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Filing date: **04/13/2009**

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

Proceeding	91189124
Party	Defendant MPOWER Mobile, Inc.
Correspondence Address	JEFF RACHO, ESQ. MPOWER MOBILE, INC. 401 CONGRESS AVE STE 2740 AUSTIN, TX 78701-3889 jeff.racho@mpowerlabs.com
Submission	Answer
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Signature	/Lisa Greenwald-Swire/
Date	04/13/2009
Attachments	MPower Answer to NOP.pdf (6 pages)(171897 bytes)

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

In the Matter of Trademark Application
Ser. No.: 77/489,881
Filed: June 3, 2008
Date of Publication: November 4, 2008
Mark: YAP, International Class 36

YAP, INC.,)	Opposition No. 91189124
(a Delaware corporation))	
Opposer,)	
v.)	
)	
MPOWER MOBILE, INC.,)	
(a Delaware corporation))	
Applicant.)	

BOX TTAB – NO FEE
Commissioner for Trademarks
P.O. Box 1451
Alexandria, Virginia 22313-1451

ANSWER TO NOTICE OF OPPOSITION WITH AFFIRMATIVE DEFENSES

Applicant MPOWER Mobile, Inc. (“MPOWER Mobile” or “Applicant”) hereby pleads and avers as follows to the Notice of Opposition by Yap Inc. (“Yap” or “Opposer”), regarding Application Serial No. 77/489,881 (hereinafter the “Application”) for the mark YAP and Design (the “Proposed Mark”):

Answering the preamble paragraph of the Notice of Opposition on page 1, which is not numbered, Applicant is without information or belief sufficient to admit or deny the allegations concerning Opposer’s incorporation, location and/or belief with respect to the mark YAP shown in Serial No. 77/489,881 and, on that basis, denies those allegations.

1. Admitted.

2. Admitted in part. Denied in part. The allegations in this paragraph are based on and relate to the Application for the Proposed Mark, which is a writing that speaks for itself. The remaining allegations in this paragraph are denied.

3. Applicant admits that U.S. Trademark Reg. No. 3,396,272 is for the mark YAP (the “Opposer’s Mark”). Applicant admits that Yap Inc. is the listed owner of Reg. No. 3,396,272. Applicant lacks knowledge or information sufficient to form a belief as to the accuracy of the registration, or the details listed in the registration. Applicant further lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 3 of Opposer’s Opposition that Reg. No. 3,396,272 is currently valid and subsisting, and on that basis denies it. Except as specifically admitted, Applicant denies each and every allegation set forth in this paragraph in its entirety.

4. Denied. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 4 of Opposer’s Opposition, and on that basis denies it, and demands strict proof thereof.

5. Denied. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 5 of Opposer’s Opposition, and on that basis denies it, and demands strict proof thereof.

6. Denied. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 6 of Opposer’s Opposition, and on that basis denies it, and demands strict proof thereof.

7. Denied.

8. Denied. The allegations in this paragraph relating to Applicant's use of the Proposed Mark with services provided by mobile telephone are based on and relate to the Application for the Proposed Mark, which is a writing that speaks for itself.

9. Denied. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 9 of Opposer's Opposition, and on that basis denies it, and demands strict proof thereof.

10. Denied. By way of further response, Applicant denies that such authorization or agreement was or is needed.

11. Denied.

12. Denied.

13. Denied.

AFFIRMATIVE DEFENSES

By way of further Answer, Applicant alleges the following affirmative defenses:

1. The answering Applicant is informed and believes and thereon alleges that the Notice of Opposition, and each purported cause of action contained therein, fails to state a claim for relief.

2. The answering Applicant is informed and believes and thereon alleges that the Notice of Opposition is barred by the doctrine of acquiescence, waiver, consent, laches, and/or estoppel, in that numerous others have used and continue to use the designation "YAP."

3. The answering Applicant is informed and believes and thereon alleges that Opposer is barred from any relief whatsoever by virtue of its course of conduct relative to Applicant's use of the Proposed Mark.

4. The answering Applicant is informed and believes and thereon alleges that Opposer is barred from any relief whatsoever by virtue of the doctrine of unclean hands.

5. The answering Applicant is informed and believes and thereon alleges that the damage, if any, alleged in Opposer's Notice of Opposition was and is directly and proximately caused or contributed to by the unreasonable acts and omissions of Opposer, and Opposer is thus barred from recovery.

6. The answering Applicant is informed and believes and thereon alleges that the goods identified in the Opposer's Mark registration at U.S. Reg. No.3,396,272 have different channels of trade than the services identified in Applicant's Proposed Mark.

7. The answering Applicant is informed and believes and thereon alleges that neither the Opposer nor the Applicant have experienced any actual confusion through their respective uses of the subject marks.

8. The answering Applicant is informed and believes and thereon alleges that the consumers of the services provided by Opposer are sophisticated.

9. The answering Applicant is informed and believes and thereon alleges that services in the Proposed Mark are distinguishable from the goods in the Opposer's Mark.

10. The answering Applicant is informed and believes and thereon alleges that the strength of the Opposer's Mark is diluted by the existence of other uses of marks incorporating the term "YAP."

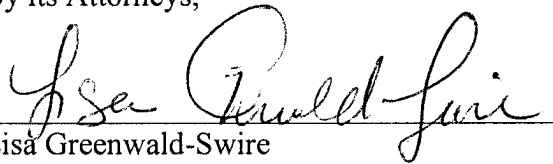
11. The answering Applicant is informed and believes and thereon alleges that Opposer obtained and/or maintained its cited registration fraudulently.

WHEREFORE, this answering Applicant prays for judgment as follows:

1. Dismissal of the Opposition in its entirety and with prejudice;
2. Grant of a registration on Applicant's Proposed Mark; and
3. For such other and further relief as the Board deems just and proper.

Respectfully submitted,
MPOWER MOBILE, INC.

By its Attorneys,



Lisa Greenwald-Swire
Fish & Richardson P.C.
500 Arguello St, Suite 500
Redwood City, California 94063
Telephone: (650) 839-5070

ATTORNEY FOR APPLICANT

April 13, 2009
Date

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the following document:

ANSWER TO NOTICE OF OPPOSITION WITH AFFIRMATIVE DEFENSES

has been served upon the following counsel on the 13th day of April, 2009, directed to said counsel at the following address and in the below manner:

VIA FIRST CLASS MAIL

Holly A. Coldiron.
Hutchinson Law Group PLLC
5410 Trinity Road, Suite 400
Raleigh, NC 27607
Telephone: (919) 829-9600

Respectfully submitted,

Dated: 4-13-09


Margaret M. Trevino