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

Proceeding	91202952
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

-----X
ATARI INTERACTIVE, INC., :
 :
 Opposer, : Opposition No. 91202952
 :
 v. :
 :
 ANDREW N. GREENBERG, :
 :
 Applicant. :
-----X

TRIAL BRIEF OF OPPOSER, ATARI INTERACTIVE, INC.

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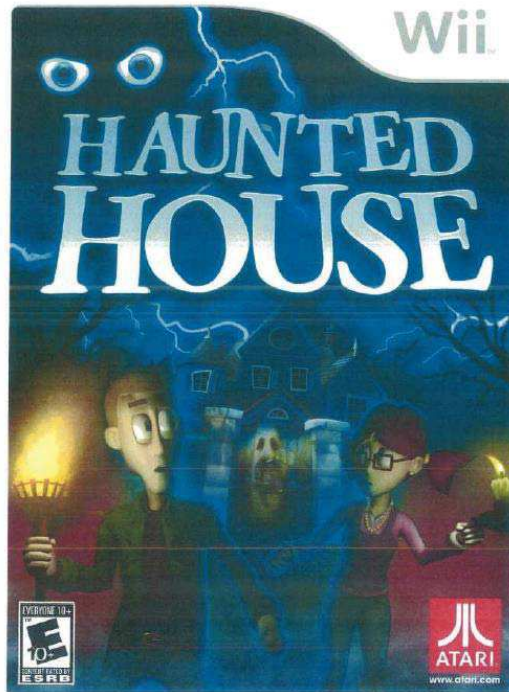
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I. INTRODUCTION

This opposition involves a dispute over an application to register a mark that is substantially identical to Opposer's mark, incorporating Opposer's longstanding and well-known trademark in its entirety, for the identical goods for which Opposer uses and has registered its mark. These facts alone strongly support a finding that Applicant's mark is likely to cause confusion and should not be registered. That conclusion is inescapable when additional factors, such as the identity of the parties' trade channels and target purchasers, and the similarities in their trade dress are considered. Accordingly, Opposer respectfully requests that its opposition be sustained, and that Applicant's application to register HAUNTED HOUSE TYCOON, Serial No. 85/268,906, be refused registration.

Opposer, Atari Interactive, Inc. is a well-known publisher and distributor of computer and video games. Atari owns the trademark HAUNTED HOUSE, which is registered in the Patent and Trademark Office for computer and video games and related goods under Registration No. 4,037,222. Applicant, Andrew N. Greenberg, has applied to register HAUNTED HOUSE TYCOON as a trademark for computer games. He plans to sell and distribute his games primarily by digital download and plans to direct his games to all types of consumers, the identical trade channels and target consumers as for Atari's HAUNTED HOUSE games. These facts compel the conclusion that Applicant's use and registration of HAUNTED HOUSE TYCOON is likely to cause confusion, and should be refused.

The likelihood that consumers will be confused by Applicant's adoption of a mark that is substantially identical to Atari's mark is heightened because of the manner in which Applicant plans to present his mark. Since 2010, Atari has sold its HAUNTED HOUSE games using the following graphics on its packaging:



Applicant adopted the trade dress shown below incorporating many of the same distinctive features as appear on Atari's package, including the use of stylized, capital letters, the overall color scheme, the use of a lightning bolt hitting the house, and the use of eyeballs, which is a distinctive feature that has been closely associated with Atari's HAUNTED HOUSE game since its introduction in 1981.



All of these facts lead to the conclusion that Applicant's use and registration of HAUNTED HOUSE TYCOON is likely to cause confusion. The subsequent actions of the Patent and Trademark Office in reviewing an application filed by Atari also point to this conclusion. Specifically, a trademark examining attorney has suspended prosecution of Atari's application to register HAUNTED HOUSE: CRYPTIC GRAVES for computer and video games, Serial No. 86/464,337, asserting that there is a potential likelihood of confusion between that mark and Applicant's applied-for mark HAUNTED HOUSE TYCOON. If HAUNTED HOUSE: CRYPTIC GRAVES and HAUNTED HOUSE TYCOON are likely to cause confusion, then surely the marks in issue in this opposition, HAUNTED HOUSE and HAUNTED HOUSE TYCOON, which are far more similar, are also likely to cause confusion.

Accordingly, Atari requests that its opposition be sustained, and that the registration of HAUNTED HOUSE TYCOON, Serial No. 85/268,906, as a trademark of Applicant's be refused and denied.

II. DESCRIPTION OF THE RECORD

A. Atari's Evidence

Atari's evidence consists of:

1. Trial testimony, taken April 30, 2014, of Todd Shallbetter, Chief Operating Officer, Atari Interactive, Inc. ("Shallbetter Tr."), and Exhibits 1-18 marked during that testimony;
2. Opposer's Notice of Reliance ("Atari's NOR"), filed on May 9, 2014 and Exhibits 1-18 attached thereto;
3. Rebuttal testimony, taken January 28, 2015, of Todd Shallbetter ("Shallbetter Reb. Tr."), and Exhibits 19-29 marked during that testimony; and

4. Opposer's Supplemental Notice of Reliance ("Atari's Supp. NOR"), filed June 12, 2015 and Exhibit 19 attached thereto.

B. Applicant's Evidence

Applicant's evidence consists of Applicant's Notice of Reliance, ("Applicant's NOR") filed on July 17, 2014 and Exhibits A01-A07, A10-17¹ attached thereto.

Applicant did not take any testimony.

III. EVIDENTIARY OBJECTIONS

A. Exhibit A03 to Applicant's Notice of Reliance Should Be Stricken From the Record

Applicant attached printouts from the LinkedIn profile of Todd Shallbetter, COO of Atari, as Exhibit A03 to his Notice of Reliance. In Applicant's supplemental submission to the Board on December 3, 2014, Applicant asserts that "Exhibit A03 is relevant to the similarity or dissimilarity and nature of the goods; the conditions under which and buyers to whom sales are made; the variety of goods on which a mark is or is not used; and the number and nature of similar marks in use on similar goods." However, Exhibit A03 does not relate to any of these factors, as the printouts comprising that exhibit do not mention either trademark at issue, any similar trademarks or include any information concerning the relatedness of Atari's and Applicant's goods or the circumstances under which those goods are purchased or sold. To the contrary, this exhibit includes only Mr. Shallbetter's professional biography. Under the Federal Rules of Evidence, "irrelevant evidence is not admissible." Fed. R. Evid. 402. Accordingly, Atari submits that Exhibit A03 to Applicant's Notice of Reliance must be stricken from the record because it is irrelevant to this opposition and has no probative value in this proceeding.

¹ Pursuant to the Board's December 19, 2014 Order, Exhibits A08 and A09 to Applicant's Notice were stricken from the record. See Dkt. 33.

See R.J. Reynolds Tobacco Co. v. Brown & Wilson Tobacco Corp., 226 USPQ 169, 173 (TTAB 1985) (excluding irrelevant evidence under Rule 402).

IV. STATEMENT OF THE ISSUES

The only issue to be decided in this proceeding is whether Applicant's use and registration of the designation HAUNTED HOUSE TYCOON for computer game software is likely to cause confusion with Atari's long-standing use and registration of its trademark HAUNTED HOUSE for game software for computers, videos games and other related goods.

V. FACTS

A. Atari's Rights in its HAUNTED HOUSE Trademark

Atari is a publisher and developer of interactive computer games, video games and mobile games, with many games dating back to the 1970's and early 1980's. Shallbetter Tr. at 6:11-15; 7:7-15. Many of Atari's games, including HAUNTED HOUSE, have now become classics. Shallbetter Tr. at 6:19-7:15.

Since its introduction, Atari's HAUNTED HOUSE game was advertised and sold as an adventure game. Adventure games are quest-based games in which the user typically is required to navigate a character through a series of challenges to achieve a goal. Shallbetter Tr. at 30:16-25, Exh. 8. The original version of HAUNTED HOUSE was a puzzle game in which a character, represented by a pair of floating eyeballs, navigated a maze in which it encountered ghouls, ghosts and other scary characters while it searched for three pieces of a magic urn. Shallbetter Tr. at 8:5-21. The game also incorporated a distinctive use of illumination to help the floating eyeballs find the targets. When the light went out, all the viewer could see was the distinctive pair of eyeballs. Shallbetter Tr. at 9:3-10:3. These features were included in later versions of the HAUNTED HOUSE game and in Atari's marketing materials for the game. *Id.* Exhibit 2 to Mr. Shallbetter's April 30, 2014 trial deposition is a screen shot from Atari's website

showing the 1981 version of the HAUNTED HOUSE game, including the floating eyeballs, which appear on the right side of the maze on page 1 of the exhibit.² Shallbetter Tr. at 12:8-13:3; 13:25-14:9; and Exh. 2 at ATARI_000068. This version of HAUNTED HOUSE was sold beginning in 1981, was re-released as part of three collections of Atari Classic games (Shallbetter Tr., Exhs. 5, 10 (at ATARI_000009-12), and 12, and as part of Atari's Greatest Hits Volumes 1 and 2 (Shallbetter Tr. at 17:6-25, Exh. 4), and was among the games that came pre-loaded on all versions of the Atari Flashback console.³ Shallbetter Tr. at 21:18-24:8, Exhs. 6 and 12. In addition, from 2008 or 2009 until 2012, the original version of the HAUNTED HOUSE game was available on Atari's website, where members of the public could play the game for free. Shallbetter Tr. at 15:17-16:8, Exh. 3.

HAUNTED HOUSE was originally released for the Atari 2600, which was an early video game console. Later, HAUNTED HOUSE was released to be played on a PC (Shallbetter Tr. at 14:10-15:7, 19:22-20:8, 36:14-21, Exhs. 3, 5, and 11 at ATARI_000016), Nintendo DS, which was a handheld game device (Shallbetter Tr. at 17:6-25, Exh. 4 at ATARI_000026-29), mobile devices using the iOS or Android operating systems (Shallbetter Tr. at 18:2-22, Exh. 4 at ATARI_000043-47), and PSP, which was a handheld PlayStation game device (Shallbetter Tr. at 37:24-38:12, Exh.11 at ATARI_000009). In addition, Atari released collections of its classic games, all of which included HAUNTED HOUSE, that were pre-loaded onto Atari's Flashback devices. Shallbetter Tr. at 21:14-24:5, Exhs. 6 and 12. These early versions of HAUNTED HOUSE have been included in six different collections of Atari classic games and Atari's Greatest Hits, and the PC version of Atari 80 Classic Games in One!, which was introduced in

² Exhibit 2 states that HAUNTED HOUSE was released in 1982. This statement is incorrect; the game was released in 1981. Shallbetter Tr. at 14:6-9.

³ Atari Flashback was a standalone console that could be plugged into a television set. It came pre-loaded with up to 60 classic Atari games. HAUNTED HOUSE was included on all of the Flashback consoles. Shallbetter Tr. at 21:14-24:5, Exh. 6.

2003 and is still being sold in an updated version that functions on modern PCs. Shallbetter Tr. at 19:22-20:8, Exh. 5. Atari's HAUNTED HOUSE games have also been available to be played online and for download from the Apple App Store and Google Play. Shallbetter Tr. at 14:10-15:7, 19:22-20:80, 36:14-21, Exhs. 3, 5, and 11 at ATARI_000016; 17:6-25, Exh. 4 at ATARI_000026-29; 18:2-22, Exh. 4 at ATARI_000043-47; 37:24-38:12, Exh.11 at ATARI_000009; and 21:14-24:5, Exh. 6. To date, HAUNTED HOUSE has been downloaded to be played on iPhone, iPad, iPod Touch and Android devices more than 4 million times. Shallbetter Tr. at 18:2-22. Until 2010, the HAUNTED HOUSE game was essentially the same as when it was originally released, but was adapted to operate on different platforms and with newer technology. During that time period, Atari added a new game entitled RETURN TO HAUNTED HOUSE, which was an updated version of the original HAUNTED HOUSE game with a new collection of mazes. Shallbetter Tr. 18:23-19:13; Exh. 4 at ATARI_000045.

In September, 2010, Atari released a new version of HAUNTED HOUSE that was "vastly different" from the earlier versions of the game because it was designed to operate on new game consoles, such as the Wii and Xbox Live, and new PCs. Shallbetter Tr. at 24:15-24:9; Exh. 7. Nevertheless, the new game continued to have the same object as the earlier HAUNTED HOUSE game, *i.e.*, the player had to find pieces of an urn while dodging enemies, such as bats, ghosts and other scary characters. It also continued to use the iconic eyeballs on packaging and marketing materials. Shallbetter Tr. at 25:10-21, Exh. 7 at ATARI_000082. The Xbox Live and PC versions of this game are still available for sale. Shallbetter Tr. at 53:8-14; Exh. 7 at ATARI_000060-63. The game is rated E by the Entertainment Software Rating Board ("ESRB"), which is the agency responsible for assigning a rating indicating the appropriate age

group for computer and video games. Shallbetter Tr. at 25:22-26:5. A rating of E means that the game is appropriate for everyone aged ten or older. Shallbetter Tr. at 26:6-11.

Since its introduction, HAUNTED HOUSE has been a family game played by children and adults of all ages. Shallbetter Tr. at 10:4-15. The earliest versions of the game were typically purchased by parents to be played with their children. Shallbetter Tr. at 10:24-11:4. Later versions of the game were aimed at families with children aged 8 and older, while the most recent game, HAUNTED HOUSE: CRYPTIC GRAVES, is aimed at a slightly older demographic. Shallbetter Tr. at 10:16-23; Shallbetter Reb. Tr. at 29:13-25. While this game is aimed at an older age group, it still involves a character going through a house with a series of maps to solve puzzles and achieve goals to beat each level. Shallbetter Reb. Tr. at 29:13-30:4.

Atari's HAUNTED HOUSE games have been sold or distributed through many different types of outlets, including through Atari's website, big box retailers, such as Target, Walmart and Amazon, specialty stores, such as Game Stop, and mom and pop retailers. Digital downloads of the HAUNTED HOUSE games to be played on PCs are available through Atari's website and through a large network of websites that offer PC downloads. Examples of these sites include Steam (which is the largest), GameFly, GamersGate, and Amazon.com. A digital version of HAUNTED HOUSE for play on Xbox is also sold through Atari's website and through Microsoft Xbox Live. Shallbetter Tr. at 35:4-25.

Over the years, HAUNTED HOUSE games have received widespread publicity in the press. A collection of published articles discussing HAUNTED HOUSE games is attached to Atari's Notice of Reliance as Exhibit 3. These articles have appeared in many publications, including as The Miami Herald, The Washington Times, Winston-Salem Journal, PR Newswire, PC Magazine, and CNN.com.

Atari and its retailers also advertised HAUNTED HOUSE games to the public. While much of that advertising was done by the retailers who were selling the games, in 2010, when Atari introduced its new version of the HAUNTED HOUSE game for Wii, Xbox Live and PC, Atari spent over \$175,000 in just four months to promote sales of that game. Shallbetter Tr. at 45:7-47:7, Exh. 13 at ATARI_000858. During this time, Atari placed online advertisements for its new HAUNTED HOUSE game featuring the recognizable floating eyeballs on multiple websites, including Disney's website. Shallbetter Tr. at 50:22-51:18, Exh. 15. Atari also participated in a co-promotion with America Haunts, a chain that operates live haunted houses around the country. Shallbetter Tr. at 49:9-50:4, Exh. 14. Advertisements for the co-promotion of Atari's HAUNTED HOUSE game and America Haunts' real-world haunted houses appeared on websites for Cartoon Network, MTV Networks and Disney. Shallbetter Tr. at 49:15-50:21, Exh. 14. In addition, Atari issued press releases announcing the introduction of its new HAUNTED HOUSE game. A report from Atari's public relations firm confirming the publications in which the press releases appeared was marked as Atari Exhibit 16 to Mr. Shallbetter's April 20, 2014 testimony. Shallbetter Tr. at 55:3-56:18. Among the publications that carried this press release were the Detroit News, CNN, Wired Magazine, Nickelodeon (on nick.com), Parentdish and Girls' Life Magazine. The fact that Parentdish carried Atari's press release confirms the family-friendly nature of Atari's HAUNTED HOUSE game. Similarly, the publication of the press release by Girls' Life shows this game to be of interest to a key demographic for Atari's game, namely, young teen girls. Shallbetter Tr. at 55:20-56:24.

Atari's sales of HAUNTED HOUSE games have been substantial. Since 2002, Atari has sold more than 2.3 million HAUNTED HOUSE games having a wholesale value in excess of \$42 million. Shallbetter Tr. 39:17-43:3, Exh. 12. The retail value of these sales is significantly

higher. These numbers do not include sales that took place through downloads, which consisted of an additional 500,000 units of downloads of compilations that included HAUNTED HOUSE, 150,000 downloads of the 2010 version of the HAUNTED HOUSE game, and more than 4 million downloads of the mobile version of HAUNTED HOUSE. Shallbetter Tr. at 18:2-11, 43:4-24.

As the result of the widespread advertising, promotion and publicity for HAUNTED HOUSE games, and the extensive sales and downloads of those games over more than three decades, consumers have come to recognize the HAUNTED HOUSE trademark in relation to computer and video games, and understand that games bearing that mark are produced and distributed by Atari.

Atari has registered its HAUNTED HOUSE trademark in the Patent and Trademark Office under Registration No. 4,037,222 for downloadable electronic games via the internet and wireless devices; electronic, video and multimedia game software for use on personal computers and for use on electronic game playing machines; recorded computer software featuring video games; game software for computers; and prepaid downloadable video game and video game software. This registration is presently outstanding and is owned by Atari Interactive, Inc. Atari's NOR, Exh. 1.

More recently, Atari filed an application in the Patent and Trademark Office to register HAUNTED HOUSE: CRYPTIC GRAVES, which is the newest version of Atari's HAUNTED HOUSE game. Atari's Supp. NOR, Exh. 19. This application covers downloadable electronic games via the internet and wireless devices; electronic, video and multimedia game software for use on personal computers and for use on electronic game playing machines; recorded computer software featuring video games; game software for computers; and prepaid downloadable video

game and video game software. *Id.* On February 27, 2014, the trademark examining attorney reviewing this application issued a Suspension Letter, suspending the application pending the disposition of the application under opposition, HAUNTED HOUSE TYCOON, on the ground that Atari's mark, HAUNTED HOUSE: CRYPTIC GRAVES, may be refused registration under Section 2(d) because of a likelihood of confusion with HAUNTED HOUSE TYCOON. *Id.*

B. Applicant's HAUNTED HOUSE TYCOON Game and Trademark

Applicant has applied to register HAUNTED HOUSE TYCOON on an intent-to-use basis as a trademark for computer game software. Applicant plans to introduce his game as a free-to-play download from his website. Atari's NOR Exh. 6 at 24:11-27:7. Free downloads tend to be used by a younger demographic, which is one of the market segments to whom Atari directs its HAUNTED HOUSE games. Atari's NOR Exh. 14 at 52:21-53:5; Shallbetter Tr. at 10:4-11:11. Applicant is also planning to use this mark for computer and video games to be played on PCs, Xbox Live, mobile devices, online through Applicant's website and Mac computers. Atari's NOR Exh. 2 at Response to Interrogatory No. 1(a). With the exception of Mac computers, Atari's HAUNTED HOUSE games can be played on all of these platforms. Shallbetter Tr. at 26:23-29:17; Exh. 7 at ATARI_000060-65; Exh. 8 at ATARI_000057; and Exh. 9 at ATARI_000053.

Applicant's game will be a tycoon-type game. Tycoon games make up "one of the more universally appealing genres of games," and often appeal to "tweens" and "female tweens," both of whom are among the target demographic for Atari's HAUNTED HOUSE games. Atari's NOR Exh. 5 at 21:17-22:6; *see also* Shallbetter Tr. at 56:12-24; 10:4-15.

Tycoon games are a genre of games in which players collect assets to build things. Atari's NOR Exh. 5 at 21:8-16. Atari is considered the creator and founder of the tycoon genre

of games, and tycoon games are closely associated with Atari because of its release of the ROLLER COASTER TYCOON games. The series of ROLLER COASTER TYCOON games are one of Atari's best-selling series of games. Shallbetter Tr. at 64:16-65:13.

In HAUNTED HOUSE TYCOON, a player will have an avatar that collects assets to build a haunted house. Based on how the player builds the haunted house, customers will visit the haunted house and, as they go through the house, ghosts, vampires and other scary characters will come out and interact with the customers. Atari's NOR Exh. 8 at 33:4-37:20. In both parties' games, the player has a mission, to find the pieces of the magic urn in Atari's game or to build a haunted house in Applicant's game, and in both games the player interacts with ghosts, ghouls, vampires and other scary characters. *Id.*; Shallbetter Tr. at 8:5-21.

Applicant's HAUNTED HOUSE TYCOON game is designed not to be too scary, a feature that is likely to make the game appropriate for younger players, which is the same group to which Atari directs its HAUNTED HOUSE games. Applicant testified "we don't do blood" and "[i]nstead of being a place where people die and ghosts have risen up, it's more the style of the big haunted houses that show up every Halloween and people pay to go through. So there's no actual nastiness involved, just monsters and people in costumes wandering through it." Atari's NOR Exh. 12 at 46:21-47:3. Applicant's game will be directed to children, but purchased by parents, the same demographic to which Atari's HAUNTED HOUSE games are directed. Like Atari, Applicant expects parents to play his game with their children. Atari's NOR Exh. 13 at 49:16-50:12.

For these reasons, a computer game marketed or distributed under the name HAUNTED HOUSE TYCOON is likely to cause confusion in the marketplace by causing users or purchasers who buy Applicant's game to believe that it is the next installment of Atari's iconic HAUNTED

HOUSE games. Shallbetter Tr. at 61:6-23. Atari's recent release of its new mobile game and HAUNTED HOUSE: CRYPTIC GRAVES game reinforces Atari's use of HAUNTED HOUSE as a trademark for an ongoing series of games and increases the likelihood that consumers would believe that HAUNTED HOUSE TYCOON is the latest release in that series.

Applicant's HAUNTED HOUSE TYCOON game is not yet generally available. It had been available on a limited basis to people Applicant knew personally, to whom he sent a copy of the game via e-mail or Dropbox prior to the commencement of this opposition, but Applicant discontinued that limited test distribution after this opposition began. Atari's NOR Exh. 7 at 27:16-28:8. Applicant ran one advertisement for his game in the 2011 program book from the Southern Interactive Entertainment and Game Expo. Atari's NOR Exh. 16 at 94:21-95:11 and attached deposition Exh. 33.

**VI. ATARI HAS ESTABLISHED STANDING
TO OPPOSE REGISTRATION OF APPLICANT'S MARK**

As the owner of the HAUNTED HOUSE registration, Atari has standing to challenge applications for confusingly similar marks, such as Applicant's Mark. Atari's NOR, Ex. 1; 15 U.S.C. §1052(d); *see also L.C. Licensing Inc. v. Berman*, 86 USPQ2d 1883, 1887 (TTAB 2008) (standing established by properly making pleaded registrations of record). In addition, Atari has standing based on its longstanding common law rights in the trademark HAUNTED HOUSE created by its use of that mark for computer games, video games and related products beginning in 1981. Shallbetter Tr. at 7:12-15.

Atari's standing to oppose Applicant's application is also based on its own pending application Serial No. 86/464,337 to register HAUNTED HOUSE: CRYPTIC GRAVES. Atari's Supp. NOR, Exh. 19. The Patent and Trademark Office suspended Atari's application and advised Atari that its application may be refused if the application under opposition in the

current proceeding registers. *See Weatherford/Lamb Inc. v. C&J Energy Services Inc.*, 96 USPQ2d 1834, 1837 (TTAB 2010) (finding proper standing based on office action suspending plaintiff's application pending possible refusal based on an alleged likelihood of confusion with defendant's registration made of record). Atari will therefore be harmed by the registration of Applicant's mark because Atari's ability to expand, secure registrations for and protect its longstanding HAUNTED HOUSE game franchise may be blocked if Applicant's mark HAUNTED HOUSE TYCOON registers. This limitation would diminish the value of Atari's valuable rights in HAUNTED HOUSE by limiting its ability to use and protect HAUNTED HOUSE-variant marks for new games in its HAUNTED HOUSE series.

Applicant's use and registration of HAUNTED HOUSE TYCOON for a computer game would also harm Atari in many other ways. As an initial matter, a computer game marketed or distributed under the name HAUNTED HOUSE TYCOON is likely to cause confusion in the marketplace by causing users or purchasers who buy Applicant's game to believe that it is the next installment of Atari's iconic HAUNTED HOUSE series. Shallbetter Tr. at 61:6-23. This confusion could affect Atari in two ways. First, any consumer who believes HAUNTED HOUSE TYCOON is an Atari game and is dissatisfied with the product may be less likely to purchase an Atari product in the future. Because Atari has no input, creative control or technical control over the content of Applicant's game, if it contains content that is inappropriate for a family game, or is defective or otherwise unsatisfactory to a consumer and the consumer believes it was produced or sold by Atari, that consumer will be less likely to purchase an Atari product in the future. This could irreparably damage Atari's reputation. Shallbetter Tr. at 61:11-62:21. This is a particular concern if, as Applicant testified, HAUNTED HOUSE TYCOON has

different content or subject matter than consumers have come to expect from Atari's HAUNTED HOUSE games. Shallbetter Tr. at 62:13-21.

Second, a consumer who encounters a game entitled HAUNTED HOUSE TYCOON and believes it is part of Atari's series of HAUNTED HOUSE games may purchase Applicant's game instead of one of Atari's games. This would have a significant impact on Atari because Atari is likely to lose sales from consumers who are confused about which game is the genuine Atari HAUNTED HOUSE game. Shallbetter Tr. at 62:5-12. All of this potential harm demonstrates that Atari has standing to oppose Applicant's application.

VII. OPPOSER HAS PRIORITY

To establish priority, an opposer need only show rights arising from "a prior registration, prior trademark or service mark use, prior use as a trade name, prior use analogous to trademark or service mark use, or any other use sufficient to establish proprietary rights." *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 64 USPQ2d 1375, 1378 (Fed. Cir. 2002); *see also Otto Roth & Co. v. Universal Foods Corp.*, 209 USPQ. 40, 43 (CCPA 1981) (opposer must prove "proprietary rights in the term [opposer] relies upon . . . whether by ownership of a registration, prior use of a technical 'trademark,' prior use in advertising, prior use as a trade name, or whatever other type of use may have developed a trade identity").

Atari is the owner of the HAUNTED HOUSE trademark and the corresponding registration in the Patent and Trademark Office, and its registration has been properly made of record. *See* Atari's NOR, Exh. 1. Because Atari's registration issued prior to the filing date of Applicant's application, and Applicant has not claimed to have made any use in commerce of HAUNTED HOUSE TYCOON, there can be no dispute regarding Atari's priority. *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1436 n.7 (TTAB 2012) (finding no priority dispute when opposer properly introduced its registrations into the record and there is no counterclaim). Furthermore,

the undisputed evidence in the record shows that Atari has used its HAUNTED HOUSE trademark in association with game software for computers, videos games and other related goods since at least as early as 1981. Shallbetter Tr. at 7:12-15. Meanwhile, Applicant testified that his HAUNTED HOUSE TYCOON game has yet to be released aside from a very limited test release of an unfinished game to his friends and acquaintances. Atari's NOR, Exh. 7 at 27:16-29:4. Atari therefore has priority over Applicant.

VIII. APPLICANT'S USE AND REGISTRATION OF HAUNTED HOUSE TYCOON IS LIKELY TO CAUSE CONFUSION

In determining whether a likelihood of confusion exists, the Board must apply the multifactor test set forth *In re E. I. DuPont de Nemours & Co.*, 177 USPQ 563, 567 (CCPA 1973); *see also Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d 1689 (Fed. Cir. 2005). Not all factors need to be accorded equal weight, or even be held relevant in any given situation. *In re Dixie Restaurants, Inc.*, 41 USPQ 1531, 1533 (Fed. Cir. 1997). Rather, only those factors for which there is evidence of record and which are relevant in a particular case must be considered. *In re Majestic Distilling, Inc.*, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003) (“[not] all of the *du Pont* factors may be relevant or of equal weight in a given case, and any one of the factors may control a particular case”). Moreover, “while [the Board] must consider each factor for which it has evidence, [it] may focus its analysis on dispositive factors, such as similarity of the marks and relatedness of the goods.” *Han Beauty, Inc. v. Alberto-Culver Co.*, 57 USPQ2d 1557, 1559 (Fed. Cir. 2001).

Due to the near identical nature of the parties' respective marks and goods, the most relevant factors in this case are: (1) the similarity of the marks; (2) the similarity of the goods; (3) the similarity of the trade channels, and (4) the similarity of the target purchasers and users. When the relevant factors are applied to the facts in this opposition, it is plain that the

registration of HAUNTED HOUSE TYCOON is likely to cause confusion with Atari's longstanding prior use of its registered trademark HAUNTED HOUSE. However, if there is any doubt about whether a likelihood of confusion exists, that doubt must be resolved against Applicant. *See Giant Foods, Inc. v. Nation's Foodservice, Inc.* 218 USPQ 390, 395 (Fed. Cir. 1983).

A. The Parties' Trademarks are Nearly Identical

In determining the degree of similarity of marks, the marks must be considered in their entireties in terms of appearance, sound, meaning and commercial impression, *Palm Bay Imports*, 73 USPQ2d at 1691, although the similarity of any one of these elements may be sufficient to find a likelihood of confusion. *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 (TTAB 1987). The likelihood of confusion test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in their overall impressions that confusion as to the source of the goods offered under the respective marks is likely to result. *See Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). The proper focus is on the recollection over time of the average consumer, who retains a general rather than specific impression of trademarks. *See Baseball America Inc. v. Powerplay Sports Ltd.*, 71 USPQ2d 1844, 1848 (TTAB 2004). In focusing on the recollection of the average consumer, one feature of a mark may be deemed more significant than another, so that it may be proper to give the dominant features more weight when considering the overall commercial impression the mark creates. *See In re National Data Corp.*, 224 USPQ 749, 751 (Fed. Cir. 1985).

When comparing Applicant's mark and Atari's mark in their entireties, the similarities in sight and sound are self-evident. The commercial impression of both marks is also nearly identical because the initial and dominant portion of Applicant's Mark is HAUNTED HOUSE.

See In re Mighty Leaf Tea, 94 USPQ2d 1257, 1260-61 (Fed. Cir. 2010) (ML confusingly similar to ML MARK LEES (stylized) for related products). Here, Applicant has also combined Atari's entire mark with the descriptive word TYCOON, which is defined as a type of computer or video game. *See* Applicant's NOR, Exh. A7. Applicant himself testified in detail that tycoon games are "pretty well seen as a genre of games now, as opposed to a name element." Atari's NOR, Exh. 5 at 21:15-16; 19:3-21:16. In fact, Atari released the first tycoon game, and is accordingly closely identified with this type of game.⁴ The ROLLER COASTER TYCOON games are one of Atari's best-selling series of games. The combination of the word TYCOON with Atari's well-known and longstanding trademark HAUNTED HOUSE reinforces the likelihood consumers will be misled by Applicant's mark, not only by confusing HAUNTED HOUSE TYCOON with Atari's HAUNTED HOUSE games, but also by confusing HAUNTED HOUSE TYCOON with Atari's ROLLER COASTER TYCOON franchise. Shallbetter Tr. at 64:16-65:13. Thus, Applicant has not only appropriated the entirety of Atari's HAUNTED HOUSE mark, but also combined it with an entirely descriptive term with which Atari is closely associated. Accordingly, Applicant's mark will create the impression that HAUNTED HOUSE TYCOON is a tycoon-type game based on or using elements from Atari's classic game HAUNTED HOUSE.

Applicant's selection of an opening screen that closely resembles the appearance of the packaging for Atari's HAUNTED HOUSE game magnifies the likelihood of confusion the use of similar marks creates. *Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 223 USPQ 1281, 1284 (Fed. Cir. 1984) ("trade dress may nevertheless provide evidence of whether the word mark projects a confusingly similar commercial impression"). As shown on page 2, *supra*,

⁴ Over the years, many different companies have distributed tycoon games, Atari's NOR, Exh. 5 at 20:21-21:7, but Atari was the first with Roller Coaster Tycoon, a game that is still on the market today. Shallbetter Tr. at 33:16-34:6.

Applicant's opening screen and Atari's packages both present the words HAUNTED HOUSE in a similar stylized font in all capital letters, have a similar overall color scheme, have a similar style of house, have lightning bolts striking the house, and have eyeballs, a key feature of Atari's game. The use of the near-identical marks in combination with these numerous features in common greatly increases the similarity of the commercial impression the parties' marks create. Shallbetter Tr. 63:5-64:11, Exhs. 7 and 18.

Applicant may try to argue that his disclaimer of the words HAUNTED HOUSE in his application eliminates any likelihood of confusion. Any such assertion would be wrong because the "[t]echnicality of a disclaimer in [an] application to register [a] mark has no legal effect on the issue of likelihood of confusion." *In re National Data Corp.*, 224 USPQ 749, 751 (Fed. Cir. 1985). This is because consumers are not aware of which words, if any, have been disclaimed in a trademark application. *See id.* At the same time, it is appropriate to give less weight to descriptive or suggestive terms, like "tycoon," in conducting a likelihood of confusion analysis because of the "reality of the market place." *Id.* at 752 (finding that "the public can be said to rely more on the non-descriptive portion of each mark"). For this reason, it has long been held that a likelihood of confusion cannot be avoided by adding a descriptive or suggestive element to another's mark. *See, e.g., Bellbrook Dairies, Inc. v. Hawthorn-Mellody Dairy, Inc.*, 117 USPQ 213, 214 (CCPA 1958) (VITA-SLIM held likely to cause confusion with SLIM); *see also* 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 23:50 (4th ed.) ("addition of a suggestive or descriptive element is generally not sufficient to avoid confusion."). Even adding a distinctive term may not eliminate a likelihood of confusion because the Board and courts have often found marks to be confusingly similar when an applicant incorporates a registrant's entire mark. *See, e.g., The Wella Corp. v. California Concept Corp.*, 194 USPQ 419,

422 (CCPA 1977) (CALIFORNIA CONCEPT is likely to cause confusion with CONCEPT).

This is especially true when, as here, the first word or words are the same. *See In re J.M.*

Originals Inc., 6 USPQ2d 1393, 1394-5 (TTAB 1987) (finding JM ORIGINALS confusingly similar to JM COLLECTABLES).

B. The Parties' Goods are Legally Identical

Along with the similarity of the marks, the degree of similarity between the parties' respective goods is one of the most important factors in determining whether likelihood of confusion exists. *See, e.g., Federated Foods, Inc. v. Fort Howard Paper Co.*, 192 USPQ 24, 29 (CCPA 1976). In assessing the similarity of the parties' goods, the Board must consider the descriptions of the goods as set forth in the opposed application and the opposer's registration, and may not limit the scope of those goods based on extrinsic evidence. *See In re Hughes Furniture Industries, Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015). The Board need not address the degree of similarity with respect to each of the goods identified in the opposed application and opposer's registration because it is sufficient if there is a likelihood of confusion with respect to any one item in the application and the registration. *See Edom Laboratories, Inc. v. Lichter*, 102 USPQ2d 1546, (TTAB 2012) ("We need not consider applicant's remaining goods because likelihood of confusion as to one of the products listed in applicant's description of goods in that class is sufficient to support a conclusion that the opposition should be sustained.")

Here, the opposed application covers "computer game software." Similarly, Atari's HAUNTED HOUSE registration includes "game software for computers." Atari's NOR, Exh. 1. As a result, there can be no dispute that the parties' goods are in part legally identical. Therefore the similarity of goods factor strongly favors a finding that confusion is likely. *See In re James Charne*, 2014 WL 3976448, at *2 (TTAB Aug. 7, 2014) (non-precedential) (finding Applicant's computer game software in part legally identical to and encompassing Opposer's computer game

software featuring fantasy games, fantasy films and music); *In re TPK U.S.A., LLC*, 2014 WL 3686866, at *2 (TTAB July 9, 2014) (non-precedential) (concluding that the identification of the goods in the application (*i.e.* computer game software, namely, game engine software for video game development and operation) to be in part legally identical to the goods covered by the registration (*i.e.* computer game software; software incorporating computer games; software incorporation computer games for mobile phones)).

Atari's HAUNTED HOUSE registration also covers downloadable electronic games via the Internet and wireless devices; electronic video and multimedia game software for use on personal computers and for use on electronic game playing machines; recorded computer software featuring video games; and prepaid downloadable video game and video game software. Atari's NOR, Exh. 1. While it is not necessary for the Board to consider the additional goods listed in Atari's registration because "game software for computers" is legally identical to the goods listed in the application under opposition, the remaining goods listed in Atari's specification are also identical or closely related to Applicant's goods. The close relationship between these goods in Atari's registration and the goods identified in Applicant's application also strongly favors finding a likelihood of confusion exists. *See In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984) (concluding that that the respective goods need only to be related in some manner, or the conditions surrounding their marketing be such that they could be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the goods come from a common source.)

In addition to using virtually the same mark as Atari for the same goods as Atari, Applicant plans to use his mark for games that can be played on the same platforms as those on which Atari's HAUNTED HOUSE games can be played. Applicant stated that he intends to use

HAUNTED HOUSE TYCOON for games that can be played on the following platforms: PC, Mac, Xbox Live and mobile devices. Atari's NOR, Exh. 2 at Response to Interrogatory No. 1(a); Exh. 10 at 41:8-25. Over the years, Atari's HAUNTED HOUSE game has been available on a variety of platforms, including, Xbox Live, PC and Nintendo Wii. Shallbetter Tr. at 26:23-29:17; Exh. 7 at ATARI_000060-65, Exh. 8 at ATARI_000057, Exh. 9 at ATARI_00053. Recently, Atari launched new versions of its HAUNTED HOUSE game for mobile devices and PCs. Shallbetter Rebuttal Tr. 28:20-30:4. Because Applicant is planning to offer his games to be played on the same platforms as those on which Atari's HAUNTED HOUSE games can be played, there can be no dispute that the parties' respective goods are identical and this factor also weighs heavily in Atari's favor.

C. The Parties' Channels of Trade and Customers Are Identical

When there are no restrictions as to channels of trade in either the applicant's application or the opposer's registration, it is presumed that the respective goods travel in all channels of trade in which those goods normally travel. Similarly, when there is no limitation on the types of purchasers or users of goods covered by an application or registration, it is presumed that the goods will be purchased and/or used by all classes of purchasers and users typical of the goods in issue. *See Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). In an analogous non-precedential case, the Board found that "because the goods include[d] legally identical computer games software, and there [were] no limitations as to channels of trade or classes of purchasers in either the application or the cited registration, we must presume that Applicant's and Registrant's goods will be sold in the same channels of trade and will be bought by the same classes of purchasers." *In re TPK U.S.A., LLC*, 2014 WL 3686866, at *2 (TTAB July 9, 2014) (non-precedential).

As in *In re TPK*, the specifications in the opposed application and Atari's registration both include computer game software without limitations with respect to channels of trade or classes of purchasers or users. Atari's NOR, Exh. 1. Therefore, it must be presumed that the parties' goods move in all channels of trade that are typical for such goods and that the goods will be available to all potential purchasers and users. *See Hewlett-Packard Co. v. Packard Press Inc.*, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002) ("absent restrictions in the application and registration, goods and services are presumed to travel in the same channels of trade to the same class of purchasers.")

Here, the evidence also shows that both parties' games will be offered through the same trade channels. Applicant testified he plans to offer computer game software under the HAUNTED HOUSE TYCOON mark in a variety of ways, including via download and, at the time Applicant was deposed, his game was available on a limited basis to be downloaded from Applicant's website. Atari's NOR, Exh. 6 at 24:11-15; Exh. 7 at 27:16-28:5. Similarly, Atari's HAUNTED HOUSE games can be downloaded from Atari's and other distributors' websites. Shallbetter Tr. at 18:2-22., Ex. 4 at ATARI_000043-45; see also Shallbetter Tr. at 26:23-29:17; Exh. 7 at ATARI_000060-65; Exh. 8 at ATARI_000057; Exh. 9 at ATARI_000053. In addition to downloads, Applicant also plans to offer his game on many of the same platforms that Atari's HAUNTED HOUSE game is offered, such as for PC, Xbox Live and on mobile devices. *See supra* Section V.B, p. 7. The presumption that the parties' goods travel in the same trade channels is therefore confirmed by the testimony of both parties.

Similarly, the record shows that the target customers for both parties overlap. Applicant testified that "tycoon" games are universally played and that he would like his HAUNTED HOUSE TYCOON game to have a very broad audience. Like Atari's HAUNTED HOUSE

games, Applicant's game will be directed to children and parents. Atari's NOR, Exh. 13 at 49:16-50:12. In addition, Applicant is aiming for an Entertainment Software Rating Board ("ESRB") rating of E for everyone. Atari's NOR, Exh. 5 at 23:25-24:10.

Atari's original 1980's HAUNTED HOUSE game was a family-friendly game as well, and Atari targeted both parents and children. Shallbetter Tr. at 10:4-11:16. Atari's more recent versions of the HAUNTED HOUSE game, including its Wii game that has been rated E for everyone and its new mobile game, are also designed for play by parents and children. Shallbetter Tr. at 10:4-11:16; 24:15-26:22; Exh. 7; Shallbetter Reb. Tr. at 28:25-29:12. Thus, as the evidence shows, Applicant's target consumers will overlap with Atari's target consumers.

The overlap in the trade channels, purchasers and users of the parties' respective goods greatly increases the likelihood that consumers will be confused.

D. Applicant's Goods are Inexpensive and May be Purchased on Impulse

The next *DuPont* factor considers the conditions under which sales are made, "i. e. 'impulse' vs. careful, sophisticated purchasing." See *DuPont*, 177 USPQ at 567. It is often said that "[w]hen the products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care." See, e.g., *Recot Inc. v. Becton*, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000).

Since there are no restrictions on the price levels of Applicant's goods in his application, the products Applicant intends to sell under the HAUNTED HOUSE TYCOON mark may be inexpensive. See *H.D. Lee Co. v. Maidenform, Inc.*, 87 USPQ2d 1715, 1726 (T.T.A.B. 2008) (where "there are no restrictions or limitations in the description of goods in either the application or opposer's registration" "the clothing products of both parties may be inexpensive and bought by ordinary consumers") (citation omitted). In addition, the evidence in the record

confirms that Applicant actually intends to offer his HAUNTED HOUSE TYCOON game for free, at least initially, thereby increasing the likelihood of confusion. Atari's NOR, Exh. 6 at 24:11-15. As a result, this factor also weighs in Atari's favor.

E. Atari's HAUNTED HOUSE Mark is Strong

“A strong mark . . . casts a long shadow which competitors must avoid. *Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.*, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992). As the record demonstrates, Atari has used its HAUNTED HOUSE mark in association with game software for computers and related goods since 1981. Shallbetter Tr. at 17:12-15. For more than thirty years, Atari's HAUNTED HOUSE games have received favorable unsolicited media attention and reviews in widely-distributed publications such as PC Magazine, CNN.com, The Miami Herald, The Washington Times, Winston-Salem Journal, and PR Newswire. Atari's NOR, Exh. 3. In addition, press releases about Atari's 2010 version of its HAUNTED HOUSE game were picked up and published by Wired magazine, Nickelodeon's nick.com and Girls' Life magazine, among others. Shallbetter Tr. at 55:3-56:18, Exh. 16. Atari has also spent considerable sums of money on advertising its HAUNTED HOUSE games. For example, in 2010, Atari promoted a new version of its HAUNTED HOUSE game through banner advertisements on websites owned by Cartoon Network, MTV Networks and Disney. Shallbetter Tr. at 47:12-51:17, Exhs. 13-15. As a result of Atari's advertising and promotion and favorable media attention, Atari has sold and distributed millions of copies of its HAUNTED HOUSE games. Shallbetter Tr. 39:17-43:3, Exh. 12. Since 2002, Atari has sold more than 2.3 million HAUNTED HOUSE games having a wholesale value in excess of \$42 million and a retail value of significantly more. *Id.* Despite this impressive volume of sales, these numbers do not include sales that took place through downloads, which consisted of an additional 500,000 units of downloads of compilations that included HAUNTED HOUSE, 150,000 downloads of the 2010 version of the HAUNTED

HOUSE game, and more than 4 million downloads of the mobile version of HAUNTED HOUSE. Shallbetter Tr. at 18:2-11, 43:4-24. This evidence demonstrates that Atari's HAUNTED HOUSE mark is well-known. See *ProQuest Information and Learning Company v. Jacques. R. Island*, 83 USPQ2d 1351, 1357-58 (TTAB 2007) (finding that opposer demonstrated strength of mark based on length of time the mark has been in use, sales and advertising figures and unsolicited media attention). Thus, because Atari's HAUNTED HOUSE mark is strong, it is entitled to broad protection.

F. The Actual Confusion Factor is Not Relevant

To date, Atari is not aware of any instances of actual confusion caused by Applicant's use of the designation HAUNTED HOUSE TYCOON as a trademark. For the absence of confusion to be a meaningful factor in the Board's analysis, the record must demonstrate that there has been an opportunity for confusion to occur. *Cunningham v. Laser Golf Corp.*, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000). In addition, "[t]he absence of evidence of actual confusion is not controlling since it is a well accepted fact that such evidence is difficult to obtain." *Allstate Insurance Co. v. DeLibro*, 6 USPQ2d 1220, 1224 (TTAB 1988). In the current case, Applicant has acknowledged that he has not yet used the HAUNTED HOUSE TYCOON mark in commerce. Moreover, as the record shows, Applicant has run only one advertisement for his game and made the game available only for test download to a limited group of people. Atari's NOR, Exh. 7 at 27:16-29:4; Exh. 2 at Response to Interrogatory Nos. 2-3 (demonstrating no sales and minimal advertising expenditures). Because of the limited promotion and distribution of Applicant's HAUNTED HOUSE TYCOON game, it is highly unlikely that a sufficient number of consumers have encountered Applicant's mark for instances of actual confusion to have come to Atari's attention. The absence of evidence of actual confusion, therefore, is a neutral factor in this proceeding.

G. Additional Factors Supporting a Finding of Likelihood of Confusion

Under *DuPont*, the Board may weigh “[a]ny other established fact probative of the effect of use.” 177 USPQ at 567. In this case, the suspension of Atari’s application to register HAUNTED HOUSE: CRYPTIC GRAVES for computer and video games based on the opposed application to register HAUNTED HOUSE TYCOON and Applicant’s bad faith intent demonstrated by strong visual similarities in the presentation of the marks are both factors that the Board should weigh in concluding that a likelihood of confusion exists.

1. The Suspension of Atari’s Pending Application to Register HAUNTED HOUSE: CRYPTIC GRAVES is Probative Evidence Supporting a Finding of Likelihood of Confusion

On November 25, 2014, Atari applied to register HAUNTED HOUSE: CRYPTIC GRAVES for video and computer games. This application was suspended because the Examining Attorney believed there was a potential likelihood of confusion between Atari’s mark and the mark being opposed in this proceeding, HAUNTED HOUSE TYCOON. Atari’s Supp NOR, Ex. 19.

The Notice of Suspension is probative evidence that the Examining Attorney, an expert in the field, believes there is a likelihood of confusion between Applicant’s mark and Atari’s HAUNTED HOUSE–variant mark. HAUNTED HOUSE: CRYPTIC GRAVES and HAUNTED HOUSE TYCOON are less similar to each other than HAUNTED HOUSE TYCOON and HAUNTED HOUSE. If, as the Examining Attorney claims, HAUNTED HOUSE: CRYPTIC GRAVES is likely to cause confusion with HAUNTED HOUSE TYCOON, then HAUNTED HOUSE TYCOON should similarly be found to be likely to cause confusion with HAUNTED HOUSE, and Atari’s opposition should be sustained. The Trademark Examiner’s official opinion that HAUNTED HOUSE: CRYPTIC GRAVES is likely to cause confusion with HAUNTED HOUSE TYCOON is therefore persuasive evidence that HAUNTED HOUSE

TYCOON is similarly likely to cause confusion with Opposer's registered trademark HAUNTED HOUSE.

2. The Strong Visual Similarities between Applicant's Game and Atari's Game Suggest Applicant's Bad Faith Intent

Under the thirteenth *DuPont* factor, the Board has often considered evidence of an applicant's bad faith adoption of its mark in the likelihood of confusion analysis. *See L.C. Licensing Inc. v. Berman*, 86 USPQ2d 1883, 1890 (TTAB 2008); *see also J & J Snack Foods Corp. v. McDonald's Corp.*, 18 USPQ2d 1889, 1891 (Fed. Cir. 1991) ("Whether there is evidence of intent to trade on the goodwill of another is a factor to be considered, but the absence of such evidence does not avoid a ruling of likelihood of confusion."). While the Board does not ordinarily review trade dress when considering whether there is a likelihood of confusion between two word marks, it has "look[ed] to applicant's retention of similar trade dress as providing evidence of whether he intended to cause confusion." *See Edom Laboratories Inc. v. Lichter*, 102 USPQ2d 1546, 1554 n.31 (TTAB 2012).

As discussed above at pages 2 and 18-19, *supra*, Applicant's trade dress, as presented in a screen shot from his game, is strikingly similar to many aspects of Atari's trade dress, specifically the package for its 2010 version of its HAUNTED HOUSE game. Shallbetter Tr. 63:5-64:11; Exhs. 7 and 18. The similarity between the parties' font choice and color scheme, as well as Applicant's use of a lightning bolt hitting the house and eyeballs strongly suggests that Applicant strove to come as close as possible to Atari's trademark and trade dress to confuse consumers and profit from that confusion. *See Edom Laboratories*, 102 USPQ2d at 1554.

IX. CONCLUSION

The renown of Atari's HAUNTED HOUSE trademark, the near identity of the parties' marks, the identity of their products, trade channels and prospective purchasers, and Applicant's

bad faith as demonstrated by his adoption of many of the distinctive features of Atari's packaging, all lead to the inescapable conclusion that Applicant's use and registration of HAUNTED HOUSE TYCOON for computer game software is likely to cause confusion with Atari's use of HAUNTED HOUSE for the same goods. There also can be no doubt that Atari will be harmed if HAUNTED HOUSE TYCOON is allowed to be registered. For these reasons, Atari respectfully requests that its opposition be sustained, and that registration of HAUNTED HOUSE TYCOON as a trademark of Applicant be refused.

DORSEY & WHITNEY LLP

Dated: July 15, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th Day of July, a true and correct copy of the foregoing TRIAL BRIEF OF OPPOSER, ATARI INTERACTIVE, INC. was served on applicant via e-mail at hdiandrew@earthlink.net, as previously agreed between applicant and opposer's counsel, and by first class mail, postage prepaid, addressed as follows:

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/s/ Kaydi Osowski

Kaydi Osowski