

WESTMONT PHARMACEUTICALS, INC.,  
Opposer,

-versus-

AMBICA INTERNATIONAL TRADING  
CORPORATION,  
Respondent- Applicant.

x-----x

}  
} **IPC No. 14-2014-00410**  
} Opposition to:  
} Appln. Serial No. 4-2014-004138  
} Date Filed: 03 April 2014  
} **TM: "LEVOXL"**  
}  
}  
}

**NOTICE OF DECISION**

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

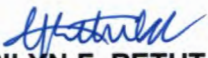
**GENER CABOTAJE SANSAET**  
Counsel for the Respondent-Applicant  
West Tower 2005-A PSE Centre, Exchange Road  
Ortigas Center, Pasig City

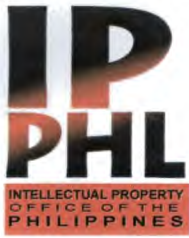
**GREETINGS:**

Please be informed that Decision No. 2016 - 193 dated June 27, 2016 (copy enclosed) was promulgated in the above entitled case.

Taguig City, June 27, 2016.

For the Director:

  
**MARILYN F. RETUAL**  
IPRS IV  
Bureau of Legal Affairs



**WESTMONT PHARMACEUTICALS, INC.,**  
Opposer,

IPC No. 14-2014-00410  
Opposition to:

- versus -

Appln. No. 4-2014-004138  
Date Filed: 03 April 2014

**AMBICA INTERNATIONAL TRADING CORPORATION,**  
Respondent-Applicant.

Trademark : "**LEVOXL**"

x ----- x

Decision No. 2016 - 193

**DECISION**

WESTMONT PHARMACEUTICALS, INC. ("Opposer"),<sup>1</sup> filed a verified opposition to Trademark Application Serial No. 4-2014-004138. The application, filed by AMBICA INTERNATIONAL TRADING CORPORATION ("Respondent-Applicant")<sup>2</sup>, covers the mark "LEVOXL" for use on "*pharmaceutical preparations namely anti-bacteria*" under class 05 of the International Classification of Goods.<sup>3</sup>

The Opposer alleges the following grounds for the opposition:

"7. The mark 'LEVOXL' filed by Respondent-Applicant so resembles the trademark 'LEVOX' owned by Opposer and duly registered with the IPO prior to the publication for opposition of the mark 'LEVOXL'.

"8. The mark 'LEVOXL' will likely cause confusion, mistake and deception on the part of the purchasing public, most especially considering that the opposed mark 'LEVOXL' is applied for the same class and goods as that of Opposer's trademark LEVOX, i.e. Class 05 of the International Classification of Goods as Antibacterial Pharmaceutical Preparation.

"9. The registration of the mark 'LEVOXL' in the name of the Respondent-Applicant will violate sec. 123 of the IP Code.

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."

<sup>1</sup> A domestic corporation duly organized and existing under the laws of the Philippines, with office address at 4/F, Bonaventure Plaza, Ortigas Avenue, Greenhills, San Juan City, Philippines.  
<sup>2</sup> A domestic corporation with office address at 9 Amsterdam Extension, Merville Park Subdivision, Paranaque City, Philippines.  
<sup>3</sup> The Nice Classification is a classification of goods and services for the purpose of registering trademark and service 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.



The Opposer's evidence consists of the following:

1. Certified true copy (Ctc) of Decision No. 2010-09 dated 22 April 2010 of the Bureau of Legal Affairs;
2. IPO E-Gazette re: Respondent-Applicant's trademark application;
3. Ctc of Certificate of Registration No. 4-1998-007705 for LEVOX;
4. Ctcs of Petition for Renewal of Registration and Notice of Issuance;
5. Sample product label bearing the trademark LEVOX;
6. Ctc of Certificate of Product Registration issued by the FDA for LEVOX; and,
7. Certification and Sales Performance of IMS Health Philippines, Inc.

On 15 December 2014, Respondent-Applicant submitted its Verified Answer containing the following allegations:

"11. The trademark 'LEVOXL' is not identical to, nor does so resemble, the trademark 'Levox' so as to cause confusion, mistake or deception on the part of the purchasing public with the trademark 'Levox'.

"12. 'LEVOXL' is not identical to 'Levox' as these marks are clearly different in spelling and have distinctive pronunciations, fonts, colors and designs, nor do they nearly resemble or are confusingly similar to each other as to be likely to deceive or cause confusion. 'Levox' is in regular case while LEVOXL is all caps and is in a different font. 'LEVOXL' is three syllable, (leh-vok-zel) while 'Levox' has only two (le-vox).

"13. To be sure, the difference in the number of letters strongly militates against the claimed confusion that might arise between the two marks.

"14. Importantly, Opposer could not have acquired any right over the mark 'Levox', considering that the same is wholly derived from LEVOFLOXACIN, the generic name of the product.

"15. In Sanofi-Aventis v. Ver Heilen Pharmaceuticals, Appeal No. 14-08-04, December 19, 2008, citing IP Code, Section 121.1, the Director General of the Hon. Office, cancelled the registration of the marks 'XARTAN' and 'XARTAN+' for being directly derived from the generic and International Non-Proprietary Name 'Losartan' x x x.

"16. Moreover, the mark 'LEVOXL' is strongly associated with XL Laboratories Pvt Ltd., the corporate name of the manufacturer of Respondent-Applicant's products with the prefix LEVO clearly device from LEVOFLOXACIN.

"17. Section 165 of the IP Code is very clear that a trade name such, as a corporate name, belonging to one, cannot be registered as a trademark by another, whether or not the trade name is registered as a mark. Conversely, Opposer cannot prevent Respondent-Applicant from using the corporate name of its manufacturer as a mark. LEVOXL being a derivative of XL Laboratories Pvt Ltd., Respondent-Applicant should not be prevented from using the same as a mark especially since.

"18. The mark 'LEVOXL' being distinct from or dissimilar to the mark 'Levox', the same cannot give rise to a cause of action in favor of Opposer much less to exclude Respondent-Applicant from the use of a separate and distinct mark 'LEVOXL'. Accordingly, Opposer cannot claim any damage by reason of Respondent-Applicant's continued use of the mark 'LEVOXL'.

"19. Respondent-Applicant's use of the mark LEVOXL in commerce is shown by the Food and Drug Administration of a Certificate of Product Registration in its favor.

"20. Lastly, comparison of packaging for LEVOXL and 'Levox' shows a great variance further lessening any chance of confusion between said marks in actual commerce."

The Respondent-Applicant's evidence consists of the following:

1. Copy of Respondent-Applicant's mark; and,
2. Certificate of Product Registration.

Thereafter, the Preliminary Conference was conducted and terminated on 07 September 2015.<sup>4</sup> Only the Opposer submitted its position paper on 16 September 2015. Hence, this instant case is deemed submitted for decision.

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

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 out into the market a superior 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.<sup>5</sup>

Sec. 123.1 (d) R.A. No. 8293, also known as the Intellectual Property Code ("IP Code") provides:

A mark cannot be registered if it:

x x x

(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;

The records and evidence show that at the time the Respondent-Applicant filed its trademark application on 03 April 2014<sup>6</sup>, the Opposer has already an existing trademark registration for the mark LEVOX bearing Registration No. 4-1998-007705 issued on 14 December 2003<sup>7</sup> in the Philippines. Unquestionably, the Opposer's application and registration preceded that of Respondent-Applicant's.

<sup>4</sup> Minutes of Hearing dated 02 September 2015.

<sup>5</sup> Pribhdas J. Mirpuri v. Court of Appeals, G.R. No. 114508, 19 Nov. 1999. See also Article 15, par. (1), Art. 16, par. 91 of the Trade-related Aspect of Intellectual Property (TRIPS Agreement).

<sup>6</sup> Filewrapper records.

<sup>7</sup> Exhibit "C" of Opposer.



The competing marks are reproduced below:

**Levox**

Opposer's Trademark

**LEVOXL**

Respondent-Applicant's Trademark

There is no doubt that the competing marks are similar or resemble each other. Even with the extra letter L at the end, and notwithstanding the fact that it is printed in the upper case, LEVOXL would still look and sound like Levox.<sup>8</sup> This Bureau likewise considers its decision finding merit to an opposition case in sustaining the Opposer's (also herein Opposer) right of ownership over the trademark LEVOX.<sup>9</sup>

It is stressed that the conclusion (of similarity) created by the use of the same word as the primary element in a trademark is not counteracted by the addition of another term. By analogy, confusion cannot be avoided by merely adding, removing or changing some letters of a registered mark.<sup>10</sup> 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.<sup>11</sup> Colorable imitation does not mean such similitude as amount 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.<sup>12</sup>

Considering that the competing marks resemble each other, it is likely for the consumers to commit mistake, or be deceived or confused. Corollarily, the law does not require actual confusion, it being sufficient that confusion is likely to occur.<sup>13</sup>

Further, a scrutiny of the goods covered by the mentioned marks show the similarity and relatedness of the pharmaceutical products covered by the marks in classification no. 5. Both products cover pharmaceutical product for anti-bacterial. Obviously, they are intended for the same purpose and use, cater to the same group of purchasers, and available in the same channels of trade.

While it is true that "LEVOX" is derived from the generic name LEVOFLOXACIN, it does not follow that a mark which is confusingly similar to "LEVOX" should be allowed registration. LEVOX is sufficiently distinctive and thus, eligible to be registered as a trademark. As a registered trademark, it enjoys protection accorded under Section 123.1 of the IP Code.

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

<sup>8</sup> Sapolin Co. v. Balmaceda, 67 Phil. 795, on rule on idem sonams.

<sup>9</sup> Decision No. 2010-09 dated 22 April 2010.

<sup>10</sup> Continental Connector Corp. v. Continental Specialties Corp., 207 USPQ.

<sup>11</sup> Societe Des Produits Nestle, S.A. v. Court of Appeals, G.R. No. 112012, 04 April 2001, 356 SCRA 207, 217.

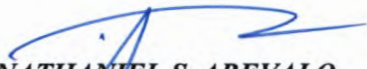
<sup>12</sup> Emerald Garment Manufacturing Corp. v. Court of Appeals, G.R. No. 100098, 29 December 1995.

<sup>13</sup> Philips Export B.V., et al. v. Court of Appeals, et al., G.R. No. 96161, 21 February 1992.

**WHEREFORE**, premises considered, the instant opposition is hereby **SUSTAINED**. Let the filewrapper of Trademark Application Serial No. 4-2014-004138 be returned, together with a copy of this Decision, to the Bureau of Trademarks for information and appropriate action.

SO ORDERED.

Taguig City, 27 JUN 2016

  
*Atty. NATHANIEL S. AREVALO*  
Director IV, Bureau of Legal Affairs