of similarity or dissimilarity is to go into the whole of the two trademarks pictured in their manner of display; that taking a casual look at the two labels it is shown that they are entirely different in color, contents, arrangement of words thereon, sizes, shape, and general appearance so that the label of one cannot be mistaken for that of the other; **that the use of the word "tussin" as a component of both trademarks cannot be considered as a factor for declaring the two confusingly similar for "tussin" is descriptive and generic and is open for appropriation by anyone, and that while the word by itself cannot be used exclusively to identify one's goods it may properly become a subject of a trademark by combination with another word or phrase; hence, Ethepa's "Pertussin" and Westmont's "Atussin".**

Similarly, in the case before Us, as correctly stated by the Director of Patents, the word SULMET is derived from a combination of the syllables "SUL" which is derived from Sulfa and "MET" from methyl both of which are chemical compounds present in the article manufactured by the contending parties and the addition of the syllable "INE" in respondent's label is sufficient to distinguish respondent's product or trademark from that of petitioner. (Italics appear in the original text of the Decision; emphasis supplied)

It may not be amiss to state that Aldrtz and Unilab's products are not identical as to cause confusion of business. An ordinary purchaser would easily distinguish an energy drink such as ENERGO from a multivitamins such as ENERVON-C considering their descriptive properties and physical attributes. Besides, an energy drink is not usually displayed along with multivitamins. As such, an intelligent buyer would not be likely confused as to the origin of the products they intend to purchase.

It further bears stressing that the uniformity in categorization of Aldrtz' energy drink and Unilab's multivitamins, by itself, does not automatically preclude the registration of what appears to be an identical mark, if that be the case.¹⁹ Elsewise stated, whether the

¹⁹ See Taiwan Kolin Corp., Ltd. v. Taiwan Electronics Co., Inc., G.R. No. 209843. March 25, 2015.

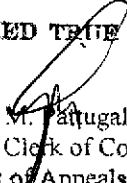
products covered by the trademark sought to be registered by Aldrtz, on the one hand, and those covered by the prior issued certificate of registration in favor of Unilab, on the other, fall under the same categories in the Nice Classification is not the sole and decisive factor in determining a possible violation of Unilabs' intellectual property right should Aldrtz' application be granted. It is hornbook doctrine that emphasis should be on the similarity of the products involved and not on the arbitrary classification or general description of their properties or characteristics. The mere fact that one person has adopted and used a trademark on his goods would not, without more, prevent the adoption and use of the same trademark by others on unrelated articles of a different kind.²⁰

In fine, there being no confusing similarity between the subject marks, the matter of whether Unilab's mark has gained reputation and goodwill becomes unnecessary.²¹

WHEREFORE, the instant petition for review is hereby **GRANTED**. Accordingly, the September 15, 2014 Decision of the Office of the Director General of the Intellectual Property Office in Appeal No. 14-2012-0023 is **REVERSED** and **SET ASIDE**. The April 17, 2012 Decision No. 2012-67 of the Director of the Bureau of Legal Affairs in IPC No. 14-2009-00211 is hereby **REINSTATED**.

SO ORDERED.

CERTIFIED TRUE COPY


Maria Isabel M. Patugalan-Madarang
Executive Clerk of Court III
Court of Appeals

Original Signed
PEDRO B. CORALES
Associate Justice

²⁰ *Ibid.*, citing Hickok Manufacturing Co., Inc. v. Court of Appeals and Santos Lim Bun Liong, No. L-44707, August 31, 1982.

²¹ See Great White Shark Enterprises, Inc. v. Caralde, Jr., *supra*, at note 13.

WE CONCUR:

Original Signed
SESINANDO E. VILLON
Associate Justice

Original Signed
RODIL V. ZALAMEDA
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court.

Original Signed
SESINANDO E. VILLON
Associate Justice
Chairperson, Eleventh Division