UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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Alexandria, VA 22313-1451
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alv

Mailed:

Cancellation No. 92059779

Watch Tower Bible and Tract Society of Pennsylvania

v.

LongTail Ad Solutions, Inc.

Before the Trademark Trial and Appeal Board

By the Board:

This case now comes up for consideration of Respondent's motion to dismiss the petition to cancel under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. The motion is fully briefed.

The Board has not relied on any extraneous materials in deciding the motion to dismiss and has determined the sufficiency of Petitioner's pleading by looking solely at the pleading itself.

In support of its motion to dismiss, Respondent argues that the petition to cancel fails to properly plead a claim for likelihood of confusion.

A motion to dismiss for failure to state a claim upon which relief can be granted is a test solely of the legal sufficiency of a complaint. *Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc.,* 988 F.2d 1157, 26

USPQ2d 1038, 1041 (Fed. Cir. 1993). For purposes of determining a motion to dismiss for failure to state a claim upon which relief can be granted, all of plaintiff's well-pleaded allegations must be accepted as true, and the complaint must be construed in the light most favorable to plaintiff. *Id*. The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Only a complaint that states a plausible claim for relief survives a motion to dismiss. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009), *citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555-56 (2007). To survive a motion to dismiss, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 570. The pleading must be examined in its entirety, construing the allegations therein so as to do justice. Fed. R. Civ. P. 8(e); *see also Otto Int'l Inc. v. Otto Kern GmbH*, 83 USPQ2d 1861, 1862 (TTAB 2007). Whether a plaintiff can actually prove its allegations is a matter to be determined not upon motion to dismiss, but rather at final hearing or upon summary judgment. *Advanced Cardiovascular Systems*, 26 USPQ2d at 1041.

To properly state a claim under Section 2(d), Petitioner must plead (1) that Respondent's mark, as applied to its goods or services, so resembles Petitioner's mark or trade name as to be likely to cause confusion, mistake, or deception; and (2) priority of use of its pleaded mark(s). *See Hydro-Dynamics*

Inc. v. George Putnam & Company Inc., 811 F.2d 1470, 1 USPQ2d 1772, 1773 (Fed. Cir. 1987) ("The common law and the Lanham Act require that trademark ownership be accorded to the first *bona fide* user.") (citation omitted).

In its pleading, Petitioner asserts that it has earlier use and its rights in its pleaded marks predate any rights that Respondent can assert in its mark. Para. No. 14. Hence, Petitioner has pleaded priority of use. Moreover, the Board finds that this allegation coupled with the others made in the petition are sufficient to assert a hypothetical pleading of likelihood of confusion. Petitioner asserts that Applicant's registration should be cancelled because it has been unable to secure a registration of its marks, even though it is the senior user, due to the fact that Applicant's registered mark has been cited as a reference by the Examining Attorney. *See Home Juice Co. v. Runglin Cos.*, 231 USPQ 897, 899 (TTAB 1986); *see also* TBMP Section 309.03(c)(2014).

Conclusion

Respondent's motion to dismiss is denied.

Proceedings are resumed. Respondent has until **December 30, 2014** to file an answer. Discovery and trial dates are reset as follows:

Deadline for Discovery Conference	**1/30/2015**
Discovery Opens	**1/30/2015**
Initial Disclosures Due	**3/1/2015**
Expert Disclosures Due	**6/29/2015**
Discovery Closes	**7/29/2015**
Plaintiff's Pretrial Disclosures	**9/12/2015**
Plaintiff's 30-day Trial Period Ends	**10/27/2015**
Defendant's Pretrial Disclosures	**11/11/2015**

Defendant's 30-day Trial Period Ends	**12/26/2015**
Plaintiff's Rebuttal Disclosures	**1/10/2016**
Plaintiff's 15-day Rebuttal Period Ends	**2/9/2016**

In each instance, a transcript of testimony together with copies of documentary exhibits must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.