

2020-1925, -1926

**United States Court of Appeals for the
Federal Circuit**

FG SRC LLC,
Appellant

v.

MICROSOFT CORPORATION,
Appellee

Appeals from the United States Patent and Trademark Office,
Patent Trial and Appeal Board in Nos. IPR2018-01601, IPR2018-01602,
IPR2018-01603, IPR2018-01605, IPR2018-01606, IPR2018-01607

**FG SRC LLC'S COMBINED PETITION FOR REHEARING
EN BANC AND PANEL REHEARING**

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June 7, 2021

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF INTEREST

Case Number 2020-1925, -1926

Short Case Caption FG SRC LLC v. Microsoft Corporation

Filing Party/Entity FG SRC LLC

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box.** Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 06/07/2021

Signature: /s/ Jay P. Kesan

Name: Jay P. Kesan

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	2. Real Party in Interest. Fed. Cir. R. 47.4(a)(2).	3. Parent Corporations and Stockholders. Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.
<input type="checkbox"/> None/Not Applicable	<input checked="" type="checkbox"/> None/Not Applicable	<input checked="" type="checkbox"/> None/Not Applicable
FG SRC LLC		

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☐ None/Not Applicable ☐ Additional pages attached

Joseph F. Depumpo Shore Chan DePumpo LLP	Rajkumar Vinnakota, Sean Hsu & Donald Puckett Janik Vinnakota LLP	

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

☐ None/Not Applicable ☐ Additional pages attached

Microsoft Corp. v. FG SRC LLC IPR2018-01601 (consolidated with IPR2018-01602 and IPR2018-1603)	SRC Labs, LLC v. Microsoft Corp. No. 2:18-cv-00321 (WDWA)	SRC Labs, LLC v. Amazon Web Servs Inc. No. 2:18-cv-00317 (WDWA)

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☒ None/Not Applicable ☐ Additional pages attached

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RULES:

Fed. Cir. R. 35	1
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**STATEMENT OF COUNSEL PURSUANT TO
FEDERAL CIRCUIT RULE 35(b)**

Based on my professional judgment, I believe this appeal requires an answer to the following precedent-setting question of exceptional importance:

1. Whether the panel decision affirming a construction that excludes a preferred embodiment should be allowed to stand.

Based on my professional judgment, I believe the panel decision is contrary to the following decisions of this Court:

- *On-Line Tech., Inc. v. Bodenseewerk Perkin Elmer GmbH*, 386 F.3d 1133, 1138 (Fed. Cir. 2004) (“a claim interpretation that excludes a preferred embodiment from the scope of the claim is rarely, if ever, correct.”).
- *Helmsderfer v. Bobrick Washroom Equipment, Inc.*, 527 F.3d 1379, 1382 (Fed. Cir. 2008) (“claim terms are presumed to have different meanings”).
- *Pfizer, Inc. v. Teva Pharmaceuticals, USA, Inc.*, 429 F.3d 1364, 1373 (Fed. Cir. 2005) (claims should be construed in a manner that “renders the patent internally consistent.”).
- *CAE Screenplates, Inc. v. Heinrich Fiedler GmbH & Co.*, 224 F.3d 1308, 1317 (Fed. Cir. 2000) (“In the absence of any evidence to the contrary, we must presume that the use of . . . different terms in the claims connotes different meanings.”).

- *Hill-Rom Servs. v. Matal*, 716 Fed. Appx. 996, 1001 (Fed. Cir. 2017) (intentional use of different terms should not be accorded the same meaning).
- *Tandon Corp. v. USITC*, 831 F.2d 1017, 1023 (Fed. Cir. 1987) (claim terms should be construed to give distinct meaning to each).

Dated: June 7, 2021

/s/ Jay P. Kesan

Jay P. Kesan
ATTORNEY OF RECORD FOR APPELLANT

I. INTRODUCTION AND POINTS OF LAW AND FACT OVERLOOKED OR MISAPPREHENDED BY THE PANEL.

The panel’s decision in this appeal affirms a construction that improperly *excludes all preferred embodiments* and assigns the same meaning to two different claim terms in the same claim. Specifically, the Board’s construction of the claim limitation “pass computed data seamlessly between said computational loops” improperly assigns the same meaning to the claim term “seamlessly” as to the claim term “systolic,” and in so doing, excludes all preferred embodiments of United States Patent No. 7,225,324 (the “’324 Patent). This violates this Court’s longstanding claim construction principles, as set forth for example in *On-Line Tech., Inc. v. Bodenseewerk Perkin Elmer GmbH*, 386 F.3d 1133, 1138 (Fed. Cir. 2004) (“a claim interpretation that excludes a preferred embodiment from the scope of the claim is rarely, if ever, correct.”); *Helmsderfer v. Bobrick Washroom Equipment, Inc.*, 527 F.3d 1379, 1382 (Fed. Cir. 2008) (“claim terms are presumed to have different meanings”); *Pfizer, Inc. v. Teva Pharmaceuticals, USA, Inc.*, 429 F.3d 1364, 1373 (Fed. Cir. 2005) (claims should be construed in a manner that “renders the patent internally consistent.”); *CAE Screenplates, Inc. v. Heinrich Fiedler GmbH & Co.*, 224 F.3d 1308, 1317 (Fed. Cir. 2000) (“In the absence of any evidence to the contrary, we must presume that the use of . . . different terms in the claims connotes different meanings.”); *Hill-Rom Servs. v. Matal*, 716 Fed. Appx. 996, 1001 (Fed. Cir. 2017) (intentionally different terms should not have the same meaning); and

Tandon Corp. v. USITC, 831 F.2d 1017, 1023 (Fed. Cir. 1987) (claim terms should be construed to give distinct meaning to each).

II. ARGUMENT

A. The Panel Decision Violates Longstanding Claim Construction Principles.

The Board erred in construing the claim limitation to “pass computed data seamlessly between said computation loops” as “communicate computed data directly between functional units that are calculating computational loops.” Appx41. This construction fails to account for (1) the different use of the terms “seamlessly” and “systolic” in the specification; and (2) the preferred embodiments.

The Board’s construction conflates the meaning of the two claim terms “seamlessly” and “systolic.” In its analysis of the term “seamlessly,” the Board credited a portion of the file history that relates only to the meaning of the claim term “systolic.” Appx36. Regarding this analysis, Petitioner’s expert Dr. Stone admitted that the construction used by the Board for “seamlessly” was indistinguishable from the proposed construction for “systolic.” This construction thus assigns the same meaning to both terms, even though both are separate limitations of Claim 1 of the ’324 Patent. Appx7763-7764, 93:3-94:22. This violates the long-standing common-sense claim construction principle that different terms in the same claim should have different meanings. Analysis of the intrinsic record confirms that a POSITA would have understood the terms “systolic” and

“seamlessly” to have different meanings within the context of Claim 1. A systolic or data driven system does not have to pass data seamlessly, as that term is used in the ’324 Patent and related U.S. Patent No. 7,620,800 (the ’800 Patent), and a system that passes data “seamlessly” is not necessarily “systolic” or “data driven.” Appx11184 at ¶177; Appx10407-10408 at ¶¶78-79.

It was clear error for the Board to conflate two different claim terms within the same claim, Claim 1. *See* Appx11183 at ¶177; Appx10407-10408 at ¶¶78-79. “In the absence of any evidence to the contrary, we must presume that the use of... different terms in the claims connotes different meanings.” *See CAE Screenplates, Inc. v. Heinrich Fiedler GmbH & Co.*, 224 F.3d 1308, 1317 (Fed. Cir. 2000); *Hill-Rom Servs. v. Matal*, 716 Fed. Appx. 996, 1001 (Fed. Cir. 2017) (affirming the Board’s construction of different terms to provide different meanings rather than the same meaning); *Tandon Corp. v. USITC*, 831 F.2d 1017, 1023 (Fed. Cir. 1987) (claim terms should be construed to give meaning to each).

It is further apparent that the Board’s construction is clearly erroneous because it excludes all preferred embodiments of the invention of the ’324 Patent. *On-Line Techs.*, 386 F.3d at 1138. Specifically, the importation of the “directly” requirement in the Board’s construction is problematic. Reconfigurable FPGA systems, like the claimed invention of the ’324 Patent and the related ’800 Patent, include reconfigurable routing resources (*e.g.*, buffers and switches) to connect the

functional units. For example, the literature regarding the Xilinx FPGA chips shows buffer switch boxes and three-state buffers to connect two or more configurable functional units. Appx3404; Appx9260-9270, Appx9273-9274, Appx9278-9282, Appx9287-9292, Appx9300-9306. That is, the functional units of the claimed invention of the '324 Patent, like reconfigurable FPGA systems, communicate via reconfigurable routing resources; meaning they are not connected “directly,” as required by the Board’s claim construction. Petitioner’s expert Dr. Stone confirms that a connection via reconfigurable resources, such as switches or buffers, are not a direct connection. Appx7761, 85:14-24; Appx11183 at ¶171 (“directly” means “the data goes from the first to the second without going to something intervening”); *see also* Appx7762, 86:19-88:10, Appx7762-7763, 88:12-91:24; Appx11183 at ¶¶174-175 (connection between two functional units via a buffer is not direct).

The Board’s extensive reliance on the testimony of Petitioner’s expert Dr. Stone to support the inclusion of the qualifier “directly” in its claim construction was misplaced. Dr. Stone’s testimony on this issue is ambiguous and internally contradictory. He testified that the word “directly” means “the data goes from the first to the second without going to something intervening.” Appx7761, 85:14-24; Appx11183 at ¶171. But when questioned as to his opinion of what constitutes “intervening structures,” Dr. Stone was unable to identify anything with any particularity. Appx7761, 86:13-18; Appx11183 at ¶172 (In response to the question

(what do you consider an intervening structure?), he could answer only “I think you’re opening a whole universe.”). Further, Dr. Stone first testified that an intervening memory would not be a direct connection (Appx7761, 85:25-86:12; Appx11183 at ¶173). Then he contradicted himself by testifying that he would consider a connection between two functional units to be direct if it included a register (a type of memory). He then inconsistently testified that he would not consider a connection between two functional units to be direct if it included a buffer (another type of memory structure). Appx7762, 86:19-88:10, Appx7762-7763, 88:12-91:24; Appx11183 at ¶¶174-175. Dr. Stone’s confusing and inconsistent testimony demonstrates first that the Board’s addition of the “directly” limitation excludes the preferred embodiments, which communicate via reconfigurable routing resources, and second, that a POSITA would not easily understand what would or would not constitute a “direct” connection under the Board’s construction. The Board’s inclusion of this extraneous limitation in its construction thus improperly introduces ambiguity and confusion. Appx11182-11183 at ¶¶169-176.

For these reasons, the Board erred by including the requirement of “passing data *directly*” in its claim construction. This construction is clearly improper under this Court’s precedents.

B. The Panel Decision Promotes Arbitrary and Capricious Claim Constructions By the Board And Sets A Poor Policy Course.

This Court has held in numerous instances that different claim terms within a Claim should ordinarily be assigned different meanings, and that claims should ordinarily be construed to include the preferred embodiments. Here, both important claim construction principles were violated. The two claim limitations “seamlessly” and “systolic” in Claim 1 should not be assigned what is effectively the same meaning. Appx7763-7764, 93:3-94:22 (Petitioner’s expert Dr. Stone admitted that the Board’s construction for “seamlessly” was indistinguishable from its proposed construction for “systolic” even though both are separate limitations of Claim 1 of the ’324 Patent).

The Board’s construction further excludes all preferred embodiments of the ’324 Patent because the reconfigurable FPGA systems of the ’324 Patent include reconfigurable routing resources (*e.g.*, buffers and switches) to connect the functional units. The functional units of the claimed invention (reconfigurable FPGA systems), communicate via these reconfigurable routing resources. Thus, even by the testimony of Petitioner’s expert, they are not connected “directly,” as required by the Board’s claim construction, and are thus improperly excluded by it.

III. CONCLUSION

The use of a Rule 36 affirmance in these circumstances deprives Patent Owner of any meaningful appeal. A written precedential opinion could not have upheld the

PTAB’s decision without overruling prior binding precedents of this Court, something that only this Court can or should do in an *en banc*, precedential decision.

For the foregoing reasons, panel rehearing and/or rehearing *en banc* is necessary and appropriate to address points of fact and law overlooked or misapprehended by the panel, *i.e.*, the fact that the Board’s construction of the term “pass computed data seamlessly between said computation loops” as “communicate computed data directly between functional units that are calculating computational loops” improperly excludes *all* preferred embodiments of the ’324 patent and assigns two different terms in the same claim the same meaning.

June 7, 2021

Respectfully submitted,

/s/ Jay P. Kesan

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ADDENDUM

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

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MICROSOFT CORPORATION,
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2020-1925, 2020-1926

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JUDGMENT

CECIL E. KEY, DiMuroGinsberg, PC-DGKeyIP Group, Tysons Corner, VA, argued for appellant. Also represented by JAY P. KESAN; ALFONSO CHAN, ARI RAFILSON, Shore Chan DePumpo LLP, Dallas, TX.

NATHANIEL C. LOVE, Sidley Austin LLP, Chicago, IL, argued for appellee. Also represented by RICHARD ALAN CEDEROTH; SCOTT BORDER, JOSEPH A. MICALLEF, Washington, DC.

THIS CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

PER CURIAM (PROST, *Chief Judge*, LOURIE and
O'MALLEY, *Circuit Judges*).

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

May 6, 2021
Date

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

FORM 19. Certificate of Compliance with Type-Volume Limitations

Form 19
July 2020

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Case Number: 20-1925, -1926

Short Case Caption: FG SRC LLC v. Microsoft Corporation

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Date: 06/07/2021

Signature: /s/ Jay P. Kesan

Name: Jay P. Kesan