

THE HONORABLE JAMES L. ROBERT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CYWEE GROUP LTD.,

Plaintiff,

v.

HTC CORPORATION, and HTC AMERICA,
INC.,

Defendants.

CASE NO.: 2:17-cv-00932-JLR

**DEFENDANTS' RESPONSE TO
PLAINTIFF'S MOTION TO
PRECLUDE CONSIDERATION OF
BELATED CLAIMS CONSTRUCTION
POSITIONS**

**NOTE ON MOTION CALENDAR:
MAY 4, 2018**

HTC CORPORATION, and HTC AMERICA,
INC.,

Third-Party Plaintiffs,

v.

STMICROELECTRONICS N.V.,
STMICROELECTRONICS, INC., and CYWEE
MOTION GROUP LTD.,

Third-Party Defendants.

JURY TRIAL DEMANDED

1 Despite Plaintiff CyWee Group Ltd.’s (“CyWee”) assertions to the contrary, Defendants
2 HTC Corporation (“HTC Corp.”) and HTC America, Inc. (“HTC America”) (collectively,
3 “HTC”) served preliminary invalidity contentions and identified claim terms for construction in
4 accordance with this Court’s Standing Order for Patent Cases (“Standing Order”). Further, the
5 Court’s recent Amendment to Scheduling Order (Dkt. # 73) and subsequent Order Affirming
6 Amendment to Scheduling Order (Dkt. # 78) (collectively, “Amended Scheduling Order”) rendered moot
7 CyWee’s claims of prejudice upon which the instant Motion to Preclude
8 Consideration of Belated Claims Construction Positions (Dkt. # 76, “Motion”) is based.
9 Accordingly, CyWee’s motion should be denied.

10 I. BACKGROUND

11 CyWee acknowledges that HTC served CyWee with its Preliminary Invalidity
12 Contentions on January 19, 2018. (*See* Motion at 2.) In those contentions, HTC expressly
13 “incorporate[d] by reference any additional invalidity contentions . . . previously disclosed by
14 any party to any other pending or prior litigation . . . involving the Asserted Patents . . . including
15 any invalidity contentions yet to be produced by Plaintiff from prior litigations and proceedings.”
16 (Ex. A¹ at 3.) HTC then specifically referenced the “invalidity contentions from . . . Samsung
17 Electronics Co. Ltd. et al (Case No. 2-17-cv-00140).” (*Id.*) CyWee subsequently produced the
18 invalidity contentions of Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc.,
19 defendants in Case No. 2:17-CV-00140-RWS-RSP in the Eastern District of Texas, on March 2,
20 2018. An excerpted copy of those contentions (“the Samsung Invalidity Contentions”) is
21 attached hereto as Exhibit B.

22 The Samsung Invalidity Contentions identified the following terms or phrases as
23 indefinite: (1) “utilizing a comparison,” from claim 1 of U.S. Patent No. 8,441,438 (“the ’438
24 Patent”); (2) “comparing the second quaternion in relation to the measured angular velocities ωx ,
25

26 ¹ All exhibits referenced herein are attached to the declaration of Albert Shih (“Shih Decl.”),
27 filed concurrently herewith.

1 ω_y , ω_z of the current state at current time T with the measured axial accelerations A_x , A_y , A_z
 2 and the predicted axial accelerations A_x' , A_y' , A_z' also at current time T,” from claims 14 and 19
 3 of the '438 Patent; and (3) “generating the orientation output,” from claim 10 of U.S. Patent No.
 4 8,522,978 (“the '978 Patent”). (*See* Ex. B at 72-74.) These three terms (“the Samsung Terms”)
 5 are the same as, or are components of, the terms at issue in this Motion.² (*See* Motion at 3.) In
 6 other words, as further discussed below, when HTC proposed that the Disputed Terms be
 7 construed as indefinite, (*see* Ex. D at 4), those terms had previously been identified as indefinite
 8 in HTC’s Preliminary Invalidity Contentions.

9 Following the service of these contentions, HTC served CyWee with its Initial Proposed
 10 Claim Terms and Elements for Construction on February 20, 2018. (*See* Ex. C.) Therein, HTC
 11 specifically identified each of the three claim terms that CyWee seeks to exclude from claim
 12 construction. (*See id.* at 1-2.) On March 30, 2018, as a part of its Disclosure of Preliminary
 13 Claim Constructions and Evidence, HTC proposed that these three terms be construed as
 14 indefinite. (*See* Ex. D at 4.) CyWee objected to four of HTC’s preliminary constructions—those
 15 for the Disputed Terms and one other. (*See* Shih Decl. at ¶ 4.) On April 4, 2018, HTC agreed to
 16 drop the added term, but maintained the inclusion of the Disputed Terms. (*See id.*) The parties
 17 met and conferred the following day, at which point CyWee stated that it had been unable to
 18 submit an expert report addressing the Disputed Terms. (*See id.* at ¶ 5.) In response, HTC
 19 suggested that CyWee could serve a supplemental expert report. (*See id.*) CyWee refused the
 20 suggestion, and indicated that it would file this Motion. (*See id.*)

21 _____
 22 ² The claim terms at issue (collectively, “the Disputed Terms”) are the following:

- 23 • “utilizing a comparison to compare the first signal set with the second signal set” (the
 24 '438 Patent at claim 1, “the First Disputed Term”);
- 25 • “comparing the second quaternion in relation to the measured angular velocities ω_x , ω_y ,
 26 ω_z of the current state at current time T with the measured axial accelerations A_x , A_y , A_z
 27 and the predicted axial accelerations A_x' , A_y' , A_z' also at current time T” (the '438 Patent
 at claims 14 and 19, “the Second Disputed Term”); and
- “generating the orientation output based on the first signal set, the second signal set and
 the rotation output or based on the first signal set and the second signal set” (the '978
 Patent at claim 10, “the Third Disputed Term”).

1 The remaining claim construction deadlines were subsequently postponed by the Court's
2 Amended Scheduling Order. As such, the deadlines for the Joint Claim Construction and
3 Prehearing Statement and Opening Claim Construction Briefs have been extended from April 25,
4 2018 to July 27, 2018 and May 18, 2018 to August 2, 2018, respectively. (See Dkt. # 42 at 1;
5 Dkt. # 73 at 1.) And the *Markman* Hearing initially scheduled for July 13, 2018 is now
6 scheduled for September 21, 2018. (See Dkt. # 42 at 2; Dkt. # 73 at 1.)

7 **II. ARGUMENT**

8 “When the parties present a fundamental dispute regarding the scope of a claim term, it is
9 the court’s duty to resolve it.” *O2 Micro Int’l Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d
10 1351, 1362 (Fed. Cir. 2008). The Federal Circuit has also made clear that “[i]ndefiniteness is a
11 matter of claim construction.” *Praxair, Inc. v. ATMI, Inc.*, 543 F.3d 1306, 1319 (Fed. Cir. 2008).
12 Accordingly, CyWee does not object to the Court determining indefiniteness at this stage per se,
13 but only to the allegedly unfair and untimely manner in which the Disputed Terms were
14 identified as indefinite. However, CyWee’s claim of prejudice is vastly overstated, especially in
15 light of the recent amendment to the case schedule. Furthermore, HTC in fact disclosed its
16 indefiniteness position in its preliminary contentions and, in any event, has proceeded in
17 accordance with the Court’s Standing Order.

18 **1. CyWee’s Claim of Prejudice Was Overstated Initially and Is Now Moot**

19 CyWee’s Motion is built upon its claim of prejudice. Indeed, to conclude its Motion
20 CyWee points to the “substantial prejudice to CyWee [in] (1) preventing CyWee from presenting
21 expert opinions on [HTC’s indefiniteness] assertions; and/or (2) unnecessarily delaying the
22 claims construction proceeding,” and on this basis requests that the Court exclude the Disputed
23 Terms from claim construction. (Motion at 6.)

24 At the time of the Motion, however, the harm alleged by Cywee was overstated. When
25 CyWee raised the expert testimony concern at the parties’ meet and confer on April 5, 2018,
26 HTC suggested that CyWee could serve a supplemental expert report that addressed the Disputed
27 Terms. (See Shih Decl. at ¶ 5.) CyWee discarded the suggestion. (See *id.*) CyWee justifies its

1 refusal to work with HTC to develop a reasonable solution to the present dispute—instead,
 2 choosing to file the present Motion—by implying that any amicable resolution would have
 3 required “delaying claim construction to allow CyWee to supplement its expert report.” (Motion
 4 at 4.) In all likelihood, however, there would have been no reason to delay claim construction
 5 proceedings. When HTC raised the option of a supplemental report on April 5, 2018, CyWee
 6 still had nearly three weeks—until April 25, 2018—before the Joint Claim Construction and
 7 Prehearing Statement was due. (See Dkt. # 42 at 1.) And, CyWee had already filed an expert
 8 declaration, *see* Decl. of Joseph J. LaViola, Jr., Ph.D., *CyWee Group Ltd. v. Samsung Elecs. Co.,*
 9 *Ltd.*, No. 2:17-CV-00140-RWS-RSP (E.D. Tex. Feb. 23, 2018), ECF No. 66-6 (attached hereto
 10 as Exhibit E), addressing the indefiniteness of the Disputed Terms in its case against Samsung.³

11 ³ In relevant part, Dr. LaViola opined as follows:

- 12 • “CyWee proposes that [*the First Disputed Term*] be construed as ‘determining or
 13 assessing differences based on a previous state associated with the first signal set and a
 14 measured state associated with the second signal set while calculating deviation angles.’
 15 ***Samsung alleges that this term is indefinite. In my opinion this term is not indefinite***
 16 because it informs, with reasonable certainty, a person of ordinary skill in the art, of the
 17 scope of the invention. Further, it is my opinion that this term has the meaning proposed
 18 by CyWee when read by a person of ordinary skill in the art in light of the intrinsic
 19 evidence.”
- 20 • “CyWee proposes that [*the Second Disputed Term*] need not be construed. In the
 21 alternative, CyWee proposes that this term be construed as ‘utilizing the second
 22 quaternion obtained from the measured angular velocities ω_x , ω_y , ω_z of the current state
 23 at current time T, the measured axial accelerations A_x , A_y , A_z , and the predicted axial
 24 accelerations A_x' , A_y' , A_z' also at current time T to obtain an updated state or updated
 25 quaternion.’ ***Samsung alleges that this term is indefinite. In my opinion this term is not***
 26 ***indefinite*** because it informs, with reasonable certainty, a person of ordinary skill in the
 27 art, of the scope of the invention. Further, it is my opinion that, while this term need not
 28 be construed, it has the meaning proposed by CyWee.”
- “CyWee proposes that [*the Third Disputed Term*] need not be construed. In the
 alternative, CyWee proposes that this term be construed as ‘generating the
 orientation/deviation angle output based on (1) the first signal set (from an
 accelerometer), the second signal set (from a magnetometer) and the rotation output
 (from a rotation sensor or gyroscope) or (2) the first signal set (from an accelerometer)
 and the second signal set (from a magnetometer).’ ***Samsung alleges that this term is***
indefinite. In my opinion this term is not indefinite because it informs, with reasonable
 certainty, a person of ordinary skill in the art, of the scope of the invention. Further, it is
 my opinion that, while this term need not be construed, it has the meaning proposed by
 CyWee.”

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