

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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HOSPICECARE, INC.,

Plaintiff,

v.

BJM HOSPICE, L.L.C.,  
doing business as ST. JUDE HOSPICE,

Defendant.

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OPINION AND ORDER

11-cv-537-bbc

Plaintiff HopsiceCare, Inc. is suing defendant BJM Hospice, LLC for trademark infringement. The question is whether defendant's logo (on the right below) infringes plaintiff's registered trademark (on the left):



Plaintiff has filed a motion for a preliminary injunction to stop defendant from using its logo. Because plaintiff has not shown that it is entitled to relief at this stage, I am denying its motion.

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972 (1997). See also Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380, 389 (7th Cir. 1984) ("[A] preliminary injunction is an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it."). In particular, "[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 20 (2008).

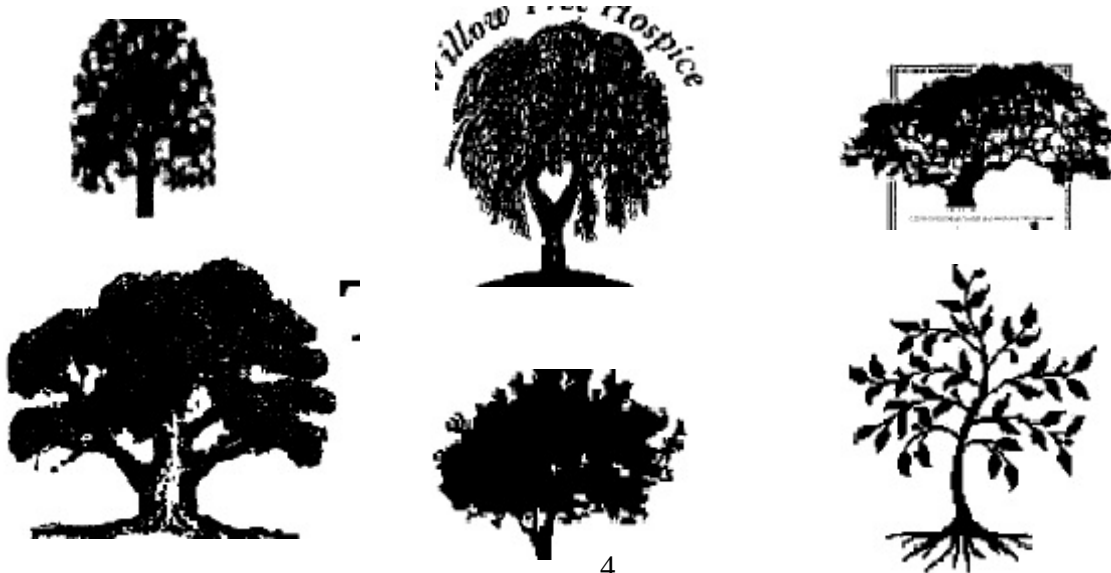
Plaintiff does not develop an argument on any of these factors in its five-page opening brief. Rather, it simply states in conclusory fashion that it has met each factor and refers the court to its proposed findings of fact. However, the proposed findings of fact are simply assertions, such as "[t]he Cross Tree Mark is causing confusion in Plaintiff's market place and is infringing on the Plaintiff's Tree Logo Mark" and "[a]s a direct and proximate result of the actions of Defendant alleged above, HospiceCare has been damaged and will continue

to be damaged in a way that cannot be remedied monetarily.” Plt.’s PFOF ¶¶ 14-15, dkt. #10. These are legal conclusions, not facts, so they have no evidentiary value.

With respect to its likelihood of success on the merits, plaintiff lists the two elements of its infringement claim: a valid trademark and a likelihood of confusion as to the origin of defendant’s products. H-D Michigan, Inc. v. Top Quality Service, Inc., 496 F.3d 755, 759 (7th Cir. 2007). However, plaintiff does not address any of the factors that a court must consider in determining whether consumers are likely to be confused, such as the similarity between the marks, the defendant's intent and any actual confusion by customers. AutoZone, Inc. v. Strick, 543 F.3d 923, 929 (7th Cir. 2008) (other factors include similarity of products, area and manner of concurrent use, degree and care likely to be exercised by consumers and strength of plaintiff's mark).

After defendant pointed out these weaknesses in plaintiff’s opening brief, plaintiff attempted to address some of them in its reply brief, but that was too late. Narducci v. Moore, 572 F.3d 313, 324 (7th Cir. 2009) (“[T]he district court is entitled to find that an argument raised for the first time in a reply brief is forfeited.”). In any event, plaintiff still ignores many of the factors in its six-page reply brief. Even with respect to those it does address, its argument remains conclusory. For example, with respect to the similarity of the marks, plaintiff fails to address the many differences between the two logos in the trunk, branches and leaves. Although both logos are trees, plaintiff does not explain why any

hospice logo using a tree would violate plaintiff's trademark. In fact, it is undisputed that many hospice care providers use trees in their logos, which weakens plaintiff's argument that customers are likely to associate any one tree logo with plaintiff. General Mills, Inc. v. Kellogg Co., 824 F.2d 622, 626 (8th Cir. 1987) ("Determining that a mark is weak means that consumer confusion has been found unlikely because the mark's components are so widely used that the public can easily distinguish slight differences in the marks, even if the goods are related."); 2 J. Thomas McCarthy, McCarthy on Trademarks & Unfair Competition § 11:85 (4th ed. 2009) ("A mark that is hemmed in on all sides by similar marks on similar goods or services cannot be very 'distinctive.' It is merely one of a crowd of similar marks."). Plaintiff says that the other logos are less similar than defendant's, but that is not immediately apparent with respect to several of the examples defendant provided:



Dkt. #19-2.

With respect to actual confusion, plaintiff cites the affidavit of Laura Jennings, who is plaintiff's director of community outreach. However, the only example of confusion she identifies is a hearsay statement from an unidentified employee of Meriter Hospital that defendant "utilizes the same color and tree" as plaintiff; the employee "inquired as to how people are to tell the difference between the hospice entities." Jennings Aff. ¶ 4, dkt. #32. Plaintiff says nothing about the color of either logo in its complaint or proposed findings of fact. The photographs plaintiff filed with the court show that the color of defendant's logo varies depending on context. In any event, the statement of the employee is inadmissible (because it is hearsay), has marginal relevance (because it does not come from a customer) and has very limited probative value (because it is simply one person). It is far from sufficient to justify the extraordinary remedy of enjoining defendant from using its own logo.

#### ORDER

IT IS ORDERED that plaintiff HospiceCare, Inc.'s motion for a preliminary

injunction, dkt. #9, is DENIED.

Entered this 27th day of September, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge