

To: REBECCA LIEBOWITZ(trademarkdocket@venable.com)
Subject: U.S. Trademark Application Serial No. 90977536 -
Sent: November 08, 2023 04:15:02 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. 90977536

Mark:

Correspondence Address:

Rebecca Liebowitz
VENABLE LLP
P.O. BOX 34385
WASHINGTON DC 20043
United States

Applicant: SummaForte, Inc.

Reference/Docket No. N/A

Correspondence Email Address: trademarkdocket@venable.com

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]ninvolved only the applicability of the Food, Drug and Cosmetic Act to food products. Though this case did involve an ingestible 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).

/Andrew Clark/
Andrew Clark
Examining Attorney
LO107--LAW OFFICE 107
(571) 270-7304
Andrew.Clark@USPTO.GOV

Your Cart ×

[View Cart](#)

SUBTOTAL: \$0.00

You are \$49+ away from free shipping
Free shipping on orders over \$49

Your Cart

Your cart is currently empty.

[Continue Shopping](#) →

Also Available



SummaMix
Box of 7 Stick Packs
Mixed Berry

[Add to Cart](#) - \$20.00



Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.