

To:
UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
PO Box 1451
Alexandria, VA 22313-1451



To:
R.J. Heher, Esq.
Fenwick & West LLP - Silicon Valley Center
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by both Electronic Mail and US Mail deliveries sent today Aug 15 2008.

RE: Opposition No. 91185136
Application No. 77362188

I agree with Opposers claim #1. I have applied for a trademark on the term and design FREEMLSLISTING.COM.

With respect to their subsequent claims 2-7, there is insufficient evidence to agree with Opposers claims and except for claim 2 & 4 they are categorically denied.

a) It is unclear the term "MLS Listing" is exclusively linked to the terms "MLSListings.com" and "infolink" without further research and evidence. In fact, the vast majority of evidence indicates otherwise. For example, in section 4, Opposers state that they "base this Opposition on all rights arising from use of the MLSListings mark on the World Wide Web". However, there are enormous numbers of references to "MLS Listing" on the "World Wide Web" that are not exclusive to "MLSListings.com" and "infolink". A search of the World Wide Web (using Google) for the term "MLS Listing", excluding the terms "MLSListings.com" and "infolink", yields over 6 million results. Thus, it is not clear the plaintiffs have demonstrated exclusive use of this term on the World Wide Web.

a 2) Furthermore, using Google and searching for "MLS Listings" in quotes for exact returns reveals more than 6 million results. On Aug 15 2008 the date of this response defendant scanned thru the first 100-Pages which represents 1,000 Google results and did not find "mls listings" which results were the Opposers.

a 3) In addition Opposers trademark is regarding MLSListings with a plural ending but Defendant's mark contains the word "FREE" and is also regarding the singular word "Listing" (non-plural), also using the word 'Free.'

a 4) Opposer is without a doubt NOT commonly known as "MLSListing" "MLS Listing" or "MLSListings" or "MLS Listings" which four terms are commonly used by



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tens of thousands of other offline and online firms and Realtors nationwide, including hundreds of MLS Multiple Listing Associations in the 50-states who are in the MLS Listing(s) business, and by the well known Realtor.com who uses the words extensively nationwide. Opposer is also definitely not known by the term "FreeMLSListing.com"

a) 5) In addition, Opposer states in section 4 they have used MLSlistings since 1997 however the term has been extremely widely used by thousands of nationwide real estate firms and Realtors, plus numerous state MLS Listings Associations for many decades prior to and after the year 1997.

b) It is unclear that the services by "MLSListings.com" are provided nationwide listings without further research and evidence. For example, in section 3, Opposers state that their "basis for this Opposition to registration and use of Applicant's FREEMLSLISTING.COM mark, all those common law rights accrued in and arising from use of the MLSLISTINGS mark individually and collectively in the United States and abroad." However, the MLSListings.com website says -- "Welcome to MLSListings.com, a helpful search tool to find active real estate listings in Silicon Valley and neighboring communities." -- and -- "Working together for the good of the real estate professionals in Northern California, two key MLS's--RE InfoLink and Central Valley MLS--have merged to form MLSListings, formerly the Northern California Real Estate Exchange (NCREX)." Further, going to their online service, clicking on "City," and then clicking on "Out of State" -- yields no results. Thus, it is not clear that the plaintiffs have demonstrated listings outside the State of California.

c) It is unclear that the plaintiff's trademark in Class 42 (computer services) extends to Class 35 without further research and evidence. Although not all of the plaintiff's trademark application history is available online, it appears the plaintiff originally claimed use in Class 35, but was rejected by the USPTO examining attorney on November 7 2001. If their claim to use in Class 35 was rejected in the application process, it's not clear how their claim to Class 35 has become valid since then.

1. Admit.

2. Admit but with strong Caveats regarding the strength of the Opposers mark to successfully mount this challenge: The Opposers Trademark is a trademark in the Supplemental Registry and not the Primary Registry. The Supplemental Register is a secondary list of registered marks maintained by the USPTO. Marks on the Supplemental Register do not qualify for registration on the Principal Register, and as such, these marks do not receive many of the benefits of registration available on the Principle Register. Furthermore, Domain Dispute Proceedings will not accept federal trademark or service mark registrations from the supplemental registry to initiate the dispute procedure. Supplemental Registry is for marks which have not achieved secondary meaning or acquired distinctiveness, which thus may not be registered on the principal register, but it may be able to be registered on the supplemental register. A mark on the supplemental registry does not have a nationwide priority against 3rd party users

(basically Supplemental Trademark rights extend only to the geographic area where the mark is actually being used.

3. Deny.

A TDR document in the online USPTO records for the Plaintiff's trademark on "MLSLISTINGS" that is labeled "Paper Correspondence Incoming", says -- "In the November 7, 2001 Office Action, the Examining Attorney stated her determination that the proposed mark is generic as to the services in Class 35, now covered in the new, divided application." It appears that this "new, divided" application became "Serial Number 75482119" for Class 35. Its services are listed as "(ABANDONED) IC 035. US 100 101 102. G & S: advertising and promotion database products and services for others offered in the field of real estate available on a global computer network and on individual web sites, namely-- (1) dissemination of advertising for others via an online communications network; and (2) rental of advertising space for others on a global computer network; and (3) dissemination of advertising matter for others regarding global communication network and database services." This application by the Plaintiff in Class 35 appears to have been abandoned and is now listed as dead at the USPTO. This "Notice of Opposition" appears to make claim to exclusive rights to use the term in Class 35 when those claims appear to have already been rejected by the USPTO when the Plaintiff sought them previously. There does not seem to be good reason to reverse the earlier decision by the USPTO on this matter.

4. Admit.

5. Deny.

Although Plaintiff has trademark rights in "MLSListings" in Class 42, Plaintiff does not have trademark rights in "MLS Listing" in Class 35. The term "MLS Listing", without a distinctive design, is a generic term in Class 35 in real estate. This appears to be why the USPTO originally rejected the Plaintiff's application for a trademark in Class 35. Further, the Plaintiff's trademark is a combination of two words "MLSListings" and does not make a standard character claim. Further, the Plaintiff does not appear to have been the exclusive user of the term "MLS Listing" so as to support common law rights to this extremely commonly used general phrase used widely in the real estate industry. A Google(tm) search of the World Wide Web for the term "MLS Listing" excluding pages with the term "MLSListings" yields over 6 million web pages. USPTO rejection of Plaintiff's original Class 35 claim as generic and over 6 million listings for the term apart from Plaintiff combine to extremely strong evidence that the term "MLS Listing" is a generic term in Class 35 for which Plaintiff has not demonstrated exclusive use and Opposers challenge is completely without merit.

6. Deny.

Plaintiff claims nationwide and international use of their mark, but does not appear to have demonstrated MLS listing services outside of California. Their MLSListings.com website says -- "Welcome to MLSListings.com, a helpful search tool to find active real estate listings in Silicon Valley and neighboring communities." -- and -- "Working together for the good of the real estate professionals in Northern California, two key MLS's--RE InfoLink and Central Valley MLS--have merged to form MLSListings, formerly the Northern California Real Estate Exchange (NCREX)." If one goes to their online service, clicks on "City," and then clicks on "Out of State" -- there are no results outside of California. Thus, we could not find evidence that Plaintiff is providing MLS listing services outside of California.

7. Deny.

(same reasoning as response to claim 5)

Finally in closing, let me say the Opposers attempt trying to stop my legitimate trademark is completely baseless and without any merit and we are also quite shocked and bewildered they can be so bold to make such grossly exaggerated and false assertions.

Sincerely,



David M. Green

(please note new correspondence address and email below)

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August 15 2008 - date of this answer and date sent by US Mail and email.

Proof of Service

I am working in County of Maricopa Arizona and am over 18-yrs of age and on the date indicated below and Under Penalty of Perjury swears to serving the Answer to the Notice of Opposition by placing a true copy in the US Mail, postage affixed envelope on the above date (and by email to R. J. Heher) addressed to both The UNITED STATES PATENT AND TRADEMARK OFFICE, Trademark Trial and Appeal Board, PO Box 1451, Alexandria, VA 22313-1451, and To: R.J. Heher, Esq. Fenwick & West LLP - Silicon Valley Center, 801 California Street, Mountain View, CA 94041.



David M. Green

Date: August 15 2008