

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

Mailed: October 7, 2008

Cancellation No. 92049162

Velocity Micro, Inc.

v.

EDGE Games, Inc.

**George C. Pologeorgis,  
Interlocutory Attorney:**

Pursuant to Fed. R. Civ. P. 26(f) and Trademark Rules 2.120(g)(1) and (2), the parties to this proceeding conducted a discovery conference with Board participation.<sup>1</sup>

The parties agreed to hold the telephonic discovery conference with Board participation at 4:30 p.m. (Eastern Time) on Thursday, August 7, 2008. The conference was held as scheduled among Robert L. Brooke and Stephen C. Piepgrass, as counsels for petitioner; Dr. Timothy Langdell, as representative of *pro se* respondent; and participating for the Board was the above-signed along with Gerard Rogers, Administrative Trademark Judge, and Cindy Greenbaum, Managing Interlocutory Attorney.

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<sup>1</sup> A request for Board participation in the discovery conference was received from petitioner by telephone on August 4, 2008.

The Board commends the parties for their collegiality and attentiveness during the conference.

This order memorializes what transpired during the conference.

In addition to general comments on the nature and sequence of Board proceedings, the imposition of the Board's standard protective order was discussed, the pleadings were reviewed, the parties were reminded of their obligation with respect to service of papers, and the parties were informed that ESTTA consent motion forms are available in this proceeding,

Additionally, the parties advised the Board that while the parties did engage in settlement discussions prior to the discovery conference, such discussions were not fruitful. Moreover, respondent stated that it wished to proceed *pro se* in this proceeding without representation by counsel. The Board advised respondent that inasmuch as it wished to proceed without legal representation at this juncture, respondent would be required to familiarize itself with all Board procedures, rules and regulations governing this case.

The parties further advised that there are no related Board proceedings. However, the parties did advise that a federal district court action brought by petitioner regarding the subject registration in this proceeding was

ongoing. Indeed, respondent's answer to the petition to cancel acknowledges the existence of this civil action.

In view thereof, and inasmuch as it is the policy of the Board to suspend proceedings when the parties are involved in a civil action which may be dispositive of or have a bearing on the Board case,<sup>2</sup> see Trademark Rule 2.117(a), the Board allowed the parties 10 days from the date of the discovery conference in which to submit a copy of the pleadings in the civil action so that the Board may ascertain whether the district court action may be dispositive of, or have a bearing, on the issues in the instant proceeding.

On August 18, 2008, petitioner filed a copy of the amended complaint in the federal district court action.<sup>3</sup>

A review of the complaint in the civil case indicates that a decision by the district court could be dispositive of, or have a bearing on, the issues in this cancellation proceeding.

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<sup>2</sup> Moreover, to the extent that a civil action in a Federal district court involves issues in common with those in a Board proceeding, the district court decision would be binding on the Board, whereas the Board decision is merely advisory to the district court. See *American Bakeries Co. v. Pan-O-Gold Baking Co.*, 2 USPQ2d 1208 (D.C. Minn. 1986). Further, Board decisions are appealable to the district court. See Section 21 of the Trademark Act, and *Goya Foods, Inc. v. Tropicana Products Inc.*, 846 F.2d 848, 6 USPQ2d 1950, at 1953 (2d Cir. 1988).

<sup>3</sup> *Velocity Micro, Inc. v. The EDGE Interactive Media, Inc.*, Civil Action No. 03:08CV135, United States District Court for the Eastern District of Virginia, Richmond Division.

Accordingly, proceedings are suspended from the date of the parties' discovery conference, i.e., August 8, 2008, pending final disposition of the civil action between the parties.

Within twenty days after the final determination of the civil action, the interested party should notify the Board so that this case may be called up for appropriate action. During the suspension period the Board should be notified of any address changes for the parties or their attorneys.

The Board further advised the parties that, to the extent that the disposition of the civil action does not resolve all the issues set forth in petitioner's originally-filed petition to cancel, petitioner may be required to file an amended petition to cancel limited to the issues not addressed by the district court. In turn, respondent would be allowed time in which to file an answer to the amended petition to cancel.

The Board also advised respondent that its answer to petitioner's originally-filed petition to cancel is argumentative and more in the nature of a brief on the case than a responsive pleading to the petition to cancel. As such, it does not comply with Rule 8(b) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Trademark Rule 2.116(a).

Fed. R. Civ. P. 8(b) provides, in part:

A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder.

In accordance with Fed. R. Civ. P. 8(b) it is incumbent on respondent to answer the petition to cancel by admitting or denying the allegations contained in each paragraph. If respondent is without sufficient knowledge or information on which to form a belief as to the truth of any one of the allegations, it should so state and this will have the effect of a denial.

In view of the foregoing and in the event that the circumstances in this case would require petitioner to file an amended petition to cancel, as discussed above, respondent would be required to file an answer to the amended petition which complies with Fed. R. Civ. P. 8.

As a final matter, the Board notes that on May 16, 2008, respondent filed a motion to substitute EDGE Games, Inc. as party defendant to this proceeding inasmuch as the subject registration in this case was assigned from The Edge

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Interactive Media, Inc. to EDGE Games, Inc. prior to the commencement of this proceeding. The Board granted the motion on June 9, 2008. However, it has come to the Board's attention that the individual who signed the motion to substitute was Jack Phillips. It is unclear from the record who Mr. Phillips is and what association he has with either The Edge Interactive Media, Inc. or EDGE Games, Inc.

Accordingly, upon resumption of these proceedings, if appropriate, the Board will issue an order requiring respondent to identify the legal relationship between Mr. Phillips and The Edge Interactive Media, Inc. or EDGE Games, Inc.

**NEWS FROM THE TTAB:**

The USPTO published a notice of final rulemaking in the Federal Register on August 1, 2007, at 72 F.R. 42242. By this notice, various rules governing Trademark Trial and Appeal Board inter partes proceedings are amended. Certain amendments have an effective date of August 31, 2007, while most have an effective date of November 1, 2007. For further information, the parties are referred to a reprint of the final rule and a chart summarizing the affected rules, their changes, and effective dates, both viewable on the USPTO website via these web addresses:  
<http://www.uspto.gov/web/offices/com/sol/notices/72fr42242.pdf>  
[http://www.uspto.gov/web/offices/com/sol/notices/72fr42242\\_FinalRuleChart.pdf](http://www.uspto.gov/web/offices/com/sol/notices/72fr42242_FinalRuleChart.pdf)

By one rule change effective August 31, 2007, the Board's standard protective order is made applicable to all TTAB inter partes cases, whether already pending or commenced on or after that date. However, as explained in the final rule and chart, this change will not affect any case in which any protective order has already been approved or imposed by the Board. Further, as explained in the final rule, parties are

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free to agree to a substitute protective order or to supplement or amend the standard order even after August 31, 2007, subject to Board approval. The standard protective order can be viewed using the following web address:

<http://www.uspto.gov/web/offices/dcom/ttab/tbmp/stndagmnt.htm>