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

Proceeding	91200167
Party	Plaintiff M2 Software, Inc.
Correspondence Address	D ESCAMILLA M2 SOFTWARE INC 6725 SUNSET BLVD, SUITE 230 LOS ANGELES, CA 90028 UNITED STATES info@m2software.com
Submission	Response to Board Order/Inquiry
Filer's Name	D. Escamilla
Filer's e-mail	info@m2software.com
Signature	/de/
Date	03/06/2013
Attachments	EDVA27 12-31-2012 Answer.pdf (11 pages)(335205 bytes)

DEC 31 2012

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

HIGHER LOGIC, LLC

Plaintiff,

v.

**DAVID ESCAMILLA and
M2 SOFTWARE, INC.**

Defendants

C.A. No. 1:12cv1153 GBL(TRJ)

Jury Demanded

ANSWER AND AFFIRMATIVE DEFENSES

ANSWER

By way of answer to the *Complaint for Declaratory Relief and Cancellation of Federal Trademark Registrations* (DKT01) (“Complaint”) filed by Plaintiff Higher Logic, LLC (“Plaintiff” or “HL”), Defendant David Escamilla (“Defendant”) says as follows:¹

AS TO NATURE OF ACTION

1. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of ¶ 1 of the Complaint and based thereon denies each and every such allegation.

AS TO JURISDICTION AND VENUE

2. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of ¶ 2, ¶ 3, and ¶ 4 of the Complaint and based thereon denies each and every such allegation.

¹ Defendant joins M2 Software, Inc., a wholly-owned party, in this Answer if intervention on behalf of this licensee [DKT07 at 20 n.15] is permitted by the Court pursuant to Fed. R. Civ. P. 24(a).

AS TO THE PARTIES

3. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of ¶ 5 of the Complaint and based thereon denies each and every such allegation. Defendant specifically denies the allegations of ¶ 5 of the Complaint as to Plaintiff's claim of a principal place of business in Virginia (within this Court's judicial district), which contradicts Plaintiff's own sworn declaration to the United States Patent and Trademark Office ("PTO") for trademark applications Ser. Nos. 85017071 and 85017090, subject of the related case *M2 Software, Inc. v. Higher Logic, LLC* (TTAB Opp. No. 91200167) (the "**TTAB Opposition**"), in which Plaintiff represented to the PTO that Plaintiff's principal place of business is rather 1629 K Street NW, Washington, D.C. 20006, in the District of Columbia.

4. Defendant admits that David Escamilla is an individual and that M2 Software, Inc. is a Delaware corporation, but the remaining allegations of ¶ 6 and ¶ 7 call for a legal conclusion and are therefore denied.

AS TO ALLEGATIONS COMMON TO ALL COUNTS

5. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of ¶ 8 and based thereon denies each and every such allegation.

6. Defendant admits that the descriptions referenced in ¶ 9 appear on www.m2software.com, but denies any remaining allegation.

7. Defendant admits that United States Registration No. 1,931,182 (the "**182 Registration**") was issued by the PTO on October 31, 1995 for the mark **M2[®]** in standard character form. Defendant denies the remaining allegations of ¶ 10 as presenting a limiting or inaccurate representation of the registration, which appears on the Principal Register and speaks for itself.

8. Defendant admits that he properly filed a Combined Declaration of Use and Incontestability Under §§ 8 & 15 (15 U.S.C. §§ 1058 & 1065) for the '182 Registration on January 3, 2001 on behalf of M2 Software, Inc. as an officer, and avers that the declaration was properly accepted and acknowledged April 8, 2001. Defendant denies the remaining allegations of ¶ 11 and ¶ 12 as presenting a limiting or inaccurate representation of the declaration and the PTO's acceptance and acknowledgement, which are government documents that speak for themselves.

9. Defendant admits that he properly filed a Combined Declaration of Use In Commerce & Application For Renewal of Registration of A Mark Under Section 8 & 9 for the '182 Registration on November 19, 2004 as an officer of M2 Software, Inc., and that the declaration and application were accepted and granted, and registration renewed on February 22, 2005. Defendant denies the remaining allegations of ¶ 13 and ¶ 14 as presenting a limiting or inaccurate representation of the combined declaration and application and the PTO's acceptance, grant, and renewal of registration, which are government documents that speak for themselves.

10. Defendant denies the allegations of ¶ 15.

11. Defendant admits Plaintiff attempted to file with the PTO two (2) trademark applications on April 22, 2010 under Serial Nos. 85017071 (the **"071 Application"**) and 85017090 (the **"090 Application"**). Defendant denies the remaining allegations of ¶ 16 as presenting a limiting or inaccurate representation of the applications, which are government documents that speak for themselves.

12. Defendant denies the allegations of ¶ 17 as presenting a limiting or inaccurate representation of the PTO's office actions with respect to the '071 Application and the '090 Application, which are government documents that speak for themselves. Defendant avers, as alleged in the TTAB Opposition, that Plaintiff committed fraud on the PTO by failing to disclose

the generic nature of *mobile membership* applications as a software category, which allowed it to evade a proper examination that should have examined the applied-for functional trademark “M2” absent generic matter, against the Defendant’s registered trademark M2®.

13. Defendant admits that he properly filed a Consolidated Notice of Opposition against Plaintiff on June 8, 2011 on behalf of M2 Software, Inc. as an officer, in the TTAB Opposition. Defendant denies the remaining allegations of ¶ 18 as presenting a limiting or inaccurate representation of the Consolidated Notice of Opposition, which document speaks for itself.

14. Defendant denies the allegations of ¶ 19 as mischaracterizing the nature of both Plaintiff’s denials and the nature of the goods and services asserted in the pleadings of the TTAB Opposition, which documents speak for themselves.

15. Defendant denies the allegations of ¶ 20, ¶ 21, and ¶ 22.

16. Defendant admits that United States Registration No. 4,128,151 (the “’151 Registration”) was issued by the PTO on April 14, 2012 for the mark M2® in standard character form. Defendant denies the remaining allegations of ¶ 23 as presenting a limiting or inaccurate representation of the registration, which appears on the Principal Register and speaks for itself.

17. Defendant admits the allegation of ¶ 24 that Plaintiff’s applications were not cited against the application that matured into the ‘151 Registration, but avers, as alleged in the TTAB Opposition, that Plaintiff committed fraud on the PTO by failing to disclose the generic nature of *mobile membership* applications as a software category, which allowed it to evade a proper examination that should have examined the applied-for functional trademark “M2” absent generic matter, against the Defendant’s registered trademark M2®.

18. Defendant admits that the website www.m2software.com is a simple one page site as intended, but denies the remaining allegations of ¶ 25 and ¶ 26.

19. Defendant admits that an email address provided on the foregoing site reads “info @ m2software.com” but denies the remaining allegations of ¶ 27 and ¶ 28. Defendant specifically avers that Plaintiff’s remaining allegations are knowingly false and have been submitted in violation of FED. R. CIV. P. 11(b) – Plaintiff is already aware from the TTAB Opposition that the spacing format of Defendant’s address is intentional, with spacing designed to reduce exposure to robotic harvesting of email addresses of businesses and to reduce incoming spam.

20. Defendant denies the allegations of ¶ 29, ¶ 30, ¶ 31, ¶ 32, ¶ 33, and ¶ 34.

AS TO COUNT I

(Declaration that Higher Logic’s Use of the M2 MOBILE MEMBERSHIP Marks Does Not Violate 15 U.S.C. § 1125(a))

21. With respect to the re-allegations of ¶ 35, Defendant repeats each of the foregoing answers above as if fully set forth herein.

22. Defendant denies the allegations of ¶ 36.

23. To the extent a response is necessary, Defendant is without sufficient information or knowledge to respond to the allegations and legal conclusions of Plaintiff in ¶ 37 and ¶ 38 of the Complaint and therefore denies the same and requires strict proof thereof.

AS TO COUNT II

(Declaration that Higher Logic’s Use of the M MOBILE MEMBERSHIP [sic] Marks Does Not Violate 15 U.S.C. § 1114(1))

24. With respect to the re-allegations of ¶ 39, Defendant repeats each of the foregoing answers above as if fully set forth herein.

25. Defendant denies the allegations of ¶ 40.

26. To the extent a response is necessary, Defendant is without sufficient information or knowledge to respond to the allegations and legal conclusions of Plaintiff in ¶ 41 and ¶ 42 of the Complaint and therefore denies the same and requires strict proof thereof.

AS TO COUNT III

(Cancellation of U.S. Trademark Registration No. 1,931,182 – Abandonment)

27. With respect to the re-allegations of ¶ 43, Defendant repeats each of the foregoing answers above as if fully set forth herein.

28. Defendant denies the allegations of ¶ 44, ¶ 45, and ¶ 46.

AS TO COUNT IV

(Cancellation of U.S. Trademark Registration No. 1,931,182 – Non-Use)

29. With respect to the re-allegations of ¶ 47 and ¶ 48, Defendant repeats each of the foregoing answers above as if fully set forth herein.

30. Defendant denies the allegations of ¶ 49, ¶ 50, and ¶ 51.

AS TO COUNT V

(Cancellation of U.S. Trademark Registration No. 1,931,182 – Fraud on the USPTO)

31. With respect to the re-allegations of ¶ 52, ¶ 53, and ¶ 54, Defendant repeats each of the foregoing answers above as if fully set forth herein.

32. Defendant denies the allegations of ¶ 55, ¶ 56, ¶ 57, ¶ 58, ¶ 59, ¶ 60, ¶ 61, and ¶ 62.

AS TO COUNT VI

(Cancellation of U.S. Trademark Registration No. 4,128,151 – Non-Use)

33. With respect to the re-allegations of ¶ 63, Defendant repeats each of the foregoing answers above as if fully set forth herein.

34. Defendant admits that the '151 Registration was issued by the PTO on April 14, 2012 for the mark M2[®] in standard character form. Defendant denies the remaining allegations of ¶ 64, ¶ 65, ¶ 66, ¶ 67, and ¶ 70 as presenting a limiting or inaccurate representation of the registration and underlying applications that are government documents that speak for themselves.

35. Defendant denies the allegations of ¶ 68, ¶ 69, ¶ 71 and ¶ 72.

AS TO COUNT VII

(Cancellation of U.S. Trademark Registration No. 4,128,151 – Fraud on the USPTO)

36. With respect to the re-allegations of ¶ 73, ¶ 74, and ¶ 75, Defendant repeats each of the foregoing answers above as if fully set forth herein.

37. Defendant denies the allegations of ¶ 76, ¶ 77, ¶ 78, ¶ 79, ¶ 80, ¶ 81, ¶ 82, and ¶ 83.

AFFIRMATIVE DEFENSES

Without admitting any wrongful conduct on the part of Defendant or any related party, and without admitting that Plaintiff suffered any loss, damage, or injury, Defendant hereby alleges the following affirmative defenses. By designating the following as affirmative defenses, Defendant does not in any way waive or limit any defenses which are or may be raised by their denials, allegations, and averments set forth herein. Defendant also does not, by alleging any affirmative defense, admit that Plaintiff does not have the burden of proof for any or all facts and/or legal conclusions underlying any of those defenses. These defenses are pled in the alternative, are raised to preserve the rights of Defendant to assert such defenses, and are raised without prejudice to Defendant's ability to raise other and further defenses.

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim)

Plaintiff's Complaint fails to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

(No Actual Case or Controversy)

Plaintiff's Complaint is not based upon an actual case or controversy.

THIRD AFFIRMATIVE DEFENSE

(Improper Jurisdiction)

Plaintiff's Complaint is barred by improper jurisdiction.

FOURTH AFFIRMATIVE DEFENSE

(Unclean Hands)

Plaintiff's Complaint is barred in whole or in part by Plaintiff's unclean hands and wrongful acts.

FIFTH AFFIRMATIVE DEFENSE

(Waiver, Estoppel, Laches)

Plaintiff's Complaint is barred, in whole or in part, by the doctrines of waiver, estoppel, and laches.

SIXTH AFFIRMATIVE DEFENSE

(Insufficient Process)

Plaintiff's Complaint is barred by insufficient process.

SEVENTH AFFIRMATIVE DEFENSE

(Insufficient Service of Process)

Plaintiff's Complaint is barred by insufficient service of process.

EIGHTH AFFIRMATIVE DEFENSE

(Improper Venue)

Plaintiff's Complaint is barred by improper venue.

NINTH AFFIRMATIVE DEFENSE

(Enforceable Senior Trademarks and Service Marks)

Defendant's M2[®] trademarks, service marks, and registrations at issue in this action are valid, incontestable, and/or enforceable and likely to be infringed by applied-for uses of Plaintiff.

TENTH AFFIRMATIVE DEFENSE

(Res Judicata and Collateral Estoppel)

Plaintiff's Complaint is barred, in whole or in part, by the doctrine of res judicata and collateral estoppel from the TTAB Opposition.

ELEVENTH AFFIRMATIVE DEFENSE

(Judicial Estoppel and Prior Admissions)

Plaintiff's Complaint is barred, in whole or in part, by the doctrine of judicial estoppel and by the contradiction of Plaintiff's prior admissions in the related TTAB Opposition.

TWELFTH AFFIRMATIVE DEFENSE

(Spoliation of Evidence and Obstruction of Justice)

Plaintiff's Complaint is barred, in whole or in part, by Plaintiff's spoliation of evidence and obstruction of justice.

THIRTEENTH AFFIRMATIVE DEFENSE

(Perjury)

Plaintiff's Complaint is barred, in whole or in part, by perjury committed by Plaintiff or its agents, including but not limited to perjury committed in securing jurisdiction of this Court.

FOURTEENTH AFFIRMATIVE DEFENSE

(Fraud, Misrepresentation, and Other Illegal Conduct)

Plaintiff's Complaint is barred, in whole or in part, by Plaintiff's fraud, misrepresentation, and other illegal conduct.

FIFTEENTH AFFIRMATIVE DEFENSE

(Undiscovered Defenses)

Defendant has insufficient knowledge or information upon which to form a belief as to whether additional defenses are available. Defendant reserves the right to assert any further or additional defenses upon receiving more complete information regarding the matters alleged in the Complaint, through discovery or otherwise.

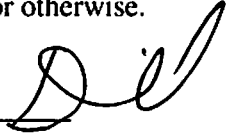
WHEREFORE, Defendant prays:

1. That Plaintiff's Complaint be dismissed with prejudice in its entirety;
2. That Plaintiff be ordered, pursuant to 15 U.S.C. § 1117 and as an equitable measure, to pay to Defendant its reasonable attorneys' fees, costs (including business resources that have been unnecessarily diverted), and disbursements in this action; and
3. That Plaintiff be awarded such other and further relief as the Court may deem just and proper.

COUNTERCLAIMS

Discovery is continuing as to counterclaims and proper jurisdiction and venue. Defendant reserves the right to assert counterclaims upon receiving more complete information about the Plaintiff and the matters alleged in the Complaint, through discovery or otherwise.

Dated: December 28, 2012

/s/ David Escamilla 
David Escamilla
Defendant, *in pro se*
500 N Michigan Ave., Suite 300
Chicago, IL 60611
Telephone: (773) 599-2430
Facsimile: (800) 874-5089
info@m2software.com

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing were caused to be served on December 28, 2012 upon the following individuals in the manner indicated:

BY FIRST CLASS U.S. MAIL

Kevin Bryan Bedell
Greenberg Traurig LLP
1750 Tysons Blvd.
Suite 1200
McLean, VA 22102

Attorney for Plaintiff,
HIGHER LOGIC, LLC

/s/ David Escamilla
David Escamilla

