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

Proceeding	92044697
Party	Defendant Jeannette Martello
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Submission	Motion for Summary Judgment
Filer's Name	Jeannette Martello
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Attachments	FAX+001.pdf (1 page)(401727 bytes) FAX1.pdf (1 page)(310923 bytes) MSJ+PAGE+1.pdf (1 page)(903449 bytes) MSJ+PAGE+2.pdf (1 page)(980150 bytes) MSJ+PAGE+3.pdf (1 page)(998971 bytes) MSJ+PAGE+4.pdf (1 page)(961560 bytes) MSJ+PAGE+5.pdf (1 page)(887600 bytes) MSJ+PAGE+6.pdf (1 page)(1052544 bytes) MSJ+PAGE+7.pdf (1 page)(1020288 bytes) MSJ+PAGE+8.pdf (1 page)(1022269 bytes) MSJ+PAGE+9.pdf (1 page)(978488 bytes) MSJ+PAGE+10.pdf (1 page)(991977 bytes) MSJ+PAGE+11.pdf (1 page)(1009911 bytes) MSJ+PAGE+12.pdf (1 page)(983970 bytes) MSJ+PAGE+13.pdf (1 page)(999493 bytes) MSJ+PAGE+14.pdf (1 page)(1017475 bytes) MSJ+PAGE+15.pdf (1 page)(917897 bytes) MSJ+PAGE+16.pdf (1 page)(986496 bytes) MSJ+PAGE+17.pdf (1 page)(1056141 bytes) MSJ+PAGE+18.pdf (1 page)(983251 bytes) MSJ+PAGE+19.pdf (1 page)(948328 bytes) MSJ+PAGE+20.pdf (1 page)(991613 bytes) MSJ+PAGE+21.pdf (1 page)(1011699 bytes) MSJ+PAGE+22.pdf (1 page)(1034749 bytes) MSJ+PAGE+23.pdf (1 page)(1010973 bytes) MSJ+PAGE+24.pdf (1 page)(1040135 bytes) MSJ+PAGE+25.pdf (1 page)(992422 bytes)

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: September 23, 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 September 23, 2009.

Sincerely,

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

Jeannette Martello, M.D., J.D.
Respondent In Pro Per

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RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND

MOTION TO AMEND THE PLEADINGS

Respondent 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 new information was recently disclosed to Respondent by 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. The California Secretary of State website revealed that the Berger Medical Corporation had indeed dissolved. Unfortunately, the date of dissolution was unknown. (Decl. Martello Exh. Page 2) Official documents had to be obtained from the California Secretary of State so that the date of dissolution could be discovered. These documents revealed that the Berger Medical Corporation had dissolved on October 8, 2008. This corporate dissolution and the discontinued association of Dr. Berger 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 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. 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 alleged that Petitioner ACM Enterprises would be damaged by U.S. Registration No. 2932953 for class 44 and petitioned to cancel the mark's Registration.

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 that it "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 OF UNDISPUTED FACTS

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

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 his wife Janet Hurren were listed as the corporation's President and Secretary. (Decl. Martello Exh. Page 7)

9/1/2003 This is the date that Petitioner alleges that the mark "SKIN DEEP LASER MED SPA" was first used anywhere. (Decl. Martello Exh. Pages 3 through 5, 166 and 167).

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

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

11/25/2003 This is the date that the marketing agreement between ACM Enterprises, Inc. and Blue Lounge Design was to become effective 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 signed a declaration that the name Skin Deep Laser Med Spas, Inc. had not been used prior to December 1, 2003. He signed this document next to 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. Page 21 of Pages 20 through 22).

12/1/2003 A 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 Articles of Incorporation for the Berger Medical Corporation were filed with the California Secretary of State. (Decl. Martello Exh. Page 24)

2004 This is the 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 25)

1/5/2004 Urban Telecommunications' invoice for phones for Skin Deep Laser Med Spa. (Decl. Martello Exh. Page 26)

1/6/2004 Dimensional Graphics invoice for sign and art work. (Decl. Martello Exh. Page 27)

1/7/2004 The California Secretary of State issues a certificate for the Berger Medical Corporation and the corporation comes into existence. (Decl. Martello Exh. Page 28)

1/8/04 Date that Pasadena business license and zoning fees for Skin Deep Laser Med Spa were paid. (Decl. Martello Exh. Page 29). The business phone number was listed as 791-5880, Colin Hurren's home phone number and his realtor wife's business fax. (Decl.Martello Exh. Pages 30- 32).

1/8/2004 Work order was placed for a sign with the A-G Silk Screen Company. The sign was to be installed at the corner of Fair Oaks and Del Mar. (Decl. Martello Exh. Page 33).

1/9/2004-1/10/2004 Computer software program was purchased with ACM Enterprises, Inc.'s American Express card. (Decl. Martello Exh. Page 34)

1/12/2004 A $500,000 revolving promissory note was secured on Colin Hurren's residence located at 1981 New York Drive to secure the obligations of ACM Enterprises, Inc. (Decl. Martello Exh. Pages 35 through 44)

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 on this date. (Decl. Martello Exh. Pages 45 and 46).

1/28/2004 Date of Ives and Associates invoice for design services rendered to Colin and Janet Hurren with the Hurren's residential address listed on the work order. (Decl. Martello Exh. Pg. 47)

1/28/2004 Email sent by 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, note paragraph one. (Decl. Martello Exh. Page 45).

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

2/10/2004 The temporary use permit for a promotional sign expires. (Decl. Martello Exh. Pg. 55).

2/11/2004 A postcard design was transmitted from EPP@graphicvisionsla.com. (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 and 58).

2/28/2004 The first skindeeplaser.com web pages appear on the internet archive. (Decl. Martello Exh. Page 59)

3/4/2004 The first print Skin Deep Laser Med Spa advertisement is published. (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 and 62).

5/10/2004 and 6/22/2004 Archived skindeeplaser.com web pages reveals a 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 as well as Respondent's priority of use. (Decl. Martello Exh. Page 65).

8/16/2004 Archived skindeeplaser.com web page reveals a 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. (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. (Decl. Martello Exh. Pages 84 and 85).

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

4/6/2005 Archived web pages for skindeeplaser.com advertise the sale of skin care products. (Decl. Martello Exh. Pages 88 and 89).

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

1/4/2007 In Los Angeles Superior Court case number GD 040122, Colin Hurren, Petitioner's President declared under the penalty of perjury that he owned Skin Deep Laser Medspa (Decl. Martello Exh. Page 92) and labeled the clients "my patients at the Medspa." (Decl. Martello Exh. Page 93) (Decl. Martello Exh. Pages 91 through 93)

9/2007 In Los Angeles Superior Court case number GD 040122, Colin Hurren, Petitioner's President declared under the penalty of perjury "my company Skin Deep Laser Medspa, in Pasadena." (Decl. Martello Exh. Page 94 of 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, ***"[w]e opened the doors of our new spa business in March of 2004." Emphasis added.*** (Decl. Martello Exh. Page 99) Jan Hurren further declared that Colin Hurren "has sole control of our community business which shows a profit of approximately $ 27,000 per month . . ." (Decl. Martello Exh. Page 102) (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. (Decl. Martello 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.*** (Decl. Martello Exh. Page 110). ***Emphasis added.*** Hurren further declared that he took home a salary from the Skin Deep Laser Medspa (Decl. Martello 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 under the penalty of perjury that he took a salary from Skin Deep Laser Medspa. Hurren also declared that he gave "opposing counsel . . . a memory stick containing the financial data" for Skin Deep Laser Medspa. (Decl. Martello Exh. Page 116 of Pages 115 through 117)

1/17/2008 In Los Angeles Superior Court case number GD 040122, Petitioner's President Colin Hurren hired accountant Kenneth Walheim. In preparation of this report, Walheim "interviewed Colin Hurren four times." Walheim was hired to "analyze the community business "Skin Deep" and to determine the value of the business, the current cash flow from the business" (Dec. Martello Exh. Page 119). ***"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."*** ***Emphasis added.*** (Decl. Martello Exh. Page 120) "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." (Decl. Martello Exh. Page 122) Profit participation with Dr. Berger is documented. (Decl. Martello Exh. Pages 125 and 127). Petitioner claims to have paid sales tax. (Decl. Martello 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. (Decl. Martello 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. (Decl. Martello Exh. Page 134). On page 1 of Exh. H, management expenses in the amount of $ 116,715.42 were paid to Hurren as income generated from the medical corporation. (Decl. Martello Exh. Page 135) (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. 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 from its inception.

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 the crimes of sales tax evasion and selling tangible property without a seller's permit. Mr. Charles Cao, Business Taxes Compliance Specialist with the California State Board of Equalization verified the fact that Petitioner does not possess a seller's permit to sell tangible property as required by 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." (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 as early as September 1, 2004. (Decl. Martello Exh. Pages 84 and 85). These sales have been conducted without a statutorily required sales permit in direct violation of California Sales and Tax Regulation 1699.

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. (Declaration of Nadine Tomala, Exh. Pages 160 through

163). (Decl. Martello Exh. Pages 164 and 165). According to the California State Board of Equalization, the sales taxes that Petitioner has collected from its patrons has not been turned over to the state of California.

Although Petitioner has not paid a penny in sales tax to the state of California, Colin Hurren knowingly misrepresented this material fact to the Los Angeles Superior Court. Hurren willfully intended to deceive the Court so that his support obligations would be lessened. Hurren hired accountant Walheim "to analyze the community business "Skin Deep" to determine the value of the business" so as to determine child and spousal support obligations. Walheim "interviewed Colin Hurren four times" and was provided Skin Deep Laser Med Spa financial data by Hurren. On page 2 of the 2004 Profit and Loss Statement, (Exh. A), Petitioner claims to have paid $ 4831.00 in sales tax. (Decl. Martello Exh. Page 126). On page 2 of the 2005 Profit and Loss Statement, (Exh. B), Petitioner claims to have paid $7599.00 in sales tax. (Decl. Martello Exh. Page 128). On page 2 of the 2006 Profit and Loss Statement (Exh. C), Petitioner claims to have paid $11,712.00 in sales tax. (Decl. Martello Exh. Page 130). On page 2 of the 2007 Profit and Loss Statement (Exh. D), Petitioner claims to have paid $ 14,610.00 in sales tax and (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 the filing of a false §1(a) verification Statement for the class 44 application for Skin Deep Laser Med Spa (Serial number 78569772). (Decl. Martello Exh. Pages 166 and 167). Petitioner knowingly filed this false material statement with a willful intent to deceive The United States Patent and Trademark Office when he declared that he knew "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)." Eight months before filing this false §1(a) verification statement, Petitioner had emailed Respondent and acknowledged 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 admitted knowledge 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). Petitioner knowingly filed this false material §1(a) verification statement with a willful intent to deceive The United States Patent and Trademark Office.

Count 3. ILLEGAL USE OF THE NAME SKIN DEEP LASER MED SPA

Violation of Business and Professions Code Sections 2285 and 2415

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 168 through 171) 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. According to California law, the name Skin Deep Laser Med Spa cannot be legally used by Petitioner since Petitioner is not a professional medical corporation or a licensed physician and surgeon.

The Medical Board of California website answers frequently asked questions regarding fictitious name permits issued to licensees. Answer 14 documents that a fictitious name permit cannot be transferred. (Decl. Martello Exh. Page 175) Answer 17 states that a "lay person" cannot be "an owner or partial owner of an FNP" (fictitious name permit). Answer 18 states that fictitious name permits can only be issued to "professional medical corporations." (Decl. Martello Exh. Page 176) (Decl. Martello Exh. Pages 172 through 182).

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 183 through 188) Since Petitioner is not a professional medical corporation, a fictitious name permit could not be issued to it. Dr. Berger applied for a fictitious name permit for Skin Deep Laser Med Spa. This permit was issued solely to Dr. Berger by the Medical Board of California on March 26, 2004. According to California law, 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. The City of Pasadena notes that Dr. Berger and the Berger Medical Corporation have never had a business license in the city of Pasadena. (Decl. Martello Exh. Page 189). Dr. Berger's medical practice has either been located in Burbank or in Encino. (Decl. Martello Exh. Pages 67 through 85)

As noted above, the fictitious name permit for Skin Deep Laser Med Spa could not be transferred and the name Skin Deep Laser Med Spa could not be used by anyone else except for Dr. Berger and then only at his practice location in Burbank. Therefore, since Petitioner has been illegally using the name Skin Deep Laser Med Spa, Petitioner has no standing to register the mark. Additionally, Petitioner has no standing to file the subject Petition for Cancellation of Respondent's mark. Petitioner has knowingly misrepresented the material fact of standing with the willful intent to deceive both The United States Patent and Trademark Office as well as The Trademark Trial and Appeal Board. By doing so, Petitioner has perpetrated fraud.

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 190 and 191). 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 precedential opinion "laser clearly involves penetration of human tissue and therefore falls within the scope of medical practice." (Decl. Martello Exh. Pages 196 and 197 of Pages 192 through 199). Therefore, the mere use of the word "Laser" in Skin Deep Laser Med Spa implies that Petitioner ACM, a lay entity, is entitled to practice medicine. Petitioner acknowledges that the use of the laser involves the practice of medicine since he advised his accountant Walheim of this in the report that was prepared for the Los Angeles Superior Court. Walheim's report documents, "[t]here 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." (Decl. Martello Exh. Page 122) Petitioner lay corporation ACM has intentionally violated California Business and Professions Code Section 2054(a) by implying that it is entitled to practice medicine.

PETITIONER IS PRACTICING MEDICINE WITHOUT A 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 200)

Petitioner touts the fact that Skin Deep Laser Med Spa is a "medical facility" (Decl. Martello, Exh. Pages 203 and 204 of Pages 201 through 206) 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***." ***Emphasis added.*** (Decl. Martello Exh. Pages 207 through 218). This 13

page pamphlet uses the words "treatments", "treat" and "treats" no less than 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." Petitioner's skin care products pamphlet touts the fact that Skin Deep Laser Med Spa prescribes and dispenses an "exclusive line of medical grade skin care products." (Decl. Martello Exh. Pages 219 through 227) 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 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." (Decl. Martello Exh. Page 186) Business & Professions Code Section 2400 mandates, "Corporations . . . shall have no professional rights, privileges, or powers." (Decl. Martello Exh. Page 228). Petitioner ACM is a lay corporation, not a professional medical corporation. (Decl. Martello Exh. Page 6). 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 45). 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). 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 Hurren himself) stress the fact that Hurren is the owner of Skin Deep Laser Med Spa. (Decl. Martello Exh. Pages 229 through 240). Janet Hurren, previous co-owner of Skin Deep Laser Med Spa is also a 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 200). 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 196 and 197) Furthermore, according to the Medical Board of California, "the use of prescriptive drugs . . . is the practice of medicine." (Decl. Martello Exh. Page 183) Botox Cosmetic® and the wrinkle fillers Restylane®, Juvederm™, Radiesse® and Perlane are all prescription strength items that can only be acquired by licensed professionals. (Decl. Martello Exh. Pages 216 and 217). Petitioner touts the fact that it has "an exclusive line of medical grade skin care products" (Decl. Martello Exh. Pages 220 and 223). 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(b) and Section 2264

Petitioner ACM and Petitioner's "Medical Directors" Dr. Berger and Dr. Gross have conspired to break California law. Both medical directors have aided and abetted the illegal practice of medicine by lay corporation Petitioner ACM and lay person accountant Colin Hurren in violation of Business and Professions Code Section 2052(b) and Section 2264. Section 2052(b) reads "any person who conspires with or aids or abets another to commit any act described in subdivision (a) is guilty of a public offense, subject to the punishment described in that subdivision." (Decl. Martello Exh. Page 200) Section 2264 reads, "The employing, directly or indirectly, the aiding, or the abetting of any unlicensed person . . . to engage in the practice of medicine or any other mode of treating the sick or afflicted which requires a license to practice constitutes unprofessional conduct." (Decl. Martello Exh. Page 241) Conspiracy is the operative word in this section. Petitioner ACM is not a medical corporation. Colin Hurren is not a licensed person. Hurren is an accountant. Petitioner conspired with Petitioner's previous medical director (Dr. Saul Berger) and Petitioner's present medical director (Dr. John Gross) to aid and abet the illegal practice of medicine. According to Medical Board of California precedent, the laser "clearly falls . . . within the scope of medical practice" (Decl. Martello Exh. Pages 196 and 197) and "the use of prescriptive drugs. . . is the practice of medicine." (Decl. Martello Exh. Page 183) According to the Bastile case," The objective of §2264 is the protection of the public from certain forms of treatment." This need for protection and the fact that the sale of prescription strength skincare products is the practice of medicine is obvious in this case. Nadine Tomala declares that she was never informed by Petitioner's nurse Liza Papadopoulos that 4%

Hydroquinone could not be used if her mother was pregnant. (Decl. Martello Exh. Pages 160 through 163). Hydroquinone 4% can cause arm and leg abnormalities in the developing fetus. Pregnancy is written as a contraindication (Decl. Martello Exh. Page 242) and precautions should be taken in pregnant women if the product is used. (Decl. Martello Exh. Page 243) This important medical advisory is written in small print on the skin care product's insert. (Decl. Martello Exh. Pages 242 and 243). The evidence that Nadine Tomala gathered on her trip to Petitioner's Skin Deep Laser Med Spa can be inspected. (Decl. Exh. Pages 242 through 251)

PETITIONER IS IN VIOLATION OF CALIFORNIA CORPORATIONS LAW

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 252) Section 13402(b) reads "The conduct of a business in 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.*** Further 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 Agreement is in direct violation of California Corporations Code Section 13402(b). The conduct of business by Petitioner's lay corporation ACM shall not be considered to be the "conduct of business as a professional corporation" since the Petitioner ACM is not a "professional corporation."

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 which mandates, "A professional corporation which has only one shareholder . . . such shareholder . . . shall also serve as the president and treasurer of the corporation." (Decl. Martello Exh. Page 252). 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. (Decl. Martello Exh. Page 253). Colin Hurren listed himself as the Chief Financial Officer on the corporate Statement of Information 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 254). 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 that mandates, "Each shareholder, director and officer of a medical or podiatry corporation, except an assistant secretary or an assistant treasurer, shall be a licensed person" (Decl. Martello Exh. Page 255). 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 255 and 256). 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 cannot receive income from a medical corporation, lay 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 257). 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 258 through 260). The Medical Board of California stresses that "[a] lay (unlicensed) person cannot own any shares of a medical corporation." (Decl. Martello Exh. Page 178). 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 261 and 262). 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 medical corporation.

Violation of California 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 263 and 264). 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.

FRAUD

For purposes of the Trademark Act, an applicant or registrant commits fraud by knowingly making a material representation with the intent to deceive The United States Patent and Trademark Office. In re Bose Corporation, United States Court of Appeals for the Federal Circuit, 2008-1448, Opposition No. 91/157,315).

Fraudulent Previously Submitted 1(a) Trademark Application

When Petitioner filed the trademark application §1(a) for Skin Deep Laser Med Spa on February 17, 2005 for class 44 (Serial number 78569772), Petitioner perpetrated a fraud and intended to deceive 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)."

Petitioner knew that his material §1(a) verification statement was false when he made it on February 17, 2005. This material misrepresentation was made knowingly with the intent to deceive the United States Patent and Trademark Office. The evidence to support an inference of deceptive intent includes an email that Petitioner sent to Respondent eight months previous to the filing of the fraudulent §1(a) trademark application for Skin Deep Laser Med Spa. This "smoking gun" email was written in Petitioner's own hand on June 24, 2004. (Decl. Martello Exh. Page 65). In this 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 Saturday morning." Furthermore, actual confusion experienced by clients who confused the two marks is documented in this email by Petitioner who stated, "Not surprisingly we do get several people contacting us who are looking for you."

Therefore, when the §1(a) verification statement was submitted by Petitioner for Skin Deep Laser Med Spa, Petitioner made misstatements in a "conscious effort to obtain for his business a registration to which he knew it was not entitled, Metro Traffic Control, inc. v. Shadow Network Inc., 104 F.3d 336 (Fed. Cir. 1997) at 341.

Petitioner knew and intended to deceive The United States Patent and Trademark Office when it submitted the §1(a) verification statement which read, "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)." Rather, as is confirmed in the June 24, 2004 email, Petitioner knew that Respondent had 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."

Therefore, Petitioner willfully intended to The United States Patent and Trademark Office when it filed a false trademark application §1(a) for Skin Deep Laser Med Spa on February 17, 2005 for class 44 (Serial number 78569772).

Furthermore, 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 for Skin Deep Laser Med Spa (Serial number 78569772). This false material statement was made by Petitioner with knowledge that it was false and the false statement in question was material. This false material statement regarding ownership of the mark was made for the sole intent to willfully deceive The United States Patent and Trademark Office. 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.

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 evidence of this case contradicts these dates and proves that Petitioner's intent to deceive the United States Patent and Trademark Office was willful. Petitioner made knowingly inaccurate statements regarding dates of first use of the mark Skin Deep Laser Med Spa. These material representations were made knowingly with the willful intent to deceive the United States Patent and Trademark Office.

On December 1, 2003, Colin Hurren, President of ACM Enterprises, Inc. signed an 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).

Furthermore, on January 3, 20008, 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. (Decl. Martello Exh. Page 110).

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 with the intent to willfully deceive the United States Patent and Trademark Office. This knowingly inaccurate statement 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 166 and 167). Furthermore, Petitioner made a false material statement that it knew was false when it was made for the sole intent to willfully deceive 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 perpetrated on The United States Patent and Trademark Office as well as 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 265 through 280). 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 evidentiary 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. Skin Deep Laser Med Spa was governed by The Facilities and Management Services Agreement that 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. This Agreement 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 the license 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 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 evidence.

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.

Morever, Petitioner's submitted specimen with the §1a trademark application for Skin Deep Laser Medspa class 44 (Serial number 78569772) proves that first use and first use in commerce were not on September 1, 2003 and January 16, 2004, respectively. According to email correspondence from Petitioner's web designer, as of January 28, 2004, a website font had not even been chosen. (Dec. Martello Exh. Page 48). Additionally, according to the internet archive, no single web page appeared prior to February 28, 2004 (Decl. Martello Exh. Page 59). It is now obvious that Petitioner submitted the web page specimen in an effort to willfully deceive The United States Patent and Trademark Office.

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 166 and 167). A fraud was perpetrated on The United States Patent and Trademark Office since the knowingly inaccurate statement regarding date of first use in commerce was made with the intent to willfully deceive The United States Patent and Trademark Office. Furthermore, Petitioner made a false material statement that it knew was false when it was made with the intent to willfully deceive 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.

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 with the intent to willfully deceive The United States Patent and Trademark Office. 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 with the intent to deceive the Trademark Trial and Appeal Board. Therefore, Petitioner also perpetrated a fraud on the Trademark Trial and Appeal Board.

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.

Morever, Petitioner's submitted specimen with the §1a trademark application for Skin Deep Laser Medspa class 44 (Serial number 78569772) proves that first use and first use in commerce were not on September 1, 2003 and January 16, 2004, respectively. According to email correspondence from Petitioner's web designer, as of January 28, 2004, a website font had not even been chosen. (Dec. Martello Exh. Page 48). Additionally, according to the internet archive, no single web page appeared prior to February 28, 2004 (Decl. Martello Exh. Page 59). It is now obvious that Petitioner submitted the web page specimen in an effort to willfully deceive The United States Patent and Trademark Office.

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

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 Respondent's Thompson and Thompson search that Petitioner's attorney cited in his Motion for Summary Judgment conducted business in intrastate commerce, not interstate commerce.

Petitioner ACM has no standing to argue for a Petition for Cancellation much less apply for a federal trademark registration. According to California law, a fictitious name permit can only be issued to a professional medical corporation and only in connection with the physician's practice that is "wholly owned and entirely controlled by the physician applicant." This requirement is at direct odds with The Facilities and Management Services Agreement entered into between Petitioner and Dr. Berger. According to the 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.

Since no genuine issues of material fact exist, Respondent Martello is entitled to a Judgment as a matter of law. Respondent requests a Motion for Summary Judgment on the grounds of fraud, unclean hands and lack of standing. The Board may consider sanctions since the time sequence and evidence were readily available to Petitioner's attorneys Katz and Hong. 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 September 23, 2009 in South Pasadena, California.

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