

ESTTA Tracking number: **ESTTA549873**

Filing date: **07/23/2013**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	PSPC, Inc.		
Entity	Corporation	Citizenship	Florida
Address	4005 Dow Road Melbourne, FL 32934 UNITED STATES		

Attorney information	Wendy K. Marsh Nyemaster Goode, P.C. 700 Walnut Street Suite 1600 Des Moines, IA 50309 UNITED STATES ptodm@nyemaster.com, wkmarsh@nyemaster.com Phone:515-645-5502		
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Applicant Information

Application No	85732399	Publication date	07/23/2013
Opposition Filing Date	07/23/2013	Opposition Period Ends	08/22/2013
Applicant	Sogeval Laboratories, Inc. 5605 N. MacArthur Blvd No. 740 Irving, TX 75038 UNITED STATES		

Goods/Services Affected by Opposition

Class 005. All goods and services in the class are opposed, namely: Canine nutritional supplements for joint support in the nature of soft chews

Grounds for Opposition

Priority and likelihood of confusion	Trademark Act section 2(d)
Dilution	Trademark Act section 43(c)
<i>Torres v. Cantine Torresella S.r.l.Fraud</i>	808 F.2d 46, 1 USPQ2d 1483 (Fed. Cir. 1986)

Mark Cited by Opposer as Basis for Opposition

U.S. Application/Registration No.	NONE	Application Date	NONE
Registration Date	NONE		
Word Mark	PHYCOX		
Goods/Services	Pharmaceutical preparations, namely, anti-inflammatories		

Related Proceedings	Opposition No. 91210575 PSPC, Inc. v. Sogeval Laboratories, Inc., Civil Action Case No. 6:13-cv-00249-RBD-TBS, pending before the U.S. District Court for the M.D. Florida
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Attachments	TRI-COX.opposition.pdf(29704 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by Overnight Courier on this date.

Signature	/wendy k. marsh/
Name	Wendy K. Marsh
Date	07/23/2013

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

<p>PSPC, INC.,</p> <p style="padding-left: 40px;">Opposer,</p> <p>v.</p> <p>SOGEVAL LABORATORIES, INC.</p> <p style="padding-left: 40px;">Applicant.</p>	<p>Opposition No: _____</p> <p>In the matter of: Application No. 85/732,399 Mark: TRI-COX Published in the Official Gazette on: July 23, 2013</p>
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STATEMENT OF CLAIM UPON WHICH OPPOSITION IS BASED

The grounds for opposition are as follows:

1. Opposer, PSPC, Inc., has received registration upon the Principal Register, under the provisions of the U.S. Trademark Act of 1946, as amended, of the trademark PHYCOX, Registration No. 3,294,575, September 18, 2007, for pharmaceutical preparations, namely, anti-inflammatories, in International Class 5. A copy of this registration is attached as Exhibit 1. This registration was registered on a date prior the date of filing of Applicant's application, and prior to any date of first use Applicant may claim.
2. Opposer's Registration No. 3,294,575 is prima facie evidence of the validity thereof and Opposer's ownership and exclusive right to use this mark in commerce on the goods specified in the registration, and is constructive notice of Opposer's ownership thereof. Said registered mark of Opposer is incontestable.

3. Opposer and its predecessor-in-interest have for many years, and Opposer is now, using the PHYCOX mark depicted in U.S. Reg. No. 3,294,575 in connection with the sale of veterinary anti-inflammatories. Said use has been valid and continuous since the date of first use and has not been abandoned. Said mark of Opposer is symbolic of extensive goodwill and consumer recognition built up by Opposer through substantial amounts of time and effort in advertising and promotion, and is an asset of Opposer.

4. Since 2007, Opposer's sales revenue for anti-inflammatories sold under the PHYCOX mark has been substantial.

5. Opposer's PHYCOX branded anti-inflammatories have been widely advertised throughout the United States since 2007 and have been sold through numerous veterinary distributors and retailers nationwide, including 1-800-PetMeds, Amazon.com, EntirelyPets.com, DrsFosterSmith.com, HealthyPets.com, VetRXDirect.com, JeffersPet.com, and VetDepot.com.

6. As a result of Opposer's extensive advertisement, marketing and promotion, the PHYCOX brand has become exceedingly popular with pet owners and in the veterinary industry. Given the volume of sales, extensive advertisement and popularity of Opposer's products bearing the PHYCOX mark, Opposer's mark has become famous, well-known and recognized as a distinctive symbol of Opposer's goodwill.

7. Opposer's PHYCOX mark became famous, well-known and recognized long prior to the filing date of the opposed application to register Applicant's mark.

8. Opposer also has common law rights in the PHYCOX mark that it relies upon in its opposition to the opposed application.

9. Like the registration of the PHYCOX mark, Applicant has requested registration upon the Principal Register of the mark TRI-COX as an anti-inflammatory. Specifically, the

application states the TRI-COX registration is for the following goods and services: canine nutritional supplements for joint support in the nature of soft chews in International Class 5. According to Applicant's advertising, Applicant's supplements for joint care are used to reduce inflammation in canine joints (Exhibit 2).

COUNT 1
Likelihood of Confusion

10. Opposer incorporates by reference the allegations contained in paragraphs 1-9.

11. Applicant's TRI-COX mark is substantially similar in appearance, sound, and connotation to Opposer's PHYCOX mark and engenders the same commercial impression. Accordingly, the purchasing public is likely to falsely associate Applicant's products with Opposer, or will erroneously believe that such products are sponsored, licensed, or otherwise authorized by Opposer, to the harm and damage to the goodwill and reputation of Opposer. This likelihood of harm and damage is increased where, as here, Opposer has no control over the quality of Applicant's products and commercial activities in selling and marketing its TRI-COX branded products.

12. The products identified by Applicant's TRI-COX mark and Opposer's PHYCOX mark are similar, if not identical.

13. Application Serial No. 85/732,399 for the mark TRI-COX for canine nutritional supplements for joint support in the nature of soft chews so closely resembles Opposer's PHYCOX mark for pharmaceutical preparations, namely, anti-inflammatories, as to be likely to cause confusion, or to cause mistake, or to deceive.

14. Registration of the mark shown in Application Serial No. 85/732,399 will result in damage to Opposer under the provisions of Section 2(d) of the U.S. Trademark Act, 15 U.S.C. § 1052(d) pursuant to the allegations stated above.

COUNT II
Fraudulent Procurement

15. Opposer incorporates by reference the allegations contained in paragraphs 1-14.

16. On January 16, 2013, the Trademark Examining Attorney issued an office action which included, in part, a requirement for Applicant to, "specify whether the wording 'TRI-COX' has any significance in the medical or veterinary trade or industry or as applied to the goods described in the application, or if such wording is a 'term of art' within [A]pplicant's industry." A copy of this 1/16/13 office action is attached as Exhibit 3.

17. In its response dated May 29, 2013 (attached as Exhibit 4), Applicant represented the following to the PTO:

With the exception of functioning as Applicant's trademark, the wording TRI-COX neither has significance in the medical or veterinary trade or industry nor as applied to the goods described in the application. The wording TRI-COX is also not a term of art within Applicant's industry.

A copy of Applicant's 5/29/13 response is attached as Exhibit 4.

18. Shortly after the filing of this response, Applicant's TRI-COX application was approved for publication.

19. On February 19, 2013, Opposer filed a lawsuit in the Middle District of Florida court against Applicant (PSPC, Inc. v. Sogeval Laboratories, Inc. Civil Action No. 6:13-cv-00249-RBD-TBS) involving the issue of whether Applicant's past, present, and intended use of

the designation "TRICOX" infringes Opposer's rights in its PHYCOX trademark registration. A copy of Opposer's Complaint in the civil action is attached as Exhibit 5.

20. On April 23, 2013, Applicant filed an answer and counterclaims to the complaint in the lawsuit. A copy of Applicant's answer is attached as Exhibit 6. As part of its answer, Applicant included several affirmative defenses to Opposer's trademark infringement claims relating to its PHYCOX trademark. In particular, Opposer's Thirteenth Affirmative Defense alleges that, "The wording COX is a generic designation which is incapable of distinguishing the goods of PSPC from those of others." (Exh. 6, p. 13). Further, Opposer's Fourteenth Affirmative Defense alleges that, "The wording COX is descriptive and is incapable of distinguishing the goods of PSPC from those of others." (Exh. 6, p. 13).

21. The statements made by Applicant in its affirmative defenses in the lawsuit directly contradict the representations Applicant made to the PTO during the prosecution of its TRI-COX trademark application. More particularly, Applicant's representation to the PTO that the term "COX" as part of "TRI-COX" has no meaning in the relevant industry directly contradicts its previously made statement in the lawsuit that the term "COX" as part of "PHYCOX" is at least merely descriptive if not entirely generic in the relevant industry for the parties' goods.

22. Applicant's statements made to the PTO on April 25, 2013 in direct contradiction to those previously made by Applicant in the parties' lawsuit were made with the specific intent to deceive the PTO in the procurement of its trademark registration. Accordingly, Application Serial No. 85/732,399 should be refused registration in its entirety.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Opposition was served on this 23rd day of July 2013, by overnight courier, postage prepaid, addressed to Applicant's attorney of record Daniel R. Frijouf, Frijouf, Rust & Pyle, P.A., 201 E. Davis Blvd, Tampa, Florida 33606-3728.

/s/ Wendy K. Marsh _____