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

Proceeding	91248894
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE
TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Application Serial No. 79/248,677 Published in the Official Gazette on May 7, 2019 at TM 732.

SABER INTERACTIVE
INCORPORATED
n/k/a S3D INTERACTIVE, INC.

Opposer,

v.

OOVEE LTD

Applicant.

Opposition No. 91248894

**OPPOSER'S OPPOSITION TO
APPLICANT'S MOTION FOR SUMMARY JUDGMENT**

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Saber Interactive Incorporated n/k/a S3D Interactive, Inc. (hereinafter “Opposer”), hereby responds to Oovee Ltd’s (hereinafter “Applicant”) Motion for Summary Judgment (hereinafter the “Motion”).¹ In support of its opposition to the Motion, Opposer relies on this memorandum of law, the accompanying Declaration of Abigail J. Remore, Esq. and Exhibits A - L attached thereto.

PRELIMINARY STATEMENT

Applicant’s Motion not only misstates the relevant facts and law at issue, but purposefully paints Opposer’s grounds for its opposition in a false light – apparently in the hopes of misleading the Board into dismissing the case so that Applicant can avoid its discovery obligations and the expense of a trial on the merits. This proceeding relates only to Applicant’s attempts to secure a federal trademark registration for a mark that it does not own. Declaration of Michael J. Brown dated October 23, 2020 (“Brown Decl.”), Ex. A, at ¶¶ 12-16; Brown Decl., Ex. B, at ¶¶ 29-35. Opposer has not raised a likelihood of confusion claim or a dilution claim which would necessitate that it prove priority of use. Opposer need not prove priority or be deemed the rightful owner of the mark at issue – SPINTIRES – in order for it to be determined that Applicant was not the rightful owner of the mark at the time its application was filed and that the application is thus void *ab initio*. Further, Opposer need not be the owner of the mark sought to be registered in order to be damaged by its registration – particularly given that Applicant is attempting to use its purported rights in that mark as a weapon against Opposer’s other trademark applications

¹ Opposer’s Opposition to Applicant’s Motion is timely submitted in accordance with 37 C.F.R. § 2.196 (“When the day, or the last day fixed by statute or regulation by or under this part for taking any action or paying any fee in the Office falls on a Saturday, Sunday or Federal holiday within the District of Columbia, the action may be taken, or the fee paid, on the next succeeding day that is not a Saturday, Sunday or a Federal holiday.”)

and business endeavors. Finally, even assuming that everything asserted in the Motion were true, the Motion focuses on matters which are entirely immaterial to the claims before the Board and must be denied.

STATEMENT OF FACTS

I. Undisputed Material Facts Referenced In Applicant's Motion

Opposer does not dispute the accuracy of the following facts set forth in Applicant's Motion:

- Oovee's application for international registration of the mark SPINTIRES in Class 9 for *Downloadable computer game programs; downloadable computer games programmes; downloadable computer games programs; downloadable computer games software; downloadable computer game software; downloadable computer game programmes; Recorded computer game programs; computer game programs for single player and multi player games; recorded computer games software; recorded computer game software; recorded computer game programmes* was filed on November 15, 2018. Applicant's Br. 5.
- Opposer previously used the SPINTIRES mark – together with Opposer's MUDRUNNER mark – on a video game product developed and sold by Opposer and/or one of Opposer's affiliates. Applicant's Br. 7-8.
- On December 22, 2018, an entity related to Opposer terminated a license agreement related to the development, manufacture and sale of video games with Applicant solely as a result of Applicant's wrongful conduct and material breaches of its warranties therein. Brown Decl., Ex. B, at ¶ 23; Applicant's Br. 11-12.

- Opposer ceased use of the SPINTIRES term in connection with the MUDRUNNER game after the termination of such agreement on December 22, 2018. Applicant's Br. 12.
- Applicant filed the opposed application more than a month prior to Opposer ceasing use of the SPINTIRES term. Applicant's Br. 5, 12.

II. **Disputed Facts**

Applicant's Motion sets forth the following facts as "undisputed" which are either false on their face, incomplete or otherwise disputed:

- Applicant wrongly asserts that "[i]n the Notice of Opposition, Saber asserted as the sole basis for damage: 'Opposer will be damaged by the registration sought by Applicant as it is using the SPINTIRES mark in commerce in connection with its MUDRUNNER game with the authorization of the mark's owner, Mr. Zagreblnyy[sic].'" Applicant's Br. at 6. This is incorrect. Though the foregoing statement is contained within Opposer's first Notice of Opposition filed on June 6, 2019 (the "Initial Pleading"), it is not the "sole basis for damage" asserted therein. Opposer's Initial Pleading clearly states another ground for damage in the paragraph immediately preceding that relied upon in Applicant's Motion: "Applicant, improperly asserting trademark rights that it does not have, has demanded that Opposer cease all use of the name SPINTIRES: MUDRUNNER, and, in fact, demanded that Opposer cease all sales of SPINTIRES: MUDRUNNER on any platform." Brown Decl., Ex. A, at ¶ 9.
- In the very next paragraph of Applicant's Motion, Applicant again wrongly implies that Opposer's only basis for damage is that Opposer is using the SPINTIRES

mark. Applicant's Br. 6. This implication is false. While Opposer's First Amended Notice of Opposition filed on August 16, 2019 (the "Amended Pleading") does make the statement asserted by Applicant, it also states the following:

- "After the release of MUDRUNNER, Opposer became aware of Applicant's fraud in connection with the License Agreement and on December 22, 2018 terminated the License Agreement. Under the terms of the License Agreement, Opposer is permitted to continue to sell and distribute the MUDRUNNER game following its termination." Brown Decl., Ex. B, at ¶ 23.
- "In spite of its fraud, misrepresentation and other wrongful acts, Applicant, improperly asserting trademark rights that it does not have, has demanded that Opposer cease use of the names SPINTIRES and MUDRUNNER, and, in fact, demanded that Opposer cease all sales of MUDRUNNER on any platform." Brown Decl., Ex. B, at ¶ 24.
- "Opposer will be damaged by the registration sought by Applicant as... [t]he registration sought by Applicant would support and assist Applicant in its improper bad faith efforts to force Opposer to cease sales of MUDRUNNER...". Brown Decl., Ex. B, at ¶ 27.
- Applicant's motion also implies that Opposer is asserting only a single basis for its ownership of the SPINTIRES mark (and, more importantly, of Applicant's lack of ownership in the SPINTIRES mark). Applicant's Br. 6. This also provides an incomplete and one-sided picture of the dispute at hand. In fact, in its Amended Pleading, Opposer asserts multiple grounds upon which it relies to show that Applicant is not the owner of the SPINTIRES mark (and was not at the time its

application was filed). Those grounds include that Opposer was automatically the owner of the SPINTIRES mark at its creation because of Mr. Zagrebelnyy's employment with Opposer at the time it was created, and, alternatively, that even if the mark was not already owned by Opposer as a result of its creation by an employee during his employment, Mr. Zagrebelnyy had never assigned any such rights to Applicant, and eventually assigned all such rights to Opposer. Brown Decl., Ex. B, at ¶¶ 3-4, 7-9, 13, 25-26; November 23, 2020 Declaration of Abigail J. Remore ("Remore Decl."), Ex. A; Brown Decl., Ex. B (attached as Exhibit B to Amended Pleading).

- Incredibly, Applicant's Motion also argues that "any dispute about ownership is irrelevant for the purposes of deciding the present motion for summary judgment." Applicant's Br. 12. Nothing could be further from the truth – the only claim before the Board in this proceeding is that Applicant is not the rightful owner of the mark it seeks to register and was not the rightful owner when it filed its application – not whether Opposer does or does not have priority of use. Brown Decl., Ex. A, at 1 (ESTTA cover sheet); Brown Decl., Ex. B, at ¶¶ 12-16.

III. Undisputed Material Facts Not Referenced In Applicant's Motion

The following undisputed facts are material to this proceeding and the Motion, but Applicant neglected to reference them:

- Applicant has asserted rights in and/or has submitted substantial evidence relating to the pending SPINTIRES application and/or its purported ownership of the SPINTIRES mark in the following pending trademark opposition and cancellation

proceedings around the world that Applicant has raised against one or more entities related to Opposer:

- T.T.A.B. Opposition Proceeding No. 91249491, opposing registration of Serial No. 88/171/058 for the mark MUDRUNNER;²
 - European Union Intellectual Property Office (“EUIPO”) Opposition Proceeding No. B003094153, opposing registration of Trademark No. 018072745 for the mark SNOWRUNNER;³
 - EUIPO Opposition Proceeding No. B003094154, opposing registration of Trademark No. 018055358 for the mark MUDRUNNER;⁴
 - United Kingdom Intellectual Property Office (“UKIPO”) Opposition Proceeding No. OP000417449, opposing registration of Trademark No. UK00003394432 for the mark MUDRUNNER;⁵ and
 - UKIPO Cancellation Proceeding No. CA000503140, seeking to cancel Registration No. UK00003402572 for the mark SNOWRUNNER.⁶
- Prior to Opposer’s initiation of the instant proceeding, Applicant was attempting and is still attempting to use its purported rights in the SPINTIRES mark and the opposed Application to force Opposer and/or entities related to Opposer as well as Opposer’s publishing partner to stop sales of the MUDRUNNER video game.

² Remore Decl., Exs. B and C; full case record accessible at <https://ttabvue.uspto.gov/ttabvue/v?pno=91249491&pty=OPP>. Note that Applicant filed an extension of time to oppose the application that is the subject of the Opposition proceeding that is the Subject of Exhibit C prior to Opposer’s initiation of the instant proceeding.

³ Remore Decl., Ex. D.

⁴ Remore Decl., Ex. E.

⁵ Remore Decl., Ex. F.

⁶ Remore Decl., Ex. G.

See, e.g., Remore Decl., Ex. H; Remore Decl., Ex. I, at ¶ 9; Remore Decl., Ex. J, at ¶ 24.

LEGAL ARGUMENT

A motion for summary judgment is intended to dispose of cases in which there is “no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a) (emphasis added); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (motion for summary judgment should be granted when “the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law”). “The purpose of the motion is judicial economy, that is, to avoid an unnecessary trial where there is no genuine dispute of material fact and more evidence than is already available in connection with the summary judgment motion could not reasonably be expected to change the result in the case.” T.B.M.P. § 528.01 (June 2020) (emphasis added) (citing *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 222 U.S.P.Q. 741, 743 (Fed. Cir. 1984), *aff’g* 221 U.S.P.Q. 151 (T.T.A.B. 1983); *Larami Corp. v. Talk To Me Programs Inc.*, 36 U.S.P.Q. 1840, 1843 (T.T.A.B. 1995); *University Book Store v. University of Wisconsin Board of Regents*, 33 U.S.P.Q.2d 1385, 1390-91 (T.T.A.B. 1994)).

The party moving for summary judgment “bears the burden of demonstrating absence of all genuine issues of material fact.” *SRI Intern. v. Matsushita Elec. Corp. of America*, 775 F.2d 1107, 1116, 227 U.S.P.Q. 557 (Fed. Cir. 1985) (citation omitted) (emphasis added). “This burden is greater than the evidentiary burden at trial.” T.B.M.P. § 528.01 (June 2020) (citation omitted); see, e.g., *Biogrand Co., Ltd. v. Sunbio*

Corporation, 2019 WL 479309, at * 2, Canc. No. 92067124 (T.T.A.B. Feb. 1, 2019).⁷ The moving party may meet this burden by demonstrating “that there is an absence of evidence to support the nonmoving party’s case.” *Celotex*, 477 U.S. at 325. “The burden of the nonmovant to respond arises only if the summary judgment motion is properly supported.” *Biogrand*, 2019 WL 479309, at * 2 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160-61 (1970)). Opposer, as the nonmoving party, must be given the benefit of all reasonable doubt, and all inferences to be drawn from the undisputed facts must be viewed in the light most favorable to Opposer. See, e.g., *Lloyd’s Food Products Inc. v. Eli’s Inc.*, 987 F.2d 766, 25 U.S.P.Q.2d 2027, 2029-30 (Fed. Cir. 1993); *Opryland USA Inc. v. The Great American Music Show Inc.*, 970 F.2d 847, 23 U.S.P.Q.2d 1471, 1472 (Fed. Cir. 1992) (evidence submitted by nonmovant is to be believed and all justifiable inferences drawn in its favor); *Olde Tyme Foods Inc. v. Roundy’s Inc.*, 961 F.2d 200, 22 U.S.P.Q.2d 1542, 1546 (Fed. Cir. 1992); *Copelands’ Enterprises Inc. v. CNV Inc.*, 945 F.2d 1563, 20 U.S.P.Q.2d 1295, 1298 (Fed. Cir. 1991); *Capital Speakers Inc. v. Capital Speakers Club of Washington D.C. Inc.*, 41 U.S.P.Q.2d 1030, 1034 (T.T.A.B. 1996) (Board accepted nonmovant’s version of the facts for purposes of deciding motion). Applicant’s Motion relies upon facts that are entirely immaterial to the proceeding at hand and does not even come close to meeting this burden. As such, the Board should deny the Motion.

⁷ Copies of unpublished decisions cited in this memorandum of law are attached as Exhibits J and K to the Remore Declaration.

I. Opposer Has Sufficient Standing To Oppose Applicant's SPINTIRES Application.

Applicant's Motion first attempts to argue that Opposer lacks standing to bring its Notice of Opposition because it is not currently using the SPINTIRES mark in commerce. In its arguments, Applicant not only misstates the contents of the Initial Pleading and the Amended Pleading but also misconstrues the relevant law.

"Any person who believes that he would be damaged by the registration of a mark" has standing to file an opposition. 15 U.S.C. § 1063(a); *see also Ritchie v. Simpson*, 170 F.3d 1092, 1095, 50 U.S.P.Q.2d 1023 (Fed. Cir. 1999) ("Section 13 of the Lanham Act establishes a broad class of persons who are proper opposers; by its terms the statute only requires that a person have a belief that he would suffer some kind of damage if the mark is registered"). The requirements for standing to oppose are liberal in favor of allowing one to oppose. *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 U.S.P.Q. 185 (C.C.P.A. 1982); *Rosso & Mastracco, Inc. v. Giant Food, Inc.*, 720 F.2d 1263, 219 U.S.P.Q. 1050 (Fed. Cir. 1983); *Tanners' Council of America, Inc. v. Gary Industries, Inc.*, 440 F.2d 1404, 169 U.S.P.Q. 608 (C.C.P.A. 1971). "What is necessary to demonstrate a real interest in the proceeding may vary from case to case..., [and] courts have found standing based on widely diverse interests." *M. Aron Corporation v. Remington Products, Inc.*, 222 U.S.P.Q. 93, 1984 WL 64050, at *3 (T.T.A.B. 1984) (citing *Lipton* 670 F.2d at 1028 ("No absolute test can be laid down for what must be proved to establish standing as a petitioner in a cancellation proceeding"))).

It is well settled that a party with no direct proprietary ownership in a trademark (the fact pattern alleged in Applicant's Motion) can have standing to oppose, so long as that party has a real commercial interest and is not simply an intermeddler. *Australian*

Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC, 965 F.3d 1370, 1374 (Fed. Cir. 2020) (“Entitlement to a cause of action... is not contingent on whether a [plaintiff] has proprietary rights in its own mark.”); *Jewelers Vigilance Committee, Inc. v. Ullenberg Corp.*, 823 F.2d 490, 2 U.S.P.Q.2d 2021, 2024 (Fed. Cir. 1987) (“If the allegations demonstrate ‘a real interest in the outcome,’ then the opposer ‘need not have a proprietary interest in the mark on which the section 2(d) opposition is grounded.’ Trade association has standing.”); see also *Empresa Cubana del Tabaco v. General Cigar Co.*, 753 F.3d 1270, 111 U.S.P.Q.2d 1058, 1062 (Fed. Cir. 2014); *Ritchie*, 170 F.3d at 1095; *Syngenta Crop Protection, Inc. v. Bio-Chek, LLC*, 90 U.S.P.Q.2d 1112, 2009 WL 691309, at *5 n. 8 (T.T.A.B. 2009) (“Proof of standing in a Board opposition is a low threshold, intended only to ensure that the plaintiff has a real interest in the matter, and is not a mere intermeddler.”) The crux of the analysis is whether the belief that one would be damaged is “reasonable and reflects a real interest in the issue” – not whether the opposer has proprietary rights in a mark. *Ritchie*, 170 F.3d at 1095; *Australian Therapeutic Supplies Pty. Ltd.*, 965 F.3d at 1374 (“neither [the statute] nor our precedent requires that a [plaintiff] in a [Board] proceeding must prove that it has proprietary rights in its own mark in order to demonstrate a real interest in the proceeding and a belief of damage.”)

Applicant’s Motion falsely implies that there is but a single basis for Opposer’s standing (or, more accurately Opposer’s entitlement to a statutory cause of action under the Lanham Act) in its pleadings. *Australian Therapeutic Supplies Pty. Ltd.*, 965 F.3d at 1373 (“the Supreme Court has clarified that there are certain issues that are discussed in terms of ‘standing’ that are more appropriately viewed as requirements for establishing a statutory cause of action”) (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*,

572 U.S. 118, 128 n.4, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014)). That is simply untrue. Applicant fails to realize – or perhaps purposely fails to mention – that Opposer has also alleged that it will be damaged by the registration of the SPINTIRES mark because Applicant is relying on its purported ownership of the mark to demand not only that Opposer and related companies cease use of the names SPINTIRES and MUDRUNNER, but also that Opposer cease all sales of its MUDRUNNER video game on any platform. Brown Decl., Ex. B, at ¶ 24; Brown Decl., Ex. A, at ¶ 9. Indeed, Applicant admits in its answers to the Initial Pleading and the Amended Pleading that “it has demanded that Opposer cease use of the names SPINTIRES.” Remore Decl., Ex. I at ¶ 9; Remore Decl., Ex. H, at ¶ 24. Applicant is further relying on its purported rights in the SPINTIRES mark to oppose the registration of the trademark MUDRUNNER by a company related to Opposer in the United States and in a number of other proceedings internationally between the parties and/or related entities in connection with the MUDRUNNER and SNOWRUNNER marks, both names of video games developed and sold by entities related to Opposer. See sources cited *supra* notes 2-6. This is more than sufficient to show Opposer’s real interest in the proceeding and a reasonable basis for its belief that Opposer would be damaged if the SPINTIRES mark is registered, thus conferring standing upon Opposer. *Tonka Corporation v. Tonka Tools, Inc., et al.*, 229 U.S.P.Q. 857, 1986 WL 83688, at *2 (T.T.A.B. 1986) (finding petitioner was more than a mere intermeddler and instead had a “real interest in seeking to cancel a registration that has been asserted, even defensively, against it”); *M. Aron Corp. v. Remington Products, Inc.*, 222 U.S.P.Q. 93, 96 (T.T.A.B. 1984).

For all of the foregoing reasons, Applicant's claims relating to standing fail on the merits, and Applicant's Motion must be denied.

II. Whether Opposer Has Abandoned The SPINTIRES Mark Is Immaterial To The Instant Proceeding.

As set forth above, summary judgment is intended to dispose of cases where there is no genuine issue of material fact. Applicant's Motion does not (because it cannot) assert that the ground upon which it relies – abandonment – is in any way material to the instant proceeding. A fact is material if it “may affect the decision, whereby the finding of that fact is relevant and necessary to the proceedings.” *Opryland USA Inc*, 23 U.S.P.Q.2d at 1472. (dispute is genuine if evidence could lead reasonable finder of fact to decide question in favor of nonmovant); *Institut National Des Appellations d'Origine v. Brown-Forman Corp.*, 47 U.S.P.Q.2d 1875, 1879, 1998 WL 650076, at *4 (T.T.A.B. 1998) (fact is material when its resolution would affect the outcome of the case). Opposer's use, or alleged lack thereof, of the SPINTIRES mark is not only not material to the instant proceeding, but is entirely irrelevant and, thus, Applicant's Motion must be denied.

“Only the owner of a mark is entitled to apply for registration.” *In re Wella A.G.*, 787 F.2d 1549, 1554, 229 U.S.P.Q. 274 (Fed. Cir. 1986) (J. Nies, concurring); *see also Holiday Inn v. Holiday Inns, Inc.*, 534 F.2d 312, 319, no. 6, 189 U.S.P.Q. 630, 635, n. 6 (C.C.P.A. 1976) (“One must be the owner of a mark before it can be registered.”). “An application filed in the name of an entity that did not own the mark as of the filing date of the application is void.” 37 C.F.R. § 2.71 (emphasis added); *accord Conolty v. Conolty O'Connor NYC, LLC*, 111 U.S.P.Q.2d 1302, 2014 WL 3427346, at *8-9 (T.T.A.B. 2014) (an application is void if not filed by the owner of the mark); *Chien Ming Huang v. Tzu Wei Chen Food Co.*, 849 F.2d 1458, 1460, 7 U.S.P.Q.2d 1335 (Fed. Cir. 1988) (affirming

Board's holding that application that was filed, "examined, deemed registrable, and published for opposition, all in the name of an applicant who was not the owner of the trademark at the filing or at any time during the pendency of the application" was void for failure to comply with Section 1 of the Lanham Act).

That Applicant is not – and was not at the time of the filing of its application for registration – the rightful owner of the mark sought to be registered is explicitly set forth in the Trademark Trial and Appeal Board Manual of Procedure as a ground upon which an opposition can be based. T.B.M.P. § 309.03(c)(1) (June 2020). However, priority of use is not an element of such a ground. *See Jeffrey Simon DBA M3K Enterprises v. James Holda and Beach ATM Services, LLC*, Canc. No. 92066602, 2019 WL 1399633, at *6 (T.T.A.B. Mar. 26, 2019) ("Because we find for Petitioner on his claim that Respondent... was not the rightful owner of the registered mark as of the filing date of the application maturing into Registration..., we need not reach the merits of Petitioner's claims of priority, likelihood of confusion and material misrepresentation.") (citing *Azeka Bldg. Corp. v. Azeka*, 122 U.S.P.Q.2d 1477, 1478 (T.T.A.B. 2017)) (not precedential).

Just a single ground is listed in the cover sheet for this proceeding – "Applicant not rightful owner of mark for identified goods or services" under Trademark Act Section 1. Brown Decl., Ex. A, at 1. Similarly, just a single claim is asserted in both the Initial Pleading and the Amended Pleading – "Applicant Is Not the Rightful Owner of the Mark." Brown Decl., Ex. A, at ¶¶ 12-16; Ex. B, at ¶¶ 29-35. Determining whether Applicant owned the SPINTIRES mark when it filed its application (or whether it still owns the SPINTIRES mark) is the only issue before the Board in this proceeding. Whether or not Opposer "abandoned" its rights in the SPINTIRES mark after Opposer filed its application

is irrelevant. As discussed above, an application that is filed on behalf of an entity that is not the owner of the mark is void *ab initio*. 37 C.F.R. § 2.71; *see also Great Seats, Ltd. v. Great Seats, Inc.*, 84 U.S.P.Q.2d 1235, 2007 WL 1740870, at *2 (T.T.A.B. 2007). If Applicant was not the owner of the SPINTIRES mark when the application was filed, it simply does not matter if Opposer abandoned its rights in the mark after that date. In such an instance, regardless of Opposer's rights, the application would be void. *See, e.g., In re Tong Yang Cement Corporation*, 19 U.S.P.Q.2d 1689, 1991 WL 326558, at *2-3 (T.T.A.B. 1991). Arguably, it is conceivable that neither Applicant nor the Opposer is the rightful owner of the SPINTIRES mark. Applicant not being able to register the SPINTIRES mark in the United States does not automatically grant Opposer that ability – further proof that the abandonment/priority issue is entirely immaterial to the case at hand.

As is set forth in significant detail in Opposer's pleadings, and as is completely ignored in Applicant's Motion, the ownership inquiry is far more complicated than whether Opposer is currently using the SPINTIRES mark (or, for that matter, when and why Applicant stopped using the SPINTIRES mark – nuances also disregarded in Applicant's Motion). Even assuming for the sake of argument that Opposer has abandoned the SPINTIRES mark as alleged in the Motion (which Opposer in no way concedes) and the paragraphs of the Amended Pleading that reference Opposer's use of the SPINTIRES mark were stricken, the dispute as to Applicant's ownership of the mark at the time the Application was filed is anything but resolved. The Application was filed before the license agreement was terminated and before Opposer stopped using the SPINTIRES mark as a result of Applicant's fraud in connection therewith.

The relevant timeline for the ownership analysis is when Applicant filed the Application, not when Opposer stopped using the mark. *See, e.g.*, 37 C.F.R. § 2.71(d); *In re Tong Yang Cement Corporation*, 1991 WL 326558, at *1. Opposer's purported abandonment is not the material issue in this proceeding – Applicant's rights in the SPINTIRES mark at the time of application is. Applicant's Motion explicitly ignores the only material issue before the Board – whether Applicant was the rightful owner of the mark at the time its Application was filed, and, thus, fails to prove that there is no genuine dispute as to any material fact. Thus, the Motion must be denied.

CONCLUSION

For all of the foregoing reasons, Opposer respectfully requests that the Board deny Applicant's ill-advised Motion for Summary Judgment and reset the deadlines in this case to allow for the parties to complete discovery on the relevant and material issues in this case and thereafter proceed to trial.

Respectfully submitted,

SABER INTERACTIVE INCORPORATED

By: /s/ Abigail J. Remore /

Abigail J. Remore
CHIESA SHAHINIAN & GIANTOMASI, PC
One Boland Drive
West Orange, New Jersey 07052
(973) 530-2114
(973) 530-2314
Attorneys for Opposer

Dated: November 23, 2020

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing Opposition to Applicant's Motion for Summary Judgment was served via e-mail on the Attorney for Applicant, Michael J. Brown, Michael J. Brown Law Office LLC, michael@mjbrownlaw.com.

/s/ Abigail J. Remore /
ABIGAIL J. REMORE
CHIESA SHAHINIAN & GIANTOMASI PC
Attorneys for Opposer

Dated: November 23, 2020

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

In the matter of Application Serial No. 79/248,677 Published in the Official Gazette on May 7, 2019 at TM 732.

SABER INTERACTIVE
INCORPORATED
n/k/a S3D INTERACTIVE, INC.

Opposer,

v.

OOVEE LTD

Applicant.

Opposition No. 91248894

**DECLARATION OF ABIGAIL J. REMORE IN OPPOSITION TO APPLICANT'S
MOTION FOR SUMMARY JUDGMENT**

I, ABIGAIL J. REMORE, of full age, hereby declare and state as follows:

1. I am an attorney at law, licensed to practice in the State of New Jersey, and member at Chiesa Shahinian & Giantomasi PC, attorneys for Opposer, Saber Interactive Incorporated, n/k/a S3D Interactive, Inc. ("Opposer"). I submit this Declaration in opposition to Applicant's Motion for Summary Judgment.

2. I have personal knowledge of the facts set forth in this Declaration.

3. Attached hereto as Exhibit A is a true and correct copy of documents titled "Nondisclosure, Noncompetition and Developments Agreement" Bates Numbered SAB_004514 – SAB_004518 produced by Opposer to Applicant in the instant proceeding. These documents were designated as CONFIDENTIAL in accordance with

the Stipulated Protective Order¹ entered into between the parties and will be filed under seal.

4. Attached hereto as Exhibit B is a true and correct copy of the Extension of Time to Oppose filed on April 17, 2019 by Applicant Oovee Ltd. (“Applicant”) against Application Serial No. 88/171,058.

5. Attached hereto as Exhibit C is a true and correct copy of the Notice of Opposition filed by Applicant in Proceeding No. 91249491 against Application Serial No. 88/171,058.

6. Attached hereto as Exhibit D is a true and correct printout from the webpage https://euipo.europa.eu/eSearch/#details/trademarks_/018072745, accessed on November 23, 2020, which is information from the European Union Intellectual Property Office’s (“EUIPO”) eSearch Plus database relating to Trademark No. 018072745 for the mark SNOWRUNNER, indicating that Applicant has opposed its registration.

7. Attached hereto as Exhibit E is a true and correct printout from the webpage <https://euipo.europa.eu/eSearch/#details/trademarks/018055358>, accessed on November 23, 2020, which is information from EUIPO eSearch Plus database relating to Trademark No. 018055358 for the mark MUDRUNNER, indicating that Applicant has opposed its registration.

8. Attached hereto as Exhibit F is a true and correct printout from the webpage <https://trademarks.ipo.gov.uk/ipo-tmcase/page/Results/1/UK00003394432>, accessed on November 23, 2020, which is information from the United Kingdom Intellectual Property Office (“UKIPO”) trade mark database relating to Trademark No.

¹ 15 TTABVUE.

UK00003394432 for the mark MUDRUNNER, indicating that Applicant has opposed its registration.

9. Attached hereto as Exhibit G is a true and correct printout from the webpage <https://trademarks.ipo.gov.uk/ipo-tmcase/page/Results/1/UK00003402572>, accessed on November 23, 2020, which is information from the UKIPO trade mark database relating to Trademark Registration No. UK00003402572 for the mark SNOWRUNNER, indicating that Applicant has filed a cancellation proceeding against it.

10. Attached hereto as Exhibit H is a true and correct copy of a letter dated January 25, 2019 from Applicant's former law firm to Focus Home Interactive, Opposer's video game publishing partner, Bates Numbered SAB_004371 – SAB_004374 produced by Opposer to Applicant in the instant proceeding. This document was designated as CONFIDENTIAL in accordance with the Stipulated Protective Order entered into between the parties and will be filed under seal. Annexes to this letter are not relevant to the instant Motion and have been omitted.

11. Attached hereto as Exhibit I is a true and correct copy of Applicant's July 26, 2019 Answer to Opposer's First Amended Notice of Opposition in the instant proceeding. 5 TTABVUE.

12. Attached hereto as Exhibit J is a true and correct copy of Applicant's August 29, 2019 Answer to Opposer's First Amended Notice of Opposition in the instant proceeding. 9 TTABVUE.

13. Attached hereto as Exhibit K is a true and correct copy of the unpublished decision in *Biogrand Co., Ltd. v. Sunbio Corporation*, Canc. No. 92067124, 2019 WL 479309 (T.T.A.B. Feb. 1, 2019).

14. Attached hereto as Exhibit L is a true and correct copy of the unpublished decision in *Jeffrey Simon DBA M3K Enterprises v. James Holda and Beach ATM Services, LLC*, Canc. No. 92066602, 2019 WL 1399633 (T.T.A.B. Mar. 26, 2019).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 23, 2020.

/s/ Abigail J. Remore /
ABIGAIL J. REMORE

EXHIBIT A

The documents enclosed as Exhibit A are designated as CONFIDENTIAL and have thus been redacted from the publicly available version of this document.

EXHIBIT B

ESTTA Tracking number: **ESTTA967436**

Filing date: **04/17/2019**

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

Applicants	Saber Interactive, Inc.
Application Serial Number	88171058
Application Filing Date	10/26/2018
Mark	MUDRUNNER
Date of Publication	03/19/2019
Potential Opposer's Correspondence Information	Michael J. Brown Michael J Brown Law Office LLC 354 Eisenhower Parkway Plaza 1, 2nd Floor, Suite 2025 Livingston, NJ 07039 UNITED STATES michael@mjbrownlaw.com 9735776300

**First 90 Day Request for Extension of Time to Oppose for Good
Cause**

Pursuant to 37 C.F.R. Section 2.102, Oovee Ltd, 97 Yarmouth Road, Norwich, Norfolk, NR7 0HF, UNITED KINGDOM, a Limited company, organized under the laws of United Kingdom, respectfully requests that it be granted a 90-day extension of time to file a notice of opposition against the above-identified mark for cause shown.

Potential opposer believes that good causes are established for this request by:

- The potential opposer needs additional time to investigate the claim
- The potential opposer needs additional time to confer with counsel

The time within which to file a notice of opposition is set to expire on 04/18/2019. Oovee Ltd respectfully requests that the time period within which to file an opposition be extended until 07/17/2019.

Respectfully submitted,
/MichaelJBrown/
Michael J. Brown
michael@mjbrownlaw.com
04/17/2019

EXHIBIT C

ESTTA Tracking number: **ESTTA987560**

Filing date: **07/15/2019**

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

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	Oovee Ltd
Granted to Date of previous extension	07/17/2019
Address	97 YARMOUTH ROAD NORWICH, NORFOLK, NR7 0HF UNITED KINGDOM

Attorney information	MICHAEL J. BROWN MICHAEL J BROWN LAW OFFICE LLC 354 EISENHOWER PARKWAY Plaza 1, 2nd Floor, Suite 2025 LIVINGSTON, NJ 07039 UNITED STATES michael@mjbrownlaw.com 9735776300
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Applicant Information

Application No	88171058	Publication date	03/19/2019
Opposition Filing Date	07/15/2019	Opposition Period Ends	07/17/2019
Applicant	Saber Interactive, Inc. 4 Winthrop Place Maplewood, NJ 07040 UNITED STATES		

Goods/Services Affected by Opposition


Class 009. First Use: 2017/10/31 First Use In Commerce: 2017/10/31 All goods and services in the class are opposed, namely: Computer game software for personal computers and home video game consoles; downloadable electronic video game programs; computer and video game programs
--

Grounds for Opposition

Priority and likelihood of confusion	Trademark Act Section 2(d)
Applicant not rightful owner of mark for identified goods or services	Trademark Act Section 1

Mark Cited by Opposer as Basis for Opposition

U.S. Application	79248677	Application Date	11/15/2018
------------------	----------	------------------	------------

No.			
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	SPINTIRES		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 009. First use: First Use: 0 First Use In Commerce: 0 Downloadable computer game programs; downloadable computer games programmes; downloadable computer games programs; downloadable computer games software; downloadable computer game software; downloadable computer game programmes; Recorded computer game programs; computer game programs for single player and multi playergames; recorded computer games software; recorded computer game software; recorded computer game programmes		

Attachments	79248677#TMSN.png(bytes) Appl-0502 Notice of Opposition.pdf(3194273 bytes)
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Signature	/MichaelJBrown/
Name	Michael J. Brown
Date	07/15/2019

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

In the Matter of Application Serial No. 88/171,058

Published in the Official Gazette of March 19, 2019

Atty. Ref.: Appl-0502

	X	
Oovee Ltd	:	
	:	
Opposer,	:	
	:	
-against-	:	Opposition No.
	:	
Saber Interactive, Inc.	:	
	:	
Applicant.	:	
	X	

Submitted via ESTTA

NOTICE OF OPPOSITION

Oovee Ltd, a United Kingdom limited company ("Oovee"), believes that it will be damaged by Saber Interactive, Inc.'s registration of the mark shown in Serial No. 88/171,058, filed October 26, 2018, and hereby opposes same.

As grounds for opposition, it is alleged that:

1. Oovee, including any and all predecessors-in-interest, has continuously used SPINTIRES as a trademark for a variety of computer game and video game products, including "Computer game software for personal computers and home video game consoles; downloadable electronic video game programs; computer and video game programs" since at least as early as 2010, and has continuously used SPINTIRES as a trademark in commerce that Congress may regulate since at least as early as June 13, 2014, when the first commercial release of the SPINTIRES game was launched.

2. Prior to its commercial launch, Oovee hosted a series of trial versions of the SPINTIRES game starting in 2008.

3. Oovee is the owner of U.S. trademark application no. 79/248677 as an extension of International Registration No 1442167.

4. Since the dates of first use and first use in commerce asserted in Paragraph 1, Oovee has continuously sold its computer game and video game products, under and in connection with its SPINTIRES trademark in the United States and has developed an exceedingly valuable goodwill and tremendous recognition value in respect of said trademark.

5. By virtue of its efforts and the expenditure of considerable sums for advertising and promotional activities, and by virtue of the excellence of its computer game and video game products sold thereunder, Oovee has gained for its SPINTIRES trademark a most valuable reputation.

6. On or about October 26, 2018, Saber Interactive, Inc. ("Saber") filed an application in the United States Patent and Trademark Office, Serial No. 88/171,058, for registration on the Principal Register in Class 9 of the mark MUDRUNNER for " Computer game software for personal computers and home video game consoles; downloadable electronic video game programs; computer and video game programs " based on use of the mark since October 31, 2017.

7. The specimen of use submitted with the MUDRUNNER application shows prominent use of the SPINTIRES trademark and refers to the identified game as "a Spintires Game" and is marketed and promoted as "Spintires: MudRunner." See, Exhibit A.

8. On or about August 2, 2016, Oovee granted a license to use the SPINTIRES trademark to Saber (the "License Agreement"). A copy of the License Agreement is attached as Exhibit B.

9. The License Agreement states “Oovee owns Spintires (the ‘Licensed Articles’)” and further states “Oovee retains title and ownership of the Licensed Articles”. Saber was granted “an exclusive license to Develop and publish console ports and enhancements to the original Spintires PC game”. See, Exhibit B, paragraph 1.

10. The License Agreement granted Saber “the right to use the Licensed Property to market, advertise and promote for sale the Licensed Article(s).” See, Exhibit B, paragraph 7.

11. The License Agreement states that “Oovee is the sole owner of the Spintires property.” The only intellectual property identified as owned by Saber is “its proprietary technology – the Saber3d Engine.” See, Exhibit B, paragraph 11 (Ownership of Intellectual Property).

12. The License Agreement states that upon termination of the License Agreement due to Saber’s breach, Saber “shall cease all development of the Port and have no right to develop or publish the Port.” See, Exhibit B, paragraph 13.

13. Oovee, through counsel, provided Saber with notice of Saber’s breach of the License Agreement on January 25, 2019. No remedy of the breach occurred within the thirty days following such notice, thereby terminating any right Saber might have to publish the variation of the Spintires game identified with the MUDRUNNER trademark. See, Exhibit B, paragraph 12(a).

14. In accordance with the License Agreement, Saber agreed that all rights in the Spintires games belong to Oovee, including the secondary trademark MUDRUNNER which was applied to the game software developed by Saber pursuant to the License Agreement.

15. Oovee is the rightful owner of the MUDRUNNER trademark as Oovee permitted Saber to use of the MUDRUNNER trademark as a secondary mark for use with Oovee’s SPINTIRES trademark under the License Agreement.

16. Oovee retained all ownership rights in the name and mark MUDRUNNER and has been involved in the SPINTIRES MUDRUNNER video games, and all subsequent iterations thereof since Oovee first hosted the SPINTIRES-branded game in 2008, and subsequently licensed development thereof under the SPINTIRES and MUDRUNNER trademarks to Saber.

17. As Saber's use of the MUDRUNNER trademark was solely in conjunction with the products sold under the SPINTIRES trademark, Oovee, as the owner of the SPINTIRES trademark controlled the quality of such goods and therefore is the rightful owner of the MUDRUNNER trademark.

18. Upon information and belief, at the time the MUDRUNNER application was filed, Saber knew that the correct owner of the MUDRUNNER trademark was Oovee.

19. Upon information and belief, Saber was never the owner of and never acquired any rights in the trademark MUDRUNNER in the United States or otherwise.

20. Upon information and belief, the declaration filed by Saber for the MUDRUNNER application was made with knowledge that the rights in the MUDRUNNER trademark belonged to Oovee.

21. Upon information and belief, as Saber submitted a false declaration with the application, and knowingly filed an application in the name of the wrong applicant, the present application for MUDRUNNER is void ab initio.

22. Upon information and belief, the goods covered by Saber's application are identical in kind to the goods for which Oovee has for many years used SPINTIRES as a trademark in the United States.

23. Saber's use of the MUDRUNNER trademark are all derivatives of the original SPINTIRES game, and include variations such as SPINTIRES: MUDRUNNER, SPINTIRES

MUDRUNNER AMERICAN WILDS, AND MUDRUNNER 2. The gaming community acknowledges and associates these games with the original SPINTIRES game and with Oovee.

24. There is no issue of priority, since the filing date of Saber's MUDRUNNER federal trademark application is well subsequent to Oovee's first use and first use in commerce of SPINTIRES as a trademark.

25. Oovee's mark has acquired distinctiveness over the many years in which the mark has been in use.

26. Consumers are likely to be deceived as to the origin, sponsorship, or affiliation of Saber's goods bearing the MUDRUNNER trademark, which has been consistently co-branded with Oovee's SPINTIRES trademark.

27. Prospective purchasers of Saber's goods offered under the MUDRUNNER trademark are likely to erroneously believe that such goods originate with or are sponsored by Oovee or to erroneously assume that there is some trade connection between Saber and Oovee.

28. Saber has willfully committed trademark theft, deliberately confusing consumers as to the source of the game SPINTIRES MUDRUNNER and passing off, riding on the coattails of the extremely successful million copy seller game SPINTIRES and have and will deprive the trademark proprietor Oovee of the benefit of the essential right to control the marketing of the game, including future derivatives bearing the MUDRUNNER secondary trademark and has adversely affected the functions of the SPINTIRES trademark by deliberately co-branding, then debranding and rebranding of the SPINTIRES game series and franchise, thereby creating a counterfeit product of SPINTIRES.

29. Oovee will be damaged by the registration sought by Saber as Oovee had licensed the MUDRUNNER mark for use in commerce in connection with its Spintires game. Saber,

improperly asserting trademark rights that it does not have, has stated that it will continue with the development and publishing of the Spintires Mudrunner game using the Mudrunner mark only (without the Spintires mark) thereby passing off the goodwill from Spintires mark to Mudrunner mark.

30. Such rebranding is with intent to deprive the trade mark proprietor Oovee of the benefit of the essential right to control the marketing of the game, including future derivatives bearing the Mudrunner mark, and has adversely affected the functions of the Spintires mark.

31. The registration sought by the Saber would support and assist the Saber in its confusing and misleading use of the name and trademark MUDRUNNER which Oovee owns and licensed to Saber for use in commerce.

32. Oovee's SPINTIRES mark is famous, in that more than one million copies of the SPINTIRES game has been sold worldwide.

33. Oovee will be injured by the granting of a Certificate of Registration to Saber for the mark of application Serial No. 88/171,058 because the MUDRUNNER trademark is associated with Oovee's SPINTIRES trademark and therefore, when used in connection with the goods of Saber, such mark:

- a. properly belongs to Oovee, and not to Saber;
- b. would be likely to cause confusion or to cause mistake or to deceive;
- c. would falsely suggest a connection with Oovee; and
- d. would tend to damage Oovee's valuable goodwill in its SPINTIRES trademark.

WHEREFORE, Oovee, by its attorneys, requests that this opposition be sustained and the application for registration be denied.

Respectfully submitted,

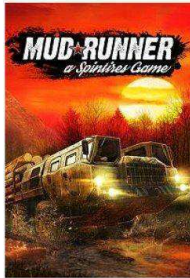
Dated: July 15, 2018

By: /MichaelJBrown/
Michael J. Brown
Michael J Brown Law Office LLC
354 Eisenhower Parkway
Plaza I, 2nd Floor, Suite 2025
Livingston, NJ 07039
tel: (973) 577-6300
fax: (973) 577-6301
michael@mjbrownlaw.com

Attorneys for Opposer, Oovee Ltd

EXHIBIT A

19 VEHICLES EACH WITH DIFFERENT STRENGTHS



XBOX LIVE Xbox One X Enhanced

Spintires: MudRunner

Focus Home Interactive • Strategy, Simulation

 [Game hub](#)

★★★★★ 267

Spintires: MudRunner is the ultimate version of the million-seller hit Spintires for the first time on consoles. The game puts players in the driver seat and dares them to take charge of incredible all-terrain vehicles, venturing across extreme landscapes with only a map and compass as guides! It's [More](#)



EVERYONE

Online Interactions Not Rated by the ESRB

\$34.99+

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...

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Online multiplayer on Xbox requires Xbox Live Gold (subscription sold separately).

* Offers in-app purchases

[See System Requirements](#)

[Overview](#)

[System Requirements](#)

[Reviews](#)

[Related](#)

Included in



Spintires: MudRunner

EXHIBIT B

License Agreement

This License Agreement (this "Agreement") is made effective as of August 2, 2016 between Oovee, Ltd. A private Limited Company registered in England and Wales and Saber Interactive, a Delaware, LLC.

In the Agreement, the party who is granting the right to use the licensed property will be referred to as "Oovee," and the party who is receiving the right to use the licensed property will be referred to as "Saber Interactive."

The parties agree as follows:

1. GRANT OF LICENSE Oovee owns Spintires (the "Licensed Articles"). In accordance with this Agreement, Oovee grants Saber Interactive an exclusive license to Develop and publish console ports and enhancements to the original Spintires PC game for video game consoles including, but not limited to Xbox One, Playstation 4, Wii, Mac OS the "Port". Oovee retains title and ownership of the Licensed Articles.

Any enhancements or improvements made to the game may also be made available on the PC via downloadable content through Steam or other digital distribution channels on similar terms to this Agreement.

2. PAYMENT OF ROYALTY Saber Interactive will pay to Oovee a royalty which shall be calculated as follows:

- ☐ 10% up to \$900,000 in net receipts.
- ☐ 25% of all amounts exceeding \$900,000

With each royalty payment, Saber Interactive will submit to Oovee a written report that sets forth the calculation of the amount of the royalty payment. Saber agrees to pay Oovee ("Royalties") as a

percentage of Net Revenues (as defined below), unless otherwise specified in each applicable Schedule. "Net Revenues" shall be defined as one hundred percent (100%) of Saber's actual gross receipts and all other receivables of any kind whatsoever received in payment of Port whether received by Saber ("Gross Revenues"), less actual and verifiable, out-of-pocket expenses solely and directly attributable to the Port, including: (a) third-party, platform-owner fees (not to exceed thirty percent (30%) of Gross Revenues); (b) third-party, distribution fees (not to exceed twenty percent (20%) of Gross Revenues); and (c) government taxes (e.g., VAT, excise or sales or use tax, governmental withholdings, etc.) incurred in connection with the sale or exploitation of the Licensed Article(s), if any, but excluding any taxes on Saber's income, to the extent actually paid by and not reimbursed to Saber.

Any other deductions other than those directly attributable to the port must be mutually agreed upon in advance and in writing by Saber and Oovee. Saber shall have the right, in its sole discretion, to determine the sales price of the game, to offer the game at discounts and as promotional giveaways.

3. MODIFICATIONS The scope of the work to be completed by Saber is enumerated in Appendix A of this Agreement. Changes outside of said scope are not permitted unless the prior written approval of Oovee is obtained. Such approval shall not be *unreasonably withheld*.

4. TRANSFER OF RIGHTS This Agreement shall be binding on any successors of the parties. Neither party shall have the right to assign its interests in this Agreement to any other party, unless the prior written consent of the other party is obtained. However, Saber shall have the right to assign publishing rights to a third-party publisher.

5. LICENSE TERRITORY AND LANGUAGE: Saber's rights herein

shall be limited to the right to develop, create, publish, market, distribute and sell the Licensed Article(s), and to engage in Advertising and Promotion worldwide. Saber shall have the right, but not the obligation to localize the Licensed Property into any language desired.

6. EXCLUSIVITY: The rights granted herein shall be exclusive unless otherwise indicated on the applicable Schedule.

7. ADVERTISING AND PROMOTION: Saber shall have the right to use the Licensed Property to market, advertise and promote for sale the Licensed Article(s) during the License Term in the License Territory ("Advertising and Promotion").

8. ROYALTY STATEMENTS AND PAYMENTS: Saber shall, within thirty (30) days of the end of each calendar quarter (March 31, June 30, September 30 and December 31 of each year), commencing with the first full calendar quarter following Saber's execution of this Agreement and continuing until a final Certification of Wind-Up is delivered, furnish Oovee complete statements, certified to be accurate by an authorized representative of Saber, specifying the License Territory, a description of the Licensed Article(s), a description of the Licensed Property used therein or thereon (including, without limitation, any and all names and likenesses from the Licensed Property which appear in or on the Licensed Article(s), including, without limitation, any Collateral Materials and Advertising and Promotion), the amount due Oovee Gross Receipts, Adjusted Gross Receipts, unit sales, invoice price, quantity invoiced, Royalties rate, the distribution channels or portals, deductions for actual cash and credit returns of defective merchandise (including the amount and quantity related thereto), and other deductions as specifically permitted in Paragraph 2 above the amount shown to be payable to upon invoice within 10 business after the rendering of the respective Royalty Statement.

9. REPRESENTATIONS AND WARRANTIES: (a) Saber

represents and warrants all of the following:

(i) Saber is a company duly organized, validly existing and in good standing under the laws of the state and country of its principal office, with full power and authority to execute and deliver this Agreement and to perform its obligations, and maintains its principal executive office at the address set forth herein. The execution, delivery and performance of this Agreement have been duly authorized by all necessary actions of and this Agreement constitutes a valid and binding obligation of Saber enforceable against Saber in accordance with its terms.

(ii) Saber shall comply with and act in accordance with: (A) any and all applicable laws and other legal obligations of or in the License Territory including, without limitation, local, state and federal directives, rules, assessments, regulations, filing requirements, ordinances, statutes, codes, judgments and civil or common law; and (B) conventions and treaties to which the United States or any legal subdivision thereof is a party (individually and collectively, "Law" or "Laws").

(iii) The making of this Agreement by Saber does not violate any agreement, right or obligation between Saber and any other person, entity, firm or corporation, and the permission or agreement of no other person, entity, firm or corporation is required to execute this Agreement or perform the obligations herein, or Saber has secured such permission, if necessary.

(iv) Neither the execution and delivery of this Agreement nor the performance of the Saber of any or all of the terms, obligations and services herein shall: (A) breach, be in conflict with or constitute a default under any agreement or commitment to which Saber is a party; (B) violate any Law applicable to Saber; or (C) incur for or involve Oovee in any liability whatsoever.

(v) Saber shall undertake a level of customer service and provide

warranties to consumers at least as favorable as is standard in its industry.

(vi) To the extent any third-party materials or third-party intellectual property rights are used by Saber in connection with the Licensed Article(s) or the Advertising and Promotion, Saber represents and warrants that it owns or controls or has acquired under license all *necessary rights in and to all such third-party materials and intellectual property rights included in the Licensed Article(s) or the Advertising and Promotion, whether in the development thereof or in the finished product released to the public.* Saber has paid or will pay any and all re-use and license fees to the appropriate person or entity (which fees may include a calculation and payments in satisfaction of pension and welfare obligations) and has obtained or will obtain written and executed authorizations for such use from the person or entity having the right to grant such permissions.

(vii) None of the representations or warranties made by Saber in this Agreement as of the date hereof and none of the statements contained in any agreement or other document or report furnished by or on behalf of Saber to Oovee in connection with this Agreement *contain any untrue statement of a material fact or omit any material fact necessary to make such statements accurate in light of the circumstances under which they were made.*

(b) Oovee represents and warrants all of the following:

(i) Oovee is a company duly organized, validly existing and in good standing under the laws of the state and country of its principal office, with full power and authority to execute and deliver this Agreement and to perform its obligations, and maintains its *principal executive office at the address set forth herein.* The execution, delivery and performance of this Agreement have been duly authorized by all necessary actions of and this Agreement constitutes a valid and binding obligation of Oovee enforceable against Saber in accordance with its terms.

(v) Oovee shall comply with and act in accordance with: (A) any and all applicable laws and other legal obligations of or in the License Territory including, without limitation, local, state and federal directives, rules, assessments, regulations, filing requirements, ordinances, statutes, codes, judgments and civil or common law; and (B) conventions and treaties to which the United States or any legal subdivision thereof is a party (individually and collectively, "Law" or "Laws").

(vi) The making of this Agreement by Oovee does not violate any agreement, right or obligation between Oovee and any other person, entity, firm or corporation, and the permission or agreement of no other person, entity, firm or corporation is required to execute this Agreement or perform the obligations herein, or Saber has secured such permission, if necessary.

(iv) Neither the execution and delivery of this Agreement nor the performance of the Oovee of any or all of the terms, obligations and services herein shall: (A) breach, be in conflict with or constitute a default under any agreement or commitment to which Oovee is a party; (B) violate any Law applicable to Oovee; or (C) incur for or involve Oovee in any liability whatsoever.

(v) Oovee shall undertake a level of customer service and provide warranties to consumers at least as favorable as is standard in its industry.

(vi) To the extent any third-party materials or third-party intellectual property rights are used by Saber in connection with the Licensed Article(s) or the Advertising and Promotion, Oovee represents and warrants that it owns or controls or has acquired under license all necessary rights in and to all such third-party materials and intellectual property rights included in the Licensed Article(s) or the Advertising and Promotion, whether in the development thereof or in the finished product released to the public. Oovee has paid or will pay any and all re-use and license fees to the appropriate

person or entity (which fees may include a calculation and payments in satisfaction of pension and welfare obligations) and has obtained or will obtain written and executed authorizations for such use from the person or entity having the right to grant such permissions.

(vii) None of the representations or warranties made by Oovee in this Agreement as of the date hereof and none of the statements contained in any agreement or other document or report furnished by or on behalf of Oovee to Saber in connection with this Agreement contain any untrue statement of a material fact or omit any material fact necessary to make such statements accurate in light of the circumstances under which they were made.

10. AGREEMENT NOT TO SUE AND WAIVER Saber hereby, as part of the consideration for this Agreement, waives any right to pursue any course of action against Oovee for copyright, trade secret or any other form of intellectual property infringement that may have resulted from the release of the PC version of Spintires. Such waiver shall become effective upon release of the Licensed Property on any of the platforms indicated in Appendix A. Prior to said release and from the effective date of this agreement and while it is in force, Saber shall agree to withhold pursuit of any legal claims arising from the release of Spintires.

11. OWNERSHIP OF INTELLECTUAL PROPERTY Oovee is the sole owner of the Spintires property. Saber is the sole owner of its proprietary technology – the Saber3d Engine.

Saber shall utilize a combination of its proprietary technology – the Saber3d Engine with existing Spintires code to create the console ports. Saber and Oovee agree that as part of this agreement, both parties shall have the right in perpetuity to use the source code in the PC and console versions of the game for future development purposes. *Such rights shall survive this Agreement whether the Port is released or whether the agreement is terminated in*

accordance with Paragraph 12.

12. TERMINATION: (a) *Termination with Notice and Right to Cure:* Oovee and Saber shall have the right, in its sole discretion, in addition to any and all other rights and remedies and at no cost or expense to itself, to declare a material breach of this Agreement and to terminate this Agreement effective immediately upon notice to other party at any time upon the occurrence provided that both parties shall have a period not to exceed thirty (30) days from the date of notice by the notifying party of such default to cure the default to the other party's sole satisfaction.

(b) *Termination for Convenience:* Saber shall have the right to terminate the game for convenience at any time prior to the commercial release of the Licensed Articles.

13. EFFECT OF TERMINATION OR EXPIRATION: Upon termination of this Agreement for cause, the following shall occur: (a) If termination is due to Saber's breach, it shall cease all development of the Port and have no right to develop or publish the Port. (b) If termination is due to Oovee's breach, Saber shall have the right to continue development of the Port at its sole discretion and offset and actual or reasonably anticipated costs from Royalty due to Oovee. Saber's obligation to pay Royalty to Oovee shall survive termination after Commercial Release of the Licensed Articles.

14. INDEMNIFICATION Both parties shall defend, indemnify and forever hold harmless each other's officers, directors, shareholders, employees, agents, representatives, assigns and successors-in-interest from and against any and all claims, liabilities, penalties, losses, costs, damages, demands, actions, causes of action, suits, proceedings, judgments and expenses including, without limitation, amounts paid in settlement, reasonable attorneys' fees, court costs and other legal expenses arising out of, connected with, or relating to any material breach by

either party of any of its representations or warranties, provided that prompt written notice is given to said party of any such claim or suit. The provisions of this Paragraph shall survive termination of this Agreement.

15. NOTICES AND PAYMENTS: Any notice or other communication required or permitted to be given shall be in writing addressed to the respective party at the address set forth in the introductory paragraph hereof and may be personally served, telecopied or sent by registered or certified mail, postage prepaid, return receipt requested and shall be deemed given: (a) if served in person, when served; (b) if telecopied, on the date of transmission if confirmed before 3:00 p.m. (according to the local time of the receiving party) on a business day and otherwise on the following business day, provided that a hard copy of such notice is also sent pursuant to (c) below; or (c) if by certified or registered mail, on the third (3rd) business day after deposit in the mail, postage prepaid.

Unless otherwise directed by Oovee, all notices shall be sent by mail or facsimile to:

Oovee

170 High Street Gorleston-On-Sea

NORFOLK NR31 6RG United Kingdom

Attn: ~~Tony Fellas~~ ZANE SAXTON

Email: ~~tony@oovee.co.uk~~ ZANE.SAXTON@OOVEE.CO.UK

Notices to Saber shall be addressed to:

Saber Interactive

4 Winthrop Place

Maplewood, NJ 07040

Attn: Matthew Karch

E-mail: karch@saber3d.com

Wire Transfer Payments: All payments may be made via wire transfer to the following account and shall be made according to instructions on the invoices issued after receipt by Oovee of the royalty statements.

16. GOVERNING LAW, VENUE AND JURISDICTION: This Agreement, and its validity, construction and effect, shall be governed by and enforced in accordance with the internal laws of the United Kingdom (*i.e.*, without reference to the conflicts of laws provisions thereof). Each party to this Agreement irrevocably submits to the personal jurisdiction and venue of a state or federal court of competent jurisdiction in the United Kingdom for any purpose permitted herein.

17. DISPUTE RESOLUTION: Any controversy, claim, or dispute arising out of or relating to this Agreement or this agreement to arbitrate, including, without limitation, the interpretation, performance, formation, validity, breach, or enforcement of this Agreement, and further including any such controversy, claim, or dispute against or involving any officer, director, agent, employee, affiliate, successor, predecessor, or assign of a party to this Agreement (each, a "Dispute"), shall be fully and finally adjudicated by binding arbitration to the fullest extent allowed by law (the "Arbitration"). The seat of the Arbitration shall be the London Court of International Arbitration.

18. LIMITATION ON LIABILITY: The parties agree that in any arbitration or court action pursuant to Paragraph 17 above, the damages that may be awarded shall be limited to any actual damages suffered. In no event shall either party be liable for any *special, incidental, consequential, exemplary or punitive damages*, or any claim for loss of profits, lost business or lost business opportunities, even if the other party has been advised of the possibility of such damages.

19. WAIVER, MODIFICATION AND AMENDMENT: No modification, amendment or waiver of any of the provisions contained in this Agreement, or any future representation, promise or condition in connection with the subject matter of this Agreement, shall be binding upon any party to this Agreement unless made in writing and signed by a duly authorized representative or agent of such party. The failure by either party to enforce, or the delay by either party in enforcing, any of said party's rights under this Agreement shall not be construed as a continuing waiver of such rights, and said party may, within such time as is provided by the laws established by any government with applicable jurisdiction, commence appropriate suits, actions or proceedings to enforce any or all of such rights. A waiver by either party of a default in one or more instances shall not be construed as a waiver in other instances.

20. NO JOINT VENTURE: This Agreement does not constitute and shall not be construed to constitute an agency, a partnership or a joint venture between Oovee and Saber. Saber shall have no right to obligate or to bind the Oovee Entities in any manner whatsoever, and nothing contained in this Agreement shall give or is intended to give any rights of any nature to any third-party.

21. ADDITIONAL DOCUMENTS: Upon either party's request, the other party shall promptly execute and deliver to any the requesting party such further documents and instruments, in form and substance satisfactory to the requesting party, to confirm and effectuate the terms and conditions of this Agreement, and, in the event that said party fails or is unable to execute any such documents or instruments, the party appoints the requesting party its attorney-in-fact with the full right and authority to execute and deliver the same, which such appointment shall be deemed a power coupled with an interest and shall be irrevocable under any and all circumstances.

22. SEVERABILITY: If any term or provision of this Agreement, as

applied to either party or any circumstance, for any reason shall be declared by a court of competent jurisdiction to be invalid, illegal, unenforceable, inoperative or otherwise ineffective, that provision shall be limited or eliminated to the minimum extent necessary so that this Agreement shall otherwise remain in full force and effect and enforceable, provided, however, that if any term or provision of this Agreement pertaining to the payment of monies to Oovee shall be declared invalid, illegal, unenforceable, inoperative or otherwise ineffective, Oovee shall have the right to terminate this Agreement as provided herein.

23. COUNTERPARTS: This Agreement may be executed in one or more counterparts, each of which shall be an original, but all of which together shall constitute one agreement binding on all of the parties hereto notwithstanding that all of the parties hereto are not signatories to the same counterpart. Each of the parties agrees that a photographic or facsimile copy of the signature evidencing a party's execution of this Agreement shall be effective as an original signature and may be used in lieu of the original for any purpose.

24. PARAGRAPH HEADINGS AND DEFINITIONS: Paragraph and subparagraph headings are for ease of reference only and shall not have any effect upon the

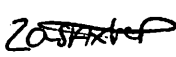
construction of this Agreement or any of the terms or provisions hereof. All capitalized terms used herein shall be defined as set forth elsewhere in this Agreement.

25. ENTIRE AGREEMENT: This Agreement, together with Schedule "A" and all such additional Schedules as are added hereto following the date hereof and thereby made a part hereof, constitutes a single, integrated written contract expressing the entire agreement of the parties concerning the subject matter hereof. No covenants, agreements, representations or warranties of any kind whatsoever have been made by any party to this Agreement except as specifically set forth in this Agreement. All

prior agreements, discussions and negotiations have been and are merged and integrated into, and are entirely superseded by, this Agreement. Each party and its counsel have participated fully in the review and revision of this Agreement. Any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply in the interpretation of this Agreement.

IN WITNESS WHEREOF, each party has executed this Agreement on the date indicated below

Licensor: Oovee

By:  3/8/16

Oovee , LTD

Zane Saxton

Licensee: Saber Interactive

By: 

Saber Interactive, Inc.

Matthew Karch

EXHIBIT D



Protect your intellectual property in the European Union

EUTM file information

SNOWRUNNER

018072745

Timeline



Trade mark information

Name	SNOWRUNNER	Filing date	28/05/2019
Filing number	018072745	Registration date	

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X

Nature	Individual	Second language	German
Nice classes	9, 28 (Nice Classification)	Application reference	7501604
Vienna Classification		Trade mark status	Application opposed
		Acquired distinctiveness	No

Goods and services

English (en) ▼

- 9 Computer game software for personal computers and home video game consoles; downloadable electronic video game programs; computer and video game programs; computer software; computer game software; mobile applications.
- 28 Video game consoles.

Description

No data

Owners

Saber Interactive Inc.

ID	1093776	Country	US - United States	Correspondence address	
Organisation	Saber Interactive Inc.	State/county	New Jersey	Saber Interactive Inc. 4 Winthrop Place Maplewood New Jersey 07050	Hidden. You can set your contact details to be publicly available via the User Area.
		Town	Maplewood		

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Hidden. You can set your contact details to be publicly available via the User Area.

Representatives

MEWBURN ELLIS LLP

ID	10577	Country	GB - United Kingdom	Correspondence address	Hidden. You can set your contact details to be publicly available via the User Area.
Organisation	n/a	State/county	n/a	MEWBURN ELLIS LLP	Hidden. You can set your contact details to be publicly available via the User Area.
Legal status	Legal person	Town	London	Theresienhof	Hidden. You can set your contact details to be publicly available via the User Area.
Type	Association	Post code	EC2V 5DE	Theresienstraße 1	Hidden. You can set your contact details to be publicly available via the User Area.
		Address	City Tower 40 Basinghall Street	ALEMANIA	Hidden. You can set your contact details to be publicly available via the User Area.

Correspondence

	From	Procedure	Filing number	Subject	Date	Actions
		Opposition	003094153	B224B	03/11/2020	

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X

	From	Procedure	Filing number	Subject	Date	Actions
		Opposition	003094153	B233B	19/08/2020	
		Opposition	003094153	B233A - Notification to the opponent of observations filed by the applicant/holder	19/08/2020	
		Opposition	003094153	Letter to the EUIPO	06/08/2020	
		Opposition	003094153	B213A — Notification to the opponent of documents submitted by the applicant/holder	17/06/2020	
		Recordal	018029051	H726A - Notification of entry of a change of representative in the Office - Register and database	16/06/2020	
		Recordal	018029051	H726A - Notification of entry of a change of representative in the Office - Register and database	16/06/2020	
		Recordal	018029051	Application form and attachment	16/06/2020	
Showing 1 to 10 of 48 entries						

IR transformation

No data

Seniority

No data

Exhibition priority

No data

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X

No data

Publications

Bulletin number	Date	Section	Description
2019/108	11/06/2019	A.1	Applications published under Article 44 EUTMR
Showing 1 to 1 of 1 entries			

Cancellation

No data

Recordals

Bulletin number	Date	Section	Filing number	Title	Subtitle
			017974000	Representative	Appointment / Replacement of representative
			017978274	Proprietor	Change of name and address
			017991798	Proprietor	Total transfers
			018001175	Proprietor	Change of name and address
			018029051	Representative	Appointment / Replacement of representative
Showing 1 to 5 of 5 entries					

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X

Filing number	Date	Grounds	Opponent	Representative	Language	Reference	Status	Extent of opposition
003094153	10/09/2019	Art. 8(4) Likelihood of confusion Unfair advantage /detriment to distinctiveness or repute Mark was filed without authorisation of proprietor	Oovee Ltd	PINSENT MASONS LLP	English	7501604	Open	Class 9 Computer game software for personal computers and home video game consoles; downloadable electronic video game programs; computer and video game programs; computer software; computer game software; mobile applications. Class 28 Video game consoles.
Showing 1 to 1 of 1 entries								

Appeals

No data

Decisions

No data

Renewals

No data

Trade mark relations

X

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No data

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X

EXHIBIT E



Protect your intellectual property in the European Union

EUTM file information

MUDRUNNER

018055358

Timeline



Trade mark information

Name	MUDRUNNER	Filing date	24/04/2019
Filing number	018055358	Registration date	

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X

Nature	Individual	Second language	German
Nice classes	9 (Nice Classification)	Application reference	JLP/7486558
Vienna Classification		Trade mark status	Application opposed
		Acquired distinctiveness	No

Goods and services

English (en) 

9 Computer game software for personal computers and home video game consoles; downloadable electronic video game programs; computer and video game programs.

Description

No data

Owners

Saber Interactive Inc.

ID	1093776	Country	US - United States	Correspondence address	
Organisation	Saber Interactive Inc.	State/county	New Jersey	Saber Interactive Inc. 4 Winthrop Place Maplewood New Jersey 07050	Hidden. You can set your contact details to be publicly available via the User Area.
Legal status	Legal entity	Town	Maplewood	ESTADOS UNIDOS (DE AMÉRICA)	

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Hidden. You can set your contact details to be publicly available via the User Area.

Representatives

MEWBURN ELLIS LLP

ID	10577	Country	GB - United Kingdom	Correspondence address	Hidden. You can set your contact details to be publicly available via the User Area.
Organisation	n/a	State/county	n/a	MEWBURN ELLIS LLP	Hidden. You can set your contact details to be publicly available via the User Area.
Legal status	Legal person	Town	London	Theresienhof	Hidden. You can set your contact details to be publicly available via the User Area.
Type	Association	Post code	EC2V 5DE	Theresienstraße 1	Hidden. You can set your contact details to be publicly available via the User Area.
		Address	City Tower 40 Basinghall Street	ALEMANIA	Hidden. You can set your contact details to be publicly available via the User Area.

Correspondence

	From	Procedure	Filing number	Subject	Date	Actions
		Opposition	003094154	Letter to the EUIPO	16/11/2020	

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X

	From	Procedure	Filing number	Subject	Date	Actions
		Opposition	003094154	Letter to the EUIPO	10/09/2020	
		Opposition	003094154	B233B	10/07/2020	
		Opposition	003094154	B233A - Notification to the opponent of observations filed by the applicant/holder	10/07/2020	
		Opposition	003094154	Letter to the EUIPO	06/07/2020	
		Opposition	003094154	Letter to the EUIPO	06/07/2020	
		Recordal	018028368	H726A - Notification of entry of a change of representative in the Office - Register and database	16/06/2020	
		Recordal	018028368	H726A - Notification of entry of a change of representative in the Office - Register and database	16/06/2020	
Showing 1 to 10 of 47 entries						

IR transformation

No data

Seniority

No data

Exhibition priority

No data

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X

Country	Filing number	Date	Status
United States	88171058	26/10/2018	Claimed
Showing 1 to 1 of 1 entries			

Publications

Bulletin number	Date	Section	Description
2019/108	11/06/2019	A.1	Applications published under Article 44 EUTMR
Showing 1 to 1 of 1 entries			

Cancellation

No data

Recordals

Bulletin number	Date	Section	Filing number	Title	Subtitle
			017974000	Representative	Appointment / Replacement of representative
			017978274	Proprietor	Change of name and address
			017991798	Proprietor	Total transfers
			018001175	Proprietor	Change of name and address
			018028368	Representative	Appointment / Replacement of representative

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X

Oppositions

Filing number	Date	Grounds	Opponent	Representative	Language	Reference	Status	Extent of opposition
003094154	10/09/2019	Art. 8(4) Identity of marks and G&S Likelihood of confusion Unfair advantage /detriment to distinctiveness or reput Mark was filed without authorisation of proprietor	Oovee Ltd	PINSENT MASONS LLP	English	JLP/7486558	Open	Class 9 Computer game software for personal computers and home video game consoles; downloadable electronic video game programs; computer and video game programs.
Showing 1 to 1 of 1 entries								

Appeals

No data

Decisions

No data

Renewals

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X

Trade mark relations

No data

International Applications

No data

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X

EXHIBIT F

[Skip to main content](#)

Intellectual Property Office

Trade mark number

UK00003394432

StatusOpposed

Overview

Trade mark

MUDRUNNER

Dates

Filing date24 April 2019

Priorit ☐ details**Priorit ☐ date**

26 October 2018

Priorit ☐ countr ☐

United States of America

TM from which priorit ☐ claimed

88171058

ClaimWhole

Goods and services

Classes and terms

Class 9

Names and addresses

Owner(s) name

Saber Interactive Inc.

4 Winthrop Place, Maplewood, New Jersey, 07040, United States of America

Country of Incorporation

United States of America

Incorporation state

Delaware

IPO representative name

Baker & McKenzie LLP

100 New Bridge Street, London, EC4V 6JA, United Kingdom

Publications

First advert

Journal

2019/021

Date of publication

24 March 2019

Opposition details

Opposition details

Opposition number

OP000417449 (Standard)

Opposition status

Defence filed/Evidence period

Opponent

Oovee Ltd

97 Yarmouth Road, NORWICH, Norfolk, NR7 0HF, United Kingdom

Intellectual Property Office is an operating name of the Patent Office

EXHIBIT G

[Skip to main content](#)

Intellectual Property Office

Trade mark number

UK00003402572

StatusRegistered

Overview

Trade mark

SNOWRUNNER

Dates

Filing date

28 March 2019

Date of entry in register

16 August 2019

Renewal date28 March 2029

Cancellation details

Cancellation number

CA000503140

Cancellation status

Defence filed/Consolidated

Cancellation applicant

Oovee Ltd

97 Yarmouth Road, NORWICH, Norfolk, NR7 0HF, United Kingdom

Goods and services

Classes and terms

Class 9

Class 28

Names and addresses

Owner(s) name

Saber Interactive Inc.

4 Winthrop Place, Maplewood, New Jersey, 07040, United States of America

Country of Incorporation

United States of America

Incorporation state

Delaware

IPO representative name

Baker & McKenzie LLP

100 New Bridge Street, London, EC4V 6JA, United Kingdom

Publications

First advert

Journal

2019/023

Date of publication

07 June 2019

Intellectual Property Office is an operating name of the Patent Office

EXHIBIT H

The document enclosed as Exhibit H is designated as CONFIDENTIAL and has thus been redacted from the publicly available version of this document.

EXHIBIT I

ESTTA Tracking number: **ESTTA990627**

Filing date: **07/26/2019**

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

Proceeding	91248894
Party	Defendant Oovee ltd
Correspondence Address	MICHAEL J BROWN MICHAEL J BROWN LAW OFFICE LLC 6TH FLOOR 1 EAST PARADE LEEDS LS12AD UNITED KINGDOM UNITED KINGDOM ip@appleyardlees.com, chris.hoole@appleyardlees.com +44 113 246 5353
Submission	Answer
Filer's Name	Michael J. Brown
Filer's email	michael@mjbrownlaw.com
Signature	/MichaelJBrown/
Date	07/26/2019
Attachments	Appl-0113 Answer to Notice of Opposition.pdf(72358 bytes) Appl-0113 Answer Exhibits.pdf(3030782 bytes)

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

In the Matter of Application No. 79/248,677

Atty. Ref.: Appl-0113

	X	
Saber Interactive Incorporated	:	
Opposer,	:	
	:	
-against-	:	Opposition No. 91248894
	:	
Oovee Ltd	:	
Applicant.	:	
	X	

Submitted via ESTTA

ANSWER TO NOTICE OF OPPOSITION

Oovee Ltd, a limited company formed under the laws of the United Kingdom (“Applicant”), hereby answers the Notice of Opposition.

1. Applicant has no information about the allegations in paragraph 1 of the Notice of Opposition and can neither admit nor deny said allegations.

2. Applicant admits the allegations in paragraph 2 of the Notice of Opposition.

3. Applicant admits that Pavel Zagrebelnyy (“MrZ”) has been an employee of Saber Interactive Incorporated at certain points between 2008 and 2019, and otherwise has no information about the allegations in paragraph 3 of the Notice of Opposition, and can neither admit nor deny said allegations.

4. Applicant denies the allegations in paragraph 4 of the Notice of Opposition.

5. Applicant denies the allegations in paragraph 5 of the Notice of Opposition.

6. Applicant denies the allegations in paragraph 6 of the Notice of Opposition.

7. Applicant denies the allegations in paragraph 7 of the Notice of Opposition.

8. Applicant has no information about the allegations in paragraph 8 of the Notice of Opposition and can neither admit nor deny said allegations.

9. Applicant admits that it has demanded that Opposer cease use of the name SPINTIRES: MUDRUNNER, and otherwise denies the remaining allegations in paragraph 9 of the Notice of Opposition.

10. Applicant denies the allegations in paragraph 10 of the Notice of Opposition.

11. Applicant repeats its responses to the allegations in paragraphs 1-10 of the Notice of Opposition.

12. Applicant denies the allegations in paragraph 12 of the Notice of Opposition.

13. Applicant denies the allegations in paragraph 13 of the Notice of Opposition.

14. Applicant denies the allegations in paragraph 14 of the Notice of Opposition.

15. Applicant denies the allegations in paragraph 15 of the Notice of Opposition.

16. Applicant denies the allegations in paragraph 16 of the Notice of Opposition.

Affirmative Defenses

17. The opposition should be barred by estoppel, as Opposer was until recently, and well after filing date of the application, a licensee of Applicant, licensed by Applicant to use the SPINTIRES mark. A copy of the license agreement is attached as Exhibit A.

18. The opposition should be barred by estoppel, as Opposer was until recently, and well after filing date of the application, licensed by Applicant to use the SPINTIRES mark, and therefore contractually barred from objecting to Applicant's rights in the SPINTIRES mark.

19. The opposition should be barred by acquiescence, as Opposer has known of Applicant's claim of right to the SPINTIRES mark for at least three years.

20. The opposition should be barred by lack of standing as Opposer has no valid basis to oppose the registration of the SPINTIRES mark.

21. The opposition should be barred by lack of standing as Opposer has not alleged any claim of right to the SPINTIRES mark.

22. The opposition should be barred by lack of standing as Opposer appears to be asserting the rights of a third party, MrZ, who is not a party to the opposition.

23. The opposition should be barred for failure to join a necessary as Opposer appears to be asserting the rights of a third party, MrZ, who is not a party to the opposition.

24. The opposition should be barred by lack of standing as Opposer's allegations of a license from MrZ fails to take into account that MrZ had assigned all rights in and to the SPINTIRES mark to Applicant. A copy of a consultancy agreement between Applicant and MrZ is attached as Exhibit B, showing that "All Intellectual Property Rights ... shall belong to Oovee". See Exhibit B, para. 5.2.

25. The opposition should be barred by fraud, as Opposer falsely asserted that "Applicant has never been the owner of the mark SPINTIRES", despite Opposer's knowledge of the license from Applicant to Opposer (Exhibit A).

26. The opposition should be barred by fraud, as Opposer falsely asserted that MrZ is the owner of the SPINTIRES mark, despite Opposer's knowledge of the Consultancy Agreement (Exhibit B).

WHEREFORE, Applicant, by its attorneys, requests that this opposition be denied and the application for registration be allowed to proceed to registration.

Respectfully submitted,

Dated: July 26, 2019

By: /MichaelJBrown/

Michael J. Brown
Michael J Brown Law Office LLC
354 Eisenhower Parkway
Plaza I, 2nd Floor, Suite 2025
Livingston, NJ 07039
tel: (973) 577-6300
fax: (973) 577-6301
michael@mjbrownlaw.com

Attorneys for Applicant

CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2019, I served this Answer to the Notice of Opposition on the Opposer by emailing, addressed to Opposer's correspondence address of record as follows:

pnussbaum@csglaw.com, ajremore@csglaw.com, trademarks@csglaw.com,
tmdocketing@csglaw.com

/MichaelJBrown/

Michael J. Brown

EXHIBIT A

License Agreement

This License Agreement (this "Agreement") is made effective as of August 2, 2016 between Oovee, Ltd. A private Limited Company registered in England and Wales and Saber Interactive, a Delaware, LLC.

In the Agreement, the party who is granting the right to use the licensed property will be referred to as "Oovee," and the party who is receiving the right to use the licensed property will be referred to as "Saber Interactive."

The parties agree as follows:

1. GRANT OF LICENSE Oovee owns Spintires (the "Licensed Articles"). In accordance with this Agreement, Oovee grants Saber Interactive an exclusive license to Develop and publish console ports and enhancements to the original Spintires PC game for video game consoles including, but not limited to Xbox One, Playstation 4, Wii, Mac OS the "Port". Oovee retains title and ownership of the Licensed Articles.

Any enhancements or improvements made to the game may also be made available on the PC via downloadable content through Steam or other digital distribution channels on similar terms to this Agreement.

2. PAYMENT OF ROYALTY Saber Interactive will pay to Oovee a royalty which shall be calculated as follows:

- ☐ 10% up to \$900,000 in net receipts.
- ☐ 25% of all amounts exceeding \$900,000

With each royalty payment, Saber Interactive will submit to Oovee a written report that sets forth the calculation of the amount of the royalty payment. Saber agrees to pay Oovee ("Royalties") as a

percentage of Net Revenues (as defined below), unless otherwise specified in each applicable Schedule. "Net Revenues" shall be defined as one hundred percent (100%) of Saber's actual gross receipts and all other receivables of any kind whatsoever received in payment of Port whether received by Saber ("Gross Revenues"), less actual and verifiable, out-of-pocket expenses solely and directly attributable to the Port, including: (a) third-party, platform-owner fees (not to exceed thirty percent (30%) of Gross Revenues); (b) third-party, distribution fees (not to exceed twenty percent (20%) of Gross Revenues); and (c) government taxes (e.g., VAT, excise or sales or use tax, governmental withholdings, etc.) incurred in connection with the sale or exploitation of the Licensed Article(s), if any, but excluding any taxes on Saber's income, to the extent actually paid by and not reimbursed to Saber.

Any other deductions other than those directly attributable to the port must be mutually agreed upon in advance and in writing by Saber and Oovee. Saber shall have the right, in its sole discretion, to determine the sales price of the game, to offer the game at discounts and as promotional giveaways.

3. MODIFICATIONS The scope of the work to be completed by Saber is enumerated in Appendix A of this Agreement. Changes outside of said scope are not permitted unless the prior written approval of Oovee is obtained. Such approval shall not be *unreasonably withheld*.

4. TRANSFER OF RIGHTS This Agreement shall be binding on any successors of the parties. Neither party shall have the right to assign its interests in this Agreement to any other party, unless the prior written consent of the other party is obtained. However, Saber shall have the right to assign publishing rights to a third-party publisher.

5. LICENSE TERRITORY AND LANGUAGE: Saber's rights herein

shall be limited to the right to develop, create, publish, market, distribute and sell the Licensed Article(s), and to engage in Advertising and Promotion worldwide. Saber shall have the right, but not the obligation to localize the Licensed Property into any language desired.

6. EXCLUSIVITY: The rights granted herein shall be exclusive unless otherwise indicated on the applicable Schedule.

7. ADVERTISING AND PROMOTION: Saber shall have the right to use the Licensed Property to market, advertise and promote for sale the Licensed Article(s) during the License Term in the License Territory ("Advertising and Promotion").

8. ROYALTY STATEMENTS AND PAYMENTS: Saber shall, within thirty (30) days of the end of each calendar quarter (March 31, June 30, September 30 and December 31 of each year), commencing with the first full calendar quarter following Saber's execution of this Agreement and continuing until a final Certification of Wind-Up is delivered, furnish Oovee complete statements, certified to be accurate by an authorized representative of Saber, specifying the License Territory, a description of the Licensed Article(s), a description of the Licensed Property used therein or thereon (including, without limitation, any and all names and likenesses from the Licensed Property which appear in or on the Licensed Article(s), including, without limitation, any Collateral Materials and Advertising and Promotion), the amount due Oovee Gross Receipts, Adjusted Gross Receipts, unit sales, invoice price, quantity invoiced, Royalties rate, the distribution channels or portals, deductions for actual cash and credit returns of defective merchandise (including the amount and quantity related thereto), and other deductions as specifically permitted in Paragraph 2 above the amount shown to be payable to upon invoice within 10 business after the rendering of the respective Royalty Statement.

9. REPRESENTATIONS AND WARRANTIES: (a) Saber

represents and warrants all of the following:

(i) Saber is a company duly organized, validly existing and in good standing under the laws of the state and country of its principal office, with full power and authority to execute and deliver this Agreement and to perform its obligations, and maintains its principal executive office at the address set forth herein. The execution, delivery and performance of this Agreement have been duly authorized by all necessary actions of and this Agreement constitutes a valid and binding obligation of Saber enforceable against Saber in accordance with its terms.

(ii) Saber shall comply with and act in accordance with: (A) any and all applicable laws and other legal obligations of or in the License Territory including, without limitation, local, state and federal directives, rules, assessments, regulations, filing requirements, ordinances, statutes, codes, judgments and civil or common law; and (B) conventions and treaties to which the United States or any legal subdivision thereof is a party (individually and collectively, "Law" or "Laws").

(iii) The making of this Agreement by Saber does not violate any agreement, right or obligation between Saber and any other person, entity, firm or corporation, and the permission or agreement of no other person, entity, firm or corporation is required to execute this Agreement or perform the obligations herein, or Saber has secured such permission, if necessary.

(iv) Neither the execution and delivery of this Agreement nor the performance of the Saber of any or all of the terms, obligations and services herein shall: (A) breach, be in conflict with or constitute a default under any agreement or commitment to which Saber is a party; (B) violate any Law applicable to Saber; or (C) incur for or involve Oovee in any liability whatsoever.

(v) Saber shall undertake a level of customer service and provide

warranties to consumers at least as favorable as is standard in its industry.

(vi) To the extent any third-party materials or third-party intellectual property rights are used by Saber in connection with the Licensed Article(s) or the Advertising and Promotion, Saber represents and warrants that it owns or controls or has acquired under license all *necessary rights in and to all such third-party materials and intellectual property rights included in the Licensed Article(s) or the Advertising and Promotion, whether in the development thereof or in the finished product released to the public.* Saber has paid or will pay any and all re-use and license fees to the appropriate person or entity (which fees may include a calculation and payments in satisfaction of pension and welfare obligations) and has obtained or will obtain written and executed authorizations for such use from the person or entity having the right to grant such permissions.

(vii) None of the representations or warranties made by Saber in this Agreement as of the date hereof and none of the statements contained in any agreement or other document or report furnished by or on behalf of Saber to Oovee in connection with this Agreement *contain any untrue statement of a material fact or omit any material fact necessary to make such statements accurate in light of the circumstances under which they were made.*

(b) Oovee represents and warrants all of the following:

(i) Oovee is a company duly organized, validly existing and in good standing under the laws of the state and country of its principal office, with full power and authority to execute and deliver this Agreement and to perform its obligations, and maintains its *principal executive office at the address set forth herein.* The execution, delivery and performance of this Agreement have been duly authorized by all necessary actions of and this Agreement constitutes a valid and binding obligation of Oovee enforceable against Saber in accordance with its terms.

(v) Oovee shall comply with and act in accordance with: (A) any and all applicable laws and other legal obligations of or in the License Territory including, without limitation, local, state and federal directives, rules, assessments, regulations, filing requirements, ordinances, statutes, codes, judgments and civil or common law; and (B) conventions and treaties to which the United States or any legal subdivision thereof is a party (individually and collectively, "Law" or "Laws").

(vi) The making of this Agreement by Oovee does not violate any agreement, right or obligation between Oovee and any other person, entity, firm or corporation, and the permission or agreement of no other person, entity, firm or corporation is required to execute this Agreement or perform the obligations herein, or Saber has secured such permission, if necessary.

(iv) Neither the execution and delivery of this Agreement nor the performance of the Oovee of any or all of the terms, obligations and services herein shall: (A) breach, be in conflict with or constitute a default under any agreement or commitment to which Oovee is a party; (B) violate any Law applicable to Oovee; or (C) incur for or involve Oovee in any liability whatsoever.

(v) Oovee shall undertake a level of customer service and provide warranties to consumers at least as favorable as is standard in its industry.

(vi) To the extent any third-party materials or third-party intellectual property rights are used by Saber in connection with the Licensed Article(s) or the Advertising and Promotion, Oovee represents and warrants that it owns or controls or has acquired under license all necessary rights in and to all such third-party materials and intellectual property rights included in the Licensed Article(s) or the Advertising and Promotion, whether in the development thereof or in the finished product released to the public. Oovee has paid or will pay any and all re-use and license fees to the appropriate

person or entity (which fees may include a calculation and payments in satisfaction of pension and welfare obligations) and has obtained or will obtain written and executed authorizations for such use from the person or entity having the right to grant such permissions.

(vii) None of the representations or warranties made by Oovee in this Agreement as of the date hereof and none of the statements contained in any agreement or other document or report furnished by or on behalf of Oovee to Saber in connection with this Agreement contain any untrue statement of a material fact or omit any material fact necessary to make such statements accurate in light of the circumstances under which they were made.

10. AGREEMENT NOT TO SUE AND WAIVER Saber hereby, as part of the consideration for this Agreement, waives any right to pursue any course of action against Oovee for copyright, trade secret or any other form of intellectual property infringement that may have resulted from the release of the PC version of Spintires. Such waiver shall become effective upon release of the Licensed Property on any of the platforms indicated in Appendix A. Prior to said release and from the effective date of this agreement and while it is in force, Saber shall agree to withhold pursuit of any legal claims arising from the release of Spintires.

11. OWNERSHIP OF INTELLECTUAL PROPERTY Oovee is the sole owner of the Spintires property. Saber is the sole owner of its proprietary technology – the Saber3d Engine.

Saber shall utilize a combination of its proprietary technology – the Saber3d Engine with existing Spintires code to create the console ports. Saber and Oovee agree that as part of this agreement, both parties shall have the right in perpetuity to use the source code in the PC and console versions of the game for future development purposes. Such rights shall survive this Agreement whether the Port is released or whether the agreement is terminated in

accordance with Paragraph 12.

12. TERMINATION: (a) *Termination with Notice and Right to Cure:* Oovee and Saber shall have the right, in its sole discretion, in addition to any and all other rights and remedies and at no cost or expense to itself, to declare a material breach of this Agreement and to terminate this Agreement effective immediately upon notice to other party at any time upon the occurrence provided that both parties shall have a period not to exceed thirty (30) days from the date of notice by the notifying party of such default to cure the default to the other party's sole satisfaction.

(b) *Termination for Convenience:* Saber shall have the right to terminate the game for convenience at any time prior to the commercial release of the Licensed Articles.

13. EFFECT OF TERMINATION OR EXPIRATION: Upon termination of this Agreement for cause, the following shall occur: (a) If termination is due to Saber's breach, it shall cease all development of the Port and have no right to develop or publish the Port. (b) If termination is due to Oovee's breach, Saber shall have the right to continue development of the Port at its sole discretion and offset and actual or reasonably anticipated costs from Royalty due to Oovee. Saber's obligation to pay Royalty to Oovee shall survive termination after Commercial Release of the Licensed Articles.

14. INDEMNIFICATION Both parties shall defend, indemnify and forever hold harmless each other's officers, directors, shareholders, employees, agents, representatives, assigns and successors-in-interest from and against any and all claims, liabilities, penalties, losses, costs, damages, demands, actions, causes of action, suits, proceedings, judgments and expenses including, without limitation, amounts paid in settlement, reasonable attorneys' fees, court costs and other legal expenses arising out of, connected with, or relating to any material breach by

either party of any of its representations or warranties, provided that prompt written notice is given to said party of any such claim or suit. The provisions of this Paragraph shall survive termination of this Agreement.

15. NOTICES AND PAYMENTS: Any notice or other communication required or permitted to be given shall be in writing addressed to the respective party at the address set forth in the introductory paragraph hereof and may be personally served, telecopied or sent by registered or certified mail, postage prepaid, return receipt requested and shall be deemed given: (a) if served in person, when served; (b) if telecopied, on the date of transmission if confirmed before 3:00 p.m. (according to the local time of the receiving party) on a business day and otherwise on the following business day, provided that a hard copy of such notice is also sent pursuant to (c) below; or (c) if by certified or registered mail, on the third (3rd) business day after deposit in the mail, postage prepaid.

Unless otherwise directed by Oovee, all notices shall be sent by mail or facsimile to:

Oovee

170 High Street Gorleston-On-Sea

NORFOLK NR31 6RG United Kingdom

Attn: ~~Tony Fellas~~ ZANE SAXTON

Email: ~~tony@oovee.co.uk~~ ZANE.SAXTON@OOVEE.CO.UK

Notices to Saber shall be addressed to:

Saber Interactive

4 Winthrop Place

Maplewood, NJ 07040

Attn: Matthew Karch

E-mail: karch@saber3d.com

Wire Transfer Payments: All payments may be made via wire transfer to the following account and shall be made according to instructions on the invoices issued after receipt by Oovee of the royalty statements.

16. GOVERNING LAW, VENUE AND JURISDICTION: This Agreement, and its validity, construction and effect, shall be governed by and enforced in accordance with the internal laws of the United Kingdom (*i.e.*, without reference to the conflicts of laws provisions thereof). Each party to this Agreement irrevocably submits to the personal jurisdiction and venue of a state or federal court of competent jurisdiction in the United Kingdom for any purpose permitted herein.

17. DISPUTE RESOLUTION: Any controversy, claim, or dispute arising out of or relating to this Agreement or this agreement to arbitrate, including, without limitation, the interpretation, performance, formation, validity, breach, or enforcement of this Agreement, and further including any such controversy, claim, or dispute against or involving any officer, director, agent, employee, affiliate, successor, predecessor, or assign of a party to this Agreement (each, a "Dispute"), shall be fully and finally adjudicated by binding arbitration to the fullest extent allowed by law (the "Arbitration"). The seat of the Arbitration shall be the London Court of International Arbitration.

18. LIMITATION ON LIABILITY: The parties agree that in any arbitration or court action pursuant to Paragraph 17 above, the damages that may be awarded shall be limited to any actual damages suffered. In no event shall either party be liable for any *special, incidental, consequential, exemplary or punitive damages*, or any claim for loss of profits, lost business or lost business opportunities, even if the other party has been advised of the possibility of such damages.

19. WAIVER, MODIFICATION AND AMENDMENT: No modification, amendment or waiver of any of the provisions contained in this Agreement, or any future representation, promise or condition in connection with the subject matter of this Agreement, shall be binding upon any party to this Agreement unless made in writing and signed by a duly authorized representative or agent of such party. The failure by either party to enforce, or the delay by either party in enforcing, any of said party's rights under this Agreement shall not be construed as a continuing waiver of such rights, and said party may, within such time as is provided by the laws established by any government with applicable jurisdiction, commence appropriate suits, actions or proceedings to enforce any or all of such rights. A waiver by either party of a default in one or more instances shall not be construed as a waiver in other instances.

20. NO JOINT VENTURE: This Agreement does not constitute and shall not be construed to constitute an agency, a partnership or a joint venture between Oovee and Saber. Saber shall have no right to obligate or to bind the Oovee Entities in any manner whatsoever, and nothing contained in this Agreement shall give or is intended to give any rights of any nature to any third-party.

21. ADDITIONAL DOCUMENTS: Upon either party's request, the other party shall promptly execute and deliver to any the requesting party such further documents and instruments, in form and substance satisfactory to the requesting party, to confirm and effectuate the terms and conditions of this Agreement, and, in the event that said party fails or is unable to execute any such documents or instruments, the party appoints the requesting party its attorney-in-fact with the full right and authority to execute and deliver the same, which such appointment shall be deemed a power coupled with an interest and shall be irrevocable under any and all circumstances.

22. SEVERABILITY: If any term or provision of this Agreement, as

applied to either party or any circumstance, for any reason shall be declared by a court of competent jurisdiction to be invalid, illegal, unenforceable, inoperative or otherwise ineffective, that provision shall be limited or eliminated to the minimum extent necessary so that this Agreement shall otherwise remain in full force and effect and enforceable, provided, however, that if any term or provision of this Agreement pertaining to the payment of monies to Oovee shall be declared invalid, illegal, unenforceable, inoperative or otherwise ineffective, Oovee shall have the right to terminate this Agreement as provided herein.

23. COUNTERPARTS: This Agreement may be executed in one or more counterparts, each of which shall be an original, but all of which together shall constitute one agreement binding on all of the parties hereto notwithstanding that all of the parties hereto are not signatories to the same counterpart. Each of the parties agrees that a photographic or facsimile copy of the signature evidencing a party's execution of this Agreement shall be effective as an original signature and may be used in lieu of the original for any purpose.

24. PARAGRAPH HEADINGS AND DEFINITIONS: Paragraph and subparagraph headings are for ease of reference only and shall not have any effect upon the

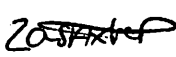
construction of this Agreement or any of the terms or provisions hereof. All capitalized terms used herein shall be defined as set forth elsewhere in this Agreement.

25. ENTIRE AGREEMENT: This Agreement, together with Schedule "A" and all such additional Schedules as are added hereto following the date hereof and thereby made a part hereof, constitutes a single, integrated written contract expressing the entire agreement of the parties concerning the subject matter hereof. No covenants, agreements, representations or warranties of any kind whatsoever have been made by any party to this Agreement except as specifically set forth in this Agreement. All

prior agreements, discussions and negotiations have been and are merged and integrated into, and are entirely superseded by, this Agreement. Each party and its counsel have participated fully in the review and revision of this Agreement. Any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply in the interpretation of this Agreement.

IN WITNESS WHEREOF, each party has executed this Agreement on the date indicated below

Licensor: Oovee

By:  3/8/16

Oovee , LTD

Zane Saxton

Licensee: Saber Interactive

By: 

Saber Interactive, Inc.

Matthew Karch

EXHIBIT B

Oovee Game Studios

170 High Street
Gorleston-On-Sea
Norfolk, UK.
NR31 6RG

T: +(020)7 3664 0670
E: enquiry@oovee.co.uk
W: http://www.oovee.co.uk



OOVEE GAME STUDIOS (OOVEE LTD)
CONSULTANCY AGREEMENT

THIS AGREEMENT is dated day of **7th May 2014**

Between:

1 OOVEE LTD (registered in England and Wales Registration Number 6771895) of 170 High Street, Gorleston-On-Sea, Norfolk NR31 6RG (hereinafter "OOVEE")

And:

2 Pavel Aleksandrovich Zagrebelnyy of Prospekt Kosygina 9/2 apt 220, Saint-Petersburg (hereinafter "Consultant")

Background

(A) OOVEE wishes to engage the Consultant to provide the services described in Schedule 1 hereto. The Consultant offers consultancy and other services in relation to such services and the Consultant warrants that s/he has considerable skill, knowledge and experience in this field.

(B) In reliance upon the Consultant's skill, knowledge and experience OOVEE wishes to engage the Consultant to provide the Services and the Consultant has agreed to accept this engagement on the terms and conditions set out below.

(C) This Agreement supersedes all prior agreements and understandings (whether written or oral) between OOVEE and the Consultant, or any of them, with respect to the subject matter hereof. To avoid any doubt, Oovee and Consultant acknowledge and confirm that as of 17th April 2011 the Project was, is and will be the sole property of OOVEE.

Limited company registered in England & Wales: **0677 1895**
VAT Registered: **127 2222 47**

This document is private and confidential

IT IS AGREED AS FOLLOWS:

1 Definition

1.1 In this Agreement the following expressions shall have the following meanings unless the context requires otherwise:

“The Commencement Date”, the date specified in Schedule 1.

“Confidential Information” means all information whatsoever relating to the business of OOVEE or the Project carried on from time to time.

“Documents” means all records, reports, documents, papers and other materials whatsoever originated in any medium by OOVEE or by the Consultant on behalf of OOVEE pursuant to this Agreement and any other property of OOVEE, including all submitted designs, concepts, graphic devices, logos, page/screen layouts, borders, backgrounds, buttons, navigational devices, produced in the course of the supply of the Services or the Project.

“Fee” means the sum (if any) as specified in Schedule 1 and/or Schedule 2 and certified as accurate by OOVEE’s auditors. The certificate of accuracy from Digital sale will be submitted to the Consultant within 30 days after the end of each calendar month. The certificate of accuracy from Retail sale will be submitted to the Consultant within 30 days after the end of each calendar quarter. Consultant agrees to accept the said certificate of accuracy.

Fee (if any) will be paid by OOVEE to the Consultant within 14 days after receiving the said certificate of accuracy from auditors. Such sum (if any) will be paid in Pound Sterling (£) to the Consultant based on the invoice issued by the Consultant.

Fees from Digital and Retail sales will be received by the Consultant from the Release Date.

“Fixed Period” means the period (if any) specified in Schedule 1.

“Intellectual Property Rights” means all intellectual property rights arising created or developed as a result of or relating to the performance of the Services by the Consultant including without limitation patents, trademarks or trade names, service marks, designs, design rights, know-how and copyright (in each case whether registered or not) and including all applications for registration thereof in any jurisdiction

“Project” means the project more particularly described in Schedule 1.

“Services” means the services to be provided by the Consultant more particularly described in Schedule 1.

Limited company registered in England & Wales: **0677 1895**
VAT Registered: **127 2222 47**

This document is private and confidential

“Third Party Intellectual Property Rights” means all intellectual property rights owned by a third party including without limitation patents, trademarks or trade names, service marks, designs, design rights, know-how and copyrights (in each case whether registered or not).

“Retail” means sales made via a retail chain, whether physical or digital, by an appointed retail publisher. In this case “IMGN.PRO”.

“Digital” means sales made by appointed online store. In this case “Steam”.

“Release Date” means when the Project will be put to sale via Retail or Digital outlets.

“Deductions” means all costs for publishing/developing and operational in relation to the Project (costs that include other OOVEE activities to be pro-rated).

1.2 Headings in this Agreement are only for convenience and shall not affect its construction.

1.3 Where appropriate words denoting a singular shall include the plural and vice versa.

2 Duration

The Consultant agrees to provide the Services to OOVEE from the Commencement Date for the Fixed Period (if any) subject always to the provisions for earlier termination contained elsewhere in this Agreement.

3 The Consultant's Obligations

3.1 The Consultant will provide the Services with reasonable skill and care to the reasonable satisfaction of OOVEE and in accordance with the terms of this Agreement.

3.2 The Consultant will at all times act in the best interests of OOVEE and will in all aspects diligently and faithfully observe all reasonable directions of OOVEE.

3.3 The Consultant shall keep detailed records of all work undertaken by him/her in relation to the provision of the Services to OOVEE and at OOVEE's request shall make such records available for inspection by OOVEE or its agent

3.4 OOVEE will rely on the Consultant's skill expertise and experience in the provision of the Services and also upon the accuracy of all representations made and advice given by the Consultant in connection with the Services provided thereunder and the Consultant hereby agrees to indemnify and keep indemnified OOVEE against all loss damage costs professional and other expenses whatsoever incurred by OOVEE whether direct or consequential (including but without limitation any economic loss or other loss turnover profits business or goodwill) as a result of such reliance.

3.5 The Consultant accepts liability for death or personal injury or damage to property howsoever resulting from the Consultant's negligence where such negligence occurs in the course of providing the Services to OOVEE thereunder or for any purpose related to this Agreement and the Consultant hereby agrees to indemnify and keep indemnified OOVEE against any and all liability loss damage costs and expense of whatsoever nature incurred or suffered by OOVEE or by any third party arising from any and all claims or proceedings which seek to recover loss and damage to property caused by any act or omission of the Consultant, its employees, agents or sub-contractors.

3.6 The Consultant warrants that:

Limited company registered in England & Wales: **0677 1895**
VAT Registered: **127 2222 47**

This document is private and confidential

3.6.1 The Consultant has full power to enter into this Agreement.

3.6.2 There is no legal bar which prevents the Consultant from performing the Services.

3.6.3 So far as the Consultant is aware no third party intends to prevent or hinder the Consultant from performing the Services.

3.6.4 All work produced by the Consultant in the provision of the Services will be original and will not contain any obscene or defamatory matter or contravene any statute and that the performance of the Services will not in any way be a violation or infringement of any Third Party Intellectual Property Rights or any existing agreement with a third party provided that this warranty shall not extend to use of specific materials required by OOVEE such as, but not limited to, texts, logos, images, sounds and mechanisms underlying the provision of the Services, where such materials have been provided by OOVEE and used in accordance with OOVEE's instructions ("OOVEE Materials") and provided further that the Consultant will notify OOVEE if the Consultant believes that use of any OOVEE Materials is likely to constitute such a violation or infringement.

3.7 Where the Consultant considers it necessary to use the services of a third party for whatever reason the Consultant shall (except in matters of a minor and obvious nature) first obtain the consent of OOVEE.

3.8 The Consultant agrees to make available to the Directors (or such person(s) as the Directors may delegate) of OOVEE such reasonable facilities as the Directors may require in order that the Directors may evaluate and assess the progress of the Services.

3.9 The Consultant acknowledges that material failure to meet the requirements of any specification set out in Schedule 1 after having been given a reasonable opportunity to correct, will entitle OOVEE to reject such part of the Services and, at OOVEE's discretion, to terminate this Agreement, in which case OOVEE shall not be liable to pay the fee provided for in clause 4 provided that OOVEE shall be required to pay a reasonable amount for the work or the services performed. Such reasonable amount, to be determined, primarily on the basis of functionality and utility of services. Termination shall be without prejudice to OOVEE's accrued rights and OOVEE shall have no liability whatsoever to the Consultant arising out of such termination.

3.10 The Consultant hereby retains its moral rights to be identified as the creator & designer of any item provided as part of the Services and undertakes that it will not undermine the rights of Oovee as owners of any item provided as part of the services

3.11 Where a date for delivery is set out in Schedule 1 for any work to be provided as part of the Services, that work must be delivered to OOVEE by the specified date and time shall be of the essence in relation to such delivery. Failure to comply with the delivery date will entitle OOVEE to terminate the Agreement immediately without prejudice to its accrued rights and to recover any sum already paid to the Consultant provided that OOVEE shall have no claim under this clause where such delay is beyond the reasonable control of either party. In the event of termination of the Agreement under this clause 3.11, the Consultant shall not be entitled to payment of the fee specified in clause 4 and shall have no claim whatsoever against OOVEE arising out of this contract or its termination.

4 Remuneration

4.1 In consideration of the provision of the Services provided to OOVEE by the Consultant pursuant to this Agreement OOVEE will pay the Consultant the Fee.

5 Confidential Information/Intellectual Property Rights

5.1 Title to the Documents (except library items as referred to in clause 5.1.3 below) will at all times vest in OOVEE and upon termination of this Agreement for whatever reason the Consultant will deliver up to OOVEE all Documents and any and all copies thereof in his/her possession or under his/her control.

5.1.1 Certain design elements of the Services, including the OOVEE name, logo and any items derived from it including specific items belonging to OOVEE and supplied to the Consultant for inclusion in the Services (including but not limited to textual content) and any item which is a design element referred to in clause 5.1.2 below are the property of OOVEE and the Consultant hereby assigns OOVEE by way of assignment of present and future copyright all rights in such elements and the Consultant shall make available to OOVEE on request all preliminary design and supporting materials relating to such items.

5.1.2 The Consultant agrees it shall not during or at any time after the termination of this Agreement without the written consent of OOVEE develop any computer code or program which contains any design element which would cause a reasonable suspicion that such site (or that element of it) was in any way connected with OOVEE.

5.1.3 OOVEE acknowledges that elements of the Services which constitute general know-how or expertise (other than those elements referred to in clause 5.1.2 above) are part of the Consultant's library of techniques, images, code fragments etc. ("the library items") and further acknowledges that in the performance of the Services the Consultant is likely to develop new or enhanced library items and that such items are and remain the exclusive property of the Consultant.

5.1.4 The Consultant hereby grants a non-exclusive royalty-free irrevocable licence to use such library items as are included in the Services (including use by adaptation or amendment) for the purposes of any of OOVEE's computer codes or programs and to allow access thereto to any Third Party for the purpose of modifying, developing, redesigning or otherwise working on any computer code or program or reproducing it as part of any other work.

5.2 The Consultant agrees to treat as secret and confidential and not at any time for any reason disclose or allow disclosure to any person or otherwise make use of or permit to be made use of the Confidential Information or any other information whatsoever which has or may have come to the Consultant's knowledge in the provision of the Services save where such information is in the public domain, other than through the default of the Consultant.

5.3 All Intellectual Property Rights save those in respect of the library items referred to above shall belong to OOVEE and the Consultant will have no rights to use the Intellectual Property Rights other than in the performance of his/her obligations in relation to the Services or by a separate agreement with OOVEE in relation to the Intellectual Property Rights and upon termination of this Agreement for whatever reason the Consultant shall execute all such documents as OOVEE's legal advisers may require to transfer and assign any Intellectual Property Rights.

5.4 If the provision of the Services by the Consultant requires the use of any Third Party Intellectual Property Rights the Consultant will be responsible for obtaining such permissions from the third party to use the Third Party Intellectual Property Rights as are necessary in order that OOVEE may reproduce, distribute or publish any document or report relating to the Services as OOVEE considers fit. The cost of obtaining such third party permissions will be borne by the Consultant unless OOVEE has previously agreed in writing to the contrary.

6 Conditions

6.1 Nothing in this Agreement shall be interpreted as meaning that the Consultant is an employee of OOVEE, and therefore shall not be entitled to any pension, bonus or other fringe benefits from OOVEE.

6.2 The Consultant agrees to work under the Consultancy Agreement as a self-employed person and is therefore excluded from the provisions of the Working Time Regulations (or any similar regulations in any jurisdiction) including entitlement to minimum wage, paid holiday or leave from OOVEE.

6.3 The Consultant shall be solely responsible for making all his/her own returns and deductions with regard to tax and national insurance in respect of his/her remuneration thereunder and the Consultant agrees to indemnify OOVEE in respect of any and all claims that may be made by the relevant authorities in any jurisdiction against OOVEE in this regard.

6.4 OOVEE will advise Consultant in tax matters resulting from the cooperation of the parties.

7 Termination

7.1 Either party may terminate this Agreement by giving not less than one calendar months' notice in writing, not sooner than 3 year after Commencement Date.

7.2 Either party may terminate this Agreement forthwith by notice in writing if the other party is in breach of this Agreement and shall have failed to remedy the breach within 28 days of the receipt of a request in writing from the party not in breach to remedy the breach such request indicating that failure to remedy the breach may result in termination of this Agreement.

7.3 Without limitation OOVEE may by notice in writing immediately terminate this Agreement if:

7.3.1 the Consultant has a bankruptcy order made against him/her or has entered into any composition or arrangement (whether formal or informal) with his/her creditors

7.3.2 the Consultant shall be guilty of serious misconduct which without limitation shall include the commission of any act of fraud or dishonesty (whether or not connected with the Services)

7.3.3 the Consultant shall be guilty of incompetence and/or gross or persistent negligence in respect of his/her obligations thereunder

7.3.4 the Consultant fails or refuses after written warning to carry out duties properly required of him/her thereunder

7.3.5 the Consultant shall have been prevented by illness, injury or otherwise from providing the Services thereby causing an unacceptable delay in the completion of the work.

7.4 OOVEE shall have the right to engage another Consultant to complete any Services on which the Consultant was working at the time of termination for whatever reason.

7.5 Upon termination of this Agreement for whatever reason the Consultant shall immediately comply with his/her obligations in respect of clause 5.

7.6 Termination of this Agreement howsoever arising will be without prejudice to the rights and duties of the parties arising in any way out of this Agreement prior to termination and without limitation all the clauses in this Agreement which expressly or impliedly have effect after termination will continue to be enforced notwithstanding termination.

8 Assignment

8.1 Consultant will have the right to assign this Agreement in connection with a change of Consultant's legal form to any new entity which belongs in whole to the Consultant.

8.2 OOVEE will be entitled to assign the benefit and/or delegate the burden of this Agreement.

9 General

9.1 Each of the parties is an independent contractor and nothing contained in this Agreement shall be construed to imply that there is any relationship between the parties of partnership or of principal/agent or of employer/employee nor are the parties hereby engaging in a joint venture and accordingly neither of the parties shall have any right or authority to act on behalf of the other nor to bind the other by contract or otherwise, unless expressly permitted by the terms of this Agreement.

9.2 Failure to exercise or delay in exercising on the part of either party any right, power or privilege of that party under this Agreement shall not in any circumstances operate as a waiver thereof nor prejudice either party's rights to take subsequent action.

9.3 This Agreement sets forth the entire agreement between the parties with respect to the subject matter herein and supersedes and replaces all prior communications, representations, warranties, stipulations, undertakings and agreements whether oral or written between parties.

9.4 Any notice required to be given to OOVEE hereunder will be deemed well served if delivered personally or sent by registered post or recorded delivery post to OOVEE's principal place of business for the time being and notice required to be served on the Consultant will be well served if delivered to him/her personally or sent by registered post or recorded delivery post to his/her usual or last known place of abode. Any notice if posted will be deemed to have been served 48 hours after the date on which it was posted.

9.5 This Agreement shall be binding upon and shall inure to the benefit of the successors of the parties hereto and the assigns of OOVEE.

9.6 No variation to this Agreement shall be effective unless in writing signed by the duly authorised representatives of both of the parties.

9.7 The formation, construction, performance, validity and all aspects whatsoever of this Agreement shall be governed by English Law and the parties hereby agree to submit to the non-exclusive jurisdiction of the English Courts.

9.8 The Consultant undertakes and agrees to take out adequate insurance cover with an insurance company of good repute to cover its liability under this Agreement and agrees to produce at OOVEE's request a copy of the insurance policy for inspection by OOVEE.

Schedule 1

The Commencement Date: 08/05/2014

The Project: The development of an interactive software game for PC platform under the title "SPINTIRES"

The Fee: 50% of Net Receipts (as defined hereunder) less Deductions (as defined here under).

Net Receipts: All amounts invoiced by OOVEE for sales of the Game in all channels including Retail and Digital less only applicable direct taxes, chargebacks and returns.

Deductions: PEGI/USK rating (2200 EUR)
Cost of multilanguage localization (4000 EUR)
Creation of packaging materials (3000 EUR)
kraz audio recording (1160 EUR)
bmp1 audio samples (used with maz) (164 EUR)
Ural audio recording (2787 EUR)
Forum software (410 EUR)

Brief Description of Services: Developing "SPINTIRES" Project in accordance with OOVEE and the written or discussed design plan. Such plan once agreed by Oovee and the Consultant will be enclosed to this agreement in the form of the appendix. To avoid any doubt, the Service will cover bug fixing, patches and improvements (at least 6 months from commencement date and at the request of OOVEE) and the multiplayer mode for the Project as agreed (no later than 13th June) in the above mentioned plan. During the duration of this agreement the Consultant will provide customer technical support at the request of OOVEE.

Schedule of Deliverables (if applicable): 13th June 2014

Fixed Period (if applicable): This Agreement is concluded for indefinite period of time and shall be effective as of the Commencement Date. Each Party may terminate this Agreement according to section 7 hereinabove. The termination of this Agreement shall not affect the validity of Licence granted by the Consultant to Oovee upon this Agreement (point 5.1.4).

SIGNED by:

Managing Director, OOVEE Ltd: Zane Andrew Saxton



SIGNED by _____

Position Lead Developer

For and on behalf of the Consultant

Limited company registered in England & Wales: **0677 1895**
VAT Registered: **127 2222 47**

This document is private and confidential

EXHIBIT J

ESTTA Tracking number: **ESTTA998598**

Filing date: **08/29/2019**

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

Proceeding	91248894
Party	Defendant Oovee ltd
Correspondence Address	MICHAEL J BROWN MICHAEL J BROWN LAW OFFICE LLC 354 EISENHOWER PARKWAY PLAZA 1, 2ND FLOOR, SUITE 2025 LIVINGSTON, NJ 07039 UNITED STATES michael@mjbrownlaw.com 973-577-6300
Submission	Answer
Filer's Name	Michael J. Brown
Filer's email	michael@mjbrownlaw.com
Signature	/MichaelJBrown/
Date	08/29/2019
Attachments	Appl-0113 Answer to 1st Amended Notice of Opposition.pdf(34062 bytes) Appl-0113 Answer Exhibits.pdf(3030782 bytes)

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

In the Matter of Application No. 79/248,677

Atty. Ref.: Appl-0113

-----X		
Saber Interactive Incorporated	:	
Opposer,	:	
	:	
-against-	:	Opposition No. 91248894
	:	
Oovee Ltd	:	
Applicant.	:	
-----X		

Submitted via ESTTA

ANSWER TO FIRST AMENDED NOTICE OF OPPOSITION

Oovee Ltd, a limited company formed under the laws of the United Kingdom (“Applicant”), hereby answers Saber Interactive Incorporated’s First Amended Notice of Opposition.

1. Applicant has no information about the allegations in paragraph 1 of the First Amended Notice of Opposition and can neither admit nor deny said allegations.
2. Applicant admits the allegations in paragraph 2 of the First Amended Notice of Opposition.
3. Applicant admits that Pavel Zagrebelnyy (“Zagrebelnyy”) has had a relationship with Saber Interactive Incorporated at various times, and otherwise has no information about the allegations in paragraph 3 of the First Amended Notice of Opposition, and can neither admit nor deny said allegations.
4. Applicant has no information about the allegations in paragraph 4 of the First Amended Notice of Opposition and can neither admit nor deny said allegations.

5. Applicant has no information about the allegations in paragraph 5 of the First Amended Notice of Opposition and can neither admit nor deny said allegations.

6. Applicant admits a demo of the Spintires game was made available on a third party unsecure Russian language web site at some time in 2009, and otherwise denies the allegations in paragraph 6 of the First Amended Notice of Opposition.

7. Applicant denies the allegations in paragraph 7 of the First Amended Notice of Opposition.

8. Applicant denies the allegations in paragraph 8 of the First Amended Notice of Opposition.

9. Applicant denies the allegations in paragraph 9 of the First Amended Notice of Opposition.

10. Applicant admits that Zagrebelnyy created the Spintires game, and otherwise has no information about the allegations in paragraph 10 of the First Amended Notice of Opposition and can neither admit nor deny said allegations.

11. Applicant has no information about the allegations in paragraph 11 of the First Amended Notice of Opposition and can neither admit nor deny said allegations.

12. Applicant denies the allegations in paragraph 12 of the First Amended Notice of Opposition, to the extent that the statements in that paragraph constitute an allegation.

13. Applicant denies the allegations in paragraph 13 of the First Amended Notice of Opposition.

14. Applicant admits entering into an agreement with ImagiNation s.c. on or about May of 2013 regarding the distribution of the SPINTIRES-branded game in certain countries, and denies the remaining allegations in paragraph 14 of the First Amended Notice of Opposition.

15. Applicant admits entering into a second agreement with ImagiNation s.c. on or about October of 2013 regarding the distribution of the SPINTIRES-branded game, and denies the remaining allegations in paragraph 15 of the First Amended Notice of Opposition.

16. Applicant admits entering into a license agreement with Opposer dated August 2, 2016 (the "License Agreement"), and has no information about the remaining allegations in paragraph 16 of the First Amended Notice of Opposition and can neither admit nor deny said allegations.

17. Applicant admits that the License Agreement granted certain rights to Opposer, and denies the remaining allegations in paragraph 17 of the First Amended Notice of Opposition.

18. Applicant has no information about Opposer's knowledge as alleged in paragraph 18 of the First Amended Notice of Opposition and can neither admit nor deny said allegations. Applicant denies the remaining allegations in paragraph 18 of the First Amended Notice of Opposition.

19. Applicant has no information about Opposer's knowledge as alleged in paragraph 19 of the First Amended Notice of Opposition and can neither admit nor deny said allegations. Applicant admits granting certain rights to ImagiNation s.c., and denies the remaining allegations in paragraph 19 of the First Amended Notice of Opposition.

20. Applicant has no information about Opposer's knowledge as alleged in paragraph 20 of the First Amended Notice of Opposition and can neither admit nor deny said allegations. Applicant denies the remaining allegations in paragraph 20 of the First Amended Notice of Opposition.

21. Applicant has no information about the allegations in paragraph 21 of the First Amended Notice of Opposition and can neither admit nor deny said allegations. Applicant denies the allegations of fraud in paragraph 21 of the First Amended Notice of Opposition

22. Applicant has no information about the allegations in paragraph 22 of the First Amended Notice of Opposition and can neither admit nor deny said allegations.

23. Applicant has no information about the allegations in paragraph 23 of the First Amended Notice of Opposition and can neither admit nor deny said allegations.

24. Applicant admits that it has demanded that Opposer cease use of the names SPINTIRES, and otherwise denies the remaining allegations in paragraph 24 of the First Amended Notice of Opposition.

25. Applicant admits that Exhibit B of the First Amended Notice of Opposition purports to be an “Assignment and Transfer Agreement”, but has no information about the allegations in paragraph 25 of the First Amended Notice of Opposition or Exhibit B thereto, and can neither admit nor deny said allegations.

26. Applicant denies the allegations in paragraph 26 of the First Amended Notice of Opposition.

27. Applicant denies the allegations in paragraph 27 of the First Amended Notice of Opposition.

28. Applicant repeats its responses to the allegations in paragraphs 1-27 of the First Amended Notice of Opposition.

29. Applicant denies the allegations in paragraph 29 of the First Amended Notice of Opposition.

30. Applicant denies the allegations in paragraph 30 of the First Amended Notice of Opposition.

31. Applicant denies the allegations in paragraph 31 of the First Amended Notice of Opposition.

32. Applicant denies the allegations in paragraph 32 of the First Amended Notice of Opposition.

33. Applicant denies the allegations in paragraph 33 of the First Amended Notice of Opposition.

34. Applicant denies the allegations in paragraph 34 of the First Amended Notice of Opposition.

35. Applicant denies the allegations in paragraph 35 of the First Amended Notice of Opposition.

Affirmative Defenses

36. The opposition should be barred by estoppel, as Opposer was until recently, and well after filing date of the application, a licensee of Applicant, licensed by Applicant to use the SPINTIRES mark. A copy of the license agreement is attached as Exhibit A.

37. The opposition should be barred by estoppel, as Opposer was until recently, and well after filing date of the application, licensed by Applicant to use the SPINTIRES mark, and therefore contractually barred from objecting to Applicant's rights in the SPINTIRES mark.

38. The opposition should be barred by acquiescence, as Opposer has known of Applicant's claim of right to the SPINTIRES mark for at least three years.

39. The opposition should be barred by lack of standing as Opposer has no valid basis to oppose the registration of the SPINTIRES mark.

40. The opposition should be barred by lack of standing as Opposer has not alleged any claim of right to the SPINTIRES mark.

41. The opposition should be barred by lack of standing as Opposer appears to be asserting the rights of a third party, Zagrebelnyy, who is not a party to the opposition.

42. The opposition should be barred for failure to join a necessary as Opposer appears to be asserting the rights of a third party, Zagrebelnyy, who is not a party to the opposition.

43. The opposition should be barred by lack of standing as Opposer's allegations of a license from Zagrebelnyy fails to take into account that Zagrebelnyy had assigned all rights in and to the SPINTIRES mark to Applicant. A copy of a consultancy agreement between Applicant and Zagrebelnyy is attached as Exhibit B, showing that "All Intellectual Property Rights ... shall belong to Oovee". See Exhibit B, para. 5.2.

44. The opposition should be barred by lack of standing as Opposer's allegations of an assignment of rights from Zagrebelnyy post-dates the filing of the international application of the present US application.

45. The opposition should be barred by fraud, as Opposer falsely asserted that "Applicant has never been the owner of the mark SPINTIRES", despite Opposer's knowledge of the license from Applicant to Opposer (Exhibit A).

46. The opposition should be barred by fraud, as Opposer falsely asserted that Zagrebelnyy is the owner of the SPINTIRES mark, despite Opposer's knowledge of the Consultancy Agreement (Exhibit B).

47. The opposition should be barred under the doctrine of unclean hands based on Opposer's conduct and false statements, both with regard to Applicant and before the Board.

WHEREFORE, Applicant, by its attorneys, requests that this opposition be denied and the application for registration be allowed to proceed to registration.

Respectfully submitted,

Dated: August 29, 2019

By: /MichaelJBrown/
Michael J. Brown
Michael J Brown Law Office LLC
354 Eisenhower Parkway
Plaza I, 2nd Floor, Suite 2025
Livingston, NJ 07039
tel: (973) 577-6300
fax: (973) 577-6301
michael@mjbrownlaw.com
Attorneys for Applicant

CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2019, I served this Answer to the First Amended Notice of Opposition on the Opposer by emailing, addressed to Opposer's correspondence address of record as follows:

pnussbaum@csglaw.com, ajremore@csglaw.com, trademarks@csglaw.com,
tmdocketing@csglaw.com

/MichaelJBrown/
Michael J. Brown

EXHIBIT A

License Agreement

This License Agreement (this "Agreement") is made effective as of August 2, 2016 between Oovee, Ltd. A private Limited Company registered in England and Wales and Saber Interactive, a Delaware, LLC.

In the Agreement, the party who is granting the right to use the licensed property will be referred to as "Oovee," and the party who is receiving the right to use the licensed property will be referred to as "Saber Interactive."

The parties agree as follows:

1. GRANT OF LICENSE Oovee owns Spintires (the "Licensed Articles"). In accordance with this Agreement, Oovee grants Saber Interactive an exclusive license to Develop and publish console ports and enhancements to the original Spintires PC game for video game consoles including, but not limited to Xbox One, Playstation 4, Wii, Mac OS the "Port". Oovee retains title and ownership of the Licensed Articles.

Any enhancements or improvements made to the game may also be made available on the PC via downloadable content through Steam or other digital distribution channels on similar terms to this Agreement.

2. PAYMENT OF ROYALTY Saber Interactive will pay to Oovee a royalty which shall be calculated as follows:

- ☐ 10% up to \$900,000 in net receipts.
- ☐ 25% of all amounts exceeding \$900,000

With each royalty payment, Saber Interactive will submit to Oovee a written report that sets forth the calculation of the amount of the royalty payment. Saber agrees to pay Oovee ("Royalties") as a

percentage of Net Revenues (as defined below), unless otherwise specified in each applicable Schedule. "Net Revenues" shall be defined as one hundred percent (100%) of Saber's actual gross receipts and all other receivables of any kind whatsoever received in payment of Port whether received by Saber ("Gross Revenues"), less actual and verifiable, out-of-pocket expenses solely and directly attributable to the Port, including: (a) third-party, platform-owner fees (not to exceed thirty percent (30%) of Gross Revenues); (b) third-party, distribution fees (not to exceed twenty percent (20%) of Gross Revenues); and (c) government taxes (e.g., VAT, excise or sales or use tax, governmental withholdings, etc.) incurred in connection with the sale or exploitation of the Licensed Article(s), if any, but excluding any taxes on Saber's income, to the extent actually paid by and not reimbursed to Saber.

Any other deductions other than those directly attributable to the port must be mutually agreed upon in advance and in writing by Saber and Oovee. Saber shall have the right, in its sole discretion, to determine the sales price of the game, to offer the game at discounts and as promotional giveaways.

3. MODIFICATIONS The scope of the work to be completed by Saber is enumerated in Appendix A of this Agreement. Changes outside of said scope are not permitted unless the prior written approval of Oovee is obtained. Such approval shall not be *unreasonably withheld*.

4. TRANSFER OF RIGHTS This Agreement shall be binding on any successors of the parties. Neither party shall have the right to assign its interests in this Agreement to any other party, unless the prior written consent of the other party is obtained. However, Saber shall have the right to assign publishing rights to a third-party publisher.

5. LICENSE TERRITORY AND LANGUAGE: Saber's rights herein

shall be limited to the right to develop, create, publish, market, distribute and sell the Licensed Article(s), and to engage in Advertising and Promotion worldwide. Saber shall have the right, but not the obligation to localize the Licensed Property into any language desired.

6. EXCLUSIVITY: The rights granted herein shall be exclusive unless otherwise indicated on the applicable Schedule.

7. ADVERTISING AND PROMOTION: Saber shall have the right to use the Licensed Property to market, advertise and promote for sale the Licensed Article(s) during the License Term in the License Territory ("Advertising and Promotion").

8. ROYALTY STATEMENTS AND PAYMENTS: Saber shall, within thirty (30) days of the end of each calendar quarter (March 31, June 30, September 30 and December 31 of each year), commencing with the first full calendar quarter following Saber's execution of this Agreement and continuing until a final Certification of Wind-Up is delivered, furnish Oovee complete statements, certified to be accurate by an authorized representative of Saber, specifying the License Territory, a description of the Licensed Article(s), a description of the Licensed Property used therein or thereon (including, without limitation, any and all names and likenesses from the Licensed Property which appear in or on the Licensed Article(s), including, without limitation, any Collateral Materials and Advertising and Promotion), the amount due Oovee Gross Receipts, Adjusted Gross Receipts, unit sales, invoice price, quantity invoiced, Royalties rate, the distribution channels or portals, deductions for actual cash and credit returns of defective merchandise (including the amount and quantity related thereto), and other deductions as specifically permitted in Paragraph 2 above the amount shown to be payable to upon invoice within 10 business after the rendering of the respective Royalty Statement.

9. REPRESENTATIONS AND WARRANTIES: (a) Saber

represents and warrants all of the following:

(i) Saber is a company duly organized, validly existing and in good standing under the laws of the state and country of its principal office, with full power and authority to execute and deliver this Agreement and to perform its obligations, and maintains its principal executive office at the address set forth herein. The execution, delivery and performance of this Agreement have been duly authorized by all necessary actions of and this Agreement constitutes a valid and binding obligation of Saber enforceable against Saber in accordance with its terms.

(ii) Saber shall comply with and act in accordance with: (A) any and all applicable laws and other legal obligations of or in the License Territory including, without limitation, local, state and federal directives, rules, assessments, regulations, filing requirements, ordinances, statutes, codes, judgments and civil or common law; and (B) conventions and treaties to which the United States or any legal subdivision thereof is a party (individually and collectively, "Law" or "Laws").

(iii) The making of this Agreement by Saber does not violate any agreement, right or obligation between Saber and any other person, entity, firm or corporation, and the permission or agreement of no other person, entity, firm or corporation is required to execute this Agreement or perform the obligations herein, or Saber has secured such permission, if necessary.

(iv) Neither the execution and delivery of this Agreement nor the performance of the Saber of any or all of the terms, obligations and services herein shall: (A) breach, be in conflict with or constitute a default under any agreement or commitment to which Saber is a party; (B) violate any Law applicable to Saber; or (C) incur for or involve Oovee in any liability whatsoever.

(v) Saber shall undertake a level of customer service and provide

warranties to consumers at least as favorable as is standard in its industry.

(vi) To the extent any third-party materials or third-party intellectual property rights are used by Saber in connection with the Licensed Article(s) or the Advertising and Promotion, Saber represents and warrants that it owns or controls or has acquired under license all *necessary rights in and to all such third-party materials and intellectual property rights included in the Licensed Article(s) or the Advertising and Promotion, whether in the development thereof or in the finished product released to the public.* Saber has paid or will pay any and all re-use and license fees to the appropriate person or entity (which fees may include a calculation and payments in satisfaction of pension and welfare obligations) and has obtained or will obtain written and executed authorizations for such use from the person or entity having the right to grant such permissions.

(vii) None of the representations or warranties made by Saber in this Agreement as of the date hereof and none of the statements contained in any agreement or other document or report furnished by or on behalf of Saber to Oovee in connection with this Agreement *contain any untrue statement of a material fact or omit any material fact necessary to make such statements accurate in light of the circumstances under which they were made.*

(b) Oovee represents and warrants all of the following:

(i) Oovee is a company duly organized, validly existing and in good standing under the laws of the state and country of its principal office, with full power and authority to execute and deliver this Agreement and to perform its obligations, and maintains its *principal executive office at the address set forth herein.* The execution, delivery and performance of this Agreement have been duly authorized by all necessary actions of and this Agreement constitutes a valid and binding obligation of Oovee enforceable against Saber in accordance with its terms.

(v) Oovee shall comply with and act in accordance with: (A) any and all applicable laws and other legal obligations of or in the License Territory including, without limitation, local, state and federal directives, rules, assessments, regulations, filing requirements, ordinances, statutes, codes, judgments and civil or common law; and (B) conventions and treaties to which the United States or any legal subdivision thereof is a party (individually and collectively, "Law" or "Laws").

(vi) The making of this Agreement by Oovee does not violate any agreement, right or obligation between Oovee and any other person, entity, firm or corporation, and the permission or agreement of no other person, entity, firm or corporation is required to execute this Agreement or perform the obligations herein, or Saber has secured such permission, if necessary.

(iv) Neither the execution and delivery of this Agreement nor the performance of the Oovee of any or all of the terms, obligations and services herein shall: (A) breach, be in conflict with or constitute a default under any agreement or commitment to which Oovee is a party; (B) violate any Law applicable to Oovee; or (C) incur for or involve Oovee in any liability whatsoever.

(v) Oovee shall undertake a level of customer service and provide warranties to consumers at least as favorable as is standard in its industry.

(vi) To the extent any third-party materials or third-party intellectual property rights are used by Saber in connection with the Licensed Article(s) or the Advertising and Promotion, Oovee represents and warrants that it owns or controls or has acquired under license all necessary rights in and to all such third-party materials and intellectual property rights included in the Licensed Article(s) or the Advertising and Promotion, whether in the development thereof or in the finished product released to the public. Oovee has paid or will pay any and all re-use and license fees to the appropriate

person or entity (which fees may include a calculation and payments in satisfaction of pension and welfare obligations) and has obtained or will obtain written and executed authorizations for such use from the person or entity having the right to grant such permissions.

(vii) None of the representations or warranties made by Oovee in this Agreement as of the date hereof and none of the statements contained in any agreement or other document or report furnished by or on behalf of Oovee to Saber in connection with this Agreement contain any untrue statement of a material fact or omit any material fact necessary to make such statements accurate in light of the circumstances under which they were made.

10. AGREEMENT NOT TO SUE AND WAIVER Saber hereby, as part of the consideration for this Agreement, waives any right to pursue any course of action against Oovee for copyright, trade secret or any other form of intellectual property infringement that may have resulted from the release of the PC version of Spintires. Such waiver shall become effective upon release of the Licensed Property on any of the platforms indicated in Appendix A. Prior to said release and from the effective date of this agreement and while it is in force, Saber shall agree to withhold pursuit of any legal claims arising from the release of Spintires.

11. OWNERSHIP OF INTELLECTUAL PROPERTY Oovee is the sole owner of the Spintires property. Saber is the sole owner of its proprietary technology – the Saber3d Engine.

Saber shall utilize a combination of its proprietary technology – the Saber3d Engine with existing Spintires code to create the console ports. Saber and Oovee agree that as part of this agreement, both parties shall have the right in perpetuity to use the source code in the PC and console versions of the game for future development purposes. Such rights shall survive this Agreement whether the Port is released or whether the agreement is terminated in

accordance with Paragraph 12.

12. TERMINATION: (a) *Termination with Notice and Right to Cure:* Oovee and Saber shall have the right, in its sole discretion, in addition to any and all other rights and remedies and at no cost or expense to itself, to declare a material breach of this Agreement and to terminate this Agreement effective immediately upon notice to other party at any time upon the occurrence provided that both parties shall have a period not to exceed thirty (30) days from the date of notice by the notifying party of such default to cure the default to the other party's sole satisfaction.

(b) *Termination for Convenience:* Saber shall have the right to terminate the game for convenience at any time prior to the commercial release of the Licensed Articles.

13. EFFECT OF TERMINATION OR EXPIRATION: Upon termination of this Agreement for cause, the following shall occur: (a) If termination is due to Saber's breach, it shall cease all development of the Port and have no right to develop or publish the Port. (b) If termination is due to Oovee's breach, Saber shall have the right to continue development of the Port at its sole discretion and offset and actual or reasonably anticipated costs from Royalty due to Oovee. Saber's obligation to pay Royalty to Oovee shall survive termination after Commercial Release of the Licensed Articles.

14. INDEMNIFICATION Both parties shall defend, indemnify and forever hold harmless each other's officers, directors, shareholders, employees, agents, representatives, assigns and successors-in-interest from and against any and all claims, liabilities, penalties, losses, costs, damages, demands, actions, causes of action, suits, proceedings, judgments and expenses including, without limitation, amounts paid in settlement, reasonable attorneys' fees, court costs and other legal expenses arising out of, connected with, or relating to any material breach by

either party of any of its representations or warranties, provided that prompt written notice is given to said party of any such claim or suit. The provisions of this Paragraph shall survive termination of this Agreement.

15. NOTICES AND PAYMENTS: Any notice or other communication required or permitted to be given shall be in writing addressed to the respective party at the address set forth in the introductory paragraph hereof and may be personally served, telecopied or sent by registered or certified mail, postage prepaid, return receipt requested and shall be deemed given: (a) if served in person, when served; (b) if telecopied, on the date of transmission if confirmed before 3:00 p.m. (according to the local time of the receiving party) on a business day and otherwise on the following business day, provided that a hard copy of such notice is also sent pursuant to (c) below; or (c) if by certified or registered mail, on the third (3rd) business day after deposit in the mail, postage prepaid.

Unless otherwise directed by Oovee, all notices shall be sent by mail or facsimile to:

Oovee

170 High Street Gorleston-On-Sea

NORFOLK NR31 6RG United Kingdom

Attn: ~~Tony Fellas~~ ZANE SAXTON

Email: ~~tony@oovee.co.uk~~ ZANE.SAXTON@OOVEE.CO.UK

Notices to Saber shall be addressed to:

Saber Interactive

4 Winthrop Place

Maplewood, NJ 07040

Attn: Matthew Karch

E-mail: karch@saber3d.com

Wire Transfer Payments: All payments may be made via wire transfer to the following account and shall be made according to instructions on the invoices issued after receipt by Oovee of the royalty statements.

16. GOVERNING LAW, VENUE AND JURISDICTION: This Agreement, and its validity, construction and effect, shall be governed by and enforced in accordance with the internal laws of the United Kingdom (*i.e.*, without reference to the conflicts of laws provisions thereof). Each party to this Agreement irrevocably submits to the personal jurisdiction and venue of a state or federal court of competent jurisdiction in the United Kingdom for any purpose permitted herein.

17. DISPUTE RESOLUTION: Any controversy, claim, or dispute arising out of or relating to this Agreement or this agreement to arbitrate, including, without limitation, the interpretation, performance, formation, validity, breach, or enforcement of this Agreement, and further including any such controversy, claim, or dispute against or involving any officer, director, agent, employee, affiliate, successor, predecessor, or assign of a party to this Agreement (each, a "Dispute"), shall be fully and finally adjudicated by binding arbitration to the fullest extent allowed by law (the "Arbitration"). The seat of the Arbitration shall be the London Court of International Arbitration.

18. LIMITATION ON LIABILITY: The parties agree that in any arbitration or court action pursuant to Paragraph 17 above, the damages that may be awarded shall be limited to any actual damages suffered. In no event shall either party be liable for any *special, incidental, consequential, exemplary or punitive damages*, or any claim for loss of profits, lost business or lost business opportunities, even if the other party has been advised of the possibility of such damages.

19. WAIVER, MODIFICATION AND AMENDMENT: No modification, amendment or waiver of any of the provisions contained in this Agreement, or any future representation, promise or condition in connection with the subject matter of this Agreement, shall be binding upon any party to this Agreement unless made in writing and signed by a duly authorized representative or agent of such party. The failure by either party to enforce, or the delay by either party in enforcing, any of said party's rights under this Agreement shall not be construed as a continuing waiver of such rights, and said party may, within such time as is provided by the laws established by any government with applicable jurisdiction, commence appropriate suits, actions or proceedings to enforce any or all of such rights. A waiver by either party of a default in one or more instances shall not be construed as a waiver in other instances.

20. NO JOINT VENTURE: This Agreement does not constitute and shall not be construed to constitute an agency, a partnership or a joint venture between Oovee and Saber. Saber shall have no right to obligate or to bind the Oovee Entities in any manner whatsoever, and nothing contained in this Agreement shall give or is intended to give any rights of any nature to any third-party.

21. ADDITIONAL DOCUMENTS: Upon either party's request, the other party shall promptly execute and deliver to any the requesting party such further documents and instruments, in form and substance satisfactory to the requesting party, to confirm and effectuate the terms and conditions of this Agreement, and, in the event that said party fails or is unable to execute any such documents or instruments, the party appoints the requesting party its attorney-in-fact with the full right and authority to execute and deliver the same, which such appointment shall be deemed a power coupled with an interest and shall be irrevocable under any and all circumstances.

22. SEVERABILITY: If any term or provision of this Agreement, as

applied to either party or any circumstance, for any reason shall be declared by a court of competent jurisdiction to be invalid, illegal, unenforceable, inoperative or otherwise ineffective, that provision shall be limited or eliminated to the minimum extent necessary so that this Agreement shall otherwise remain in full force and effect and enforceable, provided, however, that if any term or provision of this Agreement pertaining to the payment of monies to Oovee shall be declared invalid, illegal, unenforceable, inoperative or otherwise ineffective, Oovee shall have the right to terminate this Agreement as provided herein.

23. COUNTERPARTS: This Agreement may be executed in one or more counterparts, each of which shall be an original, but all of which together shall constitute one agreement binding on all of the parties hereto notwithstanding that all of the parties hereto are not signatories to the same counterpart. Each of the parties agrees that a photographic or facsimile copy of the signature evidencing a party's execution of this Agreement shall be effective as an original signature and may be used in lieu of the original for any purpose.

24. PARAGRAPH HEADINGS AND DEFINITIONS: Paragraph and subparagraph headings are for ease of reference only and shall not have any effect upon the

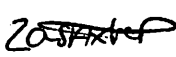
construction of this Agreement or any of the terms or provisions hereof. All capitalized terms used herein shall be defined as set forth elsewhere in this Agreement.

25. ENTIRE AGREEMENT: This Agreement, together with Schedule "A" and all such additional Schedules as are added hereto following the date hereof and thereby made a part hereof, constitutes a single, integrated written contract expressing the entire agreement of the parties concerning the subject matter hereof. No covenants, agreements, representations or warranties of any kind whatsoever have been made by any party to this Agreement except as specifically set forth in this Agreement. All

prior agreements, discussions and negotiations have been and are merged and integrated into, and are entirely superseded by, this Agreement. Each party and its counsel have participated fully in the review and revision of this Agreement. Any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply in the interpretation of this Agreement.

IN WITNESS WHEREOF, each party has executed this Agreement on the date indicated below

Licensor: Oovee

By:  3/8/16

Oovee , LTD

Zane Saxton

Licensee: Saber Interactive

By: 

Saber Interactive, Inc.

Matthew Karch

EXHIBIT B

Oovee Game Studios

170 High Street
Gorleston-On-Sea
Norfolk, UK.
NR31 6RG

T: +(020)7 3664 0670
E: enquiry@oovee.co.uk
W: http://www.oovee.co.uk



OOVEE GAME STUDIOS (OOVEE LTD)
CONSULTANCY AGREEMENT

THIS AGREEMENT is dated day of **7th May 2014**

Between:

1 OOVEE LTD (registered in England and Wales Registration Number 6771895) of 170 High Street, Gorleston-On-Sea, Norfolk NR31 6RG (hereinafter "OOVEE")

And:

2 Pavel Aleksandrovich Zagrebelnyy of Prospekt Kosygina 9/2 apt 220, Saint-Petersburg (hereinafter "Consultant")

Background

(A) OOVEE wishes to engage the Consultant to provide the services described in Schedule 1 hereto. The Consultant offers consultancy and other services in relation to such services and the Consultant warrants that s/he has considerable skill, knowledge and experience in this field.

(B) In reliance upon the Consultant's skill, knowledge and experience OOVEE wishes to engage the Consultant to provide the Services and the Consultant has agreed to accept this engagement on the terms and conditions set out below.

(C) This Agreement supersedes all prior agreements and understandings (whether written or oral) between OOVEE and the Consultant, or any of them, with respect to the subject matter hereof. To avoid any doubt, Oovee and Consultant acknowledge and confirm that as of 17th April 2011 the Project was, is and will be the sole property of OOVEE.

Limited company registered in England & Wales: **0677 1895**
VAT Registered: **127 2222 47**

This document is private and confidential

IT IS AGREED AS FOLLOWS:

1 Definition

1.1 In this Agreement the following expressions shall have the following meanings unless the context requires otherwise:

“The Commencement Date”, the date specified in Schedule 1.

“Confidential Information” means all information whatsoever relating to the business of OOVEE or the Project carried on from time to time.

“Documents” means all records, reports, documents, papers and other materials whatsoever originated in any medium by OOVEE or by the Consultant on behalf of OOVEE pursuant to this Agreement and any other property of OOVEE, including all submitted designs, concepts, graphic devices, logos, page/screen layouts, borders, backgrounds, buttons, navigational devices, produced in the course of the supply of the Services or the Project.

“Fee” means the sum (if any) as specified in Schedule 1 and/or Schedule 2 and certified as accurate by OOVEE’s auditors. The certificate of accuracy from Digital sale will be submitted to the Consultant within 30 days after the end of each calendar month. The certificate of accuracy from Retail sale will be submitted to the Consultant within 30 days after the end of each calendar quarter. Consultant agrees to accept the said certificate of accuracy.

Fee (if any) will be paid by OOVEE to the Consultant within 14 days after receiving the said certificate of accuracy from auditors. Such sum (if any) will be paid in Pound Sterling (£) to the Consultant based on the invoice issued by the Consultant.

Fees from Digital and Retail sales will be received by the Consultant from the Release Date.

“Fixed Period” means the period (if any) specified in Schedule 1.

“Intellectual Property Rights” means all intellectual property rights arising created or developed as a result of or relating to the performance of the Services by the Consultant including without limitation patents, trademarks or trade names, service marks, designs, design rights, know-how and copyright (in each case whether registered or not) and including all applications for registration thereof in any jurisdiction

“Project” means the project more particularly described in Schedule 1.

“Services” means the services to be provided by the Consultant more particularly described in Schedule 1.

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“Third Party Intellectual Property Rights” means all intellectual property rights owned by a third party including without limitation patents, trademarks or trade names, service marks, designs, design rights, know-how and copyrights (in each case whether registered or not).

“Retail” means sales made via a retail chain, whether physical or digital, by an appointed retail publisher. In this case “IMGN.PRO”.

“Digital” means sales made by appointed online store. In this case “Steam”.

“Release Date” means when the Project will be put to sale via Retail or Digital outlets.

“Deductions” means all costs for publishing/developing and operational in relation to the Project (costs that include other OOVEE activities to be pro-rated).

1.2 Headings in this Agreement are only for convenience and shall not affect its construction.

1.3 Where appropriate words denoting a singular shall include the plural and vice versa.

2 Duration

The Consultant agrees to provide the Services to OOVEE from the Commencement Date for the Fixed Period (if any) subject always to the provisions for earlier termination contained elsewhere in this Agreement.

3 The Consultant's Obligations

3.1 The Consultant will provide the Services with reasonable skill and care to the reasonable satisfaction of OOVEE and in accordance with the terms of this Agreement.

3.2 The Consultant will at all times act in the best interests of OOVEE and will in all aspects diligently and faithfully observe all reasonable directions of OOVEE.

3.3 The Consultant shall keep detailed records of all work undertaken by him/her in relation to the provision of the Services to OOVEE and at OOVEE's request shall make such records available for inspection by OOVEE or its agent

3.4 OOVEE will rely on the Consultant's skill expertise and experience in the provision of the Services and also upon the accuracy of all representations made and advice given by the Consultant in connection with the Services provided thereunder and the Consultant hereby agrees to indemnify and keep indemnified OOVEE against all loss damage costs professional and other expenses whatsoever incurred by OOVEE whether direct or consequential (including but without limitation any economic loss or other loss turnover profits business or goodwill) as a result of such reliance.

3.5 The Consultant accepts liability for death or personal injury or damage to property howsoever resulting from the Consultant's negligence where such negligence occurs in the course of providing the Services to OOVEE thereunder or for any purpose related to this Agreement and the Consultant hereby agrees to indemnify and keep indemnified OOVEE against any and all liability loss damage costs and expense of whatsoever nature incurred or suffered by OOVEE or by any third party arising from any and all claims or proceedings which seek to recover loss and damage to property caused by any act or omission of the Consultant, its employees, agents or sub-contractors.

3.6 The Consultant warrants that:

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This document is private and confidential

3.6.1 The Consultant has full power to enter into this Agreement.

3.6.2 There is no legal bar which prevents the Consultant from performing the Services.

3.6.3 So far as the Consultant is aware no third party intends to prevent or hinder the Consultant from performing the Services.

3.6.4 All work produced by the Consultant in the provision of the Services will be original and will not contain any obscene or defamatory matter or contravene any statute and that the performance of the Services will not in any way be a violation or infringement of any Third Party Intellectual Property Rights or any existing agreement with a third party provided that this warranty shall not extend to use of specific materials required by OOVEE such as, but not limited to, texts, logos, images, sounds and mechanisms underlying the provision of the Services, where such materials have been provided by OOVEE and used in accordance with OOVEE's instructions ("OOVEE Materials") and provided further that the Consultant will notify OOVEE if the Consultant believes that use of any OOVEE Materials is likely to constitute such a violation or infringement.

3.7 Where the Consultant considers it necessary to use the services of a third party for whatever reason the Consultant shall (except in matters of a minor and obvious nature) first obtain the consent of OOVEE.

3.8 The Consultant agrees to make available to the Directors (or such person(s) as the Directors may delegate) of OOVEE such reasonable facilities as the Directors may require in order that the Directors may evaluate and assess the progress of the Services.

3.9 The Consultant acknowledges that material failure to meet the requirements of any specification set out in Schedule 1 after having been given a reasonable opportunity to correct, will entitle OOVEE to reject such part of the Services and, at OOVEE's discretion, to terminate this Agreement, in which case OOVEE shall not be liable to pay the fee provided for in clause 4 provided that OOVEE shall be required to pay a reasonable amount for the work or the services performed. Such reasonable amount, to be determined, primarily on the basis of functionality and utility of services. Termination shall be without prejudice to OOVEE's accrued rights and OOVEE shall have no liability whatsoever to the Consultant arising out of such termination.

3.10 The Consultant hereby retains its moral rights to be identified as the creator & designer of any item provided as part of the Services and undertakes that it will not undermine the rights of Oovee as owners of any item provided as part of the services

3.11 Where a date for delivery is set out in Schedule 1 for any work to be provided as part of the Services, that work must be delivered to OOVEE by the specified date and time shall be of the essence in relation to such delivery. Failure to comply with the delivery date will entitle OOVEE to terminate the Agreement immediately without prejudice to its accrued rights and to recover any sum already paid to the Consultant provided that OOVEE shall have no claim under this clause where such delay is beyond the reasonable control of either party. In the event of termination of the Agreement under this clause 3.11, the Consultant shall not be entitled to payment of the fee specified in clause 4 and shall have no claim whatsoever against OOVEE arising out of this contract or its termination.

4 Remuneration

4.1 In consideration of the provision of the Services provided to OOVEE by the Consultant pursuant to this Agreement OOVEE will pay the Consultant the Fee.

5 Confidential Information/Intellectual Property Rights

5.1 Title to the Documents (except library items as referred to in clause 5.1.3 below) will at all times vest in OOVEE and upon termination of this Agreement for whatever reason the Consultant will deliver up to OOVEE all Documents and any and all copies thereof in his/her possession or under his/her control.

5.1.1 Certain design elements of the Services, including the OOVEE name, logo and any items derived from it including specific items belonging to OOVEE and supplied to the Consultant for inclusion in the Services (including but not limited to textual content) and any item which is a design element referred to in clause 5.1.2 below are the property of OOVEE and the Consultant hereby assigns OOVEE by way of assignment of present and future copyright all rights in such elements and the Consultant shall make available to OOVEE on request all preliminary design and supporting materials relating to such items.

5.1.2 The Consultant agrees it shall not during or at any time after the termination of this Agreement without the written consent of OOVEE develop any computer code or program which contains any design element which would cause a reasonable suspicion that such site (or that element of it) was in any way connected with OOVEE.

5.1.3 OOVEE acknowledges that elements of the Services which constitute general know-how or expertise (other than those elements referred to in clause 5.1.2 above) are part of the Consultant's library of techniques, images, code fragments etc. ("the library items") and further acknowledges that in the performance of the Services the Consultant is likely to develop new or enhanced library items and that such items are and remain the exclusive property of the Consultant.

5.1.4 The Consultant hereby grants a non-exclusive royalty-free irrevocable licence to use such library items as are included in the Services (including use by adaptation or amendment) for the purposes of any of OOVEE's computer codes or programs and to allow access thereto to any Third Party for the purpose of modifying, developing, redesigning or otherwise working on any computer code or program or reproducing it as part of any other work.

5.2 The Consultant agrees to treat as secret and confidential and not at any time for any reason disclose or allow disclosure to any person or otherwise make use of or permit to be made use of the Confidential Information or any other information whatsoever which has or may have come to the Consultant's knowledge in the provision of the Services save where such information is in the public domain, other than through the default of the Consultant.

5.3 All Intellectual Property Rights save those in respect of the library items referred to above shall belong to OOVEE and the Consultant will have no rights to use the Intellectual Property Rights other than in the performance of his/her obligations in relation to the Services or by a separate agreement with OOVEE in relation to the Intellectual Property Rights and upon termination of this Agreement for whatever reason the Consultant shall execute all such documents as OOVEE's legal advisers may require to transfer and assign any Intellectual Property Rights.

5.4 If the provision of the Services by the Consultant requires the use of any Third Party Intellectual Property Rights the Consultant will be responsible for obtaining such permissions from the third party to use the Third Party Intellectual Property Rights as are necessary in order that OOVEE may reproduce, distribute or publish any document or report relating to the Services as OOVEE considers fit. The cost of obtaining such third party permissions will be borne by the Consultant unless OOVEE has previously agreed in writing to the contrary.

6 Conditions

6.1 Nothing in this Agreement shall be interpreted as meaning that the Consultant is an employee of OOVEE, and therefore shall not be entitled to any pension, bonus or other fringe benefits from OOVEE.

6.2 The Consultant agrees to work under the Consultancy Agreement as a self-employed person and is therefore excluded from the provisions of the Working Time Regulations (or any similar regulations in any jurisdiction) including entitlement to minimum wage, paid holiday or leave from OOVEE.

6.3 The Consultant shall be solely responsible for making all his/her own returns and deductions with regard to tax and national insurance in respect of his/her remuneration thereunder and the Consultant agrees to indemnify OOVEE in respect of any and all claims that may be made by the relevant authorities in any jurisdiction against OOVEE in this regard.

6.4 OOVEE will advise Consultant in tax matters resulting from the cooperation of the parties.

7 Termination

7.1 Either party may terminate this Agreement by giving not less than one calendar months' notice in writing, not sooner than 3 year after Commencement Date.

7.2 Either party may terminate this Agreement forthwith by notice in writing if the other party is in breach of this Agreement and shall have failed to remedy the breach within 28 days of the receipt of a request in writing from the party not in breach to remedy the breach such request indicating that failure to remedy the breach may result in termination of this Agreement.

7.3 Without limitation OOVEE may by notice in writing immediately terminate this Agreement if:

7.3.1 the Consultant has a bankruptcy order made against him/her or has entered into any composition or arrangement (whether formal or informal) with his/her creditors

7.3.2 the Consultant shall be guilty of serious misconduct which without limitation shall include the commission of any act of fraud or dishonesty (whether or not connected with the Services)

7.3.3 the Consultant shall be guilty of incompetence and/or gross or persistent negligence in respect of his/her obligations thereunder

7.3.4 the Consultant fails or refuses after written warning to carry out duties properly required of him/her thereunder

7.3.5 the Consultant shall have been prevented by illness, injury or otherwise from providing the Services thereby causing an unacceptable delay in the completion of the work.

7.4 OOVEE shall have the right to engage another Consultant to complete any Services on which the Consultant was working at the time of termination for whatever reason.

7.5 Upon termination of this Agreement for whatever reason the Consultant shall immediately comply with his/her obligations in respect of clause 5.

7.6 Termination of this Agreement howsoever arising will be without prejudice to the rights and duties of the parties arising in any way out of this Agreement prior to termination and without limitation all the clauses in this Agreement which expressly or impliedly have effect after termination will continue to be enforced notwithstanding termination.

8 Assignment

8.1 Consultant will have the right to assign this Agreement in connection with a change of Consultant's legal form to any new entity which belongs in whole to the Consultant.

8.2 OOVEE will be entitled to assign the benefit and/or delegate the burden of this Agreement.

9 General

9.1 Each of the parties is an independent contractor and nothing contained in this Agreement shall be construed to imply that there is any relationship between the parties of partnership or of principal/agent or of employer/employee nor are the parties hereby engaging in a joint venture and accordingly neither of the parties shall have any right or authority to act on behalf of the other nor to bind the other by contract or otherwise, unless expressly permitted by the terms of this Agreement.

9.2 Failure to exercise or delay in exercising on the part of either party any right, power or privilege of that party under this Agreement shall not in any circumstances operate as a waiver thereof nor prejudice either party's rights to take subsequent action.

9.3 This Agreement sets forth the entire agreement between the parties with respect to the subject matter herein and supersedes and replaces all prior communications, representations, warranties, stipulations, undertakings and agreements whether oral or written between parties.

9.4 Any notice required to be given to OOVEE hereunder will be deemed well served if delivered personally or sent by registered post or recorded delivery post to OOVEE's principal place of business for the time being and notice required to be served on the Consultant will be well served if delivered to him/her personally or sent by registered post or recorded delivery post to his/her usual or last known place of abode. Any notice if posted will be deemed to have been served 48 hours after the date on which it was posted.

9.5 This Agreement shall be binding upon and shall inure to the benefit of the successors of the parties hereto and the assigns of OOVEE.

9.6 No variation to this Agreement shall be effective unless in writing signed by the duly authorised representatives of both of the parties.

9.7 The formation, construction, performance, validity and all aspects whatsoever of this Agreement shall be governed by English Law and the parties hereby agree to submit to the non-exclusive jurisdiction of the English Courts.

9.8 The Consultant undertakes and agrees to take out adequate insurance cover with an insurance company of good repute to cover its liability under this Agreement and agrees to produce at OOVEE's request a copy of the insurance policy for inspection by OOVEE.

Schedule 1

The Commencement Date: 08/05/2014

The Project: The development of an interactive software game for PC platform under the title "SPINTIRES"

The Fee: 50% of Net Receipts (as defined hereunder) less Deductions (as defined here under).

Net Receipts: All amounts invoiced by OOVEE for sales of the Game in all channels including Retail and Digital less only applicable direct taxes, chargebacks and returns.

Deductions: PEGI/USK rating (2200 EUR)
Cost of multilanguage localization (4000 EUR)
Creation of packaging materials (3000 EUR)
kraz audio recording (1160 EUR)
bmp1 audio samples (used with maz) (164 EUR)
Ural audio recording (2787 EUR)
Forum software (410 EUR)

Brief Description of Services: Developing "SPINTIRES" Project in accordance with OOVEE and the written or discussed design plan. Such plan once agreed by Oovee and the Consultant will be enclosed to this agreement in the form of the appendix. To avoid any doubt, the Service will cover bug fixing, patches and improvements (at least 6 months from commencement date and at the request of OOVEE) and the multiplayer mode for the Project as agreed (no later than 13th June) in the above mentioned plan. During the duration of this agreement the Consultant will provide customer technical support at the request of OOVEE.

Schedule of Deliverables (if applicable): 13th June 2014

Fixed Period (if applicable): This Agreement is concluded for indefinite period of time and shall be effective as of the Commencement Date. Each Party may terminate this Agreement according to section 7 hereinabove. The termination of this Agreement shall not affect the validity of Licence granted by the Consultant to Oovee upon this Agreement (point 5.1.4).

SIGNED by:

Managing Director, OOVEE Ltd: Zane Andrew Saxton



SIGNED by _____

Position Lead Developer

For and on behalf of the Consultant

Limited company registered in England & Wales: **0677 1895**
VAT Registered: **127 2222 47**

This document is private and confidential

EXHIBIT K

2019 WL 479309 (Trademark Tr. & App. Bd.)

THIS OPINION IS NOT A PRECEDENT OF THE TTAB

Trademark Trial and Appeal Board

Patent and Trademark Office (P.T.O.)

BIOGRAND CO., LTD.

v.

SUNBIO CORPORATION

Cancellation No. 92067124

February 1, 2019

*1 Before Mermelstein, Goodman and Heasley
Administrative Trademark Judges

By the Board:

Sunbio Corporation (“Respondent”) owns a registration for the mark BF-7 for dietary and nutritional supplements; dietary and nutritional supplements containing silk fibroin; dietary beverage supplements for human consumption in liquid and dry mix form for therapeutic purposes; dietary food supplements; dietary supplemental drinks; dietary supplements; dietary supplements consisting primarily of silk fibroin; dietary supplements for human consumption; dietary supplements for supporting brain health, enhancing memory and concentration, improving cognitive health and preventing cognitive decline, and protecting neuronal cells; health food supplements; liquid nutritional supplement; nutraceuticals for use as a dietary supplement; nutraceuticals for use as a dietary supplement for supporting brain health, enhancing memory and concentration, improving cognitive health and preventing cognitive decline, and protecting neuronal cells; nutritional supplements; nutritional supplements consisting primarily of silk fibroin; nutritional supplements for supporting brain health, enhancing memory and concentration, improving cognitive health and preventing cognitive decline, and protecting neuronal cells; nutritional supplements in the form of tablets, capsules, caplets, chewables, powder, syrups, gummies, and gels; powdered nutritional supplement drink mix and concentrate

in International Class 5.¹

Biogrand Co., Ltd. (“Petitioner”) petitions to cancel Respondent’s registration on numerous grounds including likelihood of confusion, misrepresentation of source, nonuse, abandonment, fraud, false advertising and unfair competition. Petitioner asserts common law rights in BF-7 for “dietary and nutritional compounds and products derived from silk fibroin” and ownership of a pending United States application for the mark BF-7 for “dietary supplements; health food supplements; nutritional supplements” in International Class 5.² *See* 1 TTABVue. Respondent’s answer denies the salient allegations of the notice of opposition and asserts a variety of affirmative defenses. *See* 4 TTABVue.

This case now comes up on Respondent’s motion for partial summary judgment as to the claims of likelihood of confusion, abandonment, misrepresentation of source, false advertising, unfair competition; and Petitioner’s cross-motion for summary judgment on the same grounds, as well as the additional grounds of nonuse and fraud. *See* 8 TTABVue, 10 TTABVue. The motions are fully briefed.

*2 Summary judgment is an appropriate method of disposing of cases in which there are no genuine disputes as to material facts, thus leaving the case to be resolved as a matter of law. *See* Fed. R. Civ. P. 56(a). In deciding motions for summary judgment, the Board must follow the well-established principles that, in considering the propriety of summary judgment, all evidence must be viewed in a light favorable to the non-movant, and all justifiable inferences are to be drawn in the non-movant's favor. The Board may not resolve disputes of material fact; it may only ascertain whether such disputes are present. *See Lloyd's Food Prods. Inc. v. Eli's Inc.*, 987 F.2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993); *Opryland USA Inc. v. Great Am. Music Show Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992); *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992).

The burden is on the party moving for summary judgment to demonstrate the absence of any genuine dispute of material fact, and that it is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56(a). The burden of the nonmovant to respond arises only if the summary judgment motion is properly supported. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160-61 (1970). The initial burden at summary judgment is greater than the evidentiary burden at trial. *See* TBMP § 528.01 (2018), and authorities cited therein. The fact that the parties have filed cross-motions for summary judgment does not demonstrate the absence of genuine disputes of material fact, or that we may resolve any such disputes. *Drive Trademark Holdings LP v. Inofin*, 83 USPQ2d 1433, 1437 (TTAB 2007). To the contrary, we consider the evidence in view of each party's burden as movant and nonmovant.

Respondent's Motion for Summary Judgment and Petitioner's Cross-Motion for Summary Judgment on the Claims of Likelihood of Confusion, Abandonment, Misrepresentation of Source and False Advertising and Unfair Competition

Likelihood of Confusion

The Board's determination of likelihood of confusion under Section 2(d) is based on an analysis of all the facts in evidence that are relevant to the *du Pont* factors. *See In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973); *Miss Universe L.P. v. Comty. Mktg., Inc.*, 82 USPQ2d 1562, 1566 (TTAB 2007).

Respondent moves for summary judgment on Petitioner's likelihood of confusion claim, arguing that Petitioner does not have priority because its claims of use of “marked products with ‘BF-7’ in the United States as of January 7, 2009” are unsupported. It also argues that Petitioner lacks evidence of continuous use, as evidenced by Petitioner's pending United States application, which was filed as intent-to-use. 8 TTABVUE 7-8. In support of its arguments, Respondent points to Petitioner's answers to certain interrogatories. *See* 8 TTABVUE 8, 14-16. Respondent relies on its registration for priority, referring to its alleged first use in commerce date, but it does not provide any evidence of a date earlier than the application filing date to support its own claim of priority. *See Cent. Garden & Pet Co. v. Doskocil Mfg. Co.*, 108 USPQ2d 1134, 1139-40 (TTAB 2013) (party may rely on application filing date of involved registration which is part of the record through Trademark Rule 2.122(b), but any earlier use date requires further proof); Trademark Rule 2.122(b)(2) (“The allegation in . . . a registration [] of a date of use is not evidence on behalf of the . . . registrant. . .”).³

*3 In response, Petitioner also moves for summary judgment on its likelihood of confusion claim, arguing that it has common law rights “based on prior use of the ‘BF-7’ mark in commerce from 2009”; that it obtained a certificate of safety from the United States Food and Drug Administration on August 13, 2008; and from 2012-2015, it spent “extensive human and financial resources to secure US FDA approval.” 10 TTABVUE 7. In support of its arguments, Petitioner submits the declaration of its founder and director, Dr. Sung Su Kim.⁴ 10 TTABVUE 132.

The evidence of record,⁵ and any reasonable inferences that may be drawn from the underlying undisputed facts, viewed in the light most favorable to each non-movant, fails to demonstrate an absence of a genuine dispute of material fact on the ground of likelihood of confusion. While each party has offered evidence to support its motion (and opposition), the evidence presented simply raises factual disputes. In particular, a genuine dispute remains as to Petitioner's priority. Petitioner's evidence of prior use, while not clearly indicating the nature of the use or the nature of the goods on which BF-7 has been used in the United

States⁶ is sufficient to raise a genuine dispute.⁷ In view thereof, both parties' cross-motions for summary judgment on the claim of likelihood of confusion are **denied**.

Abandonment

Section 45 provides that a mark is abandoned “[w]hen any course of conduct of the owner, including acts of omission as well as commission, causes the mark to become the generic name for the goods or services on or in connection with which it is used or otherwise to lose its significance as a mark. Respondent argues that Petitioner's abandonment claim should be dismissed because “[t]here is simply no evidence in the record whatsoever to support a claim of abandonment.” 8 TTABVUE 8. Petitioner argues that

Respondent's registration should be cancelled because Respondent permits and encourages “other[s] to use BF-7 as a ‘technical name’” which Petitioner asserts is not consistent with trademark ownership and “is indicative of abandonment.”

Attorney argument is no substitute for evidence, *Martahus v. Video Duplication Servs. Inc.*, 3 F.3d 417, 27 USPQ2d 1846, 1849 (Fed. Cir. 1993), and the motions for summary judgment on the abandonment claim are unsupported. Accordingly, there remain genuine disputes of material fact as to whether Respondent abandoned the involved mark. In view thereof, the motion and cross-motion for summary judgment on the claim of abandonment are **denied**.

Misrepresentation of Source

“[T]he term misrepresentation of source, as used in Section 14(c) of the Act, refers to situations where it is deliberately misrepresented by or with the consent of the registrant that goods and/or services originate from a manufacturer or other entity when in fact those goods and/or services originate from another party.” *Osterreichischer Molkerei-und Kasereiverband Registrierte GmbH v. Marks & Spencer Ltd.*, 203 USPQ 793, 794 (TTAB 1979). A pleading of misrepresentation of source “must be supported by allegations of blatant misuse of the mark by respondent in a manner calculated to trade on the goodwill and reputation of petitioner.” *Otto Int'l Inc. v. Otto Kern GmbH*, 83 USPQ2d 1861, 1863 (TTAB 2007) (quoting *McDonnell Douglas Corp. v. Nat'l Data Corp.*, 228 USPQ 45 (TTAB 1985)). “In order to prevail, petitioner must show that respondent took steps to deliberately pass off its goods as those of petitioner.” *Bayer Consumer Care AG v. Belmora LLC*, 110 USPQ2d 1623, 1632 (TTAB 2014).

*4 Respondent asserts Petitioner's claim must fail because the “record is simply devoid of any evidence of deliberate action constituting misrepresentation of source on the part of [Respondent].” 8 TTABVUE 7. Petitioner argues that Respondent's products are labeled as CERA-Q in Korea but are re-labeled as BF-7 in the United States; that in “Korea, **Petitioner is the only legal source** of silk fibroin peptide products branded as ‘BF-7’ to have health-related functionality”; and that Respondent's behavior can only be interpreted as Respondent trading on Petitioner's goodwill and reputation. 10 TTABVUE 15; 13 TTABVUE 7.

Upon review of the parties' evidence and arguments, viewed in a light most favorable to each non-movant, the Board is not persuaded that there is no genuine dispute of material fact. Genuine disputes remain because it is unclear from the evidence of record whether Respondent's conduct is blatant misuse of BF-7 in a manner calculated to trade on the goodwill and reputation of Petitioner. In view thereof, the motion and cross-motion for summary judgment are **denied**.

False Advertising and Unfair Competition

Respondent argues that Petitioner's claims related to false advertising and unfair competition under Section 43(a) should be dismissed because the Board lacks jurisdiction to hear such claims. See 8 TTABVUE 6-7. Petitioner argues that the Board has authority to also consider false advertising and unfair competition under Section 43(a) when Respondent's registration should be cancelled based on noncompliance with U.S. law. See 10 TTABVUE 10-11.

We construe this portion of Respondent's motion as one for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(h)(3) based on lack of subject matter jurisdiction, which can be raised at any time. The standard for adjudicating this portion of Respondent's motion is the same as that set forth in Fed. R. Civ. P. 12(b)(6). *W. Worldwide Enters. Grp. Inc. v. Qingdao Brewery*, 17 USPQ2d 1137, 1140 (TTAB 1990).

The Board has no jurisdiction over claims of unfair competition, as our jurisdiction extends only to the right to federal trademark registration. *Knickerbocker Toy Co., Inc. v. Faultless Starch Co.*, 467 F.2d 501, 175 USPQ 417, 423 (CCPA 1972); *Person's Co. Ltd. v. Christman*, 10 USPQ2d 1634, 1636 (TTAB 1989). Trademark Act § 43(a) provides a remedy “in a civil action” to anyone who is likely to be damaged by certain “uses. . . [of] any word, term, name, symbol, or device.” *Id.* Such actions are beyond the jurisdiction of the Board, which may determine only the right to registration of a mark, not liability resulting from the use of it. See J.T. McCarthy, *McCarthy on Trademarks and Unfair Competition* §§ 20:21.50, 20.99 (5th ed. Nov. 2018 Update).

*5 In view thereof, Respondent's motion is **granted**, and the Section 43(a) claim is dismissed.

Petitioner's Motion for Summary Judgment on its Claims of Nonuse and Fraud

Nonuse

Section 1(a) of the Trademark Act allows “[t]he owner of a trademark used in commerce” to request registration of its trademark on the Principal Register. 15 U.S.C. § 1051(a). Section 45 of the Act states that a mark shall be deemed to be used in commerce on goods when:

(A) it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto, or if the nature of the goods makes such placement impracticable, then on documents associated with the goods or their sale, and

(B) the goods are sold or transported in commerce.

Accordingly, one of the available grounds for cancellation of a registration is a claim that there was no use of the mark in commerce as of the filing date of a use-based application that matured into the registration. See e.g., *Lens.com Inc. v. 1-800 Contacts Inc.*, 686 F.3d 1376, 103 USPQ2d 1672, 1676-77 (Fed. Cir. 2012); *Int'l Mobile Machs. Corp. v. Int'l Tel. & Tel. Corp.*, 800 F.2d 1118, 231 USPQ 142 (Fed. Cir. 1986); *Paramount Pictures Corp. v. White*, 31 USPQ2d 1768, 1769 (TTAB 1994) (“use in commerce” involves the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark), *aff'd unpub'd*, 108 F.3d 1392 (Fed. Cir. 1997); *ShutEmDown Sports Inc. v. Lacy*, 102 USPQ2d 1036 (TTAB 2012).

Fraud

A fraud claim requires allegations of a specific false statement of material fact, knowingly made in the prosecution of the involved application with the intent of deceiving the USPTO into issuing a registration to which the party was not entitled; allegations that a party knew or should have known of a material statement's falsity are insufficient. See *In re Bose Corp.*, 580 F.3d 1240, 91 USPQ2d 1938, 1940 (Fed. Cir. 2009). On a motion for summary judgment, it must be shown that there is no dispute of material fact about the existence of intent to deceive the Office. *DaimlerChrysler Corp. v. Am. Motors Corp.*, 94 USPQ2d 1086, 1090 (TTAB 2010). Questions of intent are typically unsuited for resolution on summary judgment. *Id.* “Furthermore, fraud will not lie if it can be proven that the statement, though false, was made with a reasonable and honest belief that it was true.” *Hiraga v. Arena*, 90 USPQ2d 1102, 1107 (TTAB 2009) (citing *Woodstock's Enters. Inc. (Cal.) v. Woodstock's Enters. Inc. (Or.)*, 43 USPQ2d 1440 (TTAB 1997)).

*6 Both Petitioner's nonuse and fraud claims largely rely upon its assertion that Respondent has not used BF-7 nor "sold any of the goods identified in the Application at the time Respondent filed it"; and that the specimen submitted to support use is a false specimen.⁸ 10 TTABVUE 18.

Respondent argues that there "is no evidence that the specimen is fake other than Petitioner's attorney's opinion"; and that as to the nonuse claim, Respondent has sales to a customer in California. 12 TTABVUE 6-7, 12-15. Petitioner argues that Respondent's specimen "appears to have originated from SmartNutri - a Korean company that was owned by Thomas Chang (current Sunbio CEO)"; that Sunbio and SmartNutri are unrelated companies; that the specimen has a "fake seal" from the Korean Ministry of Food & Drug Safety; that Respondent's product "was never registered or authorized to be manufactured in Korea"; and that although Respondent has admitted in interrogatories that it has not conducted any studies, the specimen has statements about BF-7 studies. 10 TTABVUE 20-22. As to the nonuse claim, Petitioner argues that "Respondent offers only invoices of raw materials sold in powder form and one email exchange with a person interested in buying BF-17 for their parent living in Australia" and that Respondent "produced no evidence regarding manufacturing contracts, quality control, specifications, inspections, for any product associated with the BF-7 mark, regulatory filings or permits or applications, catalogs, point of purchase webpages, invoices, distributor or buyers." 10 TTABVUE 16-17.

Upon review of the evidence and the parties' arguments, the Board is not persuaded that there is no genuine dispute of material fact. In connection with the fraudulent specimen claim, Petitioner did not support its arguments with evidence. As to the nonuse claim, the inferences to be drawn from the 2014 email, in a light most favorable to Respondent, raise genuine disputes of material fact regarding Respondent's use of the mark on the goods prior to the filing date of its application.

In view thereof, the Board **denies** Petitioner's motion for summary judgment on the claims of nonuse and fraud.

Because the parties dispute a great many matters of fact, as well as what conclusions that are to be drawn from the evidence, we will not entertain any further motions for summary judgment.

Proceedings are resumed⁹ and dates are reset as follows:

Plaintiff's Pretrial Disclosures Due	February 10, 2019
Plaintiff's 30-day Trial Period Ends	March 27, 2019
Defendant's Pretrial Disclosures Due	April 11, 2019
Defendant's 30-day Trial Period Ends	May 26, 2019
Plaintiff's Rebuttal Disclosures Due	June 10, 2019
Plaintiff's 15-day Rebuttal Period Ends	July 10, 2019

BRIEFS SHALL BE DUE AS FOLLOWS:

Plaintiff's Main Brief Due	September 8, 2019
Defendant's Main Brief Due	October 8, 2019
Plaintiff's Reply Brief Due	October 23, 2019

*7 Generally, the Federal Rules of Evidence apply to Board trials. Trial testimony is taken and introduced out of the presence of the Board during the assigned testimony periods. The parties may stipulate to a wide variety of matters, and many requirements relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125. These include pretrial

disclosures, the manner and timing of taking testimony, matters in evidence, and the procedures for submitting and serving testimony and other evidence, including affidavits, declarations, deposition transcripts and stipulated evidence. Trial briefs shall be submitted in accordance with Trademark Rules 2.128(a) and (b). Oral argument at final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a).

Footnotes

- 1 Registration No. 4932313 issued April 5, 2016, claiming first use anywhere of February 1, 2014 and in interstate commerce of May 1, 2015.
- 2 Application Serial No. 87597332 was filed September 6, 2017 based on an intent to use under Section 1(b) and under Section 44(e) claiming ownership of a South Korean registration which issued March 6, 2017.
- 3 Evidence of continuous use is not required to establish priority. *W. Fla. Seafood Inc. v. Jet Rests. Inc.*, 31 F.3d 1122, 31 USPQ2d 1160, 1665 (Fed. Cir. 1994) (“The governing statute does not speak of ‘continuous use,’ but rather of whether the mark or trade name has been ‘previously used in the United States by another and not abandoned.’”); *Kemi Organics, LLC v. Gupta*, 126 USPQ2d 1601, 1607 (TTAB 2018).
- 4 Dr. Kim's declaration includes a list of various websites with no accompanying printout of those websites. See 10 TTABVUE 134-36. Internet search summaries or links to website pages are inadmissible because they merely offer links to information that is not otherwise of record. See *Edom Labs. Inc. v. Lichter*, 102 USPQ2d 1546, 1550 (TTAB 2012); *Calypso Tech. Inc. v. Calypso Capital Mgmt. LP*, 100 USPQ2d 1213, 1219 (TTAB 2011). In view thereof, the website pages have not been considered by the Board.
- 5 Respondent submitted evidence attached to its briefs, none of which has been authenticated by a declaration. Because Petitioner has not objected to the attached evidence on the basis of lack of authentication, we have considered it. See *Fed. R. Civ. P. 56(c)(2)* (Advisory Committee notes) (2010 amendment) (court may consider unauthenticated documents on summary judgment, eliminating the unequivocal requirement that documents submitted in connection with such a motion must be authenticated).
- 6 Attached to Dr. Kim's declaration are purported copies of material distributed in the U.S. by its business promoter. 10 TTABVUE 229-61. Those materials display BF-7 alone as well as with other terms such as BF-7 MEMORY UP, BF-7 NEURO CARE, BF-7 BRAIN Q. See, e.g., 10 TTABVUE 248-61.
- 7 With regard to priority, we have not considered that Petitioner's application was filed under Trademark Act § 1(b) as an “intent-to-use” application. Such an application is not an admission that the applied-for mark is not in use or otherwise inconsistent with actual use of the mark. “An intent-to-use applicant is entitled to rely upon actual use, or use analogous to trademark use, prior to the constructive use date of the intent-to-use application.” *Wet Seal Inc. v. FD Mgmt. Inc.*, 82 USPQ2d 1629, 1635 (TTAB 2007); *Stoller v. Sutech U.S.A., Inc.*, 199 F. App'x 954, 957-58 (Fed. Cir. 2006) (*per curiam*) (not precedential).
- 8 To be clear, any theory of fraud based on the dates of use Respondent submitted with its application is misplaced. The dates of first use and first use in commerce in an application cannot constitute fraud on the USPTO because the Office does not rely on them in determining the right to register. E.g., *Hiraga*, 90 USPQ2d at 1107. Instead, the relevant issue is whether the mark was in use as of the application filing date.
- 9 The evidence submitted in connection with the motion for summary judgment is of record only for consideration of that motion. To be considered at final hearing, any such evidence must be properly introduced in evidence during the appropriate trial period. See *Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993); *Pet Inc. v. Bassetti*, 219 USPQ 911 (TTAB 1983); *Am. Meat Inst. v. Horace W. Longacre, Inc.*, 211 USPQ 712 (TTAB 1981).

2019 WL 479309 (Trademark Tr. & App. Bd.)

EXHIBIT L

2019 WL 1399633 (Trademark Tr. & App. Bd.)

This Opinion is not a Precedent of the TTAB

Trademark Trial and Appeal Board

Patent and Trademark Office (P.T.O.)

JEFFREY SIMON DBA M3K ENTERPRISES

v.

JAMES HOLDA AND BEACH ATM SERVICES, LLC

Cancellation No. 92066602

March 26, 2019

*1 Sada Sheldon of the Law Offices of Khalil & Sheldon for Petitioner, Jeffrey Simon dba M3K Enterprises
Duncan G. Byers of Pender & Coward PC for Respondents, James Holda and Beach ATM Services, LLC.

Before Kuhlke, Kuczma and Goodman

Administrative Trademark Judges

Opinion by Kuczma

Administrative Trademark Judge:

Jeffrey Simon dba M3K Enterprises (“Petitioner”) filed an Amended Petition for Cancellation of James Holda's and Beach ATM Services, LLC's,¹ (jointly referred to as “Respondent”), Trademark Registration No. 5127645 for the mark:



(“ATM” and “est 2015” disclaimed) for:

Automated teller machine services; Rental of cash dispensers or automated-teller machines, in International Class 36.²

Petitioner contends that: Respondent is not the rightful owner of the registered mark; Petitioner has priority of ownership over an identical mark for overlapping services with which the registered mark is likely to cause confusion; and Respondent made several material misrepresentations of fact in its trademark application in order to secure Registration No. 5127645.

Except for admitting likelihood of confusion, Respondent denies the salient allegations in its Answer to the Amended Petition for Cancellation; the affirmative defenses it alleged in its Answer to the Amended Petition were stricken by the Board.³

I. Preliminary Matters - Accelerated Case Resolution

The parties agreed to resolve this proceeding by Accelerated Case Resolution (“ACR”) in lieu of a trial stipulating that “the Board may resolve any issues of material fact upon the filing of cross motions for summary judgment”⁴ The Board's Order of November 1, 2017, approved the use of ACR for this proceeding including the following additional stipulations:⁵

1. The parties agree that there will be no discovery depositions.
2. The parties agree to stipulate to a set of facts, to the extent they can.
3. The Parties may offer into evidence testimony by declaration and/or affidavit.
4. Expert disclosures will not be necessary in this proceeding.

II. The Record

Pursuant to the parties' ACR stipulation, Petitioner's testimony was presented by declaration with accompanying exhibits. Thus, the record includes the pleadings and, by operation of Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1), the file history for Respondent's Registration No. 5127645 which is the subject of this proceeding, and the following evidence submitted by Petitioner:

- *2** 1. Declaration of Jeffrey Simon with Exhibits A-D, (20 TTABVUE 15-27):
- Exhibit A: images dated May 7, 2015 of Steve Snelling of True Colors at computer screen showing ATM2GO (stylized) (20 TTABVUE 20-24),
 - Exhibit B: image taken by Jeffrey Simon showing an ATM at the Lava Music Festival on which Mr. Simon placed the mark at issue (20 TTABVUE 25),
 - Exhibit C: image of a kiosk Mr. Simon retained from the partnership with Respondent (20 TTABVUE 26),
 - Exhibit D: Pender & Coward letter dated April 24, 2017 addressed to Mr. Jeff Simon, 4987 Cleveland St., Suite 103, Virginia Beach, VA 23462 (20 TTABVUE 27);
2. Declaration of Sada Sheldon of The Law Offices of Carl Khalil & Sada Sheldon, PLC, counsel of record for Petitioner with Exhibits 1-4 (20 TTABVUE 28-46):
- Exhibit 1: Registrant's⁶ Answers to Interrogatories 1-5, 7 and 10, and Response to Request for production of Documents (20 TTABVUE 30-34),
 - Exhibit 2: Petitioner's First Request for Admissions to Registrant dated November 3, 2017 Admissions 15-16, 20-21, 24 and Exhibits AC (20 TTABVUE 35-41),
 - Exhibit 3: Registrant's Answers to Request for Admissions 5-6, 10-12, 14-16, 18-24, 28-34 and 36, dated December 4, 2017 (20 TTABVUE 42-46),

- Exhibit 4: copy of application from Trademark Status and Document Retrieval system (TSDR) for the subject mark filed by James Holda (20 TTABVUE 47-55).

Respondent submitted no evidence. Only Petitioner submitted a brief entitled Motion for Summary Judgment Pursuant to Accelerated Case Resolution.

III. Background

Petitioner Jeffrey Simon dba M3K Enterprises, and Respondent, Beach ATM Services, LLC (“Beach ATM”), formed a partnership in November or December 2014 to provide mobile cash dispensing through automated teller machines (“ATM”) placed at festivals and similar events where ATM services were needed.⁷ In May 2015, the partnership adopted the logo



(ATM-2-GO & Design) designed by Steven Snelling of True Colors in Virginia Beach, Virginia for use in offering the partnership's ATM services.⁸ On May 16, 2015, the mark was first used in interstate commerce by the partnership and its agents being displayed on a stationary ATM at the Lava Music Festival in Suffolk, Virginia.⁹

From May through November 2015, the partnership provided ATM services at over 20 events in Virginia and North Carolina.¹⁰ Several months later, around the end of November 2015, the partnership dissolved.¹¹ Upon termination of the partnership, the partners agreed that they would both continue to provide ATM services under the ATM-2-GO & Design mark.¹² Petitioner continued using the mark on additional ATM's at various events since the termination of the partnership. Petitioner also continued to use the mark on his website and on the three ATM-2-GO & Design branded kiosks retained from the partnership to promote ATM services.¹³

*3 Unbeknownst to Petitioner, about six months after the partnership dissolved, on May 25, 2016, Respondent James Holda filed a trademark application to register the mark ATM-2-GO & Design for “automated teller machine services” and “rental of cash dispensers of automated teller machines” in International Class 36 which eventually matured into Registration No. 5127645. On November 2, 2017, Respondent Holda retroactively assigned any interest he owned in the mark as of the filing date of the application to Respondent Beach ATM Services, LLC.

IV. Standing

Standing is a threshold issue that must be proven by the plaintiff in every *inter partes* case. See *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014); *John W. Carson Found. v. Toilets.com Inc.*, 94 USPQ2d 1942, 1945 (TTAB 2010) (citing *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999)). Our primary reviewing court, the U.S. Court of Appeals for the Federal Circuit, has enunciated a liberal threshold for determining standing, namely that a plaintiff must demonstrate that it possesses a “real interest” in a proceeding beyond that of a mere intermeddler, and “a reasonable basis for his belief of damage.” *Empresa Cubana Del Tabaco v. Gen. Cigar*, 111 USPQ2d

at 1062; *Ritchie v. Simpson*, 50 USPQ2d at 1025; *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982). A “real interest” is a “direct and personal stake” in the outcome of the proceeding. *Ritchie v. Simpson*, 50 USPQ2d at 1026. A belief in likely damage can be shown by establishing a direct commercial interest. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000).

The Declaration of Jeffrey Simon submitted with Petitioner's ACR Summary Judgment Brief establishes Petitioner's interest in the service mark



based on his continuing use of that mark in connection with his ATM services which are identical to those covered in the subject Registration.

Based on this, Petitioner believes that he will be damaged by the continued registration of the identical mark to promote identical services. Accordingly, Petitioner has a real interest in this proceeding and a reasonable basis for his belief that he will be damaged by the continued registration of Respondent's identical mark. *Spirits Int'l B.V. v. S.S. Taris Zeytin Ve Zeytinyagi Tarim Satis Kooperatifleri Birligi*, 99 USPQ2d 1545, 1548 (TTAB 2011); *Toufigh v. Persona Parfum Inc.*, 95 USPQ2d 1872, 1874 (TTAB 2010). Petitioner is therefore not a mere intermeddler and has established his standing in this cancellation proceeding. *Ritchie v. Simpson*, 50 USPQ2d at 1025; *Lipton Indus. v. Ralston Purina*, 213 USPQ at 189; *Swiss Grill Ltd. v. Wolf Steel Ltd.*, 115 USPQ2d 2001, 2008 (TTAB 2015).

V. Ownership of the Registered Mark

*4 Section 1(a)(1) of the Trademark Act, 15 U.S.C. § 1051(a)(1), provides:

The owner of a trademark used in commerce may request registration of its trademark on the principal register by paying the prescribed fee and filing in the Patent and Trademark Office an application and a verified statement

...

Thus, an application based on use in commerce under 15 U.S.C. §1051(a) must be filed by the party who owns the mark on the application filing date. If the applicant does not own the mark on the application filing date, the application is void and registration must be refused. Therefore, only the owner of a mark may file an application. See *In re Wella A.G.*, 787 F.2d 1549, 229 USPQ 274, 277 (Fed. Cir. 1986) (C.J. Nies concurring) (“Under section 1 of the Lanham Act, only the owner of a mark is entitled to apply for registration.”); *In re Deister Concentrator Co.*, 289 F.2d 496, 129 USPQ 314, 320 (CCPA 1961) (“Under section 1, only ‘The owner of a trademark’ can apply for registration.”); *Wonderbread 5 v. Gilles*, 115 USPQ2d 1296, 1303 (TTAB 2015).

Accordingly, a trademark application is void ab initio if filed by an individual or entity who is not the owner of the mark as of the filing date. *Conolty v. Conolty O'Connor NYC LLC*, 111 USPQ2d 1302, 1309 (TTAB 2014) (an application filed by one who is not the owner of the mark sought to be registered is a void application); *Great Seats Ltd. v. Great Seats Inc.*, 84 USPQ2d 1235, 1239 (TTAB 2007) (only the owner of the mark may file the application for registration of the mark; if the entity filing

the application is not the owner of the mark as of the filing date, the application is void ab initio); *Am. Forests v. Sanders*, 54 USPQ2d 1860, 1862 (TTAB 1999) *aff'd*, 232 F.3d 907 (Fed. Cir. 2000) (application filed in the name of an individual, when it was actually owned by a partnership composed of the individual and her husband, was void ab initio); *see also* 37 C.F.R. § 2.71(d) (. . . An application filed in the name of an entity that did not own the mark as of the filing date of the application is void.). “Neither the Board nor the courts can waive this statutory requirement.” *Huang v. Tzu Wei Chen Food Co.*, 849 F.2d 1458, 7 USPQ2d 1335, 1336 (Fed. Cir. 1988) (affirming Board's holding that a trademark application was void ab initio where applicant was not the owner of the mark on the filing date).

*5 Respondent Holda filed an application to register the mark



for “automated teller machine services” and “rental of cash dispensers or automated teller machines” together with three specimens of use.¹⁴ The uncontested evidence presented shows that Respondent's application was void ab initio because Respondent Holda, as an individual, was not the owner of the mark on the filing date. He filed the used-based application for the mark under his own name even though he has “never individually used the mark in connection with [the] ATM services;”¹⁵ and he has only used the mark “as an agent of Beach ATM Services, LLC.” Inasmuch as Respondent Holda has never used the mark independently, he was never the owner of the mark and incorrectly filed the application in his name.

A closer look at the specimens filed with the application in light of the evidence confirms that they do not show Respondent Holda's use of the mark. The first specimen is a photo of an ATM enclosure taken on August 15, 2015, at the Caribfest in Norfolk, VA, an event serviced by the partnership. Respondent Holda admits that he did not individually use the mark at that event.¹⁶ The second specimen is a photo of a mobile cart bearing the mark taken on July 25, 2015, at Jerk Fest in Virginia Beach, VA, an event serviced by the partnership. Respondent Holda admits that he did not individually use the mark at that event either.¹⁷ The third specimen consists of a screenshot of Petitioner's website. Petitioner owned and controlled the website on the date that Respondent Holda filed the specimen with the USPTO. Respondent Holda admits he did not own, have access to, or control the website on (or before) the day he filed the application.¹⁸ While the insufficiency of the specimens, per se, does not constitute grounds for cancelling the registration, the evidence regarding them supports Respondent Holda's lack of ownership of the mark at the time the application was filed.¹⁹

Additionally, the nunc pro tunc Assignment executed by Respondent Holda on November 2, 2017, well-after this proceeding was initiated, assigning the rights in Registration No. 5127645 and the mark as of the filing date of the application to Beach ATM Services, LLC, does not alter the outcome.²⁰ While trademark ownership may be assigned, Respondent Holda, as the assignor, may transfer only what he owns. *See A&L Laboratories, Inc. v. Bou-Matic LLC*, 429 F.3d 775, 77 USPQ2d 1248, 1252 (8th Cir. 2005); 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 18:15 (5th ed.) (March 2019 Update). As supported by the evidence, Respondent Holda did not own the trademark when the application was filed. Thus, he had nothing to transfer to Respondent Beach ATM Services, LLC.

*6 In a use-based application, if there is no use by applicant on any of the goods or services specified at the time of filing, the application and any resulting registration is void ab initio on the ground of nonuse. *See Aycock Engineering, Inc. v. Airflite, Inc.*, 560 F.3d 1350, 90 USPQ2d 1301, 1305 (Fed. Cir. 2009) (“The registration of a mark that does not meet the use requirement is void ab initio.”); *Holiday Inn v. Holiday Inns, Inc.*, 534 F.2d 312, 189 USPQ 630, 636 n.6 (CCPA 1976) (“One must be the owner of a mark before it can be registered.”).

VI. Conclusion

The application for registration of



was improperly filed by James Holda, who as an individual, never used the mark and accordingly, had no rights in the mark at the time he filed the underlying application. Thus, the application resulting in Registration No. 5127645 was void ab initio and this cancellation is sustained.

Because we find for Petitioner on his claim that Respondent Holda was not the rightful owner of the registered mark as of the filing date of the application maturing into Registration No. 5127645, we need not reach the merits of Petitioner's claims of priority, likelihood of confusion and material misrepresentation. See *Azeka Bldg. Corp. v. Azeka*, 122 USPQ2d 1477, 1478 (TTAB 2017) (the Board has “discretion to decide only those claims necessary to enter judgment and dispose of the case,” as our ‘determination of registrability does not require, in every instance, decision on every pleaded claim’) (quoting *Multisorb Tech., Inc. v. Pactiv Corp.*, 109 USPQ2d 1170, 1171 (TTAB 2013)).

Decision: The Petition to Cancel Registration No. 5127645 is granted and Registration No. 5127645 will be cancelled in due course.

Footnotes

- 1 Trademark Registration No. 5127645 was issued to James Holda as registrant. Subsequent to the filing of the Petition for Cancellation, Registration No. 5127645 was assigned retroactive to May 25, 2016 (the filing date of the underlying application for the Registration), from James Holda to Beach ATM Services, LLC. See Exhibit A to Registrant's Response to Petitioner's Motion for Leave to File an Amended Petition for Cancellation. (10 TTABVUE 7-8). (The TTABVUE citations used herein refer to the docket.) See Reel/Frame: 006195/0479, recorded: 11/02/2017. In light of the execution of the Assignment after this Cancellation was initiated, Beach ATM Services, LLC was joined as a respondent and party defendant. See 12 TTABVUE 1-2 citing 37 C.F.R. § 3.73(b) and TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (“TBMP”) § 512.01 (June 2017). Therefore, Mr. Holda and Beach ATM Services, LLC are jointly referred to as “Respondent” unless otherwise specifically identified.
- 2 Registration No. 5127645 issued on January 24, 2017, based on Application Serial No. 87049809, filed May 25, 2016, alleging first use and first use of the mark in commerce as of May 22, 2015 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a). The mark consists of the literal element “ATM 2 GO” with a stylized “2” in an oval and a ribbon below the “2” containing the literal element “est 2015” in the ribbon.
- 3 14 TTABVUE 7-11, 19 TTABVUE.
- 4 8 TTABVUE. While the parties stipulated in the Joint Stipulation and Request for Accelerated Case Resolution that “the Board may resolve any issues of material fact upon the filing of cross motions for summary judgment . . .,” Respondent did not file a motion for summary judgment.

8 TTABVUE 2-3; 9 TTABVUE.

“Registrant” identifies Respondent James Holda.

Sheldon Decl., Exhibit 1, Answer to Interrogatory No. 1 of Registrant's Answers to Interrogatories and Response to Request for Production of Documents (20 TTABVUE 30); *see also* Declaration of Jeffrey Simon (“Simon Decl.”) ¶ 3 (20 TTABVUE 15-16).

Registrant's Answer to Interrogatory No. 2 states that the mark was created on May 15, 2015. *See* Sheldon Decl., Exhibit 1 Answer to Interrogatory No. 2 (20 TTABVUE 31); while Petitioner's evidence states that the mark was “created on or about May 7, 2015” Simon Decl. ¶¶ 4, 6, 7, Exhibit A (20 TTABVUE 16, 20-24).

Sheldon Decl. Exhibit 1, Answers to Interrogatory Nos. 3-4 (20 TTABVUE 31); Simon Decl. ¶ 8 (20 TTABVUE 16). Additionally, the mark was also used “concurrently, at the Wings for Warriors event in Virginia Beach, Virginia.” Answer to Interrogatory No. 4 (20 TTABVUE 31).

Simon Decl. ¶ 9 (20 TTABVUE 17).

Sheldon Decl. Exhibit 1, Answers to Interrogatory Nos. 1 & 7 (20 TTABVUE 30, 32); Simon Decl. ¶ 10 (20 TTABVUE 17). Paragraph 10 of Petitioner's Simon Declaration states “Around the end of November 2015, the Partnership terminated. Petitioner and I discussed that we would both continue to provide ATM services under the ATM-2-GO mark.” It is clear that there is an error in that sentence. “Respondent” (or Registrant), not “Petitioner,” discussed continuing to provide ATM services with Mr. Simon who is the Petitioner in this case. Therefore, “Petitioner” is read as “Respondent” in this instance.

Simon Decl. ¶ 10 (20 TTABVUE 17); Sheldon Decl. Exhibit 1, Answer to Interrogatory No. 7 (20 TTABVUE 32).

Simon Decl. ¶¶ 12-13 (20 TTABVUE 17).

Sheldon Decl. Exhibit 3, Registrant's Answers to Request for Admissions Nos. 15, 20, 24 (20 TTABVUE 44).

Sheldon Decl. Exhibit 1, Answer to Interrogatory No. 5 (20 TTABVUE 32); Exhibit 3, Answer to Request to Admit Nos. 10-12, 14 (20 TTABVUE 43).

Sheldon Decl. Exhibit 3, Answers to Request for Admissions Nos. 15-16, 18-19 (20 TTABVUE 44).

Sheldon Decl. Exhibit 3, Answers to Request for Admissions Nos. 20-23 (20 TTABVUE 44).

Sheldon Decl. Exhibit 3, Answers to Request for Admissions Nos. 24, 28-31 (20 TTABVUE 44-45).

See Dragon Bleu (SARL) v. VENM, LLC, 112 USPQ2d 1925, 1929 n.12 (TTAB 2014) (an alleged error of the examining attorney in accepting a specimen of use is not a valid ground for opposition or cancellation, although a plaintiff may allege that the applicant's mark was not actually in use when such use was required); *Marshall Field & Co. v. Mrs. Fields Cookies*, 11 USPQ2d 1355, 1358-59 (TTAB 1989) (the insufficiency of the specimens, per se, does not constitute grounds for cancellation; the proper ground for cancellation is that the term has not been used as a mark); *Century 21 Real Estate Corp. v. Century Life of Am.*, 10 USPQ2d 2034, 2035 (TTAB 1989) (the adequacy of specimens is solely a matter of ex parte examination; the failure to make service mark use (as opposed to a failure of the specimens to show such use) is a proper ground for opposition).

As noted above, all rights, title and interest in Registration No. 5127645 and the mark were assigned to Respondent Beach ATM Services, LLC as of May 25, 2016, the filing date of the application. The Assignment was executed on November 2, 2017 by James Holda to Beach ATM Services, LLC and provides that the “Assignor [James Holda] assigns all rights, title and interest in the 5,127,645 registration and Mark, along with any associated goodwill resulting therefrom, as of the effective date that this Assignment has been made, to the Assignee.” *See* Reel: 006195 Frame: 0479 Recorded: 11/02/2017.

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