19-1210

United States Court of Appeals for the Federal Circuit

DISTEFANO PATENT TRUST III, LLC

Plaintiff-Appellant,

v.

LINKEDIN CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the District of Delaware in No. 1:17-cv-01798-LPS-CJB, Judge Leonard P. Stark

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APPELLEE'S RESPONSE TO APPELLANT'S COMBINED PETITION FOR REHEARING AND REHEARING EN BANC

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December 30, 2019

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

DiStefano Patent Trust III v. LinkedIn Corporation,
19-1210

CERTIFICATE OF INTEREST

Counsel for the Appellee, LinkedIn Corporation, certifies the following:

1. The full name of every party or amicus represented by me is:

   LinkedIn Corporation

2. The Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:

   LinkedIn Corporation

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

   Microsoft Corporation

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:

   Klarquist Sparkman, LLP: Robert T. Cruzen, Todd M. Siegel, Andrew M. Mason, and Sarah E. Jesema; and
   Morris, Nichols, Arsht & Tunnell LLP: Jack B. Blumenfeld

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 affect or be affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47.4(a)(5) and 47.5(b).

None.

December 30, 2019

/s/ Robert T. Cruzen
Robert T. Cruzen

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ARGUMENT

LinkedIn Corporation ("LinkedIn") hereby responds to the Combined Petition for Rehearing and Rehearing En Banc ("Petition") filed by Distefano Patent Trust III, LLC ("DiStefano"). Pursuant to the Court's request, LinkedIn limits its response to the issue presented as Point 1 of the "Points of Law or Fact Overlooked or Misapprehended by the Panel" on page 3 of the Petition. Point 1 reads as follows:

> 1. The district court decision on Rule 12(b)(6) specified that only the asserted patent claims 1, 4, 5, 8, and 10 were covered (Appx002), but the court's judgment invalidated "the patent." Appx017. DiStefano asks the Court to vacate the district court judgment at least to the extent that it encompasses more than the district court's opinion on the asserted patent claims.

DiStefano's plea that this Court vacate the district court's Judgment should be rejected. First, the Judgment DiStefano now attacks as erroneous was submitted to the district court *by DiStefano* jointly with LinkedIn. DiStefano should not be heard to complain that the district court signed and entered a judgment when DiStefano itself presented that judgment to the district court for consideration. *See* Part I, *infra*. Second, DiStefano mentioned this issue in passing for the first time in its Reply brief on appeal, and only in a footnote, without ever requesting the relief it now demands. *See* Part II, *infra*. The argument is waived. For these reasons, the Court should deny the Petition.

I. DISTEFANO SUBMITTED THE FORM OF JUDGMENT TO THE DISTRICT COURT JOINTLY WITH LINKEDIN.

The district court's Memorandum Order granting LinkedIn's motion to dismiss issued on September 28, 2018 (APPX001), and that same day the district court requested that the parties meet and confer and submit a status report regarding how the case should proceed. APPX016.

On October 5, 2018, DiStefano and LinkedIn jointly submitted the requested Joint Status Report with one attachment, a proposed form of judgment. The Joint Status Report appears as entry number 30 on the district court Docket Report for this matter. APPX022. Because DiStefano never sought the relief it now requests during briefing of the appeal in this matter, LinkedIn did not include the Joint Status Report or its attached proposed form of judgment in the appendix on appeal. But the Court may take judicial notice of the Joint Status Report and its attachment because they are public records filed in the district court, and not subject to reasonable dispute. Fed. R. Evid. 201(b); *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 857 F.3d 1347, 1351 (Fed. Cir. 2017). LinkedIn has filed herewith an Unopposed Motion for Judicial Notice.

The Joint Status Report states in its entirety the following:

> The parties provide this joint status report in response to the Court's September 28, 2018 Order (D.I. 29). *The parties agree that*, based on the Court's Memorandum Opinion and Order (D.I. 28-29), *judgment of invalidity of the '760 patent should be entered in favor of LinkedIn*. A

> proposed form of Judgment is attached for the Court's consideration.

MJN, Ex. A at 1 (emphasis added). The Joint Status Report was signed by DiStefano's counsel. *Id*. Thus, DiStefano expressly informed the district court that it "agree[d]" that "judgment of invalidity *of the '760 patent*" rather any particular set of claims should be entered in favor of LinkedIn. *Id*. (emphasis added).

The proposed judgment attached to the Joint Status Report reads as follows:

> For the reasons stated in the Court's September 28, 2018 Memorandum Opinion (D.I. 28), judgment of invalidity of United States Patent No. 8,768,760 is hereby entered in favor of defendant LinkedIn Corporation and against Plaintiff DiStefano Patent Trust III, LLC for failure to claim patent-eligible subject matter under 35 U.S.C. § 101.

MJN, Ex. B at 1.

On October 17, 2018, the district court signed the Judgment. APPX017. The Judgment signed by the district court is the same document that DiStefano and LinkedIn submitted to it as an attachment to the Joint Status Report. The documents set forth identical text (*compare* APPX017 *with* MJN Ex. B), and the Judgment bears two electronic filing notations at the top, one from when it was submitted for approval by DiStefano and LinkedIn (APPX017 (ECF notation listing it as "Document 30-1 Filed 10/05/18")), and one from when it was signed

and entered by the district court. *Id*. (ECF notation listing it as "Document 31 Filed 10/17/18").

DiStefano never acknowledges this history in its Petition. Its recitation of the facts reviews the Memorandum Order of September 28, 2018, but then skips directly to entry of the Judgment on October 17, 2018. Petition at 4. No mention is made of the parties' Joint Status Report, that DiStefano told the district court it agreed that judgment of invalidity of the '760 patent should be entered, or that DiStefano itself had jointly submitted the Judgment to the district court.

Instead, DiStefano attributes "error" to the district court, and calls the court's Judgment "overly broad." Petition at 5. In its Reply brief footnote 3 on appeal, DiStefano states that "[i]n the Final Judgment, however, *the district court mistakenly invalidated the entire patent*." Reply at 6, n.3 (emphasis added).

If any mistakes occurred, it was when DiStefano erred by jointly submitting the form of judgment to the district court, or when it expressly told the district court that DiStefano agreed that "judgment of invalidity of the '760 patent should be entered in favor of LinkedIn." MJN, Ex. A at 1. Even assuming that these were mistakes by DiStefano rather than intentional acts DiStefano has now come to regret, DiStefano did not seek relief in the district court by filing a motion to alter or amend the judgment, and it does not do so on appeal, instead opting to blame the district court for DiStefano's own error. The Court should not countenance

DiStefano's efforts to paint the district court as sloppy and careless when the district court merely signed a Judgment that DiStefano had submitted to it for signature, after DiStefano had already told the Court that it *agreed the '760 patent was invalid*. *Cf. Key Pharm. v. Hercon Labs. Corp.*, 161 F.3d 709, 715 (Fed. Cir. 1998) ("The impropriety of asserting a position which the trial court adopts and then complaining about it on appeal should be obvious on its face, and litigants hardly need warning not to engage in such conduct.").

II. DISTEFANO WAIVED THE ARGUMENT THAT THE JUDGMENT IS PURPORTEDLY OVERLY BROAD.

In the district court, DiStefano never suggested that the Judgment was overly broad. DiStefano also never listed concerns regarding the scope of the Judgment as an issue in its Docketing Statement. ECF No. 10, at 2. And DiStefano never raised the issue in its Opening Brief on appeal. *See, e.g.,* Appellant's Opening Brief at 2 (statement of issues).

DiStefano instead first mentioned the issue in footnote 3 of its Reply brief on appeal. Even then, the Reply brief only included an observation without requesting any relief from this Court: "In the Final Judgment, however, the district court mistakenly invalidated the entire patent. Appx017." *Id*. at 6, n.3.

Moreover, the Petition falsely states that "counsel was asked at oral argument if claim 1 was considered representative of the *asserted* claims, and she replied that it was." Pet. at 5 (emphasis added). In fact, counsel for DiStefano was

asked immediately and directly at oral argument whether "independent claim 1 was representative," and she responded "Yes it is," *without any qualification regarding asserted claims versus unasserted claims* in either the question posed or the answer given. Oral Argument at 00:50, DiStefano Patent Tr. III, LLC v. LinkedIn Corp., 784 F. App'x 785 (Fed. Cir. 2019) (No. 19-1210), http://oralarguments.cafc.uscourts.gov/default.aspx?fl=2019-1210.mp3.[1]

Arguments presented for the first time in a reply brief are waived. *Advanced Magnetic Closures, Inc. v. Rome Fastener Corp.*, 607 F.3d 817, 833 (Fed. Cir. 2010) (disregarding arguments not presented in opening brief). And arguments raised only in footnotes are waived. *Kennametal, Inc. v. Ingersoll Cutting Tool Co.*, 780 F.3d 1376, 1383 (Fed. Cir. 2015). It stands to reason that mere observations presented for the first time in a reply brief on appeal, and only in a footnote, are waived. The Court should deny DiStefano's Petition for this reason as well.

[1] Counsel for LinkedIn was also asked the same question, and agreed that claim 1 was representative, again without any qualification regarding asserted versus unasserted claims. Oral Argument at 14:15, DiStefano Patent Tr. III, LLC v. LinkedIn Corp., 784 F. App'x 785 (Fed. Cir. 2019) (No. 19-1210), http://oralarguments.cafc.uscourts.gov/default.aspx?fl=2019-1210.mp3.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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December 30, 2019

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of December, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit through the Court's CM/ECF system.

Participants in this case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Robert T. Cruzen
Robert T. Cruzen

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

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December 30, 2019

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