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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	EdgeResponseToEA&FuturesFurtherNoticeOfAug2012.pdf (11 pages)(47867 bytes)

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

In the Matter of Registration No. 3,559,342
For the Trademark THE EDGE
Issued January 13, 2009

In the Matter of Registration No. 3,381,826
For the Trademark GAMER'S EDGE
Issued February 12, 2008

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

In the Matter of Registration No. 2,251,584
For the Trademark CUTTING EDGE
Issued June 8, 1999

In the Matter of Registration No. 2,219,837
For the Trademark EDGE
Issued January 26, 1999

EA DIGITAL ILLUSIONS CE AB, **ELECTRONIC ARTS INC.,** **Petitioners in pro per,** **v.** **EDGE GAMES, INC.** **FUTURE PUBLISHING LTD** **Co-Registrants/Co-Defendants.**	**CO-REGISTRANT EDGE GAMES INC'S RESPONSE TO PLAINTIFFS' AND CO-DEFENDANT FUTURE PUBLISHING LTD'S JOINT SUPPLEMENTAL NOTICE (Docket No. 82)** **Cancellation No. 92051465**

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

1. We refer to Plaintiff's and Co-Defendant/Co-Registrant Future's joint Supplemental Notice regarding the District Court's Order Striking Edge Game's Motion for Relief from judgment (at Docket No. 82).

District Court Order to Strike is Invalid.

2. Since Edge Games was not served with Plaintiff's Motion to Strike, and since Edge Games received no notice of Plaintiff's Motion to Strike, the District Court's Order striking our Rule 60 Motion is, we are advised, invalid. While it may take a further motion from Edge Games to clarify the invalidity of the court's order, clearly since Edge Games had no notice and was not served with Petitioner's motion, there can be no valid order in such a circumstance. Edge Games had a right to be heard on the motion, and if it had been heard and had the opportunity to have counsel substitute in, then the court would clearly have not issued the order that Petitioner's obtained by deceit and abuse of process.

3. In any event, the District Court's order to strike Edge Game's motion to deem the original Final Order void is a technicality, as the Board must surely be aware. The court's order does not dispose of this matter, nor is it in any sense a final decision on the issue of Edge Games gaining relief (an order deeming the Final Order void), as Petitioner's and Co-Defendant Future are trying to mislead the Board into believing. By issuing the order to strike the court has made no decision or order at all as to whether Edge Games may seek relief via a Rule 60 Motion, or by other means, and has most certainly not barred Edge Games from filing a new Rule 60 Motion, so long as this time it is filed by counsel representing Edge Games and not by Edge Games in Pro Se. The court's order is thus not a final decision in any sense of the term, and yet Petitioner's and Future would wish the Board to view it as a final decision, asking as they do for this matter to now be brought to a close. That is deliberately misrepresentation of the facts, as Petitioner and Future are well aware.

Edge Games Did Not Receive Proper Notice of the Motion to Strike.

4. What Petitioners and Future write regarding service on Edge Games of the Motion to Strike is deceitful, deliberately misleading, and disingenuous at best. They claim that Edge Games was notified of the Motion in three different ways: By there mere fact of the alleged e-filing with the District Court; by alleged emailing of the motion to "corp@edgegames.com;" and by exhibiting the Motion to their filing in these proceedings at Docket No. 78. But Petitioners are well aware that none of these methods are proper service of notice on Edge Games thus their summary in Docket No. 82 merely stands as an admission that Edge Games was not given proper notice of the Motion to Strike and thus was deprived of its right in law to contest that motion and to be heard in respect to it before a ruling was made on it.

5. Every electronic copy of any document or notice sent to Edge Games by either Petitioners or Co-Defendant Future has at all times during these proceedings been sent to "tim@edgegames.com" and both parties and their representatives are very aware that only emails sent to this address will reliably reach Edge Games. The main corporate email address for Edge (corp@edgegames.com), as Petitioners admit, is the main public email on Edge Games website. As such, it is the email address to which Edge games gets sent a flood of spam email, numerous inquiries, and so forth, much of which gets filtered out by either the sender's or Edge Game's email service as 'spam.' A thorough search of the inbox for the corp@edgegames.com address, along with a thorough search of Edge Games' spam filter, revealed no emails from Petitioners or from Co-Defendant Future. Certainly, Edge Games received no notice of the Motion to Strike from Petitioners via the "corp" email address and indeed, even if Edge Games had received such an email it would not have been proper service on Edge Games in any event – as Petitioners know well.

6. It was thus disingenuous at best for Petitioners to claim to have sent notice of the Motion to Strike to Edge Games "corp" email address. What is most likely, and

we say, clearly what happened, is that Petitioners wished to find a way to be able to technically argue that Edge Games had received notice of the Motion to Strike, while believing that Edge Games would not actually become aware of the Motion (and thus would not oppose it) until after an order resulting from the Motion had been made by the court. Had Petitioners genuinely wished to give notice of the Motion to Edge Games, it would have sent the Motion along with a formal notice to Edge Games via mail to its address, and sent a copy via facsimile, and emailed a copy of the documents to the known-reliable "tim@edgegames.com" address. Petitioners clearly knew Edge Game's physical address since it had previously sent all notices and documents to that address, and Petitioners clearly were also very aware of Edge Game's facsimile number (626 844 4334) since they had also sent various correspondence to it before and it is clearly stated (along with the street address) on Edge's letterhead.

7. As to Petitioners and Future's suggestion that the mere e-filing of the Motion to Strike stood as effective notice on the Lanier Law Firm, that is clearly nonsensical. Petitioners were well aware that Edge Games filed its Rule 60 Motion in Pro Se, and hence clearly Edge Games is not represented by any law firm, not the Lanier Law Firm or otherwise. Petitioners are also very aware that the Lanier Law Firm ceased to represent Edge Games in October 2010 since Petitioners were clearly informed of this fact at that time. In any event, it would be disingenuous, and not credible, for Petitioners to suggest that almost two years later they seriously thought that the Lanier Law Firm was effectively accepting service on behalf of Edge Games merely by the simple act of Petitioners e-filing their Motion with the District Court. That is such patent nonsense it is surprising Petitioners and Future have the audacity to ask the Board to believe it.

8. Finally, as to the suggestion that Edge Games was notified of the Motion to Strike via Petitioners' filing at Docket No. 78, clearly this does not stand as valid service or notice on Edge Games, as the Board must be well aware.

9. Moreover, as Edge Games made clear in its response at Docket No. 79 to Petitioners' filing at Docket No. 78, we believed based on the exhibit filed by Petitioners that there was no evidence of an actual Motion being filed by Petitioners and thus understood that Petitioners were exhibiting a draft motion that they are contemplating filing. As the record shows, Petitioners did not disabuse Edge Games of this and thus Edge Games had every right to proceed assuming it was correct and that eventually if Petitioners were to file such a Motion that Edge Games would be formally served with it and put on formal notice of it.

10. Edge Games did contact the District Court and ask if such a Motion to Strike had been filed by Petitioners and were orally informed that no such Motion had been filed. Since Edge Games, not being attorneys, has no access to the electronic PACER system, it had no way to double check the veracity of what it had been told orally by the court, and was thus reasonably left to rely on the oral confirmation and on the appearance of Petitioners' filing. Edge Games was not aware that the numbers at the top of the Exhibit to Docket No. 78 indicated that the Motion had been filed, and Edge Games was not likely to know this since Edge and its Pro Se representatives are not attorneys who are familiar with District Court filings.

Edge Games Has Unlimited Time To File A Motion For Relief

11. We note again that (as we have proven by cites in prior submissions), there is no time limit for a party to file a Rule 60 Motion where that motion is alleging that the Court's Final Order in question is void or is voidable (in whole or part). Whereas other motions under Rule 60 must be filed within a set period (usually one year) from when a court order is made, it is clear that the right to file under 60(b)(4) has <u>no time limit</u> at all since, as the Supreme Court has ruled, there logically can be no time limit to apply to have a void order deemed void since by its nature it is as if had never been made, and hence there can be no time limit to challenge an order that was (technically, by virtue of being void) never made. It

was thus extremely unfair for the Board to give Edge Games only 20 days to file a Motion for relief that Edge has a statutory right to file at any time and certainly not within a 20-day period as ruled by the Board. Edge Game's statutory right as to how long it has to file a motion with the District Court to seek relief should govern here, not a lesser period arbitrarily unfairly imposed.

12. Edge Games is urgently still addressing the issue of filing an Amended Rule 60 Motion with the District Court, through attorneys, but as previously indicated this is an extremely complex issue and Edge Games will need reasonable time to file such amended motion. A key issue Edge Games is facing is one that Edge Games raised in earlier filings in these proceedings, namely that the October 2010 Distict Court Order is void on its face, and clearly so, since a necessary party (Future Publishing Ltd, co-owner of several of the marks being canceled by the order) were not a party to the law suit. And it is well established in Federal Law, backed by numerous Supreme Court rulings (that Edge has previously cited), that any court order that is void because the court exceeded its jurisdiction by impacting a party that was not a party to the law suit, then any order or judgment that arises from that law suit is void – not just void<u>able</u>, but void *ab initio* (void on its face). Edge is thus being advised that it may not be appropriate to file a Rule 60(b)(4) Motion with the District Court since Rule 60 motions are to be used where a party believes that a court order is void<u>able</u> but not to be used where it is void on its face due to the court clearly exceeding its jurisdiction. Edge's counsel is thus discussing this issue with the District Court, and as yet there is no clear decision as to whether it is proper for Edge Games to file a Rule 60 motion, or whether that would be contrary to Supreme Court rulings for Edge to do so – <u>or for Edge to be required to do so by the Board</u>.

The Court's Final Order of October 2010 is Void on Its Face, and it Would Thus be Unlawful For the Board To Act On The Order.

As previously argued in prior filings in this matter, backed by Edge citing Supreme Court rulings on the issue and other cites, The District Court's Final Order of October 2010 that sought to cancel five of Edge Games' US Registered Trademarks was void on its face since some of the marks in question were (and still are) co-owned by Future Publishing Ltd which was thus a "necessary" and "indispensable" party to the legal action, and yet was not a party to the law suit. As the Supreme Court has ruled (see prior filings by Edge), in a circumstance such as this where the Board can easily check for itself based on the public record (inspection via PACER of the court record for example), that Future were clearly a necessary and indispensable party and that they were not a party to the law suit, then the Board can see for itself that the Final Order is clearly void, without needing any further order from the court or demanding Edge file for any further or other relief of the Final Order. Here, the Board can easily see that the Final Order was void since it is obvious that at least some of the marks the court sought to order canceled were co-owned by Future at the time of the order in 2010, and the Board can of course easily confirm from its own records that Future was a co-owner of the marks and thus had a right in law to be represented at the legal hearing before any valid order impacting those trademark registrations could be made.

And, no, it is not remotely relevant whether Future knew of the court proceedings and deliberately decided not to join itself as a party to them, nor is it remotely relevant that Future now – well over a year later – states it now agrees with (or waives its rights in respect to, or whatever) the ruling that the court made in 2010. As the same Supreme Court rulings cite by Edge previously make clear, if a necessary or indispensable party to an action is not a party to it, then any order that is made is void on its face, and that absent party cannot then later make the void order valid by either stating that it made a deliberate decision not to be a party, or that it waives its rights to object to the court order, or that it now agrees with the substance of the court order or otherwise. The fact is, as the Supreme

Court has clearly ruled several times, if a necessary or indispensable party is not a party to the legal action then any resulting order from that action is void on its face, and cannot later be made valid by any action of the missing party, any declaration of the missing party, or otherwise. The order is final, cannot be changed, may not be amended, cannot have relief sought from it, and is void on its face – that is, shall be deemed to have never been made (see the Supreme Court rulings previously cited by Edge Games).

While Edge Games still requires considerably more time for its counsel to investigate the filing of a new Rule 60 Motion, or the alternative if there is an alternative, the fact remains in the meantime that **the Supreme Court has ruled that it would be unlawful for the Board (or the US PTO/Registrar/ Commissioner) to act on any court order that the Board (or the PTO) has *any* reason to believe *may* be void on its face (let alone if the Board can readily perceive the order is void on its face).** It is nonsensical to argue, as Petitioners have before, that the Board and the PTO are obliged to act on any court order that is placed before it. Clearly, if the Board or the PTO had a court order placed before it that had obvious defects – such as the trademark numbers were not legitimate, or the marks were owned by parties that were not parties at all to the court case – the one would trust that the Board would believe it has every right in law to not act on such a court order that it can easily observe is flawed or might be invalid, but instead would first demand of the party presenting the order (not the party against whom the order is made) to show further proof that the order is indeed not flawed, that it is indeed valid, before acting on the order. This is just clear common sense and one would hope is usual Board/PTO practice.

If the Board is minded to act on the Court's 2010 Order, then it should first demand of Petitioners and Future to prove that the clear indicators that the Final Order is void on its face are not true, and thus the Board should rightly require Petitioners to seek a court order confirming the apparently void Final Order is not in fact void, rather than requiring Edge to seek relief from an order that the

Supreme Court has ruled one cannot seek relief from if it is void on its face (in contrast to being voidable).

Closing These Proceedings Based On Petitioners' Filing of November 15, 2010.

As Edge Games has argued in its prior motion (that has yet to be ruled on by the Board), Edge still maintains that the most equitable conclusion to these proceedings would be for the Board to honor and act on the closing of these proceedings per the filing by Petitioners and Edge of November 2010. What the parties clearly agreed was that these proceedings would be closed, with Petitioners clearly withdrawing their petition to cancel the marks in question, upon Edge Games filing its Section 7 Voluntary Surrenders of the five marks in question. As Edge pointed out, Edge's part of that agreement to end these proceedings was that Edge file such Section 7 Surrenders, not that the surrenders all be successful and result in the cancellation of the mark(s) in question. It was not Edge's fault that, Petitioners having agreed to these terms to close these proceedings, it then transpired that Edge had no standing or authority to surrender two of the five marks (and we still say, three of the five marks, since it was still against PTO policy for the PTO to have permitted the division of the one co-owned mark while these proceedings were still ongoing).

The fact that Future were later added to these proceedings should not have impacted the agreement reached between Petitioners and Edge prior to Future being added, since it is clear from Future's Intervener Filing that Future only objected to the cancellation of any mark that they co-owned. Thus the settlement that Petitioners and Edge Games reached in November 2010 and lead to a filing to dismiss these proceedings in November 2010, should have been acted on since this agreement would leave the two marks co-owned by Future and Edge still live and not canceled (and we say should also leave the third mark that was co-owned by Future and Edge as at September 2009 still live and not canceled, too, since it should not have been split).

In conclusion: There was no valid service on Edge Games of Petitioners' Motion To Strike, and thus the Court's order granting that motion is invalid (or will soon be ruled invalid when Edge files to have it deemed so). We say it is invalid on its face since there was clearly no valid service on Edge. Second, Edge reasonably requires appreciable more time to file an amended Rule 60 motion, or to take such other action as the court and Edge's counsel may deem appropriate if a Rule 60 motion is deemed inappropriate by the court. Third, clearly the court's order to strike is in any event not a final order, and in no sense barred Edge from re-filing such a motion or otherwise seeking relief via counsel. Fourth, in any event since the October 2010 Final Order of the Court is void on its face, and clearly so, as the Supreme Court has ruled it would be unlawful for the Board or the PTO to act on the order and cancel any of the marks in question. Fifth, Edge still maintains that Petitioners and Edge made an irrevocable firm agreement to terminate these proceedings in November 2010 which would leave at least two of the marks in question live and not canceled (those co-owned by Future), and we say a third should also be left live and uncanceled since it was co-owned by Future at the commencement of these proceedings. Edge thus requests again that the November 2010 filing in which Petitioners formally withdrew the petition be honored, that the instant proceedings be terminated, with at least two (and we say three) of the five registrations live and uncanceled and co-owned by Future.

Date: August 23, 2012

Respectfully submitted,

By: /s/ Tim Langdell________

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Certificate of Service

In accordance with Rule 2.105(a) of the Trademark Rules of Practice, as amended, it is hereby certified that a true copy of the foregoing Co-Defendant Edge Games Inc's Reply to Petitioners' and Co-Defendant Future's Joint Supplemental Notice was served on the following parties of record, by depositing same in the U.S. Mail, first class postage prepaid, this 23rd day of August 2012:

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