NO. 18-2431

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

UNILOC 2017 LLC,

Appellant

v.

CISCO SYSTEMS, INC.,

Appellee

PETITION FOR REHEARING OF VACATE AND REMAND ORDER

From the U.S. Patent and Trademark Office, No. IPR2017-00058,
Karl D. Easthom, Ken B. Barrett, and Jeffrey T. Smith,
Administrative Patent Judges, presiding

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Attorneys for Appellee, Cisco Systems, Inc.

CERTIFICATE OF INTEREST FOR CISCO SYSTEMS, INC.

Counsel for Appellee, Cisco Systems, Inc. certifies the following:

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

   Cisco Systems, Inc.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

   N/A

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:

   None.

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:

   Haynes and Boone, LLP: Jamie H. McDole.

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. 4 7. 4(a)(5) and 4 7.5(b).

   Uniloc 2017 LLC v. Cisco Systems, Inc., 19-1064, CAFC, October 10, 2018

   Uniloc 2017 LLC et al. v. Google LLC, 19-2307, CAFC. August 27, 2019

   Uniloc USA, Inc. et al v. RingCentral, Inc., 2-17-cv-00354,-00355 TXED, April 25, 2017

   Uniloc USA, Inc. et al v. Cisco Systems, Inc., 2-17-cv-00527, WAWD, April 4, 2017

Uniloc USA, Inc. et al v. Avaya Inc., 6-15-cv-01168, TXED, December 28, 2015

Dated: February 24, 2020.

/s/ Theodore M. Foster
Theodore M. Foster

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STATEMENT SUPPORTING EN BANC REHEARING

Based on my professional judgment, I believe the panel decision is contrary to the following precedents of this Court: *ConocoPhillips v. U.S.*, 501 F.3d 1374 (Fed. Cir. 2007); *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006); *Monsanto Co. v. Scruggs*, 459 F.3d 1328 (Fed. Cir. 2006); *Rothe Dev. Corp. v. Dept. of Defense*, 413 F.3d 1327 (Fed. Cir. 2005); *Graphic Controls Corp. v. Utah Med. Prods., Inc.*, 149 F.3d 1382, 1385 (Fed. Cir. 1998). *See In re Motupalli*, No. 2019-1889, 791 Fed. Appx. 895 (Fed. Cir. Nov. 8, 2019) and Fed. R. App. P. 28(a). The ruling also conflicts with this Court's decision in *Arthrex v. Smith & New, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019).

/s/ Theodore M. Foster
Theodore M. Foster

Attorney of Record for Appellee, Cisco Systems, Inc.

STATEMENT SUPPORTING PANEL REHEARING: POINTS OF LAW OR FACT OVERLOOKED OR MISAPPREHENDED BY THE COURT

In vacating the Final Written Decision and remanding this case in light of *Arthrex*, the panel overlooked the express limitations of *Arthrex* and the longstanding and numerous authorities holding that arguments not properly briefed in an appellant's opening brief are not preserved for appeal.

INTRODUCTION

In *Arthrex v. Smith & New, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019) ("Arthrex")[1], this Court held that "the current structure of the Board violates the Appointments Clause." *Id.* at 1335. The Court further noted, however, that "Appointments Clause challenges are 'nonjurisdictional structural constitutional objections' that can be waived when not presented." *Id.* at 1340 (quoting *Freytag v. Commissioner of Internal Rev.*, 501 U.S. 868, 878-79 (1991)). As a result, this Court concluded that the impact of *Arthrex* would be "limited to those cases where final written decisions were issued and *where litigants present an Appointments Clause challenge on appeal*." *Arthrex*, 941 F.3d at 1340 (emphasis added). Notwithstanding the recognition in *Arthrex* that its application should be so limited, the panel here withdrew this case from the oral argument docket and summarily vacated and remanded to the Patent Office for further proceedings in light of *Arthrex* without holding the Appellant, Uniloc 2017 LLC ("Uniloc") to its obligation to adequately raise the issue on appeal. This ruling is not only inconsistent with *Arthrex* itself and the wealth of authorities from this jurisdiction requiring appellants to adequately brief arguments in their opening brief, but also opens a floodgate of unnecessary and excessive remands under *Arthrex*. For these

[1] *Arthrex* remains pending on en banc review by this Court. Should the Court reverse or alter its decision in *Arthrex* en banc, Cisco reserves the right to seek additional relief consistent with that ruling.

reasons, the panel should grant rehearing and reverse its order on vacatur and remand. Or, alternatively, Cisco urges the en banc Court to review the panel's order and reverse the vacatur and remand.

ARGUMENT

As noted above, *Arthrex* is "limited to those cases where final written decisions were issued and *where litigants present an Appointments Clause challenge on appeal*." *Arthrex*, 941 F.3d at 1340 (emphasis added). Uniloc did not brief the merits of an Appointments Clause challenge in its opening brief. Instead, in two sentences at the end of its brief, it mentions the existence of an Appointments Clause challenge raised in "a pending appeal to the Federal Circuit, *Polaris Innovations Ltd. v. Kingston Tech.*, No. 18-01768." Brief of Appellant at 27. With nothing more than a one sentence summary of what Polaris argued in its appeal, Uniloc "adopts this constitutional challenge for purposes of preserving the issue pending the appeal." *Id.* This is not enough to "have presented an Appointments Clause challenge on appeal." *Arthrex*, 941 F.3d at 1340.

Rule 28(a)(8)(A) of the Federal Rules of Appellate Procedure requires that the appellant include "its contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies" in its opening brief. This Court has held that summary, unsupported statements are not "sufficient under our precedents to preserve an argument for review." *ConocoPhillips v. U.S.*,

501 F.3d 1374, 1381-82 (Fed. Cir. (2007) (listing cases). And the appellant may not remedy this omission by incorporating briefing or arguments from other pleadings (much less pleadings from a completely separate appeal) by reference. *See Rothe Dev. Corp. v. Dept. of Defense*, 413 F.3d 1327, 1339 (Fed. Cir. 2005); *Graphic Controls Corp. v. Utah Med. Prods., Inc.*, 149 F.3d 1382, 1385 (Fed. Cir. 1998); *see also Monsanto Co. v. Scruggs*, 459 F.3d 1328, 1335 (Fed. Cir. 2006). To hold otherwise would allow an appellant to circumvent the word count limitations by incorporating arguments from other briefing. *See Graphic Controls*, 149 F.3d at 1385. Similarly, mere recitations of what has happened in a different proceeding "does not amount to a developed argument." *SmithKline Beecham Corp. v. Apotex Corp*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) ("We find that these mere statements of disagreement with the district court as to the existence of factual disputes do not amount to a developed argument."). Uniloc's briefing simply does not meet these minimum briefing standards.

Having failed to adequately brief the Appointments Clause challenge in its opening brief, Uniloc waived the issue. Thus, this is not a case where a litigant has presented "an Appointments Clause challenge on appeal" under *Arthrex.* This Court's order vacating and remanding the case in light of *Arthrex* notwithstanding, Uniloc's failure to raise the issue, therefore, is inconsistent with *Arthrex* and is contrary to the wealth of authorities requiring parties to adequately brief arguments

in their opening briefs. To allow this ruling to stand contravenes this Court's authorities requiring parties to adequately brief its arguments on appeal and risks expanding the impact of *Arthrex* beyond its intended reach.

PRAYER

For these reasons, Cisco respectfully requests that the panel grant rehearing, find that Uniloc waived its Appointments Clause challenge by failing to adequately raise it in its opening brief, reverse its order of vacatur and remand, and reset this case for argument on the merits. Should the panel decline to grant the rehearing, Cisco urges the en banc Court to grant rehearing en banc to confirm the minimum standards for preserving arguments on appeal and avert the improper expansion of the *Arthrex* decision beyond its intended reach.

Cisco further requests all such other relief to which it may be justly entitled.

Respectfully Submitted,

/s/ David L. McCombs

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Cisco Systems, Inc.

ECF CERTIFICATION

I hereby certify that (i) the required privacy redactions have been made pursuant to Federal Rule of Civil Procedure 5.2; (ii) the electronic submission is an exact copy of the paper document; (iii) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses; and (iv) the paper document will be maintained for three years after the mandate or order closing the case issues.

/s/ Theodore M. Foster
Theodore M. Foster

ADDENDUM

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

UNILOC 2017 LLC,
Appellant

v.

CISCO SYSTEMS, INC.,
Appellee

2018-2431

Appeal from the United States Patent and Trademark Office, Patent Trial and Appeal Board in No. IPR2017-00058.

UNILOC 2017 LLC,
Appellant

v.

CISCO SYSTEMS, INC.,
Appellee

2019-1064

Appeal from the United States Patent and Trademark Office, Patent Trial and Appeal Board in No. IPR2017-00198.

PER CURIAM.

O R D E R

In light of this court's decision in *Arthrex, Inc. v. Smith & Nephew, Inc.*, No. 18-2140 (Fed. Cir. Oct. 31, 2019) and the fact that Uniloc has raised an Appointments Clause challenge in its opening brief in these cases,

IT IS ORDERED THAT:

(1) The oral argument scheduled for March 3, 2020 is cancelled and the cases are removed from the calendar.

(2) The Patent Trial and Appeal Board's decisions in No. IPR2017-00058 and No. IPR2017-00198 are vacated and the cases are remanded to the Board for proceedings consistent with this court's decision in Arthrex.

FOR THE COURT

January 23, 2020
Date

/s/Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

United States Court of Appeals for the Federal Circuit

UNILOC 2017 LLC,
Appellant

v.

CISCO SYSTEMS, INC.,
Appellee

2018-2431

Appeal from the United States Patent and Trademark Office, Patent Trial and Appeal Board in No. IPR2017-00058.

JUDGMENT

THIS CAUSE having been considered, it is

ORDERED AND ADJUDGED:

VACATED AND REMANDED

ENTERED BY ORDER OF THE COURT

January 23, 2020

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

CERTIFICATE OF SERVICE

I hereby certify that I served a copy on counsel of record on February 24, 2020, by:

U.S. Mail

Fax

Hand

X Electronic Means (by E-mail or CM/ECF)

David L. McCombs — Name of Counsel

/s/ David L. McCombs — Signature of Counsel

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CERTIFICATE OF COMPLIANCE

1. This petition complies with the type-volume limitation of Fed. R. App. P. 35(c)(2) and 40(b) because:

■ this petition contains **1,055** words, excluding the parts of the motion exempted by Fed. Cir. R. 40(c).

2. This petition complies with the typeface and type style requirements of Fed. R. App. P. 27(d)(1)(E) because:

■ this petition has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

/s/ Debra J. McComas
Debra J. McComas

4831-4492-3317