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Continued Hurdles for Trademarks in the CBD Industry

The U.S. Trademark Trial and Appeal Board (TTAB) just issued a precedential decision that will continue to frustrate those individuals and corporate entities in the hemp and cannabidiol (CBD) space. The TTAB decided that, in the case of *In re: Stanley Brothers Social Enterprises LLC*, (Serial No. 86568478 ; June 16, 2020), the Colorado CBD company could not register its trademark "CW" because the goods associated with the mark, namely "hemp oil extracts sold as an integral component of dietary and nutritional supplements," violate the Food, Drug and Cosmetic Act (FDCA), per the TTAB's opinion.

The examining attorney at the U.S. Patent and Trademark Office had previously determined that the mark "CW," as used, was a per se violation of the FDCA. In appealing to the TTAB, Stanley Brothers argued that dietary supplements are not "food," and CBD falls within an exception to the FDCA for drugs or biological products "marketed in food." The TTAB disagreed and noted that under 21 U.S.C. § 321(ff) "a dietary supplement shall be deemed to be a food within the meaning of this chapter." The board also said hemp oil is a food product to which CBD (a drug) has been added.

While hemp-derived CBD was removed from the Controlled Substances Act in 2018, the FDA has continued to opine that CBD is not authorized for ingestible use under the FDCA. The TTAB has followed the FDA's lead, and, accordingly, registration of marks for foods, beverages, dietary supplements, or pet treats containing CBD will still be refused as unlawful under the FDCA, even if derived from hemp, because, according to the FDA, they may not be introduced lawfully into interstate commerce.

Key Takeaways

The recent TTAB decision highlights that CBD companies still face hurdles when seeking to protect their intellectual property. One deciding factor on whether registration will be secured is the description of goods and/or services for the pending trademark

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application. For example, trademarks for non-medicated topical skincare and body oils containing CBD are much more likely to obtain registration because the FDA does not similarly argue against the marketing of cosmetics containing CBD. Accordingly, many hemp companies have secured trademarks for their topical products and plan to apply for additional trademark protection once the FDA finally issues regulations for CBD, or Congress forces the FDA to legally recognize and regulate ingestible CBD products. It will be interesting to see whether this TTAB decision is next appealed to the Federal Circuit.

For more information, please contact Karlyn Schnapp, Jonathan Miller, or any member of Frost Brown Todd's Hemp Team.

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