

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

DK CROWN HOLDINGS INC. (FORMERLY DRAFTKINGS INC.), A
DELAWARE CORPORATION,
Petitioner,

v.

DIOGENES LIMITED,
Patent Owner.

Case IPR2023-00266

Patent 10,970,969

PETITIONER'S MOTION TO EXCLUDE EVIDENCE

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I. INTRODUCTION

Pursuant to 37 C.F.R. § 42.64(c), Petitioner DK Crown Holdings, Inc., (formerly “DraftKings, Inc.”) a Delaware Corporation (“DraftKings”), moves to exclude Exhibits 2036 and 2037¹ and ¶¶63 and 65-68 of Exhibit 2016 (“Vancura Declaration”).

Exhibits 2036 and 2037 are filings from a different *inter partes* review proceeding, which Patent Owner Diogenes, Ltd. (“PO”) submitted for the first time with its Sur-Reply (Paper 24 (“Sur-Reply”)) in support of new arguments raised therein. These materials are “new evidence” and should therefore be excluded under 37 CFR § 42.23(b). PO was aware of these materials three months before it filed the POR but failed to include them with that brief. Not only are these materials irrelevant to the arguments raised in any prior briefing, but they are also misleading and confusing, and their probative value, if any, is outweighed by prejudice to DraftKings, who is unable to respond to these materials or the corresponding new arguments on their merits with briefing. *See generally* Fed. R. Evid. 401, 402, and 403.

¹ Exhibits 2036 and 2037 and the new arguments raised in PO’s Sur-Reply are also subject to Petitioner’s forthcoming motion to strike, which was recently authorized by the Board. *See* Paper 25.

Paragraphs 63 and 65-68 of Dr. Vancura's Declaration (Exhibit 2016) should also be excluded. There, Dr. Vancura relies on a "definition of 'cash out'" that DraftKings' expert, Mr. Crevelt, allegedly provided during his deposition. Vancura Declaration, ¶63. But Mr. Crevelt provided no such "definition." Dr. Vancura's testimony is therefore based solely on misquoted portions of Mr. Crevelt's testimony, not any reliable principles and methods as required under FRE 702. That testimony is also not based on any facts or data for the very same reason and therefore does not satisfy the requirements of FRE 703.

II. LEGAL STANDARD

The Federal Rules of Evidence govern the admissibility of evidence submitted in the context of *inter partes* review proceedings before the Patent Trial and Appeal Board (the "Board"). *See* 37 C.F.R. § 42.62(a) ("[e]xcept as otherwise provided in this subpart, the Federal Rules of Evidence shall apply to a proceeding"). A motion to exclude evidence before the Board is a two-step process: (1) a party must timely serve written objections to the challenged evidence (37 C.F.R. § 42.64(b)(1) ("Once a trial has been instituted, any objection must be filed within five business days of service of evidence to which the objection is directed. The objection must identify the grounds for the objection with sufficient particularity to allow correction in the form of supplemental evidence.)); and (2) a party must preserve its objection by filing a motion to exclude (37 C.F.R. § 42.64(c) ("A motion to exclude evidence

must be filed to preserve any objection. The motion must identify the objections in the record in order and must explain the objections. The motion may be filed without prior authorization from the Board.”)).

A. Admissibility of Expert Testimony

FRE 702 governs the admissibility of expert testimony and provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. The proponent of expert testimony bears the burden to demonstrate its admissibility and must do so by a preponderance of the evidence. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 n.10 (1993); *Bourjaily v. United States*, 483 U.S. 171 (1987).

FRE 703 further provides that “[a]n expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed.” FRE 703 should not be used as a “backdoor to allow the admission of otherwise inadmissible...materials.” *Wi-LAN Inc. v. Sharp Elecs. Corp.*, 992 F.3d 1366, 1375 (Fed. Cir. 2021) (internal citations omitted).

B. Admissibility of Non-Testimonial Exhibits

Section 42.23(b) provides that “[a] sur-reply may only respond to arguments raised in the corresponding reply and *may not be accompanied by new evidence* other than deposition transcripts of the cross-examination of any reply witness.” 37 CFR § 42.23(b) (emphasis added). FRE 401, 402, and 403 further govern the admissibility of relevant evidence. FRE 401 provides the test for relevant evidence: “Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” Fed. R. Evid. 401. FRE 402 further provides that relevant evidence is admissible unless the United States Constitution, a federal statute, these rules, or other rules prescribed by the Supreme Court provide otherwise.” Fed. R. Evid. 402. Finally, FRE 403 outlines that the “court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid. 403.

III. EXHIBITS 2036 AND 2037 SHOULD BE EXCLUDED

A. Exhibits 2036 and 2037 Are Untimely, Misleading, and Prejudicial

Exhibits 2036 and 2037 should be excluded under Section 42.23(b) and FRE 401-403 as being improper, irrelevant, and unduly prejudicial because they are newly added evidence in a sur-reply. *See* 37 C.F.R. § 42.23(b); *see also* Consolidated Trial Practice Guide 73, <https://www.uspto.gov/TrialPracticeGuideConsolidated>

(stating that a “sur-reply that raises a new issue or belatedly presents evidence may not be considered”). PO’s belated submission of these materials violates the bright-line rule that new evidence is ***not permitted*** in a sur-reply . *Id.*; *see also Ford Motor Company v. Safe Driving Technologies LLC*, IPR2021-01446, Paper 28 at 83 (confirming that submitting new evidence in a sur-reply without prior authorization is not permitted by Board rules or guidance).

PO had the opportunity to address these documents in its POR but chose not to. For example, Exhibit 2036 was served electronically on PO on June 22, 2023, but PO did not include it in the POR it submitted ***three months later*** on September 29, 2023. *See generally* Paper 13. Instead, PO waited to include this evidence after DraftKings filed its Reply. Such belated introduction of evidence leaves DraftKings with no opportunity to address these materials on the merits.

PO’s inclusion of new evidence in its Sur-Reply goes against the well-recognized intended purpose of Section 42.23(b). *See FedEx Corporate Services, Inc., v. Roambee Corporation*, IPR2022-00934 Paper 41 at 9 (explaining that Section 42.23(b) “serves to minimize the possibility of undue prejudice to a party due to the introduction of new evidence”). Exhibits 2036 and 2037 should be excluded because they unfairly prejudice DraftKings and their inclusion is unquestionably not in compliance with 37 C.F.R. § 42.23(b).

Exhibits 2036 and 2037 should also be excluded because they are irrelevant to any timely raised arguments and are misleading under FRE 401 and 402. Specifically, these materials are from a different IPR proceeding (IPR2023-00265), which involved a different application of the DeWaal reference as to different claim limitations of a different patent. Critically, while the patent at issue in IPR2023-00265 is related to the '969 Patent at issue here, the Challenged Claim limitations involving the term “wager” are distinct. For example, the Challenged Claims here do not recite that “the wager must ‘coincide[] with each of the defined number of legs,’” which the Board panel in the -00265 IPR case relied on in construing the term “wager.” Ex. 2036 at 11-12. Here, neither party, nor the Board in its Institution Decision, proffers any similar construction.

PO’s citation to this new evidence attempts to paint these two different proceedings in the same light and glosses over key distinctions. These exhibits should be excluded because they are not relevant to any timely arguments, were introduced late, are prejudicial to DraftKings, and have the propensity to confuse, rather than assist, the Board in issuing its decision.

B. DraftKings Timely Objected to Exhibits 2036 and 2037

DraftKings timely objected to this evidence under 37 C.F.R. § 42.23(b) and Rules 401, 402, and 403, in compliance with 37 C.F.R. § 42.64(b)(1), including an identification of the bases for objection with sufficient particularity. *See* Paper 27 at

1-2 (identifying the exhibits and bases for objections). Accordingly, DraftKings' Motion to Exclude is supported by timely and sufficient objection.

IV. DR. VANCURA'S CLAIM CONSTRUCTION TESTIMONY (EX. 2016) SHOULD BE EXCLUDED

A. The Vancura Declaration (Exhibit 2016) is Unreliable, Inaccurate and Relies on an Improper Basis

Paragraphs 63 and 65-68 of the Vancura Declaration should be excluded because they rely almost entirely on a misquoted excerpt of Mr. Crevelt's deposition testimony. Dr. Vancura set forth a claim construction of the term "cash out offer" that includes "providing ... funds to the player for discretionary use." Ex. 2016, ¶68. While Dr. Vancura has since disavowed the vast majority of his initial claim construction opinion, the portion of his original construction regarding "discretionary use" is still present in his revised construction.² In support of this aspect of his construction, Dr. Vancura states the following:

Petitioner's expert stated during his deposition that the *definition* of "cash out" *that he used in his declaration's analysis* was 'providing funds to the player for his discretionary use.' EX 1027, 14:2-5.

² During cross-examination, Dr. Vancura substantially altered all aspects of his proposed construction of the term "cash out offer" except for the portion identified here that recites "providing ... funds to the player for discretionary use." *See* Ex. 1069; Reply, 6. Dr. Vancura's revised construction therefore does not cure his improper reliance on Mr. Crevelt's misquoted testimony.

Ex. 2016, ¶63 (citing Ex. 2017). Thus, Dr. Vancura relies primarily on a “definition” allegedly provided by Mr. Crevelt to support this aspect of his construction.

The problem with Dr. Vancura’s testimony is that Mr. Crevelt never testified as to such a “definition of ‘cash out,’” nor did he testify that he used any such meaning “in his declaration’s analysis.” Instead, the totality of the cited portion of Mr. Crevelt’s testimony is reproduced below:

Question: What about if the credit could only be used to make another wager, would that be considered a cash out?

[Objection]

Mr. Crevelt: If you’re providing funds to the player for his discretionary use, whether it’s for another wager or something else, yes, that would be a cash out.

Ex. 2017, 13:20 – 14:5. This is not a claim construction or limiting definition. Nothing in Mr. Crevelt’s testimony stated or implied that “discretionary use” was a requirement (as opposed to a possible example) of a “cash out.” Mr. Crevelt was merely responding to an improperly phrased question (which DraftKings objected to) by explaining that cashed out funds should not be limited and can instead be used in a variety of ways. In fact, the response merely shows that Mr. Crevelt answered in the affirmative (“yes”) when asked “if the credit could only be used to make

another wager, would that be considered a cash out.” His response was inclusive, and not a limiting definition, as Dr. Vancura contends.³

The Vancura Declaration’s reliance on this misquoted portion of Mr. Crevelt’s testimony is unreliable and should be excluded under FRE 703. None of the Vancura Declaration is based on “opinion on facts or data...that the expert has been made aware of or personally observed.” Fed. R. Evid. 703. Instead, it is centered around Mr. Crevelt’s misquoted opinion (e.g., “Petitioner’s expert stated during his deposition that...”; “As acknowledged by Petitioner’s expert...”; “Petitioner’s expert could not recall the...”). Ex. 2016, ¶¶63, 65, 67. But paraphrasing an

³ Indeed, Mr. Crevelt’s use of the term “discretionary” to describe “cash out” funds in other portions of his testimony confirms his broad understanding of the term. *See, e.g.*, Ex. 2017, 17:20-18:4 (**Question**: “What if the player did not take the cash out of this – out of the game and is always required to reuse whatever he cashed out to play another came, would you consider that cash out?” **Mr. Crevelt**: “*Yes, I would because the funds are discretionary.*”), 29:3-9 (**Question**: “Are credits that are only to be used in order to pay for an additional wager discretionary funds?” **Mr. Crevelt**: “*They are discretionary because the player would have the option of what kind of wager he would like to make.*”). And Dr. Vancura himself conceded that Mr. Crevelt repeatedly used the term “discretionary” to refer to “the situation where the funds were restricted to only allow the user to place additional wagers.” Ex. 1058, 330:2-8. Mr. Crevelt’s testimony thus contradicts, and does not support, Dr. Vancura’s construction.

unsupported rendition of an opposing expert's statements is not a basis for rendering an opinion admissible. Indeed, Dr. Vancura's testimony here is decidedly not based on any personal observations or opinions of the facts and data relevant to the case as required FRE 703.

Moreover, Dr. Vancura does not cite to anything that corroborates the misquoted "definition" allegedly offered by Mr. Crevelt, or that otherwise demonstrates that his interpretation is grounded in "sufficient facts or data," or that it is the "product of reliable principles and methods." Fed. R. Evid. 702(b), (c). *See* Fed. R. Evid. 402; *see also* 37 C.F.R. § 42.65(a); CTPG at 35 ("Expert testimony that does not disclose the underlying facts or data on which the opinion is based is entitled to little or no weight."); *Toshiba Corp., v. Optical Devices, LLC*, IPR2014-01447, Paper 34 at 41 (P.T.A.B. Mar. 9, 2016) (giving no "persuasive weight" to expert's testimony that did not support reasoning). While Dr. Vancura broadly alleges that his construction is "consistent with the teachings of the '969 Patent," the only portions of the '969 Patent cited by Dr. Vancura that could potentially corroborate his testimony go to "**when** an offer to buy-out a ticket holder will be made"—not whether the disbursed funds are "discretionary," or provided **without restriction on use**. *See* Ex. 2016, ¶64 (citing Ex. 1001, 10:56-61). And Dr. Vancura does not ground his interpretation of "cash out" as being "discretionary" in any sort of knowledge gained through experience in the relevant field. That is to say, Dr.

Vancura’s support for the “discretionary” aspect of his construction are solely based on an improper reading of Mr. Crevelt’s testimony. Such erroneous and unsupported opinions should be excluded.

B. DraftKings Timely Objected to Dr. Vancura’s Declaration

DraftKings timely objected to the Vancura Declaration (Exhibit 2016) as improper expert testimony under Rules 702 and 703 in compliance with 37 C.F.R. § 42.23(b), including an identification of the bases for objection with sufficient particularity. *See* Paper 14 at 1 (identifying the exhibit and bases for objections). Accordingly, Petitioner’s Motion to Exclude is supported by timely and sufficient objection.

V. CONCLUSION

For the above reasons, Petitioner submits that Exhibits 2036 and 2037 and portions of the Vancura Declaration (Ex. 2016) should be excluded from the record.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this paper complies with the type-volume limitation of 37 C.F.R. § 42.24 because it is less than 15 pages, excluding the parts of the paper exempted by 37 C.F.R. § 42.24(a).

BAKER BOTTS L.L.P.

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Lead Counsel for Petitioner

Date: February 29, 2024

CERTIFICATE OF SERVICE

The undersigned hereby certifies on this 29th day of February, that true and correct copies of the foregoing **PETITIONER’S MOTION TO EXCLUDE EVIDENCE PURSUANT TO 37 C.F.R. § 42.64(c)** were served in their entirety on the following parties via electronic mail:

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