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OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Healix Infusion Therapy, Inc.
v.
Cerner Corporation

Opposition No. 91170997
to application Serial No. 78311374
filed on October 9, 2003

Tim Headley of Wright Brown & Close, LLP for Healix Infusion
Therapy, Inc.

Jean M. Dickman and Lisa R. Brooks-Hammond of Shook, Hardy &
Bacon L.L.P for Cerner Corporation.

Before Hairston, Walters and Kuhlke, Administrative
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Cerner Corporation, applicant, has applied to register
the mark HELIX (in standard character form) for goods
identified as "computer software for use in the healthcare
field, namely software for managing, storing, analyzing,
maintaining, processing, structuring, reviewing, building,
editing, distributing, communicating, organizing, sharing,
referencing, monitoring and integrating genetic information;
computer software for automating clinical, financial and

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administrative healthcare processes involving genetic information in Class 9.”¹

Healix Infusion Therapy, Inc. has opposed registration under Section 2(d) of the Trademark Act on the ground that applicant’s mark, when applied to applicant’s goods, so resembles opposer’s registered mark HEALIX (Registration No. 2258592) for “medical management of physician practices, namely, medical cost management of physician practices; business management of physician practices; cost management for the health benefit plans of others in physician practices” in Class 35 and “health care services, namely, maintaining files and records concerning the medical condition of individuals of physician practices and managed health care services” in Class 42, as to be likely to cause confusion. Opposer also pleaded ownership of Application Serial Nos. 78231329; 78231318; and 78232622, all for the mark HEALIX and for services in the healthcare and/or medical fields.

Applicant, in its answer, denied the likelihood of confusion allegations of the notice of opposition. Applicant also set forth, as “affirmative defenses,” amplifications of its denial of likelihood of confusion.

¹ Serial No. 78311374, filed on October 9, 2003; which is based on an allegation of a bona fide intention to use the mark in commerce.

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The record consists only of the opposed application and the pleadings. Neither party presented evidence at trial. Both parties have filed briefs.

Opposer's likelihood of confusion argument set forth in its brief rests on opposer's asserted ownership of pleaded Registration No. 2258592 and three additional registrations (3098781; 3098782; and 3101469) which issued from its pleaded applications. Opposer, however, did not put any evidence in the record to establish its ownership of these registrations. Opposer acknowledges that Trademark Rule 2.122(d) sets forth the ways in which a party may make its registrations of record, and thus establish ownership of such registrations. Yet, opposer argues that it should not be required to make its registrations of record in accordance with Trademark Rule 2.122(d), and that the Board should take judicial notice of its registrations. Opposer's argument is not well-taken as the Board has stated in numerous decisions that it does not take judicial notice of registrations residing in the U.S. Patent and Trademark Office. See *In re Duofold Inc.*, 184 USPQ 638 (TTAB 1974).

In the alternative, opposer argues that applicant's answer to paragraph no. 1 of the notice of opposition should be deemed an admission of opposer's ownership of the above registrations. In paragraph no. 1 of the opposition, opposer alleged that it owned Registration No. 2258592 and

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the applications which presumably issued into Registrations 3098781; 3098782; and 3101469. Applicant, in its answer to this paragraph, stated that "Cerner is without knowledge or information sufficient to admit or deny the allegations of paragraph 1 of Opposer's Statement of Opposition, and therefore denies same." Opposer contends that applicant could have quickly verified, through the USPTO's records, the truth of opposer's allegations in paragraph no. 1 of the notice of opposition, and that by denying such allegations without attempting to verify them, applicant's answer is "evasive" and therefore constitutes an admission. In support of its position in this regard, opposer relies on *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

Opposer's argument is unpersuasive and its reliance on the Lipton case is misplaced. First, Fed. R. Civ. P. 8(b) specifically provides that "[i]f a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial." Applicant so stated in its answer to paragraph no. 1 of the notice of opposition and further denied the allegations thereof. Moreover, it was not incumbent upon applicant to verify through USPTO records opposer's ownership of any registrations. On the contrary, it was opposer's obligation to introduce copies of its

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registrations in accordance with Trademark Rule 2.122(d). See *Hewlett-Packard Co. v. Olympus Corp.*, 18 USPQ2d 1710 (Fed. Cir. 1991) [In an opposition proceeding, Trademark Rule 2.122(d) provides a clear and simple means for entering registrations into evidence].

Insofar as opposer's reliance on the Lipton case is concerned, in discussing standing, the Court therein indicated that "[a]n answer which attempts to evade the pleading requirements of Rule 8 by the tactic of an equivocal admission or denial is an admission." 213 USPQ 190. The problem with opposer's argument is that applicant's answer to paragraph no. 1 in the notice of opposition is not an equivocal admission or denial of the allegations therein; it is a clear denial. Thus, opposer's reliance on the Lipton case is misplaced.

In order to prevail on its likelihood of confusion claim herein, opposer was required to prove its standing. Having failed to put any evidence in the record to establish ownership of the above registrations, we find that opposer has failed to prove its standing, and therefore, its claim of likelihood of confusion.

Decision: The opposition is dismissed with prejudice.