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NAME: Nancy L. Taylor

SIGNATURE: _____

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Serial No:	78/131,833	[redacted] 01-16-2003 U.S. Patent & TMOfc/TM Mail Rcpt Dt. #72
Publication in the Official Gazette:	TM 269	
Publication Date:	December 31, 2002	
Mark:	**RE-LEVE**	

Box TTAB, NO FEE
Assistant Commissioner for Trademarks
2900 Crystal Drive
Arlington, Virginia 22202-3513

REQUEST FOR SUSPENSION AND EXTENSION OF TIME TO FILE NOTICE OF OPPOSITION DUE TO FILING OF LETTER OF PROTEST

Sir or Madam:

Bayer-Roche L.L.C., a Delaware limited liability company having its principal place of business at 36 Columbia Road, Morristown, New Jersey 07962, by and through its attorneys, hereby requests that the Board **suspend** the time to file a Notice of Opposition in the above-identified matter pursuant to TBMP § 215. Potential opposer Bayer-Roche L.L.C. filed a letter of protest with the PTO on November 5, 2002 (see

attached copy), well over a month before publication of the above-identified mark on December 31, 2002. Under TBMP § 215:

> If a potential opposer indicates, in a first or a subsequent request for an extension of time to oppose, that potential opposer filed a letter of protest (not yet determined by the Director) with respect to the subject mark within thirty days after publication, the Board will grant the extension request, if otherwise appropriate, and then suspend the running of the extension period pending determination of the letter of protest.

Potential opposer is not aware at this date of any determination by the PTO on the letter of protest, so the Board should suspend the period in which to oppose the above-identified application pending determination of the letter of protest.

In furtherance of this request, Bayer-Roche L.L.C., by and through its attorneys, hereby requests that the Board grant a sixty (60) day extension of time to file a Notice of Opposition, through March 31, 2003, in the above-identified matter.

This request is being submitted in triplicate as required by 37 C.F.R. § 2.102(d).

Dated: January 13, 2003

Respectfully submitted,

HELLER EHRMAN WHITE & McAULIFFE LLP

By: _____

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24172-0036

November 5, 2002

Via Express Mail

Assistant Commissioner for Trademarks
2900 Crystal Drive
Arlington, Virginia 22202-3514
Attention: Ms. Jessie Marshall

Re: Letter of Protest Regarding Serial No. 78/131,833 for RE-LEVE

Dear Ms. Marshall:

We write on behalf of our client Bayer-Roche L.L.C. ("Bayer-Roche") to protest trademark Application Serial Number 78/131,833 for RE-LEVE filed on May 29, 2002 in Class 5 for "analgesic topical gel for medical use." (Please see the enclosed print-out from the PTO web site for further information on the application).

The proposed mark RE-LEVE is merely a misspelling of the word "relieve" – a word which is descriptive of the specified goods. Applicant's goods are an analgesic topical gel, *i.e.*, a gel that "relieves pain." *See* attached definition of "analgesic," Webster's II New College Dictionary (1995). The specimen of use submitted with the application makes clear the descriptive nature of the mark. The specimen is a container bearing the RE-LEVE device and the legend "A Topical Pain Relieving Gel" (see copy of specimen from application file). The term RE-LEVE is thus used here to denote a product that "relieves" pain. The deliberate misspelling "re-leve" does not change the descriptive character of the term.[1]

In addition, the proposed mark RE-LEVE is likely to be confused with Bayer-Roche's ALEVE mark, registered in Class 5 for "anti-inflammatory, analgesic, and antipyretic pharmaceutical preparations" (Reg. No. 1,536,042). The proposed mark RE-LEVE

[1] *See* 2 McCarthy on Trademarks § 11:31 ("If the misspelling is so phonetically identical to the original descriptive term that buyers will recognize it as descriptive, then the misspelled mark is still 'descriptive.'"); *citing, inter alia, Andrew J. McPartland, Inc. v. Montgomery Ward & Co.*, 164 F.2d 603 (C.C.P.A. 1947) (KWIX-TART held descriptive as phonetic equivalent of "quick start"); *A. & H. Transp., Inc. v. Save Way Stations, Inc.*, 214 Md. 325 (1957) (SAVON GAS held equivalent of descriptive "save on gas"); *No-D-Ka Dentifrice Co. v. S. S. Kresge Co.*, 24 F.2d 726 (D.Mass. 1928) (NO-D-KA held equivalent of descriptive "no decay"); *Steem-Electric Corp. v. Herzfeld-Phillipson Co.*, 118 F.2d 122 (7th Cir. 1940) (STEEM held the equivalent of the descriptive "steam").

incorporates the last four letters of the ALEVE mark and sets the "LEVE" suffix apart from the rest of the mark with a dash, making the marks visually similar. The marks also sound similar. Finally, the goods for both marks are analgesics and so are nearly identical.

Because the proposed mark is descriptive under 15 U.S.C. § 1052(e) and so resembles the ALEVE mark as to be likely to cause confusion under 15 U.S.C. § 1052(d), we urge you to grant this letter of protest and recommend refusal of App. Ser. No. 78/131,833 for both the Principal and Supplemental Registers.

Thank you very much for your attention to this matter.

Very truly yours,

Heller Ehrman White & McAuliffe LLP

By: _____
Beth M. Goldman
Attorneys for Bayer-Roche L.L.C.

Attachments

cc: Fred Carl

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