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

Proceeding	92065178
Party	Defendant The General Conference Corporation of Seventh-day Adventists
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Philanthropist.com, Inc.

Petitioner,

vs.

General Conference Corporation
of Seventh-day Adventists

Registrant.

Cancellation No. 92065178 (Parent)
Cancellation No. 92065255

**REGISTRANT’S REPLY BRIEF IN SUPPORT
OF ITS MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Registrant General Conference Corporation of Seventh-day Adventists ("Registrant") hereby submits this reply brief in further support of its Motion for Summary Judgment, and in response to Petitioner Philanthropist.com, Inc.’s Memorandum in Opposition thereto ("Petitioner’s Brief").

Petitioner has failed to proffer or point to any evidence that raises a genuine issue of material fact as to Petitioner’s standing or the substance of its claims. Instead, Petitioner has attempted to rely solely on the allegations in its pleadings, as well as on unsupported dictionary and encyclopedia entries and dicta in outdated decisions that did not involve the mark at issue in this proceeding. However, Petitioner has not pointed to any evidence showing that relevant consumers today associate the term “Adventist” with the name of a class or category of religious services, or the other goods and services covered by the registrations at issue in this proceeding. Therefore, the Board must grant summary judgment to Registrant and dismiss the Second Amended Petition for Cancellation.

II. PETITIONER HAS NOT SHOWN ANY GENUINE ISSUE OF MATERIAL FACT AS TO ITS LACK OF STANDING

Petitioner has buried its discussion of standing at the end of its brief and refers to standing as a “peripheral matter.” In fact, standing is an essential element of any claim before the Board, which must be proven before the Board can consider the merits of the claimant’s position. Registrant demonstrated in

its Motion, based upon the testimony of Petitioner's owner, that i) the value of the <adventist.com> domain name has not depreciated; and ii) that Petitioner did not have an objectively reasonable fear of further legal action after the parties' domain name dispute was resolved. In response, Petitioner has not pointed to any evidence that would support its claim of standing, or even attempted to explain away its owner's deposition testimony; instead, Petitioner merely rests on the allegations made in the Second Amended Petition for Cancellation and incorrectly states that "this issue has been argued, considered, and resolved...in favor of Petitioner." Petitioner's Brief, at 13.

Petitioner falsely claims that "this Board has already found that...Petitioner has **shown**" that Petitioner has an interest in the value of its domain name and that the value of the domain name has diminished. *Id.* (emphasis added). In fact, the Board has not found that Petitioner has "shown" any such thing; the Board merely ruled that for purposes of Registrant's Motion to Dismiss, Petitioner had adequately **alleged** these facts. *See* 14 TTABVUE, at 8 (stating that "Petitioner has met the initial pleading burden to set forth matters which, **if proven**, would establish its standing") (emphasis added). This is an entirely different question than whether Petitioner can ultimately prove these facts at trial, or whether Petitioner can show enough evidence to raise a genuine issue of fact and avoid summary judgment. The standard for surviving a motion for summary judgment is significantly higher than the standard for surviving a motion to dismiss. It is a basic tenet of law under Rule 56 that the nonmoving party may not rest on mere allegations or assertions, but must produce evidence showing the existence of a genuine dispute of material fact for trial. *See Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d at 1028 (CCPA 1982) ("[W]e reject the premise that a petitioner should be found to have standing by virtue of its complaint alone...A petitioner's allegations alone do not establish standing."); *see also Kellogg Co. v. Pack'Em Enterprises Inc.*, 14 U.S.P.Q.2d 1545, 1549 n. 6 (TTAB 1990), *aff'd*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991) ("[S]tatements made in pleadings cannot be considered as evidence in behalf of the party making them, even upon summary judgment...."). Moreover, except with respect to pleaded registrations, exhibits attached to a pleading are not evidence on behalf of the party to whose

pleading they are attached unless they are thereafter properly identified and introduced. *See* 37 C.F.R. § 2.122(c); TBMP §§ 317, 704.05(a).

Petitioner argues in its brief that “Petitioner’s ownership of said property [the <adventist.com> domain name] continues to be impacted by threat of potential legal action by Registrant” and that “the value and transferability of said property has still depreciated due to Registrant’s ongoing claim to the word ‘Adventist,’” but these are merely attorney arguments for which there is no evidentiary support in the record. *See In re Consol. Specialty Rests. Inc.*, 71 USPQ2d 1921, 1929 (TTAB 2004) (“[A]ttorney argument without support in the record . . . does not overcome the prima facie case.”). Moreover, the record shows that Petitioner is not under legal threat and the value of the domain name has clearly not depreciated, as Petitioner has rejected at least one offer to purchase the domain name for nearly fourteen times what he paid for it. Registrant’s Motion, at 5-6. *Id.* This fact, along with Petitioner’s other statements during his deposition – in which he admitted that “it’s not a money thing” – clearly show that his motivation for bringing this proceeding was not to protect the value of his investment in the domain name, but rather his spite at the Church, which does not provide a basis for standing.

As there is no evidence of record to the contrary, the Board must grant summary judgment to Petitioner on the basis of Registrant’s lack of standing.

III. PETITIONER HAS NOT INTRODUCED SUFFICIENT EVIDENCE TO RAISE A QUESTION OF MATERIAL FACT AS TO WHETHER THE TERM ADVENTIST IS GENERIC FOR RELIGIOUS SERVICES

Even if the Board were to find that Petitioner can survive summary judgment on standing, Registrant is still clearly entitled to summary judgment on the substance of Petitioner’s claims, as Petitioner has also failed to come forward with any sufficient evidence to raise a genuine issue of material fact as to whether the term “Adventist” is generic for Registrant’s goods and services.

Registrant’s Motion introduced a substantial body of evidence, including evidence of newspaper and media usage, evidence of usage by other religious bodies, and consumer survey evidence, which shows beyond any issue of fact that consumers associate the ADVENTIST mark with Registrant’s religious services, rather than as a generic term for multiple denominations. In contrast, Petitioner has

introduced almost no evidence to support its position. Instead, Petitioner relies upon only a few dictionary and encyclopedia entries and a few statements made in dicta in irrelevant cases on different factual records. This meager evidence is not sufficient to create any legitimate issue of fact as to whether the ADVENTIST mark is a generic term as applied to religious services.

A. The Dictionary and Encyclopedia Definitions are Contradictory, Uncorroborated, and Factually Flawed

Petitioner first attempts to rely on selected dictionary definitions of the term “Adventist” or “Adventism” to create an issue of fact. However, the dictionary definitions upon which Petitioner relies are outdated and are contradicted by other dictionary entries; in fact, the three definitions cited by Petitioner in its brief are all at least twenty-five years old. Petitioner also includes three more dictionary definitions in its Exhibit A, but one of these (the Merriam-Webster definition of “Adventism”) also defines “Adventism” as referring to “the principles and practices of Seventh-day Adventists,” and another entry (from the “Online Etymology Dictionary”) provides information on the history and etymology of the term rather than its current meaning. Furthermore, as pointed out in Registrant’s Motion, there are several other major dictionaries in which the entry for “Adventist” directs readers to the entry for “Seventh-day Adventist,” indicating that these terms are synonymous. Petitioner’s Brief, at 10.

Courts have urged caution in relying upon dictionary entries to show that a mark is generic, particularly when there may be multiple, contradictory dictionary definitions of a term. *See Boston Duck Tours, LP v. Super Duck Tours, LLC*, 531 F.3d 1, 23 (1st Cir. 2008) (stating that “dictionary definitions are not conclusive indicators of overall public perception,” and particularly where “the specific dictionary definitions offered by the parties...do not significantly favor one party over the other.”). In fact, in one case cited by Petitioner, *Gimix, Inc. v. JS&A Group*, 699 F.2d 901 (7th Cir. 1983), the court found the mark at issue, AUTO PAGE, was not generic, because both terms in the mark had a number of possible definitions, which indicated that the mark was not “subject to any common public understanding.” *Id.* at 906.

Petitioner also attempts to rely on several encyclopedia entries for the terms “Adventist” or “Adventism” to manufacture questions of fact. However, the four encyclopedia entries which Petitioner has introduced through Exhibit B suffer from serious flaws and are not sufficient to raise a genuine issue of material fact. The first entry, from Encyclopdia.com, erroneously identifies the Advent Christian Church and the Church of God as “Adventist” denominations, despite the lack of any evidence that the members of these groups refer to themselves as “Adventists,” or are referred to as such by others.

The second entry included in Petitioner’s Exhibit B, a printout of the Columbia Encyclopedia entry for “Adventists” from the web site “factmonster.org,” merely duplicates the first entry in the Encyclopedia.com listing, and again erroneously identifies the Advent Christian Church and the Church of God as “Adventist” denominations.

Petitioner’s third entry is the Wikipedia entry for “Adventism,” which as Registrant discussed at length in Registrant’s Motion, is largely uncorroborated and contains numerous factual errors. *See* Registrant’s Motion, at 9-10. Furthermore, while this entry characterizes several other denominations as “Adventists,” Registrant has already demonstrated that most of these denominations (such as the Christadelphians, Advent Christian Church, Primitive Advent Christian Church, Davidian Seventh-day Adventist Association, and Church of God) do not refer to themselves as “Adventists” and are not commonly referred to by others as such.¹

The fourth and final encyclopedia entry submitted by Petitioner is the Encyclopaedia Britannica Online entry for “Adventism,” which almost exclusively discusses the Seventh-day Adventist Church. The article also briefly mentions the Advent Christian Church and the Jehovah’s Witnesses, neither of which identify themselves as, or are commonly referred to by others as, “Adventist” denominations.

Finally, Petitioner also discusses a purported entry from the “Encyclopedia of American Religions” which supposedly lists several denominations under the heading “Adventist family.”

¹ The Wikipedia entry also refers to the True and Free Adventists, who were only active in the Soviet Union; the Creation Seventh-day Adventist Church, which appears to be inactive and against whom Registrant has a court order prohibiting use of the ADVENTIST mark; and the Seventh-day Adventist Reform Movement, a splinter group of the Seventh-day Adventist Church that uses the term “Adventist” (in combination with “Reform”) to indicate that it was formerly association with the Seventh-day Adventist Church. *See* Registrant’s Motion, at 12-14.

However, while Petitioner claims that an excerpt from this work is included within Exhibit B to Petitioner's Brief, the referenced exhibit in fact consists merely of the excerpts from the online encyclopedias discussed above, and does not contain any excerpts from an "Encyclopedia of American Religions." Petitioner's arguments based upon this publication therefore must be disregarded by the Board, as Petitioner has failed to introduce this publication into evidence. TBMP §528.05(e).

B. The Case Law Cited by Petitioner is Outdated and Irrelevant

Petitioner also cites several cases, all of which are at least ten years old, which Petitioner claims support its position that the term "Adventist" is generic for religious services. However, none of those cases are binding precedent, and the question of whether the term "Adventist," standing alone, is generic was not the central question in any of those cases. Moreover, those cases were based upon different factual records not currently before the Board. In this particular case, the Board must rule based upon the evidence put forth by the parties as to current, modern day consumer interpretation of the term "Adventist," rather than dicta in other cases involving other marks in which the distinctiveness of the ADVENTIST mark was not the question at issue and involving facts not before this Board.

The first case cited by Petitioner, *General Conference Corp. of Seventh-day Adventists v. McGill*, 624 F.Supp.2d 883 (W.D. Tenn. 2008), actually supports Registrant's position. Petitioner has cited the court's decision on summary judgment, but has neglected to point out that the court ultimately ruled in favor of Petitioner on nearly all counts, and enjoined the defendant from any use of the ADVENTIST mark. *General Conference Corp. of Seventh-day Adventists v. McGill*, No. 1:06-cv-012107-JDB-egb, 2012 U.S. Dist. LEXIS 48160, at *2-3 n.1 (W.D. Tenn. Apr. 5, 2012). Furthermore, in denying summary judgment, the *McGill* court appeared to rely heavily upon the Wikipedia entry for "Adventism," which, as shown in Petitioner's Motion, is highly flawed and not entitled to any significant weight.

Petitioner also cites *Stocker v. General Conference Corp. of Seventh-day Adventist*, 39 U.S.P.Q.2d 1385 (TTAB 1996), which Petitioner falsely characterizes as "consider[ing] the exact question at issue here." Petitioner's Brief, at 8. In fact, the issue before the Board in *Stocker* was whether Registrant's trademark SEVENTH-DAY ADVENTIST was generic. The parties in that case did not

submit evidence as to whether the mark ADVENTIST by itself was generic. Any statements made by the Board in that case regarding the term “Adventist” were merely dicta made without the benefit of a full record regarding the distinctiveness of the mark, and are not binding on the Board in this proceeding.

Finally, Petitioner also refers to *General Conference Corp. of Seventh-day Adventists v. Perez*, 97 F. Supp. 2d 1154 (S.D. Fla. 2000) and *General Conference Corp. of Seventh-day Adventists v. Seventh-day Adventist Kinship Int’l, Inc.*, Case No. CV 87-8113 MRP (C.D. Cal. 1991), in which the courts made statements that Petitioner characterizes as supporting its position that the ADVENTIST mark is generic. However, in both of those cases, as in *Stocker*, the courts were considering the distinctiveness of the SEVENTH-DAY ADVENTIST mark, not the ADVENTIST mark at issue in this proceeding. As such, the dicta in these cases provide no legal or factual support for Petitioner’s position in the present case.

C. Petitioner Has Failed to Introduce Any Other Evidence Supporting its Position that “Adventist” is a Generic Term

Petitioner also mentions one trademark registration and a few printed publications which it claims support Petitioner’s position. However, Petitioner has not included copies of the registration or publications with its brief. TBMP §528.05(e) specifically states that, in order for printed publications or official records to be made of record, the offering party must, *inter alia*, include a copy of the publication with the party’s brief. Without copies of the publications, it is impossible for Registrant to determine when these books were published, the context in which the term “Adventist” was used, or other factors which would be highly relevant to the materiality and weight, if any, to be given to the statements in these publications. Moreover, evidence not properly of record may not be considered by the Board. *See, e.g., Syngenta Crop. Prot. Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1117 (TTAB 2009) (registration not properly introduced in evidence will not be considered). Therefore, the Board must disregard all of Petitioner’s assertions regarding these publications and strike Sections III.D and E of Petitioner’s Brief.

D. Registrant’s Evidence Shows the Absence of Any Genuine Issue of Fact

Petitioner has also alleged that the evidence submitted by Registrant is insufficient to establish the absence of a genuine issue of fact. Petitioner argues that the affidavit of Registrant’s in-house counsel

Jennifer Gray Woods is self-serving and is insufficient to provide evidence as to the “beliefs, verbiage, or practices” of other denominations. Petitioner’s Brief, at 13. However, as the person with primary responsibility for monitoring and enforcing Registrant’s rights in the ADVENTIST mark, Ms. Woods is clearly the most knowledgeable witness regarding the use of “Adventist” by other religious groups. Moreover, Ms. Woods’ affidavit was not based on her personal opinions, but instead attached and relied on substantial, independent evidence from outside web sites and publications, including the web sites of the other denominations themselves, clearly showing that those denominations either were inactive, had only a handful of members, or did not refer to themselves as “Adventist.”

Petitioner also claims that Registrant’s survey evidence “raises significant questions as to whether the public primarily associates ‘Adventist’ with Registrant.” Petitioner’s Brief, at 12. Petitioner does not attack the methodology or reliability of the survey, but merely argues that the majority of consumers in the survey did not associate “Adventist” with “Seventh-day/Seventh-day Adventist.” However, this showing is not required of Registrant; instead, Registrant merely must show that consumers are more likely to associate the mark with a single source of religious services (i.e. a single denomination) rather than as a generic term referring to multiple denominations, which the survey evidence clearly shows. *See* Registrant’s Motion, at 7 (showing that 63% of Protestant Christians associate the term “Adventist” with a single denomination).

It is clear that the substantial evidence submitted by Registrant in connection with its motion is more than enough to establish the absence of any genuine issue of material fact given the dearth of evidence introduced by Petitioner, despite it bearing the ultimate burden of proof.

D. Petitioner Has Failed to Establish a Genuine Issue of Fact

In summary, the dictionary definitions, online encyclopedia entries, and statements in dicta made on different factual records upon which Petitioner relies are insufficient to establish a genuine issue of fact. These materials are outdated, uncorroborated, and do not show the manner in which relevant consumers today interpret the term “Adventist.” *See In re Well Living Lab Inc.*, 122 U.S.P.Q.2d 1777,

1780-81 (TTAB 2017) (finding that Internet evidence showing modern day meaning of term had “more significance and probative value” than dictionary definitions).

Petitioner claimed in its Petition that there are “thousands of users” of the term “Adventist” in connection with religious observances and related goods and services. 15 TTABVue, at ¶25. If this is truly the case, Petitioner should have been able to identify at least some of these other users when facing summary judgment. Instead, Petitioner has merely cited a few dictionary and encyclopedia entries, which do not create a question of material fact in light of the overwhelming evidence in the form of affidavits, publications, and web site evidence that members of other denominations do not refer to themselves as “Adventists” and are not commonly referred to by others as such. The record clearly shows that the only active U.S. denominations other than the Seventh-day Adventist Church that currently describe themselves as “Adventists” are a few small splinter groups that long ago broke away from the Seventh-day Adventist Church, which actually supports Registrant’s position. *McGill*, 624 F. Supp. 2d at 893-94.

The key question in determining whether a term is generic is the primary significance of the mark to the relevant public. *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341 (Fed. Cir. 2001). In this case, while there may be a few encyclopedias or dictionaries which erroneously categorize other religions as “Adventist,” or a few small splinter groups that long ago broke away from the Seventh-day Adventist Church that use names containing “Adventist,” it is clear beyond any genuine issue of fact that the primary significance of the term ADVENTIST to the relevant public is as an identification of source for the Seventh-day Adventist Church, and that no reasonable finder of fact could conclude to the contrary on the basis of the evidence submitted by Petitioner. Therefore, the Board must grant summary judgment to Registrant on the issue of religious services.

IV. PETITIONER HAS NOT INTRODUCED ANY EVIDENCE TO SUPPORT ITS CLAIM THAT REGISTRANT’S MARK IS GENERIC FOR REGISTRANT’S OTHER GOODS AND SERVICES

Finally, to the extent that Petitioner has introduced any evidence at all, Petitioner’s evidence only pertains to religious services. Petitioner has not even attempted to argue in its brief that the term “Adventist” is generic in connection with the other goods and services covered by Registrant’s two

registrations, such as educational services, health care services, employee benefits services, and film production services.

The Board has stated many times that when a party moving for summary judgment demonstrates that there is no genuine dispute as to any material fact, “the burden shifts to the nonmoving party to demonstrate the existence of specific genuinely disputed facts that must be resolved at trial.” *ChaCha Search, Inc. v. Grape Technology Group, Inc.*, 105 U.S.P.Q.2d 1298, 1303 (TTAB 2012). In order to establish the existence of disputed facts, the nonmoving party “must point to an evidentiary conflict created on the record at least by a counterstatement of facts set forth in detail in an affidavit by a knowledgeable affiant.” *Id.* (quoting *Octocom Systems Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 941 (Fed. Cir. 1990)).

Petitioner has completely failed to meet this burden in connection with the non-religious goods and services; in fact, it hasn’t even tried. Registrant met its burden of showing the absence of a genuine issue of fact by showing that Petitioner had proffered no evidence of any significant generic usage of the term “Adventist” in connection with these goods and services, and Petitioner has failed to point to any evidence to the contrary in its response. The meager evidence that Petitioner has provided in its response – the dictionary and online encyclopedia entries – relates only to religious services, and not to any of the other goods and services covered by these registrations.

Therefore, even if the Board finds that there is a genuine issue of fact as to whether the term “Adventist” is generic in connection with religious services, the Board must grant summary judgment to Registrant with regard to the remaining goods and services.

VIII. CONCLUSION

For the reasons set forth above, Registrant requests that the Board grant this Motion for Summary Judgment and dismiss the cancellation with prejudice.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing REPLY BRIEF IN SUPPORT OF REGISTRANT'S MOTION FOR SUMMARY JUDGMENT were served this 19th day of November, 2018, by e-mail only:

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