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

Proceeding	92051465
Party	Defendant Edge Games, Inc., and Future Publishing, Ltd.
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Exhibit A of the attached declaration). Future also fails to mention that it was it that insisted Edge Games must take action against Electronic Arts (see Exhibit B of the attached declaration). Future also fails to mention that when Electronic Arts applied to register the mark in question (“Mirror’s Edge”) the USPTO refused to permit Electronic Art’s application to go forward to publication, stating that there was clear evidence that the mark “Mirror’s Edge” had a likelihood of confusion in the mind of consumers with Edge Games and Future’s mark “Edge” (see Exhibit C of the attached declaration). None of this suggests a law suit that is in any sense “frivolous,” and indeed the law suit was clearly well founded and not frivolous. It was, though, brought by Edge Games at the insistence of Future, which makes Future’s false and misleading representations rather ironic and suspect.

3. Future also falsely state that as a condition of dismissal of the law suit with Electronic Arts, “Mr Langdell” was required to stipulate that “each of the above-referenced trademark registrations [...] would be ordered cancelled by the Court.” Future also falsely state that as a condition of dismissal a copy of the Judgment of cancellation would have to be submitted to the Commissioner for Patents and Trademarks. Neither statement is true: the legal action in question was settled by an agreement reached between Electronic Arts and Edge Games, part of which settlement and associated stipulation included a draft stipulated judgment that the parties asked the judge to sign. These were thus not “conditions of dismissal” as Future seeks to mischaracterize them to the Board, they were terms of settlement that Electronic Arts and Edge Games worked out and agreed upon between them. Terms that, in hindsight, Future needed to be a party to in order for the settlement and stipulated judgment to be valid in law.

4. Co-Defendant Future makes clear by its Opposition (and other papers it has filed in these proceedings) that it has no intention of acting as a defendant in this matter despite being a co-owner of the trademark registration in question. Rather, Future obviously acts as a collaborator with the Petitioners, seeking to wrongfully gain cancellation of Edge Game’s lawful trademark registrations and cause Edge Game’s and the jointly owned registrations harm. This is a clear case of commercial sabotage, with Future acting in collusion with petitioner Electronic Arts against Edge Games.

5. What Future avoid mentioning, presumably because they wish the Board to overlook it, is that by virtue of being co-owners of three of the registrations in these proceedings they not only shared with Edge Games in the benefits and protection afforded by owning a trademark registration, but they also shared with Edge Games in any responsibility and liability associated with the registrations. Thus not only should Future have been a party to the District Court proceedings, Future should have also had the same accusations levied against it in respect to fraud on the USPTO and non-use of the registrations in question. By conveniently avoiding becoming a party to the Court action, and instead joining Electronic Arts in attacking Edge Games, Future sought to give the illusion that it had no responsibility for the trademarks it jointly owns with Edge Games. By virtue of this deceit Future sought to make it look as if Edge Games alone was guilty of some wrong doing, but in reality while the accusations levied by Electronic Arts and supported by Future were false and unfounded, they should have been aimed at Future as well as Edge Games. The Judge's opinions, then, should have also been targeted equally at Future and its principal officers, just as much as at Edge Games and Dr Langdell.

6. In its Opposition Future argues that the Board is obliged to comply with the District Court's Order. Future also argues that Edge Games' recourse if it felt the District Court's Order was not valid was to file a motion to the District Court seeking to vacate, modify or otherwise seek relief from the Judgment. Future is mistaken on both issues: first, neither the Board nor the US Trademark Office per se, is obliged to comply with a District Court Order that is clearly invalid. The District Court Judgment sought to bind a third party (a non-party) – Future Publishing Ltd – in an action to which Future was not a party. It is axiomatic that any Judgment or Court Order that seeks to bind a third party who was not a party to the action (a “non-party”) is invalid and thus *void ab initio* (see *Potenz Corp. v. Petrozzini*, 170, Ill, App, 3d 617, 525 N.E. 2d 173, 175 (1988)). Where a court seeks to make an order that would bind a non-party then all that is required to determine the order is void is to inspect the record of the case and determine that the party the court sought to bind (here Future) was not a party to the case. That being determined then the order (judgment) is automatically deemed *void ab initio*.

7. It is a common misconception among attorneys that only a judge can declare an order void, but this is not the law. If a court acts beyond its authority – here seeking to bind an entity that was not a party to the law suit – then the judgment in question and all orders arising

from the judgment are automatically void. As the U.S. Supreme court stated “Courts are constituted by authority and they cannot go beyond that power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable, but are simply void, and this is even prior to reversal”[emphasis added] (*Vallely v. Northern Fire and Marine Ins. Co.*, 254 U.S. 348, 41 S. Ct. 116 (1920)). See also *Old Wayne Mut. I. Assoc. v. McDonough*, 204 U.S. 8, 27 S. Ct. 236 (1907); *Williamson v. Berry*, 8 How. 495, 540, 12 L.Ed. 1170, 1189, (1850); *Rose v. Himely*, 4 Cranch 241, 269, 2 L.Ed. 608, 617 (1808).

8. That is, any judgment or order that seeks, even just in part, to bind a person or entity that was not a party to the court action is invalid in its entirety. It is not merely “voidable” (in the sense of being *subject to being* voided by a judge upon a motion to vacate or similar or upon appeal), such judgments and such orders are automatically void. Indeed, case law (see above) states that such judgments and orders by virtue of being void, rather than voidable, may not be appealed and may not have motions in respect to them filed for them to be vacated or modified. The judgment or order in question being *void ab initio* in a real sense does not exist, and thus cannot be modified, vacated or appealed. Here, since the District Court’s Judgment and Order were *void ab initio* because the court sought to bind a non-party, there was no need for Edge Games to file any motion or to appeal for the District Court’s Final Judgment to be deemed void.

9. In the case – as here – of a stipulated judgment the invalidity is even more clear. Here the so-called “final judgment” in the District Court case was arrived at by the stipulation between the parties in litigation, namely Electronic Arts and Edge Games. A stipulation is a contract and a contract cannot bind a person or entity that is not a party to the contract. Thus since the underlying settlement agreement (between Electronic Arts and Edge Games) and the court stipulation both sought to bind a non-party (Future), both the settlement agreement and the court stipulation were invalid and thus void, too. Consequently, not only is the District Court Judgment invalid, but also the related settlement agreement and court stipulation are also both invalid – all three are *void ab initio*.

10. The reason the Judgment, settlement contract and court stipulation are all *void ab initio* is because in each case they sought to bind an entity (Future) that was not a party. When a

Judgment or a contract (such as a settlement or a court stipulation) seeks to bind a non-party, then that renders the entire Judgment, Order or contract void not just the part of it that sought to bind the non-party. Pursuant to the Vallely court decision (above), a void order (or judgment) does not have to be reversed by a court to be a void order or void judgment. Courts have consistently held that a void order cannot, by definition, be a “final order” (irrespective of how they are titled or referred to), and that indeed a void order is not an order at all. A void order has no legal force or effect.

11. The point made that Edge Games and the District Court may have been aware of the partial assignment of the registration to Future does not make the Court’s Final Judgment valid. Just as when the fact of the partial assignment to Future – that is, the joint ownership of the registration by both Edge Games and Future – was brought to the Board’s attention the Board responded by adding Future as a Co-Defendant, similarly, the District Court had an obligation to add Future as a party to the court action upon being notified that Future was co-owner of at least one (and Edge Games says three) of the trademark registrations in question. The fact that there was some mention of partial assignment of a registered trademark from Edge Games to Future in the court proceedings does not mean the Final Judgment was valid even though it sought to bind a non-party. On the contrary, it could be argued that the fact the court was aware that in making the Final Judgment it was seeking to bind an entity it knew very well was a non-party makes the error in making the Judgment worse than if the court had been unaware that it was effectively seeking to bind a non-party.

12. Further and in the alternate, even if the District Court Final Judgment were valid (which clearly it is not), the Board is still not obliged to comply with the Judgment for the following additional reasons. Beyond the clear error of the Court’s Final Judgment seeking to bind a non-party, the Judgment also gave no reason for cancellation of the five trademark registrations it referenced (including the one in question in this motion by Future). There are three possible grounds for a court to rule that a trademark registration should be canceled: (i) there was fraud on the PTO in obtaining the registration; (ii) the mark was abandoned; (iii) the mark is generic and thus not capable of distinction in the market. The third basis was not in consideration in the District Court matter. Electronic Arts only sought to have the court cancel the five registrations based either on allegations of fraud on the PTO or on the basis of non-use. However, the settlement

and stipulation entered into between Electronic Arts and Edge Games specifically stated that Edge Games was to be deemed not to have committed fraud on the PTO and was not to be deemed to have abandoned its marks. Indeed, had the court matter gone forward the court would have had to add Future as a party and consider whether Future had committed fraud on the USPTO in obtaining at least three of the registrations in question (since it was co-owner of three), and consider whether Future had abandoned any of the three trademark registrations it was co-owner of. Since Future boasts in paper filed in this proceeding that it has substantial common law rights in its part of the registrations in question, and since Future does not appear to be admitting it committed fraud on the USPTO in obtaining the instant registration it is seeking to force the cancellation of, presumably Future would have vigorously opposed the allegations by Electronic Arts had Future been added to the District Court case. This then highlights the absurdity of the Final Judgment and the even greater absurdity of Future seeking to compel the Board to comply with the Judgment.

13. The Stipulation (exhibited by Future) as well as the settlement both clearly state that there is to be deemed no wrongdoing by any party and no finding as to wrongdoing by any party (hence no finding of fraud on the USPTO in obtaining any of the registrations, including the instant one). Indeed, since the case was not litigated on the merits, there obviously was no such finding. Further, in the Final Judgment the Sixth Claim for Relief by Electronic Arts (Declaratory Relief) was not found in Electronic Arts favor but was found in Edge Games favor. This Sixth Claim for Declaratory Relief called upon the court to declare that Edge Game's had no common law rights associated with its trademark registrations . By denying this Sixth Claim, and instead ruling in Edge Games favor on it, the court effectively ruled that Edge Games does have all its common law rights in its trademarks, and thus had certainly not abandoned any of its trademark registrations.

14. Consequently, the District Court's Final Judgment contains an order to the Trademark Office to cancel the five referenced trademark registrations without stating any reason why they should be canceled. What the Board can determine, though – by reviewing the stipulation, the settlement and the Final Judgment itself -- is that the cancellations were not to be on the basis of either fraud on the USPTO or on the basis of abandonment – and yet those are the only bases a court could order cancellation. The only conclusion that can reasonably be drawn,

which conclusion is supported by the settlement and stipulation, is that the court was seeking to order the USPTO to act on Edge Games' voluntary surrender of the registrations. Insofar as the Final Judgment was merely asking the USPTO to act on Edge Game's voluntary surrender, this makes the Final Judgment no different in real terms from Edge Game's Section 7 Surrenders, one of which was already reversed by the Board as imperfect because Edge Games is not the sole owner of the registration in question. We would argue that there is no other reasonable interpretation of the Final Judgment since it could not have been ordering the cancellation of the registrations based on either fraud or abandonment.

15. Further and in the alternate, the settlement agreement between Electronic Arts and Edge Games anticipates at paragraph 2.2 (see the exhibit to Future's Reply) that the USPTO may either fail or refuse to cancel the U.S. trademark registrations in question. In this event, the settlement states, Edge Games is to file in the USPTO a petition for voluntary cancellation. As the record shows, this is precisely what Edge Games did upon being requested to do so by Electronic Arts. Contrary to what Future say in their Reply, then, Edge Games complied fully with the settlement by taking the step it was required to take of filing the Section 7 Surrenders that it did file.

16. As Future also notes, the petitioner at first filed its Request For Entry Of Judgment (docket 32) arguing that it had a District Court Judgment in its favor and thus should have a judgment in its favor in the instant cancellation proceedings, too. As Future also noted, Petitioner then withdrew this Request For Entry Of Judgment because Edge Games reminded petitioner Electronic Arts that such a judgment would be entirely contrary to the settlement between the parties and the courts' stipulated order that stated there was no finding of fraud and no finding of abandonment. As the record shows (at docket 33), in withdrawing its Request for Entry of Judgment, petitioner Electronic Arts stated that the parties had agreed that Edge Games would file voluntary surrenders of the subject registrations instead of there being termination of the proceedings before the Board by execution of the Court Judgment. And as the Board is aware, in regard to this instant registration Edge Games duly filed the Section 7 Surrender and then correctly filed to withdraw the surrender because it did not have grounds to file a surrender of a registration it was not the sole owner of. The Board then correctly reversed the Section 7 Surrender and reactivated the instant cancellation proceedings.

17. Since the settlement and the court stipulation specifically anticipated that if the USPTO did not cancel the registrations based simply on receiving the Courts Judgment in October 2010 then Edge Games was to file voluntary surrenders, and since (at docket 33) it is clear that the parties specifically agreed not to terminate the proceedings before the Board by invoking the Court's Final Judgment but instead agreed to have Edge Games file the voluntary surrenders, for this reason too Future's Motion should be denied.

18. Edge Games notes that petitioner Electronic Arts did not file a motion to cancel the instant registration based on compelling the Board to comply with the District Court Judgment, nor did petition adjoin Future's motion nor did petitioner file any paper supporting he motion. Clearly, petitioner did not file such a motion itself, and did not support Future's motion, since it was well aware that the parties had agreed not to invoke the District Court Judgment to terminate the current proceedings, but rather had agreed that instead Edge Games would file voluntary surrenders, which it did.

19. Future also state in their Opposition that Reg. No. 2,219,837 is the parent of a divided registration that was owned entirely by "Mr. Langdell" at the time of the Judgment. This is untrue in that the registration is not nor was it ever owned by "Mr. Langdell." At the time the instant cancellation proceedings were commenced by Electronic Arts in September 2009 this registration was undivided and owned jointly by Edge Games Inc (not Mr. Langdell) and Future. While the record appears to show that it is true that Future applied to divide this registration and that presumably the relevant department in the USPTO processed that division in or about the November or December timeframe of 2009, the division should not have been processed while the instant proceedings were ongoing before the Board. It is a general rule in the USPTO that no such action is to be processed while a registration is subject to a petition to cancel it. Thus the division of the registration into the parent and child registration that Future claim to have (3,713,604) should not have happened and the Board should request the relevant department reverse that division of the registration.

20. However, even if the division is not reversed, Future is wrong insofar as it suggests that the child registration 3,713,604 should not have been part of the current proceedings or the District Court case. In both the current proceedings and the District Court case Electronic Arts has

alleged that the original undivided registration 2,219,837 was fraudulently obtained. While Edge Games denies that allegation, since the allegation is made it impacts both the parent and the child registrations. Were the original undivided registration be found to have been fraudulently obtained, which Edge Games maintains it would not be, then both the parent registration and the child registration would need to be cancelled – not just the parent registration. Similarly, the child registration was by implication part of the District Court case, too, and was subsumed under the reference of 2,219,837 which must also contain 3,713,604 insofar as there is any accusation of the original undivided registration being fraudulently obtained. And it is clear from both the instant proceedings and the District Court action that Electronic Arts was alleging that the original undivided registration was wrongfully obtained, not that the post-division parent registration was wrongfully obtained.

21. More important, at the time the instant proceedings were started the registration in question was undivided and it is clear that Electronic Arts was calling on the original undivided registration to be cancelled either on the basis of fraud on the USPTO or on the basis of non-use. Similarly, while the technical status as at the time of the court judgment may have been that the registration was divided, it is also clear that as part of the settlement Edge Games agreed to voluntarily surrender the entire original undivided registration since no where is there any mention in the District Court case or the settlement or the Judgment of registration 2,219,837 being divided. Since the original undivided registration should not have had a division processed while the current proceedings were ongoing, and since the division must thus be reversed at this time to recover the status quo as at the time of filing of the instant petition, in filing its Section 7 Surrender for the mark 2,219,837 Edge Games was seeking to surrender the entire original undivided registration, not the divided parent.

22. Contrary to what Future now argue in their Opposition, in previous paper filed with the USPTO and previously referenced in these proceedings, Future laid claim to owning the entirety of reg. no. 2,219,837 and asked the USPTO to transfer the entirety of the registration, the parent registration included, to Future. While this request by Future was denied, nonetheless Future are on record as having a claim to ownership of the divided parent registration 2,219,837 and since Future have laid this claim to ownership of the divided parent registration as well as to the divided child registration, clearly Edge Games lacked the authority to file a section 7 surrender

either of the original undivided registration of even of the alleged divided parent registration. Regardless of which argument Future chooses to make as it flip-flops according to what it believes will get the result it desires from the Board, the fact remains that in all instances Edge Games lacked the authority and standing to file a section 7 surrender of reg. no. 2,219,837.

23. There is no such argument or confusion surrounding the second registration in this Motion, reg. no. 3,559,342, which was undisputedly not divided either at the time of filing the instant petition or at the time of the court judgment. Like the third registration (3,105,816) that Edge Games previously filed a successful motion to withdraw its section 7 surrender of, the Board should also grant Edge Game's motion to withdraw the section 7 surrender of 3,559,342 for the same reasons that the Board found compelling for reg. no. 3,105,816.

24. Petitioners' Opposition, insofar as it incorporates the contents of Future's Opposition, is also responded to by Edge Games above. Petitioners' Opposition claims that Edge Games arguments are without merit because the subject registrations were ordered cancelled by a judgment of the United States District Court. This, though, as is explained above, is without merit and ignores critical facts and relevant legal principals since it is indisputable that the District Court Judgment is void due to being invalid because the court sought to bind a non-party. Similarly, contrary to what Petitioners argue in their Opposition, both the stipulation and the settlement between the parties were both also invalid, and hence both *void ab ignitio*, since they both sought to bind a non-party, too. And again Petitioners make the same mistaken argument that the fact Edge Games stipulated to the judgment "with full knowledge of its prior dealings with Future which had been disclosed to the Court" somehow makes the judgment valid: it does not. The fact that Edge and the Court may have known that Future were co-owners of at least two, and probably three, of the five trademark registrations in question before the Court meant that the Court was well aware that Future should have been brought in as a party. By knowing about Future's co-ownership of three of the five registrations the court was seeking to order cancelled, the court was knowingly seeking to bind a non-party which it may not do. And by knowingly seeking to bind a non-party the judgment was indisputably invalid and consequently *void ab initio*.

25. Future's Opposition also makes outlandish and deliberately misleading statements of the kind they and Electronic Arts made to the District Court that caused the court to gain a

completely false view of Edge Games, its business practices and its trademark registrations. Contrary to what Future say, the District Court did not make any finding that Edge Games or Langdell personally were guilty of fraud, nor did the court make any finding that Mr. Langdell had made “numerous willful false statements under oath to the USPTO and to the Court.” On the contrary, while the District Court Judge expressed his opinion based on the false and deliberately misleading information supplied to him by Future and Electronic Arts, he did not make any such findings against Edge Games or Dr. Langdell and indeed made clear that at trial the jury might reach an entirely different conclusion.

26. Electronic Arts elicited the negative opinion given by Judge Alsop by deliberately misleading the Judge and by Electronic Art’s witnesses giving knowingly false testimony that was deliberately intended to give a false negative impression of Edge Games and its CEO Dr. Langdell. Indeed, Future’s representative Mr. Binns who gave a damning declaration in the District Court proceedings that contributed to the Judge’s negative opinion of Edge Games and Langdell achieved this result by perjuring himself. For instance, in his declaration to the District Court Mr Binns falsely stated that in 2004 Future’s magazine had no presence in the United States market (Binns decl. ¶ 8) and that Future’s Edge magazine was not distributed in print or electronic form in the U.S. market between 1996 and late 2004 (Binns decl. ¶ 7). These statements were patently untrue: elsewhere in his declaration Binns admitted that the Future Edge magazine website had been operational since 2000 (Binns decl. ¶ 8) and thus its magazine had a presence in electronic form in the U.S. via that website for many years prior to 2004. But more pertinently, Future sold numerous copies of its UK magazine via subscription into the U.S. market and had done so since at least 1996 when it stated as much in the settlement reached with Edge Games at that time. Further, Future distributed numerous copies (many of which free of charge, but which still caused a substantial ‘presence’ in the U.S.) to all leading participants in the computer and video game market in the U.S., with probably several hundred such copies going to Electronic Arts employees each month within the U.S. in the years prior to 2004. To state, as Binns did, that Future’s Edge magazine had no presence in the U.S. in 2004 was a blatant falsehood.

27. Binns also falsely stated in his declaration before the District Court that Future’s agreement with Edge Games was non-assignable (Binns decl. ¶ 9, Exhibited to Future’s Opposition), whereas that is patently not true. There is a paragraph in that agreement entitled

“Assignment” as Binns knew very well when he made the false statement to Judge Alsop in order to turn the Judge against Edge Games (see Exhibit D to the attached declaration). Similarly Binns also falsely stated that there was no quality control in any of the agreements between Edge and Future. This was patently not true, as Binns was fully aware, since the 1996 settlement with Edge contained all the key elements for true quality control (Future assured quality of the magazine, they were contractually obliged to supply a sample of the magazine to Edge every month, and Edge had the contractual right to compel Future to change its magazine or terminate the agreement should Edge not be satisfied with the quality of Future’s product).

28. In Binns paragraph 13, he deliberately seeks to mislead the District Court into believing that the specimen that Edge filed in 2004 to support the Combined Declaration of Use and Incontestability was not “genuine” – clearly wanting the Judge to believe he was saying the specimen was a fake. Binns was deliberately stating that the specimen was not of their own UK magazine called “Edge” and putting his statement in such a way as to mislead the Judge into thinking that there would have been only one such genuine item in 2004, and that would have solely been the Future UK magazine. What Binns omits to say, deliberately so as to mislead the Judge, is that Future did not have the right to print US versions of its Edge magazine at that particular time in August 2004 (they gained that right a few months later in October 2004). He deliberately fails to mention that in August 2004 Edge Games had the sole right to publish such printed matter as is depicted in the specimen in question, and that the specimen was an entirely genuine copy of Edge’s printed matter goods and not the “fake” that Binns (and Electronic Arts) clearly wanted the Judge to falsely believe.

29. Binns was not the only of Electronic Art’s witnesses to deliberately make false statements under penalty of perjury to Judge Alsop with the aim of getting the Judge to form a unwarranted negative opinion of Edge Games. The Marvel Comics representative too made at least two false statements in his declaration in support of Electronic Art’s counterclaim. He stated that Marvel Comics had no license with Edge Games yet that was not true. Through its subsidiary Malibu/Bravura Comics, Marvel had a license from Edge Games to publish comic books based on the Edge comic book character. Whether or not Marvel actually made use of that license and continued to publish such comic books is irrelevant, the fact remains that Marvel have that license from Edge Games to this day and thus the Marvel representative did not tell the truth when he

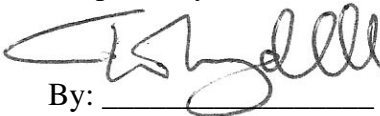
stated that Marvel has no license with Edge. Similarly, the Marvel representative stated under penalty of perjury that the Edge related comics in question had not been printed and sold since 1995 when Marvel reach a settlement with Edge Games. However, that too was a falsehood since in late 1997 Marvel Comics filed a Statement of Use with the USPTO for those same comic book title's trademark registrations stating under penalty of perjury that the Edge marks in question were in current use on Marvel comic books at that time – two years after the Marvel Comics representative falsely stated to Judge Alsop in October 2010 that the sales had ceased. Clearly, like Future's Binns, the Marvel Comics representative was colluding with Electronic Arts to present a deliberately misleading and false picture to the District Court Judge that Edge Games and its CEO Langdell did not tell the truth. In reality, it was Electronic Arts and its witnesses that were not telling the truth.

30. That all said, Electronic Arts' and Future's deliberate misrepresentations and misleading of the District Court Judge are ultimately moot since the Final Judgment is invalid because it sought to bind a non-party. Since the judgment is invalid, and hence *void ab initio*, there is no valid argument that the Board should deny Edge Game's Motion to withdraw its two section 7 surrenders on the basis that the Board should cancel both of the marks in question. On the contrary, the Board cannot and must not act on the District Court's Judgment since it is void, and Edge Game's motion is valid since, as was the case with the other registration the Board already ruled in Edge Games' favor on, here too Edge Games lacked the authority or standing to surrender the registrations in question since it was not the sole owner of either of them (or, in the case of 2,219,837, will not be the sole owner once the mistaken division is reversed that should not have been processed while the instant proceedings were underway and before they were concluded).

For all the above additional reasons, Co-Defendant Edge Game's Motion to withdraw (reverse) its two section 7 surrenders should be granted.

Date: August 28, 2011

Respectfully submitted,

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