IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

PAPST LICENSING GMBH & CO. KG,	§	
	§	
Plaintiff,	§	
	§	Civil Action No. 6:15-cv-1095
v.	§	
	§	JURY TRIAL DEMANDED
APPLE INC.,	§	
	§	
Defendant.	§	

PLAINTIFF'S SUR-REPLY TO LG ELECTRONICS, INC., LG ELECTRONICS U.S.A., INC., AND LG ELECTRONICS MOBILECOMM U.S.A., INC.'S MOTION TO EXCLUDE OPINIONS AND TESTIMONY OF ROBERT ZEIDMAN

Plaintiff respectfully files this Sur-reply to LG's Motion to Exclude Opinions and Testimony of Zeidman (Dkt. 426).[1]

ARGUMENT

I. Zeidman's Opinions for the "A Processor" Limitations Are Admissible.

LG does not and cannot dispute that the claim construction principle on which Zeidman relies—*i.e.*, "a" means "at least one" or "one or more"—has been described by the Federal Circuit and this District as "a rule." *See, e.g.*, *Baldwin Graphic Sys., Inc. v. Siebert, Inc.*, 512 F.3d 1338, 1342 (Fed. Cir. 2008); *Imperium IP Holdings (Cayman), Ltd. V. Samsung Elect. Co.*, No. 4:14-cv-371, 2015 WL 3761904 (E.D. Tex. June 16, 2015).

Furthermore, LG has not proven and cannot prove an exception to this general rule—there is no disclaimer, no prosecution history estoppel, and no "clear intent" in the Patents or during prosecution to depart from the "rule" that "a" means "one or more." *See* Dkt. 463 at 4-7.

LG's continued reliance on *In re Varma*, 816 F.3d 1352 (Fed. Cir. 2016) is misplaced. The claim language here is different than the language in *Varma*, and the colloquial "two dogs" analogy in *Varma* is not applicable here. The claim limitation at issue in *Varma* was "***a*** statistical analysis request ***corresponding*** to ***two*** or more selected investments." *Id.* at 1356 (emphasis added). The Federal Circuit concluded that the claim "language on its face excludes Interpretation 1"—*i.e.*, "**a** request that calls for ***a*** statistical analysis of a single investment." It held instead that "***[a] single*** request must ***correspond*** to at least ***two*** investments." *Id.* at 1362 (emphasis added). Here, there is no similar "corresponding," prescribed ratio, or any other language that would overcome the effect of the general rule of claim construction applicable here. *See, e.g.*, Dkt. 463 at 4-6.

[1] Unless otherwise noted, all capitalized terms have the same meaning set forth in Papst's Response to LG's Motion (Dkt. 463).

Nevertheless, LG reasserts that a single processor "must be configured to do all of the" actions set forth in the "wherein" limitations that follow the "a processor" limitation. Dkt. 507 at 1-2; Dkt. 426 at 7-8. But the Federal Circuit has previously considered and rejected an argument substantively similar to LG's argument. *See 01 Communique Lab., Inc. v. LogMeIn, Inc.*, 687 F.3d 1292 (Fed. Cir. 2012).

In *01 Communique*, the district court had determined that the asserted claims required "a 'locator server computer' that includes a 'location facility'" and further construed "location facility" as capable of performing four functions:

> a component of a locator server computer that itself: 1) creates communication sessions between a remote computer and personal computer; 2) receives a request for communication with the personal computer from the remote computer; 3) locates the personal computer (and "determines the then location of the personal computer"); and 4) creates a communication channel between a remote computer and the personal computer.

Id. The district court then held that "LogMeIn d[id] not infringe the [Asserted] Patent" because "'the LogMeIn system does not contain any component that itself performs all the four functions required of the location facility under the Court's construction of the term.'" *Id.*

As described by the Federal Circuit, the issue on appeal in *01 Communique* was "whether the location facility must be contained entirely on a single locator server computer as held by the district court and asserted by LogMeIn, or whether it may be distributed among multiple locator server computers as asserted by 01 Communique." *Id.* at 1296. In overturning the district court, the Federal Circuit first stated that the district court's conclusion and LogMeIn's arguments were "at odds with our well-established precedent" that "the words 'a' or 'an' in a patent claim carry the meaning of 'one or more.'" *Id.* at 1297 (citing *TiVO, Inc. v. EchoStar Commc'ns Corp.*, 516 F.3d 1290, 1303 (Fed. Cir. 2008)). It further concluded that there was no evidence of the clear intent, disclaimer, or prosecution history estoppel needed to depart from that general claim

construction rule. *Id.* at 1297-1299. Ultimately, the Federal Circuit agreed that the "location facility" must perform the four functions identified by the district court, but it held that "the locator server computer may comprise one or more computers, and the location facility may be distributed among one or more locator server computers." *Id.* at 1299-1300.

Accordingly, whereas LG's arguments misapply the applicable law, Zeidman's opinions and proffered testimony regarding the "a processor" limitations are based on the correct legal standards. Those opinions are admissible. And LG's Motion should be denied.

II. Zeidman's Opinions for the "Customary" Terms Are Admissible.

Zeidman has not and will not present to the jury contradictory opinions regarding the terms "still imaging device" or "mass storage device." His opinion is and has always been that the Accused Products are neither still imaging devices nor mass storage devices but instead are cell phones that communicate with the host computer by ***identifying themselves*** as still image devices or mass storage devices. With regard to these terms, this is the only opinion set forth in Zeidman's report, the only opinion Zeidman testified to during his deposition, and the only opinion Zeidman and Papst intend to present to the jury.

LG's assertion in its Reply that Zeidman has "admitted" the Accused Products are still imaging devices or mass storage devices is wrong. *See* Dkt. 507 at 2-3. Every one of the alleged "admissions" that make up the basis of LG's Motion are out-of-context quotes from the tens of thousands of pages of claim charts that were attached to Zeidman's report. In context, these quotes are invariably surrounded by other language clarifying that the Accused Products merely ***identify themselves*** as mass storage devices or still imaging devices. For example, LG points to the caption to an image of LG's user manual (*see* Dkt. 507 at 2 citing Dkt. 405-2 at ZEIDMAN-LG-009252). But that caption (and the other captions that LG takes out of context) is under a section of the claim chart explicitly titled: "**The Accused Device identifies itself as a mass**

storage device." Ex. 4 at ZEIDMAN-LG-009251. In full, that section describes the steps by which the cellphone "identifies itself" as a mass storage device. *See id.* at ZEIDMAN-LG-009251-9254. Likewise, in the analysis of Claim 1(e) (which includes the key limitation "wherein the analog data acquisition device is not within the class of devices"), LG's out-of-context alleged "admission" is followed directly by Zeidman's actual and consistent conclusion: "The above steps are independent of the actual analog source of the data. The Accused Device is not actually within the class of devices device, but is a cellphone." *Id.* at ZEIDMAN-LG-009284-9285.

Contrary to LG's mischaracterizations (*see* Dkt. 507 at 3), Zeidman has not opined and Papst has not argued that the Accused Products are still imaging devices in certain circumstances. LG wholly ignores the opening and closing clauses in the sentence "***In the Responder/Initiator relationship***, the Accused PTP/MTP Products are still imaging devices compliant with PTP ***for the purpose of transferring photos***." The import of this sentence is precisely that the Accused Products are not still imaging devices, but that they identify and act as such in this one relationship and for this one purpose. That is precisely the in-context thesis of the Zeidman report and the opinion that Zeidman will offer the jury.[2]

The other alleged "admissions" cited by LG likewise occur under headings, above conclusions, and among other sentences that make perfectly clear that the Accused Products are cell phones that merely ***identify*** as mass storage devices or still imaging devices. Indeed, while LG makes much of the number of times it or its expert has misconstrued Zeidman's opinion ("1200 times," *see* Dkt. 507 at n.3), it disregards the fact that Zeidman states in some variant that

[2] Papst referred in its Response to the USB Specification Revisions 2 to demonstrate that, contrary to LG's assertion in its Motion (Dkt. 426 at 11), "a digital camera is a still imaging devices" and one that is supported by the USB specification. *See* Dkt. 463 at 9 & Ex. 3. In its Reply, LG does not deny that the USB specification confirms the accuracy of Zeidman's testimony that a digital camera is a still imaging device. *See* Dkt. 507 at n.2.

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