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 IPR2015-01996[1]
Patent No. 6,829,634 B1

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

PETITIONERS' CONSOLIDATED REQUEST FOR REHEARING PURSUANT TO 37 C.F.R. § 42.71(d)

[1] Bungie, Inc., who filed Petition IPR2016-00964, has been joined as a petitioner in this proceeding.

Petitioners respectfully request rehearing, pursuant to §42.71(d),[2] of the portions of the Board's November 18, 2016 Order–Conduct of the Proceeding (Pap. 79, "Order") (1) denying Petitioners' November 15, 2016 request for a conference call to seek the Board's guidance concerning the deposition of a third party declarant resident in France, and the taking of this deposition via videoconference, and (2) denying "the requested deposition of a foreign, third-party witness." Order at 4. Petitioners respectfully submit that the Order was based on factual assumptions misapprehending the circumstances surrounding Petitioners' request, and in particular on two misapprehended facts addressed below. Accordingly, Petitioners respectfully seek rehearing.[3]

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

[3] Although not a decision on a "petition or motion" (*see* title of §42.71), it is Petitioners' understanding that the Order is the proper subject of a motion for rehearing, *e.g.*, *Volusion v. Versata*, CBM2013-00018, Pap. 42 at 4 (noting failure to seek rehearing of Board order denying request—made through conference call—to file motion to strike); *Agilysys v. Ameranth*, CBM2014-00016, Pap. 14 at 2 (noting failure to seek rehearing of Board order—stemming from conference call—requiring paper re-designating lead and backup counsel), and that, in any event, the Board may exercise its discretion under §42.5(a) to consider Petitioners' Request under §42.71(d)'s requirements. *See IBM v. Intellectual Ventures II*, IPR2015-

I. Timeline of Events

In accordance with §42.71(d)(1), Petitioners timely file this Request within 14 days of the Board's non-final November 18 Order. Petitioners would have provided the following timeline of relevant events on the requested call with the Board. *Cf*. Pap. 19 at 5 (limiting emails requesting conference calls to "short statement" agreed to by both parties). On October 21, 2016, Patent Owner ("PO") filed Objections to Evidence in Petitioner's Reply and Petitioner's Opposition to Patent Owner's Motion to Amend. Pap. 58. Under §42.64(b)(2), Petitioners' deadline to serve supplemental evidence in response to PO's Objections was November 4, and the Due Date 4 deadline for filing motions to exclude and observations on cross-examination was the following November 10.[4] Pap. 61 at 1.

01323, Pap. 35 at 2 n.1 (exercising discretion to consider request for rehearing of Board order denying request—made through request for a conference call—for authorization to file a paper).

[4] As reflected in the correspondence attached as Exhibit 1158, in view of the limited availability of a different supplemental evidence declarant (Petitioner's retained expert Dr. Bennett) the following week and as a courtesy to PO, Petitioners had also provided PO on Nov. 1 with advanced notice that they planned to serve an additional declaration by Dr. Bennett the next day by 10a.m. PT/1p.m. ET (*i.e.*, two days *before* Petitioners' Nov. 4 deadline for serving supplementary

On November 4, Petitioners timely served supplemental evidence, including the Declaration of Christophe Diot (Ex1152)—a 4-page declaration (plus attachments) limited to fact testimony regarding the authenticity and availability of the prior art Gautier reference (Ex1130), as well as the authenticity of other references. Ex1156 ¶4. Petitioners were not certain until the night before (November 3) whether Dr. Diot, a third-party resident of France not under their control, would actually provide a declaration. *Id*. ¶3. Petitioners proactively provided PO, at the time of service, two dates/times (November 7 and 8 around 3 p.m. ET) on which Dr. Diot was available for deposition by video should PO choose to depose him—even though Petitioners had not yet offered his declaration in evidence.[5] Ex1155; Ex1156 ¶4.

In a similar circumstance earlier in this proceeding, the Board permitted Petitioners to make third-party foreign declarants whose testimony is limited to

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evidence) and proactively offered him for deposition on Nov. 4 should PO choose to depose him. Petitioners served Dr. Bennett's declaration by the designated time (Ex1159), and PO deposed him on Nov. 4 (Pap. 66).

[5] As a point of comparison, *PO* also served a declaration of its *hired expert* the same day (Friday, November 4), provided a date for a deposition two business days later, and demanded Petitioners respond by Saturday, November 5. Ex1154 at 1-3. Petitioners responded by Sunday morning, November 6. *Id.* at 1.

supporting the dates and availability of prior art references available for deposition by video. Pap. 13 at 6-7. The Board reasoned that "it would be unnecessarily costly and burdensome to Petitioner to make the Australia declarants available for live deposition in the United States to be cross-examined regarding their three-page declarations." *Id*. at 6. As the Board noted, the Board's rules and the Federal Rules of Civil Procedure "specifically provide for alternatives to live deposition, such as deposition by video or telephone." *Id*. (citing §42.53(b)(3) and Fed. R. Civ. P. 30(b)(4), and noting "these rules are construed 'to secure just, speedy, and *inexpensive* resolution of every proceeding'" (emphasis original)). The Board further determined that "the perceived advantage in having a live deposition [does not] justif[y] the expense to Petitioner, or the inconvenience to the third-party witnesses, with requiring them to travel" to the U.S. Pap. 13 at 6.

Dr. Diot is similarly a third-party foreign declarant with testimony "limited in scope" to exhibits' authenticity and availability. *See* Pap. 13 at 7. Because his situation is nearly identical to the declarants subject to the Board's prior order, and given the compressed schedule, Petitioners "proposed a reasonable, inexpensive solution" (*id*.) by offering Dr. Diot (like the prior declarants) for video deposition prior to submitting his declaration so the parties could reach agreement. *See* §42.53(b)(3) (testimony outside U.S. permitted "upon agreement of the parties"); *Valeo v. Magna*, IPR2014-01208, Pap. 24 at 5 ("encourag[ing] … parties to …

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