

In re Application of
Aspira Health LLC

U.S. Trademark Application Serial No. 88465863

For the mark: ASPIRA HEALTH.

Commissioner for Trademarks
P.O. Box 1451 Alexandria
Alexandria, VA 22313-1451

Introduction

Part I of this Response discusses the amendments made to the application. Part II requests reconsideration of the Section 2(d) rejection.

I. Amendments

Applicant has amended the application as follows:

1. Identification of Services:

Health Care in the nature of urgent medical care centers.

2. Disclaimer:

Applicant has entered the requested disclaimer.

II. Request for Reconsideration of 2(d) Rejection

The application is rejected under Trademark Act Section 2(d), 15 USC Section 1052(d), in view of (Reg. No.: 4782939) ASPIRA LABS and (Reg. No.: 5408258) ASPIRA IVD. Reconsideration and a withdrawal of the Examining Attorney's rejection is respectfully requested in view of the services amendment and the following remarks.

Summary of Argument: (A) ASPIRA is entitled only to a narrow scope of protection. The law recognizes the marketplace reality that, where the same and similar marks are widely used, consumers are able to differentiate among them; (B) The amendment of the services identification alleviates confusion because urgent medical care centers are not likely to be confused with *medical testing for diagnostic or treatment purposes in the field of gynecological oncology and women's health*; (C) the marks contain distinguishable text and connotation.

A. ASPIRA Receives a Narrow Scope of Protection.

The Cited Marks exist in a crowded field of closely similar marks. It is well established that where marks are in a crowded field, each mark is entitled only to a narrow scope of protection. *Miss World (UK), Ltd. v. Mrs. America Pageants, Inc.*, 856 F.2d 1445, 1449 (9th Cir. 1988) (“In a ‘crowded’ field of similar marks, each member of the crowd is relatively ‘weak’ in its ability to prevent use by others in the crowd... Simply put, a mark which is hemmed in on all sides by similar marks on similar goods cannot be very ‘distinctive’. It is merely one of a crowd of marks. In such a crowd, customers will not likely be confused between any two of the crowd and may have learned to carefully pick out one from the other.”) (*citing* McCarthy § 11:26, internal quotes omitted). **The law recognizes the marketplace reality that, where the same and similar marks are widely used, consumers are able to differentiate among them. *Id.***

Here, the USPTO register reflects a good number of ASPIRIA, ASPIRO and ASPIRE marks in International Class 044.

Mark Registration / Application No.	Mark	Owner	Goods / Services
3420673	ASPIRA	MERIT MEDICAL SYSTEMS, INC.	Medical drainage devices, namely, pleural and/or peritoneal drainage devices and pleural and peritoneal catheters and fittings therefor.
4587897	ASPIRA Scientific (and Design)	Aspira Scientific, Inc.	Custom manufacture of chemicals, pharmaceuticals, and biologics, for use in the pharmaceutical and biotechnology industries, not including unprocessed polyester resins for use in the manufacture of plastic consumer and household containers.
3643229	ASPIRE FAMILY DENTAL	Health Care Service Corporation	Dentist services.
4013011	ASPIRE INDIANA	ASPIRE INDIANA HEALTH, INC.	Mental health services.

4923070	ASPIRE	Trademarks Holding, LLC	Health spa services for health and wellness of the body and spirit, namely, such services offered exclusively at the owner's proprietary hotels or health resorts, provided all such services are exclusive of offering cosmetic dermatology services and skin care products.
4052759	ASPIRE HOME CARE	Home Health Holdings, Inc.	Home health care services; skilled nursing services; hospice care services; palliative care services.
4644866	ASPIRE	Levine, Todd	Dentist services; Dental services, namely, performing restorative and cosmetic procedures; Oral surgery and dental implant services; Dental hygienist services; Teeth whitening services; Healthcare services, namely, treatment of patients with snoring, sleep apnea and TMJ (temporomandibular joint) disorders, craniofacial pain disorders and myofascial pain disorders.
4812016	ASPIRE Design Mark	Aspire Bariatrics, Inc.	healthcare and medical care services relating to noninvasive bariatric weight loss solutions.
5182381	ASPIRE	INCEPTION FERTILITY VENTURES, LLC	In vitro fertilization services.
5401083	ASPIRE	Aspire Dermatology, LLC	Dermatology services.
5463400	ASPIRE COUNSELING SERVICES Design Mark	Aspire Counseling Services, Inc.	Addiction treatment services.

5626155	ASPIRE MEDICAL SERVICES AND EDUCATION	Pagosa Crisis Pregnancy Center, Inc.	Medical counseling; Medical services, namely, providing pregnancy testing, prenatal care, obstetric ultrasound; providing medical information related to sexually transmitted diseases and infections; providing medical treatment of sexually transmitted diseases and infections; providing counseling services for medical issues related to pregnancy.
5928846	ASPIRE ALLERGY & SINUS	National Allergy & Sinus Holdings, LLC	Medical services, namely, allergy and otolaryngology testing, diagnosis and treatment.
3888764	ASPIRO	Aspiro Group, Inc.	Therapeutic services for at-risk adolescents and their families, primarily in a wilderness setting.
4458249	ASPIRO Design Mark	Aspiro Group, Inc.	Therapeutic services for at-risk adolescents and their families, primarily in a wilderness setting.

The USPTO has allowed ASPIRA marks to coexist on the register even when those registrations cover services more closely related than are Applicant's product and Registrant's services. See, e.g.:

Registration No.	Mark	Owner	Goods / Services
4782939	ASPIRA LABS	Vermillion, Inc.	Medical testing for diagnostic or treatment purposes; Medical testing for diagnostic or treatment purposes in the field of gynecological oncology and women's health.
3420673	ASPIRA	MERIT MEDICAL SYSTEMS, INC.	Medical drainage devices, namely, pleural and/or peritoneal drainage devices and pleural and peritoneal catheters and fittings therefor.
4587897	ASPIRA Scientific (and Design)	Aspira Scientific, Inc.	Custom manufacture of chemicals, pharmaceuticals, and biologics, for use in the pharmaceutical and biotechnology industries, not including unprocessed polyester resins for use in the manufacture of plastic consumer and household containers.

As shown above, because ASPIRA is a diluted mark, the USPTO has frequently found minimal word distinctions sufficient to differentiate marks. It is thus evident from the number registrations containing ASPIRA that “marks containing [such] term...have been registered for the same or closely related goods or services because the remaining portions of the mark are sufficient to distinguish the marks as a whole from one another.” *In re Hamilton Bank*, 222 U.S.P.Q. 174 (T.T.A.B. 1984).

Reconsideration is respectfully requested. Applicant asks that the Examining Attorney consider the additional distinguishing components discussed below in view of the weak / diluted strength of the BE WELL component.

B. Urgent Care Services Render Confusion Unlikely

In view of the amendment, Applicant asks that the Examining Attorney consider the differences in the services. Evidence shows that urgent care centers are understood places where patients can receive medical care by a licensed practitioner. The ordinary consumer readily understands what a walk-in clinic is, and can distinguish between a walk-in clinic and a lab that provides *medical testing for diagnostic or treatment purposes in the field of gynecological oncology and women's health*. Confusion as to source would be likely if the cited registrations were for hospital services, but they are not. The cited registration is for sophisticated pathological diagnostic services.

Urgent care is a category of [walk-in clinic](#) focused on the delivery of [ambulatory care](#) in a dedicated medical facility outside of a traditional [emergency department](#) (emergency room). Urgent care centers primarily treat [injuries](#) or [illnesses](#) requiring immediate care but not serious enough to require an emergency department (ED) visit. Urgent care centers are distinguished from similar ambulatory healthcare centers such as emergency departments and [convenient care clinics](#) by their scope of conditions treated and available facilities on-site.

https://en.wikipedia.org/wiki/Urgent_care_center

Both the Urgent Care Association of America (UCAOA) and the American Academy of Urgent Care Medicine (AAUCM) have established criteria for urgent care centers and the physicians that operate them. Each share similar qualifying criteria including:

- Must accept walk-in patients during business hours
- Treat a broad spectrum of illnesses and injuries, as well as perform minor medical procedures
- Have a licensed physician operating as the medical director

- Be open 7 days a week
- Have on-site diagnostic equipment, including [phlebotomy](#) and [x-ray](#)
- Contain multiple exam rooms
- Various ethical and business standards
- Contain a procedure room where stitches could be placed, a cast be put on a leg, or even a minor surgical procedure if it is not too risky and can be done under a local anesthetic (numbs a small portion of the body; however, will not put patient into a medically induced coma).
- Contain communication lines with local hospitals so that patients who need transfer to an emergency room have easy access.

https://en.wikipedia.org/wiki/Urgent_care_center

Urgent care centers are staffed by licensed medical care providers.

Unlike other walk-in clinics such as [retail clinics](#), urgent care centers are generally staffed by a physician and supported by [nurses](#), [physician assistants](#) and [medical assistants](#). Sixty-five percent of urgent care centers have at least one physician on-site at all times. [citation needed]

Of the physicians that staff urgent care centers, 47.8% are [family medicine](#), 30.1% are [emergency medicine](#) and 7.6% are [internal medicine](#). [citation needed]

With these licensed physician on-site, urgent care centers are able to offer a wide range of services including [broken bones](#), moderate cuts and lacerations requiring [stitches](#), and most common injuries and illnesses. These services, of course, are made possible with the diagnostic equipment and [x-ray](#) machines typically found at an urgent care.

https://en.wikipedia.org/wiki/Urgent_care_center

For the above reasons, the applicant hereby respectfully requests reconsideration in withdrawal of the 2(d) rejection.

C. The Marks Contain Distinguishable Text and Connotation

In view of the above, Applicant asks that the Examining Attorney consider the **distinguishing components**, which include **(1) LABS / IVS versus HEALTH**. In the context of the full mark LABS / IVS connotes specific diagnostic / laboratory services. HEALTH, on the other hand, with respect to walk in clinics, has a different commercial impression - that of ambulatory medical care.

When analyzing whether a mark is likely to cause confusion, the mark must be analyzed as a whole, including any disclaimed material.¹ Further, it is axiomatic that the respective marks

¹ See *In re National Data Corp.*, 753 F.2d 1056, 224 U.S.P.Q. 749 (Fed. Cir. 1985); see also, *In re Farm Fresh Catfish Co.*, 231 U.S.P.Q. 495 (T.T.A.B. 1986) (CATFISH BOBBERS with "CATFISH" disclaimed) for fish held not likely to be confused with BOBBER for restaurant services).

be reviewed for likelihood of confusion as a whole and should not be broken into component parts to reach a conclusion of confusing similarity.² This "anti-dissection" rule is violated when "the focus is on a prominent feature of conflicting marks and likelihood of confusion is decided solely upon that feature, ignoring all other elements of the mark." *J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition*, 23:31 at 23-125, 126 (4th ed. 2012).

In the context of the full mark LABS / IVS connotes specific diagnostic / laboratory services. HEALTH, on the other hand, with respect to walk in clinics, has a different commercial impression - that of general ambulatory medical care. For the above reasons, the applicant hereby respectfully requests reconsideration in withdrawal of the 2(d) rejection.

Conclusion

For the reasons set forth above, applicant hereby respectfully requests reconsideration and withdrawal of the Section 2(d) rejection. If further matters remain in connection with this application, the examining attorney is invited to telephone the applicant's undersigned representative to resolve any issues.

Respectfully submitted,

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 /clr/

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² *In re Hearst Corp.*, 25 U.S.P.Q.2d 1238, 1239 (Fed. Cir. 1992) (explaining that "marks tend to be perceived in their entireties, and all components thereof must be given appropriate weight. When "GIRL" is given fair weight, along with "VARGA", confusion with "VARGAS" becomes less likely.").