Filed on behalf of Game Show Network, LLC and WorldWinner.com, Inc.
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Game Show Network, LLC and WorldWinner.com, Inc.,

Petitioners,

v.

Patent Owner of

U.S. Patent 6,174,237 to Stephenson

Case IPR2013-00289

PETITIONERS' OPPOSITION TO PATENT OWNER'S MOTION TO EXCLUDE EVIDENCE

I. EXHIBITS 1011-1014 AND 1021 ARE RELEVANT TO WHETHER THE *PLAYING A GAME* LIMITATIONS REQUIRE THAT THE HOST COMPUTER COMPETES HEAD-TO-HEAD WITH A HUMAN PLAYER

The most fundamental claim construction dispute in this IPR is whether the "*playing a game*" limitations require that the host computer competes head-to-head with a human player. Exhibits 1011-1014 and 1021 are directly relevant to this dispute because they establish that, in 2009, when Stephenson sued MVP Networks for patent infringement of the '237 patent at issue in this IPR, Stephenson acknowledged—or at least implicitly represented to the United States District Court for the Northern District of Oklahoma—that the "*playing a game*" limitations do ***not*** require such head-to-head competition. Indeed, had Stephenson and his counsel believed that the "*playing a game*" limitations required the computer to compete head-to-head with a human player, they could not have complied with their ethical obligations in bringing the lawsuit, because the product that Stephenson accused of infringement (the Golden Fairway computer game) did *not* include a host computer that competed head-to-head with a human player.

Accordingly, Stephenson's allegations in the MVP Network litigation directly contradict his current position in this IPR that the "*playing a game*" limitations require the host computer to compete head-to-head with a human player. Indeed, Stephenson's prior representations to a federal court demonstrate that Petitioners' position that the claims do not require head-to-head competition is the ***broadest reasonable construction***. Indeed, if the claims required the host computer to compete head-to-head with a human player, Stephenson could not have ethically accused the Golden Fairway computer game—which lacks such head-to-head competition—of infringement.

A. Exhibits 1011 and 1021 are relevant to show that Golden Fairway did not have a computer that competed head-to-head with a human player

Exhibit 1011 is a printout of a review of the Golden Fairway computer game that was published on the website http://molej.com on November 13, 2009. In Exhibit 1021 (the Declaration of David Johnson), Mr. Johnson states that:

> Exhibit 11 is a true and correct printout of my November 13, 2009 review of Golden Fairway. I wrote the review of Exhibit 1011 shortly after personally playing, and observing the operation of Golden Fairway. The review of Exhibit 1011 fairly and accurately records my observation of Golden Fairway, based upon my personal usage of the game.

Ex. 1021 ¶ 4. Significantly, Exhibit 1011, a reasonably detailed review of Golden Fairway, does not mention any mode in which Golden Fairway included a host computer competing head-to-head with a human player. *See* Ex. 1011. Further, Mr. Johnson declares in his declaration that he "played the game in each of the different modes," playing an estimated "100 rounds of golf with the Golden Fairway game," but that, from his experience, "Golden Fairway did not offer an option to compete head-to-head against a computer-operated opponent that acted as a player in the game." Ex. 1021 ¶¶ 3, 5.

Stephenson argues that Exhibit 1021 should be excluded because Mr. Johnson allegedly "did not indicate which version of the game he played, or that he had personal knowledge of every mode or version of the game(s) at issue in the lawsuit" and because "Johnson's statements are irrelevant and unreliable because on their face they do not purport to describe all functionality or versions of the product at issue in the MVP lawsuit." Paper 41 at 3. In essence, Stephenson suggests that Mr. Johnson did not play Golden Fairway enough to know whether it

had a mode in which the computer competed head-to-head with a human player.

Stephenson's arguments fail for at least two reasons. First, Stephenson necessarily investigated Golden Fairway before accusing it of infringement and, thus, he knows the true content and capabilities of Golden Fairway. Therefore, if Exhibits 1011 and 1021 misrepresent Golden Fairway in any way, Stephenson could have brought forth contrary evidence. He did not do so. Stephenson's failure to introduce *any* contrary evidence reveals that Exhibits 1011 and 1021 are indeed accurate. Second, Stephenson could have cross-examined Mr. Johnson to probe his experience with, and knowledge of, Golden Fairway. But Stephenson declined to cross-examine Mr. Johnson. Thus, Stephenson has not shown that Exhibits 1011 and 1021 are unreliable.

For these reasons, Exhibits 1011 and 1021 should be admitted into evidence.

B. Exhibits 1012-1014 contain relevant admissions of Stephenson that the '237 Patent does not require the host computer to compete head-to-head with a human player

Each of Stephenson's allegations in the MVP Network litigation is "an opposing party's statement" under Federal Rule of Evidence 801(d)(2). Such statements, commonly called "admissions," are not hearsay. Therefore, party admissions that are relevant to the issues in the case are admissible evidence against the party that made the admission.

Stephenson's allegations that Golden Fairway infringed the '237 Patent are relevant, and, therefore, admissible, because they are admissions that the '237 Patent does not require the host computer to compete head-to-head with a human player. In order to meet their Rule 11 obligations before filing the lawsuit accusing

Golden Fairway of infringement, Stephenson and his counsel necessarily inspected Golden Fairway and concluded that it was covered by at least one claim of the '237 Patent. All of the claims of the '237 patent include the "*playing a game*" limitations. Moreover, because the relevant features of Golden Fairway would have been readily apparent through an inspection of the publicly available game, without requiring discovery, it is simply implausible that Stephenson did not know that Golden Fairway lacked such head-to-head competition.

Therefore, when Stephenson alleged in his Complaint (Ex. 1012 ¶¶ 11-14), then later in his Motion for Default Judgment (Ex. 1013 at 2-3), that Golden Fairway infringed the '237 Patent, he admitted that the '237 Patent does not require the host computer to compete head-to-head with a human player. In his motion to exclude, Stephenson attempts to disclaim his own admissions by suggesting that the district court automatically entered default judgment and a permanent injunction against MVP Network without considering Stephenson's evidence of infringement. Paper 41 at 2. Stephenson's suggestion is both legally irrelevant to the question of admissibility and factually incorrect. The suggestion is legally irrelevant because Stephenson's allegations are relevant party admissions, which are admissible evidence without regard to whether the district court relied upon them. The suggestion is also factually incorrect because, even in cases of default judgment, the plaintiff must prove that it is entitled to a requested remedy, such as a permanent injunction. Indeed, in the MVP Network litigation, Stephenson actively argued that his infringement evidence was strong enough to justify a permanent injunction. Ex. 1013 at 2-3. The district court agreed and

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