

Transcript of Hearing

Date: March 27, 2023
Case: Clover Network, LLC -v- CloudofChange, LLC (PTAB)

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CLOVER NETWORK 1031
CLOVER NETWORK v. CLOUDOFCHANGE
IPR2023-00287

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CLOVER NETWORK, LLC,	:	Case IPR2023-00287
Petitioner,	:	Case IPR2023-00288
v.	:	Case IPR2023-00232
CLOUDOFCHANGE, LLC,	:	
Patent Owner.	:	U.S. Patent No.:
	:	9,400,640

Petition for Inter Partes Review

of U.S. Patent No. 9,400,640

Conducted Telephonically

Monday, March 27, 2023

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Petition for Inter Partes Review of U.S. Patent No. 9,400,640, conducted telephonically.

Pursuant to notice, before Kaleigh Irish, Notary Public in and for the State of Maryland.

A P P E A R A N C E S

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THE HONORABLE CARL M. DeFRANCO
Patent Trial and Appeal Board

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P-R-O-C-E-E-D-I-N-G-S

JUDGE PLENZLER: Good afternoon. Welcome to the Patent Trial and Appeal Board. This is Judge Plenzler. This is the conference call for IPR2023-00232, -00288, -00287. I am joined in the call by Judges Lorin and DeFranco. I guess first off, do we have a court reporter on the call?

MR. CAVANAUGH: This is David Cavanaugh from petitioner Clover, and we have arranged for a court reporter, Your Honor, Kaleigh --

JUDGE PLENZLER: Okay. All right. Thank you, Mr. Cavanaugh. Who else do we have on the call for Petitioner?

MR. CAVANAUGH: We also have Amy Mahan and Jason Kipnis for the petitioner.

JUDGE PLENZLER: Okay, thank you. And for Patent Owner?

MR. YATES: This is Jay Yates of the law firm Patterson + Sheridan. With me is Todd Patterson, Edgar Gonzalez, and Jordan Brown from my firm.

JUDGE PLENZLER: Okay, thank you. Do we have anyone else on the call?

MR. GRAY: Yes, Your Honor. This is Joseph Gray on behalf of petitioner LightSpeed in --

JUDGE PLENZLER: Okay.

MR. GRAY: -- the separate IPRs.

JUDGE PLENZLER: All right. And I think this call was requested by Petitioner, so I'll let you begin.

MR. CAVANAUGH: Yes. This is Dave Cavanaugh for Clover. And I think, Your Honor, I'll begin with where our last conference ended, in February 3rd. Mr. Yates had identified two particular points that were remaining prior to joinder and institution.

The first one was a stipulation, a Sotera stipulation that we had not made and that we had said that we would not make until there was some briefing on the issue. And there has been some briefing on the issue, and I'll address that. And as Your Honors know, we are prepared to stipulate, make a Sotera stipulation for these IPRs. And then I think the

other piece was at the request of the patent owner, that they be able to file the POPR, and so there was a wait for them to file the POPR.

And so I think with that as context, you know, the Sotera stipulation that we're -- that the petitioner Clover is adopting in this call and for these IPRs is -- it kind of -- kind of largely addresses all the Fintiv issues that the patent owners raised, although I think there are a couple characterizations that perhaps need a little bit more context, which is why we're requesting some additional briefing, five pages. And if Your Honors like, I can go through the particular issues. It should be pretty streamlined.

You know, for example, in Factor 1, you know, the District Court's stay pending the IPR was denied, and the patent owner was correct, but it was denied without prejudice. And if it's denied without prejudice with leave, or the expectation that we were to file the motion for stay when -- refile the motion to stay when the -- when the decision on institution and the joinder motion had been --

JUDGE PLENZLER: Let -- yeah, let me -- let me interrupt you real quick because I did look through the briefing before this call, which Patent Owner presents in its preliminary response, and I guess I'm just wondering -- it seems like a lot of that stuff was not based on joinder occurring.

And so I'm wondering just, you know, what really do you need to brief if we do have joinder, right? You know, because they talk about a final decision happening after trial. You know, they talk about in I think mid 2024, but that's certainly not the case if we end up joining with the other proceedings, right?

MR. CAVANAUGH: Correct, Your Honor.

JUDGE PLENZLER: Okay.

MR. CAVANAUGH: And, you know, to the extent that -- you know, from a kind of desire to be complete and to make sure that all Your Honors have all the helpful information that can provide context for things, you know, we were proposing some additional briefing on the Fintiv issues, but I

don't see that as necessarily for deciding -- because much of it is related to issues other than joinder.

JUDGE PLENZLER: Right, because again, what's really the additional workload, right? For example, on the board, we're already hearing the other cases.

MR. CAVANAUGH: Correct.

JUDGE PLENZLER: So -- okay. Yeah, that was my confusion on that as far as, you know, why we really need additional briefing on the Fintiv issues.

MR. CAVANAUGH: I think as a practical matter, Your Honor, like, we would ask what the most appropriate way to make the Sotera stipulation, whether we just file a paper, a short paper like with that statement, if that would be suitable. We certainly could read it into the record right now if that would be appropriate, and I just want to understand what Your Honors would prefer.

JUDGE PLENZLER: Okay, I understand. And then when you would do the Sotera stipulation,

however we might decide would be the best way to do that, it seems like Patent Owner doesn't have a problem with you entering a Sotera stipulation. Is that correct, Mr. Yates?

MR. CAVANAUGH: That's my understanding, Your Honor. Mr. Yates can speak for CloudofChange.

MR. YATES: This is Mr. Yates on behalf of patent owner CloudofChange, and we are unopposed if they would like to submit a Sotera stipulation.

However, our position is that they fully briefed the Fintiv issues in their petition. Having a Sotera stipulation at this point in time, while there may be ramifications in the District Court and other issues, doesn't change their petition, doesn't supplement their petition.

The petition was filed and, according to the regs, needs to be seen as complete at filing, and so we're against additional briefing. But we understand why they may want to file some sort of Sotera stipulation to help in their motion to stay in the District Court.

And in general, we believe, though, that

any analysis of joinder puts the cart before the horse, that per the statute, the institution is what's important, and then --

JUDGE PLENZLER: Mr. Yates.

MR. YATES: -- whether --

MR. CAVANAUGH: I'm sorry for interrupting, but I think we're -- you were kind of going on to a different issue than what we were talking about, and I --

MR. YATES: Well --

MR. CAVANAUGH: Just for clarity of the conversation, I just want to make sure --

JUDGE PLENZLER: Is that --

MR. CAVANAUGH: -- that we're --

JUDGE PLENZLER: -- Mr. Cavanaugh speaking right now?

MR. CAVANAUGH: Yes, it is. I apologize.

JUDGE PLENZLER: I'll -- yeah, this is Judge Plenzler again. Mr. Yates, I'll let you finish that thought, and then I'll give you a chance to respond briefly, Mr. Cavanaugh.

MR. YATES: I'm glad to do this however,

in the order that you want. We were talking about institution and whether or not it's proper to presuppose joinder before institution, and we think that's not how the statute and the guidance reads; that institution, we have our right as Patent Owner, under Fintiv and other things, to have institution and have that analysis be, you know, unimpacted by whether or not there could be joinder. And then to the extent there is institution, there is a separate joinder analysis.

And candidly, we believe, given that we've already filed our patent owner's response where we're seeking there to be joinder in the LightSpeed IPRs, that joinder will require at this point a massive extension of the deadlines in the LightSpeed IPRs, and that's where we are in terms of our --

JUDGE PLENZLER: Mr. Yates, let me --

MR. YATES: I'm glad to think of the issues in any order.

JUDGE PLENZLER: Mr. Yates, let me ask you a couple questions. So I know you've mentioned a massive extension in the LightSpeed IPRs. If --

let's assume that we do, you know, determine that petitions in 232 and 288 and 287 are sufficient for institution, right? We grant joinder. If --

Like we talked about on our last call on February 3rd, if Petitioner is not using its own declarant, right, if they're just using the same one from the underlying proceedings and, you know, if institution happens after the petitioner's replies are already entered in those other proceedings, for example, what massive extension of time do you see being required, and what would require that?

MR. YATES: Well, the issue as to whether or not Clover's petition can be supported by the declaration from the LightSpeed petition, we think is an open issue, and we're not conceding to Clover's representations that that's covered. Their representations include that it's an identical petition, and the case law that we cited in our opposition to the motion to joinder shows that that's not how the PTAB treats a declaration from a different expert.

And so then in the case that -- and again,

joinder is only bringing in the issue -- if LightSpeed's were to settle and resolve, you would have a petition from Clover which would be going forward, and it's really unclear whether that would have been supported by a declaration from LightSpeed.

Again, there is no reference that the expert for Clover actually read or otherwise understood Mr. Gray's petition on behalf of LightSpeed. There is no reference in the petition that they're adopting that and they mean these to be that way.

JUDGE PLENZLER: Okay. And I think I understand your position there. Mr. Cavanaugh, did you want to respond briefly?

MR. CAVANAUGH: I do, Your Honor, just on two points. As we talked about in the February 3rd call, you know, it's our understanding that the understudy role is that we are adopting the -- you know, or using, if you will, or kind of relying on the joined party's petition declarant. And, you know, I don't foresee that as creating any additional work or any additional time for the

patent owner in this case.

You know, as to whether or not the particular issues or the particular way that our expert says anything, I think that's largely, you know, not relevant to our joinder if we are relying on, as the patent owner is acknowledging that we have to do or as is kind of insisting that we do, is -- you know, that itself is not really relevant.

But I would say two points on that, Your Honor. One is they haven't identified any daylight between the two petitions, and the grounds that we present in the IPR, the Clover IPRs, are the same as what was presented in the LightSpeed IPRs, which is the foundational kind of criteria for joinder. And I think everything else is somewhat, you know -- you know, a kind of leveraging of a difference that they don't even identify in the declarations.

JUDGE PLENZLER: Okay. I'll tell you what. Let me put you both on a brief hold while I confer with Judges Lorin and DeFranco real briefly here, and I'll be back momentarily, all right?

MR. CAVANAUGH: Thank you, Your Honor.

MR. YATES: Thank you, Your Honor.

(Conference placed on hold.)

JUDGE PLENZLER: All right. This is Judge Plenzler with the Patent Trial and Appeal Board back on the call. Mr. Cavanaugh, are you still with us?

MR. CAVANAUGH: I am, Your Honor.

JUDGE PLENZLER: All right. How about Mr. Yates?

MR. YATES: Yes, sir, Your Honor.

JUDGE PLENZLER: And Mr. Gray?

MR. GRAY: Yes, Your Honor.

JUDGE PLENZLER: Okay. So a couple things. So I conferred with my panel. So for the issues that the call was requested for, the Fintiv briefing and the Sotera stipulation, I guess right now, we don't see a need for additional briefing. We would authorize filing the Sotera stipulation. I guess we would say that you should probably do that as a separate paper rather than just relying on a transcript from this call.

Mr. Cavanaugh, when you do that, I know

like on a previous call, like I think I mentioned earlier here, from February 3rd, you indicated that you would be willing to basically use the expert -- if we grant institution and joinder, that you would use the expert from the underlying proceedings, the 779 and so on. Is that still the case?

MR. CAVANAUGH: Yes, Your Honor.

JUDGE PLENZLER: Would you also be able to indicate that in the paper where you filed your Sotera stipulation?

MR. CAVANAUGH: Yes, Your Honor.

JUDGE PLENZLER: And let's see. I mean, you can use this call, especially because we have a transcript and a court reporter here, and just indicate that you received authorization from us to file the Sotera stipulation as well as the additional stipulation regarding the use of the expert from the underlying proceedings.

And I'm guessing that you won't have a problem doing that in the next week or so?

MR. CAVANAUGH: No, Your Honor. I can do that --

JUDGE PLENZLER: Okay.

MR. CAVANAUGH: -- in the next few days.

JUDGE PLENZLER: Okay. Yeah, and then as indicated, we don't see the need for any additional briefing at this time, so it doesn't really seem like there are any issues that we're giving authorization here for that are in dispute. I understand there is some dispute as far as how we handle the petition and the motion for joinder, but it seems like that's a separate thing for us to consider. Is there anything else that you would like to discuss today, Mr. Cavanaugh?

MR. CAVANAUGH: The timing of the decision on joinder and the decision on institution, I think, is a question for us that we would just like to kind of raise with Your Honors.

The patent owner had said that our delay in kind of identifying -- of raising the joinder issue to the panel was somewhat prejudicial to them. And, you know, that being whatever it is, you know, they had an authorization to file the POPR, and that has been filed.

You know, there are no issues in the POPR that aren't also underlying issues in the IPRs which are sought to be joined, and, you know, that is -- like, there is no like one year from service issue that the patent owners raised or anything of a statutory nature that would prevent institution.

And, you know, to the -- to the extent that the patent owner was feeling prejudice because of the delay, I would just want to be mindful of the -- of the timeframe. And, you know, an earlier decision on institution, to the extent that Your Honors are available or are able to do that, may help the process move along.

JUDGE PLENZLER: Okay. As far as -- how would that help the process move along if you're not doing anything other than standing by for Petitioner --

MR. CAVANAUGH: I think that to the extent that the patent owner is saying now, I guess, that there should be a delay, where they were saying there shouldn't be a delay in their papers and, you know, they said in the prior conference call they

want kind of the time period to move along, like, I think that, you know, to the extent that Your Honors move along and make an institution decision - you know, the District Court case, which is going to start the discovery in the middle of April - that we would renew our motion for stay pending the joined IPRs.

And, you know, I don't know whether the District Court would grant it. He certainly said he would entertain it, and that's what we would propose. And, you know, to the extent that that can happen before discovery were to commence, I think that that would -- you know, that may be helpful from a -- for the parties from a District Court kind of timing of discovery standpoint.

JUDGE PLENZLER: Sure. I'll be perfectly honest with you. I don't have any set dates in mind, but I do think that asking for a decision basically two and a half weeks or so from now might be a little ambitious. I don't know that we'll be able to get you a decision, one way or the other, by the middle of April, so.

MR. CAVANAUGH: I understand, Your Honor. And I just -- I -- that's why I didn't initiate the call -- the comment with a particular date, but I think that moving kind of in a -- in a determined rate would be helpful, Your Honors, because there are other things going on in the case that would be affected. But I appreciate Your Honors' consideration of the issue, and I also understand the other issues that the board -- other cases that the board has, and I don't mean to kind of advance this case in front of others.

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

MR. YATES: No, Your Honor. Only that we believe our patent owner's preliminary response outlines Fintiv issues that are convincing and compelling. We hope the board does an institute, consistent with our briefing. That also solves whether or not we have to get to a joinder analysis.

JUDGE PLENZLER: Sure. I understand --

MR. YATES: Thank you.

JUDGE PLENZLER: -- that. And please,

don't take my questions as, you know, implying that we will or won't, you know, decide things one way or another. I'm just trying to figure out, for purposes of this call, what we do with the request for briefing, just trying to get things ready for us to make a decision without having to circle back with you both again. So we will certainly take all your arguments into consideration.

MR. YATES: Thank you, Your Honor.

JUDGE PLENZLER: All right. It sounds like there is nothing else from either side, then; that we've taken care of the issues, at least that are the subject for today's call. Is that correct, Mr. Cavanaugh and Mr. Yates?

MR. CAVANAUGH: That's correct, Your Honor. This is David Cavanaugh.

MR. YATES: And this is Mr. Yates. Yes, Your Honor. Thank you.

JUDGE PLENZLER: Okay. Thank you. Mr. Cavanaugh, I know you're aware, as you mentioned at the beginning, you'll get this court transcript filed as soon as possible. And with that, consider

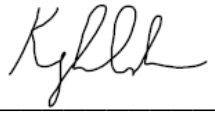
this call adjourned. Thanks, everyone, for their time.

(Hearing concluded at 2:54 p.m.)

CERTIFICATE OF SHORTHAND REPORTER - NOTARY PUBLIC

I, Kaleigh Irish, the officer before whom the foregoing proceedings were taken, do hereby certify that the foregoing transcript is a true and correct record of the proceedings; that said proceedings were taken by me stenographically and thereafter reduced to typewriting under my supervision; that review was not requested; and that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this 27th day of March, 2023.



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THE STATE OF MARYLAND

My Commission Expires: October 18, 2024

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