

ESTTA Tracking number: **ESTTA141359**

Filing date: **05/18/2007**

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

**Notice of Opposition**

Notice is hereby given that the following party opposes registration of the indicated application.

**Opposer Information**

Name	Triumph Pharmaceuticals, Inc.
Granted to Date of previous extension	06/06/2007
Address	10403 Baur Blvd., Ste. A St. Louis, MO 63132 UNITED STATES
Correspondence information	Lisabeth H. Coakley Attorney of record Harness, Dickey & Pierce, P.L.C. 5445 Corporate Drive Suite 200 Troy, MI 48098 UNITED STATES docketingtm@hdp.com Phone:248-641-1600

**Applicant Information**

Application No	77013209	Publication date	02/06/2007
Opposition Filing Date	05/18/2007	Opposition Period Ends	06/06/2007
Applicant	Warner-Lambert Company LLC 201 Tabor Road Morris Plains, NJ 07950 UNITED STATES		

**Goods/Services Affected by Opposition**

Class 003. All goods and services in the class are opposed, namely: Non-medicated pre-brush mouth rinse, non-medicated mouthwash and mouth rinse
Class 005. All goods and services in the class are opposed, namely: Medicated mouthwash

**Grounds for Opposition**

Priority and likelihood of confusion	Trademark Act section 2(d)
Other	reverse confusion

**Marks Cited by Opposer as Basis for Opposition**

U.S. Registration No.	3143142	Application Date	07/21/2004
Registration Date	09/12/2006	Foreign Priority	NONE

		Date	
Word Mark	SMART MOUTH		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 003. First use: First Use: 2004/11/15 First Use In Commerce: 2004/11/15 Non-medical mouth rinse, toothpaste, breath freshening spray Class 030. First use: First Use: 2006/05/19 First Use In Commerce: 2006/05/19 Chewing gum, candy breath mints		

U.S. Application No.	77052997	Application Date	11/29/2006
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	BE A SMARTMOUTH		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 003. First use: Non-medical mouth rinse, toothpaste, breath freshening spray Class 030. First use: Chewing Gum, Candy Breath Mints		

U.S. Application No.	77120839	Application Date	03/02/2007
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	BE SMART		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 003. First use: Non-medical mouth rinse, toothpaste, breath freshening spray Class 030. First use: Chewing gum, candy breath mints		

U.S. Application No.	78704996	Application Date	09/01/2005
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	SMART TEETH		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 003. First use: Non-medical mouth rinse, toothpaste, breath freshening spray Class 030. First use: Chewing Gum, Candy Breath Mints		

U.S. Application No.	78705013	Application Date	09/01/2005
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	SMART GUMS		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 003. First use: Non-medical mouth rinse, toothpaste, breath freshening spray Class 030. First use: Chewing Gum, Candy Breath Mints		

U.S. Application No.	78920120	Application Date	06/29/2006
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	SMART MOUTH		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 025. First use: Clothing, footwear, headgear		

U.S. Application No.	78586928	Application Date	03/14/2005
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	A SMART SOLUTION		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 003. First use: Non-medical mouth rinse, toothpaste, breath freshening spray Class 030. First use: Chewing gum, Candy breath mints		

Attachments	78453888#TMSN.jpeg ( 1 page )( bytes ) 77052997#TMSN.jpeg ( 1 page )( bytes ) 77120839#TMSN.jpeg ( 1 page )( bytes ) 78704996#TMSN.jpeg ( 1 page )( bytes ) 78705013#TMSN.jpeg ( 1 page )( bytes ) 78920120#TMSN.jpeg ( 1 page )( bytes ) 78586928#TMSN.jpeg ( 1 page )( bytes ) 77013209 - SMART RINSE.pdf ( 6 pages )(203479 bytes )
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Signature	/lhc/
Name	Lisabeth H. Coakley
Date	05/18/2007



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

<b>TRIUMPH PHARMACEUTICALS INC.</b>	)	
	)	
Opposer,	)	
	)	
v.	)	Opposition No. _____
	)	Application Serial No. 77/013209
	)	Mark: SMART RINSE
<b>WARNER-LAMBERT COMPANY LLC and JOHNSON &amp; JOHNSON</b>	)	
	)	
Applicant.	)	

**NOTICE OF OPPOSITION**

Triumph Pharmaceuticals Inc., believing that it will be damaged by the registration of the mark shown in Application Serial No. 77/013209 in Classes 03 and 05, filed by Warner-Lambert LLC and assigned to Johnson & Johnson (hereinafter "J & J") and published for opposition on February 6, 2007, opposes Application Serial No. 77/013209.

The grounds for this opposition are as follows:

1. Triumph Pharmaceuticals Inc. is a Colorado corporation, located and doing business at 10403 Baur Boulevard, Suite A, St. Louis, Missouri 63132 (hereinafter "Triumph").
2. Triumph has been engaged in the manufacture, distribution, marketing, advertising, promotion, and sale in interstate commerce of oral care products, including but not limited to, non-medical mouth rinse, toothpaste, breath freshening spray, chewing gum and candy breath mints and further intends to engage in the manufacture, distribution, marketing, promotion, and sale in interstate commerce of clothing, footwear and hats.
3. Triumph markets and advertises its products or intends to market and

advertise its products under the marks SMART MOUTH, SMARTMOUTH, BE A SMARTMOUTH, BE SMART, SMART TEETH, SMART GUMS and A SMART SOLUTION (hereinafter referred to as a family of "SMART Marks").

4. The SMART Marks were adopted by Triumph as a trademark for its oral care products at least as early as November 15, 2004 and have been used continuously since then by Triumph on oral care products in interstate commerce by using the SMART Marks on packaging in which the goods are shipped and by displaying representations of said Marks in advertising and in other ways customary to the trade.

5. Triumph's SMART Marks oral care products have obtained wide recognition and popularity by the public and are broadly distributed by mass merchandisers including but not limited to, Wal-Mart, Walgreens, and CVS. Triumph's SMART Marks products have become so popular and well recognized by the public that Triumph's SMART Marks oral care products are scheduled to be the featured product on the nationally televised program known as "The Apprentice" sponsored by Donald Trump in April, 2007.

6. Triumph is owner of the entire right, title and interest in and to the family of SMART Marks, as evidenced by the following United States Trademark Registration issued by and Applications filed with the United States Patent and Trademark Office:

<u>Mark</u>	<u>Reg/ App No.</u>	<u>Registration/Filed Date</u>	<u>Goods</u>
<b>SMART MOUTH</b>	3,143,142	September 12, 2006	non-medical mouth rinses, toothpaste, breath freshening spray in Class 03; chewing gum and candy breath mints in Class 30
<b>BE A SMARTMOUTH</b>	77/052997	November 29, 2006	non-medical mouth rinses, toothpaste, breath freshening

			spray in Class 03; chewing gum and candy breath mints in Class 30
<b>BE SMART</b>	77/120839	March 2, 2007	non-medical mouth rinses, toothpaste, breath freshening spray in Class 03; chewing gum and candy breath mints in Class 30
<b>SMART TEETH</b>	78/704996	September 1, 2005 NOA issued	non-medical mouth rinses, toothpaste, breath freshening spray in Class 03; chewing gum and candy breath mints in Class 30
<b>SMART GUMS</b>	78/705013	September 1, 2005 NOA issued	non-medical mouth rinses, toothpaste, breath freshening spray in Class 03; chewing gum and candy breath mints in Class 30
<b>SMART MOUTH</b>	78/920120	June 29, 2006	Clothing, footwear, headgear in Class 25
<b>A SMART SOLUTION</b>	78/586928	March 14, 2005	non-medical mouth rinses, toothpaste, breath freshening spray in Class 03; chewing gum and candy breath mints in Class 30

The registration and applications are, in all respects, valid, subsisting and owned by Triumph and are prima facie evidence of Triumph's exclusive right to use or constructive

right to use and register the SMART Marks in commerce on the goods set forth in such registration and/or applications.

7. Triumph has made substantial investment and spent significant sums in advertising, promoting and publicizing its goods under the SMART Marks since its initial use. Triumph has extensively used, advertised, promoted, offered for sale and distributed goods bearing the SMART Marks to the public in every area of the United States. As a result of its extensive sales, marketing efforts, advertising and promotional efforts, Triumph has developed widespread recognition in the United States among consumers of its SMART Marks products and the public in general have come to know and recognize Triumph's SMART Marks and associate the same exclusively with Triumph and/or the goods or services sold or provided by Triumph.

8. Upon information and belief, on October 4, 2006, J & J's predecessor in interest, Warner-Lambert Company LLC, filed to register the SMART RINSE mark ("Rinse" being disclaimed apart from the mark as shown) for use on virtually the same goods as are identified in Triumph's registration and applications for its SMART Marks for "non-medicated pre-brush mouth rinse, non-medicated mouthwash and mouth rinse" in Class 03 and "medicated mouthwash" in Class 05, with prior knowledge of Triumph's SMART Marks.

9. Triumph's SMART Marks and J & J's SMART RINSE mark are confusingly similar in sound, appearance and meaning as to be likely, when applied to the proposed goods and services of J & J, to cause confusion or mistake or to deceive purchasers resulting in damage and detriment of Triumph and its reputation.

10. Triumph, upon information and belief, avers that its customers, and the public in general, are likely to be confused, mistaken or deceived as to the origin and



sponsorship of J & J's proposed goods to be marketed under J & J's SMART RINSE mark and misled into believing that such goods and services emanate from, or are licensed by or are in some way directly or indirectly associated with Triumph, to the damage and detriment of Triumph and its reputation.

11. Triumph, upon information and belief, avers that if J & J's use of the SMART RINSE on oral care products becomes widespread, Triumph's customers, and the public in general, are likely to be confused, mistaken or deceived as to the origin and sponsorship of Triumph's oral care products under Triumph's SMART Marks and misled into believing that such goods and services emanate from, or are licensed by or are in some way directly or indirectly associated with J & J, to the damage and detriment of Triumph and its reputation.

12. Triumph, upon information and belief, avers that it will be damaged by the registration by J & J of the alleged SMART RINSE trademark, as set forth in J & J's Trademark Application Serial No. 77/013209 in that the alleged mark is confusingly similar to Triumph's SMART Marks and will be used in connection with virtually the same goods as those offered to the public by Triumph under the SMART Marks.

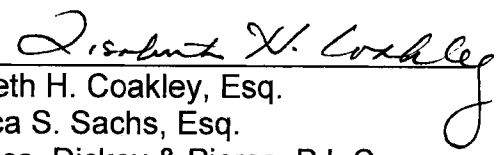
**Wherefore,** Triumph Company believes and avers that it is being and will continue to be damaged by registration of SMART RINSE mark and requests that said Application Serial No. 77/013209 be rejected, that no registration be issued thereon to J & J, and that this Opposition be sustained in favor of Triumph.

Please charge the required fee of \$600.00 (\$300.00 per class) to Deposit Account No. 08-0750 and any additional fees which may be required.

Respectfully Submitted,

TRIUMPH PHARMACEUTICALS INC.

Date: May 18, 2007

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