



WESTMONT PHARMACEUTICALS, INC.,
Opposer,

-versus-

ZEPHYR MEDICAL CORPORATION,
Respondent- Applicant.

X-----X

IPC No. 14-2010-00319
Opposition to:
Appln. Serial No. 4-2010-001529
Date Filed : 11 February 2010
TM: "LEVOZEF"

NOTICE OF DECISION

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ZEPHYR MEDICAL CORPORATION
Respondent-Applicant
600 Shaw Blvd.
Pasig City

GREETINGS:

Please be informed that Decision No. 2014 - 189 dated July 23, 2014 (copy enclosed) was promulgated in the above entitled case.

Taguig City, July 23, 2014.

For the Director:

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



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Trademark: "LEVOZEF"

Decision No. 2014 - 189

DECISION

WESTMONT PHARMACEUTICALS, INC. ("Opposer")¹ filed an opposition to Trademark Application Serial No. 4-2010-001529. The application, filed by ZEPHYR MEDICAL CORPORATION ("Respondent-Applicant")², covers the mark "LEVOZEF" for use on "pharmaceutical preparations" under class 05 of the International Classification of Goods and Services³.

The Opposer interposes the following grounds for opposition:

"1. The trademark 'LEVOZEF' so resembles 'LEVOX' trademarks owned by Opposer, registered with this Honorable Office prior to the publication for opposition of the mark 'LEVOZEF'. The trademark 'LEVOZEF', which is owned by Respondent, will likely cause confusion, mistake and deception on the part of the purchasing public, most especially considering that the opposed trademark 'LEVOZEF' is applied for the same class and good as that of trademarks 'LEVOX', i.e. Class 95) used as antibacterial;

"2. The registration of the trademark 'LEVOZEF' in the name of the Respondent will violate Sec. 123 of Republic Act No. 8293, otherwise known as the 'Intellectual Property Code of the Philippines'.

Under the above-quoted provision, any mark which is similar to a registered mark shall be denied registration in respect of similar or related goods or if the mark applied for nearly resembles a registered mark that confusion or deception in the mind of the purchasers will likely result.

"3. Respondent's use and registration of the trademark 'LEVOZEF' will diminish the distinctiveness and dilute the goodwill of Opposer's trademark 'LEVOX'.

"4. Opposer, the registered owner of the trademark 'LEVOX', is engaged in the marketing and sale of a wide range of pharmaceutical products. The Trademark

¹ A corporation duly organized and existing under the laws of the Philippines with office located at 4th Floor Bonaventure Building, Greenhills, San Juan City.

² A corporation duly organized and existing under the laws of the Philippines with office located at 600 Shaw Blvd. Pasig City.

³ The Nice Classification of goods and services is for registering trademark and service marks, based on a Multilateral treaty administered by the WIPO, called the Nice Agreement Concerning the International Classification of Goods and Services for Registration of Marks concluded in 1957.

Application for the trademark 'LEVOX' was filed with the Intellectual Property Office on 15 October 1998 by Opposer and was approved for registration 14 December 2003 and valid for a period of ten (10) years or until 14 December 2013. The Opposer's registration of the 'LEVOX' trademark subsists and remains valid to date.

"5. The trademark 'LEVOX' has been extensively used in commerce in the Philippines.

x x x

"6. There is no doubt that by virtue of the above-mentioned certificate of Registration, the uninterrupted use of the trademark 'LEVOX', and the fact that they are well known among consumers as well as to internationally known pharmaceutical information provider, the Opposer has acquired an exclusive ownership over the 'LEVOX' marks to the exclusion of all others.

"7. 'LEVOZEF' is confusingly similar to 'LEVOX'.

x x x

"8. Moreover, Opposer's intellectual property right over its trademark is protected under Section 147 of Republic Act No. 8293, otherwise known as the Philippine Intellectual Property Code ('IP Code').

"9. To allow Respondent to continue to market its products bearing the 'LEVOZEF' mark undermines Opposer's right to its marks. As the lawful owner of the mark 'LEVOX', Opposer is entitled to prevent the Respondent from using a confusingly similar mark in the course of trade where such would likely mislead the public.

"10. By virtue of Opposer's prior and continued use of the trademark 'LEVOX', the same have become well-known and established valuable goodwill to the consumers and the general public as well. The registration and use of Respondent's confusingly similar trademark on its goods will enable the latter to obtain benefit from Opposer's reputation, goodwill and advertising and will tend to deceive and/or confuse the public into believing that Respondent is in any way connected with the Opposer.

"11. Likewise, the fact that respondent-applicant seeks to have its mark 'LEVOZEF' registered in the same class (Nice Classification 5) as the trademark 'LEVOX' of Opposer plus the fact that both are antibacterials, will undoubtedly add to the likelihood among the purchasers of these two goods."

The Opposer's evidence consists of the following

1. Exhibit "A" - IPO E-Gazette officially released on 22 November 2010;
2. Exhibit "B" - Certificate of Registration No. 4-1998-007705 for the trademark "LEVOX";
3. Exhibit "C" - Affidavit of Use for the trademark "LEVOX";
4. Exhibit "D" - Sample product label bearing the trademark "LEVOX";
5. Exhibit "E" - Certification and Sales Performance; and,

6. Exhibit "F" - Certificate of Product Registration issued by Bureau of Food and Drugs.

This Bureau issued and served upon the Respondent-Applicant a Notice to Answer on 23 March 2011. Respondent-Applicant however, did not file an answer. Thus, this case is deemed submitted for decision.

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

The instant opposition is anchored on Section 123.1 paragraph (d) of the IP Code which provides that a mark cannot be registered if it is identical with a registered mark belonging to a different proprietor or a mark with an earlier filing or priority date, in respect of the same goods or services or closely related goods or services or if it nearly resembles such mark as to be likely to deceive or cause confusion.

The records and evidence show that at the time the Respondent-Applicant filed its trademark application on 11 February 2010, the Opposer has already an existing trademark registration for the mark LEVOX bearing Registration No. 4-1998-007705 issued on 14 December 2003⁴. Unquestionably, the Opposer's application and registration preceded the Respondent-Applicant's.

Nevertheless, the competing marks are hereby reproduced for comparison:

Levox

Opposer's mark

Levozef

Respondent-Applicant's mark

Both mark start with the prefix "LE" and "VO" which is not sufficient to reach a conclusion that there is the likelihood of confusion, much less deception. The ending letter consisting of "X" in the Opposer's mark, and the ending syllable of "ZEF" in the Respondent-Applicant's mark create a visual and aural distinction of the said marks, which if spoken gives a sound entirely distinct from each other.

This Bureau takes cognizance via judicial notice of the Trademark Registry which shows that LEVO is likewise used as a prefix or component of trademarks used on pharmaceutical products. These marks include LEVOCARNIL (Registration No. 42009012870); LEVOCET-NATRAPHARM (Registration No. 42011002165); LEVOTEC (Registration No. 42007009946); and, LEVOPHED (Registration No. 42005001710)⁵.

Succinctly, what will set apart or distinguish two trademarks that both contain LEVO and used on similar or related goods are letters and/or syllables that follow or accompany the said affix trademarks. In this instant case, Respondent-Applicant's mark ends with the syllable "ZEF" which is obviously different from the letter "X" in the Opposer's mark.

⁴ Exhibit "B" of Opposer.

⁵ IPOPHL Trademarks Database, available at <http://www.wipo.int/branddb/ph/en/> (last accessed 23 July 2014).

Taking into account that the only similarity between the competing marks is the prefix LE and VO, sustaining the instant opposition would have the unintended effect of giving the Opposer the exclusive right to use LE-VO, which evidently and sufficiently describes the pharmaceutical goods involved.

Furthermore, it is doubtful if the consumers in encountering the mark LEVOZEF will have in mind or be reminded of the mark LEVOX. The Opposer has not established that LEVOX is a well-known mark, nor its fame that could support a claim that the Respondent-Applicant's trademark application and use of the mark LEVOZEF is indicative of the latter's intent of riding in on the goodwill supposedly earned and enjoyed by the Opposer's mark.

WHEREFORE, premises considered, the instant opposition is hereby **DISMISSED**. Let the file wrapper of Trademark Application Serial No. 4-2010-001529 be returned, together with a copy of this Decision, to the Bureau of Trademarks for information and appropriate action.

SO ORDERED.

Taguig City, 23 July 2014.


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