

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

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**BEFORE THE PATENT TRIAL AND APPEAL BOARD**

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WARGAMING GROUP LIMITED,  
Petitioner,  
v.

GAME AND TECHNOLOGY CO., LTD.,  
Patent Owner.

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Case IPR 2017-01082  
Patent 7,682,243

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**PETITIONER'S MOTION TO EXCLUDE EXHIBIT 2027**

## **I. Statement of Precise Relief Requested**

In its Preliminary Response, Patent Owner alleged that service occurred more than one year prior to the filing of the petition, based upon a claim that a UK process server physically handed documents to a Wargaming.net LLP agent in London. *See* Paper 8 at 4. In order to decide the service dispute early and efficiently, the Board ordered that limited discovery be taken before the parties briefed the service issue. In view of the evidence uncovered during discovery that there was no proper service in the United Kingdom, Patent Owner produced a new declaration by its lawyer Mr. Zito (Ex. 2027), who now alleges he served Wargaming entities in Cyprus by mail. Because Patent Owner did not disclose its intention to call Mr. Zito as a witness, disclose the declaration itself, or even disclose its service by mail theory before the close of the limited discovery period, Petitioner was ambushed by the Patent Owner's new theory and declaration a week before its reply brief was due. Petitioner respectfully requests that Mr. Zito's untimely declaration (Ex. 2027) be excluded as inadmissible hearsay because Patent Owner prevented Petitioner from challenging the newly alleged facts through cross-examination.

## **II. Statement of Reasons for Relief Requested**

The Board instituted this *inter partes* review but reserved making a determination of whether the petition is barred under §315(b) owing to a factual

dispute over whether “Wargaming.net LLP, a real party-in-interest to Petitioner, ‘was served with a complaint alleging infringement of the ‘243 patent on December 14, 2015, in accordance with the laws of England and Wales’ pursuant to the Hague Convention.” *See* Paper 16 at (Order on Conduct and Schedule of the Proceeding) (quoting Patent Owner’s preliminary response). The Board decided that it “want[ed] discovery and briefing on the service issue to take place early in the trial as it could be case-dispositive.” *Id.* The Board ordered limited discovery and directed the parties “to contact their respective witnesses to inquire as to potential dates for depositions . . . .” *Id.* at 3.

At that time, Patent Owner had not disclosed any declaration by Mr. Zito or indicated that it would rely on a declaration by Mr. Zito.<sup>1</sup> On a conference call with the Board, Petitioner’s counsel raised his concern that Patent Owner may try to surprise Petitioner with an additional declaration from Mr. Talbot (Patent Owner’s

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<sup>1</sup> Patent Owner filed one other declaration by Mr. Zito (Ex. 2021) on November 15, 2017, which was also after the November 2 deposition deadline. That declaration is not the subject of this motion because of the parties’ agreement that authentication declarations do not require a deposition. *See* Paper 16 at 3 (“[T]he parties agreed that, if either party relies on documents, the party may rely on an affidavit to authenticate any such documents.”).

only declarant for the service issue at that time) after his deposition was taken in London. *Id.* The Board “advised Patent Owner that any declaration testimony must be produced before the deposition.” *Id.* The parties agreed to complete the depositions on November 2, 2017, and the Board ordered Petitioner to file its opening brief by November 17, 2017. *Id.* at 4.

Realizing that its UK service theory was untenable in view of the damaging admissions in Mr. Talbot’s deposition and in view of Petitioner’s opening brief, Patent Owner switched tactics and disclosed its new service by mail theory for the first time on December 1, 2017, when it *filed its response* to Petitioner’s brief (Paper 25), and the new declaration by Mr. Zito (Ex. 2027). Petitioner was not previously aware that Patent Owner would raise any service by mail in Cyprus theory or that Mr. Zito would claim to have effected service by mail himself. As a result of the expedited briefing schedule that afforded Petitioner one-week to prepare and file a response, it was impractical to seek a deposition of Mr. Zito.

Patent Owner’s excuse for its untimely declaration and new service by mail theory is that the Board’s order regarding discovery only required any new declaration by Mr. Talbot (the UK process server) to be disclosed before the deposition. Ex. 1029. Such a position is nonsensical in that Patent Owner would be free to rely upon new declarations and evidence in its response brief, so long as that evidence was for a previously *undisclosed* theory.

Given the Patent Owner's lack of diligence or candor in failing to disclose its service by mail theory or that it would rely on Mr. Zito as a fact witness, Petitioner respectfully requests that the Board exclude Mr. Zito's declaration as inadmissible hearsay given that his "out of court" statement was not made during the period for taking testimony on the service issue and was not subject to cross-examination.

**III. Petitioner's motion is timely and authorized.**

Petitioner submits that this motion is timely and authorized by 37 C.F.R. § 42.64(c). Petitioner filed its objection to Ex. 2027 on December 8, 2017, which was within five business days of the exhibit's filing.

December 8, 2017

Respectfully submitted,

/Harper Batts/

Harper Batts, Reg. No. 56,160

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