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

Proceeding	91210177
Party	Defendant e2 Auto LLC, Winokur, Eric Matthew
Correspondence Address	ERIC WINOKUR E2 AUTO LLC 3131 S BASCOM AVE STE 210 CAMPBELL, CA 95008-6754 info@e2-auto.com;eric@e2-auto.com
Submission	Answer
Filer's Name	Eric
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Signature	/eric winokur/
Date	04/30/2013
Attachments	eSquare Answer to Complaint.pdf (12 pages)(286937 bytes)

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

In the Matter of
Trademark Application Serial No. 85/670,848
Published in the Official Gazette: December 11, 2012
Mark: ESQUARE

Square, Inc.,)	
)	
Opposer,)	
v.)	Opposition No. <u>91210177</u>
)	
e2 Auto LLC and Eric Matthew Winokur,)	
)	
Applicant.)	
_____)	

Commissioner for Trademarks
P.O. Box 1451
Alexandra, Virginia 22313-1451

**APPLICANT’S ANSWER
TO NOTICE OF OPPOSITION, AFFIRMATIVE DEFENSES**

Applicant, e2 Auto LLC and Eric Mathew Winokur (“Applicant”), having its business at 3131 South Bascom Ave. Suite 210, Campbell CA 95008, for its answer to the Notice of Opposition filed by Square, Inc. (“Opposer”) against application for registration of Applicants trademark ESQUARE, Serial No. 85/670,848 filed July 6, 2012, and published in the Official Gazette of December 11, 2012 (the “Mark”), pleads and avers as follows:

Denials

Applicant does not have knowledge or information sufficient to admit or deny the allegations in the preamble concerning Opposer’s business organization, location, or belief with respect to the

Application Serial Number 85/670,848 for Applicant in International Class 009 (“ESQUARE” or “Applicant’s Mark”), and on that basis, denies those allegations and further denies that Opposer will be damaged by the registration of Applicant’s Mark.

1. Applicant admits that it is the owner of Application Serial Number 85/670,848 (the “Application”), published in the December 11, 2012 issue of the Official Gazette; Applicant admits also that it filed the Application on July 6, 2012 based upon its bona fide intent to use the mark in commerce on specified goods and services in International Class 009, and admits further that paragraph 1 of the Opposition appears to accurately recite the goods and services described in the Application. Applicant denies any allegations in paragraph 1 of the Opposition which it does not expressly admit.

2. Answering paragraph 2 of the Notice of Opposition, Applicant does not have sufficient knowledge or information to form a belief as to the truth of the averments the validity, ownership or priority of the Opposer’s Marks referenced in Paragraph 2, of the Opposition, and on that basis denies them.

3. Answering paragraph 3 of the Notice of Opposition, Applicant does not have sufficient knowledge or information to form a belief as to the truth of the averments the validity, ownership or priority of the Opposer’s Marks referenced in Paragraph 3, of the Opposition, and on that basis denies them.

4. Answering paragraph 4 of the Notice of Opposition, Applicant does not have sufficient knowledge or information to form a belief as to the allegations contained therein and accordingly denies the allegations.

5. Answering paragraph 5 of the Notice of Opposition, Applicant does not have sufficient knowledge or information to form a belief as to the allegations contained therein and accordingly denies the allegations.

6. Answering paragraph 6 of the Notice of Opposition, Applicant does not have sufficient knowledge or information to form a belief as to the truth of the averments the validity, ownership

or priority of the Opposer's Marks referenced in Paragraph 6, of the Opposition, and on that basis denies them. Applicant specifically denies that Opposer's SQUARE or SQUARE-based Marks are entitled to any special protections as famous marks, and avers that because they are weak, merely descriptive, and devoid of secondary meaning, they should be afforded narrow and limited protections, if any.

7. Answering paragraph 7 of the Notice of Opposition, Applicant does not have sufficient knowledge or information to form a belief as to the allegations contained therein and accordingly denies the allegations.

8. Answering paragraph 8 of the Notice of Opposition, Applicant does not have sufficient knowledge or information to form a belief as to the allegations contained therein and accordingly denies the allegations.

9. Answering paragraph 9 of the Notice of Opposition, Applicant does not have sufficient knowledge or information to form a belief as to the allegations contained therein and accordingly denies the allegations.

10. Answering paragraph 10 of the Notice of Opposition, Applicant does not have sufficient knowledge or information to form a belief as to the allegations contained therein and accordingly denies the allegations.

11. Answering paragraph 11 of the Notice of Opposition, Applicant does not have sufficient knowledge or information to form a belief as to the allegations contained therein and accordingly denies the allegations.

12. Answering paragraph 12 of the Notice of Opposition, Applicant does not have sufficient knowledge or information to form a belief as to the truth of the averments the validity, ownership or priority of the Opposer's Marks referenced in Paragraph 12, of the Opposition, and on that basis denies them. Applicant specifically denies that Opposer's SQUARE or SQUARE-based Marks are entitled to any special protections as famous marks, and avers that because they are weak, merely descriptive, and devoid of secondary meaning, they should be afforded narrow and limited protections, if any.

13. Answering paragraph 13 of the Notice of Opposition, Applicant does not have sufficient knowledge or information to form a belief as to the allegations contained therein and accordingly denies the allegations. Applicant specifically denies that the referenced SQUARE or SQUARE-based Marks are famous, or, if the SQUARE or SQUARE-based Marks are famous, Applicant denies that they became famous “well before” Applicant adopted the “ESQUARE” mark.
14. Answering paragraph 14 of the Notice of Opposition, Applicant denies each and every allegation contained therein.
15. Answering paragraph 15 of the Notice of Opposition, Applicant denies each and every allegation contained therein.
16. Answering paragraph 16 of the Notice of Opposition, Applicant denies each and every allegation contained therein.
17. Answering paragraph 17 of the Notice of Opposition, Applicant denies each and every allegation contained therein.
18. Answering paragraph 18 of the Notice of Opposition, Applicant admits the allegations of Paragraph 18, subject, however, to Applicants specific denial of any averment that Applicant needed any consent or agreement from Opposer to file the Application.
19. Answering paragraph 19 of the Notice of Opposition, Applicant denies each and every allegation contained therein.
20. Answering paragraph 20 of the Notice of Opposition, Applicant does not have sufficient knowledge or information to form a belief as to the truth of the averments contained in paragraph 20 of the Opposition, and on that basis denies them, except that Applicant specifically denies that Applicants Mark is confusingly similar to any of the Opposer’s SQUARE or SQUARE-based Marks referenced, denies that the parties commercial markets are “substantially identical” denies that similarities, if any, between the parties respective marks or markets are likely to cause confusion or mistake or to deceive, and denies that confusion or mistake or deception, if any, has caused any loss, damage or injury to Opposer or the purchasing public.

21. Answering paragraph 21 of the Notice of Opposition, Applicant denies each and every allegation contained therein.
22. Answering paragraph 22 of the Notice of Opposition, Applicant denies each and every allegation contained therein.
23. Answering paragraph 23 of the Notice of Opposition, Applicant denies each and every allegation contained therein.
24. Answering paragraph 24 of the Notice of Opposition, Applicant denies each and every allegation contained therein.
25. Answering paragraph 25 of the Notice of Opposition, Applicant denies each and every allegation contained therein.
26. Answering paragraph 26 of the Notice of Opposition, Applicant denies each and every allegation contained therein.
27. Answering paragraph 27 of the Notice of Opposition, Applicant denies each and every allegation contained therein.

AFFIRMATIVE DEFENSES

First Affirmative Defense

As a separate and affirmative defense to the Opposition, Applicant alleges that Opposer fails to set forth facts sufficient to oppose the registration of the Applicant's mark, or to state a claim upon which any relief can be granted.

Second Affirmative Defense

As a separate and affirmative defense to the Opposition, Applicant alleges that as a result of Applicant's continuous use of the Mark since the time of Applicant's adoption thereof, the Mark has developed significant goodwill among the consuming public and consumer acceptance of the services offered by Applicant in conjunction with the Mark. Such goodwill and

widespread usage has caused the Mark to acquire distinctiveness with respect to Applicant, and caused the Mark to become a valuable asset of Applicant.

Third Affirmative Defense

As a separate and affirmative defense to the Opposition, Applicant alleges that there is no likelihood of confusion, mistake or deception because, inter alia, the Mark and the pleaded marks of the Opposer are not confusingly similar.

Fourth Affirmative Defense

As a separate and affirmative defense to the Opposition, Applicant alleges that there is no likelihood of confusion, mistake, false suggestion, or deception because, inter alia, the Applicant's mark and the pleaded marks of the Opposer, as used by the parties, are not confusingly similar. Any similarity between the Mark and Opposer's alleged trademark is restricted to that portion of the Mark consisting of the word "square," which is not distinctive. As a result, under the antidissection rule any secondary meaning Opposer may have in its marks is narrowly circumscribed to the exact trademarks alleged and does not extend to any other feature of the trademarks beyond the word "SQUARE."

Fifth Affirmative Defense

As a separate and affirmative defense to the Opposition, Applicant alleges that there is no likelihood of confusion, mistake, false suggestion, or deception because, inter alia, the Mark and the pleaded marks of the Opposer are not confusingly similar. Due to extensive third-party use, applications for, or registrations of marks identical or confusingly similar to the "SQUARE" or "SQUARE" based marks, used in connection with goods or services identical or similar to those as to which Opposer claims rights, Opposer's rights, if any, are too severely limited as to give rise to any enforceable rights against Applicant or to prevent the registration of the Applicant's mark.

Sixth Affirmative Defense

As a separate and affirmative defense to the Opposition, Applicant alleges that alternatively, any similarity between the Mark and Opposer's alleged trademark is restricted to that portion of the Mark consisting of the letters "square," which is not distinctive.

Both marks are phonetically pronounced differently. Phonetically Opposer's mark "Square" and "Square Up" are singularly limited to the phonetic pronunciation as "skwair" and "skwair up". As opposed to applicants mark (Esquare) which may be generally and phonetically pronounced as "eskwahreh" or "e-skware". As a result, under the antidissection rule any secondary meaning Opposer may have in its alleged SQUARE and SQUARE UP trademark is narrowly circumscribed to the exact trademark alleged and does not extend to any other feature of the trademark beyond the letters "SQUARE."

Seventh Affirmative Defense

As a separate and affirmative defense to the Opposition, Applicant alleges that Opposer's pleaded marks is or has become generic for inexpensive, convenient or fast but low quality or commercialized versions of credit card payment processing, and therefore cannot have meaning as a trademark. Or, in the alternative, Opposer's marks are merely descriptive of the goods or services offered under the mark. Opposer's pleaded marks are therefore inherently unprotectable absent acquired distinctiveness, which the pleaded marks lack.

Eighth Affirmative Defense

As a separate and affirmative defense to the Opposition Applicant alleges that Applicant has been using its mark and developing consumer recognition and goodwill in its mark for approximately 5 years and during this time Opposer failed to take meaningful action to assert the claims on which it bases this Opposition, on which inaction Applicant has relied to its detriment. Opposer's claims are consequently barred by the doctrines of laches, acquiescence and estoppel from opposing Applicant's application.

Ninth Affirmative Defense

As a separate and affirmative defense to the Opposition, Applicant alleges that the Opposition is barred by the doctrine of unclean hands.

Tenth Affirmative Defense

As a separate and affirmative defense to the Opposition, Applicant alleges that the Opposition is barred by the doctrine of waiver.

Eleventh Affirmative Defense

As a separate and affirmative defense to the Opposition, Applicant alleges that the Opposition is barred because Opposer has suffered no damages.

Twelfth Affirmative Defense

As a separate and affirmative defense to the Opposition, Applicant alleges that the Opposition is barred in that Applicant's actions were taken in good faith, based on good, sufficient, and legal cause, upon reasonable grounds for belief in their truth or justification, and were reasonable under the circumstances.

Thirteenth Affirmative Defense

As a separate and affirmative defense to the Opposition, Applicant alleges that the terms "SQUARE" and "SQUARE UP" are not terms coined by Opposer. Rather, the terms "SQUARE" and "SQUARE UP" are generic terms to denote an event of payment, bill payment, or account settlement, as defined www.dictionary.com and by the Merriam Webster Dictionary. Therefore, Opposer's pleaded "SQUARE" and "SQUARE UP" trademark is a generic reference to the services offered under the mark, i.e., a "payment settlement" with the theme of "squaring up".

Fourteenth Affirmative Defense

As a separate and affirmative defense to the Opposition, Applicant alleges that there is no likelihood of dilution by blurring because Opposer's and Applicant's marks are not sufficiently similar; there are, upon information and belief, numerous uses and registrations of third party marks with the "square" formative; neither Applicant nor Applicant's predecessors in interest intended any association with Opposer's marks or any of them; and upon information and belief, ordinary prospective purchaser's of Applicants products do not associate Applicant's and Opposer's marks.

Fifteenth Affirmative Defense

As a separate and affirmative defense to the Opposition, Applicant alleges that Applicant's services and Opposer's services are not marketed through the same channels of trade.

Sixteenth Affirmative Defense

As a separate and affirmative defense to the Opposition, Applicant alleges that Applicant does not provide credit card processing services, and or merchant card services.

Seventeenth Affirmative Defense

As a separate and affirmative defense to the Opposition, Applicant alleges Applicant's mark and Opposer's marks are not likely to cause confusion, mistake, false suggestion or deception to purchasers as to the source of Opposer's goods or services.

Eighteenth Affirmative Defense

As a separate and affirmative defense to the Opposition, Applicant alleges that Applicant's mark and Opposer's marks are not likely to disparage or falsely suggest a trade connection between Opposer and Applicant.

Nineteenth Affirmative Defense

Applicant further affirmatively alleges that its application should be allowed to proceed over a likelihood of confusion rejection because the word "square" or its phonetic equivalent is "highly diluted." Through a basic word search for "square" there were over 3091 registered results in the TEAS system, and 271 were in international class 009.

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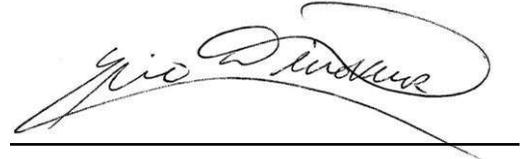
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WHEREFORE, Applicant prays that Opposer's Notice of Opposition be rejected and dismissed, and that a registration for the mark ESQUARE be issued to the Applicant.

Dated: April 30, 2013

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Eric M. Winokur", written over a horizontal line.

Eric M. Winokur
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EXHIBIT A

Exhibit A: Image of www.dictionary.com displaying common definition of “Square” and “Square Up”.

