

No. 18-__

IN THE
Supreme Court of the United States

RICHARD J BAKER,
Petitioner,

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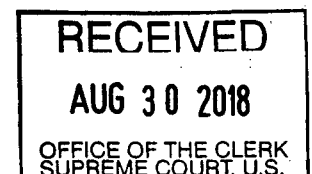
MICROSOFT CORPORATION, UBISOFT, INC.,
NINTENDO OF AMERICA INC., ELECTRONIC
ARTS, INC., HARMONIX MUSIC SYSTEMS, INC.,
MAJESCO ENTERTAINMENT,

Respondents.

**Petition for a Writ of Certiorari to the
United States Court of Appeals
for The Federal Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Article I, Section 8, Clause 8, of the United States Constitution grants Congress the power "To promote the progress of science and useful arts, by "*securing*" for limited times to authors and inventors the exclusive right to their respective writings and discoveries." US Patent holders when they give forth their discoveries petitioner believes form a binding contract agreement with the U.S. Government and judiciary to "secure" their private property against infringement. In proceedings today lower courts are not helping to secure for inventors their patents which seriously conflicts with the spirit of the Patent Act of 1790 (1 Stat. 109).

The questions presented are:

1. Whether under rights given by Congress and contained in U.S. Constitution. Article I Section 8. Clause 8 to all U.S. patent holders for disclosure of invention on even a scintilla of evidence being shown of genuine dispute all courts must forward when requested proceedings to the trier of fact "a trial" otherwise the promise to secure for all inventors their personal property invention is broken by the U.S. Government?

2. Should the U.S. Government compensate inventors when the judiciary have failed to help secure their issued patent, a promise contained in U.S. Constitution. Article I Section 8. Clause 8 is broken?

PARTIES TO THE PROCEEDING

All parties are listed in the caption. Majesco Entertainment has been listed as a respondent because they did not participate at the Circuit Court level but were listed as defendant.

RULE 29.6 STATEMENT

Petitioner, Richard J Baker, has no parent corporation or shares held by a publicly traded company.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING.....	ii
RULE 29.6 STATEMENT.....	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
PETITION FOR WRIT OF CERTIORARI.....	1
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE	3
I. A CONTRACT FORMED BY PROMISE AND ACCEPTANCE BETWEEN INVENTOR AND U.S. GOVERNMENT HAS NOW BEEN BROKEN. SHOULD U.S. GOVERNMENT COMPENSATE?.....	3
II. THE LITIGATION THROUGH THE LOWER COURTS	5

A.	The United States Court of Appeals for the Federal Circuit	5
B.	Petitioners Specification Proves Judiciary Got It Seriously Wrong	6
C.	The United States District Court for the Western District of Washington	7
D.	District Court Support For Non-Movant Non-Existent.....	8
REASONS FOR GRANTING THE WRIT.....		11
I.	The case presents an issue of national importance, continuing judiciary support for inventors to help secure their U.S. Patents ..	11
II.	Further Reasons For Valid Disputes Going To Jury Trial.....	12
III.	Clearly inventors should have a valid claim to some sort of compensation under Restatement (Second) of Contracts §71 and Restatement (Second) of Contracts § 90 when there has been promise made by U.S. Government to secure and no support is forthcoming from judiciary during proceeding	12
A.	Breach of Contract and Broken Promises under Restatement (Second) of Contracts §71.....	13
B.	Promissory Estoppel under Restatement (Second) of Contracts §90.....	14
CONCLUSION.....		16

v

**Appendix A-Judgment and Opinion, United States
Court of Appeals for the Federal Circuit (9th April,
2018) App.1**

**Appendix B-Opinion, U.S. District Court United
States District Court for the Western District of
Washington at Seattle Granting Defendants' Motion
For Summary Judgment (3rd January, 2017) .. App.12**

**Appendix C-Order United States Court of Appeals
for the Federal Circuit Denying Petition for Panel
Rehearing and Rehearing En Banc (8th June,
2018) App.34**

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Poly-America, L.P. v. API Industries, Inc.</i> , (16-1200, Fed. Cir. October 14, 2016).....	7
<i>Vitronics Corp. v. Conceptronic, Inc.</i> , 90 F.3d 1576 (Fed. Cir. 1996).....	7
CONSTITUTIONAL PROVISIONS	
U.S. Constitution, Article I, Section 8, Clause 8.....	2, 13, 14, 15
U.S. Constitution, Amend. V	2, 10
U.S. Constitution, Amend. XIV	2, 10
STATUTES, REGULATIONS, AND RULES	
28 U.S.C. § 1254(1).....	2
35 U.S.C. § 112 ¶ 6.....	7
Patent Act of 1790 (1 Stat. 109)	2
Rule 56 of The Federal Rules Of Civil Procedure. Summary Judgment	<i>passim</i>
OTHER AUTHORITIES	
Restatement (Second) of Contracts § 71	1, 12
Restatement (Second) of Contracts § 90	1, 12, 13
US Patent No. 5,486,001.....	6, 7, 9, 10

PETITION FOR WRIT OF CERTIORARI

Richard J Baker respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit and United States District Court for the Western District of Washington.

OPINIONS BELOW

1. The Judgment and Opinion, United States Court of Appeals for the Federal Circuit affirming to respondents in Case No. 17-2357 is reprinted at appendix..... App.1
2. The opinion, U.S. District Court United States District Court for the Western District of Washington at Seattle Granting Defendants' Motion For Summary Judgment (3rd January, 2017)..... App.12
3. The order of the United States Court of Appeals for the Federal Circuit Denying Petition for Panel Rehearing and Rehearing En Banc in Case No. 17-2357 is reprinted at App.34

JURISDICTION

The United States Court of Appeals for the Federal Circuit Court entered of judgment on April 9, 2018 is found at App.1 The United States Court of Appeals for the Federal Circuit Court denial of Petition for Panel Rehearing and Rehearing En Banc on June 8, 2018 is found at App.34. The United States District Court for the Western District of Washington at Seattle entry of early summary judgment to the Respondents on January 3, 2017 is found at App.12. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides: No person shall ... be deprived of life, liberty, or property, without due process of law.

Section One of the Fourteenth Amendment to the United States Constitution provides: [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

United States Constitution (Article I, Section 8, Clause 8) Patent Act of 1790 (1 Stat. 109)).

Breach of Contract and Broken Promises under Restatement (Second) of Contracts §71.

Promissory Estoppel under Restatement (Second) of Contracts § 90.

STATEMENT OF THE CASE**I. A CONTRACT FORMED BY PROMISE AND ACCEPTANCE BETWEEN INVENTOR AND U.S. GOVERNMENT HAS NOW BEEN BROKEN. SHOULD U.S. GOVERNMENT COMPENSATE?**

In 1991 petitioner invented a "new machine" that took video to a whole new level of performance, one which can teach people "personally" for the first time. It allows any expert to teach potentially tens of thousands of people per day around the world similar to face-to-face communications and "never" have to see anyone's physical movement. Unheard of at the time. The invention works via capturing a persons movement using a camera, transmitting it to a computer database via a communications means, where it is analysed against an experts stored movement and new visual presentation made which shows person their movement against a preferred stored experts movement and audio instructional comments from the expert are generated to go with the split screen, superimposed visual presentation. By converging a number of known industries and adding his "unique algorithm" to a computer database a computer can "automatically" mass produce in near real-time personalised instructional video for people.

Petitioner is pioneer inventor of this technology and should have received broad coverage of where he could work the invention if he did not relinquish any elements during prosecution, which

he did not, explained at point III in his Corrected Brief Of Appellant, Document: #33 Page: 29 Filed: 10/25/2017. The invention unfortunately petitioner was to find out was way before its time, problems with motion capture, near real time video transmission, computer processing speed etcetera. About 12 years go by and PC Games Consoles come up to speed to make petitioner new machine around 2007, petitioner sues respondents for infringement 2015. Respondents have case moved to their home town on inconvenience and then ask for early summary judgment on narrow question **“can petitioner work his motion tracking camera and computer inside same room, in close proximity to parson having their motion captured”** where respondents systems work, when he mentioned in approved claims his motion capture camera is situated at a **“first location”** and computer is at a **“remote second location”** and both devices are only separated via a communications means? Petitioner provided many material facts in opposition to summary judgment that went against the other side’s case, all of which he still feels was good enough to send this case to trial but the District Court took onboard all the pleadings of respondents and awarded early summary judgment on 3rd January, 2017.

On valid material facts “disputes” being shown which added inferences of doubt to what respondents said occurred at prosecution it became not a law question for judge to decide and Judge Jones should have sent proceedings to trial, but he did not. Sticking to the same material facts but just

elaborating on them even more petitioner then filed Appeal in the Federal Circuit Case No 17-2357, Document No 33 on 25th October, 2017 but here again the Federal Circuit also decided wrongly to weight the disputes and affirmed to the respondents Document No 51-2, Filed: 9th April, 2018. Petitioner then further filed Petition For Panel Rehearing And Rehearing En Banc Document No 52 on 7th May, 2018, same material facts, valid disputes and rehearing was denied. Document No 54 on 8th June, 2018. One may think that two courts and three determinations on petitioners' pleadings the justices could not have got things wrong, but they "**clearly did**", one can see this by what petitioner advises at point II "B" below. This case shows how on showing of "valid disputes" by a non-movant, cases "**must be**" sent to trier of fact, "trial" otherwise justice may not be served. Here lower court judiciary have not helped to "secure" for inventor a patent and if petitioner cannot now get hearing in this last court of justice a contract formed by "promise and acceptance" and payment of continual fees to keep patent, contract/agreement between inventor and U.S. Government valid has been broken. Should the U.S. Government then compensate inventors?

II. THE LITIGATION THROUGH THE LOWER COURTS

A. The United States Court of Appeals for the Federal Circuit

Petitioner in this section finds it hard to even describe how on many genuine material facts,

disputes showed in his Reply Brief Document No 45, Filed: 27th November, 2017 and Petition For Panel Rehearing And Rehearing En Banc Document No 52 7th May, 2018 how this court could not see this case needed to go to trial considering to defeat summary judgment a non-moving party only has to show substantial evidence that a dispute of material facts exists, regardless of the strength of that evidence and even if the moving side can produce the testimony of "a dozen bishops", and the non-moving side only has the testimony of a known liar, "then summary judgment is not appropriate. Deciding on the relative credibility of a person is a question for the factfinder at trial.

B. Petitioners Specification Proves Judiciary Got It Seriously Wrong

One factor alone should have sent this case to trial. In his pleadings petitioner mentioned a number of times his U.S. Patent No. 5,486,001 "specifications" read on his image capturing device being "**not physically affixed**" or "**attached**" to the computer, see J.A. 51 at line 12. The significant of this statement is it tells a "**distance**" petitioners camera and computer can be away from one another "not physically affixed or attached together" can be a very "**minute**" distance and so it puts beyond any doubt petitioner could work his "remote" computer in a single room, in close proximity to motion capture camera, the exact territory respondents accused systems work and thus early summary judgment to the respondents by the judiciary was plainly wrong should not have been granted.

The specification is the single best guide to the meaning of a disputed term, and acts as a dictionary when it expressly defines terms used in the claims or when it defines terms by implication. *Vitronics Corp. v. Conceptoronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996). Statements made in a patent application hold greater weight than do statements made during prosecution since “[u]ltimately, the only meaning that matters in claim construction is the meaning **“in the context of the patent”**”. *Poly-America, L.P. v. API Industries, Inc.*, (16-1200, Fed. Cir. October 14, 2016), p. 10 (emphasis added).

A patentee can be his own “lexicographer” which is exactly what he told the Federal Circuit Document No 52 at page 6. This particular page also talks about camera and computer are not **“affixed”** and the terminology petitioner used to described where his camera and remote computer are located, first and second location was nothing new because it was a carry over from his originating application 1992 W092/2 1 4 1 2 PCT/AU92/00253, example see J.A. 321 Claim 4. No estoppel took place at patent prosecution.

C. The United States District Court for the Western District of Washington

On February 26, 2015, petitioner filed suit in the Eastern District of Texas Tyler Division, alleging respondents literally and via Doctrine Of Equivalent (DOE) 35 U.S.C. § 112 ¶ 6 and After-Arising Technology (AAT) infringed upon his issued U.S. Patent No. 5,486,001. Respondents moved on

August 11, 2015 to have case transferred to Western District of Washington on inconvenience because petitioner had no ties to the chosen forum Texas. Court granted request on March 17, 2016. In Seattle on June 17, 2016 respondents filed motion for early summary judgment of non-infringement. Case 2:16-cv-00396-RAJ Document No 130 that the court should consider.

Plaintiff's infringement theory is that storage, transmission, and/or comparison of visual image signals "locally" constitutes infringement of the "remote" location limitations, including pursuant to the doctrine of equivalents and after-arising technology. Defendants contend that statements made during prosecution of the patents-in-suit legally preclude and/or prohibit Plaintiff's infringement theory; Plaintiff disagrees. This is a narrow legal issue. Joint Status Report Document No 127 filed April 18, 2016.

D. District Court Support For Non-Movant Non-Existent

In the District Court petitioner presented his opposition of defendants motion for summary judgement, Document No 133 Filed July 9, 2016. The document shows many evidentiary claims as to why and how he was entitled to work his "new machine" anywhere. In particular it talks about what actually happened during patent prosecution which backs up no "clear and convincing" evidence

he ever relinquished the territory the respondents claim. J.A. 464-468. He mentioned and showed the district court a picture at J.A. 462 of how the respondents camera's are "separated" from computer via a "communications means" mentioned in his approved patent claims and how they use USB cable which is a modern "communications" means. The accused systems use a "peripheral" device camera which is "not physically affixed" to computer mentioned in petitioners approved patent specifications. J.A. 51, line 12. He mentioned to the district court there was no difference to way the accused systems operate and the invention. When they use a peripheral device camera not attached to computer it is in a first location with a remote computer in second location. On reading and seeing this information alone the district court should have by law supported the non-movant and helped to secure for inventor the patent, sent case to trial without even considering petitioner was a pioneer inventor and may have had AAT DOE rights as well but Judge Jones went against legal principals of early summary judgment and weighted up the evidence and wrongly determined (a) respondents camera and computer where "physically" connected. J.A. 15, line 3 which they are differently not plus (b) in regards petitioners two audio-visual transceivers they cannot be working in same room, which they can and stated at i. Construction of Claims 1, 10, and 18 of the '001 Patent

The Court construes the term "remote" in Claims 1, 10, and 18 of the '001 Patent to require "more" than physical separation at

the same location. The Court's construction is supported by the plain language of Claims 1, 10, and 18, the '001 Patent specification, and the prosecution history of the '001 Patent.

All petitioner was required to show at early summary judgment was a dispute of material facts exists, regardless of the strength of that evidence but Judge Jones decided to determine petitioner evidentiary claims normally reserved for jury and became decider of the evidentiary claims and award early summary judgment to the respondents which if then the Federal Circuit does not have time to do proper due diligence in regards the evidentiary claims and inventor cannot get hearing in this court means by just a district court saying at early summary judgment there must be "more", to disputes shown a case can basically be over even for a pioneer inventor and justice has certainly not been served when one can see by doing proper due diligence of petitioners patent specifications and keeping in mind he was allowed to be his own lexicographer he was clearly entitled to work his remote computer in the same territory as respondents systems. Under procedural due process clause found in both the Fifth and Fourteenth Amendments petitioner should have received hearing by impartial trier of fact.

REASONS FOR GRANTING THE WRIT

- I. The case presents an issue of national importance, continuing judiciary support for inventors to help secure their U.S. Patents.**

The framers of the 1790 Patent Act may have had very good intentions to protect inventors intellectual property but today inventors and people working within the patent industry are saying the judiciary in the United States over the last decade or so have passed laws which make it a lot easier for accused patent infringers to go free by example running across border to a non-patent friendly state, to the stage now where many believe a U.S. patent is not worth the effort, time and cost to receive and can easily be terminated by Agency not Category III court.

All inventors who have a U.S. patent look to the laws formed by this court to protect their valuable personal property which the Patent Act states should be "secured" but what good are this courts laws if the lower court judiciary and agency administration especially in computer related cases are not fully conversant with today's computer technology compared to old, how terminology has changed over the years for particular computer parts but work same etcetera? What can happen is at early summary judgment bad decisions can be made and potential infringers can go free. The USPTO can also issue a patent again for the same subject matter, which this inventor believes actually has happened

to him with his instant patent. One of the only defences an inventor has left to judiciary making a bad decision is on a valid showing of genuine "disputes" calls for judiciary to forward case to trial. This is not happening as evidence by this case. Petitioner believes this court needs to make absolutely clear for the reasons given below at point III "A" and "B" that all cases in the lower courts which show even a mere scintilla of evidence and have requested must be sent to jury trial.

II. Further Reasons For Valid Disputes Going To Jury Trial

If aggrieved party has good evidence which could convince a jury in their favour there is good probability the other party may then consider settling before trial. By court ordering on a showing of disputed facts lower courts must send case to jury trial also helps take away the stigma inventors will not receive fair hearing in some U.S. states. A much fairer system for everyone petitioner believes having now experienced what can happen when judiciary say against valid disputes there must be "more" during early summary judgment a case is basically over on a word if appeal court justices also do not have the time to understand fully the workings of an invention.

III. Clearly inventors should have a valid claim to some sort of compensation under Restatement (Second) of Contracts §71 and Restatement (Second) of Contracts § 90 when there has been

promise made by U.S. Government to secure and no support is forthcoming from judiciary during a proceeding.

A. Breach of Contract and Broken Promises under Restatement (Second) of Contracts §71

Bargain Theory

- (1) To constitute consideration, a performance or a return promise must be bargained for.
- (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.
- (3) The performance may consist of
 - (a) an act other than a promise, or
 - (b) a forbearance, or
 - (c) the creation, modification, or destruction of a legal relation.
- (4) The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.

Inventors when they hand over their inventive ideas to the U.S. Government via its agency USPTO expect from statements made in Article I Section 8. Clause 8 of U.S. Constitution that they may receive

a U.S. patent and help to “secure” protect it by the judiciary against infringement during life of the patent. U.S. Government via its agency USPTO in return expects to receive and usually does from inventor “best mode” of operation, plus ongoing monies to keep patent alive. Valid contract has then been formed between the parties via “promise in exchange for an action” and money and “one parties reliance on another’s promise”. Usually when such promises are broken in other industries it’s called stealing and there is recourse for an aggrieved individual or company to be compensated. If lower courts and this court do nothing to help secure for inventors their valid patents when genuine disputes are shown which should have sent proceeding to trier of fact then who compensates an inventor when promises are broken under Article I Section 8. Clause 8 of U.S. Constitution?

**B. Promissory Estoppel under
Restatement (Second) of Contracts
§ 90.**

The promissory estoppel doctrine allows an injured party to recover on a promise upon which he relied, and then suffered a loss as a result. There are five elements of promissory estoppel that must exist in order for the concept to be enforced. The five elements of promissory estoppel are listed below:

- **Legal Relationship** – Some form of legal relationship must exist, or be anticipated to exist, between the parties, such as a contractual relationship.

- **Promise** – It must be shown that a promise was made between the parties to the action that led the injured party to assume that some sort of action was to be taken. Such a promise must be reasonably reliable, or believable.
- **Reliance** – It must be shown that the injured party relied on the promise that was made, and took some action based on that promise.
- **Detriment** – The party that relied upon the promise must have suffered some sort of detriment or loss, which puts him in a worse position than when he started.
- **Unconscionability** – It must be shown that it was unfair for the promisor to break his promise to the promisee.

All the above five elements are present when a patent has been applied for and approved by U.S. Government via its agency USPTO and the lower courts unfairly do not help to “secure” for inventor their U.S. patent. The courts will not always force the promisor to honor his promise. The only time this is done is if “injustice” can be avoided only by “enforcement of the promise.” The remedy granted for breach may be limited as “**justice requires**”. Under summary judgment justice requires even a scintilla of evidence being shown of genuine dispute all courts must forward proceedings to the trier of fact “a trial” otherwise the promise to “secure” for all inventors their personal property discoveries contained in United States Constitution (Article I, Section 8, Clause 8) is broken by the U.S.

Government. Petitioner now ask this court in supervisory role to step in and rule more strongly on initial request for a jury trial and scintilla of evidence being shown of genuine dispute all lower courts must forward the proceedings to jury trial. To show all inventors that the spirit of the framers 1790 Patent Act to secure their patents is still alive and enforceable by this court if needed.

CONCLUSION

“The petition for a writ of certiorari should be granted”; “The judgment of the District Court should be reversed, new judge appointed.”

Respectfully submitted.

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