No. 19-1076

United States Court of Appeals for the Federal Circuit

VERIFY SMART CORP.,
Appellant

v.

ASKELADDEN, L.L.C.,
Appellee

UNITED STATES,
Intervenor

Appeals from the United States Patent and Trademark Office, IPR2017-00726,
Carl M. DeFranco, Melissa A. Haapala, Frances L. Ippolito,
Administrative Patent Judges Presiding.

PETITION FOR REHEARING AND REHEARING EN BANC

Jean-Marc Zimmerman
Zimmerman Law Group
233 Watchung Fork
Westfield, New Jersey 07090
(908) 768-6408
jmz@zimllp.com

Steven M. Hoffberg
Hoffberg & Associates
29 Buckout Road
West Harrison, NY 10604
(914) 949-2300
steve@hoffberglaw.com

Counsel for Appellant

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4, undersigned counsel for Appellant Verify Smart Corp. certifies the following:

1. The full name of the party represented by undersigned counsel is:
Verify Smart Corp.

2. The name of the real party in interest (please only include any real party in interest NOT identified in Question 3) represented by me is:
N/A

3. The parent corporations and publicly held companies that own 10% or more of stock in the party 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:
Hoffberg & Associates, Steven M. Hoffberg
Zimmerman Law Group L.P., Jean-Marc Zimmerman

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 are:
Verify Smart Corp. v. Bank of America, N.A., Bank of America Corp., Wells Fargo Bank, N.A. and Wells Fargo & Co., **No. 17-cv-4248-JMV-JBC (D.N.J.).**

Dated: September 21, 2020

/s/ Steven M. Hoffberg
Steven M. Hoffberg
Hoffberg & Associates
29 Buckout Road
West Harrison, NY 10604
(914) 949-2300
steve@hoffberglaw.com

Attorney for Appellant

TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES

Cases **PAGE NO.**

Statutes **PAGE NO.**

RULE 35(b) STATEMENT

Based on my professional judgment I believe that this case involves one or more questions of exceptional importance, in particular, whether the Director of the USPTO can accept a petition for Inter Partes Review ("IPR") from a party, where acceptance of that petition requires determination of an issue outside the scope of the jurisdiction of the agency's authority.

This case also seeks a determination of whether the Patent Trial and Appeal Board's ("PTAB") failure to consider, in determining the real parties in interest ("RPI"), whether members of a joint venture that included an admitted RPI of the Petitioner were a combination of competitors acting in restraint of trade in violation of the Sherman Act and should have therefore each been considered a RPI, was an unconstitutional deprivation of due rights process or resulted in an impermissible taking under the 5th amendment.

/s/ Steven M. Hoffberg
STEVEN M. HOFFBERG

Attorney for Appellant

Dated: September 21, 2020

I. INTRODUCTION

This appeal arises from an IPR petition filed by Askeladden L.L.C. ("Askeladden"), an entity created by and wholly owned by The Clearing House Payments Company L.L.C. ("TCH"), to *inter alia* file such petitions on behalf of the "financial services industry", i.e.; its 25 owner member banks. The petition named Askeladden alone as the sole real party in interest. Verify Smart Corp. ("Verify"), the patent owner of U.S. 8,285,648 ("'648 Patent"), came to understand, after the filing, that Askeladden was controlled by its parent TCH, and that the parent itself was controlled by its owner member banks, who were competitors. Further, it became apparent during the limited discovery permitted that two of these member banks, i.e. Bank of America ("BofA") and Wells Fargo Bank ("Wells Fargo"), had previously been served with complaints and sued by Verify for infringing the '648 Patent, and that the IPR petition itself was in part copied from a prior Covered Business Method petition filed by Bank of America, and that Askeladden's filing of the Petition was contingent on settlement of the Wells Fargo litigation, suggesting significant coordination between Askeladden and TCH's member banks, thereby making the correct identification of the RPI of significant importance.

II. ARGUMENT

A. Lack of Jurisdiction of PTAB Over an Issue Required for Adjudication Compels Dismissal of Petition

The PTAB in this case accepted and maintained the IPR Petition in spite of the fact that it conceded it lacked jurisdiction over allegations of antitrust violations of the Sherman Act which would ultimately render the proceeding time-barred under 35 U.S.C. § 315(b)[1]. Wells Fargo was served with a complaint for infringing Verify's '648 Patent, more than one year prior to filing of the petition, and therefore the proceeding was time-barred if the antitrust allegation is taken as true. According to *Thryv, Inc. v. Click-to-Call Technologies, LP*, 590 U.S. ___ (2020), the merits of a finding of the PTAB under 35 U.S.C. § 315(b) is unreviewable. However, the Administrative Procedure Act, 5 U.S.C. § 706 preserves issues surrounding the procedure used by the PTAB to determine the RPI as being reviewable, and especially permits the supervising Court to oversee the PTAB's process of adjudicating whether it properly considered and identified RPI and privies of the Petitioner. The determination of RPI and privies of the Petitioner is reviewable under 35 U.S.C. § 315(e)[2], and is unrelated to the institution decision

---

[1] 35 U.S.C. § 315(b) provides: "Patent Owner's Action - An inter partes review may not be instituted if the petition requesting the proceeding is filed more than 1 year after the date on which the petitioner, real party in interest, or privy of the petitioner is served with a complaint alleging infringement of the patent…"

[2] 35 U.S.C. § 315(e) provides: "Estoppel -

that is unreviewable under *Thryv*, and was specifically preserved by Verify on appeal.

Verify alleged (Appx.355-358, Appx.488-490) that TCH, a joint venture of 25 of the largest banks whose activities are directed toward benefiting these banks, to the detriment of non-owner banks and others operating in the same markets, was anticompetitive, and represented a restraint of trade in violation of The Sherman Act, 15 U.S.C. § 1[3]. As a result, these joint venturers are jointly responsible for the actions of TCH, and therefore all 25 banks stand as RPI in the IPR brought by TCH's wholly-owned subsidiary Petitioner Askeladden.

---

(1) Proceedings before the office - The petitioner in an inter partes review of a claim in a patent under this chapter that results in a final written decision under section 318(a), or the real party in interest or privy of the petitioner, may not request or maintain a proceeding before the Office with respect to that claim on any ground that the petitioner raised or reasonably could have raised during that inter partes review.

(2) Civil actions and other proceedings - The petitioner in an inter partes review of a claim in a patent under this chapter that results in a final written decision under section 318(a), or the real party in interest or privy of the petitioner, may not assert either in a civil action arising in whole or in part under section 1338 of title 28 or in a proceeding before the International Trade Commission under section 337 of the Tariff Act of 1930 that the claim is invalid on any ground that the petitioner raised or reasonably could have raised during that inter partes review."

[3] 15 U.S.C. § 1 provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Petitioner and TCH, added as an RPI after Verify moved for them to be so added, each failed to present any evidence during the IPR, or on appeal to this Court, rebutting Verify's antitrust allegation, thereby conceding the issue and waiving its right to oppose the assertion. The PTAB determined that it lacked jurisdiction over the antitrust claim in the Final Witten Decision ("FWD") (Appx-8-59), but nevertheless maintained the IPR in spite of the fact that it understood that the although antitrust issue was beyond its power to consider, it was the inviolable law of the land which governs all contractual relations, and should have been considered to properly determine the RPI to the IPR. A panel of this Court affirmed that the PTAB lacked jurisdiction over the antitrust claim, but provided Verify with no recourse to have the PTAB's failure to consider the antitrust issue in determining the RPI addressed.

Section 1 of The Sherman Act, 15 U.S.C. § 1, provides a standard of conduct which governs all commercial relationships which Congress can regulate. A violation of Section 1 of the Sherman Act, renders void ab initio an agreement between competitors, such as TCH's formation agreement/operating agreement, that is violative of the statute. When interpreting an agreement, the cornerstone of relationships between parties, a tribunal must consider various canons of contract construction and the governing law. To find that the PTAB does not have jurisdiction to apply the laws governing contracts is to find that the PTAB is incompetent to determine the RPI and privies of a Petitioner, exactly the task denominated by Congress for the PTAB to perform in 35 U.S.C. § 315(e), and which is not rendered moot by this Court's prior decision in *Thryv*. The joint venture established and directed by the 25 competing banks, i.e., TCH, is ineffective to isolate these banks of members of this joint venture LLC from liability for the acts of the LLC itself. Thus, these 25 member banks are themselves RPI to the proceeding and as such are bound by the estoppel provisions of 35 U.S.C. § 315(e).[4]

The PTAB refused to allow Verify to conduct any discovery of TCH, and neither Askeladden nor TCH ever presented any agreements or other evidence that TCH's member banks were isolated from liability for the actions of TCH and Askeladden. The PTAB therefore determined without any evidence of record that TCH's member banks were isolated and thus immune from liability solely by virtue of being joint venturers in TCH. Significantly, TCH never had to produce its members' agreement for consideration despite efforts by Verify to obtain the agreement and other discovery from TCH, and as such there is no *prima facie*

[4] Because the identity of the RPI and privies of Petitioner is a single question for determination under 35 U.S.C. § 315(b) and § 315(e), it would be arbitrary and capricious for the PTAB to adopt different determinations for each.

evidence that the members of TCH are not liable for its obligations[5]. Absent such evidence to support the isolation of TCH members from being responsible for TCH's actions, a review of the antitrust laws is not required by the PTAB, since lack of member liability stands as an unpled affirmative defense.

The PTAB lacks jurisdiction to impose civil or criminal penalties under the Sherman Act, but no such penalties were demanded by Verify. However, that does not mean that the PTAB lacks jurisdiction to interpret agreements between parties subject to the Sherman Act, state Limited Liability Company Acts, or other governing law, in order to properly determine the RPI in an IPR.

This Court's panel affirmed that the PTAB lacked jurisdiction to address antitrust allegations, but did not address whether the PTAB had jurisdiction to evaluate and determine whether the facts asserted in Verify's claim supported finding that by virtue of allegedly being joint venturers in an antitrust conspiracy, TCH's member banks were RPI or privies of Petitioner.

The circumstances of this case did not require more than a *prima facie* consideration of Verify's claims to determine whether the alleged antitrust conspiracy between TCH and its member banks gave rise to relationships that

---

[5] See Delaware Limited Liability Company Act § 18-303(b) Liability to Third Parties provides: "(b) Notwithstanding the provisions of subsection (a) of this section, under a limited liability company agreement or under another agreement, a member or manager may agree to be obligated personally for any or all of the debts, obligations and liabilities of the limited liability company."

could be violative of such laws. Petitioner presented no evidence in rebuttal of Verify's allegations, submitting at best attorney arguments absent evidence. Rather, it appears that Petitioner purposefully sought to avoid making its mandatory discovery disclosures regarding the relationship between and activities of TCH and its member banks.

This apparently purposeful avoidance acts as a waiver of the issue on appeal, and permits this Court to decide the issue on the pleadings and evidence of record as a matter of law. *See, Lazare Kaplan International, Inc., v. Photoscribe Technologies, Inc.*, 628 F.3d 1359 (Fed. Cir. 2010) ("It is well-settled that a party must file a cross-appeal if, although successful in the overall outcome in the district court, the party seeks, on appeal, to lessen the rights of its adversary or to enlarge its own rights. *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 479, 119 S.Ct. 1430, 143 L.Ed.2d 635 (1999)") ("Absent a cross-appeal, an appellee . . . may not 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary.'") (quoting *United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435, 44 S.Ct. 560, 68 L.Ed. 1087 (1924))"…). As neither the Petitioner nor Askeladden addressed the antitrust issue on appeal, it was not preserved and was consequently waived.

While the PTAB concluded that it lacked jurisdiction to determine the substantive merits of an antitrust claim, it was not precluded from considering and affirming Verify's claim that as constituted, the 25 member banks of TCH (an admitted RPI) should be deemed joint venturers engaged in wrongful conduct violative of the antitrust laws. *See American Needle, Inc. v. National Football League*, 560 U.S. 183; 130 S. Ct. 2201; 176 L. Ed. 2d 947; 94 U.S.P.Q.2d 1673 (2010) ("This case raises that antecedent question about the business of the 32 teams in the National Football League (NFL) and a corporate entity that they formed to manage their intellectual property. We conclude that the NFL's licensing activities constitute concerted action that is not categorically beyond the coverage of §1.")

American Needle applied antitrust law to "contracts, combinations and conspiracies in restraint of trade" if "an agreement joins together independent centers of decision-making. If it does, the entities are capable of conspiring under Section 1, and the court must decide whether the restraint of trade is an unreasonable and therefore illegal one." The Supreme Court held that the determination of whether conduct is joint - and thus subject to Section 1 of the Sherman Act - requires "a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate." *American* Needle. *Id*. At 191. The licensing agreement at issue in *American Needle* was not insulated from an antitrust challenge merely because NFL teams had formed an integrated organization, i.e., joint venture. The key question posed by the antitrust laws, according to the Court, is whether entities "are acting as separate economic actors pursuing separate economic interests, and each [entity] therefore is a potential independent center of decision-making." *Id*. (citing *Copperweld Corp. v. Independence Tube Corp*., 467 U. S. 752, 769 (1984).) The Court functionally inquired whether particular joint venture conduct "deprives the marketplace of independent centers of decision-making". *Id.* Ample evidence was presented that TCH, through its Askeladden subsidiary run by TCH officers, consolidated the decision-making with respect to licensing of third-party patents, while avoiding challenge to patents owned by the member banks.

In this case, the PTAB **did not reject** Verify's arguments regarding the existence of an antitrust violation by TCH and its 25 member banks, and other than evidence presented by Verify supporting this allegation, the record is devoid of any analysis by the PTAB or rebuttal evidence submitted by Petitioner or TCH regarding this issue. In fact, the PTAB refused to permit discovery on the issue and refused to consider the issue. Therefore, Verify's assertion that a violation of 15 U.S.C. § 1 exists and that the remedy is a determination that the 25 member banks of TCH are each RPI to the Petition stands unrebutted.[6]

[6] Since the Petitioner demurred and failed to respond to the assertion, a remand is not only not required, but is in fact proper, and this issue may be decided on appeal as a matter of law. *Greenbrier v. United States*, 193 F.3d 1348, 1354 (Fed. Cir. 1999).

Had the PTAB properly considered the issue and ruled against Verify, then raising the 35 U.S.C. § 315(b) issue on appeal with respect to the institution decision might have been precluded by 35 U.S.C. § 314(d) under *Thryv*. However, *Thryv* did not consider and does not pertain to determinations made under 35 U.S.C. § 315(e). Therefore, although the PTAB failed to consider the antitrust issue and deemed it outside of their jurisdiction in determining the RPI as part of the institution decision, the issue of whether the RPI issue was properly decided remains ripe under 35 U.S.C. § 315(e) since the PTAB never considered the antitrust analysis that Verify in fact presented to the PTAB, because it believed it was outside the PTAB's jurisdiction. 35 U.S.C. § 314(d) insulates institution decisions of the PTAB from review, *see Thryv*, but does not insulate determinations of the identity of RPI and privies of Petitioner under 35 U.S.C. § 315(e) from review.

In fact, the PTAB has jurisdiction to consider at least as much of the antitrust issue as raised by Verify, since it is a subsidiary issue to a core adjudication required by statute, i.e., a determination of RPI. No statute otherwise limits the jurisdiction of the PTAB from considering such issue. 35 U.S.C. §6(b)(4) defines the PTAB's duties.[7] And 35 U.S.C. § 312(a) specifies the nature of the PTAB's

[7] 35 U.S.C. § 6(b)(4) provides: "Duties - The Patent Trial and Appeal Board shall - (4) conduct inter partes reviews and post-grant reviews pursuant to chapters 31 and 32."

jurisdiction over IPRs, and requires as a predicate for grant of review of the petition a determination of the RPI.[8]

Thus, the governing statutes not only permit the PTAB to assume jurisdiction over issues required to adjudicate the RPI and privies in question, the statutes mandate it. In this case, under 5 U.S.C. § 706(2)(C), the PTAB clearly acted "short of statutory right", i.e., failing to provide the full extent of statutory protections to Verify as the patent owner in an IPR, which requires that this Court set aside the FWD.

35 U.S.C. § 315(e) provides a distinct, separately appealable basis from the institution decision governed by the holding in *Thryv* for this Court to review whether the PTAB correctly determined the RPI and privies of Petitioner and whether they were estopped from bringing the IPR. Thus, the fact that the FWD as issued was unfavorable to Verify, does not deprive Verify of a right to have this Court review the PTAB's determination of RPI and privies of the Petitioner under 35 U.S.C. § 315(e).

Therefore, without departing from the narrow holding in *Thryv*, this Court should determine *de novo* who the estopped parties are under 35 U.S.C. § 315(e),

---

[8] 35 U.S.C. § 311(a) provides: "(a) Requirements of Petition. - A petition filed under section 311 may be considered only if - (2) the petition identifies all real parties in interest."

or remand this case to the PTAB for determination of those parties with appropriate guidance.

B. <u>Deprivation of Due Process</u>

This case presents a further question of exceptional importance. This Court ruled that the PTAB, while entrusted by Congress to determine the RPI and privies of Petitioner, does not have jurisdiction to make that determination by considering a basic question of contract law and permissible relations between parties. The Sherman Act imposes a public policy constraint on the freedom to contract, and must be considered when interpreting agreements between competitors. The 25 member banks of TCH are clearly competitors, and the result of their action, i.e., TCH and its actions including creating Petitioner Askeladden, restrain competition by removing independent decision-making by competitors within the market. *See American Needle*, supra. The America Invents Act (AIA) was not intended to repeal the Sherman Act, and did not do so. It remains the law of the land, and the AIA must be interpreted consistent therewith.

Due process requires that the procedures by which laws are applied must be evenhanded, so that individuals are not subjected to an arbitrary exercise of government power. *Marchant v. Pennsylvania R.R.*, 153 U.S. 380, 386 (1894). Moreover, due process also requires that the supervising Court determine whether the tribunal has jurisdiction, and if not, whether the action of the tribunal should be annulled, and not affirmed. *See*, *Burns et al. v. Wilson et al.*, 346 U.S. 137, 73 S.Ct. 1045. 97 L.Ed. 1508 (1953); *U.S. v. Grimley*, 137 U.S. 147; 11 S.Ct. 54; 34 L.Ed. 636 (1890) ("It cannot be doubted that the civil courts may in any case inquire into the jurisdiction of a court-martial, and, if it appears that the party condemned was not amenable to its jurisdiction, may discharge him from the sentence."). Thus, the appropriate remedy where, as here, the tribunal lacks jurisdiction, which both the PTAB and Federal Circuit agreed to be the case as regards the antitrust issue, is annulment of the administrative determination.

In this case, the PTAB established a presumption that the initial disclosure of the RPI in the Petition was correct, even though when challenged by Verify the Petitioner did not have to sustain its burden of proof that its identification of the RPI was correct. When the PTAB determined that it lacked jurisdiction to determine the RPI, it should have dismissed the Petition, since identification of the RPI is a jurisdictional element of the Petition under 35 U.S.C. § 311, and absent jurisdiction to apply the antitrust laws to determine the RPI when this issue is presented for consideration, the Petition is *ex judis*.

Further, this Court has jurisdiction under 5 U.S.C. 706[9] to set aside the determination of RPI as being contrary to law (5 U.S.C. § 706(2)(A)), to determine

[9] 5 U.S.C. § 706 provides: "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret

that the PTAB impermissibly abridged Verify's constitutional due process rights under the 5th Amendment (5 U.S.C. § 706(2)(B)), to set aside actions as being "in excess of statutory jurisdiction" (5 U.S.C. § 706(2)(C)), and "unsupported by substantial evidence" (5 U.S.C. § 706(2)(E)).

More telling of the constitutional violation at issue in this case is that the PTAB, having determined that the antitrust issue was properly raised for its consideration, after having been presented with pleadings arguing that the antitrust issue was dispositive of a critical issue for the institution decision, i.e., determining the RPI, ruled that the antitrust issue was outside of its jurisdiction. In such a circumstance, the PTAB was compelled to dismiss, and should have dismissed the Petition. *Id*. Dismissal is both just and equitable, since the tribunal could not

---

constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -
(1) compel agency action unlawfully withheld or unreasonably delayed; and
(2) hold unlawful and set aside agency action, findings, and conclusions found to be -

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court."

deliver a proper result absent consideration of the antitrust issue, and further since the matter is in any case outside its jurisdiction, even if it had considered the issue. This result is not absurd, but is in fact consistent with the holding of *Thryv*, that it is the institution decision alone that is unreviewable.

Finally, assuming that the Courts do not require that the administrative tribunals justly apply the laws to achieve an equitable result, this still leaves open a claim of an impermissible uncompensated taking by the PTAB of Verify's rights under the 5th Amendment by deprivation of due process. The PTAB in this case impermissibly ignored the antitrust issue, ruling in favor of the Petitioner, and rendered its FWD against Verify despite this dispositive issue having been left unadjudicated.

III. CONCLUSION

For the foregoing reasons, the petition for rehearing and for rehearing *en banc* should be granted.

Respectfully submitted,
/s/ Steven M. Hoffberg
Steven M. Hoffberg
Hoffberg & Associates
29 Buckout Road
West Harrison, NY 10604
(914) 949-2300
steve@hoffberglaw.com

Jean-Marc Zimmerman
Zimmerman Law Group
233 Watchung Fork
Westfield, New Jersey 07090
(908) 768-6408
jmz@zimllp.com

Attorneys for Appellant

Dated: September 21, 2020

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2020, I electronically filed Patent Owner Verify Smart Corp.'s Petition for Rehearing and Rehearing En Banc with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the registered users of the CM/ECF system in this case, and emailed the same to:

Mr. Richard Rainey
Mr. Douglas Behrens
Covington & Burling LLP
One CityCenter, 850 Tenth Street, NW

Charles R. Macedo
Mark Berkowitz
Amster, Rothstein & Ebenstein LLP
90 Park Avenue
New York, NY 10016

Dennis Fan
Farheena Y. Rasheed
Civil Division, Appellate Staff
United States Department of Justice
950 Pennsylvania Ave. NW, Rm. 7213
Washington, DC 20530

/s/ Steven M. Hoffberg
Steven M. Hoffberg
Hoffberg & Associates
29 Buckout Road
West Harrison, NY 10604
(914) 949-2300
steve@hoffberglaw.com

Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7) and Federal Circuit Rule 28(a)(14), the foregoing Brief was prepared in MS Word, is proportionally spaced, has a typeface of 14 point Times New Roman, and contains **3,808** words (per Word 2019 automated word count), excluding those sections identified in Fed. R. App. P. 32(f) and Federal Circuit Rule 32(b).

/s/ Steven M. Hoffberg
Steven M. Hoffberg
Hoffberg & Associates
29 Buckout Road
West Harrison, NY 10604
(914) 949-2300
steve@hoffberglaw.com

Attorney for Appellant

Dated: September 21, 2020

ADDENDUM

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

VERIFY SMART CORP.,
Appellant

v.

ASKELADDEN, L.L.C.,
Appellee

UNITED STATES,
Intervenor

2019-1076

Appeal from the United States Patent and Trademark Office, Patent Trial and Appeal Board in No. IPR2017-00726.

Decided: August 5, 2020

STEVEN M. HOFFBERG, Tully Rinckey PLLC, New York, NY, for appellant. Also represented by JEAN-MARC ZIMMERMAN, Zimmerman Law Group, Westfield, NJ.

RICHARD L. RAINEY, Covington & Burling LLP, Washington, DC, for appellee. Also represented by DOUGLAS ALEXANDER BEHRENS, BRIAN GERARD BIELUCH; MARK

BERKOWITZ, CHARLES R. MACEDO, Amster Rothstein & Ebenstein LLP, New York, NY.

DENNIS FAN, Appellate Staff, Civil Division, United States Department of Justice, Washington, DC, for intervenor. Also represented by SCOTT R. MCINTOSH, ETHAN P. DAVIS; THOMAS W. KRAUSE, FARHEENA YASMEEN RASHEED, Office of the Solicitor, United States Patent and Trademark Office, Alexandria, VA.

Before LOURIE, SCHALL, and DYK, *Circuit Judges.*

LOURIE, *Circuit Judge.*

Verify Smart Corp. ("Verify") appeals from the final written decision of the United States Patent and Trademark Office Patent Trial and Appeal Board ("the Board") holding claims 1–19 of U.S. Patent 8,825,648 ("the '648 patent") unpatentable as obvious. *See Askeladden LLC v. Verify Smart Corp.*, No. IPR2017-00726, 2018 WL 3572368 (P.T.A.B. July 23, 2018) ("*Decision*"). Because the Board did not err in its conclusion that the challenged claims would have been obvious over the prior art, we affirm.

BACKGROUND

Verify owns the '648 patent, which is directed to systems and methods for verifying a user's identity in electronic transactions. The patent relates to multi-factor authentication, which utilizes secure information that the user knows as well as an electronic communications device (*e.g.*, a phone) in the user's possession. For example, the patent provides that "a user and the user's communication device are pre-enrolled in a verification program" administered by a verifier (*i.e.*, the user's bank) and the verifier operates a database that stores a secure identifier for the user (*e.g.*, a password or personal identification number ("PIN")) as well as an identifier for the user's electronic device (*e.g.*, an access number). *See, e.g.*, '648 patent col. 4 ll. 5–8, 27–

29. When the user attempts to make a transaction, the verifier attempts to open a communications link with the user's device, and once the communications link is open, the verifier sends an identification verification request ("IVR") to the device, which displays the request to the user. *Id.* col. 4 ll. 38–46. The user then responds to the IVR by inputting the correct secure identifier and sending the response back to the verifier through the open communications link. *Id.* col. 4 ll. 48–51. The verifier then compares the secure identifier entered by the user with the secure identifier stored in the database and permits the transaction to proceed if there is a match. *Id.* col. 4 ll. 54–61.

Claim 1 is illustrative and recites:

> 1. A user identity verification method for verifying the identity of a user by a verifier in the course of an electronic transaction, said user identity verification method comprising the steps of:
>
> (a) pre-enrolling the user, comprising the steps of:
>
> (a1) assigning to the user a bona fide secure identifier; and,
>
> (a2) storing the bona fide secure identifier in a database that is accessible to the verifier;
>
> (b) pre-enrolling a user communications device, wherein pre-enrolling the user communications device comprises the steps of:
>
> (b1) obtaining a user access number for the user communications device, wherein the user access number can be used to open a communications link with the user communications device; and,
>
> (b2) storing the user access number in a database that is accessible to the verifier;

(c) retrieving the user access number stored at Step (b2);

(d) opening a communications link between the verifier and the user communications device by using the user access number retrieved at Step (c);

(e) sending an identity verification request (IVR) from the verifier to the user through the communications link opened at Step (d);

(f) inputting by the user a putative secure identifier;

(g) sending through the communications link opened at Step (d) a response to the IVR of Step (e);

(h) retrieving the bona fide secure identifier stored at Step (a2);

(i) comparing the putative secure identifier input at Step (f) with the bona fide secure identifier retrieved at Step (h); and,

(j) allowing the transaction to proceed only if the comparison of Step (i) results in a match between the putative secure identifier and the bona fide secure identifier.

’648 patent col. 18 l. 63–col. 19 l. 31.

Askeladden, LLC (“Askeladden”) is a single-member limited liability company formed by The Clearing House Payments Company, LLC (“TCH”), which in turn is owned by twenty-five of the world’s largest commercial banks, including Bank of America (collectively the “member banks”). Askeladden filed a petition for *inter partes* review of claims 1–19 of the ’648 patent, arguing that the claims were unpatentable as obvious over a combination of U.S. Patent App. Pub. 2005/0184145 (“Law”), U.S. Patent App. Pub. 2006/0165060 (“Dua”), and U.S. Patent 6,886,741 (“Salveson”).

Law describes a secure wireless authorization system that allows a user to use a wireless device to authorize a third-party transaction request in real time. Law ¶ 47. In Law's system, when an authorization request is received, an authorization server (*i.e.,* a bank) sends an authorization request to the user's wireless device through an encrypted secure channel. *Id.* ¶¶ 36, 49. The channel is encrypted by a pre-established symmetric key, which can be used as a "device password" or "device key." *Id.* ¶¶ 66–67. If the wireless device receives the request, it displays the request to the user and allows the user to respond by inputting a PIN or personal digital signature. *Id.* ¶ 49. If the authorization server receives a response within a certain specified period of time (*i.e.*, a "timeout" period), it confirms that the user's security credentials are correct and allows the transaction to proceed. *Id.* ¶¶ 49–50.

The Board instituted review on all claims and all grounds. After institution, Verify filed a motion to terminate the proceedings, arguing that Askeladden failed to name TCH and Bank of America as real parties in interest as required by 35 U.S.C. § 312(a)(2). The Board determined that TCH should be named as a real party in interest but that neither Bank of America nor any other member banks is in privity with Askeladden or TCH and need not be named. J.A. 611, 614. Rather than terminate the proceedings, the Board allowed Askeladden to update its mandatory notice to name TCH as a real party interest, which it did. J.A. 615, 628. Verify continued to argue that the member banks are real parties in interest in later filings.

Meanwhile, Verify also filed a motion to amend the claims of the '648 patent under 35 U.S.C. § 316(d) in which Verify sought to amend claim 2 and add dependent claims 20–31. J.A. 564–77. Verify later withdrew its proposed addition of claims 20–22 and 26–30. J.A. 730. Askeladden responded that amended claim 2 and new claims 25 and 31 would have been obvious over Law and/or Dua. Askeladden also argued that new claims 23 and 24 lacked written description support in the specification of the ’648 patent and alternatively that the claims would have been obvious over Law, Dua, and U.S. Patent App. Pub. 2003/0182194 (“Choey”).

The Board issued a final written decision in which the Board determined that Askeladden had demonstrated the unpatentability of claims 1–19 of the ’648 patent, denied Verify’s motion to amend for all claims, and reiterated its conclusion that none of the member banks are real parties in interest to the proceeding. Relevant to this appeal, the Board determined that independent claims 1, 2, and 5, as well as dependent claim 19, would have been obvious over Law and Dua. With respect to Verify’s motion to amend, the Board determined that proposed amended claim 2 and proposed new claims 25 and 31 would have been obvious over Law and Dua and that proposed new claims 23 and 24 would have been obvious over Law, Dua, and Choey. The Board also determined that proposed claims 23 and 24 lack written description support in the specification of the ’648 patent.

Verify appealed. We have jurisdiction under 28 U.S.C. § 1295(a)(4)(A).

DISCUSSION

Verify makes four principal arguments on appeal. First, Verify argues that the Board erred in concluding that the claims would have been obvious over the prior art. Second, Verify argues that the Board erred in denying its motion to amend because the amended claims would have been unpatentable as obvious. Third, Verify argues that the Board erred in determining that Bank of America is not a real party in interest. Finally, Verify argues that the application of *inter partes* review to pre-AIA patents is a taking under the Fifth Amendment. We address Verify’s arguments in turn.

A. Obviousness

Obviousness is a question of law that "lends itself to several basic factual inquiries," *Graham v. John Deere Co.*, 383 U.S. 1, 17–18 (1966) (citing *Great Atl. & Pac. Tea Co. v. Supermarket Equip. Corp.*, 340 U.S. 147, 155 (1950)), including the scope and content of the prior art, the level of ordinary skill in the art, differences between the prior art and the claimed invention, and any relevant secondary considerations. *Id.* "We review the PTAB's factual findings for substantial evidence and its legal conclusions *de novo*." *Redline Detection, LLC v. Star Envirotech, Inc.*, 811 F.3d 435, 449 (Fed. Cir. 2015) (citing *Rambus Inc. v. Rea*, 731 F.3d 1248, 1251 (Fed. Cir. 2013)). A finding is supported by substantial evidence if a reasonable mind might accept the evidence as adequate to support the finding. *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). "If two 'inconsistent conclusions may reasonably be drawn from the evidence in record, the PTAB's decision to favor one conclusion over the other is the epitome of a decision that must be sustained upon review for substantial evidence.'" *Elbit Sys. of Am., LLC v. Thales Visionix, Inc.*, 881 F.3d 1354, 1356 (Fed. Cir. 2018) (quoting *In re Cree, Inc.*, 818 F.3d 694, 701 (Fed. Cir. 2016) (internal brackets omitted)).

1. Claims 1 and 5

Verify argues that the Board erred in concluding that claims 1 and 5 would have been obvious over the prior art. Independent claim 1 recites, *inter alia*, "opening a communications link between the verifier and the user communications device by using the user access number" and "sending an identity verification request (IVR) from the verifier to the user through the communications link." Independent claim 5 recites substantially similar limitations. The Board determined that Law discloses opening a communications channel through its description of connecting an authorization server of the issuing bank (*i.e.*, the verifier) and the user's wireless device. *Decision*, 2018 WL

3572368, at *8. The Board also concluded that Law discloses sending an identification verification request through an open communications link through its description of sending an authorization request from the authorization server to the user's wireless device. *Id.*

Verify argues that the Board improperly failed to construe the term "open[ing] a communications link with the user communications device." Verify further argues that Law fails to disclose the steps of opening a communications channel and sending an IVR through the channel because the authorization server of Law transmits its authorization request to the user's wireless device through a third-party intermediary without having previously opened a communications channel with the user's device. Verify also challenges the Board's finding of a motivation to combine Law with Dua.

Askeladden responds that Verify's claim construction argument is waived because Verify failed to seek construction of any claim terms before the Board and that the Board's conclusion that Law discloses opening a communications link is supported by substantial evidence, including the testimony of its expert, Ivan Zatkovich.

We agree with Askeladden on both counts. Verify did not file a preliminary response to Askeladden's petition for *inter partes* review, and the Board, in its institution decision, determined that no claim terms required construction. *Askeladden LLC v. Verify Smart Corp.*, No. IPR2017-00726, Paper 6 at 7 (P.T.A.B. July 24, 2017). Thereafter, Verify failed to request or propose a construction for any claim terms in its patent owner's response. *See Askeladden LLC v. Verify Smart Corp.*, No. IPR2017-00726, 2017 WL 6061669 (P.T.A.B. Nov. 20, 2017). Having failed to present its claim construction argument before the Board, Verify is not entitled to present that argument for the first time on appeal. *See In re Baxter Int'l*, 678 F.3d 1357, 1362 (Fed. Cir. 2012) ("Absent exceptional circumstances, we generally do not consider arguments that the applicant failed to present to the Board." (internal citations omitted)).

Under the plain and ordinary meaning of the claim terms as adopted by the Board, we agree with Askeladden that the Board's finding that Law discloses opening a communications channel and sending an IVR through the channel is supported by substantial evidence. Before the Board, Verify argued that Law's authorization system operates using an SMS (short message service) network, in which communications from the authorization server to the user's wireless device are routed through an SMSC (short message service center), which is operated by the wireless carrier, not the bank. J.A. 377–80. According to Verify, at the time that the authorization server transmits the authorization request to the SMSC, no communications link is open with the user's device. J.A. 384. In response, relying on the declaration of Zatkovich, Askeladden argued that Law's authorization server establishes an encrypted communications channel with the user device and subsequently transmits its authorization request to the user's device through this channel.

Having been presented with competing theories as to how Law's authorization server communicates with the user's wireless device, the Board found that Law discloses the claimed communications link. Our task is not to determine which theory we find more compelling. "[I]t is not for us to second-guess the Board's assessment of the evidence." *Velander v. Garner*, 348 F.3d 1359, 1378 (Fed. Cir. 2003). Rather, the only question before us is whether the finding adopted by the Board is supported by substantial evidence. Here, we conclude that it is.

Zatkovich testified that, in his opinion, Law's authorization server "opens a 'communications link' prior to sending a message." J.A. 3283 ¶ 150. This testimony accords with the disclosure of Law, which explains that, if a transaction is not pre-authorized, then the authorization server will "attempt to connect to the wireless device." Law ¶ 62. Thereafter, if the user's device is available, then the authorization server will "send out an authorization request" to the user's wireless device "through an encrypted secure channel . . . connecting the authorization server and the user's wireless device." *Id.* With respect to Verify's argument that use of SMS precludes establishing a communications link between the authorization server and the user's device, Zatkovich testified that Law discloses establishing a secure wireless connection between an authorization server and the user communications device "irrespective of the protocol selected," such as SMS. J.A. 3285 ¶ 153. The disclosure of Law comports with Zatkovich's testimony that Law's encrypted channel can support various communication protocols. As Law explains, the user's wireless device "must handle various security schemes and communication channels." Law ¶ 70. Based on Law's disclosure and Zatkovich's testimony, we conclude that the Board's finding that Law discloses opening a communications link between the verifier (Law's authorization server) and the user communication device, as well as sending an identity verification request (Law's authentication request) from the verifier to the user through the communications link is supported by substantial evidence.

Substantial evidence also supports the Board's finding of a motivation to combine Law with Dua. The Board credited Zatkovich's testimony that a skilled artisan would have been motivated to combine Law with Dua because the references "are both directed to electronic transaction processing and, in particular, verifying and authenticating users and authorizing financial transactions." J.A. 988 ¶ 54. Zatkovich further testified that a person of skill would have recognized that combining Law with Dua would facilitate "the convenience and flexibility offered by over-the-air, on demand, download methods." J.A. 993 ¶ 64. Accordingly, we affirm the Board's finding of a motivation to combine the references, and hence the obviousness of claims 1 and 5.

2. Claim 19

Claim 19 depends from claim 5 and recites the additional steps of storing a "device identifier" of the user communications device in the database, obtaining the device identifier of the user communications device used during verification, comparing the device identifier obtained during verification with the device identifier stored in the database, and, if the device identifiers match, allowing the transaction. '648 patent col. 22 ll. 16–28. The Board determined that "device keys" described in Law to encrypt messages sent through Law's secure encrypted channel disclose the device identifier recited in claim 19, and that Law discloses the remaining steps of claim 19 through its description of verifying the device credentials of the user's device prior to authorizing a transaction. *Decision*, 2018 WL 3572368, at *11.

Verify argues that Law's use of device keys to encrypt communication does not meet the limitations of claim 19 because, while the device keys may be used to verify the credentials of the user's device, the key is never transmitted to the authorization server and compared to an identifier stored in the server, as required by the claim. Askeladden responds that substantial evidence supports the Board's conclusion that Law's device keys disclose a device identifier and are used in the manner recited in the claim.

We agree with Askeladden. Law explains that the symmetric key used to encrypt communications between the authentication server and user device "can be used as a device password" or "device key." Law ¶ 67. Further, "[u]pon receiving the response from the wireless device, the authorization server will . . . verify the security credentials of the user and the wireless device." Law ¶ 50. In reaching its conclusion that Law discloses comparing the device key with a key stored in the authorization server, the Board credited Zatkovich's testimony that a skilled artisan "would have understood that verifying the separate security credentials of the wireless device requires retrieving and comparing the stored value of these credentials . . . to that retrieved from the user communication device." J.A. 3294 ¶ 171. The Board was within its discretion to weigh the credibility of expert testimony, *see Yorkey v. Diab*, 601 F.3d 1279, 1284 (Fed. Cir. 2010) (citing *Velander*, 348 F.3d at 1371), and Verify has not otherwise demonstrated that the Board's finding is unsupported by substantial evidence, or that claim 19 was not obvious.

B. Motion to Amend

Verify argues that the Board erred in denying its motion to amend the claims under 35 U.S.C. § 316(d). We address the challenged amendments and proposed new claims in turn.

1. Claims 2, 25, and 31

Independent claim 2 recites substantially similar subject matter as claim 1. In its motion to amend, Verify sought to amend claim 2 additionally to recite "wherein the first verifier communication device is configured to open a communication link with the user communications device, and thereafter determine whether the open communication link has been broken." J.A. 566. Verify also proposed to amend claim 2 to further limit the condition in which the transaction proceeds to require that "the open communications link is not previously broken." J.A. 566–67. Proposed dependent claims 25 and 31 similarly require that the transaction is blocked if the opened communication link is broken. J.A. 575, 577. The Board determined that Law's timeout feature discloses the proposed limitations that the verifier determine whether the communication link is broken and that the transaction is made contingent on a determination that it is not. *Decision*, 2018 WL 3572368, at *20. Accordingly, the Board concluded that the proposed amendments are unpatentable as obvious over the prior art.

Verify argues that Law does not disclose the amended limitations because Law's timeout feature only indicates the failure of a user to respond within a predetermined amount of time and does not indicate whether the communications link is broken. Askeladden responds that the Board's conclusion was supported by substantial evidence.

We agree with Askeladden. Law explains that "[i]n the event that the user does not respond to the request within the specified time limit, the authorization server will . . . deny the request or wait for the postauthorization model to take effect . . . ." Law ¶ 63. Zatkovich testified that a person of skill would have understood that "a 'broken' communication link would include a link where the line is 'dropped' or a response is not received within a specified time period." J.A. 3304 ¶ 192. Indeed, the '648 patent itself describes a communications link being "timed-out" as one example of when the link is "broken." '648 patent col. 8 ll. 28–32. Accordingly, we conclude that the Board's determination that amended claim 2 and proposed new claims 25 and 31 would have been obvious over the prior art is supported by substantial evidence, and that the motion to amend was properly denied.

2. Claims 23 and 24

Proposed claim 23 depends from claim 5 and further recites "determining a location of the user communications device with a GPS locating function on a cell phone." J.A. 574. Proposed claim 24 includes the same limitation by virtue of its dependency on claim 23. The Board determined that the proposed claims lack written description support in the specification because, while the specification of the '648 patent provides written description support for determining a location of a cell phone via a GPS locating function, it does not provide support for determining a location of other types of devices encompassed by the user communication device. *Decision*, 2018 WL 3572368, at *19. Alternatively, the Board concluded that the proposed claims would have been obvious over Law, Dua, and Choey. *Id*. at *21. Accordingly, the Board denied Verify's motion to add claims 23 and 24.

Verify argues that under the broadest reasonable interpretation proposed claims 23 and 24 require only that the GPS elements of a locating function must be on the recited cell phone, not the communications device itself, which is supported by the specification. Further, Verify argues that the Board's conclusion that the claims would have been obvious over the prior art is unsupported by substantial evidence because Choey describes a system in which the GPS receivers are located on top of cell towers, not "on a cell phone," as required by the claims.

Askeladden responds that the Board correctly determined that the proposed claims lack written description support because the claims recite determining the location of a communications device, and the specification only describes how to determine the location of a cell phone. Even if the specification provides written description support for the claims, Askeladden argues, the Board's conclusion that Choey discloses using a GPS-enabled mobile phone system to detect mobile phone location was supported by substantial evidence.

We agree with Askeladden and the Board that Verify's proposed claims improperly introduce new matter. Proposed amendments "may not enlarge the scope of the claims of the patent or introduce new matter." 35 U.S.C. § 316(d)(3). The passage on which Verify relies for support of its replacement claims recites: "[B]ecause of the GPS locating functions now universal on cell phones, any attempted false verification query can automatically trigger a tracking routine to immediately locate the stolen cell phone." '648 patent col. 5 ll. 30–33. But the written description explains that the term "communications device" as used in the ’648 patent “is intended broadly to include communications devices of any nature linked in a communications system,” including computers. *Id.* col. 2 ll. 21–27. Thus, while the written description discloses determining the location of cell phones, the proposed claims recite determining the location of other types of devices. Even under Verify’s reading of the claims in which only the GPS function is on a cell phone, the written description does not disclose using the cell phone to track devices other than the cell phone—specifically, the user communications device. Accordingly, we agree that proposed claims 23 and 24 introduce new matter and affirm the Board’s denial of Verify’s motion to amend as to those claims.

Having affirmed the Board’s conclusion that proposed claims 23 and 24 introduce new matter to the specification of the ’648 patent, we need not address the Board’s decision that those claims would have been obvious over the prior art.

C. Real Party in Interest

Verify argues that the Board erred in concluding that Bank of America is not a real party in interest. According to Verify, Bank of America should be named as a real party in interest in the proceedings because of the member banks’ control over TCH. Because Verify asserted the ’648 patent against Bank of America more than one year before Askeladden filed its petition for *inter partes* review, Verify argues that Askeladden’s petition should be dismissed as time-barred under 35 U.S.C. § 315(b).

Verify’s argument is foreclosed by intervening precedent. In *Thryv, Inc. v. Click-To-Call Techs., LP*, the Supreme Court held that 35 U.S.C. § 314(d) precludes judicial review of the Board’s application of the one-year time bar set forth in § 315(b). 140 S. Ct. 1367 (2020). The Court explained that “a contention that a petition fails under § 315(b) is a contention that the agency ‘should have refused to institute an *inter partes* review,’” and therefore a challenge to a petition's timeliness under § 315(b) is a dispute about the application of an institution-related statute and is barred from appellate review by § 314(d). *Id.* at 1373–74 (quoting 35 U.S.C. § 314(d)).

Thereafter, in view of *Click-To-Call*, this court held that preclusion of judicial review under § 314(d) "extend[s] to a Board decision concerning the 'real parties in interest' requirement of § 312(a)(2)." *ESIP Series 2, LLC v. Puzhen Life USA, LLC*, 958 F.3d 1378, 1386 (Fed. Cir. 2020). Accordingly, we hold that § 314(d) precludes our review of the Board's decision that Bank of America is not a real party in interest.

Somewhat relatedly, Verify also argues that the operation of TCH by the member banks is an unlawful restraint of trade under the Sherman Act. Observing that it lacks jurisdiction to determine Sherman Act violations, the Board declined to address Verify's argument. *Decision*, 2018 WL 3572368, at *15 n.6. The proceedings that may be addressed by the Board are enumerated by statute. *See* 35 U.S.C. § 6(b)(1)–(4). Relevant here, the scope of *inter partes* review is limited to requests to cancel claims of issued patents as unpatentable under 35 U.S.C. §§ 102 and 103 and does not extend to alleged antitrust violations. 35 U.S.C. § 311(b). Accordingly, we agree with the Board that it lacked jurisdiction to address Verify's antitrust allegations in the first instance and similarly decline to address Verify's arguments on appeal.

D. Takings Claim

Finally, Verify argues that the retroactive application of *inter partes* review to patents that issued prior to the enactment of the America Invents Act ("AIA") is a taking under the Fifth Amendment, but Verify's argument is foreclosed by our precedent. In *Celgene Corp. v. Peter*, we held that "the retroactive application of IPR proceedings to pre-AIA patents is not an unconstitutional taking under the Fifth Amendment." 931 F.3d 1342, 1362 (Fed. Cir.

2019). Accordingly, we hold that the retroactive application of IPR proceedings to the ’648 patent, which issued before the enactment of the AIA, is not an unconstitutional taking.

We note briefly that Verify also raises due process challenges to various procedural decisions of the Board. Specifically, Verify argues that the Board violated due process by denying Verify’s request for discovery from TCH for evidence of secondary considerations of nonobviousness and the member banks’ status as real parties in interest. We review the Board’s application of its rules for trial proceedings for abuse of discretion. *Ultratec, Inc. v. CaptionCall, LLC*, 872 F.3d 1267, 1271–72 (Fed. Cir. 2017); *Redline Detection*, 811 F.3d at 442. In denying Verify’s request, the Board observed that “TCH has not entered any papers or testimony in this proceeding. Nor has TCH advanced any positions during this proceeding” and that 37 C.F.R. § 42.51(b)(1)(iii) requires routine discovery of only “relevant information that is inconsistent with a position advanced by *the* party.” J.A. 648 (emphasis in original). Since TCH had not advanced any position in the proceeding, the Board determined that it was not subject to routine discovery. In any event, the Board also determined that Verify’s requests were untimely. We find that the Board’s determination that Verify’s motions were overbroad and untimely was reasonable and that the Board did not abuse its discretion in denying the motions.

CONCLUSION

We have considered Verify’s remaining arguments but find them unpersuasive. For the foregoing reasons, the decision of the Board is affirmed.

AFFIRMED