

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT AND TRIAL AND APPEAL BOARD

GSN GAMES, INC., f/k/a WORLDWINNER.COM, INC.,
Petitioner,

v.

BALLY GAMING, INC.,
Patent Owner.

Case No. CBM2015-00155
Patent No. 5,816,918

**PATENT OWNER'S OBJECTIONS TO PETITIONER'S
EVIDENCE UNDER 37 CFR § 42.64(b)(1)**

Pursuant to 37 CFR § 42.64(b)(1), Patent Owner hereby objects to the following evidence submitted by Petitioner in its Petition. These objections are being served within ten (10) business days of the institution of trial by the Board as required by rule.

Exhibit 1002, Declaration of William K. Bertram: Patent Owner objects to this exhibit under FED. R. EVID. 602 as not being based on the personal knowledge of the declarant, who has not even provided a curriculum vitae, much less been qualified as an expert witness pursuant to FED. R. EVID. 702 and 703. Specifically, while paragraph 4 of Mr. Bertram's declaration references an attached CV, no such CV was attached to the Petition or otherwise filed by Petitioner. Patent Owner objects to paragraph 11 of the Bertram Declaration under Fed. R. Evid. 702 as unreliable and not useful to the trier of fact in that it incorrectly states the law with respect to 35 U.S.C. § 101. Additionally, Patent Owner objects to Mr. Bertram's testimony that comprises nothing more than legal argument without any additional support and is therefore unreliable and not useful to the trier of fact under Fed. R. Evid. 702 and inadmissible under Fed. R. Evid. 704. "Rule 704 was not intended to allow experts to offer opinions embodying legal conclusions." *Bausch & Lomb, Inc. v. Alcon Labs., Inc.*, 79 F. Supp. 2d 252, 255 (W.D.N.Y. 2000) (quoting *United States v. Scop*, 846 F.2d 135, 139 (2d Cir. 1988)). Specifically, Patent Owner objects to the following paragraphs of Mr. Bertram's declaration on this

basis: ¶¶ 16-17, 25-26, 28-44, 48-49, 51, and 55-58. Patent Owner further objects to ¶¶ 23 and 57 for lack of foundation under Fed. R. Evid. 901(a) with respect to the references cited therein for the reasons set forth in greater detail below.

Exhibit 1004, I. Nelson Rose, *Gambling and the Law* (1986): Patent Owner objects to this exhibit under Fed. R. Evid. 901(a) for lack of authentication.

Petitioner has failed to provide evidence of when this exhibit was actually available to the public. The exhibit as provided is a book alleged to have been published in 1986. The publication date, as well as any other information in the *Gambling and the Law* book related to publication, is hearsay, and Petitioner has made no argument that any exception or exclusion applies. *See Emnos USA Corp. v. dunnhumby LTD.*, IPR2015-00162, Paper 07 at 11 (PTAB Dec. 30, 2015).

Further, Petitioner has provided no evidence or foundation whatsoever as to whether this document was available to the public and the date which it was made available to the public. Whether a document is publicly accessible is a question of fact based on the document's disclosure to the public and is publicly available "if it was 'disseminated or otherwise made available to the extent that persons interested and ordinarily skilled in the subject matter or art exercising reasonable diligence, can locate it.'" *In re NTP, Inc.*, 654 F.3d 1279, 1296 (Fed. Cir. 2011) (quoting *Kyocera Wireless Corp. v. Int'l Trade Comm'n*, 545 F.3d 1340, 1350 (Fed. Cir.

2008) and *In re Klopfenstein*, 380 F.3d 1345, 1350 (Fed. Cir. 2004)) (internal quotes omitted).

Exhibit 1005, Anthony N. Cabot, *The Games People Play: Is it Time for A New Legal Approach to Prize Games?* Patent Owner objects to this exhibit under Fed. R. Evid. 402 and 403 for lack of relevance. This exhibit is alleged to having been published in Winter 2003/2004, long after the accorded priority date of the '918 Patent, so its relevance is not apparent from its face. Petitioner has presented no evidence that would establish its relevance to the present petition. Patent Owner additionally objects to this exhibit under FED. R. EVID. 901(a) for lack of authentication. Petitioner has failed to provide evidence of when this exhibit was actually available to the public. The exhibit as provided is an alleged reprint of a Nevada Law Journal article that appears to have been printed from a Westlaw website in 2015. It is not the actual article. *See Standard Innovation Corp. v. Lelo, Inc.*, IPR2014-00148, Paper 42 at 10 (PTAB Apr. 23, 2015), “[T]he Board has stated that ‘[t]o authenticate printouts from a website, the party proffering the evidence must produce some statement or affidavit from someone with knowledge of the website . . .’) Petitioner has provided no evidence or foundation whatsoever as to whether this document was available to the public and the date which it was made available to the public.

Exhibit 1006, I. Nelson Rose, Gambling and the Law – Update (1993):

Patent Owner objects to this exhibit under Fed. R. Evid. 901(a) for lack of authentication. Petitioner has failed to provide evidence of when this exhibit was actually available to the public. The exhibit as provided is an alleged reprint of a Hastings Communication and Entertainment Law Journal article that appears to have been printed from a Westlaw website in 2015. The exhibit is not the actual article. Petitioner has provided no evidence or foundation whatsoever as to whether this document was available to the public and the date which it was made available to the public, or whether any hearsay exception applies to the alleged dates of publication.

All of the objections above go to the admissibility of the exhibits objected to as evidence affirmatively supporting Petitioner's petition and are not intended to bar use of these exhibits by Patent Owner for purposes of impeachment.

Respectfully submitted,

/John M. Mueller/

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Dated: February 4, 2016

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