

Fed. Circ. Gives 7 Patent Appeals Quick Closure

By **Dani Kass**

Law360 (March 10, 2022, 6:56 PM EST) -- The Federal Circuit quickly and briefly shut down a series of appeals argued earlier this week, issuing seven affirmations on cases that ranged from challenging the invalidation of video game and spinal implant patents to freeing PetSmart and IHOP from infringement litigation.

The appeals court issued six of its oft-challenged one-line orders on Thursday, plus one on Wednesday. These Rule 36 judgments simply say the ruling being appealed has been affirmed.

Unless otherwise specified, counsel for the parties did not immediately respond to requests for comment Thursday.

Here's a breakdown of this week's decisions.

Worlds Inc. v. Activision Blizzard Inc. (21-1990)

The Federal Circuit refused to touch a Massachusetts federal judge's holding that five patents owned by Worlds Inc. are invalid under the U.S. Supreme Court's Alice decision, in a win for Call of Duty maker Activision Blizzard Inc.

U.S. District Judge Denise J. Casper had held in April that the patents are directed to the abstract idea of filtering for crowd-control purposes, which she concluded doesn't pass the threshold for patenting under Alice.

The affirmance came just two days after oral arguments before U.S. Circuit Judges Kimberly A. Moore, Raymond T. Chen and Todd M. Hughes.

The patents-in-suit are 7,181,690; 7,493,558; 7,945,856; 8,082,501; and 8,145,998.

Worlds is represented by Wayne Helge, Aldo Noto and James Wilson of Davidson Berquist Jackson & Gowdey LLP.

Activision is represented by Kevin S. Prussia, Sonal N. Mehta and Jennifer J. John of WilmerHale

Boston Scientific v. Nevro Corp. (21-1775)

The same panel of judges also upheld the Patent Trial and Appeal Board's invalidation of a Boston Scientific spinal implant patent, likewise argued Tuesday. Nevro had successfully challenged the patent, which is one of many Boston Scientific said it was infringing with its Senza Spinal Cord Stimulation System. The two parties have multiple fights between them, including one where a Delaware federal jury awarded Boston Scientific \$20 million in November.

Boston Scientific's appeal of the PTAB's obviousness finding had focused on claim construction.

"Nevro is pleased with the court's judgment, especially as this is the fourth appeal between Nevro and Boston Scientific in their global dispute, and the fourth straight win for Nevro before the Federal Circuit," the company said in a statement.

The patent-in-suit is U.S. Patent No. 7,822,480.

Boston Scientific is represented by Z.W. Julius Chen, Pratik A. Shah and Michael P. Kahn of Akin Gump Strauss Hauer & Feld LLP and David A. Caine and Matthew Wolf of Arnold & Porter.

Nevro is represented by Ryan C. Morris, Thomas Anthony Broughan III, Ching-Lee Fukuda and Sharon Lee of Sidley Austin LLP and Jon Wright of Sterne Kessler Goldstein & Fox PLLC.

American Patents LLC v. Unified Patents LLC (21-1635)

A second panel from Tuesday — composed of U.S. Circuit Judges Pauline Newman, Alan D. Lourie and Richard G. Taranto — upheld the PTAB's invalidation of a network patent challenged by Unified Patents.

American Patents' appeal had argued that the PTAB wrongly expunged certain exhibits before the appeal was complete, and then struck those same exhibits, which it warned "could give [the PTAB] free license to pick and choose how the record in inter partes review proceedings will be presented to the court on appeal" and undermine its ability to evaluate cases. The panel wasn't persuaded.

"We were blessed to be represented by the thoroughly capable Debbie McComas in this appeal, on International Women's Day no less," Unified Patents general counsel Jonathan Stroud said in an email. "We look forward to continued excellence and are proud of the work she and her team so ably provide."

The patent-in-suit is U.S. Patent No. 7,373,655.

American is represented by Larry D. Thompson Jr., Matthew James Antonelli, Zachariah Harrington and Rehan M. Safiullah of Antonelli Harrington & Thompson LLP.

Unified is represented by Debra J. McComas, David L. McCombs, Raghav Bajaj, David W. O'Brien and Angela Oliver of Haynes & Boone LLP and in-house by Ashraf Fawzy and Jonathan Stroud.

Modern Font Applications LLC v. Peak Restaurant Partners LLC (20-2278) & Modern Font Applications LLC v. PetSmart Inc. (21-1543)

Modern Font Applications failed to persuade U.S. Circuit Judges Lourie, Timothy B. Dyk and Jimmie V. Reyna that federal judges in Utah were wrong to throw out his infringement suits against Peak Restaurant Partners, which owns IHOP, and PetSmart. The case was argued before the panel on Monday.

The company had alleged that the restaurant chain and pet store chain infringed the same patent with their handheld device software, but U.S. District Judges Ted Stewart and Bruce S. Jenkins said the suits failed to raise a claim for direct or induced infringement.

"I'm pleased that the panel swiftly and summarily affirmed Judge Jenkins' ruling that Modern Font Applications never stated a valid claim of patent infringement against PetSmart, and awarded PetSmart its costs on appeal," the retailer's attorney, David Swetnam-Burland of Brann & Isaacson, said in an email. "The speed with which the court of appeals acted confirms PetSmart's view that none of Modern Font Applications' arguments had merit. I look forward to litigating PetSmart's pending motion for sanctions when the case returns to the district court."

The patent-in-suit is U.S. Patent No. 9,886,421.

Modern Font is represented by Perry S. Clegg of Johnson & Martin PA.

Peak is represented by Ricardo Bonilla, Neil J. McNabney and Michael Vincent of Fish & Richardson PC.

PetSmart is represented by David Swetnam-Burland, Peter J. Brann and Stacy O. Stitham of Brann & Isaacson

Willis Electric Co. Ltd. v. Everstar Merchandise Co. Ltd. (21-1870)

On Monday, that same panel heard arguments from Willis Electric Co. that the PTAB wrongly invalidated its Christmas tree patent as obvious after being challenged by Everstar Merchandise. The appeal had centered on claim construction.

"Everstar is pleased with today's Federal Circuit's decision affirming the unpatentability of Willis' '588 patent," the company said in a statement.

The patents-in-suit are U.S. Patent Nos. 9,157,588.

Willis is represented by Patrick M. Arenz and Brenda L. Joly of Robins Kaplan LLP.

Everstar is represented by Brent R. Babcock Of Loeb & Loeb LLP and Preston H. Heard, Barry J. Herman and Tyler Train of Womble Bond Dickinson.

Azurity Pharmaceuticals Inc. v. Bionpharma Inc. (21-1926)

The appeals court had issued one additional affirmance on Wednesday, upholding a bench trial decision from Delaware. The trial ruling was from then-U.S. District Court Judge Leonard Stark, who will be joining the Federal Circuit after Judge Kathleen M. O'Malley steps down Friday.

After oral arguments Monday, U.S. Circuit Judges Newman, Chen and Kara Farnandez Stoll affirmed Judge Stark's holding that Bionpharma didn't infringe two Azurity Pharmaceuticals patents when filing a generic drug application for its version of the blood pressure drug Epaned. Azurity's appeal had focused largely on claim construction and the doctrine of equivalents.

Counsel for Bionpharma declined to comment.

The patents-in-suit are U.S. Patent Nos. 10,039,745, and 10,154,987.

Azurity is represented by Richard Torczon, Ty William Callahan, Clayton Kaufman, Wendy L. Devine, Nicholas S. Halkowski, Kristina M. Hanson and Natalie J. Morgan of Wilson Sonsini Goodrich & Rosati PC.

Bionpharma is represented by Andrew M. Alul and Roshan Shrestha of Taft, Stettinius & Hollister LLP.

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