

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CHERIE PHILLIPS,) CIV. NO. 07-00423 HG-KSC
)
Plaintiff,)
)
vs.)
)
MIKE MURDOCK, THE WISDOM)
CENTER, INC., WISDOM)
INTERNATIONAL, INC., MIKE)
MURDOCK EVANGELISTIC)
ASSOCIATION,)
)
Defendants,)
_____)

**ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON
PLAINTIFF'S TRADEMARK INFRINGEMENT AND UNFAIR COMPETITION CLAIMS;
AND GRANTING DEFENDANTS' MOTION TO DISMISS ALL REMAINING CLAIMS**

Plaintiff Cherie Phillips is the author of a book entitled the Wisdom Bible of God. Defendant Mike Murdock is the author of The Wisdom Bible.

In the Amended Complaint, Plaintiff sets out five claims. The first two claims allege that the title of Murdock's book infringes upon Plaintiff's trademark rights, in violation of § 32 of the Lanham Act, 15 U.S.C. § 1114; and unfairly competes with Plaintiff's work, in violation of § 43 of the Lanham Act, 15 U.S.C. § 1125(a). The final three claims are for violation of Plaintiff's rights pursuant to the First and Fourteenth Amendments of the United States Constitution, and violation of her human rights pursuant to international law.

Defendants move for dismissal and/or summary judgment on all Plaintiff's claims.

Summary Judgment is GRANTED as to the claims of trademark infringement and unfair competition, and Dismissal is GRANTED as to all remaining claims in the Amended Complaint.

PROCEDURAL HISTORY

On August 7, 2007, Plaintiff filed a Complaint. (Doc. 1.)

On October 9, 2007, Defendants filed an Answer. (Doc. 7.)

On the same day, Defendants filed a Motion to Dismiss Copyright Infringement Claim. (Doc. 8.)

On November 23, 2007, Plaintiff filed an Opposition to the motion to dismiss copyright infringement claim. (Doc. 20.)

On November 29, 2007, Defendant filed a Reply. (Doc. 21.)

On December 10, 2007, Plaintiff filed a pleading entitled Supplement to Plaintiff's Opposition to the motion to dismiss. (Doc. 23.)

On March 28, 2008, (Doc. 24), the Court issued an order with respect to Count IV of the Complaint, (Doc. 1):

1. Dismissing with prejudice Plaintiff's claims for copyright infringement based on the following publications written by Defendants: a) The Wisdom Topical Bible; b) The Wisdom commentary, Volumes 1 and 2; c) The Holy Spirit Handbook; d) The Holy Spirit Handbook: The God Book; e) Wisdom Key 3000 Topical

Bible; f) 101 Wisdom Keys; g) Seeds of Wisdom Topical Bible in English and Spanish; h) The New Believer's Topical Bible; i) The Survival Bible.

2. Dismissing Plaintiff's claims for copyright infringement based on Defendants' publications The Wisdom Bible and The Minister's Topical Handbook, without prejudice, giving Plaintiff leave to amend by April 30, 2008.

On April 30, 2008, (Doc. 25), Plaintiff filed the Amended Complaint.

On May 9, 2008, (Doc. 26), the Court issued an order dismissing with prejudice Plaintiff's claims for copyright infringement, Count IV of the original Complaint filed on August 7, 2007, (Doc. 1).

On May 14, 2008, Defendants filed a Motion to Dismiss And/Or For Summary Judgment On All Remaining Claims. (Doc. 27).

On May 21, 2008, the Court entered a Minute Order stating the motion would be decided without hearing pursuant to Local Rule 7.2(d). (Doc. 29.)

On May 23, 2008, Plaintiff filed a Motion To File The (previously filed, Doc. 25,) Amended Complaint; and a Motion To Continue The Deadline To File Opposition To Motion To Dismiss. (Motion to File: Doc. 30; and Motion to Continue: Doc. 31.)

On May 28, 2008, Defendants filed the Declaration Of Allison Mizuo Lee Regarding Plaintiff's Motion To Continue The Deadline To File Opposition To Motion To Dismiss. (Doc. 32.)

On May 30, 2008, the Court entered a Minute Order denying Plaintiff's Motion To File The (previously filed) Amended Complaint as moot, and granting Plaintiff's Motion To Continue The Deadline To File Opposition To Motion To Dismiss. (Doc. 33.)

On June 23, 2008, Plaintiff filed an Opposition. (Doc. 34.)

On July 2, 2008, Defendants filed a Reply. (Doc. 35.)

BACKGROUND

The Amended Complaint alleges that Plaintiff Cherie Phillips founded the Stoic Church of Philosophy on July 4, 1995. (Am. Compl. at ¶ 13, Doc. 25.) The Wisdom Bible of God, also known as the Wisdom Bible, was written by Plaintiff for the Stoic Church in 1997. (Id. at ¶ 15.)

Phillips describes her book as merging various philosophies with religious themes, ideas, and narratives. She explains Stoicism as, "a new religion based on the sacred mathematical wisdom of God expressed in the hybrid combination of religion and philosophy, ... designed for intellectuals whose mind has evolved out of symbolism and into logic." (Id. at ¶ 13.1, emphasis in the original.)

Phillips describes her book title, Wisdom Bible of God, as being an arbitrary trademark that is inherently distinctive

because "wisdom, in Stoicism means the sacred mathematical logic of God," and not the wisdom of humans. (Id. at ¶ 18, emphasis in the original; see also id. at ¶¶ 18.1 and 30.) On the cover of Phillips' book, the title is accompanied by the symbol Π . She indicates the pi symbol is included in the title as in Stoicism it has the "equivalent religious function to the 'cross' design mark in Christianity." (Id. at ¶¶ 19 - 19.1.) The title of Phillips' work, Wisdom Bible of God, also known as Wisdom Bible, are not registered as trademarks. (Id. at ¶ 25.2).

In February 2007, Phillips saw an advertisement for Defendant Murdock's books on his television show. (Id. at ¶ 21.) Based on the advertisement, Plaintiff asserts that Murdock's book, The Wisdom Bible, has a "similar title to Phillips' work, Wisdom Bible of God . . ." (Id.) Phillips also bases her assertion of trademark infringement on an advertisement for Defendant Murdock's The Wisdom Bible in a catalogue of his books. (Id.)

The Amended Complaint

The Amended Complaint sets out five claims:

- I. Trademark infringement, pursuant to § 32 of the Lanham Act, 15 U.S.C. § 1114;
- II. Unfair competition pursuant to § 43 of the Lanham Act, 15 U.S.C. § 1125(a);
- III. Violation of Plaintiff's rights pursuant to the First

Amendment of the United States Constitution;

IV. Violation of Plaintiff's rights pursuant to the Fourteenth Amendment of the United States Constitution; and,

V. Violation of Plaintiff's rights pursuant to her international human rights.

The claims are based on the allegation that Defendant Murdock's book, *The Wisdom Bible*, infringes on Plaintiff's trademark rights in her work entitled *the Wisdom Bible of God*.

Defendants' Motion To Strike Or Dismiss the Amended Complaint

The original Complaint in the case, (Doc. 1), contained claims for copyright infringement, trademark infringement, and unfair competition. The Complaint did not set out claims for violation of Plaintiff's rights pursuant to the First and Fourteenth Amendments of the United States Constitution, and violation of her human rights pursuant to international law.

On March 28, 2008, the Court issued an Order Dismissing Without Prejudice Plaintiff's claims for copyright infringement based on Defendants' publications *The Wisdom Bible* and *The Minister's Topical Handbook*, giving Plaintiff leave to amend by April 30, 2008. (Doc. 24.) Leave to amend the Complaint was granted only to cure, if possible, the deficiencies in Plaintiff's copyright infringement claims.

The Amended Complaint, (Doc. 25), filed by *pro se* Plaintiff

Phillips did not attempt to state a claim for copyright infringement, and the claim was Dismissed With Prejudice on May 9, 2008. (Doc. 26).

The Amended Complaint did, however, set out three new claims, claims III, IV, and V, for violation of Plaintiff's rights pursuant to the First and Fourteenth Amendments of the United States Constitution, and violation of her human rights pursuant to international law. Defendants move to strike or dismiss the Amended Complaint for failure to obtain leave of the Court to add the claims. (Motion at 7, Doc. 27.) In the interests of reaching the merits of the matter brought by *pro se* Plaintiff Phillips, Defendant's motion to dismiss or strike the Amended Complaint is DENIED and the claims are considered.

STANDARD OF REVIEW

MOTION TO DISMISS

The Court may dismiss a complaint as a matter of law pursuant to Fed. R. Civ. P., Rule 12(b)(6) where it fails "to state a claim upon which relief can be granted." Rule 8(a)(2) of the Fed.R.Civ.P. requires "a short and plain statement of the claim showing that the pleader is entitled to relief." This complaint must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47 (1957); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) (a well-pleaded complaint may proceed even if it appears

"that recovery is very remote and unlikely"); Kimes v. Stone, 84 F.3d 1121, 1129 (9th Cir. 1996)("[a]ll that is required is that the complaint gives 'the defendant fair notice of what the plaintiff's claim is and the ground upon which it rests.'") (quoting Datagate, Inc. v. Hewlett-Packard Co., 941 F.2d 864, 870 (9th Cir. 1991)).

While the Court's review is generally limited to the contents of the complaint, the Court may consider documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice without converting the motion to dismiss into a motion for summary judgment. Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001)("Review is limited to the contents of the complaint"); United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003)(the courts may consider certain materials without converting the motion to dismiss into a motion for summary judgment); Branch v. Tunnell, 14 F.3d 449, 453-54 (9th Cir. 1994)(documents whose contents are alleged in a complaint and whose authenticity is not questioned by any party may also be considered).

In evaluating a complaint when considering a Fed.R.Civ.P. 12(b)(6) motion to dismiss, the Court must presume all factual allegations of material fact to be true and draw all reasonable inferences in favor of the non-moving party. Roe v. City of San Diego, 356 F.3d 1108, 1111-12 (9th Cir. 2004); Pareto v.

F.D.I.C., 139 F.3d 696, 699 (9th Cir. 1998); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) (the complaint must be liberally construed, giving the plaintiff the benefit of all proper inferences).

Conclusory allegations of law and unwarranted inferences, though, are insufficient to defeat a motion to dismiss. Pareto, 139 F.3d at 699; In re VeriFone Securities Litigation, 11 F.3d 865, 868 (9th Cir. 1993) (conclusory allegations and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim); Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir.), cert denied, 454 U.S. 1031 (1981) (the Court does not "necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations"). Additionally, the Court need not accept as true allegations that contradict matters properly subject to judicial notice or allegations contradicting the exhibits attached to the complaint. Sprewell, 266 F.3d at 988.

In Bell Atl. Corp. v. Twombly, 127 S.Ct. 1955 (2007), the United States Supreme Court recently addressed the pleading standards under the Federal Rules of Civil Procedure in the anti-trust context. Numerous federal courts have considered Twombly's effect on the federal pleading standard, namely whether Twombly established a blanket heightened pleading standard for all cases. The Court agrees with those courts that have held it does not.

A few weeks after Twombly, the Supreme Court decided Erickson v. Pardus, 127 S.Ct. 2197, 2200 (2007). In Erickson, a prisoner civil rights case, the Court reiterated that Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Id. Under Rule 8, "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Id.

The Ninth Circuit Court of Appeals in Skaff v. Meridien North America Beverly Hills, LLC, 506 F.3d 832 (9th Cir. 2007) applied Erickson in the Americans with Disabilities Act context, and reaffirmed the applicability of Rule 8's fair notice pleading standard. The Ninth Circuit clarified that Rule 8's fair notice pleading standard, as opposed to a heightened pleading standard, applies unless there is an explicit requirement in a statute or federal rule. Id. at 840-41 ("[T]he Supreme Court has repeatedly instructed us not to impose such heightened standards in the absence of an explicit requirement in a statute or federal rule."); see Bell Atl. Corp. v. Twombly, ---U.S. ----, 127 S.Ct. 1955, 1973 n. 14, (2007); cf. Private Securities Litigation Reform Act of 1995, Pub.L. No. 104-67, § 101(b), 109 Stat. 737, 747 (imposing heightened pleading standard for securities fraud class actions) (codified at 15 U.S.C. § 78u-4(b)(1)-(2)); Fed.R.Civ.P. 9(b) (imposing heightened pleading standard for

complaints of fraud or mistake)).

As the Supreme Court stated in Twombly, while detailed factual allegations are not needed, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels, conclusions, or "a formulaic recitation of the elements of a cause of action." Twombly, 127 S.Ct. at 1964 (citing Conley v. Gibson, 355 U.S. 41, 47 (1957); and Papasan v. Allain, 478 U.S. 265, 286 (1986) (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation")). It is enough if the factual allegations raise a right to relief above the speculative level. Twombly, 127 S.Ct. at 1964-65 (citing 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-236 (3d ed.2004) ("[T]he pleading must contain something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action")). Dismissal is appropriate under Rule 12(b)(6) if the facts alleged do not state a claim to relief that is "plausible on its face." Id. at 1974.

MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). There must be sufficient evidence that a reasonable jury could return a verdict for the nonmoving party. Nidds v. Schindler Elevator

Corp., 113 F.3d 912, 916 (9th Cir. 1996).

The moving party has the initial burden of "identifying for the court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact." T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). The moving party, however, has no burden to negate or disprove matters on which the opponent will have the burden of proof at trial. The moving party need not produce any evidence at all on matters for which it does not have the burden of proof. Celotex, 477 U.S. at 325. The moving party must show, however, that there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law. That burden is met simply by pointing out to the district court that there is an absence of evidence to support the nonmovant's case. Id.

If the moving party meets its burden, then the opposing party may not defeat a motion for summary judgment in the absence of probative evidence tending to support its legal theory. Commodity Futures Trading Comm'n v. Savage, 611 F.2d 270, 282 (9th Cir. 1979). The opposing party must present admissible evidence showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); Brinson v. Linda Rose Joint Venture, 53 F.3d

1044, 1049 (9th Cir. 1995). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Nidds, 113 F.3d at 916 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986)).

The court views the facts in the light most favorable to the non-moving party. State Farm Fire & Casualty Co. v. Martin, 872 F.2d 319, 320 (9th Cir. 1989).

Opposition evidence may consist of declarations, admissions, evidence obtained through discovery, and matters judicially noticed. Fed. R. Civ. P. 56(c); Celotex, 477 U.S. at 324. The opposing party cannot, however, stand on its pleadings or simply assert that it will be able to discredit the movant's evidence at trial. Fed. R. Civ. P. 56(e); T.W. Elec. Serv., 809 F.2d at 630. The opposing party cannot rest on mere allegations or denials. Fed. R. Civ. P. 56(e); Gasaway v. Northwestern Mut. Life Ins. Co., 26 F.3d 957, 959-60 (9th Cir. 1994). Nor can the opposing party rest on conclusory statements. National Steel Corp. v. Golden Eagle Ins. Co., 121 F.3d 496, 502 (9th Cir. 1997).

ANALYSIS

The Amended Complaint sets out five causes of action or claims.

In claims I and II, Plaintiff claims trademark infringement and unfair competition in violation of § 32 of the Lanham Act, 15 U.S.C. § 1114, and § 43 of the Lanham Act, 15 U.S.C. § 1125(a).

Plaintiff's claims set out the allegation that Defendants copied the title of Phillips' work, the Wisdom Bible of God, by naming Defendant Murdock's book The Wisdom Bible. (Am. Compl. at ¶ 21.)

In the third and fourth causes of action, claims III and IV, the Amended Complaint alleges violation of the First and Fourteenth Amendments of the United States Constitution.

The fifth cause of action, claim V., alleges a violation of Plaintiff's international human rights based on the alleged copying of the title. (Am. Compl. at ¶ 25.2.)

I. and II. TRADEMARK INFRINGEMENT AND UNFAIR COMPETITION

Defendants assert that Phillip's title, Wisdom Bible of God, should not be granted trademark protection because there is no protectable interest in a descriptive title that has not acquired a secondary meaning. (Motion at 10 and 14, Doc. 27.)

Pursuant to Title 15 U.S.C. § 1114(1)(a) of the Lanham Act, the owner of a protectable trademark may hold liable any person who, without consent, "use[s] in commerce any ... registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services" which is likely to cause confusion. 15 U.S.C. § 1114(1)(a). The trademark holder must demonstrate that it owns a valid mark, and thus a protectable interest, before trademark infringement can be established. Tie Tech, Inc. v. Kinedyne Corp., 296 F.3d 778, 783 (9th Cir. 2002).

Here, any trademark rights Plaintiff possesses arise from

common law because the mark at issue, the title Wisdom Bible of God, is not federally registered. Id. ("In essence, the registration discharges the plaintiff's original common law burden of proving validity in an infringement action."); (Am. Compl. at ¶ 25.2, Doc. 25.) Where a trademark is not registered, a plaintiff asserting infringement must establish both "(1) that it has a protectable ownership interest in the mark; and (2) that the defendant's use of the mark is likely to cause consumer confusion, thereby infringing upon the [plaintiff's] rights to the mark." Dep't of Parks & Recreation for the State of Cal. v. Bazaar Del Mundo, Inc., 448 F.3d 1118, 1124 (9th Cir. 2006).

A plaintiff must raise a genuine issue of fact regarding both factors in order to defeat a motion for summary judgment. See Yellow Cab Co. of Sacramento v. Yellow Cab of Elk Grove, Inc., 419 F.3d 925, 928 (9th Cir. 2005) (the "validity of the trademark is 'a threshold issue' on which the plaintiff bears the burden of proof"); Thane Int'l Inc. v. Trek Bicycle Corp., 305 F.3d 894, 901 (9th Cir. 2002) ("[A] district court may grant summary judgment . . . if 'no genuine issue' exists regarding likelihood of confusion.").

The tests for trademark infringement and unfair competition examine the same considerations. See Brookfield Commc'ns, Inc. v. W. Coast Entm't, 174 F.3d 1036, 1046-47 (9th Cir. 1999) ("To resolve whether West Coast's use of 'moviebuff.com' constitutes

trademark infringement or unfair competition, we must first determine whether Brookfield has a valid, protectable trademark interest in the 'MovieBuff' mark."); Joujou Designs, Inc. v. Jono Ligne Internationale, Inc., 821 F. Supp. 1347, 1353 (N.D. Cal. 1992)(tests for infringement of a common law trademark and unfair competition under 15 U.S.C § 1125(a) are the same: whether confusion is likely). The claims for trademark infringement and unfair competition are analyzed under the two-pronged test.

A. Plaintiff Must Establish A Protectable Interest

When a plaintiff has an unregistered trademark, the presumption of validity is inapplicable, and the plaintiff must establish its protectable interest. See Yellow Cab Co. of Sacramento, 419 F.3d at 928.

In determining if a protectable interest exists, a trademark is first examined to see which of five categories it falls into: "(1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; and (5) fanciful." Id. at 927.

Automatic trademark protection is extended to suggestive, arbitrary, and fanciful trademarks as they require a "mental leap" between the mark and the object referenced. Filipino Yellow Pages, Inc., v. Asian Journal Publications, Inc., 198 F.3d 1143, 1147 n.3 (9th Cir. 1999); KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc., 408 F.3d 596, 602 (9th Cir.2005) ("The latter three categories are deemed inherently distinctive

and are automatically entitled to protection because they naturally 'serve[] to identify a particular source of a product....'") (quoting Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 768 (1992)).

In contrast, generic and descriptive terms, because they "refer[] to the type or species of the product at issue," are not given automatic protection. Rudolph Int'l, Inc., v. Realys, Inc., 482 F.3d 1195, 1197 (9th Cir. 2007). Generic marks are not given trademark protection at all. For descriptive marks, trademark protection only extends to marks that have acquired "secondary meaning" in the minds of consumers. Id. at 1197-98 (descriptive terms may be protected if they acquire secondary meaning in the minds of consumers); Two Pesos, Inc., 505 U.S. at 769 ("Marks which are merely descriptive of a product are not inherently distinctive. When used to describe a product, they do not inherently identify a particular source, and hence cannot be protected," unless they acquire a secondary meaning).

Plaintiff argues that the "Wisdom Bible" title is arbitrary and automatically entitled to trademark protection. Plaintiff's description of her own writings contained in the book, however, reveals the title "Wisdom Bible" is descriptive. Plaintiff describes her work as a compendium and reinterpretation of ancient wisdom from the great religions and philosophies. (Am. Compl. at ¶¶ 13 and 20.4, Doc. 25.) The book is a collection of

the wisdom of ancient religious texts and philosophers; a book meant to be an authoritative text, a "bible," of ancient wisdom. Phillips' work is the collection of sacred texts of the Stoic religion. (Am. Compl. ¶¶ 16.2, 20.1, 20.3, and 20.3.1.) The text of the book falls under the accepted definition of the word "bible," defined as a book regarded as the authoritative text on a subject.¹ The title "Wisdom Bible," describes the contents, and what the author intends the book to convey, precisely.

B. Secondary Meaning

A descriptive mark is protected only if it has acquired secondary meaning. Rudolph Int'l, 482 F.3d at 1197-98. Secondary meaning is acquired when consumers associate the trademark with the trademark owner's goods in commerce. See Filipino Yellow Pages, 198 F.3d at 1147; Levi Strauss & Co. V. Blue Belle, Inc., 778 F.2d 1352, 1354 (9th Cir. 1985) ("The basic element of secondary meaning is ... the mental association by a substantial segment of consumers and potential consumers 'between the alleged mark and a single source of the product.'") (quoting 1 J. McCarthy, §§ 15:2 at 659 and 13:11(B) at 686). Establishing secondary meaning requires a consideration of several factors, including:

¹ "Bible" is defined in the Oxford English dictionary as 1. the Christian scriptures, consisting of the Old and New Testaments; 2. the Jewish scriptures; and 3. informally, a book regarded as authoritative, a sacred book. See OXFORD ENGLISH DICTIONARY, Vol. II, 168 (2nd ed., 2001).

(1) whether actual purchase[r]s of the product bearing the claimed trademark associate the trademark with the producer, (2) the degree and manner of advertising under the claimed trademark, (3) the length and manner of use of the claimed trademark and, (4) whether use of the claimed trademark has been exclusive.

Levi Strauss & Co., 778 F.2d at 1358 (alteration in original).

"Secondary meaning is a question of fact, so to survive summary judgment[,] [the party bringing the trademark claim] was required to come forward with enough evidence of secondary meaning to establish a genuine dispute of fact." Japan Telecom, Inc., v. Japan Telecom America, 287 F.3d 866, 873 (9th Cir. 2002) (internal citation omitted).

In Japan Telecom, the claimant submitted a declaration from the company's president along with two letters and six declarations from business owners who "personally" knew the claimant company as a means of demonstrating actual confusion that resulted from the defendants' use of a similar mark. Id. at 873-74. The court found such evidence insufficient to establish that buyers had developed a "mental recognition" of the trade name, as the declarations came from those who personally knew Japan Telecom's President.

Here, Plaintiff asserts that her work is broadly known. Plaintiff states that the title Wisdom Bible has been used in commerce since 1999, when the book was allegedly sold to "Canadians", alleges that a copy of the work was sent to the Virginia State Library, and alleges that in 2001 the book was

"placed on the worldwide internet." Phillips fails to proffer any evidence in support of the statements. On the basis of the allegations alone that the work is broadly known, Plaintiff asserts that use of a similar title is likely to cause public confusion. (Am. Compl. at ¶¶ 29 and 32.)

Phillips proffers only unsupported conclusions that her trademark the Wisdom Bible of God is a title with an established secondary meaning. (Opp. at ¶ 7.) The conclusions are not factually supported with any evidence of actual consumer association of the title, Wisdom Bible of God, with Phillips' books on her Stoic religion. See Filipino Yellow Pages, 198 F.3d at 1152 (declaration from founder and President of claimant corporation insufficient because "[e]vidence of secondary meaning from a partial source possesses very limited probative value."). Conclusory statements by Phillips are insufficient.

Plaintiff argues that the title of her work has a secondary meaning because it redefines the word "wisdom" as meaning the wisdom of God alone, and not the wisdom of mankind. (Am. Compl. at ¶ 18, "wisdom, in Stoicism means the sacred mathematical logic of God," and not the wisdom of humans; emphasis in the original). This argument does not address what consumers understand "Wisdom Bible of God" to mean as an alleged trademark. Plaintiff's assertions do not demonstrate that the title is so established that it has a secondary meaning as denoting Phillips' Stoic bible

only. Nor is the accepted definition of "wisdom" in the English language limited to the wisdom of God. The accepted definition amongst consumers, English speakers, includes the wisdom of God and mankind. See OXFORD ENGLISH DICTIONARY, Vol. XX, 421-22 (2nd ed., 2001). No secondary meaning denoting the Stoic religion alone can be established in the minds of consumers using the word "wisdom."

The "Wisdom Bible" title is not protected as a trademark. The title cannot be the subject of an unfair competition claim because Phillips does not meet her burden of establishing secondary meaning.

C. Likelihood Of Confusion

Even assuming Phillips did establish secondary meaning, she could not prevail on her trademark and unfair competition claims without also showing that "customers are likely to be confused about the source or sponsorship of the products." See Reno Air Racing Ass'n, Inc. v. McCord, 452 F.3d 1126, 1135 (9th Cir. 2006). An eight-factor test guides this assessment:

(1) the strength of the mark; (2) the proximity or relatedness of the goods; (3) the similarity of the marks; (4) evidence of actual confusion; (5) the marketing channels used; (6) the degree of care customers are likely to exercise in purchasing the goods; (7) the defendant's intent in selecting the mark; and (8) the likelihood of expansion into other markets. Not all of the factors are of equal importance or applicable in every case.

Id. at 1136 n.9.

Plaintiff proffers no evidence of actual confusion. Plaintiffs assertions of confusion are insufficient. National Steel Corp., 121 F.3d at 502 (opposing party may not rest on conclusory statements).

Plaintiff's statements regarding Murdock's intent in naming his work The Wisdom Bible are also conclusory, and lack both logic and factual support. Proffering no evidence, Plaintiff concludes that the only purpose that Defendant Murdock could have in naming his work The Wisdom Bible is to convert would be followers of Plaintiff's Stoic religion to Christianity or "Murdockism." (Am. Compl. at ¶ 49.2, Doc. 25.) Plaintiff overlooks the same facts that are overlooked in her argument that the title Wisdom Bible is an arbitrary trademark - the words "wisdom" and "bible" make up descriptive titles. Defendant Murdock's title is also descriptive as the title of a work that contains "the complete scriptures of the Holy Bible along with Murdock's notes." (Id. at ¶ 34, Doc. 25.) The similarity of the descriptive titles does not show intent on the part of Defendants.

The books are also readily distinguishable on the covers, despite the similar title, as the title of Plaintiff's work includes the symbol [], while Murdock's does not. (Opp. at Exh.s 3, 4, and 5.)

Even if Plaintiff had established a protectable interest,

summary judgment would be appropriate as Plaintiff fails to proffer any evidence raising a genuine issue of material fact as to consumer confusion.

III. and IV. First And Fourteenth Amendments Of The United States Constitution

The Amended Complaint alleges a cause of action for violation of the First and Fourteenth Amendments of the United States Constitution; alleging that Defendants use of the title The Wisdom Bible is an act of sex discrimination, violates Phillips right to freedom of religion and equal protection under the law, and violates the Constitutionally mandated separation of Church and State.

The guaranties of the First and Fourteenth Amendments of the United States Constitution restrain only action undertaken by a government, federal or state, as the Constitution governs the relationship between the people and their government. The Federal Constitution does not circumscribe action by private individuals and entities. Southcenter Joint Venture v. National Democratic Policy Committee, 780 P.2d 1282, 1286 (1989) (“[T]he fundamental nature of a constitution is to govern the relationship between the people and their government, not to control the rights of private the people vis-a-vis each other.”)

The First Amendment guaranties are limitations on action by a government, federal or state only, and do not circumscribe action by private individuals and entities. U.S. Const. Amend.

I; Central Hardware Co. v. N.L.R.B., 407 U.S. 539, 547 (1972) ("The First and Fourteenth Amendments are limitations on state action, not on action by the owner of private property used only for private purposes."). The United States Constitution does not prohibit a private person's infringement of another person's First Amendment rights. The First Amendment forbids only infringement which may be properly attributable to the State. Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551, 567 (1972). There can be no valid claim of violation of rights guaranteed by the Federal Constitution without state action. Rendell-Baker v. Kohn, 457 U.S. 830, 837 (1982).

The Fourteenth Amendment of the Constitution provides in part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S.C.A. Const. Amend. 14. The guaranties of the Fourteenth Amendment can also be violated only by conduct that may be fairly characterized as state action. Rendell-Baker, 457 U.S. at 837 ("Similarly, the Fourteenth Amendment, which prohibits the states from denying federal constitutional rights and which guarantees due process, applies to acts of the states, not to acts of private persons or entities."); Lugar v. Edmondson Oil Co., 457 U.S. 922, 935 (1982) (Fourteenth Amendment offers no shield

against private conduct, however discriminatory or wrongful).

To bring a claim for infringement of the rights guaranteed by the First and Fourteenth Amendments, Phillips must allege state action. Phillips' case is brought against Mike Murdock, the Wisdom Center, Inc., Wisdom International, Inc., and Mike Murdock Evangelistic Association. All of the named Defendants are private, not state, actors and the conduct involved is private. Dismissal is warranted because the Amended Complaint fails to state a claim for violation of the guaranties of the First and Fourteenth Amendments.

V. International Human Rights

Plaintiff has not stated any basis upon which the Court can find a cause of action for violation of Plaintiff's international human rights.

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CONCLUSION

FOR THE FOREGOING REASONS,

1. Defendants' Motion For Summary Judgment as to Plaintiff's claims for trademark infringement and unfair competition is GRANTED.

2. Plaintiffs remaining claims in the Amended Complaint for violation of the First and Fourteenth Amendments of the United States Constitution, and of international human rights, are DISMISSED WITH PREJUDICE.

As no claims remain, the case is closed.

IT IS SO ORDERED.

DATED: July 31, 2008, Honolulu, Hawaii.



/s/ Helen Gillmor

Chief United States District Judge

CHERIE PHILLIPS vs. MIKE MURDOCK, THE WISDOM CENTER, INC., WISDOM INTERNATIONAL, INC., MIKE MURDOCK EVANGELISTIC ASSOCIATION, Civ. No. 07-00423 HG KSC; ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S TRADEMARK INFRINGEMENT AND UNFAIR COMPETITION CLAIMS; AND GRANTING DEFENDANTS' MOTION TO DISMISS ALL REMAINING CLAIMS