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August 13, 2007  
GDH/gdh

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

In re Optical Sensors Inc.

Serial No. 78566607

Barbara A. Wrigley of Oppenheimer Wolff & Donnelly LLP for  
Optical Sensors Inc.

John S. Yard, Trademark Examining Attorney, Law Office 115 (Tomas  
V. Vlcek, Managing Attorney).

Before Hohein, Grendel and Zervas, Administrative Trademark  
Judges.

Opinion by Hohein, Administrative Trademark Judge:

Optical Sensors Inc. has filed an application to register on the Principal Register in standard character form the mark "ACQTRAC" for "non-invasive hemodynamic monitoring systems for vascular and cardiovascular diagnostics, comprised of monitoring and diagnostic devices for measuring hemodynamic variables" in International Class 10.<sup>1</sup>

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to its goods, so resembles the

<sup>1</sup> Ser. No. 78566607, filed on February 14, 2005, which is based on an allegation of a bona fide intention to use such mark in commerce.

mark "ACCUTRACKER," which is registered on the Principal Register in standard character form for "ambulatory blood pressure monitors" in International Class 10,<sup>2</sup> as to be likely to cause confusion, or to cause mistake, or to deceive.

Applicant has appealed and has filed a brief.<sup>3</sup> The Examining Attorney has filed a brief.<sup>4</sup> We reverse the refusal to register.

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<sup>2</sup> Reg. No. 2,113,366, issued on November 18, 1997, which sets forth a date of first use of the mark anywhere and in commerce of February 15, 1985; combined affidavit §§8 and 15.

<sup>3</sup> While a reply brief has not been submitted, applicant has filed, more than three months after such brief was due, a request for remand and amendment of the application. Specifically, applicant requests that the identification of its goods be amended to read: "Non-invasive hemodynamic systems for diagnosing vascular and cardiovascular parameters, comprised of a diagnostic device for measuring hemodynamic variables." Applicant states, in support thereof, that it "believes that the amended identification of goods further distinguishes its mark from the mark in Registration No. 2113366, and therefore respectfully requests that the Board remand the application to the Examining Attorney for further consideration of the application in light of this amendment." However, TBMP §1205.01 (2d ed. rev. 2004) provides in relevant part that (footnote omitted):

If an applicant that has filed a timely appeal to the Board files an amendment to its application more than six months after the issuance of the final action, ... the Board will treat the amendment as a request for remand. Such a request will be granted upon a showing of good cause. Good cause will be found, for example, ... when the amendment will obviate a ground for refusal. .... Remand in an ex parte appeal is a matter of discretion with the Board, and the Board may refuse to remand for consideration of an amendment filed more than six months after the date of the action from which the appeal was taken, if, for example, the amendment ... would serve no useful purpose.

In this instance, the request for remand is denied since good cause therefor has not been shown. Applicant has not only failed to provide any explanation for its delay in seeking to amend its identification of goods until several months after completion of all briefing with respect to the issue of likelihood of confusion in this appeal, but it offers no indication that the Examining Attorney subsequently has agreed to allow registration upon entry of the proposed amendment.

<sup>4</sup> The Examining Attorney, noting in his brief that "applicant relies on evidence attached to its brief which does not appear as part of the record prior to appeal," has specifically objected to consideration of

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence which are relevant to the factors bearing on the issue of whether there is a likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 568 (CCPA 1973). However, as indicated in Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), in any likelihood of confusion analysis, two key considerations are the similarity or dissimilarity in the goods at issue and the similarity or dissimilarity of the respective marks in their entireties.<sup>5</sup> Two other key factors in this case concern the conditions under which and buyers to whom sales of the goods at issue are made and the similarity or dissimilarity of established, likely to continue trade channels for such goods.

Applicant, in support of its arguments that confusion is not likely, has made of record the declaration of Paulita

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the following evidence attached to applicant's brief on the ground that such evidence is untimely under Trademark Rule 2.142(d): "[T]he report dated December 12, 2006 from Dave Wright of the Marksmen research group providing information on the registrant and its ACCUTRACKER mark, and the attached new registration printout evidence" consisting of four third-party registrations for the marks "ACCUTRAC" and "ACCU-TRAC" for goods in International Class 10 and a list of other third-party registrations for marks in such class which contain the prefix "ACCU" or the suffix "TRAC" or variations thereof. Inasmuch as Trademark Rule 2.142(d) provides in relevant part that "[t]he record in the application should be complete prior to the filing of an appeal" and that the Board "will ordinarily not consider additional evidence filed with the Board by the appellant ... after the appeal is filed," the objection is sustained and no further consideration will be given to the untimely evidence attached to applicant's brief.

<sup>5</sup> The court, in particular, pointed out that: "The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." 192 USPQ at 29.

LaPlante, its "President, Director and CEO," which provides in relevant part that:

1. Applicant['s] ... non-invasive hemodynamic monitoring system includes complex monitoring and diagnostic devices for measuring hemodynamic variables and providing data pertaining to vascular and cardiovascular diagnostics. Heart clinics, cardiology offices and endocrinology practices that specialize in heart failure use Applicant's non-invasive hemodynamic monitoring system to monitor and titrate drug therapy, monitor cardiovascular disease progression and/or diagnose disease states.
2. Applicant's non-invasive hemodynamic monitoring system costs approximately \$40,000 with disposable sets selling for \$10 each.
3. Applicant's non-invasive hemodynamic monitoring systems are directly marketed to offices and out-patient facilities where heart patients are frequently seen, including heart failure clinics, cardiology offices and endocrinology practices that specialize in heart failure. The sales process for Applicant's non-invasive hemodynamic monitoring systems is lengthy and involves in depth analysis of a customer's needs and extensive consultation with the customer's cardiologists and endocrinologists. Applicant's non-invasive hemodynamic monitoring systems are sold via a mix of direct sales and distribution networks. Applicant supports distributors in the distribution networks by providing customer training and demonstrations of Applicant's non-invasive hemodynamic monitoring system on patients. After purchase, distributors install Applicant's non-invasive hemodynamic monitoring system with or without support from Applicant.
4. Applicant's products and services are extremely sophisticated and would only be purchased after careful and lengthy

consideration and study of Applicant's system by someone with a sophisticated knowledge of vascular and cardiovascular diagnostic needs. ....

Based upon such declaration, applicant contends that its goods differ significantly from the registrant's goods and asserts that "there is no evidence at all to suggest that the relevant purchasing public would expect Applicant's products to be available from the same source as ... [the registrant's] products." Applicant insists, furthermore, that the channels of trade for the respective goods are different; that its goods are costly; and that "the consumer group associated with Applicant's goods is highly sophisticated." Applicant notes, moreover, that:

Significantly, the medical community is not homogenous; it is highly segmented thus making confusion unlikely. Astra Pharm. Prod., Inc. v. Beckman Instruments, Inc., 220 USPQ 786, 791-92 (1st Cir. 1983) (no likelihood of confusion, in part because hospital personnel are sophisticated purchasers). ....

In particular, applicant maintains that the differences in the goods at issue in this appeal make confusion unlikely, stressing that:

Consumer confusion is unlikely because Applicant's non-invasive hemodynamic monitoring systems used for vascular and cardiovascular diagnostics are sold to highly sophisticated hospital professionals in the medical industry that would not confuse Applicant's product with ... products for ambulatory blood pressure monitoring. Applicant's customers purchase Applicant's product to treat cardiovascular disease patients using comprehensive hemodynamic information, including heart rate, cardiac output, cardiac index, stroke volume, pre-ejection period, left ventricular ejection time, blood pressure, mean arterial pressure, system vascular resistance, various

contractility indices and thoracic fluid status. This careful purchasing decision makes confusion unlikely. In addition, ... [the registrant] offers a small, reasonably inexpensive portable blood pressure device. Based on these differences ..., consumer confusion is unlikely.

In determining whether goods and services are related, "it is not enough that the products may be classified in the same category or that a term can be found that describes the product." Signature Brands, Inc. Substituted for Health O Meter, Inc. v. Dallas Technologies Corporation, 1998 WL 80140 (T.T.A.B. 1998). .... Specifically, all devices that measure blood pressure are not considered similar so as to increase the likelihood of confusion simply because they involve measuring blood pressure; there must be additional evidence that the context in which today's consumers make decisions makes confusion as to the source of ... [the respective] goods likely.

Applicant argues, in this respect, that "the Examining Attorney has not met the burden of proving that ... [the respective] medical products are sufficiently related that confusion is likely to result" inasmuch as the evidence made of record (as discussed in detail later in this opinion) by the Examining Attorney, consisting of "copies of third-party registrations" and "print-outs of websites," is inadequate because applicant "has expressly stated that its goods relating to hemodynamic monitoring are directed to uses other than ambulatory blood pressure monitoring." In particular, applicant contends that (underlining in original):

Applicant respectfully asserts that the recitation of goods ... in the present application ... [is] restricted to channels of trade in which vascular and cardiovascular diagnostic equipment is sold. Specifically, Applicant's ACQTRAC mark is used in combination with "non-invasive hemodynamic

monitoring systems for vascular and cardiovascular diagnostics, comprised of monitoring and diagnostic devices for measuring hemodynamic variables. In contrast, ... [the registrant's] ACCUTRACKER mark is used in combination with "ambulatory blood pressure monitors." The term "ambulatory" ... indicates that the ... blood pressure monitors are used for out-patient medical care. .... Accordingly, Applicant respectfully asserts that ... [the respective] medical products are not sufficiently related such that confusion is likely to result.

Applicant also insists, however, that even if the respective goods "were both used in hospitals, this is not sufficient to assume that the goods are closely related, particularly where the consumers are sophisticated." Applicant points out that "[i]t has long been recognized that purchasers of medical equipment ... are highly sophisticated" and, as such, are "more likely to distinguish between marks and goods than is the general consuming public," citing *In re N.A.D.*, 754 F.2d 996, 224 USPQ 969, 971 (Fed. Cir. 1985) [because anesthesia machines are "elaborate, sizeable, complex pieces of technical apparatus of the kind which would be purchased only in consultation with an anesthesiologist or someone with equivalent technical knowledge," "only very sophisticated purchasers are here involved who would buy with great care and unquestionably know the source of the goods"]; *Pfizer Inc. v. Astra Pharmaceutical Products Inc.*, 858 F.Supp. 1305, 33 USPQ2d 1545, 1562 (S.D.N.Y. 1994) ["[t]he consumers here are doctors, as sophisticated a group as one could imagine"]; and *Astra Pharmaceutical Products, Inc. v. Beckman Instruments, Inc.*, supra. Thus, applicant contends, while both its goods and those of the registrant may be purchased, for

example, by hospital personnel, its goods "are purchased by hospital personnel working in heart clinics, cardiology offices and endocrinology practices that specialize in vascular and cardiovascular diagnostics, such as heart failure," as opposed to registrant' goods, which "are likely purchased by a general purchasing agent after being approved by committee and/or hospital personnel." Therefore, "[b]ecause Applicant's goods are purchased by specialized professionals working in vascular and cardiovascular diagnostics while ... [the registrant's] goods are purchased by other hospital personnel, consumer confusion is highly unlikely" according to applicant.

Applicant additionally maintains that confusion is unlikely because of the dissimilarity in the channels of trade for the respective goods and the conditions under which and buyers to whom sales thereof are made.<sup>6</sup> Specifically, applicant stresses that:

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<sup>6</sup> Although applicant also argues, based solely on various third-party registrations, that "[t]here are currently numerous marks using the common terms 'accutrac' and 'accutrak' as part of a trademark" and that such serves to "demonstrate that consumers have learned to differentiate among these marks without confusion, [thereby] making confusion unlikely in this case," it is pointed out that the only third-party registrations which are considered to be of record herein are those which are listed in applicant's response to the initial Office action. However, none of those is relevant inasmuch as the Examining Attorney, in his final refusal, accurately noted that "[n]o other similar 'accutrak' registered marks exist in the medical field at large, let alone the blood pressure or heart monitoring medical subfields." Moreover, and in any event, it is well settled that third-party registrations are not evidence of what happens in the marketplace or that the purchasing public is familiar with the use of the marks which are the subjects thereof and has therefore learned to distinguish those marks by the differences therein. See, e.g., National Aeronautics & Space Admin. v. Record Chem. Co., 185 USPQ 563, 567 (TTAB 1975). Such registrations therefore do not show that the subject marks are actually being used, much less that the extent of their use is and/or has been so great that customers have indeed become accustomed to encountering the marks in the marketplace and

Applicant's non-invasive hemodynamic monitoring systems are directly marketed to offices and out-patient facilities where heart failure patients are seen, including heart failure clinics, cardiology offices and endocrinology practices that specialize in heart failure. Applicant's system is also sold through distributors who also provided post-sale installation. .... Applicant supports the distributors by providing customer training and demonstrations of Applicant's system on patients. .... Thus, customers are introduced to Applicant's goods ... only through Applicant's approved marketing and sales information. Accordingly, customers know at all times the source of the non-invasive hemodynamic monitoring system.

....

It is unlikely that the consumers of Applicant's non-invasive hemodynamic monitoring system, who are highly knowledgeable regarding vascular and cardiovascular diagnostics, will believe that ... [the respective] goods derive from a common source because the purchasing decision is made with great care. When consumers exercise heightened care in evaluating the

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will differentiate among marks such as "ACQTRAC," "ACCUTRAC," "ACCU-TRAK" or "ACCUTRACKER" by differences in the constituent elements thereof. See, e.g., Smith Bros. Mfg. Co. v. Stone Mfg. Co., 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973); and AMF Inc. v. American Leisure Prods., Inc., 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973), in which the court indicated that:

[L]ittle weight is to be given such registrations in evaluating whether there is likelihood of confusion. The existence of these registrations is not evidence of what happens in the market place or that customers are familiar with them nor should the existence on the register of confusingly similar marks aid an applicant to register another likely to cause confusion, mistake or to deceive.

See also Olde Tyme Foods, Inc. v. Roundy's Inc., 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992) [third-party registrations "may not be given any weight" (emphasis in original) as to the strength of a mark]; and In re Hub Distrib., Inc., 218 USPQ 284, 285-86 (TTAB 1983). Applicant's contention, therefore, that the *du Pont* factor which concerns the number and nature of similar marks in use on similar goods favors a finding of no likelihood of confusion is instead neutral since it is without any evidentiary foundation.

relevant products ... before making purchasing decisions, there is not a strong likelihood of confusion. Electronic Design & Sales Inc. v. Electronic Data Systems Corp., 954 F.2d 713, 21 USPQ2d 1388, 1392 (Fed. Cir. 1992) ("there is always less likelihood of confusion where goods are ... purchased after careful consideration.") [.] .... As a leading treatise notes, "the price level of the goods ... is an important factor in determining the amount of care the reasonably prudent buyer will use. If the goods ... are relatively expensive, more care is taken and buyers are less likely to be confused as to source or affiliation." 3 McCarthy on Trademarks and Unfair Competition §23:95 (4th ed. 1998). Similarly,

[w]here the relevant buyer class is composed solely of professional, or commercial purchasers, it is reasonable to set a higher standard of care than exists for consumers.

Id. at §23:101 ....

Here, the purchasers of Applicant's non-invasive hemodynamic monitoring system are highly sophisticated and purchase the system only after a lengthy, highly involved sales process. .... Purchasers of Applicant's products place great importance on, and take great care in, purchasing these products. They must determine whether to purchase Applicant's non-invasive hemodynamic monitoring system by analyzing whether Applicant's system will meet their needs, and by comparing particular technical, medical information to goods and services provided by Applicant's competitors. .... These customers do not purchase Applicant's system on impulse, but rather apply a careful decision[-]making process that commonly takes place over a period of time and involves numerous contacts with Applicant's sales force or authorized distributors. .... The selection of Applicant's product is made at a very high level by highly knowledgeable purchasers.

Furthermore, the care with which Applicant's customers make their decisions is heightened by the fact that Applicant's non-invasive hemodynamic monitoring systems are

extremely costly. Applicant's systems cost \$40,000 with disposable sets costing \$10 each. .... Because of the significance and high cost of Applicant's systems, consumers take extreme care in making purchasing decisions and it is highly unlikely that they will be confused as to the source of Applicant's non-invasive hemodynamic monitoring system and ... [the registrant's] ambulatory blood pressure monitors.

The Examining Attorney, on the other hand, dismisses applicant's arguments, asserting in his brief that there is a likelihood of confusion because the marks at issue are "highly similar" in sound, appearance and connotation and "impart the same commercial impression," while the respective goods "are highly related if not identical in both field and function." Specifically, he contends that the marks "ACQTRAC" and "ACCUTRACKER" are essentially equivalents inasmuch as "[t]he only real difference in the marks is the suffix '-ER' contained in the registrant's mark." The commercial impression of each mark, he maintains, "is the connotation of the accurate tracking of one's vital signs, blood pressure and cardiovascular and hemodynamic data." Furthermore, even if such marks are considered "weak," he insists that the registrant's mark is "still entitled to protection against registration by a subsequent user of the same or similar mark for the same or closely related goods," citing *Hollister Inc. v. Ident A Pet, Inc.*, 193 USPQ 439 (TTAB 1976).

As to the respective goods, the Examining Attorney insists that applicant's "non-invasive hemodynamic monitoring systems for vascular and cardiovascular diagnostics, comprised of monitoring and diagnostic devices for measuring hemodynamic variables," and registrant's "ambulatory blood pressure monitors"

are "highly related" in that "applicant's goods monitor blood pressure in addition to additional hemodynamic variables."<sup>7</sup> Both products, he contends, are shown by the evidence of record to be "medical devices used for cardiovascular diagnostics and monitoring" and, as such, would be "found in the same medical channels of trade."

In support of his position, the Examining Attorney asserts that he has made of record "substantial evidence" demonstrating the relatedness of the applicant's and registrant's respective goods. Specifically, he contends that:

Included as evidence of the similarity of the respective goods and channels of trade are copies of printouts from the USPTO X-Search database, which show third-party registrations of marks used in connection with the same or similar goods and/or services as those of applicant and registrant in this case. These printouts have probative value to the extent that they serve to suggest that the goods and/or services listed therein, namely hemodynamic monitoring equipment and blood pressure monitoring equipment, are of a kind that may emanate from a single source. See *In re Infinity Broadcasting Corp. of Dallas*, 60 USPQ2d 1214, 1217-1218 [sic] (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 at n.6 (TTAB 1988) [, *aff'd as not citable precedent*, No.

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<sup>7</sup> The term "hemodynamic," he notes for the first time in his brief, is the adjectival form of the noun "hemodynamics," which The American Heritage Dictionary of the English Language (3rd ed. 1992) defines as "the study of the forces involved in the circulation of the blood." Inasmuch as it is settled that the Board may properly take judicial notice of dictionary definitions, the implicit request that the Board take judicial notice of such definition is granted. See, e.g., *Hancock v. American Steel & Wire Co. of New Jersey*, 203 F.2d 737, 97 USPQ 330, 332 (CCPA 1953); *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983); and *Marcal Paper Mills, Inc. v. American Can Co.*, 212 USPQ 852, 860 n.7 (TTAB 1981).

88-1444 (Fed. Cir. Nov. 14, 1988)]. The goods in these registrations as identified can each be seen to identify either ambulatory blood pressure monitors, hemodynamic monitoring systems, or both. These registrations further indicate that the respective goods come from the same family or genus of goods.

Evidence from internet webpages has also been made of record showing that the applicant's and registrant's goods and their parts and accessories are found in the same channels of trade, perform the same function, and may in fact even be the same goods. Included in this evidence are the following excerpts:

- Wilburn Medical USA online catalog webpage showing "vital sign monitors." On this page is shown an ambulatory blood pressure monitor such as that of the ... [registrant], in addition to more comprehensive hemodynamic monitoring systems such as that of the applicant.
- A webpage product list from Lidco Cardica Systems showing parts and assemblies for both hemodynamic monitors and blood pressure monitors.
- Webpage product information on an Otsuka Electronics ambulatory blood pressure monitor, which provides hemodynamic parameters such as systolic, diastolic and mean pressure, cardiac output, heart rate, stroke volume, left ventricle ejection time, total peripheral resistance, inter-beat interval, aortic impedance and aortic compliance[.]
- A Cardiodynamics product information webpage showing that its BioZ noninvasive hemodynamic monitor is "compact, lightweight and portable[.]"
- A December 1, 2005 article from *Electronic Design* online Magazine, entitled "Changing the Face of Blood Pressure Monitoring[.]" which discusses technological advances in the field of blood pressure and hemodynamic monitoring and analysis.

This information is significant in that not only do the applicant's goods move in the

same channels of trade [as those of the registrant's goods], but that differences between the [respective] goods may be so minimal that they may even be considered the same goods. For example, the Otsuka Electronics ambulatory blood pressure monitor would appear to perform the same advanced functions as a hemodynamic monitoring system such as that of the applicant. Conversely, the BioZ hemodynamic monitor would appear to be compact, lightweight and portable enough that it could be suitable for ambulatory use.

Moreover, this evidence shows that a "hemodynamic monitoring system" is in essence the latest, state of the art enhancement of the blood pressure monitor in the rapidly advancing field of medical diagnostic technology. As such, these are not two distinctly different products, as the applicant suggests, so much as a standard version and an enhanced version of the same product. ....

Furthermore, in response to applicant's assertion that the registrant "offers a small, reasonably inexpensive portable blood pressure device," the Examining Attorney, citing *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1595 (TTAB 1999), correctly states that "[a] determination of whether there is a likelihood of confusion is made ... on the basis of the goods ... [as] identified in the application and registration, without limitations or restrictions that are not reflected therein." Here, the Examining Attorney points out, "nothing in the record indicates that the registrant's goods are 'small' or low-priced." Instead, he insists, the evidence of record "shows that high-end blood pressure monitors in the marketplace can perform all of the features of applicant's hemodynamic monitoring system." Noting, moreover, that applicant "seems to try to carve out an exceedingly narrow channel of trade for itself," the Examining

Attorney maintains that he "has provided strong evidence of relatedness and channels of trade by way of third[-]party registrations and internet webpage evidence." In addition, as to applicant's contention that because its goods are identified as being "for vascular and cardiovascular diagnostics," such goods are limited to channels of trade which are separate from those for registrant's ambulatory blood pressure monitors, the Examining Attorney insists that "[t]his argument is rather semantic and unpersuasive" in that:

Applicant again creates an exceedingly narrow distinction, and it is one without a difference. As shown in the evidence, ambulatory blood pressure monitors serve clear diagnostic functions, for example, diagnosing low blood pressure or high blood pressure, which can be done at a precise point in time, over a period of time and/or while engaged in various activities. Ambulatory blood pressure monitors, such as the Otsuka Electronics ambulatory blood pressure monitor shown in the evidence of record, measure and record all of the hemodynamic variables that applicant's hemodynamic measuring system measures and records. The respective goods accordingly serve similar diagnostic purposes. Finally, applicant's goods, notwithstanding the limiting language, clearly serve a significant monitoring function, as do the ... registrant's goods, based on the simple and clear wording of the identification of goods.

With respect to applicant's assertion that the goods at issue would be bought by different, highly sophisticated personnel, the Examining Attorney urges that, notwithstanding the declaration furnished by applicant, "it is difficult to believe that those charged with purchasing [ambulatory] blood pressure monitors would be completely different and removed from those

charged with purchasing [non-invasive] hemodynamic monitoring systems." "This would be especially so," he argues, "in the context of specialized medical practices, likely consisting of several doctors and a small support staff, which the applicant sees among its primary consumers, or the case of small hospitals or clinics." Moreover, while essentially conceding that the goods at issue would be purchased by sophisticated and careful buyers, who would decide to purchase only after much deliberation and consideration, the Examining Attorney, citing *inter alia* In re Decombe, 9 USPQ 1812, 1814-15 (TTAB 1988) and In re Pellerin Milnor Corp., 221 USPQ 558, 560 (TTAB 1983), contends that "the fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion."

Lastly, as to applicant's reliance on In re N.A.D., supra, as authority for a finding of no likelihood of confusion in this appeal, the Examining Attorney distinguishes such case by noting that "the crucial and deciding fact" therein was that "there was a consent agreement of record" which was "given great weight." The Examining Attorney also take issue with applicant's reliance on Astra Pharm. Prod., Inc. v. Beckman Instruments, Inc., supra, contending that while, as in that case, "a hospital community is not a homogeneous whole, but is composed of separate departments with diverse purchasing requirements," in this appeal "the stratification of purchasing departments urged by applicant as to highly related blood monitoring goods would seem unlikely

at best in the vast majority of hospitals, and wholly inapplicable to smaller, specialty cardiac medical practices."

Upon careful consideration of the arguments and evidence presented, we find that a likelihood of confusion has not been shown on this record. While, concededly, the marks "ACQTRAC" and "ACCUTRACKER" are indeed very similar in sound, appearance, connotation and commercial impression, we disagree with the Examining Attorney that such marks are essentially equivalents inasmuch as "[t]he only real difference in the marks is the suffix '-ER' contained in the registrant's mark." Applicant's mark, unlike registrant's mark, utilizes the noticeably different spelling "ACQ" to suggest the term "accurate," unlike the "ACCU" portion of registrant's mark, and ends with the term "TRAC" instead of the word "TRACKER" as is the case with registrant's mark. Although both marks, in particular, nonetheless project basically the same overall connotation and commercial impression of accurate tracking of blood pressure or other vascular and cardiovascular data as contended by the Examining Attorney, such marks are also inherently "weak" in that they are highly suggestive of a characteristic of monitoring equipment, including applicant's non-invasive hemodynamic monitoring systems and registrant's ambulatory blood pressure monitors. Consequently, as a general proposition, the marks at issue herein are of the kind which would not be entitled to as broad a scope of protection as would be the case with arbitrary or other types of "strong" marks. See, e.g., Sure-Fit Products Co. v. Saltzson Drapery Co., 254 F.2d 158, 117 USPQ 295, 297

(CCPA 1958) ["[i]t seems both logical and obvious ... that where a party chooses a trademark which is inherently weak, he will not enjoy the wide latitude of protection afforded the owners of strong trademarks"]. Absent, therefore, use of the marks at issue in connection with the same or highly related goods, confusion would generally not be likely.

Turning, then, to whether applicant's "non-invasive hemodynamic monitoring systems for vascular and cardiovascular diagnostics, comprised of monitoring and diagnostic devices for measuring hemodynamic variables," are "highly related if not identical in both field and function" to registrant's "ambulatory blood pressure monitors" as contended by the Examining Attorney, we disagree with the Examining Attorney that the record contains "substantial evidence" of the commercial relatedness of the respective goods, such that their contemporaneous marketing under the highly suggestive marks "ACQTRAC" and "ACCUTRACKER" would be likely to cause confusion as to source or sponsorship. While the Wilburn Medical USA online catalog webpage does indeed list, under the category of "vital sign monitors," both a "CardioDynamics BioZ ... non-invasive hemodynamic monitor that reports cardiac output, systemic vascular resistance, contractility, and fluid status" as well as a "Tiba SE-25S ... 24-Hour ambulatory blood pressure monitor that allows you to gather blood pressure measurements outside of the clinical setting," such webpage, which also lists various "vital signs" and "multi-parameter" monitors, is the sole piece of evidence that tends to show that goods like applicant's and registrant's

may be sold in the same channels of trade. However, as other information on such webpage makes readily apparent, Wilburn Medical appears to be a large medical supply house for hospital and other purchasers and its online catalog covers virtually every kind of medical equipment available, including for example "Cholesterol Testing," "Bone Density Testing," "Diabetic Testing" and "Skincare" products as well as "Syringe Pumps," "Urine Analyzers" and "IV Administration Products." Nonetheless, whether such goods, and in particular non-invasive hemodynamic monitoring systems and ambulatory blood pressure monitors would in fact be sold to the same class or classes of individual purchasers is simply not apparent from such evidence alone.

As to what the Examining Attorney refers to as a "webpage product list from Lidco Cardica Systems showing parts and assemblies for both hemodynamic monitors and blood pressure monitors," such excerpt upon inspection actually pertains only to a "Hemodynamic Monitor Assembly" which is sold in the United Kingdom and is supplied with such items as a "Blood Pressure Monitor Cable Assembly" and a "Power Cord"; there is nothing which indicates that the "Hemodynamic Monitor Assembly" is suitable for sale in the United States, much less that it functions as an ambulatory blood pressure monitor. Similarly, while a "24 Hours Continuous Blood Pressure Monitor" offered through a webpage of "OTSUKA ELECTRONICS CO., LTD." is touted with the statement that "[a]mbulatory monitoring is possible not only for blood pressure but also hemodynamic parameters based on arterial waveforms [sic] derived from fingers," such unit does

not appear to provide the range of variables monitored by non-invasive hemodynamic monitoring systems for vascular and cardiovascular diagnostics" like, for instance, applicant's goods do. Conversely, while the "CardioDynamics" product information webpage indicates that its "BioZ" "[n]oninvasive hemodynamic monitor" is advertised as "compact, lightweight and portable," it is speculative to assume that such features, as the accompanying picture of the product makes clear, mean that a non-invasive hemodynamic monitor can function, or serve the same purpose, as an ambulatory blood pressure monitor. Likewise, that a "December 1, 2005 article from *Electronic Design* online Magazine, entitled 'Changing the Face of Blood Pressure Monitoring[,]' which discusses technological advances in the field of blood pressure and hemodynamic monitoring and analysis," reports on a non-invasive blood pressure cuff for use in connection with monitoring of surgical patients does not demonstrate that such a device may be purchased by the identical customers for, and be utilized the same as, an ambulatory blood pressure monitor. That is, even though such goods would appear to "serve similar diagnostic purposes," it plainly is not the case that "differences between the [respective] goods may be so minimal that they may even be considered the same goods," as contended by the Examining Attorney. In short, that non-invasive hemodynamic monitoring systems, especially those used for vascular and cardiovascular diagnostics, and ambulatory blood pressure monitors both measure and monitor blood pressure does not necessarily mean that such goods are commercially related in that

they would be sold to the same classes of individual purchasers and/or used by identical medical practitioners, even if sold to and used by, for instance, heart clinics, cardiology offices and endocrinology practices that specialize in heart failure use.

Additionally, with respect to the six use-based third-party registrations made of record and relied upon by the Examining Attorney to show that "the goods and/or services listed therein, namely hemodynamic monitoring equipment and blood pressure monitoring equipment, are of a kind that may emanate from a single source," none is probative thereof inasmuch as there is not a single registration which sets forth, on the one hand, "hemodynamic monitoring systems" or similarly identified goods, and "ambulatory blood pressure monitors" or the like specified products, on the other. Such registrations, instead, refer in each instance to a broad category of goods<sup>8</sup> rather than the particular products at issue in this appeal. Thus, just as it is settled that while a term may be found which encompasses the specific goods at issue, such does not mean that customers will view those goods as commercially or otherwise closely related in the sense that they will assume that they emanate from

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<sup>8</sup> For example, the third-party registrations variously list "medical apparatus, namely, sensors for use with computer hardware and software for monitoring and detecting physiological data in a patient, specifically ... for hemodynamic monitoring including blood pressure and electrocardiograms"; "patient monitoring systems and clinical information systems"; "medical apparatus for hemodynamic monitoring, namely, the measurement and display of blood pressure, blood flow, vascular resistance and other information as to the state of the heart and circulation"; "medical apparatus; namely a system for the assessment, monitoring and management of human hemodynamic and oxygen transport dynamics"; and "patient monitors and sensors for detecting a physiological condition, namely, blood content monitoring ... and hemodynamic monitoring including blood pressure."

or are associated with a common source, see, e.g., General Electric Co. v. Graham Magnetics Inc., 197 USPQ 690, 694 (TTAB 1977); and Harvey Hubbell Inc. v. Tokyo Seimitsu Co., Ltd., 188 USPQ 517, 520 (TTAB 1975), the approach taken by the Examining Attorney with respect to the third-party registrations which he made of record is tantamount to finding an all-encompassing term for applicant's and the cited registrant's goods rather than a showing of relatedness in that the same parties typically offer such goods under an identical mark. Consequently, the third-party registrations of record are insufficient to show that the goods at issue are commercially or otherwise closely related in that they are of a type that may emanate from a single source. See, e.g., In re W.W. Henry Co., 82 USPQ2d 1213, 1215 (TTAB 2007).

Nonetheless, even assuming that applicant's "non-invasive hemodynamic monitoring systems for vascular and cardiovascular diagnostics, comprised of monitoring and diagnostic devices for measuring hemodynamic variables" and which are used to monitor and titrate drug therapy, monitor cardiovascular disease progression and/or diagnose disease states in patients, would be purchased by the same hospital and medical institutions, including heart clinics, cardiology offices and endocrinology practices that specialize in heart failure, as would also be buyers of registrant's "ambulatory blood pressure monitors" for out-patient use, it seems clear that the purchasing decisions for such goods would be made by highly sophisticated and knowledgeable buyers under conditions of sale which would

further minimize any likelihood of confusion as to source or affiliation.

In particular, as Astra Pharmaceutical Products, Inc. v. Beckman Instruments, Inc., supra at 220 USPQ 791, makes clear, for a likelihood of confusion to exist, "it must be based on confusion of some relevant person; i.e., a customer or user, and there is always less likelihood of confusion where goods are expensive and purchased and used by highly specialized individuals after careful consideration." Here, as stated in the declaration submitted by applicant, its non-invasive hemodynamic monitoring systems "are directly marketed to offices and out-patient facilities where heart patients are frequently seen, including heart failure clinics, cardiology offices and endocrinology practices that specialize in heart failure." Moreover, as further noted therein, "[t]he sales process for [such goods] ... is lengthy and involves in depth analysis of a customer's needs and extensive consultation with the customer's cardiologists and endocrinologists". Additionally, the declaration furnished by applicant establishes that its non-invasive hemodynamic monitoring systems are sold by way of both direct sales as well as distribution networks; that applicant supports the distributors in its distribution networks by providing customer training and demonstrations of its product on actual patients; that, after purchase, applicant's distributors install its non-invasive hemodynamic monitoring systems (with or without support from applicant); and that one of applicant's non-invasive hemodynamic monitoring systems costs approximately

\$40,000. Furthermore, as to non-invasive hemodynamic monitoring systems from sources other than applicant, there is nothing in the record to indicate that such would be marketed and sold in any different manner than that used for applicant's goods.

It is therefore clear that doctors, including cardiologists and endocrinologists, would constitute the persons who would make, or be primarily responsible for making, the purchasing decisions with respect non-invasive hemodynamic monitoring systems like those sold by applicant. Doctors would be the individuals most knowledgeable of patient parameters which require medical monitoring and would undoubtedly be the persons most familiar with the equipment available for measuring and tracking such variables. Doctors, therefore, have been held to be highly discriminating and sophisticated purchasers. See, e.g., Warner-Hudnut, Inc. v. Wander Co., 280 F.2d 435, 126 USPQ 411, 412 (CCPA 1960) [physicians constitute "a highly intelligent and discriminating public]." As such, they would be expected to exercise a high degree of care and deliberation in decisions involving the purchasing of medical equipment to deal with their patients' needs, including the selection of non-invasive hemodynamic monitoring systems.

Likewise, as to registrant's goods, cardiologists, endocrinologists and other doctors with the need to monitor a patient's blood pressure outside of a hospital or clinical setting would likely make or be responsible for making the purchasing decision concerning ambulatory blood pressure monitors, especially since the record shows, in view of the

webpage of product information with respect to an Otsuka Electronics ambulatory blood pressure monitor, that some models of such goods can also provide information regarding "hemodynamic parameters such as systolic, diastolic and mean pressure, cardiac output, heart rate, stroke volume, left ventricle ejection time, total peripheral resistance, inter-beat interval, aortic impedance and aortic compliance." Such goods, while not nearly as expensive perhaps as applicant's goods, would nevertheless be bought with care and deliberation to ensure that they meet blood pressure monitoring needs for ambulatory patients and, even if not purchased after a lengthy and extensive consultation period with the vendor thereof, would not be bought impulsively.

Plainly, in their capacity as buyers of goods of the kinds sold by applicant and registrant, doctors constitute sophisticated purchasers. As such, their "sophistication is important and often dispositive because '[s]ophisticated consumers may be expected to exercise greater care.'" *Electronic Design & Sales Inc. v. Electronic Data Systems Corp.*, supra at 21 USPQ2d 1392, quoting from *Pignons S.A. de Mecanique de Precision v. Polaroid Corp.*, 657 F.2d 482, 489, 212 USPQ 246, 252 (1st Cir. 1981). While, in this case, it is certainly possible for both applicant's goods and registrant's goods to be purchased by the same specialized medical practices, our principal reviewing court in *Electronic Design & Sales*, supra at 21 USPQ2d 1391, has noted that it is error to deny registration simply because an applicant markets and sells its goods in the same general field as those promoted and sold by the registrant (e.g., what the Examining

Attorney herein has characterized as "medical devices used for cardiovascular diagnostics and monitoring"), cautioning that:

We are not concerned with mere theoretical possibilities of confusion, deception, or mistake or with de minimis situations but with the practicalities of the commercial world, with which the trademark laws deal.

Id., quoting from *Witco Chemical Co. v. Whitfield Chemical Co.*, 418 F.2d 1403, 1405, 164 USPQ 43, 44-45 (CCPA 1969), *aff'g*, 153 USPQ 412 (TTAB 1967).

In summary, applicant's goods, as previously indicated, clearly are quite expensive and registrant's goods, at a minimum, would not be inexpensive. Both products, as noted earlier, would be bought only by highly knowledgeable, discriminating and sophisticated purchasers after thorough deliberation, with applicant's goods additionally subject to a lengthy period involving extensive consultation with a physician concerning an in depth analysis of his or her heart failure patients' needs for non-invasive hemodynamic blood monitoring as well as associated training and demonstrations of applicant's product on actual patients along with installation thereof after purchase is made. Given the knowledge, care and deliberation required of doctors in making the purchasing decisions with respect to applicant's and registrant's goods, the noticeably distinguishable differences in the marks "ACQTRAC" and "ACCUTRACKER," the weakness inherent in such highly suggestive marks when used in connection with medical monitoring equipment, and the lack of a sufficient showing that the goods at issue are commercially or otherwise closely related, we conclude on this record that contemporaneous use by applicant

of the mark "ACQTRAC" for its "non-invasive hemodynamic monitoring systems for vascular and cardiovascular diagnostics, comprised of monitoring and diagnostic devices for measuring hemodynamic variables," is not likely to cause confusion with registrant's mark "ACCUTRACKER" for its "ambulatory blood pressure monitors." See, e.g., In re Digirad Corp., 45 USPQ2d 1841, 1845 (TTAB 1998) [no likelihood of confusion between the mark "DIGIRAD" for gamma radiation sensors, signal processors and display apparatus for use in medical isotopic tracing and nuclear imaging and mark "DIGIRAY" and design for electronic digital x-ray system comprised of an x-ray scanning beam tube and detector for medical use].

**Decision:** The refusal under Section 2(d) is reversed.