No. 14-1135

IN THE
United States Court of Appeals for the Federal Circuit

CARDSOFT (ASSIGNMENT FOR THE BENEFIT OF CREDITORS), LLC,
Plaintiff-Appellee,
v.

VERIFONE, INC., HYPERCOM CORP., VERIFONE SYSTEMS INC.,
Defendants-Appellants,

INGENICO S.A., INGENICO CORP., INGENICO INC., WAY SYSTEMS, INC.
Defendants.

On Appeal from the United States District Court for the Eastern District of Texas, Case No 08-cv-00098
Hon. Roy S. Payne & Hon. Chad Everingham, M.JJ.

SUPPLEMENTAL BRIEF OF DEFENDANTS-APPELLANTS VERIFONE, INC., HYPERCOM CORP., AND VERIFONE SYSTEMS INC.

Cam T. Phan
ORRICK, HERRINGTON & SUTCLIFFE LLP
1000 Marsh Road
Menlo Park, CA 94025

Mark S. Davies
Susannah Landes Weaver
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005

E. Joshua Rosenkranz
Richard A. Bierschbach
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000

Counsel for Defendants-Appellants

CERTIFICATE OF INTEREST

Counsel for appellants certify the following:

1. We represent VeriFone, Inc., VeriFone Systems Inc., and Hypercom Corp.

2. VeriFone, Inc., VeriFone Systems Inc., and Hypercom Corp. are the real parties in interest.

3. VeriFone, Inc. is the operating entity of, and is wholly owned by, VeriFone Systems Inc. VeriFone Systems Inc. is a publicly traded company. No publicly traded company owns more than 10 percent of VeriFone Systems Inc. And no publicly traded company other than VeriFone Systems Inc. owns more than 10 percent of VeriFone, Inc. Hypercom Corp. is a wholly owned subsidiary of VeriFone, Inc.

4. The names of all law firms and the partners and associates that appeared for VeriFone, Inc. and VeriFone Systems Inc. in the trial court or agency, or are expected to appear in this court are:

ORRICK, HERRINGTON & SUTCLIFFE LLP

E. Joshua Rosenkranz
Mark S. Davies
Richard A. Bierschbach
Brian D. Ginsberg (no longer with the firm)
Cam T. Phan
Susannah Landes Weaver

JONES DAY

Robert W. Kantner

KOLISCH HARTWELL PC

Brantley C. Shumaker (no longer with the firm)
David C. Bourgeau
Owen W. Dukelow
Peter E. Heuser (no longer with the firm)
Shawn J. Kolitch

POTTER MINTON PC

E. Glenn Thames, Jr.

The names of all law firms and the partners and associates that appeared for Hypercom Corp. in the trial court or agency, or are expected to appear in this court are:

ORRICK, HERRINGTON & SUTCLIFFE LLP

E. Joshua Rosenkranz
Mark S. Davies
Richard A. Bierschbach
Brian D. Ginsberg (no longer with the firm)
Cam T. Phan
Susannah Landes Weaver

JONES DAY

Robert W. Kantner

PARKER, BUNT & AINSWORTH PC

Robert C. Bunt

DLA PIPER US LLP

Aaron G. Fountain
William G. Goldman (no longer with the firm)

GILLAM & SMITH, LLP

Melissa Richards Smith

FEINBERG DAY ALBERTI & THOMPSON LLP

Sal Lim

Date: August 24, 2015

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ E. Joshua Rosenkranz
E. Joshua Rosenkranz
Counsel for Defendants-Appellants

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INTRODUCTION

This case concerns the proper construction of the term "virtual machine" in two patents held by Plaintiff-Appellee CardSoft (Assignment for the Benefit of Creditors), LLC ("CardSoft"). In reversing the district court's claim construction under a de novo review standard, this Court concluded that "the ordinary meaning of 'virtual machine' is clear in light of the specification and prosecution history." *CardSoft v. Verifone, Inc.*, 769 F.3d 1114, 1119 (Fed. Cir. 2014). For its part, the district court likewise relied only on the intrinsic evidence. A45-48. CardSoft contends that the Supreme Court's recent decision in *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, affects the result. But *Teva* confirms that where, as here, "a district court's construction of a patent claim" does not require "the judge to resolve any underlying factual dispute[] … the Court of Appeals will review that construction *de novo*." 135 S. Ct. 831, 840-41 (2015).

BACKGROUND

Defendants-Appellants VeriFone, Inc. and Hypercom ("VeriFone") sell payment terminals. Plaintiff-Appellee CardSoft has patents for software that controls a payment terminal. *CardSoft*, 769 F.3d at 1116.

As this Court explained in its prior decision, "[a]ccording to the patents, prior art payment terminals used a variety of 'different hardware/software architectures,'" which "meant that each application program for a payment terminal needed to be written specifically for that terminal." *Id.* (quoting '945 patent). "To solve this problem," this Court continued, "the specification describes a 'virtual machine,' acting as an 'interpreter' between an application program (like a particular merchant's payment processing software) and a payment terminal's underlying hardware and operating system." *Id.* (quoting '945 patent). So "[i]nstead of writing a payment processing application for a particular hardware configuration or operating system, a developer can write the application for [a] virtual machine." *Id.* (citing '945 patent).

The issue presented in this appeal is the proper construction of the term "virtual machine." *Id.* at 1117. The district court construed the term to mean "'a computer programmed to emulate a hypothetical computer for applications relating to transport of data.'" *Id.* (citation omitted). VeriFone urged that the district court had omitted a key limitation: that the computer "'process[] instructions expressed in … hardware/operating system-independent language.'" *Id.* (citation

omitted). Indeed, this limitation was the entire point of CardSoft's invention—to solve the problem of having to write applications (i.e., instructions) specifically for a particular terminal's hardware and operating system.

This Court agreed, noting that the district court's construction was "correct," as far as it went, but "incomplete" because it left out the critical limitation urged by VeriFone. *Id.* at 1117-18. As this Court explained, in determining that the virtual machine need not process instructions (i.e., applications) in hardware/operating system-independent language, the "district court's construction improperly conflate[d] the claimed virtual machine with applications written to run on the virtual machine." *Id.* at 1118. "The claimed virtual machine is operating system or hardware dependent because it must communicate directly with the underlying operating system or hardware." *Id.* "But," this Court continued, "the applications written to run on the virtual machine are not correspondingly dependent because the applications are written to communicate with the virtual machine, not the actual underlying operating system or hardware." *Id.* Accordingly, this Court

reversed the district court's construction and granted VeriFone judgment of no infringement as a matter of law. *Id.* at 1120.

Subsequently, the Supreme Court decided *Teva*, CardSoft petitioned for certiorari, and the Supreme Court vacated this Court's decision and remanded the case in light of *Teva*.[1] This Court then requested supplemental briefs "addressing the impact of" *Teva* "on this case." Order, Aug. 3, 2015, Dkt. 72.

ARGUMENT

I. The District Court's Construction Of "Virtual Machine" Was Based On Intrinsic Evidence And Accordingly This Court Correctly Conducted De Novo Review.

In this case, the district court made no factual findings. Consequently, *Teva* cannot affect this dispute: "Because the district court's claim constructions were based solely on the intrinsic record, … *Teva* does not require [this Court] to review [it] any differently than under the de novo standard." *Cadence Pharm. Inc. v. Exela PharmSci*

[1] The Supreme Court "issue[s] GVR orders rather reflexively, even when its underlying decision on the merits of one case provides scant reason for revising a lower court's ruling in a different case." Erwin Chemerinsky & Ned Miltenberg, *The Need to Clarify the Meaning of U.S. Supreme Court Remands: The Lessons of Punitive Damages' Cases*, 36 Ariz. St. L.J. 513, 515-16 (2004). Such an order is "not a 'final determination on the merits.'" *Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001) (citation omitted).

Inc., 780 F.3d 1364, 1368 (Fed. Cir. 2015); *MobileMedia Ideas LLC v. Apple Inc.*, 780 F.3d 1159, 1169 (Fed. Cir. 2015) (similar).

A. *Teva* Confirms This Court's Settled Rule That A Claim Construction Based On Intrinsic Evidence Is Reviewed De Novo.

In *Teva*, the Supreme Court decided that an "appellate court … should review for clear error those factual findings that underlie a district court's claim construction." 135 S. Ct. at 842. In so deciding, the Court observed that appellate judges "lack the tools that district courts have available to resolve factual disputes fairly and accurately, such as questioning the experts, examining the invention in operation, or appointing a court-appointed expert." *Id.* at 838-39 (internal quotation marks and citation omitted).

The Court noted, however, that "a district court's construction of a patent claim" "*often* requires the judge only to examine and construe the document's words without requiring the judge to resolve any underlying factual disputes." *Id.* at 840-41 (emphasis added). "As all parties agree," the Court continued, "the Court of Appeals will review that construction *de novo*." *Id.* at 841. Accordingly, it is only when "the district court … need[s] to look beyond the patent's intrinsic evidence"

to make "subsidiary factual findings about th[e] extrinsic evidence" that this Court reviews those findings for clear error. *Id.* at 841.

B. The District Court Did Not Rely On Any Factual Findings.

The district court relied exclusively on intrinsic evidence to construe the "virtual machine" term. A45-48. It recognized that VeriFone had based its "proposed limitation … [on] the language of the claims, the common specification's description of the 'virtual machine' and the prosecution history of the patents-in-suit." A43. And in rejecting VeriFone's construction, the district court "[f]irst" looked to "the language of the claims"; "[s]econd" looked to the "specification"; and "[f]inally" looked to the "prosecution history." A46-47. The district court ultimately decided that "CardSoft's proposed construction of 'virtual machine means' … is supported by the common specification of the patents-in-suit." A47. Indeed, CardSoft explained on appeal that the district court construed the disputed term "based on the intrinsic evidence in this case, *viz.* the specification and claims of the patents-in-suit and their respective prosecution file histories." Corrected Resp. Br. of Pl.-Appellee 10, May 7, 2014, Dkt. 43.

The district court's opinion does not cite or even discuss any extrinsic evidence. This contrasts sharply with the district court opinion at issue in *Teva*, which referred to Teva's expert declaration at least 14 times and repeatedly stated that it "credit[ed] and accept[ed] all of Dr. Grant's opinions." *Teva Pharm. USA, Inc. v. Sandoz Inc.*, 810 F. Supp. 2d 578, 584, 586, 588, 589, 590, 591, 594 (S.D.N.Y. 2011). Here, the district court's construction "require[d] the judge only to examine … the document's words without requiring the judge to resolve any underlying factual disputes." *Teva*, 135 S. Ct at 841.

C. This Court Correctly Applied De Novo Review.

In an effort to invoke the clear error standard of review, CardSoft has pointed to one line in the transcript of the claim construction hearing in which the magistrate judge hearing the case stated that he had "read" the deposition of CardSoft's consultant. A16,669. But this is not a factual finding to which this Court must defer. This Court has held over and over since *Teva* that the mere fact that a "district court 'heard'" extrinsic evidence is not enough to trigger deferential review. *Shire Dev., LLC v. Watson Pharm., Inc.*, 787 F.3d 1359, 1368 (Fed Cir. 2015); *In re Papst Licensing Digital Camera Patent Litig.*, 778 F.3d

1255, 1260-61 (Fed. Cir. 2015) (applying de novo review despite the fact that "the district court received a 'tutorial' from the parties' expert[]" in preparation for claim construction because it ultimately "relied only on the intrinsic record").[2]

As this Court explained in *Shire*:

> The Supreme Court held that we "should review for clear error those factual findings that underlie a district court's claim construction." *Teva*, 135 S. Ct. at 842. **The Court did not hold that a deferential standard of review is triggered any time the district court hears or receives extrinsic evidence.** *See id.* Here, there is no indication that the district court made any factual findings that underlie its constructions.

787 F.3d at 1368 (emphasis added). The same is true in this case. The mere fact that the district court "hear[d] or receive[d] extrinsic evidence" does not mean that this Court reviews its construction for clear error. *Id.*

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[2] *See also Info-Hold, Inc. v. Applied Media Techs. Corp.*, 783 F.3d 1262, 1266 (Fed. Cir. 2015) (applying de novo review while noting the fact that the district court referred to a Notice of Allowability for a different patent because "the district court made no findings about it"); *Vasudevan Software, Inc. v. MicroStrategy, Inc.*, 782 F.3d 671, 676 (Fed. Cir. 2015) (applying de novo review because "the district court essentially limited its review to intrinsic evidence," while noting that the district court noted that IBM and Oracle in another litigation stipulated to plaintiff's proposed construction).

CardSoft also may argue that the district court somehow necessarily made a factual finding when it decided to rely only on intrinsic evidence. But that type of speculation was possible in *Shire*, *Info-Hold*, and *Vasudevan*, and yet this Court found *Teva* inapplicable each time. These cases reflect the settled proposition that where, as here, "the intrinsic record fully determines the proper construction," there is no need to consider the extrinsic evidence. *Microsoft Corp. v. Proxyconn, Inc.*, 789 F.3d 1292, 1297 (Fed Cir. 2015). *See also In re Papst*, 778 F.3d at 1261 (reviewing district court's claim constructions de novo "because intrinsic evidence fully determines the proper constructions"); *Southco, Inc. v. Fivetech Tech. Inc.,* No. 2014-1390, 2015 WL 1609846, at *1 (Fed. Cir. Apr. 10, 2015) (applying de novo standard despite the fact that the plaintiff provided the district court an affidavit from its expert because "the intrinsic evidence determines the proper construction").

II. *Teva* Does Not Affect This Appeal Merely Because This Court's Opinion Cites Other Judicial Decisions.

CardSoft may also advance a second argument—already rejected by this Court—that this Court erred when it observed that its construction was consistent with prior judicial decisions. CardSoft

would be wrong and, at any rate, this Court's opinion in fact relies on the intrinsic evidence.

A. This Court Concluded That "The Ordinary Meaning Of 'Virtual Machine' Is Clear In Light Of The Specification And Prosecution History."

In reversing the district court's construction of the term "virtual machine," this Court—like the district court—relied on the intrinsic evidence.

This Court started with the patent, noting that the "problem with the prior art, as the specification notes, was that applications were hardware or operating system dependent." *CardSoft*, 769 F.3d at 1118 (citing '945 patent). And "[t]he patent teaches using a virtual machine to solve this problem because a virtual machine 'creates a complete portable environment,' which 'allows programs to operate independent of processor' and allows 'different arrangements of hardware [to] be controlled by the same application software.'" *Id.* (quoting '945 patent). VeriFone's construction was further supported by CardSoft's admission during prosecution that its claimed virtual machine allows for portability of applications to "'incompatible computers.'" *Id.* (citing prosecution history). Based on the specification and the prosecution

history, this Court concluded that the "district court improperly" omitted "the defining feature of a virtual machine," which is "its ability to run applications that did not depend on any specific underlying … hardware." *Id.* This Court had no trouble concluding that "*the ordinary meaning of 'virtual machine' is clear in light of the specification and prosecution history*." *Id.* at 1119 (emphasis added).

Accordingly, this Court can—and did—conclude that the intrinsic evidence alone demonstrates the district court's claim construction error. Regardless of whether this Court or the district court "considered extrinsic evidence" (neither did), "that evidence is ultimately immaterial to the outcome because the intrinsic record is clear." *Eidos Display, LLC v. AU Optronics Corp.,* 779 F.3d 1360, 1365 (Fed. Cir. 2015); *see Microsoft,* 789 F.3d at 1297 (similar); *Enzo Biochem Inc. v. Applera Corp.*, 780 F.3d 1149, 1156 (Fed. Cir. 2015) (district court's "sole factual finding does not override our analysis of the totality of the specification"); *see also Teva*, 135 S. Ct. at 841 ("Experts may be examined to explain terms of art, and the state of art, at any given time, but they cannot be used to prove the proper or legal construction of any instrument of writing.") (internal quotation marks omitted).

B. The Court's Use Of Prior Decisions To Confirm A Conclusion Based On The Intrinsic Evidence Does Not Implicate *Teva*.

Unrelated to the standard of review, CardSoft has complained that this Court considered "extrinsic" evidence not before the district court. Pet. For Panel Reh'g and En Banc Reh'g 2 & n.2, Nov. 17, 2014, Dkt. 62. This Court has already rejected this argument. Order Den. Pet. For Panel Reh'g and Reh'g En Banc, Dec. 22, 2014, Dkt. 65.

More importantly, this Court did nothing remotely improper. All this Court did was note that the "ordinary meaning" of "virtual machine" based on the specification and prosecution history was confirmed by the general understanding of the Java virtual machine described in prior decisions from this Court—the same Java virtual machine that CardSoft discussed during prosecution. *CardSoft*, 769 F.3d at 1118-19 (citing A18,849). Specifically, this Court noted that "[d]uring prosecution of the '945 patent," "[t]he applicant explained that the claims describe 'an *addition* to a conventional virtual machine,' not a wholly new structure," and the applicant "stated that the Java virtual machine was a 'conventional' virtual machine." *Id.* at 1118-19 (quoting prosecution history). This Court then noted that in its prior decisions,

it had explained that "[t]he Java virtual machine acted as an interpreter between a computer application and the computer's underlying operating system and hardware, allowing developers to write one application and run it on multiple different types of computers." *Id.* at 1118 (citing prior cases). Thus, this Court concluded, the prosecution history "expressly ties" the "'write once, run anywhere'" feature of the Java virtual machine, described in its prior opinions, to the patent's use of "virtual machine." *Id.*

It was entirely proper for this Court to reference these prior cases "to support its independent conclusion in this case." *V-Formation, Inc. v. Benetton Group SpA*, 401 F.3d 1307, 1312 (Fed. Cir. 2005); *see Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 440 (2001) (a "broad legal comparison" of results reached "in comparable cases" is "more suited to the expertise of appellate courts" than district courts). Indeed, this is just the type of "persuasive authority" this Court may consider in its "*de novo* [review of] the district court's ultimate interpretation of the patent's claims." *Teva*, 135 S. Ct. at 839-40.

Though this Court referred to these prior decisions as "extrinsic evidence," *CardSoft*, 769 F.3d at 1118, it appears to have done so in the

generic sense of that term; the citation to prior case law is not a "factual finding" and, regardless of how characterized, is entirely appropriate. Indeed, this Court recently did just that in *Sociedad Espanola de Electromedicina y Calidad, S.A. v. Blue Ridge X-Ray Co.*, No. 2015-1102, 2015 WL 4603764, at *2-3 (Fed. Cir. July 31, 2015). There, because the district court's construction "relied only on intrinsic evidence," this Court concluded that *Teva* called for "entirely *de novo*" review. *Id*. at *2. This Court went on to cite *both* intrinsic evidence and "confirm[atory]" extrinsic evidence in reversing the district court's construction. *Id*. at *3

III. Even If *Teva's* Clear Error Standard Of Review Applies, The Court Correctly Reversed The District Court's Construction.

Even if this Court concludes that the district court made some unspecified factual finding, the district court's "ultimate determination" was still wrong and does not "deserve[] deference." *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 789 F.3d 1335, 1342 (Fed. Cir. 2015) (on remand from the Supreme Court, reversing the district court's "ultimate determination" despite concluding that the district court's factual findings were not clearly erroneous).

In its decision in this case, this Court explained that the district court's construction "conflates the virtual machine itself with applications (or instructions) running on the virtual machine. The *defining characteristic* of a virtual machine was, and is, that it acts as an interpreter between applications and the underlying hardware or operating system." *CardSoft*, 769 F.3d at 1119 (emphasis added). As such, this Court concluded that the district court's construction "would leave" the key term "'virtual machine' *essentially meaningless*." *Id.* (emphasis added).

Given that the district court's claim construction was inconsistent with the defining characteristic of the key claim term, this Court should reverse the district court's "ultimate determination" regardless of the applicable standard of review.

CONCLUSION

This Court should once again reverse the district court's construction and grant Appellants judgment of no infringement as a matter of law.

Respectfully submitted,

/s/E. Joshua Rosenkranz
E. Joshua Rosenkranz

Cam T. Phan
ORRICK, HERRINGTON
& SUTCLIFFE LLP
1000 Marsh Road
Menlo Park, CA 94025

Richard A. Bierschbach
ORRICK, HERRINGTON
& SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000

Mark S. Davies
Susannah Landes Weaver
ORRICK, HERRINGTON
& SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005

Counsel for Defendants-Appellants

August 24, 2015

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system on August 24, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ E. Joshua Rosenkranz
E. Joshua Rosenkranz
Counsel for Defendants-Appellants