

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC.,
Petitioner

v.

IMMERSION CORPORATION
Patent Owner

U.S. Patent No. 8,773,356

Filing Date: January 31, 2012

Issue Date: July 8, 2014

Title: Method and Apparatus for Providing Tactile Sensations

Case IPR2016-01381

**PETITIONER'S MOTION TO EXCLUDE PATENT OWNER'S EVIDENCE
UNDER 37 C.F.R. § 42.64**

Mail Stop Patent Board
Patent Trial and Appeal Board
P.O. Box 1450
Alexandria, VA 22313-1450

I. INTRODUCTION

Petitioner moves to exclude Exhibits 2011, 2012 and the August 14, 2017 deposition testimony of Dr. Baudisch's regarding those exhibits Exhibit 2013 at 54:24-56:3; 57:1-58:13. The evidence that is the subject of this motion is not mentioned in any of the Petition, Patent Owner's Response, Petitioner's Reply, or any expert declaration. The evidence was first raised by attorneys for Patent Owner during their cross examination of Petitioner's expert regarding his reply declaration on August 14, 2017. Petitioner properly objected during the deposition to those exhibits as beyond the scope of the expert's declaration and on grounds of relevance, authentication, foundation, and hearsay. Patent Owner failed to address the objections with supplemental evidence during the deposition as required by 37 C.F.R. §42.64(a). Accordingly, this evidence should be excluded for the reasons discussed herein.

II. RELIEF REQUESTED

Pursuant to 35 C.F.R. § 42.64, Petitioner hereby moves to exclude Exhibits 2011, 2012 in their entirety, along with the related deposition testimony of Dr. Baudisch's August 14, 2017 deposition transcript, Exhibit 2013 at 54:24-56:3; 57:1-58:13. Petitioner's motion is based on the Federal Rules of Evidence ("FRE"), which are applicable to this proceeding. *See* C.F.R. § 42.62.

III. AUTHORIZATION FOR THIS MOTION

A “motion to exclude evidence” may be filed without prior authorization from the Board. 37 C.F.R. § 42.64(c).

IV. STATEMENT OF MATERIAL FACTS

Exhibit 2011 is a document purporting to describe a “StarCraft” video game.

Exhibit 2012 is a document purporting to describe a “Super Smash Bros.” video game.

On July 28, 2017, Petitioner filed its Reply, Paper No. 18, which was accompanied by the declaration of Petitioner’s expert, Dr. Baudisch. Exhibit 1025 (Baudisch reply declaration). Neither Paper No. 18, nor Exhibit 1025 (nor any other previous paper or declaration in this IPR) discussed Exhibits 2011 and 2012 or the subject matter of those documents.

On August 14, 2017, Patent Owner took Dr. Baudisch’s deposition. Despite the fact that Exhibits 2011 or 2012 were outside the scope of Dr. Baudisch’s direct testimony, PO asked him several questions about their contents, to which Petitioner properly objected. Exhibit 2013 at 55:21-24 (“MR. WILLIAMS: Objection. Scope. Also object to [Exhibit 2011] on the grounds of foundation and authenticity and relevance. Perhaps hearsay.”); 57:15-19 (“MR. WILLIAMS: Object to the scope. And with respect to [Exhibit 2012], I’ll object to the exhibit

on the grounds of authenticity, foundation, relevance. And to the extent it's being relied on for the truth of any statement herein, hearsay.”).

Patent Owner did not attempt to provide any supplemental evidence during the deposition as required by 37 C.F.R. §42.64(a) to address Petitioner's objections.

V. STATEMENT OF THE REASONS FOR THE REQUESTED RELIEF

Petitioner timely objected to Exhibits 2011 and 2012 on the grounds that these Exhibits contain inadmissible hearsay under FRE 801(c), are irrelevant under FRE 401-403, are unauthenticated under FRE 901(a), and lack foundation under FRE 602. Exhibit 2013 at 55:21-24; 57:15-19. Dr. Baudisch's testimony regarding those exhibits should be excluded for the same reasons. PO failed to provide any supplemental evidence to address these objections during the deposition as required by 37 C.F.R. §42.64(a) .

A. Exhibits 2011 and 2012 Should be Excluded as Inadmissible Hearsay under FRE 801(c)

Hearsay is an out of court statement offered into evidence to prove the truth of the matter asserted in the statement. FRE 801(c). The entire contents of Exhibits 2011 and 2012 consist of written statements by unidentified third parties not testifying in this proceeding. Patent Owner did not at the deposition, and has not otherwise identified any hearsay exception that applies to any of the content of

these Exhibits. Thus, each of these exhibits should be excluded as inadmissible hearsay under FRE 801(c).

Specifically, Exhibit 2011 purports to be a document describing a “StarCraft” video game. Patent Owner relies on Exhibit 2011 to establish the truth of its contents, i.e., that the description of the video game is accurate. Immersion Corporation’s Motion for Observation on Cross Examination, Paper 27 (Observation 3).

Similarly, Exhibit 2012 purports to be a document describing a “Super Smash Bros.” video game. Patent Owner relies on Exhibit 2012 to establish the truth of its contents, i.e., that the description of the video game is accurate. Immersion Corporation’s Motion for Observation on Cross Examination, Paper 27 (Observation 4).

Because each of these Exhibits consists entirely of written statements by unidentified third parties not testifying in this proceeding, and Patent Owner relies on the content of these documents for the truth of the matter asserted, the Exhibits should be excluded as inadmissible hearsay under FRE 801(c).

B. Exhibits 2011 and 2012 Should be Excluded as Irrelevant Under FRE 401-403

Evidence that lacks “any tendency to make a fact more or less probable than it would be without the evidence” is irrelevant and inadmissible. FRE 401, 402.

FRE 403 further provides that the Board may exclude otherwise relevant evidence

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