UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SONY INTERACTIVE ENTERTAINMENT LLC,
Petitioner

v.

QUANTUM IMAGING LLC,
Patent Owner

IPR2023-00995
Patent 10,846,941

PATENT OWNER'S MOTION TO EXCLUDE

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I. Relief Requested

Patent Owner Quantum Imaging LLC ("Quantum") asks the Board to exclude from the record inadmissible exhibits submitted by Petitioner Sony Interactive Entertainment LLC ("Sony"). It is not enough for the Board to find that this Motion is moot if the Board does not rely on the inadmissible exhibits in reaching its Final Written Decision. If these exhibits remain in the record, Sony could continue to rely on them on appeal to the Federal Circuit, and Quantum would be unfairly forced to face them again.

II. Ex. 1004 Should be Excluded in Its Entirety or Certain Paragraphs

Quantum timely objected to the entirety of Ex. 1004 as well as certain portions thereof (i.e., ¶¶ 66-70 [uncited], 72-84 [Reply, 9-10, 12-13], 89 [uncited], 95 [uncited], 97-114 [Pet., 38, Reply, 29], 115-116 [uncited], 117 [Reply, 31], 118-119 [uncited], 120-122 [Pet., 16], 123-126 [Pet., 17-18, 35], 127-137 [Pet., 21], 138-139 [Pet., 22], 140-146 [Pet., 22], 147-148 [Pet., 25], 150-153 [Pet., 23, 25], 157 [Pet., 25], 160-164 [Pet., 26, Reply, 17], 170-175 [Pet., 28], 178 [Pet., 28–29], 180-182 [Pet., 30], 187 [Pet., 30-31], 190 [Pet., 31], 193-197 [Pet., 31], 198-212 [Pet., 32-35, Reply, 19], 214 [Pet., 35-36], 215-217 [Pet., 35-36], 218-220 [Pet., 36], 221-225 [Reply, 31], 226-227 [Pet., 39-40], 228-230 [Pet., 40, 42], 231-234 [Pet., 44, 50-51], 235-237 [Pet., 46], 238-241 [Pet., 47-48, Reply, 26, 29-30], 242-245 [Pet., 49], 247-250 [Pet., 49-50], 253-256 [Pet., 50-52], 259 [Pet., 52], 262 [Pet., 53], 265 [Pet., 54],

268 [Pet., 54], 271-272 [Pet., 55], 275 [Pet., 55-56], 277-282 [Pet., 56-57], 283-290 [Pet., 58], 292-294 [Pet., 58-59], 295-297 [Pet., 59], 298-300 [Pet., 59], 301-304 [Pet., 60])[1] under Fed. R. Evid. ("FRE") 702, 703, 801, 802, 805, and 901. (Paper 13, pp.1-6) Sony chose not to respond to Quantum's objection to the admissibility of Ex. 1004. The Board should, therefore, exclude Ex. 1004 in its entirety or at least the outlined paragraphs for the detailed reasons outlined in pp. 1-6 of Paper 13 and, more particularly, for the reasons set forth below.

A. Under FRE 702 and 703

Quantum objects to Ex. 1004 in its entirety (or the following paragraphs ¶¶ 66-70, 72-84, 95, 97-114, 115-148, 150-153, 157, 160-164, 170-175, 178, 180-182, 187, 190, 193-197, 198-212, 214, 215-245, 247-250, 253-256, 259, 262, 265, 268, 271-272, 275, 277, 278, 280-290, 278-290, 283-290, and 292-304) according to FRE 702 and 703 as the declarant, Mr. David Crane ("Crane"), fails to provide sufficient underlying facts or data upon which the statements contained therein could legitimately be based, violating FRE 702. Crane has also not "reliably applied the principles and methods to the facts of the case," and his expert opinions are not "the product of reliable principles and methods," thereby violating FRE 702. Ex. 1004 is

[1] The page number in brackets following the paragraph number (i.e., "[Pet. ___]") indicates where in the Petition (Paper 2) or its Reply (Paper 31) Sony relied thereon.

used throughout Sony's Petition to support the alleged invalidity of all of the challenged claims according to Grounds 1 and 2.

As one example of how Ex. 1004 violates FRE 702/703, in ¶¶ 117-119, Crane attempts to provide a basis for why a POSITA would have been motivated to combine certain hearsay and unauthenticated background information with the Pisanich prior art reference to arrive at Quantum's claimed invention. In so opining, Crane provides no legal principles, framework, analysis, or methods for his conclusory opinion (1) why a POSITA would have been motivated to combine the alleged background information with the Pisanich reference, or (2) why a POSITA would have had a reasonable expectation of success in doing so. In another example, in ¶¶ 198-212, Crane failed to provide any independent analysis for his opinion that independent claim 23 was invalid other than cursory citation to prior paragraphs sprinkled throughout his report that themselves include nothing more than conclusory statements untethered to any "reliable principles and methods." While the test for determining obviousness under *KSR* is flexible, bald conclusory opinions of obviousness are insufficient. *KSR International Co. v. Teleflex Inc.*, 550 U.S. 398, 415 (2007); *see also, In re Magnum Oil Tools Int'l, Ltd.,* 829 F.3d 1364, 1380 (Fed. Cir. 2016) ("To satisfy its burden of proving obviousness, a petitioner cannot employ mere conclusory statements. The petitioner must instead articulate specific reasoning, based on evidence of record, to support the legal conclusion of

obviousness.") Crane provided no legal basis for his expert analysis that all of the challenged claims were invalid in light of the supposed knowledge of a POSITA in combination with the Pisanich prior art reference. As such, Ex. 1004 is inadmissible and should be excluded.

B. Under FRE 802 and 805

Ex. 1004 in its entirety, or at least ¶¶ 72-84, 97-114, 117, 215-217, 221-245, 247-250, 253-256, 259, 262, 265, 268, 271-272, 275, 277-278, 280-290, 295-304, is inadmissible under FRE 802 and 805 for containing hearsay and/or hearsay within hearsay and should be excluded as Ex. 1004 contains out-of-court statements offered to prove the truth of the matter asserted. FRE 801. For example, the information provided by Crane in ¶¶ 72-84 includes descriptions and screenshots of manuals for and alleged use of flight simulator programs obtained by Crane from various online repositories, including www.mobygames.com (*Id.*, p. 29, n. 1) and www.oldgamesdownload.com (*Id.*, p. 30, n. 2). Crane offers these screenshots for the truth of what they disclose despite being out-of-court statements and, therefore, hearsay. Furthermore, Crane uses this evidence to prove the truth of the information contained therein–classic hearsay within hearsay. Further, Crane cites in ¶¶ 97-116 to Ex. 1008, which contains out-of-court statements that Crane offers for the truth of the matters asserted as discussed below.

C. Under FRE 901

Ex. 1004 in its entirety, or at least ¶¶ 72-84, 89, 97-114, 117, 120-122, 127-137, 147-148, 215-217, 221-225, 226-245, 247-250, 253-256, 259, 262, 265, 268, 271-272, 275, 277-278, 280-290, 295-304, is inadmissible under FRE 901 as it relies upon or recites evidence (i.e., Ex. 1008) for which no sufficient basis has been provided to support a finding that the item is what the proponent claims it is as required for authentication under FRE 901. As discussed below, Ex. 1008 is inadmissible as Sony has not properly authenticated the evidence despite Quantum's timely objection thereto. The admission of all paragraphs within Ex. 1004 that cite, relate, rely on, or otherwise refer to Ex. 1008 are inadmissible.

D. Additional Grounds to Exclude Ex. 1004

Paragraphs of Ex. 1004 that were not explicitly and clearly relied upon by Sony, its expert, or Quantum should be excluded per 37 C.F.R. §42.104(b)(5). These portions include, without limitation, ¶¶ 66-70, 89, 95, 115-116, and 118-119. These pages were not relied on by any of the parties in this proceeding and, thus, are irrelevant because they lack relevance and fail to support a patentability challenge. FRE 402. Accordingly, their probative value is substantially outweighed by a danger of prejudice and confusion. FRE 403.

III. The Board Should Exclude Ex. 1008

Quantum timely objected to the admissibility of Ex. 1008 (Paper 13, pp. 6-8), and Sony chose not to respond to these objections. *See*, 37 C.F.R. § 42.64(b)(2). Thus, in determining the admissibility of Ex. 1008, the Board must rely solely on the evidence provided with Sony's Petition. *See Standard Innovation Corp. v. LELO, Inc.,* IPR2014-00148, Paper 41, pp. 8-9 (P.T.A.B. Apr. 23, 2015) (distinguishing the *admissibility* of evidence from the *sufficiency* of evidence, and finding that a petitioner failed to introduce timely supplemental evidence to support admissibility). *See also TRW Automotive U.S. LLC, v. Magna Electronics Inc.,* IPR2014-01348, Paper 25 (P.T.A.B. January 15, 2016); and *Riverbed Technology, Inc. et al., v. Realtime Data LLC*, IPR2016-00978, Paper 67 (P.T.A.B. October 30, 2017).

A. Under Fed. R. Evid. 901

Ex. 1008 lacks authentication and is, therefore, inadmissible and should be excluded by the Board. Sony submitted Ex. 1009, a Declaration of Alexander Harry ("Harry"), with its Petition to which Quantum also timely objected as inadmissible (Petition p. 36, *see below*) in an apparent attempt to authenticate Ex. 1008. FRE 901. As discussed below, Ex. 1009 cannot authenticate Ex. 1008, nor is Ex. 1008 self-authenticating. As such, it is inadmissible and should be excluded. Sony relies upon Ex. 1008 to support its second grounds of invalidity for which the Board instituted this proceeding.

Ex. 1008 is not a patent. On its face, it purports to be a user manual for the online multi-player game "Phantasy Star Online" (Ex. 1008, p. 1) and bears a copyright notation of "(C)SEGA CORPORATION, 2000." (Ex. 1008, p. 33.) In its Petition, Sony alleged that Ex. 1008 qualifies as prior art to the challenged claims as it was "distributed publicly at least as early as March 31, 2001," as illustrated by the 2000 copyright notice by SEGA Corporation. (Petition, p. 36-37.) As Ex. 1008 is not self-authenticating, Sony must produce evidence to support a finding that Ex. 1008 is what it alleges to be. FRE 901. To the extent that it relies on the copyright date, it is well settled that the mere appearance of a date on a document does not establish when it was available to or disseminated to the public. *See, e.g., L-3 Communication Holdings, Inc. v. Power Survey, LLC,* IPR2014-00832, Paper 9, p. 11 (P.T.A.B. Nov. 14, 2014; *see also In re Lister*, 583 F.3d 1307, 1316-17 (Fed. Cir. 2019); *Neutrino Dev Corp. v. Sonosite Inc.*, 337 F. Supp. 2d 937, 947 (S.D. Tex. 2004), *aff'd*, 210 Fed. App'x 991 (Fed. Cir. 2006). Thus, the 2000 copyright date on the face of the PSO Manual is insufficient to authenticate per FRE 901 that the document is what Sony claims it to be–i.e., a publicly available document from 2000 (and undoubtedly inadequate to show that Ex. 1008 was "distributed publicly at least as early as March 31, 2001" as Sony has alleged in its Petition).

In addition to Ex. 1008's copyright date, Sony submitted with its Petition Ex. 1009 as the sole basis of authenticating Ex. 1008 as a true and correct copy of a game

manual allegedly "distributed publicly at least as early as March 31, 2001." (Petition, p. 36-37; *See* Ex. 1009, ¶¶11–12.) The declarant describes himself as "an analyst with Global Technology Transfer Group ('GTT')" and a registered U.S. patent agent "with fifteen years of experience in patent practice, including drafting and prosecuting patents and ensuring positive relationships, with a wide range of clients." (*Id.*, ¶2). Harry is neither a records custodian for Sega nor the person responsible for archiving or retrieving Sega's video game manuals or versions thereof. Notably, Harry did not testify that he consulted with people who were records custodians of Sega or that he had any knowledge of Sega's video game packaging and distribution practices when the Phantasy Star Online game was purportedly sold or distributed.

Harry did testify that he ordered a copy of the Phantasy Star Online videogame, which purportedly included a copy of a game player manual (a copy of which is allegedly reproduced as Ex. 1008), for the Sega Dreamcast gaming console from an individual seller on the e-commerce website eBay. (*Id.*, ¶6.) Nothing suggests that the particular seller from which Sony obtained the video game and Ex. 1008 was trustworthy or someone unconnected with this IPR proceeding or underlying litigation. Nothing in the record indicates the eBay seller's particular business practices; for example, whether he obtains one or more items separately

and then seals them together to create the products he sells on eBay. Pointedly, Harry stated in his cross-examination that he did not know the seller. (Ex. 2012, 26:22-24).

Harry also acknowledged that there were marks on the front and back of Ex. 1008 that could be due to wear (Ex. 2012, 54:7-55:2, 61:12-62:3), contrary to his unequivocal statement that the Manual was part of an unopened game "original from the factory." (Ex. 1009, ¶8.) Accordingly, there is no basis for Harry's statement in ¶12 of Ex. 1009 that "Based on the integration of the [Ex. 1008] into the product packaging, it is my opinion based on my professional experience that [Ex. 1008] would have been provided by SEGA with all copies of the [game] that were sold." Harry cannot authenticate that Ex. 1008 is what Sony claims it to be–i.e., a document "distributed publicly at least as early as March 31, 2001"—and it is inadmissible under FRE 901.

B. Under Fed. R. Evid. 802

Further, the copyright notice relied on by Sony to evidence the publication date is hearsay, does not fall within any exception, has no guarantees of trustworthiness, and is therefore inadmissible under FRE 802. A copyright notice alone is insufficient to establish public accessibility as of a particular date. *See ServiceNow, Inc. v. Hewlett–Packard Co.*, IPR2015–00716, Paper 13 at 17 ("[w]e are not persuaded that the presence of a copyright notice, without more, is sufficient evidence of public accessibility as of a particular date.") (*citing LG Electronics, Inc.*

v. Advanced Micro Devices, Inc., IPR2015-00329, Paper 13 at 10–13). To the extent that Sony is attempting to rely on the 2000 copyright date appearing in Ex. 1008 to establish that it was "distributed publicly at least as early as March 31, 2001," (1) the copyright date is a statement; (2) the statement was not made while testifying at the Board; and (3) Sony is attempting to use the copyright date statement to prove that Ex. 1008 was distributed publicly at least as early as March 31, 2001. The Board should exclude Ex. 1008 as it is hearsay and hearsay within hearsay, for which no exception applies. FRE 802, 803, and 805.

Sony attempts to overcome the hearsay deficiency of Ex. 1008 by noting other admittedly "circumstantial evidence" (Pet., Paper 2, p. 38, n. 4), including reference to promotional advertising and additional **copyright statements** about the game Sonic Adventure 2, referenced on page 19 of Ex. 1008, as well as other video game industry publications that discuss the Phantasy Star Online game. *Id.* However, this "circumstantial evidence" is also hearsay, hearsay within hearsay, unauthenticated statements, and does not save Ex. 1008 from being inadmissible. While Sony may attempt to counter these grounds of inadmissibility using later filed evidence, such as Ex. 1024, such evidence was not timely submitted according to the rules after Quantum's timely filed objections of December 26, 2023 (Paper 13).

C. Under FRE 401, 402, and 403

Evidence is relevant if (1) it has any tendency to make a fact more or less probable than it would be without the evidence and (2) the fact is of consequence in determining the action. FRE 401. Only prior art patents and printed publications may form the basis of a challenge in an *inter partes* review. 35 U.S.C. § 311(b). Sony bears the burden of proving that a document is a "printed publication" by showing that the document was publicly accessible to persons concerned with the art to which the document relates. *In re Weyer*, 655 F.2d 221, 227 (C.C.P.A. 1981); *see also L-3 Comm.,* IPR2014-00832, Paper 9 at 11. Because Sony provides no admissible evidence that Ex. 1008 was publicly accessible as a printed publication, Sony fails to establish that Ex. 1008 is relevant as a prior art printed publication under 35 U.S.C. § 102(b) (pre-AIA). FRE 401. As such, it is irrelevant under FRE 401 and inadmissible under FRE 402.

IV. The Board Should Exclude Ex. 1009

Quantum timely objected to the admissibility of Ex. 1009 (Paper 13, pp. 8-10). Sony chose not to respond to these objections. *See*, 37 C.F.R. § 42.64(b)(2). As indicated above, Sony relies on Ex. 1009 to attempt to authenticate Ex. 1008, which serves as the basis for its invalidity position in ground 2 instituted by the Board.

A. Under FRE 701, 702, and 703

First, to the extent that Harry does not claim to be an expert, he has provided improper lay witness opinions, which constitutes grounds for exclusion. *See,* FRE 701. Harry is a patent agent and lacks the appropriate technical qualifications to testify as a lay opinion witness regarding video game materials' authentication or public availability. (*See*, Ex. 1009, Att. A.) Similarly, Harry's attempts at expert witness opinions also fail as he provides insufficient underlying facts or data upon which his opinions could legitimately be based. FRE 702. In attempting to provide expert witness opinions, he failed to "reliably [apply] the principles and methods to the facts of the case," and any so-called expert opinions are not "the product of reliable principles and methods." *Id*.

B. Under FRE 602

To the extent Harry proffers statements about matters outside the scope of his personal knowledge, such testimony is inadmissible. FRE 602. For instance, in ¶ 8 of Ex. 1009, Harry attempts to provide an opinion concerning the condition of the Phantasy Star Online DVD he procured, asserting that it arrived encased in "cellophane wrap [that] appeared to be intact and original from the factory." Similarly, in ¶ 12 of Ex. 1009, Harry states an **unsupported opinion as fact** that Sega would have included Ex. 1008 with every unit of the Phantasy Star Online video game. However, nowhere in Ex. 1009 does Harry testify he was a records custodian for Sega or responsible for archiving or retrieving Sega's video game

manuals or versions thereof. Moreover, Harry did not testify that he had any personal knowledge of Sega's video game packaging and distribution practices when Phantasy Star Online was purportedly sold or distributed or that he contacted or consulted people who did.

C. Under FRE 802 and 805

Ex. 1009 is inadmissible under FRE 802 and 805 to the extent it contains or relies on out-of-court statements offered for the truth of the matters asserted. For example, Ex. 1009 recites various third-party video game industry magazines and online articles to prove the existence or publication of Ex. 1008 on a particular date. (*See,* Ex. 1009, ¶¶ 13–16.) The third-party materials included in Ex. 1009 are inadmissible hearsay and hearsay within hearsay to the extent Sony relies on such statements to prove the date Ex. 1008 was available and/or publicly disclosed.

D. Under FRE 401, 402, and 403

Finally, Quantum further objects to the admissibility of Ex. 1009 under FRE 401, 402, and 403 to the extent its contents (e.g., ¶¶1–8, 9(a)–(b), 10–12, and 17) are not cited in the Petition and are not identified by Sony as relevant to the issues in this proceeding. *See Symantec Corp. v. Rpost Comms. Ltd.,* IPR2014-00353, Paper 15 (PTAB July 15, 2014). Ex. 1009 is irrelevant and, therefore, inadmissible.

V. The Board Should Exclude Ex. 1017

Quantum timely objected to the admissibility of Ex. 1017 (Paper 32, pp. 1-2). Sony chose not to respond to these objections. Ex. 1017 is inadmissible under FRE 106 because Petitioner cherrypicked portions of the *Microsoft Computer Dictionary, Fifth Edition,* and failed to include all related parts "that in fairness ought to be considered at the same time." Finally, Quantum objects to the admissibility of Ex. 1017 as neither Sony nor its expert explicitly and clearly relied upon it per 37 C.F.R. § 42.104(b)(5).

VI. The Board Should Exclude Ex. 1024

Quantum timely objected to the admissibility of Ex. 1024 (Paper 32, pp. 1-2). At the outset, it appears that Sony has improperly offered Ex. 1024 in an attempt to bolster the authenticity of Ex. 1008. (Reply, Paper 31, pp. 20-22) Quantum properly objected to the admissibility of Ex. 1008 on authenticity, hearsay, and other grounds on December 23, 2023 (Paper 13, pp. 6-8). Sony had ten (10) days from December 23, 2023 (i.e., January 2, 2024) to provide supplemental evidence according to 37 C.F.R. § 42.64(b)(2) to support the admissibility of Ex. 1008. **Sony chose not to submit supplemental evidence in response to Quantum's objections.** As such, to the extent that Ex. 1024 attempts to authenticate or otherwise overcome Quantum's first objection to the admissibility of Ex. 1008 (*see, e.g.,* Reply, Paper 31, p. 20-22), the time to do so has run, and Sony is precluded from offering Ex. 1024 for this

purpose. Accordingly, to the extent that Ex. 1024 is inadmissible as irrelevant to the current proceedings under FRE 401, the Board should wholly exclude it.

VII. Conclusion

For the preceding reasons, the Board should exclude Sony's Exhibits 1004 (or certain ⁋ therein), 1008, 1009, 1017, and 1024.

Date: August 19, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2024, I caused a true and correct copy of the foregoing Patent Owner's Motion to Exclude to be served via electronic mail to Sony-Quantum-IPR@mofo.com upon the following attorneys of record for the Petitioner:

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