IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:	Dream Crew IP, LLC.
Serial No:	88612716
Trademark:	THC (Stylized)
Filing Date:	September 11, 2019

RESPONSE TO FINAL NONFINAL OFFICE ACTION

COMES NOW, the Applicant, Dream Crew IP, LLC. (Applicant), and respectfully requests the Examining Attorney to reconsider United States Patent and Trademark Office's (USPTO) initial refusal of trademark Application Serial Number 88612716 for "THC" (Application), a stylized mark, in International Classes 005, 025, 031 and 034 stating as follows:

PRIOR PENDING APPLICATION – CLASSES 005, 031, 034

The USPTO cites the earlier-filed U.S. trademark application Serial Number 88239310 for "THC" as a potential source of a 2(d) likelihood of confusion refusal with respect to Classes 005, 031 034. Serial Number 88239310 having since been cancelled, this earlier-filed application no longer poses an obstacle to Applicant's Application.

CLASS 025 – Section 2(d)

Applicant withdraws its Application with respect to Class 025 only.

FAILURE TO FUNCTION – CLASSES 005, 031, 034

USPTO determinations relating to a mark's functionality are subject to a set burden of proof. Specifically, the Examining Attorney must establish a prima facie case of functionality in order to uphold a functionality determination. See *In re Beckton, Dickinson & Co.*, 675 F.3d 1368, 1374, 102 USPQ2d 1372, 1376 (Fed. Cir. 2012). Once a prima facie case has been established, the burden shifts to the applicant to rebut the presumption of functionality that attaches *Id.*

The USPTO's prima facie case in this instance rests upon an opinion that the existence of a particular graphic symbol used in Canada, and apparently comprising Applicant's mark, has been "widely reported" in the United States. The USPTO relies on mention of this symbol in graphicartsmag.com, lealfly.com and marketwatch.com to constitute "widely reported" news content in the U.S. Applicant's counsel respectfully submits he has never heard of graphicartsmag.com or leafly.com prior to their appearance in the Nonfinal Office Action. There is no indication of the number of views or impressions the reporting articles cited by the USPTO have received, if any. Moreover, the hearsay content of these articles is accepted as truthful and accurate despite the fact that speculated content is not attributed to a journalistic source.

Notwithstanding the foregoing, assuming a "significant" number of Americans visit Canada on an annual basis, marijuana was not legalized in Canada until October 17, 2018, less than two years ago. Moreover, global travel has come to something of a standstill for the past six months due to Covid-19 which surely drastically impacts those figures. The statement that ,"A significant number of American consumers of marijuana products would, therefore, be familiar with the Canadian THC symbol" is predicated on a multitude of assumptions. For

example, which U.S. states did the visitors to Canada originate from? Possession of marijuana in New York state is illegal. New York state shares a border with Canada's most populous province, Ontario. Are New Yorkers considered "consumers of marijuana products"? What is the length of the average visit these Americans spend in Canada? Where does the symbol appear in Canada. Is it visible only in dispensaries or does it appear in television advertisements? While Americans apparently may encounter this symbol in Canada, based on the evidence, has it been established as "likely" that Americans would view the symbol the same way for cannabis products – particularly in U.S. states where cannabis products are not legal in the first place so there is no basis for residents to believe they would possess significant amounts of THC?

Likelihood of confusion is determined on a *case-by-case basis* by applying the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973) (called the "*du Pont* factors") (emphasis added). "Likelihood of confusion" means that confusion is probable, not simply that it may occur. Applicant respectfully submits the USPTO has not met its burden and established actual confusion as likely.

CONCLUSION

WHEREFORE, Applicant respectfully requests the Examining Attorney to reconsider this Application's initial refusal and instead approve it for publication in the Trademark Gazette.

Respectfully submitted this 11th day of Auguts, 2020

s/robert kleinman/

Robert Kleinman
Breanne Cope

Common Sense Counsel
404 West 7th Street
Austin, Texas 78701
T: (512) 599-5329 / F: (512) 628-3390
robert@commonsensecounsel.com
breanne@commonsensecounseol.com