

ESTTA Tracking number: **ESTTA1101639**

Filing date: **12/14/2020**

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

Proceeding	91248764
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Attachments	Opposer Reply Trial Brief.pdf(128456 bytes)

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

MOBILESOFT TECHNOLOGY, INC.,)	Opposition No.: 91248764
a Delaware Corporation,)	
Opposer,)	In the matter of:
)	
v.)	Application Serial No: 87836135
)	Mark: MY MY STAR
MY MY STAR, INC.,)	
)	Filed: March 15, 2018
Applicant.)	
)	Published: February 12, 2019
)	

OPPOSER MOBILESOFT TECHNOLOGY, INC.'S

REPLY TRIAL BRIEF

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II. INTRODUCTION

Opposer MobileSoft Technology, Inc. (“Opposer”) submits this reply brief in response to the issues raised by Applicant My My Inc. (“Applicant”) in its November 30, 2020 brief, *ad seriatim*.

Given the Applicant has not challenged Opposer’s arguments in any material fashion and has not prosecuted any of its affirmative defenses, the only remaining issues to be addressed pertain to the dates that Applicant alleges it used its Mark.


Applicant claims that it has been substantially and continuously using the MY MY STAR mark (“Applicant’s Mark¹) since as early as November 1, 2000 and has been doing so in commerce since as early as January 1, 2006.²

Mr. Len Wilson’s (“Wilson”) testimony as to Applicant’s alleged dates of first use and dates of first use in commerce of its Mark and its claim of substantial and continuous use of its Mark and “doing so in commerce” are uncorroborated by any documentary evidence. The only support for Applicant’s date claims are Wilson’s ever-changing inconsistent declaration and cross-examination testimonies. Wilson’s mere statements do not reach the threshold for evidence. Wilson’s attempt to “massage” the facts to fit Applicant’s “date of use” theory has resulted in numerous inconsistent statements, which calls into question the credibility of his entire testimony.

III. ANALYSIS OF WILSON’S INCONSISTENT STATEMENTS

A. Date of First Use and Date of First Use in Commerce of Applicant’s Mark

Wilson’s two declarations and his cross-examination transcript testimonies concerning the date of first use and use in commerce are inconsistent and conflicting. It is apparent that Wilson is attempting to show use of Applicant’s Mark to establish priority, creating difficulty for him to keep his story straight.

¹ Throughout its brief, Applicant identifies its mark as “Senior Mark” and Opposer’s marks as “Junior Marks.” Opposer objects to Applicant’s unproven characterization of the marks as senior and junior. By Applicant merely identifying a mark as senior or junior does not make it factual. Opposer believes that Applicant is trying desperately to convince the reader that it has priority over Opposer. Accordingly, Opposer will continue to reference Applicant’s pending mark, MY MY STAR, as “Applicant’s Mark” and Opposer’s registered marks, MY MY and , as “Opposer’s Marks”.

² 16 TTABVUE 6: App. Br., at p. 5, first para.



Perhaps, as Wilson testified when questioned about why he attached the Notice of Opposition in the *My My Star, Inc. v. MobileSoft* matter³ to his 7/16/20 Declaration, Wilson testified that the reason was because he objected to it and it's not something he likes.⁴

Wilson, in his 7/16/20 Declaration, testified that “[A]s early as November 1, 2000, Applicant began using Applicant’s Mark [MY MY STAR]. At least as early as January 1, 2006, Applicant has been, and continues to, offer goods and services . . . under Applicant’s Mark.”⁵

Contrary to the above statements, Wilson testified at his cross-examination that My My Star, LLC, a New York limited liability corporation first used Applicant’s mark, MY MY STAR, as early as January 1, 2006, and not Applicant⁶, as Applicant My My Star, Inc., a California corporation, wasn’t formed until 2010 or 2011.⁷ Applicant’s Articles of Incorporation were filed with the Secretary of State of California on July 21, 2010.⁸

Wilson testified that My My Star, LLC, was in New York from either 2006 or 2008 or 2009.⁹ Again, inconsistent with his testimony that the LLC first used the MY MY STAR mark as early as January 1, 2006.

When Wilson was questioned about his 7/16/20 Decl. ¶¶ 4, 7 and Decl. Ex. B, Wilson testified that the dates reflected on Ex. B are not accurate and that 20 years ago, he originally used Applicant’s Mark as an experiment and later as a business name, as follows:

³ As testified to by Sjoblad, Applicant and Opposer were previously parties to another Opposition Proceeding (No. 91236066), in which Applicant opposed Opposer’s MYMY and , then pending marks; and, that Opposition was dismissed with prejudice and MobileSoft’s MYMY and  applications proceeded to registration. 13 TTABVUE 8-9: Sjoblad [8/30/20] Decl. ¶ 11.

⁴ 14 TTABVUE 111: Wilson Tr. p. 108, ll. 7-12; and, 14 TTABVUE 158, 208: Wilson Tr. Ex. 24 [Wilson 7/16/20 Decl.] at ¶ 14 and Ex. E.

⁵ 14 TTABVUE 155: Wilson Tr. Ex. 24 [Wilson 7/16/20 Decl.] at ¶ 4; and, 14 TTABVUE 37-38: Wilson Tr. p. 34, l. 17-p. 35, l. 3.

⁶ 14 TTABVUE 39-40, 41: Wilson Tr. p. 36, l. 9 – p. 37, l. 5, p. 38, ll. 2-6.

⁷ 14 TTABVUE 39, : Wilson Tr. p. 36, ll. 9-14, p. 46, l. 8-p. 47 l. 6.

⁸ 14 TTABVUE 87: Wilson Tr. p. 84, ll. 11-17; and, 14 TTABVUE 204-205: Wilson Tr. Ex. 24 at Ex. D (also found at 10 TTABVUE 51-52: Wilson [7/16/20] Decl. at Ex. D)

⁹ 14 TTABVUE 17-18: Wilson Tr. p. 14, l. 23 – p. 15, l. 1.

A. The background are grayed out on purpose. You're not supposed to pay attention to them. They're not specific to the project itself necessarily. So, that's all. Like it's -- so, your seeing dates on that doesn't really reflect anything.

Q. That those were the dates? So, those dates aren't accurate?

A. They're not necessarily the dates, I'm saying. They don't really reflect anything about the project as far as the dates go or something like that.

...

Q. Like what were you using it on?

A. It was a personal project for -- how do I explain this? So, 20 years ago when people were still pioneering how the internet worked I made My My Star. . . . [I]t started as an experiment, . . . and eventually turned into a company later.

Q. So, when you started the company, was that My My Star, Inc.?

A. No. Actually, the original was LLC.

Q. My My Star, LLC?

A. Correct.

Q. Okay. So, was it under My My Star, LLC or My My Star, Inc.? Your next sentence under paragraph 4 says at least as early as January 1, 2006 is when you started to use the My My star on goods and services.

A. Started using it, I believe, as a freelancer. So, originally it was an experiment. And then I started using it as a business name as a freelancer and/or small company. I can't remember because it was so long ago.¹⁰

When Wilson was questioned during his oral cross-examination, whether the MY MY STAR mark was first used on goods and services in commerce on January 1, 2006, he testified that "I would say it depends. When you say goods and services, it really depends. . . . [I] would say as early as 2000, 2001 to some degree . . ." Subsequent to that questioning, Wilson was asked:

Q. So, you don't know the year which My My star word mark was first used in commerce on any good or service?

A. I'm going to say 2001. Again, it's a gray area, but people hired me for my services based off of a My My Star website as early as 2001.

Q. Okay. And do you have any evidence supporting that?

¹⁰ 14 TTABVUE 37-39, 155-157, 198-199; Wilson Tr. p. 34, l. 5 – p. 36, l. 8; Wilson Tr. MST Ex. 24 [Wilson 7/16/20 Decl.] at ¶¶4, 7; Wilson [7/16/20] Decl. Ex. B.

A. I mean, I suppose I could—I don't know.

Q. Okay.

A. I could—let me think. Probably somewhere, but I can't guarantee it. There's definitely people that could say that that's the case, but I don't know if I have physical work still around to show it.¹¹

To clarify or confirm Wilson's statements, Wilson was presented with his June 26, 2019 Declaration, which he submitted in *My My Star, Inc. v. MobileSoft Technology, Inc.*, Opposition 91236066¹².

Q. The reason I'm pulling this up is because I'm not sure what date at least it's been used since. If you look at paragraph 3 you state that at least as early as May 31, 2002, you started to use-- .

...
Q. I'm just trying to determine is it as early as May 31, 2002 or January 1, 2006 or 2001?

Wilson also testified as to the date Applicant's Mark was used on goods/services:

Q. My question is, what date did My My Star, Inc. begin utilizing the My My word mark on any of its goods and services in commerce?

A. At least 2002. I can't give a specific month, but, yeah, at least 2002. . . . Certainly, the beginning of 2002, though, if not 2001.¹³

Later, Wilson testified that Applicant has used its Mark on goods/services since 2010 or 2011:

Q. And, so, let's talk about My My Star, Inc. How long has My My Star, Inc. been using the My My star trademark on any of its goods and services in commerce?

A. My My Star, Inc. has been using it since 2010 or 2011. Whenever it was—from the day it was formed.¹⁴

B. Applicant's Alleged Substantial and Continuous Use of Its Mark and Its Use In Commerce.

1. Applicant Alleges that the Domain "www.mymystar.com" Demonstrates Continuous Use of Its Mark.

Applicant's brief states that: "To demonstrate Applicant's continuous use of [its] Mark, Applicant has owned and utilized the domain www.mymystar.com since at least as early as 2005 to market and offer

¹¹ 14 TTABVUE 41-43: Wilson Tr. p. 38, ll. 12-24, p. 39 l. 16- p. 40, l. 7.

¹² 37 CFR § 2.122(f) *Testimony From Other Proceeding*, permits

¹³ 14 TTABVUE 44-46: Wilson Tr. p. 41, l. 10- p. 43, l. 6.

¹⁴ 14 TTABVUE 49: Wilson Tr. p. 46, ll. 8-14.

its advertising services, marketing services, and digital video production services.” Referencing Wilson’s [7/16/20] Decl. ¶ 8, Decl. Ex. C.¹⁵

Opposer has the following three observations. First, Applicant wasn’t in existence in 2005. As discussed, *supra*, Wilson testified that Applicant was formed in 2010 or 2011. Secondly, upon review of Wilson [7/16/20] Decl. Ex. C, ICANN LOOKUP identifies “Contact Privacy Inc.” as the domain registrant. WHOis.net shows “Tucows Domains Inc” as the domain registrant. In fact, Applicant is not identified in any of the documents appended at Wilson [7/16/20] Decl. Ex. C.¹⁶

At Wilson’s oral cross-examination, he testified that he wasn’t sure of the date or year when Applicant began continuous use of its Mark:

Q. When you state at paragraph 8 of your declaration on page 3: "Applicant's continuous use of Applicant's Mark," what do you mean by "continuous use"?

A. That it's a live website with work on it so that people can see we do visual production.

Q. And continuous from what date or what year? Continuous from what point in time? You're not sure?

A. No.¹⁷

Wilson admits that Applicant did not register the domain name www.mymystar.com with the USPTO:

Q. Okay. Did you register the domain name with an accredited domain name registry or with the USPTO?

A. A domain name for a website you would register with a domain register. USPTO, I'm unaware of that.

Q. So, it's fair to say you didn't register the domain name www.mymystar.com with the USPTO because USPTO is a trademark registry and not a domain name registry, correct?

A. Yeah. Again, I didn't know much about trademarks until recently.

Q. In fact, did you know that if a person registers a domain address with a domain name registry, that another party could later ask you to surrender the domain address if it infringes on someone else's trademark?

¹⁵ 16 TTABVUE 6: App. Br. p. 5, 2nd para.

¹⁶ 14 TTABVUE 200-203: Wilson Tr. Ex. 24 [Wilson 7/16/20 Decl.] Ex. C.

¹⁷ 14 TTABVUE 80: Wilson Tr. p. 78, ll. 1-10.

A. No.¹⁸

2. Applicant Alleges that Its Continuous Incorporation Under the Name “My My Star, Inc.” Demonstrates Continuous Use of Its Mark Since 2010

Applicant states that its continuous incorporation under “My My Star, Inc.” demonstrates continuous use of its Mark since 2010¹⁹; and, in Wilson [7/16/20] Declaration, he testifies that: “Applicant’s continuous use of Applicant’s Mark is further evidenced by Applicant’s incorporation in California.”²⁰

However, at his oral cross examination, Wilson testified that:

(a) He was aware that the use of a business name does not qualify as trademark use:

Q. Are you aware that the use of a business name does not qualify as trademark use?

A. I am now, yes.²¹

(b) A business name identified on the Articles of Incorporation does not qualify for trademark usage:

Q. Are you aware that a business name identified on the Articles of Incorporation does not qualify as trademark usage?

A. Yes.²²

(c) The filing of Applicant’s Articles of Incorporation with the State of California to form a business entity, did not give trademark rights:

Q. Are you aware that even though you filed incorporation documents with the State of California to form the business entity My My Star, Inc., does not give you trademark rights, and other parties could try to prevent your use of the business name if they believe a likelihood of confusion exists with their trademarks?

A. Yeah.²³

¹⁸ 14 TTABVUE 81-82: Wilson Tr. p. 78, l. 15 – p. 79, l. 7.

¹⁹ 16 TTABVUE 6-7: App. Br. at last continuing sentence at p. 5 - top p. 6.

²⁰ 14 TTABVUE 157: Wilson Tr. Ex. 24 [7/16/20] Decl. ¶ 9.

²¹ 14 TTABVUE 88: Wilson Tr. p. 85, ll. 20-22.

²² 14 TTABVUE 89: Wilson Tr. p. 86, ll. 2-5.

²³ 14 TTABVUE 89-90: Wilson Tr. p. 86, l. 21 – p. 87, l. 4.

3. Applicant's Alleged Continuous Use of Its Mark on Goods/Services

As discussed in great detail, *supra*, Applicant's date of first use cannot be established through any offered testimony nor through documentary evidence. Additionally, Wilson testified that My My Star, LLC, a New York company, was the first to use the Mark and not Applicant. No date of Applicant's first use has been proven.

With respect to use of Applicant's Mark in commerce, again there are conflicting dates as detailed, at pp. 2-4, *supra*. In addition, Wilson was questioned at his cross-examination regarding documentation to support his testimony that Applicant has been substantially and continuously using Its Mark in commerce since January 1, 2006, Wilson testified that he could produce some physical evidence, but could not guarantee it:

Q. Do you have documents from 2006 showing that the My My star trademark is used on any good or service where the consumer could purchase? Do you have a receipt from services with the My My star on it, that trademark on it, which would show that you were paid for a service?

A. Can you tell me what part you're referencing? I just want to make sure I answer this correctly.

Q. Okay. When a good or service is being used in commerce, it's being offered for sale to the consumer.

...

A. I was asking, are you referring to page 1, No. 4?

Q. Correct.

A. So, you want to know if I can prove this?

Q. Correct, if you have any documentary evidence of that.

A. Okay. Again, so, there are people that could definitely verify this. I'm pretty sure I -- I couldn't guarantee it, but I'm pretty sure I could produce some physical evidence of it, but I can't guarantee it, and that's it.²⁴

Wilson was questioned more specifically about evidence supporting Applicant's use of Its Mark on the specific services he alleged in his 7/16/20 Decl. at ¶ 4, since January 1, 2006.

Q. Do you have evidence to support your statement that states that you have used the My My star word mark on social media marketing campaigns since January 1, 2006 and each and every year since then to 2020?

²⁴ 14 TTABVUE 51-52: Wilson Tr. p. 48, l.14 – p.49, l. 22.

A. I can't say every single year, no, but at some point since then, yeah.

Q. Same question regarding software applications. Have you used the My My star word mark on software applications since January 1, 2006 and each and every year since then to 2020?

A. What type of project?

Q. Software applications.

A. Again, not necessarily each and every year, but, yes, since then, yes.

Q. Same question to online games. Have you used the My My word mark on online games since January 1, 2006 and each and every year including 2020?

A. Same answer. Not necessarily every year, but at some point since then.²⁵

4. Applicant Attempts to Bolster Its Claims of Use in Commerce

In his 7/16/20 Declaration at ¶6, Wilson attempts to bolster Applicant's claim of use of Its Mark in commerce by listing 51 companies and attaching an Ex. A, which is "[A]n exemplar of such use of Applicant's Mark in connection with the aforementioned clients". Wilson also stated that "[E]x. A provides a screenshot of Applicant's website (www.mymystar.com) which shows said exemplary clients for whom services were provided under Applicant's Mark, as well as, a sampling of purchase orders and statements of work demonstrating services provided under Applicant's Mark for these clients."²⁶

For ease of analysis, Opposer will address Wilson's statements regarding Ex. A in sections, (a) the screenshot of Applicant's website; and, (b) services were provided under Applicant's Mark; and, (c) purchase orders and statements of work demonstrating services provided under Applicant's Mark.

(a) Wilson's 7/16/20 Decl., ¶ 6 as to Ex. A: Screenshot of Applicant' Website

Wilson testified in his 7/16/20 Declaration that the screenshot of Applicant's website provided under Ex. A, shows Applicant's "exemplary clients for whom services were provided under Applicant's Mark." Yet, when the website address shown on Ex. A is pulled up, it appears as a blank page.

²⁵ 14 TTABVUE 55-56: Wilson Tr. p. 52, l. 16 – p. 53, l. 12.

²⁶ 14 TTABVUE 156, 159-161: Wilson Tr. Ex. 24 [Wilson (7/16/20) Decl.] at ¶ 6; and Wilson Tr. Ex. 24 [Wilson (7/16/20) Decl.] at Ex. A.

When Wilson was cross-examined regarding his above statement concerning the screenshot of Applicant's website, Wilson testified:

Q. Okay. So, when your mark is being used on your goods or services, what mark is on them? What mark do you use?

A. The one that's currently online on our website.

Q. Okay. So, the one that's currently on your website. Would that be the one where you indicate at Exhibit A . . . but if you look on your hardcopy as well at page 5, Exhibit A, and then page 6, is that your website page?

A. That's a previous website, but it still has the correct mark.

Q. So, that's not your current website page?

A. No. That's older.

Q. Because if we look at paragraph 6 of your declaration, which is at page 2, where it states about Exhibit A, that you provide a screen shot of the applicant's website that shows the client. So, can I assume that that copy was made presently and not before -- I'm confused as to when this screen shot was taken.

A. I don't know.²⁷

When questioned about the website address located at the top of the screenshot that he attached at Ex. A of his 7/16/20 Declaration, Wilson testified:

Q. When I could not find exactly what you presented here on page 6, I looked at the upper left-hand corner and looked at the web address and it showed mymystar.com/flash/. So, I went to that site. And I'll pull up what I found. I found a blank page.²⁸

A. Because the flash player isn't playing on your browser.

Q. So, if I would go to mymystar.com/flash/, what do I need to do in order to obtain what you did on Exhibit A?

A. The reason that that site isn't up anymore is because the flash player has been -- well, it's being phased out. So, you would need -- you can still run it, but you need to have the plug-in installed, which used to be the norm. . . .²⁹

²⁷ 14 TTABVUE 20-21: Wilson Tr. p. 17, l. 8 – p. 18, l. 7.

²⁸ 14 TTABVUE 240-241: Wilson Tr. MST Ex. 27.

²⁹ 14 TTABVUE 60-61: Wilson Tr. p. 57, l. 19 – p. 58, l. 15.

**(b) Wilson's 7/16/20 Decl., ¶ 6, as to Ex. A, Screenshot of Website:
"Services Were Provided Under Applicant's Mark"**

Regarding Wilson's statement, he testified at his cross-examination that the thumbnails show Applicant's work:

Q. Where on Exhibit A, page 6-7 where it shows the different thumbnails does it indicate where someone could purchase your services?

A. The top.

Q. Okay. I'll scroll back up there slowly so I don't miss it. Could you point out where at the top or tell me?

A. Underneath the contact.

Q. Where does it indicate an offer of the service?

A. Right there it says: My My Star is a Digital Production Studio. We Love This Stuff. We Are Hiring." And then it says: "Contact."

Q. It says you are hiring, but, yet, it doesn't say we are offering this service or this good, correct?

A. My My Star is a digital production studio. That's the first thing it says.

Q. It states what it is.

A. Correct.

Q. But it doesn't state what services it can provide to the consumer. Like, if I was a consumer and I would want to have this done, there's nothing I can click on and, you know, say I want to order this. There's not an order form on here.

A. That's not how it works. You don't make an order form for something like this. You state who you are and you state how to contact you and show work and that's it. It's not -- I don't understand your question.

Q. Well, what I'm trying to understand, I'm a consumer. I'm going to this site. It says: "My My star is a Digital Production Studio." Where does it say like the services, the banner advertisements, the downloadable or non-downloadable videos, the software applications, the online games?

A. That's what the thumb -- that's what the thumbnails are for. You look at the work. It states what we are. It shows our work and it shows our -- this is standard business practice in my industry. You say what are you, show the work, you leave the phone number. It isn't something that a child is going to go buy.³⁰

³⁰ 14 TTABVUE 61-63: Wilson Tr. p. 58, l. 23 – p. 60, l. 17.

(c) Wilson's 7/16/20 Decl. at ¶ 6 as to Ex. A: The Purchase Orders and Statements of Work Demonstrating Services Provided Under Applicant's Mark.

Wilson's states that Ex. A appended to his 7/16/20 Declaration "shows said exemplary clients whom services were provided under Applicant's Mark, as well as, a sampling of purchase orders and statements of work demonstrating services provided under Applicant's Mark for these clients." However, when questioned at his cross-examination, Wilson testifies that he blacked out the names of the purchaser, ad agencies; that the purchase orders were entered into between My My Star, Inc. as vendor and an ad agency and not with any of the 51 some listed "Applicant's clients" at his 7/16/20 Decl. ¶ 6; and, that of the 35 pages of documents provided as purchase orders and statements of work, only two of the 51 some companies Wilson listed were referenced as the clients of the ad agency purchaser; and, that Applicant's Mark is not shown on any of the purchase orders and statements provided at Ex. A. For example:

Q. I couldn't find that it was. I just could find Lexus and Toyota. Of course, these are, as you just stated, purchase orders or statements of work. So, this is what you were talking about before a client -- an agency -- an ad agency would call you. This is what you would enter into?

A. Correct.

...

Q. [A]nd then there's a bunch of blackouts. There's three big blackouts. Why are those blacked out?

A. For privacy.

Q. For privacy of the purchaser?

A. Correct.

Q. Okay. And it shows the vendor is My My Star, Inc. on all of these statements, correct?

A. Yes.

Q. Okay. So, anywhere else in these documents that you've provided, the purchase orders and the statements of work, other than My My Star --

A. Actually, let me double check that. I believe it's all My My Star, Inc.

Q. As the vendor?

A. Yeah.

Q. So, other than My My Star, Inc. showing as the vendor, do any of these documents show My My star, the trademark, on any of the services being offered or ordered?

A. It wouldn't be.

...

Q. Same deal. The agency represents the client, Toyota. And your agreement as vendor, My My Star, is with the agency, correct?

A. Correct.³¹

5. Wilson Allegation that Applicant has Conducted Millions of Dollars in Business Transactions Under Applicant's Mark

Applicant states that “[O]verall, Applicant has conducted millions of dollars in business transactions under the [Applicant's] Mark.” Citing Wilson 7/16/20 Decl. ¶ 7.³²

When cross-examined on his 7/16/20 Decl. ¶7, Wilson testified:

MS. KALLENBACH: He [Wilson] offered to provide the documents and we'd be happy to take a look at them. I'm just trying to get support of the factual support of the millions of dollars of business transactions.

MR. KHALIFEH: My objection is it misstates the records. Mr. Wilson never offered to provide the million dollar -- the records to evidence the million dollars worth of sales.

BY MS. KALLENBACH: Q. So, other than your statement, you have no other evidentiary factual evidence of the millions of dollars of business transactions conducted under the My My star word mark, correct?

A. Correct. I will just say that you can see by just the website and the samples provided, you can put together a loose IBF of the amount of money we made over the years. So, I'll leave it at that.³³

Finally, Wilson reluctantly admits that Applicant's Facebook page has only generated 5 likes and 5 follows, testifying that it's not promoted:

Q. [I]t's Facebook Community Page. It indicates a date of 7/18/2020, that it was a screen shot. (MST Exhibit 34 marked.)

BY MS. KALLENBACH: Q. Mr. Wilson, are you familiar this Facebook page?

³¹ 14 TTABVUE 162-197, 67, 69-70, 74; Wilson Tr. MST Ex. 24 [Wilson 7/16/20 Decl.] at Decl. Ex. A; and, Wilson Tr. p. 64, ll. 17-24, p. 66, l. 25 - p. 67, l. 21; and, p. 71, ll. 2-5.

³² 16 TTABVUE 7: App. Br. at p. 6, first para., last sentence.

³³ 14 TTABVUE 78-79: Wilson Tr. p. 75, l. 14.

MR. KHALIFEH: The witness testified on direct that either of these exhibits that Counsel is seeking to now admit into evidence. Once again, the appropriate time to admit such pieces of evidence has now passed. Please proceed accordingly.

BY MS. KALLENBACH: Q. Mr. Wilson, are you familiar with this document? Have you seen this on Facebook before?

A. This isn't submitted evidence.

Q. Are you familiar with this document, Mr. Wilson?

A. I'm not answering.

Q. So, this is not My My Star, Inc.? This is not your company on Facebook, correct?

MR. KHALIFEH: Object to the form of the question, please.

BY MS. KALLENBACH: Q. If somebody would pull up on Facebook My My Star, Inc., is this what they would find?

MR. KHALIFEH: Objection. Assumes facts not admitted into evidence.

BY MS. KALLENBACH: Q. Mr. Wilson, are you on Facebook with My My Star?

MR. KHALIFEH: Objection. Mr. Wilson has never testified to being on Facebook.

MS. KALLENBACH: He's testified as being on social media.

A. We do digital production, so people hire us to do things for social media.

BY MS. KALLENBACH: Q. So, what I'm presenting to you is not My My Star, Inc.? This could be somebody else. I'm just asking if this is you or not.

MR. KHALIFEH: Objection once again under Rule 611.

BY MS. KALLENBACH: Q. You can answer, Mr. Wilson or deny that it's yours. I mean, I don't care.

A. My attorney has answered.

Q. So, this is not your work? This is not the same My My Star?

A. It is My My Star's work, correct.

Q. It is?

A. Yes, it is, it is our work.

Q. Okay. Great. And it indicates five 5 likes and five follows, so not so much, correct?

A. It's not a promoted -- it's not promoted. It's only for like -- so, my LinkedIn is the main, which has like 1,000 followers or something like that.³⁴

IV. LAW AND ARGUMENT

A. Wilson Inconsistent Statements

Applicant bases the facts set forth in its brief entirely on Wilson's declaration and cross-examination testimonies. As set forth, *supra*, Opposer has identified significant inconsistencies within Wilson's 7/16/20 Declaration, 6/26/19 Declaration, and his 8/11/20 cross-examination transcript.

The way in which prior inconsistent statements are more useable than prior consistent statements is that they are *always* admissible, so long as they're inconsistent. The Ninth Circuit has described it as a "basic rule of evidence" that "prior inconsistent statements may be used to impeach a witness." *United States v. Monroe*, 943 F.2d 1007, 1012 (9th Cir. 1991) (quoting *United States v. McLaughlin*, 663 F.2d 949, 952 (9th Cir. 1981) and *United States v. Hale*, 422 U.S. 171, 176 (1975)). *See also United States v. Bao*, 189 F.3d 860, 865-66 (9th Cir. 1999) (same quote).

"Even the inability to answer a question may be inconsistent with a previous affirmative response to the same question." *Weinstein's Federal Evidence* § 613.04[1]. *See, e.g., United States v. Tran*, 568 F.3d 1156, 1162-63 (9th Cir. 2009) (not abuse of discretion to find "vague," "reluctant," and "evasive" in-court testimony inconsistent with prior statement).

Quite frankly, Wilson is unable to get his story straight. In fact, his evolving and internally inconsistent story lines read more as after-the-fact rationalizations, than as credible evidence. These inconsistencies, combined with "the general lack of documentary support" or other objective evidence, without corroboration of any sort demonstrates that Applicant has not provided credible evidence to establish a date of first use of its Mark or date of first use of its Mark in commerce.

³⁴ 14 TTABVUE 112-115, 272-273; Wilson Tr. MST Ex. 34, Wilson Tr. p. 109, l. 24 – p. 112, l. 10.

B. Applicant's Priority Date is Its Date of Filing-March 15, 2018

Contrary to Applicant's arguments at 16 TTABUVE 10-16, Applicant has not established a date of first use of its Mark or date of first use in commerce of its Mark, because of the lack of credible testimony or proof.

Examples of Wilson's inconsistent statements as detailed, *supra*, are numerous. The consequence of Wilson's inconsistent statements is that his entire testimony may not be credible. "[A] prior inconsistent statement is admissible to raise the suggestion that if a witness makes inconsistent statements, then *his entire testimony may not be credible*; such an inference does not depend on whether either the prior statement or the subsequent in-court statement is true." *United States v. Bao*, 189 F.3d 860, 866 (9th Cir. 1999) (emphasis added).

The oral testimony even of a single witness may be adequate to establish priority, **but only if it is sufficiently probative**. *Executive Coach Builders, Inc. v. SPV Coach Company, Inc.*, 123 USPQ2d 1175 (TTAB 2017) [precedential] (emphasis added). See, *Powermatics, Inc. v. Glebe Roofing Prods. Co.*, 341 F.2d 127, 144 USPQ 430, 432 (CCPA 1965); *Kohler Co. v. Baldwin*, 82 USPQ2d at 1108 (TTAB 2006)[precedential]. Such **testimony "should not be characterized by contradictions, inconsistencies, and indefiniteness but should carry with it conviction of its accuracy and applicability."** *B.R. Baker Co. v. Lebow Bros.*, 150 F.2d 580, 66 USPQ 232, 236 (CCPA 1945) (emphasis added); *Nationstar Mortg. LLC v. Ahmad*, 112 USPQ2d 1361, 1372 (TTAB 2014)[precedential]. Oral testimony is strengthened by corroborative documentary evidence. *Elder Mfg. Co. v. Int'l Shoe Co.*, 194 F.2d 114, 92 USPQ 330, 333 (CCPA 1952).

Due to Wilson's inconsistent testimony, unsupported by documentary evidence, Applicant did not establish any of the facts in its brief that support of its arguments.

Applicant did not establish priority before Opposer because, as the TTAB found in *Executive Coach*: "[T]he testimony is indefinite and internally inconsistent; unsupported by documentary evidence; and contradicted by the documentary evidence that is of record. *Executive Coach v. SPV Coach*, 123 USPQ2d 1175, 1197 (TTAB 2017) [precedential].

Turning to Applicant's priority date, because Applicant has not established by credible evidence either the date of its first use of its Mark or date of its first use of its Mark in commerce, its priority date is March 15, 2018, the filing date of its application. *Cent. Garden & Pet Co. v. Doskocil Mfg. Co.*, 108 USPQ2d 1134, 1140 (TTAB 2013) [precedential] ("for when an application or registration is of record, the party may rely on the filing date of the application for registration, i.e., its constructive use date"); *Syngenta Crop Prot. Inc. v. BioChek LLC*, 90 USPQ2d 1112, 1119 (TTAB 2009) ("applicant may rely without further proof upon the filing date of its application as a 'constructive use' date for purposes of priority").

**C. Dates of Use or Specimens Filed in Application Are Not Evidence,
Unless Established by Competent Evidence**

Applicant alleges in its Brief that: "Applicant filed U.S. Trademark Application Serial No. 87836135 for the [Applicant's] Mark on March 15, 2018, which properly alleges a first use date of November 1, 2000 and a first use in commerce date of January 1, 2006."³⁵

TBMP 704.03(a) *Subject of Proceeding*, provides in relevant part:

However, the fact that the subject application or registration file is automatically part of the record in a proceeding **does not mean that an allegation of a date of use or that the specimens filed therein are evidence on behalf of the applicant or registrant in the inter partes proceeding. The alleged date of use of the mark and the specimens in an application or registration file are not evidence in an inter partes proceeding**, on behalf of the applicant or registrant, unless the alleged date of use is **established by competent evidence and the specimens are identified and introduced in evidence as exhibits during the testimony period.** (emphasis added).

See *UMG Recordings, Inc. v. O'Rourke*, 92 USPQ2d 1042, 1047 (TTAB 2009) (dates of use not evidence); *Life Zone Inc. v. Middleman Group Inc.*, 87 USPQ2d 1953, 1960 (TTAB 2008)[precedential] (alleged date of use in application not evidence); *Baseball America, Inc. v. Powerplay Sports, Ltd.*, 71 USPQ2d 1844, 1848 n.10 (TTAB 2004) (dates of use and specimens not evidence); *Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 28 USPQ2d 1464, 1467 (TTAB 1993) (without proof of use, application filing date, not dates of use alleged in the application, is the earliest use date on which the applicant may rely), *recon. denied*, 36 USPQ2d 1328 (TTAB 1994).

³⁵ 16 TTABVUE 6: App. Br. at p. 5, last para.

D. Applicant Argues that Its Webpage Shows Use of Its Mark

At p. 10 , *supra*, Wilson testified that Applicant's website showed use of Its Mark, which in part reads:

A. Right there it says: My My Star is a Digital Production Studio. We Love This Stuff. We Are Hiring." And then it says: "Contact."

Q. It says you are hiring, but, yet, it doesn't say we are offering this service or this good, correct?

A. My My Star is a digital production studio. That's the first thing it says.

Q. It states what it is.

A. Correct.

A web page that merely provides information about the goods, but does not provide a means of ordering them, is viewed as promotional material, which is not acceptable to show trademark use on goods. *In re Genitope Corp.*, 78 USPQ2d 1819, 1822 (TTAB 2006). There must be a means of ordering the goods directly from the applicant's web page, such as a telephone number for placing orders or an online ordering process. *In re Quantum Foods, Inc.*, 94 USPQ2d 1375, 1380 (TTAB 2010)[precedential]; *In re Osterberg*, 83 USPQ2d 1220, 1224 (TTAB 2007)[precedential].

In re MediaShare Corp., 43 USPQ2d 1304, 1305 (TTAB 1997) (concluding that applicant's specimen was merely advertising material because it lacked the price of the goods and other information normally associated with ordering goods).

Here, Applicant's webpage indicates that "My My Star is a Digital Production Studio. We Love This Stuff. We Are Hiring." And then it says: "Contact." Nowhere does it offer any good or service. Instead, it literally is stating that My My Star is hiring to fill positions at its studio, like a "want ad."

In re Monograms Am., Inc., 51 USPQ2d 1317 (TTAB 1999) (letterhead specimen showing the mark MONOGRAMS AMERICA and the wording "A Nationwide Network of Embroidery Stores" held insufficient to support registration for consulting services for embroidery stores).

E. Applicant Argues That Domain Usage Shows Continuous Use of Mark

Applicant argues that its ownership and use of the domain www.mymystar.com since at least as early as 2005, further demonstrates Applicant's continuous use of the Applicant's Mark.³⁶

The mere registration of a domain name does not constitute a commercial use. *Panavision International, L.P. v. Toeppen*, 945 F. Supp. 1296, 1303 (C.D. Cal. 1996) ("Registration of a trade[mark] as a domain name, without more, is not a commercial use of the trademark.")

The term "domain name" means any alphanumeric designation which is registered with or assigned by any domain name registrar, domain name registry, or other domain name registration authority as part of an electronic address on the Internet. Internet. The term "Internet" has the meaning given that term in section. 15 U.S.C. § 1127.

A trademark identifies goods or services as being from a particular source. Use of a domain name only as part of a web address does not qualify as source-indicating trademark use. Registration of a domain name with a domain name registrar does not give any trademark rights.

When a mark appears in the computer browser area as part of the URL, Internet address, or domain name of the website that houses the web page, consumers generally do not recognize this as trademark use. Instead, this use merely identifies the Internet location of the website where business is conducted and goods or services are offered. *See, e.g., In re Roberts*, 87 USPQ2d 1474, 1479-80 (TTAB 2008)[precedential] (concluding that the mark IRESTMYCASE, which appeared as part of a website address, www.irestmymcase.com, on applicant's specimens, merely served as a contact address to reach the applicant and failed to function as a service mark for applicant's services).

Accordingly, Applicant's claim of domain name usage is not evidence of usage of its Mark.

³⁶ 16 TTABVUE 6: App. Br. p. 5, last para.

**F. Applicant Argues That Its Continuous Incorporation Under
“My My Star, Inc.” Shows Continuous Use of Its Mark**

Applicant argues that it has been continuously incorporated under the name “My My Star, Inc.” since 2010.”³⁷

An active incorporation with a state does not show continuous use of a trademark. Opposer could not locate any statute, rule or case law that equates an active incorporation of a company as proof of use or continuing use of a trademark.

In fact, the California Business & Professions code explicitly warns that “the filing of articles of incorporation pursuant to Section 200 Corp. of the Corporations Code shall not of itself authorize the use in this state of a corporate name in violation of the rights of another under the federal Trademark Act (15 U.S.C. Sec. 1051 et seq.).” Therefore, incorporation by the State of California is not a valid defense to trademark claims.

G. Applicant Alleges Use of Its Mark on Purchase Orders

Applicant alleges use of its Mark on the purchase orders appended to Wilson [7/16/20] Decl. Ex. A. However, Wilson admitted during his cross-examination that Applicant’s Mark was not shown on any of the purchase orders. *See*, p. 12, *supra*.

H. Applicant Alleges that it has Generated Millions of Dollars

Wilson declared Applicant has generated millions of dollars from the use of its Mark, yet provided only purchase orders from two clients of ad agency purchasers. Wilson admitted during his cross-examination that except for his testimony, there was no other evidentiary factual evidence of the millions of dollars of business transactions conducted under the My My star word mark. Wilson testified that by just looking at the website and the samples provided, a loose IBF could be made of the amount of money Applicant made over the years. *See*, p. 12, *supra*.

³⁷ 16 TTABVUE 6-7: App. Br. p. 5, at last para. continuing to top of p. 6.

Applicant has failed to establish its date of use of its Mark or its date of first use of its Mark by competent evidence. Applicant's facts cannot be established by credible testimony. Accordingly, Applicant's arguments as to any claim under Trademark Act Section 2(d) fail.

V. APPLICANT'S AFFIRMATIVE DEFENSES ARE DEEMED WAIVED

TBMP 311.02(b)(1), Affirmative Defenses, In General, provides in relevant part:
Affirmative defenses may be deemed waived if not pursued at trial or argued in briefs.

TBMP 801.01, Briefs on the Case, In General, provides in relevant part:

If a party fails to reference a pleaded claim or affirmative defense in its brief, the Board will deem the claim or affirmative defense to have been waived.

Applicant raised a number of Affirmative Defenses in its Answer, none of which was supported by evidence at trial or argued in Applicant's Brief. These affirmative defenses therefore are waived. *Miller v. Miller*, 105 USPQ2d 1615, 1616 n.3 (TTAB 2013) [precedent opinion] (affirmative defense of unclean hands deemed waived because applicant failed to argue and present evidence regarding the defense at trial); *Am. Flange & Mfg. Co., Inc. v. Rieke Corp.*, 80 USPQ2d 1397, 1400-01 (TTAB 2006) ("Applicant did not argue [certain] affirmative defenses in its brief, and we have not considered them in our determination of these proceedings."). *Alcatraz Media, Inc. v. Chesapeake Marine Tours, Inc.*, 107 USPQ2d 1750, 1753 (TTAB 2013) [precedent opinion] respondent's affirmative defense of failure to state a claim not argued in brief deemed waived), *aff'd*, 565 F. App'x 900 (Fed. Cir. 2014) (mem.); *Syndicat Des Proprietaires Viticulteurs De Chateaufneuf v. Pasquier DesVignes*, 107 USPQ2d 1930, 1931 n.6 (TTAB 2013) [precedent opinion] (affirmative defenses neither pursued at trial nor argued in brief deemed waived); *Research in Motion Ltd. v. Defining Presence Marketing Group Inc.*, 102 USPQ2d 1187, 1189-90 (TTAB 2012) [precedent opinion] (affirmative defenses not pursued at trial deemed waived); *Swiss Watch International Inc. v. Federation of the Swiss Watch Industry*, 101 USPQ2d 1731, 1734 n.4 (TTAB 2012) [precedent opinion] (affirmative defenses deemed waived where no mention of them in trial brief); and, *Barbara's Bakery Inc. v. Landesman*, 82 USPQ2d 1283, 1292 (TTAB 2007) [precedent opinion] (where applicant did not argue the affirmative defense of equitable estoppel in her brief, the affirmative defense was given no

consideration). *TiVo Brands LLC v. Tivoli, LLC*, 129 USPQ2d 1097, 1100-01 (TTAB 2018) [precedent opinion] (affirmative defenses waived because not pursued at trial or argued in brief); and, *Kemi Organics, LLC v. Gupta*, 126 USPQ2d 1601, 1602 n.5 (TTAB 2018) [precedent opinion] (affirmative defenses waived because not argued in ACR brief).

Based on the extensive, well-established precedent case law and TBMP Sections 311.02(b)(1) and 801.01, because Applicant failed to argue and present evidence of its affirmative defenses at trial and did not argue those defenses in its brief, Applicant's affirmative defenses are deemed waived. Accordingly, Opposer respectfully requests that the Board not consider Applicant's affirmative defenses in the determination of this proceeding.

VI. CONCLUSION

Applicant has not established dates of first use or use in commerce of its Mark by competent evidence. Consequently, Applicant's priority date is the date it filed Applicant's Mark application with the USPTO, March 15, 2018. Contrary to Applicant's assertions, Opposer has proved in its Principal Brief that Applicant's Mark is confusingly similar to Opposer's Marks and has established fame to prevail on a claim of dilution by blurring or tarnishment.

Opposer requests that the Board sustain its Opposition.

Dated: December 14, 2020

Respectfully submitted by:

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VII. CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Opposer MobileSoft Technology, Inc.'s Reply Trial Brief has been served on counsel for Applicant My My Star, Inc., Omni Legal Group, Omid E. Khalifeh, by forwarding said copy on December 14, 2020 via email at info@omnilegalgroup.com and omid@omnilegalgroup.com.

Dated: December 14, 2020

/s/ Michelle M. Kallenbach
Michelle M. Kallenbach