Misc. No. 2020-135

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

In re Apple, Inc.

On Petition for a Writ of Mandamus from the United States District Court for the Western District of Texas, Case No. 6:19-CV-00532-ADA, Judge Alan Albright

OPPOSED NON-CONFIDENTIAL MOTION OF RESPONDENT FOR LEAVE TO FILE SUR-REPLY BRIEF

Respondent, Uniloc 2017, LLC ("Uniloc"), respectfully moves for leave to file a sur-reply brief in opposition to the Petition for a Writ of Mandamus. Uniloc has conferred with Petitioner Apple, Inc. ("Apple") and is authorized to state that Apple opposes the relief requested in this Motion.

Uniloc understands that a sur-reply is not typical in proceedings before this Court. This is an unusual proceeding, however, in which a sur-reply is warranted because of the new issues and arguments in Apple's Reply.

The reason for this request results from the timing of Apple's Petition. Apple filed its Petition before the District Court issued the written order that Apple challenges. Because Apple short-circuited the regular appeal process, it addressed what it thought the District Court would hold, and not any actual findings. The District Court then issued a detailed, thirty-page written Order, and Uniloc responded to Apple's alleged points of error in light of the Court's Order.

The Order did not contain the alleged errors that Apple's Petition raised, so Apple raised new points of error in its Reply. That includes, among others, asserting that the District Court committed the following alleged errors—none of which were in Apple's Petition (and, in many cases, were never presented to the District Court):

- Giving weight to the location of Uniloc's physical documents under the sources-of-proof factor (*Compare* Petition, at 29–31 *with* Reply, at 6);
- Relying on Apple's documentation located in the Western District of Texas, including its revenue and royalty information under the sources-of-proof factor (*Compare* Petition, at 29–31 *with* Reply, at 7);
- Giving weight to the location of Huawei and not giving weight to the numerosity of witnesses under the compulsory-process factor (*Compare* Petition, at 26–29 *with* Reply, at 8);
- Giving weight to the locations of the inventors, patent prosecution attorney, a prior art witness, and Uniloc's witnesses under the willing-witnesses factor (*Compare* Petition, at 18–24 *with* Reply, at 10–11); and
- Allowing the case to advance before ruling on the Motion to Transfer under the judicial-economy factor (*Compare* Petition 32–33 *with* Reply, at 13–14).

None of those alleged errors were in Apple's Petition. Apple thus waived these issues and arguments, as identified in Uniloc's proposed sur-reply, and the Court should disregard them. *See, e.g.*, *Amhil Enters. v. Wawa, Inc.*, 81 F.3d 1554, 1563 (Fed. Cir. 1996) (explaining that a reply brief is "not the appropriate place to raise, for the first time, an issue for appellate review"); *Kennametal, Inc. v. Ingersoll Cutting Tool Co.*, 780 F.3d 1376, 1385 (Fed. Cir. 2015) ("[A]rguments not raised until [the] reply brief are waived.") (quoting *Lifestyle Enter., Inc. v. United States*,

751 F.3d 1371, 1377 (Fed. Cir. 2014)); *Commc'ns. Test Design, Inc. v. Contec, LLC*, 952 F.3d 1356, 1363 n.4 (Fed. Cir. 2020) ("It is well established that an issue not raised by an appellant in its opening brief is waived.").

Should the Court be inclined to consider Apple's Reply, Uniloc respectfully requests that the Court provide Uniloc leave to file the attached sur-reply, which fits within the word limits for reply briefs (3,900 words). Good cause exists for this request. Without leave, Uniloc is unable to address the merits of these new issues that Apple raised in its Reply. That will prejudice Uniloc, should the Court entertain Apple's Reply.

Conversely, any prejudice to Apple from losing the "last word" results from Apple's decision to file its Petition before receiving the District Court's written Order. Had Apple waited for the Order, these proceedings would have followed the normal briefing process. Apple's rush to file its Petition, before the District Court's written Order, resulted in Apple raising new issues and arguments in Reply that were not raised in the Petition. Should the Court consider those arguments (which Apple waived), good cause exists to provide Uniloc with the opportunity to respond to Apple's allegations.

Uniloc is authorized to state that Apple opposes the relief requested in this Motion.

Dated: July 13, 2020

Respectfully submitted,

By: /s/ Christian Hurt
William E. Davis, III
Texas State Bar No. 24047416
bdavis@bdavisfirm.com

Christian J. Hurt
Texas State Bar No. 24059987
churt@bdavisfirm.com

The Davis Firm, PC
213 N. Fredonia Street, Suite 230
Longview, Texas 75601
Telephone: (903) 230-9090
Facsimile: (903) 230-9661

Counsel for Respondent
Uniloc 2017, LLC

CERTIFICATE OF INTEREST

Counsel for Respondent, Christian Hurt, certifies the following:

1. The full name of every party or amicus represented by me is:

   Uniloc 2017, LLC

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

   None.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

   CF Uniloc Holdings, LLC

4. The names of all law firms and 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 are:

   William Ellsworth Davis, III, Christian J. Hurt, Debra Coleman, Edward K. Chin, Ty Wilson, Davis Firm, P.C.;

5. The title and number of any case known to counsel to be pending in this or any other court agency that will directly affect or be directly affected by this court's decision in the pending appeal. See Fed. Cir. R. 47.4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary):

   No other appeal from these proceedings was previously before this Court or any other appellate court. There is no case pending in this Court or any other court that will directly affect or be directly affected by the Court's decision here.

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