

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

CLARK BAKER and THE OFFICE OF )  
MEDICAL AND SCIENTIFIC JUSTICE, INC. )

Plaintiffs, )

v. )

JEFFERY TODD DESHONG, )

Defendant. )

Civil Action No. 4:13-00552-C

**MOTION TO DISMISS  
FOR FAILURE TO STATE A CLAIM, AND IN PART  
FOR LACK OF SUBJECT MATTER JURISDICTION**

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, defendant moves the to dismiss the action against him for failure to state a claim on which relief can be granted, and in part for lack of jurisdiction, for the reasons set forth in the accompanying memorandum of law.

**CERTIFICATE OF CONFERENCE**

On August 14, 2013, counsel Neal Hoffman conferred at length on the telephone with Mark Weitz, counsel for plaintiffs, and asked him to concur in the dismissal of the action. Mr. Weitz was unwilling to accede to the relief sought in this motion, although he indicated that he might seek to replead.

**INTRODUCTION**

*See* Brief in Support of Motion to Dismiss, page 1.

**FACTS**

*See* Brief, pages 1-4.

## **STANDARDS FOR MOTION TO DISMISS**

*See* Brief, page 4.

## **GROUND FOR DISMISSAL**

### **I. THE TRADEMARK CLAIMS INFRINGE DeSHONG'S FREE SPEECH RIGHT TO DESCRIBE THE SUBJECT OF HIS CRITICISM**

*See* Brief, pages 5-7.

### **II. THE COMPLAINT SHOULD BE DISMISSED BECAUSE IT DOES NOT ALLEGE COMMERCIAL USE, AND BECAUSE THE BLOG IS PLAINLY NON-COMMERCIAL.**

#### **A. The Trademark Laws Apply Only to Commercial Uses of Trademarks.**

*See* Brief, pages 8-13.

#### **B. The Complaint Does Not Allege Commercial Use in Connection With Defendant's Goods or Services, and in Fact DeShong's Blog Is Non-commercial.**

*See* Brief, page 13.

### **III. THE COMPLAINT SHOULD BE DISMISSED BECAUSE PLAINTIFF HAS NOT PLEADED LIKELIHOOD OF CONFUSION ABOUT THE SOURCE OF PLAINTIFF'S WEB SITE, NOR COULD SUCH LIKELY CONFUSION BE PLEADED.**

#### **A. Trademark Infringement Claims Require the Plaintiff to Plead and Prove That Consumers are Likely to Be Confused About the Source, Sponsorship or Affiliation of the Goods or Services.**

*See* Brief, pages 14-16.

#### **B. The Complaint Does Not Plead Likelihood of Confusion About Source, Nor Could It Plead Such Confusion Given the Nature of the Blog in Question.**

*See* Brief, pages 16-20.

#### **C. The Complaint Also Does Not Plead Facts That Meet the Heightened Standard for Trademark Claims About Expressive Works.**

*See* Brief, pages 20-21.

**IV. THE COMPLAINT SHOULD BE DISMISSED BECAUSE DeSHONG HAS MADE FAIR USE OF THE PHRASE “HIV INNOCENCE” TO DESCRIBE THE GROUP THAT HIS BLOGS CRITICIZE.**

*See* Brief, pages 21-23.

**V. THE DEFAMATION AND DISPARAGEMENT CLAIMS SHOULD ALSO BE DISMISSED FOR FAILURE TO STATE A CLAIM.**

*See* Brief, pages 23-24.

**VI. TO THE EXTENT THAT THE COMPLAINT ALLEGES DEFAMATION CLAIMS BASED ON STATEMENTS THAT ARE NOT OF AND CONCERNING A PLAINTIFF, OR ALLEGES A TRADEMARK CLAIM ON BEHALF OF BAKER EVEN THOUGH THE TRADEMARK BELONGS TO OMSJ, THE COMPLAINT SHOULD BE DISMISSED FOR LACK OF STANDING**

*See* Brief, pages 4, 24.

**CONCLUSION**

The complaint should be dismissed.

Respectfully submitted,

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August 15, 2013

Attorneys for Defendant Jeffery Todd DeShong

**CERTIFICATE OF SERVICE**

I do hereby certify that a true and correct copy of the above and foregoing instrument was served on all counsel of record pursuant to the Federal Rules of Civil Procedure on this the 15th day of August, 2013.

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/s/ Neal A. Hoffman  
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