

ESTTA Tracking number: **ESTTA600694**

Filing date: **04/25/2014**

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

|                        |   |
|------------------------|---|
| Proceeding             | 91204456  |
| Party                  | Plaintiff<br>Intrust Financial Corporation  |
| Correspondence Address | ALICIA E BODECKER<br>FOULSTON SIEFKIN LLP<br>1551 N WATERFRONT PARKWAY, SUITE 100<br>WICHITA, KS 67206<br>UNITED STATES<br>bmatthews@foulston.com, mnorton@foulston.com |
| Submission             | Motion to Reopen  |
| Filer's Name           | Michael J. Norton   |
| Filer's e-mail         | mnorton@foulston.com  |
| Signature              | /Michael J. Norton/   |
| Date                   | 04/25/2014  |
| Attachments            | 2014-04-25 Intrust Motion to Reopen & Ex. A.pdf(197048 bytes )  |

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

|                                |   |                                   |
|--------------------------------|---|-----------------------------------|
| Intrust Financial Corporation, | ) |                                   |
|                                | ) |                                   |
| Opposer,                       | ) |                                   |
|                                | ) | Opposition No. 91204456           |
| v.                             | ) | Application Serial No.: 85/250992 |
|                                | ) | Mark: NTRUST                      |
| nTrust Corp.,                  | ) |                                   |
|                                | ) |                                   |
| Applicant,                     | ) |                                   |
| _____                          | ) |                                   |

**OPPOSER’S MOTION TO REOPEN TESTIMONY  
PERIOD TO INTRODUCE NEWLY DISCOVERED EVIDENCE**

On April 7, 2014, Opposer, Intrust Financial Corporation, was contacted by one of its vendors, who apparently also does business with Applicant. The vendor sent Opposer a money card mockup showing Applicant’s Mark, and asking if Applicant’s mockup belonged to Opposer. The vendor was confused as to ownership of Applicant’s money card mockup and thought that Opposer was the owner *because* of the similarity between Applicant’s Mark and Opposer’s Marks.

Opposer hereby moves to reopen Opposer’s testimony period for the specific purpose of introducing newly discovered evidence of actual confusion. Opposer’s testimony period closed on March 27, 2014. The attached email (Exhibit A), which evidences the instance of actual confusion between INTRUST (“Opposer’s Mark”) and NTRUST (“Applicant’s Mark”), was not received by Opposer until April 7, 2014, and is therefore newly discovered.

Opposer seeks to introduce testimony of those persons involved in the instance of actual confusion, which may include but are not limited to, Debbie Canfarelli and Geno Reed of FIS Global (“FIS”), and the other persons identified in Exhibit A. To allow for disclosure of the new

witnesses and evidence, Opposer further requests that the period for pretrial disclosures be reset. Finally, Opposer requests that the new testimony period and pretrial disclosures period be set to run from the date of the Board's decision on this Motion.

### **INTRODUCTION**

One of the issues in this case is likelihood of confusion between Opposer's registered Marks and Applicant's Mark. Although it is not *mandatory* that Opposer show actual confusion to prevail, such a showing is probative to the issue of likelihood of confusion, and could affect the outcome of the case. Here, evidence of actual confusion was unavailable until after the close of Opposer's testimony period, and was therefore not offered in support of Opposer's case during its case in chief. Because of the potential significance of this evidence, Opposer requests that the testimony period be reopened and the newly discovered evidence submitted.

### **STATEMENT OF FACTS**

Opposer was not aware of instances of actual confusion at any point prior to the close of its testimony period on March 27, 2014. Opposer first became aware of actual confusion on April 7, 2014, when FIS—the company that develops and produces Opposer's debit, credit, payroll, and stored-value cards—contacted Opposer under the mistaken belief that a document bearing Applicant's Mark belonged to Opposer.

The events leading up to the actual confusion began on April 3, 2014, when Applicant submitted images of the nTrust Cloud Money Mastercard to Geno Reed, Senior Designer at FIS, to be printed. Mr. Reed<sup>1</sup> emailed one of the images out to his co-workers on April 7, 2014, with the subject line "Art Looking for an Owner" and stating, "Design received art for the attached but we do not know to whom it belongs. Please review." (Exhibit A).

---

<sup>1</sup> Although the email originated from Mr. Reed's email account, it appears the message may have been sent by "Tammy" on his behalf.

Among the recipients of Mr. Reed's email was Debbie Canfarelli, a Client Services Manager at FIS. Ms. Canfarelli forwarded the email to Jennie Githens and Jerry Chandler, employees of Opposer, the same day stating, "Please confirm if you sen[t] the attached image file to us, I don't recall seeing an email from you for this image." *Id.* It was through this April 7, 2014, email that Opposer first discovered the instance of actual confusion.

### **ARGUMENTS AND AUTHORITIES**

A party seeking to reopen its testimony period to introduce newly discovered evidence must show that the evidence is newly discovered and could not have been discovered earlier through the exercise of reasonable diligence. *Harjo v. Pro-Football, Inc.*, 45 U.S.P.Q.2d 1789 (TTAB 1998) (internal citations omitted). Here, the evidence is unquestionably newly discovered because the instance of actual confusion occurred on April 7, 2014—11 days after the close of Opposer's testimony period. Opposer could not have discovered such evidence earlier through reasonable diligence because the confusion had not yet occurred.

Factors to be considered when assessing whether to reopen a party's testimony period include: (1) the nature and purpose of the evidence sought to be brought in, (2) the stage of the proceeding, and (3) prejudice to the nonmoving party. *L.C. Licensing, Inc. v. Berman*, 86 USPQ2d 1883 (TTAB 2008) (quoting Trademark Board Manual of Procedure (TBMP) §509.01(b)(2)). Each of these factors weighs in favor of reopening Opposer's testimony period.

First, the evidence Opposer seeks to introduce has significant probative value to a dispositive issue in this case—likelihood of confusion. While evidence of actual confusion is not *necessary* to establish likelihood of confusion, such a showing is "*highly probative, if not conclusive*, of a high likelihood of confusion." *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 1317 (Fed. Cir. 2003) (emphasis added). Further, because Opposer does not have other

evidence of actual confusion, it is not cumulative of evidence already submitted by Opposer and is highly likely to affect the outcome of the case. *See Chanel, Inc. v. Mauriello*, 2010 WL 3873650 (TTAB 2010) (motion denied because newly discovered evidence was cumulative of evidence submitted during movant's testimony period, had no significant probative value, and was therefore unlikely to affect outcome); *Harjo*, 45 U.S.P.Q.2d at 1791 (same).

Next, the early stage of this proceeding favors reopening Opposer's testimony period. At present, Applicant's 30-day trial period has not yet opened, and no deposition dates have been scheduled. Reopening Opposer's trial period will cause only a short delay, and Applicant will still have its full 30-day trial period to offer any responsive evidence. Because the trial portion of this proceeding is at such an early stage, Opposer's testimony period should be reopened to introduce the newly discovered evidence. *See Chanel*, 2010 WL 3873650 at \*3 (denying motion to introduce evidence discovered after the close of trial); *L.C. Licensing, Inc.*, 86 U.S.P.Q.2d at 1884 (denying motion to reopen filed after parties had filed trial briefs).

Finally, reopening will not prejudice Applicant because the short delay will not affect its ability to litigate the case. Prejudice in this context refers not to mere inconvenience and delay caused by the reopening. *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997); TBMP § 509.01(b)(1). Rather, it is prejudice to Applicant's ability to defend against Opposer's claims—for example, where the delay has resulted in a loss or unavailability of evidence or witnesses which otherwise would have been available. *Id.* Opposer is unaware of any plausible reason why a short delay would affect Applicant's ability to litigate the case.

## CONCLUSION

For the foregoing reasons, Opposer respectfully requests that the Board (1) reopen Opposer's testimony period to allow for testimony and evidence of actual confusion between Applicant's Mark and Opposer's Mark; (2) reset Opposer's pretrial disclosures period; and (3) set the new periods to run from the date of the Board's determination of this motion.

Respectfully submitted,



---

Michael J. Norton, KS #18732  
William P. Matthews, KS #18237  
FOULSTON SIEFKIN LLP  
1551 N. Waterfront Parkway, Suite 100  
Wichita, Kansas 67206-4466  
Telephone: 316-291-9743

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 25th day of April, 2014, a true and correct copy of the above and foregoing **Opposer's Motion to Reopen Testimony Period to Introduce Newly Discovered Evidence** was sent via email to counsel of record as follows:

James D. Nguyen  
JimmyNguyen@dwt.com  
Davis Wright Tremaine LLP  
Suite 2400  
865 S Figueroa Street  
Los Angeles CA 90017  
*Attorney for Applicant*



---

Michael J. Norton, KS #18732  
William P. Matthews, KS #18237  
FOULSTON SIEFKIN LLP  
1551 N. Waterfront Parkway, Suite 100  
Wichita, Kansas 67206-4466  
Telephone: 316-291-9743

**From:** [Canfarelli, Deborah R](#)  
**To:** [Githens, Jennie M](#)  
**Cc:** [Chandler, Jerry G](#)  
**Subject:** FW: Art Looking for an Owner  
**Date:** Monday, April 07, 2014 3:20:18 PM  
**Attachments:** [image001.png](#)  
[nTrust Cloud Money Card.pdf](#)

---

Hello Jennie,

Please confirm if you send the attached image file to us, I don't recall seeing an email from you for this image.

Thank you,

Debbie

Debbie Canfarelli  
Client Services Manager I  
FIS Romeoville Card Personalization  
630-378-6612 - Direct  
331-215-3817 - Mobile  
630-378-6720 - Fax



---

**From:** Reed, Geno  
**Sent:** Monday, April 07, 2014 2:34 PM  
**To:** Romeoville - Client Services  
**Subject:** Art Looking for an Owner

Hi All:

Design received art for the attached but we do not know to whom it belongs. Please review.

Thanks,  
Tammy

---

The information contained in this message is proprietary and/or confidential. If you are not the intended recipient, please: (i) delete the message and all copies; (ii) do not disclose, distribute or use the message in any manner; and (iii) notify the sender immediately. In addition, please be aware that any message addressed to our domain is subject to archiving and review by persons other than the intended recipient. Thank you.





O-05491