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Subject: U.S. TRADEMARK APPLICATION NO. 85663019 - TEAHC - N/A - EXAMINER BRIEF

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# UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 85663019

MARK: TEAHC



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**GENERAL TRADEMARK INFORMATION:**

<http://www.uspto.gov/trademarks/index.jsp>

**TTAB INFORMATION:**

<http://www.uspto.gov/trademarks/process/appeal/index.jsp>

**APPLICANT:** Hinton, Christopher C.

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

N/A

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## **EXAMINING ATTORNEY'S APPEAL BRIEF**

### **STATEMENT OF THE CASE**

Applicant has appealed the Trademark Examining Attorney's final refusal to register the trademark TEAHC for "Tea-based beverages" on the ground that the mark is deceptively misdescriptive of a feature of the identified goods, Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1).<sup>1</sup> It is respectfully requested that the refusal be affirmed.

### **STATEMENT OF FACTS**

The applicant filed the instant application on June 27, 2012, to register the mark, TEAHC, for "Tea-based beverages."

Prior to examination, applicant submitted an amendment to allege use on August 26, 2012.

In the initial Office action dated November 26, 2012, the Examining Attorney refused registration because the mark is merely descriptive of a feature of the identified goods.

Applicant responded on April 25, 2013, and argued that the mark is not merely descriptive.

On June 5, 2013, the Examining Attorney issued a second non-final Office action maintaining the descriptive refusal, refusing registration because the goods are not in lawful use in commerce, refusing

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<sup>1</sup> Registration was additionally refused on the ground that the mark on the drawing did not match the mark on the specimen, Trademark Act Sections 1 and 45, 15 U.S.C. §§1051, 1127. The Examining Attorney, however, is persuaded by the applicant's arguments, and this refusal is hereby withdrawn.

registration because the mark is deceptively misdescriptive and requiring applicant to submit additional information.

Applicant responded on December 5, 2013, and argued against the lawful use and deceptively misdescriptive refusals and provided the required information.

On December 31, 2013, the Examining Attorney issued a subsequent non-final Office action maintaining the refusals of registration because the mark is descriptive and deceptively misdescriptive of the identified goods and requiring applicant to submit additional information, including a statement that the goods comply with the Controlled Substances Act.

Applicant submitted a response to the outstanding Office action on June 26, 2014, providing additional information and a statement that the goods comply with the Controlled Substances Act.

On August 22, 2014, the Examining Attorney maintained the refusals of registration because the mark is descriptive and deceptively misdescriptive of the identified goods. In addition, the Examining Attorney refused registration because the mark on the drawing does not match the mark on the specimen.

Applicant responded on February 19, 2015, arguing against the refusal of registration because the marks do not match.

On March 17, 2015, the Examining Attorney issued a final Office action withdrawing the descriptive refusal and maintaining the deceptively misdescriptive refusal and the refusal because the marks do not match.

On May 22, 2015, the applicant submitted its appeal brief, and the file was forwarded to the Examining Attorney on June 3, 2015. The Examining Attorney is persuaded by the applicant's arguments that the mark on the drawing does match the mark on the specimen. The refusal of registration because the marks do not match is hereby withdrawn.

#### **ISSUE**

The issue on appeal is whether the mark is deceptively misdescriptive of the identified goods under Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1).

#### **ARGUMENTS**

**THE APPLICANT'S MARK IS DECEPTIVELY MISDESCRIPTIVE IN CONNECTION WITH THE GOODS FOR WHICH THE MARK IS USED.**

The applicant's mark is deceptively misdescriptive of the identified goods. The test for determining whether a mark is deceptively misdescriptive has two parts: (1) whether the mark misdescribes the

goods and/or services; and if so, (2) whether consumers are likely to believe the misrepresentation. See *In re White Jasmine LLC*, 106 USPQ2d 1385, 1394 (TTAB 2013) (citing *In re Quady Winery, Inc.*, 221 USPQ 1213, 1214 (TTAB 1984)); TMEP §1209.04.

**I. The proposed mark misdescribes features and ingredients of the applicant's goods.**

The applicant's mark is misdescriptive of tea-based beverages that do not contain THC. A mark is misdescriptive when the mark merely describes a significant aspect of the goods and/or services that the goods and/or services could plausibly possess but in fact do not. *In re Schniberg*, 79 USPQ2d 1309, 1312 (TTAB 2006); *In re Phillips-Van Heusen*, 63 USPQ2d 1047, 1048 (TTAB 2005); see TMEP §1209.04. To be merely descriptive, a mark must immediately convey knowledge of a quality, feature, function, or characteristic of an applicant's goods or services. *In re The Chamber of Commerce of the U.S.*, 675 F.3d 1297, 1300, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 963, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)); TMEP §1209.01(b).

The proposed mark, TEAHC, is a phonetic equivalent of the term THC. A novel spelling or an intentional misspelling that is the phonetic equivalent of a merely descriptive word or term is also merely descriptive if purchasers would perceive the different spelling as the equivalent of the descriptive word or term. See *In re Hercules Fasteners, Inc.*, 203 F.2d 753, 97 USPQ 355 (C.C.P.A. 1953) (holding "FASTIE," phonetic spelling of "fast tie," merely descriptive of tube sealing machines); *Andrew J. McPartland, Inc. v. Montgomery Ward & Co.*, 164 F.2d 603, 76 USPQ 97 (C.C.P.A. 1947) (holding "KWIXTART," phonetic spelling of "quick start," merely descriptive of electric storage batteries); *In re Carlson*, 91 USPQ2d 1198

(TTAB 2009) (holding “URBANHOUSING” phonetic spelling of “urban” and “housing,” merely descriptive of real estate services); *In re State Chem. Mfg. Co.*, 225 USPQ 687 (TTAB 1985) (holding “FOM,” phonetic spelling of “foam,” merely descriptive of foam rug shampoo); TMEP §1209.03(j).

In this case, consumers would, in calling for the goods, pronounce applicant’s mark as the equivalent to “T.H.C.” Indeed, applicant’s specimen of use bolsters this interpretation. The proposed mark is displayed on the specimen as “TeaHC.” The letters “EA” appear in black in significantly smaller size while the wording “THC” is displayed more prominently in green color. When encountering applicant’s mark in the marketplace, consumers would view it and pronounce it as “T.H.C.”

The Merriam-Webster Online Dictionary defines THC as “either of two physiologically active isomers  $C_{21}H_{30}O_2$  from hemp plant resin; *especially*: one that is the chief intoxicant in marijuana.”<sup>2</sup>

The attached evidence from Yahoo.com demonstrates that consumers have encountered and are familiar with teas that contain THC and marijuana. Indeed, this website contains a recipe for THC-infused tea and states, “I have just the thing for you. It’s called Tea-H-C. But this isn’t the same tea your grandma drinks... That’s because this tea (T), contains an H, and a C, the main active ingredient found in marijuana(THC).”<sup>3</sup>

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<sup>2</sup> See TICRS pages 2-4 of the Office action dated June 5, 2013.

<sup>3</sup> See TICRS pages 8-10 of the initial Office action dated November 26, 2012.

Likewise, the attached evidence from UrbanDictionary.com, Grasscity.com, and Marijuana.com further demonstrates that tea containing cannabis and THC is commonly produced and called TeaHC.

UrbanDictionary.com defines TeaHC as, "Tea using Marijuana as an alternative of getting high without smoking it."<sup>4</sup> The attached evidence from Grasscity.com provides discussion on the smell of TeaHC, stating, "I was wondering if you are brewing some marijuana pot grass tea, if it will make your kitchen, or whole house smell like pot."<sup>5</sup> Additionally, Grasscity.com includes a discussion of making TeaHC and indicating, "...you can use any part of the cannabis plant that has THC in it, but if you're not using buds, then you're going to need A LOT more product to the tea potent."<sup>6</sup> Marijuana.com provides another recipe for TeaHC and states, "(T)his is a Weed Tea recipe that I came up with for a friend of mine who wanted to (tr)y pot, but refuses to smoke it."<sup>7</sup>

Moreover, the attached evidence from Wikipedia indicates that tea is a common way to ingest cannabis and defines "cannabis tea" as "an infusion of cannabis - usually the leaves of the plant - in hot water."<sup>8</sup>

Lastly, the attached evidence from SensiSeeds.com shows a cannabis tea called Honeybush Hemp Infusion and drinks containing cannabis that appear to be in an in-store display.<sup>9</sup> It is plausible that tea would be made with cannabis and contain THC. In this case, however, applicant contends that its tea does not contain cannabis or THC.<sup>10</sup> Therefore, since the goods do not contain THC, the mark misdescribes a feature of ingredient of the applicant's goods.

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<sup>4</sup> See TICRS pages 2-3 of the initial Office action dated November 26, 2012.

<sup>5</sup> See TICRS pages 4-7 of the initial Office action dated November 26, 2012.

<sup>6</sup> See TICRS pages 10-11 of the Office action dated June 5, 2013.

<sup>7</sup> See TICRS pages 5-9 of the Office action dated June 5, 2013.

<sup>8</sup> See TICRS page 31 of the final Office action dated March 17, 2015.

<sup>9</sup> See TICRS pages 34-37 of the final Office action dated March 17, 2015.

<sup>10</sup> See TICRS pages 3-4 of the applicant's response received on April 25, 2013.

## II. TEAHC and THC do not have any other meanings when used in connection with tea and tea beverages.

Contrary to applicant's assertions, the terms TeaHC and THC do not have any other meanings. Applicant contends that the wording TeaHC stands for "TeaHoneyCare" and references advertisements for its beverages.<sup>11</sup> These advertisements, however, do not contain any direct connection between the applied-for mark and the wording "TeaHoneyCare" or make any reference to applicant's goods.<sup>12</sup> Additionally, applicant has not provided any argument or evidence regarding the extent of use of these advertisements. Nor has applicant provided any evidence that TeaHC would be recognized in the industry or by consumers as meaning "tea honey care" with respect to tea products. Indeed, applicant's specimen does not contain any reference to this intended meaning and does not convey the contended alternative meaning.<sup>13</sup> The applicant's goods are merely identified as TeaHC.<sup>14</sup>

Moreover, the attached definition of TeaHC states, "Tea using Marijuana as an alternative of getting high without smoking it,"<sup>15</sup> and the attached definition of THC states, "either of two physiologically active isomers  $C_{21}H_{30}O_2$  from hemp plant resin; *especially*: one that is the chief intoxicant in marijuana."<sup>16</sup> This definition clearly indicates that the term THC has only one recognized meaning. Indeed, the evidence of record clearly shows that TEAHC, for tea products, has one recognized meaning, namely, teas containing tetrahydrocannabinol, the chief intoxicant in marijuana.<sup>17</sup>

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<sup>11</sup> See page 3 of Applicant's Brief.

<sup>12</sup> See TICRS pages 9 and 10 of the applicant's response received on December 5, 2013.

<sup>13</sup> See TICRS page 2 of the amendment to allege use filed on August 26, 2012.

<sup>14</sup> *Id.*

<sup>15</sup> See TICRS pages 2-3 of the initial Office action dated November 26, 2012.

<sup>16</sup> See TICRS pages 2-4 of the Office action dated June 5, 2013.

<sup>17</sup> See *e.g.* TICRS pages 2-3; 4-7 and 8-10 of the initial Office action dated November 26, 2012, and TICRS pages 5-11 of the Office action dated June 5, 2013.

### III. Consumers are likely to believe the misrepresentation.

Consumers are likely to believe the misrepresentation because cannabis and items containing cannabis have been legalized in some form in 23 states and the District of Columbia.<sup>18</sup> Moreover, the attached evidence from CNN.com shows that Colorado and Washington have legalized cannabis for recreational use.<sup>19</sup> The Trademark Act does not prohibit the registration of misdescriptive terms unless consumers who encounter the mark are likely to believe the misrepresentation. *Binney & Smith Inc. v. Magic Marker Indus., Inc.*, 222 USPQ 1003 (TTAB 1984); TMEP §1209.04.

While cannabis and items containing cannabis remain unlawful under Federal law, consumers are able to purchase cannabis, as well as drinks and teas containing cannabis and THC, for both medical and recreational use in certain states and the District of Columbia. Indeed, the attached evidence from SensiSeeds.com shows a commercially-available cannabis tea called Honeybush Hemp Infusion and drinks containing cannabis that appear to be a part of an in-store display.<sup>20</sup> .

Moreover, the attached evidence from Yahoo.com demonstrates that consumers have encountered and are familiar with teas that contain THC and marijuana. Indeed, this website provides a recipe for THC-infused tea and states, "I have just the thing for you. It's called Tea-H-C. But this isn't the same tea your

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<sup>18</sup> See TIGRS pages 2-24 of the final Office action dated March 17, 2015.

<sup>19</sup> See TIGRS pages 25-30 of the final Office action dated March 17, 2015.

<sup>20</sup> See TIGRS pages 34-37 of the final Office action dated March 17, 2015.

grandma drinks... That's because this tea (T), contains an H, and a C, the main active ingredient found in marijuana(THC)."<sup>21</sup>

Likewise, the attached evidence from UrbanDictionary.com, Grasscity.com, and Marijuana.com further demonstrates that tea containing cannabis and THC is commonly produced and that consumers are familiar with THC and cannabis teas. UrbanDictionary.com defines TeaHC as, "Tea using Marijuana as an alternative of getting high without smoking it."<sup>22</sup> The attached evidence from Grasscity.com provides discussion on the smell of THC tea, stating, "I was wondering if you are brewing some marijuana pot grass tea, if it will make your kitchen, or whole house smell like pot."<sup>23</sup> Additionally, Grasscity.com includes a discussion of making THC tea and indicating, "...you can use any part of the cannabis plant that has THC in it, but if you're not using buds, then you're going to need A LOT more product to the tea potent."<sup>24</sup> Marijuana.com provides another recipe for THC tea and states, "(T)his is a Weed Tea recipe that I came up with for a friend of mine who wanted to (tr)y pot, but refuses to smoke it."<sup>25</sup> The attached evidence from SensiSeeds.com also includes a photograph of an in-store display of various beverages containing THC and labeled "cannabis drinks."<sup>26</sup>

Lastly, the attached evidence from Wikipedia indicates that tea is a common way to ingest cannabis and defines "cannabis tea" as "an infusion of cannabis - usually the leaves of the plant - in hot water."<sup>27</sup> The

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<sup>21</sup> See TICRS pages 8-10 of the initial Office action dated November 26, 2012.

<sup>22</sup> See TICRS pages 2-3 of the initial Office action dated November 26, 2012.

<sup>23</sup> See TICRS pages 4-7 of the initial Office action dated November 26, 2012.

<sup>24</sup> See TICRS pages 10-11 of the Office action dated June 5, 2013.

<sup>25</sup> See TICRS pages 5-9 of the Office action dated June 5, 2013.

<sup>26</sup> See TICRS pages 32-33 of the Office action dated December 31, 2013.

<sup>27</sup> See TICRS page 31 of the final Office action dated March 17, 2015.

evidence demonstrates that consumers are familiar with THC and cannabis teas and encounter them in the marketplace.

Contrary to applicant's assertion, the average consumer may legitimately believe that teas containing marijuana and THC are being offered for sale legally. Most consumers are not versed in conflict of laws and may believe that THC teas are lawful because they have been approved on the state level.

Moreover, consumers in Colorado and Washington have access to recreational marijuana and may encounter THC teas in grocery stores, gas stations, coffee shops and other places where tea-based beverages are sold.

Consumers are likely to believe the misrepresentation because goods that contain cannabis and THC are lawful under local laws and available in some areas.

### **CONCLUSION**

As shown by the evidence in the record, it is plausible that tea contains THC. Applicant has indicated that its goods do not contain THC. Accordingly, the proposed mark misdescribes applicant's goods. Because goods containing THC are lawful under local laws and available in some states and the District of Columbia, consumers are likely to believe the misrepresentation. For the foregoing reasons, it is respectfully submitted that the refusal of registration under Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1), be affirmed.

Respectfully submitted,

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