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

Proceeding	91166487
Party	Defendant Creative Action, LLC
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Submission	Motion to Compel Discovery
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Date	10/06/2009
Attachments	Motion to Compel.pdf (7 pages)(284436 bytes) Motion to Compel - Ex. A.pdf (13 pages)(2379534 bytes) Motion to Compel - Ex. B.pdf (21 pages)(2574565 bytes) Motion to Compel - Ex. C.pdf (3 pages)(276900 bytes) Motion to Compel - Ex. D.pdf (3 pages)(475994 bytes) Motion to Compel - Ex. E.pdf (10 pages)(980150 bytes)

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

In the matter of Application Serial No. 78/359,895
Filed: January 30, 2004
For the Mark: MEMORY MAGIC in International Class 28
Published in the Official Gazette: May 10, 2005 at TM 30

HASBRO, INC. Opposer, v. CREATIVE ACTION LLC, Applicant	Opposition No. 91166487
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**CREATIVE ACTION LLC'S MOTION FOR AN ORDER TO COMPEL
HASBRO, INC. TO PRODUCE DOCUMENTS AND THINGS**

Pursuant to 37 C.F.R. § 2.120(e) and Rule 37(a)(3)(B)(iv) of the Federal Rules of Civil Procedure, Creative Action LLC ("Creative Action") hereby moves the Board for an order to compel Hasbro Inc. ("Hasbro") to produce documents and things. The reasons that support the granting of this motion are set forth below.

Certificate of Good Faith Efforts to Resolve the Dispute

Creative Action, through the undersigned attorney, hereby certifies that it has made good faith efforts to resolve the dispute without resort to motion practice. The present motion concerns documents in Hasbro's possession that relate to litigation involving the mark MEMORY and that Hasbro refuses to produce. Creative Action wrote to Hasbro on May 17, 2006 and May 22, 2009 to request production of the requested documents and has discussed this matter

with Hasbro on various occasions by telephone. In each instance Hasbro refused to produce the requested documents.

Statement of Facts

On March 10, 2006, Creative Action served its first request for production of documents and things on Hasbro, which included request no. 22:

All documents that relate to any inter partes proceedings or litigation in which the [sic] Hasbro has been or is involved that refers to or relates to the mark MEMORY, other than the instant proceeding, including, but not limited to, pleadings, discovery documents, depositions, and transcripts relating to such proceedings or litigation.

Hasbro responded on April 14, 2006 as follows:

Hasbro objects to this request as overbroad, unduly burdensome, duplicative of other requests, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. Hasbro further objects to the extent the request seeks information protected by the attorney-client privilege, attorney work product, or other privilege. Subject to and without waiving the foregoing and the General Objections, Hasbro will produce publicly filed documents, if any, from inter partes proceedings or litigation in which the [sic] Hasbro has been or is involved over the right to use the MEMORY® trademark.

Despite requests from Creative Action to produce the requested documents, Hasbro has agreed to produce only *publicly available* documents, but not non-public documents. More recently, on June 4, 2009, Hasbro's counsel wrote to the undersigned attorney as follows:

"Hasbro is willing to produce all publicly available documents associated with *Hasbro, Inc. v. MGA Entertainment, Inc.*, Docket No. CA-06-262S (D.R.I.) as long as Creative Action agrees to pay for the expense of copying those documents. Once you have confirmed that, we will produce them promptly. Hasbro will not produce any documents that are under seal because they are not public and are subject to a confidentiality order."

On May 26, 2006, Hasbro sued MGA Entertainment, Inc. in federal district court in Rhode Island for trademark infringement concerning MGA's use of the mark "3-D MEMORY MATCH-UP" on its version of a matching game involving three-dimensional "Spider-Man & Friends" characters. See attached docket report, Exhibit A, docket entry 1. In response to Hasbro's motion for a preliminary injunction, MGA asserted various defenses, including the allegation that the mark MEMORY had become the generic description for a matching card game. The parties conducted extensive discovery and motion practice throughout the remainder of 2006 and participated in an evidentiary hearing in late 2006 that lasted seven days. *Id.* On July 31, 2007, Judge Smith denied Hasbro's motion for a preliminary injunction. *Hasbro, Inc. v. MGA Entertainment, Inc.*, 497 F.Supp.2d 337 (D.R.I. 2007). In his Memorandum and Decision, a copy of which is appended hereto as Exhibit B, Judge Smith stated as follows:

"MGA submitted compelling evidence that the term "Memory" has been used to describe a generic card game since before Hasbro obtained its first trademark in 1967."

Id., at 13.

"In sum, at this juncture, MGA has carried its burden of proving by a preponderance of the evidence that the term "Memory" is and has been a generic term not entitled to trademark protection."

Id., at 19.

After the ruling on the preliminary injunction motion, the parties eventually settled the suit in September, 2008. On September 30, 2008, Hasbro filed an agreed motion to seal certain docket entries. See Ex. A, Dkt. Entry 142. Final judgment was entered in early October, 2008. *Id.*, Dkt. Entry 143. A copy of the

final judgment entry between Hasbro and MGA is attached hereto as Exhibit C. As can be seen in paragraph 10 of the final judgment, over 60 docket entries were sealed. In fact, most of, these docket entries were purged from the courts' docket records. See Ex. A. One of the docket entries that was sealed and purged included no. 133, which was Judge Smith's Memorandum and Decision. See Exs. A and B (header).

At the time the Hasbro suit was in progress, MGA was involved in a suit with Mattel, Inc. concerning MGA's line of BRATZ dolls. In August, 2008, Mattel was awarded a \$100 million judgment against MGA and, thereafter, a receiver was appointed temporarily for its BRATZ product line. See Exhibit D, attached, a copy of a web page discussing this matter.

Argument

From Hasbro's point of view, it is hard to imagine a more unfavorable result in the MGA suit than a preliminary finding by a district court that the mark MEMORY is generic for card matching games. Fortunately for Hasbro, MGA was under intense pressure from Mattel in the BRATZ dolls case and basically gave up on the lawsuit with Hasbro. This worked to Hasbro's enormous benefit because it could dictate the terms of the settlement, which included an agreed motion to seal significant portions of the record.

Clearly, Hasbro was concerned that third parties such as Creative Action might try to use the results of the *Hasbro v. MGA* case to argue that Hasbro had no enforceable rights in the mark MEMORY. Accordingly, Hasbro not only had all evidence that supported Judge Smith's Memorandum and Order sealed, it

even had the Memorandum and Order itself sealed. Fortunately for the public, the Memorandum and Order already had been published.

The Board should not permit Hasbro to get away with its attempted cover up. It is inconceivable that a federal district court has ruled that a mark is generic and yet interested members of the public cannot have access to pertinent records from the case. Hasbro's offer to produce *publically available* records from that case is a hollow offer since it has been successful in having almost all of the record in the case sealed.

Not only are the documents in question public records, but there is a stipulated protective order in effect in the present proceeding that would protect the confidentiality of such documents even if they were not public records. See docket entries 14 and 15, dated June 7 and 8, 2006. Applicant attaches hereto a copy of the stipulated protective order as Exhibit E. By stipulating to this order, Hasbro agreed to a procedure that would protect the confidentiality of its sensitive documents. Since a protective order is in place, Hasbro should not be permitted to unilaterally avoid its discovery obligations because it finds it convenient to do so.

Creative Action points out that request no. 22 is not limited to documents related to the litigation with MGA Entertainment, Inc. The request is broader, and encompasses any inter partes proceeding or litigation involving the mark MEMORY. Hasbro has provided no reason to explain its failure to produce documents from other inter partes proceedings or litigation.

Conclusion

Hasbro has no justification for failing to comply with its obligation to produce the documents requested in Creative Action's document request no. 22. The Board should issue an order compelling Hasbro to comply with the request. The order should encompass *all* inter partes proceedings or litigation in which Hasbro has been or is involved that refers to or relates to the mark MEMORY, including the MGA litigation and any other inter partes proceedings or litigation as well.

Respectfully submitted,



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Attorney for Creative Action LLC

October 6, 2009

CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2009 a true and correct copy of the foregoing *CREATIVE ACTION LLC'S MOTION TO COMPEL DISCOVERY* was served on counsel for Hasbro, Inc. electronically and by mailing a copy via first class mail, postage pre-paid, to:

Kim J. Landsman, Esq.
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, NY 10036-6710


Wayne D. Porter, Jr.

CLOSED

**U.S. District Court
District of Rhode Island (Providence)
CIVIL DOCKET FOR CASE #: 1:06-cv-00262-S-DLM**

Hasbro, Inc. v. MGA Entertainment, Inc
Assigned to: Judge William E Smith
Referred to: Magistrate Judge David L. Martin
Cause: 15:1051 Trademark Infringement

Date Filed: 05/26/2006
Date Terminated: 10/03/2008
Jury Demand: Plaintiff
Nature of Suit: 840 Trademark
Jurisdiction: Federal Question

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Counter Claimant

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V.

Counter Defendant

Hasbro, Inc

represented by **Jeffrey K. Techentin**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Elizabeth Shofner
(See above for address)
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
05/26/2006	<u>1</u>	COMPLAINT against MGA Entertainment, Inc (Filing fee \$ 350 receipt number 63373.), filed by Hasbro, Inc.. (Attachments: # <u>1</u> Civil Cover Sheet # <u>2</u> Exhibit 1 - Principal Registry# <u>3</u> Exhibit 2 - Trademark# <u>4</u> Exhibit 3 - Memory# <u>5</u> Exhibit 4 - Marvel)(Baldinelli, Doreen) (Entered: 05/26/2006)
05/31/2006	<u>2</u>	MOTION for Kim J. Landsman, Esquire to Appear Pro Hac Vice by Hasbro, Inc..

		(Baldinelli, Doreen) (Entered: 05/31/2006)
05/31/2006	<u>3</u>	MOTION for Michael D. Sant'Ambrogio, Esquire to Appear Pro Hac Vice by Hasbro, Inc.. (Baldinelli, Doreen) (Entered: 05/31/2006)
06/08/2006		<u>2</u> MOTION for Kim J. Landsman, Esquire to Appear Pro Hac Vice, <u>3</u> MOTION for Michael D. Sant'Ambrogio, Esquire to Appear Pro Hac Vice REFERRED to MJ Martin. (Mercurio, Alba-Sue) (Entered: 06/08/2006)
06/12/2006	<u>4</u>	ORDER granting <u>3</u> Motion to Appear Pro Hac Vice of Michael D. Sant'Ambrogio . Signed by Magistrate Judge David L. Martin on 6/12/06. Sent to counsel. (Theall, Jeannine) (Entered: 06/12/2006)
06/12/2006	<u>5</u>	ORDER granting <u>2</u> Motion to Appear Pro Hac Vice of Kim J. Landsman . Signed by Magistrate Judge David L. Martin on 6/12/06. Sent to counsel. (Theall, Jeannine) (Entered: 06/12/2006)
06/20/2006	<u>6</u>	ANSWER to Complaint, COUNTERCLAIM against Hasbro, Inc. by MGA Entertainment, Inc.(Baldinelli, Doreen) (Entered: 06/21/2006)
06/20/2006	<u>7</u>	NOTICE of Appearance by George E. Lieberman on behalf of MGA Entertainment, Inc (Baldinelli, Doreen) (Entered: 06/21/2006)
06/20/2006	<u>8</u>	NOTICE of Appearance by Brooks R. Magratten on behalf of MGA Entertainment, Inc (Baldinelli, Doreen) (Entered: 06/21/2006)
06/20/2006	<u>9</u>	Designation of Lead Counsel and counsel to Receive Notices (Baldinelli, Doreen) (Entered: 06/21/2006)
06/22/2006	<u>10</u>	MOTION for Kent R. Raygor, Esquire to Appear Pro Hac Vice by MGA Entertainment, Inc. (Baldinelli, Doreen) (Entered: 06/22/2006)
06/22/2006	<u>11</u>	MOTION for Janene P. Bassett to Appear Pro Hac Vice by MGA Entertainment, Inc. (Baldinelli, Doreen) (Entered: 06/22/2006)
06/28/2006	<u>12</u>	AFFIDAVIT of Service, filed by Hasbro, Inc. for Summons & Complaint MGA Entertainment, Inc served on 6/12/2006. (Baldinelli, Doreen) (Entered: 06/28/2006)
06/29/2006	<u>13</u>	MOTION for a Preliminary Injunction, Recall, and MOTION for Expedited Discovery WITH SUPPORTING MEMO by Hasbro, Inc.. Responses due by 7/17/2006 Responses due by 7/17/2006 Responses due by 7/17/2006 (Baldinelli, Doreen) Additional attachment(s) added on 6/30/2006 (Baldinelli, Doreen). Summary Text Modified on 10/19/2006 (Farrell Pletcher, Paula). (Entered: 06/30/2006)
06/29/2006	<u>14</u>	DECLARATION of Sean Wiggins re <u>13</u> MOTION for a Preliminary Injunction, Recall, and Expedited Discovery. (Exhibit 1 photograph - could not be scanned. (Baldinelli, Doreen) Modified on 6/30/2006 (Baldinelli, Doreen). (Entered: 06/30/2006)
06/29/2006	<u>15</u>	DECLARATION of Paul N. Vanasse re <u>13</u> MOTION for a Preliminary Injunction, Recall and MOTION for Expedited Discovery. (Baldinelli, Doreen) (Entered: 06/30/2006)
06/29/2006	<u>16</u>	DECLARATION of Mark Stark re <u>13</u> MOTION for a Preliminary Injunction, Recall, and Motion for Expedited Discovery. (Baldinelli, Doreen) Additional attachment(s) added on 6/30/2006 (Baldinelli, Doreen). (Entered: 06/30/2006)
06/30/2006		Set Deadlines/Hearings: Rule 16 Conference set for 7/13/2006 02:00 PM before Judge William E Smith. (Mercurio, Alba-Sue) (Entered: 06/30/2006)

07/10/2006	<u>17</u>	MOTION for Irene Choi, Esquire to Appear Pro Hac Vice by Hasbro, Inc.. (Baldinelli, Doreen) (Entered: 07/10/2006)
07/10/2006	<u>18</u>	CERTIFICATE OF SERVICE (Attachments: # <u>1</u> Exhibit A - Report)(Baldinelli, Doreen) (Entered: 07/10/2006)
07/13/2006		Motion Forwarded to Chambers <u>10</u> MOTION for Kent R. Raygor, Esquire to Appear Pro Hac Vice, <u>11</u> MOTION for Janene P. Bassett to Appear Pro Hac Vice FORWARDED to Chambers of Judge Smith. (Mercurio, Alba-Sue) (Entered: 07/13/2006)
07/13/2006		Minute Entry for proceedings held before Judge William E Smith : Rule 16 Conference held on 7/13/2006. All counsel present. (Mercurio, Alba-Sue) (Entered: 07/13/2006)
07/13/2006	<u>19</u>	Reply to Counterclaim by Hasbro, Inc.. (Baldinelli, Doreen) (Entered: 07/14/2006)
07/13/2006		Set/Reset Deadlines as to <u>13</u> MOTION for Preliminary Injunction, Recall, and Expedited Discovery. Responses due by 7/17/2006 (Mercurio, Alba-Sue) (Entered: 07/14/2006)
07/14/2006	<u>20</u>	STIPULATION extending time for defendant to respond to Plaintiff's for a Preliminary Injunction, Recall, and Expedited Discovery to 7/17/06. Signed by Judge William E Smith on 7/13/06. (faxed to counsel of record)(Mercurio, Alba-Sue) (Entered: 07/14/2006)
07/14/2006	<u>21</u>	ORDER granting <u>11</u> Motion to Appear Pro Hac Vice of Janene P. Bassett . Signed by Judge William E Smith on 7/13/06. (faxed to counsel of record) (Mercurio, Alba-Sue) (Entered: 07/14/2006)
07/14/2006	<u>22</u>	ORDER granting <u>10</u> Motion to Appear Pro Hac Vice of Kent R. Raygor . Signed by Judge William E Smith on 7/13/06. (faxed to counsel of record) (Mercurio, Alba-Sue) Additional attachment(s) added on 7/31/2006 (Mercurio, Alba-Sue). (Entered: 07/14/2006)
07/14/2006	<u>23</u>	PRETRIAL ORDER:Fact Discovery due by 11/13/2006. Dispositive Motions due by 2/13/2007. Pretrial Memorandum due by 2/13/2007. Signed by Judge William E Smith on 7/14/06. (faxed to counsel of record)(Mercurio, Alba-Sue) (Entered: 07/14/2006)
07/31/2006	<u>30</u>	STIPULATION re: motion for preliminary injunction. Signed by Judge William E Smith on 7/31/06. (faxed to counsel of record)(Mercurio, Alba-Sue) (Entered: 07/31/2006)
07/31/2006	<u>31</u>	STIPULATION AND PROTECTIVE ORDER. Signed by Judge William E Smith on 7/31/06. (faxed to counsel of record)(Mercurio, Alba-Sue) (Entered: 07/31/2006)
07/31/2006		Motion Forwarded to Chambers <u>17</u> MOTION for Irene Choi to Appear Pro Hac Vice FORWARDED to Chambers of Judge Smith. (Mercurio, Alba-Sue) (Entered: 07/31/2006)
08/02/2006		Set/Reset Deadlines as to <u>25</u> MOTION to Strike, <u>13</u> MOTION for Preliminary Injunction. Motion Hearing set for 9/11/2006 09:00 AM before Judge William E Smith. (Mercurio, Alba-Sue) (Entered: 08/02/2006)
08/02/2006	<u>32</u>	ORDER granting <u>17</u> Motion to Appear Pro Hac Vice of Irene Choi . Signed by Judge William E Smith on 8/1/06. (Mercurio, Alba-Sue) (Entered: 08/02/2006)
08/03/2006		CORRECTIVE DOCKET ENTRY re: <u>33</u> Reply to Response to Motion; Error: Document incorrectly linked; Correction: Linked to correct motion. (Baldinelli, Doreen) (Entered: 08/03/2006)
08/09/2006		Set Deadlines/Hearings: Telephone Conference set for 8/11/2006 02:30 PM before Judge William E Smith. (Mercurio, Alba-Sue) (Entered: 08/09/2006)
08/09/2006	<u>35</u>	NOTICE of Appearance by Jeffrey K. Techentin on behalf of Hasbro, Inc., Hasbro, Inc.

		(Techentin, Jeffrey) (Entered: 08/09/2006)
08/11/2006	<u>36</u>	NOTICE to Take Deposition of Plaintiff Hasbro, Inc.'s Witnesses (Lieberman, George) Additional attachment(s) added on 8/11/2006 (Mercurio, Alba-Sue). (Entered: 08/11/2006)
08/11/2006		CORRECTIVE DOCKET ENTRY re: <u>36</u> Notice to Take Deposition, no filer selected, added filer MGA Entertainment. Document replaced, document did not contain e-signature on certification. (Mercurio, Alba-Sue) (Entered: 08/11/2006)
08/11/2006		CORRECTIVE DOCKET ENTRY re: <u>37</u> Redaction Index. Replaced document, original document did not contain e-signature on certification. (Mercurio, Alba-Sue) (Entered: 08/11/2006)
08/11/2006		Minute Entry for proceedings held before Judge William E Smith : Telephone Conference held on 8/11/2006. All counsel present. (Mercurio, Alba-Sue) (Entered: 08/11/2006)
08/17/2006		<u>38</u> MOTION to Compel Appropriate Responses to Interrogatories, Document Requests and Requests for Admissions and Produce Persons for Their Depositions REFERRED to MJ Martin. (Mercurio, Alba-Sue) (Entered: 08/17/2006)
08/17/2006		Motion Forwarded to Chambers <u>39</u> MOTION to Continue or Denial of Preliminary Injunction/Recall Motion of Plaintiff/Counterclaim-Defendant Hasbro, Inc. FORWARDED to Chambers of Judge Smith. (Mercurio, Alba-Sue) (Entered: 08/17/2006)
08/22/2006		Minute Entry for proceedings held before Magistrate Judge David L. Martin : Telephone Conference held on 8/22/2006. (Saucier, Martha) (Entered: 08/23/2006)
08/22/2006	<u>42</u>	MOTION to Seal by MGA Entertainment, Inc. (Baldinelli, Doreen) (Entered: 08/23/2006)
08/23/2006	<u>41</u>	NOTICE by MGA Entertainment, Inc, MGA Entertainment, Inc re <u>28</u> Declaration <i>Withdrawal of Khare Declaration</i> (Lieberman, George) (Entered: 08/23/2006)
08/23/2006	<u>43</u>	MOTION to Seal by MGA Entertainment, Inc. (Baldinelli, Doreen) (Entered: 08/23/2006)
08/24/2006		ORDER granting <u>42</u> Motion to Seal Documents. Signed by Magistrate Judge David L. Martin on 8/24/06. (Saucier, Martha) (Entered: 08/24/2006)
08/24/2006		ORDER granting <u>43</u> Motion to Seal Transcript . Signed by Magistrate Judge David L. Martin on 8/24/06. (Saucier, Martha) (Entered: 08/24/2006)
08/24/2006	<u>44</u>	SEALED MOTION With Supporting Memo by MGA Entertainment, Inc, Responses due by 9/11/2006 Placed in Judge Smith's Vault(Saucier, Martha) (Entered: 08/24/2006)
08/24/2006	<u>45</u>	SEALED MOTION With Supporting Memos by MGA Entertainment, Inc, MGA Entertainment, Inc. Responses due by 9/11/2006 (Saucier, Martha) (Entered: 08/24/2006)
08/24/2006		<u>44</u> SEALED MOTION, <u>45</u> SEALED MOTION REFERRED to Magistrate Judge Martin. (Saucier, Martha) (Entered: 08/24/2006)
08/24/2006		Motions No Longer Referred: <u>44</u> SEALED MOTION (Saucier, Martha) (Entered: 08/24/2006)
08/24/2006	<u>46</u>	Sealed Document. (Saucier, Martha) (Entered: 08/24/2006)
08/24/2006	<u>47</u>	SEALED MOTION by MGA Entertainment, Inc. Responses due by 9/11/2006 (Baldinelli, Doreen) (Entered: 08/24/2006)
08/24/2006	<u>49</u>	MOTION to Seal WITH SUPPORTING MEMO by Hasbro, Inc. (Mercurio, Alba-Sue) (Entered: 08/24/2006)

08/24/2006		49 MOTION to Seal REFERRED to MJ Martin. (Mercurio, Alba-Sue) (Entered: 08/24/2006)
08/25/2006	51	ORDER granting 49 Motion to Seal . Signed by Magistrate Judge David L. Martin on 8/25/06. (Saucier, Martha) (Entered: 08/25/2006)
08/25/2006	52	Sealed Document. (Saucier, Martha) (Entered: 08/25/2006)
08/25/2006		53 MOTION to Seal REFERRED for determination to MJ Martin. (Mercurio, Alba-Sue) (Entered: 08/25/2006)
08/25/2006	54	Cross MOTION for Protective Order <i>Relative to Rule 30(b)(6) Deposition Notice</i> by Hasbro, Inc.. Responses due by 9/11/2006 (Techentin, Jeffrey) (Entered: 08/25/2006)
08/25/2006	56	RESPONSE in Opposition re 54 Cross MOTION for Protective Order <i>Relative to Rule 30(b)(6) Deposition Notice</i> filed by Hasbro, Inc.. (Baldinelli, Doreen) (Entered: 08/28/2006)
08/28/2006		54 Cross MOTION for Protective Order <i>Relative to Rule 30(b)(6) Deposition Notice</i> REFERRED for determination to MJ Martin. (Mercurio, Alba-Sue) (Entered: 08/28/2006)
08/28/2006	57	REPLY to Response to Motion re 55 Response in Opposition to Motion, filed by MGA Entertainment, Inc, MGA Entertainment, Inc. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C)(Lieberman, George) (Entered: 08/28/2006)
08/28/2006	58	ORDER granting 53 Motion to Seal . Signed by Magistrate Judge David L. Martin on 8/28/06. (Saucier, Martha) (Entered: 08/28/2006)
08/28/2006	59	Sealed Document. (Saucier, Martha) (Entered: 08/28/2006)
08/28/2006	60	MOTION to Seal WITH SUPPORTING MEMO by MGA Entertainment, Inc. (Mercurio, Alba-Sue) (Entered: 08/28/2006)
08/28/2006		60 MOTION to Seal REFERRED for determination to MJ Martin. (Mercurio, Alba-Sue) (Entered: 08/28/2006)
08/28/2006	61	ORDER granting 60 Motion to Seal . Signed by Magistrate Judge David L. Martin on 8/28/06. (Saucier, Martha) (Entered: 08/28/2006)
08/28/2006	62	Sealed Document. (Saucier, Martha) (Entered: 08/28/2006)
08/29/2006	67	TRANSCRIPT REQUEST by MGA Entertainment, Inc, MGA Entertainment, Inc for proceedings held on 8/29/2006 before Judge Martin.. (Lieberman, George) (Entered: 08/29/2006)
08/29/2006		Minute Entry for proceedings held before Magistrate Judge David L. Martin : Motion Hearing held on 8/29/2006 re 54 Cross MOTION for Protective Order <i>Relative to Rule 30(b)(6) Deposition Notice</i> filed by Hasbro, Inc., 38 MOTION to Compel Appropriate Responses to Interrogatories, Document Requests and Requests for Admissions and Produce Persons for Their Depositions filed by MGA Entertainment, Inc., 45 SEALED MOTION filed by MGA Entertainment, Inc.. (Techentin, Landsman, Lieberman) Attys argue; Motion #38 Granted in Part, Denied in Part; Order to follow by Court; Motions #45 & #54 under advisement by the Court. (Theall, Jeannine) (Entered: 08/29/2006)
08/29/2006	68	Exhibit List re: motion hearing held on 8/29/06 before MJ Martin(Theall, Jeannine) (Entered: 08/29/2006)
08/30/2006		Remark: Transcript Request forwarded to Joseph Fontes along with original (2) tapes, request and copy of docket (Saucier, Martha) (Entered: 08/30/2006)
08/30/2006	74	SECOND MOTION to File a Reply Under Seal WITH SUPPORTING MEMO by MGA

		Entertainment, Inc. (Mercurio, Alba-Sue) (Entered: 08/30/2006)
08/30/2006		74 MOTION to Seal REFERRED for determination to MJ Martin. (Mercurio, Alba-Sue) (Entered: 08/30/2006)
08/31/2006	76	ORDER granting 74 Second Motion to Seal . Signed by Magistrate Judge David L. Martin on 8/31/06. (Theall, Jeannine) (Entered: 08/31/2006)
09/01/2006	77	Sealed Document. (Saucier, Martha) (Entered: 09/01/2006)
09/01/2006	78	RESPONSE in Opposition re <u>54</u> Cross MOTION for Protective Order <i>Relative to Rule 30(b)(6) Deposition Notice</i> WITH SUPPORTING MEMO filed by MGA Entertainment, Inc, MGA Entertainment, Inc. (Lieberman, George) (Entered: 09/01/2006)
09/01/2006	79	ORDER granting 38 Motion to Compel, denying 45 Sealed Motion, denying <u>54</u> Motion for Protective Order . Signed by Magistrate Judge David L. Martin on 9/1/06. (Saucier, Martha) (Entered: 09/01/2006)
09/12/2006	80	AMENDED NOTICE to Take Deposition by MGA Entertainment, Inc of 30(b)(6) witnesses, Hambley, Nagler (Magratten, Brooks) Modified on 9/13/2006 - added text Amended (Baldinelli, Doreen). (Entered: 09/12/2006)
09/25/2006	81	MOTION to Compel 30(b)(6) Deposition of MGA with supporting memo by Hasbro, Inc., Hasbro, Inc.. Responses due by 10/12/2006 (Attachments: # 1 Exhibit 1 (Notice of 30(b)(6) Deposition of MGA))(Techentin, Jeffrey) (Entered: 09/25/2006)
09/25/2006	82	DECLARATION re <u>81</u> MOTION to Compel 30(b)(6) Deposition of MGA of <i>Kim J. Landsman</i> by Hasbro, Inc., Hasbro, Inc.. (Techentin, Jeffrey) Modified on 9/25/2006 - added text - Exhibits attached (Baldinelli, Doreen). (Entered: 09/25/2006)
09/26/2006	83	Emergency MOTION to Expedite <i>Consideration of Motion to Compel 30(b)(6) Deposition of MGA</i> with supporting memo by Hasbro, Inc., Hasbro, Inc.. Responses due by 10/13/2006 (Techentin, Jeffrey) (Entered: 09/26/2006)
09/26/2006		<u>81</u> MOTION to Compel 30(b)(6) Deposition of MGA, <u>83</u> Emergency MOTION to Expedite <i>Consideration of Motion to Compel 30(b)(6) Deposition of MGA</i> REFERRED for determination to MJ Martin. (Mercurio, Alba-Sue) (Entered: 09/26/2006)
09/28/2006	84	ORDER finding as moot <u>83</u> Motion to Expedite . So Ordered by Magistrate Judge David L. Martin on 9/28/06. (Saucier, Martha) (Entered: 09/28/2006)
09/28/2006	85	ORDER finding as moot <u>81</u> Motion to Compel . So Ordered by Magistrate Judge David L. Martin on 9/28/06. (Saucier, Martha) (Entered: 09/28/2006)
09/28/2006		DECLARATION of Janene P. Bassett re: Authentication re 24 Response in Opposition to Motion for Preliminary Injunction and Recall by MGA Entertainment, Inc. Exhibits in support could not be scanned - exceeds system page capacity. (Baldinelli, Doreen) (Entered: 09/28/2006)
10/04/2006		Set Hearing: In Chambers Conference set for 10/16/2006 at 2:00 PM in Judge Smith Chambers - Room 412 before Judge William E Smith. (Baldinelli, Doreen) (Entered: 10/04/2006)
10/04/2006		Reset Hearings: In Chambers Conference reset for 10/10/2006 at 2:30 PM in Judge Smith Chambers - Room 412 before Judge William E Smith. (Baldinelli, Doreen) (Entered: 10/04/2006)
10/10/2006		Minute Entry for proceedings held before Judge William E Smith : In Chambers Conference

		held on 10/10/2006. All counsel of record present. (Baldinelli, Doreen) (Entered: 10/11/2006)
10/11/2006		NOTICE of Hearing on Motion <u>13</u> MOTION for Preliminary Injunction, Recall and MOTION to Expedite Discovery Motion Hearing set for 10/23/2006 at 9:30 AM in Courtroom 2 before Judge William E Smith. (Baldinelli, Doreen) (Entered: 10/11/2006)
10/23/2006		Minute Entry for proceedings held before Judge William E Smith : Motion Hearing Day 1 held on 10/23/2006 re <u>13</u> MOTION for Forfeiture of Property MOTION to Expedite MOTION to Expedite filed by Hasbro, Inc. Jeffrey Techentin, Irene Choi, Kim Landsman for Plaintiff. George Lieberman, Janene Basset, Kent Raygor for Defendants. All counsel of record present. 1 witness sworn, 48 Exhibits ent'd full, 33 exhibits ID Only. (Court Reporter Anne Clayton.) (Baldinelli, Doreen) (Entered: 10/23/2006)
10/24/2006		Minute Entry for proceedings held before Judge William E Smith : Motion Hearing (DAY 2) held on 10/24/2006 re <u>13</u> MOTION for a Preliminary Injunction, Recall, and MOTION for Expedited Discovery filed by Hasbro, Inc. Jeffrey Techentin, Irene Choi, Kim Landsman for plaintiff. George Lieberman, Janene Basset, Kent Raygor for defendants. All counsel of record present. CRX of W-1, Mark Stark, continues by defendant. RDX plaintiff. RCRX defendant. W-2, Bruce Whitehill, sworn and questioned. W-3, Thomas DuPont, sworn and questioned. 14 exhibits entered full. 26 exhibits entered ID. (Court Reporter Anne Clayton.) (Leyva, Lucia) (Entered: 10/26/2006)
10/25/2006		Minute Entry for proceedings held before Judge William E. Smith : Motion Hearing held on 10/25/2006 re <u>13</u> Preliminary Injunction, Recall, and MOTION for Expedited Discovery filed by Hasbro, Inc. Jeffrey Techentin, Irene Choi, Kim Landsman for plaintiff. George Lieberman, Janene Basset, Kent Raygor for defendants. All counsel of record present. W-4, Sean Wiggins, sworn and questioned. W-5 Paul Vanasse, sworn and questioned. W-6, Millins Taft, Jr., sworn and questioned. W-5, Paul Vanasse recalled. Plaintiff moves exhibits full. Objection by defendant. Counsel to review exhibits in question prior to next court date. Exhibits not marked or entered full at this time. Plaintiff rests. W-7, Courtney Werner, sworn and questioned. 70 exhibits entered full. 30 entered ID. 1 exhibit previously marked for ID entered full. (Court Reporter Anne Clayton.) (Leyva, Lucia) (Entered: 10/26/2006)
10/26/2006		Notice of Continuation of Preliminary Injunction Hearing set for 11/15/2006 at 9:00 AM in Courtroom 2 before Judge William E Smith. (Baldinelli, Doreen) (Entered: 10/26/2006)
10/30/2006	<u>101</u>	TRANSCRIPT REQUEST <i>For Preliminary Injunction Hearing</i> by MGA Entertainment, Inc, MGA Entertainment, Inc for proceedings held on 10/23/06 through 10/25/06 before Judge William E. Smith.. (Lieberman, George) (Entered: 10/30/2006)
10/30/2006	<u>102</u>	TRANSCRIPT REQUEST <i>for Hearing on Motion for Preliminary Injunction and Recall</i> by Hasbro, Inc for proceedings held on 10/23/2006 to 10/25/2006 before Judge Smith.. (Techentin, Jeffrey) (Entered: 10/30/2006)
11/01/2006	<u>103</u>	MOTION for David R. Garcia to Appear Pro Hac Vice by MGA Entertainment, Inc, MGA Entertainment, Inc. (Lieberman, George) (Entered: 11/01/2006)
11/02/2006		MOTION to Seal by Hasbro, Inc. (Baldinelli, Doreen) (Entered: 11/02/2006)
11/02/2006		Telephone Conference set for 11/3/2006 at 11:00 AM in Judge Smith Chambers - before Judge William E Smith. (Baldinelli, Doreen) (Entered: 11/02/2006)
11/03/2006		Motion Forwarded to Chambers <u>104</u> MOTION to Compel MGA Discovery Responses and Motion in Limine Concerning the Circumstances Under Which Certain Exhibits Were Collected and MGA's Knowledge of the Exhibits, MOTION to Seal FORWARDED to

		Chambers of Judge Smith. (Baldinelli, Doreen) (Entered: 11/03/2006)
11/03/2006	105	Sealed Document. (Baldinelli, Doreen) (Entered: 11/03/2006)
11/03/2006		TRANSCRIPT of Proceedings held on October 23, 2006 before Judge William E. Smith. Court Reporter: Anne Clayton.. (Baldinelli, Doreen) (Entered: 11/03/2006)
11/03/2006		Minute Entry for proceedings held before Judge William E Smith : Telephone Conference held on 11/3/2006. Jeffrey K. Techentin, Kim Landsman for Plaintiff. George Lieberman, Kent R. Raygor for Defendant. (Baldinelli, Doreen) (Entered: 11/03/2006)
11/08/2006	<u>107</u>	MOTION for Protective Order by Hasbro, Inc. Responses due by 11/27/2006 (Baldinelli, Doreen) (Entered: 11/09/2006)
11/08/2006	108	MOTION to Seal by Hasbro, Inc. (Baldinelli, Doreen) (Entered: 11/09/2006)
11/09/2006	<u>109</u>	STIPULATION re <u>107</u> MOTION for Protective Order, <u>108</u> MOTION to Seal <i>withdrawing request for expedited review</i> by Hasbro, Inc. and MGA Entertainment, Inc.(Techentin, Jeffrey) Modified on 11/13/2006 added filer MGA(Zinni, Concetta). (Entered: 11/09/2006)
11/13/2006		112 MOTION in Limine <i>to Exclude Testimony of George Cooper and Beth Chapman and Objections to Defendant's Requests for Judicial Notice</i> , 110 MOTION in Limine REFERRED to Judge Smith. (Zinni, Concetta) (Entered: 11/13/2006)
11/15/2006	<u>117</u>	NOTICE to Take Deposition by MGA Entertainment, Inc, MGA Entertainment, Inc of Hasbro (Attachments: # <u>1</u>)(Magratten, Brooks) (Entered: 11/15/2006)
11/15/2006		Minute Entry for proceedings held before Judge William E. Smith : Motion Hearing held on 11/15/2006 re <u>112</u> MOTION in Limine <i>to Exclude Testimony of George Cooper and Beth Chapman and Objections to Defendant's Requests for Judicial Notice</i> filed by Hasbro, Inc; <u>110</u> MOTION in Limine filed by MGA Entertainment, Inc. <u>13</u> MOTION for Preliminary Injunction (DAY 4) filed by Hasbro, Inc. Plaintiff: J. Techentin, I. Choi, K. Landsman, M. Sant'Ambrogio. Defendant: G. Lieberman, K. Raygor. Counsel of record present. Court addresses motions filed since last date. Argument heard as to both motions in limine. Court grants each motion to the extent explained in open court. Argument heard as to objections raised to requests for judicial notice submitted by the defendant. W-8, Barry Shapiro, sworn and questioned. W-9, Yuval Caspi, sworn and questioned. W-8, Barry Shapiro, recalled to finish testimony. W-10, Sandra F. Disner, sworn and questioned. Voir Dire of witness as to qualifications as an expert by plaintiff. Argument heard as to W-10's qualifications as an expert witness. Court to allow witness to testify as an expert. 24 exhibits entered full. 13 entered for ID only. 1 exhibit previously marked for ID on 10/24/06 entered full. (Court Reporter Anne M. Clayton.) (Leyva, Lucia) (Entered: 11/16/2006)
11/16/2006	118	ORDER granting <u>108</u> Motion to Seal - So Ordered by Judge William E Smith on 11/14/06. (Barletta, Barbara) (Entered: 11/16/2006)
11/16/2006		Minute Entry for proceedings held before Judge William E. Smith : Motion Hearing held on 11/16/2006 re <u>13</u> MOTION for Preliminary Injunction by Hasbro, Inc. Plaintiff: J. Techentin, I. Choi, K. Landsman, M. Sant'Ambrogio. Defendant: G. Lieberman, K. Raygor. Counsel of record present. DX of W-10, Sandra Disner, continues by defendant. CRX plaintiff. RDX defendant. RCRX plaintiff. W-11, Alex Keossian, sworn and questioned. W-12, Beth Chapman, sworn and questioned. W-13, Bo Lumabao, sworn and questioned. 33 exhibits entered full. 2 for ID only. 1 prev. marked ID entered full. (Court Reporter Anne M. Clayton.) (Leyva, Lucia) (Entered: 11/17/2006)
11/17/2006		NOTICE of Hearing on Motion <u>13</u> MOTION for PRELIMINARY INJUNCTION: Motion Hearing set for 12/12/2006 09:00 AM in Courtroom 2 before Judge William E Smith.

		(Farrell Pletcher, Paula) (Entered: 11/17/2006)
11/20/2006	<u>119</u>	TRANSCRIPT REQUEST by MGA Entertainment, Inc, MGA Entertainment, Inc for proceedings held on 11/15/06-11/17/06 before Judge William E. Smith.. (Lieberman, George) (Entered: 11/20/2006)
11/21/2006		Sealed Document placed in vault. (Baldinelli, Doreen) (Entered: 11/21/2006)
11/27/2006	<u>120</u>	ORDER granting <u>103</u> Motion to Appear Pro Hac Vice of David R Garcia . So Ordered by Judge William E Smith on 11/22/2006. (Baldinelli, Doreen) (Entered: 11/27/2006)
12/04/2006		Telephone Conference set for 12/5/2006 at 11:00 AM in Judge Smith Chambers - before Judge William E Smith. (Baldinelli, Doreen) (Entered: 12/04/2006)
12/05/2006		Minute Entry for proceedings held before Judge William E Smith : Telephone Conference held on 12/5/2006. Jeffrey Techentin, Kim Landsman for Plaintiff. George Lieberman, Kurt Raygor for Defendants. (Court Reporter s.) (Baldinelli, Doreen) (Entered: 12/05/2006)
12/12/2006		Minute Entry for proceedings held before Judge William E Smith: Motion Hearing held on 12/12/2006 re <u>13</u> MOTION for Forfeiture of Property MOTION to Expedite MOTION to Expedite filed by Hasbro, Inc. Kent Raygor, George Lieberman for Defendant, Jeffrey Techentin, Kim Landsman for Plaintiff. All counsel of record present. 1 witness sworn in (David Yerkes), 3 Exhibits ent'd full, 3 exhibits ID only. (Court Reporter Anne Clayton.) (Baldinelli, Doreen) (Entered: 12/12/2006)
12/12/2006	<u>122</u>	NOTICE of Hearing: Settlement Conference set for 2/6/2007 02:00 PM in Magistrate Judge Lovegreen Chambers - Room 519 before Magistrate Judge Robert W Lovegreen. (Price, Rhonda) (Entered: 12/12/2006)
12/12/2006		Minute Entry for proceedings held before Magistrate Judge Robert W Lovegreen : Settlement Conference held on 12/12/2006. (Price, Rhonda) (Entered: 12/12/2006)
12/18/2006	<u>123</u>	TRANSCRIPT REQUEST by Hasbro, Inc for proceedings held on 12/12/2006 before Judge Smith.. (Techentin, Jeffrey) (Entered: 12/18/2006)
01/03/2007	<u>125</u>	TRANSCRIPT REQUEST by MGA Entertainment, Inc, MGA Entertainment, Inc for proceedings held on 12/12/2006 before Judge William Smith.. (Lieberman, George) (Entered: 01/03/2007)
01/10/2007		CORRECTIVE DOCKET ENTRY re: Settlement Conference; Minute entry entered on 12/12/06, indicating that a Settlement Conference was held on 12/12/06 was docketed in error. A Settlement Conference is scheduled for 2/6/07 at 2:00 P.M. before Magistrate Judge Robert W. Lovegreen. (Price, Rhonda) (Entered: 01/10/2007)
02/02/2007	<u>127</u>	STIPULATION <i>Extending Deadline for Submission of Proposed Findings of Fact and Conclusions of Law through February 5, 2007</i> by Hasbro, Inc. (Techentin, Jeffrey) (Entered: 02/02/2007)
02/06/2007		MOTION to Seal by Hasbro, Inc. (Baldinelli, Doreen) (Entered: 02/06/2007)
02/06/2007		TEXT ORDER - It is hereby ordered that each party shall have through and until Monday, February 5, 2007 to file proposed Findings of Fact and Conclusions of Law with respect to Hasbro's Motion for Preliminary Injunction and Recall.. So Ordered by Judge William E Smith on 2/6/2007. (Baldinelli, Doreen) (Entered: 02/06/2007)
02/06/2007		Minute Entry for proceedings held before Magistrate Judge Robert W Lovegreen : Settlement Conference held on 2/6/2007. (Price, Rhonda) (Entered: 02/06/2007)

02/08/2007		ORDER granting MOTION to Seal filed by Hasbro, Inc. So Ordered by Judge William E Smith on 2/6/2007. (Baldinelli, Doreen) (Entered: 02/08/2007)
02/08/2007		Sealed Document placed in vault. (Baldinelli, Doreen) (Entered: 02/08/2007)
06/20/2007	<u>131</u>	NOTICE by Hasbro, Inc of <i>Withdrawal of Appearance of Irene Choi</i> (Techentin, Jeffrey) (Entered: 06/20/2007)
06/20/2007	<u>132</u>	NOTICE by Hasbro, Inc of <i>Withdrawal of Appearance of Michael Sant'Ambrogio</i> (Techentin, Jeffrey) (Entered: 06/20/2007)
11/13/2007		NOTICE of Hearing:Status Conference set for 11/28/2007 at 10:00 AM in Judge Smith Chambers before Judge William E Smith. (Baldinelli, Doreen) (Entered: 11/13/2007)
11/28/2007		Minute Entry for proceedings held before Judge William E Smith : Status Conference held on 11/28/2007. Jeffrey K. Techentin, Kim J. Landsman for Plaintiff. Brooks R. Magratten, George E. Lieberman, Ken R. Raygor (via telephone), Sam Khare (via telephone) for defendants. (Baldinelli, Doreen) (Entered: 11/28/2007)
11/29/2007	<u>134</u>	ORDER OF SETTLEMENT CONFERENCE. So Ordered by Judge William E Smith on 11/29/2007. (Baldinelli, Doreen) (Entered: 11/29/2007)
12/19/2007	<u>135</u>	NOTICE by MGA Entertainment, Inc re: <i>Withdrawal of Appearances</i> (Daly, Michael) (Entered: 12/19/2007)
12/31/2007	<u>136</u>	MOTION for Ronald Greenberg to Appear Pro Hac Vice by MGA Entertainment, Inc. (Daly, Michael) (Entered: 12/31/2007)
12/31/2007	<u>137</u>	MOTION for Peter Marcus to Appear Pro Hac Vice by MGA Entertainment, Inc. (Daly, Michael) (Entered: 12/31/2007)
01/04/2008	<u>138</u>	ORDER granting <u>137</u> Motion to Appear Pro Hac Vice of Peter J Marcus. So Ordered by Judge William E Smith on 1/8/2008. (Baldinelli, Doreen) (Entered: 01/04/2008)
01/04/2008	<u>139</u>	ORDER granting <u>136</u> Motion to Appear Pro Hac Vice of Ronald Greenberg. So Ordered by Judge William E Smith on 1/4/2008. (Baldinelli, Doreen) (Entered: 01/04/2008)
02/28/2008	<u>140</u>	MOTION for Elizabeth Shofner to Appear Pro Hac Vice by Hasbro, Inc. (Techentin, Jeffrey) (Entered: 02/28/2008)
03/05/2008	<u>141</u>	ORDER granting <u>140</u> Motion to Appear Pro Hac Vice of Elizabeth Shofner. So Ordered by Judge William E Smith on 3/4/2008. (Baldinelli, Doreen) (Entered: 03/05/2008)
09/30/2008	<u>142</u>	Assented MOTION to Seal WITH SUPPORTING MEMO by Hasbro, Inc. (Smith, Rana) (Entered: 10/01/2008)
10/01/2008		Motion Forwarded to Chambers <u>142</u> Assented MOTION to Seal FORWARDED to Chambers of Judge William E. Smith. (Geile, Wendy) (Entered: 10/01/2008)
10/03/2008		TEXT ORDER granting <u>142</u> Motion to Seal. So Ordered by Judge William E Smith on 10/3/08. (Geile, Wendy) (Entered: 10/03/2008)
10/03/2008	<u>143</u>	FINAL JUDGMENT in favor of Hasbro, Inc against MGA Entertainment, Inc. So Ordered by Judge William E Smith on 10/2/2008. (Geile, Wendy) (Entered: 10/03/2008)
10/17/2008	<u>144</u>	Receipt for Exhibits retrieved by Plaintiff re: Preliminary Injunction Hearing 10/25/2006 as to Hasbro, Inc. (Smith, Rana) (Entered: 10/17/2008)
10/17/2008	<u>145</u>	Receipt for Exhibits retrieved by Defendant re: Preliminary Injunction Hearing on

10/25/2006 as to MGA Entertainment, Inc. (Smith, Rana) (Entered: 10/17/2008)

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

_____)	
HASBRO, INC.,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 06-262 S
)	
MGA ENTERTAINMENT, INC.,)	
)	
Defendant.)	
_____)	

MEMORANDUM AND DECISION

WILLIAM E. SMITH, United States District Judge.

This case involves a trademark dispute between Hasbro, Inc. and MGA Entertainment, Inc. over the use and application of the word "Memory" as it applies to certain two- or three-dimensional matching games marketed and sold by each company. Hasbro seeks a preliminary injunction against MGA barring any further shipping or selling of MGA's game "3-D Memory Match-Up," and additionally seeks a recall order requiring MGA to recall its game from distributors and retailers. The basis for Hasbro's action is its claim that MGA's use of the word "Memory" infringes on Hasbro's registered trademark of that word for a line of card-matching games it has sold since 1966. Because Hasbro is unable to establish its likelihood of success on the merits, the motion for a preliminary injunction is DENIED.



I. Background

In 1964, Hasbro's predecessor Milton Bradley Co. acquired the rights to a game called "Memory" from a German company, Otto Maier Verlag Ravensburg, through a licensing agreement. With the knowledge and permission of Ravensburg, Milton Bradley applied for, and was granted, a trademark for the term "Memory" in 1966. The trademark was registered with the United States Patent and Trademark Office ("USPTO") in 1967 for the single word "Memory" in a particular stylized design, for use with "equipment comprising cards with many matching pairs of designs for playing a matching card game."¹

The initial game consisted of 36 pairs of matching cards that featured characters or other images on one side. The players mixed the cards up (akin to shuffling a deck of cards) and then placed them in rows, face down on a flat surface. Play began with each

¹ This was, in point of fact, Milton Bradley's second effort at obtaining a trademark for "Memory." The first application was refused because Milton Bradley's application "show[ed] the type of game involved to be a memory card matching game." For this type of game, "where the memory of the player is relied upon to locate matching cards," the Trademark Examiner held that the word "Memory" was "merely descriptive . . . and not subject to registration." The Trademark Examiner advised Milton Bradley that "an identification of goods directed to a game is not acceptable because it appears that the identifiable goods which bear the mark comprise the parts with which the game is played."

Milton Bradley reapplied, arguing that the word "Memory" did "not describe the goods, their function or manner of use." Instead, Milton Bradley argued that "Memory" "may suggest the type of game involved, but it does not describe them." The Trademark Examiner accepted this explanation and approved the trademark in 1967.

player, in turn, selecting two cards and turning them image-side up. If the two selected cards were identical, the player had made a match and could keep the two cards and select again, otherwise, the cards were replaced, face down and play passed to the next player. This process was repeated until all of the cards were out of play. The player who collected the most pairs of cards was declared the winner.

In 1972, Milton Bradley sent an affidavit to the USPTO to establish the 1967 mark's incontestability. Milton Bradley averred that it "owned" the 1967 mark, that the mark was still in use, that the mark had been used for five consecutive years, and that there had been no final decision adverse to its claim of ownership of the mark. The "Memory" mark then underwent a series of font changes beginning in 1978, and next in 1984 when Hasbro acquired Milton Bradley. The mark was renewed in August of 1987.

In 2003, Hasbro, the now-owner of the 1967 trademark, filed a second application to register the "Memory" trademark. The USPTO registered the mark on October 19, 2004, for "card matching games, in Class 28." The registration also reflected that "[t]he mark consists of standard characters without claim to any particular font, style, size, or color."

Over the past thirty-nine years, Hasbro and Milton Bradley have issued numerous themed versions of the Memory game. Hasbro's stated policy on themed versions is to allow the "core basic

original game" to "grow to a state of awareness and significance that it has become big enough to expand" into a themed line of games. On several occasions, Hasbro has also licensed its Memory mark for use on a variety of merchandise. Hasbro also has licensed the use of "Memory" for software and books.

Total revenues from "Memory" sales exceed \$130 million. In the past eight years, Hasbro has spent over \$20 million in "Memory" advertisements and promotions. This includes two recent national campaigns, "My First Games" and "Games Make Great Gifts," which each featured "Original Memory" (Hasbro's original card-matching game), and advertisements on the radio; "Memory" is additionally often featured in periodicals as a favorite toy.

Sometime in either 2003 or 2004 MGA game developers came up with an idea for a three-dimensional version of a memory game. This version eschewed the traditional two-dimensional card model for a design that employed a set of plastic cups, under which certain objects could be placed.

This initial idea, however, was shelved for approximately two years, until MGA acquired a license from Marvel for the "Spider-Man & Friends" name, logo, images and characters. Having acquired the license, MGA reworked the memory game concept into its current form. The game contains 10 molded plastic characters (all "Spider-Man and Friends" characters) that come in two different halves which can snap together (an upper half corresponding with the head

and torso and a lower half corresponding with the hips and legs of the character). Game play occurs after the characters are split apart and each half is placed under one of 20 plastic cups. Players take turns picking up two cups at a time to try and match the top half of a character with its corresponding bottom half. Upon finding two matching halves, the player snaps them together and keeps the character. Play continues until all matching character halves are found.

MGA's game originally appeared on store shelves in December 2005 with the name "Memory Match-Up," but after it received Hasbro's initial complaint, it changed the name of the game to "3-D Memory Match-Up." Additionally, MGA originally placed a "TM" next to the "Up," but removed it when Hasbro complained. MGA has put very little effort into advertising its game, focusing promotion only on its own website's Products page.

Six months after MGA acquired its license from Marvel for "Spider-Man and Friends," Hasbro also obtained a similar license (both licenses were non-exclusive). Upon obtaining this license, Hasbro decided to issue a "Spider-Man and Friends" themed version of its "Original Memory" game, which, based on past performance, it believed would be quite profitable. However, because Marvel places strict requirements on the style and color of any licensed product including the character appearances for the Spiderman and Friends

characters, Hasbro's game would be forced to look very similar to MGA's "3-D Memory Match-Up."

On May 5, 2006, before Hasbro had released its "Spider-Man and Friends" memory game, it filed an action for injunctive relief against what it deemed to be MGA's trademark infringement of its "Memory" mark. The Court held an evidentiary hearing that ranged over seven days and included testimony from each of the companies along with expert testimony in connection with the origin and history of the memory card-matching game and the use and understanding of the word "Memory." The parties also submitted evidence, including advertising and product sales history, consumer surveys and market penetration reports, to establish both the nature of the mark itself and the likelihood of consumer confusion.

II. Analysis

During the evidentiary hearing, the parties fought unsparingly for every inch of legal ground. It appears that no potentially probative piece of evidence was left out and every possible argument, on either side, was vigorously pursued, proving that when it comes to fun and games, there is no fooling around. Nevertheless, at the center of this case is a dispute over two main issues: 1) whether the term "memory" is a generic name for a class of card (or card-variant) matching games; and 2) whether Hasbro's trademark is entitled to protection and, if so, whether MGA has

infringed upon it. Of these, only the first merits discussion at this preliminary stage.

Before a preliminary injunction may be entered, Hasbro must show (1) it will likely succeed in its infringement case against MGA; (2) that irreparable harm would result if the injunction were denied; (3) that the balance of equities is in its favor; and (4) that the injunction would serve the public interest. See Borinquen Biscuit Corp. v. M.V. Trading Corp., 443 F.3d 112, 115 (1st Cir. 2006). In infringement cases, "likelihood of success" is the most critical, and essentially, the determinative factor. See id. Once a likelihood of success is established, "the other decisions will flow from that ruling." Keds Corp. v. Renee Int'l Trading Corp., 888 F.2d 215, 220 (1st Cir. 1989).

In order to succeed on an infringement action, a party must first prove two elements: (1) that its mark merits protection; and (2) that the alleged infringement of that mark is likely to result in consumer confusion. Borinquen, 443 F.3d at 116. But, for purposes of a preliminary injunction, a party need only establish a likelihood of success in proving these elements. See id.

In order to establish that a mark is entitled to trademark protection, it must first qualify as distinctive. See Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 769 (1992). "When considering whether a mark meets that standard, courts often employ a taxonomy that classifies marks along a continuum of increasing

distinctiveness." Borinquen, 443 F.3d at 116. This "distinctiveness" continuum contains five categories: (1) generic, (2) descriptive, (3) suggestive, (4) arbitrary, and (5) fanciful. Two Pesos, 505 U.S. at 768. "By definition, generic marks can never be ranked as distinctive," and "suggestive, arbitrary, and fanciful marks are considered inherently distinctive." Borinquen, 443 F.3d at 116.

Hasbro has registered two marks, one registered in 1967 and the other registered in 2003. For registered marks, the registration itself is prima facie evidence of the validity of the registered mark and, where the mark is registered without requiring the applicant to prove secondary meaning, the mark is considered presumptively distinctive rather than descriptive. 15 U.S.C. § 1115(a);² Equine Techs., Inc. v. Equitechnology, Inc., 68 F.3d 542, 545 (1st Cir. 1995). Thus, the 2003 mark can be considered presumptively distinctive. The other, the 1967 mark, has attained

² § 1115(a) states:

[Evidence of registration] shall be admissible in evidence and shall be prima facie evidence of the validity of the registered mark and of the registration of the mark, of the registrant's ownership of the mark, and of the registrant's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the registration subject to any conditions or limitations stated therein, but shall not preclude another person from proving any legal or equitable defense or defect

"incontestable"³ status.⁴ 15 U.S.C. §1065; see Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 205 (1985) (where a mark has attained "incontestable" status, the presumption of distinctiveness becomes conclusive and, subject to only a few affirmative defenses, may be used to enjoin others from infringing upon the mark).

Notwithstanding the protection to which registered (or unregistered) marks may be entitled, a finding of genericness will render the term unprotectable. See S.S. Kresge Co. V. United Factory Outlet, 598 F.2d 694, 696 (1st Cir. 1979); see also TE-TA-MA Truth Found.-Family of URI, Inc. v. World Church of the Creator, 297 F.3d 662, 665 (7th Cir. 2002) (noting that even an incontestable mark is subject to cancellation "if it is or becomes generic"). "A generic term is one that does not distinguish the goods of one producer from the goods of others. Instead, it is one that either by definition or through common use has come to be understood as referring to the genus of which the particular product is a species." Keebler Co. v. Rovira Biscuit Corp., 624

³ Incontestability is established "when [a mark's] owner files an affidavit with the PTO attesting that the following requirements have been met: (i) there has been no final decision adverse to its ownership or enforcement rights for the preceding five-year period; (ii) there is no pending case or proceeding regarding the owner's rights in the mark; and (iii) the owner is still using the mark." Borinquen, 443 F.3d at 117 n.3; 15 U.S.C. § 1065.

⁴ MGA attacks the "incontestable" status on a number of grounds. For the reasons discussed below, however, it is unnecessary at this juncture to address these arguments.

F.2d 366, 373-74 (1st Cir. 1980) (internal quotations and citation omitted). Generic terms are unprotectable through trademark registration because such protection would frustrate legitimate competition, "mak[ing] it difficult for competitors to market their own brands of the same product." Blau Plumbing, Inc. v. S.O.S. Fix-It, Inc., 781 F.2d 604, 609 (7th Cir. 1986). Courts often approach the task of determining whether a mark is generic by recognizing that generic terms answer the question "What are you?" while a mark answers the question "Where do you come from?" See Colt Defense LLC v. Bushmaster Firearms, Inc., 486 F.3d 701, 705 (1st Cir. 2007).

For a term to be generic, its "primary significance . . . to the relevant public must be to identify the nature of a good, rather than its source." Id. (internal quotations and citation omitted). This can occur in one of two ways. First, an invented name may become "genericized," Nat'l Nonwovens, Inc. v. Consumer Prods. Enters., Inc., 397 F. Supp. 2d 245, 254 (D. Mass. 2005); that is, the term "began life as a 'coined term'" but became generic through common usage. See Hunt Masters, Inc. v. Landry's Seafood Rest., Inc., 240 F.3d 251, 255 (4th Cir. 2001). Second, a term may be generic if it was commonly used prior to its association with the specific products at issue. Id.; see Murphy Door Bed Co. v. Interior Sleep Sys., Inc., 874 F.2d 95, 100-01 (2d Cir. 1989).

Under either approach, evidence of the relevant public's understanding of a term can be used to prove genericness. See 2 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 12:13 (4th ed. 2006). This evidence may include competitors' use (use of the term by competitors which has not been contested by plaintiff), plaintiff's use (use of the term as a generic name by the plaintiff), dictionary definitions, media usage, testimony of persons in the trade, and consumer surveys. See id.

The Court of Appeals for the First Circuit has never expressly determined who, precisely, bears the burden of persuasion (or what that burden is) when an incontestable mark is challenged as generic, although it has determined the burden for registered, contestable marks. See, e.g., Colt Defense, 486 F.3d at 705 (holding that a registered, contestable mark creates a rebuttable presumption that may be overcome "where the alleged infringer demonstrates genericness by a preponderance of the evidence"). The Courts of Appeal for the Ninth Circuit and Sixth Circuit have declined to heighten the burden for incontestable marks, holding that the alleged infringer "has the burden of showing genericness by a preponderance of the evidence" where the mark is registered and incontestable. Reno Air Racing Ass'n, Inc. v. McCord, 452 F.3d 1126, 1135 (9th Cir. 2006); Nartron Corp. v. STMicroelectronics, Inc., 305 F.3d 397, 405 (6th Cir. 2002) (finding that a mark's "incontestable" status does not increase the burden for proving

genericness of a registered mark). The Court of Appeals for the Seventh Circuit, on the other hand, may require some lower burden necessary to prove genericness. See TE-TA-MA, 297 F.3d at 665 (holding that, in genericness challenges, an incontestable registration acquires a "bursting-bubble presumption of non-generic-ness" as opposed to the conclusive presumption such registration normally commands); see also Nat'l Nonwovens, 397 F. Supp. 2d at 252 (reading TE-TA-MA's "bursting-bubble presumption" to create a rebuttable presumption of protection which "evaporates as soon as evidence of invalidity is presented" but not clarifying how much evidence is necessary to "burst the bubble"); but see Door Sys., Inc. v. Pro-line Door Sys., Inc., 83 F.3d 169, 172 (7th Cir. 1996) (applying the "bursting bubble presumption" to a registered, but not necessarily incontestable, mark).

This Court need not definitively choose, at this stage, which burden applies, however, because even applying the higher burden - requiring the alleged infringer to prove by a preponderance of the evidence that the term is generic - MGA has at this juncture presented sufficient evidence of the term's genericness to defeat Hasbro's motion for a preliminary injunction.⁵ In other words, MGA

⁵ A complication can be noted here. Because the evidentiary hearing occurred in the context of a preliminary injunction, the burdens controlling entry of a preliminary injunction collide rather obliquely with the burdens governing the genericness inquiry: to establish genericness, MGA must prove (assuming for now the heightened burden) by a preponderance of the evidence that the term is generic, but for this preliminary injunction, Hasbro

has met its burden of proving by a preponderance of the evidence that the term "Memory" is generic such that Hasbro is unable to demonstrate it likely will succeed on the merits of its claim of infringement.

Over the course of the seven day evidentiary hearing, MGA submitted compelling evidence that the term "Memory" has been used to describe a generic card game since before Hasbro obtained its first trademark in 1967. For instance, "The Game Book," published in 1946 identifies "Memory" as a card game where:

The first player turns up any card. He then turns up another card attempting to find a duplicate of the first card turned up If a card he turns up is a duplicate of the card some other player had turned up and then turned face down, he tries to remember its location and turn it up.

In the New Complete Hoyle - The Official Rules of All Popular Games of Skill and Chance, published in 1956, in an entry under the "Juvenile Games" section, a game called "Concentration (Memory, Pelmanism)" is described and corresponds with the above description. This entry is also contained in The New Complete

must prove a likelihood of success on the merits. Assuming for the moment that MGA were to come up just short of meeting its burden of proof for genericness, what effect would this have on Hasbro's preliminary injunction claim? Nevertheless, because MGA has, at this stage, proven by a preponderance of the evidence that the term is generic, the nuances of this shifting scale do not require exploration.

Hoyle published in 1964 and in the Official Rules of Card Games published in 1968.⁶

MGA also submitted dictionary use as evidence establishing the genericness of the term. In the 1961 edition of the unabridged Random House Dictionary, the seventh definition of "**con-cen-tra-tion**" is:

7. Also called memory. *Cards*. A game for two or more players in which the pack is spread out face down on the table and each player in turn exposes two cards at a time and replaces them face down if they do not constitute a pair, the object being to take the most pairs by remembering the location of the cards previously exposed.

Random House Dictionary of the English Language: The Unabridged Edition 304 (1961). Similarly, the twelfth definition for "Memory" is: "12. *Cards*. Concentration (def. 7)." Id. at 894. This definition is likewise found in the 1966, 1987 and 2001 editions. The 1963 "Webster's Third" dictionary also provides the following definition:

"**con-cen-tra-tion** . . . 5: a card game for two or more players in which a pack of cards is laid out card by card face down and at random, the skill of the game consisting of remembering the position of such cards as are briefly turned up in play - called also *memory*."

⁶ These sources are not technically dictionaries, and Hasbro argues that they are therefore not competent evidence. But this merely means that they fall within another category of evidence, such as media usage. That they are essentially trade publications clearly directed to consumers is competent, and in this case compelling, evidence of genericness. See Colt Defense, 486 F.3d at 707 (noting that trade usage is only problematic where the publication is directed at producers); Liquid Controls Corp. v. Liquid Control Corp., 802 F.2d 934, 938 (7th Cir. 1986) (trade publications competent evidence of genericness).

Webster's Third New Int'l Dictionary of the English Language Unabridged 469 (1963). The fifth definition for "Memory" refers back to this definition. Id. at 1409. The same definition, or one substantially similar, is found in the 1961, 1965 and 1967 editions.⁷

This dictionary evidence is persuasive because "[i]f the term . . . appear[s] in a standard dictionary in lower case, [it is] powerful evidence that the term [is] generic, because nouns and other nominatives listed in dictionaries, save for the occasional proper name, denote kinds rather than specific entities ('dog,' not

⁷ Hasbro argues that these definitions should be considered "uncommon" because they occur toward the end of the entry's definitional list or that the definitions are irrelevant because they are not found in more "authoritative" dictionaries like the Oxford English Dictionary. Hasbro's first claim is unpersuasive and its second misses the point. No case suggests that the placement of a definition in the entry list is dispositive, or even particularly relevant, to whether the term is generic or not. Moreover, even were location particularly relevant, in this case there is at best a conflict of opinion regarding the meaning of the definition's location, rendering such evidence not especially useful. Dictionary use is simply one factor that must be taken into consideration in determining genericness. See Nartron, 305 F.3d at 407 (finding that the failure to provide any dictionary definitions was not determinative because "[d]ictionary definitions are merely one source from which genericness may be proven"). It suffices here that in these dictionaries, published before Hasbro obtained its trademark, "Memory" was defined as a card-matching game and not as a specific entity. Additionally, it bears noting that the dictionaries submitted by MGA have, in point of fact, been used in a number of genericness cases, lending support to their credibility for this type of inquiry. See In re Bayer Aktiengesellschaft, - F.3d -, 2007 WL 1502078 *4 (Fed. Cir. May 24, 2007) (Webster's Third); Colt Defense, 486 F.3d at 710 (Webster's Third); Murphy Door, 874 F.2d at 101 (Webster's Third); Liquid Controls, 802 F.2d at 936 (Random House).

'Fido').” Door Sys., 83 F.3d at 171; see also Liquid Controls, 802 F.2d at 937 (concluding that the definition contained in the 1967 Webster’s Third New International Dictionary was the “everyday, dictionary understanding of the term”). The definitions here suggest, rather forthrightly, that the term “Memory” referred at the time Hasbro registered its mark, and continues to refer, to a type of game, and consequently, a class of products rather than Hasbro’s specific one.

MGA has additionally adduced evidence of Hasbro’s own generic use of the term. For example, in Milton Bradley’s (Hasbro’s predecessor) game “Shenanigans” an aspect of the game is called, generically, “memory game” and appears to refer to a card-matching game. And on its website, Hasbro describes a number of handheld games which require similar card-matching skills as “memory games,” even though they are unrelated to the specific game “Memory.” Although limited, this evidence is relevant because “[a] kind of estoppel arises when the proponent of [a] trademark use is proven to have itself used the term before the public as a generic name” See Colt Defense, 486 F.3d at 707 (quoting McCarthy § 12:13). MGA also put forth substantial evidence of competitors’ use of the term. Specifically, MGA identified a substantial number of (non-Hasbro) games that use the term “Memory” in their title or on their packaging to describe some aspect of the card-matching game. A number of these games are sold by direct competitors of

Hasbro - including Cranium, which sells a game titled, "Sounds of the Seashore - The Magical Matching and Memory Game" and Cardinal Industries, which sells a game called "Memory Match." Many of these games are also sold in the same stores that Hasbro's game is sold, including Target and Toys "R" Us.

MGA also supports its generic claim with considerable evidence of the term "Memory" being used in conjunction with internet card-matching "memory games." See In re Bayer, - F.3d -, 2007 WL 1502078 at *4 (endorsing the use of internet evidence as admissible and competent evidence for evaluating a trademark). As just one example, MGA submitted the Netscape "Celebrity" "Memory Match" game, a game designed to be played on the Netscape website requiring players to match celebrity cards. There also exist, as MGA points out, many websites which contain a category of games called, more or less, "memory games." This includes www.amazon.com, which has a "Matching & Memory" category, and www.allstarpuzzles.com, which contains a "Memory Games" category. These sites offer (either for download or sale) more than just Hasbro's "Memory" game.

The substantial volume of evidence of competitors' use of the term "Memory" to describe a memory matching game is particularly significant, and probative, for the question of genericness because "[t]he more members of the public see a term used by competitors in the field, the less likely they will be to identify the term with

one particular producer." Colt Defense, 486 F.3d at 706 (quoting Classic Foods Int'l Corp. v. Kettle Foods, Inc., 468 F. Supp. 2d 1181, 1190 (C.D. Cal. 2007)). Where four other competitors' use of a term to describe a product may support a finding of genericness, see Schwan's IP, LLC v. Kraft Pizza Co., 460 F.3d 971, 974 (8th Cir. 2006), the sheer volume of the competitors' use of the term "Memory" to describe a memory game is highly persuasive to a determination that the term refers not to Hasbro's specific game but to a class of products all revolving around a basic, i.e., generic card-matching game. See Colt Defense, 486 F.3d at 706 (finding that as more competitors use the term, the support for a finding of genericness increases).

It is true that MGA failed to offer any consumer surveys in support of its genericness claim, and that, additionally, Hasbro offered its own brand penetration surveys, which, it claims, demonstrate that consumers associate Hasbro's specific game with the term "Memory."⁸ But, it has been made clear that such evidence is not dispositive on the question of genericness; rather, it is merely one of several factors that may be considered. See 2 McCarthy, supra, § 12:13. This is also true of relative sales

⁸ For example, a recently completed study by Hasbro showed that 70% of target purchasers, comprised of mothers with children ages 3-5, were aware of Hasbro's "Memory" brand game and 34% owned it. Hasbro's expert, Dr. Thomas Dupont, testified that this study revealed that "Memory has substantial awareness among the target market."

volume. Although Hasbro argues that its dominant market position rebuts any claim that the relevant public would view the term "Memory" as generic, in the absence of actual evidence proving this, the Court cannot draw such a conclusion. See Kresge, 598 F.2d 697. There has been no presentation of evidence suggesting that consumers associate the term "Memory" with Hasbro's game, just that Hasbro's game occupies a large market share. See Kellogg Co. v. Nat'l Biscuit Co., 305 U.S. 111, 118-19 (1938).

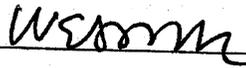
In sum, at this juncture, MGA has carried its burden of proving by a preponderance of the evidence that the term "Memory" is and has been a generic term not entitled to trademark protection. See Nat'l Nonwovens, 397 F. Supp. 2d at 254. This conclusion establishes that Hasbro has not proven that it is likely to succeed on the merits of its trademark infringement case, establishing that a preliminary injunction is inappropriate. It bears noting, however, in this case especially, that "a party losing the battle on likelihood of success may nonetheless win the war at a succeeding trial on the merits." Narragansett Indian Tribe v. Guilbert, 934 F.2d 4, 6 (1st Cir. 1991). It may be the case that, at trial, Hasbro will successfully negate MGA's attempts to prove genericness and ultimately establish its infringement claim.⁹

⁹ Of course, the opposite is true as well. The risk of trial is that Hasbro's mark may be found definitively generic with all the consequences that may flow from such a determination.

III. Conclusion

For the reasons stated above, Hasbro's motion for a preliminary injunction is DENIED.

It is so ordered.



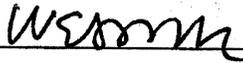
William E. Smith
United States District Judge

Date: 7/31/07

III. Conclusion

For the reasons stated above, Hasbro's motion for a preliminary injunction is DENIED.

It is so ordered.



William E. Smith
United States District Judge

Date: 7/31/07

4. This Final Judgment may be entered without costs or attorneys fees as to either party and without further notice.

5. Hasbro and MGA agree not to appeal from this Final Judgment, and not to attack the validity of this Final Judgment or any provision thereof in any collateral or subsequent proceeding.

6. Hasbro is the owner of the valid, subsisting Registration Nos. 834,282 and 2,894,970 for the trademark MEMORY® for board games in the United States Patent and Trademark Office.

7. MGA's counterclaims filed in this action are dismissed with prejudice.

8. Pursuant to Fed. R. Civ. P. 65 and 15 U.S.C. § 1116, MGA is permanently enjoined from using the term "memory" as all or part of the name of a game, except pursuant to license from Ravensburger AG.

9. This shall constitute the final judgment in this matter, which will be closed, but the Court retains jurisdiction over the parties and this action to implement and enforce this Final Judgment.

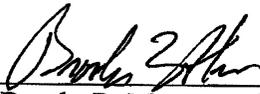
10. The following docket entries in the Court record shall be sealed: Docket Nos. 24, 25, 26, 27, 28, 29, 33, 34, 37, 38, 39, 40, 44, 45, 46, 47, 48, 50, 53, 55, 63, 64, 65, 66, 69, 70, 71, 72, 73, 75, 76, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 104, 106, 110, 111, 112, 113, 114, 115, 116, 121, 124, 126, 128, 129, 130, and 133.

Dated: October 2, 2008


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IT IS SO ORDERED on October 2, 2008.


Honorable William E. Smith
United States District Judge

469779_1

Receiver starts dressing up maker of Bratz: Mattel seems to be winning war with MGA.

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It's been a bumpy ride for [MGA Entertainment Inc.](#) Chief Executive [Isaac Larian](#).

The 55-year-old entrepreneur was hit last week with a federal judge's ruling that gives control of his company to a temporary receiver.

It's the latest blow to Larian in his long-running war with Mattel Inc. over ownership of MGA's Bratz dolls. Mattel seems to be winning at every turn.

The receiver, [Beverly Hills](#) attorney Patrick Fraioli, replaces the [MGA](#) board and has sweeping authority to sell company assets, investigate business transactions or even recommend that the company file for bankruptcy.

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"He is charged with operating the business and to preserve, or enhance, the value of the assets," said Stephen Donell, an L.A.-based court-appointed receiver who is not involved in the case. "It's different than a situation where a receiver may be appointed to liquidate the company."

Larian said he would appeal the receivership ruling, [according to](#) a news report.

It remains unclear how long Fraioli will oversee the Bratz maker, and Larian could regain control May 18. That's when U.S. District Court Judge Stephen Larson is expected to decide whether to make the receivership permanent.

If the judge names Fraioli permanent receiver, the receiver could remain in that role until the legal tussle over the Bratz property concludes. After that, Larian would presumably regain control of MGA minus the Bratz doll line unless an appeal is successful.

"From the standpoint of MGA, it is very scary," said Dan Schechter, a [Loyola Law School](#) professor who is not involved in the case. "The judge shows every indication that he will put a permanent receiver in place."

At the moment, toy industry insiders said Larian, who has expressed confidence over the course of the [litigation](#) that he would prevail, is likely frustrated over losing his chief executive powers.

"This is new to Isaac, being on the losing side," said Jim Silver, an industry expert who has known Larian for 14 years. "He's not running his company anymore, and I'm sure he is looking at all avenues of what he can do."

[In the meantime](#), Larson's order directs Fraioli to preserve and maximize the profits of MGA and its entities, including the company's [international operations](#), and the Bratz assets that set off the dispute.

Fraioli declined Business Journal requests for comment, citing the judge's demand for discretion. However, according to people familiar with the situation, Fraioli is holding meetings with Larian and other MGA executives at the company's Van Nuys headquarters, determining the status of the company's finances, understanding how the [Bratz products](#) figure into MGA's bottom line, and developing an overall picture of the company's business structure. Fraioli is also [talking to](#) MGA's suppliers and distributors to explain his role as temporary receiver and calm any fears that the

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company may be shutting down.

The decision to put MGA into receivership was issued in a 25-page ruling issued by Larson on April 27. Larson also denied MGA's request to reduce an award of \$100 million in damages to Mattel.

A Riverside federal jury awarded the *El Segundo* toymaker the \$100 million sum in August, after finding that a Mattel designer created the Bratz name and character while working for the company and improperly took the idea to MGA.

Larson's most recent ruling also forbids MGA from manufacturing, marketing or selling Bratz products. That means a previous ruling, which had been stayed at MGA's request, is now in force. The receiver can sell Bratz products, however, if such sales will help Mattel collect what it's owed. Retailers can continue to sell MGA-manufactured Bratz products through the holiday season of this year, but in January 2010 they will have to return any unsold inventory.

A Mattel spokeswoman declined to comment for this article. An MGA spokesperson did not return requests for comment nor did Larian.

Peaks and valleys

In 1982, Larian created MGA's predecessor, ABC International Traders Inc., an electronics importer, and it filed for Chapter 11 bankruptcy in 1997, but later re-emerged as a toy company.

The Bratz dolls, with their pouty lips and provocative clothing, brought Larian success. At its peak in 2005, the line generated an estimated \$2 billion in annual sales—making it MGA's monster product. The company's other lines include Little Tikes and Baby Born, a baby doll line.

But in 2004, Mattel filed a lawsuit claiming that toy designer Carter Bryant drew the dolls while he was still a Mattel employee and argued that the line was Mattel's property as a result.

A federal jury in August agreed with Mattel, awarding the company ownership of the Bratz intellectual property and \$100 million in damages. Mattel was awarded ownership of the dolls after the 2009 holiday season to give retailers assurance that they could purchase Bratz products.

[ILLUSTRATION OMITTED]

In the past several months, Mattel raised concerns that Larian had been trying to shield MGA's assets from creditors. Larson appointed Fraioli as temporary receiver in response to Mattel's allegations. In his order, Larson wrote "good cause exists to believe that the MGA parties ... are engaging in, or about to engage in transactions, acts, practices and courses of businesses that constitute fraudulent transfers of assets and violations of Mattel's ownership."

Mattel has argued that MGA's largest creditor, Omni 808 Investors LLC, appears to be first in line to claim its assets, jeopardizing the \$100 million judgment and the right to the Bratz doll line. Mattel also claims that Omni, which is headed by Beverly Hills investor Neil Kadisha, could be a friendly debt holder because it is being funded by Larian. Larson's ruling restrains Kadisha from foreclosing on the lien.

In response to Mattel's concerns, Larson asked temporary receiver Fraioli to investigate the company's finances, in particular transfers and transactions made by MGA after July 2008, which was during the trial. Many of the transactions described in Mattel's allegations took place around that time.

But the receiver's role doesn't stop at financial inquiry and oversight. Fraioli also has the power to hire employees. He can even replace Larian and other MGA executives, or hire people to oversee current MGA management. Larson gave Fraioli permission to retain accountants, attorneys and consultants to help run the company.

Meanwhile, attorneys for Mattel and MGA are preparing for a second phase of the case over claims that MGA stole Mattel's trade secrets by hiring executives away and pumping them for proprietary information. MGA has countersued, alleging that Mattel infringed on its property by making a version of the Bratz doll, the My Scene fashion doll. That claim would only be valid pending a successful appeal of the ruling that the Bratz line is no longer MGA property.

Once the legal battle between the toy rivals ends, Silver, the toy industry consultant who is close to Larian, said he expects the MGA executive to launch another doll product.

"I would expect him to do a fashion doll line," Silver said. "He's going to want to compete against Barbie. Sometimes in business it's personal, and this is personal."

By ALEXA HYLAND Staff Reporter

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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. 78/359,895
Filed: January 30, 2004
For the Mark: MEMORY MAGIC in International Class 28
Published in the Official Gazette: May 10, 2005 at TM 330

HASBRO, INC.,

Opposer,

v.

Opposition No. 91/166,487

CREATIVE ACTION, LLC,

Applicant.

**STIPULATION AND ORDER FOR
PROTECTION AND CONFIDENTIALITY**

The parties engaged in this Opposition have agreed that it would serve their interests to conduct certain discovery in this action under a protective order pursuant to 37 CFR § 2.120(f) and Fed. R. Civ. P. 26(c); and it appearing that certain discovery is likely to involve trade secrets or other confidential information; and relying on the terms of this Protective Order in responding to discovery;

IT IS HEREBY ORDERED THAT:

1. This Protective Order shall apply to all information, documents and things subject to discovery or otherwise submitted to the Trademark Trial and Appeal Board (the "Board") in this action, which are owned or controlled by a party or nonparty and believed in good faith by that party or nonparty to contain its trade secrets or other confidential business information, including without limitation testimony adduced at



depositions upon oral examination or upon written questions, answers to interrogatories, documents produced, information obtained from inspection of premises or things, and answers to requests for admission. The term "CONFIDENTIAL MATERIALS" shall include all the foregoing and all information, documents and things derived therefrom, including but not limited to copies, summaries or abstracts thereof.

2. The producing party or nonparty ("producing person") shall label or mark documents and things that it deems to be CONFIDENTIAL MATERIALS with the legend "CONFIDENTIAL" on the face thereof at the time of production or copying. The designation of any information, documents or things as CONFIDENTIAL shall constitute a representation that counsel, in good faith, believes that the item so designated contains CONFIDENTIAL MATERIAL as that term is defined herein.

a. Where large numbers of documents are produced for inspection, the producing person may produce them with a written statement that the information contained in the documents is confidential and then specifically label or mark with the above legend only those documents of which the opposing party requests a copy.

b. If the confidentiality label is inadvertently omitted, the producing person may subsequently request that the receiving party treat previously produced information or documents as CONFIDENTIAL MATERIALS by sending copies appropriately marked. The receiving party will comply with the request to the extent possible after such request, and such information or documents shall be fully subject to this Protective Order to the extent that the documents or contents thereof have not already been disclosed beyond those permitted access in paragraph 5 below.

3. As to depositions upon oral examination or testimony, if any counsel so states before the record is closed, the testimony of the witness shall be deemed CONFIDENTIAL MATERIALS until the expiration of twenty (20) calendar days after the receipt by counsel of the record of the transcript. The transcript may only be shown to the persons specified in paragraph 5 below during the twenty (20) calendar day period. If counsel of record believes that the transcript or portions thereof constitutes CONFIDENTIAL MATERIALS, counsel shall designate in writing to other counsel of record within that twenty-day period the specific pages and lines constituting such CONFIDENTIAL MATERIALS.

4. CONFIDENTIAL MATERIALS shall be used solely for the purpose of this opposition and of pursuing or defending legal rights directly relating to this opposition, and not for any other purpose, including but not limited to use in any business or commercial enterprise.

5. Access to CONFIDENTIAL MATERIALS or dissemination thereof shall be limited to the following, unless and until the Board rules that there may be further disclosure:

(a) those attorneys and their staff actively involved in the opposition or supervision of the opposition of this matter who are (i) employed by counsel of record in this action or (ii) regularly employed in the legal departments of the parties; and the other employees in those law firms or legal departments whose functions require access to CONFIDENTIAL MATERIALS;

(b) the authors, senders, addressees, and copy recipients of such CONFIDENTIAL MATERIALS and employees of the producing person;

(c) non-party independent consultants or experts engaged by counsel or the parties to assist in this litigation, provided that each such consultant or expert has the need to learn the content of such CONFIDENTIAL MATERIALS and has signed an undertaking in the form of Exhibit A annexed hereto before being provided with discovery materials protected by this Order;

(d) commercial copy services, translators, and data entry and computer support organizations hired by and assisting outside counsel for a party, provided that the CONFIDENTIAL MATERIALS disclosed to these entities are marked "CONFIDENTIAL"; and

(e) any other person as to whom the parties first agree in writing and who signs an undertaking in the form of Exhibit A annexed hereto before being provided with discovery materials protected by this Protective Order.

These restrictions may be altered or supplemented only by written stipulation between the parties filed with and approved by the Board.

6. Nothing in this Protective Order shall bar or otherwise restrict any counsel referred to in paragraph 5(a) from rendering advice to his client with respect to this action, and, in the course thereof, from relying in a general way upon his examination of CONFIDENTIAL MATERIALS, provided, however, that in rendering such advice, and in otherwise communicating with his client, such counsel shall not disclose the contents or substance of any CONFIDENTIAL MATERIALS.

7. If any CONFIDENTIAL MATERIALS or pleadings or other papers containing CONFIDENTIAL MATERIALS must be filed with the Board in connection with any motions or other proceedings herein, the papers shall be submitted to the Board

in a separate sealed envelope or other sealed container bearing the proceeding number and name, indication of the general nature of the contents of the envelope or container, and, in large letters, the designation "CONFIDENTIAL." Where possible, only CONFIDENTIAL portions of the filings with the Board shall be filed under seal.

8. For purposes of this Order, "interested person" means any party or non-party whose CONFIDENTIAL MATERIALS have been produced in this litigation. If, at any hearing in connection with any motion or other proceeding, or at trial, a party intends to rely upon or offer into evidence any CONFIDENTIAL MATERIAL, that party shall inform all interested persons a reasonable time in advance so that all parties and interested persons may take such steps as they deem reasonably necessary to preserve the confidentiality of such material.

9. The acceptance of information, documents or things designated as CONFIDENTIAL MATERIALS by any party shall not constitute an admission or concession, permit any inference, or create a presumption that any such designation is in fact merited or appropriate. Any party challenging a CONFIDENTIAL designation shall designate in writing to the producing person those portions of the information, documents and things challenged as improperly designated and may, after conferring in good faith with opposing counsel, move this Board for an order that the designated information, documents or things shall not be accorded the protection for which the producing person has designated them. If such a motion is made, nothing herein shall alter any burden of proof that would otherwise apply in determining whether the subject information, documents or things are within the scope of 37 CFR § 2.120(f) or Fed. R. Civ. P. 26(c)(7) and are properly designated. Any information, documents or things as to which such a

motion is served shall be accorded the protection for which they have been designated until the motion is determined, and if the motion is denied, for as long as the order denying the motion remains in effect.

10. The parties are engaging in discovery in reliance on the terms of this Protective Order. Subject to the foregoing, this Protective Order shall not prevent or prejudice any party from applying to the Board for relief therefrom, or from applying to the Board for further or additional protective orders, or from agreeing with the other party to a modification of this protective order, subject to the approval of the Board.

11. Within sixty (60) days after final termination of this action, either by settlement, expiration of the time to appeal, or after issuance of the appellate mandate after an appeal, receiving counsel of record either shall return all CONFIDENTIAL MATERIALS including all copies, abstracts, or summaries thereof, or documents containing information taken therefrom, but excluding opposition papers or exhibits or any materials which in the judgment of receiving counsel are work product materials of said counsel in its possession, custody, or control, to counsel for the party who has provided them in discovery or shall certify destruction thereof; provided, however, that one counsel of record for each party may retain one copy of all CONFIDENTIAL MATERIALS, including all opposition papers, hearing or trial exhibits, and deposition exhibits, solely for reference in the event of a dispute over the use or dissemination of information subject to the terms herein established or over compliance with the final judgment.

12. This Protective Order shall not be construed as an agreement by any person to produce or supply any document, or as a waiver by any person of his right to

object to the production of any document, or as a waiver of any claim of privilege with regard to the production of any document.

13. Notwithstanding any designation of confidentiality by any party, nothing herein shall prevent any party from using, without restriction, any material that is:

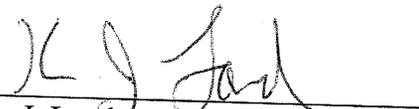
- (a) obtained from sources available to the public;
- (b) obtained from a third party who is free to disclose such material to the receiving party without breach of an obligation to the non-receiving party; or
- (c) in the possession of a non-producing party prior to its production by a producing party.

14. In the event that attorney-client privileged information or attorney work product materials are produced inadvertently to the opposing party pursuant to document production, and if counsel for the party producing the privileged material requests the return of the material within fourteen (14) days of discovering such inadvertent disclosure, counsel for the receiving party shall return the material promptly, without retaining copies, and there shall be no waiver of the attorney-client privilege or work product immunity by reason of such inadvertent disclosure. If the receiving party has extracted, copied, or used information from a document or other discovery material that is subsequently returned pursuant to the immediately preceding sentence, to the extent possible the extracted, copied, or used information will be expunged promptly and not used thereafter. However, to the extent that, prior to being notified of the inadvertent production, the receiving party uses such information in good faith in documents filed with the Board or at depositions, the receiving party will have no obligation to expunge such information from or otherwise alter any such documents filed with the Board or the

transcript of any such deposition. The foregoing shall not detract from or otherwise affect applicable law to the extent that one party notifies the other of inadvertent disclosure of allegedly privileged material more than 14 days after the inadvertent disclosure.

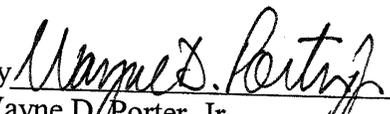
Dated: June 5, 2006

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SO ORDERED on _____, 2006

**[EXHIBIT A]
IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial No. 78/359,895
Filed: January 30, 2004
For the Mark: MEMORY MAGIC in International Class 28
Published in the Official Gazette: May 10, 2005 at TM 330

HASBRO, INC.,

Opposer,

v.

Opposition No. 91/166,487

CREATIVE ACTION, LLC,

Applicant.

**CONSENT TO BE BOUND BY
PROTECTIVE ORDER**

The undersigned hereby certifies that he or she has read the Protective Order in this action and agrees to be bound by it and that he or she voluntarily submits to the personal jurisdiction of the Trademark Trial and Appeal Board of the United States Patent and Trademark Office for purposes of the enforcement of the above-specified Protective Order and the imposition of any sanctions for contempt thereof by the undersigned.

[signature]

Sworn to before me this
_____ day of _____, 2006

Notary Public