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precedent of the TTAB

Hearing: Sept. 11, 2025 Mailed: October 30, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Mobigame
v.
Edge Games, Inc.

Cancellation No. 92075393

Patrick J. Concannon and Micah W. Miller, Nutter, McClennen & Fish, LLP, for Mobigame.

Edge Games, Inc., pro se (by Dr. Tim Langdell, CEO).

Before Larkin, Casagrande, and O'Connor[1], Administrative Trademark Judges.

Opinion by Casagrande, Administrative Trademark Judge:

The course of this cancellation case was long and contentious. But, ultimately, it turns on the answer to a simple question: do we believe the testimony of Dr. Timothy Langdell, the CEO of Respondent Edge Games, Inc., that Respondent used the mark

[1] Administrative Trademark Judge Myles sat on the panel at the September 11, 2025, hearing. She has since left federal government service. Administrative Trademark Judge O'Connor has been substituted for her on this case. The change in composition of the panel does not necessitate a second oral argument. *See In re Bose Corp.*, 772 F.2d 866, 869-70 (Fed. Cir. 1985).

EDGE GAMES[2] on or before the date it filed the use-based application that matured into the challenged registration? As we explain below, our answer is no, we do not. So, we grant the Petition to cancel Respondent's registration.

Petitioner Mobigame's Second Amended Petition to cancel, which is the operative complaint in the case,[3] asserts several claims: priority and likelihood of confusion under Section 2(d) of the Act, 15 U.S.C. § 1052(d); fraud on the USPTO in procuring the challenged registration under Section 14(3), 15 U.S.C. § 1064(3); nonuse by Respondent prior to filing its Section 1(a) use-based application; and abandonment. In its Answer, Respondent denied the salient allegations in the Second Amended Petition.[4]

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[2] Reg. No. 5934761 issued on December 17, 2019, based on Application Ser. No. 85147499 filed on October 7, 2010, under Section 1(a) of the Lanham Trademark Act, 15 U.S.C. § 1051(a). The application alleged a date of first use anywhere and in commerce at least as early as December 31, 2003. The registration identifies the following goods: "Computer game programs; Computer game software; Computer game software downloadable from a global computer network; Computer game software for use on mobile and cellular phones," in International Class 9.

[3] *See* 45 TTABVUE 8-15. The Board order accepting the Second Amended Petition struck ¶ 34 of that pleading due to Petitioner's failure to state a claim of abandonment by naked licensing. *See* 48 TTABVUE. References in this opinion to the briefs, other filings in the case, and the record cite the Board's TTABVUE docket system. The number preceding "TTABVUE" is the docket number assigned to the cited filing in TTABVUE and any number immediately following "TTABVUE" identifies the specific page(s) to which we refer.

[4] *See* 51 TTABVUE. Under the heading "Affirmative Defenses," Respondent asserted that Petitioner failed to state a claim upon which relief may be granted and the defenses of laches and unclean hands. Failure to state a claim is not an affirmative defense. *See, e.g.*, *Shenzhen IVPS Tech. Co. v. Fancy Pants Prods., LLC*, No. 91263919, 2022 WL 16646840, at *1 n.5 (TTAB 2022). And because Respondent did not pursue its laches and unclean hands defenses at trial, these defenses are forfeited. *See, e.g.*, *Keystone Consol. Indus., Inc. v. Franklin Invest. Corp.*, No. 92066927, 2024 WL 3771168, at *2 (TTAB 2024).

The case is fully briefed.[5] Respondent requested an oral hearing,[6] which was held on September 11, 2025.[7] Having carefully considered the evidence, the briefing, and the parties' arguments at the hearing, we now grant the Petition.

I. The record

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of Respondent's registration.

During its trial period, Petitioner submitted evidence including:

- The Declaration of David Papazian, founder and President of Petitioner, along with exhibits;[8]
- The Declaration of Randall Copeland, the CEO of Velocity Holdings, LLC, which did business as Velocity Micro, which previously litigated against the predecessor to Respondent in the U.S. District Court for the Eastern District of Virginia, along with exhibits;[9]
- A Notice of Reliance attaching several types of official state, federal, and international government records;[10] and
- A Notice of Reliance attaching a few printed publications.[11]

During its trial period, Respondent submitted:

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[5] *See* 132 TTABVUE (Petitioner's brief); 133 TTABVUE (Respondent's brief); 136 TTABVUE (Petitioner's reply brief (redacted version)); 137 TTABVUE (Petitioner's reply brief (unredacted confidential version)).

[6] *See* 138 TTABVUE.

[7] *See* 144 TTABVUE.

[8] *See* 58 TTABVUE. Certified translations of two French-language documents in this filing were later submitted in response to the Board's invitation at 89 TTABVUE 9. *See* 90 TTABVUE.

[9] *See* 59 TTABVUE.

[10] *See* 60 TTABVUE.

[11] *See* 61 TTABVUE.

- A transcript of Respondent's cross-examination of David Papazian;[12]
- The Declaration of Dr. Timothy Langdell, founder and CEO of Respondent and founder and primary actor for Respondent's corporate predecessors (including Edge Interactive Media, Inc. ("Edge Interactive" or "EIM")), along with exhibits;[13]
- A Notice of Reliance on various U.S. and international official records;[14] and
- A "Notice of Reliance on Printed Publications in General Circulation."[15]

For its rebuttal evidence, Petitioner submitted:

- A Rebuttal Declaration of Randall Copeland, with exhibits;[16]
- Four Rebuttal Notices of Reliance on printed publications;[17]
- The Rebuttal Declaration of Vineeta Gajwani, Vice President, Legal Affairs of Electronic Arts Inc., a company that previously litigated with Respondent and Respondent's predecessor, with exhibits;[18]
- The Rebuttal Declaration of David Papazian, with exhibits;[19]
- A Rebuttal Notice of Reliance on Official Records;[20]

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[12] *See* 100 TTABVUE.

[13] *See* 107 TTABVUE. The exhibits are found not only in 107 TTABVUE, but also in 106 TTABVUE (confidential exhibits), 108 TTABVUE, and 109 TTABVUE.

[14] *See* 110 TTABVUE.

[15] *See* 111 TTABVUE. We note, however, that some documents attached to this Notice of Reliance are not printed publications (e.g., purported printouts from searches of archived webpages available through the Internet Archive's WayBack Machine).

[16] *See* 118 TTABVUE.

[17] *See* 119 TTABVUE (also attaching an official court document); 123 TTABVUE; 124 TTABVUE; 127 TTABVUE.

[18] *See* 120 TTABVUE.

[19] *See* 121 TTABVUE; 122 TTABVUE (corrected version).

[20] *See* 125 TTABVUE.

- A transcript of the discovery deposition taken by Petitioner in this case of Dr. Langdell;[21] and

- A transcript of the cross-examination by Petitioner of Dr. Langdell.[22]

II. Petitioner is entitled to pursue this statutory cancellation proceeding

Before we rule on any of the issues in the case, we need to make sure the relevant statute authorizing us to decide petitions to cancel registrations entitles Petitioner to ask us to do so. Otherwise, we lack the authority to resolve this dispute. Section 14 of the Trademark Act, 15 U.S.C. § 1064, authorizes petitions for cancellation to be filed "by any person who believes that he is or will be damaged … by the registration of a mark." To be so entitled, a party petitioning for cancellation of a registration must first plausibly allege and then demonstrate at trial: (1) an interest within the zone of interests protected by the cancellation statute, i.e., a direct and personal stake in the outcome of a cancellation proceeding; and (2) a reasonable belief in damage that would be proximately caused by registration of the mark in violation of the statute. *Curtin v. United Trademark Holdings, Inc.*, 137 F.4th 1359, 1364-65, 1367 (Fed. Cir. 2025) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 120-37 (2014)).

Here, Petitioner has alleged, and has submitted testimony supporting the allegations, that it has common law rights in the mark EDGE for computer games dating back to January 4, 2009, and that such common law rights existed before any

[21] *See* 130 TTABVUE.

[22] *See* 131 TTABVUE.

date of actual first use or constructive use priority date upon which Respondent can rely for the challenged EDGE GAMES mark.[23] Petitioner also plausibly alleges a likelihood of confusion between its mark and Respondent's EDGE GAMES mark.[24] This suffices to show that Petitioner has a real interest in petitioning to cancel Respondent's registration and a reasonable basis for its belief of damage. *See, e.g.*, *DeVivo v. Ortiz*, No. 91242863, 2020 WL 1227592, at *2 (TTAB 2020). As a result, Petitioner may also pursue its claims based on its other pleaded statutory bars to registration. *See, e.g.*, *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1377 (Fed. Cir. 2012).

III. Evidentiary objections

Appendices to the parties' trial briefs raise several evidentiary objections, with Respondent raising far more than Petitioner.[25] We have reviewed these objections and find the Board's statement in *Fuji Med. Instruments Mfg. Co. v. Am. Crocodile Int'l Grp., Inc.*, No. 92062760, 2021 WL 3286400 (TTAB 2021), apt:

> The parties raise numerous other objections on the grounds of failure to produce documents during discovery, relevance, authentication, foundation, and hearsay. Given the number and nature of the objections, we see no compelling reason to discuss any of them specifically. The Board is capable of assessing the proper evidentiary weight to be accorded the testimony and evidence, taking into account the concerns raised by the objections. Suffice it to say, we have considered all of the

[23] *See* 45 TTABVUE 9 (Second Amended Petition); 58 TTABVUE 6 (Declaration of David Papazian).

[24] *See* 45 TTABVUE 10-11.

[25] *See* 132 TTABVUE 52-53 (Petitioner's objections); 133 TTABVUE 70-96 (Respondent's objections); 136 TTABVUE 27-28 (additional objections by Petitioner (redacted)); 137 TTABVUE 27-28 (additional objections by Petitioner (unredacted confidential filing)).

> testimony and exhibits submitted. In doing so, we have kept in mind the various objections raised by Petitioner and Respondent and we have accorded whatever probative value the subject testimony and evidence merit.

See id. at *4 (citation omitted).

IV. Analysis

We will start with Petitioner's claim that Respondent was not using the EDGE GAMES mark as of the October 7, 2010 filing date of the application that matured into the challenged registration because not only is it the simplest of the asserted claims, but also because it will be efficient to do so. Besides being a standalone claim here, Petitioner's fraud and Section 2(d) claims, as pleaded, depend on nonuse. If we find nonuse, that alone would provide a basis to cancel the registration. If we reject the nonuse claim, Petitioner's fraud and Section 2(d) claims fall too. In a cancellation proceeding claiming pre-filing nonuse or any statutory ground of nonregistrability (except fraud[26]), the petitioner bears the burden to prove its case by a preponderance of the evidence. *See, e.g.*, *W. Fla. Seafood, Inc. v. Jet Rests., Inc.*, 31 F.3d 1122, 1128 (Fed. Cir. 1994); *Eastman Kodak Co. v. Bell & Howell Document Mgmt. Prod. Co.*, 994 F.2d 1569, 1575 (Fed. Cir. 1993).

A. Legal standard for a nonuse claim

Under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), a mark in a use-based application may not be registered unless it has been "used in commerce." Section 45 of the Trademark Act, 15 U.S.C. § 1127, defines "use in commerce" to mean

[26] *See In re Bose Corp.*, 580 F.3d 1240, 1243 (Fed. Cir. 2009) (proof of fraud requires clear and convincing evidence).

"the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark." A trademark is used in commerce "on goods when it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto … and the goods are sold or transported in commerce." *Id.* The goods identified in a use-based trademark application must have been sold or transported in commerce before the filing of the application. *Christian Faith Fellowship Church v. Adidas AG*, 841 F.3d 986, 989 (Fed. Cir. 2016). If, at the time an applicant files a used-based application, it has not made bona fide use of its mark in commerce in connection with any of the identified goods or services, the application (and any resulting registration) is "void ab initio." *Aycock Eng'g, Inc. v. Airflite, Inc.*, 560 F.3d 1350, 1357 (Fed. Cir. 2009).[27]

In acknowledging that proving nonuse is essentially "prov[ing] a negative," which can be challenging, the Federal Circuit has noted that "direct evidence" is not required: it is perfectly appropriate to rely on "proper inferences" from indirect evidence. *See Cerveceria Centroamericana v. Cerveceria India, Inc.*, 892 F.2d 1021, 1024-25 (Fed. Cir. 1989) ("Especially when a party must prove a negative, as in proving abandonment through nonuse, without resort to proper inferences the burdened party could be faced with an insurmountable task."). From a defendant's perspective, prior use of a mark may be established through clear and believable testimony. *See, e.g.*, *Araujo v. Framboise Holdings Inc.*, 99 F.4th 1377, 1380-81 (Fed.

[27] *Aycock* explains that "void ab initio" is a Latin term that means "null from the beginning." *Id.* n.9.

Cir. 2024); *Powermatics, Inc. v. Globe Roofing Prods. Co.*, 341 F.2d 127, 130 (CCPA 1965); *Nettie Rosenstein, Inc. v. Princess Pat, Ltd.*, 220 F.2d 444, 446 (CCPA 1955). Where the testimony of use comes only from an interested witness "testifying long after the events happened …, such testimony … should be most carefully scrutinized" to make sure it is reliable. *B.R. Baker Co. v. Lebow Bros.*, 150 F.2d 580, 583-84 (CCPA 1945). The testimony should not be "characterized by contradictions, inconsistencies and indefiniteness," but rather should carry with it "conviction of its accuracy and applicability." *Kohler Co. v. Baldwin Hardware Corp.*, No. 92041434, 2007 WL 117575, at *8 (TTAB 2007) (citing *B.R. Baker*, 150 F.2d at 583). If the circumstances reflected by the record indicate that the testimony is not reliable and credible, it need not be accepted. *See, e.g.*, *Jim Dandy Co. v. Martha White Foods, Inc.*, 458 F.2d 1397, 1401 (CCPA 1972) (rejecting proffered showing of use in commerce based on witness testimony that was "far from clear and definite"); *Mars Generation, Inc. v. Carson*, No. 91224726, 2021 WL 4988613, at *9-10 (TTAB 2021) (rejecting prior use testimony of a witness); *Tao Licensing, LLC v. Bender Consulting Ltd.*, No. 92057132, 2017 WL 6336243, at *9 (TTAB 2017) ("Mr. Bender's cross-examination testimony regarding statements made in his declaration has undermined his credibility" on his testimony of use before the statement of use was filed); *Nationstar Mortg. LLC v. Ahmad*, No. 91177036, 2014 WL 6480655, at *8-11 (TTAB 2014) (finding owner and president's testimony about events and key documents that would support his case that he used the mark before filing a use-based application not credible where he professed not to

know basic information about his company that a person in the position would normally be expected to know).

B. Applying the legal standard to the evidence here

This case fits that "indirect evidence / interested witness testimony rebuttal" scenario. Petitioner relies on several pieces of circumstantial evidence to show that Respondent did not use the mark before filing its application. And Respondent uses the testimony of its CEO Dr. Langdell to try to rebut Petitioner's nonuse case.

Petitioner has presented several pieces of indirect (i.e., circumstantial) evidence to support its claim that Respondent did not use the mark prior to filing the application for EDGE GAMES on October 7, 2010.

1. Respondent has long asserted rights in a number of EDGE-formative marks other than EDGE GAMES for computer games and printed materials. For example, years before filing its application to register EDGE GAMES, Respondent owned several U.S. registrations for EDGE-formative marks for such goods. These included: No. 2219837 (EDGE for, inter alia, printed matter relating to games and video);[28] No. 2251584 (CUTTING EDGE, for, inter alia, comic books);[29] No. 3105816 (EDGE for, inter alia, comic books);[30] No. 3559342 (THE EDGE for, inter alia, video game machines, video and computer game software);[31] and No. 3381826 (GAMER'S EDGE

[28] *See* 110 TTABVUE 12-13.

[29] *See* 60 TTABVUE 26.

[30] *See* 110 TTABVUE 18-19.

[31] *See id.* at 38-39.

for, inter alia, computer and video game software)[32] (collectively, "Respondent's Earlier EDGE Registrations").

2. For about 25 years Respondent has engaged in litigation both in the U.S. and in Europe over rights to its alleged bevy of EDGE-formative marks other than EDGE GAMES, including Respondent's Earlier EDGE Registrations and several European EDGE-formative registrations.[33]

3. One such instance of litigation was a 2008 dispute in the United States District Court for the Eastern District of Virginia (the "E.D. Va. Case") between Velocity Micro, Inc., and Respondent (and Respondent's corporate predecessor).[34] In that trademark infringement case, Velocity alleged, inter alia, that it had priority in the mark GAMER'S EDGE and that Respondent (or its predecessor) had never used, or only later used, GAMER'S EDGE.[35]

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[32] *See id.* at 33-34.

[33] *See, e.g.*, 60 TTABVUE 19-42 (2010 N.D. Cal. case); *id.* at 44-59 (2011 U.K. Chancery Court case); *id.* at 61-112 (2014 U.K. I.P.O. case); *id.* at 114-18 (2012 U.K. I.P.O. case); *id.* at 125-39 (2008 E.D. Va. case); 125 TTABVUE 50-56 (1998 TTAB litigation in No. 91103117); *id.* at 58-70, 71-88 (2001 TTAB litigation in No. 91107996). We take judicial notice that the TTAB's publicly available TTABVUE database reflects that Respondent's predecessor, Edge Interactive, instituted additional Board proceedings against parties over various of its alleged EDGE marks, including: Nos. 92021685 (1993 case asserting GAMER'S EDGE); 92021684 (1993 case asserting EDGE); 91098702 (1995 case asserting EDGE); 91099511 (1995 case asserting EDGE); 91101566, 91104280, 91104138, 91104135 (1996 cases asserting EDGE); 91107946, 91107291, 91116095 (1997 cases asserting EDGE). *See, e.g.*, *Urock Network, LLC v. Sulpasso*, No. 92058974, 2015 WL 4658976, at *6 n.10 (TTAB 2015) ("The Board may take notice of filings in other TTAB proceedings.") (citation omitted).

[34] *See* 59 TTABVUE 4-7 (Randall Copeland Declaration).

[35] We take judicial notice of the complaint filed in *Velocity Micro, Inc. v. Edge Interactive Media, Inc.*, ECF No. 1, No 3:08-CV-00135 (E.D. Va. Feb. 29, 2008). *See, e.g.*, *Innovative Therapies, Inc. v. Kinetic Concepts, Inc.*, 599 F.3d 1377, 1382 & n.2 (Fed. Cir. 2010) (notice may be taken of court filings in other cases); *Biomedical Patent Mgmt. Corp. v. Cal. Dep't of Health Servs.*, 505 F.3d 1328, 1331 n.1 (Fed. Cir. 2007) (same).

4. Respondent asserted counterclaims in the E.D. Va. Case alleging that it had priority in the marks EDGE, THE EDGE, and GAMER'S EDGE and that it was Velocity Micro's use of GAMER'S EDGE that infringed Respondent's rights, not the other way around.[36] Although Respondent's 2008 counterclaims targeted Velocity Micro's use of a mark consisting of a variant of the root word "game" together with the term "edge," the counterclaims did not mention Respondent's ownership of any alleged trademark rights in EDGE GAMES.[37]

5. On October 1, 2010, the United States District Court for the Northern District of California (the "N.D. Cal. Litigation") made tentative findings[38] in a published order (*Edge Games, Inc. v. Elec. Arts, Inc.*, 745 F. Supp. 2d 1101 (N.D. Cal. 2010)) denying Respondent's motion for a preliminary injunction in a trademark case against Electronic Arts, Inc., that Respondent's Earlier EDGE Registrations were "infected by evidence of deceit," *see* 745 F. Supp. 2d at 1118, which would render them invalid and subject to cancellation under 15 U.S.C. § 1119.[39]

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[36] We take judicial notice of Respondent's Answer and Counterclaims filed in *Velocity Micro, Inc. v. Edge Interactive Media, Inc.*, ECF No. 16, No 3:08-CV-00135 (E.D. Va. Aug. 21, 2008).

[37] As noted above, the application that matured into the challenged registration claimed first use of the EDGE GAMES mark at least as early as December 31, 2003.

[38] A court's findings in a preliminary injunction hearing are necessarily tentative because they would "not [be] binding at [a later] trial on the merits." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). But they are findings that the plaintiff Edge Interactive had not demonstrated a likelihood of success in proving that these marks were valid due to fraud committed by Dr. Langdell. 60 TTABVUE 37. No trial findings ever superseded the Court's October 1, 2010, factual findings.

[39] *See* 60 TTABVUE 20-42. In the N.D. Cal. Litigation, Dr. Langdell, on August 20, 2010, filed a declaration in support of the motion for a preliminary injunction asserting ownership of several EDGE-formative marks, including marks based on averred common-law rights, specifying: EDGE, THE EDGE, GAMER'S EDGE, EDGE OF EXTINCTION, CUTTING

6. Shortly after this order issued, Respondent's attorney, on October 6, 2010, signed a stipulated judgment resolving the N.D. Cal. Litigation. The stipulated judgment contained provisions ordering the cancellation of Respondent's Earlier EDGE Registrations.[40]

7. On the day after it agreed to the stipulated judgment cancelling Respondent's Earlier EDGE Registrations, Respondent filed its October 7, 2010, use-based application to register EDGE GAMES.

8. Petitioner's CEO and founder David Papazian, who has been integrally involved in the computer gaming industry since 2004,[41] testified that he was unaware of any use by Respondent of EDGE GAMES as a mark prior to the filing date of Respondent's application.[42]

From this evidence, we see no pre-filing use of, nor any assertion of trademark rights in, the mark EDGE GAMES by Respondent or any corporate affiliate. The first assertion of EDGE GAMES as a mark appears in the application underlying the registration at issue in this case, which was filed the day after Respondent signed a

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EDGE, EDGEGAMERS, a stylized EDGE logo, EDGE OF TWILIGHT, and CROSS EDGE. *See* 125 TTABVUE 18-30. EDGE GAMES was not among these marks.

[40] *See* 130 TTABVUE 223-30 (identifying Reg. Nos. 2219837, 2251584, 3105816, 3559342, and 3381826). The district court endorsed the parties' stipulated judgment on October 8, 2010. *See* 125 TTABVUE 11-12. On November 14, 2010, Respondent filed with the TTAB (in Can. No. 92051465) a "Motion on Consent to Surrender" Reg. Nos. 2219837, 2251584, 3105816, 3559342, and 3381826 "with prejudice." *See* 110 TTABVUE 57-59. We take judicial notice that the Board then ordered those registrations cancelled. *See* 32 TTABVUE in Can. No. 92051465. Respondent later made several more filings in Can. No. 92051465, but they have no bearing on the issues before us in this case.

[41] *See* 58 TTABVUE 5.

[42] *See id.* at 12-13.

stipulated judgment giving up Respondent's Earlier EDGE Registrations. The clear inference we draw from this circumstantial evidence is that before October 2010, Respondent never considered EDGE GAMES a trademark—and never used it as such. The published October 1, 2010, decision of the Northern District of California signaled that Respondent's Earlier EDGE Registrations were in imminent jeopardy of being ordered cancelled by the Court because they were "infected" with fraud. Indeed, just a few days later, on October 6, Respondent agreed to a judgment ordering those registrations to be cancelled. These negative developments prompted Respondent to move quickly to apply to register a different EDGE mark, EDGE GAMES—according to Petitioner, too quickly, i.e., before Respondent had begun use of the mark in commerce as a source indicator.

To rebut this clear inference of nonuse before filing, Respondent squarely rests its pre-filing use argument on Dr. Langdell's lengthy declaration. This triggers our responsibility to "most carefully scrutinize[ ]" Dr. Langdell's testimony to determine if it is reliable. *See, e.g.*, *B.R. Baker Co.*, 150 F.2d at 583-84; *see also Kohler Co.*, 2007 WL 117575, at *8. Of course, the reliability of testimony—even testimony of a single, interested witness such as Dr. Langdell—can be bolstered with corroborating documentation. *See, e.g.*, *Elder Mfg. Co. v. Int'l Shoe Co.*, 194 F.2d 114, 118 (CCPA 1952) ("Oral testimony is obviously strengthened by corroborative documentary evidence.") (citing *B.R. Baker Co.*, 150 F.2d at 583). Dr. Langdell's declaration attaches many documents in an attempt to corroborate his testimony that

Respondent used EDGE GAMES as a mark before filing the application. His declaration contains his testimony about some, but not all, of these documents.

Before we get to the documents, we start with Dr. Langdell's testimony about when Respondent (and its predecessor company) started using EDGE GAMES as a mark. When he filed Respondent's application in 2010, Dr. Langdell attested that Respondent first used the mark at least as early as Dec. 31, 2003. Curiously, however, in his 2024 trial declaration in this case, Dr. Langdell avers that he first started using the mark nearly 20 years earlier than the date he set forth in the application, i.e., in 1984.[43]

Dr. Langdell's declaration attaches reams of documents. While many of the documents do not bear on the nonuse issue, the ones that do fall loosely into two broad categories, each with a few subcategories:

Category 1: Documents showing use of EDGE GAMES as a mark

1. Documents showing the mark but bearing no indicia of date, for which Dr. Langdell's declaration avers what the document is and its purported date.

[43] *See* 107 TTABVUE 6, 12. He avers that Exhibit F (a large, multi-document agglomeration of different types of documents) corroborates the 1984 date, but we don't see anything indicating use of the mark EDGE GAMES in the 1980s or 1990s. The documents in Exhibit F that do show the mark EDGE GAMES and that also bear any indicia of when they were published or printed all post-date the application filing date. *See, e.g.*, *id.* at 183-98 (2024 print-outs from Respondent's website). To the extent we can discern printing or publishing dates that pre-date the October 7, 2010, filing date, the only "Edge" marks we see are EDGE and THE EDGE. *See, e.g.*, *id.* at 88-177. Dr. Langdell avers that the "instruction leaflet" from a mid-1980s version of one game uses the mark EDGE GAMES, *see id.* at 12, but the document itself uses the term "games" only in its generic sense to describe games put out by EDGE. *See id.* at 215-17. The document also appears to be a U.K. document, referring to the U.K. copyright act of 1956, using a U.K. address, using British spelling conventions, and setting forth prices in "£" units. Use abroad does not count as use in commerce sufficient to support U.S. trademark rights. *See Person's Co., Ltd. v. Christman*, 900 F.2d 1565, 1568 (Fed. Cir. 1990) ("foreign use has no effect on U.S. commerce and cannot form the basis for a holding that appellant has priority here") (citations omitted).

2. Documents showing the mark but bearing dates after the application filing date.

3. Documents showing the mark with date indicia pre-dating the filing date.

Category 2: Documents NOT showing use of EDGE GAMES as a mark

4. Documents not showing the mark and bearing date indicia pre-dating the application filing date.[44]

5. Documents not showing the mark comprising physical samples of digital discs for computer games or purported screenshots from these games.

6. Documents purporting to evidence the number of unit sales and/or dollar volume of such sales, of various computer games that Dr. Langdell avers used the mark, but which documents themselves do not show use of the mark.

Documents that do not show use of EDGE GAMES as a mark (Category 2) obviously are of no utility as corroborative evidence of Dr. Langdell's testimony, because, as to those documents not showing the mark, we must rely solely on Dr. Langdell's testimony that these concern uses of EDGE GAMES as a mark. So we will focus on documents in Category 1 (documents that do show use of EDGE GAMES as a mark).

In Exhibit J to Dr. Langdell's declaration, there are a few of what Dr. Langdell testified are screenshots from Respondent's "Bobby Bearing" game as he says it appeared during the time period from 2003 to 2010.[45] These documents depict the term EDGE GAMES, arguably as a mark. But for these documents to corroborate Dr.

[44] There are many documents in the record reflecting trade name use by Respondent of "Edge Games," sometimes with and sometimes without "Inc." Respondent does not argue, however, that this constitutes use in commerce of EDGE GAMES as a trademark for the identified goods. *See, e.g.*, *In re Letica Corp.*, No. 73341524, 1985 WL 72074, at *1 (TTAB 1985) ("trade names qua trade names do not qualify for registration").

[45] *See* 107 TTABVUE 16 (testimony); *id.* at 454-56 (screenshots).

Langdell's testimony as to the dates of use, there must be something on the documents themselves directly or indirectly indicating a time frame. Nothing on the documents indicates when these screenshots were downloaded, however, nor does anything in the documents indicate the vintage of the game version from which they were taken. Thus, these documents do not serve as corroboration of Dr. Langdell's testimony about **when** EDGE GAMES appeared on the purported "Bobby Bearing" screenshots. Rather, they require us to trust, implicitly, Dr. Langdell's testimony about the vintage of these screenshots. The same goes for what Dr. Langdell testifies is a screenshot saying "EDGE GAMES" from a version of the game "Mythora" from the period from 2004-2010,[46] as well as for the specimen he submitted when he filed the application.[47]

Documents in the second subcategory (documents showing use of EDGE GAMES as a mark but with date indicia **after** the filing date) are potentially relevant to Petitioner's abandonment claim, but we're focusing here on the claim that Respondent did not use the mark before filing. For that purpose, documents in the second subcategory have almost no probative value.[48]

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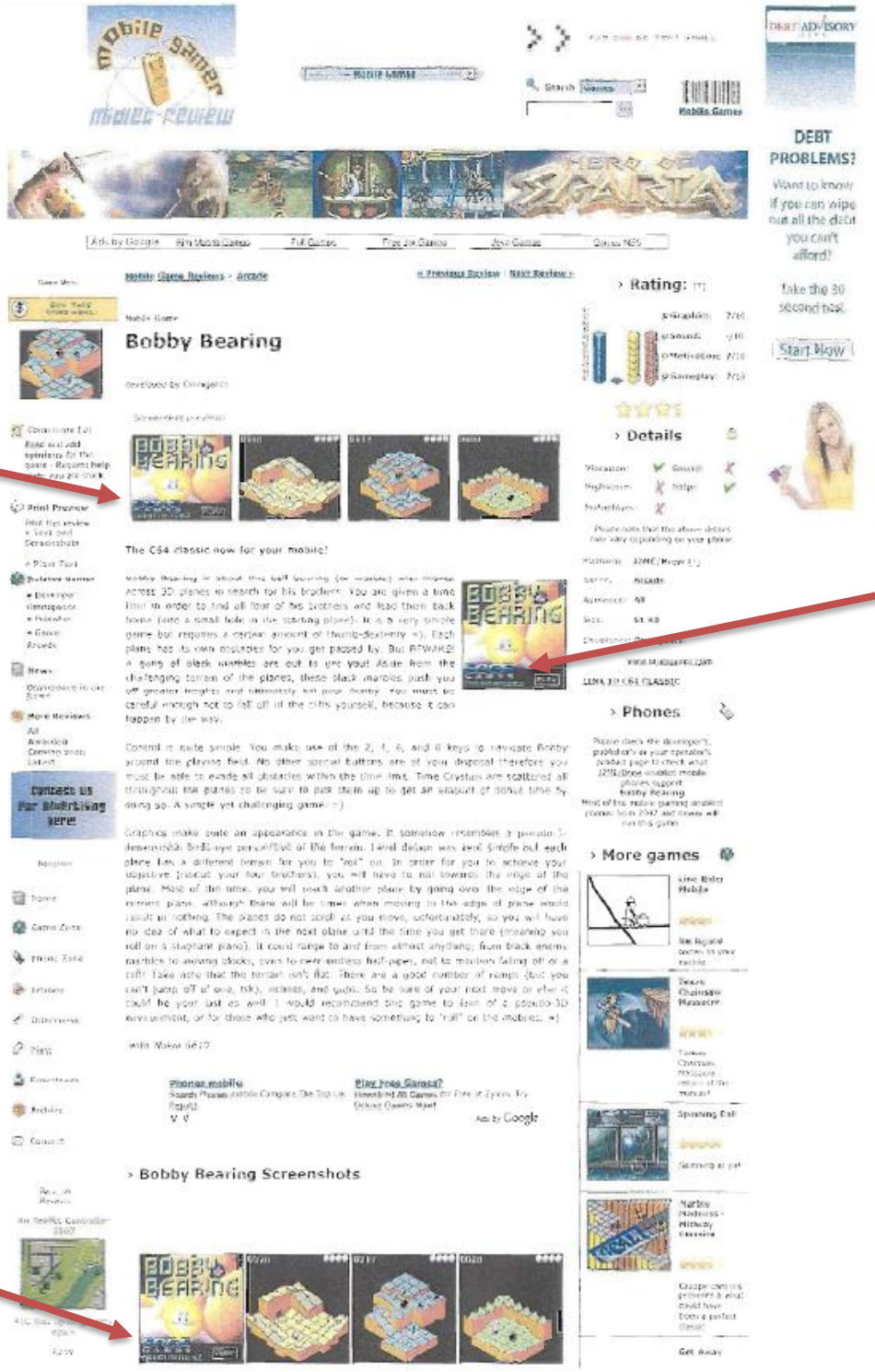
[46] *See id.* at 13 (testimony); *id.* at 318-21 (screenshots). Our review of the record reveals that the only two documents showing the MYTHORA game that bear a date prior to the October 7, 2010, filing date use only the mark EDGE and do not use the mark EDGE GAMES. *See id.* at 327-28.

[47] *See id.* at 17 (testimony); *id.* at 474 (specimen page).

[48] Two illustrative examples of this subcategory of document are: 107 TTABVUE 461-62 (screenshot from the Internet Archive's WayBack Machine, with the URL reflecting status as of 2012-05-13); *id.* at 463 (screenshot of nexva.com website reflecting a print date of 10/11/2010).

The third subcategory—documents that show use of EDGE GAMES as a mark **and** contain date indicia that pre-dates the application filing date—is of the most potential evidentiary significance to the nonuse claim. As best we can tell, there is only one such document in the record, and there are two versions of it. Because this document is so central to Dr. Langdell's testimony about pre-filing use of EDGE GAMES as a mark, we reproduce both versions below. Here is the version appearing in Exhibit J to Dr. Langdell's declaration:[49]

[49] *See* 107 TTABVUE 457-48 (because the document, as submitted, is barely legible, we've inserted red arrows to point to the places where, according to Dr. Langdell, the mark EDGE GAMES appears).



Bobby Bearing

The C64 classic now for your mobile!

› Bobby Bearing Screenshots

EDGE001023







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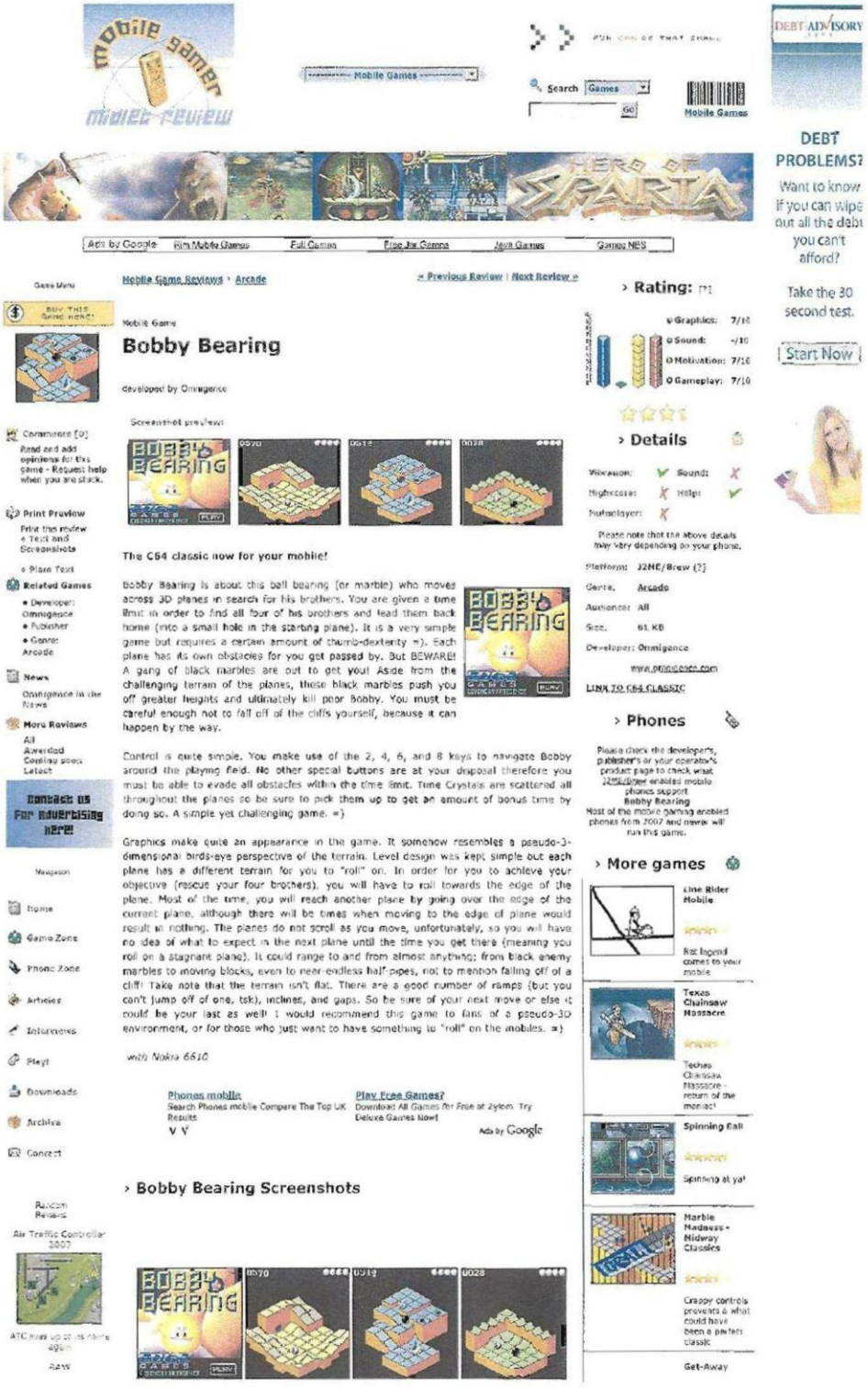
The above Exhibit J version contains a complete URL and a print date, both of which we generally require for screenshots of webpages. *See, e.g.*, Trademark Rule 2.122(e), 37 C.F.R. § 2.122(e). The image is quite fuzzy, however, and, generally, evidence must be legible to be probative. *See, e.g.*, *In re Virtual Indep. Paralegals, LLC*, No. 86947786, 2019 WL 1453034, at *8 n.23 (TTAB 2019). A viewer looking where the arrows point and looking to see the words EDGE GAMES may (or may not) be able to make out the term "GAMES" underneath what looks like the term "EDGE." Dr. Langdell's declaration does not discuss or authenticate the version of this document that appears in Exhibit J.

The second version of this document appears as Exhibit L to Dr. Langdell's declaration and it too is barely legible. It appears to be an altered, one-page version of the first version:[50]

[50] *See* 107 TTABVUE 478.

Bobby Bearing Mobile Game Review (Java™/J2ME) - Mobile Games@Midlet Review

2007 review by Midlet Review



http://www.midlet-review.com/index?content=review&id=15

0210

The Exhibit L version contains additional wording that appears to have been typed on the document after it was downloaded reading "2007 review by Midlet Review." It contains the same URL as the first version, but lacks a print date (though what looks like it may be a Bates number appears near where the print date appears on the first version). In contrast to the lack of any testimony concerning the Exhibit J version, Dr. Langdell testifies about the Exhibit L version as follows:

> Also in Exhibit L is a true and accurate copy of a review of EDGE GAMES' mobile game titled Bobby Bearing published online by an entity known as "Midlet Review." This document is a true and correct copy downloaded and printed by me on June 8, 2009. However, the review was published, to the best of my knowledge and belief, in or about 2008 and I note that the comment on the right side where there is a section headed "Phones" indicates that the game will run on "most of the mobile gaming enabled phones from 2007 and newer." While this review is of the so-called Java/J2ME version of Bobby Bearing for mobile phones, I attest and affirm that the opening screen of both the BREW and JAVA versions of the Bobby Bearing game featured the mark "EDGE GAMES" as the publisher's brand name the game was sold under.[51]

Given the illegibility and other issues with this document (in both versions), the document is not independently corroborative of Dr. Langdell's testimony that the mark was used before the application filing date. Rather, both versions of this document depend, to varying extents, on Dr. Langdell's testimony about them.

[51] 107 TTABVUE 18. Though Dr. Langdell testifies that he downloaded this page on June 8, 2009, this document does not contain a print date corroborating that.

Petitioner vigorously attacks Dr. Langdell's credibility, and we are required to "carefully scrutinize[ ]" his testimony to assure ourselves that it is reliable. *B.R. Baker Co.*, 150 F.2d at 583-84.[52]

Our inquiry concerns Dr. Langdell's testimony regarding use on or before the application filing date, October 7, 2010. In other words, we're assessing his testimony about events that happened, at minimum, 15 years ago and earlier. We have reviewed both the discovery deposition transcript[53] and cross-examination transcript[54] of Dr. Langdell. Throughout his discovery deposition, which took place in September 2023, Dr. Langdell expressed difficulty remembering basic events concerning his businesses from the time frame with which we are concerned because of how long ago the events occurred (and even as to more recent events):

> Q … How many employees worked for Edge Games in 2008?
> A I don't recall the exact number. That's a long time ago.[55]
>
> ———
>
> Q But just to be clear, you don't recall the name of any employees for Edge Games from 2008?
> A Not from that long ago. No. I don't.
> Q … [H]ow many employees did Edge Games have in 2009?
> A Again, that's a long time ago, so I don't remember exactly. Obviously, certainly me.[56]

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[52] On several occasions, the Federal Circuit has noted that it is within the province of the USPTO's adjudicatory boards, as factfinders in adversarial administrative proceedings, to assess the credibility of witnesses before them. *See, e.g.*, *Tiger Lily Ventures Ltd. v. Barclays Cap. Inc.*, 35 F.4th 1352, 1363 (Fed. Cir. 2022); *M.Z. Berger & Co. v. Swatch AG*, 787 F.3d 1368, 1377 (Fed. Cir. 2015); *Velander v. Garner*, 348 F.3d 1359, 1371 (Fed. Cir. 2003).

[53] *See* 130 TTABVUE.

[54] *See* 131 TTABVUE.

[55] 130 TTABVUE 29.

[56] *Id.* at 30.

Q … Just focusing on employees in 2009 --
A. Yes.
Q -- how many were there for Edge Games?
A From my memory, I can say that I was an employee. But who else, I can't recall at this distance.[57]

Q [Y]ou don't now recall how many employees Edge Games, Inc. had in 2010?
A I don't have a clear recollection of the number at this distance in time.
Q Dr. Langdell, did Edge Games, Inc. have any employees in 2008, '09 or '10 other than yourself?
A I cannot state with certainty, because that's a long time ago.[58]

Q … Do you recall how many employees Edge Games had in 2011, and who they were?
A Other then (sic) myself, I don't recall.
Q How about 2012?
A Other than myself, I don't recall.
Q Moving on [to] 2013, Dr. Langdell, did Edge Games, Inc. have any employees other than yourself?
A I don't recall.
Q In 2014, Dr. Langdell, did Edge Games have any employees other than yourself?
A I don't recall.[59]

Q How about 2015, Dr. Langdell? Did Edge Games, Inc. have any employees in 2015 in addition to yourself?
A I do not recall.[60]

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[57] *Id.*

[58] *Id.* at 31.

[59] *Id.* at 32.

[60] *Id.* at 33

Q Could you please state the name of any … independent contractors that worked for Edge Games, Inc. in 2008?
A I can't recall the names at this distance in time.[61]

Q How about in 2009? Could you state the name of any Edge Games, Inc. independent contractors who were working with Edge Games, Inc. in 2009?
A I don't remember their names.[62]

Q Dr. Langdell, in the years subsequent to 2009-2010, in the years ranging from 2011 to 2015, did Edge Games, Inc. make use of independent contractors to assist with its business?
A We did. I don't recall the names of anyone in that time period. That's still a decade ago.[63]

Q Did Edge Games, Inc. during your time at Edge Games, Inc. have other corporate officers that you worked alongside?
A I believe so. At some point, but I don't remember who.[64]

Q Dr. Langdell, other than yourself, were there other corporate officers for The Edge Interactive?
A Yes.
Q Can you please state the names of the other officers?
A I don't recall them. We had several -- to the best of my recollection we had several corporate officers of Edge Interactive from time to time, but I do not recall who they were.[65]

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[61] *Id.* at 36.

[62] *Id.* at 36-37.

[63] *Id.* at 38.

[64] *Id.* at 42.

[65] *Id.* at 44-45. We note that, less than two years later, at his February 2025 cross-examination deposition, Dr. Langdell contradicted his prior discovery testimony that other (unnamed) corporate officers worked alongside him at either of his companies:

When asked about the federal court ruling against his company in the E.D. Va. Case,[66] he testified:

> I don't have the documents with me, but it is my recollection that the main memorandum opinion issued in the Velocity Micro case -- was -- I think the technical term was voided, reversed, vacated, in the final order of the case. But my memory is very hazy. It's 2008, so I do not remember this period, and I can't speak to that period beyond that memory. I don't have a memory of this proceeding.[67]

Taken collectively at face value, Dr. Langdell's deposition testimony reflects an extraordinary inability to recall, within the past two years, basic corporate events and people during (and even after) the time period with which the nonuse claim is concerned. This troubling lack of recollection is amplified by the fact that Respondent and its predecessor are not large companies, but small ones run primarily—indeed virtually single-handedly—by Dr. Langdell.[68]

> Q Did you oversee or work alongside any other corporate officers at the Edge Interactive Media, Inc.?
>
> A Not that I recall.
>
> Q Did you oversee or work alongside any corporate officers at Edge Games, Inc.?
>
> A No.
>
> Q So you cannot name one corporate officer at either Edge Games, Inc. or the Edge Interactive Media, Inc.?
>
> A I can name myself.

131 TTABVUE 15.

[66] *See* 60 TTABVUE 125-39.

[67] 130 TTABVUE 44.

[68] *See, e.g.*, 107 TTABVUE 5 ("At all times since the early 1980s, I have personally carried out, or directly overseen, the entire scope of EDGE GAMES', and its predecessors in rights', business operations, product development, branding, marketing plans, marketing activities, legal affairs, third party contracts, and preparation of product sales and distribution reports.").

Dr. Langdell's relatively recent testimony repeatedly disclaiming the ability to recall events from the first decade of this century (up to as recently as 2015) seriously undermines the reliability of Dr. Langdell's testimony about the things he **does** claim to remember from the same period—including facts pivotal to this case, such as whether games such as "Bobby Bearing" and "Mythora" had contained screens that showed the mark EDGE GAMES. We find it significant that Dr. Langdell, in 2010—i.e., much closer in time to the period in question—when testifying about these same two games he now claims had made use of the mark EDGE GAMES since 2003, averred only that these games used the marks EDGE, THE EDGE, CUTTING EDGE, and GAMER'S EDGE.[69] His 2010 declaration made no mention of these games using the mark EDGE GAMES.

Further, the contrast between Dr. Langdell's professed inability to recall basic corporate events and people up to about 2015 and the relative precision with which he testifies about specific, seemingly less important corporate events he undertook during that same period—such as the precise date he downloaded a particular document from the Internet (e.g., the purported Midlet review[70])—also reflects negatively on his credibility. *See, e.g.*, *Miles Lab'ys Inc. v. Naturally Vitamin Supplements Inc.*, No. 91062820, 1986 WL 83319, at *10 (TTAB 1986) (making

[69] *See* 125 TTABVUE 22 (including testimony about sales of "our flagship mobile game, '"Bobby Bearing,"' in the U.S. between 2003 and 2009, sold under the marks "EDGE, THE EDGE, CUTTING EDGE, GAMER'S EDGE"). This declaration, signed on August 19, 2010, testified about Respondent's "family of marks based on the designation 'EDGE,'" including registered and common law marks, but, as noted, did not mention any use of or claim to rights in the EDGE GAMES mark. *See id.* at 18-22.

[70] *See id.* at 18 ("downloaded and printed by me on June 8, 2009").

adverse credibility judgment where, inter alia, "[i]n sharp contrast to his much more detailed recall of early commercial activities under the VIT-A-DAY and SUPER VIT-A-DAY marks during his trial deposition taken August 24, 1984, Sanders claimed at his discovery deposition taken one year earlier to have no knowledge or recollection of any of the facts concerning adoption of these trademarks.").

That's not all that concerns us. Less than a year ago, Dr. Langdell lied to the USPTO concerning this very registration file. On December 17, 2024, in the midst of the trial period in this case, he submitted a combined Section 8 & 15 declaration in which he declared: "There is no proceeding involving [Respondent's right to keep EDGE GAMES on the register] pending and not finally disposed of either in the United States Patent and Trademark Office or in a court."[71] That statement was obviously false. **This very case** was, at the time, "pending and not finally disposed of," and the sole concern of this case is "the owner's right to … keep the [EDGE GAMES mark] on the register." Because he has, throughout this proceeding, acted as Respondent's pro se representative, Dr. Langdell knew of the continued pendency of this proceeding and, accordingly, of the falsity of his Section 8/15 declaration.[72]

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[71] The file of the registration against which a petition to cancel is filed is automatically of record. *See* Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1); *see also, e.g.*, *L'Oreal S.A. v. Marcon*, No. 91184456, 2012 WL 1267956, at *2 n.6 (TTAB 2012) ("When a registration owned by a party has been properly made of record, and the status of the registration changes between the time it was made of record and the time the case is decided, the Board, in deciding the case, will take judicial notice of, and rely on, the current status of the registration, as shown by the records of the Office.").

[72] The Federal Circuit recently held that fraudulent statements to the USPTO in a Section 15 declaration of "incontestability" do not provide a basis for cancellation of a registration. *See Great Concepts, LLC v. Chutter, Inc.*, 90 F.4th 1333, 1341, 1344 (Fed. Cir. 2023). That limitation does not diminish the significance of Dr. Langdell's fraudulent statement to the USPTO in assessing his credibility.

Petitioner also attacks Dr. Langdell's credibility based on multiple court and Board rulings in which he was found either to have lied and/or otherwise to have acted in bad faith.[73] For example, in the prior Board case *Collector's Edge of Tenn., Inc. v. Edge Interactive Media, Inc.*, No. 91107996, there are two rulings directed to the credibility of Dr, Langdell, the sole pro se representative of Respondent's predecessor. In a January 12, 2001, ruling, the Board:[74]

- ruled against Respondent's predecessor on its motion to extend the testimony period, noting: it is "perfectly clear [that] applicant's claim [that it was not given timely notice of a deposition] is, at best, highly misleading, and more likely an intentional misrepresentation";[75]

[73] Fed. R. Evid. 608(b)(1) allows inquiry into specific instances of conduct on cross-examination if the instances concern the witness's character for truthfulness or untruthfulness. *See, e.g.*, *United States v. White*, 692 F.3d 235, 248-51 (2d Cir. 2012) (prior instances of court testimony that the prior judge discredited); *United States v. Reid*, 634 F.2d 469, 473-74 (9th Cir. 1980) (defendant's prior false statements to a government agency in a case where defendant testified at trial). While the rule does not allow extrinsic evidence to prove the untruthfulness of the specific facts referred to in the extrinsic evidence, Respondent did not object on this basis, forfeiting any potential objection. *See, e.g.*, *United States v. Redditt*, 381 F.3d 597, 602 (7th Cir. 2004). Indeed, Respondent acknowledges these rulings, arguing against giving them weight, *see, e.g.*, 133 TTABVUE 15, and highlighting that rulings in other cases did not contain findings that criticized Dr. Langdell's credibility. *See, e.g.*, 133 TTABVUE 7 nn.3, 4; *id.* at 46; *id.* at 47 nn. 32, 33; *id.* at 48-50; *id.* at 51 & nn. 38, 39. *See, e.g.*, *Hilson Rsch. Inc. v. Soc'y for Human Resource Mgmt.*, No. 92019007, 1993 WL 290669, at*1 n.8 (TTAB 1993) (where material was inadmissible, but the opposing party raised no objection and mentioned the material in its briefs as though properly of record, objection held to be waived). Where, as here, proof of prior trademark use hinges on a witness's testimony, the believability of that testimony is crucial. *See, e.g.*, *Powermatics, Inc. v. Glebe Roofing Prods. Co.*, 341 F.2d 127, 130 (CCPA 1965). The specific instances of Dr. Langdell's conduct evidenced in these court and Board orders in past official proceedings involving the rights of Respondent and its predecessors in various EDGE trademarks are pertinent to his credibility in **this** official proceeding. We note that Dr. Langdell, when asked questions about E.D. Va. and N.D. Cal. district court rulings against Respondent (excerpts from these rulings appear *infra*), was evasive and argumentative. *See, e.g.*, 130 TTABVUE 42-44, 95-99. Those are characteristics that detract from a witness's credibility.

[74] *See* 125 TTABVUE 59.

[75] *See id.* at 61.

- also found "applicant's claim [to have been unaware of the trial schedule because it hadn't received a copy of the Board's order with the schedule] to be lacking in credibility";[76]

- noted yet another "Edge" case involving EIM where it had found Respondent's "unsupported claims as to the filing and service of papers lacking in credibility;"[77] and

- described Dr. Langdell's "tortured account of the facts" that Respondent's adversary was guilty of unclean hands.[78]

In a second November 1, 2001, ruling in the same case,[79] the Board found Dr. Langdell's representations on behalf of EIM "with respect to his sending and receipt of correspondence … to be severely lacking"[80] and to have "stretche[d] the bounds of credulity well beyond the breaking point."[81]

In *Edge Interactive Media, Inc. v. Edge Tech. Pty. Ltd.*, No. 91103117 (TTAB March 31, 1998),[82] another case where Dr. Langdell was the pro se representative of his company, the Board:

- denied EIM's motion to re-open its dismissed opposition proceeding, rejecting as not "credible" Opposer's representation that it did not receive the applicant's motion to dismiss;[83]

- noted that "opposer's overall lack of credibility" is further supported by its falsely stating to the Board that it "filed a motion to compel" and then

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76 *See id.* at 62.

77 *See id.* at 67-68 (citing *Edge Interactive Media, Inc. v. Edge Sys., Inc.*, No. 91107325 (TTAB July 15, 1999)).

78 *See id.* at 69.

79 *See id.* at 72-87.

80 *See id.* at 76.

81 *See id.* at 77.

82 *See* 125 TTABVUE 49-56.

83 *Id.* at 54.

subsequently filed "proof" with the Board of the prior filing, when in fact it had done neither;[84] and

- concluded that "[u]nder the totality of the circumstances, we do not find opposer's reports [regarding whether it received applicant's motion to dismiss, whether it had moved offices, whether it filed a motion to compel or a motion to extend time] credible."[85]

In the E.D. Va. Case mentioned earlier, *Velocity Micro, Inc. v. Edge Interactive Media, Inc.*, No. 3:08-cv-00135-JRS (E.D. Va. Nov. 7, 2008),[86] the Court:

- made a factual finding against Respondent's predecessor that "these conflicting statements [about the relationship between Edge Interactive and Edge Games] were misrepresentations made on behalf of Edge Interactive as part of their concerted effort to mislead this Court and gain an unfair advantage in litigation";[87]

- sanctioned EIM "because Mr. [Jack] Phillips, Vice President of Edge Interactive, has made untruthful statements to the Court regarding service of process and Mr. Langdell's relationship to Edge Interactive";[88]

- found that EIM's representations that Dr Langdell "resigned from" EIM, was not its agent for service, and received no communication regarding the matter "were clearly false";[89] and

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84 *Id.* at 55.

85 *Id.* at 56.

86 *See* 60 TTABVUE 125-39. Respondent objected to the introduction into evidence of this document in its slip opinion form based on lack of authentication and various other grounds. *See* 130 TTABVUE 86. However, the Board was able to obtain a copy of the court opinion on Westlaw to confirm its authenticity. *See* 2008 WL 4952605. In any event, tribunals frequently take judicial notice of even unpublished court rulings, and we do so here. *See, e.g.*, *Function Media, L.L.C. v. Google, Inc.*, 708 F.3d 1310, 1316 n.4 (Fed. Cir. 2013) ("It is proper to take judicial notice of a decision from another court or agency at any stage of the proceeding, even if it was not available to the lower court.") (citation omitted). We overrule Respondent's objection.

87 60 TTABVUE 130.

88 *Id.* at 132-33. As discussed *infra*, another U.K. tribunal suspected that "Jack Phillips" did not actually exist, but was instead an invention of Dr. Langdell.

89 *Id.* at 133-35.

- held that: "Edge Interactive's numerous misrepresentations were part of the company's conscious strategy to mislead the Court and unfairly delay these proceedings."[90]

In the Northern District of California Litigation, *Edge Games, Inc. v. Elec. Arts, Inc.*, No. C 10-02614 WHA (N.D. Cal. Oct. 1, 2010),[91] the Court, in denying Edge Games' motion for a preliminary injunction against a company Respondent accused of trademark infringement, issued a lengthy ruling that:

- stated that Electronic Arts' "attacks and supporting evidence about the validity of Edge Games' marks and the sworn representations made to both the USPTO and the Court … raise serious questions regarding the veracity of Dr. Langdell's entire declaration;"[92]

- found that "untruths plague Dr. Langdell's representations" about his rights through alleged licensee "Future Publishing";[93]

- noted "[c]ompelling evidence of fraud on the USPTO … with respect to plaintiff's 'THE EDGE' mark;"[94]

- found that, "[e]ven more disturbing, it appears as though the specimen … submitted by plaintiff to the USPTO was doctored;"[95]

- found that another "specimen submitted [by Respondent] to the USPTO appears to have been doctored in three material ways;"[96]

- held that "[e]vidence of fraud infects [Respondent's] registration for 'GAMER'S EDGE' as well";[97]

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90 *Id.* at 137.

91 *See* 60 TTABVUE 20-42) (preliminary injunction ruling against Respondent). As noted earlier, this decision was also published in the FEDERAL SUPPLEMENT at 745 F. Supp. 2d 1101.

92 60 TTABVUE at 27.

93 *Id.* at 29.

94 *Id.* at 30.

95 *Id.*

96 *Id.* at 32.

97 *Id.*

- noted "disturbing evidence that the 'GAMER'S EDGE' mark may have been grafted retroactively onto product packaging by [Respondent]";[98]
- found that the Section 8 & 15 specimen of current use Respondent submitted to the USPTO "was most certainly not … 'currently on sale'";[99] and
- found that "many of Dr. Langdell's assertions in his declaration were materially misleading or downright false."[100]

This October 1, 2010, N.D. Cal. ruling denying Respondent's motion for a preliminary injunction was followed one week later with a Stipulated Final Judgment ordering the USPTO to cancel five of the EDGE-formative U.S. trademark registrations Respondent asserted in that action, namely, "U.S. Trademark Registration Nos. 2,219,837 [EDGE for printed matter]; 2,251,584 [CUTTING EDGE for publications]; 3,105,816 [EDGE for printed matter]; 3,559,342 [THE EDGE for video game peripherals]; and 3,381,826 [GAMER'S EDGE for computers, video game software, and video game accessories]."[101]

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[98] *Id.* at 33.

[99] *Id.* at 34.

[100] *Id.* at 37.

[101] *Edge Games, Inc. v. Elec. Arts, Inc.*, ECF No. 78, No. C 10-02614 WHA (N.D. Cal. Oct. 8, 2010); *see also* 125 TTABVUE 8-9, 11-12. While Dr. Langdell gamely argues (in his declaration, an inappropriate vehicle for such argument) that the district court "voided and reversed" its own published decision on the preliminary injunction, *see* 107 TTABVUE 46-48, the record reflects that the Court endorsed a stipulated final judgment cancelling the Respondent's Earlier Registrations, requiring the Clerk to send a copy of the order denying Respondent's motion for a preliminary injunction to the USPTO, and otherwise entering judgment against Respondent. *See* 125 TTABVUE 8-9, 12-13. We also Shepardized the citation of the decision denying the preliminary injunction (745 F. Supp. 2d 1101) to confirm that there is no negative history or treatment of the decision.

Less than a year later, in litigation before the U.K. High Court of Chancery in *Future Publishing Ltd. v. Edge Interactive Media Inc., Edge Games, and Dr. Timothy Langdell*,[102] the Court issued a ruling:

- stating that it was "unable to find" in the record representations made by Future Publishing about Dr. Langdell's alleged rights in the subject matter of the case "despite Dr Langdell's assertions that they were given";[103]
- finding Dr. Langdell's testimony "confused and unpersuasive";[104]
- noting Dr. Langdell's "long and torturous explanations" of key emails he alleges to have sent and finding "I have no doubt … that it was never in fact sent" and "was concocted" by Dr. Langdell;[105]
- finding "Dr Langdell's story is incredible";[106]
- finding "[o]verwhelming evidence that the disks [which Dr Langdell claimed were proof that he invented the logo at issue] were concocted";[107]
- finding that Dr. Langdell "deliberately adopted [a] logo which is an obvious replica of [Future Publishing's EDGE logo]" to "confuse visitors to his website";[108]
- finding that Dr. Langdell engaged in "acts of passing off" by "trying to appropriate" Future Publishing's EDGE logo as that of Respondent;[109]
- rejecting all of Respondent's evidence of use of EDGE in U.K. and thereby invalidating Respondent's registrations for EDGE in that country;[110] and

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[102] *See* 60 TTABVUE 44-59, reported at 2011 WL 2039942 (also appearing at 130 TTABVUE 287-302).

[103] *Id.* at 46.

[104] *Id.* at 47.

[105] *Id.* at 48.

[106] *Id.*

[107] *Id.* at 49.

[108] *Id.* at 52.

[109] *Id.* at 55.

[110] *Id.* at 56-58.

- noting that the Court "suspect[s]" that "Jack Phillips," who submitted "witness statements" in the past on behalf of Dr Langdell's companies, "does not exist and is an invention of Dr Langdell."[111]

And in more recent litigation in the U.K., *Future Publishing Ltd. v. Edge Interactive Media Inc., Edge Games Inc., and Dr Timothy Langdell*, Case No: CH 2018 000210 (U.K. High Court of Justice Chancery Division Oct. 17, 2019),[112] another judge:

- Entered a "civil restraint order" against Dr. Langdell based on findings that "Dr Langdell has 'persistently' issued claims or made applications which were totally without merit";[113] and
- Based this ruling, in part, on the fact that, in several other UK cases, "Dr Langdell has been found to have been dishonest and unreliable in relation to his actions and the conduct of proceedings."[114]

And finally, in another instance of Board litigation (of which we take judicial notice), *Edge Games Inc. v. Razer (Asia-Pacific) Pte Ltd.*, No. 92058543 (TTAB June 2, 2016),[115] the Board entered the sanction of dismissal with prejudice of Respondent's case, noting in that ruling:

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[111] *Id.* at 45. As set forth earlier, the E.D. Va. Court decision sanctioned Respondent based in part on an "untruthful statement" made on Respondent's behalf by "Jack Phillips." *See* 60 TTABVUE 132-33. At his discovery deposition, Dr. Langdell refused to answer questions about the E.D. Va. Court's discussion of "Jack Phillips" (who the Court stated had corresponded with it in the alleged capacity of "Vice President of Edge Interactive") on the claimed basis that the E.D. Va. Court ruling was "voided, reversed, vacated, and to be treated as if it never issued." 130 TTABVUE 43-45. Dr. Langdell also claimed that he "do[esn't] have a recollection at this time" of "Jack Phillips." *Id.* at 45.

[112] *See* 119 TTABVUE 51-58 (also reported at 2019 WL 05269535).

[113] *Id.* at 57.

[114] *Id.*

[115] *See* 50 TTABVUE in No. 92058543.

- Respondent's "blatant disregard for rules and procedures of which it was well aware";[116]
- Respondent's "intent to delay proceedings and thwart [its adversary's] discovery of relevant information";[117]
- Respondent's "egregious" failure to comply with a Board order and applicable rules;[118]
- that Respondent "act[ed] intentionally and in bad faith to circumvent Prior Order II";[119] and
- that Respondent engaged in a "clear pattern of disregard for Board rules and orders."[120]

Collectively, these rulings reflect an astoundingly abysmal record of disregard and contempt for the solemnity and integrity of government adjudicatory proceedings involving Respondent's trademarks, and repeated instances of untruthfulness in such cases on the part of Dr. Langdell.

In sum, we have no confidence whatsoever in Dr. Langdell's testimony about using EDGE GAMES as a mark before filing the application that matured into the challenged registration. He testified repeatedly that his memory of events prior to 2010 is weak, or nonexistent. His testimony about whether, as CEO of Respondent or its predecessor, he worked with any other corporate officers is both contradictory and simultaneously vague. He was evasive, nonresponsive, and argumentative during his two depositions in this case. And, while this case was pending and in the trial period,

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116 *Id.* at 3.

117 *Id.* at 3-4.

118 *Id.* at 4.

119 *Id.* at 6-7.

120 *Id.* at 8.

he lied to the USPTO in filing his combined Section 8/15 Declaration for the very registration at issue here. Those circumstances enshroud Dr. Langdell's testimony about when Respondent began using EDGE GAMES as a trademark in an all but impenetrable veil of doubt. And though we cannot and do not base our assessment of the incredibility of Dr. Langdell's testimony in this case on the multiple prior Board and court rulings that have found Dr. Langdell to be—stated mildly—less-than-honest-and-forthright with those tribunals, with other participants in those cases, and even with the USPTO in prosecution proceedings concerning Respondent's Earlier EDGE Registrations, we draw a level of comfort from those decisions that our decision here to reject Dr. Langdell's testimony about pre-filing use in this case is not an outlier.

In sum, the inferences we draw from Petitioner's evidence indicate that Respondent (or its predecessors) did not use EDGE GAMES as a trademark before the filing date. And the evidence here convinces us that Dr. Langdell's testimony in rebuttal that he used EDGE GAMES as a trademark prior to filing the use-based application that matured into the challenged registration is wholly unreliable.[121] We

[121] *See, e.g.*, *Jim Dandy Co.*, 458 F.2d at 1401 (rejecting proffered showing of use in commerce based on witness testimony that was "far from clear and definite"); *Fuji Med. Instruments Mfg. Co. v. Am. Crocodile Int'l Grp., Inc.*, No. 92062760, 2021 WL 3286400, at *14-19 (TTAB 2021) (testimony of ownership of mark found not credible based, inter alia, on general evasiveness of deposition testimony, inability to recall the date of a key phone call, professed inability to recall who owns the stock of the company of which he has been CEO for years); *Mars Generation*, 2021 WL 4988613, at *9-10 (rejecting prior use testimony of a witness); *Tao Licensing*, 2017 WL 6336243, at *9 ("Mr. Bender's cross-examination testimony regarding statements made in his declaration has undermined his credibility" on his testimony of use before the statement of use was filed); *Nationstar Mortgage*, 2014 WL 6480655, at *8-11 (finding owner and president's testimony about events and key documents that would support his case that he used the mark before filing a use-based application not credible

find no **credible** evidence in the record that Respondent, prior to filing its application, used EDGE GAMES as a trademark for "Computer game programs; Computer game software; Computer game software downloadable from a global computer network; Computer game software for use on mobile and cellular phones." On this basis, we find that Petitioner has proved its nonuse claims by a preponderance of the evidence. We therefore grant the petition to cancel Respondent's registration for EDGE GAMES. Because that alone means that Respondent's registration must be cancelled, we do not reach any of Petitioner's other claims. *See, e.g.*, *CBC Mortg. Agency v. TMRR, LLC*, No. 92076723, 2022 WL 3444028, at *14 n.22 (TTAB 2022); *Kohler Co. v. Honda Giken Kogyo K.K.*, No. 91200146, 2017 WL 6547628, at *3 & n.4 (TTAB 2017).

Decision: The petition to cancel is GRANTED.

where he professed not to know basic information about his company that a person in the position would normally be expected to know).