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Tracking Cannabis IP Litigation: Update on the First Cannabis Patent Fight

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Since 2008, the U.S. Patent and Trademark Office has issued approximately 1,200 cannabis-related patents—ranging from the isolation of novel cannabinoids to new methods for cannabis cultivation to various food and beverage products. For cannabis-related products and processes, a patent can be a key differentiator because it gives the owner the exclusive right to make, use, and sell the invention for 20 years from the filing date.

Given the number of applied-for and granted patents, cannabis IP litigation is likely to trend upward. The first time a cannabis patent was asserted in federal court was in *United Cannabis Corp. v. Pure Hemp Collective* (D. Colo., No. 18-cv-1922). The suit was filed in Colorado Federal Court by a biotechnology company, United Cannabis Corporation. United Cannabis claims that Pure Hemp Collective Inc.'s CBD tincture infringes on its patented "liquid cannabinoid formulation" containing "at least 95 percent of the total cannabinoids." (U.S. Patent Number 9,730,911).

On February 6, 2020, the Court in *United Cannabis* granted a joint motion to stay all deadlines so the parties could finish negotiating stipulations on patent infringement and damages. The stay signals that the parties are getting ready to test the scope of the '911 Patent's claims, which appear to be quite broad. If validated, the scope of the '911 Patent implicates nearly all CBD products. The Court questioned whether the '911 Patent claims anything "novel, useful, or nonobvious." However, the relevant claims survived a patent eligibility Section 101 challenge as of last April when the Court determined that "the 911 Patent is not 'directed to' an unpatentable law of nature, a natural phenomenon, or an abstract idea," but "is instead 'directed to' a non-naturally occurring delivery method of naturally occurring chemicals in (as far as the record reveals) non-naturally occurring proportions and concentrations." The issue of whether the claims reciting formulations comprising THC can be deemed invalid for involving a Schedule I controlled substance has not yet been raised.

The patent attorneys at Michael Best are watching *United Cannabis Corp.* closely, as it may be the first case to standardize legal definitions for cannabis and cannabinoid-related patent claims. The outcome will surely have an impact on how patent owners should construct their claims when pursuing patent protection. For cannabis companies seeking intellectual property (e.g., trademark, copyright, or patent) protection, the attorney team at Michael Best is ready to help you protect and enforce your rights in this rapidly growing market.

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