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

Proceeding	91197762
Party	Defendant Delphix Corp.
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Date	04/16/2012
Attachments	Delphix Rule 12(c) Motion.pdf (11 pages)(38585 bytes) Delphix Rule 12(c) Declaration.pdf (8 pages)(114030 bytes)

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

In the matter of
Trademark Application No. 77/944,256
Mark: DELPHIX
Trademark Registration No. 3,768,914
Mark: DELPHIX (Logo)

Embarcadero Technologies, Inc., Opposer and Petitioner, vs. Delphix Corp., Applicant and Registrant.	Opposition No.: 91197762 Cancellation No.: 92055153

DELPHIX CORP'S MOTION FOR JUDGMENT ON THE PLEADINGS ON EMBARCADERO TECHNOLOGIES, INC.'S CLAIM OF FRAUD AND MEMORANDUM IN SUPPORT THEREOF

Registrant and Applicant Delphix Corp. ("Delphix"), pursuant to Rule 12(c) of the Federal Rules of Civil Procedure and TBMP § 504, hereby moves for judgment on the pleadings because of Petitioner and Opposer Embarcadero Technologies, Inc.'s ("Embarcadero") failure to adequately plead its fraud claim regarding Delphix's Registration No. 3,768,914.

INTRODUCTION

Embarcadero's fraud theory is based on a misunderstanding of the law. Embarcadero first alleges that Delphix issued a press release after filing its Statement of Use. Petition at ¶¶ 19-20. Embarcadero then alleges that in order for a mark to be used in commerce the mark must be "generally and widely available." *Id.* ¶¶ 19-20. From these bare allegations, Embarcadero

presumes that Delphix could not have used the Delphix Mark before issuing its press release and therefore it committed fraud on the USPTO. This is not the law. There is no "press release" or "generally and widely available" standard to establish use in commerce. Nor can the mere fact that an Applicant issued a press release after filing its Statement of Use support a particularized and plausible claim of fraud.

Recognizing that it cannot plead specific facts supporting its fraud claim, Embarcadero tries to mask its failures under the guise of an "investigation." *Id.* ¶¶ 19-22. Embarcadero made no real investigation. Embarcadero's "investigation" consisted entirely of reviewing the Delphix Mark application and one press release on Delphix's website – both publicly available. Reviewing widely-known and mundane facts is not an investigation. Nor can re-reviewing documents considered by the examiner be an investigation. Without any investigation, Embarcadero's fraud claim rests solely on its unfounded belief rather than the particularized facts required to adequately plead a fraud claim. The Board should not allow Embarcadero's formulaic incantation of an "investigation" to circumvent the mandate that fraud allegations must provide "specific facts upon which the belief is reasonably based."

Given Embarcadero failure to allege particularized and plausible facts supporting its fraud allegations, Delphix respectfully requests dismissal of Embarcadero's conclusory and implausible fraud claim.

ARGUMENT

A. Embarcadero's Fraud Claims "Should Not Be Taken Lightly" and Are Subject to Stringent Pleading Standards

At a minimum under Federal Rule of Civil Procedure 8's notice pleading standards, an adequate pleading "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Embarcadero must allege facts that, when considered true, raise the right to relief

"above the speculative level." *Id; see also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.") Even if a petition contains specific factual allegations, "only a complaint that states a plausible claim for relief," rather than "the mere possibility of misconduct," will survive a motion to dismiss. *Iqbal*, 129 S. Ct. at 1950. These pleading standards prevent a petitioner with a "largely groundless claim" from proceeding "*in terrorem*." *Twombly*, 550 U.S. at 557-58.

On top of these minimum pleading requirements, Embarcadero must plead its fraud allegations under the heightened requirements of Federal Rule of Civil Procedure 9(b). *Asian & Western Classics B.V. v. Selkow*, 92 USPQ2d 1478, 1478 (TTAB 2009). Allegations of fraud in procuring a trademark registration "should not be taken lightly" and receive demanding scrutiny. *In re Bose Corp.*, 580 F.3d 1240, 91 USPQ2d 1938, 1941 (Fed. Cir. 2009). *In re Bose* sets out the relevant standard for proving fraud:

> Fraud in procuring a trademark registration or renewal occurs when an applicant knowingly makes false, material representations of fact in connection with his application. A party seeking cancellation of a trademark registration bears a heavy burden of proof. Indeed, "the very nature of the charge of fraud requires that it be proven 'to the hilt' with clear and convincing evidence. There is no room for speculation, inference or surmise and, obviously, any doubt must be resolved against the charging party."

Id. at 1939 (internal citations omitted). The Trademark Trial and Appeal Board incorporates these exacting principles into its review of whether fraud is sufficiently pled. *See Asian & Western Classics*, 92 USPQ2d at 1478-79.

Under these standards, Embarcadero must allege with particularity that Delphix *knowingly* made a *false, material misrepresentation* in seeking a registration with the *intent* to deceive the United States Patent and Trademark Office ("USPTO"). *Id.* at 1478-79. Rule 9(b) further requires that Embarcadero's "pleadings [must] contain explicit rather than implied

expression of the circumstances constituting fraud." *Id.* at 1478 (quoting *King Automotive, Inc. v. Speedy Muffler King, Inc.*, 667 F.2d 1008, 212 USPQ 801, 803 (CCPA 1981)). This particularity requirement means that the allegations must "identify the specific who, what, when, where, and how of the material misrepresentation." *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 91 USPQ2d 1656, 1667 (Fed Cir. 2009). The purpose of Rule 9(b) is to weed out baseless claims, prevent fishing expeditions, and serve the goals of Rule 11. *Asian & Western Classics*, 92 USPQ2d at 1479.

Here, Embarcadero's formulaic legal conclusions and threadbare factual assertions fail to pass Rule 8(a) muster, much less the particularized pleading requirements set out by the Board and Rule 9(b). Accordingly, the Board should grant Delphix's motion for judgment on the pleadings and dismiss Embarcadero's insufficient fraud allegations.[1]

B. Embarcadero's Fraud Claim Fails to Allege Any Particular Facts that Delphix Made a False, Material Representation to the USPTO.

Embarcadero alleges that Delphix "knowingly made false, material representations to the USPTO with the intent to deceive" based ***entirely*** on its invented legal standard that the Delphix Mark could not be "used in commerce" until a press release is issued or until the product using the mark was "generally and widely available." Petition ¶¶ 15-20. This is not what the Trademark Act[2] or precedent requires. Instead, use in commerce is a flexible standard, which takes account of different industry practices. *Automedx v. Artivant Corp.*, 95 USPQ2d 1976, 1981 (TTAB 2010). For example, prelaunch activities, including test marketing, have long been

[1] A motion for judgment on the pleadings is especially appropriate for disposing of inadequately pleaded claims. *See* Fed. R. Civ. P. 12(h)(2)(B). Further, Rule 12(c) motions may target individual claims and seek partial judgment on the pleadings. *Kraft Group LLC v. Harpole*, 90 USPQ2d 1837, 1840 (TTAB 2009).

[2] Section 45 of the Trademark Act, 15 U.S.C. § 1127 defines "use in commerce" as a "bona fide use of a mark in the ordinary course of trade, and not merely to reserve a right in a mark." This definition includes no requirement that to qualify, a mark must have been publicly "launched" or be "generally and widely available."

held sufficient for establishing use of a mark in commerce. *Id*. (collecting cases and quoting *McCarthy on Trademarks and Unfair Competition* § 19:109 (4th ed. 2010) that "sales made in a test marketing program will probably suffice as a bona fide use of the mark in the ordinary course of trade because test market sales are a common harbinger of a proposed new product launch."); *see also Chance v. Pac-Tel Teletrac Inc*, 242 F.3d 1151, 58 USPQ2d 1222, 1228 (9th Cir. 2001) (conducting a public relations campaign, including interviews with major papers, brochures, and a slide deck was sufficient to establish "use in commerce" because trademark rights can vest even before any goods or services are actually sold if the totality of one's prior actions establish a right to use the trademark); *Allard Enters., Inc. v. Advanced Programming Res., Inc.*, 146 F.3d 350, 46 USPQ2d 1865, 1872-73 (6th Cir. 1998) (word-of-mouth marketing campaign seeking targeted sales constituted "use in commerce," even though the mark had not gained "wide public recognition").

Embarcadero ignores these rules and instead alleges that because Delphix issued a September 2010 press release they could not have previously used the Delphix Mark. Petition ¶¶ 17, 19, 20. But there is no "press release" standard for use in commerce. Any company can use its mark before issuing a press release. A company can likewise use its mark before making it "generally and widely available." *See Automedx,* 95 USPQ2d at 1982 ("The Board has held that *bona fide* test marketing and experimental sales in small volumes are sufficient to show use of a mark" (citing *E.I. du Pont de Nemours and Co. v. Big Bear Stores, Inc.*, 161 USPQ 50, 51 (TTAB 1969)); *Allard Enters.*, 46 USPQ2d at 1873 (commercial use of a mark does not require "wide public recognition."). If, Embarcadero's "press release" standard was the law, then anytime an applicant issued a press release *after* filing its Statement of Use, the applicant would be subject to a fraud claim.

Nevertheless, a cursory glance at the September 2010 press release demonstrates that the Delphix Mark *was and had long been* in commercial use prior to that date. *See* Declaration of

Eric Ball, Ex. A ("Delphix Launches First Database Virtualization Solution at DEMO").[3] The press release is principally to announce Delphix's appearance at a well-known industry conference – DEMO. *Id*. Delphix is listed as "*the market-leading provider* of database virtualization software." *Id* (emphasis added). Existing customers of Delphix Server include "members of the Fortune 1000 across major industries, including technology, telecommunications, retail, manufacturing, consumer goods, and Saas." *Id.* One customer, Corporate Express had already won an award – the Best Green IT Architecture award – for its use of Delphix's goods. *Id.* Another customer, Holland America Line, noted that from its use of the Delphix Server, they "*were* able better [sic] allocate our high performance storage . . . and *continue* to discover compelling new ways to use the product." *Id.* (emphasis added). Finally, the press release provides "USEFUL LINKS," including Delphix's Twitter feed which includes even earlier references to use of the Delphix Mark and awards received for goods offered under the Delphix Mark. *See Id.*

Delphix's September 2010 press release – Embarcadero's sole evidence of fraud – therefore fails to provide any particularized facts or plausible support for its fraud claim. The press release does not say: "Delphix announces <u>today</u> its first use of the Delphix Mark." The press release says the exact opposite and provides particularized facts that the Delphix Mark had been in bona fide commercial use for quite some time. *See Tellabs*, 551 U.S. at 323 (holding that a court may take into account plausible opposite inferences from underlying alleged facts to

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[3] The Board may consider documents referred to and relied upon by Embarcadero in their Petition, including portions not mentioned in the Petition. *See, e.g., In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1405 n.4 (9th Cir. 1996); *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 986 (9th Cir. 1999); *In re Calpine Sec. Litig.*, 288 F. Supp. 2d 1054, 1076 (N.D. Cal. 2003); *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997); *see also, Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322(2007) (noting that, in addition to the complaint, courts "ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss . . . documents incorporated into the complaint by reference and matters of which a court may take judicial notice").

determine whether a claim is sufficient to survive a motion to dismiss). The only plausible inference one can take away from the press release is that by September 2010, Delphix had spent considerable time and effort marketing and using the Delphix Mark in commerce since Delphix already had a significant customer base, had won industry awards, and was the market leader of database virtualization software.

In sum, Embarcadero's petition fails to provide any "explicit . . . expression[s] of the circumstances constituting fraud." *Asian & Western Classics*, 92 USPQ2d at 1478. It alleges no facts from which the Board could infer that Delphix did not test market the Delphix Mark. It does not address that the software industry practice is to test market products. Nor does it allege that after interviewing Delphix's suppliers, customers, and other witness, there was no evidence that the Delphix Mark had been in commercial use. Instead, Embarcadero relies on its bare allegation of no commercial use based on Delphix's mere issuance of a press release.

Thankfully, Rule 9 and the Board's precedent require more to sufficiently plead a fraud claim. Embarcadero must plead particularized facts and plausible support for its claim that Delphix had not used the Delphix Mark. Here, Embarcadero's conclusory press release allegations fail to meet this standard. Accordingly, Embarcadero's fraud claim must be dismissed. *Exergen*, 91 USPQ2d at 1667 (affirming the finding that fraud based claims were deficient under Rule 9(b) for failing to plead particularized facts that "identif[y] the specific who, what, when, where, and how of the material misrepresentation").[4]

C. Embarcadero's Fraud Claim Fails to Properly Allege Intent

Embarcadero fails to properly plead intent for the same reasons that it fails to allege specific facts supporting a material misrepresentation based on its press release allegations. A pleading of fraud on the USPTO must include an allegation of intent to deceive *and* sufficient

[4] Nor do Embarcadero's conclusory allegations and threadbare recitals of a fraud claim's legal elements even satisfy Rule 8(a)'s more relaxed "plausibility" requirements. *See Twombly*, 550 U.S. at 570; *Iqbal*, 129 S. Ct. at 1949-50.

underlying facts that a party acted with the requisite state of mind. *Asian & Western Classics*, 92 USPQ2d at 1479 (citing *Exergen*, 91 USPQ2d at 1667 n.4). Such "involved conduct . . . must indicate sufficient culpability to require a finding of intent to deceive." *Kingsdown Med. Consultants, Ltd. v. Hollister Inc.*, 863 F.2d 867, 9 USPQ2d 1384, 1392 (Fed. Cir. 1988) (en banc). While Embarcadero offers the formulaic and vacant allegation that Delphix "knowingly and intentionally made material misrepresentations" and gave "knowingly fraudulent statements given solely with the intent to deceive the PTO" (Petition ¶¶ 21-22), Embarcadero fails to provide any relevant facts that any misrepresentations occurred. Without a misrepresentation, there can be no knowledge of such misrepresentation and no intent to deceive the USPTO.

Embarcadero's failure to specifically plead facts supporting the underlying misrepresentation element renders all other fraud element pleadings, including intent, deficient. Fed. R. Civ. P. 9(b); *Kingsdown*, 9 USPQ2d at 1392. Moreover, such threadbare and conclusory legal assertions regarding Delphix's intent fail to state a claim under the Supreme Court's pleading requirements. *Iqbal*, 129 S. Ct. at 1949 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). Thus, Delphix respectfully requests that the Board dismiss Embarcadero's insufficiently pled fraud claim.

D. The Board Should Reject Embarcadero's Sham "Investigation" Allegations.

Even if Embarcadero's conclusory allegations appear to be facially sufficient, they fail to rise above generic "information and belief" allegations. Pleadings of fraud made "on information and belief" when there is no allegation of "specific facts upon which the belief is reasonably based" are insufficient to state a claim. *Exergen*, 91 USPQ2d at 1670 (noting that the pleading provided "neither the 'information' on which it relies nor any plausible reasons for its 'belief'"). To hold otherwise would allow fraud allegations to "devolve into a 'magic incantation to be asserted against'" every rights holder. *Id.*

Recently, the Board recognized that fraud pleadings could be sufficient if they were

adequately based "on the results of an investigation." *Meckatzer Lowenbrau Benedikt Weib KG v. White Gold, LLC*, 95 USPQ2d 1185, 1187 (TTAB 2010). In *Meckatzer*, the petitioner hired a private investigator to determine whether the registrant had used the marks with the goods referenced in the Statement of Use in the United States. *Meckatzer*, Opp. to Motion to Dismiss, No. 92051014 [Dkt. No. 12], at 3. The private investigator *inter alia* contacted a representative for the registrant and "a number of its U.S. distributors and vendors," learning that the mark was not used for those products. *Id.* The Board accordingly denied the registrant's motion to dismiss for failure to allege fraud. *Meckatzer*, 95 USPQ2d at 1187-88.

Here, Petition conducted no such investigation. There is no allegation that Embarcadero contacted Delphix, a single customer, former employee, distributor or vendor. Nor is there an allegation that Embarcadero hired a private investigator. All Embarcadero has alleged is that it looked at Delphix's publicly available application and press release. But it does not appear that Embarcadero even bothered reading the press release beyond the first sentence of the title. *See* Petition ¶¶ 16-19; Declaration of Eric Ball, Ex. A; *supra* at Section B. This is not an investigation. Rather, with an apparent nod to *Meckatzer*, Embarcadero has merely placed the words "[b]ased on the results of due investigation" where "based on information and belief" would normally appear. Petition ¶¶ 19, 20, 21, 22.

Replacement of "on information or belief" with "due investigation" is nothing more than the improper elevation of form over substance. *See Super Sack Mfg. Corp. v. Chase Packaging*, 57 F.3d 1054, 35 USPQ2d 1139, 1142 n.1 (Fed. Cir. 1995) ("a motion's substance, rather than its linguistic form alone, determines its nature and thus its legal effect."). Without safeguards, "due investigation" will devolve into yet another "magic incantation" that the *Exergen* court warned so strongly against. Why would any petitioner bother with a proper investigation, if it could claim it conducted an investigation after merely looking at the application file and a single press release?

Given the inadequacy of Embarcadero's sham "investigation," Embarcadero fails to plead specific facts supporting its claim of fraud. *See Exergen*, 91 USPQ2d at 1670. Accordingly, the Board should dismiss Embarcadero's fraud claims and require it to plead "specific facts upon which the belief is reasonably based." *Id.* For example, if any real investigation occurred, what specifically did Embarcadero do? How, in good faith, is it able to make the damning allegation that Delphix lied to the Board? Without dismissal and repleading of a claim meeting Rule 9(b)'s particularized pleading standards, Delphix and the Board will be forced to waste their time disputing a baseless fishing expedition. *Asian & Western Classics*, 92 USPQ2d at 1479; *Twombly*, 550 U.S. at 557-58 (reaffirming rule 8's pleading standards to prevent groundless claims from "tak[ing] up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value").

CONCLUSION

For the foregoing reasons, Delphix respectfully requests that the Board grant its motion for judgment on the pleadings, dismiss Embarcadero's fraud claim from the Petition to Cancel and strike paragraphs 6-7 and 15-23 from the Petition accordingly.

Respectfully submitted,

Dated: April 16, 2012

/s/ Eric Ball

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CERTIFICATE OF SERVICE BY HAND DELIVERY

I hereby certify that a true and correct copy of the foregoing **DELPHIX CORP'S MOTION FOR JUDGMENT ON THE PLEADINGS ON EMBARCADERO TECHNOLOGIES, INC.'S CLAIM OF FRAUD AND MEMORANDUM IN SUPPORT THEREOF** is being served on April 16, 2012, by hand delivery on Embarcadero's Attorney of Record at the address below:

Martin R. Greenstein
Techmark A Law Corporation
4820 Harwood Road, 2nd Floor
San Jose, CA 95124-5273

/s/ Eric Ball
Eric Ball

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

In the matter of
Trademark Application No. 77/944,256
Mark: DELPHIX
Trademark Registration No. 3,768,914
Mark: DELPHIX (Logo)

Embarcadero Technologies, Inc., Opposer and Petitioner, vs. Delphix Corp., Applicant and Registrant.	Opposition No.: 91197762 Cancellation No.: 92055153

ERIC BALL'S DECLARATION IN SUPPORT OF DELPHIX CORP'S MOTION FOR JUDGMENT ON THE PLEADINGS ON EMBARCADERO TECHNOLOGIES, INC.'S CLAIM OF FRAUD

I, Eric Ball, do hereby declare as follows:

1. I am an attorney with the law firm Fenwick & West LLP. I am duly licensed to practice in California and authorized to represent Applicant and Registrant Delphix Corporation in this action before the United States Patent and Trademark Office. I submit this declaration in support of Delphix Corporation's Motion for Judgment on the Pleadings on Embarcadero Technologies, Inc.'s Claim of Fraud. I have personal knowledge of the facts stated in this declaration, and, if called to testify as a witness, I could and would testify competently to the facts set forth herein.

2. Attached hereto as **Exhibit A** is a true and correct copy of Delphix Corporation's

Press Release entitled "Delphix Launches First Database Virtualization Solution at DEMO," dated September 14, 2010, which is incorporated by reference in the Petition for Cancellation.

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

Executed on this 16th day of April, 2011 in Mountain View, California.

/s/ Eric Ball

Eric Ball, Esq.
Attorney for Registrant
FENWICK & WEST LLP
Silicon Valley Center
801 California Street
Mountain View, CA 94041
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Exhibit A

Delphix Launches First Database Virtualization Solution at DEMO

- News
- Press Releases
- Events

VIRTUALIZATION SOFTWARE ENABLES SELF-SERVICE PROVISIONING, CONSOLIDATES STORAGE HARDWARE FOR CUSTOMERS INCLUDING TIVO, CORPORATE EXPRESS, AND HOLLAND AMERICA

DEMO FALL 2010 – SANTA CLARA, CA – September 14, 2010—Delphix, the market-leading provider of database virtualization software, today announces the launch and wide availability of Delphix Server. Delphix applies the simplifying concept of virtualization to database infrastructure, turning structured data and its supporting infrastructure into software that operates in a fraction of the space, while preserving full functionality and performance. Public customers of Delphix Server include members of the Fortune 1000 across major industries, including technology, telecommunications, retail, manufacturing, consumer goods, and SaaS.

Corporate Express, a division of Staples, recently won the Best Green IT Architecture award from iCMG for its Delphix deployment in July 2010. “By virtualizing and consolidating databases, we reduced storage requirements by more than 12:1. We moved from complexity and cost to a few clicks that developers can manage themselves,” said Andrew Grech, Infrastructure and Operations Manager at Corporate Express. “In addition to the cost savings, self-service has freed our senior IT personnel to focus on higher value projects for the business. With Delphix, we can develop applications faster, with less risk and hardware.”

Delphix Server solves two major IT challenges: the operational complexity and redundant infrastructure required to support production applications on databases. “Delphix has an innovative solution to one of the largest problems in the Holland America datacenter: cost-effectively provisioning, managing, and refreshing databases,” said John Lehotsky, Director of Infrastructure and Operations, Holland America Line.

Most customers see immediate savings with a Delphix deployment and can often pay for the software in existing tier-one or tier-two storage budgets. Lehotsky added, “By using Delphix, we were able better allocate our high performance storage. This allows us to better time any future storage purchases while also

introducing several new options for backup and disaster recovery. We are very excited about using Delphix and continue to discover compelling new ways to use the product."

Delphix software installs on standard x86 servers or in virtual machines in minutes. In as little as an hour, customers can virtualize database infrastructure and have complete, fully functional databases that operate in $1/10^{th}$ the space, with improved agility, manageability, and performance. While Delphix consolidates storage and reduces database provisioning and refresh times from days to minutes, it adds zero impact to production systems through its innovative synchronization technology.

"We're honored to be launching at DEMO with Richard Rothschild, Senior Director of IT at TiVo, one of our valued customers," said Jedidiah Yueh, Delphix CEO. "At Delphix, we believe in excellence in engineering and design, and products that deliver unusually powerful value to customers."

"Delphix is like TiVo for databases," said Rothschild. "It lets us instantly create virtual databases and shift them backward or forward in time. The management interface is simple and elegant—a rarity in enterprise solutions."

Delphix Server benefits include:

- **Agile Application Development:** database provisioning and refresh can take days to weeks and often involve multiple operational groups; these hurdles can introduce significant delays into project schedules. Delphix automates the provisioning and refresh process, enabling developers to instantly create personal sandboxes or virtual databases (VDBs) that are up-to-date and isolated from other VDBs. With Delphix, developers can cut months out of project schedules and perform destructive or parallel testing to improve overall application quality and performance.
- **Improved Data Resiliency:** recovering data in the event of data loss can be unpredictable and take days to weeks, particularly if the last good state is unknown. Delphix's patent-pending TimeFlow technology enables customers to create a running record of database changes; VDBs can be instantly provisioned from multiple points-in-time, with granularity down to the second. This time-shifting capability enables businesses to dramatically reduce the time required to recover from logical data loss.
- **Storage Consolidation:** The average customer creates seven copies of each production database for development, testing, QA, staging, operational reporting, pilots, and training, with each copy typically having its own dedicated and largely redundant storage. Rather than create redundant copies of infrastructure, Delphix creates a single virtual environment, where multiple VDBs can be instantly provisioned or refreshed from a shared footprint—coordinating changes and differences in the background without compromising functionality or performance. Businesses can realize 10x reductions in database storage costs with Delphix.

"Our research suggests that the easiest way to justify technology investments over the next 12-18 months is to reduce operational expenses or improve business processes," said Brian Babineau, Senior Analyst at Enterprise Strategy Group. "Delphix does both—a rare accomplishment in technology solutions today. Delphix streamlines the infrastructure drag beneath production applications while enabling agile IT to drive innovation."

"Server virtualization reshaped the compute tier for IT. We expect Delphix to do the same for databases," said Matt Marshall, executive producer of DEMO. "We chose Delphix because it brings an innovative approach to the single largest source of inefficiency and inflexibility left in the modern datacenter, an area which has seen little evolution over the last decade—until now."

DEMO Fall 2010 Information

Jedidiah Yueh, Delphix CEO, and Richard Rothschild, TiVo Senior Director of IT, will co-present the company's market-leading database virtualization solution from the DEMO Fall stage on Tuesday, September 14th, at 4:08 p.m.

To experience a live demonstration, visit station #29 at the DEMO Fall 2010 Conference. DEMO.com visitors will also be able to view Delphix's live stage presentation within 24 hours by clicking on the "Watch DEMO Videos" link.

USEFUL LINKS

- Delphix website: http://www.delphix.com
- Delphix Server: http://www.delphix.com/products.php
- Twitter feed: http://twitter.com/delphixcorp

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About DEMO

Produced by the IDG Enterprise events group, the worldwide DEMO conferences focus on emerging technologies and new products innovations, which are hand selected from across the spectrum of the technology marketplace. The DEMO conferences have earned their reputation for consistently identifying cutting-edge technologies and helping entrepreneurs secure venture funding and establish critical business. For more information on the DEMO conferences, visit http://www.demo.com/.

About Delphix

Delphix is the market-leading provider of database virtualization solutions. Delphix software addresses the single largest source of inefficiency and inflexibility in the modern datacenter—provisioning, managing, and refreshing databases for business-critical applications. Delphix founder and CEO, Jedidiah Yueh, was Founding CEO of Avamar, a pioneering de-duplication company acquired by EMC in 2006, which shipped a billion dollar product that continues to transform datacenters with more than 20,000 customers. The Delphix team developed Oracle database clustering (RAC), used in more than 30,000 Oracle deployments, pioneered data de-duplication with Avamar, and developed the virtualization product roadmap and strategy at VMware during its growth into a multi-billion dollar business. Delphix is located in Palo Alto, California, and is backed by Greylock Partners and Lightspeed Venture Partners, two leading venture capital firms in Silicon Valley. The Delphix Board of Directors includes founding board members for companies such as Oracle, Business Objects, Informatica, Riverbed, and Avamar.

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CERTIFICATE OF SERVICE BY HAND DELIVERY

I hereby certify that a true and correct copy of the foregoing **ERIC BALL'S DECLARATION IN SUPPORT OF DELPHIX CORP'S MOTION FOR JUDGMENT ON THE PLEADINGS ON EMBARCADERO TECHNOLOGIES, INC.'S CLAIM OF FRAUD AND MEMORANDUM IN SUPPORT THEREOF** is being served on April 16, 2012, by hand delivery on Embarcadero's Attorney of Record at the address below:

Martin R. Greenstein
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4820 Harwood Road, 2nd Floor
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/s/ Eric Ball
Eric Ball