WESTMONT PHARMACEUTICALS, INC., Opposer, -versus- **CNN GENERICS DISTRIBUTION, INC.,** Respondent- Applicant.	}	**IPC No. 14-2011-00055** Opposition to: Appln. Serial No. 4-2010-001665 Date Filed: 15 Feb. 2010 TM: **"LEFLOX"**

NOTICE OF DECISION

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CNN GENERICS DISTRIBUTION, INC.,
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Respondent-Applicant
2nd Floor, LC Building
459 Quezon Avenue, Quezon City

GREETINGS:

Please be informed that Decision No. 2013 - 108 dated June 18, 2013 (copy enclosed) was promulgated in the above entitled case.

Taguig City, June 18, 2013.

For the Director:

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

WESTMONT PHARMACEUTICALS, INC.
Opposer,

-versus-

CNN GENERICS DISTRIBUTION, INC.,
Respondent-Applicant.
x ---------- x

IPC No. 14-2011-00055
Opposition to Trademark
Application No. 4-2010-001665
(Filing Date: 15 Feb. 2010)
Trademark: **"LEFLOX"**

Decision No. 2013-108

DECISION

Westmont Pharmaceuticals, Inc.[1] ("Opposer") filed on 18 February 2011 an opposition to Trademark Application Serial No. 4-2010-001665. The application, filed by CNN Generics Distribution, Inc.[2] ("Respondent-Applicant"), covers the mark "LEFLOX" for use on "*pharmaceutical preparation*" under Class 5 of the International Classification of Goods[3].

The Opposer posits that the mark LEFLOX is confusingly similar to its registered mark "LEVOX" considering that both pertains to goods in Class 5 of the International Classification of Goods. It maintains that the registration of Respondent-Applicant's trademark is a violation of Sec. 123.1(d) of Rep. Act No. 8293, also known as the Intellectual Property Code of the Philippines ("IP Code"). To support its contention, the Opposer presented/submitted the following as evidence:[4]

1. certified copies of the Certificate of Reg. No. 4-1998-007705, which reveals that the trademark LEVOX was registered since 14 December 2003;
2. sample product label bearing the trademark LEVOX;
3. copy of the certification and sales performance issued by the Intercontinental Marketing Services showing that LEVOX is one of the leading brands in the Philippines in the category "J01G-Fluoroquinolones Market"; and

[1] A domestic corporation duly organized and existing under the laws of the Philippines, with principal address as 4th Floor Bonaventure Plaza, Ortigas Avenue, Greenhills, San Juan City.
[2] With principal business address at 2nd Floor, LC Building, 459 Quezon Avenue, Quezon City.
[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.
[4] Marked as Exhibits "B" to "E".

4. certified true copy of its Certificate of Product Registration issued by Bureau of Food and Drugs for the brand name LEVOX.

This Bureau issued a Notice to Answer dated 23 March 2011 and served a copy thereof upon the Respondent-Applicant on 31 March 2011. The Respondent-Applicant, however, did not file an Answer.

The primordial issue of this case is whether the trademark application by Respondent-Applicant should be allowed.

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. Thus, Sec. 123.1 (d) of the IP Code prohibits the registration of a mark that:

> (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 15 February 2010, the Opposer already has a valid and existing registration for the mark LEVOX (issued on 14 December 2003) for goods with *"broad spectrum antibacterial medicinal preparation"* under Class 5. Considering therefore, that the Respondent-Applicant's trademark application covers "*pharmaceutical preparations*", these could include the pharmaceutical products specified in the Opposer's trademark registration.

But, does LEFLOX nearly resemble LEVOX such that confusion, or even deception, is likely to occur?

A scrutiny of the competing marks shows that the only difference between them is that the letter "V" in LEVOX is replaced with the letters "FL" in LEFLOX. In this regard, 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

purchaser as to cause him to purchase the one supposing it to be the other[5]. Colorable imitation does not mean such similitude as amounts to identify, nor does it require that all details be literally copied. Colorable imitation refers to such similarity in form, context, words, sound, meaning, special arrangement or general appearance of the trademark or tradename with that of the other mark or tradename in their over-all presentation or in their essential, substantive and distinctive parts as would likely to mislead or confuse persons in the ordinary course of purchasing the genuine article[6].

Corollarily, trademarks are designed not only for the consumption of the eyes, but also to appeal to the other senses, particularly, the faculty of hearing. Thus, when one talks about the Opposer's trademark or conveys information thereon, what reverberates is the sound made in pronouncing it. The same sound is practically replicated when one pronounces the Respondent-Applicant's mark.

Succinctly, because the Respondent-Applicant will use or uses the mark on "*pharmaceutical preparations*", this could include goods or products that are similar and/or closely related goods to those covered by the Opposer's registered trademark. The changes in the spelling therefore did not diminish the likelihood of the occurrence of mistake, confusion, or even deception. There is the likelihood that information, assessment, perception or impression about LEFLOX products delivered and conveyed through words and sounds and received by the ears may unfairly cast upon or attributed to the LEVOX products and the Opposer, and *vice-versa*.

It is stressed that the determinative factor in a contest involving trademark registration is not whether the challenged mark would actually cause confusion or deception of the purchasers but whether the use of such mark will likely cause confusion or mistake on the part of the buying public. To constitute an infringement of an existing trademark, patent and warrant a denial of an application for registration, the law does not require that the competing trademarks must be so identical as to produce actual error or mistake; it would be sufficient, for purposes of the law, that the similarity between the two labels is such that there is a possibility or likelihood of the purchaser of the older brand mistaking the newer brand for it.[7] The likelihood of confusion would subsist not only on the purchaser's perception of goods but on the origins thereof as held by the Supreme Court:[8]

> 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

[5] *Societe Des Produits Nestle , S.A v. Court of Appeals*, G.R. No.112012, 4 April 2001, 356 SCRA 207, 217.
[6] *Emerald Garment Manufacturing Corp. v. Court of Appeals*. G.R. No. 100098, 29 Dec. 1995.
[7] *American Wire and Cable Co. v. Director of Patents et al.,* (31 SCRA 544) G.R. No. L-26557, 18 Feb. 1970.
[8] *Converse Rubber Corporation v. Universal Rubber Products, Inc., et al.,* G.R. No. L-27906, 08 Jan. 1987.

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 belief that there is some connection between the plaintiff and defendant which, in fact does not exist.

Accordingly, this Bureau finds that the Respondent-Applicant's trademark application is proscribed by Sec. 123.1 (d) of the IP Code.

WHEREFORE, premises considered, the instant opposition is hereby **SUSTAINED**. Let the filewrapper of Trademark Application Serial No. 4-2010-001665 be returned, together with a copy of this Decision, to the Bureau of Trademarks for information and appropriate action.

SO ORDERED.

Taguig City, 18 June 2013.

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