

EXHIBIT A



VIA ECF FILING

October 22, 2015

Hon. Magistrate Judge K. Nicole Mitchell
William M. Steger Federal Building and United States Courthouse
211 W. Ferguson St.
Tyler, Texas 75702

Re: *Cellular Communications Equipment LLC v. LG Electronics, Inc. et al.*
Civil Action No. 6:14-cv-00982-JRG-KNM (Lead Case)

Dear Magistrate Judge Mitchell:

Plaintiff's letter (D.I. 129) opposing Defendants' request to seek summary judgment of indefiniteness (D.I. 123) identifies no facts in dispute that would preclude the Court from resolving the indefiniteness dispute now. While asserting (Opp. at 1) that Defendants "fail to consider the perspective of one skilled in the art," Plaintiff does not address Defendants' detailed accounts of how Defendants' expert will testify concerning a POSA's perspective. Nor does Plaintiff suggest that it can present any expert testimony to the contrary. Thus, Plaintiff's letter confirms that the time is ripe for Defendants to move for summary judgment that '060 claim 15, '556 claims 15 and 23, and '966 claims 5-7 and 14-17 are invalid as indefinite.

I. '060 Claim 15: Plaintiff's Response Confirms the Lack of an Objective Standard.

Defendants cited two separate reasons – both backed by specific references to what Defendants' expert will explain – why there are no "objective boundaries" from which a POSA could determine what constitutes "accurate receipt" in the context of the '060 patent. *Interval Licensing LLC v. AOL, Inc.*, 766 F.3d 1364, 1371 (Fed. Cir. 2014). First, there are multiple frames of reference against which the accuracy of receipt could be measured. Second, "accurate receipt" itself is a term of degree in the field of digital communications. These uncertainties are fatal given the lack of any intrinsic evidence relevant to "accurate receipt."

Plaintiff's only response concerning the "multiple frames of reference" ambiguity is to assert that claim 15 "plainly contemplates" one of the two possibilities and not the other. Such "[a]ttorney argument is no substitute for evidence." *Enzo Biochem, Inc. v. Gen-Probe, Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005) (affirming summary judgment of invalidity).

Plaintiff responds to the "term of degree" problem by selectively citing a dictionary. Notably, however, Plaintiff fails to address the two definitions of "accurate," cited in Defendants' letter, which confirm that "accurate receipt" is a term of degree. Instead, Plaintiff distorts the one definition that it does cite. Plaintiff quotes a truncated version of an inapposite third definition – "free from error *esp. as the result of care [an ~ diagnosis]*" (highlighted portion omitted in Plaintiff's letter).¹ An "accurate diagnosis" (e.g., determining that a patient has the flu and not the Ebola virus) is immaterial to "accurate receipt" of a digital message (i.e., determining if the necessary percentage of bits have been correctly received).

¹ Plaintiff also incorrectly includes "correct," which the dictionary lists only as a synonym.

Plaintiff also makes the correct but irrelevant observation (Opp. at 1) that there are “accepted processes for ... ensuring that messages are received correctly.” These techniques are immaterial given the undisputed fact – explained in Defendants’ letter but not addressed by Plaintiff – that POSAs consider how accurate a transmission needs to be in a given context. What is “accurate” enough for one application is different than what is “accurate” enough for another. Further, as Defendant’s expert will also explain, these “accepted processes” are not capable of perfect fidelity (i.e., confirming that all bits are received without the possibility of any being lost or transmuted, with perfect certainty). The degree of accuracy between these processes can differ by orders of magnitude.

Indeed, the existence of “accepted processes” for determining the accuracy of message receipt is irrelevant here for the same reason that Judge Davis granted summary judgment of indefiniteness in the *ADT* case (discussed in Defendants’ letter, but not addressed by Plaintiff) even though there were accepted processes for determining the smoothness of bumps. The patentee in *ADT* submitted an expert declaration discussing various “prior art” references for determining smoothness, but those methods were legally immaterial because the specification provided no “guidance” for which technique “should serve as a benchmark.” 2012 WL 2872121, at *15 (E.D. Tex. July 12, 2012). Here, likewise, there is no intrinsic evidence suggesting what constitutes “accurate receipt.” Without any such objective guidance, the term is indefinite and Defendants respectfully request permission to move for summary judgment to this effect.

II. ’556 Claims 15 and 23: CCE Concedes the Operative Facts and Construes the Claims Such That the Disputed Terms are Superfluous.

Defendants cited two indisputable facts confirming that the phrases “type 1 power headroom report” and “type 2 power headroom report” (appearing in ’556 claims 15 and 23) are indefinite. First, a POSA at the relevant time would have needed to rely solely on the ’556 specification to understand the meaning of these terms. Second, the only relevant guidance is a passage (5:36-41) reciting the equations that also appear in dependent claims 16 and 24, which are presumptively narrower than claims 15 and 23 under the doctrine of claim differentiation.

Plaintiff concedes both of these facts, yet incorrectly asserts (Opp. at 2) that “the inventors [were] not required to specify how” type 1 and type 2 reports are calculated. Given that “type 1” and “type 2” reports were not terms of art at the time of the alleged invention, the inventors plainly *did* need to define them in the specification if they wanted to prosecute claims distinguishing between type 1 and type 2 reports. By contrast, *Hill-Rom* (Opp. at 2) concerned a term (“datalink”) that indisputably had an ordinary meaning to a POSA. That ordinary meaning controlled even though the specification only described wired datalinks. Here, “type 1” and “type 2” power headroom reports indisputably *lacked* plain and ordinary meanings, outside the context of the patent, at the relevant time. POSAs instead would have needed to rely solely on the specification, raising the “fundamental question” that Defendants’ opening letter emphasized given the mismatch between the specification and principles of claim differentiation.

Plaintiff attempts to recast “type 1” reports as a “first type” of report and “type 2” as a “second type” of report, thus concluding that the only limitation on “type 1” and “type 2” reports is that they be different. This expansive approach renders these proper nouns (i.e., “type 1” and “type 2”) superfluous. Claims 15 and 23 both require that the power head room report control element includes “at least one of: a type 1 power headroom report for a primary serving cell and a type 2 power headroom report for the primary serving cell.” Under Plaintiff’s theory that type

1 or type 2 reports merely need to be different, the inventors could just as easily have claimed “at least one power headroom report for the primary serving cell” without changing the scope of claims 15 and 23. Yet “claims are interpreted with an eye toward giving effect to all terms.” *Bicon, Inc. v. Straumann Co.*, 441 F.3d 945, 950 (Fed. Cir. 2006).

In essence, Plaintiff argues that the term it made up to mean one thing – a report calculated a specific way – could mean anything. It does not. Defendants respectfully request permission to move for summary judgment that ’556 claims 15 and 23 are indefinite.

III. ’966 Claims 5-7 and 14-17: CCE Did Not Refute Defendants’ Factual Contentions.

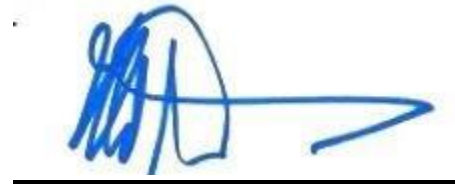
Defendants cited indisputable facts identifying inconsistencies in claims 5 and 14 rendering the claims indefinite: (1) the requirement that “the initial transmit power depends on ... the second power control adjustment state $f(0)$; and (2) that the initial transmit power equation in Claim 5 does not refer to the second power control adjustment state, $f(0)$. (D.I. 123-1, pp. 5-6.) Defendants also identified expert testimony explaining that a POSA could not determine the scope of the claims with reasonable certainty, rendering them indefinite. (*Id.*) This same issue was identified in the European prosecution, prompting the patentee to cancel the claims. (*Id.*)

Plaintiff did not refute Defendants’ factual contentions, nor did it suggest that its own expert would offer contrary testimony. Instead, Plaintiff pointed to the substitution method and Kyocera’s Petition for *Inter Partes* Review (IPR) as evidence that the claims are not indefinite. This reliance is misplaced. Kyocera’s expert in the IPR does not testify that the claims are definite. Rather, as Plaintiff acknowledges, Kyocera’s expert stated only that “[T]he equation in claim 5 can be rewritten with the P_{preamble} variable expanded per Equation 3 of the ’966 patent.” Yet, whether the equation in claim 5 *can* be rewritten in a particular manner is not determinative of whether a POSA would understand that the claimed equation was meant to be rewritten in that manner, and therefore is not determinative of whether the claim is definite. The fact that Kyocera developed a construction does not mean that the term is definite. The claim construction inquiry is separate and apart from the indefiniteness doctrine under *Nautilus*. *Halliburton Energy Servs., Inc. v. M-I LLC*, 514 F.3d 1244, 1251 (Fed. Cir. 2008) (“Even if a claim term’s definition can be reduced to words, the claim is still indefinite if a person of ordinary skill in the art cannot translate the definition into meaningfully precise claim scope”). Moreover, an IPR reviews the patentability of one or more claims in a patent only on grounds that could be raised under §§ 102 or 103. Defendants cannot raise indefiniteness issues in an IPR and must therefore apply some construction, even if it may not conform to the reasonable certainty requirement of § 112. *See In re Cuozzo Speed Technologies, LLC*, 793 F.3d 1268, 1289 (2015) (dissent explaining that IPR “broadest reasonable construction” is inconsistent with § 112).

By its reply, Plaintiff contends that the equations for P_{Msg3} in claims 5 and 14 require a math substitution of Equation [3] into P_{preamble} . (See D.I. 129-1, p. 3.) However, such a substitution is not called for in the claims at issue, and undisputed testimony from Defendants’ expert establishes that a POSA would not have known that a substitution would be required or what the substitution should be. Plaintiff cites nothing to suggest that a POSA would understand that the substitution should be performed. Plaintiff is not entitled to rewrite the claims to avoid an indefiniteness finding. *See Allen Eng’g Corp. v. Bartell Indus., Inc.*, 299 F.3d 1336, 1349 (Fed.Cir.2002) (a court does not “rewrite [indefinite] claims to preserve their validity”). Accordingly, Defendants respectfully request permission to move for summary judgment that ’966 claims 5 and 14, as well as their dependent claims, are indefinite.

Very truly yours,

WOLF, GREENFIELD & SACKS, P.C.



Michael N. Rader

Counsel for Sony Mobile Communications
(USA) Inc.

ON BEHALF OF ALL DEFENDANTS