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## HTC Blindsided by Stay in the Dark Strategy

### Eastern District of Texas Expands Activity Equating to Willful Blindness

By: Manon Burns and Barry Irwin | October 18, 2019

Motiva alleged that HTC directly, indirectly, and willfully infringed of a number of Motiva's patents directed to video game and virtual reality systems. HTC moved to dismiss two of Motiva's claims, arguing that Motiva failed to adequately plead its claims for indirect and willful infringement. Specifically, HTC argued that that Motiva failed to allege sufficient factual support regarding HTC's knowledge of Motiva's patents and HTC's intent.

Regarding indirect patent infringement, there are two types: induced and contributory. A claim of induced infringement requires that the defendant take active steps to encourage infringement by another. It also requires the plaintiff to show that the defendant both (1) knew about the asserted patents and (2) knew that the acts induced by the defendant would infringe the asserted patents. A claim of contributory infringement requires the plaintiff to show that the defendant sold or offered to sell a product used in practicing a patent, and that the product has no substantial non-infringing uses, or in other words, no real uses other than to infringe the patent. Contributory infringement also has a knowledge requirement, as the defendant must know that the product it sells will contribute to that infringement.

Motiva argued that HTC's actions, or lack thereof, satisfied the knowledge requirement of both kinds of indirect infringement, alleging that HTC "has a policy or practice of not reviewing the patents of others (including instructing its employees to not review the patents of others)." *Motiva Patents, LLC v. Sony Corp. HTC Corp.*, No. 918CV00179JRGKFG, 2019 WL 4737051, at \*2 (E.D. Tex. Sept. 27, 2019). Such a policy, Motiva argued, constituted willful blindness to the existence of Motiva's patents. In *Glob.-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 768 (2011), the Supreme Court approved of the doctrine of willful blindness to supply the knowledge requirement for indirect infringement, providing a framework of requirements: "(1) The defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact." Judge Gilstrap of the Eastern District of Texas agreed with Motiva, finding that a policy of not reviewing patents and instructing employees to not review patents are deliberate actions to avoid learning of infringement.

Further, for similar reasons, Judge Gilstrap agreed with Motiva that its allegations of willful blindness were sufficient to satisfy the requirement for willful infringement—that the defendant know of the patent and act recklessly in proceeding to sell the accused device. The Supreme Court's discussion in *Halo* of subjective willfulness ("knowing or having reason to know of facts") also suggested to Judge Gilstrap that willful blindness should apply in the willful infringement context. *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1933 (2016).

This decision seems to require that all companies review patents that they become aware of, or reasonably should be aware of, that may potentially impact their product. Otherwise, they risk being accused of willful blindness. At a minimum, companies should discontinue practices of forbidding employees from reviewing patents of others.