

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

MBA

Mailed: April 13, 2009

Opposition No. 91182604

Cornerstone BioPharma, Inc.

v.

Vision Pharma, LLC

**Before Bucher, Rogers and Cataldo, Administrative Trademark
Judges**

By the Board:

Vision Pharma, LLC ("applicant") seeks to register VISRX, in standard characters, for a "pharmaceutical preparation for the relief of symptoms associated with allergic rhinitis, vasomotor rhinitis and the common cold,"¹ and registration is opposed by Cornerstone BioPharma, Inc. ("opposer"). In its notice of opposition, opposer alleges: (1) prior use and registration of ALLERX in typed² and stylized³ formats, for pharmaceutical preparations including

¹ Application Serial No. 77226994, filed July 11, 2007, based on an intent to use the mark in commerce.

² Registration No. 2448112, issued May 1, 2001, based on a date of first use in commerce of May 1, 1998 for "dietary and nutritional supplements." [Section 8 Affidavit accepted]. Opposer acquired this registration by assignment.

³ Registration No. 3384232, issued February 19, 2008, based on a date of first use in commerce of April 25, 1999 for "Anti-allergy preparations; antihistamine preparations; and decongestant preparations."

"for the temporary relief of symptoms associated with allergic rhinitis" and the marketing and sale thereof, and that applicant's mark is likely to cause confusion with opposer's marks; (2) that applicant's use of its mark "falsely suggests a connection with Opposer within the meaning of 15 U.S.C. § 1052(a);" and (3) that use of applicant's mark "is false and misleading and likely to cause confusion with Opposer's registered ALLERX trademark and is therefore in violation of 15 U.S.C. § 1125(a)" In its answer, applicant denies the salient allegations in the notice of opposition and counterclaims for cancellation of opposer's pleaded registrations, alleging that Registration No. 3384232 should be cancelled because ALLERX "is descriptive and has not attained secondary meaning" and that Registration No. 2448112 should be cancelled because it was maintained by fraud. Opposer denies the salient allegations in the counterclaims.

This case now comes up for consideration of applicant's motion for judgment on the pleadings, filed December 2, 2008. The motion, which seeks judgment only on opposer's claim of priority and likelihood of confusion, is fully briefed. Because applicant recognizes that opposer's "well-pleaded factual allegations are accepted as true" for purposes of its motion, a brief review of those allegations is in order.

Opposer alleges that as a result of "significant sales growth," the "popularity and quality" of its products and "extensive marketing and promotional efforts," its mark "has acquired great value as a way of identifying" opposer's pharmaceutical products and "become well known among health care providers, pharmacists, consumers and the public generally." Notice of Opposition ¶¶ 4, 6, 7. Opposer claims that applicant uses VISRX "in connection with the marketing and sale of an unauthorized generic version" of ALLERX which includes the "same active ingredients and dosages as ALLERX Dose Pack." Id. ¶ 11. Furthermore, the "product informational insert" for applicant's product "is virtually a word-for-word copy of the Opposer's product informational insert." Id. ¶ 12. Opposer alleges that applicant identifies its product "as a generic equivalent or other substitute" for opposer's product in "national pharmaceutical databases that are widely used by pharmacists and health care providers," in order "to encourage substitution" of applicant's product for opposer's. Id. ¶ 13. Finally, opposer claims that applicant offers its product "for sale to the same or similar customers as Opposer," and "in the same or similar channels of commerce as Opposer." Id. ¶¶ 14, 15.

In its motion, applicant argues that even assuming all of these allegations are true, "[t]he dispositive issue in

this Opposition is that the VISRX mark is not similar to the ALLERX mark, and thus no likelihood of confusion exists between the marks as a matter of law." Specifically, applicant claims that the marks are "visually and aurally distinguishable" even though both contain the suffix "RX," because the suffix "is merely descriptive of these products." Applicant further claims that because the parties' products are prescription drugs, "the relevant individuals for purposes of a likelihood of confusion analysis are the pharmacists dispensing the drug, or the physicians prescribing it." According to applicant, these individuals are careful, sophisticated and unlikely to be confused.

In its response to the motion, opposer argues that because the parties' goods are identical, "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,"⁴ and that it "should be afforded the opportunity to present evidence in support of its likelihood of confusion claim." Opposer specifically argues that the parties' marks are "sufficiently similar to support a finding of likelihood of confusion," because they sound and appear similar, and because opposer's mark is a

⁴ Opposer claims that "[s]ince the Opposition was filed, the active ingredients and dosages used" in its product have changed, but the parties' goods remain similar or identical.

"coined" and distinctive term. Furthermore, according to opposer, because the parties offer pharmaceutical products, it is especially important to evaluate the parties' marks with a "heightened sensitivity for confusion." Finally, opposer disputes applicant's assertion that the relevant purchasers of the parties' products are sophisticated and careful physicians and pharmacists, pointing out that this contention is unsupported by the allegations in the notice of opposition.

In its reply brief, applicant argues that even assuming "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."

The Board recently set forth the standard for evaluating motions for judgment on the pleadings:

A motion for judgment on the pleadings is a test solely of the undisputed facts appearing in all the pleadings, supplemented by any facts of which the Board will take judicial notice. For purposes of the motion, all well pleaded factual allegations of the non-moving party must be accepted as true, while those allegations of the moving party which have been denied (or which are taken as denied, pursuant to Fed. R. Civ. P. 8(b)(6), because no responsive pleading thereto is required or permitted) are deemed false. Conclusions of law are not taken as admitted. *Baroid Drilling Fluids Inc.*

v. SunDrilling Products, 24 USPQ2d 1048 (TTAB 1992). All reasonable inferences from the pleadings are drawn in favor of the nonmoving party. *Id.* A judgment on the pleadings may be granted only where, 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.*

Ava Enterprises Inc. v. P.A.C. Trading Group Inc., 86 USPQ2d 1659, 1660 (TTAB 2008).

Applicant requests judgment on the pleadings on opposer's claim of likelihood of confusion, a claim which requires "focusing on ... whether the purchasing public would mistakenly assume that the applicant's goods originate from the same source as, or are associated with," opposer's goods. *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 1314-15, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). However, in this case, because we must focus only on the allegations in the pleadings, we need not and cannot weigh any evidence regarding the likelihood of confusion factors set forth in *In re E.I. du Pont de Menours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), but rather must accept as true opposer's factual allegations. Therefore, we accept as true that opposer's mark is strong, well known and distinctive, that the parties' goods and channels of trade are identical, that applicant's product insert is virtually identical to

opposer's and that applicant encourages substitution of its product for opposer's.

Even accepting all of these allegations as true, and accepting opposer's contention that we should have a "heightened" sensitivity to confusion because the parties' products are pharmaceuticals, and drawing all reasonable inferences in opposer's favor, we nonetheless find that there is no genuine issue of material fact remaining for trial as to the differences in the involved marks, and we therefore conclude that applicant is entitled to judgment on the pleadings as a matter of law. In *Ava Enterprises*, we recognized that the dissimilarity of the marks at issue in that case, standing alone, was "dispositive," and granted judgment on the pleadings based only on the differences between the parties' marks. *Ava Enterprises*, 86 USPQ2d at 1660 (granting judgment on the pleadings based on the differences between PAC BOOSTER THE PERFECT SOUND and BOSS AUDIOSYSTEMS). Here, as in *Ava Enterprises*, the parties' marks look and sound different and convey different meanings, notwithstanding that both end in "RX." There is no genuine issue that this only common element, RX, is an accepted abbreviation for the word "prescription,"⁵ and the

⁵ "RX ... a medical prescription." *Webster's Third New International Dictionary*, p. 1993 (1993). The Board may take judicial notice of dictionary definitions. *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

involved goods are medicines. Further, as applicant points out, the remaining elements of the parties' marks -- ALLE and VIS - have nothing in common. Accordingly, applicant's motion is hereby **GRANTED** with respect to opposer's likelihood of confusion claim, which is **DISMISSED WITH PREJUDICE**.

While applicant's motion does not address opposer's two remaining claims, we hereby dismiss, *sua sponte*, opposer's purported claim under 15 U.S.C. § 1125(a), with prejudice. It is well-settled that such claims are outside the Board's jurisdiction. *Ross v. Analytical Technology Inc.*, 51 USPQ2d 1269, 1270 n. 2 (TTAB 1999); *Andersen Corp. v. Therm-O-Shield International, Inc.*, 226 USPQ 431, 432 n. 5 (TTAB 1985 ("...Section 43(a) provides recourse to a damaged party by way of a civil action. This statutory provision is inapplicable to an opposition proceeding and the Board may not entertain any claim based on this provision.")).

Opposer need not file an amended petition for cancellation. Instead, opposer's allegations will be considered only to the extent that they bear on opposer's remaining claim that use of applicant's mark falsely suggests a connection with opposer under Section 2(a). Proceedings herein are resumed with respect to opposer's claim under Section 2(a) and to applicant's counterclaims.

Remaining disclosure, discovery, trial and other dates are reset as follows:

Expert Disclosures Due	July 9, 2009
Discovery Closes	August 8, 2009
Plaintiff's Pretrial Disclosures	September 22, 2009
30-day testimony period for plaintiff's testimony to close	November 6, 2009
Defendant/Counterclaim Plaintiff's Pretrial Disclosures	November 21, 2009
30-day testimony period for defendant and plaintiff in the counterclaim to close	January 5, 2010
Counterclaim Defendant's and Plaintiff's Rebuttal Disclosures Due	January 20, 2010
30-day testimony period for defendant in the counterclaim and rebuttal testimony for plaintiff to close	March 6, 2010
Counterclaim Plaintiff's Rebuttal Disclosures Due	March 21, 2010
15-day rebuttal period for plaintiff in the counterclaim to close	April 20, 2010
Brief for plaintiff due	June 19, 2010
Brief for defendant and plaintiff in the counterclaim due	July 19, 2010
Brief for defendant in the counterclaim and reply brief, if any, for plaintiff due	August 18, 2010
Reply brief, if any, for plaintiff in the counterclaim due	September 2, 2010

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

News from the TTAB

The USPTO published a notice of final rulemaking in the Federal Register on August 1, 2007, at 72 F.R. 42242. By this notice, various rules governing Trademark Trial and Appeal Board inter partes proceedings are amended. Certain amendments have an effective date of August 31, 2007, while most have an effective date of November 1, 2007. For further information, the parties are referred to a reprint of the final rule and a chart summarizing the affected rules, their changes, and effective dates, both viewable on the USPTO website via these web addresses:

<http://www.uspto.gov/web/offices/com/sol/notices/72fr42242.pdf>

http://www.uspto.gov/web/offices/com/sol/notices/72fr42242_FinalRuleChart.pdf

By one rule change effective August 31, 2007, the Board's standard protective order is made applicable to all TTAB inter partes cases, whether already pending or commenced on or after that date. However, as explained in the final rule and chart, this change will not affect any case in which any protective order has already been approved or imposed by the Board. Further, as explained in the final rule, parties are free to agree to a substitute protective order or to supplement or amend the standard order even after August 31, 2007, subject to Board approval. The standard protective order can be viewed using the following web address:

<http://www.uspto.gov/web/offices/dcom/ttab/tbmp/stndagmnt.htm>
