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

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| Proceeding | 91174641 |
| Party | Defendant PLMIC, LLC |
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

**PARAMETRIC TECHNOLOGY CORPORATION,
Opposer**

v.

**PLMIC, LLC,
Applicant**

Opp. No. 91174641

**PLMIC, LLC,
Opposer**

v.

**PARAMETRIC TECHNOLOGY CORPORATION,
Applicant**

Opp. No. 91177168

BRIEF OF PLMIC, LLC

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I. DESCRIPTION OF THE RECORD

The record in these two Consolidated Oppositions consists of the following:

1. The file of Application Serial No. 78835516, opposed by Parametric Technology Corporation (“PTC”).
2. The file of Application Serial No. 76662967, opposed by PLMIC, LLC (“PLMIC”).
3. The pleadings of the two Consolidated Oppositions, including amended Notices of Opposition for both Oppositions and related Answers.
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.

II. STATEMENT OF THE ISSUES¹

1. In this case of Consolidated Oppositions, should PLMIC's Opposition be sustained because of its priority of use of FLEXPLM?

2. Should PTC's Opposition be denied because PLMIC's prior use is sufficient not only to establish priority, but also to entitle it to registration?

3. Does a good-faith mistake by a layperson without counsel as to what constitutes trademark usage — a mistake that was discovered and corrected in these proceedings — constitute grounds to invalidate PLMIC's application?

III. RECITATION OF FACTS

The parties do not dispute that the computer services each offers under FLEXPLM are similar. PTC Brief, 4. Those computer services relate to Product Lifecycle Management (or PLM). Silvestri Dep, at 6-7, 19-21; Silvestri Exh. 3 and 4; Mauskar Dep, at 7; Mauskar Exh. 5.

FLEXPLM was first used, and was first used in commerce, by PLMIC's predecessor in title, Jason Silvestri (Silvestri Dep., 7-10), who is the sole member and managing member of PLMIC. *Id.*, 4. He so used it at least as early as March 31, 2005, and did so 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." *Id.*, 7-10. More specifically, he did so by posting on the Internet the availability of certain services described as FlexPLM Advertising Solutions, and attempted to sell those services to AimNet Solutions. *Id.*, 10-11, 13-17; Silvestri Dep., Exhs. 1 and 2. AimNet Solutions declined to buy those particular services, but instead bought other services simultaneously offered by Silvestri relating to search engine optimization and marketing. *Id.*,

¹ In accordance with the Board's Order of August 25, 2008, PLMIC submits this brief as defendant in Opposition No. 91174641, and as plaintiff in Opposition No. 91177168.

10-11; Noseworthy Dep., 5-6. Noseworthy was then a Marketing Program Manager for Aimnet; he is now a Senior Marketing Manager for Monster Worldwide, and is Silvestri's brother-in-law. Noseworthy Dep., 4-5. By referring to a website project he was then working on, Noseworthy pinpointed the time of Silvestri's "pitching" FLEXPLM services to AimNet from early February 2005 to March 2005. *Id.*, 5-9; Noseworthy Dep., Exh. 8. In response to a question by PTC's counsel, Noseworthy testified:

Q. When you said that Jason pitched the FlexPLM services to you in 2005, in what way did he do that? Did he come in and speak with you? Did he call you? Did he write to you? Did he e-mail you?

A. Well, I will tell you, I remember it pretty clearly because, and it is somewhat tricky to say this with Jason sitting in the room, but I would never have imagined he was capable of this at the time. I simply had no idea Jason had this kind of knowledge. He originally called me and had asked me to look at a web page, and over the phone, he walked me through it and said it was something like an opportunity for AimNet, and honestly, I just was stunned. I always thought of my — well, he wasn't my brother-in-law at that time, but later to be my brother-in-law as a younger brother, and he was in a rock band, he was this guy and that guy. I never thought of him as being this person that could not only impress me, but blow me away to the point that I really could not comprehend what he was talking about.

So when he brought it to me over the phone and showed me the link, and we went through it on the website, I remember saying to him, stop, you need to come in and sit down and talk to me about this. I understand what you are showing me, but I don't understand how it applies to AimNet. You need to come in.

Later he came in, and we sat in my office at AimNet in Holliston, Massachusetts, and he went through it on the computer showing me the website, which again I remember being struck, very impressed with like, wow, this is fantastic, and it was then that I said to him, this is great, this is very interesting. I think you have something here. This is a great thing. It is not a great fit for AimNet, let me tell you now that you are sitting here impressing the hell out of me how I think you can help me.

We went into search engine marketing and search engine optimization, which in and of itself Jason was not just pitching a service but again educating me like he did on FlexPLM. It was the student teaching the teacher. I was stunned.

This is part of the reason I remember seeing the site. I remember him talking to me on the phone, and I remember him coming in to speak with me at my Holliston office. [Noseworthy Dep., 9-12.]

About 7 to 8 months earlier, on July 20, 2004, Silvestri purchased and registered a website domain, FlexPLM.com. Silverstri Dep., 7. He believed in good faith that such usage constituted trademark usage, and thus cited that date as the first use in commerce in the Use Application he filed under §1(a) on March 13, 2006 (Serial No. 78835516).² *Id.*, 8, 17-21; Silvestri Dep., Exhs. 1, 3, and 4. He filed the Application on his own, -and without having conferred with counsel. *Id.*, 17-18. By an assignment executed in May 2006, Silvestri assigned to PLMIC all of his rights and interests in FLEXPLM, including his rights and interests in the pending Application. *Id.*, 9-10. This assignment was recorded at the PTO on June 23, 2006.

PLMIC's first consummated sale of FLEXPLM services occurred in September 2006. *Id.*, 17.

PTC first used FLEXPLM in May 2005, when it entered into a contract for the performance of services. Mauskar Dep., 13; PTC Brief, 7. PTC filed its Use Application under §1(a) for FLEXPLM on July 13, 2006 (Serial No. 76662967).³

Each party is opposing the other's Application. PTC filed its Opposition to PLMIC's Application on November 22, 2006; PLMIC filed its Opposition to PTC's Application on May 8, 2007. The Oppositions were consolidated on June 14, 2007.

² The Application was 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," Class 35.

³ The Application was 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," Class 9; 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," Class 42.

IV. ARGUMENT

A. *PLMIC'S OPPOSITION SHOULD BE SUSTAINED BECAUSE OF ITS PRIORITY OF USE OF FLEXPLM.*

Through PLMIC's predecessor in interest, Mr. Silvestri, its March 2005 usage obviously pre-dates PTC's May 2005 first usage.⁴

It is true that PLMIC's first consummated sale of FLEXPLM services did not occur until September 2006. *Id.*, 17. However, at least as early as March 2005 (and possibly as early as February 2005), Silvestri had posted post the mark FLEXPLM on the Internet as an advertisement of **already-available** services. Shortly thereafter, and within March 2005, Silvestri attempted to sell those services to AimNet. Although AimNet did not buy them, it did buy the related services he was offering for search engine optimization and marketing. Silvestri's March 2005 use of FLEXPLM was sufficient for creating a priority date. As McCarthy says:

[P]rominent use of the mark in pre-sales activity directed at potential customers should suffice to create a priority date, certainly as to a knowing competitor who rushes in to make an attempted preemptive first use, and probably even as to a subjectively ignorant competitor. [J. T. McCarty, McCarthy on Trademarks and Unfair Competition, §16:12, p. 16-27 (4th ed., 2009).]

For purposes of priority of use under common law of Lanham Act sect. 43(a) or 2(d) priority disputes, some form of pre-sales publicity or sales solicitation may suffice to prove priority over a rival user. [*Id.*, §16:13, p. 16-27.]

See also the cases discussed in McCarthy at §16:13 — *e.g.*, *New West Corp. v. NYM Co.*

⁴ Concurrently with this Brief, PLMIC is filing a motion to amend its Application, specifying that its first use and first use-in-commerce dates were at least as early as March 31, 2005. *See* TMEP §§903.05 and 1504.02; TBMP §§514.01 and 514.03. Given PTC's position on the merits, it obviously does not consent to the granting of that Motion. The issue itself, however, is being tried by the consent of the parties pursuant to Fed. R. Civ. P. 15(b), as reflected by motions thereunder filed by both parties.

of California, Inc., 595 F.2d 1194 (9th Cir. 1979) (pre-sales publicity and solicitation of orders can result in creating an association of the goods or services and the mark with the user thereof); *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 1053 (9th Cir. 1999) (widespread and public announcement of the imminent launch of the web site was sufficient for first use date); *Johnny Blastoff, Inc. v. Los Angeles Rams Football Co.*, 188 F.3d 427 (7th Cir. 1999) (public announcement of new team mark sufficient to establish priority of use); *Chance v. Pac-Tel Teletrac Inc.*, 242 F.3d 1151 (9th Cir. 2001) (pre-sale public relations campaign sufficient to establish priority of use); *Unisplay S.A. v. American Elec. Sign Co.*, 28 U.S.P.Q.2d 1721, 1729 (E.D. Wash. 1993) (“The Court concludes that *New West* stands for the proposition that sales are not required for use sufficient to create rights in the trademark); and *Cascades of Levitt Homes Inc. v. Cascades of Sabatello Development Corp.*, 43 U.S.P.Q.2d 1920 (S. D. Fla. 1997) (real estate developer established priority of use by using the mark on two on-site billboards before the development opened).

To the same effect is §18 of the Restatement (3rd) of Unfair Competition: “A designation is ‘used’ as a trademark ... when the designation is displayed or otherwise made known to prospective purchaser in the ordinary course of business in a manner that associates the goods, services, or business of the user....” *See also*: Comment *c*: “The initial use of a designation can be sufficient to constitute bona fide commercial use if the circumstances indicate an intention to continue use in the ordinary course of business.”; Comment *d*: “[T]he manner of use must be calculated to cause prospective purchasers to associate the designation with the goods, services or business of the user.... The use of a designation in pre-sales solicitations, presentations, or other advertising can result in the

creation of good will symbolized by the designation even before any actual sales....

[S]uch pre-sales activity can qualify as trademark use if the use is calculated to produce the required association between the mark and the user's goods [or services] and is done in the ordinary course of business.”

PTC quotes (at 18) from *T.A.B. Systems v. PacTel Teletrac*, 37 U.S.P.Q.2d 1879 (Fed. Cir.). However, *T.A.B.* is easily distinguished. It involved press releases over a 2-month period, only one of which was circulated to a national wire service, and only some of which were distributed to potential customers; it also involved a slide show to 7 potential customers. The Court found these actions were not “so broadly or repetitively distributed” as to create a public identification with the opposer's services. At 1882. Here, in stark contrast, PLMIC's FLEXPLM advertising occurred on the Internet, which is **worldwide** and **continuous**. Silvestri Dep., 19-20. Anyone in the world at any time on or after March 2005 has had instantaneous access to that advertising. More particularly, anyone in the world at any time on or after March 2005 who has (or had) an interest in Product Lifecycle Management (or PLM) has had instantaneous access to PLMIC's Internet advertising of FLEXPLM.

B. PTC'S OPPOSITION SHOULD BE DENIED BECAUSE PLMIC'S PRIOR USE IS SUFFICIENT NOT ONLY TO ESTABLISH PRIORITY, BUT ALSO TO ENTITLE IT TO REGISTRATION.

This Argument focuses on what is meant by “use in commerce” under §45 of the Lanham Act, 15 U.S.C. §1147. It is true that in *In re Cedar Point*, 220 U.S.P.Q. 533, 536 (1983) holds as follows:

[T]he case law draws a clear distinction between what is required for purposes of **registration**, on the one hand, and what is required for purposes of establishing **priority** in an *inter partes* proceeding before the Board, on the other: “use in commerce” (i.e., for service marks, use or display of the mark in

the sale or advertising of the services in question coupled with an actual rendering of the services in commerce, or in more than one state, etc.), also known as “technical trademark or service mark use,” is necessary for the former, while “use analogous to trademark use,” or “nontechnical use,” is sufficient for the latter. The reason for the different standard is that while the “use in commerce” requirement of Sections 1, 3, and 45 of the Act is controlling with respect to application to **register** trademarks and service marks, an *inter partes* proceeding frequently involves the provisions of Section 2(d) of the Act, which prohibits the registration of a mark “which so resembles a mark registered in the Patent and Trademark Office or a mark or trade name **previously used** in the United States by another and not abandoned, as to be likely, when applied to the goods of applicant, to cause confusion, or to cause mistake, or to deceive.” [Emphasis added; internal citations omitted.]

However, *Cedar Point* was decided before the 1988 amendment to the definition of “use in commerce” under §45. That amendment inserted what is now the first sentence of the present definition, which reads as follows:

The term “use in commerce” **means** the bona fide use of a mark in the ordinary course of trade, and not merely to reserve a right in the mark. For purposes of this chapter, a mark shall be **deemed** to be in use in commerce—

(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. [Emphasis added.]

“Deem” means “consider, think, or judge.” Black’s Law Dictionary, p. 425 (7th ed. 1999). Thus, the **second** sentence of this definition operates similarly to a “safe harbor” provision. That is, if one has “used or displayed in the sale or advertising of services and the services are rendered in commerce,” then one shall be “deemed” to have used the mark in commerce.

This “safe harbor,” however, is **not** the **only** way that one may meet the definition. One might meet that definition by satisfying its **first** sentence. That is, if one

has made a “bona fide use of a mark in the ordinary course of trade, and not merely to reserve a right in the mark,” then this use too qualifies as “use in commerce.” The legislative history to the 1988 amendment supports this construction:

The Committee intends “use in commerce” to be interpreted to mean commercial use which is typical in a particular industry. Additionally, the definition should be interpreted with **flexibility** to encompass various **genuine, but less traditional, trademark uses**, such as those made in test markets, infrequent sales of large or expensive items

7 U.S. Code Cong. and Admin. News, p. 5607 (1988) (quoting from Senate Report No. 100-515 on the Trademark Law Revision Act of 1988) (emphasis added). PLMIC’s contends Mr. Silvestri met the standard of the **first** sentence of the definition of “use in commerce,” because: (a) he was ready, willing, and able to sell FLEXPLM services in March 2005; and (b) he in fact made a bona fide attempt to sell FLEXPLM services to AimNet in March of 2005, while also engaging in related Internet advertising.

C. A GOOD-FAITH MISTAKE BY A LAYPERSON WITHOUT COUNSEL AS TO WHAT CONSTITUTES TRADEMARK USAGE DOES NOT CONSTITUTE GROUNDS TO INVALIDATE PLMIC’S APPLICATION

Silvestri filed the Application on his own and without counsel on March 13, 2006. Silvestri Dep., 17, 18; Silvestri Dep, Exh. 1. When he did, he made a good-faith mistake as to what constitutes trademark usage. He believed in good faith that purchase and registration of the website domain www.flexplm.com — which occurred in July 2004 — qualified. He was wrong. But his error was utterly innocent, and not at all fraudulent. Even Federal District Court judges have made similar mistakes. *See, e.g., Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 1052 (9th Cir. 1999)

PTC (at 10-12) cites to *Sinclair Oil Corp. v. Kendrick*, 85 U.S.P.Q.2d 1032, 1035

(TTAB 2007) and *Medinol Ltd. v. Neuro Vasx, Inc.*, 67 U.S.P.Q.2d 1205 (TTAB 2003).

However, neither case supports PTC's argument for invalidation. In *Sinclair Oil*, the

Board ruled:

Fraud in procuring a trademark registration occurs when an applicant **knowingly** makes false, **material** representation of **fact** in connection with an application to register. A party making a fraud claim is under a heavy burden because fraud must be proved by **clear and convincing evidence**, leaving nothing to speculation, conjecture, or surmise. Any doubt must be resolved **against** the party making the claim. [Emphasis added; internal citations omitted.]

Silvestri make no "knowing" misstatement of fact. He filed as a layman without any legal assistance. His mistake was not a mistake of fact; it was a mistake of law — namely, what constituted trademark usage. Nor was his mistake "material." Although the dates he cited were incorrect, his actual first use date — at least as early as March 31, 2005 (*see* Argument B) preceded by roughly one year his filing date of March 13, 2006.

Similarly, *Medinol* does not support PTC's argument. In that cancellation proceeding, the registrant filed a statement of use that the mark had been used in connection with two items — stents and catheters — when in fact it had only been used with the latter. That was a knowing misstatement of fact. It was not an innocent mistake of law, such as Silvestri made.

As PTC itself notes (at 9), when PLMIC became aware of its mistake it admitted it. It did so in a response to a discovery request by PTC asking for documents that supported PLMIC's Answer that it had "first used FLEX PLM in commerce as early as July 20, 2004." PLMIC responded to this request by saying, "The above answer is mistaken. Mr. Silvestri in fact first 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 www.plmic.com [sic, should have been www.flexplm.com]." Silvestri Dep., 26-28

(Silvestri acknowledging the typo; Silvestri Dep. Exh. 7, Req. 3. *See also* PLMIC's Answer to ¶1 of PTC's Amended Notice of Opposition, and ¶4 of PLMIC's Amended Notice of Opposition — both paragraphs fully addressing in detail Silvestri's mistake about first use in commerce.

V. SUMMARY

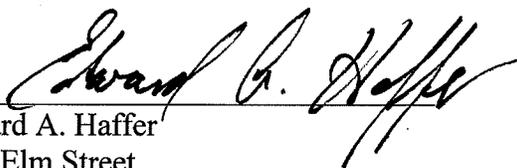
For the foregoing reasons, PLMIC's Opposition should be sustained, and PTC's Opposition should be denied. PTC's contention for invalidation of PLMIC's Application should likewise be denied.

By virtue of his sales efforts to AimNet in March 2005 and his related advertising of FLEXPLM over the Internet — advertising that was (and is) worldwide and continuous — Mr. Silvestri established priority of use of FLEXPLM. His use preceded PTC's by at least two months. As Silvestri's successor in interest, PLMIC has the benefit of that priority.

On a related point, concurrently with this Brief, PLMIC is filing an amendment to its Application, specifying that its first use and first use-in-commerce dates were at least as early as March 31, 2005. *See* TMEP §§903.05 and 1504.02; TBMP §§514.01 and 15.03. As stated in n. 4 hereto (at p. 5), "Given PTC's position on the merits, it obviously does not consent to the granting of that Motion. The issue itself, however, is being tried by the consent of the parties pursuant to Fed. R. Civ. P. 15(b), as reflected by motions thereunder filed by both parties." PLMIC respectfully request that the Board grant that Motion or grant such other relief as is just.

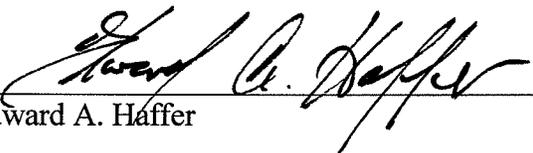
Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was mailed this date to Thomas V. Smurzynski, Esq., Lahive & Cockfield, LLP, One Post Office Square, Boston, MA 02109.


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