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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GAME SHOW NETWORK, LLC AND WORLDWINNER.COM
Petitioners

v.

JOHN H. STEPHENSON
Patent Owner

Case IPR2013-00289
Patent 6,174,237

**PATENT OWNER'S REPLY IN SUPPORT OF MOTION TO EXCLUDE
EVIDENCE SUBMITTED BY GAME SHOW NETWORK, LLC AND
WORLDWINNER.COM UNDER 37 C.F.R. § 42.64**

Petitioners' reply illustrates why Exhibits 1011-14 and 1021 should be excluded. First, the exhibits are not relevant to claim construction, which is determined based on the claims, specification and file history as a matter of law. Petitioners admit they seek to use information about a case that was never litigated to "*factually undermine*" Patent Owner John H. Stephenson's ("Stephenson") claim construction. Response at 5 (emphasis in original). Therefore, even by Petitioners' admission, the factual "evidence" of Exhibits 1011-14 and 1021 is irrelevant to claim construction.

Second, Petitioners argument that Stephenson made admissions in a case where default judgment was entered without an answer or any discovery is flawed. Nothing in the pleadings of the prior case constitutes an admission as to the scope of the claims and Petitioners' logic simply does not follow. In fact, Petitioners fail provide sufficient foundation for the proposed exhibits and the inferences they allegedly support. Therefore, the Board should exclude each of Exhibits 1011-14 and 1021.

I. Exhibits 1011-14 and 1021 are Irrelevant to the Board's Inquiry.

The exhibits have no relevance to claim construction. Claim construction is a question of law, based on the language of the claims, the patent specification, and the file history. *Markman v. Westview Instruments, Inc.*, 517 US 370, 384 (1996); *Phillips v. AWH Corp.*, 415 F. 3d 1303, 1314 (Fed. Cir. 2005). As they must,

Petitioners don't even argue that legal estoppel applies. Instead, Petitioners admit that they present Exhibits 1011-14 and 1021 to argue questions of fact related to claim construction. Response at 5. Claim construction is not determined based on some inference made from pleadings in a different case, involving some unknown version of a different product, and which no discovery about that product was taken.

Petitioner's allegation of "admission" by Stephenson is legally irrelevant. In their Response, Petitioners ignore the legal requirements of claim construction to argue that Stephenson has made certain "admissions" regarding the '237 claims. Even if Stephenson had made statements outside of this proceeding and outside of the prosecution of the '237 patent, those statements are irrelevant. Claim construction is a legal question based on the claims, specification, and patent file history. Any outside statements made by Stephenson have no effect on this inquiry. *See Phillips v. AWH Corp.*, 415 F. 3d at 1314.

However, Stephenson's MVP lawsuit is not the admission Petitioners claim. These admissions are not actual admissions, but are, instead vague inferences that depend on a factual determination of the actual gameplay of Golden Fairway. In order for the Board to lend credence to Petitioners' argument, the Board would first need to make a factual determination of all the play options in Golden Fairway. Such a determination is appropriate to a federal court, but not part of an

inter partes review. Exhibits 1011-14 and 1021 are factual documents related to the gameplay of MVP's Golden Fairway and the alleged statements made by Stephenson.

II. Exhibits 1011-14 and 1021 Lack Foundation and Do Not Represent Admissions by Stephenson.

Taken in its best light, Petitioners' argument requires that they show that Golden Fairway lacked computer-controlled opponents in all versions going back to 2003, and that Stephenson knew and understood that it lacked such features. They have shown neither. Petitioners have failed to provide sufficient foundation to show the actual gameplay of all possible Golden Fairway games, and have failed to show how Stephenson's level of knowledge regarding those games constitutes an admission.

Petitioners fail to provide a foundation for Mr. Johnson's statements. Exhibits 1011 and 1021, Mr. Johnson's review and affidavit, never claim that Mr. Johnson looked at all the versions of the Golden Fairway game. Mr. Johnson also does not explain how he could tell whether the opponents with whom he was playing were controlled by players or by the computer. Mr. Johnson would not be the first game player to mistake computer "bots" for human opponents. He makes no claim that Golden Fairway specifically stated that no players could be computer opponents, only that he did not know of any such players.

Furthermore, Mr. Johnson's alleged experience with Golden Fairway is very time-limited. Mr. Johnson refers to playing the game "shortly" prior to writing the review in November, 2009. Exhibit 1021 ¶4. Petitioners then attempt to refer Mr. Johnson's statements to all possible versions of Golden Fairway. Stephenson was eligible to seek damages for all versions of the Golden Fairway game going back six years from the time of filing. Mr. Johnson does not address any other versions of Golden Fairway, other than the one that existed in November, 2009, and provides no insight as to how he knew that version, or any other, excluded computer opponents.

Finally, Petitioners incorrectly assume that Stephenson must have known the intimate details of the Golden Fairway golf game before filing suit. Petitioners argue that it would have been unethical for Stephenson to file a lawsuit without such details. Response at 1. That is untrue. Stephenson's attorney was required to have a good faith basis to believe that the claims were infringed by Golden Fairway. Fed. R. Civ. P. 11. Stephenson was, however, entitled to plead the facts known to him and seek additional details, such as comprehensive source code and gameplay details for all previous versions, in discovery. In this case, Stephenson never got the chance. Therefore, the mere fact of Stephenson's filing cannot be interpreted as factual evidence of the content of the game or Stephenson's intent with regard to claim construction.

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