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

Proceeding	91228289
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Padraic McFreen.

*Opposer,*

v.

MITAC International Corp.

*Applicant.*

Opposition No. 91228289

**MOTION FOR RECONSIDERATION OF BOARD'S SEPTEMBER 16, 2019  
DECISIONS AND ORDER ON OPPOSER'S MOTION FOR SUMMARY  
JUDGMENT**

Pursuant to Federal Rules of Civil Procedure, Trademark Federal Statute and Rules §2.127(b)<sup>1</sup>, Trademark Trial and Appeal Board Manual of Procedure, standing precedent, Federal Rules of Evidence, Padraic McFreen (“Opposer”), hereby moves this Trademark Trial and Appeal Board (“Board”) to reconsider its September 16, 2019 order denying Opposer’s Motion For Summary Judgment (“Motion”). This Board should modify and/or reverse its decisions and order.

As a threshold matter, this Board has eviscerated trademark rules, trademark law, Federal Rules of Evidence and the Federal Rules of Civil Procedure, specifically, Fed. R. Civ. P, 56(a), for summary judgment motions. In its order, this Board unequivocally states the summary judgment standard to be that set out in

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<sup>1</sup> A motion for reconsideration under Trademark Rule 2.127(b) is limited to a demonstration that on the basis of the facts before the Board and applicable law, the Board’s ruling was in error and requires appropriate change. Trademark Trial and Appeal Board Manual of Procedure (TBMP)

Fed. R. Civ. P. 56(a).<sup>2</sup> This Board's order states "...In deciding summary judgment, this Board may not resolve any factual dispute; it may only determine whether a genuine dispute of material fact exists...[a] factual dispute is genuine if, on the evidence of record, a reasonable fact finder could resolve the matter in favor of the non-movant...when the movant has supported its motion with sufficient evidence, if unopposed, indicates there is no genuine dispute of material fact and that the moving party is entitled to judgment as a matter of law, does the burden shift to the non-movant to demonstrate the existence of a genuine dispute of material fact to be resolved at trial. This Board goes further to support its adopted standard by relying on *Barmag Barmer Maschinenfabrik AG v. Maurata Mach., Ltd.*, quoting "[t]he party opposing the motion must point to an evidentiary conflict created on the record at least by a counter statement of a fact or facts set forth in detail in an affidavit by a knowledgeable affiant."<sup>3</sup>

This Board states in its order that "[a] factual dispute is genuine if, on the evidence of the record, a reasonable fact finder could resolve that matter in favor of the non-movant."<sup>4</sup> This position is supported in part by its reliance upon *Olde Tyme Foods, Inc. v. Roudy's, Inc.*, 961 F.2d 200, 22 USPQ2d 1542, where the court held, "...the nonmoving party 'need only present evidence from which a jury might return a verdict in its favor,' quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257, 106 S. Ct. 2505, 2514, 91 L.Ed.2d 202 (1986). The *Olde Tyme* court went further with the *Anderson* holding by stating, '[o]nly disputes over facts that might affect

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<sup>2</sup> 70 TTABVUE 8

<sup>3</sup> 731 F.3d 831, 221 USPQ 561, 564 (Fed. Cir. 1984).

<sup>4</sup> 69 TTABVUE 8

the outcome of the suit under the governing law will properly preclude the entry of summary judgment.”

**This Board Erred in its Determination, Opposer Contended Commercial Impression of Parties’ Marks to be My View**

This Board erred by reaching a determination “Opposer contends that the commercial impression of both parties’ marks is [‘]My View[‘].”<sup>5</sup> This Board misconstrues Opposer’s statements. This conclusion is in error.

In his Motion, Opposer states “[t]he evidence persuasively shows that the dominant elements of Opposer’s marks and Applicant’s applied-for mark as well as the intended use lettering configuration are identical...[b]oth Opposer’s mark and Applicant’s applied-for mark are pronounced [‘]My View[‘]...[n]o differences in sight, sound and meaning, will lead this Board to a conclusion of likelihood of confusion...the marks give the same visual impression, are both pronounced [‘]My View[‘], and create the same connotation and commercial impression.”<sup>6</sup> Opposer does not state the commercial impression of both parties’ marks is “My View.” Opposer stated the marks give the same commercial impression. The commercial impression referred to in Opposer’s motion is MiVu.

This Board has held the “points of comparison for a word mark are appearance, sound, meaning, and commercial impression,” relying on *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3r 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). This Board has held as precedent “sound is one factor in determining whether the marks are confusingly similar.” *In*

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<sup>5</sup> 70 TTABVUE 4

<sup>6</sup> 31 TTABVUE 21-22

*re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973). This Board has also held “[m]arks may be similar in appearance despite the addition, deletion, or substitution of letters or words,” relying on *Weiss Assocs. Inc. v. HRL Assocs, Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 Fed. Cir. 1990)(finding TMM similar to TMS) and *In re Pix of Am., Inc.*, 225 USPQ 691 (TTAB 1985) (finding NEWPORTS and NEWPORT to be essentially identical in appearance).

Commercial impression refers to the pleaded mark and the mark sought to be registered, indicating the origin of the services and be of such a nature ordinary consumers would consider the term to be a trademark. Opposer’s motion language concerning commercial impression pointed to the marks themselves, rather than meaning and sound from the perspective of Opposer and the evidence of record relating to the manner in which Applicant pronounces its mark. *See. In re Viterra Inc.*, 671 F.3r 1358, 1367, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012). ([There is n]o correct pronunciation of a mark, because it is impossible to predict how the public will pronounce a particular mark.) The commercial impression of Opposer’s mark, MiVu (Stylized) and Applicant’s applied-for mark, MiVue, is MiVu. Respectfully, this Board’s decisions based upon its error here should be reversed.

**This Board Erred in its Determination, A Genuine Dispute For Trial Exists Concerning The Fame (Strength or Weakness) of the Prior Mark, the Fifth duPont Factor**

This Board erred in determining a genuine dispute “regarding the strength or weakness of Opposer’s mark for his goods, and thus regarding the degree of

protection to which the mark is entitled...” had been sufficiently raised by Applicant.<sup>7</sup> Applicant stated in its response, “[i]ndeed Opposer never argues that its mark is strong”<sup>8</sup> and goes on to state “[o]pposer has not and cannot possibly argue [it’s] mark is famous...”<sup>9</sup> This Board’s position erroneously blurs duPont factors as the test regarding strength or weakness and this question is in fact an alternate manner in which this Board refers to its test for fame. This Board has held this to be settled law and simultaneously construes Applicant’s inadmissible third-party registration evidence as proper evidence of a genuine issue for trial (Opposer’s Mark, MiVu, absent of fame (strength)).

Third-party registrations are not a component of the test for fame, but rather a test for the sixth du Pont factor. This Board obviously missed and adopted this slight-of-hand by Applicant, as it has already held that the requirements for demonstrating a genuine dispute for trial concerning fame are significantly different from the review of third-party use. *See. Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d 1689 (Fed. Cir. 2005) ([T]he proper legal standard for evaluating the fame [(strength or weakness)] of a mark under the fifth du Pont factor is [with] the class of customers and potential customers of a product or services, and not the general public.) The strength of a mark is a determination of fame, rather than the degree of third-party use.

Applicant did not provide argumentation in its Response, nor evidence that would demonstrate Opposer’s mark to be commercially or conceptually weak. There

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<sup>7</sup> 70 TTABVUE 11

<sup>8</sup> 66 TTABVUE 99

<sup>9</sup> *Id.* at 109

is no support in Applicant's Response or the record to support the conclusion a genuine issue regarding fame remained for trial. Opposer has not claimed a level of fame; however, this Board has held as precedent "where fame exists it "plays a 'dominant role in the process of balancing the du Pont factors' and '[f]amous marks thus enjoy a wide latitude of legal protection'" and "cast[] a long shadow which competitors must avoid." *See. Bose Corp. v. QSC Audio Products, Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002) and *Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992). Fame of a mark may be measured by *inter alia* "length of use of the mark." *Coach Services Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1720 (Fed. Cir. 2012).

Applicant has not proffered evidence and the record is devoid of any evidence of weakness relating to Opposer's mark, MiVu. Respectfully and in the interest of judicial economy, this Board should have, at a minimum, reached a determination that due to the absence of Applicant's admissible evidence of weakness and the length of usage, Opposer's mark is entitled to a concomitantly broad scope of protection, rather than preserving this issue for trial. Applicant's evidence, having been accepted in error, prejudices Opposer by creating insurmountable burdens which Opposer must overcome at trial. The decisions in this Board's order lack evidentiary support and are incongruent with Board precedent.

**This Board Erred By Concluding Third-Party Registration Evidence  
Creates Genuine Issues for Trial**

Applicant's Response to Opposer's Motion For Summary Judgment

("Response") was based on assertions lacking evidentiary support. Applicant proclaimed Opposer's mark, MiVu, to be weak and further asserted Opposer's use of its mark descriptive. Applicant advanced these arguments without evidence admissible for trial and this Board erred by accepting Applicant's arguments and evidence and by not applying strict rules of evidence and support established by this Board, the Federal Rules of Civil Procedure and the Federal Rules of Evidence.<sup>10</sup>

**Opposer's Mark, MiVu, Descriptive and Weak**

**Inadmissible Evidence**

This Board erred by accepting Applicant's counsel's unsupported assertions that "MiVu whether it is spelled as MiVu, MIVU; or MY VUE is the phonetic equivalent of MY VIEW," "Opposer selected the mark because of its descriptive meaning", "Opposer's descriptive usage of his own mark is shown on his website," "...Opposer advertises his goods by using MiVu in the slogan: MiVu of the World" and "Opposer uses MiVu descriptively to show that his goods and services reflect his view of the world."<sup>11</sup> Applicant's counsel proffered manufactured Opposer testimony evidence. This is not evidence of record and is not of the type that may be entered into evidence for trial.

This Board further erred by disregarding its own precedent and accepting as evidence Applicant's counsel's unsupported assertions of Opposer's alleged

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<sup>10</sup> 70 TTABVUE 11

<sup>11</sup> 66 TTABVUE 99

descriptive use of its mark and allowing for Applicant's arguments regarding same to create a genuine issue for trial when: (1) Applicant's counsel, not a party to these proceedings, doesn't allege descriptive use of Opposer's registered mark, MiVu (Stylized), but a standard character mark, MIVU, which is not Opposer's registered mark, MiVu (Stylized) at issue here, but Opposer's trade name, MiVu and a component of Opposer's remaining three standard character MIVU marks; and (2) Applicant's counsel's assertions concerning descriptive use, relying on Opposer's trade name and a component of Opposer's remaining registered three standard character MIVU marks. As objected to by Opposer, Applicant's evidence is not admissible evidence for trial in the instant proceeding. The mere attempt here, contrasts Opposer's mark, MiVu (Stylized) in its Response, demonstrates Applicant has no evidence of the descriptive use it alleges, did not demonstrate weakness of Opposer's mark, MiVu (Stylized) and did not create genuine issue for trial.

It is not clear to Opposer why this Board would completely disregard such rudimentary attempt by Applicant and an appropriately responsive objection by Opposer. Applicant conceded similarity between both Applicant's applied-for mark, MIVUE, and Opposer's registered mark, MIVU (Stylized).<sup>1213</sup>

This Board disregarded Opposer's declared statements concerning the correct marketing slogan and its reference.<sup>14</sup> Despite the obviousness of the issue here, this Board failed to note the fact that MiVu is Opposer's trade name and require

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<sup>12</sup> Applicant does not resolve this error.

<sup>13</sup> Applicant did not differentiate Opposer's registered mark, MiVu (Stylized) from Opposer's trade name, MiVu, LLC. Applicant does not show Opposer's use of its registered mark throughout the entirety of its Response and the Board erred by accepting this inadmissible evidence.

<sup>14</sup> 67 TTABVue 3

Applicant to clearly delineate Opposer's trade name usage from the alleged descriptive use of its mark on its goods. Applicant attached evidence of Opposer's trade name usage to its declaration.<sup>15</sup> Despite Opposer's objections, these statements were accepted by this Board as factual. This Board's acceptance is in error.

In accord with trademark law, registered stylized marks are restricted to their respective registered version; however, standard character marks are not restricted by color, style or font in the manner in which a respective mark may be depicted—including the identical stylization of Opposer's mark and presented to consumers. *See. Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) (“[T]he arguments of Applicant concerning a difference in type style is not viable where the party asserts rights in no particular display. By presenting its mark merely in typed drawing, a difference cannot legally be asserted by Applicant.”) Because Applicant's mark may be displayed in the identical manner as Opposer's mark, the mere stylization of Opposer's mark is insufficient to distinguish the respective marks. *See. In. re Aquitane Wine USA, LLC*, 126 USPQ2d 1181, 1186-87 (TTAB 2018).

This Board's error prejudices Opposer by preventing it from properly supporting its case before this tribunal knowing that the same Board is allowing its adversary to proffer manufactured evidence for purposes of thwarting adverse outcomes. This Board's decision to accept as fact unsupported conclusory

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<sup>15</sup> 66 TTABVUE 60-61

statements and inadvertently allowing Applicant to veer outside of the legal bounds of trademark law is inconsistent with its prior holdings.

In quoting the *Barmag* holding, in its order, this Board stopped short of noting the *Barmag* court's reliance on *Union Carbide Corp. v. American Can Co.* Specifically, "the court may not simply accept a party's statement that a fact is challenged...[t]he party opposing the motion must point to an evidentiary conflict created on the record...[m]ere denials or conclusory statements are insufficient." The *Barmag* court relies upon Fed. R. Civ. P. 56, 28 U.S.C.A., specifically, "[n]onmovant may not rest on its conclusory pleadings on summary motion but must set out, usually in an affidavit by one with knowledge of specific facts, what specific evidence could be offered at trial...[n]onmovant runs risk of grant of summary judgment by failing to disclose evidentiary basis for his claim...[m]ere conclusory assertions do not raise a genuine issue of fact on motion for summary judgment...[i]n countering a motion for summary judgment, more is required than mere assertions of counsel...assertions of counsel do not create a genuine material fact for trial."

Relative to Applicant's declaration, Federal R. Civ. P. 56(c)(1)(A) sets out the standard for declarations and affidavits and the Federal Rules of Evidence, specifically, admissible evidence, are set out in 37 CFR § 2.122(b), 2.122(d)(2), 2.122(e), 2.122(f) and 2.127(e)(2). TBMP 528.05(b), Affidavits and Accompanying Exhibits, provides the following rule: "[a]ffidavits must be submitted in support of, or in opposition to, a motion for summary judgment provided that they (1) are made

on personal knowledge; (2) set forth such facts as would be admissible in evidence; and (3) show affirmatively that the affiant is competent to testify to the matters stated therein.” This rule relies upon Federal R. Civ. P. 56(c)(4) Affidavits or Declarations. “An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.” This Board has disregarded these rules by allowing Applicant to ignore it’s this Board’s inherent authority. This prejudices Opposer. Opposer, now, cannot rely on this Board to adhere to its own precedent, trademark rules or Federal rules. This prevents Opposer from protecting its rights and preventing others from the use of its mark in these proceedings. In opposition of Fed. R. Civ. P. 56 and TBMP 528.05(b), specifically concerning documents submitted with a summary judgment affidavit, this Board erroneously considered Applicant’s exhibits.

TBMP § 528.05(b) states that “[d]ocuments submitted with a summary judgment affidavit, but not identified therein, cannot be considered as exhibits to the affidavit.”<sup>1617</sup> This Board erred by overlooking Opposer’s objection to Applicant’s attempt.<sup>18</sup> Therein, Opposer states “[a]pplicant attempts to enter into the record third-party use and registration of the mark MY VIEW—using the exact words—MY and VIEW—denotatively to further make its argument that Opposer’s Mark, MiVu, is weak. Opposer objects.” This Board misconstrues Opposer’s objections

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<sup>16</sup> TBMP § 528.05(d) provides that “[a] party may make a third-party registration of record, for purposes of summary judgment only, by filing a copy thereof with its brief on the summary judgment motion. This rule does not conflict with nor obviate Applicant from the requirements set forth in TBMP § 528.05(b).

<sup>17</sup> 66 TTABVUE 4-39

<sup>18</sup> 67 TTABVUE 2, 5

here to be singularly related to probative value, when its objections were to both probative value as well as to admissibility.<sup>19</sup> This Board misapplied Opposer's objections thereby allowing Applicant's evidence and argumentation to carry.

These rules and Board holding render Applicant's unsupported assertions of counsel and evidence "inadmissible," as its declaration is devoid of any admissible evidence relating to its counsel's assertions. There are no exceptions. Inadmissible evidence cannot be construed most favorable to the non-movant as the pre-requisite is admissibility.

Opposer's objections to admissibility were not considered by this Board and prejudice Opposer by removing Board precedent, trademark rules, Federal Rules of Civil Procedure and the Federal Rules of Evidence from this proceeding making it impossible for Opposer to effectively receive fair and unbiased consideration of its evidence and argumentation to prove the likelihood of confusion at trial. Moreover, this Board misconstrued all of Opposer's objections to be related to probative value, despite Opposer's analysis and clear discussion of trial evidence and it proclaiming inadmissibility.<sup>2021</sup> This Board should reverse its decision.

### **Erroneous Consideration of Third-Party Registrations**

This Board erred by accepting Applicant's counsel's assertion that the proffered third-party registrations were selected for their respective descriptive qualities. This Board erred in disregarding its own precedent concerning third-party registrations. This Board relied on *Olde Tyme Foods Inc. v. Roundy's Inc.*, 22

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<sup>19</sup> 70 TTABVUE 7

<sup>20</sup> 67 TTABVUE 2, 4, 6, 7 (2x)

<sup>21</sup> 70 TTABVUE 7, Footnote No. 25

USPQ2d 1542, 1545 (Fed. Cir. 1992) in the instant order<sup>22</sup> for establishing the summary judgment standards; however, ignores its holding concerning third-party registrations. Specifically, “[a]s to the strength of a mark...registration evidence may not be given *any* weight.” *Id.*

Applicant’s proffered third-party registrations do not possess the identical sight, sound, connotation and commercial impression to Opposer’s mark, MiVu (Stylized). This Board erred in not considering Opposer’s objections to this evidence and by accepting Applicant’s third-party registrations in support of its assertion concerning the weakness of Opposer’s mark, MiVu. Applicant provided this list of third-party registrations and serial numbers in an attempt to prove weakness:

**Applicant's Proffered Third-Party Registrations<sup>23</sup>**

Serial No.	Reg. No.	Word Mark	Goods	Status
77613019	3677777	MYVIEW	IC 036, Retirement Services	Live
77902644	3896299	MYVIEW	IC 035, Business Services	Live
77685470	3704729	MYVIEW	IC 041, Casino Services	Live
85438310	4448246	MYVIU	IC 035, Ad Services	Live
85664996	4441031	MYVUE	IC 09, Medical SW	Live
86357939	4757593	MIVIEW	IC 09, Optical Lens	Live
86178422	5428623	MYVIEW	IC 010, Medical Devices	Live
86866712	N/A	MY VIEW	IC 09; IC 038; IC 041; IC 042; IC 045	N/A
86506085	N/A	MY VIEW	IC 007; IC 009; IC 011; IC 014	N/A

This Board erred by concluding market conditions render each respective mark weak, without evidence. This Board erroneously accepted Applicant’s assertions as a result of not closely examining the registrations. Despite Opposer objections, Applicant’s proffered registrations were considered without considering the fact that they are: (1) not all MY VIEW marks; (2) marks used with services and

<sup>22</sup> *Id.* at 8

<sup>23</sup> 69 TTABVue 11-39

goods that are not similar to Opposer's goods; (3) not of the same International Class as Opposer's mark, MiVu; and (3) without registration (two of eight). There is only one registration remotely related to Opposer's goods and the mark points more to Applicant's applied-for mark, MiVue, than Opposer's registered mark.

This Board furthered erred in accepting these third-party registrations as evidence of similar marks used on similar goods as Opposer's and did so without a showing by Applicant that Opposer's mark is legally phonetically equivalent to a mark, MY VIEW. This Board should have determined that both parties' marks may allegedly be phonetically equivalent to a MY VIEW mark, rendering Applicant's unsupported assertion moot.

These Board decisions and omissions prejudice Opposer's ability to support its position and properly defend its registered mark, MiVu, since this Board will, in ad hoc fashion, overlook its own precedent as well as find similarity where none exists. This creates a no win burden for Opposer.

This Board did not see that third-party use of Opposer's mark, MiVu, is nonexistent, the use of Applicant's alleged similar mark, MY VIEW on any category of goods is limited and its use on similar goods as Opposer's is completely nonexistent.

In addition to inadmissibility, this Board erred by not concluding there to be absolutely no probative value in the third-party registrations.<sup>24</sup> The addition of new applications for similar MiVu marks and goods won't change this fact before trial.

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<sup>24</sup> An example of how the TTAB has addressed this issue when considering marks as registered and applied-for, along with related goods are the proceedings for S/N 85863532 (February 19, 2015).

Respectfully, this Board should correct its error by finding no genuine issue for trial relating to third-party use.

**This Board Erred By Creating and Preserving for Trial an Issue of Similar Marks in Use on Similar Goods, When No Issue Exists**

This Board erred by overlooking Applicant's attempt to combine duPont factor tests and for masquerading the test for fame as the test for weakness through the use of third-party registrations, specifically, testing for similar marks used on similar goods in its efforts to have Opposer's mark, MiVu, deemed descriptive and therefore, weak.

Applicant's Response intentionally omitted the sixth duPont factor, "the number and nature of similar marks in use on similar goods."<sup>25</sup> Reason for the omission, Applicant conceded to Opposer the issue of similar marks to its MiVu mark, in use on similar goods, namely, "computer software and hardware for use with associated network of Internet connected devices, to collect, aggregate, analyze, transform, prioritize, and distribute content of any type across electronic systems or Internet systems,' in International Class 9."<sup>26</sup>

Recognizing the omission, this Board should have required Applicant to show the marks which it conceded to be the same or similar to Opposer's mark, MiVu.

These are the conceded marks:

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<sup>25</sup> 66 TTABVUE 98

<sup>26</sup> 70 TTABVUE 2-3

**Marks Similar to Opposer's Mark**

Serial No.	Reg. No.	Word Mark	Goods	Status
88022503		MIVU	Medical SW/Device	DEAD
87939942		MIVU MOBILE IM	Medical Service	DEAD
86393087	5200316	MIVU MOGOBILE	SW/HW/Devices	LIVE
86393078	5200315	MIVU ESCAPEVELOCITY	SW/HW/Devices	LIVE
8639035	5200314	MIVU PPCV	SW/HW/Devices	LIVE
86300476		ABILIFY MIVU	Medical SW/Device	DEAD
85829840	4539050	MIVU	SW/HW/Devices	LIVE
76205548		MIVU CORPORATION	SW/HW/Services	DEAD
756634398		MIVU	Education Services	DEAD
86786555		MIVUE	SW/HW/Devices/Device Holders	

This Board erroneously considered this question to be unresolved when parties determine no issue exists. This Board decision prejudices Opposer by requiring Opposer to essentially argue against itself at trial. This Board should deem this issue to be conceded and not a genuine issue for trial.

**This Board Erred in its Determination that A Genuine Issue Concerning Similarity of Goods**

This Board erred when, after concluding Applicant had conceded similarities of parties' marks, Board precedent concerning type written marks render arguments concerning style differences moot as discussed herein above and despite these conclusions of law, preserved this issue for trial. Applicant's sought after registration for a standard character mark, MiVue, for, inter alia, software, electronic systems, devices and hardware, Applicant's goods, are legally identical to Opposer's goods and that this legal finding supports the presumption that the channels of trade and classes of purchasers are as well. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence

regarding channels of trade and classes of consumers, this Board was entitled to rely on this legal presumption in determining likelihood of confusion); *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1028 (TTAB 2011). This Board has relied on this legal presumption when the gap of similarity between marks was far greater than in the instant proceeding. Here, in this instance, parties have not limited usage in anyway nor restricted consumers by type. No limitations or restrictions of consumers and channels means parties' goods are available to any consumer through any channel, regardless of market conditions or performance. These are facts of law established by this Board and recited several thousand times each year.

**Applicant and Opposer Goods Categorized Side-by-Side**

<b>Goods Type</b>	<b>MIVUE</b>	<b>MIVU (Stylized)</b>
<b>Software<sup>27</sup></b>	x	x
<b>Hardware<sup>28</sup></b>	x	x
<b>Electronic Systems</b>	x	x
<b>Network Connected Devices</b>	x	x
<b>Device Belts</b>	x	
<b>Devices Generally</b>	x	x
<b>Device Covers</b>	x	

The *Viterra* court held that “[t]he legal identity of Opposer’s and Applicant’s goods and their overlapping channels of trade and classes of purchasers not only

<sup>27</sup> On September 23, 2019, seven days following this Board’s order, Applicant announced its industry leading Internet server and computer data network storage division was teaming up with its partners for its premier showcase of computer hardware and Internet (Cloud) solutions used by hyperscale Internet companies like Google and Facebook to deploy large scale data center server infrastructures and that its target customers are corporations from telecommunications companies to banking. Not precisely finished consumer goods. <http://www.mitacmct.com/en-US@28~PRDetail>

<sup>28</sup> Of the thirty plus goods in Applicant’s recital, once device straps, carriers, and covers have been removed, more than one-third of the goods are software, hardware, and electronic systems and handheld computers. Global Position Satellite Systems are not finished consumer goods.

weigh heavily in favor of finding a likelihood of confusion, but also reduce the degree of similarity of the marks necessary to find a likelihood of confusion.

This order prevents Opposer from fully and successfully mounting its case in opposition Applicant's mark. This Board is systematically removing precedent from Opposer's proceeding while simultaneously using the same removed precedent in other proceedings. This smacks of intentional uneven hand by which trademark law is administered within the United States. This Board should reverse its decision and deem the genuine issues of similarity of marks, goods, consumers and channels of trade settled as a matter of law.

Opposer has a right to know what legal theories this Board applied to its analysis and the identification of those "disputes that remain for trial."<sup>29</sup> As this is Opposer's proceeding, this Board is obviously harboring a preconceived notion concerning Opposer's opposition of Applicant's mark, MIVUE and is electing to not disclose its position to Opposer. *See. Selva & Sons, Inc. v. Nina Footware, Inc.*, 705 F.2d 1316, 217 USPQ 641.

This Board's order states "[t]he fact that we have identified and discussed certain genuine disputes of material fact as sufficient basis for denying the motion for summary judgment should not be construed as a finding that these are necessarily the only disputes that remain for trial." This Board prejudices Opposer by making this proclamation. This Board's statement is inconsistent with the guidance provided by the *Old Tyme* court. This Board denied Opposer's motion for alternative reasons which are obvious by the absence of discussion and analysis

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<sup>29</sup> 69 TTABVUE 11

within its order. This Board's order contains very limited recitations of the arguments and evidence put forth by Opposers and couches its position for doing so by relying on *Guess? L.P. v. Knowlux LLC*, 116 USPQ2d 2018, 2018 (TTAB 2015). This Board in *Guess?* stated in pertinent part that “[w]hile this Board carefully considers all arguments made by the parties in connection with a motion, there is no requirement that this Board’s order repeat or discuss irrelevant arguments.” This Board prejudices Opposer’s motion by strongly proclaiming its arguments and evidence to be irrelevant.

For the reasons set forth herein above, Opposer respectfully requests this Board to reverse its decisions and order.

Respectfully submitted,

/s/ Padraic McFreen  
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**ELECTRONIC MAILING CERTIFICATE**

I hereby certify that the foregoing Motion is being submitted electronically through the Electronic System for the Trademark Trial and Appeal Board (“ESTTA”) and [doCKET@lawabel.com](mailto:doCKET@lawabel.com), [leabelman@lawabel.com](mailto:leabelman@lawabel.com), [jbseyler@lawabel.com](mailto:jbseyler@lawabel.com) on this 4<sup>th</sup> day of October, 2019.

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