

2020-1400

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

NEW VISION GAMING & DEVELOPMENT, INC.,
Appellant,

v.

SG GAMING, INC., f/k/a Bally Gaming, Inc.,
Appellee,

and

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

On Appeal from United States Patent and Trademark Office, Patent
Trial and Appeal Board in No. CBM2018-00006

**APPELLANT NEW VISION GAMING & DEVELOPMENT, INC.'S
REPLY IN SUPPORT ITS RENEWED MOTION FOR JUDICIAL
NOTICE**

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*Counsel for Appellant New Vision
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Appellant New Vision Gaming & Development Inc. (“New Vision”) hereby replies in support of its motion for judicial notice of publicly available documents that support its arguments with respect to the present appeal. Given the grant of the motion for judicial notice in *Mobility Workx, LLC v. Unified Patents, LLC*, 15 F.4th 1146 (Fed. Cir. 2021), as well as the arguments presented herein, the Court should grant the present motion.

Appellee SG Gaming Inc. (“SG”) did not file an opposition to the present motion. Intervenor Katherine K. Vidal presented only a limited opposition to the motion. ECF No. 58. New Vision replies to those limited arguments, which should be rejected.

First, Intervenor does not dispute that this Court, in *Mobility Workx*, concluded that these “types of government documents are capable of being ‘accurately and readily determined from sources whose accuracy cannot reasonably be questioned.’” 15 F.4th at 1152 (citing Fed. R. Evid. 201(b)). That should be reason enough to grant the motion.

Additional documents included in the Joint Appendix (since the first briefing) are entirely consistent with the Court’s ruling *Mobility*

Workx. For example, the additional documents include the final report from the Government Accountability Office (“GAO”) concerning the identified structural bias of the PTAB. That document was only published in December 2022. New Vision’s motion details why the Court can properly take judicial notice of the other documents, *see* ECF No. 56, at 5-13, and the PTO does not offer any opposition to most of New Vision’s motion.

Second, as New Vision notes in its reply brief, the Supreme Court and this Court have rejected the reasoning of Intervenor’s argument that New Vision forfeited its constitutional challenge to the Patent Trial and Appeal Board’s (“PTAB”) structure and process for deciding whether to institute the New Vision post-grant proceeding under the Leahy-Smith America Invents Act (“AIA”). *See Carr v. Saul*, 141 S. Ct. 1352, 1360 (2021) (noting how the Supreme Court “has often observed that agency adjudications are generally ill-suited to address structural constitutional challenges”); *Mobility Workx*, 15 F.4th at 1152. Intervenor’s position, resting on a flawed argument, is not a basis to deny New Vision’s motion for judicial notice.

Third, Intervenor mistakenly argues that New Vision should have raised, but failed to raise, this issue before the PTAB. To the contrary, New Vision raised this issue during the remand for Director review. Appx9207-9227. Rather than confront the substance of New Vision's due process argument (which relied on largely the same documents in the current joint appendix), the Director simply denied New Vision's request for review. Appx9228-9230. Thus, the most reasonable view of the record is that the Director considered but rejected New Vision's due process argument, but without providing an explanation.

For the foregoing reasons, New Vision asks that its motion be granted and that the Court take judicial notice of the documents identified above and submitted in the Joint Appendix (ECF No. 51), including those documents in the Joint Appendix with pages within the range of Appx3602-9032.

Date: February 1, 2023

Respectfully submitted,

/s/ Matthew J. Dowd

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CERTIFICATE OF COMPLIANCE

I certify that this motion contains 499 words, excluding portions excluded by the rule, which is within the limit prescribed by the rules of this Court.

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