Addressing the examining attorney's 2(e) refusal first, that the mark CHILL CRYOTHERAPY is, in totality, "merely descriptive," Applicant disagrees with the examining attorney and submits that its mark does convey a unique commercial impression. In the context of the mark, the word "CHILL" operates as a clever "double entendre" and should not be taken only literally.

The word "CHILL" is a very well known and now long established as a slang or vernacular word that can function as both adjective and verb, and means "to calm down", or "be calm", "be easy going", "be relaxed" or "relax." See Urban Dictionary definition attached and submitted as evidence herein.

The USPTO Register is replete with marks that include the word "CHILL", obviously accepted in its slang and popular meaning, and clearly not taken literally by the examining attorneys on these files, nor intended by the trademark owners, to have a literal interpretation. As in the instant case, these "CHILL" marks function as a double entendre.

CRYOTHERAPY is the local or general use of low temperatures in medical therapy. Cryotherapy is used to treat a variety of benign and malignant tissue damage, medically called lesions.[1] The term "cryotherapy" comes from the Greek *cryo* (κρύο) meaning *cold*, and *therapy* (θεραπεία) meaning *cure*. Cryotherapy has been used as early as the seventeenth century. See Wikipedia definition, attached and submitted in evidence.

Examples of a merely descriptive phrase, in totality, would be, for example, "LOW TEMPERATURE CRYOTHERAPY" or "COLD CRYOTHERAPY" both of which would be redundant to the point of being nonsensical, since CROYTHERAPY includes and means "cold" from the Greek word "cryo."

"CHILL" has an entirely different and widely accepted meaning and is the reason numerous marks that include the word have been accepted by the USPTO for registration. Adopting the examining attorney's reasoning, Applicant submits that a "merely descriptive" objection should properly have been made in the applications for the following marks, copies of which marks, now registered, are attached hereto and submitted in evidence. In each of these cases, the marks are arguably much more descriptive, in totality, than Applicant's mark and are summarized as follows:

CHILL YOGURT YOUR WAY & Design, Reg. No. 3947263, for frozen yogurt;
CHILL FROZEN YOGURT FRESH & HEALTHY, Reg. No. 4824632 for frozen yogurt;
CHILL SHOT, Reg. No. 4689948, for various beverages;
CHILL N FREEZE, Reg. No. 4830137, for various beverages;
CHILL KEG, Reg. No. 4772438, for beverage containers
CHILL WRAPPER, Reg. No. 2680852, for insulated sleeves for beverage bottles.

It is telling as well, that in none of these registrations, is the word "CHILL" even the subject of a disclaimer, and that the marks CHILL YOGURT YOUR WAY & Design and CHILL FROZEN YOGURT FRESH & HEALTHY, both for *inter alia*, frozen yogurt, are owned by different parties. In fact, the multitude of "CHILL" marks on the Register, being 652 LIVE records as of today's date (see screen capture taken from TEAS search results) indicates that small differences between these marks even in the same Class, as with the frozen yogurt marks noted above, suffice to distinguish one from another. Finally, the examining attorney is asked to take note that the word "CHILL" in the cited application was not subject to a disclaimer of the word "CHILL", indicating that the USPTO examining attorney on that file did not consider the word to be descriptive.

For all the foregoing reasons, the examining attorney is therefore respectfully requested to withdraw the 2(e) objection. With this office action response, Applicant is disclaiming the word "CRYOTHERAPY" as merely descriptive in the context of the mark.

Turning to the 2(d) refusal on the basis of alleged confusion with the applied-for mark CC CHILL CRYOSAUNA & Design, Applicant submits that the two marks are not confusing in sound, appearance or meaning, and that the channels of trade, being the consumers for the respective services, are very different in seeking treatment for different concerns.

Comparison of the marks themselves.

It is settled law that, in assessing likelihood of confusion, marks must be compared in their entireties in for similarities in appearance, sound, connotation, and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F. 3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir.

2005)); TMEP §1207.01(b)-(b)(v).

Although marks are compared in their entireties, one feature of a mark may be more significant or dominant in creating a commercial impression. *See In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 751 (Fed. Cir. 1985); TMEP §1207.01(b)(viii), (c)(ii). Greater weight is often given to this dominant feature when determining whether marks are confusingly similar. *See In re Nat'l Data Corp.*, 753 F.2d at 1058, 224 USPQ at 751.

The cited application features the distinctive design element of two interlocking C's made of blue ice crystals, and that is the most significant or dominant element in creating the commercial impression of the cited mark. This design element is very prominent and has the effect of catching the viewer's eye and engaging the viewer before the viewer looks at the words.

In terms of the words themselves, there are also significant differences. While the word "CHILL" is contained in both marks, for reasons stated above (notably the commonality of the word and its popularity as a slang expression that makes it appealing for trademarking) it is not highly distinctive. In fact, the presence of the word "CHILL" in both Applicant's mark and the cited mark, and the prefix "CRYO" are the only similarities between the marks in terms of appearance, connotation, and commercial and impression. The word THERAPY in Applicant's mark is significantly different and bears no relationship to the word SAUNA in the cited mark. Because of the overall differences in appearance in connotation, the commercial impression made by the marks also differ considerably, and the marks are therefore unlikely to be confused by the consumer on this basis alone.

The respective services

The services in the cited mark are: "*therapeutic cryotherapy for treatment of rheumatoid arthritis and improvement of athletic performance*." The services of Applicant, on the other hand, are "*Health care services, namely, wellness programs; Health spa services for health and wellness of the body and spirit; Health spa services, namely, cosmetic body care services; Health spa services, namely, providing weight loss programs*." It is clear that CC CHILL CRYOSAUNA & Design, the cited mark, relates to consumers who seek remedy for one or both of two specific health concerns, namely the treatment of arthritis and the improvement of athletic

performance.

Applicant's mark, on the other hand, relates to overall health, weight control and appearance, namely cosmetic body care, in the sense of what are commonly called "spa services" or "health spa" services as generally understood.

Those persons seeking treatment for arthritis or increase in athletic performance are not likely to expect relief of these conditions in a health and beauty spa with diverse services including cosmetic treatments, as offered by the Applicant under its mark CHILL CRYOTHERAPY.

Finally, Applicant and the owner of the cited mark, have offered their services to the public under their respective marks for almost a year, with no instances of confusion reported.

In a particular case, any of the *du Pont* factors may play a dominant role. In fact, in some cases, a single factor may be dispositive. *Kellogg Co. v. Pack'em Enterprises Inc*., 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991). In the present case, the dissimilarity of the marks and differences in commercial impression are so great as to outweigh the other *du Pont* factors, and for this reason, the examining attorney is respectfully requested to withdraw the 2(d) refusal of Applicant's mark and approve the application for publication.

In response to the examining attorney's questions, the word "CHILL", to the best of Applicant's knowledge does not have any significance in the cryotherapy trade or industry, nor any significance as applied to the services described in the application.
"CHILL" is not a " term of art" within Applicant's industry. By definition, cryotherapy includes chilling the body via exposure to cold temperatures or application of devices that cools a localized area of the body and Applicant's services include cryotherapy. Applicant submits herein three pages from its website clearly defining and illustrating its services, per the examining attorney's request for further information. As can be seen from these pages Applicant's services are not directed towards healing or treatment of any particular affliction or ailment, such as arthritis, but are provided for beauty, fitness and overall well being, in a luxurious spa type setting.