

## Request for Reconsideration after Final Action

**The table below presents the data as entered.**

Input Field	Entered
<b>SERIAL NUMBER</b>	85677969
<b>LAW OFFICE ASSIGNED</b>	LAW OFFICE 104
<b>MARK SECTION (no change)</b>	
<b>ARGUMENT(S)</b>	
Please see the actual argument text attached within the Evidence section.	
<b>EVIDENCE SECTION</b>	
<b>EVIDENCE FILE NAME(S)</b>	
<b>ORIGINAL PDF FILE</b>	<a href="#">evi_9767147154-171608442 . 2_d Argument - NOW YOGA AND FITNESS.pdf</a>
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<b>DESCRIPTION OF EVIDENCE FILE</b>	2(d) Argument - NOW YOGA AND FITNESS, Exhibits 1-2, Exhibit 3, Exhibits 4-6
<b>SIGNATURE SECTION</b>	
<b>RESPONSE SIGNATURE</b>	/Matthew H. Swyers/
<b>SIGNATORY'S NAME</b>	Matthew H. Swyers
<b>SIGNATORY'S POSITION</b>	Attorney of Record

<b>SIGNATORY'S PHONE NUMBER</b>	800-906-8626 x100
<b>DATE SIGNED</b>	04/29/2014
<b>AUTHORIZED SIGNATORY</b>	YES
<b>CONCURRENT APPEAL NOTICE FILED</b>	YES
<b>FILING INFORMATION SECTION</b>	
<b>SUBMIT DATE</b>	Tue Apr 29 17:19:05 EDT 2014
<b>TEAS STAMP</b>	USPTO/RFR-97.67.147.154-2 0140429171905015229-85677 969-5001b2f113db4fadd06eb 627b6ed68f5bf5796806176fe c4562894ca27a5d2de-N/A-N/ A-20140429171608442161

PTO Form 1930 (Rev 9/2007)  
OMB No. 0651-0050 (Exp. 05/31/2014)

## **Request for Reconsideration after Final Action To the Commissioner for Trademarks:**

Application serial no. **85677969** has been amended as follows:

### **ARGUMENT(S)**

**In response to the substantive refusal(s), please note the following:**

Please see the actual argument text attached within the Evidence section.

### **EVIDENCE**

Evidence in the nature of 2(d) Argument - NOW YOGA AND FITNESS, Exhibits 1-2, Exhibit 3, Exhibits 4-6 has been attached.

**Original PDF file:**

[evi\\_9767147154-171608442\\_2\\_d\\_Argument - NOW YOGA AND FITNESS.pdf](#)

**Converted PDF file(s) (10 pages)**

[Evidence-1](#)

[Evidence-2](#)

[Evidence-3](#)

[Evidence-4](#)

[Evidence-5](#)

[Evidence-6](#)

[Evidence-7](#)

[Evidence-8](#)

[Evidence-9](#)

[Evidence-10](#)

**Original PDF file:**

[evi\\_9767147154-171608442 . Exhibits 1-2.pdf](#)

**Converted PDF file(s)** (4 pages)

[Evidence-1](#)

[Evidence-2](#)

[Evidence-3](#)

[Evidence-4](#)

**Original PDF file:**

[evi\\_9767147154-171608442 . Exhibit 3.pdf](#)

**Converted PDF file(s)** (13 pages)

[Evidence-1](#)

[Evidence-2](#)

[Evidence-3](#)

[Evidence-4](#)

[Evidence-5](#)

[Evidence-6](#)

[Evidence-7](#)

[Evidence-8](#)

[Evidence-9](#)

[Evidence-10](#)

[Evidence-11](#)

[Evidence-12](#)

[Evidence-13](#)

**Original PDF file:**

[evi\\_9767147154-171608442 . Exhibits 4-6.pdf](#)

**Converted PDF file(s)** (3 pages)

[Evidence-1](#)

[Evidence-2](#)

[Evidence-3](#)

## **SIGNATURE(S)**

### **Request for Reconsideration Signature**

Signature: /Matthew H. Swyers/ Date: 04/29/2014

Signatory's Name: Matthew H. Swyers

Signatory's Position: Attorney of Record

Signatory's Phone Number: 800-906-8626 x100

The signatory has confirmed that he/she is an attorney who is a member in good standing of the bar of the highest court of a U.S. state, which includes the District of Columbia, Puerto Rico, and other federal territories and possessions; and he/she is currently the applicant's attorney or an associate thereof; and to the best of his/her knowledge, if prior to his/her appointment another U.S. attorney or a Canadian attorney/agent not currently associated with his/her company/firm previously represented the applicant in this matter: (1) the applicant has filed or is concurrently filing a signed revocation of or substitute power

of attorney with the USPTO; (2) the USPTO has granted the request of the prior representative to withdraw; (3) the applicant has filed a power of attorney appointing him/her in this matter; or (4) the applicant's appointed U.S. attorney or Canadian attorney/agent has filed a power of attorney appointing him/her as an associate attorney in this matter.

The applicant is filing a Notice of Appeal in conjunction with this Request for Reconsideration.

Serial Number: 85677969

Internet Transmission Date: Tue Apr 29 17:19:05 EDT 2014

TEAS Stamp: USPTO/RFR-97.67.147.154-2014042917190501

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: :  
Now Yoga, LLC :  
Serial No.: 85/677,969 : Examining Attorney: Zachary B. Crome  
Filed: July 16, 2012 :  
Mark: NOW YOGA AND FITNESS : Law Office: 104

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**Commissioner for Trademarks**  
**P.O. Box 1451**  
**Alexandria, VA 22313-1451**

**RESPONSE TO OFFICE ACTION**

COMES NOW the Applicant, Now Yoga, LLC (hereinafter "Applicant"), by counsel Matthew H. Swyers, Esq., The Trademark Company, PLLC, and submits their request that the examining attorney withdraw his refusal to register the instant mark under Section 2(d) of the Trademark Act stating as follows:

**ARGUMENT IN SUPPORT OF REGISTRATION**

The Examining Attorney refused registration of the mark on the basis that, if registered, the Applicant's mark would create a likelihood of confusion with the mark NOWYOGA as used by Leslie Sims, as more fully identified in U.S. Registration Number 2,703,257 (hereinafter referred to as "Leslie Sims mark").

Applicant respectfully disagrees with the Examining Attorney's decision as more fully set forth below.

### **The Standard for a Determination of a Likelihood of Confusion**

A determination of likelihood of confusion between marks is determined on a case-specific basis. *In re Dixie Restaurants Inc.*, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997). The examining attorney is to apply each of the applicable factors set out in *In re E.I. DuPont DeNemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973). The relevant *DuPont* factors are:

- (1) the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression;
- (2) the similarity or dissimilarity and nature of the services as described in an application or registration or in connection with which a prior mark is in use;
- (3) the similarity or dissimilarity of established, likely-to-continue trade channels;
- (4) the conditions under which and buyers to whom sales are made, i.e., 'impulse' vs. careful, sophisticated purchasing;
- (5) the number and nature of similar marks in use on similar services; and
- (6) the absence of actual confusion as between the marks and the length of time in which the marks have co-existed without actual confusion occurring.

*See id.*

The examining attorney is required to look to the overall impression created by the marks, rather than merely comparing individual features. *Mead Data Cent., Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 875 F.2d 1026, 1029, 10 USPQ2d 1961 (2d Cir. 1989). In this respect, the examining attorney must determine whether the total effect conveyed by the marks is confusingly similar, not simply whether the marks sound alike or look alike. *First Savings Bank F.S.B. v. First Bank System Inc.*, 101 F.3d at 645, 653, 40 USPQ2d 1865, 1870 (10<sup>th</sup> Cir. 1996) (recognizing that while the dominant portion of a mark is given greater weight, each mark still must be considered as a whole)(citing *Universal Money Centers, Inc. v. American Tel. & Tel. Co.*, 22 F.3d 1527, 1531, 30 USPQ2d 1930 (10th Cir. 1994)). Even the use of identical dominant words or terms does not automatically mean that two marks are similar. In *General Mills, Inc. v.*

*Kellogg Co.*, 824 F.2d 622, 627, 3 USPQ2d 1442 (8th Cir. 1987), the court held that “Oatmeal Raisin Crisp” and “Apple Raisin Crisp” are not confusingly similar as trademarks. Also, in *First Savings Bank F.S.B. v. First Bank System Inc.*, 101 F.3d at 645, 653, 40 USPQ2d 1865, 1874 (10<sup>th</sup> Cir. 1996), marks for “FirstBank” and for “First Bank Kansas” were found not to be confusingly similar. Further, in *Luigino’s Inc. v. Stouffer Corp.*, 50 USPQ2d 1047, the mark “Lean Cuisine” was not confusingly similar to “Michelina’s Lean ‘N Tasty” even though both marks use the word “Lean” and are in the same class of services, namely, low-fat frozen food.

Concerning the respective services with which the marks are used, the nature and scope of a party’s services must be determined on the basis of the services recited in the application or registration. *See, e.g., Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 n.4 (Fed. Cir. 1993); *J & J Snack Foods Corp. v. McDonald’s Corp.*, 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991); *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); *Paula Payne Products Co. v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76 (C.C.P.A. 1973). *See generally* TMEP § 1207.01(a)(iii).

If the services in question are not related or marketed in such a way that they would be encountered by the same persons in situations that would create the incorrect assumption that they originate from the same source, then, even if the marks are similar confusion is not likely. *See, e.g., Shen Manufacturing Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 73 USPQ2d 1350 (Fed. Cir. 2004) (cooking classes and kitchen textiles not related); *Local Trademarks, Inc. v. Handy Boys Inc.*, 16 USPQ2d 1156 (TTAB 1990) (LITTLE PLUMBER for liquid drain opener held not confusingly similar to LITTLE PLUMBER and design for advertising services, namely the

formulation and preparation of advertising copy and literature in the plumbing field); *Quartz Radiation Corp. v. Comm/Scope Co.*, 1 USPQ2d 1668 (TTAB 1986) (QR for coaxial cable held not confusingly similar to QR for various products (e.g., lamps, tubes) related to the photocopying field). *See generally* TMEP § 1207.01(a)(i).

Moreover the fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are immune from source confusion. *See In re Decombe*, 9 USPQ2d 1812 (TTAB 1988); *In re Pellerin Milnor Corp.*, 221 USPQ 558 (TTAB 1983). However, circumstances suggesting care in purchasing may tend to minimize likelihood of confusion. *See generally* TMEP § 1207.01(d)(vii).

Applying the legal standards as enumerated above, it is clear that confusion is not likely to exist and Applicant's mark is entitled to register despite the existence of the cited marks.

***Dissimilarities in the Marks as to their Respective Appearances and the Number and Nature of Similar Marks in Use on Similar Services***

The Applicant applied to register the mark NOW YOGA AND FITNESS. The cited mark is NOWYOGA (U.S. Reg. No. 2,703,257.) Copies of the applications for Applicant's mark and for the blocking mark are attached hereto as Exhibits 1 – 2 respectively. *See* Exhibits 1 - 2.

Facially, the applied for mark differs from the cited marks insofar as Applicant's mark consists of the term "NOW" followed by the terms "YOGA AND FITNESS." *See* Exhibit 1. In contrast, U.S. Reg. No. 2,703,257 is a standard character word mark consisting of the single term "NOWYOGA" only. *See* Exhibit 2. Thus, it cannot be said that the marks are identical and true differences do exist in the appearances thereof.

As such, it is submitted that these differences in the appearance of the applied-for mark and the cited marks referenced herein create a separate and distinct commercial impression. This analysis, however, is not submitted in a vacuum with respect to these applications. Generally,

the existence of third-party registrations cannot justify the registration of another mark that is so similar to a previously registered mark as to create a likelihood of confusion, or to cause mistake, or to deceive. *E.g.*, *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1248 (TTAB 2010); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1272 (TTAB 2009).

However, third-party registrations may be relevant to show that a mark or a portion of a mark is descriptive, suggestive, *or so commonly used that the public will look to other elements to distinguish the source of the goods or services*. *See, e.g.*, *In re Hartz Hotel Servs., Inc.*, 102 USPQ2d 1150, 1153-54 (TTAB 2012)(*emphasis added*); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991); *In re Dayco Products-Eagle Motive Inc.*, 9 USPQ2d 1910, 1911-12 (TTAB 1988); *Plus Prods. v. Star-Kist Foods, Inc.*, 220 USPQ 541, 544 (TTAB 1983).

There can be no doubt that both the Applicant's mark and that of the registrant contain the terms, or translation equivalents thereto, NOW in connection with yoga instruction services in International Class 41. In this regard, Applicant respectfully submits Exhibits 4 through 6 which display 3 registered marks incorporating the term "NOW" and literal equivalents thereof used in relation to similar services. *See* Exhibits 4 through 6. The marks are as follows:

NOW & ZEN STRENGTH TRAINING AND YOGA CONDITIONING, U.S. Reg. No. 3,898,082, owned by Barte, Traci, used in connection with "Educational services, namely, providing classes in the field of yoga and strength training, featuring a fusion of yoga and strength training intervals to achieve a mind and body connection for all physical activities" in International Class 41, *See* Exhibit 4;

SERENITY NOW YOGA, U.S. Reg. No. 3,925,230, owned by Nummy Nums Inc., used in connection with "Yoga instruction" in International Class 41, *See* Exhibit 5;

HAPPY NOW YEAR!, U.S. Reg. No. 4,012,501, owned by Circle Yoga, LLC, used in connection with "Yoga instruction" in International Class 41, *See* Exhibit 6;

Accordingly, based upon the distinctions between the appearance of Applicant's mark as apart from the cited mark and in consideration of the dilution of the term "NOW" and literal equivalents thereof as they relate to marks in related classes, Applicant respectfully submits that these *DuPont* factors favor a finding of an absence of a likelihood of confusion should Applicant's mark be permitted to register.

***Dissimilarity Between the Marks' Respective Services***

Comparing the services of the Applicant and the services of the cited marks, it is apparent that the services of the Applicant differ significantly from the services of the cited marks. Applicant's mark is used exclusively in connection with yoga instruction and related services. Specifically, Applicant's NOW YOGA AND FITNESS mark is used with yoga instruction, massage, acupuncture, and other holistic services. Additionally, Applicant's NOW YOGA AND FITNESS mark is used with related retail services. Some of the classes offered under our NOW YOGA AND FITNESS mark include Ashtanga, Freedom Flow, Gentle Flow, Heated Power Flow, and Heated Vinyasa. Our classes offered under the NOW YOGA AND FITNESS mark are available at our studio in Providence, Rhode Island. *See* Exhibit 3, Affidavit of Per Davidson.

In the alternative, the Leslie Sims mark appears to be used in connection with Buddhism based yoga and QiGong classes. Specifically, the Leslie Sims mark provides classes including Buddhist Yoga, 5 Tibetans, 18 Hands Buddha Hands QiGong, Hua Shan Toaist Chi Kung. The classes offered under the Leslie Sims mark appear to feature a more spiritual approach to instruction and method. These classes are offered in Los Altos, Mountain View and Portola Valley, California. *See* Exhibit E of Exhibit 3, Affidavit of Per Davidson.

Although the evidence presented by the examining attorney somewhat suggests that the average purchaser of Buddhism based yoga and QiGong classes may also be seeking yoga

instruction, massage, acupuncture, and other holistic services there is no evidence of record that such overlap exists between Applicant's mark and the respective blocking mark. Additionally, evidence is attached concerning like companies that specialize exclusively in food trailers that sell Japanese food at special events, such as Open Door Yoga, Eyes of the World Yoga, and Motion Center. *See* Exhibits B – D. of Exhibit 3, Affidavit of Per Davidson.

It is respectfully submitted that there is little, if any, relation between the services of the Applicant and the services found in the cited mark and, as such, this *DuPont* factor also favors a finding of an absence of a likelihood of confusion should Applicant's mark be permitted to register.

***Dissimilarities Between the Trade Channels for the Marks***

Applicant's yoga instruction, massage, acupuncture, and other holistic services, bearing the NOW YOGA AND FITNESS mark are offered at a facility in Providence, Rhode Island. The retail services offered in connection with Applicant's NOW YOGA AND FITNESS mark are available online, and classes may also be paid for through the same website located at [www.nowyoga.net](http://www.nowyoga.net). *See* Exhibit 3, Affidavit of Per Davidson. In the alternative, it appears that the trade channels of the services bearing Leslie Sims marks were offered exclusively in California, namely in Los Altos, Mountain View and Portola Valley, California. It does not appear that patrons of the Leslie Sims mark can pay for classes online. *See* Exhibit E of Exhibit 3, Affidavit of Per Davidson.

As such, it is respectfully submitted that Applicant's services travel in a channel of trade wholly diverse from those which would be expected for the services of the cited marks. Moreover, as the evidence of record indicates that the Applicant's channel of trade for its services are completely distinct from the services of the cited marks, it is submitted that their

respective services would not be encountered by the same persons in situations that would create the incorrect assumption that such services originate from the same source and, accordingly, this *DuPont* factor also favors registration of the Applicant's mark.

***The Marks' Services are Marketed Differently***

The services offered in connection with the NOW YOGA AND FITNESS mark are currently marketed using social networking, newsletters, word of mouth, direct sales calls, brochures, blog, commercials, radio ads, trade shows, informational website, and coupons. Through Applicant's website hosted at [www.nowyoga.net](http://www.nowyoga.net) and through Amazon.com retails items commonly used with yoga including water bottles, yoga mats, and yoga clothing will be offered. These retail items are used as part of Applicant's marketing plan. *See* Exhibit 3, Affidavit of Per Davidson. In contrast, although the Leslie Sims mark appears to market on a website, they do not sell retail items used for marketing through their website. Additionally, one can only assume that the Leslie Sims mark does not market using social networking, newsletters, word of mouth, direct sales calls, brochures, blog, commercials, radio ads, trade shows, or coupons. *See* Exhibit E of Exhibit 3, Affidavit of Per Davidson.

***Sophistication of the Purchasers and Members of the Respective Services***

Applicant's yoga instruction, massage, acupuncture, and other holistic services, bearing the NOW YOGA AND FITNESS mark are used to attract a very specific consumer, namely, adults seeking yoga instruction and other body work and healing services as well as related accessories. In contrast, it can only be assumed that the Leslie Sims' mark was used to attract those seeking Buddhism based yoga and QiGong classes. *See* Exhibit E of Exhibit 3, Affidavit of Per Davidson.

As such, the average purchaser or member of the respective services offered under the cited marks would also exercise a high level of sophistication in choosing the cited mark's services as apart from the services of the Applicant's mark, therefore minimizing any likelihood of confusion. *See* TMEP § 1207.01(d)(vii). As such, it is suggested that this *DuPont* factor also favors registration of the instant mark.

***The Absence of Evidence of Actual Confusion and the Duration of Time the Marks have Co-Existed with the Absence of such Actual Confusion.***

Finally, Applicant is not aware of any instances of actual confusion as between the services offered in connection with its mark and the services offered under the registered marks. Moreover, as set forth in the attached affidavit given the length of time during which Applicant has used its mark in connection with its services and has co-existed with the other registered marks without confusion such again suggests that confusion is not likely as between the marks should Applicant's mark be permitted to register. *See* Exhibit 3, Affidavit of Per Davidson. As such, it is submitted that this *DuPont* factor also favors registration of the Applicant's mark.

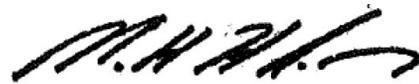
**CONCLUSION**

In conclusion, based upon the foregoing it is submitted that the *DuPont* factors addressed herein favor registration of the Applicant's mark. The services themselves are completely distinct and do not travel in similar trade channels or marketing channels such that they would be encountered by the same class of purchasers or members. Additionally, the sophistication of the Applicant's consumers and the conditions under which sales are made by Applicant are wholly diverse from those of the cited marks.

WHEREFORE it is respectfully requested that the Examining Attorney reconsider his refusal of the instant proceedings, remove as an impediment the cited marks, and approve the instant application for publication upon the Principal Register.

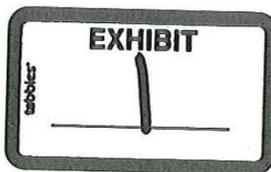
Respectfully submitted this 29<sup>th</sup> day of April, 2014.

THE TRADEMARK COMPANY, PLLC

A handwritten signature in black ink, appearing to read 'M.H. Swyers', written in a cursive style.

---

Matthew H. Swyers, Esquire  
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NOW YOGA AND FITNESS

US Serial Number: 85677969

Application Filing Date: Jul. 16, 2012

Filed as TEAS Plus: Yes

Currently TEAS Plus: Yes

Register: Principal

Mark Type: Service Mark

Status: A final Office action refusing registration has been sent (issued) because the applicant neither satisfied nor overcame all requirements and/or refusals previously raised. The applicant may respond by filing (1) a request for reconsideration; and/or (2) an appeal to the Trademark Trial and Appeal Board. To view all documents in this file, click on the Trademark Document Retrieval link at the top of this page.

Status Date: Oct. 29, 2013

## Mark Information

Mark Literal Elements: NOW YOGA AND FITNESS

Standard Character Claim: Yes. The mark consists of standard characters without claim to any particular font style, size, or color.

Mark Drawing Type: 4 - STANDARD CHARACTER MARK

Disclaimer: "YOGA AND FITNESS"

## Goods and Services

Note: The following symbols indicate that the registrant/owner has amended the goods/services:

- Brackets [.] indicate deleted goods/services;
- Double parenthesis ((.)) identify any goods/services not claimed in a Section 15 affidavit of
- Asterisks "\*" identify additional (new) wording in the goods/services.

For: Yoga instruction

International Class(es): 041 - Primary Class

U.S Class(es): 100, 101, 107

Class Status: ACTIVE

Basis: 1(b)

## Basis Information (Case Level)

Filed Use: No	Currently Use: No	Amended Use: No
Filed ITU: Yes	Currently ITU: Yes	Amended ITU: No
Filed 44D: No	Currently 44D: No	Amended 44D: No
Filed 44E: No	Currently 44E: No	Amended 44E: No
Filed 66A: No	Currently 66A: No	
Filed No Basis: No	Currently No Basis: No	

## Current Owner(s) Information

Owner Name: Now Yoga, LLC

Owner Address: 144 Cypress St, Unit D  
Providence, RHODE ISLAND 02906  
UNITED STATES

Legal Entity Type: LIMITED LIABILITY COMPANY

State or Country Where Organized: RHODE ISLAND

## Attorney/Correspondence Information

### Attorney of Record

Attorney Name: Matthew H. Swyers, Esq.

Attorney Primary Email Address: [admin@thetrademarkcompany.com](mailto:admin@thetrademarkcompany.com)

Attorney Email Authorized: Yes

### Correspondent

Correspondent Name/Address: MATTHEW H. SWYERS, ESQ.  
344 MAPLE AVE STE 151

VIENNA, VIRGINIA 22180  
UNITED STATES

Phone: 800-906-8626 x100

Fax: 270-477-4574

Correspondent e-mail: [admin@thetrademarkcompany.com](mailto:admin@thetrademarkcompany.com)

Correspondent e-mail Yes  
Authorized:

Domestic Representative - Not Found

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## Prosecution History

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Date	Description	Proceeding Number
Oct. 29, 2013	NOTIFICATION OF FINAL REFUSAL EMAILED	
Oct. 29, 2013	FINAL REFUSAL E-MAILED	
Oct. 29, 2013	FINAL REFUSAL WRITTEN	88568
Oct. 08, 2013	TEAS/EMAIL CORRESPONDENCE ENTERED	88889
Oct. 07, 2013	CORRESPONDENCE RECEIVED IN LAW OFFICE	88889
Oct. 07, 2013	TEAS RESPONSE TO OFFICE ACTION RECEIVED	
Apr. 07, 2013	NOTIFICATION OF NON-FINAL ACTION E-MAILED	6325
Apr. 07, 2013	NON-FINAL ACTION E-MAILED	6325
Apr. 07, 2013	NON-FINAL ACTION WRITTEN	88568
Mar. 19, 2013	TEAS/EMAIL CORRESPONDENCE ENTERED	88889
Mar. 18, 2013	CORRESPONDENCE RECEIVED IN LAW OFFICE	88889
Mar. 18, 2013	TEAS RESPONSE TO OFFICE ACTION RECEIVED	
Sep. 19, 2012	NOTIFICATION OF NON-FINAL ACTION E-MAILED	6325
Sep. 19, 2012	NON-FINAL ACTION E-MAILED	6325
Sep. 19, 2012	NON-FINAL ACTION WRITTEN	88568
Sep. 18, 2012	ASSIGNED TO EXAMINER	88568
Jul. 23, 2012	NEW APPLICATION OFFICE SUPPLIED DATA ENTERED IN TRAM	
Jul. 19, 2012	NEW APPLICATION ENTERED IN TRAM	

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## TM Staff and Location Information

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### TM Staff Information

TM Attorney: CROMER, ZACHARY

Law Office Assigned: LAW OFFICE 104

### File Location

Current Location: TMEG LAW OFFICE 104 - EXAMINING  
ATTORNEY ASSIGNED

Date in Location: Oct. 29, 2013



LOS ALTOS, CALIFORNIA 94022  
UNITED STATES

Phone: 650-559-1590

Correspondent e-mail: [nowyoga@gmail.com](mailto:nowyoga@gmail.com) [nowyoga@me.com](mailto:nowyoga@me.com)

Correspondent e-mail Yes  
Authorized:

Domestic Representative - Not Found

## Prosecution History

Date	Description	Proceeding Number
May 15, 2012	NOTICE OF ACCEPTANCE OF SEC. 8 & 9 - E-MAILED	
May 15, 2012	REGISTERED AND RENEWED (FIRST RENEWAL - 10 YRS)	68335
May 15, 2012	REGISTERED - SEC. 8 (10-YR) ACCEPTED/SEC. 9 GRANTED	68335
Apr. 01, 2012	REGISTERED - COMBINED SECTION 8 (10-YR) & SEC. 9 FILED	68335
May 01, 2012	TEAS RESPONSE TO OFFICE ACTION-POST REG RECEIVED	
Apr. 24, 2012	POST REGISTRATION ACTION MAILED - SEC. 8 & 9	68335
Apr. 24, 2012	CASE ASSIGNED TO POST REGISTRATION PARALEGAL	68335
Apr. 01, 2012	TEAS CHANGE OF CORRESPONDENCE RECEIVED	
Apr. 01, 2012	TEAS SECTION 8 & 9 RECEIVED	
Sep. 02, 2008	REGISTERED - SEC. 8 (6-YR) ACCEPTED	73376
Jul. 17, 2008	ASSIGNED TO PARALEGAL	73376
Jul. 10, 2008	TEAS SECTION 8 RECEIVED	
Mar. 07, 2008	CASE FILE IN TICRS	
Apr. 01, 2003	REGISTERED-PRINCIPAL REGISTER	
Feb. 06, 2003	ALLOWED PRINCIPAL REGISTER - SOU ACCEPTED	
Dec. 20, 2002	ASSIGNED TO EXAMINER	76521
Dec. 16, 2002	STATEMENT OF USE PROCESSING COMPLETE	
Jun. 18, 2002	USE AMENDMENT FILED	
Jun. 24, 2002	PAPER RECEIVED	
Jun. 18, 2002	TEAS STATEMENT OF USE RECEIVED	
Mar. 26, 2002	NOA MAILED - SOU REQUIRED FROM APPLICANT	
Jan. 01, 2002	PUBLISHED FOR OPPOSITION	
Dec. 12, 2001	NOTICE OF PUBLICATION	
Nov. 07, 2001	APPROVED FOR PUB - PRINCIPAL REGISTER	
Nov. 01, 2001	ASSIGNED TO EXAMINER	78444

## Maintenance Filings or Post Registration Information

Affidavit of Continued Use: Section 8 - Accepted

Renewal Date: Apr. 01, 2013

## TM Staff and Location Information

TM Staff Information - None

File Location

Current Location: Not Found

Date in Location: May 15, 2012



**AFFIDAVIT OF PER DAVIDSON**

COMES NOW Mr. Per Davidson, a resident of Orleans, MA. and a citizen of the United States above the age 18 and states as follows:

My name is Per Davidson and I am a citizen of the United States and resident of Orleans, MA.

In the course and scope of my work I have become familiar with the services offered under the NOW YOGA AND FITNESS mark, the manner by which these services are offered to the public, general information concerning our customers, as well as general information concerning the use of the mark NOW YOGA AND FITNESS to identify our services. I have also conducted research concerning the prior registered mark NOWYOGA as used by Leslie Sims, as more fully identified in U.S. Registration Number 2,703,257 (hereinafter referred to as "Leslie Sims mark").

In this regard, I state the following based upon my own knowledge:

1. The attached Exhibit A reflects true and accurate copies of pages posted to our website hosted at [www.nowyoga.net](http://www.nowyoga.net). See Exhibit A.
2. Our mark NOW YOGA AND FITNESS is used exclusively in connection with yoga instruction and related services. Specifically, our NOW YOGA AND FITNESS mark is used with yoga instruction, massage, acupuncture, and other holistic services. Additionally, our NOW YOGA AND FITNESS mark is used with related retail services. Some of the classes offered under our NOW YOGA AND FITNESS mark include Ashtanga, Freedom Flow, Gentle Flow, Heated Power Flow, and Heated Vinyasa. Our classes offered under the NOW YOGA AND FITNESS mark are available at our studio in Providence, Rhode Island.

3. Our services are marketed exclusively to adults seeking yoga instruction and other body work and healing services as well as related accessories. Our industry is highly specialized and there is absolutely no overlap in the trade and/or marketing channels utilized by the average purchaser of studio that appears to focus on Buddhist yoga and QiGong that is located in Northern California. In support thereof, I have attached evidence concerning like companies that specialize in conventional yoga instruction and related body work, such as Open Door Yoga, Eyes of the World Yoga, and Motion Center. *See Exhibits B – D.*

4. In contrast, the Leslie Sims mark appears to be used in connection with Buddhism based yoga and QiGong classes. Specifically, the Leslie Sims mark provides classes including Buddhist Yoga, 5 Tibetans, 18 Hands Buddha Hands QiGong, Hua Shan Toaist Chi Kung. The classes offered under the Leslie Sims mark appear to feature a more spiritual approach to instruction and method. These classes are offered in Los Altos, Mountain View and Portola Valley, California. *See Exhibit E.*

5. The trade channels of our services bearing the NOW YOGA AND FITNESS mark are currently offered at our facility in Providence, Rhode Island. The retail services offered in connection with our NOW YOGA AND FITNESS mark are available online, and classes may also be paid for through the same website located at [www.nowyoga.net](http://www.nowyoga.net).

6. In contrast, it appears that the trade channels of the Leslie Sims mark are offered exclusively in California, namely in Los Altos, Mountain View and Portola Valley, California. It does not appear that patrons of the Leslie Sims mark can pay for classes online. *See Exhibit E.*

7. Accordingly, there is only minimal in the channels of trade between the services provided under our NOW YOGA AND FITNESS mark and the services provided under the Leslie Sims mark.

8. To sell our services bearing the NOW YOGA AND FITNESS mark, we market using social networking, newsletters, word of mouth, direct sales calls, brochures, blog, commercials, radio ads, trade shows, informational website, and coupons. Through our website hosted at [www.nowyoga.net](http://www.nowyoga.net) and through [Amazon.com](http://Amazon.com) we will be selling retail items commonly used with yoga including water bottles, yoga mats, and yoga clothing. These retail items are used as part of our marketing plan. In contrast, although the Leslie Sims mark appears to market on a website, they do not sell retail items used for marketing through their website. Additionally, one can only assume that the Leslie Sims mark does not market using social networking, newsletters, word of mouth, direct sales calls, brochures, blog, commercials, radio ads, trade shows, or coupons. *See Exhibit E.*

9. In my experience with our business our clients exercise a very high level of sophistication in choosing the services offered under our NOW YOGA AND FITNESS mark. After all, they are choosing services which are designed to attract very specific consumer, namely, adults seeking yoga instruction and other body work and healing services as well as related accessories. The yoga instruction, massage, acupuncture, and other holistic services offered under the NOW YOGA AND FITNESS mark are offered for about \$14.00 a class or \$700.00 for a prepaid year of unlimited yoga classes. It can only be assumed that Leslie Sims' mark was used to attract those seeking Buddhism based yoga and QiGong classes. The classes offered under the Leslie Sims mark appear to be available for \$150 for two months of classes. *See Exhibit E.*

10. In both my personal life as well as in my understanding of Buddhism based yoga and QiGong classes, I do not believe that there is any potential for a likelihood of confusion between our NOW YOGA AND FITNESS mark and the blocking mark and I respectfully request that the

U.S. Patent and Trademark Office withdraw the instant refusal and in consideration of this new evidence publish our mark for publication on the Principal Register.

11. We have been using the mark NOW YOGA AND FITNESS in association with our services since June 2012. In that time there have been no instances of actual confusion with the blocking mark.

12. We believe this period of co-existence without any evidence of confusion between our NOW YOGA AND FITNESS mark and the blocking mark to be significant insofar as if a likelihood of confusion truly existed would we not have seen some evidence thereof? Correspondingly, if there has been no such confusion how can it be argued that such is still “likely” devoid of any evidence thereof?

BEFORE ME, the undersigned authority, this 9 day of March 2014, personally appeared Per Davidson, who after being first duly sworn, states that the above information is true and correct, and who is personally known to me or who has produced MADL S 35088807 as identification and who did take an oath.

Per Davidson  
Per Davidson

April 9, 2014  
Date

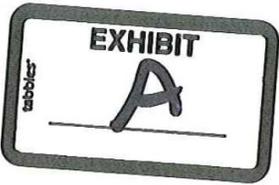
Notary Public: Douglas P. Frongillo (signature)

Notary Public: Douglas P. Frongillo (Typed/Printed name of Notary Public)

Commission No. 44636

My Commission Expires: 2/10/2015

Douglas P. Frongillo  
Notary Public, Rhode Island  
My Commission Expires February 10, 2015  
Notary I.D. 44636



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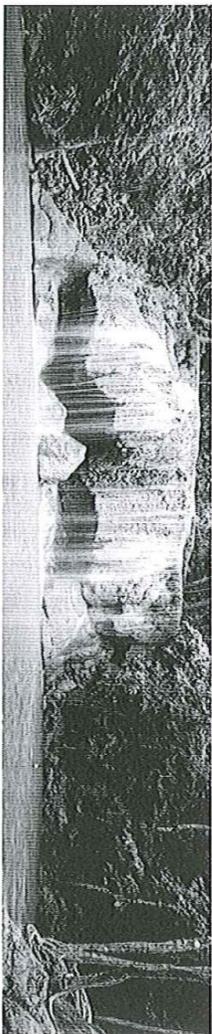
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info@nowyogafitness.com



## Rates

**Important Notice:** If you have purchased a Group or any other voucher, please arrive 10 minutes before class time. All other students, please register for classes online and arrive 10 minutes before class to secure your spot. Maximum capacity is 22 students per class.

- Single Drop In: \$14
- Student Drop In: \$12
- 10 Class Pass: \$110
- 20 Class Pass: \$200
- 1 Month Unlimited Pass: \$130
- Monthly AutoPay (3 month minimum): \$60
- 1 Year prepaid unlimited yoga: \$695

## Class Card Policies

- We accept Visa, MasterCard, American Express and Discover online and at the studio, as well as cash in studio



# OPEN DOOR *yoga*

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*Strong limbs. Deep seats. Open minds. Open doors.*

Payments

- WELCOME
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- TEACHER TRAINING

## Welcome to Open Door Yoga!

Open Door is a community based yoga studio in Raleigh, NC that offers classes in Heated Hatha Yoga. Our classes are suitable for everyone, from yoga first-timers to advanced students. We love to explore the potential of yoga, but care most about creating an environment where everyone is truly accepted and welcomed. We invite you to join us and a tasty growing community of Raleigh yoga practitioners to come see how a consistent practice of simple, hatha yoga can increase your health, energy, smiles and help you get the most out of our greatest tools: our brains and our bodies!

Phone: (919) 455-5772  
 Address: 745 West Johnson Street - Raleigh, NC 27603  
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401-232-5002 (home office)  
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### Start here

New to the studio? Why study yoga at Eyes? Master teachers teach here. A primary group of carefully selected teachers bring something "fresh" to every class. [Lead me!](#)

**Pass: Any 4 classes** new students only. **TRY Pass:** to ANY four classes at \$29 within 15 days. Click "Sign up" and you will find the Explorer "Prinetime Classes."



Prinetime Yoga classes at the door, pay \$2 more for all classes. Community Yoga Classes \$7 suggested Short Form Yoga, 45 min., \$7 (last 2008)

### Parking suggestions



### What's Happening Now?

New workshop style classes

**"Fundamentals: Learn the Poses"** with Julie Shore Mondays, 7:30pm

**"Mindfulness in Action"** with Shannah Green Wednesdays, 5:45pm



**Live Music Vinayasa Event** with Bryna René and Joshua Fonseca with Shannah Green Tuesday, Apr 1, 5:45pm  
A prinetime class and a \$5 suggested donation to the musicians



### Programs



**Yin Yoga Retreat** with Jenn Thomas Sun Mar 23, 1 - 4 pm  
\$39 by Mar 21 / \$49 late registration









Lord Shiva, The Power  
of Ben, Arms and  
Legs

Shiva Blueprint |  
Buddhist Yoga (Vajr)  
2009 Condensed(pdf)  
Tantra Yin Organs

Jan/Feb  
Mar/Apr  
May/June  
July/Aug  
Sept/Oct  
Nov/Dec

2 months | private 200/200/200 level class \$150  
Private 45 minutes with Leslie \$110

MVLA course must 200-condensed

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SE

manduka mat



**LESLIE SIMS** offers tools for body, breath, and mind in Yoga and Chi Kung (QiGong). She is director of NowYoga, head coach of Club Swim, California, Yoga Alliance 500/ESET, was certified by Iyengar, and studies Ayurveda. In 1997 she expanded her studies to include 18 Buddha Hatha QiGong, and Hua Shou, Taoist Chi Kung under Larry Johnson, O.M.D., L.Ac. and Chinese medicine with Hao Liu, O.M.D., L.Ac. the 8th generation of the physician for the Qing Dynasty, Foyal Family. She is a pioneer in teaching the same concept from both an Indian Yoga and a Taoist perspective. Understanding the universal principles depicted in Lord Shiva's **Kundala** inherent in both systems, provides a blueprint for correct action and internal development. She teaches privately, in groups, in retreats and workshops, locally and internationally.

650.558.1950  
nowyoga@gmail.com

**MARIA FOLEY** is a Registered Yoga Therapist who has been practicing yoga since 1990. She includes elements of both the Iyengar and Ashtanga traditions and aims to train the body, mind, and breath to work in harmony. Maria graduated from Stanford's Teacher Education Certification Program in 2007. 650.424.8501  
maria@mariafoley.com

**BARBARA LEVITT, Ph. D.** is an herbalist with acupuncture studies at Five Branches Institute of Traditional Chinese Medicine in Santa Cruz. She gives private herbal instruction to complement an Yoga or QiGong (Chi Kung) practice. 650.970.7895  
barbaralevitt@bdrmail.com

**BRAD SIMS** is devoted to helping individuals reach their maximum potentials through a balanced body. He is a graduate of the UC Santa Barbara, a certified Structural Integration Practitioner, and certified SuijinMedical Instructor. Brad is an accomplished athlete in water polo and tennis, with developed practices in yoga and qiGong. He continues his studies under Larry Johnson, O.M.D., L.Ac., learning the art of Qi Gong—a means of promoting health, treating disease, increasing longevity, and cultivating spiritual development. From his in-depth participation and analysis of physical activities, he teaches correct action for any physical activity through his teaching and Structural Integration Practice. He is also an Ideal Health representative.  
650.862.5907  
bradsims@valhoo.com



"With prayer for divine blessings, now begins an exposition of the sacred art of Yoga."

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United States of America  
United States Patent and Trademark Office

**NOW**  
Strength Training & **ZEN**  
Yoga Conditioning

Reg. No. 3,898,082

Registered Dec. 28, 2010

Int. Cl.: 41

SERVICE MARK

PRINCIPAL REGISTER

GRECO, STEPHANIE (UNITED STATES INDIVIDUAL)  
1915 SEVENTH AVE WEST  
SEATTLE, WA 98119 AND

BARTEF, TRACI (UNITED STATES INDIVIDUAL)  
11183 NE 162ND STREET  
BOTHELL, WA 98011

FOR: EDUCATIONAL SERVICES, NAMELY, PROVIDING CLASSES IN THE FIELD OF YOGA AND STRENGTH TRAINING, FEATURING A FUSION OF YOGA AND STRENGTH TRAINING INTERVALS TO ACHIEVE A MIND AND BODY CONNECTION FOR ALL PHYSICAL ACTIVITIES, IN CLASS 41 (U.S. CLS. 100, 101 AND 107).

FIRST USE 6-1-2009, IN COMMERCE 6-1-2009.

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "STRENGTH TRAINING" AND "YOGA CONDITIONING", APART FROM THE MARK AS SHOWN.

THE MARK CONSISTS OF THE WORDING "NOW & ZEN", "STRENGTH TRAINING" AND "YOGA CONDITIONING".

SN 77-924,096, FILED 1-29-2010.

JEAN IM, EXAMINING ATTORNEY



*David J. Kappas*

Director of the United States Patent and Trademark Office



# United States of America

United States Patent and Trademark Office

## Serenity Now Yoga

**Reg. No. 3,925,230**

**Registered Mar. 1, 2011**

**Int. Cl.: 41**

**SERVICE MARK**

**PRINCIPAL REGISTER**

SERENITY NOW YOGA CORP (FLORIDA CORPORATION)  
1441 LANGHAM TERRACE  
LAKE MARY, FL 32746

FOR: YOGA INSTRUCTION, IN CLASS 41 (U.S. CLS. 100, 101 AND 107).

FIRST USE 6-4-2009; IN COMMERCE 6-9-2009.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "YOGA", APART FROM THE MARK AS SHOWN.

SER. NO. 85-076,354, FILED 7-1-2010.

EDWARD NELSON, EXAMINING ATTORNEY



*David J. Kappas*

Director of the United States Patent and Trademark Office



**United States of America**  
United States Patent and Trademark Office

**HAPPY NOW YEAR!**

**Reg. No. 4,012,501**

CIRCLE YOGA, LLC (D.C. LIMITED LIABILITY COMPANY)  
5615 39TH STREET, NW  
WASHINGTON, DC 20015

**Registered Aug. 16, 2011**

**Int. Cl.: 41**

FOR: YOGA INSTRUCTION, IN CLASS 41 (U.S. CLS. 100, 101 AND 107).

**SERVICE MARK**

FIRST USE 12-15-2010; IN COMMERCE 12-15-2010.

**PRINCIPAL REGISTER**

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

SER. NO. 85-226,611, FILED 1-26-2011.

NORA BUCHANAN WILL, EXAMINING ATTORNEY



*David J. Kappas*

Director of the United States Patent and Trademark Office