Serial No. 88278503

RESPONSE TO OFFICE ACTION

I. INTRODUCTION

Applicant responds to Examiner's rejection of the mark **LISTEN UP!** in light of Section 2(d) as it pertains to registration number 4399961.

II. THERE IS NO LIKELIHOOD OF CONFUSION WITH THE CITED REGISTRATION BASED ON DIFFERENCE IN THE NATURE OF GOODS.

Respectfully Applicant states that a review of the relevant facts makes clear that there is no likelihood of confusion between Applicant's and Registrant's marks. Applicant's goods and Registrant's goods address entirely different consumers and fields of engagement. In order for there to be a likelihood of confusion based upon a comparison of the goods, goods need be "related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that [the goods and/or services] emanate from the same source." *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); TMEP § 1207.01(a)(i). Additionally, contrary to Examiner's position there is no evidence in the record that either party could convert their respective good from board game to electronic software or vice versa.

"[T]he issue is not whether the goods and/or services will be confused with each other, but rather whether the **public** will be confused as to their source. (emphasis added) See *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000). If the goods or services in question are not related or marketed in such a way that they would be encountered by the same persons in situations that would create the incorrect assumption that they originate from the same source, then, even if the marks are identical, confusion is not likely. See, e.g., *Coach*

Servs., Inc. v. Triump Learning LLC, 668 F.3d 1356, 1371, 101 USPQ2d 1713, 1723 (Fed. Cir. 2012)(affirming the Board's dismissal of opposer's likelihood-of-confusion claim, noting "there is nothing in the record to suggest that a purchaser of test preparation materials who also purchases a luxury handbag would consider the goods to emanate from the same source" though both were offered under the COACH mark); *In re Thor Tech, Inc.*, 113 USPQ2d 1546, 1551 (TTAB 2015)(finding use of identical marks for towable trailers and trucks not likely to cause confusion given the difference in the nature of the goods and their channels of trade and the high degree of consumer care likely to be exercised by the relevant consumers).

In the instant case, there is no evidence that consumers of Registrant's goods would be exposed to consumers of Applicant's goods. Board games are tabletop games that involve counters or pieces moved or placed on a pre-marked surface or board. Such games are played with peers, in real time, and in person. Boardgames demand interaction and social activity. Video games can analogized with books and leisurely reading. Video games are "me/alone" time and do not offer the same social activity and opportunity to interact fact to face. Consumers looking to host parties or engagements do not look for video games or online games, but rather board games.

Additionally, Registrant's good is classified among others as being an electronic game software for handheld electronic devices. There is a fundamental difference in playing a board game and playing a game that has been designed for use in a handheld electronic device such as a Gameboy or PlayStation Portable (PSP). Consumers know these differences. A consumer searching for a Gameboy game would not find themselves searching in the board game section of a store. However, even if there were cases in which consumers did entertain the purchase of

Applicant's goods and Registrant's goods, the inherit nature of the goods ensures that there would be no confusion as to the source, sponsorship or affiliation.

III. CONCLUSION

For the reasons set forth herein, the Examining Attorney should withdraw the refusal based on likelihood of confusion. The mere *possibility* that relevant purchasers might relate the two different goods as having the same origin does not meet the statutorily established test of likelihood of confusion. E.g., *In re Huges Aircraft Company*, 222 U.S.P.Q. 263, 264 (TTAB 1984) ("the Trademark Act does not preclude registration of a mark where there is a possibility of confusion as to source or origin, only where such confusion is likely"). Rather, the differences in Applicants and Registrant's goods showcase that there will be no likelihood of confusion between Applicant's and Registrant's marks in the minds of consumers.

Respectfully Submitted,

/kevinkeener/

Kevin Keener

Attorney for Applicant