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

Proceeding	92054551
Party	Plaintiff Andrey Pinsky
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Date	12/30/2011
Attachments	2011-12-30 (Declaration of Petitioner dated 2011-12-29).pdf ( 97 pages ) (4211611 bytes )

**UNITED STATES PATENT AND TRADEMARK OFFICE  
TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of mark Registration No. 3981394  
For the mark: KONCEPT  
Date of First Use: June 12, 2010  
Date of Registration: June 21, 2011

ANDREY PINSKY,

Petitioner,

v.

DOUGLAS BURDA

Registrant.

Cancellation No. 92054551

**DECLARATION OF ANDREY PINSKY**

I, Andrey Pinsky, of Toronto, Ontario, Canada, HEREBY DECLARE THAT:

1. I am the Petitioner in this cancellation proceeding. Therefore, I have knowledge of matters to which I hereafter depose except where I expressly state that my knowledge is based on information and belief. In such circumstances I will identify the basis of my information and belief.
  
2. I am an intellectual property and business lawyer licensed to practice in Ontario, Canada. I am admitted to practice before Canadian Intellectual Property Office and the United States Patent and Trademark Office (USPTO). I provide my

intellectual property and business law services to residents of Canada, to residents of the United States of America, and to international clients.

3. Since January 27, 2010, I have been advertising my intellectual property and business law services in the United States of America via my newsletter titled CONCEPT LAW. I used the newsletter to demonstrate my expertise in Canadian intellectual property and business law and to advertise and offer my intellectual property and business law services to the residents of the United States of America in association with the trademark CONCEPT LAW. I have attached to this Declaration (Exhibit 1 through Exhibit 9) documents that demonstrate samples of advertisements distributed in association with the trademark CONCEPT LAW and that also demonstrate the date of first use (January 27, 2010) of the trademark CONCEPT LAW in the United States of America.

Exhibit 1 Copy of the advertisement of legal services distributed in the United States of America in January 2010 in association with the trademark CONCEPT LAW.

Exhibit 2 Copy of the advertisement of legal services distributed in the United States of America in February 2010 in association with the trademark CONCEPT LAW.

Exhibit 3 Copy of the advertisement of legal services distributed in the United States of America in March 2010 in association with the trademark CONCEPT LAW.

Exhibit 4 Copy of the advertisement of legal services distributed in the United States of America in April 2010 in association with the trademark CONCEPT LAW.

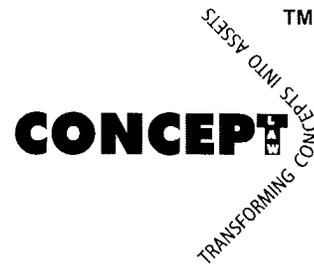
Exhibit 5 Copy of an announcement email accompanying advertisement of legal services in the United States of America in association with the

trademark CONCEPT LAW. The email provided a hyperlink back to the website [www.pinskylaw.ca](http://www.pinskylaw.ca).

- Exhibit 6 Copy of the page titled News of the website [www.pinskylaw.ca](http://www.pinskylaw.ca) archived by [www.archive.org](http://www.archive.org) and [www.waybackmachine.com](http://www.waybackmachine.com) on February 11, 2010, showing a sample of the CONCEPT LAW trademark.
- Exhibit 7 Copy of the page titled News of the website [www.pinskylaw.ca](http://www.pinskylaw.ca) archived by [www.archive.org](http://www.archive.org) and [www.waybackmachine.com](http://www.waybackmachine.com) on April 12, 2010, showing a sample of the CONCEPT LAW trademark.
- Exhibit 8 Copy of the page titled Sitemap of the website [www.pinskylaw.ca](http://www.pinskylaw.ca) archived by [www.archive.org](http://www.archive.org) and [www.waybackmachine.com](http://www.waybackmachine.com) on February 11, 2010, showing a sample of the CONCEPT LAW trademark.
- Exhibit 9 Email sent to attorney Reggie Borkum on January 25, 2010, in relation to legal services provided to his client and copies of advertisement of legal services sent to him and his client in association with the trademark CONCEPT LAW.

4. I clearly marked CONCEPT LAW as my trademark in the advertisements of legal services distributed in the United States of America and in the emails with which the advertisements were distributed. I used the trademark CONCEPT LAW to identify my intellectual property and business law services offered, distributed, and sold to the residents of the United States of America.
5. I used the trademark CONCEPT LAW in association with advertisement, offering, and sale of my intellectual property and business law services in the form exhibited in the samples below:

CONCEPT LAW™



6. Between January 27, 2010 and June 11, 2010, I sold my intellectual property and business law services in association with the trademark CONCEPT LAW to the residents of the United States of America.
  
7. Since January 27, 2010, and to date, on a continuous basis, I have been advertng, offering, and selling my intellectual property and business law services in association with the trademark CONCEPT LAW to the residents of the United States of America.
  
8. I have attached to this Declaration affidavits and declarations (Exhibit 10 through Exhibit 25) provided by the United States of America patent and trademark attorneys, which evidence my date of first use (January 27, 2010) of the trademark CONCEPT LAW in the United States of America and which support my Petition to Cancel registration of the trademark KONCEPT (Registration No. 3981394). All declarations and all affidavits listed below will be filed with the Trademark Trial and Appeal Board separately from my declaration.

Exhibit 10            Declaration of Elliot C. Alderman, copyright and trademark attorney and partner of Alderman Law, Washington, DC. Telephone number (202) 973-0188.

- Exhibit 11 Affidavit of Grady K. Bergen, patent and trademark attorney and partner of Griggs Bergen LLP, Dallas, TX. Telephone number (214) 665-9568.
- Exhibit 12 Declaration of D. Whitlow Bivens, intellectual property attorney and partner of Musick Peeler, San Diego, CA. Telephone number (619) 525-2553.
- Exhibit 13 Affidavit of William M. Borchard, intellectual property attorney and partner of Cowan, Liebowitz, Latman, New York, NY. Telephone number (212) 790-9290.
- Exhibit 14 Affidavit of Jonathan M. D'Silva, patent and trademark attorney and associate of law firm MacDonald Illig, Erie, PA. Telephone number (814) 870-7715.
- Exhibit 15 Affidavit of Aaron A. Fishman, patent and trademark attorney and partner of law firm Pearne Gordon LLP, Cleveland, OH. Telephone number (216) 579-1700.
- Exhibit 16 Affidavit of Thomas D. Foster, patent and trademark attorney and president of law firm Foster & Associates, San Diego, CA. Telephone number (858) 922-2170.
- Exhibit 17 Affidavit of Richard J. Gurak, patent and trademark attorney and partner of law firm Husch Blackwell LLP, Chicago, IL. Telephone number (312) 526-1574.
- Exhibit 18 Affidavit of Erik J. Heels, patent and trademark attorney and partner of law firm Clock Tower Law Group, Maynard, MA. Telephone number (978) 823-0008.
- Exhibit 19 Affidavit of Scott H. Kaliko, patent and trademark attorney and partner of law firm Kaliko & Associates LLC, Ramsey, NJ. Telephone number (201) 962-3570.
- Exhibit 20 Affidavit of Marvin H. Kleinberg, patent and trademark attorney and partner of law firm Kleinberg & Lerner LLP, Los Angeles, CA. Telephone number (310) 557-1511 x 3017.
- Exhibit 21 Declaration of Bert P. Krages II, patent and trademark attorney practicing as a sole practitioner, Portland, OR. Telephone number (503) 597-2525.
- Exhibit 22 Affidavit of Mark H. Miller, patent and trademark attorney and partner of law firm Jackson Walker LLP, San Antonio, TX.

Telephone number (210) 978-7751.

Exhibit 23 Affidavit of James J. Murphy, patent and trademark attorney and counsel to law firm Thompson Knight, Dallas, TX. Telephone number (214) 969-1749.

Exhibit 24 Affidavit of Joel D. Skinner, patent and trademark attorney and member of law firm Skinner & Associates, Hudson, WI. Telephone number (715) 386-5800.

Exhibit 25 Affidavit of Miguel Villarreal Jr., patent and trademark attorney and member of law firm Gunn, Lee & Cave P.C., San Antonio, TX. Telephone number (210) 886-9500.

9. I have attached to this Declaration a copy of my letter to Douglas Burda (Exhibit 26), the Registrant in the current cancellation proceeding, in which I advised Mr. Burda not to register his trademark KONCEPT (Registration No. 3981394). I sent my letter to Mr. Burda on June 15, 2011, six days prior to registration of his trademark. I also sent a copy of my letter to Mr. Burda to Ms. Caryn Glasser, the attorney in charge of Mr. Burda's trademark application at the USPTO (Exhibit 27).

Exhibit 26 Letter dated June 15, 2011, sent to Douglas Burda, the Registrant in the current cancellation proceeding, in respect of his application for the trademark KONCEPT.

Exhibit 27 Letter dated June 15, 2011, sent to Caryn Glasser, the attorney in charge of Mr. Burda's trademark application at the USPTO, in respect of Douglas Burda's application for the trademark KONCEPT.

10. I have attached to this Declaration a printout copy of the office action (Exhibit 28) issued by Mr. Frank Lattuca, attorney at the USPTO, in respect of a trademark application for the trademark THE CONCEPT LAW GROUP. It is my information and belief, based on review of the USPTO website, that in the office

action, Mr. Lattuca advised the applicant that the trademark THE CONCEPT LAW GROUP would not be allowed due to likelihood of confusion with the pending application for Mr. Burda's trademark KONCEPT. I have also attached a printout copy of Notice of Abandonment (Exhibit 29) issued in respect of the trademark THE CONCEPT LAW GROUP by the USPTO.

Exhibit 28            Copy of the office action issued by Frank J. Lattuca, attorney at the USPTO, on May 3, 2011, in respect of trademark application for the trademark THE CONCEPT LAW GROUP (Application No.85230890).

Exhibit 29            Copy of Notice of Abandonment issued by the USPTO on November 29, 2011, in respect of trademark application for the trademark THE CONCEPT LAW GROUP (Application No.85230890).

11. I have attached to this Declaration a printout copy of the website [www.pandalawfirm.com](http://www.pandalawfirm.com) and trademark PANDA & Design (Exhibit 30). Based on the information provided on the website, it is my belief that Panda Law Firm is located in Las Vegas, Nevada, and is providing bankruptcy related legal services. Based on the information provided on the website [www.pandalawfirm.com](http://www.pandalawfirm.com), it is my belief that the attorneys of the law firm are Xenophon M. Peters, Judah Zakalik, and Jennifer Rigdon. Based on the information obtained from the website, the Panda Law Firm operated its website [www.pandalawform.com](http://www.pandalawform.com) at least as early as May 27, 2010.

12. I have attached to this Declaration a printout copy of the trademark registration issued by the USPTO to Douglas Burda (Exhibit 31), the Registrant in the current cancellation proceeding, in respect of the trademark Panda which upon

information and belief, based on my review of the USPTO website, Mr. Burda registered in his own name. Mr. Burda declared March 18, 2011, as the date of first use of his trademark. Based on my review of the information on the Panda Law Firm's website [www.pandalawfirm.com](http://www.pandalawfirm.com), it is my belief that Mr. Burda never had any affiliation with the Panda Law Firm.

- Exhibit 30            Copy of the website [www.pandalawfirm.com](http://www.pandalawfirm.com) and trademark PANDA & Design. The law firm is located in Las Vegas, Nevada, and is providing bankruptcy legal services. The attorneys of the firm are Xenophon M. Peters, Judah Zakalik, and Jennifer Rigdon. Operated as early as May 27, 2010.
- Exhibit 31            Copy of trademark registration (No. 4041945) for the trademark Panda issued to Douglas Burda, Respondent in the current cancellation proceeding, in October 2011. Date of first use claimed by Douglas Burda was March 18, 2011.

13. I have included in this Declaration a link to YouTube videos advertising legal services provided by the Panda Law Firm in association with the trademark PANDA (<http://www.youtube.com/watch?v=DzJmg3rLufw>). Based on my review of the YouTube website, it is my belief that the videos were uploaded on YouTube on August 24, 2010, that is seven months prior to March 18, 2011, the date of the first use declared by Douglas Burda for his trademark Panda. I have also attached to this Declaration printouts of screenshot of the YouTube videos uploaded by the Panda Law Firm on August 24, 2010 (Exhibits 32 and Exhibit 33), demonstrating advertisement of its legal services in association with the trademark PANDA.

- Exhibit 32            Printout of a screenshot of video advertising Panda Law Firm legal services in association with the trademark PANDA.
- Exhibit 33            Printout of a screenshot of video advertising Panda Law Firm legal

services in association with the trademark PANDA.

14. Based on the abovementioned information, it is my belief that Douglas Burda prior to flinging of his trademark application for the trademark Panda had, or, as a trademark lawyer, ought to have, knowledge that the Panda Law Firm was advertising, offering, and selling its legal services in Las Vegas in association with the trademark PANDA long before Douglas Burda adopted his trademark Panda. It is also my belief, that Douglas Burda willfully and knowingly mislead, deceived, and defrauded the USPTO by applying for his trademark Panda and registering it with the USPTO, as he also did in the case of his application for and registration of the trademark KONCEPT.

*Andrey Pinsky*

*December 29, 2011*

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Andrey Pinsky

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Date

THIS IS EXHIBIT '1' TO THE DECLARATION  
OF ANDREY PINSKY OF TORONTO, ONTARIO, CANADA

## CANADIAN NOVELTY AND OBVIOUSNESS STANDARDS

### Canadian Standard of Novelty

By statute, Patent Act, R.S.C. 1985, c. P-4, as amended R.S.C. 1985, c. 33, s. 28.2, no patent may be valid if:

1. The subject matter was disclosed in an application filed by a third person which has a "filing date" prior to the "claim date" of the application in question;
2. The subject matter was disclosed in an application filed by a third party after the "claim date" but has claimed a "filing date" before the claim date by reason of conventional priority;
3. The subject matter was disclosed in an application filed by a third party before the "claim date";
4. The subject matter was disclosed in an application filed by the applicant, or someone deriving knowledge from the applicant, more than one year before the filing date, in such a manner that it became available to the public.

The requirements 1 and 2 above create a first to file system in Canada, whereby the first applicant, or one claiming earliest convention priority, will get the patent. Applications will be made available for public inspection 18 months after filing, thus permitting a subsequent applicant the opportunity to consider what disclosures are made by a prior application and to attempt to make such distinctions a may be necessary.

The requirements 3 and 4 above establish a principle of absolute novelty. A public disclosure of the invention by a third party, who has not derived it from the applicant at any time prior to the filing date (or deemed filing date if the application claims convention priority), will invalidate the patent, whereas the applicant has a grace period of one year prior to the filing date during which period the applicant, or someone deriving the information from the applicant, may make a public disclosure.

Pursuant to s. 28.2 of the Patent Act, a person is not entitled to a patent if (a) the invention was known or used by others in Canada, or patented or described in a printed publication in Canada or a foreign country, before the invention thereof by the applicant for patent. To prove invalidity under s. 28.2 of the Patent Act, a challenger must show *that each and every element of the claim is found in a single prior art reference.*

The Supreme Court of Canada in a decision given on November 6, 2008, in the case *Apotex Inc. v. Sanofi-Synthelabo Canada Inc.*, [2008] S.C.J. No. 63, gave through consideration of the issue of novelty which, with appropriate adjustments as to whether one looks at prior patents, printed publications and Canadian uses or sales, or simply at disclosures, can be said to be applicable to all issues of novelty. This requires that the prior material both disclose and enable the claimed invention wherein two questions must be answered:

1. What constitutes disclosure at the first stage of the test for novelty?
2. How much trial and error is permitted in respect of what is disclosed?

It must be kept in mind that, if the claim is disclosed to special advantages that a claimed invention possesses, the prior disclosure must be read so as to determine whether that special advantage would have been disclosed to a person skilled in the art without trial or error. If trial and error or experimentation is required, the

second question is how much. A non-exhaustive test has been proposed by the Supreme Court of Canada in *Apotex Inc. v. Sanofi-Synthelabo Canada Inc.*, [2008] S.C.J. No. 63, to be applied and adjusted according to evidence:

1. Ennoblement is to be assessed having regard to the prior patent as whole, including the specification and the claims;
2. The skilled person may use his or her common general knowledge to supplement information contained in the prior patent;
3. The prior patent must provide enough information to allow the subsequently claimed invention to be performed without undue burden;
4. Obvious errors or omissions in the prior art will not prevent enablement if reasonable skill and knowledge in the art could readily correct the error or find what was omitted.

### Canadian Standard of Obviousness

s. 28.3. Invention must not be obvious – The subject matter defined by a claim in an application for a patent in Canada must be subject-matter that would not have been obvious on the "claim date" to a person skilled in the art or science to which it pertains, having regard to:

- (a) information disclosed more than one year before the "filing date" by the applicant, or by a person who obtained knowledge, directly or indirectly from the applicant in such a manner that the information became available to the public in Canada or elsewhere; and
- (b) information disclosed before the "claim date" by a person not mentioned in paragraph (a) in such a manner that the information became available to the public in Canada or elsewhere.

The Supreme Court of Canada in *Apotex Inc. v. Sanofi-Synthelabo Canada Inc.* [2008] S.C.J. No. 63, November 6, 2008, has set forth the following approach to the issue of obviousness:

- 1(b). Identify the "notional person skilled in the art";
- 1(b). Identify the relevant common general knowledge of that person;
2. Identify the inventive concept of the claim in question or, if that cannot readily be done, construe it;
3. Identify what, if any differences exist between the matter cited as forming part of the "state of the art" and the inventive concept of the claim or the claim as construed;
4. Viewed without any knowledge of the alleged invention as claimed, do those differences constitute steps which would have been obvious to the person skilled in the art or do they require any degree of invention?

If an "obvious to try" test is warranted, then the Court should apply a number of factors, including as non-exhaustive list:

1. Is it more or less self-evident that what is being tried ought to work? Are there a finite number of identified predictable solutions known to persons skilled in the art?
2. What is the extent, nature and amount of effort required to achieve the invention?
3. Is there a motive provided in the prior art to find the solution the patent addresses?

## FILING A CANADIAN TRADEMARK APPLICATION

### Filing Procedure

Registration is obtained by the filing of an application in proper form and submitting the appropriate fee. No application is awarded a filing date until the fee is paid. Each application must only refer to one trademark. An application is next searched, and then examined by examiners in the Trademark Office. Applications are examined in chronological order of filing date, unless an applicant requests and the Office agrees to expedite. If approved, the application is advertised for opposition and, if unopposed or not successfully opposed, the trademark is registered. It is unusual, but not unknown, that more than one application may be filed to register the same trademark.

An application to register a trademark must be filed by the applicant or a duly qualified trademark agent acting on the applicant's behalf. If the applicant is not a Canadian resident, a Canadian person or firm must be nominated to receive all correspondence and service of legal papers in respect of the application. The application is to be drafted in accordance with a form published by the Registrar, or in any other form so long as the same information is included therein. The format of the application is governed by the Trademark Regulations. The application can contain any number of wares and/or services, but cannot attempt to cover more than one trademark, or format of the trademark, contrary to the practices in some other countries. The Trademarks Office publishes a *Wares and Services Manual: User Guide* which outlines the policy of the Office with examples as to acceptable ways in which wares and services may be expressed in an application. The application should be filed along with a prescribed filing fee.

All applications are given an initial examination by the Formalities Section to ensure that the form and content are correct, at which time an application number and filing date being the actual date of filing, are assigned. Thereafter, the file is open for public inspection and will be examined by an examiner in the Trademark Office. Accelerated examination of trademark applications may be possible if a proper request is made to the Trademark Office outlining the facts that would justify advancement. Currently, because of the large backlog in the Trademark Office, it is difficult to convince the Office to expedite an application, absent possible litigation and/or domain name issues.

The examination by the Trademark Office is first directed to ensure compliance with the formal requirements as to the application, then the substance of the application is examined as to registrability of the trademark and as to confusion with any other co-pending application. The examiner, if objections are to be raised, will correspond with the applicant or his or her agent, who will be given an opportunity to make one or more written responses. The examiner will set a deadline to file a response. If no response is provided, the examiner can consider the trademark to be abandoned.

All correspondence to the Office in respect of the application shall include the name of the applicant, the application number, if one has been assigned, and the trademark. The Registrar requires the applicant to provide a translation into English and French of any words in any other language appearing in the trademark. The Registrar requires a transliteration of matter expressed in characters, other than the Latin characters or numerals, into Latin characters or Arabic numerals as the case may be.

If there are no objections, or if they are overcome, the application will be advertised in the *Trademark Journal* for opposition by any interested party and, if unopposed or unsuccessfully opposed, be allowed for registration and subsequently registered if the application is completed by fulfilling the technical requirements of the Act. If the examiner refuses to allow the application to be advertised, the applicant may ask for a review of the decision by the Registrar of Trademarks, who may also refuse to allow the trademark to be advertised. If the Registrar does refuse, an appeal lies to the Federal Court. In cases where there is doubt, the registrar may give notice to the owner of a registered trademark, with which the application may be alleged to be confusing, of his intent to advertise in case such owner may wish to oppose. Allowance of an application for advertisement does not indicate that the Registrar has decided that the trademark is registrable, but rather that he is not satisfied that it is not registrable.

A final fee is payable upon the mark being allowed for registration. In addition, if the application is based upon proposed use, a declaration attesting to commencement of use must be filed before the application will be processed to registration. In that regard, the Trademarks Office issued a practice notice in 1998 signalling a significant change in the ability of an applicant to obtain extensions of time to file a declaration of use. The Trademarks Office does not send out a default notice for failure to file a declaration of use.

### Form of Application

An application to register a trademark must be in the prescribed form which is required to include the following:

- (a) Full and proper name of the applicant;
- (b) The trademark, and in the case where the trademark is a design, a drawing of the design in the proper format;
- (c) A statement in ordinary commercial terms of the wares or services;
- (d) In the case of application based on use in Canada the date of first use;
- (e) In the case of an application based on making known in Canada the date on which the trademark was first made known;
- (f) In the case an application based on an application (which matures into a registration) or a registration, and use in a foreign country, particulars thereof;
- (g) In the case of an application based on proposed use in Canada, a statement that the applicant intends to use the mark in Canada;
- (h) A statement that the applicant is satisfied that he is entitled to use the trademark in Canada in association with the wares or services described; and
- (i) In the case of certification mark, the standards defined by the applicant are required.

In the case where the applicant's trademark agent does not reside in Canada, an appointment of an associate agent who is resident in Canada, as a representative for service in Canada, must be included. In appropriate cases, a claim to priority based upon a previously filed application in a country of the Union may be made. This claim usually gives the applicant an effective earlier filing date in Canada. It is not a basis for registration itself. Such claim should be made at the time of the filing of the application.

THIS IS EXHIBIT '2' TO THE DECLARATION  
OF ANDREY PINSKY OF TORONTO, ONTARIO, CANADA

## CANADIAN PATENT INFRINGEMENT LAW

### 1. General

The Canadian *Patent Act* does not define infringement. Instead, it states that any act, which interferes with the full enjoyment of the monopoly granted to the patentee, is an infringement. The monopoly is the exclusive right of making, constructing, using, vending and importing the invention, subject to adjudication. The question of infringement is a mixed question of fact and law. The construction and scope of the patent is a matter of law. Whether the defendant's activities fall within the scope of the patent is a question of fact. On appeal, the standard of review is that of palpable and overriding error.

### 2. Construction of the Claims

The first task of a Court is to construe the claims. The language in which a patentee has cast her claims has been referred as protection from trespass – a fence within which she claims and outside of which others are free to roam. Infringement is defined by reference to the claims, not to the specification of the preferred embodiment. A mere finding of similarity is insufficient to support a finding of infringement. There is infringement if the article includes all the essential elements of at least one patent claim; the question is essentially one of fact. The burden is on the patentee to prove on the balance of probabilities that the infringement has occurred.

### 3. Intention is Immaterial

Intention is not material to finding of infringement. To do otherwise would destroy the efficacy of a patent because very few people are aware of the contents of a patent. However the nature of the remedy, such as punitive damages, may be affected by whether or not there was knowledge and intent. Whether or not infringer has property rights in the infringing material is irrelevant – property ownership is not a defence to patent infringement. An alleged infringer cannot rely on its own later issued patent as a defence to infringement if it is insufficiently different from the patent at issue.

### 4. Infringement of Essential Elements

The Supreme Court of Canada in *Free World Trust v. Electro Sante Inc.* (2000) SCJ No. 67, 9 CPR (4<sup>th</sup>) provided instruction concerning division on “literal” infringement and infringement of the “substance”. The Court stated the division is unnecessary provided that the Court first properly construed the claims to determine the “essential” elements of the claims as intended by the inventor. There is a single issue to consider – have the “essential” elements of the claims been taken? The onus is on the patentee to show that, to a skilled reader, a claimed feature of the invention was obviously substitutable. The essential element may be distinguished from a non-essential element by asking, as of the date the patent was made public: (1) Would the variant have a material effect on the way the invention works? If yes, the variant is outside the claim; (2) Would the fact that the variant would have no material effect have been obvious as of that date? (3) As of that date, would the reader skilled in the art have understood that strict compliance was intended?

The Federal Court of Appeal, prior to the Supreme Court decision in *Free World Trust*, adopted a doctrine of equivalence when considering infringement, stating that there is equivalence when substituting device “performs substantially the same way to obtain the same result” *Apotex Inc. v. Merck Frost Canada Inc.* (2000) FCJ No. 1028, 8 CPR (4<sup>th</sup>). In considering infringement by taking of the substance of an invention, one is considered to have infringed even if one's act does not in every respect fall within the express terms of the claim

defining the invention. It does not matter whether one omits a feature that is not essential or substitutes an equivalent for it. However, the patentee can resort to a doctrine of equivalency only in respect of a feature of an invention not essential to it. An element is essential if it is required for the device to work as contemplated and claimed by the inventor, it is non-essential if it may be substituted or omitted without having a material effect on either the structure or the operation of the invention described in the claims. If it is not obvious at the date of the patent publication that the substituted member has no material effect upon the way the invention works, then there is no infringement.

### 5. What is “Use of the Invention”?

Use has been considered by the Supreme Court of Canada in *Schmeiser v. Monsanto Canada Inc.* (2004) SCJ No. 29 and is summarised as: (1) “Use” or “exploiter”, in their ordinary meanings, denote utilization with a view to production or advantage; (2) The basic principle in determining whether the defendant has “used” a patented invention is whether the inventor has been deprived, in whole or in part, directly or indirectly, of the full enjoyment of the monopoly conferred by the patent; (3) If there is a commercial benefit to be derived from the invention, it belongs to the patent holder; (4) It is no bar to finding of infringement that the patented object or process is a part of or composes a broader un-patented structure or process, provided the patented invention is significant or important to the defendant's activities that involve the un-patented structure; (5) Possession of a patented object or an object incorporating a patented feature may constitute “use” of the object's stand-by or insurance utility and thus constitute infringement.

### 6. Comparing the Claims with the “Use”

What must be compared is what the defendants are actually doing, not what some particular embodiment of the patent actually achieves but rather what the patent claims it would achieve and if there are ambiguities, they may be resolved by reference to the disclosure. What is to be compared is the accused device with the patent in issue, not with the patentee's commercial product. A patent owned by alleged infringer cannot be compared with the patent alleged to be infringed. It is the actual device and not a patent for the device that must be compared. The development of the alleged infringement is not relevant. Nor is it relevant that the alleged infringer may have changed its design after infringement was alleged. While the patentee must prove infringement, where proof rebutting infringement, particularly of a chemical claim, is within the resources of the defendant who fails to perform tests available to it, an inference of infringement may arise.

### 7. Import and Export

The monopoly granted to a patentee extends so as to preclude the importation into Canada of products made abroad in accordance with processes that would, if practised in Canada, constitute an infringement of the patent. The export from Canada of a product to be used abroad may be an infringement. An offering in Canada of a product that is sold elsewhere, even if eventually imported into Canada by a purchaser, does not amount to “vending” or any other form of infringement in Canada by the person so offering or selling elsewhere. Whether there was a sale or an agreement to sell goods to be manufactured at a future date, there is still an infringement. The sale of component parts to be assembled in Canada, then disassembled for shipment abroad constitutes an infringement.

## ADVERTISEMENT OF A TRADEMARK FOR OPPOSITION

Where the Registrar is satisfied that a trademark application is in the proper form, that it is registrable, and that there is no co-pending application having priority, then the trademark will be advertised for opposition in the *Trade-marks Journal*. Where the Registrar is in some doubt as to whether the trademark as applied for is confusing with a previously registered trademark, she may give specific notice to the owner of that previously registered mark of the advertisement so as to allow him to oppose if he wishes. The Federal Court does not have jurisdiction to determine ownership or proper applicant in respect of a pending application – that issue is for opposition proceedings.

Once a trademark is advertised, any person may file an opposition to the registration of the trademark. There is no limitation that the opponent be a person who would be adversely affected by the outcome of the proceedings. Trademark proceedings are a matter of both public and private concern. All correspondence respecting an opposition should be clearly marked "ATTENTION OPPOSITION BOARD". Once the Statement of Opposition has been forwarded to the applicant, all correspondence must be copied to the opposite party except for the written argument, in which case only the transmittal letter is to be copied.

An opposition may be filed within two months from the date of advertisement or, if time is extended by the Registrar, then at any time up to the date of allowance to registration of the trademark upon payment of a prescribed fee. The Registrar has no obligation to extend time and, if she fails to do so, there is no decision upon which the Federal Court can act. The trademark will be registered and the potential opponent must apply to the Federal Court for expungement. The Registrar must ensure that he is fully aware of an opposition or a request for an extension of time to file an opposition which is filed before the expiry of the statutory time period, whether at a regional office or the National Capital Office. Where the Registrar has allowed an application without considering a previously filed request for an extension of time to oppose, the Registrar may withdraw the allowance at any time before the issuing of a certificate of registration and extend the time for filing a statement of opposition.

The grounds upon which an opposition may be made are that: (1) the application does not comply with the required formalities of section 30 of the *Trade-marks Act*; (2) the trademark is not registrable; (3) the applicant is not the person entitled to registration; (4) the trademark is not distinctive; (5) the applicant has no right to use the trademark. The last ground is either implied in section 30(a) or is arising under that section - the applicant, when it has alleged use of the trademark, has not in fact continuously

used that mark in the normal course of trade.

The Opposition Board does not have jurisdiction to determine whether there has been a breach of an agreement between the parties as to trademarks. An opponent must ensure that the grounds of opposition are set out in sufficient detail to enable an applicant to reply. A party may apply to amend its stated grounds of opposition, and the Registrar has a discretion to allow or refuse such amendment based on judicial discretion. On appeal to the Courts, the grounds are limited to those before the Registrar. The relevant date for consideration of the state of the register and perhaps for all purposes is the date of filing the statement of opposition, but it does not close off evidence as to what may have occurred after. While there continues to be some judicial debate on the subject, it would appear that the material date for determination of non-registrability on the ground of likelihood of confusion is the date of first use. The date upon which distinctiveness is to be determined is the date of filing of the statement of opposition. Registrability is to be decided as of the date of registration. Throughout the proceedings, all relevant circumstances should be considered so as to avoid an absurd result by applying overly technical interpretations of the *Trade-marks Act*.

Throughout the opposition proceedings, the onus rests on the applicant to satisfy the Registrar that the trademark ought to be registered. The opponent may lead evidence to prove the basis of its opposition and bears the burden of proof therein. However, the onus as to registrability remains on the applicant. A party does not need to file evidence if its arguments can be based on materials filed by the other party. The Registrar or Court may look at all the evidence filed and not only on an issue-by-issue basis. The Registrar must be reasonably satisfied, on a balance of probabilities, that registration is unlikely to cause confusion, the Registrar should not apply the "beyond a doubt criterion".

The opposition proceedings are determined by Hearing Officers, appointed for the purpose of conducting and determining oppositions who provide written reasons allowing or rejecting oppositions. An appeal lies to the Federal Court, which appeal must be commenced within two months after dispatch of the written reasons. The conduct of an opposition is governed by Regulations to the *Trade-marks Act*. In addition, the Trademarks Office publishes guidelines on procedures before the Trade-marks Opposition Board.

THIS IS EXHIBIT '3' TO THE DECLARATION  
OF ANDREY PINSKY OF TORONTO, ONTARIO, CANADA

## CANADIAN TRADEMARK OPPOSITION PROCEEDINGS

Opposition Proceedings are commenced by a Statement of Opposition on behalf of opponent(s). A person's right to oppose an application is a remedy that cannot be taken away from it thus, even where such person may have acquiesced in the use of a trademark, this does not constitute acquiescence in the registration of the trademark.

The Statement of Opposition is a pleading which specifies the grounds on which the opponent will rely in the proceedings and in connection with which the opponent will file supporting evidence. The Statement of Opposition must be filed within two months of the date of the advertisement of the application, along with the required fee, or if permitted by the Registrar at any time up to allowance of the application for registration. Once an application is opposed, the application procedure is suspended, thereby preventing an application from amending the application to rely on secondary meaning under section 12(2).

The deadlines to file pleadings, evidence, request cross-examination, file written arguments and request an oral hearing are set out in the *Trademarks Act* and the *Trademarks Regulations*. The Registrar has recognized that the time limits set by the Act and Rules for opposition are impracticable and has published a policy statement as to the grounds for extension of time. Extensions of time are often necessary, due to the multinational nature of trademark opposition. Extensions of time are now complicated, due to different rules governing extensions for applications advertised pre and post October 1, 2008. New rules governing extensions are effective March 31, 2009. A new feature introduced in the March 31, 2009, rules is a "cooling off period" – a one time extension, available to both parties at specific stages of the opposition, for a maximum of nine months. Because the cooling off period is available to both parties, the maximum length of the cooling off period is 18 months. The reality is that despite the introduction of the cooling off period, extensions of time are more difficult to obtain than previously.

The Registrar inspects the Statement of Opposition and if he finds it does not raise a substantial ground of opposition, he may refuse the opposition, otherwise he will forward a copy of the statement of Opposition to the applicant. The decision of the Registrar that there is a substantial issue is not appealable; the process must continue until a final determination of the opposition. The Statement of Opposition does not need to be overly technical, for instance the precise wares or services said to be confusing need not be enumerated. It is the policy of the Trademarks Office that if an applicant is having difficulty in replying to a Statement of Opposition that appears to be unclear, the applicant is to seek clarification directly from the opponent or raise an objection in its Counterstatement.

A Statement of Opposition may be amended at any time before the Registrar has made a decision. It is important to plead carefully, initially, as the Court is limited on appeal to the grounds pleaded. A party may apply to the Registrar to strike or for amendment of the other party's Statement of Opposition and the Registrar should consider arguments as to the sufficiency of a Statement of Opposition before evidence is filed. The Applicant then has two-month period, or such longer period of time as is allowed by the Trademark Office, within which to file a counter statement in response to the Statement of Opposition, failing which the application is deemed to be abandoned.

The next step is the filing of evidence by the opponent by way of affidavit or statutory declaration with a copy to the applicant within four months failing which the opposition is deemed to have been abandoned. The evidence must contain relevant facts in support of

the Statement of Opposition. Hearsay evidence, such as that of a corporate officer testifying as to business records and transactions of a corporation, is admissible. The failure to provide relevant evidence by a party reasonably expected to have such evidence, without explanation, can lead to adverse inferences being drawn. Relevant evidence includes advertising and promotional materials for the wares and services, market share information, and packaging materials in relation to wares.

Cross-examination on any affidavit filed in an opposition proceeding may be held only if ordered by the Registrar on request from the opposite party. There is no absolute right to a cross-examination, although the registrar usually gives permission to do so if a request is made within two months from the date of submission of the evidence. The party requesting the cross-examination is responsible for its costs and for the preparation of the transcripts from the cross-examination. A person being examined may refuse to answer certain questions, however, a negative inference may be given in respect of the evidence offered by that witness.

Fourteen days after completion of all evidence, the Registrar will call for the filing of written argument, in duplicate. The written arguments are distributed by the Registrar when all arguments are received. There is no obligation on any party to an opposition to file a written argument. If a written argument is filed, it should contain a review of the evidence, the law as it pertains to the case, and the party's viewpoint of the relevance of the facts and the law to the case.

Upon receipt of the other party's written argument, or upon expiration of the time allotted by the Trademarks Office to file written arguments, either party may request an oral hearing. In the opposition, the onus remains on the applicant to prove that its mark is registrable and not confusing, but the burden of proof in establishing each ground of opposition remains with the opponent. The relevant date for determining confusion is the date of the decision by the Hearing Officer. Issue estoppel will apply to opposition proceedings provided the proper legal bases, as to parties or their privies being identical and issues being identical, apply. There is no obligation on either party to attend an oral hearing.

If no oral hearing is requested, the Registrar will render a written decision in the opposition on the basis of the file contents. If an oral hearing is held, the Registrar will render a written decision after conclusion of the hearing and the basis of the file contents. The decision will be to allow or reject the opposition in whole or in part, with reasons. The burden of proof required to be imposed by the Registrar is not that of "doubt" or "reasonable doubt" but simply that of an ordinary civil matter. The risk of confusion must be tangible and not theoretical. The onus remains on the applicant to show that the trademark is registrable, for instance, that there is no likelihood of confusion. However, the allegations of confusion must have some air of reality.

A decision of the Registrar can be appealed to the Federal Court within two months of the decision's dispatch. On appeal, the onus remains on the applicant to establish its right to registration. The appeal process is governed by the *Trademarks Act* and the *Rules of the Federal Court of Canada*.

At present, there is no provision for an award of costs to a successful party in an opposition proceeding in Canada.

## IMPEACHMENT OF A CANADIAN PATENT

The Federal Court, at the instance of the Attorney General of Canada or any interested party, may declare a patent or any claim in a patent invalid in an action for impeachment. The burden of proof lies with the person alleging invalidity to prove its allegations on the balance of probabilities. There is no standard similar to that in administrative law to deal with the "reasonableness" of the Commissioner's decision to grant a patent. A finding of invalidity of some claims does not affect the validity of the remaining claims.

Only the Federal Court has jurisdiction to impeach a patent, although provincial courts may declare a patent or claims invalid as between the parties to an action. The Court will not permit a party to impeach a patent under the cloak of confidentiality order simply because a competitor may then realize the plaintiff's interest in commercializing a certain product. Where the patents have expired at the end of their term before the Court has dealt with validity, the Court may simply deal with validity on the basis that it was asserted as a defence to an action for infringement.

In an action for impeachment, it is usual to raise grounds such as lack of subject matter, or lack of proper specification or claims, the onus being on the party alleging invalidity to prove the same. A person cannot seek to set aside a notice of allowance issued to another person in respect of that person's application for patent. The appropriate steps are the filing of a protest during prosecution of the application, or an action in the Federal Court once the patent has issued. A party, having been unsuccessful in a final action in seeking to invalidate a patent, cannot bring a second action asserting other grounds of invalidity. While a foreign court cannot adjudge a Canadian patent, a party may plead that a foreign judgement, by reason of *res judicata*, estoppel, or comity, binds or affects a party asserting the equivalent Canadian patent.

An action to impeach a patent may be commenced only in the Federal Court by a statement of claim. Before the action is launched a plaintiff must post security for costs in an amount to be determined by the Court. The defendant who owns the patent has no duty to post security for costs. The Federal Court may declare a patent invalid, make a declaration as to Inventorship and Ownership or any other appropriate remedy known to the common law or equity.

A defendant in an infringement action in the Federal Court may counterclaim for impeachment and is not required to post security of costs. An owner of a patent may be joined as a party to the action, not as third party.

An action to impeach may be brought by a "person interested", which includes a defendant sued under some of the claims of a patent and includes a former employer of the named inventor, which employer claims that the invention

was obtained in violation of the employee's obligations. A party is sufficiently interested to pursue an impeachment action if it is able to show that it is dealing with the same kind of product or process and is in competition with the patentee. A person seeking approval under a drug regulatory scheme, where the patent is listed in respect of that drug, is person interested. A third party has no right to challenge a decision to allow a patent, the proper procedure is to commence impeachment proceedings once the patent issues. A party, who had unsuccessfully attacked the validity of some claims of a patent in earlier proceedings, is not a "person interested" in attacking other claims in subsequent proceedings. A defendant in a patent infringement action who has counterclaimed for a declaration of invalidity may continue that counterclaim even where the main action has been discontinued.

A certificate of judgement voiding any patent in whole or in part may be registered with the Patent Office and is effective unless the judgement is received on appeal. Impeachment of a patent under section 10 of the Patent Act is to be distinguished from a defence raised under section 59 that the patent is void for any fact or default which by the Act renders the patent void. Such a fact may be failure to pay maintenance fees, which renders the patent void, as a defence, but not impeached as it would otherwise be under section 60.

THIS IS EXHIBIT '4' TO THE DECLARATION  
OF ANDREY PINSKY OF TORONTO, ONTARIO, CANADA

## ASSIGNMENT AND LICENCE OF A CANADIAN PATENT

### 1. Assignment

Unless he has assigned his rights, a patent will issue to the inventor, or if deceased, to his estate. There are three distinct rights which are each capable of assignment at law. The first occurs the moment the invention is made, when the right to apply for a patent comes into existence; the second is the right under an application once made; the third is the patent itself once granted.

An application for a patent is assignable and the assignment must be in writing. Such an assignment may be varied by a subsequent oral agreement, subject to equity, which may preclude an oral agreement on reassignment or extinguishing a right of reassignment. Where an assignment of an application is registered in the Patent Office, the application may not be withdrawn without the consent of the assignee.

A patent is assignable and the assignment must be in writing and may be registered with the patent office. The Court will carefully examine the wording of a document so as to determine if there was an assignment as opposed to a license or right to use. The Court will not assume exclusivity in the absence of clear wording. An assignment of a patent is void as against a subsequent assignee unless the first assignment is registered before the subsequent one. However, a subsequent assignee can take no interest in a patent if he had actual knowledge as to a previous assignment. Where an assignment of a patent or pending application has been registered, the Federal Court has jurisdiction to vary or expunge that registration, however, the Federal Court has no jurisdiction to determine a question of ownership of a patent based only upon the interpretation of a contract. The Court will not make an amendment to title during the course of a trial in the absence of a pleading requesting such relief. A co-owner can sell its interest in a patent to another whereby the new purchaser becomes a co-owner. A patent is not infringed by a co-owner who, without the consent of the other, makes or sells the invention in Canada. A co-owner cannot grant a valid licence to a third party without the consent of the co-owner – such a licence is invalid and the would be licensee will be an infringer if it makes the patented invention. A co-owner of a patent cannot assign a portion of its share without the consent of the other co-owner.

Where a patent has been assigned prior to litigation and only the assignor is party to the litigation, not the assignee, the assignor may be awarded damages but not the equitable remedies of profits or an injunction. An assignment made during the litigation may not carry with it the right to claim any damages that might be accruing to a former owner. The point, however, has not been fully litigated. It has been suggested that an assignment, made for the purpose of fostering litigation, may constitute an abuse of process for which relief under section 65 of the *Patent Act* may be sought, however, a simple assignment cannot, in itself, give rise to claim for champerty or maintenance. The Federal Court of Appeal on a preliminary issue has held that an assignment of patent rights, without any showing that there was an intention to lessen competition unduly, or any matter beyond the assignment may be contrary to the *Competition Act*. The fact that an assignor did not take an action for infringement is no defence to an action taken by an assignee. At common law a right in tort may not be assigned, therefore an assignment of a patent even with words purporting to assign any claim to past damages, does not convey any right to claim damages. However, if the infringement occurs in Quebec, then claims for past infringement would appear to be assignable.

The Federal Court may order that any entry as to title to a patent be varied or expunged. However, there must be first in existence a patent or patent application. The Federal Court has no jurisdiction to hear

matters simply as to entitlement to an assignment of a patent. The Federal Court has the exclusive role with respect to varying or expunging records in the Patent Office: the Commissioner has no power to disobey or disregard an order of the Court in that respect. The Commissioner does not need to be a party to the court proceedings. Once a patent has issued, the Commissioner has no discretion or power to amend the Inventorship of a patent. The Federal Court has broad powers to amend the title of a patent, including errors as to the naming of inventors, upon application and upon notice to all interested persons. However, the Federal Court has no power to make a declaration that someone other than the person to whom a patent has been granted is the owner of that patent. The superior courts of the provinces have jurisdiction over a dispute as to whether a party may or ought to file an application for a patent on behalf of another and what obligations arise therefrom.

### 2. Licence by Agreement

A patentee may grant an exclusive or non-exclusive licence, subject to whatever terms and conditions upon which the parties may agree, to use the patented invention. By the grant of a licence, the patentee grants to the licensee the right to act in a certain way *vis-a-vis* the patented article, a right which, but for the licence, the licensee would not enjoy. The licensed rights are not equivalent to those of the patentee but are limited to and qualified by the express terms of the licence. The *Patent Act* requires that any grant or conveyance of an exclusive right be registered but it does not require that such grant be in writing and is silent as to the effects of any, of failure to register.

At common law it may have been open to question whether a licensee or even an exclusive licensee could bring an action as plaintiff for infringement of a patent; however, Patent Act allows both an exclusive and a non-exclusive licensee to bring such an action for damages. A licence may be oral but there may well be disputes as to the terms of the licence. A licence may be implied by reason of corporate relationship between the parties, if such relationship is clear and proved, and may be proved in evidence by testimony of witnesses as to the nature of the corporate relationship. An exclusive licence need not be registered in order to still have a right to claim for damages. A purchaser of an article is also a person claiming under the patentee – a purchaser acquires a right to use the article and not to sue under the patent.

A patentee and licensee are free to make an arrangement between themselves as to how the patented invention is to be used – the function of the Court being no more than to determine the rights between them as expressed by the intention of the parties. The terms of the licence should be sufficiently clear, failing which, the Court may refuse to enforce the agreement. A licensee cannot dispute the validity of a patent, and its invalidation is not a defence to an action for royalties in the absence of a warranty of validity; in the absence of fraud, such a warranty will not be implied. However, when sued for infringement, a licensee may challenge the validity of the patent. Also, where the licensee is acting outside the licence, it may challenge validity. An acknowledgement by a licensee that a patent is valid and that he or she will not, during the term of the licence or thereafter contest the validity of the patent, has been held to be a valid and enforceable covenant. In an action for breach of licence, it is rare that punitive damages would be awarded. A licence may impose restrictions on a licensee by way of restricting the area within Canada, or by restricting the nature of manufacturing done, or by restricting export, for example, and a licensee who acts outside the scope of the restrictions is an infringer of the patent. Any use prior to the obtaining of a licence is an infringement.

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TRADEMARK APPLICATION REGISTRATION

## APPEALS FROM DECISIONS OF THE REGISTRAR

An appeal from a decision of the Registrar of Trademarks lies to the Federal Court of Canada pursuant to section 56(1) of the *Trade-marks Act*. A person who was involved in the decision may appeal, however, where no person was involved, save a successful applicant, the judicial review would appear to be appropriate for a third party to invoke where the *Act* does not provide for a specific right of appeal. The appeal is commenced by notice of application filed within two months from the date of dispatch of the decision under appeal. Each decision must be the subject of a separate notice of application, even where the parties and trademark are the same. The Court has a discretion to allow an amendment of a Statement of Opposition even after the Registrar has made a decision, but that discretion should be cautiously exercised. While a party is allowed to introduce new evidence on an appeal, it cannot raise a new issue that was not raised before the Opposition Board or Registrar.

An appeal is to be distinguished from an application for judicial review of an administrative decision of the Registrar, such as a decision to publish a notice under section 9 of the *Trade-marks Act*. In respect of such decisions, the standard of review is reasonableness except where new evidence is admitted, in which case it is correctness. Evidence may be admitted on judicial review where the application was the first opportunity to raise the issue. Administrative decisions of the Registrar are subject to review by the Court, however, interlocutory decisions are not. The Court does not have the power to grant orders prohibiting the Registrar from carrying out his or her statutory duties.

The time for filing the notice of application cannot be extended except by a request in the notice of application for relief to that effect which is dealt with on the hearing. The factors to be considered in granting an extension of time to appeal include: (1) is there at least an arguable case as opposed to frivolous or vexatious; (2) is there prejudice to the respondent; (3) is there evidence of a genuine intention to appeal; and (4) is there good reason for the delay.

The Registrar should not be named as respondent. If there is no person who can appear to argue in opposition, the Attorney General of Canada should be named as respondent. The notice of application together with a statement of relief sought and grounds to be argued is filed with the Federal Court and the Registrar and served by registered mail upon the registered owner of any trademark referred to by the Registrar in the decision and any other person entitled to notice of the decision, such as the other parties to the proceedings before the Registrar – all within two months of the dispatch of the decision. Affidavits to be relied upon shall follow within 30 days. Any person desiring to respond must file an appearance within ten days from service and affidavits within 30 days after being served with the applicant's evidence.

Section 56 is a provision of general application and applies to all appeals, by whatever party, from a decision of the Registrar. An appeal is to be treated as a trial *de novo* as far as introduction of new evidence is concerned. The Court appears to be limited to those issues raised before the Registrar, except as to legal issues out of the same factual circumstances as were before the Registrar, in which case those arguments may be raised. However the respondent may raise those issues even if the appellant/applicant has not. An undischarged bankrupt cannot commence an appeal, nor can an assignee of the trademarks of the bankrupt who was not a party to the opposition, nor can a person, even an assignee, who was not a party to the opposition.

Evidence, in addition to that before the Registrar, may be adduced before the Court by way of affidavits, which must be filed by the appellant with the Court following the filing of the notice of applica-

tion. The evidence set out in such affidavits should be confined to the actual knowledge of the deponent, unless the exception to the hearsay apply.

The respondent has 30 days from the date of the filing of affidavits by the appellant to file its evidence. The Court may allow evidence to be filed even though no evidence was filed in the trademark proceeding. The time for filing affidavits may be extended by the Court for a party where that party establishes that the evidence in the affidavit is relevant, that it is able to file the affidavits forthwith and provides the Court with a good reason as to its untimely filing. In allowing evidence to be filed through an extension of time, the Court does not pass on the merits. Affidavits, although filed with the Court Registry, must be tendered to the Court at the hearing in order to come before the Court for determination.

Cross-examination is permitted on affidavits without requiring leave of the Court the onus being on the party requesting leave to demonstrate that cross-examination is necessary. Cross-examination on appeal in the Court on the affidavits previously filed before the Registrar is not allowed. In exceptional cases the Court has, despite the general rule that such proceedings are summary, allowed discovery to be conducted on a party but never on the Registrar.

Prior to the hearing the Registrar's file should be transferred to the Court by a letter of request, a copy of which should be filed with the Court. All material filed with the Registrar becomes part of the appeal record, whether or not the Registrar refused to accept such material; whether material such as affidavits which were refused to be considered by the Registrar can be used as evidence on the appeal is an open question. The appeal is from the decision of the Registrar, not the reasons given.

In determining such appeal, the Court is entitled to exercise any discretion vested in the Registrar. The Federal Court of Appeal in November 2000 has attempted to make a clear definition as to the applicable standard of review on an appeal from the Registrar. In brief, the Court has stated that where there is new evidence before the trial judge, the standard of review is correctness, where if no additional evidence has been filed, the standard is reasonableness *simpliciter* – that is, was the Registrar clearly wrong. Often there is additional evidence filed so that the question becomes whether the additional evidence makes material difference to the evidence such that the standard shifts from "clearly wrong" to "correctness". "Reasonableness simpliciter" means that a decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence which it had before it to the conclusion at which it arrives. While some parts of the reasoning may be erroneous, if the result is still correct, the decision cannot be considered unreasonable. The Supreme Court of Canada has settled the issue of standard of review in the *Barbie* case. The Applicable standards of review is that of reasonableness – the question being whether the Board's decision is supported by reasons that can withstand a somewhat probing examination and is not clearly wrong.

In summary, the standard of review of a Registrar's decision is on the basis of reasonableness and, if fresh evidence is submitted, then the issue is whether the fresh evidence materially affects the decision. Parliament has recognized that the Court sitting in appeal is expected to be able to decide issues as if they were being tried for the first time before the Court. The burden of proof is on the appellant to show that the Registrar erred. The question before the Court is whether the Registrar was wrong and not whether s/he was so wrong as to warrant interference with the decision.

THIS IS EXHIBIT '5' TO THE DECLARATION  
OF ANDREY PINSKY OF TORONTO, ONTARIO, CANADA

## **Concept Law (TM) Newsletter**

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**From:** "Concept Law (TM)" <newsletter@pinskylaw.ca>  
**To:** "Pinsky Law (Newsletter)" <newsletter@pinskylaw.ca>  
**Sent:** March 16, 2010 3:13 PM  
**Attach:** Managing and Protecting Trade Secrets.pdf; Canadian Trademark Opposition Proceedings.pdf; Impeachment of a Canadian Patent.pdf  
**Subject:** Concept Law (TM) Newsletter  
Good Afternoon,

Please find attached Volume 2010, April Issue of the Concept Law (TM) Newsletter. This newsletter provides timely reports and commentary on developments in Canadian business, technology and intellectual property law. Other issues of the Concept Law (TM) Newsletter are available at the following URL:

<http://www.pinskylaw.ca/Articles/articles.htm>

Let me know if you do not want to receive this newsletter, and I will remove you from the list of the recipients.

Yours truly,  
Andrey Pinsky  
[www.pinskylaw.ca](http://www.pinskylaw.ca)

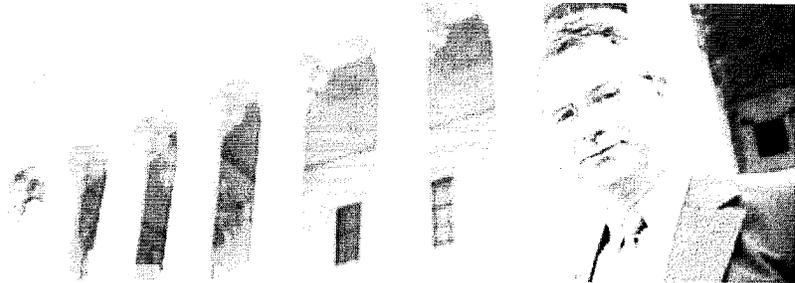
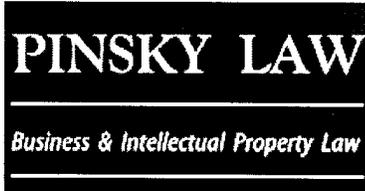
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THIS IS EXHIBIT '6' TO THE DECLARATION  
OF ANDREY PINSKY OF TORONTO, ONTARIO, CANADA

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Financing for Startups

Because most loans and lines of credit are asset-based loans, knowing the lender's guidelines is very important. The industry and market characteristics, the stage and health of the startup in terms of cash flow, debt coverage, and collateral are critical to the lender's evaluation process. Naturally, startups have more difficulty borrowing money from banks than established businesses because they don't have assets, track record of profitability and a positive cash flow.

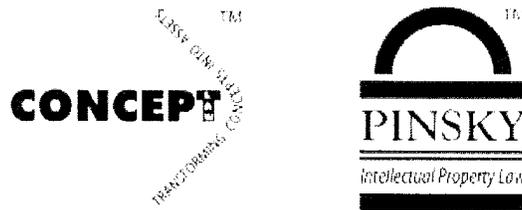
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Taxation of a Startup

Federal income taxes are imposed under the Income Tax Act and the Regulations enacted pursuant to the ITA. In Canada both the federal and provincial governments impose income taxes on residents and non-residents. Under the ITA, income tax is imposed on the total world income of residents and on Canadian source income of non-residents. Business and property income is determined according to generally accepted accounting principles except where there is a specific statutory rule to the contrary.

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Intellectual Property Law



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Intelligent Products

John Bordynuik Inc. (JBI) is a one vendor solution for the design and manufacture of robust, intelligent electronics in products. Anyone can manufacture plastic or steel - JBI makes intelligent plastic and steel. As your technology partner, JBI has a vested interest in ensuring that your product is constantly evolving and cost effective. JBI has the world's largest engineering information archive - a crucial factor in the development of elegant, robust and highly competitive products.

Data Recovery

JBI employs sophisticated custom hardware and software to recover data from any type of computer media. JBI's invasive procedure usually recovers 100% of data stored on hard discs, tapes, floppies, and optical discs. John Bordynuik has designed recovery hardware for the past 18 years and his clients include MIT, the US Army, the United Nations, the Ontario Legislative Assembly, various institutions, and private individuals. Data recovery is available to individuals and corporate clients. JBI can recover data from one hard drive to thousands of platters or tapes. Quick turnaround time is available but our emphasis is to recover every possible byte and speed is not always practical.

www.mbiztech.com

mBizTech Corp is a Preferred ISV Partner (Independent Software Vendor) of Research in Motion, manufacturer of the BlackBerry platform. mBiztech is a leader in the field of mobile data access applications and services. mBiztech provides a suite of easy to deploy, out-of-the-box products for BlackBerry providing seamless access to data systems such as Lotus Domino, Oracle, SQLServer and DB2. mBizTech solutions also include a full set of tools to create and customize forms and user interface for BlackBerry. Peripherals, such as barcode readers, printers and GPS receivers, can also be incorporated to extend the functionality of our products.

mBizTech was founded in 1998 to provide mobile technology solutions for enterprise database environments across a broad range of business sectors. Industries currently using mBizTech technology include financial services, real estate, telecommunications, oil & gas and Customer Relationship Management. Our custom solutions allow businesses to reduce operating costs, improve service and increase profits.

INTERNET ARCHIVE  
**Wayback Machine**  
24 captures  
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THIS IS EXHIBIT '7' TO THE DECLARATION  
OF ANDREY PINSKY OF TORONTO, ONTARIO, CANADA

INTERNET ARCHIVE  
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BETA

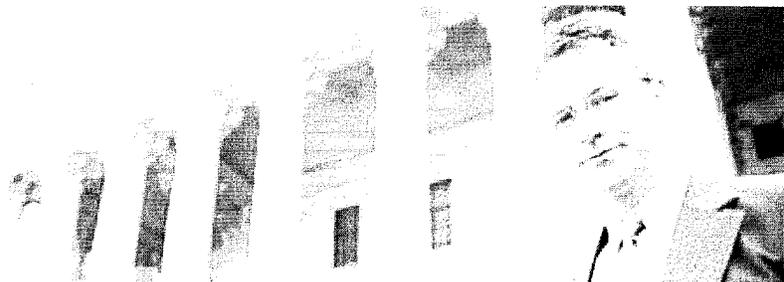
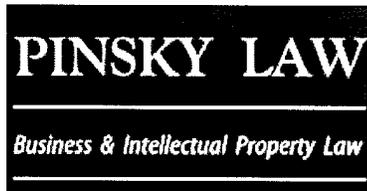
http://www.pinskylaw.ca/News/news.htm

Go FEB JUN Close

24 captures  
 26 Apr 06 - 5 Dec 10

2009 2011 Help

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**Financing a Startup**

Because most loans and lines of credit are asset-based loans, knowing the lender's guidelines is very important. The industry and market characteristics, the stage and health of the startup in terms of cash flow, debt coverage, and collateral are critical to the lender's evaluation process. Naturally, startups have more difficulty borrowing money from banks than established businesses because they don't have assets, track record of profitability and a positive cash flow.

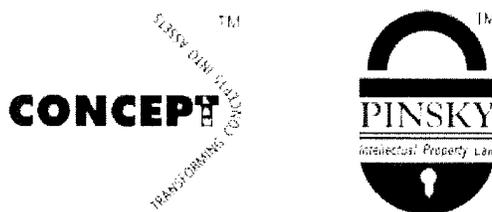
[Read more >>](#)

**Calculation of Income**

Federal income taxes are imposed under the Income Tax Act and the Regulations enacted pursuant to the ITA. In Canada both the federal and provincial governments impose income taxes on residents and non-residents. Under the ITA, income tax is imposed on the total world income of residents and on Canadian source income of non-residents. Business and property income is determined according to generally accepted accounting principles except where there is a specific statutory rule to the contrary.

[Read more >>](#)

**Trademark Law Search**



Contact John Bordinuik: [www.johnbordinuik.com](http://www.johnbordinuik.com)

**Intelligent Products**

John Bordinuik Inc. (JBI) is a one vendor solution for the design and manufacture of robust, intelligent electronics in products. Anyone can manufacture plastic or steel - JBI makes intelligent plastic and steel. As your technology partner, JBI has a vested interest in ensuring that your product is constantly evolving and cost effective. JBI has the world's largest engineering information archive - a crucial factor in the development of elegant, robust and highly competitive products.

**Data Recovery**

JBI employs sophisticated custom hardware and software to recover data from any type of computer media. JBI's invasive procedure usually recovers 100% of data stored on hard discs, tapes, floppies, and optical discs. John Bordinuik has designed recovery hardware for the past 18 years and his clients include MIT, the US Army, the United Nations, the Ontario Legislative Assembly, various institutions, and private individuals. Data recovery is available to individuals and corporate clients. JBI can recover data from one hard drive to thousands of platters or tapes. Quick turnaround time is available but our emphasis is to recover every possible byte and speed is not always practical.

Contact mBizTech: [www.mbiztech.com](http://www.mbiztech.com)

mBizTech Corp is a Preferred ISV Partner (Independent Software Vendor) of Research in Motion, manufacturer of the BlackBerry platform. mBiztech is a leader in the field of mobile data access applications and services. mBiztech provides a suite of easy to deploy, out-of-the-box products for BlackBerry providing seamless access to data systems such as Lotus Domino, Oracle, SQLServer and DB2. mBizTech solutions also include a full set of tools to create and customize forms and user interface for BlackBerry. Peripherals, such as barcode readers, printers and GPS receivers, can also be incorporated to extend the functionality of our products.

mBizTech was founded in 1998 to provide mobile technology solutions for enterprise database environments across a broad range of business sectors. Industries currently using mBizTech technology include financial services, real estate, telecommunications, oil & gas and Customer Relationship Management. Our custom solutions allow businesses to reduce operating costs, improve service and increase profits.

Wayback Machine  
23 captures  
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THIS IS EXHIBIT '8' TO THE DECLARATION  
OF ANDREY PINSKY OF TORONTO, ONTARIO, CANADA

INTERNET ARCHIVE  
**Wayback Machine**  
OF 14

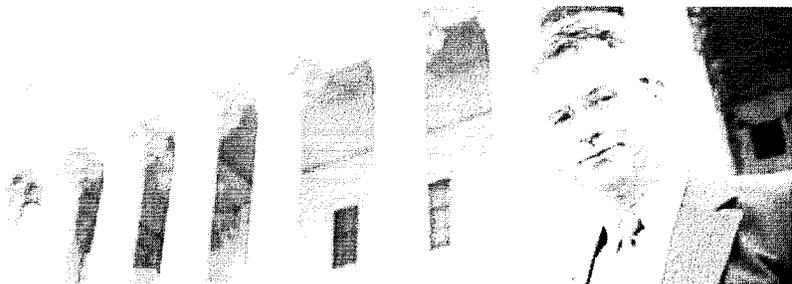
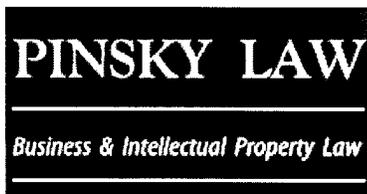
http://www.pinskylaw.ca/Sitemap/sitemap.htm

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23 captures  
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**Business**

Investor management team scrutiny is a major focus of investor scrutiny.

Aside from competence of management team, control of intellectual property is a major focus of investor scrutiny. The ability to identify and protect intellectual property directly reflects on investor confidence and the resulting access to capital available to technology start-up. Protection of intellectual property assets is available through the law of copyright, trade secrets, patents and trademarks.

[Read more >>](#)

**Financing & Startups**

Many startup companies, particularly in technology sector, require capital beyond the means of their founders in order to finance continued growth. Expenses quickly add up, and a business that cannot manage its cash flow will not survive. Because startup companies typically have a limited operating history and are considered to be risky ventures, obtaining even simple financing arrangements can be a difficult task.

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- [Intellectual Property Litigation](#)
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**Wayback Machine**  
BETA

23 captures  
26 Apr 06 - 5 Dec 10

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THIS IS EXHIBIT '9' TO THE DECLARATION  
OF ANDREY PINSKY OF TORONTO, ONTARIO, CANADA

**Andrey Pinsky (Pinsky Law)**

---

**From:** "Andrey Pinsky (Pinsky Law)" <andrey@pinskylaw.ca>  
**To:** "Reggie Borkum" <rborkum@bkflaw.com>  
**Sent:** January 25, 2010 2:31 PM  
**Attach:** Popular Trademark Law Misconceptions.pdf; Popular Patent Law Misconceptions.pdf; Dealing with Patent Infringing Activities.pdf; Capitalizing on Intellectual Property.pdf; Canadian Trademark Application Cost US\$\_pdf  
**Subject:** Re: Canadian Trademark  
 Reggie,

Canada does not employ the International class systems when it issues registered trademarks. A trademark in Canada can cover any number of wares and services in any number of industries, provided, of course, there is no conflict with already registered trademarks. I am attaching a cost estimate for a \*BASIC\* Canadian trademark application. I am also attaching January and February issues of the Concept Law Newsletter for your client's and your review.

Let me know if you have questions.

Regards,  
 Andrey Pinsky

----- Original Message -----

**From:** Reggie Borkum  
**To:** andrey@pinskylaw.ca  
**Sent:** Monday, January 25, 2010 1:23 PM  
**Subject:** Canadian Trademark

Andrey:

Thank you for your prompt response, very much appreciated. My client is [REDACTED] and will want to trademark [REDACTED] under the beverage class in Canada. We have explained the descriptive nature of the mark and they wish to move forward with this name. Per your voicemail, please provide a cost estimate and I will forward to our client. If acceptable to the client, I will e-mail the client's contact information to you.

Regards,  
 Reggie

Reggie F. Borkum, Esq.  
 Blanchard, Krasner & French  
 800 Silverado Street, Second Floor  
 La Jolla, California 92037  
 (858) 551-2440 / fax: (858) 551-2434  
[rborkum@bkflaw.com](mailto:rborkum@bkflaw.com)  
[www.bkflaw.com](http://www.bkflaw.com)

The contents of this e-mail message, including any attachments, are intended solely for the use of the person or entity to whom the e-mail was addressed. It contains information that may be protected by the attorney-client privilege, work-product doctrine, or other privileges, and may be restricted from disclosure by applicable state and federal law. If you are not the intended recipient of this message, be advised that any dissemination, distribution, or use of the contents of this message is strictly prohibited. If you received this e-mail message in error, please e-mail [bkf@bkflaw.com](mailto:bkf@bkflaw.com) attention postmaster and contact the sender by reply e-mail. Please also permanently delete all copies of the original e-mail and any attached documentation.

IRS Circular 230 Disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachments or enclosures) is not intended or written, and cannot be used, for the purpose of (a) avoiding penalties under the Internal Revenue Code or (b) promoting, marketing or recommending to another party any transaction or matter addressed herein.

THIS IS EXHIBIT '10' TO THE DECLARATION  
OF ANDREY PINSKY OF TORONTO, ONTARIO, CANADA

**DECLARATION OF Elliott Alderman**

I, *Elliott Alderman*, of the City of Washington, in the District of Columbia, the United States of America,  
MAKE OATH AND SAY THE FOLLOWING:

1. I am an intellectual property attorney licensed to practice in Washington, DC, the United States of America, in the areas of copyright and trademark law.
2. Since January 27, 2010, I have been receiving a newsletter distributed by Andrey Pinsky, a Canadian intellectual property and business lawyer. In his newsletter titled "CONCEPT LAW", Mr. Pinsky has been advertising and offering his intellectual property and business law services to the residents of the United States of America.
3. Mr. Pinsky clearly marked "CONCEPT LAW" as his trademark, which he used to identify his intellectual property and business law services offered and distributed to the residents of the United States of America.
4. Since January 27, 2010 to date, Mr. Pinsky on a continuous basis has been promoting and offering his intellectual property and business law services under the trademark "CONCEPT LAW" to the residents of the United States.
5. Mr. Pinsky used the trademark "CONCEPT LAW" in the form exhibited in the samples below:

CONCEPT LAW™

**CONCEPT**

TM  
CONCEPTS INFO ASSETS  
TRANSFORMING CO.

/Elliott Alderman/

September 15, 2011

*Elliott Alderman*

*9/15/11*

THIS IS EXHIBIT '11' TO THE DECLARATION  
OF ANDREY PINSKY OF TORONTO, ONTARIO, CANADA

**AFFIDAVIT OF GRADY K. BERGEN**

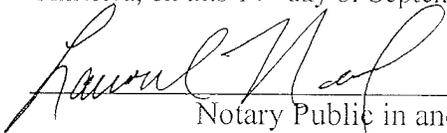
I, Grady K. Bergen, of the City of Dallas, in the State of Texas, the United States of America, MAKE OATH AND SAY THE FOLLOWING:

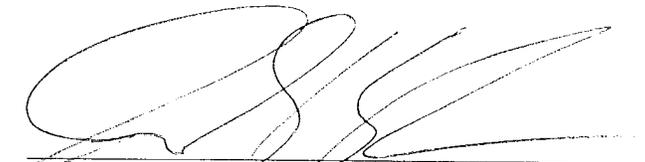
1. I am an intellectual property attorney licensed to practice in the United States of America in the areas of patent and trademark law.
2. Since January 27, 2010 I have been receiving a newsletter distributed by Andrey Pinsky, a Canadian intellectual property and business lawyer. In his newsletter titled "CONCEPT LAW", Mr. Pinsky has been advertising and offering his intellectual property and business law services to the residents of the United States of America.
3. Mr. Pinsky clearly marked "CONCEPT LAW" as his trademark, which he used to identify his intellectual property and business law services offered and distributed to the residents of the United States of America.
4. Since January 27, 2010 to date, Mr. Pinsky on a continuous basis has been promoting and offering his intellectual property and business law services under the trademark "CONCEPT LAW" to the residents of the United States.
5. Mr. Pinsky used the trademark "CONCEPT LAW" in the form exhibited in the samples below:

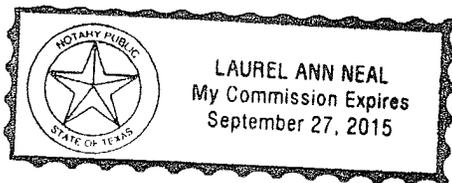
**CONCEPT LAW** <sup>TM</sup>



SWORN before me in the City of Dallas )  
in the State of Texas, United States of )  
America, on this 14<sup>th</sup> day of September, 2011 )

  
\_\_\_\_\_  
Notary Public in and for  
State of Texas

  
\_\_\_\_\_  
Grady K. Bergen



THIS IS EXHIBIT **'12'** TO THE DECLARATION  
OF ANDREY PINSKY OF TORONTO, ONTARIO, CANADA

## DECLARATION OF D. WHITLOW BIVENS

I, D. Whitlow Bivens, of the City of San Diego, in the State of California, the United States of America, DECLARE:

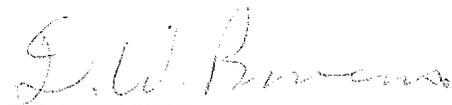
1. I am an intellectual property attorney located and practicing in California. I am licensed to practice in California and before the United States Patent and Trademark Office. My practice deals primarily with intellectual property issues. I have personal knowledge of the facts set forth herein such that, if called as a witness, I could and would testify competently to those facts under oath.
2. Since at least as early as March 16, 2010, I have been receiving a newsletter distributed by Andrey Pinsky, a Canadian intellectual property and business lawyer. In his newsletter titled "CONCEPT LAW", Mr. Pinsky has been advertising and offering his intellectual property and business law services.
3. Mr. Pinsky clearly marked "CONCEPT LAW" as his trademark, which he used to identify his intellectual property and business law services.
4. I have received Mr. Pinsky's newsletter promoting and offering his intellectual property and business law services under the trademark "CONCEPT LAW" on a continuous periodic basis since at least as early as March 16, 2010, to date.
5. Mr. Pinsky used the trademark "CONCEPT LAW" in the form exhibited in the samples below:

CONCEPT LAW™

CONCEPT™

TM  
CONCEPTS INTO ASSETS  
TRANSFORMING CONCEPTS

The undersigned being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, and that such willful false statements and the like may jeopardize the validity of the document declares that all statements made of his own knowledge are true; and all statements made on information and belief are believed to be true.

  
\_\_\_\_\_  
D. Whitlow Bivens

  
\_\_\_\_\_  
Date

THIS IS EXHIBIT '13' TO THE DECLARATION  
OF ANDREY PINSKY OF TORONTO, ONTARIO, CANADA

**AFFIDAVIT OF WILLIAM M. BORCHARD**

I, William M. Borchard, of the City of New York, in the State of New York, the United States of America, MAKE OATH AND SAY THE FOLLOWING:

1. I am an intellectual property attorney licensed to practice in the State of New York, United States of America.
2. Since March 16, 2010 I have been receiving a newsletter distributed by Andrey Pinsky, a Canadian intellectual property and business lawyer. In his newsletter titled "CONCEPT LAW", Mr. Pinsky has been advertising and offering his intellectual property and business law services to the residents of the United States of America.
3. Mr. Pinsky clearly marked "CONCEPT LAW" as his trademark, which he used to identify his intellectual property and business law services offered and distributed to the residents of the United States of America.
4. Since March 16, 2010 to date, Mr. Pinsky on a continuous basis has been promoting and offering his intellectual property and business law services under the trademark "CONCEPT LAW" to the residents of the United States.
5. Mr. Pinsky used the trademark "CONCEPT LAW" in the form exhibited in the samples below:

**CONCEPT LAW** <sup>TM</sup>



SWORN before me at the City of New York )  
in the State of New York, United States of )  
America, on this 6<sup>th</sup> day of October, 2011 )

*Jean A. Jensen*  
\_\_\_\_\_  
Notary Public

*William M. Borchard*  
\_\_\_\_\_  
William M. Borchard

**JEAN A. JENSEN**  
Notary Public, State of New York  
Qualified in Nassau County  
No. 01JE4804127  
Commission Expires January 31, 2015

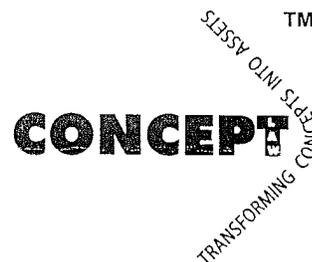
THIS IS EXHIBIT **'14'** TO THE DECLARATION  
OF ANDREY PINSKY OF TORONTO, ONTARIO, CANADA

AFFIDAVIT OF JONATHAN M. D'SILVA

I, Jonathan M. D'Silva, of the City of Erie, in the State of Pennsylvania, the United States of America, MAKE OATH AND SAY THE FOLLOWING:

1. I am an attorney licensed to practice law in the United States of America in Pennsylvania, New York, and the District of Columbia.
2. I am a registered patent attorney before the United States Patent and Trademark Office.
3. Since at least as early as March 16, 2010 I have been receiving a newsletter distributed by Andrey Pinsky, a Canadian intellectual property and business lawyer. In his newsletter titled "CONCEPT LAW", Mr. Pinsky has been advertising and offering his intellectual property and business law services to the residents of the United States of America.
4. Mr. Pinsky clearly marked "CONCEPT LAW" as his trademark, which he used to identify his intellectual property and business law services offered and distributed to the residents of the United States of America.
5. Since at least as early as March 16, 2010 to date, Mr. Pinsky on a continuous basis has been promoting and offering his intellectual property and business law services under the trademark "CONCEPT LAW" to the residents of the United States.
6. Mr. Pinsky used the trademark "CONCEPT LAW" in the form exhibited in the samples below:

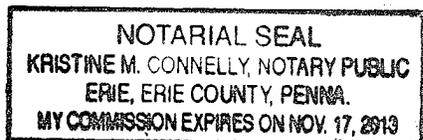
CONCEPT LAW™



SWORN to and subscribed before me this  
11th day of October, 2011.

*Kristine M. Connelly*  
\_\_\_\_\_  
Notary Public

*J. M. D'Silva*  
\_\_\_\_\_  
Jonathan M. D'Silva



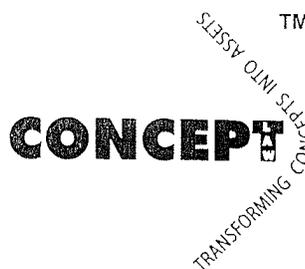
THIS IS EXHIBIT **15** TO THE DECLARATION  
OF ANDREY PINSKY OF TORONTO, ONTARIO, CANADA

**AFFIDAVIT OF AARON A. FISHMAN**

I, Aaron A. Fishman, of the City of Broadview Heights, in the State of Ohio, the United States of America, MAKE OATH AND SAY THE FOLLOWING:

1. I am an intellectual property attorney licensed to practice in the United States of America in the areas of patent and trademark law.
2. Since at least March 16, 2010, I have been receiving a newsletter distributed by Andrey Pinsky, a Canadian intellectual property and business lawyer. In his newsletter titled "CONCEPT LAW", Mr. Pinsky has been advertising and offering his intellectual property and business law services to the residents of the United States of America.
3. Mr. Pinsky clearly marked "CONCEPT LAW" as his trademark, which he used to identify his intellectual property and business law services offered and distributed to the residents of the United States of America.
4. Since at least March 16, 2010 to date, Mr. Pinsky on a continuous basis has been promoting and offering his intellectual property and business law services under the trademark "CONCEPT LAW" to the residents of the United States.
5. Mr. Pinsky used the trademark "CONCEPT LAW" in the form exhibited in the samples below:

**CONCEPT LAW** <sup>TM</sup>



SWORN before me at the City of Cleveland)

in the State of Ohio, United States of )

America, on this day of )

September 19, 2011 )

Jennifer A. Crowley )  
Exp 3/13/13

Aaron A. Fishman

Aaron A. Fishman

THIS IS EXHIBIT **16** TO THE DECLARATION  
OF ANDREY PINSKY OF TORONTO, ONTARIO, CANADA

**AFFIDAVIT OF THOMAS D. FOSTER**

I, Thomas D. Foster of the City of San Diego in the State of California, the United States of America,  
MAKE OATH AND SAY THE FOLLOWING:

1. I am an intellectual property attorney licensed to practice in the United States of America in the areas of patent and trademark law.
2. Since January 27, 2010 I have been receiving a newsletter distributed by Andrey Pinsky, a Canadian intellectual property and business lawyer. In his newsletter titled "CONCEPT LAW", Mr. Pinsky has been advertising and offering his intellectual property and business law services to the residents of the United States of America.
3. Mr. Pinsky clearly marked "CONCEPT LAW" as his trademark, which he used to identify his intellectual property and business law services offered and distributed to the residents of the United States of America.
4. Since January 27, 2010 to date, Mr. Pinsky on a continuous basis has been promoting and offering his intellectual property and business law services under the trademark "CONCEPT LAW" to the residents of the United States.
5. Mr. Pinsky used the trademark "CONCEPT LAW" in the form exhibited in the samples below:

CONCEPT LAW™

CONCEPT™

TM  
CONCEPTS INTO ASSETS  
TRANSFORMING CON

September 15, 2011

  
Thomas D. Foster

ACKNOWLEDGMENT

State of California  
County of San Diego )

On September 15, 2011 before me, Maher Malaab  
(insert name and title of the officer)

personally appeared Thomas Daniel Foster,  
who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are  
subscribed to the within instrument and acknowledged to me that he/she/they executed the same in  
his/her/their authorized capacity(ies); and that by his/her/their signature(s) on the instrument the  
person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing  
paragraph is true and correct.

WITNESS my hand and official seal.

Signature [Handwritten Signature]

(Seal)  MAHER MALAAB  
COMM. #1878946  
NOTARY PUBLIC - CALIFORNIA  
SAN DIEGO COUNTY  
My Commission Expires 02/02/2014

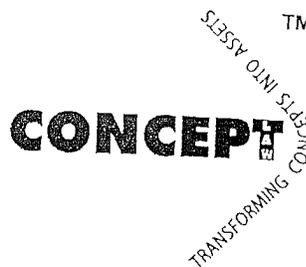
THIS IS EXHIBIT ~~17~~ TO THE DECLARATION  
OF ANDREY PINSKY OF TORONTO, ONTARIO, CANADA

**AFFIDAVIT OF RICHARD J. GURAK**

I, Richard J. Gurak, of the City of Chicago, in the State of Illinois, the United States of America, MAKE OATH AND SAY THE FOLLOWING:

1. I am an intellectual property attorney licensed to practice in the United States of America in the areas of patent and trademark law.
2. Since at least as early as February 17, 2010, I have been receiving a newsletter distributed by Andrew Pinsky, a Canadian intellectual property lawyer. In his newsletter titled "CONCEPT LAW", Mr. Pinsky has been advertising and offering his intellectual property and business law services to the residents of the United States of America.
3. Mr. Pinsky clearly marked "CONCEPT LAW" as his trademark, which he used to identify his intellectual property and business law services offered and distributed to the residents of the United States of America.
4. To the best of my knowledge, since February 17, 2010 to date, Mr. Pinsky on a continuous basis has been promoting and offering his intellectual property and business law services under the trademark "CONCEPT LAW" to the residents of the United States.
5. Mr. Pinsky used the trademark "CONCEPT LAW" in the form exhibited in the samples below:

**CONCEPT LAW** <sup>TM</sup>



SWORN before me at the City of Chicago )  
In the State of Illinois, United States of )  
America, on this day of September 15, 2011 )

*Pamela F. Pape*  
\_\_\_\_\_  
Commissioner for Taking Affidavits  
Pamela Pape

*Richard J. Gurak*  
\_\_\_\_\_  
Richard J. Gurak



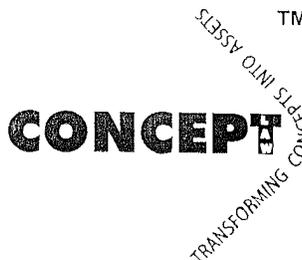
THIS IS EXHIBIT **18** TO THE DECLARATION  
OF ANDREY PINSKY OF TORONTO, ONTARIO, CANADA

**AFFIDAVIT OF Erik J. Heels**

I, Erik J. Heels, of the City of Maynard, in the State of Massachusetts, the United States of America, MAKE OATH AND SAY THE FOLLOWING:

1. I am an intellectual property attorney licensed to practice in the United States of America in the areas of patent and trademark law.
2. Since 2010-01-27 I have been receiving a newsletter distributed by Andrey Pinsky, a Canadian intellectual property and business lawyer. In his newsletter titled "CONCEPT LAW", Mr. Pinsky has been advertising and offering his intellectual property and business law services to the residents of the United States of America.
3. Mr. Pinsky clearly marked "CONCEPT LAW" as his trademark, which he used to identify his intellectual property and business law services offered and distributed to the residents of the United States of America.
4. Since 2010-01-27 to date, Mr. Pinsky on a continuous basis has been promoting and offering his intellectual property and business law services under the trademark "CONCEPT LAW" to the residents of the United States.
5. Mr. Pinsky used the trademark "CONCEPT LAW" in the form exhibited in the samples below:

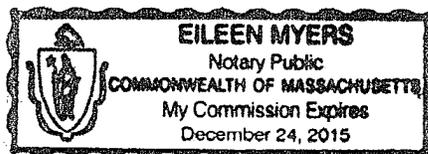
CONCEPT LAW™



Commonwealth of Massachusetts  
County of Middlesex

On this 23rd day of September, 2011, before me, the undersigned notary public, personally appeared Erik J. Heels (name of document signer), proved to me through satisfactory evidence of identification, which were MA LIC. # S76874867, to be the person who signed the preceding or attached document in my presence, and who swore or affirmed to me that the contents of the document are truthful and accurate to the best of (his) (~~her~~) knowledge and belief.

  
Erik J. Heels





THIS IS EXHIBIT '19' TO THE DECLARATION  
OF ANDREY PINSKY OF TORONTO, ONTARIO, CANADA

**AFFIDAVIT OF SCOTT H. KALIKO, ESQ**

I, Scott H. Kaliko, Esq of the City of Mahwah, in the State of New Jersey, the United States of America,  
MAKE OATH AND SAY THE FOLLOWING:

1. I am an intellectual property attorney licensed to practice in the United States of America in the areas of patent and trademark law.
2. Since 1/27/2010 I have been receiving a newsletter distributed by Andrey Pinsky, a Canadian intellectual property and business lawyer. In his newsletter titled "CONCEPT LAW", Mr. Pinsky has been advertising and offering his intellectual property and business law services to the residents of the United States of America.
3. Mr. Pinsky clearly marked "CONCEPT LAW" as his trademark, which he used to identify his intellectual property and business law services offered and distributed to the residents of the United States of America.
4. Since 1/27/2010 to date, Mr. Pinsky on a continuous basis has been promoting and offering his intellectual property and business law services under the trademark "CONCEPT LAW" to the residents of the United States.
5. Mr. Pinsky used the trademark "CONCEPT LAW" in the form exhibited in the samples below:

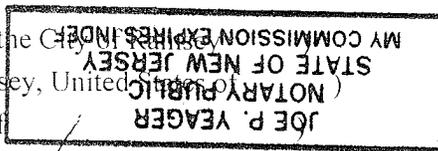
**CONCEPT LAW** <sup>TM</sup>

**CONCEPT** <sup>TM</sup>

TRANSFORMING CONCEPTS INTO ASSETS

SWORN before me at the City of Mahwah, in the State of New Jersey, United States of America, on this day of

9/16, 2011



Commissioner for Taking Affidavits  
Joe P. Yeager

Scott H. Kaliko

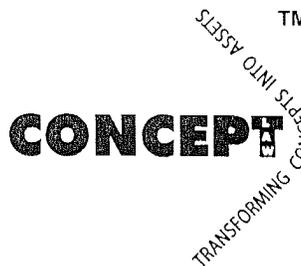
THIS IS EXHIBIT **20** TO THE DECLARATION  
OF ANDREY PINSKY OF TORONTO, ONTARIO, CANADA

**AFFIDAVIT OF MARVIN H. KLEINBERG**

I, Marvin H. Kleinberg, of the City of Los Angeles, in the State of California, the United States of America, MAKE OATH AND SAY THE FOLLOWING:

1. I am an intellectual property attorney licensed to practice in the State of California and the United States Patent and Trademark Office, and before the Supreme Court of the United States of America in the areas of patent and trademark law.
2. Since April 18, 2010, I have been receiving a newsletter distributed by Andrey Pinsky, a Canadian intellectual property and business lawyer. In his newsletter titled "CONCEPT LAW", Mr. Pinsky has been advertising and offering his intellectual property and business law services to the residents of the United States of America.
3. Mr. Pinsky clearly claimed "CONCEPT LAW" as his trademark, which he used to identify his intellectual property and business law services offered and distributed to the residents of the United States of America by using appropriate markings and legends.
4. Since April 18, 2010, to date, Mr. Pinsky on a continuous basis has been promoting and offering his intellectual property and business law services under the trademark "CONCEPT LAW" to the residents of the United States.
5. Mr. Pinsky used the trademark "CONCEPT LAW" in the form exhibited in the samples below:

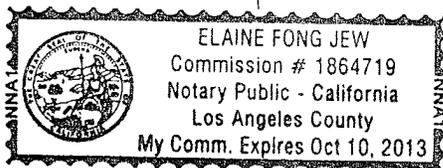
CONCEPT LAW™



SWORN before me at the City of Los Angeles )  
in the State of California, United States of )  
America, on this 15<sup>th</sup> day of September, 2011 )

*Elaine Fong Jew*  
Notary Public

*Marvin H. Kleinberg*  
MARVIN H. KLEINBERG



# CALIFORNIA JURAT WITH AFFIANT STATEMENT

- See Attached Document (Notary to cross out lines 1-6 below)
- See Statement Below (Lines 1-5 to be completed only by document signer[s], *not* Notary)

\_\_\_\_\_  
Signature of Document Signer No. 1

\_\_\_\_\_  
Signature of Document Signer No. 2 (if any)

State of California

County of LOS ANGELES

Subscribed and sworn to (or affirmed) before me

on this 15<sup>TH</sup> day of SEPT., 2011,  
by Date Month Year

(1) MARVIN H. KLEINBERG  
Name of Signer

proved to me on the basis of satisfactory evidence to be the person who appeared before me (.) (.)

(and

(2) \_\_\_\_\_  
Name of Signer

proved to me on the basis of satisfactory evidence to be the person who appeared before me.)

Signature *Elaine Fong Jew*  
Signature of Notary Public



Place Notary Seal and/or Stamp Above

## OPTIONAL

*Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.*

### Further Description of Any Attached Document

Title or Type of Document: \_\_\_\_\_

Document Date: \_\_\_\_\_ Number of Pages: \_\_\_\_\_

Signer(s) Other Than Named Above: \_\_\_\_\_

RIGHT THUMBPRINT OF SIGNER #1
Top of thumb here

RIGHT THUMBPRINT OF SIGNER #2
Top of thumb here

THIS IS EXHIBIT **21** TO THE DECLARATION  
OF ANDREY PINSKY OF TORONTO, ONTARIO, CANADA

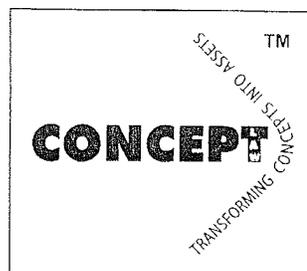
IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

DECLARATION OF BERT P. KRAGES II

I, Bert P. Krages II, do declare and say:

1. I am an intellectual property attorney licensed to practice by the Oregon State Bar. My practice includes the areas of patent and trademark law.
2. Since no later than February 17, 2010, I have been receiving a newsletter distributed by Andrey Pinsky, a Canadian intellectual property and business lawyer. In his newsletter titled "CONCEPT LAW," Mr. Pinsky has been advertising and offering his intellectual property and business law services to the residents of the United States of America.
3. Mr. Pinsky clearly marked "CONCEPT LAW" as his trademark, which he used to identify his intellectual property and business law services offered and distributed to the residents of the United States of America.
4. Since February 17, 2010 to date, Mr. Pinsky on a continuous basis has been promoting and offering his intellectual property and business law services under the trademark "CONCEPT LAW" to the residents of the United States.
5. Mr. Pinsky used the trademark "CONCEPT LAW" in the form exhibited in the samples below:

CONCEPT LAW™



I declare under penalty of perjury under the laws of the United States of America  
that the foregoing is true and correct.

Dated: September 14, 2011

*Bert P. Krages II*

---

Bert P. Krages II  
Attorney at Law  
6665 S.W. Hampton Street, Suite 200  
Portland, OR 97223

THIS IS EXHIBIT '22' TO THE DECLARATION  
OF ANDREY PINSKY OF TORONTO, ONTARIO, CANADA

**AFFIDAVIT OF MARK H. MILLER**

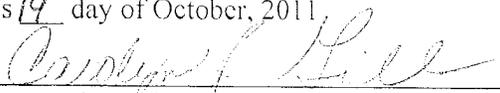
I, Mark H. Miller, of the City of San Antonio, in the State of Texas, in the United States of America, MAKE OATH AND SAY THE FOLLOWING:

1. I am an intellectual property attorney licensed to practice in the United States of America in the areas of patent and trademark law.
2. Since February 17, 2010, I have been receiving a newsletter distributed by Andrey Pinsky, a Canadian intellectual property and business lawyer. In his newsletter titled "CONCEPT LAW", Mr. Pinsky has been advertising and offering his intellectual property and business law services to the residents of the United States of America.
3. Mr. Pinsky clearly marked "CONCEPT LAW" as his trademark, which he used to identify his intellectual property and business law services offered and distributed to the residents of the United States of America.
4. Since February 17, 2010, to date, Mr. Pinsky on a continuous basis has been promoting and offering his intellectual property and business law services under the trademark "CONCEPT LAW" to the residents of the United States.
5. Mr. Pinsky used the trademark "CONCEPT LAW" in the form exhibited in the samples below:

**CONCEPT LAW**™

**CONCEPT**™  
TRANSFORMING CONCEPTS INTO ASSETS

SWORN before me at the City of San Antonio,  
in the State of Texas, United States of America, on  
this 14 day of October, 2011.



Commissioner for Taking Affidavits  
Carolyn J. Gill

My Commission Expires September 22, 2015



**MARK H. MILLER**

THIS IS EXHIBIT '23' TO THE DECLARATION  
OF ANDREY PINSKY OF TORONTO, ONTARIO, CANADA

**AFFIDAVIT OF James J. Murphy**

I, James J. Murphy, of the City of Dallas, in the State of Texas, the United States of America, MAKE OATH AND SAY THE FOLLOWING:

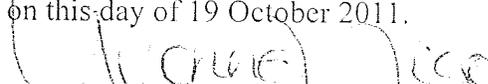
1. I am an intellectual property attorney licensed to practice in the United States of America in the areas of patent and trademark law.
2. Since January 27, 2010 I have been receiving a newsletter distributed by Andrey Pinsky, a Canadian intellectual property and business lawyer. In his newsletter titled "CONCEPT LAW", Mr. Pinsky has been advertising and offering his intellectual property and business law services to the residents of the United States of America.
3. Mr. Pinsky clearly marked "CONCEPT LAW" as his trademark, which he used to identify his intellectual property and business law services offered and distributed to the residents of the United States of America.
4. Since January 27, 2010 to date, Mr. Pinsky on a continuous basis has been promoting and offering his intellectual property and business law services under the trademark "CONCEPT LAW" to the residents of the United States.
5. Mr. Pinsky used the trademark "CONCEPT LAW" in the form exhibited in the samples below:

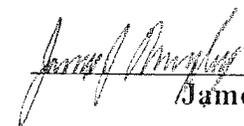
CONCEPT LAW™

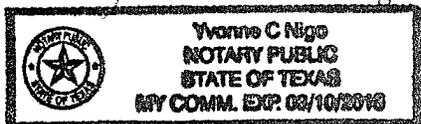
**CONCEPT**

TM  
CONCEPTS INTO ASSETS  
TRANSFORMING CO

SWORN before me at the City of Dallas,  
in the State of Texas, United States of America,  
on this day of 19 October 2011.

  
\_\_\_\_\_  
Commissioner for Taking Affidavits  
Yvonne Nigo

  
\_\_\_\_\_  
James J. Murphy



THIS IS EXHIBIT **24** TO THE DECLARATION  
OF ANDREY PINSKY OF TORONTO, ONTARIO, CANADA

**AFFIDAVIT OF JOEL D. SKINNER**

I, Joel D. Skinner, of the City of Hudson, in the State of Wisconsin, the United States of America, MAKE OATH AND SAY THE FOLLOWING:

1. I am an intellectual property attorney licensed to practice in the United States of America in the areas of patent and trademark law.
2. Since January 27, 2010 I have been receiving a newsletter distributed by Andrey Pinsky, a Canadian intellectual property and business lawyer. In his newsletter titled "CONCEPT LAW", Mr. Pinsky has been advertising and offering his intellectual property and business law services to the residents of the United States of America.
3. Mr. Pinsky clearly marked "CONCEPT LAW" as his trademark, which he used to identify his intellectual property and business law services offered and distributed to the residents of the United States of America.
4. Since January 27, 2010 to date, Mr. Pinsky on a continuous basis has been promoting and offering his intellectual property and business law services under the trademark "CONCEPT LAW" to the residents of the United States.
5. Mr. Pinsky used the trademark "CONCEPT LAW" in the form exhibited in the samples below:

**CONCEPT LAW** <sup>TM</sup>

**CONCEPT** <sup>TM</sup>



TRANSFORMING CONCEPTS INTO ASSETS <sup>TM</sup>

SWORN before me at the City of Hudson  
in the State of Wisconsin, United States of  
America, on this 12th day of October, 2011

*Maureen A. Wegleitner*

Commissioner for Taking Affidavits

*Joel D. Skinner*

Joel D. SKinner

THIS IS EXHIBIT '25' TO THE DECLARATION  
OF ANDREY PINSKY OF TORONTO, ONTARIO, CANADA

**UNITED STATES PATENT AND TRADEMARK OFFICE  
TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of mark Registration No.: 3981394  
For the mark:           KONCEPT  
Date of First Use:     June 12, 2010  
Date of Registration:  June 21, 2011

ANDREY PINSKY,  
  
                  Petitioner,  
  
                  v.  
  
DOUGLAS BURDA,  
  
                  Registrant.

Cancellation No. 92054551

**AFFIDAVIT OF MIGUEL VILLARREAL, JR.**

I, Miguel Villarreal, Jr., being duly sworn, depose and state the following:

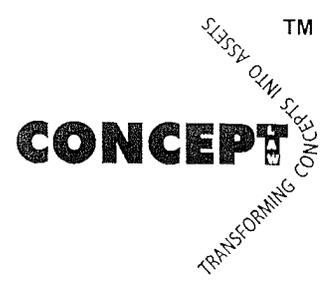
1.     “My name is Miguel Villarreal, Jr. I am over eighteen (18) years of age. I am an intellectual property attorney licensed to practice before the Courts of the State of Texas, the United States District Courts of Texas, the United States Court of Appeals for the Fifth Circuit and the United States Patent and Trademark Office. My practice is primarily in the areas of patent and trademark law. My office is located at 300 Convent St., Suite 1080, San Antonio, Texas 78205. I am fully competent to make this affidavit, and I have personal knowledge of the facts stated in this affidavit. To my knowledge, all of the facts stated in this affidavit are true and correct.
  
2.     Since January 27, 2010, I have been receiving a newsletter distributed by Andrey Pinsky, a Canadian intellectual property and business lawyer. In his newsletter, titled “CONCEPT LAW,” Mr. Pinsky has been advertising and offering his intellectual property and business law services to the residents of the United States of America.

3. Mr. Pinsky clearly marked "CONCEPT LAW" as his trademark in his newsletter, which he used to identify his intellectual property and business law services offered and distributed to the residents of the United States of America.

4. Since January 27, 2010 to date, and based on the newsletters I have received, Mr. Pinsky on a continuous basis has been promoting and offering his intellectual property and business law services under the trademark "CONCEPT LAW" to the residents of the United States.

5. Mr. Pinsky used the trademark "CONCEPT LAW" in his newsletters in the form exhibited in the samples below:

CONCEPT LAW™



6. Further, Affiant sayeth naught."

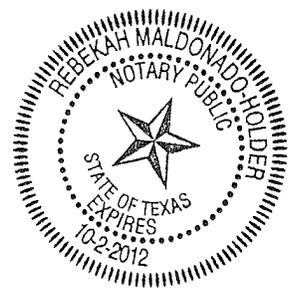
[Handwritten Signature]  
Miguel Villarreal, Jr.

BEFORE ME, the undersigned authority, on this day personally appeared MIGUEL VILLARREAL, JR., known to me to be the person of that name, who signed the foregoing instrument, and acknowledged the same to be his free act and deed.

GIVEN under my hand and seal of office this 4 day of October, 2011.

[Handwritten Signature]  
Signature of Notary Public

Rebekah Maldonado Holder  
Printed Name of Notary Public



My Commission Expires: 10-2-2012  
Notary Public for the State of Texas

THIS IS EXHIBIT '26' TO THE DECLARATION  
OF ANDREY PINSKY OF TORONTO, ONTARIO, CANADA

# PINSKY LAW

*Intellectual Property & Technology Law*

SUITE 900  
45 SHEPPARD AVE. EAST  
TORONTO, ONTARIO  
CANADA, M2N 5W9

TEL: (416) 221 - 2600  
FAX: (416) 221 - 2640  
WWW.PINSKYLAW.CA

June 15, 2011

SENT BY EMAIL TO: [HELLO@KONCEPTLAW.COM](mailto:HELLO@KONCEPTLAW.COM)  
[DOUGLAS.BURDA@GMAIL.COM](mailto:DOUGLAS.BURDA@GMAIL.COM)  
[TRADEMARKASSISTANCECENTER@USPTO.GOV](mailto:TRADEMARKASSISTANCECENTER@USPTO.GOV)

Douglas Burda  
Koncept Innovative Law  
P.O. Box 15533  
Las Vegas, Nevada 89114  
USA

Dear Mr. Burda

**Re: Trademark "Koncept" USPTO file # 85176628**

---

My name is Andrey Pinsky. I am the principal of Pinsky Law, a Canadian intellectual property law firm. As you are aware, CONCEPT LAW™ is trademark under which Pinsky Law distributes its intellectual property services for a number of years. My attention has been directed to your law firm's recent adoption of the trademark and trade name "Koncept Innovative Law" for a very similar legal services promoted and distributed in the same commercial channels.

Pinsky Law adopted the trademark CONCEPT LAW™ in 2007, not only in Canada and the United States but also internationally, and has been promoting its intellectual property services continuously since then. Pinsky Law has extensively promoted its CONCEPT LAW™ services to intellectual property practitioners in Canada, the United States, and internationally through brochures and monthly newsletters and has developed a valuable goodwill in the trademark since its adoption. Pinsky Law CONCEPT LAW™ newsletter has been delivered to thousands of intellectual property professionals in Canada, the United States, and internationally on a monthly basis. As a result, CONCEPT LAW™ has become a well-known trademark for intellectual property services.

Pinsky Law does not have a United States trademark registration for CONCEPT LAW™, but it claims common law rights inuring to it from its long-standing use of that trademark. Trademark rights in the United States arise from use, not mere registration. I sincerely believe that the name "Koncept Innovative Law" and sale of intellectual property legal services under this name may mislead potential clients and intellectual property professionals into believing that your law firm services originate with Pinsky Law or that they are approved, sponsored, or supplied by Pinsky Law. I feel strongly that there is a high likelihood of confusion in the market place between Pinsky Law intellectual property services distributed under the trademark CONCEPT LAW™ and intellectual property services distributed under the name "Koncept Innovative Law". I believe that you are no more eager to suffer such confusion than Pinsky Law is. Accordingly, I ask that before your fledgling services get off the ground under the name "Koncept Innovative Law", you consider adopting another

name and another trademark that could not create any confusion with Pinsky Law long-standing trademark CONCEPT LAW™.

My attention has also been directed to the fact that you filed trademark application for registration of the trademark "Koncept" on the principal register of the United States Patent and Trademark Office (USPTO). The trademark application (#85176628) was filed on November 15, 2010, and is still alive. You claimed June 12, 2010, as the date of first use of the trademark "Koncept". A simple Internet search for words "concept law" would have revealed to you that on both of those dates CONCEPT LAW™ was a trademark used by Pinsky Law to distribute its legal services. I can discern no legitimate commercial justification for your use and registration of the trademark "Koncept" other than to profit from Pinsky Law extensive advertising of the trademark CONCEPT LAW™ and the invaluable goodwill generated by it. Your actions are indefensible, as the numerous federal cases demonstrate. I am asking you to voluntarily abandon your trademark application with the USPTO for the trademark "Koncept". I am asking you to abandon your trademark application in order to avoid expenses that will arise from expungement proceedings I will have to commence to cancel registration of the trademark "Koncept".

If you believe that I am mistaken in my conviction that there inevitably will be confusion between CONCEPT LAW™ trademark and "Koncept" trademark, I welcome your written comments. However, if I have persuaded you that there may be substantial confusion, it stands to reason that as the junior adopter, you might consider renaming your law firm and the trademark it uses to distribute its services. I look forward to receiving your written reply at your earliest convenience.

Yours very truly,

  
Andrey Pinsky

Copy to: Caryn Glasser United States Patent and Trademark Office by email and mail

THIS IS EXHIBIT **27** TO THE DECLARATION  
OF ANDREY PINSKY OF TORONTO, ONTARIO, CANADA

# PINSKY LAW

*Intellectual Property & Technology Law*

SUITE 900  
45 SHEPPARD AVE. EAST  
TORONTO, ONTARIO  
CANADA, M2N 5W9

TEL: (416) 221 - 2600  
FAX: (416) 221 - 2640  
WWW.PINSKYLAW.CA

June 15, 2011

SENT BY EMAIL TO: [TRADEMARKASSISTANCECENTER@USPTO.GOV](mailto:TRADEMARKASSISTANCECENTER@USPTO.GOV)

SENT BY FAX TO: (571) 270-2517

AND BY MAIL TO:

Caryn Glasser  
Trademark Assistance Center  
P.O. Box 15533 Madison East,  
Concourse Level Room C 55  
600 Dulany Street  
Alexandria, VA 22314  
USA

Dear Ms. Glasser

**Re: Trademark "Koncept" USPTO file # 85176628**

---

Please find enclosed letter to Mr. Douglas Burda concerning the abovementioned trademark application.

Yours very truly,

  
Andrey Pinsky

THIS IS EXHIBIT **28** TO THE DECLARATION  
OF ANDREY PINSKY OF TORONTO, ONTARIO, CANADA

---

**To:** The Concept Law Group, P.A. ([scott@pats-tms.com](mailto:scott@pats-tms.com))  
**Subject:** U.S. TRADEMARK APPLICATION NO. 85230890 - THE CONCEPT LAW GROUP - TCLG/TM  
**Sent:** 5/3/2011 10:45:34 AM  
**Sent As:** ECOM109@USPTO.GOV  
**Attachments:** [Attachment - 1](#)  
[Attachment - 2](#)  
[Attachment - 3](#)  
[Attachment - 4](#)

---

**UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)  
OFFICE ACTION (OFFICIAL LETTER) ABOUT APPLICANT'S TRADEMARK APPLICATION**

**APPLICATION SERIAL NO.** 85230890

**MARK:** THE CONCEPT LAW GROUP

**\*85230890\***

**CORRESPONDENT ADDRESS:**

SCOTT SMILEY  
THE CONCEPT LAW GROUP, P.A.  
716 NW 30TH CT  
FORT LAUDERDALE, FL 33311-1722

**CLICK HERE TO RESPOND TO THIS LETTER:**

[http://www.uspto.gov/trademarks/teas/response\\_forms.jsp](http://www.uspto.gov/trademarks/teas/response_forms.jsp)

**APPLICANT:** The Concept Law Group, P.A.

**CORRESPONDENT'S REFERENCE/DOCKET  
NO:**

TCLG/TM

**CORRESPONDENT E-MAIL ADDRESS:**

[scott@pats-tms.com](mailto:scott@pats-tms.com)

**OFFICE ACTION**

**STRICT DEADLINE TO RESPOND TO THIS LETTER**

TO AVOID ABANDONMENT OF APPLICANT'S TRADEMARK APPLICATION, THE USPTO MUST RECEIVE APPLICANT'S COMPLETE RESPONSE TO THIS LETTER **WITHIN 6 MONTHS** OF THE ISSUE/MAILING DATE BELOW.

**ISSUE/MAILING DATE:** 5/3/2011

The assigned trademark examining attorney has reviewed the referenced application and has determined the following:

**Prior Pending Application**

The filing dates of pending Application Serial Nos. 85176628 precede applicant's filing date. See attached referenced applications. If one or more of the marks in the referenced applications register, applicant's mark may be refused registration under Trademark Act Section 2(d) because of a likelihood of confusion with the registered mark(s). See 15 U.S.C. §1052(d); 37 C.F.R. §2.83; TMEP §§1208 *et seq.* Therefore, upon receipt of applicant's response to this Office action, action on this application may be suspended pending final disposition of the earlier-filed referenced applications.

In response to this Office action, applicant may present arguments in support of registration by addressing the issue of the potential conflict between applicant's mark and the marks in the referenced applications. Applicant's election not to submit arguments at this time in no way limits applicant's right to address this issue later if a refusal under Section 2(d) issues.

### **Mark Differs on Drawing and Specimen**

The mark on the specimen disagrees with the mark on the drawing. In this case, the specimen displays the mark as THE CONCEPT LAW GROUP, P.A.; and the drawing shows the mark as only THE CONCEPT LAW GROUP.

An application based on Trademark Act Section 1(a) must include a specimen showing the applied-for mark in use in commerce for each class of goods and/or services. Trademark Act Sections 1 and 45, 15 U.S.C. §§1051, 1127; 37 C.F.R. §§2.34(a)(1)(iv), 2.56(a); TMEP §§904, 904.07(a). The mark on the drawing must be a substantially exact representation of the mark on the specimen. 37 C.F.R. §2.51(a); TMEP §807.12(a); see 37 C.F.R. §2.72(a)(1). In addition, the drawing of the mark can be amended only if the amendment does not materially alter the mark as originally filed. 37 C.F.R. §2.72(a)(2); see TMEP §§807.12(a), 807.14 *et seq.*

Therefore, applicant must submit one of the following:

- (1) A new drawing of the mark that agrees with the mark on the specimen but does not materially alter the original mark. See 37 C.F.R. §2.72(a)(2); TMEP §§807.12(a), 807.14 *et seq.* Amending the drawing to agree with the specimen would not be considered a material alteration of the mark in this case.; or
- (2) A substitute specimen showing use in commerce of the mark on the drawing, and the following statement, verified with an affidavit or signed declaration under 37 C.F.R. §2.20: **“The substitute specimen was in use in commerce at least as early as the filing date of the application.”** See 37 C.F.R. §§2.59(a), 2.193(e)(1); TMEP §§807.12(a), 904.05. If submitting a specimen requires an amendment to the dates of use, applicant must also verify the amended dates. 37 C.F.R. §2.71(c); TMEP §904.05.

If applicant cannot satisfy one of the above requirements, applicant may amend the application from a use in commerce basis under Trademark Act Section 1(a) to an intent to use basis under Section 1(b), for which no specimen is required. See TMEP §806.03(c). However, if applicant amends the basis to Section 1(b), registration will not be granted until applicant later amends the application back to use in commerce by filing an acceptable allegation of use with a proper specimen. See 15 U.S.C. §1051(c)-(d); 37 C.F.R. §§2.76, 2.88; TMEP §1103.

To amend to Section 1(b), applicant must submit the following statement, verified with an affidavit or

signed declaration under 37 C.F.R. §2.20: **“Applicant has had a bona fide intention to use the mark in commerce on or in connection with the goods and/or services listed in the application as of the filing date of the application.”** 37 C.F.R. §2.34(a)(2); TMEP §806.01(b); *see* 15 U.S.C. §1051(b); 37 C.F.R. §2.35(b)(1), 2.193(e)(1).

Pending receipt of a proper response, registration is refused because the specimen does not show the applied-for mark in use in commerce as a trademark and/or service mark. Trademark Act Sections 1 and 45, 15 U.S.C. §§1051, 1127; 37 C.F.R. §§2.34(a)(1)(iv), 2.56(a); TMEP §§904, 904.07(a).

### **DISCLAIMER REQUIRED**

Applicant must disclaim the descriptive wording “LAW GROUP” apart from the mark as shown because it merely describes an ingredient, quality, characteristic, function, feature, purpose or use of applicant’s goods and/or services. *See* 15 U.S.C. §§1052(c)(1), 1056(a); *In re Steelbuilding.com*, 415 F.3d 1293, 1297, 75 USPQ2d 1420, 1421 (Fed. Cir. 2005); *In re Gyulay*, 820 F.2d 1216, 1217-18, 3 USPQ2d 1009, 1010 (Fed. Cir. 1987); TMEP §§1213, 1213.03(a).

Specifically, the application lists applicant as providing legal services. The term LAW GROUP indicates applicant is a provider of those services..

The following is the standard format used by the Office:

**No claim is made to the exclusive right to use “LAW GROUP” apart from the mark as shown.**

TMEP §1213.08(a)(i); *see In re Owatonna Tool Co.*, 231 USPQ 493 (Comm’r Pats. 1983).

**TEAS PLUS APPLICANTS MUST SUBMIT DOCUMENTS ELECTRONICALLY OR SUBMIT FEE:** Applicants who filed their application online using the reduced-fee TEAS Plus application must continue to submit certain documents online using TEAS, including responses to Office actions. *See* 37 C.F.R. §2.23(a)(1). For a complete list of these documents, see TMEP §819.02(b). In addition, such applicants must accept correspondence from the Office via e-mail throughout the examination process and must maintain a valid e-mail address. 37 C.F.R. §2.23(a)(2); TMEP §§819, 819.02(a). TEAS Plus applicants who do not meet these requirements must submit an additional fee of \$50 per international class of goods and/or services. 37 C.F.R. §2.6(a)(1)(iv); TMEP §819.04. In appropriate situations and where all issues can be resolved by amendment, responding by telephone to authorize an examiner’s amendment will not incur this additional fee.

If the applicant has any questions or needs assistance regarding this action, please telephone the assigned examining attorney.

/Frank J Lattuca/  
Trademark Examining Attorney  
Law Office 109  
Tel: (571) 270-1518  
Email: Frank.Lattuca@uspto.gov

**TO RESPOND TO THIS LETTER:** Go to [http://www.uspto.gov/trademarks/teas/response\\_forms.jsp](http://www.uspto.gov/trademarks/teas/response_forms.jsp). Please

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wait 48-72 hours from the issue/ mailing date before using TEAS, to allow for necessary system updates of the application. For *technical* assistance with online forms, e-mail [TEAS@uspto.gov](mailto:TEAS@uspto.gov). For questions about the Office action itself, please contact the assigned trademark examining attorney. **E-mail communications will not be accepted as responses to Office actions; therefore, do not respond to this Office action by e-mail.**

**All informal e-mail communications relevant to this application will be placed in the official application record.**

**WHO MUST SIGN THE RESPONSE:** It must be personally signed by an individual applicant or someone with legal authority to bind an applicant (i.e., a corporate officer, a general partner, all joint applicants). If an applicant is represented by an attorney, the attorney must sign the response.

**PERIODICALLY CHECK THE STATUS OF THE APPLICATION:** To ensure that applicant does not miss crucial deadlines or official notices, check the status of the application every three to four months using Trademark Applications and Registrations Retrieval (TARR) at <http://tarr.uspto.gov/>. Please keep a copy of the complete TARR screen. If TARR shows no change for more than six months, call 1-800-786-9199. For more information on checking status, see <http://www.uspto.gov/trademarks/process/status/>.

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Print: May 3, 2011

85176628

Issue: 0000/00/00

**DESIGN MARK**

**Serial Number**

85176628

**Status**

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**Word Mark**

KONCEPT

**Standard Character Mark**

Yes

**Type of Mark**

SERVICE MARK

**Register**

PRINCIPAL

**Mark Drawing Code**

(4) STANDARD CHARACTER MARK

**Owner**

Burda, Douglas INDIVIDUAL UNITED STATES P.O. Box 15533 Las Vegas  
NEVADA 89114

**Goods/Services**

Class Status -- ACTIVE. IC 045. US 100 101. G & S: Legal services.  
First Use: 2010/06/12. First Use In Commerce: 2010/06/12.

**Filing Date**

2010/11/15

**Examining Attorney**

GLASSER, CARYN

**Attorney of Record**

Douglas Burda

# KONCEPT

Print: May 3, 2011

85176628

Issue: 0000/00/00

**DESIGN MARK**

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**Goods/Services**

Class Status -- ACTIVE. IC 045. US 100 101. G & S: Legal services.  
First Use: 2010/06/12. First Use In Commerce: 2010/06/12.

**Filing Date**

2010/11/15

**Examining Attorney**

GLASSER, CARYN

**Attorney of Record**

Douglas Burda

# KONCEPT

THIS IS EXHIBIT **29** TO THE DECLARATION  
OF ANDREY PINSKY OF TORONTO, ONTARIO, CANADA

---

**To:** The Concept Law Group, P.A. ([scott@pats-tms.com](mailto:scott@pats-tms.com))  
**Subject:** U.S. TRADEMARK APPLICATION NO. 85230890 - THE CONCEPT  
LAW GROUP - TCLG/TM  
**Sent:** 5/3/2011 10:45:37 AM  
**Sent As:** ECOM109@USPTO.GOV  
**Attachments:**

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**IMPORTANT NOTICE REGARDING YOUR  
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**USPTO OFFICE ACTION HAS ISSUED ON 5/3/2011 FOR  
SERIAL NO. 85230890**

Please follow the instructions below to continue the prosecution of your application:

**TO READ OFFICE ACTION:** Click on this [link](#) or go to <http://portal.uspto.gov/external/portal/tow> and enter the application serial number to access the Office action.

**PLEASE NOTE:** The Office action may not be immediately available but will be viewable within 24 hours of this e-mail notification.

**RESPONSE IS REQUIRED:** You should carefully review the Office action to determine (1) how to respond; and (2) the applicable response time period. Your response deadline will be calculated from 5/3/2011 (or sooner if specified in the office action).

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**WARNING**

**Failure to file the required response by the applicable deadline will result in the ABANDONMENT of your application.**

Side - 1



**NOTICE OF ABANDONMENT**  
**MAILING DATE: Nov 29, 2011**

The trademark application identified below was abandoned in full because a response to the Office Action mailed on May 3, 2011 was not received within the 6-month response period.

If the delay in filing a response was unintentional, you may file a petition to revive the application with a fee. If the abandonment of this application was due to USPTO error, you may file a request for reinstatement. Please note that a petition to revive or request for reinstatement **must be received within two months from the mailing date of this notice.**

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**SERIAL NUMBER:** 85230890  
**MARK:** THE CONCEPT LAW GROUP  
**OWNER:** The Concept Law Group, P.A.

Side - 2

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## Las Vegas Bankruptcy Lawyers

### Xenophon M. Peters



Attorney Xenophon M. Peters is a founding partner at Peters & Associates, LLP in Las Vegas, where he concentrates on helping people and businesses in Las Vegas, North Las Vegas and Henderson, Nevada with Chapter 7 and Chapter 13 bankruptcy, debt settlement, loan modifications, foreclosure mediations, short sales, and deeds in lieu of foreclosure.

Mr. Peters' experience includes complex real estate law in the areas of real estate development, transactions and commercial finance. Mr. Peters has represented some of the largest developers in Las Vegas regarding apartment complexes, mixed-use projects, and high-rise resorts, condominiums and condominium-hotel developments. He has represented

both buyers and sellers in the purchase and sale of hotels/casinos and developed/undeveloped land. Currently, Mr. Peters focuses his practice on residential and commercial loan modifications, foreclosure mediations, short sales and consumer bankruptcies.

Prior to becoming an attorney, Mr. Peters was a financial advisor at a major stock brokerage. There, he guided his clients to help attain their financial goals. With this financial background, Mr. Peters is not only able to give clients their best legal options out of debt, but also help them achieve their ultimate financial goals once their debt issues have been resolved.

#### Education:

J.D., Board School of Law, University of Nevada, Las Vegas  
B.S., University of Colorado

#### Admissions:

California State Bar  
Nevada State Bar

#### Professional Associations/Memberships:

State Bar of California  
State Bar of Nevada  
Named as Super Lawyers Rising Star – 2011

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PETERS AND  
ASSOCIATES, LLP

5426 SOUTH EASTERN AVENUE  
SUITE 100  
LAS VEGAS, NV 89119

TELEPHONE: 702-583-4940  
FAX: 702-473-9138

### Las Vegas Bankruptcy Lawyer Judah Zakalik



Attorney Judah Zakalik is a Partner in Peters & Associates, LLP, a Nevada law firm helping consumers in Las Vegas and Henderson find debt relief through a Chapter 7 or Chapter 13 bankruptcy or debt settlement, and helping homeowners avoid foreclosure through loan modifications and workouts, short sales, and deeds in lieu of foreclosure.

Mr. Zakalik's legal background includes experience in corporate litigation, real estate transactions, corporate bankruptcies, and intellectual property rights. As a courtroom litigator, Mr. Zakalik represented financial institutions in lawsuits brought by homeowners for violations of federal statutes. This

Mr. Zakalik's experience has proved invaluable in Mr. Zakalik's current practice, helping homeowners and businesses keep their residential and commercial property through the loan modification process and consumer bankruptcies.

As a Founding Member of the Diversity Committee within the State Bar of Nevada, Mr. Zakalik actively volunteers his time to increase diversity within the legal profession in the State of Nevada. When not practicing law, Mr. Zakalik enjoys the Las Vegas arts and music scene, traveling, and engaging in snow sports and martial arts.

**Education:**

J.D., *magna cum laude*, Seattle University School of Law  
B.A., University of Washington

**Admissions:**

Nevada State Courts  
Nevada Federal Courts

**Professional Associations/Memberships:**

State Bar of Nevada (Founding Member, Diversity Committee)

---

**Jennifer Rigdon, Associate**

Jennifer Rigdon is an associate at Peters & Associates, LLP, where she practices primarily in the area of consumer bankruptcy law in the Las Vegas, North Las Vegas and Henderson, Nevada regions, with a focus on debtor rights in Chapter 7 and Chapter 13.

Ms. Rigdon graduated with a Bachelor of Arts degree, *summa cum laude*, from the University of California, Los Angeles in 2004. She earned her Juris Doctorate from the University of Nevada, Las Vegas, William Boyd School of Law in 2007. While attending law school, she served as a judicial extern to the Honorable Timothy P. Greeley of the United States District Court for the Western District of Michigan. She also served as an extern to the Nevada Attorney General's Office. She is admitted to practice before the state and federal courts of Nevada and is a member of the State Bar of Nevada.

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# PANDA

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<b>Goods and Services</b>	IC 045. US 100 101. G & S: Legal services. FIRST USE: 20110318. FIRST USE IN COMMERCE: 20110321
<b>Standard Characters Claimed</b>	
<b>Mark Drawing Code</b>	(4) STANDARD CHARACTER MARK
<b>Serial Number</b>	85272772
<b>Filing Date</b>	March 21, 2011
<b>Current Filing Basis</b>	1A
<b>Original Filing Basis</b>	1A
<b>Published for Opposition</b>	August 2, 2011
<b>Registration Number</b>	4041945
<b>Registration Date</b>	October 18, 2011
<b>Owner</b>	(REGISTRANT) Douglas Burda INDIVIDUAL UNITED STATES 900 Las Vegas Boulevard South, Unit 1009 Las Vegas NEVADA 89101
<b>Attorney of Record</b>	Douglas Burda
<b>Type of Mark</b>	SERVICE MARK
<b>Register</b>	PRINCIPAL
<b>Live/Dead Indicator</b>	LIVE

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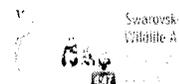
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**CERTIFICATE OF ELECTRONIC FILING**

I certify that a true and complete copy of the foregoing PETITIONER'S DECLARATION filed pursuant to the Order of the Trademark Trial and Appeal Board dated December 1, 2011 is being electronically transmitted to the Trademark Trial and Appeal Board, U.S. Patent and Trademark Office on December 30, 2011.

By:



Andrey Pinsky

**CERTIFICATE OF SERVICE**

I hereby certify that a true and complete copy of the foregoing PETITIONER'S DECLARATION filed pursuant to the Order of the Trademark Trial and Appeal Board dated December 1, 2011 has been served on Douglas Burda by sending a copy via FedEx on December 29, 2011 to:

DOUGLAS BURDA  
KONCEPT INNOVATIVE LAW  
UNIT 1009  
900 LAS VEGAS BOULEVARD SOUTH  
LAS VEGAS, NEVADA, 89101  
USA

By:



Andrey Pinsky