To: REBECCA LIEBOWITZ(trademarkdocket@venable.com)
Subject: U.S. Trademark Application Serial No. 90258058 - SUMMATAPE
Sent: November 08, 2023 04:11:51 PM EST
Sent As: tmng.notices@uspto.gov

Attachments

screencapture-summaforte-com-pages-new-to-summatape-16994655085511
screencapture-nfuztape-com-blogs-nfuz-tape-blog-how-does-kinesiology-tape-with-infused-essential-oils-work-16994658094411
screencapture-www-performancehealth-com-heali-kinesiology-tape-16994736263911
screencapture-www-healimedical-com-en-us-blogs-blogs-kinesiology-tape-16994738194551
screencapture-legendscbd-com-products-feel-better-with-legends-cbd-infused-kinesiology-tape-16994740379091
screencapture-blacktopplus-com-pages-for-the-pros-16994742809141
screencapture-www-vitaminshoppe-com-p-kinesiology-tape-nude-crackle-20-strips-hli0001-16994747609831

United States Patent and Trademark Office (USPTO)
Office Action (Official Letter) About Applicant's Trademark Application

U.S. Application Serial No. 90258058

Mark: SUMMATAPE

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Applicant: SummaForte, Inc.

Reference/Docket No. N/A

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REQUEST FOR RECONSIDERATION AFTER FINAL ACTION DENIED

Issue date: November 8, 2023

Applicant's request for reconsideration is denied. *See* 37 C.F.R. §2.63(b)(3). The trademark examining attorney has carefully reviewed applicant's request and determined the request did not: (1) raise a new issue, (2) resolve all the outstanding issue(s), (3) provide any new or compelling evidence with regard to the outstanding issue(s), or (4) present analysis and arguments that were persuasive or

shed new light on the outstanding issue(s). TMEP §§715.03(a)(ii)(B), 715.04(a).

Accordingly, the following requirement(s) and/or refusal(s) made final in the Office action dated March 10, 2023, are **maintained and continued**:

- Section 1 and 45 Refusal – Unlawful Use of the Applied-For Mark in Commerce (FDCA Refusal)

See TMEP §§715.03(a)(ii)(B), 715.04(a).

The applicant was refused registration because the applied-for mark was not in lawful use in commerce as of the filing date of the application. Trademark Act Sections 1 and 45, 15 U.S.C. §§1051, 1127; *see* TMEP §907.

Specifically, the goods to which the proposed mark are applied are unlawful under the Food, Drug and Cosmetic Act (FDCA), 21 U.S.C. §321(g)(1). Applicant's goods include items that are intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease and/or intended to affect the structure of or any function of the body, namely, Kinesiology tape; the foregoing containing CBD solely derived from hemp containing no more than .3 percent delta-9 THC on a dry weight basis. Furthermore, the applicant's specimen of use and website indicates that the goods contain 150mg of CBD.

The applicant has provided several arguments against the Final Refusal, which have been considered and found unpersuasive.

First, applicant argues that there are several live registrations for similar or identical goods. Prior decisions and actions of other trademark examining attorneys in applications for other marks have little evidentiary value and are not binding upon the USPTO or the Trademark Trial and Appeal Board. TMEP §1207.01(d)(vi); *see In re USA Warriors Ice Hockey Program, Inc.*, 122 USPQ2d 1790, 1793 n.10 (TTAB 2017). Each case is decided on its own facts, and each mark stands on its own merits. *In re Cordua Rests., Inc.*, 823 F.3d 594, 600, 118 USPQ2d 1632, 1635 (Fed. Cir. 2016) (citing *In re Shinnecock Smoke Shop*, 571 F.3d 1171, 1174, 91 USPQ2d 1218, 1221 (Fed. Cir. 2009); *In re Nett Designs, Inc.*, 236 F.3d 1339, 1342, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001)).

The applicant next argues that *In re Stanley"[u]*involves only the applicability of the Food, Drug and Cosmetic Act to food products.Though this case did involve an ingestibles food product, the TTAB affirmed refusals based upon the Food, Drug and Cosmetic Act, which also covers therapeutic and medicinal products. Moreover, the FDA provides, "**[u]nder the FD&C Act, any product intended to have a therapeutic or medical use, and any product (other than a food) that is intended to affect the structure or function of the body of humans or animals, is a drug**. Drugs must generally either receive premarket approval by FDA through the New Drug Application (NDA) process or conform to a "monograph" for a particular drug category, as established by FDA's Over-the-Counter (OTC) Drug Review. **CBD was not an ingredient considered under the OTC drug review. An unapproved new drug cannot be distributed or sold in interstate commerce**." (emphasis added). See previously attached website screenshots from www.fda.gov. This further supports the validity of the FDCA refusal as it pertains to topical therapeutic or medicinal products.

Moreover, the applicant argues "[w]hile the Examining Attorney notes that under the FDCA, "any product (other than a food) that is intended to affect the structure or function of the body of humans or

animals, is a drug" (citing 21 U.S.C. § 321(g)(1)), Applicant respectfully asserts that such language is so broad and overencompassing such that virtually anything could fall under this definition...Under the cited definition of a drug, even a cold compress to ease inflammation, or a hot water bottle to alleviate cramps could also be classified as a drug because they are "intended to affect the structure or function of the body."" and "Applicant's products are not intended to affect the structure of or any function of the body, but are simply intended to provide support and ameliorative pain relief. Once again, the doctrine of "reasoned decision making" dictates that the refusal be withdrawn so that there are not "conflicting lines of precedent governing identical situations." See TMEP § 1216.01." However, these arguments have been considered and found unpersuasive.

Specifically, the applicant's kinesiology tape is infused with CBD in a manner for the CBD to be absorbed by the users body through their skin in the same manner that therapeutic topical products are utilized. The applicant's website states:

> Unlike other kinesiology tapes, SummaTape also delivers CBD and menthol through the skin, providing a soothing cooling sensation and producing a triple anti-inflammatory effect.
>
> The menthol stimulates blood flow in inflamed areas and works with the CBD to accelerate muscle repair and improve circulation to help support and aid in the healing of injuries.

See attached website screenshots from www.summaforte.com.

Moreover, the attached website screenshots from NFuze Tape, Performance Health, Heali Medical, Legends CBD, Blackto Plus, and Vitamin Shoppe, demonstrate other competitors in the market place producing and selling kinesiology tape infused with various ingredients that are intended to be absorbed through the wearers skin similar to topical medicinal or therapeutic products. *See* attached website screenshots.

Although, the applicant is not producing and selling a traditional topical therapeutic or medicinal product as explicitly prohibited by the FDCA, the applicant's goods function similarly by delivering CBD through the wearers skin to be absorbed and utilized for therapeutic purposes. Accordingly, the FDCA Refusal under Section 1 and 45 is *continued* and *maintained*.

If applicant has already filed an appeal with the Trademark Trial and Appeal Board, the Board will be notified to resume the appeal. *See* TMEP §715.04(a).

If applicant has not filed an appeal and time remains in the response period for the final Office action, applicant has the remainder of that time to (1) file another request for reconsideration that complies with and/or overcomes any outstanding final requirement(s) and/or refusal(s), and/or (2) file a notice of appeal to the Board. TMEP §715.03(a)(ii)(B).

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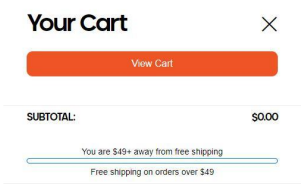

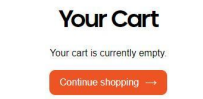

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