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

Proceeding	91182604
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Trademark Application Serial No. 77/226,994

Filed: July 11, 2007

Mark: VISRX

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CORNERSTONE BIOPHARMA, INC.,)

Opposer,)

v.)

Opposition No. 91182604

VISION PHARMA, LLC,)

Applicant.)

**OPPOSER'S MEMORANDUM IN OPPOSITION TO
APPLICANT'S MOTION FOR JUDGMENT ON THE PLEADINGS**

Opposer Cornerstone BioPharma, Inc. ("Cornerstone") submits this memorandum in opposition to the motion for judgment on the pleadings filed by Applicant Vision Pharma, seeking dismissal of this Opposition.

Taking all well-pleaded factual allegations in Cornerstone's Notice of Opposition as true, and resolving all reasonable inferences therefrom in Cornerstone's favor, as FED. R. CIV. P. 12(c) requires, it is clear that Cornerstone, which sells anti-allergy preparations under its federally-registered mark ALLERX®, has stated a sufficient basis for refusing registration of the confusingly similar mark VISRX for use in connection with pharmaceutical products that are the same, for purposes of this Opposition, as Cornerstone's ALLERX® products. In short, Vision's motion for judgment on the pleadings is without merit and should be denied. Cornerstone should be permitted to proceed with this Opposition and should be afforded the opportunity to present evidence in support its likelihood of confusion claim.

FACTUAL ALLEGATIONS OF THE NOTICE OF OPPOSITION

Cornerstone markets patented prescription medicines for the treatment of respiratory illness. Notice of Opposition (“Opp.”) ¶ 2.

Since 1999, Cornerstone and its predecessor in interest have used the trademark ALLERX® in connection with the marketing and sale of pharmaceutical preparations in the United States for the temporary relief of symptoms associated with allergic rhinitis. *Id.* ¶ 3. Cornerstone’s ALLERX® Dose Pack is a prescription-only 10-day or 30-day prepackaged therapeutic regimen for temporary relief of symptoms associated with allergic rhinitis. *Id.* ¶ 4. Since its introduction, ALLERX® Dose Pack has enjoyed significant sales growth, with sales increasing from \$4.4 million in 2001 to \$13.4 million in 2007. *Id.* Cornerstone also uses its ALLERX® mark in connection with the marketing and sale of other pharmaceutical preparations for the temporary relief of allergic rhinitis, including ALLERX®-D and ALLERX® Suspension, *id.* ¶ 5, and, more recently, ALLERX® DF and ALLERX® PE.

Cornerstone’s ALLERX® mark is symbolic of extensive goodwill and customer recognition built up by Cornerstone through its advertising and promotional efforts. *Id.* ¶ 7. Cornerstone and its ALLERX® mark have become well known among health care providers, pharmacists, consumers and the public generally, and they have come to recognize the mark as signifying and identifying Cornerstone as the source of the high-quality products it sells and distributes thereunder. *Id.* Persons know Cornerstone by its distinctive ALLERX® mark, and they associate Cornerstone’s ALLERX® mark with the pharmaceutical preparations that Cornerstone offers for the temporary relief of symptoms associated with allergic rhinitis. *Id.* By virtue of the popularity and quality of Cornerstone’s ALLERX® products, Cornerstone’s extensive marketing and promotional efforts, and its exclusive use of the ALLERX® mark in

connection with such products, Cornerstone's ALLERX® mark has acquired great value as a way of identifying the products sold by Cornerstone, as a way of distinguishing them from those sold by others, and as a way of identifying Cornerstone as the source of such products. *Id.* ¶ 6.

Cornerstone is the owner of U.S. Reg. No. 3,384,232, which issued on February 19, 2008, for its ALLERX® mark for use in connection with anti-allergy preparations, antihistamine preparations, and decongestant preparations in International Class 005. *Id.* ¶ 8. The U.S. Patent and Trademark Office has recognized the inherent distinctiveness of the ALLERX® mark, as it placed the mark on the Principal Register without requiring proof of secondary meaning.

Vision began using the mark VISRX in late 2007 in connection with the marketing and sale of an unauthorized generic version of ALLERX® Dose Pack called "VISRX Dose Pack." *Id.* ¶ 12. It is undisputed that VISRX Dose Pack, like ALLERX® Dose Pack, is a prepackaged 10-day or 30-day prepackaged therapeutic regimen for temporary relief of symptoms associated with allergic rhinitis. *Id.* ¶ 11; Answer to Notice of Opposition and Counterclaims ("Ans.") ¶ 11. It also is undisputed that VISRX Dose Pack, at the time it was launched, used the same active ingredients and dosages as ALLERX® Dose Pack. *Opp.* ¶ 11; *Ans.* ¶ 11.¹ The product informational insert distributed by Vision with VISRX Dose Pack is virtually a word-for-word copy of Cornerstone's product informational insert for ALLERX® Dose Pack. *Opp.* ¶ 12.

Vision listed VISRX Dose Pack as a generic equivalent or other substitute for ALLERX® Dose Pack in one or more of the national pharmaceutical databases that are widely used by

¹ Since the filing of this Opposition ALLERX® Dose Pack has been reformulated and now contains different active ingredients and different dosages. ALLERX® Dose Pack continues to be sold as a prepackaged 10-day or 30-day prepackaged therapeutic regimen for temporary relief of symptoms associated with allergic rhinitis, like VISRX Dose Pack. Cornerstone will file a supplemental pleading on this point pursuant to FED. R. CIV. P. 15(d) if necessary.

pharmacists and health care providers in selecting and dispensing prescription drugs. *Id.* ¶ 13.² Thus, not surprisingly, Vision offers VISRX Dose Pack for sale in the same or similar channels of commerce and to the same or similar customers as Cornerstone offers ALLERX® Dose Pack for sale. *Id.* ¶¶ 14-15.

On July 11, 2007, Vision applied to register VISRX for use in connection with a pharmaceutical preparation for the relief of symptoms associated with allergic rhinitis, vasomotor rhinitis and the common cold in International Class 005. *Id.* ¶ 9; Ans. ¶ 9. VISRX was published for opposition on December 25, 2007. Opp. ¶ 16; Ans. ¶ 16. Following the Board's entry of an extension of time for Cornerstone to file a notice of opposition, this Opposition was filed on February 23, 2008.

Cornerstone asserts in its Opposition that it will be damaged by the registration of VISRX within the meaning of 15 U.S.C. § 1063(a) because Vision's use of VISRX, as applied for, falsely suggests a connection with Cornerstone within the meaning of 15 U.S.C. § 1052(a) and/or so resembles Cornerstone's registered ALLERX® mark as to be likely to cause confusion, mistake and/or deception within the meaning of 15 U.S.C. § 1052(d) as to the affiliation, connection or association of Vision with Cornerstone, or as to the origin, sponsorship, or approval of Vision's products, services or commercial activities with Cornerstone. Opp. ¶ 19. Cornerstone further asserts that it will be damaged by registration of VISRX because Vision's use of its VISRX mark, as applied for, is false and misleading and likely to cause confusion with Cornerstone's registered ALLERX® mark and is therefore in violation of 15 U.S.C. §1125(a). *Id.* ¶ 21.

In the instant motion, Vision asks the Board to dismiss this Opposition on the pleadings and to preclude Cornerstone from offering evidence in support of its claims that VISRX, when

² Vision listed VISRX Dose Pack as a generic equivalent or other substitute for ALLERX® Dose Pack in order to encourage substitution of VISRX Dose Pack for ALLERX® Dose Pack. *Id.* ¶ 13.

used in connection with Vision's anti-rhinitis product VISRX Dose Pack, is confusingly similar to Cornerstone's federally-registered mark ALLERX® used in connection with its anti-rhinitis product ALLERX® Dose Pack. Ignoring the undisputed identity of the products involved, and disregarding the factual allegations in the Notice of Opposition that the products are sold in the same or similar channels of commerce and to the same or similar customers, as well as the allegations demonstrating the strength of the ALLERX® mark as an identifier of the source of Cornerstone's products, Vision rests its motion on the narrow contention that "[t]he marks are not similar in appearance or sound or commercial impression" and urges the Board to conclude – as a matter of law – that "no purchaser would be confused between the VISRX product and the ALLERX product." Motion for Judgment on the Pleadings ("Mot.") p. 4.³ However, evaluated under the standard appropriate for Rule 12(c) motions, in which all of Cornerstone's well-pleaded allegations must be taken as true and all reasonable inferences therefrom must be resolved in Cornerstone's favor, Vision's motion clearly requires denial. As shown below, the Notice of Opposition alleges a sufficient basis for Cornerstone's claim that the use of VISRX, as applied for, is confusingly similar to its federally-registered mark ALLERX®.

ARGUMENT

For purposes of the instant motion, all well-pleaded factual allegations of the Notice of Opposition must be accepted as true, and all reasonable inferences from the pleadings must be drawn in Cornerstone's favor. *Ava Enterprises, Inc. v. P.A.C. Trading Group, Inc.*, 86

³ Vision attempts to buttress its contention concerning similarity of the marks with a speculative argument that the relevant individuals for purposes of the likelihood of confusion are pharmacists and physicians, whose supposed "sophistication" supports dismissal of this Opposition. See Mot. pp. 6-7. As discussed below, this argument is unsupported by the pleadings, which do not specify any classes of purchasers to whom the ALLERX® Dose Pack and VISRX Dose Pack products are sold. Thus, it is not appropriate for consideration in connection with Vision's motion for judgment on the pleadings.

U.S.P.Q.2d 1659, 1660 (TTAB 2008). Judgment on the pleadings may be granted only if, on the facts as deemed admitted, there is no genuine issue of material fact to be resolved, and the moving party is entitled to judgment on the substantive merits of the controversy, as a matter of law. *Id.* As demonstrated below, Vision's attempt to stop this Opposition based on an argument that there is no likelihood of confusion between the marks, as a matter of law, falls well short of the stringent standard required for the entry of judgment on the pleadings under Rule 12(c). Accordingly, Vision's motion should be denied, and Cornerstone should be permitted to proceed with the presentation of evidence in support of its well-pleaded likelihood of confusion claim.

**VISION HAS FAILED TO DEMONSTRATE THAT THERE IS NO
LIKELIHOOD OF CONFUSION BETWEEN THE MARKS AS A MATTER OF LAW.**

I. The Marks Are Sufficiently Similar To Support a Finding of Likelihood of Confusion.

It is well-established that exact similitude between two marks is not required to give rise to a likelihood of confusion. *See, e.g., American Steel Foundries v. Robertson*, 269 U.S. 372, 70 L. Ed. 317, 46 S. Ct. 160 (1926); *see generally* 4 J. McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §23:20 (4th ed. 2008). Rather, as one court has observed, "absolute identity is not necessary for infringement; all that is necessary is enough similarity between the marks to confuse customers." *Washington Speakers Bureau Inc. v. Leading Authorities Inc.*, 33 F. Supp. 2d 488 (E.D. Va. 1999), *aff'd*, 217 F.3d 843 (4th Cir. 2000). Further, as the Board recognizes, "Where applicant's goods are identical to opposer's goods, the degree of similarity between the marks which is required to support a finding of likelihood of confusion is less than it would be if the goods were not identical." *Wyeth Holdings Corp. v. Walgreen Co.*, 2005 TTAB LEXIS 263 (TTAB 2005); *accord In re Microsoft Corp.*, 68 U.S.P.Q.2d 1195 (TTAB 2003); *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 877 (Fed. Cir. 1992).

Here, there can be no question that the goods in question are the same for purposes of this Opposition. Cornerstone's federally-registered mark ALLERX® covers anti-allergy preparations, antihistamine preparations; and decongestant preparations. Opp. ¶ 8. Vision seeks to register VISRX for use in connection with a pharmaceutical preparation for the relief of symptoms associated with allergic rhinitis, vasomotor rhinitis and the common cold. *Id.* ¶ 9. Thus, the goods for which Vision seeks to register VISRX are clearly the same as those covered by Cornerstone's registration. Further, VISRX Dose Pack was launched as an unauthorized generic version of ALLERX® Dose Pack, Opp. ¶ 11, and Vision does not dispute that VISRX Dose Pack was launched with the same active ingredients and dosages as Cornerstone's ALLERX® Dose Pack. *Id.*; Ans. ¶ 11. Since this Opposition was filed, the active ingredients and dosages used in ALLERX® Dose Pack have changed, but both ALLERX® Dose Pack and VISRX Dose Pack continue to be promoted and sold as pharmaceutical preparations for the temporary relief of symptoms associated with allergic rhinitis. Accordingly, given the identity of the goods in question, the degree of similarity between the marks required to support a finding of likelihood of confusion in this matter is not as great as it would be if the goods were different or merely related. *See, e.g., Centraz Industries, Inc. v. Spartan Chemical Co.*, 77 U.S.P.Q.2d 1698 (TTAB 2006).

Further, as Vision ignores, “[i]n the field of medical products, it is particularly important that great care be taken to prevent any possibility of confusion in the use of trademarks.” *Morgenstern Chem. Co. v. G.D. Searle & Co.*, 253 F.2d 390, 393 (3d Cir. 1958). Thus, “the tests of confusing similarity are modified when the goods involved are medicinal products.” 4 J. McCarthy § 23:32. This is because “[c]onfusion as to source or product between medicinal products may produce physically harmful results to purchasers and greater protection is required

than in the ordinary case.” *Id.* On this point, the Board has recognized that “[w]here the marks are used on pharmaceuticals and confusion as to source can lead to serious consequences, it is extremely important to avoid that which will cause confusion.” *Alfacell Corp. v. Anticancer Inc.*, 71 U.S.P.Q.2d 1301 (TTAB 2004). Thus, as McCarthy points out, “public policy supports enjoining trademark use on a lesser showing of confusing similarity than for ordinary goods.” *Id.*

Contrary to Vision’s suggestion, this rule is not overridden by the fact that prescription medications may be prescribed by physicians and dispensed by pharmacists. As the Third Circuit has pointed out, “medical expertise is not enough, in and of itself, to lessen the likelihood of confusion in prescription drug cases.” *KOS Pharmaceuticals, Inc. v. Andrx Corp.*, 369 F.3d 700, 713 (3d Cir. 2004). Indeed, as the Board has observed, “[t]here is no reason to believe that medical expertise as to pharmaceuticals will ensure that there will be no likelihood of confusion as to source or affiliation.” *Alfacell*, 71 U.S.P.Q.2d 1301; *see also Blansett Pharmacal Co. v. Carmrick Laboratories, Inc.*, 25 U.S.P.Q.2d 1473 (likelihood of confusion found between NALEX and NOLEX for nasal decongestants, even though products were prescription drugs prescribed by physicians and dispensed by pharmacists).

In this matter, ALLERX® Dose Pack and VISRX Dose Pack are prescription-only pharmaceutical products for the treatment of temporary symptoms associated with allergic rhinitis. VISRX Dose Pack was launched with the same active ingredients and dosages as ALLERX® Dose Pack. Opp. ¶ 11. Since this Opposition was instituted, ALLERX® Dose Pack has been reformulated and now contains different active ingredients and different dosages. On the record to be considered for this motion (*i.e.*, the pleadings), the risk of serious consequences from confusion between the now-different formulations of the products cannot be ruled out, nor

can the potential that other products with different formulations might be marketed in the future under one or both of the marks. Therefore, the marks involved in this Opposition should be evaluated, for purposes of the instant motion, with the heightened sensitivity for confusion involving pharmaceuticals that is supported by McCarthy and that the Board endorsed in *Alfacell*.

Turning now to the *Du Pont* factor that is the focus of the instant motion – “the similarity or dissimilarity of the marks in their entirety in appearance, sound, connotation and commercial impression”⁴ – it should be noted that similarity as to only one of these elements may support a finding of likelihood of confusion, especially in the context of identical goods. *See, e.g., Interstate Brands Corp. v. McKee Foods Corp.*, 53 U.S.P.Q.2d 1910 (TTAB 2000) (“Similarity in either form, spelling or sound alone may be sufficient to support a finding of likelihood of confusion.”). Moreover, analysis of this *Du Pont* factor requires a comparison of the marks “in their entirety.” Dissection of the marks to determine if their commercial impressions are confusing, as Vision attempts to do, is improper. *See Recot, Inc. v. Becton*, 214 F.3d 1322 (Fed. Cir. 2000).

The overall commercial impression of the marks involved here is sufficiently similar to support a finding of likelihood of confusion. The ALLERX® and VISRX marks are, overall, similar in sound. ALLERX® is pronounced “äl – ə – rĕks.” VISRX is pronounced as “vĭz – ə – rĕks.” Both are pronounced in three syllables, two of which (the second and third) are largely identical in sound, stress and rhythm. The marks are also similar in appearance. ALLERX® and VISRX both end with the letters “Rx,” and (as VISRX is used in connection with VISRX Dose Pack), both display a distinctive capitalized “R” in “Rx.” In view of the fact that the marks are used in connection with pharmaceutical products that, for purposes of this Opposition, are legally

⁴ *In re E.I Du Pont de Nemours & Co.*, 177 U.S.P.Q. 563 (C.C.P.A. 1973).

identical, and accepting as true Cornerstone's allegations that those products are sold to the same customers and in the same channels of commerce, it is clear that there is a sufficient degree of similarity in the overall commercial impressions of the marks, in the context in which they are used, to support a finding of likelihood of confusion. *See, e.g., KOS Pharmaceuticals*, 369 F.3d at 700 (ADVICOR and ALTOCOR held confusingly similar when used for prescription cholesterol-reducing drugs); *Blansett Pharmaceuticals*, 25 U.S.P.Q.2d 1473 (NALEX and NOLEX held confusingly similar when used for prescription nasal decongestant drugs); *Eli Lilly & Co. v. Natural Answers, Inc.*, 86 F. Supp. 2d 834 (S.D. Ind. 2000), *aff'd*, 233 F.3d 456 (7th Cir. 2000) (HERBROZAC held confusingly similar to PROZAC when advertised as an herbal alternative to PROZAC).

Vision's effort to dissect the two marks and to compare only "ALLE" with "VIS" by ignoring their shared suffix, "Rx," should be rejected. It is noteworthy that ALLERX® is a coined term; it combines the letters "ALLE" with the letters "RX" to form a word that is not found in any English dictionary. Moreover, the combination is pronounced in a strikingly different way than the ordinary combination of its two parts (which would form a four-syllable word pronounced "äl - ə - ar - ěks"). "Rx," standing alone, connotes a prescription medication, but when it is combined with "ALLE" to form ALLERX®, it creates a new, distinctive mark that is most appropriately viewed in its entirety, not via a dissection of its components. The term VISRX also is not in found a dictionary, but – significantly – it clearly can be inferred from the pleadings that VISRX was adopted specifically with reference to ALLERX®. After all, given that Vision launched VISRX Dose Pack as an unauthorized generic version of the branded product ALLERX® Dose Pack, Opp. ¶ 11, it is evident that the term VISRX was chosen to evoke an impression of similarity with ALLERX®, in terms of sight, sound and overall commercial

impression, in order to improve Vision's chances that its VISRX Dose Pack actually would be substituted for ALLERX® Dose Pack.

It certainly cannot be concluded at this juncture that ALLERX® and VISRX, as a matter of law, are "so dissimilar [that] it is difficult to imagine that a purchaser could be confused between the two marks." Mot. pp. 4-5. In this regard, *Ava Enterprises* – the only decision cited by Vision granting judgment on a Rule 12(c) motion on the basis of the dissimilarity of the marks involved – is instructive. In *Ava Enterprises*, the Board pointed out that the Opposer's mark, BOSS AUDIOSYSTEMS, did not contain any term identical to those in the applied-for mark, PAC BOOSTER THE PERFECT SOUND. 86 U.S.P.Q.2d at 1661. It also found that the words "BOSS" and "BOOSTER" were "completely different in meaning." *Id.* Although the terms BOSS and BOOSTER both began with the letter "B," shared the letters "O" and "S," and sounded similar, and even though there was some overlap in the respective goods, the Board found that the connotations of the marks could not be similar and concluded that "the marks as a whole" were "entirely different." *Id.* Thus, the Board held, based solely on the pleadings, that "a likelihood of confusion cannot exist as a matter of law." *Id.* The present matter, however, is considerably different. ALLERX® and VISRX are much closer in overall commercial impression and have many fewer elements of dissimilarity than the quite different marks BOSS AUDIO SYSTEMS and PAC BOOSTER THE PERFECT SOUND. Moreover, while *Ava Enterprises* involved audio components, this matter involves pharmaceuticals, which deserve heightened protection against confusingly similar marks. Quite simply, the circumstances that led the Board to find no likelihood of confusion in *Ava Enterprises*, as a matter of law, do not compel the same conclusion here.

Pack'em, the other decision Vision cites in support of its request for judgment as a matter of law, also is distinguishable. See *Kellogg Co. v. Pack'em Enterprises, Inc.*, 951 F.2d 330 (Fed. Cir. 1991). The marks involved in that case, FROOT LOOPS and FROOTEE ICE, were found to be dissimilar in appearance (FROOTEE ICE even featured an elephant design). *Id.* at 333. The marks did not share any common words; their only similarity was that one began with the word FROOT and the other began with the word FROOTEE. *Id.* Here, unlike the relatively open-and-shut case presented in *Pack'em*, there is sufficient similarity between the overall commercial impressions of the ALLERX® and VISRX marks, as discussed above, to support a finding of a likelihood of confusion. The marks at issue here are much more similar in sound, appearance, connotation and overall commercial impression than those in *Pack'em*.⁵

In sum, it cannot be concluded, as a matter of law, that the ALLERX® and VISRX marks are so dissimilar that there can be no possible finding of a likelihood of confusion between them, in view of their use on the same products sold to the same customers in the same channels of commerce. Opp. ¶¶ 11 (same products), 14 (same channels of commerce), 15 (same customers). Viewing Cornerstone's allegations as true and resolving all reasonable inferences in its favor, as Rule 12(c) requires, it is clear that judgment on the pleadings, based solely on the issue of the similarity of the marks in question, is not appropriate.

⁵ Since *Pack'em* was decided on summary judgment, it was noted that Kellogg had produced no evidence of actual confusion, such as a customer survey, to rebut *Pack'em*'s argument that the marks were dissimilar as a matter of law. *Id.* at 332. Here, Vision asks the Board to dismiss this Opposition on a much more limited record, *i.e.*, the pleadings. The marks at issue, however, are sufficiently similar in overall commercial impression that Cornerstone should be allowed the opportunity to develop through discovery and to bring forward evidence of actual confusion, such as a survey, that would allow the Board to evaluate the similarity or dissimilarity of the marks on a more fully-developed record.

II. Vision's Speculative Argument Concerning the Supposed Sophistication of Likely Buyers of the Products Involved Is Both Improper and Unavailing.

Straying far beyond the factual allegations of the Notice of Opposition, Vision argues that the relevant individuals for purposes of the likelihood of confusion analysis – simply because the products involved are prescription drugs – are the pharmacists dispensing the drugs and the physicians prescribing them. *See* Mot. p. 6. While such an argument might be advanced on a motion for summary judgment (assuming Vision could point to admissible evidence in the record to support its contention), it is not at all appropriate in the context of the instant motion, because there are no allegations on this point in the Notice of Opposition. Without proper support in the pleadings, Vision's argument concerning the "sophistication" of the relevant individuals for the likelihood of confusion analysis is pure speculation that cannot form the basis for the entry of judgment against Cornerstone as a matter of law, *see* FED. R.CIV. P. 12(c), and it should be disregarded

In any event, assuming for purposes of Vision's argument that physicians and pharmacists might be an appropriate class of individuals for the likelihood of confusion analysis, it still does not follow that judgment on the pleadings dismissing this Opposition is appropriate. After all, as the Board has recognized, "being knowledgeable and/or sophisticated in a particular field does not necessarily endow one with knowledge and sophistication in connection with the use of trademarks." *In re Decombe*, 9 U.S.P.Q.2d 1812 (TTAB 1988). More particularly, even health care professionals "are prone to carelessness," *Alfacell*, 71 U.S.P.Q.2d 1301, and "there is no reason to believe that medical expertise as to pharmaceuticals will ensure that there will be no likelihood of confusion as to source or affiliation." *Id.*; *see KOS Pharmaceuticals, Inc.*, 369 F.3d at 713 ("medical expertise is not enough, in and of itself, to lessen the likelihood of confusion in prescription drug cases"). Thus, "[e]ven though the goods may be prescription drugs, the rule

regarding a lesser degree of likelihood of confusion for medicinal products should control over the supposed ‘sophistication’ of physicians and pharmacists.” 4 McCarthy §23:32. Indeed, as McCarthy points out, “[o]ne cannot ignore the fact that physicians use a notoriously illegible scrawl in writing out prescriptions. If the pharmacist misreads a brand name, he may fill the prescription with a drug other than that which the doctor intended. This fact emphasizes the need for clearly dissimilar trademarks and brand names and justifies the lesser quantum of proof of confusing similarity for medicinal goods.” *Id.*

In view of the fact that the ALLERX® and VISRX marks have similarities in appearance, sound and overall commercial impression, as well as the fact that they both are used in connection with anti-rhinitis preparations dispensed in 10-day and 30-day dose pack form, it simply cannot be concluded that any supposed “sophistication” of the physicians and pharmacists involved in dispensing the products to patients demands that this Opposition be dismissed as a matter of law. Doctors and pharmacists simply are not immune from mistaking one mark for another. *See Schering Corp. v. Alza Corp.*, 207 U.S.P.Q. 504 (TTAB 1980). Entry of judgment on the pleadings on this basis would be error.

III. Other Du Pont Factors Weigh Heavily in Cornerstone’s Favor.

Contending that the first *Du Pont* factor – the similarity or dissimilarity of the marks – is the dispositive issue for its motion, Vision ignores that other *Du Pont* factors strongly favor Cornerstone. As noted above, there is no question that both the ALLERX® and VISRX marks are used in connection with anti-rhinitis pharmaceutical preparations, Opposition ¶¶ 4, 11, so the second *Du Pont* factor – the similarity of goods – clearly tilts in Cornerstone’s favor. Moreover, accepting the truth Cornerstone’s allegations that the products involved are sold to the same customers in the same channels of commerce, *id.* ¶¶ 14-15, as required for purposes of the instant

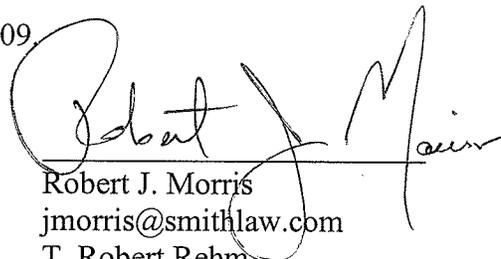
motion, it is plain that the third *Du Pont* factor also weighs heavily for Cornerstone. Further, as alleged in the Notice of Opposition, the ALLERX® mark has been promoted widely and successfully since 1999, resulting in significant increases in sales of the products sold thereunder, and it has achieved significant value as an identifier of high-quality products and of Cornerstone as their source. *Id.* ¶¶ 4, 6-7. Thus, these facts also point the fifth *Du Pont* factor – the fame of the prior mark – in Cornerstone’s favor.

In summary, viewed as a whole, the pleadings allege a sufficient and viable basis upon which a finding of a likelihood of confusion could be based. Denial of the instant motion is, therefore, required.

CONCLUSION

For the foregoing reasons, Vision’s motion for judgment on the pleadings should be denied.

This the 9th day of January, 2009.



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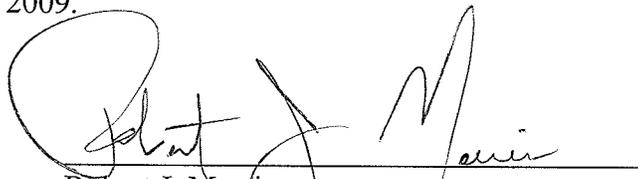
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposer's Memorandum in Opposition to Applicant's Motion for Judgment on the Pleadings was served on counsel of record for Applicant, Vision Pharma, LLC, by depositing a copy hereof in the United States mail, first-class postage prepaid, addressed as follows:

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