TTAB

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

In the matter of trademark Reg. No. 3,559,114
For the mark DYNAMAX
Registered on (Date) January 6th, 2009

Dynamax, Inc., a Texas Corporation Petitioner, v. Dynaflex International, Inc., a California Corporation, Registrant.	Cancellation **92058466** **REGISTRANT'S ANSWER**

Mail Stop TTAB
Assistant Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

To the Honorable Trademark Trial and Appeal Board. In response to the allegations made by the Petitioner in the petition to cancel, Registrant Dynaflex International, Inc., responds and answers the allegations as follows:

1. Registrant responds that paragraph 1 states background facts relating to an application, all of which are already of record, such that no response is required.
2. Registrant responds that paragraph 2 states background facts relating to an application, all of which are already of record, such that no response is required.
3. Registrant responds that paragraph 3 states background facts relating to an application, all of which are already of record, such that no response is required.
4. Registrant denies Paragraph 4. The registrant does not have sufficient knowledge to affirm or deny this paragraph. Petitioner will provide proof of common-law rights.
5. Registrant denies the allegations of paragraph 5.

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6. Paragraph 6 of the petition to cancel is true.

7. Paragraph 7 of the petition to cancel is true.

8. Paragraph 8 of the petition to cancel is true.

9. Paragraph 9 of the petition to cancel is true except that the allegation of the use of the mark is an allegation of a date at least as early as July 18, 2007. The actual first date of use should be earlier, however the actual first date of use is not entirely relevant because the goods are not confusingly similar.

10. Paragraph 10 of the petition to cancel is true.

11. Paragraph 11 of the petition to cancel is true.

12. Paragraph 12 of the petition to cancel is incorrect.

13. Paragraph 13 of the petition to cancel is denied. The registrant does not have sufficient knowledge to affirm or deny this paragraph. Petitioner will provide proof of first use to establish the December 31, 1985 date.

14. Paragraph 14 of the petition to cancel is denied. The registrant does not have sufficient knowledge to affirm or deny this paragraph. The allegations are currently unfounded and applicant denies the allegations on that basis until such time as petitioner provides proof.

15. Paragraph 15 of the petition to cancel is denied. The registrant does not have sufficient knowledge to affirm or deny this paragraph.

16. Paragraph 16 of the petition to cancel is denied. The registrant does not have sufficient knowledge to affirm or deny this paragraph.

17. Paragraph 17 of the petition to cancel is denied. The registrant does not have sufficient knowledge to affirm or deny this paragraph.

18. Paragraph 18 of the petition to cancel is correct. There is no difference in spelling or sound

of the trademarks at issue.

19. Paragraph 19 of the petition to cancel is denied as inaccurate. The goods are different, the customers are different and there is no likelihood of confusion. The registrant's use of the mark is for a gyroscopic wrist exerciser which is a highly specialized product that is unlikely to be confused with the alleged common law trademark asserted by the petitioner.
20. Paragraph 20 of the petition to cancel is denied.
21. Paragraph 21 of the petition to cancel is denied. There has been no rejection to any of the Petitioner's applications. The alleged harm is hypothetical.
22. Paragraph 22 of the petition to cancel is denied. There has been no rejection to any of the Petitioner's applications. The alleged harm is hypothetical.
23. Paragraph 23 of the petition to cancel is denied as inaccurate. There is no likelihood of confusion.
24. Paragraph 24 of the petition to cancel is denied. There has been no rejection to any of the Petitioner's applications. The alleged harm is hypothetical.

AFFIRMATIVE DEFENSES

The Registrant raises the following affirmative defenses:

1. Laches: the petitioner waited until a few days before the five-year incontestability date to file this action in January 3, 2014. Petitioner waited from their alleged 1985 date about 30 (thirty) years until filing an application for registration. Petitioner neglected to file a federal trademark application in a timely manner. Much evidence from long ago may no longer be available due to petitioner's intentional delay. Petitioner did not contact the registrant until a few days before the five-year incontestability date.
2. Estoppel: the petitioner should be denied relief due to the petitioner's unreasonable delay

in bringing this issue to the Trademark Trial and Appeal Board.

3. Generic mark: the petitioner should be denied relief because its asserted mark is generic.
4. Merely descriptive: the petitioner should be denied relief because its asserted mark is merely descriptive and lacks secondary meaning.

PRAYER FOR RELIEF

Registrant prays that the petition to cancel be dismissed with prejudice. In the alternative, registrant prays that the Board amend the complained about registration's recitation of goods and services to "manually operated exercise equipment, namely gyroscopic wrist exercisers". Previously, the recitation of goods was "manually operated exercise equipment".

APPOINTMENT OF ATTORNEY

The registrant appoints Clement Cheng, Esq. of Newhope Law, PC as its attorney. Please send postal correspondence to 17220 Newhope St., Suite 127; Fountain Valley, CA 92708 Phone: (714) 825-0555; Fax: (714) 825-0558. E-mail: law@clemcheng.com

Respectfully submitted,

Date: January 14, 2014

By _____

Clement Cheng, Esq.
Newhope Law, PC
17220 Newhope St., Suite 127
Fountain Valley, CA 92708
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Attorney for Registrant

PROOF OF SERVICE
TTAB Opposition 92058466

I, the undersigned, declare I am over the age of 18 and not a party to this action. My business address is at 17220 Newhope St., Suite 127 Fountain Valley, CA 92708.

On January 14, 2014, I served:

REGISTRANT'S ANSWER

By placing true copies thereof in a sealed envelope, addressed as follows to:

1 copy sent to:
DLA Piper, LLP, Heather A. Dunn, Esq.
555 Mission St., Suite 2400
San Francisco, California 94105

ATTORNEY FOR PETITIONER

1 copy sent to:
Mail Stop TTAB
Assistant Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

☐ BY PERSONAL SERVICE: I caused such envelope to be delivered by hand to the offices of the addressee(s).

☒ BY MAIL: I am readily familiar with the practice of the office for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, correspondence is put in the office outgoing mail tray for collection and is deposited in the U.S. Mail that same day in the ordinary course of business. I am aware that, on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one (1) day after the date of deposit for mailing shown on this proof of service.

☒ FEDERAL: I declare under penalty of perjury under the laws of the United States that the foregoing is true and that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

☐ STATE: I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 14, 2014, at Fountain Valley, California.

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

Proceeding	92058466
Party	Defendant Dynaflex International, Inc.
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Submission	Answer
Filer's Name	Clement Cheng
Filer's e-mail	law@clemcheng.com
Signature	/clemcheng/
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