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 REPLY IN SUPPORT OF THEIR MOTION TO EXCLUDE**

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

Unable to overcome Petitioners' showing that paras. 5-8 and 10 of Ex2026 (Abarbanel Declaration) are inadmissible, Patent Owner ("PO") instead improperly uses its Opposition (Pap.85, "Opp.") to Petitioners' Motion to Exclude (Pap.77, "Mot.") as a back door attempt to supplement the record at the eleventh hour with six additional exhibits (Exs. 2112-17) that are ***wholly irrelevant*** to the admissibility of the challenged paragraphs. These improper exhibits—which, in any event, do not cure the evidentiary issues in Ex2026—should be disregarded, and Petitioners' Motion granted.

## I. PO's Submission of Exhibits 2112-17 Is Improper

Supplemental *evidence* can be filed in response to a motion to exclude "*solely to support admissibility* of the originally filed evidence and to defeat a motion to exclude *that evidence*," but not "*to support any argument on the merits*." *Handi Quilter v. Bernina*, IPR2013-00364, Pap.30, 2; §42.64(b)(2).[2] "Supplemental *information*, on the other hand, is evidence a party intends to [use to] support an argument on the merits." *Handi*, 2-3 (emph. orig.). The proper procedure for filing supplemental *information* more than one month after institution is by requesting Board authorization to file a motion to submit that information. §42.123(b).

PO improperly purports to submit Exs. 2112-17 as supplemental *evidence* even though they are clearly not directed to supporting the admissibility of the

[2] Unless otherwise noted, citations are to 37 C.F.R., and all emphases added.

challenged paragraphs. *Handi*, 2. PO's claim that these exhibits "confirm" the reliability of Ex2026 and "reveal[] [its] relevance … [to] the conception and reduction to practice of the '344 Patent" (Opp. 5), is demonstrably false. Indeed, ***none*** of these exhibits even mentions Mr. Abarbanel or his declaration. Rather, the exhibits appear to relate to a simulation run by one of PO's experts (Ex2112), obviousness analyses from a declarant never previously presented as an expert (Ex2113) and another of PO's expert (Ex2114), and purported authentication of *other* exhibits in this proceeding (Exs. 2114-17).

PO's submission of Exs. 2112-17 at this late stage is a blatant attempt to circumvent the Board's rules governing the filing of supplemental information. PO could have, but failed to: (1) file Exs. 2112-17 with its Patent Owner Response, or (2) properly request the Board's authorization to file supplemental information. Thus, any "prejudice" to PO (Opp. 5) is of PO's own making, and PO should not be allowed to belatedly offer these exhibits into evidence in the context of a motion to exclude as an end-run around §42.123(b). Nor should PO be authorized to file supplemental information at this late stage with oral hearing just two weeks away.[3]

[3] While PO agrees the Board is well-positioned to consider the complete record and assign the appropriate weight to evidence (Mot. 2; Opp. 2), that does not extend to evidence *that is not part of the record*—including PO's *served* supplemental exhibits, *i.e.*, Exs. 2112-17—as PO suggests (Opp. 4-5). Supplemental

Pap.84, 2. Exs. 2112-17 should therefore be disregarded.

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

PO does not dispute that the testimony in paragraphs 5-8, 10 of Ex2026 "describ[es]" Abarbanel's out-of-court "discussions" with the named inventors (Opp. 2) or that it is being offered for the truth of the matter asserted—PO's argument that various features were implemented in SWAN. Mot. 5. Thus, these paragraphs fall squarely within the hearsay rule (FRE 801, 802)[4] and PO's conclusory assertion that Petitioners' objections go to weight rather than admissibility (Opp. 2) does not render them admissible—FRE 403 is not an exception to FRE 801, 802.

Moreover, contrary to PO (Opp. 3), these statements do not fall under the residual hearsay exception (FRE 807), which is "reserved for exceptional cases," at least because they are not "*more* probative" on the issue of what features were implemented in SWAN "than any other evidence that the proponent can obtain through reasonable efforts." *CaptionCall v. Ultratec*, IPR2015-00637, Pap.98, 16;

---

evidence is not part of the record until submitted to defeat a motion to exclude, and its use then is limited solely to the admissibility of the originally filed evidence. *Handi*, 2.

[4] *Cf. REG Synthetic Fuels v. Neste Oil Oyj*, No. 15-1773, 2016 WL 6595978, at *7 (Fed. Cir. Nov. 8, 2016) (inventor email offered for non-hearsay purpose of showing fact of *communication* of conception, not truth of communication's substance).

FRE 807(a)(3). Indeed, as PO admits, PO submitted declarations of the named inventors and other "documentary evidence" on that issue. Opp. 2-3, 5. And while PO is correct that to establish an actual reduction to practice the named inventors' testimonies must be corroborated by independent evidence (Opp. 3), Abarbanel's testimony merely repeats the inventors' statements and thus ***cannot corroborate*** because "the truth [of the information contained in these statements] depends upon information received from the inventor[s]," and do not "guarantee[] … trustworthiness." *Thurston v. Wulff*, 164 F.2d 612, 617 (CCPA 1947); *Medichem v. Rolabo*, 437 F.3d 1157, 1170 (Fed. Cir. 2006) ("The requirement of *independent knowledge* remains key to the corroboration inquiry."); FRE 807(a)(1).

PO's assertion that the challenged paragraphs are not hearsay because declarations are not out-of-court statements (Opp. 2) is inapposite. Petitioners are not asserting the Abarbanel declaration is an out-of-court statement *in toto*, but rather that there is inadmissible hearsay *within* the declaration—namely, Abarbanel's attempted testimony about the named inventors' out-of-court statements regarding various features that were allegedly implemented in SWAN. *See* Mot. 5. Similarly, though Abarbanel may have personal knowledge of his "discussions" with and "expla[nations]" by the named inventors, he lacks personal knowledge as to whether those features that the named inventors told him were implemented in SWAN were actually implemented. FRE 602. Moreover, while Mr. Abarbanel

DOCKET ALARM

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

**LAW FIRMS**
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

**FINANCIAL INSTITUTIONS**
Litigation and bankruptcy checks for companies and debtors.

**E-DISCOVERY AND LEGAL VENDORS**
Sync your system to PACER to automate legal marketing.