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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.
Correspondence Address	TIM LANGDELL EDGE GAMES INC 530 SOUTH LAKE AVENUE, 171 PASADENA, CA 91101 UNITED STATES uspto@edgegames.com
Submission	Other Motions/Papers
Filer's Name	Tim Langdell
Filer's e-mail	uspto@edgegames.com, tim@edgegames.com
Signature	/Tim Langdell/
Date	04/11/2013
Attachments	MotionToVacateAmended.pdf (7 pages)(68673 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,	)	**MOTION TO VACATE BOARD DECISION DATED APRIL 9, 2013 AND/OR REQUEST FOR RECONSIDERATION (AMENDED)**
Petitioners,	)	
v.	)	
EDGE GAMES, INC., a California corporation and FUTURE PUBLISHING LTD a UK corporation	)	**Cancellation No. 92051465**
Co-Registrants/Co-Defendants.	)	

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

1. With deep respect, the Board has wrongly applied Section 37 of the Trademark Act. The act states in pertinent part:

> "Decrees and orders shall be **certified by the court to the Director**…"

The District Court Orders of October 2010 were not certified to the Director, they were certified copies obtained by a party and supplied to the Board, which thus does not meet the requirements of Section 37. No Court Order has been sent, in certified form, by the Court to the Director as Section 37 requires the Court to do. The Board was thus in error when it sought certified copies directly from Petitioners, and acted on receipt of those copies from the Petitioners rather than from the Court itself. In any event, the Board is well aware that the Court Orders are void on their face, and hence invalid and should not be acted upon by the Director or the Board. If the Court had meant the Orders to be acted on then the Court would have sent the certified copies of the Orders to the Director itself, directly, as Section 37 calls for.

2. By April 8, 2013 the Board had two live, timely and perfectly valid new Motions before it: one Motion to Confirm the District Court Judgment and Final Order as Void, and one Motion to Dismiss the Instant Proceedings.

3. While the Board has broad discretion as an administrative body, it does not have the discretion to completely ignore two live, valid motions before it before making a final decision in this case – not least when both of the new Motions before it have direct bearing on the final decision (and if either Motion had been granted then the Board could not and would not have made the final decision it indicated in its April 9, 2013 Letter).

4. Most pertinently, the Board has accepted certified copies of a District Court Order and Judgment that the Board is fully aware from inspection of the public record are entirely invalid documents, void on their face. Thus to completely ignore the Motion before the Board calling for the Board to use a modicum of common sense and to follow basic law to confirm the Court Judgment and Order as void, seems at the very least inequitable, unfair, unlawful and lacking in due diligence and fair treatment of the parties to this action. The Motion to Confirm the Court

Judgment and Orders as Void was filed well before the Board made its April 9, 2013 decision, and thus Co-Defendant/Co-Registrant Edge Games, Inc ("EDGE") had every right to have that Motion properly considered and ruled upon by the Board before the Board made any final decision in this case.

5. EDGE also notes that both Petitioners and Co-Defendant Future Publishing Ltd filed a formal Reply to EDGE's Motion to Confirm the Court Judgment and Orders as Void (see Docket #91 and #92), and by filing a formal response to the Motion the Petitioners and Co-Defendant confirmed the Motion valid and one that the Board was obligated to fully consider and rule upon before arriving at a final decision in these proceedings. Indeed, EDGE still has a number of days left to it in regard to the Motion to Confirm before the Board should be starting to fully consider this valid and live Motion. The Motion to Confirm was thus timely (in that it was filed before a final decision was rendered) and the Board is obligated to consider and rule on it before making a final determination in this case.

6. The Motion to Dismiss, filed April 8, 2013, was also filed before the Board's final decision dated April 9, 2013, and thus this entirely valid and timely Motion (in that it was filed before the Board rendered its April 9th Decision) should also be fully and fairly considered and ruled on by the Board before the Board makes its final decision in this case. If the Board finds, as EDGE is certain that it will do, that this Motion to Dismiss is valid, and that the proceedings should have been dismissed in 2009 when EDGE first filed its Affirmative Defense calling for dismissal of these proceedings, then the Board will realize that as of April 9, 2013 the Board had no standing to make a final decision in a case that should have been dismissed in 2009.

7. And on this point of the dismissal that should have happened in 2009, EDGE notes that **if the Board had terminated these proceedings as it should have done in late 2009, then EDGE would not have then had to sue Petitioners in June 2010** – since the law suit was prompted in part by Co-Defendant Future Publishing Ltd's ("Future") insistence that EDGE was contractually obliged to sue Petitioners, and partly by the fact the Board had refused to terminate the instant proceedings leaving EDGE with no choice but to sue Petitioners in the face of Co-Defendant Future insisting that EDGE had to do so in order to protect the jointly owned "EDGE" mark and brand. Thus the fact that EDGE went on to sue Petitioners in June 2010 cannot be

taken as support for Petitioners' argument that they had an "interest" in these cancellation proceedings in 2009 or were being actually harmed by EDGE. Regardless, any alleged harm that Petitioners might have had claim to in the period from June 2010 (when EDGE was compelled to sue in part by the Board's refusal to terminate these proceedings) to December 2010 went away by this point since Petitioners had both received full registration of their three MIRROR'S EDGE marks, and had received unequivocal undertakings from EDGE to permit Petitioners to use this mark unchallenged by EDGE.

8. The Board had no right or authority to consider Petitioners or Co-Defendants filing of the 2010 District Court Judgment and Orders, since the Board should not have been considering the instant Cancellation proceedings at the time Petitioners filed said Court documents, and certainly not by the time that the Petitioners first filed certified copies of said 2010 Judgment and Orders (which by the Board's own confirmation on March 8, 2013 (Docket #84) the Board stated it should never have been considering until it received in certified form, anyway). The Board was thus obligated to ignore all filings by either Petitioners or Co-Defendant Future in regard to the 2010 District Court Judgment and Orders since the instant proceedings should have been terminated shortly after their commencement in 2009, should have been terminated before Petitioners filed certified copies of the 2010 Judgment and Orders, and certainly should have been terminated before the Board made a final decision on April 9th based on entirely invalid and void Court Judgments and Orders.

9. EDGE thus asks that the Board vacate the decision that it made on April 9, 2013 and that the Board fully consider and rule on the two live and timely Motions before it – one to Confirm the 2010 Court Judgment and Orders Void, and one to Dismiss the Proceedings – before the Board makes any final decision in this case based on the invalid and void 2010 Court Judgment and Orders. Should the Board fail to take this reasonable and correct course then EDGE will be compelled to Appeal the decision and will be assured of prevailing on appeal due to the Board's failure to follow proper procedure, failing to consider and rule on live and timely Motions before it, and the Board's failure to accept the 2010 Court Judgment and Orders as void even though it is patently obvious to anyone inspecting them that they are clearly void.

10. Last, the Board states that due to receiving the certified copies of the 2010 District Court Orders the Board is therefore granting the instant petition to cancel. However, the instant petition to cancel was based on two (and only two) grounds, neither of which have been proven or even yet litigated before the Board: the first being a *false* allegation by Petitioners that Co-Defendant EDGE and Co-Defendant Future committed fraud on the USPTO in obtaining the registrations that the Co-Defendants jointly own; and the second being a *false* allegation by Petitioners that EDGE and Future abandoned the marks that they jointly own by non-use and failing to show evidence of intention to recommence such use. **The 2010 Court Orders filed with the Board say nothing about these only two grounds that Petitioners based this petition on, and thus the Court's Orders cannot be used to make a final determination of this cancellation action on either of the (sole) two grounds the petition was filed on.**

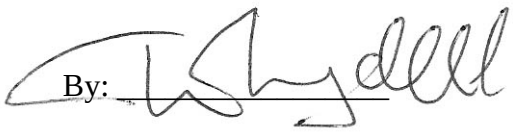
11. EDGE reminds the Board that in October 2010 (October 18, 2010; Docket #28) Petitioners at first filed a "Notice of Disposition of Civil Proceeding and Request for Entry of Judgment." But at Docket #33 (November 15, 2010) **Petitioners withdrew their request for entry of judgment based on the 2010 District Court's Final Order.** The reason Petitioners withdrew their request for entry of judgment based on the District Court Orders is that Petitioners position (which has never been changed or amended) was that Petitioners and EDGE had settled on the clear condition that EDGE was to be deemed not to have committed fraud on the USPTO and not to have abandoned any of its five U.S. Trademark Registrations through non-use. Since the sole grounds for Petitioners' petition were these two bases of fraud and abandonment, and since it was explicitly agreed by the parties that EDGE was to be deemed not to have committed fraud or to have abandoned any of its marks, thus the parties further agreed that the instant proceedings could not be terminated with an entry judgment by the Board in favor of the Petitioners (which would carry with it the implication that EDGE was either found guilty of committing fraud on the USPTO or of having abandoned its marks – there being no third ground for cancellation of the five marks in question which the Court Orders could be interpreted as supporting).

12. Thus in November 2010 **it was agreed between the parties, and placed on record by Petitioners (Docket #33), that it would not be an acceptable resolution to these cancellation proceedings that the Board terminate them by granting Petitioners petition to**

cancel – hence the reason that the Petitioners withdrew they request to enter judgment in their favor based on the 2010 Court Orders, and the reason that Petitioners have never refilled such a request with the Board since they know to do so would be a direct breach of the settlement that Petitioners allege exists between them and EDGE. Yet the Board decision of April 9, 2013 goes directly contrary to the agreement between the parties and the parties joint instruction to the Board in this regard. And with deep respect these facts, and the fact that the Board felt the necessity to insist Future be brought into these proceedings as a co-defendant[1], prove that EDGE has been correct all along that the proper resolution of these proceedings was to terminate them based on the fully valid grounds that EDGE cited, ruling in favor of EDGE on a with prejudice basis. And then, with these proceedings properly terminated, the issue of whether or not the 2010 District Court Final Order was or was not a document that the Director should act upon should have been taken up in separate proceedings. Accordingly, for all these reasons too, EDGE asks that the Board vacate its decision of April 9, 2013, terminates these proceedings in EDGE's favor (denying the petition to cancel), and commences separate proceedings *if appropriate* relating to the Director's consideration of the void 2010 District Court Final Order.

Date: April 10, 2013

Respectfully submitted,



By: _____

Dr. Tim Langdell, CEO
EDGE Games, Inc.
Co-Registrant in *Pro Se*
530 South Lake Avenue, 171
Pasadena, CA 91101
Telephone: 626 449 4334
Facsimile: 626 844 4334
Email: ttab@edgegames.com

[1] As EDGE argued previously in these proceedings, the fact the Board felt that it had to bring Future in as a co-defendant was because the Board realized that as co-owners of the marks in question there could be no valid decision rendered in these proceedings unless the co-owner Future was a party to them. In taking this action the Board was at the same time confirming that the Board understands why the District Court Final Order of 2010 was void on its face, since for the exact same reasons the Board insisted Future had to be a party to the instant proceedings, so too should the District Court have insisted that Future become a co-defendant in that proceeding for any resulting Judgment or Order to be valid, or Petitioners (as the Plaintiffs in regard to Petitioners' District Court Counterclaim) should have brought Future by naming Future as co-defendants to the Counterclaim that sought to cancel the marks co-owned by Future and EDGE.

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 Defendant Edge Games Inc's Motion to Vacate the Board Decision / Request For Reconsideration was served on the following parties of record, by depositing same in the U.S. Mail, first class postage prepaid, this 10th day of April, 2013:

Robert N. Phillips
Reed Smith LLP
101 Second Street, Suite 1800
San Francisco, CA 94105-3659

Vineeta Gajwani
Electronic Arts, Inc.
209 Redwood Shores Parkway
Redwood City, CA 94065

Cheri Langdell