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THIS DECISION IS NOT
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Medtech Products, Inc.
v.
James A. Braun

Opposition No. 118,640
to application Serial No. 75/758,215
filed on July 23, 1999

Betty K. Steele of Baker, Donelson, Bearman & Caldwell
for Medtech Products, Inc.

James A. Braun, pro se.

Before Quinn, Bottorff and Drost, Administrative
Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application has been filed by James A. Braun to
register the mark MOMINTUM for "pharmaceutical
preparations, namely, caffeinated mint flavored tablets
for use as an alertness aid."¹

¹ Application Serial No. 75/758,215, filed July 23, 1999,
alleging a bona fide intention to use the mark in commerce.

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Registration has been opposed by Medtech Products, Inc. under Section 2(d) of the Trademark Act on the ground that

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applicant's mark, if used in connection with applicant's goods, would so resemble opposer's previously used and registered mark MOMENTUM for "analgesics and relaxants" as to be likely to cause confusion.

Applicant, in his answer, admitted certain critical allegations of the notice of opposition (see discussion, infra); applicant denied, however, the allegations of likelihood of confusion.

Before turning to the merits of the opposition, we focus our attention on a few evidentiary matters.

The first matter concerns a significant piece of evidence, namely opposer's pleaded registration. Attached to the notice of opposition are photocopies of the registration certificate for opposer's pleaded registration and of the registration renewal certificate. Paragraph 2 of the notice of opposition reads, in relevant part, as follows: "Opposer is submitting herewith as part hereof and marked Exhibit A, Registration No. 0982617." Applicant admitted the fact that the registration accompanied opposer's pleading.

Trademark Rule 2.122(d)(1) provides that a registration owned by an opposer, and pleaded by the opposer in the notice of opposition, will be received in evidence and made part of the record in the proceeding if

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the notice of opposition is accompanied by two copies of the registration prepared and issued by the Office showing both the current status of and current title to the registration. See: Philip Morris Inc. v. Reemtsma Cigarettenfabriken GmbH, 14 USPQ2d 1487 (TTAB 1990). Further, the issuance date of status and title copies filed with the notice of opposition must be reasonably contemporaneous with the filing of the notice of opposition. TBMP §703.02(a).

The problem in the present case is that opposer merely submitted photocopies of the registration certificate and certificate of renewal. Neither shows current status nor title (in fact, the certificates, obviously dated several years prior to the filing date of the notice of opposition, list the owner as the original registrant, American Home Products Corp.). Moreover, opposer's allegations in the notice of opposition are silent as to current status and title of the pleaded registration, and applicant's admission relative to the submission of the registration certificate has no bearing on this information.² Accordingly, the pleaded

² Opposer should also note that status and title of registrations issued by the Office are not proper subject matters for judicial notice. Beech Aircraft Corp. v. Lightning Aircraft Co., 1 USPQ2d 1290 (TTAB 1986).

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registration was not properly made of record, and has not been considered in determining the merits of this case.

The second evidentiary matter relates to Exhibit B

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attached to the notice of opposition, that is, a photocopy of what appears to be a box in which opposer's product is sold to the public. Trademark Rule 2.122(c) provides that except in the case of a status and title copy of a pleaded registration, an exhibit attached to a pleading is not evidence on behalf of the party to whose pleading the exhibit is attached unless identified and introduced in evidence as an exhibit during the period of the taking of testimony. Inasmuch as this evidence was not properly introduced, it does not form part of the record and, accordingly, has not been considered in reaching our decision.

The next evidentiary matter relates to the exhibits attached to applicant's final brief on the case, and applicant's request that the Board take judicial notice of this evidence. The first item comprises pages from what applicant characterizes as "a standard text on dispensing drugs." It appears from the excerpts that the text is a standard reference work and, therefore, appropriate subject matter for judicial notice. See: *Sprague Electric Co. v. Electric Utilities Co.*, 209 USPQ 88 (TTAB 1980). Accordingly, we have considered this evidence in making our decision.

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The other exhibits accompanying applicant's brief are photocopies of packaging for opposer's product and the products of two third parties. This evidence clearly is not proper subject matter for judicial notice. The evidence should have been introduced during applicant's testimony period. Accordingly, we have not considered this evidence.

In view of the above, the record consists of the pleadings; the file of the involved application; and the excerpts from the standard reference text of which we have taken judicial notice. Both parties filed briefs. An oral hearing was not requested.

With respect to priority, the pleaded registration, as noted above, is not of record; thus, opposer is not entitled to the priority benefits accorded to a valid and subsisting registration owned by an opposer. Cf.: King Candy Co., Inc. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). Critical in this case, however, are opposer's allegations regarding its prior common law rights, and applicant's admission thereof. Applicant, in its answer, admits the following allegations in the notice of opposition: "2. The Opposer and its predecessors in title have since 1973 used the word mark MOMENTUM for analgesics and relaxants

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in International Class 5, U.S. Class 18. 3. There is no issue as to priority."

Accordingly, notwithstanding opposer's failure to properly introduce its pleaded registration, applicant has admitted that opposer has prior and continuous use since 1973, resulting in common law rights in the mark MOMENTUM for analgesics and relaxants. These rights give opposer standing in this case, as well as priority of use.

We finally turn our attention to the crux of this controversy. Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Insofar as the marks are concerned, MOMENTUM and MOMINTUM are substantially similar in sound and appearance, differing by only one letter in the middle portion of the marks. Both marks are presented in typed

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form with no difference in style. Because the slight difference between the letter "E" in opposer's mark and the letter "I" in applicant's mark appears in the middle of the marks, this difference in appearance may not even be noticed by consumers. This would be especially probable given the close similarity in the sound of the marks. The short vowel "E" and "I" sounds are very similar in the marks and, again, any slight difference in pronunciation may easily be lost on consumers. As to connotation, it is quite likely, given the similarities in appearance and sound, that prospective consumers will view the marks as having similar, if not identical meanings. In this connection, we take judicial notice of the dictionary listing of the term "momentum:" "force or speed of movement; impetus, as of a physical object or course of events." The Random House Dictionary of the English Language (2d ed. unabridged 1987). When applied to the respective pharmaceutical products of the parties, the marks convey the same meaning, that is, that the product provides impetus for movement. Although we recognize that applicant's mark includes the word "mint," and applicant's product is in the form of a mint tablet, this meaning is hidden within the mark and, again, may likely be missed by many consumers.

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We next turn to the question of the similarity between the goods. The goods need not be identical or competitive in nature in order to support a finding of likelihood of confusion, it being sufficient for the purpose that the goods are related in some manner and/or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under circumstances that could give rise, because of the similarities between the marks used thereon, to the mistaken belief that they originate from or are in some way associated with the same source. See: *Hilson Research Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993); and *Chemical New York Corp. v. Conmar Form Systems, Inc.*, 1 USPQ2d 1139 (TTAB 1986).

In the present case, although the goods are used for different purposes, the goods are both pharmaceutical products. In point of fact, as shown by the information found in 2 USP DISPENSING INFORMATION (21st ed. 2001) at pages 1337-1338, analgesics (the type of medicine sold by opposer) may contain caffeine because the caffeine decreases the time needed to achieve therapeutic effects from the analgesic. Thus, although the products have different uses, they may, as just noted, be

complementary. This point is conceded by applicant. (brief, p. 2: "In fact, [the goods] could complement each other.").

Due to the fact that the products are both pharmaceuticals (and neither identification is limited to prescription pharmaceuticals), they would be sold in the same channels of trade, such as drug stores, grocery stores, and the like.³ Further, the products would be purchased by the same classes of ordinary consumers. There is no evidence on these points, but we presume that the goods move through trade channels that are normal for such goods and that they are purchased by the usual classes of purchasers. See: *Cheesebrough-Pond's Inc. v. Soulful Days, Inc.*, 228 USPQ 954 (TTAB 1985).

We next address the other du Pont factors referred to by the parties. Opposer, in its brief, contends that its mark is "an extremely strong mark" and that it "has built up a considerable amount of goodwill in the MOMENTUM mark." Opposer also asserts that "[t]here are no other pharmaceuticals marketed directly to consumers

³ Applicant requests, in its brief, that the Board take judicial notice that applicant's goods are marketed as a "refreshment," and not as an over-the-counter medication, in a certain department store. Applicant's stated "fact" is hardly proper subject matter for judicial notice, and this fact was never established by properly introduced evidence. Accordingly, it has not been considered. TBMP §712.01.

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for personal use that are sold under the word 'MOMENTUM' save Opposer's goods."⁴ Suffice it to say that while opposer's mark is only somewhat suggestive, there is no evidence to support opposer's claims regarding the notoriety of its mark.

In trying to distinguish the marks, applicant has relied upon differences in what he perceives to be the trade dress of the packaging for the products. This argument misses the mark inasmuch as, in determining likelihood of confusion in Board proceedings, we must compare the marks themselves. The fact that the product packaging may be

⁴ In connection with this statement, opposer makes reference to one third-party registration and two third-party applications. Aside from the fact that it is unusual for a plaintiff to point out the existence of third-party registrations or applications of similar marks, this evidence was not properly made of record. Accordingly, it has not been considered.

different in terms of trade dress is of little moment here

when the marks are presented alone in typed form.

Applicant also argues that purchasers of the parties' goods are sophisticated and that this factor militates against a finding of likelihood of confusion. We recognize that there may be a somewhat more careful decision when it comes to buying medicines than when buying other household or grocery items. In any event, in view of the stark similarities between the marks and the similarities between the goods, even careful purchasers are likely to be confused here. See: *Glenwood Laboratories, Inc. v. American Home Products Corp.*, 455 F.2d 1384, 173 USPQ 19 (CCPA 1972); *Sterling Drug, Inc. v. Sankyo Co.*, 139 USPQ 395 (TTAB 1963).

We conclude that consumers familiar with opposer's analgesics and relaxants sold under the previously used mark MOMENTUM would be likely to believe, upon encountering applicant's mark MOMINTUM for caffeinated mint flavored tablets for use as an alertness aid, that the pharmaceutical products originated with or were somehow associated with or sponsored by the same entity.

Decision: The opposition is sustained, and registration to applicant is refused.