UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CLOVER NETWORK, LLC

Petitioner

v.

CLOUDOFCHANGE, LLC

Patent Owner

TELEPHONIC HEARING IN THE FOLLOWING MATTERS:

IPR2023-00232
IPR2023-00287
IPR2023-00288

Friday, February 3, 2023
11:30 a.m.

B E F O R E:

HON. LORIN
HON. PLENZLER
HON. DEFRANCO

Reported stenographically by
JOSHUA B. EDWARDS, RDR, CRR, CRC
New York Notary Public Registration No. 01ED6228287
New York Electronic Notary Public No. 01ED0000628

CLOVER NETWORK 1030
CLOVER NETWORK v. CLOUDOFCHANGE
IPR2023-00287

A P P E A R A N C E S

On Behalf of CLOVER NETWORK, LLC:

DAVID CAVANAUGH, ESQ.
AMY MAHAN, ESQ.
JASON KIPNIS, ESQ.
WILMER, CUTLER, PICKERING, HALE AND DORR, LLP
2600 El Camino Real
Suite 400
Palo Alto, CA 94306

On Behalf of LIGHTSPEED COMMERCE:

JOSPEH GRAY, ESQ.
SLAYDEN GRUBERT BEARD GRUBER PLLC
401 Congress Avenue
Austin, TX 78701

On Behalf of CLOUDOFCHANGE, LLC:

JAY YATES, ESQ.
TODD PATERSON, ESQ.
KYRIE CAMERON, ESQ.
EDGAR GONZALEZ, ESQ.
PATTERSON & SHERIDAN, LLP
595 Shrewsbury Avenue
Suite 100
Shrewsbury, NJ 07702

* * * * * *

PTAB Proceedings

JUDGE PLENZLER: This is a conference call for IPR2023-00232, dash 00287, and dash 00288. I'm joined on the call by two other judges on the panel, Judge Lorin and Judge DeFranco. Sounds like we do have a court reporter on the call; is that correct?

THE COURT REPORTER: Yes, your Honor, that's correct.

MR. CAVANAUGH: That's correct, your Honor.

JUDGE PLENZLER: Okay. Who arranged for the court reporter?

MR. CAVANAUGH: The, petitioner, Clover, your Honor. And consistent with our prior practice, we can submit the transcript when it becomes available.

JUDGE PLENZLER: All right, perfect. That was what I was just going to mention to you all. So I guess if we could start out just by having the parties introduce themselves. We will start with petitioner. And I'm just going to refer to these proceedings as the 232 proceedings to simplify things, and the earlier instituted trials that you are attempting to join as the 779 proceeding. I understand that we have three

PTAB Proceedings

different cases here and we have three different cases that were instituted. But just for simplicity, let's specify the specific differences, I will refer to this as the 232 and the petition to be joined in 779.

So with that, can we start with the petitioner. Who is on the call for petitioner for the 232?

MR. CAVANAUGH: Your Honor, this is Dave Cavanaugh. And with me is Amy Mahan and Jason Kipnis, all of whom are from Wilmer Hale and all representing Clover.

JUDGE PLENZLER: All right. Mr. Cavanaugh, will you be the one speaking for petitioner today?

MR. CAVANAUGH: I will be, your Honor, yes.

JUDGE PLENZLER: Okay, all right. And who do we have on the call for patent owner?

MR. YATES: Thank you, your Honor, this is Jay Yates with the law firm of Patterson Sheridan. I'm joined by my colleagues Todd Patterson, Kyrie Cameron, and Edgar Gonzalez. And we are on behalf of patent owner CloudofChange, LLC.

JUDGE PLENZLER: All right. And Mr. Yates, will you be speaking on behalf of patent owner

today?

MR. YATES: Yes, your Honor.

JUDGE PLENZLER: Okay, thank you. And then finally, who do we have on the call for petitioner from the 779 proceeding?

MR. GRAY: Good morning, your Honor, this is Joseph Gray from Slayden Grubert Beard Gruber on behalf of petitioner, Lightspeed Commerce.

JUDGE PLENZLER: Okay. And you will being speaking on behalf of petitioner in that proceeding?

MR. GRAY: That's correct, your Honor.

JUDGE PLENZLER: Okay, perfect. So just by way of background here, this call is initiated as a result of motion for joinder. And the first thing that I guess I would like to discuss, Mr. Cavanaugh, I know that you note the requirements the Trial Practice Guide in your e-mail.

One thing that complicates things pretty well here for us is the fact that you filed your motion back I believe in November, November 21st, the 232 proceeding. And what the Trial Practice Guide mentions is contacting the Board within five days

PTAB Proceedings

of filing the motion. So we are almost two months beyond that right now. So what happened?

MR. CAVANAUGH: Your Honor, we recognize that the briefing was ongoing with regard to the opposition to the motion. And we wanted to have the briefing completed before the motion was heard. And that's the delay. I think if there was no opposition, we would have contacted the Board immediately.

JUDGE PLENZLER: Okay. Well, I mean, I think one of the things that patent owner notes is that -- Mr. Yates, I will let you chime in in a minute here -- but with respect to the 779 proceeding, for example, we are already beyond the patent owner response in that case, the deposition of petitioner's expert in that case. And we are looking at I think a preliminary response due date in this 232 case, middle of March, and then subsequently a DI being issued with a due date in June.

And even if it was looked at far before that, I think in the 232 case, we are already past petitioner's reply, mid-April. I'm seeing some trouble here with timing in view of the two-month

PTAB Proceedings

delay, and particularly because it looks like you want to use a different expert. I see that your petition is basically identical, but now you have a different expert which causes other problems as far as depositions for patent owner in that matter. So can you help me understand why that's not going to be an issue?

MR. CAVANAUGH: Yes, your Honor. You know, as an understudy role, we would only be active, and as we said both in our motion and our reply, responding to what the patent owner had argued. You know, we will only be active in this proceeding should the other petitioner settle out the case. And, you know, given the fact that the POR is kind of -- timing is arriving, like it seems unlikely that that is going to be an issue for the POR if there's no settlement, you know, there is no issue because our expert, the person that we file, our declarant, the person that we filed the petition -- filed the declaration that we filed with the petition, it won't be operative in the proceeding.

JUDGE PLENZLER: Let me interrupt real quick. Why do we need to have a different declarant for

the 232 petition, right? Other situations where things are a lot smoother and more streamlined where there's joinder involved where someone is taking an understudy role, they will basically agree to accept the earlier proceedings' expert should the matter settle. So why do we need to have a separate expert?

MR. CAVANAUGH: I don't know that there is a concrete reason other than, you know, we have, you know, identified this expert and walked through the positions are nearly identical, if not identical. If your Honors would want us to have our expert adopt -- sign a statement adopting the other petitioner's declarant's positions, we could do that and would do that.

You know, in this case, I'm not sure it would be, you know, needed because the positions are the same. We are not arguing different grounds. We are not arguing different claims. We are certainly kind of very much aligned.

JUDGE PLENZLER: Right. I understand that. Let me stop you though, because the issue that I see is not that your petition is any different, not that the declaration is any given, right.

It's a matter of patent owner being able to depose an expert, right. And so with the timing of these two proceedings being involved and having a different expert, let's say, that petitioner's 779 proceeding drops out and now you want to have your expert take over, what happens with the deposition?

MR. CAVANAUGH: Let's say that -- just so I understand your scenario, your Honor, so the petitioner, the first petitioner drops out after the POR is filed, and what would happen with the reply?

JUDGE PLENZLER: Right. Like in the 779 proceeding, the patent owner response has already been filed. And patent owner has already deposed petitioner's expert in the proceeding; is that correct?

MR. CAVANAUGH: Yes, that's my understanding, your Honor.

JUDGE PLENZLER: Let's say we institute trial and we go forward with joinder in this 232 proceeding, for example. And now we are after the petitioner's reply if petitioner and patent owner settle in the 779 proceeding. So now you move up

from your understudy role, but you have a different declarant. Now unless there's some kind of deposition that happens just as a just-in-case type thing, what do we do with the patent owner's ability to depose your witness and have the patent owner respond?

MR. CAVANAUGH: In the scenario where, I think because the expert, if the other expert drops out, like, our expert would shoehorn in. And we've done that in other proceedings without much, you know, without much ado. To the extent that your Honors would want an adoption of the earlier declaration, we are certainly willing to do that. And as part of the understudy role, we are kind of adopting, if you will, kind of the declaration testimony of what the earlier expert has provided.

If your Honors would find it helpful, what we could do, and I would need to kind of think through some of the process here, but if you want our expert to adopt what the earlier declarant has said in a statement, I think we could do that because the statements are the same.

And therefore there would be no difference

other than a new expert that's already adopted the entire proceeding, very similar to how a joinder circumstance would exist. There's no requirement that it be the same expert in the joined petition, because sometimes experts are not available to both parties because of other commitments.

JUDGE PLENZLER: Is that the case here? Is there any reason why you would not be able to join, use what the petitioner in 779 has including their expert should they drop out?

MR. CAVANAUGH: I'm not aware of any restriction on that in this case.

JUDGE PLENZLER: Okay.

MR. CAVANAUGH: And I would need to ask my colleagues to confirm that.

JUDGE PLENZLER: Okay. And I will ask, Mr. Gray, petitioner in the 779 proceeding, are you aware of any issue, as far as should you drop out, of the availability of your expert?

MR. GRAY: I'm not aware of anything that would impede our expert's ability to proceed in the 232 matter if we were to settle and drop out.

JUDGE PLENZLER: Okay. And I will ask Mr. Cavanaugh again, if the expert in the 779

proceeding were available, would you be willing to basically -- if petitioner in 779 drops out, proceed with the case that they had going including their expert and no longer rely on yours, just relying on their petition and their expert and their filings?

MR. CAVANAUGH: Yes, your Honor, I think we could do that. I'm not aware of any restriction on the declarant's ability to support our petition. And presuming that is the case, I think we would rely on that.

JUDGE PLENZLER: Okay. Mr. Yates, being counsel for patent owner on both proceedings, if it that were the case and we had petitioner in the 232 proceeding as well as the others that are looking for joinder, it seems like that removes the issues that you were concerned with; is that correct?

MR. YATES: Your Honor, it substantially helps. Also the briefing may have helped, although this hearing may be an opportunity to clarify. Clover's position as an understudy based on their motion includes that they would be jointly responsible for certain filings and

arguments, as well as that there would be consolidated filings which is not at least our typical understanding of an understudy role that an understudy is truly an understudy.

And in their motion, on its face deals with consolidated filing joint responsibility. So that is part of our opposition as well, is that understudy actually means understudy. And then secondarily, the issue of I think you just worked through the idea that we shouldn't have Dr. Mowry, the expert for Clover, not for Lightspeed but in the secondary proceedings, really show up at all given the advanced stage of discovery with respect to the 779 and related proceedings.

JUDGE PLENZLER: Okay.

MR. CAVANAUGH: Your Honor, I can address I think both of those with the understudy.

JUDGE PLENZLER: Mr. Cavanaugh?

MR. CAVANAUGH: Yes.

JUDGE PLENZLER: Okay, go ahead.

MR. CAVANAUGH: I'm sorry, I should have introduced myself as I was beginning speaking. With regard to the understudy role, as we've characterized it and kind of in response to the

opposition, I think clarified to the extent that it was needed, our understudy role is that of an understudy.

When we talk about joint responsibility for papers, that is, like, and maybe I am going to do another kind of bullet point underneath what I just a second ago said, to the extent that the reason for the understudy role is to make sure that the patent owner has a single paper to respond to and that there is consolidated filings, you know, that is what our understanding of the understudy role is. And that is what we are committing to. And that's consistent with not only what the panels have said in other joinder proceedings, but also with I think the rules with the Trial Practice Guide provides.

To the extent that there's any unclarity or lack of clarity with regard to what the joint responsibility is, it's just the recognition that once joinder occurs, you know, to the extent that there is kind of a working together in the petitioner, we just want to make sure that the record provides that that is likely going to occur. And to the extent that we're trying to be,

you know, open and kind of just going to say that there is a joint responsibility, some people are going to perhaps take a larger role, some less so.

But with a joinder like this, you know, we just want to clarify that, you know, there are going to be the petitioners addressing the various issues. But that doesn't change the understudy role in the sense that there is a single filing that is going to be made and that there is a single consolidated paper that the patent owner would have to work with.

JUDGE PLENZLER: So are you saying that you would, even if you disagree with something that Mr. Gray was filing in the 779 proceeding, you are basically bound by you are not going to try to say I think this is maybe patent owner's concern?

Correct me if I am wrong when I'm done here, Mr. Yates, but you might want to file something different if you disagree with the position taken? Can you clarify that?

MR. CAVANAUGH: Yes. I mean, that's not our understanding of an understudy role that we would be able to take a different position.

JUDGE PLENZLER: Okay. That's what I

PTAB Proceedings

thought. I just wanted to clarify.

Mr. Yates, does that help clarify what petitioner meant by consolidated filings, just that they are basically going to have the papers filed by the 779 petitioner?

MR. YATES: Yes, sir, I think so, although the notion of joint responsibility in consolidated filing is still somewhat strange to us. But I think I understand that they are being an understudy as most of us understand the term "understudy." So thank you for the clarification.

JUDGE PLENZLER: Okay. And if we should decide to join proceedings, I will do my best to make everything as clear as possible as far as the agreement. And it's helpful we will have a transcript of this call, too.

So just to sum up initially here, and I will ask you, Mr. Yates, if we do end up with an agreement from Mr. Cavanaugh, petitioner in the 232 proceeding, that understudy is just understudy, they are going to rely on everything filed by the petitioner in the 779 proceeding, it might work with them, but the 779 petitioner's papers, and also declarant in the 779 case will be

PTAB Proceedings

the only one, nothing from the 232 declarant will be used after institution?

If that were the case and if petitioner in the 232 is joined simply as a party with nothing different evidentiary- or argument-wise, would you have any issue at all with that?

MR. YATES: The only -- the only remaining -- the only remaining sort of two points are, one, Lightspeed in the initial proceeding offered a stipulation that Clover has not adopted that has ramifications in the district court. And so we would like Clover to be bound by that same stipulation. We think that stipulation was important as part of the institution decision.

And then secondarily, our point is that we don't believe patent owner should be asked to waive its rights with respect to a patent owner's preliminary response. We haven't filed patent owner's preliminary responses. We think we may be more persuasive in the patent owner's preliminary response convincing the Board not to institute on this proceeding. And we think the proper time to deal with joinder is after -- only after there would be an institution decision.

PTAB Proceedings

And based on standard practice, the institution decision we believe would come in mid-June, sort of after the close of discovery in the Lightspeed proceedings. And therefore it may make working through the second expert under the understanding we have today, may make that actually easier because we would already be through the close of discovery in the Lightspeed proceedings, and therefore the question of depositions of second experts and other things would be moot without some sort of scheduling change.

So again, our motion, without waiving our right to a patent owner's preliminary response and without some sort of accelerated action taken from the Board, we think this decision is much more proper in June when we have more information at the close of discovery in all three of the Lightspeed proceedings.

JUDGE PLENZLER: Okay, thank you. That answers one of my questions that I was going to ask about waiving the preliminary response. So I understand your position there. If you could, it's been a little while in the earlier

PTAB Proceedings

proceedings, can you refresh my memory on the stipulation that you mentioned. What that was?

MR. YATES: Yes. This is Mr. Yates. And what I am trying to pull up in front of me will be the Lightspeed petition dealing with the 00779. And the petition there includes a stipulation. See if I can find the right page. It's on page 10 of paper 1, the petition. And it says, "Petitioner stipulates not to pursue in the district court any ground raised or that could have been reasonably raised in IPR (under section 102 or 103) based on prior patents or printed publications alone."

And this importantly is if the IPR is instituted and since it remains precedential at the time of the institution. What's different than the statutory estoppel is that the stipulation applies on institution. It doesn't deal with a stipulation at the end of the proceedings. And so that stipulation by Lightspeed was more aggressive than the statutory estoppel, but will have effect at the district court litigation. And that was part of the briefing dealing with the patent owner's petition

PTAB Proceedings

as well as the -- I believe the preliminary response.

JUDGE PLENZLER: Okay, all right. Mr. Cavanaugh, is that something that you would be willing to stipulate to?

MR. CAVANAUGH: Your Honor, maybe to take a step into a little bit of the different procedural histories of Lightspeed and Clover, Lightspeed was sued first and currently has -- earlier had a trial date in June, now September of 2023. I guess discovery had started and has been proceeding. Clover, in contrast, doesn't yet have discovery proceeding as well as doesn't have a trial date until April of 2024.

And so, you know, it seems that as we all know and as the director has recognized, in the interim guidance just having the trial identified doesn't necessarily mean that that's when it's going to occur. And so I think that given the different circumstances, different postures of the cases, you know, what might have been appropriate for Lightspeed and the Board to consider on institution incentive, we would be happy to brief it, your Honor, but we think the incentive doesn't

PTAB Proceedings

apply in the same way.

JUDGE PLENZLER: Okay. So I will take that as a no, then, that you would not be willing to stipulate?

MR. CAVANAUGH: Well, not without some additional briefing, your Honor, just so you have the recognition. So yes, at this point we are unwilling to stipulate to that. To the extent that there's briefing that you or the patent owner would like to do, we would be happy to do it. We think the incentive as it's currently contemplated is not applicable to Clover's situation. And we're happy to brief that.

JUDGE PLENZLER: Okay, all right. Trying to think is there anything else that you would like to raise before we adjourn the panel?

Mr. Cavanaugh?

MR. CAVANAUGH: Yes, one last thing about the patent owner's suggestion in terms of proposal, but a suggestion to wait for the decision on institution. You know, not quite sure that that's what joinder is contemplating. They were identifying that we delayed letting the Board know and that that was something that was allegedly

PTAB Proceedings

inept to prejudice.

I'm not quite sure given everything we've talked about how that prejudice would either, A, exist; or B, is not addressed by the circumstances that we have been talking about, adopting the Lightspeed expert's position, you know, if there's a settlement we would use Lightspeed's expert. And so I'm not quite sure the genesis of the suggestion of the patent owner, but I'm not sure that it's really applicable or appropriate here.

JUDGE PLENZLER: Okay. Mr. Yates, do you have anything else you wanted to add?

MR. YATES: Your Honor, only that with respect to that last point, we had recently filed the patent owner responses in the Lightspeed IPRs through December and January is when we have taken depositions. And what may have been in an alternate universe would have been a pushing back of some of those deadlines to facilitate some sort of joinder, but this call didn't happen at that time and we were further down. Fortuitously, the institution decision on the Clover matters at current force and speed without some sort of acceleration would take place after the close of

PTAB Proceedings

the discovery of the Lightspeed matters. And they moot some of the concerns.

JUDGE PLENZLER: Okay. Mr. Gray, you don't have anything further, do you?

MR. GRAY: I do not, thank you.

JUDGE PLENZLER: All right. I am going to put everyone on a brief hold and confer with my panel, and I will be back shortly. All right.

(Brief pause.)

JUDGE PLENZLER: All right. Judge Plenzler back on the call here. Mr. Cavanaugh, you still with us?

MR. CAVANAUGH: I am, your Honor.

JUDGE PLENZLER: All right. Mr. Yates?

MR. YATES: Yes, sir, your Honor.

JUDGE PLENZLER: All right. Mr. Gray?

MR. GRAY: Yes, your Honor.

JUDGE PLENZLER: All right. Thanks, everyone, for the time this morning. I think what we have to do right now is just wait. As Mr. Yates mentioned, there's still time to file the preliminary responses in the three proceedings at issue here. And so we will wait for those to come in. And if we do need additional briefing

and something comes up, for example, where we decide to institute and allow joinder and we need some sort of statement from petitioner in the 232 and other proceeding that they will follow what we talked about today with respect to using the 779 proceeding's declarant, we will go ahead and reach out to you and try to get that moving. But otherwise, it seems like we are just going to have a little bit of time to wait here to see how this all plays out.

Before I terminate the call, do we have anything else from Mr. Cavanaugh?

MR. CAVANAUGH: Nothing from me, your Honor. Thank you.

JUDGE PLENZLER: Okay. Mr. Yates?

MR. YATES: Nothing further. Thank you, your Honors.

JUDGE PLENZLER: Okay. Mr. Gray?

MR. GRAY: Nothing further. Thank you, your Honor.

JUDGE PLENZLER: Okay. And Mr. Cavanaugh, I think you said that you arranged for the court reporter, correct?

MR. CAVANAUGH: We did, your Honor.

PTAB Proceedings

JUDGE PLENZLER: Okay.

MR. CAVANAUGH: I guess we can file it in the 232, the 288, 287 proceedings. That way you have the benefit of it.

JUDGE PLENZLER: Right, yeah. We appreciate that. And it was very helpful to have a court reporter today. So thank you for arranging that. And with nothing else, this call is adjourned. I thank everyone, and have a good weekend.

(Hearing concluded at 12:02 p.m.)

* * *

C E R T I F I C A T E

I, JOSHUA B. EDWARDS, a Notary Public for and within the State of New York, do hereby certify that the above is a correct transcription of my stenographic notes.



JOSHUA B. EDWARDS
NY Association Certified Reporter
NY Realtime Certified Reporter
NCRA Registered Diplomate Reporter
NCRA Certified Realtime Reporter
NCRA Certified Realtime Captioner
Notary Public of the State of
New York