

ESTTA Tracking number: **ESTTA453632**

Filing date: **01/27/2012**

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

Petition for Cancellation

Notice is hereby given that the following party requests to cancel indicated registration.

Petitioner Information

Name	Home Team Wines, LLC		
Entity	Limited Liability Company	Citizenship	California
Address	955 Broadway Sonoma, CA 95476 UNITED STATES		

Attorney information	Kathleen E. Letourneau Owen, Wickersham & Erickson, P.C. 455 Market Street, 19th Floor San Francisco, CA 94105 UNITED STATES kel@owe.com, mowen@owe.com, tmpparalegal3@owe.com Phone:415-882-3200		
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Registration Subject to Cancellation

Registration No	3911885	Registration date	01/25/2011
Registrant	Patari, Wayne R 4233 Rosewood Road Schnecksville, PA 18078 UNITED STATES		

Goods/Services Subject to Cancellation

Class 044. First Use: 2010/10/15 First Use In Commerce: 2010/10/15 All goods and services in the class are cancelled, namely: Vineyard and winery services, namely, the cultivation of grapes for others

Grounds for Cancellation

Other	Nonuse in Interstate Commerce
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Attachments	Petition to Cancel - BLUEBIRD VINEYARD.pdf (14 pages)(1214789 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/Kathleen Letourneau/
Name	Kathleen E. Letourneau

Date	01/27/2012
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re Registration of:

Registrant: Wayne R. Patari
Registration No.: 3,911,885
Issued: January 25, 2011
Mark: **BLUEBIRD VINEYARD**

HOME TEAM WINES, LLC

Petitioner,

v.

WAYNE R. PATARI

Registrant.

Cancellation No.

PETITION FOR CANCELLATION

Home Team Wines, LLC (hereinafter “Petitioner”) a limited liability company duly organized and existing under the laws of California, with a business address of 955 Broadway, Sonoma, California 95476, believes that it is and will continue to be damaged by Registration No. 3,911,885 and hereby petitions to cancel said registration in its entirety.

To the best of Petitioner’s knowledge, the name and address of the current owner of the registration is: Wayne R. Patari, 4233 Rosewood Road, Schnecksville, Pennsylvania 18078 (hereinafter “Registrant”). As grounds for complete cancellation, Petitioner alleges on knowledge as to itself and otherwise upon information and belief, as follows:

1. Petitioner is engaged in the business of making and selling wine.
2. Petitioner filed an intent to use application for the trademark BLUEBIRD for “wine” in International Class 33 on March 9, 2010 and was assigned application Serial No. 77/954,768.
3. Petitioner filed its Amendment to Allege Use on December 20, 2010 setting forth a date of first use in commerce of August 17, 2010.
4. Petitioner received office actions dated June 14, 2010 and July 27, 2011 refusing registration of its BLUEBIRD mark based on Section 2(d) confusing similarity with Registrant’s registration for BLUEBIRD VINEYARD (Registration No. 3,911,885).
5. Registrant filed an intent to use application in his name to register the service mark BLUEBIRD VINEYARD for “vineyard and winery services, namely, the cultivation of grapes for others” in International Class 44 on August 17, 2009.
6. On November 8, 2010, Registrant filed a Statement of Use claiming a date of first use in commerce of October 15, 2010. Registrant’s Statement of Use included the following material representation: “Applicant . . . is using the mark in commerce on or in connection with the goods/services identified above” (emphasis added).
7. Registrant’s Statement of Use was accompanied by specimens of use consisting of 1) copies of Registrant’s application to the Office of the Secretary of the Commonwealth of Pennsylvania for the fictitious business name “Bluebird Vineyard” and 2) a photograph which included a display of unlabeled wine bottles and a crate of grapes with a printout tacked to it that read “BLUEBIRD VINEYARD PENNSYLVANIA WINE GRAPES.” Attached hereto as Exhibit A is a true and correct copy of Registrant’s Statement of Use and specimens, as obtained through the United States Patent and Trademark Office

(USPTO) TSDR Portlet.

8. On January 25, 2011, the USPTO accepted Registrant's Statement of Use and issued trademark Registration No. 3,911,885.

9. Petitioner contends that Registrant did not meet the required use standard for obtaining a trademark registration. A trademark registration requires the mark be used "in commerce" prior to registration or it is void ad initio. See Aycock Eng'g, Inc., v. Airflite, Inc., 560 F.3d 1350, 1357 (Fed. Cir. 2009). Section 45 of the Trademark Act, 15 U.S.C. §1127, defines "commerce" as "all commerce which may lawfully be regulated by Congress. Section 45 defines "use in commerce" as "the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in the mark." For service marks, the "use in commerce" requirement is met when 1) a mark is "used or displayed in the sale or advertising of services" and 2) and (i) the services are "rendered in commerce" or (ii) the services are "rendered in more than one State or in the United States and a foreign country." 15 U.S.C. §1127. Interstate commerce (i.e., commerce which takes place across state and/or national boundaries) is a prerequisite to obtaining and maintaining federal trademark registration. Commercial trade that takes place entirely within one state (i.e., a purely intrastate use) is not generally considered "use in commerce" for federal registration purposes.

10. Petitioner believes and therefore alleges that Registrant's mark BLUEBIRD VINEYARD is not, and at the time of the application which resulted in Registration No. 3,911,885 was not, in use in interstate commerce. Petitioner conducted a phone conversation with Registrant on January 10, 2011 where Registrant indicated that he has only done business with two local Pennsylvania wineries, one which is called "Monterre". Petitioner additionally conducted an investigation into the use of the BLUEBIRD VINEYARD mark by

Registrant and Registrant's related business activity by means of Internet research. Petitioner was unable to find any online business presence for Registrant. Based on such investigation and information and belief, and based on Petitioner's conversations with Registrant, Registrant's use of the BLUEBIRD VINEYARD mark has been limited to the state of Pennsylvania. Registrant has not used the BLUEBIRD VINEYARD mark on or in connection with "vineyard and winery services, namely, the cultivation of grapes for others" in interstate commerce. Therefore, Registrant has no right to maintain its registration on the Principal Register.

11. Furthermore, Registrant's Statement of Use specimens do not support a finding that Registrant used BLUEBIRD VINEYARD as a service mark on or in connection with "vineyard and winery services, namely, the cultivation of grapes for others" in International Class 44. First, Registrant's fictitious business name application merely confirms that Registrant owns a business by the fictitious business name "Bluebird Vineyard." However, the Trademark Act does not provide for registration of mere trade names. See In re Letica Corp., 226 USPQ 276, 277 (TTAB 1985). Second, the photo supplied by Registrant does not show the BLUEBIRD VINEYARD mark as used in the sale or advertising of the "vineyard and winery services, namely, the cultivation of grapes for others" services recited in the application. A specimen must show an association between the mark and the services for which registration is sought. 15 U.S.C. §§1051, 1127; see also, In re Adair, 45 USPQ2d 1211 (TTAB 1997) (tags affixed to decorated Christmas tree that bear the mark "TREE ARTS CO. and design" and the applicant's location, but make no reference to services, fail to show use for "design services in the nature of designing handcrafted, permanently decorated Christmas and designer trees"); In re Johnson Controls, Inc., 33 USPQ2d 1318 (TTAB 1994) (labels

affixed to packaging of valves do not show use of mark for custom manufacture of valves). In this case, Registrant's photo does not show an association with the cultivation of grapes for others. Rather, the specimen appears to show an association with wine (International Class 33) or fresh wine grapes (International Class 31), neither of which are among the goods or services listed in Registrant's registration. As such, Registrant's specimens of use do not serve to evidence Registrant's use in commerce.

12. Based on the foregoing circumstances, Registrant failed to render the service described in its registration in interstate commerce at the time Registrant filed his Statement of Use, and as of the date of this Petition for Cancellation. Registrant's registration is therefore void ab initio because Registrant made no bona fide use of the service mark BLUEBIRD VINEYARD in interstate commerce for the services recited in the subject registration, in contravention of the Trademark Act.

13. Petitioner is and will continue to be injured and damaged by the existence of Registration No. 3,911,885 because said Registration will prevent Petitioner from obtaining its own registration. Registration No. 3,911,885 permits Registrant to retain the presumption of an exclusive right to the trademark BLUEBIRD VINEYARD for "vineyard and winery services, namely, the cultivation of grapes for others" in International Class 44, and thereby casts a cloud upon Petitioner's right to use the mark BLUEBIRD in the United States, especially as the registration for BLUEBIRD VINEYARD has been cited as a basis for rejecting Petitioner's application for BLUEBIRD for "wine" in International Class 33.

14. Petitioner has a reasonable expectation that if it continues to manufacture, promote, offer for sale, sell, and otherwise distribute its BLUEBIRD wine, it will be subject to intimidation and possible legal action by Registrant.

WHEREFORE, Petitioner prays that Registration No. 3,898,834 be canceled in its entirety and that this Petition for Cancellation be sustained in favor of Petitioner.

Respectfully submitted,

OWEN, WICKERSHAM & ERICKSON, P.C.

Dated: January 27, 2012

By: 
Kathleen E. Letourneau
Melville Owen

Attorneys for Petitioner,
HOME TEAM WINES, LLC

455 Market Street, 19th Floor
San Francisco, CA 94105
Phone: (415) 882-3200
Fax: (415) 882-3232
E-mail: kel@owe.com
mowen@owe.com

Exhibit A

**~TRADEMARK/SERVICE MARK ALLEGATION OF USE (Statement of Use/
Amendment to Allege Use) (15 U.S.C. § 1051(c) or (d))~**

~To the Commissioner for Trademarks~

<TRADEMARK/SERVICEMARK INFORMATION>

<Mark> "BLUEBIRD VINEYARD" (STANDARD CHARACTER MARK)
<Serial Number> 77/805707

<APPLICANT INFORMATION>

<Name> PATARI, WAYNE R
<Street> 4233 ROSEWOOD ROAD
<City> Schnecksville, PENNSYLVANIA 18078
<State>
<Country> USA
<Zip/Postal Code>

<NOTICE OF ALLOWANCE INFORMATION>

<Notice of Allowance> ~Enter YES if you are filing the Allegation of Use after a Notice of Allowance has issued. If not, enter NO.~
YES

<GOODS AND/OR SERVICES INFORMATION>

<All Goods and/or Services in Application/Notice of Allowance>~The owner is using or using through a related company the mark in commerce on or in connection with all goods and/or services listed in the application or Notice of Allowance. If not, list in the next section the goods and/or services not in use to be deleted.~

<Goods and/or Services Not in Use to be Deleted>~In the following space, list only those goods and/or services (and/or entire class(es)) appearing in the application or Notice of Allowance for which the owner is not using the mark in commerce. LEAVE THIS SPACE BLANK IF THE OWNER IS USING THE MARK ON OR IN CONNECTION WITH ALL THE GOODS AND/OR SERVICES LISTED IN THE APPLICATION OR NOTICE OF ALLOWANCE.~



11-08-2010

U.S. Patent & TMO/PTM Mail Rpt. Dt. #30

<USE INFORMATION>

<Date of First Use Anywhere> OCT 15th 2010
<Date of First Use in Commerce> OCT 15th 2010

<OPTIONAL - REQUEST TO DIVIDE INFORMATION>

<Request to Divide> NO ~Enter YES if you are submitting a request to divide with this document. If not, enter NO.~

(CLASS 044)

<FEE INFORMATION>

\$100.00 x <Number of Classes> 1 = <Total Fees Paid> \$100.00

<SPECIMEN AND SIGNATURE INFORMATION>

~Applicant requests registration of the above-identified trademark/service mark in the United States Patent and Trademark Office on the Principal Register established by the Act of July 5, 1946 (15 U.S.C. §1051 et seq., as amended). Applicant is the owner of the mark sought to be registered, and is using the mark in commerce on or in connection with the goods/services identified above, as evidenced by the attached specimen(s) showing the mark as used in commerce.

(You MUST ATTACH A SPECIMEN showing the mark as used in commerce for at least one product or service in each international class covered.)

The undersigned being hereby warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements and the like may jeopardize the validity of this document, declares that he/she is properly authorized to execute this document on behalf of the Owner; and all statements made of his/her own knowledge are true and that all statements made on information and belief are believed to be true.~

~Signature~

Wayne Patari

<Date Signed>

NOV 6, 2010

<Name>

WAYNE PATARI

<Title>

OWNER

<CONTACT INFORMATION>

<Name>

WAYNE PATARI

<Company/Firm Name>

BLUE BIRD VINEYARD

<Street>

4333 Rosewood Road

<City>

Schnecksville PA

<State>

PA

<Country>

USA

<Zip/Postal Code>

18078

<Telephone Number>

610-799-0171

<Fax Number>

<e-Mail Address>

bluebirdvineyard@yahoo.com

<CERTIFICATE OF MAILING> ~Recommended to avoid lateness due to mail delay.~

~I certify that the foregoing is being deposited with the United States Postal Service as first class mail, postage prepaid, in an envelope addressed to the Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451, on~

<Date of Deposit>

NOV 6 2010

~Signature~

Wayne Patari

<Name>

WAYNE PATARI

The information collected on this form allows an applicant to demonstrate that it has commenced use of the mark in commerce regulable by Congress. With respect to applications filed on the basis of an intent to use 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 thirteen minutes. 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. (See bottom left side of this form).

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
CORPORATION BUREAU
401 NORTH STREET, ROOM 206
P.O. BOX 8722
HARRISBURG, PA 17105-8722
WWW.CORPORATIONS.STATE.PA.US/CORP

Bluebird Vineyard

THE CORPORATION BUREAU IS HAPPY TO SEND YOU YOUR FILED DOCUMENT. THE CORPORATION BUREAU IS HERE TO SERVE YOU AND WANTS TO THANK YOU FOR DOING BUSINESS IN PENNSYLVANIA.

IF YOU HAVE ANY QUESTIONS PERTAINING TO THE CORPORATION BUREAU, PLEASE VISIT OUR WEB SITE LOCATED AT WWW.CORPORATIONS.STATE.PA.US/CORP OR PLEASE CALL OUR MAIN INFORMATION TELEPHONE NUMBER (717)787-1057. FOR ADDITIONAL INFORMATION REGARDING BUSINESS AND / OR UCC FILINGS, PLEASE VISIT OUR ONLINE "SEARCHABLE DATABASE" LOCATED ON OUR WEB SITE.

ENTITY NUMBER: 3958368

Patari, Wayne
4233 Rosewood Road
Schnecksville, PA 18078

ST, PAO4B

From: pao4b@state.pa.us
Sent: Sunday, May 23, 2010 2:08 PM
To: ST, PAO4B
Subject: PAO4B New Registration *292645*

**PENNSYLVANIA DEPARTMENT OF STATE
CORPORATION BUREAU
Application for Registration of Fictitious Name
(54 Pa.C.S. § 311)**

Document will be returned to the name and address you enter below.

Name
Wayne Patari
Address
4233 Rosewood Road
Address

City
Schnecksville
Zip
StateCode
PA 18078

Commonwealth of Pennsylvania
FICTITIOUS NAME 2 Page(s)

Email: **wpatari@yahoo.com**

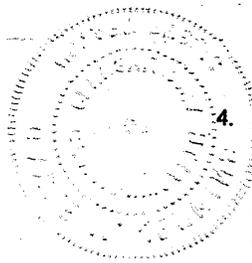


Fee: \$70

In compliance with the requirements of 54 Pa.C.S. § 311 (relating to registration), the undersigned entity(ies) desiring to register a fictitious name under 54 Pa.C.S. Ch.3 (relating to fictitious names), hereby state(s) that:

- The fictitious name is:
Bluebird Vineyard
- A brief statement of the character or nature of the business or other activity to be carried on under or through the fictitious name is:
the cultivation of grapes for others
- The address, including number and street, if any, of the principal place of business (P.O. Box alone is not acceptable):
Uff Road (street # not assigned yet) Kempton PA 19529 39
Number and Street City State Zip County
- The name and address, including number and street, if any, of each individual interested in the business is:

Name	Number and Street Address	City	State	Zip
Wayne Richard Patari	4233 Rosewood Road	Schnecksville	PA	18078
- Each entity, other than an individual, interested in such business is (are):: *0000*
- The applicant is familiar with the provisions of 54 Pa.C.S. § 332 (relating to effect of registration) and understands that filing under the Fictitious Names Act does not create any exclusive or other right in the fictitious name.



5/25/2010

**PENNSYLVANIA DEPARTMENT OF STATE
CORPORATION BUREAU
Fictitious Name Registration Signature Form**

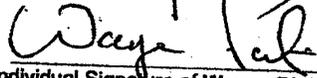
Document must be completed and mailed to the address listed below.

Department of State
Corporation Bureau
P.O. Box 8722
Harrisburg, PA 17105-8722
(717) 787-1057 (717) 787-1057

1. The enterprise structure is:
Sole Proprietorship
2. The enterprise legal name is:
Wayne Richard Patari
3. The enterprise's fictitious name is:
Bluebird Vineyard

IN TESTIMONY WHEREOF, the undersigned have caused this Application for Registration of Fictitious Name to be executed this

26 day of MAY 2010



Individual Signature of Wayne Richard Patari

0264520100523

PA DEPT. OF STATE

MAY 28 2010

Proof of Publication Notice in The Morning Call

Under Act No. 587, Approved May 16, 1929, and its amendments

COPY OF NOTICE OR ADVERTISEMENT

STATE OF PENNSYLVANIA }
COUNTY OF LEHIGH } SS:

Glenn Adams, Credit Manager of THE

MORNING CALL, INC., of the County and State aforesaid, being duly sworn, deposes and says that THE MORNING CALL is a newspaper of general circulation as defined by the aforesaid Act, whose place of business is 101 North Sixth Street, City of Allentown, County and State aforesaid, and that the said newspaper was established in 1888 since which date THE MORNING CALL has been regularly issued in said County, and that the printed notice or advertisement attached hereto is exactly the same as was printed and published in regular editions and issues of the said THE MORNING CALL on the following dates, viz.:

and the 30TH day of AUGUST A.D. 20 10

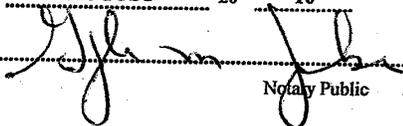
Affiant further deposes that he is the designated agent duly authorized by THE MORNING CALL, INC., a corporation, publisher of said THE MORNING CALL, a newspaper of general circulation, to verify the foregoing statement under oath, and the affiant is not interested in the subject matter of the aforesaid notice or advertisement, and that all allegations in the foregoing statements as to time, place and character of publication are true.



Designated Agent, THE MORNING CALL, INC.

SWORN to and subscribed before me this 3169 day of

AUGUST 20 10



Notary Public

COMMONWEALTH OF PENNSYLVANIA
Notarial Seal
Gayle M. Jenkins, Notary Public
City of Allentown, Lehigh County
My Commission Expires Jan. 29, 2013
Member, Pennsylvania Association of Notaries



My Commission Expires:

PUBLISHER'S RECEIPT FOR ADVERTISING COSTS

THE MORNING CALL, INC., publisher of THE MORNING CALL, a newspaper of general circulation, hereby acknowledges receipt of the aforesaid notice and publication costs and certifies that the same have been duly paid.

THE MORNING CALL, INC. a Corporation,
Publishers of THE MORNING CALL
A Newspaper of General Circulation

By 