

ESTTA Tracking number: **ESTTA167189**

Filing date: **10/05/2007**

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

Proceeding	91179145
Party	Defendant Eatertainment, Inc.
Correspondence Address	Miguel Villarreal, Jr. Gunn & Lee, P.C. 700 N. St. Mary's Street, Suite 1500 San Antonio, TX 78205 UNITED STATES
Submission	Answer and Counterclaim
Filer's Name	Miguel Villarreal, Jr.
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Signature	/miguel villarreal jr/
Date	10/05/2007
Attachments	Answer.pdf (14 pages)(618199 bytes)

Registration Subject to Cancellation

Registration No	2530510	Registration date	01/15/2002
Registrant	Archbold, Hunt 801 Bellemeade Ave. Atlanta, GA 30318 UNITED STATES		
Goods/Services Subject to Cancellation	Class 041. First Use: 1999/05/01 , First Use In Commerce: 1999/05/01 Goods/Services: Entertainment in the nature of on-going television programs and radio programs in the fields of sports and comedy		
Grounds for Cancellation	The registered mark has been abandoned.		
	The registration was obtained fraudulently.		

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

In re Matter of U.S. Application Serial No.: 77/058,756
For: SPORTOPIA
Filed: December 7, 2006
Date of Publication: June 26, 2007
Official Gazette, TM 1061

Sportopia Entertainment, LLC, and
William Hunt Archbold

Opposers,

v.

Eatertainment Inc.,

Applicant.

Opposition No. 91179145

**ANSWER TO OPPOSITION AND
COUNTERCLAIM FOR CANCELLATION OF REGISTRATION**

Applicant Eatertainment Inc. (“Applicant”) hereby files this answer in response to Opposer Sportopia Entertainment, LLC’s (“SEL”) and Opposer William Hunt Archbold’s (“Archbold”) (collectively referred to hereinafter as “Opposers”) “Notice of Opposition” and asserts a counterclaim for cancellation of registration and would respectfully show onto the Board as follows:

With respect to the introductory paragraph of the “Notice of Opposition,” Applicant lacks knowledge or information sufficient to form a belief as to the truth of the allegations therein and accordingly denies the same.

1. Applicant is without sufficient information to admit or deny the allegations contained in

paragraph numbers 1 and 2 and therefore the allegations contained in paragraphs 1-2 are denied.

2. Regarding paragraph 3, Applicant admits that it is a Texas corporation.

3. Regarding paragraph 4, Applicant admits that Registration No. 2,530,510 was issued on January 15, 2002. Applicant denies all other allegations and characterizations of paragraph 4.

4. Applicant is without sufficient information to admit or deny the allegations contained in paragraph 5 and therefore the allegations contained in paragraph 5 are denied.

5. Regarding paragraph 6, Applicant denies that December 7, 2006 is a “date well after Opposer Archbold’s first use and registration of its SPORTOPIA mark” to the extent that Opposer Archbold is implying that its “first use” and “registration” overlaps with Applicant’s restaurant services. Otherwise Applicant admits paragraph 6.

6. Regarding paragraph 7, Applicant admits that on July 17, 2007, only Opposer Archbold filed a request for extension of time to oppose Applicant’s mark extending the time to file his notice of opposition until August 25, 2007. Applicant denies that Opposer filed any extension of time to file its notice of opposition.

7. Applicant denies the allegations and characterizations of paragraph 8.

8. Applicant denies the allegations and characterizations of paragraph 9.

9. Applicant denies the allegations and characterizations of paragraph 10.

10. Applicant denies the allegations and characterizations of paragraph 11.

11. Applicant denies the allegations and characterizations of paragraph 12.

AFFIRMATIVE DEFENSES

12. Applicant’s mark was published for opposition on June 26, 2007. The deadline to oppose Applicant’s mark or file an extension of time to file a notice of opposition expired July 26, 2007.

Opposer SEL failed to file either its notice of opposition or an extension of time to file its notice of opposition by this time. Consequently, Opposer SEL lacks standing to bring and is barred from continuing in this proceeding.

13. There is no likelihood of confusion, mistake, or deception because Applicant's mark and the pleaded mark of Opposers are not confusingly similar. Applicant's intended use of the mark SPORTOPIA in connection with restaurant services could not possibly be confused with Archbold's alleged use of SPORTOPIA in connection with "entertainment in the nature of *on-going television programs and radio programs* in the fields of sports and comedy." Any similarity, if at all, between Applicant's mark and the pleaded mark of Opposer is in the term "SPORTOPIA" which upon information and belief has been used and registered for non-competing goods and services.

14. Since Applicant's services are generally consumed by sophisticated consumers, the purchaser would take great care before making the purchase. Where care is involved in the purchasing decision, there is less of a likelihood of confusion.

15. Opposer Archbold acted with unclean hands with respect to the mark at issue.

COUNTERCLAIM
CANCELLATION OF REGISTRATION NO. 2,530,510

16. Applicant Eatertainment, Inc., a corporation incorporated and existing under the laws of the State of Texas and having its principal place of business at 4444 Corona Dr., Suite 208, Corpus Christi, Texas 78411, believes that it is and will be damaged by Registration No. 2,530,510 and hereby counterclaims for cancellation of said registration.

As grounds for this counterclaim, it is alleged that:

Fraudulent Procurement of Registration

17. Registration No. 2,530,510 lists as its recited services “entertainment in the nature of on-going television programs and radio programs in the fields of sports and comedy in International Class 41.”
18. Application Serial No. 75/849,799, which issued as Registration No. 2,530,510, was filed on the basis of “intent to use” the mark in commerce by Opposer Archbold on November 15, 1999.
19. Opposer Archbold initially filed Application Serial No. 75/849,799 for “multimedia entertainment in all current forms, including internet, TV, radio, print, DVD, film, video, music, and satellite,” alleging a date of first use of December 15, 1995.
20. Opposer Archbold further listed his goods as “Multimeadia [sic] entertainment word and adventure for *the entire world*,” and stated that he had a bona fide intent to use the mark SPORTOPIA in commerce “on labels, business cards, on TV show [sic], print ads.”
21. On August 24, 2001, Archbold filed a “Trademark/Service Mark Allegation of Use” (hereinafter “Statement of Use”) claiming that he first used the mark anywhere on May 1, 1999, *not* December 15, 1995 as he had originally claimed in his application.
22. In the Notice of Opposition, Opposers alleged *yet a third* date of first use for SPORTOPIA, this time alleging use in commerce “since at least as early as 1993.” Opposers’ statement of first use of the mark SPORTOPIA in commerce “since at least as early as 1993” is a willfully and materially false statement made to the Board.
23. In his Statement of Use, Archbold falsely declared that he “was using the mark in commerce on or in connection with [his] goods/services...”
24. Archbold was not using the mark in commerce on or in connection with his recited services

at the time he filed his Statement of Use.

25. Archbold made such false or fraudulent declarations and/or representations to the U.S. Patent and Trademark Office with intent to deceive the public and the U.S. Patent and Trademark Office.

26. Archbold knew or should have known such false or fraudulent declarations and/or representations were false at the time he made them.

27. Archbold would not have received Registration No. 2,530,510 for all of the services identified therein but for the willful material misrepresentation in the Statement of Use.

28. Registration No. 2,530,510 was procured by Archbold's knowingly false or fraudulent statements, which statements were made with the intent to induce authorized agents of the U.S. Patent and Trademark Office to grant said registration.

29. The U.S. Patent and Trademark Office, reasonably relying upon the truth of said false statements, did, in fact, accept Archbold's Statement of Use and issued Registration No. 2,530,510.

30. Archbold is therefore not entitled to continue Registration No. 2,530,510 since Archbold committed fraud in the procurement of the subject registration, and said registration is therefore invalid, unenforceable, and void.

Abandonment

31. Alternatively, shortly after issuance of Registration No. 2,530,510 on January 15, 2002, Archbold discontinued any bona fide use of SPORTOPIA in the ordinary course of trade in connection with his services for "entertainment in the nature of on-going television programs and radio programs in the fields of sports and comedy."

32. Archbold had no plan or intent to resume such use. Further, Opposers have not used nor intend to use the mark SPORTOPIA in connection with restaurant services.

33. Archbold failed to use the mark SPORTOPIA in commerce in connection with its recited services for a period of at least three consecutive years.

34. Consequently, Archbold abandoned Registration No. 2,530,510 for the service mark SPORTOPIA.

35. In early 2007, Archbold set up a website, www.sportopiaforthepeople.com, purporting to use the mark. Also, in early summer 2007, Archbold organized Opposer SEL to deceive the public and Applicant into believing that he is using the mark SPORTOPIA in commerce in connection with the services recited in Registration No. 2,530,510. This subsequent nominal use of the SPORTOPIA mark, after failing to use same for more than three years prior, is insufficient to revive the mark.

36. Opposers have not used the mark SPORTOPIA in connection with the services of “entertainment in the nature of on-going television programs and radio program in the fields of sports and comedy” for a period of at least three consecutive years.

37. Consequently, Opposers abandoned any trademark rights they may have had in the mark SPORTOPIA.

38. Despite the fact that Opposers have no superior rights to the term SPORTOPIA for restaurant services, Opposers already threatened Applicant with legal action in a letter dated May 22, 2007, a copy of which is attached hereto as **Exhibit A**.

39. On June 4, 2007, the undersigned attorney on behalf of Applicant responded to Opposers’ threats as is indicated by **Exhibit B** attached hereto. Opposers were asked to provide any evidence of, *inter alia*, Opposers’ use of SPORTOPIA, as well as any evidence that Opposers’ services have become well known in the field of restaurant services. Opposers ignored and failed to respond.

40. Opposers are attempting to ride on the coattails of Plaintiff and the substantial investments

and progress Plaintiff made in getting ready to use the mark SPORTOPIA in connection with its restaurant services.

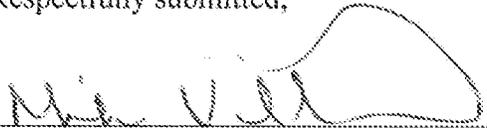
41. Unless Registration No. 2,530,510 is canceled, Opposers will continue to threaten Applicant with a lawsuit under the cloak of authority given to Opposer Archbold by the U.S. Patent and Trademark Office, all to the damage of Applicant.

42. The continued existence of Registration No. 2,530,510 casts a cloud upon Applicant's right to use the mark SPORTOPIA in connection with its restaurant services and will be a source of continuing damage and injury to Applicant. Applicant respectfully requests that Registration No. 2,530,510 be cancelled.

WHEREFORE, PREMISES CONSIDERED, Applicant prays that the "Notice of Opposition" be dismissed with prejudice in its entirety and that a registration be issued to Applicant for its mark. Applicant further prays that pursuant to 15 U.S.C. § 1064 Registration No. 2,530,510 be cancelled. This Answer and Counterclaim is being filed electronically together with the statutory filing fee of \$300. The Commissioner is authorized to draw upon the Deposit Account of Gunn & Lee, P.C., Account No. 500808, for any outstanding fees, if any, relating to this Answer and Counterclaim.

Respectfully submitted,

Date: 10/5/07



Ted D. Lee
Regis. No. 25,819
Texas Bar No. 12137700
Miguel Villarreal, Jr.
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700 N. St. Mary's Street, Suite 1500
San Antonio, Texas 78205
210/886-9500
210/886-9883 Facsimile

ATTORNEYS FOR APPLICANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answer to Opposition and Counterclaim for Cancellation of Registration is being deposited with the United States Postal Service as Express Mail on this 5th day of October, 2007, in an envelope addressed to:

Marguerite E. Patrick
Morris, Manning & Martin, LLP
3343 Peachtree Road, N.E.
1600 Atlanta Financial Center
Atlanta, GA 30326-1044



Miguel Villarreal, Jr.

Exhibit A



MORRIS, MANNING & MARTIN, LLP
ATTORNEYS AT LAW

Marguerite E. Patrick
404-495-3613
bpatrick@mmlaw.com
www.mmlaw.com

May 22, 2007

VIA CERTIFIED MAIL NO. 7005 1160 0002 7935 2024
RETURN RECEIPT REQUESTED

Eatertainment, Inc.
4444 Corona Drive, Suite 208
Corpus Christ TX 78411

VIA CERTIFIED MAIL NO. 7005 1160 0002 7935 2031
RETURN RECEIPT REQUESTED

George S. Gray, Esq.
PO Box 270190
Corpus Christi, TX 78427-0190

RE: Eatertainment, Inc.'s Unauthorized and Unlawful Use of the SPORTOPIA Trademark

Dear Sirs:

We represent Sportopia Entertainment, LLC ("Sportopia"). Sportopia owns all rights, title, and interest, including without limitation, all Federal, state, and common law rights and goodwill symbolized thereby, in and to the mark SPORTOPIA (US Reg. No. 2,530,510), among others. (the "Trademark").

Sportopia has been using the Trademark in connection with the marketing and advertising of its sports and comedy entertainment program services since 1999. Sportopia owns valuable rights in the Trademark, and has been using and continues extensive use and advertisement of its services using the Trademark. As a result of such widespread use, Sportopia has developed considerable goodwill in the Trademark and its services have become well known to the trade and relevant public. Accordingly, the Trademark must be protected against infringements and improper use.

It has been brought to our attention that Eatertainment, Inc. ("Eatertainment") filed an application for the identical word mark SPORTOPIA, to be used for creating a franchise of a sports bar and restaurant concept. Such use is improper because Sportopia historically has provided sport and entertainment services at and to sports bars and restaurants. Sportopia also solicits sponsorship from sports bars and restaurants. Moreover, the restaurant services industry is well within the reasonable expansion of Sportopia's market and service offerings. Eatertainment's contemplated use of the Trademark is unlawful and without authorization or approval from Sportopia.

Atlanta
404.233.7000

1600 Atlanta Financial Center
3343 Peachtree Road, N.E.
Atlanta, Georgia 30326-1044
Fax: 404.365.9532

With offices in

Washington, D.C.
Charlotte, North Carolina

Eatertainment, Inc.
George S. Gray, Esq.
May 22, 2007
Page 2

Eatertainment's unauthorized and unlawful use of the Trademark is likely to cause the public to believe, contrary to fact, that Eatertainment, is sponsored by, affiliated with, or approved in some way by Sportopia. Further, Eatertainment's intended use of the Trademark would constitute unfair competition and false advertising because it misrepresents the nature, characteristics, qualities, and origin of Eatertainment's commercial activities. Eatertainment's unauthorized use of the Trademark also would dilute the distinctiveness of the Trademark and misdirect the public. This likelihood of confusion, false advertising, and dilution would subject your organization to injunctive and monetary remedies for trademark infringement, unfair competition, and trademark dilution under the Federal Trademark Act, 15 U.S.C. §1051, et seq.

Should Eatertainment be interested in licensing the right to use the Trademark, Sportopia may engage in discussions with it to explore such possibility. Otherwise, Eatertainment is not permitted to any use of the Trademark.

We demand that Eatertainment immediately take the following actions to avoid further infringement of the Trademark. Specifically, we hereby demand that Eatertainment provide written assurances to us within fourteen (14) days following the date of this letter that Eatertainment will immediately: (1) cease any use of the Trademark (or any confusingly similar variation or combination thereof) and permanently refrain from any and all other misuse of the Trademark; (2) cease any distribution of information using the Trademark; (3) cease any advertisement or use of media using the Trademark; (4) cease any solicitation of funding using the Trademark; and (5) withdraw its trademark application for the identical word mark SPORTOPIA and not pursue registration of any confusingly similar mark.

If the requested actions are not taken, Sportopia will take actions to prevent Eatertainment's improper and continued use of the Trademark. This letter is sent without prejudice to Sportopia's rights and claims, all of which are expressly reserved.

We look forward to receiving a prompt and satisfactory response.

Sincerely,

MORRIS, MANNING & MARTIN, LLP



Marguerite E. Patrick

MEP:dz

Exhibit B

Ted D. Lee*
Michelle L. Evans
John C. Cave
Miguel Villarreal, Jr.
Robert L. McRae
Michael D. Paul
Edward B. Marvin
Robert A. McFall†

GUNN & LEE, P.C.

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* Board Certified:
Civil Trial Law

† Patent Agent Consultant

G-8967

June 4, 2007

Via Federal Express

Marguerite E. Patrick
Morris, Manning & Martin, LLP
1600 Atlanta Financial Center
3343 Peachtree Road, N.E.
Atlanta, GA 30326-1044

RE: Response to Cease and Desist Letter of May 22, 2007

Dear Ms. Patrick:

This office has been retained by Eatertainment, Inc. ("Eatertainment") in the above referenced matter. This letter is in response to your letter dated May 22, 2006, addressed to Eatertainment and Mr. George Gray.

Your letter claims that Sportopia Entertainment, LLC ("SEL") owns the universe of all rights to the mark SPORTOPIA (U.S. Reg. No. 2,530,510). However, the registration is strictly limited to "entertainment in the nature of on-going television programs and radio programs in the fields of sports and comedy, in Class 41." If your client desired a broader scope of protection for the mark, it should not have limited its protection by making such a narrow recitation of services.

You further contend that SEL has been using the mark SPORTOPIA in connection with its limited services since 1999. However, this cannot be. Documents on file indicate that the company was created only days ago. If you have any evidence to the contrary, including evidence of SEL's "extensive use and advertisement of its services" since 1999 or that SEL's "services have become well known" in the field of restaurant services, I would appreciate it if you could provide that to me.

Neither can you contend that SEL acquired its rights, if any, from the owner of record, Mr. Hunt Archbold. Mr. Archbold has not used the mark for more than three years, effectively abandoning any rights he may have had therein. As you no doubt are aware, the Lanham Act presumes abandonment of the mark after three years. Further, a subsequent resumption of use is insufficient to revive the mark. In other words, your client's registration is ripe for cancellation. Again, if you have any evidence to the contrary, I would appreciate it if you could provide that to me.

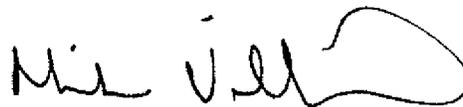
Regarding the “reasonable expansion” of your client’s limited services into the restaurant services industry, I note that the mark was registered on January 15, 2002. To date, your client has not “expanded” into the restaurant industry. Indeed, to the contrary, the registration was abandoned due to nonuse. It was only *after* my client’s recent courtesy in attempting to contact Mr. Archbold at his residence—because the business number was not a working number—and *after* your telephone conference with Mr. Gray (wherein you were unable to provide any information to Mr. Gray’s questioning about Mr. Archbold’s use) that a sparse Internet website appeared. However, this website fails to restore the rights, if any, Mr. Archbold may have had in the mark. Once again, if you have any evidence to the contrary, I would appreciate it if you would provide it to me.

Ms. Patrick, even assuming *arguendo* that the registration is still valid, the services go in two different directions. Your client’s services are directed to television and radio programs. In contrast, my client’s mark is directed toward restaurant services. There is no correlation between the two. It is interesting to note that your client’s registration popped up in every one of the examining attorney’s searches during prosecution. However, the examiner did not find a likelihood of confusion between my client’s application and the registration. Similarly, given the overwhelming disparities between your client’s mark and Eatertainment’s mark, it is highly unlikely that a jury would find a likelihood of confusion between the two marks, especially in the area of restaurant services.

Eatertainment intends to exercise its right to pursue the registration of its mark SPORTOPIA for restaurant services without any interference from your client. Eatertainment has taken great steps and made substantial investments in order to proceed with its business in the restaurant industry. Eatertainment intends to continue doing so. Therefore, Eatertainment will not withdraw its current application but instead will vigorously defend its right to continue the prosecution of same until final issuance. Further, should your client choose to interfere and rely on its “natural expansion” theory to enter the restaurant services industry, it will be your client who would then be infringing my client’s trademark rights.

I trust that this matter is now resolved.

Sincerely,



Mike Villarreal

MV/lm

cc: Ted D. Lee
Damon Bentley
George Gray