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

ACM Enterprises, Inc., Petitioner, - against - Martello, Jeannette, M.D., Respondent.	Cancellation No.: 92044697 Filed: March 19, 2009

Certificate of Facsimile Transmission

I hereby certify that this correspondence (Pages 1-25, excluding cover page) of the Motion for Summary Judgment and Motion to Amend the Pleadings is being transmitted by facsimile to the United States Patent and Trademark Office on the date shown below.

On March 19, 2009.

Sincerely,

Jeannette Martello, M.D.

Jeannette Martello, M.D.
Respondent In Pro Per

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE

THE TRADEMARK TRIAL AND APPEAL BOARD

ACM ENTERPRISES, INC.,	Cancellation No. 92044697
Petitioner,	Filed March 19, 2009
vs.	
JEANNETTE MARTELLO, M.D.,	
Respondent	

RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND MOTION FOR AMENDMENT OF THE PLEADINGS

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Respondent Martello (hereinafter "Martello") recently became aware of pertinent information regarding this case. Apparently, Dr. Saul Berger is no longer medical director of the Skin Deep Laser Med Spa. Dr. John Gross is the new medical director. This information was revealed to Respondent in an email from Petitioner's attorney David Hong on December 29, 2008 (Decl. Martello Exh. Page 1).

Given this news, time was needed to conduct a thorough investigation into what bearing this had on the case. A review of the California Secretary of State website was conducted. This revealed that the Berger Medical Corporation had dissolved, but the website did not reveal the date of dissolution. (Decl. Martello Exh. Page 2) Official documents were obtained from the California Secretary of State which revealed that the Berger Medical Corporation dissolved on October 8, 2008. The dissolution of the Berger Medical Corporation and discontinued association of Dr. Berger as the Medical Director of Skin Deep Laser Med Spa have great bearing on this case. With this new information recently revealed, Respondent Martello respectfully requests granting this Motion to Amend the Pleadings to include the additional affirmative defenses of lack of standing and fraud.

Under FRCP Rule 15(a) and the Trademark Rules of Practice 37 CFR 2.115, Respondent Martello respectfully submits this Motion for the Amendment of the Pleadings. Under FRCP Rule 56(a) and Trademark Rules of Practice 37 CFR 2.127, Respondent concurrently submits this Motion for Summary Judgment. Respondent respectfully requests that the Board grant a Motion for Summary Judgment in favor of Respondent and not grant the Petition for Cancellation of the mark. There are no genuine issues of material fact and Respondent is entitled to a judgment as a matter of law.

FACTUAL BACKGROUND

On July 1, 2005, Petitioner ACM Enterprises, Inc. filed a Petition for Cancellation against Respondent's U.S. Registration No. 2932953 (Serial No. 76581387—hereinafter '387). The '387 application was for the mark SKIN DEEP in class 044 for medical services; healthspa services, namely cosmetic body services; cosmetician services and physician services. In its Cancellation petition, ESTTA tracking number 37541, attorney Michelle Katz represented Petitioner ACM Enterprises, Inc. and stated that Petitioner would be damaged by U.S. Registration No. 2932953 for class 44 and petitioned to cancel the mark's Registration. Petitioner was noted to be ACM Enterprises, Inc. DBA

Skin Deep Laser Med Spa, a California corporation located and doing business at Colin Hurren's residence located at 1981 New York Drive, Altadena, California, 91001.

In paragraph 4 of the Cancellation petition, Petitioner alleged that it had standing to file the Cancellation Petition since it had been "using the mark "SKIN DEEP LASER MED SPA" in connection with the sale of services; providing cosmetic medical treatments . . . all supervised by licensed medical staff since September 1, 2003 in California and since Jan. 16, 2004 in interstate commerce" (Decl. Martello Exh. Page 3)

In paragraph 13 of the Cancellation petition, Petitioner alleged, "Petitioner has continuously used the mark (Skin Deep Laser Med Spa) since Sept. 1, 2003 anywhere and since Jan. 16, 2004 in interstate commerce, and Petitioner's continued and ***legal use of said mark*** will be impaired by the continued registration of said mark of respondent." ***Emphasis added.*** (Decl. Martello Exh. Pgs. 4 & 5)

TIMELINE

11/19/1991 Articles of Incorporation for Once in a Lifetime Entertainment, Inc. were filed with the California Secretary of State. Article Two explicitly states that it is not a professional corporation. (Decl. Martello Exh. Page 6) This corporation was formed by Rosser Cole, the same attorney who later formed the Berger Medical Corporation and who subsequently submitted the fictitious name permit application for Dr. Berger.

11/30/1991 A Certificate of Amendment for Once in a Lifetime Entertainment, Inc. was filed. The name was changed to ACM Enterprises, Inc. Colin Hurren and Janet Hurren were listed as the corporation's President and Secretary. (Decl. Martello Exh. Page 7)

9/1/2003 Date that Petitioner alleges that the mark "SKIN DEEP LASER MED SPA" was first used anywhere. (Decl. Martello Exh. Pages 3 through 5) (Decl. Martello Exh. Page 168).

11/19/2003 Skindeeplaser.com was reserved with Register.com. (Decl. Martello Exh. Page 8)

11/23/2003 Colin Hurren sent an email to Melissa of Blue Lounge regarding the fact that the name Skin Deep Med Spa had just been chosen. (Decl. Martello Exh. Page 9).

11/25/2003 Date that the marketing agreement between ACM Enterprises, Inc. and Blue Lounge Design was to become effective. The work order was for the Skin Deep Med Spa branding project.

The billing address was listed as Colin Hurren's residence. (Decl. Martello Exh. Pages 10 through 13). Blue Lounge Design is a company owned by Colin Hurren and Dominic Symons. (Decl. Martello Exh. Pages 14 through 19. Refer specifically to pages 16 and 17).

12/1/2003 Colin Hurren, President of ACM Enterprises, Inc declared that he had not used the name, Skin Deep Laser Med Spas, Inc. prior to this date. (Decl. Martello Exh. Page 21).

12/1/2003 Publication order was placed by Hurren's attorney Rosser Cole. Final publication date of Skin Deep Laser Med Spas, Inc. was listed as 12/24/2003. (Decl. Martello Exh. Page 23).

12/26/2003 The Berger Medical Corporation Articles of Incorporation were filed with the California Secretary of State. (Decl. Martello Exh. Page 24)

12/27/03 Design review work was begun by Ives and Associates for Skin Deep Laser Med Spa (Decl. Martello Exh. Page 25)

2004 Starting year of the Copyright notice that is present on the bottom of all web pages for Skin Deep Laser MedSpa's website, www.skindeeplaser.com. (Decl. Martello Exh. Page 26)

1/5/2004 Urban Telecommunications Invoice to Skin Deep Laser Med Spa for phones. (Decl. Martello Exh. Page 27)

1/6/2004 Dimensional Graphics invoice for sign and art work. (Decl. Martello Exh. Page 28)

1/7/2004 Date that the California Secretary of State issued a certificate for the Berger Medical Corporation and the corporation came into existence. (Decl. Martello Exh. Page 29)

1/8/04 Pasadena business license and zoning fees were paid for Skin Deep Laser Med Spa. (Decl. Martello Exh. Page 30). The business phone number was listed as 791-5880 although it was in actuality Colin Hurren's home phone number that served as his realtor wife's business fax. (Decl.Martello Exh. Pages 31 through 33).

1/8/2004 Work order was placed for a 9 feet by 7 ½ feet sign from A-G Silk Screen Company. The sign was to be installed at the corner of Fair Oaks and Del Mar. (Decl. Martello Exh. Page 34).

1/9/2004-1/10/2004 Computer software program was purchased with ACM Enterprises, Inc.'s American Express card. (Decl. Martello Exh. Page 35)

1/12/2004 A revolving promissory note in the amount of $500,000 was secured from Comerica Bank on Colin Hurren's residence located at 1981 New York Drive to secure the obligations of ACM Enterprises, Inc. (Decl. Martello Exh. Pages 36 through 45)

1/16/2004 Date that Petitioner alleges that the mark "SKIN DEEP LASER MED SPA" was first used in interstate commerce. (Decl. Martello Exh. Pages 3 through 5)

1/21/2004 Facilities and Management Services Agreement was signed by Dr.Berger and Colin Hurren. (Decl. Martello Exh. Pages 46 through 47).

1/28/2004 Date of Ives and Associates invoice for design services rendered to Colin and Janet Hurren with Colin Hurren's residential address listed on the work order. (Decl. Martello Exh. Pg. 25)

1/28/2004 Email from Alan Gerber from Javanex.com to Melissa at Blue Lounge regarding website fonts. Skin Deep Laser Med Spa did not yet have a website. (Decl. Martello Exh. 48)

2/1/2004 Date that the Facilities and Management Services Agreement signed on 1/21/2004 was to become effective. (Decl. Martello Exh. Pages 46 through 47).

2/6/2004 Fictitious name permit application was submitted by Dr.Berger to the Medical Board of California Licensing Program. Dr. Berger's medical practice address was listed as 101 S. First Street, Suite 1200, Burbank, California. The contact person was listed as R. Rosser Cole, the same attorney who filed the Articles of Incorporation for Once in a Lifetime Entertainment (which became ACM Enterprises, Inc.). The application was signed under the penalty of perjury and was executed in the city of Burbank. (Decl. Martello Exh. Pages 49 through 54).

2/10/2004 The temporary use permit for a promotional sign expired on this date. The permit was issued to Patricia Bedford, owner of the commercial building. (Decl. Martello Exh. Page 55).

2/11/2004 A postcard design was sent from EPP@graphicvisionsla.com email to Melissa of Blue Lounge. (Decl. Martello Exh. Page 56). This is the email address for pre-press, i.e. before the postcards were printed. (Decl. Martello Exh. Pages 57 through 58).

2/28/2004 This is the date that the first web pages for skindeeplaser.com appear on the internet archive (Decl. Martello Exh. Page 59)

3/4/2004 This is the first date that a print advertisement was run for Skin Deep Laser Med Spa according to evidence produced by Petitioner. (Decl. Martello Exh. Page 60).

3/26/2004 A fictitious name permit FNP31957 for Skin Deep Laser Med Spa was issued to Dr. Berger by the Medical Board of California for Dr. Berger's medical practice located at 101 S. First Street, Suite 1200, Burbank, California 91502. (Decl. Martello Exh. Pages 61 through 62).

5/10/2004 and 6/22/2004 Archived www.skindeeplaser.com web pages show only a light blue screen without text. (Decl. Martello Exh. Pages 63 and 64).

6/24/2004 Email was sent by Petitioner to Respondent documenting actual confusion between the two businesses and Respondent's priority of use. (Decl. Martello Exh. Page 65).

8/16/2004 Archived www.skindeeplaser.com web page shows only a light blue screen without text (Decl. Martello Exh. Page 66).

8/28/2004 Dr. Berger's medical practice is advertised as being located in Burbank or Encino. No archived web pages list Dr. Berger's medical practice address as 425 South Fair Oaks, Pasadena, California. (Decl. Martello Exh. Pages 67 through 83).

9/1/2004 The Tolucan Times documents that Dr. Berger "has a busy plastic surgery practice in Burbank". The article touts the sale of skin care products at the location of Skin Deep Laser Med Spa, 425 South Fair Oaks, Pasadena, California (Decl. Martello Exh. Pages 84 through 85).

12/29/2004 and 2/3/2005 Archived www.skindeeplaser.com web pages show only a light blue screen without text. (Decl. Martello Exh. Pages 86 and 87).

4/6/2005 Web page for Skin Deep Laser MedSpa from the internet archive. The sale of skin care products at 425 South Fair Oaks is advertised on its website, www.skindeeplaser.com. (Decl. Martello Exh. Pages 88 through 89).

1/22/06 Web page submitted as evidence by Petitioner touts skin care product sales at 425 South Fair Oaks. (Decl. Martello Exh. Page 90).

1/4/2007 In Los Angeles Superior Court case number GD 040122, Colin Hurren, Petitioner's President declares his ownership of Skin Deep Laser Medspa and calls Skin Deep Laser Med Spa's clients, "my patients at the Medspa" (Decl. Martello Exh. Pages 91 through 93)

9/2007 In Los Angeles Superior Court case number GD 040122, Colin Hurren, Petitioner's President states, "my company Skin Deep Laser Medspa, in Pasadena." (Decl. Martello Exh. Pages 94 through 97)

11/17/2007 In Los Angeles Superior Court case number GD 040122, Janet Hurren, Colin Hurren's wife declared under the penalty of perjury the following. On Exh. Page 99, ***"We opened the doors of our new spa business in March of 2004." Emphasis added.*** On Exh. Page 100, "I knew that we were taking loans on the house to feed the business." On Exh. Page 102, Colin Hurren "has sole control of our community business which shows a profit of approximately $ 27,000 per month . . . The Court should further note that this income is not taxed in total because . . . draws it down on the "loan" he (we) made to the company and he leaves the rest in the business until he is able to shelter it." (Decl. Martello Exh. Pages 98 through 104)

12/20/2007 In Los Angeles Superior Court case number GD 040122, Colin Hurren, Petitioner's President declared under the penalty of perjury that Skin Deep Laser Medspa was his sole and separate property. (Exh. Page 105). (Decl. Martello Exh. Pages 105 through 108)

1/3/2008 In Los Angeles Superior Court case number GD 040122, ***Colin Hurren, Petitioner's President declared under the penalty of perjury "I opened the Skin Deep Laser Medspa. . . in February 2004.*** (Exh. Page 110). ***Emphasis added.*** Hurren further declared that he took home a salary from the Skin Deep Laser Medspa (Exh. Pages 111 and 112). (Decl. Martello Exh. Pages 109 through 114).

1/14/2008 In Los Angeles Superior Court case number GD 040122, Colin Hurren, Petitioner's President declared the following. On Exh. Page 116, Hurren declared that he took a salary from Skin Deep Laser Medspa and put money back into the business. The fact that Colin Hurren controlled the financial aspects of Skin Deep Laser Med Spa is documented when he declared that he gave "opposing counsel . . . a memory stick containing the financial data" for Skin Deep Laser Medspa. (Decl. Martello Exh. Pages 115 through 117)

1/17/2008 For Los Angeles Superior Court case number GD 040122, Colin Hurren (Petitioner's President) hired accountant Kenneth Walheim to "analyze the community business "Skin Deep" and to

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determine the value of the business, the current cash flow from the business" (Exh. Page 119). On Exh. Page 120, "In 2004 Colin Hurren formed "Skin Deep" and used the ACM Enterprises, Inc. corporate shell to house the business . . . contacts with the required health care professionals were obtained to meet professional requirements for the business and the doors opened in 2004." On Exh. Page 122, "Although the community has advanced some money to purchase the business . . . In addition there are restrictions on the equipment leasing or other alternative ways of acquiring lasers by the manufacturer. In order to lease, you must be an M.D." Profit participation with Dr. Berger is documented on Exh. Page 125 and 127). Petitioner claims to have paid sales tax on Exh. Pages 126, 128, 130 and 132). Income generated from the medical corporation Skin Deep Laser Med Spa, Inc. was listed as being distributed to unlicensed person Colin Hurren for CEO salary in the amount of $ 132,000 on Exh. Page 132. On page 1 of Exh. F, income from the medical corporation Skin Deep Laser Med Spa, Inc. was listed as being distributed to unlicensed person Colin Hurren for management expenses in the amount of $ 64,218.21. (Exh. Page 134). On page 1 of Exh. H, CEO accrued salary for Colin Hurren listed as $ 126,495.00 with management expenses in the amount of $ 116,715.42 paid to Hurren as income generated from the medical corporation. (Exh. Page 135) On page 1 of Exh. I-1, the monthly revenue for December 2007 listed as $ 89,733.94. (Exh. Page 137). (Decl. Martello Exh. Pgs. 118 through 151)

10/8/2008 The Berger Medical Corporation dissolved on October 8, 2008. Colin Hurren was the sole signatory on the Certificate of Corporate Dissolution. (Decl. Martello Exh. Page 152)

UNCLEAN HANDS

Petitioner ACM is not entitled to the equitable remedy of Cancellation of the Registration due the fact that Petitioner has acted unethically and in bad faith with respect to the subject matter of the Petition by violating several laws in the formation and conduct of the business, Skin Deep Laser MedSpa. Furthermore, Petitioner ACM has illegally used the name Skin Deep Laser Med Spa.

Count 1. SALES TAX EVASION and Tangible Property Sales without a Seller's Permit Violation of California State Board of Equalization Sales and Tax Regulation 1699

Petitioner ACM has unclean hands. Petitioner is being investigated by the California State Board of Equalization for sales tax evasion and for selling tangible property without a seller's permit.

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Note the document from Mr. Charles Cao, Business Taxes Compliance Specialist with the California State Board of Equalization that verifies the fact that Petitioner has no seller's permit to sell tangible property as defined in Regulation 1699. According to the California State Board of Equalization, this is a direct violation of California Sales and Tax Regulation 1699 which reads "every person engaged in the business of selling . . . tangible personal property . . . is required to hold a permit for each place of business in the state at which transactions relating to sales are customarily negotiated with his or her customers." (Decl. Martello Exh. Pages 153 through 159) Evidence produced by Petitioner reveals that skin care has been sold at Skin Deep Laser Med Spa since at least September 1, 2004 ***without a seller's permit.*** (Decl. Martello Exh. Pages 84 through 85).

To make matters worse, Petitioner has collected California sales tax revenue from its customers without turning over the money collected to the state of California. Nadine Tomala, a skin care customer, recently purchased a prescription-strength skin care product from Petitioner and California sales tax was collected by Petitioner. (Note Declaration of Nadine Tomala, Exh. pages 254 through 257). (Decl. Martello Exh. Pages 160 and 161). Petitioner has collected thousands of dollars in sales tax revenue and failed to turn over these monies to the financially unstable state of California.

Although Petitioner has not paid a penny in sales tax to the state of California, Colin Hurren intentionally misrepresented this material fact to the Los Angeles Superior Court. Colin Hurren hired accountant Kenneth Walheim "to analyze the community business "Skin Deep" and determine the value of the business" so as to determine child and spousal support obligations. In order to prepare the Declaration, Mr. Walheim "interviewed Colin Hurren four times" and was provided Skin Deep Laser Med Spa financial data. On page 2 of the Profit and Loss Statement for 2004, (Exh. A), Petitioner claims to have paid $ 4831.00 in sales tax. (Decl. Martello Exh. Page 126). On page 2 of the Profit and Loss Statement for 2005, (Exh. B), Petitioner claims to have paid $7599.00 in sales tax. (Decl. Martello Exh. Page 128), On page 2 of the Profit and Loss Statement for 2006 (Exh. C), Petitioner claims to have paid $11,712.00 in sales tax. (Decl. Martello Exh. Page 130), On page 2 of the Profit and Loss Statement for 2007 (Exh. D), Petitioner claims to have paid $ 14,610.00 in sales tax and Exh. D (2007). (Decl. Martello Exh. Page 132).

Count 2. Knowledge of Actual Confusion and Respondent's Priority of Use Prior to Petitioner's Filing a Federal Trademark Application

Petitioner's bad faith actions are further documented in a June 24, 2004 email in which Petitioner acknowledges actual confusion between Petitioner's and Respondent's businesses, "Not surprisingly we do get several people contacting us who are looking for you." In this email, Petitioner admits awareness of Respondent's priority of use, "Dear Doctor Martello, Firstly, let me say how much I enjoy your radio show it is now part of my Saturday morning." (Decl. Martello Exh. Page 65). Eight months after this email was sent, with this knowledge, Petitioner filed a false 1(a) verification statement on the trademark application for Skin Deep Laser Med Spa on February 17, 2005 for class 44 (Serial number 78569772). (Decl. Martello Exh. Pages 162 and 163).

ILLEGAL USE OF THE NAME SKIN DEEP LASER MED SPA

Is Petitioner ACM legally using the name Skin Deep Laser Med Spa? According to California laws, the answer is "NO." California Business and Professions Code Sections 2285 and 2415 mandate that a fictitious name permit can only be issued to a licensed physician and surgeon and/or professional medical corporation for use with the physician's own ***medical*** practice. (Decl. Martello Exh. Pages 164 through 167) Section 2415(a) reads, "any physician and surgeon . . . or ***professional*** corporation, desires to practice under any name that would otherwise be a violation of Section 2285 may practice under that name if . . . the corporation obtains and maintains in current status a fictitious-name permit issued by the Division of Licensing." Section 2415(b) reads, "The division or the board shall issue a fictitious-name permit authorizing the holder thereof to use the name specified in the permit in connection with his, her, or its ***practice*** if the division or the board finds to its satisfaction that: (1) The applicant or applicants or shareholders of the professional corporation hold valid and current licenses as physicians and surgeons . . . (2) The professional practice of the applicant or applicants is ***wholly owned and entirely controlled*** by the applicant." ***Emphasis added.*** The fictitious name Skin Deep Laser Med Spa was to be used solely by Dr.Berger for his medical practice located in Burbank, California. The name Skin Deep Laser Med Spa could not be legally used by Petitioner ACM, a non-professional, non-medical corporation.

The Medical Board of California website answers frequently asked questions regarding fictitious

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name permits issued to licensees. Answer 14 (Exh. Page 171) documents that a fictitious name permit can not be transferred. Answer 17 states that a "lay person" can not be "an owner or partial owner of an FNP" (fictitious name permit). Answer 18, fictitious name permits can only be issued to "professional medical corporations." (Exh. Page 172) (Decl. Martello Exh. Pages 168 through 178) The Medical Board of California stresses the illegality of such a "rent-a-license" scheme in its edict entitled, "The Bottom Line" on the medical spa business. (Decl. Martello Exh. Pages 179 through 184) Petitioner ACM is not a professional medical corporation and a fictitious name permit could not be issued to it. Licensed physician Dr. Berger applied for a fictitious name permit for Skin Deep Laser Med Spa. Therefore, only Dr. Berger could use the name Skin Deep Laser Med Spa after the permit was issued to him by the Medical Board of California on March 26, 2004. Dr. Berger could only use the fictitious name Skin Deep Laser Med Spa for his medical practice located at 101 South First Street, Suite 1200, Burbank, California. (Decl. Martello Exh. Pages 49 through 54) According to documentation on the internet, Medical director Dr. Berger has never had a medical practice located at Skin Deep Laser Med Spa, 425 South Fair Oaks, Pasadena, California. His medical practice has been either located in Burbank or in Encino, California. (Decl. Martello Exh. Pages 67 through 83) Additionally, a published article in the Tolucan Times from September 1, 2004 documents the fact that Dr. Saul Berger "has a busy plastic surgery practice in Burbank." (Decl. Martello Exh. Pages 84 through 85) The Los Angeles County Office of Finance documents that his business is presently located in Encino, California. The City of Pasadena states that Dr. Berger and the Berger Medical Corporation have never had a business license in the city of Pasadena. (Decl. Martello Exh. Page 185). Therefore, since Petitioner ACM has been illegally using the name Skin Deep Laser Med Spa, Petitioner has no standing and has perpetrated a fraud on both The Trademark Trial and Appeal Board and on The United States Patent and Trademark Office.

Violation of California Corporations Code Section 13402(b)

The business arrangement between Petitioner and Dr. Berger violates the California Moscone Knox Act which governs professional corporations, specifically California Corporations Code Section 13402(b). (Decl. Martello Exh. Page 186) Section13402(b) reads "The conduct of a business in

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this state by a corporation pursuant to a license . . . shall not be considered to be the conduct of a business as a professional corporation if the business is conducted by . . . a corporation which is not a professional corporation." The business relationship between Petitioner and Dr. Berger was memorialized in the Facilities and Management Services Agreement. In the first paragraph of this agreement, "Company" is defined as Skin Deep Laser Med Spa, Inc., a California Corporation *(a non-professional corporation). Emphasis added.* Farther down, in paragraph 1.2, "Company" is re-defined, "The term 'Company' shall mean the Professional Corporation, and any affiliates owned principally by the Company." Miraculously, through semantics, Petitioner's non-professional corporation, Skin Deep Laser Med Spa, Inc., a California Corporation transforms itself into a professional corporation. This business arrangement is in direct violation of The California Moscone Knox Act, California Corporations Code Section 13402(b).

Violation of California Corporations Code Section 13403

The business arrangement between Petitioner and Dr. Berger (the Berger Medical Corporation) violates the California Moscone Knox Act which governs professional corporations, specifically California Corporations Code Section 13403. (Decl. Martello Exh. Page 187). According to Code Section 13403, "A professional corporation which has only one shareholder . . . such shareholder . . . shall also serve as the president and treasurer of the corporation." According to the fictitious name permit application filed by Dr. Berger, he was the sole shareholder of the Berger Medical Corporation. (Decl. Martello Exh. Pages 49 through 54). Therefore, according to Section 13403, Dr. Berger should have been both the President and Treasurer/Chief Financial Officer of the Berger Medical Corporation. Petitioner's attorney confirmed that Colin Hurren was the Chief Financial Officer. (Exh. Page 190). (Decl. Martello Exh. Pages 188 through 191). Colin Hurren listed himself as the Chief Financial Officer on the corporate Statement of Information form filed with the California Secretary of State on August 29, 2005, certifying that "the corporation certifies the information contained herein . . . is true and correct." (Decl. Martello Exh. Page 152). The fact that Dr. Berger was not the Chief Financial Officer is in direct violation of California Corporations Code Section 13403.

Violation of Business and Professions Code Section 2408

The business arrangement between Petitioner and Dr. Berger (the Berger Medical Corporation) violates California Business and Profession Code Section 2408. (Decl. Martello Exh. Page 192). Section 2408 reads, "Each shareholder, director and officer of a medical or podiatry corporation, except an assistant secretary or an assistant treasurer, shall be a licensed person . . . Nothing in this section shall be construed as prohibiting a nonlicensed person from using the business titles of executive vice president, chief executive officer, executive secretary." Colin Hurren was the Chief Financial Officer of the Berger Medical Corporation, in violation of California Business and Professions Code Section 2408.

Violation of Business and Professions Code Section 2409

The business arrangement memorialized in The Facilities and Management Services Agreement between Petitioner and Dr. Berger (the Berger Medical Corporation) violates California Business and Professions Code Section 2409 that reads, "the income of a medical . . . corporation attributable to professional services rendered while a shareholder is a disqualified person . . . shall not in any manner accrue to the benefit of such shareholder or his or her shares in such a professional corporation." (Decl. Martello Exh. Pages 192 and 193). Accountant Colin Hurren, an unlicensed and disqualified person, drew a salary from the income of the Berger Medical Corporation. In one legal document submitted to the Los Angeles Superior Court, his CEO salary was listed as $ 132,000. (Decl. Martello Exh. Page 132). Furthermore, Colin Hurren declared under the penalty of perjury that he took home a salary from the Skin Deep Laser Med Spa business. (Decl. Martello Exh. Pages 111, 112 and 116). Janet Hurren, Colin Hurren's wife declared under the penalty of perjury that her husband "had been telling me all along that the business was not making any money, but I observed that he was inuring increasingly frequent and increasingly expensive expenditures which caused me to doubt his representations." (Decl. Martello Exh. Page 101). Since a lay person or lay corporation can not receive income from a medical corporation, Petitioner ACM and lay person Colin Hurren intentionally violated California Business and Professions Code Section 2409.

Violation of California Corporations Code Section 1901(b)

The fact that Petitioner violated the California Moscone Knox Act is demonstrated by Colin Hurrren's completion of the Certificate of Corporate Dissolution for the Berger Medical Corporation. (Decl. Martello Exh. Page 152). Unlicensed person Colin Hurren completed and signed the Certificate of Corporate Dissolution that was filed with the California Secretary of State. According to California Corporations Code Section 1901(b), the Certificate of Dissolution is supposed to be signed by at least a majority of the directors then in office or by one or more shareholders authorized to do so." (Decl. Martello Exh. Page 194). Although Director and Officer Dr. Berger formed the Berger Medical Corporation, his signature does not appear anywhere on the Certificate of Corporate Dissolution. Since this legal document was not completed by the majority of directors, (Dr. Berger *and* Colin Hurren), the Certificate was completed and filed by Colin Hurren as a shareholder of the Berger Medical Corporation. In the alternative, if Colin Hurren was not a shareholder of the Berger Medical Corporation, he violated California Corporations Code section 1901(b) by completing and filing the Certificate of Corporate Dissolution for the Berger Medical Corporation on October 8, 2008.

Violation of California Corporation Code Sections 13401.5(a) and 13406(a)

If unlicensed person Colin Hurren was a shareholder of the professional Berger Medical Corporation and had the right to complete and file the Certificate according to California Corporations Code Section 1901(b), this is a direct violation of the California Moscone Knox Act, specifically California Corporations Code Sections 13401.5(a) and 13406(a). Section 13401.5(a) reads that only licensed persons may be shareholders of a medical corporation. (Decl. Martello Exh. Pages 195 through 197). The Medical Board of California stresses that "no stock in a medical corporation may be owned by a lay-person." (Decl. Martello Exh. Page 174). Section 13406(a) reads, that "shares of capital stock in a professional corporation may be issued only to a licensed person" (Decl. Martello Exh. Pages 198 and 199). If Colin Hurren filed the Certificate of Corporate Dissolution for the Berger Medical Corporation as a shareholder in a professional corporation (as directed by California Corporations Code section 1901(b)), he was in direct violation of California Corporations Code Section 13401.5(a) and 13406(a) since he was not legally able to be a shareholder of a professional corporation.

Violation ofCalifornia Corporations Code Section 13407

Alternatively, if one is to believe the fictitious name permit application completed by Dr. Berger that was signed under penalty of perjury, no non-physician shareholders existed at the time of the application's filing on February 6, 2004. (Decl. Martello Exh. Pages 49 through 54). Since Colin Hurren signed the Certificate as "one or more shareholders authorized to do so" as directed by California Corporations Code section 1901(b), shares of stock in the Berger Medical Corporation must have been transferred to Petitioner ACM in violation of California Corporations Code Section 13407 (Decl. Martello Exh. Pages 200 through 201). Section 13407 reads, "shares in a professional corporation . . . may be transferred only to a licensed person . . . to a person licensed to practice the same profession . . . or to such professional corporation, and any transfer in violation of this restriction shall be void." Therefore, if Colin Hurren filed the Certificate of Corporate Dissolution for the Berger Medical Corporation as a shareholder, he was in direct violation of California Corporations Code Section 13407 since he was not legally able to become a shareholder of a professional corporation.

Financial statements regarding taxes, debts and liabilities on the Certificate of Corporate Dissolution for the Berger Medical Corporation were all completed by unlicensed person Colin Hurren, a man who was not supposed to have any vested financial interest in a professional corporation since he is not a licensed person. This is in violation of California Corporations Code Section 13401.5(a), 13406(a), Section 13407 and Business and Professions Code Section 2409.

PETITIONER ACM IS ILLEGALLY PRACTICING MEDICINE WITHOUT A LICENSE

Violation of Business and Professions Code Section 2400

According to the Medical Board of California edict, "California law prohibits the corporate practice of medicine. Laypersons or lay entities may not own any part of a medical practice. (Business & Professions Code Section 2400)." (Decl. Martello Exh. Page 202). Section 2400 reads, "Corporations . . . shall have no professional rights, privileges, or powers." Petitioner ACM is a lay corporation. (Decl. Martello Exh. Pages 6 and 7). According to paragraph 1.2 of the Facilities and Management Services Agreement, the term "Company" (Skin Deep Laser Med

Spa) shall mean the Professional Corporation, and any affiliates *owned* principally by the Company." (Decl. Martello Exh. Page 46). According to this agreement, lay entity ACM became the owner of Skin Deep Laser Med Spa, the professional corporation. Colin Hurren is an accountant, a layperson. (Decl. Martello Exh. Page 100). Colin Hurren declared under the penalty of perjury that he was the owner of Skin Deep Laser Med Spa. (Decl. Martello Exh. Pages 92 and 94) and that the community property of Skin Deep Laser Med Spa was now his sole and separate property. (Decl. Martello Exh. page 105). Numerous press releases (many written by Colin Hurren) tout the fact that he is the owner of Skin Deep Laser Med Spa. Decl. Martello Exh. Pages 203 through 214). Janet Hurren, previous co-owner of Skin Deep Laser Med Spa is a also lay person, a realtor. (Decl. Martello Exh. Page 100). In her declaration for Los Angeles Superior Court case number GD 040122, Janet Hurren declared, "We opened the doors of ***our new spa business in March of 2004.*** ***Emphasis added.*** (Decl. Martello Exh. Page 99). "It was not until September 1, 2007 that I discovered just how much our spa was making." (Decl. Martello Exh. Page 101). Janet Hurren declared Colin Hurren "has sole control of our community business which shows a profit of approximately $ 27,000 per month." (Decl. Martello Exh. Page 102). The fact that layperson Colin Hurren now owns solely and layperson Janet Hurren once owned Skin Deep Laser Med Spa as part of community property is a violation of Business & Professions Code Section 2400. Furthermore, since a lay entity such as Petitioner ACM may not own any part of a medical practice, this is also in violation of Business & Professions Code Section 2400.

Violation of Business and Professions Code Section 2051

Petitioner has violated Business and Professions Code Section 2051 which reads, "the physician's and surgeon's certificate authorizes the holder to use drugs or devices in or upon human beings and to sever or penetrate the tissues of human beings and to use any and all other methods in the treatment of diseases, injuries, deformities, and other physical and mental conditions." (Decl Martello Exh. Page 215). The Medical Board of California's Precedential Decision no. MBC-2007-01-Q mandated that "IPL and laser treatment fall within the ambit of these statutes. These medical devices are designed to treat blemishes or physical conditions involving the veins and skin . . . and such tissue

penetration is not without attendant risks . . . In short, the use of IPL and laser clearly involves penetration of human tissue and therefore falls within the scope of medical practice." (Decl. Martello Exh. Pages 220 and 221 of Pages 216 through 223) Furthermore, according to the Medical Board of California, "the use of prescriptive drugs . . . is the practice of medicine." (Decl. Martello Exh. Page 179 of 179 through 184) Botox Cosmetic® and the wrinkle fillers Restylane®, Juvederm™, Radiesse®and Perlane are all prescription strength. (Decl. Martello Exh. Pages 239and 240). Petitioner's Skin Care Products touts the fact that it has "an exclusive line of medical grade skin care products" (Decl. Martello Exh. Pages 243 and 246). Lay entity Petitioner ACM has therefore violated Business and Professions Code Section 2051 by illegally practicing medicine without a medical license.

Violation of Business and Professions Code Section 2052(a)

Since Petitioner is not able to legally use the fictitious name Skin Deep Laser Med Spa, it has violated California Business and Professions Code Sections 2052(a) which reads, "any person who practices or attempts to practice, or who advertises or holds himself or herself out as practicing, any system or mode of treating the sick or afflicted in this state, or who diagnoses, ***treats***, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other physical or mental condition of any person, without having at the time of so doing a valid, unrevoked, or unsuspended certificate as provided in this chapter or without being authorized to perform the act pursuant to a certificate obtained in accordance with some other provision of law is guilty of a public offense, punishable by a fine not exceeding ten thousand dollars ($10,000), by imprisonment in the state prison, by imprisonment in a county jail not exceeding one year, or by both the fine and either imprisonment." (Decl. Martello Exh. Page 215) Petitioner ACM touts the fact that Skin Deep Laser Med Spa is a "medical facility" (Decl. Martello, Exh. Pages 226 and 227 of Pages 224 through 229)

Petitioner ACM holds itself out as diagnosing and treating various ailments, disorders and deformities. Skin Deep Laser Med Spa's pamphlet is entitled "Menu of ***Treatments***." (Decl. Martello Exh. Pages 230 through 241). This 13 page pamphlet uses the words "treatments", "treat" and "treats"

69 times. The medical words "therapy", "patients", "injections", "medication" and "diseased" are used throughout the pamphlet. The medical phrases "promote healing", "reverse the aging process", "safe and effective therapies, "safely treated", "medical field", "special medication", "permanent reduction of hair", "stimulates new collagen formation", "safely and selectively blocking the muscles from contracting" are documented throughout. Petitioner's pamphlet emphasizes, 1) "These treatments are safe and effective in removing veins"; 2) "When employed for cosmetic purposes, it is used in minute quantities that cannot harm your body"; "3) "Most of the products selected for use at Skin Deep are developed to be virtually identical to components found naturally in your body or skin structure"; 4) "There may be slight bruising or darkening of the skin at the treatment site." Petitioner's pamphlet recommends alternatives to traditional medical approaches: "These approaches can be a safer alternative over prescribed drugs such as Accutane or long-term antibiotics" and "as a medical spa we are able to offer far more effective skin care solutions through the use of prescription products and medical lasers. We take pride in devoting more time to our clients than can be provided in a traditional medical setting." Without a doubt, lay corporation Petitioner ACM has violated California Business and Professions Code Sections 2052(a) by holding itself out as practicing, any system or mode of treating the sick.

Violation of Business and Professions Code Section 2054(a)

Since Petitioner is not able to legally use the fictitious name Skin Deep Laser Med Spa, Petitioner has violated California Business and Professions Code Sections 2054(a) which reads, "any person who uses . . . any other terms or letters indicating or implying that he or she . . . is entitled to practice hereunder, or who represents or holds himself or herself out as a physician and surgeon, physician, surgeon, or practitioner under the terms of this or any other law, without having at the time of so doing a valid, unrevoked, and unsuspended certificate as a physician and surgeon under this chapter, is guilty of a misdemeanor." (Decl. Martello Exh. Pages 251 and 252). Petitioner ACM is violating California Business and Professions Code Section 2054(a) by using the name Skin Deep Laser Med Spa. The use of the word "Med" in the name Skin Deep Laser Med Spa misleads the public to believe that medicine is being practiced at the spa. Additionally, according to the Medical Board of California's

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*** RX REPORT ***
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INCOMPLETE RECEPTION

TX/RX NO	5107
RECIPIENT ADDRESS	
DESTINATION ID	
ST. TIME	03/20 02:47
TIME USE	10'00
PGS.	20
RESULT	NG

Exh. Pages 254 through 269). These disastrous side effects are written in small print on the skin care product's insert. (Decl. Martello Exh. Pages 268 through 269)

FRAUD

For purposes of the Trademark Act, an applicant or registrant commits fraud by knowingly making a false statement as to a material fact in conjunction with a trademark application or registration. Mister Leonard Inc. v. Jacques Leonard Couture Inc. 23 USPQ2d 1064, 1065 (TTAB 1992). The fraud requirements include the following: the statement in question 1) must be false; 2) must be made with knowledge that it is false; and 3) it must be material. Hasbro, Inc. v. Mitchell W. Goldman, Opposition No. 91152638 to Application Serial No. 76206220 (TTAB 2001).

Previously Submitted 1(a) Trademark Applications

When Petitioner filed the trademark application 1(a) for Skin Deep Laser Med Spa on February 17, 2005 for class 44, Petitioner perpetrated a fraud on The United States Patent and Trademark Office. According to the 15 USC §1051 requirement for the verified statement regarding Ownership or Entitlement to Use. "In an application based on §1(a), the verified statement must allege that the verifier believes the applicant to be the owner of the mark and that no one else, to the best of his or her knowledge and belief, has the right to use the mark in commerce, either in the identical form or in such near resemblance as to be likely, when applied to the goods or services of the other person, to cause confusion or mistake, or to deceive. 15 U.S.C. §1051(a)(3)(A); 37 C.F.R. §2.33(b)(1)."

With respect to the requirements of fraud, Petitioner knew that his material §1(a) verification statement was false when he made it on February 17, 2005. Eight months previous to filling out the 1(a) application, Petitioner emailed Respondent on June 24, 2004. (Decl. Martello Exh. Page 65). In this email communication, Petitioner acknowledged actual confusion and mistake, regarding clients who called Petitioner looking for Respondent, "Not surprisingly we do get several people contacting us who are looking for you." Petitioner has met all of the requirements for fraud and that fraud has been perpetrated on The United States Patent and Trademark Office.

In this June 24, 2004 email, Petitioner acknowledged the fact that Respondent had priority of first use, "Dear Doctor Martello, Firstly, let me say how much I enjoy your radio show it is now part of my

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Saturday morning." Furthermore, Respondent filed its application for Skin Deep class 44 on March 15, 2004 (Registration number 2932593) (Decl. Martello Exh. Pages 270 and 271) nearly one year before Petitioner filed its application for Skin Deep Laser Medspa class 44 (Serial number 78569772) on February 17, 2005. (Decl. Martello Exh. Pages 162 and 163). This information is posted on the United States Patent and Trademark Office website. Therefore, Petitioner's false material §1(a) verification statement was made with knowledge that it was false at the time that it was made on February 17, 2005. Petitioner has met all of the requirements for fraud and that fraud has been perpetrated on The United States Patent and Trademark Office.

With respect to the requirements of fraud, Petitioner's §1(a) verification statement was false with respect to ownership of the mark. The verified statement "must allege that the verifier *believes the applicant to be the owner of the mark.*" *Emphasis added.* Petitioner ACM knew that it did not own the fictitious name Skin Deep Laser Med Spa since the fictitious name permit was issued to Dr. Saul Berger and not to Petitioner. Additionally, the fictitious name Skin Deep Laser Med Spa could not be transferred from Dr. Saul Berger to Petitioner ACM. Therefore, Petitioner knew that it did not own the mark Skin Deep Laser Med Spa when the false §1(a) verification statement was made on February 17, 2005. This false material statement was made by Petitioner with knowledge that it was false and the false statement in question was material. But for this fraudulent statement, the registrant would not have been perceived to have had standing to apply for federal trademark registration, much less for this Petition for Cancellation.

When Petitioner filed the 1(a) trademark application for Skin Deep Laser Med Spa on February 17, 2005 for class 3, Petitioner perpetrated a fraud on The United States Patent and Trademark Office. (Decl. Martello Exh. Pages 272 and 273). At the time that Petitioner filed the application for 1(a) use for class 3, Eli Lilly and Company already had a registered mark for Skin Deep for class 3 that it owned since 1976. (Registration number 1046221). Decl. Martello Exh. Pages 274 and 275). This posted information was freely available for review on the United States Patent and Trademark Office website at the time of Petitioner's February 17, 2005 1(a) filing for class 3. Therefore, Petitioner submitted a false material statement, knowing it was false at the time that it submitted it to The United

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States Patent and Trademark Office. Furthermore, Petitioner did not disclose the existence of Eli Lilly registered trademark for class 3 when Petitioner submitted its own 1 (a) application for class 3. Petitioner has met all of the requirements for fraud and that fraud has been perpetrated on The United States Patent and Trademark Office.

False Dates of First Use

Petitioner ACM Enterprises, Inc. intentionally misrepresented material facts in the Petition for Cancellation filed on July 1, 2005 by attorney Michelle Katz. In its Petition for Cancellation, paragraphs 4 and 13, Petitioner intentionally misrepresented use of the mark Skin Deep Laser Med Spa anywhere since September 1, 2003 and in interstate commerce since January 16, 2004. The facts of this case contradict the aforementioned dates of September 1, 2003 and January 16, 2004 of first use of the mark Skin Deep Laser Med Spa by Petitioner.

On December 1, 2003, Colin Hurren, President of ACM Enterprises, Inc. signed a fictitious name permit application for Skin Deep Laser Med Spas, Inc. (number 03 3613024) and filed this legal document with the Los Angeles County Recorder/County Clerk. Under item 6, the box that was checked off read "Registrant has not yet begun to transact business under the fictitious business name or names listed herein." This form was signed by Colin Hurren underneath a statement that read "I declare that all information in this statement is true and correct. (A registrant who declares as true information which he or she knows to be false is guilty of a crime." (Decl. Martello Exh. Pages 20 through 22). Petitioner can not have it both ways. Petitioner declared under penalty of perjury that it had not yet begun to use the fictitious name Skin Deep Laser Med Spas, Inc. to transact business as of December 1, 2003. Petitioner made a false material statement that it knew was false when it was made when Petitioner filed its application for Skin Deep Laser Medspa class 44 (Serial number 78569772) on February 17, 2005 and cited a date of first use anywhere as September 1, 2003. (Decl. Martello Exh. Pages 162 and 163). A fraud was perpetrated on The United States Patent and Trademark Office. Furthermore, Petitioner made a false material statement that it knew was false when it was made when Petitioner filed its Petition for Cancellation on July 1, 2005. Under the penalty of perjury, through his attorney Michelle Katz, Petitioner alleged first use anywhere of the mark Skin Deep Laser Med Spa as

early as September 1, 2003. Therefore, a fraud was also perpetrated on The Trademark Trial and Appeal Board.

A myriad of press releases written and submitted by Colin Hurren for publication on the internet proudly tout the fact that Skin Deep Laser Med Spa opened in March of 2004. (Decl. Martello Exh. Pages 276 through 291). First use of the mark anywhere in March of 2004 is supported by Colin Hurren's wife, Janet Hurren who declared that Skin Deep Laser Med Spa opened in March of 2004. (Decl. Martello Exh. Page 99). Colin Hurren declared under penalty of perjury that he opened Skin Deep Laser Medspa in February 2004. (Decl. Martello Exh. Page 110).

The first use of the mark Skin Deep Laser Med Spa anywhere in March of 2004 is supported by the facts. Colin Hurren emailed Melissa of Blue Lounge on November 23, 2003 regarding the fact that they had just decided upon a name, Skin Deep Med Spa. The Berger Medical Corporation did not come into existence until January 7, 2004. The Facilities and Management Services Agreement was not signed between Dr. Saul Berger (Berger Medical Corporation) and Colin Hurren (ACM Enterprises dba Skin Deep Laser Med Spa, a California Corporation) until January 21, 2004 and it became effective on February 1, 2004. Since a number of procedures performed at Skin Deep Laser Med Spa are either performed by a physician or under the supervision of a physician, if first use had indeed been on September 1, 2003 or even on January 16, 2004 as the Petitioner alleges, there would not have been a physician to perform or supervise the procedures that Petitioner listed in his Cancellation Petition. The Petitioner alleged that "cosmetic medical treatments" were performed, "all supervised by licensed medical staff".

The Pasadena business license for Skin Deep Laser Med Spa was not filed with the city of Pasadena until January 8, 2004 and did not become effective until February 1, 2004. Dr. Saul Berger and the Berger Medical Corporation did not file an application for a fictitious name permit for Skin Deep Laser Med Spa (fictitious name permit number 31957) until February 2, 2004. The fictitious name permit for Skin Deep Laser Med Spa was issued to Dr. Saul Berger and the Berger Medical Corporation on March 26, 2004. It is only after March 26, 2004, that the name Skin Deep Laser Med Spa could be used ***publicly*** and then only in connection with Dr. Saul Berger's medical practice located at 101 South First

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Street, Suite 1200, Burbank, California 91502 (the address of his medical practice listed on the fictitious name permit application with the Medical Board of California). Therefore, Petitioner's first use date of March 2004 coincides more with the unveiled facts.

Petitioner alleged first use anywhere of the mark Skin Deep Laser Med Spa as of September 1, 2003. That false statement is in direct contradiction to his words (signed under penalty of perjury) and the paper trail of facts. Additionally, Petitioner alleged first use in interstate commerce as January 16, 2004, a date before Colin Hurren and his wife Janet Hurren declared that Skin Deep Laser Med Spa opened; a date before Dr. Berger started working with Petitioner; a date before the City of Pasadena documented that the business opened and a date before a myriad of press releases document its March 2004 opening. Petitioner made a false material statement that it knew was false when it was made when Petitioner filed its application for Skin Deep Laser Medspa class 44 (Serial number 78569772) on February 17, 2005 and cited a date of first use in interstate commerce as January 23, 2004. (Decl. Martello Exh. Pages 162 and 163). A fraud was perpetrated on The United States Patent and Trademark Office. Furthermore, Petitioner made a false material statement that it knew was false when it was made when Petitioner filed its Petition for Cancellation on July 1, 2005. Under the penalty of perjury, through his attorney Michelle Katz, Petitioner alleged first interstate use of the mark Skin Deep Laser Med Spa as January 16, 2004. Therefore, a fraud was also perpetrated on The Trademark Trial and Appeal Board.

Intrastate Use versus Interstate Use

Although Petitioner's attorney David Hong attempted to argue that Trademark Manual of Examining Procedure Section 904.06(b) "allows use of Internet Web Sites showing the mark as proper specimens for trademarks", he was wrong in his broad interpretation. According to the Trademark Manual of Examining Procedure, "an Internet web page that merely provides information about the goods, but does not provide a means of ordering them, is viewed as promotional material, which is not acceptable to show trademark use on goods. *See In re Genitope Corp.*, 78 USPQ2d 1819, 1822 (TTAB 2006). The mere existence of a website or web pages does not prove use in interstate commerce.

The scope of federal trademark jurisdiction is commerce that may be regulated by the United

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States Congress. "Rendered in commerce," as required by sections 3 and 45 of the Trademark Act of 1946, 15 U.S.C.A. § 1051 et seq. means "all commerce which may lawfully be regulated by Congress." Article I, § 8 of the United States Constitution provides that "The Congress shall have the Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." According to Trademark Manual of Examining Procedure § 900, "a purely intrastate use does not provide a basis for federal registration." All of the businesses listed in the Thompson and Thompson search that Petitioner's attorney cited in his Motion for Summary Judgment conducted business in intrastate commerce, not interstate commerce.

Petitioner filed a 1(a) trademark application for Skin Deep Laser Med Spa in class 44 (Serial number 78569772) on February 17, 2005 and cited a first date of use in commerce as January 16, 2004. This was the day that the sign was first erected at the business establishment address of 425 South Fair Oaks, Pasadena, California. According to the City of Pasadena, the Skin Deep Laser Med Spa did not open until February 1, 2004 and the agreement between Petitioner and Dr. Berger did not become effective until February 1, 2004. A variety of press reports reveal that Petitioner first opened up Skin Deep Laser Med Spa in March 2004. The name Skin Deep Laser Med Spa could not be used legally by Dr. Saul Berger until March 26, 2004 then only in conjunction with his practice located in Burbank, California. According to the facts of this case, as of January 16, 2004, Petitioner had not even begun to ***illegally use*** the fictitious name Skin Deep Laser Med Spa (which he can never own or legally use according to California Law) in ***intrastate*** commerce, much less in ***interstate*** commerce. When Petitioner submitted its 1(a) federal trademark application for Skin Deep Laser Med Spa in class 44 (Serial number 78569772) on February 17, 2005, Petitioner alleged use of the mark in ***interstate*** commerce as of January 23, 2004, a date before ***intrastate use*** was even begun. Petitioner made a false, material statement that he knew was false when it was made. By doing so, Petitioner perpetrated a fraud on The United States Patent and Trademark Office. When Petitioner submitted its Petition for Cancellation on July 1, 2005, Petitioner alleged use of the mark in ***interstate*** commerce as of January 16, 2004, a date before ***intrastate use*** was even begun. Petitioner made a false, material statement that he knew was false when it was made. Therefore, Petitioner also perpetrated a fraud

on the Trademark Trial and Appeal Board.

LACK OF STANDING

As analyzed above, Petitioner ACM has been illegally using the name Skin Deep Laser Med Spa and therefore has no standing to argue for a Petition for Cancellation much less apply for a federal trademark registration. According to Business and Professions Code Section 2415(a) and 2415(b), a fictitious name permit can only be issued to a professional medical corporation and only in connection with the physician's practice. The physician's medical practice is to be "wholly owned and entirely controlled by the physician applicant" according to Business and Professions Code section 2415(b)(2). This "wholly owned and entirely controlled" requirement is at direct odds with The Facilities and Management Services Agreement entered into between Colin Hurren (ACM dba Skin Deep Laser Med Spa) and Dr. Saul Berger (Berger Medical Corporation dba Skin Deep Laser Med Spa, A Medical Corporation). In this agreement, Dr. Berger's practice of medicine was to be managed by the non-professional Company, Skin Deep Laser Med Spa, Inc. Petitioner had no standing to file this Petition for Cancellation.

CONCLUSION

Petitioner has wasted the time of The Trademark Trial and Appeal Board by filing a Petition for Cancellation. Since no genuine issues of material fact exist, Respondent Martello is entitled to a judgment as a matter of law. Respondent respectfully requests a Motion for Summary Judgment on the grounds of fraud, unclean hands and lack of standing.

The undersigned being warned that willful false statements and the like are punishable by fine or Imprisonment, or both, under 18 U.S.C. 1001, and that such willful false statements and the like may jeopardize the validity of the application or document or any registration resulting therefrom, declares that all statements made of her own knowledge are true; and all statements made on information and belief are believed to be true. I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on March 19, 2009 in South Pasadena, California.

Jeannette Martello, M.D., J.D.

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