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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Chilton and Leste Consultants

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Serial No. 75/637,523

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Rod S. Berman of Jeffer, Mangels, Butler & Marmaro LLP for Chilton and Leste Consultants.

Alicia P. Collins, Trademark Examining Attorney, Law Office 115 (Tomas Vlcek, Managing Attorney).

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Before Hanak, Hohein and Walters, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

Chilton and Leste Consultants has filed an application to register the mark "TENDER LOVING CARE TLC HOME HOSPICE" and

design, as reproduced below,

for "hospice services."[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 mark "TENDER LOVING CARE" and design, which is registered, as illustrated below,

for "home nursing services,"[2] as to be likely to cause confusion, or mistake or to deceive.

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

The determination under Section 2(d) is based on an analysis of all of the facts in evidence which are relevant to

[1] Ser. No. 75/637,523, filed on February 8, 1999, which alleges a date of first use anywhere of June 30, 1995 and a date of first use in commerce of October 1, 1995. The terms "CARE" and "HOME HOSPICE" are disclaimed in accordance with §6(a).

[2] Reg. No. 1,313,962, issued on January 8, 1985, which sets forth a date of first use anywhere and in commerce of February 1978; combined affidavit §§8 and 15. While the words "TENDER LOVING" are registered, pursuant to §2(f), on the basis of having acquired distinctiveness, the term "CARE," in accordance with §6(a), is disclaimed.

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 goods and/or services and the similarity of the marks.[3]

Turning first to consideration of the respective services, applicant argues that its hospice services are "materially different" from registrant's "home nursing services." The term "hospice," applicant notes, is defined in relevant part by Webster's New Collegiate Dictionary (1977) as "a facility or program designed to provide a caring environment for supplying the physical and emotional needs of the terminally ill." The "important differences between hospice and home nursing services," applicant maintains, "are documented in the Chilton Declaration, which accompanied Applicant's Request for Reconsideration" of the final refusal.

According to such declaration, Shelly Chilton is the "Administrator and Managing Partner" of applicant, which owns and operates a hospice service; that hospice services "consist

[3] 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/or services] and differences in the marks."

of a program of medical and non-medical services offered to terminally ill patients in dealing with numerous issues involved in dying with dignity," including "a team approach to providing expert medical care, pain management, and emotional and spiritual support"; that hospice programs "are licensed by state authorities and must comply with federal regulations"; that the "services offered by hospice providers consist of providing durable medical equipment, medications, medical supplies, bereavement counseling, physicians, registered nurses, licensed vocational nurses, home health aids, social workers, clergy and other[s] ... to make the end of life for terminally ill patients as comfortable as possible"; that "[h]ospice organizations are required to be licensed"; and that providers of such services "are required to include the term 'hospice' in their names or to otherwise clearly indicate that they are licensed."

Ms. Chilton also declares that "applicant advertises its hospice services in the 'hospice' section of various directories"; that "'[h]ospice' services are not the same as 'home nursing services,'" which "typically involve care giving by an unlicensed care giver" and "are not specifically directed to patients with terminal illnesses" or "to satisfying all of the numerous physical, psychological, emotional, and spiritual needs of the terminally ill and their families"; that home nursing services, unlike hospice services, "are not state

licensed and federally regulated" nor do they otherwise "require certification ... or even state or local oversight," such that "[a]nyone who is able to offer care to those who are unable to care for themselves can advertise that they are offering home nursing services"; and that:

> In order to qualify for placement with a hospice organization, a physician must refer a patient who is suffering from a terminal illness, and the physician must certify that the patient is only subject to palliative, rather than curative treatment; i.e., that the patient's terminal illness is incurable by treatments such as chemotherapy or radiation, so that the treatment is limited to reducing the pain and impact of the disease and making the patient more comfortable.

In addition, Ms. Chilton declares that it has been here experience that "patients and their families seeking hospice treatment exercise as much care and diligence in deciding upon the treatment and service provider as with any major life decision, and that such persons usually rely on recommendations of physicians and others before selecting a particular hospice service provider"; that such patients and their families "typically take great care in the selection of the hospice service provider and generally interview the hospice service provider before being admitted to the hospice program"; that it has also been her experience with home nursing treatment that "patients and their families ... exercise great care in

interviewing and deciding upon a provider of home nursing services"; that in consequence thereof, person encountering applicant's mark in connection with its hospice services "will pay particular attention to the 'hospice' element of the mark," which "essentially serves as a government certification of the hospice care provider"; that, "[o]n the other hand, the absence of the term 'hospice' from the name of a home nursing service provider should immediately inform a patient and the patient's family that the home nursing provider is not a hospice care provider"; and that "[t]ypically, people with a loved one in need of help due to illness or surgery do not look for 'hospice' services."

We concur with the Examining Attorney, however, that the evidence of record is sufficient to demonstrate that, as identified, the respective services--although specifically different--are nonetheless so closely related that, if offered under the same or similar marks, confusion as to the source or sponsorship thereof is likely to occur. As the Examining Attorney correctly notes, it is well established that services or goods 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 services or goods 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 producer 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).

Here, as support for her contention that the services at issue are sufficiently related, the Examining Attorney notes that the term "hospice" is defined by The American Heritage Dictionary of the English Language (3d ed. 1992) as "[a] program that provides palliative care and attends to the emotional, spiritual, social, and financial needs of terminally ill patients at an inpatient facility or at the patient's home"[4] and that, like registrant's "home nursing services," applicant's "hospice services," as indicated by the disclaimed words "HOME HOSPICE" in its mark, are rendered in a patient's home. The Examining Attorney also notes that, as stated in the Chilton declaration, applicant's hospice services are provided by a team which includes registered nurses and vocational nurses, which

[4] Although such definition was not offered until the Examining Attorney submitted her brief, it is settled that the Board may properly take judicial notice of dictionary definitions. 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

"are the same categories of professionals who provide home nursing services" to the patients cared for by applicant.

In addition, the Examining Attorney observes that the record contains copies of seven use-based third-party registrations of marks (none of which contain the word "HOSPICE") which are registered for, *inter alia*, "nursing care," "nursing," "nursing services" or "home nursing services," on the one hand, and "hospice care," "home health and hospice services," or "hospice services," on the other. While such registrations are admittedly not evidence that the different marks shown therein are in use or that the public is familiar with them, they nevertheless have some probative value to the extent that they serve to suggest that the services listed therein are of the kinds which may emanate from a single source. See, e.g., In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785-86 (TTAB 1993) and In re Mucky Duck Mustard Co. Inc., 6 USPQ2d 1467, 1470 (TTAB 1988) at n. 6.

Also of record, as the Examining Attorney further points out, "is evidence retrieved from the Internet and Lexis/Nexis® which illustrates that the services of the parties travel in the same channels of trade" in that "the same entity is likely to provide home nursing services ... along with

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1372, 217 USPQ 505 (Fed. Cir. 1983); and Marcal Paper Mills, Inc. v. American Can Co., 212 USPQ 852, 860 (TTAB 1981) at n. 7.

hospice services." The former, in particular, refers to "Keweenaw Home Nursing and Hospice" as providing both "Skilled Nursing" and "Hospice Care" services and also lists five separate entities in one Mississippi county under the heading "NURSING HOMES/HOSPICES LONG TERM CARE." Other examples of Internet advertising by home health care providers of both nursing and hospice services include ads by such Michigan institutions as "North Woods Home Nursing and Hospice," "Bay Shore Home Nursing and Hospice" and "U.P. Home Nursing and Hospice" and a Virginia organization, "Commonwealth Home Nursing & Hospice." Various directories also list both home nursing and hospice care under the heading of home health care services.

As to the "Lexis/Nexis" excerpts, the following examples are representative (**emphasis added**):

> "In partnership with ECHN is Visiting Nurse & Health Services of Connecticut, which provides **at-home nursing care and hospice care**." -- Medical Industry Today, December 7, 1998;
>
> "Among the services which Coram will provide are **home nursing**, infusion therapy, home respiratory therapy, durable medical equipment, **and home hospice care**." -- Id., April 24, 1998;
>
> "Integrated Health Services is a diversified health services provider, offering post-acute medical and rehabilitative services through its nationwide healthcare network. IHS's post-acute services include **home nursing** services, home infusion services, subacute

> care, inpatient and outpatient rehabilitation, respiratory therapy, **hospice care**, and diagnostic care." -- Id., October 7, 1997;
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> "The **hospice**, operating since 1975, provides Medicare-certified **home nursing** care ...." -- Id., March 7, 1996; and
>
> "As a pharmacist for San Diego-based LifeCare, which provides **home nursing**, home infusion, and **hospice care**, Golman knows how emergency situations affect pharmacists." -- Drug Topics, March 20, 1995.

In light of such evidence, we agree with the Examining Attorney that, while there are differences between hospice services and home nursing services,

> the fact that the services ... differ is not controlling in determining likelihood of confusion. The issue is not likelihood of confusion between particular ... services, but the likelihood of confusion as to the source of those ... services. *See In re Rexel Inc.*, 223 USPQ 830. 831 (TTAB 1984), and cases cited therein. The evidence of record ... is sufficient to show that the services ... are very closely related because they are likely to be offered by common sources under the same mark and likely to travel through the same trade channels.

Accordingly, and although we note that applicant does not currently advertise its "hospice services" other than in the "hospice" section of various directories, given the fact that there are no limitations or other restrictions in the channels of trade and classes of consumers for its services as set forth in its application, such services must be presumed, as confirmed

by the record, to be rendered and advertised in the identical channels of trade and to be directed to the same classes of patients as are registrant's "home nursing services." The provision of the respective services, under the same or similar marks, would therefore be likely to cause confusion as to origin or affiliation.

As to the marks at issue, applicant maintains that the Examining Attorney has erroneously relied on the "contention that the phrase 'TENDER LOVING CARE' is the sole or dominant portion of each mark" inasmuch as (footnotes omitted):

> It is clear that the phrase "TENDER LOVING CARE" is merely descriptive, describing the type of care that persons desire from providers of various services, including those offered by the Applicant and the owner of the registered mark. Indeed, the record includes numerous third-party uses of the phrase "TENDER LOVING CARE," particularly in the medical field, which support a conclusion that this phrase is descriptive and, as such, a weak designator of source.
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> Where as here, the two marks at issue contain a descriptive common term, consumers of the respective services are more likely to rely on the non-common portion of each mark to distinguish among the services offered. Thus, the different stylizations, designs and other words contained in Applicant's mark are likely to be more significant and memorable to consumers in distinguishing the sources of the respective services than the phrase "TENDER LOVING CARE." Indeed, the registered mark would have no trademark value but for the stylization of the mark.

> With respect to the Applicant's mark, ... because the term "TENDER LOVING CARE" alone has no trademark significance, it is the other words and design elements of the applied-for mark that make it distinctive. Thus, the Examiner's failure to consider the Applicant's mark as a whole, instead of dissecting out the "TENDER LOVING CARE" portion of Applicant's mark, was erroneous. When comparing the Applicant's entire mark with the registered mark, there are several important differences. First, Applicant seeks registration of a stylized version of the words "TENDER LOVING CARE" forming an arch above a design of a heart. Second, beneath that design is the wording "TLC HOME HOSPICE." Third, all of the wording of Applicant's mark is in block lettering. By way of contrast, the registered mark ... consists of a different stylized version of the wording "TENDER LOVING CARE," in which these three terms appear in a column, in a rounded typefont, with strong thick vertical lines and thin horizontal lines for the lettering.
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> There is no similarity between the stylizations of the two marks. The registered mark affords the owner thereof solely the rights to the stylized mark as registered. Because the registered mark is not simply the words TENDER LOVING CARE in block form, but is rather a stylized version of these words, a comparison of the marks in their entireties evidences that there is no likelihood of confusion. Stated otherwise, given the numerous physical differences between the marks, and given that the only commonality of the marks is the weak, descriptive phrase "TENDER LOVING CARE[,]" the comparison of the marks factor weighs strongly against a finding of likelihood of confusion.

We agree with the Examining Attorney, however, that when considered in their entireties, the respective marks are so similar that their contemporaneous use in connection with hospice services and home nursing services is likely to cause confusion. Applicant's assertion that the phrase "TENDER LOVING CARE," when taken as a whole, is merely descriptive of the respective services is not only unsupported, as the Examining Attorney points out, by any evidence of record, but it ignores the fact that, not only has applicant not disclaimed such phrase or the words "TENDER LOVING" in its application, but such words were registered as part of registrant's mark on the basis of their having acquired distinctiveness as an indicator of source. Furthermore, while we note that the record contains a definition from The American Heritage Dictionary of the English Language (3d ed. 1992) of the term "TLC" as an "abbreviation" for "[t]ender loving care" and also contains examples of at least four active third-party entities which use the term "TLC" (or a variant thereof, such as "T.L.C.") as part of their trade names and/or service marks with respect to home health care services, there simply is no evidence, as asserted by applicant, of "numerous third-party uses of the phrase 'TENDER LOVING CARE,' particularly in the medical field." The record, instead, fails to demonstrate any such usage.[5]

[5] Specifically, while there is a listing for "TENDER LOVING HOME HEALTH

CARE INC." as an active corporation, such entity obviously does not use the phrase "TENDER LOVING CARE" as such and, of the other 12 firms listed which do utilize the phrase as part of their corporate names, none is clearly indicated to be a provider of home health care or other medical services. Moreover, of the two which, from their trade names, arguably might be providers of such services, namely, "TENDER LOVING CARE PROVIDERS, INC." and "TENDER LOVING CARE RETIREMENT, INC.," both are listed as "suspended" rather than as "active" by the California Secretary of State/Corporations Division. Although, in addition, applicant contends in its initial brief that "there are numerous federal registrations for marks containing the term 'TENDER LOVING CARE', including TENDER LOVING CARE SICK CHILD SERVICE and design, Reg. No. 1,473,611 for 'temporary custodial care of sick non-hospitalized children by nursing staff,'" the Examining Attorney observes in her brief that:

> It has long been the policy of the ... Board not to take judicial notice of registrations residing in the [U.S. Patent and Trademark] Office. *In re Lar Mor International, Inc.*, 221 USPQ 180 (TTAB 1983). For such registrations to properly be made of record, an applicant must proffer copies of the registrations from the register. *In re Duofold [Inc.]*, 184 USPQ 638 ... (TTAB 1984 [sic, 1974]). For this reason, evidence in the form of third-party registrations has not been considered by the Examining Attorney because no copies of the relevant registrations have been properly made of record.

In the present case, however, the single third-party registration specified by applicant is considered to be of record, and has been considered, inasmuch as applicant raised the same contention in its response to the initial Office Action, but the objection thereto, as asserted above by the Examining Attorney, is deemed to have been waived since the previous Examining Attorney failed to interpose the objection in a timely manner and thereby denied applicant the opportunity to cure the deficiency by submitting copies of the registration(s) it regarded as pertinent. Nonetheless, even if applicant had supported its argument with a copy of any third-party registration(s) upon which it desired to rely, such evidence would not in any event constitute proof of actual use of the registered mark(s) and that the purchasing public, having become conditioned to encountering certain services thereunder, is able to distinguish the source thereof based upon differences in the elements of such mark(s) other than the phrase "TENDER LOVING CARE." See, e.g., Smith Bros. Mfg. Co. v. Stone Mfg. Co., 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973); AMF Inc. v. American Leisure Products, Inc., 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973); and In re Hub Distributing, Inc., 218 USPQ 284, 285-86 (TTAB 1983). The number and nature of any similar mark(s)

Moreover, as the Examining Attorney correctly points out, a side-by-side comparison of the respective marks is not the proper test to be used in determining the issue of likelihood of confusion inasmuch as it is not the ordinary way that customers will be exposed to the marks. Instead, 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 concomitant lack of perfect recall, whether confusion as to source or sponsorship is likely. The proper emphasis is accordingly on the recollection of the average purchaser, who normally retains a general rather than a specific impression of marks. See, e.g., Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller, 477 F.2d 586, 177 USPQ 573, 574 (CCPA 1973); Envirotech Corp. v. Solaron Corp., 211 USPQ 724, 733 (TTAB 1981); and Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106, 108 (TTAB 1975).

Finally, while marks must be considered in their entireties, including any descriptive matter or design element, our principal reviewing court has indicated 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

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in use on the same or similar services is thus not a relevant *du Pont* factor in this appeal.

to a particular feature of a mark, provided [that] the ultimate conclusion rests on consideration of the marks in their entireties." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). For instance, according to the court, "that a particular feature is descriptive ... with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark ...." Id. Also, as the Examining Attorney further properly points out in her brief:

> [W]hen a mark consists of a word portion and a design portion [and/or stylization of lettering], the word, or literal, portion is more likely to be impressed upon a purchaser's memory and to be used in calling for the ... services. *In re Appetito Provisions Co. [Inc.]*, 3 USPQ2d 1553 (TTAB 1987); *Amoco Oil Co. v. Amerco, Inc.*, 192 USPQ 729 (TTAB 1976) ....

Applying the above principles, the Examining Attorney argues that "the dominant portion of the registered mark is the wording 'TENDER LOVING CARE.'" The Examining Attorney maintains that, as to applicant's mark:

> The Applicant's mark consists of the wording "TENDER LOVING CARE," combined with the acronym "TLC," the wording "HOME HOSPICE," and a simple heart design. The acronym "TLC" stands for "tender loving care." .... Usage of this acronym in the Applicant's mark is only reiterative of the wording "TENDER LOVING CARE," that also appears in the mark, and as such does not

> serve to alter the overall commercial impression of the mark. The wording "HOME HOSPICE" is the common commercial name for the services in question and therefore has no source indicating significance. The wording simply indicates the genus of the Applicant's services, and has been disclaimed apart from the mark as shown. For these reasons, the additional terms, along with the heart design and the stylization of the lettering in the Applicant's mark, do not alter the overall commercial impression of the mark so as to obviate the likelihood of confusion. Just as in the case of the registered mark, the dominant feature of the Applicant's mark is the wording "TENDER LOVING CARE."

Here, while there are several differences in appearance in the respective marks which, as applicant has catalogued, are apparent on a side-by-side comparison, the connotation and general overall commercial impression engendered by each of such marks is substantially the same, given the dominance, for the reasons expressed by the Examining Attorney, of the phrase "TENDER LOVING CARE" in each of the marks. Although, admittedly, such phrase is suggestive, rather than merely descriptive, of the services with which it is respectively associated, in each instance the phrase suggests the same kind of care which customers for and patients of the services desire to receive. Thus, in the case of each mark, the principal source-indicative portion is the identically suggestive phrase "TENDER LOVING CARE, given the minimal stylization of the lettering in both applicant's mark and

registrant's mark and the presence of the reiterative abbreviation "TLC," in conjunction with the generic term "HOME HOSPICE," in applicant's mark. Furthermore, while it is true that applicant's mark contains a prominent heart design which is lacking in registrant's mark, such design simply reinforces the concept, which is shared with registrant's mark, of a service which claims to provide "tender loving care." Purchasers of and clients for applicant's and registrant's services would therefore regard the phrase "TENDER LOVING CARE" as the identifying and distinguishing element of the respective marks and would use such phrase when referring to or otherwise asking about applicant's hospice services and registrant's home nursing services. Confusion as to the origin or affiliation of such closely related services is accordingly likely when rendered under the respective marks.

Applicant additionally argues, based upon the Chilton declaration, that confusion is nonetheless unlikely due to the conditions of sale and sophistication of consumers for the services at issue. Specifically, as stated in its initial brief:

> The record also establishes that the sophistication of, and care taken by, purchasers of Applicant's services are additional important factors supporting the absence of likely confusion. As documented in the Chilton Declaration, patients and families of patients seeking hospice

> services generally exercise an extraordinary amount of care and attention in selecting the hospice service provider. Dying persons and their families typically rely on recommendations of physicians and others and generally interview the hospice service provider before being admitted to the program. Hospice services are selected under circumstances designed to avoid confusion, particularly because of the great care taken by consumers of these services, and due to other circumstances, such as personal interviews with service providers and physician recommendations. ....
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> Persons seeking home nursing services likewise exercise great care in selecting the source of such services. .... Consumers selecting each of these respective services exercise great care, and by no means select these services on "impulse." Thus the circumstances surrounding the selection of hospice service providers are such that there is little likelihood of confusion with a home nursing service. These uncontroverted facts in the record are inconsistent with the Examining Attorney's theoretical speculation that a prospective purchaser of hospice services might casually conclude that the registrant might offer hospice services in addition to home nursing services.

Even though, as pointed out by applicant, neither hospice services nor home nursing services are chosen casually and are, instead, typically selected only after careful consideration, it is well settled, as the Examining Attorney properly notes in her brief, that the fact that consumers may exercise deliberation and/or rely upon a physician's recommendation in choosing the respective services "does not

necessarily preclude their mistaking one [service mark or] trademark for another" or that they otherwise are entirely immune from confusion as to source or sponsorship. Wincharger Corp. v. Rinco, Inc., 297 F.2d 261, 132 USPQ 289, 292 (CCPA 1962). See also In re Decombe, 9 USPQ2d 1812, 1814-15 (TTAB 1988); and In re Pellerin Milnor Corp., 221 USPQ 558, 560 (TTAB 1983). This would especially be true, and not just mere speculation, in the circumstances of this case inasmuch as the record demonstrates that hospice services and home nursing services are frequently provided by the same source under the same name. Conditions are such that consumers, despite the care exercised in the selection of hospice service providers and home nursing service providers, could reasonably assume, due to the substantially similarity between applicant's mark and registrant's mark, that the same entity provides both services.

Specifically, and given that purchasers of home nursing services and, especially, hospice services, obviously are often under substantial emotional stress at the time of choosing providers of such services, it is reasonable that, for instance, a family member or relative responsible for the care of a loved one could assume, upon learning from the patient's physician that the loved one is suffering from a terminal illness, that the palliative care offered by applicant's hospice services is from the same provider which renders registrant's

home nursing services, given the substantial similarity in the marks at issue. In such a situation, the person responsible for caring for a loved one, as applicant notes in the Chilton declaration, would "usually rely on recommendations of physicians and others before selecting a particular hospice service provider." Consequently, the person making the care-giver hiring decision, upon inquiring of and receiving from either a physician or other trusted individuals an oral recommendation of applicant's "TENDER LOVING CARE" hospice services, could reasonably believe--in the absence of the opportunity for a side-by-side comparison of the marks--that such provider is the same one as, or is sponsored by, the "TENDER LOVING CARE" home nursing services provider which that person has either heard of or used previously. Accordingly, notwithstanding the high degree of care involved in selecting providers of the respective services, customers therefor could mistakenly assume a common origin or affiliation for such services.

Finally, applicant contends that, as set forth in its initial brief, "[t]he Examining Attorney has not submitted any evidence that the registered mark is well-known, let alone famous," and also mentions that "[t]here is no evidence of any actual confusion in the record." However, suffice it to say that the absence of evidence of fame and of actual confusion is

clearly not evidence of the absence of fame and of actual confusion. That is, since there is no evidence as to either of such *du Pont* factors, they have no bearing on the issue of likelihood of confusion herein.

We accordingly conclude that consumers and potential customers, who are familiar or acquainted with registrant's "TENDER LOVING CARE" and design mark for "home nursing services," would be likely to believe, upon encountering applicant's substantially similar "TENDER LOVING CARE TLC HOME HOSPICE" and design mark for "hospice services," that such closely related services emanate from, or are sponsored by or associated with, the same source.

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