No. 17-1226

IN THE
SUPREME COURT OF THE UNITED STATES

FRONT ROW TECHNOLOGIES, LLC,
Petitioner,
v.
MLB ADVANCED MEDIA, L.P., NBA MEDIA VENTURES, MERCURY RADIO ARTS, INC. DBA THE GLENN BECK PROGRAM, INC., GBTV, LLC, PREMIERE RADIO NETWORKS INC., TURNER SPORTS INTERACTIVE, INC., TURNER DIGITAL BASKETBALL SERVICES, INC.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

SUPPLEMENTAL BRIEF

Michael W. Shore
Counsel of Record
Russell J. DePalma
SHORE CHAN DEPUMPO LLP
901 Main Street, Suite 3300
Dallas, Texas 75202
Telephone (214) 593-9110
Facsimile (214) 593-9111
mshore@shorechan.com

Counsel for Petitioner Front Row Technologies LLC

SUPPLEMENTAL BRIEF

Front Row Technologies, LLC respectfully submits this Supplemental Brief in support of its petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

On March 8, 2018, a Federal Circuit panel issued an opinion in *Exergen Corp. v. KAZ USA, Inc.*, ___ F. App'x ___, 2018 WL 1193529. In its decision, the *Exergen* panel again stated that the second step of the *Alice*[1] patent eligibility test under 35 U.S.C. § 101 is a question of fact such that "whether a claim element is well-understood, routine, and conventional to a skilled artisan in the relevant field is a question of fact and deference must be given to the determination made by the fact finder on this issue." *Exergen*, 2018 WL 1193529 at *4.

The *Exergen* decision also held that "[l]ike indefiniteness, enablement, or obviousness, whether a claim is directed to patentable subject matter is a question of law based on underlying facts." *Id.* To that end, the facts supporting a defendant's claim of ineligibility must be proven by the defendant by clear and convincing evidence. *Berkheimer v. HP, Inc.*, 881 F.3d 1360, 1368 (Fed. Cir. 2018); *Aatrix Software, Inc. v. Green Shades Software, Inc.*, 882 F.3d 1121, 1126 (Fed. Cir. 2018).

Exergen supports Front Row's claim of an *intra*-circuit conflict within the Federal Circuit. The panel in the present case followed a completely different standard and allowed the district court, without a factual

1. *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S.Ct. 2347 (2014).

record established through expert testimony or discovery, to act as its own technological historian and expert regarding what were conventional applications of specific devices more than 10 years ago so as "to conclude, by clear and convincing evidence, that broadcasters have captured and transmitted video [as claimed in the patents] 'for some time,' and that the [patented] concepts were 'well-known' at the time of Front Row's claimed invention." Pet. App137a-145a. This second "no record required" analytical approach for determining patents validity under 35 U.S.C. § 101 is still clearly the majority view, having been adopted in over 50 reported cases.

Ultimately, this Court needs to decide and inform the lower courts whether *Exergen* is the correct analytical framework for assessing whether a claim element or claimed combination is "well-understood, routine, and conventional to a skilled artisan at the time of the patent." *See also Berkheimer*, 881 F.3d at 1369. *Exergen, Aatrix Software* and *Berkheimer* stand "in substantial tension with prior treatment of eligibility analysis that has generally permitted resolution of the issue on the pleadings as a pure question of law." Dennis Crouch, *Patent Eligibility: Underlying Questions of Fact*, PATENTLY O, Feb. 8, 2018.

Exergen therefore further demonstrates the need for the Court to grant the petition for certiorari and issue a writ of certiorari to the Federal Circuit. This Court is the only venue to resolve the intra-Circuit conflicts on the correct analytical approach to patent eligibility. This is a crucial question of patent law affecting perhaps hundreds of thousands of issued patents.

Respectfully submitted,

/s Michael W. Shore

Michael W. Shore
Counsel of Record
Russell J. DePalma
SHORE CHAN DEPUMPO LLP
901 Main Street, Suite 3300
Dallas, Texas 75202
Telephone (214) 593-9110
Facsimile (214) 593-9111
mshore@shorechan.com

Counsel for Petitioner