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

Proceeding	91198102
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Attachments	Applicant's Motion For Summary Judgment.pdf ( 10 pages )(111035 bytes ) Notice of Reliance.pdf ( 4 pages )(30134 bytes )

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

In the Matter of Trademark Application Serial No. 77/921,906

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WILDFIRE INTERACTIVE, INC.,

Opposer,

v.

MOBILIZATION LABS, LLC,

Applicant.  
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Mark: WILDFIRE

Opposition No. 91198102

**APPLICANT'S MOTION FOR SUMMARY JUDGMENT  
AND MEMORANDUM OF SUPPORT THEREOF**

In accordance with Rule 56 of the Federal Rules of Civil Procedure, Petitioner, Mobilization Labs, LLC ("Mobilization Labs"), moves for summary judgment against Respondent Wildfire Interactive, Inc. ("Wildfire Interactive") and seeks registration of Application Serial No. 77/921,906 based upon Applicant's verifiably true statement to the Patent and Trademark Office that it was actively using the WILDFIRE mark in commerce in connection with the services recited in its application.

**I. UNDISPUTED FACTUAL BACKGROUND**

Applicant Mobilization Labs, LLC, ("hereinafter Mobilization Labs") which was formerly known as "We The Citizens, LLC" was formed on January 7, 2005. Mobilization Labs is a Georgia based technology company that develops and publishes computers software services under the mark "WILDFIRE." Mobilization Labs has marketed and sold its WILDFIRE brand software services through a variety of means, including company web sites.

On January 27, 2010, Mobilization Labs filed an application for federal registration of the mark WILDFIRE for its software services. Mobilization Labs' application was assigned serial number 77921906. Mobilization Labs application was successfully reviewed by the USPTO, and on July 13, 2010, its application was published for opposition.

On August 11, 2010, Opposer Wildfire Interactive filed an extension of time to oppose the registration of Mobilization Labs' mark "WILDFIRE." On September 22, 2010, Applicant Mobilization Labs filed a civil action against Opposer Wildfire Interactive in the United States District Court for the Northern District of Georgia. On January 7, 2011, Wildfire Interactive, Inc. instituted this Opposition proceeding against Mobilization Labs' on the unsupported allegation that "On information and belief, and in violation of 15 U.S.C. § 1051(a), Mobilization Labs' WILDFIRE mark was not in use in commerce in connection with all of the services listed as of the filing date of its Application."

**II. MOBILIZATION LABS USE OF THE WILDFIRE MARK IN COMMERCE IN CONNECTION WITH THE SERVICES RECITED IN ITS APPLICATION**

Mobilization Labs' application for the mark WILDFIRE recited the following services:

"Computer services, namely, creating an online community for registered users to participate in discussions, get feedback from their peers, form virtual communities, and engage in social networking featuring a platform enabling a user to leverage social relationships to locate and recruit supporters/donors, provides motivational systems for said supporters, and allows the user track and analyze results.

Despite Opposer's allegations to the contrary, Mobilization Labs has been using the WILDFIRE mark in commerce in connection with all of the services recited in its application for years prior to the filing date of its application on January 27, 2010. For example, prior to filing its trademark application, Mobilization Labs marketed its computer software in connection with all of the recited services listed in its application on its company websites

[www.wethecitizens.com](http://www.wethecitizens.com) and [www.wildfireplatform.com](http://www.wildfireplatform.com).

Publicly available records of Applicant's website as it existed in past periods in time are available through the archival website [www.waybackmachine.org](http://www.waybackmachine.org). The Wayback Machine is an initiative of the Internet Archive, a 501(c)(3) non-profit, which has built a digital library of Internet sites and other cultural artifacts in digital form. By entering the domain address of websites, users are able to review how websites appeared on specific dates in the past. By entering the domain name: <https://wethecitizens.com/platform.html>, one can find a record of Applicant's website on January 30, 2009, nearly a full year prior to the date it filed its application on January 27, 2010. (A copy of Applicants January 30, 2009 website is attached as Exhibit 1.) The January 30, 2009 record of Applicant's website demonstrates that it was using the WILDFIRE mark in connection with all of the services recited in its application prior to its filing date.

Not only was applicant advertising all of the services listed in its application prior to filing its application, Mobilizations Labs was all using its WILDFIRE software in interstate commerce to provide the recited services to clients. For example, Applicant's WILDFIRE software was used in marketing efforts in a number of widely publicized political campaigns, including Rudy Giuliani's nationwide presidential election network. On or about November 29, 2007, Applicant's WILDFIRE software provided Giuliani's campaign with the custom online community, "[my.joinrudy2008.com](http://my.joinrudy2008.com)" which was designated: "Team Rudy." (A January 30, 2008 copy of the Team Rudy website is attached as Exhibit 2.) Team Rudy allowed public users to register with a nationwide community of Giuliani supporters. Thereafter, registered users could interact with supporters on both a local and national level. Registered users could compete for recognition and prizes by performing tasks for the campaign, such as recruiting supporters. Reviews of Team Rudy were published in multiple online news sites. (See Exhibits 3 & 4.)

The staff side of the Team Rudy WILDFIRE software allowed the Giuliani staff to locate, recruit, and communicate with its supporters. It also allowed the staff to motivate supporters with contests, and further to track the results of the supporters' efforts. (A copy of the WILDFIRE Staff Side User Guide is attached as Exhibit 5.)

Prior to filing its trademark application, Applicant's WILDFIRE software was also used in marketing efforts and fan promotions for customers on a national level, including the well-known musical act "The Jonas Brothers." Applicant's WILDFIRE software was used to create the custom social network the "Fan Family Experience." (A February 12, 2009 copy of the Fan Family Experience website is attached as Exhibit 6) The Fan Family Experience network allowed the Jonas Brothers to recruit and communicate with their legion of fans. It also allowed the Jonas Brothers' to hold contests and award prizes to their fans based on an analysis of the fans use of the network.

On the public side of the network, fans of the Jonas Brothers were able to register with the network to meet other fans on both a local and national level. They could also receive Jonas Brothers related news, concert updates, and compete to win prizes. Reviews of the Jonas Brothers online community were reported on internet news sites. (See Exhibit 7.)

It is clear from these facts that prior to the date it filed for trademark registration, Applicant Mobilization Labs was using the mark WILDFIRE to market its computer software services, and was providing such services in interstate commerce to customers. Therefore, Applicant truthfully represented to the Patent and Trademark Office that it was using the WILDFIRE mark for all of the recited goods and/or services prior to the date it filed its application.

### III. SUMMARY JUDGMENT STANDARD

Summary judgment should be granted if the evidence shows “that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). Once the moving party has shown that no genuine issue of fact exists, the burden shifts to the non-moving party to demonstrate the existence of a factual issue. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). When the moving party's motion is supported by evidence sufficient to indicate that there is no genuine issue of material fact, and that the moving party is entitled to judgment, the burden shifts to the nonmoving party to demonstrate the existence of specific genuinely disputed facts that must be resolved at trial. The non-moving party may not rest on the mere allegations of its pleadings and assertions of counsel, but must designate specific portions of the record or produce additional evidence showing the existence of a genuine issue of material fact for trial. Fed. R. Civ. P. 56(e).

The burden of the moving party may be met by showing (that is, pointing out) "that there is an absence of evidence to support the nonmoving party's case." See *Celotex Corp. v. Catrett*, supra (no requirement that moving party support its motion with affidavits or other similar materials negating the opponent's claim but may be based on nonmovant's failure to make sufficient showing as to its own case on which it has burden of proof) and *Avia Group International Inc. v. L.A. Gear California Inc.*, 853 F.2d 1557, 7 USPQ2d 1548 (Fed. Cir. 1988); *Sweats Fashions Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793 (Fed. Cir. 1987).

Disputed facts that do not resolve or effect the outcome of the litigation will not preclude the entry of summary judgment. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (explaining that “the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment”).

#### **IV. APPLICANT IS ENTITLED TO SUMMARY JUDGMENT**

Applicant Mobilization Labs has demonstrated that it was actively using the mark in commerce to market the goods and/or services listed in its trademark application. Moreover, Applicant has proved that it actually provided the recited goods and/or services to a number of client's on a national level prior to filing its trademark application. Applicant has shown that no genuine issue of fact exists. Therefore, the burden shifts to the non-moving party to demonstrate the existence of a factual issue.

Opposer Wildfire Interactive, Inc. has failed to produce any evidence that Mobilization Labs negligently or fraudulently registered its mark in violation of 15 U.S.C § 105(a). As such, the Board should find that Opposer has failed to make sufficient showing as to its own case on which it has the burden of proof. Accordingly, Applicant is entitled to summary judgment and this Opposition should be dismissed.

#### **V. PRIORITY OF DISPOSITIVE MOTIONS**

Prior to Opposer's filing of its Motion for Suspension, counsel for Mobilization Labs asked counsel for Opposer Wildfire Interactive to provide *any* basis for its assertion that "upon information and belief" that Applicant was not using the mark in commerce. Counsel for Opposer failed to provide any basis whatsoever for its allegations.

Mobilization Labs believes that Opposer has no basis for its claim. Rather, Wildfire Interactive instigated this unsupported Opposition solely to undermine Mobilization Labs' legitimate right to the registration of the WILDFIRE mark. Accordingly, Mobilization Labs does not consent to suspension of this Opposition, as it believes that the facts are clearly in Applicant's favor, and that summary judgment will promptly resolve this case.

**A. Opposer's Motion For Suspension Is Inappropriate.**

Opposer Wildfire Interactive commenced this Opposition proceeding nearly four months subsequent to the filing of the pending civil litigation. In doing so, it has compelled Applicant Mobilization Labs to expend time and resources in responding to this Opposition. Nevertheless, Opposer now laments the burden and expense it would suffer in proceeding with its own case. However, neither Applicant nor Opposer will be required to expend significant resources in proceeding with Summary Judgment.

As noted in Opposer's Motion for Suspension, the "Civil Action is already well into the discovery phase of the litigation." As such, Opposer's counsel has already received discovery information that clearly demonstrates that Applicant was using the WILDFIRE mark in commerce for all of the recited services prior to the date it filed its application.

Moreover, the majority of evidence that Applicant has provided in support of its Motion for Summary Judgment are publicly available and instantly accessible internet records. Opposer has prevented Applicant from receiving federal registration of its mark, and in doing so has put Applicant to substantial time and expense in responding to this Opposition. Equity demands that Opposer be required to support the allegations it used to deny Applicant registration of the WILDFIRE mark, before demanding suspension of its own proceeding. Therefore, this board should find that suspension of this proceeding is inappropriate, and allow the dispositive motion for Summary Judgment to be considered first.

**B. Suspension Is Discretionary When A Dispositive Motion Is Pending.**

In support of its motion to suspend, Opposer's cite: Trademark Rule 2.117 which provides that "whenever it shall come to the attention of the Trademark Trial and Appeal Board that a party or parties to a pending case are engaged in a civil action or another Board proceeding

which may have a bearing on the case, proceedings before the Board may be suspended until termination of the civil action or the other Board proceeding.” However, whenever there is pending before the Board both a motion to suspend and a motion which is potentially dispositive of the case, the potentially dispositive motion may be decided before the question of suspension is considered, regardless of the order in which the motions were filed. See Trademark Rule 2.117(b), 37 CFR § 2.117(b). Thus, when a motion to suspend and a dispositive motion are both pending, the Board has discretion to decide the potentially dispositive motion before the question of suspension is considered. *See Miscellaneous Changes to Trademark Trial and Appeal Board Rules,* 1214 TMOG 145, 147 (September 29, 1998).

Both the permissive language of Trademark Rule 2.117(a) (“proceedings ... may be suspended...”) and the explicit provisions of Trademark Rule 2.117(b) make clear that suspension is not the necessary result in all cases. The Board's discretion to consider a dispositive motion pending at the same time as a motion to suspend, clearly allows it to consider all relevant factors before rendering judgment.

In the case at bar, the determination required to resolve this motion for summary judgment is simple: Did Applicant use the mark in commerce for all of the services listed in its application prior to the date it filed its Application? Applicant has presented evidence, in the form of publicly available internet documents that unequivocally demonstrates that it used the mark for all the services recited in its application prior to filing. As such, Opposer should not be allowed to suspend its own Opposition proceeding without providing any evidentiary support or justification for its allegations. Accordingly, this court should exercise its discretion to consider Applicant’s Motion for Summary Judgment prior to the Opposer’s Motion to Suspend.

## VI. CONCLUSION

Opposer Wildfire Interactive initiated this Opposition proceeding, yet it has failed to provide any proof to support its allegation. Nevertheless, it argues that the burden of expense of supporting its own case requires that the Board suspend this proceeding. Applicant Mobilization Labs has provided definitive proof that it was using the WILDFIRE mark in commerce in connection with the goods identified in the application prior to the time it filed with the Patent and Trademark Office. Therefore, Applicant respectfully requests that the Board grant its Motion for Summary Judgment, that this Opposition be dismissed, and that Application No. 77/921,906 be allowed to proceed to registration.

Respectfully submitted:

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**CERTIFICATE OF SERVICE**

I hereby certify that true copies of this Motion for Summary Judgment were deposited as First Class mail with the United States Postal Service on March 14, 2011, to Counsel for Opposer at the following address:

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<b>Exhibit No.</b>	<b>Publication</b>	<b>Date</b>	<b>Source URL</b>
<b>1</b>	This exhibit contains Applicant's website "www.wethecitizens.com" as it existed on January 30, 2009.	01/30/09	<a href="http://replay.waybackmachine.org/20090130070310/http://wethecitizens.com/index.html">http://replay.waybackmachine.org/20090130070310/http://wethecitizens.com/index.html</a>
<b>2</b>	This exhibit contains the Giuliani Campaign's "Team Rudy" website using Applicant's Wildfire software services on or about January 30, 2008.	01/30/08	<a href="http://replay.waybackmachine.org/20080130194248/http://my.joinrudy2008.com/wildfire/tour">http://replay.waybackmachine.org/20080130194248/http://my.joinrudy2008.com/wildfire/tour</a>
<b>3</b>	News article entitled "Rudy Giuliani Launches 'Team Rudy' Social Network"	11/29/07	<a href="http://techpresident.com/blog-entry/rudy-giuliani-launches-team-rudy-social-network">http://techpresident.com/blog-entry/rudy-giuliani-launches-team-rudy-social-network</a>
<b>4</b>	News article entitled "Rudy Giuliani Launches a Social Network: It Doesn't Suck."	12/06/07	<a href="http://mashable.com/2007/12/06/rudy-giuliani-launches-a-social-network-it-doesnt-suck/">http://mashable.com/2007/12/06/rudy-giuliani-launches-a-social-network-it-doesnt-suck/</a>
<b>6</b>	This exhibit contains the Jonas Brother's "Fan Family Experience" website created using Applicant's Wildfire software services on or about February 18, 2009.	02/18/09	<a href="http://replay.waybackmachine.org/20090208060632/http://fanfamilyexperience.com/an/landing">http://replay.waybackmachine.org/20090208060632/http://fanfamilyexperience.com/an/landing</a>
<b>7</b>	Blog review of the Fan Family Experience website and its services. The comments include a discussion of Mobilization Labs' Wildfire software.	01/24/09	<a href="http://siblingrevelry.wordpress.com/2009/01/24/and-thats-the-way-we-all-became-the-jonas-bunch/">http://siblingrevelry.wordpress.com/2009/01/24/and-thats-the-way-we-all-became-the-jonas-bunch/</a>

The above-listed internet publications illustrating Applicant's goods and/or services are all relevant to rebut Opposer's assertions that Applicant was not using the WILDFIRE mark in commerce in connection with all of the services listed as of the filing date of its application.

These publications prove that Applicant was using the mark in commerce with the recited goods and/or services on or about the first quarter of 2009, nearly a year prior to the date Applicant filed its application on January 27, 2010.

In addition, the above publications are relevant to show that not only was applicant advertising the mark in connection with the services listed in its application, but that it was actually providing said services to a variety of customers in interstate commerce prior to the date

it filed its application. Accordingly, Applicant's mark is therefore eligible for registration under Section 1(a) of the Lanham Act, 15 U.S.C. Section 1051(a)

In addition to the above, the below publications are also relevant to rebut the following:

1. Internal Exhibit No. 5, consisting of a copy of the Staff Side User Guide for the "Team Rudy" which was distributed to all of the Giuliani team members which administered the staff side of the WILDFIRE software, which rebuts Opposer's assertion that Applicant was not using the WILDFIRE mark in association with the recited services prior to filing its application.

True and accurate copies of the listed portions of the above-listed publications are attached hereto Applicant's Exhibits.

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**CERTIFICATE OF SERVICE**

The undersigned attorney hereby certifies that a true and complete copy of the foregoing Notice of Reliance has been served, via First Class mail with the United States Postal Service on March 14, 2011, to Counsel for Opposer at the following address:

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