UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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Electronic Arts Inc.
Petitioner

v.

White Knuckle Gaming, LLC
Patent Owner

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Case: IPR2016-00634
Patent 8,540,575 B2

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PETITIONER'S MOTION TO EXCLUDE EVIDENCE

I. STATEMENT OF PRECISE RELIEF REQUESTED

Pursuant to 37 C.F.R. § 42.62(c), Petitioner Electronic Arts Inc. ("EA") moves to exclude: (1) Exhibit 2002 based on Federal Rules of Evidence ("F.R.E.") 401-403, 801-802, and 37 C.F.R. § 42.61(c); (2) Exhibits 2203-2215 based on F.R.E. 401-403 and 801-802; (3) Exhibits 2216-2224 based on F.R.E. 401-403 and 801-802; (4) Exhibits 2231-2236 based on F.R.E. 401-403 and 801-802; (5) Exhibits 2211 and 2236 based on F.R.E. 901; and (6) Exhibits 2204, 2205, 2208, and 2209 based on 37 C.F.R. § 42.63(b).

II. OBJECTIONS WERE TIMELY MADE

White Knuckle Gaming, LLC ("White Knuckle") served Exhibits 2201-2236 on EA on December 19, 2016. EA timely objected to these exhibits pursuant to 37 C.F.R. § 42.64(b)(1). Paper No. 20.

III. ARGUMENT

A. Exhibit 2202 – Pisanich

White Knuckle relies on Exhibit 2202,[1] International Publication No. WO 02/062436 to Pisanich ("Pisanich"), for the truth of its statements regarding gaming architectures around the time of the priority claim of the '575 patent. *See* P.O. Resp. (Paper 19) at 10. White Knuckle argues that the statements in Pisanich demonstrate that video games at that time did not update based on real world

[1] The exhibit served on EA has the file name "2202 Pisanich," however each page within the document includes the identifier "EA-1006." Pisanich was exhibit EA-1006 in IPR2015-01595.

events as they occur. *Id.* White Knuckle then suggests, in circular fashion, that the Board may disregard the specific teachings of the prior art references at issue in this review. *Id.*

Exhibit 2202 should be excluded because it is irrelevant to any issue before the Board and thus inadmissible under F.R.E. 401-402. The statements in Pisanich cannot change what the prior art references at issue in this IPR disclose to one of ordinary skill in the art. Thus, Pisanich is irrelevant.

Further, Pisanich does not contradict the prior art's teachings. Pisanich on its face discloses ***real-time*** video game updates based on real-world events. (WK-2202 at 1 ((“Title: INTEGRATION OF REAL-TIME DATA INTO A GAMING APPLICATION”).) Pisanich thus does not contradict, for example, the Madden References' disclosure of weekly updates based on players' real-life performances. Thus, Pisanich is irrelevant to the obviousness of the challenged claims in view of the prior art.

Exhibit 2202 should further be excluded because its probative value, if any, is outweighed by the risk of confusion it creates because the Pisanich prior art reference is not at issue in this IPR. Therefore Exhibit 2202 should also be excluded under F.R.E. 403.

Exhibit 2202 should be excluded for the additional reason that it constitutes inadmissible hearsay. White Knuckle cites to Exhibit 2202 for the truth of its

statements regarding conventional gaming architectures. *See* P.O. Resp. (Paper 19) at 10. Therefore, Exhibit 2202 should be excluded pursuant to F.R.E. 801 and 802.

Finally, Exhibit 2202 should be excluded under 37 C.F.R. § 42.61(c) because White Knuckle does not submit the exhibit to prove what the specification teaches or the drawings describe. *See* 37 C.F.R. § 42.61(c) (specification of a patent is admissible as evidence only to prove what the specification describes); *see also* 77 Fed. Reg. 48,612, 48,624 (Aug. 14, 2012) (explaining that 37 C.F.R. § 42.61(c) addresses the "problem in which a party mistakenly relies on a specification to prove a fact other than what the specification says"). Instead, White Knuckle relies on Exhibit 2202 to disprove what ***other*** references show was known in the prior art. Under Rule § 42.61(c), Exhibit 2202 is inadmissible for that purpose.

B. Exhibits 2203-2215 – FIFA 2009 Articles

White Knuckle relies on exhibits relating to FIFA 2009 (Exhibits 2203-2215) for the truth of their statements purportedly touting the advantages of video game updates. *See* P.O. Resp. (Paper 19) at 3. White Knuckle asks the Board to assume that the invention's features were not commercially developed until 2008 based on the FIFA articles. *Id.* White Knuckle also argues that the challenged

claims are non-obvious in view of secondary considerations related to FIFA 2009. *Id.* at 37.

Exhibits 2203-2215 should be excluded because they are irrelevant to the issues in this IPR and thus inadmissible under F.R.E. 401-402. As an initial matter, White Knuckle never cites directly to exhibits 2204-2213. Rather, White Knuckle asks the Board to "See Exhs. 2203-25" for support for its theory that in-game updates were not commercially developed until 2008. *See* P.O. Resp. (Paper 19) at 3. And even if White Knuckle's blanket citation to the FIFA articles were sufficient, the articles cannot change what the prior art references disclose.

Further, White Knuckle claims that a nexus exists between FIFA 2009 and the challenged '575 patent claims (*Id.* at 47), but White Knuckle does not address FIFA 2009 in its arguments regarding industry praise, copying, or commercial success (*Id.* at 38-45). White Knuckle includes one sentence in its arguments addressing industry praise that references FIFA 2009's "Living Seasons" feature followed by the sentence fragment "The game is" with nothing further. (*Id.* at 41.) White Knuckle provides no explanation of how FIFA 2009 provides object evidence of non-obviousness—it does not.

Moreover, FIFA 2009 is irrelevant because its praise and success related to many features unrelated to the '575 patent. White Knuckle argues that a nexus exists because Exhibits 2203 and 2214 purportedly "describe the features of FIFA

09 as including the same features as the claimed invention in the '575 patent." (*Id.* at 47.) But the presumption is rebutted when the "evidence shows that the proffered objective evidence was due to extraneous factors other than the patented invention." *WBIG, LLC v. Kohler Co.*, 829 F.3d 1317, 1329-1330 (Fed. Cir. 2016) (quotes and citation omitted). The FIFA 2009 articles show that the game's praise and success related to features such as dynamic updates from a "global network of scouts" (WK-2207), a new online "club mode" (WK-2213 at 4), "new animation sequences" (*Id.*), and "all-new collision and shielding systems" (*Id.*). FIFA 2009 thus lacks a nexus to the challenged claims. Exhibits 2203-2215 should therefore be excluded as irrelevant under F.R.E. 401-402. Exhibit 2203-2215 should further be excluded under F.R.E. 403 because their probative value, if any, is outweighed by the risk of confusion of issues and wasting time.

Further, Exhibits 2203-2215 constitute inadmissible hearsay, and hearsay within hearsay. White Knuckle relies on these exhibits for the truth of their statements regarding purported features of the FIFA 2009 video game. *See* P.O. Resp. (Paper 19) at 3. Thus, Exhibits 2203-2215 should be excluded pursuant to F.R.E. 801 and 802.

C. Exhibits 2216-2224 – NBA Live and NBA 2K9 Articles

White Knuckle also relies on exhibits relating to NBA Live (Exhibits 2216-2220, 2225) and NBA 2K9 (Exhibits 2221-2224) for the truth of their statements

purportedly touting the advantages of video game updates. *See* P.O. Resp. (Paper 19) at 3. And like with the FIFA articles, White Knuckle asks the Board to assume that the features recited in the challenged claims were not commercially developed until 2008 based on these articles to circularly support its arguments about the prior art. *Id.* White Knuckle also argues that the challenged claims are non-obvious in view of secondary considerations related to NBA Live 2009, NBA Live 2010, and NBA 2K9. *Id.* at 36-47.

Exhibits 2216-2225 should be excluded because they are irrelevant to the issues in this IPR and thus inadmissible under F.R.E. 401-402. White Knuckle argues that because dynamic updating features of NBA Live 2009 and NBA 2K9 were successful and touted as prominent features, Madden 2000 must not have had such features. *Id.* at 11. But these articles cannot change what the Madden 2000 references disclose. Further, the articles discuss ***real-time*** updates and updates provided ***from third-parties who provide scouting information to the NBA***, neither of which are recited in the challenged claims. (*e.g.,* WK-2221 at 1 ("delivering constant updates to player ratings and player tendencies"); WK-2218 at 3 ("The game is changing daily based on statistical information and tendencies being tracked and downloaded from Synergy Sports Technology"); WK-2219 at 2 ("powered by the premier analytics provider using NBA data").) The articles do not contradict—let alone discuss—the teachings of the prior art references at issue

in this IPR. Therefore, Exhibits 2216-2225 are irrelevant to the teachings of the prior art references.

Turning to secondary considerations, White Knuckle claims that a nexus is presumed to exist between NBA Live and NBA 2K9 and the challenged '575 patent claims because it alleges that those products are covered by the '575 patent. *See* P.O. Resp. (Paper 19) at 46-47. But the presumption is rebutted when the "evidence shows that the proffered objective evidence was due to extraneous factors other than the patented invention." *WBIG*, 829 F.3d at 1329-1330. The success of NBA Live 09 was attributable in part to its system for ***real-time*** updates, "Dynamic DNA." (WK-2216 ("new feature allows players to have access to ***constantly updating*** stats"); WK-2220 at 1 ("[r]eal-time updates on … statistics").) The articles further tout that the updates are more accurate than previous updates because they come from Synergy Sports Technology's statistics, the "same company that 23 NBA teams are using to scout their opponents." (WK-2218 at 3; WK-2219 at 2 ("powered by the premier analytics provider using NBA data"); WK-2220 at 2 ("It'll be insanely accurate if Synergy is involved").) The game's success was also related to new features, including "[n]ew pick-and-roll controls," "improved fake-out moves," and a "new play-calling system." (WK-2216 at 1.)

The '575 patent claims do not recite real-time updates, "dynamic" updates, updates with statistics from a third-party or the other new game features. The

presumption of a nexus is thus rebutted. Indeed, the articles expressly recognize that the praised improvements are ***not*** based on updating the players' ratings as recited in the '575 patent claims. (WK-2220 ("I was expecting the game to just update the players[']ratings but this is even bigger than that.").) Exhibits 2216-2225 should therefore be excluded as irrelevant under F.R.E. 401-402. Exhibit 2216-2225 should further be excluded under F.R.E. 403 because their probative value, if any, is outweighed by the risk of confusion of issues and wasting time.

Finally, Exhibits 2216-2225 constitute inadmissible hearsay. White Knuckle relies on these exhibits for the truth of their statements regarding purported features of the NBA Live and NBA 2K9 video games. *See* P.O. Resp. (Paper 19) at 3. Thus, Exhibits 2216-2225 should be excluded pursuant to F.R.E. 801 and 802.

D. Exhibits 2231-2236 – The Madden Game

White Knuckle cites to Exhibits 2231-2236 in relation to its arguments regarding how the Madden 2000 video game updates worked. *See* P.O. Resp. (Paper 19) at 15-16. White Knuckle argues that the updates were merely roster updates, and that its screenshots from the game somehow support that view. Exhibits 2231 and 2232 are screenshots of the Madden 2000 game after White Knuckle purportedly updated the video game with the PlayoffWeek1 update described in Exhibit 1016 and the Super Bowl update described in Exhibit 1019,

respectively. (WK-2237 at ¶¶10-11.) White Knuckle cites to Exhibit 2233 to show that in real life the Rams signed a new kicker between week 1 of the 2000 playoffs and the Super Bowl in support of its argument that the game updates dealt with updating rosters. *See* P.O. Resp. (Paper 19) at 15-16. White Knuckle similarly relies on Exhibit 2236 to show that in real life Anthony Dorsett changed positions. *Id.* at 24. White Knuckle's only reference to Mr. Crane's deposition testimony, Exhibit 2234, relates to whether he analyzed the binary data for updating the Madden game. *See* P.O. Resp. (Paper 19) at 22. And White Knuckle only relies on Mr. Ferwerda's deposition testimony, Exhibit 2235, in relation to who maintained control of the .zip files that contained the Madden 2000 updates, when those updates were packaged, and the Madden 2000 video game with the updates. *See* P.O. Resp. (Paper 19) at 21, 27.

Exhibits 2231-2236 should be excluded because they are irrelevant to the issues in this IPR and thus inadmissible under F.R.E. 401-402. The Madden 2000 game is not prior art at issue in this IPR. Evidence of how the game worked therefore is irrelevant to the obviousness of the challenged claims. Exhibits 2231-2236 should therefore be excluded as irrelevant under F.R.E. 401-402.

Additionally, even if the screenshots were relevant, they actually confirm that the updates ***did*** update in-game character performance based on real-life performance. *See* Pet. Reply (Paper 22) at 4-6. Exhibit 2231-2236 therefore

should further be excluded under F.R.E. 403 because their probative value, if any, is outweighed by the danger of confusion of issues and wasting time.

Further, Exhibits 2233 and 2236 constitute inadmissible hearsay. White Knuckle relies on Exhibit 2233 for the truth of its statements regarding a real-life roster change in the NFL. *See* P.O. Resp. (Paper 19) at 15-16. White Knuckle relies on Exhibit 2236 for the truth of its statements regarding to a real-life position change for the Titans' Anthony Dorsett. *See* P.O. Resp. (Paper 19) at 24. Thus, Exhibit 2233 and 2236 should be excluded pursuant to F.R.E. 801 and 802.

E. Exhibits 2211 and 2236 – Unauthenticated Exhibits

Exhibit 2011 appears to be a printout from the website http://www.eurogamer.net. Exhibit 2236 appears to be a printout of an online article from the Los Angeles Times. White Knuckle fails to provide any authentication for these exhibits. Accordingly, these exhibits should be excluded under F.R.E. 901.

F. Exhibits 2204, 2205, 2208, and 2209 – Uncertified Translations

Exhibit 2204 appears to be a web page with the title "FIFA 09 – Adidas Live Season." The remainder of the web page is not in English. Similarly, Exhibit 2208 appears to be a web page with the title "FIFA 09: Adidas Live Season" and the remainder of the web page is not in English. According to the Declaration of David Jones, served as Exhibit 2237, Exhibits 2005 and 2009 are "machine

translations obtained using Google's automated website machine translation feature for each website and appear to be true and correct copies of the translation of those websites that I viewed and printed of each website." *See* Exhibit 2237 at ¶3. Mr. Jones's declaration does not attest to the accuracy of the translations, but only that they were machine translations obtained from Google. These exhibits should be excluded because White Knuckle has not provided "a translation of the document into English and an affidavit attesting to the accuracy of the translation." 37 C.F.R. § 42.63(b).

Respectfully submitted,

Dated: April 14, 2017

/Gerard M. Donovan/
Gerard M. Donovan
Reg. No. 67,771

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), I certify that on April 14, 2017, a true and correct copy of the foregoing **PETITIONER'S MOTION TO EXCLUDE EVIDENCE** was served via email upon the following attorney of record for Patent Owner:

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