

ESTTA Tracking number: **ESTTA278341**

Filing date: **04/15/2009**

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

Proceeding	92047056
Party	Defendant BOI NA BRAZA, INC.
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Date	04/15/2009
Attachments	Boi Na Braza's Trial Brief.pdf ( 33 pages )(15150350 bytes )

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

In the Matter of Registration No. 2,534,608  
Date of Registration: January 29, 2002

Terra Sul Corporation a/k/a  
Churrascaria Boi Na Braza, Inc.,

Petitioner,

vs.

Boi Na Braza, Inc.,

Registrant.

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Cancellation No. 92047056

**Registrant Boi Na Braza, Inc.'s Trial Brief**

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### **Description of the Record**

The evidence of record consists of Registrant's Registration No. 2,534,608; Petitioner's Trial Brief and the deposition testimony of Farid Saleh, designated official records, and other documents included therein; and the following exhibits, properly made of record:

- Exhibit A.           Boi Na Braza, Inc.'s Certificate of Registration
- Exhibit B.           State of New Jersey Business Registration Certificate for Churrascaria Boi Na Brasa Corp.
- Exhibit C.           Farid Saleh's Federal Trademark/Service Mark Application for the mark CHURRASCARIA BOI NA BRASA CORP.

### Statement of the Issues

This cancellation proceeding presents three issues.

First, can Terra Sul Corp. (“Petitioner” or “Terra Sul”) prove that it “acquired” rights in the CHURRASCARIA BOI NA BRASA mark by relying solely on the self-serving, uncorroborated testimony of its president without presenting evidence of a *written* assignment of the mark from Churrascaria Boi Na Brasa Corp. or evidence showing transfer of the mark by operation of law.

Second, if Terra Sul acquired any rights in the CHURRASCARIA BOI NA BRASA mark from Churrascaria Boi Na Brasa Corporation, can Terra Sul establish superior rights to Registrant Boi Na Braza, Inc. (“Registrant” or “Boi Na Braza”) by relying on a single advertisement predating Registrant’s date of first use and by uncorroborated, self-serving testimony of continuous use of the mark from Terra Sul’s president?

Third, can Terra Sul disregard the statutory presumption and, without offering *any* evidence of its own, shift the burden to Registrant to prove that the registered mark BOI NA BRAZA is *not* merely descriptive?

## Statement of Facts

Registrant Boi Na Braza, Inc. was incorporated in Texas by brothers Jonas, Joseph, and Julio Matheus on June 24, 1999, for the purpose of operating a Brazilian barbeque-style restaurant.<sup>1</sup> A week later, Boi Na Braza filed an intent-to-use application in the U.S.P.T.O. to register the mark BOI NA BRAZA for restaurant services.<sup>2</sup> On July 19, 1999, Boi Na Braza began using the BOI NA BRAZA mark,<sup>3</sup> and in due course, filed a statement of use. On January 29, 2002, Boi Na Braza's Federal Registration No. 2,534,608 for BOI NA BRAZA issued (the "Registration").<sup>4</sup>

Petitioner Terra Sul Corp. was incorporated in New Jersey on January 19, 1999, by Farid Saleh,<sup>5</sup> who was previously involved in the operation of a Brazilian restaurant at 70 Adams Street in Newark, New Jersey.<sup>6</sup> Although Petitioner identifies itself in this proceeding as Terra Sul a/k/a Churrascaria Boi Na Braza, the record contains *no evidence* that Terra Sul began using the mark CHURRASCARIA BOI NA BRASA before Boi Na Braza's first use in July 1999. Indeed, Terra Sul did not register the term "Churrascaria Boi Na Braza" as an assumed name until after it filed the petition initiating this proceeding.<sup>7</sup> And in that assumed-name registration, Terra Sul told the

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<sup>1</sup> Petitioner's Br. at Exhibit E.

<sup>2</sup> *See* Exhibit A.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* The registration states that the English translation of the mark "Boi Na Braza" is "Ox in embers."

<sup>5</sup> Petitioner's Br. at Ex. A-18.

<sup>6</sup> According to Petitioner, Saleh was president and a part owner of Churrascaria Boi Na Braza Corp., which he alleges began doing business at the 70 Adams Street address in Newark in 1996 or 1997.

<sup>7</sup> Petitioner's Br. at Ex. A-19. This was also after Terra Sul received a cease-and-desist letter from Boi Na Braza on January 11, 2007. Petitioner's Br. at Ex. A-21.

New Jersey authorities that it had not used the assumed name Churrascaria Boi Na Brasa in the state before January 16, 2007.<sup>8</sup>

In March 1996, Saleh, together with other “part-owners,” formed a New Jersey corporation, Churrascaria Boi Na Brasa Corp.<sup>9</sup> According to Petitioner, “Churrascaria Boi Na Brasa Corp. . . began doing business at the 70 Adams Street address in Newark shortly thereafter.”<sup>10</sup> According to the records of the New Jersey Department of Treasury’s Division of Revenue, Churrascaria Boi Na Brasa Corp. was still extant as of June 2008.<sup>11</sup>

In its Trial Brief, Terra Sul asserts that

- “*Petitioner* . . . purchased . . . land at 70 Adams Street in Newark, New Jersey, which soon became the location of the [Churrascaria Boi Na Brasa] restaurant;”<sup>12</sup>
- “*Petitioner* began using the service mark CHURRASCARIA BOI NA BRASA to identify restaurant services at least as early as 1996 in Newark, New Jersey,”<sup>13</sup>
- “When *Petitioner*’s restaurant opened in 1996, . . . .”;<sup>14</sup>

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<sup>8</sup> Petitioner’s Br. at Ex. A-19. *See also* § II below discussing the statements made in the registration and the New Jersey statute.

<sup>9</sup> Petitioner’s Br. at 2.

<sup>10</sup> Petitioner’s Br. at 2. This is contrary to the statement made elsewhere in Petitioner’s brief that “Petitioner began using the service mark CHURRASCARIA BOI NA BRASA to identify restaurant services at least as early as 1996 in Newark, New Jersey. Petitioner’s Br. at 4.

<sup>11</sup> *See* Exhibit B.

<sup>12</sup> Petitioner’s Br. at 2 (emphasis added).

<sup>13</sup> Petitioner’s Br. at 2 (emphasis added). Petitioner then contradicts this statement by saying the original name of the entity that owned the CHURRASCARIA BOI NA BRASA mark was “Churrascaria Boi Na Brasa Corp.” *See* Petitioner’s Br. at 2. There is no evidence that Petitioner has at any time changed its name.

<sup>14</sup> Petitioner’s Br. at 2-3 (emphasis added). Here, Petitioner claims that no one else used the term “boi na brasa” for restaurant services in 1996. This statement is additionally completely unsubstantiated by Petitioner, as Petitioner has offered no evidence that it performed any availability search prior to commencing use of the CHURRASCARIA BOI NA BRASA mark.

- “*Petitioner* initially began advertising [in 1997] through flyers and word of mouth and later through newspapers;”<sup>15</sup>
- “By September 1997, *Petitioner* was advertising CHURRASCARIA BOI NA BRASA in the Brazilian Press, (a nationally-distributed newspaper), among other publications;”<sup>16</sup>
- “Soon after the restaurant opened, *Petitioner* was given the opportunity to do a catering event in Atlantic City for the Trump Taj Mahal Casino Resort;”<sup>17</sup>
- “Within a short amount of time, *Petitioner*’s restaurant business . . . had become well-known to the relevant public, primarily in the Tri-state area of New York, New Jersey, and Connecticut.”<sup>18</sup>
- *Petitioner Terra Sul* has senior common law rights that supersede Registrant Boi Na Braza’s alleged rights.”<sup>19</sup>
- “*Petitioner*’s first use [of CHURRASCARIA BOI NA BRASA] in commerce is at least as early as March 1996;”<sup>20</sup> and
- “*Petitioner* has continued to operate its restaurant at the same location in Newark and under the same name since it opened in April 1996.”<sup>21</sup>

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<sup>15</sup> Petitioner’s Br. at 3 (emphasis added).

<sup>16</sup> Petitioner’s Br. at 3 (emphasis added).

<sup>17</sup> Petitioner’s Br. at 3 (emphasis added).

<sup>18</sup> Petitioner’s Br. at 3 (emphasis added).

<sup>19</sup> Petitioner’s Br. at 6 (emphasis added).

<sup>20</sup> Petitioner’s Br. at 6 (emphasis added).

<sup>21</sup> Petitioner’s Br. at 7 (emphasis added).

Petitioner did none of these things, however, because *Petitioner did not exist in 1996, 1997, or 1998*. Petitioner was not incorporated until January 1999.<sup>22</sup> While certain persons or entities may have operated a restaurant at 70 Adams Street, in Newark, New Jersey prior to January 1999, that entity *was not* Petitioner.<sup>23</sup> Petitioner therefore did not acquire any trademark rights in the CHURRASCARIA BOI NA BRASA mark based on actual use of such mark before 1999. If Petitioner ever acquired any trademark rights in the CHURRASCARIA BOI NA BRASA mark, it acquired those rights either by assignment or by operation of law. There is no evidence that it did either.

### **Legal Arguments and Authority**

#### **I. Terra Sul bears the burden of establishing the grounds for cancellation by a preponderance of the evidence.**

Boi Na Braza's Registration is *prima facie* evidence of the validity of the BOI NA BRAZA mark, of the registration of the BOI NA BRAZA mark, of Boi Na Braza's ownership of the BOI NA BRAZA mark, and of its exclusive right to use the BOI NA BRAZA mark in commerce for restaurant services.<sup>24</sup> A party petitioning to cancel a federally registered mark must establish each ground for cancellation by a preponderance of the evidence.<sup>25</sup> Terra Sul has not met this burden for a number of reasons. First, Terra Sul has not established that it acquired any rights in the

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<sup>22</sup> Petitioner's Br. at 3.

<sup>23</sup> See e.g., Petitioner's Br. at Ex. A, p.6, lines 7-19 (stating that Terra Sul Corp. has owned Churrascaria Boi Na Braza since 1999 and that it is not the original owner of Churrascaria Boi Na Braza), p. 21, lines 16-25 and p. 22, lines 2-3 (identifying "Farid, Churrascaria Boi Na Braza Corp.," and not Petitioner, as payor on check used to pay rent for Churrascaria Boi Na Braza restaurant dated May 1997).

<sup>24</sup> 15 U.S.C. § 1057(b) (2008).

<sup>25</sup> See *West Florida Seafood Inc. v. Jet Restaurants Inc.*, 31 F.3d 1122, 31 U.S.P.Q.2D (BNA) 1660 (Fed. Cir. 1994) (Noting that "a presumption of validity attaches to a service mark registration, and the party seeking cancellation must rebut this presumption by a preponderance of the evidence"); see also *Cerveceria Centroamericana S.A. v. Cerveceria India Inc.*, 892 F.2d 1021, 13 U.S.P.Q.2D (BNA) 1307 (Fed. Cir. 1989) ("[I]n a [trademark registration] cancellation for abandonment, as for any other ground, the petitioner bears the burden of proof. Moreover, the petitioner's burden is to establish the case for cancellation by a preponderance of the evidence").

CHURRASCARIA BOI NA BRASA mark by actual use or that it acquired any prior rights from Churrascaria Boi Na Brasa Corp. Second, even if Terra Sul acquired some trademark rights from Churrascaria Boi Na Brasa Corp., there is no evidence that Churrascaria Boi Na Brasa Corp. continuously used the CHURRASCARIA BOI NA BRASA mark from November 1997 to July 1999. Last, Terra Sul cannot prevail on its claim that the registered mark should be cancelled for descriptiveness because it has offered *no evidence* to support that claim, attempting instead to shift the burden of proof to Registrant.<sup>26</sup>

**II. Terra Sul has offered only self-serving, uncorroborated testimony of its president, Farid Saleh, that it “acquired” rights in the mark CHURRASCARIA BOI NA BRASA. Such evidence is insufficient to establish that Terra Sul has superior rights in the mark.**

Terra Sul’s claim that it acquired ownership rights in the mark CHURRASCARIA BOI NA BRASA in 1999 is based *solely* on the self-serving testimony of its president, Farid Saleh (“Saleh”) in this matter and its filing of a Registration of Alternate Name *in 2007*, after this proceeding was initiated.<sup>27</sup> Saleh’s testimony is not corroborated by a single document or by testimony of a single person. In fact, the record includes contradictory documents indicating that Saleh perhaps personally owned the mark<sup>28</sup> or that Churrascaria Boi Na Brasa Corp. continued to own the mark up to and after 1999.<sup>29</sup> Furthermore, the alternate name registration, which Petitioner also attempts to rely on, was filed eight years too late to be helpful to Petitioner and the document in fact

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<sup>26</sup> As to Petitioner’s § 2(e) claim, based on likelihood of confusion, Petitioner cannot prevail on this claim as a matter of law unless and until it establishes superior rights in the CHURRASCARIA BOI NA BRASA mark, which it cannot. Accordingly, Registrant need not address this claim.

<sup>27</sup> Petitioner’s Br. at 3.

<sup>28</sup> See Exhibit C identifying Farid Saleh as the service mark owner of the CHURRASCARIA BOI NA BRASA mark in an intent-to-use service mark application dated March 21, 2002.

<sup>29</sup> See Petitioner’s Br. at Exhibit A-8, identifying the insured party as “Churrascaria Boi Na Brasa” for the period May 22, 1998 to May 22, 1999 and Exhibit A-9 identifying the insured party as “Churrascaria Boi Na Brasa” for the period June 14, 1999 to June 14, 2000.

*contradicts* Saleh’s testimony that Terra Sul owned and used the mark in New Jersey beginning in January 1999 or at any time prior to the filing date of that document.

Terra Sul claims that “soon after its formation [it does not say when], Petitioner Terra Sul acquired ownership of the restaurant ‘Churrascaria Boi Na Brasa’ and the associated service mark CHURRASCARIA BOI NA BRASA.<sup>30</sup> But the record it presents is devoid of any evidence of an assignment of the CHURRASCARIA BOI NA BRASA mark from Churrascaria Boi Na Brasa Corp. to Terra Sul.

Ownership rights in a trademark can be transferred by a written assignment or by operation of law.<sup>31</sup> Because trademark rights exist only appurtenant to an established business, trademark rights cannot be transferred except in connection with the goodwill of the business or enterprise in connection with which the mark is used.<sup>32</sup>

Under New Jersey law, any mark, registration or application for registration is assignable with the goodwill of the business in which the mark is used.<sup>33</sup> The statute very clearly requires, however, that any such assignment “shall be by instruments *in writing* duly executed and shall be recorded with the Secretary of State upon payment of the recording fee payable to the Secretary of State.”<sup>34</sup> Terra Sul has produced no evidence that it acquired rights in the CHURRASCARIA BOI

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<sup>30</sup> Petitioner’s Br. at 3.

<sup>31</sup> See 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 18 *et. seq.* (4<sup>th</sup> ed. 2008).

<sup>32</sup> 15 U.S.C. § 1060; *Id.* at § 18:2.

<sup>33</sup> N.J. STAT. ANN. § 56:3-13.6 (1995) (emphasis added).

<sup>34</sup> *Id.* Additionally, New Jersey’s Statute of Frauds likewise requires that any “contract for the sale of personal property will be unenforceable by way of action or defense beyond five thousand dollars in amount or value of remedy unless there is some writing which indicates that a contract for sale has been made between the parties at a defined or stated price, reasonably identifies the subject matter, and is signed by the party against whom enforcement is sought or by his authorized agent.” N.J. STAT. ANN. § 12A:1-206 (2001).

NA BRASA mark from Churrascaria Boi Na Brasa Corp. by written assignment as required by New Jersey law.

Nor is there any evidence that Petitioner “acquired” the rights in the CHURRASCARIA BOI NA BRASA mark by operation of law. Terra Sul has not produced any bill of sale, asset purchase agreement, merger document, change-of-name certificate, or any other writing that would evidence a transfer of any rights in the *mark* CHURRASCARIA BOI NA BRASA from Churrascaria Boi Na Brasa Corp. to Terra Sul. Even if Terra Sul were presumed to have acquired some ownership interest in Churrascaria Boi Na Brasa Corp., that corporation would presumptively be a separate legal entity from Terra Sul, and Terra Sul would not automatically own the acquired company’s assets.<sup>35</sup> Thus, unless Churrascaria Boi Na Brasa Corp. transferred its assets to Terra Sul, for which there is no evidence, or unless Churrascaria Boi Na Brasa Corp. was merged into Terra Sul, again, for which there is no evidence, Petitioner did not acquire any trademark rights from Churrascaria Boi Na Brasa Corp. by operation of law.<sup>36</sup>

Terra Sul’s Registration of Alternate Name further refutes its own claim to have acquired rights in the CHURRASCARIA BOI NA BRASA mark in January 1999. In fact, Petitioner’s registration of its alternate name is inconsistent with its claim in this proceeding—that it acquired and has continued to use the CHURRASCARIA BOI NA BRASA mark, stating instead that the name had *not* been used before January 16, 2007.

New Jersey’s statute concerning the use of corporate alternate names prohibits the use of assumed corporate names without the company’s actual name unless a company has complied with N.J. STAT. ANN. § 14A:2-2.1 (2008), which states:

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<sup>35</sup> See Fletcher Cyclopedic Corporations, Ch. 2 § 29.

<sup>36</sup> There is certainly no evidence of any merger of the two companies here. Churrascaria Boi Na Brasa continues to exist as a New Jersey corporation. See Exhibit B.

“no domestic corporation...shall transact any business in this State using a name other than its actual name unless (a) it also uses its actual name in the transaction of any such business in such a manner as not to be deceptive as to its actual identity; or (b) it has been authorized to transact business in this State, using an assumed name as provided in subsection 14A:2-2(3); or (c) it has first registered the alternate name as provided in this section.”

The statute permits a corporation to adopt and use any alternate name by filing a certificate of registration of a corporate alternate name with the New Jersey Secretary of State. In that registration, the corporation must state that it “has not previously used the alternate name in this State in violation of this section,” or, if it has used the assumed name to transact business in the state, to identify “the month and year in which it commenced such use.”<sup>37</sup>

In its alternate-name registration, Terra Sul’s president, Salch, swore that Terra Sul had not “previously used the Alternate Name [Churrascaria Boi Na Brasa] in this state in violation of this Statute.”<sup>38</sup> In the section of the registration requiring identification of the month and year in which it had used an assumed name, Terra Sul answered “N/A.”<sup>39</sup> Terra Sul thus certified to the New Jersey authorities that, as of January 16, 2007, it had never used the name “Churrascaria Boi Na Brasa” separate and apart from its corporate name, which, of course, is completely contrary to the position taken here.

In addition to the alternate-name registration in February 2007, other documents cast doubt on Petitioner’s claim that it acquired the trademark rights in CHURRASCARIA BOI NA BRASA from Churrascaria Boi Na Brasa Corp. in 1999.<sup>40</sup> Several insurance policies for the restaurant at

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<sup>37</sup> *Id.*

<sup>38</sup> Petitioner’s Br. at E. A-19 ¶ 8.

<sup>39</sup> *Id.* Statements made in alternate name registrations are made under oath. See N.J. STAT. ANN. § 56:1-2.

<sup>40</sup> Terra Sul makes the astonishing claim that “it is not disputed that by January 1999, Petitioner was already in business, continued to do business, and had acquired goodwill in its name in at least New York and New Jersey” and cites Petitioner’s Ex. A-15 and A-16 as support for this claim. Boi Na Braza assuredly does dispute this claim and in

70 Adams Street, Newark, New Jersey are of record. One covers the period from May 22, 1998 to May 22, 1999,<sup>41</sup> and the second covers the period June 14, 1999 to June 14, 2000.<sup>42</sup> Both policies name “Churrascaria Boi Na Brasa,” not Terra Sul, as the insured Party,<sup>43</sup> and both cover a period in which Petitioner claims to have owned rights in the CHURRASCARIA BOI NA BRASA mark.

Petitioner has also produced a federal intent-to-use trademark application signed, but apparently never filed, by Saleh, *in March 2002*, in which Saleh identifies himself personally as the applicant, and states under oath that the basis of his application for the mark CHURRASCARIA BOI NA BRASA is an intent to use under Section 1(b) of the Lanham Act.<sup>44</sup> Under the Lanham Act, a person who has a “bona fide intention... to use a trademark in commerce may request registration of its trademark on the principal register...”<sup>45</sup> In such application, the applicant must verify a statement that specifies that “to the best of the verifier’s knowledge and belief, no other person has the right to use such mark in commerce either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods of such other person, to cause confusion, or to cause mistake, or to deceive.”<sup>46</sup>

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fact the Exhibits that Petitioner cites do *not* show that Petitioner has commenced doing business and certainly does not show that Petitioner had acquired any goodwill in its name in New York in Jew Jersey. These documents show only that Churrascaria Boi Na Brasa Corp. had a single advertisement in a Portuguese-language newspaper and had a single business dealing at Trump Taj Mahal in Atlantic City, New Jersey.

<sup>41</sup> Petitioner’s Br. at Ex. A-8.

<sup>42</sup> Petitioner’s Br. at Ex. A-9.

<sup>43</sup> Petitioner’s Br. at Ex. A-8 and A-9.

<sup>44</sup> *See* Exhibit C.

<sup>45</sup> 15 U.S.C. § 1051(b).

<sup>46</sup> *Id.*

Thus, in 2002, Petitioner's president and sole shareholder,<sup>47</sup> Saleh, signed a sworn statement not only that he, Saleh, was not currently using but had a bona fide intention to use the CHURRASCARIA BOI NA BRASA mark in the future, but that he knew of *no other person that had the right to use such mark in commerce*. The following language is clearly printed on the Service Mark Application which Saleh signed:

The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements, and the like, may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered, or, if the application is being filed under 15 U.S.C. Section 1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of his/her own knowledge are true; and that all statements made on information and belief are believed to be true.

Directly under this language on the application, Saleh signed his name and had the document notarized. Saleh therefore swore, under oath, that he had not used the CHURRASCARIA BOI NA BRASA mark in commerce prior to March 2002 and that he knew of no other entity, which would presumably include Petitioner, that had the right to use such mark commerce. This is in direct contradiction to Petitioner's claim that it acquired rights in the CHURRASCARIA BOI NA BRASA mark from Churrascaria Boi Na Brasa Corp. in 1999. It is also worth noting that as of the date identified on the application, Churrascaria Boi Na Brasa Corp. does not appear to have been dissolved as the New Jersey Department of Treasury's Division of Revenue issued a Business

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<sup>47</sup> In his deposition, Saleh is actually unclear as to whether his wife is a shareholder or if she simply has an interest in his shares. Petitioner's Br. at Ex. A, p.93, line 10-20.

Registration Certificate for such corporation in June 2008.<sup>48</sup> The documents that Petitioner has produced, documents which have been sworn to by Petitioner’s president, therefore directly contradict Petitioner’s claim that it acquired rights in the CHURRASCARIA BOI NA BRASA mark from Churrascaria Boi Na Brasa Corp. in 1999.

Even where state statutes do not require trademark assignments to be in writing, the existence of an assignment must be proved “by clear and uncontradicted oral testimony of a person in a position to have actual knowledge.”<sup>49</sup> In such cases, the courts have required “strong evidence to establish an assignment is appropriate both to prevent parties from using self-serving testimony to gain ownership of trademarks and to give parties incentive to identify expressly the ownership of the marks they employ.”<sup>50</sup>

Here, the only evidence that Petitioner acquired rights in the CHURRASCARIA BOI NA BRASA mark is Saleh’s testimony that “Terra Sul Corp. acquire[d] ownership of Churrascaria Boi Na Brasa” in 1999 and that “Terra Sul [was] a registered corporation.”<sup>51</sup> As the president and sole shareholder of Petitioner, Saleh’s testimony is clearly self-serving. Additionally, his testimony is unclear and contradicted by documentary evidence. First, Saleh is not clear in his testimony as to whether Terra Sul acquired ownership of the *mark* or the *corporation*. Second, the documentary evidence contradicts Saleh’s testimony that Terra Sul acquired the mark in 1999.<sup>52</sup> Petitioner’s

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<sup>48</sup> See Exhibit B.

<sup>49</sup> *Doebler’s Penn. Hybrids, Inc. v. Taylor Doebler, III, et. al.*, 442 F.3d 812, 822, 78 U.S.P.Q.2D (BNA) 1509 (3d Cir. 2006) citing *TMT North America, Inc. v. Magic Touch GmbH*, 124 F.3d 876, 884, 43 U.S.P.Q.2D (BNA) 1912 (7th Cir. 1997).

<sup>50</sup> *Id*

<sup>51</sup> Petitioner’s Br. at Ex. A, p. 51, lines 16-26.

<sup>52</sup> See *Doebler’s*, *supra* note 49 at 822 (finding that documentary evidence that contradicted the self-serving testimony of a principal of the party claiming assignment of a mark to be support for the conclusion that mark was not assigned).

alternate name registration asserts that Petitioner never used the mark before February 2007.

Saleh's 2002 intent-to-use trademark application stated that he, the president and sole shareholder, had never used the mark but intended to do so, and also that he knew of no other person with a right to use such mark. Last, the insurance policies produced by Petitioner identify "Churrascaria Boi Na Brasa" as the insured party after January 1999, the date Petitioner alleges it acquired the mark from Churrascaria Boi Na Brasa Corp.<sup>53</sup>

Saleh's testimony is clearly self-serving, inconsistent with prior sworn statements and contradicted by the evidence and as such in no way establishes that Petitioner validly acquired the CHURRASCARIA BOI NA BRASA mark from Churrascaria Boi Na Brasa Corp. Even if New Jersey did not require transfer of trademark ownership to be in writing, Saleh's testimony alone is insufficient to establish the transfer of any trademark rights from Churrascaria Boi Na Brasa Corp. to Terra Sul in 1999.

### **III. Petitioner has failed to establish that Churrascaria Boi Na Brasa Corp. had substantial and continuous trademark rights before Boi Na Braza adopted its mark in July 1999.**

To establish prior rights, Petitioner must show that it or its predecessor-in-interest used the CHURRASCARIA BOI NA BRASA mark not on one sporadic occasion but continuously from a time before Registrant's first date of first use.<sup>54</sup>

Petitioner points to the evidence in Exhibits A-15 and A-16 as proof that Churrascaria Boi Na Brasa Corp. adopted and used the mark CHURRASCARIA BOI NA BRASA before Registrant's first use of the mark in July 1999. Those exhibits contain two advertisements in a Brazilian Press newspaper for the Adams Street restaurant, a 1996 insurance policy, and a Hold

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<sup>53</sup> Petitioner's Br. at Ex. A-8 and A-9.

<sup>54</sup> *Casual Corner Associates, Inc. v. Casual Stores of Nevada, Inc.*, 493 F.2d 709 (9th Cir. 1974) (stating that in order to establish prior state common law rights in a mark, a petitioner must "establish that it has a valid right under state law acquired by a use continuing from a date prior to the registration and publication of the mark under the federal trademark laws...[t]o be a continuing use, the use must be maintained without interruption.")

Harmless and Indemnity Agreement between Trump Taj Mahal Casino Resort and Churrascaria Boi Na Brasa.<sup>55</sup>

The U.S.P.T.O. has consistently taken the position that to constitute evidence of service mark use, a document must show the mark as actually used in the sale or advertising of the services.<sup>56</sup> The fact that Churrascaria Boi Na Brasa Corp. took out an insurance policy in 1996 may constitute evidence that the company was in existence, but it does not prove that the company was using the term “CHURRASCARIA BOI NA BRASA” as a service mark for restaurant services. Nor does the fact that Churrascaria Boi Na Brasa Corp. entered into a contract with Trump Taj Mahal, obligating it to indemnify Trump Taj Mahal against any and all claims and liabilities incurred from Churrascaria Boi Na Brasa’s provision of food or grocery products or breach of any warranties related to the quality of its products. While newspaper advertising can constitute service mark use, depending on the circumstances, only one of the two newspaper ads offered into evidence by Petitioner, was even published before Boi Na Brasa’s July 19, 1999 date of first use. Apart from the single newspaper advertisement in the *Brazilian Press* dated September 17-23, 1997, the only other evidence offered by Petitioner that Churrascaria Boi Na Brasa Corp. used the mark between 1996 and July 19, 1999, is Saleh’s testimony that his corporation Churrascaria Boi Na Brasa Corp. used the mark continuously beginning in 1996 until the rights were “acquired” by Terra Sul sometime in 1999.

Oral testimony alone is not enough to establish prior trademark use unless it is clear, convincing, consistent and sufficiently circumstantial to convince the trier of fact of the probative

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<sup>55</sup> Cancelled checks signed by Churrascaria Boi Na Brasa Corp. and corporate documents showing that Churrascaria Boi Na Brasa Corp. did business in New Jersey does not constitute evidence that they used “CHURRASCARIA BOI NA BRASA” as a service mark for restaurant services. *See* TMEP § 1301.04.

<sup>56</sup> *See* 37 C.F.R. § 2.56(b)(2); TMEP § 1301.04.

value of the testimony.<sup>57</sup> Here, Saleh’s testimony has not been clear about when the mark was first used, the alleged transfer of the mark, and the ways his corporation allegedly used the mark from 1996-1999. For example, Saleh testifies that he started to “think about the idea [of a restaurant] in 1995”<sup>58</sup> and that he was not one hundred percent sure as to when his company began advertising the CHIURRASCARIA BOI NA BRASA mark in newspapers, but in “1997, I think.”<sup>59</sup> As substantiation for its claim of newspaper advertising, Petitioner has submitted only a single advertisement prior to Registrant’s date of first use. No other specimens of use of the mark have been submitted as evidence of use, despite Saleh’s claims that he advertised in fliers around Newark and perhaps also the newspaper *Brazilian Voice*.<sup>60</sup> Saleh thus gives no clear testimony regarding the date that the mark was first used to identify his restaurant services, referring only to opening in 1996 and advertising in newspapers in 1997. Saleh first testified that he filed the Registration of Alternate Name with the State of New Jersey on January 16, 2008 and then changed his testimony to identify February 18, 2008.<sup>61</sup> In response to the question of who was the owner of Churrascaria Boi Na Brasa on May 22, 1999, Saleh testified as follows:

Okay. From ’98—actually ’99, Churrascaria Boi Na Brasa Corp. owned Churrascaria Boi Na Brasa. I was the president. In ’99, we changed the corporation and I was the president, and then [the CHURRASCARIA BOI NA BRASA mark] went to Terra Sul. However this insurance policy—so the period on this [insurance] policy is until the fifth month. So the next [insurance policy] probably—so to tell you the truth, if I’m going to answer, now I would say that Churrascaria Boi Na Brasa Corp. was the owner until ’99 and as of 1999, we’ve created another corporation that because the owner and I was president.<sup>62</sup>

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<sup>57</sup> See *Thompson Medical Co., Inc. v. Alberto-Culver Co.*, 156 U.S.P.Q. 133, 135 (TT & A Bd 1981); see also *H. Betti Industries, Inc. v. Brunswick Corp.*, 211 U.S.P.Q. 1188, 1187 (TT & A Bd 1981).

<sup>58</sup> Petitioner’s Br. at Ex. A, p.39, lines 10-11.

<sup>59</sup> Petitioner’s Br. at Ex. A, p. 40, lines 24-25.

<sup>60</sup> Petitioner’s Br. at Ex. A, p. 41, lines 2-15.

<sup>61</sup> Petitioner’s Br. at Ex. A, p.54, lines 12-15, p. 55, lines 16-18.

This explanation is vague and unclear as to how the corporation was “changed” and how the CHURRASCARIA BOI NA BRASA mark “went” to Terra Sul. In fact, Saleh himself appears to be uncertain as to when Terra Sul acquired the mark.

Saleh’s testimony is not only vague and fails to identify a clear date that the mark was put into use to advertise the restaurant services and establish a clear chain of title for the mark, but is not corroborated by any other person and is contradicted by his own documents — the assumed name registration and the intent-to-use application. Petitioner has failed to prove by a preponderance of the evidence that Churrascaria Boi Na Brasa Corp. was the senior user and that Petitioner is the senior user by virtue of having acquired Churrascaria Boi Na Brasa’s trademark rights. Petitioner has therefore failed to overcome the presumption that Boi Na Braza is the owner of the BOI NA BRAZA mark to which it is entitled by virtue of its Registration.

**IV. Petitioner has not rebutted the presumption that Registrant’s mark is inherently distinctive.**

Registrant’s Registration is prima facie evidence of the BOI NA BRAZA mark’s validity.<sup>63</sup> “A mark that is registered on the Principal Register is entitled to all of the Section 7(b) presumptions including the presumption that the mark is distinctive, and moreover, in the absence of a Section 2(f) claim in the registration, that the mark is inherently distinctive of for the goods.”<sup>64</sup> Registrant, therefore, is entitled to a strong presumption that its mark is distinctive.<sup>65</sup>

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<sup>62</sup> Petitioner’s Br. at Ex. A, p.27, lines 18-25, p. 28, lines 2-5.

<sup>63</sup> See 17 U.S.C. § 1057.

<sup>64</sup> The mark was not registered under Section 2(f) of the Lanham Act. See, e.g., *Sally Beauty Co. v. Beautyco, Inc.*, 304 F.3d 964, 64 U.S.P.Q. 2d 1321, 1326 (10th Cir. 2002) (rebuttable presumption that the mark is inherently distinctive); and *Equine Technologies Inc. v. Equitechnology, Inc.*, 68 F.3d 542, 36 USPQ2d 1659, 1661 (1st Cir. 1995) (holder of the mark entitled to presumption that its registered trademark is inherently distinctive). See also *McCarthy*,

Petitioner has failed to offer any evidence at all as to how the term “Ox in embers” is descriptive of restaurant services. Petitioner points to Boi Na Braza’s statement in its Answers to Petitioner’s Interrogatories that the term “boi na brasa” is “a well-known name that is often used in Brazil.”<sup>66</sup> However, Petitioner did *not* state “boi na brasa” is used to identify restaurant services in Brazil. “Apple” is a well-known name for a fruit in the United States. That fact, however, does not mean that “apple” cannot function as a trademark for consumer electronic devices. The extent to which “boi na brasa” is used in Brazil is irrelevant to whether the term BOI NA BRAZA is distinctive of restaurant services in the United States.<sup>67</sup>

In determining whether a mark is descriptive, there are a number of tests which can be applied. One such test is the “imagination” test, which notes that: “[a] term is suggestive if it requires imagination, thought and perception to reach a conclusion as to the nature of the goods. A term is descriptive if it forthwith conveys an immediate idea of the ingredients, qualities or characteristics of the goods.”<sup>68</sup> Here, the mark BOI NA BRAZA requires great imagination—and a knowledge of the Portuguese language—to reach a conclusion as to the nature of the goods. A second test that is often used in determining whether a mark is descriptive or suggestive is the “competitor’s need” test. The analysis under this test is whether “the suggestion made by the mark [is] so remote and subtle that it is really not likely to be needed by competitive sellers to describe

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supra note 31 at §11:43 (4<sup>th</sup> ed. 2006) (noting that “The vast majority of courts have interpreted this section [7(b)] to mean that plaintiff in litigation is entitled to a strong prima facie presumption that its registered mark is either not ‘merely descriptive’ or if descriptive, that secondary meaning is presumed, which amounts to the same thing.”).

<sup>65</sup> There was no Section 2(f) claim in the registration, and therefore Registrant is entitled to the further presumption that its BOI NA BRAZA mark is inherently distinctive.

<sup>66</sup> Petitioner’s Br. at Ex. B, Interrogatory No. 16.

<sup>67</sup> Petitioner argues that changing the letter “s” to a letter “z” in the word “Braza,” does not make the mark distinctive. However, Registrant has never argued before the U.S.P.T.O. and does not argue here that using the letter “z” in “Braza,” instead of “s,” makes the mark distinctive.

<sup>68</sup> *Stix Prods., Inc. v. United Merchants & Mfrs., Inc.*, 295 F. Supp. 479 (S.D.N.Y. 1968).

their goods.”<sup>69</sup> “As the amount of imagination needed increases, the need of [others to use] the mark to describe the product decreases.”<sup>70</sup> As applied here, competitors, including Petitioner, have absolutely no need to use the term “Boi Na Braza” to describe their restaurant services.

Petitioner has provided no evidence whatsoever that Registrant’s mark is descriptive. Furthermore, Petitioner has disregarded the statutory presumption of distinctiveness to which the BOI NA BRAZA Registration is entitled.<sup>71</sup> Instead, Petitioner has attempted to shift the burden to Registrant to “maintain” the presumptions granted to it under the Lanham Act. By failing to offer any evidence that the BOI NA BRAZA Registration merely descriptive, Petitioner not overcome the statutory presumption.

### **Summary and Conclusion**

Petitioner has failed in its burden of proving, by a preponderance of the evidence, valid grounds for cancellation of Registrant’s BOI NA BRAZA Registration. First, Petitioner has not proven that it acquired rights in the CHURRASCARIA BOI NA BRASA mark by either an assignment or by operation of law from Churrascaria Boi Na Brasa Corp. The uncorroborated, self-serving testimony of Terra Sul’s president, Saleh—testimony that is contradicted by documentary evidence, is furthermore insufficient to prove that Petitioner has acquired any trademark rights in the CHURRASCARIA BOI NA BRASA mark.

Second, Petitioner has failed to establish rights in the CHURRASCARIA BOI NA BRASA mark that are senior to Registrant. Petitioner has offered only a single advertisement in a Portuguese-language newspaper that allegedly pre-dates Registrant’s first use date. Such is not

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<sup>69</sup> See 2 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 11:68 (2005); see also *Union Carbide Corp. v. Ever-Ready, Inc.*, 531 F.2d 366 (7th Cir. 1976), *cert. denied*, 429 U.S. 830 (1976).

<sup>70</sup> *Id.*

<sup>71</sup> As has been noted, the Registration includes no claim of acquired distinctiveness under Section 2(f).

sufficient to show continuous use of its mark prior to Registrant's date of first use of its BOI NA BRAZA mark. Further, Petitioner's uncorroborated and self-serving testimony of continuous use of the CHURRASCARIA BOI NA BRASA mark is contradicted by documents sworn to by Saleh, president and sole shareholder of Terra Sul, stating that the mark was not in use as of March 21, 2002 and had not been used in New Jersey before January 16, 2007.

Finally, Petitioner has offered no evidence that Registrant's Registration is merely descriptive of restaurant services and has instead attempted to shift the burden of proof to Registrant to prove that its BOI NA BRAZA mark has acquired secondary meaning. Registrant's Registration is *prima facie* evidence of the validity of the mark and was not registered under Section 2(f) of the Lanham Act. The Registration, therefore, is presumed inherently distinctive. Petitioner may not disregard the statutory presumption and, without offering any evidence of its own, shift the burden to Registrant to prove that the BOI NA BRAZA Registration is *not* merely descriptive.

Accordingly, Registrant respectfully submits that Petitioner has not met its burden for canceling the Registration. Registrant respectfully requests that the Board deny Petitioner's Petition to Cancel the Registration and that such Registration continue in full force and effect.

Dated: April 15, 2009

Respectfully submitted,

Boi Na Braza, Inc.

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Attorneys for Registrant  
Boi Na Braza, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing REGISTRANT BOI NA BRAZA'S TRIAL BRIEF is being served upon Petitioner's attorney of record, Eamon J. Wall, by First Class Mail, postage prepaid, on this 15<sup>th</sup> day of April, 2009, in an envelope addressed to:

Eamon J. Wall  
Wall & Tong, LLP  
595 Shrewsbury Avenue, Suite 100  
Shrewsbury, New Jersey 07702

Remy M. Davis  
Remy M. Davis

**EXHIBIT A**

**Int. Cl.: 42**

**Prior U.S. Cls.: 100 and 101**

**United States Patent and Trademark Office**

**Reg. No. 2,534,608**

**Registered Jan. 29, 2002**

**SERVICE MARK  
PRINCIPAL REGISTER**

**BOI NA BRAZA**

**BOI NA BRAZA, INC. (TEXAS CORPORATION)  
4025 WILLIAM D. TATE  
GRAPEVINE, TX 76501 BY ASSIGNMENT MATH-  
EUS BROTHERS, THE (PARTNERSHIP) AR-  
LINGTON, TX 76011**

**FOR: RESTAURANT SERVICES, IN CLASS 42  
(U.S. CLS. 100 AND 101).**

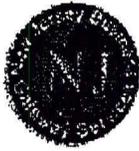
**FIRST USE 7-19-1999; IN COMMERCE 9-11-2000.**

**THE ENGLISH TRANSLATION OF "BOI NA  
BRAZA" MEANS "OX IN EMBERS".**

**SN 75-748,967, FILED 7-1-1999.**

**IRENE D. WILLIAMS, EXAMINING ATTORNEY**

**EXHIBIT B**

**STATE OF NEW JERSEY  
BUSINESS REGISTRATION CERTIFICATE**

<b>Taxpayer Name:</b>	CHURRASCARIA BOI NA BRASA CORP
<b>Trade Name:</b>	
<b>Address:</b>	70 ADAMS ST NEWARK, NJ 07105
<b>Certificate Number:</b>	0665488
<b>Effective Date:</b>	June 03, 1996
<b>Date of Issuance:</b>	June 12, 2008

**For Office Use Only:**  
20080612160159914

**EXHIBIT C**

**\*Trademark/Service Mark Application\***

**\* To the Commissioner for Trademarks \***

<DOCUMENT INFORMATION>  
<TRADEMARK/SERVICEMARK APPLICATION>  
<VERSION 1.22>

**<APPLICANT INFORMATION>**

<NAME> Farid Saleh  
<STREET> 70 Adam St  
<CITY> Newark  
<STATE> NJ  
<COUNTRY> USA  
<ZIP/POSTAL CODE> 07105  
<TELEPHONE NUMBER> 973-589-6069

**<APPLICANT ENTITY INFORMATION>**

<CORPORATION: STATE/COUNTRY OF INCORPORATION> New Jersey

**<TRADEMARK/SERVICEMARK INFORMATION>**

<MARK> CHURRASCARIA BOI NA BRASA CORP.

<TYPED FORM> Yes

**<BASIS FOR FILING AND GOODS/SERVICES INFORMATION>**

<INTENT TO USE: SECTION 1(b)> Yes

<LISTING OF GOODS AND/OR SERVICES> RESTURANT SERVICE

**<FEE INFORMATION>**

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<NUMBER OF CLASSES PAID> 1  
<NUMBER OF CLASSES> 1

**<LAW OFFICE INFORMATION>**

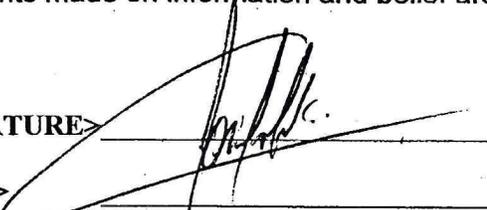
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<SIGNATURE AND OTHER INFORMATION>

~ PTO-Application Declaration: The undersigned, being hereby warned that willful false statements and the like so made are punishable under 15 U.S.C. §1001, and that such willful false statements may jeopardize the validity of the application or any resulting registration, do hereby execute this application on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered under 15 U.S.C. §1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge, no other person or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely to cause confusion, or to cause mistake, or to deceive; and that all statements made on information and belief are believed to be true.

<SIGNATURE>



\* please sign here\*

<DATE>

<NAME> Farid Saleh

<TITLE> CEO

2007/07/16/2007  
 CHIEF INFORMATION OFFICER  
 PUBLIC OF NEW JERSEY  
 GUEL F. DESOUSA



The information collected on this form allows the PTO to determine whether a mark may be registered on the Principal register and provides notice of an applicant's claim of ownership of the mark. Responses to the request for information are required to obtain the benefit of a registration on the Principal or Supplemental register. 15 U.S.C. §§1051 et seq. and 37 C.F.R. Part 2: All information collected will be made public. Gathering and providing the information will require an estimated 12 or 18 minutes (depending if the applicant uses the mark in commerce, use of the mark in commerce, or a foreign application or registration). Please direct comments on the time needed to complete this form, and/or suggestions for reducing this burden to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, Washington D.C. 20231. Please note that the PTO may not conduct or sponsor a collection of information using a form that does not display a valid OMB control number.