



WESTMONT PHARMACEUTICALS, INC.,
Opposer,

-versus-

BIOLINK PHARMA,
Respondent-Applicant.

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IPC No. 14-2012-00417
Opposition to:
Appln. Serial No. 4-2012-750006
Filing Date: 22 March 2012
TM: "CEFTRIGEN"

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NOTICE OF DECISION

OCHAVE & ESCALONA

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BIOLINK PHARMA

Respondent-Applicant
2nd Flr. Biolink Pharma Bldg.,
#35 Scout Lozano St., Brgy. Laging Handa
Quezon City

GREETINGS:

Please be informed that Decision No. 2013 - 69 dated April 17, 2013 (copy enclosed)
was promulgated in the above entitled case.

Taguig City, April 17, 2013.

For the Director:


ATTY. EDWIN DANILO A. DATING
Director III
Bureau of Legal Affairs



WESTMONT PHARMACEUTICALS,
INC.,

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BIOLINK PHARMA,
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IPC NO. 14-2012-00417

Appln. Ser. No. 4-2012-750006

Filing Date: 22 March 2012

Trademark: CEFTRIGEN

Decision No. 2013 - 69

DECISION

WESTMONT PHARMACEUTICALS, INC.,¹ ("Opposer") filed on 12 September 2012 a Verified Opposition to Trademark Application No. 4-2012-750006. The application, filed by BIOLINK PHARMA² ("Respondent-Applicant") covers the mark CEFTRIGEN for use on "antibiotics" under Class 05 of the International Classification of goods³.

The Opposer alleges the following:

"1. The mark 'CEFTRIGEN' so resembles the trademark 'ZEPTRIGEN' owned by Opposer and duly registered by this Honorable Bureau prior to the publication of the application for the mark 'CEFTRIGEN'.

"2. The mark 'CEFTRIGEN' will likely cause confusion, mistake and deception on the part of the purchasing public most especially considering that the opposed mark 'CEFTRIGEN' is applied for the same class of goods as that of the Opposer's trademark 'ZEPTRIGEN', i.e., Class 05 of the International Classification of Goods as Antibiotics.

"3. The registration of the trademark 'CEFTRIGEN' in the name of the Respondent will violate Sec. 123 of the IP Code, which provides, in part, that a mark cannot be registered if it:

x x x

"4. Under the above-quoted provision, any mark which is similar to a registered mark shall be denied registration in respect of similar or related goods or if the mark applied for nearly resembles a registered mark that confusion or deception in the mind of the purchasers will likely result."

The Opposer's evidence consists of the following:

¹ A corporation duly organized and existing under the laws of the Philippines with principal office located at 4th Floor, Bonaventure Plaza, Ortigas Avenue, Greenhills, San Juan City.

² A domestic corporation with office address at #25 Scout Lozano St., Brgy. Lagging Handa, Quezon City.

³ The Nice Classification is a classification of goods and services for the purpose of registering trademark and service marks, based on the multilateral treaty administered by the World Intellectual Property Organization. The treaty is called the Nice Agreement Concerning the International Classification of Goods and Services for the Purpose of the Registration of Marks concluded in 1957.

1. Exhibit "A" - Printout of two (2) pages of IPO E-Gazette which was officially released on 13 August 2012;
2. Exhibit "B" - Copy of Certificate of Reg. No. 4-2002-001388 for the trademark "ZEPTRIGEN";
3. Exhibit "C" - Copies of the Actual Declaration of Actual Use/Affidavit of Use for the 5th Anniversary of the trademark "ZEPTRIGEN";
4. Exhibits "D" - Sample of product label bearing the trademark "ZEPTRIGEN"; and
5. Exhibits "E" - Certificate of Product Registration issued by the Bureau of Food and Drugs for the mark "ZEPTRIGEN".

This Bureau issued on 26 September 2012 a Notice to Answer and personally served a copy thereof to the Respondent-Applicant's address on 05 October 2012. The Respondent-Applicant, however, has not filed his Answer. Accordingly, pursuant to Rule 2 Section 10 of the Rules and Regulations on Inter Partes Proceedings, as amended, the case is deemed submitted for decision on the basis of the opposition, the affidavits of witnesses, if any, and the documentary evidence submitted by the Opposer.

Should the Respondent-Applicant be allowed to register the mark "CEFTRIGEN"?

The essence of trademark registration is to give protection to the owners of trademarks. The function of a trademark is to point out distinctly the origin or ownership of the goods to which it is affixed; to secure to him who has been instrumental in bringing into the market a superior article of merchandise, the fruit of his industry and skill; to assure the public that they are procuring the genuine article; to prevent fraud and imposition; and to protect the manufacturer against substitution and sale of an inferior and different article as his product.⁴ Thus, Sec. 123.1 (d) of the IP Code provides that a mark cannot be registered if it is identical with a registered mark belonging to a different proprietor or a mark with an earlier filing or priority date, in respect of the same goods or services or closely related goods or services or if it nearly resembles such a mark as to be likely to deceive or cause confusion.

The records show that at the time the Respondent-Applicant filed its application for the mark CEFTRIGEN on 22 March 2012, the Opposer already has an existing registration for the trademark ZEPTRIGEN issued on 24 February 2005, covering goods falling under Class 05, namely, "*medicinal preparation for use as antibacterial*". On the other hand, the Respondent-Applicant's trademark application is used on "*antibiotics*" also under Class 05. An "*antibiotic*" is a drug that is used to treat infections caused by bacteria and other microorganisms.⁵ The goods, therefore, are used on similar or closely related goods.

But are the competing marks, as shown below, identical or similar or resemble each other such that confusion, mistake or deception is likely to occur?

Zeptrigen

CEFTRIGEN

Opposer's Mark

Respondent-Applicant's Mark

⁴See *Pribhdas J. Mirpuri v. Court of Appeals*, G. R. No. 114508, 19 Nov. 1999.

⁵ See Definition of Antibiotic, MedicineNet, available at <http://www.medterms.com/script/main/art.asp?articlekey=8121> (last accessed 16 April 2013)

A perusal of the composition of the competing trademarks involved in this case show that both marks contain three syllables consisting of nine letters. Opposer's mark starts with the syllable "ZEP" while in Respondent-Applicant's mark, the letters "Z" and "P" in Opposer's mark are replaced with the letters "C" and "F" to form "CEF". Both marks have similar second and third syllables "TRI" and "GEN". The ZEPTRIGEN mark starts with a capital letter and all succeeding letters in the lower case while the CEFTRIGEN mark is written in all caps. Although the marks are not entirely the same, there are no appreciable disparities between the two marks so as to avoid the likelihood of confusing one for the other. The subject marks may differ in spelling but when Respondent-Applicant's CEFTRIGEN mark is pronounced, it produces the same sound as that of Opposer's ZEPTRIGEN mark because the beginning letters of both marks are likely to be pronounced as "S" and the "F" in Respondent's mark becomes undistinguishable from the letter "P" in Opposer's mark. Trademarks are designed not only for the consumption of the eyes, but also to appeal to the other senses, particularly, the faculty of hearing. Thus, when one talks about the Opposer's trademark or conveys information thereon, what reverberates is the sound made in pronouncing it. The same sound is practically replicated when one pronounces the Respondent-Applicant's mark.

Confusion cannot be avoided by merely adding, removing or changing some letters of a registered mark. Confusing similarity exists when there is such a close or ingenuous imitation as to be calculated to deceive ordinary persons, or such resemblance to the original as to deceive ordinary purchaser as to cause him to purchase the one supposing it to be the other⁶. Colorable imitation does not mean such similitude as amounts to identify, nor does it require that all details be literally copied. Colorable imitation refers to such similarity in form, context, words, sound, meaning, special arrangement or general appearance of the trademark or trade name with that of the other mark or trade name in their over-all presentation or in their essential, substantive and distinctive parts as would likely to mislead or confuse persons in the ordinary course of purchasing the genuine article⁷.

It is stressed that the determinative factor in a contest involving trademark registration is not whether the challenged mark would actually cause confusion or deception of the purchasers but whether the use of such mark will likely cause confusion or mistake on the part of the buying public. To constitute an infringement of an existing trademark, patent and warrant a denial of an application for registration, the law does not require that the competing trademarks must be so identical as to produce actual error or mistake; it would be sufficient, for purposes of the law, that the similarity between the two labels is such that there is a possibility or likelihood of the purchaser of the older brand mistaking the newer brand for it.⁸ The likelihood of confusion would subsist not only on the purchaser's perception of goods but on the origins thereof as held by the Supreme Court.⁹

Callman notes two types of confusion. The first is the confusion of goods in which event the ordinarily prudent purchaser would be induced to purchase one product in the belief that he was purchasing the other. In which case, defendant's goods are then bought as the plaintiff's and the poorer quality of the former reflects adversely on the plaintiff's reputation. The other is the confusion of business. Here, though the goods of the parties are different, the defendant's product is such as might reasonably be assumed to originate with the plaintiff and the public would then be deceived either into that belief or into belief that there is some connection between the plaintiff and defendant which, in fact does not exist.

It has been held time and again that in cases of grave doubt between a newcomer who by the confusion has nothing to lose and everything to gain and one who by honest dealing has

⁶ See *Societe Des Produits Nestle, S.A v. Court of Appeals*, G.R. No.112012, 4 Apr. 2001, 356 SCRA 207, 217.

⁷ See *Emerald Garment Manufacturing Corp. v. Court of Appeals*, G.R. No. 100098, 29 Dec. 1995.

⁸ See *American Wire and Cable Co. v. Director of Patents et al.*, G.R. No. L-26557, 18 Feb. 1970.

⁹ See *Converse Rubber Corporation v. Universal Rubber Products, Inc., et al.*, G.R. No. L-27906, 08 Jan. 1987.

already achieved favour with the public, any doubt should be resolved against the newcomer in as much as the field from which he can select a desirable trademark to indicate the origin of his product is obviously a large one.¹⁰

Accordingly, this Bureau finds that the Respondent-Applicant's trademark application is proscribed by Sec. 123.1 (d) of the IP Code.

WHEREFORE, premises considered, the instant opposition is hereby **SUSTAINED**. Let the filewrapper of Trademark Application Serial No. 4-2012-750006, together with a copy of this Decision, be returned to the Bureau of Trademarks for information and appropriate action.

SO ORDERED.

Taguig City, 17 April 2013.



Atty. **NATHANIEL S. AREVALO**
Director IV
Bureau of Legal Affairs

¹⁰ See *Del Monte Corporation et. al. v. Court of Appeals*, GR No. 78325, 25 Jan. 1990.