H. LUNDBECK A/S, Opposer, **-versus-** **UNITED LIFE SCIENCES PTY. LTD.,** Respondent- Applicant.	}	**IPC No. 14-2012-00030** Opposition to: Appln. Serial No. 4-2011-010671 Date Filed: 07 September 2011 **TM: "RELAXPRO"**

NOTICE OF DECISION

VERALAW
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GREETINGS:

Please be informed that Decision No. 2016 - 125 dated May 03, 2016 (copy enclosed) was promulgated in the above entitled case.

Taguig City, May 03, 2016.

For the Director:

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

H. LUNDBECK A/S,
Opposer,

- versus -

UNITED LIFE SCIENCES PTY. LTD.,
Respondent-Applicant.
x ---------- x

IPC No. 14-2012-00030
Opposition to:

Appln. No. 4-2011-010671
Date Filed: 07 September 2011
Trademark : **"RELAXPRO"**

Decision No. 2016 - 125

DECISION

H. LUNDBECK A/S ("Opposer"),[1] filed a verified opposition to Trademark Application Serial No. 4-2011-010671. The application, filed by UNITED LIFE SCIENCES PTY. LTD. ("Respondent-Applicant")[2], covers the mark "RELAXPRO" for use on goods under class 05[3] namely: *dietary supplement preparation for use of relief of stress symptoms.*

The Opposer alleges that the registration of the mark RELAXPRO in the name of the Respondent-Applicant will violate and contravene Section 123.1 (d), (e), (f) and (g) of the Intellectual Property Code, because said mark is confusingly similar to the internationally well-known mark LEXAPRO owned, registered and unabandoned by the Opposer.

Opposer is the registered owner of the well-known mark LEXAPRO. Said mark was first used in Ireland in 2002. In the Philippines, the mark LEXAPRO was first used in 2004, through the company's local partner, Lundbeck Philippines, and is registered under Certificate of Registration No. 4-2002-10072, for goods under Class 5.

LEXAPRO has captured a substantial market share and has become one of the more popular drugs in a long list of revolutionary and lifesaving drugs manufactured by Opposer. During the first four years since it was launched, LEXAPRO has been sold and marketed in at least 26 countries. In the last 12 years, Opposer's worldwide sales of products bearing the mark LEXAPRO totaled US $5,117,890,725.

Opposer also maintains various websites where information about Opposer and its products including LEXAPRO are available. A Google search of LEXAPRO instantly reveals more than 29 million hits.

Opposer has registered the same in the Intellectual Property Offices of various countries and jurisdictions including its home country, Denmark with Registration No. 002041259. The Opposer's multi-country registration, and the fact that the mark has been used and is continuously being used in 26 countries, clearly prove that the mark LEXAPRO is well-known, both here and abroad.

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1 A corporation duly organized and existing under the laws of Denmark with principal office address at 9 Ottiliavej, DK-2500 Valby, Denmark.

2 With registered address at No. 1 Sophia Road #08-01/04, Peace Center, Singapore 228149.

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.

Republic of the Philippines
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Finally, the Opposer held that there can be no doubt that the marks LEXAPRO and RELAXPRO are confusingly similar. They are practically identical because they contain the same dominant syllable "E", "A" and "PRO". Moreover, the marks sound very similar and since both marks pertain to goods under class 5, confusion will most definitely result.

The Opposer's evidence consists of the following:

1. Special Power of Attorney;
2. Verification and Certification against Forum Shopping;
3. Printout of Respondent-Applicant's application details for RELAXPRO;
4. Website printout of trademark registration for LEXAPRO under Certificate of Registration No. 4-2002-10072;
5. Google Search results for LEXAPRO; and,
6. Affidavit-Direct Testimony of Soren Ingemann Larsen (inclusive of Annexes).

On 10 July 2012, Respondent-Applicant filed its Answer with allegations that RELAXPRO is not confusingly similar to Opposer's marks LEXAPRO as to be likely to cause confusion, mistake and deception on the part of the purchasing public. It is readily evident that the similarities, if any, between the competing trademarks are completely undermined by their material differences.

Respondent-Applicant's trademark which is composed of eight (8) letters, starts with the letter 'R' while Opposer's mark which has seven (7) letters, starts with the letter 'L'. The first two syllables of Respondent-Applicant's trademark is different from Opposer's mark. RELAXPRO appears and sounds different from LEXAPRO.

While Respondent-Applicant's trademark RELAXPRO and Opposer's mark LEXAPRO both cover class 05, the marks are intended to be used on pharmaceutical products that have different therapeutic or medicinal purposes. Purchasers are known to be more wary of the nature of the goods they are buying especially if what they are buying are pharmaceutical products or medicines. Moreover, medicines are generally dispensed and sold upon prescription of a doctor.

The only similarity with the competing marks is the last syllable PRO. Opposer has neither the exclusive nor vested right to use PRO, and thus, it has no right to prevent others from utilizing the same. It is a well settled rule that any applicant-registrant cannot claim for its exclusive use words which are generic or descriptive. Thus, PRO cannot be exclusively appropriated by the Opposer especially because Opposer failed to establish that LEXPARO is a well-known mark.

The Respondent-Applicant attached the legalized and authenticated Secretary's Certificate.

On 24 July 2012, the Opposer filed its Reply.

Thereafter, the Preliminary Conference was held and terminated on 04 February 2013. Only the Opposer filed its position paper on 22 February 2013. Hence, this case is deemed submitted for decision.

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

The records and evidence show that at the time the Respondent-Applicant filed its trademark application for the mark RELAXPRO on 07 September 2011[4], the Opposer has already an existing trademark registration for the mark LEXAPRO bearing Registration No. 42002010072 issued on 20

[4] Filewrapper records and Exhibit "C" of Opposer.

November 2006[5]. The Opposer has also shown international trademark registration from various countries for the trademark LEXAPRO.[6] Unquestionably, the Opposer's application and registration preceded that of Respondent-Applicant's.

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

LEXAPRO	RELAXPRO
Opposer's Trademark	Respondent-Applicant's Trademark

The competing marks contain the vowels "E", A" and "O" and comprised of the identical suffix "PRO". It also contains all other letters except the letter "R" in RELAXPRO, which are jumbled in the first and middle syllables of both word marks. Thus, the marks appear visually and aurally similar.

Further, a scrutiny of the goods covered by the mentioned marks show that both are covered under classification no. 5 of the goods. While Opposer's LEXAPRO covers pharmaceutical preparations acting on the central nervous system[7]; and Respondent-Applicant's RELAXPRO covers dietary supplement preparation for use of relief of stress symptoms[8], it may happen that these medicines are disposed by the pharmacist by mistake committed either in reading the prescription, or simply by disposing the same. The illness intended to be treated by the competing drugs appears related because stress-related disease affects the all systems of the body including the nervous system.[9]

Succinctly, because the coverage of the Respondent-Applicant's trademark application would allow using the mark RELAXPRO on goods or pharmaceutical products that are already dealt in by the Opposer using the mark LEXAPRO, the changes in spelling did not diminish the likelihood of the occurrence of mistake, confusion, or even deception. The contending marks have identical sounds 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 Opposer'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-Applicant's mark. This is the application of the *idem sonams rule* as held in the case of Sapolin Co. v. Balmaceda[10] which provides that confusion is likely to arise between contending marks which when pronounced sounds alike.

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

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5 Exhibit "D" of Opposer.
6 Exhibit "F" inclusive of Annexes of Opposer.
7 Exhibit "D" of Opposer.
8 Exhibit "C" of Opposer.
9 What is Stress-Related Illness? available at http://www.healthline.com/health-slideshow/what-is-stress-related-illness#2 (last accessed 18 April 2016).
10 67 Phil. 795.

purchaser as to cause him to purchase the one supposing it to be the other.[11] 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.[12]

Further, 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, 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.[13] 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:[14]

> 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 on 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 of the former reflects adversely on the plaintiff's reputation. The other is the confusion of business. Hence, 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. 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.

WHEREFORE, premises considered, the instant opposition is hereby **SUSTAINED.** Let the filewrapper of Trademark Application Serial No. 4-2011-010671 be returned, together with a copy of this Decision, to the Bureau of Trademarks for information and appropriate action.

SO ORDERED.

Taguig City, 03 MAY 2016

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

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11 Societe Des Produits Nestle, S.A. v. Court of Appeals, G.R. No. 112012, 04 April 2001, 356 SCRA 207, 217.
12 Emerald Garment Manufacturing Corp. v. Court of Appeals, G.R. No. 100098, 29 December 1995.
13 American Wire and Cable Co. v. Director of Patents, et al., 31 SCRA 544, G.R. No. L-26557, 18 February 1970.
14 Converse Rubber Corporations v. Universal Rubber Products, Inc. et al., G.R. No. L-27906, 08 January 1987.