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

Proceeding	91206251
Party	Defendant Finish Strong Ventures, Inc.
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Date	06/11/2013
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Application Serial No.:	**85171899**
Mark:	**THE ELEVATION GROUP**
International Class:	**41**
Applicant:	**Finish Strong Ventures, Inc.**
Published in *Official Gazzette:*	**April 3, 2012**

ELEVATION MANAGEMENT, LLC,	:	
Opposer,	:	
	:	**Opposition No. 91206251**
FINISH STRONG VENTURES, INC.,	:	
Finish Strong.	:	

FINISH STRONG'S BRIEF IN OPPOSITION TO
OPPOSER'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, and T.B.M.P. §528, Applicant, Finish Strong Ventures, Inc. ("Finish Strong"), hereby submits its responsive brief (this "Response") in opposition to the Motion for Summary Judgment ("Motion") filed by Opposer, Elevation Management, LLC ("Opposer").

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Opposer's Motion fails to establish a right to judgment as a matter of law on the merits of its Opposition, and thus the Trademark Trial and Appeal Board (the "Board") must deny the Motion. Opposer makes two separate legal arguments, but completely fails to connect them logically or legally. Opposer first argues the black letter rule that a use-based application must reflect actual use of the subject mark in commerce as of the application filing date. Opposer next argues that Finish Strong's specimen of use, submitted together with its Application, was legally flawed and thus when filed did not actually evidence Finish Strong's use of its subject mark THE

ELEVATION GROUP (the "Mark") in connection with the services designated as of the Application filing date. Opposer then simply concludes from the "fact" that the specimen was flawed that Finish Strong, as a matter of law, cannot prove it was actually using the Mark in connection with its designated services as of the date of the Application.

But as the Board must almost instantly recognize, this simply does not make logical or legal sense. Finish Strong's specimen is but one example of use that Finish Strong might have used to prove that it was making use of its mark as of the date of the Application. The legal adequacy or inadequacy of that one particular specimen proves nothing with respect to the issue that Opposer, by its Motion, has framed as the issue to be determined by the Board – whether Finish Strong was actually using its mark as of the Application filing date. There is simply no logical or legal connection between the quality or qualification of one piece of evidence of a disputed fact on the one hand, and the existence of additional evidence for that disputed fact on the other hand. But Opposer nevertheless does not even attempt to argue, or introduce a single piece of additional evidence to demonstrate that Finish Strong was not actually making use of its mark as of November 8, 2010. Opposer rests on its assertion that the specimen was flawed.

As sworn to unequivocally in the Declaration of Finish Strong's president, Michael Dillard ("Dillard Decl."), submitted herewith in support of this Response, Finish Strong began using its mark, THE ELEVATION GROUP (the "Mark") in connection with services designated in the Application that were offered, provided, and/or advertised on a "beta" website made available to subscribing members of the public on or before October 22, 2010, more than two weeks prior to filing the Application. See Dillard Decl. at ¶5. This mirrors the facts set forth in Finish Strong's statement of use in the Application – Finish Strong was using the Mark in commerce as of claimed first use date of October 22, 2010. Opposer has not alleged that Finish

Strong sought to defraud the PTO through submission of an improper or inadequate specimen, or a false statement of use. And Finish Strong was obviously not required to submit *all* of its evidence of use in connection with the Application, just a single specimen – which specimen the PTO examining attorney accepted. Finish Strong may choose not to rely at all upon its originally filed specimen to defend this Opposition proceeding, but that is of no moment. Indeed, whether Finish Strong will ultimately prevail in this case by proving use is irrelevant to this Motion – the only relevant question is whether Opposer has proven that no triable issues of fact exist with respect to Finish Strong's actual use of its Mark as of the filing date, not the viability of the specimen as evidence. Opposer seeks to prove a negative by conflating the alleged legal insufficiency of Finish Strong's specimen of use with Finish Strong's ability to introduce further evidence of such use. Such an insupportable conclusion, however, cannot form the basis for awarding judgment in favor of the party advancing that conclusion.

Indeed, given the fairly obvious logical flaw in Opposer's argument, one might question Opposer's motive for bringing the Motion at all. Interestingly, Opposer filed this Motion on April 23, 2013, six days prior to the due date for Finish Strong's responses to Opposer's discovery requests. A number of these requests actually seek documents or information regarding Finish Strong's use, and first use of its Mark in commerce. Had Opposer waited to receive Finish Strong's responses,[1] Opposer would have had the benefit of first analyzing any evidence presented by those responses in its Motion – if it determined at that point to file the Motion at all. But had Opposer waited to file the Motion, since Finish Strong had served its discovery requests *before* Opposer served its requests, Opposer would have been first obligated to answer Finish Strong's requests before receiving Finish Strong's responses – responses which

[1] Finish Strong had not prepared its responses to Opposer's requests as of the date this Motion was filed, and given the stay has not yet done so.

could have dramatically informed Opposer's determination of how to proceed in this matter. Opposer instead chose to file this Motion prior to responding to Finish Strong's discovery, and the resulting stay has now, at least temporarily, extinguished their obligation to respond to Finish Strong's discovery. All in all, Finish Strong submits that it was far cheaper and easier for Opposer to prepare and file a fatally flawed Motion – and receive the benefit of the Board's stay upon filing – than it would have been to digest Finish Strong's responses and prepare responses to Finish Strong's discovery. As a result of Opposer's tactical decision, however, the Board is compelled to intercede in this matter to rule on an essentially frivolous Motion. The Motion should simply be denied.

II. FACTUAL SUMMARY

Applicant Finish Strong is an Internet marketing and education services company based in Austin, Texas. Finish Strong designs, produces and conducts educational web-based seminars, or webinars, and provides other related educational services online to people interested in finance, investing, and the financial industry.

In or about 2010, Finish Strong first became interested in using the designation and "d/b/a" business name "The Elevation Group" in connection with its online services. Finish Strong purchased the domain name theelevationgroup.net, and later, in March, 2011, purchased and registered the additional domain name theelevationgroup.com. Dillard Decl. ¶ 3.

The idea behind The Elevation Group was, and is to conduct webinars, and host and provide other educational services to persons interested in the financial industry and investing, in particular with respect to the financial and investing tactics and strategies used by successful, wealthy individuals. In order to do so, Finish Strong constructed and introduced a website, accessed on the Internet at www.theelevationgroup.net, to host, promote, advertise, and provide

the webinars and services. Dillard Decl. ¶ 4. Initially, Finish Strong "beta tested" its website to gauge public interest. That beta test of the The Elevation Group website was launched on the Internet and made available on or before October 22, 2010 to those members of the public who had subscribed prior to a cut-off date to access the site. Dillard Decl. ¶¶ 5-7; Exhs. A, B.

On November 8, 2010, Finish Strong filed the Application to register THE ELEVATION GROUP as a trademark in International Class 42 for web-based educational services. As of that filing date, the website was fully operational and accessible. Dillard Decl. ¶ 11. Accordingly, since the Mark THE ELEVATION GROUP was in use in commerce on and in connection with the beta website as of filing date, Finish Strong filed its Application as a use-based application. Id. Finish Strong's then counsel accessed the website and printed a screen shot showing use of the Mark on the website, and submitted it with the Application as a specimen of use together with a statement of use attesting to the fact that Finish Strong had been using the Mark in commerce in connection with its web-based services since at least October 22, 2010. Dillard Decl. ¶ 12.[2]

As originally filed, the Application recited that Finish Strong's designated services in connection with the Mark were to be "International Class 41: Web-based subscription educational services in the areas of financial strategies and techniques utilized by high net worth individuals." Dillard Decl. ¶ 13.[3] In or about August, 2011, the PTO requested that Finish Strong amend its Application, including by changing its designation of services, as a condition to registration. In or about February, 2012, Finish Strong amended its designation of services to seek registration for a more specifically defined set of educational services. The PTO did not,

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[2] A copy of the original Application as filed on November 8, 2010, and the specimen of use filed therewith, are each attached as exhibits – B and C, respectively – to the Declaration of Rochelle D. Alpert ("Alpert Decl."), submitted by Opposer in support of its Motion.

[3] See Alpert Decl. Exh. B.

however, at any time request that Finish Strong provide a new specimen of use to accompany the re-stated services designation. On or about February 19, 2012, the PTO notified Finish Strong that its Application had been approved for publication on the Principal Register. Dillard Decl. ¶ 14.[4]

Although the website has changed since its inception as the original beta-test site in October, 2010, and additional sites have been created and are online, Finish Strong has continued to use its THE ELEVATION GROUP Mark on, and in connection with subscription based educational services offered, promoted, provided, and/or advertised on websites located at www.theelevationgroup.com, www.theelevationgroup.net, and www.mikedillard.com. Dillard Decl. ¶ 15.

III. ARGUMENT

As stated above, Opposer has not met its burden to show that no material issues of fact exist with respect to Finish Strong's use of its Mark in connection with its services as of the filing date of the Application. Opposer cannot establish that the alleged insufficiency of Finish Strong's specimen dictates the conclusion that Finish Strong is unable, or should be held to be unable as a matter of law, to adduce factual evidence to otherwise prove its use. Such a conclusion is completely illogical, and unfounded.

A. Summary Judgment Standard

Summary judgment may be granted by the Board in an Opposition proceeding only where the pleadings, all applicable discovery, and evidence presented by affidavits if any demonstrate that there is no remaining genuine issue as to any material fact, and the party seeking summary judgment is otherwise entitled to judgment as a matter of law. See, Trademark Trial and Appeal Board Manual of Procedure ("TBMP") §528.01; *Celotex Corp. v. Catrett*, 477

[4] The current designation in the Application is correctly recited in Opposer's Motion, see Motion at p. 2.

U.S. 317 (1986). Thus, if more evidence than is presented in the motion for summary judgment would not alter the conclusion that a moving party is entitled to prevail as a matter of law, summary judgment may be granted to avoid an unnecessary trial. *E.g.*, *Pure Gold Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624 (Fed. Cir. 1984).

Stated most succinctly, Opposer's burden is to show, by a standard of proof greater than a preponderance of the evidence, that there is no evidence to support the nonmoving party's case. *See*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1984). Should Opposer meet this burden, Finish Strong must then proffer countering evidence to establish that a genuine factual dispute for trial remains. *E.g.*, *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937 (Fed. Cir. 1990). Essentially, Opposer must make a showing that would by itself support summary judgment in the absence of any competent evidence to the contrary proffered by Finish Strong. See, 11 James WM. Moore, *Moore's Federal Practice* ("*Moore's*") §56.13[4] at p. 56-180 (Matthew Bender 3rd Ed. 2008).

B. Opposer's Motion Fails To Meet Its Burden Of Showing That No Triable Issues Of Fact Exist To Support Finish Strong's Use Of Its Mark

Under the accepted standards for summary judgment, Opposer cannot and does not meet its initial burden. As described above, Opposer bases its entitlement to summary judgment on the *merits* of its Opposition, *not* a technical defect with Finish Strong's specimen. That is, Opposer asserts that the Board should rule as a matter of law that Finish Strong cannot prove it was using its mark in connection with the services designated in the Application as of November 8, 2010, the Application filing date. As Opposer emphasizes, it is black letter law that an applicant must be using its applied-for mark in commerce in connection with the designated goods or services on or before the application date in order to support a used-based application. Motion, p. 6; *see*, *e.g.*, 37 C.F.R. §2.34(a)(1). Finish Strong does not dispute this point of law.

Opposer's only argument in support of its contention that Finish Strong was not actually using its mark, however, is that Finish Strong's specimen was improper – Opposer asserts that "Finish Strong's own specimen of use fails to demonstrate Finish Strong's offering of the applied-for services as of November 8, 2010." Motion, p. 6. Indeed, Opposer goes to great lengths to establish that Finish Strong's specimen was, and is not legally sufficient to establish the requisite use for a use-based application. Opposer argues that "advertising a service, without performance of a service, will not support registration," that a service mark specimen "must show the applied-for designation actually used … in a manner that would be perceived by potential purchasers as identifying the Finish Strong's services …," and that a "specimen must show a direct association between the services and the mark sought to be registered." Motion, pp. 6-7 (citations and emphases omitted). Even assuming *arguendo* that these points of law are well taken, however, they do not in any way establish or require a finding that Finish Strong wasn't actually using its mark on November 8, 2010, or that no evidence of such use exists or might be probative. At best, these arguments only suggest that the PTO may have mistakenly accepted a flawed, or inadequate specimen of use.

As the Federal Circuit has held, a used-based application may be considered void if the applied-for mark <u>was not in use</u> as a mark in commerce at the time of filing. *See*, *Aycock Engineering Inc. v. Airflite, Inc.*, 560 F.3d 1350 (Fed. Cir. 2009). But that is Opposer's burden to actually establish, by competent evidence, on this Motion. No circuit court, or any other court has held that a legally insufficient *specimen of use* submitted with an application itself establishes as a matter of law, or is even itself probative evidence that the applied-for mark was *not* in use. Yet Opposer has introduced no evidence, other than the specimen, that Finish Strong

was not using its mark as of the Application filing date, or for that matter as of Finish Strong's stated first use date of October 22, 2010.

Opposer fails to acknowledge in its Motion that an actual use applicant is only required to submit one specimen of its mark per class together with a sworn statement of use stating that as of the Application date, the mark is in use in commerce. See, 15 U.S.C. §1051(d); 37 C.F.R. §2.88(e); *In re Campbell*, 33 U.S.P.Q. 1055 (Comm'r Pat. & Trademarks 1993). Such an applicant is not required to proffer all of its evidence of use. And the PTO examining attorney receiving the application is *not* required to conduct an investigation into the veracity of the statement of use, or as to whether the specimen submitted represents actual use as of the filing date. Rather, as stated in the Trademark Manual of Examining Procedure, "[t]he examining attorney must examine the specimens to confirm that they show use of the subject matter as a mark on or in connection with the goods/services identified in the statement of use." TMEP, §1109.09(b) at p. 477 (7th Ed. West 2011).

In the case of the Application, this is exactly what happened: Finish Strong submitted the Application with one specimen together with a sworn statement of use attesting that the Mark had been in use in connection with the designated services since October 22, 2010.[5] See Dillard Decl. at ¶¶ 11-12. The examining attorney accepted the specimen and statement of use, and the Application was ultimately published for opposition. Whether Finish Strong submitted a specimen that may or may not have been flawed has nothing to do with whether Finish Strong can now prove, or could have proved at the time of filing that it was actually using the Mark.

[5] As noted in the Factual Summary above, section II, Finish Strong's original designation of services as of the original filing date of the Application, November 8, 2010, was substantially smaller and more general, listing the designated services as "Web-based subscription educational services in the areas of financial strategies and techniques utilized by high net-worth individuals." During prosecution and in response to an office action, Finish Strong changed its designation of services to the current, longer description cited by Opposer (see, e.g., Motion at p. 2). Dillard Decl. at ¶¶ 13-14. Note that Opposer's second statement of "Undisputed Material Facts," which describes Finish Strong as having originally filed the Application in connection with the longer designation, is therefore factually incorrect.

The issue of whether Finish Strong was actually using its Mark, and whether Finish Strong can introduce facts to prove its use, has never been raised until this Motion. But Finish Strong's specimen was certainly not submitted to the PTO in response to any heightened requirement that Finish Strong definitively prove its use in order to avoid summary judgment. There is no reason to logically conclude from Finish Strong's specimen that no additional evidence of Finish Strong's use of its Mark exists.

In short, Opposer has failed – by quite a large measure – to meet its burden of showing a right to judgment in this case sufficient to shift the burden of persuasion to Finish Strong. *See*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1984). Opposer has not even attempted to draw a logical connection between an allegedly deficient specimen of use and Finish Strong's ability to adduce additional facts which might nevertheless prove such use. And applicable PTO rules and procedures governing the submission of specimens of use themselves clearly demonstrate that Finish Strong was not required to definitively prove use by some evidentiary standard – so as to avoid summary judgment, for example – but was required only to provide one specimen as an example of the use sworn to in the statement of use given in the Application. *See*, *e.g.*, *In re Campbell*, 33 U.S.P.Q. 1055. In terms of proving Finish Strong's actual use, for purposes of Opposer's Motion and this Response, the specimen is essentially irrelevant. Accordingly, the Board's analysis should end here – since Opposer has failed to meet its burden, the Motion should simply be denied.

C. If Opposer Has Satisfied Its Initial Burden, Genuine Issues Of Material Fact Regarding Finish Strong's Use Of Its Mark Prevent Summary Judgment

If a summary judgment movant *does* satisfy its burden of showing that no evidence supporting the non-movant's position exists, and that it is otherwise entitled to judgment on the merits, the burden then shifts to the non-movant to introduce evidence apart from allegations or

denials in its pleadings to establish the existence of material issues of fact preventing summary judgment. *See*, *Moore's* §56.13[4] at p. 56-180. Specifically, a non-moving party may oppose summary judgment by introducing documentary evidence and testimony via sworn declaration or affidavit. *Id.* So long as the declaration or affidavit attests to facts, and not merely conclusory denials or assertions, such a statement should be accepted as competent evidence of material facts precluding summary judgment. *See*, *Allen v. Coughlin*, 64 F.3d 77, 80 (2d Cir. 1995).

As stated above, Michael Dillard, Finish Strong's president, has submitted a declaration which not only details Finish Strong's adoption of its THE ELEVATION GROUP Mark and Finish Strong's use of that Mark prior to, and as of the Application filing date, but also introduces and authenticates documents corroborating his sworn statements in this regard. Specifically, Mr. Dillard's sworn testimony is that Finish Strong registered the domain name "theelevationgroup.net" on or about March, 2010 (and about 1 year later registered "theelevationgroup.com"). Finish Strong next developed its web site, and as of October 22, 2010 had launched a "private"[6] beta test version of the site prominently featuring the Mark in connection with the services offered, promoted, provided, and advertised on the beta site. Dillard Decl. ¶¶ 3 - 5. This beta site continued, and was up and available as of, and after the Application filing date, November 8, 2010. Dillard Decl. ¶¶ 11 - 12. Moreover, Mr. Dillard's Declaration also authenticates documents – specifically, correspondence and screen shots of pages from the beta website launch in October, 2010 – which corroborate Mr. Dillard's testimony that as of October 22, 2010, Finish Strong was using the Mark in commerce in connection with services designated in the Application. See, Exhs A and B to Dillard Decl.

[6] In this context, "private" means a fairly large, but controlled group made up of members of the public (as opposed to Finish Strong employees, for example) that signs up online prior to the website's launch to access the beta version of the site during the beta test period. See, Dillard Decl. ¶ 5.

Accordingly, assuming the Board were to determine that Opposer's Motion satisfies its burden of establishing a right to judgment on the merits – an assumption that, as detailed above, Finish Strong does not believe is justified under any circumstances – Finish Strong has met its corresponding burden of providing competent evidence showing that at a minimum, material issues of fact regarding Finish Strong's use of its Mark as of the Application filing date and as of its stated first use date exist justifying trial. Indeed, the only issue left to be resolved is how much weight the Board should choose to give to Mr. Dillard's testimony and the proffered documentary evidence. That is, the only remaining issue is whether the Board chooses to believe Mr. Dillard and his proffered evidence, which is ultimately, and essentially a question of Mr. Dillard's credibility.

Issues of credibility, however, are issues which should not be determined on summary judgment. *E.g.*, *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467-468 (1962). "The task of evaluating a witness's credibility is normally for the fact-finder, not for a court on summary judgment." *Anvik Corp. v. Nikon Precision, Inc.*, 2013 U.S. App. LEXIS 5700 *13. "At the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 US 242, 250 (1986).

Thus, the Board here is compelled to rule that Finish Strong has met its burden of establishing that material issues of fact exist, thereby precluding the granting of summary judgment. Particularly in this case, where Opposer's evidentiary showing consists solely of Finish Strong's allegedly insufficient specimen of use, Finish Strong's proffer of evidence should be considered substantial evidence that disputed, material facts for trial unequivocally exist. *See*, 11 *Moore's* §56.13[4], at p. 56-180.

IV. CONCLUSION

For all of the reasons set forth in this Response above, and in the accompanying Dillard Declaration made in support of this Response, Finish Strong respectfully requests that Opposer's Motion be denied, and that the Opposition be ordered to proceed to trial on the merits.

Dated: Scarsdale, New York
June 11, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the enclosed FINISH STRONG'S BRIEF IN OPPOSITION TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT and DECLARATION OF MICHAEL DILLARD IN SUPPORT OF FINISH STRONG'S OPPOSITION TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT were served on Opposer on June 11, 2013, via U.S. 1st Class Mail, addressed to counsel for Opposer as follows:

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Dated: Scarsdale, New York
June 11, 2013

Nicole Saraco

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

Application Serial No.:	**85171899**
Mark:	**THE ELEVATION GROUP**
International Class:	**41**
Applicant:	**Finish Strong Ventures, Inc.**
Published in *Official Gazzette:*	**April 3, 2012**

ELEVATION MANAGEMENT, LLC,	:	
Opposer,	:	
	:	**Opposition No. 91206251**
FINISH STRONG VENTURES, INC.,	:	
Applicant.	:	

DECLARATION OF MICHAEL DILLARD IN SUPPORT OF FINISH STRONG'S OPPOSITION TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT

I, Michael Dillard, hereby declare as follows:

1. I am the president of Applicant, Finish Strong Ventures, Inc. ("Finish Strong" or "we" or "our"). I have directed, or have been directly involved in all aspects of Finish Strong's business activities at all times relevant to this matter. I have personal knowledge of the matters set forth in this declaration, including the exhibits attached hereto, and I could testify to such matters if called upon as a witness.

2. Finish Strong is an Internet marketing and education services company based in Austin, Texas. Finish Strong designs, produces and conducts educational web-based seminars, or webinars, and provides other related educational services online to people interested in finance, investing, and the financial industry.

3. In or about 2010, Finish Strong first became interested in using the designation and "d/b/a" business name "The Elevation Group" in connection with its online educational services. In order to do so, we purchased the domain name theelevationgroup.net on or about March, 2010, and later, in or about March, 2011, purchased the additional domain name theelevationgroup.com.

4. The idea behind The Elevation Group was, and is to conduct webinars, and host and provide other educational services to persons interested in the financial industry, investing, or starting a home business. The published content in particular is focused on the financial and investing tactics and strategies used by successful, wealthy individuals. In order to do so, we constructed and introduced a website, accessed at the time on the Internet at www.theelevationgroup.net, to host, promote, advertise, and provide the webinars and services.

5. Initially, we "beta tested" the website to gauge public interest. That beta test of The Elevation Group website was launched and operational on the Internet and made available on or before October 22, 2010 to those members of the public who had subscribed prior to a cut-off date to access the site.

6. Attached hereto as Exhibit A is a true and correct copy of an "email blast" – an email announcement sent to a group of recipients – announcing on October 21, 2010 to the beta test subscribers to our The Elevation Group website that the official launch of the website was coming the following day, on October 22, 2010 at 8:00 pm, Central Standard Time.

7. The following day, on October 22, 2010, at 8:00 pm, Central Standard Time, the beta-test launch of our website commenced exactly as planned and announced.

8. Attached hereto as Exhibit B are true and correct copies of three (3) additional screen captures from our The Elevation Group website as those screens appeared in 2010. The

first screen shows a page on which we advertised the prices for subscription memberships to The Elevation Group. This screen shows our prominent use of our THE ELEVATION GROUP trademark on the website, here both in two separate logo forms and in plain text. This web page was viewable by subscribers to the beta test as of October 22, 2010.

9. The second screen of Exhibit B shows a web page from the website, posted approximately two weeks after the beta test, which describes the success of the initial beta test, announces a second 24- hour "bug fix" beta test available for an additional fee, and also announces the public launch date (as opposed to the beta test) for the site. This screen again shows prominent use of THE ELEVATION GROUP on the website, in both logo form and in plain text.

10. The third screen of Exhibit B is a notice window from the website as it appeared in October, 2010, which allowed visitors to the site who missed the beta test subscription period to provide us with information so we could contact them with information about the subsequent "official" public launch of the site. Again, our mark THE ELEVATION GROUP appeared prominently on this page, which was posted and available as of October 22, 2010, in both logo and plain text form.

11. On November 8, 2010, Finish Strong filed an application to register THE ELEVATION GROUP as a trademark for web-based educational services. As of that filing date, the Elevation Group website was still online and operational. Since we were using our Mark THE ELEVATION GROUP on and in connection with the beta test website as of filing date, Finish Strong filed its Application as a "use-based" application.

12. Our attorney at the time accessed the website to print a screen shot, which I believed showed use of the Mark on a page from the website, and submitted the screen shot to

the U.S. Patent and Trademark Office ("PTO") with the Application as a "specimen of use" together with my statement of use attesting to the fact that Finish Strong had been using THE ELEVATION GROUP in commerce in connection with its web-based services since at least October 22, 2010.

13. As originally filed, our application stated that the services Finish Strong was designating in connection with the Mark were to be "International Class 41: Web-based subscription educational services in the areas of financial strategies and techniques utilized by high net worth individuals." In or about August, 2011, however, the PTO requested that Finish Strong amend the application, including by changing its designation of services, as a condition to registration.

14. In or about February, 2012, Finish Strong amended its designation of services to seek registration for a more specifically defined set of educational services. The PTO did not, however, at any time request that we provide a new specimen of use to accompany our re-stated services designation. On or about February 19, 2012, the PTO notified us that our application had been approved for publication on the Principal Register.

15. Although the website has changed since its inception as the original beta-test site in October, 2010, and additional sites have been created and are online, Finish Strong has continued to use its THE ELEVATION GROUP Mark on, and in connection with subscription based educational services offered, promoted, provided, and/or advertised on websites located at www.theelevationgroup.com, www.theelevationgroup.net, and www.mikedillard.com.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 11th day of June, 2013:

Michael Dillard

EXHIBIT A

The Elevation Group Launches In Less Than 24 Hours... Here's What You Need To Know!

Well Mike, we're just 24 hours away from the private beta-launch of The Elevation Group and you're on the private invite list, so let me fill you in on what's happening...

The world premier will take place at www.TheElevationGroup.net/launch at exactly 8:00 PM CST tomorrow night.

As of this month, our generation's economic Super Bowl has entered the 3rd quarter, and the stakes couldn't be higher...

The winners will become wealthier than ever, and the losers will lose all they have...

And whether you know it or not Mike... Whether you like it or not... You're in the game, and the money you've worked for you entire life is on the table and up for grabs. (Literally).

The good news is that I'm on your team, and I don't lose.

Three years ago I recognized what was about to take place, and started positioning my assets accordingly.

I tried to tell my friends about the financial train-wreck headed our way, (and I'm referring to some extremely smart entrepreneurs), but they simply tilted their heads and looked at me like I had lost my mind.

All I ever got in return was some stupid line like, "I'm refusing to participate in the recession..."

Well guess what...

Two years later, they've lost 30% of their money, while I'm up 118%...

So here's the deal...

This isn't over... Not by a long shot. But you can turn adversity into opportunity of a life-time ** IF ** you know how.

Tomorrow night at 8:00 PM CST marks the official launch of The Elevation Group, and I'm going to reveal a 90-minute presentation that will change the way you see money, and the world forever.

As one of the exclusive invitee's, you're going to be given a 6,000-year-old road map, and a 7-step formula that will allow you to see and predict the future event's that will be taking place here within the next 6-36 months.

This information will provide you with an opportunity to protect what you have, and change the financial destiny of your family for generations to come.

This is it Mike.

The clock is ticking and time is of the essence...

Join me tomorrow night as I show you exactly what's going to happen with our economy, how I've positioned myself to benefit, and how you can do the same...

Head to www.TheElevationGroup.net/launch and hit the refresh button on your browser at exactly 8:00 CST PM.

Make sure you have a pen and paper handy, because you WILL want to take notes...

Sincerely.

Mike Dillard

- Mike Dillard

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This message was sent from Mike Dillard to mike@mikedillard.net. It was sent from: The Elevation Group, 300 W 6th St., Austin, TX 78701, US. You can modify/update your subscription via the link below.

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EXHIBIT B

PRICING FROM OCT 2010

Join The Elevation Group

theelevationgroup.net/launch/index-live.php

ELEVATION

I Want To Be A Member Of The Elevation Group!

YES! Mike Count Me In!

12 Month Annual Membership (Save 60%!)

Yes! I'd like to save 60% and get a full "1-Year Membership" to The Elevation Group for a single payment of only $4,964.00 - $497.00! I understand that I'm receiving a massive 90% discount off the normal price today, and that my card will not be billed again.

Monthly Membership (Save 30%!)

Yes! I'd like to save 30% and join The Elevation Group as a monthly member for just $97.00 - $67.00 today, and then $67.00 every 30 days as long as I remain a member. I understand that I'm getting an exclusive 30% discount off the normal price today, and that I can cancel at anytime!

Monthly Membership (Save 30%!)

Yes! I'd like to save 30% and join The Elevation Group as a monthly member for just ~~$97.00~~ - $67.00 today, and then $67.00 every 30 days as long as I remain a member. I understand that I'm getting an exclusive 30% discount off the normal price today, and that I can cancel at anytime!

~~$97~~

Only $67/mo

Last Call For Elevation Group Beta-Testers!
EVG Will Re-Open This Thursday For 24 Hours Only!

The Elevation Group Will Open In:

Hey Friend, great news...

As you know, we had an extremely successful beta-launch of The Elevation Group two weeks ago.

While there was one major bug that prevented about 20% of new members from receiving their activation link, we were able to provide access to everyone through a manual work-around.

And once everyone had a chance to login, the positive feedback in the Member's area EXPLODED! In fact, this project and content has received more praise than anything else I've ever done, including Magnetic Sponsoring!

So here's the deal...

After bug-hunting for two weeks we believe we've fixed the activation link problem as of yesterday. After running more than 50 test orders, the success rate is at 100%.

Woohoo! ☺ But... The only way to know for sure is to test it again in the real world, which is GREAT news for you...

So this Thursday, we'll be re-opening the doors to EVG one final time for 24 hours, to test our bug fix at www.TheElevationGroup.net If you weren't able to join two weeks ago, DO IT NOW.

Why? Because the next time EVG will open is during the public launch in December, and the price is going to increase quite a bit.

During the test on Thursday, I'll still be honoring the discounted prices of $67/Mo or $497 for the entire year.

NEXT MONTH during the launch, the price is increasing quite a bit...

There will be a $297 Registration Fee, then $97/Mo, or $997 for the year.

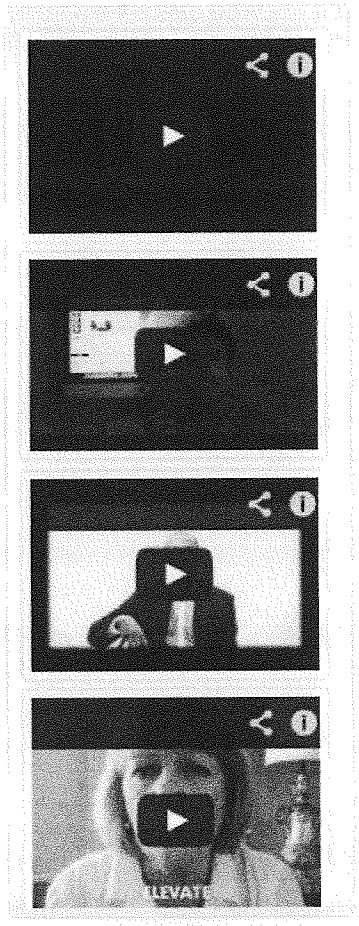
But if you join on Thursday, you can LOCK-IN the special $67/Mo or $497 annual price.

And yes, you will still receive the 30 Day, No-Questions-Asked Guarantee, so make sure you join on Thursday, even if it's just to give it a test-drive.

Your discount links and the video will be posted at www.TheElevationGroup.net Thursday morning!

Mike Dillard

See what others say ...

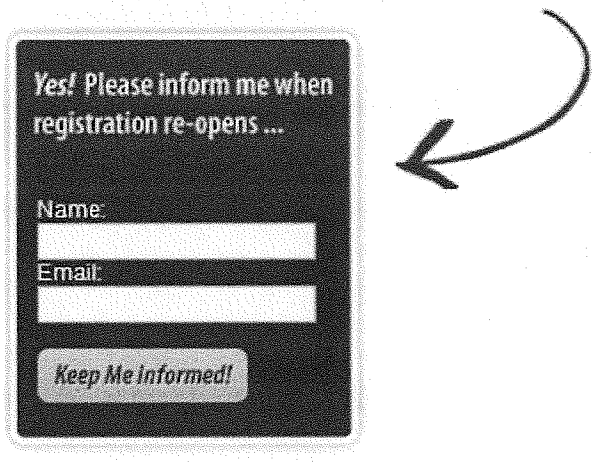


« Prev | Next »

If you've had technical difficulties placing your order or accessing your membership, please contact support and we'll make sure you're taken care of. Already a member? Login.

If you have already submitted an email or ticket, there is no need to submit another. Thank you!

Sorry, Registration for The Elevation Group Beta-Test Has Closed!
To stay informed about our official launch enter your information below...



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If you have already submitted an email or ticket, there is no need to submit another. Thank you!

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