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.,
Petitioners,

v.

ACCELERATION BAY, LLC,
Patent Owner.

Case IPR2015-01972[1]
Patent No. 6,701,344 B1

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

PETITIONERS' CONSOLIDATED MOTION TO EXCLUDE EVIDENCE UNDER 37 C.F.R. §§ 42.62 AND 42.64

[1] Bungie, Inc., who filed Petition IPR2016-00934, has been joined as a petitioner in this proceeding.

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Petitioners Activision Blizzard, Inc., Electronic Arts Inc., Take-Two Interactive Software, Inc., 2K Sports, Inc., Rockstar Games, Inc., and Bungie, Inc. (collectively, "Petitioners"), respectfully submit this Motion to Exclude pursuant to 37 C.F.R. §§ 42.62 and 42.64, and the Notice of Stipulation to Modify Due Dates 3-5 (Paper 64 at 1). As an initial matter, Petitioners respectfully submit that the Board, sitting as a non-jury tribunal with administrative expertise, is well-positioned to determine and assign the appropriate weight to be accorded to the evidence presented by both Petitioners and Patent Owner Acceleration Bay, LLC ("Patent Owner") without the need for formal exclusion. *See, e.g.*, *S.E.C. v. Guenthner*, 395 F. Supp. 2d 835, 842 n.3 (D. Neb. 2005) ("Trial courts should be more reluctant to exclude evidence in a bench trial than a jury trial. . . . [E]vidence should be admitted and then sifted . . . [and] the trial court is presumed to consider only the competent evidence and to disregard all evidence that is incompetent"; "'the better course' is to 'hear the testimony, and continue to sustain objections when appropriate'"; "[T]he court has admitted the testimony . . . and has accorded it appropriate weight." (citations omitted)); *Builders Steel Co. v. Comm'r of Internal Revenue*, 179 F.2d 377, 379 (8th Cir. 1950) (vacating Tax Court decision for exclusion of competent and material evidence; "In the trial of a nonjury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence . . . . On the other hand, a trial judge who, in the trial of a nonjury case, attempts to make strict

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rulings on the admissibility of evidence, can easily get his decision reversed by excluding evidence which is objected to, but which, on review, the appellate court believes should have been admitted."). Petitioners accordingly submit that it is, as a general matter, better for the Board to have before it a complete record of the evidence submitted by the parties than to exclude particular pieces of it and thereby risk improper exclusion that could later be assigned as error. *See, e.g.*, *Builders Steel*, 179 F.2d at 379; *Donnelly Garment Co. v. Nat'l Labor Relations Bd.* ("NLRB"), 123 F.2d 215, 224 (8th Cir. 1941) (finding NLRB's refusal to receive testimonial evidence amounted to a denial of due process; "One who is capable of ruling accurately upon the admissibility of evidence is equally capable of sifting it accurately after it has been received, and, since he will base his findings upon the evidence which he regards as competent, material and convincing, he cannot be injured by the presence in the record of testimony which he does not consider competent or material. . . . [I]f evidence was excluded which [the reviewing] court regards as having been admissible, a new trial or rehearing cannot be avoided."). *See also*, *e.g.*, *Samuel H. Moss, Inc. v. F.T.C.*, 148 F.2d 378, 380 (2d Cir. 1945), *cert. denied*, 326 U.S. 734 (1945) (observing that, "if the case was to be tried with strictness, the examiner was right . . . [but w]hy [the examiner] or the Commission's attorney should have thought it desirable to be so formal about the admission of evidence, we cannot understand. Even in criminal trials to a jury it is bet-

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ter, nine times out of ten, to admit, than to exclude, evidence . . . [W]e take this occasion to point out the danger always involved in conducting such a proceeding in such a spirit, and the absence of any advantage in depriving either the Commission or ourselves of all evidence").

However, to the extent that the Board intends to apply the Federal Rules of Evidence *strictly* in these proceedings, *cf*. 77 Fed. Reg. 48,612, 48,616 (Aug. 14, 2012) ("42.5(a) and (b) permit administrative patent judges wide latitude in administering the proceedings to balance the ideal of precise rules against the need for flexibility to achieve reasonably fast, inexpensive, and fair proceedings"), Petitioners hereby move to exclude paragraphs 5-8 and 10 of Exhibit 2026 as inadmissible hearsay, statements not based on personal knowledge, or both. For the same reasons, any reference to or reliance on these paragraphs in Patent Owner's Response (Paper 31, "POR") should be excluded as well. Petitioner's objections to Exhibit 2026 were previously set forth in Petitioners Consolidated Objections to Evidence (Paper 36 at 12-14), filed and served on July 25, 2016 pursuant to 37 C.F.R. § 42.64(b)(1), and are further explained below pursuant to 37 C.F.R. § 42.64(c).

I. Legal Standard

An out-of-court statement used to prove the truth of the matter asserted is inadmissible hearsay unless otherwise provided by a federal statute, the Federal Rules of Evidence, or other rules prescribed by the Supreme Court. F.R.E. 801,

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802. Furthermore, "[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." F.R.E. 602.

II. Exhibit 2026 ¶¶ 5-8, 10 Are Inadmissible

Patent Owner relies on statements made in a declaration by third party Dr. Robert Abarbanel (Exhibit 2026) to support arguments that the named inventors of U.S. Patent No. 6,701,344 (the "'344 patent") conceived and reduced to practice the claimed invention through the development of SWAN "by September 16, 1999." POR at 4-5. But Patent Owner uses these statements, which by their express terms contain out-of-court "discussions" with the named inventors, to try to prove the truth of the matter asserted—that various features were implemented in SWAN "on or before September 16, 1999"—making them inadmissible hearsay. F.R.E. 801, 802; Exhibit 2026 ¶¶ 5-8, 10. And because no recognized hearsay exception applies to these statements (F.R.E. 803, 804), they should be excluded. In addition, these statements are not based on the declarants' "personal knowledge" in violation of Rule 602, and should be excluded for this additional reason.

III. CONCLUSION

For the foregoing reasons, to the extent the Board determines to apply the Federal Rules of Evidence strictly in this proceeding, paragraphs 5-8 and 10 of Exhibit 2026 and any reference to those paragraphs or reliance thereon by Patent

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