

WESTMONT PHARMACEUTICALS, INC.,
Opposer,

-versus-

EUROASIA PHARMACEUTICALS, INC.,
Respondent-Applicant.

IPC No. 14-2016-00421

Opposition to:

Appl. Serial No. 4-2016-00000489

Date Filed: 14 January 2016

TM: SALBUX

X-----X

NOTICE OF DECISION

OCHAVE & ESCALONA

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No. 66 United Street,
Mandaluyong City

EUROASIA PHARMACEUTICALS, INC.

Respondent- Applicant
Unit 1201, 12th Floor AIC Burgundy Empire Tower
ADB Avenue, Ortigas Business Center
Pasig City

GREETINGS:

Please be informed that Decision No. 2017 - 189 dated 02 June 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, 02 June 2017.

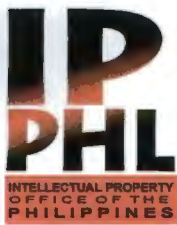
MARILYN F. RETUTAL
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Bureau of Legal Affairs

Republic of the Philippines
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WESTMONT PHARMACEUTICALS, INC.
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EUROASIA PHARMACEUTICALS, INC.,
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IPC No. 14-2016-00421
Opposition to:

Appln. No. 4-2016-00000489
Date Filed: 14 January 2016
Trademark: "SALBUX"

Decision No. 2017 - 189

DECISION

WESTMONT PHARMACEUTICALS, INC. ("Opposer")¹, filed an opposition to Trademark Application Serial No. 4-2016-00000489. The application, filed by EUROASIA PHARMACEUTICALS, INC. (Respondent-Applicant)², covers the mark "SALBUX" for use under class 05, particularly as "*pharmaceutical preparations*" of the International Classification of Goods.³

The Opposer alleges the following grounds for opposition:

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

"8. The mark 'SALBUX' will likely cause confusion, mistake and deception on the part of the purchasing public, most especially considering that the opposed mark 'SALBUX' is applied for the same class as that of Opposer's trademark 'SOLMUX', i.e., Class 05 as Pharmaceutical Preparations.

"9. The registration of the mark 'SALBUX' in the name of the Respondent-Applicant will violate Sec. 123 of the IP Code, which provides, in part, that 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,**

¹ A corporation duly organized and existing under the laws of the Philippines, with office address at No. 66 United Street, Mandaluyong City, Metro Manila, Philippines.

² With office address at Unit 1201 12th Floor AIC Burgundy Empire Tower, ADB Avenue, Ortigas Business Center, Pasig City, Metro Manila, Philippines.

³ 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.

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

"10. 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."

The Opposer's evidence consists of the following:

1. Copy of the pertinent page of the IPO E-Gazette containing the subject trademark SALBUX;
2. Certified true copy (Ctc) of Certificate of Registration No. 32907 for the trademark SOLMUX;
3. Ctc of Certificate of Renewal of Registration No. 32907 for the trademark SOLMUX;
4. Ctc of Certificate of Renewal of Registration No. 4/1981/00032907 for the trademark SOLMUX;
5. Ctcs of the Affidavits of Use for the trademark SOLMUX;
6. Sample product label bearing the trademark SOLMUX;
7. Ctc of the Certificate of Product Registration No. 007170; and,
8. Certification and sales performance issued by the Intercontinental Marketing Services.

This Bureau issued and served upon the Respondent-Applicant a Notice to Answer on 31 August 2016. The latter however, did not file an answer. Thus, Respondent-Applicant is declared in default and this case is deemed submitted for decision⁴.

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

The instant opposition is anchored on Section 123.1 paragraph (d) of R.A. No. 8293, otherwise known as the Intellectual Property Code ("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 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 14 January 2016⁵, the Opposer has already an existing trademark registration for the mark SOLMUX bearing Registration No. 32907 issued on 13 December

⁴ Order of Default dated 22 May 2017.

⁵ Filewrapper records.

2003⁶. The validity of this registration is maintained through issuance of certificates of renewal,⁷ and the filing of Affidavits of Use⁸. Unquestionably, the Opposer's applications and registrations preceded that of Respondent-Applicant's.

A comparison of the Opposer's mark with the Respondent-Applicant's is depicted below:

Solmux

Salbux

Opposer's Trademark

Respondent-Applicant's Trademark

The only difference between the marks is the second and fourth letters "O" and "M" in Opposer's SOLMUX, which is changed to letter "A" and "B" in Respondent-Applicant's SALBUX. Obviously, the marks appear visually and aurally similar.

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.⁹ 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.¹⁰

This Bureau further underscores the fact that the competing marks cover goods which belong to the same class 5 and appears related in its use, purpose and nature. Respondent-Applicant's SALBUX "pharmaceutical preparations" did not indicate the particular illness for treatment. Thus, it may happen that these over-the-counter medicines are disposed by the pharmacist by mistake committed either in reading the prescription, or simply by disposing the same.

Succinctly, because the coverage of the Respondent-Applicant's trademark registration would allow using the mark SALBUX on goods or pharmaceutical products that are already dealt in by the Opposer using the mark SOLMUX, the minute changes in spelling did not diminish the likelihood of the occurrence of mistake, confusion, or even deception. SALBUX

⁶ Exhibit "B" of Opposer.

⁷ Exhibits "C" and "D" of Opposer.

⁸ Exhibits "E" to "H" of Opposer.

⁹ Societe Des Produits Nestle, S.A. v. Court of Appeals, G.R. No. 112012, 04 April 2001, 356 SCRA 207, 217.

¹⁰ Emerald Garment Manufacturing Corp. v. Court of Appeals, G.R. No. 100098, 29 December 1995.

and SOLMUX have similarity in sounds, both consisting of two syllables, which make it not easy for one to distinguish one mark from the other. 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 Petitioner's trademark or conveys information thereon, what reverberates is the sound made in pronouncing it. The same sound, however, is practically replicated when one pronounces the Respondent-Registrant's mark.

Accordingly, this Bureau finds and concludes that the Respondent-Registrant's trademark application is proscribed by Sec. 123.1(d) of the IP Code. It must be emphasized that the Respondent-Applicant was given opportunity to defend its trademark application. It, however, failed to do so.

WHEREFORE, premises considered, the instant opposition is hereby **SUSTAINED**. Let the filewrapper of Trademark Application Serial No. 4-2016-00000489 be returned, together with a copy of this Decision, to the Bureau of Trademarks for information and appropriate action.

SO ORDERED.

Taguig City. 02 JUN 2017

Atty. GINALYN S. BADIOLA, LL.M.
Adjudication Officer, Bureau of Legal Affairs