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Paper No. 21  
PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Avant Immunotherapeutics, Inc.

Serial No. 75/496,494

Leon Yankwich of Yankwich & Associates for Avant Immunotherapeutics, Inc.

Marlene D. Bell, Trademark Examining Attorney, Law Office 105 (Thomas G. Howell, Managing Attorney).

Before Hairston, Walters and Wendel, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Avant Immunotherapeutics, Inc. seeks to register the mark AVANT IMMUNOTHERAPEUTICS for "pharmaceuticals for therapeutic and diagnostic uses in the treatment of cardiovascular disease, immune disorders, and inflammation;

[and] vaccines and purified proteins for therapeutic and medical diagnostic use."<sup>1</sup>

Registration has been finally refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, if used in connection with the identified goods, so resembles the mark AVANTI registered for "biochemical for laboratory use, namely phospholipids; [and] biochemical for pharmaceutical use, namely phospholipids for use as an additive or concipient in pharmaceuticals,"<sup>2</sup> as to be likely to cause confusion, mistake or deception.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested.

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<sup>1</sup> Serial No. 75/496,494 filed June 3, 1998; based on applicant's allegation that it has a bona fide intent to use the mark in commerce. The application includes the following statement: "The word 'avant' appearing as part of the mark AVANT IMMUNOTHERAPEUTICS means 'before' in French." In addition, the word "IMMUNOTHERAPEUTICS" has been disclaimed apart from the mark as shown. We note that as originally filed, the application also covered "scientific research and assay services." Although the services were subsequently amended to "scientific research and pre-clinical assaying services and pharmaceutical testing; custom synthesis of proteins, polynucleotides and biomolecules to the order and specification of others," applicant ultimately deleted these services from the application.

<sup>2</sup> Registration No. 1,466,820 issued December 1, 1987; Sections 8 & 15 affidavit accepted. The registration includes the following statement: "The English translation of the word 'avanti' in the mark is 'go forward'."

We turn first to a consideration of the respective marks. The Examining Attorney argues that the marks are similar in sound, appearance and commercial impression because the dominant portion of applicant's mark, AVANT, is highly similar to registrant's mark, AVANTI. In this regard, the Examining Attorney maintains that AVANT is the dominant portion of applicant's mark because it is the first word in the mark and because IMMUNOTHERAPEUTICS is descriptive of applicant's goods.

Applicant, on the other hand, argues that the IMMUNOTHERAPEUTICS portion of its mark cannot be ignored in analyzing the marks; and that the marks create different commercial impressions, and have different meanings, particularly in view of the translations of the words "AVANT" and "AVANTI."

While marks must be considered in their entirety, it is nevertheless the case that, in articulating reasons for reaching a conclusion of the issue of likelihood of confusion, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entirety." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). For instance, "that a

particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark ..." 224 USPQ at 751.

In this case, the disclaimed term "IMMUNOTHERAPEUTICS" in applicant's mark is merely descriptive of applicant's goods, and thus the dominant and principal source-indicative element of such mark is AVANT. AVANT is highly similar to the registered mark AVANTI in sound and appearance, and when translated (assuming that purchasers are even familiar with the translations), the connotations of AVANT and AVANTI are only slightly different. Thus, when the marks AVANT IMMUNOTHERAPEUTICS and AVANTI are considered in their entirety, the similarities in sound, appearance and commercial impression outweigh the differences.

Turning next to a consideration of the respective goods, applicant argues that the purchasers thereof are different and that the goods travel in different channels of trade. In particular, applicant argues that its goods are "pharmaceutically active compositions" whereas registrant's goods are "pharmaceutically inert additives."

Further, applicant states that:

Whereas the AVANTI phospholipid materials are bought and sold in bulk for a range of possible uses, the medicines and diagnosis products associated with the mark AVANT IMMUNOTHERAPEUTICS are highly regulated (i.e., by the Federal Food and Drug Administration) and are only distributed in specific limited quantities for an approved purpose (treatment, prevention, or diagnosis of disease). (Brief, p. 5).

The Examining Attorney, on the other hand, argues that it must be presumed that applicant's and registrant's goods are marketed to the same classes of purchasers because there are no restrictions in the registrant's identification of goods, and that even applicant has indicated that registrant's goods are subject to a range of possible uses. Further, the Examining Attorney argues that because applicant is involved in the custom synthesis of proteins, polynucleotides and biomolecules to the order and specification of others, it is probable that applicant would manufacture registrant's type of goods. Thus, the Examining Attorney argues that there is a sufficient relationship between applicant's and registrant's goods to support a finding of likelihood of confusion.

We are not persuaded, on this record, that applicant's pharmaceuticals for therapeutic and diagnostic uses in the

treatment of cardiovascular disease, immune disorders, and inflammation and vaccines and purified proteins for therapeutic and medical diagnostic use, on the one hand, and registrant's phospholipids for laboratory and pharmaceutical use, on the other hand, are related products. There is no evidence in this record that companies which market applicant's types of pharmaceuticals, vaccines and purified proteins also market phospholipids for laboratory use and for pharmaceutical use as an additive or concipient under the same mark. Moreover, it is pure speculation on the Examining Attorney's part when she argues that applicant would probably manufacture registrant's types of goods. Although applicant's application at one point included the "custom synthesis of proteins, polynucleotides and biomolecules to the order and specification of others," these services have been deleted and they are not before us in this appeal. Thus, we cannot consider these services in determining whether the goods identified in applicant's application and the goods identified in the cited registration are related.<sup>3</sup>

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<sup>3</sup> We should add that even if these services had not been deleted from applicant's application, there is no evidence in this record to suggest that such services and applicant's types of goods emanate from the same sources.

A reasonable interpretation of applicant's identification of goods leads us to conclude, as applicant has argued, that applicant's types of goods would be marketed to licensed dispensers such as physicians. Similarly, a reasonable interpretation of registrant's identification of goods leads us to conclude that registrant's types of goods would be marketed to laboratories and companies for use as ingredients in pharmaceuticals. Thus, the purchasers and trade channels for the respective goods are different. We note that applicant has indicated that registrant's types of goods have a range of possible uses. We do not interpret this to mean, however, that registrant's goods are in the nature of drugs which are dispensed by physicians, but rather that such goods have a wide range of uses by laboratories and pharmaceutical companies. Finally, it seems to us that both applicant's and registrant's products are of a sophisticated nature and that they would be sold under circumstances that insure discrimination in the purchase thereof.

In sum, notwithstanding the similarity of the marks AVANT IMMUNOTHERAPEUTICS and AVANTI, we find that this record does not establish that applicant's pharmaceuticals for therapeutic and diagnostic uses in the treatment of

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cardiovascular disease, immune disorders, and inflammation and vaccines and purified proteins for therapeutic and medicinal and diagnostic use, on the one hand, and registrant's phospholipids for laboratory and pharmaceutical use, on the other hand, are so related that confusion is likely to result from the contemporaneous use of the foregoing marks on these respective goods.

**Decision:** The refusal to register is reversed.

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