

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

MARIETTA EYE CLINIC, P.A.,

Plaintiff,

v.

MARIETTA OPTOMETRY, INC.;

Defendant.

Civil Action File No.:

JURY TRIAL DEMANDED

COMPLAINT

Plaintiff Marietta Eye Clinic, P.A. (“Marietta Eye Clinic”) states its Complaint against Marietta Optometry, Inc. (“Defendant” or “MOI”), as follows:

JURISDICTION AND VENUE

1. This is civil action for (a) cyberpiracy, false designation of origin, unfair competition, and trade name infringement and dilution under the Lanham Act (15 U.S.C. § 1125), (b) unfair and deceptive trade practices under Georgia law, and (c) common-law trade name infringement, unfair competition, and deceptive trade practices. In this action, Plaintiff Marietta Eye Clinic seeks preliminary and permanent equitable injunctive relief, compensatory and/or general damages, forfeiture and transfer by Defendant of the www.mariettaeyeclinic.com domain name, trebled damages, costs, and attorneys’ fees.

2. This Court has subject matter jurisdiction over all causes of action set

forth herein pursuant to 15 U.S.C. §1121; 28 U.S.C. §§ 1331, 1338(a) and 1338(b); and 28 U.S.C. § 1367.

3. Venue is proper in this judicial district and division pursuant to 28 U.S.C. § 1391.

PARTIES

4. Marietta Eye Clinic is a Georgia professional corporation, doing business as “Marietta Eye Clinic” and with places of business at:

- a. 895 Canton Road, Marietta, Georgia 30060;
- b. 2520 Windy Hill Road, Suite 206, Marietta, Georgia 30067;
- c. 2453 Powder Springs Road, Marietta, Georgia 30064;
- d. 100 Old Ballground Highway, Suite A, Canton, Georgia 30114;
- e. 3939 Roswell Road, Suite 100, Marietta, Georgia 30062;
- f. 4645 Timber Ridge Drive, Douglasville, Georgia 30135; and
- g. 4900 Ivey Road, Suite 1226, Acworth, Georgia 30101.

5. Upon information and belief, Defendant MOI is a Georgia corporation created and existing under the laws of Georgia, doing business as “Marietta Optometry.” Defendant’s principal and only place of business is located at 397 Sessions Street, Marietta, Georgia 30060. Defendant MOI is subject to the personal jurisdiction of this Court and may be served at the office of its Registered

Agent, Karen Louise Weber-Mullican, at 1635 Old 41 Highway, NW, Suite 112-144, Kennesaw, Georgia 30152.

FACTUAL BACKGROUND

6. Marietta Eye Clinic's eye-care practice opened in 1967 in Marietta, Georgia as "Marietta Eye Clinic."

7. The practice has been continuously operated as "Marietta Eye Clinic" since 1967.

8. Marietta Eye Clinic currently operates seven office locations in the Marietta, Georgia area as well as in other Georgia communities, including the cities of Canton, Douglasville, and Acworth, Georgia.

9. Defendant MOI was created in December 2005.

10. Defendant operates one eye-care office in Marietta, Georgia, approximately one mile from the main office of Marietta Eye Clinic.

11. Defendant has registered the domain name "www.mariettaeyeclinic.com" and uses said domain solely for the purpose of directing Internet users to Defendant's own web page found at <http://mariettaoptometry.com> (see Exhibit A hereto).

12. Upon information and belief, Defendant, and/or an affiliate of Defendant, also owns the domain name "www.mariettaoptometry.com," which

directs Internet users to the identical web page of Defendant (*see* Exhibit B hereto) accessed via www.mariettaeyeclinic.com.

13. On more than one occasion, but most recently on February 11, 2011 (*see* Exhibit C hereto), Marietta Eye Clinic has informed Defendant that Defendant's registration and use of the www.mariettaeyeclinic.com domain name to misdirect Internet users to Defendant's web page infringed on Marietta Eye Clinic's goodwill and ownership of the "Marietta Eye Clinic" trade name, insofar as:

a. Defendant is misusing a domain name identical to Marietta Eye Clinic's trade name;

b. Defendant has no lawful or legitimate interest in the www.mariettaeyeclinic.com domain name other than to create confusion between Defendant's optometric business and Marietta Eye Clinic's medical practice and related optometric businesses; and

c. Defendant intentionally, deliberately and in bad faith misdirects consumers who enter the www.mariettaeyeclinic.com domain name to Defendant's own website at <http://mariettaoptometry.com>.

14. On account of Defendant's willful infringement of Marietta Eye Clinic's trade name and misuse of the www.mariettaeyeclinic.com domain name,

Marietta Eye Clinic demanded that Defendant cease and desist use and exploitation of the www.mariettaeyeclinic.com domain name, cease and desist redirecting Internet traffic to the domain name to Defendant's web page, and transfer the domain name to Marietta Eye Clinic. *See, e.g.*, Ex. C.

15. Defendant refuses to cease and desist its intentional, deliberate and wrongful misuse of the domain name and presently continues its misuse.

COUNT ONE:
CYBERPIRACY UNDER 15 U.S.C. § 1125(d)

16. Marietta Eye Clinic re-alleges and incorporates herein the allegations of paragraphs 1 through 15 of this Complaint as if fully set forth herein.

17. Defendant has registered, trafficked in, and used, and continues to register, traffic in, and use the domain name www.mariettaeyeclinic.com, which name is identical, confusingly similar and dilutive of Plaintiff Marietta Eye Clinic's "Marietta Eye Clinic" trade name in violation of Section 43(d) of the Lanham Act, 15 U.S.C. § 1125(d).

18. Defendant has no trademark or other intellectual property rights in the www.mariettaeyeclinic.com domain name.

19. The www.mariettaeyeclinic.com domain name consists of the legal name of Plaintiff Marietta Eye Clinic.

20. Through its registration and use of the www.mariettaeyeclinic.com

domain name, Defendant intentionally and for commercial gain diverts consumers seeking Marietta Eye Clinic online to Defendant's own site accessible under the domain name, thereby harming the goodwill represented by Marietta Eye Clinic, by creating a likelihood of confusion as to the source, sponsorship, affiliation, or endorsement of the site.

21. Defendant has had and continues to have bad faith intent to profit from Plaintiff's "Marietta Eye Clinic" trade name, and Marietta Eye Clinic has been irreparably damaged by Defendant's use, misrepresentation, and false designation of "Marietta Eye Clinic" as Defendant's website domain name.

22. If not enjoined by this Court, Defendant will continue its acts of cyberpiracy set forth above, which acts have caused and will continue to cause Marietta Eye Clinic immediate and irreparable harm. Pursuant to 15 U.S.C. § 1116 and Rule 65 of the Federal Rules of Civil Procedure, Marietta Eye Clinic is entitled to an Order of this Court enjoining Defendant's unlawful activities. Marietta Eye Clinic has no adequate remedy at law.

23. As a result of Defendant's cyberpiracy conduct set forth above, Marietta Eye Clinic has been, and continues to be, irreparably damaged. Pursuant to 15 U.S.C. § 1117, Marietta Eye Clinic is entitled to a judgment for: (a) Defendant's profits; (b) damages sustained by Marietta Eye Clinic; (c) treble

damages; (d) Marietta Eye Clinic's attorneys' fees; (6) Marietta Eye Clinic's costs of this action; and (7) interest.

24. As a result of Defendant's acts of cyberpiracy as set forth above, and pursuant to 15 U.S.C. § 1125(d)(1)(C), Marietta Eye Clinic is entitled to an Order of this Court that Defendant shall forfeit the www.mariettaeyeclinic.com domain name and transfer said domain name to Marietta Eye Clinic.

COUNT TWO:
FALSE DESIGNATION OF ORIGIN UNDER 15 U.S.C. § 1125(a)

25. Marietta Eye Clinic re-alleges and incorporates herein the allegations of paragraphs 1 through 15 of this Complaint as if fully set forth herein.

26. Defendant has used and is using in commerce, and in connection with its services, the domain name "www.mariettaeyeclinic.com" containing the term "Marietta Eye Clinic," that constitutes a false designation of origin and/or false representation or description that falsely describes or represents, or tends to falsely describe or represent, that the services provided by Defendant originate with, are sponsored or approved by, or are affiliated, connected or associated with Plaintiff Marietta Eye Clinic.

27. Defendant's actions have caused and are likely to continue to cause confusion or mistake or deception as to the source, sponsorship, approval or affiliation of Defendant's services in violation of Section 43(a) of the Lanham Act,

15 U.S.C. § 1125(a).

28. Defendant has willfully caused, with knowledge of such false designation of origin or description or representation, such designation to be used in interstate commerce.

29. Marietta Eye Clinic has been irreparably damaged by Defendant's use, misrepresentation, and false designation of "Marietta Eye Clinic" for Defendant's website domain name.

30. If not enjoined by this Court, Defendant will continue its acts of unfair competition by the use of the false designation set forth above, which acts have caused, and will continue to cause, Marietta Eye Clinic immediate and irreparable harm. Pursuant to 15 U.S.C. § 1116 and Rule 65 of the Federal Rules of Civil Procedure, Marietta Eye Clinic is entitled to an Order of this Court enjoining Defendant's unlawful activities. Marietta Eye Clinic has no adequate remedy at law.

31. As a result of Defendant's conduct set forth above, Marietta Eye Clinic has been, and continues to be, irreparably damaged. Pursuant to 15 U.S.C. §1117, Marietta Eye Clinic is entitled to a judgment for: (a) Defendant's profits; (b) damages sustained by Marietta Eye Clinic; (c) treble damages; (d) Marietta Eye

Clinic's attorneys' fees; (6) Marietta Eye Clinic's costs of this action; and (7) interest.

COUNT THREE:
UNFAIR COMPETITION UNDER 15 U.S.C. §§ 1125(a) and 1125(c)

32. Marietta Eye Clinic re-alleges and incorporates herein the allegations of paragraphs 1 through 15 of this Complaint as if fully set forth herein.

33. Marietta Eye Clinic first used the name "Marietta Eye Clinic" in conjunction with its medical practice and related optometric businesses long before Defendant registered and used the www.mariettaeyeclinic.com domain name.

34. Marietta Eye Clinic, itself, has been using the name "Marietta Eye Clinic" in commerce in conjunction with its medical practice and related optometric businesses continuously since at least 1971, and the predecessor practice has been using the name "Marietta Eye Clinic" in commerce in conjunction with its medical practice and related optometric businesses continuously for 44 years, since 1967.

35. Marietta Eye Clinic's continuous use of the "Marietta Eye Clinic" name in conjunction with its medical practice and related optometric businesses has taken place in a number of Georgia locations, including the cities of Marietta, Canton, Douglasville, and Acworth, Georgia.

36. Defendant has used and continues to use the

www.mariettaeyeclinic.com domain name in connection with its optometric services in Marietta, Georgia.

37. Both Marietta Eye Clinic and Defendant advertise and offer their respective services on the World Wide Web and make their respective web pages available to Internet users.

38. The name “Marietta Eye Clinic” is well-recognized not only in the Marietta, Georgia area but also in other Georgia communities as referring to Plaintiff Marietta Eye Clinic.

39. Defendant willfully intended and presently intends to trade on Marietta Eye Clinic’s reputation and/or to cause dilution of the “Marietta Eye Clinic” name.

40. Marietta Eye Clinic has been irreparably damaged by Defendant's unfair competition and misuse of “Marietta Eye Clinic” as Defendant’s website domain name.

41. If not enjoined by this Court, Defendant will continue its acts of unfair competition by the misuse of the “Marietta Eye Clinic” name set forth above, which acts have caused, and will continue to cause, Marietta Eye Clinic immediate and irreparable harm. Pursuant to 15 U.S.C. § 1116 and Rule 65 of the Federal Rules of Civil Procedure, Marietta Eye Clinic is entitled to an Order of this Court

enjoining Defendant's unlawful activities. Marietta Eye Clinic has no adequate remedy at law.

42. As a result of Defendant's conduct set forth above, Marietta Eye Clinic has been, and continues to be, irreparably damaged. Pursuant to 15 U.S.C. §1117, Marietta Eye Clinic is entitled to a judgment for: (a) Defendant's profits; (b) damages sustained by Marietta Eye Clinic; (c) treble damages; (d) Marietta Eye Clinic's attorneys' fees; (6) Marietta Eye Clinic's costs of this action; and (7) interest.

COUNT FOUR:
DECEPTIVE TRADE PRACTICES UNDER O.C.G.A. § 10-1-370

43. Marietta Eye Clinic re-alleges and incorporates herein the allegations of paragraphs 1 through 42 of this Complaint as if fully set forth herein.

44. Defendant, by the aforesaid acts, has engaged in conduct that causes likelihood of confusion or of misunderstanding as to (a) the source, sponsorship, approval of optometric services described and advertised at www.mariettaeyeclinic.com or as to (b) affiliation, connection or association with Marietta Eye Clinic in violation of the Georgia Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 *et seq.*, including but not limited to O.C.G.A. § 10-1-372.

45. Upon information and belief, as a result of Defendant's deceptive trade practices Defendant has monetarily profited, and Marietta Eye Clinic has

been monetarily damaged and is likely to be continuously damaged by Defendant's aforesaid acts.

46. Unless enjoined and restrained by this Court, Defendant will continue its acts of deceptive and unfair trade practices, thereby deceiving and confusing the public and causing Marietta Eye Clinic immediate and irreparable harm. Marietta Eye Clinic is entitled to an Order of this Court enjoining Defendant's unlawful activities pursuant to O.C.G.A. § 10-1-373(a).

47. As a result of Defendant's willful, deceptive and unfair trade practices, Marietta Eye Clinic is entitled to recover its costs and attorneys' fees in accordance with O.C.G.A. § 10-1-373(b).

COUNT FIVE:
COMMON-LAW TRADE NAME INFRINGEMENT, UNFAIR COMPETITION,
AND DECEPTIVE TRADE PRACTICES

48. Marietta Eye Clinic re-alleges and incorporates herein the allegations of paragraphs 1 through 47 of this Complaint as if fully set forth herein.

49. Defendant's actions as set forth above constitute common-law trade name infringement, unfair competition, and deceptive trade practices in violation of Georgia law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Marietta Eye Clinic prays that the Court enter

judgment in its favor and against Defendant Marietta Optometry as follows:

- A. That the Court enter judgment against Defendant on all Counts above;
- B. That Defendant, its corporate officers, directors, affiliates, agents, servants, employees and attorneys, and those persons in active concert or participation with Defendant, be preliminarily and permanently enjoined and restrained from registering, using, operating or otherwise employing the “mariettaeyeclinic.com” domain name or any other domain name utilizing the term or phrase “Marietta Eye Clinic” or confusingly similar name or mark;
- C. That an accounting be conducted and judgment be rendered against Defendant for the following damages:
 - (1) all profits received by Defendant, directly or indirectly, from its sales and/or advertising of any optometric or related services sold or offered for sale on the web page accessible via the domain name www.mariettaeyeclinic.com;
 - (2) all damages sustained by Marietta Eye Clinic on account of, *inter alia*, Defendant’s cyberpiracy, false designation or origin, unfair competition, deceptive trade practices, and/or infringement or dilution of Marietta Eye Clinic’s trade name rights; and
 - (3) actual compensatory damages in an amount not presently

known but to be calculated during the pendency of this action;

D. That such damages assessed against Defendant be trebled as provided by 15 U.S.C. § 1117 and/or increased or enhanced as provided by Georgia law;

E. That Defendant forfeit the www.mariettaeyeclinic.com domain name and transfer ownership and registration of the www.mariettaeyeclinic.com domain name to Marietta Eye Clinic.

F. That Marietta Eye Clinic have and recover its costs in this suit, including reasonable attorneys' fees and expenses;

G. That Defendant be ordered to pay pre- and post-judgment interest as provided by law;

H. That Marietta Eye Clinic have such other and further relief as this Honorable Court may deem just, equitable and proper.

DEMAND FOR JURY TRIAL

Pursuant to Fed. R. Civ. P. 38(b), Plaintiff Marietta Eye Clinic demands a trial by jury of all issues triable of right by a jury.

This 20th day of December, 2011.

Respectfully submitted,

/s/ Eric G. Maurer

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