

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB FEB. 7, 00

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Vista Hospice Care, Inc.

Serial No. 75/229,462

Joseph W. Mott of Jennings, Strouss & Salmon for applicant.

Mark T. Mullen, Trademark Examining Attorney, Law Office
101 (Jerry Price, Managing Attorney).

Before Hohein, Walters and Holtzman, Administrative
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Vista Hospice Care, Inc. has filed a trademark
application to register the mark shown below for "hospice
services, namely, providing health care and counseling
services for terminally ill patients and their families."¹

¹ Serial No. 75/229,462, in International Class 42, filed January 22, 1997, based on use in commerce, alleging December 20, 1996, as a date of first use and January 6, 1997, as a date of first use in commerce. The application includes the following statement: "The drawing is lined for color, which is part of the mark. The colors are rose and purple." We note that although the design element of the mark in the



The Trademark Examining Attorney has finally refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the previously registered mark shown below², that, if used on or in connection with applicant's services, it would be likely to cause confusion or mistake or to deceive. While the cited mark is registered for a lengthy list of services, the Examining Attorney indicated the following services as pertinent to this refusal:

"Underwriting and administrative services, on a prepayment basis, relating to emergency medical care; prepaid financing and administration of medical care,

drawing is lined for color, the mark is reproduced in this decision without the color lining.

² Registration No. 1,963,697, issued March 26, 1996, to CFS Health Group, Inc.

pharmaceutical care and related health care services," in International Class 36; "health care services in the nature of a health maintenance organization and a preferred provider organization ...," in International Class 42; and, as a collective membership mark, an "organization of persons and medical providers interested in health maintenance, preferred provider organizations, preventive medicine, prepaid medical plans, reduced health costs, and programs on fitness, prenatal care, substance abuse and other health-related topics."



Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, 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 probative facts in evidence that are relevant to the factors bearing on the likelihood of

confusion issue. See, *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In the analysis of likelihood of confusion in this case, two key considerations are the similarities or dissimilarities between the marks and the similarities or dissimilarities between the services. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We turn, first, to a determination of whether applicant's mark and the registered mark, when viewed in their entireties, are similar in terms of appearance, sound, connotation and commercial impression. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See, *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975) and *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

The registered mark consists entirely of a design ("hands and heart design") and we find this design to be

substantially similar in appearance and connotation to the "hands and heart design" portion of applicant's mark. Both designs consist of two elements which, regardless of whether these elements are considered to be hands or something else, are very similar and are arranged so that the central open space forms a heart. The differences in the respective marks between these two elements and the manner in which they come together at the bottom are not significant. We find applicant's arguments to the contrary to be unpersuasive. Further, these designs would appear to be arbitrary or, at most, vaguely suggestive of a caring attitude, in connection with applicant's and registrant's services.

Considering applicant's mark alone, the word element in applicant's mark (VISTACARE and the slogan, "LIVE ALL THE DAYS OF YOUR LIFE," which appears in small letters beneath VISTACARE³) appears below the "hands and heart design" and shares equal, but separate, prominence with that design. However, when applicant's mark and registrant's mark are considered in their entireties, the substantial similarities between the "hands and heart design" elements of the two marks leads us to conclude that

³ We do not find the style of lettering of the words in applicant's mark to be a significant element of the overall commercial impression of applicant's mark.

the overall commercial impressions of the two marks are substantially similar. It is likely that consumers familiar with registrant's mark would perceive applicant's mark, if used in connection with similar or related services, as indicating services related to or sponsored by registrant.

We consider, next, the respective services of applicant and registrant. Registrant's relevant identified services in International Class 42 are healthcare services provided by a health maintenance organization or a preferred provider organization. While applicant argues that such services differ from its hospice services, there is no evidence to this effect in the record. Rather, registrant's broad identification of services reasonably encompasses healthcare services in the nature of hospice services. As applicant's identification of services reflects, healthcare is provided to terminally ill patients in connection with its hospice services.

Registrant's mark is also a collective membership mark, identifying an organization as indicated therein. As an entity rendering healthcare in the nature of hospice services, applicant's use of a mark that is confusingly similar to registrant's mark would likely be perceived by

the relevant public as indicating applicant's membership in, or sponsorship by, registrant's organization.⁴

Therefore, we conclude that in view of the similarity in the commercial impressions of applicant's mark and registrant's mark, their contemporaneous use on the services involved in this case is likely to cause confusion as to the source or sponsorship of such services.

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

G. D. Hohein

C. E. Walters

T. E. Holtzman
Administrative Trademark Judges,
Trademark Trial and Appeal Board

⁴ Since we have found sufficient similarity and/or relationship between applicant's services and registrant's services in Classes 42 and 200, it is not necessary to our finding of likelihood of confusion to determine if there is any relationship between applicant's services and registrant's underwriting, administrative and financial services identified in International Class 36, nor does the record contain any evidence or argument in this regard.