

ESTTA Tracking number: **ESTTA473945**

Filing date: **05/23/2012**

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	The Rivertown Brewing Company, LLC		
Entity	Limited Liability Company	Citizenship	Ohio
Address	607 Shepherd Drive, Unit 6 Lockland, OH, OH 45215 UNITED STATES		

Attorney information	Karen Kreider Gaunt Dinsmore & Shohl 255 East Fifth Street, Suite 1900 Cincinnati, OH 45202 UNITED STATES karen.gaunt@dinsmore.com, sonya.pinner@dinsmore.com, robin.vanhorn@dinsmore.com Phone:513-977-8503
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Registrations Subject to Cancellation

Registration No	3502445	Registration date	09/16/2008
Registrant	Fyke, Christian 500 Jones Street Verona, PA 15147 UNITED STATES		

Goods/Services Subject to Cancellation

Class 043. First Use: 2002/07/12 First Use In Commerce: 2002/07/12 All goods and services in the class are cancelled, namely: Hotel, Bar and Restaurant Services

Grounds for Cancellation

<i>Torres v. Cantine Torresella S.r.l.Fraud</i>	808 F.2d 46, 1 USPQ2d 1483 (Fed. Cir. 1986)		
Abandonment	Trademark Act section 14		
The registration is being used by, or with the permission of, the registrant so as to misrepresent the source of the goods or services on or in connection with which the mark is used.	Trademark Act section 14		
Priority and likelihood of confusion	Trademark Act section 2(d)		
Registration No	3942905	Registration date	04/12/2011
Registrant	Fyke, Christian 160 Wallace Drive Monroeville, PA 15146 UNITED STATES		

Goods/Services Subject to Cancellation

Class 032. First Use: 2002/09/30 First Use In Commerce: 2002/09/30
 All goods and services in the class are cancelled, namely: Beer, ale, india pale ale, lager, stout, porter and pilsner; Non-alcoholic beverages, namely, carbonated beverages

Grounds for Cancellation

<i>Torres v. Cantine Torresella S.r.l.Fraud</i>	808 F.2d 46, 1 USPQ2d 1483 (Fed. Cir. 1986)
Abandonment	Trademark Act section 14
The registration is being used by, or with the permission of, the registrant so as to misrepresent the source of the goods or services on or in connection with which the mark is used.	Trademark Act section 14
Priority and likelihood of confusion	Trademark Act section 2(d)

Marks Cited by Petitioner as Basis for Cancellation

U.S. Application No.	85374373	Application Date	07/18/2011
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	THE RIVERTOWN BREWING COMPANY		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 040. First use: First Use: 2011/01/10 First Use In Commerce: 2011/01/10 Brewery services		

U.S. Application No.	85606271	Application Date	04/24/2012
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	RIVERTOWN BREWING COMPANY RTB		

Design Mark		
Description of Mark	<p>The mark consists of Color is not claimed as a feature of the mark. The mark consists of a black circle with the words "RIVERTOWN" over the smaller words "BREWING COMPANY" centered in the top portion of the circle. The bottom is comprised of "RTB" in letters with an illustration of a wheat leaf emerging from the left of the "R" in "RTB", and a wheat leaf emerging from the right of the "B" in "RTB". Inside the circle is an image of a steamboat on a river with landscape comprised of hills and outdoor landscape in the upper portion of the image.</p>	
Goods/Services	<p>Class 032. First use: First Use: 2011/01/10 First Use In Commerce: 2011/01/10 Beer, ale, lager, pale ale, microbrews</p>	

Attachments	<p>85374373#TMSN.jpeg (1 page)(bytes) 85606271#TMSN.jpeg (1 page)(bytes) Fyke Petition for Cancellation.pdf (11 pages)(52583 bytes)</p>
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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	/Karen Kreider Gaunt/
Name	Karen Kreider Gaunt
Date	05/23/2012

**INTHEUNITEDSTATESPATENTANDTRADEMARKOFFICE
BEFORETHETRADEMARKTRIALANDAPPEALBOARD**

Reg.No.:3,502,445,PrincipalRegister
Reg.Date:September16,2008
ApplicationSerialNo.:77/161,418
ApplicationFilingDate:April20,2007
Mark:RIVERTOWNE
Class:043

Reg.No.:3,942,905,PrincipalRegister
Reg.Date:April12,2011
ApplicationSerialNo.:77/950,396
ApplicationFilingDate:March4,2010
Mark:RIVERTOWNE&Design
Class:032

THE RIVERTOWN BREWING
COMPANY, LLC

Petitioner,

v.

CHRISTIAN FYKE

Respondent.

PETITION FOR CANCELLATION

Cancellation No. _____

PETITION FOR CANCELLATION

Petitioner, THE RIVERTOWN BREWING COMPANY, LLC, a limited liability company of the State of Ohio, having a place of business at 607 Shepherd Drive, Unit 6, Lockland, Ohio 45215, believes that it has been damaged, and will continue to be damaged by Registration Nos. 3,502,445 and 3,942,905 and hereby petitions to cancel same on the grounds and for the reasons set forth below.

GROUND FOR CANCELLATION OF REG. NOS. 3,502,445 AND 3,942,905

As grounds for its Petition to Cancel U.S. Registration Nos. 3,502,445 and 3,942,905 it is alleged that Respondent repeatedly perpetuated fraud on the Trademark Office by engaging in an ongoing course of conduct with the specific intent to deceive the Trademark Office by Respondent's willful, intentional and repeated submission of false statements of fact, omissions and material misrepresentations concerning Respondent's alleged use of the marks that are the subject of the registrations sought to be cancelled by this Petition. It is further alleged that the registrations that are the subject of this Petition should be cancelled because the applications upon which the subject registrations are based were filed in the name of the wrong owner, and as such, the resulting registrations are void. It is also alleged that the subject registrations should be cancelled because Respondent has abandoned the marks through naked licensing and/or a failure to police the marks at issue. Finally, it is alleged that Petitioner may in fact, have priority of use of Petitioner's marks over the marks that are the subject of Respondent's registrations sought to be cancelled by the instant Petition.

STATEMENT OF FACTS

In support for the instant Petition to Cancel, Petitioner alleges:

1. On information and belief, Respondent, CHRISTIAN FYKE, is an individual located in the State of Pennsylvania, having an address at 160 Wallace Drive, Monroeville, Pennsylvania 15146, and a prior address of 500 Jones Street, Verona, PA 15147.
2. On information and belief, Respondent is the owner of record of Registration No. 3,502,445, for the mark RIVERTOWNE, issued on September 16, 2008, in connection with "hotel, bar and restaurant services" ("Respondent's First Registration"), and Registration No.

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3,942,905, for the mark RIVERTOWNE & Design, issued on April 12, 2011, in connection with “beer, ale, india pale ale, lager, stout, porter and pilsner; non-alcoholic beverages, namely, carbonated beverages” (“Respondent’s Second Registration”). (Collectively Respondent’s First Registration and Respondent’s Second Registration are hereinafter referred to as “Respondent’s Registrations.”)

3. On information and belief, Respondent’s Registrations are based on use of the subject trademarks in U.S. commerce, based upon Respondent’s Intent Use Based trademark application filed on April 20, 2007, for the mark RIVERTOWNE, for “hotel, bar and restaurant services” (“Respondent’s First Application”) and Respondent’s Use Based trademark application filed March 4, 2010 and asserting first use on September 30, 2002, for the mark RIVERTOWNE & Design, for “beer, ale, india pale ale, lager, stout, porter and pilsner; non-alcoholic beverages, namely, carbonated beverages” (“Respondent’s Second Application”).

4. On information and belief, Respondent’s First Registration was originally obtained through Respondent’s assertion under oath in connection with the prosecution of Respondent’s First Application, that the date of first use for all the services set forth in Respondent’s First Application was June 10, 2006.

5. On information and belief, Respondent’s Second Registration was originally obtained through Respondent’s assertion under oath in connection with the filing and prosecution of Respondent’s Second Application, that the date of first use for all the goods set forth in Respondent’s Second Application was September 30, 2002.

6. Petitioner is the owner of U.S. Trademark Application Serial No. 85/374,373, filed July 18, 2011, for the mark THE RIVERTOWN BREWING COMPANY, in connection with “brewery services” (“Petitioner’s First Application”), and U.S. Trademark Application Serial No. 85/606,271, filed April 24, 2012, for the mark RIVERTOWN BREWING

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COMPANY RTB & Design, in connection with “beer, ale, lager, pale ale, microbrews” (“Petitioner’s Second Application”). (Collectively, Petitioner’s First Application and Petitioner’s Second Application are referred to hereinafter as “Petitioner’s Applications”.)

7. Petitioner’s Applications are based on Petitioner’s use of the marks in commerce on or in connection with the goods and services identified in Petitioner’s Applications, and include claims of asserted first use in commerce on January 10, 2011.

8. On November 28, 2011, the U.S. Trademark Office issued a Final Office Action in response to Petitioner’s First Application, refusing registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d) on the grounds that Applicant’s mark is confusingly similar to the mark identified in Respondent’s Second Registration.

RESPONDENT’S FRAUD UPON THE TRADEMARK OFFICE

9. On information and belief, Respondent committed knowing and intentional fraud with a specific intent to deceive the United States Patent and Trademark Office in the prosecution of Respondent’s First Registration by asserting use of the subject mark for services which Respondent knew he had never offered. At the time of the filing of the Statement of Use on Respondent’s First Application, Respondent asserted that he was using the mark that is the subject of the First Registration for, *inter alia*, “hotel services” when, upon information and belief, Respondent did not use, and has not ever used the subject mark for “hotel services.” Therefore, on the basis of fraud in the procurement, Respondent’s First Registration should be cancelled pursuant to Section 14 of the Trademark Act, 15 U.S.C. § 1064 *et seq.*

10. On information and belief, Respondent committed knowing and intentional fraud with a specific intent to deceive the United States Patent and Trademark Office in the prosecution of Respondent’s Second Registration by asserting use of the subject mark for goods

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which Respondent knew he had never sold under the mark. At the time of the filing of Respondent's Second Application, Respondent asserted that he was using the mark that is the subject of the Second Registration for, *inter alia* "carbonated beverages" when, upon information and belief, Respondent did not use, and has not ever used the subject mark for "carbonated beverages." Therefore, on the basis of fraud in the procurement, Respondent's Second Registrations should be cancelled pursuant to Section 14 of the Trademark Act, 15 U.S.C. § 1064 *et seq.*

11. On information and belief, Respondent committed knowing and intentional fraud with the specific intent to deceive the United States Patent and Trademark Office in the prosecution of Respondent's Second Registration by falsely alleging that he was using the mark in interstate commerce. Respondent alleged that he was making use of the subject mark in interstate commerce sufficient to support a federal trademark application in 2002. Upon information and belief, Respondent was not engaged in interstate commerce in 2002. Therefore, on the basis of fraud in the procurement, Respondent's Second Registrations should be cancelled pursuant to Section 14 of the Trademark Act, 15 U.S.C. § 1064 *et seq.*

12. On information and belief, Respondent committed knowing and intentional fraud with the specific intent to deceive the United States Patent and Trademark Office in the prosecution of Respondent's Second Registration by knowingly and falsely asserting a first use date of September 30, 2002. By Respondent's own subsequent admission in direct response to Petitioner's inquiry, Respondent was not using the marks as of September 30, 2002 and yet Respondent knowingly asserted this as the accurate date of first use. Therefore, on the basis of false misrepresentation of material fact and fraud in the procurement Respondent's Second Registrations should be cancelled pursuant to Section 14 of the Trademark Act, 15 U.S.C. § 1064 *et seq.*

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13. In a letter dated February 10, 2012, Respondent, through counsel, contacted Petitioner and demanded that Petitioner cease and desist from further use of Petitioner's marks, asserting Respondent's Registrations as the basis for the cease and desist demand. Petitioner responded, through counsel on March 7, 2012, that Petitioner's investigation into Respondent's claims revealed that Respondent's dates of first use appeared to be false, and that it did not appear that Respondent held a valid federal permit from the Alcohol and Tobacco Tax and Trade Bureau to sell alcoholic goods in 2002, at the time Respondent had alleged first use of its mark for the goods covered by Respondent's Second Registration.

14. In direct response to Petitioner's letter, on April 2, 2012, Respondent filed Section 7A amendments on Respondent's Registrations, attempting to change his asserted first use of date for the services in Respondent's First Registration, from June 6, 2010 to July 12, 2002, a date eight years earlier, and attempting to change his asserted first use date for the goods in Respondent's Second Registration from September 30, 2002, to June 10, 2007, a date nearly five years later. With respect to Respondent's Second Registration, the Trademark Office properly denied the amendment on the grounds that Respondent failed to provide a Declaration regarding this alleged new first use date, and also failed to verify how this incorrect first use date occurred. Respondent likewise failed to provide a Declaration regarding the alleged new first use date, and also failed to verify how the alleged error in first use dates occurred with respect to Respondent's First Registration.

15. On information and belief, on May 21, 2012, Respondent again provided false and incomplete information to the Trademark Office with the specific intent to deceive the Trademark Office by asserting under oath, that the mistaken first use date was merely an error by Registrant's previous attorney, when in fact, the Section 7A Amendment on Respondent's Second Registration was only filed after Petitioner's counsel pointed out that Respondent's Second Registration was either ripe for cancellation in that the asserted first use date was knowingly fraudulent, or Respondent had seemingly operated for several years without proper licensing.

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16. Upon information and belief, Respondent's April 2, 2012 Section 7 Amendments and subsequent May 21, 2012 Office Action response were made not to "correct errors" as Respondent asserted under oath, but rather, to either attempt to "fix," via the Trademark Office, a potential serious licensure issue, or to avoid a potential loss of trademark rights which Respondent is seeking to preserve for purposes of litigation posturing. Respondent's filings on April 2, 2012 and May 21, 2012 connection with Respondent's Registrations were made in bad faith, and contained material misrepresentations amounting to fraud with respect to Respondent's actual first used dates and Respondent's true intentions with respect to Respondent's Registrations. Therefore, Respondent's Second Registrations should be cancelled for fraud and material misrepresentation pursuant to Section 14 of the Trademark Act, 15 U.S.C. § 1064 *et seq.*

17. Respondent's attempted Section 7 amendments with respect to the first used date asserted in Respondent's Registrations should be denied because these amendments were filed in bad faith and with fraudulent intent to deceive the Trademark Office. Respondent's assertion of a "mere error" is a fraudulent statement and incomplete picture of what actually transpired, and misrepresents Respondent's true intentions, and therefore, is an additional showing of fraud to cancel Respondent's Registrations, pursuant to Section 14 of the Trademark Act, 15 U.S.C. § 1064 *et seq.*

18. Because of Respondent's knowing (and admitted) intentional false statement of fact in the filing and prosecution of Respondent's First Application wherein Respondent intentionally cited a first used date that was five years earlier than the first used date which Respondent now states is his actual first used date, Respondent's First Registrations should be cancelled for fraud and material misrepresentation pursuant to Section 14 of the Trademark Act, 15 U.S.C. § 1064 *et seq.*

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19. Respondent's attempt to "move back the clock" by his April 2, 2012 Section 7 amendment to attempt to assert a first used date that is eighty years earlier than the first used date originally asserted for Applicant's services in Respondent's Second Registration is an attempt to preserve potential loss of rights, and is done for purposes of litigation posturing, and is made in bad faith with an intent to deceive the Trademark Office. Accordingly, Respondent's Second Registrations should be cancelled for fraud pursuant to Section 14 of the Trademark Act, 15 U.S.C. § 1064 *et seq.*

20. Respondent's repeated omissions, misrepresentations and false statements of fact, as alleged in paragraphs 9-20 herein, show, with sufficient particularity and detail, a willful and ongoing intention by Respondent to deceive the Trademark Office for Respondent's own illegitimate purposes and amounting to bad faith. Accordingly, Respondent's Registrations should be cancelled for fraud pursuant to Section 14 of the Trademark Act, 15 U.S.C. § 1064 *et seq.*

RESPONDENT'S APPLICATIONS (AND RESULTING REGISTRATIONS) WERE FILED AND ISSUED IN THE NAME OF THE WRONG OWNER

21. Upon information and belief Respondent's Registrations are registered in the name of the wrong owner. The named registrant is an individual, Christian Fyke. Upon information and belief, the real owner of the marks is either MKGFB, Inc. or FYBO Management, legal entities in which Respondent is, upon information and belief, an owner and/or manager. MKGFB owns a Pennsylvania fictitious name registration for "Rivertowne" and, upon information and belief, is the entity that appears to be the true owner of the mark. Because Respondent's Registrations were obtained from applications filed in the name of the wrong owner, the applications are *void ab initio* and should be cancelled pursuant to Section 14 of the Trademark Act, 15 U.S.C. § 1064 *et seq.* and pursuant to 37 C.F.R. 2.71(d).

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RESPONDENT HAS ABANDONED THE MARKS

22. Upon information and belief, Respondent's Registrations have been abandoned by Respondent through naked licensing and/or failure to police use of the marks. Accordingly, Respondent's Registrations should be cancelled pursuant to Section 14 of the Trademark Act, 15 U.S.C. § 1064 *et seq.*

PETITIONER MAY HAVE PRIORITY

23. Respondent's claims of first use as recited in Respondent's Registrations are knowingly false and Petitioner may in fact, have priority in use of its mark over Respondent's Registrations.

PETITIONER HAS BEEN DAMAGED AND IS LIKELY TO CONTINUE TO BE DAMAGED BY THE REGISTRATION OF RESPONDENT'S MARKS

24. Petitioner's First Application has been refused in light of Respondent's Second Registration and upon information and belief, Respondent's Second Registration was obtained fraudulently. As a result, Petitioner has been damaged, is likely to continue to be damaged by the continued registration of Respondent's Second Registration.

25. Respondent has made a cease and desist demand to Petitioner citing as a basis for his claims, Respondent's Registrations that are the subject of this Cancellation Petition. Accordingly, Petitioner has been damaged, is likely to continue to be damaged by the continued registration of Respondent's Registrations, because Respondent's continued ownership of Respondent's Registrations are unlawful inasmuch as Respondent's Registrations were obtained fraudulently, Respondent has abandoned the marks that are the subject of Respondent's Registrations, Respondent was not engaged in interstate commerce at the time of the filing of the applications and/or on the asserted first used dates upon which Respondent's Registrations are based, and Respondent's Registrations were obtained in the name of the wrong owner.

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26. Petitioner has been damaged, is likely to continue to be damaged by the continued registration of Respondent's Registrations because Petitioner's use of, and ability to register, its marks will be impaired by the continued registration of the Respondent's Registrations.

WHEREFORE, Petitioner prays that Registration Nos. 3,502,445 and 3,942,905 be cancelled and that this Petition for Cancellation be sustained in favor of Petitioner.

Respectfully submitted,
Dinsmore & Shohl LLP

By Karen Kreider Gaunt
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Attorneys for Petitioner

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Dated: May 23, 2012

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Cancellation was served upon Respondent this 23rd day of May, 2012 by first class mail, postage pre-paid, addressed to:

Christian Fyke
160 Wallace Drive
Monroeville, PA 15146

And

Christian Fyke
500 Jones Street
Verona, PA 15147

/Karen Kreider Gaunt/
Karen Kreider Gaunt