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

Proceeding	92071349
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of trademark Registration No. 5,753,336, registered May 14, 2019

NT-MDT, LLC, Petitioner, v. **IRINA KOZODAEVA**, Registrant.	Cancellation No. 92071349 **PETITIONER'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT** **PART I OF II**

Under Rule 56, Petitioner, NT-MDT, LLC ("NT-MDT"), in support of Part I its Motion for Summary Judgment, submits its Reply to Part II of Registrant, Irina Kozodaeva's ("Kozodaeva") Response.[1]

I. Introduction

Kozodaeva spent the first 12 months of this cancellation proceeding arguing two positions: (1) Kozodaeva's U.S. Registration 5,753,336 ("the '336 Registration") was valid because Kozdaeva had personally used the mark for the first time in interstate commerce by shipping a nanotechnology microscope to the University of Texas at Dallas in January 2019. Kozodaeva swore under oath to this fact in her statement of use she filed on March 10, 2019; and (2) NT-MDT never received an assignment of the U.S. common law rights to the Mark shown in the '336 Registration that originated in

[1] Instead of following the format the parties agreed to under the Accelerated Case Resolution stipulation, Part I of Kozodaeva's Response Brief responds to Part II of NT-MDT LLC's Motion for Summary Judgment and vice-versa. This brief will address Part II of Kozodaeva's Response first.

NT-MDT CJSC ("CJSC") because CJSC never assigned away its rights in the Mark in 2003.

Then, when the University's attorney exposed Kozodaeva to have lied because she never shipped or sold anything to the University, or used the mark in U.S. interstate commerce, Kozodaeva decided to change her story. She now argues that at CJSC's March 7, 2019, Russian bankruptcy asset sale, her sister-in-law Anastasia Yakovleva, purchased the U.S. common law rights to the Mark in the '336 Registration (even though the asset list did not include the rights or the Mark in the '336 Registration). And even though Yakovleva did not purchase any U.S. common law rights, Kozodaeva argues that Yakovleva sold her the U.S. common law rights to the Mark on March 24, 2019 (two weeks **after** she filed her statement of use). Kozodaeva now claims that because she purchased the U.S. common law rights in the Mark, that she can defeat NT-MDT's Petition by claiming she should be able to amend the date of first use in the '336 Registration to reflect the rights she allegedly purchased from her sister-in-law that purportedly date back to 1999.

The entire argument is not only preposterous, non-sensical, and a desperate attempt to save her case after she was caught in a scheme to commit fraud on the U.S. Patent and Trademark Office, the argument fails because it is wholly unsupported by any factual, legal, or procedural basis for the reasons discussed below. Kozodaeva's entire defense now depends on what she received from her sister-in-law on March 24, 2019. And simply stated, she received nothing of relevance to these proceedings. And because of this, the Board must cancel the '336 Registration. If Kozodaeva wants to obtain rights for the Mark in the '336 Registration, her only remedy is to re-apply.

II. Paragraph 3 of the stipulation in the parties' Accelerated Case Resolution precludes Kozodaeva from filing any document other than her response to NT-MDT's Motion for Summary Judgment. As part of her response, Kozodaeva has moved to amend the disputed registration under TMBP § 514. The Board must strike or deny Kozodaeva's motion.

The parties entered into a Joint Stipulation dated August 25, 2020, to proceed under an Accelerated Case Resolution and agreed to certain facts and procedures for

consolidating summary judgment briefing (hereinafter the "ACR"). Kozodaeva, expressly agreed that her:

> "responsive ACR brief"… "cannot raise any new arguments or include any additional supporting materials pertaining to any claim in the second part of NT-MDT's original brief… or any defense in the second party of Kozodaeva's brief,… nor may the Board consider any."[2]

Despite this clear limitation, Kozodaeva's "Response" dated October 13, 2020, asserts, without any advance leave from the Board, or any amendment to the ACR, that as the Registrant she is,

> "mov[ing] the Board, pursuant to TBMP § 514, to either amend or correct, or grant Registrant permission to amend or correct, the date of first use of the Mark in the challenged registration to reflect NT-MDT's date of first use on which Registrant can reply (*viz*., Jan. 31, 1999)."[3]

Since NT-MDT's Second Motion for Summary Judgment pinpoints fatal legal flaws to Kozodaeva's Registration, she apparently had no legitimate response within the bounds of the ACR. Instead, Kozodaeva violated the procedural guidelines of the ACR and manufactured a new allegation that all of her rights flow through CJSC and that she should be able to rely on CJSC's first use date of 1999. But without the Board allowing her to amend the date of first use of the '336 Registration, her argument fails.

Even if Kozodaeva's new allegation was accurate, which strains credulity as set forth below, Kozodaeva's only option is to file a new trademark application (subject to the Petitioner's current application). The Board must cancel Kozodaeva's flawed Registration as a matter of law.

Kozodaeva provides no case law to support her improper, unfounded Cross Motion to Amend under TBMP §514. For an amendment under TBMP §514, "the applicant must introduce evidence during its testimony period to use of its mark."[4]

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[2] See ACR ¶ 3. A copy of the ACR is attached herein as Exhibit A.
[3] Kozodaeva's Response to the Motion for Summary Judgment, at 3.
[4] TBMP §514, Motion to Amend Application or Registration, Note 3, *citing*, *Drive Trademark Holdings LP v. Inofin, 83 USPQ2d 1433, 1435 (TTAB 2007)* ("proposed amendment not approved").

Here, Kozodaeva has waited until she filed her Response at the eleventh hour to even attempt to raise her new argument that the date of first use of the Mark in her Registration should be amended. Not only is Kozodaeva's requested amendment dependent on CJSC, which is a Russian non-party that hasn't used the mark in over 12 years, the mark that she allegedly received in a trademark purchase agreement after she filed the statement of use is not even the same mark in the '336 Registration.

Furthermore, through the parties' ACR Stipulation, there will be no further adjudication in this matter, and this final summary briefing ends this case. Hence, Kozodaeva's Cross Motion to Amend is tantamount to attempting to amend during trial.[5] Kozodaeva's amendment request is highly prejudicial to NT-MDT, and warrants denial of Kozodaeva's belated §514 application.[6]

Indeed, there was no pre-trial disclosure by Kozodaeva's of her alleged need to adopt the date of first use of a Russian mark issued last century, a mark whose purported common law rights, as discussed below, were not even conveyed in the alleged bankruptcy fire sale, and have otherwise been abandoned.

In sum, regardless whether Kozodaeva's Cross Motion to Amend has any merit, Kozodaeva "could have and should have moved to amend . . . earl[ier],"[7] and certainly before stipulating to the groundrules in the ACR. To grant Kozodaeva's "very untimely motion to amend would prejudice [NT-MDT] by needlessly prolonging this proceeding."[8]

III. Even if Kozodaeva could amend the date of first use for the '336 Registration to 1999, the Board must still cancel the Registration.

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[5] *Hurley International, LLC v. Paul*, 91158304, at p. 5 (TTAB 1-23-2007) ("opposer's motion for leave to file amended notice of opposition was filed prior to the start of trial").

[6] *Id.*, *citing*, Fed.R.Civ.P. 15(a); TBMP Section 507.02 (2d ed. rev. 2004) (proposed amendment subject to denial if it "violate[s] settled law or be prejudicial to the rights of the adverse party").

[7] *Capital Speakers Incorporated v. Capital Speakers Club of Washington, D.C., Inc.*, Cancellation No. 19,861, at *3 (TTAB 5-28-1996).

[8] *Id.*, at *4.

As NT-MDT argued in its Motion for Summary Judgment, because Kozodaeva admitted to fraudulently alleging a date of first use based on sales and shipments that she never made to the University of Texas at Dallas, Kozodaeva's '336 Registration is defective on its face and the Board must void it ab initio. But even assuming Kozodaeva could amend the '336 Registration to claim an earlier first use date of 1999, the Board must still cancel the Registration for several reasons.

A. In Kozodaeva's Response to NT-MDT's Motion for Summary Judgment, Kozodaeva did not prove by a preponderance of the evidence that she somehow received any rights from NT-MDT CJSC's in the NT-MDT Mark.

In NT-MDT's Motion for Summary Judgment (Part II), NT-MDT offered sworn testimony from three owners of NT-MDT CJSC, CJSC NTI, NT-MDT Service and Logistics, and NT-MDT, LLC who unequivocally stated that NT-MDT CJSC orally transferred the U.S. common law rights in the NT-MDT Mark from NT-MDT CJSC to CJSC NTI in 2003, orally transferred the U.S. common law rights from CJSC NTI to NT-MDT Service & Logistics in 2005, and transferred the U.S. common law rights in writing from NT-MDT Service & Logistics to NT-MDT LLC in 2015.[9]

In her response, Kozodaeva offered no direct evidence to disprove or contradict NT-MDT's sworn testimony that the transfers occurred. The only evidence Kozodaeva offered was circumstantial evidence or declarations from Alexander Bykov who had no first-hand knowledge regarding the details and acts surrounding the assignments. At best, Kozodaeva's cited declarations are self-serving and unsupported by a disgruntled family member who has nothing more than his word against the word of the founding owners of the companies and the manangers who had intimate and personal knowledge of the day-to-day operations of the companies.

Even more so, Kozodaeva's declaration testimony from Alexander Bykov disputing the written assignment agreement between NT-MDT Service & Logistics to

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[9] *See* NT-MDT's Motion for Summary Judgment (Part II), Affidavits of Victor Bykov, ¶¶ 1-38; Andrey Bykov, ¶¶ 1-23; Vladimir Kotov, ¶¶ 1-15.

the Petitioner, NT-MDT LLC is wholly baseless and unsupported by the mountain of evidence establishing that from at least since 2015:

- NT-MDT LLC has been the sole entity that has manufactured, shipped, and invoiced goods bearing the NT-MDT trademark to NT-MDT America;[10]
- NT-MDT-LLC has been the sole entity that has received payment from NT-MDT America for the goods it shipped to NT-MDT America in the United States;[11]
- NT-MDT America has been the sole entity that has distributed and sold nanotechnology microscopes bearing the NT-MDT logo that were received from NT-MDT LLC;[12] and
- NT-MDT CJSC – the company that Kozodaeva relies upon as its life raft to save it has never had a license with NT-MDT America.[13]

Nothing in Kozodaeva's response brief refutes these facts.

B. Kozodaeva produced no evidence that CJSC had either used the disputed mark in interstate commerce in the U.S., nor did she produce any evidence of a license between CJSC and the only two entities that have used the mark in the U.S. since 2015 - NT-MDT LLC or NT-MDT America. And without use, CJSC had abandoned its rights.

Kozodaeva's entire defense to this petition is that CJSC never assigned its rights and therefore, held on to the rights since 2003. But Kozodaeva has produced no evidence to support this assertion. Kozodaeva has produced no evidence of:

- a license between CJSC and NT-MDT America. Without one, Kozodaeva cannot show that any of NT-MDT America's distribution of products between 2008 and 2020 in the U.S. inures to CJSC's benefit;

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[10] *See id*, Exhibit I; *See* NT-MDT's Reply (Part II) Declaration of Oleg Butyaev, ¶¶ 15-24, Exhibit C.
[11] See id.
[12] See id.
[13] *See* NT-MDT's Reply (Part II) Declaration of Oleg Butyaev, ¶ 21.

- a license between CJSC and NT-MDT LLC. Without one, Kozodaeva cannot show that the goods NT-MDT LLC shipped to NT-MDT America, and the payments it received from NT-MDT America between 2015 and 2020 inured to CJSC's benefit; or
- any license or royalty payments from either NT-MDT America or NT-MDT LLC to CJSC at any time after 2008.

Kozodaeva argues that CJSC never assigned its rights in the disputed mark to any entity and alleges that without a written assignment between NTI CJSC and NT-MDT Service & Logistics in 2005, CJSC still owns the U.S. rights to the mark. But somehow Kozodaeva believes the same standard should not apply when she cannot produce evidence of a written license, an oral license, or royalty payments between CJSC and NT-MDT LLC and NT-MDT America who have used the Mark in U.S. interstate commerce for the past 12 years. Kozodaeva's position is utterly ridiculous.

In fact, if Kozodaeva really believes that CJSC never assigned the rights to the Mark, and that CJSC owned the U.S. common law rights to the Mark when she allegedly obtained the rights in March 2019, then Kozodaeva's acts are inconsistent with someone who owns the Mark. It is curious that Kozodaeva admits to owning a company that directly competes with NT-MDT America and the Petitioner in the U.S. Kozodaeva admits to currently selling nanotechnology microscope equipment in the U.S.[14] By doing so, Kozodaeva admits to trying to confuse the consuming public.

Additionally, it is only logical to believe that Kozodaeva would have to view NT-MDT America and NT-MDT LLC as rogue competitors trying to sell millions of dollars of nanotechnology microsope equipment and accessories under the disputed NT-MDT Mark. After all, if Kozodaeva allegedly acquired the U.S. common law rights in March 2019, it defies logic that Kozodaeva has never once tried to police its Mark by demanding NT-MDT LLC or NT-MDT America stop infringing the disputed

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[14] "To date, Registrant continues to offer for sale Marked products in the United States, listing such products for sale at its website https://ntmdt.nl/home/products/." Kozodaeva's Response Brief, at 31.

Mark. In fact, shortly after filing this petition, the Petitioner NT-MDT LLC and NT-MDT America sued Kozodaeva and her husband for trademark infringement over the disputed Mark in the U.S. District Court for the District of Arizona.[15] Yet the Kozodaevas never even filed a counterclaim alleging trademark infringement against them. And of course, the reason why they have not is because they know they have no evidence to support their position, and will lose.

C. The 2015 NT-MDT Co. Distributor Agreement has no bearing on these proceedings.

On page 9 of its Response, Kozodaeva argues that the 2015 NT-MDT Co. Distributor Agreement with TechnoNT provides proof that NT-MDT CJSC used the disputed Mark in the U.S. Again, Kozodaeva's argument is baseless.

First, NT-MDT Co. is not the same company as NT-MDT CJSC.[16] Kozodaeva relies upon Alexander Bykov's self-serving declaration as evidence that the companies are the same. But CJSC was an entirely different company. And on the face of the rogue agreement, there is nothing defining NT-MDT Co. as being the same company as CJSC. Thus, because CJSC was not a party to the agreement, it is irrelevant.

Even more importantly, the Distributor Agreement explicitly limited the territory of use to be the Benelux countries, Germany, and France – not the U.S. So if TechnoNT did use the mark in the U.S., it was outside the scope of the agreement.[17] Therefore, the agreement cannot be used to demonstrate U.S. common law use that would have inured to any company's benefit.

But even assuming CJSC was a party to the distributor agreement, if TechnoNT used the mark in the U.S., the use inured to CJSC's benefit – not TechnoNT. And for

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[15] Case No. 19-CV-03691-PHX-JJT.
[16] *See* NT-MDT's Motion for Summary Judgment (Part II), Affidavits of Victor Bykov, ¶¶ 1-38; Andrey Bykov, ¶¶ 1-23; Vladimir Kotov, ¶¶ 1-15.
[17] At best, Exhibit 11 of Kozodaeva's declaration shows the only product TechnoNT shipped to the U.S., and it was in 2015. A single shipment from five years ago is token use at best, and is certainly not sufficient to overcome the mountain of evidence of NT-MDT America's millions of dollars of products it distributed in the U.S. on behalf of the Petitioner NT-MDT.

the reasons further discussed below, CJSC never conveyed any common law U.S. rights to any third party in its bankruptcy.

D. Even if it were true that CJSC retained ownership of the NT-MDT mark, CJSC never sold any common law rights to Yakovleva in the March 7, 2019, bankruptcy proceeding.

Without any support, Kozodaeva argues on pages 31-34 of her Response that on March 7, 2019, her sister-in-law, Anastasia Yakovleva, purchased the U.S. common law rights in the NT-MDT trademark. The only document that addresses what Kozodaeva claims that CJSC sold to Yakovleva in the bankruptcy proceeding was identified in a document entitled, "Agreement of Purchase"[18] And the documents clearly show that Yakovleva never purchased any U.S. common law rights to the Mark.

Paragraph 1.1 states that "the seller shall transfer into the ownership of the buyer the assets as in paragraph 1.3 herein and the buyer shall assume ownership over the said assets."[19] Paragraph 1.2 also references paragraph 1.3. It states, "the assets in paragraph 1.3 herein which are the subject of purchase and sale under this agreement (hereinafter referred to as the assets)…"[20] The Agreement clearly states that **the only assets that will be transferred are referenced in paragraph 1.3** and nowhere else.[21]

And regarding paragraph 1.3, the Agreement is explicit. It states, "the assets subject to sale hereunder shall be sold as lot one and they shall include:

> **a property of the closed joint stock company "Nanotechnology – MTD" that is intended for business as a single lot one consisting of as follows: intangible assets, fixed assets, financial investment of the debtor. All property assets are listed in Annex one hereto**."[22]

[18] A copy of the Agreement of Purchase is attached herein as Exhibit B.
[19] *Id* (KOZ-9).
[20] *Id*.
[21] See id.
[22] *Id*. (emphasis theirs).

To be clear, Yakovleva bolded and underlined the portion of Paragraph 1.3 to emphasize what was being transferred and sold. Paragraph 1.3 expressly states that the *only property assets that are being sold are contained in **Annex 1***.[23]

1) **The Russian trademark registration that Yakovleva purchased in the bankruptcy proceeding identified in the Agreement is not the same mark identified in the '336 Registration.**

In the Agreement, Annex 1 begins on page KOZ-12. Annex 1 includes a list of 113 pieces of intellectual property that include 106 Russian patents, seven Russian trademark registrations, 5 fixed asset items, and 1 item labeled as a financial investment.[24] The only relevant asset in this Annex is item number 113. Item 113 references is a Russian trademark registration identified as Registration No. 188978 ("'978 Registration") that issued on October 21, 1999, for the following mark:[25]

Under U.S. law, Russian registered trademarks confer no rights within the U.S and the rights afforded any Russian-issued trademark registration in the asset list are limited solely to the Russian Federation.[26] Therefore, the only asset that CJSC sold to Yakovleva that is relevant to this proceeding was a Russian trademark registration certificate that conveys no legal rights whatsoever in the U.S. to the trademark identified in the certificate.

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[23] *See also*, Exhibit A - ACR Stipulated Facts, Part 2, ¶ 8.

[24] *See* Exhibit B, KOZ-12.

[25] A copy of the '978 registration certificate is attached herein as Exhibit C.

[26] *See Person's Co. v. Christman*, 900 F.2d 1565, 1568-69 (Fed. Cir. 1990). *See also*, Exhibit A – ACR Stipulated Facts, Part II ¶ 9.

2) **Paragraph 1.5 of the Agreement conveyed no U.S. common law rights whatsoever to the '978 Registration.**

Kozodaeva argues that somehow paragraph 1.5 of the Agreement of Purchase conveys rights under US common law from CJSC to Yakoveleva. This is entirely false. Paragraph 1.5 expressly states that the acquisition of any,

> "[p]roperty of NT-MDT gives him the right to exclusively use the… Trademarks of NT-MDT for the implementation of entrepreneurial activities, including the development of equipment and control software and use and register the trademark NT MDT outside the Russian Federation – in the United States of America (use since 1999 close parentheses,…"[27]

But Kozodaeva cites no authority whereby an agreement that conveys a Russian trademark registration provides its owner common law rights in the United States. Additionally, Kozodaeva cites no authority whereby a Russian bankruptcy trustee can supersede U.S. law and convey U.S. rights to the owner of a Russian registration.

Kozodaeva also relies upon a post-Agreement declaration/statement from the bankruptcy trustee that he meant to include additional common law rights.[28] Again, the Trustee has no authority to convey that which he had no authority to convey. More importantly, Paragraph 1.3 of the Agreement clearly limits the property CJSC was conveying to what was in Annex 1 and nothing more. It is clear that any statement in Paragraph 1.5 is subject to the property that is identified and conveyed in the asset list of Annex 1 under Paragraph 1.3. And the list in Annex 1 includes no reference to any U.S. registrations or common law rights. Therefore, the Agreement conveyed no U.S. common law rights in the '978 Registration, or any other trademark to Yakoveleva.

E. Because the '978 Russian trademark is materially different from '336 Registration, CJSC never conveyed a mark that is relevant to this proceeding.

Perhaps most important to this proceeding is the fact that the trademark identified in the '978 Russian trademark registration is materially different from the '336 Registration that is the subject of this proceeding. An amendment to a registration

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[27] Exhibit B, KOZ-9.

[28] Kozodaeva's Response at 32; Footnote 106.

cannot make a change that materially alters the character or commercial impression of the mark.[29] This "material alteration" rule is the test for changes to a mark at all stages during the application process and after the mark has registered.[30]

The general rule followed by the U.S.P.T.O. is that an amendment to a registered mark is not permitted unless the amended version creates the same commercial impression as the original. The Federal Circuit has said that: "The modified mark must contain what is the essence of the original mark, and the new form must create the impression of being essentially the same mark."[31] Material or substantial changes of the registered mark itself are not allowed, for this would confront competitors and interested parties with a registered mark that they never had an opportunity to oppose. As the predecessor court to the Federal Circuit observed: "Amendment of a registration is allowed under the Lanham Act *but not to extend the scope of protected rights or to change the nature of the mark*."[32]

The '978 Russian trademark registration includes only a logo. Kozodaeva's registration that is disputed includes both the logo and the words NT-MDT. A comparison is shown below:

'978 Russian Registration (Exhibit C)	'336 U.S. Registration
	NT-MDT

[29] 15 U.S.C. § 1057(e).
[30] TMEP § 807.14.
[31] *In re Hacot-Colombier*, 105 F.3d 616, 620, 41 U.S.P.Q.2d 1523 (Fed. Cir. 1997), quoting *Visa International Service Association v. Life-Code Systems, Inc.*, 220 U.S.P.Q. 740, 743–44, 1983 WL 54211 (T.T.A.B. 1983).
[32] *In re Holland American Wafer Co*., 737 F.2d 1015, 1019, 222 U.S.P.Q. 273 (Fed. Cir. 1984) (emphasis ours).

As a general rule, the addition of any element that would require a further search will constitute a material alteration.[33] The addition of the words "NT-MDT", even to a mark with a common logo, is a material alteration of the mark. And certainly, adding the words "NT-MDT" would require a search to determine whether any other marks that are confusingly similar with those words are pending or registered with the PTO. Therefore, even if CJSC sold Yakovleva the '978 Russian registration, and somehow it included US common law rights, ***the sale did not include the mark in the registration that is currently at issue before the Board***.

F. Even if it were true that Yakoveleva somehow purchased U.S. common law rights from CJSC under paragraph 1.5 of the Agreement of Purchase, she did not sell those rights to Kozodaeva in the Trademark Purchase Agreement dated March 24, 2019.

As stated above, Kozodaeva argues that she wants to tack on CJSC's first use date of 1999 to the '336 Registration based on her belief that she purchased the U.S. common law rights to the Mark in the '336 Registraton from Yakovleva on March 24, 2019. This is unequivocally false as well.

The Trademark Purchase Agreement ("TPA")[34] between Yakovleva and Kozodaeva defines the scope of the Agreement in Section 1. Section 1 of the TPA titled "SCOPE" states in Paragraph 1.1, "The Assignor having the exclusive right to the Trademark **188978 (hereinafter referred to as the Trademark)** shall assign and the Assignee shall assume the exclusive right to the Trademark with respect to any and all goods and services as in the certificates."[35] The parties included the underlined and bolded portion to expressly define the term "the Trademark" to mean the Russian trademark registration identified as number 188978 throughout the TPA.[36] This means that the entire extent of whatever is included in the TPA when it comes to rights refers only to the rights provided under Russian law for the '978 Russian trademark

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[33] *In re Pierce Foods Corp*., 230 USPQ 307, 308-09 (TTAB 1986).
[34] A copy of the TPA is attached herein as Exhibit D (KOZ 88-90).
[35] Exhibit D, KOZ-88 (emphasis Kozodaeva's).
[36] *Id*.

registration. And it follows that the term "the Trademark" ***does not, nor can it, include any U.S. federal, state, or common law rights in any trademark***.

Kozodaeva argues that she can rely upon Paragraph 1.3[37] to demonstrate that the TPA included exclusive rights to "the assignee to use and register the trademark outside the Russian federation – in the United States of America (first use since 1999)…" Her argument is nonsensical. Again, the only trademark that Kozodaeva purchased from Yakovleva was "the Trademark", which is defined as the '978 Russian trademark registration. And as Kozodaeva has already acknowledged in Paragraph 9 of the Stipulated Facts Part II of the ACR, Russian trademarks confer no rights within the U.S., and are limited solely to rights in the Russian Federation.

Kozodaeva also admitted that the disputed Mark in the '336 Registration and the '978 Russian trademark registration are not identical trademarks.[38] Furthermore, Kozodaeva admitted that the TPA did not reference or include any assignment in the mark in the '336 Registration that is currently before the board.[39] Therefore, even if Kozodaeva's assumption is correct that Yakovleva did not assign the '978 Russian trademark registration in gross, Yakovleva most certainly did not assign, transfer, or even license any rights (U.S. common law or otherwise) to Kozodaeva in a mark that is materially equivalent to the mark in the '336 Registration. In essence, Kozodaeva has no rights in any mark traceable back to CJSC that she could somehow claim a first use date of 1999 and amend the '336 Registration to tack the 1999 date to the Registration.

IV. Kozdaeva cannot amend her statement of use in the '336 Registration and claim a first use date from an entity she had acquired no rights from as of the date she filed her statement of use.

Kozodaeva argues that she should be able to rely on CJSC's alleged U.S. common law rights and amend the date of use in her Statement of Use to 1999. But when Kozodaeva filed her statement of use on March 10, 2019, she could not claim rights that possibly inured from CJSC until at least March 24, 2019. Therefore, Kozdaeva cannot amend her statement of use

[37] Kozodaeva's Response at 32; Footnote 106

[38] Exhibit A – ACR Stipulated Facts, Part II ¶ 15.

[39] *Id* ¶ 16.

to claim a 1999 date of first use from an entity that, at the time, she had yet to acquire anything from. Simply stated, any first use from a third party can only inure to the benefit of an applicant if the applicant owned rights from the third party when Kozodaeva filed her statement of use – not long after the statement of use was filed.[40]

V. Conclusion

Based on the arguments and facts NT-MDT has presented above, the Board must cancel the '336 Registration for any one of the following reasons:

- Kozodaeva filed a fraudulent statement of use indicating that she had used the Mark in the '336 Registration in interstate commerce as of January 10, 2019 even though she had not only never used the Mark as of January 10 – she had not even used the mark prior to the May 14, 2019 Reg. date;

- Based on the stipulated procedures in the ACR, Kozodaeva cannot use this proceeding to amend the first use date in her statement of use, nor can the Board consider any first use date other than the date in Kozodaeva's statement of use;

- CJSC did not sell any U.S. common law rights to the Mark in the '336 Registration to Yakovleva on March 7, 2019. At best, Yakovleva purchased Russian trademark registration number 188978, which provided no U.S. rights to Yakovleva;

- The '978 Russian Registration is materially different than the Mark in the '336 Registration, and therefore, has no relevance to these proceedings;

- Under Paragraph 1.3 of the TPA between Yakvoleva and Kozodaeva, at best, Kozodaeva purchased the '978 Russian Registration, which as stated above, provided no U.S. federal or common law rights to Kozodaeva of any mark, let alone the Mark in the '336 Registration; and

- Having received no U.S. common law rights in the Mark shown in the '336 Registration, Kozodaeva has no legal basis to amend the materially different Mark or the date of first use to 1999 in the '336 Registration.

[40] 15 U.S.C. §1055. NT-MDT also incorporates Section II of it Motion for Summary Judgment regarding ownership and filing of the statement of use.

Without any procedural, factual, or legal basis to defend the ‘336 Registration in this matter, Kozodaeva’s only possible remedy is to file a new application for the mark and claim a date of first use subsequent to the registration date of the ‘336 Registration. Therefore, NT-MDT respectfully requests the Board to cancel the ‘336 Registration.

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

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NT-MDT, LLC, Petitioner, v. **IRINA KOZODAEVA**, Registrant.	Cancellation No. 92071349 **PETITIONER'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT** **PART II OF II**

Under Rule 56, Petitioner, NT-MDT, LLC ("NT-MDT, LLC"), in support of Part II its Motion for Summary Judgment, submits its Reply to Part I[41] of Kozodaeva's Response.[42]

I. U.S. trademark rights are derived from use in interstate commerce. Despite Kozodaeva's litany of hearsay statements and circumstantial evidence, she never disputed NT-MDT, LLC's principal argument that NT-MDT CJSC had abandoned using the NT-MDT trademark in the U.S. as of 2005.

[41] Instead of following the format under the ACR, Part II of Kozodaeva's Response Brief responds to Part I of NT-MDT LLC's Motion for Summary Judgment and vice-versa. This brief will address Part I of Kozodaeva's Response first.

[42] It should be noted that Kozodaeva indicated that she made changes to her original Response to NT-MDT's Motion for Summary Judgment. Paragraph 3 of the ACR required that Kozodaeava file the original Response with no changes ("The second part **will include the contents of Kozodaeva's original responsive brief that she filed on May 5, 2020, with its original supporting exhibits and affidavits**. Kozodaeva cannot raise any new arguments or include any additional supporting materials pertaining to any claim in the second part of NT-MDT's original opening brief it filed on March 13, 2020, or any defense in the second part of Kozodaeva's brief she filed on May 5, 2020, nor may the Board consider any").

Kozodaeva argued that CJSC never assigned its U.S. rights in the NT-MDT Mark in 2003. Even though she is factually incorrect, whether CJSC ever assigned the rights is not the primary issue. The only relevant legal issue is whether CJSC has **used** the mark in the U.S. And regarding that issue, Kozodaeva did not produce any evidence rebutting NT-MDT, LLC's fully supported allegation that CJSC: (1) never directly shipped or sold a single product to any customer or distributor in the U.S. after 2003 – and certainly not in the three years before this petition; or (2) licensed any entity to distribute any of the products in the U.S. under the NT-MDT mark that NT-MDT America has exclusively distributed in the U.S. since 2008.

A. Kozodaeva's evidence rebutting NT-MDT, LLC's argument that CJSC assigned the mark in 2003, is insufficient to meet the evidentiary standard to create an issue of fact

In its motion, three of CJSC's owners and officers[43] who had authority and first-hand knowledge of CJSC's business asserted CJSC had assigned its U.S. rights away in the NT-MDT mark in 2003.[44]

In her response, Kozodaeva argued that because the 2003 assignment never occurred or a factual dispute exists regarding whether it did occur, the TTAB cannot grant summary judgment. Kozodaeva supports her position with two primary points: (1) Alexander Bykov's affidavit that alleges if Victor Bykov orally assigned the NT-MDT mark did occur in 2003, he would have known about it, and (2) circumstantial and hearsay evidence of other written licenses of CJSC's non-U.S. trademark rights to

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[43] In Kozodaeva's response, she alleges that the TTAB should strike the owners' affidavits because they were supposedly illegally notarized because the notary could not have been present when they signed the documents. Admittedly, the notary was not present, but that was due to the COVID lockdown in Russia – not some irrelevant travel restrictions. Apparently, the Irish notary legally authorized the signatures remotely. And regardless, not only do the owners reaffirm their statements (something that they can and could have done under 37 C.F.R. § 2.20), they would be happy to resubmit them if matters to opposing counsel or the TTAB. Striking the affidavits for credibility purposes is unfounded.

[44] Affidavit of Victor Bykov ¶ 13; Affidavit of Andrey Bykov ¶ 2; Affidavit of Vladimir Kotov ¶ 2.

other NT-MDT entities demonstrate CJSC's custom and practice was to assign and license its trademark rights in writing.

As to the first point, Alexander Bykov admits that he was not present in 2003 when Victor Bykov orally assigned the mark and has no first-hand knowledge of Victor Bykov's assignment. In contrast, both Andrey Bykov and Vladimir Kotov both allege they had first-hand knowledge that Victor Bykov **did** assign the rights.

Regarding the second point, none of the written documents that Kozodaeva references pertain to any U.S. rights, and therefore, are not probative of whether CJSC assigned its U.S. rights in 2003.[45] In short, a defense of "I would have known about it" or "this is how we would have done it" does not meet the standard of rebuttal evidence sufficient to overcome the sworn testimony of *three officers and owners* with first-hand knowledge to create an issue of fact.[46]

B. Even if CJSC never assigned its U.S. rights in the NT-MDT mark, Kozodaeva provided no evidence in her response that CJSC ever directly used or licensed the Mark in the U.S.

In its motion, NT-MDT, LLC asserted two undisputed facts: (1) since 2008, NT-MDT America has exclusively distributed all AFM Microscope-related products under the NT-MDT mark in the U.S.,[47] and (2) since 2015 NT-MDT, LLC has been the exclusive entity that manufactured, invoiced, sold, shipped, and licensed those products to NT-MDT America to distribute in the U.S.[48]

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[45] *See Taylor v. Thomas*, 624 Fed.Appx. 322, 326 (6th Cir. 2015) ("When, as here, an assignment is not in writing, the plaintiff can prove an implied agreement to transfer with strong evidence of conduct manifesting agreement." (quotation omitted)); *Doeblers' Pa. Hybrids, Inc. v. Doebler*, 442 F.3d 812, 822 (3d Cir. 2006), as amended (May 5, 2006) ("Even if a writing is lacking, an assignment may be proven ... by the clear and uncontradicted oral testimony of a person in a position to have actual knowledge.").

[46] Octocom Systems, Inc. v. Houston Computer Services, Inc., 918 F.2d 937, 940 (Fed. Cir. 1990).

[47] V. Bykov Aff. ¶ 46, 51; A. Bykov Aff. ¶ 31, 36; V. Kotov Aff. ¶ 23, 28.

[48] V. Bykov Aff. ¶ 50-51; A. Bykov Aff. ¶ 35-36; V. Kotov Aff. ¶ 27-29

For all her long-winded discussion regarding CJSC's alleged ownership of the NT-MDT mark, at no time did Kozodaeva offer any evidence that CJSC sold or shipped any goods directly to customers in the U.S. or to NT-MDT America since 2008. Moreover, if, as Kozodaeva alleges, that CJSC's custom and practice was to provide all trademark licenses in writing, she never offered any evidence of a written license with NT-MDT LLC or NT-MDT America to use the NT-MDT mark. And that, of course, is because there never was any written license. And if CJSC had no written license with either NT-MDT, Service & Logistics (S&L), NT-MDT, LLC, or NT-MDT America, their continuous use of the mark in the U.S. for the last 12 years could have inured to the benefit of a licensor (CJSC) that did not exist.

In other words, Kozodaeva cannot have it both ways. She cannot simultaneously argue that if CJSC licensed the NT-MDT Mark, it would have memorialized it in writing, and also claim that without a written license, any uses of the Mark for manufacturing, sales, shipments, and distribution of AFM Microscopes between NT-MDT LLC and NT-MDT America since 2015 inured to CJSC's benefit.

In contrast, NT-MDT, LLC has provided numerous sales invoices, shipments from NT-MDT, LLC to NT-MDT America since 2017,[49] as well as evidence of NT-MDT Service & Logistics' invoices and shipments to NT-MDT America between 2008 and 2016.[50] Since 2008, the only entity that has distributed AFM Microscope systems under the NT-MDT mark in the U.S. is NT-MDT America.[51] And at no time has NT-MDT America ever received a shipment or an invoice from CJSC.[52]

As previously stated, CJSC has not manufactured, sold, or shipped any AFM Microscope-related product to customers or distributors in the U.S. since 2003.[53] As evidenced by the Bankruptcy Asset List, whatever rights CJSC may have had in any

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[49] Affidavit of Oleg Butyaev, ¶ 20.
[50] See Exhibit G to V. Bykov Aff. ¶ 8.
[51] Affidavit of Oleg Butyaev, ¶¶ 4-24.
[52] Affidavit of Oleg Butyaev, ¶ 24.
[53] V. Bykov Aff. ¶ 15-17; A. Bykov Aff. ¶ 2; V. Kotov Aff ¶ 2.

NT-MDT mark were limited to Russian trademark registrations. But Russian trademark registrations or use in Russia has no relevance to the undisputed use in the U.S. between NT-MDT LLC and NT-MDT America. Nowhere in Kozodaeva's response did she present any evidence of sales receipts, invoices, shipments, or licenses from CJSC to NT-MDT LLC or NT-MDT America, or royalty payments from either NT-MDT America or NT-MDT LLC to CJSC.[54]

Therefore, because CJSC provided no evidence rebutting NT-MDT, LLC's undisputed testimony and proof that CJSC never used the Mark in the U.S. or licensed the mark to an entity that used the Mark in the U.S., there is no factual dispute that CJSC abandoned the Mark in 2003, or at a minimum, did not use the Mark in the U.S. within three years of this petition. Therefore, even if the facts as Kozodaeva alleged regarding CJSC never assigning the rights in the NT-MDT Mark in her response are true, the TTAB still must grant summary judgment and cancel the registration.

II. Kozodaeva has, to this day, not only never received an assignment of any rights in the NT-MDT Mark, she has never even used the Mark in the U.S. Therefore, the TTAB is required to void the trademark registration ab initio.

A. Despite the Bankruptcy Trustee's unsupported hearsay statements that the March 7, 2019, Agreement of Purchase included the U.S. common law rights in the NT-MDT Mark, the Agreement did not transfer any U.S. common law rights to Anastasia Yakovleva.

In her response, Kozodaeva cited the Bankruptcy Trustee's unsupported statement that the Agreement[55] transferred rights to the U.S. common law rights in the NT-MDT Mark. But the Agreement says no such thing. Paragraph 1.1 of the Agreement expressly limits Yakovleva's purchase to "…the **assets** as in Par. 1.3 herein and the Buyer shall assume ownership and sale of said **assets**." Par. 1.3 states, "**All**

[54] In fact, this would have been impossible after CJSC filed for bankruptcy in 2017 since it no longer was even operating as a company. Even Kozodaeva does not dispute that since 2017, NT-MDT, LLC was the only entity manufacturing and shipping AFM Microscope systems to NT-MDT America and neither company ever sent one dollar to CJSC to cover its debts from its creditors.
[55] KOZ3-16

property assets are listed in Annex 1 hereto." Annex 1[56] to the Agreement is titled "**Full list of assets** of the Closed Joint Stock Company 'Nanotechnology-MDT.'" In that **full list** of assets, nowhere does it mention any U.S. common law rights to the NT-MDT Mark or a license to any other NT-MDT entity of the U.S. rights in the Mark.[57] The only trademarks in Annex 1 all pertain to Russian trademark registrations,[58] which of course, confer no U.S. common law rights in anything.[59]

Kozodaeva argues two points: (1) that the Bankruptcy Trustee's had the authority to unilaterally confer U.S. common law rights that do not exist in Reg. 188978; and (2) the Russian Registration 188978 included the NT-MDT Mark. Both are false. First, the only reference in the Agreement to U.S. rights is in Par. 1.5. But that paragraph must be read within the confines of the assets in Annex 1. U.S. common law rights are determined by use in the U.S. – not foreign registrations or foreign use. The Trustee had no authority to confer U.S. rights where none existed in Annex 1. Therefore, Yakovleva could not have purchased any U.S. common law rights.

Second, and most importantly, Reg. 188978 does not even cover the the disputed NT-MDT mark. The disputed Mark is for the combination graphic and words NT-MDT shown below:

But the mark registered under Russian Reg. 188978 is wholly different and, as shown below, includes only the graphic with no mention of the words "NT-MDT".[60]

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[56] KOZ12-16
[57] As Kozodaeva stated in her reply, there was a license, it would have been CJSC's custom and practice to have memorialized it in writing.
[58] KOZ14 - Items 107-113.
[59] *See General Healthcare Ltd. v. Qashat,* 364 F.3d 332, 70 U.S.P.Q.2d 1566 (1st Cir. 2004).
[60] O. Butyaev Aff. ¶ 25.

This mark has never been used in the U.S. without the words NT-MDT.[61] At best, Yakovleva received a Russian trademark registration for a mark that no NT-MDT entity has ever used in the U.S. And because the Bankruptcy sale never included any U.S. rights or the disputed Mark itself, Kozodaeva could not have received any rights in the disputed Mark.

B. At best, Yakovleva transferred to Kozodaeva, the Russian Reg. 188978. Therefore, Kozodaeva never owned the disputed mark when she filed her Statement of Use.

In Kozodaeva's Response, she insists that on March 24, 2019, she received the U.S. common law rights in the Mark. Again, her claim is baseless. As stated above, Yakovleva never received any mark that is the subject of this dispute. But even if she did, the only thing she attempted to transfer in the March 24, 2019 "Trademark Purchase Agreement"[62] was the Russian registration.

Paragraph 1.1 of the TPA unequivocally states that the "scope" of the rights Yakovleva purchased was limited to registration number 188978, which the parties defined as "The Trademark." Thus, the TPA limits any rights in "The Trademark" to the Russian registration, and not any U.S. common law rights since, under U.S. law, that registration cannot include U.S. rights. Kozodaeva argues that the statement in Par. 1.3 grants her U.S. rights in "The Trademark." But Par. 1.3 has no legal effect and is the equivalent of assigning a U.S. registration in an agreement and claiming it also confers rights in Russia. And perhaps most importantly, the mark in Reg. 188978 is substantively different than the disputed Mark. Therefore, even if Yakovleva received all U.S. rights in the Mark, she certainly never transferred those rights to Kozodaeva.

C. Yakovleva assigned Reg. 188978 apart from the business. Therefore, under U.S. law, the assignment was an invalid assignment "in gross."

If a party transfers ownership of a U.S. trademark without the associated goodwill, the transfer is determined to be an "assignment in gross" and can result in an

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[61] O. Butyaev Aff. ¶ 26.
[62] KOZ88-90 ("TPA").

assignee's losing rights to the assigned trademark.[63] Kozodaeva never addressed NT-MDT's argument that the Yakovleva's assignment was an invalid in-gross assignment. The March 24, 2019, TPA undoubtedly establishes that Yakovleva kept whatever "business" she obtained from the bankruptcy asset purchase and gave Kozodaeva a naked assignment of the Russian Reg. 188978 with no business goodwill attached to the mark.[64] Therefore, Kozodaeva bases here claim that she received the U.S. rights in the Mark from the TPA on an invalid assignment that effectively voided the trademark.

D. Had Kozodaeva believed she obtained rights in the Mark from NT-MDT Europe B.V. in 2018, she would have filed her U.S. application based on actual use under § 1(a) instead of intent-to-use under § 1(b).

Despite Kozodaeva being represented by not one, but two different U.S. law firms, Kozodaeva claimed that in early 2019 – six months after filing her U.S. application for the Mark – Yakovleva notified her that NT-MDT Europe B.V. – a company that never had any trademark rights in the U.S. or sold any goods in the U.S. under the Mark, never legitimately transferred the U.S. rights in the Mark to her as she believed she received in the agreement entitled "Ownership Transfer Agreement" dated April 2, 2018.[65] Apparently, Yakovleva "discovered" that it was CJSC that owned all the U.S. rights and that Kozodaeva would have to purchase the rights in the bankruptcy sale.[66] Kozodaeva's argument is nonsensical.

If, as Kozodaeva alleges, she undoubtedly believed that when she filed her U.S. application for the mark on July 19, 2018, she already owned the U.S. common law rights in the Mark, her counsel would have informed her to apply based on actual use in commerce dating back to 1999 under § 1(a) instead of applying based on intent-to-use under § 1(b). In other words, Kozodaeva is trying to have it both ways on the question

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[63] *See Sugar Busters LLC v. Brennan*, 177 F.3d 258, 265 (5th Cir. 1999).

[64] The very idea that somehow Kozodaeva thinks she purchased the entirety of a multi-entity Russian conglomerate worth tens of millions of dollars from an asset sale that included a list of mostly expired Russian patents and a couple of Russian trademarks in a bankruptcy of one of the entities is beyond ridiculous.

[65] Kozodaeva Declaration (Ex. E to Kozodaeva Response) ¶ 14.

[66] *Id* ¶ 31.

of ownership at the time she filed the statement of use. What is undisputed is that ***Kozodaeva was not the owner of the Mark*** when she filed her statement of use on March 10, 2019. Therefore, as required under TMEP § 1109.10, her registration should be voided ab initio.

E. Even if Kozodaeva was the owner of the Mark, to this day, Kozodaeva has not used the Mark in the U.S. And therefore, the TTAB must void the registration ab initio.[67]

After filing its motion for summary judgment, NT-MDT LLC confirmed that not only did Kozodaeva never use the Mark in the U.S. as of the date she claimed she first used it in her Statement of Use, and she has yet to use the mark in the U.S. as of the date of this filing.

Kozodaeva admitted in her response that when she filed her statement of use on March 10, 2019, she had not used the mark. As shown in a February 14, 2019, email exchange with her attorney, Christina Schmidt of Marcaria, Kozodaeva's husband, Dimitri Kozodaev acknowledges that as of that day they had not completed the sale or shipped any item bearing the Mark to the U.S. As Kozodaev stated:[68]

> 1. As for requirements of the provement, we can provide quotation at this moment that we to The University of Texas at Dallas. They are planning to buy our product, purchasing in process now. Will it be a good proof or we need to wait till they can make some pictures when the product will arrive to their side?
>
> Please find quotation for our customer in Dallas Texas University in the attachment. So we are in Purchase process now. We plan to sale there the exact system which is on the pictures. Also you can find our direct communications with customer attached.
>
> So the date of first use in commerce in USA is 8th January 2019.

Kozodaev's emails unequivocally establish that Kozodaeva had not even completed her first sale to UT Dallas or shipped a product to the U.S. as of January 8, 2019. On that basis alone, the false allegation of the first use in commerce on the statement of use is sufficient to void the registration. But NT-MDT has since

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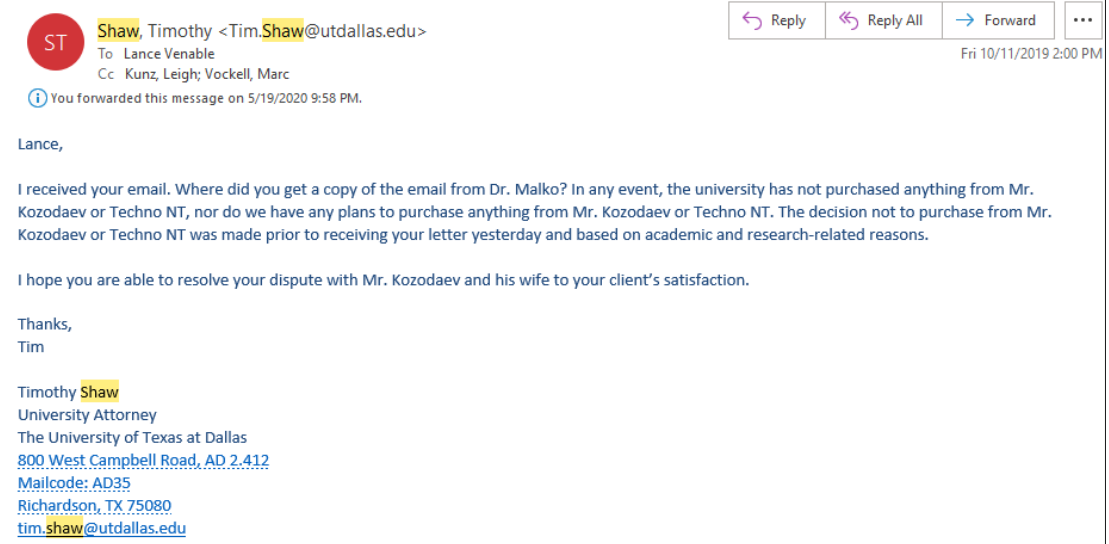
[67] Although this issue was not raised in its motion for summary judgment, NT-MDT, LLC discusses the issue in the reply and will file a separate summary judgment motion on this issue should the TTAB need to consider the issue separately.
[68] Kozodaeva Declaration (Ex. 11 KOZ446, KOZ453).

confirmed that, as of March 27, 2020, Kozodaeva never sold or shipped any product to UT Dallas or anywhere in the U.S. As Mr. Tim Shaw, counsel for UT Dallas stated in his email to NT-MDT's counsel said that as of October 11, 2019, UT Dallas had never purchased anything from Kozodaev or Techno NT.[69]



Shaw, Timothy <Tim.Shaw@utdallas.edu>
To Lance Venable
Cc Kunz, Leigh; Vockell, Marc
You forwarded this message on 5/19/2020 9:58 PM.

Reply | Reply All | Forward | ...
Fri 10/11/2019 2:00 PM

Lance,

I received your email. Where did you get a copy of the email from Dr. Malko? In any event, the university has not purchased anything from Mr. Kozodaev or Techno NT, nor do we have any plans to purchase anything from Mr. Kozodaev or Techno NT. The decision not to purchase from Mr. Kozodaev or Techno NT was made prior to receiving your letter yesterday and based on academic and research-related reasons.

I hope you are able to resolve your dispute with Mr. Kozodaev and his wife to your client's satisfaction.

Thanks,
Tim

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Kozodaeva stated her only use the Mark since January 8, 2019, and March 27, 2020,[70] was when she sold and shipped a single product to UT Dallas. Obviously, that was a fraudulent and false statement. And on information and belief, she has yet to use the mark as of today. Therefore, the TTAB must void the registration ab initio.

III. Conclusion

For the reasons cited in Parts I and II of Petitioner NT-MDT, LLC's motion, and the present reply, NT-MDT, LLC respectfully submits that this Board should grant it summary judgment and cancel the '336 Registration.

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[69] O. Butyaev Aff. ¶ 27.
[70] Kozodaeva's Response 52 to First Set of Interrogatories (served September 17, 2019 and amended on March 27, 2020).

Respectfully submitted this 29th day of October 2020

/Lance C. Venable/

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Certificate of Service

I hereby certify that the preceding was electronically FILED via ESTTA on October 29, 2020, and that a copy has been SERVED on counsel for Registrant Irina Kozodaeva on October 29, 2020, by forwarding the copy by email to

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