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Filing date: **03/15/2010**

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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Date	03/15/2010

Applicant: Follica, Inc.
Serial No.: 77665184
Mark: FOLLICA

APPEAL BRIEF

This Appeal Brief is filed in support of Applicant's Notice of Appeal filed on December 16, 2009.

Background

The Office has refused registration of Applicant's mark for the goods in class 5 based on an asserted likelihood of confusion with the mark of U.S. Registration No. 3453331. The refusal was made final in an Office Action dated June 17, 2009 and Applicant's Request for Reconsideration was denied in an action dated January 4, 2010. A Notice of Appeal was timely filed on December 16, 2009.

Argument

Applicant submits that there is no likelihood of confusion between Applicant's mark in connection with the goods in class 5 and the mark of the cited registration.

The below table summarizes the cited registration.

Registration No.	3453331
Mark	ProFollica
Class	3
Goods/ Services	Shampoos; Hair care kits comprising non-medicated hair care preparations, namely, a shampoo and activator gel; Hair gel.

Similarity of the Goods and the Trade Channels for the Goods

Applicant submits that the nature and scope of a party's goods or services must be determined on the basis of the goods or services recited in the application or registration. TMEP § 1207.01(a)(iii); citing, e.g., *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002). Registrant's goods are registered in class 3 and are shampoos, hair care kits comprising non-medicated hair care preparations, and hair gel. Applicant's goods in class 5 are "Pharmaceutical preparations for hair growth treatments." Pharmaceuticals are clearly different from shampoos, hair care kits comprising *non-medicated* hair care preparations, and hair gel. Hence, Applicant's goods are clearly different from Registrant's goods.

The Office, in the June 17, 2009 Office Action asserted:

[T]he registrant's goods, shampoos; hair care kits comprising non-medicated hair care preparations, namely, a shampoo and activator gel; hair gel, and applicant's goods, pharmaceutical preparations for hair growth treatments, travel in the same channels of trade because both are used in the care of hair.

The Office also provided copies of printouts from a USPTO database search showing third party registrations of marks used in connection with goods that are the same or similar to those of Applicant and Registrant in the present case. The Office stated:

These printouts have probative value to the extent that they serve to suggest that the goods and/or services listed therein, namely shampoos, activator gel, hair gel and pharmaceutical preparations for hair growth treatments, are of a kind that may emanate from a single source.

Applicant respectfully traverses this basis for rejection.

Whether the type of goods covered by Applicant's intended use and Registrant's registration *may* theoretically emanate from a single source is not central to the analysis in the present case. Here, importantly, Registrant's own use of the mark makes it clear to a potential consumer that Registrant's mark is not being used in connection with pharmaceutical

preparations (see Exhibits 1 and 2). Exhibit 1 is a printout from Registrant's website on which the ProFollica products are sold and was enclosed with Applicant's May 28, 2009 reply and Exhibit 2 is a resubmission of Exhibit 1 in which certain sections were highlighted and was enclosed with Applicant's December 16, 2009 reply to the final Office Action. 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 "ProFollicaTM 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, ProFollica 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.

Moreover, in view of Registrant's statements on the website, it is clear that Registrant is unlikely to expand into the field of pharmaceuticals using the ProFollica mark. Registrant advertises ProFollica products as alternatives to pharmaceuticals. The conditions surrounding the marketing of the ProFollica products are such that the products are distinguished from pharmaceutical preparations. A potential purchaser would, therefore, be advised that Applicant's and Registrant's goods are distinct and are unlikely to come from a common source.

Applicant further submits that a purchaser of pharmaceutical preparations is highly sophisticated. Such goods are not purchased at the spur of the moment, but rather after considerable contemplation. Also, such goods normally are not purchased by the general public

without professional guidance by a physician or pharmacist. The sophistication of the purchaser of the goods further mitigates any likelihood of confusion.

Similarity of the Marks

The Office stated:

The registrant's mark, ProFollica, and applicant's mark, FOLLICA, create a similar commercial impression because the dominant portion of registrant's mark is the word FOLLICA which is identical to applicant's mark.

The Office further stated:

The first syllable of registrant's mark is PRO which is the abbreviation of the word "professional". Upon seeing the marks, purchasers would reasonably assume that registrant's goods are merely the professional line of applicant's goods.

As an initial matter, as explained in detail above, Registrant's use of the ProFollica mark clearly advises the potential purchaser that Registrant's goods are not pharmaceuticals and, on this basis alone, Applicant submits that there is no likelihood of confusion.

In addition, Applicant submits that inclusion of the prefix "Pro" in Registrant's mark results in a different appearance and adds a syllable to the pronunciation of the mark, both of which result in a different commercial impression. Moreover, Applicant contends that it would not be reasonable for a potential purchaser to assume that "Shampoo, Hair care kits comprising non-medicated hair care preparations, [or] Hair gel" are "merely a professional line" of *pharmaceutical* preparations because, 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

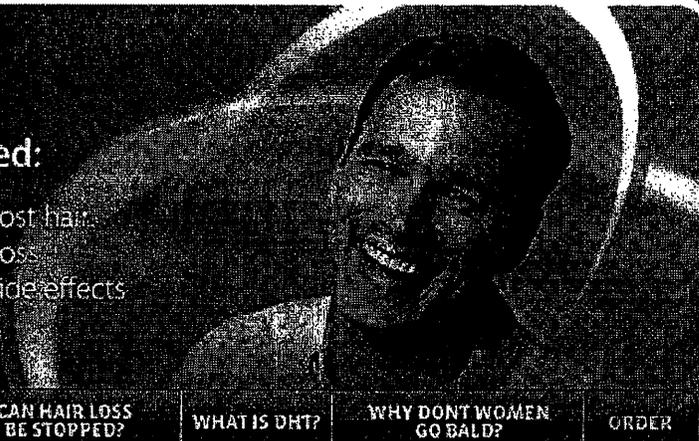
Based on the above arguments, Applicant respectfully requests that the refusal of the Examining Attorney to allow the FOLLICA mark for the goods in class 5 be reversed and that the FOLLICA mark be allowed for the goods in class 5, as well as for the goods and services in classes 10 and 44.

Index of Cited Cases

Hewlett-Packard Co. v. Packard Press Inc., 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002).

EXHIBIT 1

What is ProFollica? | Why does hair fall out? | Can hair loss be stopped? | What is DHT? | Why don't women go bald? | [Order](#)



Gain it back!
ProFollica is just what you need:

- Stop hair loss and begin to re-grow lost hair.
- Potent plant extracts, stopping hair loss.
- Avoid expensive surgery and nasty side effects.

HOME	WHAT IS PROFOLLICA?	WHY DOES HAIR FALL OUT?	CAN HAIR LOSS BE STOPPED?	WHAT IS DHT?	WHY DONT WOMEN GO BALD?	ORDER
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TESTIMONIALS

"I first started losing my hair when I was 18. Of course, all my friends thought that it would be great fun to tease me about my bald spot. Eventually I got sick and tired of losing my hair and decided I had to do something about it. So I talked to my doctor. He prescribed me Rogaine™. To my disappointment, I didn't get any results from using it. Then I heard about ProFollica™. I used it, and within 3 weeks I started seeing new hair."

Charlie, Bakersfield, CA

"With my hair coming back, I look years younger!"

"I was planning on having a hair transplant. Unfortunately my doctor told me that due to the fineness of my hair, I wasn't a good candidate for a hair transplant. I was devastated. I was really looking forward to seeing real hair growing in my bald spot. Then, a few years later I saw an ad for ProFollica™. Since it has a money back guarantee, I figured I couldn't lose. Now I'm glad I didn't have a transplant. I saved thousands of dollars."

James, KY

TAKE A LOOK AT THE ADVANTAGES THAT ONLY PROFOLLICA™ CAN OFFER.

- It's safe and all-natural
- It uses a proven, unique formula which can't be duplicated
- It works for men and women
- There are no side effects
- It's safe for colored, or permed hair
- There's no prescription necessary
- It's easy to use.
- It lets you break free of surgery and prescription drugs for your hair loss needs

And finally, it comes with our " **You Must See Visible Hair Re-growth Or Your Money Back Guarantee.**" We challenge you to find any other hair re-growth system that comes close to what we offer. You simply won't find it.

Now, you might be wondering...

WHY IS PROFOLLICA™ SO EFFECTIVE IN RE-GROWING HAIR?

ProFollica™ uses a three part strategy for giving your hair follicles the best chances for

TESTIMONIALS

"I used to wear a baseball cap everywhere I went. I wouldn't even take it off in restaurants. I'm now seeing significant amounts of hair re-growing. Thank you ProFollica™. You've given me back my life."

Wendell, Salt Lake City, UT

TESTIMONIALS

"I decided to try ProFollica™ because it contained all natural ingredients and didn't have any nasty side effects. I'd tried another hair loss remedy before and had to stop because of the side effects. I'm now seeing my hair growing back in and I don't have any side effects."

Jonathan, Toronto, ONT

hair recovery. These parts include a shampoo, a gel, and a nutritional supplement.

ProFollica™ is specially formulated, using the latest hair loss research information available. The exact formulation of ProFollica™ was developed from years of research, by highly trained professionals. The ingredients, and their exact proportion, were chosen based on their ability to block DHT, increase blood circulation, and to revitalize hair follicles. These compounds have their first visible effects within weeks of starting use. Within 6 months, you'll see substantial new growth!

Here are just some of the ingredients in the ProFollica™ Gel, one of the three system components:

- Kigelia Africana Extract (blocks enzyme)
- Ginkgo Biloba Extract (stimulates microcirculation in the scalp)
- Cinnamomumb Zeylanicum Extract (Irrigates DHT and bacteria from scalp)
- Salvia Sclarea Extract (stimulates and attaches to DHT)
- Panax Ginseng Root Extract (scalp stimulation for increasing hair depth)

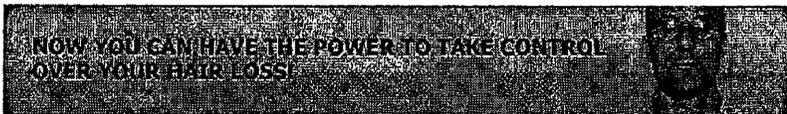
ProFollica™ is the natural choice for those who want an alternative to the pharmaceutical approach to hair re-growth.

CAN PROPER HAIR CARE RE-GROW HAIR?

The answer, surprisingly, is yes.

There is a catch though. The products used on the hair must interact with hair follicles in a precise manner.

In order to achieve hair growth, the following three things must occur. The excess sebum that is clogging the hair follicles must be removed. Whatever is applied on the head, must reduce DHT levels. Finally, the hair follicles must be revitalized with increased blood circulation.



Fortunately, there is a product that does all three - it's called ProFollica™. Using ProFollica™ you can prevent and reverse hair loss. ProFollica™ offers a natural and safe alternative to the costly prescription medicines currently used to treat baldness. And, unlike many other shampoos it contains no harsh chemicals.

PROFOLLICA™ IS GUARANTEED!

When you use ProFollica™, you won't need to use hair re-growth solutions that come with dangerous and unpleasant side effects. ProFollica™ is all natural. There are no harmful ingredients. There are no toxic chemicals. It's inexpensive. And there are no side effects except great looking hair.

Don't you owe it to yourself to turn back the clock and look your best? Use ProFollica™, and don't be surprised when you look in the mirror after just a few weeks to see yourself looking years younger as a result. Still unconvinced?

We're so confident that you'll be impressed with the results that ProFollica™ comes with a 100% satisfaction money back guarantee. No questions asked! We guarantee that within 60 days you'll see new, visible hair growth. If you're not 100% satisfied, simply return your empty bottles for a fast and courteous refund.



What Is ProFollica™? | Why does hair fall out? | Can hair loss be stopped? | What is DHT? | Why don't women go bald?
Contact Us | Guarantee | Webmasters | Order ProFollica™

These statements have not been evaluated by the Food and Drug Administration.
This product is not intended to diagnose, treat, cure, or prevent any disease.
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EXHIBIT 2

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THE ONLY HAIR GROWTH SYSTEM YOU'LL EVER NEED

INTRODUCING THE ALL NEW ALL NATURAL SOLUTION TO HAIR-LOSS, PROFOLLICA — TO HELP YOU STOP HAIR LOSS AND EVEN BEGIN TO RE-GROW PREVIOUSLY LOST HAIR! THIS REVOLUTIONARY NEW SYSTEM RELIES ON THE ANTI-DHT PROPERTIES OF SEVERAL POWERFUL PLANT EXTRACTS. RESULTING IN STOPPED HAIR LOSS AND EVEN HAIR RE-GROWTH WITHOUT THE SIDE EFFECTS! BUT THE REAL REASON WHY MORE AND MORE CUSTOMERS ARE TURNING TO PROFOLLICA IS SIMPLY BECAUSE IT WORKS:

"With my hair coming back, I look years younger!"

"I was planning on having a hair transplant. Unfortunately my doctor told me that due to the fineness of my hair, I wasn't a good candidate for a hair transplant. I was devastated. I was really looking forward to seeing real hair growing in my bald spot. Then, a few years later I saw an ad for ProFollica™. Since it has a money back guarantee, I figured I couldn't lose. Now I'm glad I didn't have a transplant. I saved thousands of dollars."

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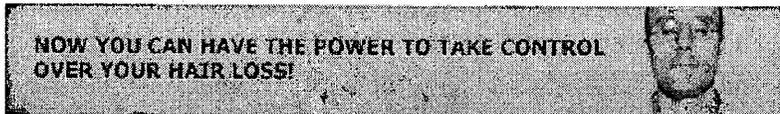
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Hair loss treatment products like **Profollica** helps promote **hair growth** and **hair restoration** with their unique **hair treatment program** and all natural formula with no toxic chemicals. Revitalize hair follicles with the Profollica **hair re-growth system** scientifically designed to rejuvenate hair with a three part strategy which includes a shampoo, a gel, and a **nutritional supplement**.

Stop hair loss and begin to prevent hair loss with a **safe hair loss treatment** designed to help stimulate the scalp without expensive hair replacement surgery or prescription drugs. To start seeing results buy Profollica today.

These statements have not been evaluated by the Food and Drug Administration.

This product is not intended to diagnose, treat, cure, or prevent any disease.

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