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

Proceeding	91207789
Party	Defendant Funzio, Inc.
Correspondence Address	Eugene M. Pak Wendel, Rosen, Black & Dean LLP 1111 Broadway, 24th Floor Oakland, CA 94607 UNITED STATES tmdocket@wendel.com
Submission	Answer
Filer's Name	Eugene Pak
Filer's e-mail	tmdocket@wendel.com
Signature	/Eugene Pak/
Date	03/04/2014
Attachments	Answer to Notice of Opposition re MODERN WAR (TTAB).pdf(86927 bytes)

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

ACTIVISION PUBLISHING, INC.)	
)	Opposition No. 91207789
Opposer,)	
)	Serial No. 85424172 (MODERN WAR)
v.)	
)	
FUNZIO, INC.,)	
)	
Applicant.)	
)	

ANSWER TO CONSOLIDATED NOTICE OF OPPOSITION

Applicant Funzio, Inc. ("Funzio" or "Applicant") hereby answers the Consolidated Notice of Opposition ("Opposition") filed by Activision Publishing, Inc. ("Opposer"), as follows:¹

Regarding the first unnumbered paragraph of the Opposition, Applicant admits that the Opposer is identified as Activision Publishing, Inc. and appears to have an address at 3100 Ocean Park Boulevard, Santa Monica, California 90405. Applicant denies that Opposer will be damaged by registration of the marks MODERN WAR (Serial No. 85/424,172) and MODERN WAR BY FUNZIO (Serial No. 85/424,176).

1. Answering paragraph 1 of the Opposition, Applicant is without knowledge or information sufficient to form a belief as to the truth of the statements and allegations in the paragraph, and on that basis denies each of them.

¹ Applicant notes that although the Opposition is entitled "Consolidated Notice of Opposition" and opposes two applications filed by Applicant (Serial Nos. 85/424,172 and 85/424,176), there are actually two separate opposition proceedings: 1) Opposition No. 91200789 (MODERN WAR) and 2) Opposition No. 91207791 (MODERN WAR BY FUNZIO). As such, Applicant is filing an Answer in both proceedings.

2. Answering paragraph 2 of the Notice of Opposition, Applicant admits that Opposer appears to be the owner of Registration No. 3,987,485 issued by the U.S. Patent and Trademark Office (“PTO) for the mark MODERN WARFARE, and that Exhibit A appears to be a copy of the Certificate of Registration.

3. Answering paragraph 3 of the Notice of Opposition, Applicant is without knowledge or information sufficient to form a belief as to the truth of the statements and allegations in the paragraph, and on that basis denies each of them.

4. Answering paragraph 4 of the Notice of Opposition, Applicant admits that it filed the applications identified in paragraph 4 with the PTO (Serial Nos. 85/424,172 and 85/424,176) to register the marks MODERN WAR and MODERN BY FUNZIO for the goods identified in paragraph 4 and in the applications. Except as admitted, Applicant is without knowledge or information sufficient to form a belief as to the truth of the statements and allegations in the paragraph, and on that basis denies each of them.

5. Answering paragraph 5 of the Opposition, Applicant admits that Opposer used “MODERN WARFARE” in connection with its other mark CALL OF DUTY prior to the date that Applicant filed its applications to register MODERN WAR and MODERN WAR BY FUNZIO. Except as admitted, Applicant is without knowledge or information sufficient to form a belief as to the truth of the statements and allegations in the paragraph, and on that basis denies each of them.

6. Answering paragraph 6 of the Opposition, Applicant denies the statements and allegations therein.

7. Answering paragraph 7 of the Opposition, Applicant denies the statements and allegations therein.

8. Answering paragraph 8 of the Opposition, Applicant admits that registration is prima facie evidence of the right to use marks in connection with the goods identified in such registration. Except as admitted, Applicant denies the remaining statements and allegations therein.

9. Answering paragraph 9 of the Opposition, Applicant admits the allegations therein, but denies that the marks MODERN WAR and MODERN WAR BY FUNZIO are similar to Opposer's MODERN WARFARE mark to the extent that is being alleged.

AFFIRMATIVE DEFENSES

As and for separate affirmative defenses, Applicant alleges the defenses set forth below. Applicant reserves the right to amend these, raise additional affirmative defenses, and/or file counterclaims based on information obtained in discovery or investigation.

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim)

Opposer's claims, and each of them, should be dismissed in whole or in part on the grounds that Opposer has failed to state a claim upon which relief can be granted in whole or in part.

SECOND AFFIRMATIVE DEFENSE

(Estoppel)

Opposer's claims, and each of them, are barred by the doctrine of equitable estoppel.

WHEREFORE, Applicant respectfully requests that:

1. The Notice of Opposition be denied and Applicant's Applications (Ser. No. 85/424,172 (MODERN WAR) and 85/424,176 (MODERN WAR BY FUNZIO) be allowed to proceed to publication, allowance, and registration; and

2. For such other relief as the Board deems proper.

Dated: March 4, 2014

Respectfully submitted,

WENDEL ROSEN BLACK & DEAN LLP

By: /Eugene M. Pak/
Eugene M. Pak

1111 Broadway, 24th Floor
Oakland, California 94607
Phone: (510) 834-6600
E-mail: eugene.pak@wendel.com;
tmdocket@wendel.com

Attorneys for Applicant
Funzio, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Answer to the Consolidated Notice of Opposition** of has been served on Opposer ACTIVISION PUBLISHING, INC. by mailing said copy on March 4, 2014 via First Class Mail, postage prepaid to:

Marc E. Mayer
Alexa L. Lewis
Mitchell Silberberg & Knupp LLP
1137 West Olympic Boulevard
Los Angeles, CA 90064
E-mail: mem@msk.com, all@msk.com

/Carol A. Bagshawe/
Carol A. Bagshawe