

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

EVIDEO OWNERS,)	
MAURO DIDOMENICO)	
DOUGLAS BUERGER)	
CRAIG LINDEN)	
REALVIRT, LLC)	
PAUL BAROUS)	
)	
Plaintiffs,)	No. 15-413
)	
v.)	Judge Lydia Kay Griggsby
)	
THE UNITED STATES,)	
)	
Defendant.)	
_____)	

DEFENDANT’S REPLY TO PLAINTIFFS’ RESPONSIVE SUPPLEMENTAL BRIEFING IN OPPOSITION TO DEFENDANT’S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM

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ARGUMENT

Pending before the Court is defendant's August 14, 2015 motion to dismiss for lack of subject matter jurisdiction and failure to state a claim. Pursuant to the Court's order dated November 10, 2015, the parties have provided supplemental and responsive briefing on two questions posed by the Court.¹ Plaintiffs' supplemental brief and response do not carry plaintiffs' burden to show jurisdiction. Although plaintiffs have failed to carry their burden and defendant's motion can be granted without further briefing, defendant will address a handful of issues raised by plaintiff's responsive brief in the interest of completeness.

First, it bears noting that plaintiffs again have failed to explain how the first requirement of *Norman II* is met. Plaintiffs' response summarily "contend[s] that the Court has jurisdiction to consider plaintiff's claims based upon *Norman v. United States*, 429 F.3d 1081 (Fed. Cir. 2005) because the illegal violations of 35 U.S.C. §132(a) by the USPTO provide a 'necessary implication that the remedy for its violation entails a return of money unlawfully exacted.' *Norman*, 429 F.3d at 1095." (Plaintiff's Response Brief to Defendant's Initial Supplemental Brief on Defendant's Motion to Dismiss ("Plaintiffs' Response") at 1). Other than this conclusory statement, plaintiffs provide no support, no

¹ The first question posed by the Court, which addressed the effect of *Norman v. United States*, 429 F.3d 1081 (Fed. Cir. 2005) ("*Norman II*"), and its progeny, on plaintiffs' ability to bring an illegal exaction claim, is addressed below. The second question posed by the Court addressed the effect of remedies available under 35 U.S.C. § 42(d) and 37 C.F.R. § 1.26 on plaintiffs' claims. It is not clear from plaintiffs' supplemental and responsive briefs whether plaintiffs claim that they paid official fees by "mistake" or in "excess of that required." To the extent plaintiffs attempt to argue they paid official fees by "mistake" or in "excess of that required," the Tucker Act is displaced by 35 U.S.C. § 42(d) and 37 CFR § 1.26 for the reasons addressed in defendant's supplemental brief. Plaintiffs' cannot avoid the bar created by 35 U.S.C. § 42(d) and 37 CFR § 1.26 by alleging they need more information.

analysis, and no explanation how a burden shifting statute—35 U.S.C. § 132(a)—leads to the necessary, inescapable or “ineluctable conclusion that the clause provides a cause of action with a monetary remedy,” as required to establish jurisdiction. *Norman II*, 429 F.3d at 1096 (quoting in parenthetical *Cyprus Amax. Coal Co.*, 205 F.3d at 1373).

Rather, as noted in defendant’s earlier briefs, failure to comply with this burden-shifting provision merely means the burden of production is not properly shifted to the patent applicant during patent prosecution. Because plaintiffs have failed to demonstrate their claims meet the first requirement of *Norman II*, plaintiffs’ claims should be dismissed.

Second, plaintiffs have argued that “causation (or nexus) is ordinarily a fact question that cannot be addressed in a motion to dismiss, *see Chevron U.S.A., Inc. v. United States*, 71 Fed. Cl. 236, 278 (2006).” (Plaintiffs’ Response at 2). Plaintiffs then repeat the attenuated alleged causal chain that was included in their supplemental brief. (Compare Plaintiffs’ Initial Supplemental Briefing On Defendant’s Motion to Dismiss at 2-4 with Plaintiff’s Response at 2-3). As noted in defendant’s underlying motion to dismiss, although causation (or nexus) is ordinarily a fact question that cannot be addressed in a motion to dismiss, *see Chevron U.S.A., Inc. v. United States*, 71 Fed. Cl. 236, 278 (2006) (denying motion to dismiss because the factual allegations in the complaint must be accepted as true), the alleged facts, presumed to be true, fail to establish any direct causation, as explained, *inter alia*, in defendant’s supplemental brief and response.

Third, plaintiffs attempt to distinguish *Clark v. United States*, 2014 WL 3728172, at *5 (Fed. Cl. 2014) (unpublished), *aff’d*, 2015 WL 7567508 (Fed. Cir. 2015), based on what was (or was not) pleaded in the complaint in *Clark*. Specifically, plaintiffs argue

that “in *Clark*, the *pro se* plaintiff in that case did not set forth any illegal violation of any statute in their pleading.” (Plaintiffs’ Response at 3-4). Plaintiffs’ arguments do not address the actual holding of *Clark*. *Clark* did not turn on what was pleaded in the complaint. Rather, *Clark* held that no illegal exaction claim could be based on the voluntary payment of processing fees for a patent application absent a showing that the government exceeded its authority in collecting the fees—i.e., the processing fees exceeded the permitted amount. *See Clark*, 2014 WL 3728172 at *5.

Moreover, although plaintiffs attempt to distinguish their pleadings from those of *Clark*, the plaintiff’s allegations in *Clark* were remarkably similar to the alleged wrongdoings raised by the plaintiffs here. The plaintiff in *Clark* contended that the United States illegally exacted money “from plaintiff by charging him various fees related to his patent application, while allegedly knowing that his patent application for the OOA program would be denied.” *Id.* Thus, like the plaintiffs here, the plaintiff in *Clark* appears to have alleged that the United States Patent and Trademark Office acted improperly by secretly intending to reject his application while still allowing him to file the application and pay various fees. The claims advanced by plaintiffs—seeking a refund of voluntary processing fees—are not illegal exaction claims for the same reasons the plaintiff in *Clark* did not have a cognizable illegal exaction claim.

Lastly, Plaintiffs argue that “[t]he government also cites a number [sic] tax cases (Defendant’s Initial Briefing, page 11) in an attempt to define what qualifies as an illegal exaction claim but does not address the distinction that the present case at issue is not a tax case.” (Plaintiffs’ Response at 4). Plaintiffs’ argument merely confirms defendant’s point. As explained in defendant’s supplemental brief, illegal exaction claims are

ordinarily based on the alleged violations of statutes that are monetary in nature—tax laws and fee setting statutes—not the alleged violation of burden shifting statutes. (*See* Defendant’s Supplemental Brief in Support of Motion to Dismiss at 11-12). Despite Plaintiffs’ burden to establish jurisdiction, Plaintiffs cite no cases to the contrary.

CONCLUSION

In light of the foregoing, and for the additional reasons raised in defendant’s motion to dismiss, defendant respectfully requests that the Court dismiss the plaintiffs’ First Amended Complaint under RCFC 12(b)(1) and/or RCFC 12(b)(6).

Respectfully submitted,

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