NOVARTIS AG, Opposer, **-versus-** **AJANTA PHARMA PHILIPPINES, INC.,** Respondent-Applicant.	} } } } } } } } } }	**IPC No. 14-2011-00132** Opposition to: Appln. Serial No. 4-2010-000811 Date Filed: 25 January 2010 **TM: "LEVETAM"**

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

NOTICE OF DECISION

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GREETINGS:

Please be informed that Decision No. 2016 - 41 dated February 10, 2016 (copy enclosed) was promulgated in the above entitled case.

Taguig City, February 10, 2016.

For the Director:

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

NOVARTIS AG,	}	**IPC No. 14-2011-00132**
Opposer,	}	
	}	**Opposition to:**
-versus-	}	**Application No. 4-2010-000811**
	}	**Date Filed: 25 January 2010**
	}	**Trademark: "LEVETAM"**
AJANTA PHARMA PHILIPPINES, INC.,	}	
Respondent-Applicant.	}	
x----------	x	***Decision No. 2016-41***

DECISION

NOVARTIS AG[1] ("Opposer") filed an opposition to Trademark Application Serial No. 4-2010-000811. The application, filed by Ajanta Pharma Philippines, Inc.[2] ("Respondent-Applicant"), covers the mark "LEVETAM " for use on "*pharmaceutical preparation, taken orally, indicated for as adjunctive therapy in the treatment of partial onset seizures in adults and children 4 years and older with epilepsy, myoclonic seizures in adults and adolescents 12 years of age and older with juvenile myoclinic epilepsy and primary generalized tonic-clonic seizures in adults and children 6 years of age and older with idiopathic generalized epilepsy*" under Class 05 of the International Classification of Goods and Services.[3]

The Opposer alleges:

x x x

"LEGAL GROUNDS FOR THE OPPOSITION

"6. The trademark LEVETAM being applied for by respondent-applicant is confusingly similar to opposer's trademark LEVETIX, as to be likely, when applied to or used in connection with the goods of respondent-applicant, to cause confusion, mistake and deception on the part of the purchasing public.

"7. The registration of the trademark LEVETAM in the name of respondent-applicant will violate Section 123.1, subparagraph (d) of the Intellectual Property Code of the Philippines, to wit:

x x x

[1] A foreign corporation duly organized and existing under and by virtue of the laws of Switzerland, with business address at 4002 Basel, Switzerland.

[2] A domestic corporation organized and existing under and by virtue of the laws of the Philippines with office address at Unit 710, Philippine AXA Life Center, #1286 Sen. Gil Puyat Avenue corner Tindalo Street, Brgy. San Antonio, Makati City 1203, Metro Manila, Philippines.

[3] The Nice Classification is a classification of goods and services for the purpose of registering trademark and service marks, based on a 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 Purposes of the Registration of Marks concluded in 1957.

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"8. The registration of the trademark LEVETAM in the name of respondent-applicant is contrary to other provisions of the Intellectual Property Code of the Philippines.

"FACTS AND CIRCUMSTANCES
" IN SUPPORT OF THE OPPOSITION

"I.

x x x

"9. The mark LEVETAM of respondent-applicant Ajanta Pharma Philippines, Inc. is confusingly similar with the trademark LEVETIX of opposer Novartis AG since:

a. "Five (5) out of seven (7) letters, i.e. L-E-V-E-T, in the mark of respondent-applicant are also present in opposer's mark and are in the exact same position.
b. "Due to the identity of the first five (5) letters, both marks 'look' alike when viewed from a distance.
c. "The first two (2) syllables LE-VE of respondent-applicant's mark are identical to the first two (2) syllables of opposer's mark. The third syllable TAM of respondent-applicant's mark sounds similar in the third syllable TIX of opposer's mark due to the identical first letter T.
d. "Because of the near unanimity in the letters and syllables of the two (2) marks, the syntax, the sound and the pronunciation of the words are the same. Phonetically therefore, the two (2) marks are confusingly similar.
e. "Both marks are word marks in plain letters and not stylized. Neither is in color nor is compounded with a unique device or design. Hence, the similarity between the two (2) marks is even more pronounced or enhanced.

"10. Indubitably, opposer's and respondent-applicant's marks are confusingly similar. The case of American Wire and Cable Co. vs. Director of Patents (G.R. No. L-26557, February 08, 1970) where the Supreme Court found that DURAFLEX, and DYNAFLEX are confusingly similar, finds application in the instant case, to wit:

x x x

"11. The last two (2) letters in both marks, i.e. I-X vis-à-vis A-M, do not negate confusing similarity between the marks of opposer and respondent-applicant, especially since most of the letters in both marks are identical and similarly positioned. The test of confusing similarity which would preclude the registration of a trademark is not whether the challenged mark would actually cause confusion, mistake or deception in the minds of the purchasing public but whether the use of such mark would likely cause confusion or mistake. The law does not require that the competing marks must be so identical as to produce actual error or mistakes. It is sufficient that the similarity between the two marks be such that there is a possibility or likelihood of the purchaser of the older brand mistaking the newer brand for it. (Acoje Mining Co., Inc. vs. Director of Patnets, 38 SCRA 480[1971]).

"12. Moreover, it is settled jurisprudence that identity or similarity in the dominant features of two (2) competing marks will cause mistake or confusion in the minds of the purchasing public. The case of Co Tiong Sa vs. Director of Patents (95 Phil. 1 [1954]) categorically held, as follows:

x x x

"13. It has also been held in the case of Phil. Nut Industry, Inc. vs. Standard Brands, Inc. (G.R. No. L-23035, 31 July 1975, 65 SCRA 575) that:

x x x

"14. The dominancy test was applied by the Supreme Court in many other cases including Lim Hoa vs. Director of Patents (100 Phil. 214 [1956]), Converse Rubber Corporation vs. Universal Rubber Products, Inc. (G.R. No. L-27906, 08 January 1987, 147 SCRA 154) and Asia Brewery, Inc. vs. Court of Appeals (G.R. No. 103543, 05 July 1993, 224 SCRA 437).

"15. In the recent case of McDonald's Corporation, et. al. vs. L.C. Big Mak Burger, et al. (G.R. No. 143993, August 18, 2004), the Supreme Court likewise applied the test of dominancy in determining that the mark BIG MAC of McDonald's Corporation and the mark BIG MAK of L.C. Big Mak Burger are confusingly similar, The Court ruled, as follows:

x x x

that was further affirmed in the 2007 case of McDonald's Corporation vs. Macjoy Fastfood Corporation (G.R. No. 166115, February 02, 2007) where the Supreme Court again applied the test of dominancy and ruled that there is confusing similarity between the McDonald's marks and the mark MACJOY & Device.

"16. The reasoning in the McDonald's case (supra) applying the Dominancy Test is relevant in the instant case. The dominant feature in opposer's mark LEVETIX is the mark itself, five (5) out of seven (7) letters of which are all present and similarly positioned in respondent-applicant's mark LEVETAM. The difference of two (2) letters vis-à-vis respondent-applicant's mark is inconsequential. This marginal distinction does not sufficiently distinguish the two marks from each other as they are similar in pronunciation, syntax, sound and appearance. As such, the two (2) marks are, for all intents and purposes, practically identical and confusingly similar. The purchasing public will easily recognize and remember the common letters L-E-V-E-T-__-__, and hence, it is very easy to mistake respondent-applicant's products bearing the mark LEVETAM for opposer's goods bearing the mark LEVETIX.

"II.

x x x

"17. Opposer's mark and respondent-applicant's mark both cover similar and competing goods under International Class 5.

x x x

Evidently, both marks are to be used on similar and competing goods. Both cover pharmaceutical goods for human use under the same classification (International Class 5). Both are also to be sold, marketed and/or found in the same channels of business and trade, namely pharmacies, clinics, hospitals, and/or doctor's offices. Hence, confusion will be more likely to arise in the minds of the purchasing public.

"18. In the case of Esso Standard Eastern, Inc. vs. Court of Appeals, et. al. (G.R. No. L-29971, August 31, 1982), the Supreme Court held that:

x x x

"19. In view of the similarity of the covered goods under International Class 5, the purchasing public will most likely be deceived to purchase respondent-applicant's goods in the belief that they are purchasing opposer's goods. This will thus result to damage to the public and to opposer's established business and goodwill, which should not be allowed.

III.

x x x

"20. In the Philippines, opposer is the owner of the trademark LEVETIX, the particulars of which are, as follows:

x x x

A copy of Certificate of Registration No. 4-2009-008113 is attached herewith and marked as Annex 'A' and made an integral part hereof.

"21. By virtue of the registration of the trademark LEVETIX in the Philippines, opposer can exercise the rights conferred on the owner of a registered mark, to wit:

x x x

"22. A boundless choice of words, phrases and symbols is available to a person who wishes to have a trademark sufficient unto itself to distinguish its products from those of others. There is no reasonable explanation therefore for respondent-applicant to use the mark LEVETAM for 'pharmaceutical preparation, et. al.' under the same International Class 5 when the field for its selection is so broad. Respondent-applicant obviously intends to pass off its products as those of opposer.

"23. In the case of American Wire & Cable Co. vs. Director of Patents (G.R. No. L-26557, February 19, 1970), the Supreme Court held that:

x x x

"24. Moreover, it has been held in many other cases, like the foregoing, that:

x x x

"25. Indubitably, the registration and use of the trademark LEVETAM by respondent-applicant will deceive and/or confuse purchasers into believing that respondent-applicant's goods and/or products bearing the trademark LEVETAM emanate from or are under the sponsorship of oppose Novartis AG, the rightful owner of the trademark LEVETIX.

"26. In view of the foregoing, opposer's mark LEVETIX which is legally protected under Philippine law bars the registration in the Philippines of the confusingly similar mark LEVETAM of respondent-applicant Ajanta Pharma Philippines, Inc.

The Opposer's evidence consists of a copy of the certificate of registration no. 4-2009-008113 for trademark LEVETIX issued by the Intellectual Property Office of the Philippines; duly authenticated corporate secretary's certificate; duly authenticated joint

affidavit-testimony of David Lossignol and Martine Roth; and pages from Novartis AG's annual report for the year 2010.[4]

This Bureau issued a Notice to Answer and served a copy thereof upon Respondent-Applicant, on 08 June 2011. Said Respondent-Applicant, however, did not file an Answer.

Should the Respondent-Applicant be allowed to register the trademark LEVETAM?

The Opposer anchors its opposition on Sections 123.1, paragraphs (d) of Republic Act No. 8293, also known as the Intellectual Property Code of the Philippines ("IP Code"), to wit:

> Sec. 123.Registrability. – 123.1. A mark cannot be registered if it:
>
> x xx
>
> (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;"

Records show that at the time the Respondent-Applicant filed its trademark application on 25 January 2010, the Opposer has an existing application for the mark LEVETIX under Application Serial No. 4-2009-008113 filed on 13 August 2009. The application matured into a registration on 11 June 2010. The registration covers "pharmaceutical preparations for the prevention and treatment of disorders of the nervous system, the immune system, the cardio-vascular system including diabetes and metabolic diseases, the respiratory system, the musculo-skeletal system, the genitourinary system; for the treatment of inflammatory disorders; for use in dermatology, oncology, hematology and in tissue and organ transplantation, in ophthalmology, and in the gastroenterological area; for the prevention and treatment of ocular disorders or diseases; anti-infectives, antivirals, antibiotics, antifungals" under Class 05. On the other hand, Respondent-Applicant filed the contested trademark application for the mark LEVETAM for "pharmaceutical preparation, taken orally, indicated for as adjunctive therapy in the treatment of partial onset seizures in adults and children 4 years and older with epilepsy, myoclonic seizures in adults and adolescents 12 years of age and older with juvenile myoclinic epilepsy and primary generalized tonic-clonic seizures in adults and children 6 years of age and older with idiopathic generalized epilepsy" under Class 05.

[4] Marked as Exhibits "A" to "Dd", inclusive.

The marks are shown below:

LEVETIX	LEVETAM
Opposer's trademark	*Respondent-Applicant's mark*

This Bureau finds that confusion or deception is unlikely to occur in this instance. Although the contending marks have the same number of letters and syllables, the visual and aural properties in respect of the Respondent-Applicant's mark has rendered said mark a character that is distinct from the Opposer's. While the marks are common as to the letters L, E, V, T , the last syllable of the contending marks make it easier for the consumers to distinguish one from the other. In this regard, when the syllable "TAM" is appended to "LEVE", the resulting mark is distinctive enough to be registered. The combination of words and syllables can be registered as trademarks for as long as it can distinguish the goods of a trader from its competitors, although as suggestive mark. Moreover, the pharmaceutical products covered by the marks treat different illnesses. LEVETIX are pharmaceutical preparations for the prevention and treatment of disorders of the nervous system, the immune system, the cardio-vascular system including diabetes and metabolic diseases, the respiratory system, the musculo-skeletal system, the genitourinary system; for the treatment of inflammatory disorders; for use in dermatology, oncology, hematology and in tissue and organ transplantation, in ophthalmology, and in the gastroenterological area; for the prevention and treatment of ocular disorders or diseases; anti-infectives, antivirals, antibiotics, antifungals, while LEVETAM are pharmaceutical preparation, taken orally, indicated for as adjunctive therapy in the treatment of partial onset seizures in adults and children 4 years and older with epilepsy, myoclonic seizures in adults and adolescents 12 years of age and older with juvenile myoclinic epilepsy and primary generalized tonic-clonic seizures in adults and children 6 years of age and older with idiopathic generalized epilepsy.

Furthermore, in the Trademark Registry, the contents of which the Bureau can take cognizance of via judicial notice, there are registered marks covering pharmaceutical preparations or drugs that have the prefix "LEVE", such as Levetocin with Reg. No. 42006003709, Levemir with Reg. No. 42006009895, Leverfresh with Reg. No. 41995103058, Lever 2000 with Reg. No. 41995100747, and Levevit with Reg. No. 8546 which are owned by entities other than the Opposer.

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.[5] This Bureau finds that the Respondent-Applicant's mark sufficiently serves this function.

WHEREFORE, premises considered, the instant Opposition is hereby DISMISSED. Let the filewrapper of Trademark Application Serial No. 4-2010-000811 together with a copy of this Decision be returned to the Bureau of Trademarks (BOT) for information and appropriate action.

SO ORDERED.

Taguig City, 10 February 2016.

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

[5] Pribhdas J. Mirpuri vs. Court of Appeals, G.R. No. 114508, 19 Nov. 1999.