

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

EVIDEO OWNERS, et al.	:	
	:	
	:	
Plaintiffs,	:	Case No. 15-413C
	:	
v.	:	Judge Lydia Kay Griggsby
	:	
THE UNITED STATES	:	
	:	
Defendant.	:	

**PLAINTIFFS’ REPLY TO DEFENDANT’S RESPONSE TO PLAINTIFF’S INITIAL SUPPLEMENTAL BRIEF ON DEFENDANT’S MOTION TO DISMISS**

Plaintiffs Mauro DiDomenico, Douglas Buerger, Craig Linden, RealVirt LLC and Paul Barous, individually and on behalf of all those similarly situated, respectfully submit the following PLAINTIFFS’ REPLY TO DEFENDANT’S RESPONSE TO PLAINTIFF’S INITIAL SUPPLEMENTAL BRIEF ON DEFENDANT’S MOTION TO DISMISS as required by the Court and in response to Defendant’s motion to dismiss dated August 14, 2015.

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January 25, 2016

COUNSEL FOR PLAINTIFFS

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## ARGUMENTS

On November 10, 2015, the Court issued an order for supplemental briefing to address the following two issues:

- 1) Whether the Court has jurisdiction to consider plaintiffs' illegal exaction claim under *Norman v. United States*, 429 F.3d 1081 (Fed. Cir. 2005) (i.e., *Norman II*) and its progeny; and
- 2) Whether the Court's Tucker Act jurisdiction with respect to the plaintiffs' illegal exaction claim is displaced by 35 U.S.C. § 42(d) and 37 C.F.R. § 1.26.

On January 11, 2016, the defendant filed a Response to Plaintiffs' Initial Supplemental Briefing. The following is plaintiffs' reply to arguments raised in defendant's response to plaintiffs' initial supplemental briefing.

### ISSUE 1

#### **The Court has jurisdiction to consider plaintiffs' illegal exaction claim under *Norman* and its progeny**

The defendant mischaracterizes *Norman II*, at page 3, lines 2-4 in the defendant's response brief, in suggesting that provisions of 35 U.S.C. § 132(a) are required to "lead to the inescapable or 'ineluctable conclusion that the clause provides a cause of action with a monetary remedy'...in order to establish jurisdiction under an illegal exaction claim. *Norman II* merely requires that a statute or provision causing an exaction provide either expressly or by "necessary implication" that the remedy for its violation entails a return of money unlawfully exacted. *Norman*, 429 F.3d at 1095. The defendant ignores the fact that plaintiffs were required to pay official fees in order to keep their patent applications from being held abandoned by the USPTO

while, at the same time, the USPTO withheld all information from plaintiffs about the secret S.A.W.S. designations that had been applied to the plaintiffs' patent applications.

The defendant is correct in their characterization of plaintiffs' chain of direct causation listed on page 5 in the Defendant's response brief. However, contrary to defendant's characterization, this chain suggests a direct link between defendant's illegal violations of 35 U.S.C. § 132(a) and the exaction of official fees paid by Plaintiffs to the USPTO. Payment of these official fees was required of the plaintiffs in order to keep their patent applications pending before the USPTO rather than plaintiffs being notified that their patent applications were being blocked from allowance for reasons associated with secret S.A.W.S. designations. At the same time, plaintiffs were required to rebut false and erroneous rejections maintained by the USPTO Examiners in Office Actions directed to plaintiffs' patent applications pending before the USPTO, rather than plaintiffs being notified that the applications were being blocked from allowance for reasons associated with secret S.A.W.S. designations.

The defendant is not correct in that discovery is required to establish the direct link between defendant's illegal violations of 35 U.S.C. § 132(a) and the exaction of official fees paid by plaintiffs to the USPTO.

## ISSUE 2

### **The Court's Tucker Act jurisdiction with respect to the plaintiffs' illegal exaction claim is not displaced by 35 U.S.C. § 42(d) and 37 C.F.R. § 1.26**

The government has not raised any arguments regarding this issue in their response brief filed January 11, 2016.

CONCLUSION

For at least the above reasons, the government's motion to dismiss should be denied. Plaintiffs respectfully request that this Court deny the government's motion and allow this case to be decided on the merits.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing PLAINTIFFS' REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFF'S INITIAL SUPPLEMENTAL BRIEF ON DEFENDANT'S MOTION TO DISMISS was filed under the Court's CM/ECF System and was served on all counsel of record thereby and in addition was served via electronic mail upon all counsel of record on this, 25th day of January, 2016. All counsel of record are served through electronic mail and no additional or alternative means of service were used.

**/s/ Patrick R. Delaney**  
Patrick R. Delaney