IP PHL
INTELLECTUAL PROPERTY OFFICE OF THE PHILIPPINES

THERAPHARMA INC., Opposer, **-versus-** **SUHITAS PHARMACEUTICALS, INC.,** Respondent-Applicant.	}	**IPC No. 14-2015-00273** Opposition to: Application No.4-2015-002128 Date filed: 27 February 2015 TM: **"RYTHM"**

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NOTICE OF DECISION

OCHAVE & ESCALONA
Counsel for the Opposer
No. 66 United Street
Mandaluyong City

SUHITAS PHARMACEUTICAS, INC.,
Respondent-Applicant
3rd Floor Centrepoint Building
Pasong Tamo corner Export Bank Drive
Makati City

GREETINGS:

Please be informed that Decision No. 2015 - 260 dated November 10, 2015 (copy enclosed) was promulgated in the above entitled case.

Taguig City, November 10, 2015.

For the Director:

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

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THERAPHARMA INC.,
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SUHITAS PHARMACEUTICALS, INC.,
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IPC NO. 14-2015-00273

Opposition to:
Appln. Ser. No. 4-2015-002128
Filing Date: 27 February 2015
Trademark: **RYTHM**

Decision No. 2015 - 260

DECISION

THERAPHARMA INC,[1] ("Opposer") filed on 15 June 2015 a Verified Opposition to Trademark Application No. 4-2015-002128. The application, filed by **SUHITAS PHARMACEUTICALS, INC.**[2] ("Respondent-Applicant") covers the mark **RYTHM** for use on *"pharmaceutical (antiarrythmic) "* under Class 05 of the International Classification of goods[3].

The Opposer alleges the following grounds:

"7. The mark 'RYTHM' filed by Respondent-Applicant so resembles the trademark 'RYTHMA' owned by Opposer and duly registered with the IPO prior to the publication for opposition of the mark 'RYTHM'.

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

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

> (d) is identical with a registered mark belonging to a different proprietor or a mark with an earlier filing or priority date, in respect of:
>
> (i) the same goods or services, or
> (ii) closely related goods or services; or
> (iii) if it nearly resembles such a mark as to be likely to deceive or cause confusion;

"10. Under the above-quoted provision, any mark, which is similar to a

[1] A corporation duly organized and existing under the laws of the Philippines with principal office located at 3rd Floor, Bonaventure Plaza, Ortigas Avenue, Greenhills, san Juan City, Philippines
[2] A domestic corporation with office address at 3rd Floor Centerpoint Bldg., Pasong Tamo cor. Export Bank Drive, Makati City, Philippines.
[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.

registered mark , shall be denied registration in respect of similar or related goods or of 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. Exhibit "A" - Copy of the pertinent page of the IPO E-Gazette;
2. Exhibit "B" – Office Order No. 15-120 of the IPO suspending work;
3. Exhibit "C" – Certified copy of Trademark Registration No. 4- 2007-11021 for the mark RYTHMA issued on 30 September 2008 ;
4. Exhibits "D" and "E" - Declaration of Actual Use for the mark RYTHMA filed on 01 April 2011 and 11 March 2013, respectively;
5. Exhibits "F" – sample product packaging bearing the mark RYTHMA;
6. Exhibit "G" - Certification and Sales Performance of the product bearing the mark RYTHMA; and
7. Exhibit "H" - Certificate of Product Registration issued by the Food and Drug Administration (FDA) for the drug bearing the mark RYTHMA;

This Bureau issued on 24 June 2015 a Notice to Answer and served to the Respondent-Applicant's address on 09 July 2015. The Respondent-Applicant, however, did not file the Answer. On 20 October 2015, an was issued declaring Respondent-Applicant in default. 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 "**RYTHMA**"?

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 RYTHM on 27 February 2015 , the Opposer already has an existing registration for the trademark RYTHM issued on 30 September 2008.

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

Respondent-Applicant's mark RYTHM is used on *"pharmaceuticals (antiarrythmic)"* under Class 05 while that of Opposer's is used on *"pharmaceutical preparation for recurrent ventricular fibrillation and unstable ventricular tachycardia"* also under Class 05. "Antiarrythmic" are drugs that are used to treat abnormal heart rhythms resulting from irregular electrical activity of the heart.[5] In the Certificate of Product Registration issued by FDA, Opposer's product is also covered by antiarrythmic pharmacologic category. As such, the goods of the parties are similar.

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?

Rythma	Rythm
Opposer's Mark	*Respondent-Applicant's Mark*

There is no doubt that Opposer's and Respondent-Applicants marks are confusingly similar. Confusion is likely in this instance because of the resemblance of the competing trademarks. Both marks contain almost the same letters except the letter "A" in Opposer's mark which was omitted in Respondent-Applicant's mark and the font. Despite the deletion by Respondent-Applicant of the letter "A" in its mark RYTHM as compared to Opposer's mark RYTHMA, no appreciable disparities between the two marks exist to avoid the likelihood of confusing one for the other. The marks are similar in appearance and in sounds. 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 other[6]. 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

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[5] *http://www.webmd.com/heart-disease/guide/medicine-antiarrhythmics, last accessed 09 November 2015.*
[6] See *Societe Des Produits Nestle, S.A v. Court of Appeals*, G.R. No.112012, 4 Apr. 2001, 356 SCRA 207, 217.

ordinary course of purchasing the genuine article[7].

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]

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. 4-2015-002128, together with a copy of this Decision, be returned to the Bureau of Trademarks for information and appropriate action.

SO ORDERED.

Taguig City, 10 November 2015.

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

[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.