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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Eastgate Health Care Center, Inc.

Serial No. 75/584,372

Robert H. Earp, III of Benesch, Friedlander, Coplan & Aronoff for
Eastgate Health Care Center, Inc.

Rebecca A. Smith, Trademark Examining Attorney, Law Office 110
(Chris A. F. Pedersen, Managing Attorney).

Before Hohein, Hairston and Drost, Administrative Trademark
Judges.

Opinion by Hohein, Administrative Trademark Judge:

Eastgate Health Care Center, Inc. has filed an
application to register the mark "DAYSPRING" for "providing
health care management services; namely, a professional nursing
facility."¹

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 services, so resembles the
following marks, which are owned by the same registrant, as to be

¹ Ser. No. 75/584,372, filed on November 6, 1998, which alleges dates
of first use of November 1997.

likely to cause confusion, mistake or deception: (1) the mark "DAYSPRING," which is registered for the "rehabilitation of former adolescent drug addicts";² and (2) the mark "DAYSPRING" and design, as reproduced below,



which is registered for "adult and adolescent alcohol and chemical dependency rehabilitation services."³

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We affirm the refusal to register.

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 of the

² Reg. No. 1,369,577, issued on November 5, 1985, which sets forth dates of first use of December 1, 1984; combined affidavit §§8 and 15.

³ Reg. No. 1,461,427, issued on October 13, 1987, which sets forth dates of first use of December 1, 1984; combined affidavit §§8 and 15.

goods [or services] and the similarity of the marks."⁴ Here, inasmuch as the respective marks consist of or include the arbitrary term "DAYSPRING," which in the case of registrant's "DAYSPRING" and design mark is also the portion thereof which would be utilized when asking for or about the associated services, the respective marks are identical, or substantially so, in sound, appearance and connotation for all practical purposes.⁵ Since such marks consequently engender essentially the same commercial impression, the focus of our inquiry is on whether applicant's services are so related to registrant's services that, when those services are offered under the marks at issue, confusion as to the source or sponsorship of the services is likely to occur. We note in this regard that, as a general proposition, where the respective marks are identical and/or essentially the same, as is the case herein, there need be only a viable relationship between the applicant's services and the registrant's services in order to support a holding of likelihood of confusion. See, e.g., In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1983) and In re Concordia International Forwarding Corp., 222 USPQ 355, 356 (TTAB 1983).

Applicant argues, among other things, that there is no likelihood of confusion in this case because the respective marks

⁴ 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 [or services] and differences in the marks."

⁵ Applicant, in its brief, not only does not contend otherwise, but in fact "concedes that its mark and the two cited registered marks are similar in appearance and sound."

"are not associated with closely related services that customarily move through the same channels of trade to the same general purchasers." Specifically, applicant insists, with respect to the excerpts made of record by the Examining Attorney from her search of the "NEXIS" database, that "the only similarity between Applicant's and Registrant's services is the fact that some large hospitals supply both nursing home facilities and drug and alcohol rehabilitation services under their own name." According to applicant, "[t]he distinct clienteles for whom the services are provided, the distinct services performed, the proximately [sic] of where such services are performed, the fact that Applicant and Registrant do not provide similar services, and the fact that both Applicant's and Registrant's services would likely be excluded from large hospitals providing both services strongly suggests that these services are not closely related and therefore [contemporaneous use of the respective marks] would not cause confusion to consumers."

In particular, applicant contends that:⁶

⁶ Applicant additionally asserts that "the laws of the State of Ohio, where Applicant's principal place of business is located, specifically distinguish nursing homes or residential care facilities from alcohol and drug addiction programs" by "defining nursing homes or residential care facilities to exclude alcohol or drug addiction programs." Applicant also notes that it "assumes other states specifically distinguish between operating nursing homes and operating alcohol and drug addiction programs, therefore further mandating a distinction between the services." Although applicant concludes that "these distinctions under state law tend to obviate any confusion as to the source of these respective services by, in effect, separating these classes of purchasers," we agree with the Examining Attorney that it does not appear that Ohio law "precludes any company or entity from providing both services in different locations, even side by side." More importantly, as the Examining Attorney further points out,

The nature of the respective services are nearly opposite with regard to their goals. Drug and alcohol rehabilitation centers attempt to identify and treat drug addicts, either through short term admittance to a facility or through outpatient counseling sessions. Treated persons eventually discontinue the program after a set amount of time, successful treatment, or voluntarily leaving the program to hopefully lead a life free from addiction. Nursing care facilities generally have no such short term or rehabilitational goals. Nursing care facilities provide care or living assistance for permanent residents, usually the elderly, who live within the facility. Generally, nursing homes provide their residents with assisted living until the resident's death.

The fact that some large, independent hospitals own and operate both nursing home facilities and drug and alcohol treatment facilities does not reveal an intimate relationship between these respective services nor that the respective services are closely related.

Large hospitals must cater to a large population of people having varied physical and emotional problems. The healthcare ... services provided by these large hospitals can be enormously varied and not closely related to each other. All of these services can differ dramatically in their targeted markets, their effects on their targeted markets, the needs the particular services meet, and the means used to meet those needs. Therefore, ... nursing home and alcohol and drug treatment services, which make up at most small components [of what the Examining Attorney refers to as] "health care services," cannot be deemed "per se" closely related based on the fact that these respective services are offered by some large hospitals.

Applicant also maintains that "the services in issue are not related or marketed in such a way that they would be

"applicant is applying for a registration that is national in scope" and thus, for registration purposes, "it is irrelevant that Ohio law

encountered by the same persons in situations that would create the incorrect assumption that they originate from the same source." According to applicant:

Purchasers seeking nursing home services will not encounter, nor wish to encounter, drug and alcohol rehabilitation services. And because these respective services are not complementary (each service satisfies a specific, non-shared need), they target dramatically different consumer groups. Therefore, because Applicant and registrant do not offer similar services to similar groups of people, there is no opportunity for Applicant's mark to cause confusion with Registrant's mark[s].

....

Thus, [and] because Registrant does not provide nursing care services and Applicant does not provide drug and alcohol treatment services, it does not appear that these marks and their corresponding services will diverge from their established, likely-to-continue trade channels, regardless of the fact the larger hospitals can offer such services under their own name. There is no opportunity nor need for Applicant or Registrant to cross-promote their services to the other's consumer group. Therefore, without any similar established, likely to continue channels of trade, consumers of these services are not likely to encounter the mark of the other.

In addition, applicant asserts that the conditions under which the respective services are purchased are "dramatically different" and that "the purchasers of those services, though typically not the same, would be ultra-discriminating," so that there would be either no likelihood of confusion or no more than "a *de minimis* likelihood of confusion." Specifically, because applicant's professional nursing facility

may distinguish between the nature of these two services."

services generally are expensive by their very nature, applicant urges that purchasers of such services must be considered to be highly discriminating and thus are "presumed to not buy causally, but only after careful consideration." In view thereof, and because "a decision made by a concerned relative to admit an elderly relative to a professional nursing care facility is an important and ... expensive proposition," applicant insists that "that decision maker would be sophisticated enough," in the rare instance where such person would also have occasion to encounter registrant's drug and alcohol rehabilitation services, "to be ultra-discriminating, especially when the everyday care of a loved one is involved." Furthermore, applicant contends that, to the extent there is any potential for confusion, such is clearly *de minimis* due to the fact that, "because nursing care facility services are distinct from drug and alcohol rehabilitation services, they traditionally cater to diametrically opposed groups of people who require distinct services which are not complimentary [sic]."

We are constrained to agree, however, with the Examining Attorney that confusion as to origin or affiliation is likely to take place. As she correctly points out, it is well settled that goods or services need not be identical or even competitive in nature in order to support a finding of likelihood of confusion. Instead, it is sufficient that the goods or services 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 situations that would

give rise, because of the marks employed in connection therewith, to the mistaken belief that they originate from or are in some way associated with the same entity or provider. See, e.g., Monsanto Co. v. Enviro-Chem Corp., 199 USPQ 590, 595-96 (TTAB 1978) and In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978).

While we concur with applicant that the mere rubric in the Examining Attorney's brief that "[t]he respective services are both health care services and fall within the health care field" is insufficient, given the wide diversity therein, to show that the services at issue herein are indeed closely related, the Examining Attorney has made of record a number of excerpts from her search of the "NEXIS" database to demonstrate that "companies that provide nursing care services also provide alcohol or drug rehabilitation services and that, as a result, the services are related."⁷ Specifically, and contrary to applicant's contention on appeal that such excerpts are limited solely to those which involve "large hospitals,"⁸ the following articles "demonstrate that it is not uncommon for companies to provide both [nursing

⁷ Although the Examining Attorney, in support of her position, also points out that "applicant has even admitted in ... response to the first Office Action ... that the applicant 'does provide some ancillary alcohol and drug rehabilitation services,'" we note that in its request for reconsideration, applicant retracted such admission. In particular, applicant indicates that while its counsel "mistakenly suggested" that applicant's facility offered ancillary alcohol and drug rehabilitation services, applicant categorically states that its "nursing care facility provides no alcohol and drug rehabilitation services, nor is it licensed to do so"

⁸ Applicant's position, we note, appears at odds with the admission in its response to the first Office Action, in which it conceded (*italics added*) that: "The Examining Attorney's research indicates that *many*

care facilities and alcohol and other rehabilitation services] and therefore [that] consumers are likely to believe that the services come from the same source" (**emphasis added**):

"Stephen Rankin has been named director of Life Care Center of Elyria, a 90-bed nursing center that will open March 14. It will specialize in Alzheimer's services, subacute care, **skilled nursing care and rehabilitation services.**" -- Plain Dealer, February 24, 1999;

"Memorial, the city's only hospital, would retain emergency room services and expand **nursing home**, psychiatric and mental health and **drug and alcohol rehabilitation services.**" -- Buffalo News, January 14, 1998;

"Tustin Hospital Medical Center is reopening its doors after having been closed for over a year. Only this time, instead of catering to a 'well-heeled' clientele, the hospital will focus on managed care patients and will include a **nursing home**, acute care facility, and a **drug and alcohol rehabilitation center.**" -- Orange County Business Journal, July 28, 1997;

"St. Peter's expansion and renovation plan ... includes the previously announced construction of a four-story addition to the front of the hospital ... and a 160-bed **nursing home** and day care center to be constructed in Guilderland.

....
The four-year expansion program will begin with ground-breaking ... for the \$13.6 million **nursing home**, which will be located next to St. Peter's **Alcohol Rehabilitation Center.**" -- Capital District Business Review, June 8, 1992;

"In 1971, he helped establish **alcohol rehabilitation programs** at several centers, including Manor Care **nursing home** in Silver Spring" -- Washington Times, February 22, 1991; and

hospitals or companies that operate nursing care facilities also provide alcohol or drug rehabilitation centers."

"Manor Healthcare Corp., one of the nation's leading owners and operators of nursing homes, is entering the Sacramento market with two large projects

....
Aside from its **nursing homes**, the company has several other health-related businesses, including an **alcohol rehabilitation hospital**. However, the company's prime focus is the elderly care market." -- Business Journal-Sacramento, April 27, 1987.

As the Examining Attorney observes in her brief, not only is it the case that "applicant has provided no evidence that the companies mentioned in the articles are large hospitals," but it is clear that "even a small company or hospital may provide several types of medical care that could include nursing care facilities and [alcohol and/or drug] rehabilitation services." Most importantly, the "NEXIS" excerpts readily demonstrate that the same entities, including health care businesses other than just hospitals, routinely offer both nursing care facilities and alcohol and/or drug rehabilitation centers. In consequence thereof, it is likely that consumers would regard applicant's professional nursing facility services and registrant's adult and adolescent drug and alcohol rehabilitation services to be closely related as to their source or sponsorship, particularly when, as here, the respective services are provided under marks consisting of or dominated by the arbitrary term "DAYSPRING."

Moreover, as the Examining Attorney convincingly argues in her brief, it is simply not the case that consumers of applicant's and registrant's services are mutually exclusive nor is a likelihood of confusion avoided by the fact that the

services at issue would tend to be selected with care and deliberation. Plainly, nursing care facilities are not limited exclusively to the long term care of the elderly, as urged by applicant, but are also directed, for example, to the care and rehabilitation of accident victims and joint replacement patients whose recovery periods require more time for recovery than health insurance will allow for their hospitalization. Similarly, it is often not uncommon for alcoholics and those suffering other forms of drug and/or substance abuse or dependency to be sufficiently incapacitated, at least at the beginning of their rehabilitation programs, as to require professional nursing care.

Thus, we concur with the Examining Attorney that, while the respective services are specifically different and their selection is subject to discrimination and care rather than based upon impulse, it is still the case that "the consumers for each service could very well be the same since the need for specific medical care is not relegated to one particular section of the population" and that "many consumers of both types of services are persons other than the patient[s] themselves." Furthermore, as the Examining Attorney persuasively notes in this regard:

Patients needing rehabilitation for [alcohol or] substance abuse are often brought to treatment by family members and friends. Similarly, patients needing nursing care facilities often have these decisions made for them by family members and friends. As a result, the consumers may be the exact same people. A consumer who has been tasked with finding nursing home facilities for one family member may [have to] seek treatment for another family member or friend for alcohol [or drug] rehabilitation services. Confronted with both [applicant's and

registrant's essentially identical] marks, the consumer is very likely to be confused that the services come from the same source.

Finally, to the extent that we may nevertheless harbor any doubt as to the conclusion that applicant's nursing care facilities are so closely related to registrant's adolescent and adult alcohol and drug rehabilitation services that the provision thereof under marks which consist of or prominently feature the arbitrary term "DAYSPRING" would be likely to cause confusion as to the origin or affiliation of the respective services, we resolve such doubt, as we must, in favor of the registrant. See, e.g., In re Hyper Shoppes (Ohio) Inc., 837 F.2d 840, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988) and In re Pneumatiques, Caoutchouc Manufacture et Plastiques Kleber-Colombes, 487 F.2d 918, 179 USPQ 729 (CCPA 1973).

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