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

Proceeding	91193335
Party	Defendant RStudio, Inc.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

EMBARCADERO TECHNOLOGIES, INC.,

Opposer,

v.

RSTUDIO, INC.

Applicant.

Opposition No. 91193335

Applications S.N.

77/691980

77/691984

77/697987

**APPLICANT'S REPLY BRIEF IN SUPPORT OF
MOTION TO AMEND APPLICATIONS**

On November 30, 2010, Opposer filed a brief in opposition to Applicant's Motion to Amend Applications. Applicant now files this brief in reply to address three discrete issues raised in Opposer's opposition brief and which were not addressed by Applicant in its Motion.

I. Applicant's Motion to Amend was Timely Filed Prior to Trial

Applicant filed with the Board and duly served upon Opposer its Motion to Amend on November 10, 2010, in advance of the close of discovery which took place on November 15, 2010 and, therefore, prior to the commencement of the trial period. In characterizing Applicant's motion as disfavored by the Board, Opposer cites to a provision in the TTAB Manual of Procedure aimed squarely at discouraging the filing of unconsented motions to amend after the trial has begun. *See* Opposition, p. 2(citing TMBP §514.03 in support of its contention that Applicant's motion is of the type typically disfavored by the Board). In fact, Opposer directly quotes the provision which states "an uncontested motion to amend **which is not made prior to trial**, and which, if granted, would affect the issues involved in the proceeding, normally will be denied by the Board." TMBP § 514.03 (emphasis added). Opposer, however, does not allege

that Applicant failed to file its motion prior to trial, nor can or does Opposer claim to be prejudiced as a result of the timing of Applicant's motion. Therefore, any possible implication that Applicant did not, in fact, file and serve its Motion to Amend in a timely manner is incorrect and should be disregarded.

II. Applicant's Motion to Amend is not Conditional in Nature

In the prefatory paragraph of its opposition brief, Opposer characterizes Applicant's proposed amendments to its identifications of goods and services as "conditionally proffered [*sic*]" on the apparent basis that Applicant requested that its amendments be entered in the event the Board deems such amendments necessary to dismiss the opposition. Applicant's request was entirely proper, and does no more than state the current practice of the Board. The TTAB Manual of Procedure explicitly provides that if "the Board ultimately finds that [Applicant] is entitled to registration even without the proposed restriction, [Applicant] will be allowed time to indicate whether it still wishes to have the restriction entered." TBMP § 514.03. Moreover, Applicant's motion cites a case¹ for the proposition that it is proper for the Board to defer a decision on a motion to amend until the time that the merits of the opposition proceedings can be considered.² Accordingly, Applicant filed its Motion to Amend without condition, subject to the discretion of the Board, and consistent with its standard practices.

¹ The footnote to Applicant's statement in its Motion read: The Board may elect to defer its decision on this motion until it considers the overall merits of this Opposition. See *Space Base Inc. v. Stadis Corp.*, 17 USPQ2d 1125 (TTAB 1990) (deferring decision on motion to amend identification of goods until final decision).

² In fact, as communicated on November 29, 2010, the Board did indeed defer decision on Applicant's motion.

III. Allegations by Opposer of Fraudulent Intent on the Part of the Applicant are Baseless and Improper

On page four of its opposition brief, Opposer, without citations of law or assertion of factual evidence, brazenly states that Applicant's request to amend its identifications of goods and services "may even be seen as a concession of an overly broad application, and possibly even that the marks may have been applied for fraudulently." Allegations of fraud on the PTO are extremely serious in nature and, if proven, have serious consequences for a trademark applicant. To even obliquely allege fraudulent intent without support of law or fact is grossly improper and Applicant firmly objects to any implications raised in this regard by Opposer in its brief. The factually unsupported nature of this allegation, which Applicant wholly refutes, is particularly spurious in light of the fact that Opposer has deposed Applicant and had ample opportunity to review documents Applicant has produced.

Applicant intends to address other issues aimed at the merits of the instant proceedings and raised by Opposer in its opposition brief at trial.

Respectfully submitted,

RSTUDIO, INC.

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Dated: December 20, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the above-identified REPLY BRIEF upon Opposer's attorneys of record:

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