2015-1169, -1241

In The United States Court Of Appeals For The Federal Circuit

DELORME PUBLISHING COMPANY, INC. and DELORME INREACH, LLC,

Plaintiffs-Appellees,

v.

BRIARTEK IP, INC.,

Defendant-Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA IN NO. 1:13-CV-00640-LMBTRJ, JUDGE LEONIE M. BRINKEMA

REPLY BRIEF OF APPELLANT

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ARGUMENT

BriarTek is a U.S. company whose product was deployed and used by the Crowd Logistics Manager for the 57th Presidential Inaugural Committee, National Mall – Public Viewing Area, during the second term inauguration of President Obama and Vice-President Biden for public safety and security (A0127). BriarTek sought the assistance of the U.S. International Trade Commission ("ITC") in Investigation 854 to protect against foreign-made products infringing on BriarTek's patent. A0150-151. After the investigation was terminated by consent order, the District Court for the Eastern District of Virginia, in assuming subject matter jurisdiction without explanation, insinuated that the district court could trump the ITC. A0407 ("The ITC is not an Article III court, is it?"). Initially, the court recognized that DeLorme's summary judgment motion of invalidity was insufficient as filed (A2977 at lines 18-20)("I'm not going to resolve this case on the pleadings that I have currently got."), and ordered supplemental briefing limited to claim construction (A2978 at lines 25-21:2)(" I just want each of your affirmative positions as to what you believe the claims actually mean."). After the ITC's finding of infringement against DeLorme, including bad faith (A5520) and imposition of a fine of over six million dollars ($6,252,500) (A4537), and a plea from DeLorme to undermine the ITC (A4550) (stating a "[c]ourt ruling invalidating the patent, …, would affect the outcome of the Commission

proceedings"), the court invalidated BriarTek's patent claims, without a proper evidentiary basis, and awarded costs to DeLorme, including costs from the ITC proceeding.

DeLorme provides little to no legal or evidentiary basis for the court's order. DeLorme characterizes the Due Process and evidentiary failings as minor "procedural" issues, and relies on attorney advocacy. But as this Court has made clear, "[t]he purpose of the summary process is to avoid a clearly unnecessary trial, …it is not designed to substitute lawyers' advocacy for evidence, or affidavits for examination before the fact-finder, when there is a genuine issue for trial." *Continental Can Co. v. Monsanto Co.*, 948 F.2d 1264, 1265 (Fed. Cir. 1991) (*citing Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). This case should be dismissed for lack of subject matter jurisdiction. And if not, the summary judgment determination should be reversed and or remanded, because there are genuine issues of material fact, and DeLorme failed to meet its burden to present clear, convincing, and uncontroverted facts to support its argument for invalidity.

I. THE DISTRICT COURT IMPROPERLY ASSUMED SUBJECT MATTER JURISDICTION OF DELORME'S COLLATERAL ATTACK ON THE ITC CONSENT ORDER

BriarTek's Notice of Appeal included an appeal of all related orders. A4837. Regardless, all courts have an "independent obligation to determine

whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (*citation omitted*).

DeLorme relies on *Minnesota Mining and Mfg. Co. v. Chemque, Inc.*, 303 F.3d 1294, 1309 (Fed. Cir. 2002) to argue waiver. Appellee Br. at 21. But *Minnesota Mining* related to "validity," not jurisdiction. A challenge to subject matter jurisdiction "can never be forfeited or waived." *Arbaugh*, 546 U.S. at 514 (*citation omitted*).

DeLorme also relies on *Stauffer v. Brooks Bros. Group, Inc*., 758 F.3d 1314, 1322 (Fed. Cir. 2014) and *SmithKline Beecham Corp. v. Apotex Corp*., 439 F.3d 1312, 1320 (Fed. Cir. 2006) to argue that arguments on subject matter jurisdiction can be precluded. Neither case relates to subject matter jurisdiction, which is this Court's "independent obligation" to consider. *Arbaugh*, 546 U.S., at 514.

DeLorme bore the burden to establish the existence of subject matter jurisdiction with evidence. *United States v. Hays*, 515 U.S. 737, 743 (1995). The lower court provided no evidentiary basis for asserting jurisdiction. A0062. DeLorme has only three citations to the Appendix in its brief to support jurisdiction:

- A4837 - the Notice of Appeal. Appellee Br. at 21.
- A0165 - the consent order. Appellee Br. at 24.
- A4548 - a June 19, 2014 DeLorme status report. Appellee Br. at 25.

The DeLorme status report (A4548) has no underlying evidentiary citation. It is an improper attempt to manufacture evidence – a fictitious quotation – that does not otherwise exist in the evidentiary record. Placing quotation marks around "bankrupt," and improperly attributing the manufactured quote, is not evidence. Moreover, even taken at its word, A4548 attempts to attribute the quote to BriarTek *after* institution of the litigation, not at the time the Complaint was filed. The citation to A4548 not only has no factual basis, it provides no evidentiary support for the Complaint.

Jurisdiction focuses on the evidence at the time of filing and the continuation of that state. *Danisco U.S. Inc. v. Novozymes A/S*, 755 F.3d 1325, 1329 (Fed. Cir. 2014). This is not a situation where a Section 337 complaint was filed, and during the pendency of the investigation a respondent filed a declaratory judgment action. Rather, Investigation 854 terminated by a consent order. A0153, A0155-171.

Termination by way of a consent order raises policy issues and moots the grievance between DeLorme and BriarTek. DeLorme states: "BriarTek cannot point to any case in which formal infringement complaints were filed, and a court then found that it lacked declaratory judgment jurisdiction." Appellee Br. at 23. Yet, BriarTek cited to *Foster v. Hallco Mfg. Co., Inc.*, 947 F.2d 469 (Fed. Cir. 1991). A0138. In *Foster*, this Court stated: "In [the situation where litigation is terminated by a consent decree which acknowledges a patent's validity], other

public policy considerations come into play, namely, preserving the finality of judgments as well as the strong public policy of encouraging settlements." *Id. at* 474-75. *Foster* expressly distinguishes between contractual prohibitions as discussed in *MedImmune Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007), and consent judgments. *MedImmune* expressly related to a "license agreement" not a consent order. *Id*. at 137.

In *Foster*, the parties terminated a previous litigation by way of a consent judgment that precluded a challenge to validity. *Foster*, 947 F.2d, at 472. In a second-filed litigation, the issue arose whether Foster, the accused infringer, was estopped from asserting an invalidity defense because of the prior consent judgment. The issue was precluded, albeit under claim preclusion, which this Court discussed in conjunction with the "case or controversy" requirement. *Id*. at 479. This Court distinguished the issue in *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969), which allowed a licensee to challenge validity, on the basis that:

> *Lear* expresses a policy in favor of precluding restrictions on attacks on patent validity. However, the Court in *Lear* did not deal with the situation where litigation is terminated by a consent decree which by its terms acknowledges a patent's validity. In such a situation, other public policy considerations come into play, namely, preserving the finality of judgments as well as the strong public policy of encouraging settlements.

Id. at 474-475. This Court noted that it has "repeatedly expressed the view that there is a strong public interest in settlement of patent litigation." *Id*. at 477.

Moreover, in relying on the ITC, DeLorme ignores that its dispute, to the extent one exists, is with the ITC, not BriarTek. *Doe v. Va. Dep't. of State Police*, 713 F.3d 745, 755 (4th Cir. 2013). BriarTek is not a party to the Consent Order. The enforcement of the Consent Order is an issue between DeLorme and the ITC. *See* Related Appeal No. 14-1572 (including the September 4, 2014 order, denying BriarTek's request to intervene.)

DeLorme raises the potential for financial liability as a basis for jurisdiction, relying on *Prasco, LLC v. Medicis Pharm. Corp.*, 537 F.3d 1329, 1341 (Fed. Cir. 2008). In *Prasco*, financial liability is not discussed as a relevant factor. Even if it was, the Complaint is silent on the issue of past liability.

Prasco also does not support DeLorme's position. In *Prasco*, this Court found that the plaintiff failed to prove subject matter jurisdiction. *Id*. at 1339. *Prasco* addresses prior litigation conduct and identifies it as one circumstance to be considered. *Id.* at 1341. In *Prasco*, the fact of one prior suit did not lead to jurisdiction. The result here should be the same. There was one prior suit – Investigation 854 filed by BriarTek that was terminated by a consent order, voluntarily by DeLorme. That termination occurred before DeLorme filed its declaratory judgment action. A litigation terminated by Delorme voluntarily should not give rise to jurisdiction.

II. THE LOWER COURT'S ERROR IN FINDING INVALIDITY IS THE RESULT OF EVIDENTIARY FAILINGS, NOT MERE PROCEDURAL MISSTEPS

DeLorme mischaracterizes BriarTek's position, arguing that BriarTek's issue is that the lower court committed procedural errors rather than substantive errors in invalidating the '380 patent. Appellee Br. at 26-27. The court's error in deciding to invalidate the '380 patent is not merely procedural missteps, but of a complete failure to find clear, convincing, and uncontroverted evidence to support an invalidity determination, including the failure to send factual issues to a jury.

A. BriarTek's Motion To Strike Highlights The Lack of Evidence In DeLorme's Summary Judgment Motion

DeLorme states: "BriarTek did not challenge DeLorme's statement of material facts, A493–501,…." Appellee Brief at 28. DeLorme continues: "[i]n the district court, BriarTek sought to exclude 'attorney argument' only from the argument section of DeLorme's summary judgment brief…." Appellee Br. at 28. This is factually incorrect.

BriarTek's motion sought to strike the "Alleged statements of facts Nos. 18, 21, 30, 32, 33, 34, 35, 36, 39, 40 and 41." A2030. Thus, as a preliminary matter, DeLorme mischaracterizes BriarTek's motion to strike.

Even if DeLorme were correct, the alleged statements of fact do not correspond to the facts relied upon in the motion. This Court has held: "[t]ypically, testimony concerning anticipation must be testimony from one skilled

in the art and must identify each claim element, state the witnesses' interpretation of the claim element, and explain in detail how each claim element is disclosed in the prior art reference." *Schumer v. Lab. Comp. Sys., Inc.*, 308 F.3d 1304, 1315-16 (Fed. Cir. 2002). A prior art device anticipates only if there is clear and convincing evidence that the prior art device "disclosed, either expressly or inherently, all the structural limitations contained in the asserted apparatus claims." *Old Reliable Wholesale, Inc. v. Cornell Corp.*, 635 F.3d 539, 545 (Fed. Cir. 2011); *see Applied Med. Res. Corp. v. U.S. Surgical Corp.*, 147 F.3d 1374, 1380 (Fed. Cir. 1998).

DeLorme went from a reference to a characterization of what the reference discloses, without any evidence from one of ordinary skill in the art. *See Nautilus v. Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2128-29 (2014) (cit*ing Carnegie Steel Co. v. Cambria Iron Co.*, 185 U.S. 403, 437 (1902)("[P]atents are 'not addressed to lawyers, or even to the public generally,' but rather to those skilled in the relevant art."). For example, the description of de Vries as applied to claim 1 in the motion was as follows:

> Claim 1. The de Vries system has a user unit: the "satcom unit" on the boat. See id. ¶ [0009]. There is an input device that includes a text entry device: a keypad. See id. ¶ [0037] ("In another embodiment, the operator unit may further comprise a keypad (not shown) that allows composition of text messages while the boater is underway, which may be sent in the same manner as any canned messages."); compare '380 Patent, 1:58.

A0508. The *only* statements of fact that address de Vries were:

> 31. de Vries. United States Patent Pub. No. 2004/0111195 is the published version of a patent application filed on June 4, 2003. DSB Dec., Ex. 14 ("de Vries").

A0499; and

> 36. The Boling, ORBCOMM, de Vries, and Motorola Manual references fall within the scope of the relevant art, namely, wireless subscriber equipment, devices, and/or systems for commercial applications, which would include satellite–based text messaging systems and satellite–based emergency reporting systems. Id. ¶ 18.

A0500. ORBCOMM was similarly lacking (*See e.g.* A0498 (Statement of Fact 30) and A0500 (Statement of Facts 39). DeLorme's interpretation of what the physical document discloses to one of ordinary skill in the art does not exist in the evidentiary record.

"What a prior art reference discloses or teaches is determined from the perspective of one of ordinary skill in the art." S*undance, Inc. v. Demonte Fabricating Ltd.*, 550 F.3d 1356, 1361 n.3 (Fed. Cir. 2008) (citation omitted). DeLorme did not present evidence to support its motion from the perspective of one of ordinary skill, which was more than a laymen. A0052. DeLorme presented attorney argument, as a substitute for how one of ordinary skill in the art would have understood the reference. Allowing DeLorme's attorneys to subsume the role of one of ordinary skill in the art is reversible error. *Sundance*, 550 F.3d, at 1362. Only competent, admissible evidence is eligible for consideration on summary

judgment. *Greensboro Professional Fire Fighters Ass'n v. City of Greensboro*, 64 F.3d 962, 967 & n.5 (4th Cir. 1995).

DeLorme misunderstands the import of the level of ordinary skill in its reliance on *Sundance*. In *Sundance*, there were no underlying factual disputes as to obviousness, the technology was simple, and no party claimed that expert testimony was required to support a holding of obviousness. *Sundance*, 550 F.3d at 1365. Here, in contrast, there are factual disputes, the adopted level of ordinary skill in the art is beyond a layperson (A0052), and both sides have relied on expert testimony for invalidity. Thus, unlike *Sundance*, DeLorme cannot rely on its attorneys' interpretations of prior art references to support an invalidity determination. *See Alexsam, Inc. v. IDT Corp*., 715 F.3d 1336, 1348 (Fed. Cir. 2013) (finding an assertion that the technology is easily understandable is improper where both sides introduce expert testimony).

B. Delorme's Summary Judgment Motion Did Not Present The Issues Ultimately Decided By The Court

The parties seem to disagree as to what a district court can, and cannot do, to cure a defective summary judgment motion.

Fed. R. Civ. P. 56(c) permits the district court to "consider other materials in the record." DeLorme cites no authority that allows a defective summary judgment filing to be cured by post-filing events. Nor does DeLorme address the court's express statement not to resolve the summary judgment motion as filed.

DeLorme affirmatively stated: "our motion is not dependent on claim construction at all…." A1693 at 9-10. The court stated: "[a]ll right, here's what I'm going to do: I'm not going to resolve this case on the pleadings that I have currently got." A2977 at lines 18-20. Moreover, the court expressly limited the argument on the post-filing submissions to claim construction. The court stated: "I don't need responses to each other. I just want each of your affirmative positions as to what you believe the claims actually mean." A2978 at lines 25-21:2. At no point was there a summary judgment motion from DeLorme that (1) discussed the level of ordinary skill in the art applied by the court, and (2) included uncontroverted evidence explaining in detail how each claim element, under the construction adopted by the lower court, is disclosed in the prior art reference from the perspective of one of ordinary skill. *Schumer*, 308 F.3d at 1315-16.

DeLorme's criticism that BriarTek fails to explain "why it makes a whit of difference which construction is used" (Apellee's Brief at 32) fails to appreciate that (1) the level of ordinary skill in the art including its temporal vantage point, and (2) claim constructions were not presented by DeLorme in its summary judgment motion, which makes the court's *sua sponte* raising of the issue inappropriate. Both were issues that required resolution. But for the court to *sua sponte* raise and decide the issues, the court was required to give BriarTek notice and opportunity to respond. Fed. R. Civ. P. 56(f) expressly prohibits granting of a

motion on grounds not raised by a party without providing notice and reasonable time to respond: "After giving notice and a reasonable time to respond, the court may: … grant the motion on grounds not raised by a party…." "The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked." *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 246 (1944); *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986), *Massey v. Del Labs., Inc.*, 118 F.3d 1568, 1572 (Fed. Cir. 1997), *and Fin Control Sys. Pty v. Oam*, 265 F.3d 1311, 1321 (Fed. Cir. 2001) (If the court has "not provide[d] the parties with adequate notice of an opportunity for [the losing party] to present evidence and argument in opposition to the motion," granting summary judgment *sua sponte* is inappropriate.) There was a dispute as to whether the references invalidated the claims under BriarTek's construction. *See* A2491, A2503-4, A2508-A2517.

Furthermore, the burden of proving invalidity always rests on DeLorme. 35 U.S.C. § 282; *Microsoft Corp. v. i4i Ltd. Partnership*, 131 S. Ct. 2238, 2242 (2011). It is not BriarTek's burden to show that under one claim construction there would be invalidity, and under another claim construction there would not be invalidity. Regardless, BriarTek did in fact present evidence that under the adopted claim constructions, there was no invalidity. Appellant Br. at 49-58.

C. Delorme Never Met its Evidentiary Burden To Prove Invalidity Under The Applied Level Of Ordinary Skill In The Art

DeLorme presents no evidence that applied any of the references to the claims under the applied level of ordinary skill in the art. DeLorme cites to Mr. Zancho's declaration and to various expert reports (Appellee Br. at 33-34), but none of these reports or declarations applied the level of ordinary skill in the art used by the court. *See* A2555-2557. Mr. Zancho's Opening Expert Report contained no opinion on the level of ordinary skill in the art. A3931, A2556. *See* A2555-56 for Mr. Zancho's different opinions on the level of ordinary skill in the art.

DeLorme's retort has been: what difference does it make? The answer is that the lack of evidence is fatal to DeLorme's Motion and the court's opinion. DeLorme bore the burden of proof to present evidence of invalidity.

The level of ordinary skill in the art certainly would have mattered, because the only evidence applying the level of ordinary skill in the art from BriarTek's expert, Dr. Steffes, ran counter to the court's opinion. *See* A2550-A2587; and Appellant Br. at 49-63.

D. Delorme Never Met its Evidentiary Burden To Prove Infringement Under Briartek's Claim Construction

DeLorme presents no evidence that applied BriarTek's claim constructions to the references. DeLorme's only citations refer to a portion of the later-filed

expert reports of Mr. Zancho that were not cited to by the court. Appellee Br. at 33. DeLorme's cites to A3979−80, A3988, A4002 and A4011. Appellee Br. at 32. DeLorme identifies:

- "153. It is my opinion that, under BriarTek's proposed claim constructions, de Vries also anticipates, and/or renders obvious, claims 1, 2, 5-12, 17, 34 and 35 of the '380 patent because the claimed features are taught by the portions of de Vries and secondary references discussed above, under either BriarTek's or DeLorme's construction." A3979-80.

- "175. It is my opinion that, under BriarTek's proposed claim constructions, ORBCOMM also anticipates and/or renders obvious claims 1, 2, 5-12, 17, 34 and 35 of the '380 patent because the claimed features are taught by the portions of ORBCOMM as discussed above. BriarTek's claim construction is generally broader than DeLorme's and thus the prior art tends to be more invalidating under BriarTek's proposed construction. This is true for all grounds of invalidity stated herein." A3988.

- "220. It is my opinion that, under BriarTek's proposed claim constructions, the Iridium Satellite Series 9505 Portable Telephone User's Guide also anticipates or renders obvious claims 1, 2, -12, 17, 34 and 35 of the '380 patent because the claimed features are taught by the portions of User's Guide discussed above, with or without secondary references to show any missed elements." A4002.

- "247. My view regarding Boling et al. are the same whether BriarTek's construction, or Delorme's proposed construction of claim terms is used. As I said earlier, in general, Briar Tek's constructions tend to be broader in scope, thus making the prior art more applicable than when a narrower construction is proposed." A4011.

Even if the court could consider these paragraphs, the portions of DeLorme's expert reports were conclusory, and therefore legally insufficient to meet Delorme's burden of proof. *Mentor H/S, Inc. v. Sonique Surgical Sys., Inc.*, 244 F.3d 1365, 1376-77 (Fed. Cir. 2001) (reversing court's grant of a new trial stating "[t]he court, in conclusory fashion, asserted that the references anticipate the claim limitations, an assertion unsupported by the record in light of the defendants' burden to prove facts establishing anticipation by clear and convincing evidence"); *and Koito Mfg. Co., Ltd. v. North Am. Lighting, Inc.*, 381 F.3d 1142, 1152 (Fed. Cir. 2004) ("General and conclusory testimony, such as that provided by Dr. Kazmer in this case, does not suffice as substantial evidence of invalidity.")

E. The District Court Erred In Not Determining The Narrower Claim Terms, Prior To Using A Contingent Construction

The lack of evidentiary basis makes claim construction a red herring. In Appeal No 2014-1572, DeLorme argues for a different claim construction from what the court applied to invalidate the claims. That is why DeLorme is supporting the use of a "contingent" construction, solely for the purposes of invalidity. *See* Appeal No. 2014-1572, Appellant Br. at 38.

Claim construction is to be analyzed on a term-by-term basis. *Enzo Biochem, Inc. v. Applera Corp.*, 599 F.3d 1325, 1331 (Fed. Cir. 2010). When a district court does not perform a claim construction and instead uses a contingent construction (A0028), thereby affirmatively taking away a property right protected

by 35 U.S.C. § 282, the court must analyze the respective terms and apply the narrower construction. The case that the court relied upon did just such a comparison for the disputed term "object." *Teknowledge Coro. v. Cellco P'ship*, 626 F. Supp. 2d 1027, 1033 (N.D. Cal. 2009), aff'd, 374 F. App'x 972, 973 (Fed. Cir. May 6, 2010) (*per curiam*), If DeLorme is permitted to argue for a new claim construction in Appeal No. 2014-1572 and win, that should preclude Delorme from arguing for the use of BriarTek's construction for invalidity.

DeLorme's reliance on *Hakim v. Cannon Avent Group, PLC*, 479 F.3d 1313 (Fed. Cir. 2007) is misplaced, because there is a dispute here as to whether the references invalidated the claims under BriarTek's construction. *See* A2491, A2503-4, A2508-A2517.

III. THE DISTRICT COURT ERRED IN REACHING ITS OWN LEGAL CONCLUSIONS ON DE VRIES

The court's opinion on de Vries relies on Mr. Zancho's expert report that (1) has no level of ordinary skill in the art, and (2) cites to paragraphs applying Delorme's claim construction.

One of the claim elements in claim 1 of the '380 patent is a "text entry device," which the court defined as "keypad or virtual keyboard capable of entering detailed text messages." A0029. DeLorme had no claim construction in its motion, but previously took the position that the term meant "keys or buttons pressed by the ambulatory person to send transmission signals that contain text."

A1738. Both proposed definitions involved keys of some sort and sending text, but BriarTek's construction required "capable of entering detailed text messages." The court did not apply the construction when rejecting BriarTek's evidence, stating that "'detailed' does not appear in the any claim of the '380 Patent." A0035. But "detailed" does appear under BriarTek's construction.

The definition of "text entry device", which is what the "input device" is defined as including. A0116. This also impacts the "user unit" and what the "user processor" is communicatively coupled to, which also impacts what is present at the monitoring system as "the information corresponds to information entered at the input device." A0116. The corresponding nature of the input was defined in BriarTek's construction as "[t]he output device displays textual messages and/or audio messages, corresponding to the format of the message sent by the user unit, and the information displayed matches or agrees almost exactly with the information input keypad or virtual keyboard capable of entering detailed text messages." A0029. This last section is in the clause relating to "adapted for mutual communication." Thus, what the user enters and how it is transmitted and received is germane.

DeLorme offers three arguments to justify the court's position. First, DeLorme takes the position that "[e]ven if the text entry device must be capable of entering detailed text messages, claim 1 is not limited to sending detailed text

messages,…" Appellee Br. at 40-41. In other words, DeLorme advocates changing the construction to DeLorme's and reading out detailed text messages. Reading out "capable of entering detailed text messages" changes the applied construction.

Second, DeLorme alleges de Vries discloses both "canned messages and detailed messages." Appellee Br. at 40. DeLorme cites directly to de Vries (A0908). There is no evidence of record from one of ordinary skill in the art that de Vries would be interpreted as alleged by DeLorme. The only evidence of record, from BriarTek, explains why one of ordinary skill in the art would understand the disclosure to describe a system in which pre-canned messages could be changed in the field and sent as pre-canned messages – not the claimed detailed text messages. A2579.

Finally, DeLorme argues that Dr. Steffes' evidence should be rejected as conclusory. Appellee Br. at 39-40. First, absent DeLorme's meeting its burden of proof to come forward with evidence to prove invalidity, BriarTek had no burden to produce any evidence. *See* 35 U.S.C. § 282; *Commil USA, LLC v. Cisco Systems, Inc.*, 575 U.S. __, at p. 10 (2015) ("That presumption takes away any need for a plaintiff to prove his patent is valid to bring a claim.") Second, BriarTek did come forward and explained, with a supporting declaration from Dr. Steffes:

> 64. I disagree that this reference invalidates the asserted claims of the '380 patent. The publication appears to disclose that a user can send

> text messages but explicitly states that they are sent in the same manner as the canned messages ("which may then be sent in the same manner as any canned messages.") The canned messages are pre-stored. The reference is disclosing a system in which the canned messages can be changed in the field and sent as a standard canned message. This is a different process from engaging in mutual communication using detailed text messages. It is also why Mr. Zancho then needs to reach and infer the presence of a processor to attend to formatting issues associated with the detailed text messages. He likewise has to assume that upon reception there will be formatting and display of the detailed text messages.

A2579-80. The court, however, after all briefing was completed, wanted a discussion of the "communication process," and was not focusing on the claim terms as construed, which is all that BriarTek could respond to. A0035. The claims relate to what and how information is entered, transmitted and monitored. Dr. Steffes' point of distinction went right to those issues. BriarTek's evidence quoted de Vries and explained what and why the element was missing, which is not conclusory. *Med. Instrumentation and Diagnostics Corp. v. Elektra AB*, 344 F.3d 1205, 1220 (Fed. Cir. 2003).

With respect to claims 5 to 9, DeLorme relies upon *Invitrogen Corp. v. Clontech Labs., Inc.*, 429 F.3d 1052, 1080 (Fed. Cir. 2005). The court's statement that "BriarTek cannot create a material dispute by simply 'submitting an expert declaration that something is black when the moving party's expert says it is white; there must be some foundation or basis for the opinion'" assumes that there was a moving party's expert. A38; Appellee Br. at 41. There was no moving party's

expert. This is the entirety of DeLorme's summary judgment motion on claims 5 to 9:

> Claims 5–9. The system describes storing and sending canned text messages, which can be selected by, among other means, using a scrolling device. Id. ¶ [0035]. The functionality includes the ability to send pre–saved messages recalled from memory for transmission to the operations center:
>
> > In one embodiment, the operator module depicted in FIGS. 1B and C also allows the boater to communicate with the land-based operations center or with friends or family via text messages. The boater may select one of a preset number of canned text messages to send using the scroll 176, menu 178, and select 180 buttons. These canned text messages may be preset by the boater before the voyage by typing messages in a web–based interface. The boater may then select from among the pre–set canned messages, or from among a number of default standard messages, e.g., announcing an emergency.
>
> *Id.* ¶ [0037].

A0509. The citations are to the reference, not to a statement of fact, and not to an expert declaration.

With respect to claims 10 and 11, claim 10 recites, in part, that "the user processor is adapted to format the data for transmission by the transmitter." A0116. Claim 11 depends form Claim 10. A0116. There was an agreed-to construction for "adapted to format the data for transmission," which was "configured for processing the data for transmission." A0028. DeLorme, like the court, focuses on the term "format" and also argues that despite the agreed-to claim requirement that the processor is configured for processing the data for transmission, no actual

changes need to be made. A0039 and Appellee Br. at 42. This eviscerates the limitation. And it also runs contrary to DeLorme's original unsupported argument that alleged "[t]he satellite communication described requires a processor to format a message to be sent by a transmitter on one end to a receiver on the other, which is in turn processed by a processor for display to an observer." A0509. If no format change is required, why is a processor required and assumed by the court to be present?

DeLorme's entire invalidity argument was based on an impermissible inherency argument, premised on the assumption that a formatting change was a requirement for satellite transmission. The claim construction was clearly ignored by the court, as was DeLorme's original logic. DeLorme makes no attempt to justify the court's reliance on arguments in Mr. Zancho's expert report. A2579-2582.

Claim 17 is yet another example of the court's ignoring the claim construction. Claim 17 recites "[t]he system of claim 1, wherein the user unit further includes a status sensor that is communicatively coupled to the user processor and that provides a status output, wherein the user processor is adapted to format the status output for communication from the user unit to the monitoring system via the satellite network." A0117. DeLorme's motion makes no reference of the "processor." A0509-0510. By assuming that de Vries worked in a certain

manner, the court merely assumed all requisite components would be present, and improperly placed the burden of proof on BriarTek.

As to claims 34 and 35, Delorme misstates the point of disagreement. Claims 34 and 35 recite "substantially global coverage." A0022. Dr. Steffes pointed out that the reference only works on the sea and does not cover land, which precludes substantial global coverage. A2582. To get around Dr. Steffes's testimony, the court equated "substantially global" with 71% oceanic coverage. Thus, on summary judgment, the court adopted a construction of "substantially global" that excludes all land mass. That is not taking the facts in a light most favorable to the non-movant. *See Henry v. Purnell*, 652 F.3d 524, 531 (4th Cir. 2011).

IV. THE DISTRICT COURT ERRED IN REACHING ITS OWN LEGAL CONCLUSIONS ON ORBCOMM

DeLorme does not address the factual and legal issues with the court's ruling on ORBCOMM. Rather, DeLorme repeats BriarTek's position, repeats the court's position, and then concludes with "[s]uffice it to say, a system that 'can provide the United States Armed Forces with two–way on–the–move data messaging anywhere in the world' (A879) has a monitoring system." Appellee Br. at 45. The factual dispute, based on inconsistent testimony from DeLorme's expert and improper weighing of the evidence, is not addressed by DeLorme. *See* Appellant Br. at 54-57.

To the extent that DeLorme is attempting to advance an inherency argument, "[t]o serve as an anticipation when the reference is silent about the asserted inherent characteristic, such gap in the reference may be filled with recourse to extrinsic evidence. Such evidence must make clear that the missing descriptive matter is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill." *Continental Can Co.*, 948 F.2d, at 1268. Yet there is no such evidence and no evidence from the perspective of one of ordinary skill in the art.

As to claim 2, once again DeLorme does not cite to any evidence, but merely presents attorney argument. DeLorme does not address Dr. Steffes declaration (A2577), or the inconsistent logic applied by the court; namely, in de Vries handheld does not imply tethered, but in ORBCOMM pocket sized implies tethered. *See* Appellant Br. at 57.

As to claim 17, the Appellant's brief points out that what BriarTek responded to was DeLorme's original motion, not the justification newly created by the court. Appellant Br. at 57-58. DeLorme makes no effort to explain why the court's rationale was supported by the evidence or argued by the parties. Delorme attempts to introduce a new argument by quoting and citing to A2936, which is the deposition of Donald Brickerd. Appellee Br. at 46-47. As noted in the motion to strike (A2040 & A2041), there was no evidence that the system in ORBCOMM

was ever put into operation, so what it could or could not do was pure speculation. A2934-2935 ("Q Was this a system that was ever put into operation? (Discussion off the record.) MR. SANDERS:· If you don't know, you don't know. A I don't know.").

As to claim 34, the court explicitly recognized that that anticipation requires enablement to one of ordinary skill in the art, and that what matters is what is suggested to one of ordinary skill in the art. A0047-0048. Yet, there was no evidence under the applicable level of ordinary skill in the art to support the court's assumption as to what was disclosed. Delorme provides none. Thus, even if BriarTek's evidence was ignored, the invalidation of claim 34 was still improper.

V. THE DISTRICT COURT ERRED IN REACHING ITS OWN LEGAL CONCLUSIONS ON OBVIOUSNESS

DeLorme does not appear to contest that the obviousness combinations were created by the court. Rather, DeLorme's argument appears to be that the technology is easily understandable, and the court can bypass the need for evidence from one of ordinary skill in the art. Appellee Br. at 48-49. This runs counter to the Supreme Court's admonishment that "patents are not addressed to lawyers, or even to the public generally, but rather to those skilled in the relevant art…." *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2129, 189 L. Ed. 2d 37 (2014). The level of ordinary skill in the art was determined here to be beyond a layperson. A0030-0031.

In complex cases such as this, where expert testimony is offered, a trier of fact, must support its determination on expert testimony, not on its own lay interpretation of evidence. *Eidos Dsiplay, LLC v. AU Optromics Corp.*, 779 F.3d 1360, 1365 (Fed. Cir. 2015); *Centricut, LLC v. The ESAB Group, Inc.*, 390 F.3d 1361, 1369 (Fed. Cir. 2004); *see also Lumen Hemodialysis Catheter Patent Litigation*, 831 F. Supp. 1354, 1359 (N.D. Ill. 1993). Merely invoking the words "one of ordinary skill" is no substitute for evidence. *See e.g. Mintz v. Dietz & Watson, Inc.*, 679 F.2d 1372, 1377 (Fed. Cir. 2012) ("With little more than an invocation of the words 'common sense' (without any record support showing that this knowledge would reside in the ordinarily skilled artisan), the district court over-reached ….")

VI. DELORME'S ALTERNATE GROUNDS ARE NOT SUPPORTED BY THE RECORD

A. DeLorme's New Obviousness Argument Is Premised On Other Argument, Not Evidence

For the first time on appeal, DeLorme argues that Boling anticipates all of the asserted claims. DeLorme states: "There is no dispute that Boling anticipated every element of the asserted claims except for the text entry device, which the applicants added to the input device of the user unit specifically to overcome Boling." Appellee Br. at 54. This is in direct contradiction to its Reply to the Summary Judgment Opposition, in which DeLorme stated: "DeLorme is not

arguing that Boling (ECF No. 110–4) is an anticipating reference for purposes of this motion;…." A2886. In *AquaTex Indus., Inc. v. Techniche Solutions*, 479 F.3d 1320, 1328 (Fed. Cir. 2007) this Court stated "[w]e may affirm a grant of summary judgment on a ground supported in the record but not addressed by the district court…." But because DeLorme stated that Boling was not anticipatory, DeLorme has waived any argument that Boling anticipates. *Interactive Gift Express, Inc. v. Compuserve Inc*., 256 F.3d 1323, 1346-47 (Fed. Cir. 2001). Further, there is no basis upon which to assert anticipation by Boling. DeLorme is attempting to use the court's unsupported opinion that Boling confirms its conclusion of invalidity. A0058 at fn. 18. DeLorme takes unsupported arguments that have no basis in evidence (i.e. no supporting expert testimony from one of ordinary skill in the art), and simply relies upon the court's previous error to argue for another flawed opinion.

Even if considered, the reference was discussed in detail by BriarTek in its opposition to the summary judgment motion. A2505-2506; A2570-2573. As was discussed in Appellant's Brief, Boling was distinguished from the claimed invention, because it did not disclose detailed text messages, such that simply adding a keyboard fails to disclose the claimed invention. Appellant Br. at 15-16. As noted by Dr. Steffes: "the problem with Boiling was that the entire system only worked with pre-programmed messages regardless of the type of data entry device

being used." A2571. Dr. Steffes further states: "[p]urely from the perspective of one of ordinary skill in the art reading the applicant's remarks, I would not conclude that all of the elements of claim1 were present if a keyboard was added to Boling." A2571.

Claim 1 was amended to add "wherein the input device includes a text entry device adapted to receive textual data entered by a user," which is why BriarTek's claim construction uses the term detailed text message in the definition of "text entry device." A0783.

De Vries does not disclose a text entry device as discussed in Appellant Br. at 49-50. Nothing in de Vries rectifies the problem that Boling could not send anything but pre-canned messages.

ORBCOMM lacks a monitoring system. Appellant Br. at 54-57. Without a monitoring system, there is no basis to assume that a detailed text message is present that appears at a monitoring system as entered by the user. *See infra*.

As to Motorola, DeLorme attempts to rely on the court's misstatement that BriarTek conceded that Motorola disclosed a text entry device. A0054. It did not. The issue was disputed in BriarTek's opposition and supported by BriarTek's expert, Dr. Steffes. A2515 & A2582.

DeLorme has no evidence, no reason to combine, and instead relies upon unsupported argument and statements to attempt to advance an obviousness-type

argument. "[O]bviousness requires the additional showing that a person of ordinary skill at the time of the invention would have selected and combined those prior art elements in the normal course of research and development to yield the claimed invention." *Unigene Labs., Inc. v. Apotex, Inc.*, 655 F.3d 1352, 1360 (Fed. Cir. 2011). There was none.

B. DeLorme's *Alice* Argument Is New And Unfounded

Delorme's original summary judgment was filed on November 20, 2013. A0489. BriarTek's opposition was filed January 13, 2014. A2490. Delorme's reply was filed on February 7, 2014. A2874. *Alice Corp. Pty. Ltd. v. CLS Bank International*, 134 S. Ct. 2347 (2014) was decided June 19, 2014. This is an entirely new argument that was not developed and is not supported by the record. DeLorme inappropriately raised it on appeal.

Even if addressed, the asserted claims of the '380 patent are directed to a system, which is a physical item, comprising parts, and as such is a patent-eligible invention, under Section 101. *Burr v. Duryee*, 68 U.S. 531, 570, 17 L. Ed. 650 (1863). *DigiTech Image Techs., LLC v. Electronics for Imaging, Inc.*, 758 F.3d 1344, 1351 (Fed. Cir. 2014) is inapplicable, because it related to a data structure, and was not tied to an actual component. Similarly inapplicable, *buySAFE, Inc. v. Google, Inc.*, 765 F.3d 1350 (Fed. Cir. 2014) related to method claims and

computer readable material, and *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 716 (Fed. Cir. 2014) related to method claims.

VII. THERE IS NO LEGAL AUTHORITY FOR ALLOWING THE DISTRICT COURT TO AWARD COSTS FROM AN ITC PROCEEDING

The only case cited by DeLorme that purportedly allows a district court to violate the statutory construct of the ITC and award costs incurred in an ITC proceeding is *Monolithic Power Sys., Inc. v. O2 Micro Int'l Ltd*., U.S. Dist. LEXIS 154454 (N.D. Cal. Mar. 3, 2011). In *Monolithic*, the district court did not stay the case in view of the related ITC case, but instead had both cases proceed simultaneously. *Id.* at *8. Here, Investigation 854 and the district court case did not proceed simultaneously.

CONCLUSION

This Court should vacate, reverse and/or remand the district court's opinions on jurisdiction, refusal to strike evidence, granting of summary judgment of invalidity, and in awarding costs, and for any relief that this Court deem appropriate, including costs and reassignment.

Date: May 29, 2015

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on May 29, 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

I further certify that, upon acceptance and request from the Court, the required paper copies of the foregoing will be deposited with United Parcel Service for delivery to the Clerk, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, 717 Madison Place, N.W., Washington, D.C. 20439.

The necessary filing and service were performed in accordance with the instructions given to me by counsel in this case.

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