

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

NEW VISION GAMING & DEVELOPMENT,
INC.,

Appellant,

v.

SG GAMING, INC., FKA BALLY
GAMING, INC.,

Appellee,

KATHERINE K. VIDAL, Undersecretary of
Commerce for Intellectual Property and
Director of the United States Patent and
Trademark Office,

Intervenor.

No. 2020-1400

GOVERNMENT’S OPPOSITION TO MOTION FOR JUDICIAL NOTICE

Appellant, New Vision, requests that this Court take judicial notice of documents that it cites in arguing that the funding structure for America Invents Act (AIA) post-grant proceedings violates principles of structural due process. The government opposes New Vision’s motion for judicial notice for the reasons set forth in its brief at pages 20-24.

1. New Vision failed to raise its constitutional challenge before the Patent Trial and Appeal Board (PTAB) at the appropriate time. Had it done so, it would

have had the opportunity to introduce any documents it considered relevant the record before the PTAB, and the PTAB would have had the opportunity to assess New Vision's evidence and arguments in view of the United States Patent and Trademark Office's (USPTO's) practices and procedures.

Rather than follow this process, New Vision seeks to add thousands of pages to the Appendix on appeal. Because all of the materials that New Vision seeks to add to the record relate to its forfeited structural due process challenge, there is no reason for the Court to judicially notice the additional materials unless it intends to address that forfeited challenge. And the volume of material that New Vision seeks to add to the record only underscores that this challenge involves the type of factual dispute that is most properly raised before the Board in the first instance.

2. New Vision relies on this Court's consideration of some of the same materials in *Mobility Workx v. Unified Patents, LLC*, 15 F.4th 1146 (Fed. Cir. 2021). But this Court granted an appellant's motion for judicial notice in *Mobility Workx* only because "even considered in isolation," those documents did "not establish a due process violation," and the government was not "prejudiced by [the Court's] decision to take judicial notice of these documents and to resolve the [constitutional] issues to which they pertain without a remand." 15 F.4th at 1151-52. If the Court believes that New Vision raises any constitutional questions not disposed of by *Mobility Workx*, the Court should not permit New Vision's attempt

to expand the record on review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 344 words.

/s/ Dana Kaersvang
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