

ESTTA Tracking number: **ESTTA534410**

Filing date: **04/25/2013**

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

## Petition for Cancellation

Notice is hereby given that the following party requests to cancel indicated registration.

### Petitioner Information

Name	Westheimer Corporation		
Entity	Corporation	Citizenship	Illinois
Address	3451 West Commercial Avenue Northbrook, IL 60062 UNITED STATES		

Attorney information	Ronald S. Bienstock Bienstock & Michael, P.C. 411 Hackensack Ave. Hackensack, NJ 07601 UNITED STATES ip@musicesq.com Phone:2015250300		
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### Registration Subject to Cancellation

Registration No	3986754	Registration date	06/28/2011
Registrant	Agler, Darryl D. 1910 Spy Run Avenue Fort Wayne, IN 46805 UNITED STATES		

### Goods/Services Subject to Cancellation

Class 015. First Use: 2010/01/00 First Use In Commerce: 2010/01/00 All goods and services in the class are cancelled, namely: Musical Instruments, namely, guitars
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### Grounds for Cancellation

<i>Torres v. Cantine Torresella S.r.l.Fraud</i>	808 F.2d 46, 1 USPQ2d 1483 (Fed. Cir. 1986)
Abandonment	Trademark Act section 14

Attachments	Petition to Cancel - Filed.pdf ( 5 pages )(527842 bytes )
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## Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/thesuit/
Name	Ronald S. Bienstock

Date	04/25/2013
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE  
TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Trademark Registration No. 3,986,754  
Registered on June 28, 2011

WESTHEIMER CORPORATION	)	
	)	
Petitioner,	)	
	)	Cancellation No. _____
v.	)	
	)	Registration No. 3,986,754
DARRYL D. AGLER	)	
	)	
	)	
Registrant.	)	
	)	

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**PETITION FOR CANCELLATION**

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Petitioner, Westheimer Corporation (“Petitioner”), a corporation, having its principal place of business at 3451 West Commercial Avenue, Northbrook, Illinois, 60062, is a well-known manufacturer and seller of guitars. Petitioner believes that it is being damaged by the above-identified registration, and hereby petitions to cancel the same.

As grounds for its cancellation, Petitioner, by its attorney of record, alleges as follows:

**BACKGROUND**

1. Upon information and belief, Darryl D. Agler (“Registrant”) is an individual having an address of 1910 Spy Run Avenue, Fort Wayne, Indiana 46805.

2. On June 28, 2011, the United States Patent and Trademark Office (the “USPTO”) granted Registrant Registration No. 3,986,754 on the Principal Register for the mark “STRATOTONE” in International Class 015 for “musical instruments, namely, guitars” (the “Mark”).

3. Petitioner manufactures and markets guitars featuring the Mark.

4. Petitioner has used the Mark as trademark continuously since at least as early as 2009, and as a result, owns common-law trademark rights to the Mark.

5. Petitioner has invested substantial amounts of time and money in promoting its common-law trademark for the Mark and the professional quality of its guitars and bass guitars, and is continuing to spend substantial amounts of time and money in the promotion of its goods.

6. As a result of Petitioner’s extensive advertising and sale of the guitars and bass guitars featuring the Mark, Petitioner’s usage of the Mark has acquired distinctiveness amongst relevant consumers in the marketplace as being related to Petitioner’s goods.

7. On December 4, 2012, Petitioner filed an application for registration of the Mark (Trademark Application No. 85/794,320) (“Application”).

8. Petitioner has a real interest in this matter, insofar as Petitioner has an interest in the outcome of this proceeding and a reasonable basis for its belief in damages.

9. The grounds for cancellation are as follows:

**I. REGISTRANT HAS ABANDONED THE ‘STRATOTONE’ TRADEMARK AS A RESULT OF NONUSE.**

10. Petitioner re-alleges and incorporates by reference each of the numbered paragraphs above as if fully set forth herein.

11. Registrant claims that it began offering guitars featuring the Mark since January of 2010.

12. Upon information and belief, Registrant is not currently using the Mark in the relevant International Class as depicted in Trademark Registration No. 3,986,754 in the United States.

13. Upon information and belief, there is currently no bona fide usage of the Mark in the United States for the goods specified in Trademark Registration No. 3,986,754.

14. Upon information and belief, Registrant has abandoned the Mark as a result of nonuse.

15. Petitioner is injured by Registrant's registration of the Mark because it lessens Petitioner's ability to register the mark in Petitioner's Application, and fully exploit Petitioner's intellectual property.

16. Therefore, by reason of the foregoing, Registrant's U.S. Registration No. 3,986,754 must be cancelled in its entirety.

## **II. REGISTRANT'S TRADEMARK REGISTRATION HAS RESULTED FROM FRAUD PERPETRATED UPON THE USPTO.**

17. Petitioner re-alleges and incorporates by reference each of the numbered paragraphs above as if fully set forth herein.

18. Registrant's trademark application in the USPTO for the Mark (Application 78/831,179) ("Registrant's Application"), was filed on the basis that it was using the Mark in commerce in the United States for the goods specified at the time Registrant filed Registrant's Statement of Use on March 29, 2011.

19. Upon information and belief, Registrant was not using the Mark in the United States for the goods specified at the time it filed Registrant's Statement of Use.

20. Upon information and belief, Registrant misrepresented the nature of its use of the Mark in commerce in the United States at the time it submitted its sworn statement and continued to prosecute its trademark application.

21. Upon information and belief, Registrant knew such statements were false when making them.

22. Upon information and belief, said false statements were made with the intent to induce authorized agents of the USPTO to grant the registration that is the subject of this cancellation proceeding, and reasonably relying upon the truth of said false statements, the USPTO did in fact grant such registration to Registrant.

WHEREFORE, Petitioner prays that the U.S. Trademark Registration No. 3,986,754 be cancelled in its entirety.

Dated: Hackensack, New Jersey  
November 21, 2012

Respectfully submitted,  
BIENSTOCK & MICHAEL, P.C.

By: \_\_\_\_\_  
Ronald S. Bienstock, Esq.  
Bienstock & Michael, P.C.  
411 Hackensack Avenue  
Continental Plaza, 7<sup>th</sup> Floor  
Hackensack, N.J. 07601  
Telephone: (201) 525-0300  
Facsimile: (201) 525-0133

ATTORNEY FOR PETITIONER

**CERTIFICATE OF SERVICE**

The undersigned attorney hereby certifies that a true and complete copy of the foregoing Petition for Cancellation has been served, via United States Postal Service first-class mail, certified, postage pre-paid, on this 25<sup>th</sup> day of April, 2013, on:

Gregory S. Cooper  
BARNES & THORNBURG LLP  
600 ONE SUMMIT SQ  
FORT WAYNE, INDIANA 46802-3119  
UNITED STATES

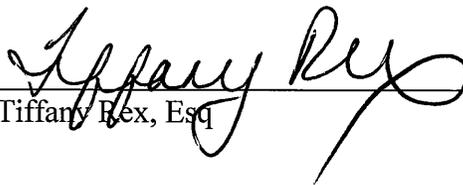
*REGISTRANT, ATTORNEY OF RECORD*

  
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Tiffany Rex, Esq.

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**CERTIFICATE OF FILING**

I hereby certify that this correspondence, including all enclosures and attachments, is being transmitted to the United States Patent and Trademark Office, Trademark Trial and Appeal Board, via the TTAB's ESTTA procedure on April 25, 2013.

  
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Tiffany Rex, Esq