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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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Attachments	ResponseToFuturesReplyReTheirMotionToCancelSeptember2011.pdf (8 pages)(48231 bytes)

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

In the Matter of Registration No. 3,105,816
For the Trademark EDGE
Issued June 20, 2006

EA DIGITAL ILLUSIONS CE AB, a Swedish Corporation; ELECTRONIC ARTS INC., a Delaware corporation,
Petitioners,

v.

EDGE GAMES, INC., a California corporation and Future Publishing Ltd, a UK company
Co-Defendants.

DEFENDANT EDGE GAMES INC'S RESPONSE TO CO-DEFENDANT FUTURE'S REPLY TO EDGE GAMES' OPPOSITION TO FUTURE'S MOTION TO CANCEL REG NO. 3,105,816 PURSUANT TO DISTRICT COURT JUDGMENT

Cancellation No. 92051465

Trademark Trial and Appeal Board
U.S. Patent and Trademark Office
P.O. Box 1451
Alexandria, Virginia 22313-1451

FURTHER IN OPPOSITION TO MOTION BY CO-DEFENDANT FUTURE PUBLISHING LIMITED FOR CANCELLATION OF REG. NO. 3,105,816

Co-Defendant and Co-Registrant Edge Games Inc. further opposes Future Publishing Ltd's motion for cancellation of the trademark registration number 3,105,816 for the mark EDGE in Class 16. Edge Games responds to Future Publishing's Reply filed August 23, 2011 and gives the additional grounds for opposing Future's motion as follows:

1. In its Reply¹, Co-Defendant Future Publishing Ltd (hereinafter “Future”) makes clear by its Motion and its Reply 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 clearly acts as a collaborator with the Petitioners, seeking to take away Edge Game’s lawful trademark rights 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. Indeed, showing the depth of its collusion, Future initially specifically informed Edge Games that it was “side by side” with Edge Games against Electronic Arts in respect to the Mirror’s Edge issue (see Exhibit A to attached declaration), and Future was insistent that Edge Games take action against Electronic Arts over the matter (see Exhibit B to attached declaration). Then when Edge Games took the action that Future insisted on, Future blind-sided Edge Games by joining with Electronic Arts in attacking Edge Games and the trademarks that Edge and Future jointly own.

2. In its Reply, and in its Motion, 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*.

3. 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

¹ While Future’s Reply and attached Declaration by Mr. Robert Phillips both indicate they have had service copies sent to Edge Games on August 23, 2011, Edge Games did not receive either document and only became aware of the Reply and attached Declaration when reviewing the TTAB docket online.

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).

4. 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.

5. 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*.

6. 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.

7. 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.

8. 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.

9. 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.

10. 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 Surrender, which was rejected 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.

11. 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.

12. 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.

13. 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.

14. 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.

15. Further and in the alternate, while the court judgment was rendered void because it attempted to bind a non-party, similarly Future's instant motion is invalid for similar reasons. A motion is invalid if it seeks to compel a non-party to be bound by an order or judgment. Here the issue is complicated by the fact that Future itself is the non-party that the District Court Judgment wrongly sought to bind. But simply because Future is that non-party (to the court action) does not mean they have standing here to make the court judgment valid. As we have argued before, no action that Future can take now can make the court judgment valid – they cannot seek to waive their right to object to the court judgment, or seek to affirm their agreement with the court judgment and by so doing make the judgment valid. Future would have had to be a party to the court action itself and a party to the settlement and the stipulation for the District Court Final Judgment to be valid. For the same reason, then, Future's motion seeking to compel the Board to comply with the invalid judgment (the void judgment) is itself therefore invalid.

16. While complicated by the most unusual circumstances where the co-owner of a registration (and co-defendant in the instant proceedings) is seeking cancellation of the very registration it co-owns, greater insight can be gained by considering the consequence of Future trying to file its own Section 7 Surrender. Were Future to file a Section 7 Surrender of this

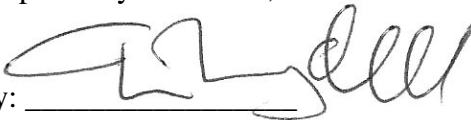
registration in the instant proceedings it would have the same result as when Edge Games tried to file a voluntary surrender – namely, the Board would correctly deny the surrender on the grounds that Future is not the sole owner of the registration in question and therefore lacks the standing and authority to surrender the entirety of a registration it only owns part of. By filing this motion to compel the Board to comply with the District Court’s Judgment what Future is effectively doing is either filing a Section 7 Surrender with the Board for its part of the instant registration No. 3,105,816 or it is seeking to wrongfully file a Section 7 Surrender on behalf of Edge Games, which it has no standing to do. Since the court judgment cannot be a cancellation based on either fraud or abandonment, it can only be an order to cancel based on voluntary surrender as stipulated by the parties (see above), then Future may not unilaterally compel the Board to cancel a registration that it is not the sole owner of, even via the mechanism of seeking to compel the Board to comply with a faulty and invalid (and consequently, by definition, *void ab initio*) court judgment.

17. Edge Games also incorporates its Reply to Future’s and Petitioner’s Oppositions to Edge Game’s Motion to Withdraw (Reverse) the Section 7 Surrenders of registrations Nos. 3559342 and 2219837 in so far as that Reply also pertains to the issues and legal points relevant to Edge Games opposition to Future’s instant motion.

For all the above additional reasons, Co-Defendant Future’s Motion should be denied.

Date: August 28, 2011

Respectfully submitted,

By: 

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