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Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re AgrotecHemp Corp.

Serial No. 88979905

James David Johnson of Johnson & Martin P.A. for AgrotecHemp Corp.

James T. Griffin, Trademark Examining Attorney, Law Office 103,
Stacy Wahlberg, Managing Attorney.

Before Shaw, Coggins and English,
Administrative Trademark Judges.

Opinion by Shaw, Administrative Trademark Judge:

AgrotecHemp Corp. ("Applicant") seeks registration on the Principal Register of the mark PUREXXXCBD, in standard characters, for goods identified as "Plant extracts for pharmaceutical purposes; vitamins; dietary supplements; all of the foregoing containing CBD solely derived from hemp containing no more than .3% THC on a dry weight basis," in International Class 5.[1]

[1] Application Serial No. 88979905, filed on August 20, 2019, based upon Applicant's allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). This application is the child of application Serial No. 88585712 which, as filed, included goods in International Classes 1 and 3, but those goods are not subject to the refusal at issue.

Registration was refused as to all of the goods under Trademark Act Sections 1 and 45, 15 U.S.C. §§ 1051 and 1127, on the ground that Applicant does not have a bona fide intent to lawfully use the proposed mark in commerce on the goods because they are not in compliance with the Federal Food, Drug and Cosmetic Act ("FDCA"), 21 U.S.C. §§ 321(g)(1), 331(d) and 355(a).

After the refusal was made final, Applicant appealed and requested reconsideration. The request for reconsideration was denied and the appeal resumed. Both Applicant and the Examining Attorney filed briefs. We affirm the refusal.

I. No bona fide intent to use the mark in lawful commerce

Trademark Act Section 1(b), 15 U.S.C. § 1051(b), states that "a person who has a bona fide intention, under circumstances showing the good faith of such person, to use a trademark in commerce" may apply for registration of the mark. Trademark Act Section 45, 15 U.S.C. § 1127, defines "use in commerce" as "the bona fide use of a mark in the ordinary course of trade." In addition, "[t]he word 'commerce' means all commerce which may lawfully be regulated by Congress." *Id*. The issue in this appeal is simple: whether an applicant for a federal trademark registration can have a bona fide intent to use its mark in commerce on goods that are currently prohibited under federal law but that may, perhaps, become lawful in the future.

For applications based on Section 1(b) of the Trademark Act, such as the present application, if the record indicates that the identified goods include items that are unlawful as of the application filing date, actual lawful use in commerce is not possible, and any intent that the applicant has to use the mark on such goods is not the necessary bona fide intent to use the mark in lawful commerce. *See In re*

PharmaCann LLC, 123 USPQ2d 1122, 1124 (TTAB 2017); *In re JJ206, LLC*, 120 USPQ2d 1568, 1569 (TTAB 2016).

The FDCA prohibits the introduction or delivery for introduction into interstate commerce of a food to which has been added a drug approved under Section 355 of the Act or a biological product licensed under 42 U.S.C. § 262. 21 U.S.C. § 331(ll); *see also* 21 U.S.C. § 321(ff) (indicating that vitamins and dietary supplements are deemed to be a food within the meaning of the FDCA and does not include an article that is approved as a new drug under 21 U.S.C. § 355, certified as an antibiotic under 21 U.S.C. § 357, or licensed as a biologic under 42 U.S.C. § 262). Further, under the FDCA, any product, such as Applicant's "plant extracts for pharmaceutical purposes," 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. 21 U.S.C. § 321(g)(1). An unapproved new drug cannot be distributed or sold in interstate commerce unless it is the subject of an FDA-approved new drug application (NDA) or abbreviated new drug application (ANDA). 21 U.S.C. §§ 331(d) and 355(a), (b) and (j). Thus, all of Applicant's goods in class 5 are covered by the FDCA.

Cannabidiol (CBD): is derived from cannabis and its components (including hemp); is an active ingredient in a FDA-approved new drug, Epidiolex®; and was the subject of substantial clinical investigations before it was marketed in foods or as dietary supplements.[2] In the absence of an NDA or ANDA, Applicant's extracts for

[2] *See FDA Regulation of Cannabis and Cannabis-derived Products: Questions and Answers*, https://www.fda.gov/NewsEvents/PublicHealthFocus/ucm421168.htm, Office Action of April

pharmaceutical purposes containing CBD or derived from hemp are unlawful under the FDCA. Applicant's vitamins and nutritional supplements, including animal supplements, containing CBD are unlawful as well under § 301(ll) of the FDCA. *See* 21 U.S.C. §§ 321(ff) and 331(ll).

The Examining Attorney contends that Applicant's goods are unlawful because they will contain CBD.[3] Applicant does not dispute that its goods will contain CBD, but argues that its goods are made from "hulled hemp seeds, hemp seed protein, and hemp seed oil [which] are Generally Recognized as Safe ('GRAS')."[4]

Given that the goods will contain CBD as indicated by the identification of the goods and the mark itself, the fact that Applicant's goods may be derived from "hulled hemp seeds, hemp seed protein, and hemp seed oil" which may be generally recognized as safe does not obviate their unlawfulness under the FDCA. The FDA requires any product marketed with a claim of therapeutic benefit and containing cannabis or cannabis-derived compounds (such as CBD) to be approved for its intended use before it may be introduced into interstate commerce.[5] Because Applicant has not made of record an NDA or ANDA for its goods, it was unlawful for Applicant to introduce such goods into interstate commerce as of the application filing date, and remains so.

28, 2020, TSDR pp. 10-29.

[3] Examining Attorney's Br., 9 TTABVUE 6.

[4] Applicant's Br., p. 5, 7 TTABVUE 6.

[5] *See Statement of Commissioner Scott Gottlieb, M.D.*, https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm628988.htm, Office Action of April 28, 2020, TSDR pp. 2-6.

Because Applicant's identified goods could not be lawfully introduced into commerce as of the filing date of the application, Applicant did not have the requisite bona fide intent to use the marks in lawful commerce in connection with such goods. *See In re Stanley Bros. Social Enters., LLC*, 2020 USPQ2d 10658, *9 (TTAB 2020) (where the identified goods are illegal under the FDCA, the applicant's use is not in lawful commerce).

We find that Applicant's goods are per se unlawful under the FDCA, and therefore Applicant does not have a bona fide intent to use the mark in lawful commerce under Sections 1 and 45 of the Trademark Act.

Decision: The unlawful use refusal under Sections 1 and 45 of the Trademark Act, based on the FDCA, is affirmed.