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

Proceeding	91204456
Party	Plaintiff Intrust Financial Corporation
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**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,)	
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**REPLY IN SUPPORT OF OPPOSER’S MOTION TO REOPEN TESTIMONY
PERIOD TO INTRODUCE NEWLY DISCOVERED EVIDENCE**

Opposer Intrust Financial Corporation (“Opposer”) has filed a motion to reopen the testimony period so that it may introduce important, newly-discovered evidence of actual confusion that has occurred over the similar “INTRUST” and “NTRUST” marks. Applicant nTrust Corp. (“Applicant”), objects to the introduction of this evidence, arguing that it is irrelevant and that reopening the testimony period would cause prejudice. As discussed below, the evidence of recent, actual confusion is relevant to show likelihood of confusion and the extent of potential confusion. In addition, reopening the testimony period will not result in prejudice to Applicant. Therefore, Opposer respectfully requests that the Board grant its motion to reopen its testimony period.

A. The Confusion of FIS Employees Is Relevant.

Applicant’s position that Opposer’s newly-discovered evidence of actual confusion is irrelevant simply because the confused parties were FIS employees rather than consumers lacks merit. Not only is the evidence relevant and admissible, it is significant that Opposer has uncovered evidence of actual confusion despite the recognized difficulty of finding such evidence, and despite the fact that Applicant is not even doing business in the United States. If

employees of an industry insider such as FIS have already experienced confusion due to Applicant's and Opposer's similar marks, confusion will most certainly occur amongst consumers once Applicant establishes itself in the United States. Because the evidence that Intrust seeks to offer demonstrates that the INTRUST and NTRUST marks are so similar that confusion has already occurred, Opposer's motion to reopen the testimony period should be granted.

The fact that evidence of actual confusion even exists in this case is noteworthy. It is well-recognized that evidence of actual confusion is notoriously difficult to come by. *Time Warner Entertainment Co. L.P. v. Jones*, 65 U.S.P.Q.2d 1650 (2002). The difficulty is compounded in this case by the fact that there have been few opportunities for confusion because Applicant does not yet do business in the United States. In such situations, a *lack* of evidence of actual confusion would have little evidentiary value because there has not been a sufficient opportunity for confusion to occur, even if it were likely to occur. *In re Uromedica, Inc.*, 2006 TTAB LEXIS 315, *13 (Aug. 4, 2006). That confusion has already occurred despite the limited opportunities for exposure to the NTRUST mark in the United States is thus highly relevant to the likelihood of confusion inquiry and to the extent of potential confusion.

The decisions that Applicant cites in its opposition do not support a contrary finding in this case. In *American B.D. Co. v. N.O. Beverages*, 213 U.S.P.Q. (BNA) 387 (T.T.A.B. 1991), the Board did not address evidence of non-consumer confusion. In *Jordache Enterprises, Inc. v. Hogg Wyld, Ltd.*, 625 F. Supp. 48, 54 (D. New Mexico 1985), the proffered evidence was excluded as hearsay. *Signeo USA, LLC v. SOL Republic, Inc.*, No. 5:aa-cv-06370-PSG, 2012 WL 2050412 (N.D. Cal. 2012) is a case out of a California district court, where there is a split as to the admissibility of evidence of non-consumer confusion. *See, e.g. JIPC Mngmt. v. Incredible*

Pizza Co., 2009 U.S. Dist. LEXIS 133019 (No. CV 08-04310 MMM), *57, 2009 WL 85191607 (C.D. Cal. July 14, 2009) (acknowledging that courts have reached different conclusions regarding the relevance of evidence of confusion among non-consumers). Yet the Federal Circuit, and not the District of California, is the relevant precedential authority for proceedings before this Board. See Trademark Trial and Appeal Board Manual of Procedure (TBMP), § 101.03 (3d ed. Rev. 2 June, 2013). The Federal Circuit has held that evidence of non-consumer confusion is relevant to show likelihood of confusion, finding that “[b]ecause dealers and experts are more sophisticated about the origins and sources of products lines than average consumers, their confusion is highly probative on the question of whether a likelihood of confusion exists.” *Imagineering, Inc. v. Van Klassens, Inc.*, 53 F.3d 1260, 1265 (Fed. Cir. 1995) (internal citations and quotations omitted).

Further, Applicant’s argument fails to recognize the distinction between offering evidence of non-consumer confusion to prove secondary meaning, and offering such evidence to prove likelihood of confusion. Applicant cites a Seventh Circuit decision in which the court held that evidence of confusion among vendors and industry insiders does not demonstrate that a mark achieved secondary meaning with respect to consumers who lack similar knowledge and sophistication. See *Platinum Home Mortgage v. Platinum Fin. Group*, 149 F.3d 722, 729 (7th Cir. 1998) (refusing to offer trademark protection to the plaintiff’s mark due to the plaintiff’s failure to establish secondary meaning). Yet with regard to the likelihood of confusion inquiry, the fact that an industry insider has greater knowledge and sophistication than an average consumer has the opposite effect.

As recognized in *JIPC Management*, 2009 U.S. Dist. LEXIS 133019 at *62-63:

“[W]hen assessing likelihood of confusion, dealers and industry insiders should, as a general matter, be less confused about the association of a particular mark

with a particular company than ordinary consumers given their greater knowledge of the industry and the companies in it.”

In that case, the court distinguished between evidence of non-consumer confusion when submitted to show secondary meaning, and non-consumer confusion when offered to establish likelihood of confusion. The knowledge of industry insiders makes them particularly attuned to trademarks as source identifiers, and, therefore, non-consumer confusion has little probative value to show acquisition of secondary meaning. *Id.* at *62. In contrast, when non-consumer confusion is offered to show likelihood of confusion, “[t]o the extent dealers and industry insiders are confused...this may suggest that consumers too will likely be confused.” *Id.* at *63. *See also Imagineering*, 53 F.3d at 1265.

The fact that industry insiders have been confused as to whether Opposer was the owner of an image bearing Applicant’s mark is highly probative of likelihood of confusion. Furthermore, the fact that actual confusion has already occurred, even though Applicant does not even do business in the United States, is relevant to the extent of potential confusion once Applicant starts marketing its products and services to American consumers. Accordingly, Opposer’s motion to reopen the testimony period should be granted

B. No Prejudice to Applicant

Applicant argues it will be prejudiced by reopening testimony, but this Board has held that ordinary delay and increased expense associated with litigating a Board proceeding alone does not constitute prejudice. *See Intershop Software Entwicklungs GmbH v. Interwave Sys., Inc.*, 2004 WL 1772118, *2 (TTAB 2004) (granting motion to reopen and rejecting nonmovant’s argument that the delay would cause prejudice in the form of “longer delay and greater expense”); *Mccorkle Nurseries, Inc. v. Yoest*, 2011 WL 5600322, *3 (TTAB 2011) (finding no prejudice despite nonmovant’s argument that reopening would result in additional costs and

further delay in resolution of the matter). Rather, prejudice in this context contemplates an impairment of applicant's ability to litigate the case, such as where the delay would result in a loss of evidence or witnesses. *See Pumpkin Ltd. v. The Seed Corps*, 43 U.S.P.Q.2d (BNA) 1582, *1587 (TTAB 1997) (no prejudice where nonmovant made no showing that any of its witnesses or evidence had become unavailable as a result of the delay in proceedings); TBMP § 509.01(b)(1). Applicant has not claimed, and Opposer is unaware of, *any* facts to suggest reopening Opposer's testimony period would affect Applicant's ability to defend in this case. Accordingly, Applicant has made no showing that it will be prejudiced by the reopening of Opposer's testimony period.

Notwithstanding, Applicant argues that reopening Opposer's 30-day testimony period would result in "significant delay" and, therefore, prejudice Applicant. The short delay will have no effect on Applicant's ability to defend against Opposer's claims, and therefore provides no basis for denying this Motion. A potential increase in legal expenses provides no basis for denial. *See Intershop Software*, 2004 WL 1772118, at *2; *Mccorkle Nurseries*, 2011 WL 5600322, at *3. In consideration of Applicant's opposition to incurring travel expenses, however, Opposer has no objection to Applicant appearing for depositions by telephone.

CONCLUSION

The evidence of actual confusion that Opposer has uncovered is relevant and admissible, and Opposer would be unfairly prejudiced should it be denied the opportunity to present this evidence merely because the confusion occurred eleven days after its testimony period closed. Applicant, on the other hand, has not demonstrated that reopening the testimony period will cause prejudice to it. Opposer respectfully requests that the Board grant its motion to reopen its testimony period.

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Dated: May 27, 2014.

CERTIFICATE OF SERVICE

I certify that on this 27th day of May, 2014, a copy of the **REPLY IN SUPPORT OF OPPOSER'S MOTION TO REOPEN TESTIMONY PERIOD TO INTRODUCE NEWLY DISCOVERED EVIDENCE** was served via email and by placing the same in the U.S. Mail, first class, postage prepaid, to counsel of record as follows:

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