

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

Daniel R. Castro
Plaintiff

v.

ENTREPRENEUR MEDIA, INC.
Defendant

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CIVIL ACTION NO: 10CA695

**CASTRO’S RULE 12(b)(6) MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM**

Now Comes Daniel R. Castro, and files this Rule 12(b)(6) Motion To Dismiss For Failure to State a Claim, and would show unto the Court as follows:

I. THE USPTO GAVE CASTRO THE RIGHT TO USE HIS “INHERENTLY DISTINCT” TRADEMARK.

It is undisputed that Castro owns a federally registered trademark for the word “EntrepreNeurology.” See Registration Certificate No. 3,663,282, attached as Exhibit 1 to Castro’s First Amended Complaint. In its Answer to Castro’s claims, EMI admits that this is true. See EMI’s Answer and Counterclaims at para. 9.4 and 9.7. When the reasonably objective consumer sees this word, they don’t even see the word “entrepreneur.” They only see the word “Neurology.” This trademark was designed to emphasize the neurological aspects of Castro’s research, and is consistent with the theme of his second book, “Anatomy of the Entrepreneur’s Brain.”

It is also undisputed that Castro’s registered mark is “inherently distinct” because it is a “coined term” invented by Castro. EMI has admitted that Castro coined this term. See page 13 of EMI’s Reply to Castro’s Response to Rule 12(b)(6) Motion to Dismiss.

It is well established law that a coined term carries the elevated status of being “inherently distinct” and is entitled to the highest level of protection under the Lanham Act. *See In re Chippendales*, 622 F.3d 1346, 1351 (Fed. Cir. 2010)(“These marks contain ‘coined, arbitrary or fanciful words or phrases that have been added to rather than withdrawn from the human vocabulary by their owners, and have from the very beginning, been associated in the public mind with a particular product ... and have created in the public consciousness an impression or symbol of the excellence of the product in question.”).

The Fifth Circuit and the District Courts within this Circuit agree that coined words are “inherently distinct” (and thus entitled to greater protection). *See Union Nat'l Bank v. Union Nat'l Bank*, 909 F.2d 839 (5th Cir. 1990)(Finally, arbitrary and fanciful terms or phrases are those which are either coined words or words which are not suggestive of the product or service. Here we have a sub-set of classifications within the categories. Fanciful terms are most often coined words such as ‘Xerox’ or ‘Kodak.’); *Abraham v. Paddle Tramps, Mgf*, 2011 U.S. Dist. LEXIS 49682 (N.D. Dallas 2011)(“In *Union National Bank*, the Fifth Circuit provided that, while ‘fanciful’ terms tended to be ‘coined words’ the term ‘arbitrary refers to ‘ordinary words which do not suggest or describe the services involved.’”).

As a matter of law, an “inherently distinct” mark serves as a unique “source identifier” that is not likely to be confused with a different source. *In re Chippendales*, at 1352. The Fifth Circuit agrees. *See Xtreme Lashes, LLC v. Xtended Beauty, Inc.*, 576 F.3d 221, 227 (5th Cir. 2009)(“The latter three categories of marks, because their intrinsic nature serves to identify a particular source of a product, are deemed inherently distinctive and are entitled to protection.”).

This case represents the inverse of a traditional trademark case. Here, the owner of a mark that is also a common noun in every day usage (“entrepreneur”), and which does not have the legal status of being “inherently distinct,” has sued the owner of a registered mark that is not even a known word, and which DOES have the legal status of being “inherently distinct.” It is undisputed that the USPTO sent a notice to EMI explaining that the word “entrepreneur” was “merely descriptive” and asking it to prove that this common noun had “acquired distinction” before it would register the mark. See correspondence from USPTO to EMI’s counsel attached as Exhibit 3 to Castro’s Response to EMI’s Rule 12(b)(6) Motion to Dismiss. Because EMI could not prove that the relevant consuming public automatically associates the word “entrepreneur” exclusively with the publisher of a magazine, EMI was forced to take advantage of a loophole in the Lanham Act. This maneuver is fully explained at pages 16-18 of Castro’s Response to EMI’s Rule 12(b)(6) Motion. As a result, EMI’s registration certificate bears the standard “Section 2(f)” designation that all “merely descriptive” marks bear.¹

In contrast, it is well established that “secondary meaning” or “acquired distinctiveness” need not be proved in order to protect an inherently distinct mark. *Abercrombie & Fitch Co., v. Hunting World, Inc.*, 537 F.2d 4, 11(2nd. Cir. 1976). As a result, the USPTO did not require any proof from Castro that his mark “EntrepreNeurology” had acquired distinction because it recognized that, as a coined word, the mark was inherently distinct. As a result, Castro’s registration certificate does not bear the Section 2(f) designation. See Exhibit 1 to Castro’s Response to EMI’s Rule 12(b)(6) Motion to Dismiss.

¹ An application under Section 2(f) is an admission that the mark is not “inherently distinct.” See *In re Reed, Elsevier Properties, Inc.*, 77 U.S.P.Q.2D 1649, 1651 (TTAB 2005); *Yamaha International Corp. v. Hoshino Gakki Co.*, 840 F.2d 1571 (Fed. Cir. 1988). EMI’s Registration No. 1,453,968 for the word “entrepreneur” shows very clearly that EMI’s mark was granted under Section 2(f).

It is also undisputed that the United States Patent and Trademark Office USPTO granted Castro's registration as a "standard character mark" without limitation as to style, font, color, design, capitalization or punctuation in accordance with Rule 2.51. See 37 C.F.R. 2.52. This gives Castro the right to present his mark in any way, shape or form he chooses, including the capitalization of the "N" to emphasize the word "neurology," as in "EntrepreNeurology," or to capitalize the "O" to emphasize the "Ology," as in "EntrepreneurOlogy" or to add a "dot" to give the mark a digital look and feel, as in "Entrepreneur.Ology." See *CitiGroup, Inc. v. Capital City Bank Group, Inc.*, 637 F.3d 1344, at *17-18 ("The registrant is entitled to depictions of the standard character mark regardless of font, style, size, or color, not merely 'reasonable manners' of presenting its standard character mark."); and *Phillips Petroleum Co. v. C.J. Webb, Inc.* 442 F.2d 1376, 1378 ("Under Rule 2.51(d) of the Trademark Rules of Practice, this means that Webb's application is not limited to the mark depicted in any special form.").

The following claims filed by EMI must be dismissed because they contain nothing more than threadbare recitals of the elements of each cause of action, plus conclusory factual statements that are not supported by any specific facts, and therefore, are not entitled to the presumption of truth. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); and *Ashcroft v. Iqbal*, 129 S. Ct. 1937, at *33 (2009).

II. CASTRO'S REGISTRATION CERTIFICATE IS A "COMPLETE BAR" TO EMI'S TEXAS DILUTION CLAIM

Despite the uniqueness and strength of Castro's registered trademark, EMI has filed a dilution claim against Castro for the *use of his own inherently distinct mark* under the Texas Anti-Dilution Statute. Tex. Bus. & Com. Code 16.29. However, this claim is expressly barred by the Lanham Act, 15 U.S.C. 1125(c) (6), which states that ownership

of a federal registration, “shall be a complete bar to an action against that person, with respect to that mark, that is brought by another person under the common law or a statute of a State and that seeks to prevent dilution of the distinctiveness of a mark.” The language of this statute is simple and easy to understand. There is no room for interpretation. Therefore, this court is required to apply it literally.

However, if the court wishes to look behind the literal words, the House Judiciary Committee issued a statement explaining the reason for the “complete bar.” This provision was intended to further “the intent of the Lanham Act to protect registered marks used in such commerce from interference by state, or territorial legislation.” See H.R. Rep. No. 104-374, at 7 (1995)(quoting 15 U.S.C. 1127 (2000)).

The Federal Circuit Court of Appeals has applied this bar literally to preclude state law dilution claims. See *Enterprise Rent-A-Car Company v. Advantage Rent-A-Car, Inc.*, 330 F.3d 1333 (Fed. Cir. 2003). The U.S. District Court for the Southern District of Texas has also applied the bar literally. *Westchester Media Company L.P. v. PRL USA Holdings, Inc.* 1999 U.S. Dist. LEXIS 12369, at *100-101 (Cause No. H-97-3278, S.D. Houston, August 4, 1999)(“This section, which has rarely been interpreted by courts precludes state law dilution claims, which have been brought against the use of a federally registered mark. Westchester’s ownership of a ‘POLO’ registration presents a complete bar to PRL’s dilution claims under Texas Law.”), *aff’d in part, vacated in part on other grounds* at 214 F.3d 658 (5th Cir. 2000). The Eighth Circuit has also applied the bar literally. See *Viacom Inc. v. Ingram Enterprises*, 141 F.3d 886, 891 (1998)(reversing summary judgment that had been granted on plaintiff’s state dilution claims). The Eighth Circuit also explained that this statutory defense does not require this court to find that the Lanham Act totally preempts state dilution law. *Id.* Nor does Castro request such a

ruling. Castro only requests that this Court apply the defensive bar literally as have the above referenced courts. For all of the above reasons, Castro respectfully requests that EMI's State law dilution claim be dismissed for failure to state a claim.

III. EMI's UNFAIR COMPETITION/FALSE DESIGNATION OF ORIGIN CLAIMS MUST BE DISMISSED

Unfair competition is a broad umbrella under the Lanham Act under which fall various types of deceptive practices. *See Pizza Hut v. Papa Johns, International*, 227 F.3d 489, 495 (5th Cir. 2000). Here, EMI has alleged "false designation of origin" as the specific type of "unfair practice" committed by Castro, as set forth in 15 U.S. C. 1125. The Fifth Circuit explicitly requires that a plaintiff claiming a violation of this section of the Lanham Act plead and prove a very *specific act of deception*, stating: "The type of false representation constituting the essence of this tort has always been understood to be an affirmative misrepresentation by the defendant (either through its advertising or otherwise in connection with its sales efforts) regarding the existence of certain qualities or characteristics that its goods do not in fact have." *Chevron Chemical Company v. Voluntary Purchasing Groups, Inc.*, 659 F.2d 695, 700-701 (5th Cir. 1981). The "essential misrepresentation" required in an "unfair competition" case requires the pleading of specific facts showing that "the defendant misrepresents his goods to be those of another.") *Id* at 701. This is also known as "passing off" – when the defendant passes off his goods as though they came from another source (the "designation of origin") *Id*.

In applying this Fifth Circuit precedent, the District Courts in this Circuit have consistently required very specific factual allegations in the pleadings, such as an "actual statement" that was false or misleading. *See Heartbrand Beef, Inc. v. Lobel's of New York, LLC*, 2009 U.S. Dist, LEXIS 882, *6 (S.D. Tex. 2009)("We need not go further

than the first element, however. Heartbrand does not identify any actual statement made by Yahoo!..... Further, even if Heartbrand has alleged that Yahoo! made a statement in placing an advertisement, Heartbrand has certainly not alleged that Yahoo! made a statement about Yahoo's products or services.”).

A plaintiff may prove its “false designation of origin” claim in one of two ways: (1) the defendant made a literally false statement about *its own products* and/or their origin; or (2) the defendant made a misleading statement about its products and/or their origin and a “substantial number” of consumers were “actually deceived.” *See The York Group, Inc. v. Horizon Casket Group, Inc.*, 459 F. Supp. 2d 567, 576 (S.D. Tex. 2006). If the plaintiff cannot plead and prove the defendant made a literally false statement, then he must at least plead and prove that the defendant made a “misleading” statement and that a “substantial number of consumers” were “actually deceived” by the statement. *Id.* (“But if the challenged statements were misleading but not literally false, the plaintiff must prove actual deception with ‘evidence of actual consumer reaction to the challenged advertising or surveys showing that a substantial number of consumers were actually misled by the advertisements’”). *Id.*

Here, EMI has alleged nothing more than that Castro is using his own “inherently distinct” trademark. Neither does EMI allege that Castro made any “literally false” statements about his own products or services. EMI does not allege that Castro made any “misleading” statements about his own products of services. In fact, EMI does not allege that Castro made ANY kind of statements (true or false) about his own products or services at all. Nor does EMI allege that Castro tried to “pass off” his products or services as EMI's. Nor does EMI allege that anyone, much less a “substantial number” of consumers have been “actually deceived” by anything Castro has done. Moreover, it

is undisputed that Castro does not sell ANY at all products under the name “EntrepreNeurology.” He plans to conduct workshops under that name, but *has not yet conducted* a single workshop. Therefore, EMI cannot identify a single consumer who was deceived into going to one of Castro’s workshops. For all of these reasons, Castro respectfully requests that EMI’s claims of Unfair Competition/False Designation of Origin be dismissed for failure to state a claim.

IV. EMI’S CLAIM OF “UNJUST ENRICHMENT” MUST BE DISMISSED

EMI’s claim of “unjust enrichment” must also be dismissed for the following reasons. First, it is unclear whether “unjust enrichment” constitutes an “independent” cause of action or is merely a remedy. *See Dudley Construction Co. v. Dawson*, 258 S.W.3d 694, 703 (Tex. App.—Waco, 2008)(“Unjust enrichment, itself is not an independent cause of action, but rather ‘characterizes the result of a failure to make restitution of the benefits either wrongfully or passively received under circumstances that give rise to an implied or quasi-contractual obligation to repay.”).

Unjust enrichment can be found where one person has “obtained a benefit from another by fraud, duress, mistake, or the taking of undue advantage.” *Id. County of El Paso v. Jones*, 2009 U.S. Dist. LEXIS 113141, at *34 (Tex. App.—El Paso, 2009). Texas law also provides that unjust enrichment can touch “passively received” benefits, where the nexus is some related third party’s acts against the plaintiff, when it would be ‘unconscionable’ for the receiving party to retain them. *Id.*

Here, EMI does not allege any specific facts explaining how, when, where, or by what conduct Castro “actively” committed “fraud, duress, mistake,” or “took unfair advantage” of EMI in any contractual dealings, or any other kind of dealings. EMI does not allege that Castro has ever had any kind of dealings with it at all. In addition, EMI

does not allege that Castro “passively” was the beneficiary of some undue benefit that was conferred upon him by EMI or some third party. Moreover, since Castro has not yet conducted a single workshop under the name “EntrepreNeurology,” EMI cannot state any facts showing “how,” “when,” “why” or “in what amount” Castro has been “enriched.

Moreover, if some other adequate legal remedy is available, EMI is deprived of the right to claim common law “unjust enrichment” altogether. *See Dudley Construction*, at *12 (citing *BMG Direct Mktg., Inc., v. Peake*, 178 S.W.3d 763, 770 (Tex. 2005)) (“Like other equitable claims and defenses, an adequate legal remedy may render equitable claims of unjust enrichment and equitable defenses of voluntary payment unavailable.”). Here, if EMI prevails on the merits of its infringement claims under the Lanham Act, and if there were any profits to disgorge from a workshop that had actually been conducted, the Lanham Act would provide for full restitution to EMI. Therefore, a claim for “unjust enrichment” is duplicative, unnecessary, and would only be confusing to the jury. *Id* (citing *Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 665-66 (Tex. 1999)).

EMI does not identify any specific facts that would support any of the essential elements necessary to state a proper “unjust enrichment” claim under Texas law (if one even exists). For all of the above reasons, Castro respectfully requests that EMI’s claim of “unjust enrichment” be dismissed.

V. EMI’S CLAIM OF “MISAPPROPRIATION” MUST BE DISMISSED

EMI also claims “misappropriation” under Texas common law. This tort falls under the general umbrella of “unfair competition.” *See United States Sporting Products, Inc., v. Stewart Game Calls, Inc.*, 865 S.W.2d 214, 218 (Tex. App. –Waco, 1993). This cause of action requires that EMI plead and prove that (1) EMI created a product (or something of value) through extensive time, labor, skill and money; (2) Castro made use

of that product in competition with EMI, and thereby, gained a competitive advantage; and (3) EMI has suffered actual harm. *Id.*

EMI's claim does not allege that it created anything of value at great time and expense. It is undisputed that the noun "entrepreneur" this is a word of French origin that has been in the public domain for several hundred years. The Ninth Circuit recognized that this noun has a common dictionary meaning. *See Entrepreneur Media, Inc. v. Smith*, 279 F.3d 1135 (9th Cir. 2002). Therefore, EMI's use of this noun as the title of its magazine does not mean that EMI created the noun or gave it any value that it did not already have. And the fact that EMI may have spent many years and millions of dollars marketing and advertising its own magazine (not giving the noun value) does not mean the average citizen "misappropriates" EMI's rights every time he/she uses the word "entrepreneur." (whether in a literary sense or to brand their products). *See Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, 119 (1938)("shredded wheat" will always be "shredded wheat" despite the fact that the manufacturer of a cereal brand spent \$17 million over thirty years to market it and brand it).

Moreover, the Ninth Circuit has already explicitly admonished EMI that it cannot prevent others from using this noun to brand or market their services, stating, "EMI cannot have the exclusive right to use the word 'entrepreneur' in any mark identifying a printed publication addressing subjects related to entrepreneurship." *See Entrepreneur Media, Inc. v. Smith*, 279 F.3d 1135, 1143 (9th Cir. 2002). Any "goodwill" that EMI claims to have created may be as to its magazine and its contents, but it is legally impossible for EMI to state any set of facts that would show that it created the "goodwill" that already existed in the word "entrepreneur." If EMI's theory were valid, then France would have a proper "misappropriation" claim against EMI for using the word

“entrepreneur” as the title of its magazine because it was the French people who created the word and gave it value. The Ninth Circuit must have recognized this when it went out of its way to explicitly tell EMI it could not prevent others from using this word to brand their products and services. *EMI*, 279 F.3d at 1143.

EMI also fails to allege any specific facts explaining when, how, where or by what conduct Castro has gained any competitive advantage. EMI only alleges that Castro has used his own “inherently distinct” federally registered trademark.

According to well established Texas law, the above referenced case law, Castro’s conduct must have caused EMI actual harm. *See United States Sporting Products, Inc., v. Stewart Game Calls, Inc.*, 865 S.W.2d 214, 218 (Tex. App. –Waco, 1993). EMI failed to plead any specific facts identifying any “actual harm” that it has suffered. It is undisputed that Castro has not yet conducted a single workshop in competition with EMI. There is no Texas authority that allows recovery under this tort for “likelihood” of harm or a “likelihood of confusion.” Therefore, Castro respectfully requests that the Court dismiss EMI’s claim of misappropriation under Texas common law.

VI. EMI’S TRADEMARK INFRINGEMENT CLAIMS UNDER THE LANHAM ACT AND UNDER TEXAS COMMON LAW MUST BE DISMISSED

EMI alleges a classic trademark infringement claim under the Lanham Act, 15 USC 1114 and under Texas common law. According to the Fifth Circuit, a claim of infringement under Texas common law is no different from a claim of infringement under the Lanham Act. *See Amazing Spaces, Inc. v. Metro Mini Storage*, 608 F.3d 225, 235 (5th Cir. 2010); and *Elvis Presley Enterprises v. Capece*, 141 F.3d 188, 193 (5th Cir. 1998). Moreover, the elements of the claims and legal issues involved are identical. *Id.* Therefore, this motion refers to both causes of action as the “infringement claims”

Liability for trademark infringement “hinges upon whether a likelihood of confusion exists between the marks at issue.” *Elvis Presley Enterprises*, 141 F.3d at 194. Consistent with the Supreme Court’s decision in *Twombly*, the Fifth Circuit has made it clear that the “likelihood of confusion” requires more than a “mere possibility of confusion.” *Id.* The Supreme Court has made it clear that factual allegations that are merely conclusory (such as “there is a likelihood of confusion”) are “not entitled to be assumed true.” *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, at *33 (2009). The Supreme Court requires more than “a sheer possibility that a defendant has acted unlawfully.” *Id.* at *29. “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* EMI’s allegation that “there is a likelihood of confusion” without any facts to explain *why* there is a likelihood of confusion fails to “nudge” EMI’s claim across the line from “mere possibility” to actual plausibility. *Id.*

When Castro applied for his trademark on the word “EntrepreNeurology,” even EMI did not think there was a likelihood of confusion. EMI, which has a custom and practice of opposing every trademark application that has the word “entrepreneur” in it, never opposed Castro’s mark, and it sailed right through with full acceptance by the USPTO as an “inherently distinct” mark. In all of its previous pleadings, EMI has never denied this fact.

If EMI had any specific facts to support its “likelihood of confusion” claim, it would have identified them and set them forth in a logical manner as the Fifth Circuit has done: EMI would have identified facts to show: (1) the type of trademark allegedly infringed; (2) the similarity between the two marks; (3) the similarity of the products or services; (4) the identity of the retail outlets and purchasers; (5) the identity of the advertising media used; (6) the defendant’s intent; and (7) any evidence of actual

confusion. *Elvis Presley Enterprises*, 141 F.3d at 194. These are the well known factors required by the Fifth Circuit to determine whether there is a “likelihood of confusion.” *Elvis Presley Enterprises v. Capece*, 141 F.3d 188, 193 (5th Cir. 1998).

Instead of identifying a single fact that correlates to any of these factors, EMI has done nothing more than make a barebones, formulaic allegation of “likelihood of confusion.” EMI has failed to set forth any facts explaining “why” or “how” there is a likelihood of confusion. The Fifth Circuit has already made it very clear that that merely incorporating another person’s “word” into your own trademark is not sufficient, by itself, to establish a likelihood of confusion. *Armstrong Cork Company v. World Carpets, Inc.*, 1 596 F.2d 496, 502 (5th Cir. 1979)(“The mere fact that Armstrong’s proposed corporate name contains the word ‘World’ does not, of itself, make the name ‘substantially similar’ to World’s trademark. A mark must be viewed in its entirety and in context. It is the overall impression that counts.”); *see also Association of Co-Op Members, Inc. v. Farmland Industries, Inc.*, 684 F.2d 1134, 1141 (5th Cir. 1982)(“[I]nclusion of another’s mark in a composite does not automatically preclude trademark status and does not of its own force establish likelihood of confusion.”)

This is especially true when the other person’s word is a common noun that has been around for several hundred years. It is even more true when the Ninth Circuit has specifically told EMI that it cannot stop others from using this common noun to brand their goods and services. *Smith*, 279 F.3d 1135, 1143 (9th Cir. 2002).

In accordance with these seven factors, the court is required to look at the “overall impression” that Castro’s mark has – as it is actually presented to the public in the marketplace. *Id.* EMI knows this. Yet, it failed to set forth any facts showing how Castro’s word “EntrepreNeurology” is actually presented to the public in the marketplace

or how the “overall impression” it makes is likely to cause confusion. For very good reasons, the Fifth Circuit requires specific facts showing “confusion about what?” and “confusion of whom?” *Armstrong Cork Company*, at 501.

The Fifth Circuit has explained that the “overall impression” test is “nothing more than a subjective eyeball test.” *Exxon Corp. v. Texas Motor Exchange of Houston, Inc.*, 628 F.2d 500, 504 (5th Cir. 1980). With the court’s own “eyeballs,” it can see that the word “EntrepreNeurology” on its face emphasizes the word “Neurology” and no reasonable person even sees the word “entrepreneur.” Nor does EMI explain how or why any reasonable person could be confused. In fact, in his Second Amended Complaint, Castro has included a document as it was actually presented in the marketplace to show the court that the logo actually says “Dan Castro’s EntrepreNeurology.” See Exhibit 2 to Castro’s Second Amended Complaint. The words “Dan Castro’s” are there to designate the point of origin. This is “Dan Castro’s EntrepreNeurology.” Castro has used this graphic in his printed brochures. The same graphic is set forth below for the court’s convenience:



[NOTE: Dan Castro’s name is in sky blue. The prefix “entrepre” is in green. The word “Neurology” is orange]

EMI has not set forth any factors comparing the colors, style, or font of Castro's logo with its own logo because to do so would be an admission that there is no likelihood of confusion. EMI knows very well that courts are required to compare such things as font, style and color in determining the likelihood of confusion. *Elvis Presley Enter., Inc.*, 141 F.3d at 201; *see e.g., Texas Dairy Queen Operators Council v. The Feed Store*, 1986 U.S. Dist. LEXIS 19341 (N.D. Tex 1986)(comparing colors, style, size and font of letters and finding "no confusion."); *Ironclad, L.P. v. Poly-America, Inc.*, 2000 U.S. Dist. LEXIS 10728 (N.D. Dallas 2000)(comparing font size, color, design, and style of letters and finding "likelihood of confusion").

EMI has also not set forth any facts sufficient to explain the similarity of Castro's products and services with EMI's products and services. It is undisputed that Castro does not even sell a product under the name "EntrepreNeurology." He markets a workshop, but no workshops have yet been conducted. EMI has not set forth any facts that would explain the identity of the outlets and purchasers. EMI has not set forth any facts describing the advertising media used. EMI has not set forth any facts that would demonstrate Castro's intent. EMI has not set forth any facts demonstrating "actual confusion" by any consumers. While the absence of one or two of these factors standing alone is not dispositive, EMI's failure to set forth any specific facts supporting ANY of these factors is compelling evidence of the fact that *it is unable* to state a proper claim for "infringement" under either the Lanham Act or Texas common law.

VII. EMI'S REQUEST FOR CANCELLATION MUST BE DISMISSED

EMI has also filed a claim requesting cancellation of the "inherently distinct" trademark owned by Castro, which it never opposed at the USPTO level to begin. This claim suffers from the same fatal defects as all of its other claims. It consists of nothing

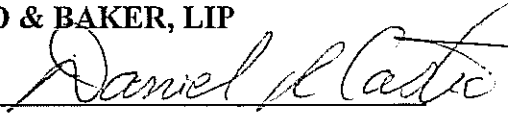
more than barebones allegations that Castro's trademark "infringes" and "dilutes" EMI's mark. Here, EMI does not even go so far as to allege that Castro's trademark is "likely to confuse" anyone – even in a conclusory manner. Even if EMI had alleged "likelihood of confusion" here, this claim suffers from the same defects as its "infringement" claims under the Lanham Act and Texas common law. There are no facts set forth to explain "how" or "why" anyone is likely to be confused. There are no facts set forth to explain the "overall impression" the word "EntrepreNeurology" makes on the average consumer. There are no facts set forth to identify Castro's intent, or any of the other classic seven factors the Fifth Circuit considers in every infringement case. *Elvis Presley Enterprises*, 141 F.3d at 194.

EMI also claims that Castro's trademark "misrepresents" the source of Castro's services. This is a mere repetition of its "false designation of origin" claim, and suffers from the same fatal defects. It is devoid of any facts showing that Castro made any statements about *his own products or services* at all. It is devoid of any "literally false" statements. It is devoid of any "misleading" statements. It is devoid of any facts explaining "actual confusion" by a "substantial number of consumers." See *The York Group, Inc. v. Horizon Casket Group, Inc.*, 459 F. Supp. 2d 567, 576 (S.D. Tex. 2006). For all of these reasons, Castro respectfully requests that EMI's claim for cancellation be dismissed.

WHEREFORE, for all the foregoing reasons, Castro respectfully requests that his Rule 12(b)(6) Motion be granted.

Respectfully Submitted,
CASTRO & BAKER, LIP

By: _____



Daniel R. Castro
State Bar No. 03997390
7800 Shoal Creek Blvd.
Suite 100N
Austin, Texas 78757
phone: (512) 732-0111
fax: (512) 732-0115

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this pleading was filed with the Clerk of the Court using CM/ECF system, which will send a notification of a Notice of Electronic Filing to the following counsel of record on June 9, 2011:

	William G. Barber Pirkey Barber, LLP 600 Congress Avenue, Suite 2120 Austin, Texas 78701
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Daniel R. Castro

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

**Daniel R. Castro
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v.

**ENTREPRENEUR MEDIA, INC.
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**CIVIL ACTION NO:
A:10-CA-695-LY**

ORDER GRANTING CASTRO'S RULE 12(b)(6) MOTION TO DISMISS

Before the Court is Castro's Rule 12(b)(6) Motion To Dismiss. The Court having considered the motion, and all responsive pleadings, is of the opinion that the Motion should be GRANTED in its entirety.

ACCORDINGLY, IT IS ORDERED that all of EMI's counterclaims are hereby dismissed.

Signed and executed this ____ day of June 2011.

The Honorable Lee Yeakel