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BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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

M2 SOFTWARE, INC.

Opposer,

v.

MODERNIZING MEDICINE, INC.

Applicant.

Opposition No. 91202450

For:



**MODERNIZING
MEDICINE**

Serial Nos.: 85/102,289; 85/102,294

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OPPOSER'S MOTION TO COMPEL PURSUANT TO TBMP § 523.01 AND CFR § 2.120(e)

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I. INTRODUCTION

1.01 M2 SOFTWARE, INC. (“M2” or “Opposer”) hereby moves to compel Applicant’s full and complete responses to Opposer’s interrogatories and requests for production, and to test the sufficiency of its responses to Opposer’s requests for admission.

1.02 Opposer makes this motion following good faith efforts to obtain complete responses to the discovery served on the Applicant. The parties have narrowed down the issues and are at an impasse with respect to differing legal interpretation by the parties of certain Board discovery requirements, which now require a legal ruling by the Board to proceed forward. *See Exhibit A, Decl. of Officer in Support of Motion to Compel (“DeclOpp.”)*, ¶¶ 12-21.

1.03 Applicant is a new entrant competitor in the software and information technology (“IT”) industry that seeks to compete under M2 Software’s identical M2[®] trademark. Both parties provide enterprise solutions and related services in the IT industry, including within the healthcare IT sub-sector. Yet in responding to discovery and arguing its objections to Opposer’s follow-up requests for supplemental responses, Applicant has continued to omit its most directly-intersecting products, services, and channels, as well as its use or intended use of Opposer’s identical M2[®] trademark in standard character form. This highly relevant evidence is pertinent to the “likelihood of confusion” issue, as well as Applicant’s bad faith motive in applying for M2 Software’s identical mark. Applicant seeks not only the identical distinctive word mark, but also the same placement, size, and design elements of M2’s own logo. *Id.* ¶ 4.

Graphic 1A: Opposer’s “M2 Oval Design”



Graphic 1B: Applicant’s Applied-for Mark



II. BACKGROUND OF PARTIES

2.01 A brief background of the parties is provided so the Board may review the critical nature of the information and documents being withheld by Applicant as to its most closely related and directly intersecting products, services, and channels. In discovery responses, Applicant, “Modernizing Medicine, Inc.” now claims it will not sell some of its products under its “Intent-to-Use” mark “*M2 Modernizing Medicine*,” and references phantom other mark “not involved in this proceeding” under which such products will be sold. *DeclOpp.* Ex. 9 at 103. Applicant uses this claim to lodge objections on grounds of “relevance.” *Id.* A brief background of M2 Software is provided so the Board may evaluate such objections. *See* Trademark Board Manual of Procedure (“TBMP”), § 414(11) (“information that a party sells the same goods or services as the propounding party, even if under a different mark, is relevant”).

A. Opposer M2 Software, Inc.

2.02 M2 Software, Inc. (“M2”) is a senior established firm in the IT industry that has provided software and services in the industry for over 20 years. *See DeclOpp.*, ¶ 3. As its primary business, M2 develops enterprise solutions and provides related services under the **M2**[®] trademark and trade name, including but not limited to software design, technical support, maintenance, and IT consultation. *Id.* M2 maintains a website at www.m2software.com. *Id.*

2.03 M2’s original 1995 federal registration is a product mark registration obtained early in company history to identify its first successful licensed enterprise solutions (“*business management applications*”) in the information technology industry within the media and entertainment corporate sub-sector, a customer industry prevalent in M2’s original launch regions, and within the financial sub-sector based on finance department use and financial sector consultants who became familiar with M2 Software. *Id.* at ¶ 5. *See* U.S. Reg. No. 1,931,182.

2.04 M2 has competed in the information technology industry for over 20 years, and its use of the **M2**[®] brand as service mark and trade name has not been limited to any one region or customer group. *Id.* at 6. M2's federal registration of its **M2**[®] trademark has always protected M2's full business providing enterprise solutions and related services, not restricted to a particular customer, as a federal trademark registration is intended to protect not only goods specified in the registration, but also goods and services likely to emanate from the same source. *See* 1 J. Thomas McCarthy, *MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION* (4th ed. 2002), §24:65.

2.05 In addition to M2's original product mark registration, M2 owns a federal registration of its **M2**[®] service mark for its software and information technology services, which M2 has continuously provided since at least as early as 1991. *Id.* U.S. Reg. No. 4,128,151.

2.06 Services that M2 has provided to the healthcare IT sub-sector of the industry, a segment in which M2 has invested a substantial amount of time and development,¹ include but are not limited to software design and information technology services for various physicians and healthcare professionals. *Id.* ¶7. The attached declaration provides examples of recent projects, including those within the healthcare IT sub-segment well prior to Applicant's inception. *Id.*

2.07 With respect to products, within M2's primary IT business segment, M2's enterprise solutions originated with its first business management applications that included development of the **M2**[®] enterprise solutions framework. *Id.* ¶ 9. The **M2**[®] framework has been included in a variety of subsequent products developed by M2 over its 20-year history, including those designed for the healthcare IT sub-sector of information technology industry. *Id.* One example of

¹ M2 Software's work on software and information technology projects in the healthcare customer subsegment has grown with the U.S. government's passage of several acts providing financial incentives to physicians for transitioning to electronic claims and medical records, including but not limited to the Medicare Modernization Act of 2003 (MMA), the Medicare Improvements for Patients and Providers Act of 2008 (MIPPA), and the Health Information Technology for Economic and Clinical Health (HITECH) Act, part of the American Recovery and Reinvestment Act (ARRA) signed on February 17, 2009.

software functionality for the healthcare IT sub-sector designed by M2 long senior to Applicant, and verifiable by date-stamp of submission to a government agency, is a Video Processing Module (VPM) for specialized medical imaging functions. *Id.* The software design was based on a client-server database system, and a screen was included in 2003 as a part of a National Institutes of Health (NIH) proposal of the client, a practicing gastroenterologist and associate professor at a major West Coast medical research institution. *Id.*, ¶¶ 10, 25, Ex. 13 at 131-34.

2.08 The healthcare IT sub-segment has become one of the focuses of M2's business. Several programs, including stimulus programs by the U.S. government, have increased the focus on IT in medicine since 2003 (MMA, MIPPA, HITECH). M2 has worked since 2008 (and through the present) with a client who is a practicing orthopedic surgeon and associate professor at a major Midwest medical research institution, providing information technology consultation and in development and design of software in the healthcare IT sub-segment. *Id.*, ¶ 11, Ex. 2 at 29.²

B. Applicant Modernizing Medicine, Inc.

2.09 Applicant Modernizing Medicine, Inc. is a new competitor of M2 Software in the software and information technology field, founded in 2010 to focus specifically on the healthcare IT sub-sector that is a sub-segment of M2 Software's business. *Id.* Ex. 14 at 136. Applicant has applied for a new trademark that features M2 Software's **M2**[®] trademark and trade name as the dominant portion of a design mark. Applicant also seeks to use M2 Software's identical standard

² Opposer has consistently protected the **M2**[®] trademark since 1991, including in at least 15 sustained oppositions, including in the healthcare IT sub-segment. The sole application against which M2 did not prevail in 20 years of business concerned an application that originally included computer software services, against which Opposer's senior trademark and registration was cited in a likelihood of confusion citation. The applicant withdrew Class 042 computer software services following citation of M2 Software's senior rights, and registered only a product line of pharmaceutical marketing materials. *M2 Software, Inc. v. M2 Communications, Inc.*, 450 F.3d 1378 (Fed. Cir. 2006), *cert. denied*, 127 S.Ct. 1363 (2006). The excluded class in M2 Software's primary field of enterprise solutions and IT services, withdrawn after citation and not a part of that proceeding, is the *same class of computer software services now before the Board* in a virtually identical application also likely to cause confusion. The evidence in that case focused on a side business of Opposer concerning interactive multimedia products, not Opposer's primary IT business. *DeclOpp.* ¶ 5.

character **M2**[®] mark and trade name in standard character form in connection with Applicant's new business. *Id.* The design form which Applicant seeks to register contains many of the design elements contained in M2 Software's own "M2 Oval Design," set forth in Graphic 1A, ¶ 1.03, *supra*. Applicant has no permission, authorization, or license from M2 Software for this attempt to register Applicant's design form of M2 Software's senior **M2**[®] trademark and trade name.

2.10 Though Applicant appears to believe it is entitled to register M2 Software's trademark if Applicant includes the words "modernizing medicine" that appear on the applied-for mark, the use of a junior housemark alongside a senior company's trademark does not prevent confusion. *See, e.g., American Trading Inc. v. Russ Berrie & Co.*, 966 F.2d 1284, 1288 (9th Cir. 1992) ("[t]he use by [defendant] of its housemark along with [plaintiff's] trademark may 'be an aggravation and not a justification, for it is openly trading in the name of another upon the reputation acquired by the device of the true proprietor'"), citing *Mendendez v. Holt*, 128 U.S. 514, 521 (1888). Indeed, the generic phrase Applicant's applied-for mark appends to Opposer's **M2**[®] mark, "modernizing medicine," merely describes some of Opposer's own goods and services. Moreover, M2's trademark is registered in standard character form, protecting against all manners of display, including the design form sought by Applicant. *See* TMEP § 1207.01(c)(iii).

2.11 The parties' goods, services, and channels directly intersect. Prior to this opposition, Applicant provided a much more detailed description of its intended business to its investors and the public in a *BusinessWeek* submission squarely intersecting M2 Software's **M2**[®] mark:

"Modernizing Medicine, Inc. a software company, provides healthcare information technology (IT) solutions for small and medium-sized specialty medical practices. It offers M2, an electronic medical assistant that automates various parts of a doctor's visit, as well as bills each visit and provides audit protection against claims of insurance fraud; and Virtual Exam Room EMA system, a practice management system for billing, prescriptions and test management, a patient self-service portal, and automated clinical decision support. The company provides its products for surgical specialties, such as dermatology, ophthalmology, otolaryngology, orthopedics, obstetrics and gynecology, urology, and podiatry. Modernizing Medicine, Inc. was incorporated in 2010 and is based in Boynton Beach, Florida."

DeclOpp., Ex. 14 at 136 (emphasis added).

2.12 In a dramatic change following a so-called “reorganization” after this proceeding began, *infra* note 4, in its responses to discovery, Applicant has withheld information about the majority of the products, services, and channels it was communicating to investors. Applicant now seeks to rely on representations in this Board proceeding that it intends to market only a *single* product, “EMA,” and that it intends to be restricted to just two isolated medical subspecialties, “dermatology” and “ophthamology.”³ Conspicuously missing is any reference to the “M2” electronic medical assistant Applicant was advertising to its investors before Opposer brought this action. *Id.*, Ex. 14 at 136. Also conspicuously missing is any reference to “**orthopedics**” referenced in the *BusinessWeek* disclosure, which Applicant is well-aware presents a direct collision with M2 Software. *Id.* Ex. 3 at 29. Finally, Applicant omits any disclosure of its **information technology services** of Class 042 (Ser. No. 85/102,294), one of two applications in this consolidated proceeding and an obvious encroachment on M2 Software’s senior trademark rights.

2.13 Such omissions are crucial because, with appropriate disclosures, this case is a massive waste of the time of the Board and the parties as a matter concerning an identical mark and identical products and services. There is an indisputable intersection of channels, dispositive of this case with an identical mark, if Applicant merely admits the same disclosures it previously stated to its investors. *See DeclOpp.*, Ex 3 at 29.⁴ That Applicant is seeking to prolong this proceeding by hiding its most directly intersecting evidence, including its reorganization of records mid-proceeding, demonstrates the necessity for the Board’s vigilance and careful scrutiny of Applicant’s conduct in attempting to register M2 Software’s identical M2[®] trademark.

³ *Cf.*, *e.g.*, *DeclOpp.*, Ex. 5 at 42-43 (answer of “EMA Dermatology and EMA Ophthamology”); at 53 (claiming use for “small and medium sized dermatology and ophthamology practices”); at 55 (listing only actual and indented conferences in dermatology and ophthamology specialties) with *Id.* Ex. 14 at 136 (*BusinessWeek*).

⁴ A direct intersection need not even be shown, because the question is source confusion, not product confusion. *See, e.g., In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993).

III. PROCEDURAL BACKGROUND OF DISCOVERY

3.01 On January 16, 2012, Opposer served on Applicant *Opposer M2 Software, Inc.*'s *First Set of Interrogatories* ("INT"), *First Set of Requests for Production of Documents and Things* ("RFP"), and *First Set of Requests for Admission to Applicant Modernizing Medicine, Inc.* ("RFA") (collectively, "*First Set Discovery Requests*"). *DeclOpp.* ¶ 15, Ex. 3 at 14-28.

3.02 On January 30, 2012, in an effort to conserve the resources of the parties and the Board for this unnecessary proceeding for the identical trademark, a practicing orthopedic surgeon and associate professor who has worked with M2 Software since at least as early as 2008 verified to Applicant's counsel that Opposer had participated healthcare IT sub-sector of the information technology industry since long prior to Applicant's existence. *Id.* at ¶ 15, Ex. 2. Applicant's counsel had represented to Opposer during the parties' initial conference that such verification might serve to avoid the time and expense of this proceeding if satisfactory. *Id.*, ¶ 14.

3.03 Having received such physician verification from Opposer, on February 6, 2012, Applicant moved the Board for an order extending time to respond to Opposer's discovery. *See* Docket 8. As a part of that motion, Applicant submitted the declaration of Scott Gitterman that declared, under oath, that "[i]n January 2012 Applicant began the transition to an entirely new document management protocol and is in the process of reorganizing its records." *Id.*, Ex. 4, ¶ 7 (emph. added). It is now quite apparent Applicant used its so-called reorganization to reconfigure the evidence it would make available in this Board proceeding as to its intended products, services, and channels, which evidence was available when this proceeding began.⁵

⁵ Applicant's "reorganization" of its records began days after Opposer expressed concern to Applicant's counsel that Applicant was destroying evidence as to the configuration of its "M2" trademark and products of its "Intent-to-Use" application. *DeclOpp.* Ex. 2, at 27 (observing changes "to your client's marketing collateral, and we would like to avert any potential spoliation of evidence.") Applicant's limited discovery production after the "reorganization" demonstrate that Opposer's concerns as to Applicant's spoliation of evidence during this proceeding were in fact well-grounded. *See, e.g.*, ¶ 2.13, *supra*.

3.04 On February 10, 2012, Applicant withdrew its motion to extend, when Opposer opted to agree to Applicant's requested 30-day extension to avoid the even longer delays and expense to the Board and parties in determining the motion Applicant had submitted. Dkt 9.

3.05 Despite having received verification of M2 Software's senior participation in the healthcare IT sub-sector, Applicant still apparently believes it is still entitled to take over M2 Software's senior mark. Following receipt of letter verification of M2 Software's senior provision of products and services in the same healthcare IT sub-sector of his client, Applicant's counsel of record passed communications in the case to a new associate, Hayden O'Byrne, who has since drafted all subsequent substantive letters to Opposer. *Id.* ¶ 14. Ex. 9 at 99.

3.06 On March 15, 2012, Applicant finally responded to Opposer's January 16, 2012 *First Set Discovery Requests*, bare on full actual disclosures but heavy on objection. *DeclOpp.*, ¶ 17, Ex. 5 ("*Interrogatory Responses*"), Ex. 6 ("*RFP Responses*"), Ex. 7 ("*RFA Responses*"). The responses were allegedly verified by an officer of Applicant, Karen O'Byrne. *Id.*, Ex. 5 at 64.

3.07 Opposer contacted Applicant to obtain a supplement to *Ms.* O'Byrne's inadequate responses. *DeclOpp.*, ¶ 18, Ex. 8 (March 20, 2012). *Mr.* O'Byrne responded on March 28, 2012 by a five (5) page, single spaced letter (equivalent of a 10-page double-spaced legal brief). *Id.*, ¶ 19, Ex. 9 at 100-104. Rather than provide supplemental responses, Applicant merely provided argument, citing inapposite cases verbatim from the Trademark Board Manual of Procedure that do not apply here, which Applicant contends will nonetheless be sufficient to shield it from disclosing the full scope of its "Intent-to-Use" products, services, and channels. *Id.*

3.08 The parties have set forth their respective positions and differing interpretations of Board rules and prior case precedent concerning Applicant's withheld discovery. *Id.* ¶¶ 19-21. The dispute has been narrowed to specific issues concerning basic questions of Board rules and discovery law, and now requires a Board ruling. Applicant has acknowledged that a motion is, at

minimum, necessary for the Board to review the appropriateness of Applicant's "trade secret" designations it has used to withhold documents and information from Opposer, and Applicant has moreover withheld any further supplemental responses.⁶ *Id.*, Ex. 9 at 101. A Board determination is required to obtain Applicant's complete and immediate responses to the discovery sought.

3.09 For the reasons set forth below, Opposer respectfully requests that the Board issue an order overruling Applicant's objections, and requiring Applicant to supplement its responses and document production in full, including information relating to all products, services, and channels disclosed to investors but now claimed "irrelevant" by Applicant's determination.

IV. THE BOARD SHOULD OVERRULE APPLICANT'S IMPROPER OBJECTIONS TO ALLOW REVIEW OF THE FULL SCOPE OF APPLICANT'S INTENDED USE

4.01 A "motion to compel" cannot compel information an applicant or its counsel has intentionally hidden from disclosure or document production, based on the mere assumption that such information exists. *See, e.g., Gray v. Faulkner*, 148 F.R.D. 220, 223 (N.D. Ind. 1992). What such a motion *can* do, however, is allow the Board to overrule those improper and evasive objections behind which the Applicant is hiding dispositive evidence in this case.

4.02 Here, there is far more than a mere assumption that Applicant is hiding information, as Applicant has provided different "Intent-to-Use" information to its investors than it has provided to the Board in this proceeding. *Cf, e.g., DeclOpp.*, Ex. 14 at 136 (investor profile for *BusinessWeek* identifying an "M2" branded product that was not disclosed by Applicant, as well as products and channels across a broad array of surgical specialties, including "orthopedics") with *DeclOpp.*, Ex. 5 at 42-43, 53, 55 (Applicant's limited identification of "ophthamology" and "dermatology" products and channels in response to discovery).

⁶ Applicant has already once set the calendar back 30 days, ¶ 3.14, *supra*, and its complete responses are required without further delay to allow for follow-up discovery before the upcoming discovery deadlines.

4.03 Applicant's arguments responding to Opposer's request for supplemental responses reveal a number of tactics that Applicant is employing to avoid the requisite admissions and disclosures in this case. Overruling the related objections will allow the Board to review proper disclosures of Applicant that will be dispositive of this case. The tactics being employed, which Applicant believes are justified by its citation of prior precedent (*Id.* Ex. 9 at 100), include:

Applicant Tactic 1: Claiming the most directly intersecting products and services are not intended to be marketed under the applied-for mark, lodging a "relevance" objection on such grounds. [*Id.*, Ex. 5, INT Nos. 2-5, 7-10, 14-18, 23; Ex. 6, at 70, *all* RFPs (claiming irrelevant all "things beyond those described in Application Serial Nos.: 85/102,289; 85/102,294"); Ex. 7 at 84, *all* RFAs (same)];

Applicant Tactic 2: Identifying only "actual" channels, goods, or services as a newly-launched company, while refusing to identify, produce documents relating to, or admit those directly intersecting "intended" channels, goods, or services in an Intent-to-Use application [*Id.*, Ex. 5, INT Nos. 1-2, 5-16, 21-22; Ex. 7, RFA No. 10].

Applicant Tactic 3: Hiding information or documents as to its most direct intersections under an overbroad "trade secret/commercially sensitive" designation to withhold such information from Opposer, proceeding by representation of an officer pursuant to TBMP § 114.01. [*Id.*, Ex. 5, INT Nos. 1-11, 14-22; Ex. 6, RFP Nos. 2-6, 8-12; Ex. 7 at 83;

Applicant Tactic 4: Claiming ordinary English words and industry terms, such as "database applications" or "enterprise software," are "vague and ambiguous" and refusing to admit or deny intersecting facts. [*Id.*, Ex. 5, INT Nos. 1, 2, 9, 11, 15, 16, 22; Ex. 7, RFA Nos. 1-5, 9;

Applicant Tactic 5: Simply refusing to respond, responding by reference to non-produced documents, or responding to a sub-part only while ignoring the full request. [*Id.*, Ex. 5, INT Nos. 1-12, 14-24; Ex. 6, RFP Nos. 1-12; Ex. 7, RFA Nos. 1-3, 9 (referencing non-produced documents), and RFA Nos. 6-8, 10, 11 (refused to admit or deny)].

4.04 None of these tactics are appropriate in a Board proceeding, as will be set forth below. As an initial matter, the Board should order Applicant to properly provide a full and complete answer to Interrogatory No. 1, which merely sought the identification of persons assisting in obtaining answers to the interrogatories, with reference to the interrogatory number and area of participation. *DeclOpp.*, Ex. 3 at 18, INT No. 1; Ex. 5 at 39. Such information is crucial to allow Opposer to properly conduct follow-up discovery. Applicant's omission of the names of the individuals responding, and their area of participation in the responses, prevents any particular individual from being held culpable or responsible for answers anonymously provided. Applicant's

redirection of Opposer’s request for area of participation in *discovery responses* to be redefined as to business participation (“*participates in the management of Applicant*”)[*Id.* Ex. 5 at 39], mocks the request, illustrates a disregard for this Board proceeding, and prevents follow-up discovery.

A. Applicant Tactic No. 1: “Relevance” Objections Must Be Overruled

4.05 Applicant’s first tactic is claiming its most directly intersecting products and services are not marketed under the applied-for mark, and objecting based on relevance. This is used to shield Applicant’s responses, including INT Nos. 2-5, 7-10, 14-15, 23 [*Id.* Ex. 5 at 35-63], all RFP responses [Ex. 6, at 70 (general objection claiming irrelevant all “things beyond those described in Application Serial Nos.: 85/102,289; 85/102,294”)]; and all RFA Responses [Ex. 7, at 84 (same)]. *See DeclOpp.*, ¶¶ 18-20. The Board should overrule this objection.

1.Applicant Cannot Claim It Uses a Different Product-Specific Mark ForIts Other Products and Services When the Applied-For Mark Is Also Its Trade Name

4.06 First, it is undisputed that Applicant must provide information and documents about products or services offered or to be offered under the involved marks. As the Applicant’s company name is “Modernizing Medicine” and the applied-for mark seeks registration of a design form its overall trade name, all products and services produced by Applicant are relevant. A trade name use can also constitute a service mark use that is pertinent to the confusion question. *See, e.g. Book Craft, Inc. v. BookCrafters USA, Inc.*, 222 USPQ 724, 727 (TTAB 1984).

2.Applicant’s Other Goods and Services Are Relevant to the “Related Goods” Prong of the Likelihood of Confusion Analysis, Showing the Types of Goods and Services the Public and the Trade are Likely To Associate With the Same Source

4.07 Second, Applicant’s other goods and services, even if Applicant claims it intends to provide them under a different mark, are relevant to demonstrate the types of goods and services likely to be perceived as originating from or sponsored by the same source. This concept is well-recognized in examination when evaluating whether *third parties* produce goods common to both Applicant and Opposer. *See* TMEP § 1207.01(a)(vi) and § 1207.01(d)(iii) (registrations for

different product lines “may serve to suggest that the goods or services are of a type that may emanate from a single source”). Other goods and services of Applicant are relevant to the “likelihood of confusion” analysis, particularly where, as here, the goods and services now intended to be sold under a different brand (a decision apparently made after commencement of this opposition) are the same as or closely related to those of Opposer. *See* TBMP §§414(8), 414(11). As demonstrated by the foregoing Background of Parties, ¶¶ 2.02-2.08 *supra*, it is hard to conceive of *any* product or service provided by Applicant, based upon its company description, that is not the same as or closely related to those of Opposer. Therefore, the Board should order that Applicant disclose *all* of its products and services, regardless of brand Applicant claims to apply (which has likely changed after commencement of this proceeding), as all such products are within the requisite scope of production prescribed by TBMP §§ 414(8) and (11).

4.08 Opposer’s senior use includes provision of computer software and related services to physicians competing in some of the same surgical specialties that Applicant has identified to investors, but has withheld in this Board proceeding under one or more objections. *Cf.*, *e.g.*, *DeclOpp.*, Ex. 2 at 29 (identifying Opposer’s prior computer software work with, without limitation, orthopedic and gastroenterology surgical specialists) with *Id.* Ex. 14 at 136 (identifying to investors, but not to the Board, Applicant’s intended offerings in “orthopedic” and “other surgical specialties”). *Cf. also Id.*, Ex. 14 at 136 (representing to investors that Applicant intends offer “**M2**,” an “electronic medical assistant) with *Id.* Ex. 5 at 42 (representing in this Board proceeding that it intends to offer only “EMA” software, with no reference to “**M2**”)

4.09 Notwithstanding the foregoing, with respect to Applicant’s relevance objections specifically as to advertising expenditures or financial sales information (INT Nos. 16-17; *Id.*, Ex. 5 at 58-59, and RFP Nos. 4-5; *Id.*, Ex. 6 at 74-75), Opposer concedes and is satisfied that such information is not relevant in this proceeding. The “M2” trademark, subject of Opposer’s senior

registrations and the junior applications, is a fanciful, coined trademark, and as such need not demonstrate secondary meaning. *See, e.g. Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992) (“The general rule regarding distinctiveness is clear: An identifying mark is distinctive and capable of being protected if it *either* (1) is inherently distinctive or (2) has acquired distinctiveness through secondary meaning.”) (emphasis in original); *McGregor Doniger, Inc. v. Drizzle, Inc.*, 599 F.2d 1126, 1132 (2d Cir. 1979) (“Thus, for example, the relatively small size of a senior user’s advertising budget or sales volume will not diminish the strength of its valid mark, and the scope of protection accorded to the mark will not be narrowed because of such evidence.”); *In re Shell Oil Co.*, 992 F.2d 1204, 1207-1208 (Fed. Cir. 1993) (“the rights flowing from federal registration do not vary with the size of the registrant”).

4.10 Aside from these narrow exceptions, Opposer respectfully requests that the Board properly OVERRULE Applicant’s relevance objections described above, to require supplemental responses as relating to Applicant’s complete goods, services, and trade channels, *all* relevant to the “likelihood of confusion” analysis before the Board.

B. Applicant Tactic No. 2: Applicant Must Be Ordered To Supplement Its Responses and Document Production With Respect to Actual as Well as Intended Uses For Applied-for Trademarks Submitted Under Section 1(b)

4.11 The applications at issue are “Intent-to-Use” applications for a trademark and service mark under Section 1(b) of the Trademark Act. *See* Ser. Nos. 85/102,289 and ’94. Applicant has evaded discovery by identifying narrow areas of business it claims to have already commenced, while refusing to provide information, documents, or admissions as to the intended goods, services, and channels contemplated by its “Intent-to-Use” applications. *See, e.g., DeclOpp.*, Ex. 5 at 39-63, INT Nos. 1-2, 5-16, 21-22; Ex. 6 (all RFPs); Ex. 7 at 86-91, RFA No. 10.

4.12 Opposer’s interrogatories requesting information as to use, advertisement, or sale “*whether actual or intended*,” that request a clarification of the answer as to whether it applies to

“actual or intended status,” were clear in the context of Applicant’s Section 1(b) applications. *Id.* Applicant has avoided the issue by claiming a clarification of “actual or intended” was vague or ambiguous, despite an “Intent-to-Use” application. *Id.* Such objection must be overruled, and Applicant ordered to supplement its responses to identify its intended uses.

4.13 Applicant further refused to provide a proper admission or denial to a request for admission that it “use[s]” or “intend[s]” to use “an ‘M2’ mark in standard character form,” under a similar objection. *Id.* Ex. 7 at 86-91, RFA No. 10. Applicant’s admission that it intends to use the dominant “M2” of its applied-for design mark in standard character form is relevant to the “sound” element of the likelihood of confusion analysis. Sight, sound, and meaning are all elements of a proper examination. TMEP §1207.01(b)(i). Opposer moves to test the sufficiency of Applicant’s response pursuant to 37 CFR § 2.120(h), TBMP § 524, and Fed. Rule Civ. Pr. 36(a). Opposer seeks an order that the request be deemed ADMITTED, a result that merely comports with information Applicant already provides to investors. TBMP § 524.01. *See, e.g.,* ¶ 2.13, *supra*.

C. Applicant Tactic No. 3: Applicant Must Be Ordered To Submit Withheld Responses and Documents for *In Camera* Inspection To Determine Whether the “Trade Secret / Commercially Sensitive” Designation is Appropriate

4.14 Both Opposer and Applicant are technology companies with directly competing products and services, and Opposer concedes partially Applicant’s objections that each possesses valuable technological and competitive information may lose its value if disclosed to a competitor. Opposer specifically concedes and agrees with Applicant that detailed information about confidential and proprietary technologies is not necessary in a proceeding involving only a determination of trademark registrability. *See, e.g. DeclOpp.* ¶ 24. *See also Id.* ¶ 12. However, a minimal description of products and services should be able to be provided without requiring designation as “Trade Secret / Commercially Sensitive” that Applicant has wielded to construct its case. *See Id.* at ¶ 17.

4.15 It is clear that Applicant provides, or intends to provide, at minimum, the products and services it disclosed on its applications and that it disclosed to investors by its *BusinessWeek* submission and similar marketing before the commencement of this proceeding. Opposer respectfully requests that the Board order Applicant to produce for *in camera* inspection, to determine appropriate designation, all responsive documents and information as to products, services, and trade channels that Applicant has designated “Trade Secret/Commercially Sensitive,” with the exception of financial and advertising expenditure information that Opposer concedes is not relevant for the reasons set forth above, ¶ 4.09 *supra*.⁷ An *in camera* inspection has been agreed-to in principle by Applicant [*DeclOpp*. Ex. 9 at 101], and the Board’s earlier Order directs that such a procedure is proper under these circumstances. *See* Order, Jan. 12, 2012, Docket 7, at 5 (“opposer [can] contest the appropriateness of the [confidentiality] designation by seeking an *in camera* inspection”).

D. Applicant Tactic No. 4: Applicant Must Be Ordered To Supplement Its Responses and Have Its Non-responsive Admissions Deemed ADMITTED Where It Has Withheld a Response By Feigning a Misunderstanding of Ordinary English Words and Industry Terms Such as “Database Applications” and “Enterprise Software”

4.16 Next, Applicant has withheld crucial discovery responses and admissions based upon its objection that ordinary English words and industry terms, such as “database applications” or “enterprise software,” were vague and ambiguous. [*DeclOpp.*, Ex. 5, INT Nos. 1, 2, 9, 11, 15, 16, 22; Ex. 7, RFA Nos. 1-5, 9].

4.17 Applicant has employed this tactic by claiming that the following plain English words are “vague” or “ambiguous,” allowing it to avoid responding to basic interrogatories:

⁷ Pursuant to 37 CFR 2.116(g), the TTAB’s standard protective order is applicable during opposition proceedings. Despite Opposer’s request and the Board’s recommendation, Applicant and its counsel each *refused* to sign the standard protective order. *See DeclOpp.* ¶ 23, Ex. 12 at 128-29. Applicant now claims that it cannot respond to discovery for information it cannot disclose to a competitor. *DeclOpp.* Ex. 5 at 43, 44, 53, 58, 59. Applicant’s concern is understandable, as the parties are direct competitors, and the field at issue involves proprietary technologies valuable to both entities. The decision of both Applicant and its counsel to refuse sign the protective order is not understandable in this context, other than to suggest a bad faith motive.

“business structure” and “principals” (INT Nos. 1,2);
“channels of distribution” (INT No. 9);
“all geographical areas (by city, state, and country)” (INT No. 11);
“trade partners” (INT No. 11);
“amount” (INT No. 16); and
“use or license” (INT No. 22).

DeclOpp., Ex. 5, at 39-63.

4.18 Applicant has also employed this tactic by claiming the following plain English words are “vague” or “ambiguous,” allowing it to withhold crucial admissions:

“computer software applications” (RFA No. 1);
“database applications” (RFA No. 2);
“information technology industry” (RFA No. 3);
“information technology goods” (RFA No. 4);
“information technology services” (RFA No. 5); and
“enterprise software” (RFA No. 9).

DeclOpp., Ex. 7, at 85-91.

4.19 Applicant also objected to the phrase “whether actual or intended.” *Id.* Ex. 5 at 37 (in general objection #15); *Id.* Ex. 5 at 39-63 (INT Nos. 9-15). However, Applicant has applied under the “Intent-to-Use” section of the Trademark Act, Section 1(b). Interrogatories requesting information as to use, advertisement, or sale, that *also* request a clarification of the answer as to whether it applies to “actual or intended status,” are clear in the context of a Section 1(b) claim.

4.20 All of the above terms are common industry English words or industry terms. Applicant is merely withholding disclosure and admissions where it knows it intersects with M2 Software. For example, “enterprise software” is well-understood by Applicant’s owner, Daniel Cane, whom publicly refers to his former employer, Blackboard, Inc., as an “enterprise software” firm. *See, e.g. DeclOpp.* ¶ 21, Ex. 10 at 106-114. Applicant is being disingenuous in claiming that this industry term is too vague or ambiguous to respond to this pertinent discovery. The other terms, outlined above, are even more common, and understood by even laypersons.

4.21 Opposer respectfully requests that the Board overrule Applicant’s “vague and ambiguous” objection, and order Applicant to supplement its responses. With respect to the iden-

tified RFA's that Applicant elected not to ADMIT or DENY based upon such objection (RFA 1-5, 9), Opposer moves to test the sufficiency of Applicant's responses pursuant to 37 CFR § 2.120(h), TBMP § 524, and Fed. Rule Civ. Pr. 36(a). For the foregoing requests, Opposer seeks an order that the matter be deemed ADMITTED. TBMP § 524.01.

E. Applicant Tactic No. 5: Applicant Must Be Ordered To Supplement Its Responses For Items On Which It Has Simply Failed To Respond In Full, and Where This Tactic Was Used in Response to a Request for Admission the Matter Must Be Deemed ADMITTED Pursuant to TBMP § 524.01

4.22 Finally, on a number of items Applicant has simply refused to respond, has responded by reference to a non-produced document, or has responded only to a sub-part.

4.23 For example, Applicant referenced and relied-upon non-produced documents. *DeclOpp.*, Ex. 5 at 39-63, INT Nos. 4, 20; *Id.* Ex. 7 at 85-91, RFA Nos. 1-3, 9.

4.24 In other instances, following its lengthy objections, Applicant ultimately answered only part of the interrogatory, or agreed to produce only a sub-section of documents. *DeclOpp.* Ex. 5 at 39-63, INT Nos. 1-12, 14-24; 72-79; *Id.* Ex. 7, at 85-81, RFP Nos. 1-12.

4.25 In another example, Applicant was requested to ADMIT or DENY that it uses the applied-for mark for products that "access an ORACLE ® database engine," that "access a MICROSOFT® SQL SERVER® database engine," or that "access a MySQL® database engine," Applicant refused to ADMIT or DENY this request. *Id.*, Ex 7 at 85-91, RFA Nos. 6-8.

4.26 These are standard industry terms for which an admission or denial can be easily obtained from Applicant, based on the goods it describes. Such admissions are directly relevant to determine relatedness of the goods. This is so, in computer software (as opposed to other types of manufacturing), the corresponding database software is a *part* of the *actual goods* provided to a client site, and relevant to nature of the parties' goods. *See, e.g. Personnel Data Systems Inc. v.*

Parameter Driven Software, Inc., 20 U.S.P.Q.2d 1863 (TTAB 1991) (considering nature of software in determining likelihood of confusion).

4.27 Applicant also refused to ADMIT or DENY requests relating to i) Applicant's use of the applied-for design mark in standard character form, and ii) Applicant's prior knowledge of Opposer M2 Software. *Id.*, Ex 7 at 85-91, RFA Nos. 10-11.

4.28 The use of the applied-for mark in standard character form is relevant to "likelihood of confusion." *See, e.g., Cadbury Beverages, Inc. v. Cott Corp.*, 73 F.3d 474, 483 (2d Cir. 1996) (finding relevant that "Cadbury's registered mark is identical-- in style as well as in name-- to Cott's adopted logo *as used on correspondence*") (emph. added). *See* TMEP §1207.01(b)(i) (relevant to "*sound*" element of "sight, sound, and meaning" analysis for likelihood of confusion).

4.29 Applicant's prior knowledge of M2 Software's senior use is relevant to intent, which is also part of the "likelihood of confusion" determination. *See, e.g., Id.* at 483 ("where allegedly infringing mark is identical to registered mark and its use began subsequent to plaintiff's registration, defendant must carry burden of explanation and persuasion") (citation omitted).

4.30 Pursuant to Fed. R. Civ. Pro. 37(a)(4), an evasive or incomplete disclosure, answer, or response will be treated as a failure to disclose, answer, or respond. For the interrogatory responses Applicant has not answered completely (INT 1-12, 14-24), or referred to a non-produced document (INT Nos. 4, 20), the Board should treat such evasive or incomplete responses as non-answers, and require Applicant provide a proper response. For Applicant's responses to requests for admissions that Applicant deflected by referencing an outside, non-produced document [RFA Nos. 1-3, 9], and for those responses that Applicant simply refused to ADMIT or DENY [RFA Nos. 6-8, 10-11], Opposer respectfully moves to test the sufficiency of Applicant's responses pursuant to 37 CFR § 2.120(h), TBMP § 524, and FRCP. 36(a). For the foregoing requests, Opposer seeks an order the matter be deemed ADMITTED. TBMP § 524.01.

V. THE BOARD SHOULD RULE THAT ITS PERMISSION OF A “REPRESENTATIVE SAMPLING” DOES NOT CONTEMPLATE A “SELECTIVE” SAMPLING THAT OMITTS FULL CATEGORIES IN MULTIPLE-CATEGORY APPLICATIONS

5.01 Finally, Applicant has taken the position in the parties’ attempt to resolve this dispute that it is entitled to provide a “representative sampling” concerning its products and services. *DeclOpp.* Ex. 9 at 102. Yet Applicant extends this argument to avoid *any* reference to particular categories, including the *information technology services* its provides or intends to provide:

“Information technology services, namely, information technology consulting services; data services, namely, acting as an application service provider in the field of electronic medical records / electronic health records to host computer application software for the collection, editing, organizing, modifying, transmission, storage and sharing of data; providing computer software solutions, namely, design and development of computer software and on-line computer software systems for healthcare and medical organizations and providers.”

Ser. No. 85/102,294 (Class 42). Though it claims multiple services, Applicant admits none in its responses, addressing instead a single “EMA” product. *DeclOpp.*, Ex. 5 at 42 (INT No. 3 *et seq.*)

5.02 Cases permitting a “representative sampling” contemplate unduly burdensome requests. *See* TBMP § 402.02 and cases cited therein. Such cases do not contemplate that an applicant, applying for multiple categories or different classes of applications, may arbitrarily choose which product or service categories it chooses to produce. Applicant must be compelled to supplement its responses to disclose its full range of products, services, and channels.

VI. CONCLUSION

6.01 For the foregoing reasons, Opposer respectfully requests that Board GRANT this Motion and issue the discovery relief set forth in the proposed Order of Exhibit B.

Dated: April 25, 2012
Chicago, Illinois

Respectfully submitted,

M2 SOFTWARE, INC.

BY: s/David Escamilla/
David Escamilla
President and C.E.O.

OPPOSER

EXHIBIT A

EXHIBIT A

“Declaration of Officer In Support of Opposer’s Motion to Compel”

[FILED SEPARATELY UNDER SEAL PURSUANT TO TTAB STANDARD PROTECTIVE ORDER]

EXHIBIT B

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

M2 SOFTWARE, INC.

Opposer,

v.

MODERNIZING MEDICINE, INC.

Applicant.

Opposition No. 91202450

For:  **MODERNIZING
MEDICINE**

Serial Nos.: 85/102,289; 85/102,294

Published: 7/12/2011

**[PROPOSED] ORDER GRANTING OPPOSER’S MOTION TO COMPEL PURSUANT TO
TBMP § 523.01 AND CFR § 2.120(e)**

The Board, having reviewed *Opposer’s Motion to Compel Pursuant To TBMP § 523.01 and CFR § 2.120(e)* (“*Motion*”), the *Declaration of Officer in Support of Opposer’s Motion to Compel* and relevant attachments, hereby orders as follows with respect to *Opposer M2 Software, Inc.’s First Set of Interrogatories, First Set of Requests for Production of Documents and Things, and First Set of Requests for Admission to Applicant Modernizing Medicine, Inc:*

Interrogatories

- 1.) That Applicant provide full, complete answers to Interrogatory No. 1 [*Motion* ¶ 4.04];
- 2.) That Applicant provide full, complete answers to those interrogatories to which it lodged an objection as to relevance concerning its channels, products, and services (Interrogatory Nos. 2-5, 7-10, 14-15, 23) [*Motion* ¶ 4.05].⁸

⁸ As the Applicant’s company name is “Modernizing Medicine” and the applied-for mark seeks registration of a logo representation of its name, all of the products and services produced by Applicant are sold or to be sold under this mark and relevant to the question of likelihood of confusion. A trade name use can also implicitly constitute service mark use for Applicant’s other products. *See, e.g. Book Craft, Inc. v. BookCrafters USA, Inc., 222 USPQ 724, 727 (TTAB 1984)*. Moreover, “the information that a party sells the same goods or services as the propounding party, even if under a different mark, is relevant to the issue of likelihood of confusion for purposes of establishing the relationship between the goods or services of the parties.” TBMP § 414(11).

3.) That Applicant provide full, complete answers to all interrogatories to which it restricted its answer to “actual” channels, goods, and services, but failed to respond as to “intended” channels, goods, and services, for Intent-to-Use applications (Interrogatory Nos. 1-2, 5-16, 21-22) [*Motion* ¶ 4.11];

4.) That Applicant submit for *in camera* inspection, to verify the appropriateness of such designation, all responses which it claimed should be designated “Trade Secret/Commercially Sensitive” which it has heretofore withheld from providing to Opposer [Motion ¶ 4.14];

5.) That Applicant provide full, complete answers to those interrogatories to which it improperly objected as “vague” or “ambiguous” with respect to ordinary words and industry terms (Interrogatory Nos. 1, 2, 9, 11, 15, 16, 22) [Motion ¶ 4.16];

6.) That Applicant provide full, complete answers to those interrogatories for which it referenced and relied-upon non-produced documents (Interrogatory Nos. 4, 20) [Motion ¶ 4.23];

7.) That Applicant provide full, complete answers those interrogatories to which it provided an evasive or incomplete response, which the Board will treat as a non-answer (Interrogatory Nos. 1-12, 14-24, 72-79) [*Motion* ¶ 4.24];

8.) That Applicant supplement its response to Interrogatory No. 12 and any other interrogatories for which it has limited a response to a “representative sampling,” which sampling has excluded, for example, any of the services described in its Class 042 application (Ser. No. 85102294), and the “M2” electronic medical assistant described to investors [Motion ¶ 5.01];

Requests for Production (“RFP”)

9.) That Applicant produce all documents and things for requests to which it previously objected on grounds of relevance (all RFP responses) [Motion ¶ 4.05];

10.) That Applicant produce all documents and things for requests for which it has restricted its production to “actual” channels, goods, and services, to include documents and things relating to “intended” channels, goods, and services (all RFPs). [Motion ¶ 4.11];

11.) That Applicant submit for *in camera* inspection, to verify the appropriateness of such designation, all documents and things which it has failed to produce to Opposer by designating such items as “Trade Secret/Commercially Sensitive” [Motion ¶ 4.14];

12.) That Applicant produce all documents and things in response to requests for which it has limited a response to a “representative sampling,” which sampling has excluded documents relating to Applicant’s services application of Class 042 (Ser. No. 85102294), the “M2” electronic medical assistant, or other products or services to be provided by Applicant (RFP Nos. 1, 2, 3, 6, 12) [Motion ¶ 5.01];

Requests for Admissions (“RFA”)

13.) That RFA Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11 [Motion ¶¶ 4.13, 4.21, 4.30], for which Applicant submitted answers that failed to “admit” or “deny” the admissions request that was presented and failed to comply with Fed. R. Civ. P. 36(a), are deemed ADMITTED pursuant to TBMP § 524.01.

DONE AND ORDERED:

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument is being served on April 25, 2012, by electronic service, pursuant to the parties' agreement under Trademark Rule 2.119(b)(6), upon the defendant / Applicant at its address of record.

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