

<p>LOHMANN ANIMAL HEALTH GMBH, Opposer,</p> <p>-versus-</p> <p>AVITEK ANIMAL HEALTH, INC., Respondent-Applicant.</p> <p>x-----x</p>	<p>} IPC NO. 14-2019-00507</p> <p>} Opposition to</p> <p>} Application No. 4-2018-504663</p> <p>} Date filed : September 27, 2018</p> <p>} Trademark: AviaPro10 <small>Designed for Broilers</small> <small>PERFORMANCE ENHANCER</small></p> <p>} } } } Decision No. 2021 -98</p>
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DECISION

LOHMANN ANIMAL HEALTH GMBH, (Opposer)¹ filed an opposition to Trademark Application Serial No. 4-2018-504663. The application, filed by AVITEK ANIMAL HEALTH, INC. (Respondent-Applicant)², covers the mark "AVIAPRO", for use on "Poultry broiler multivitamins and amino acid supplement, veterinary use only; Water supplement, veterinary use only; Water miscible supplement product, veterinary use only; Multivitamin supplement for broiler type birds, veterinary use only; Natural performance enhancer, veterinary use only; Probiotic supplement for broiler chicken and birds, veterinary use only; Oral solution, veterinary use only" under Class 5 of the International Classification of Goods³.

The Opposer relies on the following grounds in support of its opposition:

- "a. Respondent's 'AVIAPRO' mark is confusingly similar to Lohmann's AVIPRO mark;
- "b. Respondent's use of 'AVIAPRO' would cause confusion as to the origin of the goods.
- "c. Respondent's use of confusingly similar mark reveals its intention to ride on and cash in on Lohmann's established goodwill and
- "d. The registration of a confusingly similar mark used on veterinary and poultry products is contrary to public policy."

The Opposer alleges among other facts, that:

- "4. Lohmann Animal Health is a leading manufacturer of feed additives and poultry vaccines, selling its products in over 80 countries around the world. Lohmann

¹ A corporation organized and existing under the laws of Germany.

² A Philippine corporation.

³ The Nice Classification of Goods and Services is for registering trademarks and service marks based on multilateral treaty administered by the WIPO, called the Nice Agreement Concerning the International Classification of Goods and Services for Registration of Marks concluded in 1957.

is headquartered in Cuxhaven, Germany, where it has a production facility. It has a vaccine plant in Winslow, Maine, and is represented by 18 subsidiaries in Europe, Asia and North America. xxx

"6. Lohmann provides products and solutions for animal health and nutrition. It offers vaccines for poultry, chicken infectious anemia and salmonella, feed additives and veterinary products. Lohmann markets its products worldwide. In the vaccine business, Lohmann is the global market leader in salmonella vaccines, making it a notable key player in the global prevention of foodborne zoonosis. In fact, Lohmann offers a range of veterinary products that no other single company can offer. To date, Lohmann is also the oldest running poultry vaccine in the industry. xxx

"10. AVIPRO is Lohmann's brand name for its veterinary poultry vaccines designed to protect against infectious bronchitis, Newcastle disease, Fowl cholera, and food-borne pathogens like Salmonella. Some of this vaccines are as follows: AviPro 201 NDIB, AviPro 108 FC4, AviPro 233 ND-PMV3 Conc, AviPro Megan Vac 1, AviPro Megan Egg, AviPro Polybanco, and AviPro ND-IB Sohol. It is clear that 'Avipro' itself is the dominant feature of Lohmann's mark and brand name; and composite marks for its ever-growing selection of vaccines.

"11. The trademark AviPro is a combination of 'Avi' which stands for 'AVIAN', pertaining to birds and 'Pro' which is an abbreviation of the words 'PROFESSIONALS' and 'PROTECTION.' The brand name Avipro was coined to exactly reflect Lohmann's expertise as the avian professionals providing protection for the poultry industry.


"12. The AviPro brand has been out in the market since 2001 and the AviPro mark was first applied for registration in 2001. To protect its rights, Lohmann has secured registrations for the Avipro mark in more than 80 countries all over the world. Further, Lohmann vigilantly monitors the market for unauthorized use of the Avipro mark or any use of marks that may be considered to be confusingly similar with it. It also actively issues warnings upon discovery of such use and takes legal action to protect the mark.

"13. Lohmann first secured the registration for the Avipro mark in Germany on August 29, 2001. Since then, it has applied for and/or secured registrations of the Avipro mark in numerous countries/jurisdictions, such as the United States of America, Canada, Mongolia, Australia, Malaysia, Thailand, Mexico, among others. xxx"

The Opposer submitted the following evidence: Special Power of Attorney dated September 17, 2019; Copy of Elanco Animal Health Inc. General Form of Registration of Securities; Print-out of webpage of Elanco; print-out of Company profile of Lohmann Animal Health; Print-out of AviPro News; Print-out of webpage on AviPro Product Information; List of Avipro registered trademarks; Copies of trademark registrations; Judicial Affidavit of Sheldon B. Pontaoe; and Judicial Affidavit of Atty. Carlos Miguel A. Pascual.⁴

⁴ Exhibits "A" to "K", inclusive.

This Bureau served upon the Respondent-Applicant a "Notice to Answer" on 4 February 2020. The Respondent-Applicant, however, did not file an Answer. Thus, the Adjudication Officer issued on 8 August 2020 Order no. 2020-1143 declaring the Respondent-Applicant in default for failure to file an answer.

Should the Respondent-Applicant be allowed to register the trademark ?

The records show that the Respondent-Applicant filed its application on 12 January 2018, and the Opposer obtained Registration No. 4-2005-002414⁵ on 16 July 2007 for "veterinary preparations, namely, poultry vaccines" under Class 5. The Respondent-Applicant's trademark application therefore indicates goods that are identical to those covered by the Opposer's trademark registration.

The marks are reproduced below:

Opposer's marks



Respondent-Applicant's mark



Republic Act 8293, otherwise known as the Intellectual Property Code provides that a mark cannot be registered if it resembles a registered mark thereby causing a likelihood of confusion. Section 123.1 states that:

Sec. 123.1. Registrability. 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.

In determining whether marks are confusingly similar, the Supreme Court applies two tests. In *Societe Nestle des Produits v. Court of Appeals*⁶, it held:

Colorable imitation denotes such a close or ingenious imitation as to be calculated to deceive ordinary persons, or such a resemblance to the original as to deceive an ordinary purchaser giving such attention as a purchaser usually gives, as to cause him to purchase the one supposing it to be the other. In determining if colorable imitation exists, jurisprudence has developed two kinds of tests - the Dominancy Test and the Holistic Test. The test of dominancy focuses on the similarity of the prevalent features of the competing

⁵ Exhibit "H-7".

⁶ G.R. No. 112012, 4 April 2001.

trademarks which might cause confusion or deception and thus constitute infringement. On the other side of the spectrum, the holistic test mandates that the entirety of the marks in question must be considered in determining confusing similarity.

Applying the dominancy test, the dominant feature of the Opposer's mark is the word AVIPRO consisting of six letters. The Respondent-Applicant's mark used the same letters and added the letter "A" after the letter "I", hence "AVIAPRO". The letter "I" is a negligible and insignificant addition that does not sufficiently differentiate it from Opposer's mark. Noticeably, the Respondent-Applicant's mark also adopts the same format of using capital letters for "A" and "P" and lower case for "v-i" and "r-o". Thus, the commercial impression generated by the marks are confusingly similar. Visually, the letters are in block style with the letters "A" and "P" in upper case in contrast to the other letters of the word. Aurally, AVIAPRO and AVIPRO sound the same. By adding the number "10" after the word AVIAPRO is of no moment because Respondent's mark would simply look like a variation of the Opposer's AVIPRO mark. The marks are confusingly similar when read or spoken. The resultant marks when pronounced are *idem sonans* or phonetically similar. The Supreme Court held:

As to the syllabication and sound of the two trade-names "Sapolin" and "Lusolin" being used for paints, it seems plain that whoever hears or sees them cannot but think of paints of the same kind and make. In a case to determine whether the use of the trade-name "Stephens' Blue Black Ink" violated the trade-name "Steelpens Blue Black Ink", it was said and held that there was in fact a violation; and in other cases it was held that trade-names *idem sonans* constitute a violation in matters of patents and trade-marks and trade-names. (Nims on Unfair Competition and Trade-Mark, sec. 54, pp. 141-147; N. K. Fairbanks Co. vs. Ogden Packing and Provision Co., 220 Fed., 1002.)⁷

Likewise, the Supreme Court in the case of Marvex Commercial Co., Inv. V. Petra Hawpia & Co. and the Director of Patents⁸ is instructive on the matter, to wit:

Two letters of "SALONPAS" are missing in "LIONPAS"; the first letter a and the letter s. Be that as it may, when the two words are pronounced, the sound effects are confusingly similar. And where goods are advertised over the radio, similarity in sound is of especial significance (Co Tiong Sa vs. Director of Patents, 95 Phil. 1 citing Nims, The Law of Unfair Competition and Trademarks, 4th ed., vol. 2, pp. 678-679).
xxx

The following random list of confusingly similar sounds in the matter of trademarks, culled from Nims, Unfair Competition and Trade Marks, 1947, vol. 1, will reinforce our view that "SALONPAS" and "LIONPAS" are confusingly similar in sound: "Gold Dust" and "Gold Drop"; "Jantzen" and "Jazz-Sea"; "Silver Flash" and "Supper-Flash"; "Cascarete" and "Celborite"; "Celluloid" and "Cellonite"; "Chartreuse" and "Charseurs"; "Cutex" and "Cuticlean"; "Hebe" and "Meje"; "Kotex" and "Femetex"; "Zuso" and "Hoo Hoo". Leon Amdur, in his book "TradeMark Law and Practice", pp.

⁷ *Sapolin Co., Inc. v. Balmaceda*, G.R. No. L-45502, 2 May 1939

⁸ G.R. No. L-19297, 22 December 1966

419-421, cites, as coming within the purview of the *idem sonans* rule, "Yusea" and "U-C-A", "Steinway Pianos" and "Steinberg Pianos", and "Seven-Up" and "Lemon-Up". In *Co Tiong vs. Director of Patents*, this Court unequivocally said that "Celdura" and "Cordura" are confusingly similar in sound; this Court held in *Sapolin Co. vs. Balmaceda*, 67 Phil. 795 that the name "Lusolin" is an infringement of the trademark "Sapolin", as the sound of the two names is almost the same.

In the case at bar, "SALONPAS" and "LIONPAS", when spoken, sound very much alike. Similarity of sound is sufficient ground for this Court to rule that the two marks are confusingly similar when applied to merchandise of the same descriptive properties (see *Celanese Corporation of America vs. E. I. Du Pont*, 154 F. 2d. 146, 148).

Significantly, the two marks are used on similar, if not identical goods under Classes 5. Respondent-Applicant uses AVIAPRO on Poultry broiler multivitamins and amino acid supplement, veterinary use only; Water supplement, veterinary use only; Water miscible supplement product, veterinary use only; Multivitamin supplement for broiler type birds, veterinary use only; Natural performance enhancer, veterinary use only; Probiotic supplement for broiler chicken and birds, veterinary use only; Oral solution, veterinary use only while the Opposer uses its mark on veterinary products and vaccines. Veterinary preparations would necessarily include "multivitamins, supplements and enhancers" which are Respondent-Applicant's products. Significantly, the two marks are used on similar, if not identical goods under Classes 5. It can be assumed that ordinarily, the goods bearing the confusingly similar mark are marketed, advertised and sold in the same stores, outlets or channels of business. Given the similarity with the Respondent-Applicant's mark, confusion or mistake is a likelihood, among the buying public who might assume they are the same goods or that Respondent-Applicant's goods originate from, are connected with or sponsored by the Opposer, when in fact they are not. Once registered, the Opposer has, under Sec. 147 of Republic Act. 8293, the right to prevent the registration of Respondent-Applicant's mark. The law provides:

Sec. 147. Rights Conferred. 147. 1. The owner of a registered mark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs or containers for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use, of an identical sign for identical goods or services, a likelihood of confusion shall be presumed.

In *Zuneca Pharmaceutical v. Natrapharm Inc.*,⁹ the Supreme Court explains:

"Under the IP Code, the ownership of a trademark is acquired by its registration. To clarify, while it is the fact of registration which confers ownership of the mark and enables the owner thereof to exercise the rights expressed in Section 147 of the IP Code, the first-to-file rule nevertheless prioritizes the first filer of the trademark application and operates to prevent any subsequent applicants from registering marks described under Section 123.1 (d) of the IP Code.

⁹ G.R. No. 211850, September 8, 2020.

Reading together Section 122 and 123.1 (d) of the IP Code, therefore, a registered mark or a mark with an earlier filing or priority date generally bars the future registration of- and the future acquisition of rights in- an identical or confusingly similar mark, in respect of the same or closely related goods or services, if the resemblance will likely deceive or cause confusion."

In the instant case, the Opposer registered its mark AVIPRO under Registration No. 4-2005-002414¹⁰ on 16 July 2007 for "veterinary preparations, namely, poultry vaccines" under Class 5, prior to Respondent-Applicant's trademark application which bars the Respondent from adopting an identical or confusingly similar mark that would lead to a likelihood of confusion among the buying public.

WHEREFORE, premises considered, the instant Opposition to Trademark Application No. . 4-2018-504663 is hereby **SUSTAINED**. Let the filewrapper of the subject trademark application be returned, together with a copy of this Decision, to the Bureau of Trademarks for information and appropriate action.

SO ORDERED.

Taguig City, 02 JUN 2021



ATTY. ADORACION U. ZARE, LL.M.
Adjudication Officer
Bureau of Legal Affairs

¹⁰ Exhibit "H-7".