

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 REPLY IN SUPPORT OF MOTION TO EXCLUDE
EVIDENCE**

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I. Introduction

As set forth in DraftKings’ Motion to Exclude (Paper 28, “Mot.”), PO’s Exhibits 2036 and 2037 should be excluded as new, untimely, and prejudicial, and the portions of Dr. Vancura’s Declaration that rely on a misquoted “definition” that Mr. Crevelt never offered should be excluded as improper expert testimony. In opposition, PO (1) misinterprets “adjudicative facts” as a means to introduce untimely arguments and evidence in contravention of Board rules, (2) improperly advances and even expands upon merits arguments untimely raised in its Sur-Reply, and (3) quibbles with the technicalities of whether attributing a “definition” to someone who never provided that definition is a “misquote.” *See generally* Paper 30 (“Opp.”). But PO fails to address the underlying procedural deficiencies and prejudice to DraftKings that render these materials improper and unreliable. The challenged materials should therefore be excluded.

II. Argument

A. Exhibits 2036 and 2037 Should Be Excluded

Exhibits 2036 and 2037 are “new evidence other than deposition transcripts of the cross examination of any reply witness,” which the Board’s rules expressly prohibit in a Sur-Reply. 37 C.F.R. §42.23(b); Mot., 4-5. PO attempts to excuse its admittedly belated introduction of these materials by recharacterizing them as “adjudicative facts.” Opp., 6-8. PO’s attempt to evade the Board’s clear rules should be rejected.

First, PO contends that FRE 201 allows the Board to take official notice “at *any* stage of the proceeding,” such that PO’s failure to introduce the arguments and evidence in its Patent Owner Response should be excused. Opp., at 7¹. But PO fails to confront the Board’s clear prohibition on the introduction of “belated” evidence in a Sur-Reply. Consolidated Trial Practice Guide (“CTPG”), 74 (“...a reply or sur-reply that raises a new issue or *belatedly presents evidence* may not be considered.”). Critically, PO provides no reason that it could not have presented this evidence (and related argument) in its Patent Owner Response. Indeed, PO tacitly admits it knew of the materials three months prior to filing its Response. The materials are thus “belatedly present[ed] evidence” under the Board’s rules and should be excluded.

Second, PO’s reliance on *Google LLC v Jenam Tech LLC*, IPR2021-00627 (“Google I”) is misplaced. Opp., 7. In Google I, the Board took official notice of related proceedings, including an entry of adverse judgment against patent owner in IPR2021-00629 (“Google II”), in connection with evaluating a motion for collateral estoppel. *See* Google I, Paper 39, 2-4.² But the adverse judgement from the related Google II proceeding issued three months *after* Google submitted its Reply in Google I. *See* Google II, Paper 30 (Granting Adverse Judgment dated July 18, 2022);

¹ Emphasis added throughout unless otherwise noted.

² The Board also took official notice of other related proceedings raised in the POR (Google I, Paper 13), as well as other “concurrently decided” final decisions.

Google I, Paper 13 (Reply dated April 29, 2022). The materials in Google I were not “belatedly presented” because they did not exist prior to Google’s reply, and Google presumably had good cause to raise them in the later-filed motion for collateral estoppel because they could not have been addressed in the reply. Here, the opposite is true. PO could easily have submitted the challenged materials and made its related Sur-Reply arguments in its Response because it had access to Exhibits 2036 and 2037 three months before its Response date.

Third, under the guise of allegedly addressing “relevance,” PO improperly reiterates and expands upon its Sur-Reply argument that DeWaal allegedly fails to disclose “cashing out a wager” on a “wagering event.” Opp., 4-6. These arguments were improper and untimely when introduced in PO’s Sur-Reply and are likewise improper, untimely, and off-topic now, when resubmitted and expanded upon in responding to a Motion to Exclude. *See, e.g.*, CTPG, 79 (“sufficiency of the evidence to prove a particular fact” is not at issue in a motion to exclude). These improper merits arguments should be ignored.

Fourth, PO’s contention that the Board’s institution decision in the -00265 IPR is a “adjudicative fact” that forecloses Petitioner’s argument as to analogousness of DeWaal and Schugar is simply wrong. Opp., 4-6. Tellingly, PO’s Sur-Reply ignores the test for “analogous prior art,” which merely requires showing that references are within the same “field of endeavor.” *See Innovention Toys, LLC v.*

MGA Ent., Inc., 637 F.3d 1314, 1321 (Fed. Cir. 2011) (“Two separate tests define the scope of analogous art: (1) whether the art is from the same field of endeavor, regardless of the problem addressed, and (2) if the reference is not within the field of the inventor's endeavor, whether the reference still is reasonably pertinent to the particular problem with which the inventor is involved.”). DeWaal and Schugar are unquestionably within the same field of endeavor of wager-based gaming systems, and nothing in PO’s untimely exhibits demonstrates otherwise.

As discussed in the Motion, the Board’s decision in the -00265 IPR is irrelevant, not only to the threshold question of “analogousness,” but also as to the other issues involved in this case. The -00265 IPR involved *different* claim limitations resulting in a *different* claim construction of the term “wager.” Mot., 6. PO confuses the issue of whether DeWaal discloses the Board’s construction of limitations recited *only in the claims at issue in the 00265 IPR* (and not recited in any claims challenged here) with the issue of whether the DeWaal and Schugar are “analogous.” Since the issues between cases are so different, no consistency in decision making would be achieved through admission of Exhibits 2036 and 2037.

B. Dr. Vancura’s Claim Construction Opinions Should be Excluded

PO misses the point by focusing on whether Dr. Vancura “accurately quotes Mr. Crevelt’s own phrase.” Opp., 10. DraftKings is not asserting that Dr. Vancura incorrectly reproduced portions of Mr. Crevelt’s transcript, but rather that Dr.

Vancura attributes Mr. Crevelt as saying something—*i.e.*, providing a “definition” of the term “cash out”—that Mr. Crevelt never said, and then bases his claim construction opinion almost exclusively on that misquoted notion. To be clear, Mr. Crevelt never testified to a “definition of ‘cash out’” that provides “funds to the player for discretionary use” and “without any conditions or requirements that the player be in a particular game state.” *Contra* EX2016, ¶¶63, 68.

For its part, PO appears to distance itself from the interpretation by admitting that this is merely “how Dr. Vancura *reads* Mr. Crevelt’s evidence” to form his “own opinion as to the construction of the ’969 Patent claims.” Opp., 11-12. However, PO fails to address the underlying principles, methods, or other support used by Dr. Vancura to render that opinion. The opinions Dr. Vancura expresses in paragraphs 63 and 65-68 of his declaration are supported by an inaccurate and incorrect “reading” of evidence, and should be excluded, or at least be given little weight.

III. CONCLUSION

For the above reasons, Petitioner respectfully requests that the Board grant Petitioner’s motion to exclude Exhibits 2036 and 2037 and portions of the Vancura Declaration (Ex. 2016).

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies on this 14th day of March, that true and correct copies of the foregoing **PETITIONER'S REPLY IN SUPPORT OF MOTION TO EXCLUDE EVIDENCE** were served in their entirety on the following parties via electronic mail:

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