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

Proceeding	85316592
Applicant	Zinpro Corporation
Applied for Mark	PROCARE 4
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Docket No. T56702US00

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

In re Trademark Application of:

Applicant: Zinpro Corporation

Serial No: 85/316,592

Mark: PROCARE 4

International Class: 5

APPEAL BRIEF

Please enter the following Brief in Appeal into the record.

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TABLE OF AUTHORITIES

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I. INTRODUCTION

The Examiner has entered a Final Rejection of Applicant's mark PROCARE 4 asserting there is a likelihood of confusion between this mark and prior existing Registration Nos. 1,859,092 and 2,803,220. Prior Registration No. 1,859,092 is for the single word PROCARE in Class 5 for dietary and nutritional supplements. Prior Registration No. 2,803,220 is for the single word PROCARE in Class 5 for veterinary and pet products. Applicant's mark is PROCARE 4 for:

"loose mineral supplement packaged product feed nutrient/additive for non-pet livestock animals such as chickens, llamas, goats and rabbits" in International Class 5.

A Request for Reconsideration was filed and submitted evidence of widespread use of PROCARE, some in Class 5, some in related fields, and some in widely divergent fields. Indeed, Applicant submitted 20 registrations besides the two cited by the Examiner, making a total of 22 registrations that use PROCARE either singly or in conjunction with other words. A table of the database is attached as an appendix. The actual registrations are of record in the file.

II. THE FINAL REJECTION

The Examiner concluded in the Final Rejection, taking into account the *In re E.I du Pont de Nemmers*, 476 F.2d 1357 (C.C.P.A. 1973) factors, that PROCARE was a dominant portion of the mark, as such, the marks were virtually identical, and he attached evidence showing that pet food and non-pet animal foods (i.e. livestock food) are often from the same

source; and he argues there is therefore a likelihood of confusion. Applicant disagrees for the reasons argued below.

III. ARGUMENT

A. The Examiner improperly dissected the mark before considering the *du Pont* factors.

Importantly, here the mark is PROCARE 4, not PROCARE. It is true that Applicant has disclaimed "4", apart from the mark as shown. But that does not mean it is not entitled to consideration especially here where the common element of the two marks is weak. The other portion of the mark plays a more important role in likelihood of confusion determination under these circumstances, *In re Istituto Toscano "SCLAVO"*, 226 USPQ 1035 (TTAB 1985) (ASO QUANTUM not confused with QUANTUM 1 for laboratory instruments). The number four (4) is not understood by the public to mean anything in particular when associated with PROCARE; to them it is arbitrary.

The Examiner's improper dissection of the mark to focus only on PROCARE before applying the *du Pont* factors was improper and led him astray, *Recot Inc v. Becton*, 214 F.3d 1322 (Fed. Cir. 2002).

B. Under the *du Pont* factors' widespread use in many classes, some close and some divergent, is a consideration in determining likelihood of confusion.

Here the record shows that the register is crowded with a plethora of PROCARE marks. It is clear, therefore, that what distinguishes one mark from the other is not the use of

the word PROCARE, but the rest of the mark. The plethora of third party registrations limits the protection to be accorded any single PROCARE mark. Indeed the greater the number of more or less similar uses of PROCARE on different kinds of goods, the less is the likelihood of confusion under the *du Pont* factors with the amount of registrations being relevant under at least factors 6 and 9. Thus, "Dominos" for sugar was held not likely to be confused with "Dominos" for pizza where the register was crowded with Domino marks, *Star Corp. v. Dominos Pizza Inc.*, 205 USPQ 969 (5th Cir. 1980) (72 third party registrations).

C. The Examiner's new arguments in his denial of reconsideration are easily answerable.

The Examiner argues that many third party registrations may show that the mark is weak, but even weak marks are entitled to protection against subsequent registrations and then argues that the marks on the list Applicant provided are for different classes. This is true for some but not others.

For example, the two cited by the Examiner in his rejection, Registration Nos. 1,859,092 and 2,803,220 are for the identical class, 5, as is Registration No. 1,998,976. The point being the public is educated by the crowded registry to look beyond PROCARE to the rest of the mark here 4, which to the purchasing public appears arbitrary. Indeed, it is not used by anyone else, as the Examiner's search revealed.

The Examiner next argues that even Applicant's own website shows they also sell to companion pets things like minerals for canine. But that does not mean that dog product and this product are in the same channel of trade, only that they are manufactured by the same

company. For example, General Electric manufactures jet engines and household mixers, and while they both emanate from the same source, they are not sold in the same channels of trade! Certainly one is not likely to be confused with the other. So is the case here.

IV. CONCLUSION

The Examiner should be reversed. He has failed to take into account the complete mark sought for registration in applying his *du Pont* analysis; he has failed to take into account the weak diluted nature of the common portion of the mark as evidenced by the crowded registry; and he improperly dissected the mark before taking into account applying the *du Pont* factors. These points and case law precedent established there is no likelihood of confusion and therefore registrability is appropriate. Reversal is respectfully requested.

Respectfully submitted,



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USPTO REGISTRATION/APPLICATION DATABASE
Use of PROCARE in connection with Medical-related Goods/Services

Trademark	Reg. No. or Ser. No.	Applicant/ Registrant/ Assignor	Goods/services
PROCARE	1639644	DJO, LLC	Medical appliances, namely, knee splints, in Class 10
PROCARE VISION CENTER	1788650	Procare Vision Center, Inc.	Optometry services, optician services, retail store, in Class 42
PROCARE	1998976	Ideal Sales & Marketing, Inc.	Wide range of industrial first aid products, namely topical antiseptics, in Class 5
PROCARE 2000	1691242	GE Medical Systems Information Technologies, Inc.	Nurse call communication systems; namely master terminals, in Class 9
NYAHSA PROCARE CONSULTANTS	3026151	The New York Association of Homes and Services for the Aging, Inc.	Health care consulting services for long term care facilities, in Class 44
PROCARE	3109804	Wausau Paper Mills, LLC	Papers used in the manufacture of dental and medical product packaging, in Class 16
PROCARE	3343729	Stryker Corporation	Maintenance, service and repair of medical and surgical tools and equipment, in Class 37
PROCARE PHARMACY	3757341	Rx Now Inc.	Mail order pharmacy services; Retail pharmacy services, in Class 35
F.E.G.S. PROCARE HEALTH SERVICES	77885011	Federation Employment and Guidance Services, Inc.	Providing primary health care services in an outpatient diagnostic and treatment facility, in Class 44
PROCARE	3428140	GE Security, Inc.	Computer software for use in nurse call communications, in Class 9
ProCare	2995160	United American Insurance Company	Insurance underwriting in the field of Medicare supplement policies, in Class 36
ProCare Medical Home	3947220	NetCare Administrators, LLC	Federal medical care programs, in Class 35

USPTO REGISTRATION/APPLICATION DATABASE
Use of PROCARE in connection with Household Cleaning-related Goods/Services

Trademark	Reg. No. or Ser. No.	Applicant/ Registrant/ Assignor	Goods/services
PROCARE	3020684	ProTeam, Inc.	Vacuum cleaners, in Class 7
ULTRA PROCARE	3477434	Reckitt Benckiser Inc.	Carpet cleaners, in Class 3

USPTO REGISTRATION/APPLICATION DATABASE
Use of PROCARE in connection with Computer-related Goods/Services

Trademark	Reg. No. or Ser. No.	Applicant/ Registrant/ Assignor	Goods/services
PROCARE SOFTWARE	3647406	Blum Investment Group, Inc.	Computer software and hardware for use in the management of childcare related businesses, including accounting, payroll, immunization record keeping, attendance tracking and scheduling; database management software for use in the field of childcare related businesses; accounting software for use in childcare related businesses; computer hardware and software for setting up network devices in childcare related businesses, in Class 9
PROCARE	3020601	Apple Inc.	Computer installation services; computer maintenance services; computer repair services; maintenance of computer hardware; information, advisory and consultancy services relating to all the aforesaid, in Class 37 Technical support, maintenance, and consulting services pertaining to computer software and

			consumer electronics; computer diagnostic services; installation of computer software; updating of computer software; maintenance of computer software; computer consultation and testing services; consulting services in the field of selection, implementation and use of computer hardware and software systems for others; computer data recovery, in Class 42
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USPTO REGISTRATION/APPLICATION DATABASE
Use of PROCARE in connection with Yard Maintenance-related Goods/Services

Trademark	Reg. No. or Ser. No.	Applicant/ Registrant/ Assignor	Goods/services
PROCARE	3709088	The Toro Company	Consulting services relating to turf care equipment, namely, consultation regarding the repair and maintenance of turf care equipment, providing information about the repair and maintenance requirements for turf care equipment; providing repair and maintenance information in the field of turf care equipment, in Class 37
PROCARE	1472759	Pennington Seed, Inc.	Fertilizer, in Class 1

USPTO REGISTRATION/APPLICATION DATABASE
Use of PROCARE in connection with Retail Services-related Goods/Services

Trademark	Reg. No. or Ser. No.	Applicant/ Registrant/ Assignor	Goods/services
PROCARE	85583452	PROCARE UK LIMITED	Wholesale and retail services, retailing of goods over the Internet or by mail order, all the aforementioned services relating to the sale of metal foils and dispensers for metal foils, in Class 35
ProCare	3357597	Beta Distribution USA, Inc.	Retail services by direct solicitation by sales agents in the field of tools; Retail tool stores, in Class 35