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

Proceeding	91229012
Party	Defendant Pivotal Software, Inc.
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Attachments	Brief in Opposition to the Motion for Summary Judgment - 13 Jan. 2017.pdf(501066 bytes ) Exhibit A - Definition.pdf(220106 bytes ) Exhibit B - Interrogatories.pdf(2280343 bytes )

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

ROBERT BOSCH GMBH,

Opposer,

v.

PIVOTAL SOFTWARE, INC.,

Applicant.

Opposition No.: 91229012

Mark: BOSH

App. Ser. No. 86/808248

Published: March 22, 2016

**APPLICANT'S BRIEF IN OPPOSITION TO OPPOSER'S RENEWED MOTION  
FOR SUMMARY JUDGMENT**

Applicant, Pivotal Software, Inc. ("Pivotal"), requests that Opposer Robert Bosch GmbH's ("Opposer") Renewed Motion for Summary Judgment ("Motion") be denied. The Motion requests that the Trademark Trial and Appeal Board ("Board") summarily determine that there is a likelihood of confusion between Pivotal's BOSH mark and Opposer's BOSCH mark. There are significant issues of law and triable facts that preclude summary judgment as set forth below.

**Summary of Facts and Argument**

Pivotal filed a use-based application to register BOSH for "downloadable computer software for release engineering, deployment and lifecycle management of small- and large-scale cloud software" in Class 09, identifying August 2010 as the date of first use. App. No. 86808248.

Opposer owns a 1997 service mark registration for BOSCH, covering *inter alia* "design of computer software for use in data processing" in Class 42. Reg. No. 2100692.

Opposer has not submitted a maintenance specimen proving use of the BOSCH mark in connection with these services.

Pivotal's BOSH software is downloadable software that a company can use to engineer the release of a small- or large-scale cloud software product, deploy the product, and manage the lifecycle of the product. App. No. 86808248. The release occurs after the software product has been developed and release engineering creates the artifacts that will be deployed to the cloud. Deployment includes the installation and activation of the product on the computers of the cloud. And lifecycle management includes managing the release and deployment of the product on further computers, and updating the installed product, deactivating the installed product. Declaration of Cyrus Wadia in Support of Applicant's Brief in Opposition to Opposer's Motion for Summary Judgment, ¶6.

Summary judgment is inappropriate because Opposer has not met its burden of demonstrating that there is likelihood of confusion. The marks create very different commercial impressions due to their different meanings, pronunciations, and spellings. Pivotal's goods are very different from Opposer's services. Pivotal's goods and Opposer's services are each offered through distinct trade channels, to different customers, both of whom are highly sophisticated. These distinctions are reflected in the marketplace, as both marks have coexisted since 2010 without any instance of actual confusion.

#### **Procedural History**

During substantive examination of Pivotal's trademark application, the Examining Attorney did not issue an Office Action. On March 22, 2016, the BOSH mark proceeded to publication.

Opposer filed its Notice of Opposition on July 18, 2016, based on its service mark registration for BOSCH, Reg. No. 2,100,692, covering “design of computer software for use in data processing; research and development of new products for others; design and testing of new products of others; technical consultation and advice concerning new products of others; performing calculations in the design of new products for third parties; monitoring and/or surveillance of security systems for buildings and other systems such as computer systems” in Class 42.<sup>1</sup> Stressing its “design of computer software for use in data processing” services, Opposer alleges that there is a likelihood of confusion between its service mark and Pivotal’s BOSH trademark as used in connection with “downloadable computer software for release engineering, deployment and lifecycle management of small- and large-scale cloud software” in Class 09.

## ARGUMENT

### I. The Summary Judgment Standard

Fed. R. Civ. P. 56 provides that summary judgment shall be granted only “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” The burden is on the moving party to establish the absence of any genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Continental Can Co. USA, Inc. v. Monsanto Co.*, 948 F.2d 1264, 1265 (Fed. Cir. 1991). In deciding a motion for summary judgment, the Board must not try issues of fact, but must “determine instead if there are any genuine issues of material fact to be tried.” TBMP § 528.01 (2016); *Dyneer Corp. v. Automotive*

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<sup>1</sup> The specimen for renewal of Opposer’s registration does not show use of all services listed, in particular, it does not show the “design of computer software for use in data processing” at issue in this matter.

*Products plc*, 37 U.S.P.Q. 1251, 1254 (T.T.A.B. 1995). The nonmoving party, “must be given the benefit of all reasonable doubt as to whether genuine issues of material fact exist; the evidentiary record on summary judgment, and all inferences to be drawn from the undisputed facts, must be viewed in the light most favorable to the nonmoving party.” TBMP §528.01 (2016); see *Lloyd’s Food Prods., Inc. v. Eli’s, Inc.*, 987 F.2d 766, 25 USPQ3d 2027, 2028 (Fed. Cir. 1993) (noting facts must be viewed in the light most favorable to the nonmoving party, and as such it is impermissible to make inferences against nonmovant). The nonmoving party need only show that a reasonable fact finder could resolve the matter in its favor. *Opryland USA Inc. v. Great Am. Music Show Inc.*, 970 F.2d 847, 850, 23 U.S.P.Q.2d 1471, 1472-73 (Fed. Cir. 1992) (“The evidence submitted by the non-movant, in opposition to a motion for summary judgment, ‘is to be believed, and all justifiable inferences are to be drawn in [its] favor.’”); see also *Visa Int’l Serv. Ass’n v. Life-Code Sys., Inc.*, 220 U.S.P.Q. 740, 742 (T.T.A.B. 1983).

However, if the Board “concludes that there is no genuine issue of material fact, but that the nonmoving party is the one entitled to judgment as a matter of law, the Board may enter summary judgment *sua sponte* in favor of the nonmoving party.” TBMP §528.01 (2016).

## **II. The Likelihood of Confusion Standard**

To determine likelihood of confusion, the Board employs a multi-factor test established in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). The Board considers a number of factors in determining likelihood of confusion, including: 1) the similarity/dissimilarity of the marks as to their appearance,

sound, connotation, and overall commercial impression, 2) the similarity/dissimilarity of the goods and services, 3) the similarity/dissimilarity of trade channels, the conditions under which buyers to whom sales are made (i.e., impulse versus careful, sophisticated purchasing), and 4) the length of time during and conditions under which there has been concurrent use without evidence of actual confusion. *Id.* at 1361. No one factor is dispositive, and there is no mechanical test for determining likelihood of confusion – instead, “each case must be decided on its own facts.” *Du Pont*, 476 F.2d at 1361, 177 USPQ at 567.

### **III. There is No Likelihood of Confusion between Pivotal’s Mark and Opposer’s Mark**

Opposer argues there is a likelihood of confusion because “the marks are virtually identical,” the goods and services “are virtually identical,” and Pivotal’s goods and Opposer’s services “travel through the same channels of trade to the same classes of customers.” Opposer has submitted no evidence to support these alleged facts.

As this brief will show, the marks at issue (1) create different overall commercial impressions, (2) are used in connection with distinct goods and services that (3) are offered through unique trade channels to highly sophisticated consumers.

Even more telling is the fact that Pivotal’s and Opposer’s marks have enjoyed a substantial period of coexistence during which there has been no instance of actual confusion – a fact acknowledged by Opposer.<sup>2</sup> This fact alone establishes that there is no likelihood of confusion between the marks in question.

#### **A. Pivotal’s BOSH mark and Opposer’s BOSCH mark create distinct overall commercial impressions.**

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<sup>2</sup> Opposer’s Resp. to Applicant’s Interrog. No. 19.

In determining whether marks are similar in their “commercial impression,” the Board must consider the similarity or dissimilarity of marks resulting from a comparison of sight, sound, and meaning. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 1372, 73 U.S.P.Q.2d 1689 (Fed. Cir. 2005) (“[T]his court’s precedent counsels that the phrase ‘commercial impression’ is occasionally used as a proxy for the ultimate conclusion of similarity or dissimilarity of marks resulting from a comparison of their appearance, sound, and meaning.”).

Opposer claims that the BOSH trademark and the BOSCH service mark create identical overall commercial impressions by arguing that the marks are “phonetically identical” and “virtually identical.” Opposer fails to provide any evidence to support this assertion and does not address the respective meanings of the marks. The BOSH Examining Attorney apparently did not think this was the case because the BOSCH mark was not cited against Pivotal’s BOSH application during the examination phase, and Pivotal certainly disagrees as well.

*i. The marks are phonetically distinct.*

Without providing any evidence to support this allegation, Opposer baldly asserts that Pivotal’s BOSH mark and Opposer’s BOSCH mark are phonetically identical. There is no basis of record for concluding that this assertion is factually correct. When comparing similarity in sound/phonetics, “[t]he relevant comparison is not between the proper pronunciations but rather how prospective purchasers are likely to hear or use the words.” *Smithkline Beckman Corp. v. Procter & Gamble Co.*, 591 F. Supp. 1229 (N.D.N.Y. 1984).

Here, Pivotal's mark is BOSH. A prospective purchaser would likely hear or pronounce the "SH" letters in the mark as a soft "sh" sound. This is the natural spelling in English for this sound. In contrast, Opposer's mark is BOSCH. Customers who encounter this mark might pronounce the "SCH" sound as a hard "sk" sound. Consider, for example, the following common "sch" formative words: school, schedule, schizophrenia, schematic, scheme, scholar, schooner, and scholastic. Pivotal respectfully requests that the Board take judicial notice of the fact that "sch" is regularly pronounced as "sk" in English words such as school, schedule, schizophrenia, schematic, scheme, scholar, schooner, and scholastic. TBMP §704.12; TMBP §1208.04 ("The Board may also take judicial notice of encyclopedia entries, census data, standard reference works and of commonly known facts."). On the present record, the Board cannot summarily find that marks are not different in sound. This is a genuine issue of material fact.

*ii. The marks have different meanings.*

There is a material question of fact regarding the respective meanings of Pivotal's mark and Opposer's mark.

Pivotal's mark has a unique meaning: BOSH is a double entendre in that it is a recursive acronym for "Bosh Outer SHell" and is also an English word meaning "foolish talk or activity." Attached as **Exhibit A** is a print out from Merriam-Webster showing the definition of "bosh." The playful use of BOSH as it relates to "foolish talk or activity" is incongruous with the serious and technical nature of its software, thereby making the mark stand out even more in the minds of the users of the BOSH software.

Opposer's BOSCH mark, on the other hand, has no common meaning and instead is the surname of Opposer's namesake, Robert Bosch of Robert Bosch GmbH. BOSCH

should be considered primarily a surname. TMEP § 1211.01; *see also In re Pickett Hotel Co.*, 229 U.S.P.Q. 760 (T.T.A.B. 1986) (holding PICKETT SUITE HOTEL primarily merely a surname despite applicant's argument that PICKETT is the phonetic equivalent of the word "picket"). BOSCH, a surname, is not a typical or known word, and is instead identifiable as a surname by U.S. customers. As such, a typical U.S. consumer will be able to distinguish the surname from the word that means "foolish talk to activity" since there is a significant difference in the appearance, meaning, and commercial impression of the respective marks. BOSH is an arbitrary term that holds no significance to the goods offered under the BOSH mark. Opposer's mark BOSCH either has no meaning as Opposer asserts, or is primarily a surname, either of which create unique meanings in the minds of consumers that are separate and distinct from Pivotal's BOSH mark.

*iii. The marks are visually distinct.*

Pivotal's trademark is for BOSH, a four letter word using four different letters. Opposer's service mark is for BOSCH, a five letter word using five different letters. When dealing with such short marks, the distinction created by the addition or subtraction of a single letter causes a significant visual impact. Here, the marks are clearly not identical, and are rather easily distinguished by length of the marks and use of the different letters.

*iv. The marks create distinct commercial impressions which are unlikely to be confused.*

The marks are distinct as to sight, sound, and meaning. Even if the marks share some visual components, it is well established that other elements, such as meaning and pronunciation, may lead to a final finding of no likely confusion. *See Standard Brands v.*

*Eastern Shore Canning Co.*, 172 F.2d 144, 146, (4th Cir. 1949) (finding no likelihood of confusion between plaintiff V-8 vegetable juice and defendant's VA tomato juice due to distinct meanings associated with the respective marks); *see also Lebow Bros., Inc. v. Lebole Euroconf S.p.A.*, 503 F. Supp. 209, 212 (E.D. Pa. 1980) (finding that similar pronunciation does not prove likely confusion if other factors weigh more heavily).

Taking this *DuPont Factor* in the light most favorable to the Pivotal as the nonmoving party, the marks create distinct overall commercial impressions that preclude a summary finding of a likelihood of confusion. At a minimum, there is a genuine issue of material fact as to pronunciation, meaning, and impressions of the marks.

**B. Pivotal's goods are not similar to Opposer's services.**

Opposer incorrectly asserts that its services and Pivotal's goods are virtually identical. Opposer has provided no evidence to support this allegation. Indeed, even Opposer's registration maintenance evidence of use relates only to "monitoring and/or surveillance of security systems for buildings and other systems such as computer systems," thus there is a material question of fact as to whether Opposer uses its mark in commerce in connection with "design of computer software for use in data processing." This issue calls into question the validity of Opposer's registration, upon which its Opposition is based. This issue is not resolved by Opposer's evidence submitted in connection with its Motion as that evidence does not relate to the "design of computer software for use in data processing."<sup>3</sup>

Pivotal's trademark relates to an existing software solution – it is "downloadable software" – that fills a very specific need – "release engineering etc.", while Opposer's

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<sup>3</sup> See Opposer's Renewed Mot. for Summ. J., Ex. A, B, and C.

service mark relates *inter alia* to the “design of computer software for use in data processing; research and development of new products for others” (emphasis added), i.e., the development of new software. Opposer oversimplifies the relatedness of the goods and services in question. Opposer argues that since the respective goods and services relate to software generally, they are similar. This broad statement is a sweeping overgeneralization of computer software and is simply incorrect. The purpose of requiring specificity in identifying computer programs is to avoid the issuance of unnecessary refusals of registration under 15 U.S.C. § 1052(d) where the actual goods of the parties are not related and there is no conflict in the marketplace. *See In re Linkvest S.A.*, 24 U.S.P.Q.2d 1716 (T.T.A.B. 1992). Simply because Pivotal and Opposer broadly offer goods or services that relate to software generally does not make them similar by default. *In re Quadram Corp.*, 228 U.S.P.Q. 863 (T.T.A.B. 1985) (finding that there is no per se rule that goods which relate to a broad industry are likely to cause confusion). Indeed, the Board has clarified that goods and services relating to software are so broad, that it is incorrect to simply conclude that they are related. *See In re Micros Systems, Inc.*, Ser. No. 85826131 (T.T.A.B. March 6, 2015) (reversing the refusal against MISTORE for “computer software for use in connection with retail point of sale and inventory management” in Class 09 which the Examining Attorney had maintained based on the prior registration for MYSTORE EXPRESS [& Design] for “computer e-commerce software to allow users to perform electronic business transactions via a global computer network” in Class 09).

As free, downloadable open source software, the BOSH product is meant for release engineering, deployment, lifecycle management, and monitoring of distributed

systems. Specifically, it is existing, downloadable software that a company can use to engineer the release of a small- or large-scale cloud software product, deploy the software product, and manage the lifecycle of the software product. The services described in the BOSCH registration are not the same. The BOSCH services relate to the development of software that does not exist. The described BOSCH services do not including providing software tools or open source software. The record has no evidence of any other use, because Opposer has yet to show current use of its mark in connection with its services.

Turning to the specific differences between Pivotal's goods and Opposer's services, it is important to note that Opposer offers data processing software *development* services, for a fee. In contrast, Pivotal's BOSCH mark is for a *free*, downloadable software product that is offered in conjunction with the open source PaaS Cloud Foundry.

There is thus a question of material fact as to the relatedness of Pivotal's software with Opposer's development services.

**C. Pivotal's goods and Opposer's services do not travel through the same channels of trade to the same classes of customers.**

Opposer incorrectly argues that the identification of goods and services for both marks is unlimited with respect to channels of trade. First, there is no requirement that the identification of goods and services specify the channels of trade. TMEP §1402.01. Second, the absence of a concrete channel of trade does not prove an unlimited channel of trade, much less one that is the same for Pivotal and Opposer. Opposer makes a blanket assertion that Pivotal's goods and Opposer's services travel in the same channels of marketing, without any evidence. Pivotal notes that its free, downloadable open source software is distinct from Opposer's "design of computer software for data processing" services, and that they are not direct competitors.

Opposer relies on *In re Cook Medical Techs, LLC*, 105 U.S.P.Q.2d 1377 (T.T.A.B. 2012) to support its position that when there are no limitations as to channels of trade or classes of purchasers in the identification of goods in the application and cited registration, it is presumed that the applicant's and registrant's goods move in all channels of trade normal for those goods. Opposer fails to mention that in *In Re Cook Medical Techs*, the applicant's mark and the cited mark were both filed in the same class, Class 10. That is not the case here. Pivotal's goods are pending for Class 9 and Opposer's services are registered for Class 42. Also, in *In re Cook Medical Techs*, the Examining Attorney issued a 2(d) refusal based on likelihood of confusion, whereas the Examiner in the present case did not issue such a refusal. Lastly, in *In re Cook Medical Techs*, the applicant attempted to register a teal color for medical devices. The Board stated that the comparison of two color marks is some of the most unpredictable and troubling issues of infringement in trademark law. *Id.*; *McCarthy on Trademarks and Unfair Competition*, §7:45.70 (4<sup>th</sup> ed. 2012). For this reason, the comparison and application to the present case is not appropriate since the particularities of a color mark are nuanced and specific to the facts of the case. Lastly, *In re Cook Medical Techs, LLC* involves an *ex parte* dispute in which the Board must assume channels of trade, while the present case involves an *inter partes* opposition in which the Opposer can and should have presented evidence of the channels of trade, but failed to do so. For these reasons, Opposer's argument regarding the presumption of similar channels of trade should be rejected.

Further, Section 18 of the Trademark Act, 15 U.S.C. § 1068, permits the Board, in appropriate circumstances, to consider facts regarding channels of trade and class of purchasers and then to impose appropriate limitations on an application or existing

registration if necessary to avoid a likelihood of confusion. See *Proctor & Gamble Co. v. Sentry Chem. Co.*, 22 U.S.P.Q.2d 1589 (T.T.A.B. 1992). Here again, there are disputed facts that serve to defeat summary judgment.

Simply stated, Opposer's services relate to software that does not exist, whereas Pivotal's product relates to deploying and managing software that does exist. This is a massive distinction, one that defines both the customers and markets. A consumer of Pivotal's BOSH open source software would not look to Opposer's BOSCH-related services to download open source software, and a consumer of Opposer's BOSCH-related services would not look to Pivotal's BOSH downloadable software - the needs are not the same. If Opposer maintains its position that the customers and channels of trade are identical, then this is a genuine issue of material fact, as well.

**D. The respective customers of Pivotal's goods and Opposer's services are sophisticated and discerning.**

Opposer does not discuss the sophistication of the customers, which is a significant *DuPont* Factor. Opposer avoids this issue for good reason; it weighs heavily in Pivotal's favor. In addition to Pivotal's software and Opposer's software development services being targeted towards distinct customer needs, it is further worth emphasizing that each party's customers are highly sophisticated. It is well-established that the sophistication of purchasers is highly relevant in a likelihood of confusion analysis.

TMEP 1207.01(d)(vii); see also *In re Homeland Vinyl Prods., Inc.*, 81 U.S.P.Q.2d 1378, 1380, 1383 (T.T.A.B. 2006) (finding no likelihood of confusion where purchasers would exercise a relatively high degree of care in their purchasing decisions); *In re N.A.D., Inc.*, 754 F.2d 996, 999-1000 (Fed. Cir. 1985) (concluding that, because only sophisticated purchasers exercising great care would purchase the relevant goods, there would be no

likelihood of confusion merely because of the similarity between the marks NARCO and NARKOMED). In making purchasing decisions regarding sophisticated products such as these, “the reasonably prudent person standard is elevated to the standard of the ‘discriminating purchaser.’” *Weiss Assoc., Inc. v. HRL Assoc., Inc.*, 902 F.2d 1546, 14 U.S.P.Q.2d 1840, 1841 (Fed. Cir. 1990).

A purchaser who has a “reasonably focused need” or “specific purpose” or plan for the product, will exercise a high degree of care in selecting the product that meets his or her needs. *See e.g. Haydon Switch & Instr., Inc. v. Rexnord, Inc.*, 4 U.S.P.Q.2d 1510, 1517 (D. Conn. 1987) (specific products for specific industrial purpose); *G.H. Mumm & Cie v. Desnoes & Geddes, Ltd.*, 917 F.2d 1292, 16 U.S.P.Q.2d 1635, 1638 (Fed. Cir. 1990) (“focused need” for champagne); *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ’g Group, Inc.*, 886 F.2d 490, 496, 12 U.S.P.Q.2d 1289, 1293 (2d Cir. 1989) (reader of Cliffs Notes probably has specific book in mind). A software developer searching for a tool for the deployment, lifecycle management, and monitoring of cloud software has a highly specific objective in mind for using the product – and is likely to exercise extreme care and caution in selecting the software which it will use to support the project. Similarly, a customer seeking or engaging *someone else* to develop software has a specific purpose in mind for the software to be developed, and will exercise extreme care and caution in determining who develops the software. Pivotal’s software and Opposer’s services are used to satisfy distinct needs by customers who are highly sophisticated. Undoubtedly, this is a case where customers will only encounter the respective marks when searching out specific – and very distinct – goods or services. Thus it is not surprising that no actual confusion has occurred in six plus years of concurrent use.

**E. There have been no instances of confusion despite six years of coexistence, during which Opposer was aware of Pivotal's mark.**

Opposer completely ignores the longstanding duration of coexistence without one instance of actual confusion. The Board has routinely held that substantial coexistence in the marketplace can be dispositive on the question of likelihood of confusion – even where the marks are similar in appearance. *See, e.g., In re Strategic Partners, Inc.*, 102 USPQ2d 1397 (T.T.A.B. 2012) (finding no likelihood of confusion between ANYWEAR for shoes and the registered mark ANYWEAR BY JOSIE NATORI (& Design) for clothes since the marks had coexisted for over five years).

Here, the marks have been coexisting in the marketplace for over six years. In Opposer's Response to Pivotal's First Set of Interrogatories, Opposer stated, "Opposer is unaware of any instance of actual confusion between Opposer's mark and Applicant's mark." (Opposer's Resp. to Pivotal's Interrog. No. 19.) Because no instances of confusion between Pivotal's BOSH mark and Opposer's BOSCH mark have occurred in over six years of use of the marks, it is unlikely that confusion will arise in the future. *See, G.H. Mumm & Cie v. Desnoes & Geddes Ltd.*, 917 F.2d 1292, 16 U.S.P.Q.2d 1635, 1638 (Fed. Cir. 1990) (lack of actual confusion in more than a decade weighs against finding that confusion is likely).

**IV. Conclusion**

For the reasons stated above, Pivotal respectfully requests that the Board deny Opposer's Motion for Summary Judgment.

Respectfully Submitted,

Date: January 13, 2017

A handwritten signature in cursive script, reading "Lisa Greenwald-Swire", is written over a horizontal line.

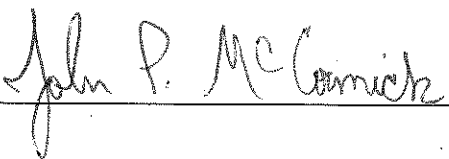
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Applicant's Brief in Opposition to Opposer's Motion for Summary Judgment has been served on Michael Striker by U.S. First Class Mail to the below-identified Attorney at his place of business:

Michael Striker  
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
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Opposition No.: 91229012

Mark: BOSH

App. Ser. No. 86/808248

Published: March 22, 2016

**DECLARATION OF CYRUS WADIA IN SUPPORT OF APPLICANT'S BRIEF  
IN OPPOSITION TO OPPOSER'S RENEWED MOTION FOR SUMMARY  
JUDGMENT**

Cyrus Wadia declares as follows:

1. I am Associate General Counsel – Strategic IP for Pivotal Software, Inc. (“Pivotal”).
2. I make this declaration in support of Applicant’s Brief in Opposition to Opposer’s Renewed Motion for Summary Judgment. I have personal knowledge of the facts set forth herein, and if called to testify, could and would testify competently thereto.
3. I have been serving as Pivotal’s Associate General Counsel since October 2013. I am Pivotal’s lead intellectual property attorney. My responsibilities include setting IP policy; managing Pivotal’s patent, trademark and copyright portfolios; conducting IP due diligence for potential acquisitions and divestiture; negotiating IP agreements and providing support for IP provisions of agreements, including patent licenses and assignments, standards agreements, bylaws and procedures, confidentiality agreements, asset purchase agreements, trademark assignments, source code licensing agreements, employment agreements, supplier agreements and product licenses; engaging in patent licensing efforts, providing copyright clearance of software offerings, including performing due diligence on open source software and evaluating API and specification licenses and implementations; and developing and presenting educational materials for internal business clients regarding proper internal IP legal procedures.
4. I am familiar with the history, development and marketing of Pivotal and its BOSH brand for open source software.
5. The BOSH mark has been used in commerce since at least August 2010.

6. The BOSH product is free, downloadable software is used by sophisticated software developers for the release of a small- or large-scale cloud software product, to deploy the software product, and manage the lifecycle of the software product. The release occurs after the software product has been developed and release engineering creates the artifacts that will be deployed to the cloud. Deployment includes the installation and activation of the product on the computers of the cloud. And lifecycle management includes managing the release and deployment of the product on further computers, updating the installed product, and deactivating the installed product.

7. Pivotal Software's trade channel for the BOSH software is through open source distribution, predominantly through [www.bosh.io](http://www.bosh.io).

8. Since the BOSH product was first used in August 2010, there have been no instances of customer confusion.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Date: December 20, 2016

*Cyrus Wadia*  
\_\_\_\_\_  
Cyrus Wadia

# **EXHIBIT A**



# bosh

*noun* \ˈbāsh\

Popularity: Bottom 40% of words

**Examples:** **BOSH** in a sentence

## Definition of BOSH

: foolish talk or activity : **NONSENSE** —often used interjectionally

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See [bosh defined for English-language learners](#)

See [words that rhyme with bosh](#)

## Related to BOSH

A Thoughtful Guide  
to Words About  
Nonsense

## Examples of BOSH in a sentence

Don't believe a word she says—it's all *bosh*.

<a pseudoscientific examination of UFO claims that was utter *bosh*>



SINCE 1828 MENU

Turkish *boş* empty

First Known Use: 1834

## BOSH Synonyms

Synonyms

applesauce [*slang*], balderdash, baloney (also boloney), beans, blah), blarney, blather, blatherskite, blither, nonsense, bull [*slar*

## BOSH Defined for English Language Learners

# bosh

*noun* \ˈbāsh\

### Definition of BOSH FOR ENGLISH LANGUAGE LEARNERS

: foolish words or ideas

### Learn More about BOSH

Thesaurus: [All synonyms and antonyms for bosh](#)

Britannica.com: [Encyclopedia article about bosh](#)

# **EXHIBIT B**

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

ROBERT BOSCH GMBH,	)	
	)	Opposition No. 91229012
Opposer,	)	
	)	Mark: BOSH
v	)	
	)	App. Serial No.: 86/808,248
PIVOTAL SOFTWARE, INC.,	)	
	)	Published: March 22, 2016
Applicant.	)	
_____	)	

**OPPOSER'S RESPONSE TO APPLICANT'S  
FIRST SET OF INTERROGATORIES**

Opposer herewith responds to Applicant's First Set of Interrogatories as follows:

Objections to Instructions

Opposer objects to Applicant's instructions as overly broad. By way of example, instruction number 6 identifies Bosch marks as "all Bosch formative trademarks owned by Opposer irrespective of territory or subject matter," despite the fact that Opposer has pleaded ownership of a single U.S. trademark registration.

Applicant's instructions as to information required to identify a communication or to identify an agreement or to identify a source of information are overly broad and burdensome and calling for unnecessary and extraneous information.

### General Objections

Opposer generally objects to Applicant's Interrogatories as overly broad and calling for generally irrelevant information, calculated to be burdensome and to harass.

Opposer further generally objects to Applicant's interrogatories as to be unlimited as to scope or territory and therefore calling for irrelevant and unnecessary information.

### Responses

Interrogatory No. 1: Identify all Persons Opposer believes has knowledge of facts relevant to any issue in this proceeding and describe the issues upon which Opposer believes each Person has knowledge.

Response to Interrogatory No. 1:

Matthew Jennings  
Regional President  
Bosch Innovation Software  
c/o Striker, Striker & Stenby

103 East Neck Road  
Huntington, NY 11743

Corey Plender  
Sales/Business Services North America  
Bosch Innovation Software  
c/o Striker, Striker & Stenby  
103 East Neck Road  
Huntington, NY 11743

The subject individuals have general knowledge as to the use of the Bosch Trademark in commerce in the United States. These individuals also have knowledge of the use by applicant of the Bosh trademark within the territory of the United States.

Interrogatory No. 2: Identify those Persons having the most knowledge of Opposer's current and intended future use of the BOSCH Mark, and Opposer's marketing or intended marketing of services associated with the BOSCH Mark.

Response to Interrogatory No. 2: See answer to Interrogatory No. 1.

Interrogatory No. 3: Identify the owner of the BOSCH Mark, and the effective date of such ownership.

Response to Interrogatory No. 3: The owner of the BOSCH mark is Robert Bosch GmbH, the Opposer herein. The effective date of such ownership is the date of first use as set forth in the BOSCH trademark pleaded herein.

Interrogatory No. 4. Identify all past, present, and potential licensees and owners of the BOSCH Mark.

Response to Interrogatory No. 4: The BOSCH mark as defined in definition No. 5 as contained in Trademark Registration No. 2,100,692 has not been licensed. Robert Bosch GmbH utilizes the BOSCH mark in the United States through Bosch Innovations Software of Chicago, Illinois. Bosch Innovations Software of Chicago, Illinois has licensed software under the trademark BOSCH as follows:

Bosch Software Innovations Corp. has issued software licenses. The software licenses are available to the purchaser in perpetuity. The licenses that have been sold are for Visual Rules Software product as well as IoT Suite products.

Interrogatory No. 5: Identify the Person or Persons involved in the selection of the color, font, stylization, and design of the BOSCH Mark.

Response to Interrogatory No. 5: Unknown. Opposer has no knowledge as to the person or persons involved in the selection of the color, font, stylization and design of the BOSCH mark.

Interrogatory No. 6: Identify all Persons who were involved in the design, development, selection, clearance, adoption, and/or use of the BOSCH Mark.

Response to Interrogatory No. 6: Objected to as irrelevant. Opposer does not know the persons who were involved in the design, development, selection, clearance, adoption and/or use of the BOSCH mark.

Interrogatory No. 7: Describe the decision-making process undertaken by Opposer to adopt the BOSCH Mark, including the reason the mark was selected, the timing of the selection process, the alternatives considered, the factors considered in selecting the BOSCH Mark, and any concerns raised regarding the selection or use of the BOSCH Mark.

Response to Interrogatory No.7: Objected to as irrelevant. Opposer has no knowledge as to this information.

Interrogatory No. 8: Identify all products and services Opposer presently sells or offers, or intends to sell or offer, under or in connection with the BOSCH Mark and for each product or service, state the date in which it was first sold or offered, or it is intended to be first sold or offered for sale.

Response to Interrogatory No. 8: Bosch Software Innovations Corporation is a United States affiliate of Bosch Software Innovations GmbH in Germany. Bosch Software Innovations Corp. was founded in 1997 and is the software and systems house of the Bosch Group, and globally designs, develops and operates innovative software and system solutions for the Internet of Things and traditional enterprise environment. The Bosch IoT Suite is Bosch Software Innovations' comprehensive toolbox in the Cloud. The software package, which is provided as Platform as a Service (PaaS), allows the interaction of devices, users, companies and partners on a centralized platform. This enables the development of innovative and future-oriented solutions for new business models.

Bosch Software Innovations Corp. offers solutions and services that allow the rapid development and integration of large numbers of IoT edge devices into cloud-based application environments. These modules allow Bosch to work with clients from manufacturing, mobility and buildings/cities to incorporate their specific domain knowledge into a working customized solution. Domain knowledge encompasses the use and visualization of the IoT device data within the client's area of expertise. It covers the UI, analytics, and data analysis portion of a developed application. Bosch Software Innovations also offers managed services options to establish and maintain the operations of a deployed IoT application in a cloud environment. Bosch will deploy the cloud app, monitor it and be responsible for the day to day operations of it. This

allows the client to focus on their business and leave the ins and outs of running a cloud application to Bosch.

Interrogatory No. 9: State all facts concerning Opposer's advertising and promotion, or intended advertising and promotion, of products or services sold or offered, or to be sold or offered in the future, under or in connection with the BOSCH Mark, identifying each advertisement or promotional activity by date, type, geographic area of distribution, and cost.

Response to Interrogatory No. 9: See answer to Interrogatory No. 8, objected to as overly broad as calling for identification of each advertisement or promotional activity by date, type, geographic area and distribution and cost.

Opposer has attached to its Response to Document Requests typical representative promotional material.

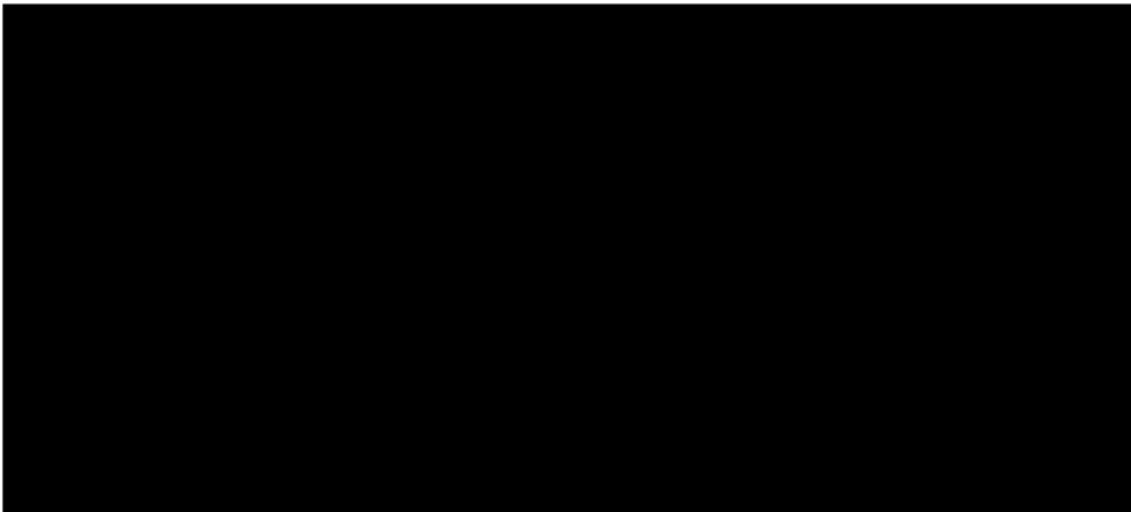
Interrogatory No. 10: Describe the channels of trade through which Opposer's services bearing the BOSCH Mark have been and are likely to be marketed, distributed and/or sold.

Response to Interrogatory No. 10: See answers to Interrogatories No. 8 and 9. Opposer promotes its goods and services in the United States through websites,

emailings, Twitter, LinkedIn, YouTube, corporate blogs, events, campaigns, webinars and White Papers.

Interrogatory No. 11: Identify all agreements relating to the BOSCH Mark including all licenses, settlement agreements and co-existence agreements, and identify the specific type of agreement, the parties thereto, the products and services involved, the marks involved, the effective date of such agreements and if applicable, the expiration date thereof.

Response to Interrogatory No. 11: Objected to as overly broad. Representative customers of Bosch Software Innovations Corp. are as follows:



Interrogatory No. 12: State all facts concerning Opposer's efforts to determine whether the BOSCH Mark creates a likelihood of confusion with respect to Pivotal or the Pivotal's BOSH Mark, including any opinions, legal or otherwise, consumer studies, surveys, or market research, and the results of such efforts.

Response to Interrogatory No. 12: Opposer's mark BOSCH is phonetically equivalent to Applicant's mark BOSH and the goods and services involved are identical. Opposer has not undertaken any consumer studies, surveys or market research in this respect.

Interrogatory No. 13: Identify all domain names owned or controlled by Opposer, including but not limited to the <bosch.com > domain, and for each domain name, state the date in which it was first acquired or used by Opposer.

Response to Interrogatory No. 13: Objected to as unlimited in scope or territory and as irrelevant.

Interrogatory No. 14: Describe in detail the classes and/or categories of consumers to whom Opposer's services are marketed and sold, or intend to be marketed and sold, including both end users and those who purchase Opposer's services.

Response to Interrogatory No. 14: Representative consumers of Applicant's products have been set forth in response to Interrogatory No. 11. Opposer generally extends its services and goods to companies in the United States requiring software, including, without limitation, for Visual Rules Software as well as IoT Suite products.

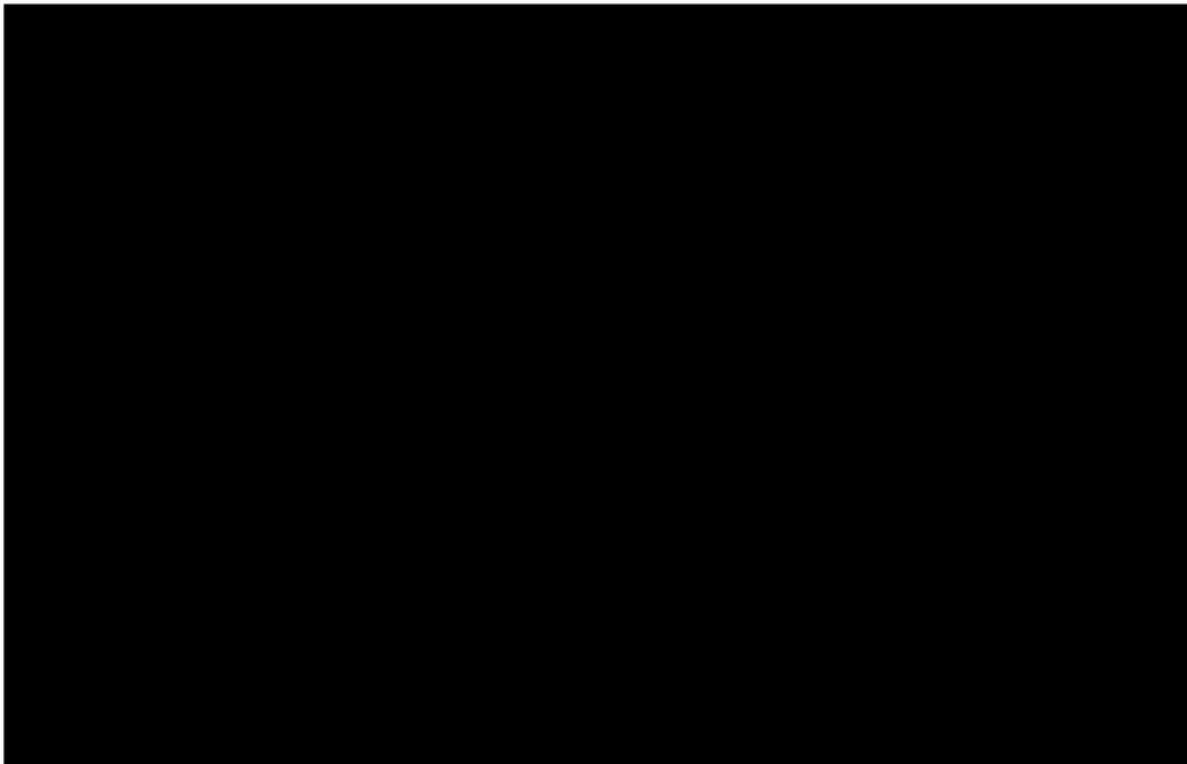
Interrogatory No. 15: State all facts concerning any objection of any kind that any Person has made relating to Opposer's use or registration of the BOSCH Mark.

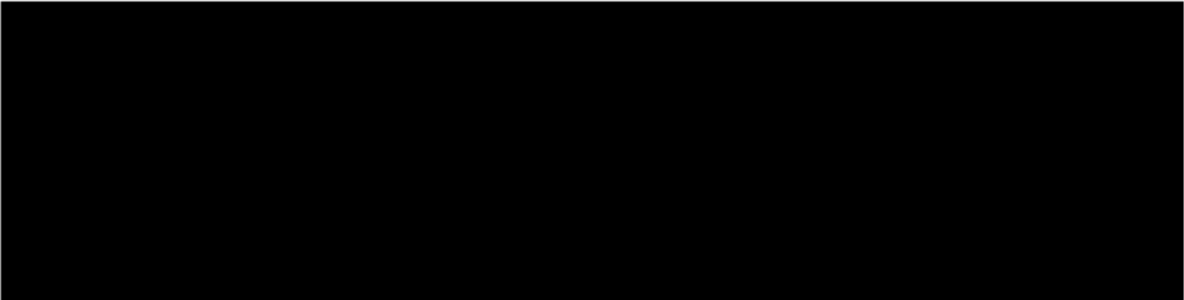
Response to Interrogatory No. 15: Opposer is unaware of any person who has made any objection to Opposers use or registration of the BOSCH mark.

Interrogatory No. 16: State all sales and advertising expenditures pertaining to the BOSCH Mark over the last five (5) years.

Response to Interrogatory No. 16: **This response confidential.**

**Attorney's eyes only**





Objected to as vague because the terminology "financial status" is unclear and ambiguous. Further objected to as calling for irrelevant information such as anticipated funding sources and timing. Opposer has previously set forth advertising and sales information.

Interrogatory No. 17: State all facts relating to Opposer's financial status as of the date of these Interrogatories, including net sales, net income, total assets, long-term debts, total liabilities, and anticipated funding sources and timing.

Response to Interrogatory No. 17: See answer to Interrogatory No. 16.

Interrogatory No. 18: Identify all similarities and dissimilarities between, on the one hand, Opposer's services, and, on the other hand, Pivotal's goods.

Response to Interrogatory No. 18: Opposer's mark BOSCH is phonetically equivalent to Applicant's mark BOSH and the respective goods and services of Opposer and Applicant appear to be identical.

Interrogatory No. 19: State all facts concerning any and all instances of actual confusion or likely confusion between Opposer and/or the BOSCH Mark, on the one hand, and Pivotal and/or the BOSH Mark on the other hand, identifying for each such instance:

- (a) the date and place the incident occurred;
- (b) the Person who was actually or likely confused; and
- (c) the Person employed by or otherwise associated with Opposer who has the most knowledge of each instance.

Response to Interrogatory No. 19: Opposer is unaware of any instance of actual confusion between Opposer's mark and Applicant's mark.

Interrogatory No. 20: State all facts concerning any objection of any kind you have made relating to another Person's use or registration of the mark or domain name BOSCH, or any other mark or domain name alleged by you to be confusingly similar to the BOSCH Marks.

Response to Interrogatory No. 20: Objected to as unlimited in territory. With respect to the United States, Opposer has previously filed Notices of Opposition Nos. 91225522; 91225003; 912911110; 91209003;91124058; 91117086; 91113918; 91109166; 91098532; 91073342; 91069921; 91068402.

Interrogatory No. 21: State all facts supporting Your claimed bona fide use of Opposer's Mark in connection with the services identified in the Registration.

Response to Interrogatory No. 21: Objected to as vague and ambiguous. Opposer actively conducts its software services within the territory of the United States through its affiliate Bosch Software Innovations Corp.

Interrogatory No. 22: Describe the circumstances relating to how and when you first became aware of the BOSH Mark, including but not limited to the date of such awareness and the manner in which you became aware of such information, and identify each Person associated with Opposer who obtained such knowledge and all documents relating to Opposer's initial awareness of the BOSH Mark.

Response to Interrogatory No. 22: Opposer became aware of the BOSH mark of Applicant when it was published for opposition purposes.

Interrogatory No. 23: Identify the Person or Persons answering or who assisted or were consulted in answering these Interrogatories and the Requests for Production served herewith on behalf of Opposer, including their current employment positions and/or relationships with Opposer and their current business and residence addresses.

Response to Interrogatory No. 23: See answer to Interrogatory No. 1. Additionally, Justin Vertraete, an administrative assistant at Bosch Software Innovations Corp. assisted in gathering information.

Interrogatory No. 24: Identify the Person who is responsible for selecting, controlling, supervising, overseeing, and enforcing Opposer's trade name, business name, trademark and service mark interests.

Response to Interrogatory No. 24: Objected to as unlimited in territory of the United States. See answer to Interrogatory No. 1.

Interrogatory No. 25: State whether Opposer's Mark is still in use for each of Opposer's services identified in its Registration and, if not, the date of last use for those services.

Response to Interrogatory No. 25: Yes.

Interrogatory No. 26: Identify and describe the actual or intended customers for each of Opposer's services identified in its Registration.

Response to Interrogatory No. 26: Objected to as overly broad. A list of representative customers is set forth above. Further objected to as not limited in territory to the United States.

Interrogatory No. 27: Identify and describe any current or previous dispute (including administrative and district court litigation and cease and desist correspondence) in any US. Geographic Territory in which Opposer has been involved related to Opposer's Mark or related or similar business names or trade names, and for each such dispute, list the names of the parties, the date of and forum for the dispute, and a description of the dispute, including any outcome and the mark or term at issue.

Response to Interrogatory No. 27: See previous answer relating to oppositions filed on behalf of Robert Bosch GmbH. Further information is publicly available in the opposition files.

Interrogatory No. 28: Identify all facts that support Your contention that any of the BOSCH Marks are famous.

Response to Interrogatory No. 28: Opposer's BOSCH mark is well known within the territory of the United States relative to software activities marketed through its affiliate Bosch Software Innovations Corp.

Interrogatory No. 29: Identify all facts that show, or tends to show, that the BOSCH Marks are widely recognized by the general consuming public of the United States.

Response to Interrogatory No. 29: See answer to Interrogatory No. 28.

Interrogatory No. 30: Identify all TTAB, court, and other legal proceedings that have found that any of the BOSH Marks are famous.

Response to Interrogatory No. 30: None.

Interrogatory No. 31: Identify all facts that support your contention that Applicant and Opposer offer similar computer software in the US in connection with its respective BOSH Mark and BOSCH Mark.

Response to Interrogatory No. 31: The goods and services set forth in Opposer's pleaded trademark registration and Applicant's pleaded trademark application are virtually identical.

Interrogatory No. 32: If You failed to admit, on an unqualified basis, one or more of Requests for Admission of Applicant's First Set of Request of Admission to Opposer, state each and every reason You did not admit the Request(s).

Response to Interrogatory No. 32: No answer required.

I hereby declare that all statements made herein of my own knowledge are true and that all statements on information and belief are believed to be true; and further that those statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code, and that such willful false statements may jeopardize the validity of the application or any patent issued thereon.

Dated: \_\_\_\_\_

\_\_\_\_\_  
ROBERT BOSCH GMBH

As to objections:

  
\_\_\_\_\_  
Michael Striker

CERTIFICATE OF SERVICE

It is hereby certified that a true and complete copy of the attached Opposer's Response to Applicant's First Set of Interrogatories was served upon Counsel for the Applicant via first class mail at the following address:

Fish & Richardson P.C.  
P.O. BOX 1022  
Minneapolis, MN 55440-1022  
Att: Lisa Greenwald-Swire

This 5<sup>th</sup> day of December, 2016

Dated: December 5, 2016

A handwritten signature in black ink, appearing to read 'MS', is written over a horizontal line.

Michael Striker