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

Proceeding	91221324
Party	Plaintiff Nintendo of America, Inc.
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Date	11/12/2015
Attachments	Motion_to_Compel.pdf(655431 bytes)

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

NINTENDO OF AMERICA INC.,

Opposer,

v.

MARIO JONES,

Applicant.

Opposition No. 91,221,324

Serial No.: 86/283,191

Mark: SUPAH MARRIO

Filed: May 16, 2014

Published: December 2, 2014

Classes: 41

OPPOSER’S MOTION FOR AN ORDER COMPELLING DISCOVERY RESPONSES

Pursuant to 37 C.F.R. § 2.120(e), Fed. R. Civ. P. 37(a)(3)(B), and TBMP § 523, Opposer Nintendo of America Inc. (“Nintendo”) hereby moves for an order compelling Applicant Mario Jones (“Applicant”) to provide written responses to Nintendo’s First Set of Interrogatories and to provide written responses and produce documents in response to Nintendo’s First Set of Requests for Production of Documents and Things. As detailed below, the October 21, 2015 deadline for responses has long passed, and Applicant has not responded to Nintendo’s discovery requests or to Nintendo’s communications attempting to resolve the failure to respond.

Background Facts

Early Discussions. Before filing its Notice of Opposition, Nintendo attempted to work directly with Applicant to resolve the parties’ dispute. Declaration of Katherine Keating (“Keating Decl.”) at ¶ 2. After an initial exchange of letters, Nintendo offered to further extend the deadline to oppose to give the parties more time to discuss a resolution. *Id.* Receiving no response from Applicant, Nintendo filed its Notice of Opposition, and Applicant filed an Answer. *Id.*

Unsuccessful Attempts to Schedule Discovery Conference. The parties were supposed to hold their discovery conference by June 10, 2015. Nintendo attempted to schedule the conference with Applicant and requested Board participation in the conference. *Id.* at ¶ 3. The Interlocutory Attorney assigned to the case also attempted to schedule the conference but was unsuccessful. *Id.* at ¶ 4. On July 1, the Interlocutory Attorney entered a notice that Applicant had “not responded to attempts by Board personnel using e-mail and telephone to schedule [the] discovery conference” and confirming that the parties’ initial disclosures remained due on July 10. *Id.*

Initial Disclosures. In light of Applicant’s evident decision not to participate in a discovery conference, Nintendo moved forward with its initial disclosures, which it served on July 10 by mailing them to Applicant’s address of record. *Id.* at ¶ 5. Nintendo’s prior letters to Applicant had been successfully delivered to this mailing address. *Id.* at ¶ 6. On July 30, the envelope containing Nintendo’s initial disclosures was returned by the Postal Service, with the handwritten notation “does not live here.” *Id.* Nintendo e-mailed a copy of its initial disclosures to Applicant the following day, notifying him that the copy sent via U.S. Mail had been returned and asking him to provide his current mailing address. *Id.* at ¶ 7.¹

Nintendo received no response to that e-mail message and received no initial disclosures from Applicant. *Id.* Nintendo sent another e-mail message on August 24 to confirm that Applicant had received Nintendo’s initial disclosures, and to note that Nintendo had received no initial disclosures from Applicant. *Id.* at ¶ 8. Nintendo asked that if Applicant intended to

¹ All e-mail messages from Nintendo’s counsel to Applicant were sent to Applicant’s e-mail address of record. *Id.* at ¶ 3. Applicant used this e-mail address to send a message to Nintendo’s counsel in June 2015, *id.* at ¶ 4, and no message sent by Nintendo’s counsel to Applicant at this e-mail address has been returned as undeliverable. *Id.* at ¶ 3.)

provide initial disclosures in the case, he let Nintendo know when it should expect to receive them. *Id.* Applicant did not respond to the message. *Id.*

On October 19, 2015 – more than three months after they were due and more than four months since Nintendo had had any contact from Applicant – Nintendo finally received initial disclosures from Applicant. *Id.* at ¶ 11. The disclosures were not accompanied by any cover letter or other communication from Applicant to account for their delay or to provide any information as to Applicant’s intentions with respect to the opposition proceedings. *Id.*

Nintendo’s Discovery Requests. Nintendo served Interrogatories, Requests for Production of Document and Things, and Requests for Admission by mailing copies to Applicant’s mailing address of record on September 16, 2015, and e-mailing copies to Applicant’s e-mail address of record on September 17. *Id.* at ¶¶ 9-10 & Exhs. A, B, & C, and D. Applicant’s responses were due by October 21, 2015. *Id.*

Nintendo did not receive any responses to its Interrogatories, Requests for Production of Document and Things, or Requests for Admission or any communications from Applicant requesting additional time to respond. *Id.* at ¶ 12. Nintendo waited for more than a week to allow for delays in postal delivery before concluding that no responses from Applicant were likely to arrive.

On October 30, 2015, Nintendo sent Applicant an e-mail message explaining that the discovery responses were overdue and that Nintendo needed the responses to move forward in the opposition proceedings. Nintendo also explained that the November 7 deadline for the parties to make expert disclosures meant that Nintendo needed to know right away whether Applicant intended to provide responses. Accordingly, Nintendo asked Applicant to let Nintendo know by the end of the day on November 3 whether Applicant intended to respond to

the discovery requests. Nintendo explained that if it did not hear from Applicant by then, it would take the silence to mean that Applicant did not intend to respond to the discovery requests and that the necessary next step for Nintendo would be to ask the Board to intervene so that Nintendo could get the information necessary to move the case forward. *Id.* at ¶ 12 & Exh. E.

As of the filing date of this Motion, Applicant has not responded to Nintendo's October 30 e-mail or otherwise communicated with Nintendo, and has not provided any responses to Nintendo's Interrogatories, Requests for Production of Document and Things, or Requests for Admission. *Id.* at ¶ 13.

Argument

I. Interrogatories and Requests for Production of Documents and Things

Responses to interrogatories and requests for production must be served within 30 days after the date of service, with five additional days to respond when service is made by means other than electronic service. TBMP § 405.04(a), § 406.04(a) Applicant's responses to Nintendo's Interrogatories and Requests for Production were due by October 21, 2015. Applicant has not served any responses or objections. In fact, Applicant has declined to communicate with Nintendo altogether. *See Keating Decl.* at ¶¶ 4-13.²

From the moment Nintendo first learned of Applicant's trademark application, its preference has been to resolve the matter without litigation. Nintendo filed these opposition proceedings only after Applicant declined to continue discussions about a potential resolution.

² Applicant has also failed to respond to Nintendo's Requests for Admission. *Keating Decl.* at ¶¶ 12-13. Accordingly, the matter in Nintendo's Requests for Admission is deemed admitted without the necessity of any motion by Nintendo. TBMP § 524.01 ("If no response is timely served to a request for admission, the matter is automatically deemed admitted, and no motion is necessary."); Fed. R. Civ. P. 36(a)(3) ("A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney.").

Having been left with no choice but to pursue the opposition, Nintendo has been hamstrung in its ability to move the proceedings forward because of Applicant's refusal to respond to discovery. For example, though the Application at issue was filed on the basis of an intent to use, Applicant denied in his Answer that Nintendo has priority with respect to the marks at issue. Answer at ¶ 16 (May 13, 2015). Especially since Applicant declined to participate in a discovery conference, his responses to Nintendo's Interrogatories and Requests for Production are Nintendo's only means of understanding both the basis for Applicant's assertion of priority and the nature and scope of any use of the mark SUPAH MARRIO by Applicant. *See* Keating Decl., Exh. A (Opposer's First Set of Interrogatories, Interrogatory Nos. 4-7, 16) and Exh. B (Opposer's First Set of Requests for Production of Documents and Things, Request No. 5). Moreover, Nintendo's Interrogatories and Requests for Production are limited in number (17 interrogatories; 14 requests for production) and in scope, covering standard topics such as channels of trade, actual confusion, consumer association of Applicant's mark with Opposer's marks, and Applicant's intent in adopting his mark.

A party's refusal to respond to interrogatories and requests for production is a proper basis for the Board to grant a motion to compel. TBMP § 523.01; *see also, e.g., Cadbury UK Limited v. Meenaxi Enterprise, Inc.*, 115 USPQ2d 1404 (TTAB 2015) (granting motion to compel where failure to cooperate interfered with party's ability to take discovery); *Medtronic, Inc. v. Pacesetter Systems, Inc.*, 222 USPQ 80 (TTAB 1984) (“[E]ach party ... has a duty ... to make a good faith effort to satisfy the discovery needs of its opponent ...”).

Nintendo would be willing to accommodate reasonable requests from Applicant as to the timing and mechanics of Applicant's discovery responses. Nintendo is also willing to engage in discussions about the substance and scope of its discovery requests. Instead, Applicant's

complete lack of any response or communication has left Nintendo with only one option: filing this motion to compel Applicant's responses. *See, e.g., H.D. Lee Co. v. Maidenform Inc.*, 87 USPQ2d 1715 (TTAB 2008) ("If applicant was unsatisfied with opposer's failure to respond to its discovery requests, it was required to file a motion to compel discovery, failing which applicant waived its right to object to such testimony and evidence on the ground that it was not produced during discovery.").

Accordingly, Nintendo respectfully asks the Board to compel Applicant to respond to Nintendo's interrogatories and requests for production so that the parties can move the opposition proceedings forward.

II. Nintendo's Good Faith and Request for Relief

Pursuant to 37 CFR § 120(e) and TBMP § 523.02, Nintendo hereby states that it has, through counsel, made a good faith effort to resolve with Applicant the issues presented in this motion. As set forth above and in the accompanying declaration, Applicant has declined to communicate with Nintendo. Applicant did not respond to requests to schedule a discovery conference, did not serve initial disclosures for more than three months after they were due, and for nearly five months has not responded to any communications from Nintendo. Keating Decl. at ¶¶ 3-13. On October 30, Nintendo asked Applicant to inform Nintendo if Applicant intended to respond to the discovery requests. *Id.* at ¶ 12 & Exh. E. Once again, Nintendo has had no response. *Id.* at ¶ 13.

Based on the foregoing, Nintendo respectfully requests that the Board grant Nintendo's Motion and enter an order compelling Applicant to respond to Nintendo's Interrogatories and Requests for Production of Documents and Things. Nintendo further requests that, pursuant to

37 C.F.R. § 2.120(e)(2), the Board suspend these opposition proceedings pending disposition of this Motion and re-set remaining deadlines upon resumption of the proceedings.

Respectfully submitted,

BRYAN CAVE LLP

Dated: November 12, 2015

/Katherine Keating/

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Attorneys for NINTENDO OF AMERICA INC.

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**DECLARATION OF KATHERINE KEATING IN SUPPORT OF
OPPOSER'S MOTION FOR AN ORDER COMPELLING DISCOVERY RESPONSES**

I, Katherine Keating, declare as follows:

1. I am an attorney in the law firm of Bryan Cave LLP, counsel of record for Opposer Nintendo of America Inc. ("Nintendo") in the above-captioned proceedings. I have personal knowledge of the facts set forth in this declaration and if called to do so, I could and would testify competently to such facts.

2. Before filing a Notice of Opposition against Application No. 86/283,191 for the mark SUPAH MARRIO, I contacted Applicant Mario Jones by letter dated December 16, 2014, on behalf of Nintendo in an attempt to resolve the matter informally. Mr. Jones responded with a letter conveying his refusal to withdraw his trademark application. He did not respond to a subsequent letter, dated March 19, 2015, in which I had reiterated Nintendo's preference for finding an amicable resolution and offered to extend the deadline for opposing the application so that the parties could continue exploring possible resolutions. I filed a Notice of Opposition on behalf of Nintendo on April 1, 2015.

3. I sent Mr. Jones an e-mail to his e-mail address of record (mariojones25@yahoo.com) on May 22, 2015, to schedule the parties' discovery conference. All e-mail messages to Mr. Jones in these proceedings were sent to that e-mail address of record. No e-mail message I sent to that address was ever returned to me as undeliverable. In my May 22 e-mail, I let Mr. Jones know that we thought Interlocutory Attorney participation would be useful and planned to request such participation. Receiving no response, I sent a follow-up e-mail to Mr. Jones on May 27, 2015. On June 1, 2015, I telephoned the Interlocutory Attorney to request Board participation in the discovery conference, explaining that the parties had not yet set a date or time.

4. On the morning of June 9, 2015 – one of the days I had originally proposed for the conference – Mr. Jones responded to my May 27 e-mail, saying that he was available that day. The Interlocutory Attorney was not available that day, but told the parties he was available for the rest of the week. Mr. Jones did not respond to my subsequent e-mails proposing dates and times for a discovery conference. On June 15, 2015, the Interlocutory Attorney sent an e-mail to Mr. Jones and me stating that he had “left a message for Mr. Jones at the telephone number listed in TTABVUE last week” but had “not heard back from him.” On July 1, 2015, the Interlocutory Attorney issued a notice stating that Applicant had “not responded to attempts by Board personnel using e-mail and telephone to schedule th[e] discovery conference” and that initial disclosures remained due as set forth in the scheduling order (by July 10, 2015).

5. On July 10, I served Nintendo's Initial Disclosures on Mr. Jones by mailing them to his mailing address of record: 355 Crescendo Way, Silver Spring, Maryland 20901-5020.

6. Letters had been successfully delivered to Mr. Jones at the Crescendo Way address in December 2014 and March 2015, and the Notice of Opposition had been successfully

mailed to Mr. Jones at the Crescendo Way address in April 2015. On July 30, 2015, the envelope containing Nintendo's Initial Disclosures to Mr. Jones was returned to our office by the U.S. Postal Service. The following hand-written notation appeared on the envelope: "Does not live here." Subsequent mailings to Mr. Jones at this address were not returned to us.

7. On July 31, 2015, my assistant e-mailed a copy of Nintendo's Initial Disclosures to Mr. Jones at this e-mail address of record. In her e-mail message, on which I was copied, she explained that the Initial Disclosures mailed to Mr. Jones had been returned to us and asked Mr. Jones to send us his current mailing address. Mr. Jones did not respond to this July 31 e-mail message, and we did not receive initial disclosures from Mr. Jones in the following months.

8. On August 24, 2015, I sent Mr. Jones a message at his e-mail address of record. In this message, I asked Mr. Jones to confirm that he had received Nintendo's Initial Disclosures and to let us know his current mailing address. I also noted that we had not received any initial disclosures from him and asked that if Mr. Jones intended to provide initial disclosures in the case, that he let us know when we should expect to receive them. Mr. Jones did not respond to this message.

9. On September 16, 2015, I served Nintendo's Interrogatories, Requests for Production of Documents and Things, and Requests for Admission on Mr. Jones by mailing them to his mailing address of record. Mr. Jones' responses to Nintendo's discovery requests were due by October 21, 2015. Attached hereto as **Exhibits A, B, and C**, respectively, are true and correct copies of Nintendo's Interrogatories, Requests for Production, and Requests for Admission.

10. On September 17, 2015, I e-mailed a copy of Nintendo's Interrogatories, Requests for Production, and Requests for Admission to Mr. Jones at his e-mail address of record.

Attached hereto as **Exhibit D** is a true and correct copy of my September 17, 2015 e-mail to Mr. Jones.

11. On October 19, 2015 – two days before Mr. Jones’ discovery responses were due – I received a copy of Initial Disclosures from Mr. Jones, which he had evidently mailed on October 13, 2015. Mr. Jones did not send any cover letter or make any other communication in connection with the Initial Disclosures.

12. By October 30, 2015 – ten days after they were due – we had not received Mr. Jones’ responses or objections to Nintendo’s Interrogatories, Requests for Production, and Requests for Admission or any other communications from Mr. Jones. On that day, I sent Mr. Jones an e-mail at his e-mail address of record. In my message, I explained that his discovery responses were overdue and that Nintendo needed the information requested through discovery in order to move forward in the opposition proceedings. I also explained that the November 7 deadline for the parties to make expert disclosures meant that Nintendo needed to know right away whether Mr. Jones intended to provide responses. I asked Mr. Jones to let me know by the end of the day on November 3, 2015, whether he intended to respond to Nintendo’s discovery requests. I explained that if we received no response from him, we would understand the silence to mean that Mr. Jones did not intend to respond to the discovery requests and that the necessary next step for Nintendo would be to ask the Board to intervene so that Nintendo could get the information necessary to move the case forward. Attached hereto as **Exhibit E** is a true and correct copy of my October 30, 2015 e-mail to Mr. Jones.

13. As of today, Mr. Jones has not responded to my October 30 e-mail message, has not provided any responses or objections to Nintendo’s Interrogatories, Requests for Production,

or Requests for Admission, and has not otherwise communicated to me, my office or Nintendo about his failure to provide discovery responses.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Dated: November 12, 2015



Katherine Keating

EXHIBIT A

persons acting on your behalf, and not merely such information as may be of your own personal knowledge or under your immediate control.

2. If you object to any interrogatory, you must state specifically the legal or factual basis for the objection and the extent to which you are refusing to respond to the interrogatory. You must respond to that part of the interrogatory to which you have no objection.

3. These interrogatories are to be regarded as continuing requests for information pursuant to Rule 26(e) of the Federal Rules of Civil Procedure. You are required to promptly supplement your responses with any additional or corrective information as may be obtained or discovered by you or any person acting on your behalf that will augment or modify your responses to any of the following interrogatories.

4. Unless specifically defined herein, all words and terms used herein shall be construed and interpreted according to ordinary custom, usage, and meaning.

5. As used herein, the terms “you” and “your” refer to Applicant Mario Jones, including, when appropriate, Applicant’s agents, employees, representatives, and attorneys.

6. As used herein, the term “SUPAH MARRIO mark” or “the mark SUPAH MARRIO” refers to the mark that is the subject of Trademark Application No. 86/283,191, and includes the mark presented in standard characters, presented in a stylized format, combined with additional words, and/or combined with a design element.

7. As used herein, the term “Nintendo” refers to Opposer Nintendo of America Inc., including, when appropriate, Nintendo’s predecessors, agents, employees, representatives, affiliates, and attorneys.

8. As used herein, the term “SUPER MARIO mark” or “the mark SUPER MARIO” refers to any of Nintendo’s trademarks that include the words “Super Mario,” including the

marks that are the subject of Trademark Registration Nos. 2,345,441 (SUPER MARIO); 2,345,410 (SUPER MARIO BROS.); 1,546,563 (SUPER MARIO BROS. 2); 1,592,182 & 4,126,557 (SUPER MARIO LAND); 1,704,302 (SUPER MARIO WORLD); 2,319,991 (SUPER MARIO 64); and 3,282,201 (SUPER MARIO GALAXY).

9. As used herein, the term “Super Mario video game franchise” refers to Nintendo’s video games that include the words “Super Mario” in the title or feature the “Super Mario” character.

10. The term “document” is used herein in its broadest sense and includes every writing or record of every type, including electronically stored information, that is in your possession, custody, or control. “Documents” include, but are not limited to, notes, letters, e-mails, instant messages, text messages, voice mail messages, images, web site pages, social media transmissions, photographs, reports, charts, drawings, audio recordings, and video recordings.

11. The term “communication” is used herein in its broadest sense and means the transmission, sending, or receipt of information of any kind by or through any means, including in face-to-face interactions, in tangible writings, through social media, and by telephone, e-mail, instant message, and text message.

12. As used herein, the term “identify” means:

a. With respect to persons, “identify” means to provide, to the extent known, the person’s full name, mailing address, e-mail address, and telephone number. Once a person has been identified in accordance with this paragraph, only the name of that person need be listed in response to subsequent requests to identify that person.

b. With respect to documents, "identify" means to provide, to the extent known, (i) the type of document (e.g., letter, memorandum, report, e-mail); (ii) the document's general subject matter; (iii) the document's date; (iv) the document's author(s) and recipient(s); and (v) the present location of the document. The above information shall be given in sufficient detail to enable a person to whom a subpoena or request for production of documents is directed to identify fully the documents sought to be produced, and to enable Nintendo to determine that such document, when produced, is in fact the document described in your response. In lieu of providing this identifying information in your response to an interrogatory, the document may be produced with your responses to these interrogatories.

c. With respect to dates, "identify" means to provide, to the extent known, the day, month, and year.

13. As used herein with respect to trademarks, the term "use in commerce" has the same meaning as set forth in the definition of the term in Section 45 of the federal Lanham Act, 15 U.S.C. § 1127.

14. The words "and" and "or" shall be construed either disjunctively or conjunctively as necessary to make the interrogatory inclusive rather than exclusive.

15. The word "any" shall be understood to encompass the word "all."

16. The past tense shall be construed to include the present tense, and vice versa, to make the interrogatory inclusive rather than exclusive.

17. The singular shall be construed to include the plural, and vice versa, to make the interrogatory inclusive rather than exclusive.

18. In responding to these interrogatories, please restate the text of each interrogatory before your written response thereto.

INTERROGATORIES

INTERROGATORY NO. 1:

Identify each person who participated or was consulted concerning the selection, adoption, creation, or use of the mark SUPAH MARRIO, including a description of each person's role in the selection, adoption, creation, or use of the mark.

INTERROGATORY NO. 2:

Explain the significance of the SUPAH MARRIO mark, including each and every reason why you selected the SUPAH MARRIO mark.

INTERROGATORY NO. 3:

Identify and describe the circumstances and substance of any communications of which you are aware in which a person referenced, mentioned, or discussed Nintendo, Nintendo's Super Mario video game franchise (or any particular Super Mario video game), Nintendo's "Super Mario" character, or Nintendo's SUPER MARIO mark in the context of your selection, adoption, creation, or use of the mark SUPAH MARRIO.

INTERROGATORY NO. 4:

State whether or not you have used the mark SUPAH MARRIO in commerce in connection with providing live performances by a musical band.

INTERROGATORY NO. 5:

If you have used the mark SUPAH MARRIO in commerce in connection with providing live performances by a musical band, identify the first date on which you did so.

INTERROGATORY NO. 6:

If you have used the mark SUPAH MARRIO in commerce in connection with any goods or services other than providing live performances by a musical band, identify the date on which you first used the mark in commerce in connection with each category of good and service.

INTERROGATORY NO. 7:

Describe in detail your plans for using the mark SUPAH MARRIO.

INTERROGATORY NO. 8:

Identify each live musical performance you are scheduled to provide under the mark SUPAH MARRIO in the 12-month period following the date of your responses to these interrogatories, including the name and location of each venue and the date of each scheduled performance.

INTERROGATORY NO. 9:

Identify each member of the musical band that has provided or will provide live musical performances under the mark SUPAH MARRIO.

INTERROGATORY NO. 10:

Identify and describe all advertisements, promotional materials, and marketing materials (including on-line advertisements, promotional materials, and marketing materials) on which the SUPAH MARRIO mark has appeared.

INTERROGATORY NO. 11:

Identify all media outlets, including, but not limited to, web sites, social media, newspapers, magazines, radio broadcasts, television broadcasts, and on-line streaming media (including YouTube), on which the SUPAH MARRIO mark or any goods or services offered

under the SUPAH MARRIO mark have been referenced, discussed, displayed, performed, or featured.

INTERROGATORY NO. 12:

Identify by name, date, and location all public events where you displayed, caused to be displayed, or otherwise used the mark SUPAH MARRIO.

INTERROGATORY NO. 13:

Identify all persons to whom you have licensed the mark SUPAH MARRIO or whom you have otherwise authorized to use the mark SUPAH MARRIO.

INTERROGATORY NO. 14:

Identify and describe the circumstances and substance of any communications of which you are aware in which a person who encountered the SUPAH MARRIO mark commented on, inquired about, or mentioned Nintendo, Nintendo's Super Mario video game franchise (or any particular Super Mario video game), Nintendo's "Super Mario" character, or Nintendo's SUPER MARIO mark.

INTERROGATORY NO. 15:

State whether or not you were aware of Nintendo's Super Mario video game franchise or the character "Super Mario" prior to (a) May 16, 2014, or (b) your first use of the SUPAH MARRIO mark (whichever of the two is earlier).

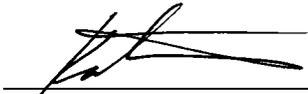
INTERROGATORY NO. 16:

State all material facts on which you base the denial in Paragraph 16 of the Answer you filed in these opposition proceedings (denying the allegation that "Nintendo has priority and is the senior user in these opposition proceedings").

INTERROGATORY NO. 17:

Identify all persons, other than your attorneys, who supplied documents or information for or who otherwise participated in responding to these Interrogatories or to Nintendo's First Set of Requests for Production of Documents and Things and Nintendo's First Set of Requests for Admission, both served concurrently herewith.

BRYAN CAVE LLP



Katherine Keating

Dated: September 16, 2015

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Attorneys for NINTENDO OF AMERICA INC.

PROOF OF SERVICE

I am employed by Bryan Cave LLP, with an office located in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is 560 Mission Street, 25th Floor, San Francisco, California 94105.

On September 16, 2015, I caused to be served on the interested parties on said action the within:

OPPOSER'S FIRST SET OF INTERROGATORIES

by placing a true copy thereof in a sealed envelope(s) addressed to each as follows:

Mario Jones
355 Crescendo Way
Silver Springs, MD 20901-5020

BY U.S. MAIL: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at San Francisco, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

BY E-MAIL. I caused a true copy of the foregoing document(s) to be served by electronic email transmission at the time shown on each transmission, to each interested party at the email address shown above. Each transmission was reported as complete and without error.

BY PERSONAL DELIVERY - I hand delivered the documents via First Legal Support Services to party by close of business day today.

BY FACSIMILE: I communicated the above-mentioned document(s) via facsimile to the addressee as indicated above. The transmission was reported complete and without error

by a transmission report issued by the facsimile transmission machine as defined in California Rule of Court 2003 upon which the said transmission was made immediately following the transmission. A true and correct copy of the transmittal report bearing the date, time and sending facsimile machine telephone number shall be attached to the original proof of service.

BY FEDERAL EXPRESS: I caused said document to be sent via Federal Express list by depositing the above document(s) in a box or other facility regularly maintained by FedEx in an envelope or package designated by FedEx with delivery fees paid or provided for.

Executed on September 16, 2015, at San Francisco, California.

I declare under penalty of perjury the laws of the State of California that the above is true and correct.


Nancy Burnett

EXHIBIT B

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

NINTENDO OF AMERICA INC.,		Opposition No. 91,221,324
v.		
MARIO JONES,		Serial No.: 86/283,191
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Applicant.		Filed: May 16, 2014
		Published: December 2, 2014
		Class: 41

**OPPOSER'S FIRST SET OF REQUESTS FOR PRODUCTION
OF DOCUMENTS AND THINGS**

PROPOUNDING PARTY: Opposer Nintendo of America Inc.

RESPONDING PARTY: Applicant Mario Jones

SET NUMBER: One

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, 37 CFR § 2.120(d), and Trademark Trial and Appeal Board Manual of Procedure § 406, Opposer Nintendo of America Inc. ("Nintendo"), through its undersigned counsel, hereby requests Applicant Mario Jones ("Applicant"), in accordance with the definitions and instructions set forth below, to produce for inspection and copying the documents and things described in these requests that are in his possession or control, by delivering them to the offices of Bryan Cave LLP, 560 Mission Street, 25th Floor, San Francisco, California 94105-2994, within 30 days following the service of this request.

DEFINITIONS AND INSTRUCTIONS

1. In responding to these requests for production, you are requested to search all documents within your possession, custody or control, or within the possession, custody, or

control of your agents, wherever located, including, but not limited to, your documents placed in storage facilities and documents in the possession of any employee, agent, representative, or person acting or purporting to act on your behalf. A document is deemed to be in your possession, custody, or control if it is in your actual possession or custody, or if it is in the custody of another person and you own the document in whole or in part, or have a legal right to obtain it, or have any express or implied understanding that you may use, inspect or copy such document, or as a practical matter, ought to be able to do so.

2. If you object to any request for production, you must state specifically the legal or factual basis for the objection and the extent to which you are refusing to comply with the request for production. You must comply with that part of the request for production to which you have no objection.

3. These requests for production are to be regarded as continuing requests pursuant to Rule 26(e) of the Federal Rules of Civil Procedure. Prompt supplemental production is required if you locate, or obtain possession, custody, or control of, additional responsive documents at any time during the pendency of these opposition proceedings.

4. Unless specifically defined herein, all words and terms used herein shall be construed and interpreted according to ordinary custom, usage, and meaning.

5. As used herein, the terms “you” and “your” refer to Applicant Mario Jones, including, when appropriate, Applicant’s agents, employees, representatives, and attorneys.

6. As used herein, the term “SUPAH MARRIO mark” or “the mark SUPAH MARRIO” refers to the mark that is the subject of Trademark Application No. 86/283,191, and includes the mark presented in standard characters, presented in a stylized format, combined with additional words, and/or combined with a design element.

7. As used herein, the term “Nintendo” refers to Opposer Nintendo of America Inc., including, when appropriate, Nintendo’s predecessors, agents, employees, representatives, affiliates, and attorneys.

8. As used herein, the term “SUPER MARIO mark” or “the mark SUPER MARIO” refers to any of Nintendo’s trademarks that include the words “Super Mario,” including the marks that are the subject of Trademark Registration Nos. 2,345,441 (SUPER MARIO); 2,345,410 (SUPER MARIO BROS.); 1,546,563 (SUPER MARIO BROS. 2); 1,592,182 & 4,126,557 (SUPER MARIO LAND); 1,704,302 (SUPER MARIO WORLD); 2,319,991 (SUPER MARIO 64); and 3,282,201 (SUPER MARIO GALAXY).

9. As used herein, the term “Super Mario video game franchise” refers to Nintendo’s video games that include the words “Super Mario” in the title or feature the “Super Mario” character.

10. The term “document” is used herein in its broadest sense and includes every writing or record of every type, including electronically stored information, that is in your possession, custody, or control. “Documents” include, but are not limited to, notes, letters, e-mails, instant messages, text messages, voice mail messages, images, web site pages, social media transmissions, photographs, reports, charts, drawings, audio recordings, and video recordings.

11. The term “communication” is used herein in its broadest sense and means the transmission, sending, or receipt of information of any kind by or through any means, including in face-to-face interactions, in tangible writings, through social media, and by telephone, e-mail, instant message, and text message.

12. As used herein with respect to trademarks, the term “use in commerce” has the same meaning as set forth in the definition of the term in Section 45 of the federal Lanham Act, 15 U.S.C. § 1127.

13. The words “and” and “or” shall be construed either disjunctively or conjunctively as necessary to make the interrogatory inclusive rather than exclusive.

14. The word “any” shall be understood to encompass the word “all.”

15. The past tense shall be construed to include the present tense, and vice versa, to make the interrogatory inclusive rather than exclusive.

16. The singular shall be construed to include the plural, and vice versa, to make the interrogatory inclusive rather than exclusive.

17. In responding to these requests for production, please restate the text of each request before your written response thereto.

REQUESTS FOR PRODUCTION

REQUEST NO. 1:

All documents relating or referring to the selection, adoption, or creation of the mark SUPAH MARRIO.

REQUEST NO. 2:

All documents referring to, related to, reflecting, or evidencing the significance of the mark SUPAH MARRIO or your reasons for selecting the mark SUPAH MARRIO .

REQUEST NO. 3:

All documents referring to, reflecting, or constituting communications in which a person referenced, mentioned, or discussed Nintendo, Nintendo’s Super Mario video game franchise, any of Nintendo’s Super Mario video games, Nintendo’s “Super Mario” character, or Nintendo’s

SUPER MARIO mark in the context of your selection, adoption, creation, or use of the mark SUPAH MARRIO.

REQUEST NO. 4:

All documents referring to, reflecting, or constituting consumer surveys, investigations, trademark searches, marketing studies, or brand awareness studies you have conducted or caused to be conducted, whether on a formal or informal basis, in connection with the SUPAH MARRIO mark.

REQUEST NO. 5:

Documents sufficient to evidence the date on which you first used the mark SUPAH MARRIO in commerce in connection with providing live performances by a musical band.

REQUEST NO. 6:

Documents sufficient to evidence your use of the mark SUPAH MARRIO in commerce in connection with each of the goods and services identified in your response to Interrogatory No. 8 of Nintendo's First Set of Interrogatories, served concurrently herewith.

REQUEST NO. 7:

Documents sufficient to evidence your plans for using the mark SUPAH MARRIO.

REQUEST NO. 8:

All documents related to or constituting marketing or business plans, whether prepared on a formal or informal basis, for any goods or services with which you have used or intend to use the mark SUPAH MARRIO.

REQUEST NO. 9:

All documents referring to or reflecting the dates and venues for live performances by a musical band provided under the SUPAH MARRIO mark, whether in the past or scheduled for the future.

REQUEST NO. 10:

All documents related to, reflecting, or constituting promotional or advertising materials (including web site content and social media transmissions) developed, disseminated, or used by you in connection with live performances by a musical band provided under the mark SUPAH MARRIO.

REQUEST NO. 11:

All documents referring to, reflecting, or constituting media coverage or public discussion of goods or services provided under the SUPAH MARRIO mark, including, without limitation, references on web sites and in social media, newspapers, magazines, trade journals, radio broadcasts, television broadcasts, and on-line streaming media (including YouTube).

REQUEST NO. 12:

All documents referring to, relating to, constituting, or evidencing any license of or other authorization to use the mark SUPAH MARRIO granted by you to any third party.

REQUEST NO. 13:

All documents referring, reflecting, or constituting communications between you and any third party relating or referring to Nintendo, Nintendo's Super Mario video game franchise, any of Nintendo's Super Mario video games, Nintendo's "Super Mario" character, or Nintendo's SUPER MARIO mark.

REQUEST NO. 14:

All documents identified in your responses to Nintendo's First Set of Interrogatories, served concurrently herewith.

BRYAN CAVE LLP

Dated: September 16, 2015



Katherine Keating

560 Mission Street, 25th Floor
San Francisco, CA 94105-2994
katherine.keating@bryancave.com
Telephone: (415) 268-2000
Facsimile: (415) 268-1999

Jill J. Chalmers
90 South Cascade Avenue, Suite 1300
Colorado Springs, CO 80903
jill.chalmers@bryancave.com
Telephone: (719) 473-3800
Facsimile: (719) 633-1518

Attorneys for NINTENDO OF AMERICA INC.

PROOF OF SERVICE

I am employed by Bryan Cave LLP, with an office located in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is 560 Mission Street, 25th Floor, San Francisco, California 94105.

On September 16, 2015, I caused to be served on the interested parties on said action the within:

**OPPOSER'S FIRST SET OF REQUESTS FOR PRODUCTION
OF DOCUMENTS AND THINGS**

by placing a true copy thereof in a sealed envelope(s) addressed to each as follows:

Mario Jones
355 Crescendo Way
Silver Springs, MD 20901-5020

BY U.S. MAIL: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at San Francisco, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

BY E-MAIL. I caused a true copy of the foregoing document(s) to be served by electronic email transmission at the time shown on each transmission, to each interested party at the email address shown above. Each transmission was reported as complete and without error.

BY PERSONAL DELIVERY - I hand delivered the documents via First Legal Support Services to party by close of business day today.

BY FACSIMILE: I communicated the above-mentioned document(s) via facsimile to the addressee as indicated above. The transmission was reported complete and without error

by a transmission report issued by the facsimile transmission machine as defined in California Rule of Court 2003 upon which the said transmission was made immediately following the transmission. A true and correct copy of the transmittal report bearing the date, time and sending facsimile machine telephone number shall be attached to the original proof of service.

BY FEDERAL EXPRESS: I caused said document to be sent via Federal Express list by depositing the above document(s) in a box or other facility regularly maintained by FedEx in an envelope or package designated by FedEx with delivery fees paid or provided for.

Executed on September 16, 2015, at San Francisco, California.

I declare under penalty of perjury the laws of the State of California that the above is true and correct.


Nancy Burnett

EXHIBIT C

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

NINTENDO OF AMERICA INC.,	Opposition No. 91,221,324
v.	Serial No.: 86/283,191
MARIO JONES,	Mark: SUPAH MARRIO
Applicant.	Filed: May 16, 2014
	Published: December 2, 2014
	Class: 41

OPPOSER'S FIRST SET OF REQUESTS FOR ADMISSION

PROPOUNDING PARTY: Opposer Nintendo of America Inc.

RESPONDING PARTY: Applicant Mario Jones

SET NUMBER: One

Pursuant to Rules 26 and 36 of the Federal Rules of Civil Procedure and Trademark Trial and Appeal Board Manual of Procedure § 407.01, Opposer Nintendo of America Inc. (“Nintendo”), through its undersigned counsel, hereby requests Applicant Mario Jones (“Applicant”), to answer the following requests for admission, in accordance with the definitions and instructions set forth below, by delivering responses to the offices of Bryan Cave LLP, 560 Mission Street, 25th Floor, San Francisco, California 94105-2994, within 30 days following the service of this request.

DEFINITIONS AND INSTRUCTIONS

1. Unless specifically defined herein, all words and terms used herein shall be construed and interpreted according to ordinary custom, usage, and meaning.

2. As used herein, the terms “you” and “your” refer to Applicant Mario Jones, including, when appropriate, Applicant’s agents, employees, representatives, and attorneys.

3. As used herein, the term “SUPAH MARRIO mark” or “the mark SUPAH MARRIO” refers to the mark that is the subject of Trademark Application No. 86/283,191, and includes the mark presented in standard characters, presented in a stylized format, combined with additional words, and/or combined with a design element.

4. As used herein, the term “Nintendo” refers to Opposer Nintendo of America Inc., including, when appropriate, Nintendo’s predecessors, agents, employees, representatives, affiliates, and attorneys.

5. As used herein, the term “SUPER MARIO mark” or “the mark SUPER MARIO” refers to any of Nintendo’s trademarks that include the words “Super Mario,” including the marks that are the subject of Trademark Registration Nos. 2,345,441 (SUPER MARIO); 2,345,410 (SUPER MARIO BROS.); 1,546,563 (SUPER MARIO BROS. 2); 1,592,182 & 4,126,557 (SUPER MARIO LAND); 1,704,302 (SUPER MARIO WORLD); 2,319,991 (SUPER MARIO 64); and 3,282,201 (SUPER MARIO GALAXY).

6. As used herein, the term “Super Mario video game franchise” refers to Nintendo’s video games that include the words “Super Mario” in the title or feature the “Super Mario” character.

7. The words “and” and “or” shall be construed either disjunctively or conjunctively as necessary to make the request inclusive rather than exclusive.

8. The word “any” shall be understood to encompass the word “all.”

9. The past tense shall be construed to include the present tense, and vice versa, to make the request inclusive rather than exclusive.

10. The singular shall be construed to include the plural, and vice versa, to make the request inclusive rather than exclusive.

11. In responding to these requests for admission, please restate the text of each request before your written response thereto.

REQUESTS FOR ADMISSION

REQUEST NO. 1:

Admit that you were aware of Nintendo's use of the mark SUPER MARIO prior to May 16, 2014.

REQUEST NO. 2:

Admit that you were aware of Nintendo's use of the mark SUPER MARIO prior to your first use of the mark SUPPAH MARRIO.

REQUEST NO. 3:

Admit that you were aware of Nintendo's Super Mario video game franchise prior to May 16, 2014.

REQUEST NO. 4:

Admit that you were aware of Nintendo's Super Mario video game franchise prior to your first use of the mark SUPPAH MARRIO.

REQUEST NO. 5:

Admit that you were aware of Nintendo's "Super Mario" character prior to May 16, 2014.

REQUEST NO. 6:

Admit that you were aware of Nintendo's "Super Mario" character prior to your first use of the mark SUPPAH MARRIO.

REQUEST NO. 7:

Admit that Nintendo's SUPER MARIO mark is famous.

REQUEST NO. 8:

Admit that the customers and audiences to whom you target or intend to target live performances by a musical band under the mark SUPAH MARRIO are likely to be familiar with Nintendo's Super Mario video game franchise or Nintendo's "Super Mario" character.

REQUEST NO. 9:

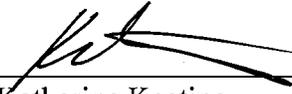
Admit that you adopted the mark SUPPAH MARRIO with the intention that persons encountering the mark would make a mental association between the mark and Nintendo's Super Mario video game franchise or Nintendo's "Super Mario" character.

REQUEST NO. 10:

Admit that any use of the mark SUPAH MARRIO by you was not prior to 1986.

Dated: September 16, 2015

BRYAN CAVE LLP



Katherine Keating

560 Mission Street, 25th Floor
San Francisco, CA 94105-2994
katherine.keating@bryancave.com
Telephone: (415) 268-2000
Facsimile: (415) 268-1999

Jill J. Chalmers
90 South Cascade Avenue, Suite 1300
Colorado Springs, CO 80903
jill.chalmers@bryancave.com
Telephone: (719) 473-3800
Facsimile: (719) 633-1518

Attorneys for NINTENDO OF AMERICA INC.

PROOF OF SERVICE

I am employed by Bryan Cave LLP, with an office located in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is 560 Mission Street, 25th Floor, San Francisco, California 94105.

On September 16, 2015, I caused to be served on the interested parties on said action the within:

OPPOSER'S FIRST SET OF REQUESTS FOR ADMISSION

by placing a true copy thereof in a sealed envelope(s) addressed to each as follows:

Mario Jones
355 Crescendo Way
Silver Springs, MD 20901-5020

BY U.S. MAIL: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at San Francisco, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

BY E-MAIL. I caused a true copy of the foregoing document(s) to be served by electronic email transmission at the time shown on each transmission, to each interested party at the email address shown above. Each transmission was reported as complete and without error.

BY PERSONAL DELIVERY - I hand delivered the documents via First Legal Support Services to party by close of business day today.

BY FACSIMILE: I communicated the above-mentioned document(s) via facsimile to the addressee as indicated above. The transmission was reported complete and without error

by a transmission report issued by the facsimile transmission machine as defined in California Rule of Court 2003 upon which the said transmission was made immediately following the transmission. A true and correct copy of the transmittal report bearing the date, time and sending facsimile machine telephone number shall be attached to the original proof of service.

BY FEDERAL EXPRESS: I caused said document to be sent via Federal Express list by depositing the above document(s) in a box or other facility regularly maintained by FedEx in an envelope or package designated by FedEx with delivery fees paid or provided for.

Executed on September 16, 2015, at San Francisco, California.

I declare under penalty of perjury the laws of the State of California that the above is true and correct.


Nancy Burnett

EXHIBIT D

Keating, Katherine

From: Keating, Katherine
Sent: Thursday, September 17, 2015 10:18 AM
To: mariojones25@yahoo.com
Subject: SUPAH MARRIO Trademark Opposition Proceedings (Opp. No. 91221324)
Attachments: Roqs.PDF; RFP.PDF; RFA.PDF

Dear Mr. Jones,

Attached are copies of Nintendo's First Set of Interrogatories, Requests for Production, and Requests for Admission in the SUPAH MARRIO trademark opposition proceedings.

Hard copies are being served by U.S. mail to your address of record: 355 Crescendo Way, Silver Spring, MD 20901-5020. As you know, the Initial Disclosures that we sent to that address on July 10 were returned to us by the postal service. We have not had a response from you to our follow-up e-mails asking for an updated address. Accordingly, we have served these discovery requests at the only mailing address we have for you but are also e-mailing them in case the mailed copies are returned to us as undeliverable.

Please let us know if you have any questions. If there is a different mailing address we should use for service, please let us know.

Thanks,
Katherine



Katherine Keating

Counsel

katherine.keating@bryancave.com T: +1 415 268 1972

EXHIBIT E

Keating, Katherine

From: Keating, Katherine
Sent: Friday, October 30, 2015 1:57 PM
To: mariojones25@yahoo.com
Subject: SUPAH MARRIO Trademark Opposition Proceedings

Importance: High

Dear Mr. Jones:

We have not received responses to the written discovery requests we sent you in September (interrogatories, requests for production, and requests for admission). Your responses were due on October 21. We need these responses in order to move things along and had hoped that they might also give us some additional ideas about how to resolve this case.

If you intend to send us discovery responses, would you please let us know when we will receive them? Unfortunately, the November 7 deadline for expert disclosures in this case means that we would need them very soon. Please let us know by the end of the day on **Tuesday, November 3**. If we don't hear from you by then, we will take that to mean that you do not intend to respond to the discovery requests. The next step for us would have to be asking the TTAB to intervene so that we can get the information we need to move forward.

As you know from our letters late last year and early this year, Nintendo's preference has always been to work with you to resolve this matter informally. As we have explained, the SUPAH MARRIO trademark application is a problem for Nintendo, but Nintendo has no wish to prevent you from calling yourself "Supah Marrio" when you perform (as long as you do not do so in a way that would cause confusion with Nintendo's SUPER MARIO mark). When you did not respond to Nintendo's second letter (which included an offer to delay any opposition if you provided consent for an extension), Nintendo had no choice but to oppose your application. Still, it hoped to be able to reach a cooperative resolution with you, and it continues to believe such a resolution is within reach.

I would be happy to speak with you at your convenience to discuss possibilities for resolving the matter.

Sincerely,
Katherine

Katherine Keating

Counsel
BRYAN CAVE LLP
T: +1 415 268 1972 F: +1 415 430 4372
560 Mission Street, 25th Floor, San Francisco, CA 94105-2994
katherine.keating@bryancave.com

bryancave.com | A Global Law Firm

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing **OPPOSER'S MOTION FOR AN ORDER COMPELLING DISCOVERY RESPONSES** and **DECLARATION OF KATHERINE KEATING IN SUPPORT OF OPPOSER'S MOTION FOR AN ORDER COMPELLING DISCOVERY RESPONSES** has been served on Applicant Mario Jones by mailing said copy on November 9, 2015, via First Class Mail, postage prepaid to:

Mario Jones
355 Crescendo Way
Silver Spring, MD 20901-5020

I further certify that I e-mailed a true and complete copy of the foregoing **OPPOSER'S MOTION FOR AN ORDER COMPELLING DISCOVERY RESPONSES** and **DECLARATION OF KATHERINE KEATING IN SUPPORT OF OPPOSER'S MOTION FOR AN ORDER COMPELLING DISCOVERY RESPONSES** to Applicant Mario Jones by sending said copy to his e-mail address of record:

mariojones25@yahoo.com

Executed on November 12, 2015, at San Francisco, California.

/katherine keating/
Katherine Keating