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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	ResponseToBoardsOrderOf30Mar2012.pdf (11 pages)(88007 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.,	)	**CO-REGISTRANT EDGE GAMES INC'S RESPONSE TO THE BOARD'S ORDER DATED 30 MARCH 2012**
Petitioners in pro per,	)	
v.	)	
EDGE GAMES, INC. FUTURE PUBLISHING LTD	)	**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. In its March 30, 2012 order the Board required Co-Registrant Edge Games Inc ("EDGE") to file a motion in the District Court seeking "reconsideration, review or modification" or any other form of *relief* from the void District Court order of October 8, 2010. However, what the Board required EDGE to do is impossible and hence unlawful, and certainly unfair and inequitable. It is not possible to seek relief from a void order: one cannot seek reconsideration, review or modification or any other relief from an order that is void. Indeed, one cannot appeal a void order, nor can anyone seek relief of any kind from a void order. A void order, by its nature, is as if it had never existed, and hence it makes no sense to seek relief of an order that does not exist. With deep respect, the Board's order is thus illogical and wrong in that it requires one of the two co-defendants, one of the two co-registrants, to file a motion with a court that cannot be filed.

2. With deep respect, we trust that the Board does not mistake the fact that EDGE is in *pro per* as indicating EDGE is not taking full and proper legal advice on its responses in this matter or that what EDGE represents as the law should be ignored simply because EDGE is in *pro per*. At all times, EDGE has sought leading expert advice on this unusual and complex case, and has relied on expertise of counsel, particularly counsel from the firm of Baker Hostetler whom we understand to be very familiar with trademark law and Board decisions. We also note that the Petitioners are in *pro per,* too.

3. Although the Board only gave EDGE 20-days to research the matter and file its response, from the research we and our counsel were able to complete, we believe the Board's order of March 30, 2012 is without precedent in the history of the Board: never before has the Board ordered a party to seek relief from a void court order. Never before has the Board acted on a void order.

4. To be clear, while EDGE did at one point in these proceedings draw attention to the fact that Petitioners and Co-Defendant Future Publishing Ltd ("Future") made fraudulent, false or misleading statements to the District Court, EDGE's position regarding the October 8, 2010 void "final order" was modified more recently in these proceedings upon EDGE's counsel drawing our attention to the fact that the October 2010 order was void on its face. Since that point in these proceedings, EDGE's consistent position is and has remained that the "final order" is void *ab initio* and consequently any other issue relating to the court proceedings of October 2010 is now moot given the void nature of the order that resulted from those proceedings.

5. Respectfully, the Board wrongly, and against all law and legal precedent, and contrary to any prevailing authority, and against all prior Board decisions, asserts that EDGE must seek relief from the void order, and that relief from the void order "lies solely in [the District] court of law [that made the order]." This is not true: it is a fact of law that it is impossible to gain relief from a void order, and indeed it is entirely unnecessary and moot to seek relief from an order that is void since by definition a void order does not exist – there is no order to seek relief from.

6. 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 <u>even prior to reversal</u>.***" (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).

7. 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). While the wording is antiquated, the meaning is clear: where the Board has a reasonable basis to believe a District Court order to be void on its face, then the Board is mandated by the Supreme Court not to execute the order; the Board is mandated not to act on a void order.

8. There is no legal precedent of any court decision, or precedent of any prior Board decision, nothing in the prevailing authorities, that supports in any way that the Board can ignore the fact an order is void on its face and act on the order as if the board were obligated to act on it.

9. While the Board's reference to the *Wella* and *Goya Foods* decisions supports the premise that the Board is bound by the mandate issued by way of a final judgment and usually has no power to deviate therefrom, that is not the case with a void order. Neither *Wella* nor *Goya Foods* deal with a situation where the court order's validity was in any doubt; in neither case was the court's final order void. Thus while the Board might usually be mandated to act on a District Court final order, that is certainly not the case – as here -- where the final order is void on its face. Indeed, to the contrary, in law the Board may not act on a void order and it would be unlawful and outside the its powers for the Board to act on a void order.

10. There is a *sizable* body of higher court legal decisions and precedent from prevailing authorities and Board decisions that the Board is obliged to respect and act on that

states a void order, where it is void on its face, is to be considered void and there shall be no demand on the impacted party to seek relief of the court that made the order, or to seek any paper from that court to "prove" or ratify that the order is void. All legal precedent, all prevailing authority, supports that if an order can be seen to be void on its face – that is, if the Board upon inspecting the record of the District Court case can clearly see that a *necessary party* or *indispensable party* (here Future, since they were co-owners of the registrations being order cancelled) to the case was not a party to the action – then the Board *must* accept the "final order" (despite its name) as void, as if it does not exist, and no demand or requirement can lawfully or fairly be placed on EDGE to "prove" the order is void by seeking any other paper from the District Court showing the order to be void.

11. The court decisions supporting EDGE's position are numerous: "*A Judgment is **void on its face** if the trial court exceeded its jurisdiction by granting relief that it had no power to grant. Jurisdiction (of location **or parties**) cannot be conferred on a trial court by the consent of the parties*. [emphasis added] (*Summers v. Superior Court (*1959) 53 Cal. 2d 295, 298 [1 Cal. Rptr. 324, 347 P 2d 668]: *Roberts v. Roberts* (1966) 241 Cal. App. 2d 93, 101 [50 Cal. Rptr. 408].)

12. And further, "*Obviously a judgment, though final and on the merits, **has no binding force** … if it is wholly **void for lack of jurisdiction of** the subject matter or **person***" (7 Witkin Cal, Procedure, supra, Judgment, § 286, p 828). Here while the so-called "final order" was not a final order based on any consideration of the merits, it was void not due to that fact but due to the fact the court exceeded its jurisdiction and powers by ordering the cancellation of trademark registrations co-owned by Future Publishing Ltd (thus making Future a *necessary party* and an *indispensable party*). The court could not issue any valid order regarding the cancellation of the

instant trademark registrations since one of the owners was not a party to the law suit, and unless Future was a party to the law suit no valid order (or judgment) could be made by the court.

13. As the prevailing authorities have made clear "*A "final" but void order can have no preclusive effect. A void judgment (or order) is, in legal effect, no judgment (or order). Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars anyone*." (*Bennet v. Wilson* (1898) 122 Cal. 509, 5613-514 [55 P. 390]). As the court and the prevailing authorities make clear, then, the issue before the Board cannot be founded on the October 8, 2010 order since that would make these instant proceedings (to quote the court decision) "worthless." Furthermore, the prevailing authorities clearly state that a void order neither binds nor bars anyone – that is, while the Board may be <u>usually</u> bound to act on the final orders of a District Court, where an order is void there is no binding effect on the Board to act on the order. Indeed, the Board is mandated to ignore any final order that is void.

14. Further, the Board does not need any confirmation from the District Court that the so-called "final order" is void since it is void on its face: "*It is well settled that a judgment or order which is void on its face [is one] which requires only an inspection of the judgment-roll or record to show its invalidity*" (*Plotitsa v. Superior Court* (1983) 140 Cal App. 3d 755, 761). Here it is obvious to the Board on simple inspection of the record of the October 2010 Court case that Future was not a party to the law suit between Electronic Arts and EDGE, and yet Future would have needed to be a party to the law suit for any resulting "final order" to be valid because that order sought to bind and impact cancellation of trademarks owned or co-owned by Future. Hence, in this instance, the District Court order of October 8, 2010 fits the court mandated definition of "void on its face" and consequently the order is void without requiring any further paper from the District Court confirming it is void.

15. A void order also cannot be appealed or if it were appealed no appellant court would hear the case since a void order cannot be given validity by the appellant court and hearing an appeal on a void order would be to give it validity. One cannot appeal a void order, any more than one can file a motion with the trial court for any relief from a void order that seeks reconsideration, review or modification. In *Mendez* the California Appeal Court stated "*[T]he affirmance by an appellant court of a void judgment imparts to it no validity*" (the court in *Mendez*, citing *Pioneer Land Co. v. Maddux*, suppra, 109 cal at p642). And the court went on to quote from *Pioneer* "*That a void order is appealable does not permit us to consider the appeal on its merits and to affirm [or reverse] the order if we were so disposed, because our affirmance [or reversal] would impart no validity and would be similarly void*." And the court then commented "*No purpose would be served by considering the merits of a void order on appeal*." Whereupon the California Court of Appeal refused to hear the case. (*Mendez Trucking, Inc. v. California Compensation Insurance, Co*., 2nd Civ. B126064).

16. If the Board has the power to require EDGE to file any motion with the District Court -- and EDGE respectfully denies such power is within the Board's right or discretion -- then certainly the Board lacks the right in law or in legal precedent, or in accord with any prevailing authority, to require EDGE to file any such motion within 20 days or within any specific time limit whatsoever. A void order that is void on its face (because a *necessary* or *indispensable party* was not a party to the court proceedings) has no statute of limitations on confirming it as void – insofar as EDGE has any right to seek a court's confirmation that a void order is indeed void, there is no time limit on when EDGE can seek that confirmation and the Board has no right or power to impose such a time limit on EDGE to do so (*MacMillan Petroleum Corp. V. Griffin* (1950) 99 Cal. App. 2d 523, 533 [222 P 2d 69]). That said, again, we

make clear that where a final order is void on its face it is unlawful to require a party to seek the trial court's confirmation that the order is void, even if such an avenue of action were available to EDGE.

17. The Board references, and seems to rely at least in part on, the fact that on November 14, 2010 EDGE filed a voluntary surrender with prejudice of each of the five registrations that are the subject of the District Court final order. With deep respect, this point is (or should be) moot and not relevant. First, the Board has already reversed at least one of these surrenders that EDGE filed in November 2010 (re Reg No. 3105816) – the Board correctly ruled that EDGE lacked the authority to file a voluntary surrender of any trademark registration that it did not solely itself own. Indeed, based on the Board's decision to reverse at least one of the November 2010 surrenders, the Board also brought Future Publishing Ltd into the instant proceedings as a co-defendant implicitly acknowledging that no decision that Future was not a party to can be valid where the decision involves a registration co-owned by Future. In this case, at least two, and EDGE would argue at least three, of the five trademark registrations are co-owned by Future, and consequently the filing that EDGE did on November 14, 2010 was invalid because EDGE lacked the authority to file the surrenders. Clearly, too, when EDGE filed those surrenders in November 2010, EDGE was not aware at that time that the District Court's final order (and the settlement agreement with Petitioners) was void. Clearly, if EDGE had been aware there was no valid court order, and no valid settlement agreement either, requiring or mandating that EDGE file the trademark registration voluntary surrenders, then EDGE would not have filed the surrenders in November 2010 or at all. Thus this point is, or should be, moot and nothing should be assumed, or taken, and no inference drawn, from the fact EDGE filed surrenders in 2010 that it lacked the authority to file.

18. The Board stated in its order that if EDGE were to fail to provide proof that it had filed a motion to seek relief from the void District Court order, then the Board would act on the void order and cancel the five trademark registrations. With deep respect, this would be unlawful and a gross miscarriage of justice. The Board is not only not mandated or obliged by any prevailing authority to act on a District Court order that is obviously void on its face, but indeed by contrast the Board is mandated and obliged to disregard such a void order and may not lawfully act on it. Consequently, it would be unlawful for the Board to cancel any of the five instant trademark registrations if that act is based in any way on the void District Court order. And, respectfully, the Board has no other legal or valid basis for canceling the five registrations in question, certainly not until the instant cancellation proceedings have been prosecuted to a final decision by the Board, based on full consideration of the merits.

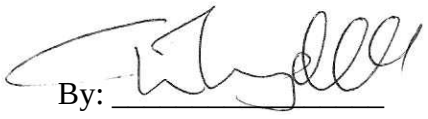
19. EDGE thus respectfully requests that the Board correct and amend its March 30, 2010 order to remove any requirement from EDGE that it file any motion with the District Court for relief of the void order. EDGE further requests that the Board affirm the District Court order as void on its face, since clearly it is void by any reasonable inspection of the record and any reasonable consideration of the prevailing authorities; and that the Board do permit the instant proceedings to go forward and the cancellations be heard on their merits. Or, by reason and virtue of argument presented by EDGE in earlier filings in this case, the Board do dismiss the instant proceedings and rule in Co-Defendants EDGE's and Future's favor that the cancellations are denied.

20. EDGE also notes that by virtue of the doctrine of *Assignee Estoppel*, Future is in any event precluded (estopped) from challenging or attacking any of at least two, and we say three, of the five trademark registrations that Future is a co-owner of since those marks were

assigned to Future by EDGE. Future thus had no right in law to file any motion before the Board to ask the Board to cancel any of the registrations that Future co-owns, and consequently Future is estopped from either asking the Board to affirm or recognize the District Court order, or to in any way at all adjoin with Petitioners in seeking cancellation of the marks in question. Consequently, while the Board was correct to decide to bring Future in as co-defendant in the instant proceedings, EDGE respectfully suggests that due to the doctrine of assignee estoppel, the Board should have instructed Future that it may only act in the role of a defendant in these proceedings (that is, seeking only to defend the registrations from cancellation by Petitioner), and that Future is estopped from acting as if it were a co-petitioner with a position adverse in any way to that of its co-defendant, EDGE. And, pertinently, only Future, and not Petitioners, motioned the Board to compel it to act on the void judgment and thus there is no valid motion.

21. Finally, EDGE notes that the Board ruled in an easily overlooked footnote 5 on page 5 of its order that both EDGE's motion to withdraw (reverse) its surrender of Regs. Nos. 3559342 and 2219837 and EDGE's motion to reverse the division of Reg. No. 2219837 were denied without the Board giving any reasons or justification for denying either of these motions. EDGE will be addressing these denials in separate filings.

Date: April 17, 2012 Respectfully submitted,



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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-REGISTRANT EDGE GAMES INC'S RESPONSE TO THE BOARD'S ORDER DATED 30 MARCH 2012 in these proceedings was served on the following parties of record, by depositing same in the U.S. Mail, first class postage prepaid, this 17th day of April, 2012:

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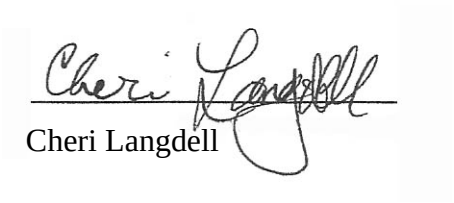

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