2019-2389

United States Court of Appeals for the Federal Circuit

UNILOC 2017 LLC,

Appellant,

v.

APPLE INC.,

Appellee,

ANDREI IANCU, Director, U.S. Patent and Trademark Office,

Intervenor.

On Appeal from the United States Patent and Trademark Office, Patent Trial and Appeal Board in No. IPR2018-00294

REPLY BRIEF OF APPELLANT

BRETT MANGRUM
RYAN S. LOVELESS
JAMES ETHERIDGE
ETHERIDGE LAW GROUP
2600 East Southlake Boulevard
Suite 120-324
Southlake, Texas 76092
(817) 470-7249
brett@etheridgelaw.com
ryan@etheridgelaw.com
jim@etheridgelaw.com
Counsel for Appellant

FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Uniloc 2017 LLC **v.** Apple Inc.

Case No. 19-2389

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ■ (appellant) ☐ (respondent) ☐ (appellee) ☐ (amicus) ☐ (name of party)

Uniloc 2017 LLC

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Uniloc 2017 LLC	Uniloc 2017 LLC	CF Uniloc Holdings LLC
.		

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:

James L. Etheridge
Ryan S. Loveless
Brett A. Mangrum
Etheridge Law Group, PLLC
2600 East Southlake Blvd, Suite 120-324
Southlake, TX 76092

FORM 9. Certificate of Interest **Form 9**
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5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

Uniloc USA, Inc. et al v. Apple Inc., 2:17-cv-00708, (E.D. Texas)

2/19/2020
Date

/s/ Brett Mangrum
Signature of counsel

Please Note: All questions must be answered

Brett Mangrum
Printed name of counsel

cc: All counsel of record via CM/EC

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INTRODUCTION

For the reasons stated in Appellant Uniloc's Opening Brief ("Uniloc Br."), the Board erred in determining Appellee Apple met its burden to prove the challenged claims of the '759 patent are unpatentable. Uniloc submits this reply to briefly respond to issues raised in Apple's Response Brief ("Apple Br.") particularly related to the "displaying real-time data" limitations recited in the claims, and to the brief filed for Intervenor, Director of the U.S. Patent and Trademark Office ("Intervenor Br.").

ARGUMENT

I. Uniloc's arguments as to the scope of claims were presented to the Board.

Apple incorrectly asserts that "Uniloc improperly seeks to circumvent the Board's fact-finding by requesting further claim construction," and that "Uniloc did not argue claim construction before the Board." Apple Br. 24. Apple's assertions are false.

In Patent Owner's Response filed with the Board, the first several pages of Uniloc's argument as to Fry and Newell explains how the Board's Institution Decision misconstrues the claims, despite stating that it adopted this Court's construction in *Paragon Solutions, LLC v. Timex Corp.*, 566 F.3d 1075 (Fed. Cir. 2009). *See* Appx279-285. For example, Uniloc argued, as it does on appeal:

> The Federal Circuit did not, however, state that its construction "displaying data without intentional delay" only excludes delay arising from "storing [GPS data] for later review." Had the Court intended to

> so limit the negative aspect of its construction (i.e., "*without* intentional delay"), and thereby significantly broaden claim scope, surely the Court would have made that explicit. The Court did not. The only qualification expressed in the construction itself is the instructive phrase "given the processing limitations of the system and the time required to accurately measure the data [to be displayed]." EX1023, at 14. Thus, while the intrinsic evidence reveals that one *example* form of "intentional delay" may arise where GPS data is stored for later review, nothing in the Court's opinion suggests that is the only possible "intentional delay" excluded by the Court's construction of the "real-time" claim language

Appx280. Accordingly, despite Uniloc basing its response to the Petition on this Court's construction as expressed in *Paragon*, there remained a dispute as to the construction of "displaying data without intentional delay" that the Board was required to resolve.

As explained in Uniloc's Opening Brief, Uniloc Br. 13-28, the Board addressed the claim construction dispute by incorrectly determining that any data collection activity can be considered "processing" as expressed in *Paragon*, such that it does not count as "intentional delay," and also incorrectly determined that the only relevant "intentional delay" is storing for later review after the activity is over. *See* Appx18-23. It is Apple that improperly seeks to frame the dispute as one of fact-finding to avoid this Court's de novo review of the Board's incorrect interpretation of "displaying without intentional delay."

II. Apple ignores the language of the claim.

Apple argues that "Uniloc unduly focuses on the language of the claim

construction instead of the claim itself and the context in which it was construed." Apple Br. 24. It is Apple, however, that is ignoring the claim language. As explained in Uniloc's Opening Brief (pp. 22-23), claim 1 recites the claimed "data" in the specific context of "data provided by said electronic positioning device and said physiological monitor." In other words, the "data" that must be displayed in "real time" (i.e., "without intentional delay") is specifically claimed as that which is provided by "said electronic positioning device and said physiological monitor." Accordingly, unrelated steps, even if they could be considered "system processing," that would intentionally delay displaying the specifically-claimed "data" cannot reasonably be disregarded as "processing limitations of the system and the time required to accurately measure *the data*" as claimed.

III. Fry teaches intentional delay in displaying the claimed data.

Apple does not dispute that Fry teaches several steps that take priority over displaying the claimed GPS data. As Patent Owner explained in its Response, Appx279-285, in Fry's Figure 3 the "numerous, higher-priority processing blocks that Fry purposefully implements before ultimately tending to its 'least critical function' (displaying the GPS data) cannot reasonably be considered to be implemented 'without intentional delay,' as required under the construction adopted by the Board," Appx284. Apple's arguments relate to whether the claim phrase "displaying real-time data provided by said electronic positioning device and said

physiological monitor" could include deliberate collection of other data or performance of other steps prior to displaying the recited data. *See* Apple Br. 30-32. For example, Apple criticizes Uniloc's observation that Fry describes display as the least critical function, arguing that this simply relates to Fry's "order of operations." Apple Br. 31. But Fry's "order of operations" is relevant to whether the claimed data is displayed without intentional delay, because interjecting additional operations in their prescribed order results in delay in the claimed displaying. Apple fails to explain how Fry could possibly teach no intentional delay in display of the claimed data when the phrase "displaying real-time data provided by said electronic positioning device and said physiological monitor" is properly interpreted.

IV. The Board's findings as to Vock rely on its incorrect interpretation of the "displaying real-time data" limitations.

Apple's Response Brief obfuscates the purported basis for the Board's determination that Vock teaches "a display unit for displaying real-time data provided by said electronic positioning device and said physiological monitor," as recited in the claims. The Board's determination, however, is demonstrably premised on interpreting this limitation merely to require that the data is displayed during the activity. As explained in Uniloc's Opening Brief and herein, such an interpretation is incorrect.

The Board's decision refers to the display unit limitation beginning at the first full paragraph of page 47 (Appx47). The decision states that Petitioner notes that

Vock's watch 744 in Figure 27 allows the user "to monitor performance data in near-real time." Appx47 (emphasis omitted). The decision states "Petitioner also notes that Vock discloses that its sensing unit 'can provide *real-time* performance data to the user, via a connected display or via a data unit.'" *Id.* The decision then recounts Petitioner's argument that a person of ordinary skill in the art would have recognized that the sensing unit of Vock's Figure 27 embodiment includes a GPS receiver and that it would have been obvious to implement features described in the Figure 27 or Figure 28 embodiment in a single system. Appx47-48. This argument is important to Petitioner's challenge because Petitioner and the Board rely on Figure 28 for the data acquisition unit recited earlier in the claim. *See* Appx46.

In explaining why it is not persuaded by Uniloc's arguments, the Board's decision "note[s] that Vock appears to use 'real-time' and 'near real time' interchangeably to indicate presentation of performance data to the user during the performance of the associated activity." Appx52. The Board states that "Vock's discussion of 'near-real time' data, therefore, is consistent with the construction of 'displaying real-time data' discussed in section II.C.1 above." Appx53. The Board thus makes clear that it interprets both "real-time" and "near-real time" in Vock to mean that the performance data is presented to the user during the performance of the associated activity. This is insufficient to meet the interpretation adopted by the Board, which includes the negative limitation that the data is displayed without

intentional delay. *Paragon*, 566 F.3d at 1092–93 (construing "displaying real-time data," as used in the claims of this case, as "displaying data without intentional delay, given the processing limitations of the system and the time required to accurately measure the data").

In addition, even if "real time" or "near real time" in Vock satisfied the construction given by this Court in *Paragon*, as Uniloc observed in its Opening Brief, there is no merit to the speculative conclusion in the Petition that a POSITA would have been motivated to combine disparate embodiments within Vock. Pointing to the admittedly distinct embodiments of Figures 27 and 28 of Vock, Petitioner argues "a PHOSITA would understand that it would have been obvious to implement features described with respect to either embodiment in a single system." Appx196. The Board determines that because Figure 27 of Vock teaches monitoring performance data in near-real time, that the data from the GPS receiver in Figure 28 must also be monitored in "near-real time." *See* Appx53-54. The Board states that watch 810 and watch 744 are described "in similar terms," Appx 54, but the Board's decision ignores that *the primary difference* in description is the absence of the GPS data being described as monitored in near-real time. The Board also misreads Vock's use of the phrase "such as discussed herein." The Board states that "by disclosing that data is transmitted 'such as discussed herein,' Vock further likens watch 810 to the previously-discussed watch 744." Appx54. But Vock's use of "such as discussed

herein" clearly refers to other displays or data units, or to the base station, and not to the manner of near-real time monitoring disclosed in connection with Figure 27. *See* Appx858 ("A data transmit section 816 (e.g., the section 22, FIG. 1A) transmits data via an antenna 816*a* (or other technique), as desired, to the watch 810 *or to other displays or data units, or to the base station, such as discussed herein*." (emphasis added)). There is simply no teaching that the GPS data in Figure 28 can be monitored in near-real time. Petitioner and the Board lack substantial evidence and engage in hindsight reasoning in casually suggesting everything in Vock must be "real-time."

V. Uniloc's Constitutional Challenge is timely.

Apple and the Intervenor argue that by not raising an Appointments Clause challenge before the agency, Uniloc forfeited its Appointments Clause challenge. The argument strains credulity under the circumstances of this case.

The Board has previously "declin[ed] to consider . . . constitutional challenge[s] as, generally, 'administrative agencies do not have jurisdiction to decide the constitutionality of congressional enactments.'" *Square, Inc. Unwired Planet LLC*, Case IPR2014-01165, Paper 32 at 25 (PTAB Oct. 30, 2015) (quoting *Riggin v. Office of Senate Fair Emp't Practices*, 61 F.3d 1563, 1569 (Fed. Cir. 1995)). Indeed, the Board has relied on the *Square* case in not reviewing the Appointments Clause issue presented by Uniloc in another case, *Apple Inc. v. Uniloc 2017 LLC*, Case IPR2018-00884, Paper 20 at 25 (PTAB Sept. 18, 2019).

Based on the merits of the Board's determinations in *Square* and *Apple*, as well as the inequity of the Patent Office changing position now *on the same issue* in this case, the "forfeiture" argument should be rejected.

In re DBC, 545 F.3d 1373 (Fed. Cir. 2008), does not suggest that this Court has ruled that it will not consider an Appointments Clause challenge to the statutory method of administrative patent judges' appointment raised for the first time on appeal unless the appellant showed that the situation was "exceptional." *In re DBC* is distinguishable, and the present case is exceptional, at least because, as noted in the *Arthrex* panel decision, 941 F.3d 1320 (Fed. Cir. 2019), *In re DBC* dealt with an appointments issue that could have been remedied by assignment to other administrative patent judges that were not argued to have been unconstitutionally appointed and Congress had taken remedial action in that case. As in *Arthrex*, "[n]o such remedial action has been taken in this case and the Board could not have corrected the problem." *Arthrex*, 941 F.3d at 1327. The *Arthrex* Court correctly decided that "[b]ecause the Secretary continues to have the power to appoint APJs and those APJs continue to decide patentability in *inter partes* review, we conclude that it is appropriate for this court to exercise its discretion to decide the Appointments Clause challenge here." *Id.* The Board issued its final written decision in the IPRs on appeal here prior to the *Arthrex* decision, and Uniloc raised the issue here prior to the filing of its opening appeal brief.

In addition, even if Apple and the Intervenor were correct that Uniloc should have raised this Appointments Clause issue before the Board, the *Arthrex* decision is an intervening change in law that justifies Uniloc raising the issue for the first time on appeal. "[A] party does not waive an argument that arises from a significant change in law during the pendency of an appeal." *BioDelivery Science Int'l, Inc. v. Aquestive Therapeutics, Inc.*, 898 F.3d 1205, 1208–09 (Fed. Cir. 2018) (citation omitted); *see also Hormel v. Helvering*, 312 U.S. 552, 558–59 (1941) (waiver does not apply in "those [cases] in which there have been judicial interpretations of existing law after decision below and pending appeal—interpretations which if applied might have materially altered the result"). As this Court has emphasized, "a sufficiently sharp change of law sometimes is a ground for permitting a party to advance a position that it did not advance earlier in the proceeding when the law at the time was strongly enough against that position." *In re Micron Tech., Inc.*, 875 F.3d 1091 (Fed. Cir. 2017).

Accordingly, Uniloc's constitutional challenge is timely.

CONCLUSION

For the foregoing reasons, and those provided in Uniloc's opening brief, the Board's judgment should be reversed, or at least vacated and remanded. The Board's decision should also be vacated and this appeal dismissed because APJs are unconstitutionally appointed principal officers. In light of *Arthrex*, Patent

Owner also requests that the Board's decision be vacated and this appeal be remanded to the Board consistent with *Arthrex*.

Respectfully submitted,

/s/ Brett A. Mangrum

Brett A. Mangrum
Ryan Loveless
Jim Etheridge
ETHERIDGE LAW GROUP
2600 East Southlake Boulevard
Suite 120-324
Southlake, TX 76092
P. 817-470-7249
brett@etheridgelaw.com
ryan@etheridgelaw.com
jim@etheridgeLaw.com
Attorneys for Patent Owner-Appellant

CERTIFICATE OF SERVICE

I caused this brief to be electronically filed with the Clerk of Court using the CM/ECF System, which will serve via e-mail notice of such filing to all counsel registered as CM/ECF users.

Dated: June 19, 2020

/s/ Brett A. Mangrum
Brett A. Mangrum

Counsel for Patent Owner-Appellant
Uniloc 2017 LLC

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Circuit Rule 32(a).

The brief contains 2,223 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Fed. Cir. R. 32(b).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6).

The brief has been prepared in proportionally spaced typeface using MS Word – Office 365 in Times New Roman 14 Point Font.

Dated: June 19, 2020

/s/ Brett A. Mangrum
Brett A. Mangrum

Counsel for Patent Owner-Appellant
Uniloc 2017 LLC