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Transcript of Hearing

Date: March 27, 2023

Case: Clover Network, LLC -v- CloudfChange, LLC (PTAB)

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CLOVER NETWORK 1038
CLOVER NETWORK v. CLOUDOFCHANGE
IPR2023-00288

1 UNITED STATES PATENT AND TRADEMARK OFFICE
2 BEFORE THE PATENT TRIAL AND APPEAL BOARD

3 -----X

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

10 -----X

11
12 Petition for Inter Partes Review
13 of U.S. Patent No. 9,400,640
14 Conducted Telephonically
15 Monday, March 27, 2023
16 2:30 p.m.

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20 Job No.: 486879

21 Pages: 1 - 24

22 Reported By: Kaleigh Irish, RPR

1 Petition for Inter Partes Review of U.S.
2 Patent No. 9,400,640, conducted telephonically.
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6 Pursuant to notice, before Kaleigh Irish,
7 Notary Public in and for the State of Maryland.
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A P P E A R A N C E S

THE HONORABLE JEREMY M. PLENZLER

THE HONORABLE HUBERT C. LORIN

THE HONORABLE CARL M. DeFRANCO

Patent Trial and Appeal Board

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APPEARANCES (Continued on Next Page)

1 A P P E A R A N C E S (Continued)

2
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1 P-R-O-C-E-E-D-I-N-G-S

2

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

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

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

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

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

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

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

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

5 JUDGE PLENZLER: Okay.

6 MR. GRAY: -- the separate IPRs.

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

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

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

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

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

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

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

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

15 MR. CAVANAUGH: Correct, Your Honor.

16 JUDGE PLENZLER: Okay.

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

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

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

8 MR. CAVANAUGH: Correct.

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

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

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

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

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

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

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

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

22 And in general, we believe, though, that

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

4 JUDGE PLENZLER: Mr. Yates.

5 MR. YATES: -- whether --

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

10 MR. YATES: Well --

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

13 JUDGE PLENZLER: Is that --

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

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

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

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

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

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

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

17 JUDGE PLENZLER: Mr. Yates, let me --

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

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

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

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

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

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

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

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

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

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

1 patent owner in this case.

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

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

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

22 MR. CAVANAUGH: Thank you, Your Honor.

1 MR. YATES: Thank you, Your Honor.

2 (Conference placed on hold.)

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

7 MR. CAVANAUGH: I am, Your Honor.

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

10 MR. YATES: Yes, sir, Your Honor.

11 JUDGE PLENZLER: And Mr. Gray?

12 MR. GRAY: Yes, Your Honor.

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

22 Mr. Cavanaugh, when you do that, I know

1 like on a previous call, like I think I mentioned
2 earlier here, from February 3rd, you indicated that
3 you would be willing to basically use the expert --
4 if we grant institution and joinder, that you would
5 use the expert from the underlying proceedings, the
6 779 and so on. Is that still the case?

7 MR. CAVANAUGH: Yes, Your Honor.

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

11 MR. CAVANAUGH: Yes, Your Honor.

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

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

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

1 JUDGE PLENZLER: Okay.

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

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

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

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

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

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

14 JUDGE PLENZLER: Okay. As far as -- how
15 would that help the process move along if you're not
16 doing anything other than standing by for Petitioner
17 --

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

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

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

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

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

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

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

20 JUDGE PLENZLER: Sure. I understand --

21 MR. YATES: Thank you.

22 JUDGE PLENZLER: -- that. And please,

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

9 MR. YATES: Thank you, Your Honor.

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

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

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

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

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

3 (Hearing concluded at 2:54 p.m.)
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1 CERTIFICATE OF SHORTHAND REPORTER - NOTARY PUBLIC

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

12
13 IN WITNESS WHEREOF, I have hereunto set my
14 hand and affixed my notarial seal this 27th day of
15 March, 2023.

16
17 
18 _____

19 NOTARY PUBLIC IN AND FOR
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22 My Commission Expires: October 18, 2024

Transcript of Hearing
Conducted on March 27, 2023

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