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

Proceeding	92053060
Party	Defendant David M. Green
Correspondence Address	DAVID M. GREEN 2549 WEST SHINNECOCK WAY PHOENIX, AZ 85086 UNITED STATES info@3gtrading.com
Submission	Answer
Filer's Name	David M. Green
Filer's e-mail	info@3gtrading.com
Signature	/David M. Green/
Date	11/08/2010
Attachments	freemlslisting trademark cancelation doc12.pdf (4 pages)(119984 bytes)

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

In The Matter Of Trademark Cancelation No. 92053060

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Douglas Deitch

Petitioner

vs

David M. Green

Defendant/Registrant/Respondent

U.S. Trademark Reg. 3731973

FREEMLSLISTING.COM & Design

DEFENDANT/REGISTRANT RESPONSE AND ANSWER RE ATTEMPT TO CANCEL

Regarding Page 1 Section 1, Regarding Page 1 Section 1, Admit with an explanation the FREEMLSLISTING.com domain name was first registered March 8, 2000 and used in connection with my Internet sites for several years prior to the first tangible use in commerce date of Nov 14, 2009, which date was based on first use in a newspaper advertisement being Nov 14, 2009. My FREEMLSLISTING.COM registered mark was in wide and extensive use both on the internet and elsewhere years earlier than the newspaper advertisement re its Intent To Use date of Nov 14, 2009.

Regarding Page 1, Section 2, and Respondent has Insufficient Information to admit or deny. Based on a review of the Petitioner's trademark application, it appears that Petitioner originally claimed a use date of no earlier than January 31, 2008 at the time the Petitioner filed for trademark. Respondent does not have sufficient information or evidence to know why Petitioner is now proposing to change the date of first use to

an earlier date -- to a date prior to the date the Petitioner originally used when submitting his trademark application.

Regarding Page 2, Section 3, and Respondent has insufficient information to admit or deny. With that said, if the Petitioner was using this term "long prior" to the filing date of January 1, 2008, then why did Petitioner claim a first use date of January 31, 2008 when Petitioner filed for a trademark? Respondent has no evidence or insight to explain this discrepancy in Petitioner's behavior.

More important information regarding Page 2, Section 3, An extremely important point is in petitioner's FREE MLS trademark application number 776344, filed March 16, 2009 they state the FREEMLS mark was first used anywhere as early as January 31, 2008, and first used in commerce as early as January 31, 2008. However, FREEMLSLISTING.COM mark application was dated January 1, 2008. That appears to be major evidence the cancelation is without merit since petitioner admits they did not start using the mark until AFTER defendant's trademark application was filed. Therefore, based on that and other factors it is clear that respondent/defendant has clear priority.

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Regarding Page 2, Section 4, Deny. Based on a review of the Petitioner's application file, it appears that not only is Petitioner's application being rejected because of the priority of Respondent's application, but also because the USPTO examiner has rejected the Petitioner's proposed use of the mark as being merely "descriptive." Respondent does not see why a valid and USPTO-approved registered trademark, with seniority, should be cancelled due to a trademark application that is not only subsequent to the approved trademark, but thus far its registration appears to have been rejected by the USPTO as well?

Regarding Page 2, Section 5, Deny, Free MLS is an extremely common real estate industry term. A Google search done today shows 4,400,000 results for the exact

term "Free MLS" with many 100s or 1000s of third party webpages and websites using the completely generic term. It is totally absurd for the Petitioner to claim the public has come to know, rely upon and recognize the services of Petitioner by such mark. Based on the office actions issued by the USPTO examiner, it appears that the USPTO also shares this view, which is why the examiner has rejected the proposed use of the term as "descriptive."

Regarding Page 2, Section 6, Deny, It is also absurd to claim that consumers and the trade can possibly be confused by concurrent use what with the more than 4 million results for "Free MLS" in Google and the generic terms extremely heavy use by 100s or 1000s of webpages and websites belonging to other parties. Further, if the Petitioner expended "considerable sums and effort" in promoting this mark prior to the originally claimed first use date of January 31, 2008, then why didn't the Petitioner provide evidence of such expenditures and claim an earlier first use date?

Regarding Page 2, Section 7, Deny, Consumers would not consider "Free MLS" as emulating from “freemlslisting.com” as the two business names, domain names, the websites and product/services are different. Further, even if there were to be confusion, then one would think that the senior trademark holder FREEMLSLISTING.COM would have good reason to file for damages rather than the unapproved trademark applicant who filed with a late use date. If someone were to start marketing a cellphone called an "iPhone" (and claim that they thought of the name in 2006 and file for a trademark which is rejected) and then demand damages from Apple based on their "lost sales," they would probably be laughed out of court. Apple would be the one who should claim damages because Apple has a prior, approved trademark.

Regarding Page 2 Section 8, Deny, No cloud will be placed on Petitioner's title and its alleged trademark. In fact, Petitioner does not have a registered trademark. Petitioner's application for a registered trademark has thus far been denied by the USPTO on the grounds it was descriptive and other reasons.

Regarding Page 3, Section 9, Deny. Petitioner's application appears to have been rejected as descriptive. Also, even if it were not, please see the example concerning Apple and iPhone above. Trademarks and similar intellectual property are explicitly designed to benefit the party with a registered and approved mark by preventing a potential competitor from subsequently applying for a trademark on the same term or providing products with a similar mark. If the subsequent potential competitor complains that they are unable to get a trademark or sell products because of the prior approved trademark, then this is not a "problem," this is exactly the intent of the whole trademark system and intellectual property system in general. Intellectual property law protects the rights of trademark holders against subsequent potential competitors. For a subsequent potential competitor to claim that they are "injured" by the proper functioning of the trademark system is just not right.

Wherefore, Defendant and Respondent David M. Green will be greatly damaged if his trademark is cancelled and prays that Petitioner's Cancellation Attempt be denied.

Respectfully submitted November 8, 2010, by David M. Green (on a Pro Se basis).

By /David M. Green/

Certificate of Service

I hereby certify a true and complete copy of the forging ANSWER to Petitioner's Cancellation attempt has been served on Petitioner's attorney Mr. Thomas D. Foster, TD Foster Intellectual Property Law, Counsel for Petitioner, 12760 High Bluff Dr., Ste 300, San Diego, California 92130, by depositing a copy in the U.S. Mail on November 8, 2010 to the proceeding address, and also a copy sent by email to foster@tdfoster.com on November 8, 2010.

/David M. Green/