

ESTTA Tracking number: **ESTTA349933**

Filing date: **05/28/2010**

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

Proceeding	77665184
Applicant	Follica, Inc.
Applied for Mark	FOLLICA
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Submission	Reply Brief
Attachments	50481.T13001 Reply Brief.PDF ( 6 pages )(359637 bytes )
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Date	05/28/2010

Applicant: Follica, Inc.  
Serial No.: 77665184  
Filing Date: February 6, 2009  
Mark: FOLLICA

### REPLY BRIEF

This Reply Brief is filed in response to the Examining Attorney's Appeal Brief filed on May 12, 2010. The Examining Attorney maintains the request that the final refusal of the registration of Applicant's mark for the goods in class 5 be affirmed. Applicant, further to Applicant's Appeal Brief, herein addresses the additional points made in the Examining Attorney's Appeal Brief.

Applicant submits that there is no likelihood of confusion of a potential consumer as to the source of the goods in class 5 for which Applicant seeks registration and the source of the goods listed in the cited registration (U.S. Registration No. 3453331 for the mark ProFollica).

#### Similarity of the Goods and the Trade Channels for the Goods

Registrant's goods are registered in class 3 for "Shampoos; Hair care kits comprising non-medicated hair care preparations, namely, a shampoo and activator gel; Hair gel." Applicant's goods in class 5 are "Pharmaceutical preparations for hair growth treatments." The Office asserts that the "purchaser for both of these products [Applicant's and Registrant's products] would be the same in that they are seeking products that promote hair growth" (Examining Attorney's Appeal Brief; bottom of page 6). Applicant, based on Registrant's use of its mark, respectfully disagrees with this assertion.

Applicant's proposed use is in connection with a *pharmaceutical*, whereas Registrant's products are shampoos, hair care kits, and *non-medicated* hair care preparations marketed as an

*alternative* to a pharmaceutical. Applicant submits that a consumer seeking a pharmaceutical hair growth treatment is not the same as one seeking an alternative to a pharmaceutical.

Registrant's own use of the mark, as shown in Exhibits 1 and 2 of record, makes it clear to a potential consumer that Registrant's mark is not being used in connection with pharmaceutical preparations. As is evident from Exhibits 1 and 2, Registrant's website states that ProFollica "lets you break free of surgery and prescription drugs for your hair loss needs," that "ProFollica<sup>TM</sup> is the natural choice for those who want an **alternative to the pharmaceutical approach** for hair re-growth" (emphasis added), and that "[t]his product is not intended to diagnose, cure, or prevent any disease." Accordingly, Registrant's own website tells a potential purchaser that the ProFollica mark is not being used in connection with pharmaceutical preparations. Instead, the ProFollica mark is being used on products that are advertised as being *an alternative to pharmaceuticals*. A potential consumer reading these statements would not be confused into believing that a ProFollica product and a pharmaceutical preparation bearing the FOLLICA mark come from the same source.

The Office also asserts that the cited third party registrations for pharmaceuticals and non-medicated products "have probative value to the extent that they serve to indicate that applicant's goods and registrant's goods may originate from a single source and are marketed under the same trademark" (Examining Attorney's Appeal Brief; page 7). In the present case, however, Registrant's own marketing distinguishes the ProFollica products from pharmaceuticals. Registrant uses the ProFollica mark in a manner that alerts a potential consumer to the fact that the ProFollica products are not pharmaceuticals.

Similarly, while the Office asserts that pharmaceutical preparations are in Registrant's normal field of expansion, Registrant's own marketing is contrary to this assertion. Registrant

markets ProFollica products as *alternatives* to pharmaceuticals. There simply is no basis for concluding that Registrant, contrary to the statements on its own website, is likely to expand into the field of pharmaceuticals with ProFollica products.

The Office further dismisses the relevance of Registrant's statements on its website because relying on these statements "assumes that the potential purchaser will actually take the trouble to go to the registrant's website and read the information about the product" and states that "purchasers frequently do not go onto a manufacturer's website when buying a product" (Examining Attorney's Appeal Brief; paragraph spanning pages 7 and 8). Applicant submits that, in the present case, these concerns are unfounded.

As is evident from the Exhibits of record, the ProFollica products *are sold* on Registrant's website (see "Order" tab at the top right corner). As such, a potential purchaser would indeed go to Registrant's website and likely would see the information that registrant provides on the website. Registrant's website also provides no indication that the ProFollica products are available *anywhere but on* Registrant's website. Instead, the website contains a large prompt to "Order Now" from the website. Applicant submits that the potential purchaser of the ProFollica products would be aware that the products are marketed as an alternative to pharmaceuticals.

Further, in response to Applicant's contention that a purchaser of pharmaceuticals is highly sophisticated and that such goods are not purchased at the spur of the moment, but rather after considerable contemplation, the Office states (at page 8 of the Examining Attorney's Appeal Brief):

Even if one assumes that the purchaser of applicant's pharmaceutical product is sophisticated, the purchaser of registrant's non-pharmaceutical goods includes the general public. Therefore, the purchaser of registrant's goods is not sophisticated.

The Office's observation that a purchaser of a registrant's product is not sophisticated (because they are not purchasing a pharmaceutical) does not negate the fact that pharmaceuticals are not purchased at the spur of the moment and generally are purchased with professional guidance (i.e., the guidance of a physician or pharmacist).

The Office states (at page 8 of the Examining Attorney's Appeal Brief):

Although physicians and pharmacists are no doubt carefully trained to recognize differences in the characteristics of pharmaceutical products, they are not trained to recognize the difference between similar trademarks used on such products.

As noted above, Registrant's products are not pharmaceuticals and are not prescribed by physicians or dispensed by pharmacists. The issue is whether a physician or pharmacist prescribing or dispensing a pharmaceutical bearing the FOLLICA mark would be confused by a ProFollica product that is sold on a website which explicitly states that ProFollica products let you "break free of surgery and prescription drugs," are alternatives to pharmaceuticals, and are not intended to diagnose, cure, or prevent any disease. Applicant submits that this is highly unlikely to be the case.

For all the above reasons, Applicant submits that the difference in the goods and channels of trade alleviates any potential likelihood of confusion between goods sold under the FOLLICA and ProFollica marks.

#### Similarity of the Marks

In response to Applicant's argument that the inclusion of the letters "PRO" at the beginning of the ProFollica mark results in a different appearance, pronunciation, and commercial impression from the FOLLICA mark, the Office states (page 5 of the Examining Attorney's Appeal Brief):

Since PRO is such a commonly used term and is found throughout everyday language, the average user would focus on the unusual term FOLLICA and would retain this portion of the mark. Therefore, the dominant portion of registrant's mark is the term FOLLICA which is identical to applicant's proposed mark.

\* \* \*

[T]he mere addition of a term to a registered mark generally does not obviate the similarity between the marks nor does it overcome the likelihood of confusion.

Applicant notes that, in the present case, the letters "PRO" are present in Registrant's mark and are not present in Applicant's mark. Applicant's mark does not merely add a term to Registrant's mark. Instead, Registrant's mark contains letters that are not included in Applicant's mark.

Further, the letters "PRO" are present at the beginning of Registrant's mark. Applicant submits that the average consumer would see these marks as different in appearance because of the natural tendency of a reader to be aware of the beginning of a word - one does not start reading in the middle of a word. The inclusion of the letters "PRO" in Registrant's mark results in a different commercial impression from Applicant's mark.

The Office makes the assertion that "the average purchaser would reasonably assume that PROFOLLICA refers to the professional line of registrant's goods while FOLLICA refers to the non-professional line of registrant's goods" (Examining Attorney's Appeal Brief; bottom of page 5). Applicant disagrees with the statement that it would be *reasonable* for a potential purchaser to assume that "Shampoo, Hair care kits comprising non-medicated hair care preparations, [or] Hair gel" are a *professional line* of pharmaceutical preparations. Shampoo, hair care kits including non-medicated preparations, and hair gel are products that clearly differ from pharmaceuticals. There simply is no basis for asserting that an average consumer would consider a non-medicated product to be a professional line of a pharmaceutical. Indeed, as stated above, Registrant draws a clear distinction between the ProFollica products and pharmaceuticals.

In view of these differences in the marks, Applicant submits there would be no likelihood of confusion as to the source of the goods intended to be sold under the respective marks.

Conclusion

Based on the above arguments, Applicant respectfully requests that the final refusal of the Examining Attorney to allow the FOLLICA mark for the goods in class 5 be reversed and that the FOLLICA mark be allowed for the goods in class 5, as well as for the goods and services in classes 10 and 44.