

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

FILED

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CLERK US DISTRICT COURT  
WESTERN DISTRICT OF TEXAS

BY

*[Signature]*  
DEPUTY

DANIEL R. CASTRO,  
PLAINTIFF,

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V.

CAUSE NO. 1-10-CV-000695-LY

ENTREPRENEUR MEDIA, INC.,  
DEFENDANT.

**ORDER**

Before the Court in the above styled and numbered cause are Defendant Entrepreneur Media, Inc.'s ("EMI") Partial Motion To Dismiss Under Federal Rule Of Civil Procedure 12(B)(6) filed November 15, 2010 (Clerk's Document No. 12), Plaintiff Daniel R. Castro's several responses filed December 15, 2010 (Clerk's Document Nos. 19, 20, 21, 22, & 23), and EMI's reply filed January 18, 2011 (Clerk's Document No. 33). Having considered the motion, responses, reply, the court file, and the applicable law, the Court will grant the motion.

**Background**

Castro's First Amended Complaint provides that Castro is an award-winning author, a professional key-note speaker, trainer, seminar leader, and a small business owner in Austin, Texas.<sup>1</sup> Castro writes articles on entrepreneurship, has conducted five years of research focusing on legendary entrepreneurs, and is interviewing modern-day entrepreneurs for a book he is writing with a working title of "Anatomy of the Entrepreneur's Brain". Castro is also developing a program titled "Boot Camp For Entrepreneurs" by which he will offer instruction to corporate executives about how to think and act like entrepreneurs.

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<sup>1</sup> Castro is also an attorney admitted to practice law in the State of Texas and represents himself in this action.

In early January 2009, Castro created the term “EntrepreNeurology” and began using it in commerce. On January 16, 2009, Castro applied to register “EntrepreNeurology” as a service mark, and as there was no opposition to his application, the mark was registered August 4, 2009.

In early September 2009, Castro created the terms “EntrepreneurOlogy” and “Entrepreneur.Ology”, purchased the domain name www.Entrepreneur.Ology, and began using these marks in commerce in February 2010. Castro created a website, www.EntrepreneurOlogy.com, to market his services. Castro registered an Assumed Name Certificate with the Travis County Clerk, showing that the mark “EntrepreneurOlogy” was the name under which he was doing business. On March 20, 2010, Castro submitted an application for trademark registration for “Entrepreneur.Ology”. Two days before the deadline for opposition expired, EMI moved to extend the deadline to oppose the mark, the motion was granted, and the deadline extended to December 8, 2010.

On September 7, 2010, counsel for EMI faxed a letter to Castro, which provides that EMI owns a trademark “ENTREPRENEUR”, and that Castro’s March 20 application reflects that he is seeking to register a mark nearly identical to EMI’s mark. EMI’s letter demands that Castro immediately withdraw his application to register the mark Entrepreneur.Ology. Additionally, EMI demanded that Castro cease and desist from further use of the domain name, entrepreneurology.com, and that he transfer the name to EMI. EMI gave Castro a deadline of September 21, 2010, to comply with the requests.

Castro commenced this action on September 15, alleging that a controversy exists between himself and EMI over the right to use the mark Entrepreneur.Ology and the domain name www.EntrepreneurOlogy.com, as well as the word “entrepreneur” and its derivatives in Castro’s

books, articles, seminars, workshops, and Boot Camp. Castro seeks a declaration of his rights with respect to federal trademark laws, the First Amendment of the United States Constitution, and the Anticybersquatting Consumer Protection Act, injunctive relief, damages, and fees.

EMI responds by moving to dismiss several of Castro's claims for failure to state a claim for which relief may be granted. *See* Fed. R. Civ. P. 12(b)(6). EMI contends that it has long used the trademark ENTREPRENEUR for a variety of goods and services, including magazines, books, publications, websites, seminars, expos, and conferences. Further, EMI contends that it owns multiple longstanding federal registrations for the mark ENTREPRENEUR and various related marks, several of which are incontestable. EMI notes that it has the right and obligation to police and enforce its trademark rights, or risk diminishing or altogether losing those rights. EMI, therefore, monitors trademark filings and use in the marketplace and challenges marks used by others without EMI's consent that it believes are infringing EMI's trademarks.

By its motion, EMI contends that despite Castro's allegations, there are no viable First Amendment issues before the Court. EMI contends that the only viable claims urged by Castro are those within the Lanham Act, which regulates misleading or deceptive commercial speech that is not entitled to First Amendment protection. *See* The Lanham Act, 15 U.S.C. §§ 1051-1141n. Additionally, EMI contends that there are no viable antitrust issues here, as EMI's conduct is not anticompetitive, and no facts exist to support any specific intent to monopolize or that there is a dangerous possibility of achieving a monopoly. Further, EMI contends that Castro's allegation that EMI has unclean hands or has acted toward Castro in bad faith is without merit. EMI moves the Court to dismiss several of Castro's claims without allowing Castro leave to amend the Complaint for a second time, arguing that any amendment would be futile. *See Stripling v. Jordan Prod. Co.*,

LLC, 234 F.3d 863, 873 (5th Cir. 2000) (amendment is futile if any amendment will fail to state claim for which relief may be granted).<sup>2</sup>

**Motion to dismiss for failure to state a claim**

Motions to dismiss for failure to state a claim are viewed with disfavor and are seldom granted. *See Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000). Claims asserted are liberally construed in favor of the claimant and all facts pleaded are taken as true. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993). The court must indulge all inferences in favor of the claimant. *Collins*, 224 F.3d at 498. “Factual allegations must be enough to raise a right to relief above the speculation level, on the assumption that all allegations in the [pleading] are true (even if doubtful in fact).” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (internal citations and quotations omitted); *see also In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 n.10 (5th Cir. 2007) (stating no longer is court to apply minimal standard of adequate pleading described in *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)). A pleading need only have enough facts to state a claim for relief that is “plausible on its face.” *Twombly*, 550 U.S. at 556, 570. However, the pleading must offer more than an “unadorned, the-defendant-unlawfully-harmed-me accusation,” and must “permit the court to infer more than the mere possibility of misconduct[.]” *Ashcroft v. Iqbal*, \_\_\_ U.S. \_\_\_\_; 129 S.Ct. 1937, 1949-50

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<sup>2</sup> After EMI moved for partial dismissal, Castro filed a Notice Of Dismissal with regard to several claims (Clerk’s Document No. 18). *See Fed. R. Civ. P. 41(a)(1)* (plaintiff may dismiss all or some claims without leave of court before defendant files either answer or summary-judgment motion). Based on Castro’s notice, the Court will dismiss Castro’s following requests for declaratory relief: (1) that the nominative-fair-use doctrine bars EMI’s infringement action; (2) that the doctrine of acquiescence bars EMI’s infringement action; (3) that estoppel bars EMI’s infringement action; (4) that the incontestability provisions of the Lanham Act are unconstitutional on their face; and (5) that the doctrine of fair use protects Castro’s use of the mark Entrepreneur.Ology as a trademark.

(2009). Otherwise, “the complaint has alleged—but it has not ‘show[n]’—that the pleader is entitled to relief.” *Id.* (quoting Fed. R. Civ. P. 8(a)(2)). In ruling on a 12(b)(6) motion, the court cannot decide disputed fact issues; rather, the court must assume that all material facts contained in the pleading are true. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322–23 (2007). However, a formulaic recitation of the elements and legal conclusions are not entitled to the presumption of truth. *Iqbal*, 129 S.Ct. at 1949.

### **Lanham Act is unconstitutional as applied**

Castro claims that portions of the Lanham Act are unconstitutional as applied because they impinge Castro’s First Amendment rights to freedom of speech and expression with regard to the use of the term “entrepreneur” and derivations thereof. Specifically, Castro challenges Title 15 United States Code sections 1065 and 1115(b). Castro claims that Section 1065, which addresses the incontestability of the right to use a trademarked term, is unconstitutional because as applied it “is an attempt to kidnap the word entrepreneur from the lexicon of the English language, and is, therefore, a violation of the First Amendment.” EMI responds that Castro’s claim and argument misconstrues and misstates what the Lanham Act and its incontestability provisions govern.

Contrary to Castro’s arguments, the Lanham Act does not limit the use of common English words when those words are used in their descriptive or dictionary sense and not in a trademark sense. *See* 15 U.S.C. § 1115(b)(4). Therefore, Castro is free to use entrepreneur in the word’s descriptive or dictionary sense as he desires. It is when Castro uses entrepreneur as part of his trademark that the Lanham Act may apply.

Further, the Lanham Act does not affect Castro’s First Amendment rights. The Lanham Act only addresses business decisions to use trademarks that may infringe others’ legitimate intellectual

property rights. The Lanham Act only regulates commercial speech that is misleading or deceptive. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980). The Lanham Act and the First Amendment coexist, and the protections of the Lanham Act against consumer confusion do not intrude on individuals' First Amendment rights. *See Westchester Media v. PRL USA Holdings, Inc.*, 214 F.3d 658, 672 (5th Cir. 2000). The Lanham Act does not prohibit or limit the use of words in a non-trademark sense.

EMI's letter to Castro provides that EMI objects to Castro's use of the mark Entrepreneurology as a "source identifier for his services". Nowhere in the letter does EMI propose or demand that Castro not use the word entrepreneur in a non-trademark manner. The Court holds that no justiciable controversy exists with regard to Castro's use of the word, entrepreneur, in a non-trademark manner.

Castro also argues that his trademark is a literary use rather than commercial speech, because he uses the marks to market "literary goods and literary services." EMI responds that if "Castro were using Entrepreneur.Ology solely as a book title, Castro's argument might have some traction, but he is not."

Castro's pleading provides that he uses the mark for "conduct[ing] workshops and seminars for Fortune 500 companies" and selling his upcoming Boot Camp training sessions, all of which are commercial enterprises for commercial gain. Speech is commercial if (1) the speech is an advertisement; (2) the speech relates to a specific product or service; and (3) the speaker has an economic motive for the speech. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983). A trademark is an advertisement, as its purpose is to communicate to consumers the source of a product being offered in commerce. 15 U.S.C. § 1127 ("The term 'trademark' includes any

word . . . used by a person . . . to identify and distinguish his or her goods . . . from those manufactured or sold by others and to indicate the source of the goods”). Additionally, Castro’s pleading provides that he filed his trademark applications in Class 41, which covers education and training, not Class 16, which covers books and printed materials.

The Court disagrees with Castro’s response that his marks are used in a literary manner. Based on Castro’s pleading, his endeavors are of an economic and commercial nature rather than of a literary nature. The Court will grant EMI’s motion with regard to Castro’s request that the Court declare Sections 1065 and 1115(b) unconstitutional as applied.

**Claim that EMI’s ENTREPRENEUR trademark is not incontestable**

Castro also asks the Court to declare that EMI’s ENTREPRENEUR trademark does not qualify for incontestable status under section 1065. By the Amended Complaint, Castro alleges that EMI’s registrations are not incontestable because (1) Castro is the senior user of the ENTREPRENEUROLOGY marks, and (2) EMI’s ENTREPRENEUR mark is generic. EMI by its motion to dismiss contends that Castro misconstrues the meaning of incontestability and ignores the fact that both the United States Patent and Trademark Office (“USPTO”) and the Ninth Circuit have determined that EMI’s registered marks are in fact incontestable.

A registered mark becomes incontestable when “such registered mark has been in continuous use for five consecutive years subsequent to the date of such registration and is still in use in commerce,” there is no adverse finding or pending proceeding against the registration, and a Declaration of Incontestability is filed with the USPTO. *See* 15 U.S.C. § 1065. The USPTO accepted Declarations of Incontestability for EMI’s ENTREPRENEUR mark: (1) for registration No. 1,453,968 On December 14, 1992; for Registration No. 2,263,883 on February 25, 2005; and

for Registration No. 2,502,032 on October 10, 2007. Consequently EMI and its marks have satisfied all statutory requirements for incontestability. In addition, the Ninth Circuit determined that EMI's registration in Classes 9 and 16 are incontestable and not generic. *See Entrepreneur Media, Inc. v. Smith*, 279 F.3d 1135, 1139, 1141, 1142 n.4, 1143 (9th Cir. 2009). Further, the Court finds that Castro's claim that his senior use of his marks somehow impacts the incontestability status of EMI's marks is without merit. The Court finds that Castro's claim that EMI's trademarks at issue fail to qualify as incontestable marks is an allegation lacking enough facts to state a claim for relief that is plausible on its face. The Court will grant EMI's motion to dismiss with regard to Castro's request for a declaration that EMI's registrations are not incontestable.

**Claim that EMI has violated antitrust laws**

By his Amended Complaint Castro alleges

7.47 that EMI is guilty of violating Section 2 of the Sherman Antitrust Act in an attempt to monopolize trade [] or commerce among the several states. . . .”

7.48 EMI has demonstrated the requisite “specific intent” to monopolize by engaging in a pattern of anticompetitive conduct designed to create barriers to entry into, and exclude competition from, the market that provides magazines, books, articles, websites, blogs, trade shows, workshops, seminars, boot camps, and keynote presentations on the topic of entrepreneurs and entrepreneurship.

7.49 This unilateral conduct comes “dangerously close” to achieving monopoly power and is having an anticompetitive effect on a substantial amount of interstate commerce. EMI has sufficient market power in the relevant market (described above) to be held liable for “attempted monopolization” under Section 2 of the Sherman Antitrust Act. Therefore, there is a “dangerous probability” that EMI's attempt to monopolize will succeed.



Castro seeks a “permanent injunction to prevent EMI from continuing to violate Section 2 of the Sherman Antitrust Act.”

EMI moves to dismiss this claim contending that Castro fails to state a claim that EMI’s “pattern of threats and lawsuits” to enforce EMI’s trademark ENTREPRENEUR amounts to attempted monopolization. Further, EMI contends that Castro’s allegations of EMI’s specific intent to monopolize do not rise above the speculative level.

To prevail on a claim of attempted monopolization under Section 2 of the Sherman Act, a plaintiff must show: “(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.” *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). “The conduct requirement is arguably the single most important aspect of [the attempted monopolization] offense.” *Northeastern Tel. Co. v. American Tel. & Telegraph Co.*, 651 F.2d 76, 85 (2d Cir. 1981); *see also Taylor Pub. Co. v. Jostens, Inc.*, 216 F.3d 465, 474 (5th Cir. 2000). To satisfy the second element of specific intent, there must be “something more than an intent to compete vigorously.” *Spectrum Sports*, 506 U.S. at 459. To satisfy the third element, there must be a dangerous probability of monopoly of a relevant market based on the defendant’s actions, specific intent, and the defendant’s ability to lessen or destroy competition in that market. *Id.* at 456. Inherent in this requirement is an allegation that a plausible antitrust market in which competition is threatened to be harmed. *Id.* at 459 (“demonstrating the dangerous probability of monopolization in an attempt case also requires inquiry into the relevant product and geographic market and the defendant’s economic power in that market.”). “The notion that proof of unfair or predatory conduct alone is sufficient to make out the

offense of attempted monopolization is contrary to the purpose and policy of the Sherman Act.” *Id.* at 457.

Here, lacking is an allegation that EMI has engaged in exclusionary or anticompetitive conduct under the antitrust laws. Principally, Castro’s Amended Complaint raises a conclusory allegation that EMI has engaged in a “pattern of threats and lawsuits” to enforce its trademark ENTREPRENEUR. However, EMI’s use of the legal process to enforce its registered trademarks is not improper conduct, and indeed EMI is obligated under trademark law to monitor and protect its trademarks. *See Amstar Corp. v. Domino’s Pizza, Inc.*, 615 F.2d 252, 265 (5th Cir. 1980) (narrowing of protection of mark where plaintiff failed to be vigilant in protecting plaintiff’s rights in mark). Further, enforcing legitimate intellectual property rights through litigation is conduct immune from prosecution under the antitrust laws. *Professional Real Estate Inv. v. Columbia Pictures Indus.*, 508 U.S. 49, 65-66 (1993) (“*PRE*”) (copyright owner’s suit to enforce its intellectual property rights immune from charge of attempted monopolization).

The Court holds that Castro’s allegation that EMI engaged in a pattern of lawsuits seeking to protect its intellectual property is not the basis of a viable claim under Section 2 of the Sherman Act. Moreover, lacking is any allegation by Castro that EMI’s conduct constitutes sham litigation excepted from immunity. Additionally, lacking is any allegation by Castro that EMI’s actions to enforce its trademarks are “objectively baseless” or that no reasonable litigant in EMI’s position could realistically expect to prevail in the alleged lawsuits. Indeed, Castro acknowledges a Ninth Circuit opinion in which that court recognized the validity of EMI’s mark and found infringement of that mark. *See EMI, Inc. v. Smith*, 279 F.3d 1135 (9th Cir. 2002) (use of “Entrepreneur Illustrated”, magazine title by publisher named “EntrepreneurPR”, which also operated a website

with the URL [www.entrepreneur.com](http://www.entrepreneur.com), infringed EMI's ENTREPRENEUR marks). Additionally, the Court finds that Castro's allegation of EMI's specific intent to monopolize are only speculative. Castro's allegation that EMI's September 7, 2010 letter notifying him of EMI's rights "demonstrates bad faith and exhibits a 'specific intent' to use the trademark laws to minimize competition in the relevant market" provides no facts that suggest EMI's ultimate motive for invoking the trademark laws is a monopoly.

The Court finds that Castro has done no more than provide "labels and conclusions, and a formulaic recitation of the elements" of a claim for attempted monopolization. *See Twombly*, 550 U.S. at 555. The Court will dismiss Castro's claims that EMI violated the antitrust laws.

#### **Request for declaration of non-infringement**

Castro seeks a declaration of non-infringement from the Court. Castro's pleadings provide that he "seeks a judicial declaration that his use of the word 'entrepreneur' and any derivative thereof, in his books, articles, keynotes, seminars, workshops, websites, and marketing materials, promoting the same, is entitled to First Amendment protection, and is therefore, noninfringing." Castro's complaint continues with other arguments alleging that he is entitled to fair use of the word entrepreneur.

The fair use doctrine applies only to terms used in a descriptive, non-trademark manner. *See* 15 U.S.C. § 1115(b)(4) (fair use occurs when "use of the name, term, or device charged to be an infringement is a use, otherwise than as a mark, . . . of a term or device which is descriptive of and used fairly and in good faith only to describe the goods or services of such party. . . .") However, what is at issue is the use of the [entrepreneurology.com](http://entrepreneurology.com) domain name and the website. Castro's domain name and his website includes his entire trademark. The word entrepreneur, in its plain

meaning, is not at issue. Only the trademark Entrepreneurology and Castro's commercial uses are in dispute. EMI's letter to Castro only objected to his trademark and domain name, both of which are commercial trademark uses. There is no controversy about any other words.

By its motion to dismiss EMI contends that Castro has inadequately pled his claim for a declaration of non-infringement and fair use. The Court agrees. Only Castro's commercial marks and website are at issue. Castro may use the word entrepreneur freely so long as it is not a commercial mark.

### **Request for declaration that Castro's marks do not constitute unfair competition**

Castro seeks a judicial declaration that his use of the marks Entrepreneur.Ology, [www.EntrepreneurOlogy.com](http://www.EntrepreneurOlogy.com), and EntrepreNeurology do not constitute "unfair competition" in violation of the Lanham Act. *See* 15 U.S.C. § 1125 (setting forth elements of civil action). Although the portion of Castro's Amended Complaint that refers to this claim "incorporates all preceding and proceeding paragraphs herein by reference", lacking is any allegation or information as to what type of unfair competition claim Castro refers. The Court holds that Castro's pleading consists of no more than a formulaic recitation of the elements and legal conclusions, which are not entitled to the presumption of truth. *See Iqbal*, 129 S.Ct. at 1949. The Court will dismiss this claim.

### **Claim of misuse of trademark and unclean hands**

The equitable unclean hands doctrine applies "*when a party seeking relief* has committed an unconscionable act immediately related to the equity the party seeks in respect to the litigation." *Petro Franchise Sys., LLC v. All Am. Props., Inc.*, 607 F.Supp. 2d 781, 799 (W.D. Tex. 2009) (emphasis added). The Fifth Circuit has specifically endorsed unclean hands as a defense to a trademark infringement suit. *Id.* (citing *Sugar Busters LLC v. Brennan*, 177 F.3d 258, 272 (5th Cir.

1999)). “Under any formulation, a court applies the unclean-hands doctrine because ‘[t]o aid a party [who has acted inequitably] would make th[e] court the abetter of iniquity.’ *Id.* On the other hand, the doctrine should not be used as a loose cannon, depriving a plaintiff of an equitable remedy merely because he is guilty of unrelated conduct. *Id.* (quotations and citations omitted).

The only allegation in the First Amended Complaint with regard to Castro’s unclean hands claim is that EMI’s attempt to prevent Castro from using the word entrepreneur “constitutes a misuse of the trademark laws, rising to the level of unclean hands.” The Court finds that absent from Castro’s pleading is any factual allegation that would invoke the unclean-hands defense. The Court will dismiss this claim.

**Claim of reverse domain name hijacking**

Castro alleges a claim of reverse domain name hijacking and seeks a “temporary and permanent injunction to prevent EMI from continuing to violate Section 2 of the Sherman Antitrust Act.” By its motion to dismiss, EMI acknowledges that the Lanham Act provides for limited remedies for reverse domain name hijacking, although the Act is without a reference to this particular term. The Lanham Act provides,

a domain name registrant whose domain name has been suspended, disabled, or transferred . . . may, upon notice to the mark owner, file a civil action to establish that the registration or use of the domain name by such registrant is not unlawful. The court may grant injunctive relief to the domain name registrant, including the reactivation of the domain name or transfer of the domain name to the domain name registrant.

15 U.S.C. § 1114(2)(D)(v). Here, Castro’s domain name has not been suspended, disabled or transferred, nor has it been removed from registration, temporarily disabled, or permanently canceled. Castro still own’s the domain name and uses it. As no adverse action has been taken with

regard to Castro's domain name, the Court holds that based on the facts alleged in the First Amended Complaint, lacking is a cognizable claim of reverse domain hijacking.<sup>3</sup>

### **Conclusion**

Having reviewed the motion, responses, reply, the First Amended Complaint, and the applicable law, the Court will grant EMI's motion and will dismiss the following claims alleged by Castro: (1) that Title 15 United States Code sections 1065 and 1115(b) are unconstitutional as applied; (2) that EMI's marks are not incontestable; (3) that Castro's marks do not constitute unfair competition under Title 15 United States Code section 1125; (4) that EMI violated Title 15 section 2, the Sherman Antitrust Act; (5) a declaration of non-infringement; (6) misuse of trademarks and unclean hands; and (7) reverse domain name hijacking.

**IT IS ORDERED** that Defendant EMI's Partial Motion To Dismiss Under Federal Rule Of Civil Procedure 12(B)(6) filed November 15, 2010 (Clerk's Document No. 12) is **GRANTED**.

**IT IS FURTHER ORDERED** that the following claims alleged by Castro: (1) that Title 15 United States Code sections 1065 and 1115(b) are unconstitutional as applied; (2) that EMI's marks are not incontestable; (3) that Castro's marks do not constitute unfair competition under Title 15 United States Code section 1125; (4) that EMI violated Title 15 section 2, the Sherman Antitrust Act; (5) a declaration of non-infringement; (6) claim that EMI misused its trademarks and claim that EMI has unclean hands; and (7) claim of reverse domain name hijacking are **DISMISSED**.

**IT IS FURTHER ORDERED** that based on Castro's Notice of Dismissal filed December 15, 2010 (Clerk's Document No. 18), Castro's requests that the Court declare: (1) the nominative-

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<sup>3</sup> Castro's response to EMI's motion for partial dismissal focuses on Castro's claim pursuant to the Anticybersquatting Consumer Protection Act rather than focusing on his reverse domain highjacking claim. EMI has not moved for dismissal of Castro's Anticybersquatting claim.

fair-use doctrine bars EMI's infringement action; (2) the doctrine of acquiescence bars EMI's infringement action; (3) estoppel bars EMI's infringement action; (4) the incontestability provisions of the Lanham Act are unconstitutional on their face; and (5) the doctrine of fair use protects Castro's use of the mark Entrepreneur.Ology as a trademark are **DISMISSED**.

**IT IS FURTHER ORDERED** that based on Castro's dismissal of several claims, the Court's separate Order rendered this same day dismissing without prejudice Castro's request that the Court stay certain ongoing proceedings before the Trademark Trial and Appeal Board, and the Court's ruling herein, **claims remaining in this cause include the following:** (1) Castro's request that the Court declare EMI's mark invalid and that the Court order the mark canceled; and (2) Castro's request for a declaration of rights under the Anticybersquatting Act.

**IT IS FURTHER ORDERED** that the parties shall consult the website for the United States District Court for the Western District of Texas ([www.txwd.uscourts.gov](http://www.txwd.uscourts.gov)), the "Forms" tab, "Austin Division," and submit a Joint Proposed Scheduling Order utilizing this Court's form **on or before Friday, May 27, 2011**. See W.D. Tex. Loc. R. CV-16(c).

SIGNED this 28th day of April, 2011.

  
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LEE YEAKEL  
UNITED STATES DISTRICT JUDGE