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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.
Correspondence Address	ERIC BALL FENWICK WEST LLP 801 CALIFORNIA STREET MOUNTAIN VIEW, CA 94041 UNITED STATES EBall@fenwick.com,trademarks@fenwick.com,csakurai@fenwick.com
Submission	Motion for Summary Judgment
Filer's Name	Eric J. Ball
Filer's e-mail	trademarks@fenwick.com
Signature	/Eric J. Ball/
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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, v. Delphix Corp., Applicant and Registrant.	Opposition No.: 91197762 Cancellation No.: 92055153

APPLICANT AND REGISTRANT DELPHIX CORP.'S
MOTION FOR SUMMARY JUDGMENT ON EMBARCADERO'S FRAUD CLAIM

Delphix Corp. ("Delphix") hereby moves for summary judgment against Embarcadero Technologies Inc.'s ("Embarcadero") claim of fraud in the registration of the DELPHIX logo mark, Registration No. 3,768,914.

I. INTRODUCTION

Founded in 2008, Delphix provides database virtualization software that increases efficiency and reduces costs by reducing the amount of data businesses have to manage. Since 2009, Delphix has installed its DELPHIX software with such well-known companies as Facebook, Inc., Comcast Corporation, TiVo, Inc., and KLA-Tencor Corporation.

On January 14, 2009, Delphix filed an intent-to-use trademark application for the DELPHIX logo. Based on an instruction manual, which Delphix provided to its customers at least as early as December 3, 2009, the Examiner accepted Delphix's February 3, 2010 Statement of Use and issued a registration for the DELPHIX logo on March 30, 2010. *See* Application file for Registration No. 3,768,914.

Despite Delphix's use of the DELPHIX logo well before the filing of its February 3, 2010 Statement of Use, Embarcadero asserts that Registration No. 3,768,914 should be cancelled on the grounds of fraud. But Embarcadero has not identified any evidence supporting its conclusory fraud claim. Embarcadero has not produced a single document, witness, or discovery response supporting its assertions. Even more telling, Embarcadero's initial disclosures and pretrial disclosures identify no documents or witnesses with knowledge of facts supporting a fraud claim. As might be expected given its lack of evidence, Embarcadero has effectively made no effort to pursue its claim. Instead, Embarcadero's fraud claim rests on its baseless allegation that because Delphix issued a September 14, 2010 press release regarding a marketing "launch," that it could not have previously used the DELPHIX logo. Embarcadero is wrong. The September 14, 2010

press release details Delphix's use of the DELPHIX logo in Registration No. 3,768,914 well before Delphix's September 2010 marketing "launch."

Additionally, Delphix has provided evidence that it committed no fraud whatsoever, in the form of sworn deposition testimony and a declaration in support of this motion of Jedidiah Yueh, Delphix's founder and the signatory to the February 3, 2010 Statement of Use. Mr. Yueh testified and attests that Delphix's February 3, 2010 Statement of Use accurately represented its use in commerce to the PTO. And even assuming—contrary to fact—that there had been some inaccuracy in the application, Embarcadero has identified no evidence that would show that such inaccuracy resulted from an intent to deceive the PTO. Rather, Mr. Yueh's testimony and declaration show that he acted in good faith.

Given Embarcadero's failure to produce evidence that Delphix did not use the DELPHIX logo by February 3, 2010, or had any intent to defraud the PTO, Embarcadero cannot raise a genuine issue of material fact. Accordingly, the Board should grant Delphix's motion for summary judgment on Embarcadero's fraud claim.

II. BACKGROUND

A. Delphix's Use in Commerce and Registration of the DELPHIX Logo

In 2008, Mr. Yueh founded Delphix and selected the DELPHIX mark. Declaration of Jedidiah Yueh in Support of Applicant and Registrant Delphix Corp.'s Motion for Summary Judgment on Embarcadero's Fraud Claim, ¶4.[1] Soon afterward, Mr. Yueh began talking to

[1] Copying and storing data is time-consuming and expensive, especially for companies working with large amounts of data. Delphix offers a novel database virtualization solution that increases efficiency and reduces cost by "generat[ing] virtual copies of the data for a variety of uses," which "reduce[s] the total amount of data that a business needs to manage." Yueh Decl. at ¶13, Ex. 2 (Deposition, 69:22-23, 70:10-11). Delphix was the first company to offer database virtualization, a concept invented by Mr. Yueh. *Id*. (Deposition, 259:7). Even now, six years after Delphix's founding, no other companies offer the type of database virtualization solution that Delphix offers. *Id*. at ¶¶4, 13, Ex 2 (Deposition, 259:11-260:20: explaining that Delphix has no direct competitors).

customers, and Delphix received funding from major investors. Yueh Decl. at ¶¶4, 13, Ex. 2 (Deposition, 175:3-17: Responding to a series of questions about what he did "as soon as the company was started," Yueh responded, "We were speaking with customers about potentially purchasing the product."); *Id*. at ¶4 (explaining that by early 2009, Delphix had received $8.5 million in Series A Funding from major venture capital firms).

At least as early as December 3, 2009, Delphix shipped and began installing its DELPHIX software at a customer: REDACTED. *Id*. at ¶¶5, 13, Ex. 2 (Deposition, 175:20-176:1: REDACTED REDACTED). Delphix began another installation, also in 2009, at REDACTED. *Id*. (Deposition, 176:22-25: REDACTED REDACTED). Each of these shipments and installations of the software included use of the DELPHIX logo in Registration No. 3,768,914 in the instruction manuals, marketing materials, and on the user interface of the software itself. *Id*. at ¶5. By September 2010, Delphix had REDACTED customers for its product. *Id*. at ¶¶12-13, Ex. 2 (Deposition, 180:9-11, 18-21). Today, Delphix's customers include members of the Fortune 1000 across major industries, including technology, telecommunications, retail, manufacturing, consumer goods, and software as a service. *Id*. at ¶4.

On January 14, 2009, Delphix filed an intent-to-use trademark application for the DELPHIX logo in connection with the DELPHIX software. *See* Application file for Registration No. 3,768,914 (January 14, 2009 Application). On August 12, 2009, Mr. Yueh filed Delphix's Statement of Use including a "data sheet" as a specimen showing use of the DELPHIX logo. *Id*. (August 12, 2009 Statement of Use). The Examiner declined Delphix's August 12, 2009 Statement of Use, explaining that a data sheet was not an appropriate specimen for goods. *Id*.

(October 1, 2009 Office Action). Instead, the Examiner requested that Delphix provide a substitute specimen such as an "instruction manual." *Id*. On February 3, 2010, Delphix complied with the Examiner's request and submitted an amended Statement of Use attaching the 2009 User's Guide (*i.e.*, an instruction manual) for the DELPHIX software. *Id*. (February 3, 2010 Statement of Use); Yueh Decl. at ¶8. Delphix used the 2009 User's Guide in commerce by providing it with the DELPHIX software to actual and potential customers, such as KLA-Tencor and Corporate Express, before submitting a copy as a specimen of use. *Id*. at ¶5. Delphix's February 3, 2010 Statement of Use included Mr. Yueh's confirmation that the 2009 User's Guide was used in commerce prior to Delphix's Statement of Use deadline.[2] *See* Application file for Registration No. 3,768,914 (February 3, 2010 Statement of Use). On February 24, 2010, the Examiner accepted Delphix's February 3, 2010 Statement of Use and issued a registration for the DELPHIX logo on March 30, 2010. *See id.* (February 24, 2010 Notice of Acceptance of SOU; March 30, 2010 Registration).

B. Embarcadero's Fraud Allegations

Embarcadero blindly asserts that Delphix's February 3, 2010 Statement of Use was fraudulent because Delphix had not used the DELPHIX logo by the time of filing. Petition at ¶¶ 20-23. But Embarcadero has failed to produce a single document supporting its allegations. Nor has Embarcadero offered a single witness supporting its claim. In fact, in both its initial disclosures and its pretrial disclosures, Embarcadero fails to identify a single document or witnesses addressing its fraud claim. Declaration of Eric Ball in Support of Applicant and

[2] With the October 1, 2009 Office Action and January 25, 2010 Extension of Time to File SOU, Delphix's deadline to file its amended Statement of Use was extended to July 28, 2010. *See* Application file for Registration No. 3,768,914. The August 12, 2009 Statement of Use filing, which attached the data sheet, is irrelevant to Embarcadero's fraud claim, because the Examiner did not rely on it when she approved registration of the DELPHIX logo. *See* Application file for Registration No. 3,768,914 (October 1, 2009 Office Action); TMEP § 904.09 (the key question is whether the "substitute or additional specimen was in use in commerce before the expiration of the deadline for filing a statement of use").

Registrant Delphix Corp.'s Motion for Summary Judgment on Embarcadero's Fraud Claim, ¶¶2-3, Exs. 1-2.

Lacking any evidence, the only conceivable source of Embarcadero's claims are the conclusory assertions in its Petition to Cancel Delphix's registration. There, Embarcadero's allegations rest on the fact that after Delphix filed its Statement of Use, Delphix issued a press release announcing a marketing "launch." Petition at ¶¶ 19-20. From this bare allegation, Embarcadero leaps to the conclusion that Delphix could not have used the DELPHIX logo before issuing its press release, and therefore committed fraud on the PTO. But of course, as is the case here, companies often use marks in commerce before announcing an official "launch." Embarcadero's sparse and conclusory assertions cannot support a claim that Delphix made any misstatements to the PTO, much less that Delphix intentionally made a material misstatement on which the PTO relied.

III. ARGUMENT

A. Legal Standards

1. Summary Judgment

Summary judgment is appropriate when "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Where, as here, Embarcadero bears the burden of proof on its fraud claim, summary judgment is proper once Delphix shows that there is a lack of evidence supporting an element of the claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The burden is then on Embarcadero to designate specific material facts showing a genuine issue for trial. *Id.* at 322-23.

An issue is "genuine" only if there is sufficient evidence for a reasonable fact finder to find for Embarcadero and "material" only if the fact may affect the outcome of the case.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). A mere "scintilla" of evidence will not suffice to meet that burden. *Anderson,* 477 U.S. at 252. Nor is it enough for the non-moving party to rely on conclusory assertions or show that there is some "metaphysical doubt as to the material facts." *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

Moreover, since the facts render Embarcadero's fraud claim implausible, it "must come forward with more persuasive evidence to support [its] claim than would otherwise be necessary." *Id.* at 587; *see also Cohn v. Petsmart, Inc.*, 61 USPQ2d 1688, 1690 (9th Cir. 2002) (requiring the non-moving party to present evidence from which a trier of fact can reasonably conclude that the claim is "probable, not simply a possibility") (citation omitted).

2. The Heavy Burden of Proving Fraud

To prove fraud, Embarcadero must establish that: (1) the registrant made a false representation to the PTO; (2) the false representation is material to the registrability of the mark; (3) the registrant had knowledge of the falsity of the representation; and (4) the registrant made the representation with intent to deceive the PTO. *In re Bose Corp.*, 91 USPQ2d 1938, 1941 (Fed. Cir. 2009).

Claims of fraud "should not be taken lightly" and must receive demanding scrutiny. *Id.* 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; *M.C.I. Foods, Inc. v. Bunte*, 96 USPQ2d 1544, 1549 (TTAB 2010) (quoting *Smith Int'l, Inc. v. Olin Corp.*, 209 USPQ 1033, 1044 (TTAB 1981)); *see also Asian & Western Classics B.V. v. Selkow*, 92 USPQ2d 1478, 1479-80 (TTAB 2009).

Far from meeting the heavy burden imposed by *In re Bose*, Embarcadero has not provided any evidence to raise a genuine issue of any material fact showing that Delphix *knowingly* made a *false, material misrepresentation* in seeking a registration with the *intent* to deceive the PTO.

B. There Is No Genuine Issue of Material Fact Regarding the Accuracy of Delphix's Statement of Use Filing

Embarcadero has no evidence that Delphix made a material misstatement in Delphix's February 3, 2010 Statement of Use filing. Instead, there is no dispute of material fact that Delphix's Statement of Use was actually correct. Notwithstanding Delphix's September 14, 2010 press release, Delphix used the DELPHIX logo in Registration No. 3,768,914 well before the February 3, 2010 Statement of Use with the shipment and installation of the DELPHIX software at various customer sites. Yueh Decl. at ¶5 (attesting to Delphix's use of the DELPHIX logo in connection with its shipment and installation of the DELPHIX software at REDACTED REDACTED in 2009); *id*. at ¶13, Ex. 2 (Deposition, 175:20-21; 175:25-176:1; 176:21-25: identifying both REDACTED as customers of the DELPHIX software during 2009).

These shipments and installations of software using the DELPHIX logo are classic use in commerce. *See* 15 U.S.C. § 1127 (defining use in commerce of a mark for goods when "(A) it is placed in any manner on the goods or their containers or the displays associated therewith . . . or if the nature of the goods makes such placement impracticable, then on documents associated with the goods . . . and (B) the goods are sold or transported in commerce"). There is no genuine issue of fact regarding Delphix's use of its DELPHIX logo on: (1) the DELPHIX software; (2) the User's Guide associated with the software installations at REDACTED REDACTED; or (3) Delphix's shipment of its software to REDACTED in

2009. Yueh Decl. at ¶¶5, 13, Ex. 2 (Deposition, 175:20-21; 175:25-176:1; 176:21-25).

Moreover, Delphix's use of its mark was a "bona fide use of a mark in the ordinary course of trade and not made merely to reserve the mark." 15 U.S.C. § 1127. Delphix used the DELPHIX logo in Registration No. 3,768,914 in instruction manuals, marketing materials, and, of course, on the user interface of the software itself. Yueh Decl. at ¶5. This use was intended to build the DELPHIX brand and identify Delphix as the sole source of the DELPHIX software. *Id*. at ¶6. Today, Delphix continues to use the same DELPHIX logo to identify Delphix as the source of its software. *Id*. at ¶7. And today, Delphix's early customers KLA-Tencor and Corporate Express continue to use and purchase the DELPHIX software initially installed in 2009. *Id*. Far from token use, Delphix's original use of its mark was consistent with industry practice for a new type of software: rolling out a smaller group of select customers, before "launching" to a broader audience. *Id*. at ¶6; *Automedx v. Artivent Corp.*, 95 USPQ2d 1976, 1981 (TTAB 2010) (finding initial test sales were reasonable use in commerce for new technologies and holding that "[u]se in commerce should be interpreted with flexibility to account for different industry practices").

Finally, after Delphix's initial installations of software at REDACTED REDACTED, Delphix's customer base continued to expand. Yueh Decl. at ¶¶12-13, Ex. 2 (Deposition, 175:25-176:1; 176:21-25). By September 2010, Delphix had REDACTED customers for its novel product. *Id*. at ¶¶12-13, Ex. 2 (Deposition 180:9-11, 18-21). This continued expansion of sales reinforces the fact that its initial installations were use in commerce. *See, e.g.*, *Automedx*, 95 USPQ2d at 1981-82 (finding use in commerce where early shipments allow for product refinement, which leads to future sales).

Embarcadero has no evidence to contradict these facts. Certainly, Embarcadero has no

evidence to raise a genuine dispute of material fact regarding the accuracy of Delphix's February 3, 2010 Statement of Use. Thus, Embarcadero has failed to establish an essential element of its fraud claim—a material false representation—and the Board should grant Delphix's motion for summary judgment. *Matsushita Elec. Indus.*, 475 U.S. at 586 ("When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.") (footnote omitted).

1. Delphix's Attendance at the September 14, 2010 DEMO Conference and Issuance of a "Launch" Press Release Do Not Raise a Genuine Issue of Material Fact Regarding Delphix's Use of the DELPHIX Logo by February 2010.

On September 14, 2010, Delphix attended a conference called DEMO to further increase awareness of the DELPHIX software, which by then was already available to and used by multiple customers. *See* Yueh Decl. at ¶13, Ex. 2 (Deposition 180:17: describing the DEMO conference as "a marketing event to generate more buzz" about Delphix's software). There were no major differences between the Delphix software sold before the DEMO conference and the software sold at or after the DEMO conference. *See id*. at ¶13, Ex. 2 (Deposition, 181:6-20: explaining that Delphix was "selling the same software before and after except for maybe changes in version number").

Embarcadero has no evidence disputing these facts. Instead, Embarcadero ignores Delphix's prior use and concusorily asserts that the DEMO conference was Delphix's first use of the DELPHIX logo. Embarcadero is wrong. Even a cursory review of Delphix's September 14, 2010 press release—the very document on which Embarcadero apparently bases its fraud claim—highlights Delphix's prior use of the DELPHIX logo. For example, the press release describes Delphix as "*the market-leading provider* of database virtualization software." Yueh Decl. at ¶12, Ex. 1 (emphasis added). The press release goes on to describe *existing* Delphix

customers as "members of the Fortune 1000 across major industries, including technology, telecommunications, retail, manufacturing, consumer goods, and Saas." *Id.* Indeed, one customer, Corporate Express, had already won an award—iCMG's July 2010 Best Green IT Architecture award—for its use of Delphix's software. *Id.* Another existing customer, Holland America Line, discussed its past use of Delphix software, noting "we *were* able better [sic] allocate our high performance storage . . . and *continue* to discover compelling new ways to use the product." *Id.* (emphasis added). A third customer identified in the press release, TiVo, even provided in-person testimonials about the DELPHIX software at the conference. *Id.*

The only plausible reading of the press release is that by September 2010, Delphix already had an established customer base, with which it had been using the DELPHIX logo. Far from contradicting Delphix's statements of use, the press release's description of Delphix's existing customers corroborates Delphix's claim of an earlier date of first use. Thus, Delphix's September 14, 2010 press release—Embarcadero's sole basis for alleging fraud—fails to raise an issue of material fact regarding any alleged misstatements in Delphix's February 3, 2010 Statement of Use filing.

Without any genuine issue of material fact regarding the accuracy of Delphix's February 3, 2010 Statement of Use filing, Embarcadero cannot prove its claim of fraud, and summary judgment is necessary. *See F.T.C. v. Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009) ("In order to avoid summary judgment, a non-movant must show a genuine issue of material fact by presenting *affirmative evidence* from which a jury could find in his favor.") (emphasis in original) (citing *Liberty Lobby, Inc.*, 477 U.S. at 257)).

C. There Is No Genuine Issue of Material Fact Regarding Any Intent to Deceive.

Even if the Board finds a genuine issue of material fact regarding the accuracy of

Delphix's February 3, 2010 Statement of Use, summary judgment is still warranted here. Embarcadero has not provided a single fact supporting its claim that Delphix knowingly made a materially false representation with the intent to deceive the PTO. Even more, Embarcadero's initial disclosures and pretrial disclosures fail to identify a single document or witness relating to either its fraud claim generally or Delphix's supposed knowing intent to deceive specifically. Ball Decl. at ¶¶2-3, Exs. 1-2.

The Federal Circuit has explained that there is "a material legal distinction between a 'false' representation and a 'fraudulent' one, the latter involving an intent to deceive, whereas the former may be occasioned by a misunderstanding, an inadvertence, a mere negligent omission, or the like." *In re Bose Corp.*, 91 USPQ2d at 1940 (quoting *Kemin Indus. v. Watkins Prods., Inc.*, 192 USPQ 327, 329 (TTAB 1976)). "Subjective intent to deceive, however difficult it may be to prove, is an indispensable element in the [fraud] analysis." *Id*. at 1941. "[S]uch intent can be inferred from indirect and circumstantial evidence. But such evidence must still be clear and convincing, and inferences drawn from lesser evidence cannot satisfy the deceptive intent requirement." *Id*. (citation omitted). For intent to deceive to be shown, the "deception must be willful to constitute fraud." *Id.* at 1940. This willful intent to deceive cannot be predicated upon proof of simple negligence or even gross negligence. *Id.* To the contrary, the Federal Circuit stated that "[t]here is no fraud if a false misrepresentation is occasioned by an honest misunderstanding or inadvertence without a willful intent to deceive. . . . Unless the challenger can point to evidence of an inference of deceptive intent, it has failed to satisfy the clear and convincing evidence standard required to establish a fraud claim." *Id.* at 1942.

Here, Mr. Yueh attests to his good faith belief that his statements regarding Delphix's use of the DELPHIX logo in Registration 3,768,914 are true. Yueh Decl. at ¶11. He believed they

were true at the time of Delphix's February 3, 2010 Statement of Use filing—as he does today. *Id*. at ¶¶9-10. Even if the 2009 User's Guide and December 3, 2009 installation of the software at REDACTED were somehow inadequate to constitute first use, there is no evidence that Mr. Yueh had anything other than a good faith intent in registering the DELPHIX logo. *Id*. at ¶¶8-11, 13, Ex. 2 (Deposition, 175:20-176:1).

Mr. Yueh's good faith belief is the antithesis of an intent to defraud. *Alcatraz Media, Inc. v. Chesapeake Marine Tours, Inc.*, 107 USPQ2d 1750 (TTAB 2013) (dismissing fraud claim where registrant testified that she "believed" that her statements regarding continuous and substantially exclusive use were true based on her observations); *M.C.I. Foods, Inc.*, 96 USPQ2d 1544 (dismissing fraud claim based in part on declarant's belief that use of the mark in presentations was relevant to the use in commerce); *Asian & Western Classics B.V.*, 92 USPQ2d at 1479-80 (after the Federal Circuit's decision in *Bose*, a claim of fraud asserting that the registrant "knew or should have known" that a representation was false is insufficient to prove fraud since "it implies mere negligence and negligence is not sufficient to infer fraud or dishonesty").

Moreover, the Board has recognized that non-lawyers, such as Mr. Yueh, can misunderstand the intricate requirements for statement of use filings. *See Maids to Order of Ohio, Inc. v. Maid-to-Order, Inc.*, 78 USPQ2d 1899, 1907 (TTAB 2006) (finding no intent and dismissing a fraud claim since "[i]t was not unreasonable for Ms. Kern, as a layperson, to believe that the . . . activities constituted use of the MAID TO ORDER mark in interstate commerce"); *see also Info. Builders, Inc. v. Bristol Techs., Inc.*, Opposition No. 91179897 (January 10, 2011) (not precedential) (finding no intent to deceive based on a non-lawyer's misunderstanding of the requirements for a substitute statement of use filing). Thus, even assuming, contrary to fact, that

there was some misunderstanding here, such misunderstandings do not support a claim of fraud. *In re Bose Corp.*, 91 USPQ2d at 1942.

Ultimately, Embarcadero cannot raise any facts, let alone a genuine issue of material fact, regarding the essential "intent to deceive" element of its fraud claim. Indeed, Embarcadero has made no attempt to provide any evidence of intent sufficient to meet the strict *Bose* requirements. *See id*. at 1939 (fraud must be "proven 'to the hilt' with clear and convincing evidence"). Delphix respectfully requests that the Board grant summary judgment on Embarcadero's ill-conceived, *in terrorem* fraud claim. *Celotex Corp.*, 477 U.S. at 323 (holding that in the summary judgment context, "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial").

IV. CONCLUSION

Embarcadero has no plausible evidence of fraud on the PTO. There is no genuine issue of material fact as to whether Delphix made a false representation material to the registrability of the mark. Nor is there a genuine issue of material fact as to whether Delphix knowingly made any representation with an intent to deceive the PTO. Instead, Mr. Yueh had and continues to have a good faith belief that Delphix's February 3, 2010 Statement of Use was and is an accurate statement of Delphix's use in commerce of the DELPHIX logo in Registration No. 3,768,914. Accordingly, Delphix's motion for summary judgment should be granted.

Dated: August 11, 2014

By: */Eric J. Ball/*

Eric Ball
eball@fenwick.com
Fenwick & West LLP
Silicon Valley Center
801 California Street
Mountain View, CA 94041
trademarks@fenwick.com
Telephone: 650.988.8500
Facsimile: 650.938.5200

PROOF OF SERVICE

I declare that:

I am employed in the County of Santa Clara, California.

I am over the age of eighteen years and not a party to the within cause; my business address is Silicon Valley Center, 801 California Street, Mountain View, California 94041. On the date indicated below, I served the **MOTION FOR SUMMARY JUDGMENT ON EMBARCADERO'S FRAUD CLAIM** on the interested parties in said cause, by mailing a true copy thereof as indicated below, addressed as follows:

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

☐ **BY PERSONAL SERVICE**: I caused such envelope(s) to be delivered by hand on the office(s) of the addressee(s).

☐ **BY OVERNIGHT COURIER:** by placing the document(s) listed above in a sealed envelope with a prepaid shipping label for express delivery and causing such envelope to be transmitted to an overnight delivery service for delivery by the next business day in the ordinary course of business.

☒ **BY US MAIL:** by placing the document(s) listed above in a sealed envelope for collection and mailing following our ordinary business practices. I am readily familiar with our ordinary business practices for collecting and processing mail for the United States Postal Service, and mail that I place for collection and processing is regularly deposited with the United States Postal Service that same day with postage prepaid.

☐ **BY E-MAIL:** by mutual agreement between the parties, causing to be transmitted via e-mail the document(s) listed above to the addressee(s) at the e-mail address(es) listed above.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at Mountain View, California, this 11th day of August, 2014.

/Deborah A. Shaw/
Deborah A. Shaw

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, v. Delphix Corp., Applicant and Registrant.	Opposition No.: 91197762 Cancellation No.: 92055153

DECLARATION OF JEDIDIAH YUEH IN SUPPORT OF APPLICANT AND REGISTRANT DELPHIX CORP.'S MOTION FOR SUMMARY JUDGMENT ON EMBARCADERO'S FRAUD CLAIM

I, Jedidiah Yueh, hereby declare:

1. I am the Chief Executive Officer of Delphix Corp. ("Delphix"), the Applicant and Registrant in this matter. I make this declaration in support of Delphix's Motion for Summary Judgment based on my own personal knowledge, and, if called as a witness, I could and would testify competently to the facts in this declaration.

2. I have been active in the software industry for more than 15 years. I am familiar with the industry and have a successful track record for identifying new market opportunities, promoting new products, and staying ahead of industry trends.

3. In 1999, I founded Avamar Technologies, Inc., a software company that pioneered data de-duplication and shipped a billion-dollars worth of products in the backup and recovery industry. EMC Corporation acquired Avamar Technologies, Inc. in November 2006 for $165 million. EMC executives have stated that Avamar is the best performing investment for EMC since VMware, Inc.

4. In 2008, I founded Delphix and selected the DELPHIX mark. Soon afterward, I began talking to customers about purchasing the DELPHIX software. Because Delphix offers such an innovative and novel software, Delphix has no direct competitors. No other companies offer the type of database virtualization solution that Delphix offers. Today, Delphix's customers include members of the Fortune 1000 across major industries, including technology, telecommunications, retail, manufacturing, consumer goods, and software as a service. Delphix also had early success with investors. By early 2009, I had helped Delphix raise $8.5 million in Series A funding from Greylock Partners and Lightspeed Venture Partners.

5. On December 3, 2009, other Delphix employees and I began the installation of the DELPHIX software at REDACTED. This DELPHIX software is the same

software described in Registration No. 3,768,914: "Computer software for use in database management; Database management software for managing database storage and provisioning functions." Also in 2009, we began another shipment and installation of the DELPHIX software at REDACTED. With the 2009 shipment and installation of the software at REDACTED, we used the DELPHIX logo from Registration No. 3,768,914 in instruction manuals, marketing materials, and on the user interface of the software itself. For example, with the REDACTED installations, we used the 2009 User's Guide I submitted with Delphix's February 3, 2010 Statement of Use.

6. We used the DELPHIX logo in instruction manuals, marketing materials, and on the user interface of the software itself with the goal of building the DELPHIX brand and identifying Delphix as the sole source of the DELPHIX software. The way we used the DELPHIX logo – on materials and software provided to early customers – is consistent with my understanding of the industry practice for introducing a novel product.

7. Today, Delphix continues to use the same DELPHIX logo to identify Delphix as the source of its software. Delphix's early customers, REDACTED, also continue to use and purchase the DELPHIX software initially installed in 2009.

8. On February 3, 2010, in response to an Office Action, I submitted an amended Statement of Use attaching Delphix's 2009 User's Guide as a substitute specimen of use. Because I provided an instruction manual – the sort of substitute specimen that the Examiner requested – and because Delphix used that manual in connection with the December 3, 2009 installation at REDACTED I believe that Delphix used the DELPHIX mark in commerce by December 3, 2009.

9. I believed that my statements regarding Delphix's use of the DELPHIX logo in Registration No. 3,768,914 were true when I submitted the February 3, 2010 Statement of Use filing.

10. Today, I still believe that my statements regarding Delphix's use of the DELPHIX logo in Registration No. 3,768,914 are true.

11. Additionally, each of my other statements to the USPTO in connection with Registration No. 3,768,914 were made in good faith, and I believed those statements were accurate at the time they were made. I never meant to deceive the USPTO. And I do not believe that the USPTO was deceived by any of my statements or Delphix's application for Registration No. 3,768,914.

12. After Delphix's initial installations of software at [redacted] Delphix's customer base continued to expand. By September 2010, Delphix had [redacted] customers for its innovative product. To promote Delphix to even more customers, I attended the DEMO conference in September 2010. At that conference on September 14, 2010, I led a presentation along with a representative from TiVo, Inc., in which TiVo provided in-person testimonials about the DELPHIX software. Attached as **Exhibit 1** is a true and correct copy of Delphix's September 14, 2010 press release announcing its attendance at the DEMO conference.

13. Attached as **Exhibit 2** is a true and correct copy of excerpts from my October 3, 2013 deposition in this matter.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration was executed on August 10, 2014, in Menlo Park, California.

Jedidiah Yueh
Chief Executive Officer
Delphix Corp.

PROOF OF SERVICE

I declare that:

I am employed in the County of Santa Clara, California.

I am over the age of eighteen years and not a party to the within cause; my business address is Silicon Valley Center, 801 California Street, Mountain View, California 94041. On the date indicated below, I served the **DECLARATION OF JEDIDIAH YUEH IN SUPPORT OF APPLICANT AND REGISTRANT DELPHIX CORP.'S MOTION FOR SUMMARY JUDGMENT ON EMBARCADERO'S FRAUD CLAIM** on the interested parties in said cause, by mailing a true copy thereof as indicated below, addressed as follows:

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

☐ **BY PERSONAL SERVICE**: I caused such envelope(s) to be delivered by hand on the office(s) of the addressee(s).

☐ **BY OVERNIGHT COURIER:** by placing the document(s) listed above in a sealed envelope with a prepaid shipping label for express delivery and causing such envelope to be transmitted to an overnight delivery service for delivery by the next business day in the ordinary course of business.

☒ **BY US MAIL:** by placing the document(s) listed above in a sealed envelope for collection and mailing following our ordinary business practices. I am readily familiar with our ordinary business practices for collecting and processing mail for the United States Postal Service, and mail that I place for collection and processing is regularly deposited with the United States Postal Service that same day with postage prepaid.

☐ **BY E-MAIL:** by mutual agreement between the parties, causing to be transmitted via e-mail the document(s) listed above to the addressee(s) at the e-mail address(es) listed above.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at Mountain View, California, this 11th day of August, 2014.

/Deborah A. Shaw/
Deborah A. Shaw

Exhibit 1

Delphix Launches First Database Virtualization Solution at DEMO

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 1/10th 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://delphix.com
- Delphix Server: http://delphix.com/products.php
- Twitter feed: http://twitter.com/delphixcorp

CONTACT

Marlena Fernandez
JustSmart Communications for Delphix
303.408.3155
mfb@justsmartcommunications.com

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.

CUSTOMERS

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

CONTACT

Marlena Fernandez
JustSmart Communications for Delphix
303.408.3155
mfb@justsmartcommunications.com

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Exhibit 2

In The Matter Of:

Embarcadero Technologies, Inc. v.
Delphix Corporation

Jedidiah Yueh
October 3, 2013

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

EMBARCADERO TECHNOLOGIES, INC.,	Consolidated Matter 91-197,762
Opposer/Petitioner,	Opposition No. 91-197,762 Cancellation No. 92-055,153
vs.	Trademarks: DELPHIX (#77/944.256) DELPHIX (Logo) #3,768,914)
DELPHIX CORP.,	
Applicant/Registrant.	

DEPOSITION OF JEDIDIAH YUEH

Date: Thursday, October 3, 2013
10:00 a.m.

Place: FENWICK & WEST
801 California St.
Mountain View, CA 94041

Reported by: Linda J. Pugliese, C.S.R.
License No. 4764

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A P P E A R A N C E S

For the Plaintiff:

NEIL D. GREENSTEIN, ESQ.
TECHMARK A LAW CORPORATION
4820 Harwood Road, 2nd Floor
San Jose, Ca 95124-5273
(408) 266-4700

For the Defendant:

ERIC J. BALL, ESQ.
MARION MILLER, Attorney at Law
FENWICK & WEST
801 California St.
Mountain View, CA 94041
(650) 988-8500

JEDIDIAH YUEH,

being first duly sworn by the Certified Shorthand Reporter to tell the truth, the whole truth and nothing but the truth, testified as follows:

EXAMINATION BY MR. GREENSTEIN

Q. Could you please state your full name for the record.

A. Jedidiah Yueh.

Q. And have you ever had your deposition taken before?

A. No.

Q. Have you ever sat in on a deposition?

A. Not that I remember.

Q. Let me tell you a little bit about the process, what goes on here. The court reporter to your right takes everything down verbatim on her machine there. And there will be various questions that I will ask. There may be objections interposed by your attorney. There will be your answers, there may be a little bit, hopefully a minimal amount of colloquy between counsel. But at the end of the day, the court reporter will then take her notes and create a written transcript of exactly what has gone on in the room here today while we are on the record. There will be times when we'll be going off the record, but while we're on

A. It can be.
Q. Can you tell me how that would be related.
A. This is for Avamar, my prior company, which provided a data de-duplication solution. We would eliminate redundant data in backup systems, backup data. That would result in less total data or reduction in the data that is being stored for backup.
Q. With respect to the products of DelphiX or Delphix, can you give me an overview of how that product operates?
MR. BALL: Objection; argumentative.
THE WITNESS: Would you like me to provide an overview of how Delphix products work?
BY MR. GREENSTEIN:
Q. Correct.
A. Delphix virtualizes databases like Oracle.
Q. And does it -- if you can provide an overview of the actual operation of that to assist us.
A. Delphix connects to source databases, begins to synchronize all the data, a little bit like TiVo for those databases, and records all of those changes, and then is able to generate virtual copies of the data for a variety of uses, such as data protection, prepackaged applications like SAP, and as we mentioned earlier, BI, business intelligence and analytics.

Q. And does the -- strike that.

Does your company's products in doing this virtualization, do any data de-duplication?

A. Delphix eliminates the need to create duplicate data so I consider it a preduplication solution not a de-duplication solution.

Q. Does your company's product do any data reduction?

A. Our product, by virtualizing databases, can reduce the total amount of data that a business needs to manage.

Q. So are you saying that it doesn't do reduction or it avoids the need to do reduction?

MR. BALL: Objection; compound and misstates his testimony.

THE WITNESS: It's hard to say based on the question.

BY MR. GREENSTEIN:

Q. So does your company's product actually do data reduction?

MR. BALL: Objection; asked and answered.

THE WITNESS: Delphix virtualizes databases which allows you to operate databases in far less space. It depends on how you define data reduction.

you were taking orders for the product; right?

A. No.

Q. Okay. What did you do as soon as the company was started?

A. Started selling the solution.

Q. When you say "started selling," you didn't have a product yet; right?

A. Yes.

Q. So you took the order. What did you give to people in exchange?

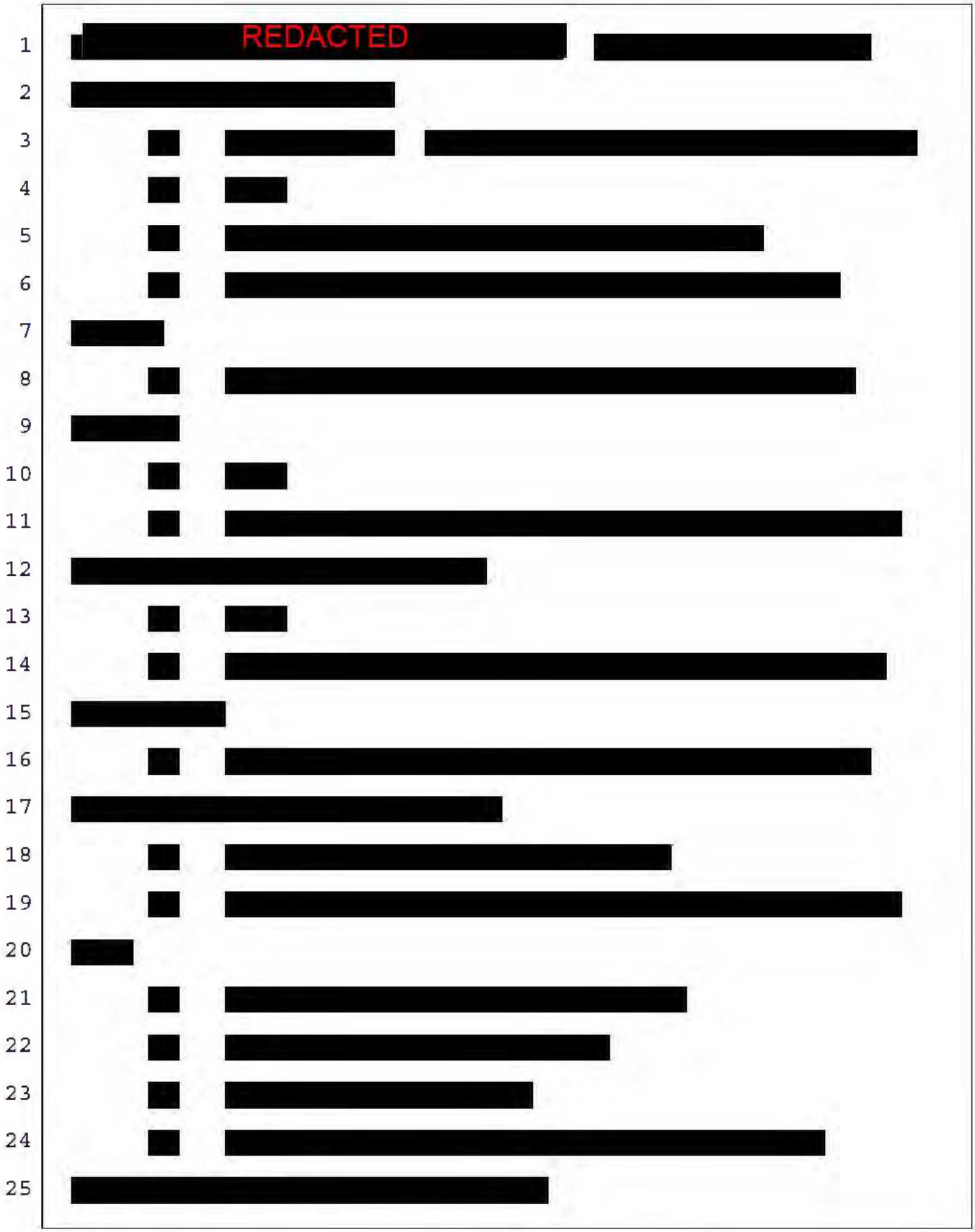
A. We didn't take orders. Nobody was willing to buy until we had the product.

Q. So you were -- would it be accurate to say when you say you started selling, you were out soliciting orders?

A. Yes. We were speaking with customers about potentially purchasing the product.

Q. Okay. And then when did you actually ship your first product. To a customer?

[redacted] REDACTED


REDACTED

September 14 of 2010?

A. Yes.

Q. And was that when your product officially merged?

MR. BALL: Objection; vague.

THE WITNESS: I disagree with the question, but this is when we launched the company.

BY MR. GREENSTEIN:

Q. You launched the company on September 14 of 2010.

A. Yes, that was our marketing launch.

Q. Okay. When you say your "marketing launch," what do you mean by that?

A. We started the company in 2008 and began selling the product and had a number of customers by the time we attended this conference. This is kind of like a marketing event to generate more buzz in the market.

Q. Prior to this conference, how many copies of the server or software were sold?

REDACTED

Q. Okay. So as I understand, you don't disagree that the company was launched in September of 2010.

MR. BALL: Objection; misstates his

testimony.

THE WITNESS: Launch is a fuzzy term. We had a marketing launch of the company in September of 2010.

BY MR. GREENSTEIN:

Q. Was there anything different about the software that was sold prior to September 2010 as opposed to after?

A. We were selling the same software both before and after except for maybe changes in version number.

Q. Anything else that was different?

MR. BALL: Objection; vague as to time.

THE WITNESS: Do you want to specify a time?

BY MR. GREENSTEIN:

Q. It's referring to the prior question. Anything else that was different between the prior September 2010 software as compared to the post-September 2010 software?

A. Not that I recall.

Q. Was the software prior to the launch in September 2010 sold pursuant to confidentiality agreements?

[redacted]

BY MR. GREENSTEIN:

Q. Of what you were an inventor on.

A. Most of the patents that we filed at Delphix Corp. are around database virtualization or their use.

Q. And did you receive any training in database virtualization?

A. I believe I invented the concept in space, to no.

Q. That you invented the concept?

A. (Nods head up and down.)

Q. And to your knowledge, is this concept of database virtualization referred to by others under any other terminology?

A. I believe other companies use it in different ways.

Q. Can you give me an example of what company and in what way they use it?

A. As I recall, there was a company called Composite Software that used it in a different way, but they were in a different space.

Q. Tell me the way in which they used it.

A. I believe they used it for normalizing data from databases for composite applications.

Q. And what do you mean when you say "normalizing data"?

A. I'm not very familiar with their products. And I believe it was a small niche-y industry, but I'd seen the term used by them.

Q. And you understand that to be different from what you do.

A. Distinctly different.

Q. Are you familiar with any other companies that use the database virtualization terminology?

A. I believe other companies may use it in their marketing to some extent, perhaps Oracle or VMware.

Q. Do you know which ones? Other than Oracle and VMware?

A. Other than those two? I don't remember.

Q. And do Oracle and VMware use it in the same context and for the same purpose of what you use database virtualization for?

MR. BALL: Objection; compound.

THE WITNESS: I don't believe Oracle and VMware used database virtualization the same way that we use it.

BY MR. GREENSTEIN:

Q. What's your understanding of the way in which Oracle uses database virtualization?

A. I believe Oracle, when it says database virtualization, means the virtualization of the software

STATE OF CALIFORNIA)
)
COUNTY OF SANTA CLARA)

I, LINDA J. PUGLIESE, Certified Shorthand Reporter in and for the State of California, do hereby certify that the witness in the foregoing deposition was by me duly sworn to testify to the truth, the whole truth, and nothing but the truth in the within-entitled cause, that the foregoing is a full, complete and true record of said testimony, and that the witness was given an opportunity to read and correct said deposition and to subscribe to the same.

I further certify that I am not interested in the outcome of this action, nor connected with, nor related to any of the parties in said action, nor to their respective counsel.

Date: October 25, 2013.

_____

Linda J. Pugliese
Certified Shorthand Reporter
License No. 4764

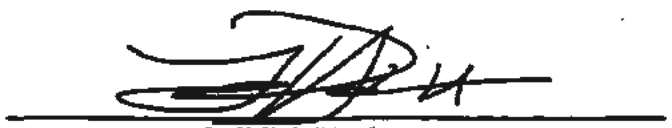
Errata Sheet to the Deposition of Jedidiah Yueh
Taken on October 3, 2013

Page	Line	Now Reads	Should Read
8	18	Casey	Caccia
9	11	objection, the objection as argumentative they	objections, the objections that it is argumentative to refer
13	2	objections. Hadn't filed a response	objections that we filed in response
23	12	Molton	Moulton
23	21	vendor	venture
24	2	Molten	Moulton
28	7	Axiom	Axion
28	15	Axiom	Axion
29	4	Embarcadero	EMC
32	6	Synovia	Sanofi
39	22	Again, not for	Again, he's not asking for speculation or
41	5	Caccio	Caccia
41	8	Caccio	Caccia
41	25	Caccio	Caccia

46	18	Caccio	Caccia
48	21	Caccio	Caccia
49	5	Caccio	Caccia
49	7	Caccio	Caccia
49	13	Caccio	Caccia
52	14	Hillary	Hilary
52	15	Hillary	Hilary
52	20	him business	him about business
52	22	you're	are you
67	11	employed	deployed
67	24	Solarus	Solaris
73	24	exchange	change
78	4	environmental	virtual
82	24	want	run
83	4	virtue	virtual
86	18	virtue	virtual
94	7	Hillary	Hilary

94	7	Hillary's	Hilary's
102	24	employee -- when an -- employee offers	employee offers
103	18	Hillary	Hilary
110	3	managing environment	managing in an environment
127	7	go to a	go do a
128	25	what --	what they intend it to mean.
132	8	argumentative in the sales	argumentative in a sense
134	17	company the	company where the
148	17	Caccio	Caccia
148	19	Caccio	Caccia
148	20	Caccio	Caccia
151	17	I'm not aware of it.	I'm not currently aware of it, other than videos.
153	4	Not that I recall or am aware of.	Not that I recall or am aware of, other than videos.
179	21	merged	emerged
180	4	merged	emerged
184	8	Hillary	Hilary
191	11	Hillary	Hilary

193	20	officer companies	officers of the companies
194	20	that's	that there is a
195	24	Caccio	Caccia
195	25	Caccio	Caccia
196	2	Caccio	Caccia
207	22	design	are designed
213	10	collapse at	collapse the
215	7	order get	order to get
234	15	I don't know.	I don't know, other than discussions with counsel.
257	14	I believe	I do not believe
259	7	to	so
268	9	Hillary	Hilary
271	1	Exhibit 4	Exhibit 40
272	21	Hillary	Hilary



Jedidiah Yueh
Deponent

11/25/13
Date

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, v. Delphix Corp., Applicant and Registrant.	Opposition No.: 91197762 Cancellation No.: 92055153

DECLARATION OF ERIC BALL IN SUPPORT OF APPLICANT AND REGISTRANT DELPHIX CORP.'S MOTION FOR SUMMARY JUDGMENT ON EMBARCADERO'S FRAUD CLAIM

I, Eric Ball, hereby declare:

1. I am an attorney duly admitted to practice in California and before the Trademark Trial and Appeal Board. I am an associate at the law firm of Fenwick & West LLP, counsel of record for Applicant and Registrant Delphix Corp. in this action. I make this declaration in support of Delphix's Motion for Summary Judgment based on my own personal knowledge, and, if called as a witness, I could and would testify competently to the facts in this declaration.

2. On May 23, 2013, I received Opposer's First Supplemental Initial Disclosures Pertaining to the Notice of Opposition. Attached as **Exhibit 1** is a true and correct copy of Opposer's First Supplemental Initial Disclosures Pertaining to the Notice of Opposition.

3. On February 4, 2014, I received Embarcadero Technologies, Inc.'s Pre-Trial Disclosures. Attached as **Exhibit 2** is a true and correct copy of Embarcadero Technologies, Inc.'s Pre-Trial Disclosures.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration was executed on August 11, 2014, in Mountain View, California.

Eric Ball

PROOF OF SERVICE

I declare that:

I am employed in the County of Santa Clara, California.

I am over the age of eighteen years and not a party to the within cause; my business address is Silicon Valley Center, 801 California Street, Mountain View, California 94041. On the date indicated below, I served the **DECLARATION OF ERIC BALL IN SUPPORT OF APPLICANT AND REGISTRANT DELPHIX CORP.'S MOTION FOR SUMMARY JUDGMENT ON EMBARCADERO'S FRAUD CLAIM** on the interested parties in said cause, by mailing a true copy thereof as indicated below, addressed as follows:

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

☐ **BY PERSONAL SERVICE**: I caused such envelope(s) to be delivered by hand on the office(s) of the addressee(s).

☐ **BY OVERNIGHT COURIER:** by placing the document(s) listed above in a sealed envelope with a prepaid shipping label for express delivery and causing such envelope to be transmitted to an overnight delivery service for delivery by the next business day in the ordinary course of business.

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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at Mountain View, California, this 11th day of August, 2014.

/Deborah A. Shaw/
Deborah A. Shaw

Exhibit 1

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

EMBARCADERO TECHNOLOGIES, INC., **Opposer/Petitioner** **v.** **DELPHIX CORPORATION,** **Applicant/Registrant**	**Consolidated Matter #91-197,762** Oppo #91-197,762 Canc #92-055,153 **Trademarks:** **DELPHIX** (#77/944,256) **DELPHIX (Logo)** (#3,768,914)

OPPOSER'S FIRST SUPPLEMENTAL INITIAL DISCLOSURES PERTAINING TO THE NOTICE OF OPPOSITION

Pursuant to *Fed. R. Civ. Proc. 26(a)(1)*, and *Trademark Rules of Practice Rule 2.120(a)(3)* Opposer/Petitioner, EMBARCADERO TECHNOLOGIES, INC., ("Embarcadero", or "Opposer/Petitioner"), hereby makes the following first supplemental initial disclosures [Opposer/Petitioner and/or Embarcadero as used herein shall mean Embarcadero Technologies, Inc. and/or its predecessors in title or interest, including but not limited to Borland International, Inc., Inprise Corporation, Borland Software Corporation and Codegear LLC.]:

I. Persons Believed to Have Discoverable Information that Registrant May Use to Support Its Claims or Defenses

In accordance with Fed. R. Civ. P. 26(a)(1)(A)(i), Embarcadero identifies the following individuals who are likely to have discoverable information that Embarcadero may use to support its claims and defenses in its Notice of Opposition. By identifying the following individuals, Embarcadero does not authorize Applicant/Registrant, or anyone acting on its behalf, to contact or otherwise communicate with such individuals, or take any action with respect to such individuals that is otherwise prohibited by any rules of professional conduct.

1. Corporate Representative of Embarcadero Technologies, Inc.
   Embarcadero Technologies, Inc.
   100 California Street, 12th Floor

San Francisco, CA 94111
Tel: 415-834-3131

Anticipated Subjects of Information: Knowledge of U.S. Trademark Registration No. 2,873,025, as well as Embarcadero's other registered marks and common law rights, owned and relied upon by Embarcadero in this proceeding; knowledge of the products and services advertised, promoted, distributed, offered and/or sold in the U.S. under or in connection with Embarcadero's U.S. Trademark Registration No. 2,873,025, and Embarcadero's other registered marks and common law rights; knowledge of Embarcadero's marketing, advertising and sales activities in the U.S.; knowledge of the channels of trade and distribution used by Embarcadero and/or the general descriptions of the types of consumers to whom Embarcadero's products and/or services bearing the mark of U.S. Trademark Registration No. 2,873,025 as well as Embarcadero's other registered marks and common law rights are advertised, promoted, distributed, offered and/or sold.

Listed below are specific corporate representatives possessing knowledge of the above anticipated subjects of information. Any specific person may testify on more than one category.

David Intersimone
Embarcadero Technologies, Inc.
100 California Street, 12th Floor
San Francisco, CA 94111
Tel: 415-834-3131

John Thomas
Embarcadero Technologies, Inc.
100 California Street, 12th Floor
San Francisco, CA 94111
Tel: 415-834-3131

2. Corporate Representative of Delphix Corporation
Delphix Corporation
275 Middlefield Road, Suite 50
Menlo Park, CA 94025
Tel: 650-494-1645

Anticipated Subjects of Information: Knowledge of U.S. Trademark Application No. 77/944,256, the subject of the opposition, as well as Applicant's/Registrant's other registered marks

and common law rights, including, but not limited to U.S. Trademark Registration No. 3,768,914, the subject of the cancellation in this consolidated matter; knowledge of the products and services advertised, promoted, distributed, offered and/or sold in the U.S. under or in connection with Applicant/Registrant's U.S. Trademark Application No. 77/944,256, and Applicant/Registrant's other registered marks and common law rights, including but not limited to U.S. Trademark Registration No. 3,768,914; knowledge of Applicant/Registrant's marketing, advertising and sales activities in the U.S.; knowledge of the channels of trade and distribution used by Applicant/Registrant and/or the general descriptions of the types of consumers to whom Applicant/Registrant's products and/or services bearing the mark of U.S. Trademark Application No. 77/944,256, as well as Applicant/Registrant's other registered marks and common law rights, including but not limited to U.S. Trademark Registration No. 3,768,914, are advertised, promoted, distributed, offered and/or sold; Applicant/Registrant's intentions to use the mark of U.S. Trademark Application No. 77/944,256 and U.S. Trademark Registration No. 3,768,914 at their respective times of filing; Knowledge of the first use of the marks of U.S. Trademark Application No. 77/944,256 and U.S. Trademark Registration No. 3,768,914 in U.S. commerce.

3. Jedidiah Yueh
President of Delphix Corporation
275 Middlefield Road, Suite 50
Menlo Park, CA 94025
Tel: 650-494-1645

Anticipated Subjects of Information: Knowledge of U.S. Trademark Application No. 77/944,256, the subject of the opposition, as well as Applicant's/Registrant's other registered marks and common law rights, including, but not limited to U.S. Trademark Registration No. 3,768,914, the subject of the cancellation in this consolidated matter; knowledge of the products and services advertised, promoted, distributed, offered and/or sold in the U.S. under or in connection with Applicant/Registrant's U.S. Trademark Application No. 77/944,256, and Applicant/Registrant's other registered marks and common law rights, including but not limited to U.S. Trademark

Registration No. 3,768,914; knowledge of Applicant/Registrant's marketing, advertising and sales activities in the U.S.; knowledge of the channels of trade and distribution used by Applicant/Registrant and/or the general descriptions of the types of consumers to whom Applicant/Registrant's products and/or services bearing the mark of U.S. Trademark Application No. 77/944,256, as well as Applicant/Registrant's other registered marks and common law rights, including but not limited to U.S. Trademark Registration No. 3,768,914, are advertised, promoted, distributed, offered and/or sold; Applicant/Registrant's intentions to use the mark of U.S. Trademark Application No. 77/944,256 and U.S. Trademark Registration No. 3,768,914 at their respective times of filing; Knowledge of the first use of the marks of U.S. Trademark Application No. 77/944,256 and U.S. Trademark Registration No. 3,768,914 in U.S. commerce.

4. Rick Caccia
VP Marketing of Delphix Corporation
275 Middlefield Road, Suite 50
Menlo Park, CA 94025
Tel: 650-494-1645

Anticipated Subjects of Information:Knowledge of U.S. Trademark Application No. 77/944,256, the subject of the opposition, as well as Applicant's/Registrant's other registered marks and common law rights, including, but not limited to U.S. Trademark Registration No. 3,768,914, the subject of the cancellation in this consolidated matter; knowledge of the products and services advertised, promoted, distributed, offered and/or sold in the U.S. under or in connection with Applicant/Registrant's U.S. Trademark Application No. 77/944,256, and Applicant/Registrant's other registered marks and common law rights, including but not limited to U.S. Trademark Registration No. 3,768,914; knowledge of Applicant/Registrant's marketing, advertising and sales activities in the U.S.; knowledge of the channels of trade and distribution used by Applicant/Registrant and/or the general descriptions of the types of consumers to whom Applicant/Registrant's products and/or services bearing the mark of U.S. Trademark Application No. 77/944,256, as well as Applicant/Registrant's other registered marks and common law rights,

including but not limited to U.S. Trademark Registration No. 3,768,914, are advertised, promoted, distributed, offered and/or sold; Applicant/Registrant's intentions to use the mark of U.S. Trademark Application No. 77/944,256 and U.S. Trademark Registration No. 3,768,914 at their respective times of filing; Knowledge of the first use of the marks of U.S. Trademark Application No. 77/944,256 and U.S. Trademark Registration No. 3,768,914 in U.S. commerce.

Embarcadero's investigation of this matter is not yet complete and Embarcadero hereby reserves the right to identify additional appropriate individuals with such knowledge as may be relevant.

II. Relevant Documents and Tangible Things

In accordance with Fed. R. Civ. Proc. 26(a)(1)(A)(ii), Embarcadero discloses the following categories of documents and tangible things in its custody or control, or publicly and equally available to Applicant/Registrant, that it may use to support its claims and defenses in its Notice of Opposition (all limited to U.S. activities):

1. U.S. Trademark Registrations, including PTO file wrappers, relied upon in this opposition;
2. Documents concerning the use of the DELPHI mark on a variety of computer software products and related services;
3. Documents concerning the DELPHI product line and products incorporating DELPHI, initially and as they have expanded over the years since the original introduction in 1994, including related services;
4. Documents, including datasheets, white papers, testimonials, product evaluation guides, installation and user guides and other materials, detailing product features, information and benefits of the DELPHI product line and products incorporating DELPHI, including related services, initially and as they have expanded over the years since the original introduction in 1994;

5. Documents relating to or containing analyst and research reports covering the various DELPHI products and services, initially and as they have expanded over the years since the original introduction in 1994, including available information on market share, consumer recognition and market positioning;

6. Documents containing information on the current and past sales, advertising and marketing information for the various DELPHI products and services;

7. Documents containing case studies on how companies have been implementing the various DELPHI products and services into their environments and benefits gained;

8. Documents containing white papers with information on industry problems and how the various DELPHI products and services address those problems;

9. Documents containing press releases announcing new product releases, awards and other industry information in connection with the various DELPHI products and services;

10. Examples of advertising and marketing of the various DELPHI products and services not specifically covered by the above categories;

11. Pages from websites of Embarcadero and/or 3rd parties showing, explaining and/or relating to the various DELPHI products and services.

Embarcadero's investigation of this matter is not yet complete. Embarcadero will disclose additional documents and tangible things as they become known. These documents will be produced or made available for inspection and copying upon reasonable notice at the usual place where the documents are kept and at a mutually agreeable time. The documents described above are located at the offices of TechMark A Law Corporation, 4820 Harwood Road, 2nd Floor, San Jose, CA 95124 and/or at the offices of Embarcadero Technologies, Inc., 100 California Street, 12th Floor, San Francisco, CA 94111.

Counsel for Embarcadero certifies that, to the best of counsel's knowledge, information and belief, formed after an inquiry that is reasonable under the circumstances, this disclosure is complete

and correct as of the date indicated below. However, counsel reserves the right to supplement or amend this disclosure as additional information becomes available, through discovery or otherwise.

Dated: May 23, 2013

Respectfully Submitted,

EMBARCADERO TECHNOLOGIES, INC.
By /Martin R Greenstein/
Martin R. Greenstein
Neil D. Greenstein
Leah Z. Halpert
TechMark a Law Corporation
4820 Harwood Road, 2nd Floor
San Jose, CA 95124-5273
Tel: 408-266-4700; Fax: 408-850-1955
E-Mail: MRG@TechMark.com
Attorneys for Opposer

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **OPPOSER'S INITIAL DISCLOSURES** is being served on May 23, 2013, by hand delivery on Applicant/Registrant's Attorney of Record at the address below, with a courtesy copy being sent via email to eball@fenwick.com:

Eric Ball
Fenwick & West LLP
801 California Street
Mountain View, CA 94041

/Leah Z. Halpert/
Leah Z. Halpert

Exhibit 2

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

EMBARCADERO TECHNOLOGIES, INC. **Opposer/ Petitioner,** **v.** **DELPHIX CORP.** **Applicant/ Registrant.**	**Consolidated Proceeding No. 91-197,762** Opposition No. 91-197,762 Cancellation No. 92-055,153 **Trademarks: DELPHIX** (#77/944,256) **DELPHIX** (Logo) (#3,768,914)

EMBARCADERO TECHNOLOGIES, INC.'S PRE-TRIAL DISCLOSURES

Opposer/Petitioner, EMBARCADERO TECHONOLOGIES, INC. (hereinafter "Embarcadero"), respectfully submits the following pre-trial disclosures of information reasonably available as of this date pursuant to the provisions of Federal Rule of Civil Procedure 26(a)(3) and 37 CFR Section 2.121(e). Embarcadero reserves the right to amend these pre-trial disclosures as further information becomes available. Nothing herein shall be construed as a waiver of the attorney-client privilege and/or work product doctrine.

Witnesses Embarcadero May Present at Trial:

1. David Intersimone
   Embarcadero Technologies, Inc.
   (May be contacted through undersigned counsel)

Subjects on which witness may testify:

Embarcadero's use of its DELPHI mark, for various goods/services including those in the field of computer software, database modeling, database creation, database management, database implementation, database provisioning, software for virtualization, software for application development and related services; facts relating to likelihood of confusion; corporate planning documents; marketing plans; nature of goods and services sold and/or distributed and/or provided under Embarcadero's DELPHI mark; various materials, web sites and materials relating to Embarcadero's use of DELPHI in the fields of computer software, database modeling, database creation, database management, software for visualization, software for application development and related services; typical customers/users of Embarcadero's goods and services under its DELPHI mark; Embarcadero's business records; and such other topics as an employee

may testify about under the Trademark Rules of Practice.

General summary or list of the types of documents and things which may be introduced as exhibits during the testimony of the witness:

Embarcadero's business records; documents relating to the use of Embarcadero's DELPHI mark; documents relating to sales, distribution, advertising, and marketing of Embarcadero's goods/services; documents relating to consumer perception of Embarcadero's DELPHI mark; documents relating to likelihood of confusion between the parties' marks; documents relating to the sound, appearance and meaning of the parties' marks; documents relating to the above topics on which the witness may testify.

2. John Thomas
Embarcadero Technologies, Inc.
(May be contacted through undersigned counsel)

Subjects on which witness may testify:

Embarcadero's use of its DELPHI mark, for various goods/services including those in the field of computer software, database modeling, database creation, database management, database implementation, database provisioning, software for virtualization, software for application development and related services; facts relating to likelihood of confusion; corporate planning documents; marketing plans; nature of goods and services sold and/or distributed and/or provided under Embarcadero's DELPHI mark; various materials, web sites and materials relating to Embarcadero's use of DELPHI in the fields of computer software, database modeling, database creation, database management, software for visualization, software for application development and related services; typical customers/users of Embarcadero's goods and services under its DELPHI mark; Embarcadero's business records; and such other topics as an employee may testify about under the Trademark Rules of Practice.

General summary or list of the types of documents and things which may be introduced as exhibits during the testimony of the witness:

Embarcadero's business records; documents relating to the use of Embarcadero's DELPHI mark; documents relating to sales, distribution, advertising, and marketing of Embarcadero's goods/services; documents relating to consumer perception of Embarcadero's DELPHI mark; documents relating to likelihood of confusion between the parties' marks; documents relating to the sound, appearance and meaning of the parties' marks; documents relating to the above topics on which the witness may testify.

3. Corporate Representative
Embarcadero Technologies, Inc.
(May be contacted through undersigned counsel)

Subjects on which witness may testify:

Embarcadero's use of its DELPHI mark, for various goods/services including those in the field of computer software, database modeling, database creation, database management, database implementation, database provisioning, software for virtualization, software for application development and related services; facts relating to likelihood of confusion; corporate planning documents; marketing plans; nature

of goods and services sold and/or distributed and/or provided under Embarcadero's DELPHI mark; various materials, web sites and materials relating to Embarcadero's use of DELPHI in the fields of computer software, database modeling, database creation, database management, software for visualization, software for application development and related services; typical customers/users of Embarcadero's goods and services under its DELPHI mark; Embarcadero's business records; and such other topics as an employee may testify about under the Trademark Rules of Practice.

General summary or list of the types of documents and things which may be introduced as exhibits during the testimony of the witness:

Embarcadero's business records; documents relating to the use of Embarcadero's DELPHI mark; documents relating to sales, distribution, advertising, and marketing of Embarcadero's goods/services; documents relating to consumer perception of Embarcadero's DELPHI mark; documents relating to likelihood of confusion between the parties' marks; documents relating to the sound, appearance and meaning of the parties' marks; documents relating to the above topics on which the witness may testify.

4. Kyle Hailey
DelphiX Corp.
275 Middlefield Road, Suite 50
Menlo Park, CA 94025

Subjects on which witness may testify:

Applicant/Registrant, DelphiX Corporation's (hereinafter "DelphiX"), use of the DELPHIX mark in the U.S. on the goods as set forth in Appln. No. 77/944,256, and any related services; DelphiX's use of the DELPHIX (Logo) mark in the U.S. on the goods as set forth in Reg. No. 3,768,914, and any related services; DelphiX's awareness of Embarcadero or Embarcadero's DELPHI mark; general market for the parties' products; and documents relating to the above topics on which this witness may testify.

General summary or list of the types of documents and things which may be introduced as exhibits during the testimony of the witness:

Documents relating to the above topics on which this witness may testify.

5. Jedidiah Yueh
DelphiX Corp.
275 Middlefield Road, Suite 50
Menlo Park, CA 94025

Subjects on which witness may testify:

Applicant/Registrant, DelphiX Corporation's (hereinafter "DelphiX"), use of the DELPHIX mark in the U.S. on the goods as set forth in Appln. No. 77/944,256, and any related services; DelphiX's use of the DELPHIX (Logo) mark in the U.S. on the goods as set forth in Reg. No. 3,768,914, and any related services; the creation, selection, and adoption by DelphiX of the DELPHIX and DELPHIX (Logo) marks; DelphiX's awareness of Embarcadero or Embarcadero's DELPHI mark; the topics on which he was designated to testify pursuant to Embarcadero's Rule 30(b)(6) second amended deposition notice; and such other topics as an employee may testify about under the Trademark Rules of Practice.

General summary or list of the types of documents and things which may be introduced as exhibits during the testimony of the witness:

Documents relating to the above topics on which this witness may testify.

6. Rick Caccia
DelphiX Corp.
275 Middlefield Road, Suite 50
Menlo Park, CA 94025

Subjects on which witness may testify:

Applicant/Registrant, DelphiX Corporation's (hereinafter "DelphiX"), use of the DELPHIX mark in the U.S. on the goods as set forth in Appln. No. 77/944,256, and any related services; DelphiX's use of the DELPHIX (Logo) mark in the U.S. on the goods as set forth in Reg. No. 3,768,914, and any related services; the creation, selection, and adoption by DelphiX of the DELPHIX and DELPHIX (Logo) marks; DelphiX's awareness of Embarcadero or Embarcadero's DELPHI mark; the topics on which he was designated to testify pursuant to Embarcadero's Rule 30(b)(6) second amended deposition notice; and such other topics as an employee may testify about under the Trademark Rules of Practice.

General summary or list of the types of documents and things which may be introduced as exhibits during the testimony of the witness:

Documents relating to the above topics on which this witness may testify.

7. Such other witnesses (and related documents) as may be appropriate based upon objections made by DelphiX, and/or to rebut any evidence propounded by DelphiX.

Dated: February 4, 2014

Respectfully Submitted,

/Martin R. Greenstein/
Martin R. Greenstein
Neil D. Greenstein
Angelique M. Riordan
Leah Z. Halpert
TechMark a Law Corporation
4820 Harwood Road, 2nd Floor
San Jose, CA 95124
Tel: 408-266-4700; Fax: 408-850-1955
Email: MRG@TechMark.com
Attorneys for Embarcadero Technologies, Inc.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing **EMBARCADERO TECHNOLOGIES, INC.'S PRE-TRIAL DISCLOSURES** is being served on the date set forth below upon DELPHIX CORP. by first-class mail, postage pre-paid:

Eric Ball
Fenwick & West LLP
801 California Street
Mountain View, CA 94041

/Angelique M. Riordan/
Angelique M. Riordan