

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

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Mailed: February 2, 2012

Cancellation No. 92054406

Due Season Christian Church
International

v.

Due Season Ministries
International

**Before Quinn, Ritchie, and Kuczma,
Administrative Law Judges**

By the Board:

Petitioner has filed a petition to cancel the registration for the mark DUE SEASON MINISTRIES INTERNATIONAL for "Christian ministry services; Counseling services in the field of Christian conduct in personal relationships; Providing a website featuring information for local church leaders in the field of Christian growth" in International Class 45.¹ As grounds for cancellation, petitioner pleads priority of use and likelihood of confusion with its previously used mark DUE SEASON.²

¹ Registration No. 3980739, issued August 25, 2011, alleging August 1, 2007, as a date of first use and first use in commerce.

² Petitioner pleads ownership of application Serial No. 76705056 for the mark DUE SEASON for "Christian ministry services" in International Class 45. This application is currently suspended

This case now comes up for consideration of respondent's motion (filed September 12, 2011) to dismiss for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6).³ Respondent filed this motion in conjunction with its answer. Petitioner has filed a brief in response.

In support of its motion, respondent argues as follows: "petitioner's claims that they will be damaged, including as a result of the registrant's mark is [sic] absolutely false." Respondent states that petitioner is "seeking a 'GENERIC NAME', not mark used in Commerce [sic], which will completely damage the registrant." Respondent states that the mark sought by petitioner is "not the actual trade name used in commerce as stated in their cancellation petition." Respondent further states that it "suggests that the Petitioner seek to register their actual church name used: 'Due Season Christian Church International,' which is different than the registrant's mark and less generic than the suspended mark." Respondent requests that this proceeding be "completely terminated and dismissed."

A motion to dismiss for failure to state a claim upon which relief can be granted is a test solely of the legal

after being refused registration under Section 2(d) on the basis of respondent's subject registered mark.

sufficiency of a complaint. See TBMP Section 503.02 (3d ed. 2011). 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. See *Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc.*, 988 F.2d 1157, 26 USPQ2d 1038 (Fed. Cir. 1993). 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, 555-556 (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).

³ Although such motion was not labeled explicitly under Fed. R. Civ. P. 12(b)(6), we construe the motion as one to dismiss for

After carefully reviewing the petition to cancel, we find that petitioner has sufficiently alleged facts for its standing, and for priority of use and likelihood of confusion in the petition to cancel that, if proved, would entitle petitioner to relief. Respondent's arguments that petitioner's petition to cancel should be dismissed because petitioner is seeking a more "generic name" and "not the actual trade name used in commerce as stated in their cancellation petition" are not well taken because they do not demonstrate that petitioner has failed to state a plausible claim for relief.

Accordingly, respondent's motion to dismiss for failure to state a claim is hereby denied.

As previously noted, respondent filed its answer in conjunction with its motion to dismiss. Our review of this answer, however, reveals that it is argumentative and more in the nature of a brief on the case than a responsive pleading to the petition to cancel. As such, it does not comply with Rule 8(b) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Trademark Rule 2.116(a).

Fed. R. Civ. P. 8(b) provides, in part:

A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse

failure to state a claim under which relief can be granted.

party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder.

The petition to cancel filed by petitioner herein consists of 7 paragraphs setting forth the basis of petitioner's claim of damage. In accordance with Fed. R. Civ. P. 8(b) it is incumbent on respondent to answer the petition to cancel by admitting or denying the allegations contained in each paragraph. If respondent is without sufficient knowledge or information on which to form a belief as to the truth of any one of the allegations, it should so state and this will have the effect of a denial.

In view of the foregoing, respondent is allowed until March 10, 2012 in which to file an answer herein which complies with Fed. R. Civ. P. 8.

As noted earlier in this order, Trademark Rules 2.119(a) and (b) require that every paper filed in the Patent and Trademark Office in a proceeding before the Board must be served upon the attorney for the other party, or on the party if there is no attorney, and proof of such service must be made before the paper will be considered by the Board.

Consequently, copies of all papers which respondent may subsequently file in this proceeding, including its answer to the petition to cancel, must be accompanied by a signed statement indicating the date and manner in which such service was made. The statement, whether attached to or appearing on the paper when filed, will be accepted as prima facie proof of service.

It should also be noted that while Patent and Trademark Rule 11.14 permits any person to represent itself, it is generally advisable for a person who is not acquainted with the technicalities of the procedural and substantive law involved in a cancellation proceeding to secure the services of an attorney who is familiar with such matters. The Patent and Trademark Office cannot aid in the selection of an attorney. Therefore the Board strongly recommends that respondent seek the services of a licensed attorney. It is recommended that respondent obtain a copy of the latest edition of Title 37 of the Code of Federal Regulations, which includes the Trademark Rules of Practice. These rules may be viewed at the USPTO's trademarks page:

<http://www.uspto.gov/main/trademarks.htm>. The Board's main webpage (<http://www.uspto.gov/web/offices/dcom/ttab/>) includes information on amendments to the Trademark Rules applicable to Board proceedings, on Alternative Dispute Resolution (ADR),

Frequently Asked Questions about Board proceedings, and a web link to the Board's manual of procedure (the TBMP).⁴

Strict compliance with the Trademark Rules of Practice, and where applicable the Federal Rules of Civil Procedure, is expected of all parties before the Board, whether or not they are represented by counsel.

Conferencing, disclosure, discovery and trial dates are reset as follows:

Time to Answer	3/10/2012
Deadline for Discovery Conference	4/9/2012
Discovery Opens	4/9/2012
Initial Disclosures Due	5/9/2012
Expert Disclosures Due	9/6/2012
Discovery Closes	10/6/2012
Plaintiff's Pretrial Disclosures	11/20/2012
Plaintiff's 30-day Trial Period Ends	1/4/2013
Defendant's Pretrial Disclosures	1/19/2013
Defendant's 30-day Trial Period Ends	3/5/2013
Plaintiff's Rebuttal Disclosures	3/20/2013
Plaintiff's 15-day Rebuttal Period Ends	4/19/2013

Briefs shall be filed in accordance with Trademark Rules

2.128(a) and (b). An oral hearing after briefing is not required but will be scheduled upon request of any party, as provided by Trademark Rule 2.129.

⁴ Respondent may also obtain a hard copy of the latest edition of Title 37 of the Code of Federal Regulations available for a fee from the U.S. Government Printing Office on the World Wide Web at <http://bookstore.gpo.gov>.