**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

CYWEE GROUP LTD.,	§ § §	
Plaintiff	§ §	
v.	§ §	NO. 2:17-CV-00140-WCB-RSP
SAMSUNG ELECTRONICS CO., LTD. AND SAMSUNG ELECTRONICS AMERICA, INC.,	§ § § §	
Defendants.	§ § §	

**DEFENDANTS SAMSUNG ELECTRONICS CO., LTD. AND SAMSUNG
ELECTRONICS AMERICA, INC.'S REPLY IN SUPPORT OF MOTION FOR
PARTIAL RECONSIDERATION**

CyWee's opposition fails to reconcile the basic inconsistency in its positions on the plain and ordinary meaning of a "3D pointing device." There is no dispute CyWee represented to this Court throughout the claim construction process that a "3D pointing device" should be broadly construed as "a handheld device that uses at least a rotation sensor comprising one or more gyroscopes, and one or more accelerometers to determine deviation angles or the orientation of a device." It is also undisputed that CyWee subsequently argued before the PTAB that a "3D pointing device" should be much more *narrowly* construed (despite the BRI standard applicable at the PTAB, versus the *Phillips* standard applicable here) as "a device capable of sensing movement and orientation in three dimensions to point to or control actions on a display." The distinction is critically important because Samsung is currently prohibited from arguing to the jury that a 3D pointing device, by its plain and ordinary meaning, requires a cursor or pointer on a display. CyWee should not be permitted to advance a broad meaning in this case to attempt to prove infringement, and later advance a much *narrower* meaning in the PTAB to attempt to avoid invalidity, while Samsung is prohibited from telling the jury that the plain and ordinary meaning is simply what CyWee told the PTAB it was.

CyWee's opposition attempts to distract from its own positions without clarifying what it believes the plain and ordinary meaning of a "3D pointing device" actually is. It is apparent from the record that a 3D pointing device must perform some pointing function and that CyWee itself believes a 3D pointing device must be able to point to or control something on a display and "perform control actions and movements . . . for certain purposes including entertainment such as playing a video game, on the display device through the [] pointer on the screen." Dkt. 205 at 3. CyWee's argument that the 3D pointing device can control any graphical output misses the mark. The specific type of graphic displayed is not at issue here and the meanings of the terms

"pointer" and "cursor" are not as limited as CyWee suggests. Accordingly, Samsung's motion for reconsideration should be granted.

I.   ARGUMENT

CyWee's opposition fails to reconcile the glaring inconsistencies in its own positions. First, CyWee cannot dispute that it argued for a restrictive meaning of 3D pointing device in the PTAB that is inconsistent with its prior arguments here and the prohibition set forth in the Court's August 14, 2018 order. Second, CyWee cannot argue that the construction of 3D pointing device in this Court cannot be broader than the construction at the PTAB.

First, CyWee fails to address all of its prior arguments to this Court that a "3D pointing device" should be broadly construed as "a handheld device that uses at least a rotation sensor comprising one or more gyroscopes, and one or more accelerometers to determine deviation angles or the orientation of a device." Dkt. No. 66 at 15–17; Dkt. No. 71 at 5–7; 8/10/18 Hr'g Tr. at 52:1–21. Based on these representations, CyWee succeeded in obtaining its plain and ordinary meaning construction from the Court and, further, a prohibition against Samsung arguing that a 3D pointing device requires a cursor or pointer on a display.

Now, however, for the purposes of overcoming the prior art at the PTAB, CyWee argues that a 3D pointing device must perform a pointing function, *i.e.*, be "a device capable of sensing movement and orientation in three dimensions ***to point to or control actions on a display***." Dkt. No. 205 at 3; Dkt. 179, Ex. 1 at 20; Dkt. 179, Ex. 2 at 21 (emphasis added). The meaning CyWee advanced to the PTAB is thus in direct opposition to the Court's prohibition that Samsung cannot argue that the plain and ordinary meaning of a "3D pointing device" requires a cursor or pointer on a display, essentially what CyWee told the PTAB it means.

CyWee does not dispute that in proposing a more restrictive construction at the PTAB, its expert, Dr. Blank, relied on this description of a 3D pointing device in the patents-in-suit:

> A user may perform control actions and movements utilizing the pointing device for certain purposes including entertainment such as playing a video game, on the display device 120 **through the aforementioned pointer on the screen 122.**

'438 Patent at 1:48–52 (emphasis added); '978 Patent at 1:52–55. Samsung relied on this passage in its own claim construction briefing. Dkt. 67 at 18–19. This passage plainly contemplates a pointer on the screen and supports Dr. Blank's argument that a 3D pointing device must point to or control actions on a display. To salvage its infringement positions, CyWee states that Dr. Blank did not intend to testify that a pointer was required. Dkt. 205 at 4–5. However, this self-serving clarification appears nowhere in Dr. Blank's declarations before the PTAB.

CyWee's new argument that a 3D pointing device must perform a pointing function, but the specific type of graphical output is immaterial, does not support the conclusion that the Court's prohibition is still warranted. As explained in Samsung's Responsive Brief (Dkt. 67), the specific type of graphic that is displayed on the screen and controlled by the user is not at issue. Further, the meanings of the terms "pointer" and "cursor" are not as limited as CyWee suggests. *See SyncPoint Imaging, LLC v. Nintendo of Am. Inc.*, No. 2:15-cv-00247-JRG-RSP, 2016 U.S. Dist. LEXIS 677, at *31 (E.D. Tex. Jan. 5, 2016) (construing a "cursor" as "a visible mark that is generated by the computer and that indicates a position on the display for the visual output from the computer."). Instead, even CyWee has admitted that a 3D pointing device must be capable of pointing to or controlling actions on a display and is not merely any device with movement sensors. It would be improper and unfair to prohibit Samsung from explaining what that means—*i.e.*, the pointing device controls a pointer, cursor, or some other graphic.

Also contrary to CyWee's Opposition, lifting the Court's current prohibition would not contradict Figure 6 of the patents-in-suit. As set forth in Samsung's Responsive Brief (Dkt. 67), Figure 6 still requires that a device with an integrated display actually display the device's

"movement pattern." *See* '438 Patent at 10:29–41; '978 Patent at 13:46–57. Again, this embodiment requires that the pointing device point to something that is being displayed.

Second, CyWee's conclusory argument that the different standards do not matter fails. CyWee cites no authority explaining why it should be allowed to obtain a broader construction under the *Phillips* standard before this Court than it argued was proper under the BRI standard before the PTAB. To the contrary, the opposite is true—the construction of a term under the *Phillips* standard cannot be broader than the construction under the BRI standard. *Facebook, Inc. v. Pragmatus AV, LLC*, 582 F. App'x 864, 869 (Fed. Cir. 2014). In violation of this precedent, CyWee argues in this Court that a 3D pointing device may be any device with sensors, to try to prove infringement, but argues in the PTAB that a 3D pointing device must perform a pointing function, to try to avoid invalidity. CyWee cannot have it both ways, and Samsung should not be prohibits from pointing that out to the jury, or at least arguing to the jury essentially the same meaning that CyWee advocated to the PTAB.

II.   CONCLUSION

For these reasons, Samsung respectfully requests that the Court remove its prohibition against Samsung arguing to the jury that the plain and ordinary meaning of "3D pointing device" requires a cursor or pointer on a display.

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