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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	Motion to Confirm Courts Judgement & Orders Void.pdf (10 pages)(62573 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, a Swedish Corporation; ELECTRONIC ARTS INC., a Delaware corporation, **Petitioners,** **v.** **EDGE GAMES, INC., a California corporation and FUTURE PUBLISHING LTD a UK corporation** **Co-Registrants/Co-Defendants.**	**CO-REGISTRANT EDGE'S MOTION TO CONFIRM THE COURT ORDERS AND FINAL JUDGMENT OF 10/8/10 VOID ON THEIR FACE DUE TO THE COURT CLEARLY LACKING JURISDICTION IN THE ABSENCE OF FUTURE AS A NECESSARY PARTY.** **Cancellation No. 92051465**

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

MOTION TO CONFIRM THE DISTRICT COURT FINAL JUDGMENT AND COURT ORDERS VOID ON THEIR FACE

INTRODUCTION

1. **Contrary to the Board's recent Order of March 8, 2013, the Board and the Director are not bound to follow the mandate of the District Court *in this particular, highly unusual, instance***. There is one time when, in law, the Board (Director) does not have to follow the mandate of the District Court; namely, when a Final Judgment or Order of the Court is *void on its face*. Indeed, this is the one time when the Board actually has no right to ask EDGE to revert to the Court to seek relief from the Judgment or Order, but instead the Board (Director) is *obligated* to accept the fact that the Judgment and Orders of October 8, 2010, *being void on their face*, must be disregarded as if they had never been made, as if they had never existed.

2. This is the one time when the Board (Director) is *obligated* to review the Court record and if the Board can determine (as it must here, based on the facts and the Court record before it) that there was a party that was either *necessary* or *indispensable* to the matter before the Court, but was not a party to the action in question, then the Board is *obligated* to determine from its own observation/inspection that the Court's Final Judgment and Orders were void. The Board (Director) has no discretion on this; it is obligated to determine the Judgment and Orders void if it can reasonably determine from inspection of the Court record that a Necessary Party or an Indispensable Party was not a party to the action. Here it is *inarguable* that Future Publishing were both an *indispensable* and a *necessary* party to the District Court case (indeed they have even stated this fact on the record in these proceedings in Docket #40), and consequently, since Future were not a party to the Court action it follows that all findings, orders or judgments arising from the Court action are by definition and by law void *on their face*. That is, by law they are all inherently void *without the Court being required to rule they are void*.

3. Reviewing the Board's Order of 8 March 2013, it is clear that the Board has misunderstood the Court's striking of EDGE's Rule 60 motion for relief *solely on the grounds EDGE is not permitted to represent itself* as if it were a striking that denied

relief from the Final Judgment – this did not happen, there was not such Order denying EDGE relief, and it is deeply troubling that the Board should misquote the Court record in this manner.

4. The Court did not consider EDGE's motion at all, let alone consider it on its merits, did not hear from the parties, did not consider all evidence and arguments, and did not then make a ruling as a result of the issues being fully litigated. And the court did not make a ruling denying EDGE relief from the Final Judgment. None of these things happened.

5. By striking out EDGE's motion on the grounds that EDGE was not permitted to act for itself, the Court did not in any way either deny relief not did the Court deny EDGE the right to re-file such a motion at any time in the future, so long as this time properly represented by counsel. As EDGE has proven by legal citations in prior filings in these proceedings, there is no time limit in which a party can question or attack a void order. Thus while the Court's Order was solely to strike the Motion on the basis of lack of standing to file it, and not a denial of relief, the Order was not a final order (or final decision of any kind) and due to the nature of the law in question could not possibly be interpreted as a final order (that is, could not in any possible sense be interpreted as the Court giving a final order denying relief). The implication, while not clearly stated, in the Board letter that there was some kind of final decision made as to whether EDGE would have relief from the Judgment is simply not true.

FACTS

6. Here it is abundantly obvious that Future Publishing Ltd, being the co-owner of at least two – and EDGE says three[1] – of the Trademark Registrations that the Court was being asked by Petitioners to cancel was clearly both a *Necessary Party* and an *Indispensable Party*. As the Supreme Court and Court of Appeals has ruled, where a Court's judgment or order will impact a party that was not a party to the action, then

[1] EDGE says 3 registrations are co-owned between EDGE and Future since one of the registrations should not have been divided while Board proceedings were ongoing (and the other 2 registrations are co-owned as a matter of record, even to this day).

all rulings arising out of the court's case – *all* judgments, *all* findings and *all* orders – are *by law* to be deemed void on their face. That is, void *ab initio*, in their *entirety*, without the impacted party (here EDGE) being required to revert to the Court for relief, or for confirmation of the void nature, or being required to take any other action *other than to bring to the attention of the entity considering whether to rely on the Court's ruling (here the Board/USPTO) that there was a necessary and indispensable party was not a party to the court action that gave rise to the judgment and orders.*

The power, the right *and the obligation*, to deem the District Court 10/8/10 Final Judgment and Orders void on their face lies with the Board (Director), not the Court.

7. Both the Supreme Court and The Court of Appeals have ruled that the power, the right and the obligation to determine whether a Court order is valid (whether it is void on its face) lies with the entity or legal forum that is considering whether to rely on or act upon said Judgment or Order. To be clear, the entity or forum tempted to rely on or act upon the Judgment or Order is **obligated** to consider whether the Judgment or Order is void on its face before relying on it or acting upon it. And if the entity or forum finds the Judgment or Order to be void on its face then it has a further obligation to disregard it as if the Judgment or Order had never been issued.

Future have confirmed on the record that it was not a party to the settlement agreement or the Court case, and that EDGE lacked the right or authority to agree a settlement or agree any Stipulated Judgments or Orders that in any way sought to impact or bind Future.

8. It cannot have escaped the Board's attention that this is a *highly* unusual case. It must be very rare indeed that a Co-Defendant, that is also the Co-Registrant (co-owner) of the marks seeking to be canceled, joins with the Petitioners to seek the cancellation of its own marks and does nothing to defend the action or to protect the marks that it co-owns.[2] Indeed, this unusual situation may be almost without precedent in the Board's history, since it arises from deeply dishonest acts by EA (Petitioners) and Future that all decent, honest companies would never contemplate. The Petitioner's and Future

[2] Future did of course at first file an Intervener Response (Docket #40) to defend what it would style as "its" portion of one of the instant Registrations. However, as soon as Future realized they could not achieve their nefarious goal of stealing EDGE Game's marks from EDGE while retaining their own Reg., they switched to the new strategy of siding entirely with Petitioners, throwing away any pretense that they intended to protect their own IP rights.

Publishing's hands are unclean; this is essentially commercial sabotage that the Board should refuse to be a party to.

9. Co-Registrant Future's first statement in these proceedings (as an Intervener; see Docket #40) was that it is the co-owner of at least one of the instant Registrations (at the time Future overlooked that it was also co-owner of at least a second). Future stated that it **strongly opposed the cancellation** of the registration unless it could split off and retain registration of what it termed "its" portion of the registration. Future stated in that submission:

> *"Future hereby states for the record as a proper intervener in these proceedings that it objects to Registrant's original Motion on Consent to Surrender Registrations With Prejudice ... to the extent that* ***Registrant did not have the right or authority*** *to surrender that portion of the Subject Registration that had previously been duly assigned to Future."*
> (Emphasis added)

10. Further, in that same "Intervener" filing by Future, **Future confirmed that both the Court Judgment/Orders and the settlement agreement between EDGE and the Petitioners were not valid since for them to be valid Future would have had to be a party to both of them.** This again proves beyond all reasonable doubt the Court Orders and Final Judgment of October 8, 2010 are void on their face. In their Intervener Filing (Docket #40) Future wrote:

> *"… insofar as* ***Future was not named a party to the civil litigation*** *and these proceedings and was* ***not included in the settlement agreement*** *that resulted in the attempted termination of these proceedings. As a result,* ***Registrant had neither the right nor the authority to negotiate*** *the surrender of Future's interest in the Subject Registration."*
> (Emphasis added).

11. Thus Future confirmed *on the record* in these proceedings that EDGE lacked both the *right* and *authority* to either enter into the settlement agreement with Petitioners, or to

agree any Stipulated Judgment or Stipulated Final Order in the Court case on behalf of Future (which is what both the settlement and Stipulated Judgment/Orders are).[3]

ARGUMENT

12. Paragraph 9 above stands as concrete proof -- that the Board (Director) must take note of -- that the District Court's Judgment and Orders are void. By Future confirming that EDGE lacked right and authority, Future are confirming they were a necessary and indispensable party – both in the Court action and in these instant cancellation proceedings. The fact that Future have since tactically taken a different position in their conspiracy to attack EDGE's marks in collusion with the Petitioners, does not reverse or nullify their acknowledgement in Docket #40 that proves Future needed to be a party to the law suit for the Court Order to be valid since as they confirm on the record, EDGE alone lacked either the *right* or *authority* to take any action at all pertaining to the co-owned registrations.

13. In paragraph 10 above, there could not be a clearer statement by a key party (Future) that **EDGE lacked both *right* and *authority* to either enter into a settlement agreement with Petitioners in October 2010 or agree to (and effectively bind Future to) a Stipulated Final Judgment and Final Order in the Court action**. This is the very definition of a court case where a *Necessary* and *Indispensable Party* being not a party to the litigation thereby renders all orders and judgments that result as void on their face. Indeed, how could the October 2010 settlement agreement between EDGE and Petitioners be at all valid given that Future confirm that for it to be valid they would have had to be a party to it? And how could the Stipulated Judgment (and resulting Stipulated Final Order) of October 8, 2010 have any validity at all when Future confirm on the record that EDGE lacked either the right or authority to agree to the Court Stipulation on Future's behalf? *Clearly*, Future had to be a party to both the settlement agreement and the Court action for either the settlement or the Final Judgment/Orders to be valid.

[3] Future also confirms again that EDGE lacked the right or authority to file the Surrenders in these proceedings, but for the purposes of this Motion we will stay focused on EDGE's lack of right or authority to enter into any agreement with Petitioners to settle the dispute, agree a stipulated judgment/Order or etc in the Court action.

Just because it was mentioned in the District Court case that Future was Co-Owner of one of marks does not mean Future did not have to be a party to the action for its outcome to be valid (for the Court to have jurisdiction to be able to make any valid orders).

14. Petitioners have argued earlier in this matter that the District Court was well aware at the sole hearing before the Court that at least one of the marks in question was Co-Owned by EDGE and Future. And they argued this to support the false proposition that since the Court knew about the co-ownership of at least one of the marks, therefore Future did not need to be a party to the action. This, of course, is sheer nonsense – both in law and in simple logic. But the point that Petitioners unwittingly made here is that Judge Alsup was given clear notice by the documents and statements filed by Petitioners and Future (in support of Petitioners) that *Future was obviously both a **Necessary Party** and an **Indispensable Party** in the action*.

15. It was first and foremost the obligation of the Court to bring Future in as a Co-Plaintiff/Co-Defendant with EDGE the moment that the Court was made aware that Future Co-Owned at least one of the marks (just as the Board correctly acted to bring Future in as a Co-Defendant in the current action). Indeed, the very fact the Board acted to bring Future in as Co-Defendant in this action should show the Board clearly that the Court erred in not taking the same action to bring Future into the Court action, to. The Board is thus fully aware that it knows the Court erred in this just as the Board would have erred had it not brought Future in.

16. But the Court, having clear evidence before it that Future was a Necessary/ Indispensable Party, nonetheless decided to move forward to give a Final Judgment and issue two Orders, in theory aware that these would be void on their face because the Court had failed to bring Future in as a party to the case. Since the Judge made no comment as to why he failed to bring Future in as a party and thus rendered his Judgment and Orders void, we can only speculate that it was an oversight on his part. But, most important, both the Petitioners and Future had a window of opportunity **at that time** – before the Court rendered its decisions and issued the Judgment and Orders – to intervene, indicate to the Court the error the Judge was making, and correct the error before allowing a situation in which all rulings or outcomes arising

from the Court action would be rendered void on their face (see the legal argument below).

17. The moment this window closed – that is, the moment the Court issued the void judgment and void orders – all possible remedy by the Court *or* by Petitioners and Future expired. The law clearly states that once a court makes the mistake of issuing a Final Order (or Final Judgment) that is void on its face because of the absence of a Necessary/Indispensable Party, then the Court cannot reverse that decision and retroactively make either the Final Order or the Final Judgment valid – neither on Appeal, or by way of modification to the Order or Judgment. When that window of opportunity for Petitioners or Future to intervene and point out the Court's error had closed, all avenues of correcting the error were closed to Petitioners and Future. It is a well established fact of law and procedure that once a Final Judgment or Orders have been issued and are void on their face, neither the aggressor party (Petitioners here) nor the party that should have been a Co-Defendant (here Future) in the action can revert to the court, reopen the case, and correct the error. The Court process does not permit that, not even with a Rule 60 Motion, and thus the District Court's Final Judgment and Orders of October 8, 2010 are forever indisputably void, and cannot now be made valid by any mechanism or avenue available to either Petitioners, Future or even the Court itself.

LEGAL GROUNDS FOR MOTION TO BE GRANTED

18. It is well established by Supreme Court rulings that if an interested party to a court action is not a party to that action, then **any Order resulting from that action is void on its face**. Here, Future Publishing Ltd by virtue of being the co-owner of several of the U.S. registered trademarks that EA sought to cancel, and which the Court's Final Order called for the cancellation of, was not just an interested party, Future was an *essential* and *indispensable* party. In the absence of Future as a party to the court action (and indeed as a party to the settlement, either), the court lacked jurisdiction to make the Stipulated Judgment and Final Order that it made. Edge Games also thus lacked standing or authority to agree to the stipulated Judgment and Order, too.

The U.S. Supreme Court stated in *Vallely*:

> *"Courts are constituted by authority, and they cannot go beyond that authority, and certain in contravention of it, their judgments and orders are regarded as nullities. They* ***are not voidable, but 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 WayneMut. 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).

Similarly, in *Elliott*, the U.S. Supreme court ruled:

> *"Where a court has jurisdiction, it has a right to decide any question which occurs in the cause, and whether its decision be correct or otherwise, its judgments, until reversed, are regarding as binding in every other court.* ***But if it act without authority, its judgments and orders are regarded as nullities****. They are* ***not voidable, but simply void****, and form no bar to a remedy sought in opposition to them,* ***even prior to a reversal****. They constitute no justification, and all persons concerned in executing such judgments or sentences are considered in law trespassers."* (Emphasis added) Elliott v. Lessee of Piersol, 26 U.S. 1 Pet.328 (1828).

Further, since Judge Alsup's Final Order of 8 October 2010 has no legal force or effect **there is no lawful authority to make a void order valid**[4]. Bates v. Board of Education, Allendale Community Consolidated School District No. 17, 136 Ill.2d 260, 267 (1990) (a court "*cannot confer jurisdiction where none existed and cannot make a void proceeding valid*."); People ex rel. Gowdy v. Baltimore & Ohio R.R. Co., 385 Ill. 86, 92, 52 N.E.2d 255 (1943). In re Marriage of Macino, 236 Ill.App.3d 886 (2nd Dist. 1992) ("*if the order is void, it may be attacked at any time in any proceedin*g, "); Evans v. Corporate Services, 207.

19. While the wording of the Elliott v Lessee of Piersol case may be somewhat unusual, the fact is that this legal ruling (and others since, all of which have confirmed the ruling), still stands with no more recent ruling superseding it. What this ruling clearly

[4] That is, one cannot revert to the original ordering court to seek relief of any kind as confirmed by this and numerous other Supreme Court rulings. Rule 60 Motions are only to be used where an Order is partially void and correctable by the issuing court (which is not the case here where the Order and Judgment are entirely void).

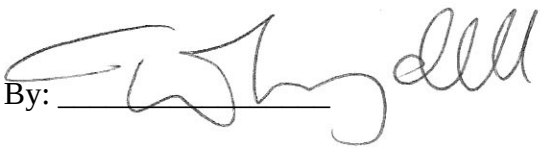
states is that no entity or forum must ever seek to enforce an Order that is void on its face since "*all persons concerned in executing such judgments or sentences are considered in law trespassers*." While unusual language, this clearly means that the Board (and the Director) are strictly forbidden from executing a Final Judgment or a Final Order if that Judgment or Order is clearly void on its face as defined by the Supreme Court rulings cited above.

20. Further, the Bates v. Board of Education ruling (above) confirms that no is no lawful authority that can make a void order valid. What this means is that EDGE Games cannot be asked to revert to the District Court (or to any Court) to gain relief from the Final Judgment or Final Order (as the Board sought apparently to do) since there is no avenue <u>of any kind</u> – certainly not a Rule 60 Motion – by which anyone can gain relief, modification, amendment or appeal of a void order (see Bates v. Board of Education ibid, and numerous other cites that support this position that a void order is to be deemed as if it never existed and therefore cannot be appealed, modified or amended).

Consequently, Edge Games respectfully requests that the Board confirms from its inspection of the District Court record that the October 8, 2010 Stipulated Judgment and Final Order be affirmed as void (on their face) for lack of the Court's jurisdiction in the absence of Future as a *necessary* and *indispensable* party.

Date: March 15, 2013

Respectfully submitted,



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