

TTAB

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

In the Matter of U.S. Trademark Application
Serial No. 76/435,646
Published in the Official Gazette on March 4, 2003



05-28-2003

U.S. Patent & TMO/TM Mail Rcpt Dt. #22

SOLARAY, INC.,

Opposer,

v.

Opposition No. 91156027

EURO PHARMA, INC.,

Applicant.

APPLICANT'S ANSWER

03 JUN 10 AM 9:38
TRADEMARK TRIAL AND APPEAL BOARD

Applicant Euro Pharma, Inc. ("Euro Pharma"), by its attorneys Joseph T. Leone and Bradley C. Fulton of DeWitt Ross & Stevens S.C., submits the following Answer to Opposer's Solaray, Inc. ("Solaray") Notice of Opposition (the "Notice").

(i) Opposer's Notice opens with an unnumbered paragraph at page 1. Specifically addressing this unnumbered paragraph, Applicant is without knowledge or information sufficient to form a belief as to the factual allegations regarding Opposer's address and organization as set forth in the first paragraph at page 1 of the Notice, and therefore denies the same. Applicant denies that Opposer will be damaged in any way by the registration of Applicant's proposed mark as presented in Serial No. 76/435,646. Applicant admits that it filed trademark application Serial No. 76/435,646, and that the application was published for opposition on March 4, 2003.

Specifically addressing the numbered paragraphs of the Notice:

1. Applicant is without knowledge or information sufficient to form a belief as to the allegations set forth in this paragraph and therefore denies the same.

2. Applicant is without knowledge or information sufficient to form a belief as to the allegations set forth in this paragraph and therefore denies the same.

3. Admitted.

4. Applicant is without knowledge or information sufficient to form a belief as to the allegations set forth in this paragraph and therefore denies the same.

5. Applicant is without knowledge or information sufficient to form a belief as to the allegations set forth in this paragraph and therefore denies the same.

6. Applicant is without knowledge or information sufficient to form a belief as to the allegations set forth in this paragraph and therefore denies the same.

7. Applicant is without knowledge or information sufficient to form a belief as to the allegations set forth in this paragraph and therefore denies the same.

8. As to the first clause of this paragraph, Applicant is without knowledge or information sufficient to form a belief as to what consumers think of "SOLARAY"-branded products and therefore denies the same. Applicant denies that Opposer's "SOLARAY" mark is famous.

9. Admitted.

10. Denied.

11. Applicant is without knowledge or information sufficient to form a belief as to the allegations set forth in this paragraph and therefore denies the same.

12. Denied.

13. Denied.

14. Denied. (Applicant also notes that the Notice contains a typographical error in the statute citation; the statutory provisions for dilution are located at 15 USC §1125(c) *et seq.*)

15. Denied.

AFFIRMATIVE DEFENSES

16. The Notice of Opposition fails to state any claim upon which relief can be granted.

17. Applicant's proposed mark is not confusingly similar to Opposer's registered mark, Registration No. 1,221,385. In short, Applicant's proposed mark does not so resemble Opposer's "SOLARAY" trademark as to be likely, when used in connection with the goods recited in Applicant's subject application for trademark, to cause confusion, to cause mistake, or to deceive buyers of Opposer's "SOLARAY"-branded goods. Therefore, there is no likelihood of confusion under 15 USC §1052(d).

18. The goods recited in Applicant's proposed mark in Class 5, "dietary supplements for use in suntanning," are unrelated to the Class 5 goods recited in Opposer's registered trademark, namely "herbs, vitamins, vitamin/herb combinations, pollen, pectin, bran, pepsin, vegetable powders, kelp and lactose for dietary use in capsule, tablet and powdered form; and gelatin capsules." Opposer's registration

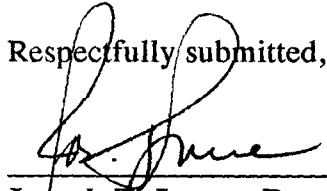
recites goods that are wholly unrelated to suntanning in general and wholly unrelated to the suntan-products market in particular. Therefore, there is no likelihood of confusion under 15 USC §1052(d) as between Opposer's registration and Applicant's proposed mark in Class 5.

19. Opposer's trademark "SOLARAY," as applied to the Class 5 goods recited in Registration No. 1,221,385, is not "famous" as that term is used in 15 USC §1125(c)(1) *et seq.* Because Opposer's "SOLARAY" trademark is not famous as applied to the Class 5 goods recited in Registration No. 1,221,385, Opposer is not entitled to invoke the dilution provisions of 15 USC §1135(c). Alternatively, if Opposer's "SOLARAY" mark is ultimately deemed to be "famous," Applicant's proposed mark to SOLAIRE does not dilute the distinctive quality (if any) of Opposer's "SOLARAY" mark.

20. WHEREFORE, Applicant respectfully requests that the Notice of Opposition be dismissed and denied, with prejudice, and that application serial number 76/435,646 be allowed to proceed to registration.

Dated this 28th day of May, 2003.

Respectfully submitted,




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I hereby certify that this correspondence is being deposited with the U.S. Postal Service as Express Mail in a postage-paid envelope addressed to:

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2900 Crystal Drive
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Date of Deposit: May 28, 2003

Signature: 

Printed Name: Marcia Layton

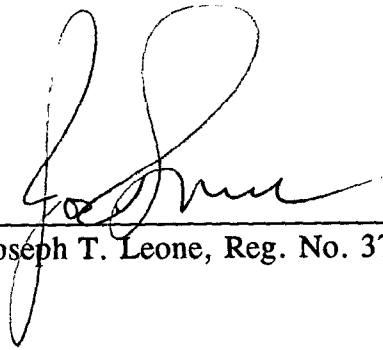
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Applicant's Answer to Opposer's Notice of Opposition is being mailed via first class mail, postage pre-paid, to

Donald A. Degnan
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Timothy P. Getzoff
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Boulder, CO 80302-5144

and simultaneously faxed to Mr. Getzoff's attention at 303-473-2720, on this 28th day of May, 2003.



Joseph T. Leone, Reg. No. 37,170