

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

VALVE CORPORATION,
Petitioner,

10

v.

ELECTRONIC SCRIPTING PRODUCTS, INC.
Patent Owner.

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Inter Partes Review No. IPR2019-00085
U.S. Patent No. 8,553,935 B2

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Title: COMPUTER INTERFACE EMPLOYING A MANIPULATED OBJECT
WITH ABSOLUTE POSE DETECTION COMPONENT AND A DISPLAY

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**PATENT OWNER'S SUR-REPLY RE: PETITIONER VALE BEING A
"SIMILARLY SITUATED PARTY"**

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Before: ANDREI IANCU, *Director of the United States Patent and Trademark Office*, WILLIAM M.
FINK, *Vice Chief Administrative Patent Judge*, and ROBERT J. WEINSCHENK, *Administrative Patent
Judge*.

Karen I. Sweeney, *Trial Paralegal*

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Without putting too fine a point on it, Valve's reply (Paper 8) is a complete CHARADE.

Yes it has not been a party for "over a year", but it was without doubt a party "defendant"
5 in the District Court case, having been named as a defendant in the identical infringement
District Court action from October, 2017 to January 2018 with HTC.

Valve claims it was never served even though it does not dispute the date or address
where it received the "summons and complaint", which delivery is "presumed" to be correct.
Rios v. Nicholson (Fed. Circ. 2007) 490 F. 3d. 928 at 930-931. However, its counsel filed for
10 "pro hac vice" in the District Court ", filed an objection to a trial by magistrate, and participated
in the proceeding in the District Court immediately after it was served in October, 2017.
Presumably Valve wants to lead this panel to believe that it filed its "venue motion" along with
the other papers it filed in the District Court after it was not served as a defendant.

Valve's counsel (Mr. Lavery) filed his declaration under oath (Exhibit 2010) in the
15 District Court action and admits Valve's "co-defendant" status; admits Valve's "technologies" in
the accused "VIVE" infringing devices; and admits its contractual license agreement with its "co-
defendant HTC" for use of the technologies.

As set forth in Shenzhen:

20 Given petitions filed by two or more similarly situated
defendants, there is a rebuttable presumption that a later-filed
petition will be denied under *General Plastics* if that later-filed
petition is filed after an earlier-filed petition has received a
preliminary response or a decision on institution.

25 The concept behind this is that, things being equal, if two or more
co-defendants are sued around the same time, they should, within
reason, file their petitions around the same time; it is generally
unfair for one defendant to wait for a "test case" to go through the
inter partes review process by another defendant before filing their
30 own petition. [at p. 16-17]

Valve knows that its dismissal was only for "venue", "without prejudice", and on non-substantive grounds. Given the judicial admissions by its lawyer of "co-defendant" status, its license with HTC for the infringing "VIVE" device, its technologies used in the infringing device, its filing of papers in the District Court after having been served, does it seriously contend it is not "similarly situated" to HTC?

Valve's shameless "misleading" of this panel that the Patent Owner (ESPI) "dropped its case against Valve" after its counsel Lavery's declaration, is blatantly false. Nothing was "dropped". A stipulation due to "venue" issues was agreed to.

Under Shenzhen Silver Star and General Plastics, Valve is a similarly situated party. The facts do not lie. Valve has admitted co-defendant status (unequivocal); involvement in the development of the alleged infringing VIVE devices (unequivocal); privity of contract in a license agreement between HTC (unequivocal); its involvement in the District Court infringement case where it was a named defendant (unequivocal), and incorporating the technology of Valve into the accused infringing VIVE devices at both HTC's facilities in China and Valve facilities in Washington (unequivocal). These are indisputable facts by Valve admitted under oath that lead to no other conclusion that Valve and HTC are similarly situated parties with regard to the patent technology at issue.

As Judge Saindon stated in Shenzhen Silver Star:

"[B]oth Petitioner and the prior petitioner... are similarly situated defendants because they both had a reason to seek Inter Partes review at or around the same time, when Patent Owner asserted at or around the same time that they infringe... [pg. 19].

HTC and Valve are similarly situated and the Board should exercise its discretion to deny Valve's cumulative "follow-on" petition.

Dated: March 21, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE (37 CFR §§ 42.6(e) and 42.105(a))

The undersigned hereby certifies that the above Patent Owner's Sur-Reply in the *Inter-Partes* Review Case IPR2019-00085 of U.S. Patent No. 9,235,934 B2 were served on this 21st day of March, 2019 on the *Petitioner* at the official correspondence address for the Lead Counsel and

5 Back-Up Counsel by e-mail per *Petitioner's* stated consent:

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