


ESTTA Tracking number: **ESTTA1253143**

Filing date: **12/09/2022**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Ex Parte Appeal - Serial No.	88498433
Appellant	Sunflora, Inc.
Applied for mark	SUN MED
Correspondence address	C BRANDON BROWNING MAYNARD COOPER & GALE PC 1901 SIXTH AVENUE NORTH SUITE 2400 BIRMINGHAM, AL 35203 UNITED STATES Primary email: bbrowning@maynardcooper.com Secondary email(s): ipdocket@maynardcooper.com, tebbert@maynardcooper.com 205-254-1036
Submission	Appeal brief
Attachments	SunMed Reply Brief 433.pdf(1173850 bytes)
Appealed class	Class 003. First Use: None First Use In Commerce: None All goods and services in the class are appealed, namely: Skin creams, lip balm, body oils, body lotion and cosmetic preparations for skin care, all containing CBD derived from hemp and less than 0.3% THC; none of the foregoing being a medicine or medical treatment or promoted as a medicine or medical treatment
Filer's name	C. Brandon Browning
Filer's email	tebbert@maynardcooper.com, bbrowning@maynardcooper.com
Signature	/C. Brandon Browning/
Date	12/09/2022

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re: Application of)
SunFlora, Inc.) Trademark Law Office: 123
For: ) Attorney: Rebecca T. Caysido
Serial No. 88/498,433) Attorney Docket No. 23334.0001
Filed: July 2, 2019)

1901 Sixth Avenue North
1700 Regions/Harbert Plaza
Birmingham, AL 35203-2618
December 9, 2022

Commissioner for Trademarks
P.O. Box 1451
Alexandria, Virginia 22313-1451

APPLICANT’S REPLY BRIEF

The Examining Attorney’s arguments with respect to the relatedness of Applicant’s Goods to the Registrant’s Services are flawed because the Examining Attorney has improperly construed the breadth of Registrant’s “providing medical information, agricultural information, and news in the field of medical cannabis” services, while ignoring the phrase “derived from hemp and less than 0.3% THC; none of the foregoing being a medicine or medical treatment or promoted as a medicine or medical treatment,” as set out in the Applicant’s Goods description. The Examining Attorney’s improper construction of Registrant’s Services arises from the Examining Attorney’s failure to give meaning to the word “medical” in the phrase “medical cannabis,” which functions to narrowly define the information services of the Registrant. These shortcomings of the

Examining Attorney's position are summed up on page 12 of the Examining Attorney's Appeal Brief which reads, in part, "[b]oth hemp and marijuana fall under the category of cannabis" and at page 13, which reads, in part, that "CBD originates from the same plant as medical marijuana." While these statements may be true, they miss the mark. Registrant's Services do not relate broadly to cannabis but instead to the field of *medical* cannabis. Further, Applicant's Goods are not products that contain CBD. Instead, Applicant's Goods are products that contain CBD *derived from hemp* and less than 0.3% THC. CBD derived from hemp and less than 0.3% THC is not derived from medical marijuana. Hemp is not medical marijuana or medical cannabis.

According to the Mayo Foundation for Medical Education and Research (MFMER), "medical cannabis" means "medical marijuana" and is "a term for derivatives of the Cannabis sativa plant that are used to ease symptoms caused by certain medical conditions." See <https://www.mayoclinic.org/healthy-lifestyle/consumer-health/in-depth/medical-marijuana/art-20137855>, attached hereto at **Exhibit J**. U.S. federal law prohibits the use of whole plant Cannabis sativa, *i.e.*, "medical marijuana," or its derivatives for any purpose. See *id.* In contrast, CBD derived from the hemp plant (less than 0.3% THC) is legal under federal law. See *id.* In the 2018 Farm Act, Congress removed hemp from the definition of marijuana in the Controlled Substances Act and defined the term hemp to mean cannabis or any part of that plant, "including ... all derivatives, extracts, cannabinoids, isomers, acids, salts and salts of isomers" that had "a delta-9 [THC] concentration of not more than 0.3% on a dry weight basis." 7 U.S.C. ¶1639o(1). Because hemp-derived products like Applicant's Goods are not marijuana, much less medical marijuana or medical cannabis, when considered in view of a proper interpretation of Registrant's Services, much of the evidence relied upon by the Examining Attorney to show that the parties' respective goods/services are related falls away.

The Examining Attorney refers to twelve sellers of topical preparations containing CBD derived from hemp and less than 0.3% THC, who the Examining Attorney alleges also provide medical information, agriculture information and news in the field of medical cannabis. However, upon inspection, none of the twelve sellers identified in the evidence relied upon by Examining provide such information in the field of medical cannabis. To the contrary, each of the sellers provide information in the field of hemp and CBD, while, at times, distinguishing hemp and CBD from marijuana and THC, respectively. The Examining Attorney's comments at pages 10-11 reflect this fact as the specific content of the seller evidence referenced by the Examining Attorney in the Examine Attorney's Appeal Brief relates to specific health benefits of CBD and hemp, while providing cursory information about THC and marijuana. The Examining Attorney does argue that one of the sellers, namely, Highline Wellness offers information about medical benefits of marijuana; however, a close inspection of the Highline Wellness evidence shows that Highline Wellness speaks only to the use of marijuana as medicine and for recreational purposes. Highline Wellness does not speak to the use of medical cannabis for the treatment of any particular ailment. Thus, the Examining Attorney's reliance on the twelve sellers is misplaced and improper.

More particularly, Kingdom Harvest is an online provider of topical products containing CBD derived from hemp and less than 0.3% THC. The Kingdom Harvest evidence relied by the Examiner Attorney shows that Kingdom Harvest promotes its products by providing on its website health benefits information about products containing CBD derived from hemp and less than 0.3% THC. To the extent the evidence includes information about medical cannabis, that information is limited to information about the legal status of medical cannabis. *See* pages 45-59 of Final

Office action, mailed on January 14, 2022. The Kingdom Harvest evidence includes no agriculture information and no medical information or news¹ in the field of medical cannabis.

Calm by Wellness is an online provider of topical products containing CBD derived from hemp and less than 0.3% THC. The Calm by Wellness evidence relied by the Examiner Attorney shows that Calm by Wellness promotes its products by providing on its website health benefits information about products containing CBD derived from hemp and less than 0.3% THC. To the extent the evidence includes information about medical cannabis, that information is limited to information about the differences between medical marijuana and hemp and the legal status of medical marijuana. *See* pages 69-74 and 77 of Final Office action, mailed on January 14, 2022. The Calm by Wellness evidence includes no agriculture information and no medical information or news in the field of medical cannabis.

Highline Wellness is an online provider of topical products containing CBD derived from hemp and less than 0.3% THC. The Highline Wellness evidence relied by the Examiner Attorney shows that Highline Wellness promotes its products by providing on its website health benefits information about products containing CBD derived from hemp and less than 0.3% THC. To the extent the evidence includes information about medical cannabis, that information is limited to information about the differences between THC and CBD, differences between hemp and marijuana, and general information about CBD and THC. *See* pages 94-112 of Final Office action, mailed on January 14, 2022. The Highline Wellness evidence includes no agriculture information and no medical information or news in the field of medical cannabis.

¹ “News” means “a report of recent events” or “previously unknown information.” *See* <https://www.merriam-webster.com/dictionary/news>, attached hereto at **Exhibit K**.

Cheef is an online provider of topical products containing CBD derived from hemp and less than 0.3% THC. The Chief evidence relied by the Examiner Attorney shows that Chief promotes its products by providing on its website health benefits information about products containing CBD derived from hemp and less than 0.3% THC. Chief also provides news information about the legal status of recreational marijuana, general and historical information about marijuana and comparisons of marijuana and hemp and THC and CBD. *See* pages 130-133, 135-138, 140-143 and 145-152 of Final Office action, mailed on January 14, 2022. Recreational marijuana and medical marijuana are not the same. Medical cannabis is used to ease symptoms caused by certain medical conditions, while recreational marijuana is used to get intoxicated. The Chief evidence includes no agriculture information, no medical information or news in the field of medical cannabis.

First Crop is an online provider of topical products containing CBD derived from hemp and less than 0.3% THC. The First Crop evidence relied by the Examiner Attorney shows that First Crop promotes its products by providing on its website health benefits information about products containing CBD derived from hemp and less than 0.3% THC. First Crop also provides information comparing CBD to THC and agriculture information about growing hemp. *See* page 157-163 and 172 of Final Office action, mailed on January 14, 2022. The First Crop evidence includes no agriculture information, news or medical information in the field of medical cannabis.

Simply CBD is an online provider of topical products containing CBD derived from hemp and less than 0.3% THC. The Simply CBD evidence includes medical information about products containing CBD derived from hemp and less than 0.3% THC, information comparing and contrasting medical cannabis and CBD-containing products and the legal status of medical marijuana and CBD-containing products. *See* page 174-182 of Final Office action, mailed on

January 14, 2022. The Simply CBD evidence includes no agriculture information and no medical information in the field of medical cannabis. The evidence does include news in the field of medical cannabis.

The Green Leaf evidence includes medical information about products containing CBD derived from hemp and less than 0.3% THC, and information comparing and contrasting medical cannabis and CBD-containing products. *See* pages 201-205 of Final Office action, mailed on January 14, 2022. The Green Leaf evidence includes no agriculture information and no medical information or news in the field of medical cannabis.

The Tanasi evidence includes medical information about products containing CBD derived from hemp and less than 0.3% THC. The Tanasi evidence includes no agriculture information and no medical information or news in the field of medical cannabis.

The Redeem Therapeutics includes medical information about products containing CBD derived from hemp and less than 0.3% THC and general information about medical marijuana. *See* page 232-233 of Final Office action, mailed on January 14, 2022. The Tanasi evidence includes no agriculture information and no medical information or news in the field of medical cannabis.

Wellcare Botanicals is an online provider of topical products containing CBD derived from hemp and less than 0.3% THC. The Wellcare Botanicals evidence relied by the Examiner Attorney shows that Wellcare Botanicals promotes its products by providing on its website health benefits information about products containing CBD derived from hemp and less than 0.3% THC. Additionally, Wellcare Botanical provides general information about THC. *See* page 23 of Non-final Office action, mailed on April 12, 2021. The Wellcare Botanicals evidence includes no agriculture information and no medical information or news in the field of medical cannabis.

Imbue Botanicals is an online provider of topical products containing CBD derived from hemp and less than 0.3% THC. The Imbue Botanicals evidence relied by the Examiner Attorney shows that Imbue Botanicals promotes its products by providing on its website health benefits information about products containing CBD derived from hemp and less than 0.3% THC. Additionally, Imbue Botanical provides information comparing hemp and marijuana, general information about THC and information about the legal status and history of hemp and marijuana. *See* pages 37-41 of Non-final Office action, mailed on April 12, 2021. The Imbue Botanicals evidence includes no agriculture information and no medical information or news in the field of medical cannabis.

Hemplucis is an online provider of topical products containing CBD derived from hemp and less than 0.3% THC. The Hemplucis evidence relied by the Examiner Attorney shows that Imbue Botanicals promotes its products by providing on its website health benefits information about products containing CBD derived from hemp and less than 0.3% THC. Additionally, Hemplucis provides information comparing hemp and marijuana, general information about THC and information about the legal status and history of hemp and marijuana. *See* pages 49-57 of Non-final Office action, mailed on April 12, 2021. The Hemplucis evidence includes no agriculture information and no medical information or news in the field of medical cannabis.

In addition to relying upon the seller evidence, the Examining Attorney relies on two third-party trademark registrations to show that sellers of topical preparations containing CBD derived from hemp and less than 0.3% THC allegedly also regularly provide medical information, agriculture information and news in the field of medical cannabis. Two third-party registrations hardly evidence that sellers of topical preparations containing CBD derived from hemp and less than 0.3% THC regularly provide medical information, agriculture information and news in the

field of medical cannabis. Further, one of the third-party references, namely, U.S. Trademark Registration No. 6,041,429 for the mark U NUHUMUN (stylized) does not encompass providing information about THC or marijuana, much less medical information, agriculture information and news in the field of medical cannabis. Instead, that registration's goods and services are limited to "Non-medicated herbal skin salves containing cannabidiol (CBD) derived from cannabis with a delta-9 THC concentration of not more than 0.3% on a dry weight basis" and "Providing information in the fields of health and wellness; providing a website featuring information in the fields of health and wellness; providing health and wellness information regarding cannabinoids, cannabidiol (CBD), and cannabidiol products; providing a website featuring health and wellness information regarding cannabinoids, cannabidiol (CBD), and cannabidiol products." The Examining Attorney's reliance on U.S. Trademark Registration No. 6,041,429 is misplaced and does not evidence that sellers of topical preparations containing CBD derived from hemp and less than 0.3% THC also regularly provide medical information, agriculture information and news in the field of medical cannabis.

Lastly, the Examining Attorney correctly states that determining a likelihood of confusion is based on the description of services stated in the Registrant's registrations and not on extrinsic evidence of actual use. Likewise, determining a likelihood of confusion is also based on the description of goods stated in the Applicant's application. *See* TMEP 1207.01(a)(iii) ("The nature and scope of a party's goods or services must be determined on the basis of the goods or services recited in the application and cited registration."). Nonetheless, the Examining Attorney throughout the Examining Attorney's Appeal Brief seeks to compare Registrant's Services with goods other than what's found in Applicant's Goods. In particular, the Examining Attorney equates Applicant's Goods with CBD goods that provide or that are promoted as having medical

benefits, despite Applicant's Goods being non-medicated and not promoted as a medicine or as a medical treatment. *See, e.g.*, pages 11-16 of the Examining Attorney Appeal Brief. The Examining Attorney's characterization of Applicant's Goods as providing or being promoted as having medical benefits is improper.

In view of the shortcomings of the evidence relied upon by the Examining Attorney to show that the parties' respective goods and services are related and the Examining Attorney's mischaracterization of Applicant and Applicant's Goods, Applicant submits that the record is lacking in evidence showing that the parties' goods and services are related for the purpose of showing a likelihood of confusion between Applicant's mark SUNMED and the Registrant's Marks.

Respectfully Submitted,

SUNFLORA, INC.

By /C. Brandon Browning/
C. Brandon Browning, Esq.
(205) 254-1036

CBB
Encl. – Exhibits J and K

EXHIBIT J

The screenshot shows a web browser window with the URL [mayoclinic.org/healthy-lifestyle/consumer-health/in-depth/medical-marijuana/ar...](https://www.mayoclinic.org/healthy-lifestyle/consumer-health/in-depth/medical-marijuana/ar...). The page features a blue header with a COVID-19 update, the Mayo Clinic logo, a search bar, and navigation links. The main content area is titled "Medical marijuana" and includes a sub-header "U.S. federal law prohibits the use of marijuana. However, many states allow medical use to treat pain, nausea and other symptoms." Below this, there is a byline "By Mayo Clinic Staff" and two paragraphs of text. To the left, there is a sidebar for "The Mayo Clinic Diet" with weight loss goal buttons. To the right, there is an advertisement for Xfinity internet and streaming services. The browser's address bar and search engine (Google) are visible at the top.

Medical marijuana - Mayo Clinic

mayoclinic.org/healthy-lifestyle/consumer-health/in-depth/medical-marijuana/ar...

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Consumer health

Basics | **In-Depth** | Expert Answers | Multimedia | Resources | News From Mayo Clinic | What's New

Products and services

Medical marijuana

U.S. federal law prohibits the use of marijuana. However, many states allow medical use to treat pain, nausea and other symptoms.

By [Mayo Clinic Staff](#)

Medical marijuana is a term for derivatives of the Cannabis sativa plant that are used to ease symptoms caused by certain medical conditions. Medical marijuana is also known as medical cannabis.

Cannabis sativa contains many active compounds. The best known are delta-9 tetrahydrocannabinol (THC) and cannabidiol (CBD). THC is the primary ingredient in marijuana that makes people "high."

The Mayo Clinic Diet
What is your weight-loss goal?
5-10 lbs »
11-25 lbs »
25+ lbs »

Advertisement

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Medical marijuana - Mayo Clinic

mayoclinic.org/healthy-lifestyle/consumer-health/in-depth/medical-marijuana/ar...

people "high."

Is medical marijuana legal in the U.S.?

U.S. federal law prohibits the use of whole plant Cannabis sativa or its derivatives for any purpose. In contrast, CBD, derived from the hemp plant (less than 0.3% THC) is legal under federal law.

Many states allow THC to be used for medical reasons. Federal law regulating marijuana supersedes state laws. Because of this, people may be arrested and charged with possession even in states where marijuana use is legal.

When is medical marijuana appropriate?

Studies report that medical cannabis has possible benefit for several conditions. State laws vary in which conditions qualify people for treatment with medical marijuana. If you're considering marijuana for medical use, check your state's regulations.

Depending on the state, you may qualify for treatment with medical marijuana if you meet certain requirements and have a qualifying condition, such as:

- Alzheimer's disease
- Amyotrophic lateral sclerosis (ALS)
- HIV/AIDS
- Crohn's disease
- Epilepsy and seizures
- Glaucoma
- Multiple sclerosis and muscle spasms
- Severe and chronic pain
- Severe nausea or vomiting caused by cancer treatment

Is medical marijuana safe?

Further study is needed to answer this question, but possible side effects of medical marijuana may include:

- Increased heart rate
- Dizziness
- Impaired concentration and memory
- Slower reaction times
- Negative drug-to-drug interactions
- Increased risk of heart attack and stroke

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Medical marijuana - Mayo Clinic

mayoclinic.org/healthy-lifestyle/consumer-health/in-depth/medical-marijuana/ar...

- Potential for addiction
- Hallucinations or mental illness
- Withdrawal symptoms

Some medical marijuana is formulated to provide symptom relief without the intoxicating, mood-altering effects associated with recreational use of marijuana.

Is medical marijuana available as a prescription medicine?

The U.S. Food and Drug Administration (FDA) has not approved the use of cannabis as a treatment for any medical condition. However, the FDA has approved the cannabinoids cannabidiol (Epidiolex) and dronabinol (Marinol, Syndros).

Cannabidiol can be used for certain forms of severe epilepsy. Dronabinol can be used for nausea and vomiting caused by cancer chemotherapy and for anorexia associated with weight loss in people with AIDS.

What you can expect

Medical marijuana comes in a variety of forms, including:

- Pill
- Liquid
- Oil
- Powder
- Dried leaves


How and where you purchase medical marijuana varies by state. Once you have the product, you administer it yourself. How often you use it depends on its form and your symptoms.

Your symptom relief and side effects will vary based on which type you are using. The quickest effects occur with inhalation of the vaporized form. The slowest onset occurs with the pill form.

Certification and use at Mayo Clinic

Minnesota

Mayo Clinic health care providers may certify state residents with qualifying conditions in the Minnesota medical cannabis program. However, not all Mayo Clinic providers are registered for the



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Medical marijuana - Mayo Clinic x +

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Google

Minnesota

Mayo Clinic health care providers may certify state residents with qualifying conditions in the Minnesota medical cannabis program. However, not all Mayo Clinic providers are registered for the certification process in Minnesota.

Minnesota residents with a supply of medical cannabis from a Cannabis Patient Center may continue use during their Mayo Clinic visit or hospital stay.

Arizona and Florida

Mayo Clinic campuses in Arizona and Florida do not certify people for medical marijuana or allow its use on campus or in the hospital.

Websites

[Arizona Department of Health Services: Medical marijuana](#)
[Florida Health: Office of Medical Marijuana Use](#)
[Minnesota Department of Health: Medical cannabis](#)
[National Conference of State Legislatures: State medical marijuana laws](#)

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EXHIBIT K

The screenshot shows a web browser window with the URL merriam-webster.com/dictionary/news. The page features the Merriam-Webster logo and navigation links like 'GAMES & QUIZZES', 'THESAURUS', and 'WORD OF THE DAY'. A search bar contains the word 'news'. Below the search bar, there are two tabs: 'Dictionary' and 'Thesaurus'. The main content area displays the definition of 'news' as a noun, plural in form but singular in construction. It includes a 'Save Word' button, phonetic pronunciation, and three numbered definitions with examples. To the right, there are three advertisements: a Neutrogena Hydro Boost cleanser, a baby gear collection from Nuna and Pottery Barn Kids, and the 'Word of the Day' 'riposte' with a subscription form. At the bottom, there is a Kroger advertisement and a video player showing a person in a grocery store.

News Definition & Meaning - Merriam-Webster

merriam-webster.com/dictionary/news

Merriam-Webster SINCE 1828

news

Dictionary Thesaurus

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Neutrogena GENTLY CLEANSE + BOOST HYDRATION WITH HYALURONIC ACID

AdChoice Hydro Boost Hydrating Cleansing Gel SHOP NOW

news noun, plural in form but singular in construction, often attributive

Save Word

\ 'nüz , 'nyüz \

Definition of news

1 a : a report of recent events
// gave her the good news

b : previously unknown information
// I've got news for you

c : something having a specified influence or effect
// the rain was good news for lawns and gardens
— Garrison Keillor
// the virus was bad news

2 a : material reported in a newspaper or news periodical or on a newscast
// listened to the news on the radio

b : matter that is newsworthy
// The layoffs were big news in this part of the state.

3 : NEWSCAST
// We saw the news on television.

nuna + pottery barn kids Exclusive Collection SHOP BABY GEAR

WORD OF THE DAY riposte See Definitions and Examples »

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