IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: Ivani, LLC Serial No: 88/354,321 Mark: **NPS** Filed: March 25, 2019	**TRADE MARK APPLICATION** **PRINCIPAL REGISTER** **RESPONSE TO OFFICE ACTION** **SUBMITTED: DECEMBER 6, 2019** Attn: Michael Ebaugh Law Office 108

Applicant Ivani, LLC (the "Applicant") hereby respectfully submits this response to the non-final Office Action dated June 6, 2019, submitted by the Trademark Examining Attorney ("Examiner"), preliminarily refusing to register Applicant's Mark, NPS (Ser. No. 88/354,321) ("Applicant's Mark). Applicant submits the following arguments in support of registration.

The Examiner seeks an Amendment to the Identification of Goods because the Examiner asserts that Applicant's current language is indefinite. Specifically, Examiner argues that "computer firmware" is indefinite. Applicant adopts the language proposed by the examiner and amends the identification of goods as follows:

> "Computer hardware and downloadable computer firmware to analyze data to detect human presence within an area."

Examiner further asserts a Section 2(d), likelihood of confusion refusal, but in doing so, it is clear that Examiner needs further information about Applicant's goods, and the underlying technology with which Applicant's Mark is associated. Applicant's good can efficiently detect human presence and cause a reaction to the same (i.e. a light turning on or a temperature reaction

from a HVAC system), and it performs this function without the use of a network (see attached definition of network) or sensors (see attached definition of sensor).

Applicant's good, with which Applicant's Mark is associated, is innovative because rather than "sense" or "detect" an object, what is actually measured is the disturbances in the normal state of energy exuded by smart devices in a space. Presently, IoT (internet of things) devices, i.e., devices that can transfer data, exist in every space. Each of these devices use many wireless communication protocol (such as Bluetooth, WiFi, Zigbee, Z-wave, etc.). Each of these devices are designed to perform their particular and discreet task. Applicant's good is a technology that is "sensorless", and in effect, leverages the waves in the environment created by these independently existing and operating IoT devices. Each device therefore is created to perform independently, not as a network, but the energy emitted from these devices is leveraged by Applicant. For example, your cell phone, your tablet, a socket on your wall and a light fixture in your living room are not a "network". They each perform a discreet task. There is no "network", rather, there are just the points of energy emission within a space (the IoT devices) that exist for a particular independent purpose. Applicant's good collects the data correlating to the invisible waves of energy exuded from these devises, and translates this data into what can be explained as an ordinary resting state of the same. Applicant's good, a technology, does not sense "a human", rather, it can detect when there is a disruption in the ordinary pathway of the invisible emission of energy form the IoT devices in the relevant space. Thus, the good associated with Applicant's Mark is the analysis of wireless signals, and the human interaction with those signals. Importantly, the IoT devices that exude the energy that Applicant's good leverages can be moved around, can leave the particular area, can be removed from the space, and new IoT devices can enter the space. In such instances, Applicant's good can recognize the "new normal" and adjust the relevant data

collection accordingly. For further information about Applicant's good, see the attached YouTube video.

Above all, Applicant's technology is patented. As such, Applicant has exclusive rights to use the technology associated with Applicant's good (and thus, associated with Applicant's Mark). Therefore, there can be no similarity of the goods with Registrant (or anyone else) because Applicant's good is the only good of its nature in the marketplace.

Given the above description of Applicant's good, and the fact that Applicant holds patents in its technology, there is no likelihood of confusion in the marketplace. Examiner highlights similarity of the marks and similarity of the goods as the DuPont factors which drive Examiner's refusal. Both of these arguments however are dispelled at the outset. Applicant's Mark and the Cited Mark, Registration Number 5182094 may be pronounced the same, but, these marks **do not have the same meaning**. And, because Applicant holds a patent, it is not possible that these marks will be used in the same way.

The Cited Mark is used in association with "network processor semiconductors for networking applications". Registrant Mellanox Technologies, LTD, an Israeli company, is a supplier of end-to-end Ethernet and InfiniBand intelligent interconnect solutions and services for servers, storage, and hyper-converged infrastructure. Registrant Mellanox intelligent interconnect solutions increase data center efficiency. Registrant Mellanox offers network and multicore processors, network adapters and cables that accelerate application runtime and maximize business results for a wide range of markets including high performance computing, enterprise data centers, Web 2.0, cloud, storage, telecom and financial services. For an explanation of Registrant and the services offered by Registrant in association with the Cited Mark, see the attached YouTube video. In any event, the Cited Mark is used in association with just network processor semiconductors.

Thus the Cited Mark is associated with an integrated circuit that is programed to function as the network architecture component inside a network application domain. See attached definition of network processor.

On its face, it is clear that Applicant's Mark and the Cited Mark are not at all the same, and in fact are not similar, are not used in the same space, are not used for same or related goods or services, do not travel in the same trade channel, and the respective goods are not complimentary. Simply put, apart from the use of the same letters, Applicant's good and Registrant's good have no relation.

In this instance, therefore, because there is no similarity of goods, trade channels, market, relevant consumer, or meaning of the marks, there cannot be a likelihood of confusion. Applicant respectfully requests that Examiner withdraw the Section 2(d) refusal. The law supports this conclusion. Even identical marks will not be likely to confuse consumers if they are not encountered by the same prospective buyers in situations that would not give an impression that they came from the same source. TMEP § 1207.01(a)(i). Furthermore, Applicant and Registrant are not "related" because "relatedness" does not mean that the services are merely in the same broad industry but instead that they occur in situations that will likely link the services or goods in the consumers' mind as to the source. *Homeowners Group, Inc. v. Home Marketing Specialists, Inc.*, 931 F.2d 1100, 1108–09 (6th Cir. 1991) ("However, services are 'related' not because they coexist in the same broad industry, but are 'related' if the services are marketed and consumed such that buyers are likely to believe that the services, similarly marked, come from the same source.")

Here, the commercial impression of the marks creates a heuristic to different sources in the mind of the consumer. Applicant's Mark in relation to Applicant's goods is in no way shape or form related to Registrant's use of the Cited Mark in association with Registrant's goods and services. And,

because Applicant's consumer – an individual in search of a novel and more efficient application that will allow for a space to respond to the presence of a human, without the installation of additional hardware throughout a space, without a "network" and without "sensors", is completely different from Registrant's consumer – a large-scale corporate entity in search of data storage and connectivity, there are no opportunities to encounter the goods in the same space in the marketplace. Many cases have reached this same conclusion that lacking opportunities to encounter the goods under similar circumstances, even when the marks are identical or very similar, defeats the possibility of a likelihood of confusion. *See Plus Products v. Plus Discount Foods, Inc.*, 722 F.2d 999, 1004 (2nd Cir. 1983) (no likelihood of confusion between similar PLUS marks for products sold in supermarkets to the extent that the goods in question were related but non-competitive); *Dynamics Research Corp. v. Langenau Mfg. Co.*, 704 F.2d 1575, 1576 (Fed. Cir. 1983) (no likelihood of confusion between identical marks for goods marketed in the metal fabrication industry, because the goods were non-competitive and purchased by different customers, i.e., opposer sold its goods to manufacturers of press brakes and sheet metal fabrication shops, whereas applicant sold its goods to state highway departments and airport authorities); *McGregor-Doniger, Inc. v. Drizzle, Inc.*, 599 F.2d 1126, 1130 (2nd Cir. 1979), *overruled on other grounds by Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc.*, 973 F.2d 1033, 1044 (2nd Cir. 1992) (holding that customers shopping for low-line golf jacket not likely to be confused by a similar mark for high-line woman's coat because such goods were non-competitive); *Edison Bros. Stores, Inc. v. Cosmair, Inc.*, 651 F.Supp. 1547 (S.D.N.Y. 1987) (holding that customers shopping for registrant's low-line NOTORIOUS clothing products were not likely to be confused by a defendant's high-line NOTORIOUS perfume products because such goods were non-competitive); *H. Lubovsky, Inc. v. Esprit de Corp.*, 627 F.Supp. 483 (S.D.N.Y. 1986) (holding that customers shopping for registrant's ESPRIT shoe

products were not likely to be confused by defendant's ESPRIT non-footwear clothing products because such goods were non-competitive); *Riva Boats International S.p.a. v. Yamaha Motor Corp.*, 223 U.S.P.Q. 183 (C.D.Cal. 1983) (no likelihood of confusion between RIVA for boats and RIVA for motor scooters); *J.C. Penney Co. v. Arctic Enterprises, Inc.*, 375 F.Supp. 913 (D. Minn. 1974) (no likelihood of confusion between EL TIGRE for snowmobiles and EL TIGRE for automobile tires and minibikes); *Oxford Industries, Inc. v. JBJ Fabrics, Inc.*, 6 U.S.P.Q.2d 1756, 1758 (S.D.N.Y. 1988) (no likelihood of confusion between JBJ for woman's apparel and JBJ for fabric print design and printing).

Applicant's good and Registrant's good are non-competitive. Applicant and Registrant are not marketplace adversaries. No consumer that encounters Applicant's good under Applicant's Mark will believe Registrant to be the source, or vice versa, because Applicant and Registrant occupy completely different and non-intersecting spaces. There is no likelihood of confusion between Applicant's Mark and the Cited Mark.

Examiner's evidence, in light of the above explanation of the stark differences between Applicant and Registrant's goods is inapposite. None of the examples provided include an entity that creates network processor semiconductors for networking applications while simultaneously performing services in the human detection area. Therefore, for the foregoing reasons, Applicant respectfully requests that the Section 2(d) refusal be withdrawn and that Applicant's Mark be permitted to proceed to registration.