


TTAB

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE DIRECTOR OF THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re: TTAB Opp. No. 91202450	CERTIFICATE OF TRANSMISSION UNDER 37 CFR 1.8 I hereby certify that this paper and any documents referred to as being attached or submitted herewith are being filed with the United States Patent and Trademark Office via facsimile to the Office of Petitions (Trademark), (571) 273-9419, on the date shown below. Date: <u>December 20, 2013</u> By: <u>/David Escamilla/</u> David Escamilla
Opposer: M2 Software, Inc. and David Escamilla	
Applicant: Modernizing Medicine, Inc.	
For:  MODERNIZING MEDICINE	
Ser. Nos.: 85/102,289; 85/102,294	

REPLY IN SUPPORT OF PETITION FOR REVIEW OF INTERLOCUTORY ORDER
OF TRADEMARK TRIAL AND APPEAL BOARD PURSUANT TO 37 CFR 2.146(e)(2)
[EXPEDITED REQUEST TO SUSPEND PENDING DETERMINATION]



12-24-2013

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Opposers M2 Software, Inc. and David Escamilla (together hereafter “Petitioner”) hereby submit a Reply to address the December 13, 2013 Response (“Response”)¹ of applicant Modernizing Medicine, Inc. (“Respondent”) responding to the November 29, 2013 Petition (“Petition”).²

I. A CHART OF THE TRUE COURSE OF PROCEEDINGS REVEALS RESPONDENT’S CLAIM, THAT IT REQUIRES NEW DISCOVERY TO RESPOND TO SUMMARY JUDGMENT, IS UNSUPPORTED

1.01 First, it should be noted that most, if not all, Respondent’s Response does not concern the issues and November 4, 2013 Order subject of the Petition. Thus, the issues raised in the Petition should be treated as conceded. However, should the Director elect to exercise supervisory authority to review the areas raised in the Response, this Reply is submitted thereto.

1.02 The purpose of a *summary* judgment motion is judicial economy in cases where, as here, there is no genuine issue of material fact where grounds are available to sustain an opposition. *See* TBMP § 528.01. Here, such grounds comprise a plain intersection between application and registration language, but Respondent has continued to invent reasons why it cannot simply make an argument in response. According to Respondent, it has been delayed from “obtaining relevant discovery” [Response at 4], that the “Petitioner erroneously believes that the TTAB should dispense with Modernizing Medicine’s discovery” [*Id.* at 10], that Petitioner seeks “to prevent Modernizing Medicine from obtaining discovery” [*Id.* at 11], and that it has received “no discovery from M2 Software” [*Id.* at 11]. All of these claims are false. Respondent is counting on manufacturing a discovery issue to remove the real Petition issue from Director jurisdiction, but this tactic will not work because the record is well-developed. A summary chart of the timeline in this proceeding, supported by docket entries, is at Reply Appendix RA1:03-05.

1.03 As shown, in 2012 Respondent has already served and received responses on substantial discovery from Petitioner [RA1:04, Seq. No. 7, 8, 13,17].³ A Rule 56(d) motion may be denied not only for an insufficient affidavit, but also if the party already had ample opportunity for

¹ See *Applicant’s Response to Petition For Review of Interlocutory Order of Trademark Trial and Appeal Board Pursuant to 37 CFR 2.146(e)(2) [Expedited Request To Suspend Pending Determination]*.

² See *Petition for Review of Interlocutory Order of Trademark Trial and Appeal Board Pursuant to 37 CFR 2.146(e)(2) [Expedited Request to Suspend Pending Determination]*, filed November 29, 2013.

³ Respondent even improperly obtained a second set of discovery, served November 18, 2013 before any proper Rule 56(d) review, as a result of Respondent’s procedural tactics and the errors addressed in the Petition. [Resp. 8]. Petitioner timely served responses on December 18, 2013. The error also resulted in a third set of discovery, also without proper Rule 56(d) review, served November 25, 2013 and adding extraordinary expenses and diversion of resources to M2 Software for a December 26, 2013 due date. [Resp. 8].

earlier discovery. *See, e.g., Barfield v. Brierton*, 883 F.2d 923, 931-32 (11th Cir. 1989). In this proceeding, it is Modernizing Medicine that has stonewalled discovery. In fact, the only Motion to Compel filed in this proceeding was required to be filed by Petitioner against the objections and evasive responses of Modernizing Medicine, ultimately revealed as caused by a spoliation of evidence subject of a motion for default judgment as a sanction, or in the alternative for summary judgment (Dkt 23, “Dispositive Motion”). *See* Petition Appendix (“A[Exh.]:[page]”) at A1:01-40. *See also* RA1:05 (Seq. 16), Dkt. 11.

1.04 Modernizing Medicine submits to the Director statements that it falsely attributes to Petitioner in an attempt to demonstrate a lack of diligence or fulfillment of Board discovery obligations. For example, Modernizing Medicine’s non-record counsel misled the Board in claiming in a sworn declaration that M2 Software’s owner had stated in a telephone call that he refused to produce documents “until the final day of the discovery period.” [Dkt. 24 at 4 n.2]. Respondent has cut and paste the same false statement here. [Resp. 14]. In fact, Modernizing Medicine had lifted that position from a motion that *Petitioner* had filed in a parallel opposition against Higher Logic, LLC, a party that has acknowledged privity with Respondent, where that applicant had claimed – **in writing** – that a motion to compel was not ripe where the applicant incorrectly believed it could withhold information until the final day of the discovery period. [A4:67]. *See* TTAB Opp. No. 91200167, DKT11 at 4 ¶ 3.03. In light of the lack of credibility demonstrated by Modernizing Medicine, the Director must disregard any factual statements provided in the Response not supported by cite or documentary evidence.⁴

**A. RESPONDENT HAS ALREADY TAKEN DISCOVERY ON SERVICES OF THE
‘151 REGISTRATION, SPECIFICALLY SOUGHT IN FULL DISCOVERY IN 2012**

1.05 For example, Respondent repeatedly claims in its Response that it suddenly needs to take Rule 56(d) discovery on the services of the ‘151 Registration, now that a summary judgment

⁴ Respondent relies upon unsupported characterizations of only telephone calls, to generate bias without ability of the opponent to refute with documentary evidence, to claim Petitioner has been uncooperative in discovery. Resp. 14. Similarly, declaratory jurisdiction was obtained by a privy party in the Eastern District of Virginia (the civil action suspending proceedings here) based on a counsel declaration that claimed events in a telephone call with no documentary evidence or documentary ability to refute. *Higher Logic LLC v. M2 Software, Inc.*, No. 12-1153 (E.D.Va.), Dkt.10 ¶10, Dkt.15-2 ¶8-9, Dkt.18 2-4. Substantial judicial resources were wasted as a result of that tactic in the federal court, and the tactic should be afforded scrutiny here.

motion has been filed [Resp. 12-13]. *See* U.S. Reg. No. 4,128, 151 (RA2:06-08).⁵ However, Respondent already took full discovery on such services on January 27, 2012, including 35 interrogatories and 52 requests for production [Dkt. 29-31, Exh. A at 3 (defining “M2 Services” as including “as described in Opposer’s trademark application, Serial No. 85341646,” specifically, “development, updating and maintenance of software and data bases; Technical support services, namely, troubleshooting of computer software problems”), Exh. B]; [RA1:04, Seq. 07-08]. *See also* Dkt. 24, EX5 P82-110. The ‘646 application, of course, merely matured into what is now known as the ‘151 registration. [RA2:06-08]. Contrary to Respondent’s claims that it does not know “the nature of [Petitioner’s] services [Resp. 14], Petitioner long ago fully responded to such discovery, including the nature of services [*e.g.* Dkt. 29-31, EX-C P6-9, P12-13, P20-21] and a representative sample of documents from operations including service provisions from M2 Software, Inc. contracts,⁶ vendor agreements,⁷ other software exemplars [*e.g.* Dkt. 29-31 EX-D MTAB0248-253, MTTAB00264], branded marketing collateral and advertisements [MTTAB003, MTTAB070-72], and a representative sample of recent revenue receipts [MTTAB0292-83]. Respondent’s characterization of documents produced from M2 Software internal operations as “irrelevant webpages” [Resp. 5] is false, and is a manufactured attempt to obtain an improper Rule 56(d) continuance.⁸

B. RESPONDENT SIMPLY MANUFACTURES REASONS TO DELAY AND DUPLICATE DISCOVERY AFTER AN INTERNAL ADMINISTRATIVE ASSIGNMENT

1.06 Respondent’s claim that the joinder of assignee David Escamilla presents new areas of discovery is also false. [Resp. 12]. Mr. Escamilla is M2 Software, Inc.’s officer authorized

⁵ The last page of Dkt. 23 EX1 P10, U.S. Reg. No. 4,128,151, already on the record docket, was inadvertently omitted from the appendix copy (at A1:43 (P-9)) and a full exhibit is attached for convenience. (RA2).

⁶ Dkt. 29-31 EX-D at (i) MTTAB0073-75, (ii) MTTAB0076-77, (iii) MTTAB0078-82, (iv) MTTAB0083-85, (v) MTTAB0086-88, (vi) MTTAB0089-93, (vii) MTTAB00104-05, (viii) MTTAB0246-47.

⁷ Dkt. 29-31 EX-D MTTAB0098-99

⁸ Other “third-party” documents Respondent claims are irrelevant [Resp. at 5] include third-party registrations and websites showing industry use of the same mark across the goods and services of both parties (*e.g.*, A1:31-33). This evidence is far from irrelevant, and demonstrates the parties’ goods and services are of a type likely to be perceived as emanating from a common source. TMEP § 1207.01(d)(iii) (compound registrations for both parties’ goods/services “may serve to suggest that the goods or services are of a type that may emanate from a single source”); TMEP § 1207.01(a)(vi) (important if “the relevant goods or services are...sold by the same manufacturer”); *Hewlett-Packard v. Packard Press, Inc.*, 281 F.3d 1261,1267 (Fed. Cir. 2002) (relevant “whether a single company sells the goods and services of both parties”); *Recot, Inc. v. Becton*, 214 F.3d 1322, 1328 (Fed. Cir. 2000) (evidence in industry of both parties’ goods/services under one mark is “extremely pertinent”).

to represent the corporation pursuant to TBMP § 114.01. The assignment was an internal administrative assignment executed to Mr. Escamilla as individual, from his standing as officer. See Dkt. 22 at 1 (citing assignment recorded Oct. 2, 2012 with the Assignment Division at Reel 4870, Frame 0638). With a unity of interest and control, Respondent has no need to repeat the same discovery. TBMP § 1201.07(b)(i). Mr. Escamilla joined prior discovery responses of M2 Software, Inc., that he already individually prepared as officer and on behalf of the corporation. DKT35 EX-A. Moreover, taking advantage of the erroneous November 4, 2013 Order subject of the Petition, Respondent took further unbounded discovery of the assignee on November 18, 2013, with Petitioner's responses timely filed December 18, 2013. See Resp. 8. Respondent presents absolutely no cause for a Rule 56(d) continuance under the facts of this internal assignment. See *J.I. Case Co. v. F.L. Industries, Inc.*, 229 USPQ 697 (TTAB 1986) (statement by applicant of need to take discovery on validity of assignment was unsupported speculation).⁹

**C. NO AFFIDAVIT EVIDENCE DEMONSTRATES HOW *MORE* DISCOVERY
WOULD BE ESSENTIAL TO RESPOND TO THE SUMMARY JUDGMENT MOTION**

1.07 Finally, Respondent continues to claim that it needs further discovery based on grounds “upon which the *opposition* is based.” [Resp. 13 (emphasis added)]. This obviously does not meet the criteria for grounds for which discovery is essential to justify its opposition to the *summary judgment motion*. See, e.g., TBMP § 528.06 (discovery limited to that needed to oppose the summary judgment motion). For example, there is no limitation in either the registration [RA2:06-08] or the application (“information technology services, namely information technology consulting services”) (Ser. No. 85/102,289) and the Board will consider that the goods and services identified therein move in all established and normal channels of trade. See TMEP § 1207.01(a)(iii). See also *Paula Payne Products v. Johnson Pub. Co. Inc.*, 473 F.2d 901, 902 (CCPA 1973) (“What is more significant * * * is the absence of a limitation in appellant's registration which would exclude appellee's market.”). “Therefore, [movant] does not need [Rule 56(d)]

⁹ Respondent attempts another procedural avoidance of a merits ruling by claiming the Dispositive Motion “should be denied because...[the assignee] has not filed initial disclosures.” [Resp. 12]. Respondent by its sophistry hides the fact that it was M2 Software, Inc. that filed the Dispositive Motion on the same day as the motion to join, and there is no dispute that M2 Software, Inc. has filed initial disclosures. Dkt. 29-31, EX.-D at MTTAB 0287 (cover, January 16, 2012). It is established that an assignee may be joined at any time. See TBMP § 512.01; *Interstate Brands Corp. v. McKee Foods Corp.*, 53 USPQ2d 1910, 1910 n.1 (TTAB 2000) (assignee joined at final decision). Mr. Escamilla also joined in M2 Software, Inc.'s discovery responses [Dkt. 35 EX-A ¶ 3], and affirmed December 13, 2013 in correspondence to Respondent that, for avoidance of any doubt, in joining prior discovery responses he also individually joins the related initial disclosures.

discovery to establish trade channel overlap...[w]e presume it exists.” *Build-A-Bear Workshop v. Silver Dollar City, Inc.*, Canc. No. 92041922 (TTAB Dec. 1, 2003) at 6 n. 9.¹⁰

1.08 It is fundamental that an application for Rule 56(d) discovery must be supported by an affidavit demonstrating “why it is unable, without discovery, to present by affidavit facts sufficient to show the existence of a genuine issue of material fact for trial.” TBMP § 528.06. Here, the only affidavit on record for Rule 56(d) relief is Dkt. 28 at 26 (“Declaration of David J. Byer In Support Of Applicant’s Motion Under Fed. R. Civ. P. 56(d)”) (“Byer Affidavit”). That affidavit sought the deposition of a research collaborator on competitive software, who had nothing to do with the trademark issues before the Board, but whom Respondent sought to depose in an attempt to overcome M2 Software’s protections of its trade secret technologies in a similar field. However, a Motion to Quash has already been granted by the Northern District of Illinois of the subpoena issued at the time of the Byer Affidavit. *M2 Software, Inc. et al v. Modernizing Medicine, Inc.*, Case No. 12-cv-08699 (N.D. Ill. Jan. 17, 2013, Dkt. 19). Moreover, the discovery that Mr. Byer sought was precisely the type of broad, non-specific discovery as to “likelihood of confusion factors” criticized by the Federal Circuit as insufficient for a Rule 56(d) continuance.¹¹ See *Strang Corp. v. The Stouffer Corp.*, 16 USPQ2d 1309 (TTAB 1990) (“The affidavit of petitioner’s attorney that during discovery ‘petitioner will seek to elicit information and obtain documents relevant to the issue of likelihood of confusion, including items relevant to consumer recognition, use, prior knowledge, channels of trade, consumer sophistication, and other Dupont factors’ is considered to be no more than the ‘discovery for discovery’s sake’ that was condemned by the Court in *Keebler Co. v. Murray Bakery Prods.*, 866 F.2d 1386, 9 USPQ 2d 1736 (Fed. Cir. 1989)”) (emph. added).¹²

¹⁰ Nor may Respondent obtain discovery on Petitioner’s customer lists that it claims it needs under Rule 56(d). [Resp. 14] See TBMP § 414(3) (“the names of customers constitute confidential information and generally are not discoverable, even under protective order.”). As required, Petitioner properly disclosed its general classes of customers and the name of its first customer. Dkt. 29-31, EX-K at 6; EX-C at 8-9.

¹¹ The Byer Affidavit claimed it needed discovery because the non-party physician “had worked with M2 Software on a computerized medical records application” and was “uniquely qualified to testify” as to various elements that “could lead to information and evidence relevant to the likelihood of confusion factors at issue on summary judgment.” Dkt. 28 at 26 (emphasis added).

¹² A second affidavit submitted in support of a motion to suspend also addressed discovery, but that affidavit focused upon discovery on common law rights claiming “[i]n this Opposition, M2 Software relies on its common law rights,” (emph. added) with no indication why that was relevant to the summary judgment motion based on an intersection of registration and application language. Dkt. 28 at 32 (“Declaration of Hayden O’Byrne in Support of Applicant’s Motion to Suspend Proceedings Pending Resolution of a Related Case”).

II. RESPONDENT'S CHARACTERIZATION OF THE PARTIES IS UNSUPPORTED

A. MODERNIZING MEDICINE IS HARDLY A VICTIM, BUT A START-UP WITH \$29 MILLION IN FUNDING, AN INTERTWINED LAW FIRM, AND A HISTORY OF IMPROPER PTO REGISTRATION

2.01 After a half-page of false personal attacks on Petitioner, Respondent is reluctant to describe itself in more than a single sentence. [Resp. 1]. This is because Respondent, like M2 Software, is the same type of provider of relational database information technology solutions, “a software company...providing information technology (IT) solutions,” recently launched as a new start-up with \$29 million in funding and the support of international funds that include Summit Partners.¹³ Hardly a “victim” [Resp. 7], instead Respondent is a sophisticated legal engine,¹⁴ with prior experience in registering claims that relied upon the prior art of senior companies.¹⁵ Modernizing Medicine is the second venture of its owner, whose prior venture Blackboard was characterized by the Software Freedom Law Center, a public interest group, as committing an “economic crime” and “thuggery” in the IP arena by leveraging technologies truly owned by senior companies after it obtained improper patents without disclosing prior art. Respondent’s tactical maneuvers in the present trademark proceeding also rely upon procedural advantages it has improperly obtained.

¹³ <http://miamiherald.typepad.com/the-starting-gate/2013/08/modernizing-medicine-secures-14-million-in-funding.html> (last accessed December 16, 2013)

¹⁴ Modernizing Medicine blurs the line between in-house and external counsel. Its counsel here is K&L Gates LLP, an international law firm that also serves as patent counsel intertwined in competitive decision making including on technology issues that may intersect with M2 Software’s proprietary materials. Both applicant and counsel refused to sign the Board’s standard protective order. *See* Dkt. 12, EX12 P129. *See, e.g., M2 Software, Inc. v. Mytrak Health System, Inc.*, Opp. No. 91196758 (TTAB Dec. 10, 2010), at 6 (recommending in similar case concerning competitive materials “that the parties sign the agreement so that its provisions are enforceable after termination of the Board proceeding”). A former K&L Gates partner, Mark Fliesher, is Modernizing Medicine’s Senior Executive Vice President and General Counsel. *See*: [www.http://www.modmed.com/leadership](http://www.modmed.com/leadership) (last accessed December 20, 2013). The partner apparently replaces an earlier party identified as “General Counsel,” Scott Gitterman, who disclosed Modernizing Medicine was “reorganizing” its records [Dkt. 12, EX-4 P31-33] prior to turning over evidence about an early, material “M2” software product for which it now claims no documents exist. [*Id.* EX-1 P9-10]. Pet. 8.

¹⁵ *See* Dkt. 12 EX 11 P-116, P-121. Respondent’s owner, in his prior venture, Blackboard, Inc. (*Id.* at 107, 114), was listed as inventor but was accused of improperly obtaining a patent by failing to disclose abundant prior art. *Id.* EX 11 P-122. That venture sued the U.S. Patent and Trademark Office to avoid reexamination, but its patent was ultimately invalidated as to all 44 claims. *Blackboard, Inc. v. Jon W. Dudas, C.A.* No. 1:08-cv-01216 (E.D. Vir., Nov. 21, 2008); Dkt. 12, EX 10 P-110; EX 11 P-124 (describing the prior venture’s leveraging of a faulty patent registration as an “economic crime” and “thuggery”).

**B. M2 SOFTWARE HAS REPEATEDLY DEMONSTRATED A VALID, LEGITIMATE,
BUSINESS FOR 22 YEARS, AND FRIVOLOUS ALLEGATIONS OTHERWISE WERE
DISMISSED WITH PREJUDICE**

2.02 Respondent's *ad hominem* attack on Petitioner's owner and business, and the validity of the trademarks therefor [Resp. 1], comprise outdated litigation "spin" that Respondent's mutual interest partners have already acknowledged.¹⁶ All such attacks have by now been refuted by intervening precedent in several federal courts. The entire first paragraph of Respondent's Response was lifted from its 2012 motion, before the same frivolous allegations were dismissed with prejudice in the U.S. District Court, Eastern District of Virginia (Alexandria).¹⁷ *Higher Logic, LLC v. Escamilla et al*, No. 12-1153 (E.D.Va. Jun. 6, 2013) ("VIRGINIA-I"). In that case, a frivolous declaratory action was filed against M2 Software, Inc. and Mr. Escamilla shortly after M2 Software filed a motion for summary judgment before the TTAB.¹⁸ That case proceeded through full discovery and was pending jury trial, when it was stipulated the Court would enter a judgment of dismissal with prejudice. A6:83. *See Warfield v. Allied Signal TBS Holdings, Inc.*, 267 F.3d 538, 542 (6th Cir. 2001) (voluntary dismissal with prejudice operates as a final adjudication on the merits with *res judicata* effect).¹⁹

¹⁶ At a case conference on January 25, 2013 in VIRGINIA-I in the chambers of the Honorable T. Rawles Jones, a representing officer for Higher Logic acknowledged conferences with other opposed applicants regarding Petitioner's trademark and their strategies, also applying for the mark that Petitioner has used to provide similar or related enterprise solutions for over 22 years. Apparently, the unregistered partners have sought to portray M2 Software, Inc. as a type of patent "troll" in the trademark realm, a story fabricated for defense purposes as inspired by the infamous plaintiff in *Central Mfg., Inc. v. Brett*, 492 F.3d 876, 880 (7th Cir. 2007), a licensing entity with 50 registrations. In stark contrast, M2 Software, Inc. is a legitimate, long-term business interested in protecting just two (2) registrations developed through hard work and investment over 22 years. A1:30.

¹⁷ Compare Response at a (Respondent's false claim repeated December 13, 2013 that Petitioner files oppositions to protect its federal trademark "irrespective of field") with Dkt. 28 (literal copy, Nov. 14, 2012).

¹⁸ The frivolous declaratory action arose when an IA in the Higher Logic proceeding respectfully inadvertently provided informal defense advice in an October 7, 2011 Rule 26(f) Board teleconference in TTAB Opp. No. 91200167, suggesting that with Petitioner's priority, the only way for the newly-launched applicant to overcome that was to petition to cancel the senior Principal Register mark. As a result, and wholly frivolously (Pet. at 9 n. 9), after Petitioner filed for summary judgment, Higher Logic filed a groundless civil declaratory action for cancellation in the U.S. District Court, Eastern District of Virginia on Oct. 15, 2012. That case wasted hundreds of thousands of dollars and relied upon questionable means [Note 4 *supra*] to secure jurisdiction. As here, the IA had suspended the TTAB proceeding pending the civil action, though a dispositive motion had already been filed in the TTAB before the civil action. *See* TBMP §510.02(a).

¹⁹ *See Allen v. McCurry*, 449 U.S. 90, 94 (1980) (under interrelated doctrines of *res judicata* and collateral estoppel, a final judgment on the merits of an action precludes the parties, or those in privity with them, from relitigating issues that were or could have been raised in that action).

2.03 On November 7, 2012, Respondent argued the “new, *related* civil action, [VIRGINIA-I], currently pending...will have a *direct bearing on this opposition*,” A3:50 (emph. added), and “a *direct bearing on the issues before the Board* in this action.” A3:54 (emph. added). Nonetheless, even after dismissal with prejudice, Respondent is forced to repeat the allegations here because the same, rejected, outdated allegations are those upon which Respondent had sought to base its case when it filed its Rule 56(d) motion in November 2012. *See* Dkt. 29-31 Exh. T (“non-use,” “abandonment”). Respondent sought such a procedural defense because, first, its ordinary Section 2(d) defense has no merit, and second, because with M2 Software, Inc. in the category of a small business, Respondent hopes to blur the distinction as to what is “abandoned” and what is merely a smaller scale business. However, federal trademark rights do not vary with the size of the registrant. *See In re Shell Oil Co.*, 992 F.2d 1204, 1207-1208 (Fed. Cir. 1993).²⁰ And, abandonment requires that a business be truly and fully abandoned, and in any other event is merely a frivolous allegation or defense intended to waste court and party resources. “[A]s a threshold matter, abandonment requires *complete* cessation or discontinuance of trademark use.” *Electro Source, LLC v. Brandess-Kalt-Aetna Group, Inc.*, 458 F.2d 931, 938 (9th Cir. 2006) (emph. in original), citing *Doebler’s Pa. Hybrids, Inc. v. Doebler*, 442 F.3d 812, 823 (3d Cir. 2006). *See Doebler’s Pa. Hybrids*, 442 F.3d at 823 (“[t]he simple fact is that the use of [the trademark] never ceased.”).²¹

2.04 Although Petitioner has brought a federal infringement lawsuit against just *one* defendant in over a decade, in that case and in prior cases the defenses of abandonment or non-use by M2 Software have been quickly rejected as unsupportable and frivolous after even a modicum of judicial investment. *See, e.g., M2 Software, Inc. v. Viacom, Inc.*, 30 Fed.Appx. 710, 711 (9th Cir. 2002) (“M2 Software is the indisputable senior user of the M2 mark based upon the introduction of its RLMS product in 1991...” (emphasis added). *See also Escamilla v. M2 Technology, Inc.*, Case No. 12-41183 (5th Cir., Jul. 16, 2013), at *2 (“For many years, Escamilla and M2 Software have

²⁰ While Respondent makes much of the fact that M2 Software, Inc. has protected its mark in at least 16 agency proceedings [Resp. 2], this is not out of the ordinary for a business that has been in operation nearly a quarter of a century. A much larger company like Apple Corporation filed over 100 proceedings in a single year according to a recent study, the equivalent of over 2,200 in the same 22-year time period. <http://thettablog.blogspot.com/2009/10/ttablog-special-report-who-files-most.html> (last accessed 12/20/2013).

²¹ Plaintiff’s diligent enforcement of his trademark is yet another factor that demonstrates no abandonment. *See, e.g., United States Jaycees v Philadelphia Jaycees*, 639 F.2d 134, 139 (3d Cir. 1981) (“On the contrary, this and other legal efforts of the [senior trademark owner] definitely indicate an intent to retain exclusive use of its marks”).

employed the M2 mark in connection with their business activities....in 2000, its right to the M2 mark was deemed incontestable.”). In a related lower court case cited by Respondent, [Resp. 2], the same court acknowledged Petitioner’s ownership of a valid mark, after years of discovery and waste of judicial resources on the same issue Respondent seeks to relitigate here. *Escamilla v. M2 Technology, Inc.* Case No. 4:12cv634 (E.D. Tex., Aug. 21, 2013), at 97 (“you’ve got the mark...the question is, is there a likelihood of confusion of goods?”).

2.05 Thus, Respondent’s motion from November 2012 providing its “DuPont” chart seeking discovery throughout the history of M2 Software, Inc.’s business to inspect “non-use” and “abandonment” [Dkt. 29-31 Exh. T chart] is outdated, already repeatedly refuted in federal courts, and certainly presents no supportable grounds for Rule 52(d) relief as an improper collateral attack that seeks only to drive up litigation costs (and its own legal fee generation) against a smaller opponent in a strategy of attrition:

Many lawyers] conduct seemingly endless discovery by manipulating the rules that permit the taking of depositions and written interrogatories or require production of documents. This can cause pretrial proceedings to go on and on ad nauseam. Such tactics are employed by unscrupulous counsel to discourage or exhaust the other side, which is often underfunded or outgunned. If left unchecked, this can result in the protraction of litigation, needless discovery, and incredible costs.

Thomas Greene, *The Practice of Law: Still a Noble Profession Despite Gamesmanship and Commercialism*, 13 Experience 20, 21 (2002).²²

III. PETITIONER’S TRADEMARK HAS CONSISTENTLY BEEN PROTECTED IN THE IT SOLUTIONS AND SERVICES FIELD FOR 22 YEARS – INCLUDING AGAINST THE APPLICATION SUBJECT OF THE *M2 COMMUNICATIONS* FEDERAL CIRCUIT CASE

3.01 Respondent appears to rely upon a misguided theory that it is entitled to register the mark used by M2 Software, Inc. for 22 years because of a decision that it cites from 2006, *M2 Software, Inc. v. M2 Communications, Inc.*, 450 F. 3d 1378, *cert. denied*, 127 S.Ct. 1363 (2006) (Fed. Cir. 2006) (“*M2Comm*”) [Resp. at 2]. In that application, however, M2 Software’s rights as

²² Modernizing Medicine appears to acknowledge that increasing the expenses of Petitioner was one of Respondent’s motives for seeking additional Rule 56(d) discovery rather than simply responding to the summary judgment motion. Response at 8 (because “Modernizing Medicine *has incurred the expense*” of responding to *one* set of discovery, Petitioner must incur similar expense (for *three* sets)) (emphasis added). See Fleming James, Jr., Geoffrey C. Hazard, Jr., and John Leubsdorf, *Civil Procedure* § 5.2 at 289 (Foundation 5th ed 2001) (underscoring the potential for abuse in “‘little’ cases . . . in which one party has an incentive to overpower the other”).

to IT solutions and services were protected because, pre-proceeding, the examiner cited M2 Software's senior mark against an original description that included computer software services.²³ This is the *same* field for which Respondent seeks registration here, and is more relevant than the portion of that application that proceeded to an *inter partes* proceeding and ultimately the Federal Circuit.

1.) M2 Software's IT Solutions Field Has Always Been Protected. First, it is important to distinguish that Petitioner has a primary business of providing enterprise solutions and related IT services that are at issue here, and a secondary field in which it provides interactive music products not relied upon in this proceeding. [A1:19 n. 16; A4:67]. The secondary field was the primary focus of *M2Comm* based upon the CD-ROM products at issue. Petitioner's rights were upheld with respect to its primary business. M2 Software's mark was cited by the PTO against the *M2Comm* applicant's original field and application, and accordingly that class did not become a part of the publication (or the resulting opposition before the TTAB).²⁴ The class for which M2 Software's mark was cited requiring the applicant's withdrawal is the same class of computer software services that M2 Software has provided since 1991, for Class 042 services subject of U.S. Reg. No. 4,128,151. Respondent has again applied in a duplicative application for the same fields against which M2 Software's rights have consistently been upheld. *See, e.g.*, Ser. No. 76/352778 (pre-*M2Comm* citation of Petitioner's mark, May 9, 2002, Class 042 services); Ser. No. 77/471671

²³ *M2Comm* identified Petitioner's clients only "so far as the record establishes" from a decade-old record that was focused on interactive multimedia products in a different side business. *Id.* at 1380. That applicant specifically *deleted* computer software services from its application after citation of Petitioner's mark, allowing it to argue it was not applying for the mark for that field. *See* Ser. No. 76/352778, May 9, 2002. The *deleted* field, against which Petitioner's rights were protected by the examiner's citation, is the field now subject of Respondent's new application. The Director may take judicial notice of an application file. *See, e.g., Hogan A.B. v. Dresser Indus.*, 9 F.3d 948, 954 n.27 (Fed. Cir. 1993) (taking judicial notice of a patent not submitted to the trial court); *Standard Havens Prods., Inc. v. Gencor Indus., Inc.*, 897 F.2d 511, 514 n.3 (Fed. Cir. 1990) (taking judicial notice of PTO correspondence as part of the public record).

²⁴ *See* Ser. No. 76/352,778, Trademark Status and Document Retrieval (TSDR), at Doc 22 and Doc 23 dated May 9, 2002 (citing M2 Software, Inc., U.S. Reg. No. 1,931,182). The original description for which the examiner cited Petitioner's mark included Class 042 services described as "Computer consultation; design of computer software for others; installation of computer software; technical support, namely, troubleshooting of computer software problems via telephone, e-mail, and in person." Doc 26 (Application) dated December 26, 2001, and the Class 009 description originally included "customized" CD-ROMs. Both descriptions were cancelled in their entirety after citation of M2 Software's mark. Doc 20, Nov. 12, 2002 (" [applicant] requests that the identification of record be canceled in its entirety and the following be substituted...")

(“M2 Technology” Section 2(d) refusal for likelihood of confusion with Petitioner’s mark, January 15, 2010, Class 042 services); Ser. No. 77/471658 (same, “M2” design).

2.) The Federal Circuit Case Involved a Limited ACR Record. Second, the TTAB proceeding was an Accelerated Case Resolution (ACR) proceeding on a very limited record, and involved only a limited sub-segment of the interactive software produced by Petitioner converted to CD-ROM media in the mid-1990’s (the media at issue in that proceeding). This is demonstrated, in part, by the limited time frame in which the Board studied evidence. *Compare M2Comm*, 450 F. 3d at 1380 (limited evidence before the Board demonstrated a first use “prior to **1998**”) (emphasis added) *with M2 Software, Inc. v. Viacom, Inc.*, 30 Fed.Appx. 710, 711 (9th Cir. 2002) (full civil proceeding, finding “M2 Software is the *indisputable senior user* of the M2 mark based upon the introduction of its RLMS product in **1991**...”) (emphasis added).

3.) The Federal Circuit Case Involved Pharmaceutical Marketing Goods, Not IT Solutions. After the Class 042 computer services were withdrawn from the *M2Comm* application, all that remained for the TTAB opposition and Federal Circuit appeal was a narrow class of pharmaceutical marketing materials products on CD-ROM.²⁵ Respondent thus misleads the Director with that decision with a truncated quote that omits the Federal Circuit’s recognition that there was a limited record. [Resp. 2]. What the Federal Circuit *actually* found was that “*In so far as the record establishes*, all of its clients are in those fields, and it does not market or sell any of its *products* to consumers in the pharmaceutical or medical field.” *M2Comm* at 1380 (emphasis added). M2 Software did not argue that its CD-ROMs were directed to pharmaceutical education. *Id.* (“[The TTAB] reasoned that while both parties sell *goods* in the same media format, i.e., interactive CD-ROMs, that fact alone renders them neither identical nor related. * * * Both the registration and the application identify subsets of CD-ROMs, defined by industry, not CD-ROMs generally.”) (emph. added).

4.) A Service Mark Use Is Not Restricted By The Occupation Of The Customer . Respondent thus is misguided in applying the limited record from a “product” mark case concerning media products, to the present case concerning IT solutions and related services. Unlike with media goods (“the registration...[is] defined by industry,” *Id.*), IT solutions firms providing solutions and services typically use the same brand in the information technology industry regardless of in which

²⁵ *M2Comm* examined just the remaining Class 009 goods: “Interactive multimedia CD-ROMs containing educational information in the fields of pharmaceutical and medical product information, therapies and strategies, and medical, pharmaceutical, and healthcare issues.” *M2Comm*, 450 F. 3d at 1380 (emph. added).

field the *customer* happens to be employed. Third-party registrations demonstrate competitors provide the same services of the parties across vertical markets [A1:33], whereby such goods and services are likely to be perceived as emanating from the same source. *See, e.g.* Dkt. 29-31 Exh. D, MTTAB0232, 239 (single brand used for both media business IT solutions and healthcare IT solutions). *Compare, e.g.,* MTTAB0260-64 (software project of Petitioner submitted in date-verifiable government-submitted document to National Institutes of Health (NIH) in Bethesda, Maryland, March 21, 2003). In the *M2Comm* case, the Federal Circuit focused on media *products* subject of the ACR motion, not services. For Petitioner's service mark registration in Class 042, there is no artificial limitation as to what clients may be provided services (just as law firms, for example, provide services under the same brand regardless of client occupation).

IV. THE LOWER COURT DECISION IN *VIACOM*, UPON WHICH RESPONDENT RELIES, RELIED UPON A “*BREATHTAKINGLY ERRONEOUS DECISION*” AND WAS REVERSED

4.01 Finally, the lower court decision cited by Respondent centrally relied upon a case that the nation's leading trademark commentator has dubbed a “breathtakingly erroneous decision outside the mainstream of trademark law.” *See* 4 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 24:6 at 24-16 (emph. added), criticizing *Zazu Designs v. L'Oreal S.A.*, 979 F.2d 499 (7th Cir. 1992), *reh'g en banc denied*, 1992 U.S.App. LEXIS 33599 (7th Cir. 1992) (foundational reliance in *M2 Software v. Viacom*, 119 F.Supp.2d 1061 (C.D. Cal 2000), *rev'd*, 30 Fed.Appx. 710 (9th Cir. 2002)). Respondent misleads by citing that case and claiming it was reversed “on other grounds.” Resp. at 2. In fact, it was reversed on the *same* grounds Respondent seeks to support, namely Respondent's position that Petitioner does not have trademark rights to protect. *See M2 Software v. Viacom*, 30 Fed. Appx. 710 (9th Cir. 2002) (M2 Software the “indisputable senior user”); *Two Pesos, Inc. v. Taco Cabana*, 505 U.S. 763, 769, 112 S.Ct. 2753 (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.”) (emph. orig.). Federal trademark rights do not vary with the size of the registrant. *In re Shell Oil Co.*, 992 F.2d at 1207-08. M2 Software ultimately prevailed with a permanent injunction of Viacom in 2004.²⁶

²⁶ The reversal of the 2000 *Viacom* case renders the follow-on cases cited by Respondent [Resp. at 15] also structurally unsound. The way the timeline fell, summary judgment in a related case, *M2 Software, Inc. v. Madacy Entm't (SFX)*, 421 F.3d 1073 (9th Cir. 2005), *cert denied*, 547 U.S. 1069 (2006) (“*Madacy-SFX*”), was determined before the erroneous *Viacom* decision was reversed and relied upon the same law. *M2Comm* was also infected, with a Federal Circuit appellee brief that cited almost exclusively to *Madacy-SFX*.

V. THE DIRECTOR SHOULD GRANT THE FULL RELIEF OF THE PETITION

5.01 In light of the foregoing, and the inequitable procedural advantages Respondent has continued to obtain even after this Petition was filed, the Director should afford the full, complete relief that was requested in the Petition. In particular, Respondent did not address, and has conceded, the necessary full reversal of the November 4, 2013 Order, including reversal of the abuse of discretion or clear error in denying reconsideration, and including reversing or vacating the remainder of the order that included unilateral procedural restrictions and improper rulings on a “response” construed as a motion to compel. Pet. 16-17. Upon reversal of the November 4, 2013 Order denying reconsideration, and on reconsideration, the June 7, 2013 Order should be vacated.

5.02 With that order vacated, the Dispositive Motion will be restored to the case posture before the first procedural error suspending for the non-existent civil action. Pet. 14-15. All further discovery and motions to compel should be suspended pending disposition.²⁷ *Krugman, Trademark Tr. and Appeal Board Practice and Procedure* (2003) ¶ 3.04[7][d], at 3-69 (after filing of 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.”).

5.03 The Director is respectfully requested to rule on the expedited request for suspension to allow adequate time to determine the Petition, and in light of the holidays and yet a third set of improper discovery Respondent submitted on November 25, 2013 after the erroneous November 4, 2013 Order, ostensibly due December 26, 2013. Note 3, [Pet. 2, 18]. Respondent’s efforts seek-

²⁷ Petitioner’s Motion to Compel (Dkt. 11) sought to overcome a variety of five (5) discovery response tactics Respondent utilized to shield documents and evidence concerning a central, material product concerning the senior trademark – namely, an M2 branded software product that Respondent had advertised to investors in a *BusinessWeek* investor portal. Dkt. 11 at 7; Dkt. 12 EX-14 P-136. In a telephone conference October 12, 2012, Respondent indicated that no documentary evidence on that material product existed or would be produced. Dkt. 23 EX-A ¶ 12. Thus, this became not an issue for a renewed motion to compel, but rather now stands as an issue requiring a default judgment for spoliation, where the evidence is now unavailable to support the motion for summary judgment. A1:01-40 However, should any further motions to compel be permitted, the Director should exercise supervisory authority to order *Petitioner’s* motion to compel be granted, in mutuality, because it was timely filed but rejected based upon an incorrect interpretation of the “good faith effort” rule, 37 CFR 2.120(e)(1) (requiring a good faith effort by “conference *or* correspondence”) (emphasis added). Although Respondent misleads the Director when it dramatically claims that Petitioner’s motion was filed “without the courtesy of a telephone call” [Resp. 5], it omits the parties’ detailed, good faith effort by correspondence. Dkt. 12, EX-8 P95-98; EX-9 P100-104.

ing out an IA conference after the Petition was filed have already resulted in three teleconferences since that filing (December 3, 2013, December 6, 2013, December 13, 2013) and a new Order of December 9, 2013 (Dkt. 48) that denied suspension while the Petition is pending.

5.04 To preserve the orderly disposition of the Petition and the Director's authority, any orders in the Opposition entered after the filing date of the Petition, on or related to the subject matter involved in the Petition, are respectfully void and should be vacated. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) ("the filing of a notice of appeal "is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."").²⁸ In light of the orders on appealed topics, and in light of prior conferences in which matters of settlement have been discussed, upon the Director's decision and on remand, this matter should be randomly reassigned.²⁹

²⁸ See, e.g., *Hashberger v. Galloway Mortgage Svcs., Inc.*, No. 20A03-0612-CV0599 (Ind. Ct. App. 2007) ("Case law applying this rule...establishes clearly that the trial court lacked jurisdiction to alter or amend its decision, thereby making the Clarification void.") (cit. omit.); *Coulson v. Ind. & Mich. Elec. Co.*, 471 N.E.2d 278, 279 (Ind. 1984) ("[t]he purpose of viewing jurisdiction in this formalistic manner is to facilitate '...the orderly presentation and disposition of appeals and [prevent] the confusing and awkward situation of having the trial and appellate courts simultaneously reviewing the correctness of the judgment.'" (quot. omitted).

²⁹ The entry of unsolicited orders concerning an appealed topic, after being divested of jurisdiction, is a sign that there is an appearance of bias operating in such decisions. See, e.g., *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 157 (3d Cir. 1993). This is understandable and practically unavoidable, but even if no actual bias exists, a random reassignment is necessary to an IA that has not been involved in this or a related case, TTAB Opp. No. 91200167, in which related topics of settlement were discussed. See, e.g. Section of Intel. Property Law of the American Bar Association, response to PTO's *Notice of Inquiry re: Trademark Trial and Appeal Board Participation in Settlement Discussions*, 76 Fed. Reg. 22678 (PTO-C-2011-011, 4/22/2011) (Board personnel involved in settlement discussions [should be] recused from deciding the case on the merits or in interim rulings.").

http://www.uspto.gov/trademarks/process/appeal/ABA_IPL_06_20_11.pdf (last accessed 12/20/2013).

December 20, 2013

Respectfully submitted,

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s/David Escamilla/

David Escamilla

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OPPOSER / PETITIONER

Joined by:

December 20, 2013

M2 SOFTWARE, INC.

BY: s/David Escamilla/

David Escamilla

President and C.E.O.

OPPOSER / PETITIONER

REPLY APPENDIX

REPLY APPENDIX

Table of Contents

Tab No.	Item	Citation
RA1	Chart of Proceedings of TTAB Opp. No. 91202450	RA1:03-05
RA2	Petition Exhibit A1 (addendum of page on record Exh. A Ex. 1)	RA2:06-08

TAB RA1

CHART RA1: Proceedings of TTAB Opp. No. 91202450

SEQ	DATE	TTAB DKT	EVENT	OPP	APP
01	11/7/2011	DKT01	Opposition Filed	✓	
02	1/16/2012	DKT12, EX12 P128	Opposer's request (REFUSED) that Applicant sign the Board's protective order per Board's recommendation in <i>M2 Software, Inc. v. Mytrak Health System, Inc.</i> , Opp. No. 91196758 (TTAB Dec. 10, 2010) at 6.	✓	
03	1/16/2012	DKT12, EX-3 P14-28	Opposer's 1st Set of Interrogatories (INT) to Applicant	✓	
04	1/16/2012	DKT12, EX-3 P14-28	Opposer's 1st Set of Reqs. For Production of Documents (RFP) to Applicant	✓	
05	1/16/2012	DKT12, EX-3 P14-28	Opposer's 1st Set of Requests For Admission (RFA) to Applicant	✓	
06	1/20/2012	DKT12, EX12 P129	Opposer's second request (REFUSED) that Applicant sign the Board's protective order, or alternatively jointly draft independent document.	✓	
07	1/27/2012	DKT29- 31 EX A	Applicant's 1st Set of Interrogatories (INT) to Opposer, Interrogatories No. 1-35	.	✓
08	1/27/2012	DKT29- 31 EX B	Applicant's 1st Set of Reqs. For Production (RFP) to Opposer, RFP Nos. 1-52	.	✓
09	1/27/2012	DKT12, EX1 P9- 10	Opposer's 37 CFR 1.120(a) and Rule 26(f) correspondence, noting Applicant's "recent changes to your...marketing collateral" and request to "avert any potential spoliation of evidence" with request to not alter or destroy records.	✓	
10	2/6/2012	DKT12, EX-4 P31-33	Declaration of Applicant's Scott Gitterman seeking extension to discovery response based "transition to an entirely new document management protocol" where Applicant is "in the process of reorganizing its records."	.	✓
11	3/15/2012	DKT12, EX-5-7, P35-93	Applicant's RESPONSES to Opposer's 1st Set INT, 1st Set RFP, and 1st Set RFA		✓
12	3/20/2012	DKT12, EX-8 P95-98	Detailed correspondence in good faith effort by Opposer to resolve discovery dispute as to Applicant's Discovery Responses, 37 C.F.R. 2.120(e)(1)	✓	

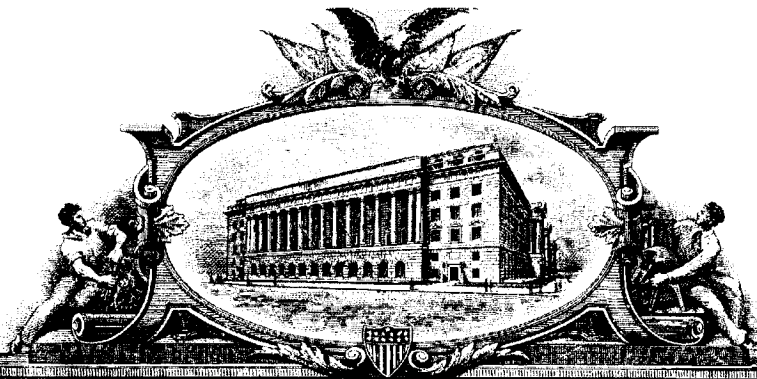
(continued...)

CHART RA1: Proceedings of TTAB Opp. No. 91202450 (continued...)

SEQ	DATE	TTAB DKT	EVENT	OPP	APP
13	3/27/2012	DKT29-31 EX C	Opposer's RESPONSES To Applicant's 1st Set INT and 1st Set RFP	✓	
14	3/28/2012	DKT12, EX-9 P100-04	Detailed Correspondence From Applicant, arguing, based upon inapposite cases, that its Discovery Responses were adequate. 37 C.F.R. 2.120(e)(1)		✓
15	4/16/2012	DKT29-31, EX-F	Detailed Correspondence From Applicant, seeking supplemental responses to Applicant's 1st Set INT and 1st Set RFP to Opposer		✓
16	4/25/2012	DKT11	Opposer's Motion to Compel after good faith effort, where "the dispute has been narrowed to specific issues concerning basic questions of Board rules and discovery law, and now requires a Board ruling." DKT11 at 8.	✓	
17	4/30/2012	DKT29-31, EX-K	Opposer's SUPPLEMENTAL RESPONSES to App.'s 1st Set INT and 1st Set RFP	.	✓
18	5/10/2012	DKT15	Applicant's Opposition to Opposer's Motion to Compel		✓
19	5/24/2012	DKT19	Opposer's Reply In Support of Opposer's Motion to Compel		.
20	10/2/2012	DKT21	Order Denying Opposer's Motion to Compel		
21	10/12/2012	DKT23, EX-A (Decl.) ¶12	Telephonic conference held, in which Applicant confirmed that no documentary evidence exists, or will be produced, relating to Applicant's "M2" software disclosed to investors in a BusinessWeek investor portal [DKT12 EX-14 P-136].	✓	✓
22	10/15/2012	DKT23	Opposer's Dispositive Motion (including for Default Judgment As Sanction for Applicant's Spoliation of Evidence, or in Alternative for Summary Judgment)	✓	
23	10/19/2012	DKT25	Order Suspending Proceedings Pending Disposition of Motion, and Joining David Escamilla as Assignee		
24	11/7/2012	DKT26	Applicant's Motion to Suspend For Civil Action		✓
25	11/14/2012	DKT28	Applicant's Response to Opposer's Dispositive Motion, Motion For Additional Rule 56(d) Discovery		✓
26	6/7/2013	DKT42	Order Suspending For Civil Action, and Denying Dispositive Motion		
27	6/7/2013	DKT43	Opposer's Motion for Reconsideration, Or In The Alternative, For Renewal of Dispositive Motion	✓	.
28	6/19/2013	DKT44	Applicant's Response In Opposition to Motion for Reconsideration, Or In The Alternative For Renewal of Dispositive Motion		✓
29	11/4/2013	DKT45	Order Denying Opposer's Motion for Reconsideration, Denying Motion for Renewal of Dispositive Motion		

TAB RA2

7359046



THE UNITED STATES OF AMERICA

TO ALL TO WHOM THESE PRESENTS SHALL COME:

UNITED STATES DEPARTMENT OF COMMERCE

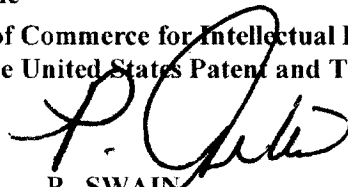
United States Patent and Trademark Office

June 08, 2012

THE ATTACHED U.S. TRADEMARK REGISTRATION 4,128,151 IS
CERTIFIED TO BE A TRUE COPY OF THE REGISTRATION ISSUED BY
THE UNITED STATES PATENT AND TRADEMARK OFFICE WHICH
REGISTRATION IS IN FULL FORCE AND EFFECT.

REGISTERED FOR A TERM OF 10 YEARS FROM *April 17, 2012*
SAID RECORDS SHOW TITLE TO BE IN: *Registrant*

By Authority of the
Under Secretary of Commerce for Intellectual Property
and Director of the United States Patent and Trademark Office


P. SWAIN
Certifying Officer



United States of America

United States Patent and Trademark Office

M2

Reg. No. 4,128,151

Registered Apr. 17, 2012

Int. Cl.: 42

SERVICE MARK

PRINCIPAL REGISTER

M2 SOFTWARE, INC. (DELAWARE CORPORATION)
6725 SUNSET BLVD., STE. 230
LOS ANGELES, CA 90028

FOR: DEVELOPMENT, UPDATING AND MAINTENANCE OF SOFTWARE AND DATA BASES; TECHNICAL SUPPORT SERVICES, NAMELY, TROUBLESHOOTING OF COMPUTER SOFTWARE PROBLEMS, IN CLASS 42 (U.S. CLS. 100 AND 101).

FIRST USE 10-23-1991; IN COMMERCE 1-10-1992.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

OWNER OF U.S. REG. NO. 1,931,182.

SEC. 2(F).

SER. NO. 85-341,646, FILED 6-8-2011.

DORITT L. CARROLL, EXAMINING ATTORNEY



David J. Kappas

Director of the United States Patent and Trademark Office

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument is being served on December 20, 2013, by electronic service pursuant to the parties' agreement under Trademark Rule 2.119(b)(6), and first-class U.S. Mail, upon the Applicant / Respondent at its address of record.

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