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Subject: U.S. TRADEMARK APPLICATION NO. 77939659 - A - ALVOGE 10.0- - EXAMINER BRIEF

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UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

APPLICATION SERIAL NO. 77939659

MARK: A

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EXAMINING ATTORNEY'S APPEAL BRIEF

Applicant Alvogen IP Co S.a.r.l. appeals the examining attorney's refusal to register the applied-for triangle shaped design as a mark for a variety of pharmaceutical preparations and patches, contraceptive sponges, and for pharmaceutical research services. Registration was refused under Trademark Act Section 2(d), 15 U.S.C. §1052(d), on the ground that the applied-for mark is likely to be confused with the mark in U.S. Registration No. 3127143.

FACTS

On February 23, 2010, applicant applied for registration on the Principal Register of a triangle shaped design. The identification specifies the goods "pharmaceutical preparations, namely, antibiotics, antidiabetics, antihypertensives, antidepressants, analgesics, anti-inflammatories, antivirals, and antiepileptics; transdermal patches for use in the treatment of infections, diabetes, hypertension, depression, pain, inflammation, and

epilepsy; and contraceptive sponges" and the services "pharmaceutical research services."

On March 2, 2010, the examining attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that the applied-for mark is likely to be confused with the triangle design in U.S. Registration No. 3127143. The identification of goods in the cited registration is: "pharmaceutical preparations, namely, medicines for the treatment of obesity, tobacco withdrawal, and for prevention of cardiovascular diseases; dietetic foods adapted for medical use; beverages for medical use, namely, nutritionally fortified beverages and vitamin fortified beverages; medicinal infusions in the nature of medicinal herbs."

On August 31, 2010, the examining attorney made final the refusal to register. On February 28, 2011, applicant filed a notice of appeal.

OBJECTION

The examining attorney objects to Fig. 1B (p. 6 of applicant's brief) as untimely submitted. The record in an application must be complete prior to the filing of an appeal; however, applicant has submitted additional evidence with its appeal brief. Because the proposed evidence was untimely submitted, this evidence should not be considered. 37 C.F.R. §2.142(d); *In re Fitch IBCA Inc.*, 64 USPQ2d 1058, 1059 n.2 (TTAB 2002); *In re Trans Cont'l Records Inc.*, 62 USPQ2d 1541, 1541 n.2 (TTAB 2002); TBMP §§1203.02(e), 1207.01; TMEP §710.01(c).

ARGUMENT

Trademark Act Section 2(d) bars registration of an applied-for mark that so resembles a registered mark that it is likely that a potential consumer would be confused

or mistaken or deceived as to the source of the goods and/or services of the applicant and registrant. See 15 U.S.C. §1052(d). The overriding concern is not only to prevent buyer confusion as to the source of the goods and/or services, but to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer. *See In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993). Therefore, any doubt regarding a likelihood of confusion determination is resolved in favor of the registrant. TMEP §1207.01(d)(i); *see Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002).

The court in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973) listed the principal factors to be considered when determining whether there is a likelihood of confusion under Section 2(d). *See* TMEP §1207.01. However, not all of the factors are necessarily relevant or of equal weight, and any one factor may be dominant in a given case, depending upon the evidence of record. *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003).

Taking into account the relevant du Pont factors, a likelihood of confusion determination in this case involves a two-part analysis. *See In re E. I. du Pont de Nemours & Co.*, 476 F.2d at 1361-62, 177 USPQ at 567. The marks are compared for similarities in their appearance, sound, connotation and commercial impression. TMEP §§1207.01, 1207.01(b). The goods and/or services are compared to determine whether they are similar or commercially related or travel in the same trade channels. *See Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164-65, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002).

I. THE MARKS ARE SIMILAR IN APPEARANCE AND COMMERCIAL IMPRESSION

In a likelihood of confusion determination, the marks are compared for similarities in their appearance, sound, meaning or connotation and commercial impression. *In re E. I. du Pont de Nemours & Co*., 476 F.2d at 1361, 177 USPQ at 567; TMEP §1207.01(b). Similarity in any one of these elements may be sufficient to find a likelihood of confusion. I*n re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); *see* TMEP §1207.01(b).

The question is not whether people will confuse the marks, but whether the marks will confuse people into believing that the goods and/or services they identify come from the same source. *In re West Point-Pepperell, Inc.*, 468 F.2d 200, 201, 175 USPQ 558, 558-59 (C.C.P.A. 1972); TMEP §1207.01(b). For that reason, the test of likelihood of confusion is not whether the marks can be distinguished when subjected to a side-by-side comparison. The question is whether the marks create the same overall impression. *See Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 1329-30, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000); *Visual Info. Inst., Inc. v. Vicon Indus. Inc.*, 209 USPQ 179, 189 (TTAB 1980).

The applied for mark is a triangle design formed by a thin top line, a wider bottom line, a side line that transitions from thin to wide, two curved angles at the top of the triangle, a pointed angle at the bottom of the triangle, and a break in the line at the pointed angle. The registered mark is also a triangle design formed by a thin top line, a wider bottom line, a side line, two curved angles on the top portion of the triangle and a pointed angle at the bottom of the triangle, but without a break in the lines. Applicant

describes its triangle design as a “stylized letter A in a triangular-like shape” and the registrant’s mark is described as a “mobius triangle.”

Comparison of the marks is in this case is essentially a comparison of the designs. Although applicant describes its mark as a stylized letter “A”, it is so highly stylized that it should be considered as design mark because the triangle shape does not contain any of the defining features of the letter “A,” either as a capital or lowercase letter. The capital letter “A” is formed by two lines that meet at a center top angle and a horizontal cross bar at the midpoint of the two lines. The top of the letter is a sharp point and the bottom is open and framed by the feet of the two lines. The triangle design of applicant’s mark lacks the sharp top point, the horizontal cross bar, and the open bottom. The lowercase letter “a” is formed by either a curved top extending over a rounded bottom joined by a straight vertical line (as an “a”), or a rounded shape with a straight side (as an “a”). The triangle design of applicant’s mark lacks both the curved top, rounded bottom and vertical side of the “a”, and the rounded shape and vertical side of the “a,” and applicant has not provided any evidence or explanation of how the design could be perceived as a letter “A” in any form. Additionally, no form of the letter “A” includes the gap that is featured in the applied-for triangle design. Letter marks that are presented in highly stylized form are essentially design marks incapable of being pronounced or conveying any inherent meaning. *See In re Burndy Corp.*, 300 F.2d 967, 968-9, 133 USPQ 196, 197 (CCPA 1962).

When the marks at issue are both design marks, the issue of similarity must be decided primarily on the basis of visual similarity. TMEP § 1207.01(c). The similarity of the marks is determined by considering the overall commercial impression created by the

marks as a whole, and not by comparing individual features of the marks. *Textron Inc. v. Maquinas Agricolas "Jacto" S.A.*, 215 USPQ 162, 165 (TTAB 1982).

In this case, the marks create a similar overall commercial impression because they are triangle designs of similar orientation and composition. When both marks consist only of a design, consideration must be given to the fact that a purchaser's recollection of a design is often general in nature. *See, e.g., In re United Service Distributors, Inc.*, 229 USPQ 237, 239 (TTAB 1986) (although differences exist in a side by side comparison such as the background shape, the similarity of the overall impression of the marks in their entireties supports a finding of likelihood of confusion); *In re Steury Corp.*, 189 USPQ 353, 355 (TTAB 1975) (an individual's recollection of a design mark is not obfuscated with minute details or characteristics of marks). Marks should not be dissected into component parts and the minute details of each part should not be compared with other parts. *See Dan Robbins & Associates, Inc., v. Questor Corporation*, 599 F.2d 1009, 202 USPQ 100 (CCPA 1979).

Applicant's argues that the registered mark is three-dimensional based on use of shading and color and thus distinguishable from the applied-for mark. However, applicant has not applied-for a color mark, and thus may display its design in any color, including the same colors as registrant. TMEP § 807.14(e)(i), *In re Data Packaging Corp.*, 453 F.2d 1300, 1302, 172 USPQ 396, 397 (C.C.P.A. 1972).

Similarly, applicant's focus on the small gap in its design forming the point of the triangle is also an inconsequential difference that does not overcome the overall similarity between its design and the registered mark. Consumers do not generally examine marks in fine detail, and tend to retain only general recollection of marks. *Nike Inc. v. WNBA*

Enterprises, LLC, 85 USPQ2d 1187, 1199 (TTAB 2007). Minor differences in designs that are otherwise similar in impression will not avoid a likelihood of confusion where a purchaser's recall of trademarks is only general in nature. *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467 (TTAB 1988).

Additionally, as set forth below, applicant and registrant offer goods that could be identical, and goods and services that are closely related. Thus, the degree of similarity between the marks required to support a finding of likelihood of confusion is not as great as would be required with diverse goods and/or services. *Citigroup Inc. v. Capital City Bank Grp., Inc*., 637 F.3d 1344, 1356, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); TMEP §1207.01(b).

II. THE GOODS OF APPLICANT AND REGISTRANT ARE CLOSELY RELATED

In a likelihood of confusion analysis, the comparison of the parties' goods and/or services is based on the goods and/or services as they are identified in the application and registration, without limitations or restrictions that are not reflected therein. *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593, 1595 (TTAB 1999); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1638-39 (TTAB 2009); TMEP §1207.01(a)(iii).

In the present case, applicant's goods include pharmaceutical preparations and patches used for hypertension and registrant's goods include pharmaceutical medicines for the treatment of cardiovascular disease. Pharmaceuticals for hypertension and cardiovascular disease are for the same use because cardiovascular refers to the heart and blood vessels, and hypertension is high pressure in blood vessels. See definitions of hypertension and cardiovascular from the Encarta® World English Dictionary (pages 5-8

of the March 2, 2010 office action) and evidence from the American Heart Association describing hypertension as high blood pressure (pages 36-37 of the August 31, 2010 office action). Thus, these goods are identical, and it is presumed that they move in all normal channels of trade and are available to all potential customers. *See Citigroup Inc. v. Capital City Bank Grp., Inc*., 637 F.3d at 1356, 98 USPQ2d at 1261; *In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1646 (TTAB 2008); TMEP §1207.01(a)(iii).

Applicant's other pharmaceutical preparations and patches and research services are related to registrant's medicines. The goods and/or services of the parties need not be identical or directly competitive to find a likelihood of confusion. *See Safety-Kleen Corp. v. Dresser Indus., Inc.*, 518 F.2d 1399, 1404, 186 USPQ 476, 480 (C.C.P.A. 1975); TMEP §1207.01(a)(i). Rather, it is sufficient that the goods and/or services are related in some manner and/or the conditions surrounding their marketing are such that they would be encountered by the same purchasers under circumstances that would give rise to the mistaken belief that the goods and/or services come from a common source. *In re Total Quality Group, Inc.*, 51 USPQ2d 1474, 1476 (TTAB 1999); TMEP §1207.01(a)(i); *see, e.g., On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086-87, 56 USPQ2d 1471, 1475-76 (Fed. Cir. 2000).

The Internet evidence of record[1] shows that the same entity commonly provides the relevant goods and services:

- www.pfizer.com: source of biopharmaceuticals research and development services; pharmaceuticals for a variety of conditions including antibiotics, diabetes, hypertension, obesity, smoking cessation, depression, epilepsy and

[1] Evidence obtained from the Internet may be used to support a determination under Section 2(d) that goods and/or services are related. *See, e.g., In re Paper Doll Promotions, Inc.*, 84 USPQ2d 1660, 1668 (TTAB 2007).

seizure disorders (pages 9-12 of the March 2, 2010 office action and pages 2-15 and 38-39 of the August 31, 2010 office action),

- www.bms.com: source of research and development of medicines; medicines for cancer, cardiovascular and metabolics, psychiatric disorders, hepatitis, HIV/AIDS and rheumatoid arthritis (pages 13-17 of the March 2, 2010 office action),
- www.lilly.com: sources of pharmaceutical research and development services; medicines for cancer, cardiology, diabetes, diabetic pain, erectile dysfunction, fibromyalgia, growth disorders, neuroscience, osteoporosis and sepsis (pages 18-22 of the March 2, 2010 office action and pages 2-15 and 40-41 of the August 31, 2010 office action),
- www.gsk.com: source of medicines for dermatology, weight loss, oral healthcare, allergy treatment, pain relief, cold and flu treatment, respiratory conditions, gastrointestinal conditions, smoking cessation, and nicotine replacement, and for treatment of infection, depression, skin conditions, asthma, heart and circulatory disease, and cancer, and vitamins; and research and development services (pages 16-26 and 42-43 of the August 31, 2010 office action),
- www.novartis.com: source of pharmaceuticals for cardiovascular and metabolism use, including treatment of hypertension, diabetes, heart failure and cardiac events, for oncology, neuroscience, respiratory, immunology and infectious disease, over the counter pain relief, smoking cessation, allergies; and research and development services, (pages 27- 35 and 44-45 of the August 31, 2010 office action).

The evidence from the USPTO's X-Search database shows of a number of third-party marks registered for use in connection with antibiotics, antidiabetics, antihypertensives, antidepressants, analgesics, anti-inflammatories, antivirals, and antiepileptics, patches for the treatment of infections, diabetes, hypertension, depression, pain, inflammation, and epilepsy and pharmaceutical research services (listed in the application) and pharmaceutical preparations for obesity, tobacco withdrawal, and cardiovascular disease (listed in the cited registration). These registrations show that the goods and services of applicant and registrant are of a kind that may emanate from a single source under a single mark. *See In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); TMEP §1207.01(d)(iii). The registrations attached to the office actions consist of

a representative sample of third party marks registered for these goods and services, and are summarized here to show the relevant goods and services:

- U.S. Registration No. 2983593, RINAT, for goods including pharmaceuticals for nervous, endocrine, cardiovascular, skeletal, immune, and metabolic system conditions, analgesics; and services including pharmaceutical research and development (pages 23-25 of the March 2, 2010 office action),
- U.S. Registration No. 3573904, TIBOTEC, for goods including pharmaceuticals for treating bacterial disease, viral conditions, cancer and neoplastic conditions, analgesics, for treating nervous system, metabolic, cardiovascular, endocrine, immune, respiratory and gastrointestinal conditions; and for services including pharmaceutical research services (pages 32-34 of the March 2, 2010 office action),
- U.S. Registration No. 3370177, COVX, for goods including pharmaceutical preparations for treatment and diagnosis of cancer, inflammatory disease, bone and joint disease, cardiovascular-metabolic disease and viral disease; and pharmaceutical research services (pages 35-37 of the March 2, 2010 office action),
- U.S. Registration No. 3588941, NITROMED, for pharmaceutical preparations for treating cardiovascular disease; and pharmaceutical research and development services (pages 38-40 of the March 2, 2010 office action),
- U.S. Registration No. 3645034, a flower design, for pharmaceutical preparations for treating infections, allergies, and cardiovascular, central nervous system, gastrointestinal, genitourinary tract, and endocrine conditions; and pharmaceutical research and development (pages 50-52 of the March 2, 2010 office action),
- U.S. Registration No. 2755125, SPEEDEL for goods including pharmaceuticals for prevention and treatment of blood disorders, cancer, cardiovascular, endocrine and metabolic, genitourinary and pulmonary disorders; and medical and pharmaceutical research services (pages 46-49 of the August 31, 2010 office action),
- U.S. Registration No. 3561623, TOLMAR for goods including pharmaceutical preparations for prevention and treatment of arthritis, nutritional disorders, autoimmune disease, and nervous system, immune system, cardiovascular, respiratory, musculoskeletal, and genitourinary disorders, for treating inflammation, for dermatology, oncology and ophthalmology, gynecology and urology, antibacterials, anti-viral, and antibiotics; and scientific research for pharmaceutical applications (pages 51-54 of the August 31, 2010 office action),
- U.S. Registration No. 3641981, ETHYPHARM for goods including pharmaceutical products for pain relief, anti-inflammation, anti-infection, cancer treatment, anti-addiction agents for treatment of cardiovascular, respiratory,

gastrointestinal, genitourinary and allergies; and research and development in the pharmaceutical field (pages 55-57 of the August 31, 2010 office action),

- U.S. Registration No. 3818946, URL PHARMA for goods including tablets, capsules, emulsions, creams and transdermals for treatment of gastrointestinal, blood, cardiovascular, skin, reproductive, endocrine, immune, nervous system, respiratory, and musculoskeletal conditions, and a full line of prescription and non-prescription preparations; and research and development services for pharmaceutical preparations (pages 58- 60 of the August 31, 2010 office action),
- U.S. Registration No. 3288552, GPC BIOTECH for goods including pharmaceutical preparations for diagnosis and treatment of circulatory, respiratory, endocrine, neurologic, cardiovascular, oncologic, auto-immune, pulmonary, lymphatic, gastrointestinal, viral, urinary, renal, infectious, metabolic and central nervous system conditions; and scientific and medical research in fields including pharmaceuticals (pages 61-62 of the August 31, 2010 office action),
- U.S. Registration No. 2939777, TRANSFORM PHARMACEUTICALS for goods including pharmaceutical preparations for treatment of cardiovascular, viral, bacterial, fungal, inflammatory, circulatory, respiratory, bone, neoplastic, hypertensive, pain, stomach, nervous system, psychotic, and brain disorder or disease conditions; and research and development of pharmaceutical drugs (pages 63-34 of the August 31, 2010 office action),
- U.S. Registration No. 3613873, ARCHEMIX THE APTAMER THERAPEUTICS COMPANY for goods including pharmaceuticals for the treatment of cardiovascular, inflammatory and oncology diseases and disorders; and pharmaceutical research and development services (pages 65-67 of the August 31, 2010 office action),
- U.S. Registration No. 3529111, SGX PHARMACEUTICALS for goods including pharmaceuticals for treating cancer, viral infections, tumors, hematological and oncological disorders, inflammatory disorders, infectious disease, immune system disorders, allergic disorders, cardiovascular disorders, metabolic and endocrine disorders, and psychiatric disorders; and pharmaceutical research, drug discovery and drug development services (pages 68-70 of the August 31, 2010 office action),
- U.S. Registration No. 2912049, INWOOD LABORATORIES, for goods including pharmaceutical cough treatments, analgesics, anti-epileptics, anti-virals, cardiovascular agents, and preparations for the treatment of alcoholism, drug addiction, emotional disorders, angina, hypertension and respiratory disorders (pages 71-73 of the August 31, 2010 office action),
- U.S. Registration No. 3427651, LCP, for goods including anti-diabetic, antibacterial cardiovascular, dermatological, anaphylactic, gastrointestinal, hypertension, heart rhythm disorder, hormonal, osteoporosis, infectious disease, allergic rhinitis and asthma, diabetes, chemotherapy, wound and bone disease pharmaceuticals (pages 77-79 of the August 31, 2010 office action),

- U.S. Registration No. 3477774, RESVATOL, for goods including cardiovascular, anti-allergic, pulmonary hypertension, immune system, nervous system, metabolic, inflammatory, heart rhythm, hormonal, infection disease, diabetes, skin disorder, wound and viral and infectious disease pharmaceuticals (pages 83-85 of the August 31, 2010 office action),
- U.S. Registration No. 3734707, APP, for goods including analgesics, anesthetics, antacids, antihistamines, anti-infectives, anti-inflammatory, anticonvulsants, antipsychotics, blood modifiers and cardiovascular pharmaceuticals (pages 86-88 of the August 31, 2010 office action),
- U.S. Registration No. 3733175, TEVA TEVA HEALTH SYSTEMS, for a house mark for a full line of allergy, analgesic, anti-bacterial, antibiotic, anti-convulsant, anti-depressant, anti-hypertensive, anti-infective, anti-inflammatory, anti-viral, cardiovascular, contraceptive, and diabetes pharmaceuticals (pages 89-92 of the August 31, 2010 office action),
- U.S. Registration No. 3549455, stylized letter "M", for goods including pharmaceutical preparations for cardiovascular, neurological, dermatological, psychiatric, allergic, metabolic, muscular, infectious and inflammatory conditions (pages 92-94 of the August 31, 2010 office action),
- U.S. Registration No. 3702756, DAPAVIR, for goods including antivirals, pharmaceuticals for treating viral, metabolic, endocrine, cardiovascular, cardiopulmonary, respiratory, neurological, hormonal, psychiatric, and immune system disease and disorders, antinfective preparations, and antibiotics (pages 95-98 of the August 31, 2010 office action),
- U.S. Registration No. 3572499 UNICHEM LABORATORIES LTD., for goods including antibiotic, anti-infective, anti-diabetic, anti-allergic and analgesic pharmaceutical preparations and pharmaceuticals for cardiovascular and psychiatric use (pages 98-100 of the August 31, 2010 office action),
- U.S. Registration No. 3724557, ABBOTT, for goods including pharmaceutical products for treating cardiovascular, autoimmune, central nervous system, cerebrovascular, diabetic, and metabolic disorders, inflammatory disease, infectious disease, seizure disorders and viral disease (pages 101-103 of the August 31, 2010 office action),
- U.S. Registration No. 3764772, ZHEIM, for goods including analgesic, anti-inflammatory, cardiovascular, viral, metabolic, endocrine, cardiopulmonary, neurological, gastrointestinal, and psychiatric pharmaceuticals, and dietary and nutritional supplements (pages 104-107 of the August 31, 2010 office action),
- U.S. Registration No. 2929594, ISOCHRON, for goods including pharmaceuticals for treatment of pain, hypertension, cardiovascular disease, diabetic neuropathy, neurological disorders, depression and alcohol abuse and addiction and dependence (pages 107-108 of the August 31, 2010 office action),
- U.S. Registration No. 2990679, AKYMA, for goods including pharmaceutical preparations and nutritional supplements for treating bone, skin, muscle, eye, ear,

cardiovascular, respiratory, genitourinary, and gastrointestinal conditions, pharmaceuticals for diabetes, analgesics, anti-anxiety, antidepressants, antihypertensives, antihistamines, anti-inflammatories, antibiotics, anti-virals, oral contraceptives and anti-infectives (pages 109-111 of the August 31, 2010 office action),

- U.S. Registration No. 3082556, ECHELON, for goods including pharmaceutical preparations for treating diabetes, cardiovascular disease, stroke, inflammatory disease, infectious disease, antibiotics, anti-infectives and anti-virals, and pharmaceutical compounds for treating diabetes (pages 112-114 of the August 31, 2010 office action),
- U.S. Registration No. 3703656, QNEXA, for goods including pharmaceutical preparations to treat obesity, facilitate weight loss, for treating metabolic disorders, and for treating diabetes and cardiovascular disease and disorders (pages 115-116 of the August 31, 2010 office action).

Therefore, applicant's and registrant's goods and services are considered related for likelihood of confusion purposes because they include pharmaceutical preparations that are used for similar purposes, and pharmaceutical preparations for a variety of uses and research services commonly emanate from a single source. *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 271-72 (TTAB 2009).

As applicant acknowledges, the Trademark Trial and Appeal Board and its appeals court have applied a higher standard to likelihood of confusion cases involving medicinal and pharmaceutical products. Although physicians and pharmacists are no doubt carefully trained to recognize differences in the characteristics of pharmaceutical products, they are not trained to recognize the difference between similar trademarks used on such products. Any confusion involving such goods could give rise to serious and harmful consequences such as mistakenly choosing wrong medication. *See Glenwood Labs., Inc. v. Am. Home Prods. Corp*., 455 F.2d 1384, 1386, 173 USPQ 19, 21 (C.C.P.A. 1972); *Alfacell Corp. v. Anticancer Inc.*, 71 USPQ2d 1301, 1305-06 (TTAB 2004); *Blansett Pharmacal Co. v. Camrick Labs., Inc.*, 25 USPQ2d 1473, 1477 (TTAB

1992). Thus, a lower threshold of proof is applied in assessing confusing similarity with respect to drugs and medicinal products.

Applicant attempts to avoid application of this principle by claiming that neither its design nor the registered mark will ever be used alone to identify a particular drug, dosage form or other detail. This limitation is not reflected in the application or registration. It is improper to make an assumption that a consumer would connect a particular mark to additional matter that is not part of the drawing of the mark, and is therefore of no significance in the determination of the commercial impression of the marks. *Nike Inc. v. WNBA Enterprises, LLC*, 85 USPQ2d 1187, 1201 (TTAB 2007) (rejecting an attempt to distinguish marks based on other wording and design elements not part of the registered or applied-for mark); *In re Cynosure Inc.*, 90 USPQ2d 1644, 1645 (TTAB 2009) (the focus is on the mark the applicant seeks to register, and not other marks used or registered). Additionally, the purpose of a trademark is to identify and distinguish the goods of a particular entity and to indicate the source of the goods. 15 U.S.C. §1127; TMEP §1202. Thus, it must be presumed that the applied-for design and the registered mark are being used precisely to identify and distinguish particular pharmaceutical preparations and to indicate the source of the preparations.

Regardless of whether a higher standard is applied, the evidence of record demonstrates that applicant's goods include pharmaceutical preparations for the same use as registrant's pharmaceutical preparations, and that applicant's other pharmaceutical preparations and research services are closely related to registrant's goods. It is telling that applicant has made no arguments attempting to distinguish its goods and services

from those of the registrant, and thus the relatedness of the goods and services should be treated as conceded by applicant.

CONCLUSION

For the foregoing reasons, the examining attorney requests that the refusal to register the applied-for mark consisting of a triangle shaped design because of a likelihood of confusion with the triangle design mark in U.S. Registration No. 3127143 under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), be affirmed.

Respectfully submitted,

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