

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SONY INTERACTIVE ENTERTAINMENT LLC
Petitioner,

v.

QUANTUM IMAGING LLC
Patent Owner.

U.S. Patent No. 10,991,165

Inter Partes Review No. IPR2023-00996

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

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I. INTRODUCTION

Petitioner Sony Interactive Entertainment provides this Opposition to Patent Owner Quantum Imaging LLC's Motion to Exclude (Paper 42; "Motion").

Quantum presents no proper basis to exclude five exhibits, including 208 paragraphs of Mr. Crane's declaration (Ex. 1004). It instead uses its Motion to improperly argue the *weight* of these exhibits. The Motion should be denied in all respects.

II. ARGUMENT

A. Legal Standard

As the moving party, Quantum "has the burden of proof to establish that it is entitled to the requested relief." (37 C.F.R. § 42.20(c).) On a motion to exclude, that burden is high given the unique nature of a Board proceeding. As the Board has noted, "[t]he policy considerations for excluding expert testimony, such as implemented by the gatekeeping framework established by the Supreme Court in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1973), are less compelling in bench proceedings such as inter partes reviews than in jury trials." *Fujan Newland Computer Co., Ltd. v. Hand Held Products, Inc.*, IPR2013-00595, Paper 52, at 15 (Feb. 18, 2015) (citations omitted). Rather, the "general approach" of the Board is to leverage its "administrative expertise" to "determine and assign the appropriate weight" to all evidence presented. *Pelican Biothermal, LLC v. VA-QTEC AG*,

PGR2021-00085, Paper 35, 30–31 (PTAB June 16, 2023). This approach is guided by “strong public policy” that supports making “all information filed in a non-jury, quasi-judicial administrative proceeding available to the public.” *K-40 Elecs., LLC v. Escort Inc.*, IPR2013-00203, Paper 46, 6 (PTAB Aug. 27, 2014).

B. The Crane Declaration (Ex. 1004) Should Not Be Excluded

Quantum moves to exclude Ex. 1004 under 37 C.F.R. § 42.104(b)(5), Fed. R. Evid. (FRE) 702-703, FRE 802 and 805, FRE 901, and FRE 402. For the reasons stated below, none of these objections stands.

First, Quantum argues that the Board is limited to the evidence provided with Sony’s Petition, and thus cannot consider Ex. 1024, which was provided with Sony’s Reply Brief. (Motion, 6.) Quantum is mistaken. The Board recognized that there “may be opportunities” for Petitioner to introduce declaration evidence in support of Ex. 1008 during the trial. (Paper 23 at 6 (citing *Hulu LLC v. Sound View Innovations, LLC*, IPR2018-01039, Paper 29 at 12-16 (PTAB Dec. 20, 2019))). As Section II.F explains, Sony properly utilized one such opportunity.

Quantum is again mistaken when it seeks to exclude Ex. 1004 under § 42.104(b)(5). First, the admissibility of exhibits submitted in a PTAB proceeding is governed by the Federal Rules of Evidence. 37 C.F.R. § 42.62(a); *Sipnet EU S.R.O. v. Straight Path IP Group, Inc.*, IPR2013-00246, Paper 63 at 2 (PTAB Oct. 9, 2014). Second, even if § 42.104(b)(5) applies, the rule does not

require exclusion of the challenged evidence; instead, the rule is “merely permissive” and “does not mandate the exclusion of evidence that is not directly cited in a Petition.” *Google Inc. v. Intellectual Ventures II LLC*, IPR2014-01031, Paper 41, 13-14 (PTAB Dec. 7, 2015).

Next, Quantum argues without support that portions of Ex. 1004 “that were not explicitly and clearly relied upon” are irrelevant under FRE 402-403. (Motion, 5.) But the Federal Circuit and the Board have recognized that there is a “low threshold for relevancy.” *Laird Techs., Inc. v. GrafTech Int’l Holdings, Inc.*, IPR2014-00025, Paper 45 at 44 (PTAB Mar. 25, 2015) (citing *OddzOn Prods., Inc. v. Just Toys, Inc.*, 122 F.3d 1396, 1407 (Fed. Cir. 1997).) The challenged portions of Ex. 1004 meet this low threshold at least by providing necessary context to Ex. 1004 as to what was generally known and understood in the field.

Quantum’s attempt to exclude portions of Ex. 1004 discussing Ex. 1008 under FRE 901 is also deficient. Quantum merely cites to the Motion’s discussion of Ex. 1008 and does not advance any independent argument supporting the exclusion of Ex. 1004. As discussed below in Section II.C, Ex. 1008 is both relevant and admissible, and Ex. 1004 permissibly relies on its contents.

Neither can Quantum exclude Ex. 1004 under FRE 702 and 703. First, Quantum’s broad and conclusory list of 208 paragraphs for exclusion disregards § 42.64(c), under which “the motion ... must explain the objections.” (Motion, 2.)

For only 26 such paragraphs does Quantum even attempt an explanation. *Id.*, 3. Second, Quantum’s arguments go to the weight and sufficiency of Mr. Crane’s declaration, not its admissibility. But the Consolidated Trial Practice Guide is clear that “[a] motion to exclude is not a vehicle for addressing the weight to be given evidence—arguments regarding weight should appear only in the merits documents.” (CTPG, 79.) As an administrative tribunal with expertise in resolving invalidity disputes of the type presented here, the Board can determine and assign appropriate weight to the evidence presented. *See supra Pelican Biothermal.*

Quantum’s objections under FRE 702 should also be rejected. Mr. Crane is qualified to testify as an expert, based at least on his education and extensive experience in the games industry. (Ex. 1004, ¶¶5-20; Ex. 1005.) And his testimony is based on reliable principles and methods and sufficient facts and data that he has personally known or observed. (Ex. 1004, ¶¶ 117-119, 198-212; *see* FRE 702(b)-(d); 703.) As set forth in Ex. 1004, and confirmed in his deposition, Mr. Crane’s analysis consistently applied the correct legal standard: each of the Petition’s grounds is based on a single prior art reference in view of the POSITA’s knowledge. (Petition, 4-5; *see, e.g.*, Ex. 1004, ¶¶ 117-19, 223-225; Ex. 2011, 134:4-139:25; 152:2-176:11.) Moreover, there was no failure to consider or describe differences: Mr. Crane testified that he “analyz[ed] differences”

alongside similarities (Ex. 2009, 159:23-160:2); and, as demonstrated by the Petition, there are no differences between the claimed subject matter and the prior art in view of the POSITA's knowledge. Ex. 1004 is thus admissible.

Quantum additionally seeks to exclude Ex. 1004 and its cited materials under FRE 802 and 805. But FRE 802 and 805 are inapplicable here: in an IPR proceeding, an expert declaration constitutes "direct testimony," not out-of-court hearsay. *Johns Manville Corp. v. Knauf Insulation, Inc.*, IPR2016-00130, Paper 35 at 19 (PTAB May 8, 2017) (citing 37 C.F.R. § 42.53(a)). Furthermore, the facts and data underlying an expert's testimony do not need to be independently admissible. *Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 711 F.3d 1348, 1373 (Fed. Cir. 2013); *see also L-3 Commc'ns Holdings, Inc. v. Power Survey, LLC*, IPR2014-00836, Paper 68 at 30 (PTAB Nov. 23, 2015). An expert may properly rely on hearsay evidence in forming his opinion. *See* FRE 703; *Fox Factory, Inc. v. SRAM, LLC*, IPR2016-01876, Paper 59 at 56 (PTAB April 2, 2018) (finding hearsay objection without merit and denying motion to exclude).

In any event, although Mr. Crane could have properly relied on hearsay evidence in his declaration, he does not: the descriptions and screenshots Quantum identifies are not hearsay, because they are being offered as evidence of what they describe, not for the truth of the matter asserted. *See* FRE 801(c) 1972 Adv.

Comm. Note (“If the significance of an offered statement lies solely in the fact that it was made . . . the statement is not hearsay.”).

C. Quantum Incorrectly Seeks The Exclusion Of Ex. 1008 (the Phantasy Star Online Manual)

Quantum seeks to exclude Ex. 1008, the Phantasy Star Online Manual prior art reference (“PSO manual”), under FRE 901, 802, and 401-403. Quantum’s attempts should be rejected.

Sony has met its burden of showing that Ex. 1008 is the same PSO manual that was publicly available. With respect to FRE 901, the rule sets forth a “low bar” for authentication and requires only a rational basis that the evidence is what it is asserted to be. *See, e.g., Advanced Micro Devices, Inc. v. Aquila Innovations, Inc.*, IPR2019-01526, Paper 37 at 99 (PTAB Mar. 10, 2021); *United States v. Turner*, 934 F.3d 794, 798 (8th Cir. 2019). The prior art may be authenticated solely on the testimony of a knowledgeable witness. *Valve Corp. v. Ironburg Inventions Ltd.*, IPR2017-00858, Paper 68 at 42-43 (PTAB Feb. 28, 2019) (rejecting motion to exclude document authenticated by “person with personal knowledge of [its] publication”), *rev. in part on other grounds*, 8 F.4th 1364, 1373 (Fed. Cir. 2021).

Here, Exhibit 1008 has been authenticated by Alexander Harry, who personally obtained and examined the PSO manual; and by Monika Hudgins, a former employee of the PSO manual’s publisher who has direct personal

knowledge of that company's publishing practices and is identified by name in the PSO manual itself. The Harry declaration and deposition testimony (Exs. 1009, 2013) and the Hudgins declaration (Ex. 1024) provide a rational basis that Ex. 1008 is what it is asserted to be, especially in view of the PSO manual's additional indicia of authenticity, including a copyright notice dated 2000 and an announcement for a future game "coming 2001." (Ex. 1008.)

Mr. Harry stated in his declaration and deposition testimony that he purchased a copy of the game Phantasy Star Online from eBay, that the game and its manual arrived in "fully intact" cellophane wrap that appeared to be original from the factory, and that Ex. 1008 is an identical copy of the manual he received. (Ex. 1009, 6-12; Ex. 2013, 38:6-39:8.) Mr. Harry also provided various public supporting documents from 2000 and 2001, corroborated by Nathan White of the Internet Archive as to their archival and retrieval. (Ex. 1011.)

Noting minor cosmetic wear on the 23-year old paper manual that Mr. Harry purchased, Quantum disputes Mr. Harry's entire basis for his conclusions regarding Ex. 1008. But Mr. Harry testified to multiple plausible explanations for the minor cosmetic wear: degradation of the paper manual over 23 years; artifacts from scanning the manual; or wear from opening the manual after it was received. (Ex. 2013, 61:22-62:3, 54:18-55:2.) Any is sufficient to establish a rational basis for Mr. Harry's conclusions. To the extent Quantum disagrees with

Mr. Harry's conclusions or their interpretation, the disagreement goes to the weight of the evidence, not to its admissibility.

The Hudgins declaration further corroborates Mr. Harry's observations and conclusions regarding Ex. 1008. Ms. Hudgins, a former Sega employee, translated and wrote the manual for the U.S. version of Phantasy Star Online, having completed it in December 2000 and provided the PSO manual for processing and printing for its January 2001 public release. (Ex. 1024, ¶¶1-2.) Ms. Hudgins confirms, based on her personal knowledge, that Ex. 1008 is a true and correct copy of the manual that she prepared in 2000. (Ex. 1024, ¶2.) Notably, Quantum failed to cross-examine Ms. Hudgins or to dispute that her declaration, in view of the Harry and White declarations and the indicia of Ex. 1008 itself, support a *rational basis* that Ex. 1008 is what it is purported to be. Ex. 1008 is admissible.

With respect to FRE 802, Quantum's motion notably is limited only to the copyright notice, dated 2000, apparent from Ex. 1008; Quantum does not challenge the remainder of Ex. 1008 under FRE 802. (Motion, 9-10.) Quantum's argument should be rejected in any event because the copyright notice is not hearsay: it is not offered for the truth of the matter stated, but instead for the fact that it was applied to the PSO manual. FRE 801(c)(2); *See* FRE 801(c) 1972 Adv. Comm. Note ("If the significance of an offered statement lies solely in the fact that it was made . . . the statement is not hearsay."). That is, Sony does not attempt to show that the

PSO manual is in fact copyrighted; only that the PSO manual's copyright statement was made in 2000, before the priority date of the '941 patent.

This showing is supported by Ex. 1024, in which Ms. Hudgins explains that the copyright notice is "consistent with [her] recollection of the timing for the preparation and completion" of the PSO Manual. (Ex. 1024, ¶4.) Quantum failed to cross-examine Ms. Hudgins and does not dispute her understanding of the copyright notice. Furthermore, the copyright notice is only one of multiple pieces of evidence supporting the authenticity of Ex. 1008; even if the Board were to find the copyright notice inadmissible, it would not support the exclusion of Ex. 1008 in view of Ex. 1009, Ex. 1024, and other elements of Ex. 1008 (*e.g.*, the "Coming 2001" advertisement on the final page).

And with respect to FRE 401-403, Quantum fails to advance an argument for excluding Ex. 1008 other than disputing that it constitutes a prior art printed publication.¹ Sony has sufficiently established that Ex. 1008 is a prior printed publication, as discussed above. And Quantum cannot dispute that Ex. 1008, as the prior art publication that forms the basis for Ground 2 of Sony's Petition, is relevant to the proceeding under FRE 401 and admissible under FRE 402.

¹ Although Quantum's heading references FRE 403, Quantum does not argue that Ex. 1008 should be excluded under FRE 403. (Motion, 10.)

D. Quantum Incorrectly Seeks The Exclusion Of Ex. 1009 (the Harry Declaration)

Quantum seeks to exclude Ex. 1011 under FRE 602 and 701-703. As an initial matter, FRE 702 and 703 are inapplicable: nowhere does Sony proffer Mr. Harry as an expert under FRE 702 and 703. To the contrary, Mr. Harry testified that he is a layperson “consumer” with a typical level of knowledge on game cases and wrappers. (*See, e.g.*, Ex. 2013, 37:10-12; 39:17-20; and 42:13-16.)

Ex. 1011 is properly admissible under FRE 602 because Mr. Harry has personal knowledge of the copy of the PSO manual and case that he ordered. (*See, e.g.*, Ex. 1011 ¶¶ 6-12.) Mr. Harry testified that he personally ordered a copy of the Phantasy Star Online game, received a package containing the game, inspected and removed the heat-sealed cellophane wrap, and inspected the contents, which included the PSO manual. (*Id.*) He personally consulted websites, industry magazine articles and product pages and testified as to his perception and comprehension of these public documents. (*See, e.g.*, Ex. 1011 ¶¶ 13-16.) Mr. Harry testifies based on this personal knowledge under FRE 602.

Even if Ex. 1011 included Mr. Harry’s opinions, they would be admissible as lay opinions under FRE 701. A lay opinion is admissible when it is rationally based on the witness’s perception and helpful to understanding the witness’s testimony. FRE 701. “Perceptions based on industry experience . . . is a sufficient foundation for lay opinion testimony.” *Burlington N. R. Co. v. State of Neb.*, 802

F.2d 994, 1004–05 (8th Cir. 1986). “The modern trend favors the admission of [lay] opinion testimony, provided that it is well founded on personal knowledge and susceptible to specific cross-examination.” *Autoforge, Inc. v. Am. Axle & Mfg., Inc.*, 2008 WL 65603 (W.D. Pa. Jan. 4, 2008).

Mr. Harry testified that, as a patent agent working in the document authentication industry, he has “extensive experience” analyzing video game materials and authenticating printed documents. (Ex. 1011 ¶¶ 2-5.) In his deposition, Mr. Harry corroborated this, providing details of his methods working in document authentication. (Ex. 2013 at 16:1-21:2.) Mr. Harry’s experience amply supports his testimony as lay opinion regarding the authenticity of the PSO manual. Moreover, since Mr. Harry has also been cross-examined by opposing counsel, his testimony is admissible under *Autoforge* and progeny. (Ex. 2013.)

Quantum additionally seeks to exclude specific materials cited in Mr. Harry’s declaration as hearsay under FRE 802 and 805. First, these documents are not hearsay: they are offered as evidence of what they describe, not for the truth of the matters asserted. *See* FRE 801(c); 1972 Adv. Comm. Note (“If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay.”).

Furthermore, even if these documents were *prima facie* hearsay, they would be admissible under at least the residual exception established in FRE 807. As to

factor (1) of this exception, his testimony “has equivalent guarantees of trustworthiness” because he corroborated the statements in his declaration under oath in a deposition that Quantum conducted. (Ex. 2013.) As to factors (2), (3), and (4), the publicly available magazines and online articles in Mr. Harry’s declarations are offered as evidence of the dissemination and public availability of Phantasy Star Online and its manual in the early 2000s, a material fact in this dispute. His testimony is more probative on this point, both because Mr. Harry has experience authenticating game manuals and because he has personal knowledge of his copy of the game and manual. (Ex. 1011.) As such, admitting Ex. 1011 serves both the purposes of these rules and the interests of justice.²

Quantum characterizes Mr. Harry’s testimony as “hearsay within hearsay.” Motion at 5-6. Contrary to Quantum’s assertions, Mr. Harry merely gives his lay impression that the PSO manual was publicly distributed contemporaneously with the PSO software in late 2000/early 2001, based on his personal observations, experience, and knowledge. Thus, his statements are not hearsay within hearsay.

² Sony analyzes Ex. 1009 under the old four-factor test set forth in FRE 807. 7 Annotated Patent Digest § 44:106. On December 1, 2019, FRE 807 was amended into a two-factor test. Fed. R. Evid. 807(a). Because the four-factor test encompasses the two-factor test, the same conclusion is reached under both.

Finally, Quantum moves to exclude Ex. 1011 under FRE 401, 402, and 403. This objection is unavailing because the evidence clearly satisfies the low bar for relevance: Mr. Harry's declaration makes the fact of the existence of the authenticated PSO manual more probable. (FRE 401(a).) The existence of the authenticated manual, in turn, is of consequence in this action. (FRE 402(b).)

E. Ex. 1017 (Microsoft Computer Dictionary Excerpts) Should Not Be Excluded

Quantum moves to exclude Ex. 1017 under FRE 106 and 37 C.F.R. § 42.104(b)(5). Ex. 1017 is an excerpt from the same Microsoft Computer Dictionary that Quantum relies upon in the POR. (*See* Ex. 2008.) Quantum asks the Board to rely on an exhibit that it also seeks to exclude. This makes no sense.

Notwithstanding this inconsistency, Quantum moves to exclude Ex. 1017 under 37 C.F.R. § 42.104(b)(5). But as discussed above in Section II.B, § 42.104(b)(5) is not applicable to the current proceeding, and in any event is “merely permissive” and unavailable to exclude Ex. 1017. *See supra* Section II.B.

Quantum further moves to exclude Ex. 1017 under FRE 106. This is a misapplication of the cited rule. As is well-settled, “Rule 106 does not prohibit admission of an incomplete document. Instead, it allows the party against whom the document is introduced to place the remainder in evidence[.]” *Mylan Pharm. Inc. v. Yeda Research & Dev. Co. Ltd.*, IPR2015-00644, Paper 91 at 39-40 (PTAB Dec. 2, 2016); *see also Argentum Pharm. LLC v. Research Corp. Techs., Inc.*,

IPR2016-00204, Paper 85 at 48-49 (PTAB Mar. 22, 2017) (declining to exclude exhibits because “rather than providing a basis for excluding evidence, FRE 106 is a vehicle for entry of additional evidence”); *Mobile Tech, Inc. v. Invue Sec. Prods. Inc.*, IPR2016-00892, Paper 35 at 68-69 (PTAB Sept. 28, 2017) (same).

F. The Hudgins Declaration (Ex. 1024) Should Not Be Excluded

Quantum moves to exclude Ex. 1024 under FRE 401. As an initial matter, Quantum’s motion should be denied on this point because Quantum failed to timely object to Ex. 1024 on FRE 401 grounds with sufficient particularity before filing its motion. (Paper 32, 3-5; 37 C.F.R. § 42.64(b)(1), 37 C.F.R. § 42.64(c).)

Notwithstanding this defect, Ex. 1024 is relevant and admissible on its own terms. Ms. Hudgins was a Sega employee who was personally involved with the development and production of the printed materials that were included with the game Phantasy Star Online. (Ex. 1024, ¶1.) Ms. Hudgins’ declaration plainly satisfies FRE 401 because it makes the fact of the existence of the authenticated prior art manual, on which the Petition relies, more probable. FRE 401.

Quantum argues that Ex. 1024 is untimely for being submitted with Sony’s Reply. (Motion at 6, 10, 14-15.) But Quantum’s PTAB case citations are superseded by the Federal Circuit’s 2018 decision in *Anacor Pharms., Inc. v. Iancu*, which recognized that an IPR petitioner “may introduce new evidence after the petition stage if the evidence is a legitimate reply to evidence introduced by the

patent owner.” *Anacor Pharms., Inc. v. Iancu*, 889 F.3d 1372, 1380–82 (Fed. Cir. 2018). Such new evidence “is to be expected in [IPR] trial proceedings” and is permissible “as long as the opposing party is given notice of the evidence and an opportunity to respond to it.” *Genzyme Therapeutic Prods. Ltd. P’ship v. Biomarin Pharm. Inc.*, 825 F.3d 1360, 1366 (Fed. Cir. 2016).

Here, as discussed in Sections II.C and F, Ex. 1024 is offered as a reply to Quantum’s evidence and argument on the admissibility of Ex. 1008, which Quantum put into issue in the POR. For example, Ex. 1024 offers the testimony of Ms. Hudgins in response to Quantum’s argument, based on Ex. 2013 (deposition transcript of Mr. Harry), that Mr. Harry did not testify to knowledge of Sega’s packaging and distribution practices. (Paper 24, 57.) Ex. 1024 was timely submitted with the reply, and Quantum had ample opportunity to respond by deposing Ms. Hudgins, though it deliberately chose not to do so. Quantum suffered no unfair burden from the proper and timely introduction of Ex. 1024 in Sony’s Reply, and its argument that it should now be excluded is meritless.

Quantum also argues, with no further explanation, that portions of Ex. 1024 are inadmissible pursuant to FRE 602, 701, 702, and 901. Quantum failed to timely object to Ex. 1024 on FRE 701 grounds, violating 37 C.F.R. § 42.64(b)(1). Quantum also disregards 37 § 42.64(c), under which “the motion ... must explain the objections.” Quantum’s boilerplate assertions thus fail.

Dated: August 26, 2024

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CERTIFICATE OF SERVICE

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