

ESTTA Tracking number: **ESTTA96943**

Filing date: **08/30/2006**

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

Proceeding	91171687
Party	Plaintiff Master Entertainment, Inc, Gay Days Hollywood, Inc. ,
Correspondence Address	Michael Kelly Kenyon & Kenyon LLP One Broadway New York, NY 10004 UNITED STATES MKelly@kenyon.com, JNicholson@kenyon.com
Submission	Opposition/Response to Motion
Filer's Name	Brett Henrichsen
Filer's e-mail	brett@masterbeat.com
Signature	/BH/
Date	08/30/2006
Attachments	Opposition to Motion to Dismiss - GAY DAYS.pdf (4 pages)(23780 bytes)

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

In the Matter of Application Serial No.: 78/521,976

Published for Opposition: March 7, 2006

-----X
MASTER ENTERTAINMENT, INC., GAY :
DAYS HOLLYWOOD, INC., :
 : Cancellation No. 91/171,687
 :
 : Opposers, :
 :
 :
 : vs. :
 :
 :
 : CENTAUR ENTERTAINMENT, INC., :
 :
 :
 : Applicant. :
-----X

OPPOSERS' OPPOSITION TO APPLICANT'S MOTION TO DISMISS; MOTION TO STRIKE; MOTION TO JOIN AND MOTION TO AMEND

Opposers, Master Entertainment, Inc. ("Master Entertainment") and Gay Days Hollywood, Inc. ("GDH") (collectively, "Opposers"), submits this memorandum of law in opposition to Applicant Centaur Entertainment, Inc.'s ("Centaur") motion to dismiss for failure to state a claim, motion to strike allegations, motion to join defendant Gay Days, Inc. and motion to amend application (Centaur's "Motion"). As explained below, Centaur's actions and the record in this proceeding render the subject application void, and therefore Centaur's Motion is moot.

I. **THE SUBJECT APPLICATION IS VOID**

A. **The Application Was Not Filed By The Owner of the Mark**

An application based on use in commerce must be filed by the owner of the mark. 15 U.S.C. § 1051(a)(1). An application that is not filed by the owner is void. *See* Trademark Manual of Examining Procedure ("TMEP") § 1201.02(b). When an application is filed in the name of the wrong party, this defect cannot be cured by amendment or assignment. 37 C.F.R. §

2.71(d); TMEP § 803.06.

Here, the subject application was filed in the name of Centaur on November 23, 2004. Then, on May 11, 2006—after the subject application published for opposition and Master Entertainment filed an extension of time to oppose—Centaur sent a letter to Glenn Mayerschoff, the Examining Attorney stating, in relevant part, that:

We now have a joint owner of our GAY DAYS mark. We have partnered with GAYDAYS, Inc., a company that owns the trademark to the GAY DAYS name in the State of Florida with a date of first use of August 25, 1997, and together Centaur and GAYDAYS, Inc. jointly own the mark.

What do we now need to do to identify this joint owner of the GAY DAYS mark and tack the date of first use on the application back to August 25, 1997?

This letter is attached hereto as exhibit A. Centaur also includes a copy of a purported assignment of a partial interest in the subject application to Gay Days, Inc. with its Motion.¹ . Therefore, by Centaur’s own admission, the subject mark is owned jointly, yet filed in the name of Centaur alone. Centaur has not followed the proper protocol for an application filed by joint owners, as set forth in Section 803.03(d) of the TMEP. For example, Gay Days, Inc. has not verified the application as required by Section 803.03(d). A situation very similar to the case here is cited in the TMEP as an example of a “non-correctable” error in identifying the applicant: “[i]f the application is filed in the name of a joint venturer when the mark is owned by the joint venture, the application cannot be amended” and is therefore void. In light of the above, the subject application is void and cannot be amended.

B. The Subject Application is Void Due to Fraud

As detailed above, Centaur filed the subject application when it knew or should have known that another entity had an ownership interest in the mark and/or had the right to use the

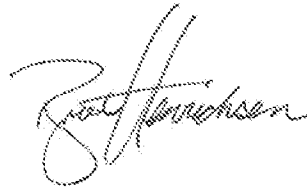
¹ The purported assignment is invalid as it does not include the required good will of the business in which the mark is used, or with the part of the good will of the business connected with the use of and symbolized by the mark. 15 U.S.C. § 1060(a)(1).

mark in commerce. Recognizing its error, Centaur now attempts to impermissibly amend its application to acknowledge the ownership rights of Gay Days, Inc. However, this type of error cannot be fixed by amendment, and the application is void. *See, e.g., Medinol Ltd. v. Neuro Vasx, Inc.*, 67 U.S.P.Q.2d 1205 (2003) (finding a party's misstatement fraudulent despite the fact that the misstatement was due to an oversight and not a willful intent to deceive).

II. CONCLUSION

In view of the foregoing, Opposers respectfully request that the Board deny Centaur's Motion in its entirety as moot and find that the application at issue is void.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Brett Henrichsen". The signature is written in a cursive, flowing style with some loops and flourishes.

Brett Henrichsen
Master Entertainment, Inc.

Dated: August 30, 2006

CERTIFICATE OF FILING

Date: August 30, 2006

I hereby certify that on August 30, 2006, an electronic copy of the foregoing OPPOSERS' OPPOSITION TO APPLICANT'S MOTION TO DISMISS; MOTION TO STRIKE; MOTION TO JOIN AND MOTION TO AMEND was filed using the Electronic System for Trademark Trials and Appeals (ESTTA).



Brett Henrichsen

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2006, a copy of the OPPOSERS' OPPOSITION TO APPLICANT'S MOTION TO DISMISS; MOTION TO STRIKE; MOTION TO JOIN AND MOTION TO AMEND was sent via first class mail to:

Nick De Biase
Centaur Entertainment, Inc.
45 Main Street, Suite 707
Brooklyn, NY 11201



Brett Henrichsen