

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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Mailed: April 22, 2016

Cancellation No. 92063115

Jenni Rivera Enterprises, Inc.

v.

Tequila Supremo, S.A. de C.V.

By the Trademark Trial and Appeal Board:

In lieu of an answer to the petition to cancel, Respondent, on April 12, 2016, filed a “motion to dismiss” for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Although Petitioner’s time to respond to this motion has not lapsed, the Board will decide the motion at this time. *See* Trademark Rule 2.127(a).

A motion to dismiss for failure to state a claim is solely a test of the sufficiency of a complaint. *See* TBMP § 503.01 (2015). That is, “[a] motion made under Rule 12(b)(6) challenges the legal theory of the complaint, not the sufficiency of any evidence that might be adduced.” *Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc.*, 988 F.2d 1157, 26 USPQ2d 1038, 1041 (Fed. Cir. 1993).

Respondent, in its motion, argues the merits of the case by alleging that Petitioner lacks standing because it did not exist at the time the petition to cancel was filed. As support for that motion, Respondent relies on matters beyond the pleadings, namely, a declaration of its attorney which makes of record a certificate of dissolution for a domestic stock corporation recorded with the Secretary of State

of the State of California on February 6, 2015, regarding Petitioner. As such, the motion is one for summary judgment on the ground of lack of standing. *See* TBMP § 503.04.

Except on limited bases not at issue in this order, a party may not file a summary judgment prior to serving its initial disclosures. *See* Trademark Rule 2.127(e)(1). Respondent filed its motion more than two months prior to the due date for its initial disclosures and does not state therein that it served its initial disclosures. Based on the foregoing, Respondent's motion for summary judgment is denied without prejudice as premature.

Dates remain as last reset in the Board's March 14, 2016 order.