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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Precious Home Companion

Serial No. 78441844

David A. Payne of Medlen & Carroll, LLP for Precious Home Companion

Nelson B. Snyder III, Trademark Examining Attorney, Law Office 107 (J. Leslie Bishop, Managing Attorney)

Before Seeherman, Bucher and Walsh, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Precious Home Companion has appealed from the final refusal of the Trademark Examining Attorney to register PHC and design, as shown below, for "in-home personal non-medical care services, namely, personal chef services and personal care assistance of activities of daily living, such as bathing, grooming, and personal mobility for

mentally or physically challenged people.”¹ Applicant has described the mark as consisting “of a rooftop over the stylized letters, P, H, and C, with a heart shaped design within the letter C.”



Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant’s mark so resembles the mark PHC PARACELSUS HEALTHCARE CORPORATION and design, as shown below, with the words HEALTHCARE CORPORATION and the design of a caduceus disclaimed, previously registered for “healthcare services including acute hospital skilled nursing homes and psychiatric programs,”² that, as used in connection with applicant’s services, it is likely to cause confusion or mistake or to deceive.



¹ Application Serial No. 78441844, filed June 25, 2004, and asserting first use and first use in commerce as of August 31, 1997.

² Registration No. 1528932, issued March 7, 1989; Section 8 & 15 affidavits, respectively, accepted and acknowledged.

Applicant and the Examining Attorney have filed appeal briefs.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We turn first to a consideration of the services. The services identified in the cited registration are "healthcare services including acute hospital skilled nursing homes and psychiatric programs." Because the general term "healthcare services" is not limited to the more particular language "acute hospital skilled nursing homes and psychiatric programs," the Examining Attorney has asserted that the registration includes home healthcare services as well as those provided in acute hospital

skilled nursing homes and psychiatric programs. Although we recognize that examination policy frowns on the use of the term "including" in identifications, see TMEP §1402.03(a),³ we must consider the identification as it appears in the cited registration, and therefore we agree with the Examining Attorney that the identification must be viewed as healthcare services generally, with "acute hospital skilled nursing homes and psychiatric programs" merely indicating some of the healthcare services that are covered by the registration.

There is a clear relationship between general healthcare services and the "in-home personal non-medical care services, namely, personal chef services and personal care assistance of activities of daily living, such as bathing, grooming, and personal mobility for mentally or physically challenged people" that are identified in applicant's application. The services identified in the cited registration encompass healthcare services rendered within the patient's home, the same venue in which applicant's services are rendered. Although applicant's

³ This section of the Trademark Manual of Examining Procedure provides that "The identification should state common names for goods or services, be as complete and specific as possible and avoid indefinite words and phrases. The terms 'including,' 'comprising,' 'such as,' 'and the like,' 'and similar goods,' 'products,' 'concepts,' 'like services' and other indefinite terms and phrases are almost always unacceptable."

services are identified as "non-medical," these services are health related because they involve caring for patients' personal assistance needs. The Examining Attorney has submitted third-party registrations showing that healthcare services and personal care services may be offered by a single entity under the same mark. See Registration No. 2255542 for, inter alia, providing home healthcare services, namely, skilled nursing, intravenous therapy, personal care assistance and companionship services; Registration No. 2333143 for, inter alia, home health care services, nursing care and personal care assistance, namely food preparation, bathing, dressing, ambulation and grooming; and Registration No. 2399959 for, inter alia, health care, nursing homes, personal care assistance. The Examining Attorney has also made of record web pages showing that companies offer home healthcare by skilled nurses as well as non-medical personal care. See, for example, All Care Visiting Nurse Association, www.allcarevna.org, which provides skilled nursing and also provides home health aides who assist clients with bathing and who prepare meals, and Aurora Visiting Nurse Association, www.aurorahealthcare.org, which offers home health services including skilled nursing services, post-surgical care, transplant care and cardiac care, and also

provides home health aides who give assistance with bathing, grooming, dressing and exercising. In addition, the Examining Attorney has shown that applicant itself hires not only home health aides but also registered nurses.

Thus, the du Pont factors of the relatedness of the services and the channels of trade favor a finding of likelihood of confusion.

Moreover, even if we were to treat the registrant's services as being limited to the type of healthcare services exemplified by "acute hospital skilled nursing homes and psychiatric programs," these services and applicant's identified services must still be considered to be related. Despite applicant's argument that applicant's and the registrant's services are distinct and different, it is not necessary that the goods or services be similar or competitive, or even that they move in the same channels of trade, to support a holding of likelihood of confusion. It is sufficient that the respective goods or services are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer. See In re

International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978).

The in-home personal non-medical care services identified in applicant's application might well be utilized by someone who has previously used the healthcare services listed in the cited registration. For example, those services might be rendered after a patient has been in an acute skilled nursing home or psychiatric program and then returns home and requires the personal care offered by applicant. Or a person who had previously used the registrant's specified services, or had a loved one who used such services, might at some future time require the in-home personal care services rendered by applicant. In either situation, consumers would be exposed to both types of services in situations where the different services would be viewed as natural progressions in the health recovery process.

Moreover, the Examining Attorney has submitted evidence to show the relatedness of skilled nursing services and personal care services. See, for example, Registration No. 2460725 for, inter alia, providing skilled nursing homes, home health care services, and personal care services; Registration No. 2811284 for, inter alia, providing nursing homes; and home care services, namely,

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personal care assistance for activities of daily living such as bathing, grooming and personal mobility; Registration No. 2850729 for, inter alia, skilled nursing care; nursing homes; home nursing aid services, namely personal grooming; and Registration No. 3010096 for, inter alia, skilled nursing care and personal care assistance of activities of daily living such as personal grooming.

Third-party registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

This brings us to a consideration of the marks. It is a well-established principle that, in articulating reasons for reaching a 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, 224 USPQ 749, 751 (Fed. Cir. 1985). Applicant's mark consists of the letters PHC, with the design of a rooftop and a heart. It is the letters PHC that are the dominant part of the mark, since it is the letters that can be articulated

and therefore the part of the mark by which people will refer to or call for the services. See *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987) (if a mark comprises both a word and a design, then the word is normally accorded greater weight because it would be used by purchasers to request the goods or services). As for the cited mark, applicant has acknowledged, in its response to the first Office action, that PHC is the dominant part of that mark: "the two registrations cited by the Examining Attorney, both of which are word marks with PHC as the dominant element."⁴ We agree that PHC is the dominant element. Although the cited mark also contains the words PARACELSUS HEALTHCARE CORPORATION, PHC is the first part of the mark and appears in larger letters. Consumers are likely to assume that PHC is an initialism for PARACELSUS HEALTHCARE CORPORATION, and use the abbreviated initials to request the services. We also note that the cited registration contains the design of a caduceus, but again, this design is entitled to lesser weight. Not only is a caduceus highly suggestive of healthcare services, but as depicted in the mark it makes

⁴ Initially the Examining Attorney also cited a second registration as a bar; this refusal was subsequently withdrawn when that registration was cancelled for failure to file a Section 8 affidavit of use.

so little impression that applicant describes the registered mark as being merely "a standard character mark with no design element." Brief, p. 2.

Therefore, considering the marks in their entireties, but giving greater weight to the more dominant elements, we find that, due to the presence of the identical letters PHC in both marks, the marks are similar in appearance, pronunciation, connotation and commercial impression. In other words, although there are some differences in the marks, these differences are not sufficient to distinguish them. The du Pont factor of the similarity of the marks favors a finding of likelihood of confusion.

Applicant has asserted that the consumers of applicant's and the registrant's services are sophisticated and, in particular, the registrant's services would be "sought by referral from health care professionals, who as a group are well educated, highly trained, and among the most sophisticated of consumers." Brief, p. 4. Applicant also asserts that such professionals would be able to distinguish between different services in the marketplace. As to the latter point, again, the question is not whether consumers can distinguish between the services themselves, but between the sources of the services. More importantly, whether or not the registrant's healthcare services may be

referred by professionals, applicant's in-home personal non-medical services may be sought by people who require home health aides for themselves or for family or friends. These are ordinary purchasers who have no particular sophistication. Although applicant asserts that the services "tend to be expensive," there is no evidence as to their cost. As identified, it appears that applicant's services could be used on a part-time basis, such as for a few hours each week. Thus, it is not clear that the consumers for applicant's identified services are likely to exercise more than ordinary care in choosing such services. As a result, even if consumers note the specific differences in the marks, they are still likely to believe, because of the dominant element PHC in both marks, and the relatedness of the services, that the services emanate from a single source. Accordingly, we cannot find that the du Pont factor of the conditions of purchase favors a finding of no likelihood of confusion.

Finally, applicant asserts that there has been concurrent use of both marks since 1997 without any evidence of actual confusion. We note, however, that there is no evidence of the extent of use by either applicant or registrant that would enable us to conclude that there has been a sufficient opportunity for confusion to occur, if

confusion were likely. Nor do we have any information about the registrant's experience with respect to any incidents of actual confusion. As the Court stated in *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003), the lack of evidence of actual confusion carries little weight, especially in an ex parte context. Thus, we treat this du Pont factor as neutral.

Considering all the relevant du Pont factors, we find that the Examining Attorney has demonstrated that applicant's mark for its identified services is likely to cause confusion with the registered mark.

Decision: The refusal of registration is affirmed.