

ESTTA Tracking number: **ESTTA829955**

Filing date: **06/28/2017**

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

**Petition for Cancellation**

Notice is hereby given that the following party has filed a petition to cancel the registration indicated below.

**Petitioner Information**

Name	Cramer Products, Inc.		
Entity	Corporation	Citizenship	Kansas
Address	153 West Warren Gardner, KS 66030 UNITED STATES		

Attorney information	Christina J. Moser Baker & Hostetler LLP 127 Public Square, Suite 2000 Key Tower Cleveland, OH 44114 UNITED STATES Email: cmoser@bakerlaw.com, nsamad@bakerlaw.com, clcketting@bakerlaw.com Phone: 216-861-7818		
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**Registration Subject to Cancellation**

Registration No.	4539507	Registration date	05/27/2014
Registrant	Poly-Gel L.L.C. 30 Leslie Court Whippany, NY 07981 UNITED STATES		

**Goods/Services Subject to Cancellation**


Class 010. First Use: 2013/06/11 First Use In Commerce: 2013/06/11 All goods and services in the class are subject to cancellation, namely: Shoulder supports, ankle supports, backsupports, knee supports, wrist supports and elbow supports all for medical use with compression, for reducing pain and increasing circulation and mobility to areas of the human body to which the supports are applied
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**Grounds for Cancellation**

Priority and likelihood of confusion	Trademark Act Sections 14(1) and 2(d)
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**Mark Cited by Petitioner as Basis for Cancellation**

U.S. Application No.	87174003	Application Date	09/16/2016
Registration Date	NONE	Foreign Priority Date	NONE

Word Mark	FLEX-I-COLD
Design Mark	 The logo for FLEX-I-COLD is displayed in a large, bold, black serif font. The text is centered within a white rectangular area.
Description of Mark	NONE
Goods/Services	Class 010. First use: First Use: 1980/12/31 First Use In Commerce: 1980/12/31 Therapeutic hot and cold therapy packs

Attachments	87174003#TMSN.png( bytes ) Petition.pdf(100228 bytes ) ExhibitsA.pdf(3545888 bytes )
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Signature	/Christina J. Moser/
Name	Christina J. Moser
Date	06/28/2017

UNITED STATES PATENT AND TRADEMARK OFFICE  
TRADEMARK TRIAL AND APPEAL BOARD

In The Matter Of Registration No. 4539507  
Registered May 27, 2014

_____	)	
Cramer Products, Inc.	)	Cancellation No. _____
	)	
	)	
Opposer,	)	
	)	
v.	)	<b>PETITION TO CANCEL</b>
	)	
Poly-Gel LLC	)	
	)	
	)	
Registrant.	)	
_____	)	

Cramer Products, Inc., a Kansas corporation with its principal place of business at 153 West Warren, Gardner, Kansas (“Cramer Products”), believes that it is damaged by the registration of the mark covered by Registration No. 4,539,507 and hereby seeks to cancel the registration of said mark. As grounds for the cancellation, it is alleged as follows:

1. Cramer Products is a leader in the sports medicine field. Founded in 1918, Cramer Products helped develop the nascent field of sports medicine, supplying brands that have become ubiquitous amongst doctors specializing in sports medicine, trainers, and athletes in their care.
2. Cramer Products has used the trademark FLEX-I-COLD in interstate commerce since at least as early as December 31, 1980 in connection with “therapeutic hot and cold therapy packs.” Attached as Exhibit A is a true and correct copy of an order form effective October 15, 1980 for Cramer Products listing the FLEX-I-COLD pack for sale. Attached as Exhibit B is a true and correct copy of the packaging approval for the FLEX-I-COLD product dated February 21, 1980. Cramer Products’ use of the FLEX-I-COLD mark has been continuous and exclusive

since 1980. Attached hereto as Exhibit C is a true and correct copy of the 2013 Cramer Products catalog, showing the goods marked with the FLEX-I-COLD mark.

3. On or about July 11, 2016, Poly-Gel, LLC (“Poly-Gel”) sent a cease and desist letter to Cramer Products claiming that Cramer Products’ use of FLEX-I-COLD in connection with a gel pack for cold and heat therapy created a likelihood of confusion with Poly-Gel’s federally registered trademark FLEXI-KOLD, U.S. Trademark Registration No. 4,539,507. Attached as Exhibit D is a true and correct copy of the cease and desist letter received from Registrant.

4. On September 16, 2016, Cramer Products filed application serial no. 87/174,003 for FLEX-I-COLD in connection with “therapeutic hot and cold therapy packs” in International Class 010.

5. On December 28, 2016, the United States Patent and Trademark Office rejected Cramer Products’ application based on a likelihood of confusion with U.S. Trademark Registration No. 4,539,507 for FLEXI-KOLD. Attached as Exhibit E is a true and accurate copy of the December 28, 2016 Office Action and attached as Exhibit F is a true and accurate copy of the Trademark Applications and Registrations Retrieval (TARR) report for the FLEXI-KOLD mark cited by the examiner.

6. Poly-Gel received its registration for FLEXI-KOLD on May 27, 2014 for use in connection with “Shoulder supports, ankle supports, back supports, knee supports, wrist supports and elbow supports all for medical use with compression, for reducing pain and increasing circulation and mobility to areas of the human body to which the supports are applied” in International Class 010. The filing date of Poly-Gel’s application is March 4, 2013.

7. Upon information and belief, Poly-Gel is the current owner of the FLEXI-KOLD registration. Poly-Gel's current address listed in the TARR database is 30 Leslie Court, Whippany, New York 07981. The correspondent identified in the TARR database for Edwin D. Schindler, Patent Attorney, PO Box 4259, Huntington, New York United States 11743-0777, [edschindler@optonline.net](mailto:edschindler@optonline.net).

8. Upon information and belief, the mark as actually used by Poly-Gel is different from the mark as registered.

9. The earliest use date claimed in Poly-Gel's registration is June 11, 2013.

10. Cramer Products has used the trademark FLEX-I-COLD at least as early as December 31, 1980 in connection with hot and cold therapy packs and, therefore, has prior rights to its mark.

### **CLAIM**

11. There is no issue as to priority. The date of Poly-Gel's alleged first use is more than three decades after Cramer Products' first use of its mark.

12. As determined by both Poly-Gel and the U.S. Patent and Trademark Office, Poly-Gel's use of the FLEXI-KOLD mark for the goods specified in the subject registration is likely to cause confusion, mistake, or deception with respect to the origin of said goods, and to confuse, mislead, or deceive members of the public into believing that Poly-Gel's goods are in some way connected to or affiliated with Cramer Products' above-described FLEX-I-COLD products.

13. Any such confusion would result in injury to or have a direct impact on Cramer Products and its FLEX-I-COLD mark. Any defect, objection, or fault found with Poly-Gel's goods marketed under the FLEXI-KOLD mark would negatively impact and seriously injure the

reputation Cramer Products has established for the goods it provides under the FLEX-I-COLD mark.

14. The U.S. Patent and Trademark Office has determined that Cramer Products cannot register its FLEX-I-COLD mark based on Poly-Gel's FLEXI-KOLD registration.

15. If Poly-Gel's registration herein is not cancelled, the registration will continue to be a source of damage and irreparable injury to Cramer Products.

WHEREFORE, Cramer Products prays that this Petition for Cancellation be granted and U.S. Trademark Registration No. 4,539,507 be stricken from the Register.

/Christina J. Moser/

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Christina J. Moser, Esq.  
Baker & Hostetler LLP  
127 Public Square, Suite 2000  
Cleveland, Ohio 44114  
(216) 861-7818  
cmoser@bakerlaw.com

Attorney for Cramer Products, Inc.



# **EXHIBIT A**



Printed in U. S. A.

# Cramer Products, Inc. School Order Form

Send order form to your sporting goods dealer.

Athletic Team Division

Effective October 15, 1980



SCHOOL _____ ADDRESS _____ CITY _____ STATE _____ ZIP _____ COACH _____ ORDER NO. _____	<p style="font-size: 2em; font-family: cursive;">7-31-81 Paul C.</p>
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Please contact your sporting goods dealer for current prices. All prices subject to change without notice.

	SUGGESTED SCHOOL PRICE		SUGGESTED SCHOOL PRICE		SUGGESTED SCHOOL PRICE
<b>A-B-A® TABLETS</b>		<b>BALL-N-FLATOR™ Air Pump (See Marathoner™)</b>		<b>COLORLESS TUF-SKIN® (See Tuf-Skin®)</b>	
_____ 100 010304 .....	\$ 4.55	<b>BASKETBALL REBOUNDER</b>		<b>COMPRESSIONETTE™ (Elastic Tubular Compression Wrap Bandage — Stockinette Material)</b>	
_____ 300 010308 .....	9.35	_____ Each 021000 .....	\$ 15.75	_____ Each 3"x11 yds. 033850 .....	\$ 17.95
<b>AIR SPLINTS</b>		<b>BATTER'S BAG</b>		_____ Each 5"x11 yds. 033893 .....	24.95
_____ Each Kit (6 splints) 013330 ...	\$ 69.25	_____ 12 Oz. 021531 .....	\$ 2.90	<b>CRAMERGESIC® Counterirritant</b>	
_____ Each Hand & Wrist 013331 ...	9.15	<b>BLACK MAGIC®</b>		_____ 3 Oz. Tube 034523 .....	\$ 3.25
_____ Each Half Arm 013332 .....	12.00	_____ Gallon 022536 .....	\$ 17.20	_____ 1 Pound 034538 .....	6.50
_____ Each Full Arm 013333 .....	13.00	<b>BOTTLES—PLASTIC SQUEEZE (Includes Carrying Case)</b>		_____ 5 Pounds 034540 .....	28.40
_____ Each Foot & Ankle 013334 ...	12.60	_____ Case (6) Pint 023547 .....	\$ 13.45	_____ 25 Pounds 034542 .....	132.45
_____ Each Half Leg 013335 .....	14.60	_____ Case (6) Quart 023647 .....	18.95	<b>CRAMEROL® Plastic-backed compress roll</b>	
_____ Each Full Leg 013336 .....	15.75	_____ Case (6) Big Mouth Quart 023747 .....	22.95	_____ Box 10" X 45' 035000 .....	\$ 12.30
<b>AIR SPLINT CARRYING CASE</b>		<b>BUTTERFLY® TABLETS</b>		<b>CRAMER-SOL™ Disinfectant-Cleaner</b>	
_____ Each 013371 .....	\$ 15.00	_____ 100 024504 .....	\$ 3.70	_____ Gallon 035536 .....	\$ 16.80
<b>AM-CAPS® Ammonia Capsules</b>		_____ 300 024508 .....	7.95	<b>DE-HESIVE™ Tape Remover (Also see Tape Remover)</b>	
_____ 10 011501 .....	\$ 2.35	<b>CHAMP ELASTIC WRAPS (Velcro-fastened) (See Wraps)</b>		_____ 8 Oz. Regular 040431 .....	\$ 3.55
_____ 100 011504 .....	19.80	<b>C-STRIPS™ Sterile Adhesive Bandages</b>		<b>DEXTROTABS® 25 grains</b>	
<b>ANKLE STABILIZER (See Knee &amp; Ankle Braces)</b>		_____ Box of 10 3/4" X 3" 030501 ....	\$ .70	_____ 300 Root Beer 040508 .....	\$ 5.90
<b>ANKLE WRAP ROLLER</b>		_____ Box of 100 1" X 3" 030604 ....	3.60	_____ 300 Orange 040608 .....	5.90
_____ Each 012500 .....	\$ 9.65	<b>CHIN STRAPS (See Pro-Guard Faceguards)</b>		_____ 300 Lime 040708 .....	5.90
<b>ANK-L-RAP®</b>		<b>CINDER SUDS®</b>		_____ 1000 Root Beer 040514 .....	15.70
_____ 36 Yd. Roll 013053 .....	\$ 8.65	_____ 5 Oz. Regular 031526 .....	\$ 2.65	_____ 1000 Orange 040614 .....	15.70
_____ 72 Yd. Roll 013054 .....	16.30	_____ 11 Oz. Large 031530 .....	4.05	_____ 4000 Root Beer 040555 .....	53.70
<b>APPLICATORS 6" Cotton Tipped</b>		<b>COLD PACK INSTANT DELUXE</b>		_____ 4000 Orange 040655 .....	53.70
_____ 1000 013514 .....	\$ 8.25	_____ Box (12 each) 032646 .....	\$ 12.95	_____ 4000 Lime 040755 .....	53.70
<b>ASPIRIN TABLETS 5 grains</b>		_____ Box (16 each) 032633 .....	15.50	<b>DIAL-A-TAB® Tablet Dispenser</b>	
_____ 100 014004 .....	\$ 1.40	<b>COLD PACK FLEXIBLE-REUSABLE (Flex-i-Cold™)</b>		_____ Each 041000 .....	\$ 5.35
_____ 500 014011 .....	4.60	_____ Box (12 ea.) Regular 032746 ..	\$ 13.50	<b>DISPENSER Liquid Sprayer</b>	
<b>ATOMIC® BALM Counterirritant</b>		_____ Box (12 ea.) Small 032846 ....	9.80	_____ Pt. Tuf-Skin® Sprayer 203733 ..	\$ 2.80
_____ 3 Oz. Tube 015523 .....	\$ 3.40	<b>COLD SPRAY</b>		_____ Qt. Disinfectant Sprayer 042571 ..	3.30
_____ 1 Pound 015538 .....	6.70	_____ 6 Oz. Regular 033527 .....	\$ 2.70	<b>ELASTIC WRAPS (See Wraps)</b>	
_____ 5 Pounds 015540 .....	29.85	_____ 10 Oz. Medium 033529 .....	3.85	<b>EYEGLASS HOLDER</b>	
<b>ATOMIC® RUB-DOWN</b>		_____ 16 Oz. Large 033533 .....	5.50	_____ Each 051000 .....	\$ 1.20
_____ 1/2 Pint 016028 .....	\$ 3.20	<b>COLD TREATMENT KIT</b>		<b>FACEGUARDS (See Pro-Guard Faceguards)</b>	
_____ Quart 016034 .....	7.45	_____ Each 033200 .....	\$ 15.35	<b>FELT</b>	
_____ Gallon 016036 .....	23.70	<b>COLD TREATMENT KIT DELUXE</b>		_____ Variety Pack 060500 .....	\$ 12.95
<b>BACITRACIN Antibiotic Ointment</b>		_____ Each 033400 .....	\$ 27.95		
_____ 1/2 Oz. Tube 020119 .....	\$ 1.35				
_____ 2 Oz. Tube 020121 .....	3.10				

Form No. 0781

# **EXHIBIT B**

flex-i-cold™  
REUSABLE PACK • FLEXIBLE WHEN FROZEN



SMALL SIZE

For relief of pain and swelling due to sprains, strains, bumps and bruises.  
**DIRECTIONS:** Store Flex-i-Cold Pack in freezer or in an insulated cooler when not in use. Apply to the injured area over an elastic wrap, towel, or a layer of Cramerol. Do not apply directly to skin. Secure with a Cramer elastic wrap. If the application of cold becomes uncomfortable, remove pack for a short period of time, then reapply.  
**CAUTION:** DO NOT APPLY DIRECTLY TO SKIN. Use only as directed. Always apply an elastic wrap, towel, or a layer of Cramerol between skin and Flex-i-Cold Pack to prevent frostbite. Persons with circulatory problems or cold allergies should consult their physicians before using any cold pack. Do not use if frozen solid.  
**NOTE:** Although this product is generally considered to be non-toxic, it is not intended for ingestion. If gel contacts skin, clean with soap and water. Discard cold pack if punctured or torn.  
Cramer Flex-i-Cold and Instant Cold Packs are available from your sporting goods dealer.

MFD. BY  
**Cramer Products, Inc.**  
GARDNER, KANSAS U. S. A. 66030

any 2-21-80  
new label copy for  
next m...

# **EXHIBIT C**



**GO HARDER.**

**PLAY SAFER.**

SPORTS MEDICINE CATALOG

# THE SPORTS MEDICINE ALL-STAR TEAM



The jersey numbers proudly indicate the years each brand has been serving professionals.

**OUR NEW TEAM HAS EVERYTHING YOUR TEAM NEEDS TO WIN**



**ACTIVE ANKLE**

**BIOFREEZE**  
COLD THERAPY PAIN RELIEF

**THERABAND**  
ELEVATE PERFORMANCE. ACCELERATE RECOVERY.

**PERFORM**  
PAIN RELIEVER

Sports Medicine legend Cramer Products, Inc. has added market leaders Biofreeze, TheraBand, and Perform to the team that already included Active Ankle. This joint roster now includes the best training, performance, sports medicine, rehab and recovery products available anywhere.

**Sports Medicine Products**

Athletic Tape  
Ankle Braces  
Supports  
Training Room Supplies  
Athletic Training Kits

**Performance Products**

Compression Garments  
Kinesiology Tape  
Protective Apparel  
Grip/Anti-Friction  
Hydration

**Training & Rehab Products**

Elastic Resistance  
Stability Trainers  
Exercise Balls  
Aquatic Training  
Paraffin Wax

**Recovery Products**

Topical Analgesics  
Cold Therapy  
Other Topicals  
Myofascial Rollers  
Stretching

All Biofreeze, TheraBand and Perform products may not be available from all stores and distributors.

Performance Health®, Biofreeze®, Thera-Band®, TheraBand™, Pedigeni™, Prossage®, Color Pyramid®, the Associated Colors are all registered trademarks owned by The Hygenic Corporation, a subsidiary of Performance Health, and are registered in the USA & other countries. Unauthorized use is strictly prohibited. © 2013 The Hygenic Corporation. All rights reserved.

# COLD THERAPY



## Flex-i-Cold™

Flexible cold and hot applications can be provided by one pack. Non-toxic gel stays flexible to -4°F and can also be heated to provide thermal therapy. Cold and hot use instructions on the puncture-resistant package.

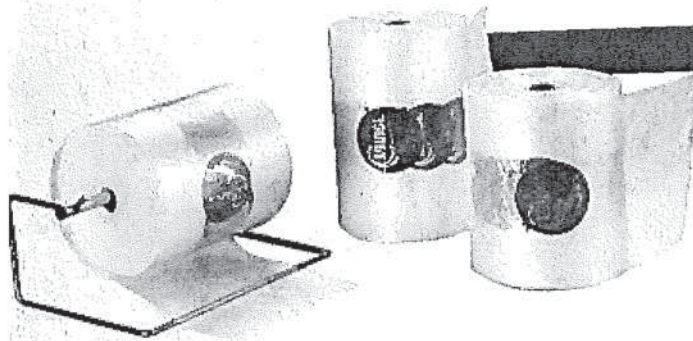
- 032746 6" x 9" Box of 12
- 032846 4" x 6" Box of 12
- 760327 6" x 9" Packaged Each
- 762900 Clamshell



## Instant Cold Pack

Single-use cold pack stays cold 15-20 minutes. No refrigeration necessary. Squeeze pack to activate.

- 033101 6" x 9" Box of 16 (packed 4x4)
- 033103 4 1/2" x 5" Box of 50
- 033107 6" x 9" Box of 16
- 033112 6" x 9" Box of 12
- 032211 Kwik Heat™ 6" x 9" Box of 12
- 762800 6" x 9" Clamshell



## Ice Bags & Dispensers

**Heavy-Duty Ice Bags:** Heavy 1 mil polyethylene material for increased durability. Extra attention to seams helps minimize breakage due to sharp ice crystals. Measures 9 1/2" x 18" (1500 bags per roll).

**Large Heavy-Duty Ice Bags:** Larger size promotes greater surface area contact. Heavier 1.25 mil polyethylene bag eliminates the need for double bagging. Measures 12" x 24" (750 bags per roll).

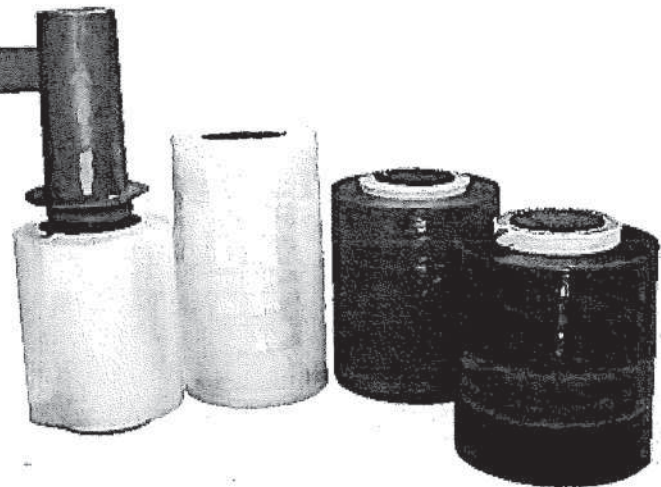
**Dispenser:** Constructed of 5/16" stainless steel. Tabletop or wall mount. The 16-inch frame allows for mounting to wooden wall studs with the provided screws. Masonry and other surface mounting supplies are not provided with dispenser. Measures 16" x 10" x 6".

- 236271 9 1/2" x 18" 1.0 mil Polyethylene Roll of 1,500
- 236272 12" x 24" 1.25 mil Polyethylene Roll of 750
- 236275 Dispenser

## Flexiwrap™

Plastic film on roller makes wrapping a quick, one-handed task. Provides compression while clear film allows inspection of injury. Patented, built-in handle brake on the roller makes tearing easier. Different sized rolls allow for various wrapping jobs. Self-adhering. All sizes contain 650' of 0.75 mil film.

- 236106 Clear 4" - 6 rolls with handle
- 236107 Clear 4" - 6 rolls only
- 236109 Clear 6" - 6 rolls with handle
- 236110 Clear 6" - 6 rolls only
- 236111 Blue 4" - 6 rolls only
- 236112 Red 4" - 6 rolls only
- 236108 Handle Only



1.800.345.2231

# **EXHIBIT D**

**EDWIN D. SCHINDLER**

*PATENT, TRADEMARK & COPYRIGHT ATTORNEY*

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**4 High Oaks Court  
P. O. Box 4259  
Huntington, New York 11743**

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Telephone: (631)474-5373  
Fax: (631)474-5374  
E-Mail: [EDSchindler@att.net](mailto:EDSchindler@att.net)  
[EDSchindler@optonline.net](mailto:EDSchindler@optonline.net)

July 11, 2016

Mr. Neal Fink  
Vice-President  
of Retail Sales Sporting Goods  
Cramer Products Inc.  
P.O. Box 1001  
Gardner, Kansas 66030

**Via Priority Mail - Express**

**Label No. EL 392536688 US**

*Re: Notice of Trademark Infringement*  
"Flex-I-Cold" Reusable Cold/Hot Packs

Dear Mr. Fink:

The undersigned intellectual property attorney is counsel to Poly-Gel L.L.C., headquartered at 30 Leslie Court, Whippany, New Jersey 07981, which is the owner of the federally registered trademark "FLEXI-KOLD" for goods, such as, shoulder supports, ankle supports, back supports, knee supports, wrist supports and elbow supports, as recited in U.S. Trademark Registration No. 4,539,507; a copy of which is enclosed.

It has recently come to our attention that your company is marketing in the United States a flexible gel pack for "both cold and heat therapy" that includes a non-toxic gel under the trademark "Flex-i-Cold," which mark has a substantially similar appearance, and can be expected to be pronounced identically, to Poly-Gel's "FLEXI-KOLD" trademark for substantially the same goods. Use of substantially the same trademark for substantially the same, if not identical, goods is likely to cause confusion in the relevant marketplace in which both your company and Poly-Gel directly compete, thereby constituting infringement of Poly-Gel's registered "FLEXI-KOLD" trademark and federal unfair competition against Poly-Gel in violation of the federal trademark laws.

In light of the foregoing, demand is made on behalf of Poly-Gel L.L.C. that Cramer Products Inc. immediately cease and desist from using "Flex-i-Cold," or any confusingly similar variation of either its "Flex-i-Cold" trademark or Poly-Gel's "FLEXI-KOLD" registered trademark, in connection with the advertising and promotion of Cramer Products Inc.'s goods, including, but not limited to, its reusable cold/hot packs, on its

Mr. Neil Fink, Vice-President  
Cramer Products Inc.

-2-

July 11, 2016

goods, packaging, in advertising, on its website, social media accounts, printed materials of any kind, and any third party website or online or physical store.

Poly-Gel L.L.C. would like to resolve this matter amicably and therefore requests written confirmation be provided to the undersigned attorney no later than July 25, 2016, that Cramer Products, Inc. will comply with the foregoing demand to cease-and-desist from use of "Flex-i-Cold" in the marketing of the relevant goods so as to avoid the necessity of any legal proceedings being taken against your company for protecting Poly-Gel's established trademark rights.

We look forward to your company's reply in an effort to amicably and quickly resolve this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Edwin D. Schindler". The signature is fluid and cursive, with a prominent initial "E".

Edwin D. Schindler

Enc.

United States of America  
United States Patent and Trademark Office

# FLEXI-KOLD

**Reg. No. 4,539,507**

**Registered May 27, 2014**

**Int. Cl.: 10**

**TRADEMARK**

**PRINCIPAL REGISTER**

POLY-GEL L.L.C. (NEW JERSEY LIMITED LIABILITY COMPANY)  
30 LESLIE COURT  
WHIPPANY, NY 07981

FOR: SHOULDER SUPPORTS, ANKLE SUPPORTS, BACK SUPPORTS, KNEE SUPPORTS, WRIST SUPPORTS AND ELBOW SUPPORTS ALL FOR MEDICAL USE WITH COMPRESSION, FOR REDUCING PAIN AND INCREASING CIRCULATION AND MOBILITY TO AREAS OF THE HUMAN BODY TO WHICH THE SUPPORTS ARE APPLIED, IN CLASS 10 (U.S. CLS. 26, 39 AND 44).

FIRST USE 6-11-2013; IN COMMERCE 6-11-2013.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

SN 85-865,414, FILED 3-4-2013.

PAM WILLIS, EXAMINING ATTORNEY



*Michelle K. Lee*

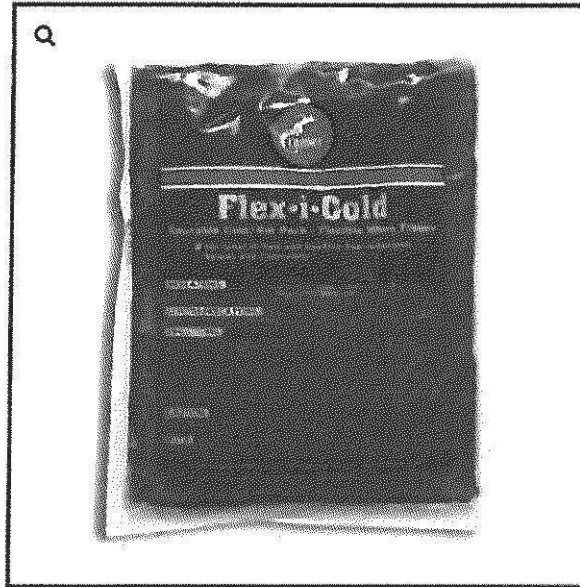
Deputy Director of the United States  
Patent and Trademark Office

**VIEW BY CATEGORY**

- Analgesics
- Athletic Training Kits
- Braces & Supports
- Cold Therapy
- Educational Products
- Endurance Support System
- First Aid Kits
- Hydration
- Mouth Guards
- Padding & Protectives
- Protective Apparel
- Splints
- Taping & Wrapping
- Team Supplies
- Training Room Supplies
- Wound Care
- New Products

## FLEX-I-COLD™ REUSABLE COLD / HOT PACKS

Flexible pack provides  
 Cold and heat  
 y.  
 Toxic gel stays  
 to negative 4 F  
 n also be heated  
 ide thermal  
 y.  
 re resistant  
 ge provides for a  
 e.



**MY CART**

You have no items in your shopping cart.



### FLEX-I-COLD™ REUSABLE COLD / HOT PACKS

SKU : 032746C

**\$25.00**

Choose an Option...

Qty: 1 +  
-

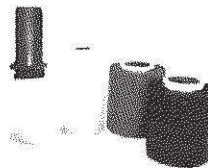
ADD TO CART

### RELATED PRODUCTS



**Instant Cold Packs**

**\$22.27**



**Flex-I-Wrap™**

**\$10.00**



**Atomic Balm**

**\$12.91**

# **EXHIBIT E**

**To:** Cramer Products, Inc, ([bhipdocket@bakerlaw.com](mailto:bhipdocket@bakerlaw.com))  
**Subject:** U.S. TRADEMARK APPLICATION NO. 87174003 - FLEX-I-COLD - 93071.020085  
**Sent:** 12/28/2016 2:32:10 PM  
**Sent As:** ECOM111@USPTO.GOV

- Attachments:** [Attachment - 1](#)  
[Attachment - 2](#)  
[Attachment - 3](#)  
[Attachment - 4](#)  
[Attachment - 5](#)  
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U.S. APPLICATION SERIAL NO. 87174003

MARK: FLEX-I-COLD

**\*87174003\***

**CORRESPONDENT ADDRESS:**

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**APPLICANT:** Cramer Products, Inc.

**CORRESPONDENT'S REFERENCE/DOCKET NO:**

93071.020085

**CORRESPONDENT E-MAIL ADDRESS:**

bhipdocket@bakerlaw.com

## OFFICE ACTION

**STRICT DEADLINE**—TO AVOID ABANDONMENT OF THIS TRADEMARK APPLICATION, THE USPTO MUST RECEIVE A COMPLETE RESPONSE TO THIS OFFICE ACTION WITHIN **6 MONTHS** OF THE ISSUE DATE.

**ISSUE/MAILING DATE: 12/28/2016**

The undersigned examining attorney has reviewed the above-referenced application, in accordance with section 2.61 of the Trademark Rules of Practice, 37 C.F.R. § 2.61 (2016), and has determined that the application cannot be advanced at this time, for the reasons detailed in this communication.

### SUBSTANTIVE REFUSALS

#### REGISTRATION REFUSED—LIKELIHOOD OF CONFUSION

Applicant filed this application on September 16, 2016, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a) (2012), based on its use of the mark “FLEX-I-COLD,” to indicate the source of “therapeutic hot and cold therapy packs” in International Class 10.

Registration of the applied-for mark is refused, pursuant to Section 2(d), because of likely confusion with the subject mark of U.S. Registration No. 2539983, issued on February 19, 2002, with its first renewal accepted on October 22, 2011, and with the subject mark of U.S. Registration No. 4539507, issued on May 27, 2014 (copies are attached hereto). *Id.* § 1052(d); *see* TMEP § 1207.01.

Section 2(d) is the statutory prohibition against registration when an applied-for mark so resembles a registered mark that it is likely, when applied to the relevant goods or services, to cause confusion, mistake or to deceive the potential consumer as to the source of the goods or services. 15 U.S.C. § 1052(d); *see* TMEP § 1207.01. *In re E. I. du Pont de Nemours & Company* sets forth the principal factors, considered on a case-by-case basis, in determining whether one mark is likely to cause confusion with another mark. 476 F.2d 1357, 1361, 177 U.S.P.Q. 563 (C.C.P.A. 1973). The focus of a likelihood of confusion analysis should be the most dispositive *DuPont* factors, which in *ex parte* prosecutions are generally the similarities of the marks, the first *DuPont* factor, the relatedness of the goods or services, the second *DuPont* factor, and the similarity of the trade channels, the third *DuPont* factor. *In re Mighty Leaf Tea*, 601 F.3d 1342, 1346, 94 U.S.P.Q.2d 1257, 1259 (Fed. Cir. 2010). In such cases, likely confusion is often determined by comparing the marks for similarities in appearance, sound, connotation and commercial impression, and by comparing the goods or services to determine whether they are similar or related, or whether the activities surrounding their marketing are such that confusion as to origin is likely. *See, e.g., In re Aquamar, Inc.*, 115 U.S.P.Q.2d 1122 (TTAB 2015); *see* TMEP § 1207.01.

As the cited registrations are owned by different registrants, and determinations for reaching this refusal are addressed separately.

#### I. REFUSAL AS TO REG. NO. 2539983

The first cited registered mark is “COLD FLEX,” presented in typeset lettering and used to indicate the source of “cold compression bandages” in International Class 10.

##### **A. RELATEDNESS OF RELEVANT GOODS, CHANNELS OF TRADE & CLASSES OF CONSUMERS**

For purposes of determining the strength of the second *DuPont* factor for Section 2(d) analysis, likely confusion is determined on the basis of the

goods or services as they are identified in the application and the registration. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 U.S.P.Q. 563 (C.C.P.A. 1973); *see, e.g., Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 U.S.P.Q.2d 1001 (Fed. Cir. 2002).

Here, the comparison is between the following:

Goods in this application:

Therapeutic hot and cold therapy packs.

Goods in U.S. Registration No. 2539983:

Cold compression bandages.

In comparing these goods, the attached evidence, comprised of digital images from therapy manufacturers' homepages, such as Elasto-Gel, Chattanooga, ThermaCare, and Ace, and the USPTO X-Search database, *see* U.S. Reg. Nos. 3827371, 4086379, 4256966, 4521974, 4553599, 4622574, 4718942, 4759811, 4892739, 4931774, 5100331, supports a determination that these types of goods are commonly sold in connection with at least one source identifier by third parties, and are related goods. *See, e.g., In re Infinity Broad. Corp.*, 60 U.S.P.Q.2d 1214, 1217-18 (TTAB 2001); *In re Mucky Duck Mustard Co.*, 6 U.S.P.Q.2d 1467, 1470 at n.6 (TTAB 1988). The Internet evidence shows that therapeutic hot and cold packs and cold compression bandages and wraps may stem from one ultimate source, and that the goods are of a nature that the relevant consumers would consider these goods related. *See* attached evidence.

In considering the channels of trade and classes of purchasers, because there are no limitations in the cited registration and the subject application, it is presumed that the respective goods travel in all normal channels of trade and are offered to all potential relevant consumers. *In re Viterra Inc.*, 671 F.3d 1358, 101 U.S.P.Q.2d 1905, 1908 (Fed. Cir. 2012).

In view of the foregoing analysis, the respective goods are sufficiently related to cause likely confusion as to their source in the minds of the consuming public if offered under the same or similar marks, and thus, the legal test for relatedness of the goods, the second *DuPont* factor, and the test regarding established, likely-to-continue trade channels, the third *DuPont* factor, both favor a finding of likelihood of confusion.

## **B. COMPARISON OF THE MARKS**

For purposes of determining the strength of the first *DuPont* factor for Section 2(d) analysis, the similarity or dissimilarity of the marks is determined by focusing on the appearance, sound, connotation and commercial impression of the marks in their entirety. *Stoncor Group, Inc. v. Specialty Coatings, Inc.*, 759 F.3d 1327, 1331, 111 U.S.P.Q.2d 1649, 1651 (Fed. Cir. 2014).

Consideration of the marks in a likelihood of confusion determination is not based on whether the marks can be distinguished when subjected to a side-by-side comparison, "but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result." *In re Davia*, 110 U.S.P.Q.2d 1810, 1813 (TTAB 2014). Analysis requires factoring into account the fallibility of memory over time and the fact that the average purchaser retains a general rather than a specific impression of trademarks. *See In re Mucky Duck Mustard Co.*, 6 U.S.P.Q.2d 1467, 1468 (TTAB 1988); *Chemetron Corp. v. Morris Coupling & Clamp Co.*, 203 U.S.P.Q. 537 (TTAB 1979); TMEP § 1207.01(b).

The Trademark Trial and Appeal Board has affirmed a determination of a likelihood of confusion in comparisons of marks consisting of "reverse combinations" of the same words or elements or a "transposition of the words" comprising the marks, when the marks convey the same meaning or create substantially similar commercial impressions. *See, e.g., In re Wine Soc'y of Am. Inc.*, 12 U.S.P.Q.2d 1139, 1142 (TTAB 1989) (affirming refusal to register the special form mark "THE WINE SOCIETY OF AMERICA" based on registration of the special form mark "AMERICAN WINE SOCIETY 1967," finding that "the transposition of words does not change the overall commercial impression"); *In re Nationwide Indus. Inc.*, 6 U.S.P.Q.2d 1882, 1884 (TTAB 1988) (holding RUST BUSTER, with "RUST" disclaimed, for a rust-penetrating spray lubricant likely to be confused with BUST RUST for a penetrating oil); *Bank of Am. Nat'l Trust & Sav. Ass'n v. Am. Nat'l Bank*, 201 U.S.P.Q. 842, 845 (TTAB 1978) ("the words 'BANKAMERICA' and 'BANK OF AMERICA', on the one hand, and 'AMERIBANC', on the other, convey the same meaning and create substantially similar commercial impressions"); *Fisher Scientific Co. v. Ipco Hosp. Supply Corp.*, 165 U.S.P.Q. 471, 472 (TTAB 1970) (sustaining opposition to "MIX O THERM" based on "THERMIX" used for identical goods, stating these marks "are in their essentials merely reverse combinations of the same words, and such being the case, would more than likely convey substantially the same commercial impressions"); *see* TMEP § 1207.01(b)(vii).

"[I]n many of the decisions concerning marks comprising reverse combinations of the same elements, the primary concern is that ordinary prospective purchasers, not being infallible in their ability to recall trade designations, may transpose the elements in their minds and, as a result, mistakenly purchase the wrong products or engage the wrong services." *In re Best Prods. Co.*, 231 U.S.P.Q. 988, 989 (TTAB 1986). There is likely confusion "where the transposition evokes the same or substantially the same commercial impression as the mark from which the transposition was derived." *Id.*

Here, the marks resemble each other. As to appearance, Applicant's applied-for mark, **FLEX-I-COLD**, and the cited registered mark, **COLDFLEX**, are presented entirely in standard character form or the typeset lettering equivalent. The rights associated with a mark in standard

characters reside in the wording and not in any particular display in terms of font, style, size or color. *In re RSI Sys., LLC*, 88 U.S.P.Q.2d 1445, 1448 (TTAB 2008). Therefore, in actual use, both marks may be displayed in a same manner of font, style, color and size. *In re Viterra Inc.*, 671 F.3d 1358, 1363, 101 U.S.P.Q.2d 1905, 1909 (Fed. Cir. 2012); *In re Strategic Partners Inc.*, 102 U.S.P.Q.2d 1397, 1399 (TTAB 2012).

The proposed mark “FLEX-I-COLD” is essentially a transposition of the cited registered mark “COLDFLEX.” Both marks share the same word roots “FLEX” and “COLD.”

The transposition of the words in the marks does not change the connotation or overall commercial impression of the words. The marks evoke substantially the same overall commercial impression.

In sum, Applicant’s mark sufficiently resembles the cited registered mark that, if used in connection with related goods, confusion would be likely to occur.

Viewed in their entireties with the differences evaluated, the marks are sufficiently similar in appearance, sound and connotation, and would create highly similar commercial impressions on the minds of purchasers. Thus, despite considering the differences of the respective marks, their similarities far outweigh the dissimilarities, based on guiding legal authority, and the rights vested in the registered mark. *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265, 62 U.S.P.Q.2d 1001, 1003 (Fed. Cir. 2002). Therefore, the legal test for similarity of the marks, the first *DuPont* factor, favors a finding of likelihood of confusion.

By choosing this mark, Applicant has fallen short of its duty as the newcomer to avoid approaching the cited registered mark in the same field of commerce. *Nina Ricci S.A.R.L. v. E.T.F. Enterprises Inc.*, 889 F.2d 1070, 12 U.S.P.Q.2d 1901 (Fed. Cir. 1989); *see Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265, 62 U.S.P.Q.2d 1001, 1003 (Fed. Cir. 2002) (finding that “doubt about the likelihood of confusion [must be found] against the newcomer because the newcomer has the opportunity and obligation to avoid confusion with existing marks.”).

Based on a determination that the marks are similar and the goods are related, and the presumption that the goods move in the same channels of trade and are available to the same classes of consumers, Applicant’s mark is refused registration, on the grounds of likely confusion with the subject registered mark in Registration No. 2539983.

Although the examining attorney has refused registration, Applicant may respond to the refusal to register by submitting evidence and arguments in support of registration.

## II. REFUSAL AS TO REG. NO. 4539507

The second cited registered mark is “FLEXI-KOLD,” in standard character form, used to indicate the source of “shoulder supports, ankle supports, back supports, knee supports, wrist supports and elbow supports all for medical use with compression, for reducing pain and increasing circulation and mobility to areas of the human body to which the supports are applied,” in International Class 10.

### A. COMPARISON OF THE MARKS

For purposes of determining the strength of the first *DuPont* factor for Section 2(d) analysis, the similarity or dissimilarity of the marks is determined by focusing on the appearance, sound, connotation and commercial impression of the marks in their entirety. *Stoncor Group, Inc. v. Specialty Coatings, Inc.*, 759 F.3d 1327, 1331, 111 U.S.P.Q.2d 1649, 1651 (Fed. Cir. 2014).

Consideration of the marks in a likelihood of confusion determination is not based on whether the marks can be distinguished when subjected to a side-by-side comparison, “but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result.” *In re Davia*, 110 U.S.P.Q.2d 1810, 1813 (TTAB 2014). Analysis requires factoring into account the fallibility of memory over time and the fact that the average purchaser retains a general rather than a specific impression of trademarks. *See In re Mucky Duck Mustard Co.*, 6 U.S.P.Q.2d 1467, 1468 (TTAB 1988); *Chemtron Corp. v. Morris Coupling & Clamp Co.*, 203 U.S.P.Q. 537 (TTAB 1979); TMEP § 1207.01(b).

“[I]t has been consistently held that similarity in any one of the elements of sound, appearance or meaning is sufficient to indicate a likelihood of confusion.” *RE/MAX of America, Inc. v. Realty Mart, Inc.*, 207 U.S.P.Q. 960, 964 (TTAB 1980); *see* TMEP § 1207.01(b). “Similarity in sound alone may be sufficient for a finding of likelihood of confusion.” *In re 1st USA Realty Prof’ls Inc.*, 84 U.S.P.Q.2d 1581, 1586 (TTAB 2007). The Board has held this “especially true” where the application and registration are for goods that “may be referred to or recommended by word of mouth.” *Id.* (citing *Miles Labs., Inc. v. Whorton Pharmacal Co.*, 199 U.S.P.Q. 758 (TTAB 1978)).

In comparison, the marks resemble each other. Applicant’s applied-for mark, **FLEX-I-COLD**, and the subject mark of Registration No. 4539507, **FLEXI-KOLD**, are presented entirely in standard character form. The rights associated with a mark in standard characters reside in the wording and not in any particular display in terms of font, style, size or color. *In re RSI Sys., LLC*, 88 U.S.P.Q.2d 1445, 1448 (TTAB 2008). Therefore, in actual use, both marks may be displayed in a same manner of font, style, color and size. *In re Viterra Inc.*, 671 F.3d 1358, 1363, 101 U.S.P.Q.2d 1905, 1909 (Fed. Cir. 2012); *In re Strategic Partners Inc.*, 102 U.S.P.Q.2d 1397, 1399 (TTAB 2012).

The marks are phonetic equivalents. When spoken, “FLEX-I-COLD” would sound the same as “FLEXI-KOLD.” It would be

impossible to distinguish the marks aurally; the relevant purchaser would call for “<del>flÄ•k'sÉ™-kÄ•ld</del>” when asking for or referring to the respective products in the marketplace. *See* Am. Heritage Dictionary of the English Language (5th ed. 2016), <http://www.ahdictionary.com/> (attached hereto) (regarding pronunciation of the components of both marks). The marks also convey the identical connotation, coupling flexible with cold. *Id.*

Thus, for comparison purposes, any differences in the appearances of the marks would not be sufficient to avoid confusion given that the marks are aurally identical.

In sum, Applicant’s mark sufficiently resembles the cited registered mark that, if used in connection with related goods, confusion would be likely to occur.

Viewed in their entirety with the differences evaluated, the marks are sufficiently similar in appearance, sound and connotation, and would create highly similar commercial impressions on the minds of purchasers. Thus, despite considering the differences of the respective marks, their similarities far outweigh the dissimilarities, based on guiding legal authority, and the rights vested in the registered mark. *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265, 62 U.S.P.Q.2d 1001, 1003 (Fed. Cir. 2002). Therefore, the legal test for similarity of the marks, the first *DuPont* factor, favors a finding of likelihood of confusion.

## **B. RELATEDNESS OF RELEVANT GOODS, CHANNELS OF TRADE & CLASSES OF CONSUMERS**

For purposes of determining the strength of the second *DuPont* factor for Section 2(d) analysis, likely confusion is determined on the basis of the goods or services as they are identified in the application and the registration. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 U.S.P.Q. 563 (C.C.P.A. 1973); *see, e.g., Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 U.S.P.Q.2d 1001 (Fed. Cir. 2002).

Here, the comparison is between the following:

### Goods in this application:

Therapeutic hot and cold therapy packs.

### Goods in U.S. Registration No. 4539507:

Shoulder supports, ankle supports, back supports, knee supports, wrist supports and elbow supports all for medical use with compression, for reducing pain and increasing circulation and mobility to areas of the human body to which the supports are applied.

In comparing these goods, the attached evidence, comprised of digital images from therapy manufacturers’ homepages, including that of Applicant, supports a determination that these types of goods are commonly sold in connection with at least one source identifier by third parties, and are related goods. *See* attached evidence. In fact, on Applicant’s retail electronic display for “COLD SHOULDER WRAP,” its “Flex-I-Cold Reusable Cold/Hot Packs” are identified as “RELATED PRODUCTS.” Source: <http://www.cramersportsmed.com/products/cold-therapy/cold-shoulder-wrap> (attached hereto).

The Internet evidence shows that therapeutic hot and cold packs and body compression supports or wraps may stem from one ultimate source, and that the goods are of a nature that the relevant consumers would consider these goods related. *See* attached evidence.

In considering the channels of trade and classes of purchasers, because there are no limitations in the cited registration and the subject application, it is presumed that the respective goods and featured services travel in all normal channels of trade and are offered to all potential relevant consumers. *In re Viterra Inc.*, 671 F.3d 1358, 101 U.S.P.Q.2d 1905, 1908 (Fed. Cir. 2012); *see* TMEP § 1207.01(a)(iii).

In view of the foregoing analysis, the respective goods are sufficiently related to cause likely confusion as to their source in the minds of the consuming public if offered under the same or similar marks, and thus, the legal test for relatedness of the goods, the second *DuPont* factor, and the test regarding established, likely-to-continue trade channels, the third *DuPont* factor, both favor a finding of likelihood of confusion.

By choosing this mark, Applicant has fallen short of its duty as the newcomer to avoid approaching the cited registered mark in the same field of commerce. *Nina Ricci S.A.R.L. v. E.T.F. Enterprises Inc.*, 889 F.2d 1070, 12 U.S.P.Q.2d 1901 (Fed. Cir. 1989); *see Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265, 62 U.S.P.Q.2d 1001, 1003 (Fed. Cir. 2002) (finding that “doubt about the likelihood of confusion [must be found] against the newcomer because the newcomer has the opportunity and obligation to avoid confusion with existing marks.”).

Based on a determination that the marks are similar and the goods are related, and the presumption that the goods move in the same channels of trade and are available to the same classes of consumers, Applicant’s mark is refused registration, on the grounds of likely confusion with the subject registered mark in Registration No. 4539507.

Each application for federal trademark registration must be considered on its own evidentiary record, and previous decisions regarding other applications and registrations are without evidentiary value and do not bind the Office or the Trademark Trial and Appeal Board (“Board”). *See, e.g., In re Davey Prods. Pty Ltd.*, 92 U.S.P.Q.2d 1198, 1206 (TTAB 2009); *see* TMEP § 1207.01(d)(vi). The Board has stated that it is

improper to “compound the problem of the registration of a confusingly similar mark by permitting such a mark to register again.” *In re Thomas*, 79 U.S.P.Q.2d 1021, 1028 (TTAB 2006).

Although the examining attorney has refused registration, Applicant may respond to the refusal to register by submitting evidence and arguments in support of registration.

Applicant must respond timely and completely to the issues raised in this Office Action. 15 U.S.C. § 1062(b); 37 C.F.R. §§ 2.62, 2.65(a); TMEP §§ 711, 718.03.

Please contact the undersigned attorney with any questions.

Sincerely,

/Judy Helfman/  
Judith M. Helfman  
Attorney at Law  
Law Office 111  
571/272-5892 (direct line)  
judy.helfman@uspto.gov

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All informal e-mail communications relevant to this application will be placed in the official application record.

**WHO MUST SIGN THE RESPONSE:** It must be personally signed by an individual applicant or someone with legal authority to bind an applicant (i.e., a corporate officer, a general partner, all joint applicants). If an applicant is represented by an attorney, the attorney must sign the response.

**PERIODICALLY CHECK THE STATUS OF THE APPLICATION:** To ensure that applicant does not miss crucial deadlines or official notices, check the status of the application every three to four months using the Trademark Status and Document Retrieval (TSDR) system at <http://tsdr.uspto.gov/>. Please keep a copy of the TSDR status screen. If the status shows no change for more than six months, contact the Trademark Assistance Center by e-mail at [TrademarkAssistanceCenter@uspto.gov](mailto:TrademarkAssistanceCenter@uspto.gov) or call 1-800-786-9199. For more information on checking status, see <http://www.uspto.gov/trademarks/process/status/>.

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# FLEXI-KOLD

**Word Mark** FLEXI-KOLD

**Goods and Services** IC 010. US 026 039 044. G & S: Shoulder supports, ankle supports, back supports, knee supports, wrist supports and elbow supports all for medical use with compression, for reducing pain and increasing circulation and mobility to areas of the human body to which the supports are applied. FIRST USE: 20130611. FIRST USE IN COMMERCE: 20130611

**Standard Characters Claimed**

**Mark Drawing Code** (4) STANDARD CHARACTER MARK

**Serial Number** 85865414

**Filing Date** March 4, 2013

**Current Basis** 1A

**Original Filing Basis** 1B

**Published for Opposition** July 23, 2013

**Registration Number** 4539507

**Registration Date** May 27, 2014

**Owner** (REGISTRANT) Poly-Gel L.L.C. LIMITED LIABILITY COMPANY NEW JERSEY 30 Leslie Court Whippany NEW YORK 07981

**Attorney of Record** Edwin D. Schindler

**Type of** TRADEMARK

**Mark**

**Register** PRINCIPAL

**Live/Dead  
Indicator** LIVE

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