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

Proceeding	91202450
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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

Opposer,

v.

**MODERNIZING MEDICINE, INC.**  
Applicant.

Opposition No. 91202450

For:



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

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**OPPOSER’S RESPONSE IN OPPOSITION TO APPLICANT’S RULE 56(d) MOTION (DKT 28)**

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## I. INTRODUCTION

1.01 Opposer, David Escamilla and M2 Software, Inc. (collectively, “Opposer” or “M2”), respectfully submits its Opposition to *Applicant’s Motion Under Fed. R. Civ. P. 56(d) In Response to Opposer’s Motion In the Alternative For Summary Judgment* (“Applicant’s Motion”) (DKT28) filed by Applicant Modernizing Medicine, Inc. (“Applicant” or “MMI”) on November 14, 2012. Applicant seeks to create a controversy or issue of material fact, where no genuine issue of material fact exists for any of the narrow, limited, but *dispositive* facts the Board may rely upon for summary judgment. A Rule 56(d) motion must be restricted to demonstrating discovery essential to respond to the *motion*. FED. R. CIV. P. 56(d).<sup>1</sup> Opposer’s simple, straightforward summary judgment motion, relying on a plain intersection of the application and registration language, does not present a typical fact-intensive pleading requiring Rule 56(d) relief. The summary judgment motion should be determined on the merits, with the limited, targeted, dispositive facts pleaded therein. Granting Applicant’s Rule 56(d) motion for discovery not necessary to respond to that targeted motion would defeat the very purpose of “summary judgment.”

## II. SUMMARY OF THE MOTION FOR SUMMARY JUDGMENT

2.01 In evaluating a Rule 56(d) motion, what is relevant *at the present case posture* is that the underlying motion at issue, *Opposer’s Motion For Leave To Amend Its Consolidated Notice of Opposition and Motion For Judgment as Sanction, Or In The Alternative For Summary Judgment* (DKT23), presents a very narrow and constricted set of undisputed facts and argument for that portion of the pleading seeking summary judgment.

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<sup>1</sup> On December 1, 2010, the former FED. R. CIV. P. 56(f) was renumbered to FED. R. CIV. P. 56(d). Thus, for much of the preceding authority cited herein will refer to the same rule as Rule 56(f).

2.02 The summary judgment section of that pleading (hereinafter the “MSJ”) relies upon the application and registration language, properly restricting analysis to those undisputed facts in this proceeding. *See* MSJ at 18, ¶ 4.23:

“Likelihood of confusion is determined on the basis of the goods and/or services as identified in the application and registration, and intersection of the registration and application language is alone sufficient to sustain an opposition on summary judgment.”

*Id.* (emphasis added), citing *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 1267-68, 62 USPQ2d 1001, 1004-05 (Fed. Cir. 2002), among other precedent.

2.03 Even the argument on summary judgment is narrowly restricted, relying upon set of undisputed facts with respect to only the “most relevant factors here,” identified in the MSJ as *DuPont* factors of “similarity of the marks, similarity of the goods/services, and similarity of the trade channels of the goods and/or services.” MSJ at 17, ¶ 4.22.

2.04 Thus, Opposer does not even argue any of the supplemental factors Applicant relies upon in claiming that it needs more discovery. For example, nowhere in the MSJ does Opposer argue secondary meaning. Applicant seeks evidence on this factor only to create bias by focusing upon the irrelevant fact that Opposer is a small business, ignoring the fanciful, inherently distinctive nature of Opposer’s mark. Applicant’s Motion at 17. Applicant’s attempt to extend discovery for secondary meaning evidence is not only not responsive to the summary judgment motion, it is wholly unnecessary in a case concerning an inherently distinctive mark that, moreover, is incontestable. *See* FED. R. CIV. P. 56(d).<sup>2</sup>

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<sup>2</sup> The MSJ notes Opposer’s M2<sup>®</sup> mark is in the “fanciful” category of trademarks as a coined symbol with no dictionary meaning. MSJ at 20, n. 19. “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.” *Two Pesos, Inc. v. Taco Cabana*, 505 U.S. 763, 769, 112 S.Ct. 2753, 120 L.Ed.2d 615 (1992) (emph. in original). MMI imports incorrect standards from cases concerning weaker “descriptive” marks needing “acquired” distinctiveness. App.’s Motion, at 22, citing *Am. Optical Corp. v. Exomet, Inc.*, 181 USPQ 120, 123 (TTAB 1974) (descriptive “SURE-GUARD” mark).

2.05 Instead, the MSJ relies upon the above three identified relevant factors. The first, “similarity of marks,” is summarily treated in the MSJ because Applicant is applying for the *identical M2*<sup>®</sup> trademark as the dominant commercial trademark of the applied for designs:

“M2’s senior trademark is registered in standard character form, protecting against all manners of display. *See* TMEP § 1207.01(c)(iii). Accordingly, the protectability of M2’s senior trademark extends to the “M2” within a circle design submitted by Applicant.”

MSJ at 18, ¶ 4.25, citing Trademark Manual of Examining Procedure (“TMEP”). The addition of a house mark in significantly smaller type does not prevent confusion. MSJ at 18, ¶ 4.26.<sup>3</sup> An identical mark is “a factor that weighs heavily.” *NASDAQ Stock Market Inc. v. Antartica S.r.l.*, 69 USPQ2d 1718, 1729 (TTAB 2003). *See* MSJ at 20.

2.06 The remaining factors addressed in the MSJ – “relatedness of the goods and channels of trade” – also require only brief analysis because these may be completely determined in a Board proceeding by the language in the application and registration alone:

A.) With respect to Applicant’s application for the same dominant trademark for software services (App. Ser. No. 85/102,294), the intersection of the plain language of application and registration alone militates for Section 2(d) refusal. Opposer’s U.S. Reg. No. 4,128,151 protects its use of the *M2*<sup>®</sup> mark for “development, updating and maintenance of software and data bases,” with no restriction to any particular customer type or channel. Applicant’s Application Ser. No. 85/102,294 for the “M2”-dominant mark for “design and development of computer software” is precisely the same class. Nothing further need be examined, and the MSJ spends just one paragraph on the entire argument for summary judgment in Class 042 – hardly the type of fact-intensive motion requiring the extraordinary relief of Rule 56(d). MSJ at 20, ¶ 4.30.

B). With respect to Applicant's application for Class 009 software goods, (App. Ser. No. 85/102,289), Opposer similarly relies upon the plain language intersections. For example, Opposer cites its Class 042 database software *services* (U.S. Reg. No. 4,128,151), containing no restriction as to type of customer, as directly related to Applicant's Class 009 database software *goods*. MSJ at 21, ¶4.32 (citing TMEP § 1207.01(a)(ii) ("well recognized...confusion is likely to occur from the use of the same or similar marks for goods, on the one hand, and for services involving those goods, on the other.")). This alone disposes of the Class 009 application.<sup>4</sup>

2.07 This is not a case concerning a wide breadth of factual issues. Instead, the MSJ is a targeted motion that can be determined on the basis of the application, against senior registrations present on the Principal Register. It is settled an opposer may rely solely on its registrations as evidence, and is entitled to have its rights considered as to the goods and services broadly defined in its registration. *CBS Inc. v. Morrow*, 708 F.2d 1579, 1581 (Fed Cir. 1983). *See Hewlett Packard v. Packard Press, Inc.*, 281 F.3d 1261, 1267 (Fed. Cir. 2002) (summary judgment proper based solely upon "the descriptions in the application and registration").

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<sup>3</sup> The MSJ identifies the prior case of *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).

<sup>4</sup> With respect to goods, both application and registration identify database solutions featuring, in part, business management applications. MSJ ¶¶ 4.31, 4.33. The MSJ provides evidence that, in this industry, software firms typically use the same trademark for the goods and services of both parties: **SAP**<sup>®</sup> business management applications for media and entertainment corporate IT sector, and **SAP**<sup>®</sup> business management applications for the healthcare IT sub-sector; **INFOR**<sup>®</sup> business management applications for the media and entertainment corporate IT sector and **INFOR**<sup>®</sup> business management applications for the healthcare IT sub-sector. *See* MSJ at 20-21, ¶ 4.31, and MSJ, Exhibit A, ¶ 9, Exh. 4 at 38-79. Therefore, in addition to the "Services/Goods" relationship described above, supplemental grounds are presented based upon the senior *goods* registration as demonstrating that the parties' database solutions are of a type likely to emanate from the same source. *See* Ser. No. 85/102,289 (identifying Applicant's database solutions that also provide business management functionality, including "billing, scheduling...data portal and ordering").

### III. APPLICANT'S DISCOVERY REQUESTS

3.01 Applicant has submitted discovery controversies it attempts to create, of some length and detail. Opposer will not discuss them individually, other than to note the vast majority are barred by the doctrine of reciprocity where Applicant itself made some of the same objections which it now contests. *See, e.g., Declaration of Opposer in Support of Opposer's Motion to Compel*, April 25, 2012 (“DOMC”) (DKT 12), Exh. 5 at P-35 to P-38, P-43 to P-44; *Id/* Exh. 6 at P-67 to P-78 (limiting responses to representative sample).<sup>5</sup> The essential point, however, is that none of the discovery issues have any bearing upon this case as presently postured, with summary judgment the only practicable outcome under Section 2(d) in light of an intersection in the very language of the application (with an identical dominant trademark). The matter should proceed to decision based upon the clear record as to undisputed facts. If the Board should determine that summary judgment may not be granted on the submitted facts, only then should this proceeding and escalated to the full range of facts and motions to compel (from both sides).<sup>6</sup>

3.02 Applicant's *de facto* motion to compel thus is not properly considered here. Proceedings are presently suspended, and Applicant's requests fall well outside what is essential for its response to the MSJ. *See Crawford-El v. Britton*, 523 U.S. at 599. Judicial economy is served by providing an opportunity for true “summary judgment” issues to be timely heard:

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<sup>5</sup> A party ordinarily will not be heard to contend that a request for discovery is proper when propounded by the party itself but improper when propounded by its opponent. *Sentrol, Inc. v. Sentex Sys., Inc.*, 231 USPQ 666, 667 (TTAB 1986); TBMP § 402.02 and cases cited therein. See DKT15 at 17 (app opp to mot compel): Applicant earlier claimed “M2's Requests...which concern the technical aspects of Modernizing Medicine's products and services are irrelevant.” May 10, 2012, DKT15, at 17 (Applicant's opposition to motion to compel, quoting Opposer where “Opposer specifically concedes and agrees with Applicant that detailed information about confidential and proprietary technologies is not necessary...”). Certainly information “irrelevant” in May 2012 cannot suddenly be “essential” in November 2012 to delay an MSJ.

<sup>6</sup> Opposer's first motion to compel was denied based upon a perceived failure to adequately confer. The issues of deficiency in Applicant's responses nonetheless remain.

“Upon the filing of a motion for summary judgment, the Board, pursuant to Trademark rule 2.127(d), will issue an order suspending all proceedings pending disposition of the motion. [After filing of the summary judgment motion] the Board...will deny any motion to compel answers to [discovery] requests. The rationale is that judicial economy is served by not requiring responses, especially when the responses are not needed to respond to the motion and because the motion may be dispositive of the case. The exception is where the summary judgment motion was filed in order to avoid responding to the discovery or was otherwise filed in bad faith.”

*Krugman*, Trademark Trial and Appeal Board Practice and Procedure (2003) ¶ 3.04[7][d], at 3-69. Here, there is no allegation the MSJ was filed to avoid responding to any discovery (responses *and* supplements were long ago submitted, *see* Applicant’s Motion, Exh. C (March 27, 2012) and Exh. K (April 30, 2012), or that the MSJ (actually triggered by discovery of Applicant’s spoliation of evidence) was otherwise filed in bad faith. Accordingly, the suspension order should be respected and the Board should grant no consideration to Applicant’s requests.<sup>7</sup>

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<sup>7</sup> While Applicant’s *de facto* motion to compel is improper in a Rule 56(d) motion, even if this were not so, Applicant improperly cites a *civil* proceeding to argue proper *Board* discovery. Even the cited transcript reveals this is inapplicable. Applicant’s Motion, Exh. R, at 31 (Court: “Well, again...when you file a lawsuit requesting either damages, injunction, or whatever, you put a lot of things at issue that might not otherwise be discoverable.”). Private competitive information is often simply unnecessary for a trademark registrability proceeding. *See* TBMP § 414 (“Selected Discovery Guidelines”), ¶ 3 (“The classes of customers...are discoverable. In contrast, the names of customers (including dealers) constitute confidential information, and generally are not discoverable, even under protective order.”) (emph. added), citing *Johnston Pump/General Valve Inc. v. Chromalloy American Corp.*, 10 USPQ2d 1671, 1675 (TTAB 1988).



#### IV. APPLICANT'S RULE 56(D) REQUEST

4.01 Applicant misapplies Rule 56(d) when it seeks permission to conduct even more discovery before having to respond to Opposer's motion for summary judgment. Applicant files an affidavit in support of the request that fails to meet the standards for a Rule 56(d) showing – namely, that the discovery it seeks is essential to respond to the MSJ:

“If a party does not believe that an adequate response can be made to the summary judgment motion without first obtaining discovery from the moving party, the Rule 56(f) affidavit should state why the discovery is needed before a response to the summary judgment motion can be filed and the affidavit should delineate what specific information is needed in order to respond to the summary judgment motion. It is not sufficient to state in general terms that discovery is needed in order to discovery some as yet unknown information that could possibly support the position of the nonmoving party.”

*Krugman*, 3-68.

“If all one had to do to obtain a grant of a Rule 56(f) motion were to allege possession by movant of ‘certain information’ and ‘other evidence,’ every summary judgment decision would have to be delayed while the non-movant goes fishing in the movant's files.”

*See Keebler v. Murray Bakery Prods.*, 866 F.2d 1386, 1389 (Fed. Cir. 1989) (emphasis added).

4.02 Rule 56(d) only allows a court to delay ruling on a motion for summary judgment if the nonmoving party requires discovery to identify "facts essential to justify the party's opposition." *Crawford-El v. Britton*, 523 U.S. 574, 599 n.20 (1998) (quotation omitted). Applicant seeks manufacture discovery controversies that sit far outside the bounds of the summary judgment motion. However, “Rule 56(d) affidavits cannot simply demand discovery for the sake of discovery.” *Young v. UPS*, 2011 WL 665321, \*20 (D.Md. Feb. 14, 2011). A non-moving party's Rule 56(d) request for discovery is properly denied "where the additional evidence sought for discovery would not have by itself created a genuine issue of material fact sufficient to defeat summary judgment." *Strag v. Bd. of Trs., Craven Cmty. Coll.*, 55 F.3d 943, 954 (4th Cir. 1995).

4.03 That is the case here – the additional discovery sought by Applicant cannot by itself create a genuine issue of material fact sufficient to defeat summary judgment, because only a very narrow set of facts is even pleaded by Opposer in the MSJ concerning the application and registration language. A non-movant must show what facts are sought and how they are reasonably expected to create a genuine issue of material fact, and must conclusively justify entitlement to the shelter of Rule 56(d) by presenting the specific facts explaining the inability to make substantive responses. *Keebler*, 866 F.2d at 1389, n. 5. See *SEC v. Spense & Green Chemical Co.*, 612 F. 2d 896, 901 (5th Cir. 1980).

4.04 Applicant’s supporting affidavit falls well short of meeting the requirements for the shelter of Rule 56(d). The “Declaration of David J. Byer In Support of Applicant’s Motion Under Fed. R. Civ. P. 56(d)” (“Byer Declaration”) barely addresses the summary judgment motion, instead relying upon a single letter. Applicant does not address specific facts necessary to respond to the motion, and only claims that “[a]ll of these elements *could lead to information and evidence* relevant to the likelihood of confusion factors.” Byer Declaration, ¶ 6.

4.05 Applicant’s other affidavit, submitted in support of another improper, tactical pending motion wherein Applicant is seeking to suspend proceedings (DKT26) is entitled “Declaration of Hayden O’Byrne in Support of Applicant’s Motion to Suspend Proceeding Pending Resolution of Related Case” (“O’Byrne Declaration”). That affidavit also does not support a request for Rule 56(d) relief. Only a single paragraph in the entire affidavit even references the MSJ (¶ 14). Even then, Mr. O’Byrne only discusses what is relied-upon “in this *Opposition*,” rather than in the summary judgment motion. See ¶ 15 (“In this *Opposition*, M2 Software relies on its common law rights.”). Obviously, such discovery is not essential for the *summary judgment motion*, which relies narrowly on intersecting application and registration language.

## V. APPLICANT'S RED HERRINGS AND NON-ISSUES

### A. Assignment Agreement

5.01 Without appropriate grounds for Rule 56(d) relief, Applicant resorts to claiming a Rule 56(d) motion is necessary as the result of an earlier assignment agreement, for administrative purposes, between Opposer David Escamilla as individual on the one hand, and David Escamilla in capacity as officer and owner of his company on the other. Applicant's Motion, at 9. Applicant is well-aware of the unity of interest and control that renders its claim of needing separate discovery nonsensical. See *Opposer's Motion For Joinder of Assignee* (DKT22) at 1 (citing assignment recorded October 2, 2012 with the Assignment Division at Reel 4870, Frame 0638).

5.02 Opposer David Escamilla was already the representative of record in this proceeding for his own company, Opposer M2 Software, Inc., and as a party in privity this is not a case where a distant third-party was assigned rights during the proceeding. Instead, the discovery the assignee would produce as an individual is the same already produced as an officer. Should there be any doubt, the declaration hereto joins David Escamilla to incorporate all discovery responses of M2 Software (which responses were, of course, made in the first instance by David Escamilla). See **Exhibit A** hereto, *Declaration of Officer*, ¶¶ 2-3.

### B. Maturing of Opposer's Pleaded Service Mark to Registration

5.03 Applicant also argues that it did not have an opportunity to discover evidence of Opposer's Class 042 service mark. This is simply untrue. The service mark was identified in the original notice, and in fact was a central focus of Applicant's discovery. See *Notice of Opposition* (DKT01) at template page 2 ("Marks Cited By Opposer as Basis For Opposition" include "M2" for "service mark use...technical support services, computer software design...maintenance") (emphasis added). See also MSJ (Exhibit A declaration), Exh. 5, at 82-110 (discovery responses describing services projects).

### C. Decade-Old Litigation

5.04 Finally, apparently throwing everything against the wall to see “what sticks” for its unnecessary Rule 56(d) motion, Applicant argues that it requires leave of the Board to discover protective order materials from decade-old litigation. Applicant’s Motion, at 13. Not only does this have nothing to do with the motion for summary judgment, even outside of the summary judgment confines the Board holds that such materials are neither discoverable nor necessary in Board proceedings. It is sufficient for a party to identify name of parties, case number, jurisdiction, and outcome. *See, Am. Soc’y of Oral Surgeons v. Am. Coll. of Oral and Maxillofacial Surgeons*, 201 USPQ 531, 534 (TTAB 1979); *J.B. Williams Co., Inc. v. Pepsodent G.m.b.H.*, 188 USPQ 577, 580-81 (TTAB 1975); *Johnson & Johnson v. Rexall Drug Co.*, 186 USPQ 167, 172 (USPQ 1975). Applicant does not claim Opposer has not already provided this information (agency enforcement history is already in Applicant’s own exhibits, Applicant’s Motion, Exhibit D, MTTAB094-095) or that Applicant does not already have this data from other sources.

## VI. CONCLUSION

6.01 None of the grounds set forth in Applicant’s Motion are essential to Applicant’s response the summary judgment motion, the proper focus of Rule 56(d). This is not surprising – the simple question before the Board on the MSJ concerns the intersection of application and registration language. Applicant’s request to delay this proceeding in order to try to develop a factual response to what is a purely legal question – whether the duplicate registration may issue with intersecting application and registration language, or whether the use of a “house mark” composite will avoid confusion. Applicant has not done anything more in Applicant’s Motion than apparently concede it has no real answer. If Applicant truly needs more discovery to de-

velop an argument to distinguish application language from language of a senior registration on the Principal Register, it probably should not have applied for the identical trademark.<sup>8</sup>

6.02 Applicant's Motion under Rule 56(d) should be DENIED. Applicant should be ordered to respond to the pending motions, including a summary judgment motion that presents a narrow question for the Board based upon clear, undisputed facts concerning the intersecting language of the new entrant's junior applications and Opposer's senior subsisting registrations.

November 28, 2012  
Los Angeles, California

Respectfully submitted,

DAVID ESCAMILLA

*s/David Escamilla/*

David Escamilla

OPPOSER

*Joined by:*

M2 SOFTWARE, INC.

BY: *s/David Escamilla/*

David Escamilla

President and C.E.O.

OPPOSER

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<sup>8</sup> See, e.g. *In re Opus One, Inc.*, 60 U.S.P.Q.2d 1812, 1815 (TTAB 2001).(with an identical mark, even a "viable relationship" is likely to cause confusion).

# EXHIBIT A

**EXHIBIT A: Declaration Of Officer**

I, David Escamilla, under oath and penalty of perjury state:

1. I am an Opposer in this proceeding as an individual, as federal registrant of the senior trademark properties, as well as an officer authorized to appear on behalf of my licensed company, M2 Software, Inc. I am over the age of eighteen and, if called as a witness, could and would testify competently to the matters set forth herein from personal knowledge.

2. On **March 27, 2012**, I submitted *Opposer's Response to Applicant's First Set of Interrogatories to Opposer and Applicant's First Set of Requests for Production to Defendant [sic] (Nos. 1-52)* with production of responsive documents. This document has been submitted by Applicant as **Exhibit C** to Applicant's motion (Dkt 28). My verification of these responses, in capacity as corporate officer, is set forth at page 49 of that exhibit. On **April 30, 2012**, I submitted *Opposer's Supplemental Response to Applicant's First Set of Interrogatories to Opposer and Applicant's First Set of Requests for Production to Defendant [sic] (Nos. 1-52)* together with supplemental production of responsive documents. This document has been submitted by Applicant as **Exhibit K** to Applicant's motion (Dkt 28). My verification of these responses, in capacity as corporate officer, is set forth at page 7 of that exhibit.

3. I join both responses as individual Opposer. I verify and declare under penalty of perjury that my responses of **March 27, 2012** and my supplemental responses of **April 30, 2012** are true and correct to the best of my knowledge, information, and belief.

DATED this 28th day of November, 2012.

/s/ David Escamilla  
David Escamilla

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument is being served on November 28, 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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