

03/09/01

**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513

PTH

Opposition No. 114,796

Dade Behring Inc.

v.

Bio-Chem Laboratory
Systems, Inc.

Before Seeherman, Hairston and Rogers, Administrative
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

By the Board:

Dade Behring Inc. has opposed the intent to use
application of Bio-Chem Laboratory Systems Inc. for the mark
shown below,

for "medical devices, namely, electrolyte analyzers for
medical diagnostic use."¹ In the notice of opposition,
opposer asserted that since 1997 it has used the mark
QUIKLYTE in connection with electrolyte testing apparatus
for medical diagnostic use; that it is the owner of a

¹ Serial No. 75/483,436, filed May 12, 1998.

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registration for this mark (Registration No. 2,207,140 issued December 1, 1998); that applicant's mark CHEMLYTE so resembles opposer's previously used and registered mark QUIKLYTE as to be likely to cause confusion; and that applicant's use of the mark CHEMLYTE will "dilute or impair" opposer's QUIKLYTE mark.

In its answer, applicant denied the essential allegations of the notice of opposition.

This case now comes up on applicant's motion for summary judgment. Opposer has filed a brief in response thereto.²

Applicant, in moving for summary judgment, concedes that opposer has priority and that the parties' goods are the same. Applicant, however, maintains that there is no likelihood of confusion in this case because the parties' marks are distinguishable. In particular, applicant argues that the marks' common element LYTE is weak and has been frequently adopted by third parties in the medical diagnostic field such that the relevant purchasers are accustomed to looking at the other element(s) in marks which include the suffix -LYTE in order to distinguish such marks.

² Inasmuch as applicant has not objected to opposer's request to accept its late-filed response, the request is approved and the Board will consider opposer's response to applicant's summary judgment motion.

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Applicant has submitted the following definitions of "lyte" taken from Webster's Third New International Dictionary (1981):

- 1 **-lyte**: a substance capable of undergoing lysis³
- 2 **-lyte** --see -lite

In addition, applicant submitted from the same dictionary definitions of the terms "electrolyte," "anolyte," "catholyte," and "hydrolyte." Also, applicant submitted, for goods in International Class 10, a list of seven registered and pending marks which include the term "lyte" and a list of sixty-four registered and pending marks which include the term "lite."

Opposer, in response to the motion for summary judgment, contends that applicant has not demonstrated that there are no genuine issues of material fact in this case. In particular, opposer maintains that the list of registered and pending marks submitted by applicant, in the absence of evidence that the marks are in use, fails to establish that marks consisting of the term LYTE are weak. Moreover, opposer argues that seven registered and pending third-party LYTE marks is an insufficient number to establish that opposer's mark exists in a "crowded field" and that the sixty-four registered and pending LITE marks are not

³ We judicially notice that the same dictionary defines "**lysis**" as "a process of disintegration or dissolution."

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relevant because LITE has a connotation which is not particularly pertinent in the field of medical diagnostics.

Summary judgment is an appropriate method of disposing of cases in which there are no genuine issues of material fact in dispute, thus leaving the case to be resolved as a matter of law. See Fed. R. Civ. P. 56(c). A party moving for summary judgment has the burden of demonstrating the absence of any genuine issue of material fact, and that it is entitled to summary judgment as a matter of law. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986). Upon consideration of the evidence and the arguments presented, we find that summary judgment is warranted in applicant's favor.

As noted above, applicant has conceded that the goods on which it intends to use its mark are identical to opposer's goods and, thus, the parties' goods would move in the same channels of trade to the same purchasers. However, notwithstanding the identity of the goods, we find that applicant's mark CHEMLYTE is simply not similar enough to opposer's mark QUIKLYTE as to be likely to cause confusion.

Applicant has established by means of a dictionary definition that the suffix "lyte" has descriptive significance as used in connection with an electrolyte testing apparatus for medical diagnostic use. Opposer does not dispute that "-lyte" is descriptive, but rather argues

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that the third-party registrations, in the absence of evidence of use of the marks therein, do not establish that marks consisting of the term "-lyte" are weak. It is true that the third-party registrations are not evidence of use of the marks therein to the extent that the public is necessarily aware of them. However, as the Board noted in *American Hospital Supply Corp. v. Air Products and Chemicals, Inc.*, 194 USPQ 340 (TTAB 1977), at 343, third-party registrations are "competent to establish that a portion common to the marks involved in a proceeding has a normally understood and well-known meaning; that this has been recognized by the Patent and Trademark Office by registering marks containing such a common feature for the same or closely related goods where the remaining portions of the marks are sufficient to distinguish the marks as a whole; and that therefore the inclusion of [the common element] in each mark may be an insufficient basis upon which to predicate a holding of confusing similarity." In other words, third-party registrations may be used to show the meaning of a mark or term in the same way that dictionaries are used. In this case, the third-party registrations for marks which include the term LYTE for goods in International Class 10 are additional evidence that the LYTE portion of the involved marks has a normally

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understood and well known meaning as used in the medical diagnostics field.⁴

It is well-established that in articulating reasons which support our conclusion on 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 entireties." In re National Data Corp., 753 F.2d 1056, 24 USPQ2d 749, 751 (Fed. Cir. 1985).

In view of the fact that the term "LYTE" has descriptive significance when used in connection with the involved goods, the relevant purchasers thereof are apt to look to the other elements of the marks which include the term in order to distinguish between them. We believe this to be especially true in this case since the class of purchasers for the involved goods would be relatively sophisticated and would immediately recognize the descriptive significance of the LYTE portion of the marks.

When the marks in the case at hand are considered in their entireties, with appropriate weight given to the dominant features thereof, the marks are not so similar in sound, appearance or meaning that confusion is likely. As

⁴ We agree with opposer, however, that the term LITE does not have the same meaning as LYTE when used in connection with the

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the beginning portions of the respective marks, QUIK and CHEM make strong impressions. QUIK and CHEM do not sound or look alike, and as a result, the marks in their entireties are markedly dissimilar. Moreover, the marks have quite different connotations. Opposer's mark QUIKLYTE suggests an electrolyte testing apparatus which yields quick results, whereas applicant's mark CHEMLYTE suggests the chemical analysis performed by the electrolyte analyzers themselves.

This case is akin to *Keebler Company v. Murray Bakery Products, Inc.*, 866 F.2d 1386, 9 USPQ2d 1736 (Fed. Cir. 1989) and *Kellogg Co. v. Pack 'Em Enterprises, Inc.*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991) in which summary judgment was granted to the defendants. In the *Keebler* case, PECAN SHORTIES for cookies was held not likely to cause confusion with PECAN SANDIES for identical goods. In the *Kellogg* case, FROOTEE ICE and design for flavored ice bars was held not likely to cause confusion with FROOT LOOPS for breakfast cereal and related products. In each case the term common to both marks in issue was either descriptive of the goods or was the phonetic equivalent of such descriptive term. In each case, it was held that the dissimilarity of the marks in their entireties was a sufficient basis upon which to grant summary judgment.

involved goods, and thus the third-party registrations for LITE marks are not probative of the meaning of LYTE.

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In this case, there are no genuine issues of material fact as to the dissimilarity between the marks QUIKLYTE and CHEMLYTE. This factor, the dissimilarity of the marks, outweighs the other DuPont⁵ factors favoring opposer. See Kellogg, *supra*, at 1144-45 stating that “[w]e know of no reason why, in a particular case, a single DuPont factor may not be dispositive.”

Applicant’s motion for summary judgment is accordingly granted and the opposition is dismissed.

⁵ In re E. I. DuPont DeNemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).