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

Proceeding	91182604
Party	Defendant Vision Pharma LLC
Correspondence Address	S. BENJAMIN PLEUNE ALSTON & BIRD LLP BANK OF AMERICA PLAZA , 101 S. TRYON STREET, SUITE 4000 CHARLOTTE, NC 28280-4000 UNITED STATES ben.pleune@alston.com
Submission	Opposition/Response to Motion
Filer's Name	Sarah C. Hsia
Filer's e-mail	ipnyc@alston.com
Signature	/sh/
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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
Published in the Official Gazette: December 25, 2007

CORNERSTONE BIOPHARMA, INC.,	)	
	)	
Opposer,	)	
	)	
v.	)	Opposition No. 91182604
	)	
VISION PHARMA, LLC,	)	
	)	
Applicant.	)	

APPLICANT'S REPLY TO OPPOSER'S OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS

Applicant, Vision Pharma, LLC ("Vision Pharma"), by and through its undersigned counsel, submits this brief reply to address several issues raised by Opposer Cornerstone Biopharma, Inc. ("Cornerstone") in its Opposition to Vision Pharma's Motion for Judgment on the Pleadings.

The question presented by Vision Pharma's motion is simple: are the ALLERX and VISRX marks dissimilar enough in appearance, sound, meaning and commercial impression that there will be no likelihood of confusion as to the source of the goods on which they are used? Vision Pharma submits that the answer to this question is yes: the marks at issue in this opposition do not look alike or sound alike, and have different connotations and commercial impressions. Cornerstone attempts to convolute this issue by presenting a lengthy, irrelevant and misleading discussion

of the history of the parties' generic pharmaceutical products and irrelevant characterizations of Vision Pharma's actions as "unauthorized" and its product as a "copy" of Cornerstone's product. These allegations and characterizations are wholly irrelevant to the determination that there is no likelihood of confusion between the ALLERX and VISRX marks, and should be disregarded.

Cornerstone also argues that a likelihood of confusion in this opposition requires a lessened degree of similarity between the marks, due to the similar goods on which the marks are used, and the nature of these goods as pharmaceutical products.[1] Even assuming, without deciding, that a lesser degree of similarity between the marks is required for a finding of likelihood of confusion, the ALLERX and VISRX marks are still not similar enough in appearance, sound, connotation or commercial impression so as to cause a likelihood of confusion. Each case cited by Cornerstone involves marks that are decidedly more similar than ALLERX and VISRX. For example, in the *Blansett* case, the Board noted that the marks at issue (NOLEX and NALEX) differed by only a single vowel – "o" vs. "a" – and that these vowels are sometimes confused when handwritten, which supported a likelihood of confusion. *Blansett Pharmacal Co. Inc. v. Carmrick Labs. Inc.*, 25 U.S.P.Q.2d 1473, 1477 (TTAB 1992). In the *Alfacell* case, also cited by Cornerstone, the Board remarked that the marks at issue (ONCASE and ONCONASE) were similar because they both began with ONC- and end in –ASE, and the only difference between these

[1] Cornerstone's suggestion that "serious consequences" could result from confusion between the products due to "now-different formulations" of these products is without merit. Cornerstone cannot allege that the VISRX product is a "generic version" of its ALLERX Dose Pack without admitting that the differences between the products is not substantial enough to cause such "serious consequences." *See* Opposition to Motion for Judgment on the Pleadings, pp. 3, 8.

marks was one syllable in the middle of the mark. *Alfacell Corp. v. Anticancer Inc.*, 71 U.S.P.Q.2d 1301, 1305 (TTAB 2004). And in the *Eli Lilly* case, the court found that the marks HERBROZAC and PROZAC were similar in "sight, sound and meaning," reasoning that the HERBROZAC mark contained 5 of 6 of the letters in PROZAC, that the "B" sound was very similar to the "P" sound from PROZAC, and noted that the overall effect of the HERBROZAC mark was "a message that effectively states 'herbal Prozac.'" *Eli Lilly and Co. v. Natural Answers, Inc.*, 86 F. Supp. 2d 834, 841 (S.D. Ind. 2000).

Here, even under the lesser standard of similarity urged by Cornerstone, the dominant portions of the ALLERX and VISRX marks are wholly dissimilar. This dissimilarity outweighs the only point of similarity in the appearance, sound, meaning and commercial impressions of the marks, namely, the descriptive "RX" term found at the end of the marks. Cornerstone argues that its ALLERX mark cannot be "dissected" for purposes of a likelihood of confusion analysis; however, it is well established that "one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark." *Wyeth Holdings Corp. v. Walgreen Co.*, 2005 TTAB LEXIS 263, *8-9 (TTAB June 21, 2005) (*citing In re National Data Corp.*, 753 F.2d 1056 (Fed. Cir. 1985). The dominant portions of the ALLERX and VISRX marks are the initial portions of the marks (ALLE and VIS), which are spelled and pronounced completely differently, and do not share any letters in common. Giving the proper weight to this dominant feature in determining the commercial

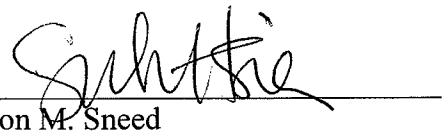
impressions of the ALLERX and VISRX marks, it is clear that these marks are so dissimilar that there can be no likelihood of confusion between them.

Finally, Cornerstone's argument that the Board should not consider the sophistication of the relevant purchasers of the products sold under the ALLERX and VISRX marks is specious and inaccurate. Indeed, in the *Blansett* case cited by Cornerstone, the Board took judicial notice "that prescription drugs and non-prescription drugs are prescribed by doctors and dispensed by pharmacists and that such persons are not prone to carelessness." *Blansett*, 25 U.S.P.Q.2d at 1477. And Cornerstone misquotes the *Alfacell* case, which similarly acknowledges that healthcare professionals are "sophisticated and ***not*** prone to carelessness." *Alfacell*, 71 U.S.P.Q.2d at 1305-6 (emphasis added). Thus, the Board should consider the sophistication of the doctors and pharmacists who prescribe and dispense the drugs in connection with which the ALLERX and VISRX marks are used in determining that there is no likelihood of confusion between these marks.

For the reasons stated above, Vision Pharma respectfully requests that its Motion for Judgment on the Pleadings be granted in its entirety.

Dated: January 26, 2009

Respectfully submitted,



Jason M. Sneed
Benjamin F. Sidbury
Alston & Bird LLP
101 S. Tryon Street, Suite 4000
Charlotte, NC 28280-4000
Tel.: (704) 444-1000
Fax: (704) 444-1111

Email: jason.sneed@alston.com; ben.sidbury@alston.com

Sarah C. Hsia
Alston & Bird LLP
90 Park Ave.
New York, NY 10016
Tel.: (212) 210-9400
Fax: (212) 210-9444
Email: sarah.hsia@alston.com

Attorneys for Applicant,
Vision Pharma LLC

CERTIFICATE OF SERVICE

The undersigned counsel of record hereby certifies that on this 26th day of January, 2009, a copy of the foregoing Applicant's Reply to Opposer's Opposition to Motion for Judgment on the Pleadings was served on counsel for Cornerstone by email and first class mail (postage prepaid) and addressed to the following:

Robert J. Morris
Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP
2500 Wachovia Capitol Center
P.O. Box 2611
Raleigh, NC 27602-2611
jmorris@smithlaw.com

Attorneys for Opposer, Cornerstone BioPharma, Inc.

An Attorney for Applicant/Counterclaims
Petitioner, Vision Pharma, LLC