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

Proceeding	92059710
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Registration No. 4,080,414

FOURSQUARE LABS, INC.,

Petitioner,

v.

HOTHEAD GAMES INC.,

Registrant.

Cancellation No. 92059710

FOURSQUARE LABS, INC.'S MOTION TO COMPEL

Pursuant to Rules 26, 33, 34, and 37 of the Federal Rules of Civil Procedure and Rule 2.120 for the Trademark Rules of Practice, Petitioner, Foursquare Labs, Inc. (“Foursquare”), respectfully moves the Board for an order compelling Registrant Hothead Games Inc. (“Hothead”), to provide complete responses to *Petitioner’s First Set of Interrogatories to Respondent* (“Foursquare’s Interrogatories”), and to produce all documents responsive to *Petitioner’s First Set of Requests for Production of Documents to Respondent* (“Foursquare’s Document Requests”) (collectively “Foursquare’s Discovery Requests”). Additionally, because Hothead failed to sign its responses to Foursquare’s Discovery Requests, and has failed to serve compliant responses since being notified of its omission, Foursquare respectfully moves the Board to strike Hothead’s unsigned responses, and to compel Hothead to respond to Foursquare’s Discovery Requests without objection.

Pursuant to 37 C.F.R. §2.120(e)(1), this Motion is being filed prior to the commencement of the initial testimony period and counsel for Petitioner certifies that a good faith effort has been made to seek a conference with Registrant’s counsel, and to resolve the issues presented in this motion, but such efforts have been unsuccessful.

I. BACKGROUND

Foursquare is the owner of U.S. Trademark Application Serial Nos. 86/181,615 (the “’615 Application”), 86/268,097 (the “’097 Application”), and 86/268,110 (the “’110 Application”) for the marks SWARM, SWARM (and design), and the Swarm logo in international classes 09, 41, 42 and 45. During prosecution of the ’615 Application and the ’097 Application, the Examining Attorney refused registration, asserting a likelihood of confusion with, *inter alia*, Hothead’s Registration No. 4,080,414 (the ’414 Registration).

Foursquare filed its Petition to cancel the ’414 Registration on July 30, 2014, based on its belief that Hothead has abandoned the SWARM mark of the ’414 Registration pursuant to 15 U.S.C. § 1127. Hothead filed its Answer on December 8, 2014. Discovery opened on January 7, 2015 and is scheduled to close on July 6, 2015.

Foursquare’s Discovery Requests were served on counsel for Hothead Games on January 7, 2015. Exhibits A & B, attached. On February 23, 2015, Foursquare received, via email, documents entitled *Respondent Hothead Games Inc’s Responses to Petitioner Foursquare Lab’s First Set of Interrogatories* (the “Unsigned Interrogatory Responses”) and *Respondent Hothead Games, Inc’s Responses to Petitioner Foursquare Lab’s First Set of Requests for Production of Documents* (the “Unsigned Document Request Responses”) (collectively the “Unsigned Discovery Responses”). Exhibits C & D, attached. Neither document was properly signed as required by Rule 26(g)(1) of the Federal Rules of Civil Procedure.¹

The Unsigned Discovery Responses were deficient in several respects. The Unsigned Interrogatory Responses were largely non-responsive. Hothead provided no substantive

¹ Both documents contained a signed certificate of service, but it was signed by an individual identified as Aura L. Tatagiba, a litigation secretary, and not an attorney of record or a representative of Hothead Games. *See* Fed. R. Civ. P. 26(g)(1).

response to 6 of Foursquare's 25 interrogatories, and nearly all of the remaining responses consisted of little more than a formulaic recitation of one of two duplicative statements, which, in most cases, bore no relationship to the specific interrogatory. In the Unsigned Document Request Responses, Hothead inappropriately refused to produce any documents for 15 of Foursquare's 24 requests. Hothead's grounds for withholding consisted primarily of boilerplate objections of relevance, breadth and vagueness as well as confidentiality and attorney-client privilege. Additionally, Hothead improperly objected to the production of information and documents "subject to entry of an appropriate Stipulated Protective Order," despite the fact that the Board's standard order was in place at the time. Exhibit D at pp. 5-6; *see also* Exhibit C at pp. 19-20. On those topics for which Hothead did agree to produce documents, Hothead has, to date, produced only three documents; the remainder of its production is overdue and insufficient.

Foursquare promptly and repeatedly sought supplementation of Hothead's Responses. In an email dated March 3, 2015, counsel for Foursquare reminded Hothead that the Board's standard protective order applies in this case by default, and therefore Hothead's objections on that basis were inappropriate. Exhibit E, attached. Foursquare sent a second email on March 9, 2015, again requesting Hothead's response. Exhibit F, attached. Hothead did not reply to either communication.

Thereafter, in a letter to Hothead dated March 24, 2015, Foursquare specifically noted Hothead's failure to sign its discovery responses *and requested prompt service of substantive, signed responses, or counsel's availability for a discovery conference.*² Exhibit G at pgs. 1 and 7, attached. Foursquare also described, in detail, the deficiencies it identified in the Unsigned Discovery Responses. *Id.* at 2-7. Hothead replied via email on March 25, 2015, producing just

² All emphasis is added unless otherwise noted.

two documents, but not addressing any issues identified by Foursquare with respect to the Unsigned Discovery Responses, or acknowledging or proposing dates for the requested discovery conference. Exhibit H, attached.³ Those two documents, and a third produced on March 31, 2015, are the only documents Hothead has produced in this case. *Hothead has never served signed discovery responses.*

On March 30, 2015, Foursquare again requested that Hothead respond to Foursquare's objections to Hothead's responses and reiterated its request for a discovery conference. Exhibit I, at pg. 2.⁴ Hothead replied to this letter via email on March 31 without addressing Foursquare's discovery concerns or acknowledging Foursquare's repeated request for a discovery conference. Exhibit J, attached.⁵

Despite repeated requests, Hothead has refused to provide adequate discovery responses or to engage in any meaningful document production. Hothead has been unresponsive to Foursquare's repeated requests for a discovery conference and has failed to directly address Foursquare's concerns, or even serve properly signed discovery responses. For the reasons set forth below, Foursquare respectfully requests that this Board compel Hothead to fully respond to Foursquare's Discovery Requests, and to produce all documents responsive to those requests without objection.

II. LEGAL STANDARD FOR A MOTION TO COMPEL

The parties have a duty to cooperate with regard to written discovery. T.B.M.P. § 408.01(c). This includes a duty to search records, to produce the requested records. T.B.M.P. § 408.02. Where a party learns that its responses to discovery requests are incomplete or incorrect,

³ Redacted to exclude settlement negotiations.

⁴ Redacted to exclude settlement negotiations.

⁵ Redacted to exclude settlement and Trade Secret/Highly Confidential Information.

it is obliged to supplement or correct its responses in a timely manner. T.B.M.P. § 408.02; Fed. R. Civ. P. 26(e)(1). Holding back responsive information or documents absent a valid objection, or failing to correct discovery responses in a timely manner, exposes a party to sanctions, and the party may be precluded from relying on its records at trial. *Spier Wines (PTY) Ltd. v. Shepherd*, 105 U.S.P.Q.2d 1239, 1242 (T.T.A.B. 2012); Fed. R. Civ. P 37(c).

III. HOTHEAD'S UNSIGNED DISCOVERY RESPONSES SHOULD BE STRICKEN

Hothead has failed to sign its discovery responses and failed to serve signed responses after the omission was called to its attention. Hothead's Unsigned Discovery Responses should be stricken. Because it has served no legally effective discovery responses, the Board should find Hothead has forfeited its right to object to Foursquare's Discovery Requests on the merits.

Every discovery request, response or objection must be signed by at least one attorney of record in the attorney's own name, or by the party personally, if unrepresented. Fed. R. Civ. P. 26(g)(1); *see also* Fed. R. Civ. P. 33(b)(5) (Responses to interrogatories must be signed by the person making them, and objections to interrogatories must be signed by the attorney making them.) The signature constitutes a certification that the response or objection was consistent with the Federal Rules of Civil Procedure and warranted by existing law or a nonfrivolous argument, and not interposed for any improper purpose, including the purpose of causing unnecessary delay. Other parties have no duty to act on an unsigned discovery response, "***and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.***" Fed. R. Civ. P. 26(g)(2).

When a party fails to serve legally effective responses to discovery requests during the time allowed, the Board has great discretion to find that the party has forfeited its rights to object to the discovery requests on the merits. T.B.M.P. §§ 403.03; 405.04(a), 406.04(a); *see Amazon*

Technologies Inc. v. Wax, 93 U.S.P.Q.2d 1702, 1706 (T.T.A.B. 2009) (ordering non-compliant party to produce responses, without objections on the merits, to propounding party's interrogatories and document requests); *No Fear, Inc. v. Rule*, 54 U.S.P.Q.2d 1551, 1554 (T.T.A.B. 2000) (citing T.B.M.P. § 403.03, and noting that the Board is invested with "great discretion" in determining whether objections are forfeited).

Hothead served its Unsigned Discovery Responses on February 23rd. Foursquare first contacted Hothead to complain about the sufficiency of those responses on March 3rd. Foursquare then sent a letter to Hothead on March 24th, specifically drawing counsel's attention to the fact that Hothead's responses were unsigned. Exhibit G at 1-2. Foursquare's letter specifically informed Hothead that its responses were legally ineffective under the Federal Rules of Civil Procedure because of their lack of signature and that Foursquare had no obligation to act on those responses. *Id.* Hothead has never addressed Foursquare's complaint and has never served signed responses to Foursquare's Discovery Requests.

It is more than 6 weeks past Hothead's deadline to serve compliant discovery responses. It has not done so. It is appropriate for the Board to strike Hothead's unsigned responses, and to compel them to respond to Foursquare's Discovery Requests without objection. *See No Fear*, 54 U.S.P.Q.2d at 1554; *see also M.C.I. Foods Inc. v. Bunte*, 86 U.S.P.Q.2d 1044, 1046 (T.T.A.B. 2008) (party compelled to serve discovery responses without objections on the merits after failing to respond in any manner to interrogatories and document requests).

IV. HOTHEAD HAS NOT RESPONDED TO REPEATED ATTEMPTS TO MEET AND CONFER REGARDING ITS DISCOVERY RESPONSES

Foursquare has asked Hothead to meet and confer regarding its Unsigned Discovery Responses on multiple occasions. Hothead failed to acknowledge Foursquare's requests, and has made no attempt to correct the discovery deficiencies identified by Foursquare or confer with

Foursquare to resolve this dispute. Foursquare has thus satisfied its obligation under 37 C.F.R. § 2.120(e), and further attempts to confer are not likely to succeed.

Foursquare promptly contacted Hothead regarding its deficient discovery responses in an email dated March 3, 2015. Exhibit E. Hothead did not respond, so Foursquare sent a second email on March 9, 2015, requesting Hothead's response. Exhibit F. Again, Hothead did not respond.

In its March 24th letter, Foursquare specifically requested a discovery conference with Hothead under 37 C.F.R. § 2.120(e). Exhibit G at 1 and 7. Foursquare asked:

Please advise by return when Hothead Games intends to serve legally effective discovery responses that comply with Hothead's discovery obligations under the Federal Rules of Civil Procedure and the discovery Rules of the TTAB. **Alternatively, please let me know your availability for a discovery conference under 37 C.F.R. § 2.120(e).**

Id. Hothead's email on March 25, 2015 did not address the issues identified in Hothead's Unsigned Discovery Responses and did not respond to Foursquare's request for a conference. Exhibit H.

Foursquare made a further attempt to meet and confer with Hothead on March 30, 2015.

Exhibit I at 2. Foursquare specifically stated:

We have separately detailed our objections to your client's discovery and are awaiting HotHead's substantive, signed responses to Foursquare's discovery requests and production of documents, including that agreement, **or to learning your availability for a discovery conference.**

Id. Hothead responded to Foursquare's letter on March 31st, but did not address Foursquare's detailed objections and again did not respond to Foursquare's request for a discovery conference.

Exhibit J.

Foursquare made four attempts over a period of weeks, asking Hothead to address its deficient production and responses. Hothead has failed to respond and failed to meet and confer with Foursquare. Foursquare has thus met its obligation to attempt to meet and confer in good faith to resolve this discovery dispute prior to filing this motion. 37 C.F.R. 2.120(e); *Hot Tamale Mama...and More, LLC v. SF Invs., Inc.*, 110 U.S.P.Q.2d 1080, 1081 (T.T.A.B. 2014) (email identifying discovery deficiency, plus “at least one additional inquiry” may satisfy good faith effort requirement).

V. **HOTHEAD’S UNSIGNED INTERROGATORY RESPONSES ARE LEGALLY DEFICIENT**

In addition to Hothead’s failure to sign its discovery responses, Hothead’s Unsigned Interrogatory Responses are legally deficient. Hothead should be compelled to provide complete and substantive responses to Foursquare’s Interrogatories.

A. **Hothead has not answered Interrogatory Nos. 3, 10, 13, 19, 20, 23**

Hothead has failed to provide substantive responses to 6 Interrogatories:

Interrogatory No. 3. Identify all trademark, service mark, trade name, or corporate name searches, or any other type of search, conducted by or on behalf of [Hothead] in connection with its decision to adopt or use the Hothead Mark.

Interrogatory No. 10. Identify, by year, each trade show or conference attended by [Hothead] since Hothead's Mark was adopted and, if different, identify, by year, each trade show or conference at which [Hothead] sold, offered for sale, or promoted products or services under the Hothead Mark.

Interrogatory No. 13. Describe in detail any instance of actual confusion known to [Hothead] regarding the source, origin, sponsorship, or enforcement of [Hothead]'s or Foursquare's products or services as a result of the parties' respective uses of the SWARM Marks and the Hothead Mark, and identify all persons having knowledge thereof.

Interrogatory No. 19. Describe in detail how [Hothead] became aware of Petitioner and identify the date on which this occurred.

Interrogatory No. 20. Describe in detail how [Hothead] became aware of Petitioner's Swarm badges and its trademarks, including the SWARM Marks, and identify the time frame in which each occurred.

Interrogatory No. 23. Identify the person or persons responsible for maintaining and/or updating [Hothead]'s website.

Exhibit C at 6, 12, 14, 18, 20. These interrogatories are germane to trademark cancellation proceedings and the Board has already determined that the information requested by Foursquare is within the acceptable scope of discovery. Trademark search reports are discoverable (Interrogatory No. 3), T.B.M.P. § 414(6), as is information related to the areas of distribution for a party's goods or services (No. 10), *Id.* at § 414(16). Information concerning the individuals engaged in advertising or promoting a party's goods or services is also discoverable (Nos. 10, 23), *Id.* at § 414(17), along with information related to Hothead's actual knowledge of Foursquare and Foursquare's mark (Nos. 13, 19, 20), *Id.* at § 414(19). Each of these interrogatories requests information that is discoverable under the Federal Rules of Civil Procedure. *See* T.B.M.P. § 405.02 ("Interrogatories may seek any information that is discoverable under Fed. R. Civ. P. 26(b)."). Hothead is not entitled to stand on its objections and should be compelled to fully answer Foursquare's requests.

Hothead's objections do not justify its refusal to substantively respond to Foursquare's interrogatories. Hothead has improperly objected on the basis of confidentiality and privilege with respect to Interrogatory Nos. 3, 10, and 13. Hothead does not explain how, for example, the identity of all trade shows and conferences attended by Hothead (Interrogatory No. 10) or instances of actual confusion (No. 13) would invoke the attorney-client privilege. Nor is Hothead justified in withholding any information on the basis of confidentiality. *See* T.B.M.P. § 414(6) (Search reports are not confidential). The Board's standard protective order is already in place. T.B.M.P. § 412.01. To the extent Hothead may have been justified in withholding any

information on the basis of privilege or other objection, that does not relieve Hothead of the burden of responding to the remainder of the request in full. Fed. R. Civ. P. 33(b)(4). To the extent a privilege objection may have been warranted for any interrogatory, Hothead has provided no privilege log, despite Foursquare's request to do so. Ex. G at 7.

Hothead also asserts objections that requests are duplicative, vague and ambiguous, overbroad or not relevant.⁶ Such so-called "boilerplate" objections are disfavored by the Board and do not support a refusal to produce. *Amazon Techs. Inc. v. Wax*, 93 U.S.P.Q.2d 1702 (T.T.A.B. 2009); *s see also Gheesling v. Chater*, 162 F.R.D. 649, 650 (D. Kan. 1995); *Baker v. Hatch*, No. 07-cv-2204-FCD-EFB (E.D. Cal. Aug 12, 2010); *Burkybile v. Mitsubishi Motors Corp.*, 2006 WL 2325506, *6 (N.D. Ill. Aug.2, 2006) (An objecting party's burden cannot be met by "a reflexive invocation of the same baseless, often abused litany that the requested discovery is vague, ambiguous, overly broad, unduly burdensome or that it is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.") (internal quotations and citations omitted).

Hothead has also objected to Interrogatory Nos. 3 and 10 on the basis that they are compound. Hothead has waived that objection by virtue of serving its Unsigned Interrogatory Responses. T.B.M.P. § 405.03(e) (In order to properly object on the basis of an alleged excessive number of interrogatories, "the party must, within the time for (and instead of) serving answers and specific objections to the interrogatories, serve a general objection on the ground of their excessive number.").

⁶ Specifically, Hothead objects to Interrogatory Nos. 3, 10, 13, 19, 20 and 23 on the basis of vagueness and relevance. Exhibit C at 7, 12, 14, 18, 20. Hothead objects to Interrogatory Nos. 3, 10, 13 and 20 as being overbroad. *Id.* at 7, 12, 14, 18. Hothead objects to Interrogatory Nos. 3 and 10 as being duplicative of other requests. *Id.* at 7, 12. Hothead does not specifically articulate its basis for any of these objections to any request.

Hothead has also objected to Interrogatory No. 19 on the basis that it is “unintelligible,” without explanation. Foursquare specifically requested that Hothead identify the alleged problem with respect to the wording of that interrogatory, Exhibit G at 2, yet Hothead has failed to do so.

Because none of Hothead’s objections justify its complete refusal to respond to Foursquare’s interrogatories, Hothead’s objections should be stricken and it should be compelled to serve complete answers, without objection.

B. Hothead’s Answers to Interrogatory Nos. 2, 5, 8, 9, 11, 12 and 14 are Non-Responsive

Hothead has provided nearly identical non-responsive answers to Interrogatory Nos. 2, 5, 8, 9, 11, 12 and 14. In response to Interrogatory Nos. 2, 11, 12, and 14, Hothead answered:

HOTHEAD entered into a publishing agreement relating to HOTHEAD’s video game titled “SWARM” with Ignition Entertainment Ltd. in or about April 2010.

Exhibit C at 6, 13-15. This same answer was provided for:

Interrogatory No. 2. Identify the individuals and entities involved in the creation, the conception, the adoption, and the use of the Hothead Mark on or in connection with any goods or services, and identify the dates and describe the circumstances of the creation, the conception, the adoption, and the use of the Hothead Mark on or in connection with any goods or services.

Interrogatory No. 11. Identify (by title, publisher, issue date, and page number) all publications in which [Hothead] has promoted products or services bearing the Hothead Mark.

Interrogatory No. 12. Identify all publications, websites, and blogs in which products bearing or services offered under the Hothead Mark have been advertised, promoted, reviewed, or discussed.

Interrogatory No. 14. Identify all agreements, including assignments, consents, authorizations, licenses, franchise agreements, option agreements, purchase and sale agreements, coexistence agreements, or permissions, entered into between [Hothead] and any other person or entity concerning the Hothead Mark.

Id. at 6, 12-14. No part of Hothead's answer identifies an individual (Interrogatory No. 2), a publication or a website (Nos. 11-12), or specifically identifies any agreement or license (No. 14). Hothead's repeated answer is non-responsive for each of them.

With respect to Interrogatory Nos. 5, 8 and 9, Hothead answered:

HOTHEAD entered into a publishing agreement relating to HOTHEAD's video game titled "SWARM" with Ignition Entertainment Ltd. in or about April 2010. HOTHEAD's "SWARM" video game was released on March 22, 2011.

Id. at 9, 11. Hothead's response is functionally indistinct from its answers to Interrogatory Nos. 2, 11, 12, and 14, and includes only the additional sentence "HOTHEAD's 'SWARM' video game was released on March 22, 2011." This answer was provided for interrogatories requesting:

Interrogatory No. 5. For each product and each service identified in response to Interrogatory No. 4: (a) Identify the individual most familiar with the marketing of such product or service; (b) State the date of first use anywhere and describe the circumstances surrounding that first use; (c) State the date of first use in commerce and describe the circumstances surrounding that first use; (d) State the dollar volume expended by [Hothead] annually in promoting such products or services since inception; and (e) State the volume in units and dollars of [Hothead]'s income received annually to date from such products or services since inception.

Interrogatory No. 8. Identify each different type of promotional material used by [Hothead] for products or services bearing the Hothead Mark, and identify the time frame during which each was used.

Interrogatory No. 9. State the amount of money expended by or on behalf of [Hothead] annually in advertising or promoting products and services under the Hothead Mark, and identify all advertisements or promotional events arising or resulting from such expenditures per year.

Id. at 8, 10-11. This response does not identify any individual (Interrogatory No. 5), type of promotional material (No. 8), or any quantity of money or units (Nos. 5, 9). It is almost entirely non-responsive to these requests.

Hothead is not entitled to pick and choose which interrogatories it will respond to, nor may it satisfy its obligations under the Federal Rules of Civil Procedure and this Board's rules through copy-pasted statements of dubious relevance to the information requested. Furthermore, because of the duplicative nature of Hothead's non-responsive answers, it is unclear whether Hothead has provided full, complete and accurate responses to even the portions of Foursquare's Interrogatories that bear partial relationship to Hothead's statement.

Hothead's non-responsive, duplicative answers to Interrogatory Nos. 2, 5, 8, 9, 11, 12, and 14 should be stricken, and Hothead should be compelled to answer each interrogatory completely, without objection.

C. Hothead's Answers to Interrogatory Nos. 15-18, 21, and 22 are Non-Responsive

Hothead has provided slightly different non-responsive answers to Interrogatory Nos. 15-18, 21, and 22. Hothead's substantive response to each of these interrogatories is a variation of the statement:

HOTHEAD entered into a publishing agreement relating to HOTHEAD's video game titled "SWARM" with Ignition Entertainment Ltd. in or about April 2010. HOTHEAD's "SWARM" video game is available for purchase and download at websites including the Microsoft XBOX Marketplace website, Sony PlayStation PS3 website, and GameStop website.

Exhibit C at 17-18 (Resp. to Interrogatory No. 18); *see also id.* at 15-20. These interrogatories actually requested:

Interrogatory No. 15. Identify all stores, websites, wholesalers, retailers, sales representatives, and distributors through which [Hothead] currently sells or offers for sale products or services under the Hothead Mark.

Interrogatory No. 16. Identify, by year, all stores, websites, wholesalers, retailers, sales representatives, and distributors through which [Hothead] has ever sold or offered for sale products or services under the Hothead Mark since inception.

Interrogatory No. 17. For each store, website, wholesaler, retailer, sales representative, and distributor identified in response to Interrogatory No. 16, identify the dates during which each such entity sold or provided any product or service under the Hothead Mark to consumers.

Interrogatory No. 18. Identify the channels of trade through which products and services bearing the Hothead Mark are provided or distributed to consumers.

Interrogatory No. 21. Identify, by year, by units sold and revenue received, all sales of products or services provided under the Hothead Mark via the Xbox Marketplace as alleged in Paragraph 5 of the Answer.

Interrogatory No. 22. Identify, by year, by units sold and revenue received, all sales of products or services provided under the Hothead Mark via Playstation.com as alleged in Paragraph 5 of the Answer.

Id. at 15-19. Hothead's response does not identify any stores by year (Interrogatory No. 16), dates during which each store sold any product (No. 17), the channels of trade (No. 18) or any revenue (Nos. 21 & 22). To the extent the response identifies any website as requested in Interrogatory Nos. 15-17, Hothead's use of the word "including" implies it is an incomplete answer. Furthermore, given the duplicative nature of Hothead's responses to these interrogatories, it is unclear whether Hothead has provided a full, complete and accurate response to these requests in any respect.

Hothead's non-responsive, duplicative answers to Interrogatory Nos. 15-18, 21, and 22 should be stricken, and Hothead should be compelled to answer each interrogatory completely, without objection.

D. Hothead's Answers to Interrogatory Nos. 1, 6 and 7 are Incomplete or Unclear

Even where Hothead has provided an answer to Foursquare's Interrogatories that bears some relation to the interrogatory posed, and where Hothead's response is not a duplication of one of the statements quoted above, Hothead's interrogatory responses are incomplete or unclear.

Interrogatory No. 1 requests that Hothead:

State the address of each location at which [Hothead] maintains a place of business, describe the functions carried out at each location, and identify each of [Hothead]'s directors, officers, and managerial employees responsible for promotion, marketing, distribution, and/or provision of products or services under the Hothead Mark.

Exhibit C. at 5. Hothead's substantive response states:

Hothead Games, Inc., 350 - 887 Great Northern Way, Vancouver,
BC, Canada V5T 4T5.

Id. at 6. Hothead's response, at best, addresses only a portion of Foursquare's interrogatory and is not a full complete and accurate response as required by the Federal Rules.

Similarly, Interrogatory Nos. 6 and 7 request:

Interrogatory No. 6. For each product or service identified in response to Interrogatory No. 4 not currently available to consumers, state the date on which that product or service was last provided or sold to consumers.

Interrogatory No. 7. For each product or service identified in response to Interrogatory No. 4 for which there was a period of time during which the product or service was not available to consumers, identify the dates during which each product or service was not available to consumers.

Id. at 9. Hothead's response in each case was, "not applicable." *Id.* at 9-10. It is not clear whether this is intended to be an objection or a response. Foursquare has sought clarification from Hothead regarding its answers, Exhibit F. at 4, to which Hothead has failed to respond.

Because Hothead's responses to Interrogatory Nos. 1, 6, and 7 are incomplete or unclear, and Hothead has failed to clarify its responses as requested, Hothead's objection should be stricken, and Hothead should be compelled to respond fully to each interrogatory, without objection.

VI. HOTHEAD'S RESPONSES TO FOURSQUARE'S DOCUMENT REQUESTS ARE INADEQUATE AND HOTHEAD'S DOCUMENT PRODUCTION IS OVERDUE

Hothead has improperly refused to produce documents for 15 of Foursquare's 24 requests, and relies on objections that are factually inaccurate. For the 9 requests in which

Hothead has agreed to produce documents, the three documents produced to date are inadequate and the remainder are overdue.

A. **Hothead is Not Entitled to Stand on Its Objections**

Hothead has declined to produce any documents in response to Request Nos. 2, 4, 5, 9, 10, 12, 15-19, and 21-24. Hothead's objections do not support a refusal to produce all material. For example, Request No. 2 seeks:

Representative samples, by year, of each different type of promotional material used by Respondent for products or services offered under the Hothead Mark since inception.

Exhibit D at 6. In response, Hothead objected that the request seeks private, confidential or trade secret information, and information protected by attorney-client privilege. *Id.* Promotional materials would not be protected by privilege, nor would they be trade secrets. Hothead has also objected on the basis that the request seeks information that is equally accessible to Foursquare, without explaining why Foursquare would have equal access to Hothead's promotional materials, or where they could be found. *Id.* In any case, this objection does not relieve Hothead of the obligation to produce documents. *See Nichols v. Moore*, 396 F. Supp. 2d 783 (E.D. Mich. 2005) (An objection that documents are "equally accessible" typically only relieves a party of the burden to produce public records or documents in the public domain and therefore not in the possession, custody or control of the responding party.)

The remaining objections are boilerplate objections of relevance, overbreadth, and vagueness. Such boilerplate objections are disfavored by the Board and do not support a refusal to produce. *See, e.g., Amazon Techs., Inc v. Wax*, Opp. No. 91187118 at *7-8 (T.T.A.B. Nov. 4, 2009); *see also Gheesling v. Chater*, 162 F.R.D. 649, 650 (D. Kan. 1995); *Baker v. Hatch*, No. 07-cv-2204-FCD-EFB (E.D. Cal. Aug 12, 2010); *Burkybile v. Mitsubishi Motors Corp.*, 2006

WL 2325506, *6 (N.D. Ill. Aug.2, 2006) (An objecting party's burden cannot be met by "a reflexive invocation of the same baseless, often abused litany that the requested discovery is vague, ambiguous, overly broad, unduly burdensome or that it is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.") (internal quotations and citations omitted).

Hothead also relies exclusively on a combination of boilerplate, confidentiality, privilege and "accessibility to Foursquare" objections in its responses to Request Nos. 4, 5, 9, 10, 12 and 15-17. Several of the requests are not expected to generate a significant number of confidential documents, if any, namely:

Request No. 4: Representative samples of each publication, website, and blog in which products bearing and services offered under the Hothead Mark has been advertised, promoted, reviewed, or discussed, since inception;

Request No. 5: For each type of product or service for which the Hothead Mark has been used, produce documents and things sufficient to show the earliest use and the earliest use in commerce of the Hothead Mark on each such product and for each such service; and

Request No. 16: All documents concerning each instance in which a person has been confused, mistaken, or deceived as to the source, endorsement, or sponsorship of Respondent's or Foursquare's products or services as a result of the parties' respective uses of the SWARM mark and Hothead Mark.

Exhibit D at 7-8, 13. To the extent a privilege objection may have been warranted for any document, Hothead has provided no privilege log, despite Foursquare's request, and its substantive production is overdue.

With respect to Request Nos. 9, 12, 15, and 17, even if privileged or confidential material exists, this does not justify a complete refusal to produce other responsive documents. *See., e.g.,* Fed. R. Civ. P. 34(b)(2)(C) ("An objection to part of a request must specify the part and permit inspection of the rest."). A protective order is already in force. T.B.M.P. § 412.01.

With respect to Request No. 10, Hothead has not raised an objection on the basis of privilege or confidentiality but rather appears to be improperly withholding documents solely on the basis of its boilerplate objections.

Hothead has also failed to produce documents responsive to Request Nos. 18 and 19. Hothead offers no more than boilerplate objections and alleges, without explanation, that these requests are “unintelligible.” A *pro forma* objection of unintelligibility is insufficient to justify withholding documents, particularly where the request may be understood. *See Jan Bell Mkt’g Inc. v. Centennial Jewelers Inc.*, 19 U.S.P.Q.2d 1636, 1638 (T.T.A.B. 1990) (document requests must describe categories with ‘reasonable particularity’); *see also Atcherley v. Clark*, No. 1:12-cv-225-LJO-DLB (E.D. Cal. Nov. 11, 2014) (a party must use “common sense and reason” when construing discovery requests); *Collins v. Wal-Mart Stores, Inc.*, No. 6-cv-2466-CM-DJW, 2008 WL 1924935, *8 (D. Kan. Apr. 30, 2008) (“**hyper-technical, quibbling, or evasive objections will be viewed unfavorably**”).

Hothead has also refused to produce documents responsive to Request Nos. 21-24 on the basis of its boilerplate objections as well as confidentiality and privilege. Hothead further alleges the unintelligibility of these requests based on the statement that “Registrant” is an undefined term. The term “Registrant” in a cancellation proceeding is amenable to interpretation and has, in fact, already been used by Hothead in this proceeding. *See Answer at 1, Foursquare Labs, Inc. v. Hothead Games Inc.*, Cancellation No. 92059710 (T.T.A.B. filed Dec. 8, 2014) (“**Registrant** Hothead Games Inc. (“Respondent”) hereby answers the Petition for Cancellation . . .”). Hothead is not justified in withholding documents on this basis. *See Collins*, 2008 WL 1924935, at *8.

None of Hothead's objections support its refusal to produce. Hothead's objections should be stricken and Hothead must promptly produce the requested documents.

B. Hothead's Documents Are Overdue

Hothead agreed to produce documents in response to Request Nos. 1, 3, 6, 7, 8, 11, 13, 14 and 20, "subject to entry of an appropriate Stipulated Protective Order in this matter," and still has not made that production despite the fact that a protective order was in force at the time Hothead transmitted its Unsigned Discovery Responses. T.B.M.P. § 412.01.

To date, Hothead has produced exactly 3 documents, namely, one agreement and two redacted screenshots from a third-party portal concerning data apparently covering a few month's time.⁷ Hothead's production is thus incomplete and overdue, even with respect to the categories for which Hothead agreed to produce documents. To the extent Hothead is relying on any privilege objections, including the attorney-client privilege, Hothead has produced no privilege log and identified no documents it is withholding.

Hothead should be compelled to produce documents responsive to Foursquare's Document Requests, without objection.

⁷ Hothead's documents are subject to a heightened confidentiality designation under the protective order, and so are not described in detail or attached.

VII. CONCLUSION

For the reasons set forth above, Foursquare respectfully requests that the Board grant its Motion to Compel, compel Hothead to fully respond to Foursquare's Discovery Requests, and to produce all documents responsive to those requests without objection.

Dated: April 10, 2015

Respectfully submitted,

By: /s/ Ann Lamport Hammitte
Ann Lamport Hammitte (Reg. No. 34,858)
Eric P. Carnevale (Reg. No. 70,609)
LANDO & ANASTASI, LLP
Riverfront Office Park
One Main Street – 11th Floor
Cambridge, MA 02142
Tel: (617) 395-7000
Fax: (617)-395-7070
Email: ahammitte@lalaw.com
ecarnevale@lalaw.com

Attorneys for Foursquare Labs, Inc.

CERTIFICATE OF SERVICE

I certify that on April 10, 2015, I served forgoing by electronic mail and first class mail, postage prepaid at Cambridge, Massachusetts 02142, on counsel of record for Registrant, Hothead Games Inc.:

Jefferson F. Scher, Esq.
Carr & Ferrell LLP
120 Constitution Drive
Menlo Park, CA 94025
Tel: 650.812.3416
Fax: 650.812.3444
Email: jscher@carrferrell.com

/s/ Ann Lamport Hammitte
Ann Lamport Hammitte

EXHIBIT A

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

In the matter of Registration No. 4,080,414

Foursquare Labs, Inc.,)	
)	
Petitioner,)	
)	
v.)	Cancellation No. 92/059,710
)	
Hothead Games Inc.,)	
)	
Respondent.)	
)	

**PETITIONER’S FIRST SET OF REQUESTS FOR
PRODUCTION OF DOCUMENTS TO RESPONDENT**

Pursuant to Rule 34 of the Federal Rules of Civil Procedure and 37 C.F.R. §2.120(d), Foursquare Labs, Inc. (hereinafter “Foursquare”) propounds the following Requests for Production of Documents to Respondent, Hothead Games Inc. (“Hothead”), to be answered fully and separately in writing, all documents and things to be produced at the offices of Lando & Anastasi, LLP, Riverfront Office Park, One Main Street, Eleventh Floor, Cambridge, MA 02142 within thirty (30) days after service of these requests, or at such other time and place as agreed by counsel.

DEFINITIONS AND INSTRUCTIONS

The document requests and accompanying interrogatories are subject to the definitions set forth below:

- A. The term “SWARM Marks” means the marks SWARM, SWARM (and Design), and SWARM Logo that are the subject of U.S. Application Nos.

86/181,615 (the “’615 Application”), 86/268,097 (the “’097 Application”), and 86/268,110 (the “’110 Application”).

- B. The term “Hothead Mark” means the mark SWARM that is the subject of U.S. Registration No. 4,080,414 (the “’414 Registration”).
- C. The term “document” is synonymous in meaning and equal in scope to its usage in Federal Rule of Civil Procedure 34(a). A draft or non-identical copy is a separate document within the meaning of this term. Any document bearing any marks, including, without limitation, initials, stamped information, comments or notations not a part of the original text is also a separate document within the meaning of this term.
- D. The term “person” means any natural person or any business, legal, or governmental entity or association.
- E. When referring to a person, to “identify” means to give the person’s full name, present or last known address, and, when referring to a natural person, the present or last known place of employment.
- F. The term “Respondent” as well as the party’s full or abbreviated name or a pronoun referring to a party, means Hothead Games Inc., and, where applicable, the company’s predecessors-in-interest, officers, directors, employees, partners, agents, corporate parent, subsidiaries, or affiliates.
- G. The term “Petitioner” as well as the party’s full or abbreviated name or a pronoun referring to a party, means Foursquare Labs, Inc., and, where applicable, the company’s officers, directors, employees, partners, agents, corporate parent, subsidiaries, or affiliates.

- H. The words “you” and “your” refer to Respondent and, where applicable, the company’s predecessors-in-interest, officers, directors, employees, partners, agents, corporate parent, subsidiaries, or affiliates.
- I. The term “concerning” means referring to, describing, evidencing, or constituting.
- J. The singular shall include the plural and vice versa, the terms “and” and “or” shall be both conjunctive and disjunctive.

Instructions

1. Where a claim of privilege is asserted in objecting to any disclosure, and any information is withheld on the basis of such assertion, specify in log form the nature of the document or disclosure, identify by name, address, title and business affiliation the writer, the addressee, and all recipients thereof, and set forth the general subject matter to which the information relates, and its date.

2. To the extent that any request is objected to as overly broad and/or unduly burdensome, please set forth the factual basis for such claim, set forth the more narrowly-defined basis, if any, on which you are prepared to respond to such request, and respond to the request on that basis.

3. To the extent that any request is objected to as vague or ambiguous, please identify the particular words, terms, or phrases that are asserted to make such request vague or ambiguous, specify the meaning actually attributed by you to such words, terms, or phrases for purposes of your response, and respond to the request accordingly.

4. These requests are continuing and may require supplemental response and production. If any information responsive to any request is not presently known,

identifiable or available, include a statement to that effect and furnish the information when known, identifiable, or available.

DOCUMENT REQUESTS

REQUEST NO. 1

All documents and things identified or consulted in your responses to Petitioner's First Set of Interrogatories.

REQUEST NO. 2

Representative samples, by year, of each different type of promotional material used by Respondent for products or services offered under the Hothead Mark since inception.

REQUEST NO. 3

Representative samples of financial and sales documents for products bearing and services offered under the Hothead Mark, such as invoices and payment records, evidencing continuous provision and sale of products and services in interstate commerce annually from inception to the present.

REQUEST NO. 4

Representative samples of each publication, website, and blog in which products bearing and services offered under the Hothead Mark has been advertised, promoted, reviewed, or discussed, since inception.

REQUEST NO. 5

For each type of product on or service for which the Hothead Mark has been used, produce documents and things sufficient to show the earliest use and the earliest use in commerce of the Hothead Mark on each such product and for each such service.

REQUEST NO. 6

Representative samples, by year, of excerpts from Respondent's website concerning or promoting products or services bearing the Hothead Mark.

REQUEST NO. 7

For each type of product on or service for which the Hothead Mark has been used, produce documents sufficient to identify the geographical areas in which such products bearing and services offered under the Hothead Mark have been provided, sold, promoted and/or advertised.

REQUEST NO. 8

For each type of product on or service for which the Hothead Mark has been used, produce documents sufficient to identify the channels of trade in which such products and services bearing the Hothead Mark have been provided, sold, promoted and/or advertised.

REQUEST NO. 9

All non-privileged documents concerning Respondent's registration or attempted registration (federal or state) of the Hothead Mark.

REQUEST NO. 10.

All trademark, service mark, trade name, or corporate name searches, or any other type of search or investigation, conducted by or on behalf of Respondent in connection with its decision to adopt or use the Hothead Mark.

REQUEST NO. 11

All documents concerning Respondent's ownership rights in the Hothead Mark.

REQUEST NO. 12

All documents and things concerning the creation, selection, and adoption of the Hothead Mark.

REQUEST NO. 13

All documents concerning any assignment, consent, authorization, license, franchise agreement, option agreement, purchase and sale agreement, coexistence agreement, or permission between Respondent and any individual or entity concerning the Hothead Mark.

REQUEST NO. 14

Documents sufficient to show the annual dollar value of sales of products on or services for which the Hothead Mark has been used since inception.

REQUEST NO.15

Documents sufficient to show the amount of money expended and budgeted annually to promote products bearing and services offered under the Hothead Mark since inception.

REQUEST NO. 16

All documents concerning each instance in which a person has been confused, mistaken, or deceived as to the source, endorsement, or sponsorship of Respondent's or Foursquare's products or services as a result of the parties' respective uses of the SWARM mark and Hothead Mark.

REQUEST NO. 17

All documents and things concerning any challenge, letter, opposition or complaint received or sent by Respondent concerning a trade name, trademark, service mark, logo, design or other designation employing the formative SWARM, or any variation thereof.

REQUEST NO. 18

All documents and things concerning Foursquare, Foursquare's Swarm Badges, and the products and services of Foursquare, including but not limited to the products or services offered under the SWARM Marks.

REQUEST NO. 19

All documents and things concerning, describing, or documenting "swarms" or "swarming" prior to 2011.

REQUEST NO. 20

All documents concerning the assertion in paragraph 5 of the Answer that "[t]he mark currently is in use on the Xbox marketplace (<http://marketplace.xbox.com/en-US/Product/Swarm/66acd000-77fe-1000-9115-d80258410b07>) and Playstation.com (<http://us.playstation.com/games/swarm-ps3.html>)."

REQUEST NO. 21

All documents concerning sales by or on behalf of Registrant of products or services bearing the Hothead Mark on the Xbox marketplace, by year.

REQUEST NO. 22

All documents concerning sales by or on behalf of Registrant of products or services bearing the Hothead Mark on Playstation.com, by year.

REQUEST NO. 23

All documents concerning sales by year of products bearing the Hothead Mark by persons or companies other than Registrant.

REQUEST NO. 24

All documents concerning support services provided to users of products bearing the Hothead Mark since inception.

Respectfully submitted,

FOURSQUARE LABS, INC.



Ann Lamoport Hammitte
Lando & Anastasi, LLP
One Main Street, 11th Floor
Cambridge, MA 02142
(617) 395-7000
alhtrademarks@lalaw.com

Dated: January 7, 2015

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy the foregoing PETITIONER'S FIRST SET OF DOCUMENT REQUESTS TO RESPONDENT was served upon counsel for Respondent by electronic mail and by first class mail, postage prepaid at Cambridge, Massachusetts, on this 7th day of January 2015 to:

Jefferson F. Scher, Esq.
Carr & Ferrell LLP
120 Constitution Drive
Menlo Park, CA 94025
jscher@carrferrell.com



Ann Lamoport Hammitte

EXHIBIT B

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

In the matter of Registration No. 4,080,414

Foursquare Labs, Inc.,)	
)	
Petitioner,)	
)	
v.)	Cancellation No. 92/059,710
)	
Hothead Games Inc.,)	
)	
Respondent.)	
)	

**PETITIONER’S FIRST SET OF
INTERROGATORIES TO RESPONDENT**

Pursuant to Rule 33 of the Federal Rules of Civil Procedure and 37 C.F.R. §2.120(d), Foursquare Labs, Inc. (hereinafter “Foursquare”) propounds the following Interrogatories to Respondent, Hothead Games Inc. (“Hothead”), to be answered fully and separately, in writing, under oath, by an officer or duly authorized agent of Respondent within thirty (30) days after service of these interrogatories.

DEFINITIONS AND INSTRUCTIONS

The interrogatories and accompanying document requests are subject to the definitions set forth below:

- A. The term “SWARM Marks” means the marks SWARM, SWARM (and Design), and SWARM Logo that are the subject of U.S. Application Nos. 86/181,615 (the “’615 Application”), 86/268,097 (the “’097 Application”), and 86/268,110 (the “’110 Application”).

- B. The term “Hothead Mark” means the mark SWARM that is the subject of U.S. Registration No. 4,080,414 (the “414 Registration”).
- C. The term “document” is synonymous in meaning and equal in scope to its usage in Federal Rule of Civil Procedure 34(a). A draft or non-identical copy is a separate document within the meaning of this term. Any document bearing any marks, including, without limitation, initials, stamped information, comments or notations not a part of the original text is also a separate document within the meaning of this term.
- D. The term “person” means any natural person or any business, legal, or governmental entity or association.
- E. When referring to a person, to “identify” means to give the person’s full name, present or last known address, and, when referring to a natural person, the present or last known place of employment.
- F. The term “Respondent” as well as the party’s full or abbreviated name or a pronoun referring to a party, means Hothead Games Inc., and, where applicable, the company’s predecessors-in-interest, officers, directors, employees, partners, agents, corporate parent, subsidiaries, or affiliates.
- G. The term “Petitioner” as well as the party’s full or abbreviated name or a pronoun referring to a party, means Foursquare Labs, Inc., and, where applicable, the company’s officers, directors, employees, partners, agents, corporate parent, subsidiaries, or affiliates.
- H. The words “you” and “your” refer to Respondent and, where applicable, the company’s predecessors-in-interest, officers, directors, employees,

partners, agents, corporate parent, subsidiaries, or affiliates.

- I. The term “concerning” means referring to, describing, evidencing, or constituting.
- J. The singular shall include the plural and vice versa, the terms “and” and “or” shall be both conjunctive and disjunctive.

Instructions

1. Where a claim of privilege is asserted in objecting to any disclosure, and any information is withheld on the basis of such assertion, specify in log form the nature of the document or disclosure, identify by name, address, title and business affiliation the writer, the addressee, and all recipients thereof, and set forth the general subject matter to which the information relates, and its date.

2. To the extent that any interrogatory is objected to as overly broad and/or unduly burdensome, please set forth the factual basis for such claim, set forth the more narrowly-defined basis, if any, on which you are prepared to respond to such interrogatory, and respond to the interrogatory on that basis.

3. To the extent that any interrogatory is objected to as vague or ambiguous, please identify the particular words, terms, or phrases that are asserted to make such interrogatory vague or ambiguous, specify the meaning actually attributed by you to such words, terms, or phrases for purposes of your response to such interrogatory, and respond to the interrogatory accordingly.

4. These interrogatories are continuing and may require supplemental response and production. If any information responsive to any interrogatories is not

presently known, identifiable or available, include a statement to that effect and furnish the information when known, identifiable, or available.

INTERROGATORIES

INTERROGATORY NO. 1

State the address of each location at which Respondent maintains a place of business, describe the functions carried out at each location, and identify each of Respondent's directors, officers, and managerial employees responsible for promotion, marketing, distribution, and/or provision of products or services under the Hothead Mark.

INTERROGATORY NO. 2

Identify the individuals and entities involved in the creation, the conception, the adoption, and the use of the Hothead Mark on or in connection with any goods or services, and identify the dates and describe the circumstances of the creation, the conception, the adoption, and the use of the Hothead Mark on or in connection with any goods or services.

INTERROGATORY NO. 3

Identify all trademark, service mark, trade name, or corporate name searches, or any other type of search, conducted by or on behalf of Respondent in connection with its decision to adopt or use the Hothead Mark.

INTERROGATORY NO.4

Identify by common commercial name each product and each service provided, offered for sale, distributed, advertised, and/or promoted by or on behalf of Respondent, on or in connection with which the Hothead Mark is used.

INTERROGATORY NO. 5

For each product and each service identified in response to Interrogatory No. 4:

- (a) identify the individual most familiar with the marketing of such product or service;
- (b) state the date of first use anywhere and describe the circumstances surrounding that first use;
- (c) state the date of first use in commerce and describe the circumstances surrounding that first use;
- (d) state the dollar volume expended by Respondent annually in promoting such products or services since inception; and
- (e) state the volume in units and dollars of Respondent's income received annually to date from such products or services since inception.

INTERROGATORY NO. 6

For each product or service identified in response to Interrogatory No. 4 not currently available to consumers, state the date on which that product or service was last provided or sold to consumers.

INTERROGATORY NO. 7

For each product or service identified in response to Interrogatory No. 4 for which there was a period of time during which the product or service was not available to consumers, identify the dates during which each product or service was not available to consumers.

INTERROGATORY NO. 8

Identify each different type of promotional material used by Respondent for products or services bearing the Hothead Mark, and identify the time frame during which each was used.

INTERROGATORY NO. 9

State the amount of money expended by or on behalf of Respondent annually in advertising or promoting products and services under the Hothead Mark, and identify all advertisements or promotional events arising or resulting from such expenditures per year.

INTERROGATORY NO. 10

Identify, by year, each trade show or conference attended by Respondent since Hothead's Mark was adopted and, if different, identify, by year, each trade show or conference at which Respondent sold, offered for sale, or promoted products or services under the Hothead Mark.

INTERROGATORY NO. 11

Identify (by title, publisher, issue date, and page number) all publications in which Respondent has promoted products or services bearing the Hothead Mark.

INTERROGATORY NO. 12

Identify all publications, websites, and blogs in which products bearing or services offered under the Hothead Mark have been advertised, promoted, reviewed, or discussed.

INTERROGATORY NO. 13

Describe in detail any instance of actual confusion known to Respondent regarding the source, origin, sponsorship, or enforcement of Respondent's or Foursquare's products or services as a result of the parties' respective uses of the SWARM Marks and the Hothead Mark, and identify all persons having knowledge thereof.

INTERROGATORY NO. 14

Identify all agreements, including assignments, consents, authorizations, licenses, franchise agreements, option agreements, purchase and sale agreements, coexistence agreements, or permissions, entered into between Respondent and any other person or entity concerning the Hothead Mark.

INTERROGATORY NO. 15

Identify all stores, websites, wholesalers, retailers, sales representatives, and distributors through which Respondent currently sells or offers for sale products or services under the Hothead Mark.

INTERROGATORY NO. 16

Identify, by year, all stores, websites, wholesalers, retailers, sales representatives, and distributors through which Respondent has ever sold or offered for sale products or services under the Hothead Mark since inception.

INTERROGATORY NO. 17

For each store, website, wholesaler, retailer, sales representative, and distributor identified in response to Interrogatory No. 16, identify the dates during which each such entity sold or provided any product or service under the Hothead Mark to consumers.

INTERROGATORY NO. 18

Identify the channels of trade through which products and services bearing the Hothead Mark are provided or distributed to consumers.

INTERROGATORY NO. 19

Describe in detail how Respondent became aware of Petitioner and identify the date on which this occurred.

INTERROGATORY NO. 20

Describe in detail how Respondent became aware of Petitioner's Swarm badges and its trademarks, including the SWARM Marks, and identify the time frame in which each occurred.

INTERROGATORY NO. 21

Identify, by year, by units sold and revenue received, all sales of products or services provided under the Hothead Mark via the Xbox Marketplace as alleged in Paragraph 5 of the Answer.

INTERROGATORY NO. 22

Identify, by year, by units sold and revenue received, all sales of products or services provided under the Hothead Mark via Playstation.com as alleged in Paragraph 5 of the Answer.

INTERROGATORY NO. 23

Identify the person or persons responsible for maintaining and/or updating Respondent's website.

INTERROGATORY NO. 24

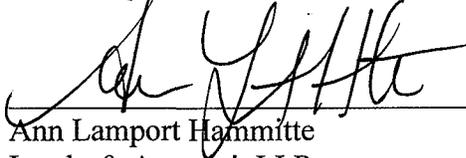
For each expert that Respondent has retained to give testimony in this proceeding, provide the information required in Rule 26(a).

INTERROGATORY NO. 25

Identify each person who supplied documents or information for, or participated in responding to, these interrogatories and Petitioner's First Requests for Production of Documents and Things.

Respectfully submitted,

FOURSQUARE LABS, INC.



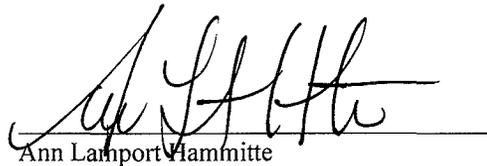
Ann Lamport Hammitte
Lando & Anastasi, LLP
One Main Street, 11th Floor
Cambridge, MA 02142
(617) 395-7000
alhtrademarks@lalaw.com

Dated: January 7, 2015

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy the foregoing PETITIONER'S FIRST SET OF INTERROGATORIES TO RESPONDENT was served upon counsel for Respondent by electronic mail and by first class mail, postage prepaid at Cambridge, Massachusetts, on this 7th day of January 2015 to:

Jefferson F. Scher, Esq.
Carr & Ferrell LLP
120 Constitution Drive
Menlo Park, CA 94025
jscher@carrferrell.com



Ann Lamport Hammitte

EXHIBIT C

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

In the matter of
Trademark Registration No. 4,080,414
Mark: SWARM

_____)	
Foursquare Labs, Inc.)	
)	
Petitioner,)	
)	
v.)	Cancellation No. 92059710
)	
Hothead Games Inc.)	
)	
Respondent.)	
_____)	

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

**RESPONDENT HOTHEAD GAMES INC.'S RESPONSES TO PETITIONER
FOURSQUARE LABS INC.'S FIRST SET OF INTERROGATORIES**

PROPOUNDING PARTY: Petitioner FOURSQUARE LABS, INC.
RESPONDING PARTY: Defendant HOTHEAD GAMES INC.
SET NUMBER: ONE (Nos. 1-25)

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure and 37 C.F.R. §2.120(d), Defendant Hothead Games Inc. ("HOTHEAD") responds to Petitioner FOURSQUARE LABS, INC.'s ("FOURSQUARE") First Set of Interrogatories, served by counsel for FOURSQUARE on January 7, 2015. HOTHEAD's responses are made on the

basis of information currently available to HOTHEAD and without prejudice to HOTHEAD's right to add, modify, or otherwise change or amend its responses as appropriate, or to correct any inadvertent errors, mistakes or omissions, based on any subsequently discovered fact or information.

GENERAL OBJECTIONS

HOTHEAD, below sets forth its General Objections to FOURSQUARE's Interrogatories. These General Objections apply to each and every interrogatory whether or not they are specifically set forth in the objections and responses to each interrogatory. HOTHEAD's General Objections are based on information that is presently available and specifically known to HOTHEAD.

HOTHEAD's objections and responses are made without in any way waiving or intending to waive, but, on the contrary, preserving and intending to preserve: (a) all questions as to competency, relevancy, materiality, privilege, and admissibility as evidence for any purpose of the response or subject matter thereof, in any subsequent proceeding in or the trial of this or any other action; (b) the right to object on any ground to the use of said objections and responses, or the subject matter thereof, in any subsequent proceeding or in the trial of this or any other action; and (c) the right to object on any ground at any time to other discovery procedures involving or relating to the subject matter of these interrogatories.

1. HOTHEAD objects to these interrogatories to the extent that they seek information protected from discovery by a claim of privilege, including the attorney-client privilege, the common interest privilege, the work product doctrine, and/or any other applicable privilege or immunity. HOTHEAD intends to and does claim all such privileges and immunities with respect to all such information. Any disclosure of privileged, immune, or otherwise protected information is inadvertent and shall not be deemed a waiver of any privilege, immunity, or protection.

2. HOTHEAD objects to these interrogatories to the extent that they seek to impose any obligation upon HOTHEAD different from or beyond those contemplated by the Federal Rules of Civil Procedure, and any and all other applicable rules (collectively “the Rules”).

3. HOTHEAD objects to these interrogatories to the extent that they seek information that is not relevant and not reasonably calculated to lead to the discovery of admissible evidence. HOTHEAD does not concede that the information sought by these interrogatories is relevant, and HOTHEAD reserves all objections, including objections to competency, relevancy, materiality and admissibility of the information requested. HOTHEAD reserves the right to object to further discovery into any subject matter sought by these interrogatories.

4. HOTHEAD objects to these interrogatories to the extent that they seek information not within HOTHEAD’s possession, custody, or control. HOTHEAD also objects to these interrogatories to the extent they call for information, the discovery of which requires more than a reasonable investigation. In addition, HOTHEAD objects to these interrogatories to the extent that they call for information which is not within HOTHEAD’s possession and is equally available to HOTHEAD and FOURSQUARE, for example, through public sources.

5. HOTHEAD objects to these requests to the extent they seek information subject to a confidentiality, non-disclosure and/or F.R.E. 408 agreement and for which HOTHEAD has not received permission to disclose such documents. HOTHEAD also objects to these interrogatories to the extent that they seek information which, if furnished, would violate a domestic or foreign judicial order, protective order, stipulation of confidentiality, or confidentiality agreement that has been entered into with respect to such information.

6. HOTHEAD objects to these interrogatories to the extent that they seek information that is already in the possession, custody, or control of FOURSQUARE.

7. HOTHEAD objects to these interrogatories to the extent that they are duplicative or redundant of other discovery taken in the above-captioned matter.

8. HOTHEAD objects to these interrogatories to the extent that the definitions, instructions and interrogatories are overly broad, unduly burdensome, and vague. HOTHEAD will respond to FOURSQUARE's interrogatories only to the extent required by the Rules.

9. HOTHEAD objects to these interrogatories to the extent that they use terms that are vague, ambiguous, not defined and/or are vaguely or ambiguously defined, and therefore fail to identify with reasonable particularity the information sought.

10. HOTHEAD objects to these interrogatories to the extent that they are overly broad or overly inclusive, or call for extensive research, investigation, information or identification of information that would subject HOTHEAD to undue oppression, burden, harassment, or expense.

11. HOTHEAD objects to these interrogatories to the extent they are premature under the Scheduling Order.

12. HOTHEAD objects to these interrogatories to the extent they call for a legal conclusion in order to reply.

13. The response to any of these interrogatories shall not be construed as a waiver of any objection to their admissibility.

14. HOTHEAD's response to each of the interrogatories is hereby made without in any way waiving or intending to waive, but rather to the contrary, by preserving and intending to preserve: (a) The right to object at any time to any further response to these or any other interrogatories; and (b) The right at any time to supplement, and/or revise, correct and/or clarify any of these objections and responses as permitted under the Rules.

15. HOTHEAD incorporates by reference the General Objections set forth above into each of its discovery responses, whether or not repeated therein, as well as any specific stated objections. HOTHEAD may repeat a General Objection for emphasis or some other reason, but the failure to repeat any general objection does not waive any general objection to these interrogatories. HOTHEAD's discovery and investigation of the information requested by FOURSQUARE is ongoing and HOTHEAD reserves it right to supplement and/or amend the objections and responses herein.

SPECIFIC OBJECTIONS AND RESPONSES TO INTERROGATORIES

INTERROGATORY NO. 1:

State the address of each location at which Respondent maintains a place of business, describe the functions carried out at each location, and identify each of Respondent's directors, officers, and managerial employees responsible for promotion, marketing, distribution, and/or provision of products or services under the Hothead Mark.

RESPONSE TO INTERROGATORY NO. 1:

HOTHEAD objects to this Interrogatory on the grounds that it is compound, duplicative of other requests, overbroad, vague and ambiguous. HOTHEAD also objects to this Interrogatory on the grounds that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence. HOTHEAD further objects to this Interrogatory to the extent it calls for private, confidential, trade secret, or financial protected proprietary information of HOTHEAD or other third parties. HOTHEAD objects to this Interrogatory insofar as it seeks information protected by attorney-client privilege, the attorney work-product doctrine or the common interest privilege.

Subject to the foregoing Specific and General Objections, HOTHEAD responds as follows:

Hothead Games, Inc., 350 - 887 Great Northern Way, Vancouver, BC, Canada
V5T 4T5.

INTERROGATORY NO. 2

Identify the individuals and entities involved in the creation, the conception, the adoption, and the use of the Hothead Mark on or in connection with any goods or services, and identify the dates and describe the circumstances of the creation, the conception, the adoption, and the use of the Hothead Mark on or in connection with any goods or services.

RESPONSE TO INTERROGATORY NO. 2:

HOTHEAD objects to this Interrogatory on the grounds that it is compound, duplicative of other requests, overbroad, vague and ambiguous. HOTHEAD also objects to this Interrogatory on the grounds that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence. HOTHEAD further objects to this Interrogatory to the extent it calls for private, confidential, trade secret, or financial protected proprietary information of HOTHEAD or other third parties. HOTHEAD objects to this Interrogatory insofar as it seeks information protected by attorney-client privilege, the attorney work-product doctrine or the common interest privilege.

Subject to the foregoing Specific and General Objections, HOTHEAD responds as follows:

HOTHEAD entered into a publishing agreement with Ignition Entertainment Ltd. with respect to HOTHEAD's video game, titled "SWARM," in or about April 2010.

INTERROGATORY NO. 3:

Identify all trademark, service mark, trade name, or corporate name searches, or any other type of search, conducted by or on behalf of Respondent in connection with its decision to adopt or use the Hothead Mark.

RESPONSE TO INTERROGATORY NO. 3:

HOTHEAD objects to this Interrogatory on the grounds that it is compound, duplicative of other requests, overbroad, vague and ambiguous. HOTHEAD also objects to this Interrogatory on the grounds that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence. HOTHEAD further objects to this Interrogatory to the extent it calls for private, confidential, trade secret, or financial protected proprietary information of HOTHEAD or other third parties. HOTHEAD objects to this Interrogatory insofar as it seeks information protected by attorney-client privilege, the attorney work-product doctrine or the common interest privilege.

INTERROGATORY NO. 4:

Identify by common commercial name each product and each service provided, offered for sale, distributed, advertised, and/or promoted by or on behalf of Respondent, on or in connection with which the Hothead Mark is used.

RESPONSE TO INTERROGATORY NO. 4:

HOTHEAD objects to this Interrogatory on the grounds that it is compound, duplicative of other requests, overbroad, vague and ambiguous. HOTHEAD also objects to this Interrogatory on the grounds that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence. HOTHEAD further objects to this Interrogatory to the extent it calls for private, confidential, trade secret, or financial protected proprietary information of HOTHEAD or other third parties. HOTHEAD objects to this Interrogatory insofar as it seeks information protected by attorney-client privilege, the attorney work-product doctrine or the common interest privilege.

Subject to the foregoing Specific and General Objections, HOTHEAD responds as follows:

HOTHEAD's video game titled "SWARM," is sold in connection with HOTHEAD's SWARM trademark.

INTERROGATORY NO. 5:

For each product and each service identified in response to Interrogatory No. 4:

- (a) Identify the individual most familiar with the marketing of such product or service;
- (b) State the date of first use anywhere and describe the circumstances surrounding that first use;
- (c) State the date of first use in commerce and describe the circumstances surrounding that first use;
- (d) State the dollar volume expended by Respondent annually in promoting such products or services since inception; and
- (e) State the volume in units and dollars of Respondent's income received annually to date from such products or services since inception.

RESPONSE TO INTERROGATORY NO. 5:

HOTHEAD objects to this Interrogatory on the grounds that it is compound, duplicative of other requests, requires discrete and independent subparts calling for discrete and independent responses, overbroad, vague and ambiguous. HOTHEAD also objects to this Interrogatory on the grounds that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence. HOTHEAD further objects to this Interrogatory to the extent it calls for private, confidential, trade secret, or financial protected proprietary information of HOTHEAD or other third parties. HOTHEAD objects to this Interrogatory insofar as it seeks information protected by attorney-client privilege, the attorney work-product doctrine or the common interest privilege.

Subject to the foregoing Specific and General Objections, HOTHEAD responds as follows:

HOTHEAD entered into a publishing agreement relating to HOTHEAD's video game titled "SWARM" with Ignition Entertainment Ltd. in or about April 2010.

HOTHEAD's "SWARM" video game was released on March 22, 2011.

INTERROGATORY NO. 6:

For each product or service identified in response to Interrogatory No. 4 not currently available to consumers, state the date on which that product or service was last provided or sold to consumers.

RESPONSE TO INTERROGATORY NO. 6:

HOTHEAD objects to this Interrogatory on the grounds that it is compound, duplicative of other requests, requires discrete and independent subparts calling for discrete and independent responses, overbroad, vague and ambiguous. HOTHEAD also objects to this Interrogatory on the grounds that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence. HOTHEAD further objects to this Interrogatory to the extent it calls for private, confidential, trade secret, or financial protected proprietary information of HOTHEAD or other third parties. HOTHEAD objects to this Interrogatory insofar as it seeks information protected by attorney-client privilege, the attorney work-product doctrine or the common interest privilege.

Subject to the foregoing Specific and General Objections, HOTHEAD responds as follows:

Not applicable.

INTERROGATORY NO. 7:

For each product or service identified in response to Interrogatory No. 4 for which there was a period of time during which the product or service was not available to consumers, identify the dates during which each product or service was not available to consumers.

RESPONSE TO INTERROGATORY NO. 7:

HOTHEAD objects to this Interrogatory on the grounds that it is compound, duplicative of other requests, requires discrete and independent subparts calling for discrete and independent responses, overbroad, vague and ambiguous. HOTHEAD also objects to this Interrogatory on the grounds that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence. HOTHEAD further objects to this Interrogatory to the extent it calls for private, confidential, trade secret, or financial protected proprietary information of HOTHEAD or other third parties. HOTHEAD objects to this Interrogatory insofar as it seeks information protected by attorney-client privilege, the attorney work-product doctrine or the common interest privilege.

Subject to the foregoing Specific and General Objections, HOTHEAD responds as follows:

Not applicable.

INTERROGATORY NO. 8:

Identify each different type of promotional material used by Respondent for products or services bearing the Hothead Mark, and identify the time frame during which each was used.

RESPONSE TO INTERROGATORY NO. 8:

HOTHEAD objects to this Interrogatory on the grounds that it is compound, duplicative of other requests, overbroad, vague and ambiguous. HOTHEAD also objects to this Interrogatory on the grounds that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence. HOTHEAD further objects to this Interrogatory to the extent it calls for private, confidential, trade secret, or financial protected proprietary information of HOTHEAD or other third parties. HOTHEAD objects to this Interrogatory insofar as it seeks information protected by attorney-client privilege, the

attorney work-product doctrine or the common interest privilege.

Subject to the foregoing Specific and General Objections, HOTHEAD responds as follows:

HOTHEAD entered into a publishing agreement relating to HOTHEAD's video game titled "SWARM" with Ignition Entertainment Ltd. in or about April 2010.

HOTHEAD's "SWARM" video game was released on March 22, 2011.

INTERROGATORY NO. 9:

State the amount of money expended by or on behalf of Respondent annually in advertising or promoting products and services under the Hothead Mark, and identify all advertisements or promotional events arising or resulting from such expenditures per year.

RESPONSE TO INTERROGATORY NO. 9:

HOTHEAD objects to this Interrogatory on the grounds that it is compound, overbroad, vague and ambiguous. HOTHEAD also objects to this Interrogatory on the grounds that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence. HOTHEAD further objects to this Interrogatory to the extent it calls for private, confidential, trade secret, or financial protected proprietary information of HOTHEAD or other third parties. HOTHEAD objects to this Interrogatory insofar as it seeks information protected by attorney-client privilege, the attorney work-product doctrine or the common interest privilege.

Subject to the foregoing Specific and General Objections, HOTHEAD responds as follows:

HOTHEAD entered into a publishing agreement relating to HOTHEAD's video game titled "SWARM" with Ignition Entertainment Ltd. in or about April 2010.

HOTHEAD's "SWARM" video game was released on March 22, 2011.

INTERROGATORY NO. 10:

Identify, by year, each trade show or conference attended by Respondent since Hothead's Mark was adopted and, if different, identify, by year, each trade show or conference at which Respondent sold, offered for sale, or promoted products or services under the Hothead Mark.

RESPONSE TO INTERROGATORY NO. 10:

HOTHEAD objects to this Interrogatory on the grounds that it is compound, duplicative of other requests, requires discrete and independent subparts calling for discrete and independent responses, overbroad, vague and ambiguous. HOTHEAD also objects to this Interrogatory on the grounds that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence. HOTHEAD further objects to this Interrogatory to the extent it calls for private, confidential, trade secret, or financial protected proprietary information of HOTHEAD or other third parties. HOTHEAD objects to this Interrogatory insofar as it seeks information protected by attorney-client privilege, the attorney work-product doctrine or the common interest privilege.

INTERROGATORY NO. 11:

Identify (by title, publisher, issue date, and page number) all publications in which Respondent has promoted products or services bearing the Hothead Mark.

RESPONSE TO INTERROGATORY NO. 11:

HOTHEAD objects to this Interrogatory on the grounds that it is duplicative of other requests, unduly burdensome, overbroad, vague, and ambiguous as to the terms "publisher" and "publication." HOTHEAD also objects to this Interrogatory on the grounds that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence. HOTHEAD further objects to this Interrogatory to the extent it calls for private, confidential, trade secret, or financial protected proprietary information of HOTHEAD

or other third parties. HOTHEAD objects to this Interrogatory insofar as it seeks information protected by attorney-client privilege, the attorney work-product doctrine or the common interest privilege. HOTHEAD objects to this Interrogatory to the extent it seeks information or documents that are in FOURSQUARE'S custody, possession, or control or that are equally accessible to FOURSQUARE.

Subject to the foregoing Specific and General Objections, HOTHEAD responds as follows:

HOTHEAD entered into a publishing agreement relating to HOTHEAD's video game titled "SWARM" with Ignition Entertainment Ltd. in or about April 2010.

INTERROGATORY NO. 12:

Identify all publications, websites, and blogs in which products bearing or services offered under the Hothead Mark have been advertised, promoted, reviewed, or discussed.

RESPONSE TO INTERROGATORY NO. 12:

HOTHEAD objects to this Interrogatory on the grounds that it is duplicative of other requests, unduly burdensome, overbroad, vague and ambiguous. HOTHEAD also objects to this Interrogatory on the grounds that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence. HOTHEAD further objects to this Interrogatory to the extent it calls for private, confidential, trade secret, or financial protected proprietary information of HOTHEAD or other third parties. HOTHEAD objects to this Interrogatory insofar as it seeks information protected by attorney-client privilege, the attorney work-product doctrine or the common interest privilege. HOTHEAD objects to this Interrogatory to the extent it seeks information or documents that are in FOURSQUARE'S custody, possession, or control or that are equally accessible to FOURSQUARE.

Subject to the foregoing Specific and General Objections, HOTHEAD responds as follows:

HOTHEAD entered into a publishing agreement relating to HOTHEAD's video game titled "SWARM" with Ignition Entertainment Ltd. in or about April 2010.

INTERROGATORY NO. 13:

Describe in detail any instance of actual confusion known to Respondent regarding the source, origin, sponsorship, or enforcement of Respondent's or Foursquare's products or services as a result of the parties' respective uses of the SWARM Marks and the Hothead Mark, and identify all persons having knowledge thereof.

RESPONSE TO INTERROGATORY NO. 13:

HOTHEAD objects to this Interrogatory on the grounds that it is overbroad, vague and ambiguous. HOTHEAD also objects to this Interrogatory on the grounds that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence. HOTHEAD further objects to this Interrogatory to the extent it calls for private, confidential, trade secret, or financial protected proprietary information of HOTHEAD or other third parties. HOTHEAD objects to this Interrogatory insofar as it seeks information protected by attorney-client privilege, the attorney work-product doctrine or the common interest privilege.

INTERROGATORY NO. 14:

Identify all agreements, including assignments, consents, authorizations, licenses, franchise agreements, option agreements, purchase and sale agreements, coexistence agreements, or permissions, entered into between Respondent and any other person or entity concerning the Hothead Mark.

RESPONSE TO INTERROGATORY NO. 14:

HOTHEAD objects to this Interrogatory on the grounds that it is compound,

duplicative of other requests, requires discrete and independent subparts calling for discrete and independent responses, overbroad, vague and ambiguous. HOTHEAD also objects to this Interrogatory on the grounds that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence. HOTHEAD further objects to this Interrogatory to the extent it calls for private, confidential, trade secret, or financial protected proprietary information of HOTHEAD or other third parties. HOTHEAD objects to this Interrogatory insofar as it seeks information protected by attorney-client privilege, the attorney work-product doctrine or the common interest privilege.

Subject to the foregoing Specific and General Objections, HOTHEAD responds as follows:

HOTHEAD entered into a publishing agreement relating to HOTHEAD's video game titled "SWARM" with Ignition Entertainment Ltd. in or about April 2010.

INTERROGATORY NO. 15:

Identify all stores, websites, wholesalers, retailers, sales representatives, and distributors through which Respondent currently sells or offers for sale products or services under the Hothead Mark.

RESPONSE TO INTERROGATORY NO. 15:

HOTHEAD objects to this Interrogatory on the grounds that it is compound, duplicative of other requests, overbroad, vague and ambiguous.

Subject to the foregoing Specific and General Objections, HOTHEAD responds as follows:

HOTHEAD entered into a publishing agreement relating to HOTHEAD's video game titled "SWARM" with Ignition Entertainment Ltd. in or about April 2010.

HOTHEAD's "SWARM" video game is available for purchase and download at websites including the Microsoft XBOX Marketplace website, Sony PlayStation PS3 website, and GameStop website. *See, e.g.,* <http://marketplace.xbox.com/en->

<US/Product/Swarm/66acd000-77fe-1000-9115-d80258410b07;>

[http://www.playstation.com/en-us/games/swarm-ps3/.](http://www.playstation.com/en-us/games/swarm-ps3/)

INTERROGATORY NO. 16:

Identify, by year, all stores, websites, wholesalers, retailers, sales representatives, and distributors through which Respondent has ever sold or offered for sale products or services under the Hothead Mark since inception.

RESPONSE TO INTERROGATORY NO. 16:

HOTHEAD objects to this Interrogatory on the grounds that it is compound, duplicative of other requests, overbroad, vague and ambiguous. HOTHEAD also objects to this Interrogatory on the grounds that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence.

Subject to the foregoing Specific and General Objections, HOTHEAD responds as follows:

HOTHEAD entered into a publishing agreement relating to HOTHEAD's video game titled "SWARM" with Ignition Entertainment Ltd. in or about April 2010. HOTHEAD's "SWARM" video game is available for purchase and download at websites including the Microsoft XBOX Marketplace website, Sony PlayStation PS3 website, and GameStop website.

INTERROGATORY NO. 17:

For each store, website, wholesaler, retailer, sales representative, and distributor identified in response to Interrogatory No. 16, identify the dates during which each such entity sold or provided any product or service under the Hothead Mark to consumers.

RESPONSE TO INTERROGATORY NO. 17:

HOTHEAD objects to this Interrogatory on the grounds that it is compound, duplicative of other requests, overbroad, vague and ambiguous. HOTHEAD also

objects to this Interrogatory on the grounds that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence.

Subject to the foregoing Specific and General Objections, HOTHEAD responds as follows:

HOTHEAD entered into a publishing agreement relating to HOTHEAD's video game titled "SWARM" with Ignition Entertainment Ltd. in or about April 2010. HOTHEAD's "SWARM" video game was released on March 22, 2011. HOTHEAD's "SWARM" video game is available for purchase and download at websites including the Microsoft XBOX Marketplace website, Sony PlayStation PS3 website, and GameStop website.

INTERROGATORY NO. 18:

Identify the channels of trade through which products and services bearing the Hothead Mark are provided or distributed to consumers.

RESPONSE TO INTERROGATORY NO. 18:

HOTHEAD objects to this Interrogatory on the grounds that it is duplicative of other requests, overbroad, vague and ambiguous. HOTHEAD also objects to this Interrogatory on the grounds that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence.

Subject to the foregoing Specific and General Objections, HOTHEAD responds as follows:

HOTHEAD entered into a publishing agreement relating to HOTHEAD's video game titled "SWARM" with Ignition Entertainment Ltd. in or about April 2010. HOTHEAD's "SWARM" video game was released on March 22, 2011. HOTHEAD's "SWARM" video game is available for purchase and download at websites including

the Microsoft XBOX Marketplace website, Sony PlayStation PS3 website, and GameStop website.

INTERROGATORY NO. 19

Describe in detail how Respondent became aware of Petitioner and identify the date on which this occurred.

RESPONSE TO INTERROGATORY NO. 19:

HOTHEAD objects to this Interrogatory on the grounds that it is unintelligible, vague and ambiguous. HOTHEAD also objects to this Interrogatory on the grounds that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence.

INTERROGATORY NO. 20

Describe in detail how Respondent became aware of Petitioner's Swarm badges and its trademarks, including the SWARM Marks, and identify the time frame in which each occurred.

RESPONSE TO INTERROGATORY NO. 20:

HOTHEAD objects to this Interrogatory on the grounds that it is overbroad, vague and ambiguous. HOTHEAD also objects to this Interrogatory on the grounds that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence.

INTERROGATORY NO. 21:

Identify, by year, by units sold and revenue received, all sales of products or services provided under the Hothead Mark via the Xbox Marketplace as alleged in Paragraph 5 of the Answer.

RESPONSE TO INTERROGATORY NO. 21:

HOTHEAD objects to this Interrogatory on the grounds that it is duplicative of other requests, unduly burdensome, overbroad, vague and ambiguous. HOTHEAD also objects to this Interrogatory on the grounds that it seeks information that is not relevant

to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence. HOTHEAD further objects to this Interrogatory to the extent it calls for private, confidential, trade secret, or financial protected proprietary information of HOTHEAD or other third parties. HOTHEAD objects to this Interrogatory insofar as it seeks information protected by attorney-client privilege, the attorney work-product doctrine or the common interest privilege.

Subject to the foregoing Specific and General Objections, HOTHEAD responds as follows:

HOTHEAD entered into a publishing agreement relating to HOTHEAD's video game titled "SWARM" with Ignition Entertainment Ltd. in or about April 2010. HOTHEAD's "SWARM" video game was released on March 22, 2011. HOTHEAD's "SWARM" video game is currently available for purchase and download at websites including the Microsoft XBOX Marketplace website, Sony PlayStation PS3 website, and GameStop website. HOTHEAD will supplement its Response after entry of an appropriate Stipulated Protective Order in this matter.

INTERROGATORY NO. 22:

Identify, by year, by units sold and revenue received, all sales of products or services provided under the Hothead Mark via Playstation.com as alleged in Paragraph 5 of the Answer.

RESPONSE TO INTERROGATORY NO. 22:

HOTHEAD objects to this Interrogatory on the grounds that it is duplicative of other requests, unduly burdensome, overbroad, vague and ambiguous. HOTHEAD also objects to this Interrogatory on the grounds that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence. HOTHEAD further objects to this Interrogatory to the extent it calls for private, confidential, trade secret, or financial protected proprietary information of HOTHEAD or other third parties. HOTHEAD objects to this

Interrogatory insofar as it seeks information protected by attorney-client privilege, the attorney work-product doctrine or the common interest privilege.

Subject to the foregoing Specific and General Objections, HOTHEAD responds as follows:

HOTHEAD entered into a publishing agreement relating to HOTHEAD's video game titled "SWARM" with Ignition Entertainment Ltd. in or about April 2010. HOTHEAD's "SWARM" video game was released on March 22, 2011. HOTHEAD's "SWARM" video game is currently available for purchase and download at websites including the Microsoft XBOX Marketplace website, Sony PlayStation PS3 website, and GameStop website. HOTHEAD will supplement its Response after entry of an appropriate Stipulated Protective Order in this matter.

INTERROGATORY NO. 23

Identify the person or persons responsible for maintaining and/or updating Respondent's website.

RESPONSE TO INTERROGATORY NO. 23:

HOTHEAD objects to this Interrogatory on the grounds that it is vague and ambiguous. HOTHEAD also objects to this Interrogatory on the grounds that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence.

INTERROGATORY NO. 24:

For each expert that Respondent has retained to give testimony in this proceeding, provide the information required in Rule 26(a).

RESPONSE TO INTERROGATORY NO. 24:

Subject to its General Objections, HOTHEAD responds as follows:

Discovery has recently opened and HOTHEAD has not retained an expert at this time. HOTHEAD reserves the right to amend its Response if and when it retains an expert.

INTERROGATORY NO. 25

Identify each person who supplied documents or information for, or participated in responding to, these interrogatories and Petitioner's First Requests for Production of Documents and Things.

RESPONSE TO INTERROGATORY NO. 25:

Subject to its General Objections, HOTHEAD responds as follows:

Gregan Dunn, Director of Business Development, Hothead Games Inc.

PROOF OF SERVICE BY EMAIL

I declare that:

I am employed in the County of San Mateo, California. I am over the age of eighteen years and not a party to the within cause; my business address is 120 Constitution Drive, Menlo Park, California 94025. On February 23, 2015, I served the within RESPONDENT HOTHEAD GAMES INC.'S RESPONSES TO PETITIONER FOURSQUARE LABS INC.'S FIRST SET OF INTERROGATORIES on the interested party in said cause, via Electronic Mail to its counsel (by consent) to: alhtrademarks@lalaw.com .

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at Menlo Park, California, this 23rd day of February 2015.



Aura L. Tatagiba

EXHIBIT D

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

In the matter of
Trademark Registration No. 4,080,414
Mark: SWARM

_____)	
Foursquare Labs, Inc.)	
)	
Petitioner,)	
)	
v.)	Cancellation No. 92059710
)	
Hothead Games Inc.)	
)	
Respondent.)	
_____)	

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

**RESPONDENT HOTHEAD GAMES INC.'S RESPONSES TO
PETITIONER FOURSQUARE LABS INC.'S FIRST SET OF
REQUESTS FOR PRODUCTION OF DOCUMENTS**

PROPOUNDING PARTY: Petitioner FOURSQUARE LABS, INC.
RESPONDING PARTY: Defendant HOTHEAD GAMES INC.
SET NUMBER: ONE (Nos. 1-24)

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure and 37 C.F.R. §2.120(d), Defendant Hothead Games Inc. ("HOTHEAD") responds to Petitioner

FOURSQUARE LABS, INC.'s ("FOURSQUARE") First Set of Requests for Production of Documents, served by counsel for FOURSQUARE on January 7, 2015. HOTHEAD's responses are made on the basis of information currently available to HOTHEAD and without prejudice to HOTHEAD's right to add, modify, or otherwise change or amend its responses as appropriate, or to correct any inadvertent errors, mistakes or omissions, based on any subsequently discovered fact or information.

GENERAL OBJECTIONS

HOTHEAD, below sets forth its General Objections to FOURSQUARE's Requests. These General Objections apply to each and every document Request whether or not they are specifically set forth in the objections and responses to each document Request. HOTHEAD's General Objections are based on information that is presently available and specifically known to HOTHEAD.

HOTHEAD's objections and responses are made without in any way waiving or intending to waive, but, on the contrary, preserving and intending to preserve: (a) all questions as to competency, relevancy, materiality, privilege, and admissibility as evidence for any purpose of the response or subject matter thereof, in any subsequent proceeding in or the trial of this or any other action; (b) the right to object on any ground to the use of said objections and responses, or the subject matter thereof, in any subsequent proceeding or in the trial of this or any other action; and (c) the right to object on any ground at any time to other discovery procedures involving or relating to the subject matter of these Requests.

1. HOTHEAD objects to these Requests to the extent that they seek documents protected from discovery by a claim of privilege, including the attorney-client privilege, the common interest privilege, the work product doctrine, and/or any other applicable privilege or immunity. HOTHEAD intends to and does claim all such privileges and immunities with respect to all such documents Any disclosure of

privileged, immune, or otherwise protected documents, things, or information is inadvertent and shall not be deemed a waiver of any privilege, immunity, or protection.

2. HOTHEAD objects to these Requests to the extent that they seek to impose any obligation upon HOTHEAD different from or beyond those contemplated by the Federal Rules of Civil Procedure, and any and all other applicable rules (collectively “the Rules”).

3. HOTHEAD objects to these Requests to the extent that they seek documents that are not relevant and not reasonably calculated to lead to the discovery of admissible evidence. HOTHEAD does not concede that the documents sought by these Requests are relevant, and HOTHEAD reserves all objections, including objections to competency, relevancy, materiality and admissibility of the documents Requested. HOTHEAD reserves the right to object to further discovery into any subject matter sought by these Requests.

4. HOTHEAD objects to these Requests to the extent that they seek documents not within HOTHEAD’s possession, custody, or control. HOTHEAD also objects to these Requests to the extent they call for documents, the location and/or discovery of which requires more than a reasonable investigation. HOTHEAD further objects to these Requests to the extent that they call for HOTHEAD to take action other than: (a) a reasonable and thorough search for documents in HOTHEAD’s possession, custody, or control in locations where the Requested documents are most likely to be found; and (b) a reasonable and thorough inquiry of those persons most likely to have information regarding the Requested documents whom HOTHEAD presently employs. In addition, HOTHEAD objects to these Requests to the extent that they call for documents which are not within HOTHEAD’s possession and are equally available to HOTHEAD and FOURSQUARE, for example, through public sources.

5. HOTHEAD objects to these Requests to the extent they seek documents subject to a confidentiality, non-disclosure and/or F.R.E. 408 agreement and for which

HOTHEAD has not received permission to disclose such documents. HOTHEAD also objects to these Requests to the extent that they seek documents which, if furnished, would violate a domestic or foreign judicial order, protective order, stipulation of confidentiality, or confidentiality agreement that has been entered into with respect to such documents.

6. HOTHEAD objects to these Requests to the extent that they seek documents that is already in the possession, custody, or control of FOURSQUARE.

7. HOTHEAD objects to these Requests to the extent that they are duplicative or redundant of other discovery taken in the above-captioned matter.

8. HOTHEAD objects to the extent that the definitions, instructions and Requests are overly broad, unduly burdensome, and vague. HOTHEAD will respond to FOURSQUARE's document Requests only to the extent required by the Rules.

9. HOTHEAD objects to these Requests to the extent that they use terms that are vague, ambiguous, not defined and/or are vaguely or ambiguously defined, and therefore fail to identify with reasonable particularity the documents sought.

10. HOTHEAD objects to these Requests to the extent that they are onerous and unduly burdensome, insofar as they seek "all" documents relating to a particular topic. HOTHEAD further objects to these Requests to the extent that they are overly broad or overly inclusive, or call for extensive research, investigation, information or identification of information or documents which would subject HOTHEAD to undue oppression, burden, harassment, or expense.

11. HOTHEAD objects to these Requests to the extent they are premature under the Scheduling Order.

12. HOTHEAD objects to these Requests to the extent they call for a legal conclusion in order to reply.

13. The production of any documents in response to these Requests shall not be construed as a waiver of any objection to their admissibility.

14. HOTHEAD's response to each of the Requests is hereby made without in any way waiving or intending to waive, but rather to the contrary, by preserving and intending to preserve: (a) The right to object at any time to any further response to this or any other Request for documents; and (b) The right at any time to supplement, and/or revise, correct and/or clarify any of these objections and responses as permitted under the Rules.

15. HOTHEAD incorporates by reference the General Objections set forth above into each of its discovery responses, whether or not repeated therein, as well as any specific stated objections. HOTHEAD may repeat a General Objection for emphasis or some other reason, but the failure to repeat any general objection does not waive any general objection to these Requests. HOTHEAD's discovery and investigation of the documents Requested by FOURSQUARE is ongoing and HOTHEAD reserves its right to supplement and/or amend the objections and responses herein.

SPECIFIC OBJECTIONS AND RESPONSES TO REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST NO. 1

All documents and things identified or consulted in your responses to Petitioner's First Set of Interrogatories.

RESPONSE TO REQUEST NO. 1:

HOTHEAD objects to this Request on the grounds that it is overbroad and unduly burdensome. HOTHEAD further objects to this Request to the extent it calls for private, confidential, trade secret, financial, or protected proprietary information of HOTHEAD or other third parties. HOTHEAD objects to this Request insofar as it seeks information protected by attorney-client privilege, the attorney work-product doctrine or the common interest privilege.

Subject to the foregoing Specific and General Objections, subject to entry of an

appropriate Stipulated Protective Order in this matter, and after a reasonable search, HOTHEAD will produce relevant, non-privileged, documents in its possession, custody, or control in response to this Request, to the extent any such documents exist.

REQUEST NO. 2

Representative samples, by year, of each different type of promotional material used by Respondent for products or services offered under the Hothead Mark since inception.

RESPONSE TO REQUEST NO. 2:

HOTHEAD objects to this Request on the grounds that it is vague, ambiguous, overbroad, and unduly burdensome. HOTHEAD objects to this Request on the grounds that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence. HOTHEAD further objects to this Request to the extent it calls for private, confidential, trade secret, financial, or protected proprietary information of HOTHEAD or other third parties. HOTHEAD objects to this Request insofar as it seeks information protected by attorney-client privilege, the attorney work-product doctrine or the common interest privilege. HOTHEAD further objects to this Request to the extent it seeks documents or materials not in HOTHEAD's possession, custody, or control or that are equally accessible to FOURSQUARE.

REQUEST NO. 3

Representative samples of financial and sales documents for products bearing and services offered under the Hothead Mark, such as invoices and payment records, evidencing continuous provision and sale of products and services in interstate commerce annually from inception to the present.

RESPONSE TO REQUEST NO. 3:

HOTHEAD objects to this Request on the grounds that it is vague, ambiguous, overbroad, and unduly burdensome. HOTHEAD objects to this Request to the extent

that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence. HOTHEAD further objects to this Request to the extent it calls for private, confidential, trade secret, financial, or protected proprietary information of HOTHEAD or other third parties. HOTHEAD objects to this Request insofar as it seeks information protected by attorney-client privilege, the attorney work-product doctrine or the common interest privilege.

Subject to the foregoing Specific and General Objections, subject to entry of an appropriate Stipulated Protective Order in this matter, and after a reasonable search, HOTHEAD will produce relevant, non-privileged, documents in its possession, custody, or control in response to this Request, to the extent any such documents exist.

REQUEST NO. 4

Representative samples of each publication, website, and blog in which products bearing and services offered under the Hothead Mark has been advertised, promoted, reviewed, or discussed, since inception.

RESPONSE TO REQUEST NO. 4:

HOTHEAD objects to this Request on the grounds that it is vague, ambiguous, overbroad, and unduly burdensome. HOTHEAD objects to this Request to the extent that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence. HOTHEAD further objects to this Request to the extent it calls for private, confidential, trade secret, financial, or protected proprietary information of HOTHEAD or other third parties. HOTHEAD objects to this Request insofar as it seeks information protected by attorney-client privilege, the attorney work-product doctrine or the common interest privilege. HOTHEAD further objects to this Request to the extent it seeks documents or materials not in HOTHEAD's possession, custody, or control or that are equally accessible to FOURSQUARE.

REQUEST NO. 5:

For each type of product or service for which the Hothead Mark has been used, produce documents and things sufficient to show the earliest use and the earliest use in commerce of the Hothead Mark on each such product and for each such service.

RESPONSE TO REQUEST NO. 5:

HOTHEAD objects to this Request on the grounds that it is vague and ambiguous. HOTHEAD objects to this Request to the extent that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence. HOTHEAD further objects to this Request to the extent it calls for private, confidential, trade secret, financial, or protected proprietary information of HOTHEAD or other third parties. HOTHEAD objects to this Request insofar as it seeks information protected by attorney-client privilege, the attorney work-product doctrine or the common interest privilege.

REQUEST NO. 6:

Representative samples, by year, of excerpts from Respondent's website concerning or promoting products or services bearing the Hothead Mark.

RESPONSE TO REQUEST NO. 6:

HOTHEAD objects to this Request on the grounds that it is vague, ambiguous, overbroad, and unduly burdensome. HOTHEAD objects to this Request to the extent that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence.

Subject to the foregoing Specific and General Objections, subject to entry of an appropriate Stipulated Protective Order in this matter, and after a reasonable search, HOTHEAD will produce relevant, non-privileged, documents in its possession, custody, or control in response to this Request, to the extent any such documents exist.

REQUEST NO. 7:

For each type of product or service for which the Hothead Mark has been used, produce documents sufficient to identify the geographical areas in which such products bearing and services offered under the Hothead Mark have been provided, sold, promoted and/or advertised.

RESPONSE TO REQUEST NO. 7:

HOTHEAD objects to this Request on the grounds that it is vague, ambiguous, overbroad, and unduly burdensome. HOTHEAD objects to this Request to the extent that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence.

Subject to the foregoing Specific and General Objections, subject to entry of an appropriate Stipulated Protective Order in this matter, and after a reasonable search, HOTHEAD will produce relevant, non-privileged, documents in its possession, custody, or control in response to this Request, to the extent any such documents exist.

REQUEST NO. 8:

For each type of product or service for which the Hothead Mark has been used, produce documents sufficient to identify the channels of trade in which such products and services bearing the Hothead Mark have been provided, sold, promoted and/or advertised.

RESPONSE TO REQUEST NO. 8:

HOTHEAD objects to this Request on the grounds that it is vague, ambiguous, overbroad, and unduly burdensome. HOTHEAD objects to this Request to the extent that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence.

Subject to the foregoing Specific and General Objections, subject to entry of an appropriate Stipulated Protective Order in this matter, and after a reasonable search, HOTHEAD will produce relevant, non-privileged, documents in its possession,

custody, or control in response to this Request, to the extent any such documents exist.

REQUEST NO. 9:

All non-privileged documents concerning Respondent's registration or attempted registration (federal or state) of the Hothead Mark.

RESPONSE TO REQUEST NO. 9:

HOTHEAD objects to this Request on the grounds that it is vague, ambiguous, overbroad, and unduly burdensome. HOTHEAD objects to this Request to the extent that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence. HOTHEAD objects to this Request insofar as it seeks information protected by attorney-client privilege, the attorney work-product doctrine or the common interest privilege. HOTHEAD further objects to this Request to the extent it seeks documents or materials not in HOTHEAD's possession, custody, or control or that are equally accessible to FOURSQUARE.

REQUEST NO. 10:

All trademark, service mark, trade name, or corporate name searches, or any other type of search or investigation, conducted by or on behalf of Respondent in connection with its decision to adopt or use the Hothead Mark.

RESPONSE TO REQUEST NO. 10:

HOTHEAD objects to this Request on the grounds that it is vague, ambiguous, overbroad, and unduly burdensome. HOTHEAD objects to this Request to the extent that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 11:

All documents concerning Respondent's ownership rights in the Hothead Mark.

RESPONSE TO REQUEST NO. 11:

HOTHEAD objects to this Request on the grounds that it is vague, ambiguous,

overbroad, and unduly burdensome. HOTHEAD objects to this Request to the extent that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence.

Subject to the foregoing Specific and General Objections, subject to entry of an appropriate Stipulated Protective Order in this matter, and after a reasonable search, HOTHEAD will produce relevant, non-privileged, documents in its possession, custody, or control in response to this Request, to the extent any such documents exist.

REQUEST NO. 12:

All documents and things concerning the creation, selection, and adoption of the Hothead Mark.

RESPONSE TO REQUEST NO. 12:

HOTHEAD objects to this Request on the grounds that it is vague, ambiguous, overbroad, and unduly burdensome. HOTHEAD objects to this Request to the extent that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence. HOTHEAD further objects to this Request to the extent it calls for private, confidential, trade secret, financial, or protected proprietary information of HOTHEAD or other third parties. HOTHEAD objects to this Request insofar as it seeks information protected by attorney-client privilege, the attorney work-product doctrine or the common interest privilege.

REQUEST NO. 13:

All documents concerning any assignment, consent, authorization, license, franchise agreement, option agreement, purchase and sale agreement, coexistence agreement, or permission between Respondent and any individual or entity concerning the Hothead Mark.

RESPONSE TO REQUEST NO. 13:

HOTHEAD objects to this Request on the grounds that it is compound, overbroad, and unduly burdensome. HOTHEAD objects to this Request to the extent

that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence. HOTHEAD further objects to this Request to the extent it calls for private, confidential, trade secret, financial, or protected proprietary information of HOTHEAD or other third parties. HOTHEAD objects to this Request insofar as it seeks information protected by attorney-client privilege, the attorney work-product doctrine or the common interest privilege.

Subject to the foregoing Specific and General Objections, subject to entry of an appropriate Stipulated Protective Order in this matter, and after a reasonable search, HOTHEAD will produce relevant, non-privileged, documents in its possession, custody, or control in response to this Request, to the extent any such documents exist.

REQUEST NO. 14:

Documents sufficient to show the annual dollar value of sales of products on or services for which the Hothead Mark has been used since inception.

RESPONSE TO REQUEST NO. 14:

HOTHEAD objects to this Request on the grounds that it is compound, overbroad, and unduly burdensome. HOTHEAD objects to this Request to the extent that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence. HOTHEAD further objects to this Request to the extent it calls for private, confidential, trade secret, financial, or protected proprietary information of HOTHEAD or other third parties. HOTHEAD objects to this Request insofar as it seeks information protected by attorney-client privilege, the attorney work-product doctrine or the common interest privilege.

Subject to the foregoing Specific and General Objections, subject to entry of an appropriate Stipulated Protective Order in this matter, and after a reasonable search, HOTHEAD will produce relevant, non-privileged, documents in its possession, custody, or control in response to this Request, to the extent any such documents exist.

REQUEST NO. 15:

Documents sufficient to show the amount of money expended and budgeted annually to promote products bearing and services offered under the Hothead Mark since inception.

RESPONSE TO REQUEST NO. 15:

HOTHEAD objects to this Request on the grounds that it is vague, ambiguous, compound, and overbroad. HOTHEAD objects to this Request to the extent that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence. HOTHEAD further objects to this Request to the extent it calls for private, confidential, trade secret, financial, or protected proprietary information of HOTHEAD or other third parties. HOTHEAD objects to this Request insofar as it seeks information protected by attorney-client privilege, the attorney work-product doctrine or the common interest privilege.

REQUEST NO. 16:

All documents concerning each instance in which a person has been confused, mistaken, or deceived as to the source, endorsement, or sponsorship of Respondent's or Foursquare's products or services as a result of the parties' respective uses of the SWARM mark and Hothead Mark.

RESPONSE TO REQUEST NO. 16:

HOTHEAD objects to this Request on the grounds that it is vague, ambiguous, and compound. HOTHEAD objects to this Request to the extent that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 17:

All documents and things concerning any challenge, letter, opposition or complaint received or sent by Respondent concerning a trade name, trademark, service

mark, logo, design or other designation employing the formative SWARM, or any variation thereof.

RESPONSE TO REQUEST NO. 17:

HOTHEAD objects to this Request on the grounds that it is vague, ambiguous, and compound. HOTHEAD objects to this Request to the extent that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence. HOTHEAD further objects to this Request to the extent it calls for private, confidential, trade secret, financial, or protected proprietary information of HOTHEAD or other third parties. HOTHEAD objects to this Request insofar as it seeks information protected by attorney-client privilege, the attorney work-product doctrine or the common interest privilege.

REQUEST NO. 18:

All documents and things concerning Foursquare, Foursquare's Swarm Badges, and the products and services of Foursquare, including but not limited to the products or services offered under the SWARM Marks.

RESPONSE TO REQUEST NO. 18:

HOTHEAD objects to this Request on the grounds that it is compound, vague, ambiguous, unintelligible, overbroad, and unduly burdensome. HOTHEAD objects to this Request to the extent that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 19:

All documents and things concerning, describing, or documenting "swarms" or "swarming" prior to 2011.

RESPONSE TO REQUEST NO. 19:

HOTHEAD objects to this Request on the grounds that it is compound, vague, ambiguous, unintelligible, overbroad, and unduly burdensome. HOTHEAD objects to

this Request to the extent that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 20:

All documents concerning the assertion in paragraph 5 of the Answer that "[t]he mark currently is in use on the Xbox marketplace (<http://marketplace.xbox.com/enUS/Product/Swarm/66acd000-77fe-1000-9115-d80258410b07>) and Playstation.com (<http://us.playstation.com/games/swarm-ps3.html>)."

RESPONSE TO REQUEST NO. 20:

HOTHEAD objects to this Request on the grounds that it is compound, overbroad, and unduly burdensome. HOTHEAD objects to this Request to the extent that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence. HOTHEAD further objects to this Request to the extent it calls for private, confidential, trade secret, financial, or protected proprietary information of HOTHEAD or other third parties. HOTHEAD objects to this Request insofar as it seeks information protected by attorney-client privilege, the attorney work-product doctrine or the common interest privilege.

Subject to the foregoing Specific and General Objections, subject to entry of an appropriate Stipulated Protective Order in this matter, and after a reasonable search, HOTHEAD will produce relevant, non-privileged, documents in its possession, custody, or control in response to this Request, to the extent any such documents exist.

REQUEST NO. 21:

All documents concerning sales by or on behalf of Registrant of products or services bearing the Hothead Mark on the Xbox marketplace, by year.

RESPONSE TO REQUEST NO. 21:

HOTHEAD objects to this Request on the grounds that it is vague and ambiguous and refers to an undefined term, "Registrant," rendering the Request

unintelligible. HOTHEAD objects to this Request to the extent that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence. HOTHEAD further objects to this Request to the extent it calls for private, confidential, trade secret, financial, or protected proprietary information of HOTHEAD or other third parties. HOTHEAD objects to this Request insofar as it seeks information protected by attorney-client privilege, the attorney work-product doctrine or the common interest privilege.

REQUEST NO. 22:

All documents concerning sales by or on behalf of Registrant of products or services bearing the Hothead Mark on Playstation.com, by year.

RESPONSE TO REQUEST NO. 22:

HOTHEAD objects to this Request on the grounds that it is vague and ambiguous and refers to an undefined term, "Registrant," rendering the Request unintelligible. HOTHEAD objects to this Request to the extent that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence. HOTHEAD further objects to this Request to the extent it calls for private, confidential, trade secret, financial, or protected proprietary information of HOTHEAD or other third parties. HOTHEAD objects to this Request insofar as it seeks information protected by attorney-client privilege, the attorney work-product doctrine or the common interest privilege.

REQUEST NO. 23:

All documents concerning sales by year of products bearing the Hothead Mark by persons or companies other than Registrant.

RESPONSE TO REQUEST NO. 23:

HOTHEAD objects to this Request on the grounds that it is vague and ambiguous and refers to an undefined term, "Registrant," rendering the Request unintelligible. HOTHEAD objects to this Request to the extent that it seeks information

that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence. HOTHEAD further objects to this Request to the extent it calls for private, confidential, trade secret, financial, or protected proprietary information of HOTHEAD or other third parties. HOTHEAD objects to this Request insofar as it seeks information protected by attorney-client privilege, the attorney work-product doctrine or the common interest privilege.

REQUEST NO. 24:

All documents concerning support services provided to users of products bearing the Hothead Mark since inception.

RESPONSE TO REQUEST NO. 24:

HOTHEAD objects to this Request on the grounds that it is vague, ambiguous, overbroad, and unduly burdensome. HOTHEAD objects to this Request to the extent that it seeks information that is not relevant to the claim or defense of any party or is not reasonably calculated to lead to the discovery of admissible evidence. HOTHEAD further objects to this Request to the extent it calls for private, confidential, trade secret, financial, or protected proprietary information of HOTHEAD or other third parties. HOTHEAD objects to this Request insofar as it seeks information protected by attorney-client privilege, the attorney work-product doctrine or the common interest privilege.

PROOF OF SERVICE BY EMAIL

I declare that:

I am employed in the County of San Mateo, California. I am over the age of eighteen years and not a party to the within cause; my business address is 120 Constitution Drive, Menlo Park, California 94025. On February 23, 2015, I served the within RESPONDENT HOTHEAD GAMES INC.'S RESPONSES TO PETITIONER FOURSQUARE LABS INC.'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS on the interested party in said cause, via Electronic Mail to its counsel (by consent) to: alhtrademarks@lalaw.com.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at Menlo Park, California, this 23rd day of February 2015.



Aura L. Tatagiba

EXHIBIT E

From: [Ann Lamport Hammitte](#)
To: ["Aura Tatagiba"](#); ["Christine Watson"](#); ["Jefferson Scher"](#)
Cc: ["Joi White"](#); ["Suehay Hernandez"](#); ["Angelica Tovar"](#)
Subject: RE: Foursquare v. Hothead (SWARM Cancellation) - Respondent's Responses to discovery requests...
Date: Tuesday, March 03, 2015 5:05:35 PM
Attachments: [F2042-5006 Standard Protective Order.rtf](#)

Counsel –

We conducted an initial review of your client's responses, and, as a preliminary matter, I remind you that a protective order is in effect. We agreed that the parties and counsel would sign the protective order, and a document in this form was sent to you on January 9th. If your client is no longer agreeable to having the parties sign, let me know. In any case, until that protective order is signed, the Board's standard protective order applies, 37 CFR § 2.116(g), and so I look forward to receiving your client's supplemental responses and production of documents promptly. Our further comments and objections will follow separately.

[REDACTED]

Sincerely,

Ann

Ann Lamport Hammitte
LANDO & ANASTASI, LLP
Proven IP Strength. Creative Solutions.

T +1 617-395-7019 / F +1 617-395-7070
Email: AHAMMITTE@LALAW.COM
Web: WWW.LALAW.COM

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From: Aura Tatagiba [mailto:atatagiba@carrferrell.com]
Sent: Monday, February 23, 2015 8:00 PM
To: ALHtrademarks
Cc: Christine Watson; Joi White; Jefferson Scher; Suehay Hernandez; Angelica Tovar
Subject: Foursquare v. Hothead (SWARM Cancellation) - Respondent's Responses to discovery requests...

Dear Counsel:

Attached for service, please find:

- Respondent Hothead Games, Inc.'s Responses to Petitioner Foursquare Lab's First Set of Interrogatories; and

- Respondent Hothead Games, Inc.'s Responses to Petitioner Foursquare Lab's First Set of Requests for Production of Documents.

Aura L. Tatagiba

Litigation Secretary

Carr & Ferrell LLP

120 Constitution Drive

Menlo Park, CA 94025

650.812.3460 direct

650.812.3444 fax

atatagiba@carrferrell.com

www.carrferrell.com

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EXHIBIT F

Ann Lamport Hammitte

From: Ann Lamport Hammitte
Sent: Monday, March 09, 2015 12:43 PM
To: 'Christine Watson'; 'Jefferson Scher'
Cc: 'Joi White'; 'Suehay Hernandez'; 'Angelica Tovar'; 'Aura Tatagiba'
Subject: RE: Foursquare v. Hothead (SWARM Cancellation) - Respondent's Responses to discovery requests...

Dear Christine and Jefferson –

I look forward to your reply.

Sincerely,

Ann

From: Ann Lamport Hammitte
Sent: Tuesday, March 03, 2015 5:06 PM
To: 'Aura Tatagiba'; 'Christine Watson'; 'Jefferson Scher'
Cc: 'Joi White'; 'Suehay Hernandez'; 'Angelica Tovar'
Subject: RE: Foursquare v. Hothead (SWARM Cancellation) - Respondent's Responses to discovery requests...

Counsel –

We conducted an initial review of your client's responses, and, as a preliminary matter, I remind you that a protective order is in effect. We agreed that the parties and counsel would sign the protective order, and a document in this form was sent to you on January 9th. If your client is no longer agreeable to having the parties sign, let me know. In any case, until that protective order is signed, the Board's standard protective order applies, 37 CFR § 2.116(g), and so I look forward to receiving your client's supplemental responses and production of documents promptly. Our further comments and objections will follow separately.

I also look forward to receiving your client's response to the settlement proposal that Ms. Watson and I discussed on February 5th.

Sincerely,

Ann

Ann Lamport Hammitte
LANDO & ANASTASI, LLP
Proven IP Strength. Creative Solutions.

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Email: AHAMMITTE@LALAW.COM
Web: WWW.LALAW.COM

This email message and any attachments may contain confidential or privileged information. If you are not the intended recipient, please notify us immediately—by replying to this message—and destroy all copies of this message and any attachments. Thank you.

From: Aura Tatagiba [<mailto:atatagiba@carrferrell.com>]
Sent: Monday, February 23, 2015 8:00 PM
To: ALHtrademarks

Cc: Christine Watson; Joi White; Jefferson Scher; Suehay Hernandez; Angelica Tovar

Subject: Foursquare v. Hothead (SWARM Cancellation) - Respondent's Responses to discovery requests...

Dear Counsel:

Attached for service, please find:

- Respondent Hothead Games, Inc.'s Responses to Petitioner Foursquare Lab's First Set of Interrogatories; and
- Respondent Hothead Games, Inc.'s Responses to Petitioner Foursquare Lab's First Set of Requests for Production of Documents.

Aura L. Tatagiba

Litigation Secretary

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EXHIBIT G

March 24, 2015

Via Email

Christine Watson, Esq.
Jefferson F. Scher, Esq.
Carr & Ferrell LLP
120 Constitution Drive
Menlo Park, California 94025

Re: *Foursquare Labs, Inc. v. Hothead Games Inc.*,
Cancellation No. 92059710 (Our ref: F2042-5006)

Dear Christine and Jefferson:

Further to my emails of March 9, 2015 and March 3, 2015 regarding Hothead Games' responses to Foursquare Labs' First Set of Interrogatories and First Set of Requests for Production of Documents, your client's interrogatory responses are non-responsive and their responses to Foursquare's requests for production withhold documents based on inappropriate objections. Furthermore, the responses have not been signed by counsel or the company. Please advise by return when Hothead Games intends to serve legally effective discovery responses that comply with Hothead's discovery obligations under the Federal Rules of Civil Procedure and the discovery rules of the TTAB. Alternatively, please let me know your availability for a discovery conference under 37 C.F.R. § 2.120(e).

Unsigned Responses

Rule 26(g) of the Federal Rules requires that every response or objection to a discovery request be signed by at least one attorney of record, in the attorney's own name, and must state the signer's address, e-mail address and telephone number. Fed. R. Civ. P. 26(g)(1). An unsigned discovery response is legally ineffective. Fed. R. Civ. P. 26(g)(2).

Hothead Games' Responses to Foursquare Labs, Inc.'s First Set of Interrogatories and First Set of Requests for Production of Documents are not signed by counsel or a company representative. The only signature is in the Proof of Service and belongs to Aura L. Tatagiba, a litigation secretary. Please promptly serve discovery responses signed by an attorney of record and by a company representative.

Christine Watson, Esq.
Jefferson F. Scher, Esq.
March 24, 2015
Page 2

While Foursquare has no obligation to act on Hothead's unsigned discovery responses per Rule 26(g)(2), Hothead's corrected responses must comply with Hothead's obligations under the Federal Rules of Civil Procedure. To that end, please ensure that Hothead's responses address the following deficiencies.

Hothead Games' Interrogatory Responses

Hothead Games' interrogatory responses do not meet Hothead's obligations under the Federal Rules of Civil Procedure or the discovery rules of the TTAB. Hothead's responses must, "to the extent it is not objected to, be answered separately and fully in writing under oath." Fed. R. Civ. P. 33(b)(3).

Hothead Games provided no substantive response to 6 of the 25 interrogatories:

- **Interrogatory No. 3:** requesting the identification of all trademark searches conducted on behalf of Hothead in connection with its decision to adopt or use the Hothead Mark;
- **Interrogatory No. 10:** requesting the identification of all trade shows or conferences attended by Hothead since Hothead's Mark was adopted;
- **Interrogatory No. 13:** requesting a description of actual confusion known to Hothead;
- **Interrogatory No. 19:** requesting a description of how Hothead became aware of Foursquare and the date on which this occurred;
- **Interrogatory No. 20:** requesting a description of how Hothead became aware of Foursquare's Swarm badges and trademarks; and
- **Interrogatory No. 23:** requesting the identity of the person or persons responsible for maintaining and/or updating Hothead's website.

These requests are germane to cancellation proceedings in that they seek information pertaining to how Hothead's Mark allegedly has been used in commerce. Hothead's general and specific objections do not provide an adequate basis for declining to respond to them. Please promptly provide complete responses to these interrogatories.

If Hothead Games maintains its objection that Request 19 is "unintelligible," please identify the problem so that we can resolve it.

Christine Watson, Esq.
Jefferson F. Scher, Esq.
March 24, 2015
Page 3

For the remainder, Hothead Games' responses are incomplete or non-responsive. Interrogatory No. 12 requests the identification of all publications, websites and blogs in which products bearing or services offered under the Hothead Mark have been advertised, promoted, reviewed or discussed. Hothead responded, subject to its general and specific objections:

HOTHEAD entered into a publishing agreement relating to HOTHEAD's video game titled "SWARM" with Ignition Entertainment Ltd. in or about April 2010.

This statement does not identify even one publication, website or blog, which was the subject of the interrogatory. Hothead repeats this answer verbatim in response to the following, and it is not an adequate response to any of them:

- **Interrogatory No 2:** requesting the identity of the individuals and entities involved in the creation, the conception, the adoption and the use of the Hothead Mark on or in connection with any goods or services;
- **Interrogatory No. 11:** requesting the identity of all publications in which Hothead has promoted products or services bearing the Hothead Mark; and
- **Interrogatory No. 14:** requesting the identity of all agreements, assignments, consents, authorizations, licenses, franchise agreements, option agreements, purchase and sale agreements, coexistence agreements, or permissions, entered into between Hothead and any other person or entity concerning the Hothead Mark.

Hothead repeats this answer nearly verbatim (having the additional single-sentence "HOTHEAD's 'SWARM' video game was released on March 22, 2011.") in response to:

- **Interrogatory No. 5:** requesting the identity of the individual most familiar with marketing products or services under the Hothead Mark, the date and circumstances of first use and first use in commerce of the Hothead Mark, the dollar volume expended annually in promoting products or services related to the Hothead Mark and the volume of income received from those products;
- **Interrogatory No. 8:** requesting the identity of each type of promotional material used by Hothead for products or services bearing the Hothead Mark and the time frame during which each was used; and

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Jefferson F. Scher, Esq.
March 24, 2015
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- **Interrogatory No. 9:** requesting the amount of money expended by or on behalf of Hothead annually in advertising or promoting products and services under the Hothead Mark, and the identity all advertisements or promotional events arising or resulting from such expenditures per year.

It is not an adequate response to any of them. No individual, dates of use, promotional materials or expenditures have been provided.

With respect to Interrogatory Nos. 15-18, 21 and 22, Hothead's substantive responses are variations of the statement:

HOTHEAD entered into a publishing agreement relating to HOTHEAD's video game titled "SWARM" with Ignition Entertainment Ltd. in or about April 2010. HOTHEAD's "SWARM" video game is available for purchase and download at websites including the Microsoft XBOX Marketplace website, Sony PlayStation PS3 website, and GameStop website.
(Response to Interrogatory No. 18.)

Interrogatory Nos. 21 and 22 request identification, by year and by units sold and revenue received, of all sales of products or services provided under the Hothead Mark via the Xbox Marketplace and Playstation.com. No part of Hothead's responses identifies any units sold or revenue received. Similarly, Interrogatory No. 17 requests the identification of the dates each store or website sold or provided any product or service under the Hothead Mark to consumers, and Hothead's answer is non-responsive. With respect to Interrogatory Nos. 15-18, it is not clear whether Hothead's responses to these interrogatories are intended to be complete responses given the duplicative nature of the answers.

Hothead's response to Interrogatory No. 1 is incomplete. It failed to include the functions carried out at the address provided, or to identify the directors, officers and managerial employees responsible for promotion, marketing distribution and/or provision of products or services under the Hothead Mark. Hothead Games must answer each interrogatory in full. *See* 37 C.F.R. § 2.120(d)(1); T.B.M.P. § 405.03(e) (June 2014 ed.).

With regard to Interrogatory Nos. 6 and 7, it is unclear whether Hothead's "Not applicable" response is intended to be an objection or an answer. Please clarify these responses.

With regard to Interrogatory No. 24, we look forward to receiving your supplementation after June 6, 2015, or your confirmation that Hothead does not intend to rely on expert testimony.

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Jefferson F. Scher, Esq.
March 24, 2015
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Please promptly provide responses which fully answer the specific interrogatories served on Hothead, namely, 1-24. To the extent Hothead maintains any privilege objections, including Attorney Client Privilege and common interest objections, they require documentation, and a timely log is required.

Hothead Games' Responses to Foursquare's Requests for Production

Hothead has improperly refused to produce documents for 15 of Foursquare's 24 requests, and relies on objections that are factually inaccurate. For the 9 requests in which Hothead has agreed to produce documents, that production is overdue.

Hothead's objections do not support a refusal to produce any material. Request No. 2 seeks:

Representative samples, by year, of each different type of promotional material used by Respondent for products or services offered under the Hothead Mark since inception.

In response, Hothead objected that the request seeks private, confidential or trade secret information, and information protected by attorney-client privilege. Promotional materials would not be protected by privilege, nor would they be trade secrets. Hothead has also objected on the basis that the request seeks information that is equally accessible to Foursquare, without explaining why Foursquare would have equal access to Hothead's promotional materials, or where they could be found. In any case this objection does not relieve Hothead of the obligation to produce documents.

The remaining objections are boilerplate objections of relevance, breadth, and vagueness. Such boilerplate objections are disfavored by the TTAB and do not support a refusal to produce. *See, e.g., Amazon Techs., Inc v. Wax*, Opp. No. 91187118 at *7-8 (T.T.A.B. Nov. 4, 2009); *see also Gheesling v. Chater*, 162 F.R.D. 649, 650 (D. Kan. 1995); *Baker v. Hatch*, No. 07-cv-2204-FCD-EFB (E.D. Cal. Aug 12, 2010); *Burkybile v. Mitsubishi Motors Corp.*, 2006 WL 2325506, *6 (N.D. Ill. Aug.2, 2006) (An objecting party's burden cannot be met by "a reflexive invocation of the same baseless, often abused litany that the requested discovery is vague, ambiguous, overly broad, unduly burdensome or that it is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.") (internal quotations and citations omitted).

Hothead also relies exclusively on a combination of boilerplate, confidentiality, privilege and "accessibility to Foursquare" objections in its responses to Request Nos. 4, 5, 9, 10, 12 and 15-17. Several of the requests are not expected to generate a significant number of confidential documents, if any, namely:

Christine Watson, Esq.
Jefferson F. Scher, Esq.
March 24, 2015
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- **Request No. 4:** Representative samples of each publication, website, and blog in which products bearing and services offered under the Hothead Mark has been advertised, promoted, reviewed, or discussed, since inception;
- **Request No. 5:** For each type of product or service for which the Hothead Mark has been used, produce documents and things sufficient to show the earliest use and the earliest use in commerce of the Hothead Mark on each such product and for each such service; and
- **Request No. 16:** All documents concerning each instance in which a person has been confused, mistaken, or deceived as to the source, endorsement, or sponsorship of Respondent's or Foursquare's products or services as a result of the parties' respective uses of the SWARM mark and Hothead Mark.

With respect to Request Nos. 9, 12, 15 and 17, even if privileged or confidential material exists, this does not justify a complete refusal to produce other responsive documents. *See, e.g.,* Fed. R. Civ. P. 34(b)(2)(C) (“An objection to part of a request must specify the part and permit inspection of the rest.”). A protective order is already in force.

With respect to Request No. 10, Hothead has not even raised an objection on the basis of privilege or confidentiality but rather appears to be improperly withholding documents solely on the basis of its boilerplate objections.

Hothead has also refused to produce documents responsive to Request Nos. 18 and 19. Hothead offers its boilerplate objections and alleges, without explanation, that these requests are “unintelligible.” A *pro forma* objection of unintelligibility is insufficient to justify withholding documents, particularly where the request may be understood. That said, we are happy to clarify these requests if you will identify what is considered to be unintelligible.

Hothead has also refused to produce documents responsive to Request Nos. 21-24 on the basis of its boilerplate objections as well as confidentiality and privilege. Hothead further alleges the unintelligibility of these requests based on the statement that “Registrant” is an undefined term. The term “Registrant” in a cancellation proceeding is amenable to interpretation and has, in fact, already been used by Hothead in this proceeding. *See* Answer at 1, *Foursquare Labs, Inc. v. Hothead Games Inc.*, Cancellation No. 92059710 (T.T.A.B. filed Dec. 8, 2014) (“**Registrant** Hothead Games Inc. (“Respondent”) hereby answers the Petition for Cancellation . . .”). It is not justified in withholding documents on this basis.

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Jefferson F. Scher, Esq.
March 24, 2015
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None of Hothead's objections support its refusal to produce, and Hothead must promptly produce the requested documents.

Hothead has agreed to produce documents in response to Request Nos. 1, 3, 6, 7, 8, 11, 13, 14 and 20, "subject to entry of an appropriate Stipulated Protective Order in this matter." No documents have been produced, and that production is overdue. To the extent Hothead maintains any privilege objections, including Attorney Client Privilege and common interest objections, they require documentation, and a timely log is also required.

A Protective Order Is In Place

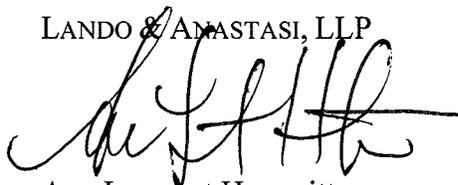
A protective order is already in place. The Trademark Trial and Appeal Board provides a standard protective order that is applicable during disclosure, discovery and trial in all cancellation proceedings. 37 CFR § 2.116(g). This order is automatically in force unless and until the parties agree to an alternative order.

To the extent Hothead objects to the standard protective order, an alternative order was been made available on January 9th. Hothead has neither signed nor objected to that agreement, and cannot delay the production of documents on this basis.

I look forward to promptly receiving your client's substantive, signed, responses to Foursquare's discovery requests and production of documents, or to learning your availability before March 30th for a discovery conference.

Sincerely

LANDO & ANASTASI, LLP



Ann Lamport Hammitte

EXHIBIT H

Menlo Park, CA 94025
650.812.3416 direct
650.812.3444 fax
jscher@carrferrell.com
www.carrferrell.com

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From: Ann Lamport Hammitte [mailto:AHammitte@LALaw.com]
Sent: Monday, March 09, 2015 9:43 AM
To: Christine Watson; Jefferson Scher
Cc: Joi White; Suehay Hernandez; Angelica Tovar; Aura Tatagiba
Subject: RE: Foursquare v. Hothead (SWARM Cancellation) - Respondent's Responses to discovery requests...

Dear Christine and Jefferson –

I look forward to your reply.

Sincerely,

Ann

From: Ann Lamport Hammitte
Sent: Tuesday, March 03, 2015 5:06 PM
To: 'Aura Tatagiba'; 'Christine Watson'; 'Jefferson Scher'
Cc: 'Joi White'; 'Suehay Hernandez'; 'Angelica Tovar'
Subject: RE: Foursquare v. Hothead (SWARM Cancellation) - Respondent's Responses to discovery requests...

Counsel –

We conducted an initial review of your client's responses, and, as a preliminary matter, I remind you that a protective order is in effect. We agreed that the parties and counsel would sign the protective order, and a document in this form was sent to you on January 9th. If your client is no longer agreeable to having the parties sign, let me know. In any case, until that protective order is signed, the Board's standard protective order applies, 37 CFR § 2.116(g), and so I look forward to receiving your client's supplemental responses and production of documents promptly. Our further comments and objections will follow separately.

I also look forward to receiving your client's response to the settlement proposal that Ms. Watson and I discussed on February 5th.

Sincerely,

Ann

Ann Lamport Hammitte
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Proven IP Strength. Creative Solutions.

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Email: AHAMMITTE@LALAW.COM

Web: WWW.LALAW.COM

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From: Aura Tatagiba [<mailto:atatagiba@carrferrell.com>]

Sent: Monday, February 23, 2015 8:00 PM

To: ALHtrademarks

Cc: Christine Watson; Joi White; Jefferson Scher; Suehay Hernandez; Angelica Tovar

Subject: Foursquare v. Hothead (SWARM Cancellation) - Respondent's Responses to discovery requests...

Dear Counsel:

Attached for service, please find:

- Respondent Hothead Games, Inc.'s Responses to Petitioner Foursquare Lab's First Set of Interrogatories; and
- Respondent Hothead Games, Inc.'s Responses to Petitioner Foursquare Lab's First Set of Requests for Production of Documents.

Aura L. Tatagiba

Litigation Secretary

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EXHIBIT I

Ann Lamport Hammitte
ahammitte@lalaw.com
Direct dial 617-395-7019

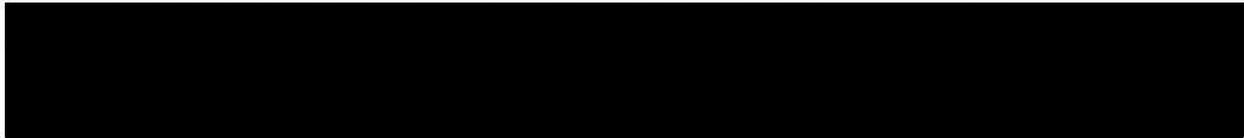
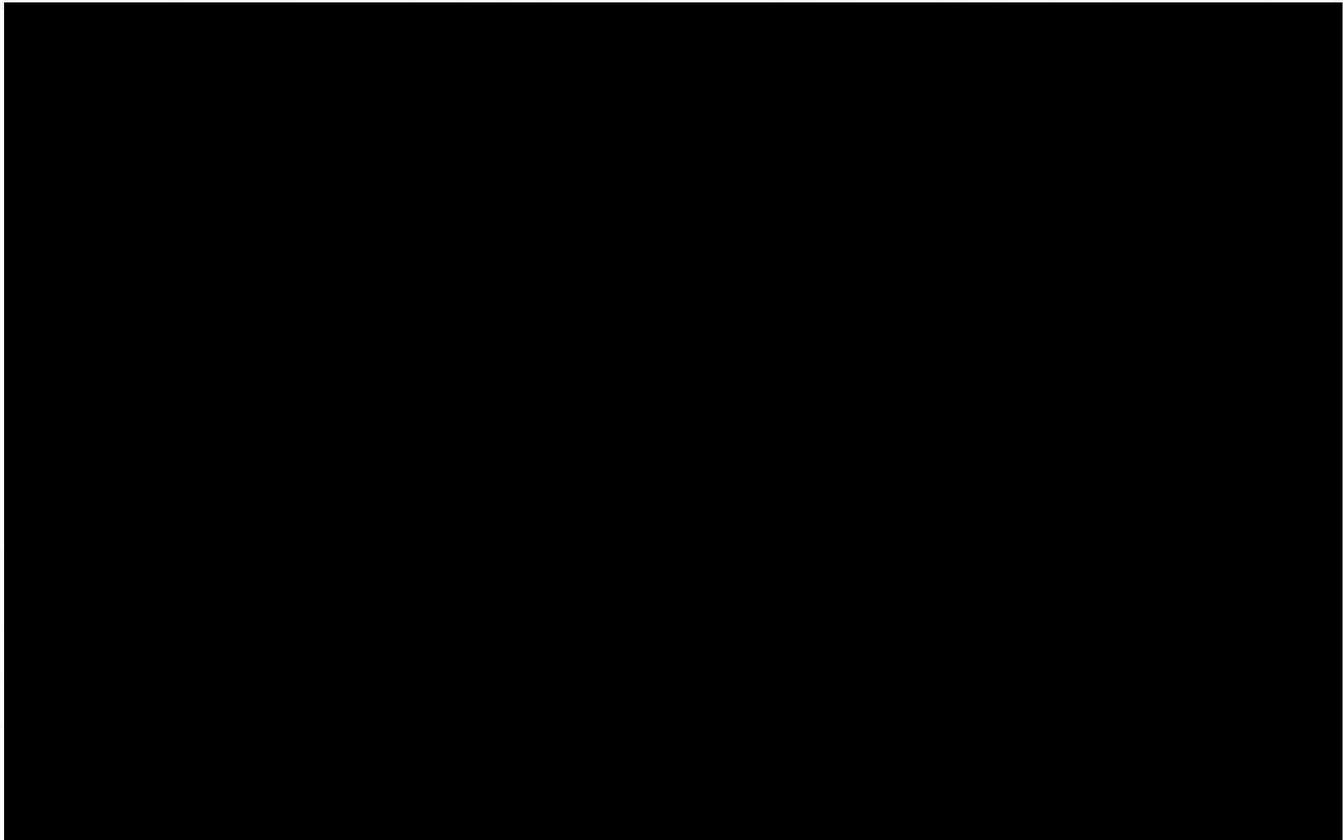
March 30, 2015

Via Email

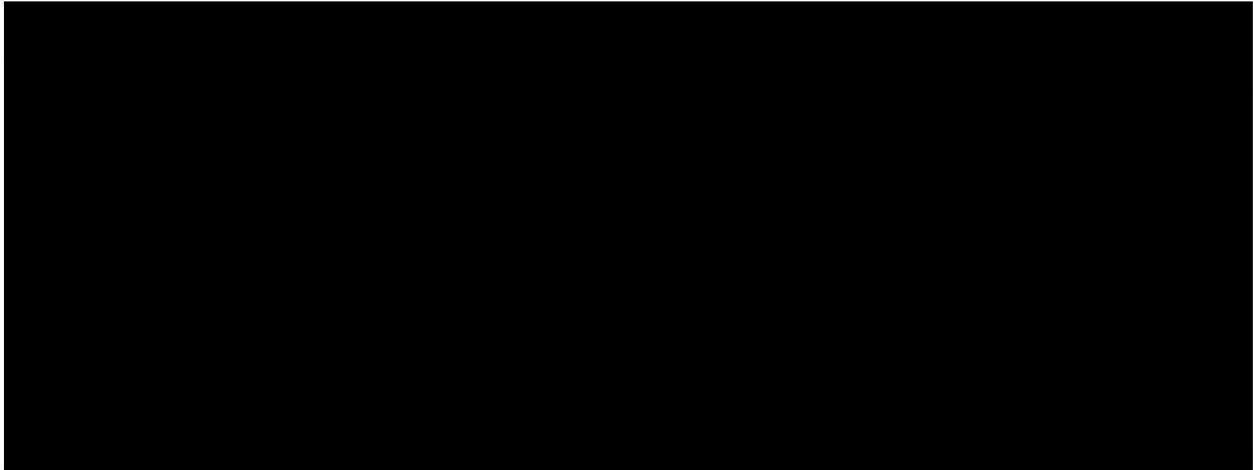
Christine Watson, Esq.
Jefferson F. Scher, Esq.
Carr & Ferrell LLP
120 Constitution Drive
Menlo Park, California 94025

Re: *Foursquare Labs, Inc. v. Hothead Games Inc.*
Cancellation No. 92059710
Our ref: F2042-5006

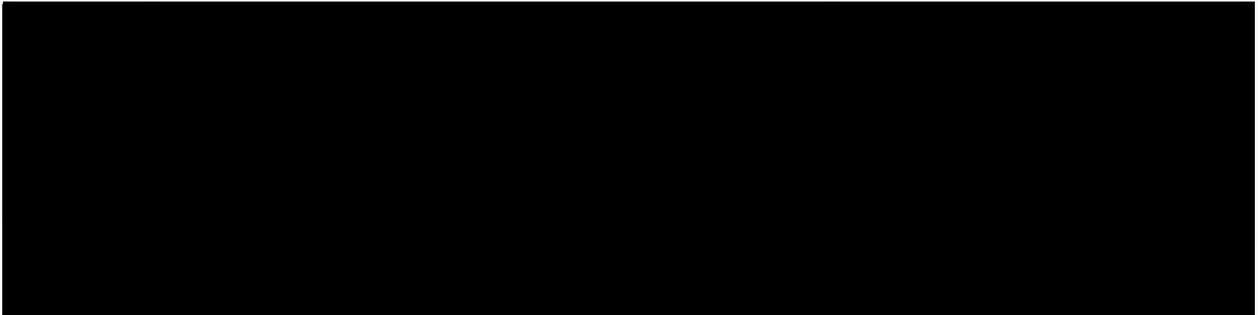
Dear Christine and Jefferson:



Christine Watson, Esq.
Jefferson F. Scher, Esq.
March 30, 2015
Page 2



Your client's discovery responses refer to an agreement with Ignition Entertainment, Ltd. which has yet to be produced. We have separately detailed our objections to your client's discovery and are awaiting HotHead's substantive, signed, responses to Foursquare's discovery requests and production of documents, including that agreement, or to learning your availability for a discovery conference.



Sincerely,

LANDO & ANASTASI, LLP

Ann Lamport Hammitte

Enclosure

cc: Foursquare Labs, Inc.

EXHIBIT J

From: [Jefferson Scher](#)
To: [Ann Lamport Hammitte](#)
Cc: [Christine Watson](#)
Subject: RE: Foursquare v. Hothead (SWARM Cancellation) - Respondent's Responses to discovery requests...
Date: Tuesday, March 31, 2015 1:32:32 PM
Attachments: [TRADE_SECRET \[REDACTED\].pdf](#)

Dear Ann:

[REDACTED]

[REDACTED]

[REDACTED]

-Jefferson

Jefferson F. Scher
Partner



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Menlo Park, CA 94025
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jscher@carrferrell.com
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From: Ann Lamport Hammitte [mailto:AHammitte@LALaw.com]
Sent: Monday, March 30, 2015 2:09 PM
To: Jefferson Scher
Cc: Christine Watson
Subject: RE: Foursquare v. Hothead (SWARM Cancellation) - Respondent's Responses to discovery requests...

Dear Jefferson and Christine –

[REDACTED]

[REDACTED]

-Jefferson

Jefferson F. Scher
Partner



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Web: WWW.LALAW.COM

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Sent: Monday, February 23, 2015 8:00 PM

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Aura L. Tatagiba

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