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

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|---|---|
| Proceeding | 91206662 |
| Party | Plaintiff<br>Valhalla Game Studios Co. Ltd. |
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| Date | 02/12/2015 |
| Attachments | Opposer's Trial Brief in Child Case.pdf(822098 bytes ) |

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

**BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In Re: Serial Nos. 77/948,333; 77/948,895; 85/310,089
Applicant's Marks: VALHALLA GAME STUDIOS, VALHALLA GAME STUDIOS and design;
Applicant's Mark in Child Case: VALHALLA ENTERTAINMENT

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VALHALLA MOTION PICTURES, INC.

Opposer,

v.

Opposition No.: 91204259
(parent case)

VALHALLA GAME STUDIOS CO. LTD.,

Applicant.

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VALHALLA GAME STUDIOS CO. LTD,

Opposer,

v.

Opposition No. 91206662
(child case)

VALHALLA MOTION PICTURES, INC.

Applicant.

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**OPPOSER'S TRIAL BRIEF IN CHILD CASE**

Opposer Valhalla Game Studios Co. Ltd. ("VGS"), Applicant for the marks VALHALLA GAME STUDIOS (Serial No. 77/948,333) and VALHALLA GAME STUDIOS & Design (Serial No. 77/948,895) hereby submits its trial brief in support of its request that the Board deny the application of Applicant Valhalla Motion Pictures, Inc. ("VMP") to register the mark VALHALLA ENTERTAINMENT & Design on the grounds that the sole purpose of its application is to monopolize the use of the VALHALLA mark over the entire field of entertainment.

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## INTRODUCTION

Opposer VGS filed its intent-to-use applications for the marks VALHALLA GAME STUDIOS (Serial No. 77/948,333) and VALHALLA GAME STUDIOS & Design (Serial No. 77/948,895) on March 2, 2010. It seems like no coincidence that, after VMP initiated its Opposition proceedings against VGS's marks, on May 2, 2011, VMP sought to register the mark VALHALLA ENTERTAINMENT & Design (Serial No. 85/310,089). Instead, it seems like a calculated move by VMP to preempt any uses of the VALHALLA name across the entire entertainment industry, which should be denied because VMP's mark is not "famous" and should not be permitted to encompass every aspect of the entertainment field.

Applicant VMP seeks to register the mark VALHALLA ENTERTAINMENT & Design based on its use in commerce in International Class No. 41 for motion picture film production and television show production and based on its intent to use in International Class No. 41 for writing and editing scripts, teleplays, and screenplays for others. However, this description of the products and goods does not even begin to convey the limitless products and goods it claims it intends to offer under its mark. Gale Ann Hurd, VMP's owner, states that VMP plans to develop "transmedia" properties based on acquired intellectual property rights of stories and characters within action and science fiction genres, including comic books, motion pictures, television series, video games, and tangible products like play action figures, clothing and children's lunchboxes. (Doc. #42 at 5-6). By its own definition, VMP's zone of expansion is virtually limitless, including various products and giftwares based on the supposed strength of its "brand" that has barely been used beyond a couple second showing in the end credits of a few films. (Doc. #42, Hurd, at 38; Doc. #40, Kobylanski, at 31).

Thus, VGS requests that the Board sustain this proceeding and refuse registration of VMP's mark.

## STATEMENT OF THE ISSUES

The issues for trial are:

1. In the parent case, whether the application of VGS for VALHALLA GAME STUDIOS and VALHALLA GAME STUDIOS & Design should issue.

2. In the child case, whether the public is likely to be confused, mistaken, or deceived as to the source of the goods and services that VMP proposes to offer under the brand VALHALLA ENTERTAINMENT & Design.[1]

## DESCRIPTION OF THE RECORD

Pursuant to Trademark Rule 2.122(b), the record includes VMP's application file and the pleadings. A full description of the record has been provided in VMP's Trial Brief in the Parent Case and the documents on file are referenced herein.

## RECITATION OF THE FACTS

### I. THE PARTIES.

#### A. VALHALLA GAME STUDIOS CO. LTD. ("VGS")

VGS was founded in 2008 by Satoshi Kanematsu, Tomonobu Itagaki, and Naoyuki Tsuji, video game industry veterans, to produce video games and video game merchandise. (Doc. #27, Kanematsu, at 7-8). Prior to founding VGS, Itagaki was the head of the Ninja Team at Tecmo, and was involved in the creation of world-renown video games Dead or Alive, games 1 through 4, and Ninja Garden, series 1 to 2. (*Id.* at 10, Exh. 2). Itagaki has sold around 14 million units of game software worldwide. (*Id.*; Doc. #47, Huntley, at 26-27). VGS's first game is the highly anticipated "Devil's Third" video game. (Doc. #27, Kanematsu, at 7-8, Exh. 2). VGS debuted the "Devil's Third" trailer at the widely attended E3 show in 2010 and 2012, and it is available for streaming worldwide on YouTube. (*Id.* at 24; Doc #47, Huntley, at 35-37). VGS's logo is prominently displayed on VGS's website, in the trailers for the "Devil's Third" game, and on various merchandising, including T-shirts, zippo cases, flags, and iPhone cases. (Doc. #27, Kanematsu, at 23-24, Exh. 5). VGS plans to continue developing its video game brand by developing original games. (*Id.* at 9-10).

[1] Pursuant to the Board's order of August 23, 2014, this brief concerns only the second issue.

### B. VALHALLA MOTION PICTURES ("VMP")

VMP is a motion picture and television show production company owned by Gale Ann Hurd. (Doc. #22, #42, Hurd, at 5). VMP has produced various films, including *Armageddon, Virus, Clockstoppers, Hulk, The Punisher*, and *Aeon Flux*, and the television show *The Walking Dead*. (Doc. #42). VMP has also published comic books, including *Anti, Dead Man's Run*, and *The Scourge*. (Doc. #40, Kobylanski, at 15, Exhibit 51; Doc. #42, Hurd, at 15-16). VMP's marks VALHALLA MOTION PICTURES & Design, VALHALLA TELEVISION & Design, and VALHALLA ENTERTAINMENT & Design have appeared in the closing credits of some of VMP's projects. (Doc. #40, Kobylanski, at 31-32).

## II. THE MARKS

### A. VALHALLA GAME STUDIOS and


VGS first filed its application for the word mark VALHALLA GAME STUDIOS and design mark VALHALLA GAME STUDIOS & Design as an intent-to-use on March 2, 2010, and began use of the mark that year. VGS sought to register the mark for computer game programs; computer game software; computer software, namely, game engine software for video game development and operation; video game software in International Class 9, printed materials, namely, novels and series of fiction books and short stories featuring scenes and characters based on video games; series of computer game hint books in International Class 16; positionable toy figures and toy action figures in International Class 28; and design and development of computer game software and virtual reality software in International Class 42. The application was filed with the U.S. Patent and Trademark Office on March 2, 2010 and was published for opposition on November 15, 2011.

**B.**

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and

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Fourteen months after VGS filed its intent-to-use applications, VMP filed registrations for VALHALLA MOTION PICTURES & Design, VALHALLA TELEVISION & Design and VALHALLA ENTERTAINMENT & Design. VMP's earlier registrations, specifically, Reg. No. 2384466 and Reg. No. 2389038 for VALHALLA MOTION PICTURES and VALHALLA MOTION PICTURES and design, were cancelled because of VMP's failure to file the Section 8 affidavit between the fifth and sixth year. (Doc. # 35). VALHALLA ENTERTAINMENT, Serial No. 752118559 was abandoned because VMP failed to respond to an Office Action. (*Id.*) However, although the VALHALLA MOTION PICTURES marks were cancelled in 2007, they were assigned to VMP as of January 1, 2009 in a trademark assignment dated December 6, 2013. This goes to show that they were not interested in the marks until this opposition. (Doc. # 41, Thomson, at 8-9, Exh. 70).

VMP alleges that it currently owns and uses the following trademarks in connection with its business: 1) the design mark VALHALLA MOTION PICTURES for International Class 41 for motion pictures film production, filed with the U.S. Patent and Trademark Office on May 2, 2011; and 2) design mark VALHALLA TELEVISION for International Class 41 for television show production, filed with the U.S. Patent and Trademark Office on May 2, 2011.

Subsequent to the filing of the VGS Mark, on May 2, 2011, VMP filed its trademark application to register the mark

for motion picture film production and television show production (based on Use in Commerce as of October 31, 2010) and writing and editing scripts, teleplays and screenplays for others (based on Intent to Use) in International Class 41.

## III. ARGUMENT

### A. Standing and Priority.

An opposer must have a real interest in the outcome of the proceeding and a reasonable belief that its rights would be damaged as a result of registration to have standing to oppose an application for trademark registration. 15 U.S.C. § 1063(a); *Ritchie v. Simpson*, 170 F.3d 1092, 1094-95, 50 U.S.P.Q.2d 1023 (Fed. Cir. 1999). VGS has shown by its two applications to register its VALHALLA marks that VGS has standing and is not a mere intermeddler. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 945, 55 U.S.P.Q.2d 1842 (Fed. Cir. 2000).

While VMP baldly asserted in the parent case that it has used the VMP marks for nearly 20 years, the record simply does not support VMP in this regard. First, as stated above, VMP had no registered marks at the time VGS applied for its marks, as VMP's marks had been effectively abandoned. VMP's earlier registrations for the VMP word mark and design mark lapsed because of VMP's failure to file the Section 8 affidavit between the fifth and sixth year and VALHALLA ENTERTAINMENT was abandoned because VMP failed to respond to an Office Action. (Doc. #35). The only evidence VMP has presented of use of the VALHALLA ENTERTAINMENT mark was in the closing credits of the television movie *The Wronged Man* in 2010. (Doc. #40, Ex. 51). It is well established that "[t]rademark rights are not established by sporadic, nominal shipments of goods bearing the mark, interspersed with long periods of inactivity." *Pet Inc. v. Edmond Bassetti*, 219 U.S.P.Q. 911 (TTAB 1983). Such is the case here. Accordingly, VGS's actual use of its logo gives it priority over VMP's mark, which VMP has failed to show it has used more than a handful of times.

### B. The Likelihood Of Confusion Analysis, Generally.

Section 2(d) of the Trademark Act provides, in relevant part:

> [n]o trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it… [c]onsists of or comprises a mark <u>which so resembles a mark registered in the Patent and Trademark Office</u>, or a mark or trade name previously used in the United States by another and not abandoned, <u>as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive</u>…

15 U.S.C. § 1052(d) (emphasis added). As used in Section 2(d), "likelihood" of confusion is synonymous with "probable" confusion; it is insufficient if confusion is merely "possible." 3 MCCARTHY ON TRADEMARKS § 23:3, p. 23-14 (citing *American Steel Foundries v. Robertson,* 269 U.S. 372 (1926)).

Moreover, the question of likelihood of consumer confusion is one of fact. *See In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357 (CCPA 1973) ("*du Pont*"): (1) the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression; (2) the similarity or dissimilarity and nature of the goods . . . described in an application or registration or in connection with which a prior mark is in use; (3) the similarity or dissimilarity of established, likely-to-continue trade channels; (4) the conditions under which and buyers to whom sales are made, i.e. "impulse" vs. careful, sophisticated purchasing; (5) the fame of the prior mark; (6) the number and nature of similar marks in use on similar goods; (7) the nature and extent of any actual confusion; (8) the length of time during and the conditions under which there has been concurrent use without evidence of actual confusion; (9) the variety of goods on which a mark is or is not used; (10) the market interface between the applicant and the owner of a prior mark; (11) the extent to which applicant has a right to exclude others from use of its mark on its goods; (12) the extent of potential confusion; (13) any other established fact probative of the effect of use.

Further, the Ninth Circuit has laid out eight factors in analyzing the likelihood of confusion between marks in the case *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979) ("*Sleekcraft*"). Those factors include (1) the strength of the allegedly infringing mark; (2) the proximity or relatedness of the goods; (3) similarity in the sight, sound, and meaning of the marks; (4) evidence of actual confusion; (5) degree to which the marketing channels converge; (6) the type of goods and degree of care consumers are likely to exercise in purchasing them; (7) intent of the defendant in selecting the allegedly infringing mark; and (8) likelihood that the parties will expand their product lines (zone of

expansion). Courts have also considered the quality of the junior user's products or services to lessen the likelihood of confusion. (*Polaroid Corp. v. Polaroid Electronics Corps.*, 287 F.2d 492 (2d Cir. 1961)).

### C. VMP's Sole Purpose in Filing This Application is to Claim a Zone of Expansion that is Merely Theoretical, and it Should be Denied.

In order to be weighed in a trademark owner's favor, the possibility of expansion into the other markets cannot be merely theoretical. Mere assertions of an intent to or interest in expanding will not suffice and the expansion should be contemplated "soon" or "in the reasonably near future." *Checkpoint Systems, Inc. v. Check Point Software Technologies Inc.*, 269 F.2d 270, 290 (3d Cir. 2001); *Surfvivor Media, Inc.* at 634 (finding that plaintiff's mere "expressed interest in expanding his product line" to be insufficient and speculative). The Sixth and Ninth Circuits explicitly require a "strong possibility" of expansion for this factor to tip the scales in support of finding infringement. *M2 Software Inc. v. Madacy Entertainment*, 421 F.3d 141, 150 (9th Cir. 2005).

In *M2 Software*, the court found that the sale of only 215 audio CDs over ten years undermined plaintiff's claims of expansion into general retail distribution of CDs that would compete with the defendant. Plaintiff, owner of M2, used its mark in connection with business management and interactive media application goods and services for the film and music industry. Defendant, Madacy Entertainment, began using M2 Entertainment as a trademark for their new record label venture. M2 Software distributed a line of products that included audio CDs and a website that provided audio content for downloading. Although M2 claimed that it began to broaden marketing of its interactive content on the internet, there must be a *strong* possibility of expanding into competing markets for the factor to weigh in finding of infringement. Since M2 only sold 215 CDs over a ten-year period, it was doubtful that M2 would expand into general retail distribution of audio CDs and this factor weighed in favor of Madacy.

Courts look at the party's concrete plans for expansion, if any, as well as evidence that other companies sell products in both markets. *Checkpoint Systems, Inc.,* F.2d at 290. In *Checkpoint Systems, Inc.*, the court stated they looked to evidence about whether or not the "consuming public might expect

the prior owner to manufacture a product in the defendant's market, or that it is likely to expand into that market." *Id.* Courts may also look more generally at evidence that the products are so closely related that the "consuming public might find it natural for one company" to sell products in both markets. *Id.* That court found that there was little evidence that either party operated in both the physical security and network security markets. Even though both products employed some overlapping computer technology, Plaintiff's products were intended to provide consumers with physical access security compared to defendant's products which consumers buy for network information security products. As such, this factor weighed in favor of the defendant. *Id.*

VMP's application for VALHALLA ENTERTAINMENT is simply a ploy to protect the use of the VALHALLA mark across a variety of classes for "transmedia" and tangible products like play action figures, clothing and children's lunchboxes. (Doc. #42 at 5-6). However, any use of VALHALLA ENTERTAINMENT has only been used in connection with VMP's products, namely, its motion pictures, so it has no independent meaning and does not exist in the mind of the consumer. It cannot lay claim to the whole field of entertainment based on use of its mark on these products related to its motion pictures, when, absent the motion picture, the products would not be recognized by the consumer.

"The fact that a company is a widely diversified and expanding corporation... [does not] mean that it has the propensity to move or will move under a particular mark in any or all directions or that it is entitled to an unlimited scope of protection of the mark." *UMC Indus., Inc. v. UMC Elecs. Co.*, 207 U.S.P.Q. 861, 879 (T.T.A.B. 1980) (quoting *Tex. Gas Transmission Corp. v. Chemplex Co.*, 174 U.S.P.Q. 117, 123 (T.T.A.B. 1972). Here, VMP has only presented evidence of artificial discussions concerning the possibility of entering the video game market, without showing any concrete plans for expansion, and this factor must weigh against it. Hurd testified that VMP has not done anything or taken any steps to actually produce video games itself. (Doc. #42, Hurd, at 47). VMP has met with video game companies to discuss partnering on various projects, but has not put together a written business plan, or budget in order to expand into video game production. (Doc. #42, Hurd, at 46-47; Doc. #37, Henigman, at 26-27;

Doc. #37, Henigman, at 41-43). Kobylanski testified that he attended E3 in 2014 as a representative of VMP and met with companies like Capcom, Konami, Sega, Square Enix, and Telltale "to hear about their available intellectual properties and to tell them a little bit about our company and what we're looking to do, the stories that we're looking to tell, to see if there's any business to be had." (Doc. #50, Kobylanski, at 6-9). He also met with ANEW and has discussed the game Castlevanie with Konami but discussions have stalled. (*Id.*). Simply put, VMP has not proven "a strong possibility of expansion."

Further, VMP's definition of the "natural" zone of expansion is limitless. It defines the word "transmedia" and has produced articles describing transmedia that say nothing about the ability to trademark "transmedia," an amorphous concept that encompasses user generated content and potentially anything considered a "creative work." (*See* Doc. #42, Hurd, at 5-6, 8, 14). In reality, the word "transmedia" on its own is meaningless – it is inherently attached to some other good, particularly a piece of intellectual property. The fame of a mark for its core products does not necessarily extend to its collateral products, particularly if the collateral product sales and advertising are limited. *Kellogg Co. v. Toucan Golf, Inc.*, 337 F.3d 616, 625 (6th Cir. 2003). Here, VMP's mark is barely even featured on its core products, motion pictures and television shows, so its mark is not recognizable to consumers, and further, it has yet to produce evidence of concrete plans for collateral products, such as video games, which supports its proposition for a likelihood of confusion in those classes. VMP should not be permitted to lay claim to essentially all classes of goods without having made any legitimate plans to enter those classes. Because entertainment encompasses so many other fields, the supposed natural zone of expansion, if VMP's argument is upheld, would virtually foreclose the use of a similar name to a small production company in every other international class. Permitting this type of monopoly over the use of a mark across all classes would contradict the entire history of trademark law.

Further, VMP's attempt to protect the VALHALLA name throughout a variety of classes on the basis that the use is related to entertainment conflicts with the numerous other marks incorporating the term "Valhalla" registered with the USPTO. These marks span a wide range of goods and services,

including clothing, gambling machines, cigars, cables, Danish ham, fitness facilities, alcohol, a gun firing range, art gallery, spa services, business consulting services, and real estate brokerage services. (Doc. #33). There are also numerous marks incorporating the image of a viking ship registered with the USPTO, also spanning a wide range of goods and services, including clothing, entertainment services, restaurants, hotels, cruise ships, travel services, machinery, business networking, special event planning, vodka, education, spices, capacitors, lumber, wines, kitchen cabinetry, computer software, magnets, jewelry pins, books, stickers, glassware, toys and sporting goods, automobiles, health spas and business marketing consulting. (Doc # 34). Furthermore, numerous goods depict many different types of viking ships. (Doc. #31, Exhs. 9-22). Regardless of the buzzword attached to VMP's proposed uses, it is clear that there is a strong likelihood of confusion between the VALHALLA ENTERTAINMENT mark and marks used by the existing "Valhalla" companies, including VGS. VMP's attempt to monopolize the VALHALLA name runs afoul of its existing use, which has been confined to motion pictures and television shows and related products, and runs afoul of trademark law precedent, which does not permit protection of the a trademark across all potential classes based on the mere potential to expand.

## CONCLUSION

VMP's attempt to register VALHALLA ENTERTAINMENT must be seen for what it really is – a contrived attempt to support its Opposition to VGS's marks by showing contemplation to expand its brand. As argued above, mere intent to expand a product line is insufficient to establish expansion into new markets, and VMP has failed to show even that here, as discussions about the possibility of expanding into entertainment-related fields do not even show "mere intent" to expand into the video game industry. By seeking to register VALHALLA ENTERTAINMENT, VMP seeks to monopolize the VALHALLA name across a variety of classes, under the guise that such an expansion is natural based on the fame of its mark and the rise of "transmedia." Such a result is not supported by the history of trademark law and is unsupported by the evidence introduced by VMP, and VMP's application for VALHALLA ENTERTAINMENT should be denied.

Dated: February 12, 2015

Respectfully submitted,

Valhalla Game Studios Co. Ltd.

/MG/

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## CERTIFICATE OF SERVICE

I hereby certify that this **OPPOSER'S TRIAL BRIEF IN CHILD CASE** is being filed electronically with the United States Trademark Trial and Appeal Board pursuant to 37 C.F.R. § 18.

I hereby further certify that on February 12, 2015, a true and complete copy of the foregoing **OPPOSER'S TRIAL BRIEF IN CHILD CASE** has been served on Opposer by electronic mail addressed to:

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Dated: February 12, 2015

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