

ESTTA Tracking number: **ESTTA246699**

Filing date: **11/04/2008**

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

Proceeding	91169231
Party	Plaintiff Barbara J. Schell M.D. PLLC
Correspondence Address	Victor N. King Speckman Law Group PLLC 1201 Third Avenue, Suite 330 Seattle, WA 98101 UNITED STATES victork@speckmanlaw.com
Submission	Other Motions/Papers
Filer's Name	Brandie Silva
Filer's e-mail	brandies@speckmanlaw.com, victork@speckmanlaw.com
Signature	/Brandie Silva/
Date	11/04/2008
Attachments	TM Usage Agreement signed by both parties 110308.pdf (6 pages)(309875 bytes)

RULE 408 – FOR SETTLEMENT PURPOSES ONLY

TRADEMARK USAGE AGREEMENT

1. This is a mutual agreement between Barbara J. Schell M.D. PLLC (“Schell”), a limited liability company established in Washington, having a principal place of business at 601 North 34th Street, Suite C, Seattle, WA 98103, and Graham D. Simpson, M.D. (collectively, “Simpson”), having an address of 5060 Meadowood Mall Cir., Reno, NV 89502, concerning their respective marks.

2. Schell owns and has exclusive rights to several trademarks and trade names, including “AGELESS”, “AGELESS.COM”, and “AGELESSINSEATTLE.COM”, for use in connection with medical and health spa services in the State of Washington. These trade names were registered in the State of Washington in November, 2000 (UBI# 602 050 573), and the registrations remain in force.

3. Schell owns U.S. Trademark Application Serial No. 78/661,281 for the mark AGELESS CENTER FOR REJUVENATION, for use in connection with “medical and health spa services, namely, cosmetic body and facial care and anti-aging services”, filed on June 29, 2005.

4. Schell owns U.S. Trademark Application Serial No. 78/691,989 for the mark AGELESS MEDICAL SPA, for use in connection with “medical spa services, namely, cosmetic body and facial care and anti-aging services”, and was allowed for registration on September 19, 2008.

5. Schell owns Federal Trademark Registration No. 3,455,313 for the mark AGELESS MEDICAL CENTER, for use in connection with “cosmetic procedures and surgery, namely, liposuction, liposculpturing, fat transplantation, carbon dioxide laser resurfacing, yag laser resurfacing, eyelids lifts, face and neck lifts; cosmetic treatment, namely, photorejuvenation, laser hair removal, laser treatment of lines and wrinkles; laser removal of leg veins, facial capillaries, sun spots, tattoos, and scars; facials, epicurean intensive lift, namely, a specialized enzyme peel that lifts and tightens the skin, back treatment, namely, skin peels, acne treatment, microdermabrasion, glycolic peel, skin fitness, namely, a facial that includes steam cleansing, enzyme treatment, massage, and application of anti-aging creams or wrinkle reducing creams, biotoning, rejuve tone, namely, using micro-current to increase energy in the skin by targeting certain muscle groups, acupuncture points, or meridians, and oxygen therapy”, registered on June 24, 2008 and the registration remains in force.

6. Schell owns U.S. Trademark Application Serial No. 78/692,007 for the mark AGELESS BY DR. BARBARA SCHELL, for use in connection with “non-medicated skin care preparations”, filed on August 12, 2005.

7. Schell owns U.S. Trademark Application Serial No. 78/839,418 for the mark AGELESS LIQUID FACELIFT, for use in connection with “cosmetic preparations for skin

renewal and body care” and “cosmetic rejuvenation, namely, non-invasive cosmetic medical procedures, cosmetic surgery, and cosmetic body care services”, filed on March 16, 2006.

8. Schell owns U.S. Trademark Application Serial No. 78/839,427 for the mark AGELESS FACELIFT, for use in connection with “cosmetic preparations for skin renewal and body care” and “cosmetic rejuvenation, namely, non-invasive cosmetic medical procedures, cosmetic surgery, and cosmetic body care services”, and a Notice of Allowance was issued on September 16, 2008.

9. Schell owns Federal Trademark Registration No. 3,433,305 for the mark AGELESS CENTER FOR REJUVENATION, for use in connection with “educational seminars, training courses, and training programs in the fields of medical enhancements, cosmetic enhancements, and aesthetics, namely, liposculpturing, fat transplantation, carbon dioxide laser resurfacing, yag laser resurfacing, eyelids lifts, face and neck lifts, photo rejuvenation, laser hair removal, laser treatment of lines and wrinkles, laser removal of leg veins, facial capillaries, sun spots, tattoos, and scars, facials, enzyme peels, back treatment, acne treatment, microdermabrasion, glycolic peel, skin fitness, biotoning, micro-current treatment, and oxygen therapy”, registered on May 20, 2008 and the registration remains in force.

10. Schell owns U.S. Trademark Application Serial No. 77/088,457 for the mark AGELESS, for use in connection with “medical goods, namely, medical ice packs, surgical shoe covers, and protective boots for use after surgical procedures” and “clothing, namely, robes; footwear”, filed on January 22, 2007.

11. Schell owns U.S. Trademark Application Serial No. 77/166,940 for the mark AGELESS IN SEATTLE, for use in connection with “non-medicated skin care preparations; cosmetic preparations for body and skin care; skin care and anti-aging products, namely, skin cream, anti-aging cream, moisturizers, lotions, skin cleansers, soaps for body care”, “educational seminars, training courses, and training programs in the fields of medical enhancements, cosmetic enhancements, anti-aging procedures, and aesthetics; providing a website featuring information about educational seminars, training courses, and training programs in the fields of medical enhancements, cosmetic enhancements, anti-aging procedures, and aesthetics”, and “medical services and health spa services, namely, cosmetic body and facial care services; anti-aging services and cosmetic procedures and surgery, namely, liposuction, liposculpturing, fat transplantation, carbon dioxide laser resurfacing, yag laser resurfacing, eyelids lifts, face and neck lifts, cosmetic treatment, namely, photorejuvenation, laser hair removal, laser treatment of lines and wrinkles, laser removal of leg veins, facial capillaries, sunspots, tattoos, and scars, facials, epicurean intensive lift, namely, a specialized enzyme peel that lifts and tightens the skin, back treatment, namely, skin peels, acne treatment, microdermabrasion, glycolic peel, skin fitness, namely, a facial that includes steam cleansing, enzyme treatment, massage, and application of anti-aging creams, biotoning, rejuve tone, namely, using micro-current to increase energy in the skin by targeting certain muscle groups acupuncture points, or meridians, and oxygen therapy; medical services, namely, cosmetic rejuvenation and anti-aging procedures; providing a website featuring medical information about medical and health spa services, cosmetic procedures and surgery, cosmetic rejuvenation, anti-aging services, skin care preparations, acne-treatment preparations, cosmetic preparations, skin care and anti-aging

products”, and a Notice of Allowance was issued on July 29, 2008.

12. Schell owns Federal Trademark Registration No. 3,170,912 for a stylized “A”, for use in connection with “medical and health services, namely, cosmetic body and facial care and anti-aging services”, registered on June 29, 2005 and the registration remains in force.

13. Schell owns U.S. Trademark Application Serial No. 78/897,631 for a stylized “A”, for use in connection with “skin care and anti-aging products, namely, skin creams and lotions”, and was allowed for registration on September 1, 2008.

14. Schell owns Federal Trademark Registration No. 3,332,758 for a stylized “A”, for use in connection with “educational seminars, training courses, and training programs in the fields of medical enhancements, cosmetic enhancements, and aesthetics”, registered on November 6, 2007 and the registration remains in force.

15. Schell has operated Ageless, Center for Rejuvenation in Seattle since 2000. Ageless, Center for Rejuvenation is advertised extensively and draws clients from a large geographical base.

16. Simpson filed intent-to-use U.S. Trademark Application Serial No. 76/619,613 (‘613 application) for the mark THE AGELESS-ZONE on November 8, 2004 for use in connection with “exercise consulting services” in International Class 41 and “spa services, namely, massage, mesotherapy, detoxification therapy, body wraps, body scrubs, exfoliating scrubs; salon services, namely, pedicures, manicures, facials, hair styling and cutting, skin treatment, and skin tanning; medical services, namely laser cosmetic surgery and injecting tissue augmenting gels, facial fillers, and pharmaceutical preparations for treating wrinkles, muscle dystonias, headaches, and spasms; nutrition counseling” in International Class 44.

17. Schell opposes Simpson’s ‘613 application and an Opposition proceeding is pending before the Trademark Trial and Appeal Board. Schell and Simpson agree to a resolution of the Opposition proceeding that permits each party to continue using its trademarks and trade names in limited, non-overlapping geographical territories.

18. Simpson agrees to perpetually bind all of his successors, licensees, franchisees, agents, employees, affiliates, and distributors to not use the mark THE AGELESS-ZONE, or any other term including the word AGELESS or including a term resembling AGELESS or any phonetic equivalent thereof, as a trademark or service mark for medical spa services, health spa services, cosmetic rejuvenations services, cosmetic procedures and surgery, cosmetic body care services, anti-aging services, and all the services under International Class 44 as set forth in Section 16 of this Agreement in the States of Washington, Oregon, Idaho, Montana, Wyoming, and Alaska.

19. Simpson agrees to perpetually bind all of his successors, licensees, franchisees, agents, employees, affiliates, and distributors to not use the mark THE AGELESS-ZONE, or any other term including the word AGELESS or including a term resembling AGELESS or any phonetic equivalent thereof, as a trademark or service mark for any goods or services that are

distributed through, advertised, or otherwise promoted in connection with cosmetic, medicated, and non-medicated skin care preparations and products, anti-aging products, apparel, footwear, medical goods, and educational seminars, training courses, and training programs in the fields of medical enhancements, cosmetic enhancements, and aesthetics.

20. Simpson agrees to perpetually bind all of his successors, licensees, franchisees, agents, employees, affiliates, and distributors to not use the letter "A" and the letter "a" in any font, style, size, or color, as a trademark or service mark for any goods or services.

21. Simpson agrees to amend the '613 application to a concurrent use trademark application to seek registration of the mark THE AGELESS-ZONE, for use in connection with spa services, salon services, and medical services as currently listed under International Class 44 in the '613 application, in areas other than and outside of the States of Washington, Oregon, Idaho, Montana, Wyoming, and Alaska.

22. Schell consents to Simpson's registration of the mark THE AGELESS-ZONE as a service mark for the services listed in paragraph 16 above. Schell will not oppose the '613 application or seek cancellation of any registration issuing from the '613 application or renewals thereof, provided Simpson uses the mark THE AGELESS-ZONE in accordance with the terms of this Agreement.

23. Simpson consents to and agrees not to object to or oppose Schell's use and registration of the marks listed below ("AGELESS marks"), and agrees not to seek to cancel any of Schell's existing and future trademark registrations or oppose any existing or future trademark applications thereof.

AGELESS CENTER FOR REJUVENATION (U.S. Trademark Application Serial No. 78/661,281 and U.S. Registration No. 3,433,305), AGELESS MEDICAL SPA (U.S. Trademark Application Serial No. 78/691,989), AGELESS MEDICAL CENTER (U.S. Trademark Registration No. 3,455,313), AGELESS BY DR. BARBARA SCHELL (U.S. Trademark Application Serial No. 78/692,007), AGELESS LIQUID FACELIFT (U.S. Trademark Application Serial No. 78/839,418), AGELESS FACELIFT (U.S. Trademark Application Serial No. 78/839,427), AGELESS (U.S. Trademark Application Serial No. 77/088,457), and AGELESS IN SEATTLE (U.S. Trademark Application Serial No. 77/166,940)

As of the date of execution of this Agreement, Schell's use of these marks are in the states of Washington, Oregon, Idaho, Montana, Wyoming and Alaska. Schell shall have the right to expand the use beyond this use into other territories and the same territories that Simpson is using his marks and the parties agree that they will take all reasonable steps necessary to avoid any instances of confusion between them.

24. This Agreement shall remain in effect so long as Simpson or his successor(s) in interest has not abandoned the use of the mark THE AGELESS-ZONE and Schell or its successor(s) in interest continues to use one or more of its AGELESS marks.

25. This Agreement shall be binding on and inure to the benefit of the parties and their

respective successors and assigns.

26. This Agreement constitutes the full understanding of the parties with respect to the subject matter hereof and supercedes and cancels any and all prior agreements, written or oral, between them relating to the subject matter hereof. This Agreement may not be amended except in writing signed by both of the parties.

27. The terms, covenants and conditions of this Agreement may be waived only by a written instrument executed by the party waiving compliance. The failure of either party at any time to require performance of any provision of this Agreement shall in no manner affect the right at a later date to enforce the same or to enforce any future compliance with or performance of any of the provisions herein. No waiver by any party of any condition or other breach of any provision, term or covenant in this Agreement, whether by conduct or otherwise, in any one or more instances, shall be deemed to be or be construed as a further or continuing waiver of any such condition or the breach of any other provision, term or covenant of this Agreement.

28. If any provision of this Agreement is held to be illegal, invalid or unenforceable under present or future law, such provision shall be fully severable, this Agreement shall be construed and enforced as if such provision never comprised a part of this Agreement, and the remaining provisions shall remain in full force and effect.

29. Each of the parties agrees to treat as confidential any and all information received from the other in connection with the negotiation, execution, and performance of this Agreement except as required by law or as it pertains to information known prior to the receipt thereof from the other. Neither party will make any public statement or comment regarding the other party except, in the case of direct inquiries concerning the opposition or the dispute between the parties, to advise that the dispute was settled amicably.

30. The parties expressly reserve all rights and remedies regarding the use and/or registration of marks not specifically set forth or defined herein. In the event that either party is in breach of any material term of this Agreement, the party in breach will have 10 days from notice of such breach to cure the breach. In the event that the party in breach does not cure the breach before the expiration of this 10-day period, the parties agree that the non-breaching party shall be free to pursue any available remedies, including but not limited to litigation. In the event of litigation to enforce the terms of this Agreement, the prevailing party shall be entitled to reimbursement of any court costs, including reasonable attorney's fees, and other expenses incurred as a result of the breach of this Agreement.

31. Schell agrees to disclose and provide a copy this Agreement to any of its successors, licensees, franchisees, agents, employees, affiliates, and distributors.

32. Simpson agrees to disclose and provide a copy of this Agreement to any of his successors, licensees, franchisees, agents, employees, affiliates, and distributors.

33. This Agreement is effective as of the date signed by Schell.

Barbara J. Schell M.D. PLLC

By Barbara J. Schell (w)
Barbara J. Schell M.D.

Dated: 10/28/08

Graham D. Simpson, M.D.

By Graham D. Simpson

Dated: 11/3/08