

From: Korschak, Carl

Sent: 1/5/2022 5:25:00 PM

To: TTAB E Filing

CC:

Subject: U.S. Trademark Application Serial No. 88732121 - PROCELLER8 - N/A - Request for  
Reconsideration Denied - Return to TTAB - Message 1 of 12

\*\*\*\*\*

Attachment Information:

Count: 11

Files: GSK1-1.jpg, GSK1-2.jpg, GSK1-3.jpg, GSK1-4.jpg, GSK1-5.jpg, GSK1-6.jpg, GSK1-7.jpg, GSK2-1.jpg,  
GSK2-2.jpg, GSK2-3.jpg, 88732121.doc

**United States Patent and Trademark Office (USPTO)**  
**Office Action (Official Letter) About Applicant's Trademark Application**

**U.S. Application Serial No.** 88732121

**Mark:** PROCELLER8

**Correspondence Address:**

KEVIN P. HARTLEY

TRUST TREE LEGAL, P.C.

798 BERRY ROAD, #41400

NASHVILLE, TN 37204

**Applicant:** Leitgeb, Mark

**Reference/Docket No.** N/A

**Correspondence Email Address:**

kevin@trust-tree.com

**REQUEST FOR RECONSIDERATION**  
**AFTER FINAL ACTION**  
**DENIED**

**ISSUE DATE:** **January 05, 2022**

**REQUEST FOR RECONSIDERATION DENIED:** Applicant's request for reconsideration is denied. *See* 37 C.F.R. §2.63(b)(3). The trademark examining attorney has carefully reviewed applicant's request and determined the request did not: (1) raise a new issue, (2) resolve all the outstanding issue(s), (3) provide any new or compelling evidence with regard to the outstanding

issue(s), or (4) present analysis and arguments that were persuasive or shed new light on the outstanding issue(s). TMEP §§715.03(a)(ii)(B), 715.04(a).

**SECTION 2(d) REFUSAL – LIKELIHOOD OF CONFUSION:** The trademark examining attorney issued a final Office action on June 23, 2021, which maintained the following refusal: Section 2(d) Refusal – Likelihood of Confusion – U.S. Trademark Reg. Nos. 4444012, 4851446, and 4727806. The trademark examining attorney notes that U.S. Trademark Reg. No. 4727806 was cancelled on December 10, 2021. Applicant filed a request for reconsideration on December 23, 2021.

Applicant’s request for reconsideration “incorporates its prior [Office action] responses by reference”, and thus restates its several arguments concerning the similarity of the marks at issue, and the relatedness of the parties’ respective goods. The trademark examining attorney has carefully reconsidered applicant’s arguments, and still does not find them persuasive. The applied-for mark PROCELLER8 is, as previously noted, highly similar to the registered marks PROCELLERA and PROCELLERA HELIX in appearance, sound, and overall commercial impression. The parties’ goods, e.g. dietary and nutritional “supplements”, “anti-inflammatories”, “antivirals”, “topical analgesics”, and “preparation[s] for the relief of pain for the treatment of wounds and skin disorders”, are also commercially and practically related. The previously attached evidence from HealthLine.com, MedicalNewsToday.com, BodyBuilding.com, NatureMade.com, NowFoods.com, Bayer.com, FlintstonesVitamins.com, Merriam-Webster dictionary, Spine-Health.com, MotherEarthLiving.com, LifeIRL.com, eBay.com, and HRSupplements.com, shows that supplements of various kinds, e.g. willow bark and peppermint oil, are commonly marketed and/or used as analgesics and pain relievers. The registration in this case uses broad wording to describe “analgesics”, “topical analgesics”, and “preparation[s] for the relief of pain for the treatment of wounds and skin disorders”, which presumably encompasses all goods of those type, including applicant’s narrower “dietary supplements”, “herbal supplements”, “mineral supplements”, “nutritional supplements”, “protein supplements”, “vitamin supplements.” *See, e.g., In re Solid State Design Inc.*, 125 USPQ2d 1409, 1412-15 (TTAB 2018); *Sw. Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015). The same evidence, as well as the newly attached evidence from US.Sandoz.com, GSK.com, Caltrate.com, Advil.com, CVS.com, and Walgreens.com shows further that “dietary supplements”, “herbal supplements”, “mineral supplements”, “nutritional supplements”, “protein supplements”, and “vitamin supplements” are commonly marketed and sold from the same sources, under the same brands or marks, as “anti-inflammatories”, “anti-inflammatory...preparations”, “analgesics”, “athletes foot preparations”, and “bandages.” *See, e.g., In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202-04 (TTAB 2009); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1268-69, 1271-72 (TTAB 2009). Optimum Nutrition, for example, markets and sells vitamins, protein supplements, and fish oil, all under the Optimum Nutrition brand name. *Id.* Bayer similarly markets and sells multivitamins and the NSAID aspirin, i.e. acetylsalicylic acid, all under the Bayer brand name. *Id.* GlaxoSmithKline likewise markets and sells multivitamins and the topical anti-inflammatory Voltaren, i.e. diclofenac, all under the GSK brand name. *Id.* The newly attached evidence from Pharma.Elsevier.com and NBCNews.com, also shows that pharmaceutical companies have made major inroads into the dietary and nutritional supplement industry, and that those companies now commonly market and sell both types of goods.

Applicant's various supplements are also related to registrant's goods because they may be used together. Goods that are often used together, or otherwise purchased by the same purchasers for the same or related purposes, have generally been found to be related such that confusion would be likely if they are marketed under the same or similar marks. See *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1567, 223 USPQ 1289, 1290 (Fed. Cir. 1984) (holding bread and cheese to be related because they are often used in combination and noting that "[s]uch complementary use has long been recognized as a relevant consideration in determining a likelihood of confusion"); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1272 (TTAB 2009) (holding medical MRI diagnostic apparatus and medical ultrasound devices to be related, based in part on the fact that such goods have complementary purposes because they may be used by the same medical personnel on the same patients to treat the same disease). The newly attached evidence from Cancer.gov, NIH.gov, HealthInAging.org, and Health.KaiserPermanente.org shows that both pharmaceutical and non-pharmaceutical preparations are commonly used together as "complementary" medical treatments. A patient suffering from arthritis might, for example, use both a topical anti-inflammatory and a dietary supplement, e.g. glucosamine, to treat their symptoms.

Third-party trademark registrations also show that applicant's supplements are related to registrant's various goods, e.g. "anti-inflammatories" and "anti-inflammatory...preparations." Active third-party trademark registrations are probative evidence suggesting that the goods in those registrations are "of a kind that may emanate from a single source." See *In re I-Coat Co.*, 126 USPQ2d 1730, 1737 (TTAB 2018) (citing *In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988)); TMEP §1207.01(d)(iii). The previously attached copies of fifteen third-party trademark registrations, registered for use in connection with supplements, anti-inflammatories, and medical goods like "bandages", suggest that parties' goods commonly emanate from a same sources, under the same brands or marks. *Id.*

Applicant also argues in its request for reconsideration that consumer confusion is unlikely in this case, because there has allegedly "not been any instances of confusion between Applicant's mark and the Cited Marks despite almost two years of simultaneous use." Applicant's argument is, however, not persuasive. Applicant—a single individual—cannot credibly claim to possess firsthand knowledge that there "have not been any instances of confusion between Applicant's mark and the Cited Marks", nor has applicant adduced any evidence tending to support that claim. Applicant also has not established, by evidence or otherwise, that the applied-for mark has ever been used in commerce, let alone used for "almost two years." Applicant's claim that there "have not been any instances of confusion between Applicant's mark and the Cited Marks", even if accepted *arguendo*, also would not obviate the likelihood of confusion in this case, as a "showing of actual confusion is not necessary to establish a likelihood of confusion." *In re i.am.symbolic, llc*, 866 F.3d 1315, 1322, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164-65, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); TMEP §1207.01(d)(ii). "[T]he relevant test is *likelihood* of confusion, not *actual* confusion." *In re Detroit Athletic Co.*, 903 F.3d 1297, 1309, 128 USPQ2d 1047, 1053 (Fed. Cir. 2018) (emphasis in original).

“Uncorroborated statements of no known instances of actual confusion . . . are of little evidentiary value”, moreover, especially during *ex parte* examination. *In re Majestic Distilling Co.*, 315 F.3d 1311, 1317, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003).

Accordingly, the following refusal made final in the Office action dated June 23, 2021 is maintained and continued:

- Section 2(d) Refusal – Likelihood of Confusion – U.S. Trademark Reg. Nos. 4444012 and 4851446

See TMEP §§715.03(a)(ii)(B), 715.04(a).

In addition, the following refusal made final in that Office action has been obviated, as the relevant prior registration has been cancelled:

- Section 2(d) Refusal – Likelihood of Confusion – U.S. Trademark Reg. No. 4727806

See TMEP §§715.03(a)(ii)(B), 715.04(a).

If applicant has already filed an appeal with the Trademark Trial and Appeal Board, the Board will be notified to resume the appeal. See TMEP §715.04(a).

If applicant has not filed an appeal and time remains in the six-month response period, applicant has the remainder of that time to (1) [file another request for reconsideration](#) that complies with and/or overcomes any outstanding final requirement(s) and/or refusal(s), and/or (2) [file a notice of appeal](#) to the Board. TMEP §715.03(a)(ii)(B). Filing a request for reconsideration does not stay or extend the time for filing an appeal. 37 C.F.R. §2.63(b)(3); see TMEP §715.03(c).

/Carl A. Konschak/

Carl A. Konschak, Esq.

Examining Attorney

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.