

District Court Awards \$285 Sanctions Against Patent Owner for Arguments Made to PTAB In Preliminary Response

MAY 5, 2021

Game and Technology Co., Ltd. v. Wargaming Group, Ltd., 2-16-cv-06554 (CDCA Oct. 20, 2020).
Before: Kronstadt.

Game and Technology (GAT) filed a patent infringement complaint against Wargaming, a foreign entity, on July 9, 2015. There was a dispute over whether service was ever effectuated. Ultimately, in February 2016, Wargaming's counsel waived service in exchange for an extension of time to answer. Then, over a year later, on March 13, 2017, Wargaming filed an IPR petition.

In the preliminary response, GAT first argued that Wargaming's petition was time barred as filed one year after service of the complaint because Wargaming's registered agent was served with the patent infringement complaint pursuant to the Hague Convention on January 6, 2016. In support of this argument, GAT offered a witness statement of a foreign process server who allegedly effectuated the service. The witness statement included a copy of the alleged service packet with a summons bearing the District Court's seal and clerk's signature. This argument would soon start to unravel.

In response, Wargaming offered a declaration from its registered agent stating that he had no recollection of having been served and offered diary entries showing that it was unlikely he was in the office at the time of the alleged service. Then, in a deposition, the foreign process server was shown the copy of the alleged service packet and testified that it was "most definitely not the bundle I served ..."

After the deposition, GAT changed its story by filing a proof of service in the District Court stating that service was effected on December 14, 2015. Attached to the proof of service was another witness statement by the same process server, but the summons attached to the proof of service did not bear a court seal or clerk's signature (as required for service to be effective). GAT then argued to the PTAB that Wargaming was actually served on December 14, 2015, as set out in the proof of service filed in the District Court. GAT argued that although this summons documents did not bear a seal or signature, service was nonetheless effective. GAT also made an alternative argument that service was effected by mailing the complaint and summons to Wargaming's alter ego in Cyprus.

This argument did not work either. The PTAB's final written decision found that Wargaming had never been served with the complaint and summons and also found the patent claims invalid.

GAT then appealed to the Federal Circuit but devoted only one paragraph to the substantive argument over service. GAT now argued that the IPR petition was time barred because Wargaming had waived service of the patent infringement complaint. But the Federal Circuit declined to hear that argument for the first time on appeal and held that GAT had waived appeal of the issue. The Federal Circuit also affirmed the PTAB's finding that the patent was invalid.

Back before the District Court after the appeal, Wargaming moved for sanctions under §285. The District Court held that it may, in certain circumstances, award fees incurred in proceedings before the PTAB. The District Court also held that the circumstances of this case warranted sanctions. Facts the District Court found to support the award of sanctions were that 1) the District Court case was stayed pending the IPR in order to promote party and judicial efficiency, 2) there were no claim construction or other pre-trial matters before the District Court, 3) no trial was ever scheduled, and 4) GAT's conduct in advancing its arguments before the PTAB was exceptional.

The District Court found three aspects of GAT's conduct exceptional. First, a reasonable investigation by GAT would have resulted in a determination that the summons served on Wargaming's agent (in December 2015) did not bear a court seal or clerk's signature. Second, after GAT learned of the deficient service, it filed a proof of service in the District Court and continued to pursue its position in the IPR. Third, GAT's litigation tactics (changing its arguments multiple times and raising new arguments on appeal) were also unreasonable.

For these reasons, the District Court awarded sanctions for Wargaming's fees and costs related to disputing GAT's arguments regarding the time bar and service of the complaint.

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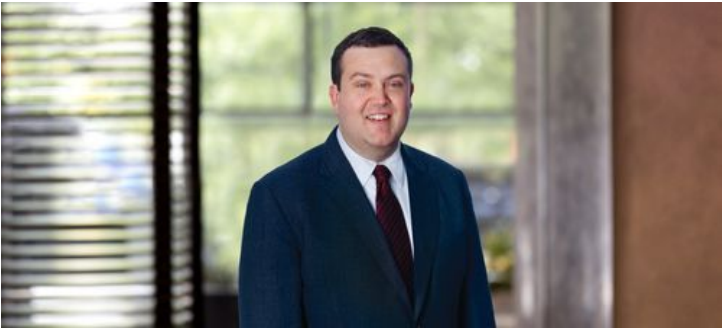
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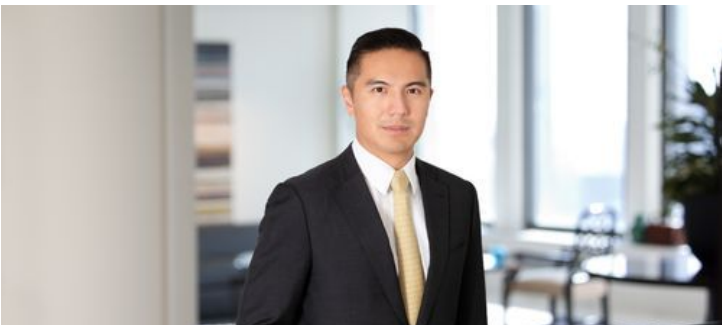
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