UNITED LABORATORIES, INC., Opposer, **-versus-** **EUROHEALTHCARE EXPONENTS, INC.,** Respondent- Applicant.	}	**IPC No. 14-2013-00024** Opposition to: Appln. Serial No. 4-2012-009171 Date Filed: 26 July 2012 **TM: "FENOZEP FORTE"**

NOTICE OF DECISION

OCHAVE & ESCALONA
Counsel for the Opposer
No. 66 United Street
Mandaluyong City

EUROHEALTHCARE EXPONENTS, INC.,
Respondent-Applicant
No. 67, Scout Fuentebella Street
Barangay Laging Handa, Tomas Morato
Quezon City

GREETINGS:

Please be informed that Decision No. 2014 - 213 dated August 18, 2014 (copy enclosed) was promulgated in the above entitled case.

Taguig City, August 18, 2014.

For the Director:

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

UNITED LABORATORIES, INC.,
Opposer,

-versus-

EUROHEALTHCARE EXPONENTS, INC.,
Respondent-Applicant.
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IPC No. 14-2013-00024
Opposition to Trademark
Application No. 4-2012-009171
Date Filed: 26 July 2012
Trademark: **"FENOZEP FORTE"**

Decision No. 2014 - 213

DECISION

United Laboratories, Inc.[1] ("Opposer") filed an opposition to Trademark Application Serial No. 4-2012-009171. The contested application, filed by Eurohealthcare Expondents, Inc.[2] ("Respondent-Applicant"), covers the mark "FENOZEP FORTE" for use on *"pharmaceutical product for cough and cold remedies"* under Class 05 of the International Classification of Goods[3].

The Opposer anchors its Opposition on the provisions of Section 123.1 (d) of R.A. No. 8293, otherwise known as the Intellectual Property Code of the Philippines ("IP Code")[4]. It contends that Respondent-Applicant's mark "FENOZEP FORTE" so resembles its own mark "NEOZEP" as to likely cause confusion, mistake and deception on the part of the purchasing public, most especially as both marks are to be applied for the same class of goods, i.e. Class 05 of the International Classification of Goods for Medicine and Pharmaceutical Preparations, A Medicinal Preparation of Antibacterials or Antibiotics, Antiseptic, Antihistamine, Decongestant, Analgesic and Antipuritic Actions For the Topical Treatment of Upper Respiration Tract Infections and Allergies. It avers that the mark "NEOZEP" has been granted renewed application on 08 October 2008, valid for a period of ten years. It also claims to have likewise registered the products bearing its mark with the Bureau of Food and Drugs.

In support its Opposition, the Opposer submitted the following as evidence:

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[1] A corporation duly organized and existing under and by virtue of the laws of the Philippines, with office address at 66 United Street, Mandaluyong City Philippines.
[2] Appears to be a Philippine corporation, with office address at No. 67, Scout Fuentabella Street, Barangay Laging Handa, Tomas Morato, Quezon City, Metro Manila.
[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] 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"

1. copy of the publication of Respondent-Applicant's mark in the IPO E-Gazette;
2. copy of the 1998 petition for renewal showing original registration to be in 1958;
3. certified true copy of Certificate of Registration No. 002329;
4. sample product label bearing the mark "NEOZEP"; and
5. certified true copy of the Certificate of Product Registration issued by BFAD.

This Bureau issued a Notice to Answer and served a copy thereof upon the Respondent-Applicant on 26 March 2013. The Respondent-Applicant, however, did not file an Answer. Accordingly, the Hearing Officer issued on 03 September 2013 Order No. 2013-1198 declaring the Respondent-Applicant in default and the case submitted for decision.

The primordial issue in this case is whether the trademark application for the mark "FENOZEP FORTE" should be allowed.

As culled from available records, the Opposer was issued Certificate of Registration No. 002329 for its mark "NEOZEP" 08 October 1998. Noteworthy, its Petition for Renewal Registration bears a notation that its original Registration Certificate No. 6854 was issued on 08 October 1958.[5] On the other hand, Respondent-Applicant filed the contested application for its mark "FENOZEP FORTE" only on 26 July 2012.

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

NEOZEP

Opposer's mark

FENOZEP FORTE

Respondent-Applicant's mark

Perusing the contending trademarks, it is manifest that the two are confusingly similar. The prevalent feature of the Opposer's mark is the word "NEOZEP" itself while that of the Respondent-Applicant's is the word "FENOZEP. What the Respondent-Applicant did was merely scramble the syllable "NEO" in the Opposer's mark and added the letter "F" at the beginning. Thereafter, it adopted the

[5] Marked as Exhibit "A-1"

last syllable "ZEP" in toto. The second word "FORTE" fails to lend Respondent-Applicant's mark the distinctiveness required by law. As aptly alleged by the Opposer in its Opposition, the Respondent-Applicant cannot exclusively appropriate the word "FORTE", which is defined in the Dictionary to mean, among other, "strength". Hence, the said term is generic and/or descriptive to medicines.

Overall, the competing marks bear resembling visual appearance, pronunciation and impression. 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.[6] As held by the Supreme Court in the case of **Del Monte Corporation vs. Court of Appeals**[7]:

> ***"It has been correctly held that side-by-side comparison is not the final test of similarity. Such comparison requires a careful scrutiny to determine in what points the labels of the products differ, as was done by the trial judge. The ordinary buyer does not usually make such scrutiny nor does he usually have the time to do so. The average shopper is usually in a hurry and does not inspect every product on the shelf as if he were browsing in a library. Where the housewife has to return home as soon as possible to her baby or the working woman has to make quick purchases during her off hours, she is apt to be confused by similar labels even if they do have minute differences. The male shopper is worse as he usually does not bother about such distinctions.***
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> ***The question is not whether the two articles are distinguishable by their label when set side by side but whether the general confusion made by the article upon the eye of the casual purchaser who is unsuspicious and off his guard, is such as to likely result in his confounding it with the original. As observed in several cases, the general impression of the ordinary purchaser, buying under the normally prevalent conditions in trade and giving the attention such purchasers usually give in buying that class of goods is the touchstone."***

Moreover, except for the letter "f", the competing marks are composed of identical letters. Since the words "NEOZEP" and "FENOZEP" are spelled almost the same, they reverberate the same sound when pronounced. Aptly, in **Marvex Commercial Co. vs. Peter Hawpia**[8] it was declared that:

> ***"The following random list of confusingly similar sounds in the matter of trademarks, culled from Nims, Unfair Competition and Trade Marks, 1947, vol. 1, will reinforce our view that 'SALONPAS' and 'LIONPAS' are confusingly similar in sound: 'Gold Dust' and 'Gold Drop'; 'Jantzen' and 'Jazz-Sea'; 'Silver Flash' and 'Supper-Flash'; 'Cascarete' and 'Celborite'; 'Celluloid' and 'Cellonite'; 'Chartreuse' and 'Charseurs'; 'Cutex' and 'Cuticlean'; 'Hebe' and 'Meje'; 'Kotex' and 'Femetex'; 'Zuso' and 'Hoo Hoo'. Leon Amdur, in his book 'TradeMark Law and Practice', pp. 419-421, cites,***

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[6] Societe des Produits Nestle,S.A. vs. Court of Appeals, GR No. 112012, April 4, 2001.
[7] G.R. No. L-78325, January 25, 1990.
[8] G.R. No. L-19297, 22 December 1966.

as coming within the purview of the idem sonans rule, 'Yusea' and 'U-C-A', 'Steinway Pianos' and 'Steinberg Pianos', and 'Seven-Up' and 'Lemon-Up. In Co Tiong vs. Director of Patents, this Court unequivocally said that 'Celdura' and 'Cordura' are confusingly similar in sound; this Court held in Sapolin Co. vs. Balmaceda, 67 Phil. 795 that the name 'Lusolin' is an infringement of the trademark 'Sapolin', as the sound of the two names is almost the same.

In the case at bar, 'SALONPAS' and 'LIONPAS', when spoken, sound very much alike. Similarity of sound is sufficient ground for this Court to rule that the two marks are confusingly similar when applied to merchandise of the same descriptive properties (see Celanese Corporation of America vs. E. I. Du Pont, 154 F. 2d. 146, 148)."

Noteworthy, the trademarks "NEOZEP" and "FENOZEP FORTE" both refer to goods under Class 05. The Opposer's trademark registration covers *"pharmaceutical preparations, a medicinal preparation of antibacterials and antibiotics, antiseptic, antihistaminic, decongestant, analgesic and antipuritic actions for upper respiration tract infection and allergies"*, which is the same and/or closely related to *"pharmaceutical product for cough and cold remedies",* to which Respondent-Applicant will use or uses its mark. Thus, assuming that consumers takes extra caution in buying pharmaceutical products as not to confuse one for the other, there is still possibility of deception such that they may be led to believe that both goods originate from the same source.

Succinctly, 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."[9] Thus, the consumers may have the notion that Opposer expanded business and manufactured a new product by the name "FENOZEP FORTE", which could be mistakenly assumed a derivative or variation of "NEOZEP".

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

[9] Societe des Produits Nestle, S.A. vs. Dy, G.R. No. 1772276, 08 August 2010.

manufacturer against substitution and sale of an inferior and different article as his product.[10] Respondent-Applicant's trademark fell short in meeting this function.

Accordingly, this Bureau finds and concludes 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. 4-2012-009171 be returned, together with a copy of this Decision, to the Bureau of Trademarks for information and appropriate action.

SO ORDERED.

Taguig City, 18 August 2014.

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

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