

ESTTA Tracking number: **ESTTA875590**

Filing date: **02/06/2018**

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

Proceeding	91228937
Party	Defendant Carl Sanko, Steve McCowan and Dannion Brinkley
Correspondence Address	CARL SANKO 4824 DENARO DR LAS VEGAS, NV 89135-2479 UNITED STATES Email: carlsanko@aol.com
Submission	Opposition/Response to Motion
Filer's Name	Carl Sanko
Filer's email	carlsanko@aol.com
Signature	/s/ Carl Sanko
Date	02/06/2018
Attachments	Answer to Opposer Motion to Compel Discovery.pdf(202461 bytes )



filed by Quest Nutrition LLC (“Quest”) attorney firm Winston and Strawn LLP (“Winston”) on January 22, 2018 against Dannion Brinkley and Carl Sanko’s trademark CannaQuest, Serial No. 86667606 filed June 18, 2015 after the USPTO and its examining attorney had conducted their due diligence, based on (1) the **similarity** of the marks; and (2) the **commercial relationship** between the goods and/or services listed in the application, and not having found any reason to bar registration including no likelihood of confusion, and approved the trademark to be published in the Official Gazette of June 14, 2016 (the “Mark”), plead and aver as follows:

## **I. Background**

Opposer represents in its January 22, 2018 Motion to Compel that emails requesting a discovery conference were delivered to Applicant beginning December 21, 2017 and following. Applicant had previously (August 31, 2017) been provided mailed correspondence that Winston was the new attorney firm for Opposer, having replaced Opposer’s prior attorney firm of Rutan and Tucker LLP. All previous communication with Opposer had been through USPTO’s Trademark Trial and Appeal Board Inquiry System and coordinated with delivery by U.S. Postal Service, no communication by use of

email as agent for correspondence had ever previously been established and Applicant was not available to receive email communication during the 2017 end of year holiday season, was in California on vacation and business from December 25, 2017 to the evening of January 8, 2018 and was also without proper records for a Discovery Conference during that time frame. Upon arriving on evening of January 8, 2018, Applicant received Opposer's letter dated January 5, 2018 as first attempt to schedule a discovery conference. Subsequent to returning to the Las Vegas office, Applicant diligently referenced Code of Federal Regulations and Federal Rules of Civil Procedures related to Trademark Trial and Appeals Board ("TTAB") rules. Preparations were made for a meaningful discovery conference by Applicant's submitted request for completion of initial disclosures to be provided by Opposer.

## **II. Arguments**

Opposer states that "Entry of an order compelling Applicants to participate in the initial discovery conference (with the Board's participation) is warranted" and that "Applicants have repeatedly ignored Quest's good-faith attempts to schedule a conference and have most recently sought to sidestep the conference altogether by improperly propounding discovery requests instead." Opposer then gratuitously (and falsely) interjects that "Applicants' actions

demonstrate a pattern of failing to abide by the Board rules regarding proceedings before it.” Opposer also gratuitously complains about Applicant’s pro se status and with considerable bias, contends that Applicant should hire an attorney. In its defense, Opposer can only make the bald claim that “the filing of its Motion is timely pursuant to 37 C.F.R. § 2.120(h)(1), as the initial disclosure deadline is January 23, 2018. In response, firstly, Applicant finds no rules under 37 C.F.R. § 2.120, or Federal Rules of Civil Procedure, or TTAB rules that prohibit the submission of a request for initial disclosures that are a meaningful and relevant part of the discovery process, whereas such rules encourage and support such submission of initial disclosures as evidenced by 37 C.F.R. § 2.120(a)(2)(ii) which relates to “Discovery” and makes no prohibition against introducing a request for initial disclosures as part of discovery and which states that “Initial disclosures must be made no later than thirty days after the opening of the discovery period”. Considering that only the TTAB sets the timing of the opening of the discovery period, that on 12-5-17 the TTAB set a discovery conference deadline of 12-24-17 (with no conference having occurred), the TTAB set an opening for the discovery period that began on 12-24-17, and the requirement in the present circumstances of 37 C.F.R. § 2.120(a)(2)(ii) related to initial disclosures being

made no later 1-23-18, that Applicant's submission within that timeframe of interrogatories to Opposer is proper, reflects Applicant's participation in the discovery process, and is evidence of Opposer's lack of good faith in belatedly requesting a motion to compel discovery while not responding to Applicant's request for discovery type information in the form of interrogatories.

Secondly, at no time was Applicant is unwilling to have a discovery conference should it have been proper. Since per 37 C.F.R. § 2.120(a)(2)(i), the discovery conference was to occur by 12-24-17, and that time had passed, Applicant was proper in also relying on 37 C.F.R. § 2.120(a)(2)(iv) that such default related to missing the discovery conference deadline automatically created a fallback rule allowing the parties to "stipulate to a shortening of the discovery period, that there will be no discovery, that the number of discovery requests or depositions be limited, or that reciprocal disclosures be used in place of discovery." Thirdly, since no discovery conference had occurred within the deadline established by the TTAB, and that Applicant had 30 days in which to submit initial requests for disclosure, that by default, the parties were moved by circumstances to use reciprocal disclosures in place of discovery. It is noted that only Applicant provided a request for such reciprocal disclosures, though Opposer had the same timetable provided by

TTAB as Applicant, was provided Applicant's timely request for disclosures, with Opposer deciding that such requests were not timely and asking Applicant to withdraw such requests. In the conclusion for relief to follow, Applicant will request that TTAB enforce Applicant's request for those disclosures stated in Applicant's interrogatories that have been acknowledged as received in Opposer's latest filing and that TTAB acknowledge that Opposer deliberately chose to not provide its initial disclosures that were required to be made no later than thirty days after the opening of the discovery period (i.e. by deadline of 1-23-18) as per 37 C.F.R. § 2.120(a)(2)(ii), and that TTAB dismiss/reverse the Opposer's present Motion to Compel.

Since, as described above, Opposer's Motion to Compel is untimely in that it has failed timely to comply with TTAB set guidelines and timelines for relevant submissions that would entitle it to settle the underlying trademark controversy and thus Opposer has no further standing to state a claim upon which relief can be granted, Applicant now requests that judgment be entered in Applicant Sanko's favor thereon. Furthermore, Applicant makes Motion to Dismiss Opposer's actions against the Cannquest mark under Rule 12(b)(6) be entered with or without prejudice. Federal Rules of Civil Procedure Rule 8

that pleading of claims for relief must contain “a short and plain statement of the claim showing that the pleader is entitled to relief”. Pursuant to FED. R. CIV. P. 12(b)(6), it is sufficient for Opposer to only establish that it has standing to maintain the proceeding and that a valid ground exists for opposing the registration applied for by the Applicant. Applicant hereby argues that Opposer has lost standing to maintain the proceeding and that a valid ground no longer exists for opposing the registration applied for by the Applicant. The TTAB does not consider the merits of the plaintiff Opposer’s standing or its claims, but only considers whether the pleading (for a motion to have a discovery conference) is sufficient to state a claim to relief that is plausible on its face. *Bell Atl. Corp. v Twombly*, 550 U.S. 544, 570 (2007); *Libertyville Saddle Shop Inc. v. E. Jeffries & Sons, Ltd.*, 22 USPQ2d 1594, 1597 (TTAB 1992). Applicant properly makes reference to Fed. R. Civ. P. 12(b)(6) as a test of the sufficiency of a complaint. *See* TBMP § 503.01 (2014). To survive such a motion, a party need only allege sufficient factual matter as would, if proved, establish that (1) it has standing to maintain the proceeding, and (2) a valid ground exists for opposing or cancelling the mark. *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 187 (CCPA 1982). However, Opposer fails to consider in its Response that in *Twombly*, 550 U.S.

at 570 (2007), while the Supreme Court expressly stated that it was not requiring “heightened fact pleading of specifics,” *Id.* at 570, and reaffirmed that Fed. R. Civ. P. 8 only requires a short plain statement of the claim. *Id.* at 555, it also established new language for pleading standards by holding that an opposer is required to plead “enough facts to state a claim to relief that is plausible on its face.” The Third Circuit summarized the *Twombly* pleading standard by stating, “a claim requires a complaint with enough factual matter (taken as true) to suggest the required element.” *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir.2008) (quoting *Twombly*, 550 U.S. at 556 (2007)). Specifically, “a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face” *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949-50 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

As stated above, the crux of the Opposition’s dilemma is that its Motion for a discovery conference only alleges without supplying facts. There were no facts proffered by Opposer as a basis for a relevant and meaningful attempt by Applicant to seek discovery via interrogatories of Opposer’s position related to opposing marks that is the whole matter of the present controversy. It is ironic

that Opposer is questioning Applicant's good faith in this matter, while not considering its tactics of legal posturing resulting in delay, lack of information, using no prior established lines for official communications, and submission of motions to TTAB to please act as referee to correct Opposer's failures.

Accordingly, as supported in numerous court cases referenced above, the Opposer has failed to sustain a cause of action upon which relief can be granted and/or for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6). Federal Rule of Civil Procedure 8(a)(2) does not require detailed factual allegations, but a pleading that offers labels and conclusions will not do, yet this is all the Opposer has done in its Motion to Compel Discovery Conference.

Yet it is incumbent upon the Opposer to allege well-pleaded factual matter and more than "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." (*Ashcroft v. Iqbal*, 556 U.S.662, 678 (2009)).

Otherwise, in pleading no facts, in pleading but threadbare recitals of the elements of a cause of action, Opposer has presented no case upon which relief can be granted. The plaintiff is only wasting the Board's time and resources in presenting no case against Applicant's mark that was reviewed by the U.S.

Patent and Trademark Office., with due diligence and found not having any reason to bar registration including no likelihood of confusion. Then comes the Applicant who comes in good faith with interrogatories to provide for meaningful discovery of facts to be provided by Opposer as a basis for settlement of the present controversy and the ironic claim is made by Opposer that such interrogatories are somehow to be rejected as not in the nature of initial discovery. Opposer's stance in effect negates discovery while its motion supposedly seeks discovery. Opposer has had ample opportunity to state its case with factual content and to its disadvantage, has missed the timeframe and thus dismissed the opportunity. Opposer has, in fact, made an opportunity for contributing or even allowing facts that can in a future proceeding be considered and be defended against. Without facts requested by Applicant, the Opposer's naked allegations become so vague or ambiguous that the defendant cannot reasonably prepare a response or diligently participate in a so-called "discovery conference".

Opposer has no set of facts to prove because Opposer has provided no facts. The *Twombly* Court instead explained that Rule 8 of the Federal Rules of Civil Procedure requires that a complaint/motion include facts (as distinct from legal "labels" and "conclusions" and various arguments against pro se Applicants)

giving rise to a "plausible" (rather than merely "conceivable") entitlement to relief. Two years later in *Iqbal*, the Court confirmed that *Twombly* applies to all civil suits, not just antitrust cases or complex cases. As *Twombly* itself recognized (quoting, among others, Judge Posner in a 1984 decision of the Seventh Circuit), the Courts of Appeals long refused to take *Conley's* "no set of facts" language "literally." They also commonly required complaints/motions to "contain either direct or inferential allegations regarding all the material elements," and required those allegations to "constitute 'more than bare assertions of legal conclusions.'" *Tahfs v. Proctor*, 316 F.3d 584, 590 (6th Cir. 2003) (quoting *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988)). And, not wanting to build the plaintiffs' own case for them, the Court refused to accept "unwarranted inferences" from those allegations. *E.g.*, *City of Pittsburgh v. W. Penn Power Co.*, 147 F.3d 256, 263 & n.13 (3d Cir. 1998). In *Read Drug v. Colwill Constr.*, 243 A.2d 548, 553-54 (Md. 1968) the court explained that a complaint must "have sufficient specificity in its allegations to provide facts ... to apprise the opposite party of what is meant to be proved". *Iqbal* articulates a clear framework for analyzing a motion that begins with a threshold inquiry and is followed by a two-step analysis. 1. *Confirm or argue the elements of the cause of action.* As a threshold matter,

where there is any doubt regarding the scope of an underlying cause of action, *Iqbal* indicates that it is important to "begin by taking note of the elements a plaintiff must plead to state a claim." 129 S. Ct. at 1947. 2. *Determine the facts that warrant an assumption of truth.* After establishing the legal baseline against which to measure the complaint, a defendant should identify all allegations that it can argue are not "entitled to the assumption of truth." *Id.* at 1950. Two types of allegations will not warrant such an assumption.

First, courts will sometimes encounter allegations that are simply too unbelievable to be accepted. In such instances, for example where the plaintiff's allegations involve "little green men," *id.* at 1959 (dissent), the defendant may ask the court to disregard the implausible factual allegation. More commonly, and as *Iqbal* emphasized, courts should not accept the truth of factual allegations that are "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." 129 S. Ct. at 1949. Thus, at the very least, a motion should note the areas in which a complaint relies on legal labels instead of subsidiary facts.

A particular issue that arises is how to treat facts alleged based on "information and belief." The Second Circuit has set out what appears to be the developing consensus: "The *Twombly* plausibility standard . . . does not prevent a plaintiff from pleading facts alleged 'upon information and belief' [1] where the facts are peculiarly within the possession and control of the defendant, or [2] where the belief is based on factual information that makes the inference of culpability plausible." *Arista Records, LLC v. Doe 3*, \_\_ F.3d \_\_, 2010 WL 1729107, \*8 (2d Cir.). In the present case, it is not true that there are facts "peculiarly within the possession and control of the defendant" as both the process and the disclosures required by the U.S. Patent and Trademark Office clearly specifies, conforms, designates, categorizes, exposes the facts of a trademark application to the public and the interested world.

It is worthwhile to consider whether the plaintiff has pleaded any of the factual information on which it purports to base its "information and belief" allegation. In any case, plaintiffs still must allege enough underlying facts to allow a plausible inference of liability in the context of their particular claim. *Twombly* itself confirms this, given that the complaint alleged an antitrust conspiracy based on information and belief, but failed because it did not support that allegation with sufficient subsidiary factual allegations.

When a plaintiff cannot prove any set of facts to state a claim which would entitle it to relief, the complaint should be dismissed with prejudice. Fed. R. Civ. P. 12(b)(6). A Rule 12(b)(6) motion tests the legal sufficiency of the complaint's claims. See *Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). On the motion to dismiss, the facts, provided there are any, that are alleged in the complaint must be accepted as true, but the Court need not accept as true conclusory allegations, legal characterizations, unreasonable inferences or unwarranted deductions of fact. See *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *Transphase Sys., Inc. v. S. Calif. Edison Co.*, 839 F. Supp. 711, 718 (C.D. Cal. 1993). If the complaint does not contain factual matter sufficient to "state a claim to relief that is plausible on its face," it must be dismissed. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Dismissal can be based on lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1988). A court is not required to accept "legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994); *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003).

Crucial to any future proceeding, Opposer has perhaps alleged, but made no factual appeal to public perception but only professional rant appealing to legal and other professionals and making derogatory statements of pro se Applicant. Opposer cannot meet the standard for pleading a plausible cause of action for trademark infringement or unfair competition or would have done so in the 30 day period for providing disclosures. Opposer has not made any factual statement as to how Applicant's products are proximate to Opposer's goods. Opposer has not made any factual statement as to how Applicant's marketing and advertising channels are similar to Opposer's. Opposer has not made any factual statement as to how careful the typical consumer is likely to be before making a purchase in which courts have made to be an important consideration in regard to eliminating confusion in that the typical consumer's care in making a purchase decision is itself a factor in substantially limiting, if not entirely eliminating confusion. Opposer has not made any factual statement as to evidence of actual confusion. Opposer has not made any factual statement Applicant's intent in choosing the mark, but has only baldly alleged that Applicant's intent is to cause confusion, mistake or to deceive. Opposer has not made any factual statement that would be a corrective to U. S. Patent and

Trademark Office's diligent search to discover evidence of any trademark infringement in concluding that there was not such evidence of trademark infringement prior to publishing Applicant's mark.

The Opposer has used much legal verbiage in referring to many court cases as substance in building its supposed case out of its initially deficient form of opposition, but failed to address the above legal standard and refutation of Applicant's above arguments and Opposer is now too late to bolster and substantiate what was needed to comply with TTAB's clear guidelines. It is therefore an affirmative defense that the Opposition is "late to the party" and is now barred as to any claim of likelihood of confusion among the public since there is no valid claim of likelihood of confusion. It may yet be determined by TTAB that Opposer has failed to set forth appropriate statutory grounds for this opposition and, therefore, lacks standing to bring this case. Applicant requests that the TTAB consider such lack of standing as part of its affirmative defense.

Applicant's affirmative defense of Opposer's failure to state a cause of action upon which relief may be granted is an appropriate *affirmative* defense. The

TTAB has consistently recognized and, in actuality, requires that there be a timely assertion of pleading *failure to state a claim* in the form of an “affirmative defense”. As noted by the TTAB, an applicant that did not pursue the affirmative [defense] of failure to state a claim, caused such defense to be waived. See *Research in Motion Limited v. Defining Presence Marketing Group Inc.*, 102 USPQ2d 1187, 1189-90 (TTAB 2012); see also, *Swiss Watch International Inc. v. Federation of the Swiss Watch Industry*, 101 USPQ2d 1731, 1734 n.4 (TTAB 2012). For further examples of the TTAB’s recognition of *failure to state a claim* as an affirmative defense, see *DLR Licensing, LLC v. Carnival Corporation*, 2014 WL5788061 (October 22, 2014) (“Respondent asserted the affirmative defense of failure to state a claim”).

Quest Nutrition, and its attorney firm of Winston and Strawn LLP, has made a deficient pleading Motion to for a Discovery Conference under Rule 12(b)(6).

### **III. Untimely Filing**

Opposer claims that its “Motion is timely pursuant to 37 C.F.R. § 2.120(h)(1), as the initial disclosure deadline”. However, since its motion is for a discovery conference, and since the TTAB gave the deadline for such discovery conference as December 24, 2017, Opposer’s claim that it has timely

filed a motion within the “initial disclosure deadline” is without merit on two scores: First, the time for a discovery conference had a deadline prior to January 23, 2018 and, secondly, the Opposer has provided no initial disclosures within the required 30 day time frame that allows a party to make initial disclosures. Opposer was to provide disclosures by January 23, 2018, not seek a discovery conference by such January date when the deadline had been set by TTAB as of December 24, 2017. Opposer’s Motion for discovery conference should be denied for these reasons. Opposer appears to be stating in this regard that filing a motion for a discovery conference on the last day that initial disclosures are due (but without actually filing such initial disclosures) after the TTAB prescribed deadline for such a conference has passed is the reason it is putting forth to requests a Motion for Discovery Conference, which would invite judicial estoppel (preclusion of inconsistent legal positions). Accordingly, Applicant’s arguments as to numerous failures of timeframes and untimely filing of the present motion are reasons to deny the Opposer’s Motion to Discovery Conference as having no merit.

#### **IV. Conclusion**

Applicant stands by his contention that Opposer is entitled to no relief under any set of facts that could be proved in support of its Motion to Compel because Opposer has failed timely to comply with TTAB set guidelines and timelines for relevant submissions that would entitle it to settle the underlying trademark controversy and thus Opposer has no further standing to state a claim upon which relief can be granted. Opposer has failed to present sufficient facts which, if taken as true, would indicate that a violation by Applicant of trademark rules had occurred or that the Opposer was entitled to a legal remedy. On the contrary, it is Opposer who violated trademark rules by not providing timely initial discovery disclosures under the 37 C.F.R. § 2.120(a)(2)(ii) 30 day rule, and is effectively asking TTAB for an extension of time calling it “a motion to compel discovery” as a remedy to be used as a corrective to Opposer’s several violations of 37 C.F.R. § 2.120. Such violations make clear that Opposer is legally deficient in pleading grounds for continuation of legal proceedings and therefore in ultimately opposing the Cannaquest mark. For these reasons, the Opposer’s Notice of Opposition and Response both lack merit for failure to sustain a cause of action upon which relief can be granted and/or for failure to state a claim upon which relief can be

granted, pursuant to Fed. R. Civ. P. 12(b)(6) and Applicant is entitled to an order dismissing Opposer's claims and motions and requests such order without leave to amend or further wasting the time and resources of the TTAB.

### **APPLICANT'S COUNTERCLAIM**

Wherefore, having answered Opposer's Motion to Request Discovery Conference filed on January 22, 2018 that was 29 days after TTAB had provided December 24, 2017 as deadline for a Discovery Conference, under Fed. R. Civ. P. 12(b)(6), Applicant hereby prays that

- A. Opposer's untimely Motion to Request Discovery Conference be dismissed and that judgment be entered in Applicant Sanko and Brinkley's favor thereon.
- B. Applicant's Motion to Dismiss Opposer's actions against the Cannaquest mark under Rule 12(b)(6) be entered with or without prejudice as the USPTO and/or TTAB shall deem just and proper.
- C. For such other and further relief as the USPTO and/or TTAB shall deem just and proper.

DATED this 6th day of February, 2018.

/s/ Carl Sanko \_\_\_\_\_

Carl Sanko, Applicant

Signed by Dannion Brinkley on 2-6-18:

/s/ Dannion Brinkley \_\_\_\_\_

Dannion Brinkley, Applicant

## CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing  
**APPLICANT’S ANSWER TO OPPOSER’S MOTION TO COMPEL  
DISCOVERY CONFERENCE WITH APPLICANT’S MOTION TO  
DISMISS BASED ON OPPOSER’S UNTIMELY COMPLETION OF  
DISCOVERY OBLIGATIONS UNDER 37 C.F.R. § 2.120 and WITH  
APPLICANT’S MOTION TO DISMISS UNDER RULE 12(b)(6)**

has been served on the party listed below by emailing said copy on

February 6, 2018 to:

Laura M. Franco, Winston & Strawn LLP

LFranco@winston.com

DATED this 6th day of February, 2018.

/s/ Carl Sanko \_\_\_\_\_

Carl Sanko, Applicant