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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Continuum Care Corporation

Serial No. 75/026,799

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for Continuum Care Corporation.

Maureen Beacom Gorman, Trademark Examining Attorney, Law Office 111 (Craig Taylor, Managing Attorney).

Before Quinn, Wendel and Holtzman, Administrative Trademark Judges.

Opinion by Wendel, Administrative Trademark Judge:

Continuum Care Corporation has filed an application to register the proposed mark CONTINUUM CARE for the services, as amended, of "assisted living facility and retirement home."[1]

Registration has been finally refused under Section 2(e)(1) on the grounds that the proposed mark is generic

[1] Serial No. 75/026,799, filed December 1, 1995, claiming first use dates of June 1992. The application was subsequently amended to one seeking registration under the provisions of Section 2(f).

and, if not generic but rather only merely descriptive, that the evidence of acquired distinctiveness is insufficient for registration under Section 2(f). Applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested.[2]

The issues before us are whether the phrase CONTINUUM CARE, when used in connection with applicant's assisted living facility and retirement home services, is generic, or, if not generic, whether the phrase has acquired distinctiveness as would permit registration under Section 2(f). If generic, the designation is by definition incapable of indicating source. See In re Merrill Lynch, Pierce, Fenner, and Smith Inc., 828 F.2d 1567, 4 USPQ2d 1141 (Fed. Cir. 1987). If not generic, since applicant has amended the application to one seeking registration under Section 2(f), the phrase has been conceded to be merely descriptive and the only question is whether it is registrable on the basis of acquired distinctiveness. See

[2] During the course of prosecution the case was assigned to two different Examining Attorneys and the brief was written by a third. We would advise this last attorney that it is not necessary, or even warranted, to attach copies of Office actions and the like, to the appeal brief. The entire record is before the Board and it is assumed that applicant already has copies of the same. Duplication of any more than highly pertinent evidence is simply a waste of resources.

In re Leatherman Tool Group Inc., 32 USPQ2d 1443 (TTAB 1994).[3]

We turn first to the issue of genericness. The burden of proof is on the Office to show by "clear evidence" that CONTINUUM CARE is a generic designation for the services of applicant. See In re Merrill Lynch, 4 USPQ2d at 1143. Evidence of whether the relevant public's perception of the designation is as a generic reference or as an indication of source may be obtained from any competent source, including newspapers, magazines, dictionaries, catalogs and other publications. See In re Northland Aluminum Products, Inc., 777 F.2d 1556, 227 USPQ 961 (Fed. Cir. 1985); In re Leatherman Tool Group, Inc., *supra.*

The Examining Attorney maintains that the phrase CONTINUUM CARE is a generic designation for a type of health care outside of a hospital setting or for services that provide long term health care in a home like

[3] We note that applicant, in its brief, continues to argue that its mark is suggestive, and in the alternative, that if descriptive, its mark has acquired distinctiveness. Applicant, however, amended its application to one seeking registration under the provisions of Section 2(f) after receiving a final refusal under Section 2(e)(1) on the grounds of descriptiveness. (Amendment After Final, filed April 27, 1999). In a later response, applicant succinctly stated that "Applicant chose not to appeal this matter, but rather seek registration under Section 2(f)." (Response, August 26, 1999). Thus, we find this amendment to be unequivocal, and not to have been made in the alternative. Cf. TMEP §1212.02(c). As a result, applicant has conceded that its mark is merely descriptive.

environment, such as applicant's. During the course of refusing registration of the phrase first under Section 2(e)(1) on the ground of being merely descriptive and subsequently as being generic, she has made of record numerous articles obtained from the Internet, as well as excerpts of articles obtained from the Nexis database, in support of her position. While the total of forty-two references show a variety of usages of the phrase "continuum care" for services in the health care field, the following are representative of those highly relevant to the present issue:

> Christian Care Centers Inc.: Full Continuum Care Retirement Communities, Independent Living apartments, Assisted Living Apartments... (www.d.fwmall.com);
>
> The Lutheran Home: River Falls, a skilled nursing facility, is attached to WelLHaven Apartments by a heated walkway offering the added convenience of continuum care, if needed. (www.lutheranhome.org);
>
> Another trend is the continuum care facilities, where a person can live independently or with nursing assistance or skilled nursing treatment. (The Bakersfield Californian, November 9, 1997);
>
> Elder Options of Texas- Retirement and Continuum Care Communities (www.elderoptionsoftexas.com);
>
> Brookline Village, State College, PA 16801 – Continuum care retirement community offering independence and health care (www.psu.edu);

THE PARKS METHODIST RETIREMENT VILLAGE: Grand opening festivities are under way for this continuum care facility. Expansion has nearly doubled the number of residents served. Parks Methodist will be the only facility in the city with full continuum of care, which will include 55 independent living patio homes and cottages, 23 assisted living apartments and 90 long-term care beds in the nursing facility.
(www.oaoa.com);

Robert Greenwood, a spokesman for the American Association of Homes and Services for the Aging, said many retirement communities are expanding services to maintain residents as they age.
"I think it's a trend for retirement communities to offer continuum-care services. The market is responding to what consumers want and that is to continue living in the same environment as they age," Greenwood said.
(www.amcity.com);

"Because people are living longer, continuum-care centers are springing up all over the place," Weissman said.
(The Kansas City Star, December 24, 1995);

The firm has done many senior living continuum-care facilities.
(Tulsa World, April 24, 2000); and

In 1988, the NYS Legislature approved the site for a 600-unit continuum-care housing project and nursing home on the northwest quadrant of Pilgrim State Hospital. The project is to consist of 282 independent living units (for those needy senior citizens who need no nursing care) ... The rest of the units are to be included in a congregate care-nursing facility.
(LI Business News, June 22, 1992).

Applicant contends that “continuum care” in general is not generic but rather a species of “institutional care.” Applicant agrees that continuum care is a type of care provided outside of a hospital setting, but argues that this care may include many different variations including institutional and home care, long term and short term care. Even these, according to applicant, can be further divided. For example, institutional care has several subspecies such as retirement care, substance abuse care, and convalescence care. Applicant maintains that continuum care is not the common term used for these various types of care provided outside of a hospital but rather only suggestive of a category of service provided.

Applicant points to dictionary definitions of the separate words “continuum” and “care” and, on this basis, argues that the phrase as a whole could have several different meanings to the public. For instance, applicant contends, the phrase could mean the same type of care as at home and could apply to day care centers as well as to retirement homes; it could mean the same care as was received in a hospital of some specific type; or, it could mean the same level of care in the future as in the past. While “continuum care” has been applied to care outside of a hospital, applicant argues that these various services

are not interchangeable and thus the phrase is not generic for either a type of care or facility. Instead, applicant insists, "continuum care" is only suggestive of the type of care which may be provided at many different institutions.

In its supplemental brief, applicant argues that the Examining Attorney has supported her refusal based on genericness with only a modest number of uses of the phrase, most of which are subsequent to applicant's commencement of use of its mark. Applicant contends that the Examining Attorney's evidence has failed to demonstrate that the primary significance of the phrase is as a generic designation. Applicant states that it has conducted Internet research to determine whether there is widespread usage of the phrase in a generic manner and has determined that the phrase "continuum of care" is most often used in reference to services of this nature and only a few actually used "continuum care." Applicant thus concludes that "continuum care" is not generic for either a type of facility or a type of care outside of a hospital.

The critical issue in determining genericness is whether members of the relevant public primarily use or understand the designation sought to be registered as a reference to the genus or category of services in question. See H. Marvin Ginn Corp. v. International Association of

Fire Chiefs, Inc., 782 F.2d 987, 228 USPQ 528 (Fed. Cir. 1986). In making our determination, we follow the two-step inquiry set forth in *Marvin Ginn* and recently reaffirmed by the Court in In re American Fertility Society, 188 F.3d 1341, 51 USPQ2d 1832 (Fed. Cir. 1999), namely:

(1) What is the genus or category of services at issue?, and

(2) Is the designation sought to be registered understood by the relevant public primarily to refer to that genus or category of services?

In a broad sense it would appear that the genus or category of services involved here are retirement or assisted living facilities. As such, “continuum care” is not the designation used to refer to such facilities; they are retirement or assisted living facilities.

Our inquiry, however, does not stop at this point. As we pointed out in In re Central Sprinkler Co., 49 USPQ2d 1194 (TTAB 1998), a product, or in this case, a service, may fall into more than one category. In that case, the term sought to be registered was ATTIC and the goods involved were automatic sprinklers for fire protection. Although the goods in a broad sense were sprinklers for fire protection, the Board found that the term “attic” would also be understood by the public as referring to a narrower category of such sprinklers, namely, those for the

fire protection of attics. Thus, ATTIC was found to be a generic designation for goods of this type.

In making this determination, the Board recognized that the applicant's proposed mark did not fall within the classic case of a generic noun, but rather would be more accurately characterized as a generic adjective.[4] Nonetheless, the Board held that because the term "attic" "directly names the most important or central aspect or purpose of applicant's goods, that the sprinklers are used in attics, this term is generic and should be freely available for use by competitors." Id. at 1199. See also In re Northland Aluminum Products, Inc., *supra*, (BUNDT generic for coffee cake); In re Sun Oil Co., 426 F.2d 401, 165 USPQ 718 (CCPA 1970)(CUSTOMBLENDED for gasoline); In re Helena Rubinstein, Inc., 410 F.2d 438, 161 USPQ 606 (CCPA 1969)(PASTEURIZED for face cream); In re Pennzoil Products Co., 20 USPQ2d 1753 (TTAB 1991)(MULTI-VIS for motor oil); In re Reckitt& Colman, North America Inc., 18 USPQ2d 1389 (TTAB 1991)(PERMA PRESS for soil and stain remover).

[4] Note discussion in 2 J.T. McCarthy, *McCarty on Trademarks and Unfair Competition,* Section 12:10 (4th ed. 2001), that the general rule of thumb that generic names are nouns and descriptive terms are adjectives does not accurately describe the results in case law. As stated by McCarthy, "To be generic, a term need not directly name the product, but may name some distinctive characteristic of that genus of products."

Here we find the phrase "continuum care" to be used in the health care industry to define a type of continuing care outside of a hospital setting. While the phrase may be applicable to services over a broad spectrum of the health care field, we find the evidence of record clearly establishes that the phrase is often used in particular with retirement and assisted living facilities.[5] If the retirement home is one in which a continuum of care for the elderly persons living there is provided, the facility is referred to as a "continuum care" home. The evidence, especially the Internet and Nexis excerpts introduced by the Examining Attorney, clearly shows that there is a growing trend for retirement communities of the continuum care variety and that there would be public awareness of the applicability of the phrase to facilities of this nature. Applicant's own specimens and advertisements demonstrate that applicant's services not only fall within this variety of facility, but are promoted in such a generic sense.[6]

[5] Despite applicant's arguments to the contrary, we find the amount of evidence produced by the Examining Attorney of the use of the specific term "continuum care", and particularly in connection with retirement home facilities, more than adequate.
[6] Applicant's specimens use "Continuum Care" as a descriptor of the "Rockwood Health Care Center," together with the statement "Long term commitment to quality care in a home like environment." Applicant's advertisements include statements such as "Continuum Care at Sykesville."

Thus, while applicant may argue that continuum care is only a "species" of institutional care, we find this subcategory to be generic as well. Just as ATTIC was found to be generic for a particular category of sprinklers, CONTINUUM CARE is generic for a particular type of health care that is available at certain retirement and assisted living facilities. If the facility is one of this nature, then its owner should be free to so describe its services.

While applicant relies upon general dictionary definitions of the separate components of the phrase "continuum care" for its argument that the phrase may be interpreted in various manners by the public, this argument is counterbalanced by the clear evidence of record that there has been widespread use of the phrase "continuum care" as a whole in connection with a continuum of health care and, in particular, with the continuum-type of health care services involved here, and that the public would so interpret the phrase. Although there may be other equally well recognized usages of the term as a whole in the health care field, this does not detract from the generic significance of the term when used in connection with retirement and assisted living facilities. The relevant public would immediately recognize the use of the phrase to

designate a specific type of health care available at these facilities.

Finally, applicant's argument that most of the uses relied upon by the Examining Attorney were subsequent to applicant's first uses of its alleged mark is to no avail. Even if applicant were the first user of the phrase, and there is evidence that this is not the case, subsequent use by others in a generic sense cannot be disregarded. See In re Audio Book Club, Inc., 52 USPQ2d 1042 (TTAB 1999). The question is whether the primary significance of the phrase to the relevant public is as a generic designation at the time at which the term is sought to be registered.

Accordingly, we find the phrase CONTINUUM CARE to be generic when used in connection retirement homes and assisted living facilities such as applicant's in which health care services of this particular type are available. As such, the phrase is incapable of identifying and distinguishing applicant's services from those of others and thus incapable of registration under the provisions of Section 2(f), regardless of the evidence submitted thereunder.

In the interests of completeness, however, we have also considered the evidence introduced by applicant in support of its claim of acquired distinctiveness under

Section 2(f). For purposes of this review, we assume that CONTINUUM CARE is merely descriptive, rather than generic, when used in connection with applicant's services. Nonetheless, the phrase is still highly descriptive, and thus the burden on applicant to establish distinctiveness is proportionally greater. See Yahama International Corp. v. Hoshino Gakki Co., Ltd., 840 F.2d 1572, 6 USPQ2d 1001 (Fed. Cir. 1988).

Applicant's evidence consists of a declaration of continuous and exclusive use since 1992 and spread sheets showing a revenue for its 15 facilities for the year ending 3/31/99 of approximately $31 million and advertising expenses in 1998-1999 of around $60,000–$94,000.[7] The Examining Attorney argues that this evidence is inadequate to overcome the 2(e)(1) refusal; that the advertising expenditures are minimal; and that applicant has failed to demonstrate that this advertising was spent on associating the mark CONTINUUM CARE with applicant, as opposed to the name of a particular facility.

Applicant argues that the continuous and exclusive use of its mark for eight years is prima facie evidence of its

[7] The Examining Attorney has noted that applicant's originally submitted spread sheets showed expenditures of around $60,000 for these two years, while figures submitted with applicant's brief totaled around $94,000 for the same period.

acquired distinctiveness. In addition, applicant has attached to its brief additional evidence of its manner of use of the phrase CONTINUUM CARE in advertising and of its expenditures therefor, which applicant argues supports its claim of distinctiveness.[8]

The major deficiency in applicant's claim of distinctiveness, however, lies in the absence of any evidence of applicant's promotion of CONTINUUM CARE as its mark for its various facilities or of public recognition of the mark as an indicator of a single source for these services. Regardless of the years of use or the amount of advertising expenditures, applicant is under the burden of showing that the mark has acquired distinctiveness in the eyes of the public, i.e., that its advertising and promotional efforts have resulted in the recognition of CONTINUUM CARE as an indicator of the source of these services, rather than as a descriptor of the type of services offered at these facilities. See In re Audio Book Club, Inc., *supra,* (inadequate evidence to establish that advertising and promotional efforts resulted in recognition of AUDIO BOOK CLUB as indicator of source of services,

[8] While the evidence attached to applicant's brief was clearly untimely under Trademark Rule 2.142(d), the Examining Attorney has not objected to the same but rather has taken the evidence under consideration. Accordingly, we have also considered the attached exhibits.

rather than as name of new category of “book club” services).

Applicant’s evidence is sorely lacking with respect to any promotional efforts to advance CONTINUUM CARE as its mark. For example, in the advertising attached to its brief at Exhibit D we find advertisements for “Continuum Care at Sykesville” or for “Continuum Court Yards.” The first usage would readily be viewed by the public as a description of the type of care available at the Sykeseville facility, whereas the second is not even an example of usage of the mark sought to be registered. There is no direct evidence whatsoever of the actual recognition by the purchasing public of the phrase CONTINUUM CARE, as used by applicant, as an indication of origin.

Accordingly, we find that, even if the phrase CONTINUUM CARE is found to be merely descriptive, rather than generic, the evidence submitted by applicant is insufficient to demonstrate acquired distinctiveness under Section 2(f).

Decision: The refusal to register CONTINUUM CARE on the ground that the phrase is generic is affirmed. In the alternative, if the phrase is found to be merely descriptive, the refusal to register on the ground that applicant's evidence is insufficient to demonstrate acquired distinctiveness under Section 2(f) is also affirmed.