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Paper 98
Entered: December 12, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ACTIVISION BLIZZARD, INC., ELECTRONIC ARTS INC.,
TAKE-TWO INTERACTIVE SOFTWARE, INC.,
2K SPORTS, INC., ROCKSTAR GAMES, INC., and
BUNGIE, INC.,
Petitioner,

v.

ACCELERATION BAY, LLC,
Patent Owner.

Cases IPR2015-01951, IPR2015-01953 (Patent 6,714,966 B1)[1,2]
Cases IPR2015-01964, IPR2015-01996 (Patent 6,829,634 B1)
Cases IPR2015-01970, IPR2015-01972 (Patent 6,701,344 B1)

Before SALLY C. MEDLEY, LYNNE E. PETTIGREW and
WILLIAM M. FINK, *Administrative Patent Judges*.

FINK, *Administrative Patent Judge*.

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[1] This Order applies to each of the listed cases. We exercise our discretion to issue one Order to be entered in each case. The parties, however, are not authorized to use this caption for any subsequent papers.

[2] Bungie, Inc., who filed Petitions in IPR2016-00933, IPR2016-00934, IPR2016-00935, IPR2016-00936, IPR2016-00963, and IPR2016-00964, has been joined as a Petitioner in these proceedings.

ORDER
Denying all Motions for Entry of the Default Protective Order
and to Seal Certain Papers and Exhibits and all
Motions to Seal
37 C.F.R. §§ 42.14, 42.54

In each of the Proceedings, Patent Owner filed *two* Motions for Entry of the Default Protective Order and requesting certain papers or exhibits be sealed. *E.g.*, IPR2015-01951, Paper 34, Paper 36.[3] In its first motion, Patent Owner states that Petitioner does not oppose entry of the Default Protective Order, which, Patent Owner represents, is "concurrently filed herewith and attached hereto as Exhibit A." Paper 34, 4. However, no "Exhibit A" is attached. In its second motion, Patent Owner moves to seal its Response and additional exhibits and also represents that the Default Protective Order is attached as Exhibit A. Paper 36, 4. In this motion, a Proposed Stipulated Protective Order is appended to the Motion at unnumbered pages 11–17 of the paper. We assume this is intended to be Exhibit A, although it is not marked as such. Patent Owner has since filed additional motions to seal regarding certain papers and exhibits. *See* Paper 67, Paper 81, Paper 86. *None* of the confidential exhibits are accompanied by non-confidential, redacted exhibits.

Petitioner filed Oppositions to Patent Owner's respective Motions. Paper 40, Paper 41. Although Petitioner does not oppose entry of the "Default Protective Order," Petitioner points out Patent Owner's request to "seal the entirety of each document allegedly containing confidential

[3] We hereinafter refer to the papers and exhibits in IPR2015-01951.

information without submitting a redacted version," is not in accordance with our orders. *E.g.*, Paper 40, 2. For example, "Patent Owner has filed under seal the entirety of its Patent Owner Response (Paper 32) and multiple declarations and exhibits thereto. *See* Paper 36." Paper 41, 2. Petitioner has also filed motions to seal for certain papers and exhibits. *See* Paper 56, Paper 90, Paper 96. As with Patent Owner, Petitioner did not file redacted, non-confidential versions, although Petitioner did indicate it was prepared to do so upon meeting and conferring with Patent Owner. Paper 56, 2.

Petitioner is correct regarding the lack of non-confidential, redacted versions of exhibits and papers for the public record. Our regulations emphasize that the "[r]ecord of a proceeding, including documents and things, shall be made available to the public, except as otherwise ordered." 37 C.F.R. § 42.14. To this end, as set forth in the Board's default protective order (and reproduced in the proposed Joint Stipulated Protective Order, appended to Paper 36):

> Where confidentiality is alleged as to some but not all of the information submitted to the Board, *the submitting party shall file confidential and non-confidential versions of its submission*, together with a Motion to Seal the confidential version *setting forth the reasons why the information redacted from the non-confidential version is confidential and should not be made available to the public.. The nonconfidential version of the submission shall clearly indicate the locations of information that has been redacted. The confidential version of the submission shall be filed under seal.*

Trial Practice Guide, 77 Fed. Reg. 48,756, 48,771 (Aug. 14, 2012) (emphasis added). Similarly, as set forth in the Scheduling Order (Paper 12)

for these proceedings, "[r]edactions should be limited strictly to isolated passages consisting entirely of confidential information. *The thrust of the underlying argument or evidence must be clearly discernible from the redacted version.*" Paper 12, 3 (emphasis added).[4]

These instructions have not been followed. As noted above, as best we can discern, none of the papers and exhibits that have been filed as confidential have been accompanied by redacted, public versions *clearly indicating the locations of the redacted information*.[5] With regard to the papers (e.g., Patent Owner Response), there are no accompanying, non-confidential versions in which *the thrust of the underlying argument or evidence is clearly discernible.* Because we cannot determine which portions of the papers and exhibits allegedly contain confidential information, as opposed to argument and non-confidential information, the

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[4] The Scheduling Order also makes clear that the proposed protective order should have been filed as a separate exhibit to the motion. *Id.*

[5] To the extent further guidance is necessary (*see* Paper 49, 2), we make the following observation. Few, if any, exhibits, even business records, should ever be confidential in their entirety, without good cause to show that *all* of the information contained therein is truly sensitive. *See* 37 C.F.R. § 42.54(a). Even business records (e.g., sales forecasts, license agreements) often contain some non-confidential information serving to identify the nature of confidential portions of the exhibit. Conversely, deposition transcripts, declarations, and papers containing a party's arguments will generally contain *substantial* non-confidential portions. In all cases, the Motion to Seal must *set forth the reasons why the information redacted from the non-confidential version is confidential and should not be made publicly available*. Trial Practice Guide, 77 Fed. Reg. at 48,771 (emphasis added).

Board is presently unable to satisfy its obligation under 37 C.F.R. § 42.14 to make the record of the proceedings public. Consequently, we do not find good cause to grant the motions.

Accordingly, we *deny* all of the motions *without prejudice*. However, for each proceeding, we grant Patent Owner leave to file a *single consolidated motion* for entry of the Proposed Stipulated Protective Order (which must be identified therein and filed as a *separate* exhibit) and to seal certain papers and exhibits that it seeks to maintain as confidential. Along with its single consolidated motion, Patent Owner is instructed to file non-confidential, redacted versions of those exhibits (*with the same exhibit numbers* as the currently filed confidential exhibits) and papers (to be numbered by the system) identified in its single consolidated motion. To the extent Patent Owner has reconsidered the need to maintain confidentiality as to any exhibit or paper, Patent Owner is instructed to notify the Board via email of any currently confidential exhibits that it wishes to de-designate as confidential (such exhibits or papers will therefore not be subject to its single consolidated motion). Patent Owner should file its single consolidated motion and redacted exhibits and papers on or before January 6, 2017.

Similarly, after Patent Owner has complied with the above instructions for each proceeding, Petitioner is granted leave to file a *single consolidated motion* to seal those papers and exhibits it seeks to maintain as confidential, along with non-confidential, redacted versions of each (with exhibits having the same numbering as currently filed confidential exhibits).

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