

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE PATENT TRIAL AND APPEAL BOARD

DK CROWN HOLDINGS INC.,

Petitioner

v.

DIOGENES LIMITED,

Patent Owner

IPR2023-00266

U.S. Patent No. 10,970,969

**PATENT OWNER'S OPPOSITION
TO PETITIONER'S MOTION TO EXCLUDE**

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I. Introduction

Petitioner seeks to preclude the Board from considering its own decision in a previous *inter partes* review that (a) involves the same parties, (b) asserts the same prior art, (c) concerns the same patent family (Petitioner concedes the patents at issue are “related”), and (d) implicates the same claim element—a “wager”. Petitioner also raises new and unfounded objections to portions of Patent Owner’s expert evidence. Both aspects of Petitioner’s motion should be denied.

Petitioner’s objection to EX2036 and EX2037 puts form over substance. The Board is entitled to, and should, consider its previous decision addressing some of the same questions it is being asked to address in this proceeding, including whether Petitioner’s asserted DeWaal reference can be mapped onto the claimed “wager” of the ‘969 Patent. Despite the Board already determining this issue in Patent Owner’s favour in another proceeding, Petitioner made the same argument in its Reply here. Whether considered as “evidence” or as a matter for official notice, the Board can and should consider its prior decisions to avoid the risk of inconsistent findings.

Petitioner’s objections to portions of Dr. Vancura’s testimony are also unfounded. Dr. Vancura did not “misquote” Mr. Crevelt. Even if there were any foundation to Petitioner’s objection, it would go to weight, not admissibility. The Board can review each expert’s evidence and weigh it appropriately to reach a just result.

II. Petitioner's Motion to Exclude EX2036 and EX2037 Should Be Denied

a. EX2036 and EX2037 from IPR2023-00265 are Relevant

EX2036 and EX2037 are two papers from IPR2023-00265; EX2037 is the Petition and EX2036 is the Board's decision denying institution.

As Petitioner notes, IPR2023-00265 was a "related proceeding between the parties". *See* Paper 29, p. 3. It was initiated by the same Petitioner on the same date and asserting the same prior art—Schugar and DeWaal—as this proceeding. Petitioner in IPR2023-00265 asserted that US Patent No. 9,704,338 (an earlier patent in the same family as the '969 Patent) was invalid for anticipation by DeWaal or obviousness over DeWaal in view of Schugar.

In IPR2023-00265, Petitioner argued that DeWaal and Schugar "are analogous art because they are each directed to cashing out a wager before the completion of a multi-leg wagering event using a networked electronic betting system." *See* EX2037, p. 21. This is the same argument Petitioner makes in this proceeding, as recently as in its Reply: "Schugar and DeWaal are analogous art because both are directed to cashing out a wager before the completion of a multi-leg wagering event using a networked electronic betting system". *See* Paper 21, Petitioner's Reply, p. 17.

However, the Board in IPR2023-00265 has already rejected Petitioner's argument that DeWaal is "directed to cashing out a wager". On the contrary, the

Board concluded that DeWaal's bonus game (where Petitioner contends the "cash out offer" is found) has nothing to do with a wager.

In IPR2023-00265, the Board found the challenged independent claims of Patent Owner's '338 Patent "require[] 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 EX2036, p. 14 (emphasis added).

The Board rejected Petitioner's contention that DeWaal's identification of players eligible to win the bonus game was based on the wager. Specifically, the Board found that "[t]he wager in DeWaal is the *bet placed to play the initial game*, which occurs prior to the multi-round bonus event" and "[t]hat wager *does not*...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*" or, in other words, "it is those choices, *not the wager*, that determine[] whether the player advances at each leg." See EX2036, pp. 16-17 (emphases added). The Board made the same finding in rejecting Petitioner's argument that DeWaal disclosed a "cash out offer" as claimed: "[t]o the extent that Petitioner intends to map DeWaal's offer of an additional award to advancing players to quit the bonus event to the recited wager, we are not persuaded by such a mapping." See EX2036, p. 17 (internal citations omitted). In other words, any "cash out offer" in DeWaal is not connected to any "wager".

In its motion to exclude, Petitioner argues that that the Board's denial decision from IPR2023-00265 is "irrelevant." *See* Petitioner's Motion to Exclude, Paper 28, p. 4. Petitioner argues that the Board's finding in IPR2023-00265 involves a "different application" of DeWaal to "different claim limitations of a different patent", specifically with respect to the claimed "wager". *Id.*, p. 6.

But, like the related '338 Patent, the claims of the '969 Patent concern *a wager* on *a wagering event*. DeWaal's bonus game—as the Board has already found—does not. Yet, Petitioner here urges the Board to accept that DeWaal teaches "cashing out *a wager* before the completion of *a* multi-leg *wagering event*." *See* Petition, pp. 20-21; *see also* Paper 21, Petitioner's Reply, p. 17. (emphases added)

The Board has already addressed these arguments. To avoid the risk of an inconsistent finding here, the Board can and should refer to its earlier decisions and Petitioner's already-rejected arguments. EX2036 and EX2037 are relevant.

b. Petitioner's Argument Emphasizes Form over Substance; Official Notice of Adjudicative Facts is Appropriate in any Event

Petitioner also seeks the exclusion of EX2036 and EX2037, characterizing them as "new evidence other than deposition transcripts of the cross examination of any reply witness." *See* Petitioner's Motion to Exclude, Paper 28, p. 4. But EX2036 and EX2037 are not submitted as "new evidence". They are adjudicative facts, demonstrating merely (a) that Petitioner has made the same arguments it makes here before and (b) that those arguments were rejected by this Board.

The Board is empowered to take official notice of EX2036 and EX2037 in IPR2023-00265. The Board may “take [official] notice on its own or must take [official] notice if a party requests it and the court is supplied with the necessary information.” *See* FRE 201(c) and 37 CFR § 42.62. *See also, e.g., Google LLC v Jenam Tech LLC*, IPR2021-00627, Paper 39 at p. 4 (Board taking official notice of other IPR proceedings between the same parties involving substantially the same issues). Further, the Board may take official notice at any stage of a proceeding. *See* FRE 201(d) and 37 CFR § 42.62.

Here, official notice is necessary to avoid inconsistent decision-making and to promote efficiency and fairness in the proceeding. EX2036 and EX2037 reflect adjudicative facts relating to the same parties, concerning the same prior art, and involving closely related issues. Their source, *i.e.* an IPR before this Board, can be accurately and readily determined. *See* FRE 201(b) and 37 CFR § 42.62.

Contrary to Petitioner's submissions, there is no absolute prohibition on any new documents ever being introduced with a sur-reply—as demonstrated, for example, by the case law Petitioner relies on in its co-pending motion to strike. *See* Paper 29, p. 2. In *Samsung*, relied upon by Petitioner at page 2 of its motion to strike, the Patent Owner sought to introduce with its sur-reply eight documents not previously tendered: (a) correspondence between the Patent Owner and a third party, (b) a recently-filed motion in District Court litigation, (c) a book by Petitioner's

expert, and (d) a pending complaint Patent Owner commenced against a third party more than a year before the petition, and the proof of service of that complaint. Despite finding that none of the impugned exhibits were “deposition transcripts of a reply witness” and thus “under the plain language of the rule should not have been filed with the Sur-reply”, **and** finding with respect to the exhibits in category (d) that the Patent Owner “fail[ed] to provide any explanation at all of its failure to submit these exhibits with the Patent Owner Response”, the Board denied Petitioner’s motion to exclude the exhibits in category (d), because “it would be in the interest of justice to admit [them] in order to have a complete record.” *See Samsung Electronics Co., Ltd. v. Communication Technologies, Inc.*, IPR2022-01221, Paper 85, pp. 4-7 (Sept. 14, 2023).¹

EX2036 and EX2037 are not new evidence. There is no bright line rule precluding documents reflecting adjudicative facts, and it is in the interest of justice to admit these exhibits in order to have a complete record. Even if they were “new evidence”, their exclusion would be inconsequential. They should be considered as a matter of official notice in any event.

¹ Petitioner, in its co-pending motion to strike, omits this aspect of *Samsung*, stating only that the Board “grant[ed] petitioner’s Motion to Strike new exhibits in sur-reply that patent owner ‘could have filed [...] with its Response’ but did not and offered no authorization or good cause for the late submission”. *See* Paper 29, p. 2.

c. EX2036 and EX2037 are Timely and Not Prejudicial

Petitioner also complains that Patent Owner was “aware of these materials three months before it filed the POR [Patent Owner’s Response] but failed to include them with that brief”, and that the materials’ “probative value, if any, is outweighed by prejudice to [Petitioner], who is unable to respond to these materials or the corresponding new arguments on their merits with briefing.” Petitioner’s Motion to Exclude, Paper 28, p. 1. These submissions have no merit.

When it filed the POR, Patent Owner could not have foreseen that Petitioner would, in its Reply, choose to double down on the very same arguments about DeWaal that the Board had rejected in IPR2023-00265. It was that unforeseen choice that prompted Patent Owner to place EX2036 and EX2037 before the panel. If there is any prejudice to Petitioner, it stems from this choice of theirs, and not from Patent Owner’s effort to ensure a complete record. Petitioner has known of the other proceedings and outcomes all along.² The Board’s prior determinations regarding DeWaal should be considered in this proceeding.

² Indeed, Petitioner sought rehearing of the Board’s decision denying institution in at least one proceeding it lost, IPR2023-00268, but did not do so in IPR2023-00265.

III. Petitioner's Motion to Exclude Portions of the Vancura Declaration Should Be Denied

Petitioner's motion to exclude paragraphs 63 and 65-68 of the Vancura Declaration should be denied. To the extent Petitioner's submissions have any merit (which is denied), their objections go to weight, not admissibility. The Board is capable of reviewing the evidence of both experts in the case and weighing them appropriately to reach a just result.

a. Petitioner's Objections are Unfounded

Petitioner says 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". Petitioner's Motion to Exclude, Paper 28, p. 7.

There is no misquote. In paragraph 63, Dr. Vancura accurately quotes Mr. Crevelt's own phrase, "providing funds to the player for his discretionary use", which he links to "cash out" in the same answer. EX2016, ¶63. The quoted words appear verbatim in Mr. Crevelt's deposition transcript. EX2017, 14:2-3 and 5.

What Petitioner really objects to is how Dr. Vancura *reads* this portion of Mr. Crevelt's evidence – *i.e.*, as providing a definition of "cash out" (which Dr. Vancura agrees with and notes is consistent with the '969 Patent's teachings). EX2016, ¶63. Petitioner dislikes Dr. Vancura's reading but goes beyond urging the Board to read this evidence differently; it seeks to exclude it from the record altogether. See, *e.g.*, Paper 28, p. 8-9 ("This is not a claim construction or a limiting definition..."; "[Mr.

Crevelt's] response was inclusive, and not a limiting definition, as Dr. Vancura contends.") But disliking Dr. Vancura's opinion, and preferring to characterize Mr. Crevelt's evidence differently, is not a proper basis for objection.

As to paragraphs 65-68, these portions of Dr. Vancura's evidence do not even purport to quote (much less misquote) Mr. Crevelt's testimony, so Petitioner's objection cannot be sustained. EX2016, ¶¶65-68.

Paragraphs 65-67 simply identify areas of apparent agreement between the two experts, in an effort to assist the Board. Again, Petitioner's real objection seems to be that it disagrees with how Dr. Vancura reads Mr. Crevelt's evidence. But the Board will be entitled to its own interpretation, and Petitioner's disagreement with Dr. Vancura does not make his evidence unfair or objectionable. Saying over and over that Dr. Vancura has "misquoted" Mr. Crevelt does not make it so.³

³ Notably, although Petitioner's motion accuses Dr. Vancura at least six times of "misquot[ing]" Mr. Crevelt, its notice of objection delivered in accordance with 37 CFR § 42.64(b)(1) did not raise that objection at all. *See* Paper 14, p. 1 (alleging that the objected-to testimony "...is based on insufficient facts or data, is not the product of reliable principles and methods, and does not reliably apply the appropriate principles and methods to the facts of the case. For example, the testimony is based on cross-examination testimony from DraftKings' expert ... that is ***taken out of context, does not support the proposition it is relied upon to establish***, and is inadmissible on its own independent bases as, for example, ***stemming from vague and confusing questioning***." (emphases added).

Paragraph 68, on its face, states Dr. Vancura's own opinion as to the construction of the '969 Patent claims ("The claimed cash out offer, *in my understanding*, requires ..."). EX2016, ¶68 (emphasis added). Petitioner utterly fails to explain why this clear statement of Dr. Vancura's own views, grounded in the patent and the evidence before the Board, should be excluded.

Accordingly, Petitioner has failed to establish that any of the objected-to paragraphs should be excluded from the record.

b. Petitioner's Objections Go to Weight, Not Admissibility

In any event, Petitioner's objections to how Dr. Vancura characterizes and responds to Mr. Crevelt's testimony go to weight, not admissibility. Petitioner's own brief underlines this point:

"... 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)."

See Paper 28, p. 10 (emphases added).

The Board, by Petitioner's motion, has Petitioner's argument on how the evidence should be interpreted. It is capable of reviewing both experts' testimony and forming its own conclusions. If it agrees that Dr. Vancura has fairly interpreted Mr. Crevelt's evidence, the Board can give appropriate weight to that interpretation

in its analysis. If it agrees with Petitioner that Dr. Vancura has unfairly paraphrased or “misquoted” Mr. Crevelt’s statements, it can disregard the objected-to paragraphs or give them little weight. There is no need to exclude them.

IV. Conclusion

For these reasons, Petitioner’s motion to exclude EX2036 and EX2037 and paragraphs 63 and 65-68 of the Vancura Declaration should be denied. In any event, the Board should take official notice of EX2036 and EX2037.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6, I hereby certify that on March 7, 2024, the foregoing Patent Owner's Opposition to Petitioner's Motion to Exclude was served via email on the following counsel of record for Petitioner.

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CERTIFICATE OF COMPLIANCE

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

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