UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

CPC PATENT TECHNOLOGIES PTY LTD.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 6:21-cv-00165-ADA
	)	
APPLE INC.,	)	
	)	
Defendant.	)	

PLAINTIFF CPC PATENT TECHNOLOGIES PTY LTD.'S SUR-REPLY TO DEFENDANT APPLE INC.'S CLAIM CONSTRUCTION BRIEF

CPC hereby submits this sur-reply in support of its claim construction positions.

A. The '039 Patent

1. "biometric card pointer [enrolment] system"

Apple's argument boils down to the following construct: 1) the entire terms "biometric card pointer [enrolment] system" have no plain and ordinary meaning; 2) the Court therefore has no choice but to find the constructions thereof somewhere in the specification; and 3) the Court is free to adopt as a definition any discussion of the term from the specification, irrespective of any evidence of lexicography. Apple cannot reconcile this construct with the maxim that specification embodiments are not to be imported into a claim absent an express intent that an invention be limited to such embodiment. *See Helmsderfer v. Bobrick Washroom Equip., Inc.,* 527 F.3d 1379, 1381 (Fed. Cir. 2008).

More importantly, however, Apple itself describes the term "biometric pointer card system" as "descriptive," belying the notion that it has no plain meaning. ECF Docket No. 52 at 6. And, Apple does not argue (nor can it) that the constituent words of these limitations each has no plain meaning. In fact, as Apple tacitly acknowledges, this collection of individual words

means that "card data is used to point to a memory location where biometric data of the card user is stored." *See id.* at 7.

Apple contends, however, "that without the context of the '039 Patent, a person of ordinary skill in the art could not understand what is meant by "biometric card pointer system." *Id.* CPC does not now, nor has it ever, contended that the plain meaning of these limitations need be determined without any reference to the specification. In any event, under the law, assigning a limitation its plain meaning does not deprive the reader of the specification's context. *See Phillips v. AWH Corp.,* 415 F.3d 1303, 1313 (Fed.Cir.2005) (en banc) ("Claim terms are generally given their plain and ordinary meanings to one of skill in the art ***when read in the context of the specification*** and prosecution history" (emphasis added)). This, however, is not the same as reading specification embodiments into the claims.

This case is distinguishable from the *Lenovo* decision, cited by Apple, as "NIM," the term to be construed, had a definition set forth in the specification. *Lenovo Holding Co., Inc. v. DoDots Licensing Solutions LLC*, 2021-1247, -1521 & -1580, 2021 WL 5822248, at *3 (Fed. Cir. Dec. 8, 2021) (***the definition of the NIM is content, rather than compiled code*** (emphasis in original)). The closest that Apple can come to identifying a "definition" of "biometric pointer card system" is that such "phrase ***is consistent with*** the disclosure in the patent and the recited claims." ECF Docket No. 52 at 6 (emphasis added). Apple then goes on to recount these various descriptions. *See id.* at 3-4. According to Apple's logic, any claim limitation should necessarily be limited to specification embodiments, as a patent invariably contains descriptions of the limitations in the form of embodiments, and such descriptions purportedly serve as definitions. This, however, is not the law, and the plain meaning of these limitations should control, as CPC contends.

2. "means for defining, dependent upon the received card information, a memory location in a local memory external to the card"

Counsel for CPC generally adheres to the notion that a party should not repeat wholesale what is already contained in an earlier brief. However, with regard to this limitation, Apple makes two statements about CPC's arguments that are pure fiction: 1) CPC "vaguely points to two entire figures—Figures 3 and 4—in support of its construction;" and 2) "CPC's proposal fails to identify specific disclosure in the specification that is linked to the claimed function." ECF Docket No. 52 at 8. Regarding these issues, CPC said the following:

> The '039 Patent teaches that '[t]ypically, the BCP application program is resident on ***the hard disk drive 110*** and read and controlled in its execution by the ***processor 105*** . . . In one example of the disclosed BCP approach, the ***card data 604*** acts as the memory reference ***which points***, as depicted by an arrow 608, to ***a particular memory location at an address 607 in the local database 124***.' '039 Patent, col. 7, line 66 – col. 7, line 1 & col. 7, lines 31-34.
>
> * * *
>
> The afore-quoted passage references ***elements*** of the flow chart depicted in Figure 4 of the '039 Patent.

ECF Docket No. 49 at 4-5 (emphasis added).

Contrary to Apple's criticism, CPC does not point vaguely to the entirety of Figure 4 of the '039 Patent, but cites that figure in connection with the specification description that describes the various ***components*** thereof. That description, in turn, identifies the structure (hard disk drive 110, processor 105, and local databased 124) for performing the claimed function (defining, dependent upon the received card data 604, a memory location in a local memory address 707 if databased 124 external to the card). Apple characterizes the identified structure as "functional in nature," but offers no explanation as to how a disk drive, processor, and database are "functional." *See* ECF Docket No. 52 at 8.

Apple then goes on to argue "CPC has not shown any link between the algorithm flowcharts in its brief and the function." *Id.* at 9. This is a regurgitation of the same argument, and is specious in the face of the passage quoted above from CPC'S original claim construction brief.

Finally, Apple takes issue with CPC's discussion of Figure 3 from the '039 Patent, as CPC did not identify that figure in its proposed construction. *Id.* at 8. In fact, CPC was addressing that figure because ***Apple*** had cited to that figure in its original claim construction brief. *See* ECF Docket No. 49 at 9, *citing* ECF Docket No. 46 at 17. Even without reference to Figure 3, however, Apple has failed to show by clear and convincing evidence that this limitation is invalid under section 112.

3. "means for storing, if the memory location is unoccupied, the biometric signature at the defined memory location"

Apple does not contest the specification's teaching of a "computer program product including a computer readable medium having recorded thereon a computer program for directing a processor to execute a method of enrolling in a biometric card pointer system, the program comprising . . . code for storing, if a memory location defined by the card information is unoccupied, the biometric signature at the defined memory location." *See* '039 Patent, col. 5, lines 14-18 & 21-23. This is the disclosed structure to which CPC points in defining this term. Apple also does not contest that, in its own proposed construction of this term identifies the ***wrong*** location for storing the biometric signature. *See* ECF Docket No. 49 at 11-12. Apple's proposed construction should therefore be rejected.

B. The '705 and '208 Patents

1. "being characterized according to/determining/determine at least one of the number of said entries and a duration of each said entry"

The parties' dispute over this limitation is whether the plain meaning of "at least one of the number of said entries and a duration of each said entry" is "***both*** the number of said entries and a duration of each said entry," as Apple proposes. Apple argues that "[t]he patentee chose to use the word 'and.'" ECF Docket No. 52 at 11, *citing SuperGuide Corp v. DirecTV Enterprises, Inc.*, 358 F.3d 870, 886 (Fed. Cir. 2004). The patentee also chose to use the term "at least one." That latter term, according to Apple, mandates selecting both a "number" and a "duration" in the context of this conjunctive limitation. *Id.* However, as at least one court has recognized, *SuperGuide* did not "set[ ] forth a *per se* rule that the use of 'at least one of' followed by 'and' connotes a conjunctive list." *3rd Eye Surveillance, LLC v. United States*, 140 Fed. Cl. 39, 69 (2018) (citation omitted). Specifically, when, as here, the context is "an option of two," "[t]he duality of the term makes it a binary choice between two options—not a list giving rise to the confusion present in *SuperGuide*." *Id.*

Further, when "the specification or claims imply a broader meaning" than would result from the conjunctive construction, the disjunctive construction ("or") applies, notwithstanding the holding in *SuperGuide*. *See Hewlett-Packard Co., v. MPHJ Tech. Invs., LLC*, No. IPR2013-00309, 2013 WL 8563946, at *5 (P.T.A.B. Nov. 21, 2013). Apple ignores once again the specifications' teaching that "the control information is encoded by ***either*** or both (a) the number of finger presses and (b) the relative duration of the finger presses." '208 Patent, col. 10, lines 50-52; '705 Patent, col. 10, lines 61-63 (emphasis added), *i.e.,* a meaning broader than the conjunctive construction proposed by Apple. That construction should be rejected.

2. "biometric signature"

The parties' dispute concerning this term invokes the following question – does "biometric signature" necessarily include the separate limitation "biometric signal?" Nothing in the

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