2022-1041

United States Court of Appeals for the Federal Circuit

In re: JOY TEA INC.,

Appellant.

On Appeal from the Trademark Trial and Appeal Board regarding Serial No. 88/640,009

BRIEF FOR AMERICANS FOR SAFE ACCESS AND INTERNATIONAL CANNABIS BAR ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANT URGING REVERSAL

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FEBRUARY 25, 2022

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 22-1041

Short Case Caption In re: JOY TEA INC.

Filing Party/Entity Americans for Safe Access and International Cannabis Bar Association

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

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Date: 02/25/2022 Signature: /s/ James R. Gourley

Name: James R. Gourley

FORM 9. Certificate of Interest **Form 9 (p. 2)**
July 2020

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.
☐ None/Not Applicable	☑ None/Not Applicable	☑ None/Not Applicable
Americans for Safe Access		
Canbar Association (DBA International Cannabis Bar Association)		

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☑ None/Not Applicable ☐ Additional pages attached

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

☑ None/Not Applicable ☐ Additional pages attached

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☑ None/Not Applicable ☐ Additional pages attached

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

Americans for Safe Access and the International Cannabis Bar Association submit this brief as *amici curiae* under Federal Rule of Appellate Procedure 29 and Federal Circuit Rule 29. This brief supports Appellant Joy Tea Inc.'s position. All parties consent to the filing of this brief. No counsel for any party in this case authored this brief in whole or in part. No person or entity—other than *amici curiae* and its counsel—made a monetary contribution specifically for the preparation or submission of this brief.

INTEREST OF *AMICUS CURIAE* ASA

Americans for Safe Access ("ASA") is the nation's largest member-based organization of patients, medical professionals, scientists, and concerned citizens working to promote safe and legal access to cannabis for therapeutic use and research. ASA fulfills its mission through legislative advocacy, education, grassroots activism, services provided to patients and their providers, and litigation. ASA has more than 150,000 active members with chapters and affiliates in all 50 states and the District of Columbia, many of which legally permit the use of medical cannabis. ASA's advocacy addresses treatment and symptom relief for patients suffering from aging, arthritis, cancer, chronic pain, gastrointestinal disorders, HIV/Aids, movement disorders, multiple sclerosis, PTSD, and many more conditions, as well as illnesses, symptoms, and side effects from other treatments.

As one of the nation's leading advocacy groups for the right to access medical cannabis, ASA has an interest in ensuring that petitioners' claims are not lost to the overreach of a federal agency, in this instance, the United States Patent and Trademark Agency (the "USPTO"), and its attempts to prematurely enforce other federal agencies' regulations, such as the Drug Enforcement Administration ("DEA") and the Food and Drug Administration ("FDA").

As an *amicus* in this appeal, ASA's position is that the USPTO incorrectly issued a decision refusing to publish and possibly allow Application No. 88/640,009 (the "Application"), an Intent-To-Use ("ITU") application filed on October 2, 2019, for the mark FOR JOY in connection with teas and beverages containing cannabidiol ("CBD") in Class 30. The USPTO refused the application because it asserts that the applicant, Joy Tea Inc., could not have had a *bona fide* intent to use the mark in lawful commerce upon the Application's filing date. By issuing this refusal, the USPTO evaded an important issue that is well-recognized under USPTO trademark practice: an ITU applicant has thirty-six months from the date a Notice of Allowance is issued to introduce the applied-for goods under the applied-for mark into interstate commerce.

ASA submits this *amicus* brief to highlight this issue and to urge this Court to take up the pressing and long-overdue question of whether an ITU applicant is entitled to use the thirty-six-month period after a Notice of Allowance to introduce goods into lawful interstate commerce. Applicants in other industries routinely avail themselves of this thirty-six-month period as standard practice, including but not limited to pharmaceutical companies, whose products have not yet been approved by the FDA. Applicants in the cannabis industry should be treated no differently, and ITU applications for cannabis goods should be evaluated under the "lawful use" requirement at the time an applicant submits the required evidence of use to obtain registration.

When ITU applications are published and allowed, that publication serves an important public policy goal that is being thwarted without sufficient justification by the USPTO's current practice of refusing to allow cannabis-related ITU applications. Trademarks serve as source identifiers and allow consumers to choose products based on quality, safety, or any other metric they deem appropriate. Published and allowed ITU applications deter competitors from adopting similar marks because doing so may subject them to future liability for trademark infringement if and when the ITU application proceeds to registration.

INTEREST OF *AMICUS CURIAE* INCBA

With over 800 current members, the International Cannabis Bar Association ("INCBA") is the largest member-based bar association of attorneys representing clients in the cannabis industry, the vast majority of whom practice law in the United States. INCBA members focus their legal practices in a variety of substantive areas, many of whom are also members of, among others, the American Bar Association's Tort, Trial, and Insurance Practice Section, Business Law Section, and International Law Section, as well as the International Trademark Association. INCBA's primary mission is to provide continuing legal education, networking, and professional support for these attorneys.

INCBA helps its members navigate the complex landscape that includes the federal prohibition on cannabis under the Controlled Substances Act ("CSA"), regulations by the FDA under the Food Drug and Cosmetics Act ("FDCA"), jurisdictionally specific decriminalization, state regulatory regimes, and municipal-level requirements. Since its inception in 2015, INCBA members have seen a legal grey area blossom into a $22 billion industry. The growth of the industry is based on patchwork policy of federal non-enforcement of the CSA and FDCA by the DEA and FDA, respectively, federal appropriations riders prohibiting the use of federal funds to interfere with the implementation of state-level medical programs, and agency guidance on Bank Secrecy Act (BSA) and Anti-Money Laundering (AML) laws.

The cannabis industry is one of the most highly regulated industries in the United States, and the attorneys and market participants must approach these businesses with an eye towards municipal, state, and federal legal and regulatory compliance. INCBA's U.S. members are bound by the relevant state ethics requirements, the applicable state-level regulatory regime, and the web of federal laws governing cannabis related matters. INCBA members have played, and will continue to play, an important part in ushering in an age of transparency and reliability that bolsters the public health and safety goals of each cannabis regulatory environment.

In the face of non-enforcement by federal agencies, namely the DEA and FDA, the result has been a proliferation of state regulated cannabis industries and a national burgeoning of CBD from Hemp products, sold online and in a wide array of commercial establishments, such as gas stations, mini-marts, specialty shops, and department stores. In this context, the USPTO's *per se* stance on the unavailability of trademark protections unnecessarily complicates the legal landscape navigated by INCBA members. Trademark lawyers seeking to protect a client's mark that is legally used at the state level are forced to seek state level protections, which provide only a limited scope of protection. The traditional benefits of federal trademark protection to consumers – brand recognition, consistency of quality control, and consumer safety – are currently unavailable and unenforceable by mark-holders.

INCBA members, and trademark lawyers more generally, have an interest in seeking consistency, and seeing this burgeoning industry treated as any other: unique and otherwise qualifying marks should be granted with the traditional thirty-six-month period to prove lawful use, not rejected under a *per se* rule.

SUMMARY OF THE ARGUMENT

The Appellant in this case seeks narrow relief that does not implicate the legality of the goods that it may someday sell in interstate commerce using the trademark at issue. The USPTO is applying a *per se* rule against allowing cannabis-related intent-to-use ("ITU") applications to proceed through publication and allowance, thereby entering the thirty-six-month window for showing lawful use in commerce. This *per se* rule, which is used to reject marks for which the applicant has a bona fide intention to use in interstate commerce in the future, but on a product that is currently not legal under the Food Drug and Cosmetics Act ("FDCA"), should be rejected. Not only is the USPTO's *per se* rule illogical and inconsistently applied, but it also thwarts the goals of the Lanham Act, which is primarily focused on consumer protection.

Below, *amici* will describe how consumers in the cannabis industry are harmed by the USPTO's current treatment of cannabis-related ITU trademark applications, how the USPTO treats cannabis-related ITU applicants differently than it does such applicants in other industries that file applications for then-illegal goods, why any concern by the USPTO regarding its integrity is unfounded, and how the USPTO's lawful use requirement, as applied to use-based applications, is on shaky legal ground that crumbles when applied to ITU applications.

ARGUMENT

I. The purpose of the Lanham Act is thwarted by the USPTO's *per se* rule to reject ITU trademark applications for cannabis-related goods that are not currently legal under the FDCA or CSA.

The USPTO has implemented a *per se* rule that no ITU applicant for cannabis-related goods or services can have a bona fide intention to use the applied-for mark in lawful use at a future date if the use proposed in the application is unlawful at the time of filing.[1] Appellant has already shown in its opening brief how the USPTO's rule is incorrect as a matter of fact and logic in this case. Below, *amici* will discuss how this requirement does not further, but instead thwarts, the Lanham Act's goal of consumer protection.

One of the primary goals of the Lanham Act, and of trademark law more generally, is to protect consumers from confusion and deception by helping them to "identify goods and services that they wish to purchase, as well as those they want to avoid."[2] ITU applications further this goal before the mark is even

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[1] *See In re JJ206, LLC*, 120 USPQ2d 1568, 1569 (TTAB 2016).

[2] *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017); *see also* Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2020, 2021 (2005) ("The consumer, we are led to believe, is the measure of all things in trademark law."); Jeanne C. Fromer & Mark A. Lemley, *The Audience in Intellectual Property Infringement*, 112 MICH. L. REV. 1251, 1258 (2014) (observing that trademark law "enable[s] consumer decision-making" by combatting trademark use "that causes consumer confusion about the origins of goods or services"); Mark A. Lemley & Mark McKenna, *Irrelevant Confusion*, 62 STAN. L. REV. 413, 414 (2010) (recognizing that "[w]ith some significant exceptions, the basic rule of

registered because the filing provides the applicant with priority over later-filed applications and later-used marks through constructive use. As stated in the Trademark Manual of Examining Procedure ("TMEP") 201.02, filing any application for registration on the Principal Register, including an ITU application, constitutes constructive use of the mark, provided the application matures into a registration.[3] Upon registration, the ITU filing affords the applicant nationwide priority over others, except: (1) parties who used the mark before the applicant's filing date; (2) parties who filed in the USPTO before the applicant; or (3) parties who are entitled to an earlier priority filing date based on the filing of a foreign application under 15 U.S.C. §1126(d) or §1141g.[4]

Because ITU applications are searchable in the USPTO trademark database immediately or soon after filing, they put the world on constructive notice that, at some point in the future, the applicant may obtain exclusive rights in that

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trademark law is that a defendant's use of a mark is illegal if it confuses a substantial number of consumers and not otherwise"); Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L.REV. 1839, 1844 (2007) ("It would be difficult to overstate the level of consensus among commentators that the goal of trademark law is--and always has been--to improve the quality of information in the marketplace and thereby reduce consumer search costs.").

[3] *See Cent. Garden & Pet Co. v. Doskocil Mfg. Co.*, 108 USPQ2d 1134 (TTAB 2013).

[4] *See Zirco Corp. v. Am. Tel. & Tel. Co.*, 21 USPQ2d 1542 (TTAB 1991); *Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 86 USPQ2d 1527 (D.C. Cir. 2008).

trademark that is effective as of the filing date. This aspect of ITU applications serves an important function when competitors are performing due diligence on trademarks they are considering for use. It is routine for competitors to steer clear of using marks that have been applied for on an ITU basis, and especially those ITU applications that have been allowed but not yet registered, because there is typically a concern that such applications could, at some point in the future, mature into a registered mark that carries with it exclusive rights. This robust public notice system serves an important consumer protection function by allowing good faith competitors to avoid using confusingly similar marks.

But the USPTO's *per se* rule of refusing to allow, and indeed its general antipathy towards, cannabis-related ITU applications because the underlying goods or services are currently illegal thwarts the Lanham Act's consumer protection policy goal. The USPTO should follow the policy articulated in TMEP § 1101 for all ITU applications: "The USPTO will *not* evaluate the good faith of an applicant in the *ex parte* examination of applications. Generally, the applicant's sworn statement of a bona fide intention to use the mark in commerce will be sufficient evidence of good faith in the *ex parte* context." (emphasis in original) By evaluating cannabis-related ITU applications in the same manner as all other ITU applications and allowing them to proceed to a Notice of Allowance, the trademark register can continue to serve its important public notice function without violating the USPTO's lawful use requirement for registered trademarks.

Today, cannabis product manufacturers and sellers must rely on a patchwork of state trademark laws to protect their brands and thereby protect consumers. For obvious reasons, the lack of a national trademark registry for marijuana brands puts cannabis product consumers at risk. After all, they may not understand that two cannabis products bearing similar or even identical marks in two different states are not necessarily made by the same company and may have very different characteristics. The USPTO can take a small but meaningful step towards protecting consumers by issuing Notices of Allowance for otherwise allowable cannabis-related ITU applications without running afoul of its self-imposed lawful use requirement for registration. If the applicant is able to show lawful use during the thirty-six month period following allowance, the allowed applications can proceed to registration.

II. The USPTO should treat cannabis-related ITU applications the same way it treats ITU applications for pharmaceutical goods that have not yet been approved by the FDA and therefore are not lawful to sell when the application is filed.

Pharmaceutical companies routinely reserve trademarks for pharmaceutical drugs years in advance of their release by filing ITU applications – often well before the FDA has approved the drug and made it legal to sell in interstate commerce. To take one example, Eli Lilly and Company applied to register the trademark TALTZ on November 18, 2011.[5] It was examined and found to be in condition for allowance on January 15, 2013.[6] But it was not approved by the FDA until March 22, 2016.[7] In other words, the application was in condition for registration for three years while the FDA determined whether it would be legal to sell the drug in interstate commerce.

The situation faced by Eli Lilly is almost identical to that faced by a vast number of food and beverage manufacturers who have a bona fide intention to manufacture products regulated by the FDA that include hemp-derived CBD. The FDA has stated that it "is committed to protecting public health while also taking steps to improve the efficiency of regulatory pathways for the lawful marketing of appropriate cannabis and cannabis-derived products."[8] Therefore, an ITU applicant can easily look at the FDA's current review process for cannabis-related goods and have an objectively reasonable bona fide intent to use a cannabis-related trademark in lawful interstate commerce in exactly the same manner that a pharmaceutical company can anticipate that the FDA's drug review process will result in approval and lawful use at some point in the future. Indeed, when filing

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[5] U.S. Trademark App. Ser. No. 85476614.
[6] *Id*. at Notice of Allowance dated January 15, 2013.
[7] *See* Press Release, Lilly, *Lilly's Taltz® (ixekizumab) Receives U.S. FDA Approval for the Treatment of Moderate-to-Severe Plaque Psoriasis* (March 22, 2016) (available at https://investor.lilly.com/news-releases/news-release-details/lillys-taltzr-ixekizumab-receives-us-fda-approval-treatment)
[8] APPX96

extensions of time to file a statement of use in an ITU application, one of the USPTO authorized reasons for filing the extension is "steps to obtain required government approval." Again, if pharmaceutical companies are allowed to await government approval before filing a statement of use, cannabis companies should be able to do the same.

III. Any concern by the USPTO regarding agency integrity is unfounded.

To the extent the USPTO is concerned that the agency will somehow be seen as approving or endorsing illegal activity by allowing cannabis-related ITU applications to proceed to allowance, that concern is unfounded. The Supreme Court in *Matal v. Tam* pointedly noted that "registration does not constitute approval of a mark"[9] Similarly, one prominent commentator has noted: "[t]he government, by registering a mark, does not thereby give its approval or imprimatur to the propriety, suitableness, or tastefulness of the mark or of the suitability or quality of the goods or services with which it is used."[10] This is even more true for an ITU application that has been issued a Notice of Allowance but has not yet proceeded to registration. Issuing a Notice of Allowance for a cannabis-related application can only be seen as a judgment that the USPTO is satisfied that the mark is fit for registration but-for the applicant satisfying the use

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[9] *Matal*, 137 S.Ct. at 1759.
[10] J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 19:3.50 (5th ed.)

in commerce requirement, and it is entirely consistent with the USPTO's lawful use requirement for registration.

IV. The USPTO's self-imposed lawful use requirement has no valid basis in statute or policy for use-based trademark applications, and even less so for ITU applications.

In 1955, the USPTO promulgated Rule 2.69.[11] It remains in effect today and is the only USPTO rule concerning the lawful use requirement:

> When the sale or transportation of any product for which registration of a trademark is sought is regulated under an Act of Congress, the Patent and Trademark Office may make appropriate inquiry as to compliance with such Act for the sole purpose of determining lawfulness of the commerce recited in the application.[12]

One of the first examples of the USPTO enforcing the lawful use requirement was in a cancellation proceeding between two pesticide companies.[13] The USPTO canceled the mark based in part on the trademark owner's failure to comply with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[14] Since then, it has been used by the USPTO to investigate a breathtaking array of

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[11] *See* 20 Fed. Reg. 4797, 4803 (July 7, 1955). In 1989, the USPTO made minor cosmetic changes to the rule to conform to the Trademark Law Revisions Act of 1988. 54 Fed. Reg. 37592 (Sept. 11, 1989).
[12] *Id*.
[13] *Coahoma Chemical Co. v. Smith*, 113 U.S.P.Q. (BNA) 413 (Comm'r Pat. 1957).
[14] Ch. 124, 61 Stat. 163 (1947) (codified as amended at 7 U.S.C. Section 136 *et seq*.). Among other things, the FIFRA required labels on "economic poisons" to include the name and address of the manufacturer, its weight, and various warning labels. *Coahoma*, 113 U.S.P.Q. (BNA) at 418.

laws outside the field of trademark law, including the Controlled Substances Act,[15] the Food, Drug and Cosmetic Act,[16] the Amateur Sports Act,[17] the Securities Exchange Act of 1934,[18] the Endangered Species Act,[19] the International Emergency Economic Powers Act,[20] the Cuban Assets Control Regulations,[21] the Federal Meat Inspecting Act,[22] the Communications Act of 1934,[23] the Federal Alcohol Administration Act,[24] and the Federal Indian Arts the Crafts Act.[25]

Despite being cited somewhat frequently during USPTO proceedings, the lawful use requirement has received startlingly little judicial scrutiny. The first TTAB decision on lawful use in *Coahoma* was appealed to this Court's predecessor, and the cancellation was affirmed on other grounds, allowing the panel to sidestep ruling on whether the USPTO had the authority to impose the

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[15] *In Re Morgan Brown*, 119 U.S.P.Q.2d (BNA) 1350 (T.T.A.B. 2016).
[16] *In Re Stellar Int'l, Inc.*, 159 U.S.P.Q.2d (BNA) 48 (T.T.A.B. 1968).
[17] *United States Olympic Committee v. O-M Bread Inc.*, 26 U.S.P.Q.2d (BNA) 1221 (T.T.A.B. 1993).
[18] *East West Bank, Co. v. The Plubell Firm, LLC*, 2016 WL 5219824 at *13 (T.T.A.B. 2016).
[19] U.S. Trademark App. Ser. No. 79226020 (Non-Final Office Action, Feb. 20, 2018).
[20] U.S. Trademark App. Ser. No. 79179932 (Office Action, Jan. 25, 2016).
[21] U.S. Trademark App. Ser. No. 86503062 (Office Action, Apr. 3, 2017).
[22] *In Re Cook, United, Inc.*, 188 U.S.P.Q. (BNA) 284 (T.T.A.B. 1975).
[23] *In Re WSM, Inc.*, 225 U.S.P.Q. (BNA) 883 (T.T.A.B. 1985).
[24] *Great Adirondack Steak & Seafood Cafe, Inc.*, 2017 WL 3670296 (T.T.A.B. 2017).
[25] *In Re Indian Nation Leather Co.*, 44 U.S.P.Q.2d (BNA) 1539 (T.T.A.B. 1997).

lawful use requirement.[26] Since then, courts have heard five other appeals from the TTAB that involved the lawful use requirement, but the issue was again avoided either because the parties did not question the agency's authority in the first place, or because the court was able to decide the case on other grounds.[27]

Professor Robert Mikos of Vanderbilt Law School recently published a detailed critique of the lawful use requirement, finding it to be both unauthorized and unwise.[28] There is no statutory support for it. It burdens trademark examiners with investigating and interpreting laws that are outside their field of expertise. It imposes penalties on trademark owners that were never intended by Congress (i.e. loss of federal trademark rights) for alleged violations of other laws, and usurps enforcement discretion typically reserved to the regulatory agencies who oversee enforcement of those laws, or the Department of Justice. And it is cumbersomely implemented through arbitrary enforcement of the materiality exception, among

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[26] *Smith v. Coahoma Chem. Co. Inc.*, 264 F.2d 916 (C.C.P.A. 1959).

[27] *Application of Silenus Wines, Inc.*, 557 F.2d 806 (C.C.P.A. 1977)(cancellation affirmed on other grounds); *Weight Watchers Int'l, Inc. v. I. Rokeach & Sons, Inc.*, 546 F. Supp. 841 (S.D.N.Y. 1982)(challenge to requirement dismissed because not timely pleaded); *Johnson & Johnson v. Jack Frost Labs. Inc.*, 1990 WL 488871 (Fed. Cir. Mar. 6, 1990)(lawful use not raised on appeal); *O-M Bread, Inc. v. U.S. Olympic Comm.*, 65 F.3d 933, 936 n2. (Fed. Cir. 1995)(Board's "authority" to demand lawful use not challenged on appeal); *Zao Gruppa Predpriyatij Ost & Zao Ost Aqua*, 2013 WL 5588296 *7 (W.D.Wash. 2013)(same).

[28] Mikos, Robert A., *Unauthorized and Unwise: The Lawful Use Requirement in Trademark Law* (June 8, 2021). Vanderbilt Law Research Paper No. 21-24, 75 Vanderbilt Law Review 161 (2022), Available at SSRN: https://ssrn.com/abstract=3862859

many other problems. Although Professor Mikos's criticisms were focused mainly on use-based applications and registrations, they apply even more forcefully to the narrow relief requested by Appellant – namely, to allow its ITU application to proceed through publication and allowance so that it may have thirty-six months to show that it is using the mark in commerce. No ITU applicant is required to show use of any kind to receive a Notice of Allowance. Why, then, should the lawful use requirement be considered at all during examination of an ITU application?

V. Conclusion

The Court should overturn the judgment of the TTAB and instruct the USPTO to allow Appellant's application to proceed through the examination process like any other ITU application. If the TTAB ever possessed evidence that Appellant does not have a bona fide intent to use the mark in commerce in the future, it failed to marshal that evidence. As described above, the USPTO's *per se* rule against cannabis-related ITU trademark applications is counterproductive, illogical, unfounded, and should be rejected.

Dated: February 25, 2022

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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