

Amy B. Spagnole, Esq.
aspagnole@haslaw.com
Direct (617) 378-4204

BOSTON, MA 02109-1113
TEL: 617.345.9000
FAX: 617.345.9020
www.haslaw.com

January 24, 2007

VIA FIRST CLASS MAIL

United States Patent and Trademark Office
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Re: Petition for Cancellation
of United States Trademark
Reg. No.: 2,406,685
Registrant: Douglas J. Markham
Mark: LIVING IN THE ZONE
Class: 41

75/402,266

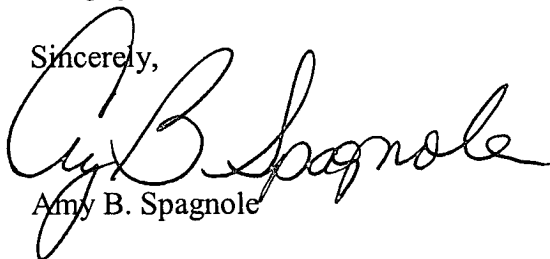
Dear Madam:

The following documents are submitted in connection with U.S. Reg. 2,406,685, issued to Douglas J. Markham of the mark LIVING IN THE ZONE in International Class 41 on the Principal Register:

1. Petition for Cancellation;
2. Petition fee, \$300.00, by check No. 71890 for 1 class;
3. Certificate of Mailing dated January 24, 2007; and
4. Authorization to charge Deposit Account.

The Commissioner is authorized to charge any additional needed fees and to credit any overpayments to Account No. 50-0485, Hinckley Allen & Snyder LLP.

Sincerely,



Amy B. Spagnole

Enclosures

cc: Deborah L. Benson (w/o Encl.)

624933



01-26-2007

U.S. Patent & TMO/TM Mail Rcpt Dt. #30

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

_____)	
BARRY D. SEARS Ph.D.,)	
)	
Petitioner,)	
)	
v.)	Cancellation No. _____
)	
DOUGLAS J. MARKHAM,)	Mark: LIVING IN THE ZONE
)	Reg. No.: 2,406,685
Respondent.)	Class: 41
_____)	

PETITION FOR CANCELLATION

Barry D. Sears, Ph.D., a United States citizen, with an address of 222 Rosewood Drive, Suite 500, Danvers, Massachusetts 01923 ("Petitioner" or "Dr. Sears"), believes that he has been and will continue to be damaged by United States Trademark Registration No. 2,406,685 the mark LIVING IN THE ZONE for "educational services, namely conducting seminars in the field of fitness and nutrition," in International Class 41, issued on the Principal Register on November 21, 2000.

To the best of Petitioner's knowledge, the current owner of Registration No. 2,406,685 sought to be cancelled herein is Douglas J. Markham, a United States citizen with an address of 752 McKevevett Rd., Santa Paula, California 93060 (hereinafter "Respondent"). Dr. Sears hereby petitions to cancel such registration pursuant to § 14(3) of the Lanham Trademark Act of 1946, 15 USC § 1064(3). As grounds for this Petition, Dr. Sears alleges as follows:

01/30/2007 6TKDARS2 00000138 2406685

01 FC:6401

300.00 DP

1. On November 21, 2000, Respondent obtained Registration No. 2,406,685 for the mark LIVING IN THE ZONE for the services listed in the application namely, “educational services, namely, conducting seminars in the field of fitness and nutrition”.

2. On or about October 19, 2006, Respondent filed a combined Declaration of Use and Incontestability under Sections 8 and 15 of the Trademark Act (the “Combined 8 & 15 Declaration”).

3. Respondent signed the Combined 8 & 15 Declaration attesting that: (1) Respondent or his related company, is using the mark LIVING IN THE ZONE in commerce on or in connection with the services listed in the existing registration; (2) that the Respondent or his related company has continuously used the mark LIVING IN THE ZONE in commerce for five (5) consecutive years after the date of registration or the date of publication; and (3) Respondent is still using the mark LIVING IN THE ZONE in commerce on or in connection with the services listed in the existing registration.

4. Respondent’s Combined 8 & 15 Declaration, filed on October 19, 2006, was signed by Respondent under the penalty of fine or imprisonment or both and with the knowledge that any willful false statements contained therein may jeopardize the document and registration.

5. Upon information and belief, Respondent is **not** using the mark LIVING IN THE ZONE on or in connection with the services listed in Registration No. 2,406,685, and was **not** using the mark LIVING IN THE ZONE in connection with such services at the time he submitted the Combined 8 & 15 Declaration.

6. Upon information and belief, Respondent has **not** used the mark LIVING IN THE ZONE in commerce on or in connection with the services listed in Registration

No. 2,406,685 for five (5) consecutive years after the date of registration or date of publication.

7. On November 28, 2006, Petitioner filed an intent to use application to register the mark ZONE LIVING.

8. Petitioner is and will continue to be damaged by continuance of Registration No. 2,406,685, in that Petitioner believes that it will be unable to obtain a registration on the Principal Register for the mark ZONE LIVING, and the procedural and evidentiary advantages that result therefrom, so long as the registration sought to be cancelled is maintained on the Register, despite the Respondent's abandonment of the mark LIVING IN THE ZONE and his fraud on the Trademark Office.

FIRST GROUND FOR RELIEF
FRAUD IN THE MAINTENANCE OF REGISTRATION NO. 2,406,685

9. Petitioner incorporates by reference paragraphs 1 through 8 as if fully set forth herein.

10. On November 21, 2000, Respondent obtained Registration No. 2,406,685 for the mark LIVING IN THE ZONE for "educational services, namely, conducting seminars in the field of fitness and nutrition."

11. On or about October 19, 2006, Respondent filed a Combined Declaration of Use and Incontestability under Sections 8 & 15 of the Trademark Act.

12. Respondent Combined 8 & 15 Declaration attests that: (1) Respondent or his related company, is using the mark in commerce with on or in connection with the services listed in the existing registration, namely "educational services, namely, conducting seminars in the field of fitness and nutrition"; (2) that the Respondent or his related company has continuously used the mark in commerce for five (5) consecutive

years after the date of registration or the date of publication; and (3) that Respondent is still using the mark in commerce on or in connection with the services listed in the existing registration.

13. Respondent's Combined 8 & 15 Declaration filed on October 19, 2006 was signed by Respondent under the penalty of fine or imprisonment or both and with the knowledge that any willful false statements contained therein may jeopardize the document and registration.

14. Upon information and belief, at the time Respondent signed and filed the Combined 8 & 15 Declaration on October 19, 2006, Respondent was **not** using the mark LIVING IN THE ZONE on or in connection with the services listed in the registration.

15. Upon information and belief, at the time Respondent signed and filed the Combined 8 & 15 Declaration on October 19, 2006, Respondent knew that he was **not** using the mark LIVING IN THE ZONE on or in connection with the services listed in the registration.

16. Upon information and belief, at the time Respondent signed and filed the Combined 8 & 15 Declaration on October 19, 2006, Respondent had **not** used the mark LIVING IN THE ZONE on or in connection with the services listed in the registration for five consecutive years.

17. Upon information and belief, at the time Respondent signed and filed the Combined 8 & 15 Declaration on October 19, 2006, Respondent knew that he had **not** used the mark LIVING IN THE ZONE on or in connection with the services listed in the registration for five consecutive years.

18. Respondent's representation in the Combined 8 & 15 Declaration that he was using the mark LIVING IN THE ZONE on the services in the registration is material because Respondent's registration would have been cancelled but for Respondent's representation.

19. Respondent's representation in the Combined 8 & 15 Declaration that he has used the mark LIVING IN THE ZONE in commerce on or in connection with the services listed in the registration for five (5) consecutive years is material because Respondent would not have received the additional statutory benefits of a Section 15 Declaration of Incontestability but for Respondent's representation.

20. Upon information and belief, at the time Respondent filed his Combined 8 & 15 Declaration, he made a false representation that he knew or should have known was false.

21. Proper grounds for cancellation of a trademark registration is fraud on the USPTO, including fraud in connection with the maintenance of a registration and filing a Combined Section 8 & 15 Declaration. See Medinol Ltd. v. Neuro Vasx, 67 USPQ2d 1205 (TTAB 2003); Standard Knitting, Ltd. v. Toyota Jidosha Kabushiki Kaisha, 77 USPQ2d 1917 (TTAB 2006).

22. Respondent has maintained Registration No. 2,406,685 by committing fraud upon the USPTO.

23. Respondent knowingly made a false material representation to the USPTO in order to maintain his registration of LIVING IN THE ZONE.

24. Respondent's false material representations in his Combined 8 & 15 Declaration that he was using the mark LIVING IN THE ZONE on or in connection with

the services in the registration and that he has used the mark LIVING IN THE ZONE in commerce on or in connection with the services listed in the registration for five (5) consecutive years constitutes adequate basis for cancellation of Registration No. 2,406,685.

25. The Petitioner has been and will continue to be damaged by continuance of said Registration No. 2,406,685 so long as the registration sought to be cancelled herein is maintained on the Register despite Respondent's lack of bona fide use of the mark LIVING IN THE ZONE in commerce on or in connection with the services identified in the registration and Respondent's fraud on the Trademark Office.

SECOND GROUND FOR RELIEF
ABANDONMENT

26. Petitioner incorporates by reference paragraphs 1 through 25 as if fully set forth herein.

27. Upon information and belief, Respondent has discontinued use of the mark covered by Registration No. 2,406,685 and does not intend to resume use of such mark.

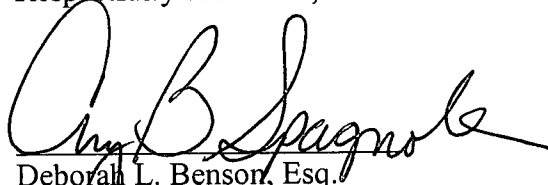
28. Respondent has abandoned the mark LIVING IN THE ZONE in the United States, and his Registration No. 2,406,685 therefor.

29. Petitioner is and will continue to be damaged by continuance of Registration No. 2,406,685, in that Petitioner believes that it will be unable to obtain a registration on the Principal Register for the mark ZONE LIVING, and the procedural and evidentiary advantages that result therefrom, so long as the registration sought to be

cancelled is maintained on the Register, despite the abandonment of the mark LIVING IN THE ZONE by Respondent.

WHEREFORE, the Petitioner requests that this Petition for Cancellation be sustained and that Trademark Reg. No. 2,406,685, issued to Douglas J. Markham on November 21, 2000, be cancelled.

Respectfully submitted,



Deborah L. Benson, Esq.
Amy B. Spagnole, Esq.
Hinckley, Allen & Snyder LLP
28 State Street
Boston, MA 02109
Tel: (617) 345-9000
Fax: (617) 345-9020

Dated: January 24, 2007

Counsel for Petitioner Barry D. Sears, Ph.D.

Certificate Of Mailing

I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first-class mail in an envelope addressed to the Commissioner for Trademarks, PO Box 1451, Alexandria, VA 22313-1451, on 1/24/07
Date 1/24/07 Amy B. Spagnole