PEDIATRICA, INC.,	}	**IPC No. 14-2015-00579**
Opposer,	}	Opposition to:
	}	Application No. M/0000/01270355
	}	Date Filed: 23 July 2015
-versus-	}	**TM: "GROWELL"**
	}	
	}	
	}	
NUTRISET,	}	
Respondent- Applicant.	}	

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

NOTICE OF DECISION

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GREETINGS:

Please be informed that Decision No. 2017 - 273 dated June 30, 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, June 30, 2017.

MARILYN F. RETUTAL
IPRS IV
Bureau of Legal Affairs

PEDIATRICA, INC.,
Opposer,

-versus-

NUTRISET,
Respondent-Applicant.
x ---------- x

IPC No. 14-2015-00579
Opposition to Trademark
Application No. M/0000/01270355
Date Filed: 23 July 2015
Trademark: **"GROWELL"**

Decision No. 2017- 273

DECISION

Pediatrica, Inc.[1] ("Opposer") filed an opposition to Trademark Application Serial No. M/0000/01270355. The contested application, filed by Nutriset[2] ("Respondent-Applicant"), covers the mark "GROWELL" for use on *"dietary foodstuffs for medical use; food for babies, children, adults, nursing women, pregnant women and at-risk populations; dietary preparations to prevent and treat malnutrition; dietary preparations, vitamin and mineral preparations, dietary supplements and nutritional supplements to prevent and treat malnutrition; dietary preparations, dietary supplements, nutritional supplements for persons on special diets, as required by medical treatments; breakfast food, snack food or ingredients for making food to prevent and treat malnutrition; dietary supplements and nutritional supplements in paste, gel capsule, tablet, lozenge, liquid, powder, biscuit, pouch and jar form; high-calorie dietary preparations, enriched with vitamins and minerals, for strengthening the body and/or preventing infection"* under Class 05 of the International Classification of Goods[3].

The Opposer alleges, among others, that it was issued registration for the mark "GROWEE" on 04 September 2000 under Certificate of Registration No. 4-1995-104490 and that it dutifully filed the pertinent Affidavits of Actual Use and Declarations of Actual Use ("DAU"). It also registered its product with the Bureau of Food and Drugs, now the Food and Drug Administration. The International Marketing Services acknowledged "GROWEE" as one of the leading brands in the Philippines in the category of *"TC A11B – Multivit Without Minerals"* in terms of market share and sales performance.

The Opposer thus anchors its opposition on the provision of Section 123.1 (d) of Republic Act No. 8293, also known as the Intellectual Property Code of the Philippines (IP Code). It contends that the marks "GROWEE" and "GROWELL" are

[1] A domestic corporation with office address at 3rd Bonaventure Plaza, Greenhills, San Juan, Metro Manila.
[2] With known address at Hameau du Bois Ricard, CS 80035 F076770 Malaunay, France.
[3] The Nice Classification is a classification of goods and services for the purpose of registering trademark and services marks, based on the 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 Purpose of the Registration of Marks concluded in 1957.

confusingly similar. In support of its Opposition, the Opposer submitted the following as evidence:[4]

1. the Respondent-Applicant's mark as published in the IPO E-Gazette;
2. certified true copy of Trademark Registration No. 4-1995-104490 for "GROWEE";
3. certified true copies of the Affidavits of Use and DAUs or "GROWEE";
4. certified true copy of Certificate of Product Registration No. FR-7252;
5. sample product label bearing the mark "GROWEE"; and,
6. copy of the certification and sales performance issued by the "IMS".

This Bureau issued Notice to Answer and served a copy thereof upon the Respondent-Applicant on 27 January 2016. However, Respondent-Applicant failed to comply. Accordingly, the Adjudication Officer issued on 30 March 2017 Order No. 2017-788 declaring the Respondent-Applicant in default and the case submitted for decision.

The primordial issue in this case is whether the Respondent-Applicant's trademark application for the mark "GROWELL" should be allowed registration.

Records reveal that at the time the Respondent-Applicant filed the contested application, the Opposer has a valid and existing registration for the mark "GROWEE" issued as early as 04 September 2000.

Section 123.1(d) of the IP Code, relied upon by Opposer, provides that:

> ***"Section 123.1. 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; x x x"***

To determine whether the marks of Opposer and Respondent-Applicant are confusingly similar, the two are shown below for comparison:

GROWEE	GROWELL
Opposer's mark	*Respondent-Applicant's mark*

[4] Marked as Exhibits "A" to "I".

The marks are apparently similar with respect to its beginning letters "GROW", which term, however, is connotative of dietary supplements, vitamins, minerals and other similar products. As such, the word "GROW" is a weak mark and the Opposer cannot claim exclusive use or protection thereto. What will set apart or distinguish such mark from another which also includes the term "GROW" is the letters, syllable or words that come before or after the same.

In this case, the letters "EE" follow the word "GROW" in the Opposer's mark while that of the Respondent-Applicant's with the letters "ELL". Clearly, they are confusingly similar visually and aurally. The Respondent-Applicant failed to introduce any element that would make the mark it seeks to register clearly distinctive or distinguishable from the Opposer's. 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.[5]

Moreover, it is settled that the likelihood of confusion would not extend not only as to the purchaser's perception of the goods but likewise on its origin. 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*: "Here 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 the belief that there is some connection between the plaintiff and defendant which, in fact, does not exist."[6] This is especially so where the goods the competing marks cover are similar as in this case.

Finally, 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.[7] This Bureau finds that Respondent-Applicant's trademark is not consistent with this function.

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[5] Societe des Produits Nestle,S.A. vs. Court of Appeals, GR No. 112012, 04 April 2001.
[6] Societe des Produits Nestle, S.A. vs. Dy, G.R. No. 172276, 08 August 2010.
[7] Pribhdas J. Mirpuri vs. Court of Appeals, G.R. No. 114508, 19 November, 1999.

WHEREFORE, premises considered, the instant opposition is hereby **SUSTAINED**. Let the filewrapper of Trademark Application Serial No. M/0000/01270335 be returned, together with a copy of this Decision, to the Bureau of Trademarks for information and appropriate action.

SO ORDERED.

Taguig City, 30 JUN 2017

ATTY. Z'SA MAY B. SUBEJANO-PE LIM
Adjudication Officer
Bureau of Legal Affairs