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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	TOMI Environmental Solutions, Inc.		
Entity	Corporation	Citizenship	Florida
Address	9454 Wilshire Boulevard Beverly Hills, CA 90212 UNITED STATES		

Attorney information	Jordana S. Rubel Morgan, Lewis & Bockius LLP 1111 Pennsylvania Avenue, NW Washington, DC 20004 UNITED STATES Jrubel@morganlewis.com, apolott@morganlewis.com, jkfee@morganlewis.com, fgordon@morganlewis.com, trademarks@morganlewis.com Phone:2027395118		
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Registration Subject to Cancellation

Registration No	3917962	Registration date	02/08/2011
Registrant	Astro Pak Corporation 270 East Baker Street Costa Mesa, CA 92626 UNITED STATES		

Goods/Services Subject to Cancellation

Class 040. First Use: 2010/01/12 First Use In Commerce: 2010/01/12 All goods and services in the class are cancelled, namely: Biological decontamination services

Grounds for Cancellation

The mark is or has become generic	Trademark Act section 2(e)(1), or section 23 if on Supplemental Register
The mark is merely descriptive	Trademark Act section 2(e)(1)
Failure to function as a mark	Trademark Act section 1,2 and 45
Other	Unlawful use.

Attachments	Petition to Cancel iHP registration.pdf(19819 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	/Jordana S. Rubel/
Name	Jordana S. Rubel
Date	02/08/2016

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

TOMI ENVIRONMENTAL SOLUTIONS, INC.,

Petitioner,

v.

ASTRO PAK CORP.,

Respondent.

MARK: iHP

Registration No. 3,917,962

Cancellation No.:

PETITION FOR CANCELLATION

TOMI Environmental Solutions, Inc. (“TOMI”), a Florida corporation with its principal office at 9454 Wilshire Boulevard, Beverly Hills, CA 90212, submits this petition because it believes it is being damaged and will continue to be damaged by Registration No. 3,917,962, for the iHP designation, owned by Astro Pak Corp. (“Astro Pak” or “Respondent”). TOMI hereby petitions to cancel the registration for the iHP designation.

As grounds for the petition to cancel, TOMI alleges as follows:

Petitioner and Its Patented Technology and Products

1. TOMI is a global bacteria decontamination and infectious disease control company that provides environmentally safe solutions for decontamination of indoor surfaces.
2. TOMI owns groundbreaking technology, including, *inter alia*, a patented process that, among other things, produces an activated cleaning fluid mist comprised of activated ionized hydrogen peroxide that will neutralize biochemical contaminants, such as bacteria, viruses, toxins, and chemical agents. *See, e.g.*, United States Patent Nos. 6,969,487 and 7,008,592.

3. TOMI also owns patented technology directed, *inter alia*, to equipment that produces an activated cleaning fluid mist comprised of activated ionized hydrogen peroxide that can be used to decontaminate various locations. *See id.*

Respondent's Trademark Registration

4. On November 27, 2009, Respondent filed an intent-to-use application to register the iHP designation in connection with "biological decontamination services."

5. Respondent did not disclose in the application that the iHP designation was an acronym for "ionized hydrogen peroxide," which has a meaning in connection with the services listed in the application.

6. The term "ionized" is used in connection with hydrogen peroxide in TOMI's patents, which were owned by L-3 Communications and its subsidiary L-3 Applied Technologies, Inc. (collectively "L-3 Communications") at the time Astro Pak submitted its application.

7. L-3 Communications, and later TOMI (who acquired the patented technology from L-3 Communications), supplied Astro Pak's subsidiary, SixLog Corporation ("SixLog"), with patented equipment, materials, processes and technology that SixLog used to generate, , *inter alia*, "ionized hydrogen peroxide" for use in SixLog's biological decontamination services.

8. AstroPak and/or SixLog's ability to use the iHP designation in a manner that accurately describes the biological decontamination services they provide depends on TOMI's continued willingness to supply Astro Pak and/or SixLog with access to its patented equipment, materials, and technology.

9. On November 29, 2010, Respondent filed a Statement of Use asserting a January 12, 2010 date of first use for the iHP designation in connection with the services listed in the application.

10. To support the Statement of Use, Respondent submitted a specimen showing use of the iHP designation by SixLog, which defines iHP as “a hydrogen peroxide based technology” that is “ionized.”

11. On February 8, 2011, the Patent and Trademark Office registered Respondent’s iHP designation (Registration No. 3,917,962) (the “Registration”).

FIRST GROUND FOR CANCELLATION OF REGISTRATION
Genericness

12. TOMI incorporates by reference paragraphs 1 through 11 of this Petition for Cancellation.

13. The designation iHP is an acronym for “ionized hydrogen peroxide”.

14. The term “ionized hydrogen peroxide” refers to a mist for biological decontamination that is created using TOMI’s patented process and equipment.

15. Ionized hydrogen peroxide is the category name of a particular type of material used for biological decontamination.

16. Purchasers of Respondent’s services understand the phrase “ionized hydrogen peroxide” to refer to a type of hydrogen peroxide that is ionized, not a source.

17. “Ionized hydrogen peroxide” is not capable of distinguishing Respondent’s services pursuant to 15 U.S.C. § 1091 because it is a generic phrase.

18. The Registration should therefore be cancelled under 15 U.S.C. §§ 1091 and 1064.

SECOND GROUND FOR CANCELLATION OF REGISTRATION
Lack of Distinctiveness

19. TOMI incorporates by reference paragraphs 1 through 18 of this Petition for Cancellation.
20. The designation iHP is an acronym for “ionized hydrogen peroxide”.
21. The term “ionized hydrogen peroxide” refers to a mist for biological decontamination that is created using TOMI’s patented process and equipment.
22. If it is not generic, the phrase “ionized hydrogen peroxide” is merely descriptive of the services in the Registration because it is an ingredient, characteristic, and feature of the materials used by Respondent to provide its biological decontamination services.
23. Petitioner and other third parties have the right to use the term “ionized hydrogen peroxide” or the acronym IHP in connection with describing the mist for biological decontamination that is created using TOMI’s patented process, equipment, and materials.
24. When used on or in connection with the Respondent’s services, the designation iHP is merely descriptive of Respondent’s services and cannot function as a trademark absent a showing of secondary meaning under Section 2(f) of the Trademark Act of 1946, 15 U.S.C. § 1052(f).
25. The designation iHP has not acquired secondary meaning signifying Respondent as the exclusive source of the relevant services.
26. If Respondent is permitted to maintain the Registration, Respondent would be able to obstruct Petitioner and third parties from using the term “ionized hydrogen peroxide” or the acronym IHP descriptively.
27. The Registration should therefore be cancelled under 15 U.S.C. §§ 1052(e) and 1064.

THIRD GROUND FOR CANCELLATION OF REGISTRATION
Failure to Function as a Service Mark

28. TOMI incorporates by reference paragraphs 1 through 27 of this Petition for Cancellation.

29. The specimen Respondent submitted with its Statement of Use states that iHP is “a hydrogen peroxide based technology” and repeatedly refers to “iHP technology”. The specimen does not demonstrate use of the iHP designation as a service mark used by Respondent in connection with offering or providing biological decontamination services.

30. Respondent’s use of the iHP designation to describe the source of the technology behind ionized hydrogen peroxide is false and/or misleading because ionized hydrogen peroxide technology includes a patented process and patented equipment and materials owned by TOMI.

31. Upon information and belief, at the time Respondent submitted its Statement of Use, Respondent used the iHP designation solely as the name of a method, process, system or technology for decontamination, not as a source identifier for the provision of biological decontamination services.

32. Upon information and belief, Respondent continues to use the iHP designation as the name of a method, process, system or technology for decontamination, not as a source identifier for the provision of biological decontamination services.

33. Respondent’s use of the iHP designation therefore did not and does not function as a service mark.

34. The Registration should therefore be cancelled under 15 U.S.C. §§ 1127 and 1064.

FOURTH GROUND FOR CANCELLATION OF REGISTRATION
Unlawful Use

35. TOMI incorporates by reference paragraphs 1 through 34 of this Petition for Cancellation.

36. The technology and equipment that are necessary to create ionized hydrogen peroxide that is critical to TOMI's ability to deliver the services identified in the Registration is patented by TOMI.

37. The solution that Respondent must use with TOMI's patented technology and equipment to create ionized hydrogen peroxide that is critical to Respondent's ability to deliver the services identified in the Registration is also proprietary to TOMI.

38. Respondent no longer has the ability to acquire TOMI's technology and equipment or its solution and therefore will not be able to use ionized hydrogen peroxide in connection with the delivery of its biological decontamination services.

39. To the extent that Respondent uses ionized hydrogen peroxide in connection with its biological decontamination services, its use of the ionized hydrogen peroxide will be unauthorized and therefore illegal and cannot be the basis for the maintenance of the trademark registration or for the continued maintenance of bona fide trademark rights.

40. The iHP Registration should therefore be cancelled under Section 14 of the Trademark Act of 1946, 15 U.S.C. § 1064.

WHEREFORE, for the reasons set forth in the foregoing paragraphs, TOMI believes it will be damaged by continued registration of the iHP designation shown in Registration No. 3,917,962 and respectfully requests that the Registration be cancelled.

CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2016, I caused a true and complete copy of the foregoing PETITION FOR CANCELLATION to be sent to the Respondent via First Class U.S.

Mail at the following address:

Astro Pak Corporation
270 East Baker Street
Suite 100
Costa Mesa, CA 92626

By: /s/ Jordana S. Rubel

Jordana S. Rubel