

This Opinion is not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re AccentCare, Inc.

Serial No. 85712363

Ben L. Wagner of Mintz Levin Cohn Ferris Glovsky Popeo for AccentCare, Inc.

Brian P. Callaghan, Trademark Examining Attorney, Law Office 108 (Andrew Lawrence, Managing Attorney).

Before Cataldo, Mermelstein and Gorowitz,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

AccentCare, Inc. (“Applicant”) seeks registration in standard characters on the Principal Register of the mark TEXAS HOME HEALTH for the following services:

behavioral health services; home health care services; hospices; managed health care services; nursing care; nursing services; occupational therapy services; physical therapy; speech therapy services

in International Class 44 and

personal care assistance of activities of daily living, such as bathing, grooming and personal mobility for mentally or physically challenged people; social services, namely, companionship services for the elderly and disabled

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in International Class 45. During prosecution, Applicant amended the involved application to seek registration under Section 2(f) of the Trademark Act, 15 U.S.C. §1052(f), based upon a showing of acquired distinctiveness.¹ In addition, Applicant disclaimed HOME HEALTH apart from the mark as shown.²

The Trademark Examining Attorney refused registration of Applicant's mark on the ground of a likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), in view of nine registrations, all owned by the same entity, for marks consisting in part of the terms TEXAS HEALTH, including Registration No.

3921474 for the mark  **Texas Health** for

comprehensive health care services; hospital services; addiction treatment services; mental health services; mobile medical diagnostic services and home healthcare services

in International Class 44.³ Registration No. 3921474 issued on the Principal Register with a claim of acquired distinctiveness under Section 2(f) of the

¹ Applicant proposed this amendment at the suggestion of the Trademark Examining Attorney in order to traverse a refusal to register under Trademark Act Section 2(e)(2), 15 U.S.C. §1052(e)(2).

² Application Serial No. 85712363 was filed on August 24, 2012, based upon Applicant's allegation of first use of the mark anywhere and in commerce under Section 1(a) of the Trademark Act in connection with the Class 44 services on November 11, 2001 and in connection with the Class 45 services on June 23, 2007.

³ The marks in Registrant's following five registrations include the interlocking circular design displayed above, and also include the wording TEXAS HEALTH RESOURCES (Registration No. 3773835); TEXAS HEALTH HARRIS METHODIST (Registration No. 3769616); TEXAS HEALTH ARLINGTON MEMORIAL HOSPITAL (Registration No. 4031790); TEXAS HEALTH PRESBYTERIAN (Registration No. 3769617); and TEXAS HEALTH PHYSICIANS GROUP (Registration No. 3917298). The marks in Registrant's remaining three registrations are in standard characters, and consist of the wording TEXAS HEALTH ORTHOPEDIC DESTINATION (Registration No. 4010702); TEXAS

Trademark Act, 15 U.S.C. §1052(f), in part as to “TEXAS” and a disclaimer of “HEALTH” apart from the mark as shown. “Color is not claimed as a feature of the mark.” “The mark consists of the wording ‘TEXAS HEALTH’ and to the left of the wording is a design of a circular shape comprised of interlocking lines.”⁴

Applicant filed a request for reconsideration and appealed the final refusal. The Examining Attorney denied the request for reconsideration. The refusal has been fully briefed by Applicant and the Examining Attorney.

Based upon the record and the arguments made, we affirm the likelihood of confusion refusal.

Likelihood of Confusion

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, however, two key considerations are the similarities between the marks and the similarities between the goods 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).

HEALTH ORTHOPEDIC DESTINATION DALLAS-FORT WORTH (Registration No. 4010703); and TEXAS HEALTH ORTHOPEDIC DESTINATION NORTH TEXAS (Registration No. 4010704). All nine of the cited registrations recite substantially similar services.

⁴ Registration No. 3921474 issued on February 22, 2011.

Family of Marks Asserted by Examining Attorney

In his first Office Action, issued on December 18, 2012, the Examining Attorney referred to the cited registrations as a “family,” stating: “both applicant’s mark and each of the registrant’s family of marks features the formative terms ‘TEXAS’ and ‘HEALTH’....” Applicant, in its briefs, presents arguments directed toward Registrant’s asserted “family” of marks. In his brief on appeal, the Examining Attorney clarifies that he is not asserting that the marks in the cited registrations comprise a family of marks for purposes of this appeal.⁵

To be clear, a “family of marks” may be established *in an inter partes proceeding* where there is evidence that a group of marks having a shared characteristic are advertised and promoted together. *See J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889, 1891 (Fed. Cir. 1991). The mere existence of similar registrations, in this case, the cited registrations containing the common term “TEXAS HEALTH,” does not per se establish a family. Rather there must be evidence of recognition by the public that the shared characteristic (or “family surname”) is indicative of a common origin. *Id.* It is settled, however, that an Examining Attorney, lacking the resources to establish a “family of marks,” should refrain from advancing such an argument during ex parte prosecution. *See In re Hitachi High-Technologies Corp.*, 109 USPQ2d 1769, 1772 (TTAB 2014); and *In re*

⁵ 9 TTABVUE 16, n. 2. Record citations are to TTABVUE, the Trademark Trial and Appeal Board’s publically available docket history system. *See Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014).

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Mobay Chem. Co., 166 USPQ 218, 219 (TTAB 1970).⁶ Accordingly, the Examining Attorney's assertion that the marks in the cited registrations comprise a family of marks, as well as Applicant's arguments directed toward Registrant's putative family of marks, will be given no further consideration. "Each cited registration must stand on its own as a basis for refusal under Section 2(d)." *See Hitachi*, 109 USPQ2d at 1772.

Registration No. 3921474

For purposes of our likelihood of confusion determination herein, we will concentrate our discussion on cited Registration No. 3921474 for the mark



comprehensive health care services; hospital services; addiction treatment services; mental health services; mobile medical diagnostic services and home healthcare services.

If likelihood of confusion is found as to the mark and services in this registration, it is unnecessary to consider the other cited registrations because they identify identical or substantially similar services. Conversely, if likelihood of confusion is not found as to the mark and services in this registration, we would not find likelihood of confusion as to the mark and services in the other cited registrations.

⁶ Indeed, the Examining Attorney has not established on the record of this case that the nine marks in the cited registrations are advertised and promoted together such that we may find they comprise a family of marks.

Scope of Protection Accorded the Cited Mark

As Applicant notes, this mark is registered on the Principal Register with a claim of acquired distinctiveness under Section 2(f) in part as to TEXAS and with a disclaimer of HEALTH. Applicant argues that “the cited marks themselves are weak because of their replete descriptiveness,”⁷ and thus entitled to only a narrow scope of protection.⁸

We agree that the cited mark is conceptually weak. Nonetheless,

The Court of Appeals for the Federal Circuit and the Trademark Trial and Appeal Board have recognized that even a weak mark is entitled to protection against the registration of a similar mark for closely related goods or services. *See King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 1401, 182 USPQ 108, 109 (C.C.P.A. 1974).

TMEP §1207.01(b)(ix) (January 2015). As a result, we must determine whether the Applicant’s involved mark and the mark in cited Registration No. 3921474, issued on the Principal Register with a claim of acquired distinctiveness in part as to TEXAS, and a disclaimer of HEALTH, are similar and identify services that are closely related.

The Services

We turn to the *du Pont* factor involving the relatedness of Applicant’s services and Registrant’s services. It is settled that in making our determination, we must

⁷ 7 TTABVUE 12. Record citations are to TTABVUE, the Trademark Trial and Appeal Board’s publically available docket history system. *See Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014).

⁸ The cited registration is entitled to a presumption of validity under Trademark Act Section 7(b), 15 U.S.C. §1057(b), that may not be attacked in an *ex parte* proceeding. We construe Applicant’s argument that the cited mark is “descriptive” as directed to the strength of the registration, rather than its validity.

look to the services as identified in the application vis-à-vis those recited in the cited registration. *See Octocom Sys., Inc. v. Houston Computers Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); and *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011). It is not necessary that the respective services be 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 services are related in some manner, or that the conditions and activities surrounding the marketing of the 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 originated from the same producer. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991).

In this case, Applicant's Class 44 services include "behavioral health services, home health care services, and managed health care services." These services are identical in part to Registrant's "home healthcare services." Further, these services appear to be encompassed by Registrant's broadly worded "comprehensive health care services." Thus, as identified, Applicant's services in Class 44 are identical in part to Registrant's services.

With regard to Applicant's Class 45 services, the Examining Attorney has made of record evidence from commercial and informational Internet websites showing that third parties provide these services as well as services identified in the cited registration. The following examples are illustrative:

(December 18, 2012 Office Action)

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24/7 NY Aids, Inc. provides companionship for the elderly, mobility assistance, and home health care services
247nyaides.com;

Ambi's Home Health Care, LLC provides companionship services for the elderly and home health care services
Ambishomehealthcare.com;

Erwine Home Health and Hospice, Inc. provides bathing, grooming, personal mobility services and home health care services
Erwinehomehealth.com; and

NYHC New York Health Care provides mobility assistance, companionship for the elderly, bathing, mobile medical diagnostic services and home health care services
Nyhc.com.

(July 12, 2013 Office Action)

Inova NVA Home Health provides personal care assistance to the elderly and home health care services
Inova.org; and

ValleyHealth provides assistance in daily living such as bathing and grooming and home health care services
Valleyhealthlink.com.

This evidence suggests that certain of Registrant's services may emanate from the same sources as certain of Applicant's services identified in Class 45, and further may be identified under the same mark.

In short, as identified, Applicant's services in Class 44 are identical in part to Registrant's services. In addition, the evidence of record suggests that Applicant's Class 45 services are related to Registrant's services inasmuch as it demonstrates that third parties provide both under the same marks. As such, this *du Pont* factor favors a finding of likelihood of confusion as to both classes of services.

Channels of Trade

In making our determination regarding the relatedness of the channels of trade, we look as we must to the services as identified in the involved application and cited registration. *See Octocom Systems, Inc. v. Houston Computers Services Inc.*, 16 USPQ2d at 1787. *See also Paula Payne Products v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973).

Because the services identified in Class 44 in the application are in part identical to the services in the cited registration, we must presume that the channels of trade and classes of purchasers are to that extent the same. *See Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) (“Given the in-part identical and in-part related nature of the parties’ goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade”); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) (“Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers”).

With regard to applicant’s Class 45 services, inasmuch as there are no restrictions recited either in Applicant’s services or Registrant’s services, it is presumed that the services at issue move in all channels of trade normal for such services, and that they are purchased by all of the usual consumers for such services. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981), citing *Kalart Co., Inc. v. Camera-Mart, Inc.*, 258 F.2d 956, 119 USPQ 139 (CCPA 1958). Here, the Examining

Attorney's third-party evidence, excerpted above, clearly suggests that the services are not only related, but may in fact be offered by the same businesses, and to the same customers. As such, this *du Pont* factor is also favors a finding of likelihood of confusion as to both classes of services.

Similarity of the Marks

We turn then to our comparison of the two marks in their entireties and, in doing so, look to their appearance, sound, connotation and commercial impression. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). We keep in mind that, under this factor, the test is not whether the marks can be distinguished when subjected to a side-by-side comparison; “[i]nstead, it is the similarity of the general overall commercial impression engendered by the marks which must determine, due to the fallibility of memory and the consequent lack of perfect recall, whether confusion as to source or sponsorship is likely.” *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d at 1741; *see also, Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted). Thus, although we place the marks alongside each other in the following paragraph for purposes of this decision, consumers will rarely have the luxury of viewing the marks in such a manner, relying by necessity on their less than perfect memories.

Turning to our consideration of the marks at issue, we note initially that, with regard to Applicant's Class 44 services, “[w]hen marks would appear on virtually identical ... services, the degree of similarity [of the marks] necessary to support a

conclusion of likely confusion declines.” See *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 1034 (1994). See also *ECI Division of E-Systems, Inc. v. Environmental Communications Inc.*, 207 USPQ 443, 449 (TTAB 1980).

In this case, Applicant’s TEXAS HOME HEALTH mark is similar to Registrant’s



mark to the extent that both share the identical terms “TEXAS” and “HEALTH.” As a result, the marks appear similar inasmuch as Applicant’s mark incorporates all of the wording in Registrant’s mark. For the same reason the marks, when spoken, sound similar. We note Applicant’s argument that its mark places the term “HOME” between the terms comprising Registrant’s mark “breaking up any mental association that would link the Applicant’s mark with the cited marks.”⁹ Applicant further argues that “by putting ‘HOME’ directly before ‘Health,’ it creates an alliterative feature.”¹⁰ We agree that the presence of the term “HOME” in Applicant’s mark creates a difference from Registrant’s mark, which does not include that term. Nonetheless, the marks are more similar than dissimilar in appearance and sound based upon their shared terms.

We observe that the term “TEXAS” is geographically descriptive; however, the term appears to have the same meaning in both marks, denoting the State of Texas. Similarly, the disclaimed terms “HEALTH” in Registrant’s mark and “HOME HEALTH” in Applicant’s mark appear to be at least highly descriptive of the health-

⁹ 7 TTABVUE 12.

¹⁰ *Id.*

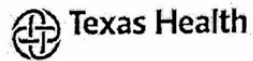
related services recited in the application and registration, but nonetheless related in meaning and similar in pronunciation. As a result, Applicant's mark connotes home healthcare services provided in Texas and Registrant's mark connotes the somewhat broader meaning of healthcare services provided in Texas. The meaning of Applicant's mark thus appears to be subsumed by that of Registrant.

Finally, we observe that Registrant's mark includes an abstract design of a circular shape comprised of interlocking lines, which is absent from Applicant's mark. The design appears to be arbitrary as used in connection with Registrant's services while, as discussed above, the wording TEXAS HEALTH is geographically descriptive and generic, respectively, of Registrant's services. However, the circular abstract design is not necessarily that portion of Registrant's mark that will be impressed upon consumers.

A number of cases reflect the principle that if a mark comprises both a word and a design, the word is normally accorded greater weight because it would be used by purchasers to request the goods or services. *See In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987); and *Kabushiki Kaisha Hattori Tokeiten v. Scuotto*, 228 USPQ 461, 462 (TTAB 1985). In this case, we find that the word portion of Registrant's mark is at least an equally dominant element of it because consumers would use it to call for Registrant's services. In so determining, we do not discount or ignore the circular design element in Registrant's mark. The design is relatively prominent in size and appears distinctive as applied to the services. Nonetheless, the abstract design would not be used by consumers to search or call

for Registrant's services. Rather, the term TEXAS HEALTH, displayed in large, prominent letters to the right of the design, is far more likely to be articulated by consumers requesting Registrant's services.

Viewed as a whole, Applicant's TEXAS HOME HEALTH mark and Registrant's



are more similar than dissimilar in appearance and sound, and give the impression of being variations on each other that nonetheless point to a common source. In view of the foregoing, we find that the similarities in the marks outweigh the differences, and that this *du Pont* factor also weighs in favor of a finding of likelihood of confusion.

Conclusion

Neither the Examining Attorney nor Applicant has presented arguments or evidence with regard to any of the additional *du Pont* factors. Accordingly, we treat them as neutral. Because the marks are similar, the services are identical in part and otherwise related, and offered in the same trade channels, we find that Applicant's mark, if used in association with the services identified in the application, is likely to cause confusion with the registered mark in connection with the services recited in the registration.

Decision: The likelihood of confusion refusal to register Applicant's mark is affirmed as to both classes.