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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GAME SHOW NETWORK, LLC AND WORLDWINNER.COM
Petitioners

v.

JOHN H. STEPHENSON
Patent Owner

Case IPR2013-00289
Patent 6,174,237

PATENT OWNER'S MOTION TO EXCLUDE EVIDENCE SUBMITTED BY GAME SHOW NETWORK, LLC AND WORLDWINNER.COM UNDER 37 C.F.R. § 42.64

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Pursuant to 37 C.F.R. § 42.64, Patent Owner John H. Stephenson ("Stephenson") moves to exclude Exhibits 1011, 1012, 1013, 1014 and 1021 submitted with Petitioner's Reply under Federal Rules of Evidence 401 and 403. Those exhibits each relate to a lawsuit ended by a default judgment, and are irrelevant because a default judgment says nothing about the facts or law of the case. By introducing those exhibits, Petitioner seeks to resurrect issues never litigated in a long-dead case against an entity that appears to no longer exist. That case is unrelated to the current action or the associated litigation. Stephenson originally entered the objection to this evidence in Paper 38, submitted April 28, 2014. For at least the reasons detailed below, the Board should exclude each of Exhibits 1011-14 and 1021.

I. Because Stephenson did not admit or provide any construction of any term in the *Stephenson v. MVP* lawsuit, and because Petitioner misrepresents that lawsuit, the contents of any related Exhibits and Johnson Declaration should be excluded as irrelevant

In contrast to Petitioner's assertion, Stephenson never "admitted" or "conceded" any claim construction for the '237 patent. Specifically, Stephenson did not state or imply whether the claims require head-to-head competition with a computer. *See* Reply at 13. Petitioner's assumptions regarding documents from Stephenson's prior lawsuit are unsupported, rendering admission of those

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documents improper under the Federal Rules of Evidence 401 and 403 as irrelevant and/or a mischaracterization of the evidence.

The statements in the complaint (Ex. 1012) provide no evidence to support Petitioner's proposed claim construction in the instant proceeding.

Petitioner's reply fails to mention the procedural posture of the MVP lawsuit, which is dispositive on this issue. MVP never responded to Stephenson's complaint. After multiple, futile attempts to reach out to MVP, the District Court entered a default judgment without claim construction or discovery.

Under Federal Circuit law, the case was never "actually litigated." *See, e.g.*, *Lee ex rel. Lee v. United States*, 124 F.3d 1291, 1295 (Fed. Cir. 1997). The Court never made any findings of fact. Stephenson never made any statements about whether or not the claims required head-to-head competition with a computer. For Petitioners to extrapolate any "admission" or "concession" by Stephenson from the MVP default judgment is improper. Therefore, the Board should exclude Exhibits 1012-1014 as irrelevant to claim construction, or any other matter in this proceeding.

A default judgment cannot be used to apply issue preclusion (collateral estoppel) because the issues are not actually litigated. *Lee*, 124 F.3d at 1295 (rejecting Lee's argument that the U.S. was estopped from litigating the issue of negligence when a district court had entered default judgment). Stephenson should

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not be precluded from making any argument in the instant proceeding as no argument was actually litigated for estoppel purposes in the MVP lawsuit.

II. The Johnson Declaration Should be Excluded for the Same Reasons and Because it is Deficient on its Face

As shown above, exhibits 1011-1014 and 1021 should be excluded because they provide no insight into the correct interpretation of the claims and say nothing regarding whether those claims are invalid. Petitioner also relies on the related declaration of an individual, Mr. Johnson, who did not indicate which version of the game he played, or that he had personal knowledge of every mode or version of the game(s) at issue in the lawsuit. *See* Exhibits 1011 and 1021. Petitioner uses this declaration to summarily decree that a particular product, apparently now defunct, lacked a certain feature in all of its embodiments. Reply, 13. Johnson's statements should be excluded for the same reasons as the litigation documents. The default judgment indicates nothing relevant to claim construction, and thus the operation of any product at issue in that lawsuit is similarly irrelevant. Moreover, Johnson's statements are irrelevant and unreliable because on their face they do not purport to describe all functionality or versions of the product at issue in the MVP lawsuit. Therefore, the declaration should also be excluded under Rules 401 and 403.

III. Conclusion

Stephenson never actually litigated the instant claims in the lawsuit against MVP, never made any claim constructions, and never admitted anything about the

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claims' requirements. Any use of the documents regarding that lawsuit are irrelevant and should be excluded under Rules 401 and 403. The Johnson Declaration should also be excluded under Rules 401 and 403 as premised on the same defective estoppel position, and further because the Johnson declaration on its face does not profess to even address all embodiments of the product at issue in the MVP lawsuit. Any miniscule relevance of these materials is outweighed by their creation of confusion and prejudice. Accordingly, Stephenson respectfully requests the Board grant its Motion to Exclude Exhibits 1011-1014 and 1021.

Respectfully submitted,

Date: May 27, 2014

/Daniel W. McDonald/
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Attorneys for Patent Owner Stephenson

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