THERAPHARMA INC., Opposer,	}	IPC No. 14-2010-00182 Opposition to: Appln. Serial No. 4-2009-008037 Date filed: 12 Aug. 2009 TM: "VEZTOR"
-versus-	}	
BELL KENZ PHARMA, INC., Respondent-Applicant.	}	

x----------x

NOTICE OF DECISION

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Mandaluyong City

BELL KENZ PHARMA, INC.
Respondent-Applicant
RII Bldg., # 136 Malakas Street
Diliman, Quezon City

GREETINGS:

Please be informed that Decision No. 2012 - 93 dated May 17, 2012 (copy enclosed) was promulgated in the above entitled case.

Taguig City, May 17, 2012.

For the Director:

Atty. PAUSI U. SAPAK
Hearing Officer, BLA

CERTIFIED TRUE COPY
SHARON S. ALCANTARA
Records Officer II
Bureau of Legal Affairs, IPO

THERAPHARMA INC.,
Opposer,

- versus -

BELL KENZ PHARMA, INC.,
Respondent-Applicant.
x----------x

IPC No. 14-2010-00182
Opposition to:

Appln. Serial No. 4-2009-008037
Date Filed: 12 Aug. 2009
TM: "**VEZTOR**"

Decision No. 2012- 93

DECISION

THERAPHARMA INC.,[1] ("Opposer") filed on 20 August 2010 an opposition to Trademark Application Serial No. 4-2009-008037. The application, filed by BELL KENZ PHARMA, INC.[2] ("Respondent-Applicant"), covers the mark "VEZTOR" used on "*Lipid Regulating Agent (Tablet)*" under Class 5 of the International Classification of goods.[3]

The Opposer alleges among other things that it owns the registered mark "VESTAR". According to the Opposer, the registration of the mark VEZTOR in favor of the Respondent-Applicant will violate Sec. 123.1 of Rep. Act No. 8293, also known as the Intellectual Property Code of the Philippines ("IP Code"), because it so resembles VESTAR such that it will likely cause confusion, mistake and deception on the part of the purchasing public.

To support its opposition, the Opposer submitted as evidence the print-out of page 1 of the "IPO E-Gazette" dated "5/24/2010", copy of Cert. of Reg. No. 4-2006-003582 for the mark VESTAR, copy of the Declaration of Actual Use for the mark VESTAR filed by the Opposer on 22 January 2009, sample product label bearing the trademark VESTAR, and copy of Cert. of Product Registration issued by the Bureau of Food and Administration also for the brand name VESTAR[4].

This Bureau issued a Notice to Answer and served a copy thereof upon the Respondent-Applicant on 23 September 2010. The Respondent-Applicant, however, did not file an Answer.

Should the Respondent-Applicant's trademark application be allowed?

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1 A domestic corporation duly organized and existing under the laws of the Philippines, with principal business address at 3rd Floor, Bonaventure Plaza, Ortigas Avenue, Greenhills San Juan City, Philippines.
2 A domestic corporation, with principal business address at R11 Bldg., 136 Malakas Street, Diliman, Quezon City, Philippines.
3 The Nice Classification is a classification of goods and services for the purpose of registering trademark and services 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.
4 Marked as Exhibits "A" to "E", with sub-markings.

It is emphasized that the essence of the trademark registration is to give protection to the owners of the trademarks. The function of a trademark is to point out distinctly the origin or ownership of the goods to which it is applied; to secure to him who has been instrumental in bringing into the market as superior article of merchandise; the fruit of the industry and skill; to assure to 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.[5] Thus, Section 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 mark as to be likely to deceive or cause confusion.

Records show that at the time the Respondent-Applicant filed its trademark application on 12 August 2009, the Opposer has an existing trademark registration for the mark VESTAR (bearing Reg. No. 4-2006-003582) for use on "*Anti-Angina Medicinal preparation*" under Class 5 of the International Classification of Goods. Because the goods indicated in the Respondent-Applicant's trademark application also points to cardiovascular diseases or application, the same are considered closely related to those covered by the Opposer's trademark registration.

The question is: Are the subject marks, as shown below, closely resembles each other such that mistake, confusion or even deception is likely to occur?

Vestar	**Veztor**
Opposer's mark	Respondent-applicant's mark

Both marks consist of two syllables and six letters. The Respondent-Applicant's mark differs from the Opposer's only as regards two letters. The letters "s" and "a" in the Opposer's mark became letters "z" and "o", respectively, in the Respondent-Applicant's. The changes, however, did little in conferring upon the Respondent-Applicant's mark a character that would make it clearly distinct from the Opposer's.

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

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

two labels is such that there is a possibility or likelihood of the purchaser of the older brand mistaking the newer brand for it.[6]

In this regard, 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.

Succinctly, because the Respondent-Applicant will use or uses the mark VEZTOR on goods that are similar and/or closely related to those covered by the Opposer's registered trademark, the changes in the spelling did not diminish the likelihood of the occurrence of mistake, confusion, or even deception. There is the likelihood that information, assessment, perception or impression about VEZTOR products delivered and conveyed through words and sounds and received by the ears may unfairly cast upon or attributed to the VESTAR products and the Opposer, and *vice-versa*.

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 other[7]. 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 tradename with that of the other mark or tradename 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 article[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 is inconceivable for the Respondent-Applicant to have come up with the mark VEZTOR without having been inspired by or motivated by an intention to imitate the

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6 See *American Wire and Cable Co. v. Director of Patents et al.*, (31 SCRA 544) G.R. No. L-26557, 18 Feb. 1970.
7 See *Societe Des Produits Nestle , S.A v. Court of Appeals*, G.R. No.112012, 4 April 2001, 356 SCRA 207, 217
8 See *Emerald Garment Manufacturing Corp. v. Court of Appeals*. G.R. No. 100098, 29 Dec. 1995.
9 See *Converse Rubber Corporation v. Universal Rubber Products, Inc., et al.*, G.R. No. L-27906, 08 Jan. 1987.

mark VESTAR. It is highly improbable for another person to come up with an identical or nearly identical mark for use on the same or related goods purely by coincidence. The field from which a person may select a trademark is practically unlimited. As in all cases of colorable imitation, the answered riddle is why, of the millions of terms and combination of letters and available, the Respondent-Applicant had come up with a mark identical or so clearly similar to another's mark if there was no intent to take advantage of the goodwill generated by the other mark[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 opposition is hereby SUSTAINED. Let the filewrapper of Trademark Application Serial No. 4-2009-008037, together with a copy of this Decision be returned to the Bureau of Trademarks (BOT) for information and appropriate action.

SO ORDERED.

Taguig City, 17 May 2012.

ATTY. NATHANIEL S. AREVALO
Director IV, Bureau of Legal Affairs

[10] See *American Wire and Cable Co. v. Director of Patents et.* al, supra.