

ESTTA Tracking number: **ESTTA1223971**

Filing date: **07/25/2022**

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

Proceeding no.	92078502
Party	Plaintiff Flamel Ireland Limited
Correspondence address	AUSTIN PADGETT TROUTMAN PEPPER HAMILTON SANDERS LLP 600 PEACHTREE ST. NE SUITE 3000 ATLANTA, GA 30308 UNITED STATES Primary email: trademarks@troutman.com Secondary email(s): austin.padgett@troutman.com 404-885-3155
Submission	Motion to Amend Pleading/Amended Pleading
Filer's name	Austin Padgett
Filer's email	trademarks@troutman.com, austin.padgett@troutman.com
Signature	/Austin Padgett/
Date	07/25/2022
Attachments	Motion.pdf(187968 bytes) Exhibit A.pdf(254114 bytes) Exhibit B.pdf(185356 bytes) Exhibit C.pdf(165146 bytes) Exhibit D.pdf(435065 bytes)

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

In the Matter of Registration No. 6024896
For the mark: AVADEL
Registered: March 31, 2020

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FLAMEL IRELAND LIMITED,	:	
	:	Cancellation No. 92078502
Petitioner,	:	
	:	
v.	:	
	:	
RETHINK CREATIVE GROUP LLC,	:	
	:	
Respondent.	:	
-----	X	

**PETITIONER'S MOTION FOR LEAVE TO FILE
AMENDED PETITION FOR CANCELLATION
AND REQUEST FOR SUSPENSION**

Pursuant to Fed. R. Civ. P. 15(a) and Rule 2.107(a) of the Trademark Rules of Practice, Petitioner Flamel Ireland Limited (“Petitioner”) hereby moves the Board for leave to file an Amended Petition for Cancellation in this proceeding to allege that Respondent Rethink Creative Group LLC (“Respondent”) did not use the mark AVADEL (“Respondent’s Mark”) in commerce as of the date it filed its statement of use in support of U.S. Trademark Registration No. 6024896 (“Respondent’s Registration”) and Respondent’s Registration should not have registered because the application was void *ab initio*. Petitioner further requests suspension of this matter pending the disposition of this motion.

STATEMENT OF FACTS

In the September 20, 2019, statement of use associated with its application for Registration No. 6024896, Respondent represented to the U.S. Patent and Trademark Office that

it had used Respondent's Mark at least as early as September 20, 2019. *See Affidavit of Austin Padgett in Support of Petitioner's Motion for Leave to File Amended Petition for Cancellation ("Padgett Affidavit")* ¶2, *Exhibit A*.

During the recent course of discovery, Petitioner requested information from Respondent about its first use of Respondent's Mark. In its requests for admissions, Petitioner requested Respondent to "[a]dmit that the Challenged Mark was first used in commerce on September 20, 2019." *Padgett Affidavit* ¶¶3–5, *Exhibit B*. Respondent denied the request for admission. *See id.* In its interrogatories, Petitioner requested the "date ranges of actual use of the Challenged Mark" in connection with Petitioner's goods and services. *Padgett Affidavit* ¶¶6–8, *Exhibit C*. In response, Respondent stated the dates are "October 1, 2019, to present." *See id.*

Based on the information provided in discovery, Respondent was not using Respondent's Mark in commerce as of September 20, 2019—the date it both claimed its date of first use and filed its statement of use.

II. ARGUMENT

It is blackletter law that an applicant must show use of its mark in U.S. commerce to obtain a registration. 15 U.S.C. §§ 1051(a), 1127. The registration of a mark that does not meet the use requirement is void *ab initio*. *See Gay Toys, Inc. v. McDonald's Corp.*, 585 F.2d 1067, 1068 (CCPA 1978). That is, when a mark has not been used in commerce on the day the use-based application or statement of use is filed, the application and resulting registration of that mark are void *ab initio*. *See Couture v. Playdom*, 778 F.3d 1379, 113 USPQ2d 2042, 2043–44 (Fed. Cir. 2015) (internal citation omitted); *see also ShutEmDown Sports, Inc. v. Carl Dean Lacy*, 102 USPQ2d 1036, 1045 (TTAB 2012).

Petitioner has adequately pled the additional basis for cancellation in the Proposed Amended Petition for Cancellation filed concurrently herewith. Petitioner submits that justice requires the Board to grant Petitioner leave to amend its Petition for Cancellation. *See Hurley Int'l. LLC v. Volta*, 82 U.S.P.Q.2d 1339, 1341 (T.T.A.B. 2007). A copy of the proposed Amended Petitioner for Cancellation is attached hereto as *Exhibit D*. For ease of reference and comparison, the additional allegations are provided in the new count, namely “THIRD GROUND FOR CANCELLATION – NON-USE.”

Petitioner respectfully requests that this matter be suspended pending the disposition of this motion. The resulting decision of this motion may change the scope of discovery in this matter, and the resources of both the parties and the Board are served by suspending this matter until this subject matter of this motion is resolved.

Respectfully submitted,

TROUTMAN SANDERS LLP



Austin Padgett
TROUTMAN SANDERS LLP
600 Peachtree Street NE, Suite 3000
Atlanta, Georgia 30308-2216
(404) 885-3000 (phone)
(404) 885-3900 (fax)
trademarks@troutmansanders.com
austin.padgett@troutman.com
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent by email to Attorney for Respondent of record.

This 25th day of July 2022.

A handwritten signature in black ink, appearing to read "A. Padgett", written in a cursive style.

Austin Padgett

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

In the Matter of Registration No. 6024896
For the mark: AVADEL
Registered: March 31, 2020

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FLAMEL IRELAND LIMITED,	:	
	:	Cancellation No. 92078502
Petitioner,	:	
	:	
v.	:	
	:	
RETHINK CREATIVE GROUP LLC,	:	
	:	
Respondent.	:	
-----	X	

**DECLARATION OF AUSTIN PADGETT IN SUPPORT OF PETITIONER’S MOTION
FOR LEAVE TO FILE AMENDED PETITION FOR CANCELLATION**

Austin Padgett declares as follows:

1. I am a partner with the law firm of Troutman Pepper, counsel for Petitioner in the above-identified cancellation proceeding. I have personal knowledge of the facts set forth below.
2. In its application for Registration No. 6024896, Respondent represented to the U.S. Patent and Trademark Office that it had used the AVADEL mark at least as early as September 20, 2019. A true and correct copy of the online record for the application is attached as *Exhibit A*.
3. On May 24, 2022, Respondent provided its objections and responses to Petitioner’s first set of requests for admissions. A true and correct copy of the document is attached as *Exhibit B*.
4. Specifically, in Request No. 1, Petitioner requested Respondent to “[a]dmit that the Challenged Mark was first used in commerce on September 20, 2019. *See Exhibit B*.

5. In response, Respondent denied the request. *See Exhibit B.*
6. On June 16, 2022, Respondent provided its objections and responses to Petitioner's first set of interrogatories. A true and correct copy of the document is attached as *Exhibit C.*
7. Specifically, in Interrogatory No. 5, Petitioner requested the "date ranges of actual use of the Challenged Mark" in connection with Petitioner's goods and services. *See Exhibit C.*
8. In response, Respondent stated the dates are "October 1, 2019, to present." *See Exhibit C.*

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

This 25th day of July 2022.



Austin Padgett



United States Patent and Trademark Office

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AVADEL

Word Mark AVADEL

Goods and Services IC 035. US 100 101 102. G & S: advertising, marketing, and promotion services; brand consulting services, namely, brand concept, design, and development services; public relations. FIRST USE: 20190920. FIRST USE IN COMMERCE: 20190920

Standard Characters Claimed

Mark Drawing Code (4) STANDARD CHARACTER MARK

Serial Number 88064111

Filing Date August 3, 2018

Current Basis 1A

Original Filing Basis 1B

Published for Opposition January 29, 2019

Registration Number 6024896

Registration Date March 31, 2020

Owner (REGISTRANT) Rethink Creative Group LLC LIMITED LIABILITY COMPANY TEXAS 2800 Shamrock Ave Fort Worth TEXAS 76107

Type of Mark SERVICE MARK

Register PRINCIPAL

Live/Dead Indicator LIVE

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

In Re Registration No. 6024896

For the mark: AVADEL

Registered: March 31, 2020

-----X	:	
FLAMEL IRELAND LIMITED,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Cancellation Number: 92078502
	:	
RETHINK CREATIVE GROUP LLC,	:	
	:	
Defendant.	:	
-----X	:	

**DEFENDANT’S RESPONSES TO
PLAINTIFF’S FIRST REQUESTS FOR ADMISSIONS**

Pursuant to Rule 36 of the Federal Rules of Civil Procedure and 37 C.F.R. § 2.120, Rethink Creative Group LLC (“Defendant”), answers and objects to the admission requests (the “Requests”) submitted by Flamel Ireland Limited (“Plaintiff”).

GENERAL OBJECTIONS

Defendant makes the following general responses and objections (“General Objections”) to the Requests. The General Objections are incorporated into each response, and the assertion of the same, similar, or additional objections or partial

6. Defendant objects to Plaintiff's Requests to the extent any Request calls for disclosure of protected data.

7. These responses are based on discovery available as of the date these responses were served on Plaintiff. Further discovery, independent investigation, or other analysis may lead to the discovery of additional information, which may lead to additions or changes to the responses set forth below. These responses are given without prejudice to Defendant's right to produce or rely on subsequently discovered information.

SPECIFIC OBJECTIONS AND RESPONSES

ADMISSION REQUEST NO. 1: Admit that the Challenged Mark was first used in commerce on September 20, 2019.

RESPONSE TO ADMISSION REQUEST NO. 1:

Denied.



Redacted

Redacted

Dated: May 24, 2022

Respectfully submitted,

CREEDON PLLC

By: /s/ Charles A. Wallace

James H. Creedon

Texas Bar No. 24092299

Charles A. Wallace

Texas Bar No. 24110501

5 Cowboys Way, Suite 300

Frisco, Texas 75034

Tel. 972.850.6864

Fax 972.920.3290

jhcreedon@creedon.com

cwallace@creedon.com

ATTORNEYS FOR DEFENDANT

Rethink Creative Group LLC

CERTIFICATE OF SERVICE

I certify that a true and complete copy of the foregoing document was served on Flamel Ireland Limited by forwarding said copy on May 24, 2022, via email to Austin Padgett at austin.padgett@troutman.com and trademarks@troutman.com.

By: /s/ Charles A. Wallace
Charles A. Wallace

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

In Re Registration No. 6024896

For the mark: AVADEL

Registered: March 31, 2020

-----X
FLAMEL IRELAND LIMITED, :
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 Plaintiff, :
 :
 v. : Cancellation Number: 92078502
 :
 RETHINK CREATIVE GROUP LLC, :
 :
 :
 Defendant. :
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**DEFENDANT’S RESPONSES TO
PLAINTIFF’S FIRST SET OF INTERROGATORIES**

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure and 37 C.F.R. § 2.120, Rethink Creative Group LLC (“Defendant”), answers and objects to the Interrogatories (the “Requests”) submitted by Flamel Ireland Limited (“Plaintiff”).

GENERAL OBJECTIONS

Defendant makes the following general responses and objections (“General Objections”) to the Interrogatories. The General Objections are incorporated into each response, and the assertion of the same, similar, or additional objections or partial

Redacted

INTERROGATORY NO. 5: For each good or service that you have offered, sold, or provided under or in connection with the Challenged Mark, state the date ranges of actual use of the Challenged Mark in connection with the good or service.

RESPONSE TO INTERROGATORY NO. 5: Subject to the General Objections, Defendant responds as follows: Under the branding “AVADEL AGENCY,” Defendant offered the services listed in Interrogatory 4 above from October 1, 2019, to present.

Redacted

Redacted

Dated: June 16, 2022

Respectfully submitted,

CREEDON PLLC

By: /s/ Charles A. Wallace

James H. Creedon
Texas Bar No. 24092299
Charles A. Wallace
Texas Bar No. 24110501
5 Cowboys Way, Suite 300
Frisco, Texas 75034
Tel. 972.850.6864
Fax 972.920.3290
jhcreedon@creedon.com
cwallace@creedon.com

**ATTORNEYS FOR DEFENDANT
Rethink Creative Group LLC**

CERTIFICATE OF SERVICE

I certify that a true and complete copy of the foregoing document was served on Flamel Ireland Limited by forwarding said copy on June 16, 2022, via email to Austin Padgett at austin.padgett@troutman.com and trademarks@troutman.com.

By: /s/ Charles A. Wallace
Charles A. Wallace

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

In the Matter of Registration No. 6024896
For the mark: AVADEL
Registered: March 31, 2020

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FLAMEL IRELAND LIMITED, :
 :
 : Cancellation No. 92078502
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 Petitioner, :
 :
 :
 v. :
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 RETHINK CREATIVE GROUP LLC, :
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 Respondent. :
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FIRST AMENDED PETITION TO CANCEL

Flamel Ireland Limited ("Petitioner"), a limited company organized and existing under the laws of Ireland with a principal place of business at 2nd Floor, Block 10, Unit 1 Blanchardstown Corporate Park, Dublin 15 Ireland, believes that it has been and will continue to be damaged by U.S. Trademark Registration No. 6024896 for the mark AVADEL, and hereby petitions for cancellation of same pursuant to Section 14(1) of the Lanham Trademark Act of 1946 ("Lanham Act"), 15 U.S.C. § 1064(1).

As grounds for cancellation, Petitioner alleges as follows:

1. Petitioner, through its licensees, provides pharmaceutical medicines and biopharmaceutical products and solutions under the mark AVADEL.

2. Petitioner is the owner of valid and subsisting United States Trademark Registration No. 5242378 on the Principal Register in the United States Patent and Trademark Office for the trademark AVADEL (hereinafter "AVADEL Mark") for the registered goods and services, which issued on July 11, 2017. Attached as Exhibit 1 is a true and correct printout from the United States Patent and Trademark Office electronic database showing the current status and title of the registration as of November 16, 2021.

3. Petitioner and its licensees have used the AVADEL Mark in interstate commerce in the United States continuously since January 2017 in connection with the registered goods and services.

4. As a result of its widespread, continuous, and exclusive use of the AVADEL Mark to identify its goods and services and Petitioner as their source, Petitioner owns valid and subsisting federal statutory and common law rights to the AVADEL Mark.

5. Petitioner's AVADEL Mark is distinctive to both the consuming public and Petitioner's trade.

6. Petitioner and its licensees have expended substantial time, money, and resources marketing, advertising, and promoting the goods and services sold under the AVADEL Mark including through online advertising, press releases, investor relations activities, and product packaging.

7. Petitioner and its licensees provide educational services under the AVADEL mark, including through their marketing materials. The products and services under the AVADEL mark have received press and industry recognition.

8. The goods and services Petitioner offers under the AVADEL Mark are of high quality.

9. As a result of its distinctiveness and widespread use and promotion throughout the United States, Petitioner's AVADEL Mark is a famous trademark within the meaning of Section 43(c) of the Lanham Act, 15 U.S.C. § 1125(c), and became famous prior to the filing date of Respondent's application for Registration No. 6024896 or any other priority date on which Respondent may rely.

10. Upon information and belief, Respondent, Rethink Creative Group LLC, with an address at 2800 Shamrock Ave, Fort Worth, TX 76107, is the current listed owner of Registration No. 6024896 for the mark AVADEL in connection with "advertising, marketing, and promotion services; brand consulting services, namely, brand concept, design, and development services; public relations." That trademark registration, based on an application filed on August 3, 2018, was issued on March 31, 2020 and bears a first-use date of September 20, 2019.

11. Petitioner's AVADEL Mark has priority over Respondent's mark because Petitioner's first-use and effective registration dates for the AVADEL Mark predate the filing date of Respondent's application for Registration No. 6024896 or any other date on which the Respondent may rely for purposes of priority.

12. Respondent's mark AVADEL is identical to Petitioner's AVADEL Mark.

13. The services covered by Respondent's Trademark Registration No. 6024896 are similar and related to the goods and services provided by Petitioner and its licensees under the AVADEL Mark.

14. Respondent's Registration No. 6024896 is unrestricted as to consumers and trade channels. As such, it is presumed that Respondent's services identified in the challenged registration are sold to all ordinary consumers of the services and travel in all ordinary trade channels.

FIRST GROUND FOR CANCELLATION — LIKELIHOOD OF CONFUSION

15. Respondent's registration should be cancelled because it consists of or comprises a mark which so resembles Petitioner's previously used and registered AVADEL Mark as to be likely, when used in connection with Respondent's services, to cause confusion, mistake, or deception within the meaning of 15 U.S.C. § 1052(d), and to cause damage to Petitioner thereby.

SECOND GROUND FOR CANCELLATION — DILUTION

16. Petitioner's AVADEL Mark is distinctive and a "famous mark" within the meaning of Section 43(c) of the Lanham Act, 15 U.S.C. § 1125(c).

17. Petitioner's AVADEL Mark became distinctive and famous prior to the filing date of Respondent's application for Registration No. 6024896 or any other date on which the Respondent may rely for purposes of priority.

18. Respondent's Registration No. 6024896 impairs the distinctiveness and causes dilution by blurring of, and thereby damages, Petitioner's famous AVADEL Mark in violation of 15 U.S.C. § 1125(c). Accordingly, pursuant to 15 U.S.C. § 1064, Respondent's Registration No. 6024896 should be cancelled.

THIRD GROUND FOR CANCELLATION — NON-USE

19. In its prosecution of Respondent's Registration No. 6024896, Respondent filed its statement of use on September 20, 2019, and claimed first use in commerce of the mark at least as early as September 20, 2019.

20. Upon information and belief, Respondent had made no use in commerce of Respondent's mark AVADEL as of September 20, 2019.

21. In its requests for admissions, Petitioner requested Respondent to "[a]dmit that the Challenged Mark was first used in commerce on September 20, 2019." Respondent denied the request for admission.

22. In its interrogatories, Petitioner requested the "date ranges of actual use of the Challenged Mark" in connection with Petitioner's goods and services. In response, Respondent stated the dates are "October 1, 2019, to present."

23. The Respondent's Registration No. 6024896 is void ab initio and should be cancelled.

WHEREFORE, Petitioner respectfully prays that its cancellation be sustained and that Respondent's Registration No. 6024896 be cancelled.

Respectfully submitted,

TROUTMAN PEPPER

/Austin Padgett/

Austin Padgett (Ohio Bar No. 85368)
Troutman Pepper Hamilton Sanders LLP
Attorneys for Opposer
600 Peachtree Street, NE, Suite 3000
Georgia USA 30308-2216
(404) 885-3000
trademarks@troutman.com
austin.padgett@troutman.com

EXHIBIT 1

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AVADEL

Word Mark AVADEL
Goods and Services IC 005, US 006 018 044 046 051 052, G & S: Pharmaceutical preparations and medications for use in the treatment of hypotension in the setting of anesthesia; pharmaceutical preparations and medications for treating pain management, respiratory diseases and disorders, allergic disorders, gastrointestinal disorders, sleep disorders, dermatological conditions, pulmonary diseases, obstetrics and gynecology; pharmaceutical products, namely, pharmaceutical agents and preparations for the treatment of autoimmune diseases, bacterial infections, chronic anemia, hypotension, disorders of the musculo-skeletal system, for maintaining blood pressure, for the reversal of the effects of anesthesia, for the reversal of the effects of non-depolarizing neuromuscular blocking agents; chemical preparations for medical and veterinary purposes for injection or oral administration, namely, a drug delivery system in the form of coatings, tablets that provide continuous and controlled release of active ingredients in a wide variety of therapeutic agents to human patients; drug delivery agents in the form of encapsulated pharmaceutical preparations for the prolonged and controlled release of active ingredients, for the treatment of a wide variety of diseases and disorders; injectable medication used to reverse anesthesia; medication used to maintain blood pressure. FIRST USE: 20170103. FIRST USE IN COMMERCE: 20170103
IC 042, US 100 101, G & S: Provision of pharmaceutical information in the fields of pharmaceutical research and chemical and biochemical analysis for research purposes. FIRST USE: 20170103. FIRST USE IN COMMERCE: 20170103
IC 044, US 100 101, G & S: Provision of pharmaceutical advice; provision of pharmaceutical information, namely, the diagnostic, prophylactic and therapeutic properties of pharmaceuticals and instructional information for use of the pharmaceutical products. FIRST USE: 20170103. FIRST USE IN COMMERCE: 20170103

Standard Characters Claimed
Mark Drawing Code (4) STANDARD CHARACTER MARK
Serial Number 86922879
Filing Date February 29, 2016
Current Basis 1A
Original Filing Basis 1B
Published for Opposition September 27, 2016
Registration Number 5242378
Registration Date July 11, 2017
Owner (REGISTRANT) Flamel Ireland Limited limited company (Ltd.) IRELAND 2nd Floor, Block 10, Unit 1 Blanchardstown Corporate Park Dublin 15 IRELAND
Attorney of Record Austin Padgett
Type of Mark Register TRADEMARK, SERVICE MARK
Live/Dead Indicator LIVE

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Accessed November 16, 2021

United States of America

United States Patent and Trademark Office

AVADEL

Reg. No. 5,242,378

Registered Jul. 11, 2017

Int. Cl.: 5, 42, 44

Service Mark

Trademark

Principal Register

Flamel Ireland Limited (IRELAND limited company (Ltd.))
2nd Floor, Block 10, Unit 1
Blanchardstown Corporate Park
Dublin 15 IRELAND

CLASS 5: Pharmaceutical preparations and medications for use in the treatment of hypotension in the setting of anesthesia; pharmaceutical preparations and medications for treating pain management, respiratory diseases and disorders, allergic disorders, gastrointestinal disorders, sleep disorders, dermatological conditions, pulmonary diseases, obstetrics and gynecology; pharmaceutical products, namely, pharmaceutical agents and preparations for the treatment of autoimmune diseases, bacterial infections, chronic anemia, hypotension, disorders of the musculo-skeletal system, for maintaining blood pressure, for the reversal of the effects of anesthesia, for the reversal of the effects of non-depolarizing neuromuscular blocking agents; chemical preparations for medical and veterinary purposes for injection or oral administration, namely, a drug delivery system in the form of coatings, tablets that provide continuous and controlled release of active ingredients in a wide variety of therapeutic agents to human patients; drug delivery agents in the form of encapsulated pharmaceutical preparations for the prolonged and controlled release of active ingredients, for the treatment of a wide variety of diseases and disorders; injectable medication used to reverse anesthesia; medication used to maintain blood pressure.

FIRST USE 1-3-2017; IN COMMERCE 1-3-2017

CLASS 42: Provision of pharmaceutical information in the fields of pharmaceutical research and chemical and biochemical analysis for research purposes

FIRST USE 1-3-2017; IN COMMERCE 1-3-2017

CLASS 44: Provision of pharmaceutical advice; provision of pharmaceutical information, namely, the diagnostic, prophylactic and therapeutic properties of pharmaceuticals and instructional information for use of the pharmaceutical products

FIRST USE 1-3-2017; IN COMMERCE 1-3-2017

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



Joseph Matol

Performing the Functions and Duties of the
Under Secretary of Commerce for
Intellectual Property and Director of the
United States Patent and Trademark Office

SER. NO. 86-922,879, FILED 02-29-2016
LESLEE ANN FRIEDMAN, EXAMINING ATTORNEY