

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

Parametric Technology Corporation, )  
Opposer, )  
v. )  
PLMIC, LLC, )  
Applicant. )

# 78835516

Opposition No. 91 174 641

PLMIC, LLC, )  
Opposer, )  
v. )  
Parametric Technology Corporation, )  
Applicant. )

# 7662957

Opposition No. 91 177 168

Certificate of First Class Mailing (37 CFR 1.8(a))

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May 4, 2009  
Date of Signature and of Mail Deposit

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**BRIEF FOR PARAMETRIC TECHNOLOGY CORPORATION  
AS PLAINTIFF IN OPPOSITION NO. 91 174 641**



05-07-2009

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## 1. DESCRIPTION OF THE RECORD

The record before the Trademark Trial and Appeal Board for these two consolidated trademark oppositions comprises the following:

1. the file of Application Serial No. 78/835,516, opposed by Parametric Technology Corporation (hereinafter "PTC");
2. the file of Application Serial No. 76/662,967, opposed by PLMIC, LLC (hereinafter "PLMIC");
3. the pleadings of the two consolidated oppositions, including amended notices of opposition for both oppositions;
4. PLMIC's responses to PTC's interrogatories and requests for document production, introduced as exhibits during the testimony deposition of Mr. Jason Silvestri;
5. the testimony deposition of Mr. Sumant Mauskar, taken on September 22, 2008, and accompanying exhibits. Mr. Mauskar is Senior Vice-President, Global Services, of PTC;
6. the testimony deposition of Mr. Jason Silvestri, taken on November 7, 2008, and accompanying exhibits. Mr. Silvestri is Managing Member of PLMIC.
7. the testimony deposition of Mr. John Graeme Noseworthy, taken on November 7, 2008, and accompanying exhibits.

## 2. STATEMENT OF THE ISSUES

This is a proceeding involving competing trademark applications by two parties for the same mark for services that are very similar to each other. Each party acknowledges that the marks and the services to which they are applied are confusingly similar. The dispute is over which party has priority. Furthermore, PTC asserts that the false statements made by Mr. Silvestri in his trademark application, later assigned to PLMIC, invalidate PLMIC's application.

### 3. RECITATION OF FACTS

Mr. Jason Silvestri's application is Serial No. 78/835,516, for FLEXPLM in standard characters. It is for "cooperative advertising and marketing of products and services by way of solicitation, customer service and providing marketing information via websites on a global computer network," and was filed on March 13, 2006, and published on October 31, 2006. The application was assigned to PLMIC, LLC on May 24, 2006. PTC filed a notice of opposition to the application on November 22, 2006.

In its notice of opposition PTC claimed that it had used FLEXPLM for "computer software for product lifecycle management and the automation of design information; the establishment and control of workflows, shared workspaces, and production processes in the nature of product design and creation; product configuration and data management; collaboration and process control; the visualization and digital mockup of designs, and use in software configuration and development, along with user guides sold with such software as a unit; and technical support services, namely, troubleshooting of computer software problems via telephone; updating of computer software; maintenance of computer software, namely error correction services for computer software; consultation and software implementation services; and product development for others." PTC claimed likelihood of confusion and that its use predated any use by Mr. Silvestri or PLMIC of its mark for its services. PTC also cited its own application to register FLEXPLM, for the goods and services recited above.

PTC's application Serial No. 76/662,967, for FLEXPLM in standard characters for the same goods and services as are set out in its Notice of Opposition, was filed on July 13, 2006, and published on April 10, 2007. PLMIC filed a notice of opposition to the application on May 8, 2007.

In its notice of opposition PLMIC claimed that it had used FLEXPLM in commerce for the services of its application since at least July 20, 2004, before PTC used its mark, and claimed likelihood of confusion.

Those are the facts of the records of the applications and the oppositions. As for the uses of their marks by the parties, the facts are as follows.

When Jason Silvestri filed his application in his own name to register FLEXPLM on March 13, 2006, it was a Section 1(a) application based on use, and he claimed a date of first use of July 13, 2003 and a date of first use in commerce of July 20, 2004. He claimed the first use date of July 13, 2003 based on his understanding that it meant "when was the first time I even thought about using it" (Silvestri Dep., p. 22). He claimed the first use in commerce date of July 20, 2004 because that was when he "registered a domain. I purchased and registered a website domain, and I called it FlexPLM, and I thought that registering a domain was a proper use of trying to claim rights to a trademark." (Silvestri Dep., p. 18).

While Mr. Silvestri filed the application himself without the advice of counsel (Silvestri Dep., p. 18), the record reveals that two months after the filing of the application a power of attorney naming a lawyer was filed. The lawyer withdrew after the notice of opposition was filed against the application, when existing counsel was appointed.

Mr. Silvestri now claims that a use of the mark occurred in March, 2005 when he "posted to the internet a certain availability to certain services with my FlexPLM Advertising Solutions" (Silvestri Dep., p. 7), but he has no records of the posting (Silvestri Dep., p. 14) because his computer crashed (Silvestri Dep., p. 14). He recalls the date because this alleged use was undertaken during a visit to his brother-in-law, J. Graeme Noseworthy, who was an employee of a company called AimNet Solutions, to see whether AimNet would purchase FlexPLM services, but AimNet declined (Silvestri Dep., p. 13). Mr. Noseworthy confirmed in his testimony that Mr. Silvestri visited him (he thinks it was February 2005) to "pitch FlexPLM," but that instead he hired Mr. Silvestri to revamp AimNet's website (Noseworthy Dep., p.8, 9).

The first sale of FlexPLM services that Mr. Silvestri made, he claims, was in September, 2006 (Silvestri Dep., p. 17), a year and a half after the approach to J. Graeme Noseworthy of AimNet, and six months after he filed his trademark application.

PLMIC, the present owner of the application, has made no attempt to amend it.

PTC filed its application to register FLEXPLM on July 13, 2006. It was a Section 1(a) application based on use, and claimed a date of first use in commerce of at least as January, 2006 for the computer software of class 9, and of at least as early as December, 2005 for the computer services of class 42. Mr. Mauskar, PTC's Senior Vice-President, Global Services, testified that the FLEXPLM mark was actually first used in connection with the software and the services in order documentation, including a contract for the performance of services, with a customer in May, 2005 (Mauskar Dep., p. 13). The software and related services were delivered to the customer under the contract.

#### 4. ARGUMENT

##### A. PLMIC'S APPLICATION IS VOID

- (1) The Application is a Use-Based Application That Was Filed Before Any Use of the Mark Occurred

Mr. Silvestri filed his application to register FLEXPLM on-line on March 13, 2006, claiming the basis of his application to be Section 1(a) of the Lanham Act. Section 1(a) provides for an application by the "owner of a trademark used in commerce" (15 U.S.C. §1051[1][a][1]). It also provides that the dates of first use and first use in commerce be included in the application (15 U.S.C. §1051[2]), and that

- (3) The statement shall be verified by the applicant and specify that--
- (B) to the best of the verifier's knowledge and belief, the facts recited in the application are accurate;
- (C) the mark is in use in commerce; . . . (15 U.S.C. §1051[3])

As for "use in commerce," the Lanham Act provides as follows:

The term "use in commerce" means the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark. For purposes of this Act, a mark shall be deemed to be in use in commerce--

- (1) . . .
- (2) on services when it is used or displayed in the sale or advertising of services and the services are rendered in commerce, or the services are rendered in more than one State or in the United States and a foreign country and the person rendering the services is engaged in commerce in connection with the services. 15 U.S.C. §1127.

Neither of the dates entered by Mr. Silvestri on his application were uses of the mark. The date of first use of July 13, 2003 was based on when he first thought of using the mark (Silvestri Dep., p. 22).

The date of first use in commerce of July 20, 2004 was based on his registration of a domain name (Silvestri Dep., p. 18). These are not the rendering of services in combination with sale or advertising of the services under the mark.

After the opposition proceedings began, Mr. Silvestri backed off from the claims of his application, and began to assert a date of March, 2005 as a date of first use of his mark. In PTC's First Request for Production of Documents (Silvestri Dep., Exh. 7) he was asked to produce documents on which he relied for contending in his answer to PTC's notice of opposition that he had "first used FLEXPLM in commerce at least as early as July 20, 2004."

He responded as follows:

The above answer is mistaken. Mr. Silvestri in fact first so used the mark in March 2005. His use of the mark as of July 20, 2004 was in the form of the purchase and registration of the website domain www.plmic.com. (Silvestri Dep., Exh. 7, Req. 3)

(Later, in his testimony, Mr. Silvestri acknowledged that the reference to www.plmic.com should have been to www.flexplm.com.)

As for the March 2005 date, Mr. Silvestri was only able to show in his testimony that he spoke to his brother-in-law about his idea for a service that his brother-in-law's employer might be interested in. His brother-in-law said no thank you, but hired Mr. Silvestri to improve the company's website instead. (Silvestri Dep., p.11) We have no idea of what Mr. Silvestri was doing at the time because all his work was in a single computer without a back-up, that crashed and lost all its data. (Silvestri Dep., p. 14) Frankly, anything that Mr. Silvestri says about this period has to be viewed skeptically, because he has demonstrated in his testimony how little he knows about the meaning of service mark use.

Mr. Silvestri does not claim that he rendered any services related to his trademark application in March 2005. The actual rendering of services is required under the Lanham Act to occur to establish the "use in commerce" for a Section 1(a) application. Therefore his actions in March 2005, since they did not include rendering services, did not constitute use in commerce. Sinclair Oil Corp. v. Kendrick, 85 U.S.P.Q. 2d 1032, 1035 (T.T.A.B. 2007).

Mr. Silvestri testified that the first time he did render services was in September, 2006 (Silvestri Dep., p. 17), a year and a half after the events of March 2005. This is six months after he filed his use-based application.

Since the use-based application was based on a false claim of use in commerce, and no use in commerce ever did occur before the filing date, the application is invalid.

(2) The Application Has Not Been Amended to an Intent-to-Use Application and Fraud Prevents Such an Amendment

Facing a situation in which it is clear that no use in commerce of his mark occurred before a use-based application was filed, Mr. Silvestri's company, PLMIC, might consider amending its application to an intent-to-use application. PLMIC should not be allowed to amend its application, or if it so amended, it should then be struck down on a basis of fraud.

The situation in this case is very similar to the one in Sinclair Oil Corp. v. Kendrick, *supra*. In that case the pro se applicant also filed a use-based application, which was opposed. As a result of applicant's answers to interrogatories, it became clear that the applicant's claim of use was based on registration of the mark as a fictitious business name, and a one-time giveaway of twenty-five product samples bearing the mark, both events occurring five years before the application was filed.

The Board, as stated above, determined that the failure to render services eliminated Section 1(a) as a basis for the application. It permitted the application to be amended to a Section 1(b) (intent-to-use) application, but then went on to invalidate the application on the basis of fraud, citing Medinol Ltd. v. Neuro Vasx, Inc., 67 U.S.P.Q. 2d 1205 (TTAB 2003).

The Board in Sinclair Oil found that the applicant there:

"filed an application based on use in commerce and signed a declaration attesting to the truth of all the statements in the application when she knew or should have known that she had not used the mark in connection with the recited services, i.e., "retail store services featuring, bath products, gift products [and] candy products." There is no question that applicant's misrepresentation resulted in the involved application being approved for publication as a use-based application." 85 U.S.P.Q. 2d 1032, at 1035.

As for applicant's sincerity, the Board said:

Even if applicant honestly believed that her activities in connection with her involved mark warranted filing the involved application based on use in commerce under Trademark Section 1(a), there is no genuine issue that, under the circumstances, it was not reasonable for applicant to believe that her activities in 1996 constituted current use or use in commerce for the identified services at the time she signed her application. That is, applicant could not have reasonably believed that either registration of STAACHI'S EXCLUSIVES as a fictitious business name in 1996 and a one-time giveaway of twenty-five product samples bearing the involved mark in 1996 were sufficient to constitute use of the mark STAACHI'S Co. 1996 and design for "retail store services featuring, bath products, gift products, [and] candy products" when the involved application was filed on February 20, 2001, nearly five years after these activities. Inasmuch as applicant's material representations regarding use of the mark were false and applicant knew or should have known such representations were false, we conclude that applicant has committed fraud. 85 U.S.P.Q. 2d 1032, at 1036.

In the present opposition proceeding, Mr. Silvestri claimed a date of first use based on when he thought of the mark, and a date of first use in commerce based on when he registered a domain name. These are ridiculous bases for use claims. Mr. Silvestri should have known better.

Furthermore, since two months after he filed his application, Mr. Silvestri has been represented by counsel. Despite this, Mr. Silvestri continued to maintain a false illusion of use of his mark. His answer, prepared by counsel, to PTC's notice of opposition said that "Mr. Silvestri first used FLEXPLM in commerce at least as early as July 20, 2004." After Mr. Silvestri's testimony to the contrary, PTC filed an amended notice of opposition, in which PTC alleged, in paragraph 9, that, with respect to the PLMIC application,

9. In fact, the mark was first put into use in commerce after the filing date of the application. The dates of first use and first use in commerce set out in the filed application were false.

PLMIC denied the allegation of paragraph 9, and referred to its response to paragraph 1.

The response to paragraph 1, in relevant part, was as follows:

Further answering, FLEXPLM was first used, and was first used in commerce, by Applicant's predecessor in title, Jason Silvestri, who is the sole member and managing member of Applicant. Mr. Silvestri first used FLEXPLM and first used it in commerce at least as early as March 31, 2005, and used it in connection with "cooperative advertising and marketing of products and services by way of solicitation, customer service and providing marketing information via websites on a global computer network." With respect to the March 2005 date, Mr. Silvestri posted on the Internet the availability of certain services described as FlexPLM Advertising Solutions, and attempted to sell those services to AimNet Solutions. AimNet Solutions declined to buy those particular services, but instead bought other services simultaneously offered by Mr. Silvestri relating to search engine optimization and marketing. In addition, on July 20, 2004, Mr. Silvestri purchased and registered a website domain, FlexPLM.com. He believed in good faith that such usage constituted trademark usage, and thus cited that date as the first use in commerce in the Application he filed on March 13, 2006, doing so on his own, and without having conferred with counsel.

Long after PLMIC was aware that it had no basis for a claim that it had used its mark in commerce before the application was filed, it continues to assert that it had. The assertion (in the answer to the amended notice of opposition) comes with an explanation, but an explanation that is inconsistent with the well-established statutory requirements for "use in commerce."

Mr. Silvestri has moved from claiming ignorance of the law to denying the law, and continues to assert a basis for his application that is legally and factually unsupportable.

PTC therefore asserts that PLMIC's application, which it is opposing, is invalid as a use-based application that does not satisfy the statutory requirements for such an application. The mark applied for was not in use in commerce when the application was filed. Any attempt to amend the application should be struck down on the basis of fraud.

#### B. PTC HAS PRIORITY OVER PLMIC

(1) The Only Claimed Use by PLMIC That Preceded PTC's Use was Insignificant and Questionable

PTC asserts that the PLMIC application is invalid because of the false dates of first use set forth in the application. There is another basis for a successful opposition by PTC. That is that PTC has priority of use.

Let us examine PTC's use first. PTC filed its application in July 13, 2006. It was use-based, and claimed a date of first use in commerce of at least as early as January, 2006 for the computer software of class 9, and of at least as early as December, 2005 for the computer services of class 42. Mr. Sumant Mauskar, PTC's Senior Vice President, Global Services, however, established in his testimony that the mark FLEXPLM was first used on computer software and software services in a Statement of Work for a customer in May, 2005 (Mauskar Dep., p. 9-12, Exh. 2). This Statement of Work was an agreement with the customer that it would be provided software and services, of the kind set out in the PTC application. Mr. Mauskar confirmed that the work had been done. (Mauskar Dep., p. 12, 15)

Mr. Mauskar testified as to other documents that demonstrated publicity and promotion of the mark FLEXPLM for the software and software services of the application (Mauskar Dep., Exh. 3-11).

Mr. Mauskar testified that PTC has received annual revenues of millions of dollars for the computer software it provides and for the software services it provides (Mauskar Dep., p. 25-26), and that it has continued to use "FlexPLM" on the products and services since May 2005 (Mauskar Dep., p. 26).

In short PTC has demonstrated that it used its mark FLEXPLM in commerce extensively on the products and services of its application, and continuously since May, 2005.

By contrast, Mr. Silvestri's use of FLEXPLM has been sporadic and insignificant. The dates of first use and first use in commerce that Mr. Silvestri set forth in his application have turned out to have no basis in reality. The first date that Mr. Silvestri now lays claim to is March, 2005. An examination of the basis for that claim shows how insubstantial it is.

Basically, Mr. Silvestri claims that the use in March, 2005 was "use in commerce" (see his answer to PTC's amended notice of opposition). However, all that Mr. Silvestri can show is that he hoped to provide his services to AimNet.

There remains the question of whether the use by Mr. Silvestri in March 2005 was "use analogous to trademark use," enough to determine priority even if it might not satisfy the technical requirements of use in commerce for a trademark application.

This requires an examination of what happened in March, 2005. Mr. Silvestri's testimony includes such statements as:

- Q. With respect to the March 2005 date, how did you use the term "FlexPLM"?
- A. As a sole proprietor of Top of The Food Chain, I posted to the internet a certain availability to certain services with my FlexPLM Advertising Solutions.
- Q. And this occurred in March 2005?
- A. This occurred March 2005. This was done over our website, FlexPLM.
- Q. Any possibility it could have been earlier than that?
- A. It could have been as early as February, actually, but I don't know for sure.

Silvestri Dep., p. 7-8.

- Q. Going back to your use of FlexPLM in March 2005, are you certain you posted on the internet the availability of certain services, including FlexPLM advertising solutions?
- A. Yes.
- Q. And what makes you certain it was March of 2005?
- A. Because I actually made a sale to a company called AimNet Solutions. They actually declined the FlexPLM services I was offering, but they did obtain a different set of services.
- Q. How is it you made your sale to AimNet in March of 2005?
- A. Repeat that.
- Q. What were the circumstances under which you made the sale to AimNet in March of 2005?
- A. At the time I was really kind of trying to drum up business, shooting it off to friends, colleagues, family, and of course, anyone who saw our advertisement on the website. One of these people was Graeme Noseworthy, my brother-in-law. I believed he worked for marketing at the time.
- Q. In AimNet?
- A. In AimNet Solutions, correct. And he looked at the FlexPLM solutions, and he declined them, and instead he went with a set of solutions that dealt with search engine optimization and marketing.

Silvestri Dep., p. 10-11.

Later, the testimony continued,

- Q. Now, if I understand you correctly, you said in March of 2005, you, in fact, pitched or offered to sell FlexPLM Advertising Solutions to AimNet?
- A. Yes.
- Q. They declined that?
- A. That's correct.

- Q. If they-what did those FlexPLM Advertising Solutions services that you offered to them; what did they entail?
- A. I would have to say the goods and services description here would best describe it.
- Q. You are referring to the goods and services description on Exhibit 1?
- A. Correct.
- Q. Do you have any records of your advertising FlexPLM services on the internet in March of 2005?
- A. I did, but I can't retrieve that. That was a couple years ago, the computer crashed. I tried desperately to revive them. I could not do so.

Silvestri Dep., p. 13-14

It turns out that Mr. Silvestri's first claim to actually selling his services came a year and a half later:

- Q. When did you make your first sale of FlexPLM services?
- A. September, 2006.
- Q. And to whom did you make the sale?
- A. Management Roundtable
- Q. And where are they located?
- A. Waltham, Massachusetts
- Q. And when you made that sale, were you working through Top of The Food Chain or PLMIC?
- A. PLMIC

Silvestri Dep., p. 17.

However, it is not clear even what the services sold in September 2006 were. On cross-examination the testimony went as follows:

- Q. Earlier Mr. Haffer's questions of you, you stated that you had made a first sale of the services in September 2006?
- A. That's correct.
- Q. Can you tell me to whom that sale was made?
- A. Yes, that was to Management Roundtable out of Waltham, Mass. Alex Cooper was the president at the time, and he accepted FlexPLM Development Solutions, which was pretty much, I created a proposal which entailed various ways to manifest their interfacing on their websites.

They had several different logging interfaces and such, that needed to be unified into a single entity, and for that, for the solutions I provided for him for the outlook, for the structure in which I showed him, he paid me for that.

Silvestri Dep., p. 28-29

Did Mr. Silvestri provide "FlexPLM Advertising Solutions" or "website Development Solutions"? Once again, he seems to have improved a company's website, but not to have provided the services of the application: "cooperative advertising and marketing of products and services . . . ."

PTC has a similar problem with Mr. Silvestri's description of his March 2005 website, because of the following testimony:

- Q. Then you say, the second part of that response, in the interrogatory answer, "As to March 2005, I, as sole-proprietor of Top of The Food Chain, posted on the internet the availability to certain services including FlexPLM Advertising Solutions"
- A. Yes.
- Q. When you posted that on the internet, did you use the words, "Top of The Food Chain"?
- A. Yes. That was the name of my business. The website was Top of The Food Chain.
- Q. There was a website that was identified as Top of The Food Chain?
- A. Yes.

Silvestri Dep., p. 26.

It appears that Mr. Silvestri was an entrepreneur with website design skills. He says that he promoted "FlexPLM" services in March 2005, but it was on a website called "Top of The Food Chain," and he has no documents to show exactly what the website showed, or how often it was visited, or how many inquiries he received. When he says that he sold the services in September 2006, it is not clear that he sold FlexPLM Advertising Solutions (which seems to refer to the services described in the application) or Development Solutions, which appeared to be website design, a different thing.

This is not the clear public use of a mark in association with services that justifies granting priority.

Mr. Silvestri's activities in March 2005 do not satisfy the guidelines set out by the Court of Appeals for the Federal Circuit for when "use analogous to trademark use" may be given weight.

T.A.B. Systems v. PacTel Teletrac, 37 U.S.P.Q. 2d 1879 (Fed. Cir. 1996). The Court said:

It is well settled that one may ground one's opposition to an application on the prior use of a term in a manner analogous to service mark or trademark use. . . . Such an "analogous" use opposition can succeed, however, only when the analogous use is of such a nature and extent as to create public identification of the target term with the opposer's product or service. 37 U.S.P.Q. 2d 1879, at 1881.

In that case, the Court of Appeals for the Federal Circuit held that the following activities by an opposer were not sufficient analogous use:

Of the press releases PacTel issued, only one was shown to have been circulated by a national wire service. The record contains no evidence, however to indicate how many of PacTel's potential consumers may have been reached by that wire service story. Although the record indicates that some of PacTel's press kits were distributed to potential consumers, no evidence was presented enabling one to infer that a substantial share of the consuming public had been reached. Likewise with PacTel's slide show presentations to seven potential customers: we discern nothing in the record to indicate whether this group of customers constituted more than a negligible portion of the relevant market. Finally, the brochures and news articles, all produced in September and October 1989, were not shown to have been so broadly or repetitively distributed that one could reasonably infer that the consuming public came to identify TELETRAC with PacTel's services by October 1989. This record evidence, which does not permit one to infer either that PacTel reached more than a negligible share of potential customers or that the customers who were reached saw more than a few references to TELETRAC over a one or two month period, is legally insufficient to ground PacTel's analogous use claim. 37 U.S.P.Q. 2d 1879, at 1882.

By comparison to the efforts of the opposer in that case, the opposer in this case can only point to a single instance in which Mr. Silvestri reached someone with his plans for a business. The extent and efficacy of his effort may be gauged by the time, eighteen months, that passed before he made what he considered to be the first sale of his services in September, 2006. This is not the extensive use of a mark that should give Mr. Silvestri priority over a serious and sustained commercial effort by PTC that dates to May, 2005.

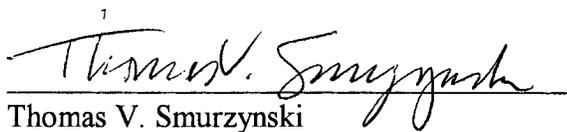
SUMMARY

In summary, Mr. Silvestri's use of his mark as a basis for his application turns out to be no use at all in a technical sense (that is, the statutory "use in commerce") before the filing date of the application. Furthermore, an amendment to an intent-to-use application (not even requested by PLMIC) should be foreclosed by the indifference to the requirements for a meaningful trademark application by Mr. Silvestri, an indifference that was never corrected by the lawyers that represented him since two months after he filed his application.

Mr. Silvestri's conversation with his brother-in-law in May, 2005 about his hopes for his business plan was not the public and extensive "use analogous to trademark use" that can give a party priority over a commercial introduction of a real business by another party.

The opposition against PLMIC's application should be decided in PTC's favor.

Respectfully Submitted,  
Parametric Technology Corporation  
By its attorneys,

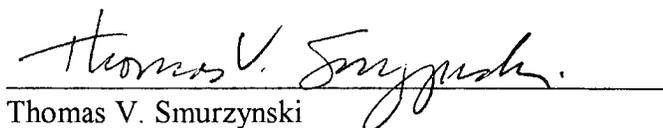


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing BRIEF FOR PARAMETRIC TECHNOLOGY CORPORATION AS PLAINTIFF IN OPPOSITION NO. 91 174 641 was served by first-class mail, postage prepaid, on counsel for Applicant, Edward A. Haffer, Sheehan Phinney Bass & Green, P.A., 1000 Elm Street, P.O. Box 3701, Manchester, NH 03105-3701, on this 4<sup>th</sup> day of May, 2009.

  
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