

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

DK CROWN HOLDINGS INC.,
Petitioner,

v.

DIOGENES LIMITED,
Patent Owner.

IPR2023-00265
Patent 9,704,338 B2

Before WILLIAM V. SAINDON, ROBERT L. KINDER, and
SEAN P. O'HANLON, *Administrative Patent Judges*.

O'HANLON, *Administrative Patent Judge*.

DECISION
Denying Institution of *Inter Partes* Review
35 U.S.C. § 314

I. INTRODUCTION

A. Background

DK Crown Holdings Inc. (“Petitioner”) filed a Petition for *inter partes* review of claims 1, 4–15, 17–19, and 32 (“the challenged claims”) of U.S. Patent No. 9,704,338 B2 (Ex. 1001, “the ’338 patent”). Paper 2 (“Pet.”), 1. Diogenes Limited (“Patent Owner”) filed a Preliminary Response. Paper 6 (“Prelim. Resp.”).

Institution of an *inter partes* review is authorized by statute only when “the information presented in the petition . . . and any response . . . shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” 35 U.S.C. § 314(a) (2018).

We have authority, acting on the designation of the Director, to determine whether to institute an *inter partes* review under 35 U.S.C. § 314 and 37 C.F.R. § 42.4(a). For the reasons set forth below, upon considering the Petition, Preliminary Response, and evidence of record, we conclude that the information presented in the Petition fails to establish a reasonable likelihood that Petitioner would prevail in showing the unpatentability of any of the challenged claims. Accordingly, we decline to institute *inter partes* review.

B. Real Parties in Interest

Petitioner identifies itself, DraftKings Inc., Crown Gaming Inc., and SBTech (Global) Limited as real parties in interest. Pet. 3

Patent Owner identifies itself and Colossus (IOM) Limited as real parties in interest. Paper 3, 2.

C. Related Matters

The parties indicate that the '338 patent is the subject of the following district court proceeding:

Diogenes Limited v. DraftKings Inc., Case No. 21-cv-01695 (D. Del. filed December 1, 2021) (“the Delaware litigation”).

Pet. 3–4; Paper 3, 2. Patent Owner notes other petitions for *inter partes* review filed by Petitioner and challenging patents owned by Patent Owner. Paper 3, 2.

D. The Challenged Patent

The '338 patent discloses a system for conducting a multi-leg wagering event. Ex. 1001, 1:54–64. Figure 1 illustrates the system hardware and is reproduced below. *Id.* at 4:55–57.

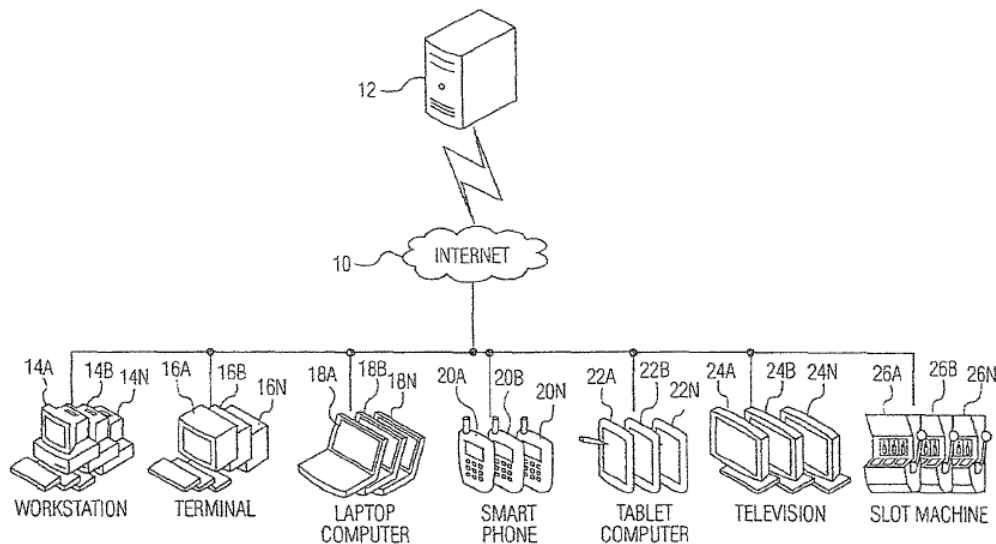


FIG. 1

Figure 1 shows the wagering system, including central server system 12 and wager input devices such as wagering stations 14 and wagering terminals 16.

Id. at 4:58–66. The central server system controls the operation of the wagering system and allows players to enter wagers via the input devices.

Id. at 7:8–11, 11:30–35. The wagering event has multiple legs and the players input a selection for each leg. *Id.* at 5:7–57, 11:36–50. The player receives a printed or electronic ticket that represents the wager. *Id.*

at 11:43–44. The system determines if the players’ inputs for each of the legs are correct. *Id.* at 13:7–11. After a predetermined number of legs have been completed, the system sends a buy-out offer to players that have correct inputs for the completed legs of the wager. *Id.* at 13:12–32, 18:51–62. The buy-out offer may be for the player’s entire ticket or a portion thereof. *Id.* at 13:32–36. If a player accepts a full buy-out offer, the player receives the agreed-upon award and the player’s participation in the wagering event ends. *Id.* at 13:41–46. If a player accepts a partial buy-out offer, the player’s participation in the wagering event will continue, but the player’s award will be reduced by the agreed-upon amount. *Id.* at 14:13–19.

E. The Challenged Claims

Petitioner challenges claims 1, 4–15, 17–19, and 32 of the ’338 patent. Pet. 1, 13. Claims 1 and 32 are independent. Claim 1 is illustrative of the challenged claims and is reproduced below.

1. A method of conducting a multi-outcome wagering event for one or more players, wherein the wagering event comprises a defined number of legs, and wherein a player is presented with at least one of a buy-out offer and a partial buy-out offer prior to completion of all of the defined number of legs, the method comprising the steps of:

providing one or more wagering input devices in communication with a system controller through which one or more players may participate in a multi-outcome wagering

event, the system controller comprising a trading exchange module, the one or more wagering input devices comprising one or more of a user input, a payment acceptor, or a link to a customer account for receiving a wager from a player, the one or more wagering input devices further comprising one or more displays for displaying the at least one of the buy-out offer and the partial buy-out offer after the multi-outcome wagering event begins, the one or more wagering input devices further comprising an input for receiving an acceptance of at least one of the buy-out offer and the partial buy-out offer, and the one or more wagering input devices further comprising a user output for issuing a credit, tokens, currency or an award to a player, said system controller being adapted for:

initiating the multi-outcome wagering event for one or more players, said multi-outcome wagering event comprised of a defined number of legs, wherein one or more jackpots, or a portion thereof, is awarded at least where a particular number of the defined number of legs are completed;

receiving a wager via one or more of the user input, the payment acceptor or the link of the one or more wagering input devices in response to input from a player desiring to participate in the multi-outcome wagering event, wherein the wager coincides with each of the defined number of legs;

generating a record reflecting the wager associated with the player at the system controller;

receiving input of an outcome of each of the defined number of legs corresponding to the multi-outcome wager event;

generating and causing display via the one or more wagering input devices the outcome of each of the defined number of legs to a player;

identifying one or more players eligible to win each of the defined number of legs based on the wager from among players participating in the multi-outcome wagering event,

determining any players eligible to win at least one jackpot or a portion thereof based on the potential outcome of each of the defined number of legs in comparison against the record reflecting the wager from among players participating in the multi-outcome wagering event, wherein players eligible to win at least one leg are eligible to win at least one jackpot or a portion thereof;

initiating via the trading exchange module and causing display of at least one of a buy-out offer and partial buy-out offer via the respective one or more displays of the one or more wagering input devices to any number of the one or more players that are eligible to win at least one jackpot for at least a portion of said at least one jackpot, said buy-out offer or partial buy-out offer being initiated by the trading exchange module at any time before the multi-outcome wagering event has been completed;

receiving an acceptance of the buy-out offer or partial buy-out offer via the input for receiving acceptance of the one or more wagering input devices in response to input from a particular number of the players eligible to win at least one jackpot that have accepted the buy-out offer or partial buy-out offer, each of the players accepting the buy-out offer will no longer be eligible to exclusively win the at least one jackpot, wherein each of the players not accepting the buy-out offer will remain eligible to win the at least one jackpot, and wherein each of the players accepting a partial buy-out offer remains eligible to win at least a portion of the at least one jackpot;

issuing a credit, tokens, currency or an award via the user output of the one or more wagering input devices to the one or more players accepting the buy-out offer or partial buy-out offer;

completing the remainder of the defined number of legs to finish the multi-outcome wagering event;

determining if any of the players have won the at least one jackpot or portion thereof;

notifying the players that have won the jackpot or portion thereof via the one or more wagering input devices; and
issuing a credit, tokens, currency or an award to the players that have won the jackpot or portion thereof via the user output of the one or more wagering input devices.

Ex. 1001, 32:62–34:21.

F. Asserted Grounds of Unpatentability

The Petition relies on the following prior art references:

Name	Reference	Exhibit
DeWaal	US 2008/0113765 A1, published May 15, 2008	1004
Schugar	US 2008/0311981 A1, published December 18, 2008	1005

Petitioner asserts the following grounds of unpatentability:

Claim(s) Challenged	35 U.S.C. §	Reference(s)
1, 4, 5, 7–9, 13, 19, 32	102	DeWaal
1, 4–15, 17–19, 32	103	DeWaal, Schugar

Pet. 13. Petitioner submits a declaration of Dwight Crevelt (Ex. 1007, “Crevelt Declaration”) in support of its contentions. Patent Owner submits a declaration of Olaf Vancura, Ph.D. (Ex. 2001) in support of its preliminary contentions.

II. PATENTABILITY ANALYSIS

A. Principles of Law

“In an [*inter partes* review], the petitioner has the burden from the onset to show with particularity why the patent it challenges is unpatentable.” *Harmonic Inc. v. Avid Tech., Inc.*, 815 F.3d 1356, 1363 (Fed.

Cir. 2016) (citing 35 U.S.C. § 312(a)(3) (requiring *inter partes* review petitions to identify “with particularity . . . the evidence that supports the grounds for the challenge to each claim”)). Petitioner bears the burden of persuasion to prove unpatentability of each challenged claim by a preponderance of the evidence. 35 U.S.C. § 316(e). This burden never shifts to Patent Owner. *Dynamic Drinkware, LLC v. Nat’l Graphics, Inc.*, 800 F.3d 1375, 1378 (Fed. Cir. 2015). The Board may authorize an *inter partes* review if we determine that the information presented in the Petition and Patent Owner’s Preliminary Response shows that there is a reasonable likelihood that Petitioner will prevail with respect to at least one of the claims challenged in the petition. 35 U.S.C. § 314(a).

“Under 35 U.S.C. § 102 a claim is anticipated ‘if each and every limitation is found either expressly or inherently in a single prior art reference.’” *King Pharm., Inc. v. Eon Labs, Inc.*, 616 F.3d 1267, 1274 (Fed. Cir. 2010) (quoting *Celeritas Techs. Ltd. v. Rockwell Int’l Corp.*, 150 F.3d 1354, 1360 (Fed. Cir. 1998)). “Anticipation requires the presence in a single prior art disclosure of all elements of a claimed invention arranged as in the claim.” *Therasense, Inc. v. Becton, Dickinson & Co.*, 593 F.3d 1325, 1332 (Fed. Cir. 2010) (quoting *Connell v. Sears, Roebuck & Co.*, 722 F.2d 1542, 1548 (Fed. Cir. 1983)).

A reference inherently discloses an element of a claim “if that missing characteristic is necessarily present, or inherent, in the single anticipating reference.” *Schering Corp. v. Geneva Pharm.*, 339 F.3d 1373, 1377 (Fed. Cir. 2003) (citing *Cont’l Can Co. USA, Inc. v. Monsanto Co.*, 948 F.2d 1264, 1268 (Fed. Cir. 1991)). “Inherency, however, may not be established by probabilities or possibilities. The mere fact that a certain thing *may* result

from a given set of circumstances is not sufficient.” *Therasense*, 593 F.3d at 1332 (quoting *Cont’l Can*, 948 F.2d at 1269).

A patent claim is unpatentable under 35 U.S.C. § 103 if the differences between the claimed subject matter and the prior art are such that the subject matter, as a whole, would have been obvious at the time the invention was made to a person having ordinary skill in the art to which the subject matter pertains. *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 406 (2007). The question of obviousness is resolved on the basis of underlying factual determinations including (1) the scope and content of the prior art, (2) any differences between the claimed subject matter and the prior art, (3) the level of skill in the art, and (4) when in evidence, any objective evidence of nonobviousness.¹ *Graham v. John Deere Co.*, 383 U.S. 1, 17–18 (1966).

B. Level of Ordinary Skill in the Art

The level of ordinary skill in the art is “a prism or lens” through which we view the prior art and the claimed invention. *Okajima v. Bourdeau*, 261 F.3d 1350, 1355 (Fed. Cir. 2001). The person of ordinary skill in the art is a hypothetical person presumed to have known the relevant art at the time of the invention. *In re GPAC Inc.*, 57 F.3d 1573, 1579 (Fed. Cir. 1995). In determining the level of ordinary skill in the art, we may consider certain factors, including: “(1) the educational level of the inventor; (2) type of problems encountered in the art; (3) prior art solutions to those problems; (4) rapidity with which innovations are made; (5) sophistication of the

¹ At this stage of the proceeding, the parties have not directed us to any such objective evidence.

technology; and (6) educational level of active workers in the field.” *Best Med. Int’l, Inc. v. Elekta Inc.*, 46 F.4th 1346, 1353 (Fed. Cir. 2022) (citations omitted). “The patent’s purpose can also be informative.” *Id.*

Petitioner contends that a person having ordinary skill in the art at the time of the invention (“POSITA”) would have had “a bachelor’s degree in electrical engineering, computer science, or a similar field; and at least two years of experience in the wager based gaming industry.” Pet. 17–18 (citing Ex. 1007 ¶ 28). Petitioner states that “[a] person with less education but more relevant practical experience may also meet this standard.” *Id.* at 18 (citing Ex. 1007 ¶ 28).

Patent Owner does not contest Petitioner’s proposed definition of the level of ordinary skill in the art. *See generally* Prelim. Resp. We note that Patent Owner’s declarant, Dr. Vancura, uses essentially the same definition as Petitioner. *See* Ex. 2001 ¶ 34.

Based on the arguments presented and the cited references, we find Petitioner’s definition of the level of ordinary skill reasonable and for purposes of this Decision, adopt it as our own.

C. Claim Construction

In an *inter partes* review, claims are construed using the same claim construction standard that would be used to construe the claims in a civil action under 35 U.S.C. § 282(b), including construing the claims in accordance with the ordinary and customary meaning of such claims as understood by one of ordinary skill in the art and the prosecution history pertaining to the patent. 37 C.F.R. § 42.100(b). “[T]he ordinary and customary meaning of a claim term is the meaning that the term would have

to a person of ordinary skill in the art in question at the time of the invention” and “after reading the entire patent.” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1313, 1321 (Fed. Cir. 2005) (en banc). In addition to the specification and prosecution history, we also consider use of the terms in other claims and extrinsic evidence including expert and inventor testimony, dictionaries, and learned treatises, although extrinsic evidence is less significant than the intrinsic record. *Id.* at 1312–17. Usually, the specification is dispositive, and it is the single best guide to the meaning of a disputed term. *Id.* at 1315.

“The Board is required to construe ‘only those terms . . . that are in controversy, and only to the extent necessary to resolve the controversy.’” *Realtime Data, LLC v. Iancu*, 912 F.3d 1368, 1375 (Fed. Cir. 2019) (alteration in original) (quoting *Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999)).

Independent claims 1 and 32 include several limitations involving “the wager.” First, the wager is *received* “in response to input from a player desiring to participate in the multi-outcome wagering event” (“receiving recitation”). Ex. 1001, 33:25–30, 40:7–11. The claims here further recite that the wager must “coincide[] with each of the defined number of legs.” *Id.* Second, the claims then *identify* “one or more players eligible to win each of the defined number of legs based on the wager.” *Id.* at 33:39–42, 40:20–23.

Accordingly, we construe claims 1 and 32 to set out a method where the wager (1) enters the player into the event (and, thus, is set before the event) and (2) is of a nature such that it serves as the metric by which the player is evaluated at each leg to determine whether the player remains

eligible to win the event.² Neither party offers a claim construction of this term.

For purposes of this Decision, and based on the record before us, we determine that no further construction of any term is necessary.

D. Overview of the Asserted Prior Art

1. DeWaal

DeWaal discloses a gaming system that provides a bonus event to certain players. Ex. 1004, code (57). A player uses a gaming device to engage in a primary, or base, wagering game, such as video poker. *Id.* ¶ 64. Upon occurrence of a triggering event, a player is given the opportunity to participate in a bonus, or secondary, game. *Id.* ¶¶ 79–80, 109, 119. The triggering event may be, for example, exceeding a certain amount of game play or reaching a specified number of points in the primary game. *Id.* ¶ 110. Alternatively, a player may pay an entry fee to engage in the bonus game. *Id.* ¶ 118. The bonus game may be a multi-round bonus event. *Id.* ¶ 108. Participating players make selections for each leg of the multi-round event. *Id.* ¶ 119. Those players that make correct selections for each leg are eligible to receive all or a portion of an award. *Id.* Players advancing to a second or subsequent leg of the multi-round event may be presented with an

² Accordingly, we understand that claim 1 is written in a way that reads on some embodiments (*see, e.g.*, Ex. 1001, 15:14–39, describing an embodiment where the wager involves guessing the outcomes of six games and the “legs” are the outcomes of each of the underlying six games) but not all embodiments (*see, e.g., id.* at 23:44–24:3, describing an embodiment where the “legs” are the outcomes of each reel in a slot machine, and thus there is no evaluation of an initial wager to determine whether the player won at each leg—the wager is akin to an entry fee to play).

additional award in exchange for quitting their play in the event. *Id.*

¶¶ 141–142.

2. *Schugar*

Schugar discloses a wagering game that allows a player to use its equity position to alter the game. Ex. 1005 ¶ 3. Schugar recognizes that, “[w]hen [a] player is playing a game in which the player can be ‘winning’ before the game is over, the player may wish to have a way to cash in on the winning state before completing the game.” *Id.* ¶ 77. For example, if a player has bet on a horse race and the player’s chosen horse is winning, the “player may find it attractive to be able to accumulate (or ‘bank’) a portion of a positive expectation situation for later redemption.” *Id.* Schugar refers to this positive expectation as a player’s “equity” in the game. *Id.* ¶ 89. The gaming system may allow the player to choose to bank some or all of the player’s equity. *Id.* ¶ 92.

E. Petitioner’s Challenges

Petitioner argues that 1, 4, 5, 7–9, 13, 19, 32 are anticipated by DeWaal (Pet. 22–55) or, alternatively, would have been obvious in view of DeWaal and Schugar (*id.* at 55–70). In support of its showing, Petitioner relies upon the Crevelt Declaration. We have reviewed Petitioner’s assertions and supporting evidence. For the reasons discussed below, and based on the record before us, we determine that Petitioner does not demonstrate a reasonable likelihood of prevailing in showing that at least one challenged claim is unpatentable.

Independent claim 1 recites a method of conducting a multi-outcome wagering event having a defined number of legs comprising, in relevant part,

“receiving a wager . . . from a player desiring to participate in the multi-outcome wagering event, wherein the wager coincides with each of the defined number of legs” and “identifying one or more players eligible to win each of the defined number of legs based on the wager from among players participating in the multi-outcome wagering event.” Ex. 1001, 33:25–30, 33:39–42. Independent claim 32 recites a method of conducting a multi-outcome wagering event comprising substantially the same recitations. *Id.* at 40:7–11, 40:20–23. Thus, each challenged independent claim requires the wager to coincide with each of the legs of the multi-outcome wagering event and identifying players eligible to win each of the legs based on the same wager. *See* § II.C above.

Petitioner relies on DeWaal to disclose these limitations. Pet. 22–25, 35–36, 39–41, 53, 55–56. Specifically, Petitioner maps DeWaal’s bonus event to the recited multi-outcome event. *Id.* at 23 (citing Ex. 1004 ¶¶ 119, 128). Petitioner maps DeWaal’s disclosure of a player submitting “money, coins or tokens” via a wagering machine payment acceptor to the recited wager. *Id.* at 35 (citing Ex. 1004 ¶¶ 57, 94–96; Ex. 1007 ¶¶ 138, 141). Petitioner argues that this wager coincides to the legs of the bonus event “because DeWaal discloses how players of its bonus event ‘*make an input* in association with the plurality of outcomes *in each round* as indicated by block 108’ of process 100.” *Id.* (quoting Ex. 1004 ¶ 129). Continuing, Petitioner argues that DeWaal discloses identifying players eligible to win each of the bonus event legs based on the wager “because DeWaal discloses how, ‘[b]ased on the players’ input,’ its ‘central controller *designates (or causes a designation of) certain players* to advance to a subsequent round.’” *Id.* at 40 (alteration in original) (quoting Ex. 1004 ¶ 130).

Patent Owner argues that Petitioner’s reliance on DeWaal improperly combines disclosures of multiple embodiments. Prelim. Resp. 37–38. Patent Owner argues that Petitioner maps DeWaal’s bonus event to the recited multi-outcome wagering event, but Petitioner maps DeWaal’s disclosure of a player inputting a wager to participate in a primary game to the recited receiving a wager. *Id.* (citing Pet. 35). Patent Owner argues that the Petition does not provide requisite reasoning to combine teachings from disparate embodiments. *Id.* at 38.

DeWaal discloses a gaming system that provides a bonus event to certain players. Ex. 1004, code (57). A player uses a gaming device to engage in a primary, or base, wagering game. *Id.* ¶ 64. To participate, a player must make a wager on the outcome of the base game. *Id.* ¶¶ 2–3, 64. Example base games include video poker games, video blackjack games, video keno, and video bingo. *Id.* ¶ 64. The player makes a wager by inserting coins, paper money, a ticket or voucher, or a credit or debit card into a payment acceptor of the gaming device and selecting all or a portion of the inputted amount to bet. *Id.* ¶¶ 57–58. If the player’s bet wins, the player is awarded a prize according to a paytable. *Id.* ¶ 75.

A player may be provided the opportunity to participate in a bonus, or secondary, game upon the occurrence of a triggering event. Ex. 1004 ¶¶ 79–80, 109, 119. The triggering event may be, for example, exceeding a certain amount of game play or reaching a specified number of points in the primary game. *Id.* ¶ 110. The bonus game may be a multi-round bonus event. *Id.* ¶ 108. Participating “players must pick a designated outcome (i.e., a winning outcome) in each round to win all or a share of an award associated with the bonus event.” *Id.* ¶ 119; *see also id.* ¶ 129 (“Based on

the players' input, the central controller designates (or causes a designation of) certain players to be ineligible (i.e., if the player's input is associated with the losing outcome) and eliminates (or causes an elimination of) those players from the bonus event . . .”).

As noted above, Petitioner maps DeWaal's base game wager to the recited wager. Pet. 35. However, Petitioner does not explain adequately how this wager “coincides with each of the defined number of legs” of DeWaal's bonus game (which Petitioner maps to the recited multi-outcome wagering event (*id.* at 23)) as required by the challenged claims. Rather, Petitioner refers to the player's input for each round of bonus game. *Id.* at 35. As explained above, DeWaal discloses that a player's selection of a winning outcome for each round of the bonus game is independent of the wager made by the player in the base game. As acknowledged by Petitioner's declarant, Mr. Crevelt, DeWaal's wager allows “a player [to] qualify for the bonus game,” but “players of the bonus event must also ‘make an input in association with the plurality of outcomes in each round as indicated by block 108’ in FIG. 3.” Ex. 1007 ¶ 141 (quoting Ex. 1004 ¶ 129).

Nor has Petitioner explained adequately how DeWaal identifies “players eligible to win each of the defined number of legs” of the bonus game “based on the wager” as required by the challenged claims. Rather, Petitioner again refers to the player's input for each round of the bonus game. Pet. 40. The wager in DeWaal is the bet placed to play the initial game, which occurs prior to the multi-round bonus event. Ex. 1004 ¶ 83. That wager does not, however, serve to identify a winner of a leg of DeWaal's bonus game. Instead, players advance by making separate

choices at each leg of the bonus game. *See, e.g., id.* ¶¶ 119, 127. That is, it is those choices, not the wager, that determines whether the player advances at each leg. As such, we are not persuaded DeWaal describes “identifying one or more players eligible to win each of the defined number of legs based on the wager” as required by the challenged claims.

Petitioner makes brief reference to “a cash out offer” that a player may accept during play of the bonus game. Pet. 41. To the extent that Petitioner intends to map DeWaal’s offer of an additional award to advancing players to quit the bonus event (*see* Ex. 1004 ¶ 141; *see also* Pet. 26 (citing same)) to the recited wager, we are not persuaded by such a mapping. DeWaal discloses that, after each round of the bonus game, the central controller may offer advancing players an opportunity to quit the bonus game in exchange for an award. Ex. 1004 ¶¶ 141–143. Petitioner does not explain adequately how such separate offers made by DeWaal’s central controller after each round—or even a player’s acceptance of one of those offers—“coincides with *each of the defined number of legs*” or allows “players eligible to win *each of the defined number of legs*” to be identified as required by the challenged claims. Moreover, Petitioner acknowledges that such a mapping does not apply to the final round of the bonus game. *See* Pet. 41 (“a player may accept a cash out offer *prior to the last round*” (emphasis added)).

For at least the foregoing reasons, Petitioner has not shown sufficiently that DeWaal discloses or teaches a wager as recited in independent claims 1 and 32. Petitioner’s reliance on Schugar to teach a partial buy-out offer does not correct this deficiency. *See* Pet. 55–58.

Therefore, Petitioner does not demonstrate a reasonable likelihood of prevailing in showing that the challenged claims are unpatentable.

III. DISCRETIONARY DENIAL

Patent Owner argues that we should discretionarily deny institution of *inter partes* review under 35 U.S.C. § 325(d) because DeWaal was submitted to the Office during prosecution of the application resulting in the '338 patent. Prelim. Resp. 40–41. Patent Owner also argues that we should discretionarily deny institution of *inter partes* review under 35 U.S.C. § 314(a) in view of the Delaware litigation. *Id.* at 41–44. Because we determine that the Petition fails to set forth a reasonable likelihood that Petitioner would prevail with respect to its challenge to the '338 patent, we do not reach Patent Owner's arguments that we should exercise discretion to deny institution.

IV. CONCLUSION

For the foregoing reasons, we are not persuaded that the Petition establishes a reasonable likelihood that Petitioner would prevail in any of its challenges to claims 1, 4–15, 17–19, and 32 of the '338 patent.

V. ORDER

In consideration of the foregoing, it is hereby ordered that the Petition is *denied*, and no trial is instituted.

IPR2023-00265
Patent 9,704,338 B2

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