

**IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

**INTELLAPEX PLLC,** )  
a Michigan professional limited liability company, )

Plaintiff, )

v. )

**INTEL CORPORATION,** a Delaware corporation,) )

Defendant. )

**INTEL CORPORATION,** a Delaware corporation,) )

Counterclaimant, )

v. )

**INTELLAPEX PLLC,** )  
a Michigan professional limited liability company, )

Counterclaim Defendant, )

and )

**BOMBAY SOLUTIONS GROUP, LLC,** )  
a Michigan limited liability company, )

Third Party Defendant. )

Hon: Ellen S. Carmody

Case No.: 1:05-CV-0404

**ORAL ARGUMENT  
REQUESTED**

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**INTELLAPEX PLLC'S REPLY TO INTEL CORPORATION'S OPPOSITION TO  
INTELLAPEX PLLC'S MOTION FOR SUMMARY JUDGMENT**

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Plaintiff and Counterclaim Defendant, INTELLAPEX PLLC (“IntellApex”) respectfully submits the following Reply Brief in support of its Motion for Summary Judgment (“Mot.”).

## I. INTRODUCTION

While Intel would like nothing better but to indefinitely drag out this case and compound IntellApex’s legal costs along the way, the law speaks for itself in this case. This case, just like *AutoZone, Inc., v. Tandy Corp.*, 373 F.3d 786 (6th Cir. 2004), is ripe for summary judgment. Although IntellApex has responded to all of Intel’s document requests, interrogatories, and requests for admission, Intel now complains that it needs more discovery and it complains about IntellApex’s numerous attorney-client privilege objections, which are clearly appropriate where, as a law firm, most all of IntellApex’s work product is privileged. Intel has expended considerable effort in an attempt to portray IntellApex in a poor light, yet no such smoke screen can hide the fact that Intel has no valid infringement or dilution claim.

## II. ARGUMENTS

### ***A. IntellApex correctly applies the legal standards under Rule 56 and the motion for summary judgment has not been brought prematurely.***

Summary judgment is entered in cases where there are no genuine issue(s) of material fact and that the moving party is entitled to a judgment as a matter of law. F.R.C.P. 56(c). However, “[b]y its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of *material* fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis added). If the disputed evidence “is merely colorable or is not significantly probative, summary judgment may be granted.” *Anderson*, 477 U.S. at 249-50.

In the instant case, IntellApex meets the summary judgment standard as there are no genuine issues of *material* fact and, as a matter of law, IntellApex is not infringing upon or diluting Intel’s trademarks. *Holiday Inns, Inc. v. 800 Reservation, Inc.*, 86 F.3d 619, 622-623 (6th Cir. 1996) (in order to avoid summary judgment in Lanham Act case alleging trademark infringement and false designation of origin, nonmoving party must establish that genuine factual disputes exist concerning those factors that are material to whether confusion is likely in marketplace as result of alleged infringement). Additional discovery in this case will not make a difference in the outcome because under no set of facts can Intel prove that IntellApex has infringed upon or diluted Intel’s marks. *Pullman Indus., Inc. v. Mfr. Enameling Corp.*, 15 Fed.Appx. 297, 302-303 (6th Cir. 2001) (opinion attached hereto as **Ex. A**) (holding that the district court did not abuse its discretion in restricting discovery prior to the grant of summary judgment, where the additional information that the plaintiff purportedly sought would not have had any effect upon the legal questions that compelled the grant of summary judgment to defendant).

“Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.” *Anderson*, 477 U.S. at 248. While Intel would like to have this Court believe that it will somehow discover outcome-determinative facts in the course of additional discovery, that simply is not the case. The following *material* facts are indisputable:

- Due to ethical rules which prohibit law firms from being owned by non-lawyers, Intel will never own or operate a law firm.<sup>1</sup>
- Due to the fact that IntellApex is a professional limited liability company organized to provide legal services, it will never produce computer chips or provide any other product or service other than legal services.<sup>2</sup>

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<sup>1</sup>See MRPC 5.4(b) (“A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.”); *see also*, Cal. Prof. Conduct, R. 1-310 (same).

- No person or entity has ever questioned IntellApex or indicated any confusion about any connection, association, sponsorship, affiliation or relationship of any kind between Intel and IntellApex.<sup>3</sup>
- Purchasers of legal services are likely to exercise a high degree of purchaser care.
- IntellApex only markets its services on the Internet.<sup>4</sup>

In light of these undisputed facts, it is clear that no amount of fishing by Intel will produce any set of facts that can change the clear outcome for this case. The discovery posed by Intel demonstrates just how far Intel is willing to go on its fishing expedition. Many of Intel's discovery requests are overbroad and consistently request IntellApex's work product and communication with clients, all of which is protected under the attorney-client privilege. *See, e.g.,* IntellApex's Responses to Intel's First Request for Production of Documents, attached hereto as **Ex. B** (Requests Nos. 3, 4, 10, 12, 14, 18, 19, 20, 24, 25, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, and 53) and IntellApex's Responses to Intel's First Set of Interrogatories, attached hereto as **Ex. C** (Interrogatories Nos. 1, 2, 9, and 13).

Intel's bare allegations or vague assertions of the need for discovery are not enough to show that additional discovery is needed before summary judgment may be granted. *Summers v. Leis*, 368 F.3d 881, 887 (6th Cir. 2004) ("Bare allegations or vague assertions of the need for discovery are not enough." (internal citations omitted)). By adopting such an overbroad discovery strategy, Intel aims to misuse and protract the proceedings under Rule 56. The basic purpose of summary judgment procedure "is to avoid the expenditure of judicial time and to

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<sup>2</sup>"A professional limited liability company shall not engage in any business other than the rendering of the professional services for which it was specifically organized." MCLA 450.4907 (1).

<sup>3</sup> Zachary Bossenbroek's Affidavit, attached as Ex. A to Mot, ¶ 6. Although Intel attacks IntellApex's affidavit by Zachary J. Bossenbroek as a "self-serving declaration," the affidavit was signed under oath and no amount of depositions or interrogatories are going to change the declarations made in that affidavit. (*See* SJM Opp., p. 1).

<sup>4</sup>**Ex B.**, Response Nos. 9, 12 & 16.

avoid trials when the facts are not in dispute insofar as they are material to the lawsuit.” *Klinge v. Lutheran Charities Ass’n of St. Louis*, 523 F.2d 56, 61 (8th Cir. 1975); *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1568 (9th Cir. 1990) (same). This purpose would be extremely well served in the instant case – especially in light of the fact that Intel has already all but conceded that it has no case when it requested a name change to “INTELLIAPEX” would be an acceptable, dissimilar mark. (*See* Ex. B, attached to Mot.).

Intel erroneously argues that IntellApex’s summary judgment motion is premature. (Intel’s Br. In Opp. to IntellApex’s Mot. for Summary Judgment (hereinafter, “SJM Opp.”), p. 2). In *Jefferson v. Chattanooga Pub. Co.*, 375 F.3d 461 (6th Cir. 2004), the court held that:

[I]t is well-established that a motion for summary judgment may be filed prior to discovery. Rule 56(b) allows a defendant to file the motion at any time, so long as the non-moving party has had sufficient time to engage in discovery. Fed R. Civ. P. 56(b); [citation omitted].

*Id.* at 465 (emphasis added). Thus in the instant case, IntellApex is permitted to file its Motion for Summary Judgment at any time so long as Intel had sufficient time to engage in relevant discovery. Not only has Intel had adequately time for discovery, as of the date Intel filed its Response, IntellApex and Bombay responded to all of Intel’s requests for production of documents, interrogatories, and requests for admission.<sup>5</sup> By responding to all the queries raised by Intel for the purpose of its discovery (excluding those protected by attorney-client privilege/attorney work product doctrine), IntellApex has satisfied and discharged its part of the burden under F.R.C.P. 56(f) for grant of summary judgment.<sup>6</sup> *U.S. Through Small Bus. Admin.*

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<sup>5</sup>Reponses to Intel’s Requests for Production of Documents (**Ex. B**), Responses to Intel’s Interrogatories (**Ex. C**), and IntellApex’s and Bombay’s Responses to Intel’s Requests for Admissions (**Ex. D**), and Supplemental Responses, attached as **Ex. E**, and e-mailed to Intel’s counsel on December 2, 2005.

<sup>6</sup> Intel complains that IntellApex produced only 8 documents in connection with its discovery requests. (*See* Opp., p. 31). However, that should not surprise Intel given that IntellApex is a start-up law firm, having only operated for about 10 months. The simple fact is that IntellApex did not create or maintain volumes of records and/or data in anticipation of a trademark infringement claim by Intel.

*v. Light*, 766 F.2d 394, 397 (8th Cir. 1985) (“Rule 56(f) is not a shield that can be raised to block a motion for summary judgment without even the slightest showing by the opposing party that his opposition is meritorious.”).<sup>7</sup>

***B. Summary judgment is appropriate in infringement and dilution actions.***

Contrary to Intel’s blatant misrepresentations of the law, summary judgment is appropriate for infringement and dilution claims. *AutoZone, Inc., v. Tandy Corp.*, 373 F.3d 786 (6th Cir. 2004) (upholding lower court’s grant of summary judgment on infringement and dilution claims where AUTOZONE and POWERZONE were not sufficiently similar).

***C. Intel is estopped from claiming that IntellApex is infringing and diluting its marks.***

In its Response, Intel, not surprisingly, completely ignores IntellApex’s estoppel argument, undoubtedly in an effort to divert attention away from this fatal blow to Intel’s claims in this case. In its June 3, 2005 cease-and-desist letter, Intel requested that IntellApex change its name to INTELLIAPEX. (*See* Ex. B of Mot.). As such, Intel is now estopped from claiming that “IntellApex” is somehow confusingly similar to its marks or dilutes its marks because of the lack of one vowel – an “I” – prior to the word “Apex.” *See In re Dow Corning Corp.*, 419 F.3d 543, 553 (6th Cir. 2005) (“Quasi-estoppel is appropriate where it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced...” (internal quotations omitted)); *Bott v. J.F. Shea Co., Inc.*, 299 F.3d 508, 512 (5th Cir. 2002) (“The doctrine of quasi-estoppel precludes a party from asserting, to another’s disadvantage, a right inconsistent with a position [it has] previously taken.”).

***D. IntellApex does not dilute any of Intel’s marks as a matter of law.***

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<sup>7</sup> In the event that this court grants Intel’s request for additional discovery under Rule 56(f), IntellApex respectfully requests that this court order a continuance to permit Intel to conduct additional discovery that is pre-defined and reasonably limited so as to not unnecessarily protract these proceedings.

Although Intel would like nothing more than to avoid a ‘likelihood of confusion’ analysis and it emphasizes its dilution argument in an attempt to do so, it never deals with well-established law that “the degree of similarity required to prove dilution is greater than the degree of similarity required to be shown for a likelihood of confusion.” *Jet, Inc. v. Sewage Aeration Sys.*, 165 F.3d 419, 425 (6th Cir. 1999) (emphasis added). (*See Mot.*, p. 21). This rule of law was recently reiterated by the Sixth Circuit in *AutoZone, Inc.*, 373 F.3d at 806. In that case, the court found that where the degree of similarity between two marks was not sufficient to demonstrate likelihood of confusion for trademark infringement, such marks certainly would not be “highly similar” or “nearly identical” to prove actual dilution. *Id.* (“POWERZONE” and “AUTOZONE” held not sufficiently similar as a matter of law); *see also, Ford Motor Co. v. Lloyd Design Corp.*, 184 F.Supp.2d 665, 680 (E.D. Mich. 2002) (on the issue of likelihood of dilution, the court noted that “marks must be of sufficient similarity” and the “proximity of Defendant’s products with Plaintiffs is a factor that weighs heavily in favor of a finding of dilution.”). Thus, while Intel expends all its efforts attempting to misguide this Court with the poor portrayal of IntellApex’s grasp of the relevant law in this matter and insists that IntellApex’s mark is somehow “whittling” away or infecting Intel’s marks, Intel falls well short of the very high dilution standard. Intel simply cannot avoid the legal conclusion that there is not a sufficient degree of similarity between the marks at issue in this case – especially in light of the fact that Intel and IntellApex are in wholly unrelated industries. *See, e.g., Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev.*, 170 F.3d 449, 458 (4th Cir. 1999) (“GREATEST SHOW ON EARTH” and “GREATEST SNOW ON EARTH” were not similar enough to sustain dilution claim); *Luigino’s, Inc. v. Stouffer Corp.*, 170 F.3d 827, 832 (8th Cir.1999) (“LEAN CUISINE” and “LEAN ‘N TASTY” were not sufficiently similar).

While Intel partially quotes *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003), to argue that the application of the Federal Trademark Dilution Act (“FTDA”) is not “confined to identical uses of famous marks,” (SJM Opp., pp. 12 -13) it omits the very important rider that the court attached to this application of dilution to non-identical marks: “[W]here the marks at issue are not identical, the mere fact that consumers mentally associate the junior user’s mark with a famous mark is not sufficient to establish actionable dilution.” *Moseley*, 537 U.S. at 433.

“Despite [Intel’s] contention that the level of similarity required is not higher in the dilution context, every federal court to decide the issue has ruled that a high degree of similarity, ranging from ‘nearly identical’ to ‘very similar,’ is required for a dilution claim to succeed.” *AutoZone, Inc.*, 373 F.3d at 806 (citations omitted). In *Thane Intern., Inc. v. Trek Bicycle Corp.*, 305 F.3d 894, 905 (9th Cir. 2002), while articulating the legislative history on identity of marks, the court observed that the diluter must use essentially the same mark:

The legislative history, while not definitive on the issue, also suggests that the marks must be identical or close thereto. In explaining the difference between dilution and infringement, the Senate Report states that: “The concept of dilution focuses on the investment the owner has made in *the mark* and on the commercial values and aura of the mark itself, protecting both from those who would appropriate *the mark* for their own benefit.” S.Rep. No. 100-515, at 7 (1988), reprinted in 1988 U.S.C.C.A.N. 5577, 5583 (emphases added). The Report then lists two hypothetical examples of dilution: “where a mark such as Kodak is used for pianos, or Buick is used for aspirin. *Id.* No example is given of the use of marks that are merely similar to the famous mark.

*Id.* at 905-906 (emphasis added); *AutoZone, Inc.*, 373 F.3d at 806. “Thus the limitation on dilution protection created by the narrow definition of famousness, like the identical or nearly identical requirement ... is critical.” *Thane Intern., Inc.*, 305 F.3d at 908 (9th Cir. 2002) (emphasis added). In the instant case, a cursory viewing of the marks of Intel and the IntellApex indisputably demonstrates that they are neither “highly similar” nor “nearly identical” for the purpose of establishing a claim of dilution. See discussion in Part E-3 *infra*, pp. 15-16.

In addition, Intel miserably fails to state how the use of IntellApex's mark has diluted the quality of Intel's mark. While asserting its claim for dilution, the onus to prima facie prove dilution lies upon Intel. *Kellogg Co. v. Toucan Golf, Inc.*, 337 F.3d 616, 628 (6th Cir. 2003). Intel cannot make a claim for dilution by mere conjectures and surmises of dilution and "infection" of its mark. (See SJM Opp, p. 14). Further, although Intel claims that additional discovery and perhaps consumer surveys would aid its case (see SJM Opp., pp. 12-13), no amount of evidence will change the fact that dilution cannot exist where the marks are not identical or nearly identical.<sup>8</sup> *Ty Inc. v. Softbelly's Inc.*, 353 F.3d 528, 536 (7th Cir. 2003) (Where court held it unnecessary to explain what circumstantial evidence entails because terms "Beanies" or "Beanie Babies" were not identical to "Screenie Babies"). Thus, IntellApex has met its burden under Rule 56.

***E. IntellApex has established as a matter of law that it is not infringing upon any marks of Intel.***

Once again, while accusing IntellApex of getting the legal standard wrong, Intel intentionally misleads this Court by only partially quoting a footnote from *Gibson Guitar Corp. v. Paul Reed Smith Guitars, LP*, 423 F.3d 539 (6th Cir. 1991), and ignoring other contrary Sixth Circuit authority. (See SJM Opp., p. 14). Intel conveniently notes that likelihood of confusion is a mixed question of fact and law, yet intentionally fails to quote subsequent parts where the court qualified its statement as follows:

Factual findings must be made with respect to the likelihood of confusion factors set out above. However, the further determination of whether a given set of foundational facts establishes a likelihood of confusion is a legal conclusion.

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<sup>8</sup> Notably, despite IntellApex affirming that none of its customers have ever inquired about an association between Intel and IntellApex (see Affidavit of Zachary J. Bossenbroek, attached as Ex. A to the Mot.), nowhere in its 135 pages of declarations and exhibits does Intel offer any evidence to the contrary that would suggest that any of its customers have ever questioned whether Intel and IntellApex are associated or otherwise related.

*Gibson Guitar Corp.*, 423 F.3d at 548, n.11 (emphasis added). Intel further ignores multiple recent Sixth Circuit cases that expressly hold that likelihood of confusion is a question of law. *Gray v. Meijer, Inc.*, 295 F.3d 641, 645 (6th Cir. 2002) (“[L]ikelihood of confusion can be a question of law appropriate for determination on a motion for summary judgment.” (internal citations omitted)); *Marketing Displays, Inc. v. TrafFix Devices, Inc.*, 200 F.3d 929, 942 (6<sup>th</sup> Cir. 1999), *rev’d on other grounds*, 532 U.S. 23 (2001) (holding that “[s]ummary judgment was appropriate on the trademark infringement claim since [defendant] established no genuine issue of material fact.”); *AutoZone, Inc.*, 373 F.3d at 807 (upholding summary judgment on dilution and infringement claims); *see also, WSM, Inc. v. Tennessee Sales Co.*, 709 F.2d 1084, 1086 (6th Cir. 1983) (“[L]ikelihood of confusion is a question of law and thus an appropriate issue for summary judgment.” (internal citations omitted)).

The undisputed *foundational facts* of this case (e.g., Intel will never practice law and IntellApex will never sell any products, let alone computer chips), coupled with the legal conclusion that the marks are dissimilar, clearly establish no likelihood of confusion as a matter of law.<sup>9</sup> All the factors relevant to likelihood of confusion inquiry tilt in IntellApex’s favor.<sup>10</sup> Yet, even if one or more factors weigh in Intel’s favor, summary judgment is still appropriate:

The defendant does not necessarily establish a genuine issue of material fact merely by disproving the existence of any one--or even a majority of--the [*Frisch*]

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<sup>9</sup>Intel provides a laundry list of items in its brief, which it claims are disputed facts and accuses IntellApex of drawing unsupported inferences/conclusions from such disputed facts. (See SJM Opp., pp. 9-10). However, Intel fails to address the point that facts which are disputed must be relevant and material. A closer look at Intel’s list of so-called disputed facts reveals that the facts that are material are actually undisputed and Intel is really just disputing the legal conclusions to be drawn from such undisputed facts. While Intel is entitled to object to the legal conclusions to be drawn from the undisputed facts, it is actually the Court’s job to determine whether the undisputed facts of this case establish likelihood of confusion. *See Gibson Guitar Corp.*, 423 F.3d at 548, n.11.

<sup>10</sup>IntellApex does not address two factors here: (i) IntellApex’s intent in selecting the mark and (ii) evidence of actual confusion. IntellApex has already affirmed its good faith and the lack of any actual confusion by its customers. (See Affidavit attached as Ex. A to Mot.). Notably, Intel offers no facts of its own to show bad faith intent by IntellApex or actual confusion. With respect to the intent factor, there is no evidence to suggest that IntellApex chose the IntellApex mark in order to dishonestly trade on Intel’s marks. Indeed, Intel’s “goods are so unrelated as to dispose of this [intent] factor with little discussion.” *Kellogg Co.*, 337 F.3d at 627.

factors. Rather, summary judgment for the plaintiff is appropriate if, upon consideration of all factors, the district court determines that no reasonable jury could [...find] that confusion of the marks would be likely.

*Marketing Displays, Inc.*, 200 F.3d at 933 (emphasis added). In this case, no reasonable jury could find likelihood of confusion – i.e., that “relevant consumers are likely to believe that the products or services offered by the parties are affiliated in some way.” *Id.* at 1107.

**1) Intel’s marks have no strength in the legal services industry.**

Intel has wasted considerable amount of ink in establishing the strength and fame of its mark. (See SJM Opp., p. 17). However, strength of the mark is only one of the factors considered in the inquiry of ‘likelihood of confusion,’ and by no means the only decisive factor. *See Kellogg Co.*, 337 F.3d at 623 (“Not all of these factors will be relevant in every case, and [t]he ultimate question remains whether relevant consumers are likely to believe that the products or services offered by the parties are affiliated in some way.” (emphasis added and internal quotes omitted)). Furthermore, the high recognition of Intel’s marks is clearly limited to the markets in which it operates – not the legal services market.

A famous mark is not entitled to unqualified protection for all goods or services, regardless of whether such goods or services have any relationship with the goods and services the famous family of marks is recognized for. *See Homeowners Group, Inc. v. Home Mktg. Specialists, Inc.*, 931 F.2d 1100, 1107 (6th Cir. 1991) (“HMS may indeed be arbitrary and hence inherently distinctive, yet have little customer recognition or “strength” in the market, or perhaps have high recognition which is limited to a particular product or market segment.” (emphasis added)); *Fruit of the Loom, Inc. v. Fruit of the Earth, Inc.*, 3 U.S.P.Q.2d 1531, 1533-1534 (T.T.A.B. 1987) (holding that “Fruit of the Loom” is distinctive, but fame is limited to the underwear field and does not extend to apparel generally); *Amstar Corp. v. Domino’s Pizza*,

*Inc.*, 615 F.2d 252, 260 (5th Cir. 1980), *cert. denied*, 449 U.S. 899 (U.S. 1980) (holding that “Domino” is a strong mark only for sugar and related products); *AM Gen. Corp. v. DaimlerChrysler Corp.*, 311 F.3d 796, 819 (7th Cir. 2002) (observing that “the proponent of a family of marks must prove that, prior to the junior user’s entry, all or many of the marks in the alleged family were used and promoted in such a way as to create public perception of the family mark as an indicator of source.”). Irrespective of the fact that Intel uses its marks on a wide variety of novelty items, such as clothing, accessories, toys, stationary, luggage and traveling gear, watches, key rings, pens and pencils, mugs and water bottles (*see* Decl. of Richard Kevin Sellers, attached to SJM Opp., ¶ 4 (hereinafter, “Decl. Sellers”)), fame of Intel’s marks is not unlimited over all goods and services. It would be a huge stretch for Intel to suggest that legal services offered by IntellApex could confusingly be viewed by consumers as affiliated to Intel’s products and services just because Intel’s family of marks is famous with respect to technology services and products.<sup>11</sup>

The USPTO’s repeated grant of trademark protection to thousands of trademarks (many of which are used in technology and service industries) with an “Intel” or “Intell” prefix significantly undermines Intel’s argument that its marks have such strength so as to entitle it to a monopoly on all words denoting “intelligence” or “intellectual” with an “Intel” or “Intell” prefix. Examples of such marks include: INTELLIX, INTELIFUSE, INTELLEVATE and INTELLICOLLECT.<sup>12</sup> In *Homeowners Group, Inc.*, 931 F.2d 1100, 1108, the court held that

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<sup>11</sup> Intel’s reliance on case law discussing protection enjoyed by the “Mc” and “R’ US” families of marks to create an analogy in this case is unfounded. (*See* SJM Opp., pp. 18-19). Use of the prefix/suffix “Mc” and “R’ US” by junior marks has a more striking similarity to the McDonald’s and Toys R’ US family of brands than the use of prefix “Intell” does to Intel. This is especially true where “Intell” is used in many marks connote commonly used English words “Intelligent” and “Intellectual.”

<sup>12</sup> By way of examples, Intellix “provides intuitive software products for building knowledge-based solutions that enhance customer service on the Internet” ([www.intellix.com](http://www.intellix.com)); INTELIFUSE is a “patented technology that will revolutionize the way ... plastic reconstructive surgeons ... fix bone.” ([www.intelifuse.com](http://www.intelifuse.com)); Intellevate is “the

evidence of other similar registered marks was relevant, stating “[t]he greater the number of identical or more or less similar trade-marks already in use on different kinds of goods, the less is the likelihood of confusion.” (*quoting* Restatement of Torts § 729 (1938)). Indeed, “[C]ourts have found extensive third-party uses of a trademark to substantially weaken the strength of a mark.” *Id.* Consequently, as evidenced by the existence of thousands of marks beginning with the prefix “Intel” or “Intell,” the IntellApex mark is not likely to be confused with Intel’s marks.

**2) Intel’s high-tech products and services and IntellApex’s legal services are not at all related.**

There can be no likelihood of confusion between “Intel” and “IntellApex” marks merely as a consequence of Intel’s products/services and IntellApex’s services allegedly coexisting in the same broad industry. *Therma-Scan, Inc. v. Thermoscan, Inc.*, 295 F.3d 623, 633 (6th Cir. 2002) (“Goods or services are not necessarily related, however, simply because they ‘coexist in the same broad industry.’” (internal citation omitted)). In *Therma-Scan, Inc.* the court held that “although TSI and Thermoscan might coexist ‘in a very broad industry of medical applications of thermology and infrared identification of heat,’ TSI’s services and Thermoscan’s goods are not so related that any confusion is likely to occur.” 295 F.3d at 633 (emphasis added). The court in *Therma-Scan, Inc.* further commented that “[w]e believe that any commonality between TSI’s services and Thermoscan’s thermometers is insufficient to establish that their products are related for the purpose of determining whether a likelihood of confusion exists.” *Id.* Thus, just because some of Intel’s and IntellApex’s customers may coexist in the same broad technology/computer industry, their goods and services (legal protection vs. technology/computer products and services) certainly are not related. *See Kellogg Co.*, 337 F.3d

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premier provider of intellectual property solutions.” ([www.intellevate.com](http://www.intellevate.com)); Intellicollect “offer[s] total e-commerce solutions to accept payments.” ([www.intellicollect.com](http://www.intellicollect.com)).

at 621-22 (Kellogg's [a cereal manufacturer] connection with the golf industry was found tenuous and, consequently, confusion was unlikely).

Likewise, Intel's connection with the legal industry is tenuous at best where it provides absolutely no legal-related services or products. Therefore, the services provided under the "IntellApex" mark cannot be regarded as related or complementary with the products provided under the "Intel" marks.<sup>13</sup> Compare with, *Wynn Oil Co. v. Am. Way Serv. Corp.*, 943 F.2d 595, 600 (6th Cir. 1991) (bulk car wash products and car wash franchises held to be related), *Jet, Inc.*, 165 F.3d at 422 (two slightly different types of oxygenating septic filters held to be related), *Little Caesar Enterprises, Inc. v. Pizza Caesar, Inc.*, 834 F.2d 568, 571 (6th Cir. 1987) (sit-down and carry-out pizza establishments held to be related).

**3) The IntellApex mark and Intel mark are not at all similar when the marks are considered in their totality.**

There are no similarities between the Intel and IntellApex marks when the sound, meaning, and appearance of the two marks are compared. Furthermore, Intel has failed to point out even a single Intel mark containing two successive L's. Where the Intel marks are comprised of two words, the word "Intel" precedes and is separate from the subsequent word. (*See, e.g.*, Decl. Sellers (INTEL INSIDE; INTEL STRATAFLASH; INTEL SPEEDSTEP; INTEL XENON; INTEL XSCALE; and INTEL NETBUSTER)). In contrast, "IntellApex" contains two successive L's and is only one word. *See Jet, Inc.*, 165 F.3d at 423-424 (holding that "JET and AEROB-A-JET are visually and verbally distinct. AEROB-A-JET has four syllables to JET's

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<sup>13</sup> In order to make a case for similarity of goods and services offered by Intel and IntellApex, Intel cites to cases which make comparisons between complimentary products/services like wine and cheese, *see E & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1291 (9th Cir. 1992); beer and meats, *see Frank Brunckhorst Co. v. G. Heileman Brewing Co.*, 875 F.Supp. 966, 979 (E.D. N.Y. 1994); and travel and entertainment industry, *see Visa Int'l Serv. Ass'n v. Visa Hotel Group, Inc.*, 561 F.Supp. 984, 991 (D. Nev. 1983). (*See* SJM Opp., p. 20). It is, however, absurd to suggest that just because every customer or potential customer of IntellApex would have encountered Intel branded computer products, IntellApex's patent-related legal services are complementary to Intel's computer products. (*See id.*). Clearly, the connection between Intel's computer-related goods and services and IntellApex's legal services are distinguishable to a much greater degree than the above discussed examples.

one... Considering the impression made by the marks as a whole, JET and AEROB-A-JET are not confusingly similar.”).

Intel argues that “Intell” is the dominant component of IntellApex’s mark as “Apex” is a common word found in the dictionary, thereby demoting the “Apex” portion of the mark when assessing similarity and allowing a comparison between “Intel” and “Intell.” (See SJM Opp., p. 23). Even if, as Intel wrongly suggests, the “Apex” portion of the “IntellApex” mark is merely descriptive, this Court is not to “dissect” the IntellApex mark for purposes determining the similarity between the marks.<sup>14</sup> See *Jet, Inc.*, 165 F.3d at 423 (6th Cir. 1999) (“We have endorsed the ‘anti-dissection rule,’ which serves to remind courts not to focus only on the prominent features of the mark, or only on those features that are prominent for purposes of the litigation, but on the mark in its totality.” (internal citation omitted)); *Universal City Studios, Inc. v. Nintendo Co., Ltd.*, 746 F.2d 112, 117-118 (2d Cir. 1984) (“[J]uxtaposing fragments of each mark does not demonstrate whether the marks as a whole are confusingly similar... When taken as a whole, we find as a matter of law that ‘Donkey Kong’ does not evoke or suggest the name of ‘King Kong.’” (emphasis added)).

Furthermore, Intel’s central argument with respect to the similarity of the marks is fatally flawed. Intel asserts that “IntellApex” “replicates the entire coined ‘Intel’ mark and merely adds a descriptive term.” (See SJM Opp, p. 22). However, the IntellApex mark uses the word “Intell,” which is not a replication of the word “Intel,” and “Apex,” which is a distinctive term – not a descriptive one. “Apex,” like the “Intell” portion of the IntellApex’s mark, is a suggestive term as it does not at all describe IntellApex’s services but *only suggests* to the consumer that it is a firm which assists its clients to reach intellectual heights. *DeGidio v. West Group Corp.*, 355

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<sup>14</sup> Ignoring Sixth Circuit authority on this issue, Intel instead relies on *Orkin Exterminating Co., Inc. v. Parrill*, 223 U.S.P.Q. 564, 566 (S.D. W. Va. 1983), in support of the proposition that the IntellApex mark should be dissected and the focus should be on the first syllable.

F.3d 506, 510 (6th Cir. 2004) (“A suggestive term suggests rather than describes an ingredient or characteristic of the goods and requires the observer or listener to use imagination and perception to determine the nature of the goods.” (internal citations omitted)). Thus, it is inappropriate to demote Apex, a distinctive portion of IntellApex’s mark, when assessing similarity.

Intel further argues that the marks sound similar because IntellApex is pronounced as “Intell-Apex.” (See SJM Opp., p. 21). This pronunciation may have been accurate had IntellApex separated “Intell” from “Apex.” However, since IntellApex is one word, the correct and the actual pronunciation used in commerce is as “in-tella-plex” with a short “a” and emphasis on the second syllable.

Moreover, the commercial presentation (seen below) of the parties’ respective marks further dispels of any chance of confusion whatsoever.



As can be seen from the commercial presentation of the marks,<sup>15</sup> the parties present their marks in starkly different typefaces and styles: the IntellApex mark contains all capital letters, while the Intel marks contain all lowercase letters; the IntellApex mark uses a wider font; the “e” in the Intel marks dip below the level of the other letters; the IntellApex mark contains the distinctive “A”; and the marks’ colors are different. These are significant differences in the visual depiction of the Intel and IntellApex marks. *IDV N. Am., Inc. v. S & M Brands, Inc.*, 26 F.Supp.2d 815, 825 (E.D. Va. 1998) (noting significant differences in the visual depiction of relevant marks). As such, the respective marks, as seen in the marketplace, are even more dissimilar and create even less likelihood of confusion. *Homeowners Group, Inc.*, 931 F.2d at 1109 (“While it is

<sup>15</sup> See <http://www.intellapex.com/> and <http://www.intel.com>.

certainly true that two marks consisting solely of the letters HMS could be very similar in appearance, confusion does not necessarily follow. ... It is this mark in its entirety, and how it is actually seen in the marketplace, that must also be compared to the relevant Homeowners mark.”).

**4) The marketing channels employed by IntellApex and Intel are completely dissimilar.**

The marketing channels employed by IntellApex and Intel Corporation are completely dissimilar. IntellApex, an intellectual property law firm, uses the Internet as its only marketing and advertising channel.<sup>16</sup> Intel, on the other hand, utilizes numerous marketing channels, including the Web, various radio, television, magazines, newspapers, and other print advertising programs, professional journals and a myriad of other advertising programs. (See SJM Opp, p. 24). Use of the Internet by Intel for some of its marketing does not alone constitute overlapping marketing channels with IntellApex. *Therma-Scan, Inc.*, 295 F.3d at 637 (“[S]ome use of the Internet for marketing, however, does not alone and as a matter of law constitute overlapping marketing channels. Instead, the relevant questions include: (1) whether both parties use the Web as a substantial marketing and advertising channel, (2) whether the parties’ marks are utilized in conjunction with Web-based products, and (3) whether the parties’ marketing channels overlap in any other way.” (internal citation omitted)); *R.L. Polk & Co. v. INFOUSA, Inc.*, 230 F.Supp.2d 780, 791 (E.D. Mich. 2002) (holding that the plaintiff’s general claim that both parties market their products over the Internet was insufficient to establish that they used similar marketing channels). *Current Comm. Group, LLC v. Current Media, LLC*, 2005 WL 1847215, at \*5 (S.D. Ohio 2005) (attached hereto as **Ex. F**) (holding that this factor weighed against finding a

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<sup>16</sup> Contrary to Intel’s blatant disregard for the truth, neither IntellApex nor Mssrs. Mohey or Bossenbroek ever authored a professional trade journal for the marketing of IntellApex. (See SJM Opp., p. 24). IntellApex’s responses to Intel’s requests for production of documents make it abundantly clear that IntellApex’s sole marketing channel is through the Internet. (Ex. B, Response Nos. 9, 12 & 16).

likelihood of confusion where “[a]lthough there [was] some overlap in the marketing channels because of the internet, ... the parties’ marketing channels [did] not overlap substantially.”).

Furthermore, it is apparent that Intel and IntellApex market and sell their goods and services to two different sets of potential customers. IntellApex’s services are exclusively targeted towards inventors who wish to take legal steps to protect their inventions, whereas, Intel provides computer hardware and technology solutions for the computing and communications industries to OEMs on a wholesale basis and through its own retail distribution network using authorized vendors/representatives. (*See Decl. Sellers*, ¶¶ 5-6). Therefore, there is no overlap in the marketing channel used by the two companies. *See Homeowners Group, Inc.*, 931 F.2d at 1111 (“Homeowners’ services are sold exclusively to real estate brokers and its marketing efforts are targeted to that commercial group. Those efforts consist primarily of telemarketing, production of special brochures and newsletters for brokers, and attending real estate conventions. In contrast, Specialists’ services are sold exclusively to owners of real estate and its marketing efforts are targeted to individuals who desire assistance in selling their property. Specialists’ marketing consists primarily of advertisements in the real estate section of newspapers and direct mail advertisements to property owners. It is apparent that Homeowners and Specialists market and sell their services to two different sets of potential customers.”).

**5) IntellApex’s customers seek legal representation and therefore are likely to exercise a high degree of purchaser care.**

Because this factor focuses on the “probable degree of purchaser care and sophistication” (*Kellogg Co.*, 337 F.3d at 623 (emphasis added)), Intel’s attempts to twist it as a factual issue are not going to work. (*See SJM Opp.*, p. 25). It is absurd for Intel to suggest that inventors, about to spend hundreds to thousands of dollars to protect their valuable and novel inventions, will not contact, consult, and negotiate with IntellApex to retain its services but would exclusively rely

on the IntellApex website and submit payments. In any event, IntellApex’s potential customers are certainly likely to exercise a high degree of care as does the general population when retaining an attorney. Further, IntellApex’s clientele are certainly sophisticated enough so as not to believe that Intel is providing legal services under the “IntellApex” mark. *Kellogg Co.*, 337 F.3d at 627 (holding that corporations and golfers purchasing \$1,500 golf clubs golfers were “sufficiently sophisticated, so as not to believe that Kellogg, a cereal company, has manufactured a golf club named ‘Toucan Gold.’”).

Further, surely Intel’s customers are not so unsophisticated as to believe that Intel now provides legal services under the “IntellApex” mark. Moreover, “the two industries [are] sufficiently separate, so that there will rarely, if ever, exist a consumer who is looking for [Intel’s] product in the [legal services] market.” *Id.* Therefore, there can be no likelihood of confusion in the minds of the parties’ customers that IntellApex is in anyway affiliated to Intel.

**6) There is no likelihood that either IntellApex or Intel will expand into the other’s service or product lines.**

Contrary to Intel’s claim, the inquiry of likelihood of expansion “is not limited simply to geographical expansion; rather, the inquiry concerns expansion in the types of ... services offered by the parties.” *Champions Golf Club, Inc. v. The Champions Golf Club, Inc.*, 78 F.3d 1111, 1121 (6th Cir. 1996); *Homeowners Group, Inc.*, 931 F.2d at 1112 (“Although plans for geographic expansion by one or both parties may be relevant, the inquiry contemplated under this factor is not so limited. The more important question in this case, which involves services which are not competitive or closely related, concerns expansion in the types of products or services offered by the parties.” (emphasis added)). IntellApex may wish to cater legal services to inventors in the all fifty states and abroad, however, IntellApex will never offer any goods or

services other than legal services<sup>17</sup> and Intel will never operate a law firm.<sup>18</sup> Consequently, this important factor indisputably favors IntellApex.

***F. USPTO's publication of IntellApex's mark for opposition is entitled to due consideration.***

The examining attorney at the United States Patent and Trademark Office has approved IntellApex's mark for publication. While the PTO's Notice of Publication creates no presumption, it nonetheless is entitled to substantial weight. *See Syntex Laboratories, Inc. v. Norwich Pharmacal Co.*, 315 F.Supp. 45, 52 (S.D. N.Y. 1970), *aff'd*, 437 F.2d 566 (2d Cir. 1971) ("While a preliminary Patent Office determination is not binding upon either this court or a trademark applicant, it is entitled to 'substantial weight' on the part of both."); *Prime Media Inc. v. Primedia Inc.*, 33 F.Supp.2d 932, 938 (D. Kansas 1998) (holding that a court may consider the rejection of a trademark application as persuasive authority in its analysis for infringement); *A & H Sportswear Co., Inc. v. Victoria's Secret Stores, Inc* 926 F.Supp. 1233, 1254 (E.D. Pa. 1996) ("While not binding on us here, we nonetheless believe the examining attorney's decision deserves our full consideration..."), *citing Morgan v. Daniels*, 153 U.S. 120 (U.S. 1894) (holding that "[i]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over.").<sup>19</sup> Unlike *Marketing Displays, Inc.*, 200 F.3d at 934, where there was no evidence that the PTO considered the senior user's "WindMaster" mark and therefore no weight was given to the registration of defendant's mark, the PTO in the present case surely considered Intel's marks which Intel, itself, claims are "world famous." (*See* SJM Opp., p. 3).

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<sup>17</sup> *See* note 2, *supra*.

<sup>18</sup> *See* note 1, *supra*.

<sup>19</sup> Intel cites *Marketing Displays, Inc.*, 200 F.3d at 934, for the rule that the PTO's determination is entitled to no weight.

### III. CONCLUSION

For the foregoing reasons, this Court should grant IntellApex's Motion for Summary Judgment.

Respectfully Submitted

Dated: December 19, 2005

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